STATE COURT
DocketWatch®

SUMMER
2011

State Court Challenges to Legislatively Enacted Tort Reforms

by Andrew Cook and Emily Kelchen***

Introduction

Over the past three decades, proponents of civil liability reform have made significant gains.[1] Propelled by significant electoral gains in the 2010 cycle, it appears that the trend will continue this year, with 21 states so far enacting civil liability legislation.

One of the most significant pieces of civil justice reform legislation was passed in Wisconsin, the authors' home state, after Governor Scott Walker called the newly elected Republican-controlled Legislature into a special session to pass legislation focused on job creation.[2] The legislation passed both houses and was signed into law within a month of its introduction.[3] The legislation made numerous changes to Wisconsin's law, including:

1) updating the state's product liability law by getting rid of the broad "consumer expectations test" and instead requiring the plaintiff to show that a reasonable alternative design could have been adopted by the manufacturer to reduce or avoid the harm posed by the product;

2) increasing the standard for admissibility of expert evidence by adopting the *Daubert*[4] standard;

3) overturning a Wisconsin Supreme Court decision[5] that adopted the controversial risk contribution theory and holding paint manufacturers collectively liable for the lead poisoning of a young man after he ingested white lead carbonate even though the plaintiff couldn't identify the actual manufacturer of the product;

4) capping punitive damages at $200,000 or two times compensatory damages, whichever is greater; and

5) holding a party or the party's attorney liable for costs and fees for bringing a complaint, cross-complaint, defense, counterclaim, or appeal in bad faith and solely for the purpose of harassing or maliciously injuring another party.[6]

Traditionally, campaign contributions and lobbying expenditures have led to the conclusion that the primary opponents of civil liability reforms in Wisconsin and across the country are plaintiffs' attorneys.[7] In many instances, these investments have given the plaintiff's bar the ability to defeat or significantly amend state civil liability

** Andrew Cook is an attorney and lobbyist for the Hamilton Consulting Group, LLC in Madison, Wis. Mr. Cook is also the legislative director for the Wisconsin Civil Justice Council, Inc., a coalition of business, medical, and insurance groups committed to strengthening Wisconsin's civil liability laws. In addition, Mr. Cook is the president of the Madison Federalist Society Lawyers Chapter. Prior to joining Hamilton Consulting Group, Mr. Cook was a staff attorney for the Pacific Legal Foundation and an in-house attorney for the Building Industry Association of Washington.*

*** Emily Kelchen, a recent graduate of the University of Wisconsin Law School, is a staff attorney at Great Lakes Legal Foundation. Mrs. Kelchen is a member of the Madison Federalist Society Lawyers Chapter steering committee, and is the former president of the UW Law student chapter.*

INSIDE

FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

Continued from cover...

legislation.[8] At the same time, the plaintiff's bar has successfully introduced and passed laws making it easier to sue and to extract higher damages awards.[9]

Despite the efforts of the plaintiff's bar, many states have enacted substantive civil liability reforms. Often those opposed to tort reform perceive the judiciary as a mechanism to prevent tort reform measures from becoming law.[10] Soon after Wisconsin's recent reforms were signed into law, legal commentators questioned the law's constitutionality,[11] and plaintiffs' attorneys voiced their intention to challenge certain provisions in court.[12] Whether the challenges to these reforms will be successful in the courts remains to be seen.

The purpose of this article is to provide a summary of recent state supreme court cases in which opponents of civil liability reform have challenged reform laws, mostly on constitutional grounds. Part I begins with a discussion of relatively recent cases in which civil liability reform laws were challenged and struck down. Part II discusses a recent West Virginia case upholding the state's cap on noneconomic damages. Part III provides a summary of pending cases challenging civil liability reform laws in state courts across the country. Part IV provides an overview of recently enacted civil liability reform laws from various states.

I. State Court Decisions Striking Down Civil Liability Reform Laws

Constitutional challenges to state civil liability laws are typically based on separation of powers, equal protection, and right to jury trial. Below is a discussion of relevant decisions where state courts ruled that a state's civil liability reforms violated that particular state's constitution.

Wisconsin: *Ferdon v. Wisconsin Patient's Compensation Fund*
(Noneconomic Damages)

While *Ferdon v. Wisconsin Patient's Compensation Fund*[13] is a relatively old decision, it is an important case highlighting how little deference some courts grant the legislative branch when striking down legislatively imposed caps on noneconomic damages.

In *Ferdon*, the Wisconsin Supreme Court held (4-3) that the statutory limitation of $350,000 for an award of noneconomic damages in medical malpractice cases is unconstitutional as a violation of the equal protection clause of the Wisconsin Constitution. The majority opinion reiterated the theory of "judicial deference to the legislature and the presumption of constitutionality of statutes," but stated that a statute will be held unconstitutional if shown to be "patently arbitrary" with "no rational relationship to a legitimate government interest."

In reaching its decision, the court explained that the statutory limitations were not per se unconstitutional and further noted that the court recently upheld the cap on noneconomic damages for wrongful death in medical malpractice actions.[14] In his concurring opinion, Justice Patrick Crooks "emphasized" that statutory caps in medical malpractice cases may be constitutional. Nonetheless, the court struck down the caps.

In their dissenting opinion, Justices David Prosser, Patience Roggensack, and Jon Wilcox challenged the majority's conclusion that the legislatively adopted cap is not rationally related to the Legislature's objective.

The dissent specifically objected to what it termed the majority's selective use of studies (many outside

Wisconsin) and the majority's conducting a "mini trial" to justify its conclusions under the rational basis theory. Justice Prosser noted that the "court is not meant to function as a 'super legislature,' constantly second-guessing the policy choices made by the legislature and governor."

