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Judicial Approach to Medical Malpractice Reform

Barbara G. Taft
Livingston, Barger, Brandt & Schroeder
Bloomington

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Beginning in the 1960s, increasing national public policy concern focused on the medical malpractice liability system. As medical malpractice claim frequency and severity increased through the 1970s and 1980s, public policy interest in medical malpractice reform continued and increased in intensity. However, agreement on an appropriate response to the perceived crisis was singularly lacking. This same trend has continued and current reform proposals are, likewise, widely diverse.

Earlier proposals have included contractual basis for medical malpractice liability and no-fault medical malpractice similar to worker's compensation or no-fault automobile insurance. Courts and state legislatures have, in general, rejected both the no-fault and the contractual liability prescriptions. Courts have explicitly limited the ability of parties to freely contract out of current medical malpractice liability rules. Only two states, Florida and Virginia, have experimented with replacing medical malpractice liability with a no-fault liability system. Even in these states, the no-fault system was in place only for infants who suffer neurological trauma during birth.[1] Although state legislatures have generally rejected no-fault and contractual proposals, the perceived malpractice crisis has led to state legislation intended to reduce malpractice frequency, probability, and severity.

While state sovereignty currently regulates medical malpractice liability, Congress has the power, under the Commerce Clause of the U.S. Constitution, to preempt state regulation.[2] A bill has been introduced in the 110th Congress that would preempt state law with respect to certain aspects of medical malpractice lawsuits.[3] The 108th and 109th Congresses considered similar medical malpractice reform proposals. To date, however, state law, in varying degrees, regulates medical malpractice liability.

In 2005, a groundswell of medical malpractice reform swept the nation. Legislatures in 48 states took up 430 bills addressing aspects of medical malpractice reform.[4] Responsive actions contemplated by state legislatures were as varied as the healthcare needs and economic bearing of the states contemplating change. The reform actions, however, generally fell into three categories, with synergistic application: 1) tort reform; 2) insurance regulation; and 3) physician regulation. Twenty-seven states enacted reform legislation, which included affidavits or certificates of merit, damage limits, doctor apologies, expert witness qualifications, and periodic payments. These states also addressed insurance regulation by creating insurance funds, premium approval, and mandatory insurance reporting. Finally, physicians found themselves under greater scrutiny with new regulations ranging from public access to doctor information, to censorship under "three strikes" rules.

The centerpiece of reform legislation has been to limit or "cap" damages awarded to plaintiffs in medical malpractice cases. Policymakers anticipate that liability insurers would respond to the passage of caps by reducing premiums based upon improved risk exposure and payout management. Supporters of reform champion California's MICRA law, which in 1975 capped economic damages at a flat $250,000, as the model for crisis recovery. Caps proposals were even taken directly to the public with voter referenda in several states, including Texas in 2003.[5] As a growing number of state legislatures have included caps legislation in medical malpractice reform, litigation challenges to the constitutionality of such caps have grown. Since 2002, legal challenges to statutory caps have been mounted in Georgia, Nebraska, Wisconsin, New Mexico, Michigan, Illinois, Alaska, West Virginia, Florida, Ohio and Utah. Additional legal challenges have addressed other aspects of medical malpractice tort reform, including procedural and evidentiary changes.

Recent Illinois History of Medical Malpractice Reform

The State of Illinois previously addressed the constitutionality of damages caps, and has had recent opportunity to revisit the issue. In 1995, the Illinois legislature passed the Illinois Civil Justice Reform Amendments, which included among other measures, a $500,000 limit on noneconomic damages in a variety of civil suits, including medical malpractice claims.[6] In 1997, the Illinois Supreme Court declared

About the Author

Barbara G. Taft is an attorney with the firm of *Livingston, Barger, Brandt & Schroeder*, with offices in Bloomington and Champaign, Illinois. She concentrates her practice in medical malpractice and nursing home defense, representing physicians, hospitals and nursing homes, as well as, employment law and general tort litigation. She received her J.D. from George Washington University National Law Center and her B.S. from Tulane University. She is licensed in Louisiana as well as Illinois, and has argued before the United States Supreme Court.

substantial portions of the tort reform provisions unconstitutional.[7] The court based its decision on two state constitutional violations: 1) violation of the prohibition against special legislation conferring a benefit to some people and not to others similarly situated; and 2) the legislative damage caps violated the doctrine of remittitur, which dictates that the courts have the sole power to correct excessive jury awards. The court likened the legislative damage cap to a "legislative remittitur," which, unlike a judicial remittitur, does not allow the plaintiff the option of refusing the reduced award and choosing instead to go forward with a new trial.[8]

On August 25, 2005, Illinois Governor Rod Blagojevich signed into law medical malpractice reform legislation, which among other significant provisions, placed statutory limitations on noneconomic damages for plaintiffs who file lawsuits against physicians and hospitals. A constitutional challenge has been lodged against Public Act 94-677, focusing on the unconstitutionality of the imposition of limitation on noneconomic damages. On November 13, 2007, a Cook County Circuit Court struck down Public Act 94-677 as unconstitutional.[9] The court ruled that the cap on noneconomic damages in medical malpractice claims violated the Separation of Powers Clause of the Illinois Constitution.[10]

Malpractice Damages Awards and Caps Legislation Variances

Similar to damages caps under federal employment law Title VII, limitation to recovery is applied by the court to reduce a jury verdict award, if necessary, to come within the statutory caps. Theoretically, jurors either have no knowledge of the caps, or they are informed to not take such caps into consideration during deliberations. Some empirical data does suggest, however, that jurors are aware of damage limitations and may compensate by awarding higher damages in economic losses not subject to a cap.[11]

More than half of the states have passed legislation imposing a limit on noneconomic damages awards, ranging from total cap figures for all damages to $250,000-$500,000 or greater cap on noneconomic damages.[12] Some states either prohibit punitive damages or limit punitive damages,[13] some limit the liability of each defendant named in the case, and some impose a cap on all damages except medical and related expenses. Also, some states allow for flexible caps, adjustable annually to meet inflation rates.[14]

The genesis of limiting noneconomic caps arises from both the distasteful suggestion that injured individuals should not be fully compensated for their economic losses and the unpredictable aspect of jury awards for noneconomic or pain and suffering, damages. It is inherently difficult for juries to place a monetary value on precisely how much a specific plaintiff should be compensated based upon evidence of pain and suffering. As a result, the amount of noneconomic damages varies greatly, without firm indicators for such widespread awards. Insurers, faced with such risk uncertainty, find it difficult to underwrite policies cost effectively.

