

WISCONSIN STATE
LEGISLATURE
COMMITTEE HEARING
RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

**Committee on
Agriculture and
Insurance
(SC-AI)**

File Naming Example:

- Record of Comm. Proceedings ... RCP
- > 05hr_AC-Ed_RCP_pt01a
 - > 05hr_AC-Ed_RCP_pt01b
 - > 05hr_AC-Ed_RCP_pt02

COMMITTEE NOTICES ...

- > Committee Hearings ... CH (Public Hearing Announcements)
- > **

- > Committee Reports ... CR
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- > Executive Sessions ... ES
- > **

- > Record of Comm. Proceedings ... RCP
- > **

INFORMATION COLLECTED BY COMMITTEE
CLERK FOR AND AGAINST PROPOSAL

- > Appointments ... Appt
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> **05hr_ab1073_SC-AI_pt02**

- > Miscellaneous ... Misc
- > **

Wisconsin Hospital Association



Testimony in Support of AB 1073
Senate Committee on Agriculture and Insurance
Eric Borgerding, Sr. Vice President
Wisconsin Hospital Association
March 6, 2006

Chairperson Kapanke and members, my name is Eric Borgerding and I am the Sr. VP of Government Affairs for the Wisconsin Hospital Association.

I want to first and foremost thank the committee for meeting again with such urgency and purpose to take up this latest proposal to reinstate a cap. I also want to recognize Sen. Fitzgerald, Rep. Gielow, Rep. Wasserman, and the impressive number of legislative co-sponsors of AB 1073, Democrat and Republican, for their support of this proposal.

The notion of reinstating a cap on non-economic damages has received extensive discussion over the past several months. During that time it has become increasingly clear that a vast majority of the legislature and Governor, and opinion leaders believe a cap must be restored. On October 25, the State Assembly passed AB 766 by a vote of 64-30. On November 8, every member of the State Senate voted to reinstate a cap. Last week, 74 members of the State Assembly supported AB 1073. And Governor Doyle has said repeatedly that he supports a cap. Thankfully, the question today appears not to be if we will reinstate a cap, rather when and how.

There are primarily two issues before you today: one of urgency and one of constitutionality.

Others before me, including Justice William Bablitch, Attorney Raymond Taffora, and, in writing, constitutional scholar Professor Gordon Baldwin, have already commented on the constitutionality of AB 1073. While the ultimate arbiters of constitutionality are the seven members of the Wisconsin Supreme Court, we believe there is no one more qualified to assess potential constitutionality than these three individuals and I urge you, your legislative colleagues and, especially, Governor Doyle, to fully consider these opinions.

However, we will not know what the Court will deem constitutional until a new bill is passed and signed into law by Governor Doyle. The Governor has already vetoed one bill. Shortly after that, an \$8.4 million verdict was handed down in Dane County. At the hearing last week in the Assembly Committee on Insurance, it was revealed that there is another multi-million lawsuit in the works. This in just the few months since the cap was overturned.

Make no mistake, there is a crisis brewing in Wisconsin and AB 1073 is a thoughtful and meaningful effort to address that situation.

And what about the situation in Wisconsin? On July 14, 2005, just hours after the Court eliminated the cap, WHA and the WMS warned of serious and swift consequences if a cap was not quickly restored. Unfortunately, and despite assurances to the contrary by the plaintiffs' bar, those predictions are coming to fruition. Today, with a mere handful of days left in the legislative session, the effect of losing the cap in Wisconsin is simply undeniable.

In July, we said liability premiums would skyrocket in Wisconsin as medical liability insurers prepared for the worst. In December, the Injured Patients and Families Compensation Fund (Fund) board of governors voted to increase premiums to the fund by 25% due solely to loss of the cap. This from a fund and its board that has been loudly praised by cap opponents as the real reason Wisconsin has enjoyed a stable liability climate.

Speaking of the Fund, let me make this prediction: With a cap now gone, I think it highly unlikely we will see anyone in this building trying to take money from the Fund to balance the state budget ever again – but at the same time we are supposed to believe that the cap makes no difference? I also predict you will see fewer charges from trial lawyers and others that the Fund is overcapitalized, rather its just become the state's deepest, widest open pocket.

In July, we warned of more lawsuits and higher damage awards due to loss of the cap. At the time, our concerns were dismissed as 'hysteria' and 'fear mongering' by those opposed to a cap. But the facts don't lie.

The Fund, which is named in malpractice suits seeking more than \$1 million or more in damages, faced 71 lawsuits in the final six months of 2005. That's up from 58 lawsuits in the final six months of 2004 – a 22.4% increase in million dollar lawsuits in just the first six months since the cap was eliminated. This despite continuing assurances by leading plaintiffs' attorneys that there will only be a "handful" more lawsuits now that the cap is gone.

In just seven months, four jury awards were reached or reinstated that exceeded the previous cap, including the \$8.4 million verdict recently handed down in Dane County. By comparison, during the previous ten years in which we had the cap, there were just nine such awards. And as indicated in testimony last week, there is apparently a \$4 million lawsuit in the works.

And we have every reason to believe this is just the beginning of a far more aggressive and litigious era in Wisconsin. In fact, both the State Bar and Milwaukee Bar Associations have offered seminars on how to make the most out of the "capless" environment. One seminar, actually titled "Life After Caps: How to Get the Most Money for Your Client", even featured a special section with tips on, and I quote, "Tools for Trial to Get the Million Dollar Award." This is what happens in Wisconsin when caps are gone.

You have already heard real stories of physicians who have escaped real liability crises in other states to come to Wisconsin. You have also heard testimony from a rural WI

hospital administrator who, due to loss of the cap, is finding it increasingly difficult to bring physicians to Wisconsin.

This is, without question, the most significant problem caused by loss of a cap – diminishing access to care. The single greatest concern of the Wisconsin Hospital Association is that fewer experienced doctors will come to Wisconsin, new doctors will choose to avoid Wisconsin, or worse yet, doctors will leave or retire far too early as they have done in many other states without caps.

These are concerns we would prefer not to have to address, but we have no choice. I am not here to defend insurance companies or the actions they must take to manage risk. I am not here because physicians and hospitals will pay more for those insurance premiums. And I am not here to begrudge the hundreds of thousands, if not millions, some plaintiffs attorneys will take as their share of now uncapped non-economic damage award. I am here because hospitals must provide all levels of care, from routine to high-risk specialties, 24 hours a day, 365 day a year, and we must have an adequate supply of physicians to do so. Wisconsin already faces a difficult challenge recruiting physicians to rural and urban parts of the state. Loss of the cap will severely exacerbate that problem, and frankly, could not have come at a worse time.

