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# WHERE DO WE GO FROM HERE? THE FUTURE OF CAPS ON NONECONOMIC MEDICAL MALPRACTICE DAMAGES IN GEORGIA

**Laurin Elizabeth Nutt***

## INTRODUCTION

"We have taken a step back. Our rates will be more expensive and less accessible."[1] These were the words of Chairman of the Georgia Senate Judiciary Committee, Preston Smith, on the day a unanimous Georgia Supreme Court struck down Georgia Code section 51-13-1, finding it unconstitutional.[2] The statute limited noneconomic damages, including physical and emotional pain, in medical malpractice lawsuits to $350,000.[3] The decision leaves Georgia susceptible to the risks associated with allowing unlimited noneconomic damage awards such as a decrease in the availability of physicians, especially for the poor and people living in rural areas, and delayed or denied health care.[4] In *Atlanta Oculoplastic Surgery,*

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1. Bill Rankin, *State High Court Overturns State's Tort Reform*, ATLANTA J.-CONST., Mar. 23, 2010, at A1.

2. *See id.* (stating medical malpractice liability insurance rates will go up because the court struck down the noneconomic damages cap statute for violating Georgia's constitutional right to a jury trial for medical malpractice claims).

3. GA. CODE ANN. § 51-13-1 (2005), *declared unconstitutional by* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010). The Georgia Supreme Court found Georgia Code section 51-13-1 unconstitutional in violation of the right to trial by jury set out in Georgia's constitution because it takes away the jury's ability to assign damages. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010). The figure of $350,000 was set after a study of the Maryland General Assembly found many non-frivolous, non-economic damage recoveries do not surpass this amount. Murphy v. Edmonds, 601 A.2d 102, 115–16 (Md. 1992).

4. *See, e.g.*, Alyson M. Palmer, *Court Kills Caps on Med-Mal Awards*, FULTON CNTY. DAILY REP., Mar. 23, 2010 (quoting Medical Association of Georgia president, Gary C. Richter, who said, "this decision is a loss for patients concerned about physician availability"); Gov. Rick Perry, *Tort Reform Must Be Part of Health Care Reform*, WASH. EXAMINER (Aug. 12, 2009, 11:00 PM), http://washingtonexaminer.com/op-eds/2009/08/gov-rick-perry-tort-reform-must-be-part-health-care-reform ("Sixty percent of [Texas] counties had no pediatricians, which often meant delayed, or denied health care for sick children," due to frivolous lawsuits and cost of medical malpractice insurance); Roger A. Rosenblatt et al., *Tort Reform and the Obstetric Access Crisis—The Case of the WAMI States*, 154 W. J. MED. 693, 693 (1991) (stating changes in practice patterns due to medical malpractice

*P.C. v. Nestlehutt*,[5] the Georgia Supreme Court ruled the damage cap imposed by section 51-13-1 violated the right to a jury trial found in the Georgia constitution, which states, "The right to trial by jury shall remain inviolate."[6]

Described as the "cornerstone" of Georgia's 2005 tort reform law[7] and "the most controversial part of Senate Bill 3,"[8] the provision for caps on noneconomic damages became the focus of legal debate in Georgia.[9] The states are split on whether these caps are unconstitutional. At least eleven states have ruled the statutes unconstitutional for various reasons, such as violation of the right to a jury trial or separation of powers, while over a dozen states have upheld the caps.[10] Interestingly, no federal caps have been enacted and Congress declined to include a damage cap provision in the recently passed Health Care Bill.[11]

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severely affect poor women and women living in rural areas where providers have limited scope of obstetric practice).

5. *Nestlehutt*, 691 S.E.2d 218.

6. GA. CONST. art. I, § I, para. XI(a); *Nestlehutt*, 691 S.E.2d at 221. The court determined article I, section I, paragraph XI(a) of the Georgia constitution encompassed medical malpractice lawsuits because prior to adoption of the constitution in 1798, the state recognized medical negligence claims since there was a common law right to jury trial for claims involving medical malpractice that included damages determined by the jury. *Nestlehutt*, 691 S.E.2d at 223. The court further stated that the right to determine the amount of damages awarded is included in the right to a jury trial and requiring a court to reduce those damages undermines the jury's basic function. *Id.* (citing Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999)).

7. Rankin, *supra* note 1.

8. Palmer, *supra* note 4.

9. *Georgia High Court Says Damages Caps Violate Right to Jury Trial:* Atlanta Oculoplastic Surgery v. Nestlehutt, 17 No. 12 Westlaw J. Health L. 7 (2010) [hereinafter Westlaw J. Health L.] (stating at least thirty other states have caps on non-economic damages with similar judicial reviews). *See generally* ADVOCACY RES. CTR., AM. MED. ASS'N, CAPS ON DAMAGES (2011), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/378/capsdamages.pdf (giving an extensive table of all of the states that have passed damage caps and judicially reviewed them through 2011).

10. *See, e.g.*, *Nestlehutt*, 691 S.E.2d at 223 (finding cap on noneconomic damages violates the Georgia constitutional right to trial by jury); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 914 (Ill. 2010) (holding that a limit on noneconomic damages in medical malpractice lawsuits violates the separation of powers clause in the Illinois constitution); Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 529 (Va. 1989) (finding once the jury has assessed damages, Virginia's constitutional right to a jury trial is satisfied and a court can then apply law to the facts); Westlaw J. Health L., *supra* note 9. *See generally* DIV. OF HEALTH LAW, AM. MED. ASS'N, CONSTITUTIONAL CHALLENGES TO STATE CAPS ON NON-ECONOMIC DAMAGES (2012), *available at* http://www.ama-assn.org/resources/doc/arc/arc-constitutional-challenges-jan-2012.pdf.

11. Westlaw J. Health L., *supra* note 9 (stating a tort reform provision was left out of the Health Care Bill); Kevin Sack, *Illinois Court Overturns Malpractice Statute*, N.Y. TIMES, Feb. 5, 2010, at A13 (stating neither the House Bill nor the Senate Health Care bill included significant changes in the

Reaction to the Georgia Supreme Court's ruling has been mixed.[12] For example, R. Adam Malone, attorney for the plaintiff in *Nestlehutt*, applauded the ruling for upholding the democratic values of this country that allow the people to self-govern through acting as jurors.[13] Proponents of damage caps, including physicians and insurance groups, such as the Medical Association of Georgia, report that one thousand physicians have moved into Georgia since Senate Bill 3 passed and that insurance costs are down by eighteen percent.[14] Opponents to the bill say that caps will not lower insurance premiums, that they fail to hold people accountable for actions, and that they deny proper access to courts. Opponents further contend that there are very few excessive jury verdicts.[15]

This Note has two primary purposes. The first is to examine the need for tort reform legislation in the United States in order to reduce health care costs for patients, doctors, and insurers, and to foster competition and availability of health care providers in all areas of the country. The second purpose is to examine actions available to the Georgia legislature by (1) examining how noneconomic damage

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medical malpractice field of legislation as it has generally been a question for the states).

12. *See* Palmer, *supra* note 4.

13. Palmer, *supra* note 4. Plaintiff's lawyers in general have applauded rulings striking down caps on noneconomic damages. For example, after Illinois struck down a similar statute, the Illinois Trial Lawyers Associations said, "the health-care crisis can not [*sic*] be solved by further hurting the patients who are victims of medical errors." Nathan Koppel, *Illinois Supreme Court Tosses Malpractice Award Curbs*, WALL ST. J. (Feb. 4, 2010, 7:13 PM), http://online.wsj.com/article/SB10001424052748703357104575045624066646704.html. Additionally, opponents to caps on noneconomic damages believe the damages do not adequately deter wrongful conduct, that jury awards are not excessive, and that damage caps will not actually reduce medical malpractice insurance costs. F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 494–95 (2006) (discussing pros and cons of caps on noneconomic damage).

