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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Another Failed Attempt At Ill. Tort Reform

Law360, New York (February 24, 2010) -- On Feb. 4, 2010, for the third time in the last 30 years of Illinois legislative tort reform efforts, the Illinois Supreme Court has thrown out the most recent reform statute, Public Act 94-677, as unconstitutional.

In *Lebron v. Gottlieb Memorial Hospital*, -- N.E.2d --, 2010 WL 375190 (Ill. 2010), the court declared the health care reform statute constitutionally unenforceable since its limitation on noneconomic damages in medical malpractice actions (\$500,000 for doctors and \$1,000,000 for hospitals) violated the separation of powers doctrine by encroaching on the judiciary's inherent power to correct jury verdicts through remittitur.

Since the act contained a nonseverability clause, the Illinois Supreme Court also struck down all of the other widespread health care reform measures.

This latest ruling by the Supreme Court is a setback for health care reform in Illinois and could very well be the death knell (the third and final out) as to any hope for noneconomic damage caps. The decision will also add fuel to the fire regarding the current national health care debate.

In May 2005, the Illinois General Assembly passed Public Act 94-677 to address "the health care crisis" in Illinois that "endanger[ed] the public health, safety, and welfare of the people of Illinois." Public Act 94-677, § 101. The legislation received bipartisan support.

In August, 2005, then-Gov. Rod Blagojevich signed Public Act 94-677 into law, stating "I signed this medical malpractice reform law to keep doctors in our state and make health care more accessible and more affordable."

P.A. 94-677 primarily addressed three categories of reform: legal reform; physician discipline; and insurance regulatory changes.

The most significant legal reform capped noneconomic damages for medical malpractice actions (\$500,000 for physicians and \$1,000,000 for hospitals). The damage cap applied to "any medical malpractice action or wrongful death action based on medical malpractice." 735 ILCS 5/2-1706.5(a) (West 2008). Other legal reforms were significant.

First, standards for experts certifying a lawsuit and testifying in court were elevated. Second, the law extended "Good Samaritan" immunity for physicians providing free care at clinics. Third, under a new "Sorry Works" rule, doctors and hospitals could apologize to patients or their families for an adverse outcome without the apology being admissible in court as an admission of liability.

Furthermore, the act authorized the use of annuities to pay for portions of certain medical care awards, provided a greater ability to discipline physicians and amended several aspects of the Illinois Insurance Code relating to medical liability insurers.

Shortly after its passage, plaintiffs challenged this health care reform measure. In *LeBron v. Gottlieb Memorial Hospital*, plaintiffs alleged that the defendant hospital and doctor delayed and mishandled a labor and delivery, causing an infant to suffer serious brain damage.

As part of their complaint, plaintiffs sought a declaration that the new damage limitation was invalid on constitutional grounds. In November 2007, a Cook County Circuit Court Judge (Diane J. Larsen) declared P.A. 94-677 unconstitutional in its entirety.

Citing the Supreme Court's earlier decision finding a prior tort reform Act unconstitutional, *Best v. Taylor Machine Works*, 179 Ill.2d 367 (Ill. 1997), the Circuit Court ruled that the law's cap on noneconomic damages violated the separation of powers doctrine because it functioned as a "legislative remittitur," a task constitutionally delegated to the judiciary.

Moreover, because the act contained inseparability wording (stating that if one section is found unenforceable the entire act fails), the Circuit Court declared the entire enactment invalid.

A direct appeal to the Illinois Supreme Court followed. The defendants argued that the present act was distinguishable from the one at issue in *Best*.

In particular, the defendants argued that the Legislature narrowly tailored the damage cap to address a specific issue, the health care crisis, and it constituted a valid exercise of the General Assembly's power in response to a public threat, as reflected in the detailed legislative record.

The act therefore did not offend separation of powers principles and was distinguishable from the wide-sweeping nature of the caps and other tort reform measures at issue in *Best*. The Supreme Court disagreed.

On Feb. 4, 2010, nearly 15 months after oral arguments, the Illinois Supreme Court ruled in a 4-2 opinion that the damage caps were unconstitutional on separation of powers grounds under the Illinois Constitution (Ill. Const. 1970, art. II, §1).

Citing its decision in *Best*, the Supreme Court ruled that Section 2-1706.5 "violates the separation of powers clause because it 'unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.'" Opinion at 14.

The Supreme Court also rejected the notion that the damage caps were just one part of a massive multidimensional response to the health care crisis that requires all interested parties including insurers, medical professionals and consumers to make sacrifices.

"[A] proper separation of powers analysis of section 2-1706.5 does not consider whether the Act balances the benefits and burdens of resolving the health-care crisis or burdens a particular group. The intrusion on the judicial authority affected by section 2-1706.5 is no less simply because other provisions of the Act may impose burdens on parties other than plaintiffs." Opinion at 16.

In the end, the Supreme Court agreed with the Circuit Court's ruling that the damage caps amounted to a legislative remittitur and violated the separation of powers. The Supreme Court emphasized, however, that

because the other provisions contained in the Act were deemed invalid solely on inseverability grounds, the General Assembly remained free to re-enact any of those provisions it deems appropriate.

Time will tell whether the Illinois General Assembly accepts the Supreme Court's invitation to reenact the other legal, physician discipline and insurance regulatory reforms. However, noneconomic damage caps in Illinois have been dealt a serious, and perhaps final, blow.

Given the strong ruling by the Illinois Supreme Court, and its reliance on the separation of powers doctrine, absent an amendment to the Illinois Constitution, it is difficult to imagine any set of circumstances under which future Illinois legislative efforts at damage caps could ever survive judicial scrutiny.

--By David M. Goldhaber, Sedgwick Detert Moran & Arnold LLP

David Goldhaber is special counsel with Sedgwick in the firm's Chicago office.

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