Medical Malpractice

Healthcare PL 2017 Retrospective

TransRe

We value risk.

Damage mitigation arguments focusing on "reasonable valuation of damages" gained traction.

While substantial attention has been given to damage mitigation arguments in the context of incorporating the presence of the Affordable Care Act (ACA), the bigger picture has been successful rulings in several jurisdictions where defense arguments regarding "reasonable valuation of damages" were allowed, inclusive of or in addition to "ACA" arguments. Significantly, these "reasonable valuation" arguments aim to highlight not only the vast discrepancy between "billed vs paid" **past** medical expenses but also – and very significantly – incorporate what the reasonable valuation of **future** medical expenses may be, and to do so in a manner which does not trigger the collateral source rules of a given jurisdiction. Regardless of whether or not the "ACA" side of the argument was granted in certain claims, the "reasonable valuation" position has yielded favorable outcomes, which is key given the unceasing discussion of the future of ACA on a national stage. Some noteworthy rulings:

In Cuevas v. Contra Costa, 2017 WL 1507913 (Cal. App. 1st Dist. 2017), the appellate court found that the trial court erred in precluding the defendant from presenting evidence of the amounts typically paid in the marketplace for the goods and services in the plaintiff's life care plan. The court's ruling, which was in late April of 2017, included two separate and key points for the defense: first, that "…. the collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits…." And, second, "… It is noteworthy that this case was briefed before the 2016 presidential election, the aftermath of which did place the ACA's continued viability into question. However, in spite of recent efforts to abolish or substantially alter the ACA, as of the writing of this opinion the ACA remains essentially intact.

Yeager v. Morris, Cause No. DV 14-11, Montana 9th Judicial District, Glacier Cty (March 2017), similarly held that following the Montana Supreme Court's decision in Meek v. Montana Eighth Judicial Dist., 2015 MT 130, the defendant is entitled to present expert testimony on amounts paid by Medicaid and private health insurance as relevant to the reasonable value of future medical care. The court also took Judicial Notice that despite the efforts to repeal/replace the ACA, there was no indication (as of the date of the ruling in late March) that the full Congress was going to be considering any such bill in the foreseeable future.

The following two claims are solid examples from 2017 of significant case law supporting use of damage mitigation arguments with or without ACA implications.

Plummer vs Medical Faculty Associates, Inc., et al, Case # 2016 CA 003998, Superior Court for the District of Columbia, Civil Division (September 29, 2017). In this historically difficult collateral source jurisdiction, the defense motion as to "reasonable valuation" of damages was nonetheless granted, even though the

corresponding “ACA” argument was denied. Specifically, the defense argued that their economic expert would testify not as to “collateral source” or “insurance” benefits the plaintiff would be entitled to but, rather, to what “reasonable buyers and sellers are willing to exchange ….and not what healthcare providers, on their own, are willing to charge.” (emphasis added). The court ruled in favor of the defense and stated these arguments would not fall under the domain of “collateral source”, as argued by plaintiff, and that plaintiff’s medical expenses “… must still be reasonable…” and further that “…Defendants are permitted to challenge the reasonableness of Plaintiffs claimed future medical costs by eliciting …testimony regarding the reasonable market value of such costs.” Given the vast discrepancy between billed vs paid, including projections as to future medical costs, this is an incredibly relevant distinction. The ruling also highlights the distinction between “reasonable valuation” and “ACA”, including how collateral source is – or is not – part of the equation.

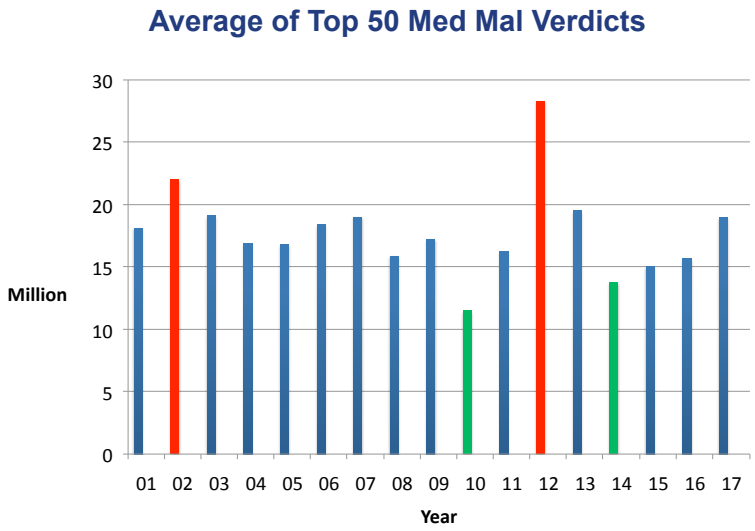
Jones vs Metro Health, Ohio Court of Appeals, Eighth Appellate District, 2017-Ohio-7329, Journal Entry and Opinion 102916, August 24, 2017. The underlying jury verdict from early 2015 was in favor of the plaintiff. That said, the original post-verdict ruling concurred with the defense position that the ACA must be considered with respect to reducing plaintiff’s future medical damages. The matter was appealed and, while a new trial was ordered, the Court of Appeals nonetheless provided two key statements with respect to “billed vs paid” and also as to the ACA. First, on the “billed vs paid” front, the court ruled “… both the amount charged by medical providers and the amount accepted by those providers are admissible into evidence…. The question of what constitutes the reasonable value of medical care provided is left to the jury.” Second, with respect to the ACA, “….We recognize that at the time of this writing, the Affordable Care Act is the subject of much debate in the United States Congress. However, currently as it stands, it is still the law.”

