

2005 DRAFTING REQUEST

Bill

Received: **11/28/2005**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Marlin Schneider (608) 266-0215**

By/Representing: **Dick Sweet**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters: **pkahler**

Subject: **Courts - immunity liability
Insurance - other insurance**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Schneider@legis.state.wi.us**

Carbon copy (CC:) to: **martyschnitzel@hotmail.com**

Pre Topic:

No specific pre topic given

Topic:

Medical malpractice noneconomic damages

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 11/28/2005	lkunkel 12/12/2005		_____			
/P1			rschluet 12/12/2005	_____	lnorthro 12/12/2005		
/1	rnelson2 12/16/2005 pkahler 12/19/2005	lkunkel 12/29/2005	chaugen 12/30/2005	_____	lnorthro 12/30/2005	sbasford 01/04/2006	

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

FE Sent For:

<END>

*None
needed*

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/P1			rschluet 12/12/2005	_____	lnorthro 12/12/2005		

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Handwritten notes:
11/mk 12/29 CH
12/29
30
12/30

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Medical malpractice noneconomic damages ✓

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/?	rnelson2	/plmk 12/12	<i>[Signature]</i>				
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[Signature]
12/25 pb

FE Sent For:

<END>

Nelson, Robert P.

From: Sweet, Richard
Sent: Wednesday, November 23, 2005 8:57 AM
To: Nelson, Robert P.
Cc: Schneider, Marlin
Subject: Noneconomic damage cap

Attachments: 27gielow_rns_rs.doc

Bob,

Marlin Schneider would like to request a bill draft on noneconomic damages in malpractice cases. I think he wants to start with AB 766 in terms of legislative findings. He would then use a cap of \$500,000 plus \$5,000 per year of life expectancy. Both amounts would be indexed for inflation. Life expectancy would be determined by using a table developed by OCI and would be based only on the plaintiff's age (not health condition or gender) at the time of the incident of malpractice. A separate cap of 25% of the patient's cap would be established for each ancillary plaintiff (e.g. spouse or minor child). This is based on option 1 in the enclosed memo.

Thanks for your help.

-3436?



27gielow_rns_rs.doc
c (82 KB)

Dick Sweet

Richard Sweet
Senior Staff Attorney
Wisconsin Legislative Council
(608)266-2982
richard.sweet@legis.state.wi.us

Nelson, Robert P.

From: Sweet, Richard
Sent: Monday, December 05, 2005 9:14 AM
To: Nelson, Robert P.
Cc: Schneider, Marlin
Subject: FW: Noneconomic damage cap

Bob,

I just spoke with Marlin. In the previous drafting request, he would like to make 2 changes:

1. The \$500,000 figure would be increased to \$750,000.
2. If the Fund ever incurs a 30% reduction in its balance in one year, the Commissioner of Insurance would be required to recommend a reduction in the cap amount. The Commissioner would forward this recommendation to the presiding officers of the 2 Houses, who would refer it to a standing committee in each House and to Joint Finance. Only Joint Finance could take formal action on the recommendation. If Joint Finance approves the recommendation, the reduction in the cap takes effect and remains in effect until the amount in the Fund is back to its previous level.

Thanks.

Dick

From: Sweet, Richard
Sent: Wednesday, November 23, 2005 8:57 AM
To: Nelson, Robert P.
Cc: Schneider, Marlin
Subject: Noneconomic damage cap

Bob,

Marlin Schneider would like to request a bill draft on noneconomic damages in malpractice cases. I think he wants to start with AB 766 in terms of legislative findings. He would then use a cap of \$500,000 plus \$5,000 per year of life expectancy. Both amounts would be indexed for inflation. Life expectancy would be determined by using a table developed by OCI and would be based only on the plaintiff's age (not health condition or gender) at the time of the incident of malpractice. A separate cap of 25% of the patient's cap would be established for each ancillary plaintiff (e.g. spouse or minor child). This is based on option 1 in the enclosed memo.

Thanks for your help.

<< File: 27gielow_rns_rs.doc >>

Dick Sweet

Richard Sweet
Senior Staff Attorney
Wisconsin Legislative Council
(608)266-2982
richard.sweet@legis.state.wi.us

4144/P1

NOV

stays

D - vote
(wanted by Mon 9am)

2005 ASSEMBLY BILL 766

other
(in 11/28)

October 17, 2005 - Introduced by Representatives GIELOW, HUEBSCH, NISCHKE, GARD, FREESE, GOTTLIEB, GUNDRUM, HAHN, HONADEL, HUNDERTMARK, JENSEN, JESKEWITZ, KERKMAN, KESTELL, KREIBICH, LAMB, LOEFFELHOLZ, MCCORMICK, MOULTON, MURSAU, RHOADES, STRACHOTA, VAN ROY, VOS, M. WILLIAMS, WIECKERT, NERISON, UNDERHEIM, SUDER, FRISKE, OWENS and PETROWSKI, cosponsored by Senators S. FITZGERALD, KAPANKE, BROWN, DARLING, ELLIS, GROTHMAN, KANAVAS, KEDZIE, A. LASEE, LAZICH, LEIBHAM, OLSEN, REYNOLDS, ROESSLER, SCHULTZ, STEPP and ZIEN. Referred to Committee on Insurance.

regen

1 AN ACT to renumber 893.55 (1); to renumber and amend 893.55 (4) (b) and
2 893.55 (4) (d); to amend 655.017, 893.55 (2) and 893.55 (3); and to create
3 893.55 (1d) and 893.55 (4) (d) 2 of the statutes; relating to: recovery of
4 noneconomic damages in medical malpractice cases.

