



Protecting Punitive Damage Caps

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Constitutionality of Non-Economic and Punitive Damage Caps

Walter H. Boone and J. Chase Bryan

In response to increasingly high jury awards and the resulting increase in commercial liability insurance premiums, states began enacting punitive and non-economic damage cap statutes in the mid-1970s.¹ At present, thirty-one states cap non-economic damages by statute,² and twenty-two states have enacted punitive damage cap statutes of some sort.³ To be sure, questions regarding the appropriateness of cap statutes have generated not only heated scholarly debate, but litigation as well.

Almost all non-economic damage cap statutes have been challenged on constitutional grounds at some point since their enactment, but these challenges have been largely unsuccessful.⁴ In fact, supreme courts in Alabama, Florida, Georgia, Illinois, Missouri, New Hampshire, Oregon, and Washington are the only courts to have declared their respective state non-economic damage cap statutes unconstitutional

either altogether or in certain circumstances.⁵ Other states, like Mississippi and Nevada, await decisions regarding the constitutionality of the state's damage caps.⁶ Successful challenges to the constitutionality of punitive damage cap statutes have also been rare, but high courts in Ohio, Alabama, and Arkansas have struck down these caps on various grounds.⁷ Despite the differences in the scope of the various cap statutes, the outcomes of constitutional challenge cases, and the approaches states take to dealing with (or not dealing with) so-called runaway jury awards, the legal arguments on both sides of the aisle on this issue are fairly consistent and well-developed. Arguments range from claims that cap statutes violate the right to a jury trial on the plaintiff's side, to the patent "legitimate state interest" argument employed by proponents of the caps.⁸ The following data deal with the most common and effective arguments for and against the constitutionality of non-economic and punitive damage caps, outline the statutory schemes for punitive damages by state, and provide a glimpse into the current legal landscape on this topic on a national scale.

1 Kathryn Vezina, *Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayer or is it the Dragon?*, 42 Me. L. Rev. 219, 220 (1990).

2 See Table 2.

3 See Table 3.

4 See Table 1.

5 See Table 1.

6 *Learmonth v. Sears, Roebuck and Co.*, 631 F.3d 724, 739 (5th Cir. 2011) (awaiting answer to certified question regarding constitutionality of Mississippi non-economic damage cap).

7 See *Infra* pp. 15-16.

8 See Table 1.

Table 1: CONSTITUTIONALITY OF NON-ECONOMIC DAMAGES CAPS BY STATE

STATE	CAPS	Challenge	HOLDING/REASONING/STATUTORY LAW
Alabama	§ 6-5-544 Cap on noneconomic damages in medical malpractice actions: \$400,000.	Constitutionality challenged by <i>Moore v. Mobile Infirmary Ass'n</i> , 592 So. 2d 156 (Ala. 1991)	UNCONSTITUTIONAL. Statutory cap violates right to jury trial and equal protection clause in medical malpractice cases.

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Alaska	<p>AS § 09.17.010 Cap on noneconomic damages in all tort actions: \$400,000 (or life expectancy × \$8,000); for severe permanent injury or disfigurement, \$1,000,000 (or life expectancy × \$25,000).</p> <p>AS § 09.55.549 Cap on noneconomic damages in medical malpractice actions: \$250,000; \$400,000 for wrongful death or severe permanent impairment.</p>	<p>Constitutionality challenged by <i>Evans v. State</i>, 56 P.3d 1046 (Alaska 2002)</p> <p>Cap has not been challenged.</p>	<p>CONSTITUTIONAL. Statutory cap does not violate right to jury trial, substantive due process, the separation of powers, or the bar against “special legislation.” The state has a legitimate interest in capping non-economic damages.</p>
Arizona	No cap	Ariz. Const., art. 2 § 31, Art. 18 § 6	State constitution prohibits caps on recoverable damages.
Arkansas	No cap	Ark. Const., art. 5 § 32	State constitution prohibits limiting recoverable damages resulting from injury or death.
California	<p>Cal.Civ.Code § 3333.2 Cap on noneconomic damages in medical malpractice actions: \$250,000.</p> <p>Cal.Civ.Code § 3333.4 Bar to recovery of noneconomic damages by certain categories of injured automobile owners and drivers, including uninsured motorists and drunk drivers.</p>	<p>Constitutionality challenged by <i>Fein v. Permanente Med. Grp.</i>, 695 P.2d 665 (Cal. 1985) and <i>Hoffman v. U.S.</i>, 767 F.2d 1431 (9th Cir. 1985).</p> <p>Constitutionality challenged by <i>Quackenbush v. Superior Court</i>, 60 Cal. App.4th 454 (1997)</p>	<p>CONSTITUTIONAL. Statutory cap does not violate equal protection or due process clauses because it is rationally related to a legitimate state interest.</p> <p>CONSTITUTIONAL. Cap does not violate due process, equal protection or “one subject” rule.</p>
Colorado	<p>C.R.S.A. § 13-21-102.5 Cap on noneconomic damages in all tort actions other than medical malpractice: \$250,000; unless clear and convincing evidence that greater award is justified, then award may not exceed \$500,000.</p> <p>C.R.S.A § 13-64-302 Cap on noneconomic damages in medical malpractice actions: \$300,000.</p>	<p>Challenged by <i>Scharrel v. Wal-Mart Stores</i>, 949 P.2d 89 (Colo.App. 1997)</p> <p>Challenged by <i>Scholz v. Metro. Pathologists, P.C.</i>, 851 P.2d 901 (Colo. 1993) and <i>Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.</i>, 95 P.3d 571 (Colo. 2004)</p>	<p>CONSTITUTIONAL. Cap does not violate equal protection or due process or deny the right of access to the courts which is guaranteed by State Constitution.</p> <p>CONSTITUTIONAL. Statutory cap does not infringe upon any fundamental right, and it is reasonably related to a legitimate state interest</p>
Connecticut	No cap		
Delaware	No cap		
District of Columbia	No cap		

