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Court of Appeals Removes Non-Economic Damage Cap

WHA: Court decision risks patient access to health care

A three-judge panel of the Wisconsin Court of Appeals on July 5 released an opinion in *Ascaris Mayo v. IPFCF* holding that Wisconsin's \$750,000 cap on non-economic damages in medical malpractice cases is unconstitutional for all injured patients because the Legislature lacked a rational basis for enacting the non-economic damage cap. It is expected the decision will be appealed and heard by the Wisconsin Supreme Court.

The case does not impact economic damages, and unlike successful plaintiffs in non-medical liability suits who must rely on the solvency of the defendant to recover economic damages, Wisconsin patients who are injured by medical malpractice are guaranteed recovery of an unlimited amount of economic damages through the Injured Patient and Family Compensation Fund (IPFCF) funded by provider assessments.

The Court of Appeals decision overturns the non-economic damage cap passed with significant bipartisan support in the Legislature and signed into law by Governor Jim Doyle in 2006. WHA, together with the Wisconsin Medical Society and American Medical Association filed a joint amicus brief with the Court of Appeals in 2015 supporting the constitutionality of the non-economic damage cap. That brief can be found here: www.wha.org/pdf/WHA_WMS-AmicusCuriaeBrief-Mayo.pdf.

Within two hours of the decision, WHA issued a press release expressing concern about the impact of the decision on future physician shortages and patient access to health care should the decision be upheld by the Wisconsin Supreme Court. That press release appears on page 2. *(continued on page 4)*

AHA Rural Policy Forum Expanded To Incorporate BCRA DC Fly-In

WHA to participate, schedule Hill meetings

With health reform front and center in Washington, D.C., the American Hospital Association (AHA) is broadening its previously rural-focused policy forum, slated for July 19-20, to now incorporate a fly-in for the full hospital field on the Better Care Reconciliation Act of 2017 (BCRA). WHA plans to attend both the rural sessions and the BCRA update and then head to Capitol Hill to meet with Wisconsin delegation members. WHA will coordinate Hill meetings for all Wisconsin attendees.

The AHA agenda will include a welcome reception July 19 and educational sessions the morning of July 20 with attendees heading to Capitol Hill for meetings in the afternoon. The AHA's confirmed speakers on July 20 include Sen. Chuck Grassley (R-Iowa) and Health Business and Services Administration (HRSA) Administrator George Sigounas, MS, PhD, among others.

If you haven't registered for the Rural Policy Forum and/or would like to participate in the BCRA fly-in, contact Jenny Boese, WHA vice president, federal affairs & advocacy, at jboese@wha.org or 608-268-1816, and register with the AHA at: www.surveymonkey.com/r/QRQV59W. For questions, contact Jenny Boese.

Court Decision Risks Patient Access to Health Care

Loss of non-economic damage cap will exacerbate future physician shortages

The Wisconsin Hospital Association (WHA) is concerned it will become more difficult for patients to find care in their communities, particularly in rural and inner city areas, if the July 5 Wisconsin Court of Appeals ruling on the constitutionality of Wisconsin's cap on non-economic damages in medical malpractice cases is upheld.

"We disagree with the Court of Appeals conclusion that there is no evidence or rationale supporting the Legislature's policy decision to protect access to health care in Wisconsin by enacting Wisconsin's cap on non-economic damages in medical malpractice cases," said WHA President/CEO Eric Borgerding. "Upsetting the Legislature's informed policy decision by invalidating Wisconsin's cap on noneconomic damages will negatively impact Wisconsin communities' efforts to attract physicians to provide accessible, quality health care to their residents."

"Wisconsin's unique, balanced medical malpractice system that includes a cap on non-economic damages is a key policy that has helped Wisconsin retain and attract high-quality physicians to Wisconsin communities," said Borgerding. "Without a sufficient supply of physicians in communities throughout the state, Wisconsin's high rankings in health care access and quality would not be achievable."

In 2016, the Wisconsin Council on Medical Education and Workforce (WCMEW) released a report indicating Wisconsin may face a shortage of more than 2,000 physicians by 2030. To address that shortage, one of that report's recommendations was to maintain public policies that preserve Wisconsin's medical liability environment because of their impact on retention and in-migration of physicians.

