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Note

*773 THE CONSTITUTIONAL AND ECONOMIC IMPLICATIONS OF A NATIONAL CAP ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS

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*775 Introduction

Imagine waking in a hospital bed. As you gain consciousness, you attempt to move and stretch out. At this moment you realize that your left leg has been completely removed from your hip down. After overcoming the shock of what has happened, you come to realize that your leg had to be removed as the result of medical malpractice on the part of the hospital and doctors that were treating you. Feeling that you have been the victim of a great injustice, you turn to the legal system for compensation for having been robbed of your leg for the remainder of your life.

This is similar to the story of Gilford Tyler. After a one week jury trial in a Maryland court, Mr. Tyler was awarded $4.5 million in non-economic damages to compensate for the loss of his limb, his permanent disfigurement, and the pain and suffering he would endure for the rest of his life as a result of medical malpractice. However, the court reduced Mr. Tyler's non-economic damages award to only $515,000 as called for by the Maryland Medical Malpractice Act's cap on non-economic damages. The trial judge noted, "The thought that the injuries sustained by the Plaintiff are, in any way, compensated by $515,000 is, facially abhorrent." [FN1]

The tragic effect of medical malpractice caps upon some of society's most severely injured individuals is only one aspect of the problems facing America's health care system. It is readily apparent that the system has problems whichmust be addressed. No scholarlynote is needed to recognize that the cost of health-care is ever rising. Medical malpractice insurance premiums continue to increase as well. Physicians and hospitals are constantly calling for reform. Another travesty is the story of the physician who worked hard to become a good health care professional, but is then forced to quit the practice of medicine all together or move to another state because he or she cannot afford the climbing cost of medical malpractice insurance coverage. Caps on damages in medical malpractice actions have been hailed by many to be the answer to the problem, shifting the burden from hospitals and physicians to the few who are severely and tragically injured by their malpractice.

In the last thirty years, many states have passed similar legislation imposing caps on non-economic damages in medical malpractice actions. [FN2] Such caps have been passed in response to increases in medical malpractice insurance premiums which have been argued to be at the source of a perceived health-care crisis. [FN3] *776 These measures have come under heavy attack for being unconstitutional and having questionable economic impact, largely due to the inherent inequity in burdening the most severely injured victims of malpractice. [FN4] The results of these attacks have been mixed. [FN5]

Since 1995, the U.S. House of Representatives has passed legislation seven times that would impose a national cap on non-economic damage awards in medical malpractice actions, but such measures have failed to pass through the U.S. Senate. [FN6] Most

recently, The Help Efficient, Accessible, Low-Cost Timely Healthcare Act of 2003, which would have capped non-economic damage awards in medical malpractice actions at $250,000, was passed by the United States House of Representatives in March of 2003, but in July, a similar measure was blocked by a filibuster in the Senate. [FN7] The vote on these measures has generally come down along party lines, with the most recent pieces of legislation being backed by President George W. Bush. [FN8]

President Bush placed a national cap on non-economic damages in medical malpractice actions at the forefront of his domestic agenda, addressing his proposal for such a cap in his State of the Union Addresses in 2003 and again in 2004. [FN9] With the nation turning its attention to the 2004 election, medical malpractice caps will likely be a hotly debated issue again this year. As the political stimulus to pass a national medical malpractice cap grows, it is important to analyze the merits of such a measure. If the state experience with caps serves as any indicator, any national cap is sure to face constitutional challenges, as well as attacks under economic theory. This Note will analyze the constitutional and economic implications of a national cap on non-economic damages in medical ***777** malpractice actions, discuss the feasibility of such a cap to achieve the goals of its proponents, and suggest alternative solutions with the potential to achieve the goals of proponents of medical malpractice caps without forcing the most severely injured victims of malpractice to shoulder the burden. [FN10]

Part I of this Note provides the background necessary to understand the debate surrounding medical malpractice caps on damages. This part briefly surveys the history of the national healthcare "crisis," the role medical malpractice litigation has played in it, and the theoretical arguments advocated by proponents and opponents of caps on medical malpractice non- economic damages. The constitutional and economic questions are analyzed in later sections, and a brief summary of the present status of state law on damages caps is provided.

Part II of the Note analyzes the case law relevant to determining the constitutionality of a national cap on non-economic damages in medical malpractice actions. The right to trial by jury, the constitutional separation of powers, the guarantee of equal protection, and due process rights are each analyzed. In subpart 1 of each of these sections, the Note first summarizes the importance of state constitutional rulings on caps for non-economic damages in medical malpractice actions in order to provide support for the federal analysis by revealing the key arguments that have already been made in this area. Then, subpart 2 of each section discusses any relevant decisions based on the federal constitution. Finally, subpart 3 of each section analyzes the potential outcome of the constitutional challenge and note the key concerns for legislators under each attack. This section concludes with some drafting suggestions to minimize the likelihood that a national cap might be found unconstitutional.

Part III discusses the economic effect of a national cap in terms of the potential of a national cap to fulfill its legislative purpose or the goals of the tort law system, as well as the potential impact a cap may have on areas outside the health industry. Part IV discusses the viability of alternative solutions and the potential to remedy the crisis without forcing the most severely injured victims of malpractice to shoulder the burden for all of society. Finally, this Note concludes that while a national cap on non-economic damages in medical malpractice actions is likely to pass constitutional muster, Congress would be wise to attempt less invasive limitations first. Congress should seek out better economic data, upon which to base their decisions, and ensure the crisis will be averted with minimal negative consequences.

*778 I. Background

A. The Role of Medical Malpractice Awards in the National Healthcare "Crisis"

The increasing cost of healthcare has been one of the most pressing problems in America in the last half century. Scholars, politicians, and industry experts have pointed fingers at many factors that could be the source of the problem and proposed many solutions to solve the perceived crisis. One of the most oft referred to culprits of the

increasing cost of healthcare is increased insurance premiums for healthcare professionals and facilities. Medical malpractice insurance premiums and overall healthcare insurance costs have risen dramatically since the 1970s. [FN11] The alleged source of the increasing cost of medical malpractice insurance has been the tort system. As the argument goes, medical malpractice claims have increased in frequency, and jury awards have become excessive. Some commentators have argued that the medical malpractice crisis is very real and tort reforms are essential to ameliorate it, while others argue there is no real crisis at all and tort reforms will only compound the problem. [FN12]

"In 2002 alone observers say, healthcare costs could jump by as much [as] 13 percent. . . . Without adequate malpractice insurance, many healthcare providers are either abandoning certain high risk procedures or leaving their practices altogether." [FN13] Those observers seemed to hit the mark. Medical malpractice insurance premiums are increasing, and it is having a marked effect on the provision of healthcare services. The most recent illustration of this was the well-publicized physician strikes in Florida, West Virginia, and New Jersey in late 2002 and early 2003, where surgeons walked out in an effort to urge state policy makers to do something about the increase in medical malpractice insurance premiums. [FN14]

1. Proponents of Caps: Arguments Advanced by Healthcare and Insurance Industries.-It is no surprise that the American Medical Association (AMA) and ***779** insurance industry lobbyists are leading the push towards a national cap on medical malpractice damages. Less damages mean less payouts, which means lower insurance premiums. Proponents cite to increasing costs of medical malpractice litigation, "[a]verage jury awards in medical malpractice cases have increased by 43 percent, from $700,000 in 1999 to $1 million in 2000." [FN15] They further argue that the reason jury awards have increased so much is the increased willingness of juries to irrationally overcompensate victims of malpractice with excessive jury awards for pain and suffering and other non-economic damages. They argue that with caps on these damages, "real" losses, i.e., economic damages, are still compensated. From this perspective, non-economic damages are problematic because it is difficult to place a dollar value on them; therefore, they should be less essential to a fair system of compensation. [FN16] It is also argued that many malpractice claims are frivolous, and caps would discourage such claims, with less likelihood of plaintiffs obtaining substantial windfalls. Statistics show that plaintiffs prevail less in medical malpractice suits than any other tort or personal injury claim. [FN17]

2. Opponents of Caps: Arguments Advanced by Trial Lawyers & Consumer Advocates.-According to opponents of caps, the limitations are unfair and likely to breed more malpractice:

These tort reform measures have four things in common: insurance companies save money; incompetent doctors avoid blame and any meaningful form of discipline; patients and their families, who have been destroyed in the process, are prevented from obtaining financial compensation, the only kind of justice available to them; and, the general public is left unprotected from doctors who may maim and kill their patients. [FN18]

The American Trial Lawyers' Association (ATLA) and consumer groups lead the charge against caps. These groups often accuse proponents of mischaracterizing statistics and accuse insurance companies of practicing bad business. Opponents of caps argue that not enough malpractice claims are filed: "A study done by the Harvard Medical Practice Study Group determined that for every [eight] instances of medical malpractice, only [one] claim was actually filed." [FN19] They argue that the low winning percentage for plaintiffs in medical ***780** malpractice suits is not evidence of frivolous suits, but is really evidence that doctors are already over-protected by the inherent difficulty in getting expert medical testimony against a practicing physician. [FN20]

Opponents of caps also argue that the real problem lies with the insurance companies' mismanagement and unethical practices. "In 1999, . . . [medical malpractice insurers] garnered 14.2% profit, while property/casualty [insurers] made 8.2%." [FN21] A letter

written by Robert Hunter, advisor to President Ford during the medical malpractice insurance crisis in the 1970s, to President George W. Bush, criticized a Department of Health and Human Services report. [FN22] He found that the Department's report provided inaccurate and erroneous information to the President blaming high jury awards for escalating medical malpractice rates. [FN23] He asserted that "the economic cycle of the insurance industry and the industry's own business practices" were the real culprit as was the case in the 1970s and 80s. [FN24] Because of these practices, opponents would warrant caution in considering caps because there are no guarantees that physicians and consumers will see any impact as insurers are the ones who get all the savings. [FN25]

Another key argument against such caps is that by subsidizing the cost of insurance for physicians who practice bad medicine, society loses. It is argued that the likelihood of a high jury verdict for malpractice is a key motivating factor for physicians to practice "good" medicine.

[T]he American people need reforms that protect the public, not reforms that blame the injured, the disabled, and victims of medical ineptitude and neglect. The reforms advanced by tort reform proponents, purportedly in the public interest, are actually in the interests of the thousands of physicians who will be allowed to practice bad medicine, undetected, undeterred, and untroubled by their conscience. [FN26]

It is also often cited by opponents of caps that "[t]he direct total cost of the ***781** malpractice system is less than one percent of total health care expenditures." [FN27] Therefore, it is argued that claims by proponents of caps that they will decrease the overall cost of healthcare or remedy the perceived national healthcare crisis are simply irrational.

Nonetheless, as Benjamin Disraeli once said, "[T]here are three kinds of lies: lies, damned lies and statistics." [FN28] Statistical information can be cited in support of both opponents and proponents of caps. Nonetheless, several things are clear and are discussed in more detail in the economic analysis of this Note in Part III: medical malpractice costs are increasing; remedying the cost of medical malpractice insurance will not, in and of itself, solve the problem of increasing health costs; caps on damages may reduce malpractice insurance premiums; and, many unwanted side-effects could result from such caps. The economic effects of caps are at the source of the problems that they present.

B. Two Key Problems

[C]aps on non-economic damages in medical malpractice are most unfair because of the nature of the claim. . . . The problem . . . is that individuals suffer loss so that society can control medical costs and encourage physicians to stay in business[,] . . . [c]aps in medical malpractice cases punish those who suffer the most . . . [seriously injured and the young]. . . caps on non-economic damages are unfair because they affect the poor and economically disadvantaged most severely." [FN29]

The inherent inequity burdening the most severely injured victims of malpractice is the catalyst for the constitutional and economic problems concerning caps on non-economic damages in medical malpractice actions.

