By David M. Goldhaber and David J. Grycz

Illinois Supreme Court Invalidates **Damage Cap**

Three Strikes and You're Out

On February 4, 2010, for the third time in Illinois' 30-year history of experimenting with tort reform, the Illinois Supreme Court once again declared damage caps unconstitutional and invalidated Public Act 94-677, a multifaceted law enacted to bring about various healthcare reforms. In Lebron v. Gottlieb Memorial Hospital, __ N.E.2d __, 2010 WL 375190 (Ill. Feb. 4, 2010), the court declared P.A. 94-677 unconstitutional since its limitation on non-economic 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. Because the Act contained an inseverability clause, the Illinois Supreme Court also struck down all of the other wide-spread reform measures. This latest ruling by the Supreme Court could very well be the death knell for damage cap reform in Illinois, absent a constitutional amendment or comprehensive federal legislation.

THE 1970S BROUGHT THE FIRST MAJOR NATIONAL wave of tort reform. Like many states, Illinois joined the movement and made its first attempt at reform in 1975. In response to a perceived crisis in the medical malpractice arena, the General Assembly passed an "Act to revise the law in relation to medical practice," effective November 11, 1975. Public Act 79-960. The law made two significant changes. First, it capped compensatory damages (including economic losses) in medical malpractice actions at $500,000. Second, the Act required the Circuit Court to convene a medical review panel–consisting of one practicing physician, one practicing attorney and a circuit court judge–after a plaintiff filed a medical malpractice suit. The panel would preside over a non-binding hearing and, if the parties agreed, make binding a decision on liability and damages.

The Illinois Supreme Court declared both provisions unconstitutional in *Wright v. Central DuPage Hospital Association*, 63 Ill.2d 313, 347 N.E.2d 736 (Ill. 1976). In a 5-2 decision, the Supreme Court invalidated the $500,000 cap on compensatory damages as a violation of the Illinois Constitution's special legislation section. *See* Illinois Constitution 1970, art. IV, § 13. Specifically, the Supreme Court concluded that the cap conferred a special privilege on medical malpractice tortfeasors while discriminating against the most seriously injured plaintiffs by limiting their available damages. The Supreme Court also found the medical review board scheme unconstitutional as it vested inherently judicial functions in the non-judicial members of the panel. This violated the Illinois Constitution's requirement that judicial powers be vested with the courts. *Wright*, 63 Ill.2d at 321-22, 347 N.E.2d at 738. Furthermore, permitting non-judicial officers to hear and decide a litigant's case violated the Illinois Constitution's guarantee of a right to trial by jury. 63 Ill.2d at 323-24, 347 N.E.2d at 740-41. Thus, in the end, the Illinois Legislature's first major attempt at damage caps failed.

Strike Two–The Supreme Court Knows Best

In 1995, the Illinois Legislature passed the Civil Justice Reform Amendments of 1995, Public Act 89-7. Many commentators described this legislation as the most comprehensive tort reform effort in the United States. *See, e.g.,* David Fink, *Best v. Taylor Machine Works, the Remittitur Doctrine, and the Implications for Tort Reform*, 94 Nw. U. L. Rev. 227, 227 (1999). The 1995 Act followed on the heels of the 1994 general election which gave Republicans, who campaigned on the issue of tort reform, control of the House, Senate, and governor's office. On March 9, 1995, then Gov. Jim Edgar signed P.A. 89-7 into law. The wide-sweeping reform changed several areas, including premises liability, products liability, health care governance, damage awards and jury instructions. The reform also abolished joint and several liability, and limited punitive damages to three times the economic damages. The central focus, however, was another $500,000 cap on non-economic damage awards. This time the cap reform cast a much larger net: "[i]n all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine, recovery of non-economic damages shall be limited to $500,000 per plaintiff. There shall be no recovery for hedonic damages." 735 ILCS 5/2-1115.1(a) (West 1996). Non-economic damages included awards for pain and suffering, disability, disfigurement, loss of consortium, and loss of society. *See* 735 ILCS 5/2-1115.2(b).

