

## PRODUCT LIABILITY

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### IN THIS ISSUE

*Nationwide tort reform has resulted in many state legislatures limiting the amount of damages recoverable by an injured party. The statutes limiting the availability of noneconomic damages have gained increasing interest in the legal community. This survey identifies which states have enacted such statutes, and whether each state's highest appellate court has addressed the statute's constitutionality.*

### Noneconomic Damages: A State-By-State Survey of Limiting Caps and Their Constitutionality

#### ABOUT THE AUTHORS



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#### ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).

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Over the past several decades, nationwide tort reform by state legislatures has developed, often in the form of limitations on the amount of damages recoverable by an injured party. With change often comes scrutiny, and a significant portion of the legal community's concern with tort reform has focused on caps limiting the recovery of noneconomic damages. These "pain and suffering" damages are less concrete than economic damages, thus rendering them significantly more difficult to value. Whether their limitation is constitutional is a question that has come before the highest courts of many states. The following survey identifies whether each state has enacted a noneconomic damages cap statute, and whether that state's highest appellate court has addressed its constitutionality. To date, 38 states have enacted a damages cap in some form that affects noneconomic damages. Approximately half of those statutes have been held constitutional, and a surprising 13 have not been challenged. Five states prohibit the enactment of a limitation on damages pursuant to the terms of their state constitutions, while eight others have chosen not to enact caps for varying reasons. What can be certain from the results of this survey is that the debate concerning the constitutionality of noneconomic damages caps is far from over.

Alabama: Pursuant to Alabama's medical liability statute, noneconomic damages, including punitives, may not exceed \$400,000. Ala. Code § 6-5-544 (1975). The Supreme Court of Alabama has held this cap is unconstitutional. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991).

Alaska: Noneconomic damages are limited to the greater of \$400,000 or the injured person's life expectancy in years multiplied by \$8,000. If the person suffers severe

permanent physical impairment or severe disfigurement, the damages may not exceed the greater of \$1 million or the person's life expectancy in years multiplied by \$25,000. Alaska Stat. § 09.17.010. The Supreme Court of Alaska has held the cap is constitutional. *Evans v. State*, 56 P.3d 1046 (Alaska 2002).

Arizona: Arizona's Constitution provides that damages for death or personal injury shall not be limited. Ariz. Const. Art. II, § 31.

Arkansas: Arkansas's Constitution allows for the enactment of workers' compensation laws, but prohibits in all other respects any limitations on the amount recoverable for injuries resulting in death or injury to person or property. Ark. Const. Art. 5, § 32.

California: For an action against a health care provider for professional negligence, the injured plaintiff is entitled to noneconomic damages in an amount not to exceed \$250,000. Cal. Civ. Code § 3333.2. The Supreme Court of California has held the statute is constitutional. *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985).

Colorado: Colorado's medical malpractice statute provides for recovery against a health care institution as defined by statute in a total amount that shall not exceed \$1 million, to include noneconomic damages in an amount that shall not exceed \$250,000 present value. Colo. Rev. Stat. § 13-64-302. Noneconomic damages in actions other than medical malpractice actions are recoverable in an amount that shall not exceed \$468,010 unless clear and convincing evidence establishes that the award should exceed that amount, but the amount in no event can exceed \$936,030. Colo. Rev. Stat. § 13-21-102.5. These amounts have been adjusted for inflation as required by the statute. The Supreme Court of Colorado has upheld both statutes as

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

Connecticut: Connecticut does not place a cap on the recovery of noneconomic damages, but it requires any award for noneconomic damages against a health care provider in excess of \$1 million to be reviewed by the court. More specifically, the court must determine if the evidence supports the award, or if it is excessive as a matter of law. Conn. Gen. Stat. § 52-228c. The constitutionality of this requirement has not been reviewed by Connecticut's Supreme Court.

Delaware: Delaware does not place a cap on noneconomic damages.

District of Columbia: The District of Columbia does not place a cap on noneconomic damages.

Florida: Florida's medical malpractice statute places caps on noneconomic damages in several distinct categories. See Fla. Stat. § 766.118. With regard to its \$1 million cap for wrongful death actions, the Supreme Court of Florida this year found this portion of the statute unconstitutional. *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). Further, Florida allows parties to agree to submit medical negligence claims to arbitration, and this statute provides that noneconomic damages therein are limited to a maximum of \$250,000 per incident. Fla. Stat. § 766.207. The Supreme Court of Florida has held this statute is constitutional. *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). Also, the Supreme Court of Florida has held that the noneconomic damages cap in the Tort Reform and Insurance Act of 1986 is unconstitutional. *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987).

