

# NORTH CAROLINA ASHRM

# LEGISLATIVE COMMITTEE UPDATE

MAY 2011

## WHAT'S COMING FROM NORTH CAROLINA MEDICAL LIABILITY REFORM LEGISLATION?

By Allan R. Tarleton

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On April 20, 2011, the state House of Representatives passed a scaled-back version of the medical malpractice reform bill, dropping the more controversial provisions in earlier versions. Gone are the sections that would have given near-immunity from liability to emergency room physicians and a \$250,000 cap on non-economic damages. The current edition of Senate Bill 33 provides for a \$500,000 limit on noneconomic damages, a heightened burden of proof in cases arising out of care provided in emergency rooms, and separate trials on liability and damages in tort cases where the plaintiff seeks more than \$150,000 in damages.

Currently, the key provisions, as passed by the House, appear at:

- G.S. 1A-1, Rule 42(b), requiring separate trials on liability and damages “upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding ... \$150,000.
- G. S. 1A-1, Rule 9(j), requiring an assertion in any complaint alleging medical malpractice that “the medical care and all medical records pertaining to the alleged negligence and resulting injuries... have been reviewed by ... [a] (Rule 702 qualified) expert witness.”
- G. S. 90-21.11, refining the definitions of (1) “health care provider” to include adult care homes and (2) “medical malpractice action” to make clear that a claim against a hospital, nursing home, or adult care home alleging corporate negligence (for example, negligent credentialing) is a “medical malpractice action” with the attendant requirements for expert testimony and proof.
- G.S. 90-21.12, adding the requirements that the trier of fact find by the greater weight of the evidence that the professional care “was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances...” or that the institutional care “was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances...” and proof of a violation of the standard of care by clear and con-



## MEDICAL LIABILITY REFORM CONTINUED

vincing evidence “[i]n any medical malpractice action arising out of the furnishing or the failure to furnish professional services in a hospital emergency room.

- G.S. 90-21.19 and 90-21.19B, imposing a \$500,000 cap on noneconomic damages (defined as “[d]amages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience... other than damages to compensate for disfigurement, loss of use of part of the body, permanent injury, or death”), requiring a separate jury issue on noneconomic damages (“What amount, if any, is the plaintiff entitled to receive for noneconomic damages?”), but prohibiting the jury from hearing that noneconomic damages are limited.

On April 26, 2011, the Senate voted not to concur with the changes made by the House to SB 33. The differences between the House and Senate versions will be worked out in a conference committee chaired by Senator Peter Brunstetter, Republican from Forsyth County. If a compromise is reached, it will go back to the House and Senate for final approval, then to the Governor.

The NC Medical Society has prepared a summary of the differences between the versions of the bill and their preferred position that can be viewed at <http://www.ncmedsoc.org/blog/wp-content/uploads/2011/04/Senate-v-House-Tort-Bills2.pdf>

SB 33 as it passed the House can be viewed at <http://www.ncleg.net/Sessions/2011/Bills/Senate/pdf/S33v5.pdf>

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THE CASE OF KUBIT AND AN INSURANCE COMPANY'S  
DUTY TO DEFEND IN NORTH CAROLINA

By Ken Nanney

Attorney with Carolinas Healthcare System and former member of NC ASHRM Board of Directors

The recent N.C. Court of Appeals case of Kubit v. MAG Mutual, et. al., 2011 N.C. App. LEXIS 482, establishes the rule that the duty to defend first arises when an insurer receives actual notice of a claim against its insured.

Traditionally, an insurance company has two principal legal duties to the insured: 1) the duty to defend the insured from lawsuits and 2) the duty to pay judgments in the event the insured loses the respective lawsuit.

Exactly when these legal duties arise is further defined in an insurance policy's provisions on coverage, limitations, exclusions and endorsements.

The Kubit case further establishes when the legal duty of an insurer to defend first arises in N.C. Because there were multiple insurance carriers who were notified at different times, the court establishes in this case what notice is acceptable and what notice is simply too late.

## KUBIT CONTINUED

In this case, Dr. Kubit, an anesthesiologist from Fayetteville, NC and certain associates were named in a lawsuit by a cardiothoracic surgeon, alleging defamation and related claims. Dr. Kubit and his associates had a number of different insurance policies with different insurance carriers that potentially provided coverage in the lawsuit. The issue in this case is when the various insurance carriers were notified of the lawsuit.

Within four days of receipt of the lawsuit, Dr. Kubit and his associates notified MAG Mutual and retained a law firm to defend the action. The court found that this notice was acceptable.

Dr. Kubit and his associates argued that they notified two additional insurance carriers, American and Cincinnati, approximately two and a half months after the suit was filed. There was a factual dispute about when American and Cincinnati actually received notice of the lawsuit. However, the court found that because there was at least a good faith argument that the insured had notified American and Cincinnati, they were obligated to defend the case once they received actual notice. It is important to note that the court indicated an insurer may be able to avoid the duty to defend altogether if there was no good faith reason for the delay and the insurer could prove that they were prejudiced by the delay.

“THE KUBIT CASE UNDERSCORES THAT PROMPT NOTIFICATION TO AN INSURANCE CARRIER IS ESSENTIAL IN ORDER TO SECURE A DEFENSE FOR AN INSURED.”

The last insurance carrier, Travelers, was not given actual notice of the existence of the lawsuit until more than eight months after it was filed. The court found that Travelers had no obligation to defend the lawsuit or to pay for any of the substantial legal fees already incurred in the defense of the action. Travelers agreed to provide a defense under a reservation of rights, once it received notice of the lawsuit, and transferred defense of the case to another law firm. The cardiothoracic surgeon eventually dismissed his case against Dr. Kubit and his associates with prejudice.

At trial, Travelers argued that it should not be obligated to pay for any defense because of the substantial delay in reporting the claim. The N.C. Court of Appeals agreed with Travelers and ruled that it did not have a duty to defend the insured at all because the insured was materially late in notifying Travelers and did not have a good faith reason to justify its delay. The court found that this notice was simply too late.

In conclusion, the Kubit case underscores that as part of a sound Risk Management Program in North Carolina, prompt notification to an insurance carrier is essential in order to secure a defense for an insured.

Legislative Committee Members: Megan Lee, Chair; Ron Burris; Larry Jones; Ken Nanne; Allan Tarleton; and John West.

**Please contact Megan Lee at [mjlee@catawbavalleymc.org](mailto:mjlee@catawbavalleymc.org) if you are interested in serving on the  
Legislative Committee!**