

2004 Ballot Measure Report **Measure 35**

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Constitutional Amendment State of Oregon Ballot Measure 35:

LIMITS NONECONOMIC DAMAGES (DEFINED) RECOVERABLE FOR PATIENT INJURIES CAUSED BY HEALTHCARE PROVIDER'S NEGLIGENCE OR RECKLESSNESS

Majority Recommends a NO vote on Measure 35

Measure 35 proposes to cap non-economic damages in medical malpractice cases at \$500,000 (adjusted annually for inflation). Measure 35's proponents contend that this cap is necessary to control rapidly increasing medical malpractice insurance premiums, that, in their view, are a key factor in escalating health care cost inflation, are forcing existing doctors to abandon the practice of medicine and are discouraging others from entering the medical field. Proponents assert that these problems are most acute in rural Oregon and in certain high-risk specialties, but it is just a matter of time before people throughout Oregon have difficulty accessing health care.

Though the members of your committee agree on most points, we did not reach a unanimous recommendation on how to vote on Measure 35. While acknowledging the problems cited by the proponents of Measure 35, the majority of your committee recommends a "no" vote because the measure does not address the core issues underlying the complex problems of increasing medical malpractice premiums, rising health care costs and reduc-

City Club members voted on October 22, 2004 to adopt the contents and majority recommendation of this report as the Club's official position. City Club recommends a NO vote on Ballot Measure 35.

tions in access to care. The majority concludes that the potential savings in medical malpractice insurance premiums are modest at best and do not outweigh the consequences of denying an injured party the right to have damages awarded by a jury. Even if savings are realized from capping non-economic damages, Measure 35 does not ensure that insurance companies will pass those savings on to policy holders through lower medical malpractice premiums. Finally, the proponents did not make a convincing case that health care providers, as a class, should be singled out for constitutional protection from large non-economic damage awards, while other groups remain exposed to such liability awards.

The minority of your committee recommends a "yes" vote on Measure 35 because, by capping awards and making claims more predictable, it would help contain malpractice premiums and encourage insurers to offer malpractice policies to new doctors, who sometimes find it difficult to secure coverage. Slowing the growth of malpractice premiums will also remove a disincentive for doctors to locate in Oregon and provide a better environment to retain those who already practice here.

I. INTRODUCTION

Ballot Measure 35 will appear on the ballot as follows:

AMENDS CONSTITUTION: LIMITS NON-ECONOMIC DAMAGES (DEFINED) RECOVERABLE FOR PATIENT INJURIES CAUSED BY HEALTHCARE PROVIDER'S NEGLIGENCE OR RECKLESSNESS.

Result of "Yes" Vote:

"Yes" vote limits recovery of non-economic damages (defined) for negligent or reckless injury to patient by healthcare provider to \$500,000 (adjusted annually for inflation).

Result of "No" Vote:

"No" retains the current law, which places no limit on jury award of non-economic damages (defined) for injury caused by negligence, recklessness of healthcare provider.

Summary:

Amends constitution. Under current law, there is generally no limit on jury awards of non-economic damages to patient, patient's legal representative, or patient's spouse for injury caused for negligent or reckless injury caused by an Oregon health care provider or health care entity to \$500,000. Defines non-economic damages to include pain; mental suffering; emotional distress; loss of society, companionship, services; loss of sexual relations; inconvenience; interference with normal and usual activities apart from employment. Specifies formula to adjust for inflation annually. Limitation applies regardless of extent of injuries, number of people entitled to damages, or number of defendants sued. Does not apply to wrongful death claims. Applies to suits filed after January 1, 2005. Other provisions.

Estimate of Financial Impact:

There is no financial impact on state or local government expenditures or revenues.

(The language of the caption, question, and summary was certified by the Oregon Secretary of State.)

The petitioners who placed Ballot Measure 35 on the November 2004 ballot seek to stabilize medical malpractice insurance premiums by limiting the amount of non-economic damages that can be awarded in medical malpractice cases. Proponents of Measure 35 propose a strategy that they claim will have a positive affect on patients' access to health care and related factors including cost, quality, and fairness.

City Club of Portland formed your committee to analyze Measure 35 and recommend a position to members and the community. Committee members were screened to ensure that no person had an economic or personal interest in the outcome of the study or has taken a public position on the subject of the measure. The study was conducted from August 9 to September 20, 2004. Your committee interviewed proponents and opponents of the measure and other interested individuals, and reviewed relevant articles, reports and other materials.

