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RESUSCITATING NONECONOMIC MEDICAL MALPRACTICE DAMAGE CAPS IN ILLINOIS

INTRODUCTION

The value of jury awards stemming from medical malpractice claims has markedly increased in the United States since 1997.¹ Specifically, the national median medical liability jury award was \$157,000 in 1997, compared to \$487,500 in 2006,² representing a rise of more than 300%.³ This alarming trend has been even more pronounced in Illinois,⁴ causing the American Medical Association (AMA) to specifically identify it as a “crisis state,” a designation that the AMA places on those states experiencing increased insurance premiums, diminished patient access to healthcare, and decreased medical practice sustainability.⁵

Cognizant of these concerns, the Illinois General Assembly conducted a series of hearings in 2004 pertaining to potential healthcare reform in Illinois, during which it provided healing arts providers, finance professors, private citizens, and insurance regulators a platform to advocate for their competing positions on the divisive matter.⁶ These hearings generated a thorough legislative record, solidifying the General Assembly’s stance that Illinois was in the midst of a health-care crisis that “endanger[ed] the public health, safety, and welfare” of its citizens.⁷ In 2005, the General Assembly attempted to remedy those concerns with the enactment of Public Act 94-677 (P.A. 94-

1. N. AM. SPINE SOC’Y & NAT’L ASS’N OF SPINE SPECIALISTS, POSITION STATEMENT ON MEDICAL LIABILITY REFORM para. 7 (2010), available at <http://www.spine.org/Documents/Advocacy/PositionStatementLiablityReform.pdf> (“Despite the fact that a majority of medical malpractice claims never come to trial, the size of jury awards and settlements has risen rapidly over the past several years.”).

2. *Id.*

3. *Id.*

4. *Renewing the Campaign: Loud Call for Strong Litigation Reform*, CHI. MED. (Chi. Med. Soc’y, Chicago, Ill.), Feb. 2005, at 1, 2, available at <http://www.cmsdocs.org/news-publications/chicago-medicine-newsletter/2005-issues/NewsletterFeb05web.pdf> (“In 1998, the average jury verdict in Cook County was \$1.07 million. In 2003, the average jury verdict . . . was \$4.45 million.”).

5. AM. MED. ASS’N, MEDICAL LIABILITY REFORM NOW! THE FACTS YOU NEED TO KNOW TO ADDRESS THE BROKEN MEDICAL LIABILITY SYSTEM 11 (2013), available at <http://protectpatientsnow.org/sites/default/files/mlr-now2b.pdf>.

6. David M. Goldhaber & David J. Grycz, *Illinois Supreme Court Invalidates Damage Cap—Three Strikes and You’re Out*, CBA REC., Apr. 2010, at 30, 31.

7. *Id.* at 32 (alteration in original).

677).⁸ While the nuances of P.A. 94-677 are explored in greater detail below, its most pertinent provision was a cap on noneconomic damages (for example, pain and suffering) “at \$500,000 for physicians and \$1,000,000 for hospitals.”⁹

Although the General Assembly maintained bold aspirations regarding P.A. 94-677’s potential ability to heal Illinois’ wounded healthcare system, the Illinois Supreme Court found the Act unconstitutional in the 2010 case *Lebron v. Gottlieb Memorial Hospital*, preventing those aspirations from coming to fruition.¹⁰ However, the Court’s decision in *Lebron* was not the beginning of the story of medical malpractice damage caps in Illinois. Rather, it represented a late chapter in a tale of legislative futility and contentious assertions of power between the state’s legislative and judicial branches. In fact, many commentators have deemed *Lebron* to be the story’s final page,¹¹ a prospect wholly unsatisfying for readers in favor of damage cap legislation.

This Comment ultimately refutes the proposition that *Lebron* was the death knell for noneconomic medical malpractice damage caps in Illinois¹² by proposing a revised piece of legislation to guard against the Court’s historical concerns regarding the constitutionality of damage cap legislation. To sufficiently address those concerns, Part II¹³ provides a historical background of damage cap legislation in the United States and discusses the lessons that can be learned from the Illinois Supreme Court’s reasoning for striking down such legislation on three separate occasions.¹⁴ Part III engages in a general discussion of the underlying purpose of damage caps and reviews the efficacy of noneconomic medical liability damage cap legislation in alternative ju-

8. Pub. L. No. 94-677, 2005 Ill. Laws 4964, *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

9. *Id.* art. 3, sec. 330, § 27.10, 2005 Ill. Laws 5000.

10. *Lebron*, 930 N.E.2d 895.

11. *E.g.*, David M. Goldhaber & David J. Grycz, *Illinois Adds Fuel to the Fiery National Healthcare Debate: Supreme Court Strikes Damage Caps and Other Healthcare Reforms*, HEALTH LAW., June 2010, at 19, 21 (2010) (“Non-economic damage caps in Illinois have been dealt a serious, and perhaps final, blow. . . . The *Lebron* decision could therefore be the final nail in the coffin for non-economic damage caps in Illinois.”); Grant McBride, Comment, *Medical Malpractice Insurance in Illinois: Where We’ve Been and Where We’re Going After Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895 (Ill. 2010), 35 S. ILL. U. L.J. 517, 531 (2011) (“Nothing short of amending the Illinois Constitution will change Illinois’ stance on damage caps.”).

12. Goldhaber & Grycz, *supra* note 11; *see also* McBride, *supra* note 11.

13. *See infra* notes 20–117 and accompanying text.

14. The Illinois Supreme Court first addressed the constitutionality of medical malpractice damage caps in *Wright v. Central Du Page Hospital Ass’n*, 347 N.E.2d 736 (Ill. 1976). It revisited the issue in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997). Finally, it most recently addressed the constitutionality of medical malpractice damage caps in *Lebron*, 930 N.E.2d 895.

risdictions where those caps have been implemented.¹⁵ Part IV proposes a revised piece of damage cap legislation that would withstand judicial scrutiny in Illinois without compromising the General Assembly's goals in passing P.A. 94-677.¹⁶ The crux of the revised legislation rests on the implementation of a "clear and convincing" evidence standard to invoke a "manifest injustice" provision, which gives the court the ability to waive the damage cap when it determines that imposition of the cap would be manifestly unjust due to specific circumstances underlying a given case.¹⁷ Part IV also explores the applicability of bifurcated proceedings to the revised legislation, whereby issues of liability and damages are separated in multi-phase litigation.¹⁸ Part V discusses the impact of this proposed legislation, including its ancillary potential to promote judicial economy.¹⁹

II. BACKGROUND

As of January 2011, approximately 50% of all states had enacted noneconomic damage caps in some form.²⁰ Proponents of damage caps attribute escalating healthcare costs to high jury awards and believe that damage cap legislation is necessary to end "the medical malpractice insurance crisis."²¹ These proponents maintain that caps reduce uncertainty to insurers by "limit[ing] runaway jury awards of non-economic . . . damages."²² In turn, this increased predictability decreases rates for malpractice premiums to physicians²³ and increases the availability of consumer healthcare insurance while lowering consumer healthcare costs.²⁴ In multiple states, physicians have staged work stoppages to demonstrate their support for damage cap legislation.²⁵ On the other hand, opponents of damage caps question

15. See *infra* notes 118–193 and accompanying text.

16. See *infra* notes 194–216 and accompanying text.

17. This proposal is modeled, in part, after Florida's statute capping noneconomic damages arising from medical malpractice claims. FLA. STAT. § 766.118(2)(b) (2011). However, Part IV, see *infra* notes 194–216 and accompanying text, explains the unique features of the proposed legislation that are specifically tailored to guard against concerns espoused by the Illinois Supreme Court.

18. See *infra* notes 194–216 and accompanying text.

19. See *infra* notes 217–220 and accompanying text.

20. AM. MED. ASS'N, *supra* note 5, at 15.

21. Kathryn Zeiler, *Turning from Damages Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 385, 387 (2005).

22. *Id.*

23. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 405 (2005).

24. *Id.*

25. *Id.* at 409.

whether they achieve their intended results.²⁶ Opponents also fear that, due to the decrease in recoverable damages as a result of damage caps, plaintiffs with meritorious medical malpractice claims will not bring their suits because the costs of litigation outweigh the limited potential recovery.²⁷ There is also concern that caps actually increase the amount of compensation in medical malpractice cases because jurors presume that caps represent fair awards, which cuts against the intended goals of damage caps.²⁸ These conflicting viewpoints on the efficacy of medical malpractice damage caps exist, in part, because research on the issue has produced evidence to support both sides of the debate.

