

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 0410-12
Bill No.: Perfected SS for SS for SCS for SB 280
Subject: Civil Procedure; Courts; Health Care; Health Care Professionals; Insurance –
General; Evidence; Physicians; Motor Vehicles
Type: Original
Date: March 17, 2003

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
General Revenue	\$752,665 to (Unknown)	\$930,294 to (Unknown)	\$958,203 to (Unknown)
Total Estimated Net Effect on General Revenue Fund	\$752,665 to (Unknown)	\$930,294 to (Unknown)	\$958,203 to (Unknown)

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
Highway	Unknown	Unknown	Unknown
Total Estimated Net Effect on Other State Funds	Unknown	Unknown	Unknown

Numbers within parentheses: () indicate costs or losses.
This fiscal note contains 11 pages.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
Federal	(\$283,095)	(\$339,714)	(\$339,714)
Total Estimated Net Effect on <u>All</u> Federal Funds	(\$283,095)	(\$339,714)	(\$339,714)

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

Officials from the **Office of Administration – Administrative Hearing Commission, – Commissioner’s Office, Department of Economic Development, Department of Public Safety – Missouri State Highway Patrol**, and the **– Missouri State Water Patrol** assume the proposed legislation would have no fiscal impact on their agencies.

Officials from the **Office of Attorney General (AGO)** assume costs can be absorbed, although there is a requirement that AGO promulgate rules regarding attorneys who represent not-for-profit organizations without compensation.

Officials from the **Office of State Courts Administrator** assume the proposed legislation would have no fiscal impact on the courts.

Officials from the **Department of Health and Senior Services (DHSS)** assume the legislation would not be expected to significantly impact the operations of the DHSS. If the proposal were to substantially impact any DHSS programs, they would request funding through the legislative process.

ASSUMPTION (continued)

Officials from the **Department of Insurance** assume fiscal impact to their department will be negligible. Legislation will have wide-ranging and profound effects upon the entire professional liability insurance industry in Missouri.

Officials from the **Department of Labor and Industrial Relations (DOL)** assume if statutory caps are put on civil actions in housing discrimination cases this would likely result in a loss of federal funds from the Department of Housing and Urban Development (HUD).

The DOL received a response from HUD on March 11, 2003. The response clearly indicates that any caps on damages in housing complaints would lead to a loss of federal funds from HUD. This bill attempts to address this problem. Section 510.263.9 caps punitive damages in tort cases and 537.071 caps non-economic actual damages in tort cases. Both of these sections would likely apply to cases brought under Chapter 213 the Missouri Human Rights Act, as the Missouri Supreme Court has defined causes of action under Chapter 213 as torts. (See *State ex rel. Diehl v. O'Malley* 95 S.W.3d 82 Mo., 2003.)

In further discussion with the FHIP/FHAP Support Division at HUD on 3/14/03 it was made clear that any statutory caps on damages including punitive damages would require a reevaluation of the Missouri Human Rights Act for substantial equivalence and lead to a quick loss of this status and the end of federal funding from HUD.

Probable loss of federal funds from HUD are \$339,714.

Under the Missouri Workers' Compensation law, an injured employee may file a workers' compensation claim if the injury occurred in the course and scope of his employment, and also file a personal injury or wrongful death lawsuit in circuit court against a third party. The employee receives medical treatment to cure and relieve him/her from the effects of the work-related injury by a health care provider that is selected or approved by the employer or its workers' compensation insurance carrier. The health care provider is paid the reasonable fees and charges for the medical treatment provided to the injured employee in the underlying workers' compensation case, pursuant to Section 287.140, RSMo. If there is a dispute on the reasonableness of the fees or charges or whether the employer or its workers' compensation insurance carrier authorized the medical treatment and is responsible to pay the charges, the health care provider files a Medical Fee Dispute with the Division of Workers' Compensation, pursuant to Section 287.140 (3) & (4), RSMo or Section 287.140.13 (5) & (6) and 8 CSR 50-2.030. The DOL assumes that proposed section 430.225 does not permit the health care provider to assert a lien on a claim filed by the patient under Section 430.225.3, as well. Because the health care providers have a remedy to pursue disputes under Chapter 287, RSMo, the

ASSUMPTION (continued)

Department interprets the proposed language in Section 430.225 as having no effect on tort claims where there is also liability under the workers' compensation law.

The rights of employers and their workers' compensation insurance carriers to subrogation for recovery of any amounts paid through the workers' compensation system are protected under §287.150, RSMo. The proposed section is interpreted to have no effect on this right of subrogation and the allocation of the moneys subrogated under the Ruediger formula. See *Ruediger v. Kallmeyer Brothers Service*, 501 S.W. 2d 56 (Mo.banc 1973), and *Kerperien v. Lumberman's Mutual Casualty*, 2002 WL 1335591 (Mo.App. E.D. June 18, 2002).