According to the Wisconsin Office of Rural Health, vacancies for physicians in rural areas have reached an all time high in Wisconsin. This is due to a number of factors, the least of which, at least for now, may be the loss of the cap. Wisconsin has always faced challenges recruiting new physicians, particularly specialists into rural areas. However, one of the major advantages over other states, and thus recruiting tools we had at our disposal, was our stable medical liability climate. We no longer have this advantage.

We can debate forever what has or has not happened in other states with or without caps. What I am asking is that you look at what is happening in *Wisconsin* today. How Wisconsin's once envied, doctor-attracting liability environment is already changing

The cap is now gone, and just as certainly malpractice premiums are on the rise, lawsuits are increasing, verdicts are increasing, and physicians are deciding not to come to Wisconsin at a time when we have unprecedented need for their skills.

When WHA appeared before this Committee on October 27, much of our testimony was speculation about the future based on the experiences of other states. Today, just four months later, our testimony is based on the actual facts of what has transpired since in Wisconsin since losing the cap. Evidence pointing to the beginning stages of a deteriorating medical liability climate and reduced access to health care is growing -- evidence that is traceable directly to the loss of our cap on non-economic damages.

Mr. Chairman and members, the writing is not just on the wall in Wisconsin, it is on the floors and ceilings. We are in fact heading down the same path as so many other states that have lost caps. The time to address this situation is now. We cannot wait until 2007, or endlessly speculate about what may or may not be constitutional; as I am sure whatever you pass will quickly be back in front of the Court. And we cannot enact an ineffective or escalating cap for the sake of political expediency. Lets get this done.

AB 1073, in its current form, is the compromise. It is 68% higher than the previous cap and AB 766. It is 17 years worth of inflation ahead of the previous cap and AB 766. It would be one of the highest caps in the country, while economic damages remain uncapped. AB 1073 received 74 bipartisan votes in the Assembly, and I respectfully request your support here in the Senate.

Again, I thank you for your diligence, urgency, and willingness to address this issue.

Thank you.

Life After Caps: How to Get the Most Money for Your Client

In July the Wisconsin Supreme Court's Ferdon decision struck down statutory caps for noneconomic damages in medical malpractice cases. In light of that decision, on February 16th, the *Wisconsin Law Journal* looks to some of the legal community's experts to discover the best way to assist your clients. The morning seminar will cover:

- How to Analyze a Case Where You Can Develop the Damages Before Spending a Lot of Money
- Now That You Know You Have a Good Case — How Do You Advance It
- Tools for Trial to Get the Million Dollar Verdict

Presenters: Jeffrey M. Goldberg, Jeffrey M. Goldberg Law Offices; Paul Gagliardi, Gagliardi, O'Brien, Braden, Olson & Capelli; Gera-Lind Kolarik, Evidence Video; and Lisa Alberte, Lisa K. Alberte & Associates

A Wisconsin Law Journal Seminar

Wisconsin
**Law
Journal**

DATE & LOCATION:

February 16, 2006

Milwaukee Bar
Association Office
424 E. Wells St.
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Registration and
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Seminar from
8:00 a.m. - 12:00 p.m.

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The seminar fee is \$50. To register, please fax or mail back the form below by February 10th to:
Wisconsin Law Journal, Attn: Heather Graham, 225 E. Michigan St., Suite 540, Milwaukee, WI 53202. For questions, please contact Heather at 414-276-0273, Ext. 109, or heather.graham@wislawjournal.com.

Register today! Life after Caps: How to Get the Most Money for Your Client

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Wisconsin Hospital Association, Inc.
NEWS



For Immediate Release

Contact: Mary Kay Grasmick, WHA 608-274-1820 or 608-575-7516 (cell)

Actuarial Committee Recommends 25% Fee Hike to Injured Patients Fund

MADISON (December 1, 2005) ----- In July of this year, the Wisconsin Supreme Court struck down the cap on excessive awards associated with medical malpractice. Now, just five months after losing the cap on non-economic damages, Wisconsin hospitals and physicians are learning about what will likely be the first wave of substantial liability insurance rate hikes.

This week, the Injured Patients and Families Compensation Fund (IPFCF) Actuarial Committee recommended a 25 percent increase in the annual fees that hospitals and physicians are required to pay into the Fund.

George Quinn, WHA senior vice president, is a member of the IPFCF Actuarial Committee. "The reason for the unprecedented hike is solely attributed to the fact that the \$447,000 cap on excessive pain and suffering awards is now gone," he explained.

According to Quinn, the Committee examined information provided by independent actuaries that showed Wisconsin providers are now at a higher risk of excessive damage awards due to the loss of Wisconsin's cap on non-economic damages. Information also presented by the actuary suggests that additional and larger fee hikes may be needed in the future.

After hospitals and physicians have exhausted their private insurance funds following a successful medical malpractice suit, the plaintiff is compensated from IPFCF monies. The IPFCF is funded through mandatory premiums assessed on hospitals and doctors.

"We don't need to speculate about the future impact of losing the cap—the future is right here and right now," said WHA Senior Vice President Eric Borgerding. "We're following the same downward spiral witnessed in Illinois, Oregon, Texas, Washington and other states that lost caps. First, liability insurance rates for health care providers soar, then doctors start leaving the state. This is followed by hospitals having trouble providing essential services like trauma, obstetrics and neurosurgery. We're already seeing doctors reconsider their plans to locate their practice to Wisconsin."

"The bottom line is this—we need to restore a cap on non-economic damages in Wisconsin, and soon," said Borgerding.

Wisconsin patients continue to have unlimited recovery of damages associated with lost wages, medical care and other out-of-pocket expenses following a successful medical malpractice suit. Wisconsin's previous cap applied only to non-economic damages, most commonly awarded for pain, suffering or other intangible losses.

The recommended fee hike will be considered early next year by IPFCF. If approved, the increase will take effect July 1, 2006.

END



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Malpractice Award Of \$8.4 Million Stirs Debate

The Capital Times :: FRONT :: A1

Saturday, February 4, 2006
Staff and news services

To Jessica Greenfield, the \$8.4 million a jury awarded her this week does nothing to ease the pain left by a surgery that paralyzed some of her inner organs. To the Wisconsin Hospital Association, the verdict by the Dane County jury is frightening.

The award, the largest medical malpractice verdict since the state Supreme Court tossed out caps on damages last summer, immediately became a flash point in a debate pitting doctors and hospitals against trial lawyers and malpractice victims.

"My life has been hell, and unfortunately, money doesn't change any of that," said Greenfield, 33, of Waupun, who has used a feeding tube since the 2000 surgery left her stomach and intestines unable to function. "I can't eat anything. I live on machines 12 hours a day. And that's just the beginning."

Hospitals fear the verdict is just the beginning in a long line of big damage awards that will increase malpractice insurance rates and drive doctors out of the state.