1. Constitutional Uncertainty.-The Supreme Court has not made a definitive ruling on the constitutionality of damage caps, and state court decisions are all across the board. A national cap on non-economic damages in medical malpractice actions will present the Court the opportunity to clear up confusion in this area of the law. This Note undertakes the academic endeavor of sorting out the constitutional arguments made for and against caps on non-economic damages in an effort to determine if such a cap would be found constitutional by the nation's high court. The constitutional arguments against state caps have come down on a variety of grounds. Some challenges have come on grounds of state constitutional provisions that have no analogous federal provision. Others, more notably, have dealt with right to trial by jury, the separation of powers, equal protection, and due process clauses and will be helpful in consideration of ***782** the constitutionality of a national cap. This section goes beyond determining the potential for constitutionality

to discuss how a cap could be drafted to ensure its constitutionality.
2. Economic Uncertainty.-There are several economic concerns that need to be considered by policy makers in this arena. The first consideration is simply the potential for caps to achieve their purported economic goals. The Texas Supreme Court noted that a state commission could not conclude there was any correlation between a damage cap and the legislative purpose of improved healthcare as data was insufficient, while an independent study concluded there was no relationship between a damage cap and increased insurance rates, because less than 0.6% of all claims brought are over $100,000. [FN30] Furthermore, while other studies have concluded that caps do decrease malpractice premiums, [FN31] the overall effect to the system may be unexpected. There is evidence that the irrationality stemming from insurance company risk calculations could lead to higher actual payouts overall. [FN32] The impact that caps can have on settlement negotiations and welfare benefit programs may result in other economic impacts that need further consideration. The goal of this Note is to identify these constitutional and economic pitfalls in an effort to suggest the proper course of action from an overall policy making perspective, as opposed to an isolated analysis of solely malpractice insurance itself.

C. Where the States Stand

After more than thirty years of tort reform, states are far from finding a universal solution to rising malpractice insurance premiums. The state experience has been varied, as is the current landscape of state law on caps on non-economic damages in medical malpractice actions. The attached tables provide a summary of where the individual states currently stand on medical malpractice caps on non-economic damages. Twenty states have a cap, and seventeen states have ***783** ruled that their current cap is constitutional. However, of the remaining thirty states that do not have a cap, eight previously had one but found it to violate state and/or federal constitutional rights. Another three that now have caps once found previous versions unconstitutional. The twenty-eight states that have ruled on the constitutionality of caps provides a body of experience to frame this Note's discussion of the constitutionality of a national cap on non-economic damages in medical malpractice.

II. Constitutional Challenges to a National Cap on Non-Economic Damages in Medical Malpractice Actions: Lessons Learned from the States, the Federal Experience, and Potential Outcomes

State high courts have both upheld and struck down statutory caps on non-economic damages in medical malpractice actions on numerous grounds. [FN33] This section analyzes the major rationales in support of such rulings that came down on state constitutional grounds that were analogous to some key federal constitutional provisions. [FN34] Then, rulings that came down on federal constitutional grounds are discussed. Finally, potential outcomes of constitutional challenges to a national cap on non-economic damages in medical malpractice actions are discussed. While this Note attempts to discuss the constitutional provisions that are implicated by caps on damages on an individual basis, it is notable that there is some overlap in the analysis of each of these constitutional provisions.

A. The Seventh Amendment Right to Trial by Jury

Many states have had challenges to damage caps based on grounds that such ***784** caps violate the right to trial by jury. The typical state constitutional provision for this right states that "the right to trial by jury is inviolate." [FN35] The argument is that damages in a medical malpractice action are factual determinations to be made by the jury. Therefore, it violates an individual's right to trial by jury when a legislature takes that determination away from the jury through the use of a cap on damages.
1. Importance of Challenges Under Analogous State Constitutional Provisions.-
a. Finding caps violated a right to trial by jury.-State court decisions that have found caps on non-economic damages in medical malpractice actions to violate the state right

to trial by jury have relied on several key findings. [FN36] The Oregon Supreme Court's 1993 decision in Lakin v. Senco Products, Inc., provides a good example of the typical analysis these courts have taken. [FN37] The first and most crucial step has been a historical analysis of the scope of jury functions at the time the rights were adopted in the state constitution. The Lakin court concluded that the assessment of damages was a factual determination and a function of a common law jury at the time the Oregon constitution was adopted in 1851. Therefore, it was unconstitutional for the legislature to take that power from the jury in passing a statutory cap. [FN38] The Washington Supreme Court recently criticized courts that have upheld damages caps in light of the right to trial by jury because they "either have not analyzed the jury's role in the matter or have not engaged in the historical constitutional analysis used by" courts that have struck down caps on these grounds. [FN39]

Furthermore, state courts that have found caps to be unconstitutional under the right to trial by jury have distinguished similar caps on several grounds. The Lakin court, distinguished caps on damages in wrongful death actions which were ***785** held constitutional, because such actions did not exist at common law, as medical malpractice actions did as a subset of personal injury. [FN40] The court reasoned that since wrongful death actions were created by the legislature, the legislature could limit the manner in which damages were awarded. However, the legislature had no power to limit awards in actions existing at common law before the legislature was created. [FN41] The Lakin court also distinguished judicial remittitur, which has long been held to not violate the right to trial by jury. The court reasoned that remittitur was permissible because it was discretionary and the plaintiff was given a right to appeal, as opposed to the mandatory nature of the statutory cap in question. [FN42]

b. Upholding caps over trial by jury challenges.-Several state courts have upheld caps over challenges on the right to trial by jury. [FN43] The Virginia Supreme Court has been cited and discussed by many other courts ruling on this issue. Virginia first upheld a medical malpractice cap over multiple constitutional challenges in the 1991 decision of Etheridge v. Medical Center Hospitals and most recently affirmed its ruling in the 1999 decision of Pulliam v. Coastal Emergency Services of Richmond, Inc. [FN44] The key distinction between these decisions has come along the lines of how the jury's function has been viewed or ***786** characterized. The Pulliam court found that part of the jury's fact-finding function is to assess damages; however, once assessed, the jury's constitutional function is complete. It is the court's duty to apply the law to the facts, and remedy is a matter of law, not fact. Because the trial court applies the limitation after the jury has made its damages assessment, the right to trial by jury is not violated. [FN45]

Other courts upholding caps over challenges on the right to jury trial have focused on the legislature's power to venture into the jury's function. The opinion of the South Dakota Supreme Court in Knowles v. United States is representative of courts that have gone very far into this line of thinking. [FN46] The Knowles court found that civil damages were not an essential element of the jury's function as retained at common law, that the common law never recognized a right to full recovery in tort, and that "[o]ur legislature retains the power to change a remedy or abolish it and substitute a new remedy, so long as it does not deny a remedy." [FN47] However, most courts have not gone so far. More illustrative of the reasoning of the majority of courts that have upheld caps is the concept that the legislature merely has the power to set the outer limits of the remedy. [FN48]

These determinations can often depend upon interpretation of state law. For example, the Idaho Supreme court upheld a medical malpractice cap on non-economic damages largely because, under the Idaho constitution, the legislature had the power to modify or repeal common law causes of action. [FN49] The court addressed the question on certification from a federal court. [FN50] As the court reasoned, if the legislature has the power to abolish common law rights, it therefore has the power to limit the remedies available for a cause of action. [FN51]

2. Federal Law & Experiences.-Many of the state decisions which came down on

challenges to caps based on the right to trial by jury have also discussed whether the cap did or did not violate the Seventh Amendment. Commentators have also discussed the implications of the Seventh Amendment upon caps on damages. [FN52] Few federal court decisions have directly addressed the constitutionality of a cap on Seventh Amendment grounds, but many opinions discussing the relevance of federal law to an analysis of the constitutionality of state caps are available that prove helpful to the analysis here. [FN53]

*787 Many of the state decisions finding caps to violate the right to trial by jury have cited United States Supreme Court precedent for support. The Lakin court cited Supreme Court precedent for two propositions. First, the Lakin court cited Dimick v. Schiedt and Feltner v. Columbia Pictures Television, Inc. [FN54] These two cases were cited for the proposition that the assessment of damages was a function of the common law jury as protected under the Seventh Amendment. [FN55] The Lakin court went on to cite Hetzel v. Prince William County for the proposition that "imposition of a remittitur without the option of a new trial 'cannot be squared with the Seventh Amendment.'" [FN56]

The Washington Supreme Court agreed with the Lakin court on this issue and suggested that Dimick rather than Tull v. United States provided the most informative analysis on the constitutionality of non-economic damages limits. [FN57] Tull was a case where the Supreme Court upheld civil penalty assessments, without jury involvement, under the Clean Air Act. [FN58] The Sofie court distinguished Tull because it did not apply to civil damages actions, but merely applied to civil penalties under a legislatively created scheme. [FN59]

Some federal courts have upheld state medical malpractice caps on damages over challenges to the Seventh Amendment. [FN60] Here again, the determination has depended upon a characterization of the jury's function. As the Fourth Circuit Court of Appeals noted, "It is not the role of the jury to determine the legal consequences of its factual findings . . . that is a matter for the legislature." [FN61] Some of the most convincing language on this issue came from the 1989 District Court of Maryland decision of Franklin v. Mazda Motor Corp.:

*788 Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function. . . . The power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action . . . . Particularly in the area of damages for pain and suffering, the legislature acts within its power in creating reasonable limits on the causes of action and recoverable damages it chooses to allow in the courts of law. [FN62]

3. Summation: Constitutionality and Legislative Concerns Regarding the Seventh Amendment Right to Trial by Jury.-The above referenced federal court rationales have been questioned and heavily criticized by scholars who find them to be based on loose foundations. [FN63] Nonetheless, it is likely that a national cap on non-economic damages will be able to withstand challenges on Seventh Amendment grounds for the reasoning laid out in Franklin. Moreover, many of the issues implicated by the analysis under the rights of the Seventh Amendment become more problematic under the constitutional analysis of other challenges.

B. The Constitutional Separation of Powers

Constitutional challenges on separation of powers grounds are closely linked to the challenges that have come under the right to trial by jury. The crux of these challenges is that through statutory caps, the legislature improperly "delegates to itself the power of remitting verdicts and judgments, which is a power unique to the judiciary." [FN64]

1. Importance of Challenges Under Analogous State Constitutional Provisions.-

a. Finding caps violated state separation of powers provisions.-The state courts which have invalidated caps on damages on separation of powers grounds have focused on the cap's invasion into the judiciary's power of remittitur. [FN65] The Supreme Court of Illinois laid out the typical rationale in striking down a cap on these grounds in the 1997

decision of Best v. Taylor Machine Works. [FN66] First, the court discussed the doctrine of remittitur, the duty of the judiciary to ensure a jury *789 does not award excessive verdicts. [FN67] The exercise of judicial remittitur must be done on a case-by-case basis as the evidence supporting a jury award varies in every case. [FN68] When a judge determines a remittitur is necessary, it is implemented if the plaintiff consents, and if the plaintiff does not consent, a new trial occurs. [FN69] The Best court also cited United States Supreme Court precedent for the proposition that "it has [long] been a traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur" which is a "question of law for the court." [FN70] The court invalidated the cap in question because it acted as a "legislative remittitur" in violation of the power vested in the judiciary. The court reasoned that the statute was "mandatory and operate[d] wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries." [FN71]

b. Upholding caps over state separation of powers provisions.-Other States have found this Separation of Powers argument to be wholly unpersuasive. [FN72] The West Virginia Supreme Court dismissed the separation of powers argument in the 2001 decision of Verba v. Gaphery. [FN73] The Court found that it was completely within the state legislature's powers to enact statutes that abrogate the common law. [FN74] Therefore, the Verba court found no merit in the legislative remittitur argument. [FN75] Likewise, in 2000, the Idaho Supreme Court dismissed such an argument in Kirkland v. Blaine County Medical Center. [FN76] The Kirkland court noted that "if anything, the statute is a limitation on the rights of plaintiffs, not the judiciary." [FN77] Key to both of these cases, however, were the state constitutions' explicit grant of power to the legislature to modify or abolish common law causes of action. [FN78]

2. Federal Law & Summation.-The Separation of Powers question in this *790 context is one in which there is not much federal law to guide our analysis. However, Congress does retain control over the jurisdiction of the United States Supreme Court and has removed specific subjects from the jurisdiction of the Court previously. [FN79] Nonetheless, this is one area in particular where the Court could determine that the legislature inappropriately crossed the bounds of the separation of powers. The key to the Court's ruling on such a challenge will depend on the characterization of both the judiciary's power of remittitur and the legislature's power to modify or abolish common law remedies. Congress, in attempting to preserve the constitutionality of any proposed cap, would be wise to consider means by which the separation of powers is preserved.

