WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE June 10, 2024

TO Joint Labor, Health and Social Services Interim Committee

FROM Luke Plumb, Staff Attorney

SUBJECT Tort Reform – Medical Malpractice Liability

The purpose of this memorandum is to discuss current legal provisions relating to medical malpractice liability in Wyoming and to provide information on potential options for legislative action to limit medical malpractice liability and insurance costs for health care professionals. This memorandum also briefly summarizes constitutional considerations that may be implicated in bringing any legislation to address the topic of medical malpractice liability and discussion of how other states have addressed tort reform for medical malpractice liability.

When contemplating tort reform and reducing medical malpractice liability in Wyoming, it should be noted that the Wyoming Constitution specifically addresses tort damages in Article 10, Section 4 which reads, "no law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." This provision is an important consideration for any legislative efforts to limit medical malpractice liability and will be referenced throughout the memorandum. Further discussion of constitutional provisions that may be implicated by programs that incentivize, assist or otherwise provide for medical malpractice insurance payments or creation of state pools is addressed later in the memorandum.

Legal Provisions Relevant to Medical Malpractice in Wyoming

In Wyoming Statute, there are several provisions that relate to or provide for limitations on medical malpractice liability and insurance. This includes the Wyoming Governmental Claims Act, the Medical Liability Compensation Account, the statute of limitations for bringing a medical malpractice claim and the admissibility of evidence for medical malpractice claims raised in court.

Wyoming Governmental Claims Act

The Wyoming Constitution provides that the State of Wyoming is immune from suit except for suits authorized by the Legislature.[1] This means that "no suit can be maintained against the State until the legislature makes provision for such filing; and, that absent such consent, no suit or claim could be made against the State."[2] For almost a century after ratification of the Wyoming Constitution, "courts and the legislature wrestled with the immunities afforded to the State, its agencies, and local governments until, in 1979, the legislature enacted the Wyoming Governmental Claims Act (WGCA)."[3]

The Legislature enacted the WGCA to "balance the respective equities between persons injured by governmental actions and the taxpayers of the state of Wyoming whose revenues are utilized by governmental entities on behalf of those taxpayers."[4] The Wyoming Supreme Court has described the Legislature's intent in passing the WGCA as follows: "The legislature sought to retain the common law principle that a governmental entity is generally immune from lawsuits against a governmental entity in certain statutorily defined situations."[5]

The WGCA makes clear that a "governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort" except those specified in certain sections of the WGCA.[6] The Wyoming Supreme Court has held that "no suit may be maintained against the State unless the legislature has authorized such a suit."[7] Further, the Court has "consistently construed procedural requirements set out in the WGCA very strictly and as jurisdictional requirements."[8] Under the WGCA, "immunity is the rule and liability is the exception."[9] The Court has noted that the "clear language of the Claims Act establishes the legislature intended 'immunity from liability' in W.S. 1-39-104(a) to mean immunity from suit, not a defense to liability."[10]

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[1] Wyo. Const. art. 1, § 8 ("Suits may be brought against the state in such a manner and in such courts as the Legislature may by law direct.").
[2] *Williams v. Lundvall*, 204 WY 27A, ¶ 7 (Wyo. 2024) (citation omitted).
[3] *Id*. ¶ 8 (citation omitted).
[4] W.S. 1-39-102(a). 2014).
[5] *Campbell Cty. Mem'l Hosp. v. Pfeifle*, 2014 WY 3, ¶ 19, 317 P.3d 573, 579 (Wyo. 2014).
[6] W.S. 1-39-104(a).
[7] *Cosco v. Lampert*, 2010 WY 52, ¶ 9, 229 P.3d 962, 966 (Wyo. 2010).
[8] *Id*. ¶ 10, 229 P.3d at 966.
[9] *Vigil v. Ruettgers*, 887 P.2d 521, 524 (Wyo. 1994).
[10] *Wyo. State Hosp. v. Romine*, 2021 WY 47, ¶ 11.

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The WGCA specifies various instances in which governmental entities[11] and their employees[12] are liable for their actions. Two provisions are relevant here. First, the WGCA specifies when a governmental entity is liable for damages involving public employees who are acting within the scope of their duties in the operation of any public hospital:

> **1-39-109. Liability; medical facilities.**
>
> (a) Except as provided in subsection (b) of this section, a governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any public hospital or in providing public outpatient health care.
>
> (b) The state of Wyoming is solely liable for damages resulting from, and the sole responsible party for, bodily injury or wrongful death to a patient treated under the provisions of W.S. 35-31-101 through 35-31-103 caused by the negligence of a health care provider or a medical facility while performing health care services pursuant to a contract to deliver volunteer health services under W.S. 35-31-101 through 35-31-103.

