

A PIAA PUBLICATION FOR THE MEDICAL PROFESSIONAL LIABILITY COMMUNITY

# Inside Medical Liability

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2018 FIRST QUARTER

**Analyzing  
Financial  
Strength  
Ratings**

**AND  
Adverse  
Verdicts on  
the Rise**





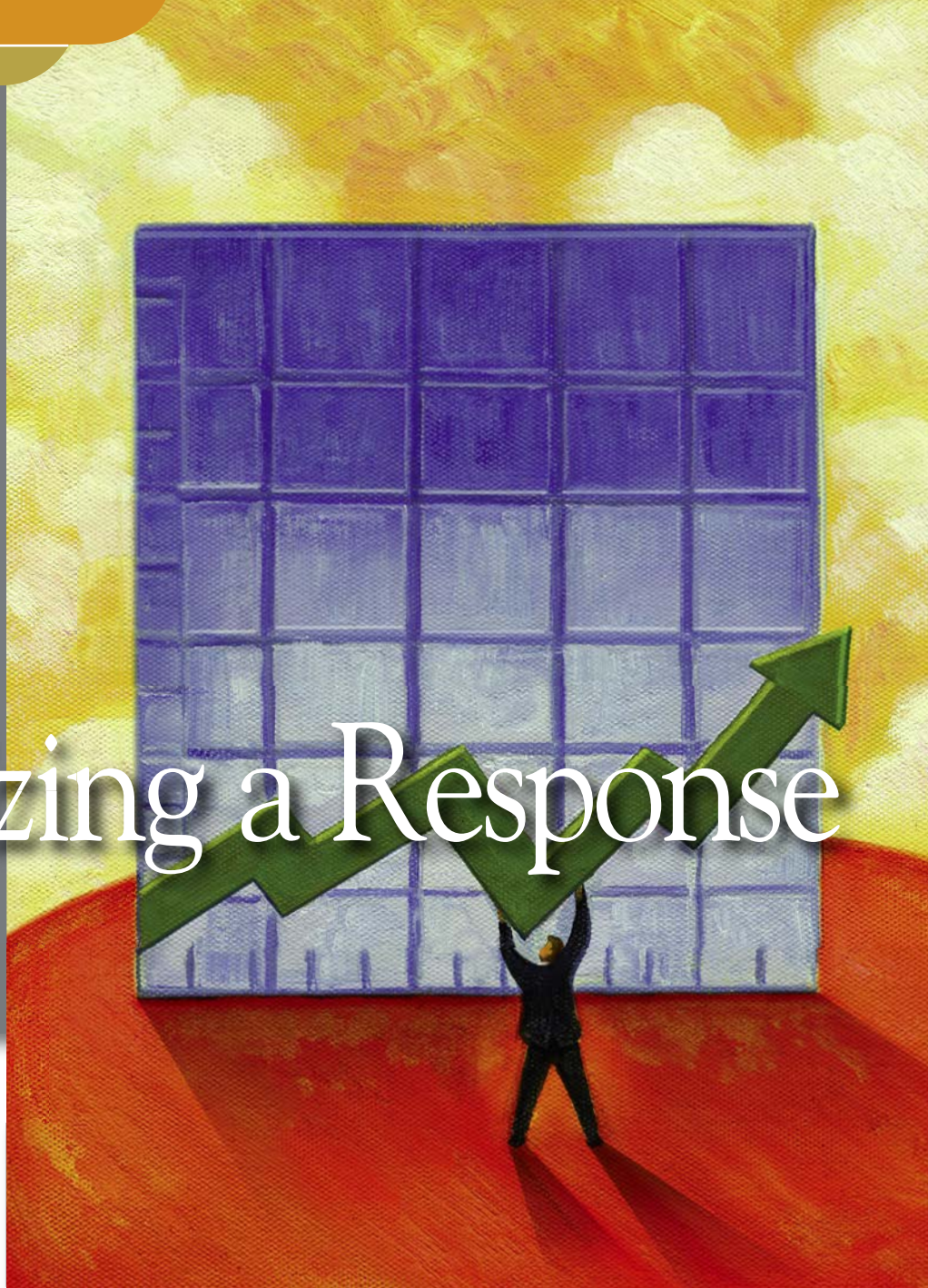
# The Recent Uptick in Adverse Verdicts in MPL:

# Strategizing a Response

BY RICHARD T. HENDERSON

To say that 2017 was a tumultuous year for many in the healthcare industry is surely an understatement. The year came in with a “bang” in the form of a new presidential administration and a specific agenda taking immediate aim at doing anything and everything to repeal and replace the Affordable Care Act (ACA).

**Richard T. Henderson** is Vice President, *TransRe*.



As we closed 2017, we were in many respects on ground that was even less firm as compared with where we were one year prior, whether this relates to the continued debate over the future of the ACA, or if H.R. 1215 or subsequent tort reform measures will be instituted, or what the impact of continued mergers and acquisitions within the healthcare space will be going forward.

