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Re: Constitutionality of New Legislation to Restore Caps on Noneconomic Damages

Dear Mr. Brenton and Dr. Turney:

At the request of the Wisconsin Hospital Association and the Wisconsin Medical Society, I have reviewed the attached draft legislation which I understand will be introduced into the Wisconsin Legislature. The bill seeks to restore limitations on noneconomic damages in medical malpractice actions. A summary follows of my conclusions on the constitutionality of such a measure, together with a legal analysis of the relevant constitutional provisions.

## I. SUMMARY

In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, all of the Justices of the Wisconsin Supreme Court agreed that the legitimacy of caps on noneconomic damages depends on whether the caps fulfill the test of rationality. Two Justices (Chief Justice Abrahamson and Justice Bradley) produced new doctrine in Wisconsin, “rationality with a bite.”

Two concurring Justices (Crooks and Butler), without writing about “rationality with a bite,” invalidated a \$350,000 cap even when adjusted for inflation. Notably neither Justices Crooks nor Butler explained why they struck the statutory cap other than concluding that the cap was “too low.” *Ferdon*, 248 Wis. 2d 573, ¶ 189 (Crooks, J., concurring). These two Justices agreed that reasonable caps would pass judicial review. *Id.* (“Statutory caps on noneconomic damages in medical malpractice cases ... can be constitutional”.)

Three Justices (Prosser, Wilcox and Roggensack) in their dissents found the statutory cap reasonable and sustainable as applied. Hence the whole Court, for differing reasons, applied a reasonableness test. No Justice favored a higher level of judicial scrutiny than reasonableness.

In my opinion, the proposed legislation is constitutional and will cure the defects associated with the present cap on noneconomic damages found by the *Ferdon* court. There is more than an adequate basis to find that legislative enactment of a cap of \$750,000 on noneconomic damages in medical malpractice cases is rational and reasonable and will overcome objections on equal protection or right to jury trial grounds. The proposed legislation passes a rationality test for the following reasons:

1. A \$750,000 cap on noneconomic damages should satisfy the doubts of Justices Crooks and Butler who flunked the \$350,000 cap even after adjustments for inflation. Neither of the Justices indicated that an automatic adjustment of the amount of a cap was necessary to meet their constitutional concerns.
2. Legislation seeking to maintain access to health care and to minimize health care costs which takes "one step at a time" passes a rationality test. The "one step at a time" test has well established judicial support, but no opinion in the *Ferdon* litigation focused on that doctrine.
3. A legislative setting of caps on noneconomic damages rests on more rational grounds than an award by a judge or jury where the sight and plight of a victim can dominate judgment. One cannot escape an obligation to set a figure on noneconomic damages, but one should seek to avoid judgments infected by emotion.
4. In particular cases where courts award noneconomic damages those damages lack comparability with awards in other settings because of highly subjective factors. Pain and suffering awards do not lend themselves to useful comparisons.

## II. ANALYSIS

### Legislation Must Pass the Rationality Test

In *Ferdon v. Wisconsin Patients Compensation Fund*, the entire Court agreed that the constitutionality of a cap on noneconomic damages must fulfill the rationality test. *See Ferdon*, 284 Wis. 2d 573, ¶¶ 64-65 (Abrahamson, C.J. and Bradley, J.); *id.*, ¶ 196 (Crooks, J. and Butler, J.); *id.*, ¶ 227 (Prosser, J.); *id.*, ¶ 320 (Roggensack, J.). No higher level of judicial scrutiny received support, as the opinion of Chief Justice Abrahamson states:

Neither party in the present case has argued that we should apply the intermediate level of review. We agree ... that rational basis, not strict scrutiny, is the appropriate level of scrutiny in the present case. ... The rational basis level of scrutiny is therefore applied in the present case.

*Ferdon*, 284 Wis. 2d 573, ¶¶ 64-66.

The three dissenting Justices agreed that caps on noneconomic damages must satisfy rationality, although they chastise the Abrahamson-Bradley “rationality with teeth” doctrine as innovative if not unprecedented. Not a word appears in the Crooks/Butler concurrence that commits them to support the “rationality with a bite” doctrine. Hence they appear willing to accept better arguments for rationality which surely includes a higher cap.

