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## BREAKING THE MYTHS: PAIN AND SUFFERING DAMAGE CAPS

### INTRODUCTION

Your chance of dying due to medical error is one in ten.<sup>1</sup>

According to a John Hopkins study, more than 250,000 people in the United States die every year because of medical negligence, making it the third leading cause of death after heart disease and cancer.<sup>2</sup> Whether individual doctors or “the system” is to blame, this means nearly ten percent of all deaths are due to medical error.<sup>3</sup> Further, according to a nationwide survey conducted by the National Opinion Research Center at the University of Chicago, twenty-one percent of patients report experience with medical errors.<sup>4</sup> Therefore, nearly one in four patients report an injury due to medical mistake. These medical errors often have “lasting impact on the patient’s physical health, emotional health, financial well-being, or family relationships.”<sup>5</sup> With injury or death due to a party’s negligence comes expensive and lengthy litigation. In an effort to lower costs, many states have introduced sweeping tort reform against medical malpractice options. These reform plans frequently include caps on plaintiffs’ noneconomic damages.

First, this Note examines an overview of noneconomic damages. Next, this Note focuses on the constitutionality of noneconomic damage caps. While this Note does not go into specifics of the constitutional debate of noneconomic damage caps, many other articles have probed the topic.<sup>6</sup> The discussion on the constitutionality of noneconomic damage caps includes discussions on the

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1. Martin A. Makary & Michael Daniel, *Medical error – the third leading cause of death in the US*, *BMJ* (May 3, 2016), <https://www.bmj.com/content/353/bmj.i2139>.

2. *Study Suggests Medical Errors Now Third Leading Cause of Death in the U.S.*, *JOHNS HOPKINS MED.* (May 3, 2016), [https://www.hopkinsmedicine.org/news/media/releases/study\\_suggests\\_medical\\_errors\\_now\\_third\\_leading\\_cause\\_of\\_death\\_in\\_the\\_us](https://www.hopkinsmedicine.org/news/media/releases/study_suggests_medical_errors_now_third_leading_cause_of_death_in_the_us) (discussing death rates in the United States).

3. *Id.*

4. *New Survey Finds 21 Percent of Americans Report Personal Experience with Medical Errors*, *INST. FOR HEALTHCARE IMPROVEMENT* (Sept. 28, 2017), [http://www.ihl.org/about/news/Documents/IHIPressRelease\\_Patient\\_Safety\\_Survey\\_Sept28\\_17.pdf](http://www.ihl.org/about/news/Documents/IHIPressRelease_Patient_Safety_Survey_Sept28_17.pdf).

5. *Id.*

6. *See, e.g.*, David F. Maron, *Statutory Damage Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 *MISS. C. L. REV.* 109, 110 (2013); Carol J. Miller & Joseph Weidhaas, *Medical Malpractice Noneconomic Caps Unconstitutional*, 69 *J. MO. B.* 344, 344 (2013); Sue Ganske, *Noneconomic Damages Caps in Wrongful Death Medical Malpractice Cases - Are They Constitutional?*, 14 *FLA. ST. U. BUS. REV.* 31, 32–33 (2015).

*effects* of these caps. As a result, this Note next focuses on the effect of the caps, including doctors' insurance premiums, patients' insurance premiums, insurance profits, physician retention, frivolous lawsuits, and difficulty finding representation for those most vulnerable among us.

### I. OVERVIEW OF NONECONOMIC DAMAGE CAPS

Noneconomic damages include a variety of compensation types and are typically referred to as "pain and suffering" damages. "Serious injuries often result in a plaintiff being unable to enjoy the activities he or she was previously able to enjoy."<sup>7</sup> This frequently leads to reduced social contact, which can affect a plaintiff's mental health.<sup>8</sup> Noneconomic damages are "subjective, non-monetary, or intangible losses" intended to "make the plaintiff whole" after an injury.<sup>9</sup> Noneconomic damages encapsulate these less-concrete losses. Noneconomic damages include pain and suffering; mental and emotional anguish; inconvenience; decreased quality of life; and loss of consortium, society, companionship, love, and affection (which a spouse of an injured party may claim).<sup>10</sup> These damages may also include humiliation and reputational damage.<sup>11</sup> The lack of direct economic loss and lack of "hard numbers" for noneconomic loss (unlike economic damages which have tangible numbers like medical bills and lost wages, for example) makes it difficult for juries to assign a monetary value to the pain and suffering awards.<sup>12</sup> Because of their subjective and abstract nature, noneconomic damages have been the subject of tort reform in many states.<sup>13</sup>

The theory behind noneconomic damage caps was that introducing caps would shrink the premiums physicians paid for liability insurance and reduce the number of medical malpractice lawsuits. Some claim personal injury and medical malpractice lawsuits have caused medical insurance premiums to skyrocket within the law few decades.<sup>14</sup> To curb these insurance premiums, tort reform proponents have introduced and pushed noneconomic damage caps.<sup>15</sup> These caps were also introduced to lower the number of medical malpractice lawsuits, which has worked. Annual rates of paid medical malpractice claims

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7. *Non-Economic Damages*, JUSTIA (Apr. 2018), <https://www.justia.com/injury/negligence-theory/non-economic-damages/> [<https://perma.cc/V5QR-V8R6>].

8. *Id.*

9. Allyson Fish, *Noneconomic Damage Caps in Medical Malpractice Litigation: Finding A Solution That Satisfies All Affected Parties*, 17 NEXUS: CHAPMAN J. L. & POL'Y 135, 136 (2012).

10. *Id.*

11. *Non-Economic Damages*, *supra* note 7.

12. *Id.*

13. *Id.*

14. 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).

15. *Id.* at 70–72.

per 1000 physicians have decreased significantly.<sup>16</sup> From 1992 to 1996, the rate of paid medical malpractice claims per 1000 physicians was 20.1.<sup>17</sup> From 1997 to 2002, this same measurement was 17.5.<sup>18</sup> This number again decreased from 2003 to 2008 and 2009 to 2014, with 13.2 and 8.9, respectively.<sup>19</sup>

“[T]he structure of noneconomic damage caps can vary greatly among states.”<sup>20</sup> There are three common forms of noneconomic damage caps. The first is the hard cap, which sets the maximum amount of noneconomic damages a plaintiff can be awarded.<sup>21</sup> Hard caps are adjusted yearly to account for inflation.<sup>22</sup> The second is the flexible cap, which provides a tiered system of noneconomic damages depending on factors like the severity of the injury sustained.<sup>23</sup> The third is the staggered cap, which varies depending on the type of defendant.<sup>24</sup> For example, South Carolina implements a provider/facility stagger where noneconomic damages of a provider are set lower but the facility can be liable for a larger amount.<sup>25</sup>

The jury, as the finder of fact, is given discretion to determine how much a plaintiff should be awarded depending on the circumstances of an individual case.<sup>26</sup> Statutory noneconomic damage caps, however, require judges to reduce those damages awarded by the jury to an injured plaintiff that exceed the ceiling of the cap.<sup>27</sup> “As of January 2018, about half of the states have enacted some variation of a cap on noneconomic damages while six states place a cap on total damages.”<sup>28</sup> Several states have imposed caps which begin as low as \$250,000.<sup>29</sup>

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16. Adam C. Schaffer et al., *Rates and Characteristics of Paid Malpractice Claims Among US Physicians by Specialty, 1992-2014*, 177 JAMA INTERN. MED. 710, 710 (2017).