Analysis by the Legislative Reference Bureau

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin Supreme Court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin Constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of \$550,000 for persons under the age of 18, and \$450,000 for persons age 18 and over. The bill requires the board of governors that approves any fee changes to the Injured Patients and Families Compensation Fund to report to the legislature

inserts:
an l. 1

ASSEMBLY BILL 766

every two years any suggested changes to these noneconomic damage limits and the reasons why the changes are necessary to meet the intent of the legislature.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 655.017 of the statutes is amended to read:

655.017 Limitation on noneconomic damages. The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider if the act or omission occurs on or after May 25, 1995 the effective date of this section [revisor inserts date], and for acts or omissions of an employee of a health care provider, acting within the scope of his or her employment and providing health care services, for acts or omissions occurring on or after May 25, 1995 the effective date of this section [revisor inserts date], is subject to the limits under s. 893.55 (4) (d) and (f) ^{↑ or to the limit}

SECTION 2. 893.55 (1) of the statutes is renumbered 893.55 (1m).

SECTION 3. 893.55 (1d) of the statutes is created to read:

893.55 (1d) (a) In this subsection, "fund" means the injured patients and families compensation fund under s. 655.27.

(b) The legislature finds the following related to the limitation on noneconomic damages in sub. (4) (d):

1. Affordable and accessible health care benefits patients and the public in general.

2. A cap on noneconomic damages is one factor necessary to maintain affordability and accessibility.

3. A cap on noneconomic damages, together with mandatory liability insurance coverage for health care providers, mandatory participation in the fund by health

Insert
2-1

Insert
2-9

Insert
2-10

Determined under A. 655.27(4)(h) and the limit under A. 893.55(4)(f), whichever is applicable

ASSEMBLY BILL 766

1 care providers, and unlimited economic damage awards, ensures adequate
2 compensation for victims of medical malpractice.

3 (c) The legislature further finds that a medical liability system should promote
4 the following objectives:

5 1. Provide adequate compensation to victims of medical malpractice through
6 economic and noneconomic damages.

7 2. Protect access to health care services across the state and across medical
8 specialities by limiting disincentives for physicians to practice medicine in Wisconsin
9 such as the unavailability of professional liability insurance coverage, high cost of
10 insurance premiums, large fund assessments, or unpredictable or large noneconomic
11 damage awards as recognized by a 2003 U.S. congress joint economic committee
12 report, a 2003 federal department of health and human services study, and a 2004
13 office of the commissioner of insurance report.

14 3. Help contain health care costs by limiting the incentive to practice defensive
15 medicine, which increases the cost of patient care as recognized by a 2002 federal
16 department of health and human services study and a 2003 U.S. congress joint
17 economic committee report.

18 4. Help contain health care costs by providing more predictability in
19 noneconomic damage awards allowing insurers to set insurance premiums that
20 better reflect their financial risk as recognized by a 2003 U.S. federal department of
21 health and human services study, a 2003 government accounting office study, and a
22 2005 office of the commissioner of insurance report.

23 5. Help contain health care costs by providing more predictability in
24 noneconomic damage awards in order to protect the financial integrity of the fund
25 and allow the fund's board of governors to approve reasonable assessments for health

ASSEMBLY BILL 766

SECTION 3

1 care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001
2 legislative audit bureau report, and a 2005 office of commissioner of insurance
3 report.

4 **SECTION 4.** 893.55 (2) of the statutes is amended to read:

5 893.55 (2) If a health care provider conceals from a patient a prior act or
6 omission of the provider which has resulted in injury to the patient, an action shall
7 be commenced within one year from the date the patient discovers the concealment
8 or, in the exercise of reasonable diligence, should have discovered the concealment
9 or within the time limitation provided by sub. (1) (1m), whichever is later.

10 **SECTION 5.** 893.55 (3) of the statutes is amended to read:

11 893.55 (3) When a foreign object which has no therapeutic or diagnostic
12 purpose or effect has been left in a patient's body, an action shall be commenced
13 within one year after the patient is aware or, in the exercise of reasonable care,
14 should have been aware of the presence of the object or within the time limitation
15 provided by sub. (1) (1m), whichever is later.

16 **SECTION 6.** 893.55 (4) (b) of the statutes is ~~renumbered 893.55 (4) (b) 2. and~~
17 amended to read:

18 893.55 (4) (b) ~~2.~~ The total noneconomic damages recoverable for bodily injury
19 or death, including any action or proceeding based on contribution or
20 indemnification and any action for a claim by a person other than the injured person
21 for noneconomic damages resulting in bodily injury, may not exceed the limit under
22 par. (d) for each occurrence on or after May 25, 1995 the effective date of this
23 paragraph.... [revisor inserts date], from all health care providers and all employees
24 of health care providers acting within the scope of their employment and providing

*or the limit determined under s. 655.27(4)(h),
whichever is applicable, or the limit under
par. (dm)*

ASSEMBLY BILL 766

\$ 950,000, plus \$ 5,000 for SECTION 6 each year that the injured party is expected to live after the injury.

