Challenging the Constitutionality of Caps Today

By Robert S. Peck

News stories across the country trumpet states trying to follow California’s ground-breaking path and enact new restrictions on civil justice, most prominently caps on damages. Wisconsin was the first out of the gate this year, as the state’s new governor, Scott Walker, packaged and pushed through an omnibus “tort reform” package. Legislatures in North Carolina, Oklahoma, and Tennessee are moving bills to cap damages. Florida and Texas have returned to the well again, seeking to add new draconian proposals that undermine accountability for wrongdoers to those already enacted. Even New York Governor Andrew Cuomo caught the bug and proposed a MICRA-like medical malpractice cap, but had to back down in the face of legislative opposition. In each of these states, it matters little that nearly a half century of “tort reform” has proven to be of little value in curing the myriad ills that are often posited in justification for its deprivations.

Yet, even as new caps proliferate, what is being overlooked is the growing consensus that these laws cannot pass constitutional muster. One interested party has not missed that development. An April 2011 article published by the American Medical Association put its members on high alert: “Caps under Fire: At least seven states face court battles that could impact medical liability damages caps.” The article identified me as the architect of these constitutional challenges, relying on the fact that the Center for Constitutional Litigation, my law firm, is involved in most of the challenges identified and has won more of these cases across the country than any other law firm.

Like the enactment of damage caps themselves, the results in constitutional challenges have followed a cyclical timetable. Early on, deference to legislative prerogative in the face of an alleged crisis led a number of courts, like California’s Supreme Court, to give short shrift to the constitutional arguments, which were often poorly framed and limited in scope. Slowly, however, more sophisticated arguments and a growing awareness of the pretextual nature of the claimed benefits of tort reform began to turn the tide. Thus, Wyoming’s Supreme Court observed that its tort reform measure, offers no explanation as to why the legislature’s sole response to the insurance “crisis” was to attempt to change commonly recognized procedures and principles related to causes of action in tort. The act is silent as to other conceivable causes of the “crisis” such as poor management, bad underwriting, and bad investments by the insurance industry. Likewise, the act is silent as to other conceivable approaches to solving the alleged crisis such as regulation of the insurance industry. Apparently, tort reform was the only avenue explored by the legislature in its efforts to solve the “crisis.”

Today, more and more courts are recognizing a “past crisis does not forever render a law valid.” (Ferdon ex rel. Petru- celli v. Wisconsin Patients Compensation Fund (Wis. 2005) 701 N.W.2d 440, 468 [striking that state’s noneconomic damage cap].) Giving hope to new MICRA challenges, California has long expressed a similar view: “a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered.” (Brown v. Merlo (1973) 8 Cal.3d 855, 869-70.)

It may seem odd that courts have taken a renewed interest in the constitutionality of restrictions on tort liability at the same time that a record number of state legislatures and the U.S. Congress are considering severe limitations on medical malpractice and other civil damages. While cases challenging caps have been a staple of court dockets for nearly two decades, it appears that the gestation period for a number these challenges has passed, and they have arrived at the doorsteps of various state high courts, raising issues no longer avoidable.
Five of the latest crop of challenges, though launched some years ago, saw final disposition in 2010. Three cases in which our firm was involved, took a targeted and customized approach focused on that state’s unique jurisprudence and achieved favorable results. Two cases involving both more problematic fact patterns and less focused arguments resulted in defeat.

**Illinois Strikes Cap as Separation of Powers Violation**

The first of the new decisions, *Lebron v. Gottlieb Memorial Hospital* (Ill. 2010) 930 N.E.2d 895, was handed down by the Illinois Supreme Court in February of last year and concluded that that state’s noneconomic damages cap in medical malpractice cases violated separation of powers. *Lebron* involved malpractice in delivering a baby, resulting in lifelong cognitive and physical deficits for the child.

