



**Special Committee on Financial Institutions & Insurance
Testimony on the impact of Hilburn decision
Presented by Eric Stafford, Vice President of Government Affairs**

Tuesday, October 29, 2019

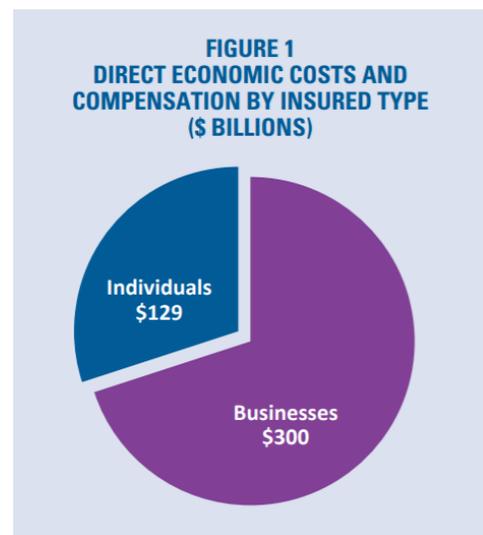
My name is Eric Stafford, Vice President of Government Affairs for the Kansas Chamber. We appreciate the opportunity to discuss the *Hilburn* decision with this committee, and the impact of the Kansas Supreme Court ruling caps on non-economic damages are unconstitutional.

Before specifically discussing the *Hilburn* decision, we feel it's important to provide historical context of the Kansas legal climate compared to where we are today. Every two years, the U.S. Chamber Institute for Legal Reform (ILR) releases a "Ranking the States" report on the state of liability across the 50 states. In 2007, Kansas had the 5th best legal climate in the nation. By 2017, Kansas had dropped to number 18 due to a variety of court decisions.

However, the new ILR rankings were just released and Kansas experienced the largest drop in ranking of any state, slipping to 32nd in the nation, largely due to June's *Hilburn* decision. ILR writes "This decision directly affects all Kansans, who will bear the costs of increased litigation. A recent study (https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_FINAL_WEB.pdf) from the Institute for Legal Reform found that every household in the state paid \$2,471 into its tort system in 2016. That number will almost certainly go up, perhaps approaching a high-cost state like New Jersey. In that state, there is no non-economic damages cap and households pay \$5,551 into its own tort system." On the next page you will find a chart outlining the costs and comparisons for all 50 states from that ILR study.

As figure 1 from the ILR report shows, businesses (includes medical malpractice costs) bear 70% of the costs associated with tort liability, which is why the Kansas Chamber and our members have such a vested interest in ensuring that Kansas restores what used to be a sound and reasonable legal climate.

Attached to our testimony is a report we commissioned to look at the history of non-economic caps, the economic impact of the decision, likelihood of future litigation, and the impact on the cost of medical malpractice.



Costs and Compensation of the U.S. Tort System Report 2018

Data: Costs and Compensation Paid in the Tort System in 2016 (\$ Millions)

