Task Force Meeting Attendance Sheet

Medical Malpractice Task Force

Date: 8/30/05 **Meeting Type:** Public Hearing - Invited Speakers

Location: 412 East State Capitol

Committee Member	Present	Absent	Excused
Representative Curtis Gielow, Chair	☑	☐	☐
Representative Mike Huebsch	☑	☐	☐
Representative Ann Nischke	☑	☐	☐
Representative Jason Fields	☑	☐	☐
Representative Bob Ziegelbauer	☑	☐	☐
Mr. David Strifling	☑	☐	☐
Ms. Mary Wolverton	☑	☐	☐
Dr. Clyde "Bud" Chumbley	☑	☐	☐
Mr. David Olson	☑	☐	☐
Mr. Ralph Topinka	☑	☐	☐

Totals: 10 0 0

John Reinemann

John Reinemann
Task Force Clerk

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cont.

WISCONSIN HOSPITAL ASSOCIATION, INC.

August 30, 2005

TO: Speaker's Medical Malpractice Task Force

FROM: Eric Borgerding, Senior Vice President

SUBJECT: Medical Liability Reform

Chairman Gielow and members, my name is Eric Borgerding and I am Senior Vice President for the Wisconsin Hospital Association (WHA). Thank you for this opportunity to speak today, and for this venue – an extraordinarily rapid and high-priority response to the loss of Wisconsin's cap on non-economic damages.

The WHA appreciates your concern and commitment, and we are anxious to work with the Task Force and anyone else seeking reasonable dialogue and reasoned solutions to maintain stability in our medical liability system. Your urgency is warranted, for the consequences of inaction or delay, though dismissed as "anecdotal" by those unfamiliar with health care administration, are of a nature that threaten to undermine Wisconsin's health care delivery system -- a system that is already facing a physician shortage in certain geographic areas and certain specialties.

If you work in the health care system, that is, if you struggle with recruiting physicians to rural or urban areas, if you are a hospital trying to keep the only long-term care facility within miles open, if you are a rural family practice doctor who also delivers babies because there are few, if any, obstetricians in the area, or more importantly, if you are a patient who may not have access to the care you need, you know the consequences of inaction or inadequate action, are far beyond anecdotal.

What has happened in Illinois, Oregon, Washington, Nevada, Ohio, and many other states without caps simply cannot be ignored or minimized:

- In Oregon, liability premiums for family practice physicians that deliver babies have increased 332% since caps on non-economic damages were struck down in 1999. By 2002, 34% of all physicians delivering babies in Oregon had quit performing deliveries.

- In Washington, where their short-lived caps were struck down in 1988, fewer doctors are delivering babies and more women are arriving in Washington hospitals never having received prenatal care.

- In Illinois, were in 2002 uncapped non-economic damages accounted for 91% of the average jury award, OB-GYNs have fled the state, many coming to Wisconsin. Southern Illinois is devoid of neurosurgeons and without head trauma coverage.

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- In Ohio, where caps were struck down in 1991 and again in 1995, a 2004 survey of physicians conducted by the Ohio Department of Insurance indicated that nearly 40% of those who responded said they had retired, or planned on retiring in the next three years due to rising insurance costs. Only 9% of the respondents were over age 64.

While the reason we are all here today is the result of action taken by Wisconsin's judicial branch, the remedy, whether it be legislation or amendment of the state constitution, rests squarely with the Legislature and, in the case of legislation, also the Governor.

With that in mind, we understand that the goal of the Task Force is to develop and recommend legislative solutions. It is in the pursuit of that important task that WHA commits to working with you to provide input and information towards this end and throughout the following legislative and/or constitutional process. For act we must.

Until very recently, Wisconsin had one of the most balanced, and frankly envied, medical liability systems in the country -- the sum of an equation that included two key factors – the Wisconsin Injured Patients and Families Compensation Fund (Fund) and a cap, indexed to inflation, on non-economic damages (some would include a third component – unlimited economic damages).

Indeed, on May 12, 2005, just six weeks before the Ferdon ruling, Wisconsin Commissioner of Insurance Jorge Gomez reported on the impact of 1995 Act 10 ($350,000 cap on non-economic damages plus inflation). In his report, the Commissioner described a then favorable medical liability climate, and the impact it has had on access to health care.

> *"To conclude ... Wisconsin's malpractice marketplace is stable. Insurance is available and affordable, and patients who are harmed by malpractice occurrences are fully compensated for unlimited economic losses. Tort reform of 1995, along with well regulated primary carriers and a well managed and fully funded Injured Patients & Families Compensation Fund has resulted in the stable medical malpractice environment,* ***and the availability of health care in Wisconsin."*** (emphasis added)

In the same report, again issued roughly two months before the Supreme Court overturned our cap on non-economic damages, Commissioner Gomez indicated that medical liability carriers were predicting premiums would remain roughly the same in Wisconsin over the coming year. However, he also made it very clear that, and again I quote:

> *"... rate stability could be dramatically impacted for both the Fund and primary carriers should the caps be removed and insurers face unlimited non-economic damages."*

Commissioner Gomez must have a crystal ball in his office, for today, just seven weeks since the Ferdon decision, his same concerns are not only being expressed, but predicted by leading actuaries.

Just this month, Pinnacle Actuarial Resources, a respected independent actuary and consulting firm, predicted premiums for Wisconsin doctors and hospitals will increase by a total of 18% to 22% --- 12% to 15% for primary ($1 million/$3 million) coverage, and up to 150% for the Fund, which pays claims in

excess of primary coverage. According to Pinnacle, Wisconsin's not-for-profit insurance fund, which interestingly has many newfound advocates these days, will be hit *much harder* than primary insurers because it is now responsible for unlimited non-economic damages.

A fair system, one that balances the rights of injured parties with the basic need for an accessible health care system, is what we had in Wisconsin, and what we must strive to maintain through this process. A system in which liability premiums do not drive out of business, out of the state, or into retirement, the very hospitals and doctors we count on the most when we need them the most.