C. Equal Protection Guarantees

Equal protection clause challenges come as a result of differential treatment to plaintiffs in medical malpractice actions on two grounds: (1) differential treatment of plaintiffs in medical malpractice cases versus plaintiffs in other personal injury cases (who can obtain full recovery), and (2) plaintiffs severely injured through medical malpractice who have large non-economic damages versus those with small or non-existent non-economic damages from medical malpractice (who can obtain full recovery). [FN80] "Equal protection raises the question most fundamental to a society: Who gets what? Of course, the problem, approached from a different angle may be reformulated: Who gives up what?" [FN81] Under the Fourteenth Amendment, states are prohibited from denying any person "equal protection of the laws." [FN82] This section, known as the equal protection clause, has been made applicable to the federal government's exercise of power, under the Fifth Amendment. [FN83] The equal protection argument against caps on damages in this context is fairly obvious: those who suffer the most severe *791 injuries will go without full compensation for their non-economic damages, while those who suffer relatively minor injuries with few non-economic damages will be fully compensated under the law. Nonetheless, mere unequal treatment under a statutory scheme is generally, in and of itself, not grounds for finding a statute unconstitutional. The Court's analysis on equal protection grounds will depend upon the nature of the rights involved, or the grounds under which unequal treatment occurs; the interest of the state in promulgating the legislation; the relation between the differential treatment

and the goal meant to be obtained; and how narrowly the law has been designed to minimize the unequal treatment involved.
It is widely accepted that the Court uses a three-tiered approach for this analysis. [FN84] The level of scrutiny the Court will apply increases from rational basis, to intermediate or heightened scrutiny, to strict scrutiny. Any equal protection challenge in this context will rely heavily on the level of scrutiny utilized. "The level of scrutiny utilized is critically important, as virtually any statute will be upheld under the rational basis test. Courts applying this standard almost always defer to the legislature's determination that the classification created by statute is rationally related to a legitimate state objective." [FN85] The rational basis test is generally used for analysis of economic or social regulation. [FN86] The test is very deferential to the legislature inquiring only whether the classification has a conceivable rational relationship to an end that is not prohibited by the Constitution.
Strict scrutiny analysis applies when the classification distinguishes between persons in terms of any right, upon some suspect class, such as race or national origin, or where the act classifies people in terms of their ability to exercise a fundamental right. [FN87] Under strict scrutiny analysis, the court independently analyzes whether there is a close and effective relationship between the classification and the goal, or ends sought, by the legislation. Provided there is a close relationship between the classification and the ends, the test then is whether the act is narrowly tailored to achieve ends that amount to a compelling ***792** state interest.
The intermediate level of scrutiny has been applied to "quasi-suspect" classifications, mainly gender. Under the intermediate or heightened level, the legislature must show that the classification involves a "substantial relationship" to an "important" governmental interest.
1. Importance of Challenges Under Analogous State Constitutional Provisions.-
a. Finding caps violated state equal protection guarantee.-The states that have found their caps on damages in medical malpractice actions to violate the equal protection clause of state constitutions have, in most instances, relied on a higher standard than rational basis. [FN88] In Moore, the Alabama Supreme Court found a $400,000 non-economic damages cap in medical malpractice actions to be a violation of the state's equal protection clause. [FN89] The test applied by the Moore court was "whether [the classifications created] where reasonably related to the stated objective, and on whether the benefit sought to be bestowed upon society outweigh[ed] the detriment to private rights occasioned by the statute." [FN90] The findings in Moore were analogous to those that led to determinations that equal protection rights were violated in other states with similar holdings. The court relied on economic studies that found there to be little or no correlation between medical malpractice premiums and the overall cost of health care and, further, that damage caps effect on lowering medical malpractice premiums was also very small. [FN91] Very few damage awards were awarded above the cap, which only limited the size of the most meritorious awards and therefore did nothing to prevent frivolous claims. [FN92] While the effect was very remote, the burden placed on the most severely injured medical malpractice victims was very high, preventing them from obtaining total compensation. [FN93]
Other courts have admitted that the test used was analogous to the federal substantial relationship test of intermediate scrutiny. In Carson v. Maurer, [FN94] the New Hampshire Supreme Court invalidated the state's medical malpractice cap ***793** using such a test. The Carson court concluded that the damage cap violated equal protection rights because the limitations were imposed in an unfair, arbitrary, and unreasonable manner. [FN95] The court's rationale relied upon similar factors to those in Moore: that paid out damage awards are only a small part of total insurance premium costs and few individuals suffer non-economic damages in excess of the cap.
b. Upholding caps over state equal protection challenges.-States upholding caps over state equal protection challenges have generally applied a rational basis test, focusing on the legislation being economic in nature. [FN96] A typical decision of this sort was Verba v. Gaphery from the Supreme Court of West Virginia in 2001. [FN97] The Verba

court characterized the legislation as economic in nature and therefore would not review the basis for the legislature's justification, despite statistical evidence refuting the legislature's findings in support of the cap. [FN98] The test as applied was very deferential to the legislature. As the court noted, "the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based." [FN99] Like most of these decisions however, the Verba majority opinion was accompanied by a strong dissent. [FN100] The dissent criticized the majority for ignoring the trend amongst the states that has been to find medical malpractice caps unconstitutional. [FN101] The dissent asserted that "the right to recover personal injury damages is a significant substantive right requiring the application of some higher, perhaps, intermediate scrutiny." [FN102]

The Verba dissent also cited to the dissent in Fein v. Permanente Medical Group, the California majority opinion which upheld that state's cap on medical malpractice damages, for an interesting and persuasive logical argument: "Insurance is a device for spreading risks and costs among large numbers of people so that no one person is crushed by misfortune. . . . In a strange reversal ***794** of this principle, the statute concentrates the costs of the worst injuries on a few individuals." [FN103] Certainly, it is somewhat of an anomaly, contrary to the idea behind insurance to uphold these types of caps on rational basis grounds. Unlike other economic regulations being upheld on rational basis grounds, the result in applying such analysis to regulation of the insurance industry does seem to strike a cord with the purpose to have such an industry in the first place. Perhaps this anomaly further provides some grounds for moving away from the rational basis test in these situations.

2. Federal Law and Experience on Equal Protection Grounds.-Few decisions finding medical malpractice damages caps violated state equal protection guarantees have gone on to hold that the statute also violated the United States Constitution. [FN104] In contrast, many decisions upholding caps on state equal protection grounds have gone on to do so under federal equal protection analysis as well. [FN105] In most of those cases, the test used for the state analysis was the federal rational basis test. In several instances, states have appealed to the United States Supreme Court to clear up confusion on this issue, but the Court has declined to do so.

The Supreme Court's decision in Duke Power Co. v. Carolina Environmental Study Group has been cited by several decisions on this issue and lends some insight to the analysis here. [FN106] In the Duke Power decision the Court rejected the use of the intermediate standard of review for analysis of the cap on damages resulting from a nuclear accident under the Price-Anderson Act. [FN107] This federal act imposed a $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants. [FN108] The Court found rational basis was the appropriate test to apply to the classification which treated victims of a nuclear accident different from victims of personal injury ***795** from other causes. [FN109] The Court focused on the fact that this was classic economic regulation in which deference is great to Congress's rationale in support of the classification. [FN110]

The Duke Power decision has been found directly applicable by some courts and used as the basis for applying rational basis to their analysis of state medical malpractice caps under equal protection guarantees. However, some courts choosing not to apply rational basis have distinguished Duke Power. The Arneson court's reasoning was typical, finding that Duke Power was distinguishable on two grounds contained in the rationale of the Supreme Court that were not present in the case of medical malpractice damages caps. [FN111] First, the Supreme Court relied on the "extremely remote possibility of an accident where liability would exceed the limitation." [FN112] Second Congress expressed a commitment to go beyond the limitation to protect the public from consequences of such an accident. [FN113] As the Arneson, court noted in the case of medical malpractice damages statutes there is both "a strong possibility of damages above the limitation and no legislative commitment beyond the limitation." [FN114]

3. Summation: Constitutionality and Legislative Concerns on Fifth Amendment Equal Protection Grounds.-The critical issue for a determination on constitutionality of a

national cap on non-economic damages in medical malpractice actions is whether rational basis test will apply or if intermediate scrutiny or some heightened level of scrutiny will be applied. While no suspect class is involved in these cases, there is a very persuasive argument to be made that there is a fundamental right to full compensation for personal injury. There is also a strong argument to be made in favor of a heightened scrutiny test due to the anomalous situation involved in putting a cap on recovery against the insurance industry. Nonetheless, as in Duke Power, if it is the prerogative of the court it is easy enough to say that this is classic economic regulation at issue and rational basis will apply. As Duke Power also pointed out, the greater the extent to which the individual gets something in return for the limitation and the smaller the likelihood that the cap will be exceeded, the more likely a cap is to pass constitutional muster. [FN115] This concept comes more into play in discussion of due process rights.

D. Due Process Rights

Challenges on due process grounds are generally analyzed very similarly to ***796** equal protection clause challenges. [FN116] It is very common for the challenges to be raised together and dealt with in the same fashion by the reviewing court. One key element that tends to be more associated with the due process analysis than that under the equal protection clause is the idea of a quid pro quo. This falls under the general analysis under the takings clause, where it is constitutional for the government to take property so long as they provide just compensation. Here the constitutionality of non-economic damages caps in medical malpractice has often hinged on the extent to which the government has given something to the victim in exchange for their potential loss of full compensation for non-economic damages.