State	General/ Professional	Medical Malpractice	Automobile	Total	Tort costs as % of state GDP	Tort costs per household (\$)
	[1]	[2]	[3]	[4]	[5]	[6]
AL	2,894	157	2,071	5,122	2.5%	2,765
AK	390	39	342	771	1.5%	3,105
AZ	3,733	309	3,081	7,122	2.3%	2,827
AR	1,915	86	1,264	3,265	2.7%	2,857
CA	36,452	1,723	17,791	55,966	2.1%	4,324
CO	4,448	353	2,871	7,672	2.4%	3,638
CT	3,794	265	2,150	6,209	2.4%	4,574
DE	1,141	61	687	1,890	2.7%	5,383
DC	1,382	155	222	1,760	1.4%	6,257
FL	17,403	1,228	15,014	33,645	3.6%	4,442
GA	7,173	506	5,705	13,384	2.5%	3,631
HI	1,014	81	534	1,629	1.9%	3,573
ID	865	32	622	1,519	2.2%	2,486
IL	11,500	1,257	5,269	18,026	2.3%	3,738
IN	3,841	198	2,605	6,644	1.9%	2,623
IA	2,113	104	1,099	3,316	1.8%	2,657
KS	1,528	101	1,114	2,744	1.8%	2,471
KY	2,055	213	2,211	4,479	2.3%	2,608
LA	3,260	253	3,396	6,909	2.9%	4,015
ME	608	59	496	1,163	2.0%	2,187
MD	4,006	730	3,295	8,032	2.1%	3,360
MA	5,824	627	3,528	9,980	2.0%	3,869
MI	5,168	456	6,222	11,846	2.4%	3,050
MN	3,489	294	2,391	6,173	1.8%	2,873
MS	1,469	140	1,312	2,921	2.7%	2,676
MO	4,514	331	2,507	7,352	2.5%	3,099
MT	792	60	477	1,329	2.9%	3,195
NE	1,211	84	808	2,103	1.8%	2,813
NV	2,571	154	1,783	4,507	3.0%	4,272
NH	777	97	531	1,405	1.8%	2,698
NJ	10,176	977	6,581	17,734	3.1%	5,551
NM	1,146	138	990	2,273	2.4%	2,998
NY	30,476	2,305	10,948	43,730	2.9%	6,066
NC	4,894	318	3,688	8,900	1.7%	2,292
ND	466	26	315	806	1.5%	2,557
OH	6,118	679	4,369	11,166	1.8%	2,414
OK	2,291	169	1,786	4,246	2.3%	2,890
OR	2,589	161	2,129	4,879	2.1%	3,105
PA	11,394	1,044	5,936	18,374	2.5%	3,721
RI	920	69	671	1,660	2.9%	4,066
SC	2,510	175	2,576	5,261	2.5%	2,802
SD	431	37	323	791	1.6%	2,369
TN	4,344	244	2,615	7,204	2.2%	2,818
TX	18,586	1,341	13,776	33,704	2.1%	3,535
UT	1,848	125	1,313	3,285	2.1%	3,483
VT	519	29	232	780	2.5%	3,061
VA	4,497	426	3,516	8,439	1.7%	2,704
WA	4,422	382	3,697	8,501	1.8%	3,071
WV	1,034	149	836	2,019	2.8%	2,796
WI	3,496	105	2,133	5,734	1.8%	2,464
WY	323	29	246	598	1.6%	2,675
National	249,813	19,078	160,076	428,966	2.3%	3,329

Sources and Notes: [1]: Includes general/professional and homeowners' liability. [2]: Sourced from SERFF physician and hospital rate filings. [3]: Includes personal and commercial automobile liability. [4] = [1] + [2] + [3]. [5]: 2016 state household estimates from the U.S. Census.

Removing Caps on Non-Economic Damages

By Ike Brannon and Jeff Patch

Introduction

In June the Kansas Supreme Court struck down state legislation that imposed caps on non-economic damages awarded by juries in personal injury cases. The 4-2 decision in [Hilburn v. Enerpipe Ltd.](#) upended decades of precedent, generating widespread uncertainty in insurance markets and among businesses of all sizes in Kansas.

Many states set caps on noneconomic damages that juries can award in lawsuits to reduce the potential economic impact of “runaway juries” that may decide cases and determine awards based on emotionally-driven, non-quantitative factors. This dynamic is particularly prominent in tragic cases involving the loss of life or serious injuries. Caps on noneconomic damages are distinguished from caps on economic damages, such as medical bills, which remain uncapped in Kansas and virtually all other states.

Kansas policy makers must now decide how—and whether—to advance reforms to try to prevent the court’s decision in *Hilburn* from reducing access to affordable insurance premiums for businesses, particularly physicians. The ruling could potentially result in an increased economic burden for Kansas firms, as well as the state’s residents in turn, by causing the price of business insurance premiums to significantly increase.

It is already clear that the court’s ruling has created an enormous amount of uncertainty into the state’s economy, and this will be particularly problematic for the healthcare industry as a whole if the court’s decision is extended to medical malpractice claims. In fact, a Kansas jury awarded the plaintiff family \$6.55 million in a wrongful death case—the largest in Kansas history—Aug. 6, according to [The Wichita Eagle](#). Jurors awarded \$1.5 million in non-economic damages and \$5.05 million in economic damages. The defendant, Wesley Medical Center, will almost certainly appeal the case to the Kansas Supreme Court.

