Medical Malpractice Caps – Version 3.0

A look at Missouri's newly enacted medical malpractice cap law

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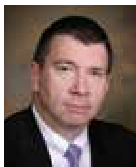
Just as software products are updated from time-to-time to fix bugs or flaws, this year the Missouri Legislature enacted the state's **third** version of a medical malpractice "cap," optimistically hoping to have corrected the issues that caused prior versions to be invalidated or eviscerated.

Caps Began in 1986

As most physicians know, Missouri first legislatively enacted a "cap" on medical malpractice case damages in 1986. That original cap set a limit on non-economic damages of $350,000, to be adjusted annually for inflation. Although it was upheld as constitutional in the face of a 1992 challenge in *Adams v. Children's Mercy Hospital*, over the next several years there remained numerous attacks on that statute.

Subsequent rulings chipped away at the foundation of the law, the guts of which was worn down over time by judicial interpretations of the original statutory language, which proved to have inherent weaknesses in the wording as drafted. In *Cook v. Newman*, the court held that the statute's applicability to "any one defendant" could result in multiple caps being applied in cases with multiple defendants; in *Scott v. SSM*, that court held the cap's applicability "per occurrence" meant that multiple caps could be imposed where more than one act (occurrence) of negligence was committed by defendants, etc.

Ultimately, these various judicial rulings on the 1986 statute caused its application to be reshaped from the original intent like an ice sculpture sitting in the sun.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As a result of this loss of purpose, and following a wave of vocal activism by the medical community, insurance industry, various chambers of commerce and other interested groups, including famous "white coat days" at the Capitol, the legislature enacted a number of sweeping business-favorable "tort reform" laws in 2005, including a new medical malpractice cap (which we will euphemistically call "Malpractice Caps – Version 2.0").

The 2005 law set a hard $350,000 cap **without** any economic escalator, and the new language was drafted to correct the "occurrence" and multiple defendant extensions of the first cap. As proponents of caps predicted, Missouri saw an almost immediate drop in the number of medical malpractice lawsuits filed…but, not surprisingly, also saw the development of a reinvigorated attack strategy from the plaintiffs' bar and other opposition groups.

The first true assault on the second version of medical malpractice caps fell short of the plaintiff's goal of completely overturning the law, with the Missouri Supreme Court in 2010 holding, in *Klotz v. St. Anthony's*, only that the new 2005 statute could not be applied retroactively to incidents arising before that cap law went into effect but filed thereafter. The court finally addressed the esoteric concept and issue of the caps themselves in 2012, in *Sanders v. Ahmed*, holding, by a 5-2 vote, that the cap in a **wrongful death** case was constitutional, giving tort reform supporters a sigh of relief and optimism for long-term applicability of the 2005 caps.

Caps Overturned in 2012

Just four months later, however, the same Missouri Supreme Court,[1] in *Watts v. Lester E. Cox*, then declared caps in medical malpractice **injury** (non-death claims) cases to be unconstitutional in a 4-3 vote. While the dissenters held that the *Adams* case was controlling on the question of the constitutionality of caps generally, the majority used the new statute as an opportunity to re-visit the issue.

The court opinion invalidating the law rationalized that the difference between the *Sanders* and *Watts* cases lay in how those

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[1] Although the same seven judges were on the Supreme Court for both cases, Judge Zel Fischer, who was in the majority on the *Sanders* case, did not participate in the *Watts* case, for which the seventh participating judge was a Kansas City Circuit Court Judge, Sandra Midkiff, sitting as a special judge, and who was one of the four majority votes.

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type of claims first arose historically. In the simplest terms, the court found that "wrongful death" cases were a creation of the legislature (i.e., one could not bring suit for death of a loved one at common law), and as such, the legislature could enact changes or limits to the manner in which those claims could be pursued, including limits on damages awarded.

As to medical malpractice claims for injuries, however, the Supreme Court found that suits or claims for such injuries to persons **were** available at "common law," i.e., well before Missouri enacted its constitution in 1820, and they reasoned, therefore, that the legislature could not today limit something that had been a given right of the people (or at least a claim that could be raised in a legal proceeding) long before this state even existed.

Since *Watts* was handed down three years ago, Missouri had been without any cap on medical malpractice "injury" claims, although the cap still exists as to "death" claims per the *Sanders* ruling. Opposition to that cap has not abated, and direct appellate attacks on it are still anticipated. As the make-up of the Supreme Court changes, a philosophical shift on that issue would not necessarily be surprising.

