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An Extreme Response or a Necessary Reform - Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates

Kelly Kotur

West Virginia University College of Law

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**AN EXTREME RESPONSE OR A NECESSARY
REFORM? REVEALING HOW CAPS ON
NONECONOMIC DAMAGES ACTUALLY AFFECT
MEDICAL MALPRACTICE VICTIMS AND
MALPRACTICE INSURANCE RATES**

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I. INTRODUCTION

No state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹ Exactly how equal protection applies to various situations is not always clear.² In several states, including West Virginia, doctors and insurance companies have pushed for medical malpractice reform in response to a perceived medical malpractice insurance crisis, and many states have been successful in instituting reforms.³ These reforms often come in the form of a cap on noneconomic damages in medical malpractice awards.⁴ Noneconomic damages are defined as those “losses including, but not limited to, pain, suffering, mental anguish and grief.”⁵ They include losses not in the form of a concrete medical bill, like loss of fertility, severe disfigurement and the death of a child, adult, or senior citizen.⁶ Twenty-seven states currently cap noneconomic damages.⁷ The West Virginia Legislature had tackled tort reform once before in 1986, resulting in a \$1,000,000 cap on noneconomic damages.⁸ After intense lobbying by doctors,⁹ the cap was reduced to \$250,000 in 2003.¹⁰ Other states have been quick to follow suit.¹¹ The new legislation was “conceived and executed in the belief that tort reform . . . will stabilize the medical professional

¹ U.S. CONST. amend. XIV, § 1.

² See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 601 (14th ed. 2001).

³ Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417, 431 n.61 (2004).

⁴ *Id.* at 431-58.

⁵ Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877, 882 (W. Va. 1991).

⁶ FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, HOW INSURANCE REFORM LOWERED DOCTORS' MEDICAL MALPRACTICE RATES IN CALIFORNIA AND HOW MALPRACTICE CAPS FAILED 3 (Feb. 10, 2003), <http://www.consumerwatchdog.org/malpractice/rp/1008.pdf>.

⁷ Marguerite Higgins, *Medical Services Rise with Suit Limits*, WASH. TIMES, June 1, 2005, at C10.

⁸ See Robinson, 414 S.E.2d at 881-82.

⁹ See Stephanie Mencimer, *Malpractice Makes Perfect: How the GOP Milks a Bogus Doctors' Insurance Crisis*, 35 WASH. MONTHLY 25 (2003). See also Lawrence Messina, *The Price of Malpractice: W.Va.'s Medical Malpractice Debate- Medical assoc., insurance firm make secret deal*, CHARLESTON GAZETTE, Feb. 26, 2001, at 2A. Messina reports that Medical Assurance, a malpractice insurance company, secretly paid the state medical association an estimated \$690,000 since 1995. The agreement required association members to lobby members of the West Virginia Legislature. In exchange, association members could reap a share of Medical Assurance's \$208 million annual profits.

¹⁰ W. VA. CODE § 55-7B-8 (2004).

¹¹ See Wayne J. Guglielmo, *Seeds of the Crisis: Multiple factors—history shows—have contributed to the current situation*, 82 MED. ECON. 22, 26 (2005).

liability insurance market in West Virginia, and thereby help to assure the availability of affordable insurance coverage.”¹² These new reforms were passed without knowledge of their effects or whether the caps would be effective in alleviating the insurance crisis.¹³ But what do these caps mean for West Virginia citizens and patrons of healthcare systems?

The current insurance crisis has threatened some citizens’ access to quality healthcare.¹⁴ A variety of complex factors affect the access to healthcare in a given area, and the cost of malpractice insurance for doctors is included in that equation.¹⁵ Although malpractice claims are only one factor affecting insurance rates,¹⁶ reducing frivolous lawsuits has been the major focus of reforms.¹⁷ These reforms capping noneconomic damages arbitrarily discriminate between similarly situated groups of people, and the caps deny certain victims of medical malpractice a full recovery for their injuries.¹⁸ Denying those victims a full recovery is considered permissible and necessary to achieve benefits for the rest of society.¹⁹ It raises the question of whether caps violate those victims’ right to equal protection. Are the states’ interests substantial enough to override those equal protection claims? State courts that have examined damage caps are split on the issue.²⁰ Caps on noneconomic damages may violate equal protection in two ways: first, victims of a medical malpractice tort are subject to

¹² W. VA. HOSPITAL ASSOC., SUMMARY OF THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY REFORM ACT 6, (March 12, 2003), available at <http://www.wvha.com/hb2122/final%20summary%202122.pdf>.

¹³ See *infra* notes 146-244 and accompanying text.

¹⁴ Glassman, *supra* note 3, at 417 (noting the AMA has warned some patients had to leave their state to receive urgent care and that pregnant women have difficulty finding an obstetrician).

¹⁵ U. S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 4 (2003).

¹⁶ *Id.*

¹⁷ See Glassman, *supra* note 3, at 431, 432-58. Glassman examines all 50 states and the District of Columbia and discusses the reform actions taken by each, if any. *Id.*

¹⁸ See *Verba v. Ghaphery*, 552 S.E.2d 406, 417-18 (W. Va. 2001) (McGraw, J., dissenting); *id.* at 413 (W. Va. 2001) (Starcher, J., dissenting). See also *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (per curiam); *Wright v. Cent. Du Page Hosp. Ass’n*, 347 N.E.2d 736 (Ill. 1976), *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

¹⁹ See *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 887 (W. Va. 1991).

²⁰ Courts in West Virginia, California, and Wisconsin have upheld the constitutionality of damage caps on noneconomic damages. See *Robinson*, 414 S.E.2d 877 (upholding a \$1,000,000 cap on noneconomic damages); *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985) (approving the constitutionality of a \$250,000 limit on noneconomic damages); *Maurin v. Hall*, 682 N.W.2d 866 (Wis. 2004) (upholding dual statutes limiting damages for either wrongful death or survival of medical malpractice). Courts in Illinois, North Dakota, and Texas have ruled that caps are unconstitutional. See *Wright*, 347 N.E.2d at 741 (striking down a law limiting noneconomic damages to \$500,000); *Arneson*, 270 N.W.2d at 135 (invalidating a \$300,000 cap on all damages); *Lucas*, 757 S.W.2d at 692 (ruling unconstitutional a \$500,000 cap on damages). But see TEX. CIV. PRAC. & REM. § 74.301 (2004). In 2003, the Texas Legislature passed a statute limiting the amount of noneconomic damages to \$250,000. *Id.*

a cap, whereas victims of other torts are not subject to any caps.²¹ Some argue that these caps are necessary to maintain access to quality care.²² Second, the caps distinguish among victims of medical malpractice; it more heavily burdens the catastrophically injured²³ and those without economic damages, such as housewives, the elderly, and children.²⁴

The caps present another problem, which is potentially more serious. Some victims are finding it difficult to obtain legal representation, and in effect they are denied any recovery at all.²⁵ Because the new legislation went into effect recently, and many of the medical malpractice cases currently being litigated are ones filed before July 1, 2003, the full effect of the caps on the number of cases has not yet been realized.²⁶

Although the reforms passed in 2003 contained several provisions,²⁷ this article focuses on § 55-7B-8 of the West Virginia Code, which established a \$250,000 cap on noneconomic damages. This article seeks to explain the revised West Virginia statute and why altering the statute was believed imperative to the survival of doctors in the state. An overview of equal protection is followed by decisions in West Virginia and other states on the constitutionality of limitations on noneconomic damages. After discussion of whether caps will work and if a malpractice insurance "crisis" really exists, the likelihood of damage caps denying victims' ability to secure representation and gain access to court is explored.

²¹ Carson, 424 A.2d at 830.

²² See Robinson, 414 S.E.2d at 880; Fein, 695 P.2d at 680.

²³ See Verba, 552 S.E.2d at 417 (McGraw, J., dissenting). See also Carson, 424 A.2d at 830. The New Hampshire Supreme Court found caps unconstitutional because the law singled out victims of medical negligence and treated them differently than victims of other types of negligence. *Id.* "The medical malpractice statute establishes several classifications. First, it confers certain benefits on tortfeasors who are health care providers that are not afforded to other tortfeasors. Conversely, it distinguishes between those tort claimants whose injuries were caused by medical malpractice and all other tort claimants. The statute also distinguishes between medical malpractice victims whose noneconomic loss exceeds \$ 250,000 and those whose noneconomic loss is \$ 250,000 or less" *Id.* These are the same types of classifications made by W. VA. CODE § 55-7B-8 (2004).

²⁴ Mark Donald, *Access Denied: Does Tort Reform Close Courthouse Doors to Those Who Can Least Afford It?*, TEXAS LAWYER, Jan. 10, 2005, at 1.

²⁵ See *infra* notes 204-39 and accompanying text.

²⁶ Interview with Paul T. Farrell, Jr., Member, Wilson, Frame, Benninger, Farrell & Metheney in Morgantown, W. Va. (Jan. 17, 2005).

