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# The Disappearing Provision: Medical Liability Reform Vanishes From The Patient Protection and Affordable Care Act Despite State Court Split

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# THE DISAPPEARING PROVISION: MEDICAL LIABILITY REFORM VANISHES FROM THE PATIENT PROTECTION AND AFFORDABLE CARE ACT DESPITE STATE COURT SPLIT

RAFAEL ANDRE ROBERTI\*

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## INTRODUCTION

The legal and medical communities have debated the impact and necessity of medical liability reform for over twenty years.<sup>1</sup> At the heart of the debate is the question of how to strike a balance between compensating patients and their families for the thousands of deaths and injuries resulting from medical errors that occur annually, and encouraging physicians to continue to care for patients across America.<sup>2</sup> While

<sup>1</sup> See generally Faye A. Silas, *Tort Reform: The Year's Hottest Issue*, B. LEADER, July-Aug. 1986, at 15 (recognizing that in 1986 alone, states introduced nearly 2,200 bills proposing tort reforms, most of which dealt with medical malpractice; however, doctors considered the bills to be reform measures while lawyers considered them "deform" measures).

<sup>2</sup> See INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 1 (2000) estimating that between 44,000 and 98,000 Americans die each year from medical malpractice). See generally U.S. DEP'T OF HEALTH AND HUMAN SERVS., *ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE QUALITY OF HEALTH CARE* 3-6, 9-10 (2003) (noting that fear of litigation among doctors increases medical errors while demonstrating that doctors are not treating high-risk patients).

several states have passed medical liability reform laws previously, on March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (ACA)—colloquially known as the “health care bill”—that contains provisions on medical liability reform.<sup>3</sup> Unfortunately, the ACA has no legal effect on the medical liability system and, therefore, is unable to create real reform in this area.<sup>4</sup> Interestingly, the lack of true federal reform comes at a time when some state supreme courts have held that laws capping non-economic damages in medical liability cases are unconstitutional, while other state supreme courts have held that such laws are constitutional.<sup>5</sup> The different rulings among the states are problematic because they lead to doctors abandoning states that do not have caps, higher incidences of defensive medicine, and higher health care costs for Americans.<sup>6</sup>

This Article focuses on how the ACA and recent state supreme court rulings regarding caps on non-economic damages negatively affect medical liability reform. Part II of this Article discusses the cost and quality of the health care system, explains the medical liability debate regarding which reforms Congress should enact, introduces relevant state court rulings and ACA provisions, and discusses the constitutional question of the reforms.<sup>7</sup> Part III analyzes how the different state court rulings affect the health care system, examines what the ACA could have provided based on its legislative history, explains why Congress must reform the medical liability system, and considers the constitutionality of a federal cap and its effect on patients and doctors.<sup>8</sup> Part IV recommends that Congress pass a law capping non-economic damages and creating mandatory health courts.<sup>9</sup> Part V concludes by urging Congress

<sup>3</sup> Compare NAT'L CONF. OF STATE LEG., *Medical Liability/Malpractice Laws*, <http://ncsl.org/default.aspx?tabid=18516> (last updated Apr. 15, 2011) [hereinafter MALPRACTICE LAWS] reviewing medical liability reforms at the state level), with The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 804, 1009-14 (2010) (providing federal grants for state demonstration projects that reform the medical liability system).

<sup>4</sup> See Ashby Jones, *New Law Deals Setback to Malpractice Foes*, WALL ST. J., Mar. 27, 2010, at A4 (declaring that the ACA is toothless because patients can freely opt out of state demonstration projects).

<sup>5</sup> Compare *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914-15 (Ill. 2010) (holding that a cap on damages violates the separation of powers clause in the Illinois Constitution because it infringes on the judge's remittitur power), and *Atlanta Oculoplastic Surgery, P.C. v. Nestlehuett*, 691 S.E.2d 218, 220 (Ga. 2010) (determining that the cap on damages violates the plaintiffs' right to trial by jury because the jury is forbidden from deciding matters of fact), with *Evans v. State*, 56 P.3d 1046, 1050-51 (Alaska 2002) (holding that the cap does not infringe on the right to trial by jury because remedy is a matter of law).

<sup>6</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 2, at 3-11 (calling for federal action to repair the broken medical liability system).

<sup>7</sup> See *infra* Part II (outlining how medical liability reform relates to health care reform).

<sup>8</sup> See *infra* Part III (arguing that medical liability reforms could help the health care system and reverse the lack of uniformity caused by the state split).

<sup>9</sup> See *infra* Part IV (proposing reforms to the medical liability system to decrease health expenditures and improve patients' access to care).

to find the balance between the need to compensate injured patients and the need to ensure that doctors provide adequate care.<sup>10</sup>

## I. BACKGROUND

### A. THE CURRENT STATE OF HEALTH CARE

In 2010, nearly every American became aware of the problems with the health care system.<sup>11</sup> The United States spends more money on health care than any other country; however, the quality and availability of the care is deficient, with over forty-six million Americans lacking health insurance.<sup>12</sup> Furthermore, in 2008, former Comptroller General of the United States David M. Walker stated that exponentially increasing health care costs could be the expense that bankrupts America.<sup>13</sup> Thankfully, after the country endured a year of acrimonious debate over how to fix the health care system, on March 23, 2010, President Obama signed the agreed-upon solution—the ACA—into law.<sup>14</sup> As promised, the ACA provides several health insurance reforms.<sup>15</sup> However, some states fear that the ACA does not allocate sufficient money to fund several of its programs, rendering such reforms useless.<sup>16</sup>

<sup>10</sup> See *infra* Part V (concluding that the ACA failed to reform the health care system).

<sup>11</sup> See President Barack Obama, Remarks by the President in State of the Union Address at the U.S. Capitol (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> [hereinafter Obama State of Union Speech] (proclaiming that millions of Americans will lose their health insurance and premiums will increase if Congress does not reform the health care system by increasing coverage).

<sup>12</sup> See KAREN DAVIS ET AL., COMMONWEALTH FUND, MIRROR, MIRROR ON THE WALL: HOW THE PERFORMANCE OF THE U.S. HEALTH CARE SYSTEM COMPARES INTERNATIONALLY 2010 UPDATE 16 (2010) (finding that the United States health care system provided poor access to health care and lacked efficiency and equity); see also U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P60-236, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 21 (2009) (stating that approximately 682,000 Americans lost their health insurance between 2007 and 2008).

<sup>13</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-411T, TESTIMONY BEFORE THE S. COMM. ON THE BUDGET, LONG TERM FISCAL OUTLOOK: ACTION IS NEEDED TO AVOID THE POSSIBILITY OF A SERIOUS ECONOMIC DISRUPTION IN THE FUTURE 8-9 (2009) (testifying that between 1976 and 2006, health care spending increased from eight percent to sixteen percent of the country's GDP).

<sup>14</sup> See Obama State of Union Speech, *supra* note 11 (urging Congress not to walk away from health care reform, despite Republicans and Democrats engaging in a battle over such reform); see also President Barack Obama, Remarks by the President and Vice President at Signing of the Health Insurance Reform Bill at the East Room (Mar. 23, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill> (claiming that the ACA lowers health care costs for families and will reduce the nation's deficit by over \$1 trillion within twenty years).

<sup>15</sup> See generally The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1101, 1311, 2714, 124 Stat. 119, 131, 141-43, 186-87 (2010) (providing expanded insurance coverage for dependents until age twenty-six, the creation of temporary high-risk pools, which provide insurance coverage for individuals with pre-existing conditions, and the creation of state health insurance exchanges in 2014).

<sup>16</sup> See Michelle Andrews, *Health Insurance Pools Offer Hope at a Cost*, NAT'L PUBLIC RADIO, (May 18, 2010) [www.npr.org/templates/story/story.php?storyId=126908380](http://www.npr.org/templates/story/story.php?storyId=126908380) (clarifying that some states have allowed the federal government to operate the temporary high-risk pools out of fear that the ACA's allocation of \$5 billion is insufficient to last until 2014, when universal health insurance coverage begins).

Thus, in passing the ACA, Congress's toughest task was finding the right balance between providing universal coverage and controlling health care costs.<sup>17</sup>

## B. THE MEDICAL LIABILITY REFORM DEBATE

The debate on medical liability reform hinges on whether changes to the system would have any beneficial effect on patients and doctors.<sup>18</sup> Medical liability refers to the responsibility a medical care provider is likely to bear should a patient sue him or her for medical malpractice.<sup>19</sup> To protect against the chance of paying substantial damages to a patient, doctors pay a premium to obtain malpractice insurance.<sup>20</sup> Several factors determine the amount of a doctor's premium, including the field in which the doctor practices, recent jury awards in malpractice cases, and the success of the insurance companies' financial investments.<sup>21</sup> Typically, when premiums increase, physicians spread the costs to their patients.<sup>22</sup> Additionally, a physician may practice defensive medicine, which occurs when a physician orders additional tests primarily to reduce his or her exposure to malpractice liability.<sup>23</sup> Therefore, if the physician orders large numbers of procedures related to the patient's ailment, a patient is less likely to prove that the physician did not apply an adequate standard of care.<sup>24</sup> Conversely, physicians may perform

<sup>17</sup> See *The Economic Case for Health Reform: Hearing Before the H. Comm. on the Budget*, 111th Cong. 40 (2009) [hereinafter *Economic Hearings*] (statement of Rep. Connolly, Member, H. Comm. on the Budget) (noting that there is a fundamental incompatibility between expanding coverage to all uninsured Americans and bringing down the overall cost of health care).

<sup>18</sup> See Silas, *supra* note 1, at 16 (emphasizing that lawyers opposed reform because there was no evidence that the system needed changing, while doctors favored reform saying that lawyers and the tort system caused insurance companies to increase malpractice insurance premiums).

<sup>19</sup> See 1 AM. LAW MED. MALPRAC. § 1:1 (3d. ed. 2010) (indicating that the term "medical provider" is not limited to doctors, nurses, and hospitals).

<sup>20</sup> See MICHELLE M. MELLO, THE ROBERT WOOD JOHNSON FOUND., UNDERSTANDING MEDICAL MALPRACTICE INSURANCE: A PRIMER 1 (2006) (establishing that most states require physicians to purchase medical malpractice insurance to guard against large damage awards).

<sup>21</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 16-36 (2003) (theorizing that the losses in medical malpractice claims appear to be the primary reason that insurance companies increase physician premiums).

