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To: Health Care Stabilization Fund Oversight Committee
From: Melissa Calderwood, Assistant Director for Research
Re: Medical Malpractice and Liability Court Decisions; Related State Legislation

This memorandum addresses the recent Kansas and Missouri court decisions regarding statutory caps on awards of non-economic damages and provides a brief summary of medical malpractice and medical liability legislation recently considered by state legislatures.

Kansas: *Miller v. Johnson*

On October 5, 2012, the Kansas Supreme Court upheld the \$250,000 cap on non-economic damage awards in a 5-2 decision. This cap on the amount of damages for pain and suffering awarded by juries to personal injury action claimants has been previously upheld (1990, *Samsel II*). The *Miller v. Johnson* decision cited, among other things, four constitutional issues to be resolved in the case. Miller argued, as summarized by the decision, the statutory cap violates:

- The right to jury trial under Section 5 of the Kansas Constitution Bill of Rights;
- The right to remedy by due course of law under Section 18 of the Kansas Constitution Bill of Rights;
- The equal protection provision of Section 1 of the Kansas Constitution Bill of Rights; and
- The doctrine of separation of powers.

The majority of the Court upheld KSA 60-19a02 as it applied to Miller (personal injury plaintiff, medical malpractice claim) – the statute provides for a \$250,000 cap on non-economic damages and applies to all personal injury actions, including medical malpractice claims, accruing on or after July 1, 1988. The opinion also cited the Health Care Provider Insurance Availability Act by indicating, "As noted in several of our prior cases, the legislature's expressed goals for the comprehensive legislation comprising the Health Care Provider Insurance Availability Act and the noneconomic damages cap have long been accepted by this court to carry a valid public interest objective." The opinion also notes that the legislature enacted this statute "in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damage awards and the possibility of large noneconomic damage awards."

The Court reversed the District Court's decision to strike the jury's award for Miller's future medical expenses; the Court also denied the doctor's cross-appeal (trial error claims).

Missouri: *Watts v. Lester E. Cox Medical Centers*

On July 31, 2012, the Missouri Supreme Court struck down a 2005 law that had capped non-economic damage awards in Missouri medical malpractice actions at \$350,000 in a 4-3 decision. The plaintiff, Deborah Watts, filed suit against Cox Medical Centers in Springfield; her son was born with severe brain injuries in 2006. A jury had awarded Watts \$1.45 million for non-economic damages for the injuries (Watts also was awarded \$3.371 million for future medical expenses). Missouri law limited the awards to \$350,000. The Supreme Court found the cap unconstitutional because it violated the state constitutional right to trial by jury.

The decision states that the statutory cap (§538.210) is "unconstitutional to the extent that it infringes on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party. Such a limitation was not permitted at common law when Missouri's constitution first was adopted in 1820, and therefore, violates the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution."

The Court later stated in its consideration of Article I, Section 22(a), that "if the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not 'remain inviolate' and the cap is unconstitutional." Additional findings were made regarding the manner in which future damages would be paid.

Challenges to the Limitations on Non-Economic Damage Awards in the States

A review of recent court decisions regarding statutory caps on non-economic damage awards indicates that the statutory limitations were upheld in California (*Stinnett v. Tam*; 5th District Court of Appeals decision), Louisiana (March 13, 2012 decision: *Oliver v. Magnolia Clinic*; \$500,000 cap), and West Virginia (June 22, 2011 decision: *MacDonald v. City Hospital, Inc.*; \$500,000 cap). In Florida, *M.D. v. United States*, the U.S. District Court held the statutory cap on non-economic damages in medical malpractice actions was constitutional (the action was brought under the Federal Tort Claims Act).

In Indiana, *Plank v. Community Hospitals of Indiana, Inc.* has been granted a transfer to the state Supreme Court (Indiana has a \$1.25 million cap on total damages). In Illinois, *Lebron v. Gottlieb Memorial Hospital*, the state Supreme Court reversed the judgment of the trial court in early 2010 (had declared the cap on non-economic damages in medical malpractice actions unconstitutional). In Mississippi, *Sears, Roebuck & Company v. Learmonth*, the Supreme Court held that ruling on the certified question regarding constitutionality of the non-economic damages cap would have required speculation and conjecture on the Court's part; the question was declined (August 23, 2012). The 5th U.S. Circuit Court of Appeals asked parties to file new briefs. Mississippi has a \$1.0 million cap on non-economic damages, so there are potential implications on the state's medical liability cap.

Medical Malpractice and Medical Liability Legislation in the States Update

According to the National Conference of State Legislatures, thirty-four states and Puerto Rico had pending legislation addressing some component of medical malpractice or medical liability issue or law during their 2012 legislative sessions. This survey does not include those states considering the medical professionals' apologies legislation. Among the issues considered in the above referenced states:

- Damage award limits or caps;
- Statute of limitation;
- Joint and several liability;
- Limits on attorney fees;
- Patient compensation or injury fund;
- Pre-trial alternative dispute resolution and screening panels;
- Affidavit or certificate of merit;
- Expert witness standards;
- Medical or peer review panels;
- Insurance premiums; and
- Requirements to carry medical liability or malpractice insurance.

The 2012 Kansas Legislature enacted legislation that meets one of the above issues identified. The bill, **2012 SB 330**, amended statutes relating to professional malpractice liability screening panels to allow any judge of a district court to convene such a panel. Under the prior law, in district courts with more than one division, only the chief judge was given the authority to convene such a panel.

A survey of the 2012 legislation in the states includes damage cap bills introduced in Arizona (HCR 2001 – Repeals Article II, §31 of the state Constitution, relating to no limits on damages for death or personal injuries); Michigan (HB 5662; SBs 1136 and 1137 – revises cap on non-economic damages if defendant has engaged in certain conduct); New Jersey (AB 966, SB 1628 – caps non-economic damages in medical malpractice actions at \$250,000); New York (AB 1360 – among other things, limits compensation for non-economic damages suffered by an injured plaintiff in any personal injury action to \$250,000; see also AB 4381; SB 3197, enacts the "Medical Liability Reform Act"); and West Virginia (HB 4379; SB 503, removes the limitation that damages must be economic and limits the amount in any one occurrence to \$1 million from the West Virginia Patient Injury Compensation Fund). As of the August 15, 2012 update from the National Conference of State Legislatures, none of these measures had been enacted.

MLC/rc