In response to criticism that caps potentially deny compensation to severely injured plaintiffs, some states have built in exceptions for catastrophic injuries. Nevada allows the judge to waive the cap in circumstances of gross negligence or exceptional circumstances.[15] In Alaska noneconomic damages are limited to the greater of $400,000 or $8,000 multiplied by plaintiff's life expectancy in years[16] and are increased to the greater of $1,000,000 or $25,000 multiplied by plaintiff's life expectancy in years for severe permanent impairment or disfigurement.[17]

Some states have provided extra protection to physicians in tailoring damage caps. In Oklahoma, legislation was passed in 2003 limiting noneconomic caps for injuries arising from pregnancy, labor and delivery and post-partum care, to address the need to retain and attract OB/Gyn physicians to the state. In Pennsylvania, a special fund has been established to abate higher insurance costs for physicians, which is funded, in part, by punitive damage awards.[18]

Legal Challenges to Medical Malpractice Reform

One explanation for the variety of legislative approaches to medical malpractice reform is the pressure to craft law that will withstand constitutional attack. The constitutionality of damage caps has been challenged in 25 states. The constitutionality of noneconomic damage caps was upheld in Alaska,[19] California,[20] Colorado,[21] Idaho,[22] Kansas,[23] Maryland,[24] Michigan,[25] Missouri,[26] Nebraska,[27] Virginia,[28] and West Virginia.[29] Comprehensive damage caps have been upheld in Indiana,[30] Louisiana,[31] and New Mexico.[32] Damage caps have been struck down in Alabama,[33] Georgia,[34] Illinois,[35] Kansas,[36] New Hampshire,[37] North Dakota,[38] Ohio,[39] Oregon,[40] Washington,[41] and Wisconsin.[42] The most common constitutional challenges to caps legislation include claims based on access to courts, right to trial by jury, equal protection, due process, separation of powers principles, and to a lesser degree, special legislation. Other challenges have been lodged against the constitutionality of certificates of merit, venue-shifting and collateral source rule exceptions. The complexity and diversity of medial malpractice reform is evident in the fact that virtually every court has rendered plurality decisions, either for or against constitutionality, with strong dissents.

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Access to Courts

Numerous states have examined whether common-law rights and remedies that were in place at the time state constitutions were adopted had protection from legislative change. A majority of the states have constitutional language guaranteeing "[a]ll courts shall be open, and every person, for injury done him or her in his or her hands, goods, persons, or reputation, shall have a remedy by due course of law and justice administered without denial or delay."[43] Although constitutional open-courts provisions are worded similarly, state courts have arrived at markedly different interpretations of the provision. The toughest open-courts challenges have been in states where case law requires courts to inquire into the public necessity for a statute that limits access to courts or whether the statute provides plaintiffs with some replacement remedy or "commensurate benefit."

A majority of jurisdictions have held that a cap on damages does not violate the open courts and right to remedy provisions of their state constitutions.[44] These courts have construed these provisions narrowly, holding that open-courts rights are not significantly impinged by damages caps. Courts characterize such constitutional provisions as preserving access to courts for redress of rights, as those rights in fact exist.[45] As the Wisconsin Court of Appeals reasoned "[i]f a statute of repose can bar the courthouse doors to an injured patient before the patient's malpractice injury had even manifested itself * * * then certainly, putting a ceiling or cap on the recovery of noneconomic damages does not violate the clause."[46] The Missouri Supreme Court held that open-courts provisions barred the legislature from erecting procedural barriers to accessing judicial process, but did not affect their ability to modify or even eliminate causes of action.[47] The court determined that damages caps fell within the legislature's purview to modify causes of action and, thus, were not unconstitutional.[48] The court further noted that because the open-courts guarantee did not implicate substantive rights, the legislature was not obligated to offer a replacement remedy or other offsetting benefit to those whose recovery it chose to limit.[49] Nebraska[50] and West Virginia[51] rejected constitutional challenges to open-courts on the same basis.

In a minority of states, courts have interpreted the open-courts guarantee as imposing substantive constraints on the legislature's discretion to restrict established causes of action and remedies. In Maine, the Supreme Judicial Court determined that a statutory cap set too low could result in a denial of the constitutional right to remedy.[52] The court stated that "it is conceivable that a statute could limit the measure of the tort damages so drastically that it would result in * * * the denial of a remedy * * *."[53] Other states have thought it necessary to overturn caps on similar grounds.[54]

The Texas Supreme Court, on a certified question from the Fifth Circuit, found a Texas statute limiting total damages against a physician or health care provider to $500,000 and noneconomic damages to $150,000 unconstitutional.[55] That court applied the open courts clause of the Texas Constitution to invalidate this total damage limitation by stating: "We hold that the restriction is unreasonable and arbitrary and that [the statutory provisions] unconstitutionally limit Lucas's right to access to the courts * * *. [T]he legislature has failed to provide Lucas any *adequate substitute* to obtain redress for his injuries."[56]