Table 1: CONSTITUTIONALITY OF NON-ECONOMIC DAMAGES CAPS BY STATE

<p>Florida</p>	<p>The "Tort Reform and Insurance Act of 1986" Cap on noneconomic damages: \$450,000.</p> <p>F.S.A. § 766.118 Cap on noneconomic damages in medical malpractice actions: \$500,000; or \$1,000,000 in cases of death, vegetative state or if manifest injustice would occur; \$750,000 against non-practitioner defendants, or \$1,500,000 in cases of death, vegetative state or manifest injustice.</p>	<p>Constitutionality challenged by Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987)</p> <p>Challenged by Estate of McCall ex rel. McCall v. U.S. 642 F.3d 944 (11th Cir. 2011)</p>	<p>UNCONSTITUTIONAL. \$450,000 statutory cap in non-economic damages is unconstitutional under access to courts and right to jury trial provisions in state constitution.</p> <p>UNDETERMINED. Court of Appeals held statutory cap does not violate the United States Constitution. Court would certify to Florida Supreme Court questions of whether the cap violated rights to equal protection, access to courts and trial by jury, or separation of powers, under Florida's constitution. Florida Supreme Court has not handed down opinion.</p>
<p>Georgia</p>	<p>Ga. Code Ann., § 51-13-1 Cap on noneconomic damages: single medical facility, \$350,000; multiple medical facilities, \$700,000; and total cap, \$1,050,000 for actions against multiple health care providers and medical facilities</p>	<p>Constitutionality challenged by Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (2010)</p>	<p>UNCONSTITUTIONAL. The statutory cap on noneconomic damages violates the right to a jury trial.</p>
<p>Hawaii</p>	<p>Haw. Rev. Stat. § 663-8.7 Cap on noneconomic damages: \$375,000; except for certain torts including intentional torts, environmental pollution, toxic and asbestos related, strict and products liability torts, aircraft accidents, and motor vehicle accidents.</p>	<p>Constitutionality challenged by Ray v. Kapiolani Med. Specialists, 125 Haw. 253, 260, 259 P.3d 569, 576 reconsideration denied, 125 Haw. 249, 258 P.3d 946</p>	<p>UNDETERMINED. The Supreme Court of Hawaii heard oral arguments on the constitutionality of the statute. The case was remanded for a new trial. The Supreme Court of Hawaii did not make a determination as to the constitutionality.</p>
<p>Idaho</p>	<p>I.C. § 6-1603 Cap on noneconomic damages: \$250,000.</p>	<p>Challenged by Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115 (Idaho 2000)</p>	<p>CONSTITUTIONAL. Statutory cap serves the state's legitimate interest in protecting the availability of liability insurance.</p>
<p>Illinois</p>	<p>ILCS 2-1115.1 Cap on noneconomic damages in actions for wrongful death, bodily injury, damage to property and product liability: \$500,000.</p> <p>ILCS 2-1706.5 Cap on noneconomic damages in medical malpractice actions: \$1,000,000 against hospitals; \$500,000 against physicians.</p>	<p>Challenged by Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997)</p> <p>Challenged by LeBron v. Gottlieb Memorial Hosp., 930 N.E.2d (Ill. 2010)</p>	<p>UNCONSTITUTIONAL. Statutory cap on noneconomic damages violates both the bar against special legislation and the separation of powers clause.</p> <p>UNCONSTITUTIONAL. The cap on noneconomic damages in medical malpractice actions violates the separation of powers clause of the Illinois Constitution</p>
<p>Indiana</p>	<p>Ind. Code Ann. § 34-18-14-3 Cap on noneconomic damages in medical malpractice actions: \$1,250,000, with each provider only liable for up to \$250,000.</p>	<p>Constitutionality challenged by Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980)</p>	<p>CONSTITUTIONAL. Cap on total damages does not violate state or federal equal protection clauses, due process clauses, or right to jury trial.</p>
<p>Iowa</p>	<p>No cap</p>		

