Wisconsin's Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on "Tort Reform"

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WISCONSIN'S CAPS ON NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES:
WHERE WISCONSIN STANDS (AND SHOULD STAND) ON "TORT REFORM"

I. INTRODUCTION

Every so often, the fine line that separates law from politics blurs, even erodes, before the public's very eyes. Some might say that this line has disappeared or that it never existed in the first place. But in either case, medical negligence law has been making a lot of noise lately, and it is making this line ever difficult to draw. States around the country have pushed forth "tort reform" agendas, controlling the nature and extent to which victims of medical malpractice may be compensated for their injuries. Should judges and juries ensure that victims of negligence are fully and fairly compensated, upholding one of the most basic pillars of the American legal system? Or should they defer to legislatures, who have enacted laws that redefine the boundaries of this basic pillar?

These questions are not only difficult to answer, but their depth and breadth underscores just how expansive and intense the debate has become. In fact, the controversy over tort reform in the context of medical negligence has pushed itself to the front of the medical community's attention; "medical liability reform" is currently a central piece of the American Medical Association's (AMA) advocacy agenda. The issue will not go away anytime soon, and the stakes are increasing by the minute.

At the heart of this dispute is the imposition of limits (or "caps") on noneconomic damages in medical malpractice cases. Legislatures often

1. See, e.g., TEX. CONST. art. III, § 66(b); FLA. STAT. ANN. § 766.118(2)(a) (West 2005); WIS. STAT. § 893.55(4)(d) (2003-2004) (limiting recovery of noneconomic damages in medical malpractice cases to $350,000, to be adjusted by the director of state courts); CAL. CIVIL CODE § 3333.2(b) (West 1997).


3. For the purpose of medical malpractice cases, Wisconsin has defined "noneconomic damages" to mean "pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and
conclude that by setting a maximum amount that can be recovered for noneconomic damages in medical malpractice cases, at least three things will happen: medical malpractice insurance premiums will improve, the cost to health care will stabilize, and health care will become more accessible. In essence, the argument suggests that damage caps will resolve the nation’s health care “crisis.” Many states, including Wisconsin, have bought into this line of reasoning and have proscribed a maximum amount of recovery for noneconomic damages in a medical malpractice action. Congress has recently taken steps in a similar direction, although no federal limit has yet been enacted.

Legal challenges to the constitutional validity of these limits are a matter of when, not if. Indeed, such challenges have been successful in a variety of instances, with Wisconsin being a prime example. This recent activity will be discussed in Part II of this Comment, which provides a history of medical malpractice caps in Wisconsin. Part III will discuss similar histories in other states, while Part IV will compare Wisconsin’s stance to these other states. Finally, in Part V, I will discuss what stance Wisconsin should take on this issue.

II. LIMITS ON NONECONOMIC DAMAGES IN WISCONSIN

The history of tort reform in Wisconsin can arguably be described as a process of trial and error. Wisconsin’s initial support to change medical negligence law can be traced back to the 1970s, when the Wisconsin Legislature made its first effort to deal with medical malpractice actions. This effort crystallized in 1975 when Wisconsin created Chapter 37 "in
response to a perceived economic and social crisis." While this legislation did not establish limits on noneconomic damages as many tort reform laws do today, it "created a Patients Compensation Fund to pay medical malpractice awards" and established "a procedure for addressing medical malpractice." The legislation was not successful, and the Wisconsin Legislature decided that something else had to be done. As a result, efforts to make new changes ensued in the mid-1980s, particularly with the proposal of Senate Bill 328 in 1985. This bill proposed a $3.3 million cap on total damages in medical malpractice actions. When this legislation did not pass, the Wisconsin Legislature turned its efforts to Wisconsin Act 340. Wisconsin Act 340, enacted in 1986, established statutory limits on noneconomic damages for medical malpractice cases. This initial limit was set at $1 million—much more plaintiff-friendly than in recent years, but a cap nonetheless. By its own terms, however, this initial cap expired on January 1, 1991. Thus, Wisconsin had several years to decide whether tort reform was effective in Wisconsin for that period of time. In 1994, Wisconsin thought that it was; "a Special Committee of the Wisconsin Patients Compensation Fund recommended" a $250,000 cap on noneconomic damages for medical malpractice cases. The Wisconsin Legislature agreed with that concept, passing Wisconsin Act 10 in 1995. Wisconsin Act 10 brought back a cap on noneconomic damages in medical malpractice cases, setting a limit of

10. Maurin, 2004 WI 100, ¶ 51, 274 Wis. 2d 28, ¶ 51, 682 N.W.2d 866, ¶ 51.
11. Id., ¶ 50, 274 Wis. 2d 28, ¶ 50, 682 N.W.2d 866, ¶ 50.
12. Id., ¶ 51, 274 Wis. 2d 28, ¶ 51, 682 N.W.2d 866, ¶ 51.
13. Id., ¶ 53, 274 Wis. 2d 28, ¶ 53, 682 N.W.2d 866, ¶ 53 (discussing the legislative history of damage caps in Wisconsin).
15. S.B. 328, 1985 Sen. (Wis. 1985); see also Maurin, 2004 WI 100, ¶ 53, 274 Wis. 2d 28, ¶ 53, 682 N.W.2d 866, ¶ 53.
16. See generally Maurin, 2004 WI 100, ¶¶ 55-60, 274 Wis. 2d 28, ¶¶ 55-60, 682 N.W.2d 866, ¶¶ 55-60 (the "1986 legislation" the court refers to is Wisconsin Act 340, which was enacted in June of 1986).
19. Act of June 12, 1986, No. 340, § 30, 1986 Wis. Sess. Laws 1497, 1504; see also Maurin, 2004 WI 100, ¶ 64, 274 Wis. 2d 28, ¶ 64, 682 N.W.2d 866, ¶ 64.
Undoubtedly, Wisconsin has viewed restrictions on medical malpractice actions as a legitimate means to control health care costs and insurance rates.

A. Initial Challenges and the Guzman Decision

While the Wisconsin Legislature seemingly was satisfied with its new, more restrictive approach to medical negligence, Wisconsin plaintiff lawyers and medical malpractice victims were not. As a result, like most other states that have enacted similar limits, Wisconsin’s caps were challenged in court. Unfortunately for Wisconsin plaintiffs, this challenge initially did not fall on sympathetic ears. At the time, the Wisconsin Supreme Court did not even consider these challenges worthy of review.

