

TORT REFORM IN ALABAMA: ARE DAMAGES RESTRICTIONS UNCONSTITUTIONAL?

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I. INTRODUCTION

In 1987 Alabama adopted sweeping reforms affecting medical malpractice actions and tort actions generally.¹ The Alabama Medical Liability Act of 1987 ("AMLA")² deals solely with actions against health care providers. Another package of bills, the Alabama Tort Reform Act ("ATRA"),³ deals generally with tort actions. Among the most significant and controversial substantive changes in the acts are those restricting damages: (1) a cap on noneconomic compensatory damages recoverable from a health care provider;⁴ (2) a cap on punitive damages;⁵ (3) modifications of the collateral source rule;⁶ (4) provisions for periodic payment of

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1. For a legislative history of these bills, see Hunter, *Alabama's 1987 Tort Reform Legislation*, 18 CUMB. L. REV. 281, 282-85 (1988).

2. Act No. 87-189, 1987 Ala. Acts 261 (codified at ALA. CODE §§ 6-5-540 to -552 (Supp. 1988)).

3. Act of June 11, 1987, No. 87-181, 1987 Ala. Acts 242 (change of venue) (codified at ALA. CODE § 6-3-21.1 (Supp. 1988)); Act of June 11, 1987, No. 87-182, 1987 Ala. Acts 244 (forum non conveniens) (codified at ALA. CODE § 6-5-430 (Supp. 1988)); Act of June 11, 1987, No. 87-183, 1987 Ala. Acts 245 (periodic payout) (codified at ALA. CODE §§ 6-11-1 to -7 (Supp. 1988)); Act of June 11, 1987, No. 87-184, 1987 Ala. Acts 249 (substantial evidence) (codified at ALA. CODE § 12-21-12 (Supp. 1988)); Act of June 11, 1987, No. 87-185, 1987 Ala. Acts 251 (punitive damages cap) (codified at ALA. CODE §§ 6-11-20 to -30 (Supp. 1988)); Act of June 11, 1987, No. 87-186, 1987 Ala. Acts 254 (frivolous litigation) (codified at ALA. CODE §§ 12-19-270 to -276 (Supp. 1988)); Act of June 11, 1987, No. 87-187, 1987 Ala. Acts 258 (collateral source rule modification) (codified at ALA. CODE § 12-21-45 (Supp. 1988)); Act of June 11, 1987, No. 87-188, 1987 Ala. Acts 259 (elimination of 10% appeal penalty) (codified at ALA. CODE §§ 12-22-72 to -73 (Supp. 1988)).

4. ALA. CODE § 6-5-544 (Supp. 1988).

5. *Id.* § 6-11-21.

6. *Id.* § 6-5-545 (medical collateral source rule); *id.* § 12-21-45 (general collateral source rule).

damages awards;⁷ and (5) a limit on recovery in a wrongful death action against a health care provider.⁸

The adoption of tort reform legislation in Alabama is part of a nationwide trend,⁹ steered by business coalition groups and prompted by a crisis in the availability and affordability of insurance. As this Article will discuss, some courts already have pronounced state legislation similar to Alabama's unconstitutional. One of the strongest arguments against the constitutionality of the legislature's malpractice reform efforts is based on equal protection. This challenge specifically points to those portions of the AMLA that bestow on health care providers the special benefit of limited damages and subject medical malpractice plaintiffs to special burdens. In addition, all restrictions on damages are particularly vulnerable to a due process challenge based on the right to remedy and right to jury trial provisions of the Alabama Constitution.¹⁰

Both equal protection and due process analyses focus in part on the state's interest in enacting the legislation. As this Article will discuss, precedents in Alabama and other jurisdictions reveal that many courts employ a heightened level of scrutiny in considering such challenges. The legislative means employed—here, the damages limitations—must substantially relate to the end desired—a solution to the insurance crisis and a decrease in insurance costs.¹¹ The Alabama Supreme Court's view of the constitutionality of the damages limitations thus could depend in large part on its assessment of the insurance crisis and the efficacy of the legislative responses to the crisis.

Part II of the Article will survey the liability insurance crisis, its perceived causes, and the efficacy of past tort reform efforts. Part III will address state constitutional law and tort reform packages in general. Part IV will specifically address the constitutionality of Alabama's damages caps considering right to

7. *Id.* § 6-5-543 (medical periodic payment rule); *id.* §§ 6-11-1 to -7 (general periodic payment rule).

8. *Id.* § 6-5-547.

9. "Within the past eighteen months, forty-two state legislatures have enacted some form of tort reform legislation." Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1587 (1987).

10. ALA. CONST. art. I, § 13 (right to remedy); *id.* art. I, § 11 (right to jury trial).

11. For discussion of the insurance crisis, see *infra* notes 12-110 and accompanying text.

jury trial, right to court access, and separation of powers challenges. Part V will consider the constitutionality of abrogation of the collateral source rule. Finally, Part VI will address those provisions of the tort reform act that mandate the periodic payment of certain damages.

II. THE LIABILITY INSURANCE CRISIS

A review of the studies generated by the tort reform movement provides an essential foundation for analyzing the state's interests under equal protection and due process challenges to tort reform legislation. Numerous studies have described the existence of serious problems in the insurance industry. The first of a series of reports issued in 1984 and 1985 by the American Medical Association¹² noted that "[b]etween 1975 and 1983, medical liability premiums increased by more than 80% in general."¹³ While premiums written on professional liability insurance increased from \$1.20 billion in 1977 to \$1.57 billion in 1983, losses and loss expenses increased from \$817 million to \$2.0 billion during the same period.¹⁴ The total indemnity paid by physician-owned companies increased from nearly \$27 million in 1979 to over \$279 million in 1983.¹⁵

Increases in premiums also have been observed in all commercial lines, with coverage becoming unaffordable for nurse-midwives and general aviation manufacturers.¹⁶ Availability problems have been reported in the following lines of insurance: pollution, day care, municipal, liquor, motor carrier, and directors and officers liability coverages.¹⁷ Concurrent problems have included the

12. AMERICAN MEDICAL ASSOCIATION SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80s Reports 1, 2, & 3 (1984-85) [hereinafter AMA REPORT 1, 2, or 3].

13. AMA REPORT 1, *supra* note 12, at 8.

14. *Id.* at 7.

15. AMA REPORT 2, *supra* note 12, at 4. This enormous increase is partially explained by the fact that most physician-owned companies were not established until the mid-1970's.

16. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 4 (1986) [hereinafter TORT POLICY GROUP, CAUSES].

The Tort Policy Working Group was established by the Attorney General and it consisted of representatives of the White House and 10 agencies, primarily the Department of Justice, the Department of Commerce, and the Small Business Administration. *Id.* at 1.

17. *Id.* at 4.

unavailability of adequate levels of coverage as well as increases in exclusions, deductibles and other policy limitations.¹⁸

In a September 1986 report, the General Accounting Office examined the cost of malpractice insurance coverage for physicians and hospitals.¹⁹ The report concluded that "[f]rom 1983 to 1985, total medical malpractice insurance costs for physicians and hospitals rose from \$2.5 billion to \$4.7 billion."²⁰ The report also found that physicians' insurance costs varied widely by region and specialty.²¹ In 1985, for example, a Long Island obstetrician/gynecologist paid \$68,116 for \$1 million/\$3 million coverage, while the same specialist in Utah paid \$13,376 for the same coverage.²² General practitioners/family medicine physicians in Dade/Broward Counties in South Florida paid \$18,229 for \$1 million/\$1 million coverage, while the same group paid \$2,760 in North Carolina for the same coverage.²³ A 1987 study by a special task force of the Department of Health and Human Services noted that "[t]he average amount spent per physician on medical liability insurance increased from \$5,800 in 1982 to \$10,500 in 1985, an increase of eighty-one percent."²⁴

A 1987 study by a Florida research team, conducted at the governor's request and reported in the *Georgetown Law Journal*, revealed that Florida had among the highest malpractice insurance rates in the nation.²⁵ Increases and absolute costs have varied significantly among specialties and geographic regions within Florida.²⁶ For example, as of January 1, 1986, Florida general practitioners paid an annual premium of \$10,488, Florida obstetricians paid \$59,537, and Florida neurosurgeons paid \$75,367.²⁷ Doctors in Florida's Dade and Broward Counties, however, paid much higher

18. *Id.* at 14-15.

19. UNITED STATES GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS (1986) [hereinafter GAO REPORT: INSURANCE COSTS].

20. *Id.* at 2.

21. *Id.* at 3.

22. *Id.* at 24.

23. *Id.*

24. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE 13 (1987) [hereinafter HHS REPORT].

25. Nye, Gifford, Webb & Dewar, *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J. 1495, 1500 (1988).

26. *Id.* at 1501.

27. *Id.*

rates. As of July 1, 1987, neurosurgeons in those counties paid \$192,420 annually, and obstetricians paid \$165,320.²⁸

A March 1987 report by the Tort Policy Working Group noted that the crisis in insurance availability and affordability had "ameliorated" during the year²⁹ since its first report in February of 1986.³⁰ This improvement was attributed to increased premiums, a reduction of risks by refusal to write coverage, lower liability limits, more self-insurance, and increased use of the claims-made policy.³¹ While availability had improved in many lines, problems continued in environmental coverage, medical malpractice and certain products liability risk classes.³² This report further noted that "insurance coverage has been substantially reduced through higher deductibles, lower coverage limits and additional policy exclusions and limitations."³³

A. *Causes of the Crisis*

There is little agreement among various interest groups as to either the source of the insurance crisis or appropriate solutions. Health care providers cite high costs of malpractice insurance, lengthy settlement negotiations, and excessive legal costs as the source of the crisis.³⁴ Consumer groups point to the length of time required to settle claims and inadequate preventive efforts by health care providers.³⁵ Some attorneys say the malpractice insurance crisis stems primarily from medical negligence and disagree with assertions that the cost of insurance presents a significant problem.³⁶ The major studies have focused on the following possible causes of the insurance crisis: (1) changes in substantive legal standards; (2) increased severity and frequency of claims; (3) the insurance cycle; (4) lack of competition and excessive insurance

28. *Id.* at 1502.

29. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 7 (1987) [hereinafter TORT POLICY GROUP, UPDATE].

30. *See supra* note 16.

31. TORT POLICY GROUP, UPDATE, *supra* note 29, at 7-8.

32. *Id.* at 8-9.

33. *Id.* at 21.

34. UNITED STATES GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: NO AGREEMENT ON THE PROBLEMS OR SOLUTIONS 14 (1986) [hereinafter GAO REPORT: NO AGREEMENT].

35. *Id.*

36. *Id.* at 5.

company profits; and (5) problems with the risk classification system used by malpractice insurers.

