

Lawyers rallying against malpractice caps

By Jane Paige

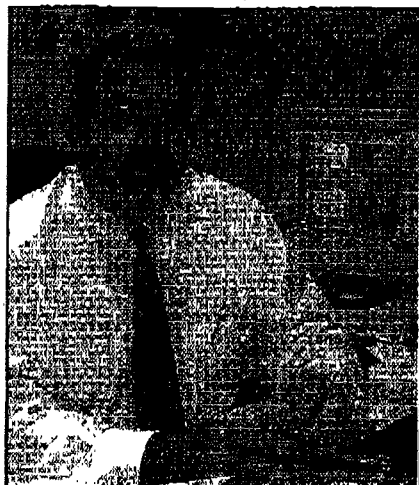
RALEIGH – Lawyers who prosecute medical malpractice cases are preparing themselves for a pay cut.

Legislation proposed at both the federal and state level would place a cap on injury awards for pain and suffering in medical malpractice cases. Specifically, it limits noneconomic damages to \$250,000 and it could also restrict attorney fees.

The emotional and controversial issue of medical malpractice caps has pitted two powerful political constituencies against each other – trial lawyers and health-care providers.

The physician argument in favor of caps is that the ever-increasing sums of money that juries award in malpractice cases handled by greedy lawyers are driving medical malpractice insurance rates ever higher.

Lawyers counter that imposing caps prob-



STEVE WILSON | TRIANGLE BUSINESS JOURNAL

Legal lobbyist Bill Wilson points to the large legal expenses in malpractice cases as a reason to nix a cap.

ably wouldn't bring down insurance rates and say it is unfair to limit awards to victims.

CHANGING FIELDS

Local trial lawyers say such legislation might force many of them to give up malpractice work and would cause further harm to people who were injured because of medical errors.

"There are huge expenses involved for the trial lawyer in medical malpractice cases," says Bill Wilson, a lobbyist with the North Carolina Academy of Trial Lawyers. "These proposed caps will eventually limit the lawyer's ability to pursue these cases."

Medical malpractice cases are expensive because many are complex and typically require testimony from numerous experts who charge for their time and expertise. Thomas Henson, a Raleigh attorney who represents plaintiffs in nursing home cases, says as much as \$50,000 can be spent on experts in nursing home suits before a case ever goes to trial.

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Wilson, of the trial lawyers academy, says more than \$200,000 can be spent preparing for particularly difficult cases.

Besides, says Henson, checks and balances already exist to eliminate so-called frivolous lawsuits. In North Carolina, a qualified expert in the field must decide if the complaint has merit before the lawsuit can be filed.

The state of Florida is considering similar legislation that would restrict who is allowed to testify as an expert witness in a

malpractice case.

Henson and other trial lawyers are reluctant to talk about the impact the proposed legislation will have on their own businesses. They prefer to focus on the effect it will have on their clients.

"I have not thought about it from that perspective," Henson says when asked about the impact on his law practice.

"I am going to practice law one way or the other," he says. "I see it as limiting the elderly access to the court system. You can do the math if the cap is \$250,000 and the case has already cost \$50,000 before we

even get to trial."

John Alan Jones, a Raleigh plaintiffs' attorney, says his law firm is diversified and could adapt to the changes. However, he says the cap would be a "boon" for insurance companies.

OHIO LIMITS

North Carolina would not be the first state to adopt malpractice caps.

Ohio legislators adopted a medical malpractice limit law in November 2002 that went into effect in April 2003. The new law has two tiers. One sets caps for noncatastrophic injuries, the other caps catastrophic injuries.

Richard Mason, executive director of the Ohio Academy of Trial Lawyers, says some attorneys already are leaving the malpractice field.

"Some members are saying they can't take malpractice cases with the caps," says Mason. "There is always a great deal of risk in these cases when you go to a jury. They can be very difficult to prosecute and many lawyers are wanting out."

Nationwide, trial lawyers are taking on fewer cases in states that have a noneconomic damages cap, according to Carlton Carl, a spokesman for the Association of Trial Lawyers of America.

"Lawyers already take very few medical

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malpractice cases," he says. "The caps mean they are taking fewer and fewer. This just means that fewer victims will be getting their day in court."

North Carolina has found itself at the center of the national debate on medical malpractice limits.

Jesica Santillan's death at Duke University Medical Center has become a rallying point for opponents to the cap. She died after a second heart-lung transplant. In the first transplant, she was given organs from a donor with an incompatible blood type.

Also, U.S. Sen. John Edwards, a North Carolina Democrat and presidential candidate, made millions of dollars handling malpractice cases as a trial lawyer. President Bush is promoting the \$250,000 awards cap.

In mid-March, North Carolina Senate leader Marc Basnight named a special committee to examine the question of malpractice limits. Sen. Robert Pittenger, a Charlotte Republican, sponsored the state bill.

In addition to the \$250,000 cap, the proposed state law limits the plaintiffs' attorneys' fees paid on a contingency fee basis. According to Senate Bill 9, no attorney can contract for or collect a contingency fee in excess of the following limits: Forty percent of the first \$50,000 recovered, 33 1/3 percent of the next \$50,000 recovered, 25 percent of the next \$500,000, and 15 percent of any amount for which the recovery exceeds \$600,000.

CRISIS LIST

In early March, the American Medical Association added North Carolina to the states it says are suffering a medical malpractice liability crisis. Many doctors face rate increases so high that patients' access to health care is becoming affected, the AMA said. It based those conclusions largely on news reports and on information collected by the North Carolina Medical Society, which represents 11,000 doctors in the state.

According to information from the North Carolina Department of Insurance, an

obstetrician pays an average of \$42,000 in medical malpractice premiums per year. Some pay as much as \$65,000. A neurosurgeon pays an average of \$45,000. Increases this year are projected to average 15 percent to 20 percent.

Other states on the AMA's medical malpractice crisis list include Washington, Oregon, Nevada, Texas, Arkansas, Missouri, Illinois, Mississippi, Florida, Georgia, Kentucky, Ohio, West Virginia, Pennsylvania, New York, New Jersey and Connecticut.

In mid-March, the U.S. House of Representatives passed a bill that would cap noneconomic damages, such as compensation for loss of a limb or sight, at \$250,000. The bill does not limit compensation for medical bills, funeral expenses and other economic damages.

Efforts to limit jury awards in medical malpractice cases may face trouble in the Senate where Democrats and some Republicans favor caps higher than those in the House-passed bill.

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