

## NEGLECTING THE NEGLECTED: THE IMPACT OF NONECONOMIC DAMAGE CAPS ON MERITORIOUS NURSING HOME LAWSUITS

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*Meritorious nursing home lawsuits serve as valuable tools for policing a nursing home industry rife with instances of negligence, malpractice, neglect, and abuse. Recent proposals advocate a national cap of \$250,000 on all noneconomic damages awarded in medical malpractice lawsuits. Many states have already adopted similar caps. In this empirical study of three hot-spot jurisdictions (California, Texas, and Florida), Professor Rustad shows the disparate effect of noneconomic damage caps on the elderly residents of nursing homes due to the general lack of meaningful economic damages among typical nursing home claimants. Noneconomic damage caps effectively doom many elder abuse and mistreatment claims by removing incentives for attorneys to accept these meritorious lawsuits.*

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## Introduction

President George W. Bush has proposed a hard cap of \$250,000 on all noneconomic damages awarded in medical malpractice lawsuit awards.<sup>1</sup> The U.S. Senate is considering capping noneconomic damages awards against all health care providers, including those who treat nursing home patients, also at \$250,000.<sup>2</sup> President Bush has singled out medical liability reforms, such as caps, as a legislative priority in his second term.<sup>3</sup> In the 2004 elections, corporate nursing homes joined for-profit hospitals as the twentieth largest industry donor to the Bush/Cheney campaign of 2004,<sup>4</sup> and two of President Bush's top donors, classified as "Rangers," were corporate representatives of the nursing home industry.<sup>5</sup> Beverly Enterprises, the largest nursing home corporate chain, endorsed the Bush administration's medical liability tort reform proposals because

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1. Robert Pear, *Bush Begins Drive to Limit Malpractice Suit Awards*, N.Y. TIMES, Jan. 6, 2005, at A18.

2. Press Release, Best Wire, Texas Study Suggests Malpractice Payouts Have Been Largely Stable (Mar. 16, 2005) [hereinafter Texas Study] (on file with The Elder Law Journal).

[C]osponsored by Sens. John Ensign, R-Nev., and Judd Gregg, R-N.H.—[Senate Bill 354 was] introduced last month in the U.S. Senate. The Ensign-Gregg bills include S. 354, a comprehensive reform package similar to California's 30-year-old Medical Injury Compensation Reform Act, which would include a broad, \$250,000 cap on the noneconomic damages that can be awarded in malpractice complaints lodged against all types of health-care providers.

*Id.* (discussing implications of an academic study of Texas medical liability awards on proposed State Senate Bill 354).

3. *Malpractice: Bush Calls for 'Immediate Action' by Congress*, AM. HEALTH LINE, Jan. 7, 2005; see also *Liable to Fail*, THE HILL, Apr. 19, 2005, available at <http://www.hillnews.com/thehill/export/TheHill/Comment/Editorial/041905.html> (noting that "tort reform has been a top priority for President Bush and the GOP-led Congress" and how "Bush has spoken repeatedly about the need to cap medical liability").

4. OpenSecrets.org, 2004 Presidential Election: George W. Bush Campaign Money, <http://opensecrets.org/presidential/indus.asp?Id=N00008072&cycle=2004> (last visited Sept. 25, 2006); see also Joe Mannies, *Bush Says He Hopes to Usher in the "Responsibility Era"; He Touts Education Plan in Forum at Westport Playhouse; Candidate Gains a Convert*, ST. LOUIS POST-DISPATCH, Sept. 13, 2000, at A1 (quoting Democratic candidate for Lieutenant Governor who compared George W. Bush's support for nursing home resident rights with his vote in Texas in 1995 that diluted nursing home standards, a tort reform supported by "the nursing home industry, which had contributed \$150,000 to Bush").

