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Capping Your Rights: The Texas Statute of Non-Economic Damage Caps in Medical Malpractice Cases and Its Assault on the Rights of the Injured and the Power of the Courts.

Ruben James Reyes

CAPPING YOUR RIGHTS: THE TEXAS STATUTE OF NON-ECONOMIC DAMAGE CAPS IN MEDICAL MALPRACTICE CASES AND ITS ASSAULT ON THE RIGHTS OF THE INJURED AND THE POWER OF THE COURTS

RUBEN JAMES REYES†

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† St. Mary's University School of Law, Candidate for J.D., May 2004; Texas Lutheran University, B.A. Political Science, May 1999. I would like to thank my family and friends, especially my parents, Alicia and Ruben, for always encouraging me to pursue my goals. I would like to express my gratitude to Julia M. Garcia for her unending support. I would also like to thank James R. Walker (editor), Patricia A. Viera (associate editor) and all *The Scholar* staff-writers who contributed their time and attention to this comment. Special thanks to David A. Mendoza (associate editor) for all your help and for being a great friend. This comment is dedicated to the memory of my grandparents, Julian and Aurora Casarez; Ysidro and Virginia Reyes.

I. INTRODUCTION

A. *True Story*

Linda McDougal was the victim of medical malpractice.[1] As a consequence of a pathologist confusing the results of McDougal's biopsy with those of another patient, she underwent an unnecessary double mastectomy.[2] Unlike nearly five million uninsured Texans,[3] McDougal had insurance and it covered her medical expenses.[4] In addition, her employer paid her salary while she was unable to work.[5] As a result, Linda McDougal had no net economic loss; it was zero.[6] Regardless of the lack of economic damages, she still had the option to sue the negligent pathologist for the non-economic damages she suffered.[7] Today, a similar non-economic damage claim in Texas against such a doctor, under our medical malpractice law, the loss attributed to an unnecessary double mastectomy would be worth no more than $250,000.[8]

B. *Real Problem*

Since taking office, Governor Rick Perry has rigorously championed his efforts "to ensure that all Texans have access to quality, affordable health care."[9] One of five *key priorities* indexed on his web page is labeled 'Health Care'.[10] The Governor has "proposed a series of initiatives to expand Texans' access to health care, and he also has outlined corrective measures to fix the medical lawsuit abuse crisis that is hurting doctors and patients across the state."[11] The Governor's words beg the question: how do legislators and public officials balance the push to limit medical malpractice lawsuit "abuse" and the need for Texans to have access to quality, affordable health care? The Legislature's answer is the passage of House Bill 4 and its non-economic damage caps in medical malpractice

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1. Kristin Loiacono, *Forgotten Faces,* TRIAL, Mar. 1, 2003, 2003 WL 11576894.

2. *Id.*

3. *See* State of Texas, Health and Human Services Commission (outlining demographic and socioeconomic statistic/indicators for Texans without health insurance in 2001) *available at* http://www.hhsc.tx.us/research/dssi/txunin2001.html (last visited Feb. 11, 2004).

4. Loiacono, supra note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. Act of June 11, 2003, 78th Leg., R.S. ch. 204, § 74.301, 2003 Tex. Sess. Law Serv. 847, 873.

9. State of Texas, Office of the Governor, http://www.governor.state.tx.us/priorities/healthcare (last visited Jan 29, 2004) (listing health care priorities outlined by the Governor) (hereinafter *Office of the Governor*).

10. *Id.* (emphasis added).

11. *Id.*

cases.[12] While House Bill 4 caps non-economic damages in medical malpractice cases at $250,000,[13] this type of legislation poses a real threat to the rights of medical malpractice victims.

This comment will discuss the effect non-economic damage caps in medical malpractice cases have on an injured victim's rights to bring a cause of action against a negligent party. Part I has introduced the problem. Part II will discuss the origins of Texas non-economic damage caps in medical malpractice cases and the Texas Legislature's reasons for enacting them. It will further address how Texas courts have interpreted the caps coupled with the Legislature's efforts to ensure the caps pass constitutional muster.

Part III will enumerate the rights threatened by the non-economic damages caps and the recently passed companion constitutional amendment.[14] It will specifically illustrate the unconstitutional aspects of the statutory cap on non-economic damages pertaining to the Equal Protection of the law, the Open Courts Doctrine, the Right of Trial by Jury, the Prohibition of Special Laws, the Separation of Powers and conflicting constitutional provisions. Part III will also demonstrate how the competing interests of health care providers, insurance companies, and insured/uninsureds are intertwined with the above issues. This section will also discuss the insurance industry's success in the political arena and the resulting injuries to the uninsured, most notably the poor. Included within the constitutional analysis is what effect, if any, House Bill 4 and Proposition 12 will have on reducing medical malpractice insurance premiums and making health care more affordable.

Part IV will discuss proposals for improving medical malpractice lawsuit reform, reducing insurance rates and making health care available to every person. Specifically, it will discuss a patient compensation fund and the passage of insurance rate regulations.

Lastly, Part V will conclude with a summation of the statute's unconstitutionality and the need to address the current assault on medical malpractice victims' rights and the power of the courts.

12. § 74.301, Tex. Sess. Law Serv. at 873.

13. *Id.*

14. TEX. CONST. art. III, § 66.

II. Background - Origins of Texas' Med- Mal Non-Economic Damage Caps

A. *Texas Legislature Takes Notice*

In 1975, the Texas Legislature recognized the problem posed by increases in medical malpractice insurance premiums,[15] and in response, it created the "Texas Medical Professional Liability Study Commission."[16] The Commission's function was to ascertain the reasons why malpractice insurance rates were dramatically increasing for doctors and other health care providers.[17] The Commission conducted hearings and submitted recommendations to the Legislature.[18] Based on its finding in 1977, the Legislature enacted the Medical Liability and Insurance Improvement Act (the Act), formerly known as 4590i.[19] The Legislature stated the purposes of the Act were to:

> (1) [r]educe [the] excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems; (2) decrease the cost of those claims and assure that awards are rationally related to actual damages; (3) do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis; (4) make available to physicians, hospitals, and other health care providers protection against potential liability through the insurance mechanism at reasonably affordable rates; (5) make affordable medical and health care more accessible and available to the citizens of Texas; (6) make certain modifications in the medical, insurance, and legal systems in order to determine whether or not there will be an effect on rates charged by insurers for medical professional liability insurance; and (7) make certain modifications to the liability laws as they relate to health care liability claims only and with an intention of the legislature to not extend or apply such modifications of liability laws to any other area of the Texas legal system or tort law.[20]

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15. Lucas v. United States, 757 S.W.2d 687, 693 (Tex. 1988).

