WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance (AC-In)

(Form Updated: 11/20/2008)

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Environmental Law News

April 2004
Published by the State Bar of Wisconsin Environmental Law Section

Making the Leap: Environmental Law News Goes Electronic

This month, the Environmental Law Section is delivering its first electronic newsletter. By "going electronic," the State Bar and the Environmental Law Section are making a giant leap forward into the electronic age - allowing members to receive information faster, in a more timely manner, while conserving limited resources. Money saved on postage and printing can be used to deliver other member services.

An electronic newsletter also presents other benefits: the ability to offer immediate feedback to the editor, authors, or division leaders; the ability to include links to other related material on the Internet; and the freedom from space restrictions to provide more meaningful and complete information on issues important to section members.

Finally, receiving the Environmental Law Section newsletter electronically provides direct access to section resources on WisBar. Take a few minutes to explore WisBar and the **Environmental Law Section Web page**. Section members preferring to read this newsletter on paper can choose the "Printer-Friendly Version" at the top of the issue. Please share your thoughts about this electronic format. Email your comments to Environmental Law Section staff liaison **Salud Garcia**.

Comments from the Chair

Russell W. Wilson
Ruder Ware

Welcome to our first electronic edition of the newsletter! This edition of the Environmental Law News is a particularly convenient tool for use by anyone contemplating liability insurance coverage issues in the context of environmental contamination. While the *Johnson Controls* case justifiably raises the hopes for coverage on the part of some insureds, it raises many issues identified in the accompanying articles by Jeffery O. Davis and Rachel A. Schneider of Quarles & Brady LLP, and Michael J. Cohen of Meissner, Tierney, Fisher & Nichols. S.C. Stay tuned, however, for the outcome of the pending petition for a writ of certiorari before the United States Supreme Court.

The Job Creation Act of 2003, which became effective on February 6, 2004, has been touted as offering sweeping regulatory reform. Will this law create new jobs? Does it offer regulatory reform? Look for these emerging issues to be analyzed soon in an upcoming issue.

Every organization needs new members in order to sustain its programs. We hope that our members consider their $20 section fee to be money well spent. If you feel the same way, please make it a point to encourage a colleague to join the Environmental Law Section! As always, if you have comments or suggestions regarding the section, please contact me at **rwilson@ruder.com**.

Edgerton Is Overruled, Now What?

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With its July 2003 decision in *Johnson Controls, Inc. v. Employers' Insurance of Wausau*, the Wisconsin Supreme Court overruled its 1994 decision in *City of Edgerton v. General Casualty Co.* The *Johnson Controls* decision ushers in a new era of potential coverage for insureds, along with disputes and litigation regarding many coverage

issues. This article briefly examines the key coverage issues resolved by the *Johnson Controls* decision and then discusses many of the issues the authors anticipate will arise between insurers and insureds in the years to come.

Where We Were Before - *Edgerton and Hills*

Even lawyers only casually involved in coverage issues know that in 1994, the Wisconsin Supreme Court decided *City of Edgerton v. General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), which held that environmental cleanup costs were not "damages" and therefore not covered by standard liability policies. Such policies provide coverage for amounts an insured is required to pay as "damages" for property damage or bodily injury arising out of an "occurrence." The court also ruled that a so-called "PRP letter," whereby the government demands that an insured perform a cleanup, was not a "suit" that triggers an insurer's duty to defend. The decision, narrowly decided by a 4-3 margin, was almost immediately met with controversy and criticism, particularly on the damages issue.

The *Edgerton* decision noted that CERCLA differentiates between response costs and natural resource damages, and that the former were "equitable" in nature. Such an interpretation, however, was almost impossible to square with traditional notions of damages and basic insurance law concepts, such as the maxim that insurance policy language is construed in accordance with an insured's reasonable expectations - particularly where the policies predated the passage of CERCLA.

In 1997, the Wisconsin Supreme Court distinguished *Edgerton* and found coverage where the insured was sued under CERCLA for contribution (under §113) by a third party who had been sued by the government in a §107 cost recovery action. ***General Casualty Co. v. Hills***, 209 Wis. 2d 167, 561 N.W.2d 718 (1997). Writing for a unanimous court, Justice Crooks stated that the case was distinguishable from *Edgerton* because it involved a non-government party, a lawsuit seeking costs of repair and third party property.

Truth be told, these were pretty weak distinctions. The *Hills* court seemed to be saying that the mere fact that the government was the claimant, the stage of proceedings at which the case came to the court, and the ownership status of the property - or all three - would bear on whether response costs were covered "damages." Aside from being illogical and based on nothing in the policy, these distinctions arguably would tend to encourage insureds to ignore government cleanup requests (which, if responded to, would put them in an *Edgerton* situation) and wait to be sued by some other private party who did the cleanup.

Where We Were in the Trenches - *Johnson Controls* at the Court of Appeals

In any event, *Hills* ushered in a new set of court of appeals decisions, most notably its decisions in ***Johnson Controls v. Employers Insurance of Wausau***, 223 Wis. 2d 798, 589 N.W.2d 454 (Ct. App. 1998) (table) and *Johnson Controls v. Employers Insurance of Wausau*, 2002 WI App 30, 250 Wis. 2d 319, 640 N.W.2d 205, where the court of appeals reacted to the "foot dragging insured" concern by finding that as soon as an insured was "contacted" by the government, it thereafter lost any chance of coverage, even if the insured was later sued by a private party (*i.e.*, as in *Hills*), because an insured in that situation was guilty of "intentional wrongdoing" by not performing the cleanup in response to that "contact." The court of appeals recognized (the second time around) that this distinction seemed "arbitrary" but was "the law set by our Supreme Court." *Id.*, 250 Wis. 2d at 335. The stage was now set for the supreme court to take on *Edgerton*.

Where We Are Now - *Johnson Controls* Overrules *Edgerton*

And take it on the court did. On July 11, 2003, the court issued its decision in ***Johnson Controls v. Employers Ins. of Wausau***, 2003 WI 108, finding that environmental cleanup costs are "damages" covered by the terms of the standard CGL policy and that a "PRP letter" triggers the insurer's duty to defend. In so doing the Court overruled *Edgerton* in its entirety.

After *Johnson Controls*, three points, at least, can be made about environmental coverage cases in Wisconsin:

- Environmental cleanup costs incurred in response to a third party or government demand are covered "damages."
- A PRP letter demanding a cleanup triggers an insurer's duty to defend.
- Many unsettled issues remain . . . .

Where Do We Go From Here?

Standard CGL coverage cases involve a kind of methodology: one looks to the "coverage part" to determine if coverage exists in the first instance, then the exclusions to see if the covered event falls within some type of exclusion. Lastly, one must look to see if all pertinent "conditions" are met. *Johnson Controls* gets insureds past one major hurdle within the coverage part, thereby bringing into play a host of coverage issues, many of which have not been pertinent in Wisconsin in nearly ten years, and were, at the time of *Edgerton*, just beginning to surface in our appellate courts. The remainder of this article will address those issues.

A. Coverage Part Issues

1. What Is a "Suit"?

While *Johnson Controls* ruled that a PRP letter triggers an insurer's duty to defend, not all PRP letters are alike and insureds can anticipate that insurers will continue to raise questions as to what type of "PRP letter" constitutes a "suit." Is it a special notice letter demanding a cleanup? A general notice letter? An information request? Of course, the stakes for an insurer in this area are considerable, since any breach of the duty to defend constitutes a waiver of coverage defenses. *Professional Office Bldgs. v. Royal Indem. Co.*, 145 Wis. 2d 573, 584-85, 427 N.W.2d 427 (Ct. App. 1988).

By and large, insureds have reason to be optimistic that courts will err in favor of triggering defense duties. *Johnson Controls* seemed to recognize the reality that insurers do, and should, get involved in covered claims early on. The Court noted that insurance policies contemplate all kinds of pre-lawsuit interaction between insurer and insured. *Johnson Controls*, 2003 WI 108, ¶ 84 ("when the CGL policy requires and the insurer insists upon notice and cooperation from the insured, and when the insurer's duty to defend is generally broader than its duty to pay, how is the insurer entitled to assert that it has no duty to defend until an actual suit has been filed?").

We note that Employers Insurance of Wausau has filed a Petition for a Writ of Certiorari with the United States Supreme Court on the suit issue. Wausau contends its due process rights were denied in the course of the Wisconsin Supreme Court's consideration of and decision that a PRP letter triggers an insurer's duty to defend. It is unlikely the petition will be granted, both because so few ever are and because the issues were in fact briefed and argued before the court.

2. Trigger/Allocation

Under most policies, coverage is afforded to bodily injury or property damage which takes place during the policy period. In environmental cases, "property damage" (i.e., contamination) typically takes place continuously over multiple policy periods. So which policy, or policies, is triggered?

Wisconsin follows the "continuous trigger" theory of coverage, meaning that so long as it can be shown that any property damage took place during the time that a policy was in effect then that policy is on the risk for coverage regardless of when the property damage began. ***Society Insurance v. Town of Franklin***, 2000 WI App. 35, ¶ 8, 233 Wis. 2d 207, 607 N.W.2d 342 (Ct. App. 2000); *Wisconsin Electric Power Co. v. California Union Ins.*, 142 Wis. 2d

673, 419 N.W.2d 255 (Ct. App. 1987). In other words, each triggered policy is obligated to pay up to its limits, even though there is only one continuous injury. This would mean in the environmental context that if it can be shown as a factual matter that contamination continuously caused damage during any given policy period that coverage is triggered, thereby allowing horizontal "stacking" of insurance policies. Issues may remain, however, as to allocation of coverage among insurers and, possibly, covered and non-covered time periods.

3. Personal Injury

In addition to covering "property damage" and "bodily injury," CGL policies also contain a separate coverage part for "personal injury," typically defined to include "wrongful entry or other invasion of the right of private occupancy." Does pollution damage trigger such coverage? The court of appeals in *City of Edgerton*, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), and in *Fortier v. Flambeau Plastics*, 164 Wis. 2d 639, 476 N.W.2d 593 (Ct. App. 1991), have said yes, at least with respect to groundwater contamination. This may become important, since some exclusions apply only to "bodily injury" or "property damage." *See* discussion on Absolute Pollution Exclusion, below.

B. Exclusion Issues

Once coverage has been established under the coverage part, the analysis turns to whether coverage for the particular claim is excluded under terms of the policy's exclusions.

1. "Sudden and Accidental" Pollution Exclusion

Policies issued after 1973 usually contain the standard "pollution exclusion" for pollution damage that is "sudden and accidental." In 1990, the Wisconsin Supreme Court, relying in large part on representations made by insurers to regulatory bodies in approving the exclusion, ruled that the phrase "sudden and accidental" should not be given a temporal limitation, and that it should be construed to exclude damages that are "expected and intended." *Just v. Land Reclamation Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990). Moreover, the "expected and intended" requirement has been construed to mean that it is the discharge of pollutants to the environment that must be expected and intended, not just the initial disposal, before coverage is excluded. *Patz v. St. Paul Fire & Marine Ins. Co.*, 15 F.3d 699 (7th Cir. 1994).

2. Intentional Acts Exclusion

Most CGL policies exclude property damage or bodily injury that is intentionally caused. To say that intentional "acts" are excluded is a bit of a misnomer. It is the resulting harm that must be intentional (or "substantially certain" to occur) for the exclusion to apply, in addition to the act that causes it (although the harm that actually results need not be the same harm that was intended for the exclusion to bar coverage). *Raby v. Moe*, 153 Wis. 2d 101, 450 N.W.2d 452 (1990); ***Brunner v. Heritage Casualty***, 225 Wis. 2d 728, 593 N.W.2d 814 (Ct. App. 1999). Moreover, simply because the actor intended harm, and loses coverage, does not mean others who are responsible for that harm lose coverage as well. Wisconsin recognizes that "innocent co-insureds," possibly including corporations sued under negligent supervision theories, have coverage even if the underlying harm was intentionally caused. *See Hedtcke v. Sentry Insurance Co.*, 109 Wis. 2d 461, 488-89, 326 N.W.2d 727 (1982) (husband intentionally burned down house; innocent co-insured wife was entitled to coverage); *Northwestern National Insurance Co. v. Nemetz*, 135 Wis. 2d 245, 400 N.W.2d 33 (Ct. App. 1986).