Second, the Act specifies when a governmental entity is liable for damages involving healthcare providers employed by the governmental entity:

> **1-39-110. Liability, health care providers.**
>
> (a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the medical malpractice of

[11] The WGCA defines a "governmental entity" as "the state, University of Wyoming or any local government" under W.S. 1-39-103(a)(i) and further provides that a "local government" means cities and towns, counties…entities formed by a county memorial hospital, special hospital district, rural health care district or senior health care district that are wholly owned by one (1) or more governmental entities…all political subdivisions of the state, and their agencies, instrumentalities and institutions…" under W.S. 1-39-103(a)(ii).

[12] Further, the WGCA defines a "public employee" as "any officer, employee or servant of a governmental entity, including elected or appointed officials, peace officers and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation" which includes "contract physicians, physician assistants, nurses, optometrists and dentists in the course of providing contract services for state institutions or county jails" under W.S. 1-39-103(a)(iv)(C).

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> health care providers who are employees of the governmental entity, including contract physicians, physician assistants, nurses, optometrists and dentists who are providing a service for state institutions or county jails, while acting within the scope of their duties.
>
> (b) Notwithstanding W.S. 1-39-118(a), for claims under this section against a physician, physician assistant, nurse, optometrist or dentist who is employed by a governmental entity or who is deemed to be a public employee of the state by virtue of a contract pursuant to W.S. 35-31-101 through 35-31-103, based upon an act, error or omission occurring on or after May 1, 1988, the liability of a governmental entity shall not exceed the sum of one million dollars ($1,000,000.00) to any claimant for any number of claims arising out of a single transaction or occurrence nor exceed the sum of one million dollars ($1,000,000.00) for all claims of all claimants arising out of a single transaction or occurrence.

The WGCA also provides that the maximum liability of a governmental entity is limited to $250,000 to any claimant for any number of claims "arising out of a single transaction or occurrence" or $500,000 "for all claims of all claimants arising out of a single transaction or occurrence."[13] Any action against a governmental entity or public employee is subject to a statute of limitations, and the action must be commenced within one year after the date the claim is filed.[14]

Under the WGCA, the public hospitals and health care providers that are operated or employed by a governmental entity can be held liable for their tortious actions that cause injury or death but there are hard dollar maximum amounts that the injured party may recover. The WGCA is the most well-known and clear example of limiting liability of health care providers (of a governmental entity) under Wyoming law and the Act has been held constitutional.

A challenge to the Wyoming Governmental Claims Act was brought in 2017 to allege that the WGCA's liability caps violated Article 10, Section 4 of the Wyoming Constitution.[15] The case centers around an inmate who died while being held in pretrial confinement at the Teton County

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[13] W.S. 1-39-118(a).

[14] W.S. 1-39-114. Note: there is an exception for children 7 years of age or younger which extends the limitation to 2 years or until the child's eighth birthday (whichever period is longer).

[15] *Millward v. Bd. of County Comm'rs of Teton*, 2018 U.S. Dist. LEXIS 231367. Note: Wyo. Const., art. 10, § 4 reads, "no law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."

Detention Center. Representatives of the inmate's estate filed a suit alleging negligence (medical malpractice) against health care providers and negligence against certain law enforcement officers who were employed by a governmental entity.[16]

The United States District Court for the District of Wyoming considered the case and provided that "in 1978, the Wyoming Supreme Court judicially abrogated governmental immunity for counties and other governmental subdivisions."[17] In response, the Wyoming legislature passed the WGCA to disclaim governmental immunity in certain statutorily defined situations.[18] The plaintiffs in the case challenged the liability caps of the WGCA and the State of Wyoming alleged that the caps were permissible under the Wyoming Constitution. The District Court ultimately held that the WGCA was constitutional and stated that "the drafters of the Wyoming Constitution never intended Article 10, § 4(a) to apply to governmental entities, and it should not apply to the WGCA to prevent the Wyoming Legislature from limiting a governmental entity's liability."[19]