1. Importance of Challenges Under Analogous State Constitutional Provisions.-

a. Finding caps violated state due process rights.-States striking down caps on due process grounds have often distinguished the caps at issues from others that have been upheld due to a lack of a quid pro quo. [FN117] The key distinctions have come in comparison to worker's compensation and to the medical malpractice statutes of Indiana and Louisiana. The 1988 Texas Supreme Court decision in Lucas v. United States is often cited for these distinctions. [FN118] A key concern for the Lucas court was that the statute failed to give an adequate substitute for a victim of malpractice to obtain redress for their injuries. The court rejected the argument that there was a sufficient societal quid pro quo thru ***797** lower insurance premiums and medical costs. Workmen's compensation schemes were distinguished because they provide a quid pro quo by giving the victim a quicker remedy at law with a lower burden of proof. [FN119] Indiana and Louisiana were cited by the Lucas court as examples of states that had provided an adequate quid pro quo through the establishment of a patient's compensation fund (PCF). [FN120] The PCF's are in effect government sponsored excess insurance to which all health care providers pay in each year. Under those systems, recovery from the medical malpractice insurance company or the healthcare provider is capped at one amount, for example $100,000. Once a victim recovers up to the cap from the provider, the PCF then provides additional compensation to a higher amount, for example $750,000. The quid pro quo is that the state guaranteed this excess insurance to the victim. The guarantee of recovery was the essential substitute for full recovery.

b. Upholding caps over state due process challenges.-States that have upheld medical malpractice damages caps over due process challenges have often found there to be a quid pro quo provided by the legislature. [FN121] The Louisiana Supreme Court in upholding the Louisiana cap and statutory scheme found three benefits that were offered to the most severely injured: "(1) greater likelihood that the offending physician would have malpractice insurance, (2) greater assurance of collection from a solvent fund [through the state sponsored PCF], and (3) payment of all medical care and related benefits." [FN122] Another adequate quid pro quo has been found through arbitration. The Florida Supreme Court approved a statute imposing caps on non-economic damages in medical malpractice cases where the defendant accepted arbitration. [FN123] The

arbitration *798 was found to provide the plaintiff with the benefit of access to a remedy faster and less expensive than litigation in exchange for the limitation. [FN124]
Some state courts have been willing to consider the general goals of medical malpractice statutory caps as constituting a sufficient quid pro quo. The Supreme Court of California in Fein noted that "it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." [FN125]
The Colorado Supreme Court went even further in Scholz v. Metropolitan Pathologists, P.C. [FN126] The Scholz court did not even address the issue of a quid pro quo. Rather, that court held that the constitutional guarantee of due process is applicable to rights, not remedies. [FN127] Therefore, there could be no violation of due process in capping damages as it is merely a remedy afforded to the plaintiff, in contrast to a right to a process to obtain a remedy. [FN128]
2. Federal Law & Summation.-Here again, the likelihood that a federal court would find a cap on non-economic damages in medical malpractice to be in violation of the due process clause is not very high. However, to the extent there is any risk of such a finding, Congress could ensure the constitutionality of a cap by providing a quid pro quo to plaintiffs in medical malpractice actions. To the extent a quid pro quo is provided the likelihood of an unconstitutional ruling will decrease.

E. Drafting Lessons

While the constitutional challenges that are likely to be raised against a national cap on non-economic damages in medical malpractice actions are of questionable validity, Congress would nonetheless be very wise to draft any proposed cap with these challenges in mind. There are several things that could be done to ensure the constitutionality of a national cap on non-economic damages in medical malpractice actions. It is also important to note that these "drafting lessons" are important ways to ensure, not only that such a cap would surely pass constitutional muster, but also to reach a socially optimal value. Each of these will be discussed in more detail in the subsequent section of this Note to analyze what their overall economic impact to a legislative scheme might be.
1. Make Any Cap Waive-able by the Judiciary.-One way to avoid some of the challenges that arise under the separation of powers and the right to trial by jury could be making any cap that is passed waive-able by the judiciary. Concerns over the right to jury trial and separation of powers may be lowered by allowing the jury to make the determination and leaving the decision up to the *799 judiciary as to whether or not the cap should be appropriately applied to a given case. This was included in a congressional proposal in 1993 and has been advocated for by some commentators. [FN129]
2. Economic Data-Show a Rational Relationship.-Should the Court decide to apply higher scrutiny than rational basis the legislature will need to have made some explicit findings of the close relationship between high non-economic damage awards and high medical malpractice premiums or overall health care costs depending on the purported goals of any such legislation. The current economic data to support such a relation is at best weak and incomplete. It would assure the likelihood a cap would be found constitutional and bolster support for legislation generally, if congress made specific empirical findings to support any such cap.
3. Narrowly Tailored.-A national cap on non-economic damages in medical malpractice actions would also be more likely to be found constitutional the more narrow the restrictions upon the right to recover are. There are several ways that the effect of any classification could be narrowed. Most notably, the higher the amount of the cap the less narrow the restriction is going to be found, as it will affect less people. There are more creative solutions to narrow the restrictions aside from fluctuations in the amount of the cap. More creative solutions will be discussed in the later sections of this Note and in conjunction with providing a quid pro quo.
4. Quid Pro Quo.-The final drafting lesson we can take from the constitutional analysis of a proposed national cap is that a finding of constitutionality would be more likely if a

quid pro quo was provided to plaintiffs for their loss of potential recovery. As previously noted, two potential quid pro quos could be providing faster remedies through arbitration or guaranteed recovery through government sponsored excess insurance. Whether a national cap on non-economic damages in medical malpractice actions could or should be found constitutional, the likelihood of such a finding can clearly be increased through some drafting considerations. However, any additional features we add to a cap, and indeed a cap in and of itself, must be analyzed for their economic desirability before we reach that point.

III. Expected Economic Effect: Is a National Cap on Non-Economic Damages in Medical Malpractice Actions Economically Desirable?

The actual economic effect of a national cap on damages has increasing relevance to the judicial determination of constitutionality the higher the level of scrutiny that is applied. The economic effect of a national cap needs to be analyzed in terms of the goals that such a statute may purport to achieve, lowering healthcare costs as a whole or lowering malpractice premiums alone. Moreover, just because something is constitutional should not end the inquiry of whether or ***800** not it is desirable. Economic analysis of the impact of a national cap on non-economic damages in medical malpractice actions will be a very important tool in determining whether or not to pursue such a cap. It is important to note at the outset of this economic analysis that much of the discussion here is based on empirical data that is old and has relied solely on state experiences. It would serve our national policy-makers well to gather recent empirical information covering a broader spectrum of the nation to make a more well-informed decision on whether or not to pursue a national cap on non-economic damages in medical malpractice actions.

A. Potential Direct Effect on the Healthcare Industry

Statistical and empirical data would suggest that, regardless of a national cap on damages effect on medical malpractice insurance premiums, it is not likely to have an impact on the overall cost of health-care plaguing the country. The effect of a cap on non-economic damages upon medical malpractice insurance alone is a topic of much debate. But, even if a great effect upon malpractice insurance is achieved it is not likely to answer to America's health care woes. The reason for this conclusion is fairly simple. Medical malpractice insurance costs simply are not a large piece of the pie that represents overall health care costs. [FN130] For example, in 1992, doctors paid five to six billion dollars in premiums while the overall cost of national health care reached 840 billion dollars. [FN131] That's less than one percent of the total cost of health care that can be attributed to malpractice premiums. [FN132]

Policy makers should be careful not to represent a national cap on non-economic damages in medical malpractice actions as the answer to America's healthcare woes. Nonetheless, medical malpractice insurance premiums are rising. [FN133] The effects of these increases can be devastating, just ask the residents of West Virginia, who had to be flown out of state for emergency surgical treatment during the West Virginia Surgeons strike. [FN134]

B. Effect on Malpractice Insurance Premiums Alone

The theory behind the feasibility of a cap on damages to decrease malpractice ***801** insurance premiums is based on making risks calculable and minimal. Insurance is concerned with spreading the cost of like events over a large group of people who are at risk of realizing such an event. Insurance premiums therefore must be based on two factors: the probability that an individual may realize the insured event and the amount or value that will be lost if the event is realized. [FN135] In terms of medical malpractice insurance, riskier fields with higher incidence of malpractice pay higher premiums due to the increased risk on the former factor. [FN136] The later factor, however, is much more difficult to determine. Damage caps are attempts to both minimize the potential cost of malpractice claims and ease the evaluation of the potential cost in evaluating risk. The

more calculable the value of potential risk is, the better an insurance company can make premiums fair in terms of their relation to the insured's actual potential loss. Correspondingly, the lower these calculable risks can be set, the lower the premium should be as well. This should also foster competition between insurers. [FN137] A non-economic damage cap attempts to both ensure better calculability and minimization of risk. In systems without a cap, the insurance company arguably must account for the risk, however minimal it may be, that a physician could get a very large, potentially boundless, claim against them. The non-economic damages cap makes the risk more calculable and minimized, at least in respect to the non-economic damages portion of the equation. Notably, the overall calculability of risk is still highly difficult to calculate as economic damages will vary in terms of a malpractice victim's future medical expense and lost wages. [FN138] However, non-economic damages are viewed, at least by proponents of caps, to be most suspect to difficult calculations as jury awards for pain and suffering are most difficult to predict because they are not based on any concrete value of loss and arguably can be irrationally large. [FN139]

Two simpler rationales behind the theory supporting a non-economic damages caps ability to lower malpractice insurance premiums are that actual payments by insurance companies will be lowered and claim frequency will decrease. [FN140] Since there will be capped awards for non-economic damages it is ***802** expected that total payments for claims will be reduced as the amount of awards will be lowered. Hence, as insurance companies are paying out less they will reduce their premiums proportionately. It is also argued that there will be lower overall payouts because claim frequency, or the number of suits brought for malpractice willgo down. The theory is that many frivolous suits that are brought in hopes of receiving a large award will not be pursued by plaintiffs because of the decreased likelihood of a substantial windfall for non-economic damages. Nonetheless, these are only theoretical economic effects which we cannot regulate directly.

The available information on the effect state non-economic damages caps have had on their malpractice insurance premiums is varied. Nonetheless, some interesting observations can be made from the available economic information from the state experience that poke some holes in the theoretical arguments in support of a national cap and suggest some concerns to bear in mind in considering alternative solutions.

A 1993 federal government study on tort reform revealed some interesting results concerning the economic impact of damage caps. [FN141] The study combined the results of six empirical studies assessing the impact of state damage caps. [FN142] The studies found that caps on total damages, both economic and non-economic, were the most effective of any of the tort reforms analyzed in reducing payment per paid claim and malpractice insurance premiums. [FN143] However, the results of analysis on non-economic caps alone were mixed: three studies concluded that such caps had a statistically significant effect of decreasing medical malpractice insurance premiums; but, the other three found no measurable impact on reducing premiums. [FN144] Another interesting finding was that only one of the six studies assessed the effect of damage caps on frequency of claims, finding that the cap had no effect on decreasing claim frequency. [FN145]

Another useful study on this point compared the status of malpractice insurance premiums and jury verdicts in Indiana, which adopted a cap on damages in medical malpractice actions, to those in Michigan and Ohio which did not. [FN146] The study revealed that the average jury award in a malpractice case in the state with a cap was actually higher than the states without caps. [FN147] Insurance ***803** companies and doctors alike were more likely to settle. Furthermore, they were more likely to settle at the price of the cap than below it. [FN148] As a result, the actual cost that was being paid per claim was higher in the state with a cap than the states without a cap (this will be referred to later as the settlement anomaly). It is also important to note that few cases were awarded at prices greater than the cap in any of the states that were analyzed. Despite this settlement anomaly, Indiana still experienced comparatively low medical malpractice premiums. [FN149] This would tend to suggest that the ability to

calculate risk is actually more important in reducing insurance premiums than actually lowering payouts per claim.

The study did not go further to look at the overall cost to citizens in these states with caps. In Indiana, as in many states, there is also a patients' compensation fund. This is government paid excess insurance. The cost of running such a system is extreme and often pits young inexperienced attorneys against more competent and experienced plaintiffs' attorneys. [FN150] The cost and effect of running such a system must also be examined.

Several states have found that caps will not reduce their medical malpractice premiums. [FN151] Most notably, West Virginia, which recently experienced a physician strike, had such a finding. A report of the West Virginia Legislature Committee concluded after a year studying the issue that "any limitations placed on the judicial system (regarding medical malpractice caps, etc.) will have no immediate effect on the cost of liability insurance for health care providers." [FN152] The conclusions of that study were similar to the experiences of Nevada and Missouri. In Nevada, insurance companies refused to lower doctor's malpractice rates after the enactment of a cap that was supported by the insurance industry in 2002. [FN153] Missouri also caps damages, but nonetheless, has experienced rises in malpractice premiums though the number of malpractice claims in that state and cost paid per claim have been declining. [FN154] This implies that even if caps have the actual desired economic effect there must be measures to ensure that it is realized by insurance companies decreasing premiums proportionately.