17. *Id.* at 712.

18. *Id.* at 714.

19. *Id.*

20. Zachary J. Cloutier, *What Watts Forgot to Mention: Equal Protection Analysis of Missouri's Noneconomic Damage Cap*, 83 UMKC L. REV. 403, 415 (2014).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Cloutier, *supra* note 20, at 415; S.C. CODE ANN. § 15-32-220(C) (2012).

26. Fish, *supra* note 9, at 137.

27. *Id.*

28. *Medical Liability Reform Now!* 5 AM. MED. ASSOC. 14 (2018), <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/mlr-now.pdf>.

29. See W. McDonald Plosser, *Sky's the Limit? A 50-State Survey of Damages Caps and The Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <http://www.mondaq.com/unitedstates/x/762574/Insurance/Skys+The+Limit+A+50State+Survey+Of+Damages+Caps+And+The+Collateral+Source+Rule> [<https://perma.cc/AE2P-HDCL>]; *Medical Malpractice Damage Caps*, MED. MALPRACTICE CTR., <http://malpracticecenter.com/legal/damage-caps> (last visited Feb. 18, 2019); 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, 435 (2004).

Many have criticized the unfairness of these damage caps.<sup>30</sup> In one landmark case, a healthy thirty-five-year-old mother of three was paralyzed and left severely brain damaged by a negligent surgeon.<sup>31</sup> 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.<sup>32</sup> In another case, the estate of Kelly Smith brought an action against a hospital when it failed to stabilize Smith's condition (an open femur fracture) before transporting him.<sup>33</sup> Following trial, the jury awarded Plaintiff \$5 million in noneconomic damages, which was reduced by over \$4.6 million to \$359,000 in accordance with Michigan's damages cap.<sup>34</sup> Overall, noneconomic damage caps, on average, reduce malpractice awards by \$42,980, or about a fifteen percent reduction.<sup>35</sup>

## II. CONSTITUTIONALITY

The Supreme Court has not made a definitive ruling on the constitutionality of damage caps, and state court decisions are across the board.<sup>36</sup> Noneconomic damage caps have been struck down as unconstitutional in several states, including Alabama, Florida, Georgia, Illinois, Kansas, Missouri, New Hampshire, North Dakota, Oklahoma, Oregon, Washington, and Wisconsin.<sup>37</sup> In some states, including Illinois, Ohio, and Wisconsin, caps were struck down by the states' supreme courts and later reenacted in an amended form.<sup>38</sup> Customarily, noneconomic damage caps are challenged on six grounds: (1) access to courts, (2) right to trial by jury, (3) due process, (4) separation of powers, (5) privileges and immunities, and (6) equal rights and opportunities.<sup>39</sup> Most recently, the Kansas Supreme Court ruled that Kansas's statutory cap on damages for noneconomic damages was unconstitutional on June 14, 2019.<sup>40</sup>

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30. See DeVito & Jurs, *supra* note 14, at 73.

31. Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 526–27 (Va. 1989).

32. *Id.* at 527.

33. Smith v. Botsford Gen. Hosp., 419 F.3d 513, 515 (6th Cir. 2005).

34. *Id.* at 515, 521.

35. Seth Seabury et al., *Medical Malpractice Reform: Noneconomic Damages Caps Reduced Payments 15 Percent, With Varied Effects By Specialty*, HEALTHAFFAIRS (Oct. 22, 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4278571/> [<https://perma.cc/GC6F-UXCX>].

36. Kevin J. Gfell, *The Constitutional and Economic Implications of A National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 781 (2004).

37. *Medical Liability Reform Now!*, *supra* note 28, at 25.

38. Ronen Avraham & Álvaro Bustos, *The Unexpected Effects of Caps on Non-Economic Damages*, 30 INT'L REV. L. & ECON. 291, 291–92 (2010).

39. Miller & Weidhaas, *supra* note 6, at 345; Ganske, *supra* note 6, at 33, 45; Fish, *supra* note 9, at 142; J. Chase Bryan, Walter H. Boone & Jordan M. Mason, *Are Non-Economic Caps Constitutional?*, 80 DEF. COUNSEL J. 154, 155 (2013).

40. Debra Cassens Weiss, *Cap on Pain-and-Suffering Damages Violates Kansas Constitution, State Supreme Court Says*, ABA J. (June 18, 2019), <http://www.abajournal.com/news/article/caps->

This long-controversial topic has largely been avoided by federal courts. “A federal statutory cap on noneconomic damages in malpractice cases has never been enacted because of political disagreement over what constitutes a proper solution to the medical malpractice predicament.”<sup>41</sup>

In 2011, the Eleventh Circuit Court of Appeals weighed in on a constitutional discussion of noneconomic damages, but ultimately certified four of the constitutional arguments to the Supreme Court of Florida in *Estate of McCall v. United States*.<sup>42</sup> The case involved a twenty-year-old woman who bled to death following a cesarean section during the birth of her son at a U.S. Air Force clinic in Florida.<sup>43</sup> The trial court awarded noneconomic damages of \$2 million, but the district court reduced the award to \$1 million in accordance with the statutory cap.<sup>44</sup> In 2014, the Supreme Court of Florida held that the noneconomic damage cap violated the Equal Protection Clause of the Florida Constitution.<sup>45</sup> Although *McCall* addressed only wrongful death actions,<sup>46</sup> the Supreme Court of Florida expanded this same reasoning to all medical negligence actions in 2017.<sup>47</sup>

Recently, damages as a whole—economic, noneconomic, and punitive—have come into the legal spotlight. Punitive damages are damages that are considered a punishment or deterrent and are typically awarded at the court’s discretion whenever a defendant’s behavior is especially reckless, wanton, or malicious.<sup>48</sup> Punitive damages and noneconomic damages are closely related. In fact, some state statutes include punitive damages within noneconomic damages.<sup>49</sup> While the United States Supreme Court has largely stayed out of the

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on-pain-and-suffering-damages-violate-kansas-constitution-state-supreme-court-says  
[<https://perma.cc/J7AT-8CWM>].

41. Fish, *supra* note 9, at 138.

42. See *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944, 947 (11th Cir. 2011), certified question answered sub nom. *Estate of McCall v. United States*, 134 So.3d 894, 897 (Fla. 2014).

43. Pamela Sakowicz Menaker, *Caps on Non-Economic Damages Held Unconstitutional*, AM. BAR ASSOC. (June 2, 2014), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2014/caps-on-non-economic-damages-held-unconstitutional/> [<https://perma.cc/2ZGK-JYN8>].

44. *Id.*

45. *McCall*, 134 So.3d at 897.

46. Bianca Bishop, *Year in Review (Case Law) June 2015–June 2016*, 20160627 AHLA Seminar Papers 2 (June 27, 2016).

47. *N. Broward Hosp. Dist. v. Kalitan*, 174 So.3d 403, 413 (Fla.App. 2015), *aff’d* 219 So.3d 49, 58 (Fla. 2017) (noting that so long as the caps discriminate between classes of medical malpractice victims, as they do in the personal injury context, they are rendered unconstitutional by *McCall*, notwithstanding the legislature’s intentions).