Georgia: For actions against one or more health care providers or a single medical facility, a claimant may recover noneconomic damages in an amount not to exceed \$350,000. If more than one medical facility is involved, this amount is increased to \$750,000. The aggregate maximum recoverable is \$1,050,000. Ga. Code § 51-13-1. Georgia's Supreme Court recently found the statute unconstitutional. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010).

Hawaii: Hawaii limits noneconomic damages to \$375,000 except for certain explicitly enumerated torts. Haw. Rev. Stat. § 663-8.7. See also Haw. Rev. Stat. § 663-10.9(2). The statute has not been addressed by Hawaii's Supreme Court.

Idaho: Idaho provides a \$250,000 cap on the recovery of noneconomic damages for personal injury and death, to be adjusted annually in accordance with the percentage change of the average annual wage as computed by statute. The cap does apply for actions arising out of willful or reckless misconduct as well as felonious acts as determined beyond a reasonable doubt. Idaho Code § 6-1603. The Supreme Court of Idaho has held the cap is constitutional. *Kirkland by & ex rel. Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000).

Illinois: Illinois's cap on noneconomic damages for medical malpractice actions limited recovery to \$1 million against a hospital and its personnel, and \$500,000 against a physician and the physician's business. 735 Ill. Comp. Stat. 5/2-1706.5. The Supreme Court of Illinois found the statute was unconstitutional in 2010, and it has since been repealed. *Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010). For noneconomic damages in other actions seeking damages as a result of death, bodily

injury, or damage to property as a result of negligence, Illinois's statute limited recovery to \$500,000 per plaintiff. This amount was to adjust yearly as provided for in the statute based on a percentage change in the consumer price index. 735 Ill. Comp. Stat. 5/2-1115.1. This cap was also found unconstitutional by the Supreme Court of Illinois. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997).

Indiana: Indiana provides a limit on the total amount recoverable in actions against qualified health care providers without delineating noneconomic damages. A patient's total recovery for injury or death may not exceed \$1,250,000, and the health care provider will not be liable for more than \$250,000. If the patient is entitled to damages which exceed the threshold for a qualified health care provider, the remainder may be recovered from the patient's compensation fund and/or additional health care providers found liable. Ind. Code § 34-18-14-3. The Supreme Court of Indiana has held that the statute is constitutional. *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980).

Iowa: Iowa does not place a cap on noneconomic damages.

Kansas: Kansas limits the recovery of noneconomic damages for personal injury actions to \$250,000. Kan. Stat. § 60-19a02. In a recent opinion from the Supreme Court of Kansas, the Court held the statute cap was constitutional. *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012).

Kentucky: Kentucky's constitution prohibits any restriction on the amount recoverable for injury or death. Ky. Const. § 54.

Louisiana: Louisiana's medical malpractice statute limits all damages for injury or death of a patient, except future medicals, to \$500,000. It does not delineate noneconomic

damages. La. Rev. Stat. § 40:1299.42. The Louisiana Supreme Court recently held the statute is constitutional. *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012).

Maine: Noneconomic damages for wrongful death actions shall not exceed \$500,000. Me. Rev. Stat. Tit. 18-A, § 2-804. This cap has not been challenged on constitutional grounds.

Maryland: Maryland limits the recovery of noneconomic damages in all personal injury suits to \$500,000, to increase by \$15,000 per year beginning on October 1, 1995. For wrongful death claims in which there are two or more claimants/beneficiaries, noneconomic damages cannot exceed 150 percent of the currently applicable cap for a single wrongful death claimant. Md. Code, Cts. & Jud. Proc. § 11-108. Maryland's Court of Appeals has affirmed the constitutionality of this statute as recently as 2013. *Dixon v. Ford Motor Co.*, 70 A.3d 328 (Md. 2013).

Massachusetts: Massachusetts caps noneconomic damages against health care providers at \$500,000, unless the jury finds circumstances apply such that the limitation would deprive the plaintiff of just compensation. Mass. Gen. Laws ch. 231, § 60H. The statute has not been challenged on constitutional grounds.

Michigan: Michigan places a cap on noneconomic damages for product liability actions in an amount not to exceed \$280,000 unless the product's defect caused death or permanent loss of a vital bodily function. In such circumstances, the amount recoverable shall not exceed \$500,000. The \$500,000 cap will not apply if the defendant was grossly negligent. Mich. Comp. Laws § 600.2946a. Although not addressed directly by the Supreme Court of Michigan, the Court acknowledged in *Phillips v. Mirac, Inc.* that

Michigan's Court of Appeals has found this statute constitutional. 685 N.W.2d 174, 183 n.14 (Mich. 2004) (citing *Kenkel v. Stanley Works*, 665 N.W.2d 490 (Mich. Ct. App. 2003)). Michigan provides similar caps in the medical malpractice context. Mich. Comp. Laws § 600.1483. The Supreme Court of Michigan has held this statute is constitutional. *Jenkins v. Patel*, 684 N.W.2d 346 (Mich. 2004).