Research on the efficacy of medical malpractice damage caps has produced inconsistent results. Various studies indicate that states with caps enjoy decreased liability insurance premiums.²⁹ For instance, one 2006 study found that internal medicine premiums were over 17.3% lower in states where noneconomic damage caps were introduced.³⁰ The results of the study further demonstrated that damage caps lowered premiums in the fields of general surgery and obstetrics/gynecology at rates of 20.7% and 25.5%, respectively.³¹ The findings also illustrate that every \$100,000 increase in the ceiling of a given damage cap correlated with a 3.9% increase in relative premiums.³² Finally, based on simulated results, the researchers in the study posited that a nationwide \$250,000 cap on noneconomic damage recovery would result in savings of \$16.9 billion, while extending the same cap only to states where caps are not in place would result in an annual savings of \$1.4 billion.³³ Other research indicates that the beneficial impact of damage caps is of a broader, more systematic nature, finding that caps work to improve general access to healthcare and decrease healthcare costs overall.³⁴

26. Zeiler, *supra* note 21, at 387.

27. *Id.*

28. *Id.* at 387–88.

29. Sharkey, *supra* note 23, at 407–08. “The August 2003 GAO study likewise demonstrated that states that have caps on medical malpractice damages also tend to have lower insurance premiums for doctors, and similarly . . . recent increases in medical malpractice premiums ‘were consistently lower’ in states with caps on noneconomic damages.” *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 32 (2003), available at <http://www.gao.gov/new.items/d03836.pdf>).

30. Meredith L. Kilgore et al., *Tort Law and Medical Malpractice Insurance Premiums*, 43 INQUIRY 255, 268 (2006).

31. *Id.*

32. *Id.*

33. *Id.* at 255.

34. AM. MED. ASS’N, *supra* note 5, at 13.

Despite the striking results of the 2006 study,³⁵ the efficacy of damage cap legislation remains in dispute. Opponents of damage caps point to conflicting research studies that have found that although caps decrease the payouts in medical malpractice claims, insurers have not responded by decreasing premiums.³⁶ Although the competing positions regarding damage cap efficacy admittedly render the need for such legislation inconclusive, one thing remains certain: legislative efforts to enact laws capping damages in some form are here to stay.³⁷ Further, the General Assembly's consistent efforts to implement damage caps since it first enacted Public Act 79-960 (P.A. 79-960) in 1975³⁸ demonstrate that the perspectives of Illinois lawmakers generally fall in line with those of damage cap proponents. However, the Illinois Supreme Court has been equally resilient in its stance that such legislation violates the state's constitution.³⁹ The resulting question is clear: is it possible for the General Assembly to draft damage cap legislation that does not violate the Illinois constitution?

The Illinois Supreme Court has addressed the constitutionality of noneconomic damage caps on three separate occasions, beginning in 1976. The court first adjudicated the issue in the 1976 case *Wright v. Central Du Page Hospital Ass'n*.⁴⁰ Subsequently, it evaluated the is-

35. *Id.* Other research has reported similar findings. A 2004 study found that "medical liability premium revenue was 13 percent to 17 percent lower in states that capped noneconomic or total damages than in states that did not." *Id.* (citing Kenneth E. Thorpe, *The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms*, HEALTH AFF. (Jan. 21, 2004), <http://content.healthaffairs.org/content/early/2004/01/21/hlthaff.w4.20>).

36. For example, one study found that while damage caps achieve their intended purpose of reducing the costs (and thus the burden) to insurers by decreasing the payouts from medical malpractice claims, insurers did not respond by decreasing premiums and, therefore, damage caps ultimately failed to realize their underlying goal of lowering insurance costs. MARTIN D. WEISS ET AL., WEISS RATINGS INC., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE 7 (2003), available at <http://www.weissratings.com/pdf/malpractice.pdf>. The study found that although the median payout in states with caps was 15.7% lower than in states without caps from 1991 through 2002, states with caps actually demonstrated more acute increases in annual premiums. *Id.* The researchers concluded that other factors, such as "medical cost inflation" and "broad market forces prevailing in the property/casualty industry," as well as the cyclical tendencies of the insurance market, are the driving forces responsible for rising insurance costs. *Id.* at 9-13.

37. See Laurin Elizabeth Nutt, Note, *Where Do We Go from Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia*, 28 GA. ST. U. L. REV. 1341, 1346 (2012) (observing that, as of February 2008, a majority of states had enacted legislation that capped damages in medical malpractice cases in some form).

38. Pub. L. No. 79-960, 1975 Ill. Laws 2888, *invalidated by Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 743 (Ill. 1976).

39. See *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 908 (Ill. 2010); see also *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997); *Wright*, 347 N.E.2d at 743.

40. 347 N.E.2d at 743.

sue in the 1997 case *Best v. Taylor Machine Works*.⁴¹ Most recently, the court addressed the constitutionality of damage caps in the 2010 case *Lebron v. Gottlieb Memorial Hospital*.⁴² Although various nuances within the court's reasoning have evolved over time, its stance that damage caps violate the Illinois constitution has remained constant.

A. *Wright v. Central Du Page Hospital Association*

The Illinois Supreme Court first addressed the constitutionality of medical malpractice damage cap legislation in the 1976 case *Wright v. Central Du Page Hospital Ass'n*.⁴³ In *Wright*, the plaintiff sought damages from the defendant hospital and, in doing so, challenged the constitutionality of P.A. 79-960, enacted in 1975 (the 1975 Act).⁴⁴ The 1975 Act capped recovery from injuries resulting from "medical, hospital or other healing art malpractice" at \$500,000.⁴⁵ The defendant posited that because the 1975 Act served the legislative purpose of remediating the emerging healthcare crisis in Illinois, its legitimate underlying purpose saved it from attacks on its constitutionality despite the fact that it treated the most severely injured plaintiffs unequally.⁴⁶ Conversely, the plaintiff argued that by treating the most severely injured plaintiffs in a different manner than those presenting with minor or moderate injuries, the 1975 Act created an unconstitutional arbitrary classification.⁴⁷

The Illinois Supreme Court struck down the 1975 Act, holding that the flat cap was entirely arbitrary and, therefore, violative of section 13, article IV of the Illinois constitution because of its status as special legislation.⁴⁸ "The special legislation clause expressly prohibits the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated."⁴⁹ In reaching its ruling, the court expressed particular concern with the inequitable prospect of preventing a severely injured plaintiff from recouping necessary medical expenses in excess of the

41. 689 N.E.2d at 1076–80.

42. *Lebron*, 930 N.E.2d at 908.

43. *Wright*, 347 N.E.2d at 743.

44. *Id.* at 737.

45. *Id.* at 741.

46. *Id.*

47. *Id.*

48. *Id.* at 743.

49. *Best*, 689 N.E.2d at 1069. The Illinois Supreme Court "has consistently held that the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis." *Id.* at 1070.

\$500,000 threshold.⁵⁰ Accordingly, the court's decision in *Wright* offers two fundamental guiding principles for future damage cap legislation: (1) a flat damage cap that rigidly applies to the most severely injured plaintiffs without consideration of the specific circumstances of their injuries will be viewed as an arbitrary classification and, therefore, as unconstitutional special legislation;⁵¹ and (2) the court will not uphold damage caps that prevent a plaintiff from recovering at least the amount of economic damages resulting from the underlying malpractice.⁵²

Twenty years later and with these principles in mind, the General Assembly again attempted to enact damage cap legislation in Illinois through Public Act 89-7, more commonly known as the Civil Justice Reform Amendments of 1995 (the 1995 Amendments).⁵³ Some commentators have called the 1995 Amendments "one of the most comprehensive tort reform packages ever conceived."⁵⁴ However, its constitutionality was quickly called into question in the 1997 supreme court case *Best v. Taylor Machine Works*.⁵⁵

B. *Best v. Taylor Machine Works*

The 1995 Amendments were an extremely expansive act of tort reform that affected almost all facets of tort law.⁵⁶ The General Assembly intended to achieve a multitude of goals through the 1995 Amendments, including decreasing the costs of healthcare and increasing its availability to consumers.⁵⁷ In *Best v. Taylor Machine Works*, numerous provisions of the 1995 Amendments were challenged as unconstitutional in two consolidated lawsuits.⁵⁸ The trial court found various components of the 1995 Amendments individually unconstitutional, including provisions pertaining to the allocation of fault and several liability, product liability presumptions, jury instructions, and a \$500,000 limit on compensatory damages for

50. *Wright*, 347 N.E.2d at 742.

51. *Id.* at 743.

52. *Id.* at 742-43.

53. Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7, 1995 Ill. Laws 284, 285, *invalidated* by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997).

54. McBride, *supra* note 11, at 519.

55. *Best*, 689 N.E.2d at 1064 (Ill. 1997).

56. McBride, *supra* note 11, at 520. (citing Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7, 1995 Ill. Laws 284, *invalidated* by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997)).