Many sources have also suggested that insurance rates have risen not as a result of the liability crisis but because of poor management. [FN155] A 1986 report by ***804** the National Association of Attorney Generals concluded that "insurance premium increases were not related to any purported liability crisis, but 'resulted largely from the insurance industry's own mismanagement.'" [FN156] While it is unlikely that the entire industry is mismanaged, it is important to note that the industry does enjoy higher profits than comparable insurance sectors. [FN157] Regardless of whether or not caps on damages are pursued or not, policy makers need to seriously consider increased regulation of medical malpractice insurance rates. Permitting increased rates while the industry is making higher profits than any other comparable insurance sector is not good policy and has the potential to undermine any measures taken to lower rates.

If medical malpractice insurance premiums have had any effect, most sources indicate it has been relatively small. [FN158] At times, the insurance industry itself has noted that a non-economic damages cap would have little or no effect on reducing insurance premiums. [FN159] This further bolsters the findings of some state courts that because of the very small number of claims that are awarded above a cap, even before one was in place, it was not rational that it would have the intended effect. [FN160] In light of these studies, it is no surprise that many states where caps have previously been upheld as constitutional continue to have challenges to their statutes for not achieving their purported goals. For example, in Indiana, one reason for passing a reform was to keep doctors in state, but that effect has not been realized. [FN161] It is also an important economic implication to note that the likelihood of constitutional challenges arising will also delay the economic ***805** impact of any reform taking place. If the constitutionality of a reform is put into question then the risk calculations engaged in by insurance companies will retain a large level of uncertainty.

A final key consideration of the potential economic impact of a national cap is the effect to which its effectiveness would increase due to its scope. Analysis of the effectiveness or ineffectiveness of state experiences with caps have considered one key factor to be that many malpractice insurers serve a national or regional market. The effect of caps in one state alone may not have much effectiveness on the rate-setting activity of a company with a national or regional scope. The effect that a national cap may have on these companies has not been the subject of much empirical study. This is another area that congress needs to examine in order to make a wise policy choice in this area.

C. Other Economic Effects on Society as a Whole

There are several other potential indirect economic effects that require examination and analysis. First, let us examine the aforementioned Settlement Anomaly a bit closer. At first glance, the fact that states with caps are having more settlements at the level of the cap resulting in higher overall payments per claim seems to suggest that, overall victims of malpractice are being compensated more under these schemes in a less costly system, as litigation is likely to be more expensive than settlements. A closer look reveals a more disturbing result. The increase of settlements is likely to increase the disparity of compensation between victims of minor injuries and severe injuries. Those with minor injuries are likely to be overcompensated as insurance companies have an incentive to get out of what could be lengthy and costly litigation to settle at a slightly higher price. But, those with very high non-economic damages from severe injury will still get the cap as well. The inequity between these two classes is increased as the severely injured is left at the same level of undercompensation while the victim with minor damages is over-compensated.

A second troubling effect of the settlement anomaly is the likelihood of increased costs to society as a whole. Part of what makes the settlement anomaly work is that insurance companies are let out at a very low level of liability and to get up to the overall cap of the injury the victim then goes through litigation with a state excess insurance fund. Now we have traded costs to the medical malpractice insurance company for the cost of resources used by a state agency which will often have to go to litigation for a determination of the total jury award that should be rewarded. Instead of the doctors who have committed malpractice and their insurance companies paying for the litigation, now the state must take up those costs. The costs of state run systems of excess insurance must be analyzed, in order to completely address this scheme.

Another concern is the extent to which a national cap will still serve the goals of tort law, to compensate the injured and deter negligent conduct. Medical malpractice caps on non-economic damages do neither. Negligent conduct of physicians is deterred less andcompensation to victims of tragic malpractice is also decreased. The risk of suffering a high jury verdict in a case of malpractice, on an economic level, deters a higher level of malpractice than a capped level of ***806** liability will. [FN162] The insurance industry has argued that verdicts that are too high can cause doctors to engage in defensive medicine, ordering unnecessary procedures to rule out maladies that the doctor would not normally consider. They argue that these defensive medicine costs increase health insurance costs and medical costs to society. The economic data in this area of deterrence is primarily speculative and incomplete. But, it is the opinion of this author that in having to choose between increased costs for overprotective versus underprotective practices, society is much better off in taking the overprotective route and ensuring the health and safety of the nation's people.

IV. Alternatives: Potential to Solve the Problem and Retain Compensation

Certainly, the questions of the constitutionality and economic impact of a national cap on non-economic damages in medical malpractice actions should be enough to bring policy-makers to ask, "Are there any better solutions to the problem of increasing medical malpractice premiums?" Many creative solutions may be likely to achieve the goals of a national cap on non-economic damages without solely burdening the severely injured, or at least providing them better compensation, and thereby avoiding much of the constitutional and economic debate surrounding proposals for a national cap on non-economic damages in medical malpractice actions. Alternative solutions need to be investigated before a national cap is declared the solution to the nation's healthcare problems. Many of the alternatives here could be used in conjunction with each other and/or a cap on non-economic damages and some states have done so. Further, it is important that each of these proposals presents its own questions of constitutionality and economic desirability that should be explored, but do not fall within the scope of this Note.

A. Loser Pays-Limiting Frivolous Cases Without Punishing the Most Severely

Injured

One key focus of advocates for caps is that frivolous lawsuits are the cause of the rise in costs. Discouraging frivolous lawsuits might more effectively be achieved by forcing the losing party to pay their opponents attorney fees. Fees can be exorbitant in medical malpractice cases, largely due to the high cost of providing expert medical testimony at trial. [FN163] Requiring attorneys fees to be paid by a losing plaintiff would cause plaintiffs attorneys to filter out frivolous claims, particularly those of the poor whom cannot indemnify the attorney for legal fees in preparation of the case. However, this opens the door to another room filled with constitutional challenges. One way to limit both the potential for disparity ***807** due to wealth of plaintiffs and burdening the plaintiff who had a trial worthy claim, but merely lost at trial, from paying fees is by making the assessment of attorney fees to the losing plaintiff judicially determinable. It may be best for a judge to be able to make the determination of what is or is not a frivolous case and assess fees accordingly.

B. Periodic Payments-Easing the Burden of Large Awards

Another way we could ease the burden on insurance companies lessening their payments paid per claim per year thereby, theoretically, leading to lower premiums is to allow them to pay the victim over time, dividing the award out over their remaining life expectancy. Permitting insurance companies to pay plaintiffs receiving large awards through periodic payments could lessen the impact of a large verdict being assessed against a particular company. [FN164] Here again there are also constitutional challenges. But, by limiting the payment of an award to only those that meet a predetermined level and giving those plaintiffs greater assurance that they will receive full compensation the likelihood of a constitutional ruling invalidating such a system should be minimized.

C. Fully Utilizing the Judiciary's Powers of Remittitur and Additur and Waive-able Caps

Caps that are waive-able at the discretion of the judiciary are one alternative. Such a cap was proposed to Congress in 1992, but failed to pass. [FN165] A large focus of groups advocating non-economic damages caps is that they are simply irrational and excessive jury awards. [FN166] If that is truly the case, then the judiciary may be the best place to determine when such has occurred. "Rather than focusing on the size of jury awards, the emphasis should be on whether juries award appropriate levels of damages relative to plaintiffs' injuries." [FN167] The implication is perhaps one less of a need for a cap and more a need for increased importance of the judiciary exercising the power of remittitur. The establishment of a national cap that is waive-able would allow the judiciary room to waive the cap where the case warrants it. By making the cap the norm and requiring judicial discretion to permit an award above it, the likelihood of successful constitutional challenges on right to trial by jury, separation of powers, and due process grounds will be greatly decreased. Nonetheless, this may not fully achieve lowering medical malpractice insurance rates as one of the key causes of high rates, as previously discussed, is an account for risk-the more the insurance company can know the better they can account for risks. The industry is not likely to gain much more risk calculability under a waive-able cap. If irrational jury determinations are really the focus of proponents of such a cap, this is a good alternative. However, if the goal is to reduce malpractice insurance premiums a ***808** waive-able cap does not appear to be a very good solution.

D. Scheduling-Making Risk Calculable Yet Permitting Compensation

One way the legislature could make risks more calculable for insurance companies yet provided adequate compensation for victims of malpractice could be through scheduling. [FN168] There is a wealth of data in this country from previous jury awards as to what appropriate values of compensation for pain and suffering from different acts of malpractice may be. Using this data combined with expert opinion the legislature could

establish some scheduling standards for different types of injury. Certainly, the legislature has been able to determine similar values in criminal law through the assessment of fines and sentences for imprisonment, and perhaps such legislation is warranted here. If most of our worry is that juries are giving excessive awards, the legislature can attempt to quantify what an appropriate award for different types of injuries would be. This could be a combination of factors including the type of injury and the duration for which the victim must live with the impact of the condition. Insurance companies would be able to account for the risks of different types of injuries that occur by using the schedule in combination with the likelihood of the particular injury resulting from malpractice as a function of a physician's specialty and clientele. Risk assessment is key to the insurance industry, almost more so than the amount of the potential award. Nonetheless, through scheduling both value and risk assessment can be taken into account in such a manner that victims of the most severe acts of malpractice will still be compensated at a legislatively predetermined level.

E. PCF-The Potential for Government Subsidization to Regulate Insurance Industry Management

As radical an idea as scheduling for injury in malpractice may be, an even more dynamic solution could be government subsidization. As previously noted, part of what has made many programs that have passed state constitutional muster successful has been the establishment of a state excess insurance fund thereby providing victims of malpractice a quid pro quo for the potential loss of complete compensation. [FN169] A national PCF could be a potential component of any medical malpractice liability reform. [FN170] Moreover, this could be used on a national level, to curb concerns of industry mismanagement undermining the scheme of the statutory structure. One such scheme could provide that if an insurance company ***809** is reaping more of a profit than a government declared industry average and an excessive award is granted against them, then the government will not subsidize the company in the event of a large award. However, if an insurance company is charging fair rates and reaping moderate profits, then if they take a hit the government could share the cost with them. This way we would not have blind acceptance of insurance companies keeping large profits, nor would we have blind burdening of the most severely injured victims of malpractice. Further, the extent to which society would have to pick up the bill to help victims of malpractice would only be where extremely necessary, not every instance where someone is victimized by malpractice in a severe manner, but a small subset of those where the malpractice insurer is operating within government standards.

Conclusion

The specter that those who suffer the greatest pain and suffering from severe acts of medical malpractice, like Gilford Tyler, [FN171] will pay the price for doctors and insurance companies nationwide to receive decreased liability is growing. While it is likely that Congress would not violate the federal constitution in passing such a national cap on non-economic damages, the economic desirability of such a cap is very suspect. Nonetheless, if such a cap is not carefully drafted it is likely to be subject to constitutional challenges which could slow and subvert the effect of its implementation. Furthermore, a national cap on non-economic damages that is not carefully drafted opens the door for the potential, albeit unlikely, for the Supreme Court to find such a cap to violate various constitutional protections. Congress would be very wise and best serve the nation by seeking out economic data to provide support for any such cap. Moreover, the importance of the constitutional rights and economic consequences that such a cap implicates warrant careful consideration of alternatives that might better achieve the goals of proponents of caps on non-economic damages while not burdening only the most severely injured victims of medical malpractice.

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[FNa1]. J.D. Candidate, 2004, Indiana University School of Law-Indianapolis; B.S., 2001, Indiana University, Bloomington, Indiana. The author would like to thank Amy Ford and Gerard Magliocca for their advice, constructive criticism, and support throughout the note writing process.

[FN1]. American Trial Lawyers Association, ATLA Press Room, Fact Sheet: Who Pays For Caps?, at http://www.atla.org/ConsumerMediaResources/Tier3/press_ room/FACTS/medmal/One%20Pagers/medmal.cap.examples.aspx (last visited Jan. 13, 2002).

[FN2]. Carol A. Crocca, Annotation, Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims, 26 A.L.R. 5th 245 (1995).