16. *Id.*

17. *Id.*

18. *Id.*

19. Act of Aug. 29, 1977, 65th Leg., R.S., ch. 817, Part 1, 1977 Tex. Gen. Laws 2039, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 884.

20. *Id.*

B. *Courts Interpret the Act*

Since the Act's passage, the Legislature's medical malpractice non-economic damage caps have faced resistance in various courts of appeals,[21] though there has been some support upholding the validity of such caps.[22] In 1988, a certified question was posed by the United State Fifth Circuit Court to the Texas Supreme Court in *Lucas v. United States*,[23] focusing on whether non-economic damage caps in medical malpractice cases are consistent with the Texas Constitution.[24] The Texas Supreme Court concluded that the "damages limitations contained in sections [then-]11.02 and 11.03 of [then-]article 4590i violate article I, § 13 of the Texas Constitution."[25] From the passage of the Act to the *Lucas* decision, the debate surrounding the necessity for non-economic damage caps in medical malpractice cases has most recently been concentrated among various interest groups contending that caps will have some impact on healthcare.[26]

In 2000, the Texas Supreme Court in *Horizon/CMS Healthcare Corp. v. Auld* recognized the Legislature's finding of "a serious problem in availability of and affordability of adequate medical professional liability insurance" coupled with a "material adverse effect on the delivery of medical and health care in Texas."[27] Additionally, the Texas Supreme Court has acknowledged that a major impetus of the Legislature was to deter the amount of frivolous medical malpractice lawsuits filed against doctors

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21. *See generally* Baptist Hospital of Southeast Texas, Inc. v. Baber, 672 S.W.2d 296, 297-98 (Tex.App.—Beaumont 1984), writ ref'd n.r.e. per curiam, 714 S.W.2d 310, 311 (Tex. 1986) (holding the considered portions of the Medical Liability and Insurance Improvement Act unconstitutional); Detar Hospital, Inc. v. Estrada, 694 S.W.2d 359, 365-366 (Tex.App.—Corpus Christi 1985, no writ) (holding the broad and absolute limitations of the Act are unconstitutional).

22. Rose v. Doctors Hospital Facilities, 735 S.W.2d 244, 251-252 (Tex.App.—Dallas 1987, writ granted) *affirmed by* Rose v. Doctors Hospital Facilities, 801 S.W.2d 841, 842 (Tex. Dec 19, 1990) (upholding the constitutionality of the Medical Liability and Insurance Improvement Act based on the rational relationship between its methods and the goals it seeks to achieve).

23. Lucas v. United States, 757 S.W.2d 687, 687 (Tex. 1988).

24. *Id.*

25. *Id.* at 692.

26. *Compare* Citizens Against Lawsuit Abuse, *Lawsuit Limitations Common* (reporting that non-economic damage caps will produce 12 percent more practicing doctors) *available at* http://www.calahouston.org/prop12-1.html (on file with author) *with* Texas Watch, *Vote Against Proposition 12 (HJR3)* (explaining why non-economic damage caps are bad for Texas and is nothing more than political gamesmanship) *available at* http://www.tcraonline.com/newslet/Texas%20Watch.htm (last visited Sept. 18, 2003).

27. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 893 (Tex. 2000).

"and other health care providers."[28] The Texas Legislature concluded that doctors and other health care providers were being bombarded with frivolous claims and could not afford to defend themselves.[29] The Legislature identified the increase of these types of lawsuits as the major factor contributing to the rise in health care costs for all Texans.[30]

C. *Texas Legislature Re-groups*

In 2003, the 78th Legislature passed House Bill 4,[31] which repealed article 4590i and replaced it with what will be codified as Chapter 74 of the Civil Practice and Remedies Code.[32] Section 74.301 states in pertinent part:

> (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for non-economic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed *$250,000* for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.
> (b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for non-economic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.
> (c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed

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28. Hart v. Wright, 16 S.W.3d 872, 876 (Tex. App.—Fort Worth 2000, pet. denied); Martinez v. Lakshmikanth, 1 S.W.3d 144, 147 (Tex. App.—Corpus Christi 1999, pet. denied).

29. Schorp v. Baptist Mem'l Health Sys., 5 S.W.3d 727, 736 (Tex. App.—San Antonio 1999, no pet.).

30. *Id.*

31. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 74.301, 2003 Tex. Sess. Law Serv. 873.

32. E-mail from Bruce R. Anderson, Attorney, Brin & Brin, P.C. Attorneys at Law, to Ruben James Reyes, Law Student, St. Mary's University School of Law (Sept. 23, 2003, 15:25:24 CST) (on file with author). For purposes of this comment and future reference, House Bill 4 will sometimes be referred to in its future codification form, i.e. §74.301.

> *$250,000* for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.[33]

In the event that the above non-economic damage caps provisions would not pass constitutional muster, the Texas Legislature provided an alternative damages scheme.[34] Additionally, to protect House Bill 4 from constitutional challenges, the Legislature passed House Joint Resolution 3, commonly referred to as Proposition 12.[35] On Saturday, September 13, 2003, Proposition 12 was voted on and passed by a narrow margin of 51% For and 49% Against.[36] Proposition 12 will be codified in Article III, Section 66 of the Texas Constitution.[37]

Proposition 12 authorizes the Legislature to set limits on non-economic damages.[38] It applies to limitations in medical malpractice liability cases and all other tort actions.[39] The Legislature, with House Bill 4 and its narrowly-voter-approved enabling Proposition 12, once again ventures to resolve problems affecting the efficiency of Texas courts.[40] Given the Texas Supreme Court's decision in *Lucas* regarding 4590i medical malpractice non-economic damage caps, it appears inevitable that House Bill 4's constitutionality will be challenged in Texas courts.