48. *Punitive Damages*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/punitive\\_damages](https://www.law.cornell.edu/wex/punitive_damages) (last visited Feb. 24, 2019).

49. Kristine C. Karnezis, *Validity of State Statutory Cap on Punitive Damages*, 103 A.L.R.5th 379 (2002).

non-economic debate, the Court recently decided a case regarding punitive damages. The Supreme Court denied punitive damages in unseaworthy claims, which is especially noteworthy because it was the first punitive damages case in which Justices Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh participated in as members of the Court.<sup>50</sup> However, because this case, at least on its face, is limited to the context of federal maritime law and its connection with seaworthiness claims, it is unclear what broader implications may follow.<sup>51</sup>

Further, in 2018, in *Lindenberg v. Jackson National Life Insurance*, the Sixth Circuit held that a Tennessee statutory cap on punitive damages was unconstitutional because it violated the state's right to trial by jury.<sup>52</sup> This decision sparked an examination of whether appellate court panels should be deciding issues of first impression.<sup>53</sup> In this case, U.S. Circuit Judge Eric Clay acknowledged the "lack of uniformity" among states regarding punitive damage caps.<sup>54</sup> The majority held that "[s]uch an infringing reduction is not analogous to permissible legal consequences that impact a jury's verdict."<sup>55</sup> As a result, the Sixth Circuit determined that punitive damages caps are unconstitutional.<sup>56</sup> However, this case also included a twenty-one page dissent by Judge Joan Larsen stating that this matter should have been decided by the Tennessee Supreme Court.<sup>57</sup> The Sixth Circuit is unlikely to have the last word on this issue.<sup>58</sup> The Tennessee Court of Appeals and ultimately the Tennessee Supreme Court eventually will step in.<sup>59</sup> Until then, however, cases in federal court will now be governed by the two-judge decision in *Lindenberg*.<sup>60</sup> As tort reformists

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50. Evan M. Tager, *Supreme Court Holds That Punitive Damages May Not Be Awarded in Connection With Unseaworthiness Claims*, GUIDEPOSTS (June 26, 2019), <https://www.punitive-damagesblog.com/2019/06/supreme-court-holds-that-punitive-damages-may-not-be-awarded-in-connection-with-unseaworthiness-claims/> [<https://perma.cc/2YGF-6G92>].

51. *Id.*

52. *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 367 (6th Cir. 2018).

53. Miriam R. Nemetz & Evan M. Tager, *Sixth Circuit Invalidates Tennessee's Punitive-Damages Cap And Holds That Punitive Damages are Available Under Tennessee Law For Bad-Faith Denial of Insurance Benefits*, MONDAQ (Jan. 30, 2019), <http://www.mondaq.com/united-states/x/776336/Insurance/Sixth+Circuit+Invalidates+Tennessees+PunitiveDamages+Cap+and+Holds+That+Punitive+Damages+Are+Available+Under+Tennessee+Law+For+BadFaith+Denial+Of+Insurance+Benefits?type=popular> [<https://perma.cc/J823-NDRU>] (this appellate court panel consisted of three judges).

54. *Lindenberg*, 912 F.3d at 366–67.

55. *Id.* at 369.

56. *Id.* at 369–70.

57. *Id.* at 370.

58. Nemetz & Tager, *supra* note 53.

59. *Id.*

60. *Id.*

commonly try to limit both punitive and noneconomic damages,<sup>61</sup> these cases regarding punitive damages may also affect cases about noneconomic damages.

Moreover, recent court decisions are bringing the discussion of effectiveness of noneconomic damage caps into their opinions when deciding cases. For example, in *Klotz v. St. Anthony's Medical Center*, Judge Richard Teitelman of the Missouri Supreme Court wrote a separate concurring opinion to emphasize the effects of caps on noneconomic damages.<sup>62</sup> In this case, the trial court reduced James Klotz's award of noneconomic damages against the defendant hospital and physician from \$509,200 to \$234,500.<sup>63</sup> Judge Teitelman's concurrence highlights that noneconomic damage caps present disproportionate disadvantages to the most seriously injured people, young people, and economically disadvantaged people.<sup>64</sup> He reasoned that these types of plaintiffs are disproportionately impacted by the "arbitrary limits on noneconomic damages."<sup>65</sup> Judge Teitelman emphasized that denying full compensation to the young and economically disadvantaged effectively extinguishes their claims.<sup>66</sup> Additionally, he acknowledged that, due to the money it takes to prove medical negligence, few lawyers, who often must work on a contingency fee basis, will take a medical negligence case on behalf of a poor person whose damages are disproportionately noneconomic.<sup>67</sup> This concurrence concludes that caps on noneconomic damages act as "a padlock on the courthouse door."<sup>68</sup>

Additionally, in *McCall's* plurality, the Supreme Court of Florida observed that other states' supreme courts have also struck down noneconomic damage caps.<sup>69</sup> According to the plurality, the Florida caps on noneconomic damages in wrongful death medical malpractice cases save "a modest amount for many by imposing devastating costs on a few—those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction *simply based upon the existence of the cap*."<sup>70</sup> This language was also quoted by the Florida Supreme Court in 2017 in *North Broward Hospital*

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61. *Effect of Tort Reform on Personal Injury Cases*, ALL LAW, <https://www.alllaw.com/articles/nolo/personal-injury/effect-tort-reform.html> [<https://perma.cc/Y56E-CD74>] (last visited Sept. 14, 2019).

62. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 782 (Mo. 2010), *as modified* (May 25, 2010).

63. *Id.* at 759.

64. *See id.* at 782 (noting that economically disadvantaged people include poverty-stricken, the physically and mentally disabled, single mothers, wounded veterans, the elderly, and others).

65. *Id.*

66. *Id.*

67. *Klotz*, 311 S.W.3d at 782.

68. *Id.*

69. Ganske, *supra* note 6, at 46 (citing *Estate of McCall v. United States*, 134 So.3d 894, 916 (Fla. 2014)).

70. *Estate of McCall v. United States*, 134 So.3d 894, 903 (Fla. 2014) (emphasis added).

*District v. Kalitan*.<sup>71</sup> In *Kalitan*, the court held that statutory caps on personal injury noneconomic damages in medical negligence actions violated the Florida Constitution's Equal Protection Clause.<sup>72</sup>

Further, in 2017, the majority in *Mayo v. Wisconsin Injured Patients* discussed that the state's noneconomic damage cap had little to no effect on physician retention in Wisconsin.<sup>73</sup> The *Mayo* court also stated the noneconomic damage caps have "the practical effect of imposing devastating costs on the few who sustain the greatest damages and creates a class of catastrophically injured victims who are denied the adequate compensation awarded by a jury, while the less severely injured malpractice victims are awarded their full compensation."<sup>74</sup> As a result, the court found the \$750,000 noneconomic damage cap to be arbitrary and unsupported by the statutory goals.<sup>75</sup>

This focus on the effects on noneconomic damage caps in recent court decisions involves the larger debate that will likely be the center of upcoming decisions regarding noneconomic damage caps. This author, like the *Mayo* majority, suggests that noneconomic damage caps present more disadvantages than benefits and do not achieve the goals they were set forth to accomplish.