²⁷ See W. VA. HOSPITAL ASSOC., *supra* note 12, at 1. The reforms also abolished joint and several liability, eliminated the collateral source rule, provided for a \$500,000 cap for emergency services provided at trauma centers, altered the qualifications for expert witnesses, raised the standard of proof on the "loss of chance" theory, limited third-party actions, altered the "ostensible agency" theory of negligence, and established a patient compensation fund. *Id.*

II. HOW THE LAW HAS CHANGED IN WEST VIRGINIA

A. *The Reforms in 1986 Capped Damages at \$1,000,000*

In response to rising insurance premiums for doctors, the West Virginia Legislature enacted the Medical Professional Liability Act in 1986.²⁸ One provision of that Act, Section 55-7B-8, capped noneconomic damages at one million dollars.²⁹ The text of the statute read: "In any medical professional liability action brought against a health care provider, the maximum amount recoverable as damages for noneconomic loss shall not exceed one million dollars and the jury may be so instructed."³⁰ The constitutionality of this provision was challenged and upheld twice.³¹

The law was enacted to "encourage and facilitate" the availability of premium health care services to the citizens of West Virginia.³² The legislature found that premiums for medical malpractice insurance had climbed dramatically and that "the nature and extent of coverage concomitantly has diminished, to the detriment of the injured and health care providers."³³ Therefore, the legislature thought it necessary to implement reforms, including a \$1,000,000 cap on noneconomic damages.³⁴

B. *The 2003 Reform Reduced the Cap to \$250,000*

Although West Virginia already had a cap on noneconomic damages, by 2002, doctors were actively advocating reducing the cap to \$250,000.³⁵ The West Virginia Legislature and West Virginia Governor Bob Wise later enacted legislation to establish a \$250,000 cap on noneconomic damages in medical malpractice cases.³⁶ On March 5, 2003, the West Virginia Legislature passed House Bill 2122,³⁷ which was a substantial overhaul of West Virginia's medical liability statutes.³⁸ The bill aimed to ensure "quality patient care; provide a fair

²⁸ Jill Oliverio, *To Cap or Not to Cap Damage Awards: That is the Constitutional Question*, 91 W. VA. L. REV. 519, 538 (1989).

²⁹ W. VA. CODE § 55-7B-8 (2000).

³⁰ *Id.*

³¹ See *infra* notes 69-101 and accompanying text (discussing the challenges to W. VA. CODE § 55-7B-8).

³² Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877, 881 (1991).

³³ *Id.*

³⁴ See *id.* at 881-82.

³⁵ Therese Smith Cox, *Candidates Warm to Tort Reform: Doctors Gaining Support for Change of Legal System*, CHARLESTON DAILY MAIL, Oct. 9, 2002, at P7A.

³⁶ Michael Romano, *To Cap or Not to Cap; Medical Community Lobbies for Limits on Noneconomic Damages*, MODERN HEALTHCARE, Mar. 24, 2003, at 10.

³⁷ W. VA. HOSPITAL ASSOC., *supra* note 12, at 1.

³⁸ *Id.* at 2.

and prompt means of resolving medical liability claims; and provide a liability environment comparable to, if not greater than, that of other states in the nation."³⁹

The new Medical Professional Liability Act caps noneconomic damages at \$250,000.⁴⁰ However, there are three instances where the cap may be extended to \$500,000: (1) wrongful death; (2) permanent and substantial physical deformity or loss of use of limb or loss of a bodily organ system; and (3) permanent physical or mental functional injuries that permanently prevent the injured person from being independently able to care for himself and perform life sustaining activities.⁴¹ The caps remain in place regardless of the number of plaintiffs or defendants.⁴² Also, the amount of the caps are adjusted yearly according to the consumer price index.⁴³ However, these inflationary increases are also restricted, eventually "cap[ping] out" at \$350,000 in most cases and \$750,000 in the three instances listed above.⁴⁴

III. SECTION 55-7B-8 MAY POSE AN EQUAL PROTECTION PROBLEM

A. *What is Equal Protection?*

Equal protection requires that the government treat a person or class of persons the same as it treats others in similar circumstances.⁴⁵ Although the government regularly makes distinctions in legislation, the government cannot treat similarly situated persons differently.⁴⁶ For example, the government cannot prohibit the sale of beer to 18-20 year-old males, while simultaneously permitting 18-20 year-old females to purchase beer.⁴⁷ In modern constitutional jurisprudence, equal protection means that if legislation divides people into classes, the division must be substantially related to the achievement of a legitimate government objective.⁴⁸ Legislation affecting a fundamental right, such as the right to vote, or engaging a suspect classification, such as race, will be unconstitutional unless it survives strict scrutiny.⁴⁹ "In the broadest view, the Equal Protection Clause is part of United States's continuing attempt to

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ W. VA. CODE § 55-7B-8 (2004).

⁴⁴ See W. VA. HOSPITAL ASSOC., *supra* note 12, at 3.

⁴⁵ BLACK'S LAW DICTIONARY 441 (7th ed. 2000).

⁴⁶ SULLIVAN & GUNTHER, *supra* note 2, at 601.

⁴⁷ See *Craig v. Boren*, 429 U.S. 190 (1976).

⁴⁸ BLACK'S LAW DICTIONARY 441 (7th ed. 2000).

⁴⁹ *Id.*

determine [how] its professed commitment to the proposition that ‘all men are created equal’” should function in practice.⁵⁰

Equal protection issues are generally decided using one of three levels of analysis: strict scrutiny, mere rationality, and heightened scrutiny.⁵¹ First, strict scrutiny applies in situations where there exists a suspect classification or where the governmental action impacts fundamental rights or interests.⁵² Racial classifications are considered to be a suspect class, while fundamental rights and interests subject to strict scrutiny include voting, criminal appeals, and the right to interstate travel.⁵³

The lowest standard of review, mere rationality, requires courts to determine whether a classification bears “some rational relationship to a legitimate state end and [it] will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.”⁵⁴ If there exists “any reasonably conceivable set of facts that could provide a rational basis for the classification[,]” it will be upheld.⁵⁵ Finally, heightened scrutiny, or intermediate scrutiny, applies to classifications involving sex, alienage, and illegitimacy.⁵⁶ Under this test, classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁵⁷ This standard is:

“intermediate” with respect to both ends and means: where ends must be “compelling” to survive strict scrutiny, and need be merely “legitimate” under rationality review, “important” objectives are required here; and where means must be “necessary” under strict scrutiny, and merely “rationally related” under rationality review, they must be “substantially related” to survive the “intermediate” level of review.⁵⁸

B. *How does Equal Protection Apply to Tort Victims?*

Generally, the question of whether equal protection has been violated arises when a state grants rights to engage in an activity to a particular class of

⁵⁰ Wikipedia, the Free Encyclopedia, *Equal Protection Clause*, http://en.wikipedia.org/wiki/Equal_protection#Notes (last visited Feb. 21, 2006).

⁵¹ See SULLIVAN & GUNTHER, *supra* note 2, at 601-04.

⁵² *Id.* at 603.

⁵³ *Id.*

⁵⁴ McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969).

⁵⁵ FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993).

⁵⁶ SULLIVAN & GUNTHER, *supra* note 2, at 603.

⁵⁷ Craig v. Boren, 429 U.S. 190, 197 (1976).

⁵⁸ SULLIVAN & GUNTHER, *supra* note 2, at 604.

individuals yet denies other individuals the same right.⁵⁹ Medical malpractice caps distinguish among tort victims; medical malpractice victims are subject to different restrictions than auto accident victims, for example. Medical malpractice plaintiffs are limited in their recovery while plaintiffs in other torts may recover complete compensation for their injuries.⁶⁰ Furthermore, the caps discriminate among medical malpractice victims by making it more difficult for the catastrophically injured patients to make a full recovery.⁶¹

Medical malpractice victims and tort victims in general are not members of a suspect class, so the constitutionality of caps is not decided using strict scrutiny.⁶² Instead, courts often examine the purpose of the legislation and determine its constitutionality,⁶³ using either heightened scrutiny⁶⁴ or mere rationality.⁶⁵ West Virginia has used mere rationality in determining the constitutionality of damage caps.⁶⁶ Because the right to bring a tort action is economically based, it is not a fundamental right for state constitutional equal protection purposes.⁶⁷

IV. COURTS ARE SPLIT ON WHETHER CAPS VIOLATE EQUAL PROTECTION

A. *The \$1 million cap was upheld in West Virginia*

The constitutionality of the million dollar cap was first examined in *Robinson v. Charleston Area Medical Center*.⁶⁸ *Robinson* involved an infant who suffered permanent and total brain damage during his delivery.⁶⁹ At the time of this case, the controlling statute limited noneconomic losses to one mil-

⁵⁹ Legal Information Institute, *Equal Protection: An Overview*, http://www.law.cornell.edu/topics/equal_protection.html (last visited on Feb. 13, 2006).