Officials from the **Department of Transportation (MoDOT)** assume the change to Section 105.711 would limit the payments from the State Legal Expense Fund to any one claimant to \$500,000 total. By limiting the payments to \$500,000 total, this would limit the amount recoverable against MoDOT employees, which is a positive benefit. However, the language is not clear regarding claims against the state entity, in this case Missouri Highways and Transportation Commission (MHTC) and MoDOT. MoDOT and MHTC maintain a self-insurance fund for paying tort liability claims against MoDOT and MHTC. The provisions in Section 105.711 apply only to payments from the SLEF. Therefore, potentially a claimant could recover up to \$500,000 against a MoDOT employee and up to the statutory limit in Section 537.610 against MHTC (approximately \$321,000+), resulting in total potential recovery of \$821,000. This change would probably result in some unknown, positive fiscal impact.

The joint and several liability provisions in Section 537.067 allows a defendant to be jointly and severally liable for the amount compensatory and non-economic damages if such defendant is found to be 10% or more at fault, however, the defendant is not to be held jointly and severally liable for more than the percentage of punitive damages for which fault is attributed to such defendant by the jury. Therefore, if a defendant is 11% at fault, and the remaining co-defendant is 89% at fault and cannot pay, the defendant must pay that co-defendant's percentage of damages. While this may limit some tort awards against MHTC, resulting in some positive fiscal impact, the total positive fiscal impact is unknown.

Section 307.178, RSMo is amended to delete existing law which limits the reduction to a plaintiff's damages in a tort case by 1% if the plaintiff was not wearing a seat belt. The new language provides that failure to wear a seat belt shall be considered as evidence of comparative negligence to be used to increase the fault of the plaintiff without an arbitrary maximum limit. This will possibly have some positive fiscal impact to MHTC, but it is unknown.

ASSUMPTION (continued)

There are additional provisions relating to venue that would potentially have some small benefits to MHTC as well.

In summary, MoDOT assumes the proposal would result in an unknown savings to the Highway Fund in each fiscal year.

Officials from the **Office of Administration – General Services Division (COA)** assume the changes proposed to section 105.711, RSMo would impact their Division:

§105.711.2(3) provides State Legal Expense Fund liability coverage to physicians employed by the State of Missouri that provides services to county jails on a part time basis.

§105.711.2(5) provides liability coverage under the State Legal Expense Fund to attorneys providing services without compensation to non profit community social services centers or through legal clinics operated by public or private schools of law or through any agency of any federal, state or local government. The aggregate of payments shall be limited to \$500,000 for all claims arising out of the same act and \$500,000 for any one claimant.

§105.711.6 appears to limit payments under all provisions of the State Legal Expense Fund to \$500,000 for any one claimant.

§105.711.2(3) provides legal expense fund liability coverage to physicians employed by the State of Missouri that provides services to county jails on a part time basis. As currently written, there is no cost impact to the state as the state does not employ physicians to provide services to county jails.

§105.711.2(5) Contact was made with the Bar Plan Mutual Insurance Company that insures individual attorneys and law firms across the state. Applying a \$500,000 per claim limit, with a standard \$1,000 deductible, \$1.5 million aggregate per year, the annual base rate for an individual attorney would be \$2,421.00 in premium cost. Debits and credits could apply based upon the type of legal work being performed and other underwriting factors. However, the number of attorneys providing the types of services described is unknown. Contact was made with the Missouri Bar and they report there are approximately 18,000 attorneys in Missouri with approximately 73% giving some free legal assistance. However it is unclear that the “free legal assistance” is limited to the services as described in §105.711.2(5) therefore the 73% may be an overestimation for purposes of this fiscal note. The Missouri Bar commissioned a survey in August, 2002 to its membership regarding attorney pro bono volunteer activities. According to the report, it may include reduced fee services or other services that would not apply to this

ASSUMPTION (continued)

proposed legislation. While this coverage likely would have fiscal impact on the state, costs cannot be determined and remain unknown.

In regard to §105.711.6, over the past 5.5 years, COA has paid on 8 claims (totaling \$8,967,589) that exceeded \$500,000 for any one claimant. The excess over \$500,000 on the 8 claims totals \$4,967,588. This amount averaged over the 5.5 years would constitute a savings of \$903,198 annually. A 3% inflation factor is used.

It should be noted that while the proposed changes to §105.711.6 appears to limit payments made under the State Legal Expense Fund to \$500,000 to any one claimant, the state would still be exposed to the liability for a judgment that might exceed \$500,000 in federal court. The State Legal Expense Fund would not be available to meet the full obligation of the state that would exceed the \$500,000 limitation.

