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Medical Malpractice Caps Seminar:

The Legal Issues

Sponsored by:

Wisconsin Legislative Council Staff

Wednesday, September 21, 2005

Room 417 North (GAR)
State Capitol
Madison, Wisconsin

8:30 Welcome

8:32 The Case: *Ferdon v. Wisconsin Patients Compensation Fund*
Atty. Richard Sweet, Legislative Council Staff

9:00 Historical Context of the Caps; The Patients Compensation Fund; and The State of the Law Since *Ferdon*
Attys. Jennifer Peterson & Timothy Muldowney, LaFollette Godfrey & Kahn
Atty. Ruth Heitz, General Counsel, Wisconsin Medical Society

9:35 Legal and Practical Implications of The Wisconsin Supreme Court's decision in *Ferdon* for Wisconsin Legislators
Atty. Robert Jaskulski, Habush Habush & Rottier

10:00 Seminar Concludes

WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

Ferdon v. Wisconsin Patients Compensation Fund
(Medical Malpractice Liability Cap)

The Wisconsin Supreme Court's July 14, 2005 decision in the case of *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005) **addresses the issue of the constitutionality of the Wisconsin statutes that place a dollar limit on noneconomic damages in medical malpractice cases**. Statutes define "noneconomic damages" as "...moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection." [s. 893.55 (4) (a), Stats.]

The statutes place a limit on noneconomic damages in medical malpractice cases of $350,000, adjusted annually for inflation since 1995. Although the court's opinion refers to the "$350,000 cap" for purposes of simplicity, and this memorandum likewise does so, the current inflation-adjusted amount of the cap is $445,755.

The *Ferdon* case was a medical malpractice action that arose as a result of a physician's negligence that injured Matthew Ferdon during birth. As a result of the injury, Ferdon has a partially paralyzed and deformed right arm. A jury awarded him $700,000 for noneconomic damages and $403,000 for future medical expenses. However, because of the statutory cap on noneconomic damages, the amount of the noneconomic damage award was reduced from $700,000 to $410,322, which was the inflation-adjusted amount in effect at that time. The jury also awarded his parents $87,600 for the personal care they will render until Matthew turns 18.

The Supreme Court struck down the statutory cap on noneconomic damages by a 4 to 3 vote. The court's opinion consisted of four opinions, which are summarized in this memorandum: (1) a majority opinion by Chief Justice Abrahamson; (2) a concurring opinion by Justice Crooks (joined by Justice Butler); (3) a dissenting opinion by Justice Prosser (joined by Justices Wilcox and Roggensack); and (4) a dissenting opinion by Justice Roggensack (joined by Justices Wilcox and Prosser).

The majority opinion held that the cap violates the equal protection provision of the Wisconsin Constitution, which states in part that "(a)ll people are born equally free and independent...." [Art I., s. 1, Wis. Const.] Since the majority decided the case on this basis, it did not address the other state constitutional issues raised by Ferdon. However, the concurring opinion also held that the cap violates the state constitutional provisions on the right to a jury trial and the right to a remedy for injuries. [Art. I, ss. 5 and 9, Wis. Const.]

LEGISLATIVE OPTIONS

Some of the concerns that led the court to declare unconstitutional the statutory cap on noneconomic damages in medical malpractice cases appear to be of such a nature that they can be remedied through legislation. For example, the majority opinion raised the concern that younger plaintiffs may have to live with pain and suffering over many decades, while older

plaintiffs will not, yet both are subject to the same cap on damages. This concern might be addressed, for example, by having a variable cap that is based on the life expectancy of a person who is the same age and gender as the plaintiff.

Another concern in the majority opinion is that patients who have family members who also received noneconomic damages from the same incident of malpractice have the cap reduced since there is a single cap that covers all family members for the same incident. This concern might be addressed by having separate caps for the patient and for each family member who incurs noneconomic damages.

One concern expressed in the majority opinion that does not appear to lend itself to a legislative solution is that persons who incur damages above the cap, regardless of its level, will not be fully compensated for those damages, while persons with damages below the level of the cap will be fully compensated. However, that is the nature of a cap. Regardless of its level, someone with damages above that level will never be fully compensated.

The concurring opinion states that the current level of the cap is too low, but does not indicate a cap in order to pass constitutional muster. However, that opinion does state that statutory caps on noneconomic damages in medical malpractice cases can be constitutional.

An alternative approach that the Legislature might consider is limiting noneconomic damages to a percentage of economic damages.

Any legislation that is enacted to modify the caps on noneconomic damage will undoubtedly be challenged in court and there is no guarantee that, even with substantial changes, the cap will be upheld. Therefore, another option that the Legislature has is amending the Wisconsin Constitution to specify that the Legislature may enact legislation that sets a cap on noneconomic damages in medical malpractice cases. State constitutional amendments must be adopted by the Legislature in two consecutive sessions and then be approved by the voters of the state in a referendum.

This discussion of options is not intended to be an exhaustive list of possible options.

SUMMARY OF THE OPINIONS

MAJORITY OPINION

After reviewing the facts of the case, the court, through an opinion authored by Chief Justice Abrahamson, addressed the question of whether the $350,000 cap on noneconomic damages in medical malpractice cases is constitutional. The court initially observed:

> This court has not held that statutory limitations on damages are per se unconstitutional. Indeed, this court has recently upheld the cap on noneconomic damages for wrongful death medical malpractice actions. Just because caps on noneconomic damages are not unconstitutional per se does not mean that a particular cap is constitutional. [*Ferdon*, par. 16.]

The court discussed the statutory provisions of ch. 655, Stats., which relates to medical malpractice by a health care provider. The court noted that primary malpractice coverage for providers is $1,000,000 for each occurrence and $3,000,000 per policy year; damages above those amounts are paid by the Patients Compensation Fund (since renamed the Injured Patients and Families Compensation Fund; referred to in this memorandum as "the Fund"). The court noted that s. 655.017, Stats., states that the amount of noneconomic damages recoverable by a claimant under ch. 655, Stats., for acts or omissions of a health care provider that occur on or after May 25, 1995 are subject to the limits in s. 893.55 (4) (d) and (f), Stats., which set forth the inflation-adjusted $350,000 cap.

