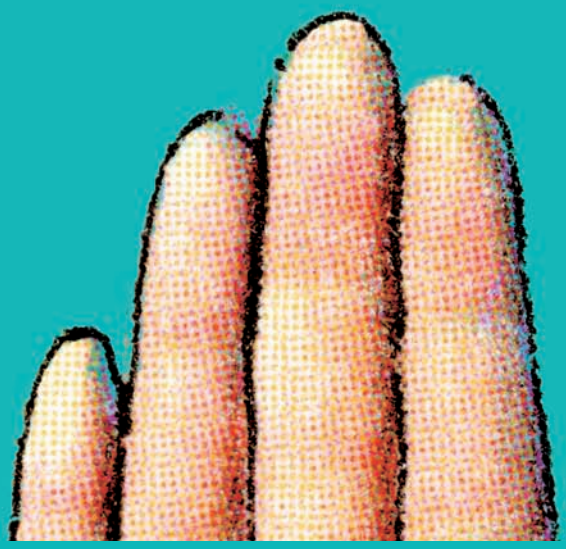
TORT REFORM

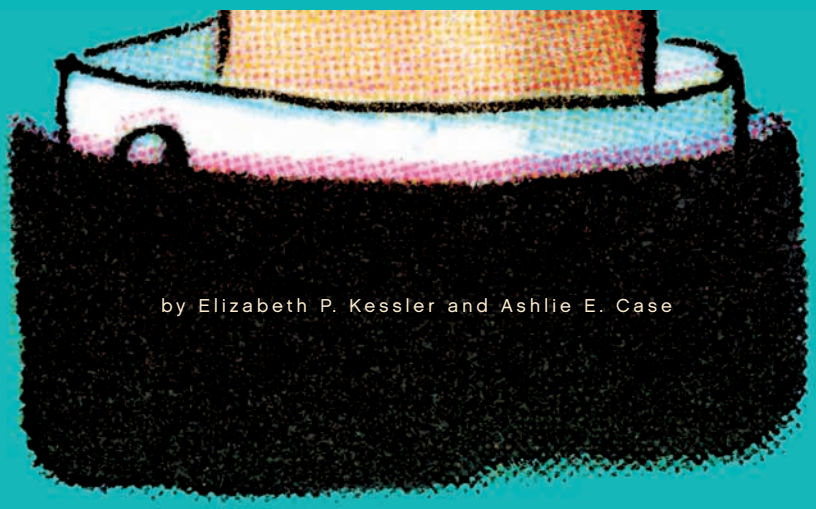
OFTEN LIES IN THE HANDS OF STATE SUPREME COURTS



Efforts by states to reform their tort laws are nearly universal. One of the incarnations of such efforts is to set limits on the amount of compensatory damages that plaintiffs can recover. Those damages are either economic or noneconomic. Economic damages awards compensate plaintiffs for actual expenses, such as medical bills and lost wages, incurred as a result of the defendant's wrongful conduct. Measuring economic damages often is fairly straightforward—reviewing hospital billing records, calculating time off work and hourly wages, etc. On the other hand, noneconomic damages awards serve to compensate plaintiffs for intangible losses, such as the capacity for enjoyment of life or mental anguish. These damages are not so easy to calculate because they are inherently subjective and there is no reliable standard by which to measure them.

Because of the unpredictable nature of noneconomic damages awards, legislatures across the country have enacted laws limiting recovery for intangible losses, often as part of their more wide-ranging tort reforms. Plaintiffs challenge the constitutionality of these damages caps on a variety of grounds, such as the right to trial by jury, the right to a remedy, the guarantee of "open courts," due process, equal protection, and separation of powers. The constitutionality of tort reforms generally and damages caps specifically is hardly settled law. Because these analyses rest almost exclusively on state constitutional grounds, which vary from state to state and, as shown by a recent decision from the Ohio Supreme Court, can change over time, the fate of these tort-reform efforts lies in the hands of state supreme courts.