What are the foundations of these challenges? In Wisconsin (and throughout the country generally), there are several theories that plaintiffs have used to try to strike down these caps. These theories typically include, in one form or another, a violation of (1) the right to trial by jury; (2) separation of powers; (3) equal protection; (4) due process; and (5) state-specific constitutional provisions.

The first challenge presented to damage caps is the contention that limiting the amount of damages one may recover is tantamount to violating one’s right to a jury trial. If the jury’s decision is set aside for an arbitrary, pre-set limit, the argument goes, it is the same as taking away the essence of a plaintiff’s right to try his or her case in front of a jury in the first place.

Article I, section 5 of the Wisconsin Constitution provides that the right to a jury trial “shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.” Medical malpractice plaintiffs have interpreted this to mean that the legislature cannot “substitute its judgment for that of the jury as to the proper amount of damages owing to a victim of

24. See, e.g., id., 240 Wis. 2d 559, 623 N.W.2d 776 (upholding limits on noneconomic damages in medical malpractice cases).
26. See, e.g., Guzman, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776.
27. See, e.g., id., 240 Wis. 2d 559, 623 N.W.2d 776.
28. See id., ¶ 6, 240 Wis. 2d 559, ¶ 6, 623 N.W.2d 776, ¶ 6.
29. Wis. Const. art. I, § 5; Guzman, 2001 WI App 21, ¶ 6, 240 Wis. 2d 559, ¶ 6, 623 N.W.2d 776, ¶ 6.
medical malpractice.\textsuperscript{30}

However, in \textit{Guzman v. St. Francis Hospital},\textsuperscript{31} the Wisconsin Court of Appeals was swift to reject this argument.\textsuperscript{32} In \textit{Guzman}, the patient-plaintiff alleged that she was seriously injured by the negligence of her health care providers.\textsuperscript{33} After trial, the trial court held that the cap on noneconomic damages was unconstitutional because it violated the right to trial by jury.\textsuperscript{34} On appeal, the Wisconsin Court of Appeals ruled that these caps do nothing of the sort.\textsuperscript{35} Rather, according to the appellate court's reasoning, the legislature has always had the power to set the parameters of legal rights;\textsuperscript{36} the Wisconsin Constitution itself allows the legislature to do so.\textsuperscript{37} In addition, the court points out, Wisconsin has already upheld the applicable statute of repose in medical malpractice cases.\textsuperscript{38} Surely, the court suggests, if the legislature has the power to bar claims entirely after an arbitrary amount of time, then the legislature should also have the power to limit recovery above an arbitrary limit.\textsuperscript{39}

A second major challenge to damage caps is often founded on the separation of powers doctrine.\textsuperscript{40} The plaintiff in \textit{Guzman} argued that the cap undermines the judiciary's power to order a remittitur and thus violates the separation of powers between the courts and the legislature.\textsuperscript{41} However, the court explained, the statutory limit on noneconomic damages does not do this; the trial court may still order a remittitur if it so chooses.\textsuperscript{42} Therefore, even if the cap was to be considered a legislative remittitur, "it represents a sharing of powers between the branches," rather than a violation of the separation of

\begin{itemize}
\item \textsuperscript{30} \textit{Guzman}, 2001 WI App 21, ¶ 7, 240 Wis. 2d 559, ¶ 7, 623 N.W.2d 776, ¶ 7.
\item \textsuperscript{31} 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776.
\item \textsuperscript{32} \textit{Id.}, ¶ 12, 240 Wis. 2d 559, ¶ 12, 623 N.W.2d 776, ¶ 12.
\item \textsuperscript{33} \textit{Id.}, 240 Wis. 2d 559, ¶ 12, 623 N.W.2d 776, ¶ 12.
\item \textsuperscript{34} \textit{Id.}, ¶ 3, 240 Wis. 2d 559, ¶ 3, 623 N.W.2d 776, ¶ 3.
\item \textsuperscript{35} \textit{Id.}, ¶¶ 10-12, 240 Wis. 2d 559, ¶¶ 10-12, 623 N.W.2d 776, ¶¶ 10-12.
\item \textsuperscript{36} \textit{Id.}, ¶ 11, 240 Wis. 2d 559, ¶ 11, 623 N.W.2d 776, ¶ 11.
\item \textsuperscript{37} \textit{Id.}, ¶ 7, 240 Wis. 2d 559, ¶ 7, 623 N.W.2d 776, ¶ 7 (quoting \textit{Wis. Const.} art. XIV, § 13 ("Such parts of the common law . . . shall be and continue part of the law of this state until altered or suspended by the legislature.")).
\item \textsuperscript{38} \textit{Guzman}, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (citing and discussing \textit{Aicher v. Wis. Patients Comp. Fund}, 2005 WI 125, 237 Wis. 2d 99, 613 N.W.2d 849 (Wis. 2000)).
\item \textsuperscript{39} \textit{See Guzman}, 2001 WI App 21, ¶ 12, 240 Wis. 2d 559, ¶ 12, 623 N.W.2d 776, ¶ 12.
\item \textsuperscript{40} \textit{Id.}, ¶ 13, 240 Wis. 2d 559, ¶ 13, 623 N.W.2d 776, ¶ 13.
\item \textsuperscript{41} \textit{Id.}, ¶ 13, 240 Wis. 2d 559, ¶ 13, 623 N.W.2d 776, ¶ 13. Essentially, this argument is based on the foundation that the legislature has already ordered a remittitur for rewards that are higher than the statutory limit, and thus violates \textit{Powers v. Allstate Insurance Co.}, 102 N.W.2d 393 (Wis. 1960) (holding that trial courts have the power to order remittitur).
\item \textsuperscript{42} \textit{Id.}, 240 Wis. 2d 559, ¶ 13, 623 N.W.2d 776, ¶ 13.
\end{itemize}
Equal Protection challenges also threaten the constitutional validity of medical malpractice caps. In *Guzman*, for instance, the patient-plaintiff alleged that the cap on noneconomic damages violated equal protection in four ways: (1) it "creates two classes of tort litigation plaintiffs," those injured by medical malpractice of a health-care provider and those injured by a health-care provider but not by medical malpractice; (2) it "creates two classes of victims," those who sustained damages higher than the cap and those who sustained damages lower than the cap; (3) it creates two classes of tortfeasors (those who caused noneconomic damage in excess of the cap and those who caused noneconomic damage that is lower than the cap) and grants immunity to those who have caused the most noneconomic damage; and (4) it penalizes those who will have to share noneconomic damages with a spouse or minors because the cap applies to each occurrence, rather than to each plaintiff.