57. *Id.* Another underlying goal of the 1995 Amendments was to remedy various issues within the tort system and its negative impact on the "creation and retention of jobs." *Id.*

58. *Best*, 689 N.E.2d at 1062.

noneconomic injuries.⁵⁹ The court went on to hold the 1995 Amendments summarily unconstitutional.⁶⁰ The arguments of the parties in *Best* echoed those previously raised in *Wright*.⁶¹ The defendants contended that the 1995 Amendments were a measure of legitimate reform within the powers of the General Assembly, while the plaintiffs countered that the 1995 Amendments were arbitrary and irrational.⁶² Distinguishable from *Wright* was the fact that the plaintiffs also challenged the 1995 Amendments based on separation of powers concerns.⁶³

The supreme court began its substantive analysis by addressing section 2-1115.1 of the 1995 Amendments, which capped noneconomic damages at \$500,000 per plaintiff in any common law or statutory action arising from death or bodily injury based on negligence or products liability.⁶⁴ The court noted that the legislation did not apply to purely tangible economic damages, thus materially differentiating it from the law struck down in *Wright*.⁶⁵ Presumably, in an attempt to overcome the special legislation concerns raised by the court in *Wright*, the General Assembly provided eight separate findings that established a legitimate need for a cap on noneconomic damages in Illinois.⁶⁶ The General Assembly stated that one of the 1995 Amendments' fundamental purposes was to "reduce the cost of healthcare and increase accessibility to [healthcare]."⁶⁷

After noting these findings and underlying purposes, the court engaged in a special legislation analysis, employing the rational basis test.⁶⁸ The court explained that in evaluating a special legislation challenge, the heart of its analysis turns on whether the statutory classification is "based upon reasonable differences in kind or situation, and whether the basis for the classification[] is sufficiently related to the

59. *Id.*

60. *Id.*

61. *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976).

62. *Best*, 689 N.E.2d at 1063.

63. *Id.*

64. *Id.* at 1066 (citing 735 ILL. COMP. STAT. 5/2-1115.1(a) (1996)).

65. *Id.* at 1067.

66. *Id.* Findings of particular note include assertions that "(1) limiting noneconomic damages will improve [healthcare] in rural Illinois[;] (2) more than 20 states limit noneconomic damages; (3) the cost of [healthcare] has decreased in those states; [and] . . . [;] (5) such awards are highly erratic and depend on subjective preferences of the trier of fact." *Id.*

67. *Id.*

68. *Best*, 689 N.E.2d at 1070-71. "Under [the rational basis test], a court must determine whether the statutory classification is rationally related to a legitimate State interest." *Id.* (quoting *Vill. of Vernon Hills v. Vernon Fire Prot. Dist.* (*In re* Petition of *Vill. of Vernon Hills*), 658 N.E.2d 365 (Ill. 1995)) (internal quotation marks omitted).

evil to be obviated by the statute.”⁶⁹ The court ultimately resolved this inquiry in the negative, finding that because section 2-1115.1 of the 1995 Amendments summarily imposed a flat cap on noneconomic damages without lending consideration to the unique facts and circumstances of each individual case, it constituted special legislation as an arbitrary limitation on a plaintiff’s ability to recover damages.⁷⁰

Next, the court addressed the plaintiffs’ contention that section 2-1115.1 violated the separation of powers clause of the Illinois Constitution.⁷¹ Under the separation of powers clause, no branch of government is vested with the authority to exercise powers belonging uniquely to another.⁷² Essentially, the plaintiffs argued that only the judicial branch possesses the power to remit verdicts, and because section 2-1115.1 conferred that power to the legislative branch, it ran afoul of the separation of powers clause.⁷³ The court reasoned that section 2-1115.1 functioned as a “legislative remittitur,” thereby usurping the power to reduce excessive verdicts from the judiciary.⁷⁴

Accordingly, the court’s ruling in *Best* provides two guiding principles moving forward: (1) it reinforced the notion first espoused in *Wright* that damage caps must be sensitive to the unique circumstances that precipitate medical malpractice claims in order to guard against special legislation concerns,⁷⁵ and merely applying a flat cap to

69. *Id.*

70. *Id.* at 1076–77. The court discussed three circumstances (raised by the plaintiffs) when section 2-1115.1 potentially imposed arbitrary classifications: “(1) the limitation on noneconomic damages distinguishes between slightly and severely injured individuals[;] (2) the limitation on noneconomic damages arbitrarily distinguishes between individuals with identical injuries[;] and (3) the limitation arbitrarily distinguishes types of injury.” *Id.* at 1075.

71. *Id.* at 1078. This portion of the court’s analysis would later be challenged in *Lebron* as pure dicta on the premise that it was unnecessary to address the separation of powers challenge because it had already found section 2-1115.1 unconstitutional as special legislation. *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895, 906 (Ill. 2010). The *Lebron* court conceded that it was not necessary to reach the separation of powers issue in *Best*, but went on to explain that because the *Best* court deliberately evaluated the issue, its discussion qualified as “judicial dictum . . . entitled to much weight.” *Id.* at 906–07.

72. *Best*, 689 N.E.2d at 1078. As provided by the court, “Under our constitution, the three branches of government—legislative, executive, and judicial—are separate, and one branch shall not ‘exercise powers properly belonging to another.’” *Id.* (quoting ILL. CONST. art. II, § 1). The court went on to explain that “the purpose of the [separation of powers] provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands.” *Id.* (alteration in original) (quoting *People v. Walker*, 519 N.E.2d 890 (Ill. 1983)).

73. *Id.*

74. *Id.* at 1080. Section 2-1115.1 did not function as a remittitur in the traditional sense (for example, reducing verdicts deemed excessive), but rather stripped the jury of its role in determining damages by “unduly encroach[ing] upon the fundamentally judicial prerogative of determining whether a jury’s assessment of damages is excessive.” *Id.*

75. *Id.* at 1076.

noneconomic damages falls short of doing so;⁷⁶ and (2) a statutorily imposed flat cap that employs a formulaic determination for damages without providing the jury, and in turn the court, an opportunity to consider the unique facts that would otherwise influence the applicability of damages in a given case unduly usurps the judiciary of its unique power to remit excessive damage awards and, therefore, runs afoul of the Illinois constitution's separation of powers clause.⁷⁷

C. *Lebron v. Gottlieb Memorial Hospital*

As discussed above, the Illinois General Assembly passed P.A. 94-677 (the 2005 Act) in 2005 in an attempt to remedy various issues within the state's healthcare system.⁷⁸ Section 2-1706.5 of the 2005 Act capped noneconomic damages at \$1,000,000 in cases against hospitals and \$500,000 in cases against physicians.⁷⁹ The 2005 Act was challenged in the 2010 case *Lebron v. Gottlieb Memorial Hospital*.⁸⁰ In *Lebron*, the plaintiff alleged that the defendants' negligent acts and omissions during the delivery of her daughter caused the newborn to suffer from, among other things, cerebral palsy and severe brain injury.⁸² The plaintiff also sought a judicial determination that the 2005 Act violated the Illinois constitution as applied to the facts of her case.⁸³ Specifically, the supreme court addressed the constitutionality of the noneconomic damage cap provision.⁸⁴ Two of the plaintiff's central arguments were that (1) the 2005 Act violated the Illinois constitution's separation of powers clause⁸⁵ as a legislative remittitur; and (2) it constituted impermissible special legislation.⁸⁶

76. *Id.*

77. *Id.* at 1080.

78. Goldhaber & Grycz, *supra* note 11, at 19.

79. Pub. L. No. 94-677, sec. 330, § 2-1706.5, 2005 Ill. Laws 4964, *invalidated by* *Lebron v. Gottlieb Mem'l Hosp.* 930 N.E.2d 895 (Ill. 2010).

80. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 900, 902 (Ill. 2010).

81. The plaintiff brought suit against Gottlieb Memorial Hospital, as well as the physician and nurse who provided the plaintiff with obstetrical care. *Id.* at 899-900.

82. *Id.* at 900.

83. *Id.* The crux of the plaintiff's argument was that her daughter "sustained disability, disfigurement, pain and suffering to the extent that damages for those injuries will greatly exceed the applicable limitations on noneconomic damages under Public Act 94-677." *Id.*

84. *Id.*

85. *Id.* at 900; *see also* ILL. CONST. art. II, § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

86. *Lebron*, 930 N.E.2d at 900. The plaintiff also challenged the legislation as violative of the "right to a trial by jury, due process, equal protection, and a certain and complete remedy." *Id.* (citations omitted).

The trial court held that because section 2-1706.5 functioned as a legislative remittitur, it violated the separation of powers clause.⁸⁷ The court declined to address the plaintiff's other challenges and found the 2005 Act unconstitutional in its entirety.⁸⁸ On review, the supreme court focused its analysis wholly on the separation of powers challenge, thus differentiating it from the opinions in *Wright* and *Best*.⁸⁹ However, to the dismay of damage cap proponents, the 2005 Act ultimately met the same fate as its predecessors.⁹⁰

The court began its analysis by addressing the defendants' argument that because the 2005 Act was narrowly tailored to address the health-care crisis unlike the broad legislation in *Best*, it did not "unduly encroach upon the judiciary."⁹¹ The court quickly pointed out the deficiencies of the defendants' argument, explaining that the 2005 Act usurped the judiciary of its power to remit damages, just as the legislation did in *Best*, despite its admittedly narrower scope.⁹² In explaining its position, the court echoed the reasoning of the *Best* court, holding that the 2005 Act violated the separation of powers clause because it limited noneconomic damages to a predetermined amount without lending consideration to the particular facts of a given case, stripping the court of its power to assess the propriety of a jury's damage determination.⁹³

The court then addressed the defendants' strained argument that section 2-1706.5 did not restrict a plaintiff's ability to recover, but merely dictated that some defendants could be held liable for noneconomic damages up to a specific amount.⁹⁴ This argument was

87. *Id.* at 900.