By way of background, the first major tort-reform legislation in Ohio was enacted in 1975 and capped damages in medical-malpractice cases at $200,000. It was struck down on due process grounds—the Ohio Supreme Court found that it was arbitrary and irrational to impose the cost of combating a perceived medical-malpractice crisis on the people most severely injured by medical malpractice.[1] Subsequent legislative tort reforms were also struck down by the court on a variety of constitutional grounds: the right to trial by jury, the right to a remedy, the guarantee of an open court, due process, equal protection, and separation of powers.[2] So when the Ohio Supreme Court upheld a noneconomic damages cap in *Arbino v. Johnson & Johnson* against attacks on all those constitutional grounds, it signified a change from the court's past approach.[3]



by Elizabeth P. Kessler and Ashlie E. Case

The *Arbino* decision provides a useful framework for evaluating and comparing the varying treatment by state supreme courts on the constitutionality of states' tort-reform measures. Melisa Arbino sued the makers of the Ortho Evra® birth control patch after she suffered blood clots and other side effects from its use.[4] Under Ohio law, noneconomic damages for a plaintiff like Arbino (who had suffered no permanent physical deformity, loss of limb or organ system, or other injury that left her unable to care for herself) were limited to $250,000, or three times economic damages up to $350,000, or $500,000 per occurrence.[5]

RIGHT TO TRIAL BY JURY USED TO ATTACK DAMAGES CAPS

One avenue plaintiffs like Arbino use to attack the constitutionality of damages caps is whether juries must decide the amount of plaintiffs' damages. The problem is that there is no uniform analysis for evaluating the right-to-a-trial-by-jury argument. The Seventh Amendment right to a jury in civil trials does not preclude imposing caps on damages (and in any event is not incorporated to the states through the due process clause of the Fourteenth Amendment), so each state is free to interpret its own trial-by-jury guarantees as more expansive than the federal protection.[6]

The *Arbino* court found that the cap on noneconomic damages for noncatastrophically injured plaintiffs did not violate the right to a jury trial found in the Ohio Constitution.[7] The court reasoned that the cap did not prevent the jury from fulfilling its traditional role: deciding all issues of fact.[8] But once a jury has fulfilled this role, awards may be altered as a matter of law.[9] For example, courts can treble damages awards under antitrust and consumer-protection statutes.[10] If damages can increase by operation of law, they can decrease as well.[11] Other states have concluded the same.[12] And like Ohio, other states have permitted noneconomic damages caps after previous rulings that they were unconstitutional.[13]

In contrast, the Washington Supreme Court in *Sofie v. Fibreboard Corp.* struck down a state statute limiting noneconomic damages in personal-injury and wrongful-death actions because the limits interfered with the jury's traditional role to determine damages.[14] The court stated that the "measure of damages is a question within the jury's province" and that "[i]t would defeat the intention of our constitution's framers to interpret an essential right so that it slowly withers away."[15] But as the dissent noted, "The majority errs by equating historical fact with constitutional necessity."[16] In other words, just because juries traditionally have determined the amount of noneconomic damages does not mean they are required to do so. Thus, there is no independent constitutional right to have noneconomic damages determined by a jury.[17] The jury's fact-finding function does not extend to the remedy phase; remedy is a matter of law, not fact.[18] Indeed, Washington abolished punitive damages without transgressing its trial-by-jury guarantee.

The *Arbino* ruling and the *Sofie* dissent get it right. It is foolish to say that a legislature can abolish a cause of action or a category of damages but cannot limit damages recoverable for that cause of action. Legislatures should be free to divine the contours of a cause of action and limit the recovery available (*e.g.*, comparative negligence takes what was the plaintiff's recovery and subtracts a portion based on the plaintiff's culpability). Capping the total damages is no different. The lesser power to limit recovery is included in the greater power to abolish causes of action.