The Wisconsin Hospital Association has been sounding the alarm since July, when the high court ruled the state's \$445,000 cap on non-economic damages was unconstitutional. Gov. Jim Doyle in December vetoed the Legislature's attempt to reinstate a similar cap.

The award included \$4.25 million for pain and suffering and \$82,000 to Greenfield's son for loss of companionship with his mother. Those non-economic damages would have been limited to \$445,000 until the court's ruling in July that called the cap arbitrary and unfair to the most severely injured victims.

Greenfield, who returns to the hospital every month to empty her stomach, is the "perfect example" of the unfairness of any cap and deserves every penny for her suffering, said her attorney Daniel Rottier.

Greenfield argued that Madison surgeon Paul Huepenbecker of St. Marys Hospital was negligent in performing the surgery. Her nerves were severed during the procedure, which involved wrapping the top of the stomach around her esophagus to prevent heartburn, Rottier said.

The jury agreed with Greenfield, finding Huepenbecker and Dean Health System negligent. In addition to the pain and suffering, the jury awarded Greenfield \$4.13 million for economic damages such as medical expenses and lost wages.

Bruce Schultz, an attorney for Huepenbecker, said nobody was pleased with the surgery's outcome, but his client "was not negligent in performing the surgery or in the manner in which he performed the surgery." Her previous gastrointestinal problems were complicated by the surgery, he said.

Eric Borgerding, a vice president of the hospital association, said doctors can expect to see more lawsuits, larger jury awards and higher medical malpractice insurance premiums in the absence of a cap.

But Rottier, who is president of the Wisconsin Trial Lawyers Association and testified to lawmakers against any cap, said such fears are overblown and not supported by data.

Wisconsin's Injured Patients and Families Compensation Fund, which is named in malpractice suits seeking more than \$1 million in damages, faced 71 lawsuits in the final six months of 2005, said fund chief Theresa Wedekind. That's up from 58 the final six months of 2004, she said.

The fund's premiums will go up by 25 percent on July 1 due to the ruling after decreasing for several years, Wedekind said. The annual premium, mandatory for 13,000 doctors, will increase between \$215 and \$1,300 depending on a doctor's classification, she said.

Mike Riley, a Madison personal injury attorney who was not involved in the case, said doctors and other health care providers win about 80 percent of all malpractice cases -- a much higher success ratio than other personal injury cases.

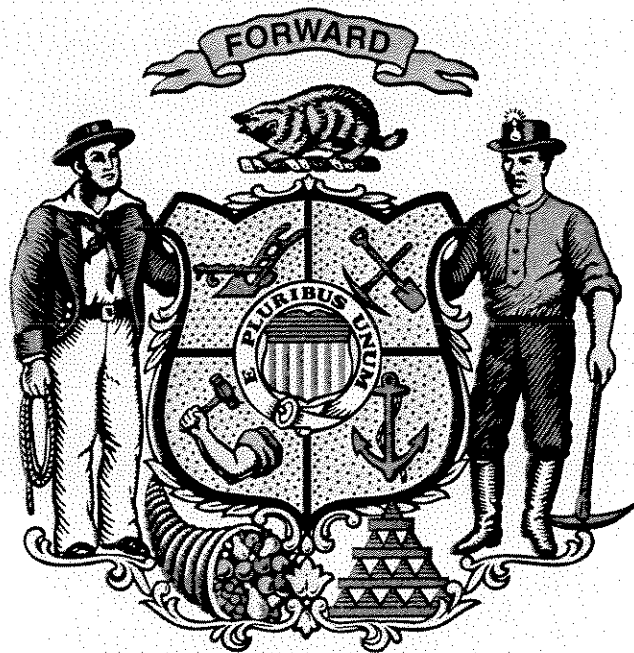
"When you get a result like this, it's not because the jury is crazy" but because the case is so egregious, he said, adding that in many cases, the lawsuit is settled for a much smaller amount.

"Without the caps, the ultimate exposure goes up, and so, too, does the incentive for the parties to settle," Riley said. "With the caps, it's really hard to find lawyers willing to take the case for just the economic damages if the non-economic damages are capped at \$350,000."

Rep. Curt Gielow, R-Mequon, said he was drafting a bill to reinstate a cap on damages that would be introduced in coming weeks. He said the cap would be in the \$750,000 range, a figure he hoped would attract support from legislative Democrats and Doyle.

"It's not the end of the world," Gielow said of this week's verdict. "It's just the beginning of the crack in the wall. Let's get it fixed."

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**WISCONSIN
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STATE BAR of
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To: Members, Senate Committee on Agriculture and Insurance

From: State Bar of Wisconsin

Re: Position Statements on AB 1072 – collateral source rule, AB 1073 – caps on noneconomic damages and AB 1074 – caps on attorney fees.

Date: March 6, 2006

The State Bar of Wisconsin through its Board of Governors requests that you **vote against** Assembly Bill 1072 – collateral source rule, Assembly Bill 1073 – caps on noneconomic damages and Assembly Bill 1074 – caps on attorney fees. We again express disappointment that these proposals were rushed through the legislative process with little to no input from the public.

AB 1072 – (Collateral Source Rule) The State Bar of Wisconsin supports the collateral source rule which bars reduction of awards by payments from collateral sources that do not have subrogation rights. The fact that payments are received from a collateral source is irrelevant in the determination of negligence or the amount of damages. The responsibility of a tort-feasor to pay damages caused should not be lessened by the victim's prudence in planning for contingencies.

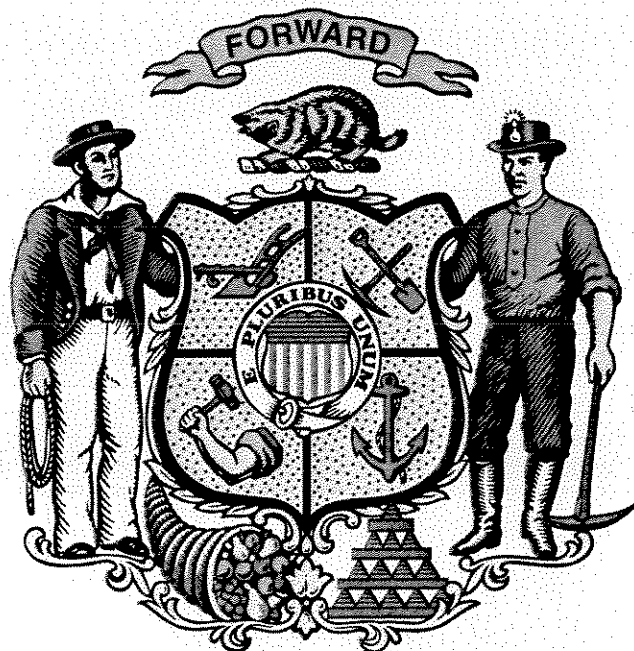
AB 1073 – (Caps) The State Bar of Wisconsin generally opposes legislatively set limits on non-economic damages. The Bar believes that caps on non-economic damages run counter to the right of obtaining justice "completely and without denial." Such caps set in place an arbitrary pretrial limit when those decisions are best decided by a jury and a court of law. In addition, caps on non-economic damages place an unnecessary hardship on the most seriously injured. Statutory caps are inconsistent with the nature of non-economic damages which are more difficult to quantify.