Finally, I would like to read an excerpt from testimony delivered on April 7, 2005 by my counterpart in Illinois, just one of many states facing a very real, very litigation-driven health care access emergency:

> *"The medical liability crisis in Illinois is causing an unprecedented health care access crisis throughout the state. While some areas of Illinois may be suffering more than others, the systemic problems driving these crises exist all over Illinois and show no signs of abating. In the areas hardest hit, we are finding an absence of obstetricians willing to treat "high risk" babies, emergency care physicians unwilling to provide trauma care, and neurosurgeons refusing to provide complex and high-risk procedures."*
>
> *The commercial insurance market has abandoned hospitals, leaving them to pay the astronomical costs of verdicts and settlements out of their own pockets – money that should be spent on caregivers and new technology and in dozens of other ways that would benefit patients and communities. This crisis is growing. If nothing is done, the health care access barriers may become insurmountable."*

This is not a "hollow anecdote", this is real life, and it is testimony I hope you will never here in Wisconsin.

On August 25, 2005, after passing the Democrat-controlled house and Democrat-controlled Senate, Illinois Governor Rod Blagojevich, also a Democrat, signed Illinois's new cap on non-economic damages into law.

We must learn from the mistakes of other states, not try to repeat them. We do not need to experience the dismantling of a health care system; we need to prevent it from happening.

WHA believes a balanced and fair system can be preserved in Wisconsin. We also believe that system must have as its foundation a cap on non-economic damages.

PINNACLE
ACTUARIAL RESOURCES, INC.
Consulting Actuaries

Pinnacle News Flash

August 2005

About the Author

Robert J. Walling

Mr. Walling is a Principal and Consultant in Pinnacle's Bloomington, IL headquarters. He is a Fellow of the Casualty Actuarial Society (CAS) and a member of the American Academy of Actuaries. He has served the CAS as Chairman of the Ratemaking Seminar, Risk and Capital Management and New Fellows Committees.

Mr. Walling is a frequent industry speaker on medical malpractice, commercial lines ratemaking, and predictive modeling topics.

In the area of medical malpractice, Mr. Walling has been involved in:

- Industry surveys of market conditions for state regulators, healthcare industry associations, and other interested parties,
- Legislative costing studies examining issues such as caps on non-economic damages, attorney fee caps, medical review boards, physician apology ("I'm Sorry") laws, and Patient Compensation Funds,
- Reserving, ratemaking, and legislative costing studies of birth related neurological injury compensation funds and other patient compensation funds,
- Reserving and funding studies for captives & self insurance programs,
- Reserve analyses of medical malpractice insurers, and
- Stochastic modeling of Death, Disability & Retirement ("Free Tail") liabilities.

Mr. Walling holds a B.S. in Mathematics Education from Miami University.

Pinnacle Predicts Climbing Wisconsin Med Mal Costs

One of the medical malpractice insurance industry's last remaining American Medical Association "white states" — medical malpractice environments viewed as "currently okay" — is in danger of losing financial stability due to a recent Wisconsin Supreme Court decision.

Pinnacle Actuarial Resources, Inc. (Pinnacle) has performed an initial analysis of the potential impact of the Wisconsin Supreme Court's decision in *Ferdon vs. Wisconsin Patients Compensation Fund*.

Pinnacle's analysis suggests that health care providers' overall insurance costs could increase by 18% to 22%. This includes a 12% to 15% rise in insurance company premiums and up to 150% growth in Wisconsin Patient Compensation Fund (PCF) assessments. These results highlight the fact that the PCF will soften the blow for insurers but not for health care providers.

Wisconsin providers' insurance costs could go up 18% to 22%

The analysis also finds that insurance industry reserves may experience additional adverse development of $35-$40 million because of the court's ruling. This amount represents about 25% of current annual industry premium. The finding excludes the likely material adverse development of PCF loss reserves.

The court's ruling in the Ferdon case found that the state's cap on non-economic damages was unconstitutional. The 4-3 decision found that the cap violates the state's equal protection guarantees. The court also stated that the ruling does not impact the state's damage cap in wrongful death cases. Reinstatement of the caps may require a change in the state's constitution.

Outstanding claim liabilities are significant because open claims will now be tried under legal conditions not contemplated in the insurance rates or the insurer loss reserves prior to the ruling. This includes some claims that remain open more than a decade after the claim event.

Higher rates and loss reserves, along with the increased uncertainty created by not having a cap on non-economic damages, will add to the instability of the market. This will create uncertainty which could have several detrimental effects on the market.

Wisconsin insurance company loss reserves could increase by $35 to $40 million

This volatility could reduce the availability of affordable coverage as insurers respond to the uncertainty created with more conservative pricing assumptions and higher contingency margins. Elimination of caps could adversely affect market stability as insurers restrict new business and look to redirect their capital to more financially attractive lines and states. At its worst, deteriorating conditions could lead to a reduction in available healthcare providers.

It is worth noting that several other elements of the state's medical liability reform remain intact and should continue to provide stability.

To learn more about Pinnacle's Wisconsin analysis or our other medical malpractice services, contact Rob Walling at rwalling@pinnacleactuaries.com or (309) 665-5010 or visit us at www.pinnacleactuaries.com.

Wisconsin Medical Malpractice At a Glance

- Non-Economic Damage Caps instituted in 1995 at $350,000 with inflation adjustment now $445,775
- Rates are typically among the 10 lowest in the U.S. (source: Medical Liability Monitor)
- Annual Premium of approximately $110M (24th largest state market)
- Loss and ALAE Ratio 1999-2003 averaged 51.8% (2nd best in the U.S.)
- Leading writers:
  - PIC Wisconsin (33%)
  - Medical Protective (17%)
  - CNA (13%)

The Realities of a Medical Liability Crisis: The Experiences of Four States

July 2005

Currently, the American Medical Association has identified 20 states in medical liability crisis. Presented below are experiences from four of those twenty crisis states.