14. Palmer, *supra* note 4 (citing to statistics provided by MAG Mutual Insurance Co. that state, "medical liability insurance costs are down 18 percent" since 2005 and a study performed by the Carl Vinson Institute of Government at the University of Georgia that states there are "about 1,000 more physicians in Georgia since the tort reform law passed in 2005").

15. Hannah Yi Crockett et al., Note, *Torts and Civil Practice*, 22 GA. ST. U. L. REV. 221, 232–33 (2005) (citing to several senators who opposed the bill during the senate floor debate). Then Senator Kasim Reed of the 35th district said that tort reform fails to reduce insurance premiums, citing the effects of reforms in California as an example. *Id.* However, in California, medical malpractice liability insurance premiums have increased at a much lower rate than national rates. Jeffrey E. Piccola, *Cap Noneconomic Damages, Attorneys' Fees*, PHYSICIAN'S NEWS DIG., June 2003, *available at* http://www.physiciansnews.com/commentary/603piccola.html.

caps have survived in other states, (2) determining whether a constitutional amendment is viable, and (3) offering alternative solutions to damage caps.

Part I of this Note explores the current state of the law, the history of tort reform in the United States, and the necessity for legislation that protects doctors—especially obstetricians— insurers, and patients.[16] Part II examines the Georgia Supreme Court's ruling and its policy implications.[17] Specifically, Part II will analyze (1) why these statutes are, in fact, constitutional, (2) the problematic nature of the Georgia Supreme Court's decision and the ability of the legislature to work around its holding, and (3) other possible legislative solutions.[18] In light of this reasoning, Part III proposes that the Georgia General Assembly amend the Georgia Constitution to specifically allow the legislature to enact laws that place limits on non-economic damages in medical liability cases.[19] Alternatively, Part III proposes the General Assembly should attempt to pass into law limits on joint and several liability, loser pay rules, and new procedural rules that would make frivolous lawsuits more difficult to bring and decrease the possibility of a windfall recovery.[20] Finally, Part III recommends that all states should rally for a federal tort reform bill.[21]

## I. TORT REFORM: PAST, PRESENT, AND FUTURE

### *A. History of Tort Reform in the United States and Georgia*

Tort reform and caps on noneconomic damages have been the subject of debate since the 1970s due to what was deemed a "medical malpractice crisis."[22] In the 1970s, legislatures began to narrow

16. *See* discussion *infra* Part I.
17. *See* discussion *infra* Part II.
18. *See* discussion *infra* Parts II.B–D
19. *See* discussion *infra* Part III.A.
20. *See* discussion *infra* Part III.B.
21. *See* discussion *infra* Part III.C.
22. Rosenblatt et al., *supra* note 4, at 693 (reporting that beginning in the '70s and '80s legislative responses included regulating the insurance and medical industries and reforming the judicial tort system).

statutes of limitation in an effort to make malpractice insurance more affordable by reducing the number and size of lawsuits brought against physicians.[23] California was the first state to enact a damage cap provision in 1975 and has since seen success in reduction of medical liability premiums compared to the nation overall and to those states that have not enacted damage caps.[24] More recently, states have been struggling with the constitutionality of the caps.[25]

Georgia's first attempt at capping noneconomic damages came with the Tort Reform Act of 2005, which also included an end to joint and several liability—a procedural rule that encourages settlement—among other procedural rules that protect medical malpractice defendants.[26] The Georgia legislature overwhelmingly supported the passage of the act.[27] The House of Representatives made several proposals to changing the bill, one of which changed the cap amount from $250,000 to $350,000 and attempted to allow greater recovery for catastrophic injury, which failed by one vote.[28] The Act has run into several constitutional challenges in the courts that have severely limited its power and undermined the legislature's reasons for enacting the safeguards.[29]

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23. *Id.* at 693. All four states the researcher investigated limited the statute of limitations for malpractice actions in the '70s and '80s. *Id.* Washington limited the time period to three years for negligence claims, Alaska limited to two years, Montana limited to three years from injury or discovery, and Idaho limited to two years after injury or one year after discovery. *Id.* at 697.

24. ADVOCACY RES. CTR., *supra* note 9. California passed the Medical Injury Compensation Reform Act of 1975 (MICRA), which capped noneconomic damages at $250,000. *Id.* California had a 167% increase in medical liability premiums in the years from 1975–2003, while the rest of the nation saw a 505% increase, and states that enacted no caps on damages, like Pennsylvania, saw a 1,400% increase in the same time period. Piccola, *supra* note 15.

25. DIV. OF HEALTH LAW, *supra* note 10 (outlining the cases and outcomes that have challenged the constitutionality of the statutes that cap noneconomic damages).

26. *See generally* Crockett et al., *supra* note 15. Section 11 of the bill added the cap on noneconomic damages to section 13 of the Georgia Code. *Id.* at 228. Additionally the legislature added a section that penalizes the parties for "rejecting a reasonable offer of judgment by requiring them to pay the opposing party's attorney's fees." *Id.* at 226. The Act also contained a provision that limited hospital liability to actions of their agents, and stipulated a plaintiff must prove "gross negligence" by "clear and convincing evidence" in emergency room settings. *Id.* at 230, 234.

27. Crockett et al., *supra* note 15. The Senate passed the bill in a vote of 39 to 15. *Id.* at 233. The House passed the bill in a vote of 136 to 34. *Id.* at 237.

28. Crockett et al., *supra* note 15, at 235. The house adopted the $350,000 cap amount without objection. *Id.*

29. *See generally* Crockett et al., *supra* note 15. The damage caps have been ruled unconstitutional due to violation of the right to trial by jury. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d

### *B. The Current State of Caps on Noneconomic Medical Malpractice Damages*

As of February 2008, thirty states have passed legislation that limits the amount of money receivable for noneconomic damages in medical malpractice cases.[30] A slight majority of states have determined the statutes do not violate their respective constitutions.[31] In states that have ruled the statutes unconstitutional, a few legislatures have responded by passing new damage cap laws.[32] For example, in 2010, Illinois struck down a statute capping noneconomic damages in medical malpractice, after striking down a cap on noneconomic damages in 1997 and a similar cap on economic and noneconomic damages in 1976.[33]

The damage caps differ widely among the states, as the amount capped can range from $250,000 for noneconomic damage to $1.75 million for caps on total damages, but Georgia's statute is fairly

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218 (Ga. 2010). Additionally, there have been constitutional challenges to the offer judgment provision of Georgia Code section 9-11-68. Merritt E. McAlister, *The Swift, Silent Sword Hiding in the (Defense) Attorney's Arsenal: The Inefficacy of Georgia's New Offer of Judgment Statutes as Procedural Tort Reform*, 40 GA. L. REV. 995, 1027 (2006).

30. ADVOCACY RES. CTR., *supra* note 9. These caps vary widely on both amount of damages allowed and the type of damages covered. For example, some states cap all damages while other states only cap noneconomic damages. *See, e.g., id*. The Georgia statute explicitly states it only covers noneconomic damages. *Id.*; GA. CODE ANN. § 51-13-1 (2005), *declared unconstitutional by Nestlehutt*, 691 S.E.2d 218.

31. ADVOCACY RES. CTR., *supra* note 9. As of publication date of this article in 2008, seventeen of the thirty states upheld the damage caps. *Id.* However, in some of the states where the caps were overturned the legislatures have enacted new laws after the old caps were found unconstitutional. *Id.* Some courts have continued to overturn the new legislation. *Id.* For example, in February 2010, Illinois struck down a cap on noneconomic damages for the third time. Sack, *supra* note 11; *see also* DIV. OF HEALTH LAW, *supra* note 10 (providing an update through October 2009, showing a majority of states upholding the statutes).