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33. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 74.301(a)-(c), 2003 Tex. Sess. Law Serv. 873 (emphasis added).

34. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 74.302, 2003 Tex. Sess. Law Serv. 873.

35. Tex. H.J.R. Res. 3, 78th Leg., R.S. (2003).

36. Laylan Copelin and David Pasztor, *Limits on Damages Narrowly Approved*, Austin-American Statesman, *available at* http://www.statesman.com/metrostate/content/election/2003/0913prop12.html (last visited Sept. 24, 2003).

37. HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.J.R. 3, 78th Leg., R.S. (2003), at http://204.65.51.20/data/hrofr/pdf/ba78r/HJR0003.pdf.

38. *Id.*

39. *Id.* I recognize that the "all other tort actions" language opens up many doors for legal attacks upon this constitutional amendment. These issues will be left for other colleagues to comment upon and can be better addressed when the 79th Legislature attempts to utilize the power it has given itself.

40. *See* Jones v. Raytheon Aircraft Services Inc., 120 S.W.3d 40, 49 (Tex. App.—San Antonio 2003, pet. denied) (Marion, J., dissenting) (discussing the act passed in response to concerns for excessive litigation and fairness within the courts).

III. Constitutional Analysis

A. *Equal Protection*

The Texas Constitution states that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."[41] The United States Constitution states that:

> [A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[42]

Opponents of non-economic damage caps assert that medical malpractice reform legislation violates the Equal Protection Clause of the United States.[43] This same argument can be applied to the Texas Constitution. Consequently, injured medical malpractice victims may argue that non-economic damage caps directly or disparately violate equal protection because of the creation of an impermissible classification distinguishing between injured victims with calculable economic damages and injured persons with no economic damages.[44]

To illustrate this point, consider these two hypothetical medical malpractice victims.[45] Victim A is a middle-aged, white male who earns a decent $50,000 annual wage as an insurance salesman. Victim B is an elderly woman who has been retired from work for the last five years and earns no income. Both victims visit Doctor X for an infected hangnail and he misdiagnosed each patient with cancer of the left foot. On account of their doctor's advice, each patient has their respective misdiagnosed foot amputated. Victim A has both economic damages (lost income and incurred medical bills) and non-economic damages (pain and suffering). Victim B has no economic damages (except her medical bills) and she too can file suit for her pain and suffering. The Texas non-eco-

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41. Tex. Const. art. I, § 3.

42. U.S. Const. amend. XIV, § 1.

43. *E.g.*, Morris v. Savoy, 576 N.E.2d 765, 769-72 (Ohio 1991); Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1063 (Ill. 1997).

44. *See* Mathew W. Light, Note, *Who's The Boss?: Statutory Damage Caps, Courts and State Constitutional Law*, 58 Wash. Lee. L. Rev. 315, 341 (Winter 2001) (citing Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1075 (Ill. 1997)).

45. The above hypothetical is used only to illustrate a point. I in no way intend to undermine the medical profession and its ability to distinguish between a cancerous growth and a hangnail.

nomic damage caps permit Victim B to recover up to only $250,000 for the traumatic event while Victim A can recover up to $250,000 plus economic damages far beyond medical expenses. Thus, assuming the medical expenses are equal, Victim A's total recovery may greatly exceed Victim B's total recovery. Consider also, Victim B is retired and she cares for her 5 grandchildren and 1 great-grandchild. As a result of her injury, Victim B will never again be physically able to provide the care she did prior to the medical mistake. The Texas Legislature will not permit a jury to award Victim B beyond the capped amount and the result of the statute's application is an impermissible distinction between victims with the ability to earn a working wage and those victims who can not.

Assuming that a medical malpractice victim's fundamental or important right to full trial by jury is not abridged, the Texas cap on non-economic damages must fail as it is unreasonable and arbitrary legislation.[46] The Texas Legislature is attempting to protect health care providers and their insurance companies regardless of the disparate effect caps have on medical malpractice victims who have little or no economic damages. By imposing limitations upon those injured patients, the cap further prevents those victims from a full and fair trial.[47]

"There are three tiers to the equal protection analysis."[48] Under an equal protection analysis, the United States Supreme Court has established the strict scrutiny, intermediate scrutiny, and the rational related tests.[49] The application of one of the tiers depends upon the classification drawn by a statute or the asserted right that is at issue.[50] The rational related test finds that state action is, generally, "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate governmental interest."[51] Specifically, there is a

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46. *See* Steve Fox, *Constitutional Roadblocks to Michigan's Cap on Non-economic Damages in Product Liability Suits*, 47 Wayne L. Rev. 1385, 1391 (discussing that Michigan's legislative intent to impose limitations on product liability recovery is clearly unreasonable and arbitrary). I make reference to Steve Fox's article multiple times throughout this comment in an effort to apply the critiques regarding the constitutionality of products liability non-economic damage caps in Michigan, to the Texas cap on non-economic damages in medical malpractice suits.

47. *See id.* at 1385.(stating that the product liability cap in Michigan unconstitutionally infringes the plaintiff's right to seek recovery).

48. In re Living Centers of America, Inc., 10 S.W.3d 1, 6 (Tex.App.—Houston [14th Dist.] 1999, pet. denied).

49. *See* Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (discussing the strict scrutiny test); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985) (discussing the rational related test); Craig v. Boren, 429 U.S. 190, 197 (1976) (discussing the intermediate level of scrutiny).

50. *Qutb*, 11 F.3d at 492.

51. *City of Cleburne*, 473 U.S. at 439-40 (1985); Lucas v. U.S., 757 S.W.2d 687, 704 (Tex. 1988) (Phillips, C.J., dissenting).

presumption of constitutionality applied to the statute, and the statute will be upheld "if any state of facts reasonably may be conceived to justify it."[52] However, if a classification disadvantages a suspect class or infringes upon a fundamental right, then government action is subject to strict scrutiny.[53] Strict scrutiny requires a showing that the statute is closely tailored to promote a compelling state interest.[54] To survive an intermediate level of scrutiny, the statute in question must be substantially related to achieve an important governmental interest.[55] Given the three different standards of review, the question that necessarily follows is whether a medical malpractice victim's right to redress is so fundamentally important that the statute must bear more than a mere rational relationship test.