1 health care services who are found negligent and from the injured patients and
2 families compensation fund.

Insert 5-2

3 *chg comp.* SECTION 7. 893.55 (4) (d) of the statutes is ~~renumbered 893.55 (4) (d) 1.~~ and
4 amended to read:

the that limit and life expectancy adjustment

5 893.55 (4) (d) *son* The limit on total noneconomic damages for each occurrence
6 under par. (b) on or after May 25, 1995 the effective date of this paragraph ... [revisor
7 inserts date], shall be \$350,000 and shall be adjusted by the director of state courts
8 to reflect changes in the consumer price index for all urban consumers, U.S. city
9 average, as determined by the U.S. department of labor, at least annually thereafter,
10 with the adjusted limit to apply to awards subsequent to such adjustments \$550,000
11 for a person who is under the age of 18 at the time of the injury, and shall be \$450,000
12 for a person who is age 18 or over at the time of the injury. *keep (insert 5-12)*

plain to

13 SECTION 8. 893.55 (4) (d) 2. of the statutes is created to read:

14 893.55 (4) (d) 2. The board of governors created under s. 619.04 (3) shall submit
15 a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd
16 numbered year of any recommended changes to the limits on noneconomic damages
17 established in subd. 1. The report shall include the reasons why the changes are
18 necessary to meet the intent of the legislative findings under sub. (1d).

Insert 5-18

(END)

→ Except as provided in A. 655.27(4)(h) the

D-note

2005 BILL

Insert ancl.

1 **AN ACT to repeal** 893.55 (4) (d); **to renumber and amend** 893.55 (4) (b); **to**
 2 **amend** 655.017, 893.55 (4) (c) and 893.55 (5) (intro.); and **to create** 893.55 (4)
 3 (b) 1. of the statutes; **relating to:** recovery of noneconomic damages in medical
 4 malpractice cases.

Analysis by the Legislative Reference Bureau

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin supreme court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of ~~\$550,000~~, plus \$5,000 for each year that the injured person is expected to live, adjusted annually for inflation. The bill requires the board of governors that administers the injured patients and families compensation fund (formerly the

insert ancl.

750,000



BILL

insert
encl. cont

insert
encl.

patients compensation fund) to adopt a life expectancy table to be used to determine the life expectancy of the injured party.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 655.017 of the statutes is amended to read:

2 **655.017 Limitation on noneconomic damages.** The amount of
3 noneconomic damages recoverable by a claimant or plaintiff under this chapter for
4 acts or omissions of a health care provider if the act or omission occurs on or after ~~May~~
5 ~~25, 1995~~ the effective date of this section [revisor inserts date], and for acts or
6 omissions of an employee of a health care provider, acting within the scope of his or
7 her employment and providing health care services, for acts or omissions occurring
8 on or after ~~May 25, 1995~~ the effective date of this section [revisor inserts date],
9 is subject to the limits under s. 893.55 (4) (d) (b) 2. and (f).

10 SECTION 2. 893.55 (4) (b) of the statutes is renumbered 893.55 (4) (b) 2. and
11 amended to read:

12 893.55 (4) (b) 2. The total noneconomic damages recoverable for bodily injury
13 ~~or death,~~ including any action or proceeding based on contribution or
14 indemnification and any action for a claim by a person other than the injured person
15 for noneconomic damages resulting in bodily injury, may not exceed ~~the limit under~~
16 ~~par. (d) \$550,000,~~ plus \$5,000 for each year that the injured person is expected to live
17 after the date of his or her injury, for each occurrence on or after ~~May 25, 1995~~ the
18 effective date of this paragraph [revisor inserts date], from all health care
19 providers and all employees of health care providers acting within the scope of their
20 employment and providing health care services who are found negligent and from
21 the injured patients and families compensation fund. The limit on total noneconomic

Insert. ALC 2.

¶ The bill also establishes a separate limit on noneconomic damages recoverable by certain relatives of the injured person, such as parents, children, and siblings, equal to 25 percent of the ^{adjusted} limit established for the injured person.