Medical Malpractice Insurance – Medical Liability Compensation

Another important provision that is currently in statute is the Medical Liability Compensation Account (Account) which was enacted in 1977.[20] While these statutes have been around for decades, research has shown that the account is not currently operating. This Account is essentially a program that provides excess coverage for physicians by creating a "pool" for participating physicians who pay a surcharge to the Insurance Commissioner to cover any liability costs for medical malpractice beyond a $50,000 insurance policy that a physician must maintain to qualify for the program.[21]

The Account is set up to operate by requiring that physicians qualify for the program by annually purchasing a "health care professional liability insurance coverage of not less than fifty thousand dollars ($50,000.00) per occurrence".[22] Any award or settlement that is adjudicated or allowed beyond the $50,000 minimum, for a qualified physician" shall be paid from the Account up to

[16] *Id*. at 3-4.
[17] *Id*. at 6 (citing *Oroz v. Bd. of County Comm'rs of Carbon County*, 575 P.2d 1155, 1158 (Wyo. 1978).
[18] *Id*.
[19] *Id*. at 19.
[20] *See* W.S. 26-33-101 through 111.
[21] W.S. 26-33-102(a), 103 and 105(c).
[22] W.S. 26-33-102(a).

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$1,000,000 "in any calendar year for one (1) or more awards or settlements against an individual physician".[23]

Statute provides that funds in the Account are collected by the Insurance Commissioner and that the Account and any investment income is held in trust for the purposes of the program which can be invested.[24] The Commissioner must be notified of a malpractice suit within 30 days from the time the suit is filed and the Commissioner may participate in the physician's defense if the claim could potentially create liability that would implicate the Account.[25] The Account is funded by an annual surcharge charged to participating physicians which shall not exceed 150% of the cost to each physician for their base $50,000 malpractice insurance premium.[26] The balance of the Account should be approximately $4,000,000 and when the Account balance exceeds $4,000,000 in any calendar year, the Commissioner is required to reduce the surcharge to keep the account balance near that level.[27] The Commissioner is allowed to purchase reinsurance to protect the account from depletion and the reinsurance is required to cover each qualified physician from $250,000 to $1,000,000 per year.[28]

The Account is to be overseen by a board of six members who are charged with administering and governing the Account and the board may even promulgate rules.[29] Settlements of claims that exceed the $50,000 minimum carried by the physician "shall be carried out through agreement jointly by the claimant, the insurance carrier and the commissioner".[30] If the claimant settles with the insurance carrier and does not include the Commissioner, then the claimant waives any claim for damages that exceed the $50,000 malpractice policy.[31]

To satisfy each claim that exceeds $50,000, the state auditor shall issue a warrant against the Account after receipt of a certified copy of the final judgment from a court.[32] Any policy for malpractice insurance that is purchased to qualify a physician to participate in the program is considered to comply with the provisions of this program.[33] Statute requires that insurers assume all obligations to pay an award imposed against an insured physician and a policy cannot be

[23] W.S. 26-33-103.
[24] W.S. 26-33-105(a).
[25] *Id.*
[26] W.S. 26-33-105(c).
[27] W.S. 26-33-105(g).
[28] W.S. 26-33-105(h).
[29] W.S. 26-33-105.
[30] W.S. 26-33-107.
[31] *Id.*
[32] W.S. 26-33-108.
[33] W.S. 26-33-109.

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terminated by cancellation without 90 days notice in writing to both the insured physician and the Commissioner.[34] If a professional liability insurer fails to pay its portion of any award that is imposed against their insured physician, the Commissioner "shall suspend that insurer's certificate of authority until the portion of the judgment allocable to the insurer is paid in full, provided the insurer has the right to a hearing in accordance with W.S. 26-3-115(b)."[35] Finally, it is important to note that the program "is exempt from and has no application to the Wyoming Insurance Guaranty Association Act."[36]

This is an overview of the Medical Liability Compensation Account, but this program may be implemented more fully to address medical malpractice liability concerns for health care providers in Wyoming.

Statute of Limitations for Medical Malpractice Claims against a Private Health Care Provider

Another important factor for bringing medical malpractice claims in Wyoming is that every claim for medical malpractice against a health care provider who is not employed by a governmental entity is subject to a statute of limitations (which is separate from the statute of limitations found in the Wyoming Governmental Claims Act):

> **1-3-107. Act, error or omission in rendering professional or health care services.**
>
> (a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
>
> (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
>
> (A) Not reasonably discoverable within a two (2) year period; or

[34] W.S. 26-33-109.
[35] W.S. 26-33-110.
[36] W.S. 26-33-111.

