
OKLAHOMA CENTER for CONSUMER & PATIENT SAFETY

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Twelve-year-old San Diego resident Steven Olsen is blind and brain damaged because, as a jury ruled, he was a victim of medical negligence when he was two years old. He fell on a stick in the woods while hiking. Under the family's managed care plan, the hospital pumped Steven up with steroids and sent him away with a growing brain abscess, although his parents had asked for a CAT scan because they knew Steven was not well. The next day, Steven Olsen came back to the hospital comatose. At trial, medical experts testified that had he received the \$800 CAT scan, which would have detected a growing brain mass, he would have his sight and be perfectly healthy today.

The jury awarded \$7.1 million in "non-economic" damages for Steven's avoidable life of darkness and suffering. However, the jury was not told of the two decade old restriction on non-economic damages in the state - California's Medical Injury Compensation Reform Act. The judge was forced to reduce the amount to \$250,000. The jurors only found out that their verdict had been reduced by reading about it in the newspaper and were outraged.

In 2001, Steven had 74 doctor visits, 164 physical and speech therapy appointments, and three trips to the emergency room. And his parents say that was a good year because Steven was not hospitalized. Steven's mother Kathy had to leave her job because caring for Steven is a full time job. She has to struggle constantly with the school district for Steven to receive special education classes.

In testimony at a joint session of the Oklahoma State Legislature in 2004, Steven's mother testified that in 2003, the medical expenses alone were \$100,000. A great deal above the economic damages awarded of \$600 per year. This creates a shift of responsibility from the insurance company that covers the doctor who negligently cared for Steven to the taxpayer to pay for his medical care and other living expenses through social security disability, Medicaid, and welfare.

The Oklahoma House of Representatives has recently passed out of committee a bill that would essentially provide corporate immunity from liability, thus causing a similar shift in Oklahoma if passed. They are claiming an interest in decreasing frivolous lawsuits and rather than addressing the source of the problem being the extreme number of medical errors and dangerous products, they are trying to take away essential constitutionally protected rights from consumers and patients.

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A few sections of the recently passed bill out of committee are listed below:

\$300,000 cap for non-economic damages- This provision is extremely discriminatory and numerous studies have shown that the most severely injured are also the most affected by non-economic damage caps. Such caps also discriminate against children, women, the elderly, minorities and low wage earners. Studies confirming the discriminatory impact of non-economic damage caps have been performed by various types of researchers, including physicians from Harvard Medical School; social scientists at the RAND Institute for Civil Justice; and a law professor at the University of Buffalo. Among other things, those studies have found the following:

- Employment income is the basis for calculating most economic damage awards. Non-economic damage caps discriminate against children because children have no income upon which to base a calculation.
- One of the more significant injuries that can be inflicted upon women is harm to reproductive capacity. However, that injury does not impact her earning capacity or entitle her to recover economic damages despite the devastating emotional impact that such a loss may cause.
- Caps discriminate against retired seniors, who often suffer neglect and abuse in nursing homes and other long-term care facilities, because they also have no employment income.

Statutes of repose are unfair to consumers. Statutes of repose terminate a manufacturer's liability for defective products -- toys, medical devices, elevators, farm machinery, appliances, freight trains, trucks, nuclear power plant parts, and factory equipment -- after a statutorily specified number of years. A person injured after the cut-off date has no recourse to hold the manufacturer of the defective product accountable.

Since statutes of repose limit liability based on time in the marketplace, they disproportionately harm those people who cannot afford to buy new products. Consumer protections should affect all income levels equally; statutes that disproportionately effect the low-income are particularly egregious.

As long as manufacturers sell products with the expectation that they will be in use longer than the statute of repose, it is unfair to limit their liability for defective products. Motor vehicles are an excellent example – surely no car manufacturer would ever agree that the vehicles they produce have a useful life of seven years or less. If a vehicle is defective when produced, it will probably remain defective 10 years later. H.B. 3120 gives no consideration to the actual useful life of any consumer product. Rather, it sets an arbitrary cut-off date beyond which people injured by even an admittedly defective product can no longer recover from the entity responsible for their injuries. That is bad public policy.

FDA compliance as a defense or Shield laws. A section of the bill seeks to create “shield laws” for manufacturers of drugs and medical devices. “Shield laws” limit liability for products that were in compliance with federal or state safety laws and regulations before the product was offered for sale. Limiting manufacturer liability will have a direct adverse impact on the consumers who purchase these products by removing an important deterrent to keeping dangerous products off the market in the first place. Whereas shield laws can limit liability to all federal and state government-approved products, it is easiest to illustrate the harm they cause by using U.S. Food and Drug Administration shield laws as an example.

The same industries arguing at the state level for FDA-shield laws have been lobbying Congress to weaken FDA pre-market approval standards. In 1997 these industries were successful in passing the so-called FDA Modernization Act, which lowered the standards for FDA approval in a way that will make it even more likely in the future that dangerous drugs and devices will be sold with FDA approval. The manufacturers should not be exempt from both liability and regulation; the courts are an important tool in ensuring the safety of our medical products.

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