<sup>22</sup> See U.S. OFF. OF TECH. ASSESSMENT, OTA-H-602, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 155 (1994) (stressing that doctors pass their increased operating costs to consumers through higher procedure fees).

<sup>23</sup> See JACKSON HEALTHCARE, A COSTLY DEFENSE: PHYSICIANS SOUND OFF ON THE HIGH PRICE OF DEFENSIVE MEDICINE IN THE U.S. 6 (2010), available at [http://www.jacksonhealthcare.com/media/91481/defensivemedicine\\_ebk0610c.pdf](http://www.jacksonhealthcare.com/media/91481/defensivemedicine_ebk0610c.pdf) (insisting that over seventy-three percent of physicians practice defensive medicine).

<sup>24</sup> See 5 DOUGLAS DANNER, LARRY L. VARN & SUSAN J. MATHIAS, MED. MALPRAC. CHKLSTS. & DISC. § 36:9 (2010) (admitting that doctors who practice defensive medicine focus on self-preservation and not on the patient's well-being).

redundant tests in order to increase their incomes instead of to prevent lawsuits.<sup>25</sup>

Thus, medical liability reforms attempt to decrease physician premiums and the practice of defensive medicine in order to lower the overall cost of health care.<sup>26</sup> For example, reforms may include the adoption of health courts, which usually include neutral expert witnesses and faster resolutions of cases, or apology statutes, which allow doctors to apologize to patients for their injuries without the doctor assuming liability.<sup>27</sup> However, the most controversial reform is a cap on non-economic damages, which may limit a patient's compensation for any pain, suffering, emotional distress, loss of consortium, or loss of enjoyment of life that resulted from the malpractice.<sup>28</sup> Critics of non-economic damages caps claim that the caps fail to reduce malpractice premiums or to decrease total health care costs substantially and are unfair to patients who have suffered an injury due to a physician's negligence.<sup>29</sup> Conversely, proponents of medical liability reform urge that caps on non-economic damages reduce malpractice premiums and total health care costs, and increase patient access to medical services.<sup>30</sup> Therefore, the critical question regarding medical liability reform is

<sup>25</sup> See Ronen Avraham, *Tort Reform May Reduce Healthcare Costs But It's No Silver Bullet – So Let's Think Outside the Box*, in Andrew F. Popper, *Materials on Tort Reform* 20, 21 (Thomson Reuters, 2010) (on file with author) (repeating that medical payment reforms, not caps, may decrease the use of redundant tests).

<sup>26</sup> See Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Sen. Orrin G. Hatch 1 (Oct. 9, 2009), [hereinafter Elmendorf Letter], available at [http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort\\_Reform.pdf](http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf) (suggesting that medical liability premiums directly affect health care expenditures and costs associated with defensive medicine indirectly affect health care costs).

<sup>27</sup> See generally Corrine Parver, *Health Courts: A Modern-Day Solution for Medical Malpractice Litigation*, in Popper, *supra* note 25, at 73, 74 (voicing that health care courts could be similar to other specialty courts, like those used for bankruptcy); Patrick T. O'Rourke & Kari M. Hershey, *The Power of "Sorry,"* THE HOSPITALIST, Oct. 1, 2007, at 17 (discussing the variation in apology statutes among the states and distinguishing between those that characterize an apology as a submission of fault from those that define an apology as a statement of sympathy).

<sup>28</sup> See HEALTH COAL. ON LIABILITY AND ACCESS, ENDING THE CONFUSION: ECONOMIC, NON-ECONOMIC AND PUNITIVE DAMAGES 1 (2010), available at <http://www.hcla.org/factsheets/2003-23-Damages.pdf> (differentiating non-economic damages from punitive damages, which a jury awards to punish or deter the defendant).

<sup>29</sup> See J. ROBERT HUNTER ET AL., AMERICANS FOR INSURANCE REFORM, TRUE RISK: MEDICAL LIABILITY, MALPRACTICE INSURANCE AND HEALTH CARE 2 (2009) (elaborating that malpractice insurance companies' decreasing investment income, not the lack of medical liability reform, explained doctors' increasing insurance rates); Tom Jackman, *\$1.6 Million Awarded in Va. Medical Case*, WASH. POST, Nov. 5, 2004, at B07 (conceding that a judge decreased the jury award of \$2.5 million for medical malpractice to \$1.6 million because of Virginia's law capping damages); see also *Economic Hearings*, *supra* note 17, at 38 (statement of Christina D. Romer, Chair, Council of Economic Advisers announcing that President Obama is not in favor of caps because he is worried about fairness to malpractice victims).

<sup>30</sup> See Elmendorf Letter, *supra* note 26, at 2-3 (acknowledging that reforms could lower national premiums by ten percent, which would reduce national health care expenditures by about \$3.5 billion in 2009); see also Eric Helland & Mark H. Showalter, *The Impact of Liability on the Physician Labor Market*, 52 J.L. & ECON. 635, 653-55 (2009) (discovering that increases in potential medical liability decrease the number of hours physicians work).

whether the reforms would decrease health care expenditures and be fair to patients.<sup>31</sup>

### C. THE STATES AND CAPS ON NON-ECONOMIC DAMAGES

While the policy debate on non-economic damages caps continues, one also can observe the battle over the caps by examining various state laws and court rulings.<sup>32</sup> In 1985, in *Fein v. Permanente Medical Group*, the California Supreme Court was one of the first courts to hold that a cap on non-economic damages was constitutional.<sup>33</sup> Since then, legislatures all over the country have passed laws capping non-economic damages, leading courts to hear cases seeking to determine the constitutionality of such laws.<sup>34</sup> In general, there are four ways to categorize a state in terms of its position on non-economic caps: 1) states that currently have a law providing for a non-economic cap or a total damages cap; 2) states that have not passed legislation providing for a non-economic cap; 3) states that have altered their constitutions to prevent the enactment of a non-economic cap; and, 4) states whose supreme courts have invalidated a law that capped non-economic damages.<sup>35</sup> Currently, thirty-eight jurisdictions have a cap on non-economic damages in medical liability cases while fourteen do not.<sup>36</sup> Additionally, there are cases pending in Indiana and Kansas regarding the constitutionality of

<sup>31</sup> Compare Kevin J. Gfell, Note, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 801 (2004) (contending that caps would allow insurance companies to decrease insurance premiums and possibly reduce the cost of health care to patients), with Patrick A. Salvi, *Why Medical Malpractice Caps are Wrong*, 26 N. ILL. U. L. REV. 553, 554 (2006) (arguing that caps on damages have failed to reduce malpractice insurance premiums in at least six states).

<sup>32</sup> See, e.g., *Oliver v. Magnolia Clinic*, Nos. 2011-C-2132, 2011-C-2139, 2011-C-2142, 2012 WL 798796, at \*3-4 (La. Mar. 13, 2012) (affirming the state's non-economic cap as constitutional); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 913-14 (Ill. 2010) (declining to follow other states' courts that have found caps constitutional because of Illinois precedent).

<sup>33</sup> See 695 P.2d 665, 679 (Cal. 1985) (holding that the cap did not violate the Due Process Clause because the legislature has broad authority to modify damages) (quoting *Am. Bank & Trust Co. v. Cmty Hosp.*, 683 P.2d 670, 676 (Cal. 1984); but see *Carson v. Maurer*, 424 A.2d 825, 836-37 (N.H. 1980) (affirming that the cap violated the state's Equal Protection Clause because it was unfair, arbitrary, and unreasonable given that the damage awards were only a small part of insurance costs), *overruled on other grounds by Cmty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707, 718 (N.H. 1980).

<sup>34</sup> See *Scholz v. Metro. Pathologists P.C.*, 851 P.2d 901, 905-06 (Colo. 1993) (upholding a state statute capping non-economic damages as constitutional in part because the Colorado Constitution does not guarantee a right to trial by jury in civil cases); but see *Moore v. Mobile Infirmary Assoc.*, 592 So.2d 156, 163-64 (Ala. 1991) (deciding that a non-economic cap is unconstitutional because the Alabama Constitution provides an inviolate right to a jury and a cap would limit the jury's ability to assess damages).

<sup>35</sup> See generally MALPRACTICE LAWS, *supra* note 3 (summarizing the variety among state laws concerning medical liability reforms).

<sup>36</sup> See *id.* (adding that seven state courts have held that caps on non-economic damages are unconstitutional).

non-economic caps.<sup>37</sup> Interestingly, several state supreme courts have held a non-economic cap constitutional on the same grounds that other state supreme courts have declared the cap unconstitutional.<sup>38</sup>

### 1. STATE COURTS HOLDING THAT CAPS ARE UNCONSTITUTIONAL

The Illinois and Georgia high courts were the most recent state supreme courts to hold that a law capping non-economic damages was unconstitutional.<sup>39</sup> On February 4, 2010, in *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court held that a law capping damages at one million dollars violates the separation of powers clause by limiting the judge's power of remittitur.<sup>40</sup> A judge's power of remittitur allows the judge to reduce the plaintiff's award or award a new trial.<sup>41</sup> However, a law capping non-economic damages reduces the plaintiff's damages, regardless of the case's facts and without the plaintiff's consent.<sup>42</sup> Therefore, the court held that the cap is unconstitutional because it usurps the judge's power and violates the separation of powers clause.<sup>43</sup>

Only one month later, in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, the Georgia Supreme Court held that a law capping non-economic damages at \$350,000 violated the right to a jury trial because the cap nullified the jury's finding of fact regarding damages.<sup>44</sup> The court stated that non-economic damages have historically been part of total damages in tort cases and that the constitutional right to a jury includes all of the jury's essential elements.<sup>45</sup> Therefore, parties have a common law right to a jury with a corollary right to the award of non-economic damages.<sup>46</sup> The court concluded that a cap's very existence

<sup>37</sup> See *Plank v. Cmty. Hosps.*, 956 N.E.2d 731 (Ind. App. 2011); Dave Ranney, *Kansas Supreme Court to Rule on Malpractice Case*, K.A. HEALTH INST. NEWS SERV. (Mar. 2, 2010), <http://www.khi.org/news/2010/mar/02/kansas-supreme-court-rule-malpractice-case/> [hereinafter Ranney Kansas] (predicting that the cap on non-economic damages will fall because it interferes with the plaintiff's constitutional right to a jury trial).

<sup>38</sup> Compare *Evans v. State*, 56 P.3d 1046, 1050-51 (Alaska 2002) (answering that the cap does not infringe on the right to trial by jury because the application of damages is a matter of law), with *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010) (asserting that the cap violates the plaintiff's right to trial by jury because the cap nullifies the jury's common law right to determine damages).