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(B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

The two-year statute of limitations as provided above sets definitive timelines for any private cause of action for a medical malpractice claim. However, there are additional exceptions to those time periods. First, injuries to minors are subject to a period of within two years of the date of the alleged act or by the minor's eighth birthday, whichever timeframe is longer.[37] If the claimant suffers from a legal disability (other than being a minor), the claim must be brought within one year of the disability being removed.[38] Additionally, in the event that the alleged malpractice act was discovered during the second year of the two-year period from the date of the act, the claimant's timeframe to commence their lawsuit is extended by six months.[39] Finally, it should be noted that the statute does apply to any person regardless of their age or legal disability.[40]

If the person who was injured as the result of a health care provider's medical malpractice fails to bring their claim within the time periods described above, the defendant physician would be able to seek dismissal of the case based on the statute of limitations.

Admissibility of Evidence for Actions Against Health Care Providers

In addition to the statute of limitations for medical malpractice claims in Wyoming, there are also limitations on admissible evidence for these types of actions. In a civil action that is brought by a claimant for medical malpractice against a health care provider, any and all statements, affirmations, gestures or conduct that expresses apology, condolence, compassion "or a general sense of benevolence" that are made by the health care provider or their employee that relates to the discomfort, injury or death of the claimant is not admissible as evidence in court.[41]

Overall, there are currently several provisions throughout statute that limit recovery of damages for certain medical malpractice claims, a potential program for health care providers to have excess coverage for any claims that do arise, statute of limitations to preclude those who allege medical malpractice from prolonging any potential claims and rules governing the admissibility of certain evidence for actions against health care providers. The next section of the

[37] W.S. 1-3-107(a)(ii).
[38] W.S. 1-3-107(a)(iii).
[39] W.S. 1-3-107(a)(iv).
[40] W.S. 1-3-107(b).
[41] W.S. 1-1-130(a).

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memorandum explores other options for tort reform of the medical malpractice field through discussion of prior legislative efforts.

Tort Reform Options and Prior Legislative Efforts

Beginning in the late 1990's and early 2000's, concerns over increasing medical malpractice insurance rates as the result of large multi-million dollar court verdicts caused the Wyoming Legislature to call a Special Session in 2004 to address the crisis.[42] During the years 2003-2006, the Legislature considered several bills to address concerns surrounding medical malpractice liability and this section of the memorandum briefly addresses some of the various options that were considered or passed into law.[43]

Constitutional Amendment to Limit Medical Malpractice Liability

During the 2004 Special, the Legislature passed House Enrolled Joint Resolution No. 1 to amend the Wyoming Constitution, Article 10, Section 4.[44] This amendment was proposed to allow the Legislature to cap damages for noneconomic losses (pain and suffering) in medical malpractice cases, with the relevant language being:

> (b) Any section of this constitution to the contrary notwithstanding, for any civil action where a person alleges that a health care provider's act or omission in the provision of health care resulted in death or injury, no law shall be enacted limiting the amount of damages to be recovered for economic loss. However, the legislature may by general law limit the amount to be recovered from a health care provider for damages for noneconomic loss resulting from the death or injury.

The amendment was submitted to the electors of Wyoming, but it was ultimately rejected at the general election.

[42] WyoFile, *Not our first rodeo: A brief history of Wyo special sessions*, May 12, 2020, available here: **https://wyofile.com/not-our-first-rodeo-a-brief-history-of-wyo-special-sessions/** (last visited May 31, 2024).
[43] Note: additional bills have been proposed on this topic but they have not all be included for brevity. Additional medical malpractice bills may be found on the legislative website by searching for bills under the "legislation tab".
[44] 2004 Special Session, Wyoming Session Laws, Original House Joint Resolution No. 1003.

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Medical Review Panel for Malpractice Claims

During the 2004 Budget Session, the Legislature passed House Enrolled Joint Resolution No. 2 which was adopted at the general election.[45] This amended Article 10, Section 4 of the Wyoming Constitution, which provides that:

> (b) Any section of this constitution to the contrary notwithstanding, for any civil action where a person alleges that a health care provider's act or omission in the provision of health care resulted in death or injury, the legislature may by general law:
>
> (i) Mandate alternative dispute resolution or review by a medical review panel before the filing of a civil action against the health care provider.