88. *Id.* at 901. Upon holding that section 2-1706.5 violates the Illinois Constitution, the trial court found the 2005 Act summarily unconstitutional as a result of its inseverability provision, deeming the act both unconstitutional on its face and as applied to the facts of the case. *Id.* at 901–02. On review, the Supreme Court of Illinois noted that because the trial court found the 2005 Act facially unconstitutional, the court's "as applied" holding was unnecessary. *Id.* at 902. The court further held that because there was no evidentiary hearing or findings of fact at the trial court level, the challenge could be only facial. *Id.* For these reasons, it "reverse[d] the [trial] court's 'as applied' ruling" and limited its review to whether the 2005 Act was facially invalid. *Id.*

89. Compare *Lebron*, 930 N.E.2d at 914, with *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741–43 (Ill. 1976), and *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1091 (Ill. 1997).

90. *Lebron*, 930 N.E.2d at 917.

91. *Id.* at 907.

92. *Id.* at 907–08 ("Notwithstanding [the Act's narrower scope], the encroachment upon the inherent power of the judiciary is the same in the instant case as it was in *Best*.").

93. *Id.* at 908 ("Section 2-1706.5, like section 2–1115.1, effects an unconstitutional legislative remittitur. The fact that the legislative remittitur operates in perhaps fewer cases under section 2-1706.5 than it would have under section 2–1115.1 does not extinguish the constitutional violation.").

94. *Id.* at 910–11.

crafted after the plaintiff's argument in the 2002 case *Unzicker v. Kraft Food Ingredients Corp.*,⁹⁵ in which the court upheld the constitutionality of legislation requiring tortfeasors found to be less than 25% at fault severally (rather than jointly) liable for a plaintiff's damages.⁹⁶ The court disagreed with the defendants' theory.⁹⁷ It held that because the plain language of section 2-1706.5 sometimes required a court to enter judgment in conflict with a jury's finding and prevented the court from assessing the propriety of the verdict as a matter of law,⁹⁸ it was inapposite from the legislation in *Unzicker*, "which required the court to enter judgment in conformity with the jury's assessment of fault where the defendant was minimally responsible."⁹⁹

The defendants raised various alternative arguments worth mentioning. First, the defendants argued that if the court struck down section 2-1706.5, it would have to concurrently invalidate other statutes that limit common law liability.¹⁰⁰ While the court opted not to address those statutes, it did acknowledge that the Innkeeper Protection Act,¹⁰¹ which implements a damage cap to mitigate a hotel's liability for its guest's property damage, was distinguishable from section 2-1706.5 because it permits parties to "contract around the statutory limit."¹⁰² Second, the defendants brought to the court's attention the fact that many other states have specifically rejected separation of powers challenges to damage cap legislation.¹⁰³ The court gave this argument little weight, stating that it was guided by its decision in *Best* rather than decisions in alternative jurisdictions.¹⁰⁴ The court ultimately struck down the 2005 Act on separation of powers grounds.¹⁰⁵

The *Lebron* opinion offers little in the way of novel guidance, as it is largely a revamped expression of the separation of powers principles previously espoused in *Best*.¹⁰⁶ However, a unique component of

95. *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024 (Ill. 2002).

96. *Id.* at 910 (discussing 735 ILL. COMP. STAT. 5/2-1117 (1994)).

97. *Lebron*, 930 N.E.2d at 911.

98. *Id.*

99. *Id.*

100. *Id.* at 913.

101. 740 ILL. COMP. STAT. 90/3.2 (2008).

102. *Lebron*, 930 N.E.2d at 913. For a discussion regarding the inclusion of a contractual loophole to medical malpractice damage caps in order to save legislation from remittitur concerns, see Jacquelyn M. Hill, Note, *Lebron v. Gottlieb and Noneconomic Damages for Medical Malpractice Liability: Closing the Door on Caps, but Opening It to New Possibilities*, 87 CHL.-KENT L. REV. 637, 661-66 (2012).

103. *Lebron*, 930 N.E.2d at 913-14.

104. *Id.* at 914.

105. *Id.*

106. *See id.* ("[W]e do not write today on a blank slate. Our decision in *Best* guides our analysis.").

Lebron is the seething dissent authored by Justice Lloyd Karmeier in response to the majority's analysis.¹⁰⁷ The dissent attacked the merits of the majority's separation of powers ruling on a number of grounds:¹⁰⁸ he argued (1) that the majority erred in following the separation of powers analysis in *Best* because that discussion was non-binding dicta;¹⁰⁹ (2) that judicial remittitur is not a power vested uniquely in the judiciary by the Illinois constitution;¹¹⁰ and (3) that a statutory limitation on damages is conceptually distinct from a judicial remittitur.¹¹¹ Justice Karmeier also emphasized the principle that the General Assembly is entitled to great deference when enacting legislation,¹¹² and further asserted that the majority offered short shrift to adjudicative responses to damage cap legislation in alternative jurisdictions.¹¹³

While Justice Karmeier's dissent offers a variety of cogent arguments that raise serious questions regarding the validity of the majority's points,¹¹⁴ it also captures the larger policy debate regarding medical malpractice damage cap liability. Justice Karmeier premised his dissent on President Obama's congressional directive regarding the need for healthcare reform to remedy rising national healthcare costs.¹¹⁵ The dissent contends that the General Assembly's enactment

107. *Id.* at 917 (Karmeier, J., concurring in part and dissenting in part). For an in-depth analysis of the dissent's argument and a discussion regarding the improprieties of the majority's opinion, see Ryan Kenneth June, Note, *Lebron v. Gottlieb Memorial Hospital: Why the Court Erred in Finding that Caps on Jury Awards Violate Separation of Powers*, 43 *LOY. U. CHI. L.J.* 881 (2012).

108. *Lebron*, 930 N.E.2d at 926–34.

109. *Id.* at 926.

110. *Id.* at 927–28 (“If anything, the opposite is true. The doctrine is constitutionally suspect. Accordingly, while remittitur may sometimes be employed by Illinois courts, it cannot, in any meaningful way, be viewed as an essential component of the judicial power vested . . . by the Illinois Constitution . . .”).

111. *Id.*

[T]he majority's analysis perpetuates the misconception . . . that legislatively imposed limits on damages in civil cases are comparable to traditional judicial remittiturs. They are not. When a court reduces a jury award to comply with a statutory damages cap . . . it is simply implementing a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable.

Id. (internal quotation marks omitted).

112. *Id.* at 920.

113. *Id.* at 932 (“Contrary to the apparent view of the majority, taking into account how other state courts have dealt with similar legal issues in similar circumstances is no threat to Illinois' sovereignty or the authority of Illinois' courts. It is simply good sense.”).

114. See generally June, *supra* note 107.

115. *Lebron*, 930 N.E.2d at 917 (Karmeier, J., concurring in part and dissenting in part). The majority took particular exception to the dissent's infusion of political rhetoric into its reasoning. *Id.* at 915 (majority opinion) (“[T]he Obama Administration's health-care reform efforts are not the backdrop against which we have decided the constitutionality of Public Act 94-677 [A]lthough we do not expect that the members of this court will always agree as to what the law

of the 2005 Act was a remedial measure consistent with those “nearly universal[ly] recogni[z]ed” concerns,¹¹⁶ in line with the theory that legislative action to effectuate healthcare reform is necessary to prevent the expenses of medical care from exceeding sustainable societal levels.¹¹⁷ The contrasting views of the majority and dissenting opinions in *Lebron* raise a fundamental question: is it possible to draft a damage cap statute that passes judicial scrutiny in Illinois without compromising the General Assembly’s underlying goals in implementing damage cap legislation?

III. ANALYSIS

A. *A Proposal That Harmonizes the Concerns of the Illinois Supreme Court with Those of the General Assembly*

Medical malpractice damage cap legislation enacted in other states contains unique provisions that serve to generate fair recovery and promote justice overall. As a result, these provisions should be considered for inclusion by the General Assembly when it drafts future damage cap legislation. For instance, the statutes enacted in Maryland, Utah, and West Virginia contain provisions that dictate annual adjustments to account for inflation.¹¹⁸ This is a measure worth including in damage cap legislation because it eliminates the need for statutory revision to account for inflation, an inevitable variable, as time progresses. Furthermore, to promote sound policy, the General Assembly should model a provision after South Carolina’s damage cap statute, which provides for a total waiver of the \$350,000 cap upon a jury determination that a defendant was “grossly negligent, wilful, wanton, or reckless.”¹¹⁹ Such a provision guards against egregiously poor healthcare and is necessary to maintain the integrity of the healthcare system that damage caps are intended to benefit.¹²⁰ Aside

is, or how to apply the law in a given case, we do expect that our disagreements will focus on the legal issues, providing a level of discourse appropriate to the state’s highest court.”).

