TRIANGLE
BUSINESS JOURNAL

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VANISHING MEDICAL MALPRACTICE CASES

Changes in North Carolina's 2011 law has had a chilling effect on medical wrongdoing lawsuits.

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Sprouts Farmers Market is opening in early 2017 on Falls of Neuse Road as the Triangle's grocery competition intensifies. **AMANDA HOYLE, 6**

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TRIANGLE BUSINESS JOURNAL

August 19, 2016
Vol. 31, No. 51, $3.00

3600 Glenwood Ave.
Suite 100
Raleigh, NC 27612

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COVER STORY

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

Medical Mutual Insurance Co. of N.C. CEO Dale Jenkins, left, and N.C. Medical Society CEO Bob Seligson, right, believe the cap on claims is beneficial.

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 brain was deprived of oxygen while 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 with the health care provider.

However, they all happened before 2012. Because of a change in North Carolina law that took effect in 2011, those who have been injured are far less likely to bring a lawsuit against medical professionals.

From 1998 through 2010, an average of 560 medical malpractice lawsuits were filed per year in North Carolina. That figure plummeted after the law changed. From 2013 through 2016 the average dropped to 301 per year, a 46 percent decrease, according to the Administrative Office of the Courts.

While rare, medical errors do occur and are sometimes due to physician negligence or failure to adhere to standard practice. The new law caps non-economic damages at $500,000. That means that if a patient is harmed during surgery directly due to negligence by the physician and a jury awards the patient a judgment of millions due to pain and suffering, the most that victim could receive is $500,000.

After that, the patient must pay for the cost of bringing the lawsuit, something that can cost hundreds of thousands of dollars, and pay attorney's fees, which can be as high as 40 percent of the judgment.

With those barriers, it's no surprise fewer victims of medical malpractice are suing, and many attorneys who represent victims say the system isn't fair.

"Ultimately, it is the public who has suffered by the unfortunate impact of denial of access to the courthouse. There may be less 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 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 filed 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.

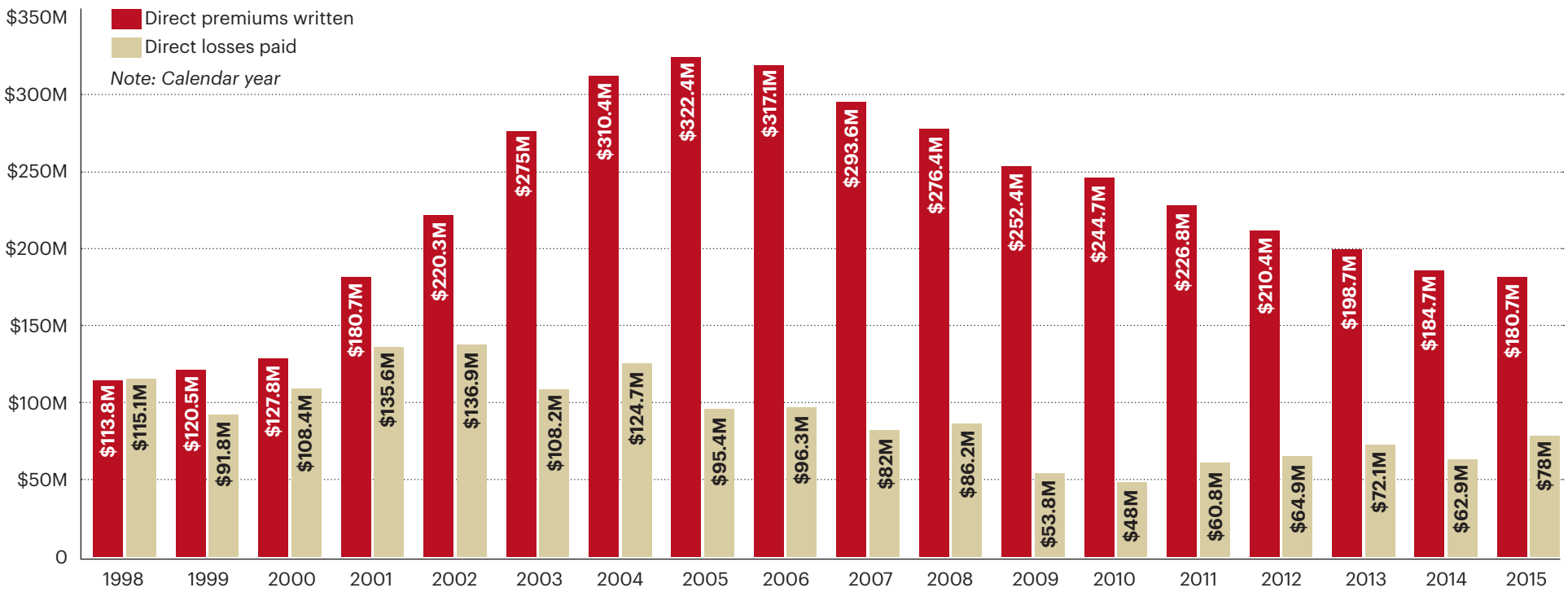
They argued medical malpractice insurance premiums had skyrocketed and threatened to put physicians out of business.