II. BACKGROUND

A. Compensation for Medical Malpractice in Oregon

In the state of Oregon, patients injured while receiving health care may sue their health care provider for medical malpractice. Medical malpractice is the failure of a medical professional to follow accepted standards of practice of his or her profession, resulting in harm to the patient.

Medical malpractice lawsuits are intended to compensate individuals for injuries caused by errors in medical care, and to encourage safer medical practices. Damages awarded for all types of malpractice claims are divided into three types: economic, punitive and non-economic. Measure 35 proposes to cap only non-economic damages in medical malpractice cases. There are three types of malpractice damage awards:

Economic damages are awarded to compensate plaintiffs for actual economic losses and costs that will be incurred. These costs include lost wages, medical treatment, durable medical goods such as wheelchairs, and at-home medical services such as home nursing. Measure 35 does not propose to cap economic damages.

Punitive damages are awarded to punish defendants for particularly egregious conduct. In Oregon, the plaintiff must show by "clear and convincing" evidence that a defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."¹ Punitive damages are intended to deter the defendant and others from committing similar acts in the future. Under Oregon law, 60 percent of the punitive damages award is paid to the Criminal

¹ ORS 31.730

Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section. The remaining 40 percent of the punitive damages award is paid to the prevailing party. The prevailing party's attorney is paid from this 40 percent, and the attorney's fee is capped at 20 percent of the gross punitive damages award.² Measure 35 does not propose to cap punitive damages; however, under existing law, punitive damages cannot be awarded against most individual health providers (e.g., physicians, dentists, nurses) when they act within the scope of their license and "without malice."³

Non-economic damages are awarded to compensate plaintiffs for any injury that does not have a financial value. Measure 35 defines non-economic damages to include pain; mental suffering; emotional distress; loss of society, companionship or services; loss of sexual relations; inconvenience; and interference with normal and usual activities apart from employment. Measure 35 proposes to limit non-economic damages in medical malpractice cases to \$500,000 adjusted annually for inflation.

While the number of medical malpractice claims in Oregon has remained relatively constant over the past 15 years, the damages awarded from these suits have been increasing. Since 1999, the average amount paid on claims has increased 90 percent.⁴

B. Insuring Against Medical Malpractice Liability

Healthcare providers purchase malpractice insurance to protect themselves from losses in the event they are sued. Medical malpractice insurance premiums vary widely by medical specialty and geography. Therefore, average costs can be misleading, because they can disguise wide variations across states and trends over time. However, as a general proposition, it is fair to say that, beginning in the late 1990s, medical malpractice insurance premiums began increasing rapidly for most physicians, most notably in Oregon in 1999.^{5,6}

The number of companies providing medical malpractice insurance in Oregon has declined significantly since 1997, when there were 15 providers. Now only two major insurers are covering doctors in Oregon. They are CNA and Northwest Physicians Mutual.⁷

² ORS 31.735

³ ORS 31.740

⁴ Grover, Stephen. "Medical Malpractice Damage Caps: Impacts of Limiting Non-economic Damages," *ECONorthwest Medical Report*, p. 13 (July 29, 2004). (Prepared for the Oregon Medical Association)

⁵ General Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, pp. 8-9 (2003) ("GAO Report")

⁶ Grover, at pp. 6-8

⁷ Hospitals and health systems obtain insurance in a separate market (or self-insure claims).

Oregon's medical malpractice insurance crisis has not escaped the notice of state policymakers. In 2003, the Legislature passed HB 3630, the Rural Subsidy Bill, which created a program to reimburse rural physicians for a portion of their medical malpractice insurance premiums.

CNA is the fourth-largest commercial insurer in the United States and the largest provider of medical malpractice insurance in Oregon. CNA has more than one million policyholders in the U.S. and internationally.