AB 1074 – (Contingent Fees) – Attorney fees are a matter of contract subject to judicial review and control; they should not be regulated by the Legislature. Furthermore, limits on contingent fees may adversely affect the ability of an impecunious victim to get representation to prosecute a claim. For many, the contingent fee is the key to the courthouse door.

If you have any additional questions, please contact State Bar of Wisconsin Public Affairs Director Lisa Roys at 609.250.6128 or lroys@wisbar.org.

State Bar of Wisconsin

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Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Senate Committee on Agriculture and Insurance
Senator Dan Kapanke, Chair

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations
Jeremy Levin – Government Relations Specialist

DATE: March 6, 2006

RE: **Support** for Assembly Bill 1073 – Caps on Noneconomic Damages in Medical Liability Cases

On behalf of nearly 11,000 members statewide, thank you for this opportunity to testify in favor of Assembly Bill 1073, which will restore a reasonable and effective cap on noneconomic damage awards in medical liability cases – a reform critical for Wisconsin's physicians and patients.

The Wisconsin Supreme Court's decision last July has thrust Wisconsin into the national medical liability reform spotlight. This light shines because of Wisconsin's long history of finding the balance between providing injured patients the ability to collect every dollar of economic damages due as a result of a medical wrong, while still promoting a stable and predictable medical liability environment. The Supreme Court's decision has dramatically upset the latter half of this equation – Assembly Bill 1073 is the attempt to restore that critical element.

As the attached American Medical Association map shows, Wisconsin continues to be one of just six states in the nation not considered to be suffering from a medical liability crisis or near-crisis – although the AMA is playing close attention to what happens with AB 1073. Wisconsin has many medical liability reforms at work helping to create this environment, which attracts high-quality physicians to the state, and increases our citizens' access to care.

We are aware that there are those who dispute a true crisis exists in some states, and that there is no danger that Wisconsin could head down a similar path if reforms are not restored. These forces do their best to distract from facts and data from these crisis states, instead relying upon academic and other studies seemingly helpful for their desires. Without getting into the motives behind this strategy of distraction, it is worth reminding what is happening in crisis states:

Oregon: Once its Supreme Court threw out Oregon's \$500,000 cap on pain and suffering damages, dramatic shifts began in that state's medical liability environment:

- Since the 1999 court decision, the average medical liability payment has increased 90 percent: from \$247,000 to \$470,000 (ECONorthwest, July 2004).
- From 1987 to 1999, just two medical liability awards were for more than \$1 million. From 1999 to 2004, there were 34 (*Statesman Journal*, Jan. 22, 2004).

- A 2002 Oregon Health and Science University survey of obstetrical clinicians in Oregon showed that 34 percent of all those delivering babies have quit performing deliveries since 1999. Of these, 75 percent practice outside the Portland metropolitan area where more than one-half the state's women give birth. In addition, 31 percent of the obstetricians said they intended to quit deliveries within the next five years (ECONorthwest, July 2004).

Illinois: Few states compare to Illinois for its bounty of horror stories. Those examples are important to Wisconsin, of course, as many of those physicians leaving Illinois gave escaped to Wisconsin. Illinois also shows how the intangible aspects of “pain and suffering” damages make that aspect of a court case dramatically more appealing to an attorney preparing a case:

- In 2002, noneconomic damages comprised 91 percent of the average total monetary value awarded by a jury. In 1997, it was 67 percent (Cook County Jury Verdict Reporter).
- Insurance premiums for Illinois physicians continue to skyrocket, especially when compared to their northern neighbors. In 2003, OB/GYNs in Illinois' Cook, Madison, St. Clair and Will Counties paid \$139,696 for liability insurance. Wisconsin OB/GYNs paid \$30,304 for similar insurance; up to \$39,508 after IPFCF fees are included (*Chicago Tribune*, March 12, 2004, “Doctors Flee Insurance Costs, State”).
- Illinois State Senator Kirk Dillard: “There is only one neurosurgeon in all of Joliet, and there are no neurosurgeons in Illinois south of Springfield which, geographically, is more than half of Illinois. In Carbondale, you have to drive through 20 counties to have a baby delivered. And at Good Samaritan Hospital in Downers Grove, there were three neurosurgeon teams; now there is only one” (*Oak Brook Business Ledger*, Sept. 13, 2004).

Massachusetts: States on the east coast are just as prone to rampant litigation environments due to lack of liability reforms. This manifests in retirements, limited practices and new physicians avoiding the state. According to the Massachusetts Medical Association's 2005 Workforce Survey:

- Twenty-four percent of practicing physicians are either planning on or considering leaving Massachusetts because of the practice environment. Forty-six percent of residents and 60 percent of fellows trained in Massachusetts left the state for other opportunities.
- It takes an average of 12.8 months to recruit a physician – and an average of 27.9 months to recruit a neurosurgeon – to fill a practice or hospital vacancy.
- Because of liability concerns, many state physicians are limiting the scope of their professional practice, including OB/GYNs who have given up delivering babies. Many emergency departments in hospitals throughout the state do not have a neurosurgeon available at all times. Radiation oncologists are considering giving up reading mammograms because of the inevitability of lawsuits.

These are just three of nearly two dozen “crisis” states on the AMA map. Again, there are those who adamantly try to distract from what is happening across the country, and will call these nothing but “anecdotes,” not suitable for academic research or worthy of policy makers' consideration. But being told there is no crisis is little comfort to the pregnant mother in rural Oregon, the child suffering a head injury in Southern Illinois, or the wife entering an ER in Massachusetts and discovering no surgeon is available to immediately treat her husband's stroke.

Wisconsin has been among the nation's leaders in finding the path to a relatively stable medical liability climate, and subsequent quality access to care. California is another such state – their noneconomic damage cap stands at \$250,000, where it has been since first enacted in 1975. That figure was used as a model in Texas, where a 2003 statewide referendum allowed that state's legislature to set a California-style noneconomic damage cap. The effects in Texas, a former crisis state, have been dramatic:

- Fifteen new insurance companies have either started or will soon start selling liability insurance.
- More physicians are performing high-risk services again. In an April 2003 physician survey, half said they stopped providing high-risk care. About a year after the new \$250,000 cap went into effect, that number had dropped to just 13 percent.
- Texas cities have seen dramatic increases in the number of physicians available to provide care. Corpus Christi was considered the epicenter of the Texas crisis, where in the five years before reforms were enacted, the city had a net loss of 40 physicians. About one year after reforms went into effect, Corpus Christi added 47 new physicians.