<sup>39</sup> See *Atlanta Oculoplastic Surgery, P.C.*, 691 S.E.2d at 220 (holding that the cap is unconstitutional because the cap violated the plaintiff's right to a jury trial); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 911, 914 (Ill. 2010) (concluding that the cap violates the separation of powers clause by limiting the judge's power of remittitur).

<sup>40</sup> *Lebron*, 930 N.E.2d at 914.

<sup>41</sup> See *id.* at 905 (citing *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079-80) (conceding that the remittitur power only allows a judge to reduce damages if the plaintiff consents to the reduction)).

<sup>42</sup> See *id.* at 908 (defining the cap as an unconstitutional legislative remittitur).

<sup>43</sup> *Id.* at 914.

<sup>44</sup> 691 S.E.2d at 223.

<sup>45</sup> *Id.* at 222-23.

<sup>46</sup> *Id.* at 223.

violates the right to trial by jury.<sup>47</sup> Based on the rulings in Illinois and Georgia, caps are unconstitutional because they violate the separation of powers clause and the right to a jury trial.<sup>48</sup>

## 2. STATE COURTS HOLDING THAT CAPS ARE CONSTITUTIONAL

Conversely, several courts, including Alaska's, Virginia's, and West Virginia's supreme courts, have upheld the constitutionality of laws that cap non-economic damages in medical malpractice suits.<sup>49</sup> In *Pulliam v. Coastal Emergency Services of Richmond Inc.*, the Virginia Supreme Court held that a cap did not violate the right to a jury trial because the determination of remedy is a matter of law and not a matter of fact.<sup>50</sup> The court then stated that the Virginia Constitution's guarantee of trial by jury only protects rights that existed at common law and common law did not recognize a right to full recovery in tort.<sup>51</sup> Lastly, the court noted that if the legislature may bar a cause of action by imposing a statute of limitations, then it is permissible for the legislature to limit the amount of recovery.<sup>52</sup>

Similarly, in *Evans v. Alaska*, the Alaska Supreme Court held that a cap on non-economic damages did not violate the separation of powers clause.<sup>53</sup> The court described the cap as a modification of a cause of action and not as modifying the power of judicial remittitur.<sup>54</sup> Since the legislature has the power to alter common law remedies, the cap does not commandeer a judge's remittitur power.<sup>55</sup>

More recently, in *MacDonald v. City Hosp., Inc.*, the West Virginia Supreme Court rejected the Georgia Supreme Court's view on non-economic damages caps and held that a law capping non-economic

<sup>47</sup> See *id.* (noting that if the legislature could cap recovery at \$350,000, then they could constitutionally cap recovery at \$1).

<sup>48</sup> See generally *id.* at 223 (removing the jury's common law ability to award damages); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914-15 (Ill. 2010) (violating the judge's remittitur power).

<sup>49</sup> See, e.g., *Evans v. State*, 56 P.3d 1046, 1055-56 (Alaska 2002) (reiterating that a non-economic damages cap is constitutional because the legislature has the power to modify a cause of action); see also *Stinnett v. TAM*, 198 Cal. App. 4th 1412 (2011) (holding California cap constitutional). Additionally, in March 2012, the Louisiana Supreme Court reaffirmed that the state's non-economic cap does not violate the Louisiana Constitution. *Oliver v. Magnolia Clinic*, Nos. 2011-C-2132, 2011-C-2139, 2011-C-2142, 2012 WL 798796, at \*3-4 (La. Mar. 13, 2012).

<sup>50</sup> 509 S.E.2d 307, 312 (Va. 1999) (quoting *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989)); see also *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (ruling that a cap on damages does not violate the right to a jury trial because the role of the jury does not include determining the legal consequences of its factual findings).

<sup>51</sup> *Pulliam*, 509 S.E.2d at 314 (quoting *Etheridge*, 376 S.E.2d at 529).

<sup>52</sup> *Id.* at 314.

<sup>53</sup> *Evans*, 55 P.3d at 1056.

<sup>54</sup> See *id.* at 1055-56 (distinguishing a cap, which is a general alteration on all cases, from a remittitur, which is a reduction based on the facts of a specific case).

<sup>55</sup> See *id.* at 1056; see also *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1336 (D. Md. 1989) (holding that a cap is constitutional under Maryland law because the legislature's power to modify common law includes the power to limit damages).

damages at five-hundred thousand dollars did not violate West Virginia's Constitution.<sup>56</sup> The court determined that the cap was an economic regulation enacted by the legislature to lower health care expenditures and insurance premiums.<sup>57</sup> Although the plaintiff argued that a cap would not curtail health care expenses, the court stated that West Virginia's Constitution allows the legislature to attempt a solution even when the results are uncertain.<sup>58</sup> Therefore, the court deferred to the legislature and determined that the cap did not violate the state's equal protection clause.<sup>59</sup>

Therefore, the above rulings, which hold that caps do not violate the right to a jury trial, the separation of powers clause, or the equal protection clause directly conflict with the rulings in Illinois and Georgia.

#### D. THE ACA AND MEDICAL LIABILITY REFORM

While several state legislatures have passed some measure of medical liability reform, the federal government previously had been unsuccessful in doing the same.<sup>60</sup> However, with the signing of the ACA on March 23, 2010, the federal government enacted provisions related to medical liability reform.<sup>61</sup> Although Representative Gingrey subsequently introduced House Bill 5690—which advocates for more stringent federal medical liability reforms—on July 1, 2010, the ACA currently only provides federal funding to states that create demonstration projects related to medical liability reform.<sup>62</sup> The demonstration projects allow states to create an alternative medical liability system in order to determine whether the reforms reduce health care expenditures.<sup>63</sup>

<sup>56</sup> 715 S.E.2d 405, 411, 415 & n.14 (W. Va. 2011) (referencing *Atlanta Oculoplastic Surgery, P.C. v. Nestlehuett*, 691 S.E.2d 218, 224-25 (Ga. 2010)).

<sup>57</sup> *Id.* at 416-20.

<sup>58</sup> *Id.* at 418.

<sup>59</sup> *Id.* at 418, 420.

<sup>60</sup> Compare Cal. Civ. Code § 3333.2 (West 2010) (capping non-economic damages at \$250,000), with H.R. 4600, 107th Cong. § 4 (1996) (as passed by House, Sept. 26, 2002) (failing to pass a federal law capping non-economic damages at \$250,000).

<sup>61</sup> See The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 804, 1009-14 (2010) (providing federal grants for state demonstration projects that efficiently resolve malpractice disputes and promote a reduction of health care errors).

<sup>62</sup> Compare H.R. 5690, 111th Cong. §§ 3, 6 (2010) (adopting a three-year statute of limitations and forbidding a patient to use a physician's benevolent apology as evidence in all malpractice cases), with The Patient Protection and Affordable Care Act, § 10607, 124 Stat. at 1009 (allowing states to determine their own solutions to improve the medical liability system).

<sup>63</sup> See Pat Muccigrosso, *Health Courts: A Chance for Justice for All?*, AMN HEALTHCARE, Apr. 1, 2010, <http://www.amnhealthcare.com/News/news-details.aspx?Id=33792> (recognizing that states could learn which reforms work best by tweaking other states' projects).

## 1. MEDICAL LIABILITY REFORM IN THE ACA

While the final version of the ACA encouraged states to create demonstration projects, Members of Congress proposed several amendments and engaged in numerous debates that would have altered the ACA's effect on medical liability reform.<sup>64</sup> On November 7, 2009, the House of Representatives passed the Affordable Health Care for America Act (the House version of the bill that became the ACA), providing that, in order for states to receive funding, the demonstration projects could not limit attorneys' fees or impose a cap on damages.<sup>65</sup> While President Obama informed Americans that he was against caps on damages, Members of Congress argued that prohibiting them would eliminate any possible savings within the health care system.<sup>66</sup> Similarly, Republican senators argued that the demonstration projects would not have any meaningful effect on medical liability reform.<sup>67</sup>

Subsequently, various Senators proposed amendments specifying how to create medical liability reform.<sup>68</sup> On December 2, 2009, Senator Graham submitted Amendment 2829, which mandated that a federal alternative dispute resolution (ADR) system or certified state ADR system hear any malpractice suit prior to the plaintiff filing the suit in state or federal court.<sup>69</sup> Additionally, while the appeals court could review the ADR panel's decision under a *de novo* standard, if the reviewing court upheld the decision, the appealing party would have to pay the opposing party's expenses.<sup>70</sup>

Similarly, on December 19, 2010, Senator Coburn submitted Amendment 3283, which provided that state demonstration proj-

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<sup>64</sup> See generally H.R. 3962, 111th Cong. § 2531 (2009) (as passed by House, Nov. 7, 2009) (forbidding caps on jury awards); 155 CONG. REC. S12169-70 (daily ed. Dec. 2, 2009) (text of SA 2829) (mandating alternative dispute resolution methods in medical liability cases).

<sup>65</sup> H.R. 3962, § 2531; see also 155 CONG. REC. H12,841 (daily ed. Nov. 7, 2009) (statement of Rep. Stearns) (claiming that House Bill 3962 prevented a state that accepted the funding from capping attorneys' fees or non-economic damages, even if state law mandates the action).

<sup>66</sup> Compare President Barack Obama, Remarks by the President at the Annual Conference of the American Medical Association at the Hyatt Regency Chicago, Chicago, Illinois (June 15, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-the-Annual-Conference-of-the-American-Medical-Association](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Annual-Conference-of-the-American-Medical-Association) [hereinafter Obama Medical Speech] (stating that caps are unfair to people who have been wrongfully harmed), with 155 CONG. REC. H12,841 (daily ed. Nov. 7, 2009) (statement of Rep. Stearns) (arguing that forbidding states to cap non-economic damages would be a federally-funded bribe discouraging states from enacting real reform).

<sup>67</sup> See, e.g., 155 CONG. REC. S11952-54 (daily ed. Nov. 21, 2009) (statement of Sen. McCain) (analyzing that the ACA does not contain real malpractice reform that would significantly reduce costs).

<sup>68</sup> See, e.g., 155 CONG. REC. S12169 (daily ed. Dec. 2, 2009) (statement of Sen. Graham) (submitting amendment 2829 to create specialty health courts for malpractice suits).

<sup>69</sup> 155 CONG. REC. S12169-70 (daily ed. Dec. 2, 2009) (text of SA 2829).

