Rising Hospital Settlements and the Shift Away from Defending Claims

Are We Breaking the Backs of Hospitals, Insurers, and Healthcare Consumers?

We’ve also witnessed a notable increase in the amount that plaintiff’s lawyers are willing to spend on advertising, as well as the number of investors who are willing to bankroll the plaintiff’s attorneys with funding for litigation. According to Assured Research, third-party litigation funding has also shifted, and now provides money for entire litigation portfolios, in stark contrast to the early days, when investors funded single-case plaintiffs in exchange for a share of the winnings in the event of successful verdicts or settlements.¹

The upshot of the current situation is more settlements and fewer trials.

In light of these trends, we think it essential to discuss some of the factors that are driving the decision on whether to defend or settle a claim, and identify issues that, we believe, could impact the financial health of hospitals, MPL insurers, and healthcare consumers, going forward.

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There is little doubt that a healthcare defendant’s best protection against the continued increase in severity is the successful defense of claims in the courtroom. This potential has always been a significant part of the calculations underlying the amount a plaintiff’s attorney is willing to accept in the settlement of the claim. But at this point, do we have the right balance between litigating versus settling? Are we taking enough of the right cases into court to help ensure this balance? This article will provide a comprehensive analysis of these difficult questions.

How did we get here?

Since the early 2000s, the MPL industry has benefited from tort reform efforts, as well as the notable achievements from the tremendous innovation, and passion, focused on improving patient safety. As discussed in the four-part series, “Getting Better all the Time: The Decade-Long Improvement in Patient Safety,” initiatives like the apology movement, the Institute for Healthcare Improvement’s “savings lives” campaign, specialty-specific risk management programs, adoption of mandatory checklists, national safety goals, patient safety alerts, and state-level tort reform, have all been effective in decreasing frequency by more than 50%, for most insurers. Faced with the proliferation of tort reform and the economic downturn of 2008, plaintiff’s attorneys became more selective in choosing cases, since they fronted the expenses involved and were looking to steer clear of any financial loss. They had traditionally funded the work required to proceed on claims with a credit line, but that became more difficult to maintain after the economic downturn. They took, we have been told, only careful and reasonable business risks—and significantly fewer of them.

In this way, the unintended consequences of tort reform, combined with the impact of the economic downturn, prompted the average tort lawyer to choose to file only the less expensive MPL claims, or simply refer those claims to the larger plaintiff’s firms. But then these firms as well became more selective in choosing cases; and that resulted in better case selection. The consequence was an increase in the severity of both verdicts and settlements. Plus, these firms had the economic depth needed to counter an insurer’s/defendant’s contention that they had the financial resources necessary to outlast the plaintiff’s capacity to spend.

At the same time, in light of the current low-interest-rate environment—the effective Fed Funds Rate fell from 5.25% in July 2007 to less than 20 basis points by January 2009—capital investors were looking for alternative investments vehicles, and that led to the development of third-party funding companies. These companies recognized that there was money to be made by funding plaintiff attorney litigation.

Michael Cannata, a principal of Patent Monetization Inc., states, “[a]s long as the U.S. [litigation] market continues to be one of the world’s largest . . . and the biggest payouts are available, this is going to be attractive for [third-party] investment.”

One important consequence of this new source of funding was more, and longer, cases; there was little incentive to settle, because the risk of losing the investment of expenses had been offloaded to a third party.

With the rise in claim severity, coupled with the availability of third-party funding, the lawyers who had previously been avoiding complicated tort actions began to file more claims. This trend seems to be exacerbating the increase in severity we have observed, by reversing the long-term decline in frequency, which, in combination, could lead to the hardening of the hospital professional liability market.

The decision to deny, defend, or settle

A lot of thought goes into a hospital or physician insurer’s decision to deny, defend, or settle a claim. Our collective experience suggests that they are, in fact, very carefully considered. However, might there be some new stressors that have had a negative impact on this process? Some cases (where there has been no liability nor any clear evidence of causation) are easy to push for favorable resolution with little to no payment. Everyone would seem to be in agreement on this assumption. Without it, we end up with a strict liability system and payments on cases without merit, and obviously that just feeds the litigation fire. However, the resolve to refuse payment on these cases appears to be waning.

In cases where there is clear liability and causation, as well as damages, the trend is to resolve the claim promptly, early in the claim life cycle, thereby eliminating the need for litigation expense. We have...
seen a number of innovative programs emerge, such as disclosure, Sorry Works!, and fast-track claims, all of which serve to reduce litigation expense. This is beneficial for all involved. Everyone seems in agreement here as well, and these initiatives have succeeded—except when the demand is unreasonably high. And therein lies the crux of the problem.