*Guzman* dealt with these challenges by first noting that these distinctions do not involve fundamental rights or suspect classes as used in equal protection analysis, and thus the statute is constitutional so long as the legislature's decision is rational. In *Guzman*, this distinction is crucial; the patient-plaintiff asserted that "strict scrutiny" applies (as it would have if a "fundamental right" or "suspect class" had been involved), and the court viewed the plaintiff's silence on the "rational basis test" analysis as a concession that the cap passes that test. The court does not suggest how that test would be met if the court would be confronted with the issue, which becomes interesting in 2005, discussed later.

Another challenge to caps on noneconomic damages is a substantive due process challenge. The plaintiffs in *Guzman* argued that substantive due process "required the legislature to give . . . plaintiffs a 'quid pro quo' in return for taking away the right to recover more than $350,000 . . . in noneconomic damages." The court brushed off this argument; since the Guzman's claim accrued after the cap had already been enacted, there was no substantive right to unlimited damages.

Plaintiffs also often challenge these damage caps on grounds of some violation of certain provisions in various state constitutions. In Wisconsin,

43. *Id.,* 240 Wis. 2d 559, ¶ 13, 623 N.W.2d 776, ¶ 13 (emphasis in original).
44. *Id.,* ¶ 19, 240 Wis. 2d 559, ¶ 19, 623 N.W.2d 776, ¶ 19.
45. *Id.,* 240 Wis. 2d 559, ¶ 19, 623 N.W.2d 776, ¶ 19.
46. *Id.,* ¶ 20, 240 Wis. 2d 559, ¶ 20, 623 N.W.2d 776, ¶ 20.
47. *Id.,* ¶ 21, 240 Wis. 2d 559, ¶ 21, 623 N.W.2d 776, ¶ 21.
48. *Id.,* ¶ 22, 240 Wis. 2d 559, ¶ 22, 623 N.W.2d 776, ¶ 22.
49. *Id.,* ¶ 24, 240 Wis. 2d 559, ¶ 24, 623 N.W.2d 776, ¶ 24.
this provision is article I, section 9 of the Wisconsin Constitution. This section generally provides that everybody is entitled to a certain remedy for all injuries.\textsuperscript{50} However, as with the other challenges, this challenge was quickly dismissed in \textit{Guzman}. As the Wisconsin Court of Appeals put it, "Section 9 'confers no legal rights.'\textsuperscript{51} In addition, the court of appeals in \textit{Guzman} emphasized that if a statute of repose does not violate the "remedy-for-wrongs" clause, then a mere limit on collectable damages certainly cannot.\textsuperscript{52}

\textbf{B. Wisconsin Medical Malpractice Law Turned Upside-Down; The Ferdon Decision}

After the \textit{Guzman} decision in 2000, it seemed clear that Wisconsin’s medical malpractice damage caps were staying put. The Wisconsin Court of Appeals had upheld the caps without breaking a sweat, and the Wisconsin Supreme Court chose not to review the case. The trial-and-error history seemed to have come to a definite conclusion, at least for the foreseeable future.

What a difference a few years can make; in 2005, the Wisconsin Supreme Court reviewed this issue in \textit{Ferdon ex. rel. Petrucelli v. Wisconsin Patients Compensation Fund}.\textsuperscript{53} Plaintiff attorneys and medical malpractice victims throughout the state crossed their fingers, hoping that a fresh set of eyes—both figuratively and literally—would result in a different conclusion than the \textit{Guzman} court reached.\textsuperscript{54}

The facts of \textit{Ferdon} will probably not surprise plaintiff lawyers. The patient-plaintiff, through his guardian ad litem, alleged medical malpractice

\textsuperscript{50} The exact language of article I, section 9 is as follows:

\begin{quote}
Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.
\end{quote}

\textsuperscript{51} \textit{Guzman}, 2001 WI App 21, ¶ 18, 240 Wis. 2d 559, ¶18, 623 N.W.2d 776, ¶ 18 (quoting Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, ¶ 43, 237 Wis. 2d 99, ¶ 43, 613 N.W.2d 849, ¶ 43).

\textsuperscript{52} \textit{Id.}, 240 Wis. 2d 559, ¶ 18, 623 N.W.2d 776, ¶ 18.

\textsuperscript{53} 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

\textsuperscript{54} There was "literally" a fresh set of eyes because between the time the \textit{Guzman} and \textit{Ferdon} decisions were published, the makeup of the Wisconsin Supreme Court had changed: Justice William Bablitch left the court in 2003, and Justice Diane Sykes left the court in 2004. They were replaced by Justice Patience Roggensack and Justice Louis Butler, respectively. \textit{See generally} Wisconsin Supreme Court System—Supreme Court Justices, http://www.courts.state.wi.us/about/judges/supreme/index.htm (last visited Jan. 10, 2005).
during birth that resulted in partial paralysis and deformity of his right arm. Among other damages, the jury awarded the plaintiff $700,000 in noneconomic damages, easily exceeding the statutory cap proscribed in section 893.44(d) of the Wisconsin Statutes. The Wisconsin Patients Compensation Fund moved to reduce the noneconomic damage award to the capped limit, the circuit court concurred, and the appellate court affirmed. The plaintiff appealed.

Unlike after the Guzman decision, however, the Wisconsin Supreme Court agreed to hear the case. The arguments, however, were generally the same; the plaintiff-patient in Ferdon, as in Guzman, alleged that the caps violated (1) equal protection, (2) his right to trial by jury, (3) the right-to-remedy provision of article I, section 9 of the Wisconsin Constitution, (4) the due process clause of the Wisconsin Constitution, and (5) the separation of powers doctrine.