32. *See* Sack, *supra* note 11. The Illinois Supreme Court has ruled damage cap statutes unconstitutional three times. *Id.* North Dakota also enacted new caps after a previous law was struck down. ADVOCACY RES. CTR., *supra* note 9 (citing Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). In New Hampshire, a damage cap was struck down in 1980 and a second damage cap was overturned again in 1991. ADVOCACY RES. CTR., *supra* note 9 (citing Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991); Carson v. Maurer, 424 A.2d 825 (N.H. 1980)).

33. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 914 (Ill. 2010) (finding the caps violated the separation of powers clause of the Illinois constitution); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); ADVOCACY RES. CTR., *supra* note 9 (citing Wright v. Cent. DuPage Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976)). The statute overturned in 1976 was a $500,000 cap on economic and noneconomic damages, while the statutes overturned in 1997 and 2010 were both $500,000 caps on noneconomic damages. ADVOCACY RES. CTR., *supra* note 9.

similar to other states.[34] Georgia Code section 51-13-1 provided that in medical malpractice cases the total amount of noneconomic damages was limited to an amount under $350,000 even in cases of wrongful death.[35] The statute explicitly stated that the term "noneconomic damages" did not include items such as past and future medical expenses, wages, or income.[36] The term "noneconomic damages" was defined in the statute as "physical and emotional pain, discomfort, anxiety, hardship . . . loss of enjoyment of life . . . loss of consortium . . . and all other nonpecuniary losses of any kind or nature."[37]

Georgia Code section 51-13-1 was an important part of the Tort Reform Act of 2005 that addressed what the General Assembly called a medical crisis.[38] Despite this legislative intent, the Georgia Supreme Court ruled that the statute was unconstitutional in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*.[39] In *Nestlehutt*, the plaintiff sued a medical facility that employed the physician who performed a facelift that left her permanently disfigured.[40] After a mistrial, the second jury awarded the plaintiff $1,265,000, which included medical expenses plus noneconomic damages of pain and suffering in the amount of $900,000 and $250,000 for loss of consortium.[41] Georgia Code section 51-13-1 would have reduced the award for pain

34. *See* GA. CODE ANN. § 51-13-1 (2005); ADVOCACY RES. CTR., *supra* note 9. California's statute, which was the first damage cap enacted in 1975 limited noneconomic to $250,000 while Nebraska sets a cap on total damages at $1.75 million. *See* ADVOCACY RES. CTR., *supra* note 9. Unlike Georgia, some statutes adjust for inflation and do not apply in gross malpractice claims. *Id.* Most states, like Georgia, cap noneconomic damages at $250,000 to $350,000 and have fixed caps that do not have exceptions for certain injuries. *Id.*

35. GA. CODE ANN. § 51-13-1 (2005), *declared unconstitutional by Nestlehutt*, 691 S.E.2d 218.

36. *Id.*

37. *Id.*

38. Crockett et al., *supra* note 15, at 232. Representative Tom Rice said he based his support of the Tort Reform Act on "simple economics." *Id.* at 235. He said the simple economics were due to "the increase in insurance premiums, the number of insurance companies leaving the state, and the number of medical specialists and facilities leaving the state." *Id.*

39. *Nestlehutt*, 691 S.E.2d at 220.

40. *Id.* The plaintiff sued the medical facility, Atlanta Oculoplastic Surgery who employed Harvey P. Cole, M.D. the surgeon that caused Ms. Nestlhutt's disfigurement during facelift surgery in 2006. *Id.*

41. *Id.*

and suffering and loss of consortium to the statutory limit of $350,000.[42]

The trial court refused to reduce the damage amount as directed in the statute and denied the defendant's request for new trial. Subsequently, the defendant appealed the ruling.[43] The Georgia Supreme Court ultimately found the statute violated the right to a jury trial found in the Georgia Constitution and declined to consider the alternative arguments of whether it violated the separation of powers or the equal protection clause of its constitution.[44]

Georgia is far from the only state that has wrestled with this issue, as thus far twenty-nine states have faced constitutional challenges to caps on noneconomic damages.[45] The reasoning articulated by courts that have ruled statutes unconstitutional varies widely, giving the Georgia Supreme Court many lines of reasoning to strike down any new cap statutes that may come its way.[46] For example, the Illinois Supreme Court ruled such statutes unconstitutional on three separate occasions for two reasons: in 1997, the court found the statute violated the prohibition against special legislation, and in 2010 determined the newest cap violated the separation of powers doctrine in the state's constitution.[47] New Hampshire also struck down

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42. *Id.* The court was to reduce the jury's damages by $800,000 to $350,000 according to the statute. *See* GA. CODE ANN. § 51-13-1 (2005).

43. *Nestlehutt*, 691 S.E.2d at 220. The plaintiffs moved to have Georgia Code section 51-13-1 declared unconstitutional, which the trial court granted and allowed the full measure of damages to be awarded. *Id.* at 220. The trial court found not only that the statute violated the right to trial by jury but also violated the doctrines of separation of powers and equal protection. *Id.* The defendants then appealed their denied motion for a new trial, which ultimately reached the Georgia Supreme Court. *Id.* The appellants asked the Georgia Supreme Court to determine whether the statute violated the right to jury trial and whether the statute applies retroactively. *Id.* at 220–26. The Court responded affirmatively to both questions. *Id.*

44. *Nestlehutt*, 691 S.E.2d at 224. The alternative arguments are found in the Georgia constitution. The first is the separation of powers doctrine under article I, section II, paragraph III, and the second is the equal protection clause found in article I, section I, paragraph II. GA. CONST. art. I, § 1, para. 2; GA. CONST. art. I, § 2, para. 3.

45. *See, e.g.*, DIV. OF HEALTH LAW, *supra* note 10. The American Medical Association has listed the states through October 2009 that have faced constitutional challenges to the non-economic damage statutes. *Id.* The chart lists whether the caps were upheld or struck down, the case that brought the question to the court, and a short description of the court's rationale for upholding or striking down the statute. *Id.*

46. *See, e.g.*, DIV. OF HEALTH LAW, *supra* note 10 (outlining the rationales courts use for striking down damage cap statutes).

47. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 914 (Ill. 2010) (holding that a limit on

damage cap statutes on separate occasions, finding in both 1980 and 1991 that the caps violated the state's equal protection doctrine.[48] South Dakota and Texas found the statutes violated the open courts doctrine by creating unreasonable and arbitrary limits in litigation.[49] However, a more recent Texas decision upheld a new damage cap statute, stating it did not violate the open courts doctrine.[50] In light of the many lines of reasoning the Georgia Supreme Court can use in the future to find caps unconstitutional, passing a constitutional damage cap may be difficult.[51] Thus, other reform measures should be considered.[52]

### *C. The Importance of Limiting Damages in Medical Malpractice Cases*

Tort reform is an important topic in light of the large costs of medical malpractice liability in the U.S., which Harvard University recently determined to be $55.6 billion annually.[53] The American

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noneconomic damages in medical malpractice lawsuits violate the separation of powers clause in the Illinois constitution); Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1081 (Ill. 1997) (finding the cap violated the prohibition against special legislation and separation of powers clause).