Northwest Physicians Mutual Insurance Company was founded by a group of Salem - area physicians and is licensed to issue insurance in Oregon and seven other western states. The company primarily writes medical malpractice insurance to qualified physicians in Oregon, California and Idaho. Since 1999, NPM has experienced significant financial difficulties. The company has stopped writing new obstetrician/gynecologist or family practice/obstetrician policies unless the physician is joining an existing group of five or more.⁸

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burse rural physicians for a portion of their medical malpractice insurance premiums. The bill, which is intended to ease the medical malpractice insurance premium crisis until a more permanent solution can be found, went into effect January 1, 2004 and will expire at the end of 2007. Obstetricians are reimbursed for up to 80 percent of their malpractice insurance premiums; family physicians who deliver babies are reimbursed up to 60 percent; all other rural physicians are reimbursed up to 40 percent. The rural subsidy program is administered by SAIF, and over 1,000 doctors are currently enrolled with approximately \$3.2 million spent, as of August 2004, on premium reimbursement.⁹ Funding for the program comes from the Oregon General Fund.

C. Recent History of Tort Reform in Oregon

Limits on civil damage awards were first introduced in Oregon in 1987 in response to escalating malpractice insurance premiums. At the urging of a task force appointed by Governor Vic Atiyeh,

⁸ Grover, at 18 (citing Oregon Department of Consumer and Business Services, *Target Report of Financial Examination of Northwest Physicians Mutual Insurance Company* (June 30, 2002))

⁹ SAIF, 2004

and with bipartisan support, the Oregon Legislature passed the Tort Reform Act.¹⁰ This act included a \$500,000 cap on non-economic damages in all civil cases. Under the law, the jury could not be informed of the \$500,000 cap, so in some cases juries awarded non-economic damages in excess of \$500,000. It was the role of the trial judge to reduce the damages to comply with the cap.

In 1994, the Oregon Court of Appeals held that the \$500,000 cap on non-economic damages violated the Oregon Constitution because it interfered with the constitutional right to trial by jury.¹¹ In 1999, the Oregon Supreme Court upheld the reasoning of the that decision when, in Lakin v. Senco Products, Inc., it struck down the statutory cap on non-economic damages.¹²

Nine days after the Lakin case was decided, the Oregon Legislature referred a constitutional amendment to the voters of Oregon. The referendum was Ballot Measure 81, which sought to give the power of capping all civil damages to the Oregon Legislature. The amendment would have given the Oregon Legislature the authority to limit damages awarded in any type of civil damage case. City Club of Portland studied Measure 81 in April 2000 and recommended a "no" vote. Measure 81 was defeated in the May 2000 primary election by a margin of three to one.

It is worth noting that governmental healthcare providers in Oregon, including Oregon Health & Science University and Oregon's 20 public health districts, already operate under strict liability caps (\$100,000 for non-economic damages, with a \$200,000 maximum for all damages for each claimant in a single incident).¹³ These caps are an outgrowth of the doctrine sovereign immunity and are unrelated to the Tort Reform Act.¹⁴ Therefore, they were not affected by the Oregon Supreme Court's invalidation of the cap on non-economic damages in the Lakin case.

Governmental health care providers in Oregon, including Oregon Health & Science University and Oregon's 20 public health districts, already operate under strict liability caps.

¹⁰ SB 323 (1987). A tort occurs when someone deliberately or through carelessness causes harm or loss to another person or their property. (www.legal-definitions.com)

¹¹ Tenold v. Weyerhaeuser Co., 127 Or App 511, 873 P2d 413 (1994), review dismissed 321 Or 561 (1995)

¹² 329 Or 62, 987 P2d 463 (1999). The cap continues to apply to claims under Oregon's wrongful death statute. Greist v. Phillips, 322 Or.281, 906 P2d 789 (1995).

¹³ ORS 30.265 to .270

¹⁴ A doctrine precluding the institution of a suit against a government without its consent.

II. ARGUMENTS PRO AND CON

A. Arguments Advanced by Proponents of Measure 35:

Rising jury awards and the high cost of defending lawsuits lead to increases in malpractice insurance premiums.

Escalating premiums for medical liability insurance are limiting access to health care. Doctors, especially obstetricians and surgeons, are leaving rural practices because they cannot afford to pay malpractice insurance premiums. Even in urban areas, physicians are leaving or limiting their practices resulting in patients having fewer health care resources within their geographic area.

Jury awards drive up the cost of health care services because increases in premiums are passed on to patients. Doctors, fearing large suits, practice "defensive medicine," which often includes over-prescribing expensive tests.

Frivolous lawsuits and overly generous awards, won by attorneys who play on jurors' emotions, often do not correlate with actual fault on the part of a physician, but rather with bad medical outcomes.