While the strict scrutiny standard should apply, not only would the non-economic damages cap fail this standard, but it should also fall under the rational related test.[56] The statutory cap clearly effects an injured victim's "fundamental right to a jury trial."[57] It is not here asserted that a medical malpractice victim has a fundamental right to damages or economic damages. Rather, it is the injured plaintiffs' unimpeded "right to a meaningful jury trial which is offended by [a] statutory cap on damages."[58]

The right to a fair jury trial in medical malpractice cases is fundamental.[59] The strict scrutiny test states that a statute must be precisely tailored to serve a compelling government interest.[60] The Texas Legislature's interest "is not to bring predictability to" medical malpractice jury awards.[61] "The processes of remittitur and additur are already in place to ensure that jury awards remain predictable."[62] Furthermore, "there is no evidence that the [statutory] cap could effectuate its intended

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52. *City of Cleburne*, 473 U.S. at 439-40 (1985); *Lucas*, 757 S.W.2d at 704; Lens Express, Inc. v. Ewald, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ).

53. *Plyler v. Doe,* 457 U.S. 202, 216-17 (1982).

54. *City of Cleburne*, 473 U.S. at 440 (1985); *Lucas*, 757 S.W.2d at 704.

55. *Lucas*, 757 S.W.2d at 704; *City of Cleburne*, 473 U.S. at 441; Craig v. Boren, 429 U.S. 190, 197 (1976).

56. Fox, *supra* note 46, at 1398.

57. *Id.*

58. *Id.*

59. TEX. CONST. art. I, § 15.

60. *E.g*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); Lucas,757 S.W.2d at 703-04.

61. *Cf.*, Fox, *supra* note 46, at 1398 (asserting Michigan's products liability cap does not bring predictability to jury awards while it "marginally shelves" the interest of lowering insurance rates).

62. *Id.* at 1399.

purpose."[63] This contention is supported by a recent United States General Accounting Office (GAO) report on medical malpractice.[64] The GAO's pertinent results in brief are as following:

> [A]ctions taken by health care providers in response to malpractice pressures have contributed to localized health care access problems in the five states we reviewed with reported problems. We confirmed instances in the five states where actions taken by physicians in response to malpractice pressures have reduced access to services affecting emergency surgery and newborn deliveries. These instances were not concentrated in any one geographic area and often occurred in rural locations, where *maintaining an adequate number of physicians may have been a long-standing problem*, according to some providers. For example, the only hospital in a rural county in Pennsylvania no longer has full orthopedic on-call surgery coverage in its emergency room (ER) because three of its five orthopedic surgeons left in the spring of 2002, largely in response to the high cost of malpractice insurance. Similarly, pregnant women in rural central Mississippi must now travel about 65 miles to the nearest hospital obstetrics ward to deliver because family practitioners at the local hospital, faced with rising malpractice insurance premiums, stopped providing obstetrics services. In both areas, *providers also cited other reasons for difficulties recruiting* physicians to their rural areas. *We did not identify similar examples of access reductions attributed to malpractice pressures* in the four states without reported problems. In the five states with reported problems, however, we also determined that *many of the reported provider actions taken in response to malpractice pressures were not substantiated or did not widely affect access to health care.* For example, *some reports of physicians relocating to other states*, retiring, or closing practices *were not accurate or involved relatively few physicians.* In these same states, our review of Medicare claims data did not identify any major reductions in the utilization of certain services some physicians reported reducing because they consider the services to be high risk, such as certain orthopedic surgeries and mammograms. Continuing to monitor the effect of providers' responses to rising malpractice premiums on access to care will be essential, given the important and evolving nature of this issue.[65]

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63. *Id.*

64. GEN. ACCT. OFF. REP. 03-836, Medical Malpractice: Implications of Rising Premiums on Access to Health Care (Aug. 2003) *available at* http://www.gao.gov/new.items/d03836.pdf (last visited Feb. 17, 2003) (hereinafter *General Accounting Office*).

65. *Id.* (emphasis added).

The GAO's report is in line with some of the findings and recommendations of "Texas Medical Professional Liability Study Commission" made in 1975.[66] The GAO report suggests facts that existed long before the Texas Legislature enacted its non-economic damage cap. Caps cannot legitimately be expected to reduce insurance rates and provide affordable, quality healthcare.[67] It necessarily follows that non-economic damage caps in medical malpractice cases are arbitrary and not rational, "let alone 'precisely tailored' to effectuate its proposed governmental interests."[68] Rather, the Texas Legislature has enacted a statute "which, at best, 'marginally serves' the interest of reducing insurance rates," while simultaneously harming a cognizable group of injured medical malpractice victims who bring suit.[69] The Texas Legislature has failed to give serious consideration to a measure imperative to reduce rising insurance premiums: placing limits on the amount of rate hikes insurance companies can make.[70] "Laws are not only intended to act as a guide, but to deter harmful behavior."[71] The cap on non-economic damages in medical malpractice cases "eludes the latter goal of the law, and, in fact," encourages health care providers to take fewer precautionary measures in their procedures, "knowing that any case will be limited in award, and likewise limited in settlement negotiations."[72]

Despite studies indicating that a cap on non-economic damages does not prevent insurance premiums from rising,[73] the legislature enacted a statute that disproportionately harms those victims with little to no economic damages and quantifiable non-economic damages. The statute has taken away medical malpractice victims' fundamental right to a meaningful jury trial.[74] This statute is irrational and arbitrary because there is no correlation between capping non-economic damages (in an effort to stunt rising malpractice premiums) and better access to healthcare.[75]

The Texas Legislature's statute discriminates between those medical malpractice victims with no economic damages and those with economic damages. In essence, the poorer the victim the more likely their amount

66. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988).

67. *Id.* (illustrating that an independent study could not find a relationship).