⁶⁰ Oliverio, *supra* note 28, at 521.

⁶¹ *Verba v. Ghaphery*, 552 S.E.2d 406, 413 (W. Va. 2001) (Starcher, J., dissenting).

⁶² Oliverio, *supra* note 28, at 522.

⁶³ See *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 881-82 (W. Va. 1991); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741, 743 (Ill. 1976); *Arneson v. Olson*, 270 N.W.2d 125, 126-27 (N.D. 1978).

⁶⁴ Oliverio, *supra* note 28, at 523 n.34 (citing *Arneson*, 270 N.W.2d at 135); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980)).

⁶⁵ Oliverio, *supra* note 28, at 523 (citing *Fein v. Permanente Med. Group*, 695 P.2d 665, 670 (Cal. 1985)); *Sibley v. Bd. of Supervisors*, 462 So.2d 149 (La. 1985); *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903 (Ohio 1976); *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. App. 1984); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986); *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986)).

⁶⁶ See *Robinson*, 414 S.E.2d at 883; *Verba*, 552 S.E.2d at 410.

⁶⁷ *Robinson*, 414 S.E.2d at 885-86 (citing *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 644 (W. Va. 1991); *Gibson v. W. Va. Dep't of Highways*, 406 S.E.2d 440, 444 (W. Va. 1991)).

⁶⁸ *Robinson*, 414 S.E.2d at 880.

⁶⁹ *Id.* at 881.

lion dollars. Noneconomic damages include pain, suffering, grief, and mental suffering."⁷⁰ In addition to awards for future lost earnings and nursing care, the jury awarded \$2,500,000 for past, present, and future loss of enjoyment of life and other noneconomic damages; the jury also awarded \$1,000,000 each to the infant's mother and father for noneconomic damages. Following an appeal by the doctor, the West Virginia Supreme Court of Appeals ruled that the cap was constitutional and reduced the award for noneconomic damages to \$1,000,000 to be shared by the three individuals.⁷¹ The court reasoned that the caps were rationally related to a legitimate state interest of reducing doctors' insurance premiums, and upheld the caps.⁷²

Ten years later, the court again examined the constitutionality of the \$1,000,000 cap in *Verba v. Ghaphery*.⁷³ The court used a rational basis test to determine whether a statute violates equal protection.⁷⁴ When a statute involves economic rights, the court examines whether the classification is a "rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally." If the classification is rational and forms a reasonable relationship, the statute does not violate Section 10, Article III of the West Virginia Constitution,⁷⁵ which encompasses the equal protection clause.⁷⁶ However, the court relied on *stare decisis* to reaffirm the constitutionality of the caps without thoroughly applying the test it just enumerated.⁷⁷ The court does address the aims of the legislature and whether the law serves a legitimate governmental purpose, but it does not examine whether all persons within the class are treated equally.⁷⁸ It is unclear how the court rationalizes and justifies the fact that the cap distinguishes between medical malpractice victims and other tort victims, and between mildly injured victims and catastrophically injured victims.

⁷⁰ *Id.* at 882.

⁷¹ *Id.* at 881.

⁷² *Id.* at 887.

⁷³ 552 S.E.2d 406 (W. Va. 2001).

⁷⁴ *Id.* at 410.

⁷⁵ *Id.* (citing *Atchinson v. Erwin*, Syl. Pt. 7, 302 S.E.2d 78 (W. Va. 1983)).

⁷⁶ W. VA. CONST., art. III, § 10. See also *Israel v. W. Va. Secondary Activities Comm'n*, 388 S.E.2d 480, 487 (W. Va. 1989).

⁷⁷ *Verba v. Ghaphery*, 552 S.E.2d 406, 410-13 (W. Va. 2001).

⁷⁸ *Id.*

1. Justices Starcher and McGraw Argue Against the Constitutionality of the Caps

Justice Larry V. Starcher and Chief Justice Warren McGraw both filed dissenting opinions in *Verba v. Ghaphery*.⁷⁹ In their opinions, both believed the statute arbitrarily and unfairly discriminated among similarly situated people.⁸⁰

Justice Starcher believes the \$1,000,000 cap is an obvious violation of equal protection in the West Virginia Constitution.⁸¹ The discriminatory and arbitrary statute treats similarly situated persons differently and unfairly, and often deprives catastrophically injured plaintiffs a remedy under the law.⁸² "A plaintiff who is injured by the negligence of anyone *other* than a 'health care provider' can collect his or her full damages as awarded by a jury—but a plaintiff who is injured by the negligence of a 'health care provider' cannot."⁸³

It is also not rational for the legislature to burden a specific class of citizens with an incomplete recovery when there are other factors that contribute to malpractice insurance rates, Justice Starcher argues.⁸⁴ Because of that, it is irrational to saddle severely injured plaintiffs with the duty of "reducing, by some immeasurable amount, all doctors' medical malpractice insurance premiums,"⁸⁵ especially because malpractice insurance is influenced by a variety of factors.⁸⁶ The burden imposed on the catastrophically injured victim is too great and is in violation of equal protection.⁸⁷

Justice McGraw agrees that the caps violate equal protection because the caps deny a full recovery to those most egregiously injured.⁸⁸ He emphasizes that damage caps force the most severely injured victims to be "singled out to pay for social relief to medical tortfeasors and their insurers."⁸⁹ That hardship is borne most heavily by the most severely maltreated and, thus, most deserving

⁷⁹ *Id.* at 413, 417.

⁸⁰ *Id.*

⁸¹ *Id.* at 413 (Starcher, J., dissenting).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 414. *See also* State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (finding cap on damages unconstitutional). "'It is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice' and that any cap on damages was 'unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary.'" *Verba*, 552 S.E.2d at 415.

⁸⁵ *Verba*, 552 S.E.2d at 414.

⁸⁶ *See infra* notes 146-208 and accompanying text.

⁸⁷ *Verba*, 552 S.E.2d at 415.

⁸⁸ *Id.* *See also* Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

⁸⁹ *Verba*, 552 S.E.2d at 418 (quoting *Fein v. Permanente Medical Group*, 695 P.2d 665, 689-90 (Cal. 1985) (Bird, C.J., dissenting)).

of relief.⁹⁰ Both Justice Starcher and McGraw echo other courts' reasoning that has stricken damage caps as unconstitutional.⁹¹ "Unlike the less severely injured, who receive full and just compensation, the catastrophically injured victim of medical malpractice is denied any expectation of compensation beyond the statutory limit."⁹² The 2003 reforms highlight this distinction even further. Those who have damages of less than \$250,000 are fully compensated for their injuries, while victims who sustain damages in excess of \$250,000 cannot achieve a complete recovery.⁹³

2. The Court Indicates a Lower Cap Might be Unconstitutional

The court in *Robinson* emphasized that its decision upholding the constitutionality of the cap was specifically limited to the \$1,000,000 cap; its judgment is not one affirming the constitutionality of any and all caps on noneconomic damages.⁹⁴ Any modifications by the legislature may cause the cap to be unconstitutional.⁹⁵ Reducing noneconomic damages at some point to a lesser cap "'would be manifestly so insufficient as to become a denial of justice[.]' under . . . the state constitutional equal protection or 'certain remedy' provisions."⁹⁶ This language suggests that the 2003 reforms will not withstand a constitutional challenge because of the reforms' effects on citizens' rights.⁹⁷

B. Other States Examine Caps on Damages

Several states have heard cases challenging caps on noneconomic damages and are divided over whether damage caps are constitutional⁹⁸ or unconstitutional.⁹⁹ The following is a sample of three states.

⁹⁰ *Id.*

⁹¹ See *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741 (Ill. 1976) (striking down a law limiting noneconomic damages to \$500,000); *Arneson v. Olson*, 270 N.W.2d 125, 135 (N.D. 1978) (invalidating a \$300,000 cap on all damages); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988) (ruling unconstitutional a \$500,000 cap on damages).

⁹² *Verba*, 552 S.E.2d at 418.

⁹³ See *id.*

⁹⁴ *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 887 (W. Va. 1991).

⁹⁵ *Id.*

⁹⁶ *Id.* (citing *Lucas*, 757 S.W.2d at 700 (Gonzales, J., dissenting)).

⁹⁷ See *infra* notes 208-244 and accompanying text.

⁹⁸ See *Robinson*, 414 S.E.2d 877 (upholding a \$1,000,000 cap on noneconomic damages); *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985) (approving the constitutionality of a \$250,000 limit on noneconomic damages); *Maurin v. Hall*, 682 N.W.2d 866 (Wis. 2004) (upholding dual statutes limiting damages for either wrongful death or survival of medical malpractice).