It was the third time the Illinois court had struck that state’s caps. In *Wright v. Central Du Page Hospital Ass’n* (1976) 347 N.E.2d 736, the court held that an earlier cap violated the Illinois Constitution’s prohibition on special legislation, a form of legislation that favors certain groups when no rationale supports providing special treatment different from that accorded the general population.

Thus, the U.S. Supreme Court has unanimously held that “the jury are judges of the damages.”

After a new cap was enacted, the court returned to the subject in *Best v. Taylor Machine Works, Inc.* (1997) 689 N.E.2d 1057, where it found that the cap still violated special legislation but also constituted a separation of powers violation. It reasoned that the “power of the court to order a remittitur or, if the plaintiff does not consent, a new trial is essential to the judicial management of trials.” The cap usurped that essential authority and undercut the “power, and obligation, of the judiciary to limit excessive awards of damages.” The cap thus substituted the legislature’s damage determination for the trial judge’s decision on whether any remittitur was merited by the evidence and, if so, what reduced amount should be suggested as a means to avoid a new trial. Moreover, the cap negated the trial judge’s obligation to ensure that a verdict conforms to the evidence. The court concluded the cap comprised an unconstitutional “legislative remittitur.”

When the Illinois General Assembly passed yet another cap in 2005, a challenge was quickly mounted, armed with the favorable precedents in *Wright* and *Best*. As counsel in *Lebron*, I was aware that the legislature had attempted to shore up the arguments supporting the cap with findings that made the special-legislation objection more difficult to prove, given the presumption of constitutionality that accompanies all legislative enactments. As a result, we pursued a successful strategy of emphasizing the separation of powers violation as the first count in our declaratory judgment action.

After winning on those grounds at the trial level, the case moved to the state supreme court. There, the court ringingly declared that the new cap’s “encroachment upon the inherent power of the judiciary is the same ... as it was in *Best*.” Under the cap, the court noted, a “court is required to override the jury’s deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff’s consent.”

**Georgia Holds Caps Violate Jury-Trial Right**

A month after the *Lebron* decision, Georgia’s Supreme Court, in a case of first impression in that state, unanimously ruled that noneconomic damage caps violate Georgia’s “inviolate” right to trial by jury. In *Atlantic Oculoplastic Surgery, P.C. v. Nestlehutt* (2010) 691 S.E.2d 218, the court declared that “[b]y requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, [the cap] clearly nullifies the jury’s findings of fact regarding damages and thereby undermines the jury’s
basic function.” The jury trial argument was front and center in our brief because of Georgia’s strong tradition of reading that right strictly.

To reach that result here, the court had to reject a frequent argument made by cap proponents. Though the Georgia court agreed with the cap’s defenders that the Legislature has authority to change the common law, it emphatically stated this general authority did not “empower the Legislature to abrogate constitutional rights that may inhere in common law causes of action.”

Missouri Holds Lowered Caps Cannot Be Applied Retroactively

In *Adams v. Children’s Mercy Hosp.* (Mo. 1992) 832 S.W.2d 898, the Missouri Supreme Court upheld the constitutionality of a $350,000 noneconomic damage cap indexed for inflation. In 2005, the Missouri General Assembly returned the cap to $350,000 after it had grown to account for inflation. In *Klotz v. St. Anthony’s Med. Cntr.* (Mo. 2010) 311 S.W.3d 752, the Supreme Court determined that the new cap could not constitutionally be applied retroactively to a cause of action that accrued before its effective date, following the primary argument we put forth. Because the inflated cap resulted in no reduction of the verdict, the court did not reach the constitutionality of caps generally.

Nonetheless, in an encouraging sign for a future challenge, two of the five justices concurred in the result and would have reached the broader constitutional question. Writing for the dissenters, Justice Michael Wolfe wrote that *Adams* “arose from the flawed view, then prevalent, that the right to trial by jury could be modified or abolished legislatively in particular cases.” Instead, he urged that the court “should overrule *Adams* to restore the right to trial by jury to its traditional and vital place in our constitutional system” and hold all caps unconstitutional.