1. *Changes in substantive legal standards.*—Some studies identify changes in substantive legal standards as the underlying cause of the crisis. The Tort Policy Working Group attributed the current crisis to the trend toward no-fault liability evident in judicial decisions during the past twenty years.³⁷ The report noted this trend had been accompanied by the erosion of the requirement of causation, an explosive growth in damages awards, and excessive transaction costs.³⁸ A 1987 report by a fifteen-member commission of the American Bar Association also accepted the idea that "tort doctrine has steadily evolved towards a more expansive system of compensation."³⁹ Some studies suggest this has undermined the insurance market by increasing the uncertainty and unpredictability of liability.⁴⁰

Professor George Priest has extensively analyzed the liability crisis and concluded that its underlying cause is the undermining of the insurance market caused by the shift to third-party insurance.⁴¹ The expansion of liability has undermined the insurance function by making it more difficult to diversify risks and by exac-

37. TORT POLICY GROUP, CAUSES, *supra* note 16, at 30-33. In a recent article, Professor George Priest has pointed out that the Working Group's conclusion is not adequately supported by its analysis. Priest notes that the expansion of liability could enhance the profitability of the insurance industry by increasing the demand for insurance. Instead, Priest posits a more sophisticated analysis. He suggests the expansion of liability has "undermined the insurance function by increasing the variance (coefficient of variation) of existing insurance risk pools." Priest, *supra* note 9, at 1550. Considering Professor Priest's analysis, the Tort Policy Working Group concluded as follows in its second report:

The lack of predictability, or comprehensibility [due to the expansion of tort liability through the undermining of fault], greatly exacerbates the already serious deficiencies of the tort system. It directly increases the cost of the tort liability system by generating uncertainty as to liability exposure, thereby increasing the cost of liability insurance or requiring larger self-insurance reserves. But, as importantly, it undermines the deterrent value of tort law, for how can one modify one's behavior to avoid wrongful conduct when one cannot ascertain what type of behavior will be found to be wrongful.

TORT POLICY GROUP, UPDATE, *supra* note 29, at 59 (footnote omitted).

38. TORT POLICY GROUP, CAUSES, *supra* note 16, at 33-45.

39. AMERICAN BAR ASSOCIATION, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 4 (1987) [hereinafter ABA REPORT].

40. See *supra* note 37.

41. Priest, *supra* note 9; see also P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 133-52 (1988).

erbating the problems of moral hazard and adverse selection.⁴² Insurance works best when risks are uncorrelated, but the change in the socio-legal environment during the past forty years has resulted in a situation where risks have become more highly correlated.⁴³ For example, the shift to a regime of strict products liability has resulted in corporations being inundated with thousands of claims for defectively designed products.

According to Professor Priest, moral hazard is more difficult to control in the third-party context.⁴⁴ Unlike first-party insurance, there are no deductibles or coinsurance requirements in third-party insurance, and the damages available in third-party actions include such items as pain and suffering, for which there is no analog in first-party insurance. In a third-party system there is a greater incentive to inflate the amount of these damages as well as other items such as medical expenses.⁴⁵

The problem of adverse selection is also exacerbated in third-party insurance.⁴⁶ Insurers are typically unable to screen the eventual beneficiaries of third-party insurance. Moreover, when third-party insurance rates increase, there is a tendency for low risk members of the provider pool to drop out of the commercial insurance market and become self insured.⁴⁷ This in turn requires rate increases, which cause additional low risk providers to drop out of the pool. There also is an unravelling effect in the consumer pool because of the tendency of lower risk consumers to drop out of the market in response to product or service price increases resulting from increased insurance costs.⁴⁸

While this trend toward no-fault liability is widely acknowledged, most of the studies' proposed reforms do not relate to substantive norms. In its first report, the Tort Policy Working Group recommended that fault be retained as the basis for liability⁴⁹ and that causation be based on "credible scientific and medical evidence and opinions."⁵⁰ The study is, however, some-

42. Priest, *supra* note 9, at 1552-53.

43. *Id.* at 1539-51; P. HUBER, *supra* note 41, at 134-37.

44. Priest, *supra* note 9, at 1553.

45. *Id.* at 1553-55.

46. *Id.* at 1566; P. HUBER, *supra* note 41, at 135-36.

47. Priest, *supra* note 9, at 1570-71.

48. *Id.* at 1539-87.

49. TORT POLICY GROUP, CAUSES, *supra* note 16, at 61.

50. *Id.* at 62-63.

what vague on the appropriate method of ensuring the retention of fault as a standard of liability. It does not address the means of preventing further judicial erosion of the reasonable person standard through innovative interpretation. Instead, the report merely suggests resistance to the further extension of the doctrine of strict liability beyond the bounds of products liability suits.⁵¹

While the American Bar Association report acknowledged that "[t]he availability and affordability of liability insurance . . . has become an important element in measuring the efficacy of the tort system," it rejected the notion that "fluctuations in the costs of liability insurance are a direct reflection of corresponding changes in the tort claims system."⁵² The commission eschewed any attempt to address the problems of the insurance industry or proposals for increased regulatory oversight and instead called for the creation of another commission to examine these matters.⁵³ The report's recommendations centered on reform of the existing tort system rather than replacement of the system with a no-fault or social insurance alternative.⁵⁴

2. *Increased severity and frequency of claims.*—Several studies emphasize that increased severity and frequency of claims are the primary causes of the insurance industry's problems. From 1979 to 1983, the number of claims filed nationwide against physicians increased 114.2%.⁵⁵ Statistics gathered on the increase in severity of claims in the area of medical malpractice are even more revealing. For example, claims data from physician-owned companies in the South show an increase in average claim severity from \$13,139 per claim in 1979 to \$106,712 per claim in 1983.⁵⁶ The closed claim data from Florida indicate that from 1975 to 1986, the increase in claim severity in medical malpractice actions has been much greater than the increase in claim frequency during this period.⁵⁷ Average claim severity rose most dramatically in South Florida, and the increases were greater in certain specialties such as pediatrics, neurology, anesthesiology, and obstetrics.⁵⁸

51. *Id.* at 61-62.

52. ABA REPORT, *supra* note 39, at 2.

53. *Id.* at 8.

54. *Id.* at 6.

55. AMA REPORT 1, *supra* note 12, at 12.

56. *Id.* at 11.

57. Nye, Gifford, Webb & Dewar, *supra* note 25, at 1544.

58. *Id.* at 1546, 1548.

Malpractice claims data from Alabama from 1980 to 1986 also reveal general upward trends in claim severity and frequency, although not of the magnitude experienced in Florida. In fact, reported claim frequency in Alabama was actually lower in 1986 than in 1985.⁵⁹ Nevertheless, the 1986 claim frequency level was twenty-six percent higher than in 1980, and the average annual increase over the period from 1980 to 1986 was seven percent.⁶⁰ Reported average claim severity, based on data available as of December 31, 1986, reflected an increase from \$12,468 to \$23,858 for this six-year period.⁶¹

In addition to increased malpractice claims, the number of products liability suits filed in federal district courts increased from 1,579 in 1974 to 13,554 in 1985.⁶² As an example of the concomitant increase in the severity of claims, the average award for wrongful death of an adult male increased from \$223,259 in 1975 to \$946,140 in 1985, a 324% increase.⁶³

On the other hand, some commentators contend there is no lawsuit crisis. In fact, one commentator has observed: "[T]he number of suits filed appears to be going down in proportion to the population. . . ."⁶⁴ Indeed, information from the National Center of State Courts suggests the number of filings for all claims in the 1980's has decreased; moreover, with respect to tort suits, the increase from 1978 to 1984 is a modest nine percent compared to an eight percent increase in population.⁶⁵ But, Professor Priest pointed out that "the Center's study is misleading because its data are so highly aggregated."⁶⁶ Since the volume of tort complaints is dominated by "auto collision, slip and fall, and other kinds of property injury cases" the data do not reveal significant increases in categories such as medical malpractice and products liability.⁶⁷

A recent study by Professor Marc Galanter of Wisconsin has shed some new light on the litigation boom. He contends that "in-

59. MUTUAL ASSURANCE, INC., 1986 ANNUAL REPORT 4 (1987).

60. *Id.*

61. *Id.*

62. TORT POLICY GROUP, CAUSES, *supra* note 16, at 45.

63. *Id.* at 47-49.

64. Saks, *In Search of the "Lawsuit Crisis,"* 14 LAW, MED. & HEALTH CARE 77, 78 (1986).

65. *Id.*

66. Priest, *supra* note 9, at 1533.

67. *Id.*

creased filings in federal courts have been sparked more by businesses suing one another over contract disputes than by citizens attacking corporate defendants."⁶⁸ According to his statistics, between 1960 and 1986 the number of contract disputes filed in federal courts increased 258%, from 13,268 to 47,443, while tort filings increased 114%, from 19,584 to 41,979.⁶⁹ During the same period, total civil filings rose 398%, from 51,000 to 254,000, and by 1986, contract dispute filings made up 18.7% of the total, and tort filings constituted 16.5%.⁷⁰ Moreover, while Galanter acknowledges that jury awards in product liability cases have skyrocketed, he argues that these figures have been distorted by suits involving certain products, such as asbestos, for which claims eventually will dwindle.⁷¹

3. *The insurance cycle theory.*—The insurance cycle theory also has been advanced to partially explain the present crisis.⁷² This theory posits that during periods of high interest rates, insurers are anxious to obtain premium dollars for investment purposes. Accordingly, in a competitive market in which several insurers are seeking additional premium dollars, significant downward pressure will be exerted on insurance rates, and higher risk activities will obtain insurance more easily. When interest rates go down, however, insurers will increase premiums and insure risks more selectively. Although the insurance cycle clearly has aggravated the insurance crisis, it does not fully explain phenomena such as the complete unavailability of certain lines of insurance and the increased restrictions on coverage.⁷³

4. *Lack of competition and excessive insurance company profits.*—Some theorists propose that insurance companies, health care providers, and large corporations have conspired to manufacture the current crisis in order to maximize their profits. Consumer protection advocate Ralph Nader, for example, decries the industry's "soaring" profits and attributes the "self-inflicted" crisis to the industry's attempts to recoup losses from excessive competi-

68. Barrett, *Litigation Boom? Professor Turns Up a New Culprit*, Wall St. J., Oct. 17, 1988, at B1, col. 5.

69. *Id.* at cols. 5-6.

70. *Id.* at col. 6.

71. *Id.* at B9, col. 1.

72. Nye, Gifford, Webb & Dewar, *supra* note 25, at 1528-29.

73. Priest, *supra* note 9, at 1530-31.

tion in the early 1980's, which resulted in unrealistically low rates.⁷⁴

Such contentions are sharply disputed, however. The 1986 Tort Policy Working Group Report notes that Nader's criticisms are inconsistent, reasoning that if the insurance industry is a competitive one, then current premiums should not exceed the level dictated by current investment returns and the level of risk insured.⁷⁵ If current premiums and profits are excessive, then "other sources of capital . . . should offer the same insurance at a lower price, or insureds will retain these 'excess profits' . . . through self-insurance or the formation of captives."⁷⁶ The Tort Policy Working Group reports, moreover, that the profit margin of the property and casualty insurance industry in 1984 was "well below the profitability of most other major industries."⁷⁷ The Health and Human Services Report concluded that while the industry has been profitable since the mid 1970's, "[t]he degree of profitability has fluctuated widely."⁷⁸ In 1986, the rate of return was approximately 11.6%.⁷⁹ The Florida study concluded that while insurance profits have not been excessive, "the insurance industry's financial position is less precarious than it claims."⁸⁰ Nationally, from 1977 to 1985, the total return on equity for the property-casualty insurance industry was slightly less than the average for United States industry as a whole.⁸¹ The return for medical malpractice insurers during this period was 16.3%, slightly more than the return for all property and casualty insurers, but slightly less than industry as a whole.⁸² Return on equity was down sharply in 1984 and 1985.⁸³

5. *Problems with risk classification systems.*—The 1987 Florida study concluded that the present risk classification system

74. Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 *Gonz. L. Rev.* 15, 18-19 (1986-87).

75. See TORT POLICY GROUP, *CAUSES*, *supra* note 16, at 25, 27-28.

76. *Id.* at 27.