With this constitutional authorization, the Wyoming Legislature passed the "Wyoming Medical Review Panel Act of 2005," which provided a stated purpose to "prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice" and to "make possible the fair and equitable disposition of such claims against health care providers as are, or reasonably may be, well founded."[46]

This act was ultimately repealed in full by 2021 Wyoming Session Laws, Ch. 99. The Medical Review Panel (Panel) was headed by the Attorney General. A person who wished to make a claim against a health care provider for an alleged act of medical malpractice was required to submit their claim to the Panel unless the parties otherwise agreed to waive submission to the Panel or if the claim was subject to a valid arbitration agreement.[47]

Statute provided for the submission of claims to the Panel, the composition of the Panel members, hearing procedures and deliberations and decisions of the Panel.[48] The ultimate decision of the Panel was not binding on the parties involved in the claim; however, the decision of the Panel could be submitted by the parties in whole or in part at any subsequent trial on the malpractice claim.[49]

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[45] 2004 Wyoming Session Laws, Original House Joint Resolution No. 0011.
[46] W.S. 9-2-1514 (repealed 2021).
[47] W.S. 9-2-1518(a) and 9-2-1519(a) (repealed 2021).
[48] W.S. 9-2-1519 through 1522 (repealed 2021).
[49] W.S. 9-2-1522(c) (repealed 2021).

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The process of submitting the claim to the Panel was intended to be a first stop for the consideration of malpractice claims prior to those actions being filed in court, per the stated purposes of the act.[50] The Medical Review Panel is an option as constitutionally authorized for the screening of medical malpractice claims.

Medical Malpractice Insurance Assistance Account

During the 2004 Special Session, the Legislature passed the Medical Malpractice Insurance Account-2, which was a program administered by the Department of Health to assist physicians practicing in Wyoming to pay for medical malpractice insurance premiums and to help pay the cost of the physician's participation in a risk retention group.[51]

The first part of the program was designed to assist physicians in paying medical malpractice insurance premiums through a loan process that required the physician to enter into a contract with the state to practice the physician's medical specialty in Wyoming for not less than three years.[52] The program set eligibility requirements for participation in the loan program and provided for the repayment of the loans based on a physician's certification to provide medical services and to procure a subsequent medical malpractice insurance policy.[53] This loan program was repealed by 2016 Wyoming Session Laws, Ch. 37.

The second part of the program was to assist physicians in paying the costs of participating in a risk retention group, also through a loan process.[54] Under this program, the risk retention group was required to be majority-owned by Wyoming physicians, providing medical malpractice insurance coverage.[55] This program differed slightly from the program to pay for insurance premiums because physicians participating in the risk retention program were required to practice in their medical specialty for the entire period of time that the physician's loan was outstanding.[56] This program also set out other eligibility requirements and terms for repaying the loans that were made to Wyoming physicians.[57] This program was repealed by 2021 Wyoming Session Laws, Ch. 149.

[50] *See* W.S. 9-2-1514 (repealed 2021).
[51] W.S. 35-1-902 (repealed 2016) and 35-1-903 (repealed 2021).
[52] W.S. 35-1-902(c) (repealed 2016).
[53] *Id*.
[54] W.S. 35-1-903(a)(intro) (repealed 2021).
[55] *Id*.
[56] W.S. 35-1-903(a)(i) (repealed 2021).
[57] W.S. 35-1-903 (repealed 2021).

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Constitutional Considerations

This memorandum addresses both statutory and constitutional provisions and potential options that relate to reducing medical malpractice liability in Wyoming. LSO has provided information on potential constitutional considerations for programs such as providing direct payments to health care providers to subsidize medical malpractice insurance premiums and the creation of state pools for payment of judgments against health care providers in previous years. This section of the memorandum briefly provides a summary of those constitutional considerations for the Committee's review.

The Wyoming Constitution governs the appropriation of public funds. First, Article 16, Section 6(a)(i) of the Wyoming Constitution, prohibits specific funding to individual entities:

> **Loan of credit; donations prohibited; works of internal improvement.**
>
> (a) Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall:
>
> (i) Loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor…

Second, Article 3, Section 36, prohibits appropriating state funds for general benevolent and other purposes:

> **Prohibited appropriations.**
>
> No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

In addition to the constitution's plain language, there are general limits on the legislature's power regarding appropriations and the lending of credit. "[I]t is elementary that the legislature cannot levy a tax or make an appropriation except only for public purposes, and this is true whether the constitution so expressly provides or not."[58] The public purpose to be served must be more than

[58] *State v. Carter*, 30 Wyo. 22, 29 (Wyo. 1923).