Table 1: CONSTITUTIONALITY OF NON-ECONOMIC DAMAGES CAPS BY STATE

<p>Kansas</p>	<p>K.S.A. 60-19a02 Cap on noneconomic damages in any personal injury action: \$250,000</p> <p>K.S.A. 60-1903 Cap on noneconomic damages in wrongful death actions: \$250,000.</p>	<p>Constitutionality challenged by <i>Samsel v. Wheeler Transport Servs., Inc.</i>, 789 P.2d 541 (1990) and <i>Miller v. Johnson</i>, 2012 WL 4773559 (Oct. 5, 2012)</p> <p>Challenged by <i>Leiker By and Through Leiker v. Gafford</i>, 245 Kan. 325(1989)</p>	<p>CONSTITUTIONAL. Non-economic damages cap does not violate due process or right to jury trial</p> <p>CONSTITUTIONAL. Cap on damages does not violate equal protection, right to trial by jury or remedy by due course of law.</p>
<p>Kentucky</p>	<p>No cap</p>	<p>Ky. Const., § 54</p>	<p>State constitution prohibits cap on damages.</p>
<p>Louisiana</p>	<p>LSA-R.S. 40:1299.42(B) Cap on noneconomic damages in medical malpractice actions: \$500,000; qualified provider is not liable for more than \$100,000.</p>	<p>Challenged by <i>Butler v. Flint Goodrich Hosp. of Dillard Univ.</i>, 607 So. 2d 517 (La. 1992) Reconsidered by <i>Oliver v. Magnolia Clinic</i>, 85 So.3d 39(La. 2012)</p>	<p>CONSTITUTIONAL. Damages cap does not violate due process or equal protection because it is not arbitrary, capricious, or unreasonable. The Supreme Court reconsidered the issue in <i>Oliver</i> and again held that the cap is constitutional.</p>
<p>Maine</p>	<p>Me. Rev. Stat. Ann. tit. 18-A, § 2-804 Cap on noneconomic damages in wrongful death actions: \$500,000.</p>	<p>Constitutionality has not been challenged.</p>	
<p>Maryland</p>	<p>Md. Code Ann., Cts. & Jud. Proc. § 11-108 Cap on noneconomic damages in personal injury and wrongful death actions: \$500,000; and increasing by \$15,000 every year starting in 1995.</p>	<p>Challenged by <i>Murphy v. Edmunds</i>, 601 A.2d 102 (Md. 1992)</p>	<p>CONSTITUTIONAL. Cap is rationally related to a legitimate state interest and does not restrict access to courts</p>
<p>Massachusetts</p>	<p>M.G.L.A. 231 § 60H Cap on noneconomic damages in medical malpractice actions: \$500,000; unless jury finds a substantial or permanent loss of bodily function or other special circumstance.</p>	<p>Constitutionality has not been challenged.</p>	
<p>Michigan</p>	<p>M.C.L.A. 600.1483 Cap on noneconomic damages in medical malpractice actions: \$280,000 (adjusted for inflation); except in cases of certain severe injuries where the damages are capped at \$500,000.</p>	<p>Constitutionality challenged by <i>Zdrojewski v. Murphy</i>, 657 N.W.2d 721(2002) and <i>Smith v. Botsford Gen. Hosp.</i>, 419 F.3d 513 (6th Cir. 2005)</p>	<p>CONSTITUTIONAL. Legislature has right to modify common law and statutory rights and remedies. And the jury still determines the facts and amount of damages, so the right to jury trial is not violated. Cap does not violate the Seventh Amendment or Equal Protection Clause of the U.S. Constitution. Constitutionality questioned in <i>Wiley v. Henry Ford Cottage Hosp.</i>, 668 N.W.2d 402(Mich. App. 2003), but court was required to follow precedent.</p>
<p>Minnesota</p>	<p>No cap (statute repealed)</p>		
<p>Mississippi</p>	<p>Miss. Code Ann. § 11-1-60 Limited recovery of noneconomic damages to \$500,000 for medical malpractice actions and \$1,000,000 for all other actions.</p>	<p>Constitutionality challenged by <i>Sears, Roebuck and Co. v. Learmonth</i>, 95 So.3d (Miss. 2012) (5th Cir. 2011). See also <i>Carter, et al. v. Interstate Realty Mgmt. Co., et al.</i>, Cause no. 14-CI-09-0019 (Coahoma Cnty. Cir. Ct., Miss., 2012) (not reported)</p>	<p>UNDETERMINED. Mississippi Supreme Court declined to answer certified question as to constitutionality of non-economic damage caps, but Fifth Circuit is proceeding to answer question. Circuit Court of Coahoma County held statutory cap on non-economic damages cap unconstitutional</p>

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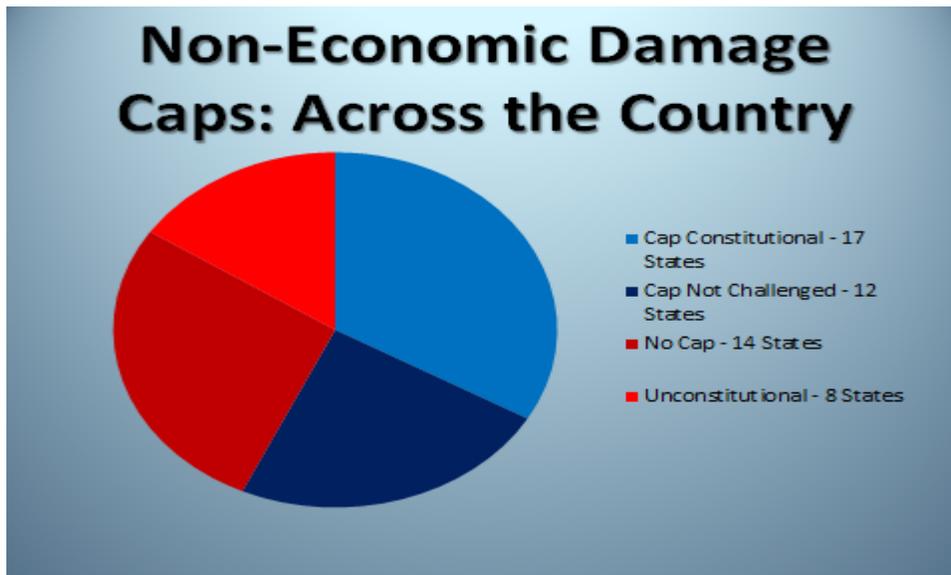
Missouri	V.A.M.S. 538.210 Cap on noneconomic damages in medical malpractice actions: \$350,000	Challenged by Watts v. Lester E. Cox Medical Centers, (Mo. July 31, 2012), 2012 WL 3101657	UNCONSTITUTIONAL. \$350,000 cap on non-economic damages violated right to trial by jury under Missouri Constitution. There is some uncertainty as to whether the cap is constitutional in cases of wrongful death caused by a health care provider since there is no common law action for wrongful death. See Sanders v. Ahmed 364 S.W.3d 195(Mo. April 3, 2012)
Montana	Mont. Code Ann. § 25-9-411(3) Cap on noneconomic damages in medical malpractice actions: \$250,000.	Constitutionality has not been challenged	
Nebraska	Neb.Rev.St. § 44-2825 Cap on noneconomic damages in medical malpractice actions: \$1.75 million; each qualified health care provider is not liable for more than \$500,000.	Constitutionality challenged by Gourley ex rel. Gourley v. Nebraska Methodist Health Syst., Inc., 663 N.W. 2d 43 (Neb. 2003)	CONSTITUTIONAL. Statutory cap does not violate equal protection, right to jury trial, open courts provision, separation of powers, prohibition against taking property for public use or prohibition against "special legislation" of State Constitution.
Nevada	N.R.S. 41A.035 Cap on noneconomic damages in medical malpractice actions: \$350,000.	The Supreme Court of Nevada heard oral arguments in Villegas v. Sheikh on the issue of whether the cap applies to each plaintiff or to each occurrence.	UNDETERMINED. The Supreme Court has not handed down an opinion on the issue, but the outcome could affect the constitutionality of the cap.
New Hampshire	N.H. Rev. Stat. § 508:4-d Cap on noneconomic damages in all personal injury actions: \$875,000.	Constitutionality challenged by Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991)	UNCONSTITUTIONAL. Cap violates equal protection clause; purpose of legislation does not outweigh individual rights
New Jersey	No cap		
New Mexico	N. M. S. A. 1978, § 41-5-6 Cap on damages in medical malpractice actions: \$600,000 cap on total damages, excluding punitive damages and past and future medical care; \$200,000 cap on personal liability of health care providers.	Constitutionality challenged by Fed. Express Corp. v. United States, 228 F. Supp. 2d 1267 (N.M. 2002)	CONSTITUTIONAL. Cap does not violate equal protection clause because it is rationally related to a legitimate state interest (ensuring a source of recovery for medical malpractice victims)
New York	No cap		
North Carolina	N.C.G.S.A. § 90-21.19 Cap on noneconomic damages in medical malpractice actions: \$500,000, except when the defendant's actions were reckless, grossly negligent, fraudulent, intentional or committed with malice and caused disfigurement, loss of use of part of the body, permanent injury, or death.	Constitutionality has not been challenged.	
North Dakota	N.D. Cent. Code § 32-42-02 (1995) Cap on noneconomic damages in medical malpractice actions: \$500,000	Constitutionality has not been challenged.	Previous law with \$300,000 cap was struck down as unconstitutional. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978)