The court's decision focused entirely on the equal protection argument, and thus the other four arguments were never discussed. In fact, the Ferdon court generally agreed with the Guzman court "that rational basis, not strict scrutiny, is the appropriate level of scrutiny in the present case." As one may recall, the Guzman court did not bother to consider whether the caps pass rational review. Interestingly, the Ferdon court somewhat clouds the issue of scrutiny by discussing different, more stringent variations of rational review (such as "rational basis with teeth"), and notes that "[w]hether the level of scrutiny is called rational basis, rational basis with teeth, or meaningful rational basis, it is this standard we now apply in this case." In any event, the court makes clear that caps on damages do create certain classifications and that these classifications must be "rationally related to achieving appropriate legislative objectives" if they are to be deemed valid. The court identified the overall legislative objective as ensuring "the quality

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55. Ferdon, 2005 WI 125, ¶ 19, 284 Wis. 2d 573, ¶ 19, 701 N.W.2d 440, ¶ 19.
56. Id., ¶ 21, 284 Wis. 2d 573, ¶ 21, 701 N.W.2d 440, ¶ 21.
57. Id., ¶¶ 22-23, 284 Wis. 2d 573, ¶¶ 22-23, 701 N.W.2d 440, ¶¶ 22-23.
58. Id., ¶ 23, 284 Wis. 2d 573, ¶ 23, 701 N.W.2d 440, ¶ 23.
59. Id., ¶ 9, 284 Wis. 2d 573, ¶ 9, 701 N.W.2d 440, ¶ 9.
60. Id., ¶ 10, 284 Wis. 2d 573, ¶ 10, 701 N.W.2d 440, ¶ 10.
61. Id., ¶ 65, 284 Wis. 2d 573, ¶ 65, 701 N.W.2d 440, ¶ 65.
63. Ferdon, 2005 WI 125, ¶ 80, 284 Wis. 2d 573, ¶ 80, 701 N.W.2d 440, ¶ 80.
64. Id., ¶¶ 81-82, 284 Wis. 2d 573, ¶¶ 81-82, 701 N.W.2d 440, ¶¶ 81-82 ("The main classification is the distinction between medical malpractice victims who suffer over $350,000 in noneconomic damages, and [those] who suffer less . . . .").
65. Id., ¶ 85, 284 Wis. 2d 573, ¶ 85, 701 N.W.2d 440, ¶ 85.
of health care for the people of Wisconsin," while identifying five interconnected objectives: (1) ensuring adequate compensation for medical malpractice victims, (2) lower malpractice insurance premiums, (3) protecting the Fund's financial status, (4) reducing overall health care costs, and (5) "[e]ncourag[ing] health care providers to practice in Wisconsin."

That the court identified certain classifications of victims and enumerated these particular legislative goals is not surprising; advocates on both sides of the debate would find these identifications familiar. What is interesting, however, is how meticulous the court was in analyzing the "rational relationship" between the cap and the legislative objectives, particularly the relationship between the cap and medical malpractice insurance rates. For example, the court cites Martin v. Richards, and studies discussed therein, suggesting that there is evidence indicating that the cap affects very few victims and may not have much of an effect on insurance rates. The court also discusses a General Accounting Office report that finds "premiums . . . are affected by multiple factors in addition to damage caps," and notes that "Minnesota, which has no caps on damages, has relatively low growth in premium rates and claims payments."

Sparing the reader further detail, it would suffice to say that the court is similarly meticulous in its analysis of each of the other four identified legislative objectives, constantly citing facts and figures suggesting that the objectives do not rationally relate to the classifications created by the cap. Ultimately, all of this analysis is done to back up the court's holding that "the $350,000 cap . . . violates the equal protection guarantees of the Wisconsin Constitution." While it is possible that "caps on noneconomic damages in medical malpractice cases, or statutory caps in general, can be constitutional[.]", for the present and immediate future, such caps are

66. Id., ¶ 89, 284 Wis. 2d 573, ¶ 85, 701 N.W.2d 440, ¶ 89.
67. Id., ¶¶ 91-95, 284 Wis. 2d 573, ¶¶ 91-95, 701 N.W.2d 440, ¶¶ 91-95.
68. 531 N.W.2d 70 (Wis. 1995).
69. See generally Ferdon, 2005 WI 125, ¶¶ 117-19, 284 Wis. 2d 573, ¶¶ 117-19, 701 N.W.2d 440, ¶¶ 117-19.
70. Id., ¶ 125, 284 Wis. 2d 573, ¶ 125, 701 N.W.2d 440, ¶ 125.
71. For example, among other facts and statistics, the court cited a 1992 report by the Wisconsin Office of the Commissioner of Insurance, see id., ¶ 99, 284 Wis. 2d 573, ¶ 99, 701 N.W.2d 440, ¶ 99; the published and hindsight surplus of the Fund from Fiscal Years 1979–2004, see id., ¶ 142, 284 Wis. 2d 573, ¶ 142, 701 N.W.2d 440, ¶ 142; the Legislative Fiscal Bureau's report to the Joint Committee on Finance, see id., ¶ 143, 284 Wis. 2d 573, ¶ 143, 701 N.W.2d 440, ¶ 143; and a Congressional Budget Office report regarding medical malpractice premiums and health care costs, see id., ¶ 163 n.219, 284 Wis. 2d 573, ¶ 163 n.219, 701 N.W.2d 440, ¶ 163 n.219.
72. Id., ¶ 10, 284 Wis. 2d 573, ¶ 10, 701 N.W.2d 440, ¶ 10.
73. Id., ¶ 189, 284 Wis. 2d 573, ¶ 189, 701 N.W.2d 440, ¶ 189 (Crooks, J., concurring).
unconstitutional in Wisconsin.\(^{74}\)

Given Wisconsin’s up-and-down history regarding damage caps in medical malpractice cases, one wonders what kind of chaos has existed in other states throughout the country. How have these caps been dealt with across the country? Are states typically more decisive than Wisconsin? Or do many other states also struggle with the issue?

III. LIMITS ON NONECONOMIC DAMAGES—HOW HAVE OTHER STATES TACKLED “TORT REFORM”?\(^{75}\)

The positions taken by other states across the country suggest that Wisconsin’s take on medical liability limits is not necessarily indicative of the nation’s view on the matter. A number of other courts have dealt with similar issues of validity, reaching varying conclusions. Three states in particular have played an interesting role in the development of medical negligence law—California, Texas, and Illinois.

For starters, it is difficult to overestimate the impact that California has had on the tort reform debate. For one, California’s current cap on noneconomic damages has been in place since 1975—one of the longest-lasting limits of any state.\(^{75}\) Even more, California’s cap has been the prized possession of tort reform supporters, who point to California’s law to prove their point that “tort reform works.”\(^{76}\)

The eye-opening event that stands out in California’s history of tort reform is the passage of the Medical Injury Compensation Reform Act of 1975, more commonly referred to as MICRA.\(^{77}\) Former California Governor Jerry Brown was instrumental in this development.\(^{78}\) “[C]iting serious problems that had arisen throughout the state as a result of a rapid increase in

\(^{74}\) A new cap of $750,000 has already been passed and signed by Governor Jim Doyle; however, it remains to be seen whether this cap will survive constitutional challenges. Stacey Forster, Doyle Signs Medical Liability Cap, MILWAUKEE J. SENTINEL, Mar. 23, 2006, at A1.