68. *Cf.*, Fox, *supra* note 46, at 1399-1400.

69. *Id.* at 1400.

70. *See, e.g., id.* (addressing the Michigan legislature's need to address other factors imperative to reduce rising insurance premiums).

71. *Id.*

72. *See, e.g., id.* (acknowledging a cap on damages in products liability suits will cause defendants to exercise less care knowing that awards will be limited in amount).

73. General Accounting Office, *supra* note 64, at 30; Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988).

74. TEX. CONST. art. I, § 15.

75. General Accounting Office, *supra* note 64, at 7.

of damages will be capped at the statutory amount. It is clear that the non-economic damage caps are not narrowly tailored to resolve the proposed problems with insurance rates and access to quality affordable healthcare. Other, less discriminatory means of addressing these issues include: 1) regulating the insurance industry and its rate increases; and/or 2) creating an injured patient compensation fund.[76]

B. *Open Courts*

The Texas Constitution states that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[77] While the federal constitution does not have an open courts provision, most state constitutions have practically identical guarantees.[78] These guarantees are also commonly known as "remedy, certain remedy, right to remedy, remedy for injury, access to courts and open access to courts provisions."[79]

Many times, state constitutional open courts provisions are used to challenge imposed limits on non-economic damages.[80] "As a practical matter, these provisions are intended to provide citizens of a state with justice and reasonable access to the courts."[81] However, some courts have stretched open courts provisions by suggesting that any time a state legislature limits an injured party's right to sue, it violates the open courts provision.[82] The Texas Supreme Court has not stretched the Open Courts Doctrine in such a manner; rather, the Texas Supreme Court has firmly established an open courts test.[83]

In *Lebohm v. City of Galveston*,[84] the Texas Supreme Court stated that:

> [L]egislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's 'lands, goods, person or reputation' *is sustained only when it is reasonable* in

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76. *Lucas*, 757 S.W.2d at 691; The Foundation for Taxpayer and Consumer Rights, To Solve Malpractice-Insurance Crisis, Roll Back Rates, Not Rights, *available at* http://www.consumerwatchdog.org/healthcare/nw/nw003321.php3 (last visited Dec. 6, 2003) (hereinafter *Foundation*) (suggesting the regulation of insurance rate hikes is the manner in which the Legislature should keep premiums down).

77. TEX. CONST. art. I, § 13.

78. *Lucas*, 757 S.W.2d at 715.

79. *Id.*

80. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment"*, 54 S.C. L. REV. 47, 62 (2002) (discussing that "thirty-seven states have open courts provisions in their constitutions, although the effect of these provisions varies").

81. *Id.*

82. *Id.*

83. Moreno v. Sterling Drug, Inc. 787 S.W.2d 348, 355 (Tex. 1990).

84. Lebohm v. City of Galveston, 275 S.W.2d 951 (Tex. 1955).

> substituting other remedies, or when it is reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it *is arbitrary or unreasonable.*[85]

The Texas Supreme Court has since affirmed the test set out in *Lebohm.*[86] In 1983, the Texas Supreme Court *in Sax v. Vottler,*[87] set forth a new test which states that in order to maintain a successful open courts statutory challenge, a party must show (1) he or she has a "cognizable common-law cause of action that is being restricted," and (2) *the "restriction is unreasonable or arbitrary* when balanced against the purpose and basis of the statute."[88] The Supreme Court has stated that the *Sax* test does not compel an incorrect analysis.[89] Applying the test to the statute at hand, the non-economic damage caps must fail.

Texas has long recognized a common-law action for medical malpractice.[90] As such, the first prong is satisfied. The statute fails the second prong in that it is unreasonable and arbitrary because there is no correlation between a cap on damages and medical malpractice insurance rates.[91] If the *Sax* test is not met, then the statute is a violation of the Open Courts Doctrine.[92] As a consequence, the cap on non-economic damages in medical malpractice cases is unconstitutional.

C. *Right of Trial by Jury*

The Texas Constitution states that "[t]he right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."[93] Some courts have held that malpractice caps infringe upon the right of trial by jury.[94] In *Boyd v. Bulala,*[95] a federal court held the Virginia cap unconstitutional under both the United States and Virginia Constitutions,[96] stating in part:

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85. *Id.* at 955.

86. Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983); Waites v. Sondock, 561 S.W.2d 772, 774 (Tex. 1977).

87. *Sax*, 648 S.W.2d at 661.

88. *Id.* at 666.

89. Lucas v. U.S., 757 S.W.2d 687, 716 (Tex. 1988) (Phillips, C.J., dissenting).

90. *Id.* at 704.

91. General Accounting Office, *supra* note 64; *Lucas*, 757 S.W.2d at 693.

92. *Sax*, 648 S.W.2d at 666; Moreno v. Sterling Drug, Inc. 787 S.W.2d 348, 355 (Tex. 1990).

93. TEX. CONST. art. I, § 15.

94. *Lucas*, 757 S.W.2d at 692.

95. Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986).

96. *Id.* at 789.

> [S]ince the assessment of damages is a fact issue committed to the jury for resolution, a limitation on the performance of that function is a limitation on the role of the jury . . . This extraordinary requirement bears no relation to the doctrines of *remittitur,* new trial, and judgment notwithstanding the verdict, and it cannot be founded upon the court's inherent power over verdicts and judgments. Indeed, there exists no permissible basis for entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury.[97]

These arguments do not prove too much for the medical malpractice victims adversely effected by this Texas legislation.[98] The Texas Legislature is masking unreasonable, arbitrary legislation that invades the right to trial by jury as legitimate governmental activity.[99] Medical malpractice victims are prevented from having a jury assess fully and fairly their amount of non-economic damages because of the $250,000 limitation. There is no allowable foundation for entering a judgment predetermined by the legislature in place of a properly reached jury verdict, especially when there exists no correlation among damage caps, insurance premiums and access to health care.[100] As such, the statute is arbitrary, unreasonable and cap on plaintiffs' right of trial by jury.