The higher level of scrutiny triggered by rationality with a bite (or with teeth) receives mixed reviews by courts and other scholars. See *Ferdon*, 284 Wis. 2d 573, ¶ 78 n.90 (citing Justice Thurgood Marshall’s critique in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 478 (1985)). Indeed that test appears unique, if not unprecedented, in Wisconsin. Notably Professor Lawrence Tribe’s treatise on constitutional law concludes that this framework of analysis presents significant dangers of reviving the repudiated doctrines of economic due process discarded in the wake of disapproval of *Lochner v. New York*, 198 U.S. 45 (1905). See *Ferdon*, 284 Wis. 2d 573, ¶¶ 218-220 (Prosser, J., dissenting) (citing 2 Lawrence H. Tribe, *American Constitutional Law* § 16.3 (2d ed. 1988)); see also *id.*, ¶ 79 n 95 (Abrahamson, C.J.) (citing Tribe, *supra*).

#### Noneconomic Damages Differ from Economic Damages

The fundamental error in *Ferdon* lies in its confusion of noneconomic damages with economic, truly compensable, damages. The former lies in a fiction that money can pay for pain and suffering. The latter rests on solid economics - identifiable expenses must be paid. Money will not cure pain and suffering - it can pay for out of pocket expenses.

Caps on economic damages are harder to sustain than caps on noneconomic damages. See John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for Redress of Wrongs*, 115 Yale L.J. 524, 622 (2005). The Yale article has arguments that one finds in the Abrahamson/Bradley opinions in *Ferdon*, but unlike the *Ferdon* opinions, the writer distinguishes economic and noneconomic injuries.

### A \$750,000 Cap Rests on Rational Principles

The *Ferdon* case came to the Wisconsin Supreme Court only after a challenge to a \$700,000 pain and suffering award. Hence, if there had been no appeal that amount would have satisfied the victims. Data suggests that a \$700,000 cap would embrace most noneconomic damage awards, and hence the reasonableness of that figure. The proposed higher limit of \$750,000 requires Justices Crooks and Butler to refine and explain their views, and it demands an explanation from Chief Justice Abrahamson and Justice Bradley who also opined that the \$350,000 limit was “too low”. *Ferdon*, 284 Wis. 2d 573, ¶ 111 (Abrahamson, C.J.) (“We have said that a statutory limit on tort recoveries may violate equal protection guarantees if the limitation is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained.”); *id.*, ¶¶ 180, 195 (Crooks, J., concurring). They opened the door to arguments that they must sustain a higher limit:

Wisconsin can have a constitutional cap on noneconomic damages in medical malpractice actions... and the cap must not be set so low as to defeat the rights of Wisconsin citizens to jury trials and to legal remedies for wrongs inflicted for which there should be redress.

*Ferdon*, 284 Wis. 2d 573, ¶ 196 (Crooks, J., concurring). Data suggests that a \$750,000 cap would embrace most noneconomic data awards, and hence the reasonableness of that figure. The legislative record and hearing testimony received on 2005 Assembly Bill 766, which included a lower cap but provided support for rationality and reasonableness of certain other caps underline the conclusion that a \$750,000 cap allows compensation for a large number of pain and suffering victims.

### Maintaining Access to Health Care and Containing Medical Malpractice Costs is Rational

The focus of new legislation rests on maintaining access to health care in part by containing total medical costs - the cost of malpractice insurance coverage does not immediately follow a reduction of costs.

The United States has the largest health care costs of any nation, and spends a larger portion of its gross domestic product on health care than any other nation. *See America's Health-Care Crisis: Desperate Measures*, The Economist, January 26, 2006, at 12 and 25 (U.S. Edition). “America’s health system is a monster,” reports The Economist. *Id.* at 24. Legislation designed to contain or control such costs are commonplace. Wisconsin’s legislature identified a health care crisis as early as 1975. *Ferdon*, 284 Wis. 2d 573, ¶ 229 (Prosser, J., dissenting). It is beyond belief to find that an attempt to contain health care costs by limiting damages is “unreasonable.” The

questions are whether the attempt to limit damages rests on arbitrary or reasoned grounds. The question does not turn on the efficiency of the proposed remedy, only on the reasonableness of the attempt.

Justice Prosser's dissent in *Ferdon* reviews justifications for the cap on noneconomic damages. Those justifications remain in play today, but require updating. The legislature's 2005 Task Force on this issue as well as hearings on 2005 Assembly Bill 766 brought those justifications up to date. Those hearings emphasized (and any additional hearings should emphasize) the following:

1. Caps on damages ensure adequate compensation at reasonable cost - the caps on noneconomic damages provide the necessary balance to the costs needed to ensure that the extraordinary guarantee of all economic damages provided by the Wisconsin medical liability system created by law can continue;
2. The cap helps to reduce the size of malpractice awards and the cost of insurance by promoting predictability;
3. A predictable medical malpractice insurance market is necessary to attract and retain health care practitioners in Wisconsin and, thus, is necessary to maintain access to health care particularly for vulnerable populations most at risk for losing their practitioners; and
4. The cap protects the assets of the injured patients and families compensation fund.