77. *Id.* at 18-19. The report notes "in 1984 the property-casualty insurance industry produced an annual rate of return on net income after taxes as a percent of net worth of 1.8%, whereas the median for Fortune 500 companies was 13.6%." *Id.*

78. HHS REPORT, *supra* note 24, at 162. After peaking in 1977, "return on net worth for the property casualty industry declined yearly until 1985." *Id.*

79. *Id.*

80. Nye, Gifford, Webb & Dewar, *supra* note 25, at 1515.

81. *Id.* at 1518.

82. *Id.* at 1520-21.

83. *Id.* at 1521.

employed by malpractice insurers has serious deficiencies, which have aggravated the insurance crisis. The report enumerated two deficiencies:

First, the number of high-risk specialists insured in some of the risk classes used by insurance companies is too small to provide a sufficient base to absorb the costs of substantial medical injuries. . . .

Second, the existing risk classification system does not appear to provide adequate market-based incentives for physicians to avoid losses.⁸⁴

The authors of the study also criticized the malpractice insurers' failure to measure individual experience.⁸⁵ The malpractice insurers do not take into account the prior loss experience of the insured or his volume of business, both of which could significantly affect the level of risk.⁸⁶ This decreases the market incentives for physicians to minimize losses. Of particular interest was the fact that the study of closed malpractice claims in Florida from 1975 to 1986 revealed that almost one-half of the amount of claims paid out was attributable to physicians with two or more claims.⁸⁷ During this period, four percent of all physicians were responsible for 42.2% of total claims payments.⁸⁸

The Florida study cited the size of the risk pool for some specialties as another problem.⁸⁹ The insurer spreads the cost of possible claims payment among the number of insureds within that speciality. Physicians who practice rarer specialties thus pay higher premiums. For example, only 488 neurosurgeons were practicing in Florida in 1985, and some of these were probably self-insured.⁹⁰ Moreover, premiums were scaled according to location. As a result, a very small group of specialists in large urban centers paid very high premiums.⁹¹

84. *Id.* at 1530.

85. *Id.*

86. *Id.* at 1530-31.

87. *Id.* at 1558.

88. *Id.*

89. *Id.* at 1531, 1533.

90. *Id.* at 1533.

91. *Id.*

B. The Efficacy of Past Tort Reform Efforts

Several studies have reviewed the efficacy of the tort reform efforts in the mid-1970's, which attempted to alleviate the effects of the previous malpractice insurance crisis.⁹² During that period, every state except West Virginia enacted some type of medical malpractice reform legislation, and a few states enacted comprehensive malpractice reform measures.⁹³ Despite these reforms, numerous studies reveal that claim severity, claim frequency, and insurance rates have continued to increase. The 1985 study by the American Medical Association reported that claims filed against physicians increased from an average of 3.3 per 100 physicians prior to 1978 to 20.3 per 100 physicians in 1983 for physician-owned companies.⁹⁴

A December 1986 report by the General Accounting Office focused on how claims and insurance costs continued to rise despite tort reforms.⁹⁵ Surveying six states that had recently implemented tort reform measures, the study found that while reforms could have moderated upward trends, "since 1980, insurance costs for many physicians and hospitals increased dramatically, as did the number of malpractice claims filed and the average amounts paid."⁹⁶ According to this report, the increases in insurance costs between 1980 and 1986 ranged from "35 percent for anesthesiologists in California to 547 percent for obstetricians/gynecologists in North Carolina."⁹⁷ Increases in claims frequency during the same period ranged from 19 to 92% in the six states, while increases in severity of claims paid ranged from 63 to 124% in five of the states.⁹⁸

In another December 1986 report, the General Accounting Office focused on the views of various California interest groups on the efficacy of tort reform in the state.⁹⁹ Despite the continued rise

92. See generally Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 5.

93. AMA REPORT 2, *supra* note 12, at 13.

94. AMA REPORT 1, *supra* note 12, at 14.

95. UNITED STATES GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986).

96. *Id.* at 3.

97. *Id.* at 14.

98. *Id.*

99. UNITED STATES GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: CASE STUDY ON CALIFORNIA (1986).

in insurance costs, claims severity, and claims frequency, health care providers and insurance officials believed the reforms had effectively moderated these increases.¹⁰⁰ Most providers believed that caps on damages and periodic payouts played significant roles in decreasing awards and settlements.¹⁰¹

Patricia Danzon conducted two studies that focused on the efficacy of tort reforms enacted in the mid-1970's.¹⁰² She concluded that of the various reform provisions, only modifications of the collateral source rule and caps on damages have had a significant impact on claim severity and frequency.¹⁰³ She later conducted another study in 1986 based on nationwide claims experience from 1975 through 1984.¹⁰⁴ Comparing states that did and did not adopt reforms, this study concluded that the frequency of claims was reduced by eight percent when the statute of limitations is shortened by one year.¹⁰⁵ Malpractice claim severity was reduced by eleven to eighteen percent, and claim frequency was reduced by fourteen percent by statutes that mandate offset of collateral source benefits.¹⁰⁶ The study also concluded that caps on awards reduced the severity of claims by twenty-three percent.¹⁰⁷

As noted by the Health and Human Services Report, however, such empirical studies must be approached with "caution" because

100. *Id.* at 2.

101. *Id.*

102. The two studies are reported in Danzon & Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345 (1983), and P. DANZON, *THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS* (1982). The 1982 study used data from claims closed from 1975-78 by insurance companies writing premiums of \$1 million or more in any year since 1970. It concluded that states with caps had 19% lower awards two years after the cap went into effect, and that states mandating the offset of collateral sources had 50% lower awards two years after the statute went into effect. GAO REPORT: NO AGREEMENT, *supra* note 34, at 20 (citing P. DANZON, *THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS* (1982)). The 1983 study used data from claims closed in 1974 and 1976. It concluded that limits on awards reduced potential verdicts by 42% and reduced settlement size by 34%. Danzon & Lillard, *supra*, at 373. It also found that limits on plaintiff contingency fees reduced settlement size by 9%. *Id.* at 365; *see also* GAO REPORT: NO AGREEMENT, *supra* note 34, at 18-20.

103. *See* Danzon & Lillard, *supra* note 102, at 360-61; *see also* GAO REPORT: NO AGREEMENT, *supra* note 34, at 18-20.

104. The study is reported in Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 57.

105. *Id.* at 78.

106. *Id.*

107. *Id.*

of inherent "methodological problems."¹⁰⁸ These problems include "differences between the changes adopted by various states, as well as the differences in practice prior to change even in states adopting similar changes, various effective dates and the delays between enactment and final judicial review of the legislation."¹⁰⁹ It has also been pointed out that the efficacy of many of these reforms was never tested, as the reforms did not withstand constitutional challenge.¹¹⁰

In summary, the data derived from these tort reform studies suggest that the insurance crisis of the early 1980's was caused by increased loss payouts and exacerbated by the insurance cycle. Based on available data, it does not appear that the crisis was caused by anti-competitive conditions in the insurance industry and excessive insurance company profitability. It also seems that tort reform efforts, such as restrictions on recoverable damages, have not been very successful in stemming the crisis. Despite tort reform legislation implemented in the mid-1970's, there was still a severe insurance crisis in the early 1980's. Moreover, insurance costs have continued to escalate despite more recent efforts at tort reform. While it may be argued that increases would have been greater without this tort reform legislation, at this time there is not sufficient data to establish the verity of this assertion.

Damages restrictions affect those who are the most seriously injured and tend to confer the greatest benefit on the most egregious wrongdoers. They also restrict rights available to plaintiffs at common law without offering any benefit in return. Arguably, this scenario bodes significant constitutional problems if heightened scrutiny is employed under either equal protection or due process analysis.

III. STATE CONSTITUTIONAL LAW AND TORT REFORM

While tort reform legislation is susceptible to attack under both state and federal constitutional provisions, in recent decisions state courts have tended to address state constitutional questions before federal constitutional questions. Traditionally, most state

108. HHS REPORT, *supra* note 24, at 121-22.

109. *Id.* at 122.

110. *Id.* at 14.

courts have subjected tort reform legislation to rationality review, which requires that the "challenged legislation rationally promote a legitimate governmental objective."¹¹¹

Provisions of state constitutions that other state courts have relied on in striking down tort reform legislation include rights to trial by jury, rights to remedy and access to the courts, rights to equal protection of the laws and due process, and the separation of powers among the three branches of government.¹¹² The Alabama Constitution contains provisions similar to each of these.¹¹³

Some courts that have pronounced tort reform measures unconstitutional have based their decisions on the doctrine of quid pro quo, which is a type of substantive due process.¹¹⁴ Florida, Kansas, and Texas have invoked the quid pro quo doctrine in striking down damages caps.¹¹⁵ Under this doctrine, the state legislature cannot retract a vested statutory or common law right—such as the right to recover damages for personal injuries—without providing a reasonable alternative. The quid pro quo doctrine may be utilized under an access to the courts or adequate remedy provision of a state constitution. It is particularly potent when coupled with attacks based on the violations of the right to trial by jury and separation of powers provisions. Although there is no right to remedy provision in the United States Constitution, the United States Supreme Court in dicta has recognized that abrogation of common law remedies may violate due process when a state fails to provide an adequate substitute remedy.¹¹⁶

The Alabama Supreme Court has developed a quid pro quo doctrine based on the access to the courts and adequate remedy

111. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 202, 208 (1985).

112. *Id.* at 213.

113. ALA. CONST. art. I, § 11 (jury trial); *id.* § 13 (right to remedy and access to courts); *id.* § 22 (prohibits granting of special privileges). Article I, § 22, in combination with article I, § 1, and article I, § 6, guarantees equal protection of the laws. *See City of Hueytown v. Jiffy Chek Co.*, 342 So. 2d 761, 762 (Ala. 1977).

114. *See, e.g., Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987).

115. *Smith*, 507 So. 2d 1080; *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

116. *New York Cent. R.R. v. White*, 243 U.S. 188, 201 (1917); *see also Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 (1978) (citing *White*, 243 U.S. 188, but refusing to hold that due process requires an adequate remedy, although noting such a substitute was provided in the case at bar).

clauses of the Alabama constitution.¹¹⁷ The Alabama test under this approach "resembles heightened scrutiny, or the middle tier analysis under the equal protection clause."¹¹⁸

IV. DAMAGES CAPS

A. Review of Legislation

In recent years, many states have enacted limitations or caps on damages recoverable in personal injury actions.¹¹⁹ Some of these

117. See, e.g., *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 342 (Ala. 1980) (Jones, J., concurring) (basing quid pro quo doctrine on ALA. CONST. art. I, § 13).