48. DIV. OF HEALTH LAW, *supra* note 10 (citing Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991); Carson v. Maurer, 425 A.2d 825 (N.H. 1980)). In *Brannigan*, the court reasoned the caps violated due process because the purpose of the legislation, to bring down health care costs, did not outweigh individual rights. *Id.*

49. DIV. OF HEALTH LAW, *supra* note 10 (citing Knowles *ex rel.* Knowles v. United States, 544 N.W.2d 687 (S.D. 1996); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988)). In *Knowles*, the court found the statute violated the open courts doctrine (that prohibits legislation that hinders access to courts) because it limited a provider's liability arbitrarily. *Id.* In *Lucas* the court found the limits were unreasonable and arbitrary. *Id.*

50. DIV. OF HEALTH LAW, *supra* note 10 (citing Rose v. Doctor's Hosp., 801 S.W.2d 841 (Tex. 1990)); Mary Alice Robbins, *State Cap on Non-Economic Damages a No-Go in Eastern District of Texas Case*, LAW.COM (Sept. 17, 2010), http://texaslawyer.typepad.com/texas_lawyer_blog/2010/09/challenge-to-hb-4s-cap-on-non-economic-damages-a-no-go-in-eastern-district-of-texas-case.html. A magistrate judge for the Eastern District of Texas found that the Tort Reform Act of 2003, which places a cap on non-economic damages, did not violate the open courts doctrine because it did not hinder access to the courts. Robbins, *supra* (citing Watson v. Hortman, No. 2:08-CV-81-TJW-CE, slip op. at 5 (E.D. Tex. Sept. 13, 2010)).

51. Andy Peters, *Legislators Are Left with Few Options*, FULTON CNTY. DAILY REP., Mar. 23, 2010. At this point, the legislature's only option is to amend the constitution to reverse the court. *Id.* An amendment requires approval of two-thirds of the House and Senate. *Id.* However, in March 2010, the chair of the Senate Health and Human Services Committee said they could not get the votes. *Id.*

52. Peters, *supra* note 51 (explaining that the Medical Association of Georgia said it would look into alternative legislative options).

53. Bruce Japsen, *Malpractice Costs Top $55 Billion a Year in U.S.*, CHI. TRIB.

Medical Association has called for states to pass various tort reform packages to stem the rise of liability premiums that may cause doctors to leave certain practice areas.[54] The Western Journal of Medicine found that issues related to medical malpractice, such as malpractice insurance, are "the most powerful factors" when physicians consider whether to provide obstetric services.[55] For example, many general and family physicians no longer provide obstetric care because of the high price and frequency of malpractice lawsuits in the area.[56] However, according to the American Medical Association, "non-economic caps and direct tort reforms more generally have a positive effect on the number of physicians per capita in a state."[57]

## II. LEGISLATIVE OPTIONS FOR REDUCING THE PRICE OF MEDICAL MALPRACTICE INSURANCE

### *A. How Georgia Courts Got it Wrong*

Georgia is in the minority of states that have found caps on noneconomic damages unconstitutional, and five of the eleven states that have struck down noneconomic caps have enacted new caps that still stand.[58] Only four states besides Georgia have found that

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(Sept. 8, 2010, 7:09 PM), http://chicagotribune.com/business/ct-biz-0909-notebook-health-20100908,0,4495498.story (stating that Harvard University found "the annual overall cost of medical liability to be $55.6 billion."). The analysis included payments of damages, attorney's fees and lost work time for doctors. *Id.*

54. CAROL K. KANE & DAVID W. EMMONS, AM. MED. ASS'N, THE IMPACT OF CAPS ON DAMAGES. HOW ARE MARKETS FOR MEDICAL LIABILITY INSURANCE AND MEDICAL SERVICES AFFECTED? (2005), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/363/prp200502caps.pdf.

55. Rosenblatt et al., *supra* note 4, at 693–98 ("During the 1980's, thousands of providers stopped practicing obstetrics or severely limited the scope of their practices, most frequently citing their concerns about medical malpractice as the reason for these changes in their obstetric practices.").

56. *Id.* at 698.

57. KANE & EMMONS, *supra* note 54, at 2. According to the association's research, states experienced lower growth of medical liability insurance rates when tort reform legislation was passed. *Id.* Studies using the American Medical Association's demographic information on physicians show that states with direct tort reforms increased physician supply relative to non-reform states, especially in high-risk specialties. *Id*. at 5.

58. DIV. OF HEALTH LAW, *supra* note 10. As of publication, eleven out of twenty-nine states with damage caps ruled that noneconomic damage caps were unconstitutional. *Id.* In 1978, North Dakota struck down a damage cap for violating the right to trial by jury but enacted a new statute in 1995. *Id*. (citing Arneson v. Olson, 270 N.W.2d 125, 134–37 (N.D. 1978)). Ohio struck down a damage cap for

noneconomic caps violated the right to trial by jury, one of which has since enacted a new cap.[59] The Georgia Supreme Court in *Nestlehutt* stated in a footnote the contradictory authority was weak because the states had "less comprehensive" jury trial provisions or employed "unpersuasive reasoning."[60] However, the reasoning of the courts with "less comprehensive" jury trial provisions is very similar to the courts with an equally comprehensive jury trial provision as Georgia.[61] Utah's constitution states the right to trial by jury is inviolate only in capital cases.[62] However, the Utah Supreme Court still found the jury decides the facts and the court can apply law by reducing damages.[63] This is the same reasoning the Ohio court used, a state which has a strong constitutional provision for the right to trial by jury just like Georgia.[64]

Courts have reasoned caps do not impinge on the right to a jury trial because they do not remove determination of the facts from the jury.[65] Generally, courts have determined that after a jury has reached its verdict, the trial court may properly enter judgment consistent with the law.[66] Moreover, courts have pointed out that legislatures

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violating the due process clause in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (1999), but enacted a new law in 2002. Oklahoma struck down its damage cap in 2008 and enacted a new law in 2009. *Id.* (citing Woods v. Unity Health Ctr., Inc., 196 P.3d 529, 531 (2008)). Texas struck down a damage cap as applied to medical malpractice caps in 1988, but enacted new legislation in 2003. *Id.* (citing Lucas v. United States, 757 S.W.2d 687 (Tex. 1988)). Wisconsin's damage cap was struck down in 2005 and new legislation was enacted a year later in 2006. *Id.* (citing Ferdon v. Wis. Patient Comp. Fund, 284 Wis. 2d 573 (2005)). Thus, only six states that have struck down their damage caps remain without damage caps today.

59. DIV. OF HEALTH LAW, *supra* note 10. Only four other states, Alabama, North Dakota, Oregon, and Washington found the damage cap statutes were an unconstitutional infringement of the right to trial by jury. *Id.* In 1978, a North Dakota court found a damage cap statute that included a limit on damages to $300,000 violated the right to trial by jury. *Arneson*, 270 N.W.2d at 134–37. The court said that the right to trial by jury was a basic right in the state and the statute was an unconstitutional deprivation of that right. *Id.* at 137. In 1995, North Dakota enacted a $500,000 cap on noneconomic damages in medical malpractice actions. N.D. CENT. CODE § 32-42-02 (1995). The new cap has not yet been constitutionally challenged. *See* DIV. OF HEALTH LAW, *supra* note 10.

60. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 n.8 (Ga. 2010).

61. *See, e.g.*, Arbino v. Johnson, 880 N.E.2d 420, 430–33 (Ohio 2007); Judd v. Drezga, 103 P.3d 135, 144–46 (Utah 2004).

62. UTAH CONST. art. I, § 10.

63. *Judd*, 103 P.3d at 145.

64. *Arbino*, 880 N.E.2d at 430–33.

65. *Arbino*, 880 N.E.2d at 431; *Judd*, 103 P.3d at 146.

