

Med-mal malaise?

Total value of settlements continues to be among lowest in past 10 years

By John McNally

Despite court business slowly humming back to pre-pandemic levels, the natural inclination is to believe settlements would start rolling in. The old adage is dead-lines spur action. And in the case of medical malpractice cases, a trial date is that deadline.

But the data accumulated for the 2022 Jury Verdict Reporter's Settlement Report showed a continued slump for total settlement amounts. The total settlement amounts for medical malpractice cases were similar to 2021 in being over 40% below pre-pandemic years.

Karen Enright, partner with Costello McMahon Gilbreth & Murphy, believes plaintiffs and defendants are coming to major impasses because risk management evaluators for insurance companies refuse to see cases at their appropriate value. This, according to Enright and other attorneys, leads to low-balled or no settlement offers, leaving the plaintiffs frustrated and ready for trial.

"The client is just upset and wants to go to trial," Enright said. "They want to hold, whether it be the doctor or the institution responsible. A lot of times the doctor thinks they'll get off the hook because the hospital will settle. That's not the case anymore. Some of my own clients are just saying 'no, we want to go to trial. We want everyone to be held accountable.'"

MASSIVE MED-MAL VERDICTS

Another factor Enright notes as reason to refuse a settlement is a growing favorable batch of jurors. So far in 2022, the Chicago Daily Law Bulletin (a sister publication of Chicago Lawyer) has reported on three med-mal cases where the jury awarded \$40 million or more for the plaintiffs. Enright says risk management analysts and insurance companies aren't thinking about how juries are becoming more capable of holding practitioners and hospitals at fault.

"(Jurors are) mad and angry. People are easily upset and that's why verdicts are high," she said. "If they find one more person lying or trying to get out of being accountable, that's something that is just an undercurrent in our community now. It's not being taken into consideration when they're doing risk analysis on

whether to settle or go to trial. That's why attorneys are more apt to say I'll roll the dice and go to trial because I don't think this is fair."

PREJUDGMENT INTEREST

Clifford Law Offices partner Keith Hebeisen believes continued uncertainty of the constitutionality of prejudgment interest law has not accelerated settlements like people thought it would.

"The whole point of it is to encourage people, who would otherwise settle a case, to do it sooner instead of waiting until the last minute or waiting to see what happens at a trial," he said. "(Prejudgment interest) has been a neutral impact, if any, on what is happening with med-mal settlements."

Hebeisen does expect the law — should it remain in place — to have its intended effect in generating more settlements.

"In the long run, it's going to have a favorable impact on more settlements happening earlier, more settlements happening in general," he said. "We're in limbo on that right now."

PATIENCE PAYING OFF

Enright checks in with her clients each week and, despite the continued uncertainty of living in a COVID era, they've remained steady and not ready to jump at a settlement.

"I think they know they're going to get their day in court. They've been waiting patiently," she said. "They know there's always things that have to be done. It's just a matter of how many judges and jurors are available."

Hebeisen repeatedly reminds his clients about reasonable expectations and case timelines during the run up to trial. He believes that client attitudes are just as they were before the pandemic. His clients who were antsy about their cases before COVID stalled the courts remain anxious now. Those who were calm before, remain calm.

Hebeisen says slow progression of cases is another factor that can cause some anxiety for clients. He notes that it's not just in Cook County and at the Daley Center. Hebeisen says a case he is working on in Winnebago County is amongst the oldest he's had on his calendar.



Karen Enright



Keith Hebeisen

"There is only so much you can do to resolve their case," he said. "You can't settle it with yourself and the other side doesn't want to talk about it."

Still, Enright has been impressed with the continued fortitude of her clients during the drawn-out case process.

"I've been surprised by the patience because I didn't see that before. Since COVID I've seen a lot more patience," she said. "With jurors I've seen a lot more empathy. Everyone knows someone who's had a hardship or been injured or sick. Some of the things they are seeing hit home."

In the end, Hebeisen states an empty calendar leads to inertia.

"The number one reason I would say for (this happening) is trial dates, trial dates, trial dates," he remarked. "If you don't have trial dates, there's no incentive for the insurance company to pay the money."

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