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incidental.[59] But there is no absolute judicial definition of a "public" as distinguished from a "private" purpose; although an equally divided Wyoming Supreme Court noted that, if "the legislative judgment as to a 'public purpose' is apparent, that judgment will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest and welfare."[60] It is conceivable that the definition of "public purpose" may depend on the particular facts and circumstances of the case.

Further, any appropriation for which consideration is received would not implicate Article 16, Section 6, as it would likely not be considered a donation. In general, "[c]onsideration may take a variety of forms including the performance of some act, a forbearance, or the creation, modification, or destruction of a legal relationship."[61] Conversely, consideration is insufficient when, for example: (1) the promisee is performing a duty imposed by law;[62] (2) there is payment of an already-existing debt that is due and undisputed;[63] or (3) one party has already undertaken performance before a promise is made.[64] "Ultimately, in testing to determine if consideration is sufficient, the [Wyoming Supreme Court] is asking: 'What did you give to get what you got?'"[65]

The Wyoming Supreme Court has considered this constitutional provision in several cases throughout the 20th century. First, the Court has held that an appropriation from a county to a private county fair association was an unconstitutional donation.[66] Although the county's appropriation was based on a statue that established criteria for the appropriation, including the appropriation being used to develop county resources and for improvements, the Court held that the appropriation was "unquestionably a donation by the county to and in aid of" the private county fair association."[67]

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[59] 63C Am. Jur. *Public Funds*, § 3, p. 227 (1997); see *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 353 P.2d 767, 773 (1960) (holding that "an incidental or indirect benefit to the public [cannot] transform a private industrial enterprise into a public one, or imbue it with a public purpose.").
[60] *Uhls v. State*, 429 P.2d 74, 86–87 (Wyo. 1967). Although the Wyoming Supreme Court has not expressly overruled *Uhls*, its precedential value may be limited based on *Uhls* being an equally divided opinion (four members split two and two, resulting in an automatic affirmance). *See Witzenburger v. State*, 575 P.2d 1100, 1116 n.21 (Wyo. 1978).
[61] *Schlesinger v. Woodcock*, 35 P.3d 1232, 1237 (Wyo. 2001).
[62] *Id.*
[63] *Id.*
[64] *Lavoie v. Safecare Health Serv., Inc.*, 840 P.2d 239, 249 (Wyo. 1992).
[65] *Prudential Preferred Props. v. J & J Ventures*, 859 P.2d 1267, 1272 (Wyo. 1993).
[66] *See Bd. of Cty. Comm'rs v. Union Pac. R.R.*, 171 P. 668, 669 (Wyo. 1918).
[67] *Id.*

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Second, the Court upheld an appropriation made to the widow of an officer killed in the line of duty.[68] The Court upheld the appropriation as "a moral, just and equitable obligation" to be paid to the widow, concluding that it was not a donation at all.[69] But in considering Article 16, Section 6, the Court noted that if the appropriation was a donation, it would be "void…because the purpose of such appropriation would then be private and not public."[70]

Third, the court rejected a challenge to the unemployment compensation system as being an unconstitutional donation.[71] The challenger asserted that some who received unemployment compensation may not be poor. But the Court concluded that the Legislature had the right to mitigate the "injurious effects of unemployment" to address the negative impacts unemployment had on the worker, his family, and his community after the worker's wages end.[72]

Finally, the Court considered another appropriation that a county made for a county fair-except this appropriation was made to a county fair board that the county commissioners had appointed.[73] The Court upheld the county's appropriation because the county fair board was a state agency.[74] The Court also noted that the purpose of the appropriation-acquiring, developing, and operating fairgrounds was a proper government function (or put another way, a proper public purpose).[75]

Limiting Medical Malpractice Liability

Whether a court would hold any potential legislation to address medical malpractice as unconstitutional would be a fact specific inquiry and dependent upon the legislation itself. Programs that are created to subsidize medical malpractice insurance premiums directly to health care providers that are not state employees or the creation of state pools for payment of judgments against health care providers could potentially be viewed as unlawful donations or loans of credit if not properly situated to contain a public purpose or otherwise provide consideration for the state.