Included in the WCMEW report is a 2012 study by economists John Perry and Christopher Clark published in *Business Economics* that concluded, "We find robust evidence that noneconomic damage caps impact physician populations. This finding is present in the majority of prior literature....The inference from this work is that physicians are less likely to move away from states and more likely to move to states that have implemented certain medical malpractice liability reforms."

"The WCMEW report highlights the challenges that Wisconsin faces in ensuring Wisconsin's supply of physicians meets patient demand for accessible health care," said Chuck Shabino, MD, WHA chief medical officer. "The competition nationally to recruit physicians is fierce. Wisconsin must continue to focus on ensuring the aspects of our state that attract physicians, such as a favorable medical malpractice environment, are maintained."

Unlike patients in most states or other successful plaintiffs in non-medical liability suits, Wisconsin patients who are injured by medical malpractice have access to unlimited economic damages through the Injured Patient and Family Compensation Fund. Funded exclusively by assessments on health care providers, the Fund places Wisconsin medical liability plaintiffs in a better position than patients in other states and other injured plaintiffs—recipients are guaranteed recovery. Other injured parties are not guaranteed recovery, left instead to hope that a tortfeasor has sufficient insurance coverage for not just non-economic damages but also all past and future medical costs, lost earnings, and other economic damages incurred by the injured party.

The public policy balance of guaranteed recovery for injured plaintiffs to better protect injured patients and a cap on non-economic damages to support accessible health care has served Wisconsin well and is key to Wisconsin's comprehensive medical liability system. The current cap on non-economic damages was passed with bipartisan support in the Legislature and signed into law by Governor Jim Doyle in 2006.

"We are expecting today's decision will be reviewed by the Wisconsin Supreme Court, and we believe the Court will uphold the well-supported and bipartisan public policy balance set by the Legislature to help ensure accessible health care in Wisconsin," said Borgerding.

WHA 2017 Nominating Awards Committee Seeking Nominations

The 2017 Nominating Awards Committee will meet in September to consider nominating a WHA chair-elect and at-large members for the WHA Board and candidates for the Trustee and Distinguished Service Award (information on these two awards can be found on the WHA website at www.wha.org/award-program-information.aspx.)

WHA members interested in being considered for, or wish to submit a candidate for, an at-large WHA Board seat or the chair-elect position should contact either WHA President/CEO Eric Borgerding at eborgerding@wha.org or WHA Nominating Committee Chair Mike Wallace at Michael.wallace@forthc.com.

Wisconsin Hospitals State PAC & Conduit—Next Contributor List to Run July 14

The Wisconsin Hospitals State PAC & Conduit campaign is over the halfway mark of reaching its 2017 goal of raising \$312,500. Over \$165,000 has been contributed by over 160 individuals. To be included on the next full contributor list to be published in the July 14 edition of the WHA *Valued Voice* newsletter, make your contribution today. Contributions received by July 13 will be listed, and individuals who make their contribution by that date will receive a Wisconsin Hospitals State PAC & Conduit padfolio. To contribute, log onto www.whconduit.com or call WHA's Jenny Boese at 608-268-1816 or Nora Statsick at 608-239-4535.

Recent Announcements on Public Health Reporting for Meaningful Use & MIPS DPH, CDC announce readiness to accept certain public health data from hospitals, physicians

On June 30, the Wisconsin Division of Public Health (DPH) announced it has the technical capacity to receive electronic case reporting data from hospitals and physicians attesting to Stage 3 of the Medicare or Medicaid EHR Incentive Program in 2017.

Under Stage 3, which is optional in 2017 but mandatory starting in 2018, hospitals and physicians must select and report on a certain number of public health and clinical data registry measures. Submitting case reporting to a public health authority such as DPH can be counted toward this reporting requirement.

DPH's announcement, as well as further information on how to register to submit electronic case reporting data to DPH may be found at: www.dhs.wisconsin.gov/phmu/electroniccasereporting.htm.