<sup>70</sup> See *id.* at S12170 (detailing that the reviewing court could disregard the "loser-pays" system only if not doing so would be manifestly unjust).

ects include mandatory health courts.<sup>71</sup> Moreover, Amendment 3283 allowed a party to use the health court's decision as evidence in an appeal to the state court.<sup>72</sup> Also on December 19, 2010, Senator Reid proposed Amendment 3276, which mandated that state demonstration projects include voluntary health courts.<sup>73</sup> Therefore, unlike Amendment 3283, Amendment 3276 allowed patients to opt out of the health court system and proceed directly to state or federal court.<sup>74</sup> On December 22, 2009, the Senate, with sixty votes in favor and thirty-nine votes against, agreed only to pass Senator Reid's Amendment 3276.<sup>75</sup>

On March 23, 2010, when President Obama signed the ACA into law, only six pages in the over 2,000-page document related to medical liability reform.<sup>76</sup> In its final version, the ACA provides states with federal funds to create demonstration projects that allow for the resolution of malpractice disputes and promote a reduction of health care errors.<sup>77</sup> However, the final version of the ACA mandates that states seeking federal funding for demonstration projects inform patients about the differences in the ADR systems and give patients the chance to withdraw from the ADR systems and pursue their cases in the existing medical liability system.<sup>78</sup> Thus, the ACA does not mention a cap on non-economic damages and creates state demonstration projects with voluntary health courts.<sup>79</sup>

## 2. THE CONSTITUTIONAL QUESTION IN FEDERAL MEDICAL LIABILITY REFORM

While the United States Supreme Court has never determined whether federal medical liability reform is constitutional, commentators have discussed the issue for several years.<sup>80</sup> The closest the Court has come to ruling on medical liability reform was in 1985, when it

<sup>71</sup> See 155 CONG. REC. S13529, S13546-48 (daily ed. Dec. 19, 2009) (text of SA 3283) (permitting state demonstration projects to include a health care tribunal or an expert panel review to hear malpractice suits).

<sup>72</sup> See *id.* at S135468.

<sup>73</sup> 155 CONG. REC. S13490, S13525-26 (daily ed. Dec. 19, 2009) (text of SA 3276).

<sup>74</sup> Compare 155 CONG. REC. S13529, S13546-48 (daily ed. Dec. 19, 2009) (text of SA 3283) (intending state court review only after an ADR system has ruled), with 155 CONG. REC. S13490, S13525-26 (daily ed. Dec. 19, 2009) (text of SA 3276) (allowing patients to pursue either an ADR or a state court resolution).

<sup>75</sup> See 155 CONG. REC. S13726 (daily ed. Dec. 19, 2009) (statement from the Presiding Officer) (accepting that Senator Inhofe did not vote).

<sup>76</sup> See Muccigrosso, *supra* note 63 (realizing that it may be easy to miss the malpractice reforms amidst the almost half of a million words in the ACA).

<sup>77</sup> The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 1009-14 (2010).

<sup>78</sup> *Id.* § 10607, 124 Stat. at 1111.

<sup>79</sup> See generally *id.* § 10607, 124 Stat. at 1009-14 (mandating that states keep the current litigation system in place if they receive federal funding for the projects).

<sup>80</sup> See, e.g., Gfell, *supra* note 31, at 773 (determining that Congress must examine state supreme court decisions before passing federal medical liability reform to ensure its constitutionality).

dismissed the plaintiff's appeal in *Fein v. Permanente Medical Group* for lack of federal jurisdiction despite Justice White's strong dissent.<sup>81</sup>

However, in 1957, Congress enacted the Price-Anderson Act, which provided a limited amount of funds from which a claimant could receive damages for injuries resulting from a nuclear accident.<sup>82</sup> In 1978, in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, the Court held that the Act was constitutional.<sup>83</sup> The Court declared that the law did not violate the Due Process Clause because an individual has no property right in any rule of common law and because courts consistently uphold statutes limiting liability.<sup>84</sup> Therefore, while the Court has not directly ruled on federal medical liability reform, there is precedent to aid the Court in deciding whether the reform would be constitutional.<sup>85</sup>

## II. ANALYSIS

While Congress debated amendments to the ACA that would have provided more concrete medical liability reform, the ACA ultimately failed to create any substantive reform.<sup>86</sup> Therefore, the ACA continues the lack of non-economic cap uniformity in the states causing barriers to medical access, and unwisely spends much-needed funding.<sup>87</sup> Part A of this analysis examines the most recent state supreme court rulings on non-economic caps in Illinois and Georgia and argues that the courts' holdings impede state legislatures from creating policy decisions and decrease patients' access to medical care.<sup>88</sup> Part B maintains that prior versions of the ACA and proposed amendments to the ACA contained concrete reforms to strengthen the health care system.<sup>89</sup> Part C explains that the government must reform the medical liability process, within

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<sup>81</sup> See 474 U.S. 892, 892 (1985) (White, J., dissenting) (recommending that the Court hear the case because the constitutional question of caps on non-economic damages in malpractice suits will reoccur unless the Court take action).

<sup>82</sup> Pub L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (2006)).

<sup>83</sup> 438 U.S. 59, 88 (1978).

<sup>84</sup> *Id.* at 88 n.32 (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912)).

<sup>85</sup> See Gfell, *supra* note 31, at 787, 794-95 (discussing how Congress should review the Price-Anderson Act before writing a law providing for medical liability reform).

<sup>86</sup> See *infra* Part III.B (speculating that amendment 3283 would have create meaningful medical liability reforms).

<sup>87</sup> See Dave Ranney, *Caps in Other States*, K.A. HEALTH INST., Mar. 2, 2010, <http://www.khi.org/news/2010/mar/02/caps-other-states/> [hereinafter Ranney States] (stating that half the states do not have caps, while the dollar limitations in the states with caps vary tremendously); see also The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 804, 1009-14 (2010) (providing federal funds to states that create ADR systems, but allowing patient to opt-out of such systems).

<sup>88</sup> See *infra* Part III.A (noting that the state supreme court rulings in Illinois and Georgia weaken the health care system).

<sup>89</sup> See *infra* Part III.B (elaborating on the possible impact of the un-enacted portions of the ACA).

the parameters of the Constitution, in order to accomplish the ACA's goal of creating an effective health care system.<sup>90</sup>

### **A. THE CONTRASTING STATE SUPREME COURT RULINGS GENERATE A WEAKER HEALTH CARE SYSTEM**

Although state supreme courts are not required to follow other states' decisions, they often cite other state supreme courts as persuasive authority when ruling on similar cases.<sup>91</sup> However, both *Lebron*, in Illinois, and *Atlanta Oculoplastic Surgery, P.C.*, in Georgia, explicitly depart from other states' supreme court rulings.<sup>92</sup> The two decisions create further uncertainty among all states' legislatures and decrease the quality of patient care in Illinois and Georgia.

#### **1. ILLINOIS' AND GEORGIA'S RULINGS CREATE A LACK OF PREDICTABILITY IN STATES' LEGISLATURES, LIMITING ELECTED OFFICIALS' FUNCTIONS**

The rulings in Illinois and Georgia limit their legislatures' power to make policy decisions that would enable a stronger health care system. The rulings provide other state supreme courts with persuasive justification for declaring a law that caps non-economic damages unconstitutional.<sup>93</sup> Since state supreme courts have adequate support for holding that a law capping non-economic damages is constitutional or unconstitutional, based on other state rulings, state legislatures will be unsure which way their supreme courts will rule.<sup>94</sup> For example, the constitutionality of a law capping non-economic damages at \$250,000 is currently before the Kansas Supreme Court.<sup>95</sup> As most state constitutions provide a right to a jury trial, a separation of powers clause, and a right to due process, when the highest courts in Kansas and

<sup>90</sup> See *infra* Part III.C (explaining why Congress must reform the medical liability system); Part III.D (analyzing the constitutional and economic impact of federal reform).

<sup>91</sup> See, e.g., *Evans v. State*, 56 P.3d 1046, 1055-56 (Alaska 2002) (deciding to follow the decisions of six other state courts when ruling that non-economic caps do not violate the separation of powers clause).

<sup>92</sup> See *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010) (declining to reverse the circuit court's judgment because other states' courts have rejected the argument that non-economic caps violate the separation of powers clause); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehuett*, 691 S.E.2d 218, 224 (Ga. 2010) (declaring that other state court rulings are unpersuasive when ruling on the Georgia Constitution).

<sup>93</sup> See generally *Ranney States*, *supra* note 87 (settling that Kansas may follow Illinois' lead and declare a damages cap unconstitutional).

<sup>94</sup> See HANS A. VON SPAKOVSKY, THE HERITAGE FOUND., A CASE STUDY IN JUDICIAL NULLIFICATION: MEDICAL MALPRACTICE REFORM IN ILLINOIS 2-4 (2010), <http://www.heritage.org/Research/Reports/2010/04/Medical-Malpractice-Reform-in-Illinois-A-Case-Study-in-Judicial-Nullification> (maintaining that the Illinois Supreme Court has held a cap unconstitutional three times, while the Ohio Supreme Court ruled a cap constitutional after two previous rulings declaring a similar law unconstitutional).

<sup>95</sup> *Kansas Appellate Courts*, KANSAS JUDICIAL BRANCH, [http://intranet.kscourts.org:7780/pls/ar/CLERKS\\_OFFICE.list\\_case\\_detail?i\\_case\\_number=99818&i\\_case\\_name=](http://intranet.kscourts.org:7780/pls/ar/CLERKS_OFFICE.list_case_detail?i_case_number=99818&i_case_name=) (last updated Apr. 6, 2012); see also *Ranney Kansas*, *supra* note 87 (discussing the reduction of damages in a case involving a patient whose doctors removed her left ovary).

Indiana make their decisions, the courts could either follow Illinois' and Georgia's interpretation by declaring the law unconstitutional or follow states like California, Alaska, and West Virginia by upholding the law.<sup>96</sup> Therefore, each time a state's legislature passes a law that caps non-economic damages, the state usually must wait until the judicial branch rules that the law is constitutional before enforcing it.<sup>97</sup> This waiting period further delays the benefits of a cap on non-economic damages, including decreased malpractice premiums for physicians and lower health care costs for patients.<sup>98</sup> For example, in 2010, the Washington legislature introduced a bill providing a cap on non-economic damages based on the patient's average annual wage and life expectancy.<sup>99</sup> However, the bill states that it is only effective if the Washington Supreme Court determines that the bill is constitutional.<sup>100</sup> Unfortunately, state supreme courts are incorrectly interpreting their respective constitutions and overruling their legislatures' public policy decisions.<sup>101</sup> The courts are violating the separation of powers doctrine and becoming super-legislatures that make policy decisions, weakening the power of the legislatures to create laws.<sup>102</sup> Therefore, the legislatures are unable to enact laws, such as a cap on non-economic damages, which strive to strengthen the health care system.

