

2-12-2019

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Six Myths of Capping Pain and Suffering Damages

By Katherine Hubbard*

Medical mistakes are the third leading cause of death.¹ With death or serious injury comes expensive and lengthy litigation. Reformists introduced noneconomic damage caps hoping to lower medical malpractice lawsuits and insurance premiums for physicians.²

In layman's terms, noneconomic damages caps are simply "pain and suffering" payments to the injured. Caps on these damages allow (and require) courts to slash jury verdicts that are over state-set limits.

States have been split on whether to uphold or drop noneconomic damage caps for decades,³ with several recent decisions.⁴ However, many myths surround the debate.

1. The Myth of Lower Physician Insurance Premiums

The effects of noneconomic damage caps on physician's premiums are modest.⁵ Damage caps do not result in lower premiums for the doctors, and

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¹ *Study Suggests Medical Errors Now Third Leading Cause of Death in the U.S.*, Johns Hopkins Medicine,

https://www.hopkinsmedicine.org/news/media/releases/study_suggests_medical_errors_now_third_leading_cause_of_death_in_the_us (last visited January 31, 2019) (discussing death rates in the United States).

² Scott DeVito & Andrew Jurs, *An Overreaction to A Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 *Stan. J. Complex Litig.* 62, 69 (2015).

³ Ronen Avraham and Álvaro Bustos, *The Unexpected Effects of Caps on Non-Economic Damages*, 30 *Int'l Rev. L. & Econ.* 291, 291–92 (2010).

⁴ *Constitutional Challenges to State Caps on Non-economic Damages*, American Medical Association, https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/arc-public/arc-constitutional-challenges_1.pdf (last visited January 31, 2019) (showing decisions in Florida in 2017; Oregon in 2016; Nevada in 2015; Missouri and Louisiana in 2012; Georgia, Maryland, and Illinois in 2010).

⁵ MM Mello and CH Williams, *Research Synthesis Report No. 10. Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms*, The Robert Wood Johnson Foundation (2006) at 12.

data could suggest the opposite.⁶ From 2002 to 2016, states that enacted only caps on damages recorded an average decrease in physician insurance premiums of 21.8 percent.⁷ States that did nothing saw an even greater decrease of 28.9 percent.⁸

This trend is supported by data from several states. For example, Missouri, a “crisis state,” saw a record low of medical malpractice claims and a reduction in medical malpractice lawsuits, total payouts, and paid claims against physicians in the early 2000s.⁹ Still, doctors’ insurance premiums rose by an astounding 121 percent.¹⁰

2. The Myth of Lower Insurance Premiums for All

There is also underwhelming evidence that noneconomic damage caps reduce insurance premiums or even significantly affect insurance premiums for patients. From 2003 to 2015, the value of medical malpractice payments declined by twenty-two percent.¹¹ Meanwhile, national healthcare costs rose by over eighty percent.¹² In over thirty years, medical malpractice premiums and claims have never been greater than one percent

⁶ Press Release, Consumer Group Issues Two New Studies On Medical Malpractice Insurance; Studies Undermine Leading Arguments for “Tort Reform”, Americans for Insurance Reform, Premium Deceit 2016 (November 2016) <file:///Users/katherinehubbard/Downloads/InsuranceRptsRel.pdf>.

⁷ *Id.* (Discussing only caps of states that only implemented damage caps rather than states that implemented damage caps as part of a larger state tort reform bill).

⁸ *Id.*

⁹ *U.S. Medical Professional Liability Segment Produces Ninth Straight Year of Underwriting Profit*, A.M. Best Special Report, <http://www.reuters.com/article/2015/05/04/nj-a-m-bestidUSnBw045953a+100+BSW20150504> (last visited May 4, 2015)(This cap was struck down as unconstitutional in July 2012 – 26 years after its enactment. In 2003, the Missouri Department of insurance saw a drop of 14 percent in new medical malpractice insurance claims (a record low) and total payouts to medical malpractice lawsuits dropped 21 percent from the previous year. This resulted in an approximate 30 percent reduction of total payouts since 1991. Paid claims against physicians’ fell 42.3 percent during the same time period.)

¹⁰ *Mo. Malpractice Claims Fall But Premiums Rise*, Insurance Journal, Nov. 9, 2004, <http://www.insurancejournal.com/news/midwest/2004/11/09/47543.htm>

¹¹ *The Medical Malpractice Scapegoat*, Public Citizen, Feb. 28, 2017 at 7, <https://www.citizen.org/sites/default/files/medical-malpractice-scapegoat-report.pdf>.

¹² *Id.*

of our nation's health care costs.¹³ Costs constituting such a minor percentage of healthcare costs "could hardly have the impact that proponents of the medical malpractice myth claim."¹⁴ There is, at the least, no evidence that caps reduce healthcare spending.¹⁵

3. The Myth of a Medical Malpractice Floodgate

Some advocates for noneconomic medical malpractice caps claim the tort reform keeps out frivolous lawsuits.¹⁶ These claims are overblown.¹⁷ Harvard researchers concluded that less than three percent of patients whose records indicated conclusive evidence of serious injury from medical malpractice brought claims.¹⁸ Additionally, frivolous lawsuits are unlikely because bringing a meritless claim is expensive.¹⁹

4. The Myth of Fleeing Physicians

Further, caps have little effect on the number of physicians practicing within a state. There is "no ... consistent" proof that doctors are more likely to continue practicing in states with damage caps.²⁰ In fact, data suggests some states with no noneconomic damage caps actually have higher

¹³ Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance And Health Care* (July 2009) at 2, www.insurance-reform.org/studies/TrueRiskF.pdf.