116. *Id.* at 919.

117. *Id.*

118. See MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09(b)(1)(ii) (LexisNexis 2013); UTAH CODE ANN. § 78B-3-410(2)(a) (LexisNexis 2012); W. VA. CODE § 55-7B-8(c) (2008).

119. S.C. CODE ANN. § 15-32-220(A), (E) (2013).

120. For an alternative argument in support of waiving the cap as applied to gross negligence, see Kristen Zaharski, Comment, *Gambling on Goldilocks: Illinois Medical Malpractice Damage Caps and the Quest for “Just Right” Reform*, 45 J. MARSHALL L. REV. 917, 936 (2012) (“It is necessary to distinguish [between ordinary and gross negligence] because not only do medical errors occur, they are inevitable. Thus, it should follow that plaintiffs’ claims can be exempt from the statutory damage cap only if they demonstrate gross negligence in their treatments. This would likely reduce the number of lawsuits filed under the guise of negligence that are brought by disgruntled plaintiffs dissatisfied with treatment outcomes.”).

from these provisions, alternative components of damage cap legislation in other states are directly responsive to the concerns of the Illinois Supreme Court and, therefore, provide helpful guidance moving forward. Florida's statute is perhaps the most germane.¹²¹ Accordingly, this Comment explores it in some depth.

1. *An Examination of Florida's Noneconomic Damage Cap Statute*

The Florida statute caps noneconomic damages against a practitioner at \$500,000 per claimant.¹²² And, prior to *Estate of McCall v. United States*, it raised the ceiling for damages to \$1 million, regardless of the number of claimants, if the injuries result “in a permanent vegetative state or death.”¹²³ The statute provides that if a practitioner's negligence does not result in a vegetative state or death, the trial court may raise the ceiling to \$1 million should it determine “that a manifest injustice would occur unless increased noneconomic damages are awarded [due to] the special circumstances of the case, . . . and [t]he trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.”¹²⁴ Furthermore, the statute sets forth caps on noneconomic damages arising from negligence of nonpractitioner defendants, which differ in value but are structured similarly to those applicable to practitioner defendants.¹²⁵ For example, the statute caps damages at \$750,000 per claimant against nonpractitioner defendants, and \$1.5 million contingent upon the previously mentioned “manifest injustice” provision and a finding by the trier of fact that

121. FLA. STAT. § 766.118 (2011), *invalidated by* *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). In the 2014 case *Estate of McCall v. United States*, the Florida Supreme Court ruled that the cap was unconstitutional as applied to wrongful death cases as a violation of the state's equal protection clause. *McCall*, 134 So. 3d at 901. The court did not address the constitutionality of the cap as applied to personal injury medical malpractice actions when the victim survives. *Id.* at 915. The court held that the cap violated the equal protection clause on two grounds. First, it held that because the Florida cap limited the amount of recoverable damages in medical malpractice cases regardless of the number of claimants, it “arbitrarily diminished compensation for legally cognizable claims.” *Id.* at 901. Second, the court engaged in a comprehensive statistical review of the issues within Florida's healthcare system that allegedly necessitated the cap at its inception and determined that “the available evidence fails to establish a rational relationship between a cap on noneconomic damages and alleviation of the purported crisis.” *Id.* at 906, 909. Despite the court's ruling, many aspects of Florida's cap provide helpful guidance for drafting damage cap legislation directly responsive to the concerns of the Illinois Supreme Court. Furthermore, the proposed legislation discussed in this Comment modifies the Florida cap to alleviate concerns regarding the inequitable treatment of injured plaintiffs. See *infra* notes 194–216 and accompanying text.

122. FLA. STAT. § 766.118(2)(b).

123. *Id.*

124. *Id.*

125. § 766.118(3).

“the defendant’s negligence caused a catastrophic injury.”¹²⁶ Importantly, the statute defines the term “catastrophic injury” as a “permanent impairment,” a category that includes spinal cord injuries involving paralysis, amputation of various extremities, various brain disorders, and severe burns.¹²⁷

Florida’s damage cap statute, which is significantly more detailed than the majority of damage cap legislation,¹²⁸ offers multiple provisions that address the concerns of the Illinois Supreme Court. First, it lends specific consideration to the various unique circumstances that give rise to medical negligence cases by applying individualized caps to practitioners and nonpractitioners,¹²⁹ and by applying heightened caps when injuries are particularly severe.¹³⁰ These components avoid arbitrary and mechanical limitations on recovery, thus protecting against the special legislation concerns espoused in *Wright* and *Best*.¹³¹ However, as demonstrated by the *McCall* opinion, the Florida legislature would have been wise either to impose a heightened cap or to allow for waiver of the cap when more than one claimant is injured or killed by a defendant’s medical negligence. This concept will be discussed in depth below.¹³²

Second, by vesting the court with the authority to invoke the “manifest injustice provision”¹³³ to raise the cap’s ceiling, the statute provides the court with a mechanism to alter a damage award in certain circumstances and, therefore, does not summarily usurp the court’s discretionary authority to review jury verdicts.¹³⁴ This provision di-

126. § 766.118(3)(a), (b).

127. § 766.118(1)(a).

128. See, for example, California’s damage cap statute, CAL. CIV. CODE § 3333.2(b) (West 1997) (implementing a flat cap on noneconomic damages at \$250,000), and Hawaii’s damage cap statute, HAW. REV. STAT. § 663-8.7 (2012) (“Damages recoverable for pain and suffering . . . shall be limited to a maximum award of \$375,000.”).

129. FLA. STAT. § 766.118(2), (3) (2011).

130. § 766.118(2)(b), (3)(b).

131. See *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078 (Ill. 1997); *Wright v. Cent. Du Page Hosp. Ass’n*, 347 N.E.2d 736, 743 (Ill. 1976). By limiting the recovery of noneconomic damages only, the statute also guards against the concern of the *Wright* court that the cap may prevent a plaintiff from recovering medical expenses resulting from a healthcare provider’s negligence. See *Wright*, 347 N.E.2d at 742. However, because the vast majority of damage cap statutes apply only to noneconomic damages, this aspect does not warrant further discussion. See generally ADVOCACY RES. CTR., AM. MED. ASS’N, CAPS ON DAMAGES (2011), available at <http://www.thehybridsolution.com/articles/capsdamages.pdf>.

132. See *infra* notes 147–150 and accompanying text.

133. § 766.118(2)(b), (3)(b).

134. § 766.118(2)(b) (permitting the trial court to increase the damage cap ceiling from \$500,000 to \$1 million if it “determines that a manifest injustice would [otherwise] occur” and the trier of fact “determines that the defendant’s negligence caused a catastrophic injury to the patient.”).

rectly pertains to the separation of powers concern that forms the basis of the court's holding in *Lebron*.¹³⁵ However, given the supreme court's reasoning in *Lebron*,¹³⁶ the limitations regarding the applicability of the manifest injustice provision as expressed in the Florida statute leave the cap susceptible to invalidation on separation of powers grounds. As such, the cap must be modified in order to safeguard against constitutionality concerns.

In *Lebron*, the court stated that “the inquiry under the separation of powers clause is . . . whether the legislature, through its adoption of the damage caps, is exercising powers properly belonging to the judiciary.”¹³⁷ A cogent argument can be made that the Florida statute, which permits the court to increase the damage cap to a predetermined amount if a manifest injustice would otherwise occur,¹³⁸ “exercis[es] powers properly belonging to the judiciary.”¹³⁹ For instance, under the Florida statute, if a jury determines that an infant suffered a catastrophic injury due to practitioner negligence and awards \$5 million in noneconomic damages, that verdict is automatically decreased to \$1 million through the operation of the statute even if the court invokes the manifest injustice provision. In reviewing the verdict, the judge is confined to the \$1 million predetermined limit and has no authority to increase the award.¹⁴⁰ Thus, the statute usurps the judge's authority to review damages in excess of the legislative cap, which directly violates the separation of powers clause.¹⁴¹

Furthermore, pursuant to the Florida statute, implementation of the manifest injustice provision requires both “a finding [by the court] that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe,”¹⁴² and that “the defendant's negligence caused a catastrophic injury to the patient.”¹⁴³ As previously mentioned, the statute then provides legis-

135. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 908 (Ill. 2010) (“Notwithstanding [the Act's narrower scope], the encroachment upon the inherent power of the judiciary is the same in the instant case as it was in *Best*.”).

136. *Id.*

137. *Id.*

138. § 766.118(2)(b)(1), (3)(b)(1).

139. *Lebron*, 930 N.E.2d at 908.

140. FLA. STAT. § 766.118(2)(c) (“The total noneconomic damages recoverable by all claimants from all practitioner defendants under this subsection shall not exceed \$1 million in the aggregate.”).

141. *See Lebron*, 930 N.E.2d at 911 (“[T]he statute here requires the court to enter a judgment at variance with the jury's determination and without regard to the court's duty to consider, on a case-by-case basis, whether the jury's verdict is excessive as a matter of law.”).

142. § 766.118(2)(b)(1).