118. Wiggins, Harnitiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193, 215 (1986-87).

119. ALASKA STAT. § 09.17.010 (Supp. 1986) (\$500,000 noneconomic damages); CAL. CIV. CODE § 3333.2 (West Supp. 1989) (\$250,000 noneconomic damages); COLO. REV. STAT. § 13-21-102 (1987 & Supp. 1988) (the amount of punitive damages shall not exceed an amount equal to the amount of actual damages awarded to the injured party); COLO. REV. STAT. § 13-21-102.5 (1987 & Supp. 1988) (\$250,000 noneconomic damages unless the court finds a greater amount is justified, but in no event exceeding \$500,000); FLA. STAT. ANN. § 768.80 (Harrison Supp. 1988) (\$450,000 noneconomic losses); GA. CODE ANN. § 51-12-5.1 (Michie Supp. 1988) (punitive damages limited to \$250,000 except in products liability and intentional tort cases); HAW. REV. STAT. § 663-8.7 (Supp. 1987) (pain and suffering damages, \$375,000, with exceptions); IDAHO CODE §§ 6-1603, -1604 (Supp. 1988) (noneconomic and punitive damages, \$400,000); IND. CODE ANN. § 16-9.5-2-2 (West 1984 & Supp. 1988) (\$500,000 limit for all damages for any injury or death); KAN. STAT. ANN. § 60-3407 (Supp. 1988) (noneconomic damages \$250,000 each party from all defendants, and \$1,000,000 for all claims of each party from all defendants in medical malpractice actions); LA. REV. STAT. ANN. § 40:1299.39 (West 1977 & Supp. 1989) (malpractice liability for state services, \$500,000); LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1989) (malpractice \$500,000 exclusive of future medical costs); MD. CTS. AND JUD. PROC. CODE ANN. § 11-108 (Supp. 1988) (noneconomic damages, \$350,000); MASS. GEN. LAWS ANN. Ch. 231 § 60(H) (West Supp. 1989) (noncompensatory damages \$500,000 or if more than one plaintiff, they share the total damages—the amount recoverable will be reduced to a percentage of \$500,000 proportionate to that plaintiff's share); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1988) (medical malpractice noneconomic losses, \$225,000 unless certain conditions exist); MINN. STAT. ANN. § 549.23 (West 1988) ("intangible" losses, \$400,000); MO. ANN. STAT. § 538.210 (Vernon 1988) (limits set annually in medical malpractice actions); MONT. CODE ANN. § 2-9-103 (1987) (limitation on governmental liability, \$750,000 each claim and \$1.5 million for each occurrence); NEB. REV. STAT. § 44-2825 (1988) (\$500,000 total recoverable for medical malpractice for any occurrence on or before Dec. 31, 1984, and \$1,000,000 for any occurrence after Dec. 31, 1985); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1988) (noncompensatory limit of \$875,000); N.J. STAT. ANN. § 2A:53A-8 (West 1987) (liability of nonprofit association organized for hospital purposes not to exceed \$10,000); N.M. STAT. ANN. § 41-5-6 (1986 & Supp. 1987) (\$500,000 for medical malpractice claims, except for punitive damages and medical care); N.D. CENT. CODE ANN. § 26.1-14-11 (Supp. 1987) (immunity from liability in excess of \$500,000 policy limits for each claim for insured professional malpractice and \$1,000,000 aggregate); OKLA. STAT. ANN. tit. 23, § 9 (1987 & Supp. 1989) (punitive damages limited to

caps apply to only medical malpractice actions,¹²⁰ while others apply to all sorts of personal injury actions.¹²¹ In some states, the caps apply to all damages,¹²² while in others they apply only to punitive¹²³ or compensatory noneconomic damages.¹²⁴

In 1987, Alabama adopted several provisions including damages caps: (1) a \$400,000 cap on noneconomic damages applicable in actions against health care providers;¹²⁵ (2) a \$1,000,000 cap on all damages applicable in wrongful death actions against health care providers;¹²⁶ and (3) a \$250,000 cap on punitive damages applicable in civil actions.¹²⁷

AMLA specifically provides that a plaintiff, in an action against a health care provider "based on a breach of the standard of care" and grounded in either tort or contract may recover noneconomic losses; "noneconomic losses" include recoveries for "pain, suffering, inconvenience, physical impairment, disfigure-

an amount equal to actual damages in absence of a court finding of clear and convincing evidence of wanton or reckless conduct); OR. REV. STAT. ANN. § 18.560 (Butterworth 1988) (\$500,000 for noneconomic damages); PA. CONS. STAT. ANN. § 8528 (Purdon 1985 & Supp. 1988) (\$250,000 per occurrence or \$1,000,000 in the aggregate); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987 & Supp. 1988) (\$1,000,000 total damages for medical malpractice); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1989) (exemplary damages awarded may not exceed four times the amount of actual damages or \$200,000, whichever is greater); TEX. REV. CIV. STAT. ANN. art. 4590(i) (Vernon Supp. 1989) (health care providers, liability not to exceed \$500,000); UTAH CODE ANN. § 78-14-7.1 (1987 & Supp. 1988) (limitation on noneconomic losses \$250,000 in malpractice actions); VA. CODE ANN. § 8.01-581.15 (1984 & Supp. 1988) (limitation of \$1,000,000 in malpractice actions); WASH. REV. CODE ANN. § 4.56.250 (1988) (noneconomic damages recoverable determined by multiplying 0.43 by the average annual wage and by the life expectancy of the damaged plaintiff according to life expectancy tables); W. VA. CODE § 55-7B-8 (Supp. 1988) (noneconomic damages for medical malpractice limited to \$1,000,000); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1988) (noneconomic limitation, \$1,000,000 for each occurrence of medical malpractice).

120. See, e.g., KAN. STAT. ANN. § 60-3407 (Supp. 1988) (\$250,000); MO. ANN. STAT. § 538.210 (Vernon 1988) (\$350,000).

121. See, e.g., ALASKA STAT. § 09.17.010 (Supp. 1986) (\$500,000); MD. CTS. AND JUD. PROC. CODE ANN. § 11-108 (Supp. 1988) (\$350,000); MINN. STAT. ANN. § 549.23 (West 1988) (\$400,000); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1988) (\$875,000).

122. See, e.g., IND. CODE ANN. § 16-9.5-2-2 (West 1984 & Supp. 1988) (\$500,000); LA. REV. STAT. ANN. § 40:1299.42(B) (West Supp. 1986) (\$500,000); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987 & Supp. 1988) (\$1,000,000); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1988) (\$1,000,000).

123. For a listing, see Priest, *supra* note 9, at 1587-88 n. 258.

124. *Id.* at 1587 n. 257.

125. ALA. CODE § 6-5-544 (Supp. 1988).

126. *Id.* § 6-5-547.

127. *Id.* § 6-11-21. This damages limitation does not apply to wrongful death actions under §§ 6-5-391 and 6-5-410. *Id.* § 6-11-29.

ment, loss of consortium and other nonpecuniary damage."¹²⁸ The \$400,000 cap limits "recovery for noneconomic losses, including punitive damages, either to the injured plaintiff, the plaintiff's spouse or other lawful dependents or any of them together."¹²⁹ The act prohibits a plaintiff from seeking any amount beyond the cap and prohibits the court and the parties from advising the jury of the limit during trial.¹³⁰ Violation of this prohibition against advising the jury may result in a mistrial.¹³¹ The trial court is required to reduce any verdict returned in excess of the cap,¹³² and the jury must itemize its verdict into past, future, and punitive damages.¹³³

A \$1,000,000 cap applies to wrongful death actions against a health care provider.¹³⁴ If the jury is advised of the cap, the court must declare a mistrial on the opposing party's motion.¹³⁵ The trial court is required to reduce any verdict in excess of \$1,000,000 to the statutorily prescribed limit or such lesser amounts as it "deems appropriate in accordance with prevailing standards for reducing excessive verdicts."¹³⁶ Unlike the \$400,000 cap, the \$1,000,000 cap is to be adjusted annually to reflect increases or decreases in the Consumer Price Index during the preceding calendar year.¹³⁷

Punitive damages limitations, generally applicable to any civil action except wrongful death actions, provide that "[p]unitive damages may not be awarded . . . 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."¹³⁸ There is a \$250,000 cap on punitive damages, unless the award is based on one or more of the following: "(1) [a] pattern or practice of intentional wrongful conduct . . . ; or, (2) [c]onduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or, (3) [l]ibel, slander or defamation."¹³⁹ Again, mention of the cap in the presence of the jury is a

128. *Id.* § 6-5-544(a).

129. *Id.* § 6-5-544(b).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* § 6-5-543(a).

134. *Id.* § 6-5-547.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* § 6-11-20(a).

139. *Id.* § 6-11-21.

ground for mistrial.¹⁴⁰ Both the trial court, upon motion of any party, and the appellate court must independently reassess an award of punitive damages.¹⁴¹ Punitive damages may not be awarded against the state, counties, or municipalities or their agencies, except for health care providers.¹⁴² Liability of a principal for punitive damages under the theory of respondeat superior is also limited to certain specified situations.¹⁴³

B. *The Constitutionality of Damages Caps*

The courts are divided on the constitutionality of damages caps.¹⁴⁴ While courts in seven states have pronounced the caps constitutional,¹⁴⁵ a majority of the courts that have addressed the

140. *Id.* § 6-11-22.

141. *Id.* § 6-11-23(b) (trial court reassessment); *id.* § 6-11-24(b) (appellate court reassessment).

142. *Id.* § 6-11-26.

143. *Id.* § 6-11-27.

144. See generally Note, *The Constitutionality of Statutory Damage Limitations in Medical Malpractice Actions*, 17 CUMB. L. REV. 569, 571 n. 17, 583 (1987).

145. See, e.g., *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (upholding \$350,000 cap on noneconomic damages awards in personal damages injury cases against plaintiff's challenges based on right to jury trial under the state and federal constitutions, due process, separation of powers, and access to courts provisions of the Maryland Constitution); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (upholding the constitutionality of a \$250,000 cap on noneconomic compensatory damages; utilizing rationality review in finding no violation of equal protection), *appeal dismissed*, 474 U.S. 892 (1985); *Johnson v. Saint Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (upholding a \$500,000 limitation on recovery which applied to both economic and noneconomic damages; rejecting equal protection claims and arguments under the state constitution that the cap was an impermissible special privilege and a denial of right to trial by jury; the court also seemed to reject a quid pro quo argument, noting that the act had established a patient compensation fund which would assure the availability of funds to pay judgments for malpractice); *Williams v. Kushner*, 524 So. 2d 191 (La. Ct. App.) (upholding \$500,000 cap applicable in action against private health care provider; holding it did not violate "right to individual dignity" and "access to courts" clauses of Louisiana Constitution), *writ granted*, 526 So. 2d 785 (La. 1988); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (plurality opinion upheld a \$500,000 limitation on all damages recoverable in medical malpractice actions; rejecting the contention that this violated the special privileges provision of the state constitution); *Etheridge v. Medical Center Hosps.*, 376 S.E.2d 525 (Va. 1989) (upholding \$750,000 cap on damages in actions against health care providers; rejecting plaintiffs' contentions that the limitation violated state and federal constitutional guarantees of due process and equal protection, and the right to jury trial,

issue have invalidated caps.¹⁴⁶

separation of powers, and prohibition on special laws provisions of the Virginia Constitution); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (upholding against due process, delegation of judicial authority, and right to trial by jury challenges a statutory chapter treating claims relating to health and patient care liability under an elaborate system involving several damages limitations).

The Louisiana Supreme Court did uphold a statutory damages cap in *Sibley v. Board of Supervisors of Louisiana State Univ.*, 462 So. 2d 149 (La.) (upholding the constitutionality of \$500,000 liability cap on malpractice liability for state services; utilizing rationality review in finding no equal protection violation, and also rejecting procedural and substantive due process arguments), *reh'g* 477 So. 2d 1094 (La. 1985), *on remand to* 490 So. 2d 307 (La. Ct. App.), *writ denied*, 496 So. 2d 325 (La. 1986). However, the case may no longer represent the law of the state, as the Louisiana Supreme Court, on rehearing, announced an independent state constitutional standard and remanded the case for determination of the constitutionality of the cap statute.