#### Saving Costs and Maintaining Access One Step at a Time

The United States Supreme Court has sustained, against due process and equal protection challenges, economic and social legislation that addresses large problems "one step at a time." A legislature can undertake "reform ... one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell v. Federal Election Commission*, 540 U.S. 93, 207-08 (2003). Notably this standard was applied even where legislation limited speech and hence required a higher degree of judicial scrutiny. The standard citation for the one step at a time doctrine is *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) wherein the Court stated:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies.

Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

*Williamson*, 348 U.S. at 489 (citations omitted).

Medical costs and the concomitant access problems generate large problems that a realistic legislative approach cannot solve all at once. Cost problems are commonly addressed piecemeal.

The Chief Justice's opinion in *Ferdon* concluded that the cap on noneconomic damages did not lower medical malpractice insurance premiums and hence failed as unreasonable and arbitrary. 284 Wis. 2d 573, ¶ 113. The focus on the costs of malpractice insurance misleads. Costs are the problem, and when costs become smaller the insurance to cover them will eventually, but not quickly, drop. Insurance premiums do not, and cannot, be traced immediately to costs. Insurance always has to cover losses incurred in the past, but which are not immediately reported. Malpractice events may not be revealed for years, but insurance purchased today must cover future claims unknown now.

The Chief Justice's opinion in *Ferdon* concedes that one dollar out of every \$100 of health care costs can be traced to malpractice related costs. 284 Wis. 2d 573, ¶ 164. Small to be sure, but the one step at a time doctrine does not flunk a law which impacts costs. Chief Justice Abrahamson and Justice Bradley failed to honor the one step rule. New legislation can repair that failure.

Three Justices sharply contest the trivial impact reported in the Abrahamson-Bradley opinion. Neither Justices Crooks nor Butler addresses the conclusion that caps have little or no impact. Hence five Wisconsin Justices (these two plus the dissenters) appear open to a showing that caps have an impact on malpractice insurance costs and premiums. Such a showing was made by the 2005 Legislative Task Force on medical malpractice issues and at the hearings on 2005 Assembly Bill 766. The economies may turn out very small, but any amount, even a 1% cost savings, satisfies the one step at a time doctrine.

It is important to note that the cost savings and stability in the medical malpractice insurance market created by a cap also helps to stabilize the employment market, directly impacting access to health care. Again, such an impact does not need to address the access issue in its entirety, but can be part of a "one step at a time" approach to addressing a significant problem.

Evidence of recent high awards for noneconomic damages punctuates the dissenting opinion in *Ferdon*. See 284 Wis. 2d 573, ¶¶ 250-55 (Prosser, J., dissenting). The 2005 Legislative Task Force on medical malpractice issues and hearings on 2005 Assembly Bill 766 supplemented those data. President Bush's State of the Union address on January 31, 2006, included references to unjustified damage awards - they are part of a national problem. A Dane County jury award of more than \$4 million in noneconomic damages coupled with the same amount of economic damages was recently reported in The Wisconsin State Journal, February 3, 2006, at B-1.

### Comparing Noneconomic Damages Awards Misleads

It is not rational to evaluate all awards for noneconomic damages as comparable. This error by the *Ferdon* majority demands refutation. It requires a subjective judgment to quantify worry, anguish and grief in a specific case, but it is impossible to compare those awards as they appear in different settings and in different people. Indeed the justice and utility of pain and suffering awards has long been debated, see Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemporary Problems 219, 224-225 (1953), but it remains settled law. People differ in their feelings of pain.

The discrimination which triggered two Justices to find a violation of equal protection in *Ferdon* lies in the distinction between caps on compensation for the most seriously hurt and no caps for those less seriously hurt. This led Chief Justice Abrahamson and Justice Bradley to conclude that the "cap limits the claims of those who can least afford it...". *Ferdon*, 284 Wis. 2d 573, ¶ 40. Here the Chief Justice refers to noneconomic damages as "unaffordable." She thus confuses noneconomic damages with economic damages. She continues to say that caps produce diminished damages for the most serious pain and suffering, while fully compensating the less seriously hurt. An award for economic damages compensates - that is the proper measure. It offends reality to say that money compensates for pain and suffering - money does not eliminate (i.e. compensate for) pain.

