LAW & MEDICINE

Noneconomic Damage Caps Don't Curb Premiums

On Dec. 12, 2007, Sen. Judd Gregg (R-N.H.) offered an amendment to a major farm-aid bill in the Senate, but it had nothing to do with aid to our nation's farmers. Sen. Gregg's amendment was called the "Healthy Mothers and Healthy Babies Rural Access to Care Act." This bill would have limited exposure to obstetricians and gynecologists who practice in towns of 20,000 people or fewer. One provision in the bill would have capped noneconomic damages—also known as "pain and suffering"—at $250,000 for a physician and $250,000 for a health care institution. The amendment was voted down 53-41.

BY MILES ZAREMSKI, J.D.

On Dec. 27, the Ohio Supreme Court upheld a law limiting the amount of pain and suffering damages a person can collect because of a defective product. The case involved Cincinnati property manager Melisa Arbino, who claimed that the Ortho Evra Birth Control Patch made by Johnson & Johnson caused permanent physical damage and jeopardized her fertility. According to press reports, Ohio Supreme Court Chief Justice Thomas J. Moyer said the Ohio law did not violate an injured person's right under state law to trial by jury or to a remedy for their injuries. One of the law's provisions caps awards at either $250,000 or three times the amount of economic damages, whichever is greater, up to an overall limit of $350,000. There is an exception to the cap if the person suffers permanent disability or loss of a limb or bodily organ.

On Nov. 13, 2007, trial judge Diane Larsen of the Circuit Court of Cook County (Chicago) ruled as unconstitutional the Illinois statute on capping noneconomic damages (*LeBron et al. v. Gottlieb Memorial Hospital et al.,* No. 2006 L 012109). Because the law containing this cap has a provision that says no part of it can be considered separately from other parts, Illinois' entire medical malpractice statute was ruled unconstitutional. On Dec. 10, 2007, the defendants appealed this decision directly to the Illinois Supreme Court; a decision is expected late this year.

Judge Larsen ruled that a cap on noneconomic damages in medical malpractice cases violates the constitutional principle of separation of powers. She noted that having the Illinois legislature cap noneconomic damages "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law." In other words, the legislative branch should not interfere with the judicial branch's ability to award and determine damages; to do so is to encroach upon the powers and authority left to the judicial branch by the state constitution.

These events reflect ongoing efforts to reform medical malpractice law during at least the past 4 decades. Attempts in Congress to legislate caps on damages have been made several times by members on both sides of the aisle, and in both chambers.

All such legislation has failed, and will no doubt fail again if attempted in the future. The reason is simple: Regulating medical malpractice is a state-based function—part of a state's ability to regulate health care—and the federal government is an interloper in this arena.

Most of the action on caps has occurred at the state level. California was one of the first to enact caps with its Medical Injury Compensation Reform Act (MICRA), which became law in 1975 and is still in place. Under MICRA, noneconomic damages are capped at $250,000. Other states have enacted caps either through the state legislatures or by voter referendum, such as occurred in Texas in 2003. The Texas law, like the one in California, also caps noneconomic damages, such as pain and suffering and loss of companionship, at $250,000, although lawyers can still sue for punitive damages.

Despite these legislative successes, other states have seen caps thrown out on various grounds, often for being in violation of a state's constitution. The fact that these caps have been so controversial lends itself to a consideration of the purpose for having caps in the first place.

I have spent 35 years serving as a lawyer representing health care providers, policy makers, and legislators, and also doing research and writing in this subject area. In light of this experience (which did not include any work as a plaintiff's attorney), my conclusion is that the driving force behind capping noneconomic damages is the perceived link between enacting caps and lowering physician malpractice insurance premiums. The theory goes that without a cap, malpractice premiums would continue to rise, forcing some physicians to leave a geographic area and practice elsewhere, or even to retire prematurely.

Research has shown, however, that caps in some states have not had an effect in lowering premiums; premiums have also increased within reason, or have stayed relatively flat, in jurisdictions without any caps. There is also a cyclical element at work: Premiums have increased dramatically, over short periods of time, once every decade since the 1970s.

It is clear that the success of and the need for caps have varied. The question then becomes, has it been prudent for various state legislators to enact such caps, if there has been no uniformity across all jurisdictions over relatively long periods of time in the perceived causal link—in other words, if there has been no real proof that high verdicts and settlements (containing noneconomic damages as a major element) are the reason that physician premiums have increased so dramatically?

Caps have been enacted because of a persuasive method of advocacy known to many as the KISS ("Keep it simple, stupid") principle. If you want to convince someone (typically, a juror) of a position, keep your point simple and straightforward. Telling legislators that in order to reduce malpractice insurance premiums, noneconomic damages must be capped is an example of KISS at work.

But in reality, increased insurance premiums are a product of complex and interrelated factors, including performance by financial markets, returns on premium dollars invested, and expected profit margins by insurers that invest in the financial markets. It may also be that these companies have a disdain for the legal profession, although it comes at the expense of patient care and those who suffer grievous injuries.

The continuing debate over capping noneconomic damages has yet to be settled, both in state and federal law. This sleeping dog has not found a resting place yet. ■

Update since the last issue: On Jan. 7, the Supreme Court declined to take the case of Adkins v. Christie, which dealt with confidentiality of peer review. That means that the lower court's ruling against the defendants will stand.

MR. ZAREMSKI *is a health care attorney who has written and lectured on health care law for more than 30 years; he practices in Northbrook, Ill. Please send comments on this column to imnews@elsevier.com.*