The dissent further pointed to the deliberative nature of the legislative process; the input that may be provided from parties on both or all sides of an issue; and, the voters' remedy to vote out of office those legislators who supported the law.

Ferdon was one of many controversial decisions issued by the Wisconsin Supreme Court that eventually led to Wisconsin's recently enacted tort reform law (Act 2). Numerous legal commentators in Wisconsin and across the country criticized the court for overreaching. Probably as a result of *Ferdon* and other controversial decisions that term, *The Wall Street Journal* dubbed Wisconsin "Alabama North,"[15] and Justice Louis Butler lost his election bid to conservative Michael Gableman.[16] Conservatives on the Wisconsin Supreme Court currently hold a 4-3 advantage.[17]

Former Wisconsin Supreme Court Justice and current U.S. Circuit Court of Appeals Judge Diane Sykes noted in a published speech that the importance of *Ferdon* and other controversial decisions could not be overstated. According to Judge Sykes, each represented "a significant change in the law" and marked "a dramatic shift in the court's jurisprudence, departing from some familiar and long-accepted principles that normally operate as constraints on the court's use of its power."[18]

The Wisconsin Legislature later amended the Wisconsin statute to impose a $750,000 cap on noneconomic damages. To date, the new cap has not been challenged in court.

Georgia: *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*
(Noneconomic Damages)

The Georgia Legislature passed the Tort Reform Act of 2005 to confront the "crisis" affecting the quality of that state's health care services.[19] In particular, the legislature was concerned that the cost of liability insurance was negatively affecting the state's quality of health care and potentially endangering the health of the entire Georgia population.[20]

Thus, the legislature enacted the Tort Reform Act to "promote predictability" and improve the quality of health care services.[21] Similar to Wisconsin's ill-fated law discussed above, the key feature of Georgia's tort reform law was a $350,000 cap on noneconomic damages in medical malpractice cases.[22] Also similar to the *Ferdon* case in Wisconsin, the Georgia Supreme Court ruled that the caps on noneconomic damages violated the state constitution and thus struck down the law.

Facts Leading to Lawsuit

Betty Nestlehutt was permanently disfigured when complications arose after her full facelift was performed at the Atlanta Oculoplastic Surgery (Oculus). Nestlehutt and her husband sued Oculus for medical malpractice. The jury returned a verdict of $1,265,000, which consisted of $115,000 for past and future medical expenses, $900,000 in noneconomic damages for pain and suffering, and $250,000 for loss of consortium.

Under Georgia's tort reform law[23] the jury's award was reduced to the statutory maximum of $350,000. The Nestlehutts filed a lawsuit seeking to have the cap declared unconstitutional. The trial court held that the statute violated the Georgia Constitution "by encroaching on the right to a jury trial, the governmental separation of powers, and the right to equal protection." The case was appealed to the Georgia Supreme Court.

Georgia Supreme Court's Decision

In a unanimous decision, the Georgia Supreme Court ruled that the noneconomic damages cap violated the constitutional right to trial by jury.[24]

The court pointed to the Georgia Constitution's guarantee of a jury trial in all cases where the common law recognized that right.[25] Citing case law that recognized a right to a jury in medical malpractice cases,[26] the court determined that such right includes a jury's determination of the amount of damages awarded, including noneconomic damages.[27]

According to the court, the mandatory reduction of jury awards "nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."[28] A statutorily mandated reduction of the jury's award, no matter the amount, is therefore an unconstitutional encroachment on the right to trial by jury.[29]

After striking down the caps, the court explained that this area is not completely settled. It noted that the legislature was free to modify the common law, but such power is limited when the common law impinges on constitutional rights.[30] The court also took pains to distinguish the caps from the judicial power of remittitur, leaving untouched the judiciary's power to modify jury awards.[31]

Illinois: *LeBron v. Gottlieb Memorial Hospital*
(Noneconomic Damages)

Background

In 1995, Illinois passed significant tort reform legislation that was struck down two years later in *Best v. Taylor Machine Works*.[32] Many of these same reforms were included in the 2005 legislative reforms.[33]

The 2005 legislation included a two-tiered cap on noneconomic damages,[34] which was explicitly designed to improve Illinois' health care climate.[35]

Facts Leading to Lawsuit

The plaintiffs, a minor and her mother, brought suit against Gottlieb Memorial Hospital, Roberto Levi-D'Ancona, M.D., and Florence Martinoz, R.N. The case involved injuries sustained by the child at birth and resulting disabilities.

The circuit court held that the statutory caps were an unconstitutional violation of the separation of powers. The court characterized the caps as remittitur, a power held only by the courts.

The holding had a wide impact because the presiding judge of the Law Division of the Cook County Circuit Court ordered that all pending and subsequently filed motions in any case challenging the constitutionality of the Act be consolidated before the same judge presiding over the plaintiffs' case.[36] *Lebron v. Gottlieb* was therefore the resolution of several challenges to the Act's constitutionality, both because of the consolidation and because the Act's inseverability provision invalidated the entire tort reform effort.

Illinois Supreme Court's Decision

In an opinion authored by Chief Justice Thomas R. Fitzgerald, the court, by a 4-2 decision, upheld the lower court and struck down the law.[37] The court relied, as the lower court did, on separation of powers and the conception of the caps as legislative remittitur. The court further ruled that the noneconomic damages provision was "arbitrary and violated the special legislation clause" of the Illinois Constitution.

