

# contingencies

A GUIDE FOR DEALING WITH CATASTROPHIC PROPERTY LOSS

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## One Product Liability Cap Covers Main and Consortium Claims

By John L. Weston

In *Wessels v Garden Way, Inc.* (released for publication Sept. 28, 2004), the Michigan Court of Appeals ruled:

1. The cap on non-economic damages is constitutional (agreeing with prior cases);
2. Loss of consortium damages are included with the main plaintiff's damages, under the cap; and
3. The judgment should reflect the amount of the damage cap when the judgment is entered, not when the verdict is rendered.

On July 19, 2001, a jury returned a product liability verdict for the injured plaintiff, Frederick Wessels, and a separate verdict for Lucy Osborne on her loss of consortium claim. The jury awarded Wessels \$400,000.00 for past non-economic damages (such as pain and suffering) and \$30,000.00 per year for thirty years for future non-economic damages. The jury gave Lucy Osborne \$150,000.00 for past non-economic damages, and \$10,000.00 per year for thirty years for future non-economic damages. The jury found Frederick Wessels 45% at fault, so both awards would be reduced by this percentage. Although the verdict was rendered in 2001, judgment was not entered until January, 2003.

The trial court ruled that the amount of the cap would be determined as of the date the verdict was rendered in 2001, instead of when the judgment was entered in 2003. In the interim, the cap had increased, as provided in the statute. The trial court also held that the cap on non-economic damages applied separately to each plaintiff's claim.

### SECRET WARDLE NOTES:

This is the first case to establish that loss of consortium damages must be combined with non-economic damages to the main plaintiff, under a single damage "cap." This can significantly reduce the total judgment. The cap is currently \$366,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the non-economic loss cap is \$653,500.00.

A defendant should consider pushing for entry of judgment soon after a verdict, to avoid the annual increase in the statutory cap.

## CONTINUED...

Garden Way appealed, claiming that the damage cap applied collectively to the claims of both plaintiffs. Wessels cross-appealed, claiming that the cap was unconstitutional. Wessels also claimed that the 2003 damage cap should have been applied, based on the time when the judgment was entered.

The Court of Appeals made short work of the constitutional arguments. The Court cited a recent Michigan Supreme Court opinion in which the Michigan Supreme Court upheld a similar non-economic damage cap in the medical malpractice statute, and a similar Court of Appeals case involving the product liability damage cap. The Wessels panel ruled that the cap did not violate the right to a jury trial or the right to equal protection. Nor did the cap violate the separation of powers doctrine, or constitute illegal special legislation.

The more significant issue – an issue of first impression in Michigan – was whether each plaintiff was entitled to a separate damage cap. Here, the *Wessels* panel reversed the trial court and held that under the plain language of the statute, only a single damage cap was contemplated for all aggregated non-economic damages.

Finally, in another issue of first impression, the Court of Appeals reversed the trial court and held that the applicable damage cap is the one in effect at the time when the written judgment is entered. The *Wessels* panel acknowledged that the statute did not specifically address this issue, but undertook a statutory analysis to conclude that the Legislature intended courts to apply the caps to the verdict, and the court can only do so by entry of a written judgment. The Court recognized that this ruling could be subject to abuse by those who sought to extend the time for entry of judgment in order to reap the benefit of annual increases in the cap. The Court of Appeals, however, believed that the trial court could adequately guard against this abuse through sanction provisions.

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