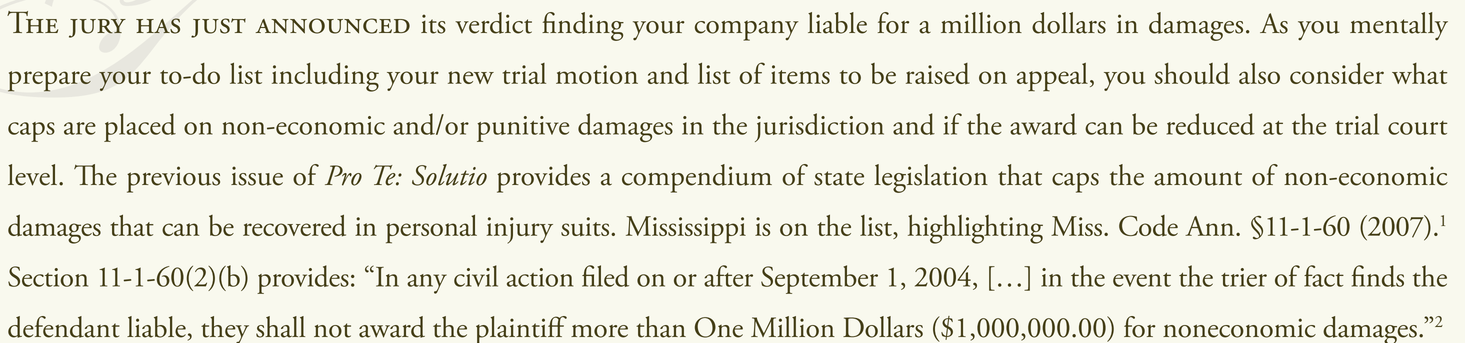
WILLMS

Limiting Adverse Verdicts: Tort Reform Victory In Mississippi



The jury has just announced its verdict finding your company liable for a million dollars in damages. As you mentally prepare your to-do list including your new trial motion and list of items to be raised on appeal, you should also consider what caps are placed on non-economic and/or punitive damages in the jurisdiction and if the award can be reduced at the trial court level. The previous issue of *Pro Te: Solutio* provides a compendium of state legislation that caps the amount of non-economic damages that can be recovered in personal injury suits. Mississippi is on the list, highlighting Miss. Code Ann. §11-1-60 (2007).[1] Section 11-1-60(2)(b) provides: "In any civil action filed on or after September 1, 2004, […] in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages."[2]

Economic Benefits of Damages Caps

In 2002, the American Tort Reform Association (ATRA) published its first listing of *Judicial Hellholes*. Mississippi's 22nd Judicial Circuit, which includes Copiah, Claiborne, and Jefferson Counties, topped the list.[3] The report describes judicial hellholes "as 'magnet courts' or even 'magic jurisdictions' — magic in that they can seemingly pull million or billion dollar verdicts out of a hat and create causes of action previously unknown or procedural rules that are foreign to due process."[4] In 2003, Mississippi's 22nd Judicial Circuit was again listed among the top jurisdictions as a judicial hellhole.[5] During the 2002 special session, the Mississippi legislature passed two pieces of tort reform legislation, including one piece that focused solely on capping medical malpractice litigation with a $500,000 cap on non-economic damages and a second that included caps on punitive damages for all tort claims.[6] Despite these reforms, Mississippi's economy continued to suffer.[7] The second wave of tort reform, which includes the current version of Miss. Code Ann. §11-1-60, was enacted in 2004 and became effective September 1, 2004. Since the enactment, insurance companies have returned to the state, Medical Assurance Company of Mississippi has ceased raising its rates, the state has been successful in recruiting new business due to the lower costs of doing business, and the mass-tort industry was virtually eliminated.[8] Mississippi has not appeared on ATRA's judicial hellhole list since 2003.

Procedural Considerations

With tort reform and statutory caps in place in the majority of states, an initial thought upon an adverse verdict must be whether the cap is applicable and should be implemented to reduce the judgment. Immediately upon receiving an adverse verdict that is above the statutory limitations for damages, you must file a Motion to Amend the Judgment or Alter the Final Judgment. The motion should include the date of judgment, the amount of judgment, the applicable statute, the amount once

the limitation is applied, and a proposed amended judgment. Some state statutes, including Miss. Code. Ann. §11-1-60, provide that the trier of fact shall not be advised of the limitations and that the judge shall appropriately reduce any award. A strict reading of this would appear to give the court the power to reduce the award *sua sponte*, but motion practice may be required. The motion to alter the judgment must be filed at the trial court level.[9]

Defending the Constitutionality of Damages Caps

Recently, Butler Snow defended the constitutionality of the caps portion of Section 11-1-60 in a premises liability action filed against the owner of a convenience store.[10] This is the first challenge to Mississippi's tort reform efforts enacted in 2004. In July 2008, the Humphreys County Circuit Court imposed the $1 million dollar limitation on non-economic damages found in Miss. Code Ann. §11-1-60 and reduced the $4 million verdict. The plaintiff challenged the amended judgment. After receiving the parties' written papers and hearing the oral argument, the trial court denied the plaintiff's constitutional challenge to §11-1-60.[11]

The plaintiff challenged Miss. Code Ann. §11-1-60 on the following grounds:

1) It violates the right to trial by jury enumerated in the Seventh Amendment of the United States Constitution and Section 31, Article 3 of the Mississippi Constitution.