Capping non-economic damages that any single judgment could fetch would bring more predictability to the system and effectively lower premiums, they said.

Indeed, that has happened. Total premiums collected by medical liability insurers – which includes health providers

TRACKING THE STATE'S MALPRACTICE PREMIUMS AND CLAIMS

Total medical malpractice insurance premiums collected, and claims paid by year in North Carolina.



SOURCE: N.C. DEPARTMENT OF INSURANCE

TBJ FILE PHOTOS

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.

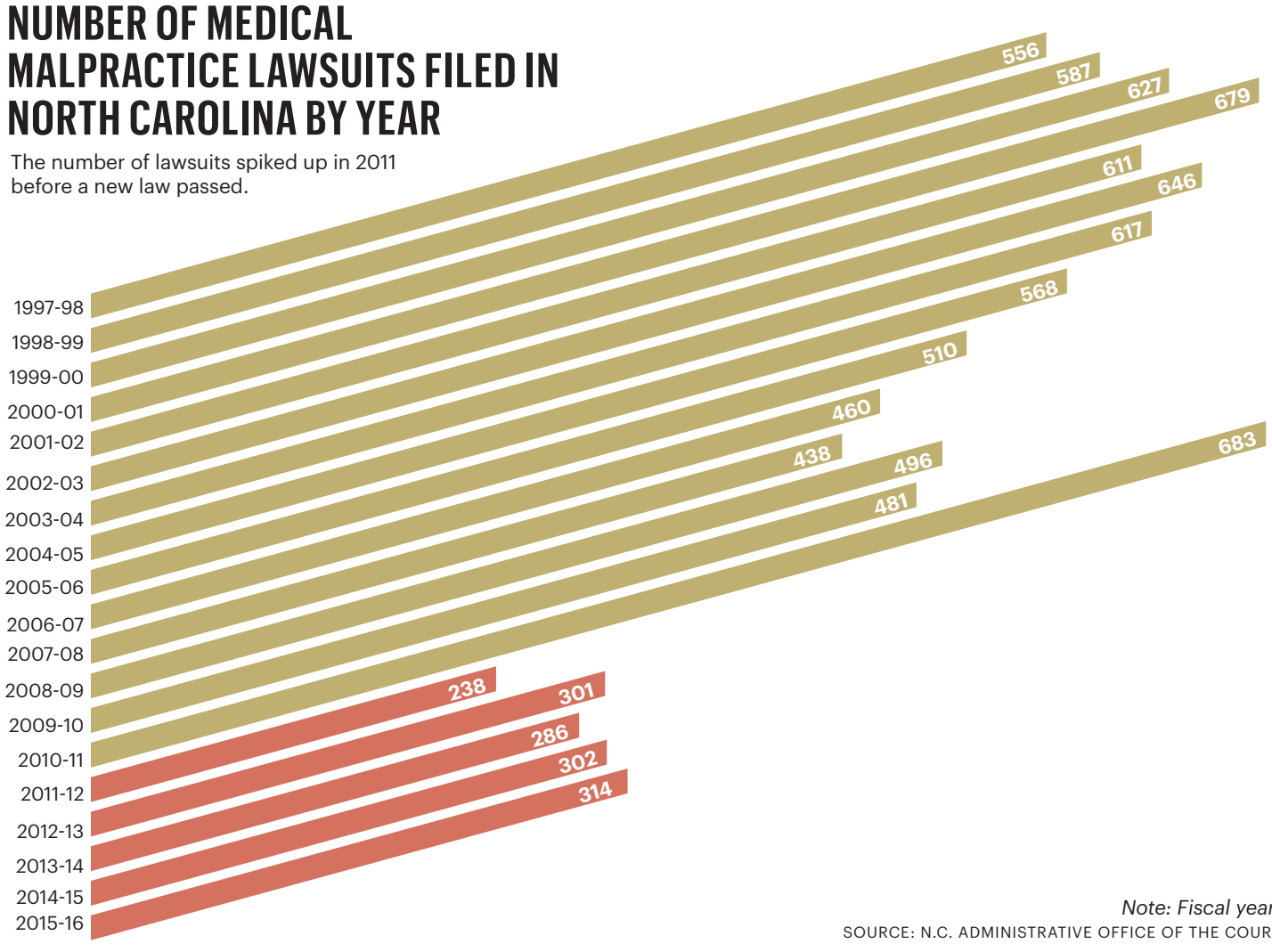
Said another way, less than one half of one percent of medical malpractice cases that were filed in more than a dozen years resulted in a verdict of more than the new cap of $500,000. To be sure, that figure does not include settlements reached out of court, which can also run in the millions. Medical 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-

CONTINUED ON PAGE 14

NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED IN NORTH CAROLINA BY YEAR

The number of lawsuits spiked up in 2011 before a new law passed.