⁹⁹ See *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741 (Ill. 1976) (striking down a law limiting noneconomic damages to \$500,000); *Arneson v. Olson*, 270 N.W.2d 125, 135 (N.D. 1978) (invalidating a \$300,000 cap on all damages); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988) (ruling unconstitutional a \$500,000 cap on damages).

1. Illinois finds a \$500,000 cap unconstitutional

In 1976, the Supreme Court of Illinois, in *Wright v. Central Du Page Hospital*, struck down a statute limiting recovery in malpractice cases to \$500,000.¹⁰⁰ The plaintiffs argued that the most seriously injured victims are unreasonably discriminated against, whereas the moderately injured are able to make a full recovery.¹⁰¹ In response, the defendants posit, "that such unequal treatment is necessary to deal with what they describe as the 'medical malpractice crisis.'"¹⁰² The defendants further argued that there is a "societal *quid pro quo*," where some malpractice victims' recoveries are limited, but society benefits in return through lower insurance premiums and medical care costs for all health care patrons.¹⁰³ However, the court found that the \$500,000 limit only in medical malpractice actions was arbitrary and in violation of the Illinois Constitution.¹⁰⁴ However, in late August, 2005, Illinois Governor Rod Blagojevich signed into law a bill which again caps at \$500,000 for physicians and \$1,000,000 for hospitals.¹⁰⁵ The constitutionality of this new law is expected to be challenged soon.¹⁰⁶

2. North Dakota strikes down a \$300,000 cap on all damages

The statute in question in *Arneson v. Olson*¹⁰⁷ imposed a \$300,000 cap on damages arising from any one occurrence.¹⁰⁸ This cap limited *total* damages, not only noneconomic damages.¹⁰⁹ The statute enumerated a number of purposes, including assuring the availability of medical services at a reasonable cost, the elimination of the expense involved with non-meritorious claims, providing ample compensation for meritorious claims, and encouraging doctors to enter into practice and remain in North Dakota.¹¹⁰

However, the court did not believe that the aims of the legislation outweighed the burdens imposed on malpractice victims.¹¹¹ The limitation does not

¹⁰⁰ 347 N.E.2d 736 (Ill. 1976).

¹⁰¹ *Id.* at 741.

¹⁰² *Id.* (citing *Hall v. Gillins*, 147 N.E.2d 352 (Ill. 1958); *Cunningham v. Brown*, 174 N.E.2d 153 (Ill. 1961)).

¹⁰³ *Id.* at 742.

¹⁰⁴ *Id.* at 743.

¹⁰⁵ See Christi Parsons, *Trial Lawyers Target Cap on Malpractice*, CHI. TRIB., Aug. 25, 2005, at C1.

¹⁰⁶ *Id.*

¹⁰⁷ 270 N.W.2d 125 (N.D. 1978).

¹⁰⁸ *Id.* at 128.

¹⁰⁹ *Id.* at 135.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 135-36.

provide for a full recovery for those victims with meritorious claims, especially the most grievously injured patients.¹¹² As the court notes, a seriously injured patient's expenses for his or her life expectancy may well exceed \$300,000.¹¹³ Moreover, the limitation does nothing to eliminate the filing of non-meritorious claims.¹¹⁴

North Dakota courts may be deciding the constitutionality of damage caps once again. The state has again limited the amount of damages awarded to a plaintiff.¹¹⁵ In 1996,¹¹⁶ North Dakota established a \$500,000 cap on non-economic damages.¹¹⁷ Its constitutionality has not yet been challenged.

3. California upholds a \$250,000 cap on noneconomic damages

In 1985, California's Supreme Court held that the state's \$250,000 cap on noneconomic damages was not in violation of equal protection.¹¹⁸ *Fein v. Permanente Medical Group* involved a man who believed his heart condition was not timely diagnosed, and that caused him to suffer additional injuries.¹¹⁹ Fein argued that the caps impermissibly distinguished among tort victims, denying a complete recovery to certain malpractice victims.¹²⁰ In denying his equal protection challenge, the court reasoned that the malpractice "insurance 'crisis'" was a compelling reason for the legislature to draw the distinction.¹²¹

West Virginia has yet to decide whether the 2003 reforms are constitutional. Certain aspects of the 2003 legislation have already been challenged,¹²²

¹¹² *Id.* at 135.

¹¹³ *Id.*

¹¹⁴ *Id.* at 135-36.

¹¹⁵ See Guglielmo, *supra* note 11, at 22.

¹¹⁶ *Id.*

¹¹⁷ N.D. CENT. CODE § 32-42-02 (2003).

¹¹⁸ *Fein v. Permanente Med. Group*, 695 P.2d 665, 682 (Cal. 1985).

¹¹⁹ *Id.* at 670.

¹²⁰ *Id.* at 682.

¹²¹ *Id.* at 683; *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989). Note, however, that the Kansas and Maryland statutes cap noneconomic damages in any tort action, not strictly medical malpractice actions. KAN. STAT. ANN. § 60-19a02(b) (2003); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (2004).

¹²² Brief of Amici Curiae The Association of Trial Lawyers of America West Virginia Trial Lawyers Association, *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 609 S.E.2d 917 (W. Va. 2004) (No. 31757). One aspect of H.B. 2122 is that the reforms were made retroactive. See *Boggs*, 609 S.E.2d at 920. Malpractice claims had to be filed by July 1, 2003, to be covered under the 1986 version of the law. See *id.* In effect, there is a gap of malpractice incidents that occurred when the old law was still in effect (before July 1, 2003), but because the reform was made retroactive, those individuals are forced to file under the 2003 version of W. Va. Code § 55-7B-8. *Id.* In the *Boggs* case, the court was urged to examine the constitutionality of the Medical Professional Li-

but the court has not ruled on the constitutionality of the modified Medical Professional Liability Act.¹²³ Whereas many states have struck down limitations on jury awards,¹²⁴ other states uncover no constitutional problems with damage caps.¹²⁵ Because there are no clear guidelines, it is unclear how West Virginia courts might decide this issue; from the language in *Robinson*, there are indications the cap would not be upheld.¹²⁶ Because *Robinson* and *Verba* were decided using rational basis review, the court will likely do the same in the future. As long as the classification bears some rational relationship to a legitimate state goal and is rationally related to achieving that goal, the limitation on noneconomic damages will be upheld.¹²⁷ However, it is clear that malpractice caps do make distinctions among tort victims and among medical malpractice victims, and might deny certain victims a full recovery. The question now becomes whether the legislation actually achieves its stated goals, and if so, are those goals compelling enough for certain members of our society to bear the burden of incomplete recovery? Conversely, if the legislation does not achieve its stated goals, then the court should strike down the statute as unconstitutional.

V. WHAT PROMPTED CHANGES IN THE LAW?

During the past few years, West Virginia physicians encouraged the legislature to undertake tort reform.¹²⁸ Those lobbying efforts first resulted in establishing a method to eliminate the filing of non-meritorious claims.¹²⁹ Since 2001, attorneys have been required to serve defendants with a certificate of merit containing an expert's opinion that the standard of care was breached.¹³⁰ Although various attorneys believed there were not many frivolous cases to be-

ability Act, but declined to do so. *Id.* at 921. *Boggs* involved a clerical error causing *Boggs's* claim to fall under the \$250,000 instead of the \$1,000,000 cap. *Id.*

¹²³ *Id.* at 921 n.5 ("We specifically do not reach the issue of the MPLA's constitutionality, as such an analysis is not necessary to reach a decision in this case.").

¹²⁴ See *Carson v. Maurer*, 424 A.2d 825, (N.H. 1980); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

¹²⁵ See *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985).

¹²⁶ See *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 887 (W. Va. 1991). "We emphasize at this point that our holding that the statutory 'cap' at issue is reasonable is limited to the particular \$1,000,000 'cap' before us." *Id.* "Any modification of the legislature [would] make is subject to being stricken as unconstitutional. A reduction of non[economic] damages to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice[,] under, for example, the state constitutional equal protection or 'certain remedy' provisions." *Id.* at 887 (quoting *Lucas v. U.S.*, 757 S.W.2d 687, 700 (Tex. 1988) (Gonzales, J. dissenting)).

¹²⁷ See *supra* notes 54-55 and accompanying text.

¹²⁸ Cox, *supra* note 35.

¹²⁹ See W. VA. CODE § 55-7B-6 (2001) (amended 2004).