Higher medical malpractice insurance premiums affect not just doctors who have claims against them, but all doctors. Even obstetricians who have faced few or no lawsuits are seeing their rates rise by 30 percent or more per year.

Caps on non-economic damages will decelerate increases in premiums, as demonstrated by previously existing damage caps in Oregon.

B. Arguments Advanced by Opponents of Measure 35:

The jury system is the proper method for determining legal damages. A "one-size-fits-all" cap is inherently unfair. Limiting non-economic damage awards will deny injured patients and their families the right to compensation for catastrophic errors.

Jury awards are not the reason malpractice insurance premiums are increasing. The increase is instead caused by poor financial returns on investments made by insurance companies. Premiums have increased in states with and without liability caps on jury awards.

Measure 35 does not call for malpractice insurance premiums to be lowered. The way to guarantee relief from high premiums is to directly regulate the insurance industry.

The number of rural doctors in Oregon has increased, not decreased. Rural hospitals are closing obstetric units due to low patient volume and the rising costs of maintaining obstetric units (including anesthesiologists, ultrasound technicians, facility costs), not because doctors cannot afford malpractice premiums.

Large awards for pain and suffering are not the norm. Only nine jury verdicts over \$1 million for non-economic damages in medical malpractice cases have occurred in Oregon since the Oregon Court of Appeals overturned caps in the Tenold case in 1994.

Prior experience in Oregon shows that caps do not reduce the number of claims. Costs per claim have risen with inflation and the ever-increasing risk of medical procedures.

Limiting jury awards removes an important tool for patients to hold doctors and other health care professionals accountable.

Medical malpractice costs are not a significant factor in high health care costs.

The insurance subsidy program enacted by House Bill 3630 is helping in rural areas and should be allowed time to work.

IV. DISCUSSION

Your committee unanimously agreed on most of the underlying factors that are relevant to an analysis of Measure 35. However, because committee members weighed the factors differently, four members of the committee recommend a "no" vote on Measure 35, while three committee members recommend a "yes" vote.

A. The Malpractice Insurance Crisis Is Real: Premiums Are Increasing Rapidly and Insurers Are Exiting the Market

Your committee unanimously agreed that there is a crisis related to the cost and availability of medical malpractice insurance in Oregon. A 2004 report by ECONorthwest reveals doubling and tripling of premiums each year for many providers.¹⁵ Premiums have increased for health care

¹⁵ Refer to note 6.

providers large and small, rural and urban, and for large self-insured systems such as Providence Health System (because of increases in re-insurance premiums). Doctors in higher-risk specialties, such as obstetrics and surgery, are seeing particularly large rate increases. Premiums for doctors at the OB/GYN Health Center in Medford tripled from 2000-2003; this increase, along with the cost of new medical equipment, prompted them to join the Providence Health System rather than continue operating independently. Between 1999 and 2004, Northwest Physicians Mutual increased premiums 172 percent for family practitioners, the practice area with the lowest malpractice premiums.

Regardless of cost, malpractice insurance is also becoming difficult to obtain for new doctors starting in private practice because some insurers are unwilling to write policies for doctors lacking a professional history. Only two major providers of medical malpractice insurance operate in Oregon, and one of those is limiting new policies and has a weak financial rating. The community of John Day nearly lost obstetrics services for lack of an insurer willing to write a policy for a doctor hired to replace a retiring practitioner. Coverage became available only when the state Department of Rural Health intervened. Experts testified that unless changes occur, medical malpractice insurance premiums will continue to escalate. Your committee heard persuasive testimony that, without some type of intervention, medical malpractice insurance premiums will continue to escalate. Further, your committee found no evidence that premiums would stop increasing barring such intervention. All members of your committee agree that some action is necessary, but we disagree on what should be done.

B. Multiple Factors Are Pushing Medical Malpractice Insurance Premiums Higher: Higher Damage Awards Are a Contributing Factor

In 2004, The New England Journal of Medicine published an overview outlining the interplay of several factors affecting malpractice insurance rates:

Insurance rates tend to move in cycles. During times of tough competition, insurers price insurance inexpensively to gain or retain market share, and then when costs exceed premiums, they raise premiums.

Economic shifts in financial markets affect the income insurers earn from their investments. During market downturns, insurers have to recoup their losses elsewhere.