Proponents of the legislation, including co-drafter the Illinois Civil Justice League, believed that reform was needed to "tame the Illinois civil justice system, which had become a virtual money tree for unscrupulous attorneys and plaintiffs and their often frivolous or exaggerated claims." James M. Cutchin, *The 1995 Illinois Civil Justice Reform Act: Has the Baby Been Thrown Out With the Bath Water*, 20 S. Ill. U.L.J. 117, 117 (1995). Critics believed it to be nothing more than a partisan bill intended as a handout to the influential medical, drug, business and insurance lobbies. *Id.* Notwithstanding the debates, the reform did not last long.

In *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (Ill. 1997), the Illinois Supreme Court struck down P.A. 89-7, finding many provisions violative of the Illinois Constitution. Again, the Supreme Court held the $500,000 cap unconstitutional special legislation since it discriminated against the most seriously injured by precluding them from being made whole while allowing the less injured to be compensated in full. The Supreme Court also stated that the cap violated the separation of powers doctrine by giving the Legislature the power to reduce excessive jury awards, a role traditionally reserved for the judiciary through remittiturs. The Act's elimination of joint and several liability also did not survive as it constituted special legislation by conferring a special benefit on certain medical malpractice plaintiffs who were excepted from the provision. In the end, the Supreme Court invalidated the entire Act since the unconstitutional provisions could not be severed from the remainder of the enactment. While the Supreme Court acknowledged that the General Assembly utilized a "fast track stratagem," the court stated that this legislative tactic played no role in its decision. While the *Best* decision clearly dealt a blow to the future of tort reform in Illinois, the struggle over damage caps would continue.

Public Act 94-677–To Address the "Health Care Crisis" in Illinois

Starting in 2004, a national dialogue started over the need for reform to address the cost of medical malpractice insurance. The Illinois General Assembly held a series of hearings where diverse groups testified as to the competing views regarding healthcare reform. Those testifying included physicians, private citizens, personal injury lawyers, law and finance professors, insurance regulators and the CEOs and general counsel of several Illinois hospitals. Around this same time, frequent media coverage reports focused on physicians leaving Illinois to practice medicine in bordering states, particularly in the high-risk areas of neurosurgery, orthopedics and obstetrics-gynecology. *See, e.g.*, *Surgeons Leaving Over High Insurance*, The Southern Illinoisan, Feb. 24, 2004. Additionally, the American Tort Reform Association placed Madison County, Illinois atop its controversial "judicial hellhole" list for the second year in a row. *See* American Tort Reform Association, *Judicial Hellholes® 2004* (available at http://www.atra.org/reports/hellholes/2004).

Reform advocates believed legislation was a necessary response to a so-called "health care crisis" in Illinois. According to these proponents, costly medical malpractice litigation raised premiums for malpractice insurance, caused doctors to leave the state and resulted in medical providers limiting services to Illinois residents. Non-economic damages were repeatedly cited as the "key driver" behind increasing medical malpractice verdicts. *See* Testimony of Jim Tierney, Illinois State Medical Society (March 8, 2005 Hearing).

Critics questioned the extent of the crisis and whether non-economic damages caps were a fair or effective way to control malpractice premiums. Some believed that simple economics resulted in physician shortages in rural areas. *See generally,* Tom Baker, *The Medical Malpractice Myth* (University of Chicago Press 2005). Pundits further argued that the evidence failed to demonstrate that malpractice litigation reduced consumer access to medical care. *Id.* Many groups, including the Illinois Trial Lawyers Association and the Center for Justice & Democracy, questioned the effectiveness of damages caps as a way of addressing high malpractice premiums. Testifying before the General Assembly, advocates pointed out that malpractice premiums continued to rise in states that had imposed damage caps, such as Texas or California. *See* Letter from Illinois Trial Lawyers Association to Gov. Rod R. Blagojevich (June 7, 2005) (available at http://www.iltla.com/PDF/Governor_letter_SB475.pdf). Thus, the only reliable solution to curbing higher premiums was to enact comprehensive insurance reforms, such as requiring insurers to use performance-based ratings for physicians, and actual–rather than estimated–loss data for setting premiums. *Id.*