¹³⁰ *Id.*

gin with,¹³¹ the statute filtered any cases that were not credible.¹³² Because the certificate of merit filters non-meritorious claims, the noneconomic cap in West Virginia affects only those victims whose claims have merit.¹³³

The certificate of merit screening provision was just the first stage of reform. Governor Bob Wise saw more extensive tort reform as a way to curb escalating malpractice insurance rates and established a task force to study the issue.¹³⁴ Several physicians claimed that medical malpractice insurance was simply too expensive, and it was causing them to leave the state.¹³⁵ Many doctors faced a 35 percent rate increase in 2001,¹³⁶ and two dozen surgeons went on strike in 2002 at Wheeling Hospital.¹³⁷ A culmination of these and other events created a favorable climate for doctors to seek tort reform.¹³⁸

Physicians began lobbying for a \$250,000 limit on "noneconomic damages, limiting attorney fees, informing juries about other sources of payment to the plaintiff, and other changes."¹³⁹ These pleas for tort reform resonate throughout the nation.¹⁴⁰ The theory behind the reforms is that if doctors' liability is limited, then the malpractice insurance rates will be more predictable and remain at an affordable level, thereby retaining doctors in the state and attracting other doctors to practice here.¹⁴¹

Retaining talented physicians in West Virginia and attracting other physicians to practice here is an important component of providing quality health-care to the citizens of this state.¹⁴² However, the new law was enacted without

¹³¹ Telephone Interview with Michael J. Romano, General Partner, Romano & Miley (Jan. 12, 2005); Interview with Paul T. Farrell, Jr., *supra* note 26; Telephone Interview with William S. Druckman, Senior Partner, The Law Offices of William S. Druckman (Jan. 24, 2005).

¹³² *Id.* But see Telephone Interview with Don R. Sensabaugh, Jr., Member, Flaherty, Sensabaugh & Bonasso (Jan. 18, 2005). Mr. Sensabaugh notes the majority of recent medical malpractice cases that have ended in a verdict for the defense as evidence of frivolous cases still making it to trial. *Id.*

¹³³ Interview with Paul T. Farrell, Jr., *supra* note 26; Telephone Interview with James G. Bordas, III, Member, Bordas & Bordas (Feb. 8, 2005).

¹³⁴ See W. VA. HOSPITAL ASSOC., *supra* note 12, at 1.

¹³⁵ See Cox, *supra* note 35.

¹³⁶ Martha Leonard, *Threat of suits frightens doctors Specialists hard to attract to state, CAMC official says*, CHARLESTON GAZETTE, Jan. 25, 2001, at 1C.

¹³⁷ See Mencimer, *supra* note 9.

¹³⁸ For a good discussion of events and the climate in West Virginia before the reforms were passed in 2003, see Mencimer, *supra* note 9. Mencimer discusses the actions of several doctors and lobbying groups in arguing for tort reform, as well as questioning whether the crisis was as severe as the insurance companies stated. *Id.*

¹³⁹ Cox, *supra* note 35.

¹⁴⁰ See Guglielmo, *supra* note 11, at 22.

¹⁴¹ See Oliverio, *supra* note 28, at 542.

¹⁴² See U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTHCARE 15 (2003).

any guarantee from the malpractice insurance companies that they would reduce and stabilize their rates.¹⁴³

A. *The Insurance Crisis is not the Result of Frivolous Lawsuits*

The urgency for medical malpractice reform has recently reached national prominence.¹⁴⁴ President Bush has made malpractice reform a top priority for his second term, and he is urging Congress to pass a national cap on damages.¹⁴⁵ Arguing that large jury awards are forcing doctors to close their businesses and are driving up personal health insurance costs, President Bush is pushing for a \$250,000 cap.¹⁴⁶ “‘Lawyers are filing baseless suits against hospitals and doctors, that’s just a plain fact,’ Bush said. ‘They are doing it for a simple reason — they know the medical liability system is tilted in their favor.’”¹⁴⁷ With the media consistently criticizing large jury awards and baseless lawsuits, one cannot help but believe there is a proliferation of frivolous lawsuits spurring a pressing need for tort reform. But do the facts show that there is a malpractice insurance crisis?

The medical lobby insists out of control jury verdicts are the cause of rising insurance rates.¹⁴⁸ Instead, a variety of factors has influenced the rise in medical malpractice premiums: “[i]nsurers’ losses, declines in investment income, a less competitive climate, and climbing reinsurance rates . . .”¹⁴⁹ Al-

¹⁴³ See W. VA. CODE § 55-7B-8 (2003). See also Carol M. Ostrom, *Insurer offers premium cut for cap; Physicians Insurance seeks trade for limit on jury awards*, THE SEATTLE TIMES, February 5, 2004, at B2. Washington state’s largest medical malpractice insurer “promised state lawmakers [] that it would reduce premiums at least 10 percent if legislators approved a \$250,000 cap on jury awards for pain and suffering.” *Id.* But see Foundation for Taxpayer and Consumer Rights, *Washington Malpractice Rates Drop Without Damage Cap; State’s Largest Insurer More Profitable Than Ever*, Jan. 11, 2005, <http://www.consumerwatchdog.net/insurance/pr/pr004811.php3> (“Physicians Insurance, Washington State’s largest medical malpractice insurer, announced a 7.7% decrease in physicians’ rates for 2005 and higher profits than the company has seen in a decade, despite the fact that the state has not passed the malpractice cap insurance companies and doctors insist is necessary to address rising premiums.”).

¹⁴⁴ See Guglielmo, *supra* note 11, at 22.

¹⁴⁵ Nedra Pickler, *Bush Continues Push for Jury Award Limits*, Jan. 5, 2005, <http://www.lexisone.com/news/ap/ap010505b.html>; Julie Rovner, *Bush Campaign Focuses on Malpractice Reform* (NPR broadcast Oct. 11, 2004).

¹⁴⁶ See Pickler, *supra* note 145.

¹⁴⁷ *Id.*

¹⁴⁸ PUBLIC CITIZEN’S CONG. WATCH, MEDICAL MISDIAGNOSIS: CHALLENGING THE MALPRACTICE CLAIMS OF THE DOCTOR’S LOBBY 6 (Jan. 2003). But see *Numbers*, TIME, July 18, 2005, at 21. Time magazine noted some interesting statistics on the financial status of 15 top medical malpractice insurance companies: “5.7%: Increase in medical-malpractice payouts by 15 leading insurance companies from 2000 to 2004 . . . 120%: Increase in the net premiums collected by those 15 companies during that same period.” *Id.* These statistics seem to support the argument that malpractice cases are not responsible for the dramatic rise in malpractice insurance rates. See *infra* notes 149-70 and accompanying text.

¹⁴⁹ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 15, at 15.

though many doctors and defense attorneys condemn the proliferation of frivolous lawsuits as the cause of the insurance crisis,¹⁵⁰ medical mistakes are more prevalent than society may believe.¹⁵¹ In the United States, an estimated 44,000 to 98,000 people die each year from preventable medical errors.¹⁵² Only about 1.5 percent of these mistakes results in a malpractice claim being filed.¹⁵³

Sensational tales of a malpractice insurance crisis are not a new development.¹⁵⁴ The country has previously experienced a malpractice insurance crisis twice before.¹⁵⁵ The cyclical nature of the economy caused the crises in the mid-1970's and mid-1980's and the economy is also the cause of the current crisis.¹⁵⁶ Throughout the 1990's, the booming economy allowed doctors to enjoy artificially lower premiums, due to insurers quest for market share.¹⁵⁷ Then between 1998 and 2001, paid losses by insurers increased 8.2 percent.¹⁵⁸ The reason for this sudden swell in payouts is unclear; some have argued that the increase is because of increased public knowledge of medical errors; reduced trust in the healthcare system stemming from patients' negative experience with managed care; higher expectations in medical care; and resistance from plaintiffs' attorneys to settle cases.¹⁵⁹ In response to these higher paid losses, malpractice insurers began to increase their incurred losses, which are "estimates of what they expect[] to pay at some point in the future for claims reported in the current year, as well as what they expect[] to pay for claims still open in previous years."¹⁶⁰ This bleak view of the future led insurance companies to reinforce their loss reserves by increasing insurance premiums.¹⁶¹

Malpractice insurance rates charged by insurance companies do not correspond to increases or decreases in payouts, which have been stable for 30

¹⁵⁰ See Guglielmo, *supra* note 11, at 22.

¹⁵¹ PUBLIC CITIZEN'S CONG. WATCH, *supra* note 148 at 6.

¹⁵² *Id.* By contrast, approximately 43,000 die from automobile accidents, 42,000 die from breast cancer, and 15,000 die from AIDS. *Id.* at 7.

¹⁵³ DOMINICK VETRI, ET AL., TORT LAW AND PRACTICE 207 (2003). See also PUBLIC CITIZEN'S CONG. WATCH, *supra* note 148, at 9.

¹⁵⁴ See *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741 (Ill. 1976) (examining legislation enacted in response to a medical malpractice crisis); *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 881 (W.Va. 1991) (examining legislation enacted in response to a medical malpractice crisis). See also Guglielmo, *supra* note 11, at 22. "We've had three malpractice insurance crises to date – one in the 1970s, another in the mid - '80s, and today's." *Id.*

¹⁵⁵ Guglielmo, *supra* note 11, at 22, 25-29.

¹⁵⁶ PUBLIC CITIZEN'S CONG. WATCH, *supra* note 148, at 19.