146. See, e.g., *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (voiding a \$450,000 cap on noneconomic compensatory damages because it violated the state constitution by denying access to the courts, failed to provide the constitutionally required redress of injuries, and denied the right to trial by jury); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (not actually striking down the statutory limitations, but casting significant doubt on their constitutionality, indicating that heightened scrutiny would be applied, and remanding for further fact finding on the equal protection claim), *cert. denied*, 431 U.S. 914 (1977), *on remand to* Nos. 55527 & 55586 (4th Dist. Idaho, Nov. 3, 1980) (damages limits held unconstitutional); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (striking down a statute imposing a maximum recovery of \$500,000 in malpractice cases; rejecting argument that there was a societal quid pro quo, i.e., lower insurance premiums and lower medical care costs, and holding that denial of recovery on an arbitrary basis amounts to a violation of the special privileges provision of the state constitution); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (utilizing quid pro quo doctrine, finding damages cap of \$1 million total and \$250,000 on noneconomic losses applicable in medical malpractice actions violated right to remedy provision of state constitution); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (employing an intermediate scrutiny approach as a matter of state constitutional law to strike down a \$250,000 limit on noneconomic losses); *Richardson v. Carnegie Library Restaurant, Inc.*, 107 N.M. 688, 763 P.2d 1153 (1988) (applying an intermediate level of review to strike down on equal protection grounds a \$50,000 cap on dramshop liability, the court being unable to identify or imagine any governmental purpose for limiting dramshop liability when other types of tort liability were unlimited); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (striking down a statute limiting liability of a qualified health care provider to \$300,000 per occurrence; the court adopted an intermediate scrutiny test and found the limitation to be arbitrary after determining there was no malpractice insurance crisis in North Dakota); *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (1985) (striking down a statute limiting general damages in medical malpractice cases to \$200,000); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (striking down a provision limiting the scope of recoverable damages when an action was brought more than three years from the date of the injury); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (striking down a statute limiting malpractice damages to \$500,000 exclusive of expenses of necessary medical, hospital, and custodial care; holding it violated open courts provision of the Texas Constitution).

1. *Right to jury trial.*—In *Kansas Malpractice Victims Coalition v. Bell*,¹⁴⁷ the Kansas Supreme Court invalidated legislation that limited a plaintiff's total recovery in a medical malpractice action to one million dollars and limited recovery for noneconomic losses to \$250,000.¹⁴⁸ Such caps were held to violate right to trial by jury¹⁴⁹ and right to remedy provisions¹⁵⁰ of the Kansas Constitution. The court acknowledged that although the legislature could modify these guarantees, this modification must be consistent with due process.¹⁵¹ The court accepted that the provision of an adequate substitute remedy—a quid pro quo—satisfied due process requirements, but rejected the contention that the legislature had

147. 243 Kan. 333, 757 P.2d 251 (1988).

148. *Bell*, 243 Kan. at ___, 757 P.2d at 253.

149. *Id.* at ___, 757 P.2d at 260; see also *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) ("*Boyd I*"); *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987) ("*Boyd II*"). The federal district court held that a Virginia statute capping total recovery in medical malpractice actions violated the seventh amendment guarantee of a jury trial in federal court. The *Boyd* court recognized "that a disparity between federal and state guarantees might force a reexamination of the rule that the seventh amendment applies in diversity actions" but "concluded that the right to trial by jury guaranteed in . . . the Virginia Constitution is equivalent to, or arguably stronger than, the right secured by the seventh amendment." *Boyd II*, 673 F. Supp. at 921-22. Thus, by finding that the damages cap violated the state constitution as well as the federal constitution, the court could say that it had "little fear that today's ruling, which is based on the seventh amendment to the U.S. Constitution, will provide to litigants in this court greater protection than they enjoy in the courts of the Commonwealth." *Id.* at 922.

The Virginia Supreme Court has subsequently held that the damages limitation does not offend that state's constitution. *Etheridge v. Medical Center Hosps.*, 376 S.E.2d 525 (Va. 1989). This raises the possibility for substantial differences in the outcome of similar litigation in the state and federal courts if the damages cap applies in only the state courts. In *Boyd*, for example, damages of \$8,300,000 were awarded, compared to a statutory limit of \$750,000 (now \$1,000,000) which could be awarded in state court. The potential for such extreme disparity suggests that it may become necessary for the federal courts, particularly the Western District of Virginia, to re-examine the scope of *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), holding that the seventh amendment of the federal constitution guarantees a right to jury trial in diversity cases in a case where the Court found little likelihood of different results; this would require the court to reperform the *Byrd* Court's weighing of this policy against the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See *Boyd I*, 647 F. Supp. at 788.

Other federal courts have held that damage caps do not infringe upon the right to a jury trial in diversity cases. See, e.g., *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Hines v. Elkhart General Hosp.*, 465 F. Supp. 421 (N.D. Ind.), *aff'd on other grounds*, 603 F.2d 840 (7th Cir. 1970); *Pierre v. Eastern Air Lines*, 152 F. Supp. 486 (D.N.J. 1957).

150. *Bell*, 243 Kan. at ___, 757 P.2d at 264.

151. *Id.* at ___, 757 P.2d at 260.

provided this quid pro quo in the form of more available and affordable health care.¹⁵²

The Alabama Constitution clearly guarantees an adequate remedy and access to the courts and mandates a separation of powers among the three branches of government.¹⁵³ The Alabama Supreme Court also has developed a quid pro quo doctrine based on the access to the courts and adequate remedy clauses of the Alabama Constitution.¹⁵⁴ Although there are no cases directly on point, it is clear from previous decisions of the Alabama Supreme Court that article I of the Alabama Constitution¹⁵⁵ preserves the historic right to a jury trial in situations where that right existed at the time of the adoption of Alabama's 1901 Constitution.¹⁵⁶ Certainly the right to recover for personal injuries was a common law right in existence in 1901 for which there was a right to a trial by jury. This may not be true, however, of wrongful death and survival actions, which are statutorily created rights rather than common law rights. Thus, it may be argued that in suits to recover for personal injuries other than death, the damages caps provided in the 1987 tort reform legislation violate the right to trial by jury by removing from the jury the consideration of damages in excess of the statutory caps. This argument should be asserted in conjunction with the access to the courts and adequate remedy provisions.

The provisions that seem even more vulnerable to constitutional attack than the damages caps as a violation of the right to trial by jury are those pertaining to trial and appellate review of punitive damages awards.¹⁵⁷ The trial court, upon motion of any party, must conduct a post-verdict hearing when the jury has awarded punitive damages. At this hearing, the trial court must make an independent assessment of such an award and "reduce or increase the award if appropriate in light of all the evidence."¹⁵⁸ The provision specifically directs that no "presumption" of cor-

152. *Id.* at ____, 757 P.2d at 263.

153. ALA. CONST. art. I, § 13 (right to remedy and access to courts); *id.* art. III, §§ 42-43 (separation of powers).

154. See *Grantham v. Denke*, 359 So. 2d 785, 787-92 (Ala. 1978).

155. ALA. CONST. art. I.

156. See *U-Haul Co. v. State*, 294 Ala. 330, 333, 316 So. 2d 685, 689 (1975).

157. ALA. CODE §§ 6-11-23 to -24 (Supp. 1988).

158. *Id.* § 6-11-23(b).

rectness attaches to the jury's verdict at this hearing.¹⁵⁹ This procedure seems effectively to remove the issue of damages from the jury in violation of the state constitution.¹⁶⁰ A similar argument could be propounded about the provision of the Tort Reform Act regarding appellate court review, which states that "no presumption of correctness shall apply to the amount of punitive damages awarded"¹⁶¹ and requires the appellate court to "independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence."¹⁶²

2. *Right to court access.*—In *Smith v. Department of Insurance*,¹⁶³ the Florida Supreme Court relied on the access to courts provision of the Florida Constitution in conjunction with the quid pro quo doctrine to strike down a \$450,000 cap on noneconomic losses. Quoting from an earlier Florida case, the court declared:

"[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."¹⁶⁴

Reasoning that the purpose of the access to the courts provision is to redress injuries, the court concluded that "[a] plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000."¹⁶⁵ The court then held that the Florida Legislature had failed to provide an alternative remedy to compensate for the deprivation of such a right and that neither the trial judge, who had upheld the legislation, nor the ap-

159. *Id.* § 6-11-23(a).

160. *See* ALA. CONST. art. I, § 11.

161. ALA. CODE § 6-11-24(a) (Supp. 1988).

162. *Id.* § 6-11-24(b).

163. 507 So. 2d 1080 (Fla. 1987).

164. *Smith*, 507 So. 2d at 1088 (quoting *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)).

165. *Id.*

pellees had attempted to demonstrate an overwhelming public need to abolish the right. Accordingly, the purported rationality of the legislation was simply irrelevant to the court's inquiry.¹⁶⁶

The Alabama Supreme Court recognized the quid pro quo doctrine under the right to remedy provision of the Alabama Constitution in *Grantham v. Denke*.¹⁶⁷ *Grantham* involved a challenge to the 1975 amendments to the Workmen's Compensation Act, which eliminated an injured employee's cause of action against a coemployee. In pronouncing the limitation unconstitutional, the court reasoned that the right to remedy provision preserves rights and remedies as they existed at common law.¹⁶⁸ The court noted the Workmen's Compensation Act conformed to the right to remedy provision to the extent that it operated between employer and employee because of the quid pro quo involved: "Each voluntarily gives up rights guaranteed by § 13 in exchange for benefits or protection under the Workmen's Compensation Act."¹⁶⁹ As to actions against coemployees, however, the court found there was no quid pro quo; accordingly, the challenged amendments violated the right to remedy provision of the Alabama Constitution.¹⁷⁰

A similar argument can be made with respect to damages caps. The caps limit the remedy available to the plaintiff in a personal injury action, and clearly the remedy was available to injured parties at common law without limitation. The only quid pro quo that could be advanced is the societal quid pro quo—lower insurance premiums or lower health care costs—and this has been forcefully rejected by other courts.¹⁷¹

Perhaps the most thorough discussion of the right to remedy analysis is contained in Justice Shores's concurrence in *Fireman's Fund American Insurance Co. v. Coleman*.¹⁷² Justice Shores characterized the approach of the *Grantham* court as "overly rigid."¹⁷³ According to Justice Shores's analysis, legislation that abolishes a common law right or remedy is "automatically suspect" but not

166. *Id.* at 1089.

167. 359 So. 2d 785 (Ala. 1978).

168. *Grantham*, 359 So. 2d at 787.

169. *Id.*

170. *Id.* at 789.

171. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

172. 394 So. 2d 334 (Ala. 1981).

173. *Coleman*, 394 So. 2d at 352 (Shores, J., concurring).

"automatically invalid."¹⁷⁴ She restated the established rule as follows: "[S]uch legislation will survive constitutional scrutiny if one of two conditions is satisfied: 1. The right is voluntarily relinquished by its possessor in exchange for equivalent benefits or protection, or 2. The legislation eradicates or ameliorates a perceived social evil and is a valid exercise of the police power."¹⁷⁵

Justice Shores interpreted this test as incorporating two variations of the quid pro quo doctrine—the possibility of an individual quid pro quo and the possibility of a valid societal quid pro quo.¹⁷⁶ She further indicated that rationality review is appropriate only if there is no deprivation of a common law right or remedy; when the statute in question does deprive the litigant of a common law right or remedy, Justice Shores seems to suggest intermediate scrutiny is appropriate.¹⁷⁷ Under this approach, legislation such as a damages cap would be subjected to "meaningful review" to determine whether society at large derives any benefit from the legislation and whether "the measures actually further the stated goals of the statute."¹⁷⁸

Subsequently, in *Lankford v. Sullivan, Long & Hagerty*,¹⁷⁹ the Alabama Supreme Court employed Justice Shores's analytical approach to invalidate a statute of repose applicable to products liability actions. After determining that the statute provided no individual quid pro quo, the court examined whether the statute eradicated a perceived social evil. The court stated there must be a "substantial relationship between the act and the eradication of the evil."¹⁸⁰ After reviewing various studies that examined the effects of statutes of repose on insurance rates, the court pronounced the connection between the legislation and the perceived social evil too tenuous to withstand constitutional scrutiny.¹⁸¹

The situation presented in *Lankford* is similar to the present situation in Alabama: there is simply no clear connection between the imposition of damages caps and the reduction of insurance rates. As discussed in Part II, no studies at the present time estab-

174. *Id.* (Shores, J., concurring).