STATE CONSTITUTIONAL PROVISIONS TO OPEN COURTS AND THE RIGHT TO A REMEDY CAN ALSO AFFECT TORT-REFORM EFFORTS

Another avenue by which plaintiffs attack the constitutionality of damages caps is under state constitutional provisions that guarantee open courts and/or the right to a remedy. These rights are often found in the same constitutional provision, but some states have only one or the other. In any event, the purpose is the same: to guarantee that people will be able to access the courts to redress their injuries. There is no analog to these provisions in the federal Constitution (because there is no federal common law), so like the trial-by-jury analysis, the results vary by state.

The *Arbino* court held that Ohio's cap did not violate the plaintiff's right to a remedy or Ohio's open-courts provision.[19] The court had interpreted those provisions as prohibiting laws that effectively prevent individuals from obtaining redress for an injury in a meaningful time and manner.[20] Considering Arbino's options, the court concluded that the cap did not foreclose her from relief or obliterate an entire jury award, since recovery of $250,000 to $500,000 in noneconomic damages for noncatastrophic injuries is a meaningful remedy. [21]

The Florida Supreme Court reached a different conclusion in *Smith v. Department of Insurance*, where it held that Florida's $450,000 cap on noneconomic damages violated its "open courts" and right-to-a-remedy provisions.[22] It is noteworthy that this cap is the only portion of the tort-reform scheme that was struck down. The court applied its holding from an earlier case that required the legislature to meet one of two conditions to restrict the right of redress from what existed at the time the Florida Constitution was adopted. The legislature had to either (1) provide a reasonable alternative benefit (like the workers' compensation program) or (2) show overwhelming public necessity and no alternative method of meeting that need (a standard not unlike strict scrutiny under a due process or equal-protection analysis, which is discussed below).[23]

The Oregon Supreme Court recently reached the same result in *Clarke v. Oregon Health Sciences University*, where it struck Oregon's cap on remedy-clause grounds (Oregon has no "open courts" language in its constitution).[24] The Oregon Constitution guarantees a "remedy by due course of law for injury done."[25] The challenged statute eliminated any cause of action for medical malpractice against individual tortfeasors—doctors, nurses, etc.—employed by a public entity and capped economic and noneconomic damages at $100,000 each in a suit against the public entity. The court found that when Oregon adopted its remedy guarantee, the plaintiff would have been entitled to seek and recover both economic and noneconomic damages from the tortfeasors without limitation as to the amount.[26] The legislature could not deny the plaintiff those damages in a tort action without providing an adequate substitute for the preexisting right to recovery.[27] The court reasoned that although the legislature has the right to modify common-law remedies to some extent, what it provided in this instance was an "emasculated version of the remedy that was available at common law."[28]

Analysis of the remedy issue will depend on the extent to which the cap curtails the availability of noneconomic damages. A cap of $15 million would not interfere with the right to a remedy, because it is a rare case where noneconomic damages are awarded in such a large amount. But the lower the limit, the more likely a court is to construe the cap as a roadblock on the avenue of redress, thus making the cap more susceptible to a finding of unconstitutionality.

STATE SUPREME COURTS' DUE PROCESS AND EQUAL-PROTECTION ANALYSES OF NONECONOMIC DAMAGES CONSTITUTIONALITY ARE LESS STATE-SPECIFIC

In contrast to the trial-by-jury and remedy/open-courts arguments, due process and equal-protection analyses by state courts almost always follow the federal standards for these protections. In the due process context, state courts usually apply the rational-basis test (because there is no fundamental right implicated), asking whether the cap bears a rational relation to public health, safety, morals, or welfare and is not arbitrary or unreasonable.[29] In the equal-protection context, the court looks for a rational relation to a legitimate government purpose.