Also last week, the federal Centers for Disease Control & Prevention (CDC) announced that for hospitals and physicians attesting to Stage 3 of the Medicare or Medicaid EHR Incentive Program in 2017 and for clinicians participating in the Merit-Based Incentive Payment System (MIPS) in 2017, the CDC is accepting registration from such providers of their intent to submit data to the CDC's National Health Care Surveys. According to the CDC, such surveys include the National Hospital Care Survey, the National Hospital Ambulatory Medical Care Survey, and the National Ambulatory Medical Care Survey.

Under Stage 3 and under MIPS, providers must select and report on a certain number of public health and clinical data registry measures, and submitting data to public health registries such as the CDC's National Health Care Surveys can be counted toward meeting this reporting requirement.

Additional information regarding the National Health Care Surveys and how to register to submit data is available here: www.cdc.gov/nchs/dhcs/meaningful_use.htm.

For additional information, contact Andrew Brenton, WHA assistant general counsel, at 608-274-1820 or abrenton@wha.org.

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“WHA fought hard several years ago to enact bipartisan legislation establishing the current cap,” said WHA President/CEO Eric Borgerding. “The Legislature held multiple hearings and received ample, credible supporting information as it debated this important public policy that impacts the accessibility of health care throughout Wisconsin. We are frustrated the Court of Appeals dismissed the multiple sources of information supporting the Legislature’s rational basis of the non-economic damage cap both when it was enacted in 2006 and today.”

“WHA will file an amicus brief with the Supreme Court and is working with other partners who share our concerns with the Court of Appeals’ decision,” said Borgerding.

In writing the Court of Appeals’ majority opinion, Judge Joan Kessler wrote, “We are left with literally no rational factual basis in the record before us which supports the Legislature’s determination that the \$750,000 limitation on noneconomic damages is necessary or appropriate to promote any of the stated legislative objectives.”

The Court of Appeals decision overturns the lower court decision in this case by Milwaukee County Circuit Court Judge Jeffrey Cohen that found the non-economic damage cap generally constitutional but unconstitutional for the particular plaintiff in this case. Judge Cohen reached a different conclusion than the Court of Appeals regarding whether the Legislature had a rational, factual basis for establishing the non-economic damage cap.

“[T]he Court has conducted a thoughtful examination of the statutory scheme and determined that the Cap is rationally related to the Legislature’s goals,” stated Judge Cohen in the 2014 lower court decision in this case on the facial constitutionality of the caps. “Studies, reports, and testimony were considered by the Legislature, which then saw fit to advance four specific goals supported by this evidence. That some studies were inconclusive is not enough to show there is no rational basis here. Plaintiffs must disprove the basis for every ‘plausible policy reason’ for the challenged classification. Having reviewed the documentation on which the Legislature relied, the Court cannot say that the goals articulated are ‘wholly irrelevant.’ The documents on which the Legislature relied contain evidence to reasonably support each goal.”

Relatedly, the U.S. House of Representatives last week passed a bill that would cap non-economic damages in medical malpractice lawsuits at \$250,000 and is modeled off of California’s non-economic damage cap established in 1975. The Congressional Budget Office concluded the legislation would reduce the federal deficit by almost \$50 billion over 10 years by lowering medical liability premiums and reducing defensive medicine.

Currently, Wisconsin’s noneconomic damage cap is technically now unconstitutional statewide as a result of the Court of Appeals decision. However, should the Wisconsin Supreme Court overturn the Court of Appeals decision, any cases filed between now and a Supreme Court decision upholding the constitutionality of the cap will remain subject to the cap.

Fast Facts from the WHA Information Center

July is Juvenile Arthritis Awareness Month

About one child in every 1,000 develops some type of chronic arthritis, and it can affect children at any age. The American College of Rheumatology estimates that around 300,000 children in the United States have been diagnosed with the condition. Growing up with arthritis can be challenging. However, with care from a team of rheumatology professionals, most children with arthritis live full and active lives.

According to the WHA Information Center, 27 patients under the age of 18 were admitted to Wisconsin hospitals with this condition in 2016. In addition, there were over 1,600 outpatient visits to hospitals of patients under the age of 18 with this condition.

Data provided by the WHA Information Center (WHAIC). WHAIC (www.whainfocenter.com) is dedicated to collecting, analyzing and disseminating complete, accurate and timely data and reports about charges, utilization, quality and efficiency provided by Wisconsin hospitals, ambulatory surgery centers and other health care providers.