3. Known Loss

Generally an insurer is not obligated to provide coverage for losses known to the insured at the policy inception date. There is no actual "known loss" exclusion in the policy; rather it seems premised on the doctrine of "fortuity"

and underlying principles concerning misrepresentations in the policy application. This so-called "known loss" exclusion has been infrequently discussed by Wisconsin courts but the few cases which address known loss suggest a preference towards a narrow construction in precluding coverage where the loss took place prior to the policy inception. See *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 560, 493 N.W.2d 768 (Ct. App. 1992), *rev'd on other grounds*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994) ("it is fundamental that an insurer does not insure against a loss which has already occurred"); *Estate of Logan v. Northwest Nat'l Cas. Co.*, 144 Wis. 2d 318, 423 N.W.2d 179 (1998) ("we do not agree, however, that the reasonable expectations of an insured.would include coverage for breaches that the insured, prior to applying for the insurance had a basis to believe *had already occurred*"). This construction is consistent with that taken by a number of other courts around the country. *See, e.g., Pittston Co. Ultramar America Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 516 (3rd Cir. 1997).

4. The Absolute Pollution Exclusion

In about 1985, the standard CGL policy was amended to add the so-called "absolute" pollution exclusion. It excludes from "bodily injury" and "property damage" the "actual, alleged, or threatened discharge, dispersal, release or escape of pollutants" in enumerated circumstances that encompass most instances where such claims could arise. Obviously the exclusion only applies to policies where it appears - namely most post-1985 policies. Due to the historic nature of the contamination at many environmental sites, the absolute pollution exclusion will likely not bar coverage for many environment claims (though it could potentially affect policy allocation issues for cleanups taking place in the 1990s or 2000s).

Even for policies containing the exclusion, all may not be lost for environmental coverage. In most policies the exclusion is applicable by its terms only to "property damage" and "bodily injury" coverage - not "personal injury" or "advertising injury." In light of the court of appeals' determination in *City of Edgerton* that pollution claims could in some circumstances be considered a form of trespass, and therefore personal injury coverage was arguably available for ground water and seepage claims, this may present a way around the absolute pollution exclusion. *See, e.g., Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992). While the court of appeals in ***Production Stamping Corp. v. Maryland Cas. Co.***, 199 Wis. 2d 322, 544 N.W.2d 584 (Ct. App. 1996) seemed to hold to the contrary, this is at least a potential issue for future resolution.

Other issues that may arise under the absolute pollution exclusion include what is a "pollutant," with Wisconsin courts basing decisions in this area on whether a "reasonable insured" would consider a given substance a "pollutant." *See, e.g., Beahm v. Pautsch*, 180 Wis. 2d 574, 510 N.W.2d 702 (Ct. App. 1993) (pollution exclusion not applicable where insured started fire to burn off "winter" grass, causing accident when smoke blew across highway); ***Vance v. Sukup***, 207 Wis. 2d 578, 588 N.W.2d 683 (Ct. App. 1996) (coverage excluded for ingestion of paint chips containing lead when airborne but not when based on contact from "intact accessible painted surfaces"); ***Donaldson v. Urban Land Interest, Inc.***, 211 Wis. 2d 224, 564 N.W.2d 728 (1997) (pollution exclusion not applicable in "sick building" case where alleged pollutant was build up of carbon dioxide due to improper ventilation of building); ***Peace v. Northwestern Nat. Ins. Co.***, 228 Wis. 2d 106, 596 N.W.2d 429 (1997) (ingested lead paint chips were a pollutant and therefore claims based on that condition were excluded).

5. Owned Property Exclusion

Many CGL policies bar coverage for damage to property "owned, occupied or rented" by the insured. The "owned property" exclusion would potentially come into play only where the claim concerned a site owned by the insured - "generator" liability at third party sites is not affected. But even at "owned" sites, the exclusion should not apply in the common situation where a cleanup concerns contaminated groundwater, since that is property of the state under Wis. Stats. § 218.01(18). *See, e.g. City of Edgerton*, 172 Wis. 2d at 554-56; *Patz v. St. Paul Fire & Marine Ins. Co.*, 817 F. Supp. 781, 783 (E.D. Wis. 1993); *Alabama Plating Co. v. U.S. Fidelity & Guar. Co.*, 690 So.2d 331, 336-37 n. 11 (Ala. 1996) (collecting cases).

However, a recent court of appeals case held that the owned property exclusion in an umbrella policy barred coverage to costs associated with off-site remediation where the off-site contamination arises out of property damage to property owned by the insured. ***State v. City of Rhinelander***, 2003 WI App 87, 263 Wis. 2d 311, 611 N.W.2d 509. The court of appeals had previously affirmed the lower court's holding that the umbrella policy's "ultimate net loss" coverage provided broader coverage than the primary policy. At the time, coverage under the primary policy was barred due to *Edgerton*. A petition for review seeking review of the 2001 court of appeals decision in light of *Johnson Controls* as well as review of the owned property holding was granted, but the parties recently settled.

C. Coverage Conditions Issues

1. Notice.

As a condition of any CGL policy, an insured is required to notify its insurer as soon as practicable of an occurrence which may give rise to a claim or suit. Late notice is excused if the insurer is not prejudiced. Wis. Stat. §§ 631.81(1) and 632.26(1)(b); *Gerrard Realty Corp. v. Am. States Ins. Co.*, 89 Wis. 2d 130, 277 N.W.2d 863 (1979).

Notice requirements are liberally construed in favor of the insured and substantial compliance with the notice provisions of the policy will suffice. *Davis v. All State Insurance Co.*, 101 Wis. 2d 1, 7, 303 N.W.2d 596 (1981). If the insurer requires more information or a different form of notice, it is the insurer's burden to come back to the insured within a reasonable period of time and request additional information. ***Towne Realty v. Zurich Insurance Co.***, 201 Wis. 2d 260, 548 N.W.2d 64. Also, notice to any authorized agent of the insurer constitutes notice to the insurer. Wis. Stat. §§ 631.09(3) and 632.26(1).

So far as prejudice is concerned, insureds can, and should, take the position that if it can be shown that an insurer typically rejects environmental coverage claims - as all insurers were certainly doing after *Edgerton* - then no prejudice can be possible since the insurer would have done nothing different had notice been given.

2. Cooperation.

Standard CGL policies require that the insured cooperate with the insurer in the investigation, defense and settlement of any claim or suit. The basic purpose of the cooperation clause is to protect the insurer's interest and to prevent collusion between the insured and injured party. ***State v. Hydrite Chemical Co.***, 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. Apps. 1998). An insured's breach of a policy's cooperation clause will not necessarily relieve an insurer from its obligations under the policy. As with notice, an insurer must demonstrate not only that the insured breached the cooperation clause, but also that the breach was material. *Sprangers v. Greatway Ins. Co.*, 182 Wis. 2d 521, 536 (1994). And also as with notice, the breach of the cooperation clause must prejudice the insurer before coverage will be forfeited.

3. Voluntary Payment.

An insured that settles a claim without the consent of its insurer risks forfeiting coverage for violating the voluntary payment clause. For those pre-*Johnson Controls* claims that were settled without the insurers consent in light of *Edgerton*, insureds should argue for coverage based on the previously discussed prejudice issue. Wisconsin has not addressed whether an insured's breach of the voluntary payment clause causes a forfeiture of coverage. One Wisconsin appeals court judge has suggested that the forfeiture of insurance coverage resulting from a settlement made without the insurer's consent requires the insured to establish prejudice. *In Matter of Liquidation of WMBIC Indemnity Corp.*, 175 Wis. 2d 398, 410 n.1, 499 N.W.2d 257 (Ct. Apps. 1993) (Sundby, J. dissenting). Other courts have agreed that forfeiture based on a voluntary payment should require a showing of prejudice to the insurer. *See e.g., Roberts Oil Co. Inc. v. Transamerica Ins.*, 833 P.2d 222 (N.M. 1992). Finally, insureds may have an argument

that at least some kinds of CERCLA settlements are not "voluntary" at all, given the enormous coercive powers the government wields in Superfund cases. *See, e.g., Maryland Cas. Co. v. Wausau Chemical Corp.*, 809 F. Supp. 680, 696 (W.D. Wis. 1992).

D. Other Issues

1. Statute of Limitations.

CGL coverage claims are governed by a six-year statute of limitations for contracts. *See* Wis. Stat. §893.43. But what is the status of claims that were not pursued while *Edgerton* was the law? In Wisconsin, the statute of limitations for contract actions begins to run from the date of the breach.. *CLL Associates v. Arrowhead Pacific*, 174 Wis. 2d 604, 497 N.W.2d 115 (1993). Issues for future resolution may include when a breach occurs, whether any kind of equitable tolling arguments will be available for claims not pursued or denied while *Edgerton* was pending and whether an insurer's breach of the duty to defend causes the insurer to waive an otherwise valid statute of limitations defense. For now, the most important point for insureds to note is that they should *immediately* analyze the status of any potentially covered claims - and if necessary file suit so as to stop the clock from ticking - so as to avoid any potential time bar that may be imminent.

2. Retroactivity.

Whether *Johnson Controls* will be applied to claims that arose before the date of the decision was one of the issues raised to the court on reconsideration. That motion was denied without comment. Insurers may, however, continue to argue in future cases that the decision is not retroactive. In Wisconsin, retroactive application of a judicial decision which overrules or repudiates an earlier decision is the general rule, not the exception. ***Brown v. Bradley***, 2003 WI 14, ¶16, 259 Wis. 2d 630, 638, 658 N.W.2d 427, 431; *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 575, 157 N.W.2d 595, 597 (1968). This doctrine, known as the "Blackstonian doctrine," is based on the theory that courts declare but do not make law. ***State v. Picotte***, 2003 WI 42, ¶ 42, 261 Wis. 2d 249, 271, 661 N.W.2d 381, 392. Consequently when a decision is overruled, "it does not become bad law - it never was the law, and the later pronouncement is regarded as the law from the beginning." *Id.* Applying the law retroactively keeps with the maxim that courts generally apply the law as it is at the time a case is decided rather than at the time of the transaction underlying the lawsuit. *McKnight v. General Motors Corp.*, 157 Wis. 2d 250, 253, 458 N.W.2d 841, 843 (Ct. App. 1990)

Limiting a new ruling to prospective application only or "sunbursting" is appropriate only if there is a "compelling judicial reason" to limit its application to future litigants. *Dupuis v. General Cas. Co.*, 36 Wis. 2d 42, 45, 152 N.W.2d 884, 885 (1967). A judicial decision is applied prospectively only where: (1) the decision to be applied prospectively establishes a new principle of law either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the retroactive application will retard the operation of the new law; and (3) the retroactive application will result in substantial inequitable results. *See Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 109, 280 N.W.2d 757, 760-61 (1979) (citing *Chevron Oil Co v. Huson*, 404 U.S. 97, 106 (1971)). Because there is a presumption in favor of retroactive application, all three factors must be satisfied in order for a decision to apply only prospectively. *See Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 112, 485 N.W.2d 376, 389 (1992).

Conclusion

The *Johnson Controls* decision provides hope for insurance coverage of environmental claims where *Edgerton* had provided none. The future will undoubtedly bring further litigation on a whole host of coverage issues as unfortunately the stakes remain quite high.

The Other Side of the Coin: Now What?

Michael J. Cohen
Meissner Tierney Fisher & Nichols S.C.