Nonmedical claims, such as those resulting from natural disasters or terrorist attacks, drive up overall costs for insurance companies. For instance, CNA, one of Oregon's two primary malpractice insurers, was a major provider of workers' compensation insurance for companies located in New York City's World Trade Center.

Medical malpractice payouts are increasing. Awards are going up quickly and each big award sets a precedent that drives the next award request in future cases.

Proponents and opponents disagree about how much each factor contributes to the problem the proponents of Measure 35 hope to solve.

Proponents of Measure 35 contend that claim payments are the most significant costs that malpractice insurers face, accounting for about two-thirds of their total costs and that recent increases in claims are being reflected in soaring premiums.¹⁶ Dr. Colin Cave, the chief petitioner for Measure 35, testified that total payouts for malpractice claims increased from \$15 million in 1999 to \$60 million in 2003 (a 300 percent increase). The proponents' data show that since the Oregon Supreme Court invalidated caps in 1999, the average demand per claim has gone from \$870,000 to \$3.6 million, and the average demand for an obstetric claim has risen to \$9.5 million.¹⁷

Opponents of Measure 35 argue that awards for non-economic damages have little to do with rising premiums. They are able to identify only eight Oregon cases since 1997 in which juries awarded over \$1 million for a malpractice claim. Instead of focusing on claims costs, they say premiums have increased to make up losses insurers experienced in the financial markets over the past several years and to recover from undercharging premiums to increase market share in the 1990s.

Both the proponents and the opponents of Measure 35 cited statistical studies supporting their positions. These studies appeared to be conducted or funded by groups that have taken a public position on damage caps; therefore your committee was reluctant to rely on their conclusions. Your committee was most persuaded by an extensive study by the U.S. General Accounting Office in August 2003. The committee viewed the GAO as an unbiased organization with the experience and expertise to evaluate this issue. The GAO submitted its report to three independent health policy researchers with expertise in malpractice-related issues and to the American Medical Association. Each of the independent researchers generally concurred with the GAO's findings. The AMA objected to portions of the report, but did not quarrel with the GAO's conclusion that medical malpractice insurance premiums increased more slowly in states with non-economic damage caps. The GAO focused on non-economic damage caps because "published research generally finds that these caps have a greater impact on medical malpractice premium rates and claims payments than some other tort reform measures."¹⁸

¹⁶ Grover

¹⁷ Proponents of Measure 35 assert that this increase is directly related to the Oregon Supreme Court's removal of the \$500,000 non-economic damages cap in 1999. Measure 35 opponents point to the 1994 Court of Appeals decision in Tenold to argue that the cap on non-economic damages was effectively removed as early as 1994, even though the Oregon Supreme Court did not definitively invalidate caps until 1999. Evaluating the effect of the 1994 decision is difficult because many claimants likely assumed the \$500,000 cap remained in effect until the state's highest court invalidated it in 1999.

¹⁸ GAO Report

Your committee is concerned that Measure 35 attempts to solve a complex problem by addressing only one of many potential contributing factors.

Although your committee relied heavily on the GAO report, it does have limitations, particularly in that it studied a relatively small number of states over a relatively short period of time. The lack of information regarding the effect of caps was an obstacle in your committee's work, mostly because a significant number of Oregon health care providers currently have the benefit of caps.¹⁹ At least one public health district already subject to caps was recently notified of a 100 percent increase in its malpractice premium for the coming year. Your committee could not determine if this definitively means that caps are not effective at reducing premiums, or whether it means that, if caps are to work, they must apply to all health care providers in the state to reduce the overall risk pool for insurers.

Your committee is concerned that Measure 35 attempts to solve a complex problem by addressing only one of many *potential* contributing factors. Also, nothing in the measure compels insurers to pass on any savings to policyholders in the form of lower premiums. Because Measure 35 would have no effect on many of the factors that potentially influence the cost of medical malpractice insurance and would not compel insurers to pass savings on to policyholders, it is unclear whether the measure would, in fact, reduce medical malpractice insurance premiums.

C. If Measure 35 Reduces Medical Malpractice Rates, It Is Unlikely to be the Panacea Touted by Its Proponents.

Proponents of Measure 35 claim that its passage would address three important social problems of concern to Oregonians:

It would improve access to health care;

It will result in greater fairness in the system of compensating medical errors; and

It would improve the quality of care, improve the adversarial health care climate and remove disincentives to practice medicine.