66. *See, e.g.*, *Arbino*, 880 N.E.2d at 432; Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1120 (Idaho 2000) ("The legal consequences and effect of a jury's verdict are a matter for the legislature (by

have set limits in other ways, such as through statutes of limitation, so it logically follows that the legislature can also limit remedies.[67] Courts have argued that remedies are a matter of law, not fact, and because limits are assigned after a jury completes its fact-finding function, remedies do not apply to a jury's role.[68] Further, the right to a jury trial guarantees only rights that existed at common law and some courts have pointed out there is no common law right to a full recovery in tort cases.[69] This logical rationale used by other courts warrants at least more than a dismissive sentence in a footnote.

In *Nestlehutt,* the Georgia Supreme Court did not address the separation of powers or equal protection arguments made by the trial court because it already held the statute unconstitutional for violating the right to trial by jury.[70] However, it is important to realize these constitutional provisions do not bar caps on damages in the majority of states.[71] The courts that have found a violation of the separation of powers doctrine say the legislature encroaches on the judiciary's power of review by enacting caps.[72] For example, in *Kirkland v. Blaine County Medical Center*[73] the plaintiff argued that the cap infringes on "the inherent right of the courts to reduce jury verdicts in those instances where the evidence demonstrates the jury's verdict is

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passing laws) and the courts (by applying those laws to the facts as found by the jury).").

67. Phillips v. MIRAC, Inc., 651 N.W.2d 437, 442 (Mich. 2002). The court mentioned the legislature's limitations in rules such as governmental immunity from tort liability, workers' compensation being the exclusive remedy against employers, or certain tort cases where the plaintiff is at fault for her own injuries. *Id.*

68. *E.g.*, Murphy v. Edmonds, 601 A.2d 102, 117–18 (Md. 1992) (finding that the statute does not apply until the jury's fact-finding function is completed and noting that a majority of the states that have considered this question have found caps do not violate the right to jury trial); Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 529 (Va. 1989) (holding there is no violation of the right to trial by jury when the jury resolved the facts and assessed damages before the court applied the law to the facts).

69. *See, e.g.*, *Etheridge*, 376 S.E.2d at 529 (Va. 1989). "[T]he jury resolved the disputed facts and assessed the damages." *Id.* Once this task is completed, the trial court is free to apply the law and reduce the verdict. *Id.*

70. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010). The trial court found the statute unconstitutional for violating the right to trial by jury, separation of powers, and the right to equal protection. *Id.* at 220. The Georgia Supreme Court affirmed the ruling after finding the statute violates the right to trial by jury. *Id.*

71. ADVOCACY RES. CTR., *supra* note 9.

72. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 908 (Ill. 2010) (stating the relevant question is whether "the statute unduly encroach[es] on the judiciary's 'sphere of authority'").

73. Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1115 (Idaho 2000).

excessive as a matter of law."[74] However, in *Kirkland*, the court reasoned that "because it is properly within the power of the legislature to establish statutes of limitations . . . create new causes of action, and otherwise modify common law without violating separation of powers," the power to limit damages does not violate the separation of powers.[75] Another court took the analysis one step further saying, "[W]ere a court to ignore the legislatively-determined remedy . . . the court would invade the province of the legislature."[76]

Plaintiffs have argued that caps violate equal protection because caps do not allow similarly situated persons to be treated alike—some plaintiffs can recover fully, while those who have noneconomic damages totaling more than the statute cannot recover their full amount of damages.[77] Some courts have used the "rational basis" test to determine whether there is a violation of equal protection and most courts considering the question have found equal protection is not violated.[78] However, other courts like New Hampshire have found damage caps unconstitutional because the purpose of the legislation does not outweigh the rights of individuals.[79]

Other states have found varying reasons for striking down damage caps that the Georgia Supreme Court did not consider.[80] These reasons include violation of a state's prohibition against special legislation, violation of the Due Process Clause, and violation of the

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74. *Id.* at 1121–22.

75. *Id.* at 1222. The court said the legislature made a valid change in the common law of personal injury and thus did not violate the separation of powers clause. *Id.*

76. Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 532 (Va. 1989). The court said the General Assembly had the power to provide and modify common law remedies, and "clearly" a modification of common law is a proper exercise of legislative power. *Id.*

77. *See* Phillips v. MIRAC, Inc., 651 N.W.2d 437, 443–44 (Mich. 2002). Only two states have actually used this as a reason for finding caps unconstitutional, and of the two, one of the states has enacted a new damage cap statute. DIV. OF HEALTH LAW, *supra* note 10 (citing Ferdon *ex rel.* Petrucelli v. Wis. Patient Comp. Fund, 701 N.W.2d 440 (Wis. 2005); Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991); Guzman v. St. Francis Hosp., 623 N.W.2d 776 (Wis. Ct. App. 2000)).

78. *See* DIV. OF HEALTH LAW, *supra* note 10; *see e.g. Phillips*, 651 N.W.2d at 444–45 (stating the plaintiff here must show legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute"). "[T]he statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption." *Id.* at 445.

79. DIV. OF HEALTH LAW, *supra* note 10 (citing Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991)).

80. *See generally* DIV. OF HEALTH LAW, *supra* note 10.

"open courts" doctrine.[81] The prohibition on special legislation is a constitutional provision that prohibits the legislature from passing local or special laws in certain cases, such as releasing liability of a party. Only one state has used this rationale.[82] The Due Process Clause provides no person shall "be deprived of life, liberty or property, without due process of law," and follows virtually the same test to determine constitutionality as Equal Protection Clauses.[83] An example of a state constitution with an open courts provision provides, "All courts shall be open, and every person . . . shall have a remedy . . . ."[84] An Ohio court determined damage caps do not violate the right to open courts because they do not block a person's ability to pursue a claim.[85]

### *B. Amending the Georgia Constitution*

A second option for the Georgia General Assembly is to amend the state constitution. According to some Georgia lawmakers, this may be the only option based on the court's strong language in *Nestlehutt*.[86] The constitutional amendment would specifically allow the legislature to place limits on noneconomic damages in medical liability cases. Texas passed such an amendment to its constitution

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81. Woods v. Unity Health Ctr., Inc., 196 P.3d 529, 531 (2008) (finding damage cap unconstitutional special legislation). *See generally* Knowles *ex rel.* Knowles v. United States, 544 N.W.2d 183, 187 (S.D. 1996) (finding total damage caps violate right to due process and open courts doctrine); DIV. OF HEALTH LAW, *supra* note 10.

82. *Woods*, 196 P.3d at 531. However, Oklahoma has since enacted a new damage cap statute. DIV. OF HEALTH LAW, *supra* note 10.

83. MICH. CONST. art. I, § 17; *Phillips*, 651 N.W.2d at 444–45 (determining the damage cap does not violate due process under the same rationale with which they determined the statute does not violate equal protection).

84. OHIO CONST. art. I, § 16.

85. Arbino v. Johnson, 880 N.E.2d 420, 432–33 (Ohio 2007). The court found that the open courts doctrine applies where an individual is "wholly foreclosed from damages after a verdict is rendered in his or her favor," like when collateral source benefits reduce an entire award. *Id.* at 433. In cases where the plaintiff can recover *some* noneconomic damages, it does not violate the right to remedy or the right to an open court. *Id.*

86. Peters, *supra* note 51. According to "three Republican state senators and two legislators in private practice," the best option for the General Assembly is to amend the constitution because the court voiced strong dislike for damage caps. *Id.* In *Nestlehutt* the court said, "The very existence of the caps, in any amount, is violative of the right to trial by jury." Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010). Also, the fact that this was a unanimous ruling does not bode well for any different result in the future. Peters, *supra* note 51.

that was approved by voters in 2003.[87] Texas' amendment has allowed the legislature to cap noneconomic damages at $250,000 and pass a law that requires plaintiffs to provide expert support for a claim within four months of filing the suit.[88]

According to the Texas Solicitor General, James Ho, the amendment makes challenges such as the *Nestlehutt* case impossible.[89] Instead, claimants are only able to file claims in federal court.[90] Recently in Texas, plaintiffs brought a case into federal court challenging the caps' constitutionality and the U.S. magistrate judge for the Eastern District of Texas upheld the caps.[91] According to the lead attorney for the defendant in the case, damage caps have always been a state issue and "no final ruling of any federal court has found a cap on non-economic damages unconstitutional."[92]

### *C. Other Legislative Solutions*

#### *1. Current Legislative Solutions*

The General Assembly has already taken other measures that will aid in the reduction of damage awards and frivolous lawsuits. For example, Georgia Code section 51-12-31 and 51-12-33 effectively end joint and several liability, thus making it more difficult for plaintiffs "to recover disproportionately from 'deep pockets.'"[93]

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87. TEX CONST. art. III, § 66; ADVOCACY RES. CTR., *supra* note 9. Proposition 12, an amendment to the Texas Constitution that allows the legislature to place limits on noneconomic damages, was passed by voters in 2003. *Id.* The amendment came after a Texas court found caps unconstitutional for violating the open courts doctrine in 1988. DIV. OF HEALTH LAW, *supra* note 10.

