Updates
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Oregon Court of Appeals Strikes Down Statutory Cap on Noneconomic Damages

Oregon is one of 35 states where the legislature has successfully enacted a statute capping the amount of noneconomic damages, commonly known as "emotional distress," that juries can award. With the issuance of two recent opinions from the Oregon Court of Appeals, however, Oregon now joins six other states with courts that have ruled such caps are unconstitutional.

In *Vasquez v. Double Press Mfg., Inc.*, and *Rains v. Stayton Builders Mart, Inc.*, the Oregon Court of Appeals struck down the state's $500,000 statutory cap on noneconomic damages. That exposes businesses and employers to millions of dollars in potential liability. Because the Oregon Supreme Court probably will review both cases, we will continue to monitor the issue as it progresses.

Oregon's Noneconomic Damages Cap

Oregon Revised Statutes 31.710 limits the amount that a plaintiff can recover for noneconomic damages in certain civil actions to $500,000. Those actions include any lawsuit seeking damages "arising out of bodily injury, including emotional injury or distress, death or property damage," except for claims against public bodies and those subject to Oregon's workers' compensation laws. The statute defines "noneconomic damages" as including damages for "pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment."

Litigation Challenging the Cap

The Oregon Legislature enacted the cap in 1987. Constitutional challenges immediately followed. Throughout the late 2000s, both the Oregon Supreme Court and the Oregon Court of Appeals held that the cap violated Oregon's constitutional right to a jury trial. In 2016, however, the Oregon Supreme Court overruled its former caselaw and concluded that statutory caps do not violate the constitutional right to a jury trial. But that case left open the possibility that the noneconomic damages cap could violate the remedy clause in the Oregon Constitution, which provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

In 2017, the Oregon Court of Appeals heard two cases in which the plaintiffs argued that the noneconomic damages cap violates the remedy clause. In *Vasquez*, the employer of the plaintiff purchased a machine from the defendant used for cutting bales of hay. While the plaintiff was working on the job, the machine crushed him, severely injuring him. After a trial and the application of Oregon's comparative-fault statutes, the plaintiff received judgment in the amount of $1,339,090.20 in economic damages and $4,860,000 in noneconomic damages. The trial court did not reduce the verdict, and the defendant appealed, asserting the noneconomic damages cap applied. On appeal, the plaintiff responded by arguing that the cap did not apply because his claims were subject to Oregon's workers' compensation laws and that the statute violated the remedy clause.

A few months later, the court of appeals heard oral argument in *Rains*. In that case, the plaintiff, Mr. Rains, fell 16 feet when a defective board broke at his job site, was severely injured and sued a number of parties, including the manufacturer of the board. His wife sued for loss of consortium. After trial, the jury awarded Mr. Rains

$3,928,275 in economic damages and $2,343,750 in noneconomic damages, and his wife received $739,375 in noneconomic damages. The trial court did not reduce the verdict, and one of the third-party defendants appealed. On appeal, the plaintiffs argued that the trial court correctly refused to reduce the verdict because the cap violated the remedy clause. The appellant rebutted that argument, and also argued that the remedy clause did not apply to Mrs. Rains's loss-of-consortium claim.

Oregon Court of Appeals Opinions

The Oregon Court of Appeals issued its opinions in *Vasquez* and *Rains* within weeks of each other. In *Vasquez*, the court held that the plaintiff's claims were not subject to the workers' compensation laws, but the statute violated the remedy clause as applied to the plaintiff. The court based its conclusion on two major reasons: (1) the legislature had not effected a *quid pro quo* by providing plaintiffs with a benefit in exchange for capping their damages, and (2) because, under the cap, the plaintiff would receive only 30% ($1,829,090) of the $6,199,090 *overall recovery*, the cap left the plaintiff with an unconstitutional remedy that is only a "paltry fraction" of the damage sustained. That reasoning left open the possibility that some other fraction of overall recovery might pass constitutional muster. *Rains*, however, seemed to quickly close that door.

In *Rains*, the court first concluded that the remedy clause did protect Mrs. Rains's loss-of-consortium claim. Then, the court held that the noneconomic damages cap violated the remedy clause. In its remedy-clause analysis, the court stated that, "for the same reasons elucidated in *Vasquez*," the statutory cap violated the remedy clause. Unlike in *Vasquez*, however, the court did not focus on the overall amount (which would have resulted in a 70% recovery). Instead, the court held that leaving Mr. Rains with $500,000 out of $2,343,750 (21%) in *noneconomic damages* was a "paltry fraction." And with respect to Mrs. Rains, the court completely ignored the fractional analysis, stating without elucidation that, in the absence of "a principled reason," reducing [the] noneconomic damages award by $259,375 left her with a constitutionally unacceptable remedy, regardless of the fraction involved.

Implications

The Oregon Court of Appeals opinions clear the way for a review of this issue by the Oregon Supreme Court, which probably will grant review. On review, the court likely will address the following five issues:

1. Which "claims" are subject to the workers compensation laws and, therefore, excepted from the cap;
2. Does the remedy clause protect a loss-of-consortium claim;
3. Does the cap violate the remedy clause;
4. Does a legislative *quid pro quo* exist with respect to the cap; and
5. If the "paltry fraction" analysis applies, will courts look to the total amount recovered or only the noneconomic damages?

For now, it appears that the noneconomic damages cap is gone in its current form. As the numbers in *Vasquez* and *Rains* evidence, that opens businesses and employers up to millions of dollars in potential exposure. Additionally, after both cases, it is not at all clear that the legislature could do anything to fix the constitutional problem. Therefore, what the Oregon Supreme Court says on this issue is important.

We will continue to follow this issue closely. Right now, however, all businesses need to examine their liability insurance policies to ensure adequate coverage for potentially uncapped noneconomic damages awards. Additionally, businesses should immediately review their best practices and policies to lessen the risk of injury to their employees and customers.

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