2) It violates Section 24 of the Mississippi Constitution, which provides for the right to a remedy by due course of law.

3) It violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution.

4) It violates the provisions for Separation of Powers in the Mississippi Constitution.

The challenging party bears the heavy burden to show the statute is unconstitutional, and a state law may be struck down "on constitutional grounds only where it appears beyond all reasonable doubt that the statute under review is unconstitutional."[12] The presumption is that State Legislature acted properly when enacting statutes. The Mississippi Supreme Court has recognized deference to the legislature in promulgating similar statutes that impose limitations on what types of damages and what amounts are recoverable.[13]

In determining whether an act of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution. Nor are the courts at liberty to declare an Act void, because in their opinion it is opposed to a spirit supposed to prevail the Constitution, but not the expressed words.[14]

In arguing for the constitutionality of a damage limitation, consider whether other statutes that impose limitations have been upheld as constitutional under the State and Federal Constitutions. For example, statutes of limitations have routinely been upheld even though they cut off an injured party's right to recover damages after a certain time specified by that same statute. The Constitution, State and Federal, does not forbid either: A) the creation of new rights; or B) the abolition of old rights recognized by the common law to obtain a permissible legislative objective.[15] An important concept to note in your argument is that non-economic damages themselves are created by statute; the damages are statutorily defined. Accordingly, the legislature has the power to limit them, expand them, or take them away entirely.

The due process analysis requires that the statute at issue be related to a proper legislative purpose. Most of the caps on damages were enacted into statutes as part of tort reform in the early part of this century to combat rising insurance prices and a tremendous influx of lawsuits. The limitations placed on non-economic damages help serve several salutary purposes. First, the presence of limitations provisions enables individuals and businesses to make better informed risk assessment decisions in connection with their respective purchase of real property, goods, and services; asset management; estate planning; personal careers; and business strategies. These statutes also provide casualty and property liability insurers with the ability to improve the predictability of the outcome of the amount of damages that can be awarded for personal injury claims made against their policies. The statutes also have the ancillary purpose of improving the business climate by making the state a more attractive place for professionals and businesses to operate, thereby creating greater employment opportunities. Finally, the limitation statutes enable injured parties and alleged tortfeasors to be in a better position to evaluate the merits of their cases and the range of verdicts that are possible, thereby increasing the likelihood of settlement in close

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THE *second wave* OF TORT REFORM, WHICH *includes* THE *current* VERSION OF MISS. CODE ANN. §11-1-60, *was enacted* IN 2004 AND BECAME EFFECTIVE SEPTEMBER 1, 2004.

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cases and reducing the burden imposed on the court system.

In our case, the State Attorney General intervened as a non-aligned party and supported the constitutionality of Section 11-1-60(2)(b), adopting the legal arguments presented on behalf of the defendants. In Mississippi, as with most states, the State Attorney General is authorized by statute to intervene on behalf of the State in pending litigation to defend the constitutionality of a state statute.[16] In some states, parties must give notice to the attorney general of any constitutional challenge to a statute. Regardless of whether your state requires notice, from a defense standpoint, alert the attorney general of the suit and your position as soon as possible. The means and method of notifying the attorney general in hopes that he will take action to bolster your side will depend on the working relationship you or your firm has with the Office of the Attorney General and the circumstances of the individual case.

In our matter, we anticipate an appeal by plaintiff to the Mississippi Supreme Court. Once a case is at that level, other interested organizations may want to have their views about these issues known to the court through the filing of *amicus curia* briefs. One entity that may have an interest in filing an amicus brief is the state defense bar association. Additionally, depending on the circumstances of the case, the American Tort Reform Association (ATRA), Defense Research Institute (DRI), Lawyers for Civil Justice (LCJ), or United States Chamber of Commerce may be willing to get involved in the matter.[17] The Advanced Medical Technology Association (AdvaMed), the Medical Device Manufacturer's Association (MDMA), the Pharmaceutical Research & Manufacturers of America (PhRMA), and the Product Liability Advisory Council (PLAC) are some of the organizations in the healthcare industry that may have an interest in the matter. Should your company find itself defending the constitutionality of a damages limitation at the appellate level, consider reaching out to one or more of the agencies that potentially may have an interest in the matter and requesting their assistance.