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Ohio	R.C. § 2315.18 Cap on noneconomic damages in tort actions: sliding scale between \$250,000 and \$500,000; no limit in cases of severe injury such as deformity or loss of limb.	Constitutionality challenged by <i>Arbino v. Johnson & Johnson</i> , 880 N.E.2d 420 (Ohio 2007)	CONSTITUTIONAL. Cap does not violate the right to a jury trial.
Oklahoma	23 Okl.St. Ann. § 61.2 Cap on noneconomic damages in actions for bodily injury: \$350,000, unless defendant's actions were in reckless disregard, grossly negligent, fraudulent, or intentional or with malice	Constitutionality has not been challenged.	
Oregon	O.R.S. § 31.710 Cap on noneconomic damages in bodily injury, death or property damage actions: \$500,000	Constitutionality challenged by <i>Lakin v. Senco Products, Inc.</i> , 987 P.2d 463 (Ore. 1999) Applicability to wrongful death actions considered in <i>Hughes v. PeaceHealth</i> 178 P.3d 225(Ore. 2008)	UNCONSTITUTIONAL in personal injury cases. Cap violates customary common law right to jury trial in actions that were recognized at common law. CONSTITUTIONAL in wrongful death cases. The cap is constitutional in wrongful death and other actions that were not recognized at common law.
Pennsylvania	No cap	Pa. Const., art. III § 18	State constitution prohibits limiting damages for personal injury or death.
Rhode Island	No cap		
South Carolina	Code 1976 § 15-32-220 Cap on noneconomic damages in medical malpractice actions: \$350,000 per claimant from each provider or institution; \$1,050,000 total per claimant from all providers or institutions. No limit in certain cases such as gross negligence and fraud.	Constitutionality has not been challenged	
South Dakota	SDCL § 21-3-11 Cap on total general damages in medical malpractice actions: \$500,000.	Constitutionality of previous version challenged by <i>Knowles ex rel. Knowles v. United States</i> , 544 N.W.2d 183 (S.D. 1996)	CONSTITUTIONAL. Amendment imposing \$1 million total damage cap in medical malpractice actions declared unconstitutional because it violated due process. Pre-amendment statute providing for \$500,000 cap on noneconomic damages remains in full force and effect.
Tennessee	T. C. A. § 29-39-102 Cap on noneconomic damages in medical malpractice actions: \$750,000 per plaintiff; \$1,000,000 for catastrophic injuries; no cap in cases of intentional torts, falsification or concealment of records, defendant's intoxication, or felonious act by defendant.	Constitutionality has not been challenged.	