The court further held that the Illinois Constitution prohibits one branch of government from exercising powers properly belonging to another.[38] The court's analysis therefore focused on "whether the statute unduly infring[ed] upon the inherent power of the judiciary."[39]

The court relied heavily on the *Best* decision and the separation of powers analysis articulated in that case.[40] According to the court, the mandatory reductions contained in Section 2-1706.5(a)(3) were an encroachment upon the traditional judicial power of remittitur.[41]

Also rejected was the argument that the statute could be distinguished from the one overturned in *Best* because it was narrower in scope and thus a valid exercise of the state's police power in response to the specific threat to public health.[42] The court did not compare the noneconomic damages cap to other caps that previously had been upheld, or to those that had not been challenged.[43]

In his dissent, Justice Lloyd Karmeier questioned whether the court itself had violated the separation of powers doctrine by deciding a constitutional question without first attempting to resolve the underlying case through another route.[44] Justice Karmeier also suggested the court was impermissibly limiting the power of the legislature to modify the common law of medical malpractice.[45]

Though the majority is certain that remittitur is a judicial power, the dissent maintains that it is a judicially created power that the Illinois Constitution does not vest in any branch.[46] The dissent conceptualized the caps as a modification of the jury's award rather than a reversal of the jury's decisionmaking.[47]

Legislative Response

The majority held that the entire Act was void because of its inseverability provision, but noted that "the legislature remains free to reenact any provisions it deems appropriate."[48] A proposal to amend the Illinois Constitution to explicitly allow the legislature to set damages caps failed to gain any traction.[49]

Washington: *Waples v. Yi*
(Noneconomic Damages)

Background

As an attempt to reduce medical malpractice litigation and to encourage parties to settle, the Washington Legislature in 2006 introduced and passed tort reform legislation, requiring a certificate of merit from a medical expert and 90 days advance notice to the defendant before filing the lawsuit.[50]

The certificate of merit requirement was struck down in 2009 when the Washington Supreme Court held in *Putman v. Wenatchee Valley Medical Center* that the requirement violated both the separation of powers and the right of access to courts since it conflicted with the court-developed pleading requirements.[51] The remaining portion of the 2006 reforms—the 90-day notice requirement—went before the court a year later in *Waples v. Yi*.

Facts Leading to Lawsuit

Two cases challenging the notice requirement were consolidated for decision by the Washington Supreme

Court in *Waples v. Yi* and *Cunningham v. Nicol*.

In September 2003, Nancy Waples received dental treatment from her dentist, Dr. Peter Yi. In September 2006, Waples brought suit against Yi alleging she had suffered injuries after being negligently administered Novocain during her treatment. Yi moved for summary judgment since Waples had not provided proper notice before filing the complaint. Waples admitted that she did not give notice, but argued that the statute requiring notice was unconstitutional. Both the trial court and the appellate court dismissed the case.

Linda Cunningham filed suit against her radiologist, Dr. Ronald Nicol in 2008. Cunningham claimed Nicol misread an MRI of Cunningham's brain in 2000. Cunningham provided Nicol notice of her intent to sue, but did not wait the required number of days before filing the suit in order to avoid the statute of repose. The trial court granted Nicol's motion to dismiss, and Cunningham appealed directly to the Washington Supreme Court.

Washington Supreme Court's Decision

In a 6-3 decision authored by Justice Charles W. Johnson, the court held that §7.70.100(1) was an unconstitutional intrusion on the judiciary's right to determine court procedures.[52]

Over time, Washington's common law has been developed to the point where it contains significant separation of power provisions despite the fact that Washington does not have a formal separation of powers clause in its constitution.[53] As in the earlier *Putman* case, the central issue in *Waples* was whether the statutory requirements conflicted with the court's rules of procedure. According to the court, "if a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters."[54]

The Washington statute provided that "no action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action."[55] Furthermore, the court explained that its procedural rule governing the filing of complaints says nothing about notice, "[e]xcept as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint."[56]

The court held that the statute's additional notice requirements violated the doctrine of separation of powers because, according to the majority, the statute and the rule could not be harmonized.[57] Providing notice is an additional step that if not completed results in dismissal, regardless of the fact that all of the requirements of CR 3(a) are properly met.[58]

The dissent, authored by Justice James M. Johnson and joined by Chief Justice Barbara A. Madsen and Justice Mary E. Fairhurst, argued that the statute and the procedural rules did not directly conflict with one another.[59] According to the dissent, "[t]he legislature enacted the short notice before suit to 'provide incentives to settle cases before resorting to court,' . . . not to modify court-prescribed procedures."[60]

The dissent also noted their concern that pre-suit notice requirements enacted and upheld in other contexts in Washington could be invalidated by the court, which might be a violation of the separation of powers by the court.[61]

Florida: *Massey v. David*
(Expert Witness Fees as Costs)

Background

In 1999, the Florida Legislature passed a 36-section bill[62] "addressing multiple aspects of civil litigation" including "extensive revisions to Florida's tort system."[63]

The specific provision challenged in *Massey* dealt with expert witness fees. Specifically, the law[64] provided that expert witness fees could not be awarded as taxable costs unless the party retaining the expert witness furnished each opposing party with a written report signed by the expert witness summarizing the expert witness's opinions and the factual basis of the opinions, including documentary evidence and the authorities relied upon in reaching the opinions. The law required that the report be filed five days prior to the deposition of the expert or at least 20 days prior to discovery cutoff.[65]

In 2002, Florida's Fourth District Court of Appeals ruled this provision was unconstitutional.[66] The decision was not appealed, and therefore for five years Florida's lower courts were bound by the Fourth District's ruling, and the status of expert witness fees remained in question.[67] That all changed as *Massey* made its way to the Florida Supreme Court.