¹⁹ Refer to discussion accompanying note 14.

For the following reasons, your committee concludes that passage of Measure 35 might positively influence some of these areas.

1. Access to Health Care

Your committee heard convincing evidence of both new and longstanding problems of access to health care in Oregon, especially in rural areas often characterized by high unemployment and aging populations. Rural populations typically have a high percentage of Medicaid and Medicare patients, and Oregon's Medicare and Medicaid reimbursements are among the lowest in nation. Rural doctors and hospitals, therefore, often receive less income than their urban counterparts, making increases in malpractice premiums difficult to absorb.

Problems being faced now in rural Oregon may foreshadow what is to come for urban areas. Though urban health care providers are cushioned somewhat by advantageous economies of scale and a more diverse mix of patients (i.e. lower percentage of Medicare and Medicaid patients), urban areas are starting to face issues related to access of care.

As with so many aspects of Measure 35, the proponents and opponents do not agree on the extent of the problem. The opponents cite statistics indicating that the number of doctors in Oregon—including in rural areas—is remaining steady or even increasing. They contend that factors like longer hours and lower earning potential are more important factors than malpractice premiums in attracting and retaining rural doctors. The proponents question the opponents' statistics, contending that not all of the doctors included in the numbers are actively practicing or, if they are practicing, they are not carrying a full patient load. The proponents are more alarmed by surveys that show a significant number of rural doctors intend to leave practice in the near future.

Your committee heard convincing testimony from Karen Whitaker, vice provost and director of the OHSU Center for Rural Health, that there are significant issues related to access of care in some, but not all, parts of rural Oregon and that these problems tend to be concentrated in certain high risk fields. Several witnesses testified that high malpractice premiums are putting a strain on health care delivery in rural Oregon.²⁰ Therefore, if Measure 35 helps stabilize malpractice insurance rates, it should reduce one disincentive to practice in rural areas and could make more doctors available in rural Oregon. This would, in turn, improve access to healthcare.

²⁰ Although these witnesses cited medical malpractice insurance premiums as a problem, they did not necessarily agree that Measure 35 would solve the problem.

2. Fairness of the Medical Malpractice Compensation System

Measure 35's proponents criticize a system of compensation that provides disproportionate awards to a small number of people, while consuming a staggering amount of resources in transaction costs. Implicit in their argument is that non-economic damage awards, which, by their nature cannot be objectively measured, are frequently arbitrary and excessive and, therefore, unfair to health care providers who are forced to defend claims.

Measure 35's opponents contend that juries are capable of determining whether awards are proportionate to the claimant's injuries. They agree that only a small portion of injured patients ever receive awards through Oregon's current system for compensating victims of medical malpractice, but they conclude that patients—not doctors—bear the brunt of any unfairness in the system.

Your committee agrees that the current system for compensating bad medical outcomes is already unfair:²¹

Jury awards for non-economic damages are subjective and inconsistent; a jury may be swayed by emotional factors instead of an objective way to set compensation. Studies have shown that juries tend to reward a suffering plaintiff based on the extent of the injury regardless of the degree of fault of the doctor.²²

Pursuing expensive and contentious legal recourse by proving that somebody is to blame for the patient's injuries is the only way for a victim of medical injury to be compensated. There is no other "social safety net" on which victims can fall back.

Because compensation is available only if the patient can show fault, the current system encourages suits against doctors who may not actually be negligent.

The specter of blame and the possibility that a health care provider could lose personal assets deters a more collaborative system for compensating patients injured by a medical error.

Because of costly attorney and expert witness fees, injured parties typically receive less than half of every dollar awarded by juries in medical malpractice lawsuits.

If a damage award is made, it can take years for the patient to receive the money.

²¹ Your committee agrees that there is a pressing need for reform of the system for compensating victims of medical injuries. Suggestions for reforms appear in Appendix A.

²² New England Journal of Medicine, 1996

People who view non-economic damage awards as frequently arbitrary or excessive will likely view Measure 35 as increasing the fairness of the system for compensating consequences of medical malpractice. Not only will health care providers be spared liability, but more funds will be available to pay claims for demonstrable damages to other claimants. People who view non-economic damage awards as generally appropriate will likely view Measure 35 as making an already unfair system slightly more unfair. The additional unfairness will be concentrated on a small number of injured people for whom the system will be extremely unfair, specifically cases that have small economic damages but high non-economic damages.²³

3. Quality of Care, Adversarial Climate, and Risk of Liability

Many witnesses described a pervasive climate of fear and hostility experienced by physicians who perceive an overly zealous legal machine waiting for any opportunity to impose liability. According to witness testimony, this perception discourages disclosure of important information that could improve medical safety, quality of care and doctor accountability. This climate also has a demoralizing effect on doctors and discourages "the best and brightest" from wanting to practice medicine.