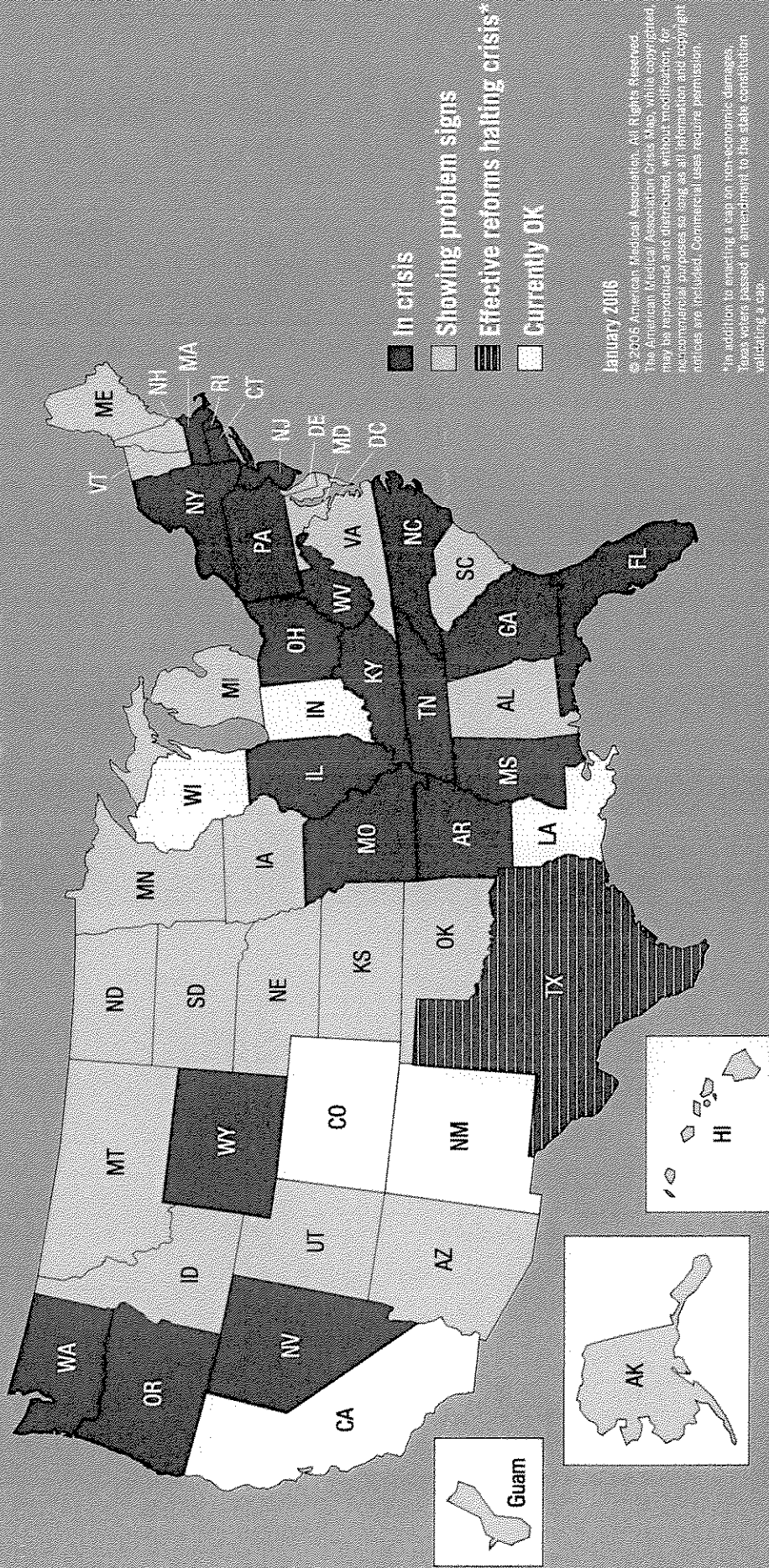
The bill before you today will attempt to reestablish what Wisconsin once had, what other states still seek, and what Texas has shown to be a true stabilizing influence to the medical liability environment: a reasonable limit on noneconomic damages. As the second attachment to this testimony shows, however, that cap amount will be the highest in the nation among those states with that kind of cap. The \$750,000 cap is more than twice the potential exposure Wisconsin's 1995 cap, and three times the amount the Texas legislature decided was the amount necessary to reverse that state's crisis.

Wisconsin's physicians are far from certain that a \$750,000 is not too high. If the State Senate follows the Assembly's overwhelming bipartisan support for the bill, and Governor Doyle signs it into law, we must remain vigilant. If the state's lawsuit environment degrades to the level of the crisis or near-crisis states, further steps might need to be taken. That is why the Society supports the provision in AB 1073 allowing the Injured Patients and Families Compensation Fund Board of Governors to provide the legislature a report every two years regarding the effect of the cap level.

Thank you for your time and consideration for this very important legislation. Please contact Mark Grapentine (markg@wismed.org) or Jeremy Levin (jeremyl@wismed.org) at (608) 442-3800 for further information.

America's medical liability crisis:

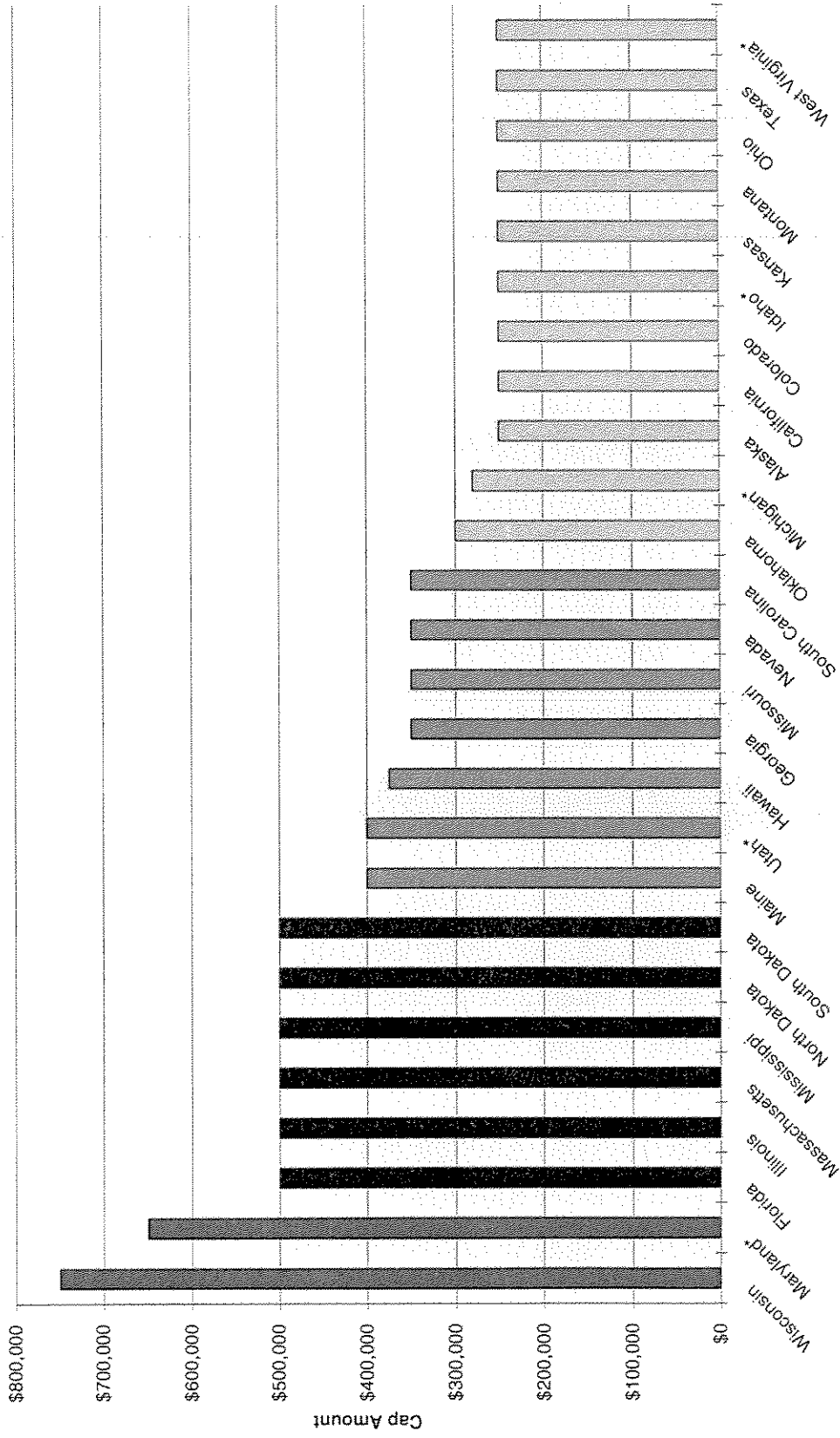
A national view



ACS-05-1019-PDF-1/06

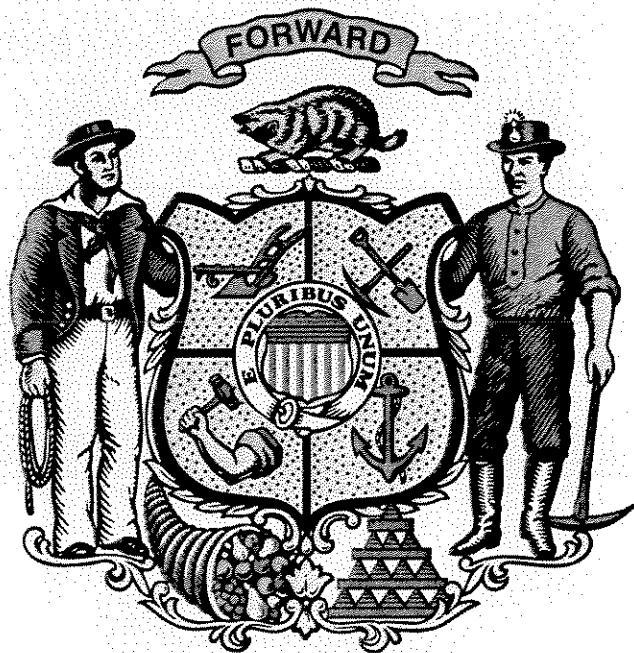


Noneconomic Damage Caps



* Denotes Adjustment for Inflation

Source: American Medical Association, Advocacy Resource Center, August 25, 2005





Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Senate Committee on Agriculture and Insurance
Senator Dan Kapanke, Chair

FROM: Mark Belknap, MD, FACP
President, Wisconsin Medical Society
Internist, Ashland Clinic, Ashland WI

DATE: March 6, 2006

RE: Testimony **Supporting** Assembly Bill 1073 – Noneconomic Damages Caps

From the physicians' perspective, passage of legislation to reinstitute caps on noneconomic damages is critical to maintain a stable medical liability climate in Wisconsin. We have learned from a survey of other states that a cap is necessary to control malpractice premium costs and escalation in frequency of malpractice suits.

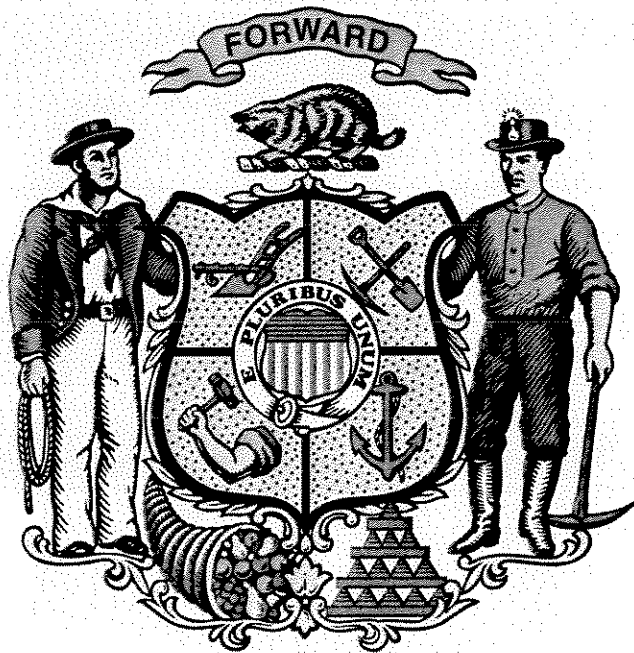
Why is this important? Increased malpractice insurance costs and an increased risk of suits will hinder efforts to recruit physicians to our state. An impending physician shortage is forecast. An insufficient number of physicians are being trained to replace those who are soon to retire and to care for the aging population of baby boomers. For a time in Ashland, we had only one general surgeon. When he was unavailable, patients had to be transported to Duluth, which is 75 miles away, for their further care. This was necessary no matter how bad the weather and how critically ill the patient. We were able to recruit two excellent general surgeons from states with poor malpractice climates largely on the strength of Wisconsin's stable malpractice climate.