[FN3]. Patricia J. Chupkovich, Comment, Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Healthcare?, 9 J. Contemp. Health L. & Pol'y 337, 337 (Spring 1993) (citing Daryl L. Jones, Note, Fein v. Permanente Medical Group: The Supreme Court Uncaps the Constitutionality of Statutory Limitations on Medical Malpractice Recoveries, 40 U. Miami L. Rev. 1075, 1078 (1986) (explaining that physicians, the insurance industry, and legislators referred to the phenomenon of increases in malpractice claims as a "medical malpractice crisis"). The frequency of medical malpractice claims rose from about one per one hundred doctors in 1960 to seventeen per one hundred doctors in the mid 1980s. Paul C. Weber, Medical Malpractice on trial 94 (1991).

[FN4]. Crocca, supra note 2, at 245.

[FN5]. Id.

[FN6]. See Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong. (2003); Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2002, H.R. 4600, 107th Cong. (2002); Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997); Health. Coverage Availability and Affordability Act of 1996, H.R. 3160, 104th Cong. (1996); Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. (1996); Balanced Budget Act of 1995, H.R. 2491, 104th Cong. (1995); see also Perry H. Apelbaum & Samara T. Ryder, The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope, 8 Cornell J.L. & Pub. Pol'y 591, 630-31 (Spring 1999).

[FN7]. Sheryl Gay Stolberg, Senate Refuses to Consider Cap on Medical Malpractice Awards, N.Y. Times, July 10, 2003, Late Edition, at A20.

[FN8]. Id.

[FN9]. Associated Press, Bush Stumps for Cap on Malpractice Suits, Indianapolis Star, Jan. 17, 2003, at A6; Major Points in President Bush's State of Union Address, Jan. 26, 2003, at http:// www.nbc17.com/news/1941889/detail.html (last visited Jan. 28, 2003).

[FN10]. It is important to note at the onset that the sole focus of this note is non-economic damage caps in medical malpractice actions. Any discussion or analysis of other types of damages (i.e., punitive damages and economic damages, etc.) and other types of actions (i.e., personal injury, wrongful death, workers' compensation, etc.) is mainly incidental and used for purposes of analogy or distinction.

[FN11]. Richard A. Posner, Trends in Medical Malpractice Insurance, 1970- 1985, 49 Law

& Contemp. Probs. 37 (1986).

[FN12]. Compare Patricia M. Danzon, The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims, 48 Ohio St. L.J. 413, 416 (1987), with Richard L. Abel, The Real Tort Crisis: Too Few Claims, 48 Ohio St. L.J. 443, 446 (1987), and Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1093, 1120-26 (1996).

[FN13]. Council of Insurance Agents & Brokers, Medical Malpractice Costs Skyrocket, at http://www.insworld.com/web/broker/assurex_ global/archive/ebmay02.asp (last visited Nov. 30, 2002).

[FN14]. Associated Press, Doctors Take to Streets to Win Malpractice Reforms, at http:// www.cnn.com/2003/HEALTH/02/01/doctors.distress.ap/index.html (last visited Mar. 3, 2003); Associated Press, Surgeons Strike in West Virginia, at http:// www.cbsnews.com/stories/2003/01/02/national/printable535018.shtml (last visited Jan. 7, 2003); CNN, N.J. Doctors Stage Work Stoppage: Medical Workers Protesting Rising Malpractice Premiums, at http:// www.cnn.com/2003/HEALTH/02/03/nj.doctors/index.html (last visited on Mar. 3, 2003).

[FN15]. Bush Stumps for Cap on Malpractice Suits, supra note 9.

[FN16]. Martha Chamallas, The Disappearing Consumer, Cognitive Bias and Tort Law, 6 Roger Williams U. L. Rev. 9 (2001).

[FN17]. Id. (citing U.S. Dep't of Justice, Bureau of Just. Stats., Tort Trials and Verdicts in Large Counties, 1996 (Aug. 2000)).

[FN18]. Dr. Harvey F. Wachsman, Individual Responsibility and Accountability: American Watchwords for Excellence in Healthcare, 10 St. John's J. Legal Comment. 303, 317 (Spring 1995).

[FN19]. ATLA Press Room, Fact Sheet: Don't Believe the Insurance Companies' Excuses: Lawsuits Are Not the Cause of Rising Medical Malpractice Insurance Rates, at http://www.atla.org/ConsumerMediaResources/Tier3/press_ room/FACTS/medmal/One%20Pagers/dont%20blame%C20lawsuits%20new.aspx (last visited Nov. 30, 2002) (citing Harvard Medical Practice Study Group, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York, Harvard University (1990)).

[FN20]. Id.

[FN21]. ATLA Press Room, Fact Sheet: Lawyers Are Not the Cause of Rising Medical Malpractice Insurance Rates, at http:// www.atla.org/medmal/notcause.pdf (last visited Nov. 30, 2002) (citing Nat'l Ass'n of Ins. Comm'rs, Profitability by Line by State in 1999 (2001)).

[FN22]. Consumer Fed'n of Am., President's Medical Malpractice Plan Based on Biased, Inaccurate Information CFA Identifies Insurer Practices as Cause of Soaring Rates, at http://www.consumerfed.org/073102medmalrelease.html (released to press on July 31, 2002) (last visited Nov. 30, 2002).

[FN23]. Id.

[FN24]. Id.

[FN25]. US House Passes Bill to Cap Malpractice Awards, at http://health_ info.nmh.org/HealthNews/reuters/NewsStory092600236.htm (last visited Nov. 18, 2002).

[FN26]. Wachsman, supra note 18, at 324.

[FN27]. ABA, Legislative and Governmental Priorities 2002: Healthcare Accountability: Medical Malpractice, at http:// www.abanet.org/poladv/priorities/medmal.htm (last visited Nov. 18, 2002).

[FN28]. The Oxford Dictionary of Quotations 249 (1992).

[FN29]. Kathleen E. Payne, Linking Tort Reform to Fairness and Moral Values, 1995 Det. C.L. Mich. St. U. L. Rev. 1207, 1228 (Winter 1995).

[FN30]. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (citing The Keeton Report at 7; and Sumner, The Dollars and Sense of Malpractice Insurance 9 (Aft Books 1979)).

[FN31]. See U.S. Congress, Office of the Technology Assessment, Impact of Legal Reforms on Medical Malpractice Costs, OTA-BPH-H-1 19 (Oct. 1993) [hereinafter Congressional Assessment] (discussing results of six independent studies: E.K. Adams & S. Zuckerman, Variation in the Growth and Incidence of Medical Malpractice Claims, 9 J. Health Pol. Pol'y & L. 475, 475-88 (1984); D. K. Barker, The Effects of Tort Reform on Medical Malpractice Insurance Markets: An Empirical Analysis, 17 J. Health Pol. Pol'y & L. 143, 143-61 (1992); G. Blackmon & R. Zeckhauser, State Tort Reform Legislation: Assessing Our Control of Risks, Tort L. & Pub. Int. (New York W.W. Norton & Co., 1991); P.M. Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 Law & Contemp. Probs. 57, 57-84 (1986); F.A. Sloan et al., Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis, 14 J. Health Pol. Pol'y & L. 663, 663-89 (1989); S. Zuckerman et al., Effects of Tort Reforms and Other Factors on Medical Malpractice, 27 Inquiry 167, 167-82 (1990)).

[FN32]. William P. Gronfein & Eleanor DeArman Kinney, Controlling Large Claims: The Unexpected Impact of Damage Caps, 16 J. Health Pol. Pol'y & L. 441 (1991).

[FN33]. For an excellent summary of judicial opinions on the constitutional validity, construction, and application of state statutory caps on damages in medical malpractice claims through 1995, see Crocca, supra note 2; see also Matthew W. Light, Note, Who's The Boss?: Statutory Damage Caps, Courts, and State Constitutional Law, 58 Wash. & Lee L. Rev. 315 (Winter 2001).

[FN34]. It is important to note that several state court opinions have also struck down or upheld statutory caps on non-economic damages in medical malpractice actions in part or solely under provisions that are unique to specific state constitutions and not particularly relevant to the federal analysis. See Smith v. Dep't of Ins., 507 So.2d 1080, 1087-89 (Fla. 1987) (discussing open courts provisions of state constitutions); Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1120-21 (Idaho 2000); Wright v. Cent. DuPage Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) (discussing state constitutional provisions on special legislation); Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988) (criticized by Bair v. Peck, 811 P.2d 1176 (Kan. 1991)); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1993); Knowles v. United States, 544 N.W.2d 183, 203-04 (S.D. 1996); Lucas, 757 S.W.2d at 690-92; Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 315 (Va. 1999), aff'g Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 533 (Va. 1989). Furthermore, many of the statutes in question in the cases discussed in this Note go beyond merely addressing non-economic damages or medical malpractice actions. Such instances are noted throughout where

relevant.

[FN35]. See Fla. Const. art. I, § 22; Ind. Const. art. I, § 20; Kan. Const., Bill of Rights § 5; Ohio Const. art. I, § 5; Or. Const. art I, § 17; Tex. Const. art. I, § 15; Wash. Const. art. I, § 21.

[FN36]. See Smith v. Schulte, 671 So.2d 1334, 1342-46 (Ala. 1995); Wright, 347 N.E.2d at 736; Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988) (finding caps on recovery and mandatory annuity payments violate the right to jury trial and right to a remedy through due course of law); Lakin v. Senco Prods., Inc., 987 P.2d 463, 468-75 (Or. 1993); Lucas v. United States, 757 S.W.2d 687, 690-92 (Tex. 1988) (holding $500,000 cap on total medical malpractice damages violates right to remedy end jury trial); Condemarin v. Univ. Hosp., 775 P.2d 348, 365-66 (Utah 1989) (plurality opinion) (striking balance in favor of constitutional right of jury trial); Sofie v. Fibreboard Corp., 771 P.2d 711, 715-28 (Wash. 1989) (holding statutory limit on non-economic damages in personal injury and wrongful death actions violated the state right to trial by jury). For further analysis of the Utah medical malpractice cap and the decision in Condemarin, see James E. Magleby, The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution, 21 J. Contemp. L. 217 (1995).

[FN37]. 987 P.2d at 468-75.

[FN38]. "The amount of damages . . . from the beginning of trial by jury, was a 'fact' to be found by the jurors." Id. at 470 (quoting Charles T. McCormick, Handbook on the Law of Damages 24 (1935)).

[FN39]. Sofie, 771 P.2d at 723.

[FN40]. Lakin, 987 P.2d at 473.

[FN41]. Id.

[FN42]. Id.

[FN43]. Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1118-20 (Idaho 2000); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 315-17 (Va. 1999) (holding that $1 million limit on recoveries in medical malpractice actions did not violate the right to jury trial, special legislation, or separation of powers provisions of state constitutions, nor the takings, due process, or equal protection provisions of the state or federal constitutions), aff'g Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525 (Va. 1989); Scholz v. Metro. Pathologists, P.C., 851 P.2d 901, 905-06 (Colo. 1993); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 601-02 (Ind. 1980); Samsel v. Wheeler Transp. Serv., Inc., 789 P.2d 541, 549-58 (Kan. 1990); Murphy v. Edmonds, 601 A.2d 102, 116-18 (Md. 1992); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-07 (Mo. 1993); Wright v. Colleton County Sch. Dist., 391 S.E.2d 564 (S.C. 1990); Knowles v. United States, 544 N.W.2d 183, 202-03 (S.D. 1996). For detailed analysis and favorable treatment of Kirkland, see Shaila Prabhakar, Tort Reform-Cap on Noneconomic Damages Does Not Violate Right To Jury Trial. Kirkland v. Blaine County Medical Center, 4 P.3d 1115 (Idaho 2000), 32 Rutgers L.J. 1087 (2001).

[FN44]. Pulliam, 509 S.E.2d 307. There are two important distinctions to the Virginia cases which, however, have no bearing on our analysis. First, the cap in question in Virginia is a cap on total damages, not merely non-economic damages. See Va. Code § 8.01-581.15. Second, the Virginia constitutional provision for the right to jury trial is a bit unique. It reads, "[I]n controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." Va. Const. art.