On May 23, 2005, after developing a substantial legislative record, the Illinois General Assembly passed Public Act 94-677, a law designed to address "the health care crisis" in Illinois that "endanger[ed] the public health, safety, and welfare of the people of Illinois." P.A. 94-677, §101. The legislation received bipartisan support, especially from downstate officials. Both the bipartisan support and the legislative process stood in stark contrast to the passage of the 1995 Act. On August 25, 2005, then Gov. Rod Blagojevich signed P.A. 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 was a multi-faceted comprehensive reform legislation that primarily addressed three categories: legal reform; medical discipline; and insurance regulations. The most significant reform capped non-economic damages in medical malpractice actions at $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). The cap was not indexed for inflation and there were no exceptions. Other notable legal reforms were significant. First, it elevated standards for experts certifying a lawsuit and testifying in court. Second, the Act 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. Finally, P.A. 94-677 authorized the use of annuities to pay for portions of certain medical care awards: the defendant would pay 20 percent of the present cash value of the future medical expenses up front, and purchase an annuity to pay the remaining 80 percent of the cost.

Further, P.A. 94-677 provided Illinois officials with a greater ability to discipline physicians. The bill expanded the Medical Disciplinary Board, doubled the number of medical investigators, and doubled potential fines for violations of the Medical Practice Act to $10,000. The Act also required the Illinois Department of Financial and Professional Regulation to post profiles of physicians on the Internet, including criminal history, disciplinary actions, history of licensure disciplinary actions in other states, and medical litigation judgments, settlements and arbitration awards.

Finally, P.A. 94-677 amended several portions of the Illinois Insurance Code as it related to medical liability insurers. For example, it transferred power from the Director of Insurance to the Secretary of Financial and Professional Regulation; increased the availability of rate review hearings; lowered the standard for finding that rates are excessive; expanded the entities required to report malpractice claims and suits; and required more detailed loss, actuarial and reserve filings.

This healthcare reform Act was soon challenged.

Strike Three. . .You're Out– Lebron v. Gottlieb Memorial Hospital

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, including cerebral palsy and cognitive mental impairment. As part of their complaint, plaintiffs sought a declaration that the new damage limitations were invalid on constitutional grounds.

On November 13, 2007, in response to cross motions filed by the parties, the Circuit Court of Cook County (the Hon. Diane J. Larsen) declared P.A. 94-677 unconstitutional both on its face and as applied to plaintiffs. Citing *Best v. Taylor Machine Works*, the Circuit Court ruled that the law's cap on non-economic 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 an inseverability clause, the Circuit Court declared the entire enactment invalid. The defendants pursued a direct appeal to the Illinois Supreme Court pursuant to Rule 302. They argued that P.A. 94-677 was distinguishable from the Act at issue in *Best.* In particular, the defendants argued that the Legislature narrowly tailored the damage cap to address a specific issue, the healthcare 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 ultimately disagreed.

The Supreme Court entertained numerous *amicus curiae* briefs. The American Bar Association, for example, argued that caps on non-economic damages threatened the ability of many injured plaintiffs to seek the redress of the courts. The ABA cited evidence that caps discourage attorneys from filing what would be meritorious malpractice cases, thus eliminating these plaintiffs' ability to recover *any* damages for injuries sustained at the hands of negligent healthcare providers. Conversely, the American Medical Association, the Illinois State Medical Society, and others, argued that P.A. 94-677 was the General Assembly's rational response to a well-documented healthcare crisis in Illinois which threatened the access to, and availability of, medical care for Illinois residents. The AMA brief also contended that the cap on non-economic damages was constitutional in that it only limited the liability of certain defendants (*i.e.*, doctors and hospitals). The Illinois Hospital Association, the American Hospital Association, The Illinois Catholic Health Association, and the Illinois Rural Health Association also submitted a joint brief to demonstrate that Illinois was truly suffering from a health care crisis when the legislation passed.