<u>FISCAL IMPACT - State Government</u>	FY 2004 (10 Mo.)	FY 2005	FY 2006
GENERAL REVENUE FUND			
<u>Savings</u> – Office of Administration Payment limits (§105.711.6)	\$752,665	\$930,294	\$958,203
<u>Costs</u> – Office of Administration Liability coverage to pro-bono attorneys (§105.711.2(5))	<u>(Unknown)</u>	<u>(Unknown)</u>	<u>(Unknown)</u>
ESTIMATED NET EFFECT ON GENERAL REVENUE FUND	\$752,665 to <u>(Unknown)</u>	\$930,294 to <u>(Unknown)</u>	\$958,203 to <u>(Unknown)</u>
HIGHWAY FUND			
<u>Savings</u> Department of Transportation Limits on damage awards	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>
ESTIMATED NET EFFECT ON HIGHWAY FUND	<u>Unknown</u>	<u>Unknown</u>	<u>Unknown</u>

FEDERAL FUNDS

Losses – Department of Labor and Industrial Relations

Loss of federal funds from HUD (\$§510.263.9 & 537.071)	<u>(\$283,095)</u>	<u>(\$339,714)</u>	<u>(\$339,714)</u>
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ESTIMATED NET EFFECT ON FEDERAL FUNDS

<u>(\$283,095)</u>	<u>(\$339,714)</u>	<u>(\$339,714)</u>
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FISCAL IMPACT - Local Government

FY 2004
(10 Mo.)

FY 2005

FY 2006

\$0

\$0

\$0

FISCAL IMPACT - Small Business

The proposed legislation could have a fiscal impact on small businesses.

DESCRIPTION

The proposed legislation would enact several tort reform measures:

PRIVATE ATTORNEY RETENTION ACT – Would require state agencies wishing to retain a lawyer or law firm to perform legal services on behalf of the agency to obtain services through open and competitive bids. The amount of a contract for legal services a state agency enters into could not exceed \$100,000 in any fiscal year without a specific appropriation for that purpose. State agencies would be required to receive a statement of the hours worked, expenses incurred, aggregate fee amount, and breakdown of hourly rate for legal services on a contingent fee basis. State agencies could not pay expenses in excess of \$1,000 per hour for legal services. (Sections 34.360, 34.363, 34.366, 34.369, and 34.371)

LEGAL EXPENSE FUND – Add attorneys practicing pro bono at tax-exempt nonprofit community social services centers to coverage from the Fund up to \$500,000. The proposal would add physicians working in county jails to coverage from the Fund. (Section 105.711)

BLG:LR:OD (12/02)

DESCRIPTION (continued)

IMMUNITY ON LAND NEAR PUBLIC TRAILS – Expand immunity from civil liability for certain landowners adjoining public trails from only certain first class counties to all political subdivisions. (Section 258.100)

SEAT BELT VIOLATIONS – Failure to wear a seat belt would be considered as evidence of comparative negligence in a lawsuit. The failure to wear a seatbelt could also be admitted to mitigate damages without introducing expert evidence proving that the failure to wear the belt contributed to the injuries. (Section 307.178)

VENUE IN SUITS AGAINST NOT-FOR-PROFIT CORPORATIONS – Provide that venue would be in county where the cause of action accrued or the county where the office of the registered agent of the corporation is maintained. (355.176)

INTEREST ON JUDGEMENTS – Claims for prejudgement and post-judgement interest in tort actions would be calculated at an interest rate tied to the auction price for 52 week Treasury bills. (Section 408.040)

LIENS FOR HEALTH PRACTITIONERS – Allow liens for health practitioners who provide medical services to patients injured by tortfeasors. The original enactment of this section was ruled unconstitutional by the Supreme Court. (Section 430.225)

VENUE SHOPPING – Require that venue in all tort actions, including torts for improper healthcare but excluding suits against motor carriers, would only be in county where cause of action accrued. Residence for a corporation is either the county where the registered agent is located, or if no such agent exists, then Cole County. In suits against corporations, venue would only be in the county where the cause of action accrued or the county of the corporation's residence. The proposal would allow any defendant to move for change of venue upon the adding of a new defendant if current venue would have been inappropriate if new defendant had initially been named. (Sections 508.010, 508.040, and 508.120)

VENUE TRANSFER – A court would dismiss or transfer venue for a cause of action accruing outside the county in which the court is located if there is another more convenient venue. The determination of convenience would be based on a number of factors, including: location of accrual of cause, location of fact witnesses and health care providers, and residence of the parties. A motion to transfer venue could be filed within 90 days after answer is due. A party filing a case in a county where none of the defendants reside or where cause accrued would bear the burden that the pending venue is more convenient than a forum in which defendants reside or cause accrued. If court grants the motion, then the case would either be transferred or dismissed

DESCRIPTION (continued)

so that the plaintiff could file in a more convenient forum in another state. If the case is dismissed and the plaintiff files in another state with jurisdiction within six months, then defendants would be required to accept service. If any defendant refuses or the court in the other forum refuses to accept jurisdiction, then the case would be reinstated in the court where it was dismissed. (Section 508.075)