In response to the Supreme Court ruling, Texas citizens passed Proposition 12 in 2003, amending the state constitution to expressly permit the legislature to limit noneconomic damages in actions against health care providers.[57] This measure paved the way for the adoption of a $250,000 damages cap in 2004.[58]

The Supreme Court of Florida, in similar fashion, had earlier held that a $450,000 ceiling on noneconomic damages on all tort and contract cases violated the open courts provision of the Florida constitution.[59] The court first compared the Tort Reform Act with other constitutionally sound statutes that placed similar restrictions on plaintiffs' right to recover (e.g., no-fault insurance and sovereign immunity), and then held the statutory restrictions impermissible, unless the legislature: (1) provided a reasonable alternative remedy or commensurate benefit or (2) showed an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.[60] Caps were revived in Florida in 1988, when the legislature adopted limitations on noneconomic damages in medical malpractice cases in which the claim was arbitrated, or in which the defendant offered to go to arbitration and the plaintiff refused.[61] This statute was challenged for violation of the open-courts provision of the Florida constitution.[62]

Applying the same standards in *Smith*, the Florida Supreme Court reached a different conclusion. The court upheld the new statute because it offered a commensurate benefit in conjunction with the redaction of the plaintiff's right to recover unlimited damages, i.e., relaxed evidentiary standards and mechanisms for ensuring prompt payment of damages inherent in arbitration. Also, the new statute was the only method likely to be effective in addressing a matter of overwhelming public necessity. The Florida Court recognized the legislature's factual findings that insurance costs had risen sharply, were driving up health care costs, and had left some physicians unable to secure insurance. The court deferred to

the legislature's conclusion that other possible reforms would not address these problems effectively.

In the minority states, in which courts have interpreted open-courts provisions to impose substantive restrictions on legislatures' ability to restrict common law rights, proponents seeking damages caps are required to establish a persuasive showing that caps are effective in achieving their intended purpose of ameliorating the effects of medical malpractice insurance crisis on the supply and cost of health services in the state. However, the majority approach views open-courts guarantees as procedural guarantees only, leaving legislatures free to limit or abolish remedies and causes of action.

Right to Trial by Jury

The right to a trial by jury also has been invoked in challenges to medical malpractice damages caps. The Seventh Amendment to the United States Constitution guaranteeing a right to trial by jury at common law, does not apply to states through the Fourteenth Amendment. However, most states have comparable jury trial guarantees in their constitutions. The Louisiana, Colorado[63] and Virginia constitutions do not guarantee an inviolate right to a civil jury trial. To date, the basis for the jury trial challenges arise from the scope of the jury's province and the character of the causes of actions to which the right to trial by jury attaches.

In Maryland, the court of appeals ruled that the jury trial right in civil cases relates to "issues of fact" in legal actions and does not extend to issues of law, equitable issues, or matters which historically were resolved by the judge rather than by jury.[64] The court further noted that the constitutional right to a jury trial is concerned with whether the court or the jury shall decide those issues which are to be resolved in a judicial proceeding. The court rationalized that where the legislature has legislatively abrogated or modified a cause of action, such as the limitation of noneconomic damages awarded in a medical malpractice suit, no question concerning the right to a jury trial arises.[65] "Neither the $350,000 limit on recovery nor the provision that the jury shall be informed of the limit interferes with the jury's proper role and its ability to resolve the factual issues which are pertinent to the cause of action." [66]

The Supreme Court of Virginia similarly rejected the argument that a legislative cap on recoverable tort damages violated the Virginia Constitution's guarantee of a jury trial, stating "the Virginia constitution guarantees only that a jury will resolve disputed facts. * * * Once the jury has ascertained the facts and assessed the damages the constitutional mandate is satisfied. [citations omitted] Thereafter, it is the duty of the court to apply the law to the facts. "[67] The Court concluded that a remedy is a matter of law and not a matter of fact.

In Michigan, although the court recognized not only the right to a trial by jury but to have that jury assess damages, the court determined that the legislature was bestowed with the power to limit a plaintiff's remedy.[68] Turning to a similar ruling in Idaho, the court could discern "no logical reason why a statutory limitation on a plaintiff's remedy is any different than other permissible limitation on the ability of plaintiffs to recover in tort actions."[69] In Indiana, the court summarily concluded, "[i]t is the policy of the Act that recoveries be limited to $500,000, and to the extent the right to have the jury assess the damages is available. No more is required by [the Indiana Constitution] in this context."[70] Similarly, the Alaska Supreme Court held that the "decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury."[71]

In some cases, courts have focused on whether the cause of action at issue existed at the time of the constitutional adoption. For example, the Oregon Supreme Court held that the state's $500,000 cap on noneconomic damages could be applied to statutorily-created causes of action such as wrongful death suits, but not to common law medical malpractice personal injury claims, which were recognized in 1857 when the state's constitution was adopted.[72] Others have rejected this approach. For instance, the Michigan court did not believe that the Constitution of 1963 was intended to prohibit the legislature from addressing appropriate damages, in light of a number of statutes providing for double and treble damages.[73] "Such increases in damages demonstrate that a defendant's right to have a jury assess liability and damages can be legislatively altered."[74]

A minority of courts, faced with constitutional challenges arising from right to trial by jury, have struck down damages caps. The Washington Supreme Court, relying on *stare decisis*, found that the measure of damages is a question of fact within the jury's province.[75] "Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function deserves constitutional protection."[76] Alabama's high court, in echoing the Washington court ruling, found problematic the proposition adopted by the Virginia court that would allow juries to determine appropriate damages awards, but not give these determinations legal effect.[77] "The practical effect of the damages limitation, laying aside all reasoning based on pure sophistry, is to prevent the jury from ap-

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plying the *facts*."[78] Kansas,[79] Texas,[80] Ohio,[81] and Florida[82] courts found damages limits unconstitutional based upon operative constitutional language nearly identical to Washington state's trial by jury constitutional provision.