The Case

Plaintiff Diana Hilburn was a passenger in a vehicle rear-ended by a driver of a semi-truck owned by Enerpipe, Ltd. in 2010. The company admitted liability but contested the damages sought. After a trial focused solely on determining damages, a jury awarded Hilburn \$33,490.86 for medical expenses and \$301,509 for noneconomic losses tied to the collision, which a state judge reduced to \$250,000, the cap under Kansas law. The judge distinguished Hilburn’s case from *Miller v. Johnson*, a 2012 decision upholding noneconomic damages caps in medical malpractice cases.

Hilburn challenged the constitutionality of caps under the [Kansas Bill of Rights](#), alleging violations of section 5, which provides a right to a jury trial, and section 18, which requires justice to be administered without delay. A state Court of Appeals panel affirmed the lower court’s decision, determining that the common-law right to remedies under section 18 met the public interest test because the cap on noneconomic damages is a reasonable trade-off to ensure that insurance remains available and affordable. The

court also noted that mandatory insurance for trucking companies under federal law guarantees a “reliable source of recovery” for plaintiffs.

Rejecting Caps

However, in 2019 a plurality of the Kansas Supreme Court reversed the appellate court, [holding](#) that section 5 of the Kansas Constitution’s Bill of Rights provides that “the right of trial by jury shall be inviolate,” and that “the determination of noneconomic damages was a fundamental part of a jury trial at common law.”

“The cap’s effect,” Justice Carol Beier wrote, “is to disturb the jury’s finding of fact on the amount of the award. Allowing this substitutes the Legislature’s nonspecific judgment for the jury’s specific judgment.”

Before *Hilburn*, fourteen other states upheld damage caps despite arguments that caps infringe on a plaintiff’s right to a jury trial. Eight of these states have constitutional provisions similar to Kansas’—Idaho, Indiana, Maryland, Nebraska, Nevada, Ohio, Oregon, and South Dakota. Five other states—Alabama, Florida, Georgia, Missouri, and Washington—struck down similar caps based on the right of trial by jury.

Justice Stegall wrote a concurring opinion holding that while the statute violates section 5, it is a close call and the legislature could remedy the problem. Stegall’s opinion may be a roadmap for the legislature to modify the statute and have a constitutionally permissible cap on noneconomic damages. Stegall wrote that

“[i]n fact, the cap does not take any question away from the jury or substantively alter its role at all...” he wrote. The law’s requirement “that ‘the court shall not instruct the jury on the limitations of this section’ is a clear indication to me that the Legislature sought to substitute its judgment for the judgment of the jury. Why else would the Legislature play hide-the-ball with something so consequential? Juries are told the substantive elements of the causes of action being tried in front of them. The legislative refusal to let the jury know about the damage cap tips the balance of consideration in my mind from a substantive modification of the cause of action to a procedural interference with the inviolate right to a jury protected by section 5.”

The dissenting opinion concluded that the court should follow the Miller precedent because laws and regulations mandating vehicle insurance for businesses are “reasonably necessary in the public interest to promote the public welfare,” and the legislature “substituted an adequate statutory remedy for Hilburn’s right to have a jury determine her damages.” The dissenting justices also noted that Kansans have relied on the law for more than three decades in “writing, negotiating, and agreeing to insurance, indemnity, and other contracts.”

The dissent also warned that jettisoning the public interest test could have implications beyond general business liability insurance, including workers compensation, auto insurance, and medical malpractice.

Constitutional and Legislative History

The modern policy conflict over tort reform stemmed from liability insurance crises of the 1970s and 1980s. The number of multimillion dollar jury verdicts [doubled from 1972 to 1983](#). In response to soaring general liability and medical malpractice insurance, most states enacted tort reform measures, including statutory limits on noneconomic damages.

The Kansas legislature codified its state's caps in statute [in 1988](#). In 2012 the Kansas Supreme Court, in *Miller v. Johnson*, affirmed the constitutionality of caps on noneconomic damages applicable in medical malpractice cases, holding that the legislature's cap was "an adequate and viable substitute" to the common-law right to a jury trial on the limited issue of damages. After *Miller*, Kansas became the eighteenth state to affirm the constitutionality of some limit on noneconomic damages.