### III. EFFECTS OF NONECONOMIC DAMAGE CAPS

#### A. *Effect on Physician Insurance Premiums*

As mentioned above, one purpose of damage caps is to reduce medical malpractice insurance premiums for physicians.<sup>76</sup> When noneconomic caps began, many physicians faced exorbitant medical malpractice liability insurance premium increases, as much as 100 percent or 200 percent more than previous years.<sup>77</sup> Some physicians were dropped by their insurers and forced to select other insurers, practice without coverage, move to other states with lower medical malpractice insurance premiums, or give up medicine altogether.<sup>78</sup> The hope was that noneconomic damage caps would alleviate some of the financial burden on physicians.

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71. N. Broward Hosp. Dist. v. Kalitan, 219 So.3d 49, 57 (Fla. 2017).

72. *Id.* at 50.

73. *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 901 N.W.2d 782, 791 (Wis. App. 2017). This decision was reversed in a 2018 holding that the statutory cap on noneconomic damages was not facially unconstitutional. *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 684 (Wis. 2018).

74. *Mayo*, 901 N.W.2d at 794.

75. *Id.*

76. 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, 419 (2004).

77. *Id.* at 417.

78. *Id.*

However, noneconomic damage caps did not turn out to be the savior for the malpractice insurance crisis that many hoped they would be. The effects of the caps on physician insurance premiums are modest.<sup>79</sup> In fact, data from the Americans for Insurance Reform concludes that limiting patients' legal rights through damage caps do not result in lower premiums for the doctors and could suggest the opposite.<sup>80</sup> A 2016 study found that, "[s]tates that enacted new limits on patients' legal rights in medical malpractice cases (caps on damages plus other traditional tort reforms) saw an average 22.7 percent decrease in pure premiums from 2002 to the present—but states that did nothing saw a larger average drop of 29.5 percent."<sup>81</sup> Even more striking, when discussing only noneconomic damage caps and excluding other traditional tort reforms, states that enacted only caps on damages saw an average 21.8 percent decrease in pure premiums from 2002 to 2016.<sup>82</sup> However, the states that did nothing saw an even greater average drop of 28.9 percent.<sup>83</sup>

This trend is supported by data from several states. For example, Missouri, a "crisis state" identified by the American Medical Association, had a cap on noneconomic damages since 1986.<sup>84</sup> 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.<sup>85</sup> This resulted in an approximate 30 percent reduction of total payouts since 1991.<sup>86</sup> Paid claims against physicians fell 42.3 percent during the same time period.<sup>87</sup> Yet between 2000 and 2003, during a time where everything seemed to be going right for doctors' insurance rates, the premiums rose by an astounding 121 percent.<sup>88</sup>

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79. Michelle M. Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms*, THE ROBERT WOOD JOHNSON FOUND. 1 (May 2006), available at [https://folio.iu.pui.edu/bitstream/handle/10244/526/no10\\_researchreport.pdf](https://folio.iu.pui.edu/bitstream/handle/10244/526/no10_researchreport.pdf).

80. J. Robert Hunter & Joanna Doroshov, *Premium Deceit 2016: The Failure of "Tort Reform" to Cut Insurance Prices*, AMERICANS FOR INS. REFORM 6 (Nov. 2016), <http://centerjd.org/system/files/MasterPremiumDeceit2016F3.pdf>.

81. *Id.*

82. *Id.*

83. *Id.*

84. "Caps" Do Not Lower Insurance Premiums For Doctors (and Insurance Insiders Admit It), CTR. FOR JUST. & DEMOCRACY (Apr. 12, 2011), [https://www.centerjd.org/sites/default/files/ckfinder/userfiles/files/CapsDontWorkF\(1\).pdf](https://www.centerjd.org/sites/default/files/ckfinder/userfiles/files/CapsDontWorkF(1).pdf). This cap was struck down as unconstitutional in July 2012—twenty-six years after its enactment. Missouri's non-economic damage cap is now \$400,000. See *Caps on Damages*, AM. MED. ASSOC., [https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/caps-on-damages\\_0.pdf](https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/caps-on-damages_0.pdf) (last visited Feb. 24, 2020).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; *Mo. Malpractice Claims Fall But Premiums Rise*, INS. J. (Nov. 9, 2004), <http://www.insurancejournal.com/news/midwest/2004/11/09/47543.htm> [<https://perma.cc/N6YE-K5TX>].

Even with new cap legislation, insurers are free to raise their prices—and they have. In Florida, political leaders vowed that a sweeping medical malpractice overhaul bill would “reduce ever-increasing insurance premiums for Florida’s physicians,” but insurers soon followed up with requests to increase premiums by as much as 45 percent.<sup>89</sup> In Mississippi, four months after medical malpractice caps were passed, surgeons still could not find affordable insurance and many Mississippi doctors were still limiting their practices or walking off the job in protest.<sup>90</sup> In Nevada, within weeks of enacting medical malpractice caps, insurance companies asserted they would not reduce insurance rates for another year or two, if ever.<sup>91</sup> Then, three medical malpractice insurers in Nevada filed for sixteen, twenty-five, and ninety-three percent rate increases.<sup>92</sup> In Ohio, almost immediately after medical malpractice tort reform was passed, each major medical malpractice insurance company within the state announced they would not reduce their rates, with one company predicting the company would seek a 20 percent rate increase.<sup>93</sup> In Oklahoma, after medical malpractice caps passed in 2003, a large insurer instituted a 20 percent raise in its premiums, followed by an extreme 105 percent rate hike in 2004.<sup>94</sup> Further, just after tort reform passed, the state’s largest insurance company, owned by the state medical association, requested an astonishing 83 percent rate hike, which was approved with the condition it be phased in over three years.<sup>95</sup> In Texas, tort reformists promised rate cuts if tort reform was passed, but after the referendum passed, major insurers requested rate hikes as high as 35 percent for doctors and 65 percent for hospitals.<sup>96</sup> When one insurance company was denied a rate increase, it announced it was using a legal loophole to avoid regulation and increase premiums without approval.<sup>97</sup> “In a 2004 filing to the Texas Department of

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89. Julie Kay, *Surprise Hikes; Despite Legislation that Promised to Rein in Physicians’ Insurance Premiums, Three Firms File for Big Rate Increases*, 50 PALM BEACH DAILY BUS. REV. 7, 7 (2003).

90. “Caps” Do Not Lower Insurance Premiums For Doctors (and Insurance Insiders Admit It), *supra* note 84; see also *Limiting Liability Will Not Fix Insurance Problems*, AMERICANS FOR INS. REFORM (Apr. 2004), <https://www.insurance-reform.org/studies/AIRCaps-then-Rate-Hikes.pdf> (citing *Miss. Tort Reform Effort Falls Short*, COMMERCIAL APPEAL (Feb. 18, 2003); Reed Branson, *Doctors In Oxford Shut, Cite Insurance*, COMMERCIAL APPEAL (Feb. 14, 2003); Ben Bryant, *Tort Reform Has Done Little to Ease Malpractice Crisis*, BILOXI SUN-HERALD (Feb. 2, 2003)).

91. “Caps” Do Not Lower Insurance Premiums For Doctors (and Insurance Insiders Admit It), *supra* note 84.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. “Caps” Do Not Lower Insurance Premiums For Doctors (and Insurance Insiders Admit It), *supra* note 84.