Where We Were Before - *Edgerton.*

Prior to the Wisconsin Supreme Court's recent decision in *Johnson Controls v. Employers Ins. of Wausau,* 2003 WI 108, the holdings of the Supreme Court in ***City of Edgerton v. General Casualty Co.***, 184 Wis. 2d 750, 517 N.W.2d 463 (1994) and its progeny were easy to apply and led to consistency and coherency in the court system. Under *Edgerton* a potential responsible party ("PRP") letter from a governmental agency was not a "suit" and remediation costs incurred to comply with agency decrees did not constitute "damages" under a Comprehensive General Liability ("CGL") policy. In ***General Casualty v. Hills***, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), the Wisconsin Supreme Court added a very clear exception to *Edgerton*: where an insured incurs remediation costs not in response to a government claim, but rather as the result of a contribution action by a private party to recover losses incurred by that party in responding to contamination, there is a "suit seeking damages." Thus, for almost ten years parties knew in the environmental context what constituted a "suit" for purposes of the duty to defend and what constituted "damages" for purposes of indemnification under a CGL policy. That clarity and consistency in the law completely changed when the Supreme Court issued its opinion in *Johnson Controls* on July 11, 2003.[1]

Where Do We Go From Here?

The Supreme Court apparently did not realize the innumerable problems that have been created by its ruling in *Johnson Controls*. As acknowledged in the companion article and further explored herein, there will be a rash of litigation concerning coverage for environmental liabilities where, under *Edgerton,* there had been little or no litigation.

There also will be litigation concerning numerous other issues created by the decision, including whether response costs incurred by an insured were "expended to remediate, or pay for the remediation of, the damaged property" or were solely for preventative measures. This sidebar article will address some of these issues, attempting not to be redundant to the issues and points raised in the companion article.

A. Coverage part issues

1. What is a "Suit"?

My learned opponent is correct in stating that insureds can anticipate that insurers will continue to raise questions as to what type of letter from the government constitutes a "suit seeking damages." Certainly not all letters from the government in the environmental context are adversarial in nature. No one can argue that letters simply requesting information are a "suit." Nor can one argue that general notices that do not require remedial action are a "suit." Among other things, the courts and the parties will struggle to apply the "suit" holding in the context of actions taken in reliance on *Edgerton* and Wisconsin's unique duty to defend requirements.

The "proper procedure" under Wisconsin law for an insurance company to follow when coverage is disputed is to request a bifurcated trial on the issues of coverage and liability until the issue of coverage is resolved. *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993). Intervention within the underlying action is not the exclusive means to seek a coverage determination (a separate declaratory judgment action may be filed), but it is the "preferred procedure." ***Fire Ins. Exchange v. Basten***, 202 Wis. 2d 74, 549 N.W.2d 690 (1996). Given this well-established law, *Johnson Controls'* new definition of what constitutes a "suit" leaves a host of unanswered questions. How does an insurer follow the "preferred procedure" under Wisconsin law for challenging coverage in the context of a government enforcement action as opposed to a court proceeding? How does an insurer intervene in

an enforcement action? How does an insurer move to stay an enforcement action? When is there a determination of the merits in an enforcement action? If a separate declaratory judgment action is filed, must the government be named in the action as an "interested party"? These duty to defend concepts were easy to apply under *Edgerton* when all parties knew when a "suit" - and an insurer's duty to defend - began and ended, but will be impossibly complex with the *Johnson Controls'* new "suit" definition.

2. Trigger/Allocation.

Wisconsin appellate courts appear to be settling on the "continuous trigger" theory of coverage. *See* ***American Family Mutual Insurance Company v. American Girl, Inc.***, 2004 WI 268 Wis. 2d 16, 673 N.W.2d 65; ***Society Insurance v. Town of Franklin***, 2000 WI App. 35, ¶¶ 8-10, 233 Wis. 2d 207, 607 N.W.2d 342; *Wisconsin Electric Power Co. v. California Union Ins. Co.*, 142 Wis. 2d 673, 419 N.W.2d 255 (Ct. App. 1987). However, there are numerous allocation issues that have not been resolved by Wisconsin courts when, as is most often the case, successive insurers are being sued by the insured or a third-party under Wisconsin's direct action statute. In ***Society Ins. v. Town of Franklin***, 233 Wis. 2d 207, 607 N.W.2d 342 (Ct. App. 2000), the court of appeals addressed the issue of successive policies issued by the same insurer, but expressly left for another day the issue of "how liability would be allocated were there multiple insurers." *Id.* at 218.

One method of allocation is the "joint and several" method. Under this approach, each triggered policy is potentially liable up to its limits for all losses attributed to the insured. The insured has the right to select which policy or policies will respond to the loss and the insurer who pays the loss may then file contribution claims against other carriers pursuant to "other insurance" clauses and/or principles of "equitable apportionment." This approach has several defects and has been rejected by a number of courts. *See generally,* Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L. Rev. 257, 269-74 (1997).

Another option is to allocate damages pro rata by each insurer's "time on the risk." A true "time-on-the-risk" approach allocates liability among triggered policies using each insurer's period(s) of coverage without taking into consideration the coverage limits of those triggered policies. Yet another iteration of this approach, the "pro rata by limits" approach, takes into consideration both the insurer's time on the risk as well as the policy limits of the insurer's triggered policies. This method is sometimes referred to as the *Carter-Wallace* allocation method. *See Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998). Other methods have also been adopted as courts continue to struggle with this complex issue. *See generally,* Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies, supra.*

Another related issue that is unresolved by Wisconsin courts is how to factor in periods of time where the insured went without coverage and/or cannot locate policies. Another iteration of this issue is how to allocate for periods of time where the insured purchased coverage, but the insurer that issued coverage is insolvent. Under a pro rata time on the risk method, liability for these uninsured periods of time are often allocated to the insured. *See e.g., Domtar, Inc. v. Niagra Fire Insurance Company*, 563 N.W.2d 724 (Minn. 1997). Undoubtedly, these and other complex issues will be litigated in this new post-*Johnson Controls* era.

B. Exclusion Issues.

1. "Sudden and Accidental" Exclusion.

The Wisconsin Supreme Court's landmark holding in *Just v. Land Reclamation Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990) that the phrase "sudden and accidental" in the standard qualified pollution exclusion was ambiguous and does not have a temporal meaning was somewhat blunted by the court's 1994 decision in *Edgerton* that response costs are not damages. Now that *Johnson Controls* overturned *Edgerton*, insurers will once again turn their focus back on the insured's conduct. As with the question of whether there is an "occurrence" (i.e., "an accident, including

continuous or repeated exposure to conditions, which results in bodily injury or property damages neither expected nor intended from the standpoint of the insured") and the application of the intentional acts exclusion, these "knowledge based" issues are often very fact intensive, resulting in a multitude of depositions of those involved in the waste handling/disposal process at issue.

2. Known Loss.

The known loss doctrine holds that insurers are not obligated to cover losses which are already occurring when the coverage is written or which has already occurred. The Wisconsin Supreme Court recently embraced the known loss doctrine as a viable coverage defense in ***American Girl***, 2004 WI 2, ¶ 86. However, the court's analysis of the issue was brief and did not address important questions such as whether the standard for known loss is objective or subjective, or what knowledge (e.g., knowledge of property damage, knowledge of specific levels of contaminants, etc.) is sufficient to establish the defense.

3. The Absolute Pollution Exclusion.

In 1994, the Wisconsin Court of Appeals in *American States Ins. Co. v. Skrobis*, 182 Wis. 2d 445, 513 N.W.2d 695 (Ct. App. 1994) stated that the absolute pollution exclusion is just that: absolute. Yet, insureds continue to litigate issues relating to the application of the exclusion, from what is a "pollutant" as defined in the exclusion to whether the property damage at issue was the result of a "discharge, dispersal, escape or release" of the "pollutant," the operative terms of the standard exclusion. *See e.g.*, ***Peace v. Northwestern Nat'l Ins. Co.***, 228 Wis. 2d 106, 596 N.W.2d 429 (1999) (the breakdown of lead paint creates a contaminant that is discharged into the environment and coverage is therefore excluded); ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 564 N.W.2d 728 (1997) (damages resulting from inadequate ventilation and the routine activity of exhaling carbon dioxide are not excluded by the absolute pollution exclusion); ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 588 N.W.2d 375 (Ct. App. 1998) (water damage is not excluded even though the water may be combined with a pollutant).

Additionally, Court of Appeals decisions are in direct conflict as to whether environmental contamination qualifies as a "personal injury" (e.g., trespass) under a CGL policy that may not be precluded by the express terms of the absolute pollution exclusion. *See, e.g., City of Edgerton v. General Cas. Co. of Wisconsin*, 172 Wis. 2d 518, 551, 493 N.W.2d 768 (Ct. App. 1992), *rev'd other grounds,* 184 Wis.2d 750, 517 N.W.2d 463 (1994), *overruled on other grounds,* ***Johnson Controls***, 2003 WI 108 ("We conclude that access to, and use of, an undefiled underground water supply is a right of private occupancy. The invasion of that right is a [covered] personal injury liability . . . ."); *Scottish Guarantee Life Ins. Co., Ltd. v. Dwyer*, 19 F.3d 307, 308 (7th Cir. 1994) (Allegations of negligent trespass to property constitute "personal injury" under Coverage B of policy (to which pollution exclusion not applicable) under definition that included "[w]rongful entry into, or eviction of a person from, a room, dwelling or premises."). *Cf.*, ***Robert E. Lee & Associates, Inc. v. Peters***, 206 Wis. 2d 509, 557 N.W.2d 457 (Ct. App. 1996) ("*Lee I*") (rejecting argument that contamination of groundwater constituted "wrongful entry" under personal injury provision in policy); ***Production Stamping Corp. v. Maryland Cas. Co.***, 199 Wis. 2d 322, 330, 544 N.W.2d 584 (Ct. App. 1996) ("[t]o permit the 'personal injury' coverage to trump an absolute pollution exclusion, as Production Stamping urges, would nullify that exclusion - a result that the parties could not possibly have intended.").

4. Owned Property Exclusion.

The owned property exclusion excludes coverage for property damage to property owned, occupied, leased or controlled by the insured. Some Wisconsin courts have held that when hazardous substances are released on the insured's owned property, but contaminate groundwater or third-party property, then the owned-property exclusion will not defeat coverage. ***Robert E. Lee & Associates v. Peters***, 206 Wis. 2d 509, 557 N.W.2d 457 (Ct. App. 1996); *City of Edgerton*, 172 Wis. 2d at 554-56, *rev'd on other grounds,* 184 Wis. 2d 750, 517 N.W.2d 463 (1994); *Maryland Casualty*, 809 F. Supp. at 693; *Patz v. St. Paul Fire & Marine Ins. Co.*, 817 F. Supp. 781, 783-84 (E.D. Wis. 1993),

aff'd on other grounds, 15 F.3d 699 (7th Cir. 1994) (owned property exclusion does not exclude coverage when contamination poses a threat to off-site property). However, in the recent case of ***State v. City of Rhinelander***, 2003 WI App 87, 263 Wis. 2d 311, 661 N.W.2d 509 (Ct. App. 2003), the Court of Appeals held that the exclusion's unambiguous "arising out of property damage" language in the General Casualty excess policy at issue in that case precluded coverage for *any off-site* remediation costs. The case was accepted for review by the Wisconsin Supreme Court but recently settled prior to oral argument. Thus, questions undoubtedly will continue to be litigated under Wisconsin law as to the scope and application of the owned-property exclusion in the environmental property context.

C. Conditions To Coverage.

1. Late Notice.

As the companion article suggests, late notice in the environmental context is a fertile area for future litigation.

Timely notice is a condition precedent to the insurer's contractual duties to defend and indemnify. *West Bend Company v. Chiaphua Industries,* 112 F. Supp. 2d 816, 822 (E.D. Wis. 2000). Most CGL policies require that the insured must give notice of any "occurrence" that may give rise to a claim under the policy "as soon as practicable." The term "occurrence" is often defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." However, some policies use the terms "accident", "happening" and/or "event." Under Wisconsin's statutory scheme, §§ 631.81 and 632.26, Wis. Stats., the insurer has the burden to show that notice was not timely. *Resseguie v. Am. Mut. Liab. Ins. Co.*, 51 Wis. 2d 92, 104, 186 N.W.2d 236 (1971); *see also* Wis. Stat. § 632.26 (2). When the insured fails to give notice within one year after the time required by the policy, "there is a rebuttable presumption of prejudice and the burden of proof shifts to the claimant to prove that the insurer was not prejudiced by the untimely notice." *Gerrard Realty Corp. v. Am. States Ins. Co.*, 89 Wis. 2d 130, 146-47, 277 N.W.2d 863 (1979).

