

# CATCHING UP WITH PROFESSIONAL, D&O AND EMPLOYMENT LIABILITY

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## Doctors' counter-punch

The medical malpractice tort reform debate may be politically dead in some states for awhile but not so at North Carolina-based Medical Justice, a company trying to protect physicians from frivolous medical malpractice lawsuits through a counter suit insurance program.

Medical Justice is a patented legal counter suit protection program that pays for the counter suit in the event a doctor is sued for a non-meritorious reason. Medical Justice also provides a deterrent package using the option of counter suit and other proprietary means to prevent these "frivolous" malpractice lawsuits from being initiated in the first place.

It is now available in Connecticut and more than a dozen additional states.

"While the immediate impact of Medical Justice is to reduce the frequency of non-meritorious malpractices lawsuits against physicians, the longer term impact is in reducing medical malpractice insurance premiums which in turn will stabilize the community health costs," said Dr. Jeffrey Segal, a board certified neurosurgeon and founder of Medical Justice.

Medical Justice Counter suit Plans are proprietary processes that protect physicians from frivolous medical malpractice lawsuits primarily by deterring their occurrence in the first place. However, if they do occur, these processes arm the physician with the ways and means to prosecute the case in support of the doctor.

## Attorneys nursing big suits

A survey examining nursing home litigation trends shows attorneys reporting a significant increase in the number of nursing home claims they handled and the average size of recoveries in the past five years.

In the policy journal Health Affairs, Harvard researchers David Stevenson and David Studdert estimated that in the high litigation states of Florida and Texas, attorneys handled claims worth more than 15% of statewide nursing home expenditures.

Attorneys surveyed were involved in litigating nearly 4,700 claims in the preceding 12 months and their firms handled 8,300 claims. The average recovery amount among paid claims, whether resolved in or out of court, was about \$406,000 per claim.

"But the most striking finding about the dynamics of this litigation," says Studdert, assistant professor of health policy and law at the Harvard School of Public Health, "was that nearly 9 out of 10 plaintiffs received compensation. This kind of payment rate is off the scale in the world of personal injury litigation, and probably reflects a tremendous reluctance to bring this kind of claim before a jury."

The survey also looked at other trends. It found that residents' children are the chief catalyst behind more than 60 percent of claims and nearly half of all nursing home claims involved wrongful death or pressure ulcers/bedsores or both.

Visit [www.healthaffairs.org](http://www.healthaffairs.org).

## How much, not how many

Tort reform advocates are charging that a consumer group has misrepresented the facts of what's driving the health care liability crisis.

Following the release of a report citing that the number of medical malpractice cases filed in state courts has dropped one percent per capita in the past five years, Center for Justice and Democracy Executive Director Joanne Doroshow is quoted in an August news release stating: "One of the most contentious issues in the debate over medical malpractice is whether the system is being overrun with increasing numbers of claims by patients."

The study, "Examining the Work of State Courts, 2002," was a joint project of the Conference of State Court Administrators, the Bureau of Justice Statistics, and the National Center for State Courts' Court Statistics Project.

American Tort Reform Association President Sherman Joyce takes issue with Doroshow's implication that the number of claims is what it is important in the debate.

"We have consistently stated that the increasing and irrational cost of medical liability claims is driving the health care liability crisis, not the number of cases filed," said Joyce. "It's no wonder why Ms. Doroshow's organization—which is funded by the personal injury bar—has made a desperate attempt to twist this information to its advantage."

He said that Doroshow fails to mention that the "outcomes of medical malpractice cases, whether settled or resolved by trial, not only affect tort reform and legislation, but also may dramatically affect malpractice insurance rates paid by doctors and hospitals."

## Sources of D&O suits

According to Watson Wyatt Co., there are six major sources of Directors & Officers lawsuits:

1. Stockholders
2. Employees

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3. Customers/Clients	
4. Competitors	
5. Other Third Party	
6. Government Agencies	

## Outside directors no panacea

While reform advocates are urging companies to add outside board members to guard against corporate fraud and deception, that approach may actually exacerbate an already massive problem of directors being too cozy with the very people they're supposed to be overseeing, University of Florida researchers say.

"Simply putting someone on a board who's an outsider who has some status because of political or business connections or whatever, doesn't ensure stockholder representation," said Henry Tosi, a professor of management at UF's Warrington College of Business, who conducted the research. "The appearances are such that it does, but our research shows that's not the case."

The findings are particularly relevant as they come in the wake of a July Securities and Exchange Commission report citing the need for tougher rules regarding the selection of directors. UF researchers set out to determine how chief executives are able to so completely control corporate processes. That control has set the stage for scandals of the magnitude of Enron and WorldCom, said Tosi, whose findings are published in Organizational Dynamics.

"Some of the scandals that occurred make some of the things that happened with organized crime look virtually unimportant - miniscule," Tosi said. UF researchers found many top managers are able to skillfully manipulate the director selection process to create an image of board independence - pleasing investors and governance activists - while still retaining a supportive board that seldom challenges their decisions, Tosi said.