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Texas	<p>V.T.C.A., Civil Practice & Remedies Code § 74.301 Cap on noneconomic damages in medical malpractice actions: \$250,000 against all providers; \$250,000 against health care institutions, not to exceed \$500,000.</p> <p>V.T.C.A., Civil Practice & Remedies Code § 74.303 Cap on all damages in wrongful death claims against medical providers: \$500,000 for each claimant.</p>	<p>Constitutionality challenged by <i>Watson v. Hortman</i>, 844 F. Supp. 2d 795 (E.D. Tex. 2012);</p> <p>Previous version challenged by <i>Rose v. Doctors Hosp.</i>, 801 S.W.2d 841 (Tex. 1990) (wrongful death case)</p>	<p>CONSTITUTIONAL. In medical malpractice cases, the cap does not violate the right of access to the courts or the Takings Clause in the United States Constitution. Amendment to Texas Constitution allowed legislature to adopt caps on noneconomic damages in medical malpractice cases. Vernon's Ann. Texas Const. Art. 3, § 66</p> <p>UNCONSTITUTIONAL. Cap on all damages found to be unconstitutional except for causes of action created by statute, such as wrongful death.</p>
Utah	<p>U.C.A. 1953 § 78B-3-410 Cap on noneconomic damages in medical malpractice actions: \$250,000, adjusted for inflation for causes of action accruing before May 15, 2010; \$450,000 hard cap for claims accruing after May 15, 2010.</p>	<p>Constitutionality challenged by <i>Judd v. Drezga</i>, 103 P.3d 135 (2004)</p>	<p>CONSTITUTIONAL. Cap does not violate open courts, uniform operation of laws, or due process provisions of the Utah Constitution. Court also held that cap does not violate separation of powers or right to jury trial (constitutional right to jury trial is "inviolate" only in capital cases)</p>
Vermont	<p>No cap</p>		
Virginia	<p>VA Code Ann. § 8.01-581.15 Cap on total amount of damages recoverable in medical malpractice actions: adjusted each year; currently \$2.05 million; Will be \$2.95 million in 2030.</p>	<p>Constitutionality challenged by <i>Etheridge, et al. v. Med. Ctr. Hosps.</i>, 376 S.E. 2d 525 (Va. 1989) and <i>Pulliam v. Coastal Emergency Services of Richmond, Inc.</i>, 509 S.E.2d 307 (Va. 1999)</p>	<p>CONSTITUTIONAL. Cap does not violate right to jury trial because once the jury determines the facts, the court simply applies the law to the facts. Also, the cap does not violate procedural or substantive due process, equal protection, or separation of powers clauses. Cap is not a "taking of property" and does not constitute special legislation.</p>
Washington	<p>RCWA 4.56.250 Cap on noneconomic damages in all actions for personal injury or death: sliding scale based on average annual wage and life expectancy.</p>	<p>Constitutionality challenged by <i>Sofie v. Fibreboard Corp.</i>, 771 P.2d 711 (Wa. 1989)</p>	<p>UNCONSTITUTIONAL. Cap violates right to jury trial</p>
West Virginia	<p>W. Va. Code, § 55-7B-8 Cap on noneconomic damages in medical malpractice actions: \$250,000 per occurrence; \$500,000 per occurrence in cases of wrongful death, physical deformity, loss of use of limb or organ system, or injury that prevents injured person from independently caring for himself.</p>	<p><i>MacDonald v. City Hosp.</i>, 715 S.E.2d 405 (W. Va. 2011)</p>	<p>CONSTITUTIONAL. Amended cap on non-economic damages in medical malpractice cases of \$250,000 does not violate right to jury trial, separation of powers, or equal protection.</p>
Wisconsin	<p>W.S.A. 893.55 Cap on noneconomic damages in medical malpractice actions: \$750,000</p>	<p>Previous version challenged by <i>Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund</i>, 701 N.W.2d 440 (Wis. 2005). Current version has not been challenged.</p>	<p>Previous version with \$350,000 cap struck down as unconstitutional because it violated the equal protection guarantees of the Wisconsin Constitution.</p>
Wyoming	<p>No caps</p>	<p>Wyoming Const., Art. 10, §4; <i>Meyer v. Kendig</i>, 641 P.2d 1235, 1239 (Wyo. 1982) (Wyoming constitution prohibits statutes that limit the "amount of damages")</p>	<p>State constitution prohibits caps on damages.</p>



SUMMARY OF ARGUMENTS AGAINST CONSTITUTIONALITY OF NON-ECONOMIC DAMAGES CAP STATUTES

Non-economic damage caps:

Violate the right to jury trial

- Carter v. Interstate Realty Mgmt. Co., No. 14-CI-09-0019, ¶ 14 (Coahoma Cnty. Cir. Ct., April 20, 2012) (holding that cap statute strips jury of its power to decide facts and determine damages thereby denying plaintiff right to jury trial);
- Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (same);
- Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 220 (Ga. 2010) (same);
- Sofie v. Fibreboard Corp., 771 P.2d 711 (Wa. 1989) (same);
- Lakin v. Senco Prods., Inc., 987 P.2d 463 (Ore. 1999) (holding that cap violates right to jury trial in personal injury cases).

Are distinguishable from power of judicial remittitur (in the context of right to jury trial)

- Nestlehutt, 691 S.E.2d at 224 (reasoning that judicial remittitur, unlike damage caps, does not violate right to jury trial because it is a carefully circumscribed power exercised on case-by-case basis and only authorized when jury award is excessive in light of evidence).

Circumvent the constitutional amendment process (in the context of right to jury trial)

- Carter, No. 14-CI-09-0019 at ¶ 3 (reasoning that cap statute allows legislature to amend the constitution – regarding right to jury trial – by statutory enactment rather than the required amendment process).

Violate separation of powers clause

- Carter, No. 14-CI-09-0019 at ¶ 10 (reasoning that cap statute allows legislature to limit effect of court judgments, rulings, and decisions, which violates constitutional Separation of Powers Clause);
- Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (same).

Violate the uniform operation of laws

- See, e.g., Judd v. Drezga, 103 P.3d 135, 141 (Utah 2004) (analyzing and dismissing appellant's argument that cap targets, and thus unconstitutionally discriminates against, only victims with significant quality of life damages and those who are most severely injured).

Violate the prohibition against special legislation

- Best, 689 N.E.2d 1057 (holding that cap constitutes special legislation because it confers special benefit on certain tort victims to exclusion of others similarly situated).

Constitute an unconstitutional legislative remittitur

- LeBron v. Gottlieb Mem'l Hosp., 2010 Ill. LEXIS 26 (Ill. 2010) (holding that cap represents an unconstitutional legislative

remittitur) (not reported).

Violate equal protection and/or due process rights

- Brannigan v. Usitalo, 587 A.2d 1232, 1236 (N.H. 1991) (holding \$875,000 statutory cap violates Equal Protection Clause of New Hampshire Constitution because it discriminates against plaintiffs with most severe injuries and in greatest need of higher non-economic damages award).