### Two States Uphold Caps

Two constitutional challenges chose a different approach than our firm uses, one that might be characterized as a blunderbuss approach that sprayed generalized constitutional arguments at the caps, hoping something would stick. Predictably, both
failed. In Chastain v. Ahmed Health Found. (S.C. 2010) 694 S.E.2d 541 (per curiam), a three-page opinion rejected arguments that South Carolina’s $300,000 cap applicable to charitable organizations violated equal protection, trial by jury, the right to a speedy remedy, or the constitutional requirement of separation of powers. The court relied on stare decisis for its conclusion, noting that the plaintiffs gave no reason the prior precedents should be questioned.

A similar decision, relying on stare decisis, was reached by the Maryland Court of Appeals, that state’s highest court, in a wrongful-death case. Because the cause of action for wrongful death did not exist at common law but only by virtue of legislative enactment, arguments against caps have a more uphill climb than those in which the jury’s authority is plenary. In DRD Pool Service, Inc. v. Freed (Md. 2010) 5 A.3d 45, the court rejected an equal-protection objection utilizing a rational-basis analysis. Likewise, the court held that the cap “does not interfere with the underlying right to a trial by jury because plaintiffs will still have a jury determine the facts and assess liability.” The court ignored the fact that the jury’s determination of the facts, which includes the amount of damages suffered, was not given its plain meaning and import when noneconomic damages are lowered to a one-size-fits-all amount.

Cases Currently under Advisement

A series of cases are awaiting decisions from state high courts as this article goes to press. One provides an opportunity for a state supreme court to revisit a previous decision that upheld the cap. In Sansel v. Wheeler Transport Serv., Inc. (1990) 789 P.2d 541, the Kansas Supreme Court held that the state’s cap on noneconomic damages for all tort actions did not violate the jury-trial or due course of law rights under the state constitution. In reaching its conclusion on the jury-trial right, the court relied on a number of federal precedents that are difficult to reconcile with more recent U.S. Supreme Court decisions. That disconnect provided the basis primary argument we made to the Kansas Supreme Court.

The new challenge involves the removal of the wrong ovary from a young woman,

In 2009, following up on the organizing and other activities of the past years, CAOC implemented a new project to identify and coordinate medical malpractice cases that may be appropriate for a state legal challenge. Spearheaded by respected national constitutional lawyer Bob Peck (Center for Constitutional Litigation) and CAOC Past-President Bruce Brusavich, we actively sought, and are continuing to seek, cases to pursue.

There are two cases currently proceeding with MICRA challenges. Stinnett v. Tam (5th District Court of Appeal) involves a medical malpractice plaintiff whose $6-million non-economic damage award was reduced to $250,000 per MICRA. Plaintiffs argue that MICRA is unconstitutional on the grounds there is no longer a “rational basis” for the MICRA cap and that it denies severely injured plaintiffs equal protection under the law. Stinnett has been fully briefed and a decision is pending in the Fifth District Court of Appeal. You may view the CAOC and coalition amicus briefs on the CAOC website: www.caoc.com/MICRAchallenge.

The second case is Fisher v. Eisenhower Medical Center, pending trial before the Superior Court of Riverside. Penny Fisher, a healthy and vibrant 30-year-old mom and triathlete was misdiagnosed for Group Strep A, resulting in her losing one leg to amputation and losing digits on both hands. Fisher, however, appeared headed to settlement as the deadline for the FORUM approached.

CASES

We need your help in finding cases appropriate for a challenge. Importantly, your client’s case will not be adversely impacted by participation and your client can still settle or proceed as you best advise. Your client could be a potential beneficiary should the claim be successful.