Medical Malpractice Verdict Severity Sees Uptick in 2017

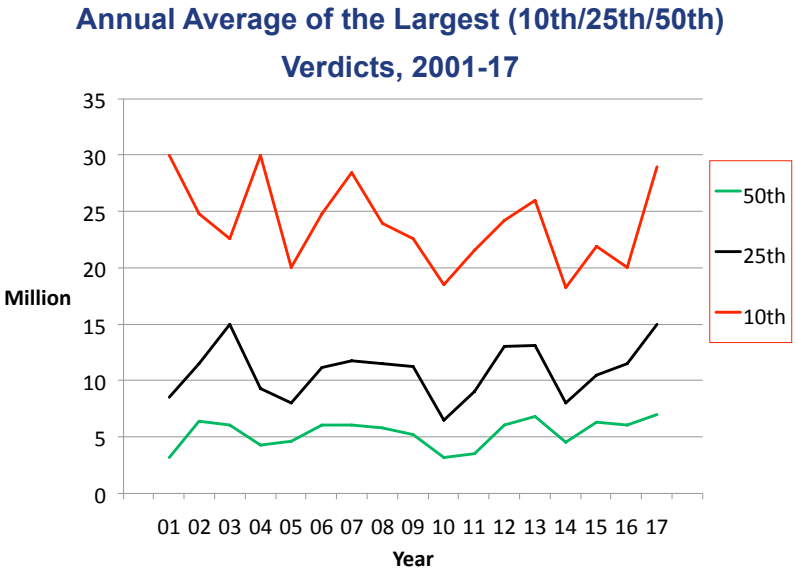
By every measure – average verdict, $10M+ verdicts, $25M+ verdicts, 10 th /25 th /50 th largest verdicts – 2017 has seen a significant increase in med mal verdict activity. Over the last 18 years, 2017 set a record for $10M+ verdicts (which have doubled since 2014), and tied the record for $25M+ verdicts (which have more than tripled since 2014). There were 7 med mal verdicts of $40M+ in 2017, while the previous three years combined saw only 8 such verdicts. That all of these data points were reached while there has been a dramatic decrease in overall claim inventory industry wide is an even greater indicator of the severity spike.

TransRe pulls verdict data from a multitude of subscription and non-subscription sources, certain state-specific repositories, existing claim data, and other verifiable sources. For the purpose of this analysis, these verdicts are what we define as “true” medical malpractice verdicts; basically, physician, hospital and medical professional negligence - and do not include verdicts involving medical products or long term care. TransRe does not state that this data is inclusive of every single malpractice verdict in every jurisdiction, but given our presence in every state and with access to a multitude of data sources, we are confident that the cumulative data provided is more expansive than most if not all individual sources.

Average of the top 50 verdicts: Our first data cut takes the 50 largest malpractice verdicts and tabulates a basic/gross average of the verdicts. While there can be wide variations in the size of certain individual verdicts within this population, this nonetheless is a solid starting point in our annual verdict analysis.



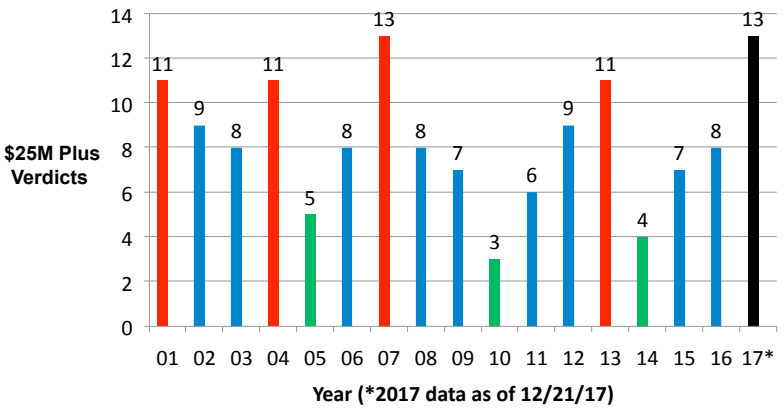
Our next data cut takes these same 50 verdicts and turns the data on its side in a way which minimizes the potential impact of a handful of verdicts which could skew the statistical average. Specifically, we look at where the 10th, 25th and 50th largest verdicts fall within this same population of verdicts. What we saw in 2017 was a significant upward trend in all three segments.



