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Law takes bite out of medical malpractice suits

IN 2011, PUNITIVE DAMAGES WERE CAPPED TO PROTECT HEALTH CARE PROVIDERS, INSURERS

JASON DEBRUYN | jdebruyn@bizjournals.com, 919-327-1029 | @TriBizHealth

In Pinehurst, a 27-week premature infant suffered third-degree burns after being left on IV bags overheated in a microwave by hospital staff and left there for more than 10 minutes. The burns caused hemorrhaging – and later, bacteria from the burn caused meningitis.

In 2000, the family settled with the hospital for $9 million.

There are other examples of medical malpractice in North Carolina. A woman died after her colon was perforated during surgery. A newborn was afflicted with quadriplegic cerebral palsy because his mother was giving birth. An orthopedic surgeon drilled a pin nearly three-quarters of an inch into a boy’s skull.

In each of these examples – and more – the families involved won a medical malpractice judgment or reached a settlement. According to the Administrative Office of the Courts, denial of access to the courthouse. There are other examples of medical malpractice litigation today but certainly no less malpractice," says Robert Zaytoun, principal of Zaytoun Law Firm, a Raleigh group that represents victims of medical malpractice.

Changes in premiums

The 2011 law that capped non-economic damages received plenty of debate. That year was the first time since 1870 that Republicans held a majority in both chambers of the General Assembly and passed, among other laws, Senate Bill 33, which had the short title, “Medical Liability Reforms.”

Then-Gov. Bev Perdue, a Democrat, vetoed the bill, but it was overridden. The new cap would affect any medical malpractice lawsuit filed beginning Oct. 1, 2011, and lawyers rushed to file complaints before the law change. Indeed, nearly 400 lawsuits were filed in the third quarter that year – more than three times the quarterly average leading up to the law change. In 2012 the lawsuits dropped sharply as any backlog had hurried to file in 2011, but by 2013 a clear pattern emerge that the new law effectively reduced medical malpractice cases brought by victims.

Supporters of the law change included physicians and insurers that offered medical liability coverage.

They argued medical malpractice insurance premiums had skyrocketed and that the new law effectively reduced medical malpractice cases brought by victims.

Indeed, that has happened. Total premiums collected by medical liability insurers – which includes health providers
like dentists and hospitals in addition to doctors – has decreased 20 percent since 2011.

“I will tell you tort reform has impacted that trend line,” says Dale Jenkins, CEO of Medical Mutual Insurance Company of North Carolina, the largest provider of medical malpractice insurance to independent physicians in the state. Bob Seligson, the CEO of the N.C. Medical Society, the group that lobbies on behalf of physicians, also says the reforms positively affected premiums. “The reforms have stabilized the market and premiums,” he says. “The tort reform bill has had a very positive impact on premium cost.”

However, attributing that drop directly to changes in the medical liability law gets more difficult.

Premiums began a sharp upward trend in 2001 and peaked in 2005, but then began to decline, even before the law change. From 2005 to 2011, for example, total premiums collected had already decreased nearly 30 percent. Comparing premiums collected year-to-year shows that a trend simply continued, rather than the 2011 law drastically affecting premium rates.

A flawed notion?

Another common argument in favor of reform held that doctors feared they could be sued out of business with one wrong move. However this argument also seems to be rooted in something other than historical fact, because such a small percentage of cases result in massive judgments.

From 1998 through 2010, a jury verdict was reached in just 266 cases, or less than 4 percent of the cases that were filed in that same time period. Of those cases that resulted in a judgment, fewer than half awarded more than $500,000 and less than a quarter awarded $1 million or more. The largest three judgments were for $10.4 million, $8.1 million and $7 million. The next highest verdict totaled $4.5 million and no other verdict in the 13-year time span topped $2.4 million.

Said another way, less than one half of one percent of medical malpractice cases that were filed in more than a dozen years resulted in a verdict of more than the new cap of $500,000. To be sure, that figure does not include settlements reached out of court, which can also run in the millions. Medical Mutual pays on somewhere between 70 to 100 cases per year, according to Jenkins. From 2000-2010, Medical Mutual made 54 payments of $1 million or higher, a figure that includes both judgments and settlements. Of course, in a settlement, the physician and insurance carrier agree to the amount to be paid.

Settlements that lead to voluntary dismissals have also steadily decreased through the years, from 299 in the 2011-13-year time span to 266 in the 2010-11 time span.

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CONTINUED FROM PAGE 13

12 fiscal year, to 144 in 2015-16.

Despite the exceedingly small number of large verdicts in North Carolina, Jenkins argues that the anxiety persisted among physicians.

“It was the fear of the personal assets at risk that was weighing so heavily on the health care community, specifically the physicians. It was definitely affecting the way they delivered care, and most importantly the cost of delivering that care,” he says. “Even though the numbers were few, the ripple effect in the physician community was gut-wrenching.”

Matthew Ballew, an attorney at Zayton Law, disagrees. “Good doctors are not defining their practices by fear of lawsuits or so-called defensive medicine,” he says. “What drives them every day is a true concern for the welfare of their patients, and doing whatever necessary to keep them safe from potential harm. That’s the oath they took to uphold and that’s what they believe in.”

Furthermore, there are many industries in which a client may bring a lawsuit against a professional, attorneys included.

“Every profession has that same concern,” Ballew says. “I’m a lawyer. If we make a mistake, if we do something wrong at any time, one of our clients could file a suit against us.”

Benefits of cap

In the past decade, physician and insurance groups have succeeded in passing these so-called tort reforms in many states. In North Carolina, the clock isn’t likely to turn back.

“I don’t perceive any way, with the legislature currently composed, that there would be a change to protect victims’ rights,” says John Alan Jones, the founding member and managing partner of Raleigh law firm Martin and Jones. “Any bill introduced would be dead on arrival.”

“Whoever wins a case, he’s not going to walk away with any compensation,” Jenkins asks rhetorically.

Attorneys who represent victims say it doesn’t reflect their character that they don’t take cases, but the simple economics of the matter. After all, it would be an unwise business move to spend $60,000 to bring a case in which the damages are capped at $500,000.

“The idea that a patient can file a frivolous lawsuit, or ‘frivolous lawsuits,’ make for good television ads, but explaining how these reforms have affected victims is more nuanced and difficult to convey in 30 seconds. Already, the courts have multiple checkpoints in which a case that has no merit would be thrown out (see sidebar pg. 13).”

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“The impact of the cap falls disproportionately on patients with minimal wage losses, including children, homemakers, the disabled and the elderly.”

BURTON CRAIGE, Attorney with Patterson Harkavy

The idea that a patient can file a frivolous lawsuit in a medical malpractice case, and trick the defense, trick the judge, trick 12 jurors, and trick the entire court system into giving them a big verdict is a complete myth. It’s a myth,” says Ballew. “No lawyer that I know files frivolous lawsuits. If anyone did, they wouldn’t be practicing law for very long.”

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