The court reviewed earlier decisions related to the issue, but held that they were inapplicable in this case because none reached the central issue of constitutionality of the cap on noneconomic damages in medical malpractice cases. One of the decisions discussed was a 2004 Wisconsin Supreme Court decision that rejected an equal protection challenge to the noneconomic damages cap in wrongful death actions. [*Maurin v. Hall*, 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866.] The court also discussed a 1995 Wisconsin Supreme Court decision that held that retroactive application of a cap on noneconomic damages in malpractice cases was unconstitutional but noted that that case did not directly determine the constitutionality of the cap itself. [*Martin v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995).]

The court then discussed the level of scrutiny that it would apply to determine whether the cap on noneconomic damage awards violates the equal protection guarantees of the Wisconsin Constitution. Generally, in reviewing a statute to determine whether it violates equal protection guarantees, a court determines whether there is a rational basis for the distinction in the statutes. However, if a statute interferes with the exercise of a fundamental right or operates to the disadvantage of a suspect class (e.g., race), the court uses a strict scrutiny analysis. The court stated that it would apply a rational basis test to the statute in question, since the malpractice statutes do not deny any fundamental right or involve a suspect classification. [*Ferdon*, pars. 65 and 66.] However, the court also referred to the level of scrutiny as "rational basis with teeth" or "meaningful rational basis." [*Ferdon*, par. 80.]

The court stated that all legislative acts are presumed constitutional and a challenger must demonstrate that a statute is unconstitutional beyond a reasonable doubt. [*Ferdon*, par. 68.]

The court observed that a person challenging a statute on equal protection grounds under the rational basis level of scrutiny bears a heavy burden in overcoming the presumption of constitutionality that is afforded to statutes. The court stated that all legislative acts are presumed constitutional and a challenger must demonstrate that a statute is unconstitutional beyond a reasonable doubt. [*Ferdon*, par. 68.]

The court expressly stated that it was not addressing the additional constitutional challenges based on a right to a jury trial and a right to a remedy under the Wisconsin Constitution, but noted "...the $350,000 cap on noneconomic damages may implicate these constitutional rights." [*Ferdon*, par. 69.]

The court found that in limiting economic damages in malpractice actions, the statutes create a number of classifications and sub-classifications. **The main classification involved in the statute is between those who suffer over $350,000 in noneconomic damages and those who suffer less than $350,000 in noneconomic damages.** Less severely injured

victims with $350,000 or less in noneconomic damages receive their full damages, while severely injured victims with more than $350,000 in noneconomic damages receive only part of their damages. **The court also noted that a main sub-classification is created by the statutes since a single cap applies to all victims of a malpractice occurrence regardless of the number of victims and claimants.** Therefore, the total award for the patient's claim for noneconomic damages, such as pain and suffering and disability, and the claims of the patient's spouse, minor children, or parents for loss of society and companionship, cannot exceed $350,000. Because of this, classes of victims are created depending on whether the patient has a spouse, minor children, or a parent.

The court identified the Legislature's objectives for enacting the $350,000 cap. In the 1975 law that created the malpractice liability chapter, the Legislature set forth 11 findings. The court summarized the legislative objectives as follows: (1) ensure adequate compensation for victims; (2) enable insurers to charge lower malpractice premiums by reducing the size of awards; (3) keep the Patients Compensation Fund's annual assessment to health care providers at a low rate and protect the Fund's financial status; (4) reduce overall health care costs for consumers of health care by lowering malpractice premiums; and (5) encourage health care providers to practice in Wisconsin, including the related objectives of avoiding the practice of defensive medicine and retaining malpractice insurers in Wisconsin.

The court stated that no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured.

The court addressed whether a rational relationship exists between the legislative objective of compensating victims fairly and the classification of medical malpractice victims into two groups--those who suffer noneconomic damages under $350,000 and those who suffer noneconomic damages over $350,000. **The court noted that young people are most affected by the $350,000 cap on noneconomic damages, not only because they suffer a disproportionate share of serious injuries from malpractice, but because they can expect to be affected by those injuries over a 60-year or 70-year life expectancy.** The court stated that no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured. It also stated that no rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers. It therefore concluded that a rational relationship does not exist between the classifications of victims in the $350,000 cap and the legislative objective of fairly compensating victims of malpractice.

The court stated that the Legislature's decision fixing a numerical cap must be accepted unless the court can say that "...it is very wide of any reasonable mark." [*Ferdon*, par. 111.] For reasons set forth in the opinion, the court concluded that the $350,000 cap is unreasonable and arbitrary because it is not rationally related to the legislative objective of lowering malpractice premiums. The court cited studies that were noted in the *Martin* decision mentioned above, showing that a cap has an insignificant, if any, effect on malpractice costs. It referenced an indication by the Commissioner of Insurance that a number of factors affect malpractice premiums and that it would be difficult to draw any conclusions from premium numbers based solely on the enactment of the 1995 cap. Although the court noted that the

Commissioner of Insurance mentioned that rate stability could be dramatically impacted for both the Fund and primary insurers if the cap were removed, the court also stated that insurers do not face the possibility of unlimited noneconomic damages because their liability is limited to $1,000,000 per occurrence and $3,000,000 per year.

The court cited a General Accounting Office (GAO) study that concluding that malpractice claims payments against all physicians between 1996 and 2002 tended to be lower and grow less rapidly in states with noneconomic damage caps. However, it also noted that GAO stated the differences in both premiums and claims payments are affected by multiple factors in addition to damage caps, including state premium rate regulation, level of competition among insurers, and interest rates and income returns that affect insurers' investment returns.

The court found that the Fund has operated and been fiscally sound when there were no caps on noneconomic damages, when there was a $1,000,000 cap on noneconomic damages, and since 1995 when there has been an inflation-adjusted $350,000 cap. [*Ferdon*, par. 144.] The $1,000,000 cap was in effect from 1986 until it sunsetted in 1991, and a new $350,000 cap was not enacted until 1995. [An earlier $500,000 cap on malpractice awards was created in 1975, but was contingent on the Fund dropping below a certain dollar level, which never occurred.] In summary, **the court stated that the Fund has flourished both with and without a cap, and therefore the rational basis standard requires more to justify the $350,000 cap as rationally related to the Fund's fiscal condition.** [*Ferdon*, par. 158.]

In addressing the legislative objective of lowering overall health care costs for consumers, the court noted that medical malpractice premiums are an exceedingly small portion of overall health care costs. It observed that the direct cost of medical malpractice insurance is less than 1% of total health care costs. **Therefore, it concluded:**

> **Accordingly, there is no objectively reasonable basis to conclude that the $350,000 cap justifies placing such a harsh burden on the most severely injured medical malpractice victims, many of whom are children.** [*Ferdon*, par. 165; emphasis added.]