The supreme court's decision still leaves some advantages for civil defendants. Kansas follows a comparative fault rule that prevents recovery by a plaintiff who is more than 50 percent at fault for an incident. Nonetheless, the cap on noneconomic damages was a crucial protection Kansas law provided to defendants in personal injury cases, particularly small- to medium-sized businesses that could be bankrupted by an adverse court decision.

The changed policy on noneconomic damages caps has caused tremendous uncertainty in businesses and insurance markets, largely because of widespread misperceptions about the scope of the court's ruling.

The Supreme Court's public information officer sent an email to reporters on June 14, the day of the decision summarizing the court's ruling [emphasis added]: "The Supreme Court struck down the statutory noneconomic damages cap **in personal injury cases other than medical malpractice actions** in *Hilburn v. Enerpipe Ltd.*, ruling that the cap violates the right to trial by jury set out in section 5 of the Kansas Constitution Bill of Rights."

Nonetheless, numerous media outlets and attorneys overlooked or ignored this clear statement, perhaps because the court did not make this statement public beyond emailing it to journalists and those who specifically requested it. It is also possible that the court may eventually hold that *Hilburn* applies to medical malpractice cases.

[Scott Martin and Zaina Afrassiab of Husch Blackwell LLP](#), one of the largest law firms in Kansas, concluded decisively that caps in medical malpractice cases will be impacted, writing that "This change does not apply to wrongful death cases or punitive damages, but it will affect non-economic damages in future medical malpractice cases as well as those currently pending in Kansas state courts."

The Economic Impact of Ending Caps

While it is hard to provide a definitive analysis given the interpretive uncertainty that currently exists, past research and a correlation analysis suggest that the *Hilburn* decision will likely increase the cost of insurance for Kansas companies.

Kip Viscusi, an economist at Vanderbilt, [observed](#) that caps on noneconomic damages reduce the loss ratios of insurance companies that would otherwise be the least profitable. As a result, it increases the number of firms in the market which, in turn, increases competition and reduces the cost of insurance.

Viscusi also points out that estimating non-economic damages is far from an exact science, and economists or risk analysts do not possess anything akin to a widely accepted economic model to do such a thing. He observes that this reality is manifested in the fact that the typical instructions given to juries for pain and suffering almost always fail to include anything that could be construed as precise or even useful.

Although damages in tort cases are usually treated in theoretical models as readily-determined values, in practice there are considerable controversies. For economic damages components, the economic methodology for what damages should be is closely aligned with the legal principles for determining damages. There will continue to be matters for debate, but the battle lines for these controversies, such as the choice of the appropriate discount rate, are sharply delineated.

Noneconomic damages have evoked much greater controversy, as there continues to be a debate over the proper role of such damages as well as the legitimacy of including components such as hedonic damages for the loss of enjoyment of life. Chief among the inherent problems of noneconomic damages is that there is no conceptual model that can be used to set these damages. As long as noneconomic damages remain ill-defined, there will continue to be wide variation in their assessment and an impetus for a variety of alternative reform proposals.

Future Litigation

While the court was explicit that its ruling applied solely to personal injury claims against businesses, most observers expected the tort bar to quickly test whether the court's jurisprudence will extend to medical malpractice claims. Indeed, in early August exactly that scenario played out in *Perez v. Wesley Medical Center*, as [The Wichita Eagle reported](#).

There is also the possibility of a decidedly different-looking state supreme court in the immediate future. Chief Justice Lawton Nuss [announced](#) his retirement shortly after the ruling (he abstained without giving a reason). Justice Lee Johnson, who joined the plurality opinion, also [announced](#) his retirement.

Gov. Laura Kelly (D) will appoint two new members of the court, likely before the next legislative session. The [Supreme Court Nominating Commission](#), which has nine members, will send the governor three possible selections for each vacancy [based on merit](#), of whom Kelly will select one nominee. The legislature has no role in nomination or confirmation.