We need medical malpractice plaintiffs who fit ALL of the following criteria:

- Children, women and the elderly are preferred, but we can accept others;
- Plaintiffs with no income or whose expected earnings are unknown or comparatively small, for example, children, low wage earners or retirees.
- Eligible cases can be either pending or yet to be filed. Cases with arbitration clauses are ineligible.
- There is no cost to you or your client;
- Your client’s case will not be impacted by participation; your client can still settle or proceed as you best advise;
- Your client could be a potential beneficiary should the claim be successful;
- If your client agrees and you believe it does not harm the underlying claim, your client may be asked to participate in press activities.

We have available for you and your client a disclosure and agreement form detailing your client’s responsibilities.

FUNDING

As you know, court cases take resources and we need to raise money for this effort in fighting MICRA in the California courts. A contribution form to help us in our efforts is available on the adjacent page, at www.caoc.com/MICRAchallenge or you can contact me at nancyp@caoc.org. The CAOC Board has donated $5000 to jumpstart the funding. The Board has made a commitment to use the money donated to the MICRA challenge fund exclusively for costs dealing with litigation and expert witnesses. No other expenses will be funded through this account. We are not raising funds for Bob Peck or the Center for Constitutional Litigation; we are only raising funds to assist in the litigation and expert fee costs. It is time to contest MICRA through the court system in California and we can only do it with your support. With Bob’s expertise, we will be able to make instrumental changes to the MICRA caps through the court system.

CAOC’s commitment to changing this outdated, unfair law remains a top priority. This is a crucial project. We can only do it with your help.

www.caoc.com/MICRAchallenge
resulting in the loss of both ovaries and the onset of menopause at age 28. In Miller v. Johnson, No. 99,818 (argued Feb. 18, 2011), the court heard an unprecedented three hours of argument that both emphasized the jury-trial right, as well as other arguments that were designed to cause the court to return to the jury-trial argument as the best possible way to determine the result. For example, Amy Miller’s wrongful loss of an ovary was argued to be a taking of her property without just compensation, compensation that is recognized as noneconomic in nature. After all, the Constitution’s framers understood property as John Locke had. In his Second Treatise on Government, Locke wrote that property included that “which men have in their persons as well as goods.” Because the cap reduced the value of that property arbitrarily and below what a jury determined as just compensation, just compensation was still owed, the argument went. The jury’s involvement in determining just compensation makes it difficult to avoid the more straightforward jury-trial right argument. A decision in the case is pending.

The jury-trial argument was prominent as well when I argued before the Hawaii Supreme Court in Ray v. Kapiolani Med. Serv., No. 29988 (argued Oct. 21, 2010), a case involving catastrophic physical injuries to a 14-year-old girl from unwarranted and extreme steroid pulsing used to treat her lupus. Hawaii follows federal precedents on the jury-trial right. As judges of the facts, the jury's assessment of damages due for a tort victim’s pain and suffering is a binding factual determination. (St. Louis, I.M. & S. R.Y. Co. v. Craft (1915) 237 U.S. 648, 661, cited with approval in Cooper Indus., Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424, 437 [pain and suffering damages “involves only a question of fact”].) Thus, the U.S. Supreme Court has unanimously held that “the jury are judges of the damages.” (Feltner v. Columbia Pictures Television, Inc. (1998) 523 U.S. 340, 353, quoting Lord Townsend v. Hughes (C.P. 1677) 86 Eng. Rep. 994, 994-45.) A decision in the case is pending.