¹⁵⁷ *Id.*

¹⁵⁸ Guglielmo, *supra* note 11, at 23.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

years.¹⁶² Instead, premiums flux with the state of the economy; insurance premiums increase or decrease in direct correlation to the strength or weakness of the economy.¹⁶³ Premium rates reflect the gains or losses experienced by the industry's market investments and the industry's perception of how much they can earn on the investment "float."¹⁶⁴ Investment float, which is the time between when premiums are paid to the insurer and when losses are paid out by the insurer,¹⁶⁵ is how insurance companies earn substantial profits."¹⁶⁶

Medical malpractice payouts currently account for less than one percent of the total healthcare costs in the United States.¹⁶⁷ In fact, for the past eighteen years, malpractice payouts have not exceeded one percent of total costs.¹⁶⁸ Furthermore, malpractice insurance premiums account for less than one percent of healthcare costs, as they have for almost twenty years.¹⁶⁹ These numbers have remained steady while overall healthcare spending has been increasing at a high rate.¹⁷⁰ This data indicates there has *not* been a recent spike in malpractice payouts that triggered outrageous premiums; this claim is a crucial aspect of the "crisis" argument. Instead, any "crisis" that exists is more likely the result of the cyclical nature of the economy.

Although malpractice insurance is frequently cited as the driving force behind doctors leaving West Virginia and other states experiencing a crisis,¹⁷¹ there is a variety of other reasons that factor into their decisions. About one-third of doctors stated that malpractice insurance factored into their decision to relocate or retire early, but almost every doctor stated it was not the deciding factor.¹⁷² Various doctors feel that West Virginia has a poor economy that is not

¹⁶² AMERICANS FOR INSURANCE REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES, UNSTABLE RATES 1 (Oct. 10, 2002), <http://www.insurance-reform.org/StableLosses.pdf> (last visited Apr. 5, 2006).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Interview with Paul T. Farrell, Jr., Wilson, Frame, Benninger, Farrell & Metheney (Jan. 17, 2005).

¹⁶⁷ AMERICANS FOR INSURANCE REFORM, THINK MALPRACTICE IS DRIVING UP HEALTH CARE COSTS? THINK AGAIN., <http://www.centerjd.org/air/pr/AIRhealthcosts.pdf> (last visited Feb. 14, 2006). In 2002, payouts accounted for 0.38 percent of total healthcare costs. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* In 2002, malpractice insurance premiums consumed 0.58 percent of total healthcare expenditures. *Id.*

¹⁷⁰ Marc Leduc, *Health Spending in the U.S.*, <http://www.healingdaily.com/conditions/health-spending.htm> (last visited Feb. 14, 2006).

¹⁷¹ Telephone Interview with Michael J. Romano, *supra* note 131. Doctors in several states are claiming that they have are being forced to leave. *Id.* If doctors are fleeing a majority of states, where are they all going? This was a question posed by Mr. Romano. *Id.*

¹⁷² Joy Davia, *Greener Pastures: High Malpractice Insurance, Poor Economy Discourage Many Doctors from Working in W.Va.*, CHARLESTON GAZETTE, Nov. 10, 2002, at P1A [hereinafter Davia, *Greener Pastures*]. See also Joy Davia, *Doctors Struggle with Different Malpractice*

encouraging to raising a family here.¹⁷³ Some doctors included in the statistics of those who left the state did not move away, but rather were actually deceased.¹⁷⁴ Other factors identified by doctors are patients who do not follow the doctor's orders, and the increased amount of paperwork required by HMO's, Medicare, and Medicaid.¹⁷⁵ Many doctors were also losing money or barely turning a profit due to poor reimbursements from Medicaid.¹⁷⁶ Positions in other states often pay more, have cheaper overhead, which includes rent, utilities, and malpractice insurance, and there is not an additional tax on doctors.¹⁷⁷

It cannot be denied that doctors in certain specialties are facing substantial malpractice insurance premiums.¹⁷⁸ As the preceding paragraphs show, the current crisis is not due to frivolous lawsuits, but is instead an attempt by insurance companies to recover their losses after the stock market declined in 2000.¹⁷⁹ As states rush to enact legislation to limit noneconomic damages, the effectiveness of caps to reduce insurance premiums has not been sufficiently proven.¹⁸⁰

B. *Caps on Damages Do Not Correlate With Lower Insurance Premiums*

The legislation in question in *Robinson v. Charleston Area Medical Center, Inc.*¹⁸¹ was the West Virginia Medial Professional Liability Act of 1986.¹⁸² It is interesting to note the reasons given for the purpose of the legislation. The legislature was concerned with ensuring access to quality healthcare for West Virginia residents.¹⁸³ "The legislature found that in recent years the cost of professional liability insurance for health care providers has risen dramatically and that the nature and extent of coverage concomitantly has diminished, to the detriment of the injured and health care providers."¹⁸⁴ From this

Problems: Some See Leaving as Only Alternative, CHARLESTON GAZETTE, Apr. 7, 2002, at P1A. In the article, one doctor stated, "[m]alpractice may not directly be the reason why I'm leaving, but it's definitely a factor." *Id.*

¹⁷³ *Id.*

¹⁷⁴ Interview with Michael J. Romano, General Partner, Romano & Miley, in Clarksburg, W. Va. (Jan. 28, 2005).

¹⁷⁵ Davia, *Greener Pastures*, *supra* note 172.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 15, at 9-14.

¹⁷⁹ See Guglielmo, *supra* note 11, at 24.

¹⁸⁰ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 15, at 41. The study noted that a cap on noneconomic damages *may* decrease insurers' losses. *Id.*

¹⁸¹ 414 S.E.2d 877 (W. Va. 1991).

¹⁸² *Id.* at 881.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

reasoning, the \$1 million cap on noneconomic damages was enacted.¹⁸⁵ Fifteen years later, however, the medical community lobbied for reduced caps. This raises an important question: If the caps were not effective before, why would they be effective now?

Over the past several years, California's malpractice insurance premiums have tracked the rate of inflation,¹⁸⁶ while other states have endured more unpredictable premiums.¹⁸⁷ In 1975, California instituted caps on malpractice awards, which limited the amount of noneconomic damages to \$250,000.¹⁸⁸ The plan, known as MICRA (Medical Injury Compensation Reform Act), was created in response to doctors and insurers who claimed that there was an insurance crisis.¹⁸⁹ MICRA was enacted to solve the insurance crisis, and insurance premiums leveled off for about ten years.¹⁹⁰ Doctors and insurance companies regularly point to California as evidence that caps are effective in lowering insurance premiums.¹⁹¹ Those who champion the experience of California ignore a crucial factor affecting its insurance rates. In the mid-1980's, there was a sudden and substantial jump in premium rates, despite the existence of California's cap.¹⁹² Those increases precipitated Proposition 103 in 1988, which "rolled back insurance rates for most policyholders, including doctors, froze premiums and refunded millions of dollars to doctors to compensate for excessive past premiums. Thereafter, medical malpractice insurance was subject to the nation's toughest rate regulation system in the country"¹⁹³ Since the passage of Proposition 103, insurance rates have continued to drop, with less variations from year to year.¹⁹⁴

The experiences of California seem to indicate that instituting a cap alone will not reduce insurance premiums for doctors. In West Virginia, the insurance companies may claim to be waiting to see if the court upholds the constitutionality of the 2003 reforms before lowering insurance premiums.¹⁹⁵ However, in California the cap was challenged in 1985,¹⁹⁶ but insurance rates

¹⁸⁵ *Id.* at 881-82.

¹⁸⁶ See FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, HOW INSURANCE REFORM LOWERED DOCTORS' MEDICAL MALPRACTICE RATES IN CALIFORNIA AND HOW MALPRACTICE CAPS FAILED 6 (Mar. 7, 2003), <http://www.consumerwatchdog.org/malpractice/rp/1008.pdf>.

¹⁸⁷ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 15, at 2.

¹⁸⁸ FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, *supra* note 186, at 2.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 2, 5.

¹⁹¹ Guglielmo, *supra* note 11, at 28.

¹⁹² See FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, *supra* note 186, at 3, 6.

¹⁹³ *Id.* at 2.

¹⁹⁴ *Id.* at 9.

¹⁹⁵ Telephone Interview with Don R. Sensabaugh, Jr., *supra* note 132.

¹⁹⁶ See *Fein v. Permanente Med. Group*, 695 P.2d 665, 679-84 (Cal. 1985).

continued to climb even after the constitutionality was upheld.¹⁹⁷ One could argue that implementing damage caps in West Virginia is not the correct solution to achieve the goals of maintaining doctors in the state and providing adequate healthcare for its citizens.