¹⁴ Kenneth C. Chessick, M.D., J.D. & Matthew D. Robinson, *Medical Negligence Litigation Is Not the Problem*, 26 N. Ill. U. L. Rev. 563, 570 (2006).

¹⁵ Bernard S. Black, David A. Hyman and Myungho Paik, *Damage Caps and Defensive Medicine, Revisited*, J. Health Econ. (Jan. 2017) at 1-2.

¹⁶ Bill Corriher, *The Other Terrible Health Care Bill Pending in Congress*, Center for American Progress, July 20, 2017,

<https://www.americanprogress.org/issues/courts/reports/2017/07/20/436343/terrible-health-care-bill-pending-congress/>

¹⁷ Carol J. Miller & Joseph Weidhaas, *Medical Malpractice Noneconomic Caps Unconstitutional*, 69 J. Mo. B. 344, 350 (2013).

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

²⁰ Alison Frankel, *Damages caps in medical cases do not lower costs, improve care: Wisconsin appeals court*, Reuters, July 6, 2017, <https://www.reuters.com/article/us-otc-medmal-idUSKBN19R2NK> (Quoting *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 383 Wis. 2d 1, 59).

retention rates.²¹ The increasing physician shortage is attributed to an aging population rather than an increased implementation of damage caps.²²

5. The Real Winners from these Myths

The reduction in payouts has instead created record surpluses for the insurance companies over the past few years.²³ No matter how profits were measured, medical malpractice insurers were incredibly profitable, especially when compared to other sectors of the economy.²⁴ In 2016, the medical professional liability insurance industry continued an unprecedented run of thirteen consecutive profitable years.²⁵ In May of 2018, the U.S. medical professional liability insurance sector's net income rose fifty percent despite a second-straight year of underwriting losses.²⁶ While patients see climbing insurance premiums, insurance companies are remaining extraordinarily profitable.

6. The Real Losers of these Myths

The "losers" of noneconomic damage caps are injured patients – often the most vulnerable. Even worse, these caps only affect the victims of malpractice who have suffered the most.²⁷ For example, noneconomic damage caps have the largest impact on pregnant women, babies, and

²¹ *Id.*

²² *Press Release, New Research Shows Increasing Physician Shortages in Both Primary and Specialty Care, American Medical Colleges*, April 11, 2018, https://news.aamc.org/press-releases/article/workforce_report_shortage_04112018/ ("Changes in physician-retirement decisions could have the greatest impact on supply, an over one-third of all currently active physicians will be 65 or older within the next decade.")

²³ *The Medical Malpractice Scapegoat*, *supra* note 11.

²⁴ *Americans for Insurance Reform*, *supra* note 13.

²⁵ Eric Wunder and Brad Parker, *2016 Year-End Financial Results for Medical Professional Liability Specialty Writers*, *Medical Liability Monitor* (April 2017).

²⁶ *Best's Special Report: Myriad Challenges Test the Mettle of Medical Professional Liability Writers*, A.M. Best Special Report, May 10, 2018, <http://news.ambest.com/PressContent.aspx?altsrc=14&refnum=26578> (Despite a second-straight year of underwriting losses, the U.S. medical professional liability insurance sector's net income rose 50% year over year as realized capital gains increased threefold....)

²⁷ Corriher, *supra* note 16.

elderly residents in nursing homes due to the general lack of meaningful economic damages.²⁸

Additionally, damage caps make it more difficult for attorneys to afford to take on legitimate cases, keeping in mind the cost of litigation.²⁹ As a result, many malpractice victims are left without legal remedy.³⁰ Ninety-five percent of medical malpractice victims report having extreme difficulty finding legal representation unless their damages are significantly larger than the typical damages for their types of injuries.³¹

Finally, even if an injured patient gets to trial, damage caps allow their award to be slashed. For example, in one landmark case, a healthy thirty-five-year-old mother of three was paralyzed and left severely brain damaged by a negligent surgeon.³² The jury returned a verdict of \$2,750,000 against defendants, but that verdict was reduced by \$2,000,000 to \$750,000 in accordance with a Virginia damage cap statute.³³

Edited by Carter Gage

²⁸ Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 *Elder L.J.* 331 (2006).

²⁹ Carol, *supra* Note 18.

³⁰ Kelly Kotur, *An Extreme Response or A Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 *W. Va. L. Rev.* 873, 882 (2006).

³¹ Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 *Vand. L. Rev.* 151 (2014).

³² *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989).

³³ *Id.*; Va. Code Ann. § 8.01-581.15 (West) (In 1983, the General Assembly amended Code § 8.01-581.15 by increasing the recovery limitation to one million dollars, when the act or acts of malpractice occurred on or after October 1, 1983).