## **2. OVERTURNING A LAW CAPPING NON-ECONOMIC DAMAGES DECREASES THE QUALITY OF MEDICAL CARE BECAUSE DOCTORS REDUCE THEIR LEVEL OF CARE WHEN FACING POSSIBLE LITIGATION**

Once a state supreme court invalidates a law capping non-economic damages, it virtually eliminates the chance that any such cap will ever

<sup>96</sup> See generally Ranney States, *supra* note 87 (suggesting that whether the Kansas Supreme Court follows the Illinois Supreme Court's decision is random because states all over the country remain split on the issue).

<sup>97</sup> But cf. K.A. HEALTH INST., *Georgia Court Rules Against Malpractice Cap*, Apr. 1, 2010, <http://www.khi.org/news/2010/apr/01/georgia-court-cap-noneconomic-damages-unconstituti/> (admitting that the Kansas State Legislature is not waiting for its supreme court to make a decision and introduced House Concurrent Resolution 5036 to amend the Kansas Constitution to allow for a limitation on non-economic damages).

<sup>98</sup> See Christi Parsons, *Trial Lawyers Target Cap on Malpractice*, CHI. TRIB., Aug. 25, 2005, at 1 (doubting that Illinois will feel the benefits of the cap until its supreme court holds that the law is constitutional).

<sup>99</sup> See 2010 Wash. Sess. Laws H-3595.4 (House Bill 2811), available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/House%20Bills/2811.pdf> (calculating non-economic damages by multiplying 0.43 by the average annual wage and by the life expectancy of the victim).

<sup>100</sup> See *id.* (adopting an effective date when a court affirms that the cap is constitutional or when the state amends the constitution to allow a cap on non-economic damages).

<sup>101</sup> See SPAKOVSKY, *supra* note 94, at 1 (arguing that the Illinois court usurped the role of the legislature because the legislature has the constitutional power to make, change, or abolish the state's tort laws).

<sup>102</sup> See Ranney States, *supra* note 87 (observing that the people of Kansas enacted the state's Constitution so the court should rarely declare something unconstitutional).

be constitutional in that state.<sup>103</sup> In states where the legislatures failed to enact non-economic caps, numerous physicians have moved, retired, or closed their practices in response to increased malpractice liability.<sup>104</sup> Therefore, patients living in rural areas of such states have to travel increasingly long distances to obtain adequate care.<sup>105</sup> In fact, a ten percent increase in an experienced rural doctor's malpractice premium results in a two percent decrease in such physicians.<sup>106</sup> Additionally, physicians in states without non-economic caps are likely to care for fewer high-risk patients and often decrease the number of hours they work per day in order to limit the chances of a malpractice lawsuit.<sup>107</sup> Although many doctors remain in states that do not have a cap on non-economic damages, a doctor in Illinois, for example, who treats high-risk patients and fears a high jury award in a malpractice case may decide to leave the state or stop treating high-risk patients altogether.<sup>108</sup> The decreasing number of doctors limits a patient's access to medical care, places a heavier burden on doctors who remain in the state, and increases the risk that a medical error will occur because doctors with heavier workloads spend less time with patients.<sup>109</sup> Therefore, since fewer doctors are practicing medicine in high-risk fields in states without caps, the availability of medical care among states will remain unequal unless courts allow legislatures to cap non-economic damages.<sup>110</sup>

<sup>103</sup> See SPAKOVSKY, *supra* note 94, at 4-5 (recognizing that the only way for the legislature to successfully pass a law capping non-economic damages would be to elect new justices onto the Illinois Supreme Court).

<sup>104</sup> See generally *id.* at 17 (extrapolating that malpractice concerns may have been a factor in the decreasing number of Obstetrics and Gynecologists (OB/GYNs) in Mississippi and Pennsylvania).

<sup>105</sup> See David A Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. 143, S160 S161 (finding that caps increase the supply of physicians in rural areas because insurance premiums decrease).

<sup>106</sup> See Katherine Baicker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, 8 F. FOR HEALTH ECON. & POL'Y 4, at 16 (2005) (articulating that doctors in rural areas may be more sensitive to premium increases because rural doctors have a harder time increasing the price of their services compared to urban physicians who can spread their costs among a greater number of patients).

<sup>107</sup> See Helland, *supra* note 30, at 655 asserting that a ten percent increase in expected liability causes physicians, to decrease the number of hours they work combined, by an amount equal to 21,800 physicians leaving the workforce).

<sup>108</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 12 13 (2003) (accepting that doctors may have left a state because of economic issues and not due to a cap, but noted that doctors who worked in emergency services or with newborns were more likely to abandon the state).

<sup>109</sup> See U.S. DEPT'T OF HEALTH & HUMAN SERVS., AMERICANS SPEAK ON HEALTH REFORM: REPORT ON HEALTH CARE COMMUNITY DISCUSSIONS 50-51 (2009), <http://www.healthreform.gov/reports/hccd/> (emphasizing that doctors do not have sufficient time to treat patients and, therefore, the quality issues in health care result from doctors treating patients as animals and not humans).

<sup>110</sup> See generally DOUGLAS MCCARTHY ET AL., THE COMMONWEALTH FUND, AIMING HIGHER: RESULTS FROM A STATE SCORECARD ON HEALTH SYSTEM PERFORMANCE 26 (2009) (establishing that significant variations in access to care among the states influences the state health care systems).

## **B. PRIOR VERSIONS OF THE ACA AND PROPOSED AMENDMENTS TO THE ACA WOULD HAVE CREATED A STRONGER HEALTH CARE SYSTEM**

Despite containing over 2000 pages of text proposing to reform the current health care system, the ACA failed to include any meaningful changes to medical liability laws.<sup>111</sup> However, several of the proposed amendments to, and prior versions of, the ACA included provisions to alter the landscape of the medical liability system dramatically, which would have reduced health care costs and provided improved access to care.

### **1. DEMONSTRATION PROJECTS FORBIDDING LIMITS ON ATTORNEYS' FEES AND CAPS ON DAMAGES WOULD ENCOURAGE UNIFORMITY IN STATES, PROVIDING IMPROVED HEALTH CARE QUALITY**

Most proposed medical liability reforms include a cap on non-economic damages because the current medical liability system lacks a uniform standard of legal and medical rules among the states.<sup>112</sup> However, the House version of the ACA—the Affordable Health Care for America Act—included a provision that forbade states from creating demonstration projects that capped non-economic damages.<sup>113</sup> At a time when states were struggling to balance their budgets without cutting other programs, states that altered their medical liability systems without capping damages could have received funds from the Affordable Health Care for America Act.<sup>114</sup> Therefore, the provision likely would have persuaded more states to adopt uniform procedures regarding malpractice suits.

For example, if a state like California, which has a cap on non-economic damages, decided to create an alternative medical liability system that did not include a cap, there would no longer be an incentive for doctors in states with caps to leave their states for California.<sup>115</sup>

<sup>111</sup> See Jones, *supra* note 4, at A4 (insisting that passing the ACA halted the movement for medical liability reform because it dropped a provision mandating health courts after plaintiffs lawyers lobbied against it).

<sup>112</sup> See Elmendorf Letter, *supra* note 26, at 1 (realizing that most reform proposals cap non-economic damages at \$250,000); see also Ranney States, *supra* note 87 (clarifying that each state's law is different and one state upholds the cap while a neighboring state strikes down a similar cap).

<sup>113</sup> See H.R. 3962, 111th Cong. § 2531 (2009) (as passed by House, Nov. 7, 2009) (allowing the Secretary of Health and Human Services to award funding to malpractice alternatives only if they do not include a cap on jury damages or attorneys' fees).

<sup>114</sup> See generally *id.* (providing additional federal funds to encourage states to reform their malpractice system); Michael Powell, *Illinois Stops Paying Its Bills, But Can't Stop Digging Hole*, N.Y. TIMES, July 2, 2010, at A1 (reasoning that states like Illinois, New York, and California are financially struggling, with no end in sight).

<sup>115</sup> Cf. FRED J. HELLINGER & WILLIAM E. ENCINOSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE IMPACT OF STATE LAWS LIMITING MALPRACTICE AWARDS ON THE GEOGRAPHIC DISTRIBUTION OF PHYSICIANS 14 (2003) (reiterating that states have different policies regarding non-economic caps and that states with caps have twelve percent more physicians per capita than states without caps).

While a federal cap on non-economic damages would create more benefits to the health care system than would a federal law forbidding caps, a uniform system is the optimal goal.<sup>116</sup> Unfortunately, the ACA fails to correct the lack of uniformity among the states by providing grants to states regardless of whether the demonstration projects cap non-economic damages.<sup>117</sup>

## 2. MANDATORY HEALTH COURTS WOULD DECREASE FRIVOLOUS CLAIMS THAT BURDEN COURTS AND DOCTORS.

Medical liability reforms, which include a separate health court system, attempt to provide resolutions that are more efficient to malpractice victims.<sup>118</sup> On December 19, 2009, Senator Coburn submitted Amendment 3283 to the ACA, which would have provided federal grants to states that created health courts.<sup>119</sup> Unlike the final version of the ACA, which allowed only voluntary health courts, Amendment 3283 would have mandated that in medical malpractice cases, patients seeking damages bring their cases to an established health court before seeking a solution in the state's court of appeals.<sup>120</sup> Additionally, since the decisions by the health courts would be admissible as evidence in appeals to state courts, the number of frivolous suits would decrease because patients with unsubstantiated claims would be less likely to sue in state court.<sup>121</sup> For example, if a health court ruled that a doctor performed a kidney transplant following the prevailing standard of care and, therefore, the doctor had not committed malpractice, a patient could appeal the ruling to a state court, but the health court's

<sup>116</sup> See Elmendorf Letter, *supra* note 26, at 4 (intimating that medical liability reforms including a cap would reduce national health care expenditures by eleven billion dollars per year); cf. President Barack Obama, Remarks by the President on Comprehensive Immigration Reform at American University School of International Service, Washington, D.C., (July 1, 2010) [hereinafter Obama Immigration Speech], available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform> (announcing that the country needs a national standard in immigration instead of differing state immigration laws).