Summary of Holding

On February 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.'" *Lebron v. Gottlieb Memorial Hosp.*, __ N.E.2d __, 2010 WL 375190, at *10 (Ill. Feb. 4, 2010) (quoting *Best v. Taylor Machine Works*, 179 Ill.2d 367, 414, 689 N.E.2d 1057, 1080 (Ill. 1997)). In other words, by capping non-economic damages, Section 2-1706.5 forced trial courts to decrease any jury awards in excess of the statutory cap, a requirement the Supreme Court believed impermissibly encroached on the judiciary's inherent power to perform the same task through remittitur. *Id.*

The Supreme Court also rejected the notion that the damage caps were just one part of a massive, multidimensional response

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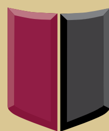

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to the healthcare crisis that required all interested parties including insurers, medical professionals and consumers to make sacrifices. "[A] proper separation of powers analysis of section 2-1706.5 does not consider whether the Act balances the benefits and burdens of resolving the health-care crisis or burdens a particular group. The intrusion on the judicial authority effected by section 2-1706.5 is no less simply because other provisions of the Act may impose burdens on parties other than plaintiffs." *Lebron*, 2010 WL 375190, at *12.

The Court similarly rejected the contention that the law was rationally related to serve a legitimate legislative interest, an argument advanced by the defendants and the Attorney General. The Court disagreed, finding that the rational basis test played no part in assessing whether the law invaded the judicial branch's "sphere of authority." *Id.* at *11-12. In making their case, Defendants had identified various damage caps adopted in 19 other states throughout the country. As the Defendants pointed out, and the majority recognized, at least eight states had upheld such damage caps following similar constitutional attacks based on a separation of powers argument. These states include Alaska, Colorado, Idaho, Maryland, Michigan, Nebraska, Utah, and West Virginia. The Court thought little of this point, stating "[t]hat 'everybody is doing it' is hardly a litmus test for the constitutionality of the statute." *Id.* at *17.

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 doctrine. 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 reenact any of those provisions it deems appropriate.

Justice Karmeier, joined by Justice Garman, dissented from most of the majority's opinion, authored by Chief Justice Fitzgerald. At the outset, the dissent framed its argument by discussing President Obama's ongoing efforts to reform the nation's healthcare system, specifically his acknowledgement that reforming malpractice laws may reduce the country's healthcare costs. The dissent generally argued that P.A. 94-677 represented a public policy determination by the General Assembly that was owed deference by the Court for several reasons. First, that remittitur is not a power granted by either the Illinois Constitution or the U.S. Constitution, and it is therefore not an "essential component" of the judiciary's power. Rather, remittitur originated from an 1822 federal court decision by Justice Joseph Story, and that remittitur itself has been attacked on constitutional grounds for abridging the right to trial by jury. *Lebron*, 2010 WL 375190, at *32-33 (Karmeier, J., concurring in part and dissenting in part). Second, a damage cap is not really a legislative remittitur because the Legislature is simply providing for the highest award as a matter of law; in other words, a trial court would not be required to substitute its judgment for that of the jury under a damage cap. Third, that the majority's opinion failed to acknowledge the legislature's power to enact, alter and abolish laws on the books, including the common law. By failing to respect this power, the dissent hypothesized that the General Assembly may respond to the majority's decision by removing non-economic damages in cases of medical malpractice. *Id.* at *38. The fiery dissent concluded on this point:

> "If courts exceed their constitutional role and second-guess policy determinations by the General Assembly under the guise of judicial review, they not only jeopardize the system of checks and balances on which our government is based, they also put at risk the welfare of the people the government was created to serve."
> *Id.* at *39.

In response, Chief Justice Fitzgerald described the dissent as peppered with "emotional and political rhetoric" ill-suited for the discourse of the state's highest court. *See id.* at *18. One point on which both the majority and dissent agreed was that the Circuit Court erred in finding Section 2-1706.5 unconstitutional both on its face and as applied to plaintiffs. In cases where, as here, the trial court did not hold an evidentiary hearing or enter any findings of fact, the constitutional analysis must be facial. *Id.* at *3. Accordingly, the Supreme Court reversed that portion of the Circuit Court's decision finding Section 2-1706.5 unconstitutional as applied. *Id.* at *21.

Conclusion

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, non-economic 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 or involvement at the federal level, it is difficult to imagine any realistic set of circumstances under which future Illinois efforts at damage caps could ever survive judicial scrutiny. The healthcare industry views the ruling in *Lebron* as a major setback for healthcare reform in Illinois. Personal injury attorneys have declared the ruling a victory for victims of medical negligence. Either way, the decision has already added fuel to the ongoing national healthcare reform debate. ■

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