88. Perry, *supra* note 4.

89. Robbins, *supra* note 50. The Solicitor General represented the defendants in a Texas case that challenged the constitutionality of Texas' damage cap provision in federal court. *Id.*

90. *Id.* The plaintiffs in *Watson v. Hortman* were forced to file their case in the Eastern District of Texas alleging damage caps are unconstitutional for violating the right of access to the courts, the Fifth Amendment's Takings Clause, Equal Protection, Due Process, and the Petition Clause of the First Amendment. *Id.* On September 13, 2010, the U.S. magistrate judge in the Eastern District of Texas recommended the defendants were entitled to summary judgment because the cap is not unconstitutional. *Id.*

91. Robbins, *supra* note 50. In the *Watson* case, the U.S. magistrate judge handed down the recommendation to the U.S. district judge presiding over the case to make a final judgment. *Id.*

92. *Id.*

93. GA. CODE ANN. §§ 51-12-31, -33 (2005). The statutes provide that defendants are only responsible for their portion of plaintiff's injury and stipulates a jury must apportion fault between all

Also, Georgia Code section 9-11-68 penalizes a party who refuses a reasonable offer of judgment.[94] Proponents of section 9-11-68 argue it encourages parties to settle out of court.[95] Finally, Georgia Code section 9-11-9.1 requires an expert provide an affidavit when the complaint is filed in malpractice cases.[96] The expert requirement ensures frivolous lawsuits will not "drag on indefinitely."[97] However, more can be done by the legislature.

### *2. Possible Solutions to Consider*

#### *a. Attorney Fee Controls*

First, attorney fee controls may be a viable option for the General Assembly.[98] Currently, there is no limitation on the amount of attorney fees available in medical malpractice cases.[99] Some states limit the percentage of damage awards lawyers can receive in civil cases.[100] Alaska sets its limits through a sliding scale approach, differentiating in the percentage of fees an attorney may collect based on whether the damage award was non-contested, contested without a

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defendants involved in the injury. *Id.* Rosenblatt et al., *supra* note 4, at 693, 695 (stating these measures were taken by the states that have seen positive results from its tort reform legislation including Washington, Alaska, Montana, and Idaho).

94. GA. CODE ANN. § 9-11-68(b) (2005). A defendant is entitled to attorney's fees if the judgment amount is less than 75% of its offer and plaintiff is entitled to fees if the judgment award is greater than 125% of its offer. *Id.* The Georgia Supreme Court has upheld the constitutionality of this statute. Smith v. Baptiste, 694 S.E.2d 83, 84 (Ga. 2010) (finding the statute is not an impermissible special law, does not violate the uniformity clause of the Georgia Constitution, and does not violate the right to the courts).

95. Crockett et al., *supra* note 15, at 245. However, opponents say this measure is unnecessary since the vast majority of lawsuits are settled outside of court anyway, and they fear this could cause "wealthy defendants [to] bully private citizen plaintiffs into accepting 'low ball' offers." *Id.* (citing Matthew C. Flournoy, *Georgia's Newly Enacted 2005 Law on Offer of Judgment or Settlement (OJS) O.C.G.A. 9-11-68(a) to (d) (Section 5 of S.B.3)*, *in* INST. OF CONTINUING LEGAL EDUC. IN GA., GEORGIA'S NEWLY ENACTED 2005 TORT REFORM, SENATE BILL 3, ANALYSIS AND PRACTICAL TIPS 6–7 (2005)).

96. GA. CODE ANN. § 9-11-9.1 (2005).

97. Perry, *supra* note 4 (stating changes like this legislation have protected both patients and doctors from clogging up the system with baseless lawsuits).

98. Rosenblatt et al., *supra* note 4, at 693, 696 (finding three of the researched states have enacted some form of attorney's fee controls).

99. *Summary of Medical Malpractice Law: Georgia*, MCCULLOUGH, CAMPBELL & LANE LLP (Apr. 2, 2010), http://www.mcandl.com/georgia.html.

100. *See, e.g.*, ALASKA R. CIV. P. 82; N.Y. JUD. LAW § 474-a (McKinney 1986).

trial, or contested at trial.[101] Reformers believe controlling fees deters attorneys from filing frivolous lawsuits and enables the plaintiff to keep more of the award.[102]

*b. Allowing Evidence of Collateral Sources*

The ability to reveal a plaintiff's collateral source of compensation would also help guard against frivolous and windfall lawsuits.[103] At common law in most states, including Georgia, the collateral source rule hides from the jury any other benefit, such as insurance payments, that the plaintiff has received.[104] Proponents of the rule say it is unfair to the plaintiff to reduce damages because of their insurance benefits and that it fails to properly deter the defendant.[105] Opponents of the rule suggest that it is inherently unfair that a plaintiff recovers twice for the same injury, resulting in windfall profits.[106] Some states recognize that windfall profits for plaintiffs mean increased medical malpractice insurance costs for physicians, resulting in decreased access to health care for the citizens of the state. In response, these states have enacted legislation to curb this common law practice, such as statutes allowing evidence of a collateral source to be brought in after the fact finder has already

101. ALASKA R. CIV. P. 82. The rule sets fees based on a sliding scale whereby it assigns a percentage of attorney's fees based on the amount of the award and how it was achieved. *Id.* For example, if a judgment is below $25,000 and awarded at trial, an attorney receives 20% of the award, but if non-contested, an attorney receives 10% of the award. *Id.* Likewise, if the judgment is for over $500,000, an attorney receives 10% of the award if litigated, but only 1% if non-contested. *Id.* The rule also gives room for judicial discretion based on a number of factors including bad faith, the amount of work performed, and the reasonableness of the claim. *Id.*

102. Lee Harris & Jennifer Longo, *Flexible Tort Reform*, 29 HAMLINE J. PUB. L. & POL'Y 61, 80–81 (2007). Opponents argue that attorneys already have an incentive not to take frivolous lawsuits through the existence of contingency fees themselves. *Id.*

103. Rosenblatt et al., *supra* note 4, at 693, 697 (asserting three of the four states in the study enacted collateral source rules).

104. F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 485 (2006). Therefore, the court cannot reduce a damage award by the amount paid by an outside source. *Id.* Georgia's collateral source rule currently bars defendants from presenting any evidence of third party payments in tort cases and common law has held there are no exceptions to this rule. Olariu v. Marrero, 549 S.E.2d 121, 123 (2001) (stating, "The common law rule made no exceptions for the introduction of evidence as to a collateral source, which rule remains applicable today.").