97. *Id.*

Insurance, GE Medical Protective revealed that the state's noneconomic damage cap would be responsible for *no more than a 1 percent drop in losses*.<sup>98</sup> In effect, insurance companies are profiting more, despite medical malpractice premium decreases.<sup>99</sup>

The effects of these caps are modest because malpractice premiums can be a "convenient scapegoat for frustrated physicians."<sup>100</sup> While a physician may suspect malpractice premiums to be the culprit when their income does not grow, fails to keep up with inflation, or declines altogether, the problem lies elsewhere.<sup>101</sup> Some pay cuts derive from health insurers clamping down on physician fees and denying payment for services that they deem unnecessary.<sup>102</sup> Some pay cuts are the result of changes in federal medical legislation.<sup>103</sup> There are many factors that contribute to physician health insurance rates, yet many point the finger at injured patients and the families of deceased patients seeking damages for their losses.

#### B. *Effect on Public Insurance Premiums*

There is also underwhelming evidence that noneconomic damage caps reduce insurance premiums or even significantly affect insurance premiums for patients. A core policy argument used to support adoption of damage caps is that caps will reduce defensive medicine and, thus, reduce healthcare spending,<sup>104</sup> but this has not been the case. From 2003 to 2015, "the value of medical lawsuit malpractice payments declined by 22 percent."<sup>105</sup> "Meanwhile, national healthcare costs rose by over 80 percent."<sup>106</sup>

One independent study concluded that damage caps and increases in insurance rates are not related because "less than .6% of claims brought are for over \$100,000."<sup>107</sup> Approximately \$215 billion was collected in 2003 for

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98. *Id.*

99. Miller & Weidhaas, *supra* note 6, at 350.

100. Marc A. Rodwin et al., *Why the Medical Malpractice Crisis Persists Even When Malpractice Insurance Premiums Fall*, 25 HEALTH MATRIX: J. OF L.-MED. 163, 223 (2015).

101. *Id.* at 191–92.

102. *Id.* at 193.

103. Scott Gottlieb, *Doctors Will Have To Take A Pay Cut Under Obamacare*, FORBES (June 28, 2013), <https://www.forbes.com/sites/scottgottlieb/2013/06/28/doctors-will-have-to-take-a-pay-cut-under-obamacare/#1054cc693a78> [<https://perma.cc/SR7K-GGQ8>].

104. Ali Moghtaderi et al., *Damage Caps and Defensive Medicine: Reexamination with Patient-Level Data*, 16 J. EMPIRICAL LEGAL STUDIES 26, 26 (2019); *see also* Myungho Paik et al., *Damage Caps and Defensive Medicine, Revisited*, 51 J. HEALTH ECON. 84, 84 (2017).

105. Taylor Lincoln, *The Medical Malpractice Scapegoat*, PUBLIC CITIZEN 7 (Feb. 28, 2017), <https://www.citizen.org/sites/default/files/medical-malpractice-scapegoat-report.pdf>.

106. *Id.*

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

insurance premiums.<sup>108</sup> Of this \$215 billion, only \$11 billion was attributable to medical negligence premiums.<sup>109</sup> During the same year, “more than \$1.5 trillion was spent on healthcare.”<sup>110</sup> Costs constituting “less than 1% of healthcare costs could hardly have the impact that proponents of the medical malpractice myth claim.”<sup>111</sup> A national study supported similar findings stating, “[c]ap supporters attribute medical malpractice claims to rising healthcare costs, but a national study showed that the direct cost of malpractice accounts for less than two percent of total national healthcare costs.”<sup>112</sup> Another study concluded that in 2015 (the most recent year where data was available), “medical malpractice payments on behalf of doctors amounted to about 0.2 percent of costs for hospital and physician services and about 0.1 percent of all healthcare costs.”<sup>113</sup> In over thirty years, medical malpractice premiums and claims have never been greater than one percent of our nation’s healthcare costs.<sup>114</sup>

Thus, even a significant “reduction of 25 to 30 percent in malpractice costs would lower health care costs by only about [0].4 to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.”<sup>115</sup> The Congressional Budget Office found that even if the country enacted an entire menu of extreme tort restrictions it could only yield an extremely small percentage of health care savings, about 0.5%.<sup>116</sup> “The small number and size of most awards is at odds with the argument that large medical malpractice damage verdicts are a major reason for the rise in healthcare costs or premiums.”<sup>117</sup> There is, at the least, no evidence that caps reduce healthcare spending.<sup>118</sup>

### C. *The Real Winners of Noneconomic Damages*

The reduction in payouts has, instead, created record surpluses for insurance companies over the past few years, despite their claims of a litigation “crisis”

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108. Kenneth C. Chessick & Matthew D. Robinson, *Medical Negligence Litigation is Not the Problem*, 26 N. ILL. U. L. REV. 563, 570 (2006).

109. *Id.*

110. *Id.*

111. *Id.*

112. Miller & Weidhaas, *supra* note 6, at 350.

113. Lincoln, *supra* note 105, at 5.

114. J. Robert Hunter et al., *True Risk: Medical Liability, Malpractice Insurance And Health Care*, AMERICANS FOR INS. REFORM 2 (July 22, 2009), [www.insurance-reform.org/studies/TrueRiskF.pdf](http://www.insurance-reform.org/studies/TrueRiskF.pdf).

115. Miller & Weidhaas, *supra* note 6, at 350.

116. Letter from Douglas W. Elmendorf, Director of the Congressional Budget Office, to Orrin G. Hatch, United States Senator (Oct. 9, 2009) (*available at* <http://www.cbo.gov/publication/41334>).

117. Miller & Weidhaas, *supra* note 6, at 348.

118. Moghtaderi et al., *supra* note 104, at 28–29.

causing higher premiums.<sup>119</sup> The Americans for Insurance Reform (AIR) found that no matter how profits were measured, medical malpractice insurers were incredibly profitable, especially when compared to other sectors in the economy.<sup>120</sup> In 2016, the medical professional liability insurance industry continued an unprecedented run of thirteen consecutive profitable years.<sup>121</sup> 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.<sup>122</sup> In fact, the average profit of the top ten medical malpractice insurance companies in 2008 was higher than ninety-nine percent of Fortune 500 companies and thirty-five times higher than the Fortune 500 average for the same time period.<sup>123</sup> Moreover, "insurance company profits are 24 percent higher in states with caps."<sup>124</sup> "[I]n states with caps, insurance companies took in 3.5 times what they paid out."<sup>125</sup> As a striking example, "California saw insurance rates increase over 450 percent in the 13 years after it passed MICRA, a severe cap on damages, and only saw rates go down in the wake of Proposition 103, a set of insurance reforms that included mandatory rollbacks."<sup>126</sup>

While noneconomic damage caps on medical malpractice claims have become a major push for tort reform, they do not significantly lower insurance rates.<sup>127</sup> Many insurance industry insiders acknowledge this and undermine any argument for noneconomic damage caps reducing premiums. For example, Victor Schwartz, General Counsel of the American Tort Reform Association stated, "[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and I've never said that in 30 years."<sup>128</sup> Additionally, Robert Nagel, an Assistant Vice President of State Farm Insurance Company

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119. *Insurance Company Handout: How the Industry Used Tort Reform to Increase Profits While Americans' Premiums Soared*, AMERICAN ASS'N FOR JUST. ON MED. NEGLIGENCE 3–5 (Dec. 2009), <https://www.decof.com/documents/the-truth-about-medical-malpractice-insurers.pdf>.