OBJECTIONS RAISED BY MOTION – Add convenient forum to the list of objections that could be raised by motion whether or not such objection appears in the pleadings. (Section 509.290)

PUNITIVE DAMAGES – In tort actions, including for improper healthcare, the proposal would allow discovery of the defendant’s assets only after a judge determines that plaintiff has a submissible case on punitive damages. The proposal would include a definition of “damages.” (Section 510.263)

CLASS ACTION CERTIFICATION – Orders granting or denying class certification would be appealable. The court of appeals must accept the appeal, but the circuit court or court of appeals would have discretion on whether to stay proceedings pending appeal. Orders granting or denying a motion based on convenient forum would be appealable. (Section 512.020)

SUPERSEDEAS BONDS – The proposal would establish a \$50 million limit on supersedeas bonds if the appellant proves that it has unencumbered assets that equal or exceed the amount of the judgement in excess of \$50 million. If the appellant fails to maintain such level of assets or is purposely dissipating assets outside the ordinary course of business to avoid payment of the judgment, then the court could require a bond equal to the full amount of the judgment. (Section 512.099)

RECOVER DAMAGES IN CHILDHOOD SEXUAL ABUSE ACTIONS – An action to recover damages from injury or illness caused by childhood sexual abuse actions would be required to be commenced within 10 years of the plaintiff attaining the age of 21 or within 3 years of the date of discovering, whichever later occurs.

JOINT AND SEVERAL LIABILITY – Provide for joint and several liability for compensatory and noneconomic damages if a defendant is found to bear 10% or more of the fault, but would only make a defendant liable for their portion of fault for punitive damages. (Section 537.067)

MEDIATION – This provision would require mediation for all tort actions unless the court finds that mediation has no chance of success. (Section 537.072)

BLG:LR:OD (12/02)

DESCRIPTION (continued)

PADDLESPOUT LIABILITY – Limit liability of paddlesport outfitters for injury or death cause by inherent risks of paddlesport activities. (Section 537.327)

AFFIDAVITS IN TORT ACTIONS AGAINST LICENSED PROFESSIONALS – This provision would require an affidavit from a similarly licensed professional supporting a cause of action for non-medical claims of professional negligence. (Section 537.530)

DEFINITIONS – Add long-term care facilities (convalescent, nursing and boarding homes) to the definition of “health care provider” as used in tort actions based on improper health care. Modify the definition of “punitive damages” to include exemplary damages and damages for aggravating circumstances. (Section 538.205)

MEDICAL MALPRACTICE NONECONOMIC DAMAGES CAP – This provision would remove the words “per occurrence” to ensure that there is a single cap, and not multiple caps per incidents of medical malpractice. The provision would also provide for a cap on noneconomic damages of \$350,000 and that periodic inflationary increases from the cap would begin on August 28, 2003. (Section 538.210)

AFFIDAVIT OF MERIT – This provision would require (current law is discretionary) a court to dismiss any medical malpractice claim for which the plaintiff fails to file an affidavit stating that he or she has obtained the written opinion of a health care provider which states that the defendant failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure caused the plaintiff’s damages. The proposal would limit extensions of time to file such affidavit to 90 days. The provision would also require the expert to be licensed and actively practicing in substantially the same specialty as the defendant. (Section 538.225)

BENEVOLENT GESTURES – This provision would make statement, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident inadmissible as evidence in a civil action. Statements of fault, however, would not be inadmissible. (Section 538.227)

QUALITY ASSESSMENT RECORDS – Prohibit certain quality assessment committee records, written proceedings or documents produced by or through the activities of any state or federal agency from being subject to release by subpoena or other means of compulsion or admissible in certain civil, criminal and administrative proceedings. Prohibit civil liability for a person’s act done in good faith as a member of a quality assessment committee. Persons related to such

DESCRIPTION (continued)

committees cannot be compelled to testify with respect to such records and documents or actions taken by the committee. (Section 538.301)

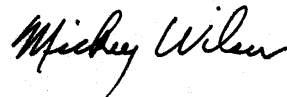
SEVERABILITY CLAUSE – The act includes a severability clause. (Section 1)

The provisions of this proposal would only apply to causes of action filed after August 28, 2003. (Section 2)

This legislation is not federally mandated, would not duplicate any other program and would not require additional capital improvements or rental space.

SOURCES OF INFORMATION

Office of the Attorney General
Office of Administration
Office of State Courts Administrator
Department of Economic Development
Department of Transportation
Department of Natural Resources
Department of Health and Senior Services
Department of Labor and Industrial Relations
Department of Public Safety
Department of Insurance



Mickey Wilson, CPA
Director
March 17, 2003