New Caps Designed to Withstand Challenges

Despite the strong wording and unique rationale of the court in the *Watts* case related to the "at common law" issue, cap supporters did not give up the fight. Instead, they started considering ways in which to enact another medical malpractice cap that could withstand constitutional scrutiny. The most creative idea in this year's new statute, in an attempt to overcome the Supreme Court's conclusion in *Watts* that injury claims are a "common law" action, was by enacting legislation that specifically articulates that medical malpractice suits henceforth are a creation of the legislature:

1.010. 1. The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

2. The general assembly expressly excludes from this section the common law of England as it relates to claims arising out of the rendering of or failure to render health care services by a health care provider, it being the intent of the general assembly to replace those claims with statutory causes of action.

Likewise, in an effort to stem the tide of attacks on other aspects of cap laws that routinely face the most common appellate challenges (e.g., lack of economic escalator, too low of a damage figure, etc.) from cap opponents, both in Missouri and other states with caps, the legislature took a number of steps that make this third medical malpractice cap different from the 2005 law:

1) There is now an economic escalator of 1.7% annually, so the cap will increase yearly to keep up with inflation, overcoming one objection to the 2005 cap, which stayed at a flat $350,000; hence defeating the argument that the value of the cap would actually decrease over time.

2) The new initial cap of $400,000 would apply to cases of less seriously injured plaintiffs, but for patients with "catastrophic" injuries, such as quadriplegia, paraplegia, loss of vision, loss of two or more limbs, brain injury or "irreversible failure of one or more major organ systems," the initial cap will be $700,000, subject to the annual economic escalator.

3) The cap on wrongful death cases was raised from the $350,000 cap that already passed muster in *Sanders* to $700,000.

Looking Ahead

Will it work this time? In hearings to evaluate the proposed new law this year, the legislature heard testimony from several plaintiff attorneys on the issue of the value of injuries, the potential impact of a cap on seriously injured plaintiffs and families, etc., and then actually did implement some of the suggestions made to address those perceived injustices, as noted above. Despite the involvement of the plaintiff's bar in advocating for higher cap figures, of course, we can still expect them to mount further appellate attacks on this cap, and on the concept of caps in general. Undoubtedly, at some point an argument will be raised over the statutory language about what constitutes "irreversible failure," a "major organ system," etc.

Another traditional argument, which never goes away and remains a stalwart position of cap opponents, is that a legislative cap impacts a litigant's inherent right to trial by jury (the argument, as everyone knows, is that a litigant is

entitled to have the jury—not the legislature—assess his or her damages). While this argument has been rejected in past cases decided in Missouri, a shift in philosophy among the court on that issue is not beyond the realm of possibility.

Moreover, given the Supreme Court's declaration in *Watts* that the last cap was unconstitutional because such injury cases were not legislatively created like wrongful death claims, it was certainly a creative stroke to try to address that rationale by specifically enacting a law that states that medical malpractice claims are henceforth "excluded" from the common law of England. We can expect the opposition, however, to argue that in spite of the legislature attempting to carve out medical malpractice claims as a statutorily created cause of action going forward, that doesn't change the fact that such tort claims against health-care providers **did** exist at common law, and are not now and never will be, therefore, a creation of the legislature. This is the "you can't put the genie back in the bottle" argument. Hence, the same argument will be made in the fight against the new cap ("Version 3.0") as has been raised in the past, and as the court ruled in *Watts*, i.e., that the legislature cannot limit damages on common law claims.

Ultimately, we saw the first (1986) version of Missouri's cap law (and the concept of non-economic caps themselves) upheld as constitutional by the Missouri Supreme Court in the *Adams* case in 1992. Because of later rulings that eroded its effectiveness and original intent, the legislature enacted the 2005 version, but that gave cap opponents a new opportunity to challenge the concept, and by the time the Missouri Supreme Court heard the *Watts* case in 2012, the seven judges sitting on the court had changed completely from those who heard *Adams* 20 years earlier. Cap laws have been enacted in more than half of the states; some have been invalidated and some upheld. It is a concept that is strongly divisive and clearly not uniformly supported.

It therefore goes without saying that even a slight shift in the make-up of any court which might hear a challenge to a new cap law can certainly impact the potential for it to be upheld. To that end, statutory language that is carefully crafted is critical, since we have seen courts latch onto a single word to deny the application of a law as intended by the legislature. We can only hope that the new "Malpractice Caps – Version 3.0" withstands the challenges that it undoubtedly faces down the road.

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