Facts Leading to Lawsuit

After Gary Massey was injured at work he hired attorney Calvin David to represent him in his action against his former employer. The employer offered to settle, but Massey would not accept the offer even though David advised him to do so. Massey and his attorney had an arbitration agreement governing their lawyer-client relationship pursuant to their retainer agreement. An arbitrator hired by David determined Massey should

accept the settlement, so David, acting without Massey's permission, filed a motion to approve settlement and appeared in court on Massey's behalf. David argued for settlement, which was in his own interest, and did not inform Massey that he should retain new counsel.

Massey filed a suit against David alleging malpractice. The trial was bifurcated, and in Phase I the jury found David negligent. However, during Phase II the jury did not award Massey any damages, and therefore, the trial judge awarded David costs. Massey argued David did not comply with the expert witness notification requirements of section 57.071(2), and should not have been awarded expert witness costs.

The issue in the case was the constitutionality of the conditional requirements placed on expert witness costs by section 57.071(2).

Florida Supreme Court's Decision

In a 4-3 decision, the Florida Supreme Court affirmed the lower court's ruling which found the statute unconstitutional.[68] The central issue centered on the distinction between substantive and procedural enactments and the importance of that distinction to the separation of powers doctrine.

Florida's Constitution contains a separation of powers provision[69] that vests the courts with the exclusive authority over rules of "practice and procedure in all courts."[70]

The court began its analysis by finding that the expert witness fees provision was purely procedural.[71] The court determined that while the creation of a right to expert witness costs is substantive,[72] the conditions on those costs and the process to be followed were procedural.[73] The court explained that "where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail."[74]

According to the court, however, "where a statute does *not* basically convey substantive rights, the procedural aspects of the statute cannot be deemed 'incidental,' and that statute is unconstitutional."[75]

The majority also cited the bill's intent section that included a statement questioning whether the law violated the separation of powers.[76] The majority took this to mean that the legislators suspected they were passing an unconstitutional bill.

In his dissent, Justice Raoul Cantero questioned the use of legislative reports in general, and in particular the reliance on a statement that could apply to any one of the 36 sections of the bill.[77] Justice Cantero further disagreed with the majority in that sec. 57.071(2) was purely procedural, arguing that the conditions added to the older expert witness costs statute were in fact substantive.[78]

Justice Cantero also argued that the remaining text was procedural, but because the procedures were minimal, and existed only to implement the substantive conditions, they should not have been considered a violation of separation of powers.[79]

II. Bucking the Trend: West Virginia Supreme Court of Appeals Upholds Cap on Noneconomic Damages

West Virginia: *MacDonald v. City Hospital Inc.*

Reversing a trend favoring the plaintiff's bar, the Supreme Court of Appeals of West Virginia on June 22, 2011 upheld a recently enacted law[80] limiting noneconomic damages in actions brought against health care providers to $500,000.

Facts Leading to Lawsuit

Plaintiff James MacDonald was admitted to City Hospital for pneumonia. MacDonald was prescribed medication which had a toxic reaction to medicine he was previously taking; the result was permanent muscle damage. The jury awarded Mr. and Mrs. MacDonald $1.5 million, but the court reduced that amount to $500,000 in line with state statute. Plaintiffs argued the cap violated the equal protection, prohibition on special legislation, right to trial by jury, separation of powers, and "certain remedy" provisions of the Constitution of West Virginia.[81] In its decision, the court systematically addressed each challenge and determined the new cap on noneconomic damages was constitutional.

West Virginia Supreme Court of Appeals Decision

First, applying precedent, the court concluded that the legislature acted "permissibly within its legislative powers that entitle it to create and repeal causes of action," and that the right of jury trial in cases at law was not impacted.[82]

Similarly, the court ruled that the new caps did not violate the separation of powers. According to the court, "if the legislature can, without violating separation of powers principles, establish statute of limitations, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it also can limit noneconomic damages without violating the separations of powers doctrine."[83]

The court then spent most of its time addressing the equal protection and special legislation challenge. The plaintiffs argued that the new caps were not a rational

response to "social, economic, historic or geographic factors" because West Virginia "was not suffering from a 'loss' of physicians to other states," nor was the state "suffering from a growing malpractice litigation problem" when the law was enacted.[84] The court rejected the plaintiffs' argument and noted the detailed explanation provided by the legislature in its findings and the purpose of the Act. Based on these findings, the court concluded that the legislature "could have rationally believed that decreasing the cap on noneconomic damages would reduce rising malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents."[85]

Finally, the court rejected the plaintiffs' argument that the noneconomic damages cap violated the certain remedy provision of the Constitution.[86] The court explained that law did not impose an absolute bar to recovery of noneconomic damages, but instead merely placed a limit on the amount of recovery; thus the law did not violate the Constitution.[87]

III. Looking Forward: Pending Cases Challenging Tort Reform Laws

Across the nation various tort laws—some new, some decades old—are facing constitutional challenges. In at least six states, cases that challenge civil justice reform legislation are pending.

California: *Stinnett v. Tam*
(Noneconomic Damages)

The California 5th District Court of Appeal has yet to schedule oral arguments in *Stinnett v. Tam*, but commentators consider this case to be a serious challenge to California's decades-old Medical Injury Compensation Reform Act of 1975 (MICRA), which includes a $250,000 cap on noneconomic damages.[88]

Stanley Stinnett was in the hospital being treated for injuries from a motorcycle accident. Mr. Stinnett complained to Dr. Tony Tam about stomach discomfort. An X-ray was taken but no further medical action was ordered by Dr. Tam. Mr. Stinnett died of asphyxiation when stomach fluids went into his lungs. Mrs. Stinnett sued Dr. Tam for wrongful death.

A jury awarded Mrs. Stinnett $148,302 for past economic loss, $1,242,093 for future economic loss, and $6,000,000 in noneconomic damages. The noneconomic portion of the judgment was reduced to $250,000 in line with the cap on noneconomic damages under MICRA.