175. *Id.* (Shores, J., concurring).

176. *Id.* (Shores, J., concurring).

177. *Id.* at 353 (Shores, J., concurring).

178. *Id.* (Shores, J., concurring).

179. 416 So. 2d 996 (Ala. 1982).

180. *Lankford*, 416 So. 2d at 1001.

181. *Id.* at 1001-03.

lish the necessary corresponding relationship between damages caps and the reduction of insurance premiums. At best, Danzon's studies indicate a link between reductions in claim severity and damages caps in medical malpractice actions.¹⁸² However, even these studies are beset with methodological difficulties. Establishing the requisite connection for other types of actions, such as products liability actions, is even more problematic, since rates tend to be set on a national basis. As noted by the court in *Lankford*, "[I]ndividual state tort reforms can do little to affect the product liability problem and *will not* stabilize product liability insurance rates."¹⁸³

More recently, in *Reed v. Brunson*,¹⁸⁴ the Alabama Supreme Court considered the quid pro quo doctrine in the context of a challenge to another statute that limits the rights of an injured employee who is covered by workmen's compensation against co-employees. More specifically, the contested legislation limited the rights of an injured employee to recover against "any officer, director, agent, servant or employee," to actions based on "willful conduct."¹⁸⁵ Applying the first part of Justice Shores's two-part test, the court determined there was an individual quid pro quo in the case—the injured employee gave up his common law rights in exchange for the remedies available under the workmen's compensation act, and for his own immunity against coemployee suits.¹⁸⁶ Although it could have stopped at this point, because only one of the two conditions of the test must be satisfied, the court continued with a discussion of the second possible ground for upholding the statute, the societal quid pro quo. The court held the legislature had the authority to eliminate coemployee suits grounded in negligence or wantonness in order to eradicate or ameliorate a perceived social evil—disharmony in the work place.¹⁸⁷

Reed thus appears to reaffirm the vitality of Justice Shores's analysis of the right of access to the courts. Clearly, the legislation upheld in *Reed* is distinguishable from the damages caps man-

182. See *supra* notes 102-07 and accompanying text.

183. *Lankford*, 416 So. 2d at 1002 (citing 44 Fed. Reg. 62,714 (1979)) (emphasis supplied by court).

184. 527 So. 2d 102 (Ala. 1988).

185. ALA. CODE § 25-5-11 (1986).

186. *Reed*, 527 So. 2d at 115.

187. *Id.* at 116.

dated by the tort reform legislation. As noted by Justice Jones in his concurrence in *Reed*, the legislation there at issue "meets the *Grantham* standard by increasing employee benefits, lengthening the statute of limitations, and preserving the cause of action for willful injury."¹⁸⁸ Justice Jones further noted this "compromise wrought by the competing interests in the legislative process provides the quid pro quo essential to the mandate of our Constitution's § 13."¹⁸⁹ The damages caps, in contrast, deprive a litigant of access to the courts to gain full redress of his injuries. Because the requisite connection between the damages caps and the reduction of insurance premiums has not yet been established, the provisions also appear to fail the societal quid pro quo prong of Justice Shores's *Coleman* test.

It has been argued that *Grantham* does not apply to a situation in which the legislature merely limits the remedy rather than totally abolishing it.¹⁹⁰ If this argument were accepted, however, it would seriously undermine the meaning of the access to the courts provision. It would allow the legislature to avoid the provision's impact by setting the recoverable damages so low as to effectively invalidate the remedy without providing an adequate substitute. As the Florida Supreme Court has observed, "[I]f the legislature may constitutionally cap recovery at \$450,000, there is no discernible reason why it could not cap recovery at some other figure, perhaps \$50,000, or \$1,000, or even \$1."¹⁹¹

While an access to the courts attack thus appears to be supportable with respect to injured but surviving parties, the same cannot be said with respect to those who die from their injuries. Reasoning that wrongful death actions are statutorily created rights rather than common law rights, the Alabama Supreme Court has upheld the legislature's abrogation of the remedy against co-employees when the victim was killed rather than merely injured.¹⁹² Although it would produce an anomalous result, the same reasoning apparently supports the constitutionality of the

188. *Id.* at 121 (Jones, J., concurring).

189. *Id.* (Jones, J., concurring).

190. Gaines & Hancock, *Tort Reform in Alabama: A Proponent's Perspective*, 18 CUMB. L. REV. 649, 666-67 (1988).

191. *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987).

192. *See Slagle v. Parker*, 370 So. 2d 947 (Ala. 1979).

damages cap applicable to wrongful death actions, but not as to the other caps.

3. *Special privilege (equal protection); special legislation*—In several cases, courts have determined that damages caps violate equal protection provisions of their state constitutions. In *Wright v. Central Du Page Hospital Association*,¹⁹³ the Illinois Supreme Court held that a statutory cap on damages in actions against health care providers violated the prohibition of special legislation provision of the Illinois Constitution.¹⁹⁴

In *Carson v. Maurer*,¹⁹⁵ the New Hampshire Supreme Court utilized intermediate scrutiny in finding a damages cap violative of equal protection. The New Hampshire court noted that the cap not only distinguished between malpractice victims and victims of other torts, but also between malpractice victims with noneconomic losses less than the cap and those with losses that exceeded the cap. The court reasoned “[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.”¹⁹⁶ Quoting the North Dakota Supreme Court, the New Hampshire Supreme Court stated:

“[T]he limitation of recovery does not provide adequate compensation to patients with meritorious claims; on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims. Restrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims.”¹⁹⁷

Like the Illinois and New Hampshire statutes, the Alabama statute establishes a lower damages cap for medical malpractice actions than for other tort actions. Under the statute, actions against a health care provider are subject to a \$400,000 cap on all noneconomic damages.¹⁹⁸ In other actions, damages are limited

193. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

194. *Wright*, 63 Ill. 2d at —, 347 N.E.2d at 743.

195. 120 N.H. 925, 424 A.2d 825 (1980).

196. *Carson*, 120 N.H. at —, 424 A.2d at 837.

197. *Id.* at —, 424 A.2d at 837 (quoting *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978)).

198. ALA. CODE § 6-5-544 (Supp. 1988).

only by a \$250,000 cap on punitive damages,¹⁹⁹ and this cap is subject to significant exceptions. The act places a one million dollar cap on wrongful death actions against a health care provider.²⁰⁰ Even the \$250,000 cap appears to violate equal protection by discriminating between those awarded punitive damages of more than \$250,000 and those awarded damages of less than \$250,000.

In *Reese v. Rankin Fite Memorial Hospital*,²⁰¹ the Alabama Supreme Court upheld a special medical malpractice statute of limitations for minors. It has been suggested that in light of this precedent, the Alabama courts would employ a rational basis test in considering the equal protection challenge to damages caps.²⁰² But the *Reese* court did not expressly articulate a rational basis test. Moreover, *Reese* is distinguishable from the tort reform limitations because the act in question in *Reese* merely withdrew "legislative grace given minors . . . in the field of medical malpractice claims."²⁰³ *Reese* involved a selective curtailment of a special right previously conferred by the legislature on minors, while the tort reform limitations involve statutory restrictions on common law rights to damages. Intermediate or heightened scrutiny should be applied to these limitations because they adversely affect common law rights, including the constitutional rights to a jury trial and court access. In light of the dearth of empirical evidence indicating that the caps will reduce insurance costs,²⁰⁴ the statutes cannot withstand heightened scrutiny. There is no substantial relationship between the means and the end. Accordingly, a court should invalidate the caps applicable only to medical malpractice actions and the cap on punitive damages.

A related challenge may be made under article IV, section 104 of the Alabama Constitution, which prohibits the legislature from enacting a "special" law "[e]xempting any individual, private corporation, or association from the operation of any general law."²⁰⁵ Arguably, a cap on damages recoverable against health care pro-

199. *Id.* § 6-11-21.

200. *Id.* § 6-5-547.

201. 403 So. 2d 158 (Ala. 1981).

202. Gaines & Hancock, *supra* note 190, at 670.

203. *Reese*, 403 So. 2d at 161.

204. *See supra* notes 12-110.

205. ALA. CONST. art. IV, § 104(9).

viders is such a special law because it applies to only claims against health care providers rather than to all common law claims.²⁰⁶

Recently, in *Reynolds v. Porter*,²⁰⁷ the Oklahoma Supreme Court analyzed the constitutionality of a statute that limited the scope of recoverable damages in a medical malpractice action when the action was filed more than three years from the date of the injury. The court considered the impact of a provision of the Oklahoma Constitution that permits passage of a special law only when a general law is inapplicable. After concluding the statute in question was a special law and therefore automatically invalid under another specific constitutional prohibition, the court also held that it could not sustain the legislation under the general standard as "reasonably and substantially related to a valid legislative objective."²⁰⁸ The court noted the statute was enacted in 1976 in response to a perceived nationwide crisis in the availability and affordability of medical malpractice insurance, but it found no connection between the challenged provision and the legislative objectives of controlling insurance rates and ensuring the continuing availability and affordability of health care.²⁰⁹ The court further noted there was no empirical evidence suggesting that the sub-class carved out by the statute was overly burdened by excessively high losses.²¹⁰

4. *Separation of powers.*—An argument that the damages limitations are an impermissible legislative attempt to mandate an amount of damages to be awarded in a trial could be asserted based on article III, section 43 of the Alabama Constitution, which generally provides that the legislature shall not exercise executive or judicial powers.²¹¹ In addition, article III, section 42 of the constitution establishes three "distinct" branches of government.²¹²

206. *But cf. Reese*, 403 So. 2d at 162. The *Reese* court held the special statute of limitations for medical malpractice actions was not a "special law," since it operated throughout the state on a class of people. This definition of special law, however, seems unduly narrow and contrary to the definition of special law set out in the Alabama Constitution: "one which applies to an individual, association, or corporation." ALA. CONST. art. IV, § 110. Although the legislation in question does not apply to a specific named health care provider, it clearly does single out health care providers as a special class.

207. 760 P.2d 816 (Okla. 1988).

208. *Reynolds*, 760 P.2d at 824.

209. *Id.* at 824-25.

210. *Id.* at 825.

211. ALA. CONST. art. III, § 43.

212. *Id.* § 42.

The Alabama Supreme Court has relied on both of these provisions to strike down legislative actions as impermissible encroachments on the judicial power.²¹³

A challenge of the damages cap under the separation of powers provisions is reinforced by rule 1(b) of the Alabama Rules of Civil Procedure: "These rules effect an integrated procedural system vital to the efficient functioning of the courts."²¹⁴ According to the advisory committee notes, this rule was included as an "intentional discouragement of piecemeal legislative modifications of all or any of these rules."²¹⁵ In addition, since this rule was adopted, a new judicial article has been adopted that confers rule making power on the Alabama Supreme Court.²¹⁶ The judicial article provides that the rules may be changed "by general act of statewide application,"²¹⁷ and it further reinforces the inviolate nature of trial by jury. Construed together, the judicial article and rule 1(b) suggest a strong policy against legislative meddling in areas that traditionally have been preserved for the judiciary.