\(^{77}\) While MICRA contains several provisions relating to medical negligence law, the cap on noneconomic damages can be found in section 3333.2(b) of the California Civil Code. (“[i]n no [medical malpractice] action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)").

medical malpractice insurance premiums,[1, the governor] convened the Legislature in extraordinary session to consider measures aimed at remedying the situation. MICRA was the product of this special session. Among other notable changes to California's medical negligence laws, MICRA proscribed a maximum recovery of $250,000 for noneconomic damages in medical malpractice cases, an amount that has gone unchanged since MICRA was passed.

The validity of the cap provision in MICRA was challenged in Fein v. Permanente Medical Group. In Fein, the plaintiff challenged the cap's validity on grounds of substantive due process and equal protection, with both arguments being similar to the plaintiff's arguments in Guzman. Like the Wisconsin Court of Appeals, the California Supreme Court dismissed these arguments with ease. Because both substantive due process and equal protection arguments depend largely upon the standard of scrutiny applied, the court begins each analysis by noting that both arguments must meet only "rational basis" review.

Since the court was confronted with two constitutional challenges, and both revolve around "rational basis" review, the court had an easy time holding the caps to be valid. Unlike the Wisconsin Supreme Court, the California Supreme Court found the link between the legislative interest (reducing malpractice insurance premiums and improving the cost and access to health care) and the cap on noneconomic damages to be crystal clear. The court explained:

In attempting to reduce the cost of medical malpractice insurance in MICRA, the Legislature enacted a variety of provisions. . . . Section 3333.2 . . . [is] one of the provisions which made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance

79. Id.
80. Id.
82. See CAL. CIVIL CODE § 3333.2(b) (West 2004).
83. 695 P.2d 665 (Cal. 1985).
85. Id.
86. "So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature." Id. at 679 (quoting Am. Bank & Trust Co. v. Cmty. Hosp., 683 P.2d 670, 676 (Cal. 1984)).
premiums. It appears obvious that this section—by placing a ceiling of $250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers. 87

Since the connection between caps on noneconomic damages and medical malpractice costs is "obvious," MICRA is able to meet the "rational basis" demands of both the due process clause and the equal protection clause. The ease with which California finds the "rational" connection between the cap and the legislative objective is an intriguing contrast to the analysis of the Wisconsin Supreme Court, which was much pickier and less deferential to the legislature in Ferdon. Perhaps this suggests a more deferential atmosphere for California on this issue, one in which legislatures are free to experiment with possible solutions to perceived "crises."

At the other end of the spectrum, Texas' history with this issue is quite different, and arguably more complex. For instance, the first thing that stands out about Texas' stance on noneconomic damage caps is that there is absolutely no question that such caps are valid. The Texas Constitution says so. 88 Article III, section 66(b) of the Texas Constitution states:

Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. 89

This section of the Texas Constitution was passed in 2003. 90 As a result of this constitutional provision, Texas courts do not have to debate the validity of noneconomic damage caps under their own state law. If nothing else, this helps avoid state-specific questions of validity encountered in Wisconsin (as a result of Wisconsin's "right to remedy" provision in article I, section 9 of the

87. Fein, 695 P.2d at 680 (emphasis supplied).
88. TEX. CONST. art. III, § 66(b).
89. Id.
Wisconsin Constitution) and Illinois, among other states.

Texas' position on noneconomic damages was not always so cut-and-dry, however. When the Texas Supreme Court was instructed to answer certified questions in *Lucas v. United States*, the Texas appellate courts were split on the issue of whether damage caps in medical malpractice cases were valid. In *Lucas*, the United States Court of Appeals for the Fifth Circuit had already determined that noneconomic damage caps in medical malpractice cases pass federal requirements of due process and equal protection, thus, the question presented to the Texas Supreme Court was whether the caps violate state law.

At the time *Lucas* was decided, the Texas Constitution was much more favorable to medical malpractice plaintiffs. Not only did the express grant of authority of article III, section 66(b) not exist, but article I, section 13 of the Texas Constitution provided medical malpractice plaintiffs with more ammunition than the typical equal protection and due process arguments. Article I, section 13 states, in part, 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." Therefore, the then-existent $500,000 cap on noneconomic damages still had to survive the scrutiny of Texas state law.

The *Lucas* court struck down the cap, and did so by focusing on the nature of the legislation. For instance, the fact that there was no alternate remedy to compensate injured plaintiffs was taken into consideration by the court. In addition, the court analyzed the purposes and bases of the statute. Specifically, the court noted that the legislation sought to control insurance rates. Considering this main purpose, and the nature of noneconomic damages limits, the court found that "it is unreasonable and arbitrary to limit [plaintiffs'] recovery in a speculative experiment to determine whether liability insurance rates will decrease." Since "article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high[,]" the cap was struck down.

91. 757 S.W.2d 687 (Tex. 1988).
92. Id. at 690.
93. Id. at 688; see also *Lucas v. United States*, 807 F.2d 414, 421-22 (5th Cir. 1986).
95. *Lucas*, 757 S.W.2d at 692.
96. Id. at 691 ("It is significant to note that in two of the jurisdictions in which damage caps were upheld, the fact that alternative remedies were provided weighed heavily in the decisions.").
97. Id.
98. Id.
99. Id. (emphasis in original).
100. Id.
Of course, this was not the end of the battle in Texas. After years of debate over the issue, the war between malpractice cap proponents and opponents forged ahead until the enactment of Proposition 12, which resulted in article III, section 66(b). For the time being, it appears the debate is over in Texas.

The debate is not over in Illinois, a state that has made several efforts to limit damages in medical malpractice cases. As early as 1976—almost a decade before Wisconsin enacted caps—the Illinois Supreme Court was considering whether an overall cap on compensatory damages in medical malpractice cases, not limited to noneconomic damages, violated the Illinois Constitution. In *Wright v. Central Du Page Hospital Ass'n*, the Illinois Supreme Court held that it did, explaining "that limiting recovery only in medical malpractice actions to $500,000 is arbitrary and constitutes a special law in violation of section 13 of article IV of the 1970 Constitution."

A more recent development, and perhaps more recognizable, began in the 1990s with new efforts by the Illinois Legislature. In 1995, the Illinois Legislature changed the law and limited noneconomic damages to $500,000 not just in medical malpractice cases, but "[i]n all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damage to property based on negligence[.]"

This law reached beyond the bounds of many tort reform caps seen throughout the country, and of course, was challenged. When these questions worked their way up the Illinois judicial ladder, it became clear that Illinois' current approach to caps could not be more different than Wisconsin's approach in *Guzman*, or than California's approach in *Fein*.

