



CASUALTY ALERT

THE QUARTERLY BULLETIN FOR NORTH CAROLINA LIABILITY AND CASUALTY RISK MANAGERS



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LEGISLATIVE UPDATE

Liability Tort Reform Legislation Enacted in North Carolina

This summer, the North Carolina Legislature passed two bills of particular interest to risk managers. Senate Bill 33 targeted medical malpractice claims specifically, whereas House Bill 542 addressed tort litigation more generally. Both reform the litigation process in ways likely to impact a wide variety of claims. Among their more significant provisions, most of which went into effect on October 1, are the following:

ATTORNEY FEES N.C.G.S. § 6-21.1

The original intent behind N.C.G.S. § 6-21.1 was to provide incentives for personal injury attorneys to handle, and for insurers to settle, smaller claims by giving trial judges the authority to tax an attorney's fee in any case in which they found, after having compared the insurer's pretrial settlement offer with plaintiff's eventual recovery, that there had been an "unwarranted refusal" to settle on the insurer's part. Because the interpretation that has been given to those words by North Carolina's appellate courts created bizarre outcomes almost universally unfavorable to the defense, N.C.G.S. § 6-21.1 came to be among the statutes addressed in House Bill 542.

The Legislature has expanded the number of cases to which N.C.G.S. § 6-21.1 applies by increasing its availability from recoveries less than \$10,000 to those that do not exceed \$20,000. At the same time, the statute has also been revised to provide that, when comparing the defendant's pretrial settlement offer to plaintiff's ultimate recovery, the trial court may only consider the "amount of damages recovered;" it may not consider court costs or the attorney fee award itself. Further, should the court decide to award an attorney's fee, it must enter a written order containing findings of fact that set forth both the basis for its conclusion that there was an

"unwarranted refusal" to settle on the defendant's part and the factual basis for, and amount of, its award.

Because N.C.G.S. § 6-21.1 now calls for a simple comparison between the jury's verdict and the highest offer made in the last 90 days before trial, its terms have been simplified and should lead to more predictable outcomes.

EXPERT TESTIMONY Rule of Evidence 702(a)

Several years ago, the North Carolina Supreme Court held that the state version of Rule of Evidence 702(a), which covers the admissibility of expert opinion testimony, does not follow the federal rule established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, in which the United States Supreme Court held that it is the role of trial courts to act as "gatekeepers" so as to prevent the introduction and use of unreliable expert testimony. Instead, the power of North Carolina's trial judges to exclude questionable opinion evidence was severely limited, especially when the testifying expert has appealing credentials.

Thanks to House Bill 542, Rule 702(a) has been rewritten so as to track the federal rule and incorporate the factors set forth in *Daubert*. As our state courts adjust to the new requirements occasioned by this rule change, case law applying *Daubert* from the federal court system and in other jurisdictions should prove helpful when deciding whether the opinions offered by those purporting to be experts will be admitted into evidence. Defendants facing expert testimony of dubious merit now have a new weapon in their arsenal of available defenses.

MEDICAL EXPENSES Rule of Evidence 414 N.C.G.S. § 8-58.1

N.C.G.S. § 8-58.1, which authorizes injured parties to testify about their own medical expenses,

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has been rewritten and new Rule of Evidence 414 adopted so as to render admissible evidence of the injured party's actual medical costs, such as the amounts they have paid or still owe for treatment rendered. This is a very significant departure from the previous rule, which permitted plaintiffs to offer evidence of the amounts they were *billed*, which typically bears no relation at all to what they actually paid or will have to pay in the future. Thus, in cases in which medical providers have agreed to accept reduced amounts, the jury will be instructed to base its medical expense award on plaintiff's actual medical costs, not the amount he was initially billed.

Moreover, the new rule also provides that evidence of the amount accepted in payment by the medical provider is admissible, regardless of its source. Thus, if a collateral source, such as group insurance, Medicare or Medicaid, has paid a discounted amount in satisfaction of plaintiff's medical bills, evidence of that discounted amount is admissible. Furthermore, to the extent that juries base their pain and suffering awards on a multiple of the injured party's medical bills, the immediate and significant impact of this change is even more abundantly clear.

TRESPASSER RESPONSIBILITY N.C.G.S. § 38B-1, et seq.

The Legislature has also adopted a "Trespasser Responsibility Act," which codifies the former common law rule that, with certain exceptions, possessors of land owe no duty of care to trespassers and are not liable for their injuries. The two major exceptions to that general rule are cases of intentional harm and, under limited circumstances, those of trespassing children who are either under the age of 14 or have the mental capacity of such a person.