With regard to the issue of physician migration, the court stated that studies indicate that caps on noneconomic damages do not affect this migration. For example, the court cited the Office of the Commissioner of Insurance's reports on the impacts of the 1995 law that established the $350,000 cap and observed that the reports do not attribute either the increases or decreases that occurred in the various years in the number of health care providers to the 1995 law, much less to the $350,000 cap. Therefore, the court concluded that the $350,000 cap is not rationally related to the objective of ensuring quality health care by creating an environment that health care providers are likely to move into or less likely to move out of. **It stated: "(t)he available evidence indicates that health care providers do not decide to practice in a particular state based on the state's cap on noneconomic damages."** [*Ferdon*, par. 171; emphasis added.]

The court noted that there is anecdotal support for the assertion that doctors practice defensive medicine, but found an accurate measurement of the extent of this phenomenon is virtually impossible. It cited the finding of three independent, nonpartisan governmental agencies that

defensive medicine cannot be measured accurately and does not contribute significantly to the cost of health care. It held that the evidence does not suggest that a $350,000 cap is rationally related to the objective of ensuring quality health care by preventing physicians from practicing defensive medicine.

In conclusion, the court held that the challengers of the statute have met their burden and demonstrated that the $350,000 cap in the statutes is unconstitutional beyond a reasonable doubt. It held that the cap violated the equal protection guarantees of the Wisconsin Constitution and therefore it did not need to address the other state constitutional challenges.

CONCURRING OPINION

While the concurring opinion by Justice Crooks, joined by Justice Butler, stated that it joined the majority opinion and its holding that the $350,000 cap on noneconomic medical malpractice damages violates the equal protection guarantees of the State Constitution, the concurring opinion also stated:

> I write separately, however, to emphasize that statutory caps on noneconomic damages in medical malpractice cases, or statutory caps in general, can be constitutional. While the majority states that this case does not take issue with the constitutionality of all statutory caps, see majority op., par. 13, I want to stress that such caps can satisfy the requirements of the Wisconsin Constitution. [*Ferdon*, par. 189.]

The opinion went on to state that the legislative objectives, when reviewed in accord with a rational basis test, provide insufficient justification for that cap under the equal protection clause, and also that the $350,000 cap is "too low" to satisfy the right to a jury trial and the right to a remedy, guaranteed by art. I, ss. 5 and 9 of the Wisconsin Constitution.

The concurring opinion stated that "(i)t seems as if the $350,000 figure was plucked out of thin air."

The concurring opinion observed that the history behind the Legislature's setting of caps for noneconomic damages in malpractice actions "...demonstrates arbitrariness, and leads to a conclusion that a rational basis justifying the present cap was, and is, lacking." [*Ferdon*, par. 190; emphasis added.] The opinion noted that the caps have changed from no cap, to $1,000,000, back to no cap, and finally to $350,000 over the course of 20 years. The concurring opinion stated that "(i)t seems as if the $350,000 figure was plucked out of thin air." [*Ferdon*, par. 191.]

The concurring opinion raised the question if $1,000,000 was the appropriate figure for the cap in 1986, how can a $350,000 cap satisfy the constitutional requirements nine years later?

The concurring opinion concluded:

> In sum, I conclude that this particular cap on noneconomic damages, set arbitrarily and unreasonably low by the legislature, violates Article I, Section 1, as well as Article I, Section 5 interpreted

in conjunction with Article I, Section 9, of the Wisconsin Constitution.

Wisconsin can have a constitutional cap on noneconomic damages in medical malpractice actions, but there must be a rational basis so that the legislative objectives provide legitimate justification, and the cap must not be set so low as to defeat the rights of Wisconsin citizens to jury trials and to legal remedies for wrongs inflicted for which there should be redress. [*Ferdon*, pars. 195 and 196.]

DISSENTING OPINION

The dissenting opinion by **Justice Prosser** stated that Matthew Ferdon suffered a life-changing injury to his arm at birth as a result of medical malpractice and that he deserves fair compensation. It noted that years ago, the Legislature established a patient's compensation system, including mandatory health care provider insurance and a Patients Compensation Fund. It stated that to stabilize liability costs in this guaranteed payment system, the Legislature capped noneconomic damages "...that compensate a patient for such unquantifiable harms as pain and suffering." [*Ferdon*, par. 200.]

This court is not meant to function as a "super-legislature," constantly second-guessing the policy choices made by the legislature and governor. [*Ferdon*, par. 204.]

The dissenting opinion went on to state that some members of the court, irrespective of what they say, believe that all caps on noneconomic damages are unconstitutional. It cited the concurring opinion that contended that some damage caps are constitutional, but not the caps set by the Legislature in this case. The dissent stated: (t)his court is not meant to function as a "super-legislature," constantly second-guessing the policy choices made by the legislature and governor. [*Ferdon*, par. 204.]

The dissenting opinion concentrated on three issues: (1) the majority's adoption of a "rational basis with teeth" standard, which the dissent characterized as intermediate scrutiny without an articulation of the factors that trigger it; (2) the broad sweep of the majority's rationale in relation to the narrow issue before the court; and (3) the majority's conclusion that the Legislature had no rational basis for enacting the malpractice noneconomic damage cap.

The dissenting opinion first disagreed with the majority's ultimate determination of the applicable level of scrutiny. It noted that the majority stated it was using the rational basis test, but also mentioned "rational basis with teeth" and "meaningful rational basis." The dissent contended that perfection is not required and that the rational basis test "does not require a statute to treat all persons identically, but it mandates that any distinction must have some relevance to the purpose for which the classification is made." [*Ferdon*, par. 216, citing *Doering v. WEA Ins. Group*, 193 Wis. 2d 118, 532 N.W.2d 432 (1995).] The dissent observed that in Wisconsin, until today, there was only one rational basis test and that now there are two.

The dissent next objected to "...the exceedingly broad scope of the majority's rationale, in light of the narrow issue before us." [*Ferdon*, par. 224.] It noted that the majority held that the cap violates equal protection because persons who suffer the most injuries will not be fully

compensated for their noneconomic damages, while those who suffer relatively minor injuries with lower noneconomic damages will be fully compensated. The dissent observed:

> Such a statement would be true of any cap on damages. All caps have that effect. [*Ferdon*, par. 225.]