The *Arbino* court found that Ohio's General Assembly acted in the public's interest in enacting the cap, which is all that is required by the first prong of the due process analysis.[30] The legislature made the finding that the state of civil litigation was deleterious to the economy; noneconomic damages are difficult to calculate and lack precise monetary value, so they are susceptible to inflation based on irrelevant factors. That cost is then passed on to the general public.[31] Enacting the cap, therefore, serves the public interest of making damages awards more predictable.

On the second prong of the due process analysis, whether the law is unreasonable or arbitrary, this cap alleviated concern from prior cases striking reforms by exempting from the cap those most severely injured.[32] The earlier caps on recovery applied to all plaintiffs, even those with devastating injuries. But this time, the legislature limited the application of the cap to those without catastrophic injuries. The court found this statute was "tailored to maximize benefits to the public while limiting damages to litigants"[33] and that "[a]t some point, the General Assembly must be able to make a policy decision to achieve a public good."[34]

As to equal protection, *Arbino* found the cap rationally related to the legitimate state interest of reforming the civil justice system to make it more fair and predictable, thereby improving the state economy.[35] The Western District of Virginia, in analyzing such a cap, concluded that the legislature may, consistent with due process, "make rules concerning the type of damages that are recoverable and the way in which damages are paid."[36] States have usually reached this conclusion.[37]

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On the other hand, the Texas Supreme Court in *Lucas v. United States* (on certified questions from the Fifth Circuit) held that the $500,000 limitation on compensatory damages was an unreasonable and arbitrary way to ensure a rational relationship between actual and awarded damages.[38] The court specifically construed federal due process protections as the floor, and not the ceiling, of the protections that a state may offer its citizens and ruled that Texas provides a higher ceiling than the federal standard.[39] The severity of the cap explains this decision to some extent.

Striking a cap on equal-protection grounds, North Dakota's highest court held that in the absence of a crisis, a $300,000 cap on all damages did not provide adequate compensation to patients with meritorious claims and did nothing to eliminate nonmeritorious claims.[40] This extremely stringent cap led to a finding that the law did not pass rational-basis muster. Caps of this nature are the exception, not the norm, particularly in more recent times as legislatures have learned to enact provisions that take the prior pronouncements of courts into account on these issues.

For the most part, as long as the court applies a rational-basis analysis to both due process and equal-protection claims, reasonable limits such as those in Ohio should withstand scrutiny. It is when the limits are more drastic or when courts apply a heightened scrutiny (either strict or intermediate) that such reforms are more likely to fail.[41]

SEPARATION-OF-POWERS ANALYSES VARY BY STATE AS WELL

A final method of attack common to many challenges to noneconomic damages caps (and tort reforms generally) is the claim that in enacting such reforms, the legislature infringes on the exclusive province of the judiciary. For example, the *Arbino* plaintiff argued that the statute enacting the cap impermissibly infringed on the judicial power to decide damages for personal injuries and represented a reenactment of legislation previously found unconstitutional.[42] But the court found that the newer reforms did not infringe on judicial power—the legislature can change amounts available in certain circumstances, *e.g.*, trebling damages by statute.[43] It found the enactment sufficiently different from previous legislation struck down.[44]

The Supreme Court of Washington in *Sofie*, however, suggested that a cap on damages might violate the separation of powers as a legislative remittitur.[45] But it did not decide the case on that basis. The lesson here is that, like the trial-by-jury and remedy/open-courts issues, the separation-of-powers analysis is likely to differ by state, particularly because of the circumstances underlying the enactment and previous tort-reform efforts within the state.

CONCLUSION

The attacks on efforts to limit damages in tort litigation will continue as long as state legislatures make tort reform a priority. Damages caps generally and noneconomic damages caps specifically have become more insulated from those assaults as legislatures have learned from the lessons of precedent and designed subsequent reforms to harmonize with court rulings on these state constitutional issues. But plaintiffs will always fight to cushion the impact of any damages caps, no matter how eminently reasonable. And state supreme courts will remain the final arbiters of these issues under the respective state constitutions. ■

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[1] *Morris v. Savoy*, 61 Ohio St. 3d 684, 686–87, 691 (1991) (citation omitted).