In the third category, often referred to as defensible cases, the hospital, physician, or allied healthcare provider had met the standard of care and frequently has a defense in the instance of causation as well. There seem to be conflicting approaches in responding to these cases. Many physicians and their carriers want to try these cases for two reasons: to protect the doctor’s reputation and to send a message that large settlements will not be accepted as the norm in defensible cases. As explained below, some hospital carriers may feel differently, and some context may be helpful here.

Cited in a Forbes article, “Medical Malpractice Claims are Declining, but the Average Payment is Rising,” a May 2017 JAMA study showed that the rate of paid claims has decreased more than 50% from the early 1990s. The rate of paid claims per 1,000 physician-years decreased across all specialties from 20.1 (1992–1996) to 8.9 (2009–2014). Significant decreases were also seen in specialties such as neurosurgery and ob/gyn.1 However, the same study also showed that the number of paid MPL claims exceeding $1 million had increased over time in 23 of 24 specialties, with a significant increase in 13 specialties.

According to the MPL Association Data Sharing Project (2013-2017), nearly three-quarters of closed claims reported no monetary award, yet they incurred an average defense cost of $41,000. Only a quarter of closed claims resulted in a monetary award to the claimant. For the 7% of claims that culminated in a jury verdict, the jury found in favor of the defendant 90% of the time.

One of the big differences between a hospital and a physician insurer is the hospital’s exposure to reputational risk, the amount of capital it needs to protect, and its insurance limits. In regard to reputation risk, hospitals recognize that they are, in many ways, the “face” of their community, and the decision to settle or defend a claim can significantly impact their brand and the amount of press coverage they will receive in the local market. Settlements allow the hospital to address the adverse event rapidly, analyze the root cause, mitigate the risk, and move on—without having to endure the sustained glare of the public spotlight. In many ways, then, this is a responsible decision, were it not for the potential long-term effects.

Another difference is that many of the larger hospital systems have their own captive insurance companies, which are backed by significant excess-of-loss reinsurance protection. To the extent that a catastrophic claim exceeds the facility’s self-insured retention, it is covered by the reinsurance company’s excess layer protection. For some of the largest claims facing a hospital (e.g., brain-damaged infant, amputation, or paralysis of a patient after an operation), settling a claim in excess of their self-insured retention might be strategically worthwhile, even if the amount of necessary self-insured retention inches higher and the reinsurance premiums increase in the future.

There may be mixed incentives for those involved in the different layers of insurance. Members of the upper level of the tower of reinsurance have put pressure on the layers beneath them or even, in some instances, on the policyholder. This is sometimes true in clearly defensible cases; those who work in the underlying exposures would settle, to protect their upper layer. In actuality, everyone should be focused on what can be done to drive down the severity of these claims. Why take part in anything that might actually precipitate an increase in future MPL claims?

At the end of the day, it is mathematically true that the average court settlement is lower than the amount of the average jury verdict, after consideration of all the costs that go into a jury trial. So it’s easy to understand why most decision makers would assume that it is always cheaper to settle a case. However, many people forget that the vicious cycle of escalating settlement offers raises plaintiff’s attorney expecta-
tions over time; it becomes a self-fulfilling prophecy of higher future awards. Stated another way, we believe the thinking of “Imagine what this would have cost us at trial if we didn’t settle this case for $17.5 million,” should revert to this: “Imagine if we hadn’t taken the other defensible baby cases to trial and won, we would be settling this case for $17.5 million and not $6 million.” We believe that it is time for us all to change the way we think about these cases.

**Potential impact of hospital settlements on MPL insurers**

As mentioned previously, MPL insurers are very focused on providing customer service to their insureds, which includes settling claims and trying cases. If the facts support a defensible claim, insurers are mission-driven to take the case to trial whenever a plaintiff’s attorney is unwilling to accept a reasonable settlement offer, or to walk away in the case of a meritless claim. After all, physicians have National Practitioner Data Bank and state board licensing concerns associated with settlements.