Mrs. Stinnett has appealed to the 5th District Court of Appeal. Stinnett argues the caps violate equal protection and interfere with the right to have a jury determine damages.

Indiana: *Plank v. Community Hospitals of Indiana Inc.*
(Noneconomic Damages)

Pending before the Indiana Court of Appeals is *Plank v. Community Hospitals of Indiana Inc.*, which involves a challenge to Indiana's $1.25 million cap on noneconomic damages.[89]

During a visit to the emergency room at Community North Hospital, Debbie Plank had an X-ray taken which showed minor intestinal blockage. In the next two weeks Plank was hospitalized, went into a coma, and died. The X-ray showing the blockage was lost in that period of time. Debbie Plank's husband, Timothy Plank, sued the hospital, as well as Dr. Joseph Pavlik, for medical malpractice. A jury awarded Mr. Plank $8.5 million, which was reduced to $1.25 million in line with the statute. Mr. Plank filed suit.

Kansas: *Miller v. Johnson*
(Noneconomic damages)

The Kansas Supreme Court is expected to issue an opinion soon that will determine the constitutionality of Kansas' $250,000 cap on noneconomic damages.[90] The cap was enacted in 1988 and was previously upheld by the Kansas Supreme Court in 1990.[91]

Amy Miller sued Dr. Carolyn Johnson for negligently removing Miller's left ovary instead of her right. The jury awarded Miller $400,000 in noneconomic damages, but the lower court judge lowered the award to $250,000 to comply with the statute.[92] Miller argues the statutory cap violates four provisions in the Kansas Constitution: the rights of equal protection, trial by jury, and remedy by due course of law, and the doctrine of separation of powers.

The case has been before the court since April 2009. Oral arguments were first held in October 2009, and the court ordered rehearing in February 2011. A decision is expected shortly.

Louisiana: *Arrington v. Galen-Med Inc.* and *Oliver v. Magnolia Clinic*
(Cap on Total Damages)

Louisiana's Third Circuit Court of Appeals has, in a number of cases, found the state's Medical Malpractice Act to be unconstitutional. The Louisiana Supreme Court has recently remanded two important cases to the Third Circuit for further consideration. At issue is Louisiana's $500,000 cap on total damages.[93]

In *Arrington v. Galen-Med Inc.*, the wife of William Arrington sued Dr. Richard Samudia and Lake Area

Medical Center for negligence.[94] Mr. Arrington died of an apparent heart attack three days after Dr. Samudia treated him in the emergency room for shortness of breath. In 2006, the Third Circuit ruled the statutory cap unconstitutional. In 2007, the Louisiana Supreme Court vacated the Third Circuit's decision and remanded the case for further consideration.[95]

Similarly, in *Oliver v. Magnolia Clinic*, the Louisiana Supreme Court vacated the 2010 ruling of the Third Circuit that held the statutory cap unconstitutional, and remanded the case for a hearing en banc.[96] Joe and Helena Oliver argued the jury's award of $6,233,000 should not be reduced. The Olivers' child was not diagnosed with cancer, despite numerous appointments with a nurse practitioner.[97]

No matter the outcome at the lower level, it is likely both of these cases will again be appealed to the Louisiana Supreme Court, challenging the constitutionality of the caps.

Mississippi: *Learmonth v. Sears* and *APAC v. Bryant* (Noneconomic Damages)

Two Mississippi cases involving traffic accidents are set to challenge the constitutionality of Mississippi's $1 million cap on noneconomic damages.

The 5th U.S. Circuit Court of Appeals asked the Mississippi Supreme Court to review the constitutionality of the statutory cap before it issues its final ruling in *Learmonth v. Sears*.[98] The Mississippi Supreme Court heard oral arguments on June 14, 2011.

Lisa Learmonth sued Sears and Roebuck Co. after she sustained injuries in an accident with one of the company's vehicles. A federal jury awarded Learmonth $4 million in damages, including $2.2 million for noneconomic damages. The judge reduced the noneconomic damages to $1 million, and Learmonth appealed the reduction to the 5th Circuit Court of Appeals.

The Mississippi Supreme Court is also being briefed on *APAC v. Bryant*, though oral argument has yet to be scheduled.[99] In that case, Ethan Bryant was severely injured when a gravel truck driven by an APAC employee ran into his car at an intersection. A jury awarded Bryant $30 million in total damages.

Nevada: *Villegas v. 8th Judicial District Court* (Noneconomic Damages)

The Nevada Supreme Court will decide whether the state's statutory cap on noneconomic damages of $350,000 applies to the case as a whole or to each plaintiff and defendant separately.[100]

Adeline Villega died under the care of Dr. Mahmud Sheikh, who diagnosed her with pancreatitis rather than a ruptured ulcer and peritonitis. Villega's estate and heirs sued Dr. Sheikh and the hospital where she was treated. Plaintiffs moved for an order to confirm they should each be entitled to recover up to $350,000 in noneconomic damages from each defendant.

The trial court ruled that the cap applied to the plaintiffs as a whole, so the plaintiffs petitioned the Nevada Supreme Court for an interlocutory appeal to rule on the application of the statute. The court heard oral arguments on March 8, 2011.

IV. Recently Enacted State Tort Reforms

The number of significant tort reforms passing in the state houses is on the rise, and Wisconsin became the first state this year to pass tort reform legislation. To date, 13 other states have passed civil liability reforms, and reforms are pending in other legislatures. In addition to Wisconsin, other states that have enacted similar substantive tort reforms include Texas, Oklahoma, Alabama, and Arizona. Below is a discussion of those states' reforms.