Critics of tort reform have frequently cited the absence of any guarantees from the insurance companies as a crucial flaw in reform plans.¹⁹⁸ Joanne Doroshow, executive director of a non-profit consumer advocacy group, criticized reform bills, stating that "the bills erode patients' rights and leave 'malpracticing hospitals, HMOs, nursing homes, doctors and even pharmaceutical companies off the hook for injuring patients, while doing nothing to control insurance rates for doctors.'"¹⁹⁹ One study concluded that there was no correlation between a damage cap and medical malpractice insurance rates, likely because 0.6 percent of all claims brought are for over \$100,000.²⁰⁰

The justification for caps on noneconomic damages is to reduce the cost of medical malpractice insurance, which in turn will retain doctors in the state and strengthen the quality of healthcare available in the state.²⁰¹ However, the burden of this type of legislation "falls exclusively on those extremely unfortunate victims" who suffer the most serious and catastrophic injuries.²⁰² A jury verdict in favor of the plaintiff for a limited amount has not received full compensation for their injuries if the legislature statutorily, and arbitrarily, caps the recovery at a lesser amount than their actual damages.²⁰³ For those who are catastrophically injured by medical negligence, it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease.²⁰⁴ It is inequitable to find that arbitrary caps will provide a parallel between a victim's actual damages and the amounts awarded.²⁰⁵ One malpractice insurance company stated that "[n]oneconomic

¹⁹⁷ See FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, *supra* note 186, at 3. In 1986, the year after the constitutionality of the cap was upheld in *Fein*, malpractice insurance rates jumped 39.96%. *Id.*

¹⁹⁸ Romano, *supra* note 36, at 10. See also *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 887 (W. Va. 1991).

¹⁹⁹ Romano, *supra* note 36, at 10.

²⁰⁰ *Lucas v. U.S.*, 757 S.W.2d 687, 691 (citing MICHAEL SUMNER, THE DOLLARS AND SENSE OF HOSPITAL MALPRACTICE INSURANCE 9 (1979)).

²⁰¹ See *W. VA. HOSPITAL ASSOC.*, *supra* note 12, at 1.

²⁰² *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741 (Ill. 1976).

²⁰³ *Lucas*, 757 S.W.2d at 692, (citing *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987)). See also *Verba v. Gaphery*, 552 S.E.2d 406, 418 (W.Va. 2001) (McGraw, J., dissenting) (citing *Carson v. Maurer*, 424 A.2d 825, 836-37 (N.H. 1980)).

²⁰⁴ *Lucas*, 757 S.W.2d at 691.

²⁰⁵ *Id.*

damages are a small percentage of total losses paid," and that caps on damages would provide loss savings of about one percent.²⁰⁶

VI. THE CAPS PRESENT A POSSIBLE ACCESS TO COURTS PROBLEM

When the West Virginia Legislature reduced the cap on noneconomic damages to \$250,000, it produced the serious side effect of making it more difficult for victims of medical malpractice to obtain representation. Several attorneys have stated that the caps make it more difficult to take medical malpractice cases.²⁰⁷ The imposition of caps on noneconomic damages has made filing a medical malpractice suit less economically sound for plaintiffs' attorneys.²⁰⁸ The cost of hiring experts to testify in malpractice cases can cost as much as \$100,000,²⁰⁹ and when the contingency fee is deducted from any possible award,²¹⁰ the amount of recovery for the client may not even approach what his or her true losses are.²¹¹ This has discouraged attorneys from representing victims of medical malpractice.²¹² Plaintiffs' attorneys regularly have to invest \$50,000 to \$100,000 out of pocket to try a malpractice case, and unless the attorney wins, he or she loses that money.²¹³ Additionally, receiving a verdict for the plaintiff in medical malpractice cases has become increasingly difficult, possibly because juries have been "poisoned" by the constant media barrage pitting doctors against lawyers.²¹⁴

²⁰⁶ Joseph T. Hallinan & Rachel Zimmerman, *Malpractice Insurer Sees Little Savings in Award Caps*, WALL ST. J., Oct. 28, 2004, at A6.

²⁰⁷ Telephone Interview with Gary Wigal, Partner, Gianola, Barnum & Wigal (Dec. 16, 2004); Telephone Interview with Michael J. Romano, *supra* note 131; Interview with Paul T. Farrell, Jr., *supra* note 26; Telephone Interview with William S. Druckman, *supra* note 131.

²⁰⁸ *Id.*

²⁰⁹ Telephone Interview with Gary Wigal, *supra* note 207; Interview with Michael J. Romano, *supra* note 131.

²¹⁰ Telephone Interview with Gary Wigal, *supra* note 207. Although the cap limits damages at \$250,000, a jury verdict could be for an amount less than that which further reduces their recovery. *Id.*

²¹¹ *Id.*

²¹² *Id.*; Telephone Interview with Michael J. Romano, *supra* note 131; Interview with Paul T. Farrell, Jr., *supra* note 26; Telephone Interview with William S. Druckman, *supra* note 131.

²¹³ Telephone Interview with William S. Druckman, *supra* note 131. *See also* Terry, *infra* note 216. Lawyers may be less inclined to take cases with low damages even when the liability is clear. "If a jury returns a verdict of \$75,000, and the plaintiff has medical bills of \$40,000, there is no way the client would get any money,' . . . '[o]nce you pay the experts and pay back the health insurer, there is nothing left for the client let alone the lawyer, so really there is no legal remedy for small cases[.]'" *Id.*

²¹⁴ *Id.*; Telephone Interview with James Bordas, III, *supra* note 133.

Because the 2003 legislation is still relatively new, the full effects have not yet been realized.²¹⁵ It is evident, however, that the cap has reduced the number of medical malpractice cases that are being filed. The following chart demonstrates the effect that the cap has had throughout West Virginia.²¹⁶

County	2002	2003	2004	2005*
Barbour	0	1	0	0
Berkeley	6	9	2	1
Boone	0	1	1	0
Braxton	0	0	1	0
Brooke	5	7	1	0
Cabell	29	28	15	1
Calhoun	0	0	0	0
Clay	1	0	0	0
Doddridge	0	0	0	0
Fayette	1	5	0	0
Gilmer	1	0	0	0
Grant	4	2	0	0
Greenbrier	5	7	3	0
Hampshire	0	1	1	0
Hancock	0	1	2	0
Hardy	0	1	1	0
Harrison	2	14	6	0
Jackson	1	1	1	0
Jefferson	1	2	1	0
Kanawha	70	66	20	2
Lewis	2	2	4	0
Lincoln	0	0	0	0
Logan	15	10	4	0
Marion	0	2	0	0
Marshall	4	6	2	0
Mason	8	2	1	0
McDowell	3	3	1	0
Mercer	8	17	9	0

²¹⁵ Interview with Paul T. Farrell, Jr., *supra* note 26. Many of the cases currently being litigated and settled are ones filed before the caps went into effect. *Id.*

²¹⁶ Juliet A. Terry, *Med Mal Lawsuit Filings Decrease*, THE STATE JOURNAL 15, Mar. 18, 2005, available at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=1628> ("The West Virginia State Treasurer's Office uses an increased filing fee to track how many medical malpractice lawsuits are filed in West Virginia each year. The filing fee for those cases was increased to \$165 in December 2001. The number of filings increased in 2003, the last year for any medical liability reform, and then dropped off by more than half in 2004. The number of cases filed does not distinguish whether the lawsuit was filed against a physician or hospital.").

Mineral	0	0	0	0
Mingo	4	4	2	1
Monongalia	17	31	7	1
Monroe	0	0	0	0
Morgan	0	1	1	0
Nicholas	0	4	1	0
Ohio	15	20	7	0
Pendleton	0	0	0	0
Pleasants	0	0	0	0
Pocahontas	0	0	0	0
Preston	2	1	0	0
Putnam	4	20	10	59
Raleigh	13	21	6	0
Randolph	2	3	3	0
Ritchie	0	0	0	0
Roane	2	0	0	0
Summers	0	0	1	0
Taylor	0	1	3	0
Tucker	0	1	0	0
Tyler	1	1	0	0
Upshur	1	2	1	0
Wayne	0	1	0	0
Webster	0	0	0	0
Wetzel	3	2	1	0
Wirt	0	0	0	0
Wood	9	14	11	1
Wyoming	0	0	0	0
Total	239	315	130	66

- The numbers for 2005 are January only; see footnote for explanation.²¹⁷

Because the new law went into effect on July 1, 2003, there was a rush to file medical malpractice cases before the deadline so the \$1,000,000 cap would apply.²¹⁸ The numbers for 2003 are skewed because of this rush to file cases under the old law. Comparing the data from 2002 and 2004 illustrates that, for most West Virginia counties, the number of cases filed decreased. For

²¹⁷ It is important to note that the figures for 2005 are for January only. While it appears from the data that the numbers of malpractice suits are on the rise, a proliferation of lawsuits against one doctor skewed the statistics. Of the 66 cases filed during January 2005, "59 of them are in Putnam County Circuit Court, where many lawsuits have been filed against Dr. John Anderson King, the former orthopedic surgeon at Putnam General Hospital who is accused of providing substandard care during his seven-month stint at the hospital in 2003." *Id.*

²¹⁸ Interview with Paul T. Farrell, Jr., *supra* note 26.

example, in 2002, Monongalia County had seventeen malpractice filings.²¹⁹ By 2004, that number had dropped to seven.²²⁰ Similarly, in Kanawha County, the 2002 number was at 70, while in 2004 it had dropped by more than two-thirds, to 20. Some would view this data as evidence that malpractice caps are achieving their goal of reducing frivolous lawsuits.²²¹ Others would interpret the data that caps are denying malpractice victims their day in court.²²² This second scenario seems more probable, given the fact that potential plaintiffs were required to file a certificate of merit to filter non-meritorious claims even before the 2003 reforms were enacted.