Violate the open courts doctrine

- See, e.g., Judd, 103 P.3d at 139 (reasoning that appellant's "cause has been allowed before and ruled upon by the courts, and his remedy has been diminished, but not eliminated," and so the statute does not violate open courts doctrine).

585 (Ind. 1980);

- Samsel v. Wheeler Transport Servs. Inc., 246 Kan. 336 (1990);
- Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989);
- MacDonald v. City Hosp., 2011 W. Va. LEXIS 57 (W. Va. 2011);
- Guzman v. St. Francis Hosp., 623 N.W.2d 776 (Wis. 2000);
- Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007) (holding that if fact-finding process not disturbed and factual-findings left intact, awards may be altered as matter of law);
- Judd v. Drezga, 103 P.3d 135 (Utah 2004) (holding statutory damages caps do not violate right to jury trial because right to jury trial only "inviolate" in capital cases).

Pose no more of a threat to due process than judicial remittitur

- Nestlehutt, 691 S.E.2d at 224 (rejecting appellant's argument that statutory caps are no more of a threat to constitutional right to jury trial than judicial remittitur).

Do not violate the open courts doctrine

- Judd v. Drezga, 103 P.3d 135, 139 (Utah 2004) (holding that Open Courts Clause not violated because appellant's cause was heard and ruled upon by court, and remedy was diminished, but not eliminated).

Do not violate uniform operation of laws/equal protection

- Judd, 103 P.3d at 143 (reasoning that damages caps in medical malpractice cases do not discriminate against a specific class of victims in an unconstitutional sense. Rather, specific medical malpractice damages caps comport with legislature's intent to reduce health care costs – universal tort caps would be imprudent).

Do not violate due process because statutory caps on hedonic damages survive the rational basis test

- Judd, 103 P.3d at 144 (holding that cap satisfies constitutional rationality standard because legislative concern with rising health care costs and fears about continued availability of services are legitimate government interests).

SUMMARY OF ARGUMENTS FOR CONSTITUTIONALITY OF NON-ECONOMIC DAMAGES CAP STATUTES

Non-economic damages caps:

Are constitutional because they are rationally related to the legitimate state interests of ensuring greater access to and affordability of liability insurance for public and private sector businesses, as well as providing citizens greater access to quality healthcare

- Fein v. Permanente Med. Grp., 695 P.2d 665 (Cal. 1985);
- Scholz v. Metro. Pathologists, 851 P.2d 901 (Colo. 1993);
- Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 115 (Idaho 2000);
- Murphy v. Edmonds, 601 A.2d 102 (Md. 1992);
- Fed. Express Corp. v. United States, 228 F. Supp. 2d 1267 (N.M. 2002).

Do not violate right to jury trial because judicial application of cap statute to facts determined and damages assessed by jury, which is a simple application of law to facts, satisfies right to jury trial under Constitution.

- Evans v. State, 56 P.3d 1046 (Alaska 2002);
- Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993);
- Johnson v. St. Vincent Hosp., 404 N.E.2d

- Do not violate the separation of powers clause
- Judd, 103 P.3d at 145 (holding that damage cap does not violate separation of powers provision because it represents the law to be applied, not an improper usurpation of jury prerogatives or judicial power);
 - Evans v. State, 56 P.3d 1046 (Alaska 2002) (same);
 - Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989) (same);
 - MacDonald v. City Hosp., 2011 W. Va. LEXIS 57 (W. Va. 2011) (same).

SUMMARY OF ARGUMENTS FOR THE CONSTITUTIONALITY OF PUNITIVE DAMAGES CAPS

Large punitive damages awards, as compared with those for compensatory damages, violate the defendant's Eighth Amendment rights under the Excessive Fines Clause

The Eighth Amendment constitutional challenge is based upon the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States. The Eighth Amendment provides:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Although the Excessive Fines Clause has traditionally been applied in criminal, rather than civil cases, the Excessive Fines Clause has been used to challenge the constitutionality of large punitive damage awards. Lori S. Nugent et al., *Punitive Damages: A State-By-State Guide To Law And Practice*, § 2:3 (2011 ed.).

Argument: an award that is not rationally related to the retributive and deterrent purposes of punitive damages is unconstitutionally excessive. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Excessive punitive damages awards violate the defendant's Fourteenth Amendment due process rights (taking property without due process of law)

“[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the

equal protection of the laws.”

In the punitive damages context, the Due Process Clause has been employed to attack the process through which punitive damages are assessed, especially when juries are given little or no guidance in determining the size of punitive damage awards.

Additionally, the requirement of the Due Process Clause that there be a rational relationship to a legitimate purpose is arguably violated when a punitive damage award is very large in comparison to an accompanying compensatory damage award. This arguable violation results when the purpose of punitive damages, namely to punish civil wrongdoers and to deter others, would be adequately served by a smaller punitive damage award. *Nugent, Punitive Damages*, § 2:4.

SUMMARY OF ARGUMENTS AGAINST CONSTITUTIONALITY OF PUNITIVE DAMAGES CAPS

Punitive damage caps:

Violate the right to a jury trial

- *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999) (striking down punitive damage cap statute as unconstitutional violation of the right to jury trial).
- *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 893 (Ala. 1993) (clarifying prior decision and holding punitive damage cap unconstitutional on ground that it violated right to jury trial).
- *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (holding punitive damage cap constitutional on ground that it does not violate right to jury trial).
- *Smith v. Printup*, 866 P.2d 985 (Kan. 1993) (holding statute requiring court to determine amount of punitive damage award does not violate constitutional right to jury trial).

Violate the separation of powers principle

- *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987) (holding punitive damage cap does not violate separation of powers).

Violate the open courts doctrine

- *Rhyne v. K-Mart Corp.*, 594 S.E.2d at 18

(holding punitive damages cap statute does not violate the Open Courts Clause of North Carolina Constitution).