Note: Fiscal years.

SOURCE: N.C. ADMINISTRATIVE OFFICE OF THE COURTS

WEEDING OUT LAWSUITS

FRIVOLOUS LAWSUIT? PROBABLY NOT

In some medical circles, there lived a fear that one frivolous lawsuit against a physician could ruin that physician's practice.

In reality, however, the North Carolina court system already has in place procedures to weed out complaints that have no merit. The following are legal motions available to any defense in a medical malpractice lawsuit.

- Motion to Dismiss under Rule 12(b)(6) – the defense can make this before a defendant even has to serve an Answer to the plaintiff's lawsuit.
- Motion for Summary Judgment under Rule 56 – the defense can make this before a defendant ever has to go to trial.
- Motion for Directed Verdict under Rule 50 – the defense can make this after the plaintiff finishes their evidence at trial, but before a defendant ever has to put on a single piece of evidence.
- Motion for Judgment Notwithstanding the Verdict also under Rule 50 – the defense can make this motion asking for a favorable judgment be entered in its favor after a jury has unanimously agreed that plaintiff has proven their case and rendered a verdict.
- Motion for New Trial under Rule 59 – once again, after the defense loses completely at trial because the jury and the trial judge agree that the jury's verdict should stand against them, they can file a motion asking for totally new trial because they allege some injustice happened during the trial.
- The defense always has the right to file a Notice of Appeal and ask the North Carolina Court of Appeals, and if that fails the N.C. Supreme Court, to overturn the plaintiff's case entirely.

In addition to these legal procedures, specific to medical malpractice cases, the plaintiff must find a physician expert who has similar practice to the defendant to certify under oath, before the complaint is filed, that the expert has reviewed "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry," and will testify in court if needed.
In addition, the attorney representing the plaintiff must also certify under Rule 11 of the Rules of Civil Procedure that the filing is made in good faith and not frivolous. The lawyer could face sanctions from the court if the case is found to be frivolous and could even put the lawyer's license in jeopardy.

SOURCE: N.C. GENERAL STATUTES, N.C. RULES OF CIVIL PROCEDURE, ZAYTOUN LAW FIRM

COVER STORY

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 Zaytoun Law, disagrees. "Good doctors are not defining their practices by fear of lawsuits or so-called defensive medicine," he says. "What drives them everyday 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

Jenkins, Seligson and other supporters of the changes argue that capping non-economic damages does nothing to directly keep anyone harmed by a medical malpractice from coming to court. Indeed, non-economic damages – meaning those for lost wages or lost future earnings – are still uncapped.

Therefore, a verdict could indeed run into the millions, if, for example, the victim is the chief executive of a Fortune 500 company who cannot return to a big salary.

If, on the other hand, the victim is a stay-at-home parent, or a disabled child, there are no lost earnings because the victim was not employed. In these cases, the non-economic damages – sometimes referred to as compensation for pain and suffering – are the only avenue for compensation is on the non-economic side.

Costs for bringing medical malpractice cases can quickly run into the six figures and attorney's fees can run between 33 percent and 40 percent of a verdict. From a simple financial viewpoint, the reality is that fewer victims of malpractice – particularly those on the bottom rungs of the economic ladder – see any benefit from bringing a lawsuit.

Even finding representation can be difficult. In nearly every case, the plaintiff's lawyer will front the money to bring a case, and cover costs and fees only if they are successful. Because of the cap, fewer attorneys are willing to take on cases.

"What does that say about plaintiff's lawyers?" 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 $600,000 to bring a case in which the damages are capped at $500,000.

"The impact of the cap falls disproportionately on patients with minimal wage losses, including children, homemakers, the disabled and the elderly," says Burton Craige, an attorney in the Raleigh office of Patterson Harkavy. "When the cap is added to the expense and risk of pursuing any malpractice case, lawyers are compelled to reject many meritorious claims with low economic damages."

> *"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

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 as 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."

Taking a step back, attorneys who represent victims say that physician and insurance groups have been successful in enacting law changes throughout the nation in part because they can perpetuate an argument in short sound bites that the public can understand.

Phrases like "tort reform," 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 merits would be thrown out *(see sidebar pg. 13)*.

"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."