The Florida Supreme Court has struck down Florida’s noneconomic damages cap in medical malpractice suits. (Estate of McCall v. U.S. (Fl. 2014) 134 So.3d 894, 2014 WL 959180.) This article explores the implications of McCall for the constitutionality of California’s $250,000 cap on noneconomic damages in medical malpractice suits. (Civ. Code § 3333.2.)

McCall held that the cap’s “invidious” discrimination lacked a rational basis and so violated Florida’s constitutional guarantee of equal protection of the law. McCall tested the asserted justifications for the cap against current conditions in health care and medical malpractice insurance, holding that current conditions provided no rational basis for the cap.

McCall’s search for a rational basis is useful for California courts that are now being asked to determine whether California’s cap has a rational basis in light of current conditions, such as: (1) the Insurance Commissioner’s regulation of malpractice insurance rates under Proposition 103, (2) the profitability of California’s malpractice insurers, (3) the absence of any threat to healthcare providers from rising insurance rates, and (4) inflation’s erosion of the value of the $250,000 cap by almost 80%.

In light of these conditions (vastly different from conditions in 1975 when the cap was enacted), McCall’s rationale raises serious doubts about the constitutionality of the $250,000 cap in section Civ. Code § 3333.2. McCall may guide California courts in at least two pending appeals that offer complete evidentiary records to challenge the constitutionality of section 3333.2’s cap on various grounds. (Chan v. Curran, A138234 [equal protection, right to jury trial, and due process denial of access to justice]; Lora v. Universal Health Services, B250519 [equal protection and right to jury trial].)

Medical Malpractice Caused Michelle McCall’s Death

When Michelle McCall delivered a healthy boy, she lost a substantial amount of blood. After the delivery, her placenta was removed surgically. During the repair of vaginal lacerations, Mrs. McCall’s blood pressure dropped precipitously, but the nurse did not report this to the doctor and the doctor did not check the blood pressure himself. After the surgery, Mrs. McCall was not monitored, went into shock, and died from cardiac arrest due to the severe blood loss.

In the heirs’ suit against the United States under the Federal Tort Claims Act, the federal district court found liability, awarding economic damages of $980,462.42 and noneconomic damages of $2 million – $500,000 for Mrs. McCall’s son and $750,000 for each of her parents.

Florida’s Cap

Florida’s statute imposed three limits in medical malpractice wrongful death actions: “[R]egardless of the number of such practitioner defendants, [1] noneconomic damages shall not exceed $500,000 per claimant. [2] No practitioner shall be liable for more than $500,000 in noneconomic damages, regardless of the number of claimants.” And [3] “if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed $1 million.” (Fla. Statutes, § 766.118(2).)

McCall’s rationale raises serious doubts about the constitutionality of the $250,000 cap in California.

Because the district court applied the $1 million limit, plaintiffs appealed to the Eleventh Circuit, which sent the case to the Florida Supreme Court.

The Equal Protection Violation

McCall held that the $1 million cap on wrongful death noneconomic damages violated the right to equal protection guaranteed by the Florida Constitution: “All natural persons, female and male alike, are equal before the law.” (Fla. Const., art. I, § 2.)
McCall applied the “rational basis” test, which requires a statute to bear a “rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed.” (Id. at *4.) McCall held the cap lacked a rational basis because it “imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants do not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the statutory cap on wrongful death noneconomic damages does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.” (Id. at *4.)

“Invidious Discrimination” Against Multiple Claimants

Florida’s cap (like California’s cap) imposed an aggregate cap on damages without regard to the number of claimants entitled to recovery. McCall held that this aggregate cap created “invidious discrimination” against multiple claimants, such as the McCall heirs. (Id. at *5.) Specifically, “[t]he damages suffered by Ms. McCall’s parents were determined to be $750,000 each, and Ms. McCall’s surviving son sustained damages determined to be $500,000. Applying the cap, the federal court then reduced the amounts of damages so each claimant would receive only half of his or her respective damages. Yet, if Ms. McCall had been survived only by her son, he would have recovered the full amount of his noneconomic damages: $500,000. Here, the cap ... limited the recovery of a surviving child (and surviving parents) simply because others also suffered losses. In a larger context, under section 766.118, the greater the number of survivors and the more devastating their losses are, the less likely they are to be fully compensated for those losses.” (Ibid. at *5.)