143. § 766.118(2)(b)(2).

latively determined conditions that qualify as “catastrophic.”¹⁴⁴ Accordingly, the statute not only prevents the court from awarding damages in excess of a predetermined amount, but also predicates the applicability of the manifest injustice provision on legislatively predetermined criteria.¹⁴⁵ Therefore, it is likely that the statute “unduly infringe[s] upon the inherent powers of judges” and violates the separation of powers clause of the Illinois constitution.¹⁴⁶

Various commentators assert that the General Assembly would be ill-advised to employ Florida’s manifest injustice provision.¹⁴⁷ Although the provision clearly does not represent an ultimate solution to the judicial and legislative damage cap gridlock in Illinois as written, it does provide a viable, albeit incomplete, response to the separation of powers concerns espoused in *Best* and *Lebron*.¹⁴⁸ However, by either (1) eliminating the “catastrophic injury” provision; or (2) revising it to include a catchall definition such as “or any other injury deemed catastrophic by the trier of fact,” and altering the manifest injustice provision to entirely lift the cap if invoked, the statute would confer upon the court the authority to grant awards in excess of the damage cap on a discretionary basis. As a result, the legislation would temper the separation of powers concerns discussed in *Lebron*.¹⁴⁹ Although these modifications directly guard against constitutionality concerns, they also leave the court with little guidance regarding when to invoke the manifest injustice provision.¹⁵⁰ Accordingly, the potential options for guiding the invocation of the manifest injustice provision are addressed below.

2. *Implementing the Manifest Injustice Provision*

The first option for implementing the manifest injustice provision is to require that the court determine by “clear and convincing evi-

144. § 766.118(1). Conditions include, *inter alia*, “[s]evere brain or closed head injury as evidenced by . . . [s]evere communication disturbances [and] . . . [s]evere episodic neurological disorders.” *Id.*

145. § 766.118(1)(a), (2)(b)–(c).

146. *Lebron*, 930 N.E.2d at 905 (quoting *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997)). The Florida statute was challenged on separation of powers grounds in *M.D. v. United States*, 745 F. Supp. 2d 1274 (M.D. Fla. 2010). There, the court justified the legislation on public policy grounds and held that it did “not usurp the authority of the judiciary.” *Id.* at 1281.

147. *See, e.g., Zaharski, supra* note 120, at 937 (“[I]t would not be prudent for Illinois to adopt a ‘manifest injustice’ provision similar to that set forth in Florida’s legislation.”).

148. *See Lebron*, 930 N.E.2d at 908–09; *Best*, 689 N.E.2d at 1081.

149. *Lebron*, 930 N.E.2d at 905.

150. Commentators have noted this concern in regard to Florida’s damage cap in its original form. *See, e.g., Zaharski, supra* note 120, at 937 (“[T]he ‘manifest injustice’ standard is inherently subjective.”).

dence” that imposition of the cap would serve as a manifest injustice regarding the plaintiff’s ability to recover. The clear and convincing evidence standard imposes a more stringent burden than the preponderance of the evidence standard,¹⁵¹ and is generally applied when a party challenges the validity of a statute.¹⁵² In this context, the heightened standard is proper because the challenging party must overcome the legislation’s presumption of constitutionality.¹⁵³ Invoking the manifest injustice provision essentially waives the damage cap statute. As a result, the argument for application of the clear and convincing evidence standard is strong.¹⁵⁴

In order to effectively determine whether clear and convincing evidence necessitates waiver of the cap, the trier of fact should first value the amount of applicable damages, and then separate the award into economic and noneconomic categories.¹⁵⁵ If the noneconomic portion of the award exceeds the damage cap, the court must then consider whether clear and convincing evidence demonstrates that failure to waive the cap would result in a manifest injustice due to the specific circumstances of the case.¹⁵⁶ However, juries are typically offered minimal guidance and great latitude with respect to valuing noneconomic damages.¹⁵⁷ Thus, determining whether a jury’s findings on the damages issue support waiver of the cap by clear and convincing evidence becomes a very difficult proposition. Accordingly, the trier of fact should be required to consider and report its findings on

151. *In re D.T.*, 818 N.E.2d 1214, 1225 (Ill. 2004).

152. 11 BUCHWALTER ET AL., *ILLINOIS LAW AND PRACTICE* § 43, at 375–76 (Joseph J. Bassano ed., 2006).

153. *Id.* at 374–75.

154. *Id.* at 373–74 (“Generally, any investigation as to whether a legislative body has exceeded its powers must begin with the presumption that its acts are valid. . . . A strong presumption of constitutional validity attaches to legislation. . . . It is the duty of the courts to presume that a statute under constitutional attack is valid.”).

155. For example, the Oklahoma statute has the jury divide the award into economic and noneconomic damages if it does not find the defendant negligent by clear and convincing evidence. This is an inquiry undertaken only if less than nine members of the jury find the defendant guilty of willful or wanton conduct. 8 VICKI LAWRENCE MACDOUGALL, *OKLAHOMA PRACTICE SERIES: OKLAHOMA PRODUCT LIABILITY LAW* § 12:16(E), at 481 (2006).

156. This proposal mimics the Florida damage cap statute, which permits the court to raise the cap “based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe.” FLA. STAT. § 766.118(2)(b)(1) (2011).

157. David M. Studdert et al., *Rationalizing Noneconomic Damages: A Health-Utilities Approach*, L. & CONTEMP. PROBS., Summer 2011, at 57, 57–58. “For the most part, courts and legal scholars have thrown their hands up and surrendered to the view that the magnitude of human suffering is essentially unknowable in any objective sense. The problem has been left to juries, ‘in the apparent hope that jurors can fill the intellectual void.’ Courts provide little guidance and give juries wide deference on how to arrive at noneconomic-damages figures.” *Id.* (footnote omitted).

various objective damages factors when making its determination, which will thoroughly inform the court's decision regarding waiver of the cap. These objective factors are addressed below.¹⁵⁸

When attacking the validity of a statute, the clear and convincing evidence standard requires that the challenging party assert specific facts in support of its stance rebutting the presumption of validity.¹⁵⁹ As applied here, the trier of fact should similarly set forth specific evidence based on objective methods that support its ultimate damages valuation. This informs the court of the basis for its award and provides the court with a thorough basis to determine whether clear and convincing evidence necessitates a waiver of the cap. This will not only serve to diminish the unpredictability of awards,¹⁶⁰ but it will help standardize the implementation of the manifest injustice provision. While various commentators have examined a wide range of methods guiding the determination of noneconomic damages,¹⁶¹ they are explored only briefly here.

Under one method, the trier of fact could make an informed damage evaluation by examining noneconomic damage awards arising from injuries similar in nature to those under consideration, and then compare the value of the award at issue to those previous awards,¹⁶² promoting consistency and predictability among awards.¹⁶³ Under another method, the trier of fact could consider a source like the AMA's Guides to the Evaluation of Permanent Impairment (AMA Guides).¹⁶⁴ The AMA Guides provide a structured system for grading permanent disability or impairment.¹⁶⁵ As such, "[t]he assumption is

158. See *infra* notes 160–170 and accompanying text.

159. BUCHWALTER ET AL., *supra* note 152, § 43, at 376 (“The burden is not sustained by making allegations which are merely general conclusions of fact or law; the facts relied on to rebut the presumption of constitutionality must be specifically set forth.”).

160. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 908 (1989). “Determination of awards on an ad hoc and unpredictable basis, especially for ‘non-economic’ losses, also tends to subvert the credibility of awards and hinder the efficient operation of the tort law’s deterrence function.” *Id.* (footnote omitted).

161. For an in-depth examination of various approaches to effective evaluation of noneconomic damages, see generally Studdert et al., *supra* note 157. See also Bovbjerg et al., *supra* note 160.

162. See Studdert et al., *supra* note 157, at 68 (“Precedential data could be provided to adjudicators in raw form—little more than brief descriptions of the injuries considered in previous, similar cases together with the noneconomic award the injury attracted . . .”).

163. *Id.* at 69. One strength of this precedential approach is that future awards stay consistent with the original valuation upon which they are based. *Id.*

164. See generally AM. MED. ASS’N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (Robert D. Rondinelli & Christopher R. Brigham eds., 6th ed. 2008).