For example, the dissenting opinion cited the statute that limits damages against state employees to $250,000. The dissenting opinion strongly disagreed with the majority's conclusion that the Legislature did not have a rational basis to enact the noneconomic damages cap.

The dissenting opinion also criticizes the majority's attack on the effectiveness of noneconomic damage caps anywhere and its conclusion that no such cap has had any effect at all on any of the five legislative objectives summarized in the majority opinion:

> The breadth of this holding is staggering. It means that, contrary to the majority's narrow statement of the issue, it will be very difficult for Wisconsin legislators to re-enact a cap on noneconomic damages in the future. The majority has attempted to insulate its ruling from legislative reaction and redress by making its ruling so broad. [*Ferdon*, par. 236.]

The dissenting opinion stated that the cap: (1) helps ensure adequate compensation at a reasonable cost; (2) reduces the size of malpractice awards, thereby reducing premiums; (3) protects the financial status of the Patients Compensation Fund and keeps annual provider assessments to a reasonable level; (4) reduces the overall cost of health care; and (5) encourages providers to stay in Wisconsin and reduces the practice of defensive medicine. In support of its statement that the cap protects the Fund's financial status, the dissenting opinion notes that the Fund had deficits prior to the 1986 enactment of the $1,000,000 cap on noneconomic damages, and that three years after enactment of that cap, the deficits began to decrease. It then shows that three years after the passage of the 1995 law that enacted the $350,000 cap, the Fund began to show accounting surpluses.

With regard to the issue of physician retention in Wisconsin, the dissenting opinion states that the cap encourages health care providers to remain in Wisconsin. It states as follows:

> Wisconsin is not in a medical malpractice crisis because the legislature has addressed it through tort reform. By undoing the work of the legislature, the majority will drag Wisconsin back into the crisis. It is disingenuous to claim that Wisconsin is not experiencing a physician migration problem and use that as a reason to get rid of the cap, when the cap is one reason that Wisconsin has no migration problem at this time. [*Ferdon*, par. 294.]

On this issue, the dissenting opinion cites a federally commissioned study that concluded that **states with a cap average 24 more physicians per 100,000 residents than states without a cap**. This means that states with a cap have about 12% more physicians per capita

than states without a cap. The dissenting opinion states that the Legislature "...unquestionably had a rational basis to conclude" that the noneconomic damage cap would both keep physicians in Wisconsin and reduce the practice of defensive medicine. [*Ferdon*, par. 308.]

It stated that "(t)he court should not second guess the legislature." [*Ferdon*, par. 314.]

The dissenting opinion summarized by stating that in 1995, the Legislature approved comprehensive medical malpractice reform and that over the past decade, "it has been very successful." It also stated that upon reviewing validly enacted legislative acts, the court is supposed to recognize that it is the Legislature's function, not the court's, to evaluate studies and reports. It stated that "(t)he court should not second guess the legislature." [*Ferdon*, par. 314.]

DISSENTING OPINION

The dissenting opinion by **Justice Roggensack** began by stating that a statute that is challenged on equal protection grounds is presumed to be constitutional, and that any doubt about the constitutionality is to be resolved in favor of upholding its constitutionality. A party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt. In citing an earlier decision of the court, the dissenting opinion observed:

> We recognized that legislatively chosen classifications are matters of line-drawing that might not be precise and that at times can produce some inequities, but that our goal was simply to determine whether the statutory scheme advances a stated legislative objective or an objective that the legislature may have had in passing the statute. [*Ferdon*, par. 326.]

In citing earlier decisions, the dissenting opinion stated that under the rational basis test, which has been used for more than 30 years, a classification that is part of a legislative scheme will pass the test if it meets the following five criteria:

(1) All classifications must be based upon substantial distinctions which make one class really different from another.

(2) The classification adopted must be germane to the purpose of the law.

(3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within the class.]

(4) To whatever class a law may apply, it must apply equally to each member thereof.

(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. [*Ferdon*, par. 327.]

The dissenting opinion stated that applying the five-step rational basis test, it concluded that the cap on noneconomic damages has a rational basis and therefore does not violate the plaintiff's right to equal protection of the law.

The dissenting opinion stated that applying the five-step rational basis test, it concluded that the cap on noneconomic damages has a rational basis and therefore does not violate the plaintiff's right to equal protection of the law.

The dissent noted that when the Legislature enacted the chapter of the statutes relating to medical malpractice, it made 11 specific findings about its reasons for doing so and that these findings are entitled to great weight in the court's consideration of whether a statute has a rational basis. It noted that the majority opinion, in summarizing the 11 legislative findings into five objectives, omitted some of the legislative findings and their content.

The dissenting opinion stated that the cap is rationally related to the Legislature's goal of reducing the size of medical malpractice verdicts and settlements, so that the premiums for medical malpractice will be contained. It stated that in moving toward this goal, the Legislature made a rational policy choice that some victims of medical malpractice would not receive all of their noneconomic damages for the public good and that is a choice that any cap will have to make, no matter what the amount. It noted that **the Legislature made this choice as part of a comprehensive plan that "fully compensated all victims of medical malpractice for all the other damages they sustained.**" [*Ferdon*, par. 331, underlining in original text.]

The dissenting opinion criticized the concurring opinion which joins in striking down the noneconomic damages cap statute, but says that a cap in some higher amount might be constitutional. The dissenting opinion also asked if the cap (which is now $445,755) is too low, what is high enough and who gets to determine that?

The dissenting opinion also criticized the majority opinion for conducting a "mini-trial" to find facts that it then uses to say that reasons that the Legislature set out are not borne out by the evidence it has examined. The opinion stated that the majority conducts its trial without the benefit of witnesses, without giving each of the parties an opportunity to submit relevant evidence, and "conveniently ducks evidence that does not fit with its conclusion." [*Ferdon*, par. 346.] It stated that the process the majority employs gives no weight to the legislative findings, which are supposed to be given great weight by the court. It also stated that it does not give the benefit of any doubt to the Legislature, as the court should do if it is to accord the Legislature the respect of a co-equal branch of government.

CONCLUSION

The majority opinion in *Ferdon* held that Wisconsin's statutory cap on noneconomic damages in medical malpractice cases violates the equal protection provision of the Wisconsin Constitution. Because it decided the case on this ground, it stated that it was unnecessary to address the plaintiff's other state constitutional challenges to the statute. However, the concurring opinion stated that the statute also violates the state constitutional provisions granting the right to a trial by jury and the right to a remedy.