D. *Prohibition Against Special Laws*

The Texas Constitution states that "[t]he Legislature shall not . . . pass any local or special law . . ."[101] In *Clark v. Finley*,[102] the Texas Supreme Court defined a "local" law as one that confines its operation "to a fixed part of the territory of the state."[103] A "special law" was defined as "a statute that relates to particular persons or things of a class."[104] The non-economic damage caps constitute a special law in favor of a certain class of litigants, namely medical malpractice victims with economic damages as opposed to victims with no economic damages and only non-economic

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97. *Lucas,* 757 S.W.2d at 711 (Tex. 1988) (*citing* Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986); *see also* Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (1988) (stating that "the Legislature cannot abolish the right to a remedy by capping a plaintiff's recovery . . . ").

98. *Contra Lucas* 757 S.W.2d at 710 (Tex. 1988).

99. *Compare* Coulter v. Melady, 489 S.W.2d 156, 159 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (holding right to jury trial not infringed by statutory provision involving lack of consent).

100. General Accounting Office, *supra* note 64; *Lucas*, 757 S.W.2d at 693.

101. TEX. CONST. art. III, § 56.

102. Clark v. Finley, 54 S.W. 343 (Tex. 1899).

103. *Id.* at 346.

104. *Id.* at 345.

damages. The Texas Supreme Court stated in *Miller v. El Paso County*[105]:

> [t]he courts recognize in the Legislature a rather broad power to make classifications for legislative purposes and to enact laws for the regulation thereof, even though such legislation may be applicable only to a particular class . . . [but] such legislation must be intended to apply uniformly to all who may come within the classification designated in the Act, and the classification must be broad enough to include a substantial class and must be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished . . .[106]

Thus, the Legislature is unquestionably empowered to create classifications of persons and things, so long as the classifications are not arbitrary.

Where a reasonable relationship exists between the classification and the objectives "sought to be accomplished by the statute,"[107] Article III Section 56 is not violated.[108] Here, the Texas Legislature has created classifications that are arbitrary. By enacting the non-economic damage caps on victims of medical malpractice, the Texas legislature has created at least two classes that will be treated differently under the same circumstances.[109] However, the Texas Legislature has decided that a legitimate medical malpractice plaintiff shall nonetheless be regarded as a frivolous litigant, the lead factor contributing to increased insurance rates, the major blockage to affordable healthcare, "and must be prevented from full recovery for his actual harm."[110]

The Texas Legislature's cap on non-economic damages is arbitrary. As previously discussed, no correlation exists among damage caps, insurance premiums and access to health care.[111] Rather, the "cap puts enormous burdens on a small class of persons who are seriously" injured by health

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105. Miller v. El Paso County, 150 S.W.2d 1000, 1001-02 (Tex. 1941).

106. *Id.* at 1002.

107. TEX. CONST. art. III, § 56.

108. *See also* Smith v. Davis, 426 S.W.2d 827, 830 (Tex. 1968).

109. Two of the classes created by this statute include the poor and injured with no economic damages and the wealthy and injured with substantial economic damages.

110. *See generally*, Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 74.302, 2003 Tex. Sess. Law Serv. 873; Fox, *supra* note 46, at 1403-04. Refer to the author's statement at note 46.

111. General Accounting Office, *supra* note 64, at 7; Lucas v. United States, 757 S.W.2d 687, 694 (Tex. 1988).

care providers, "with only a 'marginal' chance that those harms may result in lowered insurance premiums" to insurance companies.[112]

E. *Separation of Powers*

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[113]

The Texas Legislature has infringed upon "the court's power to declare [a jury] award excessive," subjecting it to remittitur, and "has substituted its own judgment for that of the jury and the court."[114] The Texas Legislature has decided that medical malpractice jury verdicts over the cap are excessive.[115] The Texas Legislature does not partake in court proceedings and decide the reasonableness of jury awards.[116] Therefore, the Legislature is in no position to make such per se findings.[117] Instead, the Texas legislature has over-stepped and has taken away the court's power to render verdicts excessive and reasonable.[118] "The Legislature has changed the court's rules of practice and procedure by taking away such power."[119]

The non-economic damage cap violates the separation of powers because of its failure to withstand scrutiny under the test of *Mistretta v. United States*.[120] In *Mistretta*, the United States Supreme Court ruled that "a Congressional delegation of power, away from the traditional role of the executive branch and into the authority of the judicial branch, did not violate the separation of powers."[121] The Supreme Court found that no

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112. Fox, *supra* note 46, at 1404 (2002). Applying Steve Fox's critique of Michigan's non-economic damage cap on products liability claims to the Texas legislature's cap on non-economic cap in medical malpractice cases.

113. TEX. CONST. art. II, § 1.

114. Fox, *supra* note 46, at 1401-02.

115. *Id.* at 1401.

116. *Id.* at 1401-02.

117. *Id.*

118. *Id.*

119. *Id.*

120. Mistretta v. U.S., 488 U.S. 361 (1989).

121. *See id.* at 412 (holding that Congress can call on the Judiciary's expertise to write policy); *cf.* Fox, *supra* note 46, at 1402 (discussing how Michigan's product liability damage cap fails *Mistretta* prongs).

violation would occur unless Congress vested in the judicial branch powers that "are more appropriately performed by the other branches or that undermine the integrity of the judiciary."[122] While no separation of powers violation existed in *Mistretta*, the Texas Legislature's non-economic damages cap fails the *Mistretta* prongs.

First, the judicial branch is vested with the powers of deciding whether a jury verdict is excessive or not.[123] The Texas Legislature is in no position to conclude that jury awarded non-economic damages are excessive as they relate to the parties involved.[124] The statute has failed the second Mistretta prong in that the judicial branch's integrity is certain to suffer because "citizens will perceive the courts as powerless" against big insurance and health care lobbyists who assert major influence over the Legislature.[125] Applying the *Mistretta* test to the non-economic damage cap, the Texas Legislature has "overstepped its authority by exercising powers which are better left to the judicial branch, thereby undermining the judiciary's integrity."[126]

F. *Conflicting Constitutional Provisions*

Now that Proposition 12 has passed, there will inherently exist a conflict between the new Texas constitutional provision and the Open Courts Doctrine.[127] When a question of the constitutionality of a statute is at issue, the Texas Supreme Court begins with a presumption that the statute is valid and that the Texas Legislature has not acted arbitrarily or unreasonably in passing it.[128] The burden lies upon the party challenging the newly enacted law to establish its unconstitutionality.[129] Provided that a reasonable construction can be ascertained rendering the statute constitutional and that it carries the Texas Legislature's intent, courts must uphold the law.[130]

A statute "should not be annulled by the courts merely because doubts may be suggested raised as to [its] constitutionality."[131] Before a statute

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122. *Mistretta*, 488 U.S. at 385.