Discrimination Against the Most Severely Injured

In addition, McCall held that Florida’s cap (like California’s cap) discriminates against the most severely injured plaintiffs. McCall cited the Illinois Supreme Court’s rejection of a $500,000 cap because that cap allowed plaintiffs awarded $100,000 to receive all of their compensation, whereas for a severely injured plaintiff the statutory cap “arbitrarily and automatically reduces the jury’s award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair.” (Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1075 (Ill.1997).) Accordingly, Best ruled that the Illinois statute discriminated “between slightly and severely injured plaintiffs, and also between tortfeasors who cause severe and moderate or minor injuries.” (Ibid., cited in McCall at *6.)

Similarly, the Supreme Court of New Hampshire condemned on equal protection grounds a $250,000 cap on noneconomic damages in medical malpractice cases. The New Hampshire court ruled it is “simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.” (Carson v. Maurer, 424 A.2d 825, 837 (N.H.1980), overruled on other grounds, Cnty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 721 (N.H.2007), cited in McCall at *6.)

McCall ruled that Florida’s cap “sav[ed] 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. Under the Equal Protection Clause of the Florida Constitution ... we hold that to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it ‘offends the fundamental notion of equal justice under the law.’” (Id. at *6, citation omitted.)

McCall rejected the argument that, because wrongful death suits were not available at common law but were creatures of statute, the Legislature could impose a discriminatory cap on noneconomic damages. McCall noted this important distinction: “[T]he statute under review here does not address and expand a class of individuals eligible to recover noneconomic wrongful death damages. Instead, it treats similarly situated, eligible survivors differently by reducing the damages awarded without regard to the fault of the wrongdoer and based solely upon a completely arbitrary factor, i.e., how many survivors are entitled to recovery. The greater the number of survivors who are eligible to recover noneconomic damages in a medical malpractice wrongful death action, the lesser the award that each individual survivor will receive.” (Id. at *8.)

The Cap Failed to Reduce Insurance Premiums

McCall tested the claimed justifications for the cap against real-world conditions when the cap was enacted and later, when the court conducted its review. McCall held that, in light of real-world conditions, the statutory cap “bears no rational relationship to a legitimate state objective, thereby failing the rational basis test.” (Id. at *9.)

McCall ruled the cap lacked a rational basis because (1) the damages cap failed to require that the savings created by the cap be passed on to health care providers in the form of reduced insurance premiums,
and (2) no evidence showed that the damages cap had, in fact, reduced insurance premiums. These two deficiencies are true also of California’s cap.

In searching for evidence of a rational basis, McCall noted that “[r]eports have failed to establish a direct correlation between damages caps and reduced malpractice premiums.” (Id. at *13.) McCall cited a nationwide study showing that malpractice premiums rose faster in states with caps than in states without caps. Specifically, from 1991 to 2002, “the median medical malpractice premiums paid by physicians in three high-risk specialties – internal medicine, general surgery, and obstetrics/gynecology – rose by 48.2 percent in states that have damages caps, but in states without caps, the median annual premium increased at a slower rate – by 35.9 percent.” (Id. at *13, citing Martin D. Weiss et al., Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage, at 7–8 (rev. ed. June 3, 2003), available at http://www.weissratings.com/pdf/malpractice.pdf.) Moreover, this study showed that a lower percentage of states with caps had static or declining malpractice premiums than states without caps: “[A]mong states with caps on damages, only 10.5 percent (two of nineteen states with caps) experienced static or declining medical malpractice premium rates following the imposition of caps. In contrast, among states without damages caps, 18.7 percent (six of thirtytwo states without caps) experienced static or declining medical malpractice premiums.” (Ibid., footnote omitted.)

Based on this evidence, McCall concluded “that the record and available data fail to establish a legitimate relationship between the cap on wrongful death noneconomic damages and the lowering of medical malpractice insurance premiums. Accordingly, we hold that section 766.118 fails the rational basis test and violates the Equal Protection Clause of the Florida Constitution.” (Id. at *16, emphasis added.)

Under Current Conditions, the Cap Has No Rational Basis

An independent ground for the Florida cap’s unconstitutionality was the lack of a rational basis in light of current conditions in health care and in the medical malpractice insurance industry.