5. PUBLIC CITIZEN, BUSH'S CAMPAIGN ADS: BROUGHT TO YOU BY SPECIAL INTERESTS 23 (2004), <http://www.whitehouseforsale.org/documents/bushads2.pdf>.

these measures “would slow the growth of liability costs throughout the nursing home industry.”<sup>6</sup>

A decade ago in Texas, then Governor-elect George W. Bush was at the forefront of a 1995 tort reform bill “to prevent frivolous and junk lawsuits,” which included a \$200,000 cap on punitive damages.<sup>7</sup> In 2003, Texas enacted a medical liability reform bill that capped noneconomic damages at \$250,000 per defendant with an absolute limit of \$750,000 against all defendants.<sup>8</sup> The Texas tort reforms were enacted despite a lack of clear evidence of an insurance crisis caused by runaway verdicts and settlements. On the contrary, a more plausible explanation is that the insurance liability crisis “in Texas, and in the nation as a whole, was driven primarily by strains on the reinsurance market—arising from such catastrophes as Hurricane Andrew and the Sept. 11 terrorist attacks—and failing investment yields.”<sup>9</sup>

The cover story for the *ABA Journal's* October 2006 issue is about the effect of Texas tort reform on nursing home litigants and other claimants with limited economic damages. The theme of the article is that the \$250,000 noneconomic damages cap hits nursing home neglect lawsuits hard because few elderly residents will have lost income or other economic losses.<sup>10</sup> The tort reform has all but eliminated Texas nursing home cases, and a number of long-term care facilities have either stopped carrying insurance or have switched to \$250,000 policies because they can settle most claims for \$15,000 or less.<sup>11</sup> Because the expenses for bringing a suit against a nursing home often exceed the potential recovery, nursing home cases are no longer being filed in large numbers in Texas.<sup>12</sup> Plaintiffs counsel representing nursing home residents are “cherry-picking cases with well-off clients who can show economic damages,”<sup>13</sup> leaving most elderly nursing home victims without the possibility of legal representation.<sup>14</sup>

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6. Beverly Enters., Current Report (Form 8-K), at exh. 99.1 (Feb. 20, 2003) [hereinafter *Beverly Current Report*].

7. R.G. Ratcliffe, *Bush Proposes Tort Reform; Says His Plan Would Prevent “Junk Lawsuits,”* HOUSTON CHRON., June 18, 1994, at A30.

8. See Texas Study, *supra* note 2.

9. *Id.*

10. Terry Carter, *Tort Reform Texas Style: New Laws and Med-Mal Damage Caps Devastate Plaintiff and Defense Firms Alike*, A.B.A. J., Oct. 2006, at 30.

11. *Id.* (quoting San Antonio plaintiff's attorney Glenn Cunningham).

12. *Id.*

13. *Id.* at 33.

14. *Id.* at 35.

The nursing home industry and its insurers employ the rhetoric of a medical malpractice liability crisis to justify radical tort reforms “that limit the ability of residents and their families to sue and to collect claims.”<sup>15</sup> Twenty-five states have already imposed caps on noneconomic damages in medical liability cases.<sup>16</sup> In 2003, Mississippi capped noneconomic damages in nursing home litigation at \$500,000, and Arkansas raised its punitive damages standard in civil suits.<sup>17</sup> Insurance executives explain that skyrocketing nursing home premiums are a by-product of excessive litigation, “partly spurred by rich jury verdicts [that] sent much of the nursing home market to alternative risk-transfer approaches several years ago.”<sup>18</sup>

Despite unsupported claims about a nursing home lawsuit crisis, little is known about the actual growth, size, ratio, plaintiff-defendant characteristics, factual foundation, and proportions of awards allocated to noneconomic damages, punitive damages, or special damages<sup>19</sup> in nursing home litigation. Almost no empirical data has been collected on either the incidence of nursing home litigation or the conditions that led to these lawsuits.