Witnesses from a variety of health care fields frequently referred to the ramifications of declining morale caused by the malpractice insurance crisis. They said prospective doctors choose specialized practices based in part on the liability risk associated with a particular specialty. As Whitaker commented, "the doctors' perception is their reality" because doctors will make career decisions based partly on their perception of the risks and costs of practicing medicine.²⁴

Witnesses also told your committee that the medical malpractice insurance system should not be about only what happens after a bad medical outcome occurs. They stressed its potential relationship with efforts to improve patient safety and quality of care. As Dr. Glenn Rodriguez of Providence Medical Center put it, "We've had the current malpractice tort system for 40 years, and it hasn't improved patient safety at all."

Many witnesses described a pervasive climate of fear and hostility felt by physicians who perceive an overly zealous legal machine waiting for any opportunity to sue.

²³ Examples include a woman who undergoes a mastectomy based on a misdiagnosis of breast cancer, and a stay-at-home parent with no income who becomes disabled. In such cases, the patient's life has been dramatically affected, but the economic damages are likely to be small.

²⁴ In fact, perceptions may be more important than reality. Individual health care providers in Oregon are already largely insulated from liability from punitive damages, and large awards frequently are satisfied by larger entities (e.g., hospitals, insurers and health systems) rather than individual health care providers.

Your committee does not believe Measure 35 will improve patient safety or quality of care because it will not change the basic malpractice system. It will have only a limited effect on the adversarial health care climate, because it will not alter the fundamental fault-based system. However, by managing one part of potential liability, it may reduce doctors' fears of liability. If Measure 35 reduces this fear among doctors, it could have a positive effect on decisions to continue to perform, or to enter, higher-risk specialties.

D. The Content of Measure 35 Should Not Be in the Constitution, But the Oregon Supreme Court Has Left the Proponents No Alternative.

A key consideration for your committee was the extent to which it is appropriate to amend the Constitution with Measure 35, even if the measure serves a public good. Because statutory limits on non-economic damages violate the constitutional right to a jury trial, a constitutional amendment is the only way to enact these caps.

This reality does not mean that use of the initiative process is a desirable means to amend the Constitution in this case. Given the complexity of the issues, proponents and opponents of caps both rely on simplistic sloganeering (e.g., "stop frivolous lawsuits;" "trust juries") that does not address the true issues. When the campaigns do go beyond slogans, both proponents and opponents cite a dizzying array of apparently conflicting statistics to support their positions. Finding unbiased, knowledgeable observers who are capable of evaluating the competing statistical claims is difficult. If the Oregon Constitution is going to be amended with respect to such a complex issue, your committee believes that it should be done through a more objective deliberative process.

Finally, your committee does not believe the Constitution should include details as specific as dollar amounts for medical malpractice caps.

V. MAJORITY CONCLUSIONS & RECOMMENDATION

After weighing the factors and decisions set forth in the Discussion section of this report, a majority of your committee concludes that:

A number of factors affect malpractice insurance premiums, and there is insufficient evidence to conclude that addressing the single factor of non-economic damages will materially affect premiums. Even if insurers do realize savings if Measure 35 is adopted, there is no assurance that insurers will pass on savings to health care providers in the form of lower premiums.

Medical malpractice insurance premiums are not the primary cause of the health care access problem in Oregon. Measure 35 would not affect malpractice insurance premiums enough to make a significant difference in longstanding issues in rural health care. Measure 35 would at best be an incomplete solution to the complex problem of health care access and quality.

Measure 35 is disproportionately unfair to the small number of malpractice victims who deserve large awards but would be constitutionally unable to receive them.

Measure 35 would do nothing to address the much-needed reform of the expensive and adversarial system for compensating victims of bad medical outcomes.

Measure 35 should be subjected to more extensive deliberation and scrutiny before it is enshrined in the Oregon Constitution.

