



Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Senate Committee on Health and Human Services

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations
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DATE: October 17, 2007

RE: OPPOSITION to Senate Bill 138

On behalf of more than 11,000 members statewide, the Wisconsin Medical Society thanks you for this opportunity to register our opposition to Senate Bill 138.

Negligence in the practice of medicine, or any other health care profession, that causes injury or death is a heartbreaking and regrettable event whenever it occurs. Medical malpractice does occasionally occur, and when it does, those injured should be reasonably compensated for their loss. Wisconsin has created a special system to govern compensation of those injured by medical malpractice through the wisdom of open public debate and bipartisan legislative compromise. It is a system that balances two important and competing interests: reasonable recovery for the few injured by medical malpractice versus affordability of health care for the many.

Wisconsin's Medical Liability Climate Attracts Physicians

Wisconsin physicians are heralded for providing some of the nation's highest-quality health care. Despite our size, Wisconsin is a destination state for physicians; this is due in part to our relatively stable medical liability climate, which attracts physicians from other states. The attached American Medical Association map is well-known among physicians nationwide – Wisconsin is one of just eight states considered not to be in a medical liability crisis or near-crisis. Affordable medical liability insurance is one factor in this ranking, and the umbrella insurance Injured Patients and Families Compensation Fund (Fund) undeniably helps make medical liability insurance affordable for Wisconsin physicians.

The Fund covers every dollar of unlimited economic damages above a physician's mandated primary insurance coverage of \$1 million per occurrence/\$3 million total per year, yet this costs taxpayers zero dollars. Every dollar awarded in a medical liability case – and even the costs the Office of the Commissioner of Insurance (OCI) bears to administer the Fund – are paid for via fees assessed on physicians, hospitals and certain nurses. The Fund is unique in the nation; no other state requires physicians to pay into an umbrella insurance coverage fund with the possibility of unlimited economic damages.

IPFCF Fiscal Status Jeopardized

Unfortunately, the Fund's fiscal stability is endangered. According to the Legislative Fiscal Bureau, Governor Doyle's proposal to "transfer" \$175 million from the Fund to backfill General Purpose Revenue (GPR) for the state's Medicaid program could cause the Fund to face a **\$233,100,000 deficit** in 2007-08 (see Table 6 in Paper 377, attached). If a "transfer" is avoided in this budget, the LFB estimates that the Fund could still face a \$60,000,000 deficit in 2008-09, growing to \$208,000,000 by 2011-12.

These deficits are due in part to the Supreme Court's 2005 action removing the cap on non-economic damages that had been in place – the LFB reports that the Fund calculated the Supreme Court's action as increasing potential loss liabilities by \$173,000,000 (see paragraph 14 in Paper 377). While the Legislature enacted a new, higher \$750,000 cap on non-economic damages that took effect in 2006, it is indisputable that the Fund faces greater liabilities than was planned for in early 2005.

Because of this fiscal situation, now is not the prudent time to further increase the Fund's liabilities by adding new potential claims as contained in Senate Bill 138. If this proposed legislation is enacted, liability insurance rates for physicians, hospitals, clinics and many other health care professionals will rise. This bill will upset the delicate balance achieved through bipartisan legislative efforts over the past three decades.

Alternative: Better Physician-Patient/Family Communication

Instead of increasing the Fund's potential liabilities, physicians wish to enact laws that will foster better communication between a physician and a patient's family when a negative outcome occurs. Physicians understand that sometimes family members feel driven to file a lawsuit when they feel that answers about "what happened" are not provided to their satisfaction. This is an unfortunate byproduct of the litigation environment – oftentimes, physicians are advised by their legal counsel not to communicate with patients or their families following a negative outcome due to the fear those conversations could become evidence in a future lawsuit. To remedy this problem, physicians supported so-called "I'm Sorry" legislation (2005 Assembly Bill 1021) to allow physicians to express sentiment of apology or condolence without fear of increasing liability exposure. Unfortunately, Governor Doyle vetoed the bill.

Alternative: "Peer Review"

Physicians also support stronger "peer review" laws, which would foster frank internal discussions at a hospital or clinic following a negative event and allow facilities to implement quality improvement activities that would be confidential and privileged. Peer review can prevent negative outcomes before they happen by identifying and improving individual or system procedures. Physicians supported a bill last session (2005 Senate Bill 578) that accomplished these goals, and the Legislature passed the bill by voice vote in the Assembly and a 29-3 Senate tally. Unfortunately, Governor Doyle vetoed the bill.

The stories of those who have lost loved ones as a result of medical malpractice are heart wrenching. However, good social policy is sometimes difficult. The creation of Chapter 655 and its subsequent amendments reflect the conscious decisions of a legislature seeking a balance between the desires of those who are injured by medical negligence and the many who need affordable health care. This balance has worked well since the creation of Chapter 655 and should not be disrupted.

Health care resources in our country and in Wisconsin are limited. The State Legislature and our courts have recognized the necessity of reasonable limits for non-economic damage recovery in medical liability actions. In Wisconsin, we have done this in a bipartisan fashion and the result is Chapter 655. We urge you to continue to appropriately maintain this balance and oppose SB 138.

Thank you again for this opportunity. If you have any questions, please feel free to contact Mark Grapentine (markg@wismed.org) or Jeremy Levin (jeremyl@wismed.org) at 608.442.3800.