Oregon

Background information:

Instituted $500,000 noneconomic damage cap in 1987.
Cap declared unconstitutional by Oregon Supreme Court in 1999.

Oregon now one of 20 states identified by the AMA as a crisis state.

As cited in the 2004 ECONorthwest report, most physicians have policies that cover $1million per claim and $3 million in aggregate. (ECONorthwest, Medical Malpractice Damage Caps, 2004, 5) (ECONorthwest is the Northwest's largest economic consulting firm.) (Wisconsin law requires such coverage.)

What Happened to Access?

ECONOMISTS CONCLUDE MEDICAL LIABILITY INSURANCE RATES ARE RESPONSIBLE FOR REDUCING NUMBER OF MDS IN OREGON, ESPECIALLY RURALS

- ECONorthwest, the largest economic consulting firm in the Northwest, concluded that rising medical liability insurance rates have been associated with a declining number of physicians in Oregon, especially in rural areas and those specialties experiencing the steepest premiums increases. (ECONorthwest, 24)

THIRD OF OBs QUIT; THIRD MORE INTEND TO QUIT; WORSE IN RURAL

- 2002 survey of obstetrical clinicians in Oregon (most recent data available) showed that 34 percent of all those delivering babies have quit performing deliveries since 1999. Of those, 75 percent practice outside the Portland metropolitan area where more than one-half the state's women give birth. In addition, 31 percent of the obstetricians said they intended to quit deliveries within the next five years. (ECONorthwest, 9)

MDs LEAVING OREGON

- A 2002 study by the Oregon Medical Association found that nearly one in eight physicians already has or definitely will close or sell his or her practice. 13.2% of all physicians already have or definitely will stop providing direct patient care. The study also found that among all

surgeons in Oregon, 23.5% already have or definitely will stop providing certain services because of changes to liability insurance. (ECONorthwest, 10)

NEW PHYSICIANS CONSIDER LIABILITY ENVIRONMENT WHEN CHOOSING PRACTICE

- The medical liability environment may also have an impact on the number of new physicians practicing in Oregon. An ECONorthwest report cited an AMA survey that found that 39% of medical school students said that the medical liability environment affected their decision about the state in which they would complete their residency, and that 48% of the students said that liability affected their choice of specialty. (ECONorthwest, 10)

OBs LEAVE RURAL COMMUNITIES

- Rural patients in Oregon are being particularly hard hit. Roseburg Women's Healthcare, which delivered 80% of the babies for the area, closed its doors in May 2002 because its liability insurance was canceled after a single, $8.5 million lawsuit. The closest other providers are 60-90 minutes away. "We consider this a medical crisis for the community," Mercy Medical CEO Vic Fresolone told the Associated Press. (Jun. 26, 2002.) (AMA, http://www.ama-assn.org/ama/pub/category/12395.html)

RURAL FAMILIES LOSE OB SERVICE

- Rural families in John Day, Hermiston, Reedsport and Roseburg [Oregon] have either lost obstetric care or have seen services drastically reduced. "We delivered more than 200 babies with no claims, then our local surgeon, who was backup for C-sections, relocated," said Reedsport's Dr. Robbie Law. "We were unable to recruit another surgeon because of the high premiums and fear of increasing risk of litigation. Now our patients have to travel 30-40 minutes to get care." (*The Business Journal of Portland*, Jan. 10, 2003 and Oregon Medical Association)

MD STOPS DELIVERING BABIES

- Dr. Katherine Merrill delivered as many as 40 babies a year in Astoria, a job she loved. In August 2003, Merrill stopped delivering babies -- a decision prompted by the steeply rising costs of medical liability insurance. Merrill said something needs to be done to keep physicians from leaving the state or quitting high-risk specialties. "Otherwise there will be no doctors in your town to deliver babies or to do brain surgery when you've been in a car accident," she said. (*The Associated Press*, January 24, 2004)

Impact on Premiums

332% INCREASE IN PREMIUMS

- Since the caps were lifted in 1999, insurance premiums for family practice physicians that deliver babies has gone up as much as 332% in Oregon, while general surgeons have seen increases of 196% and Obstetricians have seen increases of 221%. (Note that this was data from one of two insurers in Oregon.) (ECONorthwest, 7).

80% PREMIUM JUMP AFTER CAPS LIFTED

- In the first year after the caps were lifted in Oregon, premium increases were less than 5%, but two years after the lifting of the caps, average premiums for all physicians in Oregon jumped 80% in a single year. (ECONorthwest, 5, 6)

WISCONSIN HOSPITAL ASSOCIATION

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AVERAGE CLAIM HAS JUMPED 90%

- The average amount paid on claims has increased by 90% since damage caps were lifted in 1999, with the steepest increases in neurology/neurosurgery and obstetrics/gynecology. (ECONorthwest, 13)

PREMIUM INCREASE NOT LINKED TO INSURANCE MISMANAGEMENT

- ECONorthwest concluded that in Oregon, changes in investment returns likely provide little explanation for the increases in medical premiums. Empirically, a 1 percent point decrease in investment income has been associated with a 2 to 4 percent increase in premiums. Between 1997 and 2002, the rate of return of the largest insurer of physicians in Oregon declined by 1.07 percent while over that same period, premiums increased by 111 percent, or according to ECONorthwest, 25 to 50 times more than explained by changes in investment income. ((ECONorthwest, 18)

What has happened to health care costs?