Oklahoma

On April 5, 2011, Oklahoma Gov. Mary Fallin signed into law three major pieces of legislation. Less than a month later, Gov. Fallin signed three more civil liability reforms into law. Below is a summary of each bill.

Cap on Noneconomic Damages[101]—Places a cap of $350,000 on noneconomic damages. The law provides an exception to the cap in cases of "malicious conduct, gross negligence, and reckless disregard."

Joint and Several Liability[102]—Prior to enactment of this law, a tortfeasor could be on the hook for all damages if he or she was more than 50 percent at fault. The new law eliminates joint and several liability. Therefore, under the new law, such a tortfeasor is liable only for his or her actual percentage of fault.

Jury Instructions[103]—Provides that juries in civil liability cases be instructed that damages for personal injury or wrongful death are not subject to federal or state income taxes and that the jury should not consider income taxes when determining a proper compensation award.

Evidence of Admissibility Reform[104]—The new law changes the rules of evidence pertaining to unpaid bills in personal injury cases. Specifically, the bill provides in relevant part that "the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the

amounts billed for expenses incurred in the treatment of the party."

Class Action[105]—Adds new requirement to Oklahoma's class action statute by providing that in order for a class action to proceed the petition must contain "factual allegations sufficient to demonstrate a plausible claim for relief."

Trespass Law[106]—Oklahoma joins a number of other states that have passed or introduced important legislation codifying the state's particular common law, which usually provides that land owners (or possessors) do not owe a duty of care to trespassers, except under very narrow circumstances, such as intentionally harming a trespasser. The new Third Restatement of the Law (Torts): Liability for Physical and Emotional Harm, approved by the American Law Institutes, would considerably alter the common law by imposing on land possessors a duty to exercise reasonable care to any person, including trespassers. In order to preempt state courts from adopting this new duty, legislatures are introducing and enacting similar legislation codifying the state's common law as it pertains to trespassers.

Alabama

Expert Evidence[107]—Similar to Wisconsin, Alabama adopted the *Daubert* standards for admitting scientific expert evidence. This legislation precludes "junk science" from being introduced into courtrooms.

Products Liability[108]—Also similar to Wisconsin's recently enacted legislation, Alabama adopted new protections for retailers and businesses against product liability lawsuits.

Judgment Interest[109]—Under previous Alabama law, when a defendant lost a civil case and appealed the decision, the person had to begin paying 12 percent post-judgment interest on the amount awarded in the trial court. The new law lowers the interest rate to 7.5 percent.

Venue Reform[110]—The new law prevents forum shopping in wrongful death cases by requiring the lawsuit to be brought only in the county where the decedent could have brought the suit. Under previous law, the plaintiff's bar could seek a personal representative living in a county that had more favorable judges.

Texas

Early Settlement Offers[111]—Dubbed "Loser Pays," this piece of legislation requires the Texas Supreme Court to draft a new rule of civil procedure to "promote the prompt, efficient, and cost-effective resolution of civil actions" that involve claims not exceeding $100,000.

The law also directs the Texas Supreme Court to adopt rules to "provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence," and to place a cap on attorneys' fees after a defendant triggers an offer-of-settlement rule and the plaintiff rejects the offer.

Trespasser Liability[112]—Similar to the Oklahoma trespasser liability law enacted this year, Texas law codifies the traditional common law rules with respect to the duty a landowner owes to a trespasser. The purpose of this is to preempt the Restatement of Torts (Third) new liability standard from being adopted by the courts.

Arizona

State Contracts with Private Attorneys[113]—Arizona joins a number of states this year that have either introduced or passed legislation placing new limits on how states can contract with private attorneys on a contingent fee basis.

The new law bars the state from entering into a contingent fee contract with a private law firm unless the attorney general first makes a determination that the contingency fee representation is cost effective and in the public interest. Once that determination has been made, the law limits the amount of money private attorneys can receive based on the size of the recovery of damages. For example, the private attorney cannot receive more than 25 percent of the recovery that is less than $10 million; 20 percent of any recovery between $10 million and $15 million; 15 percent between $15 million and $20 million; 10 percent between $20 million and $25 million; and 5 percent of any recovery greater than $25 million. Indiana enacted similar legislation earlier this year.

Appeal Bonds Limit[114]—Under Arizona's new law, the amount of an appeal bond is limited to the lesser of the total amount of damages awarded, excluding punitive damages, 50 percent of the appellant's net worth, or $25 million.

Conclusion

Just after the last election cycle, civil liability reforms were on the rise in state legislatures; only time will tell whether the tort reforms will withstand legal challenges. What is certain is that civil liability reform advocates and opponents throughout the country will continue to battle in both the legislative and judicial branches.

Endnotes

1 *See, e.g.,* Beth I.Z. Boland, Ky E. Kirby, and Trenton H. Norris, *Tort Reform: New and Pending State Legislation Aims to Rein in Consumer-Protection Lawsuits*, Partner Advisory (Bingham McCutchen, Boston, Mass.) Winter 2006, *available at* http://www.bingham.com/Media.aspx?MediaId=3327.

2 S.B. 1, Spec. Sess. (Wis. 2011); A.B. 1, Spec. Sess. (Wis. 2011).

3 2011 Wisconsin Act 2, *available at* http://legis.wisconsin.gov/2011/data/acts/11Act2.pdf.

4 Daubert v. Merrell Dow Pharn. 509 U.S. 579 (1993).

5 Thomas v. Mallett, 2005 WI 129; 285 Wis. 2d 236 (2005).

6 Andrew Cook & Delanie Breuer, *Wisconsin Tort Reform, 2011 Wisconsin Act 2*, Wisconsin Civil Justice Council (Feb. 2011), http://www.wisciviljusticecouncil.org/key-issues/2011-special-session/wisconsin-tort-reform-summary-2011-wis-act-2/.