120. See generally Hunter et al., *supra* note 114.

121. Eric J. Wunder & Brad J. Parker, *2016 Year-End Financial Results for Medical Professional Liability Specialty Writers*, 42 MED. LIAB. MONITOR 5, 5 (2017).

122. *Best's Special Report: Myriad Challenges Test the Mettle of Medical Professional Liability Writers*, A.M. BEST (May 10, 2018), <http://news.ambest.com/PressContent.aspx?altsrc=14&refnum=26578> [<https://perma.cc/NUT6-AQAP>] (discussing A.M. Best's report and noting that "[d]espite 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 . . .").

123. *Insurance Company Handout: How the Industry Used Tort Reform to Increase Profits While Americans' Premiums Soared*, *supra* note 119, at 3.

124. *Id.*

125. *Id.* at 6.

126. *Id.* at 7.

127. Press Release, Americans for Insurance Reform, *Industry Insiders Admit – And History Shows: Tort Reform Will Not Lower Insurance Rates* (June 2, 2003) (*available at* <https://www.insurance-reform.org/pr/Quotes.pdf>).

128. *Id.*

(Kansas) stated, “[W]e believe the effect of tort reform on our book of business would be small . . . [T]he loss savings resulting from the non-economic cap will not exceed 1% of our total indemnity losses . . . .”<sup>129</sup> Moreover, after Florida enacted “full-fledged tort reform,” including a noneconomic damage cap, Aetna Casualty and Insurance Co. (Florida) concluded the reforms would not affect Aetna’s rates.<sup>130</sup> Yet noneconomic damages are still largely blamed for the soaring prices of insurance.

In sum, when insurance companies pay out less, they keep more.<sup>131</sup> Any “crisis” that exists is more likely the result of the cyclical nature of the economy.<sup>132</sup> While patients see climbing insurance premiums, insurance companies are remaining extraordinarily profitable and are raking in any benefits of medical malpractice noneconomic caps.

#### D. *Fleeing Physicians*

“Physician labor supply has long-standing importance for access to and quality of healthcare delivered in the United States.”<sup>133</sup> However, America is facing a possible physician shortage, with a predicted absence of up to 120,000 physicians by 2030.<sup>134</sup> A common argument in tort reform identifies one potential driver of physician shortages as physicians who may not want to practice in states that have unfavorable malpractice laws because they may be forced to pay higher malpractice premiums or may feel they are at higher risk for being sued.<sup>135</sup> However, research does not reflect this trend, but rather, suggests the opposite.

Noneconomic damage caps have little effect on the number of physicians practicing within a state. “Fears that doctors flee states lacking caps on medical malpractice noneconomic damages are unfounded.”<sup>136</sup> The pre- and post-Hyman Study reported in the Social Science Research Network concluded that although the raw number of physicians increased after caps were imposed, the

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129. *Id.* (citing Letter from Robert J. Nagel, Assistant Vice President, State Filings Division, to Ray Rather, Kansas Insurance Department, October 21, 1986, at 1–2).

130. *Id.* (Citing *Bodily Injury Claim Cost Impact of Florida Tort Law Change*, AETNA CASUALTY & SUR. CO., COMMERCIAL INS. DIV. (1986)).

131. *Id.*

132. 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, 889 (2006).

133. Michael F. Pesko et. al., *The Effects of Malpractice Non-Economic Damage Caps on the Supply of Physician Labor: Heterogeneity by Physician Age and Risk*, INT. REV. L. ECON. (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5675024> [<https://perma.cc/29W7-U3EX>].

134. *New Research Shows Increasing Physician Shortages in Both Primary and Specialty Care*, AAMC NEWS (Apr. 11, 2018), [https://news.aamc.org/press-releases/article/workforce\\_report\\_shortage\\_04112018/](https://news.aamc.org/press-releases/article/workforce_report_shortage_04112018/) [<https://perma.cc/KX6E-VSCT>].

135. Pesko et al., *supra* note 133.

136. Miller & Weidhaas, *supra* note 6, at 349.

rate of increase in Texas of active, direct patient care physicians per capita was actually lower after caps were implemented.<sup>137</sup> Likewise, the *Mayo* court concluded that Wisconsin's damage cap did not help retain physicians.<sup>138</sup> In a study of nineteen states, researchers found that even though one "might expect to see shifts in physician supply in the 2003–2006 period during which malpractice caps were being enacted, or shortly after, . . . we do not see any obvious visual evidence of this."<sup>139</sup>

The increasing physician shortage's main cause lies within a growing, aging population and physician retirement, rather than with medical malpractice caps.<sup>140</sup> "The combination of an aging patient population and an aging physician population is creating one of the underlying drivers of the growing physician shortage."<sup>141</sup> In a study of twenty-three major specialties, thirteen are comprised of forty-five percent or more physicians that are fifty-five years of age and older.<sup>142</sup> Twenty-two percent of physicians aged fifty-six or older indicated they would retire in the next one to three years, while over nine percent of all physicians indicated they would retire in the next one to three years.<sup>143</sup>

Moreover, doctors turning to retirement or leaving the field altogether typically do so for factors other than noneconomic damage caps. "Doctors are considering retirement as they feel the pressure of declining reimbursement, increased administrative burden, and industry consolidation."<sup>144</sup> In a survey studying physician work trends, poor work/life balance, stress, and inadequate compensation were top factors that would cause young physicians to consider searching for a new position.<sup>145</sup> A 2016 study by the University at Albany School of Public Health concluded that only seven percent of respondents cited the cost of malpractice insurance as a reason for practicing outside of New York

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137. *Id.*

138. *Mayo v. Wis. Injured Patients and Families Comp. Fund*, 901 N.W.2d 782, 791 (Wis. App. 2017).

139. Pesko et al., *supra* note 133 (note that this study does find evidence that the supply of high-risk physician specialists under thirty-five years of age rose due to noneconomic damage caps).

140. Changes in physician-retirement decisions could have the greatest impact on supply, and over one-third of all currently active physicians will be 65 or older within the next decade. *New Research Shows Increasing Physician Shortages in Both Primary and Specialty Care*, *supra* note 134.

141. *The Aging Physician Workforce: A Demographic Dilemma*, MERRITT HAWKINS (2015), <https://www.hasc.org/sites/main/files/link1mhawwhitepaperaging.pdf>.

142. *Id.*

143. *Id.*

144. *The Future of Healthcare: A National Survey of Physicians*, THE DOCTORS CO. (Sept. 2018), [https://www.thedoctors.com/contentassets/23c0cee958364c6582d4ba95afa47fcc/11724b\\_fohc-survey\\_0918\\_nomarks\\_spread\\_fr-1.pdf](https://www.thedoctors.com/contentassets/23c0cee958364c6582d4ba95afa47fcc/11724b_fohc-survey_0918_nomarks_spread_fr-1.pdf).