The landmark case in Illinois, *Best v. Taylor Machine Works*, illustrates this assertion. In that case, Illinois' cap was challenged on a variety of grounds, two of which particularly caught the eye of the Illinois Supreme Court. Like the Texas Supreme Court did in *Lucas*, the *Best* court began its analysis by examining the purpose of the cap. By its own terms, the law claims that capping noneconomic damages "will improve health care in rural Illinois," and that "the cost of health care has decreased" in states that have

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103. Id. at 743.
104. 735 ILL. COMP. STAT. 5/2-1115.1 (1996).
105. 689 N.E.2d 1057 (Ill. 1997).
106. See id. at 1068.
107. Id. at 1067.
already limited noneconomic damages.  

With these purposes and findings in mind, the Illinois Supreme Court analyzed the cap in the context of the special legislation clause of the Illinois Constitution. Article IV, section 13 of the Illinois Constitution states that "[the legislature] shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." "[T]he purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis."  

Interestingly, the special legislation clause "generally is judged under the same standards applicable to an equal protection challenge"—that is, in this instance, "the rational basis test." Given the way "rational basis" challenges have gone in other states (California, for instance), one would suspect that Illinois could easily uphold the caps as a rational response to a perceived state problem with malpractice insurance.  

The Illinois Supreme Court took a different approach. Instead of casting off these caps as being rationally related to an insurance problem, the court considers whether the "arbitrary classifications" have a "reasonable connection" to the purpose of the cap. To sum up their analysis, the court explains that "[t]he legislature is not free to enact changes to the common law which are not rationally related to a legitimate government interest," and thus, the cap violates article IV, section 13 of the Illinois Constitution. As with Ferdon in Wisconsin, the caps failed rational review.  

The "special legislation" clause was not the only reason that these caps are unconstitutional, the Best court reasoned. The Best court also invalidated the cap on the basis of the separation of powers clause of the Illinois Constitution. Because "courts are constitutionally empowered, and indeed obligated, to reduce excessive verdicts where appropriate[,]" the cap unconstitutionally intrudes upon the court's power to reduce damages by operation of law.  

108. Id.  
109. Id. at 1069.  
110. ILL. CONST. art. IV, § 13.  
111. Best, 689 N.E.2d at 1069-70.  
112. Id. at 1070-71.  
113. Id. at 1075.  
114. Id. at 1077.  
115. Id. at 1078.  
116. Id. The separation of powers clause can be found in article II, section 12 of the Illinois Constitution.  
117. Id. at 1081.
The *Best* court declined to address other challenges to the caps, since the court had held them invalid on these two grounds. But despite the Illinois Supreme Court's take on the matter, Illinois continues to strive for caps on noneconomic damages; Illinois passed more tort reform legislation in 2005, resulting in a $500,000 cap on noneconomic damages in medical malpractice cases against physicians, and a $1 million cap against hospitals. Given the precedent of Illinois law on the matter, one wonders whether this law will withstand inevitable legal challenges.

Looking at the different views of these states, one might say that Illinois was as quick to strike down these caps as California was to uphold them, which raises a glaring question—how can two states take such drastically different approaches to tort reform issues, when the underlying laws are so similar? For that matter, before *Ferdon*, Illinois and Wisconsin seemed like polar opposites on this issue: How could two states, so close in geography and so intermingled in population, have taken such drastically different approaches to tort reform issues?

IV. THE VALIDITY OF CAPS ON NONECONOMIC DAMAGES—WHAT MAKES TEXAS, ILLINOIS, OR WISCONSIN VICTIMS SO DIFFERENT?

Wisconsin's stance on noneconomic damage caps before *Ferdon* certainly was at odds with that of the Supreme Courts of Illinois and Texas. However, California seems to be equally confident in the opposite conclusion. Why is there so much variation between these courts, when the issues are so similar?

There are several possibilities. The first, easiest, and most cynical explanation is that judges are just voting their own preferences and that the validity of these caps is determined by the political makeup of the courts. Although this suggestion may seem superficial, there might be some support for it. For example, both the *Best* and *Lucas* courts at least vaguely mention or evaluate the purpose and effectiveness of these caps. Certainly, the *Ferdon* court was willing to do so. The Supreme Court of Ohio has done the same, striking down a cap on damages when there was a lack of "evidence that the damage cap has been a factor in medical malpractice insurance rate

118. *Id.*
119. 735 ILL. COMP. STAT. 5/2-1706.5 (2006).
120. *Best*, 689 N.E.2d 1075 (addressing Plaintiff's argument that the caps create classifications that "have no reasonable connection to the stated legislative goals"); see *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (finding that it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease).
121. *See supra* note 71.
setting.” In essence, these courts are discussing and ruling on the effectiveness of the law, rather than on the validity of its existence.

In such cases, one may certainly argue that it at least appears that the courts may be substituting their own judgment for that of the legislature. Indeed, in his dissent in *Ferdon*, Justice Prosser brought up this issue openly in stating that “the majority marshals non-Wisconsin studies and articles to undermine decisions made in and for Wisconsin by our legislature. The use of these studies is selective, not comprehensive, so that non-Wisconsin studies that would support our legislation are played down, overlooked, or disregarded.”

There certainly are additional explanations, however. A more substantive possibility is the precise differences in state constitutional requirements, and what kind of “teeth” these requirements have been given by state courts. While challenges based on principles found in the United States Constitution—such as due process and equal protection—are common, federal interpretation of these doctrines make it difficult for plaintiffs to succeed on these grounds. For example, when *Lucas* was before the Fifth Circuit Court of Appeals, the court rejected challenges based on federal due process and equal protection. In doing so, it quoted the United States Supreme Court, which has explained:

> [O]ur cases have clearly established that “[a] person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,” despite the fact that “otherwise settled expectations” may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

This language caused the court in *Lucas* to reject any challenge based on federal due process. Likewise, federal equal protection arguments are often quickly thrown out, as courts tend to hold that noneconomic damage caps

124. Lucas v. United States, 807 F.2d 414, 421-22 (5th Cir. 1986).
125. *Id.* at 422 (quoting Duke Power Co. v. Carolina Env'l. Study Group, 438 U.S. 59, 88 n.32 (1978) (emphasis in original)).
126. *Id.*
satisfy the "rational basis" test. 127 While state courts are certainly free to interpret any due process or equal protection clause in their own state constitution much more liberally, courts have often refused to do so. 128

On the other hand, state-specific constitutional provisions have been the basis for invalidating these caps in several instances. 129 For example, the Texas and Illinois Supreme Courts invalidated these caps through the interpretation of their own unique state constitutional provisions. Wisconsin, on the other hand, has held that its state-specific "right-to-remedy" provision "confers no legal rights." 130 Therefore, if there are no rights given to plaintiffs by this provision of the Wisconsin Constitution, then it is hard to argue that their right is being violated in this context.