7 For example, in 2009 plaintiffs' lawyers contributed $1,031,100 to statewide and legislative candidates in California. *See Total Personal Injury and Other Plaintiffs' Lawyer Political Contributions & Expenditures - January 2009 through December 2009*, Civil Justice Association of California, http://www.cjac.org/newsandresearch/contributions/2009/09/total-personal-injury-and-othe.php?display=793; see also contributions to federal candidates at http://www.opensecrets.org/industries/indus.php?cycle=2010&ind=k01 (showing that the American Association for Justice, the world's largest trial bar, was the top contributor to political federal candidates and political committees); TLR: Plaintiff Attorney Donations 'Break Records,' Posting of Andy Hogue to The Lone Star Report Blog, http://www.lonestarreport.org/Blog/tabid/65/EntryId/811/TLR-plaintiff-attorney-donations-break-records.aspx (Oct. 22, 2010, 16:18).

8 *Defrocking Tort Deform: Stopping Personal Injury Lawyers from Repealing Existing Tort Reforms and Expanding Rights to Sue in State Legislatures*, American Tort Reform Association (2008), http://www.atra.org/reports/Defrocking_Tort_Deform.pdf .

9 *Id*.

10 Victor E. Schwartz & Leah Lorber, *Judicial Nullfication of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001).

11 Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, Wisconsin Lawyer, Vol. 84, No. 4, March 2011.

12 Tom Held, *Judge Allows Lead-Paint Lawsuit to Proceed*, Milwaukee J. Sentinel, Apr. 10, 2011, http://www.jsonline.com/news/milwaukee/119577014.html.

13 2005 WI 125, 284 Wis. 2d 573 (2005).

14 *See* Maurin v. Hall, 2004 WI 100, 274 Wis. 2d 28.

15 *Alabama North,* Wall St. J., Aug. 9, 2005.

16 *See* Minnesota Lawyer, Aug. 5, 2008, http://minnlawyer.wordpress.com/2008/08/05/ex-wisconsin-justice-a-seat-on-the-court-was-bought/.

17 Andrew Cook & Jim Hough, *2011 Guide to the Wisconsin Supreme Court*, at 8, Jan. 2011, http://www.wisciviljusticecouncil.org/wwcms/wp-content/uploads/2011/01/WCJC_2011-Guide-Wisconsin-Supreme-Court.pdf.

18 Judge Diane Sykes, *Hallows Lecture: Reflections on the Wisconsin Supreme Court*, Marquette Lawyer, 52-63 Summer/Fall 2006, *available at* http://law.marquette.edu/s3/site/images/alumni/summerFall06.pdf#page=52; *see also* Rick Esenberg, The Federalist Soc'y for Law & Pub. Policy Studies, A Court Unbound? The Recent Jurisprudence of the Wisconsin Supreme Court (March 2007), *available at* http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf.

19 Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 221 (Ga. 2010) (citing 2005 Ga. Laws p. 1, § 13).

20 *Id.*

21 *Id*.

22 *Id*.

23 OCGA § 51-13-1.

24 Justice Melton concurred only in Divisions 1, 2, and 4 and in the judgment. Justices Carley, Hines, and Nahmias concurred specially, writing separately. The court did not address whether the statute also violates the separation of powers, and the right to equal protection. *Nestlehutt*, 691 S.E.2d at n.8.

25 *Id.* at 221 (citing the Georgia Constitution, which states plainly that "[t]he right to trial by jury shall remain inviolate." Ga. Const. of 1983 art. I, § I, par. XI (a)).

26 *Id.* at 221-22.

27 *Id.* at 222.

28 *Id.* at 223.

29 *Id.*

30 *Id.*

31 *Id.* at 224.

32 The 1995 reforms were struck down for violating the special legislation clause of the Illinois Constitution. LeBron v. Gottlieb Mem. Hosp., 930 N.E.2d 895, 903-06 (Ill. 2010).

33 *Id.* at 907-08 n.1.

34 Section 2-1706.5(a)(1) capped awards against hospitals at $1,000,000, while Section 2-1706.5(a)(2) capped awards against physicians or other health care professionals at $500,000. *Id*. at 911.

35 The legislature explained: "[T]he current medical malpractice situation requires reforms that enhance the State's oversight of physicians and ability to discipline physicians, that increase the State's oversight of medical liability insurance carriers, that reduce the number of nonmeritorious healing art malpractice actions, that limit non-economic damages in healing art malpractice actions, that encourage physicians to provide voluntary services at free medical clinics, that encourage physicians and hospitals to continue providing health care services in Illinois, and that encourage physicians to practice in medical care shortage areas." *Id*. at 903 (quoting Ill. Pub. Act 94-677, § 101(5), eff. August 25, 2005), 918-20.

36 *Id.* at n.2.

37 Justices Freeman, Kilbride, and Burke concurred. Justice Karmeier, joined my Justice Garman, wrote separately, concurring in part and dissenting in part. Justice Thomas took no part in the case.

38 *Id.* at 908 (citing Ill. Const. 1970, art. II, § 1).

39 *Id.* at 912.

40 *Id.* at 906-07.

41 *Id.* at 908.

42 *Id.* at 908-12.

43 *Id.* at 912-13.

44 *Id.* at 922.

45 *Id.* at 919-21, 926, 929-31.

46 *Id.* at 927-28.

47 *Id.* at 928-29.

48 *Id.* at 914.

