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FISCAL IMPACT REPORT

SPONSOR McMillan ORIGINAL DATE 01/31/14
 LAST UPDATED _____ HB 151

SHORT TITLE Health Care Liability Act SB _____

ANALYST Weber

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 Office of the State Engineer (OSE)
 Medical Board (MB)

SUMMARY

Synopsis of Bill

House Bill 151 (HB 151) enacts a new Health Care Liability Act that caps monetary damages arising from the individual or combined malpractice of a variety of health care providers, both individuals and facilities. Per Section 5(B), the Act applies to malpractice claims made on or after July 1, 2014.

Section 2 provides definitions used in the act. Among the definitions is:

1. Aggregate amount means the sum of damages arising from a single occurrence. The aggregate is the total regardless of the number of claimants or number of parties against whom malpractice claims have been made.
2. Health care providers includes 23 examples of individual practitioners, facilities and owners.
3. Noneconomic damages means all recoverable damages except:(a) past and future medical expense;(b) funeral and burial expenses;(c) past and future necessary nonmedical expenses;(d) loss of earning capacity;(e) past and future lost earnings; (f) loss of monetary benefits and financial support;(g) loss of services; and(h) punitive damages;

Section 3(A) and (B), for providers not participating in the state-sponsored excess insurance program pursuant to the Medical Malpractice Act, the “aggregate amount of noneconomic damages” is capped at \$300,000.00 for FY 2015, and is adjusted per a formula based on the consumer price index for each subsequent FY.

Section 3(C), provides that punitive damages arising from the individual or combined malpractice of health care providers described in Section 3(A) and (B) is capped at three times the aggregate amount of “compensatory damages.” While “compensatory damages” is not defined in HB 151, the term may be intended to be the same as “noneconomic damages” defined in Section 2(E).

Section 5(A) makes the new Health Care Liability Act inapplicable to claims made under the Medical Malpractice Act or the Tort Claims Act.

FISCAL IMPLICATIONS

No fiscal implications are identified.

SIGNIFICANT ISSUES

Noneconomic damages are generally described as compensation for injuries and losses that are not easily quantified by a dollar amount. Examples may include severe pain, physical and emotional distress, disfigurement, loss of the enjoyment of life that an injury has caused, etc.

The Bureau of Labor Statistics consumer price index calculator provides an estimate of how the \$300 thousand cap may inflate as the years go by. If this \$300 thousand cap was instituted in 2003 the 2013 inflation adjusted cap would be almost \$380 thousand.

The attached is a 2011 American Medical Association compilation of noneconomic damage caps and conditions for each state.

POSSIBLE QUESTIONS

How was the \$300 thousand value determined as the cap?

MW/svb



Caps on Damages

Close to 30 states have laws in place that limit damages in medical liability actions. Of these laws, states vary widely in the amount of the cap and type of damages that are covered by the cap. For example, California has a \$250,000 cap on non-economic damages that was included in its Medical Injury Compensation Reform Act (MICRA) of 1975. The AMA supports a MICRA-based cap. By comparison, Nebraska has a \$1.75 million cap on total damages (of which qualified health care providers shall be liable for \$500,000).

In addition, state laws vary in the type of circumstances in which the cap applies. For example, Michigan has a secondary cap on non-economic damages of \$500,000 that applies in cases where the plaintiff is hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, or where the plaintiff has permanently impaired cognitive capacity. Likewise in many states the cap on damages does not apply in cases of gross malpractice. Finally, caps in many states are adjusted annually for inflation, changing the level of the cap each year.

In at least 16 states, courts have upheld a cap on non-economic or total damages as constitutional. Courts have overturned a cap as unconstitutional in at least 11 states; however, some of these states have since enacted a new law, including Ohio, Kansas, Texas, and Wisconsin. In several states, such as Arizona, Kentucky, Pennsylvania, and Wyoming, the state Constitution explicitly prohibit caps on damages.

Below please find a summary of state laws that cap damages in medical liability actions.