Minnesota: Minnesota placed a \$400,000 cap on noneconomic damages, but the statute was repealed in 1990. Minn. Stat. § 549.23.

Mississippi: Mississippi limits the recovery of noneconomic damages in medical malpractice claims in an amount not to exceed \$500,000, and limits recovery to \$1 million for all other actions. Miss. Code § 11-1-60. The Supreme Court of Mississippi has declined to address the constitutionality of the caps to date.

Missouri: Noneconomic damages against a health care provider are recoverable in an amount not to exceed \$350,000. Mo. Rev. Stat. § 538.210. A recent decision of the Supreme Court of Missouri found the cap unconstitutional. *Watts ex rel. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012).

Montana: Montana limits noneconomic damages for medical malpractice claims against one or more health care providers to \$250,000 per occurrence. Mont. Code § 25-9-411. The statute has not been challenged by the Supreme Court of Montana on constitutional grounds.

Nebraska: Nebraska's Hospital-Medical Liability Act imposes a total cap on damages of \$1.75 million, and does not delineate noneconomic damages from this total. Neb. Rev. Stat. § 44-2825. The Supreme Court of

Nebraska has found the statute is constitutional. *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43 (Neb. 2003).

Nevada: In Nevada, noneconomic damages for medical and dental malpractice claims are limited to \$350,000. Nev. Rev. Stat. § 41A.035. The statute has not been addressed by Nevada's Supreme Court on constitutional grounds.

New Hampshire: In an action for medical injury, compensation for noneconomic damages shall not exceed \$250,000. N.H. Rev. Stat. § 507-C:7. The Supreme Court of New Hampshire has held this statute is unconstitutional. *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). The \$875,000 cap governing noneconomic damages in all other respects, N.H. Rev. Stat. § 508:4-d, has also been held unconstitutional. *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991).

New Jersey: Although New Jersey does not have an outright cap on noneconomic damages, New Jersey's Automobile Insurance Cost Reduction Act provides automobile insurance policyholders with the option of paying a lower premium in exchange for limiting the right to sue for noneconomic damages upon injury in an accident. A person is restricted from suing for noneconomic damages unless he or she has suffered certain qualifying injury. N.J. Stat. § 39:6A-1.1. It has not been challenged on constitutional grounds by the Supreme Court of New Jersey.

New Mexico: New Mexico's medical malpractice statute limits the recovery of total damages, except for punitives and medical care and related benefits, to \$600,000 per occurrence. It does not delineate noneconomic damages from this total. N.M. Stat. § 41-5-6. The Supreme Court of New Mexico has not addressed the

constitutionality of this statute; however, the Court of Appeals of New Mexico recently found it was constitutional. *Salopek v. Friedman*, 308 P.3d 139 (N.M. Ct. App. 2013).

New York: New York does not place a cap on noneconomic damages.

North Carolina: Noneconomic damages in medical malpractice actions are limited to \$500,000. This amount is to be adjusted according to the specific terms of the statute. This cap does not apply if the plaintiff suffered certain permanent injury or death, or if the defendant's actions constituted reckless disregard, gross negligence, fraud, intent, or malice. N.C. Gen. Stat. § 90-21.19. The statute's constitutionality has not been addressed by the Supreme Court of North Carolina.

North Dakota: North Dakota limits noneconomic damages in health care malpractice actions to \$500,000. N.D. Cent. Code. § 32-42-02. The Supreme Court of North Dakota has not addressed its constitutionality.

Ohio: Ohio limits the recovery of noneconomic damages generally in an amount not to exceed the greater of \$250,000 or an amount equal to three times plaintiff's economic loss, not to exceed \$350,000 per plaintiff or \$500,000 per occurrence. For certain permanent injuries, the cap is increased to \$500,000 per plaintiff or \$1 million per occurrence. Ohio Rev. Code § 2315.18. The Ohio Supreme Court has held the statute is constitutional. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007). Ohio caps noneconomic damages in medical malpractice actions in the same amount. Ohio Rev. Code § 2323.43. Its constitutionality has not yet been challenged. Further, Ohio's constitution does not allow a

limitation on damages for wrongful death claims. Ohio Const. Art. I, § 19a.

Oklahoma: Oklahoma provides a general cap on noneconomic damages at \$350,000, unless the defendant (1) acted with reckless disregard; (2) was grossly negligent; (3) was fraudulent; or (4) acted with intent or malice. 23 Okl. Stat. § 61.2. The statute has not been challenged on constitutional grounds in the Oklahoma Supreme Court. In addition, Oklahoma's constitution provides that damages in wrongful death actions shall not be limited. Okl. Const. Art. XXIII, § 7.