49 S.J.R.C.A. 103, 96th Gen. Assem., Reg. Sess. (Ill. 2010)

50 Waples v. Yi, 234 P.3d 187, 188 (Wash. 2010).

51 216 P.3d 374 (Wash. 2009).

52 Waples, 234 P.3d at 192.

53 *Id.* at 190.

54 *Id.* at 191.

55 *Id.* (citing RCW 7.70.100(1)).

56 *Id.*(citing CR 3(a)).

57 *Id.*

58 *Id.*

59 *Id.* at 191-93.

60 *Id.* at 192.

61 *Id.* at 193-94.

62 Ch. 99-225, Laws of Fla.

63 Massey v. David, 979 So.2d 931, 934 (Fla. 2008); *id.* at n.8.

64 Section 57.071(2), Fla. Stat (1999).

65 *Id.* at 939.

66 Estate of Cort v. Broward County Sheriff, 807 So.2d 736 (Fla. 4th DCA 2002).

67 "[I]n the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that decision." *Massey*, 979 So.2d at 936 (quoting Pardo v. State, 596 So.2d 665, 666 (Fla.1992)).

68 Justice Wells recused himself from this case.

69 "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Fla. Const art. II, § 3.

70 "The supreme court shall adopt rules for the practice and procedure in all courts . . . ." Fla. Const. art. V, § 2(a).

71 *Massey*, 979 So.2d at 939.

72 The court recognizes section 92.231(2), Florida Statutes, as creating the right, which means the first part of 57.071.(2) is an introduction to the new procedural requirements rather than the establishment of a new right. *Id.*

73 *Id.* at 939-40. The court also notes that the statute conflicts with Florida's Civil Procedure Rules 1.280(b)(4) and 1.525. *Id.* at 940-41.

74 *Id.* at 937.

75 *Id.* (emphasis in original).

76 *Id.* at 942.

77 *Id.* at n.8.

78 *Id.* at 944-45.

79 *Id.* at 947-48.

80 W. Va. Code § 55-7B-8 (2011).

81 James D. MacDonald v. City Hospital, Inc. and Sayeed Ahmed, M.D., 2011 W. Va. LEXIS 57 (June 22, 2011).

82 *Id.* at 25.

83 *Id.* at 27-28.

84 *Id.* at 29.

85 *Id.* at 38.

86 W. Va. Const. art. III, § 17.

87 *MacDonald*, 2011 W. Va. LEXIS at 46.

88 Stinnett v. Tam , No. F057784 (5th Cir. Cal. Ct. App. Filed June 3, 2009); California's Medical Injury Compensation Reform Act, Cal. Civ. Code Ann. § 3333.2.

89 Plank v. Cmty. Hosps. of Ind. Inc., No. 49 A 04 - 1004 - CT – 00254 (Ind. Ct. App. Filed May 3, 2010).

90 Kan. Stat. Ann. § 60-19a02 (2011).

91 *Id.*

92 Amy C. Miller v. Carolyn N. Johnson, M.D., No. 99818 (Kan. Filed Jan. 9, 2008).

93 La. Rev. Stat. Ann. § 40:1299.42(B) (2011).

94 Arrington v. ER Physicians Group, 940 So.2d 777 (La. App. 3 Cir. Sept. 27, 2006).

95 Arrington v. Galen-Med, Inc., 947 So. 2d 721, 724 (La. Feb. 2, 2007).

96 Oliver v. Magnolia Clinic, 57 So. 3d 308 (La. 2011).

97 Oliver v. Magnolia Clinic, 51 So. 3d 874, 875-876 (La.App. 3 Cir. 2010).

98 Sears Roebuck & Company v. Lisa Learmonth, No. 2011-FC-00143-SCT (Miss. Filed Jan. 2, 2011).

99 APAC-Tennessee, Inc. v. Ethan Bryant, No. 2009-CA-02009-SCT (Miss. Filed Dec. 17, 2009).

100 Villegas v. 8th Judicial District Court, No. 55825 (Nev. Filed Apr. 15, 2010).

101 H.B. 2024, 23 Okl. St. § 9.3, available at http://e-lobbyist.com/gaits/OK/HB2128.

102 S.B. 862, 23 Okl. St. § 15.1, available at http://e-lobbyist.com/gaits/OK/SB862.

103 S.B. 865; Okl. Stat. § 577.4, available at http://e-lobbyist.com/gaits/OK/SB865.

104 H.B. 2023; 12 Okl. Stat. § 3009.1, available at http://e-lobbyist.com/gaits/OK/HB2023.

105 S.B. 704, available at http://e-lobbyist.com/gaits/OK/SB704.

106 S.B. 494; 21 Okl. Stat. § 1835.4, available at http://e-lobbyist.com/gaits/OK/SB494.

107 S.B. 187, 2011 Sess. (Ala. 2011).

108 S.B. 184, 2011 Sess. (Ala. 2011).

109 S.B. 207, 2011 Sess. (Ala. 2011).

110 S.B. 212, 2011 Sess. (Ala. 2011).

111 H.B. 274, 82d Leg., 1st Sess. (Tex. 2011).

112 S.B. 1160, 82d Leg., 1st Sess. (Tex. 2011).

113 H.B. 2423, 50th Leg., 1st Sess. (Ariz. 2011).

114 S.B. 1212, 50th Leg., 1st Sess. (Ariz. 2011).

ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. State Court Docket Watch presents articles on noteworthy cases and important trends in the state courts in an effort to widen understanding of the facts and principles involved and to continue that dialogue. Positions taken on specific issues, however, are those of the author, and not reflective of an organization stance. State Court Docket Watch is part of an ongoing conversation. We invite readers to share their responses, thoughts and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about The Federalist Society,
please visit our website: www.fed-soc.org.

The Federalist Society
For Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036