Caps on Damages - Summary of State Laws and Legal Challenges

(Note: with the exception of Pennsylvania, the following information does not address state caps on punitive damages.)

Alabama - None

\$400,000 cap on non-economic damages; \$1 million cap on wrongful death damages, overturned, *Moore v. Mobile Infirmary Association*, 592 So.2d 156 (1991).

Alaska - \$250,000 cap on non-economic damages for claims involving personal injury, and a \$400,000 cap on non-economic damages for claims involving wrongful death or a severe permanent physical impairment that is more than 70 percent disabling. A single cap applies regardless of the number of health care providers against whom the claim is asserted or the number of causes of action filed (2005).

Arizona - None – Article 2 sec. 31 and Article 18 sec. 6 of Arizona's constitution prohibits limiting recoverable damages.

Arkansas - None – Article 5 sec. 32 of Arkansas’ constitution prohibits limiting damages recoverable for injury or death.

California - \$250,000 cap on non-economic damages. (1975) Upheld, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665 (1985).

Colorado - \$1 million cap on total damages, including any derivative claim by any other claimant, of which non-economic losses shall not exceed \$300,000 (including any derivative claim by any other claimant). Upon good cause shown and if the court determines such limit would be unfair, the court may award damages in excess of the limit. In this case, the court may award the present value of additional future damages only for loss of such excess future earnings or such excess future medical and other health care costs, or both. (1988) Upheld, *Scholz v. Metropolitan Pathologists P.C.*, 851 P.2d 901 (1993).

Connecticut - None

Delaware - None

D.C. - None

Florida - For providers, \$500,000 cap on non-economic damages for causes of action for injury or wrongful death due to medical negligence of physicians and other health care providers. Cap applies per claimant regardless of the number of defendants. Cap increases to \$1 million for certain exceptions. For non-providers, \$750,000 cap on non-economic damages per claimant for causes of action for injury or wrongful death due to the medical negligence of nonpractitioners, regardless of the number of nonpractitioner defendants. Cap increases to \$1.5 million for certain exceptions (2003).

Previous law upheld but subject to rules on voluntary arbitration, *Univ. of Miami v. Echarte*, 618 So.2d 189 (1993).

Georgia - \$350,000 cap on non-economic damages awarded against all health care providers and a separate \$350,000 cap on non-economic damages awarded against a single medical facility that can increase to \$700,000 if more than one facility is involved. No more than \$1.05 million can be awarded in a medical liability cause of action.

Health Care Providers- Any judgment in a medical liability action, including wrongful death, against a health care provider shall not exceed \$350,000 in non-economic damages regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based. The cap applies to each claimant; however, the term “claimant” is defined as including all persons claiming to have sustained damages as a result of the bodily injury or death of a single person.

Medical Facilities – Establishes a separate \$350,000 cap on non-economic damages awarded in medical liability actions, including wrongful death, against a single medical facility including all

persons and entities for which vicarious liability theories may apply, regardless of the number of separate causes of action on which the claim is based. If the lawsuit involves more than one medical facility, the total amount of non-economic damages that can be awarded against the facilities is \$700,000 with a single facility not liable for more than \$350,000 (2005).

Cap overturned *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 2010 Ga. LEXIS 272.

Hawaii - \$375,000 cap on non-economic damages, with exceptions for certain types of damages, i.e. mental anguish (1986).

Idaho - \$250,000 cap on non-economic damages per claimant in personal injury and wrongful death actions. The cap will be adjusted annually beginning July 1, 2004 based on the average annual wage. The limit does not apply to causes of action arising out of willful or reckless misconduct, or felonious actions. (2003) Upheld, *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000).

Illinois - \$500,000 cap on non-economic damages for awards in a medical liability cause of action, including wrongful death, against a physician, the physician's business or corporate entity, and personnel or health care professionals.

Separate \$1 million cap on non-economic damages for awards in a medical liability cause of action, including wrongful death, against a hospital and its personnel or hospital affiliates.

Both caps apply to all plaintiffs in any civil action arising out of the care. The caps apply to injuries that occur after the effective date of the act (2005).