V. ABROGATION OF THE COLLATERAL SOURCE RULE

A. *Review of Legislation*

Under the common law collateral source doctrine, the defendant cannot introduce evidence that the plaintiff has received compensation for his injury from third parties. For example, the defendant is prohibited from introducing evidence that the plaintiff's medical expenses were paid or reimbursed by first-party insurance, or that the plaintiff's wages were paid in whole or in part by worker's compensation or other insurance. Proponents of tort reform attacked the collateral source rule as permitting double recoveries and encouraging excessive verdicts. Defenders of the common law doctrine justify it as preserving a fund for attorneys fees and preventing a windfall to an undeserving defendant. Re-

213. See, e.g., *Board of Comm'rs of State Bar v. State ex rel. Baxley*, 295 Ala. 100, 324 So. 2d 256 (1975); *Broadway v. State*, 257 Ala. 414, 60 So. 2d 701 (1952).

214. ALA. R. CIV. P. 1(b).

215. Minutes of the Advisory Committee on the Alabama Rules of Civil Procedure 3 (June 22, 1972), quoted in 1 C. LYONS, ALABAMA RULES OF CIVIL PROCEDURE ANNOTATED 17 (2d ed. 1986).

216. ALA. CONST. amend. 328, § 6.11.

217. *Id.*

cently, several states have modified this common law rule. Some statutes mandate that the collateral source offset the award, while others merely allow the admission of evidence of compensation from other sources.²¹⁸

In 1979, the Alabama Legislature modified the collateral source rule in products liability actions.²¹⁹ Both AMLA and ATRA contain modifications of the collateral source rule.²²⁰ Under AMLA, "evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence."²²¹ In addition, the plaintiff is permitted to introduce evidence "of the cost of obtaining reimbursement or payment of medical or hospital expenses."²²² Curiously, the statute provides no time limit regarding how far back the plaintiff can reach in presenting evidence of premiums paid. The act further provides that if the plaintiff can prove he is obligated to repay the

218. See, e.g., ALA. CODE § 6-5-545 (Supp. 1988) (medical malpractice, admissible); *id.* § 12-21-45 (general rule, admissible); ALASKA STAT. § 09.17.070 (Supp. 1988) (general provision inapplicable in medical malpractice actions, mandatory under certain circumstances); *id.* § 09.55.548 (Supp. 1988) (medical rule, mandatory); CAL. CIV. CODE § 3333.1 (West Supp. 1988) (admissible in malpractice actions against health care providers); COLO. REV. STAT. § 13-21-111.6 (1987) (general, mandatory offset); CONN. GEN. STAT. § 52-225a (West Supp. 1988) (general, mandatory offset); DEL. CODE ANN. tit. 18, § 6862 (Supp. 1988) (medical malpractice, admissible, only applicable to public sources); FLA. STAT. ANN. § 766.207(7)(a) (West Supp. 1988) (medical malpractice, mandatory offset in arbitration); *id.* § 766.209(4)(b) (West Supp. 1988) (medical malpractice, mandatory offset when claimant refuses to arbitrate); IND. CODE ANN. § 34-4-36-2 (West Supp. 1988) (general, admissible, certain benefits excluded); IOWA CODE ANN. § 147.136 (West 1988) (medical malpractice, mandatory); MICH. COMP. LAWS ANN. § 600.6303 (West 1987) (general, mandatory offset); MINN. STAT. ANN. § 548.36 (West 1988) (general, mandatory offset); MONT. CODE ANN. § 27-1-308 (1987) (general, mandatory offset where total damages exceed \$50,000); NEV. REV. STAT. § 42.020 (1987) (personal injury actions against health care provider, mandatory offset); N.Y. CIV. PRAC. L. & R. § 4545(a) (McKinney Supp. 1989) (medical malpractice, mandatory offset); *id.* § 4545(b) (McKinney Supp. 1989) (actions against public employer for personal injury or wrongful death, mandatory offset); *id.* § 4545(c) (McKinney Supp. 1989) (actions for personal injuries, injury to property or wrongful death, mandatory offset); N.D. CENT. CODE § 32-03.2-06 (Supp. 1987) (general, mandatory offset); OHIO REV. CODE ANN. § 2305.27 (Baldwin 1984) (medical claims, mandatory offset except where premium paid by or for the person injured); R.I. GEN. LAWS § 9-19-34.1 (Supp. 1988) (medical malpractice, admissible); S.D. CODIFIED LAWS ANN. § 21-3-12 (1987) (medical malpractice, admissible); TENN. CODE ANN. § 29-26-119 (1980) (medical malpractice, mandatory offset); UTAH CODE ANN. § 78-14-4.5 (1987) (medical malpractice, mandatory offset but no reduction where subrogation exists).

219. See ALA. CODE §§ 6-5-520 to -525 (Supp. 1988).

220. See *id.* § 6-5-545 (AMLA); *id.* § 12-21-45 (ATRA).

221. *Id.* § 6-5-545(a).

222. *Id.*

medical or hospital expenses that have been paid or reimbursed, then this evidence also is admissible.²²³ Information concerning reimbursement of the plaintiff's expenses is deemed discoverable.²²⁴ Virtually identical provisions now govern all civil actions.²²⁵

B. Constitutionality of Abrogation of the Collateral Source Rule

Several state courts have invalidated legislative modifications of the collateral source rule under equal protection or due process rationales.²²⁶ Others have upheld their constitutionality, some utilizing rationality review to analyze equal protection challenges.²²⁷ Other courts have rejected constitutional attacks based

223. *Id.* § 6-5-545(c).

224. *Id.* § 6-5-545(b).

225. *See id.* § 12-21-45.

226. *See* Farley v. Engelken, 241 Kan. 663, 740 P.2d 1058 (1987) (applying an intermediate standard of review under the equal protection clause of the Kansas Bill of Rights to invalidate a statute providing for admissibility of collateral source evidence and mandating consideration of such evidence by the trier of fact in medical malpractice cases); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (employing intermediate scrutiny to invalidate a statute mandating collateral source offset in medical malpractice actions); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (utilizing intermediate scrutiny in invalidating a comprehensive malpractice reform statute that included a provision mandating reduction of damages by any "nonrefundable medical reimbursement insurance benefit less premiums paid by or for the claimant over the immediate preceding five years"); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976) (declaring unconstitutional a statutory modification of the collateral source doctrine in medical malpractice actions, holding this provision violated equal protection in that it "ordained differential treatment for claimants in this type of personal injury tort action from all other types of tort cases"); *see also* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (suggesting heightened scrutiny was appropriate standard, but reversing and remanding for additional fact finding on equal protection claim), *cert denied*, 431 U.S. 914 (1977), *on remand to* Nos. 55527 & 55586 (4th Dist. Idaho, Nov. 3, 1980).

227. *See, e.g.,* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (utilizing rationality review, rejected contentions that the abolition of the collateral source rule was unconstitutional on the following grounds: it amounted to a special law; it was an unconstitutional limitation on damages in violation of a specific prohibition of the state constitution against such limitations; and it was a violation of equal protection and due process); Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (utilizing rationality review, rejected due process and equal protection challenges to statute providing for admission of collateral source evidence); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981) (utilizing rationality review, rejected an equal protection challenge to a mandatory offset statute applicable only to medical malpractice actions; also rejected contentions that the act violated right to access provision of state constitution and unconstitutionally invaded the court's rulemaking power); Bernier v. Burris, 113 Ill.2d 219, 497 N.E.2d 763 (1986) (utilizing rational basis test, rejected an equal protection challenge to

on specific state constitutional provisions, including a prohibition on damages limitations,²²⁸ a prohibition against special laws,²²⁹ a guarantee of the right to court access,²³⁰ and a separation of powers clause.²³¹

Adopting intermediate scrutiny tests, some courts have determined that a statutory modification of the collateral source rule in the context of only medical malpractice actions violated equal protection by singling out health care providers and their victims for special treatment.²³² An Ohio case may have utilized strict scrutiny in finding an equal protection violation.²³³ And in *Arneson v. Olson*,²³⁴ the “near-abolition of the collateral source doctrine” for medical malpractice claims, when considered together with other provisions of the act, was held “to violate the right of medical patients in this State to due process of law.”²³⁵

Many of the same arguments that were made regarding the constitutionality of the damages cap provisions also can be made regarding the constitutionality of the abrogation of the collateral source rule. Arguably, the strongest attack is based on the quid pro quo doctrine under the Alabama Constitution’s right to remedy provision as construed by the Alabama Supreme Court in *Grantham*.²³⁶ It has been suggested that because the abrogation of the collateral source rule constitutes economic legislation, rationality review would be appropriate in considering its constitutionality.²³⁷

a statute that modified the collateral source rule in medical malpractice cases permitting a reduction of up to one-half for certain benefits received from a collateral source; also rejected contentions that it violated due process, impaired the obligation of contract, and conflicted with a federal law that protected social security benefits against garnishment, assignment, or levy); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980) (utilizing rationality review, rejected equal protection challenge to a mandatory offset rule applicable in medical malpractice actions).

228. See, e.g., *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977).

229. See *id.*

230. See *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365 (Fla. 1981).

231. See *id.*

232. *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

233. In *Graley v. Satayatham*, 74 Ohio Op. 2d 361, 343 N.E.2d 832 (1976), it appears the court may have utilized strict scrutiny in that it notes there is no “compelling governmental interest” for the discriminatory classification. *Id.* at 319, 343 N.E.2d at 836.

234. 270 N.W.2d 125 (N.D. 1978).

235. *Arneson*, 270 N.W.2d at 137 (citations omitted).

236. *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978).

237. *Gaines & Hancock*, *supra* note 190, at 658.

Intermediate scrutiny, however, is more appropriate. The statutory abrogation of the collateral source rule limits a remedy that was available to plaintiffs at common law—the right to recover for damages without consideration of collateral source benefits. As in the case of the damage cap, the plaintiff has not been given any individual quid pro quo for the abrogation, and under Justice Shores's approach in *Fireman's Fund American Insurance Co. v. Coleman*,²³⁸ it appears that any societal quid pro quo must be evaluated under an intermediate scrutiny standard.²³⁹

Similarly, one could argue that the statute modifies the right to jury trial as it existed at the time of the adoption of the 1901 Constitution in violation of article I, section 11 of the Alabama Constitution.²⁴⁰ Admittedly, however, this argument is not a strong one, since the offset here is discretionary rather than mandatory. As with damages caps, one could argue that the legislature is attempting to control the admission of evidence, a matter within the traditional purview of the judiciary, in violation of the separation of powers provisions. The fact that the collateral source rule is abrogated in all causes of action in tort and not only medical malpractice actions somewhat diminishes the probability of success with an equal protection challenge.

VI. PERIODIC PAYOUT OF DAMAGES

A. Review of Statutory Provisions

Common law judgments for damages, including damages awarded for future losses, were payable immediately at the end of trial in a lump sum.²⁴¹ Several states have now enacted statutes modifying this common law rule; most merely vest the court with discretion to order periodic payment, but some mandate such payments.²⁴²

238. 394 So. 2d 334 (Ala. 1980) (Shores, J., concurring).

239. *Coleman*, 394 So. 2d at 353-54 (Shores, J., concurring).

240. ALA. CONST. art. I, § 11.

241. See, e.g., *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, ___, 757 P.2d 251, 263 (1988).

242. ALA. CODE § 6-11-3 (Supp. 1987) (mandatory); ALASKA STAT. § 09.17.040 (Supp. 1986) (mandatory at request of injured party); ARK. STAT. ANN. § 16-114-208 (1987) (permissive); CAL. CIV. PROC. CODE § 667.7 (West 1975) (mandatory); CONN. GEN. STAT. ANN. § 52-225(d) (West Supp. 1988) (mandatory); DEL. CODE ANN. tit. 18, § 6864 (Supp. 1988) (permissive).