Finally, prior precedent may be another explanation for each state's individual stance. For example, while the Best, Lucas, and Fein courts generally resolved the constitutional issues on an independent basis, the Guzman court felt that it was significantly hampered by prior precedent. 131 The thrust of this view is that the constitutional issues confronted in Guzman can be decided in light of the Wisconsin Supreme Court's decision in Aicher v. Wisconsin Patients Compensation Fund. 132 In Aicher, the Wisconsin Supreme Court considered whether Wisconsin's five-year statute of repose in medical malpractice situations 133 was constitutional. The court found that it was, noting that the statute of repose "do[es] not violate the right-to-remedy provision of the Wisconsin Constitution . . . [and does] not offend equal protection because the classification of minor medical malpractice claimants is related rationally to the legitimate legislative objectives of reducing health care costs." 134

This determination was vitally important to the Guzman decision. As the court explains, if arbitrarily cutting off the right to bring one's suit for medical


131. See generally Guzman v. St. Francis Hosp., 2001 WI App 21, ¶ 6 n.4, 240 Wis. 2d 559, ¶ 6 n.4, 623 N.W.2d 776, ¶ 6 n.4 ("Wisconsin precedent not only illuminates our analysis, it controls it.").

132. 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849.


134. Aicher, 2000 WI 98, ¶ 6, 237 Wis. 2d 99, ¶ 6, 613 N.W.2d 849, ¶ 6.
malpractice (as a statute of repose essentially does) passes constitutional muster, then merely limiting one's damages at an arbitrary point certainly does the same.\textsuperscript{135} Considering this reasoning, Wisconsin's decisions validating the statute of repose for medical malpractice cases certainly had a great effect on how Wisconsin decided to confront the issue of damage caps (that is, before the Wisconsin Supreme Court decided the issue in \textit{Ferdon}).

While these possible explanations may shed light on how Wisconsin got to where it is, where Wisconsin will go (and should go) in the future is an entirely different question, involving several different issues. Has Wisconsin chosen the "right" side in the malpractice debate? If so, has it done so in the right fashion? Have these caps helped the medical malpractice "crisis?" How has the medical malpractice field changed after so many states have already chosen their sides? A thorough analysis of the effect that caps on noneconomic damages have had on malpractice premiums, health care costs, and health care access can help illuminate the answers to these questions.

V. THE FUTURE OF MEDICAL MALPRACTICE DAMAGES IN WISCONSIN—WHAT SHOULD WISCONSIN DO?

A. Do Caps Really Work?

As we have seen, courts that strike down noneconomic damage caps sometimes discuss their effectiveness at controlling malpractice rates or health care costs, while courts that uphold these caps either assume the connection or decline to discuss it entirely. Do these caps on noneconomic damages help control medical malpractice premiums and health care costs? Do they encourage business, improving access to the health care system? If so, why are some states so willing to invalidate these laws? If not, is it up to judges or legislators to take action?

As with other debates of this nature, there are staunch supporters and

\textsuperscript{135} Guzman, 2000 WI App 21, ¶ 12, 240 Wis. 2d 559, ¶ 12, 623 N.W.2d 776, ¶ 12. The court stated the following:

Significantly, \textit{Aicher} upheld the right of the legislature to deprive a person injured by medical-malpractice of \textit{any} right of recovery if that person brings suit after expiration of the five-year statute of repose, even though he or she might not have discovered the injury until after the repose period had passed. There can be no more drastic deprivation of the right to have one's suit for medical-malpractice damages tried by a jury than what the trial court in \textit{Aicher} characterized as closing the doors of the courtroom before the child in that case "even discovered she was injured."

\textit{Id.} (citations omitted).
opponents, both who throw out interesting arguments supporting whichever side they are on. The majority in *Ferdon* was certainly not at a loss for facts and statistics to prove its point, and neither was Justice Prosser in his dissent, for that matter.\textsuperscript{136}

One main thrust behind these caps is, of course, the stabilization of medical malpractice insurance premiums. The logic is that by capping noneconomic damages, malpractice insurance will become more affordable. However, there is evidence to show that this is not the case. For instance, according to a study conducted by Weiss Ratings, Inc. in 2003, while many states have enacted caps to deal with medical malpractice insurance premiums, "the actual experience of the states with caps does not support these proposals."\textsuperscript{137} Over a twelve-year period (1991–2002), states with caps experienced a 48.2% increase in the median annual premium, while states without caps experienced only a 35.9% increase.\textsuperscript{138} As the study suggests,

> On the surface, the theory behind caps on non-economic damage awards seems logical: caps would limit the payouts by insurers, and the lower payouts, in turn, would naturally enable the insurers to reduce med mal premiums. As we shall demonstrate below, however, in the real world of the med mal insurance business, only the first half of this theory is working.\textsuperscript{139}

In other words, the connection that was so obvious in *Fein* may not be as clear when the numbers are crunched.

The Weiss Ratings, Inc. study, while pretty indicative, is not the only evidence that suggests this conclusion, however. In several cases, insurance companies have also raised premiums at an alarmingly high rate despite a cap being in place. For example, after the Texas Constitution was amended and the legislature was allowed to impose a cap, major insurers sought a premium increase of up to thirty-five percent for doctors and sixty-five percent for hospitals.\textsuperscript{140} Florida, Mississippi, Nevada, and Oklahoma all experienced

\begin{footnotesize}
\begin{enumerate}
\item See generally *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 199, 284 Wis. 2d 573, ¶ 199, 701 N.W.2d 440, ¶ 199.
\item Weiss, Gannon & Eakins, *supra* note 75, at 3.
\item *Id.*
\item *Id.* at 7.
\end{footnotesize}
similar requests or rate hikes shortly after passing tort reform legislation.\textsuperscript{141} Nevada doctors have even described the Nevada cap on noneconomic damages as a "colossal failure."\textsuperscript{142}

Interestingly, the insurance industry's own testimony may render these facts academic. For one, the American Insurance Association, in criticizing an unfavorable report on state tort reform laws, claimed that "[i]nsurers never promised that tort reform would achieve specific savings, but rather focused on the benefits of fairness and predictability."\textsuperscript{143} Not only this, but an October 2004 press release from the Foundation for Taxpayer and Consumer Rights states that GE Protective, the country's largest medical malpractice insurer, admitted that damage caps will not lower malpractice premiums.\textsuperscript{144} With these facts and admissions, it is difficult to see how caps on noneconomic damages will help any malpractice insurance "crisis." Even with the relative stability achieved in California, major questions arise over whether it has been insurance reform, not the imposition of caps, that has made the difference.\textsuperscript{145}

Similarly, the evidence suggests that caps on noneconomic damages have not had an adverse effect on health care costs. According to the Congressional Budget Office (CBO), malpractice costs account for about two percent of health care spending.\textsuperscript{146} Therefore, any savings that is provided by caps on noneconomic damages would be miniscule, considering the breadth of health care spending in the United States.