Prejudice to the insurer in this context is a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense, resulting from the unexcused failure of the insured to provide timely notice. Whether an insurer has been prejudiced is typically governed by the facts and circumstances in each case. ***Neff v. Pierzina***, 2001 WI 95 ¶ 33, 245 Wis. 2d 285, 629 N.W.2d 177.

In the context of a recent environmental property case involving a landfill, ***Town of Mount Pleasant v. Hartford***, 2001 WI App 38 ¶13, 241 Wis. 2d 327, 625 N.W.2d 317, the court of appeals determined that the insurer was prejudiced as a matter of law when it received notice from its insured more than thirty months late. The court held that the insured failed to overcome the presumption of prejudice because the insurer could not seek an immediate determination of coverage, could not participate in pre-lawsuit mediation, and could not select defense counsel and control the defense. *Id.*

Now that *Edgerton* has been overturned, it is inevitable that numerous claims that were never tendered to insurers are being tendered or will be tendered due to the change in the law. This undoubtedly will result in a host of late notice and prejudice issues being litigated, with the insureds arguing that the insurers would have done nothing in response to the claim other than to deny the claim based on *Edgerton* and the insurers in turn arguing that, among other things, they were denied the opportunity to, at the very least, investigate the claim at a time when witnesses' memories were fresh, not faded or lost, documents were available, not lost or destroyed, and conditions at the site unchanged.

D. Retroactivity.

As the companion article notes, one of the issues raised in a motion for reconsideration filed by the insurers in

Johnson Controls was whether the decision will be applied retroactively. Unfortunately the Wisconsin Supreme Court chose not to clarify the issue and perfunctorily denied the motion. Recently, in *City of Rhinelander* the Wisconsin Supreme Court expressly requested that the parties address the issue of retroactivity, but as noted above, the case settled prior to decision by the court.

There is a well-recognized exception to retroactive application known as "sunbursting." *See* ***Colby v. Columbia County***, 202 Wis. 2d 342, 364-365, 550 N.W.2d 124 (1996). The doctrine of "sunbursting" was fashioned for cases just like *Johnson Controls.* Generally, the Wisconsin courts will apply a case prospectively if three factors are satisfied: (1) the new decision creates a new principle of law by overruling past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) retroactive application will promote, rather than retard, the operation of the rule recognized or established by the decision; (3) retroactive application could produce substantial inequitable results or thrust an excessive burden on the administration of justice. *Id.* at 364-65.

As for the first factor, there can be no dispute that *Johnson Controls* expressly overruled the black and white rules set forth in *Edgerton.* For almost ten years, insurers and policyholders alike have relied on the dictates of *Edgerton* while setting reserves, fixing premiums, settling cases, and strategizing on corporate environmental policy. Even the majority in *Johnson Controls* recognized that "numerous litigants in Wisconsin have previously had coverage disputes determined by the principles set out in *Edgerton*." ***Johnson Controls***, 2003 WI 108 ¶ 93. *Johnson Controls'* explicit overhaul of the entire regime of environmental insurance coverage law was not clearly foreshadowed and obviously favors a prospective application of its holdings.

The second factor also favors the sunbursting of *Johnson Controls*. The majority decision in *Johnson Controls* went to great lengths to stress that its decision "restor[ed] consistency and coherence to the law [of environmental insurance coverage]." *Id.* ¶ 4. A retroactive application of *Johnson Controls* would undermine the court's stated purpose and create havoc in the handling of the multitude of prior judgments based on *Edgerton*, prior settlements executed on the basis of *Edgerton*, and prior aged claims, which are now being re-tendered and reconsidered by insurers on the basis of *Johnson Controls*. On the other hand, a clear, unambiguous starting point for applying *Johnson Controls* would certainly promote the majority's intent to clarify the law of environmental insurance coverage.

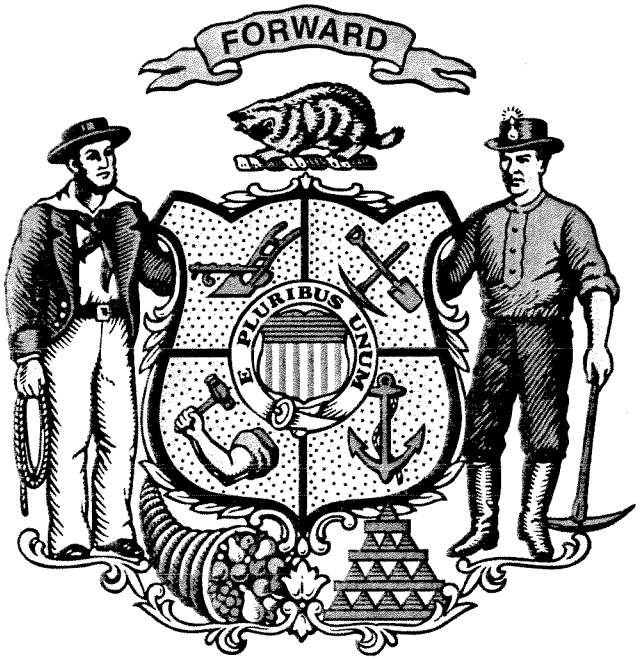
With respect to the third factor, it is apparent that the equities favor a prospective application of *Johnson Controls*. Both insurers and policyholders would benefit from operating from a clear starting point, especially since, as the Wisconsin Supreme Court has recognized, both groups have relied so extensively on the regime established in *Edgerton*. Moreover, a retroactive application would unquestionably burden the judicial system - both state and federal - with scores of coverage disputes attempting to clarify the limits of *Johnson Controls'* retroactive effect. *See Rolo v. Geres*, 174 Wis. 2d 709, 724, 497 N.W.2d 724 (1993) (considering effect on judicial workload in deciding to apply decision prospectively). As a result, a strong argument exists that prospective application is a more equitable alternative when compared to the uncertain climate that would result from a retroactive application of *Johnson Controls*.

Conclusion.

In addition to the above issues, *Johnson Controls* will undoubtedly create a multitude of other issues outside the CERCLA response cost context. Creative policyholder's counsel will use the decision to attempt to argue that garden-variety "demand letters" are now "suits." The decision also opens the door to novel arguments that traditional injunctive relief may be re-cast as a "suit seeking damages," if it has any ancillary effect of remediating or repairing alleged property damage. More broadly, the decision casts doubt upon and invites litigation over what previously were fundamental, time-honored principles that formed the foundation of insurance contract construction in Wisconsin for decades.

In the end, *Johnson Controls* will be incredibly costly for Wisconsin. Already, policyholders have made claims and filed litigation against insurers that previously were easily and quickly resolved without litigation. More litigation is sure to follow. Resources that would have gone to preventing additional contamination and compensating the public for damages to natural resources will be lost in the morass of litigation spawned by the decision.

[1] It should be noted that one of the insurers in *Johnson Controls*, Employers Insurance Company of Wausau, has filed a petition for a writ of certiorari in the United States Supreme Court.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WISCRISK

A Quarterly Publication of the State of Wisconsin Patients Compensation Fund

Spring 2004 • Volume 4, Issue 1

Patients Compensation Claims Experience

By Theresa Wedekind
Director, Patients Compensation Fund

The American Medical Association lists Wisconsin as one of only six states in the country that is not in a medical malpractice crisis. The "Wisconsin factor," tort reform, and the Patients Compensation Fund (PCF) all contribute to Wisconsin's enviable situation.

The "Wisconsin factor" can best be described as the state's overall environment. It includes the availability and quality of healthcare, plus the amounts Wisconsin juries award. In Wisconsin, we have not seen the huge jury verdicts that have been reported in other states, although verdicts here occasionally range as high as three to eight million dollars.

The non-economic damages and wrongful death caps have contributed to Wisconsin's relatively stable medical malpractice environment. Since Act 10 was passed in 1995, the non-economic damages cap has resulted in an estimated $88 million reduction in assessments collected from Fund participants through 2003. In addition, Wisconsin does not allow punitive damages in medical malpractice claims, providing further protection for the state's healthcare providers.

The Patients Compensation Fund supplies healthcare workers with coverage above the current primary limits of $1,000,000/$3,000,000, while ensuring that funds are available to compensate injured patients.

In order for a claimant to recover from the Fund, the PCF must be a named defendant in the action. Since the inception of the PCF in 1975, there have been 4,944 claims filed in which the PCF was named. During this period, the PCF's total number of paid claims was 609, resulting in indemnity payments being made on only 12.3% of all claims filed. The total amount paid on those 609 claims was $548,014,819.

Table 1 summarizes PCF loss payments by fiscal year since 1995. The PCF's fiscal year runs from July 1 through June 30.

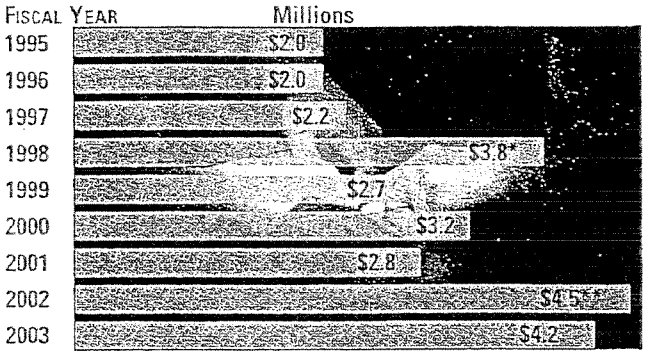
Table 1
Amount and Number of Losses Paid by Fiscal Year

	Millions	Claims Paid
1995	$24.1	25
1996	$51.5	28
1997	$34.7	16
1998	$18.7	24
1999	$19.9	28
2000	$19.7	12
2001	$39.6	22
2002	$41.3*	15
2003	$22.0	11

* Net loss payments totaled approximately $35.3 million, after deducting $5,993,923 recovered during fiscal 2002 on two losses paid in previous years.

Contents

Table 2
Loss Adjustment Expenses Paid



* $1.3 million of the fiscal 1998 total loss adjustment expenses paid represents a contingency fee paid as a result of a loss recovery by the PCF.
** Net loss adjustment expense payments totaled approximately $4.1 million, after deducting $382,820 recovered during fiscal 2002 on a loss paid in a previous year.

Loss adjustment expense payments, the cost of defending claims, are summarized in Table 2.

Fund claim payments can vary widely due to (1) the unlimited nature of PCF coverage, (2) the severity of patient injuries, and (3) the primary insurance limits in effect at the time of each incident. Table 3 categorizes PCF claim payments made from July 1, 1996 through June 30, 2003 by the size of payment.

Table 3
Range of Fund Claim Payments July 1, 1996 - June 30, 2003

Payment Range	Number of Claims
$500,000 or less	54
$500,001 – $1,000,000	31
$1,000,001 – $2,000,000	14
$2,000,001 – $5,000,000	18
Greater than $5,000,000	11
Total Claims Paid	128

Table 4 summarizes claims reported to the PCF by fiscal year since 1997. Claims are generally reported to the PCF six months to three years after the incidents occurred that gave rise to the claims. The applicable statute of limitations determines the deadline for filing a medical malpractice action.

When reading Table 4, please note that not all reported claims result in loss payments by the PCF. As stated previously, approximately 87% of the PCF's closed claims have not involved a payment by the Fund. Claims may be closed with no PCF payment for the following reasons:

- Dismissal of claims, due to lack of negligence or cause or plaintiffs did not pursue case.
- Defense verdicts at trial.
- Claim settlements negotiated within the underlying insurer limits.