¶ NOTE: This analysis is not complete. ^{The analysis} does not address the changing limit. A complete analysis will be provided in a later, introducible version.

insert 2-1

1 each occurrence and \$900,000 for all occurrences in any one policy year for
 2 occurrences on or after July 1, 1987, and before July 1, 1988, \$400,000 for each
 3 occurrence and \$1,000,000 for all occurrences in any one policy year for occurrences
 4 on or after July 1, 1988, and before July 1, 1997, and for health care providers
 5 specified in s. 655.002 (1) (d) to (j) \$1,000,000 for each occurrence and \$3,000,000 for
 6 all occurrences in any one policy year for occurrences on or after July 1, 1997, and
 7 for health care providers specified in s. 655.002 (1) (a) to (c) and (2) \$1,000,000 for
 8 each occurrence and \$3,000,000 for all occurrences in any one policy year for
 9 occurrences on or after July 1, 1997, and before July 1, 2006, and \$500,000 for each
 10 occurrence and \$1,500,000 for all occurrences in any one policy year for occurrences
 11 on or after July 1, 2006, for the protection of persons who are legally entitled to
 12 recover damages from the insured for errors, omissions, or neglect in the
 13 performance of the insured's professional services. If an insured has excess limits
 14 liability coverage or such coverage is available to the insured, the coverage provided
 15 under such plans shall be equal to the minimum level of such excess limits coverage.
 16 If the insured does not have excess limits liability coverage and such coverage is not
 17 available to the insured, the commissioner may establish minimum levels of
 18 coverage higher than the minimum limits specified in this paragraph for such plans.

19 SECTION 2. 655.016 of the statutes is amended to read:

20 **655.016 Claim by minor sibling for loss of society and companionship.**

21 Subject to s. ss. 655.017 and 655.018, a sibling of a person who dies as a result of
 22 malpractice has a cause of action for damages for loss of society and companionship
 23 if the sibling was a minor at the time of the deceased sibling's death. This section does
 24 not affect any other claim available under this chapter.

25 SECTION 3. 655.017 of the statutes is amended to read:

insert 2-1

- 3 -
insert 2-9

1 **655.017 Limitation on noneconomic damages.** The amount of
2 noneconomic damages recoverable by a claimant or plaintiff under this chapter for
3 acts or omissions of a health care provider if the act or omission occurs on or after May
4 25, 1995, and before the effective date of this section ... [revisor inserts date], and
5 for acts or omissions of an employee of a health care provider, acting within the scope
6 of his or her employment and providing health care services, for acts or omissions
7 occurring on or after May 25, 1995, and before the effective date of this section ...
8 [revisor inserts date], is subject to the limits under s. 893.55 (4) (d) and (f).

9 **SECTION 4.** 655.018 of the statutes is created to read:

insert
2-9

10 **655.018 Limitation on noneconomic damages; derivative claims.** The
11 amount of noneconomic damages recoverable by a claimant or plaintiff; derivative
12 claims under this chapter for acts or omissions of a health care provider if the act or
13 omission occurs on or after the effective date of this section ... [revisor inserts date],
14 and for acts or omissions of an employee of a health care provider, acting within the
15 scope of his or her employment and providing health care services, for acts or
16 omissions occurring on or after the effective date of this section [revisor inserts
17 date], is subject to the limits under s. 893.55 (4) (dm).

18 **SECTION 5.** 655.23 (4) (b) 2. a. of the statutes is amended to read:

19 655.23 (4) (b) 2. a. For occurrence coverage for health care providers under s.
20 655.002 (1) (a) to (c) and (2), at least \$1,000,000 for each occurrence and \$3,000,000
21 for all occurrences in any one policy year for occurrences on or after July 1, 1997, and
22 before July 1, 2006, and \$500,000 for each occurrence and \$1,500,000 for all
23 occurrences in any one policy year for occurrences on or after July 1, 2006.

24 **SECTION 6.** 655.23 (4) (b) 2. am. of the statutes is created to read:

**2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4144/ins
PJK:.....

INSERT 2-10

1 **SECTION 1.** 655.27 (4) (h) of the statutes is created to read:

2 655.27 (4) (h) 1. The board of governors shall notify the commissioner if the
3 balance of the fund is reduced by 30 percent or more during a fiscal year from the
4 balance in the fund at the beginning of that fiscal year.

5 2. If the board of governors notifies the commissioner under subd. 1., the
6 commissioner shall submit to the appropriate standing committees of the
7 legislature, as determined by the speaker and president, under s. 13.172 (3) and to
8 the joint committee on finance a report that recommends a limit on total
9 noneconomic damages under s. 893.55 (4) (d) that is different from and less than the
10 amount specified in s. 893.55 (4) (d). The joint committee on finance may approve
11 or disapprove the amount recommended by the commissioner in the report. If the
12 joint committee on finance approves the amount, that amount shall be the limit on
13 total noneconomic damages for each occurrence under s. 893.55 (4) (b) on or after the
14 day on which the amount is approved by the joint committee on finance and before
15 the day on which the fund balance returns to the balance in the fund at the beginning
16 of the fiscal year during which the fund balance was reduced by 30 percent or more.
17 If the fund balance returns to the balance in the fund at the beginning of the fiscal
18 year during which the fund balance was reduced by 30 percent or more, the limit on
19 total noneconomic damages specified in s. 893.55 (4) (d) applies to each occurrence
20 under s. 893.55 (4) (b) on or after the day on which the fund balance returns to the
21 balance at the beginning of the fiscal year during which the fund balance was
22 reduced by 30 percent or more.

(END OF INSERT 2-10)

insert 5-2

1 health and human services study, a 2003 government accounting office study, and a
2 2005 office of the commissioner of insurance report.