However, the trend wherein some hospitals are settling more claims, all across the country, is raising both indirect and direct issues for MPL insurers. As hospitals settle for ever-higher monetary damages, it raises the expectations for commensurate increases in the settlement demands of plaintiff’s attorneys, in every case they pursue, thus indirectly impacting MPL insurers. For claims that involve a hospital and the insureds of an MPL insurer, hospitals have in recent years been more willing to offer very generous settlements. Unfortunately, plaintiff’s attorneys, now backed by litigation funding companies, have increased the limits in the size of their demands, since they no longer have as much skin in the game. And we have learned that a number of plaintiff’s attorneys are convinced that the upward trend is only just beginning. So imagine what the scale of the future settlements might be, if we can’t find a strategy capable of reversing this trend.

To the extent that a hospital chooses to settle, its interest in cooperating with the physician’s insurance company on the legal defense often declines precipitously. If the MPL insurer has multiple policies exposed and gets forced into joining in the settlement, the hospital may ask the insurer to raise some, or all, of their limits to help settle the claim. Although the MPL insurer may believe that it has a winnable case, for its physician corporate policy, it frequently ends up forced to pay—as part of the settlement. For the physician involved, this is an unpleasant, and unforgettable, experience. One of the most dangerous trends is to allow the plaintiffs to insert a wedge between the hospital and the physician’s carrier. Hands down, a joint defense is the best defense. The best results come from working together.

**Impact on healthcare consumers**

At the end of the day, someone has to pay for the escalating claim settlements and jury verdicts. It’s actually amazing to hear a plaintiff’s attorney say that their settlement demand will, for the most part, be assumed by the hospital’s excess insurance carrier, so no one needs to worry about it. In reality, the increase in costs eventually gets passed on to the hospital and, ultimately, to the healthcare consumer, through higher insurance premiums and/or a larger self-insured retention. For purchasers of auto insurance, you can think of this in terms of higher insurance premiums and/or a doubling in the deductible (i.e., you pay a lot more for your insurance as well as the next accident).

**Concurrently: the vanishing trial and thus the vanishing trial lawyer**

In the current climate of competing interests, we have seen fewer trials. In the 1990s, when some insurance carriers began to push back on the cost of their in-house lawyers, they began to question the external legal bills they were getting, via third-party vendors. With the implementation of cost-control policies, the extent of involvement of younger lawyers in cases was diminished, with the unfortunate effect that there was a dramatic reduction in the training of younger lawyers. This trend contributed to the vanishing trial, in addition to the disappearance of the qualified trial lawyer.

Of course, the goal is to be efficient and effective in defending cases, but there has to be some base-line level of effort. It has become increasingly expensive to defend cases, in part because plaintiff’s attorneys have decided to invest more in cases, have made a strategic decision to outspend the defense, can use more technology, and can invoke more novel legal theories—all in an effort to alter the balance between
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Disappearing Jury Trial,” covered a number of statistical studies:

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both civil and criminal—trials have steadily declined.

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Only 1.2% percent of the 263,049 federal civil cases that terminat-
ed in the 12-month period ending September 30, 2009, did so after
reaching trial.

Between 1976 and 2003, the number of state civil jury trials
dropped 34%, even as the volume of civil cases rose 165% during the
same period. Tracing the root cause of this trend has been controver-
sial, and the question remains unsettled. According to one observer, the
shift from trials as the central icon of federal courts to a “settlement cul-
ture” may be traced back to Chief Justice Warren E. Burger, consistently
an advocate of ADR and the concept of managing litigation.

One of the primary drivers of avoiding trials in civil MPL litigation
has been the narrow focus on attorney fees and litigation expense reduction, versus
the cost of indemnity. This, coupled with the risk of experiencing an aber-
rant (outsize) verdict has perhaps contributed significantly to the
increase of larger settlements instead of trials.

The Law Week Online article also noted just how rare trial experi-
ence has become. The next generation of lawyers has almost no mean-
ingful experience in the art of trying a case in front of a jury! In a 2005
Wall Street Journal article, a general counsel noted that: “There are a lot
of name-brand firms with big litigation departments, but [they] never
go to trial and are petrified of it.” There is a real cost to our profession
when trials have become an extinct species, and the great and wise trial
lawyers gradually fade away, without the requisite training of the next
generation of trial lawyers for the defense. The number of lawyers with
seasoned courtroom experience is diminishing, thereby further threaten-
ing the institution of the jury trial. This is especially true in the
instance of young lawyers who infrequently, if ever, get to see or partici-
pate in a trial.