But there is one observation we can make with certainty: 2017 was a year that saw significant upticks in adverse (for the defense) medical professional liability (MPL) verdict activity.

As many readers are aware, as a reinsurer with a longstanding and significant presence within the MPL community in literally every jurisdiction, Transatlantic has a broad perspective when it comes to MPL verdict activity. What we saw in 2017 was an increase in adverse MPL verdicts, via basically every dynamic that we measure. From a gross statistical average of the 50 largest MPL verdicts in our repository, 2017 marked the third consecutive year in which average verdicts increased, and end-of-year statistics may show the second-highest average, as measured over the past 10 years.

## Dissecting the data

Turning the data on its side and assessing specific “cuts,” which would eliminate potential skewing of “average” verdict size, what we saw was even more enlightening. Within the top 50 verdicts each year, we segment out where the tenth, twenty-fifth, and fiftieth largest verdicts are placed, as well as how many verdicts are coming at specific levels, such as XS of \$10 million, XS of \$25 million, and so on. In this fashion, one gets a different perspective, as compared with a gross statistical average.

A noteworthy observation: The PIAA membership certainly recognizes that MPL claim frequency has significantly diminished over the past 10 to 12 years or so, whether due to tort reform efforts or other variables. This has been one factor as far as the overall population of claims that are even available to try to verdict, but beyond that, generally speaking, feedback we have from within the MPL community seems to clearly point to the fact that we are seeing fewer and fewer MPL claims actually tried to verdict—yet the results below suggest “verdict severity” is something that cannot be ignored.

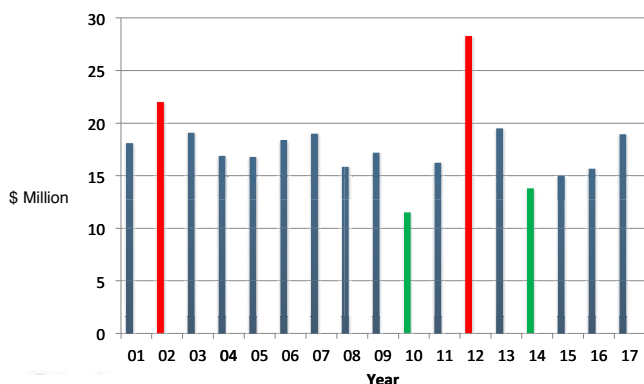
Recognizing that there is no one single source which captures all MPL verdict data, TransRe secures verdict information from multiple

sources, including our own claims data, local and national verdict subscription services, national defense counsel contacts, as well as certain data from those individual states who specifically monitor MPL statistics, which can include verdicts. While some of these sources contain more results than others in a given territory, taken in totality, the pooled verdict data, year over year, consistently pulls from the same sources.

With that caveat in mind, here’s what we saw in 2017:

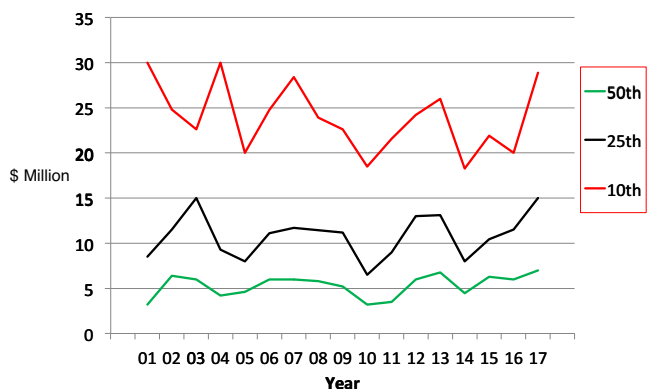
- By every measure (average verdict, verdicts above \$25 million, verdicts above \$10 million, tenth, twenty-fifth, *and* fiftieth largest)—2017 has seen a significant uptick in adverse MPL verdict activity.
- Over the 18 years the data has been tracked, 2017 has set a record for awards of more than \$10 million, and has tied the record for verdicts of more than \$25 million.
- 2017 was the third consecutive year that verdicts of more than \$10 million have increased, and that total is more than *double* the number we saw in 2014.
- We saw seven MPL verdicts of \$40 million or greater in 2017, whereas we saw only eight such verdicts over the past three years, combined.

**Figure 1. Average of Top 50 Med Mal Verdicts**

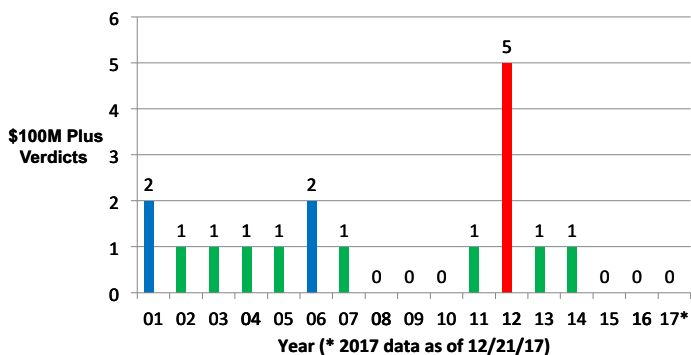


Source of all data for figures: TransRe.