Tort reform supporters often argue that unlimited liability results in practicing defensive medicine, which further increases the costs of the nation's health care system. However, the connection between caps and

\textsuperscript{141} Ams. for Ins. Reform, supra note 140, at 1.
\textsuperscript{145} The Foundation for Taxpayer and Consumer Rights, Testimony of Harvey Rosenfield Before the House Energy and Commerce Committee Subcommittee on Health 2 (Feb. 27, 2003), http://www.consumerwatchdog.org/healthcare/ep/rp003196.pdf. According to the Foundation for Taxpayer and Consumer Rights, California enacted Proposition 103 in 1988, which set forth several insurance reforms (such as frozen rates and mandatory rollbacks). \textit{Id.} From 1975 (when MICRA was enacted) until 1988, medical malpractice premiums in California rose 450%. \textit{Id.} From 1988 until 2001 (similarly, a 13 year period), medical malpractice premiums in California went down two percent). \textit{Id.}
defensive medicine is not as clear as it may appear on the surface. As the CBO has said, "so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients."\textsuperscript{147} As a result, the "CBO believes that savings from reducing defensive medicine would be very small."\textsuperscript{148}

A final prong of the medical malpractice "crisis" is the fear that unlimited liability will result in a declining availability of health care. If high premiums and "frivolous" litigation do not chase doctors away, the fear of unlimited liability will.

The connection is not quite as strong as one might think. For instance, Illinois' system prior to enacting new caps in 2005 was of unlimited liability is oft criticized by tort reform supporters. But statistics from July of 2004 suggest that unlimited liability may not necessarily lead to an exodus of health care providers in that state. According to the \textit{Chicago Tribune}, "state figures indicate that there has been a steady increase in the number of doctors licensed by the state in recent years—even in high-risk specialty fields in which doctors reportedly were leaving Illinois."\textsuperscript{149}

Alternative reasons for physician relocation, while less publicized, may present a more fulfilling explanation. Dr. Anthony Robbins, a doctor who has overseen programs to address recruitment and retention issues, has offered his opinion on the subject. Robbins claims the following:

\begin{quote}
    The difficulty in recruiting talented physicians to serve in rural areas is a nationwide problem. \ldots\ It is a continuing problem and one that has nothing to do with changes in malpractice premiums[;] \ldots\ shortages in the number of rural physicians nationwide are due to \ldots\ [social and professional] isolation, the lack of hospitals and medical technology, and a desire for greater affluence.\textsuperscript{150}
\end{quote}

With this in mind, one cannot say for certain that malpractice insurance alone is causing any physician shortages that may occur throughout the country.

\textsuperscript{147} Id. at 6.
\textsuperscript{148} Id.
\textsuperscript{150} Ass'n of Trial Lawyers of Am., \textit{Are Doctors Really Leaving?} (Jan. 27, 2003), http://www.atlanet.org/public/columns/12-19medmaldoctormnotleaving.aspx.
B. What Is the Right Approach?

This evidence, while important and telling, surely is not the end of the road for the medical malpractice debate. Cap supporters undoubtedly can point to data suggesting that caps are the answer. However, given all of the above facts and figures, there can be no denying that there is at least a legitimate debate about the issue; not over whether caps are right or wrong, but whether caps even accomplish their goal in the first place. Granting that both sides may have legitimate arguments, there is only one conclusion to date: nobody is sure. That being the case, the responsible approach is to err on the side of medical malpractice victims' right to recovery. After all, if our civil justice system aims to make victims of negligence whole again, it would be counter-productive to circumvent that goal through laws that, in the end, may not do enough good to be worthwhile.

But who should take the initiative to make sure these caps are not in place? Should courts strike down these laws, ensuring that malpractice victims are fully and fairly compensated? Or should the legislature reconsider their policy, noting the questionable connection between noneconomic damage caps and malpractice insurance rates?

Given the nature of some decisions that have struck down these damage caps (especially those by the Illinois Supreme Court, the Texas Supreme Court, and the Wisconsin Supreme Court), it appears that the safest way of taking action to remove these caps is through legislative decision making. When courts begin to analyze the effectiveness of a law in order to rule on its validity (as was arguably done in Best and Ferdon), the temptation for judges to insert their own beliefs becomes too great; the court, in arguing over the effect of the law rather than the validity of it, may inevitably become a super-legislature. Whether the legislature has the power to pass the law should not depend on the wisdom or success of the law. In essence, the power to legislate over a subject matter also includes the power to legislate poorly.

The safer, correct path to remove these caps is to eliminate them through the legislative process. The legislature, after all, is in a better position to investigate, analyze, and consider whether these caps truly help the general population. Therefore, considering both the questionable effect of noneconomic damage caps on malpractice premiums and the insufferable results that it has on many victims of malpractice, the Wisconsin Legislature must carefully consider its efforts in enacting medical malpractice legislation.
VI. CONCLUSION

Limiting noneconomic damages in medical malpractice cases has traditionally been a strongly protected policy of the State of Wisconsin. However, the Ferdon case has turned medical malpractice law upside-down in Wisconsin, and done so in an interesting if not threatening way. The willingness of courts to look at the effectiveness of certain laws to determine the validity of those laws is troubling, and may not be the proper role for the judiciary.

In any event, the effectiveness of medical malpractice caps is undoubtedly in question. Yet, the harsh results that these caps yield on certain victims of malpractice are certain. Therefore, the Wisconsin Legislature must carefully consider the effectiveness and impact of these caps before attempting to enact new laws that limit the rights of medical malpractice victims. Cutting off a victim's right to full recovery is a high price to pay in the name of an insurance crisis; a price that, in the end, may not be worth it.