Medical Litigation Newsletter

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In This Issue

Illinois Supreme Court Holds Non-Economic Damages Caps in Medical Malpractice Actions Invalid

On February 4, 2010, the Illinois Supreme Court issued its long awaited decision in *Lebron vs. Gottlieb Memorial Hospital, et al.*, 2010 WL 375190, (Nos. 105741 and 105745), striking down the "significant reforms" adopted by the Illinois General Assembly in Pub. Act 94-677 (Act) (effective, August 25, 2005) in response to a perceived medical malpractice crisis. The Court held that the limitation on non-economic damages in medical malpractice actions set forth in Section 2-1706.5 of the Illinois Code of Civil Procedure (Code) violates the separation of powers clause of the Illinois Constitution and is invalid. The Court further held that because the Act contains an inseverability provision, the Act is invalid and void in its entirety.

Legislative Background

The General Assembly had set out to improve access to healthcare within the state of Illinois by enacting comprehensive legislation addressing the perceived crisis. The legislators heard testimony that the threat of excessive non-economic damage awards was, among other things, inflating malpractice insurance premiums and limiting access to medical care in the state. Indeed, the legislative findings set forth in the Act reflect this concern. The General Assembly found that:

> [1] the increasing cost of medical liability insurance results in increased financial burdens on physicians and hospitals; [2] the increasing cost of medical liability insurance in Illinois is believed to have contributed to the reduction of the availability of medical care in portions of the state, and is believed to have discouraged some medical students from choosing Illinois as the place where they will receive their medical education and practice medicine; [3] the public will benefit from making the services of hospitals and physicians more available; and [4] this healthcare crisis, which

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HINSHAW & CULBERTSON LLP

Hinshaw Representative Matters

Each issue of the *Medical Litigation Newsletter* will showcase a few cases that have recently been handled by Hinshaw lawyers. We are pleased to report the following:

Michael F. Henrick & Richard S. Kolodziej, attorneys in the Chicago office of Hinshaw & Culbertson LLP, tried a case in Chicago in December 2009 with a defense verdict for ISMIE Mutual Insurance Company. The case involved a patient who had been operated on by a physician for colon cancer. He subsequently developed a leak at the anastomosis site. The physician handled post-op care until fired by the family. A second surgeon came in to do repair four weeks after the original surgery, but the patient died after that procedure. Plaintiff asked the jury for $2.75 million. But the jury returned verdict for the defense in three and one-half hours.

Michael P. Russart, an attorney in Hinshaw's Milwaukee office, successfully defended a chiropractor in a Chiropractic Board inquiry. It was claimed that the chiropractor was selling homeopathic remedies contrary to Wisconsin's chiropractic regulations. The Board agreed that because the chiropractor was dually licensed as a physical therapist, and physical therapists have no regulations preventing that profession from selling homeopathic products, he did not violate the Wisconsin Administrative Code.

> endangers the public health, safety and welfare of the citizens of Illinois, requires significant reforms to the civil justice system currently endangering healthcare for citizens of Illinois. Limiting non-economic damages is one of the significant reforms designed to benefit the people of the state of Illinois. An increasing number of citizens or municipalities are enacting ordinances that limit damages and help maintain the healthcare delivery system in Illinois and protect the health, safety and welfare of the people of Illinois.

The General Assembly further determined that in order to preserve the public health, safety and welfare of the people of Illinois, significant reforms to the civil justice system were needed. (Pub. Act. 94-677, Section 101, effective, August 25, 2005).

Challenged Key Provisions

At issue in *Lebron* was the constitutionality of the caps on non-economic damages set forth in Section 2-1706.5 of the Code, which provides that in malpractice actions against a physician, physician business or corporate entity, the total amount of non-economic damages shall not exceed $500,000. The Act provided for caps on non-economic damage awards in malpractice cases against hospitals, hospital personnel or hospital affiliates of $1 million.

Although not considered by the Illinois Supreme Court, the parties in *Lebron* also challenged the constitutionality of several other key provisions of the Act. Section 2-1704.5 of the Code allowed a judgment debtor to purchase an annuity to pay for future medical expenses and cost of life care. The Act amended Section 8-1901 of the Code, which established an evidentiary rule regarding a healthcare provider's admission of liability. The Act also amended Section 2-622 of the Code, regarding the Certificate of Merit, and required that the physician reviewing a medical malpractice case satisfy the expert witness standards set forth in Section 8-2501 of the Code. The amendment to Section 2-622 also required that the Certificate of Merit identify the name, address, telephone number and state licensure number of the reviewing physician. An amendment to Section 8-2501 of the Code required that expert witnesses be board certified or eligible in the same specialty as the defendant physician and devote most of their professional time to the type of care at issue in the case.

The Supreme Court's Reasoning

The Illinois Supreme Court reasoned that its 1997 decision in *Best vs. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, controlled the disposition of *Lebron*. In *Best*, the Court held that Public Act 89-7, commonly referred to as the Tort Reform Act of 1995, was unconstitutional. Among the challenged provisions in *Best* was Section 2-1115.1 of the Code, which imposed a $500,000 cap on non-economic damages in all wrongful death, property damage and personal injury actions. The Court held that the cap on non-economic damages was constitutionally infirm because, among other things, it violated the separation of powers clause of the Illinois Constitution.

Relying on its separation of powers analysis in *Best*, the Illinois Supreme Court in *Lebron* found that under Section 2-1706.5 of the Code, the Court is required to override the jury's deliberative process and reduce any non-economic damages in excess of the statutory cap, without regard to the particular facts of the case and without the party's consent (as required for judicial remittitur). Quoting *Best*, the Court in *Lebron* concluded 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." The Court determined that as was the case with the statutory cap in *Best*, Section 2-1706.5 therefore effects an unconstitutional legislative remittitur.