Although the general approach of state courts to jury-trial challenges to damages caps have been focused on province of the jury and scope of the claimants' rights at the time of constitutional adoption, the outcomes have been varied. Nebraska disagreed with the reasoning of several states' courts in concluding that a cap on damages violated the state constitution, even though the language of the constitutional provision at issue was generally the same as Nebraska's constitutional provision.[83] A review of the case law indicates that no predictor for outcome has emerged based upon the breadth of the constitutional jury provision at issue.

Equal Protection

The Fourteenth Amendment to the U.S. Constitution prohibits states from denying citizens equal protection under the law.[84] Most states have similar constitutional provisions. The guarantee of equal protection prohibits class legislation arbitrarily discriminatory against some and favoring others in like circumstances. Challengers to damages caps based on equal protection principles assert that caps impermissibly create classes. A majority of challenges have asserted that caps divide malpractice plaintiffs into two groups, allowing those whose injuries are valued below the cap to collect their full damages, while barring those with damages in excess of the cap from recovering a portion of their losses. Arguments also have been raised regarding the creation of plaintiff classes — those with medical malpractice claims and those arising under other personal injury. To a lesser extent, challengers have argued that caps offer persons sued for medical negligence a unique form of damages protection that is not available to other types of tort defendants.

Most states have adopted the federal framework, or a variation thereof, utilized to evaluate equal protection challenges. Under federal equal protection doctrine, classifications are examined using one of three levels of review: strict scrutiny, intermediate review, or rational basis review. The level of review is triggered by the nature of the classification. For example, an inherently suspect classification of race, national origin or one that affects a fundamental right will trigger strict scrutiny. Suspect classes of gender and mental capacity will trigger "substantial relationship" or intermediate review. And, classes effecting social or economic bearing will be susceptible to the "rational basis" test.

Under this framework, the courts have examined whether the classifications created by reform legislation represent a reasonable exercise of legislative power measured against a reasonably related stated objective, and whether the benefit sought to be bestowed upon society outweighs the detriment to private rights occasioned by the statute. The courts are divided as to the level of review required for evaluation of damages caps under equal protection. Those states applying strict scrutiny have found such caps unconstitutional, while a majority of those using the rational basis test have found the damages caps withstand the equal protection challenge.

In Alabama, the Supreme Court examined whether the connection between the benefit sought to be conferred on society and the means employed to accomplish it, when weighed against the inequalities created by the statute's classifications, was so attenuated and remote as to constitute an unreasonable exercise of police power.[85] After a thorough review of the information available to the legislature, the court concluded that the correlation between the damages cap and the reduction of health care costs to the citizens of Alabama was, at best, indirect and remote. By contrast, the court found the burden imposed on the rights of individuals to receive compensation for serious injuries was direct and concrete.[86] In finding the statute unconstitutional, the Alabama Supreme Court clarified that "balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, represents an unreasonable exercise of police power."[87] Courts in New Hampshire[88] and North Dakota[89] have also applied strict scrutiny review to find that damages caps were in violation of equal protection rights.

In contrast, the Nebraska Supreme Court initiated its examination of the reform statutes' impingement of equal protection by stating, "[t]he Equal Protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."[90] The Nebraska Hospital Medical Act created, in part, a $1,250,000 limit on total damages recovered by a plaintiff for any one occurrence.[91] Giving credence to the Indiana Supreme Court ruling upholding damages caps,[92] the Nebraska court recognized the goals of the legislature in reducing health care costs and encouraging availability of medical services as legitimate concerns, stating:

> "An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred. * * * [b]adly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to

> come about, i.e., that an environment would develop in the State in which private or public malpractice insurance were unavailable or unused. * * * Thus to the extent that the limitation upon recovery is successful in preserving the availability of health care services, it does so to the benefit of the entire community, including the badly injured plaintiff."[93]

The Nebraska Court rejected the heightened standard of strict scrutiny, declaring the reform statute satisfied the principles of equal protection, and upheld the damages cap. The Maryland appeals court also applied the rational basis test and held that the General Assembly, bolstered by research evidencing a $250,000 cap would cover most noneconomic damages, did not act arbitrarily in violation of equal protection in enacting a $350,000 damages cap.

Often revered as the benchmark in medical malpractice reform, the California Supreme Court upheld the provisions of the Medical Injury Compensation Reform Act (MIRCA) capping noneconomic damages at $250,000.[94] The court held that the legislature's limited application of the statutory cap on noneconomic damages to medical malpractice claims, as opposed to applying the cap to all tort claims, did not violate the equal protection principles because the legislature had responded to a crisis in medical malpractice insurance, and the statute was rationally related to legitimate state purposes for ensuring collection of judgments against tortfeasors and delivering healthcare to the state.[95]

Courts have also been torn on the amount of deference to be afforded a legislature in reviewing the constitutionality of a statute. The Supreme Court of West Virginia, in upholding a $1,000,000 noneconomic damages cap, noted that courts ordinarily will not reexamine independently the factual basis of the legislative justification of a statute.[96] However, the court emphasized that a reduction of the cap to a lesser amount could be manifestly so insufficient as to become a denial of justice under the state constitution equal protection provisions.[97]