With respect to a public purpose, these types of programs could include the retention of health care providers for the state, limiting the filing of court actions for medical malpractice which are

[68] *See State v. Carter*, 215 P. 477, 483-84 (Wyo. 1932).
[69] *Id*. at 484.
[70] *Id*. at 479.
[71] *See Unemployment Compensation Comm'n v. Renner*, 143 P.2d 181, 188-90 (Wyo. 1943).
[72] *Id*. at 189.
[73] *See Bd. of Cty. Comm'rs v. White*, 335 P.2d 433, 440 (Wyo. 1959).
[74] *Id*.
[75] *Id*.

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not borne out by the facts and the fair disposition of well-founded medical malpractice claims. But simply spending for a public purpose does not mean the spending is constitutionally compliant. No matter how apparent it may be that a legislative action serves a public purpose, that will not validate an act that is otherwise unconstitutional.[76] Further, the Legislature would need to consider if there is adequate consideration in retaining health care providers for the states, and equitable disposition of medical malpractice claims.

However, to help address the constitutional issues discussed in this memorandum, any legislation designed to limit medical malpractice liability could be drafted to serve a public purpose to ensure that the state receives adequate consideration in return for any monetary incentives or payments that may be offered under a program as described in this memorandum. Without these components, any programs of this nature could be subject to challenge under the Wyoming Constitution.

Tort Reform for Medical Malpractice Liability from Other States

This section provides information on how other states have addressed tort reform for medical malpractice claims, specifically in Wyoming's six neighboring states. Over 30 different states have enacted some level of a monetary cap on damages that may be awarded in a medical malpractice claim.[77] And several other states utilize medical malpractice review boards as the first step for a medical malpractice claim to get to court.[78] This section will address the monetary caps on damages and provide information on medical malpractice review boards where applicable.

Colorado:

Colorado limits medical malpractice liability for private health care professionals and health care institutions by setting a cap on the total amount of overall damages and noneconomic damages that a person may receive for a medical malpractice claim.[79] Under Colorado law, the total

[76] *See generally Witzenburger*, 575 P.2d 1100, 1135-36.
[77] *See* National Association of Benefits and Insurance Professionals, *Malpractice Damage Caps by State*, available here: **chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://nabip.org/media/8331/medical_malpractice_cap.pdf** (last visited May 31, 2024).
[78] *See* National Conference of State Legislatures, *Medical Liability/Malpractice ADR and Screening Panels Statutes*, August 10, 2021, available here: **https://www.ncsl.org/financial-services/medical-liability-malpractice-adr-and-screening-panels-statutes** (last visited May 31, 2024).
[79] C.R.S. 13-64-302(1)(b).

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recoverable amount for all damages against a defendant health care provider or institution is limited to $1,000,000 and of that amount, any claim for noneconomic loss or injury is capped at $300,000.[80] These limits can be exceeded by a court for good cause shown, if it is determined that the limitations set out in statute would be unfair.[81] Notably, these limitations do not apply to the Colorado Governmental Immunity Act for health care professionals who are public employees and health care institutions that are public entities.[82]

Those limits are current in Colorado statute but the Colorado General Assembly recently passed a bill that will increase the noneconomic damages cap over the course of the next five years.[83] The bill, which will become effective on January 1, 2025, will increase the noneconomic damages cap by $115,000 each year until 2029 when the amount will be set at $875,000.[84] Beginning in 2030, the cap will be adjusted for inflation, at least every two years.[85]

Finally, Colorado prohibits medical malpractice insurance carriers to require health care providers to utilize arbitration agreements with patients to address medical malpractice claims.[86] Otherwise, research has shown that Colorado does not have a medical review panel requirement.

Idaho:

Idaho does not cap economic damages in medical malpractice claims, but there is a $250,000 limit for any noneconomic damages that may be awarded to a claimant.[87] That amount does increase or decrease each year based on the percentage amount of increase or decrease that is established by the Idaho Industrial Commission for the average annual wage.[88] However, there is an exception to the limitation of awards of noneconomic damages if the cause of action arose out of "willful or reckless misconduct" or if it arose out of acts that would beyond a reasonable doubt be considered a felony under state or federal law.[89] Idaho also requires that the Idaho State Board of Medicine provide a hearing panel for prelitigation consideration of claims that would constitute medical malpractice.[90] The panel's proceedings are statutorily required to be informal

[80] C.R.S. 13-64-302(1)(b).
[81] *Id*.
[82] Colorado General Assembly, House Bill 24-1472.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] C.R.S. 10-3-1104.
[87] Idaho Code § 6-1603(1).
[88] *Id*.
[89] Idaho Code § 6-1603(3).
[90] Idaho Code § 6-1001.