3 5. Helping contain health care costs by providing more predictability in
4 noneconomic damage awards in order to protect the financial integrity of the fund
5 and allow the fund's board of governors to approve reasonable assessments for health
6 care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001
7 legislative audit bureau report, and a 2005 office of the commissioner of insurance
8 report.

9 **SECTION 14.** 893.55 (4) (b) of the statutes is amended to read:

10 893.55 (4) (b) The total noneconomic damages recoverable for bodily injury or
11 death, including any action or proceeding based on contribution or indemnification,
12 may not exceed the limit under par. (d) for each occurrence on or after May 25, 1995,
13 and before the effective date of this paragraph ... [revisor inserts date], from all
14 health care providers and all employees of health care providers acting within the
15 scope of their employment and providing health care services who are found
16 negligent and from the injured patients and families compensation fund.

17 **SECTION 15.** 893.55 (4) (c) of the statutes is amended to read:

18 893.55 (4) (c) A court in an action tried without a jury shall make a finding as
19 to noneconomic damages without regard to the limit under par. (d) (dm). If
20 noneconomic damages in excess of the limit are found, the court shall make any
21 reduction required under s. 895.045 and shall award as noneconomic damages the
22 lesser of the reduced amount or the limit. If an action is before a jury, the jury shall
23 make a finding as to noneconomic damages without regard to the limit under par. (d)
24 (dm). If the jury finds that noneconomic damages exceed the limit, the jury shall

insert 5-2



*Insert
5-2 cont
9*

*- 9 -
insert to 5-2 cont
5-18*

1 make any reduction required under s. 895.045 and the court shall award as
2 noneconomic damages the lesser of the reduced amount or the limit.

3 **SECTION 16.** 893.55 (4) (d) of the statutes is amended to read:

4 893.55 (4) (d) The limit on total noneconomic damages for each occurrence
5 under par. (b) on or after May 25, 1995, and before the effective date of this paragraph
6 [revisor inserts date], shall be \$350,000 and shall be adjusted by the director of
7 state courts to reflect changes in the consumer price index for all urban consumers,
8 U.S. city average, as determined by the U.S. department of labor, at least annually
9 thereafter, with the adjusted limit to apply to awards subsequent to such
10 adjustments.

11 **SECTION 17.** 893.55 (4) (dm) of the statutes is created to read:

12 893.55 (4) (dm) Notwithstanding pars. (b) and (d), the limit on total
13 noneconomic damages for each occurrence under par. (b) on or after the effective date
14 of this subdivision [revisor inserts date], for each person listed under s. 655.007
15 having a derivative claim for injury on account of malpractice is \$100,000, except
16 that if a parent or guardian of a child under the age of 18 is the injured party, then
17 the limit of \$100,000 for the child's derivative claim is increased by \$20,000 for each
18 year that the child's age is under the age of 17 at the time of the parent's of guardian's
19 injury. The \$100,000 limit on derivative claims and the \$20,000 adjustment on a
20 child's derivative claim shall be adjusted by the director of state courts to reflect
21 changes in the consumer price index for all urban consumers, U.S. city average, as
22 determined by the U.S. department of labor, at least annually thereafter, with the
23 adjusted limits to apply to awards subsequent to such adjustments.

24 **SECTION 18. Initial applicability.**

*Insert
5-18*

of the limit determined under s. 655.27(4)(h), whichever is applicable

*(25 percent of the
limit under par. (d) as
adjusted for inflation, or*

BILL

*insert f
5-12*

1 damages and the \$5,000 annual life expectancy increase for each occurrence under
 2 this paragraph shall be adjusted by the director of state courts to reflect changes in
 3 the consumer price index for all urban consumers, U.S. city average, as determined
 4 by the U.S. department of labor, at least annually after the effective date of this
 5 paragraph [revisor inserts date], with the adjusted amounts to apply to awards
 6 subsequent to such adjustments. The board of governors administering the injured
 7 patients and families compensation fund under ch. 655 shall adopt a life expectancy
 8 table that shall be used to determine the life expectancy of the injured person under
 9 this paragraph.

*insert
5-12*

SECTION 3. 893.55 (4) (b) 1. of the statutes is created to read:

893.55 (4) (b) 1. The legislature finds that the limitation on noneconomic damages in subd. 2. accomplishes the following objectives:

- a. Ensures adequate compensation for victims.
- b. Enables insurers to charge lower malpractice premiums by reducing the size of awards.
- c. Keeps the injured patients and families compensation fund's annual assessment to health care providers at a low rate and protects the fund's financial status.
- d. Reduces overall health care costs for consumers of health care by lowering malpractice premiums.
- e. Encourages health care providers to practice in Wisconsin, including the related objectives of avoiding the practice of defensive medicine and retaining malpractice insurers in Wisconsin.