Oregon: Oregon law caps general noneconomic damages at \$500,000. Or. Rev. Stat. § 31.710. The Oregon Supreme Court held the statute unconstitutional in civil cases in which the right to trial by jury was customary in 1857, when Oregon's constitution was adopted. *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999). Further, noneconomic damages are unavailable in a motor vehicle incident in which the plaintiff either was uninsured or was driving under the influence of intoxicants. Or. Rev. Stat. § 31.715. As it pertains to an uninsured motorist, the Oregon Supreme Court has held the statute constitutional. *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005).

Pennsylvania: Pennsylvania's constitution prohibits the limitation of amounts recoverable for injury or death except in the context of workers' compensation. Pa. Const. Art. III, § 18.

Rhode Island: Rhode Island does not place a cap on noneconomic damages.

South Carolina: South Carolina limits the recovery of noneconomic damages in medical malpractice actions at \$350,000 per claimant. For multiple providers, the cap is increased to

\$1,050,000. These amounts are to be adjusted for inflation, and they do not apply under certain circumstances such as gross negligence. S.C. Code § 15-32-220. The cap has not been challenged on constitutional grounds in the Supreme Court of South Carolina.

South Dakota: South Dakota originally capped both economic and noneconomic damages at \$1 million in medical malpractice actions. The predecessor statute now caps only noneconomic (general) damages at \$500,000 while placing no cap on economic or special damages. S.D. Codified Laws § 21-3-11. The constitutionality of the predecessor statute has not been challenged in the Supreme Court of South Dakota.

Tennessee: Tennessee limits the recovery of noneconomic damages generally to \$750,000, unless the injuries are catastrophic within the meaning of the statute such that the cap is increased to \$1 million. Tenn. Code Ann. § 29-39-102. The statute has not been challenged on constitutional grounds in the Supreme Court of Tennessee.

Texas: Texas's medical malpractice statute caps noneconomic damages at \$250,000 per claimant against a single institution, and at \$500,000 per claimant inclusive of all defendants. Tex. Civ. Prac. & Rem. Code § 74.301. A total cap of \$500,000 exists for wrongful death actions under the medical malpractice statute. Tex. Civ. Prac. & Rem. Code § 74.303. The former medical malpractice statute was held unconstitutional by a Texas appellate court. *Horizon/CMS Healthcare Corp. v. Ault*, 985 S.W.2d 216 (Tex. App. Fort Worth Jan. 8, 1999). The Texas Supreme Court has not yet ruled on the constitutionality of the current statute. However, a Texas appellate court recently found § 74.301 constitutional. *Prabhakar v.*

*Fritzgerald*, 2012 Tex. App. LEXIS 7154 (Tex. App. Dallas Aug. 24, 2012).

Utah: Utah limits the recovery of noneconomic damages in malpractice actions against a health care provider to \$450,000, to be adjusted for inflation as provided by the terms of the statute. Utah Code § 78B-3-410. The Supreme Court of Utah has held the statute is constitutional. *Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135 (Utah 2004).

Vermont: Vermont does not place a cap on noneconomic damages.

Virginia: Virginia's medical malpractice statute caps total recovery for injury or death in an amount corresponding to amounts delineated in the statute by year. The statute does not separate out noneconomic damages from the total. Va. Code Ann. § 8.01-581.15. The Supreme Court of Virginia has found it constitutional. *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989).

Washington: Washington caps noneconomic damages for personal injury and wrongful death claims as follows: 0.43 multiplied by the average annual wage and life expectancy, including all derivative claims. Wash. Rev. Code § 4.56.250. The Supreme Court of Washington has held this cap is unconstitutional. *Sofie v. Fibreboard Corp.*, 771 P.2d 771 (Wa. 1989).

West Virginia: Noneconomic damages for actions against health care providers are limited to \$250,000, to be adjusted for inflation. For wrongful death or certain more serious injuries as identified by statute, the cap will increase to an amount not to exceed \$500,000. W. Va. Code § 55-7B-8. West Virginia's Supreme Court of Appeals has held this statute is constitutional. *MacDonald v.*



*City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011).

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*International Association of Defense Counsel*

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damages for personal injury or death. Wyo. Const. Art. 10, § 4.

Wisconsin: Wisconsin limits noneconomic damages in medical malpractice actions to \$750,000 for each occurrence. Wis. Stat. § 893.55. Since its amendment in 2006, its constitutionality has not been ruled upon by the Supreme Court of Wisconsin.

Wyoming: Wyoming's constitution prohibits the enactment of a limitation on recoverable





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