Mississippi is not the only jurisdiction to be faced with a constitutional challenge to newly enacted damages caps. Last December, in the context of a pharmaceutical case, the Ohio Supreme Court upheld legislation that limits non-economic and punitive damages.[18] The Ohio Supreme Court specifically found that the statute limiting non-economic damages did not violate Ohio's constitutional right to a jury trial, the right to an open court and remedy under the Ohio Constitution, the Due Process Clause, or the Equal Protection Clause. In its twenty-five page majority opinion, the Ohio Supreme Court outlined the various reasons the plaintiff's challenges to the statute were rejected and will serve as a good starting point for a general overview of the issues. The opinion also includes a footnote citing nineteen other jurisdictions that have upheld the limits on non-economic damages.[19] Also, the previous issue of *Pro Te: Solutio* notes that the state supreme courts in Alabama, Illinois, New Hampshire, Oregon, and Washington struck down legislation that attempted to limit damages.[20]

With only approximately half of the state courts being faced with addressing these challenges, we should expect future decisions that impact how tort reform will evolve and succeed. Mississippi is facing its first challenge to the tort reform that was so desperately needed for our economy and that has reshaped our reputation from a litigation standpoint. We'll keep you posted on the results.

[1] *Pro Te: Solutio*, Vol. 1, No. 3, p. 18 (July 2008).

[2] Miss. Code Ann. §11-1-60(2)(b) (2007). Subpart (2)(a) of §11-1-60 places a $500,000.00 cap on non-economic damages in medical malpractice actions.

[3] ATRA, Judicial Hellholes Reports (2002), found at <http://www.atra.org/reports/hellholes/>.

[4] ATRA, Judicial Hellholes Reports (2003), found at <http://www.atra.org/reports/hellholes/2003/>

[5] *Id.*

[6] Percy, *Checking Up on the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?*, 73 MSLJ 1001, (Miss. L. J. 2004).

[7] Ross, Charlie, Op-ed, *Jackson Action: In Mississippi, Tort Reform Works*, Wall St. J., September 15, 2005. "Prior to the legislation, […] insurance companies were fleeing the state. Others were refusing to write new policies. The medical field was particularly strained: Liability insurance was in many cases unaffordable, and in some cases unavailable."

[8] *Id.*

[9] *Arrington v. Galon-Med, Inc.*, 947 So.2d 719 (La. 2007) (dismissing challenge to limitation statute when raised for first time on appeal and stating that litigants must raise constitutional challenges in trial court rather than appellate court).

[10] *Lymas v. Double-Quick, Inc.*, No. 2007-0072, (Circuit Court of Humphreys County).

[11] *Lymas v. Double-Quick, Inc.*, No. 2007-0072, Order, (Circuit Court of Humphreys County Sept. 18, 2008).

[12] *Wells by Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883, 888 (Miss. 1994).

[13] *Pathfinder Coach Division of Superior Coach Corp. v. Cottrell*, 62 So.2d 383, 385 (Miss. 1953).

[14] *Id.*

[15] *Wells by Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883, 890 (Miss. 1994).

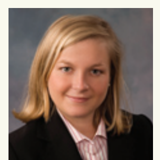
[16] *See* Miss. Code Ann. §7-5-1.

[17] To increase the likelihood of gaining support from an agency such as these, you must notify them of the matter and issue as soon as possible. Each agency has a process for submitting proposals which can be found on the agency's website. In addition, the law firm handling the issue likely has a relationship with one or more of the entities that can be a good starting point.

[18] *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[19] *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 444, fn 8 (Ohio 2007). As of the date of the opinion, courts have upheld limits on noneconomic damages in at least nineteen other jurisdictions: Alaska (*Evans v. Alaska*, 56 P.3d 1046 (Alaska 2002)); California (*Fein v. Permanente Med. Group*, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985)); Colorado (*Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004)); Florida (*Mizrahi v. Miami Med. Ctr., Ltd.*, 761 So.2d 1040 (Fla.2000)); Idaho (*Kirkland v. Blaine Cty. Med. Ctr.*, 134 Idaho 464, 4 P.3d 1115 (2000)); Indiana (*Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980)); Kansas (*Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), overruled on other ground in *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991)); Maine (*Peters v. Saft*, 597 A.2d 50 (Me. 1991)); Maryland (*Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992)); Missouri (*Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992)); Montana (*Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 776 P.2d 488 (1989)); Nebraska (*Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 663 N.W.2d 43 (2003) [$1.25 million cap on all damages]); New Mexico (*Fed. Express Corp. v. United States*, 228 F.Supp.2d 1267 (D.N.M.2002)); Oregon (*Griest v. Phillips*, 322 Ore. 281, 906 P.2d 789 (1995)); South Carolina (*Wright v. Colleton Cty. School Dist.*, 301 S.C. 282, 391 S.E.2d 564 (1990)); Texas (*Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex.1990) [cap on all damages]); Utah (*Judd v. Drezga*, 2004 UT 91, 103 P.3d 135); Virginia (*Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 509 S.E.2d 307 (1999) [cap on all damages]); and West Virginia (*Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991)).

[20] *See Pro Te: Solutio*, Vol. 1, No. 3, p. 18 (July 2008).



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