

Fate of noneconomic damage cap in hands of top state court

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The Wisconsin cap on noneconomic damages is one component of a three-part strategy that is credited with stabilizing the state's medical liability environment, but it's been subject to constant attack and revision. The state Supreme Court is weighing whether to accept a case that will likely determine the \$750,000 cap's legal fate.

The cap has been nonexistent since a three-judge state appellate court panel ruled July 5 that it was unconstitutional. The Wisconsin Supreme Court is deciding whether it will review the case. If it decides not to, the appellate ruling stands. If a review goes forward, a ruling must be delivered by the end of next June.

Wisconsin's comprehensive medical liability system includes three central elements:

- A requirement for most physicians to carry \$1 million in liability coverage per occurrence and \$3 million in aggregate.
- The Wisconsin Injured Patients and Families Compensation Fund, which is financed via assessments (based on actuarial risk) charged to physicians, clinics, hospitals and other participants and covers all damages above the primary insurance limits.
- A \$750,000 cap on noneconomic damages.

"That cap allows the fund to provide a level of coverage that is unparalleled in any other state," said John Rather, Wisconsin Medical Society (WMS) general counsel.

It also allows Wisconsin physicians to pay lower premiums than their peers in neighboring states.

(On top of an assessment fee of between \$606 and \$1,091 for the patient fund, the Doctors Co. charged Milwaukee County ob-gyns \$34,667 for liability premiums in 2016, according to the 2016 *Medical Liability Monitor* survey. The same carrier charged \$127,748 to ob-gyns in Cook County, Illinois, and \$91,072 to those in Wayne County, Michigan.)

“The cap is critical to attracting physicians to the state and retaining them,” Rather said. “It affects the cost of health care, a physician’s willingness to engage in complex care. It affects physician decision-making. And it affects the patient-physician relationship.”

Case stems from May 2011 incident

The recent ruling stems from a case, *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, involving the injuries incurred by Ascaris Mayo, a woman who visited two separate hospital emergency departments within two days and ultimately suffered organ failure plus gangrene in all her limbs, which eventually had to be amputated, according to the case summary written by Judge Joan Kessler.

A jury ruled that neither the emergency physician nor the physician assistant who treated here were negligent, but that both failed to provide proper informed consent on diagnosis and treatment options. The patient was awarded \$15 million in noneconomic damages and her husband, Antonio Mayo, was awarded \$1.5 million for the loss of his wife’s companionship. Defendants, including the compensation fund, moved to have the award reduced to match the cap.

The trial court denied the motion ruling that, while the cap was constitutional, it was unconstitutional as it applied to this case.

Kessler and another judge on the appellate panel, Kitty Brennan, ruled that the cap was unconstitutional on its face. A third judge issued a concurring opinion that matched the original trial court’s opinion.

The Mayos said the cap was unconstitutional because they were denied due process and equal protection. Kessler and Brennan agreed.

Kessler described the cap as “arbitrary,” and wrote how it has varied in amount from \$1 million, then down to \$350,000 and then up to \$750,000 in response to legislative expiration dates and judicial rulings.

They also ruled it denies equal protection by creating “a class of fully compensated victims and partially compensated victims” in the case of catastrophically injured victims such as Ascaris Mayo.

The WMS and the Litigation Center of the American Medical Association and State Medical Societies filed an amicus brief. The brief argues against that opinion and urges the state Supreme Court to review the case.

“The Court of Appeals’ decision—despite its stated justification of seeking to protect the rights of severely injured patients—would harm the unique benefits provided to all Wisconsin patients (including and especially the severely injured) by the state’s comprehensive medical liability system,” the brief states. “Elimination of the cap will harm the protections provided by the Wisconsin Injured Patients and Families Compensation Fund.”

The brief notes that Ascaris Mayo had received more than \$8.8 million for past and future medical expenses plus future wage loss. Had her injuries occurred in another state or been the result of a car accident, “There is no guarantee that she would receive compensation sufficient to pay her past medical expenses.”

Legislative remedy may be needed

The court’s decision on whether it will review the case is expected by Thanksgiving, Rather said. If it decides to review, there will be a filing period followed by oral arguments and decision would need to be rendered before June 30 when the court’s current term ends.

If it decides not to hear the case or reaffirms the appellate decision, Rather said, the Wisconsin legislature would be faced with implementing a new cap, one that attempts to “withstand judicial scrutiny.”

Rather wouldn’t make a prediction on the outcome, but did note that there is a misunderstanding about noneconomic-damage caps that needs to be reversed.

“Far too often, the issue of the cap gets played out as patient versus physician and that it’s benefitting physicians at the expense of patients,” Rather said. “But, in reality, it’s the opposite. The cap protects the patient because it allows the (compensation) fund to exist.”

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