145. *Survey: Young Doctors Still Finding Jobs The Old-Fashioned Way*, COMPHEALTH (Mar. 2018), [https://comphealth.com/resources/wp-content/uploads/2018/04/CPHY68352\\_EarlyCareerPhysReport\\_rw\\_v6\\_f.pdf](https://comphealth.com/resources/wp-content/uploads/2018/04/CPHY68352_EarlyCareerPhysReport_rw_v6_f.pdf).

State.<sup>146</sup> Further, as in previous years, New York's liability laws or legal environment were not even listed.<sup>147</sup> As a result, "there is 'no demonstrably consistent' proof that doctors are likelier to continue practicing in states with damages caps."<sup>148</sup> In fact, data suggests some states with no noneconomic damage caps actually have higher retention rates.<sup>149</sup>

*E. Trickle Rather than Floodgate*

Some advocates for noneconomic damage caps claim that tort reform keeps out frivolous lawsuits.<sup>150</sup> However, frivolous lawsuits seem to be another medical malpractice scapegoat. Harvard researchers concluded that "portraits of a malpractice system that [are] stricken with frivolous litigation are overblown."<sup>151</sup> This is a common perception by other academics, including eighty-five percent of judges, who do not believe frivolous suits are a serious problem.<sup>152</sup>

"[T]here are far more cases of medical malpractice than medical malpractice litigation."<sup>153</sup> The Department of Insurance, Financial Institutions, and Professional Registration (DFIP) asserts that only a small percent of people harmed by medical malpractice make claims.<sup>154</sup> In the United States, there are about ten incidents of medical malpractice for every one malpractice claim.<sup>155</sup> One "Harvard team looked at about 30,000 hospital records in New York and found conclusive evidence of a serious injury from medical malpractice in the records of 280 patients."<sup>156</sup> However, only eight of the 280 patients brought a claim.<sup>157</sup> "That is less than three percent."<sup>158</sup> Similar findings occurred in Utah

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146. 2016 *New York Residency Training Outcomes: A Summary of Responses to the 2016 New York Resident Exit Survey*, CENTER FOR HEALTH WORKFORCE STUDIES, SCH. OF PUB. HEALTH, S.U.N.Y. ALBANY (Sept. 2017), <https://www.chwsny.org/wp-content/uploads/2017/10/2016-NY-Exit-Survey-Report.pdf>.

147. *Id.*

148. 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-med-mal-idUSKBN19R2NK> [<https://perma.cc/6VAN-TM7F>] (quoting *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 706).

149. *Id.*

150. Christine Hines, *No "Frivolous Lawsuits" Here*, THE HILL (Feb. 11, 2011), <https://thehill.com/blogs/congress-blog/civil-rights/141401-no-frivolous-lawsuits-here> [<https://perma.cc/CF9W-3739>].

151. *Id.*

152. *Id.*

153. TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 69 (2005).

154. Miller & Weidhaas, *supra* note 6, at 348.

155. BAKER, *supra* note 153, at 69 ("Because hospital record reviews miss so much medical malpractice, the real multiple is much higher.").

156. *Id.*

157. *Id.*

158. *Id.*

and Colorado, where 15,000 hospital records indicated conclusive evidence of a serious injury from medical malpractice in the records of 161 patients.<sup>159</sup> Only four of the 161 brought claims, which is also less than three percent.<sup>160</sup>

Frivolous lawsuits are unlikely because bringing a meritless claim is expensive.<sup>161</sup> Plaintiff's lawyers typically work on contingency fees and advance expenses on their cases.<sup>162</sup> Contingency fees allow many, who would otherwise be unable to pay an attorney, to see their day in court. "Expert witnesses can charge hundreds or even thousands of dollars per hour to review documents and testify during depositions and trials."<sup>163</sup> "It is not uncommon for an expert witness to spend a total of 20–30 hours on a case, between preparation time, travel, and in-court time."<sup>164</sup> Plaintiff's attorneys using contingency fee arrangements bear this cost but take it out of a settlement if one is received.<sup>165</sup> As a result, plaintiff's attorneys have little incentive to take on weak cases.<sup>166</sup> "Studies show that plaintiffs' lawyers concentrating in medical malpractice routinely reject 80 percent or more of the requests for representation they receive."<sup>167</sup>

Another safeguard against frivolous lawsuits are affidavit of merit requirements.<sup>168</sup> An affidavit of merit must be filed with the court following a petition and must include a written opinion of a qualified health provider maintaining that the standard of care was breached.<sup>169</sup> In the United States, twenty-nine states have statutes that require an affidavit of merit in a medical malpractice claim.<sup>170</sup>

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159. *Id.*

160. BAKER, *supra* note 153, at 69.

161. Miller & Weidhaas, *supra* note 6, at 349.

162. *Id.*

163. Andrew Suszek, *How Much Will it Cost to Bring a Medical Malpractice Claim*, ALL LAW, <https://www.alllaw.com/articles/nolo/personal-injury/cost-bring-claim.html> [<https://perma.cc/SZB3-3YEP>] (last visited Sept. 23, 2019).

164. *Id.*

165. *Id.*

166. Miller & Weidhaas, *supra* note 6, at 349.

167. *Id.*

168. *Id.*

169. *Id.*

170. ARIZ. REV. STAT. ANN. § 12-2603 (2020); COLO. REV. STAT. § 13-20-602 (2019); CONN. GEN. STAT. § 52-190a (2019); DEL. CODE ANN. tit. 18, § 6853; FLA. STAT. § 766.104 (2019); GA. CODE ANN. § 9-11-9.1 (2019); HAW. REV. STAT. § 671-12.5 (2019); 735 ILL. COMP. STAT. 5/2-622 (2019); MD. CODE ANN. CTS & JUD. PROC. § 3-2A-04 (2020); MICH. COMP. LAWS § 600.2912d (2020); MINN. STAT. § 145.682 (2019); MISS. CODE ANN. § 11-1-58 (2019); MO. REV. STAT. § 538.225 (2019); NEV. REV. STAT. § 41A.071 (2019); N.J. REV. STAT. § 2A:53A-27 (2019); N.Y. CIV. PRAC. & RULES LAW § 3012-a; N.D. CENT. CODE § 28-01-46 (2019); OHIO R. CIV. P. 10; OKLA. STAT. tit. 12, § 19.1 (2019); PA. R. CIV. P. 1042.3 (2019); S.C. CODE ANN. § 15-36-100 (2005); TENN. CODE ANN. § 29-26-122 (2019); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (2019); UTAH CODE ANN. § 78B-3-423 (2020); VT. STAT. ANN. tit. 12, § 1042 (2019); VA. CODE

### F. *Difficulty Finding Representation*

While medical malpractice noneconomic damage caps do not affect frivolous lawsuits, they do affect those with rightful claims. Damage caps make it more difficult for attorneys to afford to take on legitimate cases, keeping in mind the cost of litigation.<sup>171</sup> Damage caps and other tort reforms that artificially reduce plaintiffs' damage awards also reduce contingent fee attorneys' expected recoveries, resulting in fewer economically viable cases to accept.<sup>172</sup> "Because of the complexity and expense of medical malpractice lawsuits, employing a lawyer is critical to a successful claim."<sup>173</sup> The high costs of medical malpractice investigation and litigation leave many malpractice victims without legal remedy.<sup>174</sup> As a result, "many legitimate victims of medical malpractice have no meaningful access to the civil justice system."<sup>175</sup> 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.<sup>176</sup> This problem is worsening, as the economic realities continue to silence a growing number of victims.<sup>177</sup>

This problem is highlighted in a recent investigative podcast, *Dr. Death. Dr. Death* investigates Dr. Christopher Duntsch, whose medical errors resulted in multiple deaths and catastrophic injuries to patients.<sup>178</sup> Duntsch attended a reputable medical school, had glowing online reviews, and received no negative attention from the Texas Medical board.<sup>179</sup> However his career quickly went south. He was likely one of the first, if not the first, doctor to be convicted of knowingly or intentionally injuring a patient.<sup>180</sup> While this podcast is primarily

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ANN. § 8.01-20.1 (2019); WASH. REV. CODE § 7.70.150 (2020); W. VA. CODE § 55-7B-6 (2019); WYO. STAT. § 9-2-151 (2019).