105. *Id.*

106. *Id.*; Harris & Longo, *supra* note 102, at 76–77.

awarded damages.[107] However, statutes that abrogate or abolish the collateral source rule have often been challenged on the same or similar grounds as damage cap statutes.[108] These challenges will be yet another hurdle for legislators to overcome.

#### *c. Procedural Rules*

Some courts have enacted screening panels such as mandatory mediation or arbitration.[109] For example, in Florida, parties are required to participate in mediation prior to a lawsuit.[110] Proponents of reform have even suggested a specific court for medical malpractice suits with specially trained judges.[111] Thus far, "seventeen states require, or encourage" plaintiffs to go through a screening panel prior to litigation.[112]

## III. WHY THE GENERAL ASSEMBLY SHOULD FIGHT FOR REFORM AND HOW TO PROCEED

### *A. The Importance of Tort Reform*

The Georgia General Assembly should not give up on tort reform through procedural reforms because it is an important step in avoiding a health care crisis that has the potential of leaving some Georgians, especially those in rural areas, without access to

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107. ALASKA STAT. § 09.55.548 (2010); Rosenblatt et al., *supra* note 4, at 693, 697. Alaska's statute reduces a plaintiff's award by the amount that has already been compensated. ALASKA STAT. § 09.55.548 (2010). At least sixteen state legislatures have attempted to abolish or modify the collateral source rule. 3 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 19.36 (3d ed. 2011).

108. *See* Stein, *supra* note 107. For example, an Alabama statute that allows for the admissibility of evidence of a collateral source in all actions where medical damages are claimed was challenged on equal protection and due process grounds. *Id.* (citing Marsh v. Green, 782 So. 2d 223 (Ala. 2000)). The Alabama Supreme Court ruled that the statute was valid because it did not violate the right to trial by jury or other constitutional rights. *Id.*

109. Harris & Longo, *supra* note 102, at 72–74.

110. *Id.*

111. Sen. Connie Williams, *Caps for Medical Malpractice Only*, PHYSICIAN'S NEWS DIG., June 2003, *available at* http://www.physiciansnews.com/commentary/603williams.html (describing a bill she proposed in Pennsylvania).

112. Hubbard, *supra* note 104, at 521–22. Although many states had prescreening panels in the past, the number has been reduced due to statutes being unconstitutional. *Id.* at 521.

physicians.[113] Proponents of reform like the Governor of Texas, Rick Perry, have said tort reform measures like caps on damages and various procedural measures have healed states facing a health care crisis.[114] In 2003, two-thirds of the counties in Texas had no practicing obstetricians, 60% had no pediatricians, and twenty-four counties had *no* primary care doctors.[115] This shortage of medical professionals meant long lines in doctors' offices, causing patients to postpone medical care and allowing minor health issues to grow into more serious conditions.[116] According to the Governor, tort reform has turned these statistics around by reducing insurance rates by an average of 27% and thus the number of doctors applying to practice in the state has "skyrocketed."[117] In Texas, the number of obstetricians in rural areas is up by 27%, and the number of pediatricians has grown as well.[118]

Some have argued that even if tort reform measures are passed, insurance companies will not necessarily reduce or maintain current rates as a result.[119] However, in Georgia, "Mag Mutual, Georgia's largest medical malpractice insurance provider, indicated it would . . . honor the 10% rollback of insurance premiums upon the adoption of the House version of SB3."[120] The quote indicates a willingness of insurers in the state to work with physicians to make sure both parties benefit from a reduction in medical tort damage awards.

Georgia may also lose health care providers simply because doctors tend to migrate to states like Texas that have strong tort reform measures and avoid states like Georgia that fail to enact

113. *See generally* Rosenblatt et al., *supra* note 4 (stating that the article's research findings are compatible with concluding that tort reform has decreased the rate at which physicians give up practicing obstetrics).

114. Perry, *supra* note 4 ("All major liability insurers cut their rates upon passage of our reforms, with most of those cuts ranging in the double-digits.").

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Crockett et al., *supra* note 15, at 232; Harris & Longo, *supra* note 102, at 63. For example, Senator Steve Thompson opposed Georgia's damage cap provision because "he did not believe . . . a cap would lower insurance premiums." Crockett et al., *supra* note 15, at 232.

120. Crockett et al., *supra* note 15, at 237 (quoting Senator Preston Smith during the Senate reconsideration of the Tort Reform Act after the House made changes).

damage caps. A 2005 study that examined physician supply from 1985 to 2001 found an increased physician supply of 2.4% in reform states compared to non-reform states, and in "high-risk" specialties the increase was 11.5%.[121] In order to keep current physicians in the state and to encourage new physicians to enter the state, Georgia should be proactive on this issue by passing procedural reforms now and attempting to amend the constitution in the future.

### *B. The Inefficacy of Enacting a New Cap on Noneconomic Damages*

Some states have found success in enacting new caps on damages after their courts have found a statute unconstitutional.[122] In those states, caps have effectively controlled medical malpractice insurance rates.[123] States with caps have lower medical malpractice liability insurance rates and have more doctors and thus better access to physicians in rural areas and better health care overall.[124] Proponents of caps argue that damage awards are erratic and unpredictable.[125] Caps not only increase predictability of awards, but also keep damage awards at lower, more manageable levels, which will in turn allow insurers to reduce the cost of coverage.[126] In states like Texas and California, caps have been key in bringing down the cost of medical malpractice liability insurance.[127]

In light of the Georgia Supreme Court's strong and unanimous decision to block damage caps, the Georgia General Assembly should not pass a new damage cap provision, even though caps have

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121. KANE & EMMONS, *supra* note 54 (citing a Kessler, Sage, and Becker study that used the American Medical Association's Physician Masterfile to examine the impacts of tort reform on physician supply).

122. *See* discussion *supra* Part II.A.

123. Piccola, *supra* note 15 (stating California has only seen a 167% increase in medical liability rates while Pennsylvania, which has no such cap on noneconomic damages, has seen a rate increase of 1,400%and the national increase was 505%).

124. KANE & EMMONS, *supra* note 54. From 1985 to 2000, states with noneconomic damage caps had a 2.2% increase in supply of physicians per capita compared to states without caps. *Id.* (citing Encinosa and Hellinger's 2005 paper). *See also* discussion *supra* Part III.A.

125. Richard Abel, *General Damages Are Incoherent, Incalculable, Incomensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 291(2006).

126. *See generally id.*

127. *See* Perry, *supra* note 4 (stating doctor's insurance rates have dropped on average 27%); Piccola, *supra* note 15.

been successful in other states.[128] Justice Hunstein, writing for the court, stated in no uncertain terms, "The very existence of the caps, in any amount, is violative of the right to trial by jury."[129] Michael Terry, an attorney for Nestlehutt, said the ruling puts the General Assembly on notice that any new damage cap legislation will be futile, adding, "The court was very clear saying, 'You can't do this.'"[130] Also, there are many rationales the court has at its disposal to find that caps are unconstitutional even if the court later finds the caps do not violate the right to trial by jury, making it very unlikely the court will ever uphold such legislation.[131]

### *C. The Difficulty of Amending the Constitution*

Some states have successfully amended their constitutions to specifically allow for caps on noneconomic damages.[132] However, the likelihood of an amendment is currently slim.[133] Georgia's constitution requires approval by two-thirds of the members of both the House and the Senate and ratification by a majority of the voters in the state.[134] Even though the Tort Reform Act was favorably passed in the House and the Senate, Senator Don Thomas predicted that the GOP would not be able to obtain the two-thirds votes necessary to approve an amendment.[135] However, if the GOP can get the votes in the future, an amendment is probably the best possible

128. *See* discussion *supra* Part II.A.

129. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010) (stating that the fact that plaintiffs can recover fully up to the $350,000 mark does not help the statute's constitutionality because if the court finds the legislature can cap at that amount, the legislature will be able to cap any amount).