123. *See* Larson v. Cactus Utility Co., 730 S.W. 2d 640, 641 (Tex. 1987) (holding that the rule of remittitur applies to trial courts and courts of appeals).

124. *Cf.* Fox, *supra* note 46, at 1402 (asserting that the Michigan Legislature should not substitute its judgement for that of a jury on the issue of excessive damages).

125. *Cf. Id.*(arguing the negative effect the legislature will have on the judiciary by taking away litigants' right to full trial when products liability damage caps are in place).

126. *Cf. Id.* (applying Mistretta to Michigan's products liability damage caps).

127. TEX. CONST. art. I, § 13; Tex. H.R.J. Res. 3, 78th Leg., R.S. (2003).

128. *See* Ely v. State, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *Ex parte* Anderson, 902 S.W.2d 695, 698 (Tex. App.—Austin 1995, pet. ref'd).

129. *See Ex parte Anderson,* 902 S.W.2d at 698.

130. Townsend v. State, 427 S.W.2d 55, 62 (Tex. Crim. App. 1968).

131. *See Ex parte* Granviel, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978).

will be set aside, the act must clearly show that "its validity cannot be supported by any reasonable intendment or allowable presumption."[132] Furthermore, Constitutional provisions must be interpreted "in light of the common law" and in an equitable manner.[133] The Texas Supreme Court, when interpreting the Texas Constitution, presumes that the text has been carefully contemplated.[134] When determining the intent of constitutional provisions, the Texas Supreme Court considers such factors as the historical context and purpose of the provision.[135] "When determining the purpose of a constitutional provision, [courts] will consider the evil to be remedied and the good [intended] to be accomplished by that provision."[136] American Jurisprudence lends the interpretation that when there exists irreconcilable conflict between two provisions, the specific will trump the general or the most recent will trump the antecedent provision.[137] "If there is a real inconsistency between a constitutional amendment and an antecedent provision, the amendment must prevail because it is the latest expression of *the will of the people*."[138]

The citizens of Texas were misled by the Legislature who presented Proposition 12 for vote. "The only reason the [Texas] Legislature scheduled an election on a far-reaching proposal to limit monetary damages in medical malpractice cases for [September] 13, rather than [November] 4, [was] to discourage voter turnout."[139] The Texas Legislature, insurance companies, doctors and other health care providers feared that the more Texans who voted on Proposition 12 the more likely it would be defeated by a further-informed public.[140]

The Texas Legislature needed the constitutional amendment to be approved by Texas voters, which is why the election date was so crucial to its passage.[141] "Every regular session of the Legislature produces several

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132. *Id.* at 511.

133. Texas & New Orleans R.R. Co. v. Railroad Comm'n, 220 S.W.2d 273, 277 (Tex. Civ. App.—Austin 1949, writ ref'd) (*quoting* Great S. Life Ins. Co. v. City of Austin, 243 S.W. 778, 780 (1922)).

134. Cook v. State, 902 S.W.2d 471, 478 (Tex. Crim. App. 1995); Gallagher v. State, 690 S.W.2d 587, 592 (Tex. Crim. App. 1985) (en banc).

135. *See generally* Autran v. State, 887 S.W.2d 31, 38-39 (Tex. Crim. App. 1994) (en banc) (explaining Texas Supreme Court analysis in context of determining whether the Federal or state constitution affords more protection).

136. Aerospace Optimist Club v. Texas Alcoholic Beverage Comm'n, 886 S.W.2d 556, 559-60 (Tex. App.—Austin 1994, no writ).

137. 16 AM. JUR. 2d *Constitutional Law* § 63 (2003).

138. *Id.* (emphasis added).

139. Clay Robison, *Trying to Slip One By Texas Voters*, HOUSTON CHRON., May 25, 2003, Outlook, at 2, *available at* http://www.chron.com/cs/CDA/story.hts/editorial/robison/1922822 (last visited Feb. 18, 2004).

140. *Id.*

141. *Id.*

constitutional amendments for voters to consider, and with rare exceptions those amendments in recent years have been placed on the November general election ballot."[142] The passage of constitutional amendments, in odd-numbered years, are often determined in large municipalities where city elections attract big voter turnout.[143] Usually, constitutional amendments attract very few voters by themselves.[144] By scheduling the amendment on medical malpractice for September 13, the Legislature's quest for low voter turnout was a success and Proposition 12 was narrowly approved.

The passage of Proposition 12 was not a true reflection of the will of the people because the Legislature misled the public and purposely scheduled the vote at a time where turnout would likely be low.[145] The rebuttable presumption of the amendment's validity is defeated because there is no "reasonable intendment or allowable presumption".[146] The ends do not justify the means since no correlation exists in capping non-economic damages and driving down insurance premiums or raising healthcare access.

IV. PROPOSALS

"The problem of a misperception of problems in tort reform is not new. Sanders and Joyce have written about 1980s tort reform in Texas, and documented how legislative decisions were made without an adequate empirical underpinning."[147] The Texas Legislature should mandate a study to conduct research and develop a detailed recommendation outlining how a patient compensation fund or statutory insurance regulation could be implemented.[148] According to the Texas Department of Insurance's website, the 78th Legislature did not issue a directive for the De-

142. *Id.*

143. *See id.*

144. *Id.*

145. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.J.R. 3, 78th Leg., R.S. (2003), http://204.65.51.20/data/hrofr/pdr/ba78r/HJR0003.pdf (indicating that some Representatives wanted a November ballot day).

146. *Ex parte* Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978) (en banc) (citing 53 Tex. Jur. 2d, Statutes, § 184, p. 277).

147. Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9, 39-40 (2002) (citing Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990)).

148. *See, e.g.*, OHIO DEP'T OF INS., FINAL REPORT ON THE FEASIBILITY OF AN OHIO PATIENT COMPENSATION FUND, at 1 (May 1, 2003) http://www.ohioinsurance.gov/Newsroom/scripts/Release.asp?ReleaseID=1584 (explaining Ohio's directive to ascertain the feasability of a medical malpractice compensation and its effect on stabilizing insurance premiums) (last visited Feb. 20, 2004).

partment of Insurance to undertake such a study.[149] In the hope of driving down the cost of insurance premiums and making healthcare more accessible and affordable, the Texas Legislature should consider a patient compensation fund and insurance regulatory statutes as two alternatives to a cap on non-economic damages in medical malpractice cases.

A. *Patient Compensation Fund*

Texas should follow suit with other states that have provided for a medical malpractice patient compensation fund. The states that currently have compensation funds are Indiana, Kansas, Louisiana, Nebraska, New Mexico, Pennsylvania, South Carolina, and Wisconsin.[150] "These funds, which are sometimes referred to as excess coverage or excess liability funds, pay for medical malpractice judgments or settlements that exceed a statutorily established amount."[151]

The way a patient compensation fund operates is that health care providers buy malpractice premiums from insurance companies in a minimum statutorily defined amount.[152] Insurance companies pay out claims for amounts up to the coverage limit.[153] The insurance companies also pay an annual assessment to the patient compensation fund, and the excess of judgments and settlements above the minimum coverage amounts are paid out from the fund.[154]

A patient compensation fund is one alternative for the Texas Legislature to consider to legitimately achieve a goal of keeping insurance rates down and making access to healthcare more affordable to all Texans. These types of funds are relied upon in other states and Texas should follow suit.[155]

B. *Regulate Insurance Rates*

Another alternative to the passage of non-economic damage caps in medical malpractice cases is for the Texas Legislature to regulate the rise of insurance premiums.[156] "If the insurance industry and the medical

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149. *See* State of Texas, Dep't of Ins. (outlining legislation affecting the Department of Insurance) *available at* http://www.tdi.state.tx.us/commish/lege03.html#medical (last visited Feb, 20, 2004).

150. S.C. DEP'T OF INS., OLR RESEARCH REPORT: MEDICAL MALPRACTICE COMPENSATION FUNDS, at 1 (Oct. 22, 2003) http://www.cga.state.ct.us/2003/olrdata/ins/rpt/2003-R-0742.htm (last visited Feb. 20, 2004).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See id.*

156. Foundation, *supra* note 76.

lobby have their way, Floridians will soon become guinea pigs in an experiment that has failed everywhere else it has been tried: caps of compensation for victims of medical malpractice."[157] The Texas Legislature has now taken the step that so many Floridians have feared, which is the passage of non-economic damage caps in medical malpractice cases.[158] Rather than look into a crystal ball to foresee the real effects the caps will have, all Texas has to do is look at California's experience.[159]

Looking to California as a model reveals that "the only way to cut premiums is to regulate insurance company profits and expenses."[160] The following observations of California are that:

> [the Legislature] has tried it both ways. In the mid-1970s, skyrocketing premiums galvanized doctors to join the insurance industry in support of damage caps. Intimidated by the medical profession's threat to leave the state, California lawmakers capped pain and suffering damages at $250,000. The 1975 law enriched the insurance industry by reducing what it had to pay out to victims of medical mistakes. But contrary to the insurers' promises, *premiums continued to rise—450 percent in the 13 years after the law's passage.*[161]

Texas should learn from the mistakes made by California's Legislature and its passage of MICRA[162]. At the very least, the Texas Legislature should assign a commission to ascertain the feasibility of regulating the rate at which insurance companies can raise premiums via statute; instead of on the backs of injured patients by limiting their availability of non-economic damages.

V. CONCLUSION

At the outset of this comment, it appeared that the real problem the Governor and Legislature faced was assuring Texans access to quality,

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157. *See generally id.*

158. *Id.*; Tex. H.J.R. Res. 3, 78th Leg., R.S. (2003).

159. *See generally* Tom Dresslar, *Law to Lift Cap on Malpractice Claims Unveiled: Insurers Could React by Hiking Rates, Spurring a Prop. 103 Showdown*, L.A. Daily J., May 11, 1999, at 1 (describing the crisis that led to MICRA's passage); Lois Richardson, *Why California Needs MICRA*, CAL. HEALTH L. MONITOR, Mar. 9, 1998, 6 No.5 SMCAHTHLM 2 (Westlaw).

160. Foundation, *supra* note 76.

161. *Id.* (emphasis added).

162. Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Reexamine Damage Caps in California's Elder Abuse Act,* 39 SAN DIEGO L. REV. 599, 625 (2002); Health Program Office of Technology Assessment, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 12 (1993); *see* generally Cal. Civ. Code § 3333.2(a) (West 1997).

affordable health care.[163] In their attempts to achieve this goal, an assault on patient's rights and the power of the courts has come to the forefront; with a cap on non-economic damages in medical malpractice lawsuits.[164]

The Texas Legislature's statute on non-economic damage caps in medical malpractice cases is unconstitutional because it violates: 1) the Equal Protection Clause under both the Federal and Texas Constitutions; 2) the Texas Open Courts Doctrine; 3) a Patient's Right to Trial by Jury; and the 4) Prohibition against Special Laws. Moreover, the statute's enabling constitutional amendment is a violation of the Texas Constitution's Separation of Powers and must fail as it is not a reflection of the will of the people.

As a means of deterring lawsuit abuse, lowering medical malpractice insurance premiums, and having healthcare more accessible and affordable, the Texas Legislature should consider other statutory alternatives. A patient compensation fund and insurance regulatory statutes are two options the Legislature should consider as an alternative to a cap on non-economic damages in medical malpractice cases. It is only when the Legislature repeals the current non-economic damage caps statute that their assault on the rights of the injured and the power of the courts will cease.

163. Office of the Governor, *supra* note 9. (listing priorities outlined by the Governor).

164. *Id.*