INCREASED PREMIUMS LEAD TO HIGHER HEALTH CARE COSTS

- The ECONorthwest report also concluded that increased medical liability insurance premiums can lead to higher health care costs in three ways: pass-through of premium increases to patients and health insurers, reduced supply of health care services, and increased testing and procedures, i.e., defensive medicine. (ECONorthwest, 11)

OREGON COST OF BABY DELIVERY INCREASED 31%

- "In 2002, the Oregon Department of Human Services (DHS) estimated that the average cost of baby deliveries covered by the [Oregon Health Plan] would increase by $300 (31 percent) due in part to the increases in medical malpractice premiums." (ECONorthwest, 22)

DEFENSIVE MEDICINE; C-SECTION RATE INCREASED

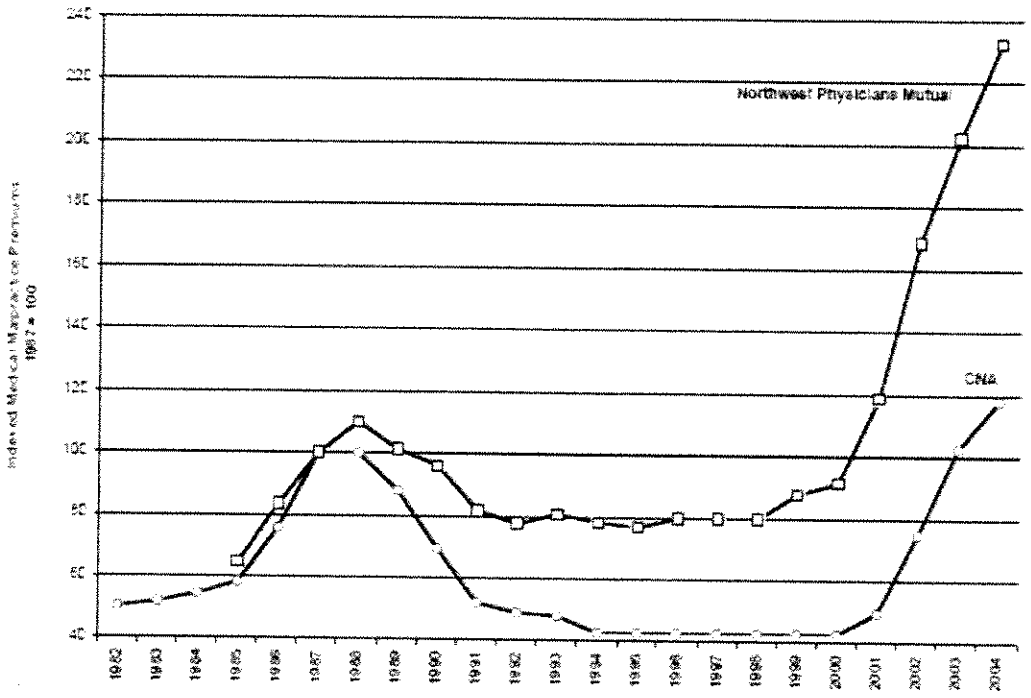
- Fear of being sued is cited as a factor behind increasing C-section rates. In 1997, Oregon's C-section rate was 17 percent, but by 2003, it had risen to 25 percent. Dr. Ono says the possibility of lawsuits forces doctors to practice defensive medicine -- delivering babies surgically at the slightest hint of trouble. He cites the risk of litigation as why his annual insurance premiums have risen from $25,000 to $70,000 in the past three years. (*The Oregonian*, Jan. 2, 2005)

OREGON MARKET FOR HOSPITAL LIABILITY INSURANCE DISINTEGRATES

- Following the departure of ten insurers, there is now only one insurance provider to Oregon hospitals. (ECONorthwest, 18)

Charts

Figure 1: Indexed Medical Malpractice Premiums for Oregon Physicians, 1982-2004 (1987=100)



Source: CNA and Northwest Physicians Mutual

ECONorthwest, Medical Malpractice Damage Caps, 2004, 6

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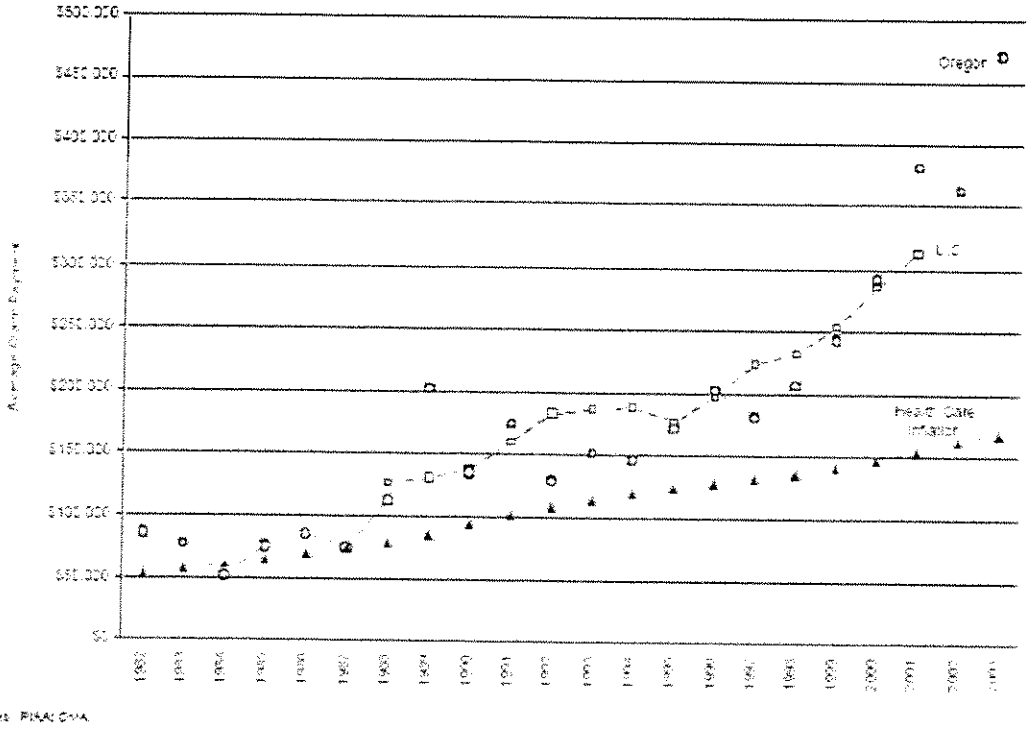
Figure 4: Average Payment on Medical Malpractice Claims, U.S. and Oregon, 1985-2002



Sources: PIAA; CMA

ECONorthwest, Medical Malpractice Damage Caps, 2004, 15

Washington

Background information:

Instituted noneconomic damage cap in 1986.
Cap declared unconstitutional by Washington Supreme Court in 1988.