In small towns such as Ashland many or all babies are delivered by family practitioners. In family practice, obstetrics is only a portion of the practice, yet a higher tier of malpractice insurance with a higher premium is required. When malpractice premiums rise and when, as in Ashland, payment for a majority of deliveries is from Medicaid and is therefore woefully inadequate to cover practice costs, the continued delivery of obstetrical services will become financially impossible. This has been the case in states such as Oregon when caps on non-economic damages have been lost, and access to obstetrical care in rural areas has suffered. Again, from Ashland the nearest referral center is Duluth, which is 75 miles away.

One of the reasons that most physicians go into medicine is the desire to serve others. Physicians fear being involved in a malpractice suit. With high awards for noneconomic damages will likely come an increase in incidence of suits filed that have questionable merit. There is poor correlation between medical negligence and jury awards; often the jury award correlates better with patient suffering from an unfortunate outcome not clearly tied to negligence. 53 percent of Wisconsin physicians are more than 45 years old, and 28 percent are projected to retire or significantly reduce their practices in the next 10-12 years. Putting the above factors together, if the risk of being involved in a suit of questionable merit increases, physicians nearing the age of retirement will likely see earlier retirement to be a more attractive option than continuing to practice in an increasingly hostile environment. This will exacerbate the expected physician shortage and lead to a further deterioration in access to health care.

The currently proposed \$750,000 cap is not ideal from a physician perspective. The rate of suits will likely rise from that seen with the previous lower cap. However, this cap is preferable to no cap or a large cap, which experience in other states has shown to be ineffective in controlling rates of malpractice suits. An actuarial study done in 2005 comparing other states found that a cap of \$1 million or more had the same effect as no cap at all.

In summary, one of the key determinants of access to health care is physician supply. Determinants of physician supply are rates of recruitment, retention, and retirement. Each of these variables is likely to be adversely affected by a deteriorating medical liability environment. This is why it is critical that the legislature passes the current bill capping non-economic damages at \$750,000 and that it passes it this legislative session.



*I had to
leave.*

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Suite 400
Madison, WI 53703

*Please
distribute
my testimony
to committee
members*

Jeffrey Spitzer-Resnick
Managing Attorney

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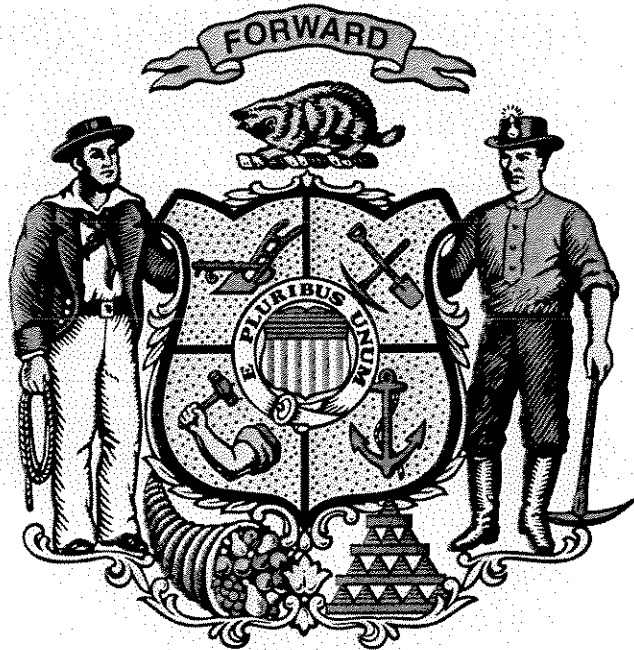
disabilityrights WISCONSIN

TESTIMONY AGAINST AB 1073

by
Jeffrey Spitzer-Resnick
Managing Attorney

Disability Rights Wisconsin (DRW-formerly the Wisconsin Coalition for Advocacy), is Wisconsin's protection and advocacy agency for people with disabilities. Among the many things we do on behalf of people with disabilities is to provide representation to victims of abuse and neglect. Based on our many years of experience dealing with the abuse and neglect of people with disabilities, DRW strongly opposes AB 1073 for the following reasons.

1. **The Wisconsin Supreme Court correctly ruled that an arbitrary cap on damage awards violates the Constitution.** In the *Ferdon* decision, the Wisconsin Supreme Court ruled that the then existing cap of \$445,755 was arbitrary and had no rational basis. It is a complete mystery how instituting a \$750,000 cap, **without the former inflation provision**, is any less arbitrary than the recently struck down cap. The mere recitation of rationale, which are not substantiated by real data, is not the rationale that the Supreme Court was looking for, so this bill is likely to be ruled unconstitutional as well.
2. **Caps strike the most vulnerable victims hardest.** Tort law compensates those who have the highest earning potential more than those who have the least earning potential. Therefore, imposing a cap disproportionately impacts people with severe disabilities and the elderly, who have the lowest earning potential. Once again, there is no Constitutional justification for discriminating against the most vulnerable victims of abuse and neglect.
3. **Caps will exacerbate the Medicaid crisis.** The legislature is well aware of the skyrocketing costs of Wisconsin's Medical Assistance program. A significant portion of these costs can be attributed to the long term care needs of people with disabilities and the elderly. Reinstating a cap will exacerbate the Medicaid crisis because victims of medical abuse and neglect who end up with severe disabilities will often exhaust their damage awards well before the end of their life time. This will especially be true for younger victims of medical abuse and neglect. Their only option at that point will be to enroll in the Medicaid program, causing Wisconsin taxpayers to foot their long term care expenses. It is counter-intuitive for the legislature to institute caps in an effort to keep medical malpractice premiums down, while driving taxes up due to increased Medicaid costs.



WISCONSIN CITIZEN ACTION



The State's Largest Public Interest Organization

Wisconsin Citizen Action Testimony before the Senate Committee on Insurance In Opposition to SB1073

My name is Darcy Haber and I am the Statewide Program Manager for Wisconsin Citizen Action. Thank you for the opportunity to testify today in opposition to SB1073. Wisconsin Citizen Action believes that putting a cap on the pain and suffering of patients injured by malpractice is simply cruel and immoral – there is perhaps no more appropriate use for the term, “adding insult to injury.” Injured patients need their full jury awards to normalize their lives as much as possible. They use it for necessities that so-called “economic damages” don’t pay for such as modifying a house to be wheelchair accessible and hiring someone to do basic life tasks, such as grocery shopping, that some are no longer able to accomplish.

Please don’t be fooled by the Wisconsin Medical Society that you are doing this to save our doctors. The medical society is representing the private insurance companies on this one because when the state’s largest insurance company, Physicians Insurance Company or “PIC” makes a profit, they get a share.