The Legislature could consider two options to address the court's concerns: (1) legislation; and (2) a state constitutional amendment. Although legislation might address some of the court's

concerns, there is no guarantee that modifying the statute will satisfy enough of the court's concerns to allow a new statute to pass constitutional muster.

The memorandum was prepared by Richard Sweet, Senior Staff Attorney, on July 26, 2005. The information memorandum is not a policy statement of the Joint Legislative Council or its staff.

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The History of Chapter 655 and Limits on Non-Economic Damages in Wisconsin Health Care Liability Cases

By: Timothy J. Muldowney and Jennifer L. Peterson
LaFollette Godfrey & Kahn

Ruth M Heitz, JD
General Counsel, Wisconsin Medical Society

Statutory History

- 1975: Chapter 37, Laws of 1975 creates Chapter 655 of the Wisconsin Statutes; awards are limited to $500,000 if the Fund's assets fall below certain levels.

- 1986 to 1991: Non-economic damages are limited to $1,000,000.

- 1995 to 2005: Non-economic damages are limited to $350,000, adjusted for yearly inflation.

Legislative Findings (supporting Chapter 37, Laws of 1975, § 1)

(1) The legislature finds that:

(a) The number of suits and claims for damages arising from professional patient care has increased tremendously in the past several years and the size of judgments and settlements in connection therewith has increased even more substantially;

(b) The effect of such judgments and settlements, based frequently on newly emerging legal precedents, has been to cause the insurance industry to uniformly and substantially increase the cost and limit the availability of professional liability insurance coverage;

(c) These increased insurance costs are being passed on to patients in the form of higher charges for health care services and facilities;

(d) The increased costs of providing health care services, the increased incidents of claims and suits against health care providers and the size of such claims and judgments has caused many liability insurance companies to withdraw completely from the insuring of health care providers;

(e) The rising number of suits and claims is forcing both individual and institutional health care providers to practice defensively, to the detriment of the health care provider and the patient;

(f) As a result of the current impact of such suits and claims, health care providers are often required, for their own protection, to employ extensive diagnostic procedures for their patients, thereby increasing the cost of patient care;

(g) As another effect of the increase of such suits and claims and the costs thereof, health care providers are reluctant to and may decline to provide certain health care services which might be helpful, but in themselves entail some risk of patient injury;

(h) The cost and the difficulty in obtaining insurance for health care providers discourages and has discouraged young physicians from entering into the practice of medicine in this state;

(i) Inability to obtain, and the high cost of obtaining, such insurance has affected and is likely to further affect medical and hospital services available in this state to the detriment of patients, the public and health care providers;

(j) Some health care providers have curtailed or ceased, or may further curtail or cease, their practices because of the nonavailability or high cost of professional liability insurance; and

(k) It therefor appears that the entire effect of such suits and claims is working to the detriment of the health care provider, the patient and the public in general.

Selected Court Challenges to Chapter 655

- *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978). The Wisconsin Supreme Court concluded that Chapter 655 does not violate equal protection or due process guarantees, does not constitute an unlawful delegation of judicial authority, and does not impair a malpractice claimant's right of trial by jury.

- *Rineck v. Johnson*, 155 Wis. 2d 659, 456 N.W.2d 336 (1990). The Wisconsin Supreme Court held that the $1,000,000 cap superceded the lower cap for wrongful death where the death resulted from medical malpractice.

- *Martin v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995). The Wisconsin Supreme Court held that a retroactive application of the $1,000,000

statutory cap on non-economic damages in medical malpractice cases does not violate substantive due process.

- *Jelinek v. St. Paul Fire & Casualty Ins. Co.*, 182 Wis. 2d 1, 512 N.W.2d 764 (1994). The Wisconsin Supreme Court held that, in light of the sunset of the $1,000,000 statutory cap, recovery of non-economic damages in medical malpractice cases involving death was unlimited.

- *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, 236 Wis. 2d 316, 613 N.W.2d 120. The Court of Appeals held that the statutory cap on non-economic damages in wrongful death medical malpractice cases, Wis. Stat. § 893.55(4)(f), does not violate the equal protection clause of the Wisconsin Constitution.

- *Guzman* v. *St. Francis Hosp., Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776. The Court of Appeals, in three separate opinions, held that the statutory cap on non-economic damages in Wis. Stat. §§ 655.017 and 893.55(4)(d) is constitutional and does not violate the right to a trial by jury, the right to a remedy clause, substantive due process or the doctrine of separation of powers.

- *Maurin v. Hall*, 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866. The Wisconsin Supreme Court held that the cap on non-economic damages in wrongful death medical malpractice cases does not violate the equal protection clause.

- *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 701 N.W.2d 440. The Wisconsin Supreme Court held the statutory cap on non-economic damages in medical malpractice cases violates the equal protection clause of the Wisconsin Constitution.

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CLE ON MEDICAL MALPRACTICE

Wisconsin Legislative Council

September 21, 2005

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MYTH:

Medical malpractice costs are a substantial factor in driving up health costs.

REALITY:

Medical malpractice expenses are a tiny part of total health care spending.

EVIDENCE

Overall tort expenditures are less than the cost of medical injuries. Total national costs (lost income, lost household production, disability and health care costs) of negligence in hospitals are estimated to be between $17 billion and $29 billion each year.[1] Awards, legal costs and insurance cost an estimated $6.5 billion, or 0.46 percent of total health care spending in 2001.[2] This is at least three to four times less than the cost of medical negligence to society.

Malpractice insurance costs amount to only 3.2 percent of the average physician's revenues. According to experts at the Medicare Payment Advisory Commission (MedPAC), liability insurance premiums make up just a tiny part of a physician's expenses and have increased by only 4.4 percent over the past year.[3] The increase in this expense is noticeable primarily because of the decreases in reimbursements that doctors are receiving from HMOs and government health programs.