Cap overturned *Lebron v. Gottlieb Mem. Hosp.*, 2010 Ill. LEXIS 26.

Previous \$500,000 cap on non-economic damages, overturned *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

\$500,000 cap on economic and non-economic damages, overturned *Wright v. Central DuPage Hospital Assn.*, 63 Ill.2d 313, 347 N.E.2d 736 (1976).

Indiana - \$750,000 cap on total damages for any act of malpractice that occurs after 12/31/89 and before 7/1/99. \$1.25 million total cap for any act of malpractice that occurs after 6/30/99. Health care providers are not liable for more than \$250,000 for an occurrence of malpractice any amount awarded in excess of \$250,000 will be paid through the Patient Compensation Fund. (1975) Upheld, *Johnson v. St. Vincent Hospital*, 404 N.E. 2d 585 (1980).

Iowa - None

Kansas - \$250,000 cap on non-economic damages. This is the total amount of non-economic damages recoverable by each party from all of the defendants. (1988) Upheld, *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336 (1990).

Previous law struck down as unconstitutional, *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988).

Kentucky - None. Section 54 of Kentucky's Constitution prohibits cap on damages.

Louisiana - \$500,000 cap on total damages, excluding damages recoverable for medical care. A health care provider covered by the Patient's Compensation Fund shall not be liable for more than \$100,000. The Patient's Compensation Fund will cover the excess amount awarded up to the cap (1975).

Upheld caps on total damages, but future medical expenses are excluded from cap, *Butler v. Flint Goodrich Hospital of Dillard University*, 607 So. 2d 517 (1992).

Ruled unconstitutional by Louisiana Court of Appeal, Third Circuit in *Arrington v. ER Physicians Group*, No. 04-1235 (La. Ct. App. Sept. 2006). Vacated and set aside by Louisiana Supreme Court *Arrington v. Galen-Med, Inc.* (La. 06-2968 Feb. 2007).

Maine - \$500,000 cap on non-economic damages in wrongful death actions (2007).

Maryland - The limit on non-economic damages is frozen at \$650,000 until January 1, 2009, after which time the cap will increase annually by \$15,000 per year. Cap applies in aggregate to all claims and defendants arising from the same medical injury. (Cap also applies in wrongful death actions if the claim involves only one claimant or beneficiary). In wrongful death actions involving two or more claimants or beneficiaries, then the total cap on non-economic damages is \$812,500 (125% of the cap) (2005).

Court ruled that cap does not apply if pre-trial arbitration process waived *Semsker v. Lockshin* (Montgomery County Civil No. 283674) (2009).

Previous law upheld as constitutional, *Murphy v. Edmunds*, 325 MD 342, 601 A.2d 102 (1992).

Massachusetts - \$500,000 cap on non-economic damages, with exceptions for proof of substantial disfigurement or permanent loss or impairment, or other special circumstances which warrant a finding that imposition of such limitation would deprive the plaintiff of just compensation for the injuries sustained (1986).

Michigan - \$280,000 cap on non-economic damages, adjusted annually for inflation, except in cases where the plaintiff is hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, or where the plaintiff has permanently impaired cognitive capacity rendering him incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living, or the plaintiff has had permanent loss or damage to a reproductive organ resulting in the inability to procreate, then non-economic damages shall not exceed \$500,000. As of 2009 the \$280,000 cap is \$410,800 and the \$500,000 cap is \$733,500. (1993) Upheld, *Zdrojewski v. Murphy*, 202 Mich. App. Lexis 1566 (2002); Upheld *Smith v. Botsford General Hospital* (6th Cir. 2005).

Minnesota - None

Mississippi - \$500,000 cap on non-economic damages per plaintiff for medical liability causes of action filed against a health care provider (2004).

Missouri - \$350,000 cap on non-economic damages per plaintiff irrespective of the number of defendants. Law specifies that multiple caps cannot apply to a single defendant. The law also specifies that in a personal injury case a spouse who claims loss of consortium shall be considered the same plaintiff as his/her spouse. In wrongful death cases, all individuals asserting a claim shall be considered a single plaintiff (2005).