A majority of your committee, therefore, recommend a NO vote on Measure 35.

Respectfully submitted,

Alana Bove Finn
Francis Lancaster
Bert Lowry
Mark Skolnick, *chair*

VI. MINORITY CONCLUSIONS AND RECOMMENDATION

After weighing the factors and issues set forth in the Discussion section of this report, a minority of your committee concludes that:

A cap on non-economic damages would have a decelerating effect on the growth of premiums as is true in many of the states that have enacted caps. Although the extent of the impact cannot be determined at this time, we believe that the dire circumstances, particularly in rural Oregon, justify taking this step.

While capping non-economic damages may be unfair for a few Oregonians who might otherwise be compensated with larger awards, a greater public good would be accomplished by slowing down the growth of medical malpractice premiums.

Stabilizing malpractice premiums would provide a better environment for doctors entering high-risk practices in Oregon and help retain doctors who already are here.

Managed care, the rapidly shrinking Oregon Health Plan, and lower Medicare and Medicaid reimbursements all threaten the delivery of a critical and essential health care service to our citizens. Spiraling medical malpractice premiums further stress an already fragile health care system. We believe controlling the malpractice insurance crisis would be an important positive first step in addressing this systemic crisis.

An amendment to the Oregon Constitution is a blunt instrument, one that should be used only as a last resort. The 1999 decision of the Oregon Supreme Court has left a vote on a constitutional amendment as the only path to this necessary reform.

A minority of your committee, therefore, recommends a YES vote on Measure 35.

Respectfully submitted,

Patricia Elliott
Joanne Kahn
Rhidian Morgan

Advisor and Staff to the Full Committee:

Jeff Knapp, *research adviser*
Wade Fickler, *research director*

ACKNOWLEDGEMENTS

Your committee acknowledges and appreciates the support and advice of our Research Advisor, Jeff Knapp and City Club Research Director Wade Fickler.

VI. APPENDICES

A. Other Alternatives

Your committee identified alternative approaches that are reportedly working in other states. Your committee believes some of these concepts are worthy of further consideration.

Allow for review of insurance premium increases by a public commission, to force insurance companies to justify their increases. California's 1975 Medical Injury Compensation Reform Act is a model used by other states. The California law puts a \$250,000 cap on non-economic damages, limits attorney fees to a sliding scale, and regulates malpractice rate increases proposed by insurance companies. Attorneys' fees are set to a sliding scale of 40 percent of the first \$40,000 awarded, down to 15 percent for amounts over \$600,000.

Establish an expert panel to review cases to separate bad medical outcomes from the actual "negligence" cases.

Create a table of "standard compensation" for bad medical outcomes, through some sort of social safety fund, possibly a reserve fund created from malpractice insurance premiums. It would be unnecessary to go to court to get this compensation.

Establish a tiered system that differentiates severe cases and allows a higher level of awards.

Allow patients to access information related to malpractice claims so they can select physicians based, in part, on their professional history.

Fully fund the Patient Safety Commission created last year by the Oregon Legislature. The commission was created to "build the framework for a voluntary reporting system that will track medical errors without exposing the reporting parties to litigation."²⁵

²⁵ The Business Journal, "Patient Safety Group Seeks More Funding," August 6, 2004

B. Witnesses

Colin Cave, M.D., Past President of the Oregon Medical Association, Chief Petitioner for Measure 35
 Tom Sadoris, M.D., Internist, Private Practice
 Glen Rodriguez, M.D., Chief Medical Officer, Providence Health System
 Charlie Burr, Campaign Manager, No on 35 Campaign/Trust Juries for Responsible Solutions Committee
 Jason Reynolds, Executive Director, Oregon Consumer League
 Karen Whitaker, Vice Provost, OHSU; Director, Center for Rural Health
 Bill Taylor, Staff Attorney, Oregon House Judiciary Committee
 Peter Merck, Corporate Management Analyst, State Accident Insurance Fund (SAIF)
 Kathy Brooks, plaintiff in a malpractice claim
 Sherry Heaton, Insurance Broker, Chivaroli and Associates
 Jack Polance, Attorney at Law, Private Practice
 Victor Van Der Does, Chief Executive Officer, Morrow County Health District
 Ronnie Emden, M.D., Obstetrician, Vancouver Clinic
 Bob Howser, Hospital Administrator, Blue Mountain Hospital District

C. Resources

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