<sup>117</sup> See The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 804, 1009-14 (2010) (expanding federal grants for state demonstration projects that reform the medical liability system without specifying whether the projects could cap non-economic damages).

<sup>118</sup> See Parver, *supra* note 27, at 74 (embracing health courts, which would allow more injured patients to receive compensation).

<sup>119</sup> 155 CONG. REC. S13,529, 13,546-48 (daily ed. Dec. 19, 2009) (text of SA 3283).

<sup>120</sup> Compare § 10607, 124 Stat. at 1111 (mandating that states inform plaintiff-patients that they may opt out of any alternative system), with 155 CONG. REC. S13547-48 (daily ed. Dec. 19, 2009) (text of SA 3283) (granting an appellate review of a plaintiff-patient's claim only after the patient exhausts the alternative remedies).

<sup>121</sup> See 155 CONG. REC. S13547-48 (daily ed. Dec. 19, 2009) (text of SA 3283) (approving that the determinations of the expert panel and the administrative health care tribunals would be admissible into evidence in the state court); see also Philip G. Peters, Jr., *Health Courts?*, 88 B.U. L. REV. 227, 233, 264 (2008) (noting that while health courts would screen out meritless claims, modern courts do so at a much slower pace).

decision would serve as evidence to show that the doctor had acted reasonably.<sup>122</sup>

Additionally, the amendment would have allowed states to create an expert panel, an administrative health care tribunal, or a combination of the two.<sup>123</sup> Therefore, a state would be free to create whichever system it felt worked best and other states could alter their systems accordingly.<sup>124</sup> Amendment 3283 also ensured that the quality of healthcare would improve by mandating that states analyze patient safety data related to malpractice cases and implement policies to reduce health care errors based on the data.<sup>125</sup> While health courts, along with the successful claims pursued in them, may increase the cost of health care at first, they would reduce costs over time by decreasing the amount of time necessary to pursue malpractice litigation.<sup>126</sup>

However, Congress abandoned the mandatory health court provision in the final version of the ACA, allowing patients to bypass any existing health court and bring their malpractice cases directly to state courts.<sup>127</sup> Therefore, the ACA converts the federally-funded health courts into a procedural step in malpractice litigation, incapable of producing any true reform.<sup>128</sup> Thus, the voluntary health courts and the absence of a federal cap on non-economic damages in the ACA continues the lack of an uniform malpractice liability system among the states in which jury judgments and damages vary from state to state.<sup>129</sup>

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<sup>122</sup> Cf. 155 CONG. REC. S13547-48 (daily ed. Dec. 19, 2009) (text of SA 3283) (embracing providers' use of health courts' decisions as evidence in state court).

<sup>123</sup> See *id.* (text of SA 3283) (stating that an expert panel includes three medical experts and three attorneys while one expert judge with health care expertise would preside over an administrative health care tribunal).

<sup>124</sup> See *id.* at S13546 (allowing states the freedom to determine which health court model to use); Muccigrosso, *supra* note 63 (suggesting that demonstration projects could answer questions regarding which standard of liability works best, how judges would be selected, and how states would finance the system).

<sup>125</sup> See generally 155 CONG. REC. S13547-48 (daily ed. Dec. 19, 2009) (text of SA 3283) (urging states to reform medical procedure standards after reviewing medical errors in malpractice cases).

<sup>126</sup> See CTR. FOR JUST. & DEMOCRACY, *Health Courts*, IMPACT, Summer 2009, Vol. 9, Issue 2 (citing Maxwell J. Melham & Dale A. Nance, MEDICAL INJUSTICE: THE CASE AGAINST HEALTH COURTS (AAJ 2007)) (lambasting health courts for increasing the number of malpractice claims by thirty-three to fifty percent); see also Parver, *supra* note 27, at 73-74 (recognizing that health courts would create a body of science-based common law precedent allowing for more efficient resolutions to medical injury claims).

<sup>127</sup> See The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 1010 (2010) (requiring that demonstration projects allow patients to opt out of health courts).

<sup>128</sup> See Muccigrosso, *supra* note 63 (speculating that the ACA significantly undercuts the benefits of health courts by removing the provision that mandates a health court tribunal prior to state court review).

<sup>129</sup> Cf. *id.* (maintaining that medical liability reform could lead to much-needed consistency and balance among states).

### **C. THE FEDERAL GOVERNMENT MUST REFORM THE MEDICAL LIABILITY SYSTEM TO DECREASE HEALTH CARE COSTS AND SUSTAIN OTHER ACA PROVISIONS**

Medical liability reform remains necessary today because it will make desperately needed reductions to the overall cost of health care.<sup>130</sup> The current economic situation of the United States is poor: the unemployment rate reached 9.5 percent in July 2010 while the federal deficit encompassed nearly sixty-two percent, or \$9.1 trillion, of the country's estimated GDP of \$14.6 trillion.<sup>131</sup> Moreover, in 2008, the nation spent approximately \$2.20 trillion, or fifteen percent of its GDP, on health care services and supplies.<sup>132</sup> Nearly twenty-five years ago, health care spending accounted for only 10.6 percent of the GDP; thus, the government needs to contain health care costs in order to improve the nation's poor economic outlook.<sup>133</sup> Although the ACA fails to enact true medical liability reform, the federal government should take steps to repair the medical liability system in order to reduce insurance costs and ensure that other provisions in the ACA have sufficient funding.<sup>134</sup>

#### **1. MEDICAL LIABILITY REFORM WOULD REDUCE HEALTH CARE COSTS OVERALL BY LOWERING INSURANCE PREMIUMS AND DECREASING THE AMOUNT OF DEFENSIVE MEDICINE**

Medical liability reform can help control health costs as the non-partisan Congressional Budget Office (CBO) estimated that reforms would reduce national health care expenditures by \$11 billion per year.<sup>135</sup> Additionally, such reforms would reduce federal budget deficits by approximately \$54 billion by 2020.<sup>136</sup> While the CBO estimates

<sup>130</sup> See generally Elmendorf Letter, *supra* note 26, at 1 (asserting that medical liability directly affects health care costs by increasing doctors' operating costs).

<sup>131</sup> See U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., USDL-10-1076, THE EMPLOYMENT SITUATION – JULY 2010 (2010) at 1 (claiming that 14.6 million Americans are unemployed); CONG. BUDGET OFF., PUB. NO. 4130, THE LONG-TERM BUDGET OUTLOOK 1 (2010) (determining that the federal debt increased from forty percent of the GDP in two years).

<sup>132</sup> See CONG. BUDGET OFF., at 27 (demonstrating that health care costs accounted for five percent of the GDP in 1960, an increase of ten percentage points in fifty years).

<sup>133</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-411T, *supra* note 13, at 8-9 (acknowledging that if the substantial increases in health care spending continue, the health care system may bankrupt the country); see also President Barack Obama, Remarks by the President at the Opening of the White House Forum on Health Reform (Mar. 5, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-opening-white-house-forum-health-reform> [hereinafter Obama Forum Speech] (identifying that one of the greatest threats to the country is the rapidly-increasing cost of health care).

<sup>134</sup> See 155 CONG. REC. H12620 (daily ed. Nov. 27, 2009) (statement of Rep. Dreier) (commanding Congress to adopt California's 1975 medical liability reform package, which included a sliding scale for attorneys' fees, caps on non-economic damages, and periodic payments for future damages).

<sup>135</sup> See Elmendorf Letter, *supra* note 26, at 3 (extrapolating that reforms reduce spending on medical liability premiums by .02 percent and utilization of unnecessary health care services by .03 percent).

<sup>136</sup> See *id.* at 4-5 (calculating that the reforms would reduce spending by forty-one billion dollars and increase tax revenues by thirteen billion dollars).

attribute only \$6.6 billion in national health care expenditures to the practice of defensive medicine, a recent Gallup poll estimated that defensive medicine costs the country between \$650 and \$850 billion per year.<sup>137</sup> Moreover, opponents of medical liability reform argue that its savings would not be significant.<sup>138</sup> Although the savings vary tremendously, at a time when the country is struggling financially, Congress needs to focus its attention on ways to secure whatever savings may exist regardless of the uncertainty over the exact amount.<sup>139</sup>

## **2. MEDICAL LIABILITY REFORM IS NECESSARY TO PROVIDE NEEDED MONEY TO OTHER INADEQUATELY-FUNDED HEALTH CARE PROGRAMS**

While the main goals of the ACA are to expand health insurance coverage and contain the increasing health care costs, the ACA lacks cost-containment measures and provides insufficient appropriations to fund its own programs.<sup>140</sup> For example, one key provision in the ACA creates a temporary high-risk insurance plan for individuals who have pre-existing conditions and have not been able to receive insurance coverage for six months.<sup>141</sup> However, numerous states will not operate the federally-funded program because they fear that the ACA's allocation of \$5 billion is insufficient to run the programs until the permanent insurance pools begin in 2014, leaving the state's government liable for the difference.<sup>142</sup> Moreover, even in states that are operating the pool, the reach of the pools may be limited.<sup>143</sup>

<sup>137</sup> See *id.* at 3-4 (admitting that if proposals reform joint-and-several liability rules, physicians may conduct more tests because every physician who takes part in the patient's treatment is liable), with JACKSON HEALTHCARE, *supra* note 23, at 6 (indicating that between seventy-three and ninety-two percent of the physicians surveyed had practiced defensive medicine).

<sup>138</sup> See HUNTER ET AL., *supra* note 29, at 15 (removing all malpractice suits only eliminates one percent of the country's health care expenditures).

<sup>139</sup> Compare Powell, *supra* note 114, at A1 (describing several states' debt), with Elmendorf Letter, *supra* note 26, at 3 (contending that the proposed medical liability reforms could save eleven billion dollars per year).

<sup>140</sup> Compare *Economic Hearings*, *supra* note 17, at 40 (statement of Christina Romer, Chair, Council of Economic Advisers) (explaining that the ACA can expand coverage to get sufficient care that will slow the increase in health care costs), and Peter R. Orszag & Ezekiel J. Emanuel, *Health Care Reform and Cost Control*, NEW ENG. J. MED., June 16, 2010 (detailing the reforms' cost savings), with *Economic Hearings*, *supra* note 17, at 40 (statement of Rep. Connolly, Member, House Comm. on the Budget) (realizing that there is a fundamental incompatibility between expanding coverage and bringing down the overall cost of health care).

<sup>141</sup> See The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1101, 124 Stat. 119, 141-43 (2010) (mandating that either the federal or state governments create an insurance pool to cover patients with pre-existing conditions until the health insurance exchanges become effective in 2014).