In 2005, the Wisconsin Supreme Court determined that the appropriate standard of review for an equal protection challenge was rational relationship.[98] However, the court ruled that the $350,000 cap on noneconomic damages in medical malpractice cases was not rationally related to the legislative objective of lowering medical malpractice insurance premiums.[99] The court asserted that, "[a] court need not, and should not, blindly accept the claims of the Legislature. For judicial review under rational basis to have any meaning, there must be meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose."[100] The North Dakota Supreme Court reached a similar conclusion about the effect of caps. Based on a review of the record, the Court concluded that the legislature was "misinformed or subsequent events have changed the situation substantially," in concluding, that there was no medical malpractice "crisis." Without a crisis to justify the restriction on recovery, North Dakota's $300,000 cap on medical malpractice economic and noneconomic damages violated equal protection guarantees.[101]

The majority of courts has adopted a rational basis review when faced with a constitutional challenge on equal protection principles; and of those courts, most have upheld the damages cap as being reasonably related to furthering the purpose of stabilizing the medical malpractice arena and delivering qualified healthcare to the state's citizens. However, a growing number of states are closely reviewing the factual basis for the legislative action to determine if a substantial correlation exists between the action taken and the ends to be achieved at the expense of guaranteed rights.

Due Process

Due process challenges to damages limitation include procedural due process guarantees and substantive due process violations. Procedural due process guarantees a litigant the right to reasonable notice and a meaningful opportunity to be heard. The procedural due process guarantee does not create constitutionally protected interests. The purpose of the guarantee is to provide procedural safeguards against a government's arbitrary deprivation of certain interests. By comparison, substantive due process tests the reasonableness of a statute pursuant to the legislature's power to enact the law. Ordinarily, review of a substantive due process challenge is approached on the same basis as an equal protection challenge.

The procedural due process argument has not succeeded in any state. The due process argument rests on the assumption that a plaintiff has a vested property interest in the damages awarded by a jury and that a damages limitation deprives the plaintiff of an opportunity to present evidence to justify the full award. For example, in Virginia, a plaintiff argued that the $750,000 damages cap deprived her of an effective opportunity to be heard, since the cap precluded the outcome of the trial and conclusively presumed that no plaintiff's damages would exceed $750,000.[102] The Virginia Supreme Court rejected this argument. The Colorado Supreme Court followed suit, stating,"[t]he constitutional guarantee of due process is applicable to rights, not remedies" in deny-

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ing the plaintiff's procedural due process argument.[103]

State courts that have upheld legislative tort reform under equal protection analysis have also rejected challenges based upon substantive due process rights. That is, states will normally uphold damages caps against substantive due process challenges if the legislature acted reasonably in the face of a medical malpractice crisis. In applying a rational basis test Utah,[104] Virginia,[105] West Virginia,[106] Alaska,[107] Michigan,[108] and Colorado[109] rejected a substantive due process challenge to damages caps. Each court independently determined that the legislature reasonably could conceive as true the facts on which each challenged statute was based. However, the Supreme Court of Ohio determined that the record contained no evidence that the statutory damages cap was rationally related to addressing increasing costs of healthcare and found the statute in violation of substantive due process protections.[110]

Separation of Powers

Additional challenges to medical malpractice legislation arise under a separation of powers violation theory. Many state constitutions contain provisions that vest judicial powers exclusively in the court system, similar to Article III of the U.S. Constitution.[111] Theoretically, the legislative branch infringes on judicial power and determines judicial controversies when it enacts laws that alter or affect court or jury procedures.[112]

The Illinois Supreme Court determined that the statutory damages cap improperly delegated to the legislature the power of remitting verdicts and judgments, which is a power unique to the judiciary.[113] Resting on the premise that "[f]or over a century it has been a traditional inherent power of the judicial branch of government to apply the doctrine for remittitur, in appropriate and limited circumstances to correct excessive jury verdicts," the court concluded that the damages caps invaded the power of the judiciary to limit excessive awards of damages.[114] The Illinois Supreme Court found persuasive *dicta* regarding legislative remittitur in an opinion of the Supreme Court of Washington, in which the court found unconstitutional Washington's statutory limit on noneconomic damages.[115] The Supreme Court of Washington noted that because the "[l]egislature cannot make such case-by-case determinations," separation of powers concerns would be violated by the "legislative attempt to mandate legal conclusions."[116] The Illinois Supreme Court's determination that damages caps violated constitutionally protected separation of powers was recently reaffirmed by a Cook County trial judge.[117]

Other courts have found that no violation of the separation of powers occurs with the institution of damage limitations. The Supreme Court of Utah, noting that "judicial power is the power to hear and determine controversies between adverse parties and questions in litigation," ruled that damage caps represent law to be applied, not an improper usurpation of jury prerogatives.[118] In finding no constitutional violation, the Utah court looked to a previous holding in stating that, "the power to declare what the law shall be is legislative. The power to declare what is the law is judicial."[119] Similarly, the Nebraska Supreme Court disregarded the plaintiff's argument of legislative remittitur by reaffirming that "a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy."[120] The court concluded that the legislature may change or abolish a cause of action, including the ability to cap damages in a cause of action.[121]

The Michigan high court ruled that the judicial power to make rules that affect the practice and procedure in courts only extends to matters of practice and procedures, and the legislature, not the courts, has the authority to enact substantive law.[122] The Courts of West Virginia[123] and Maryland[124] concurred in concluding that if the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statues of repose, create presumptions, create new causes of action and abolish old ones, then they can limit noneconomic damages without violating the separations of powers doctrine.

Some courts have upheld statutory damages caps by justifying them as a form of pre-established remittitur.[125] The U.S. Supreme Court has held that remittitur did not violate the Seventh Amendment right to jury trial because judicial reduction of excessive damages awards was practiced at the time of the adoption of the federal Constitution.[126] However, the Court cautioned that remittitur should be applied on a case-by-case basis, and should only be used to reduce jury verdicts that are palpably and grossly excessive.