SECTION 4. 893.55 (4) (c) of the statutes is amended to read:

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-41447dn

PJK →
mk

I don't think this concept is workable. ✓ If the noneconomic damages limit can be temporarily modified by the Joint Committee on Finance at the recommendation of the Commissioner of Insurance if the balance in the fund falls below a certain level, how will judges know what the limit is at any given time? ✓ Would they have to contact someone to find out whenever a jury verdict in a medical malpractice case provides for noneconomic damages? ✓ Who would they contact? ✓ What effect would a limit that is subject to change have on settlements? ✓ All participants would have to know the relevant amount on the day of the occurrence. How would anyone know exactly when the fund balance is returned to its "previous level" so that the statutory limit applies again? ✓

I'm not quite sure what you mean by "previous level" of the fund. ✓ Is that the balance at the beginning of the fiscal year in which the fund balance was reduced by 30 percent? ✓ That's what I used in the draft. How are judges, attorneys, plaintiffs, and claimants supposed to find out what limit applies to a particular claim? One day it is one amount and the next day it may be a different amount.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: pam.kahler@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4144/P1dn
PJK:lmk:rs

December 12, 2005

I don't think this concept is workable. If the noneconomic damages limit can be temporarily modified by the Joint Committee on Finance at the recommendation of the Commissioner of Insurance if the balance in the fund falls below a certain level, how will judges know what the limit is at any given time? Would they have to contact someone to find out whenever a jury verdict in a medical malpractice case provides for noneconomic damages? Who would they contact? What effect would a limit that is subject to change have on settlements? All participants would have to know the relevant amount on the day of the occurrence. How would anyone know exactly when the fund balance is returned to its "previous level" so that the statutory limit applies again?

I'm not quite sure what you mean by "previous level" of the fund. Is that the balance at the beginning of the fiscal year in which the fund balance was reduced by 30 percent? That's what I used in the draft. How are judges, attorneys, plaintiffs, and claimants supposed to find out what limit applies to a particular claim? One day it is one amount and the next day it may be a different amount.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: pam.kahler@legis.state.wi.us

Nelson, Robert P.

From: Northrop, Lori
Sent: Friday, December 16, 2005 10:28 AM
To: Nelson, Robert P.; Kahler, Pam
Subject: FW: Draft review: LRB 05-4144/P1 Topic: Medical malpractice noneconomic damages

Not sure what he is asking here? Did he talk to either of you about making this draft a /1??

Thanks

From: Schneider, Marlin
Sent: Friday, December 16, 2005 10:18 AM
To: Northrop, Lori
Subject: RE: Draft review: LRB 05-4144/P1 Topic: Medical malpractice noneconomic damages

Any word on a final draft? - Marlin

From: Northrop, Lori
Sent: Monday, December 12, 2005 9:44 AM
To: Rep.Schneider
Subject: Draft review: LRB 05-4144/P1 Topic: Medical malpractice noneconomic damages

Following is the PDF version of draft LRB 05-4144/P1 and drafter's note.



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-4144/PA
RPN&PJK:lk&cs:fs

keep

1/4

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

2005 Bill

Refer

1/4

1 AN ACT to renumber 893.55 (1); to amend 655.016, 655.017, 893.55 (2), 893.55
2 (3), 893.55 (4) (b), 893.55 (4) (c) and 893.55 (4) (d); and to create 655.018, 655.27
3 (4) (h), 893.55 (1d) and 893.55 (4) (dm) of the statutes; relating to: recovery of
4 noneconomic damages in medical malpractice cases.

Analysis by the Legislative Reference Bureau

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin Supreme Court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin Constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of \$750,000, plus \$5,000 for each year that the injured person is expected to live, adjusted annually for inflation. The bill requires the board of governors that administers the injured patients and families compensation fund (formerly the patients compensation fund) to adopt a life expectancy table to be used to determine the life expectancy of the injured party.

* The bill also establishes a separate limit on noneconomic damages recoverable by certain relatives of the injured person, such as parents, children, and siblings, equal to 25 percent of the adjusted limit established for the injured person.

in the statutes
reference to noneconomic

person's limit

Insert A

NOTE: This is a preliminary draft and its analysis is not complete. The analysis does not address the changing limit. A complete analysis will be provided in a later, introducible version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 655.016 of the statutes is amended to read:

2 **655.016 Claim by minor sibling for loss of society and companionship.**

3 Subject to ~~s.~~ ss. 655.017 and 655.018, a sibling of a person who dies as a result of
4 malpractice has a cause of action for damages for loss of society and companionship
5 if the sibling was a minor at the time of the deceased sibling's death. This section does
6 not affect any other claim available under this chapter.

7 **SECTION 2.** 655.017 of the statutes is amended to read:

8 **655.017 Limitation on noneconomic damages.** The amount of
9 noneconomic damages recoverable by a claimant or plaintiff under this chapter for
10 acts or omissions of a health care provider if the act or omission occurs on or after May
11 25, 1995 the effective date of this section ... [revisor inserts date], and for acts or
12 omissions of an employee of a health care provider, acting within the scope of his or
13 her employment and providing health care services, for acts or omissions occurring
14 on or after ~~May 25, 1995~~ the effective date of this section ... [revisor inserts date],
15 is subject to the limits under s. 893.55 (4) (d) and (f), or to the limit determined under
16 s. 655.27 (4) (h) and the limit under s. 893.55 (4) (f), whichever is applicable.