In 2003, the Texas Legislature adopted a \$250,000 cap on noneconomic damages, which is similar to Section 55-7B-8 enacted in West Virginia.²²³ Victims of medical malpractice in Texas are experiencing difficulty finding attorneys to take their cases.²²⁴ The reforms in Texas “slammed the courthouse doors shut on those who can least afford it – children, stay-at-home moms and the elderly.”²²⁵ One lawyer noted that since the reforms became effective, her firm has taken just two new medical malpractice cases, whereas the firm normally would have taken 30 to 40 cases over the same time period.²²⁶ Another firm has been screening hundreds of malpractice cases but has yet to file one.²²⁷ Whether or not tort reform is working is still being debated.²²⁸ Some lawyers argue that one malpractice insurance carrier has reduced premiums 17 percent, doctors in high-risk specialties are increasing, and Texas has become an attrac-

²¹⁹ Terry, *supra* note 216, at 15.

²²⁰ *Id.* The numbers for 2003 were skewed because of the reforms taking effect on July 1, 2003. Before the cap went into effect, there were 26 malpractice cases filed, and only four afterwards.

²²¹ Telephone Interview with Don R. Sensabaugh, Jr., *supra* note 132.

²²² Donald, *supra* note 24. See also Terry, *supra* note 216, at 15. West Virginia Trial Lawyers Association lobbyist Jim Casey argues the decline in suits filed is not related to a decline in non-meritorious suits. Rather, “[p]eople are now turning away what once was or would have been a valid claim because the risk of going to trial and being unsuccessful have increased dramatically because of the cost involved[.]” *Id.*

²²³ Compare TEX. CIV. PRAC. & REM. § 74.301 (2005) (establishing a \$250,000 cap on noneconomic damages, limiting all claimants to a total of \$250,000 regardless of the number of defendants, and extending the cap to \$500,000 when more than one health care institution is involved), with W. VA. CODE § 55-7B-8 (Supp. 2005) (establishing a \$250,000 cap on noneconomic damages, limiting all claimants to \$250,000 regardless of the number of defendants, and extending the cap to \$500,000 for instances of wrongful death, loss of limb, or bodily organ system, or permanent physical or mental injury that prevents an injured person from caring for himself for herself).

²²⁴ See Donald, *supra* note 24.

²²⁵ *Id.*

²²⁶ *Id.* Note that the numbers represent an approximate time period of sixteen months. The reforms in Texas became effective on September 1, 2003, and the article by Mark Donald was published on January 10, 2005.

²²⁷ *Id.*

²²⁸ *Id.*

tive place to practice medicine.²²⁹ Others remark that another malpractice insurance carrier requested a 39 percent increase in 2004 and argue that the cap effectively denies victims a remedy for their loss.²³⁰ This reflects the opinions and experiences of attorneys here in West Virginia.²³¹

The issue of whether Section 55-7B-8 acts as a barrier to justice will likely be raised if and when the constitutionality of the provision is challenged. The West Virginia Constitution, through the certain remedy provision, guarantees that its citizens will have access to the state's courts.²³² "This state constitutional provision has sometimes been called the 'open courts' or 'access-to-courts' provision."²³³ Legislation implicates the certain remedy provision if it substantially limits procedural remedies permitting judicial adjudication of cases.²³⁴ In *Lewis v. Canaan Valley Resorts, Inc.*, the West Virginia Supreme Court of Appeals examined the constitutionality of legislation that was challenged under the certain remedy provision.²³⁵ Lewis argued that the West Virginia Skiing Responsibility Act, which absolved ski area operators from liability under certain conditions,²³⁶ infringed on his ability to gain access to court.²³⁷

Because, as the court reasoned, access to court is not a fundamental right, any legislation that impairs that right will not be examined under strict scrutiny.²³⁸ Instead, once the certain remedy provision is implicated, the court will use a two-part test.²³⁹ The legislation will be upheld if either (1) "a reasonably effective alternative remedy is provided by the legislation," or (2) if no alternate remedy is provided, then the purpose of limiting or modifying the cause of action or remedy must be to "eliminate or curtail a clear social or economic problem[.]"²⁴⁰ Additionally, limiting or modifying the cause of action or remedy must be a reasonable method of achieving such purpose.²⁴¹

²²⁹ *Id.*

²³⁰ *Id.* Medical Protective Co. requested a 39 percent increase in rates, stating that capping noneconomic damages will reduce losses by 1.0 percent.

²³¹ See *supra* notes 208-15 and accompanying text.

²³² W. VA. CONST. art. III, § 17.

²³³ *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 644 n.13 (W. Va. 1991).

²³⁴ *Id.* at 644.

²³⁵ *Id.* at 644-46. The West Virginia Legislature enacted § 20-3A-1, the Skiing Responsibility Act. The Act stated that skiers assumed the risks that are inherent to the sport of skiing and are virtually impossible to eliminate. *Id.* The Act excused ski area operators from liability in certain instances. *Id.* at 638.

²³⁶ W. VA. CODE § 20-3A-6 (2004).

²³⁷ See *Lewis*, 408 S.E.2d at 644.

²³⁸ *Id.*

²³⁹ *Id.* at 645.

²⁴⁰ *Id.*

²⁴¹ *Id.*

In the context of medical malpractice reform, Section 55-7B-8 does not provide a reasonably effective alternative remedy for victims of medical malpractice.²⁴² Therefore, Section 55-7B-8 should be unconstitutional unless it can be redeemed under the second prong of the two-part test. The Legislature enacted the reforms to maintain doctors in the state and ensure that West Virginia citizens have access to quality healthcare.²⁴³ In doing so, they were aiming to eliminate the social and economic problem of West Virginia as an unattractive place to practice medicine because of its malpractice insurance premiums and frivolous lawsuits, which in turn places its citizens at a healthcare disadvantage.²⁴⁴ Section 55-7B-8 may still be unconstitutional, however, because limiting an individual's right to file a claim against a healthcare provider has little effect on malpractice insurance rates.²⁴⁵ In determining damage caps' constitutionality, courts should carefully examine the factors affecting malpractice insurance rates, and then determine whether capping damages is rationally related to controlling those rates. If courts look closely at the facts, they will likely determine that caps do not have as significant an impact as insurance companies and doctors assert.²⁴⁶

VII. CONCLUSION

As calls for medical malpractice reform intensify throughout the country, a solid look at the facts, and not the hype, underlying malpractice insurance rates and healthcare in a given region is vital. Several factors affect malpractice insurance rates, including actions and business practices of insurance companies, yet the focus of tort reform has centered on capping noneconomic damages. Ironically, studies have shown that the impact of these damage caps on noneconomic damages do not significantly affect doctors' malpractice insurance premiums. "'Band-Aid solutions, such as a sole focus on tort reform, have not worked in the past, and they won't work now[.]'"²⁴⁷

Establishing reforms without careful consideration of the facts can severely limit citizens' rights guaranteed to them in the Constitution. In West Virginia, the cap has had the effect of singling out medical malpractice victims for differential treatment, and it resonates with unfairness. Those with substantial damages may be denied a full recovery if their damages are purely noneconomic. Additionally, they may be denied *any* recovery because of the diffi-

²⁴² See W. VA. CODE § 55-7B-8.

²⁴³ See W. VA. CODE § 55-7B-1.

²⁴⁴ See *id.*

²⁴⁵ See *supra* notes 145-207 and accompanying text.

²⁴⁶ See Oliverio, *supra* note 28, at 542.

²⁴⁷ See Wayne J. Guglielmo, *Behind the med-mal crisis: A Medical Economics Special Investigation*, 82 MED. ECON. 20 (2005).

culty in securing an attorney to take their case. Those individuals are suffering the consequences of tort reform; those reforms are unlikely to have a significant impact on lessening the cost of malpractice insurance rates, which is the purpose of the reforms. Because of that negligible impact, one could argue that the legislation is not rationally related to achieving those goals, and therefore it fails rational basis review. Courts and legislators should carefully examine whether establishing caps on noneconomic damages will truly achieve the goals of the legislation, and they should further consider the impact damage caps inflict on victims' rights. The realization will likely be that the rights seized from medical malpractice victims do not justify the possible benefits.

*Kelly Kotur**

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