I, § 11. For a critical analysis of the Virginia Supreme Court's decision in Pulliam, see Elizabeth Anne Keith, Pulliam v. Coastal Emergency Services of Richmond, Inc.: Reconsidering the Standard of Review and Constitutionality of Virginia's Medical Malpractice Cap, 8 Geo. Mason L. Rev. 587 (2000) (concluding that Virginia's medical malpractice cap should be found unconstitutional).

[FN45]. Id. at 589 (citing Etheridge, 376 S.E.2d at 529).

[FN46]. 544 N.W.2d 183.

[FN47]. Id. at 202-03.

[FN48]. See Wright, 391 S.E.2d at 569.

[FN49]. Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1119 (Idaho 2000).

[FN50]. Id.

[FN51]. Id.

[FN52]. See Kenneth Owen O'Connor, Comment, Funeral for a Friend: Will the Seventh Amendment Succumb to a Federal Cap on Non-Economic Damages in Medical Malpractice Actions?, 4 Seton Hall Const. L.J. 97 (Winter 1993).

[FN53]. It is important to note that although there are no cases discussed which have found a cap on medical malpractice damages to violate the Seventh Amendment, particularly in comparison to the larger number of cases which have held there is no Seventh Amendment violation, this should not end our analysis. The key behind this anomaly lies in part because those courts that have invalidated caps based on state constitutional grounds have not needed to address the federal constitution; the state constitution was dispositive. However, courts upholding the caps have had to address all challenges. Notably, the tendency for a court to rule one way on the state issue may also show a tendency to rule the same way on the federal issue. Therefore, we cannot end our analysis merely because there are far more decisions that have specifically held there was no violation of the Seventh Amendment. This should be kept in mind in analyzing the other federal rights that will be discussed in this part of the Note as well.

[FN54]. Lakin v. Senco Prods., Inc., 987 P.2d 463, 470 (Or. 1993) (citing Dimick v. Schiedt, 293 U.S. 474, 480 (1935) and Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)).

[FN55]. Id.

[FN56]. Id. (quoting Hetzel v. Prince William County, 523 U.S. 208, 211 (1998)).

[FN57]. Sofie v. Fibreboard Corp., 771 P.2d 711, 725 (Wash. 1989) (discussing Dimick and Tull v. United States, 481 U.S. 412 (1987)).

[FN58]. Tull, 481 U.S. at 412.

[FN59]. Id.

[FN60]. See Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989); Davis v. Omitowoju, 883 F.2d 1155, 1158-65 (3d Cir. 1989) (upholding $250,000 limit imposed by Virgin Islands statute); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-38 (D. Md. 1989) (upholding Maryland damages cap).

[FN61]. Boyd, 877 F.2d at 1196.

[FN62]. 704 F. Supp. at 1331-32.

[FN63]. O'Connor, supra note 52.

[FN64]. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1078 (Ill. 1997).

[FN65]. See Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1078-81 (Ill. 1997); State ex. rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1085 (Ohio 1999); see also Wright v. Central DuPage Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976); Sofie v. Fibreboard Corp., 771 P.2d 711, 715-28 (Wash. 1989) (suggesting a violation of the separation of powers but striking down statutory damage limitation on other grounds).

[FN66]. 689 N.E.2d at 1078-81.

[FN67]. Id. at 1079 (noting that judiciary has a duty to remit where an award falls outside the range of fair and reasonable compensation, results from passion or prejudice, or shocks judicial conscience; but allowing awards to stand that "fall[] within the flexible range of conclusions that can reasonably be supported by the facts" as they are for the jury to determine).

[FN68]. Id. at 1080.

[FN69]. Id.

[FN70]. Id. at 1079 (citing Hansen v. Boyd, 161 U.S. 397, 412 (1896) and Dimick v. Schiedt, 293 U.S. 474, 484-86 (1935)).

[FN71]. Id. at 1080.

[FN72]. See Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1121-23 (Idaho 2000); Verba v. Ghaphery, 552 S.E.2d 406, 410-11 (W. Va. 2001); see also Murphy v. Edmonds, 601 A.2d 102, 116-18 (Md. 1992) (dismissing of separation of powers argument in same discussion as right to trial by jury contention); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 319 (Va. 1999).

[FN73]. 552 S.E.2d at 410-11.

[FN74]. Id. at 411.

[FN75]. Id.

[FN76]. 4 P.3d at 1121-23.

[FN77]. Id. at 1122.

[FN78]. Id.; see also Verba, 552 S.E.2d at 411 (discussing W. Va. Const art. 8 § 13).

[FN79]. Light, supra note 33, at 361 n.321-22 (noting the following: the U.S. Const. art III, § 2 cl. 2 authorizes Congress to make "Exceptions" and "Regulations" regarding Supreme Court jurisdiction); Ex parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1868) ("upholding statute abrogating Supreme Court jurisdiction to hear habeas corpus appeals of certain ex-Confederates"); William Cohen & Jonathan D. Varat, Constitutional Law 42-43 (1997) ("discussing congressional proposals to strip Supreme Court of jurisdiction

over abortion and school prayer cases").

[FN80]. A more radical argument that has been made against caps, beyond the scope of this Note, is that caps on non-economic damages will have a discriminatory impact on women's ability to obtain full compensation in tort. Lisa M. Ruda, Note, Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs, 44 Case W. Res. L. Rev. 197 (1993).

[FN81]. Jacqueline Ross, Will States Protect Us, Equally, From Damage Caps In Medical Malpractice Legislation?, 30 Ind. L. Rev. 575 (1997) (quoting James W. Torke, The Judicial Process in Equal Protection Cases, 9 Hastings Const. L.Q. 279, 343 (1982)). The Ross Note provides a more detailed analysis focusing solely on equal protection guarantees and advocating state use of a higher than rational basis standard by state courts in analyzing the constitutionality of medical malpractice caps.

[FN82]. U.S. Const. amend. XIV.

[FN83]. Bolling v. Sharpe, 347 U.S. 497 (1954).

[FN84]. Though some jurists and commentators have suggested the real analysis actually occurs on more of a spectrum than a system where everything fits into one of three neat tiers. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453 (1985) (Stevens, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

[FN85]. Kevin Sean Mahoney, Note, Alaska's Cap on Non-economic Damages: Unfair, Unwise and Unconstitutional, 11 Alaska L. Rev. 67, 73 (June 1994).

[FN86]. See generally Mahoney, supra note 85, at 73; Ross, supra note 81.

[FN87]. Where a fundamental right is involved there are implications of both equal protection and substantive due process. Under substantive due process, federal protection will be given to such fundamental rights, under fundamental principles of liberty and justice and necessary under the Anglo-American scheme of ordered liberty that pertain to the States under the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). For federal equal protection analysis, where a fundamental right is implicated the court generally applies a standard which varies according to the importance of the right and the nature of the burden placed on the exercise of that right. Randy J. Riley, EZ Review for Constitutional Law 76 (2001).

[FN88]. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 165-70 (Ala. 1992), aff'd, Smith v. Schulte, 671 So.2d 1334 (Ala. 1995); Brannigan v. Usitalo, 587 A.2d 1232, 1234-36 (N.H. 1991), aff'g Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153 (N.M. 1988); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Condemarin v. Univ. Hosp., 775 P.2d 348, 354 (Utah 1989) (favoring middle-tier scrutiny of legislations impinging on right to recover for negligently caused injuries).

[FN89]. Moore, 592 So. 2d at 170.

[FN90]. Id. at 166. Notably, this test does not correlate directly with any of the three tiers of the federal analysis. The court noted it was at liberty to not follow the federal tiers when applying state law and declined to comment on which of the two lower tiers their analysis was most near. Id. at 170.

[FN91]. Id. at 167-69 (citing studies from government and private sources conducted in

the mid-1980's).

[FN92]. Id. at 169.

[FN93]. Id.

[FN94]. 424 A.2d 825 (N.H. 1980).

[FN95]. Id. at 835-39.

[FN96]. Fein v. Permanente Med. Group, 695 P.2d 665, 682-84 (Cal. 1985); Scholz v. Metro. Pathologists, Inc., 851 P.2d 901, 906-07 (Colo. 1993); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 549-58 (Kan. 1990); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 518-22 (La. 1992) (holding $500,000 cap on general damages did not violate state equal protection guarantee because the Act's limitations were reasonably related to furthering the general state interest of compensating victims; court also found a quid pro quo whereby tort victims traded full recovery for guaranteed recovery); Murphy v. Edmonds, 601 A.2d 102, 107-16 (Md. 1992); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1993); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 317-19 (Va. 1999); Verba v. Chaphery, 552 S.E.2d 406, 410 (W. Va. 2001).

[FN97]. 552 S.E.2d at 406.

[FN98]. Id. at 410.

[FN99]. Id.

[FN100]. Id. at 413.

[FN101]. Id.

[FN102]. Id. at 414-15 (citing decisions from the Supreme Courts of Nebraska, North Dakota, New Hampshire and West Virginia for support).

[FN103]. Id. at 418 (citing Fein, 695 P.2d at 689-90 (Bird, C.J., dissenting)).

[FN104]. See supra note 53. The same concerns apply here. But see Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986) (federal district court holding medical malpractice cap on damages violated federal and state equal protection clauses), rejected by Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (finding $300,000 cap on medical negligence violates equal protection clauses of both the North Dakota and United States Constitutions).

[FN105]. Davis v. Omitowoju, 883 F.2d 1155, 1165 (3d Cir. 1989) (finding Virgin Islands' medical malpractice damage cap of $250,000 constitutional); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-38 (D. Md. 1989); Fein v. Permanente Med. Group, 695 P.2d 665, 682-84 (Cal. 1985), appeal dismissed for want of a federal question, 474 U.S. 892 (1985); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So.2d 517, 518-22 (La. 1992), cert. denied, 508 U.S. 909 (1993); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1993); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 317-19 (Va. 1999); Hoem v. State, 756 P.2d 780, 783 (Wyo. 1988) (holding medical malpractice tort reform violated equal protection under rational basis review).

[FN106]. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

[FN107]. Id. at 82-93.

[FN108]. Id. at 65.

[FN109]. Id. at 83.

[FN110]. Id.

[FN111]. Arneson v. Olson, 270 N.W.2d 125, 135 n.6 (N.D. 1978).

[FN112]. Id.

[FN113]. Id.

[FN114]. Id.

[FN115]. Established, in that case, through an increased congressional commitment to provide for victims and the high amount at which the cap was set. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 83 (1978).

[FN116]. See Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1069-78 (Ill. 1997); State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (discussing the appropriate test for due process analysis, since legislation did not involve fundamental right or suspect class, court applied the "rational relation" test where classification is "deemed valid on due process grounds '[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary."' (internal citation omitted). Also noting, that while Morris did not involve a fundamental right or suspect class, the right to a jury trial had subsequently been held by the Ohio Supreme Court to include "the right to have the jury determine the amount of damages to be awarded" and therefore strict scrutiny may apply); see also Wright v. Cent. DuPage Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976) (holding a non-economic damages cap in medical malpractice actions violated plaintiff's due process right as an arbitrary taking of vested rights in property); Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 259, 263-64 (Kan. 1988) (finding caps on recovery and mandatory annuity payments violate the right to jury trial and right to a remedy through due course of law, stating, "means selected have a real and substantial relation to the objective sought . . . . One way to meet due process requirements is through substitute remedies."); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (finding statutory limit on damages violates the open courts guarantee, right to "remedy by due course of law" Art. I § 13 of Texas Constitution. Standard used "must be shown that the litigant has a cognizable common law cause of action that is being restricted; second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.").

[FN117]. Sheward, 715 N.E.2d at 1069-78. See also Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (finding $200,000 cap on non-economic damages violates due process).