Violate the prohibition on special legislation

- Bernier v. Burris, 497 N.E.2d 763, 776 (Ill. 1986) (holding statute barring recovery of punitive damages in legal and medical malpractice actions does not constitute unconstitutional special legislation).

Violate the prohibition against taking property without just compensation

- Gordon v. State, 608 So.2d 800, 801-02 (Fla.1992) (rejecting claimant's argument that statute restricting punitive damage award constituted a taking and holding that "right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages.").

Violate the due process and equal protection guarantees

- Rhyne v. K-Mart Corp., 594 S.E.2d 1 (N.C. 2004) (upholding constitutionality of North Carolina punitive damages cap statute on grounds that it does not violate constitutional due process or equal protection rights).
- Bernier, 497 N.E.2d at 776 (Ill. 1986)

(holding statute barring recovery of punitive damages in legal and medical malpractice actions constitutional because it does not violate equal protection or due process clauses).

- Smith v. Printup, 866 P.2d 985 (Kan. 1993) (holding statute requiring court to determine amount of punitive damage award does not violate equal protection or due process clauses).
- Gilbert v. Security Finance Corp. of Oklahoma, Inc., 152 P.3d 165, 180 (Okla. 2006) (holding statutory punitive damage cap does not violate due process rights).
- Wackenhut Applied Techs. Ctr., Inc. v. Sygnatron Prot. Sys., Inc., 979 F.2d 980 (4th Cir. 1992) (holding Virginia statute capping punitive damages does not violate the due process guarantees of the Virginia and United States Constitutions).

Punitive damage cap held unconstitutional on other grounds:

Bayer Cropsience LP v. Schafer, 2011 Ark. 518 at *13-14 (2011) (striking down punitive damage cap as unconstitutional on ground that it violated provision of Arkansas Constitution prohibiting General Assembly from limiting amount to be recovered for injuries resulting in death or for injuries to persons or property)

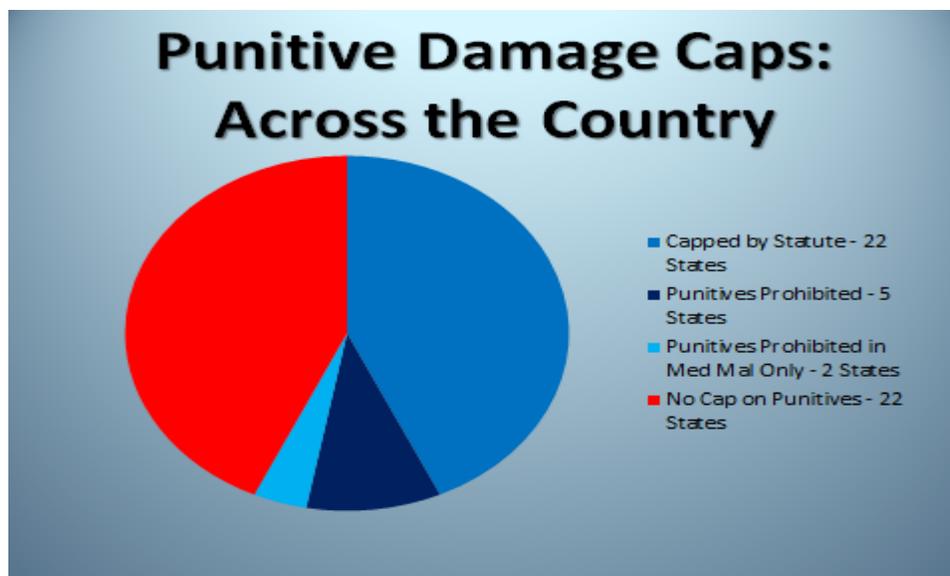


Table 4: STANDARDS FOR PUNITIVE DAMAGES BY STATE	
Alabama	Punitive damages may not be awarded in any civil action, except for wrongful death, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. AL ST § 6-11-3
Alaska	None
Arizona	None; but limit on liability for exemplary or punitive damages against manufacturer or seller of drug. AZ ST § 12-701
Arkansas	In order to recover punitive damages the plaintiff has the burden of proving that the defendant is liable for compensatory damages and that either of both of the following aggravating factors were present and related to the injury for which compensatory damages were awarded: defendant knew or ought to have known that his conduct would naturally and probably result in injury of damage and that he continued the conduct with malice or in reckless disregard of the consequences, from which malice may be inferred and/or the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage. AR ST § 16-55-206
California	None
Colorado	In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. CO ST § 13-21-102
Connecticut	Punitive damages may be awarded in products liability case if claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. CT ST § 52-240b
Delaware	In any action for medical negligence, punitive damages may be awarded only if it is found that the injury complained of was maliciously intended or was the result of willful or wanton misconduct by the health care provider, and may be awarded only if separately awarded by the finder of fact in a separate finding from any finding of compensatory damages. DE ST TI 18 § 6855
District of Columbia	None
Florida	Punitive damages may be awarded in fact finder determines that the wrongful conduct proven was motivated solely by unreasonable financial gain and determines that he unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the person making policy decisions on behalf of the defendant. FL ST § 768.3
Georgia	Punitive damages may be awarded only such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. GA ST § 51-12-5.1
Hawaii	None
Idaho	In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted. ID ST § 6-1604
Illinois	Punitive damages not recoverable in healing art and legal malpractice cases IL ST CH 735 § 5/2- 1115
Indiana	When a finder of fact announces a verdict that includes a punitive damages award in a civil action, the party against whom the judgment was entered shall notify the office of the attorney general of the punitive damages award; when punitive damages award is paid, the party against whom the judgment was entered shall pay the punitive damages award to the clerk of court where action is pending; clerk of court shall pay 25% to person to whom punitive damages were awarded and pay 75% to treasurer of state. IN ST 34-51-3-6
Iowa	None
Kansas	In any civil action where claims for punitive damages are included, the plaintiff shall have the burden of proving by clear and convincing evidence in the initial phase of the trial that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud, or malice. KS ST 60-3701
Kentucky	Plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice. KY ST § 411.184
Louisiana	None
Maine	None
Maryland	None
Massachusetts	None
Michigan	None
Minnesota	Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. MN ST § 549.20
Mississippi	Punitive damages may be awarded if claimant proves by clear and convincing evidence that the defendant acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. MS ST § 11-1-65