17 **SECTION 3.** 655.018 of the statutes is created to read:

18 **655.018 Limitation on noneconomic damages; derivative claims.** The
19 amount of noneconomic damages recoverable by a claimant or plaintiff; derivative
20 claims under this chapter for acts or omissions of a health care provider if the act or

1 omission occurs on or after the effective date of this section [revisor inserts date],
2 and for acts or omissions of an employee of a health care provider, acting within the
3 scope of his or her employment and providing health care services, for acts or
4 omissions occurring on or after the effective date of this section [revisor inserts
5 date], is subject to the limits under s. 893.55 (4) (dm).

6 **SECTION 4.** 655.27 (4) (h) of the statutes is created to read:

7 655.27 (4) (h) 1. The board of governors shall notify the commissioner if the
8 balance of the fund is reduced by 30 percent or more ^{any} during a fiscal year from the
9 balance in the fund at the beginning of that fiscal year.

10 2. If the board of governors notifies the commissioner under subd. 1., the
11 commissioner shall submit to the appropriate standing committees of the
12 legislature, as determined by the speaker and president, under s. 13.172 (3) and to
13 the joint committee on finance a report that recommends a limit on total
14 noneconomic damages under s. 893.55 (4) (d) that is different from and less than the
15 amount specified in s. 893.55 (4) (d). The joint committee on finance may approve
16 or disapprove the amount recommended by the commissioner in the report. If the
17 joint committee on finance approves the amount, that amount shall be the limit on
18 total noneconomic damages for each occurrence under s. 893.55 (4) (b) on or after the
19 day on which the amount is approved by the joint committee on finance and before
20 the day on which the fund balance returns to the balance in the fund at the beginning

21 of the fiscal year ^{→ under subd. 1.} during which the fund balance was reduced by 30 percent or more ^{keep}

22 If the fund balance returns to the balance in the fund at the beginning of the fiscal
23 year ^{→ under subd. 1.} during which the fund balance was reduced by 30 percent or more ^{keep} the limit on
24 total noneconomic damages specified in s. 893.55 (4) (d) applies to each occurrence

25 under s. 893.55 (4) (b) on or after the day on which the fund balance returns to the

1 balance at the beginning of the fiscal year during which the fund balance was
 2 reduced by 30 percent or more. *under subd. 1*

3 SECTION 5. 893.55 (1) of the statutes is renumbered 893.55 (1m).

4 SECTION 6. 893.55 (1d) of the statutes is created to read:

5 893.55 (1d) (a) In this subsection, "fund" means the injured patients and
 6 families compensation fund under s. 655.27.

7 (b) The legislature finds the following related to the limitation on noneconomic
 8 damages in sub. (4) (d):

9 1. Affordable and accessible health care benefits patients and the public in
 10 general.

11 2. A cap on noneconomic damages is one factor necessary to maintain
 12 affordability and accessibility.

13 3. A cap on noneconomic damages, together with mandatory liability insurance
 14 coverage for health care providers, mandatory participation in the fund by health
 15 care providers, and unlimited economic damage awards, ensures adequate
 16 compensation for victims of medical malpractice.

17 (c) The legislature further finds that a medical liability system should promote
 18 the following objectives:

19 1. Provide adequate compensation to victims of medical malpractice through
 20 economic and noneconomic damages.

21 2. Protect access to health care services across the state and across medical
 22 specialities by limiting disincentives for physicians to practice medicine in Wisconsin
 23 such as the unavailability of professional liability insurance coverage, high cost of
 24 insurance premiums, large fund assessments, or unpredictable or large noneconomic
 25 damage awards as recognized by a 2003 U.S. congress joint economic committee

1 report, a 2003 federal department of health and human services study, and a 2004
2 office of the commissioner of insurance report.

3 3. Help contain health care costs by limiting the incentive to practice defensive
4 medicine, which increases the cost of patient care as recognized by a 2002 federal
5 department of health and human services study and a 2003 U.S. congress joint
6 economic committee report.

7 4. Help contain health care costs by providing more predictability in
8 noneconomic damage awards allowing insurers to set insurance premiums that
9 better reflect their financial risk as recognized by a 2003 U.S. federal department of
10 health and human services study, a 2003 government accounting office study, and a
11 2005 office of the commissioner of insurance report.

12 5. Help contain health care costs by providing more predictability in
13 noneconomic damage awards in order to protect the financial integrity of the fund
14 and allow the fund's board of governors to approve reasonable assessments for health
15 care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001
16 legislative audit bureau report, and a 2005 office of commissioner of insurance
17 report.

18 **SECTION 7.** 893.55 (2) of the statutes is amended to read:

19 893.55 (2) If a health care provider conceals from a patient a prior act or
20 omission of the provider which has resulted in injury to the patient, an action shall
21 be commenced within one year from the date the patient discovers the concealment
22 or, in the exercise of reasonable diligence, should have discovered the concealment
23 or within the time limitation provided by sub. (1) (1m), whichever is later.

24 **SECTION 8.** 893.55 (3) of the statutes is amended to read:

1 893.55 (3) When a foreign object which has no therapeutic or diagnostic
2 purpose or effect has been left in a patient's body, an action shall be commenced
3 within one year after the patient is aware or, in the exercise of reasonable care,
4 should have been aware of the presence of the object or within the time limitation
5 provided by sub. (1) (1m), whichever is later.

