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MEDICAL MALPRACTICE LIMITS: 2005 WISCONSIN ACT 183

2005 Wisconsin Act 183, passed by the legislature and signed by Governor Doyle on March 22, 2006, establishes a limit of \$750,000 on noneconomic damages in medical malpractice cases. This replaces a lower limit which was struck down by the Wisconsin Supreme Court in 2005. In addition, the governor vetoed a bill earlier in the session which set lower limits than those enacted in Act 183.

The limit applies only to compensation for nonpecuniary damages such as pain and suffering, loss of mental or physical health, the enjoyment of normal activities and pleasures of life, or loss of society and companionship or love and affection. It does not restrict the amount that a court may award for quantifiable economic damages such as health care expenses and loss of income. Act 183 is the latest legislative effort which, since 1986, has attempted to balance the desire to maintain adequate access to affordable health care while providing sufficient compensation to the victims of medical negligence.

MEDICAL MALPRACTICE COMPENSATION SYSTEM

Compensation Fund Pays Claims Not Covered by Insurance. The payment of claims to patients injured by medical malpractice is covered by a two-level system: medical malpractice insurance and the Injured Patients and Families Compensation Fund. Generally, licensed physicians and nurse anesthetists and certain other health care providers who practice in Wisconsin are required to carry health care liability insurance with limits of at least \$1 million for each occurrence or claim and at least \$3 million for all occurrences in a policy year or all claims in a reporting year. In addition, the health care providers must pay assessments to the Injured Patients and Fam-

ilies Compensation Fund, which pays the portions of damage awards that exceed the limits of the insurance policies.

The Injured Patients and Families Compensation Fund was created by Chapter 37, Laws of 1975, the Medical Malpractice Law. Originally called the Patients Compensation Fund and renamed by 2003 Wisconsin Act 111, it is managed by a 13-member Board of Governors and administered by the Office of the Commissioner of Insurance. The Board of Governors appoints the members of the Injured Patients and Families Compensation Fund Peer Review Council, which reviews each claim for damages paid by the fund and recommends adjustments to the fees paid to support the fund by health care providers.

Mediation. Any person alleging malpractice may request mediation to resolve the dispute outside of court in an informal and inexpensive manner. 1985 Wisconsin Act 340 established the mediation system administered by the Office of the Director of State Courts, which appoints the mediation panels. If a person files a medical malpractice lawsuit, he or she must concurrently file a request for mediation, and no court proceedings may occur regarding the action until the mandatory mediation period has expired.

HISTORY OF LIMITS ON MEDICAL MALPRACTICE ECONOMIC DAMAGES

There is no statutory limit on how much a person injured by medical malpractice may recover in actual monetary damages; however, some legislators have long promoted caps on noneconomic damage awards. They argue that allowing unlimited noneconomic damages increases the cost of malpractice insurance, thus creating disincentives for medical specialists to practice in the state. Health care

costs are inflated by the increased insurance payments and the practice of "defensive medicine." Fewer medical providers and higher costs result in diminished access to affordable and adequate health care services. Opponents of caps counter that the prospect of substantial damage awards encourages medical providers to practice within acceptable standards of care. They assert that limits hamper the ability of judges and juries to punish negligent practitioners and compensate victims adequately for untimely death or debilitating injuries.

\$1 Million Limit – 1986 through 1990. 1985 Wisconsin Act 340 imposed a \$1 million limit, adjusted at least annually by the Director of State Courts according to the consumer price index, on noneconomic damages that could be recoverable in medical malpractice actions. It also generally limited attorney contingency fees on the entire award for damages, both economic and noneconomic, to one-third of the first \$1 million recovered plus one-fifth of the award in excess of that amount. The limit for noneconomic damages was in effect for actions filed on or after June 14, 1986 and before January 1, 1991. The attorney fees limits remain in effect. By the sunset date, the maximum allowable inflation-adjusted amount for noneconomic damages was \$1,351,000. After that date, there was no cap on noneconomic damages.

\$350,000 Limit – 1995 through 2005. 1995 Wisconsin Act 10 reestablished a limit on the amount awardable in noneconomic damages. Effective for cases filed beginning May 25, 1995, the allowable maximum of \$350,000 was adjusted for inflation, like the previous cap. By 2005, the adjusted limit was \$445,755. The limit was judicially affirmed by the Wisconsin Court of Appeals in 2000 in the case of *Guzman v. St. Francis Hospital*, 240 Wis. 2d 559. Although the Wisconsin Supreme Court had accepted a direct appeal from the Milwaukee Circuit Court, a 3-3 deadlocked vote sent the case to the court of appeals. The court ruled that the cap did not infringe on the right to a

jury trial and was not a violation of the separation of powers principle.

Supreme Court Strikes Limit on Noneconomic Damages. Revisiting the issue in 2005, the Wisconsin Supreme Court, in *Ferdon v. Wisconsin Patients Compensation Fund*, 284 Wis. 2d 583, found the limit violated the equal protection provision of the Wisconsin Constitution. The court declared the limit arbitrary and without rational basis, pointing out that those who were awarded damages below the limit would be fully compensated, while those who received judgments above the limit could be unfairly deprived of the reasonable amount necessary to provide for a lifetime of necessary care of someone with severe injuries.

Limits Bill Vetoed. In December 2005, Governor Doyle vetoed Assembly Bill 766, which set new noneconomic damages caps of \$450,000 for persons age 18 and older, and \$550,000 for persons under 18. In his veto message, he noted that the amounts would likely be considered arbitrary and lacking a rational basis by the Wisconsin Supreme Court, particularly as the bill set limits virtually unchanged from those previously invalidated.

ACT 183 CAPS NONECONOMIC DAMAGES AWARDS

2005 Wisconsin Act 183 creates a limit of \$750,000 on noneconomic damages for each occurrence of medical malpractice. It also requires the Compensation Fund's Board of Governors to report biennially to the legislature regarding any suggested changes to the limits and the reasons for the adjustments. Addressing the court's concern that the cap "cannot be set unreasonably low," the legislature declared that the limit "represents an appropriate balance between providing reasonable compensation for noneconomic damages associated with medical malpractice and ensuring affordable and accessible health care." The limits, which apply to occurrences on or after April 6, 2006, are in Sections 655.017 and 893.55 (1d) (a), Wisconsin Statutes.