Special Legislation

Finally, a limited number of constitutional challenges have been lodged under "special legislation" violation of state constitutions. The Nebraska Constitution, typical of provisions addressed by other states, provides:

> "The Legislature shall not pass local or special laws in any of the following cases, * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. * * * In all other cases where a general law can be made applicable, no special law shall be enacted."[127]

Special legislation clauses prohibit the legislature from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated. The Nebraska Supreme Court, describing the rational for the safeguard against special legislation, stated: "It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted."[128] In a medical malpractice context, challengers have argued that damages caps impermissibly penalize the most severely injured individuals, whose noneconomic damages would most likely exceed the cap; while at the same time benefiting certain tortfeasors, who are relieved of liability for fully compensating plaintiffs.

Courts have utilized the same analysis for special legislation as equal protection challenges. The courts examine whether the legislature acted arbitrarily or unreasonably in creating a legislative classification. Thus, classifications that have some reasonable distinction from other subjects of a like character, and which distinction bears some reasonable relation to legitimate state objectives and purposes of the legislation, will withstand constitutional challenge.

The Idaho Supreme Court rejected a plaintiff's argument that the $400,000 cap on noneconomic damages arbitrarily discriminated between slightly and severely injured plaintiffs, and between tortfeasors who cause severe and moderate or minor injuries.[129] In defending the constitutional actions of the legislature, the court stated,"[b]y striking this balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, the legislature 'is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life.'"[130]

The Nebraska Supreme Court also rejected a special legislation challenge, finding that "the Legislature had evidence to justify their reasons for passing the act. The class is based upon reasons of public policy and substantial differences of situation or circumstances that suggested the justice or expediency of diverse legislation."[131]

To the contrary, the Supreme Court of Illinois found that a limitation on damages did violate the state special legislation constitution prohibition.[132] The court posed the question to be determined as, "whether the classifications created by [statute] are based upon reasonable differences in kind or situation, and whether the basis for the classifications is sufficiently related to the evil to be obviated by the statute."[133] Relying on former decisions, the Illinois Supreme Court found the damages cap in violation of constitutional prohibition against special legislation.

> "[W]e are unable to discern any connection between the automatic reduction of one type of compensatory damages awarded to one class of injured plaintiffs and a savings in systemwide costs of litigation. Even assuming that a systemwide savings in costs were achieved by the cap, the prohibition against special legislation does not permit the entire burden of the anticipated cost savings to rest on one class of injured plaintiffs."[134]

The Court concluded that the legislature arbitrarily exercised its police power in altering the common law and limiting available remedies through damage limitation legislation.[135]

Other Constitutional Challenges

In addition to challenges to damages caps, constitutional challenges have been raised against procedural and evidentiary changes. Commonly a component of tort reform has focused on "certificates of merit," or certifications verifying the legitimacy of claims involving professional standards of care. At least 20 states require some form of expert certification in medical negligence cases. Constitutional challenges have been raised regarding separation of power violations, where judicially created rules of civil procedure are being impinged by legislative action. The Ohio Supreme Court struck down a certification requirement finding that the malpractice certification requirement directly conflicted with a rule of civil procedure specifying that "pleadings need not be verified or accompanied by affidavit."[136] The Ohio legislature then reenacted a nearly identical requirement, this time declaring the certificate of merit to be jurisdictional, not merely procedural. The Ohio court once again rejected the legislative requirement, noting the transparent attempt to circumvent the constitutional violations previously identified.[137] Other challenges have been met with promulgation of new court rules to satisfy the apparent violation. For example, in 2003, the Supreme Court of Pennsylvania promulgated a new rule imposing attorney certification of expert review in actions based on allegations of licensed professional negligence in response prior legislative action.[138]

However, courts generally have not been receptive to arguments that certification requirements unconstitutionally hinder access to the courts. The Missouri Supreme Court rejected a challenge to that state's requirement, finding that it did not interfere with the constitutional right to a jury trial.[139]

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The court ruled the certification was no more onerous than the longstanding requirement that before filing a lawsuit an attorney must ascertain the claim "is well grounded in fact and warranted by existing law."[140] Because medical malpractice claims must eventually be supported by expert testimony in any case, the court held that the certification requirement was a reasonable means of reducing claims lacking expert support.

Another procedural issue challenge arose from the Georgia 2005 Tort Reform Act, which contained two separate venue-shifting provisions. The Georgia Supreme Court struck down a provision that allowed a nonresident defendant the power to change venue as being contrary to the state's constitutional provision holding open the option of venue in the county of either joint tortfeasor's residence.[141] The court did up hold the provision allowing a trial court to decline to exercise jurisdiction and instead transfer a case to a different county of proper venue if the interest of justice and convenience of the parties warranted the action.[142] The court reasoned that the statute was consistent with Georgia Constitution's having vested questions of venue in the court.[143]

Abolition of or exception to the collateral source rule has also seeped into medical malpractice reform. The Supreme Court of New Hampshire struck down a medical malpractice reform provision, allowing evidence of plaintiff's compensation from collateral sources, as a violation of the state's equal protection clauses.[144] The court found that the provision arbitrarily and unreasonably discriminated in favor of the class of health care providers at too high a price to the medical malpractice plaintiffs.