<sup>142</sup> See Andrews, *supra* note 16 (believing that approximately nineteen states will allow the federal government to run the pools).

<sup>143</sup> See generally Robert Pear, *States Decide on Running New Pools for Insurance*, N.Y. TIMES, Apr. 29, 2010, at A15 (noting that even states that agreed to operate the pools were concerned about the lack of funding).

For example, Pennsylvania, which began operating its high-risk insurance pool on August 4, 2010, only has funding sufficient to provide insurance coverage for 3,500 previously uninsured Pennsylvanians.<sup>144</sup> However, even if medical liability reform only reduces national health care expenditures by \$11 billion in 2010, the federal government could use the \$11 billion savings and allocate an additional \$352 million to Pennsylvania.<sup>145</sup> With the additional funding, the state's high-risk insurance pool could cover triple the number of previously uninsured residents that it covers today.<sup>146</sup> Therefore, Congress must create medical liability reform and use any savings from the reform to ensure that the ACA is effective in accomplishing its goal of providing universal insurance coverage.

**D. CONGRESS MUST ENACT A CONSTITUTIONAL FEDERAL CAP ON  
NON-ECONOMIC DAMAGES IN MALPRACTICE CASES TO PROVIDE ALL  
AMERICANS WITH EQUAL ACCESS TO MEDICAL SERVICES**

In 1985, Justice White noted that the constitutionality of a law capping non-economic damages was dividing the nation; thus, in *Fein v. Permanente Medical Group*, he dissented and urged the Supreme Court to hear the case on its merits rather than dismiss it for lack of jurisdiction.<sup>147</sup> Similarly, on July 1, 2010, President Obama spoke to the nation about immigration reform.<sup>148</sup> Reflecting on Arizona's controversial immigration law, the President stated that as individual states create their own laws, the nation faces the possibility that the country will have different immigration laws in each state.<sup>149</sup> Unfortunately, the same is true in the medical liability system: the nation currently faces the problem that rules for doctors involved in malpractice lawsuits vary between

<sup>144</sup> See Press Release, Pa. Ins. Dep't, Pennsylvania to Begin Offering Health Plan for People with Pre-Existing Medical Conditions (Aug. 2, 2010), [http://www.portal.state.pa.us/portal/server.pt/community/press\\_releases/17319](http://www.portal.state.pa.us/portal/server.pt/community/press_releases/17319) (follow "More News and Media" hyperlink; then follow "August 2, 2010" hyperlink) (declaring that health insurance premiums for the plan cost \$283.20 per month).

<sup>145</sup> See generally Elmendorf Letter, *supra* note 26, at 4 (insisting that reforms would save eleven billion dollars nationally per year); NAT'L CONF. OF STATE LEG., *Coverage of Uninsurable Pre-existing Conditions: State and Federal High-Risk Pools*, available at [http://www.ncsl.org/?tabid=14329#2010\\_Pools](http://www.ncsl.org/?tabid=14329#2010_Pools) (last updated Aug. 27, 2010) (outlining that Pennsylvania received 3.2 percent—\$160 million—of the \$5 billion that the ACA allocated to states to run the temporary high-risk insurance pools).

<sup>146</sup> See Pa. Ins. Dep't, *supra* note 144 (rationalizing that \$160 million provided enough funds for the state's high-risk insurance pool to provide coverage for 3,500 individuals).

<sup>147</sup> See *Fein v. Permanente Medical Grp.*, 474 U.S. 892, 892 (1985) (White, J., dissenting) (recommending that the Court resolve the question of whether the legislature must provide *quid pro quo* compensation for the remedy it replaces when enacting a cap and recognizing that the constitutional question of caps in malpractice cases will reoccur unless the Supreme Court acts).

<sup>148</sup> See Obama Immigration Speech, *supra* note 116 (informing the audience that he believes the nation should not back down when facing challenges like immigration, health care, and an economic downturn).

<sup>149</sup> See *id.* (identifying that varying political views and special-interest lobbying have halted necessary reforms).

states.<sup>150</sup> Therefore, Congress must pass a law capping non-economic damages in malpractice cases that will establish a national standard.<sup>151</sup>

### **1. A CAP ON NON-ECONOMIC DAMAGES IN MALPRACTICE LAWSUITS IS CONSTITUTIONAL BECAUSE CONGRESS CAN LIMIT LIABILITY**

Even if Congress passes a federal law capping damages, patients and lawyers will likely challenge the constitutionality of the law, eventually leading the United States Supreme Court to decide whether such caps are constitutional.<sup>152</sup> Although states remain divided on the issue of whether a law capping non-economic damages is constitutional, a well-drafted federal law that caps such damages would be constitutional based on the Court's 1978 holding in *Duke Power Company v. Carolina Environmental Study Group, Inc.*<sup>153</sup> In *Duke Power Company*, the Court held that a limited damages fund for nuclear accident victims did not violate the Due Process Clause because individuals have no property right in any rule of common law and because courts have consistently upheld statutes limiting liability.<sup>154</sup> Additionally, the Court remarked that Congress had expressed a commitment to provide additional relief, beyond the cap, if it became necessary.<sup>155</sup> Therefore, Congress likely would not violate the Due Process Clause by passing a law that limited damages to injured patients so long as the provision allowed Congress to increase the limitation when necessary.<sup>156</sup>

<sup>150</sup> See generally MALPRACTICE LAWS, *supra* note 3 (detailing the varying laws that states have enacted to regulate a malpractice lawsuit).

<sup>151</sup> Cf. Obama Immigration Speech, *supra* note 116 (proclaiming that national immigration rules are necessary amidst a patchwork of local immigration laws).

<sup>152</sup> Cf. *Ranney Kansas*, *supra* note 37 (analyzing the Kansas Supreme Court's decision to hear the plaintiff's appeal, which claims that a law capping non-economic damages violates the plaintiff's right to a jury trial).

<sup>153</sup> See *Duke Power Co. v. Carolina Env'tl. Study Grp.*, 438 U.S. 59, 88 (1978) (holding that a limited fund for damages in nuclear accident lawsuits was constitutional); see also Henry Cohen & Vanessa K. Burrows, CONG. RESEARCH SERV., ORDER CODE 95-797, FEDERAL TORT REFORM LEGISLATION: CONSTITUTIONALITY AND SUMMARIES OF SELECTED STATUTES 4 (2008), available at [http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95797\\_07072008.pdf](http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95797_07072008.pdf) (recognizing that medical liability reforms such as caps on damages are constitutional based on *Duke Power Company*); Gfell, *supra* note 31, at 794, 809 (discussing how state courts have differed in the interpretation of the Supreme Court's ruling in *Duke Power Co.*, but concluding that a federal cap is constitutional because the Court can limit liability).

<sup>154</sup> *Duke Power Co.*, 438 U.S. at 88, n. 32 (quoting *Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 50 (1912)).

<sup>155</sup> See *Duke Power Co.*, 438 U.S. at 90-91 (affirming that the assurance of \$560 million and the commitment to take further action if necessary was a sufficient substitute for a previously uncertain remedy).

<sup>156</sup> Cf. *id.* at 88 (dismissing the question of whether the Due Process Clause requires a limitation on damages to provide a reasonable substitute remedy and holding that the Price-Anderson Act does provides a just substitute).

Similarly, courts have disagreed as to whether a cap on non-economic damages would violate the Equal Protection Clause.<sup>157</sup> In *Duke Power Company*, the Court held that Congress's justification—encouraging the exploration of nuclear energy—was sufficient to limit the recovery of injured individuals in nuclear accidents, but not those injured in other accidents.<sup>158</sup> Likewise, Congress's motivation for enacting a federal cap on non-economic damages would be to lower insurance premiums and health care costs, and to ensure that patients have adequate access to medical care.<sup>159</sup> Therefore, the Supreme Court probably would uphold a federal cap on non-economic damages against an equal protection challenge.<sup>160</sup>

Moreover, courts have disagreed as to whether a cap violates the plaintiff-patient's right to a jury trial; specifically, whether the determination of damages in common law is a matter of law for judges to decide or a matter of fact for juries to decide.<sup>161</sup> The Court of Appeals for the Fourth Circuit determined that a state law capping damages did not violate the right to a jury because the role of the jury does not include determining the legal consequences of its factual findings.<sup>162</sup> Following the Fourth Circuit's ruling, a federal law capping non-economic damages would not violate the plaintiff-patient's right to a jury trial because the reduction of damages would be a matter of law, imposed by a judge only after the jury has fulfilled its constitutional duty of resolving factual disputes.<sup>163</sup>

<sup>157</sup> Compare *Carson v. Maurer*, 424 A.2d 825, 836-37 (N.H. 1980) (holding that the cap violated the Equal Protection Clause by distinguishing between malpractice victims and victims of other torts, and between victims with non-economic damages over \$250,000 and those with damages less than \$250,000) (overruled on other grounds by *Cnty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707, 718 (N.H. 1980)), with *Robinson v. Charleston Area Medical Ctr.*, 414 S.E.2d 877, 888 (W. Va. 1991) (upholding the constitutionality of the legislation against equal protection arguments because the law was an economic regulation, rationally related to the permissible purpose of reducing health care costs).

<sup>158</sup> *Duke Power Co.*, 438 U.S. at 93-94.

<sup>159</sup> See *Elmendorf Letter*, *supra* note 26, at 3 (claiming that the proposed reforms will lower health care spending by eleven billion dollars per year); *HELLINGER & ENCINOSA*, *supra* note 115, at 14 (finding that states with caps have twelve percent more doctors per capita than those without caps).

<sup>160</sup> Cf. *Duke Power Co.*, 438 U.S. at 93-94 (settling that if Congress has ample justification for providing different remedies to injured parties then the law does not violate the Equal Protection Clause).

<sup>161</sup> Compare *Atlanta Oculoplastic Surgery, P.C., v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010) (holding that when Georgia's Constitution was adopted, a common law right to a jury existed, and, therefore, a cap nullifies the jury's finding of fact), with *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 312 (Va. 1999) (asserting that the cap does not violate the right to a jury because the jury's sole common law purpose was to resolve disputes of facts and the judge applies the law of the cap only after the jury resolves the facts).

<sup>162</sup> See *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (affirming that "it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries" and not "to determine the legal consequences" (citing *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989))).

<sup>163</sup> See *id.* at 1196 (insisting that, as a matter of law, the Virginia legislature has determined that damages above \$750,000 are irrelevant).