165. Studdert et al., *supra* note 157, at 72 (“Use of this tool leads to ratings, first expressed as a percentage loss of function for the particular organ system under examination, and then translated into ‘whole-person impairment ratings.’”).

that the impairment ratings provide a reasonable proxy for the extent of disability.”¹⁶⁶ Purportedly, the ratings indicate the extent to which an individual’s injuries will decrease her ability to engage in common daily activities, and also represent her subjective discomfort or impairment,¹⁶⁷ which are both measurements that relate to noneconomic loss evaluation.¹⁶⁸ Other methods, such as presenting the trier of fact with a matrix to value noneconomic damages based on factors such as age and severity of injury,¹⁶⁹ could also be helpful in guiding the evaluation. While this list of methods for assisting the jury in determining noneconomic damages is far from exhaustive, the fundamental point is that these options provide the jury with concrete objective methods to reach its damages valuation. They provide the court with a sound basis for determining whether clear and convincing evidence requires waiver of the cap. In drafting future damage cap legislation, the General Assembly should determine which objective methods would be most effective in guiding the trier of fact’s evaluation of noneconomic damages. It should include a provision requiring the trier of fact to provide reasoning derived from those methods to best inform the court’s decision when considering waiver of the cap.¹⁷⁰

With regard to the procedural implementation of the clear and convincing standard, various aspects of Oklahoma’s damage cap statute, which expired in 2010 pursuant to its own provisions,¹⁷¹ are instructive. According to that statute, if a jury returns a verdict in excess of the \$300,000 cap, the jury is required to tender to the judge a form representing whether a minimum of nine jury members found evidence of willful or wanton conduct by the defendant.¹⁷² If the jury so finds, the cap is waived.¹⁷³ This serves as a viable model for invoking the manifest injustice provision. If the jury returns a verdict in excess of the cap on noneconomic damages, it should then be required to submit a form to the judge listing the aforementioned objective dam-

166. *Id.*

167. *Id.* at 73.

168. *Id.*

169. See Bovbjerg et al., *supra* note 160, at 939 (“[C]onstructing a matrix requires policymakers to decide the categories of injury to use, the ‘worth’ of the categories relative to one another, and the general dollar level of recoveries desirable.”).

170. This is consistent with the requirement that, when rebutting the presumptive validity of a statute, the challenging party must support its stance by specific facts rather than mere “general conclusions of fact or law.” BUCHWALTER ET AL., *supra* note 152, at 376.

171. MACDOUGALL, *supra* note 151, at 481.

172. *Id.* While the jury makes this determination in accordance with a preponderance of the evidence standard, it is worth noting that the statute employs a clear and convincing standard for waiver of the cap if the underlying cause of action pertains to pregnancy, labor and delivery, or emergency care. *Id.*

173. *Id.*

age factors on which the award is based. If the judge determines that the jury's submission demonstrates that imposition of the cap would result in a manifest injustice by clear and convincing evidence, the court should waive the cap.

3. *When Should Evidence on Damages Be Presented to the Trier of Fact? The Traditional Approach Versus a Bifurcated System.*

In a traditional "unitary" trial, there is only one trial phase, during which the jury hears the totality of evidence and makes findings on all pertinent issues simultaneously.¹⁷⁴ As applied to the legislation proposed here, a unitary trial would require the parties to present evidence regarding liability as well as the predetermined damages factors during the same trial phase. While this proposal is consistent with the unitary approach,¹⁷⁵ the requirement that the trier of fact must base its findings on multiple specific objective methods raises concerns regarding judicial economy; namely, that it will force parties to engage in time-consuming evidentiary showings pertaining to damages. One solution to this potential issue is trial bifurcation.¹⁷⁶

The most common version of trial bifurcation involves a process in which the jury first determines the issue of liability and, contingent upon a finding for the plaintiff on that issue, then hears evidence on and makes its determination regarding damages.¹⁷⁷ A major advantage of bifurcation is that the jury's finding on the first issue often precludes the need to address the remaining issues, thus expediting the trial process by eliminating the presentation of evidence regarding an ultimately irrelevant issue.¹⁷⁸ In the legislation proposed here, this advantage is amplified because the presentation of damages evidence is likely to be more involved than in a typical trial, in which the parties are not required to present evidence of damages using a variety of objective methods.

174. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 706 (2000) ("In a unitary trial, the jury hears all of the evidence and decides all of the issues at the same time.").

175. *Id.*

176. *Id.* at 705 ("One of the greatest potential benefits of issue bifurcation is increased judicial efficiency.").

177. *Id.* at 705-06 ("In its most familiar form, the issues of liability and damages are tried separately, with the jury usually hearing and deciding liability first. . . . In the large share of those cases where the jury finds for the defendant on liability[,] . . . all of the trial time spent presenting evidence on damages has been wasted.").

178. *Id.* at 705 ("Frequently the jury's disposition of the first issue will obviate the need to try the remaining issues.").

In Illinois, if any party objects to bifurcation of liability and damages, the trial judge is prohibited from ordering bifurcation.¹⁷⁹ Disadvantages of bifurcation include (1) prejudice to plaintiffs because bifurcation often results in more favorable outcomes for the defendant;¹⁸⁰ and (2) as applied to the medical malpractice context, bifurcation may cause witnesses to testify twice: once as to liability, and once as to damages.¹⁸¹ It is clear that bifurcation does not feasibly apply to cases where liability and damages overlap¹⁸² because, in those cases, it is very difficult to separate the issues in a multi-phased trial.¹⁸³ However, outside of its positive impact on judicial economy,¹⁸⁴ bifurcation can also have distinct advantages over the unitary system in medical malpractice cases. Specifically, when evidence of damages is presented in a unitary trial, it invokes feelings of sympathy and emotion, which undeniably impact the issue of liability.¹⁸⁵ In situations where the manifest injustice provision is applicable, evidence of extreme pain and suffering will likely be forceful, making the mitigating impact of bifurcation particularly beneficial.¹⁸⁶ Therefore, although bifurcation of medical malpractice proceedings will not always be proper, its positive impact under the right circumstances warrants a

179. *Richter v. Nw. Mem'l Hosp.*, 532 N.E.2d 269, 274 (Ill. App. Ct. 1988). This rule does not apply to bifurcation in all circumstances. For instance, in the context of marriage dissolution, the court can order bifurcation if it determines “that bifurcation is necessary to protect and promote the emotional and mental well-being of the parties’ children.” *In re Marriage of D.T. Wade*, 946 N.E.2d 485, 490 (Ill. App. Ct. 2011).

180. Gensler, *supra* note 174, at 705.

181. David N. Hoffman & Jeffrey R. Nichols, *Bifurcation of Medical Malpractice Trials*, N.Y. St. B.J., Mar./Apr. 1998, at 38, 38 (1998) (“The standard argument against bifurcation in the medical malpractice context is that the plaintiff’s attorney is utilizing the same witnesses on the liability and damage portions of the trial. Thus plaintiffs’ attorneys argue that a single trial fosters judicial economy by saving time through not having to recall the same witnesses for the damages phase.”).

182. Dan Cytryn, *Bifurcation in Personal Injury Cases: Should Judges Be Allowed To Use the “B” Word?*, 26 NOVA L. REV. 249, 257 (2001) (“Bifurcation of liability and damages is inappropriate in medical malpractice cases A medical malpractice case requires medical testimony in the liability, causation, and damage aspects of the trial. In most cases, the treating physician’s testimony will be required to establish both liability and damages [I]t is difficult to separate at what point the medical testimony on liability ends, and the medical testimony on damages begins.”).

183. *Id.*

184. Gensler, *supra* note 174, at 706. Alternative arguments in favor of bifurcation include its potential to clarify and simplify issues. Hoffman & Nichols, *supra* note 181, at 38.

185. Gensler, *supra* note 174, at 741.

186. Hoffman & Nichols, *supra* note 181, at 38 (“Since general liability lawsuits are routinely bifurcated, [the impact of sympathy] is normally eliminated.”).

more flexible approach than the current Illinois rule precluding bifurcation upon the objection of any party.¹⁸⁷

In considering whether to bifurcate a medical malpractice proceeding, Illinois judges should make the determination on an ad hoc basis, lending consideration to the above mentioned factors¹⁸⁸ and any other factors deemed material by the General Assembly. This is modeled after Federal Rule of Civil Procedure 42(b), which vests the court with the authority to order a separate trial of “issues, claims, crossclaims, counterclaims, or third-party claims”¹⁸⁹ in order to promote “convenience, to avoid prejudice, or to expedite and economize.”¹⁹⁰ By revising the current Illinois bifurcation rule to reflect a balance-oriented approach, judges would make the decision regarding bifurcation on a case-by-case basis, thus promoting judicial economy¹⁹¹ and alleviating the impact of prejudice due to juror sympathy and emotion.¹⁹² This approach would also control for concerns regarding potential prejudice to plaintiffs and would allow the judge to opt against bifurcation when the issues of damages and liability intertwine.¹⁹³ Accordingly, the process would be beneficial for all parties involved and would have a positive impact on the judicial system overall.

IV. IMPACT AND RECOMMENDATIONS

A. *The Proposed Legislation*

The legislation proposed in this Comment contains a variety of features that will ultimately harmonize the Illinois Supreme Court’s constitutionality concerns and the General Assembly’s desire to enact a statute limiting the amount of recoverable damages stemming from medical malpractice claims.¹⁹⁴ First, in order to promote fair awards and incentivize good healthcare practices, the cap will not apply when a care provider is found to have acted in a wanton, reckless, or willful manner.¹⁹⁵ Second, in order to guard against separation of powers

187. *Richter v. Nw. Mem’l Hosp.*, 532 N.E.2d 269, 274 (Ill. App. Ct. 1988); see also *Mason v. Dunn*, 285 N.E.2d 191, 193 (Ill. App. Ct. 1972).