Future Constitutional Challenges to Medical Malpractice Reform

The single most concentrated challenge to medical malpractice reform has been on damages limitation provisions. In California and other states, the anticipated effects of caps legislation of reduced insurance premiums were delayed as constitutional challenges worked their way through the judicial system. In Texas, the lauded influx of physicians to the state since the 2004 reform act can be accounted for by migration of Louisiana medical professionals following Hurricane Katrina, as easily as tort reform. And, despite reform, many rural counties still remain without adequate healthcare services.[145]

Constitutional challenges continue to be brought against caps legislation passed as part of the latest round of tort reform. States are carefully crafting legislation to avoid previously addressed constitutional challenges. Further, legislatures are thoroughly documenting evidence of the effects of high liability insurance costs on healthcare in their state and the effectiveness of caps in stabilizing those costs. However, the seemingly increasing judicial acceptance of damages caps legislation should not be interpreted as evidence that caps are effective. Many courts have undertaken a rational basis standard of review, as opposed to one of higher scrutiny, and have not challenged legislative findings. The case law indicates that the evidence presented to the courts that have reviewed constitutional challenges, appears mixed and constitutional rights implications persist.

Endnotes

1 Weiler, P.C. Medial Malpractice on Trial Cambridge, MA:GOA (1991)

2 U.S. Const. art. I, § 8, cl.3.

3 H.R. 2580: Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2007.

4 "Medical Malpractice Reform: State Medical Malpractice Reform 2005 Numbers at a Glance," National Conference of State Legislatures, June 24, 2005.

5 Prop. 12 HJR 3 - Nixon | Nelson-"Constitutional amendment to immediately authorize the Legislature to limit non-economic damages assessed against a provider of medical or health care and, after January 1, 2005, to limit awards in all other types of cases." September 2003.

6 735 ILCS 5/2-1115.1 (West 1996).

7 *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997).

8 *Best*, 689 N.E.2d at 1080.

9 *Lebron v. Gottlieb Memorial Hospital*, No. 2006 L 12109, Cir. Crt. Cook County, Nov. 13, 2007, J. Larsen.

10 Ill. Const. of 1978, art. II, § I.

11 D.M. Stubbert, Y.T. Yang and M.M.Mello, "Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California," *Health Affairs* 23 (2004): 54-67.

12 C.N. Kelly and M.M. Mello, "Are Medical Malpractice Caps Constitutional? An Overview of State Litigation," *Journal of Law, Medicine & Ethics* 33 (2005): 515-534.

13 Pa. Stat. Ann. 40 P.S. 1303.505 (West 2002).

14 Idaho Code § 6-1603 (West 2004).

15 Nevada Rev. Stat. § 41.031 (West 2004).

16 Alaska Stat. § 09.17.010(b) (West 1997).

17 Alaska Stat. § 09.17.010(c) (West 1997).

18 Pa. Stat. Ann, tit. 40, ch. 5c, §1304A.

19 *Evans v. State of Alaska*, 56 P.3d 1046 (Alaska 2002).

20 *Hoffman v. U.S.*, 767 F.2d 1431 (9th Cir. 1985); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 655 (1985), *appeal dis'd*, 474 U.S. 892 (1985).

[21] *Scholz v. Metropolitan Pathologists,P.C.*, 851 P.2d 901 (Colo.1998).

[22] *Kirkland v. Blaine County Med. Crt.*, 134 Idaho 464, 4 P.3d 1115 (2002).

[23] *Sansel v. Wheeler Transp. Service*, 246 Kan. 336, 89 P.2d 541 (1990).

[24] *Murphy v. Edmunds*, 325 Md. App. 342, 601 A.2d 102 (1992).

[25] *Zdrojewski v. Murphy*, 251 Mich. App. 586, 657 N.W.2d 221 (2002).

[26] *Adams v. Children's Mercy Hosp*., 832 S.W.2d 898 (Mo. 1993).

[27] *Gourley v. Neb. Methodist Hosp*., 265 Neb. 918, 633 N.W.2d 43 (2003).

[28] *Etheridge v. Med. Crt. Hosp*., 237 Va. 87, 367 S.E.2d 525 (1989).

[29] *Verba v. Ghaphery*, 210 W.Va. 30, 552 S.E.2d 406 (2001).

[30] *Johnson v. St. Vincent Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*; *In Re Stephens*, 867 N.E.2d 148 (Ind. 2007).

[31] *Butler v. Flint Goodrich Hosp.*, 607 So.2d 517 (La. 1992).

[32] *Fed. Express Corp. v. U.S.*, 228 F. Supp.2d 1267 (N.M. 2002).

[33] *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1994).

[34] *Denton v. Con-Way S. Express, Inc*., 261 Ga. 41, 402 S.E.2d 269 (1991).

[35] *Best*, 689 N.E.2d 1057.

[36] *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988).

[37] *Carson v. Mauer*, 120 N.H. 925, 424 A.2d. 825 (1980).

[38] *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

[39] *Ohio ex. rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

[40] *Lakin v. Sunco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (1999).

[41] *Sophie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989).

[42] *Ferdon v. Wisconsin Patients Compensation Fund*, 284 Wis. 2d 573, 701 N.W.2d 440 (2005).

[43] Neb. Const. art. I, § 13 (1875).

[44] *Guzman v. St. Francis Hospital, Inc*., 623 N.W.2d 776 (Wis. App. 2000); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E. 2d 877 (1991); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992)(*en banc*); *Johnson v. St. Vincent Hospital*, 404 N.E.2d 585, *abrogated on other grounds; Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

[45] *Guzman*, 623 N.W.2d at 787.

[46] *Id*. at 786-87.

[47] *Adams*, 832 S.W.2d at 906.

[48] *Id*.

[49] *Id*.

[50] *Gourley*, 663 N.W.2d at 73-74.

[51] *Robinson*, 414 S.E.2d 877.

[52] *Peters v. Saft*, 597 A.2d 50 (Me.1991).

[53] *Id*. at 53.

[54] *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, *overruled in part on other grounds, Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991) (The Kansas Supreme Court struck down a bill capping noneconomic damages, finding them to be arbitrary and in violation of both the right to trial by jury and the right to a remedy under the Kansas Constitution.); *Matter of Certification of Questions of Law*, 1996 S.D. 10, 544 N.W.2d 183 (1996) (A cap on damages violates South Dakota's constitution's open courts or right to remedy provisions.).