Missouri	An award of punitive damages against a health care provider shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to his actions which were found to have injured or caused or contributed to cause the damages claimed by the petition MO ST 538.210
Montana	Punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice. MT ST 27-1-221
Nebraska	None
Nevada	In an action for the breach of an obligation not arising from contract, where it proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff may recover punitive damages. NV ST 42.005
New Hampshire	No punitive damages shall be awarded in any action, unless otherwise provided by statute. NH ST § 507:16
New Jersey	Punitive damages may be awarded only if plaintiff proves by clear and convincing evidence that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by wanton and willful disregard of persons who foreseeable might be harmed by those acts or omissions. NJ ST 2A:15-5.12
New Mexico	None
New York	None
North Carolina	Punitive damages may be awarded only if claimant proves by clear and convincing evidence that the defendant is liable for compensatory damages and that one of the following factors was present and related to the injury for which the compensatory damages were awarded 1) fraud, 2) malice, or 3) willful or wanton conduct. NC ST § 1D-15
North Dakota	In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court may award punitive damages. ND ST § 32-03.2-11
Ohio	Punitive damages are not recoverable from a defendant in a tort action unless both of the following apply: 1) the actions or omissions of the defendant demonstrate malice or aggravated or egregious fraud, or that the defendant knowingly authorized, participated in or ratified actions or omissions; and 2) fact finder has returned a verdict of the total compensatory damages recoverable by the plaintiff. OH ST § 2315.21
Oklahoma	Punitive damages may be awarded if defendant has been guilty of reckless disregard for the rights of others or the defendant has acted intentionally and with malice towards others. OK ST T. 23 § 9.1
Oregon	Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the defendant has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others. OR ST § 31.730
Pennsylvania	None
Rhode Island	None
South Carolina	No award for damages under this chapter shall include punitive damages. SC ST § 15-78-120
South Dakota	Punitive damages shall not be awarded unless the plaintiff proves by clear and convincing evidence that the defendant has acted with willful, wanton or malicious conduct. SD ST § 21-4-4.1
Tennessee	None
Texas	Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery results from fraud, malice, or gross negligence. TX CIV PRAC & REM § 41.003
Utah	Punitive damages may be awarded only if compensatory damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others. UT ST § 78B-8-201
Vermont	None
Virginia	None
Washington	None
West Virginia	None
Wisconsin	None
Wyoming	None
United States	None

While most of the cases striking down non-economic damage caps as unconstitutional have been decided within the last twenty years, the recent trend, if one exists, reflects most courts' willingness to uphold the statutes. With the exception of Georgia, every state Supreme Court that has decided the issue of the

constitutionality of non-economic damage caps in the last ten years has upheld the statutes. The most frequently used and successful argument against the constitutionality of cap statutes is that they violate the plaintiff's right to a jury trial. Indeed, this argument appears in almost every constitutional challenge to a

cap statute, although it has successfully convinced a court to strike down a cap statute as unconstitutional in only a handful of state cases. On the other hand, advocates of caps consistently rely on the “legitimate state interest” argument – a very difficult argument to overcome and an attractive argument for a court to rely upon in upholding a cap statute. The “most successful” arguments against the constitutionality of damage cap statutes is perhaps a bit misleading because even

the most successful arguments from this position rarely have met with any success before a state high court. Indeed, it appears the vast majority of state legislatures are intent on keeping runaway jury awards under check, and a state judiciary willing to overturn the will of the people as voiced through the legislature, at least in this area of the law, is and likely will remain uncommon.

About Walter Boone

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Important Litigation Involvement

- During jury trial representing minority shareholders in a breach of fiduciary duty and fraud claim seeking in excess of \$5.8 million, favorable settlement involving, among other terms, change in majority ownership
- Nominal settlement of products liability claim brought by double amputee against aerial lift manufacturer with seven figure special damages after aggressive fact investigation demonstrated aerial lift had no causal connection to accident
- Successful arbitration of multi-million dollar environmental indemnity claim arising out of the sale of an asphalt refinery
- Defense verdict rejecting \$6 million breach of contract claim based on waiver in two week jury trial between poultry renderer and two of its shareholders
- Jury verdict rejecting future lost wages claim by plaintiff with alleged spinal cord injury in a personal injury case where liability was admitted
- Voluntary dismissal with prejudice of products liability claim of paraplegic plaintiff against aerial lift manufacturer after aggressive fact investigation and early discovery
- Arbitration award dismissing indemnity claim in excess of \$1 million arising out of an oilfield accident
- Defense verdict in favor of luxury motor home manufacturer in breach of warranty claim for failure to warn
- Defense verdict in favor of mildewcide manufacturer in a chemical exposure personal injury lawsuit
- Dismissal of malpractice claim against patent law firm based on lack of personal jurisdiction
- Dismissal of class action claims against lender arising out of Hurricane Katrina for failure to meet class action criteria
- Summary judgment dismissing breach of contract and fraud claims against historically black college for failure to prove elements of claims, including reasonable reliance
- Removal and ultimate dismissal of state court claims against PPA manufacturer brought outside of the PPA MDL proceeding
- Successful litigation appointing umpires in federal courts in Louisiana arising out of Hurricane Katrina claims against insurer

Education

- University of Mississippi School of Law, J.D. (cum laude)
- Georgetown University, B.A. (cum laude)