Table 4
Claims Reported by Fiscal Year

Fiscal Year	Number of Reported Claims
1997	182
1998	161
1999	215
2000	246
2001	169
2002	182
2003	170

The PCF's experience at trial, as well as claim settlement history since fiscal 1999, is reported in Table 5. Trial losses may result in no PCF payment (verdict within primary carrier limits). Settlements represent cases negotiated to resolution out of court.

Table 5
Trial and Settlement History

Number of Cases	1999	2000	2001	2002	2003
Tried-Won	20	17	26	18	32
Tried-Lost	12	7	10	9	3
Settled-Fund Payment	17	10	17	14	13
Settled-No Fund Payment*	25	30	41	63	44
Won or Settled Within Primary Limits	60.8%	73.4%	71.3%	77.9%	82.6%

* Settled within primary carrier limits.

Although the medical malpractice liability crisis is far from over in the United States, the PCF is a major factor in Wisconsin's relatively stable premiums and the state's reputation as a desirable place for physicians to practice. In addition to protecting healthcare providers against claims that exceed primary limits, the PCF's percentage of trials won or settled without incurring Fund payments has increased by nearly 36% over the past five years.

Rate Comparison with Surrounding States

Medical liability rate averages are lower in Wisconsin than in most surrounding states. The following two tables compare rates in Wisconsin and its five neighbors. The comparison uses published $1,000,000/$3,000,000 mature claims-made coverage rates and does not include PCF assessments. Wisconsin average rates are second only to Minnesota rates.

When possible, the rates of three companies writing in any one area were used to calculate an average. (In Michigan, the averages are based on the rates of two companies.)

Table 1 shows average rates for three specialties: Internal Medicine, General Surgery, and OB/GYN. Wisconsin, Iowa, and Minnesota rates are statewide, while Illinois, Michigan, and Ohio rates are broken out by major metropolitan area.

Table 2 expresses the same information as a relativity factor, comparing each rate to the Wisconsin average. For example, Chicago area Internal Medicine rates are four times higher than Wisconsin rates while Minnesota rates are 15 percent lower.

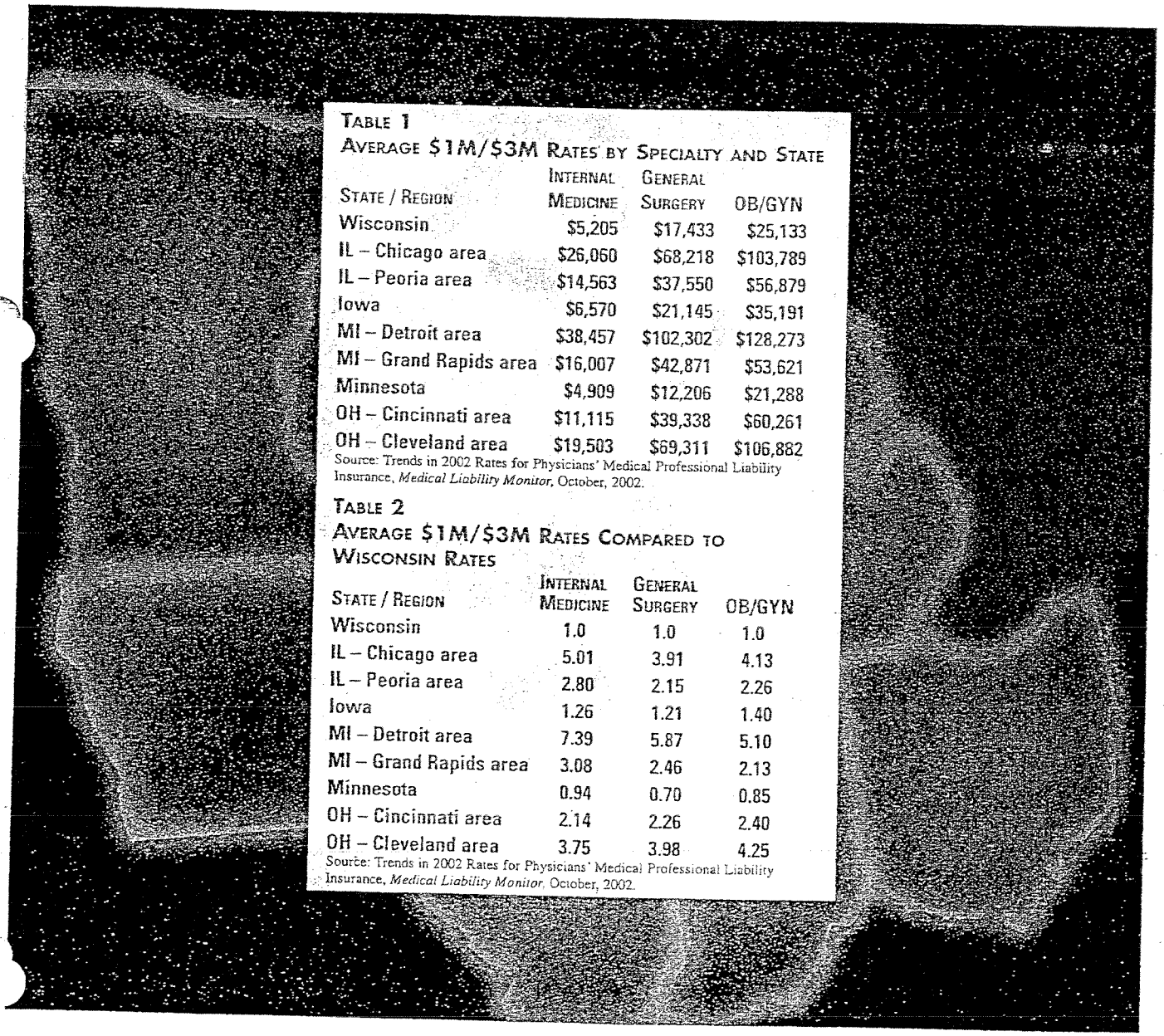


Table 1
Average $1M/$3M Rates by Specialty and State

State / Region	Internal Medicine	General Surgery	OB/GYN
Wisconsin	$5,205	$17,433	$25,133
IL – Chicago area	$26,060	$68,218	$103,789
IL – Peoria area	$14,563	$37,550	$56,879
Iowa	$6,570	$21,145	$35,191
MI – Detroit area	$38,457	$102,302	$128,273
MI – Grand Rapids area	$16,007	$42,871	$53,621
Minnesota	$4,909	$12,206	$21,288
OH – Cincinnati area	$11,115	$39,338	$60,261
OH – Cleveland area	$19,503	$69,311	$106,882

Source: Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance, *Medical Liability Monitor*, October, 2002.

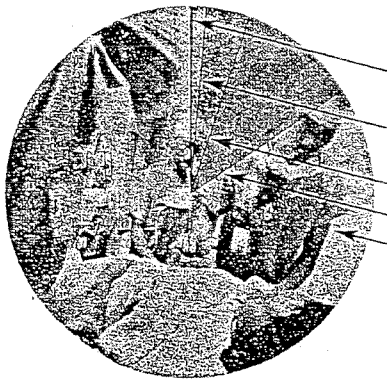
Table 2
Average $1M/$3M Rates Compared to Wisconsin Rates

State / Region	Internal Medicine	General Surgery	OB/GYN
Wisconsin	1.0	1.0	1.0
IL – Chicago area	5.01	3.91	4.13
IL – Peoria area	2.80	2.15	2.26
Iowa	1.26	1.21	1.40
MI – Detroit area	7.39	5.87	5.10
MI – Grand Rapids area	3.08	2.46	2.13
Minnesota	0.94	0.70	0.85
OH – Cincinnati area	2.14	2.26	2.40
OH – Cleveland area	3.75	3.98	4.25

Source: Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance, *Medical Liability Monitor*, October, 2002.

PCF Participants

As of December 31, 2003, Fund participants totaled 13,191. Participants included 11,145 physicians, 1,323 corporations, 492 nurse anesthetists, 118 hospitals with 27 affiliated nursing homes, 50 partnerships, 21 hospital-owned or controlled entities, 14 ambulatory surgery centers, and cooperative.



Fund Participants

Type	Qty.	Percent
Ambulatory surgical centers and cooperatives	15	.1%
Hospitals, affiliated nursing homes & owned/controlled entities	166	1.3%
Nurse anesthetists	492	3.7%
Corporations & partnerships	1,373	10.4%
Physicians	11,145	84.5%
Total	**13,191**	**100.0%**

Wisconsin Patients Compensation Fund

By Theresa Wedekind
Director, Patients Compensation Fund

The Fund was created in 1975 to provide excess medical malpractice insurance for Wisconsin healthcare providers. Its 13-member Board of Governors includes members of the public, the Commissioner of Insurance, and legal, insurance, hospital and medical representatives.

Administrative costs, operating costs, and claim payments are funded through assessments on participating healthcare providers. Participation is mandatory with exceptions for part-time physicians or those who practice primarily outside of Wisconsin. The Fund's annual administration budget is approximately $750,000 and its operating budget is $50,000,000.

In 2003, the Fund was protected by a new law that changes the Fund's legal name to the Injured Patients and Families Compensation Fund. The new name will be used primarily in legal documents. The law explicitly states that the Fund is held in trust exclusively for the benefit healthcare providers and claimants and may not be spent for any other purpose of the state.

About WiscRisk

WiscRisk is published quarterly and circulated to more than 12,000 healthcare providers statewide. Designed to keep readers informed of trends in liability claims and loss prevention, this publication is prepared by the Risk Management Steering Committee for the Patients Compensation Fund.

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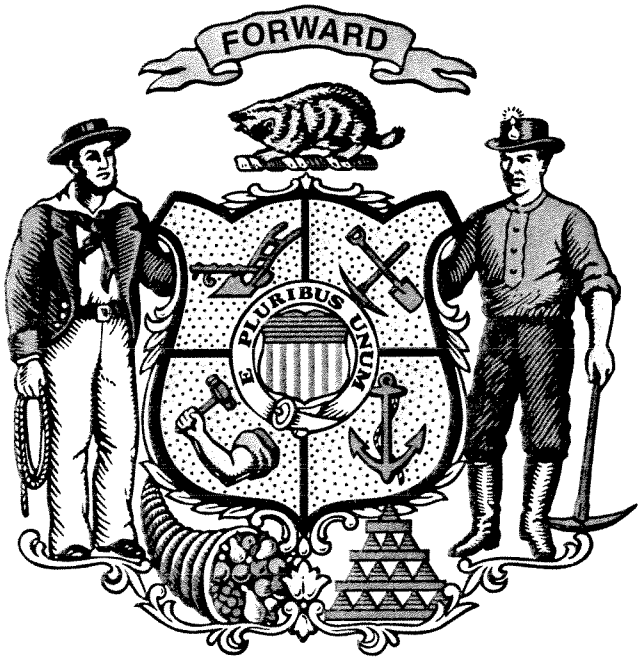
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Health Affairs

July 1, 2004

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Are Damages Caps Regressive? A Study Of Malpractice Jury Verdicts In California

Studdert, David M
Yang, Y Tony
Mello, Michelle M

HEADNOTE

Strong evidence that caps' fiscal impact on California verdicts is not distributed equitably across different types of injuries.

ABSTRACT: Caps on damages have emerged as the most controversial legislative response to the new malpractice crisis. We analyzed a sample of high-end jury verdicts in California that were subjected to the state's $250,000 cap on noneconomic damages. We found strong evidence that the cap's fiscal impact was distributed inequitably across different types of injuries. In absolute dollar terms, the reductions imposed on grave injury were seven times larger than those for minor injury; the largest proportional reductions were for injuries that centered on pain and disfigurement. Use of sliding scales of damages instead of or in conjunction with caps would mitigate their adverse impacts on fairness.

As A MEDICAL MALPRACTICE CRISIS spreads across the United States, policymakers are responding with reforms aimed at curbing the cost and frequency of litigation.1 Caps on damages have emerged as the most common legislative response; they are also the most controversial.