Malpractice insurance costs have risen at half the rate of medical inflation, debunking the myth of "out-of-control juries." While medical costs have increased by 113 percent since 1987, the total amount spent on medical malpractice insurance has increased by just 52 percent over that time—less than half of medical services inflation.[4]

Government data show that medical malpractice awards have increased at a slower pace than either malpractice premiums for doctors or health insurance premiums for consumers. According to the federal government's National Practitioner Data Bank, the median medical malpractice payment by a physician to a patient rose 35 percent from 1997 to 2000, from $100,000 to $135,000.[5] But during the same time, the average premium for single health insurance coverage has increased by 39 percent.[6] Malpractice claim payout increases have actually slowed to 1.6% a year from 2000 to 2003 — below the rate of inflation.[7]

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[1] *To Err is Human; Building a Safer Health System,* Institute of Medicine, National Academy of Science 1999.
[2] Gerald F. Anderson, et al., "Health Spending In The United States And The Rest Of The Industrialized World," *Health Affairs,* Vol. 24, Issue 4, 903-914, July-August 2005.
[3] Official Transcript, Medicare Payment Advisory Commission, Public Meeting, December 12, 2002.
[4] Office of the West Virginia Insurance Commission, *Medical Malpractice: Report on Insurers with over 5% Market Share* (November 2002)
[5] National Practitioner Data Bank Annual Reports, 1997 through 2001.
[6] Kaiser Family Foundation and Health Research and Educational Trust, Employer Health Benefits Surveys, 1998-2002; National Practitioner Data Bank Annual Reports, 1997 through 2001.
[7] Chandra, Amitabh, "The Growth of Physician Medical Malpractice Payments: Evidence From The National Practitioner Data Bank," *Health Affairs,* Vol. 24, Issue 3, W5-240-249, May-June 2005.

So-called "defensive medicine" is a red herring. Only a small percentage of diagnostic procedures — "certainly less than 8 percent" — are performed because of a concern about malpractice liability.[8] The General Accounting Office (GAO) found that (1) some defensive medicine is good medicine, (2) managed care discourages bad defensive medicine, and (3) doctors do defensive medicine because they make money from defensive medicine.[9]

Ferdon Decision

¶126 One reason that the cap does not have the expected impact on medical malpractice insurance premiums may be that a very small number of claims are ever filed for medical injuries, and even fewer of any eventual awards are for an amount above the cap. (Footnotes omitted)

¶127 Articles and studies, including a General Accounting Office study, indicated that in 1984, 57% to 70% of all claims resulted in no payment to the patient. Wisconsin statistics are similar. According to information derived from the Office of Medical Mediation Panels, from 1989 through 2004 a little more than 10% of the claims filed resulted in verdicts, with only about 30% of those favorable to the plaintiffs. In 2004, out of the 23 medical malpractice verdicts in Wisconsin, only four were in favor of the plaintiffs. (Footnotes omitted)

¶128 Victims of medical malpractice with valid and substantial claims do not seem to be the source of increased premiums for medical malpractice insurance, yet the $350,000 cap on noneconomic damages requires that they bear the burden by being deprived of full tort compensation. (Footnote omitted)

¶129 Based on the available evidence from nearly 10 years of experience with caps on noneconomic damages in medical malpractice cases in Wisconsin and other states, it is not reasonable to conclude that the $350,000 cap has its intended effect of reducing medical malpractice insurance premiums. We therefore conclude that the $350,000 cap on noneconomic damages in medical malpractice cases is not rationally related to the legislative objective of lowering medical malpractice insurance premiums. (Footnote omitted)

¶174 Three independent, non-partisan governmental agencies have found that defensive medicine cannot be measured accurately and does not contribute significantly to the cost of health care. (Footnote omitted.)

¶175 The evidence does not suggest that a $350,000 cap on noneconomic damages is rationally related to the objective of ensuring quality health care by preventing doctors from practicing defensive medicine. We agree with the non-partisan Congressional Budget Office's finding that evidence of the effects of defensive medicine was "weak or inconclusive." (Footnote omitted.)

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[8] Office of Technology Assessment, *Defensive Medicine and Medical Malpractice,* OTA-H602 pg. 74 (July 1994).
[9] GAO-03-836, "Medical Malpractice and Access to Health Care," pgs. 26-27, August 2003.

MYTH:

Wisconsin's high health costs are caused by numerous medical malpractice claims.

REALITY:

There is no medical malpractice crisis in Wisconsin.

EVIDENCE

***Expansion Magazine* has rated Wisconsin's malpractice costs as the lowest in the nation, *just 39 cents out of each $100 spent on health care*.**[10] The national average is 46 cents for every $100. Meanwhile, Wisconsin health insurance premiums are rated second highest in the nation. There is no correlation between malpractice costs and health care costs.

In Wisconsin, a state with 5.5 million people, only 240 medical negligence claims were filed in 2004 with the Medical Mediation Panels. **That is one claim for every 22,916 Wisconsin citizen.**[11]

Between 1995-2005, when the cap was in effect, there were only nine verdicts in which the jury awarded more than the cap amount to an injured patient.[12] The total amount of money that was denied to the nine people because of the cap was just over $10 million, about $1 million per year. **That comes to 18 cents per person in Wisconsin per year.**

If you compare the actual dollars, in 2003 Wisconsin doctors were spending ***less money*** on medical malpractice insurance than they did in 1989 — $118 to $112.5 million.[13]

49th in US

The frequency of awards in Wisconsin rank 49th lowest out of the 50 states on a per-capita basis, with only the state of Alabama lower.

Source: National Practitioners Databank Reports 1992-2002.

According to the National Practitioners Data Bank, in 2003 Wisconsin was the third lowest state in the number of doctors, per 1,000 doctors, for whom claims were paid to injured patients.[14] This demonstrates that many people injured by medical negligence in Wisconsin go uncompensated. Nor was that ranking due to the cap. Wisconsin was the third lowest state for the number of payments per 1,000 doctors in both 1994 and 1995, before the cap took effect.[15]

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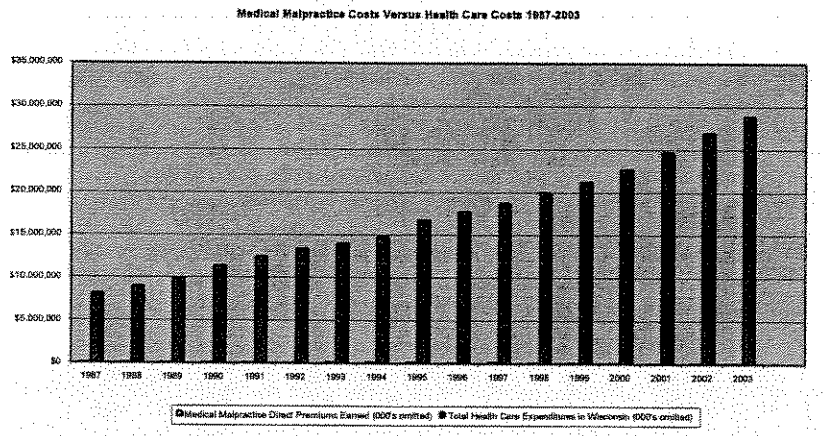
[10] From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1987-2002.
[11] Randy Sproule, Medical Mediation Panels.
[12] Information obtained from Randy Sproule, Medical Mediation Panels.
[13] From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1989 & 2003.
[14] 2004 National Practitioner Data Bank Annual Report.
[15] 1999 National Practitioner Data Bank Annual Report.