### Noneconomic Damage Awards Rest on Many Variables

Even if two people have similar pain and suffering their compensation inevitably differs. The perceptions of the decision maker (jury or judge), the advocacy of counsel, the appearance of the victims, the manner in which counsel presents a case, etc., all affect the outcome of suits for noneconomic damages and the compensation awarded by juries. See Melvin M. Belli, *The Use of Demonstrative Evidence in Achieving the More Adequate Award* 33-35 (1952). No objective guidelines measure the money equivalent of pain and suffering. "[I]t is impossible to make an exact evaluation of the value of pain and suffering." Epstein, *Cases & Materials on Torts* 871 (6<sup>th</sup> ed. 1995).

### Noneconomic Damage Awards Suffer from Arbitrariness

Despite flaws, our tort system uses money to recognize the worth of a victim's suffering even where the calculation defies economic analysis or logic. Caps appear the only alternative to unrestricted, and less predictable, arbitrary awards. The subjective element in setting damages makes it impossible, if not irrational to compare awards, let alone conclude that the more severely injured get more than the less-injured. Pain and suffering damages depend more on the fact finders perceptions than upon any objective factor. Awards for pain and suffering therefore rest on significant subjectivity by decision makers, and hence the inaccuracy of comparing awards. Objectively, a more seriously injured person may receive less than a less seriously injured counterpart simply because of the manner of presentation, the ability of counsel to persuade, etc. Caps set in legislation have the merit of predictability. Caps rest on legislative debate and review where emotional considerations can be muted by time, by temperament, and by the legislative process. When a judge or jury assesses noneconomic damages the resulting award rests more on subjective factors than awards limited by a legislature.

### Wisconsin Law Sets the Scope of Noneconomic Damages

Awards for noneconomic damages rest on state law and are not constitutionally required. Some health care programs do not allow noneconomic damages. For example, Medicare & Medicaid eliminate damages for pain & suffering. Commonly, however, states award unquantifiable damages for loss of enjoyment in life. *See, e.g., McDougal v. Garber*, 536 N.E.2d 372 (N.Y. 1989). The enjoyment of life stands as an equivalent of an award for pain and suffering.

Even before the enactment of the 14th Amendment, courts limited awards in tort suits if they were found excessive. In 1822, Justice Joseph Story, sitting as Circuit Justice, ordered a new trial unless the plaintiff agreed to a reduction in his damages. He stated 184 years ago:

As to the question of excessive damages, I agree that the court may grant a new trial for excessive damages. . . . It is indeed an exercise of discretion full of delicacy and difficulty. But, if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.

*Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C. Mass. 1822).

If a judge holds power to limit damages it should follow that so also does a legislature in enacting statutes. Courts outside Wisconsin have deferred to state legislation designed to protect due process and check excessive awards based on nonquantifiable data. See *Ferdon*, 284 Wis. 2d 573, ¶ 17; *id.*, ¶ 311-312 (Prosser, J., dissenting). Due process can impose a substantive limit on the size an award of noneconomic damages just as due process limits punitive damages awards. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of N. Am. v. Gore*, 517 U.S. 559, 615 (1996) (Ginsburg, J., dissenting) (table of state law limits on punitive damages).

#### Wisconsin's Equal Protection Doctrine

The Wisconsin Constitution has no explicit equal protection language, but relies on a construction of Article I, section 1 of the Wisconsin Constitution. For many years, Wisconsin equal protection law advanced in lock step with U.S. Supreme Court interpretations. The influence of an article by Justice William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), has led some state courts to interpret their own state constitution as affording more than required by the United States Constitution. *Ferdon* illustrates this.

#### The Majority in *Ferdon* Relied on Opinion not Law

A critical weakness in the *Ferdon* opinion lies in WHY the severity of pain and suffering justifies caps. One harbors the suspicion that two of the Justices rest on their moral or emotional disapproval of the classification. However, as Justice Sandra Day O'Connor observed, the United States Supreme Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Lawrence v. Texas* 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

#### Wisconsin's Right to Jury Trial Provisions

Wisconsin's Constitution specifies that "the right of trial by jury shall remain inviolate" but does not define *when* that right exists. All of the Justices in *Ferdon* would sustain a proper legislative cap on noneconomic damages, and hence new legislation need only satisfy the four justices who found the cap "too low." Statutes such as the Federal Employers Liability Act (FELA) allow a jury to make awards for pain and suffering. See *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135 (2003). No decision of any federal court holds that the 7th Amendment requires a jury to specify the dollar amount of a pain and suffering award. Indeed a law review article, cited in Chief Justice Abrahamson's opinion in *Ferdon* concludes that "constitutional challenges ... against a