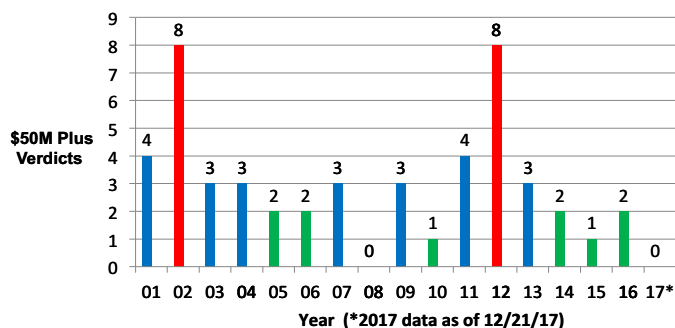
**Figure 2. Annual Average of the Largest (10th/25th/50th) Verdicts, 2001–17**



**Figure 3. \$100M+ Verdicts, 2001–17**



**Figure 4. \$50M+ Verdicts, 2001–17**





■ The past year was the third consecutive year in which the number of verdicts of more than \$25 million increased and in 2017, there were more than three times the number of verdicts of more than \$25 million than there were in 2014.

■ Looking at this via a “cross section” (10th/25th/50th largest verdicts), we set a record in 2017 for where the fiftieth largest came in (\$6.8M, only the fourth year of the past 18 where fiftieth largest was at least \$6 million)

■ 2017 also tied the 18-year record for twenty-fifth largest (\$15 million, from back in 2003)

■ We saw the second highest result for the tenth largest, at \$28.9 million, just barely inside of \$30 million, which was posted in 2004.

## Why is this happening?

What is the cause of this phenomenon, and what can be done by the PIAA base to turn the tide? There are no simple solutions; however, we can make some observations and then provide our best guidance on what can be done.

First, no longer can we assume that historically conservative venues will continue to be “defense-friendly” going forward. Indeed, we have seen numerous “record” verdicts being returned in such venues, even if those verdicts may not have achieved national attention.

Second, now is the time for the defense community to revisit its historically embedded positions when it comes to how “damages” are defended. This goes far beyond what have been generally characterized as “ACA” arguments and gets specifically to strategies focused on “reasonable valuation” of damages as well as “anchoring” of damage assessments. The long-held belief that “we don’t want to set a floor for the jury” and/or “it will signal that we are conceding liability” is one that we are continually seeing as in need of reconsideration.

Third, there must be some form of coordination of effort to make accountable the exorbitant life-care plans that we see and that often exceed the mid-eight figure range, if not even higher. Part of this may involve the “damages” strategies mentioned above, but beyond that, we need to put our respective heads together to rein in what has largely become a runaway train with respect to life-care plans.

## Refining our strategies

In addition, we need greater coordination and refinement of our defense strategies, not just within the PIAA community, but more important, with those outside of PIAA as well, whether these entities are hospitals, risk retention groups, or “commercial” insurers, who typically have major areas of policy limits exposed.

As a reinsurer that touches all corners of the industry, we are encouraged that we see some truly innovative and cutting-edge ideas being developed. Unfortunately, all too often we don’t see the level



of collaboration that would advance these ideas for the benefit of all.

Too often, we are seeing a lack of cohesive defenses, if not outright adversarial relationships across defendants and counsel. This serves no purpose; it merely plays into the hands of the plaintiff’s bar.

## The homework

With that, we all have our assignment, as it were, and if there is going to be meaningful improvement in MPL results for the industry as a whole, there is no better place to start than with PIAA.

What TransRe pledges to do: act as a conduit, wherever possible, to facilitate meaningful discussion within and amongst all segments of the MPL arena and to promote collaborative efforts aimed at

improving MPL results. [PIAA](http://PIAA)

For related information, see [www.transre.com](http://www.transre.com).



Figure 5. \$25M+ Verdicts, 2001–17

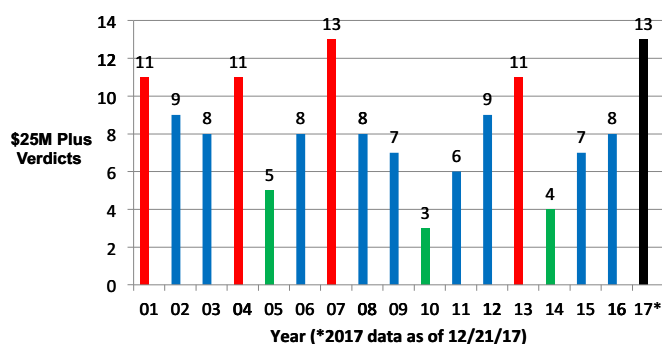


Figure 6. \$10M+ Verdicts, 2001–17