6 **SECTION 9.** 893.55 (4) (b) of the statutes is amended to read:

7 893.55 (4) (b) The total noneconomic damages recoverable for bodily injury or
8 death, including any action or proceeding based on contribution or indemnification
9 and any action for a claim by a person other than the injured person for noneconomic
10 damages resulting in bodily injury, may not exceed the limit under par. (d) or the limit
11 determined under s. 655.27 (4) (h), whichever is applicable, or the limit under par.
12 (dm) for each occurrence on or after May 25, 1995 the effective date of this paragraph
13 [revisor inserts date], from all health care providers and all employees of health
14 care providers acting within the scope of their employment and providing health care
15 services who are found negligent and from the injured patients and families
16 compensation fund.

17 **SECTION 10.** 893.55 (4) (c) of the statutes is amended to read:

18 893.55 (4) (c) A court in an action tried without a jury shall make a finding as
19 to noneconomic damages without regard to the limit under par. (d) (dm). If
20 noneconomic damages in excess of the limit are found, the court shall make any
21 reduction required under s. 895.045 and shall award as noneconomic damages the
22 lesser of the reduced amount or the limit. If an action is before a jury, the jury shall
23 make a finding as to noneconomic damages without regard to the limit under par. (d)
24 (dm). If the jury finds that noneconomic damages exceed the limit, the jury shall

1 make any reduction required under s. 895.045 and the court shall award as
2 noneconomic damages the lesser of the reduced amount or the limit.

3 SECTION 11. 893.55 (4) (d) of the statutes is amended to read:

4 893.55 (4) (d) The Except as provided in s. 655.27 (4) (h), the limit on total
5 noneconomic damages for each occurrence under par. (b) on or after May 25, 1995 the
6 effective date of this paragraph [revisor inserts date], shall be \$350,000 \$750,000,
7 plus \$5,000 for each year that the injured party is expected to live after the injury,
8 and that limit and the life expectance adjustment shall be adjusted by the director
9 of state courts to reflect changes in the consumer price index for all urban consumers,
10 U.S. city average, as determined by the U.S. department of labor, at least annually
11 thereafter, with the adjusted limit to apply to awards subsequent to such
12 adjustments. The board of governors administering the injured patients and
13 families compensation fund under ch. 655 shall adopt a life expectancy table that
14 shall be used to determine the life expectancy of the injured person under this
15 paragraph.

16 SECTION 12. 893.55 (4) (dm) of the statutes is created to read:

17 893.55 (4) (dm) Notwithstanding pars. (b) and (d), the limit on total
18 noneconomic damages for each occurrence under par. (b) on or after the effective date
19 of this subdivision [revisor inserts date], for each person listed under s. 655.007
20 having a derivative claim for injury on account of malpractice is 25 percent of the
21 limit under par. (d), as adjusted for inflation, or of the limit determined under s.
22 655.27 (4) (h), whichever is applicable.

23

(END)

**2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4144/lins
RPN&PJK:lk&cs:rs

INSERT A

¶ Current law requires certain health care providers to carry health care liability insurance with liability limits of at least \$1,000,000 for each occurrence and at least \$3,000,000 for all occurrences in a policy year. If a medical malpractice claim against a health care provider who is subject to the health care liability insurance requirements exceeds the limits of the provider's health care liability insurance, the injured patients and families compensation fund pays the portion of the claim that exceeds the limits. Moneys in the injured patients and families compensation fund (fund) come from assessments paid by the health care providers who are subject to the health care liability requirements. ✓

This bill provides that, if the balance in the fund is ever reduced by 30 percent or more in a fiscal year from the balance in the fund at the beginning of that fiscal year, the board of governors that administers the fund must notify the commissioner of insurance (commissioner). ✓ The commissioner must then recommend an amount for the limit on noneconomic damages for an injured person that is lower than the amount established in the bill and submit that amount to the appropriate standing committees of the legislature and to the Joint Committee on Finance (JCF), which may either approve or disapprove the amount. If JCF approves the amount, that amount becomes the new limit on noneconomic damages for an injured person for each occurrence of medical malpractice on or after the date on which JCF approves the amount until the date on which the balance in the fund equals the amount that existed at the beginning of the fiscal year in which the fund's balance was reduced by 30 percent or more. For each occurrence of medical malpractice on or after the date on which the fund's balance returns to the amount at the beginning of the fiscal year in which the fund's balance was reduced by 30 percent or more, the noneconomic damages amount established in the bill applies.

(END OF INSERT A)

Basford, Sarah

From: Schneider, Marlin
Sent: Tuesday, January 03, 2006 6:02 PM
To: LRB.Legal
Subject: Draft review: LRB 05-4144/1 Topic: Medical malpractice noneconomic damages

It has been requested by <Schneider, Marlin> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-4144/1 Topic: Medical malpractice noneconomic damages

Basford, Sarah

From: Basford, Sarah
Sent: Wednesday, January 04, 2006 11:12 AM
To: Schoenfield, Mike
Subject: LRB -4144/1 (attached)

Attachments: 05-4144/1



05-41441.pdf (33
KB)

Sarah Basford
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