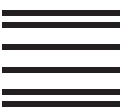
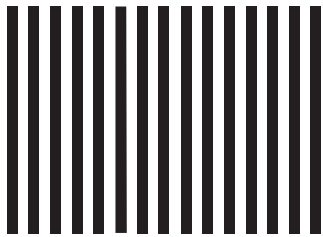


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**Illinois State Medical Society/ISMIE Mutual**

Attn: Karen Clement  
Twenty North Michigan Avenue  
Suite 700  
Chicago, Illinois 60602



## Setting the Stage for the Legal Challenge

### The Precedent

When the state legislature responds to the will of the people and exercises the legislative powers delegated to it, as it did in enacting medical liability reform, the legislation is typically “accorded great deference by the judiciary” (*Best v. Taylor Machine Works*). Illinois courts employ a “strong presumption that legislative enactments are constitutional” and insist that the “party challenging constitutionality of a statute has the burden of establishing its invalidity” (*McAlister v. Shick*). Essentially, “courts have a duty to sustain legislation whenever possible and resolve all doubts in favor of constitutional validity” (*McAlister v. Shick*).

### The Cases

These are the cases plaintiffs’ lawyers are utilizing in their attempt to overturn Illinois’ reform law:

- *Lebron v. Gottlieb Memorial Hospital*
- *Alexander v. Nacopoulos*
- *Zago v. Resurrection Medical Center*

Defense of these cases involves a twofold strategy. Before the trial court can rule upon the constitutionality of the statute, several preliminary matters must be addressed in order for the defendants to be afforded a strong and thorough defense of the case.

First, the issues presented by plaintiffs must be “ripe for judicial resolution.” In other words, the case must be at a point where the judge can rule. The plaintiffs are challenging the limit on non-economic damages, but no damages have been established. Secondly, the plaintiffs have not disclosed the name of the consultant in their affidavit, thereby failing to follow the requirement of the statute. A flawed or inadequate certificate of merit permits the trial court to dismiss the case at the preliminary state of proceeding.

Once preliminary matters are addressed, the issue of proof of medical negligence can be addressed by the Court.

### The Lawyers

These familiar attorney names represent those who have, to date, been involved in the constitutional challenge and the underlying medical malpractice lawsuits:

#### For the plaintiffs:

Jeffrey Goldberg  
Todd Smith  
Devon Bruce  
Robert Peck  
Francine Hochberg  
Brian Murphy

#### For the defense:

Richard Donohue  
Karen Kies DeGrand  
Theodore Olson  
Andrew S. Tulumello  
Saul J. Morse

Illinois Attorney General Lisa Madigan is required by the state Constitution to defend the constitutionality of the reform law under challenge, but does not serve as counsel to the individual defendants named in these lawsuits.

### The Justices

These are the Illinois Supreme Court justices who will decide the fate of the reform law.

Anne M. Burke  
*(D-1st District)*

Thomas R. Fitzgerald  
*(D-1st District)*

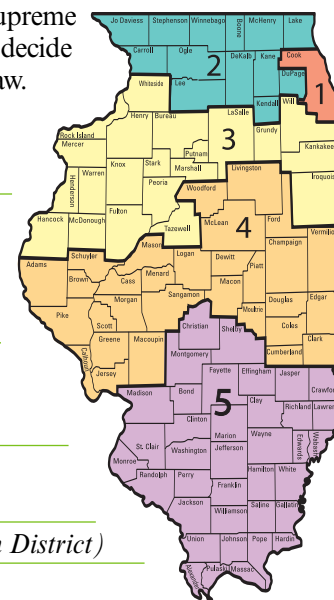
Charles E. Freeman  
*(D-1st District)*

Robert R. Thomas,  
Chief Justice  
*(R- 2nd District)*

Thomas L. Kilbride  
*(D-3rd District)*

Rita B. Garman *(R-4th District)*

Lloyd A. Karmeier  
*(R-5th District)*



August 2007

## Illinois Medical Litigation Reform Law Challenged:



## An Update for Physicians

Historic and comprehensive medical litigation reforms became law in Illinois two years ago. Before the ink on the Governor’s signature was dry, plaintiffs’ attorneys launched their assault against it.

Because the reform law applies only to patient injuries occurring *after* August 2005, the challenge in the courts is just now beginning to take shape. This brochure was prepared to “debunk” trial attorneys’ legal arguments, as well as keep you informed on the legal challenge.

### Consider these important points:

- The reform law is not “severable,” meaning if one part is found to be unconstitutional, all parts of the law are thrown out.
- Plaintiffs’ attorney interests are attacking several key aspects of the reform law (not just non-economic damages caps). They hope the Supreme Court can be convinced to declare unconstitutional or more of its provisions, thereby overturning the entire law – including caps.