188. For a similar proposal, see Hoffman & Nichols, *supra* note 181, at 38 (“[T]rial judges should analyze the issue of bifurcation on a case by case basis, balancing the prejudice to the physician or hospital from not bifurcating the trial against the presumed repetition of the plaintiff’s expert witness’s testimony.”).

189. FED. R. CIV. P. 42(b).

190. *Id.*

191. Gensler, *supra* note 174, at 706.

192. *Id.* at 705.

193. Cytryn, *supra* note 182, at 257.

194. See *supra* notes 118–193 and accompanying text.

195. See *supra* notes 119–121 and accompanying text.

concerns, the statute will include a manifest injustice provision that vests the judge with the authority to waive the cap if the trier of fact returns a noneconomic damages award in excess of the cap.¹⁹⁶ Third, because a presumption of validity underlies enacted legislation, a party seeking to waive the cap must show by clear and convincing evidence that a failure to do so would result in manifest injustice.¹⁹⁷ Fourth, in order to thoroughly inform the judge's determination of whether clear and convincing evidence requires a waiver of the cap, the party seeking to waive the cap must present evidence on predetermined objective damages criteria, and the trier of fact must tender a form to the judge explaining the specific criteria on which the award is based.¹⁹⁸ Fifth, because this damages provision has the potential to result in prolonged damages proceedings, the judge must have the authority to bifurcate the liability and damages phases on an ad hoc basis in order to promote convenience, to avoid prejudice, or to expedite and economize the litigation process.¹⁹⁹

This proposal has the potential to benefit the state's healthcare and judicial systems concurrently. Specifically, it has the ability to lower health insurance premiums and incentivize doctors to practice within the state's borders, thereby resolving longstanding issues related to high healthcare costs and poor patient access²⁰⁰ while simultaneously promoting judicial economy within the state's congested court system. Further, by providing a mechanism to waive the cap when its imposition would be unjust, the proposed legislation mitigates the concern that plaintiffs will hesitate to file viable medical malpractice claims for fear of the cap's limitation on recoverable damages.²⁰¹ Moreover, although the option to waive the cap may cut against the intended goals of damage cap legislation, the heightened clear and convincing evidence standard minimizes this concern by ensuring that waiver of the cap occurs only in limited circumstances.

The imposition of a noneconomic damage cap to medical malpractice claims has the ability to alleviate many of the specific problems currently affecting Illinois' healthcare system.²⁰² For instance, the 2010 Illinois New Physician Workforce Study, which surveyed 1,738 residents and fellows in Illinois, found that half of graduating physicians planned to leave Illinois and practice in alternative states, citing

196. See *supra* notes 151–173 and accompanying text.

197. See *supra* notes 156, 159 and accompanying text.

198. See *supra* notes 157–169 and accompanying text.

199. See *supra* notes 174–193 and accompanying text; see also FED. R. CIV. P. 42(b).

200. AM. MED. ASS'N, *supra* note 5, at 5, 13.

201. See *supra* notes 151–173 and accompanying text.

202. Goldhaber & Grycz, *supra* note 6, at 32.

“the medical malpractice liability environment” as “a major consideration” underlying their decision to relocate.²⁰³ Interestingly, the survey contained a question asking whether respondents were aware of the *Lebron* decision and how its ruling affected their decision of where to locate following graduation.²⁰⁴ Over half of the respondents who planned to practice outside of Illinois stated that the opinion “affirm[ed] their decision to leave the state and reinforce[d] the negative environment they believe exists due to a lack of tort reform, high medical malpractice premiums, . . . and what they perceive to be a state legal profession that is anti-physician.”²⁰⁵ This is a particularly alarming sentiment because patient access to healthcare in Illinois is in need of improvement,²⁰⁶ and the migration of graduating physicians to alternative states will only exacerbate the issue.

Many graduating physicians in the aforementioned study cited “the high costs [of] medical malpractice insurance” as a major reason for planning to leave Illinois and relocate elsewhere.²⁰⁷ Noneconomic damage caps have been found to “lower medical liability premiums and lower healthcare costs.”²⁰⁸ Thus, this proposal has the ability to reverse the trend of limited access to healthcare in Illinois by lowering the costs incurred by medical practitioners within the state, thereby increasing the state’s retention of graduating physicians. Perhaps more importantly, it has the potential to lighten the shadow of “hostility” created by the *Lebron* opinion and convey a more physician-friendly message to medical practitioners within the state.²⁰⁹ Furthermore, because noneconomic damage caps lower healthcare costs by decreasing “the health insurance premiums of self-insured plans,”²¹⁰ the proposed legislation will also benefit the state’s citizens by lowering healthcare costs overall.

A unique benefit of the legislation proposed in this Comment is that by vesting the judge with the authority to waive the cap when imposition of the restriction would cause unfair levels of compensation, it guards against the inequitable results feared by many damage cap opponents. Take, for example, an incident similar to *Lebron*, in which a

203. ILL. HOSP. ASS’N, ILLINOIS NEW PHYSICIAN WORKFORCE STUDY 4 (2010), available at <http://www.ihatoday.org/uploadDocs/1/phyworkforcestudy.pdf>.

204. *Id.* at 22.

205. *Id.*

206. *Id.* at 9 (“Illinois ranks 25th in the nation in active patient care physicians per 100,000 state residents.”).

207. *Id.* at 15.

208. AM. MED. ASS’N, *supra* note 5, at 13.

209. *See* ILL. HOSP. ASS’N, *supra* note 203, at 21.

210. AM. MED. ASS’N, *supra* note 5, at 9.

newborn infant sustains a marked loss of mental function and a severely debilitating handicap due to the medical negligence of the attending obstetricians. In this example, the plaintiff could present clear and convincing evidence demonstrating the patent injustice that would result from limiting her available compensation to a predetermined amount and leaving her family significantly undercompensated for her noneconomic injuries. Although no level of compensation can truly account for the newborn's injuries, the proposed legislation would allow the court to lift the cap and issue a verdict more proportionate to, among other things, the infant's loss of a normal life and the family's emotional burden moving forward. Thus, the legislation is sensitive to the facts of a given case, and does not apply when its application would result in a clearly deficient judgment.

Although the intended goal of this legislation is to lower healthcare costs and promote access to healthcare, it will simultaneously result in a variety of ancillary benefits pertaining to judicial economy. In particular, damage caps have been found to increase settlement rates²¹¹ because they increase the predictability of trial outcomes.²¹² This increase in settlement rates will decrease the congestion within Illinois' overly burdened judicial system.²¹³ The potential for increased settlement rates is not the only avenue by which this legislation will promote judicial economy. By granting the judge discretionary authority to bifurcate the liability and damages phases of the proceedings when issues of liability and damages do not intertwine,²¹⁴ a finding in favor of the defendant on liability will preclude the need for a damages phase, resulting in an expedited trial process.²¹⁵ Therefore, the proposed legislation not only resolves issues within Illinois' healthcare system while guarding against inequitable results, but it concurrently promotes judicial economy, which is of particular importance due to the state's highly congested court system.²¹⁶

211. See Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341, 363 (1999).

212. *Id.*

213. *Erwin ex rel. Erwin v. Motorola, Inc.*, 945 N.E.2d 1153, 1174 (Ill. App. Ct. 2011) ("Cook County's docket is congested. . . . [I]n 2007, Cook County disposed of about 1.8 million cases . . .").

214. See *supra* notes 174–193 and accompanying text.

215. See *supra* notes 174–193 and accompanying text.

216. *Erwin*, 945 N.E.2d at 1174.

V. CONCLUSION

The value of jury awards stemming from medical malpractice claims is on the rise.²¹⁷ This is particularly true in Illinois, which is now considered a “crisis state” due to its increased insurance premiums, diminished patient access to healthcare, and in turn, decreased medical practices sustainability.²¹⁸

The Illinois General Assembly has attempted to combat these concerns numerous times, most recently through the enactment of the 2005 Act, which capped noneconomic damages at \$500,000 for physicians and \$1,000,000 for hospitals.²¹⁹ The 2005 Act ultimately met the same fate as its predecessors, as it was held unconstitutional in the 2010 Illinois Supreme Court case *Lebron v. Gottlieb Memorial Hospital*.²²⁰

The legislation proposed in this Comment evades the concerns of the Illinois Supreme Court by employing a manifest injustice provision that vests the court with the authority to waive the cap if it determines by clear and convincing evidence that failure to do so would result in a manifest injustice. It also calls for a discretionary approach to trial bifurcation of medical malpractice proceedings in which the judge has the authority to bifurcate trials when it would serve to promote judicial economy. This proposal has the potential to heal the wounded healthcare system in Illinois while simultaneously avoiding the concerns of the state’s supreme court. Accordingly, it has the ability to lighten the shadow of the healthcare crisis within the state’s borders, reversing the negative healthcare climate to the benefit of the state’s citizens.

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217. *See supra* note 1 and accompanying text.

218. *See supra* note 5 and accompanying text.

219. *See supra* notes 8–9 and accompanying text.

220. *See supra* notes 78–105 and accompanying text.

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