[2] *Sorrell v. Thevenir*, 69 Ohio St. 3d 415 (1994); *Galayda v. Lake Hosp. Sys.*, 71 Ohio St. 3d 421 (1994); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552 (1994); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999).

[3] *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468 (2007).

[4] *Id.* at ¶ 1.

[5] *Id.* at ¶ 28.

[6] *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916); *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Arbino*, 116 Ohio St. 3d at ¶ 41 (citation omitted).

[7] *Id.* at ¶ 42.

[8] *Id.* at ¶ 35.

[9] *Id.* at ¶ 37.

[10] *Id.* at ¶ 39.

[11] *Id.*

[12] *Johnson v. St. Vincent Hosp.*, 273 Ind. 374 (1980) (upholding $500,000 limit on noneconomic damages because legislatures can restrict causes of action through statutes of limitation and procedural rules without transgressing the right to a jury trial); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (upholding Maryland's $350,000 cap on noneconomic losses to a right-to-jury challenge) ("a legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases is not acting as a fact finder in a legal controversy. It is acting permissibly within its legislative powers that entitle it to create and repeal causes of action.").

[13] *See*, *e.g.*, *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333 (1988) (striking noneconomic damages cap) *overruled in Bair v. Peck*, 248 Kan. 824 (1991) ("constitutional right to trial by jury does not guarantee that every jury damage award will be collectible or guarantee any source for payment of such an award. The duty of the jury is to determine liability and determine the amount of damages suffered. It has nothing to do with the collection of the damages.").

[14] *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

[15] *Id.* at 717.

[16] *Id.* at 729–30 (Callow, C.J., dissenting).

[17] *Id.*

[18] *Id.* at 732. *See Tull v. U.S.*, 481 U.S. 412, 425, 426 n.9 (1987) ("Nothing in the [7th] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial.").

[19] *Arbino*, 116 Ohio St. 3d at ¶¶ 43–47.

[20] *Id.* at ¶ 44.

[21] *Id.* at ¶¶ 45, 47.

[22] 507 So. 2d 1080 (Fla. 1987).

[23] *Id.* at 1087–88 (citing *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)).

[24] 175 P.3d 418 (Or. 2007).

[25] Oregon Const., Art. I, § 10.

[26] 175 P.3d at 433.

[27] *Id.* at 434.

[28] *Id.*

[29] *Arbino,* 116 Ohio St. 3d at ¶¶ 48–62.

[30] *Id.* at ¶ 56.

[31] *Id.* at ¶ 53; *id.* at ¶ 54.

[32] *Id.* at ¶¶ 59–61.

[33] *Id.* at ¶ 61.

[34] *Id.*

[35] *Id.* at ¶ 69.

[36] *Boyd v. Bulala*, 647 F. Supp. 781, 789–90 (W.D. Va. 1986) (but striking the enactment based on the right to trial by jury).

[37] *See*, *e.g.*, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137 (1985) (upholding $250,000 limitation on noneconomic damages in medical-malpractice cases as rationally related to legitimate government objection); *C.J. v. State*, 151 P.3d 373 (Alas. 2006) (upholding $400,000 noneconomic damages cap to due process challenge under the Alaska Constitution).

[38] 757 S.W.2d 687 (Tex. 1988).

[39] *Id.* at 692.

[40] *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

[41] *See*, *e.g.*, *Carson v. Maurer*, 120 N.H. 925 (1980) (striking down $250,000 cap on equal-protection grounds) *overruled by Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748 (2007) (holding that the intermediate-scrutiny test adopted and applied in *Carson* was incorrect).

[42] *Arbino*, 116 Ohio St. 3d at ¶ 73.

[43] *Id.* at ¶ 74.

[44] *Id.* at ¶ 76.

[45] *Sofie*, 771 P.2d at 721.