Twenty-one states already cap damages for noneconomic losses in medical malpractice cases, generally with ceilings in the range of $250,000-$750,000. Six states cap total damages. Most of these measures were introduced during earlier crises in the mid-1970s and mid-1980s. However, six states so far-Florida, Mississippi, Nevada, Ohio, Texas, and West Virginia-have enacted legislation on caps in response to the current crisis. Caps were also the centerpiece of the leading federal tort reform proposal to date. Both the Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act (H.R. 5), which passed the House in 2002, and the Patients First Act of 2003, S. 11, which faltered in the Senate in July 2003, included a $250,000 cap on noneconomic damages. These bills sought to emulate California's Medical Injury Compensation Reform Act (MICRA) of 1975, one of the earliest and best-known state reforms.

Proponents of MICRA-style caps, including President George W. Bush and the American Medical Association, regard them as crucial in preventing excessive payouts in malpractice suits and stabilizing professional liability insurance premiums.2 Trial attorneys and consumer groups dispute their efficacy and also object to their "one-size-fits-all" nature on fairness grounds. They argue that caps place unacceptable restrictions on plaintiffs' rights to recovery, resulting in inadequate

compensation of severely injured patients.3 Opponents further claim that caps' bite is felt most sharply by lower wage earners, particularly women and the elderly, who rely heavily on the "pain and suffering" portion of damages awards to obtain adequate compensation.4 Several academic commentators have echoed these concerns, arguing that fixed-dollar caps are a blunt and regressive policy response because they disproportionately burden certain types of plaintiffs.5

There is reasonable evidence that damages caps control payouts in malpractice litigation.6 Caps' impact on liability insurance markets is less clear; there is some evidence to suggest that they help limit the growth of premiums in the medium term, but research findings present a mixed picture on this point.7 To the best of our knowledge, however, no data are available to support or refute the claims that caps are "regressive" in the sense that they disproportionately burden vulnerable subgroups of litigants.

Using a sample of jury verdicts from California, we analyzed awards before and after they were subjected to the MICRA cap. Our primary focus was fairness: Among verdicts subjected to the cap, to what extent was the burden of reductions distributed equitably across different types of injuries? We examined the size of reductions in absolute-dollar-value terms and proportionally, by considering them as a percentage of the overall award. We also tested whether the burden of the cap fell disproportionately on women and the elderly, as critics have claimed.

* Fairness in injury compensation. Among compensated plaintiffs, fairness can be conceptualized in two main ways. The most basic question is whether the absolute-dollar value of the compensation is appropriate. Do the total damages received by plaintiffs at each injury level meet (and not exceed) societal expectations about what constitutes reasonable compensation for that sort of injury? The conventional view is that tort damages should make negligently injured people "whole" for their losses. Hence, the question becomes how accurately compensation tracks the magnitude of the loss or injury.

But fairness also has an important relative dimension. Borrowing from taxation policy, this has been conceptualized in terms of "vertical" and "horizontal" equity.8 Principles of vertical equity dictate that more severe injuries should receive higher compensation than less severe ones, and vice versa; principles of horizontal equity call for similar levels of compensation for injuries of similar severity.

The malpractice system has drawn heavy criticism over its performance on both the absolute and relative dimensions of fairness.9 Many victims of negligence receive little or nothing.10 At the other end of the spectrum, some multimilliondollar "jackpot" awards appear to be disproportionate to the severity of the injuries they are compensating.11

Concerns about the latter problem and its impact on liability insurance markets are driving the current interest in caps. The noneconomic component of damages is the focal point. Noneconomic losses are inherently subjective, and juries are given little or no guidance in valuing them. Jury instructions in California, for example, simply ask jurors to "exercise calm and reasonable judgment in light of the evidence."12

The subjective nature of noneconomic losses imbues with controversy discussions of the reasonableness of absolute levels of compensation. It also sets the stage for perennial disagreement over what amount is an acceptable upper limit for a noneconomic damages cap. The concept of relative fairness, on the other hand, presents a more tractable problem. It is quite feasible to investigate the internal

consistency and coherence of awards. Previous studies partially challenge the popular view that jury awards fail to discriminate between severity levels of injuries. In their analysis of jury verdicts from Florida and Kansas City, Randall Bovbjerg and colleagues identified vertical equity in noneconomic damages but "enormous" problems with horizontal equity.13 These findings are supported by other research.14

* The MICRA cap. The cap established under MICRA pertains to noneconomic damages only.15 Any action for injury against a health care provider based on "professional negligence" is subject to the cap, regardless of the severity of injury, the plaintiff's age, or the magnitude of economic loss. Intentional torts, such as battery and sexual misconduct, are exempt.16

Several other features of the MICRA cap are noteworthy. First, the cap was fixed at $250,000 in 1975; unlike damages caps in some other states, it has never been adjusted for inflation. If adjusted for inflation, the cap would have reached $877,000 in 2002. Second, the cap is applied after juries have decided on damages. In other words, juries are theoretically "blinded" to the existence of the cap in reaching their verdict. Third, any modifications to awards based on comparative fault are made before the cap is applied.17 Fourth, in cases that involve ongoing or future losses, a present value is assigned to the compensation.18

Study Data And Methods

* Data and sample. We extracted data on jury verdicts from the California Jury Verdicts Weekly (CJVW). This publication covers cases statewide; it is one of the best-known jury verdict reporting services in the country and has been used in previous empirical studies of civil litigation. The reports are obtained through a combination of voluntary reporting by and CJVW solicitations to attorneys, with the latter based on information gathered by CJVW staff from court dockets and from news and wire reports. Attorneys involved in the litigation complete structured forms summarizing the details of the case. The summaries are then edited and facts are checked by forwarding the summaries to attorneys on both sides.

Lexis-Nexis catalogues CJVW reports electronically. Our search of malpractice verdicts from the period 1985-2002 yielded 486 unique verdicts decided in favor of the plaintiff. We eliminated plaintiff verdicts that did not relate to medical malpractice (63), involved out-of-court settlements (58) or arbitration decisions (42) rather than an actual jury verdict, alleged sexual battery or other offences not subject to the MICRA cap (7), or did not clearly separate economic and noneconomic award components (18). This left 298 verdicts. In 152 (51 percent) of them, the jury returned a noneconomic damages award in excess of $250,000, and the court applied the cap. These 152 cases made up the study sample.

* Verdict review. We abstracted details of the plaintiff (age and sex), type of claim, injury, and monetary aspects of the verdict (economic, noneconomic, and any other damages). A surgeon and an internist, both with experience assessing injury types in malpractice litigation, independently scored the severity of each injury using the National Association of Insurance Commissioners (NAIC) nine-point scale.19 The scale ranges from emotional injury only (1) to death (9). The physicians' scores were concordant in 66 percent of cases, differed by one point in 24 percent, and differed by two points in 10 percent (weighted kappa = .8). Disagreements were discussed to reach consensus. To ensure sufficient sample size for analyses, the nine levels of injury were collapsed into six categories: temporary injury and five levels of permanent injury (minor, significant, major, grave, death).

* Data analyses. After describing the characteristics of plaintiffs, claims, injuries, and verdicts, we analyzed, in absolute and proportional terms, the size of the reductions effected by the cap. Proportional reductions are expressed as percentages and were calculated by dividing the reduction by the total pre-cap award; this measure is a useful addition to the absolute reduction because it is sensitive to the respective contributions of economic and noneconomic damages to the original award. We quantified variation in both types of reductions across levels of severity and types of injury. Statistically significant differences were identified using t-tests.

Finally, we used multivariate linear regression analysis to explore the relationship between the size of the reduction and plaintiffs' sex, age, and injury severity. To account for the differences in the timing of verdicts, we converted the dollar values of awards to 2002 dollars using the Consumer Price Index (CPI).

Study Results

* Sample characteristics. The most common types of events leading to claims in our sample were surgical errors, obstetrical errors, missed or delayed diagnoses, and drug errors (Exhibit 1). Fifty-three percent of the plaintiffs were female, and the mean plaintiff age was thirty-seven years.

In general, plaintiffs' injuries were severe: Approximately half resulted in death, grave injury, or major injury. No claims involved emotional or insignificant injury exclusively, and only 3 percent involved temporary minor injury. Besides death, loss of ambulatory capacity and severe neurological impairment among infants and adults were the most common types of injury.

Verdicts in the sample totaled nearly $390 million, with a mean award of $2.5 million and a median award of $1.3 million (Exhibit 2). The $250,000 cap lowered the total by 34 percent, to $253 million. For noneconomic compensation specifically, it lowered the total by 73 percent.

* Awards of noneconomic damages across injury types. The box-and-whisker plots in Exhibit 3 show the distribution of the original noneconomic damages component of the awards by severity of injury. Several points are noteworthy. First, the long upper whiskers highlight a large right tail to the distribution.20 The skew was especially pronounced among the most severe nonfatal injuries. Second, there was wide variation in noneconomic damages awarded within each severity category; the variation again was particularly large among the most severe injuries.

Third, the mean value of noneconomic damages within injury severity categories increased with severity (excluding death). There were no statistically significant differences across neighboring categories, with the exception of the gravecleath comparison, although there was a statistically significant jump between the means for the bottom three and top three severity categories ($755,861 versus $1,427,733, $p < .001$). Fourth, the probability of a multimillion-dollar verdict for noneconomic damages increased with severity. The seventy-fifth percentiles of the distributions shown in Exhibit 3 rise sharply across severity categories, peaking with grave injuries and dropping off for deaths.21

* Absolute reductions in noneconomic damages under the cap. Exhibit 4 illustrates both the magnitude of reductions and the variation across injuries. The mean reductions for grave injury were seven times larger than those for minor injury; the differences in medians for these two levels of injury differed by a factor of three. Again, deaths disrupt the direction of the relationship between size of reduction and injury severity.

* Proportional reductions in noneconomic damages under the cap. Exam ining reductions imposed by the cap in terms of the percentage decrease in the plaintiffs' original award, rather than in absolute terms, we found huge variations across verdicts. Reductions ranged from 2 percent to 82 percent (mean = 37 percent, standard deviation, ±20 percent) for nonfatal injuries and from 6 percent to 88 percent (mean = 47 percent, SD, ±24 percent) for fatal injuries.

Exhibit 5 describes nonfatal injuries at both ends of the spectrum-those for which the proportional reduction was smallest (< or =8 percent) and largest (> or =70 percent). Severe neurological injuries to newborns were common in the first group, accounting for nine of the twenty verdicts with the smallest percentage reductions. Injuries that caused pain or disfigurement but not significant loss of physical functioning dominated the second group: Twelve of the twenty verdicts with the largest reductions fit this profile. In addition, seven of the twenty largest reductions involved unnecessary or repeated surgical procedures, and four involved injuries to the female breast.

Exhibit 5 also illustrates how the types of injuries described above come to bear such different burdens under the MICRA cap. The balance between economic and noneconomic components of the award is critical. Noneconomic damages constitute 10 percent or less of the overall award in verdicts with proportionally small reductions, but they account for the vast majority of awards with the largest reductions. Because verdicts for injuries such as deafness, numbness, disfigurement, and chronic pain attracted relatively small economic damages awards, imposition of the cap eliminated most of the award.

* Female and elderly plaintiffs. In unadjusted analyses, we found no significant differences in the percentage reductions experienced by female and male litigants after application of the MICRA cap (41 percent versus 38 percent reductions, respectively; $t = -0.9$, $p = .4$).22 To focus this comparison on the class of plaintiffs at highest risk of exhibiting sex disparities, we excluded newborns and the elderly from comparison; there still was no significant difference. The size of reductions among elderly and nonelderly litigants was virtually identical (39 percent; $t = 0.1$, $p = .9$). In multivariate analyses that adjusted simultaneously for the effects of sex, age, and severity, women's reductions were slightly larger than men's (4 percent), but this difference was not statistically significant. There were no significant differences between elderly and nonelderly plaintiffs in the multivariate analyses.