APPEAL BONDS N.C.G.S. § 1-289

N.C.G.S. § 1-289 has been amended to preserve the right of appeal in cases involving large jury awards. It now requires the trial court to set the amount of the appeal bond only after first considering certain "relevant factors," including the (1) amount of the judgment; (2) policy limits of applicable insurance; and (3) net worth of the judgment debtor. This new procedure, which will apply to all actions filed on or after October 1, replaces a system in which appeals had to be accompanied by a bond equal to the full amount of the judgment. In the absence of such a bond, the judgment creditor was free to execute on the judgment, even while the appeal was pending. In cases in which the judgment exceeded available insurance coverage, it was impossible to obtain a bond if the defendant had inadequate assets to back it up. As amended, N.C.G.S. § 1-289 now gives trial judges latitude to stay execution on judgments in appropriate cases, even if not covered in their entirety by the appeal bond.

SEPARATE TRIALS OF LIABILITY AND DAMAGES Rule of Civil Procedure 42(b)

Rule of Civil Procedure 42(b) has been amended so as to permit either party in a tort action in which more than \$150,000 in damages is being sought to have the issues of liability and damages bifurcated and tried separately, unless the court, for "good cause shown" by the non-moving party, orders a single trial of both issues.

PRE-LITIGATION REVIEW OF MEDICAL MALPRACTICE CLAIMS Rule of Civil Procedure 9(j)

Before being amended by Senate Bill 33, Rule of Civil Procedure 9(j) only required that medical malpractice complaints contain an allegation that plaintiff's medical care had been reviewed by an expert who was expected to qualify under Rule of Evidence 702. The cases decided under Rule 9(j) establish that its certification requirement could be satisfied even if the expert had not actually reviewed plaintiff's records before expressing an opinion about the medical care provided. The amendment to Rule 9(j) not only clarifies its provisions, it explicitly requires the certification to state that the expert has reviewed all of the medical records that pertain to the alleged negligence.

EXPERT TESTIMONY REGARDING NON-CLINICAL ISSUES Rule of Evidence 702(h)

This amendment to Rule of Evidence 702 strengthens the requirements imposed on expert witnesses who testify about administrative and non-clinical issues in medical malpractice cases, by requiring that they have substantive knowledge regarding applicable standards of care in the same type of medical facility as the defendant. And, as to licensed nursing and other adult care homes, the amended rule now requires that plaintiffs establish that the defendant's action (or inaction) was not in accordance with the standards of practice among similar health care providers situated in the same or a similar community under the same or similar circumstances as existed at the time the alleged malpractice occurred.

DEFINITION OF "HEALTH CARE PROVIDER" N.C.G.S. § 90-21.11

N.C.G.S. § 90-21.11 has been amended so as to broaden the scope of statutory protections available to defendants in malpractice cases by adding licensed adult care and nursing homes to the definition of "health care provider" and provide that the category of "medical malpractice" claims includes civil actions brought against hospitals, nursing homes and other adult care homes which allege a breach of such administrative and corporate duties as credentialing, monitoring and supervision of staff, as long as the claim arises out of the same

facts or circumstances as a claim that has been asserted against a health professional. These revisions appear to eliminate the distinction made in prior in case law between claims of negligence in clinical care and those related to administration or facility management.

STANDARD FOR EMERGENCY MEDICAL CARE N.C.G.S. § 90-21.12

This statutory amendment makes it more difficult for potential plaintiffs to pursue claims against emergency room doctors and others who provide emergency medical treatment by requiring that liability claims arising from treatment of emergency medical conditions be proven by "clear and convincing evidence."

NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES N.C.G.S. § 90-21.19

Of all the tort reforms enacted during this summer, this is the one that has garnered the most public attention. Applicable to all actions filed on or after October 1, non-economic damages have been capped at \$500,000 per defendant, although that cap will be indexed to inflation every three years.

There are two exceptions to the cap that has now been placed on noneconomic damages: it does not apply to punitive damage awards and has no application if the jury finds that (a) plaintiff suffered "disfigurement, loss of use of part of the body, permanent injury or death" and (b) the act that proximately caused plaintiff to be injured was "committed in reckless disregard to the rights of others."

This new provision also requires the court to instruct the jury that "noneconomic damages" includes pain, suffering, emotional distress, loss of consortium, inconvenience and other nonpecuniary compensatory damage, but does not include punitive damages. It also calls for the jury to specify the amount, if any, it awarded for noneconomic damages.

MINORS' MEDICAL MALPRACTICE CLAIM LIMITATIONS PERIOD N.C.G.S. § 1-17

The Legislature has also amended N.C.G.S. § 1-17 so as to shorten the statute of limitations applicable to claims of medical negligence made on behalf of minors, by requiring that they be brought within the standard statute of limitations, except for the claims of children under the age of 10, those who have been adjudicated an "abused or neglected juvenile," and children placed in the custody of the State or an approved child placement agency.