In fact, for the 18 years in which the data has been tracked, we achieved a “record” high value for the 50th largest verdict, tied the record for the 25th largest, and narrowly missed the high for the 10th largest. This suggests that verdict amounts from one end of the continuum to the other increased and gives additional depth beyond the gross statistical average.

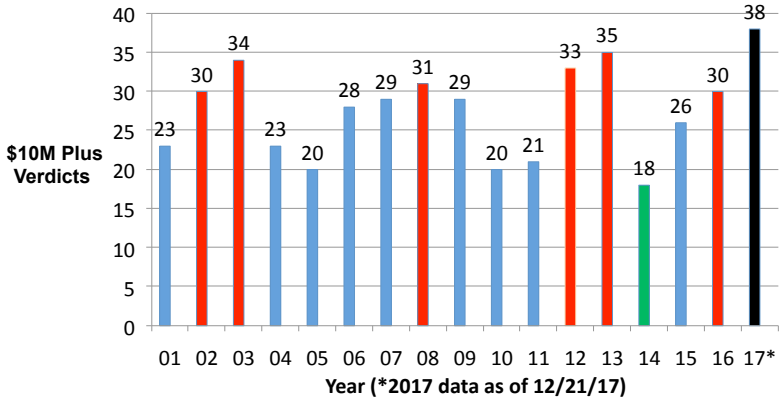
We then further assess verdict severity by looking at how many verdicts come in at $25M or greater. For the 18 years the data has been tracked, 2017 was only the 5th year in which there were at least 10 such verdicts, and only the 2nd year out of the past 10 where there were at least 10 $25M or greater verdicts. Further, the total of 13 $25M verdicts tied the 18 year high which was established in 2007. Lastly, this was the 3rd successive year in which $25M verdicts increased and the total of 13 was more than three times the number of such verdicts as compared to 2014.

$25M+ Verdicts, 2001-17



We then dig deeper into the verdicts and tabulate the number of verdicts which come in at $10M or greater. Note this population is inclusive of those claims which also reached $25M. What we saw, again, was a marked increase in verdicts at this threshold. In fact, the total of 38 such verdicts was a "record" for the 18 years of verdict tracking, and marked the 3rd consecutive year of increase, and was also more than twice the number of such verdicts rendered as recently as 2014.

$10M+ Verdicts, 2001-17



By any analysis, the underlying population of medical malpractice claims has diminished substantially over the past 10-12 years or so. Further, based on various public sources as well as specific insurer feedback, it is clear that the number of medical malpractice claims actually tried to verdict industry-wide has also dropped over this time frame, and substantially so in many jurisdictions. While many individual insurers within the med mal community have experienced only modest variation in their year over year results with respect to "win ratio" (defense verdicts/plaintiff verdicts), the data above suggests verdict "severity" has been increasing. Lastly, we continue to see "record" verdicts returned in rural and/or historically defense-friendly venues, even if the size of these verdicts may be modest in comparison to those which achieve national media attention and, in fact, which may even fall outside of the "top 50" national verdicts. Taken in context with the broader verdict results, this may well be something which merits further analysis within the defense/insurer communities as far as underlying strategies and tactics when it comes to medical malpractice defense/trials.

Healthcare Continues to be a Top Cyber Target

With a number of high profile breaches of large facilities and a constant stream of lower-profile breaches of small-to-midsize facilities, the healthcare industry remained in the news in 2017. The Department of Health and Human Services “Wall ofShame” has recorded 280 breaches, representing 4,638,658 compromised records as of 12.28.2017. This number is expected to grow in the coming year, as cyber incidents have showed no signs of slowing and both state and federal regulations trend towards expanding definitions of reportable breaches and tighter controls.
The healthcare industry continues to face unique challenges in the current cyber threat environment.

Upcoming Speaking Engagements & Contacts

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Crittenden Medical Insurance Conference
April 8-10, 2018

CLM Annual Conference
March 16, 2018

Megan McIntyre
Senior Vice President, Medical Professional

Crittenden Medical Insurance Conference
April 8-10, 2018

Peter Cridland
Assistant Vice President

Crittenden Medical Insurance Conference
April 8-10, 2018

PLUS Healthcare & Medical PL Symposium
March 20-21, 2018

Paul McKeon
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April 8-10, 2018

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