In fact, some of the most egregious recent cases occurred in firms with a majority of outside directors, such as Enron - 80 percent outside directors, Tyco - 65 percent outsiders, and Disney - 60 percent, the research found.

From the time they first seek the job, some CEOs begin a concentrated effort to gain total control over the company and other top managers, Tosi said. More significant, they also strive to hold sway over the boards that are supposed to be overseeing them and representing stockholders. Their methods include negotiating generous compensation packages and the ability to control director selection and pay, and managing the compensation and promotions of other senior executives who may pose threats to them.

CEOs also insulate themselves from risk and boost their power and prestige through unrelated diversification of the company, which may

provide tremendous short-term increases to a firm's revenues but often isn't the best long-term strategy for the company or its stockholders, Tosi said.

"From the beginning, CEOs in management-controlled firms start with an agreement that provides them with substantial discretion over areas in which they can craft the protective shield they prefer," Tosi said.

"Basically, they (CEOs) craft it so they have more control than the board, and there is less incentive for board members to monitor the CEO at the exact same time that it's needed most.

"These boards, like others dominated by outsiders, often act like they are members of the emperor's court," Tosi said, "either approving the CEO's actions or not being terribly interested in what the CEOs do, so long as they are able to hold on to their board status and pay."

Instead of adding outside directors, Tosi and his UF colleagues suggest giving stockholders more representation on boards. One option: requiring every board to have an external stockholder with some reasonable share of stock but with no direct involvement with the company's managers or executives. They also suggest representation for institutional investors.

"There is such an integrated web of factors that reinforce the CEOs capacity to control the context in ways that allow them to basically take advantage of their position in ways that many think have negative effects on stockholders," Tosi said. "If there were more real shareholder representation, then these things are less likely to happen."

## D&O emerging claims issues

Directors and officers liability insurance is very much a business line in flux, but Joseph Monteleone, vice president of claims at Hartford Financial Products, a unit of The Hartford Financial Services Group expects no availability crisis in the near future.

Speaking at this year's Risk & Insurance Management Society conference in Chicago, Monteleone noted that new market capacity from the direct and reinsurance markets was emerging to replace the spate of insurers and reinsurers that left the volatile and complex D&O line.

D&O claims in 2002 increased significantly in frequency and severity. At the same time, the number of restatements of earnings, a prominent element in many of the severe D&O losses, also showed a strong increase. For this reason, premiums will continue to increase even as policy terms and conditions grow more restrictive and policy limits get lower, he said.

"Companies are being asked to bear more of the risk - both in higher policy retentions and slimmer insured layers. Hopefully, that will create some additional incentive for companies to practice good corporate governance," he said.

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Monteleone raised some emerging claims issues in the D&O market this year, including:

\* Policyholder counsel contentions that restitution amounts are covered by the D&O policy;

\* Emergence of "dishonesty" and "personal profit" exclusions that will be triggered by factual evidence rather than a court ruling; and

\* Curbing settlement costs through more vigorous negotiations with the plaintiffs' bar.

## Awards in EPL cases up 14%

The odds in favor of an employee bringing suit against an employer for discrimination or retaliation are pretty good. In fact, a plaintiff who gets heard in court has a 75% chance of winning.

The probability of a plaintiff in court recovering in employment liability cases has risen from 58% in 1996 to 75% in 2002, according to Jury Verdict Research's report, Employment Practice Liability: Jury Award Trends and Statistics - 2003 Edition.

The JVR report also shows that the national jury award median for employment practice liability cases, which includes discrimination and retaliation claims, rose 14% in one year - from \$175,000 in 2001 to \$200,000 in 2002.

The 63-page study showed that of all discrimination types, age discrimination and disability discrimination plaintiffs won the most money from 1996-2002. The overall median jury award in discrimination cases was \$161,818 for the period.

In retaliation cases-- which occur when an employee is retaliated against by an employer for claiming discrimination, filing a workers compensation claim or whistleblowing -- the overall median award is \$139,900, with the median for whistleblowers who charge retaliation being the highest at \$326,250.

The median EPL award has climbed every year from \$1996 to 2002, except for dips between 1998-1999 and 2002-2001. In 1999 the median award was \$146,550; in 1998 it was \$150,845. In 2001, it was \$175,000, down from \$182,500 on 2000.

Verdicts are most often rendered against service and retail establishments, with such firms fielding 51% of verdicts. Other defendant types include government agencies (31%); manufacturing and industrial companies (13%), and transportation companies (5%).

With a median award of \$207,250, manufacturing and industrial firms took the biggest hit. Other median wards by defendant type are: government- \$194,892; service/retail- \$125,500, and transportation- \$197,922.

Among discrimination awards, the most common were for sex discrimination (38%) followed by race (20%); disability (17%); age (16%) and other (9%).

Not all cases reach a verdict. The median for EPL cases settled was \$56,750.

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