Washington now one of 20 states identified by the AMA as a crisis state.

Access

RURAL MD'S DROP OB: PREGNANT WOMEN FOREGO PRENATAL CARE

- When rural doctors decide to drop obstetrics insurance coverage and stop delivering babies because of liability insurance premiums -- as they have in Odessa, Republic and Davenport -- they're also prohibited by their insurance companies from offering prenatal care. That means more pregnant women who've never had a prenatal check-up are showing up at Spokane hospitals to deliver babies. "**That is Third-World medicine**," said Tom Corley, president of Holy Family Hospital. "That's what you'd expect in the middle of Africa." Other rural women are making long drives into Spokane for prenatal care. (The Spokesman-Review, March 2, 2004)

MD STOPS DELIVERING BABIES: INSURANCE COST DOUBLED

- Delivering babies finally got too expensive for Mount Vernon doctor Bob Pringle. Like many physicians throughout Washington, he has abandoned obstetrics. "Patients who find themselves in high-risk pregnancies are going to have a problem," he said of the trend. Pringle, who recently cut his practice to part-time gynecology, said delivering babies would cost him $79,000 a year in liability insurance, nearly twice what it did a few years ago. (Seattle Post-Intelligencer, March 3, 2004)

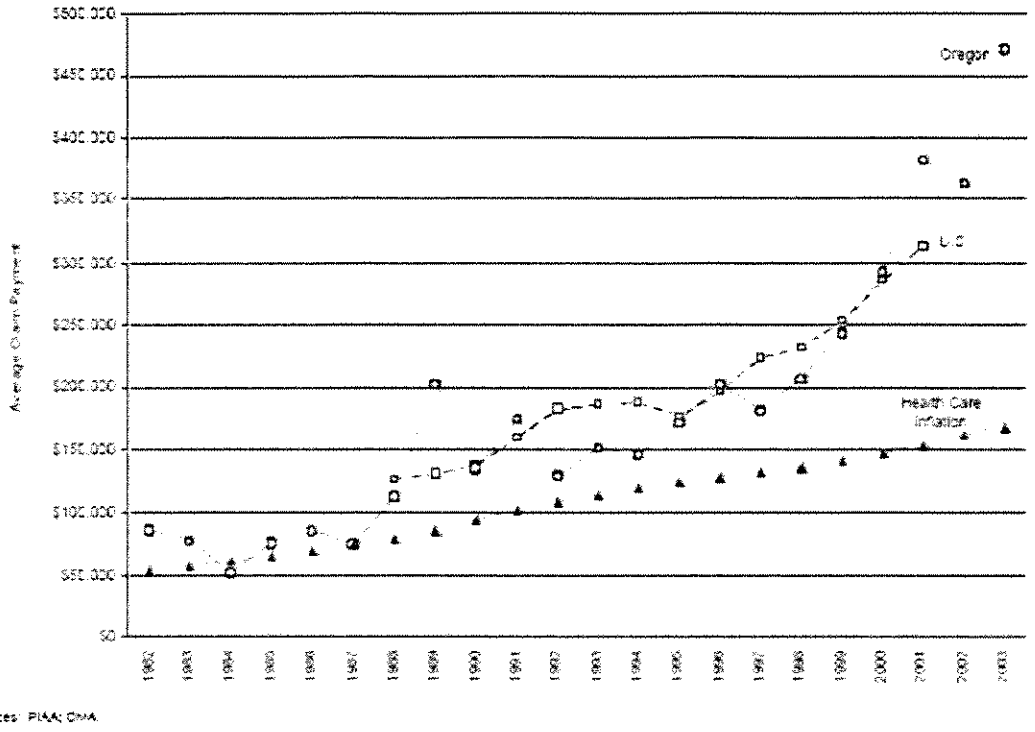
REDUCING OBGYN SERVICES
FAMILY DOCS DELIVERING BABIES CUT BY 2/3

- Facing escalating liability insurance rates, Valley Women's Healthcare, one of the larger obstetric and gynecology clinics in south King County, is reducing services. Swedish Physicians, which operates out of 11 clinics including Pine Lake and Factoria, has cut the number of family physicians delivering babies from 21 to 7. (King County Journal, January 25, 2004)

MD STOPS DELIVERING BABIES
 # OF OBS CUT IN HALF

- Effective New Year's Day 2004, 55 year-old obstetrician John Lenihan restricted his Tacoma, Washington practice to gynecology. He was driven out of obstetrics, he says, by liability insurance premiums that have recently become prohibitively expensive. By Lenihan's count, 31 independent obstetricians were practicing in the Tacoma-Lakewood area in 2001. That number shrank to 21 in 2002, then to 15 in 2003. (Tacoma News-Tribune, January 12, 2004)

Figure 4: Average Payment on Medical Malpractice Claims, U.S. and Oregon, 1982-2003



Sources: PIAA; CMA

ECONorthwest, Medical Malpractice Damage Caps, 2004, 15

Impact on Premiums

WASHINGTON PREMIUMS INCRESED 55%; WI 5%

- In 2000-2001, the combined average of the highest premium increases for OB/GYNs, Internists, and General Surgeons in Washington was 55% compared to 5% in Wisconsin. (Medical Liability Monitor, 2001.)

Illinois

Background information:

Prior to 2005, Illinois has enacted medical liability reforms on three occasions and each time the Illinois Supreme Court has invalidated those reforms. (AMA, http://www.ama-assn.org/ama/pub/category/12386.html)

Illinois now one of 20 states identified by the AMA as a crisis state.