In 1791, the Founding Fathers built the right to a trial by jury into
the Bill of Rights in the text of the Seventh Amendment. The right to a
jury trial was, and still is, seen as a cornerstone of the civil justice sys-
tem in this country. Judge William Young of Boston has noted: “Without
jury trials, the courts’ status as the grassroots guardians of constitution-
al values is threatened as never before.” There is truth in that. As one
district judge put it: “The jury trial is the canary in the mine-
shaft” of our democracy.” [I]f it goes, if our people lose their inherited
right to do justice in court, other democratic institutions will lose
breath too.

Trials, after all, are showcase moments for our legal system and for
the rule of law—they fulfill the requirement that justice must not only
be done, but must in addition be done in a public venue. In many ways,
trials are touchstones of our democracy.

As Judge Lawrence E. Stengel, a Shareholder with the law firm
Saxton & Stump, a recently retired federal and state court trial judge,
and former Chief Judge of the U.S. District Court for the Eastern District of
Pennsylvania has stated: “The jury trial is the quint-
essential exercise of the principles of democracy. A
fair and impartial jury hears evidence and argu-
ment presented by skilled advocates. After careful
instruction on the law by a judge, the jury discusses,
debates and decides the case. This is a local, com-
munity based, vital and effective expression of our
constitutional system of due process. It is government by the people in
its purest form and a daily reminder of the power and importance of
the rule of law.
The decline of the jury trial means that our understanding of what cases have merit, and what cases lack merit, is less evidence based. We are left to speculate about the merit of a case or its value. The decline of the trial limits the opportunities for skilled advocates to test the truth of an argument or a claim in a time-honored process governed by rules of procedure and rules of evidence. When a trial is conducted under the rules of procedure and applicable law, we all learn from the result. For those involved in a dispute, there is a great value to presenting their facts and arguments to a fair and impartial jury and obtaining a definitive statement about the dispute at the end of the trial.”

More trials will restore balance to the system and the cases can be tried and won.

Few things strike greater fear in MPL insurers than the prospect of taking an MPL claim to trial. After all, it seems that hardly a day goes by without media coverage of yet another multi-million dollar jury award. But that perception is deceptive. As noted before, insurers prevail in nine of every 10 of jury trials, and only 8% of claims make it to the verdict stage of trial.

There is empirical data in this regard, and it shows that the fear of taking a case to trial based on common myths is not supported by the results as revealed in the data. It is impossible to know how many defense verdicts could have been achieved had these matters not been settled based on fears and myths. What we do know is that these trials should not be avoided just because of anxiety engendered by myth (e.g., defendants are viewed as evildoers with deep pockets, jurors are easily swayed by a sympathetic injured plaintiff, laymen juries aren’t sophisticated enough to understand the science presented by medical experts so they side with the more likeable expert, juries are unpredictable, it always cost more to settle a claim, etc.). But we also know that plaintiff’s attorney don’t really want to take on trials ether. Their business model includes a bias toward settling cases. If there is a reasonable settlement that plaintiff’s attorney don’t really want to take on trials ether. Their business model includes a bias toward settling cases. If there is a realization that to obtain the very large settlement/award in the eight figures, a case needs to be tried, more reasonable settlements should occur. Of course, this necessitates the training and deployment of the new crop of defense trial lawyers.

At the end of the day, even when verdicts lead to large judgments for plaintiffs, evidence suggests that in the long run, these judgments rarely stick, succumbing to some sort of post-verdict review or settlement.

Conclusion

Football coach Vince Lombardi once said, “Confidence is contagious; so is lack of confidence.” We worry that our healthcare industry’s willingness to settle so many defensible MPL cases is evidencing a lack of confidence, just when we need it most. As we noted before, Boston Judge William Young said “Without jury trials, the courts’ status as the grass-roots guardians of constitutional values is threatened as never before.” If you have a defensible case in which the hospital, nurses, and physicians met the standard of care and truly cared for the patient, it may be time to become guardians of these individuals, and try more cases in court. We do respect the need for insurers to monitor expenses, but investing in good counsel, strategic and thorough preparedness, and in literally trying cases may be in our collective best interest.

As an industry, we should consider trying our strongly defensible cases and increasing the percentage of claims that progress to trial to the 15% to 20% range. With high-defensibility and low-severity cases, we should encourage that those be tried by younger lawyers with a senior lawyer as mentor or second chair.

If we undertake this change, we could fundamentally affect the court system and the evaluations of plaintiff’s cases, potentially resulting in better control of the troubling problem of high-severity verdicts and settlements.

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References

9. Hon. William G. Young: “With Heart and Soul and Mind to Do Justice”.