Medical malpractice costs are a drop in the bucket compared to health care costs in Wisconsin. In 2003, Wisconsinites spent an estimated $28.8 *billion* on health care costs compared with $112.5 *million* for medical malpractice costs.[16]



Insurers of health care providers thrive in Wisconsin. Wisconsin medical malpractice insurers had the lowest loss ratios (the percentage of each premium dollar spent in paying claims and claim expenses) in the country in 2002.[17] Physicians Insurance Company of Wisconsin, Wisconsin's largest malpractice insurer, has seen its assets increase by $92 million from 2001 to 2004.[18] It paid dividends to its stockholders averaging over $833,000 per year from 1999 through 2002.[19] Its 2003 report to the Office of the Commissioner of Insurance showed that it earned premiums of over $37 million and expected its direct losses to be a negative number, giving it a pure loss ratio of 0.0%. That profitability was not due to the cap. Wisconsin malpractice insurers had a pure loss ratio in 1994, the year before the cap was enacted, of 42.4%. That means out of every dollar collected for premiums, only 42 cents were paid out in claims. In that year, the Wisconsin insurers had premiums written in the amount of $79.4 million and paid claims of $30.1 million.[20]

Ferdon Decision

¶ 162 [M]edical malpractice insurance premiums are an exceedingly small portion of overall health care costs. (Footnote omitted.)

¶165 ... even if the $350,000 cap on noneconomic damages would reduce medical malpractice insurance premiums, this reduction would have no effect on consumer's health care costs. Accordingly, there is no objectively reasonable basis to conclude that the $350,000 cap justifies placing such a harsh burden on the most severely injured medical malpractice victims, many of whom are children.

¶166 We agree with those courts that have determined that the correlation between caps on noneconomic damages and the reduction of medical malpractice premiums on overall health care costs is at best indirect, weak, and remote. (Footnote omitted.)

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[16] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-05, pages 92, 93 & 96. Years 1999-2003 are also estimated based on annual percent changes of 6.3% in 1999, 7.1% in 2000, 8.5% in 2001, 9.3% in 2002. Year 2003 is estimated based on a projected rate increase of 7.2%.

[17] Eric Nordman, et al., "Medical Malpractice Insurance Report: A study of Market Conditions and Potential Solutions to the Recent Crisis," National Association of Insurance Commissioners, page 78, September 2004.

[18] Physicians Insurance Company of Wisconsin, Inc.
https://ociaccess.oci.wi.gov/CmpInfo/GetFinancialData.oci?cmpId=0

[19] Physicians Insurance Company of Wisconsin, Inc. 2003 Annual Report, page 24.

[20] Wisconsin Insurance Report Business of 2003, page 104.

MYTH:

Rising medical malpractice costs are forcing good doctors to quit practicing or leave their states.

REALITY:

Doctors are not fleeing states in droves, despite increasingly frantic and unsupported claims from the American Medical Association, the insurance industry and their allies.

EVIDENCE

Doctors not Leaving. In 2003 the *Washington Post* reported at least 1,000 doctors had left Pennsylvania in recent years because of rising malpractice premiums caused by lawsuits. That was not true. This past April, the head of the state medical society said Pennsylvania had gained 800 more doctors the past two years. In addition, the insurance commissioner's office reported that malpractice payouts had fallen for the second year in a row and lawsuit filings were declining.[21]

Independent assessments by state officials and the media have found that the number of doctors in many states including Florida, Ohio, Pennsylvania and Washington, has remained stable and in most, has actually increased.[22]

Doctors wildly overstating claims. In 2003, the Government Accounting Office (GAO) reviewed claims by physicians that high medical malpractice premiums were causing doctors to flee states with high malpractice fees. Its review of five states concluded that the doctors have wildly overstated their case. "We also determined that many of the reported physician actions and hospital-based service reductions were not substantiated or did not widely affect access to health care" (p. 12). "Although some reports have received extensive media coverage, in each of the five states we found that actual numbers of physician departures were sometimes inaccurate or involved relatively few physicians" (p. 17). "Contrary to reports of reductions in mammograms in Florida and Pennsylvania, our analysis showed that utilization of these services among Medicare beneficiaries is higher than the national average in both [states]." (p. 21)[23]

Effect on OB/GYNs. UW Law School Professor Marc Galanter reviewed two Office of Technology Assessment studies that also fail to confirm the existence of a linkage between high malpractice premiums and doctors leaving the profession. The first study examined whether New York obstetrician/gynecologists (OB/GYNs) and family practitioners (FPs) who experienced high absolute increases in malpractice insurance premiums were more likely than physicians with lower premium increases to withdraw from obstetrics practice. The researchers found that "[m]edical malpractice insurance premium increases were not associated with physician withdrawal from obstetrics practice for either OB/GYNs of FPs." The second study

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[21] Stephanie Mencimer, "Trial and Error," Mother Jones, September/October 2004.

[22] FL, *Palm Beach Post* Editorial, 7/16/03; OH, *Toledo Blade*, 7/17/04; PA, *Allentown Morning Call*, 4/24/04; WA, *Seattle Times*, 2/23/04

[23] GAO-03-836 "Medical Malpractice and Access to Health Care," pgs. 26-27, August 2003.

looked at whether state premium levels and personal malpractice claims history accounted for whether OB/GYNs were practicing obstetrics at all. "The study found that OB/GYNs in states with greater liability threats and who reported higher personal malpractice exposure were more likely to be practicing obstetrics and had higher volumes of obstetric care than their counterparts."[24]

Effect on Rural Areas. A 1995 article reviewed a trend of worsening access to obstetrical care in some rural areas. The study concluded, "Contrary to what family physicians often claim, we found malpractice premium costs and Medicaid reimbursement rates were not associated with family physicians' likelihood of providing maternity care."[25]