Current Status

Where an Act is held unconstitutional in its entirety, it is void *ab initio*. The state of the law is as if the Act had never been passed. Therefore, the statutory provisions that apply to medical malpractice actions are those that were in effect prior to August 2005.

For the past 20 years, plaintiffs in medical malpractice actions have been required to attach to the Complaint (1) an affidavit declaring that the attorney has consulted with a health professional who believes that there is merit to the action, and (2) the professional's report in which the basis for that determination is stated. Failure to file the documents as required by Section 2-622 of the Code can be grounds for dismissal. This provision was part of the medical malpractice reform legislation adopted by the General Assembly in 1985 in response to what was then perceived to be a crisis in the area of medical malpractice. In discussing the requirements of Section 2-622, courts have emphasized that the statutory provision is designed to reduce the number of frivolous suits filed and to eliminate such actions at an early stage in the proceedings, before the expenses of litigation have mounted.

In an effort to hone the effectiveness of Section 2-622 of the Code as a screening device for frivolous lawsuits, the General Assembly in the Tort Reform Act of 1995 amended the last sentence of Section 2-622(1) of the Code to require the disclosure of the identity of the reviewing health professional. The General Assembly went further in Public Act 94-677, which amended Section 2-622 of the Code to require not only the disclosure of the health professional's name but also his address, current license number and state of licensure. With the decisions in *Best* and *Lebron*, these amendments to Section 2-622, although not held substantively unconstitutional, were nevertheless struck down on severability principles. The question now is whether plaintiffs are required to disclose the identity of the reviewing health professional. Under the version of Section 2-622 that applies to medical malpractice actions after *Lebron*, the identity of the reviewing healthcare professional need not be disclosed in the Affidavit or report.

After reviewing the legislative history of Section 2-622 of the Code, the Illinois Supreme Court in *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill. 2d 421, 892 N.E.2d 994 (2008), held that Public Act 90-579 did not reenact the version of Section 2-622 that the Supreme Court held invalid in *Best*. The Court reasoned that the General Assembly's intent when it adopted Public Act 90-579 was simply to add naprapaths to the coverage of Section 2-622. As a result, the version of Section 2-622 that applies to medical malpractice complaints filed after *Lebron* is the pre-1995 version of the statute, as amended with the addition of the naprapath language found in Public Act 90-579. That version contained no requirement that the identity of the reviewing health professional be disclosed. Before 1995, Section 2-622 stated, in relevant part, as follows:

> Section 2-622. Healing art malpractice. (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:
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> (1) That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last six (6) years or teaches or has taught within the last six (6) years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, podiatrist or a psychologist, the written report must be from a health professional licensed in the same profession, with

the same class of license as the defendant. For affidavits filed as to all other defendants, the *** written report must be from a physician licensed to practice medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit, but information which would identify the reviewing health professional may be deleted from the copy so attached.

While caps on non-economic damages in medical malpractice actions in Illinois are a dead issue without a constitutional amendment, the legislature remains free to reenact any provisions that were in Public Act 94-677 that were held invalid solely on inseverability grounds. An amendment to Section 2-622 of the Code requiring the disclosure of the name, address, current license number and state of licensure of the reviewing health professional would avoid the cloak of anonymity found in the current version of the statute and discourage the filing of frivolous lawsuits.

Madelyn J. Lamb

The 2010 Estate Tax Earthquake

Because Congress did not act in 2009 to preserve the federal estate tax and the generation-skipping transfer (GST) tax in 2010, the federal estate, gift and GST taxes, which are sometimes collectively referred to as "transfer taxes," have changed greatly from what they were in 2009. As a result of the provisions of the 2001 Tax Act, the estate and GST taxes have been repealed for one year. The gift tax remains in place, with a $1 million exemption and 35 percent maximum rate. A "modified carryover basis" regime has been implemented to generally deny a step-up in the basis of appreciated assets at death.

Unless Congress acts, the estate, gift and GST taxes as they existed before 2002 will be reinstated in 2011 with: a 55 percent rate (with a five percent surcharge on estates or cumulative gifts between $10 million and $17.184 million; a $1 million exemption for lifetime and testamentary transfers; and a $1 million exemption from GST tax (as indexed for inflation since 1999). Because of this changed and unpredictable environment, individuals and their advisors now face significant uncertainty in planning the gratuitous transfer of assets.

Congress' inaction may mean that an individual's estate plan no longer meet the person's objectives and goals. In particular, plans based on formulas or decisions tied to transfer taxes may be significantly impacted. Many individuals have estate plans that use charitable gifts or techniques, such as charitable remainder trusts or charitable lead trusts that are designed to take advantage of the federal estate tax charitable deduction, with the intention of lowering or eliminating the estate tax associated with a particular transfer. The changes in the estate tax rates and exemptions may affect the original motivation for a particular vehicle or plan.

If Congress fails to act quickly and there is a carryover basis regime for part or all of 2010, estate plans will need to be reviewed to make sure that adequate provisions have been or are made to take advantage of the adjustments available to reduce the impact on a decedent's estate because the appreciated assets it holds no longer receive a step-up in basis to the fair market value on the date of death. To accommodate all of this uncertainty, estate planning documents, whether revocable or irrevocable, must include necessary and appropriate provisions to provide flexibility by enabling documents to be amended or other steps to be taken to achieve estate planning objectives, while minimizing or eliminating exposure to transfer taxes, no matter what form those taxes may take in the future. At the very least, an individual's estate plans and related documents should be reviewed by an attorney or other estate planning professional.

David K. Ranich