I took an entirely different tack arguing before the West Virginia Supreme Court of Appeals in MacDonald v. City Hospital, Inc., No. 35543 (argued Mar. 8, 2011). Twice before that court had upheld its $1 million cap on noneconomic damages. Emboldened by those holdings, the legislature reduced the cap to $250,000 per occurrence, but allowed $500,000 in cases of certain permanent injuries. MacDonald involved a treatment for pneumonia that resulted in severe myopathy because of the interaction of the prescribed drugs with other medication, an entirely foreseeable result. Mr. MacDonald’s jury verdict for $1 million in pain and suffering was reduced to the higher cap of $500,000, and Mrs. MacDonald’s loss of consortium verdict of $500,000 was entirely eviscerated. Nothing in the court’s recent precedents or composition gave anyone much confidence that the cap would be overturned this time. However, by emphasizing the nullification of Mrs. MacDonald’s proven claim, when another similarly situated spouse, whose partner had a less severe injury would still recover, an equal protection argument was made out. Moreover, in upholding the prior $1 million cap, the court had stated that a reduction “to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice,” in violation of the state constitution’s equal protection and “certain remedy” provisions. This unconstitutional threshold, I argued, had been met. The case is pending.

Finally, the Mississippi Supreme Court is likely to hear oral argument this summer in Learmonth v. Sears Roebuck & Co., No. 2011-FC-00143-SCT, on certified questions from the Fifth Circuit concerning the state’s general noneconomic damage cap. Because of Mississippi’s strong separation of powers jurisprudence, the briefs are heavily focused on that ground.

In addition to these state cases, others challenges are pending. For example, the Eleventh Circuit has been asked to issue certified questions on the constitutionality of Florida’s cap to its supreme court. Estate of McCall v. United States, No. 09-16375-J (11th Cir., argued Jan. 8, 2011). In McCall, an equal protection argument has provided the fulcrum of our argument in a case in which a young mother bled to death unnoticed before the hospital staff attending her. Because the cap operates to split noneconomic damages between all eligible claimants, it discriminates against...
larger families because the larger the pool of claimants, the smaller the recovery. In Watson v. Harrison County Med. Cntr., No. 2-08-CV-81 (E.D. Tex., argued Mar. 11, 2010), a federal constitutional challenge seeks to overcome an amendment of the Texas Constitution that authorizes damage caps by asking the federal courts to “incorporate” the Seventh Amendment’s jury-trial right as applicable to the states, just as the U.S. Supreme Court recently did with the Second Amendment’s right to bear arms.

MICRA Being Challenged

The arguments and trends developing in cap challenges provide hope that MICRA is not immune from a renewed constitutional challenge. Several existing cases working their way through the courts provide vehicles for that challenge. MICRA was enacted to address a “major health care crisis” in 1975. Its constitutionality was upheld in Fein v. Permanente Med. Group (Cal. 1985) 38 Cal.3d 137, where it was challenged solely on equal-protection and due-process grounds, the weakest constitutional objections that could be mustered. Subsequently, a court of appeal decision in a wrongful-death case, Yates v. Pollock (1987) 194 Cal. App.3d 195, rejected the right to a jury trial, yet that constitutional ground is usually unavailable in wrongful death cases, making the decision, which lacked any analysis, of questionable precedential value. As for wrongful death, California’s courts have recognized that “[b]ecause it is a creature of statute, the cause of action for wrongful death ‘exists only so far and in favor of such person as the legislative power may declare.’” (Canavin v. Pacific Southwest Airlines (1983) 148 Cal.App.3d 512, 529.)

Nonetheless, the jury-trial right provides a powerful argument against the cap. California’s Constitution guarantees an inviolate right to a jury trial and only authorizes the General Assembly to prescribe how it might be waived and when it shall consist of 8 or less persons. The Legislature has no other dominion over it. The right is a “protection to parties relying on the verdict.” (Jehl v. Southern Pacific Co. (1967) 66 Cal.2d 821, 830.) Even American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, which upheld the validity of the MICRA statute’s periodic-payment provision, acknowledged that the jury is the ultimate decisionmaker on total damages.

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Yet, it is realistic to note that it takes a court with a steely backbone to apply constitutional prohibitions strictly and overcome a general tendency to defer to legislative judgments. Even then, as the multiple attempts to enact caps and the multiple successful challenges in Illinois demonstrates, it is an issue that requires eternal vigilance.