REAL CAUSES OF PREMIUM HIKES

Rather than looking at medical malpractice lawsuits, perhaps the AMA should re-focus its scrutiny to the practices of insurance companies. The GAO confirms that one cause of the malpractice premium spike is that malpractice insurance firms artificially held down premiums while the stock and bond markets boomed in the late 1990s, and then got caught short when the market went sour in 2001. To make up for the shortfall, the industry jacked up rates severely in many states.[26]

The highly-conservative *Wall St. Journal* confirmed this analysis in its investigation of the malpractice premium crisis. It concluded in a front-page June 24, 2002 article:
"A price war that began in the early 1990's led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims...An accounting practice widely used in the industry made the area seem more profitable in the early 1990's than it really was. A decade of short-sighted price slashing led to industry losses of $3 billion last year."[27]

Ferdon Decision

¶168 Studies indicate that caps on noneconomic damages do not affect doctors' migration. The non-partisan U.S. General Accounting Office concluded that doctors do not appear to leave or enter states to practice based on caps on noneconomic damages in medical malpractice actions. (Footnote omitted.)

¶170 The Wisconsin Office of the Commissioner of Insurance's biennial reports on the impact of 1995 Wis. Act 10 examine the Act's impact on the number of health care providers in Wisconsin. The Commissioner's 2003 report shows a slight decrease in the number of providers. The Commissioner's 2005, 2001, and 1999 reports show a slight increase in the number of health care providers. The Commissioner's reports do not attribute either the increases or decreases in the number of health care providers to 1995 Wis. Act 10, much less to the $350,000 noneconomic damages cap. (Footnotes omitted.)

¶171 The available evidence indicates that health care providers do not decide to practice in a particular state based on the state's cap on noneconomic damages.

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[24] Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1144-45 (1996).
[25] D. Pathman & S. Tropman, *Obstetrical Practice Among New Rural Family Physicians*, 40 JOURNAL OF FAMILY PRACTICE, No. 5, pp. 457, 463 (May 1995).
[26] GAO-03-702, "Medical Malpractice Insurance: Multiple Factors Have Contributed to Premium Increases," June 2003.
[27] Rachel Zimmerman & Christopher Oster, "Insurers Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, p. 1, June 24, 2002.

MYTH:

"Tort reform" and caps on damages have succeeded in holding down health care costs and medical malpractice premiums in states that have adopted them.

REALITY:

Caps on damages discriminate against the most severely injured and have not lowered health care costs.

EVIDENCE

Medical Malpractice Insurance Rates Not Reduced with Caps. The 2003 Weiss Report found that despite caps on economic damages in 19 states, "most insurers continued to increase premiums (for doctors) at a rapid pace, regardless of caps." The report found that insurers failed to pass along any savings to physicians in states with caps by refusing to lower their insurance premiums, and that caps only slowed the increase in the amount of damages insurers were required to pay out.[28]

Ironically, the Weiss study also found premiums are actually higher in states with caps than in those without. The average malpractice premium in states without caps was $35,016 in 2003. The average premium in states with caps was $40,381.[29] But despite this well-documented differential, many doctors have been stampeded into clamoring for caps as a "solution" to their sharply-rising premiums.

In recent years, at least 40 states have enacted some sort of "tort reform"; since 2002 alone, Florida, Mississippi, Nevada, Ohio, Oklahoma, and Texas have done so. Interestingly, in each state, immediately after the legislation passed, insurers sought rate increases — ranging from a minimum of 20 percent all the way up to 93 percent.

Capping Noneconomic Damages No Panacea. A recent insurance company memo explains how little noneconomic damages have to do with medical malpractice insurance. The insurer was asking for a rate increase of 27% per occurrence or 41% claims made coverage in Texas after the passage of Proposition 12, capping noneconomic damages in medical malpractice cases. The memo states:

"Noneconomic damages are a small percentage of total losses paid. Capping noneconomic damages will show loss savings of 1.0%."[30]

Instead of a frantic, ill-considered rush toward more restrictions on citizen's legal rights like caps, all the major players must seriously examine the roots of the recent epidemic of rate increases in many states. Most recently, a doctor in Connecticut signed a letter along with the state trial lawyer association and two patient groups challenging a recent rate increase of a

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[28] Martin D. Weiss, Ph.D., et al., *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, Weiss Ratings, Inc., June 2003.
[29] *Medical Liability Monitor*, October 2003.
[30] The Medical Protective Company, Texas Physician and Surgeons Actuarial Tort Reform Memorandum, found at www.aisrc.com/caps.pdf.

medical malpractice insurer. The letter prompted the Commissioner to hire an outside actuary to review the rate hike.[31]

A One-Sized Cap is Unfair. A study from the Harvard School of Public Health indicates that caps on non-economic damages result in inequitable payouts across different types of injuries and limits patients' ability to be fairly compensated for their pain and suffering.[32]

The study analyzed a sample of jury verdicts in California that were subjected to the state's $250,000 cap on non-economic damages. They found that reductions imposed on grave injuries were seven times larger than those for minor injuries. People suffering from pain and disfigurement had particularly large reductions in their awards.

Ferdon Decision

¶82: The $350,000 cap limits the claims of those who can least afford it; that is, the claims of those, including children such as Matthew Ferdon, who have suffered the greatest injuries. Thus, the cap's greatest impact falls on the most severely injured victims. (Footnote omitted.)

¶99 According to a 1992 report by the Wisconsin Office of the Commissioner of Insurance, children from ages 0 to 2 with medical malpractice injuries comprise less than 10% of malpractice claims, yet their claims comprise a large portion of the paid claims and expenses of insurers and the Fund. That is, "[p]laintiffs with the most severe injuries appear to be at the highest risk for inadequate compensation. Hence, the worst off may suffer a kind of 'double jeopardy' under caps." (Footnotes omitted.)

¶100 Furthermore, because an injured patient shares the cap with family members, the cap has a disparate effect on patients with families.

¶101 The legislature enjoys wide latitude in economic regulation. But when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational. Limiting a patient's recovery on the basis of youth or how many family members he or she has does not appear to be germane to any objective of the law.

¶102 If the legislature's objective was to ensure that Wisconsin people injured as a result of medical malpractice are compensated fairly, no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured. No rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers. (Footnote omitted.)

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[31] Tanya Albert, AMNews staff. Oct. 18, 2004.

[32] David Studdert, Michelle Mello and Y. Tony Yang, *Journal Health Affairs*, July/August 2004, http://www.insurancejournal.com/news/national/2004/07/08/43841.htm.