[FN118]. 757 S.W.2d at 690-92.

[FN119]. Id. at 690 (citing Wright v. Cent. DuPage Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976)). The Kansas Supreme court also made a distinction to no-fault insurance schemes, "injured patient does not receive prompt payment (as in no-fault insurance) or a reduced burden of proof (as in workers' compensation)," despite the defendant's arguments that quid pro quo was satisfied thru lower-cost and increased, sustained availability of healthcare to the public and guaranteed recovery from insurance. Bell, 757 P.2d at 259. See also Lakin v. Senco Prods., Inc., 987 P.2d 463, 468-75 (Or. 1999).

[FN120]. Lucas, 757 S.W.2d at 691 (citing Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 601 (Ind. 1980) (upholding a $500,000 cap on total recovery in medical malpractice actions); Sibley v. Bd of Supervisors, 462 So. 2d 149, 154-8 (La. 1985) (upholding $500,000 cap on non-economic damages in medical malpractice actions)).

[FN121]. See Fein v. Permanente Med. Group, 695 P.2d 668, 679-82 (Cal. 1985); Johnson, 404 N.E.2d at 598-600; Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 518-22 (La. 1992); see also Scholz v. Metro. Pathologists, 851 P.2d 901, 907 (Colo. 1993); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992); Knowles v. United States, 544 N.W.2d 183, 189-202 (S.D. 1996) (finding no due process violation because due process does not apply to remedies); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 317-19 (Va. 1999); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991) (finding no due process violation under rational basis test similar to that of equal protection analysis).

[FN122]. Butler, 607 So.2d at 521.

[FN123]. See Univ. of Miami v. Echarte, 618 So.2d 189, 194 (Fla. 1993).

[FN124]. Id.

[FN125]. 695 P.2d at 681 n.18.

[FN126]. 851 P.2d at 907.

[FN127]. Id.

[FN128]. Id. (quoting Gibbes v. Zimerman, 290 U.S. 326, 332 (1933)).

[FN129]. Chupkovich, supra note 3, at 371-75 (advocating for passage of the Healthcare Liability Reform and Quality of Care Improvement Act of 1992 which would have imposed a national cap on liability with a waiver provision giving discretion to the judiciary).

[FN130]. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); ABA, supra note 27.

[FN131]. Fran Kirtz, Medical Malpractice May Ride the New Reform Wave: With Help From AMA and Congress, Exorbitantly High Premiums-and Settlements-Could Come Down, Med. World News, Apr. 1993, at 70.

[FN132]. Larry S. Stewart, Damage Caps Add to Pain and Suffering, Wash. Times, Nov. 7 1994, at 18 ("Losses paid by insurers in 1991 for medical negligence amounted to only 0.31% of national health care costs.").

[FN133]. Knowles v. United States, 544 N.W.2d 183, 190 (S.D. 1996) ("The Hatch Study concluded '[d]espite unchanging claim frequency and declining loss payments and loss expense, on average, physicians paid approximately triple the amount of premiums for medical malpractice insurance in 1987 than in 1982."').

[FN134]. See supra note 14.

[FN135]. For more detailed economic discussion and further breakdown economically in terms of group premiums versus individual premiums, see Franklin D. Cleckly & Govind Hariharan, A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?, 94 W. Va. L. Rev. 11, 52-60 (1991).

[FN136]. Id. at 53.

[FN137]. Id. at 57.

[FN138]. This is a likely cause of the finding in some studies that only caps on total damages resulted in a decrease in malpractice premiums. See Gronfein & Kinney, supra note 32, at 64-65. An in depth analysis of caps on total damages is beyond the scope of this Note, but would also be a useful tool in constructing the most appropriate legislation in this arena.

[FN139]. American Medical Association, The Medical Liability Crisis: Talking Points, Jan. 21, 2003, at http://www.ama-assn.org/ama/pub/article/9255- 7188.html (last visited Mar. 3, 2003); American Osteopathic Association, Medical Malpractice Liability: A Call for Tort Reform?, at http://www.aoa-net.org/Government/stateaffairs/PLI/tortreform.htm (last visited Nov. 18, 2002).

[FN140]. Id.

[FN141]. Congressional Assessment, supra note 31, at 62-67. This source provides an excellent summary of the background of the medical malpractice crisis and various reforms, a compilation of economic studies analyzing the impact of such reforms, and a very brief discussion of some constitutional implications.

[FN142]. Id. at 63-65.

[FN143]. Id. at 64. Among the other tort reforms analyzed for impact on medical malpractice insurance were: statutes of limitations, pretrial screening panels, limits on contingent attorney fees, modifications in the standard of care, allowing reductions of collateral payments, allowing periodic payments, joint and several liability, informed consent, and costs for frivolous suits.

[FN144]. Id. at 64-65.

[FN145]. Id. at 65.

[FN146]. Gronfein & Kinney, supra note 32, at 446-60.

[FN147]. Id. at 447 (showing mean claim award in Indiana was $404,832, while mean claim awards for Michigan and Ohio were $290,022 and $303,220, respectively).

[FN148]. Id. at 447-48 (showing 27.9% of Indiana claims settled at $500,000, amount of cap in Indiana, whereas only 12.3% in Michigan and 14.1% in Ohio were settled at or above $500,000).

[FN149]. Id. at 459.

[FN150]. Id.

[FN151]. Press Release, American Trial Lawyers Association: New Bipartisan Study by West Virginia Legislature Confirms Caps in Medical Malpractice Cases Won't Reduce Insurance Rates for Doctors (Jan. 7, 2003), available at http://www.ata/prg/ConsumerMediaResources/Tier3/press_room/medmalpr.aspx (last visited Jan. 17, 2003).

[FN152]. Id.

[FN153]. Id.

[FN154]. Id.

[FN155]. Supra notes 20-25. Gail Eisland, Note, Miller v. Gilmore: The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations, 38 San Diego L. Rev. 672, 685 n.121 (1993). For an example of how one medical malpractice insurance company lost money and folded for reasons that had nothing to do with low premium rates or high medical malpractice lawsuit verdicts, see Verba v. Ghaphery, 552 S.E.2d 406, 415-16 (W. Va. 2001) (Starcher, J., dissenting) (citing Barry Hill, Ponzi Rides Again: The PIE Mutual Story, WVTLA Advocate (Fall 1998)).

[FN156]. Eisland, supra note 155, at 685 n.121 (quoting W. John Thomas, The Medical Malpractice "Crisis": A Critical Examination of a Public Debate, 65 Temp. L. Rev. 459, 473 (1992) (quoting National Association of Attorney Generals, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance (1986))).

[FN157]. Larry S. Stewart, Damage Caps Add to Pain and Suffering, Wash. Times, Nov. 7, 1994, at 18 ("[M]edical malpractice as a line of insurance had the highest profit as a percentage of premiums in 1991.").

[FN158]. U.S. GAO, Medical Malpractice: Effects of Varying Laws in the District of Columbia, Maryland, and Virginia, (1999).

[FN159]. State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (citing "a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, found that the savings from various tort reforms, including a $250,000 cap on noneconomic damages, were 'marginal to nonexistent'").

[FN160]. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (citing an independent study that showed that less than 0.6% of all claims brought were for more than $100,000).

[FN161]. Bureau of Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1993, at 122 (1994). The rate of physicians per 100,000 residents in Indiana is 165, while the national average is 224.

[FN162]. Wachsman, supra note 18.

[FN163]. In many states costs are also excessive due to the lengthy period of time it takes to work a medical malpractice case through the legal process, which may involve a pre-trial medical screening panel, litigation or settlement with the party being sued, and litigation or settlement with a state excess insurance fund.

[FN164]. See Wachsman, supra note 18, at 323-24.

[FN165]. See Chupkovich, supra note 3.

[FN166]. See Chamallas, supra note 16.

[FN167]. O'Connor, supra note 52, at 114.

[FN168]. For further explanation of this alternative, see Randall R. Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 Nw. U. L. Rev. 908 (1989).

[FN169]. See supra note 120 (discussing cases where state caps upheld due to quid pro quo provided thru PCF).

[FN170]. A step beyond some national subsidization would be a move towards a no-fault medical liability system. This is beyond the scope of this Note. For such a proposal, see David M. Studdert & Troyen A. Brennan, Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States, 27 Am. J.L. & Med. 225 (2001).

[FN171]. American Trail Lawyers Association, supra note 1.

[FN172]. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1992).

[FN173]. Smith v. Dep't of Ins., 507 So. 2d 1080 (Fl. 1987); $250,000 cap on non-economic damages only where both parties submit to arbitration. Fl. Stat. § 766.207.

[FN174]. Best v. Taylor Math. Works, 689 N.E.2d 1057 (Ill. 1997).

[FN175]. Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991), aff'g Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

[FN176]. State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

[FN177]. Lakin v. Senco Prods., Inc., 987 P.2d 463, 476 (Or. 1999).

[FN178]. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).

[FN179]. Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

[FN180]. Alaska Stat. § 09.17.010 (2003); Evans v. State, 56 P.3d 1046 (Alaska 2002).

[FN181]. Cal. Civ. Code § 3333.2 (2004); Fein v. Permanente Med. Group, 695 P.2d 668 (Cal. 1985).

[FN182]. Colo. Rev. Stat. § 13-64-302(I) (2003); Scholz v. Metro. Pathologist, 851 P.2d 901 (Colo. 2003).

[FN183]. Idaho CODE § 6-1603 (2003); Kirkland v. Blair County Med. Ctr., 4 P.3d 1115 (Idaho 2000).

[FN184]. Ind. Code Ann. § 34-18-14-3 (2003); Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980).

[FN185]. Kan. Stat. Ann. § 60-19a02 (2003). Non economic cap previously struck down in Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988)

[FN186]. La. Rev. Stat. Ann. § 40:1299.42 (2001); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992).

[FN187]. Md. Code Ann., Cts. & Jud. Proc. § 11-108 (2002); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992).

[FN188]. Mo. Rev. Stat. § 538.210 (2000); Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992).

[FN189]. Mont. Code Ann. § 25-9-411 (2003); Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989) (discussing cap on wrongful death damages).

[FN190]. Neb. Rev. Stat. § 44-2825; Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003).

[FN191]. N.M. Stat. Ann. § 41-5-6 (2003); Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998).

[FN192]. N.D. Cent. Code § 32-62-02 (2003); Ameson v. Olson, 270 N.W.2d 125 (N.D. 1978).

[FN193]. S.D. Codified Laws Ann. § 21-3-11 (2003); Knowles v. United States, 544 N.W.2d 183 (S.D. 1996).

[FN194]. Va. Code Ann. § 8.01-581.15 (2003); Pulliam v. Coastal Emergency Servs., Inc., 509 S.E.2d 307 (Va. 1999).

[FN195]. W. Va. Code § 55-7B-8 (2003); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991).

[FN196]. Wis. Stat. §§ 893.55, 665.017 (2003); Guzman v. St. Francis Hosp., Inc., 623 N.W.2d 776 (Wis. App. 2000), rev. denied, 629 N.W.2d 783 (Wis. 2001).

[FN197]. Haw. Rev. Stat. §§ 663-8.7, 663-10.9; Mass. Ann. Laws ch. 231, § 60H, ch. 229 § 2 (2000); Mich. Comp. Laws § 600.1483; Utah Code Ann. §§ 78-14-7.1, 78-14-3 (2003). The Massachusetts cap is often not problematic for plaintiffs because it allows juries to give higher awards where they find certain special circumstances so warranting such. For a detailed discussion of Michigan's Medical Malpractice Cap in which the author calls for the Michigan Supreme Court to find the cap unconstitutional, see John P. Desmond, Michigan's Medical Malpractice Reform Revisited-Tighter Damage Caps and Arbitration Provisions, 11 T.M. Cooley L. Rev. 159 (1994). While the current Utah cap has not been ruled on, a previous attempt was struck down in Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989).

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