Both AMLA and ATRA contain provisions involving the periodic payment of future damage.²⁴³ Both acts require the trier of fact to itemize damages as past, future, or punitive damages, and both provide that the "trier of fact shall not reduce any future damages to present value."²⁴⁴ Periodic payment is not applicable to future damages of less than \$150,000; when the award of future damages exceeds \$150,000, both acts mandate periodic payments of the amount exceeding \$150,000 over a period of years.²⁴⁵

Naturally, the payment of attorney's fees on the amount paid in a lump sum would ordinarily be paid immediately, pursuant to the contract between the attorney and client. Attorney's fees owed on future damages in excess of \$150,000 are to be paid by the defendant in a lump sum after reduction to present value.²⁴⁶ The acts do not specify the discount rate to be used in calculation of the present value.

The following example illustrates how the acts will operate. Suppose a judgment is entered for \$400,000. The jury specifies that this amount includes \$100,000 in past damages and \$300,000 in future damages. After the verdict is returned, the judge holds a hearing to determine the appropriate schedule for payment of future damages and attorney's fees. Under both acts, \$150,000 of the future damages would be payable immediately. The remaining \$150,000 in future damages would be subject to the periodic payment provisions. Assuming the contract between the attorney and client calls for payment of fifty percent of the recovery to the attorney, the court would then hold a hearing to reduce that to

sive); FLA. STAT. ANN. § 768.78 (Harrison Supp. 1988) (mandatory); ILL. ANN. STAT. Ch. 110, ¶ 2-1705 (Smith-Hurd Supp. 1988) (mandatory); IND. CODE ANN. § 16-9.5-2.2 (West Supp. 1988) (mandatory); IOWA CODE ANN. § 668.3 (West 1987) (permissive); KAN. STAT. ANN. § 60-3407 (Supp. 1988) (mandatory); LA. REV. STAT. ANN. § 13:5114 (West Supp. 1988) (permissive); MICH. COMP. LAWS ANN. § 600.6309 (West 1987) (mandatory); MONT. CODE ANN. § 25-9-403 (1987) (permissive); N.H. REV. STAT. ANN. § 507-C:7 (1983) (permissive); N.Y. CIV. PRAC. L. & R. 5041 (McKinney Supp. 1988) (mandatory); N.D. CENT. CODE § 32-03.2-09 (Supp. 1987) (permissive); R.I. GEN. LAWS § 9-21-13 (Supp. 1988) (mandatory); S.D. CODIFIED LAWS § 21-3A-6 (1987) (mandatory); UTAH CODE ANN. § 78-14-9.5 (1987) (mandatory); WASH. REV. CODE ANN. § 4.56.260 (1988) (mandatory); WIS. STAT. ANN. § 655.015 (1986) (mandatory). See generally Flora, *Periodic Payment of Judgments in Washington*, 22 GONZ. L. REV. 155 (1986-87).

243. ALA. CODE §§ 6-5-543 (Supp. 1988) (AMLA); *id.* § 6-11-3 (ATRA).

244. *Id.* §§ 6-5-543(a), -11-1.

245. *Id.* §§ 6-5-543(b)(2), -11-3(3).

246. *Id.* §§ 6-5-543(d), -11-3(3)(b).

present value. Assuming that the client's life expectancy is ten years, that no evidence was offered to indicate the approximate time frame in which the damages would be incurred, and that the annual discount rate is five percent, the court would reduce the attorney's fees to a present value of \$46,043.49. A question arises as to whether the amount remaining for distribution to the client by way of periodic payments is \$75,000 or \$75,000 plus \$28,956.61 (the unused portion of the judgment for future damages allotted to the attorney's fee before reduction to present value). Unfortunately, on this point, the acts are unclear.²⁴⁷

There are several differences between the AMLA and ATRA provisions. Under AMLA, if the judgment creditor dies before the payments are complete, then the liability of the judgment debtor for further payments of future damages ceases, except that damages awarded for loss of future earnings must be paid to the spouse or children, until the spouse remarries or dies,²⁴⁸ and all the children die or reach the age of twenty-two years.²⁴⁹ Under ATRA, however, the death of the judgment creditor does not absolve the judgment debtor of his liability; the judgement debtor must continue to make payments to the estate of the creditor "or as otherwise directed by the court having jurisdiction over the estate."²⁵⁰ AMLA requires the judgment debtor either to post a security, provide evidence of sufficient insurance, or purchase an annuity to assure full payment of future damages.²⁵¹ ATRA requires that the debtor give "adequate assurance that the defendant can and will make all required payments."²⁵² This assurance can take the form of a bond, an annuity or a finding that "the defendant . . . [has] sufficient financial ability to make all required payments."²⁵³

247. For example, § 6-11-3(3)(c) provides as follows: "The total amount of all periodic payments when added to the sum of \$150,000 and when added to that portion of the damages award, not reduced to present value, which was used to calculate the attorney's fee in paragraph (b), above, shall not exceed the total amount of future damages contained in the verdict of the trier of fact." ALA. CODE § 6-11-3(3)(c) (Supp. 1988); *see also id.* § 6-5-543(b)(2)(b).

248. *Id.* § 6-5-543(e)(1).

249. *Id.* § 6-5-543(e)(2).

250. *Id.* § 6-11-4(1).

251. *Id.* § 6-5-543(c).

252. *Id.* § 6-11-3(c)(2).

253. *Id.*

B. Constitutionality of Periodic Payment Statutes

The highest courts in California, Florida, Illinois, and Wisconsin have upheld periodic payment statutes.²⁵⁴ In contrast, the highest courts in Kansas, New Hampshire, and North Dakota have invalidated such provisions.²⁵⁵ In *Carson v. Maurer*,²⁵⁶ the New Hampshire Supreme Court struck down a periodic payment statute applicable to only medical malpractice actions, holding that the statute unduly favored health care providers and discriminated against malpractice victims. It has been asserted that such an equal protection attack on the Alabama legislation is "tenuous" because the periodic payments provisions apply to all civil actions.²⁵⁷ Nonetheless, there is still a violation of equal protection because the statute impermissibly distinguishes between those with future damages of less than \$150,000 and those with future damages exceeding that amount. In addition, AMLA is especially vulnerable in its departures from the ATRA provisions on periodic payments of damages.

It has also been argued that a quid pro quo is not necessary because plaintiffs have not been denied a right, and that an attack based on the right to jury trial will be unsuccessful because the

254. *American Bank & Trust Co. v. Community Hosp. Inc.*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (California Supreme Court, reversing itself on rehearing, utilized rationality review to uphold a periodic payment statute against due process and equal protection attacks; the court rejected a quid pro quo argument as well as contentions that the statute violated the right to jury trial and was void for vagueness), *vacating* 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983); *Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783 (Fla. 1985) (utilizing rationality review, upheld the constitutionality of a periodic payment statute); *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (utilizing rationality review, rejected contentions that a periodic payout statute violated equal protection, due process, and the right to trial by jury); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (utilizing rationality review, rejected an equal protection attack on a provision for periodic payout of future medical expenses).

255. *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (annuity provision for periodic payments violated right to jury trial and right to remedy provisions of the Kansas Constitution); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (utilizing intermediate scrutiny, concluded a periodic payment statute applicable only in medical malpractice actions unreasonably discriminated in favor of health care defendants and unduly burdened malpractice plaintiffs in violation of equal protection guarantees); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (although finding no constitutional objection to the particular periodic payout provision as construed, declared the whole medical malpractice reform act invalid, including the periodic payout provision).

256. 120 N.H. 925, 424 A.2d 825 (1980).

257. *Gaines & Hancock*, *supra* note 190, at 656.

jury designates damages as past and future.²⁵⁸ These contentions were rejected in *Kansas Malpractice Victims Coalition v. Bell*.²⁵⁹ As already discussed, the Kansas Supreme Court in *Bell* struck down a damages cap applicable to medical malpractice actions. In addition to capping total recovery in medical malpractice actions at one million dollars and limiting recovery for noneconomic loss to \$250,000, the Kansas legislation also required that any recovery for future losses be invested in an annuity, with periodic payout of damages to the plaintiff.²⁶⁰ A special "pinhole provision" permitted the plaintiff to petition the court for supplemental benefits of up to three million dollars from a special fund when the award of damages for future medical expenses was inadequate under the one million dollar cap.²⁶¹ In striking down the cap and annuity provisions, the court relied on provisions of the Kansas Constitution guaranteeing the right to jury trial and the right to remedy.²⁶² With respect to the periodic payment provisions of the legislation, the court explained:

The forced remedy of recovery of future damages by annuity also violates the common-law right to a remedy. The annuity provided for in the statute is a contract, owned and controlled by someone else. Plaintiffs traditionally receive lump-sum judgments that they control. While a plaintiff may certainly agree to accept his judgment in the form of an annuity (or in whatever form he chooses), the concept of forcing him to accept an annuity limits his remedy. His payout may take years and . . . there is always the risk of default, however slight. Lump-sum payments do not carry such risks. Annuities, therefore, modify the common law with regard to remedies.²⁶³

Likewise, the Alabama periodic payments legislation also violates the right to remedy provision of the Alabama Constitution.²⁶⁴ At common law, plaintiffs were entitled to a lump sum judgment. In depriving plaintiffs of this right, the legislature has not offered

258. *Id.*

259. 243 Kan. 333, 757 P.2d 251 (1988).

260. *Bell*, 243 Kan. at ____, 757 P.2d at 253.

261. *Id.* at ____, 757 P.2d at 255-56.

262. *Id.* at ____, 757 P.2d at 256.

263. *Id.* at ____, 757 P.2d at 263.

264. ALA. CONST. art. I, § 13.

them a quid pro quo.²⁶⁵ The right to jury trial provision of the Alabama Constitution²⁶⁶ is similarly violated by the periodic payment provision. It invades the province of the jury by mandating periodic payment of future damages in excess of \$150,000, rather than the lump sum awarded by the jury. The separation of powers provisions²⁶⁷ are violated as well because the periodic payout legislation interferes with judicial supervision of the payment of a judgment and imposes additional burdens on the courts in administering the judgment, thereby invading the province of the judiciary. Utilizing the intermediate scrutiny approach suggested by Justice Shores in *Fireman's Fund American Insurance Co. v. Coleman*,²⁶⁸ the court should thus invalidate these periodic payout provisions.

VII. CONCLUSION

There are numerous state constitutional grounds for invalidating provisions of AMLA and ATRA. The major defect running throughout all the tort reform legislation is its one-sided approach. Its immediate benefits inure only to defendants, and the damages limitations adversely affect the most severely injured plaintiffs without providing them with any benefits in return. Additionally, these restrictions should not be considered in isolation. Instead, the impact of the collective provisions should be analyzed by the courts. With damages limitations accompanied by abrogation of the collateral source rule and periodic payout provisions, the impact on injured plaintiffs could be devastating.

Arguably, the restrictions will make complex cases, which require large outlays in time and expenses, less attractive to attorneys, since their potential fees will be reduced. Although supporters of this legislation argue that it provides benefits to plaintiffs as a class by reducing insurance costs over the long run, there is no empirical verification of this purported societal quid pro quo.

265. See generally *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978) (invalidating coemployee legislation that cut off the right to sue without offering the employee an alternative remedy or benefit).

266. ALA. CONST. art. I, § 11.

267. *Id.* art. III, § 43.

268. 394 So. 2d 334 (Ala. 1981).