130. Rankin, *supra* note 1.

131. *See* discussion *supra* Part II.A.

132. See discussion *supra* part II.B.

133. Peters, *supra* note 51. Senator Don Thomas, chair of the Senate Health and Human Services Committee, said that the amendment would not receive a two-thirds vote. *Id.*

134. GA. CONST. art. X, § 1, para. II. Passing an amendment is much more strenuous than passing the original Tort Reform Act which only required a majority vote in each house. Peters, *supra* note 51.

135. Peters, *supra* note 51 (stating the House may be harder to convince because of an attempted House Tort Reform Act to raise the cap to $750,000, which did not pass and may cause some dissent among even among Republicans who would traditionally favor this type of legislation).

solution to enacting caps on damages that withstand constitutional challenges.[136]

### *D. The Effectiveness and Hurdles of New Procedural Rules*

Because the Georgia Supreme Court will most likely strike down a new damage cap provision and a constitutional amendment is probably not currently possible, the General Assembly should consider other legislative solutions.[137] The first type of reform to consider is controlling attorney's fees. Most countries use a "loser pay" system where the winner is entitled to reimbursement from the losing party.[138] However, such a strict system of fee shifting may have a "chilling effect" on plaintiffs.[139] Therefore, a better solution is limiting contingency fees to "weed out non-meritorious claims" because lawyers will have less incentive to take frivolous cases.[140]

A great example of curbing attorney's fees is New York's sliding scale approach to contingency fees that replaced a one-third across-the-board fee limit. The new approach permits an attorney to recover 30% of the first $250,000 of an award, 25% of the next $250,000, 20% of the next $500,000, 15% of the next $125,000, and only 10% of recoveries over $1,250,000.[141] The New York statute allows an attorney to appeal for a higher percentage if compensation is inadequate.[142] Actuaries suggest that "[e]liminating the sliding fee schedule entirely and returning to a one-third across-the-board cap

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136. *See* discussion *supra* Part II.B.

137. *See* discussion *supra* Part III.B–C.

138. Marie Gryphon, *Assessing the Effects of a "Loser Pays" Rule on the American Legal System: An Economic Analysis and Proposal for Reform*, 8 RUTGERS J.L. & PUB. POL'Y 567, 567–68 (2011) (citing W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361 (1999)) (noting many commentators agree such a system would result in a reduction in nuisance suits).

139. McAlister, *supra* note 29, at 1034.

140. *Medical Malpractice Reform: Limiting Contingent Fees*, HEALTH CARE NEWS IN DEPTH, Apr. 5, 2010, *available at* www.gnyha.org/9583/File.aspx (citing ERIC NORDMAN, DAVIN CERMAK, & KENNETH MCDANIEL, NAT'L ASS'N OF INS. COMM'RS, MEDICAL MALPRACTICE INSURANCE REPORT: A STUDY OF MARKET CONDITIONS AND POTENTIAL SOLUTIONS TO THE RECENT CRISIS (2004), *available at* http://www.naic.org/documents/topics_Med_Mal_Rpt_Final.pdf).

141. N.Y. JUD. LAW § 474-a (McKinney 1986).

142. *Medical Malpractice Reform: Limiting Contingent Fees*, *supra* note 140.

would increase hospital costs by 25%—40% . . . ."[143] Limitations like New York's statute decrease the number of claims and increase the rate of settlement because attorneys and clients will have less incentive to risk going to trial to obtain a large jury award.[144] A statute capping the amount of fees given to an attorney is likely far less divisive than capping the amount of damages available to a victim, making it an option the General Assembly is more likely to agree upon in today's political climate.

Another possible procedural rule states have used is allowing for the admissibility of collateral source evidence after a fact finder has rendered an award and where the court reduces the damage amount by the amount already received.[145] Many states use this approach as a good measure to curb larger than necessary damage recoveries.[146] However, it is very likely that a statute that abrogates the collateral source rule would face many of the same challenges as damage caps.[147]

A better solution is improving the dispute resolution system with procedural reforms, because the current process is long, expensive, and unpredictable.[148] A study found plaintiffs recover, on average, five years after the time of injury.[149] Malpractice system experts recommend creating courts dedicated specifically to evaluating malpractice claims.[150] Special courts could "meet injured patients' needs and rights by increasing access, improving consistency in decision-making, and enhancing equity in payments."[151] Georgia has

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143. *Id.*

144. *Id.* (citing Casey L. Dwyer, *An Empirical Examination of the Equal Protection Challenge to Contingency Fee Restrictions in Medical Malpractice Reform Statutes*, 56 DUKE L.J. 611 (2006)).

145. ALASKA STAT. § 09.55.548 (2010); Rosenblatt et al., s*upra* note 4, at 697. Alaska's statute reduces plaintiff's award by the amount that has already been compensated. ALASKA STAT. § 09.55.548 (2010).

146. *See* discussion *supra* Part II.C(2)(b).

147. *See* Stein, *supra* note 107.

148. *Medical Malpractice Reform: Improving the Dispute Resolution System*, HEALTH CARE NEWS IN DEPTH, Feb. 8, 2010, *available at* www.gnyha.org/9379/File.aspx.

149. *Id.* (citing David Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2024–33 (2004)).

150. *Id.*

151. *Id.* (citing Michelle Mello et al., *Health Courts and Accountability for Patient Safety*, 84 MILBANK Q. 459, 459–92 (2006)).

already implemented several separate special courts that have received positive reaction.[152] These courts improve fairness and consistency in the system.[153] Alternatively, the legislature should consider mandatory arbitration to give plaintiffs an incentive to settle before going to trial. Proponents of reform say mediation and arbitration are preferable because they take the remedy out of the hands of the jury, who are more prone to giving higher damage awards due to sympathy.[154]

## CONCLUSION

The *Nestlehutt* decision left the Georgia General Assembly wondering how to implement safeguards to protect Georgia's physicians from high medical malpractice liability expenses that cause a reduction in availability and an increase in the cost of health care to citizens of the state.[155] Although passing new legislation has achieved success in some states, the Georgia Supreme Court unanimously ruled caps unconstitutional and noted it would do so even if the provision were altered, signaling an unwillingness to budge on the issue.[156]

Constitutional amendments are effective because cases like *Nestlhutt* could only be brought in federal courts that have never found caps unconstitutional.[157] However, due to the current difficulty of amending Georgia's constitution, the legislature should look to other tort reform measures beyond caps on noneconomic damages. Likewise, a collateral source rule may prove to be another constitutional hurdle. Thus, the best solutions for the General Assembly are creating a sliding fee system like New York's and

152. *See* Megan K. Johnson, *Business Court Annual Report*, FULTON CNTY. SUPERIOR COURT (2011), http://www.fultoncourt.org/sca200807/documents-and-forms/doc_view/297-business-court-report-october-2010.raw?tmpl=component (stating business courts were created in 2005); *See* Bill Rankin & Carrie Teegardin, *Drug Court: Saving Money, Saving Lives*, ATLANTA J.-CONST., Mar. 4, 2012, at A1.

153. Johnson, *supra* note 152, at 2. Through use of judges with specialized knowledge of business law, the business court is more time efficient and accurate. *Id.*

154. Harris & Longo, *supra* note 102, at 66–67, 72–74.

155. *See* discussion *supra* Introduction.

156. *See* discussion *supra* Part III.B.

157. *See* discussion *supra* Part II.B.

improving the dispute resolution system through procedural reforms such as creating courts dedicated to malpractice cases or requiring arbitration or mediation prior to trial.[158] These steps will ensure that Georgians have access to affordable health care until further legislative solutions can be obtained.

158. *See* discussion *supra* Part III.D.