[55] *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988).

[56] *Lucas*, 757 S.W. at 690. (emphasis added)

[57] Tex. Const. art. 3, § 66 (2003).

[58] Tex. Civ. Prac. & Rem., § 74.301(West 2004).

[59] *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987).

[60] *Smith*, 507 So.2d at 1088-89.

[61] Fla. Stat. § 766.207, 209 (2007).

[62] *University of Miami v. Echarte*, 618 So.2d 189 (Fla. App. 3 Dist. 1993).

[63] *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

[64] *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992).

[65] *Murphy*, 601 A.2d at 117.

[66] *Id*.

[67] *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 529 (Va. 1989).

[68] *Phillips v. Mirac, Inc*., 251 Mich.App. 586, 651 N.W.2d 437 (2002).

[69] *Phillips*, 651 N.W.2d at 442, quoting, *Kirkland v. Blaine Co, Medical Center*, 4 P.3d 115.

[70] *Johnson v. Saint Vincent Hospital, Inc*., 404 N.E.2d 585 (Ind. 1980).

[71] *Evans v. State of Alaska*, 56 P.3d 1046 (Alaska 2002).

[72] *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999).

[73] *Phillips*, 651 N.W.2d 437.

[74] *Phillips*, 651 N.W.2d at 442.

[75] *Sofie v. Fibreboard Corp*., 771 P.2d 711 (Wash. 1989).

[76] *Sofie*, 771 P.2d at 718.

[77] *Moore v. Mobile Infirmary Assoc*., 592 So.2d 156, 163 (Ala. 1992).

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[79] *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251.

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[80] *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

[81] *Duren v. Suburban Community Hospital*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ohio Com.Pl. 1985).

[82] *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987).

[83] *Gourley*, 663 N.W.2d at 75.

[84] U.S. Const. amend. XIV § 1.

[85] *Moore v. Mobile Infirmary Association*, 592 So.2d 156 (Ala. 1992).

[86] *Id*. at 168-69.

[87] *Id*. at 169.

[88] *Carson v. Maurer*, 424 A.2d 825 (N.H.1980).

[89] *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1078).

[90] *Gourley*, 663 N.W.2d at 69.

[91] Neb. Rev. Stat. §§ 44-2801, *et seq*. (Reissue 1998).

[92] *Johnson*, 404 N.E.2d 585.

[93] *Gourley*, 663 N.W.2d at 72-73, *citing*, *Johnson*, 404 N.E.2d at 599.

[94] *Fein*, 38 Cal.3d 137.

[95] *Id*.

[96] *Robinson*, 414 S.E.2d 877.

[97] *Id*.

[98] *Petrucelli v. Wisconsin Patients Compensation Fund*, 284 Wis.2d 573, 701 N.W.2d 440 (2005).

[99] *Petrucelli*, 701 N.W.2d at 474.

[100] *Id*. at 460.

[101] *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978).

[102] *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989).

[103] *Scholz*, 851 P.2d at 907.

[104] *Judd v. Drezga, M.D.*,512 Utah Adv. Rep. 23, 103 P.3d 135 (2004).

[105] *Pullman v. Coastal Emergency Services of Richmond, Inc.*, 257 Va. 1, 509 S.E.2d 307 (1999).

[106] *Robinson*, 414 S.E.2d 877.

[107] *Evans v. State of Alaska*, 56 P.3d 1046 (Alaska 2002).

[108] *Phillips*, 651 N.W.2d 437.

[109] *Scholz*, 851 P.2d at 907.

[110] *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991).

[111] J.M. Scherlinck, Note, "Medical Malpractice, Tort Reform, and the Separation of Powers Doctrine in Michigan," *Wayne Law Review* 44 (1998):313-341, at 327.

[112] *Judd*, 103 P.3d 135.

[113] *Best*, 689 N.E.2d at 1078-79.

[114] *Id*. at 1079.

[115] *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

[116] *Id*. at 720.

[117] *Lebron v. Gottlieb Memorial Hospital*, No. 2006 L 12109, Cir. Crt. Cook County, Nov. 13, 2007, J. Larsen

[118] *Judd*, 103 P.3d 135.

[119] *Judd*, 103 P.3d at 145.

[120] *Gourley*, 663 N.W.2d 43.

[121] *Id*. at 75.

[122] *Phillips*, 651 N.W.2d at 442.

[123] *Verba v. Ghaphery*, 552 S.E. 2d 406 (W.Va. 2001).

[124] *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992).

[125] *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d at 260.

[126] *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

[127] Neb. Const. art. III, § 18.

[128] *Gourley*, 663 N.W.2d at 65 (citation omitted).

[129] *Kirkland*, 4 P.3d 1115.

[130] *Id*. at 1121.

[131] *Gourley*, 663 N.W.2d at 69.

[132] *Best v. Taylor Machine Works*, 689 N.E.2d 1057.

[133] *Best*, 689 N.E.2d at 1071.

[134] *Id*. at 1077.

[135] *Id*.

[136] *Hiatt v. Southern Health Facilities, Inc.*, 68 Ohio St.3d 236, 626 N.E. 2d 71, 73 (1994).

[137] *Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1076 (Ohio 1999).

[138] Pa. Stat. Ann. 40 P.S. 1303.505 (West 2002).

[139] *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. 1991).

[140] *Mahoney*, 807 S.W.2d at 508.

[141] *EHCA Cartersville v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006).

[142] *Id*.

[143] *Id*.

[144] *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980).

[145] S. Batchelor, "Baby, I Lied: Rural Texas still waiting for doctors tort reform was supposed to deliver," *The Texas Observer*, October 19, 2007.