171. Miller & Weidhaas, *supra* note 6, at 349.

172. Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VANDERBILT L. REV. 151, 194 (2014).

173. *Id.* at 173.

174. *Id.* at 167.

175. *Id.* at 154.

176. *Id.* at 193.

177. Shepherd, *supra* note 172, at 154.

178. *Dr. Death: Free Fall*, WONDERY (Sept. 18, 2018) (downloaded using iTunes).

179. *Id.*

180. *Id.* (In the podcast, the prosecution team stated, "It's extremely unusual, we did a lot of research to see if we could find anyone else who'd done cases like this – any other doctors who had been prosecuted for what they had actually done within the surgery . . . we couldn't find anyone." Toby Shook, a Dallas defense attorney who spent twenty-three years working as a Dallas County prosecutor stated, "I cannot recall a physician being indicted for aggravated assault for acts committed during surgery . . . and not just Dallas County—I don't recall hearing about it anywhere." Kevin Brooks, a Dallas County prosecutor stated, "You don't see a doctor charged with this." Brooks also noted that doctors who run afoul of the law usually are accused of insurance or prescription fraud. With regard to doctors being prosecuted for errors committed during surgery, Brooks concluded, "It's fairly rare.")

about a doctor's extreme misconduct and the holes within medical malpractice reporting, it ends highlighting how medical malpractice caps in Texas left many severely injured patients without a remedy.<sup>181</sup>

Barry Morguloff, one of Duntsch's victims, recalls, "I could not find an attorney to save my life that would take the case. Come to find out, [in] the state of Texas, there are caps on malpractice and it is not worth an attorney's time and energy to take on a malpractice case . . . ."<sup>182</sup> Many of Duntsch's victims experienced this difficulty.<sup>183</sup> Attorney Mike Lions states how noneconomic damage caps can prohibit recovery,

What I see day to day is people calling me saying "they killed my child—they killed my child in the ER" and now, what do we do? Well, what you do is you pray that you get pregnant again and have another baby because no lawyer is going to take that case. That child didn't have a job, has no economic loss, your physical pain and suffering is capped at \$250,000.<sup>184</sup>

Moreover, those left without a legal remedy or little economic recovery are also the most vulnerable among us. Damage caps can disproportionately burden the most severely injured patients.<sup>185</sup> The largest impacts in dollar terms from noneconomic damage cases were in pediatrics and obstetrics/gynecology, where average payments were reduced by over \$100,000.<sup>186</sup> Along with pregnant women and babies, noneconomic damage caps have disparate effect on elderly residents in nursing homes due to the general lack of meaningful economic damages among typical nursing home claimants.<sup>187</sup> The elderly are especially vulnerable because many are not earning money and have very little to no potential to earn money in the future. Those with the least earning power are the most vulnerable.<sup>188</sup> Even worse, these caps only affect the victims of malpractice who have suffered the most (or have the most damage-worthy injuries) because only those most seriously injured will have noneconomic damages that reach the limits of the caps.<sup>189</sup>

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181. *Dr. Death: Closure*, WONDERY (Sept. 25, 2018).

182. *Id.* at 5:10.

183. *Id.* at 5:05.

184. *Id.* at 10:30.

185. Mello, *supra* note 79.

186. *Medical Liability Reform Now!*, *supra* note 28, at 12.

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

188. *Dr. Death: Closure*, *supra* note 181, at 9:50.

189. Billy Corriher, *The Other Terrible Health Care Bill Pending In Congress*, CTR. FOR AM. PROGRESS (July 20, 2017), <https://www.americanprogress.org/issues/courts/reports/2017/07/20/436343/terrible-health-care-bill-pending-congress/> [<https://perma.cc/74SE-A4TR>].

## CONCLUSION

The sharp divergence amongst the states of whether to have noneconomic damage caps has been present for decades. As seen, many states have upheld noneconomic damage caps while others have struck them down. Some never enacted the caps at all. Still, the federal courts and government have largely stayed out of the division.<sup>190</sup> In effect, “pain and suffering” damage caps have little effect on healthcare costs but a major effect on legal rights of an injured patient. There is no proof that noneconomic damage caps actually make doctors’ insurance premiums lower or that they are a primary factor in many of the hurdles facing physicians today. Additionally, noneconomic damages do not significantly impact insurance rates for patients either.

However, noneconomic damages do harshly influence those who are hurt the most by negligent doctors or medical staff. They also allow insurance companies to profit at patients’ expense. Noneconomic damage caps are not the answer to fixing health insurance premiums, but they are used as a scapegoat to avoid the true problems to the detriment of the most vulnerable Americans. The caps also bring up larger national issues: Should it matter which state the loss occurred in? Within a state, should it matter how many legally protected family members are left after a devastating loss?<sup>191</sup>

However, there is still possibility for change. Plaintiffs’ bar members view recent decisions superseding noneconomic damage caps as long overdue and as indicative of a continuing trend.<sup>192</sup> Brant Mittler, a cardiologist and attorney, warned about the effects of Texas limits on malpractice suits: “By giving damages to the individual, the jury is sending a message about safety to the doctors, the nurses, the hospital: ‘Please change your ways. Make health care safer to protect all of us.’”<sup>193</sup> Failing to hold the medical field accountable

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190. Michael Matray, *Are Federal Caps on Noneconomic Damages Possible Under a Republican Government?*, CUNNINGHAM GROUP (Apr. 4, 2017), <https://www.cunninghamgroup.com/federal-caps-noneconomic-damages-possible-republican-government/> [<https://perma.cc/MA24-5A69>]. The government will likely not take action on enacting a federal noneconomic damage cap. In 2017, the Trump Administration voiced its support for H.R. 1215, which includes a noneconomic damage cap of \$250,000. *Id.* The house passed the bill and the Senate received and referred the bill to the Committee on the Judiciary. *Id.* There has currently been no other action taken on H.R. 1215.

191. Ganske, *supra* note 6, at 50.

192. Menaker, *supra* note 43.

193. Billy Corriher, *In Texas, No Justice for Injured Patients*, CTR. FOR AM. PROGRESS (Oct. 21, 2014), <https://www.americanprogress.org/issues/courts/news/2014/10/21/99402/in-texas-no-justice-for-injured-patients/> [<https://perma.cc/6BQF-A7CS>].

for their deadly mistakes will not protect the hundreds of thousands of patients that die from medical errors each year.<sup>194</sup>

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194. *See, e.g.*, *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 526–27 (1989).

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