

## WISCONSIN HOSPITAL ASSOCIATION, INC.



August 30, 2005

TO: Speaker's Medical Malpractice Task Force  
FROM: Eric Borgerding, Senior Vice President  
SUBJECT: Medical Liability Reform

Chairman Gielow and members, my name is Eric Borgerding, and I am Senior Vice President for the Wisconsin Hospital Association (WHA). Thank you for this opportunity to speak today, and for this venue – an extraordinarily rapid and high-priority response to the loss of Wisconsin's cap on non-economic damages.

The WHA appreciates your concern and commitment, and we are anxious to work with the Task Force and anyone else seeking reasonable dialogue and reasoned solutions to maintain stability in our medical liability system. Your urgency is warranted, for the consequences of inaction or delay, though dismissed as "anecdotal" by those unfamiliar with health care administration, are of a nature that threaten to undermine Wisconsin's health care delivery system -- a system that is already facing a physician shortage in certain geographic areas and certain specialties.

If you work in the health care system, that is, if you struggle with recruiting physicians to rural or urban areas, if you are a hospital trying to keep the only long-term care facility within miles open, if you are a rural family practice doctor who also delivers babies because there are few, if any, obstetricians in the area, or more importantly, if you are a patient who may not have access to the care you need, you know the consequences of inaction or inadequate action, are far beyond anecdotal.

What has happened in Illinois, Oregon, Washington, Nevada, Ohio, and many other states without caps simply cannot be ignored or minimized:

- In Oregon, liability premiums for family practice physicians that deliver babies have increased 332% since caps on non-economic damages were struck down in 1999. By 2002, 34% of all physicians delivering babies in Oregon had quit performing deliveries.
- In Washington, where their short-lived caps were struck down in 1988, fewer doctors are delivering babies and more women are arriving in Washington hospitals never having received prenatal care.
- In Illinois, where in 2002 uncapped non-economic damages accounted for 91% of the average jury award, OB-GYNs have fled the state, many coming to Wisconsin. Southern Illinois is devoid of neurosurgeons and without head trauma coverage.

- In Ohio, where caps were struck down in 1991 and again in 1995, a 2004 survey of physicians conducted by the Ohio Department of Insurance indicated that nearly 40% of those who responded said they had retired, or planned on retiring in the next three years due to rising insurance costs. Only 9% of the respondents were over age 64.

While the reason we are all here today is the result of action taken by Wisconsin's judicial branch, the remedy, whether it be legislation or amendment of the state constitution, rests squarely with the Legislature and, in the case of legislation, also the Governor.

With that in mind, we understand that the goal of the Task Force is to develop and recommend legislative solutions. It is in the pursuit of that important task that WHA commits to working with you to provide input and information towards this end and throughout the following legislative and/or constitutional process. For act we must.

Until very recently, Wisconsin had one of the most balanced, and frankly envied, medical liability systems in the country -- the sum of an equation that included two key factors -- the Wisconsin Injured Patients and Families Compensation Fund (Fund) and a cap, indexed to inflation, on non-economic damages (some would include a third component -- unlimited economic damages).

Indeed, on May 12, 2005, just six weeks before the Ferdon ruling, Wisconsin Commissioner of Insurance Jorge Gomez reported on the impact of 1995 Act 10 (\$350,000 cap on non-economic damages plus inflation). In his report, the Commissioner described a then favorable medical liability climate, and the impact it has had on access to health care.

*"To conclude ... Wisconsin's malpractice marketplace is stable. Insurance is available and affordable, and patients who are harmed by malpractice occurrences are fully compensated for unlimited economic losses. Tort reform of 1995, along with well regulated primary carriers and a well managed and fully funded Injured Patients & Families Compensation Fund has resulted in the stable medical malpractice environment, **and the availability of health care in Wisconsin.**"* (emphasis added)

In the same report, again issued roughly two months before the Supreme Court overturned our cap on non-economic damages, Commissioner Gomez indicated that medical liability carriers were predicting premiums would remain roughly the same in Wisconsin over the coming year. However, he also made it very clear that, and again I quote:

*"... rate stability could be dramatically impacted for both the Fund and primary carriers should the caps be removed and insurers face unlimited non-economic damages."*

Commissioner Gomez must have a crystal ball in his office, for today, just seven weeks since the Ferdon decision, his same concerns are not only being expressed, but predicted by leading actuaries.

Just this month, Pinnacle Actuarial Resources, a respected independent actuary and consulting firm, predicted premiums for Wisconsin doctors and hospitals will increase by a total of 18% to 22% --- 12% to 15% for primary (\$1 million/\$3 million) coverage, and up to 150% for the Fund, which pays claims in excess of primary coverage. According to Pinnacle, Wisconsin's not-for-profit insurance fund, which interestingly has many newfound advocates these days, will be hit *much harder* than primary insurers because it is now responsible for unlimited non-economic damages.

A fair system, one that balances the rights of injured parties with the basic need for an accessible health care system, is what we had in Wisconsin, and what we must strive to maintain through this process. A system in which liability premiums do not drive out of business, out of the state, or into retirement, the very hospitals and doctors we count on the most when we need them the most.

Finally, I would like to read an excerpt from testimony delivered on April 7, 2005 by my counterpart in Illinois, just one of many states facing a very real, very litigation-driven health care access emergency:

*“The medical liability crisis in Illinois is causing an unprecedented health care access crisis throughout the state. While some areas of Illinois may be suffering more than others, the systemic problems driving these crises exist all over Illinois and show no signs of abating. In the areas hardest hit, we are finding an absence of obstetricians willing to treat “high risk” babies, emergency care physicians unwilling to provide trauma care, and neurosurgeons refusing to provide complex and high-risk procedures.”*

*The commercial insurance market has abandoned hospitals, leaving them to pay the astronomical costs of verdicts and settlements out of their own pockets – money that should be spent on caregivers and new technology and in dozens of other ways that would benefit patients and communities. This crisis is growing. If nothing is done, the health care access barriers may become insurmountable.”*

This is not a “hollow anecdote,” this is real life, and it is testimony I hope you will never hear in Wisconsin.

On August 25, 2005, after passing the Democrat-controlled house and Democrat-controlled Senate, Illinois Governor Rod Blagojevich, also a Democrat, signed Illinois’s new cap on non-economic damages into law.

We must learn from the mistakes of other states, not try to repeat them. We do not need to experience the dismantling of a health care system; we need to prevent it from happening.

WHA believes a balanced and fair system can be preserved in Wisconsin. We also believe that system must have as its foundation a cap on non-economic damages.