Adjusted analyses also provided an opportunity to test whether the relationship between injury severity and absolute-dollar reductions in the award persisted after sex and age were controlled for.23 We observed a strong effect. When death was excluded and severity was categorized in the same way as shown in Exhibits 3 and 4, an incremental increase severity score was associated with a 33 percent greater reduction in the size of damages ($p = .001$).

Discussion

* Impact of caps on vertical equity. We found strong evidence that caps' fiscal impact on verdicts was distributed inequitably across different types of injuries. Characterization of the injury types that carry the heaviest "burden" under caps depends on the approach used to measure reductions. Analysis of absolute reductions shows that the burden essentially climbs with severity.

Imposition of greater reductions on more severe injuries may be justified if compensation for this particular group of injuries were especially prone to excess.

In fact, available evidence suggests that the reverse is true: Plaintiffs with the most severe injuries appear to be at highest risk for inadequate compensation.24 Hence, the worst-off may suffer a kind of "double jeopardy" under caps.

Analysis of proportional reductions shows that the burden of caps tends to fall on injuries that cause chronic pain and disfigurement but do not lead to declines in physical functioning that would generate lost work time or high health care costs. The large percentage reductions for these injuries can be explained by the high ratio of noneconomic to economic losses involved. Notwithstanding their limited economic impact, the injuries involved are by no means trivial (Exhibit 5).

* Impact of caps on horizontal equity. In literal terms, caps advance the horizontal equity of compensation; they completely eliminate dispersion of awards above the limit of the cap. However, they achieve this result in a procrustean manner-essentially, by prescribing a single level of noneconomic compensation for severe injuries. Gains in horizontal equity under caps are thus in direct tension with goals of vertical equity and absolute fairness.

Also relevant to the issue of horizontal equity is how plaintiffs of different socioclemographic groups fare under caps. Our findings suggest that the two groups that have attracted the most attention-women and the elderly-are no more heavily burdened by caps than their male and younger counterparts, even when the reductions are examined in proportional terms. However, an important caveat to this finding relates to our focus on receivers rather than seekers of compensation. In theory, caps may influence attorneys' willingness to take cases that involve paltry economic losses. We cannot tell from our analysis whether such screening activity occurs or, if it does occur, the degree to which it adversely affects women and the elderly.

* Study limitations. Our study findings should be interpreted in light of several other limitations. First, we do not observe the universe of plaintiff verdicts in California. Previous attempts to measure the proportion of verdicts captured by verdict reporting services have yielded estimates ranging from 75 percent to 95 percent.25 The CJVW's data collection methodology probably biases reports toward larger verdicts. This may increase the frequency of awards in higher severity categories, but it should have little impact on the mean and median reductions we calculated within severity categories.

Second, our analysis does not control for the underlying merits of claims. This omission may bother those drawn to caps by their promise of curbing unjust awards. Previous studies suggest that juries actually do a reasonable job of deciding negligence.26 Regardless, caps are a clumsy solution to this perceived problem.

Third, the frame of the analysis is the upper level of the "dispute pyramid"namely, plaintiffs who obtained compensation through verdicts. This frame excludes both injured patients who never sought compensation and plaintiffs whose claims were not resolved by verdict. There is every reason to expect the "shadow" of the impacts of caps we identified to fall across settlements. Litigants' expectations about potential returns in court exert a powerful influence over settlement negotiations, establishing the parameters for both liability questions and valuations of damages.27

Fourth, our analysis assumes that juries are ignorant of the cap. Although California courts have frowned upon disclosure of caps to juries, in some cases this standard may be infringed, or jury members may learn about the cap from other sources, which may influence juries' valuations of damages. One potential behavioral response would be to inflate the economic component of the award as a

way of offsetting the impending reduction in noneconomic damages under the cap. The only substantial implication of such behavior for our findings would be to render the percentage reductions shown in Exhibit 5 underestimates of the "true" proportional reduction attributable to the cap.

* A scaled approach to noneconomic damages. Interest in caps stems in part from concerns about the opaque and haphazard nature of noneconomic damages determinations; it may also be traced to a degree of ambivalence, fuelled by skepticism among some economists, about whether this type of loss should be compensated at all.28 Regardless, the tort system does and will continue to recognize noneconomic losses. The critical policy question thus becomes how to compensate them appropriately and fairly.

Our study illustrates the threat to fairness posed by flat caps, especially in the area of vertical equity. One option for addressing this problem is use of a schedule, or sliding scale, for noneconomic damages. Schedules have long been advocated by academic commentators and recently received the endorsement of the institute of Medicine.29 Using a schedule permits the noneconomic component to vary by severity of injury and possibly also by the plaintiff's age.30 The maximum award in each severity bracket would be capped, but at a level more commensurate with the severity of the injury than a flat cap permits.31

Schedules would also advance goals of horizontal equity, by reducing the large variation in noneconomic damages awarded by juries for ostensibly similar levels of harm, a "spread" that was highly visible in our sample among injuries with higher severity. Caps also control this dispersion-in fact, they eliminate it altogether for awards that reach the cap-but it is a Pyrrhic victory, won completely at the expense of vertical equity. Using a sliding scale avoids this trade-off; it could be structured to simultaneously respect principles of vertical and horizontal equity in compensation.

A schedule along these lines would be feasible to develop and implement. The design calls for a two-step process, beginning with formulation of the severity tiers. One option for this formulation would be to use an existing injury severity scale, such as that used by the NAIC; better still, it should be relatively straightforward to design a scale to differentiate among levels of noneconomic injury (as opposed to injury generally). The next step, assignment of dollar values or ranges to each tier, defines the compensation gradient across ascending severity levels. This involves a much more politically charged set of decisions. Vertical equity would dictate only that the slope of the gradient be positive, at least up to cases involving death. The actual dollar values that define the slope could be assigned through deliberation about what constitutes reasonable compensation for the various levels of noneconomic loss. Bovbjerg and colleagues have proposed using median jury awards from past verdicts in the state.32

Whether such a sliding scale would reduce the overall costs of litigation more or less than a flat cap does depends on the dollar values chosen for each tier and, of course, the spillover effects on decisions about pressing litigation. Savings in administrative costs that stem from the increased predictability of damages under the schedule should also be taken into consideration. One likely outcome is that the sliding scale would result in systematically lower awards in cases involving temporary or minor injury than under flat caps, and higher awards for significant and grave injury. Savings at the low end may not offset more generous compensation at the high end. But the legitimate societal interest in fairly compensating the severely injured may justify some modest increase in the overall cost of awards.

As THE MALPRACTICE CRISIS gathers momentum, so will interest in caps on damages.

Decisions to implement them should be made with an awareness that they are likely to exacerbate existing problems of fairness in compensation. A decision to limit damages awards represents a social judgment that stabilizing the liability insurance market must be prioritized over allowing juries to determine levels of compensation for medical injuries. In the current environment, such a trade-off may well be justified. But from an ethical perspective, care should be taken to choose that policy option that infringes least on the interest of patients and society in fair compensation. Use of a sliding scale of damages represents a more rational balancing of interests.

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SIDEBAR

"Our study illustrates the threat to fairness posed by flat caps, especially in the area of vertical eauity."

FOOTNOTE

NOTES

1. U.S. General Accounting Office, Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates, Pub. no. GAO-03-702 (Washington: GAO, 2003); and M.M. Mello, D.M. Studdert, and T.A. Brennan, "The New Medical Malpractice Crisis," New England Journal of Medicine 348, no. 23 (2003): 22812284.

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15. Cal. Civ. Code, sec. 3333.2.

16. Perry v. Shaw, 88 Cal. App. 4th 658 (2001).

17. McAdory v. Rogers, 215 Cal. App. 3d 1273 (1989, 2d Dist).

18. Salgado v. County of Los Angeles, 19 Cal. 4th 629 (1998).

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20. The aggregate verdict totals exhibited this same skew, as is evident in the consistently larger mean than median values noted in the discussion of data presented in Exhibit 2.

21. The four statistical properties of noneconomic damages reported in this subsection arc consistent with the results from Bovbjerg and colleagues' study of jury verdicts from Florida and Missouri. See Bovbjerg et al., "Valuing Life and Limb."

22. For this calculation, proportional reduction is the appropriate specification of the change-in-award variable because it is sensitive to underlying mix of economic and noneconomic damages. There is no strong reason why the absolute-dollar

value of noneconomic damages should be less for women or the elderly. Rather, the argument is that reductions to this component of the award have a greater effect on these plaintiffs because of the prominence of noneconomic damages in the overall award.

23. For this calculation, the absolute reduction in the size of the verdict is the appropriate specification of the change-in-award variable. We took a natural logarithm of the dollar reduction to normalize the distribution. Hence, the association between severity and reductions is expressed in terms of percentage change in the award for successive levels of severity.

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28. A. Schwartz, "Proposals for Product Liability Reform: Theoretical Synthesis," Yale Law Journal 97, no. 3 (1988): 353-419; and S. Shavell, Economic Analysis of Accident Law (Cambridge, Mass.: Harvard University Press, 1987).

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30. Age is a reasonably well-established predictor of noneconomic damages. See Bovbjerg et al, "Valuing Life and Limb."

31. A couple of states already employ a sliding-scale approach to setting the level of the cap. For example, Alaska's cap limits noneconomic damages to $400,000, or $8,000 times the years of the plaintiff's life expectancy, whichever is greater (Alaska Stat. Sec. 09.17.010); in cases of severe and permanent impairment or severe disfigurement, the limit is the greater of $1 million or $25,000 times the years of the plaintiff's life expectancy. Ohio's recently enacted cap is set at the greater of $250,000 or three times the plaintiff's economic loss up to a maximum of $350,000 (Ohio S.B. 281). Although innovative, these approaches only partially embrace the logic of a sliding scale because they are tethered to factors-life expectancy and economic damages-that may have a weak relationship to the actual severity of the noneconomic loss.

32. Bovbjerg et al., "Valuing Life and Limb."

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---- INDEX REFERENCES ----

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Testa; R.H. Mnookin; R.L. Rabin; R.R. Bovbjerg; Rogers; Russell Gruen; S. Daniels; S. Shavell; S.M. Erickson; Sample; Savings; Shaw; Studdert; Study; T. Koenig and M. Rustad; T.A. Brennan; Theoretical Synthesis; Tony Yang; Troy Brennan)

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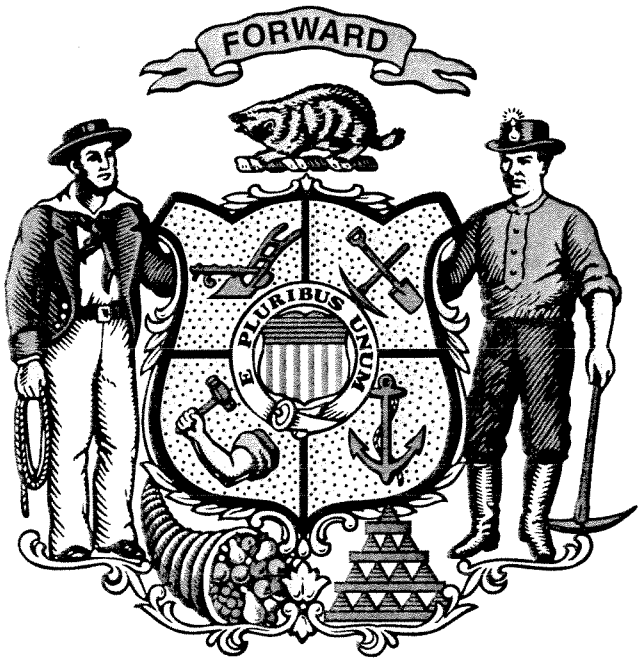
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WISCONSIN'S INSURANCE INDUSTRY: A HISTORY OF STRENGTH, STABILITY AND GROWTH

MADISON, WI, July 6 – The Wisconsin insurance industry is financially strong and growing and is a key contributor to the economy in the state, providing jobs and tax revenues while providing consumers with quality products and services at reasonable rates.