Access

THE MEDICAL LIABILITY CRISIS:A TRAGEDY BARELY AVERTED

- On April 2, 2004, 15-year old Alex, a freshman at Naperville Central High School, went to a local elementary school with friends to play whiffle ball on the asphalt playground that is immediately adjacent to the brick school building.

  As Alex was running to catch a fly ball, he overestimated his distance from the school building and ran full force into the brick wall. Stunned, he told his friends he was going home, hopped on his bike, and was screaming in pain by the time he arrived home.

  His mother, not seeing a wound or swelling, gave him an ice pack. Hearing that he was nauseated, she took him to an emergency clinic. X-rays at the clinic showed nothing wrong. But his pain kept increasing with each passing minute, so they called 911 and transferred Alex to Edward Hospital. A CT-scan revealed a large hemorrhage in Alex's brain that required immediate surgery. Part of his skull had splintered during the impact,which cut some of the arteries in his brain, causing the hemorrhage.

  The nearest neurosurgeon was called from his office in Geneva to come to Edward. Because this was during rush hour on a Friday afternoon, backup plans were also made to airlift him to Children's Memorial Hospital. The doctor arrived at Edward in just 30 minutes, but Alex had already slipped into a coma before surgery began. The surgery lasted 3 hours, during which the neurosurgeon removed a section of Alex's skull. He replaced the piece of skull with four titanium plates that Alex must have for the rest of his life. Alex was in intensive care for the next 4 days and then spent a week on the pediatrics floor. For several months, he had to take anti-seizure medicine.

  Alex is only alive today because he had access to a neurosurgeon near his home. Had he been airlifted to Chicago (if no neurosurgeons were available in his hometown of Naperville),he would have died while necessary preparations were being made to get him there. Today, there are only three neurosurgeons in the Naperville area (just a few years ago there were 15). (http://www.ihatoday.org/issues/liability/medbroch.pdf)

THE MEDICAL LIABILITY CRISIS: A PERSONAL TRAGEDY

- On February 2, 2004, Lisa Kasten's 84-year old active father slipped in his front yard. He went inside, told his wife that he had fallen, but he seemed fine. Two hours later he complained of nausea, so his wife called 911. Lisa got to her parents' house before the ambulance, and her father was barely able to communicate. Finally the ambulance arrived and drove the eight miles to Belleville's hospital.

Impact on Premiums

WASHINGTON PREMIUMS INCRESED 55%; WI 5%

- In 2000-2001, the combined average of the highest premium increases for OB/GYNs, Internists, and General Surgeons in Washington was 55% compared to 5% in Wisconsin. (Medical Liability Monitor, 2001.)

One of the two neurosurgeons examined him and determined that he needed immediate surgery to keep him alive. However, both of Belleville's neurosurgeons had recently terminated performing surgeries because their medical liability insurance premiums were so excessive. Lisa's father was stabilized, and arrangements were made to airlift him to Saint Louis University Hospital (about a 10- minute flight). But because of a snowstorm, the helicopter was grounded. An ambulance took him on the 45-minute drive to Saint Louis University Hospital.

Upon arrival at the hospital he was comatose and close to death. As decisions were made about what procedures should be done, he became unable to breathe on his own. The next morning he was brain dead and later that evening, Lisa's mother decided to cut off her husband's life support after 62 years of marriage.
(http://www.ihatoday.org/issues/liability/medbroch.pdf)

CITY LOSES HEAD TRAUMA COVERAGE

- In February 2003, two Joliet neurosurgeons gave up brain surgery, leaving the city's only two hospitals without full-time coverage for head trauma cases. Joliet's two hospitals, Silver Cross Hospital and Provena St. Joseph Medical Center, acknowledge they will be unable to handle all emergency head trauma cases. They say they may have to stabilize and transport serious cases 45 minutes to the nearest trauma center. (Chicago Tribune, Feb. 16, 2003)

ALL OF SOUTHERN ILLINOIS LEFT WITHOUT HEAD TRAUMA COVERAGE

- The last two brain surgeons in Southern Illinois are leaving because of medical liability insurance premiums of nearly $300,000 a year. Neurosurgeons B. Theo Mellion and Sumeer Lal of Neurological Associates of Southern Illinois turned in their resignations to Southern Illinois Healthcare, said Tom Firestone, chief executive officer of SIH and will leave this summer. (UPI, February 25, 2004)

OBGYNs LEAVE ILLINOIS FOR WISCONSIN

- When three ob-gyns on staff at Advocate Lutheran General Hospital in Park Ridge learned their 2004 liability insurance premiums would climb from $345,000 to $510,470, they decided to take their practice to Kenosha, where during their first year their combined insurance will cost $50,018. "This state is like the Titanic," said one of the doctors. "A year ago, we saw the iceberg. Now we've already hit." (Chicago Tribune, March 12, 2004)

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- Dr. Susan Hagnell grew up in Chicago's Rogers Park neighborhood, attended medical school in Illinois and delivered well over 700 babies at hospitals in the northwest suburbs. But when her liability insurance bill soared from $71,848 to $118,742 last summer, Hagnell decided to jump the border. Now she delivers Wisconsin babies. "If I knew what was going to happen, I would never have become an obstetrician/gynecologist." (Chicago Tribune, March 12, 2004)

44% OF PATIENTS REPORT LOSING A DOCTOR DUE TO CRISIS

- A November-December 2004 survey of 1,300 residents statewide, conducted by Northern Illinois University's Center for Governmental Studies found:• 44 percent of those living in southern Illinois say they have lost a doctor because he or she left a practice or moved out of state to escape high medical liability insurance premiums. (Illinois Hospital Association, The Illinois Medical Liability Crisis, p. 11, 2005)

MEDMAL PREMIUMS AND MEDICAID PATIENTS

- At St.Anthony's in Chicago, which treats mostly Medicaid patients, OBs are reimbursed by Medicaid approximately $900–$1,000 per delivery. Therefore, a physician must deliver 150 babies (about the total delivered yearly in a normal OB practice) just to pay the $150,000 medical liability premium. (Illinois Hospital Association, The Illinois Medical Liability Crisis, p. 7, 2005)