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15. BERNADETTE WRIGHT, AARP PUB. POL’Y INST., NURSING HOME LIABILITY INSURANCE: AN OVERVIEW, EXECUTIVE SUMMARY ii (2003), available at [http://assets.aarp.org/rgcenter/health/2003\\_08\\_nh\\_ins.pdf](http://assets.aarp.org/rgcenter/health/2003_08_nh_ins.pdf).

16. In 2005, the following states capped noneconomic damages in medical malpractice claims: Alaska, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. See AM. TORT REFORM ASS’N, NONECONOMIC DAMAGES REFORM, <http://www.atra.org/issues/index.php?issue=7340>. The following states have imposed a cap on all noneconomic damages: Hawaii, Idaho, Kansas, and Maryland. *Id.* Finally, caps on noneconomic damages have been struck down as unconstitutional in Alabama, New Hampshire, Oregon, and Washington. *Id.*

17. Cherie Song, *States Move to Curb Nursing Home Suits*, NAT’L L.J., July 7, 2003, at 1.

18. Steve Tuckey, *Insurers Returning to Nursing Home Market*, NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Feb. 14, 2005, at 26.

19. Special damages include medical costs and other out-of-pocket plaintiff expenses that arise out of the incident at issue. In contrast, general or nonpecuniary damages such as pain and suffering are intangible. Lost wages also make up a substantial part of most personal injury claims. There are two basic requirements for recovering lost wages. First, the lost wages must be actual and certain. The wages cannot be speculative, remote, or uncertain. Second, the plaintiff must prove that his injury impaired him from being able to work. To recover future lost earnings, plaintiffs must prove that they are permanently disabled and that their disability will diminish their future earning capacity. Kevin S. Willging, Attorney, Niles, Bartone & Wilmer, LLP, Personal Injury Damages in Maryland (1999), <http://library.findlaw.com/1999/Jul/1/129742.html>.

This article reports the findings of a study that collected such empirical data through a comprehensive analysis of nursing home litigation in three jurisdictional hot spots: California, Florida, and Texas. As background, Part I reviews the literature on what we know and still do not know about nursing home litigation. Part II of this article presents a study of the empirical dimensions of pain-and-suffering or nonpecuniary awards in nursing home neglect, abuse, and mistreatment cases in the three jurisdictional hot spots. This multijurisdiction dataset covers all plaintiffs' verdicts reported in nursing home negligence, abuse, and mistreatment cases in California, Florida, and Texas federal and state courts for the period 1990 through 2004.

A close examination of the aggravating circumstances leading to noneconomic damages reveals that nursing home litigation tends to be a by-product of substandard care, not extravagant juries. There would be a nationwide outcry if legislators openly proposed eliminating nursing home claims. Although the tort reformer's focus on capping noneconomic damages appears reasonable because nursing home residents are still permitted to receive full economic damages, the typical nursing home claimant has no meaningful economic damages. Capping noneconomic damages is in effect a death penalty for many elder abuse and mistreatment claims because the victims are unable to find attorneys to represent them when noneconomic damages are downsized.

## I. What Do We Know About General Damages in Nursing Home Litigation?

### A. The Nursing Home Problem in the United States

In early America, old-age security meant having either wealth or lots of children who could care for their elderly parents.<sup>20</sup> The first nursing homes were prefigured by "old folk's homes," founded by nonprofit entities during the first three decades of the twentieth century.<sup>21</sup> Long-term care facilities developed during a period in which the extended family was being displaced by the streamlined nuclear

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20. See Ellen A. Kramarow, *The Elderly Who Live Alone in the United States: Historical Perspectives on Household Change*, 32 *DEMOGRAPHY* 335, 337 (1995).

21. See *A Brief History of Long-Term Care*, *NURSING HOMES*, Dec. 1999, available at [http://www.findarticles.com/p/articles/mi\\_m3830/is\\_12\\_48/ai\\_58572867](http://www.findarticles.com/p/articles/mi_m3830/is_12_48/ai_58572867) [hereinafter *Brief History*].