Previous law upheld, *Adams v. Children's Mercy Hospital*, 848 S.W. 2d 535 (1993).

Montana - \$250,000 cap on non-economic damages per occurrence. If a single incident of malpractice injures multiple, unrelated patients, the \$250,000 cap applies to each patient and all claims deriving from injuries to that patient (1995, 1997).

Nebraska - \$1.75 million in total damages. Health care providers who qualify under the Hospital-Medical Liability Act (i.e. carry minimum levels of liability insurance and pay surcharge into excess coverage fund) shall not be liable for more than \$500,000 in total damages. Any excess damages shall be paid from the excess coverage fund (1976, 1984, 1986, 1992, 2003).

Upheld, *Prendergast v. Nelson*, 256 N.W.2d 657 (1977); *Gourley ex. rel. Gourley v. Nebraska Methodist Health System Inc.*, 265 Neb. 918, 633 N.W.2d 43 (Neb. 2003).

Nevada - \$350,000 cap on non-economic damages awarded to each plaintiff from each defendant (2004).

New Hampshire - None

\$875,000 cap on non-economic damages, overturned, *Brannigan v. Usitalso*, 587 A.2d 1232 (N.H. 1991).

\$250,000 cap on non-economic damages in medical malpractice, overturned, *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980).

New Jersey - None

New Mexico - \$600,000 cap on total damages, excluding punitive damages and past and future medical care. Health care providers personal liability shall not exceed \$200,000, any award in excess of this amount shall be paid by the patient compensation fund. (1992) Upheld, *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267 (NM 2002).

New York - None

North Carolina - None

North Dakota - \$500,000 cap on non-economic damages (1995). Economic damage awards in excess of \$250,000 are subject to judicial review for reasonableness (1987).

Previous law struck down as unconstitutional. *Arneson v. Olson*, 270 N.W.2d (N.D. 1978).

Ohio - Establishes a sliding cap on non-economic damages. The cap shall not exceed the greater of \$250,000 or three times the plaintiff's economic loss up to a maximum of \$350,000 for each plaintiff or \$500,000 per occurrence. The maximum cap will increase to \$500,000 per plaintiff or \$1,000,000 per occurrence for a claim based on either (A) a permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or (B) a permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and person life sustaining activities (2002).

Note: The Ohio Legislature's previous attempts to enact a law with a cap on non-economic damages were overturned by the Ohio Supreme Court. For example, \$250,000-500,000 sliding scale cap on non-economic damages, overturned, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio 3d 451, 715 N.E. 2d (1999).

Oklahoma - \$400,000 cap on non-economic damages for claims arising from bodily injury regardless of the number of parties against whom the action is brought or the number of actions brought. The non-economic damages cap shall not apply if the judge and jury find by clear and convincing evidence that: 1) the plaintiff or injured person has suffered permanent and substantial physical abnormality or disfigurement, loss of use of a limb, or loss of, or substantial impairment to a major body organ or system; 2) the plaintiff or injured person has suffered permanent physical functional injury which prevents them from being able to independently care for themselves and perform life sustaining activities; or 3) the defendant's acts or failures to act were: a) in reckless disregard for the rights of others; b) grossly negligent; c) fraudulent; or d) intentional or with malice. The cap will not go into effect until the state establishes a patient compensation fund. The compensation fund will cover awards in excess of the cap when a plaintiff's case meets one of the exceptions (2009).

Previous law struck down as unconstitutional *Woods v. Unity Health Center, Inc* 2008 OK 97 (2008).

Cap does not apply in wrongful death cases because the Oklahoma Constitution specifically limits damage limitations in those types of cases.

Oregon - \$500,00 cap on non-economic damages in wrongful death cases.

Upheld *Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995), *Hughes v. PeaceHealth*, 2008 Ore. LEXIS 60 (Ore. S.Ct. 2008).

\$500,000 cap on non-economic damages, overturned, *Lakin v. Senco Products*, 987 P.2d 463 (Or. 1999).

