

# “comment”

August 2012

## **Volatility & Unpredictability Likely after Supreme Court Strikes Damage Cap**

For years, Missouri physicians have been insulated against bell-ringer jury awards, but that's about to change. On July 31 the Missouri Supreme Court struck down the \$350,000 cap on “pain and suffering” awards (enacted in 2005). And that could massively impact healthcare delivery and the professional liability environment in the state.

The Court's reversal of the cap stemmed from a \$1.5 million pain and suffering award where the patient was born with brain damage. The award was reduced to the \$350,000 cap; however, the Supreme Court subsequently declared the cap unconstitutional in a 4-3 ruling. According to the opinion, the cap violates the right to trial by jury by infringing on the jury's constitutionally protected purpose of determining the amount of damages.

What does this mean for you? An analysis by the Missouri Foundation for Health found that before tort reform, the average number of lawsuits filed per year was 847. *The St. Louis Post-Dispatch* reports that after tort reform was enacted, that average dropped to 643. According to the Missouri Insurance Commission's latest medical malpractice statistics report, prior to tort reform in 2005, annual pending claims at year end peaked at 5,800.

Medical-legal experts caution that without a cap on noneconomic damages, volatility may return. What's equally troubling is the uncertainty and unpredictability of noneconomic damage awards, along with a flurry of lawsuits, now that there's no limit on these awards.

And physicians insured by med-mal companies that entered the market post tort reform may be left holding the bag. The recent med-mal insurance market has largely consisted of smaller companies that entered the market following a new law which allowed Missouri-domiciled companies to start with relatively small amounts of capital. Traditionally, these companies have grown by charging lower rates. Without a cap, this practice could backfire, as companies' reserves (monies set aside to pay future claims) were most likely based on the cap remaining in place. These small companies also have grown by selling assessable policies, which allows them to assess additional premiums, if necessary.

Patients will surely feel the pinch, too; reversing the cap may impact both the cost and delivery of healthcare, particularly in rural areas. Physicians may limit the services they provide or leave the state altogether. “Defensive medicine” may increase as physicians seek to minimize risk.

“It will be unsettling to everyone and every institution delivering healthcare in Missouri,” said Stan Starnes, ProAssurance's Chairman and CEO. “It's certainly unfortunate because of what it could mean for the future of healthcare costs and availability,” he said.

Missouri Chamber of Commerce officials are equally concerned the ruling could damage the economic climate of the state, according to the *St. Louis Business Journal*. The Chamber's general counsel told the *Journal*, “The end result? Medical malpractice costs will go up. Healthcare costs will go up. Health insurance costs will go up. The rate of doctors leaving our state will go up. And ultimately, healthcare will be less attainable for Missouri citizens.”

A number of legislators have expressed frustration with the decision and are considering a ballot proposal to amend the Missouri Constitution to restore the caps.



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