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and nonbinding but any person wishing to bring a claim in court is required to submit their case to the panel.[91]

Montana:

Montana maintains one of the lowest caps on noneconomic damages for medical malpractice cases in the country, which is $250,000 for each single incident of malpractice but also all claims for noneconomic loss deriving from injuries the claimant received.[92] The cap is per patient but the $250,000 cap applies based on the same act or series of acts that caused injury or death and even in the event that the malpractice included one or more health care providers.[93] Also of note, the $250,000 limitation under Montana statute cannot be disclosed to a jury.[94]

And similar to Idaho, Montana also requires all malpractice claims or potential claims against health care providers to be submitted to the Montana Medical Legal Panel.[95] There are two exceptions to the requirement for submission to the panel, and the first is if there is a valid arbitration agreement between the parties to the malpractice claim and second, claims brought by inmates against health care providers who provide services in the correctional institution.[96] Montana specifically provides legislative purpose for the panel by stating the purpose is "to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded."[97]

Nebraska:

Nebraska takes a different approach on medical malpractice limits and actually sets a maximum amount that may be recovered in a claim at $2,250,000 but only up to $800,000 may be recovered from a qualified health care provider.[98] The total recoverable amount is set by the Nebraska Hospital-Medical Liability Act and provides for health care providers who qualify and maintain a $500,000 insurance policy to be covered up to $800,000 with the remaining

[91] Idaho Code § 6-1001.
[92] M.C.A. 25-9-411(1)(a).
[93] *Id*.
[94] *Id*.
[95] M.C.A. 27-6-105.
[96] *Id*.
[97] M.C.A. 27-6-102.
[98] R.R.S. Neb. § 44-2825.

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maximum recoverable amount to be paid from the Excess Liability Fund.[99] The Excess Liability Fund is similar in operation to Wyoming's Medical Liability Compensation Account, and is funded through a surcharge that is paid by qualifying physicians in Nebraska.[100] Finally, Nebraska also requires that any malpractice claim must be reviewed by a medical review panel as a requirement for a claim to proceed to court.[101]

South Dakota:

South Dakota limits the total general damages that may be awarded for a medical malpractice claim to $500,000.[102] However, South Dakota statute specifically provides that there is not cap on the amount of special damages that may be awarded.[103] South Dakota does not have a specific requirement that a medical malpractice claim be submitted to a review panel but does allow for parties to enter into voluntary agreements to address any issues for past and future services.[104]

Utah:

Utah's cap on noneconomic damages in malpractice actions is $450,000 but that amount is required to be adjusted for inflation each year by the state treasurer.[105] The limits that are prescribed for noneconomic damages do not apply to awards of punitive damages in malpractice actions.[106] Finally, Utah has also established and requires that a medical malpractice claim be submitted to the Utah Health Care Malpractice Division.[107] Similarly to Idaho, the proceedings are required to be informal and nonbinding on the parties, but a claim must be presented for review as a prerequisite to commence litigation in court.[108] Utah statute provides that any claim submitted for review is confidential and privileged, and is also immune from civil process.[109] The party who initiates the action is required to request a prelitigation panel review with the Division within 60 days after the service of the statutorily required notice to intent to commence an action.[110]

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[99] R.R.S. Neb. § 44-2825.
[100] R.R.S. Neb. § 44-2829
[101] R.R.S. Neb. § 44-2840
[102] S.D. Codified Laws § 21-3-11.
[103] *Id*.
[104] S.D. Codified Laws § 21-25B-1.
[105] Utah Code Ann. § 78B-3-410(1) and (2).
[106] *Id*. at (3).
[107] Utah Code Ann. § 78B-3-416(1).
[108] *Id*.
[109] *Id*.
[110] *Id*.

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Conclusion

This memorandum provides a brief overview of the relevant statutory and constitutional provisions regarding medical malpractice liability in Wyoming, other legislative efforts and options to limit medical malpractice liability, a discussion of constitutional considerations for the Committee's review and an brief overview of how other states have handled tort reform for medical malpractice. Please let me know if you have any questions or need further information.

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