The Impact on the Cost of Medical Malpractice

The Center for Justice and Democracy at New York Law School updated its [state law summary of caps on economic and non-economic damages](#) June 20. It is difficult to

compare caps across states because of multiple variances. For instance, some states cap total damages, caps vary in size, some types of claims are exempt from caps, only some state supreme courts have explicitly ruled on the constitutionality of caps, and some states have passed new versions of caps after courts ruled old versions unconstitutional (so the caps' constitutional standing may be weaker). The cap threshold also varies significantly among states, from \$250,000 in California to more than \$2 million in Nebraska.

Before *Hilburn*, 20 states had no cap on noneconomic damages. The average cost of medical malpractice premiums in those states was \$10,640.65, according to an [analysis of state-by-state data published by the Capson Physicians Insurance Company](#). In the 30 states with some cap on noneconomic damages, the average cost was \$8,653.70, a difference of nearly \$2,000. The data represents the yearly average cost of premiums for physicians in solo practices or practices of up to 50 doctors.

This comparison does not fully account for the differing costs of medical care by state, and merely comparing costs across states cannot account for the wide variance in premium cost by practice area and a physician's claims history. For instance, general practitioners pay \$4,000-12,000, surgeons pay \$30,000-\$50,000 and obstetricians have the highest premiums—up to [\\$200,000](#). OB/GYNs are the most sued speciality (85 percent will face such a lawsuit during their careers) and have liability exposure for up to 20 years after delivering a child, as a typical two year statute of limitation does not start until an injured party reaches age 18.

One thing that may mitigate the impact of the Kansas Supreme Court ruling is that Kansas juries tend to be skeptical of plaintiff claims in medical malpractice lawsuits. Fourteen medical malpractice cases went to jury trial in Kansas in the fiscal year 2017, [according to the Kansas City Star](#), and the jury found for the plaintiff in two of them. Only one of the 13 medical malpractice jury trials in 2016 went for the plaintiff. However, non-medical businesses, such as trucking companies at issue in the *Hilburn* case, will be much harder hit by the loss of the damages cap, and medical providers will assuredly see insurance cost increases.

A Congressional Fix?

Congress considered this issue as recently as 2017, when the [House Judiciary Committee advanced](#) the "Protecting Access to Care Act of 2017," (H.R. 1215) on an 18-17 vote. The bill would have capped noneconomic damages at \$250,000. The [Trump administration supported the bill](#). All 191 Democrats who voted and the [American Bar Association](#) opposed the legislation, making a federalism argument that medical liability law has been a state issue for 200 years. The bill [passed the House](#) but the Senate took no action on the bill.

Part of the problem with such legislation is the proper amount for a cap is heavily dependent on the state. For example, a \$1 million noneconomic damages cap that might make sense for New York or California would be too high in Kansas or Iowa. No similar legislation has been introduced this congressional session.

Conclusion

Awarding damages to someone injured by negligence on the part of a business accomplishes two things: the first is that it helps the victim recover from the incident, but it also provides an incentive for businesses to be vigilant and to take all reasonable steps to prevent such accidents as best they can.

However, the amount of noneconomic damages awarded when a business has failed to take adequate steps to protect a customer or employee or patient and they suffer an injury is difficult to anticipate. Such awards rarely seem based on hedonics, or anything else that can be anticipated, and they vary widely as a result. The infrequent but newsworthy awards that total many millions of dollars can impact insurance costs and make doing business in a state more costly, while also imposing costs on taxpayers and consumers in a state.

It is the wide variability that noneconomic damages can engender that states seek to reign in by imposing caps. Our nascent economic analysis indicates that caps on noneconomic damages results in lower insurance costs.

Businesses need to pay when their negligence imposes costs on a patient or customer. A cap on noneconomic damages would not end that responsibility, but it would make such costs more predictable. There is no evidence that it would reduce firms' incentives to take steps to prevent such accidents from occurring.

Ike Brannon and Jeff Patch are policy fellows of the Kansas Chamber of Commerce Foundation. Brannon is president of [Capital Policy Analytics](#), a Washington, D.C.-based economic consulting firm, and a senior fellow at the [Jack Kemp Foundation](#). Patch, an analyst at Capital Policy Analytics, operates [Iowa Intelligence](#), a West Des Moines-based research firm.