Pennsylvania - None. Article III sec. 18 of Pennsylvania's Constitution prohibits limiting damages for personal injuries or death. Punitive damages are capped at 2 times actual damages.

Rhode Island - None

South Carolina - \$350,000 stacked cap on non-economic damages. A claim for non-economic damages in a medical liability action against a single health care provider or single health care institution cannot exceed \$350,000. If the award is against more than one health care provider or institution, the total award for non-economic damages cannot exceed \$1.05 million, with each defendant not liable for more than \$350,000. The cap applies separately to each claimant and adjusts annually for inflation based on the Consumer Price Index (2005).

South Dakota - \$500,000 cap on total general (non-economic) damages. (1985, revived by 1996 court decision).

Struck down cap on total damages, revived cap on non-economic damages, *Knowles ex. rel. Knowles v. United States*, 544 N.W. 2d 183 (SD 1996).

Tennessee - None

Texas - \$250,000 cap on non-economic damages for claims against physicians and other health care providers. The cap applies per claimant regardless of the number of defendants. Also provides a \$250,000 cap on non-economic damages awarded against a single health care institution and a \$500,000 cap on non-economic damages if a judgment is rendered against two or more health care institutions, with the total amount of non-economic damages for each individual institution, not exceeding \$250,000 per claimant, irrespective of the number defendants, causes of action, or vicarious liability theories involved. The total amount of non-economic damages for health care institutions cannot exceed \$500,000. Combining the liability limits for physicians, health care providers, and institutions, the maximum non-economic damages that a claimant could recover in a health care liability claim is capped at \$750,000 (2003).

Proposition 12, a ballot initiative to amend the Texas Constitution to specifically allow the legislature to enact laws that place limits on non-economic damages in health care and medical liability cases, was approved by the voters on September 13, 2003.

\$500,000 cap on all civil damages for wrongful death, indexed for inflation since 1977. The cap does not apply to medical, hospital, and custodial care received before judgment or required in the future. In 2002 the cap reached approximately \$1.4 million (1977, limited by 1990 court decision).

\$500,000 cap on non-economic damages (adjusted annually), overturned as applied to cases other than wrongful death, *Rose v. Doctors Hospital*, 801 S.W. 2d 841 (Tex. 1990).

Utah - \$250,000 cap on non-economic damages for causes of action arising before July 1, 2001, \$400,000 cap on non-economic damages for causes of action arising on or after July 1, 2001 but before July 1, 2002. Indexed annually for inflation thereafter. (1986, 2001) Upheld, *Judd v. Drezga*, 2004 UT 91 (Ut. 2004). \$450,000 hard cap on non-economic damages for claims arising after May 15, 2010.

Vermont - None

Virginia - \$2.0 million cap on total damages. The last increase shall be July 1, 2008. (1976, 1977, 1983, 1999, 2001) Upheld, *Etheridge, et.al. v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (Va. 1989).

Washington - None

Sliding cap on non-economic damages, overturned, *Sophie v. Fiberboard Corp.*, 771 P.2d 711 (Wash. 1989).

West Virginia - \$250,000 cap on non-economic damages per occurrence, regardless of the number of plaintiffs and number of defendants. The cap increases to \$500,000 per occurrence, for the following types of injuries; permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities. The limits only apply to defendants who have at least \$1,000,000 per occurrence in medical liability insurance. The limits will be adjusted annually for inflation up to \$375,000 per occurrence or \$750,000 for injuries that fall within the exception (2003).

Upheld previous cap on non-economic damages, *Robinson v. Charleston Area Med. Center*, 186 W.Va. 720 (1991); *Verba v. Ghaphery* 552 S.E. 2d 406 (W.Va. 2001).

Wisconsin - \$750,000 cap on non-economic damages (Enacted 2006).

\$350,000 cap on non-economic medical malpractice damages overturned as unconstitutional *Ferdon v. Wisconsin Patients Compensation Fund*, 2003AP988 (2005).

Wyoming - None - Constitution prohibits caps.