Premiums

NONECONOMIC DAMAGES GREATLY INCREASE IN ILLNOIS
NONECONOMIC DAMAGES COMPRISE OVER 90% OF ALL DAMAGES

- In 2002, non-economic damages comprised 91% of the average total monetary value awarded by a jury. In 1997, it was 67%. (Cook County Jury Verdict Reporter)

ILLINOIS SEEING SKYROCKETING PAYOUTS AND #s OF LAWSUITS; PREMIUMS INCREASING

- Because of payouts that have climbed 59% in the last two years, and frequency of lawsuits filed jumping 36% over the last nine months, Illinois' major medical liability insurance company-ISMIE-announced a rate increase of 35.2 percent for its 14,000 existing policyholders. The higher rates took effect July 1, 2003. (Copley News Service, April 30, 2003)

One of the two neurosurgeons examined him and determined that he needed immediate surgery to keep him alive. However, both of Belleville's neurosurgeons had recently terminated performing surgeries because their medical liability insurance premiums were so excessive. Lisa's father was stabilized, and arrangements were made to airlift him to Saint Louis University Hospital (about a 10- minute flight). But because of a snowstorm, the helicopter was grounded. An ambulance took him on the 45-minute drive to Saint Louis University Hospital.

Upon arrival at the hospital he was comatose and close to death. As decisions were made about what procedures should be done, he became unable to breathe on his own. The next morning he was brain dead and later that evening, Lisa's mother decided to cut off her husband's life support after 62 years of marriage. (http://www.ihatoday.org/issues/liability/medbroch.pdf)

CITY LOSES HEAD TRAUMA COVERAGE

- In February 2003, two Joliet neurosurgeons gave up brain surgery, leaving the city's only two hospitals without full-time coverage for head trauma cases. Joliet's two hospitals, Silver Cross Hospital and Provena St. Joseph Medical Center, acknowledge they will be unable to handle all emergency head trauma cases. They say they may have to stabilize and transport serious cases 45 minutes to the nearest trauma center. (Chicago Tribune, Feb. 16, 2003)

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Ohio

Background information:

Ohio's attempts at medical liability reform, including damage caps have been declared unconstitutional by the Ohio Supreme Court in 1991 and 1995.

Ohio passed reform, including damage caps, in 2003. Cases challenging that reform are now beginning to make it to trial.

Ohio now one of 20 states identified by the AMA as a crisis state.

Access

OHIO MDS LEAVE OHIO FOR WISCONSIN DUE TO SKYROCKETING PREMIUMS

- "My wife and I are both physicians and just arrived in Wausau [Wisconsin] in March. We fled the crisis in Ohio after spending our whole careers in that state," said Christopher J. Magiera, a gastroenterologist. Magiera and his wife, Pamela G. Galloway, a general surgeon, gave up their 15-year-old practice when their medical liability premiums that were projected to reach $100,000 apiece. In Wisconsin, they pay a fraction of that. (Journal Sentinel, April 20, 2003)

YOUNG OBGYNs STAY OUT OF OHIO

- Dr. William Hurd, chairman of the department of obstetrics and gynecology at the Wright State University School of Medicine, said the liability crisis already is driving young doctors out of the Dayton area. "In the last two years, not a single one of our (Ob-gyn) residents has set up a practice in Dayton, or even Ohio," Hurd said. (Dayton Daily News, Aug. 28, 2002)

MD STOPS DELIVERING BABIES; NO COVERAGE IN COUNTY

- Insurance premiums got so high for Dr. Brian Bachelder of Mount Gilead that he stopped delivering babies in 2003. Because he was the only obstetrician in Morrow County, women there now travel at least a half-hour to Marion. (Columbus Dispatch, February 16, 2004)

MDs STOP DELIVERING BABIES

- Dr. Albert E. Payne, 51-year-old obstetrician-gynecologist, is facing a premium increase from $26,500 in 2001 to $120,000. "My medical office will probably have to close this year. I have been in solo private practice in Akron for the past 20 years. I never had a malpractice lawsuit judgment against me. I love what I do. Two dozen Ob-gyns in my area have closed their practices in the past two years. If my sad prediction is correct, after next year, there will be none left." (Columbus Dispatch, January 5, 2004)

MDs STOP DELIVERING BABIES
INS PREMIUMS WOULD COST 11 MONTHS OF MDs SALARY

- Dr. Frank Komorowski, 58, of Bellevue, stopped delivering babies after 20 years when he found out Dec. 26, 2002, that his liability insurance was tripling to more than $180,000. Komorowski-the only obstetrician in Bellevue-figured it would end up costing him nearly 11 months of his salary to pay the premium increase in addition to taxes and other expenses. (The News-Messenger, March 5, 2003)

40% OF OHIO MDs HAVE OR PLAN TO RETIRE DUE TO LIABILITY COSTS

- In the summer of 2004, the Ohio Department of Insurance commissioned a survey of 8,000 doctors to understand how rising premiums affected the doctors' practices and their patients. (Exhibit E). The results demonstrated that the rising medical liability insurance costs have significantly affected physician behavior. Nearly 40 percent of the 1,359 doctors who responded to the survey indicated that they have retired or plan to retire in the next three years due to rising insurance costs, yet only 9 percent of the respondents were over age 64. (Ohio Medical Malpractice Commission, 2005, 4)

48% OF OBGYNs AND FAMILY PHYSICIANS HAVE STOPPED DELIVERING BABIES

- In northeast Ohio, 48 percent of OB/GYN and family practice physicians reported they have stopped delivering babies due to high medical liability insurance costs. (Ohio Medical Malpractice Commission, 2005, 5)

OHIO LIABILTY CRISIS COULD CREATE ACCESS CRISIS

- A 2004 Ohio Department of Insurance survey of 8,000 doctors reported that high medical liability premiums are having an effect on health care services in Ohio, and that Ohio could soon face a crisis of access to care. (Ohio Medical Malpractice Commission, 2005, 5)

