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EXPANSION OF WRONGFUL DEATH DAMAGES IN NEW JERSEY APPEARS UNLIKELY

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On April 5, 2018, the New Jersey Senate Judiciary Committee pushed forward Senate Bill S-1766, which was designed to expand recoverable wrongful death damages to include “mental anguish, emotional pain and suffering, loss of society, and loss of companionship.” The bill was then referred to the Senate Budget and Appropriations Committee, where it has languished for the past year. In order for it to become law, it must be approved by the Senate and signed into law by Governor Murphy. The bill appears to have stalled due to opposition from the business community and state and local governments, and ultimately appears unlikely to become law in New Jersey in the near future, primarily due to its impact on the economy and the potential for increased insurance costs.

The current version of New Jersey’s Wrongful Death Act, N.J.S.A. 2A:31-5, permits the recovery of “pecuniary injuries resulting from the death,” as well as “hospital, medical, and funeral expenses incurred for the deceased.” The New Jersey Supreme Court has interpreted this statute to permit recovery for financial loss, calculated as the actual monies that the decedent would have earned and contributed for the benefit of the survivors, and the reasonable value of the services, assistance, care, training, guidance, advice, counsel and companionship that would have been provided to the survivors. See *Green v. Bittner*, 85 N.J. 1 (1980). The value of such services is “confined to what the marketplace would pay a stranger with similar qualifications for performing such services.” *Id.* at p. 12. As such, juries are required to disregard the emotional aspect of such damages when rendering verdicts and to conduct a purely economic analysis based on the evidence presented.

Senate Bill S-1766, the proposed amendment to New Jersey’s Wrongful Death Act, would permit the jury to award damages specifically for “mental anguish, emotional pain and suffering, and loss of society and companionship.” The quantum of such damages would be subject to the jury’s discretion; and is thereafter subject to reversal or remittitur only if it is so outrageous that it “shocks the judicial conscience.” Such a nebulous and subjective standard creates the potential for vastly disparate verdicts in wrongful death matters. The potential for disparate verdicts, depending on the subjective judgment of the jury, has always been present in civil jury trials, but is likely to be exacerbated by introducing damages for emotional harm into the wrongful death analysis because such damages are hard to conceptualize and difficult to accurately quantify. Such uncertainty is likely to lead to increased difficulty in reaching settlements in wrongful death cases due to the inherent complexity in evaluating defendants’ potential exposure where the jury is permitted to consider the “mental anguish, emotional pain and suffering, and loss of society and companionship” resulting from the loss of a loved one.

Although damages for mental anguish and emotional pain and suffering resulting from the death of a loved one are indeed real and significant, the potential for vastly greater exposure for companies doing business in New Jersey, medical professionals, state and local governments, and individuals involved in accidents will inevitably result in higher liability insurance premiums. Advocates for Senate Bill S-1766 argue that increased insurance premiums are a small price to pay to correct unjust outcomes that occur where decedents are people with little or no income or earning

capacity, such as children, stay-at-home spouses, or elderly people. Wrongful death damages for such decedents under the current version of New Jersey’s Wrongful Death Act are dramatically less than those that are recoverable when the decedent is a middle-aged, high earning professional with multiple dependents. Advocates argue that it is fundamentally unfair to value the lives of decedents differently based upon their earning potential. This argument has moral and logical appeal, but there are economic consequences to its implementation. Such consequences should be evaluated in the context of neighboring states such as New York, Pennsylvania, and Connecticut, which do not permit recovery for mental anguish or emotional pain and suffering to the extent contemplated in Senate Bill S-1766. The fact that Senate Bill S-1766 has not advanced during the past year suggests that there has been strong pushback from New Jersey’s business community, as well as the state and local governments, whose budgets are already under increasing pressure from other rising costs. It bears noting that former-Governor Jon Corzine vetoed similar legislation ten years ago. In sum, the fact that Senate Bill S-1766 has languished for over a year suggests that the economic realities associated with expansion of wrongful death damages are prevailing in the battle with advocates who favor full compensation for the emotional pain and suffering caused by the death of a close family member. The tides of opinion on this issue have evolved over time, however, and it remains to be seen how this will play out in the long run.