McCall’s search for a rational basis in light of current conditions sets an example for California courts asked to resolve constitutional challenges to California’s cap in light of current conditions. Specifically, constitutional challenges based on current conditions render inapposite Fein v. Permanente Medical Group (1985) 38 Cal.3d 137. Fein’s rejection of the equal protection challenge rested solely on the Legislature’s finding that in 1975, when the damages cap was enacted, “skyrocketing” insurance rates had created a crisis in healthcare. Nothing in Fein foreclosed a showing today that current conditions do not reflect “skyrocketing” insurance rates, there exists no insurance-based crisis in healthcare, health care providers are now protected by the Insurance Commissioner’s regulation of insurance rates, insurers are profitable and so do not need dramatic increases in insurance rates, and inflation has eroded the $250,000 value of the cap to $58,857 – less than 25% of the 1975 limit.

As McCall noted, “[c]onditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation. The United States Supreme Court has recognized that ‘[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.’” (Id. at *18, citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48, 44 S.Ct. 405, 68 L.Ed. 841 (1924).) McCall thus reasoned: “[E]ven if section 766.118 may have been rational when it was enacted based on information that was available at the time, it will no longer be rational where the factual premise upon which the statute was based has changed. It is for this reason that Florida courts consider both pre and postenactment data in assessing the continued rationality of a statute.” (Id. at *16.)

McCall noted that Florida’s medical malpractice insurers are profitable (as they are in California). McCall cited a 2013 report by the Florida Office of Insurance Regulation showing that “the Florida medical malpractice line of business standing alone generated a direct (before reinsurance) return on surplus of 14.0% in 2012, compared to a nationwide net return on surplus for Florida’s leading medical malpractice writers of 5.3%.... This represents the ninth consecutive year of profitability.” (Id. at *17-18.) Similar evidence exists of the profitability of California’s medical malpractice insurers.

In addition, McCall cited current data showing (1) the number of medical malpractice insurers in Florida had increased and (2) that from 2003 to 2010 the profits of four medical malpractice insurers in Florida had increased over 4300 percent.

“With such impressive net income estimates, the insurance industry should pass savings on to Florida physicians in the form of reduced malpractice insurance premiums, and it should no longer be necessary to continue punishing those most seriously injured by medical negligence by limiting their noneconomic recovery to a fixed, arbitrary amount.” (Id. at *18 footnote omitted.)

From 2003 to 2010 the profits of four medical malpractice insurers in Florida had increased over 4300%.

McCall also noted the lack of any risk that rising insurance premiums would drive out doctors. Specifically, current data showed that Florida’s current level of practicing physicians was above the national average. McCall said: “Having evaluated current data, we conclude that no rational basis exists to justify continued application of the noneconomic damages cap of section 766.118. The 2011 State Physician Workforce Data Book prepared by the Association of American Medical Colleges (AAMC) reflects that in 2010, there were 254.8 active physicians for every 100,000 people in Florida, a number higher than twentyeight other states. (AAMC, 2011 State Physician Workforce Data Book, at 9 (Nov.2011), available at https://www.aamc.org/download/263512/data/statedata2011.pdf.) Further, data collected through December 31, 2010, reflects...
that 59.4 percent of active physicians who completed medical school in Florida are practicing in Florida. [Citation.] Only three other states retained a higher percentage of medical students.” (Id. at *17, emphasis added.)

From this analysis of current conditions, McCall concluded that the damages cap even if justified when enacted, no longer had a rational basis: “[E]ven if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. No rational basis currently exists (if it ever existed) between the cap imposed by section 766.118 and any legitimate state purpose. [Citation.] At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members.... Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications. Accordingly, and for each of these reasons, the cap on wrongful death noneconomic damages in medical malpractice actions does not pass constitutional muster.” (Id. at *18, emphasis added.)

In sum, as McCall shows, when California courts determine whether current conditions offer a “rational basis” for the $250,000 cap on noneconomic damages, California courts will necessarily rule that the cap no longer has a rational basis. Those current conditions include the Insurance Commissioner’s regulation of malpractice insurance rates under Proposition 103, insurer profitability, the absence of any threat to healthcare from rising insurance premiums, and the eroding effect of inflation since 1975. In light of these undisputed conditions, California’s $250,000 cap on noneconomic damages in medical malpractice cases appears to have no rational basis.1

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1 In the sole published appellate decision where evidence of current conditions was presented to establish the cap’s unconstitutional denial of equal protection, the trial court and the appellate court failed to examine current conditions. Instead, they upheld the cap by simply ignoring that evidence – as the dissent noted. Stinnett v. Tam (2011) 198 Cal.App.4th 1412, 1434 (concurring and dissenting opinion of Dawson, J). California Supreme Court justices Werdegar and Liu voted to grant review. Id. at 1436.