There are 349 domestic insurers based in Wisconsin, according to the Wisconsin Insurance Alliance (WIA). This number has remained fairly stable over the years. Wisconsin-domiciled insurance carriers are Wisconsin businesses, run by Wisconsin residents, providing Wisconsin jobs. Premiums written by domestic insurers in the state totalled more than $21 billion.

Further, the combined assets of all of the state's domestic insurers exceeded $205 billion..

As taxpayers, insurers have contributed more than $107 million in direct state taxes as a result of a combination of premium taxes, franchise taxes, fire dues, agent listing fees,

company licenses, admissions and renewals from domestic and non-domestic insurers. In addition there are corporate, and property taxes as well as the personal income taxes paid by employees.

Compared to other Wisconsin industries, the insurance industry is also a major employer in the state. Insurance carriers employ about 44,711 people, with another 16,712 people working in insurance related activities [agents, claims adjusters etc.], compared to manufacturing (food and kindred), 60,900 employees; banks and related activities 54,800 employees; and manufacturing (paper), 40,500 employees. Wages paid by insurers are above those paid by other Wisconsin industries. In 2002, the average annual wage was $45,614, well above the average wage paid by other business sectors including commercial and savings banks, manufacturing and education and health services.

In addition to the impact and contributions to the state's economy in terms of net worth and employment, Wisconsin's insurance industry provides quality services at reasonable costs to its consumers. According to WIA, the cost of homeowners insurance in Wisconsin is the lowest in the country, with average annual premiums of $287.00 -- 56 percent below the national average. Annual automobile insurance premiums in Wisconsin average $573.46, which is ranked 41st out of 50 states, once again being substantially below the national average.

WIA recognizes these other important goals for maximizing growth of Wisconsin's insurance industry:

- Maintaining an insurance regulatory environment that promotes a competitive insurance marketplace, monitors the business of insurance and advises insurance companies in an expeditious, effective, objective and fair manner;
- Allowing carriers to operate in a market-driven economy without regulations that place Wisconsin in significant competitive disadvantage;

- Preventing state and local taxes from placing Wisconsin companies at a competitive disadvantage;

- Improving the overall health of Wisconsin's economy to retain businesses and stop the out-of-state migration of employers and employees;

- Maintaining a quality educational system which continues to provide a skilled workforce applying contemporary technology; and

- Continuing to maintain consumer confidence in insurance through a court system that recognizes and respects the role of the Legislature and the Office of Commissioner of Insurance.

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The Wisconsin Insurance Alliance

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STUDY SAYS AUTO INSURANCE IN WISCONSIN AMONG LEAST EXPENSIVE IN THE COUNTRY

MADISON, WI, Oct. 4 -- Auto insurance costs in Wisconsin are among the lowest in the country, according to a report issued by the National Association of Insurance Commissioners (NAIC).

Wisconsin ranks 47th out of the 50 states and the District of Columbia in terms of average auto insurance premiums, according to the NAIC. The study, which is based on 2002 data, reported that the average auto insurance premium in Wisconsin is $671.39, compared with the national average of $879.99.

By contrast, average auto insurance premiums are $986.71 in Michigan, $885.54 in Minnesota and $801.75 in Illinois. Among neighboring states, only consumers in Iowa spend less on auto insurance with an average premium of $638.56.

"Wisconsin insurance consumers continue to benefit from a highly competitive auto insurance market, sound regulation, and a less litigious environment than many other states," said Eric Englund, president of the Wisconsin Insurance Alliance. Consumers also can take steps to lower their own insurance expenses, he said.

Actions include comparison shopping among several insurance companies; dropping collision and/or comprehensive coverage on older cars; buying a car that is less likely to be stolen or sustain serious damage in an accident; and, taking advantage of discounts for low mileage, automatic seat belts or airbags and anti-lock brakes and purchasing auto and homeowners coverage from the same company.

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WISCONSIN'S LOW AUTO AND HOME INSURANCE COSTS PLACE SMALLEST FINANCIAL BURDEN ON RESIDENTS, SAYS REPORT

MADISON, October 14 – Wisconsin's auto and home insurance costs place a lower financial burden on its residents than any other state, according to a new report.

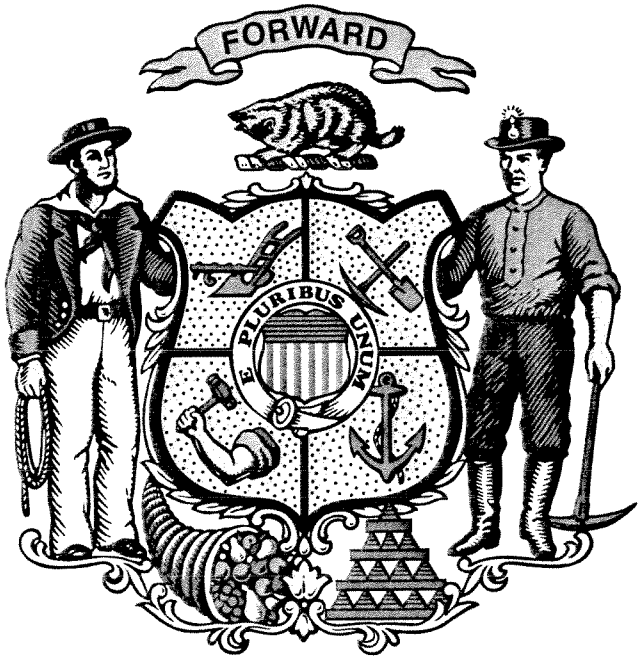
Auto Insurance Report, a California-based insurance publication, reported that Wisconsin residents bear the lowest Personal Insurance Burden (PIB) in the nation.

The PIB divides the combination of average auto insurance expenditure and homeowners insurance premium into median family income to identify states where insurance costs consume a larger proportion of income.

With a combined premium of $881, Wisconsin recorded a PIB of 1.3 percent, the lowest in the nation. By contrast, the national average was two percent. The highest PIB was in Texas which has a 3 percent PIB, according to the publication.

"Motorists and home owners in Wisconsin enjoy the benefits of a highly competitive insurance marketplace," said Eric Englund, president of the Wisconsin Insurance Alliance. "It is gratifying to learn from an independent source that these low costs are benefiting the pocketbooks of families here."

The results are based on 2001 premium data compiled by the National Association of Insurance Commissioners.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ACOG NEWS RELEASE

For Release: July 16, 2004
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Medical Liability Survey Reaffirms More Ob-Gyns Are Quitting Obstetrics

Washington, DC – The fear of being sued is the driving force behind many obstetricians-gynecologists' decision to stop delivering babies, according to the latest medical liability survey conducted by The American College of Obstetricians and Gynecologists (ACOG). The national survey of ACOG ob-gyn members confirms that the medical liability insurance crisis has worsened in recent years, with one in seven ACOG Fellows reporting that they had stopped practicing obstetrics because of the high risk of liability claims. Ob-gyns have an average of 2.6 claims filed against them during their career.

"This crisis is getting more serious by the day. It's not only threatening today's ob-gyns, but also the future of our specialty," says ACOG President Vivian M. Dickerson, MD. The number of US medical students entering the specialty of ob-gyn has declined for the third year in a row. In 2004, only 65% of the ob-gyn residency slots were filled by US medical school seniors, compared with 86% a decade earlier. "Women's health is in jeopardy as new doctors turn away from our specialty," she adds.

Highlights from ACOG's Medical Liability Survey*:

Impact of Claims

- One in seven ACOG Fellows has stopped practicing obstetrics because of the risk of liability claims.
- Changes made by ACOG Fellows because of the risk of liability claims or of being sued:
  - Decreased the amount of high-risk obstetric care - 22%
  - Stopped offering/performing VBACs - 14.8%
  - Decreased the number of deliveries - 9.2%
  - No longer practicing obstetrics - 14%
  - Decreased gynecologic surgical procedures performed - 12.3%
  - No longer doing major gynecologic surgery - 5.6%
- Changes made by ACOG Fellows because of liability insurance costs and availability:
  - Decreased the amount of high-risk obstetric care - 25.2%
  - Decreased the number of deliveries - 12.2%
  - No longer practicing obstetrics - 9.2%
  - Decreased gynecologic surgical procedures performed - 14.8%
  - No longer doing major gynecologic surgery - 5.4%

Frequency of Claims

- In 2003, one in two Fellows had been involved in a claim in the last four years.
- Over 76% of ACOG Fellows reported they had been sued at least once; 57% had two or more claims filed against them, and 41.5% had three or more claims.
- Ob-gyns have an average of 2.6 claims filed against them during their career.
- About three in ten (29.6%) of ob-gyns have been sued for care provided during their residency.

Type of Claims

- Obstetric claims accounted for 61% of claims against ob-gyns; 38% were gynecologic claims.
- From 1999-2002, the top four primary obstetric allegations were: neurologically impaired infant (34%); stillbirth/neonatal death (15%); other infant injury - major (7%); and delay in or failure to diagnose (7%).
- From 1999-2002, the top four primary gynecologic allegations were: delay in or failure to diagnose (29%); patient injury - major (25%); patient injury - minor (15%); and other/non-specified (12%).

Resolution of Claims

- Almost half (49.5%) of claims against ob-gyns are dropped by plaintiffs' attorneys, dismissed or settled without payment.
- Of cases that do proceed to court, ob-gyns win eight out of ten times (81.3%).
- From 1999-2002, on average the length of time from occurrence to closing of the claim was four years; 13% of claims took seven or more years to resolve.
- Closed claim resolution experience:
    - No payout - 49.5%
        - Dropped by plaintiff - 33.6%
        - Dismissed by court - 13%
        - Settled without payment - 2.9%
    - Settled with payment - 36.0%
    - Arbitration or other alternative dispute resolution mechanism - 2.7%
    - Jury/court verdict - 8.6%

ACOG has identified 23 **Red Alert**** states with a medical liability insurance crisis now threatening the availability of physicians who deliver babies. The **Red Alert** *crisis* states are the **District of Columbia, Florida, Georgia, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, West Virginia, and Wyoming.** The other **Red Alert** states where a *crisis is brewing* are **Alabama, Arizona, Connecticut, Illinois, Kentucky, Maryland, Missouri, and Utah.** Mississippi, Texas, and West Virginia are being monitored by ACOG since their crisis status is pending outcome of recently enacted state laws.

Medical liability reform is ACOG's top priority. When ob-gyns can't find or afford medical liability insurance, they are forced to stop delivering babies, curtail surgical services, or close their doors. Across America, pregnant women cannot get the prenatal and delivery care they need but ACOG warns that the liability crisis hurts all women. With physician shortages, there are also fewer ob-gyns available to provide gynecologic surgery and preventive care, such as screening and special procedures. Women lose care that helps protect fertility, end pelvic pain, or treat cancer early. Women travel longer distances to find a doctor, have longer waiting periods for appointments, and have shorter visits once they get there.

"This crisis in health care is critical for both physicians and the women they treat. This is a national problem, and we need a national solution," states Dr. Dickerson.

*Every two to four years since 1986 ACOG has commissioned a national survey on the medical liability experiences of its members. This survey, designed and conducted with Princeton Survey Research Associates, covered the period 1999-2003. The response rate was 45.5%.

**ACOG Criteria for Identifying Red Alert States
ACOG considered a number of factors in determining the hardest hit states in the escalating medical liability insurance crisis for ob-gyns. The relative weight of each factor could vary by state. Factors included: the lack of available professional liability coverage for ob-gyns in the state; the number of carriers currently writing policies in the state, as well as the number leaving the medical liability insurance market; the cost, and rate of increase, of annual premiums based on reports from industry monitors; a combination of geographical, economic, and other conditions exacerbating an already existing shortage of ob-gyns and other physicians (for example, Mississippi and West Virginia, having a number of medically underserved areas); the state's tort reform history, and whether tort reforms have been passed by the state legislature - or are likely to be in the future - and subsequently upheld by the state high court.

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The American College of Obstetricians and Gynecologists is the national medical organization representing over 47,000 members who provide health care for women.