August 2007

[www.RealityMedicine.com](http://www.RealityMedicine.com)

**ISSUE BY ISSUE:  
The Faulty Premise of Plaintiff Attorneys' Attacks on Medical Liability Reform**

*The initial legal briefs challenging the constitutionality of medical liability reform have been submitted, and ISMS and ISMIE Mutual have responded. Here are the issues at the center of the challenge and the basic arguments that will ultimately be decided by the Illinois Supreme Court.*

**At Issue:**  
**Reasonable limits on non-economic damages in medical liability cases**

Plaintiffs' lawyers fighting against reform contend the cap on non-economic damages is unconstitutional because it is arbitrary and because, in their view, the General Assembly did not consider enough evidence in choosing to adopt the cap. **This premise is faulty.** To prove the cap is unconstitutional, plaintiffs' lawyers must demonstrate the General Assembly had *no* rational basis for adopting these limits. To succeed, cap opponents will need to show the legislature was *not* acting rationally when lawmakers limited non-economic damages to resolve a statewide health care crisis. The legislature considered vast empirical data detailing the medical liability crisis and concluded caps were a sound and wholly rational response.

**At Issue:**  
**Improvements to periodic payment provisions, allowing the defendant to purchase an annuity to pay for future medical expenses, while allowing plaintiff access to medical funds when needed**

Plaintiffs' lawyers contend the periodic payments provision is unconstitutional because it applies only to medical liability cases. **This premise is faulty.** To rollback this payment provision, plaintiffs' lawyers must demonstrate the General Assembly had *no* rational basis for adopting it. Yet, previous Illinois case law (*Bernier v. Burris*) has already established that the legislature may rationally decide to allow periodic payment of

damages in medical liability cases (as opposed to other civil lawsuits). The *Bernier* case also acknowledged that periodic payment provisions are designed to keep medical liability premiums at reasonable levels.

**At Issue:**  
**Stronger standards for expert witnesses to ensure qualified testimony on the standard of care**

Plaintiffs' lawyers contend higher standards for medical experts violate the Illinois Constitution because they impose more stringent restrictions than for any other civil action. **This premise is faulty.** The Illinois Supreme Court has previously recognized that laypersons are not normally qualified to evaluate professional medical conduct. The need for a special category of rules governing medical experts in medical liability cases is recognized throughout the country. In accord with such standards, some cases involve areas of medicine so complex that only a highly trained medical subspecialist can understand the science-based decision-making involved.

**At Issue:**  
**The "affidavit of merit" provision, including a new requirement to disclose the name of the health professional affirming the claim**

Plaintiffs' lawyers argue that the affidavit of merit confers upon non-judge experts the inappropriate judicial authority to stop an action before it begins. Plaintiffs' lawyers further contend the disclosure provision conflicts with a Supreme Court rule stating that plaintiffs ordinarily do not need to reveal the identity of certain "consultants" they hire to provide pre-trial advice. **This premise is faulty.** Non-judge experts are not being granted judicial authority. These outside experts are not making the ultimate decision on the lawsuit; rather, they are providing an opinion from the perspective of the same specialty discipline as the defendant. Precedent (*McAlister v. Schick*) has established the consulting "health care provider does not exercise judicial power." As to the second point, plaintiffs'

lawyers misinterpret the meaning of the Supreme Court rule, which does not apply to the health professionals who review the claim for the affidavit of merit. The rule applies only to consultants *who will not be called at trial*, but the Supreme Court has recognized that the reviewing professionals might well be expert witnesses at trial.

**At Issue:**  
**Incentives to encourage health care professionals to acknowledge mistakes and express grief or apology, when appropriate**

Plaintiffs' lawyers suggest that protecting expressions of grief and apology made by health professionals from being used in lawsuits is unconstitutional because it applies only to health professionals. **This premise is faulty.** The General Assembly rationally chose to limit the courtroom admissibility of such statements by health professionals in order to address problems unique to health care. As both the Illinois courts and legislature have recognized, open communication between health professionals and patients is a bedrock tenet of medical care. Allowing for non-punitive disclosure of adverse medical events can improve patient care and, as studies have shown, lead to a reduction in medical liability lawsuits.

**The Path Ahead**

Even though two years have passed since medical liability reform became law, Illinois remains in the early stages of the constitutional challenge. It may take years before the case reaches the Supreme Court and a decision is made. ISMS and ISMIE Mutual will keep you informed as the challenge progresses.

You can also play a role in preserving medical liability reform by talking to your patients, family members and local opinion leaders about the importance of this law for Illinois and how the crisis will explode if it is overturned. Talking points, patient education materials and regular updates can be found at [www.RealityMedicine.com](http://www.RealityMedicine.com). ■

**YES, I would like to receive the following "Reality Medicine" materials supporting medical liability reform:**

- 20 patient education handouts
- "Don't Let Them Tip Back the Scales" office poster
- "Medical Liability Reform...it's the healing touch" office poster
- Physician update on the court challenge brochure
- 50 Keep Doctors in Illinois wristbands

**Please send to:**



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