Lastly, courts have split when determining the extent of the legislative branch's power and whether a law capping non-economic damages violates the separation of powers clause.<sup>164</sup> The Alaska Supreme Court, in *Evans v. State*, held that a cap does not violate the separation of powers clause because the court characterized the legislative action as a modification and limitation of a cause of action, which the legislature has the constitutional power to do.<sup>165</sup> However, the Illinois Supreme Court rejected the *Evans* decision and portrayed a cap on damages as a legislative remittitur—an exclusive power of the judiciary to reduce damages on a case-by-case basis.<sup>166</sup> Conversely, the U.S. District Court for the District of Maryland, in *Franklin v. Mazda Motor Corporation*, held that a non-economic damages cap was constitutional under Maryland law because the power of the legislature to modify common law unavoidably includes the power to limit damages.<sup>167</sup> While states remain split, if Congress drafted legislation that capped non-economic damages in medical malpractice cases, the United States Supreme Court should follow the *Evans* and *Franklin* courts and hold that the cap does not violate the separation of powers clause because the congressional action is a constitutional modification of common law and does not interfere with the judiciary's remittitur power.<sup>168</sup>

## **2. A FEDERAL LAW THAT CAPS NON-ECONOMIC DAMAGES WOULD DECREASE HEALTH CARE PROVIDER INSURANCE PREMIUMS AND INCREASE PATIENTS' ACCESS TO CARE**

A federal cap would allow insurance companies to predict the payouts for medical malpractice cases more accurately, allowing the companies to decrease insurance premiums for doctors.<sup>169</sup> Additionally, the cap would create more uniform standards in medical liability cases among the states, which is necessary because it allows Americans who need medical services to obtain greater access to medical care regardless of the state in which they live.<sup>170</sup> Moreover, a doctor will no longer

<sup>164</sup> Compare *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 905-06, 914-15 (Ill. 2010) (rejecting a cap on damages as unconstitutional because the legislature usurped the exclusive power of the judge's remittitur), with *Evans v. State*, 56 P.3d 1046, 1055-56 (Alaska 2002) (deciding that the legislature's modification of common law was properly reserved to the voting public expressing their views through their representatives).

<sup>165</sup> *Evans*, 56 P.3d at 1055.

<sup>166</sup> See *Lebron*, 930 N.E.2d at 905 (declining to follow other state courts because a popularity contest is an improper measuring stick with which to determine state constitutional law).

<sup>167</sup> 704 F. Supp. 1325, 1336 (D. Md. 1989).

<sup>168</sup> Cf. *Evans*, 56 P.3d at 1056 (declining to classify the alteration as a remittitur because the legislative cap applies to all medical malpractice cases and is not case specific like a remittitur).

<sup>169</sup> See generally U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 2, at 21-22 (detailing that in 2003, malpractice premiums for internists in Los Angeles, C.A.—a state with a cap—are more than fifty percent lower than premiums for internists in Miami, Florida—a state without a meaningful cap).

<sup>170</sup> See generally *HELLINGER & ENCINOSA*, *supra* note 115, at 14 (establishing that caps on non-economic damages increased the availability of physicians).

leave a state solely because the doctor fears paying more damages in a malpractice lawsuit in his or her current state than in another state because all the states would have an equal cap on non-economic damages.<sup>171</sup>

On the other hand, opponents of caps on non-economic damages fear that such caps decrease the physician's level of care because a physician that knows that he or she only faces a limited penalty for malpractice will not have a sufficient deterrent to providing inadequate care.<sup>172</sup> However, a cap on non-economic damages would still provide a deterrent to doctors from deviating from the prevailing standard of care because the cap does not limit the amount of punitive damages that a jury may award if the doctor acts maliciously.<sup>173</sup> Thus, a federal cap on non-economic damages protects a patient in case of a doctor's malpractice and keeps doctors from leaving specific states and practice areas out of fear of increased financial liability.

### III. POLICY RECOMMENDATIONS

The lack of medical liability reform in the ACA is a serious problem because it allows the ACA to fail to provide uniformity and certainty in the states and to neglect to find a solution to the increasing costs of health care.<sup>174</sup> Therefore, the following subsections recommend that Congress create a national policy on medical liability reform, including a federal cap on non-economic damages and a mandatory health court system.

#### A. CONGRESS MUST PASS FEDERAL LEGISLATION CAPPING NON-ECONOMIC DAMAGES TO DECREASE HEALTH CARE EXPENDITURES AND INCREASE ACCESS TO CARE

In order to reform the health care system adequately, Congress must provide a law capping non-economic damages in malpractice suits.<sup>175</sup> On July 1, 2010, Representative Gingrey introduced House Bill 5690, providing a proper forum in which to include a non-economic

<sup>171</sup> Cf. (finding that states with caps have seen a greater increase in doctors per capita than states without caps).

<sup>172</sup> See HUNTER ET AL., *supra* note 29, at 4 (responding that the cap on non-economic damages in Texas does not hold physicians in the state accountable for their errors because it is an insufficient deterrent).

<sup>173</sup> See HEALTH COAL. ON LIABILITY AND ACCESS, *supra* note 28, at 1 (stating that non-economic damages serve as compensation for subjective losses while punitive damages serve to punish and deter doctors' negligent actions).

<sup>174</sup> See *infra* Part III.A (saying that the lack of uniformity in the states leads to decreased access to care and increased health care expenditures).

<sup>175</sup> Cf. Elmendorf Letter, *supra* note 26, at 4 (noting that medical liability reforms could reduce health care expenditures by eleven billion dollars a year).

cap.<sup>176</sup> Unfortunately, current state laws that cap non-economic damages provide minimal assistance to Congress in determining how to cap damages because there is little agreement on the structure of the cap.<sup>177</sup> However, Ohio's cap would provide Congress a good starting point from which to construct a cap on non-economic damages because the Ohio law allows patients that have suffered catastrophic injuries to recover a greater amount of money than those who have suffered less serious injuries.<sup>178</sup>

Additionally, in order to make certain that the Supreme Court would describe the cap as an economic regulation, the text of the legislation must demonstrate that the purpose of the cap is to lower health care expenditures.<sup>179</sup> The federal cap legislation also should include a commitment to adjust the cap if Congress determines that patients are not receiving adequate compensation.<sup>180</sup> This language is necessary to ensure that the Supreme Court views the federal legislation capping damages as an analogous statute to the Price-Anderson Act, which the Court declared constitutional in *Duke Power Company*.<sup>181</sup>

#### **B. CONGRESS SHOULD ENACT LEGISLATION CREATING MANDATORY HEALTH COURTS TO DECREASE THE BURDEN OF COURTS AND PROVIDE EFFICIENT RESOLUTION TO MALPRACTICE CASES**

In addition to a cap on damages, Congress must alter the structure of the medical liability system by including mandatory health courts that would hear malpractice cases before they reach state courts.<sup>182</sup> While House Bill 5690 includes a provision on apology statutes, the bill is silent concerning health courts or other ADR systems.<sup>183</sup> However, health courts would reduce health care expenditures by decreasing the amount of time necessary to litigate malpractice lawsuits and the

<sup>176</sup> See generally H.R. 5690, 111th Cong. §§ 3, 6 (2010) (seeking a three-year statute of limitations and forbidding a patient to use a physician's benevolent apology as evidence in malpractice cases).

<sup>177</sup> See *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 913-14 (Ill. 2010) (contrasting California's cap, which limits damages at \$250,000, with Florida's cap, which provides a range of damages between \$150,000 and \$1.5 million, depending on the physician).

<sup>178</sup> See generally OHIO REV. CODE ANN. § 2323.43 (West 2010) (providing a cap of \$250,000 for general malpractice lawsuits and a cap of \$500,000 if the malpractice resulted in a patient's permanent and substantial deformity).

<sup>179</sup> Cf. *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 887-88 (W. Va. 1991) (deferring to the legislature when it attempts to regulate the economy).

<sup>180</sup> Cf. *Duke Power Co. v. Carolina Env'tl. Study Grp.*, 438 U.S. 59, 90-91 (1978) (ruling that Congress's commitment to increase the funds, if necessary, was reasonable).

<sup>181</sup> Cf. *id.* at 82 (declaring that the Price-Anderson Act's limitation on damages in nuclear accident cases was constitutional).

<sup>182</sup> See Muccigrosso, *supra* note 63 (advocating that the ACA undercuts the benefits of health courts because the courts would be voluntary and its decisions, non-binding).

<sup>183</sup> See generally H.R. 5690, 111th Cong. § 6 (2010) (disallowing patients to use a physician's apology as evidence of malpractice without referencing ADR systems).

number of frivolous claims.<sup>184</sup> Therefore, in order to provide a more efficient medical liability system, Congress should mandate that any malpractice suit commenced in a health court also give both parties the right to appeal in order to reduce the burden on the state courts.<sup>185</sup> Additionally, as Amendment 2829 to the ACA would have provided, the victorious party should be able to use the health court's decision as evidence in the appeals court to show a sufficient or insufficient level of care by the physician.<sup>186</sup> Thus, Congress should include the text of Senator Graham's Amendment 2829 in House Bill 5690 and mandate that health courts hear malpractice lawsuits prior to allowing a state court to hear the case.

### CONCLUSION

Almost a year before signing the ACA, President Barack Obama stated that the troubles of the health care system are a direct consequence of actions that previous legislatures failed to take.<sup>187</sup> Unfortunately, Congress again failed to create substantive medical liability reform that would reduce the increasing cost of health care in America and ensure that patients across the country have access to adequate medical care.<sup>188</sup> Congress must take the necessary steps to correct its mistake and implement provisions that disappeared from the ACA, such as mandatory health courts, and pass a federal cap on non-economic damages to ensure that a uniform set of malpractice standards exists in the United States.

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<sup>184</sup> See Parver, *supra* note 27, at 74 (recognizing that health courts would create a body of science-based common law, allowing more efficient resolutions to malpractice lawsuits).

<sup>185</sup> See Muccigrosso, *supra* note 63 (suggesting that demonstration projects with effective health courts could lead to consistency in the medical liability system).

<sup>186</sup> 155 CONG. REC. S12169-70 (daily ed. Dec. 2, 2009) (text of SA 2829).

<sup>187</sup> See Obama Forum Speech, *supra* note 133 (believing that since Theodore Roosevelt first urged for reform almost one hundred years ago, Washington politics have stalled such reforms from becoming law).

<sup>188</sup> See Jones, *supra* note 4, at A4 (establishing that the ACA failed to address the enormous jury verdicts that have increased the malpractice insurance premiums).