Premiums

PREMIUMS SKYROCKET IN OHIO

- The state Department of Insurance expects premiums to increase 10 percent to 40 percent this year. A year ago, they rose by an average of 30 percent. Many doctors with specialty practices in, say, obstetrics, saw their premiums rise by 100 percent or more. (Akron Beacon Journal, February 18, 2004)

PREMIUMS SKYROCKET IN OHIO
PREMIUMS MUCH LESS IN INDIANA (WITH CAP)

- From 2001-02, Ohio physicians faced medical liability insurance increases ranging from 28 to 60 percent. Ohio ranked among the top five states for premium increases in 2002. General surgeons pay as much as $74,554, and Ob-gyns pay as much as $152,496. Comparatively, Indiana (Indiana has a noneconomic damage cap) general surgeons pay between $14,000-$30,000; and Ob-gyns pay between $20,000-$40,000. (Medical Liability Monitor Oct. 2002)

OHIO COMMISSION EXPECTS TORT REFORM TO STABILIZE OHIO CRISIS

- The statutorily created Ohio Medical Malpractice Commission stated in its 2005 report that based on testimony and data from states that do have tort reform in place it fully expects tort reform to have a stabilizing impact on the medical malpractice market in Ohio over time. (Ohio Medical Malpractice Commission, 2005, 6)

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Other notable facts on the medical malpractice crisis:

IN CRISIS STATES, PREMIUMS MAKE UP AN INCREASED SHARE OF COST OF DELIVERING A BABY

- If an obstetrician delivers 100 babies per year (which is roughly the national average) and the malpractice premium is $200,000 annually (as it is in Florida), each mother (or the government or her employer who provides her health insurance) must pay approximately $2,000 merely to pay her share of her obstetrician's liability insurance. If a physician delivers 50 babies per year, the cost for malpractice premiums per baby is twice as high, about $4,000. It is not surprising that expectant mothers are finding their doctors have left states that support litigation systems imposing these costs. Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, "Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System." 13, July 24, 2002

Additional information can be found at http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnowjune142005.pdf.

In the last 15 years, the number of mega-verdicts over $1 million rose 600 percent. [8] "Medical Liability Insurance Crisis." *American College of Emergency Physicians*. June 2003. Date accessed: February 24, 2004.

According to Jury Verdict Research, a private research firm, awards rose 100 percent between 1997 to 2000, from $503,000 to $1 million "Verdict and Settlement Study Released: No Change in Median Medical Malpractice Jury Award Plaintiff Recovery Rate Up a Fraction." Jury Verdict Research. March 20, 2003. Date accessed: February 24, 2004.

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WISCONSIN IN BRIEF

Wisconsin

Background on Wisconsin's medical liability noneconomic damage cap

- Cap was established in 1995 at $350,000 for injuries not resulting in death. The amount increased with inflation each year and had grown to over $445,000 by 2005.

- Wisconsin continues to have medical liability caps for wrongful death. Those caps are $350,000 for deceased adults and $500,000 for deceased children. Those caps were ruled to be constitutional by the Wisconsin Supreme Court in 2004.

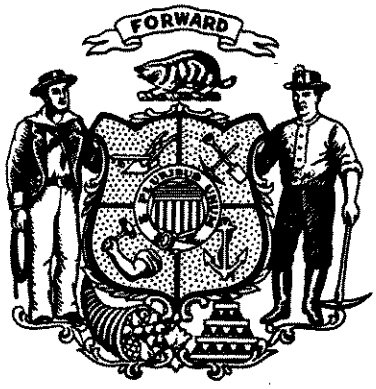
- "Wisconsin has the highest primary insurance coverage requirement of $1million per incident and $3 million per policy year. Wisconsin is also the only [Patients Compensation Fund] to have both mandatory participation and unlimited coverage." Kim Swissdorf, Wisconsin Legislative Fiscal Bureau, 2003-2005 Budget Paper No. 458, Patients Compensation Fund (Insurance and Health and Family Services), 4 (2003)

- Prior to the Supreme Court's decision, Thomas F. Dickinson, President and CEO, FinCor Holdings Inc. wrote about the insurance perspective on Wisconsin's medical liability environment:
    - "Contrary to the assertions of opponents of non-economic damage caps, Wisconsin's non-economic damage caps allow insurers such as MHA Insurance Company to keep medical liability premiums affordable....One of the main reasons MHA Insurance Company expanded its professional medical liability insurance offerings to the state of Wisconsin was due to the state's non-economic damage caps. Recently, other new medical liability insurance companies have entered the market as well, which is good news for hospitals. The increased competition will no doubt have a positive influence on premium affordability. " FinCor Holdings, Inc. is a sister organization to MHA Insurance company. (Solutions Spotlight, July 2005)

- Unlike patients in almost all other states, Wisconsin patients who are injured by medical malpractice have access to unlimited economic damages through the Injured Patient and Family Compensation Fund. The Fund ensures that all injured patients are fully compensated for past and future medical costs, lost earnings, and other economic damages.

- Wisconsin has a unique system in the country for addressing medical malpractice. Through mandatory insurance and the Injured Patients and Families Compensation fund, injured patients are assured of receiving all economic damages awarded to them by the jury. Unlike Wisconsin, in most states, an injured plaintiff can only expect to receive economic damages up to the limits of the defendant's liability insurance (usually $1million). Thus, in other states, even though a jury might award $5million in economic damages, the plaintiff is likely to only collect the limit of the defendant's liability insurance.

END



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WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

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

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

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

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

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

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

LEGISLATIVE OPTIONS

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

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

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

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

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

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

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

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

SUMMARY OF THE OPINIONS

MAJORITY OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCURRING OPINION

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

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

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

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

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

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

The concurring opinion concluded:

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

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

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

DISSENTING OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISSENTING OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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