There is no credible evidence of a malpractice insurance crisis and even the insurance executives who testified before the legislature themselves have not predicted anything more than a single digit increase – the same as it is every year. Remember, in Wisconsin, the private insurers already have an effective combined cap of 1 million on both types of damages because of our innovative patient’s compensation fund. This is why PIC is considered such an attractive target of acquisition attempts. For example, the Alabama-based Pro-Assurance has recently offered to acquire PIC for \$5,000 a share – a \$1200 per share increase over an offer made before the malpractice caps were lifted! Certainly the 4th largest and extremely profitable malpractice insurance provider in the United States wouldn’t increase its offer by over 25% if it thought there was an impending malpractice insurance crisis in Wisconsin.

Having shown the so-called malpractice crisis to be nothing more than certain special interests crying wolf, I would like to talk briefly about the real health

PTO
→

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★ www.wi-citizenaction.org



care crisis. While I understand we are not here to talk about the larger health care crisis in Wisconsin, leaders of this legislation have claimed that somehow adding this insult to injured patients will somehow ease our health crisis.

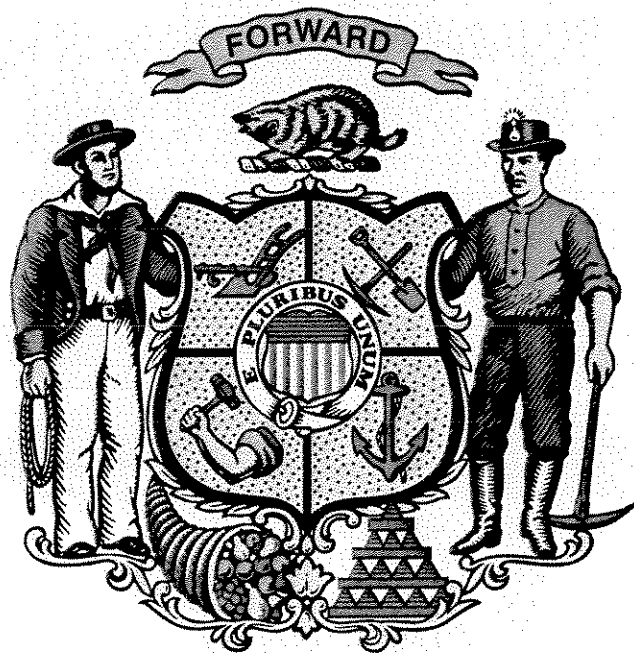
This is simply untrue. Malpractice costs represent less than .04% of health care costs in Wisconsin. The sponsors of this legislation are simply barking up the wrong tree if they are attempting to solve our health care crisis. In the latest ratings by Expansion Management Magazine, the magazine the business executives read when deciding where to locate their business, Wisconsin was rated the best (lowest) in terms of medical malpractice rates and the second worst (highest) in terms of health insurance premiums. But unfortunately we aren't here to talk about health insurance premiums.

We *are* here today to talk about the very unfortunate patients – the real people and families who will testify here today. Can we really look them in the eye and say that we are sorry this terrible thing happened to your family but we do need to make the whole situation even worse for you because we think it might help hold down premiums on malpractice insurance (although we have no credible evidence that says so), which represents .04 percent of Wisconsin health care costs? I know I couldn't do that.

And finally, as hard as this legislature may try to find a magic number that would make malpractice caps constitutional, they will find there is no such number. This legislation, like the last, will not survive constitutional scrutiny.

Because in Wisconsin, justice belongs to the people, not insurance companies.

Thank you for your attention today.

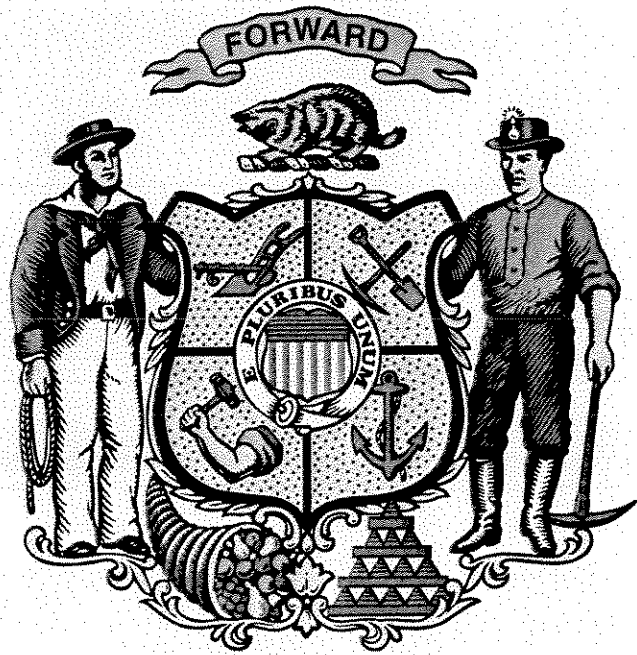


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SENATE AMENDMENT ,

TO 2005 ASSEMBLY BILL 1073

750 w/CPI

1 At the locations indicated, amend the bill as follows:

2 1. Page 5, line 18: delete lines 18 to 21 and substitute "inserts date, shall be
3 ~~\$350,000~~ \$750,000 and shall be adjusted by the director of state courts to reflect
4 changes in the consumer price index for all urban consumers, U.S. city average, as
5 determined by the U.S. department of labor, at least annually thereafter, with the
6 adjusted limit to apply to awards subsequent to such adjustments."

7 (END)

*Adjusted by
CPI*



State of Wisconsin
2005 - 2006 LEGISLATURE

LRBa2660/1
RPN&PJK:lmk:rs

2 year
Review
No Leg Oversight

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3 2. Page 5, line 23: delete the material beginning with that line and ending with
4 page 6, line 2, and substitute:

5 "893.55 (4) (d) 2. The commissioner of insurance shall by rule increase the
6 limits on noneconomic damages established under subd. 1. biennially and by such
7 amounts as the board of governors created under s. 619.04 (3) determines is
8 necessary to meet the intent of the legislative findings under sub. (1d). The board
9 of governors shall indicate, and the rule shall include, the reasons why the increase
10 is necessary to meet the intent of those legislative findings."

11 (END)



State of Wisconsin
2005 - 2006 LEGISLATURE

LRBa2659/1
RPN&PJK:lmk:rs

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No Leg. Oversight*

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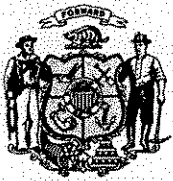
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Annual Review



State of Wisconsin
2005 - 2006 LEGISLATURE

LRBa2658/1
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750
Medical CPI

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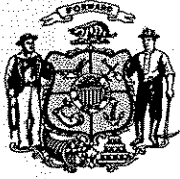
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State of Wisconsin
2005 - 2006 LEGISLATURE

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State of Wisconsin
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State of Wisconsin
2005 - 2006 LEGISLATURE

LRBa2661/1
RPN:lmk:ch

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750 w/CPI

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State of Wisconsin
2005 - 2006 LEGISLATURE

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*Annual Review
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