
# Medical Malpractice Liability Reform: Legal Issues and 50-State Surveys of Caps on Noneconomic and Punitive Damages and of Punitive Damages Burden of Proof Standards

**Vivian S. Chu**
Legislative Attorney

March 1, 2011

**Congressional Research Service**
7-5700
www.crs.gov
R41661

**CRS Report for Congress**
*Prepared for Members and Committees of Congress*

# Summary

Medical malpractice liability is governed by state law, but Congress has the power, under the Commerce Clause of the U.S. Constitution (Art. I, § 8, cl. 3), to enact tort reform laws that would affect actions for medical malpractice liability brought under state law. In the 112th Congress, H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act was introduced by Representative Phil Gingrey on January 24, 2011, and was marked up on February 9 and 16, 2011, by the House Committee on the Judiciary. This bill would preempt state law with respect to certain aspects of medical malpractice lawsuits. Past Congresses have considered similar measures.

This report does not examine the effects of medical malpractice litigation or medical malpractice liability reform on the health care system or on the cost of liability insurance premiums; rather, it explains specific tort reform proposals that are commonly included in medical malpractice liability reform bills, and discusses the individual arguments in favor of and against such proposals from a legal perspective. These proposals include imposing caps on noneconomic damages and punitive damages; permitting defendants to be held liable for no more than their share of responsibility for a plaintiff's injuries; requiring that damage awards be reduced by amounts plaintiffs receive from collateral sources such as health insurance; limiting lawyers' contingent fees; creating a federal statute of limitations; and requiring that awards of future damages in some cases be paid periodically rather than in a lump sum. It also includes, where appropriate, a description of H.R. 5's provisions with respect to these categories.

An **Appendix** to this report includes two tables. The first table (**Table A-1**) is a 50-state survey of caps on noneconomic and punitive damages. The second table (**Table A-2**) is a 50-state survey of the burden of proof standards for punitive damages and whether a state requires a separate proceeding to determine such damages.

# Contents

Introduction ..... 1
The Tort of Medical Malpractice ..... 1
Noneconomic Damages ..... 2
Arguments For Caps on Noneconomic Damages ..... 3
Arguments Against Caps on Noneconomic Damages ..... 3
Punitive Damages ..... 3
Arguments For Caps on Punitive Damages ..... 5
Arguments Against Caps on Punitive Damages ..... 5
Limiting Joint and Several Liability ..... 6
Arguments For Limiting Joint and Several Liability ..... 6
Arguments Against Limiting Joint and Several Liability ..... 7
Abolishing the Collateral Source Rule ..... 7
Arguments For Abolishing the Collateral Source Rule ..... 8
Arguments Against Abolishing the Collateral Source Rule ..... 8
Limiting Attorneys' Contingent Fees ..... 8
Arguments For Limiting Attorneys' Contingent Fees ..... 9
Arguments Against Limiting Attorneys' Contingent Fees ..... 9
Periodic Payment of Damages ..... 10
Arguments For the Periodic Payment of Damages ..... 11
Arguments Against the Periodic Payment of Damages ..... 11
Creating a Federal Statute of Limitations ..... 11

## Tables

Table A-1. State Caps on Noneconomic and Punitive Damages in Medical Malpractice Lawsuits ..... 14
Table A-2. Punitive Damages—Burden of Proof, Standard, and Separate Proceeding ..... 25

## Appendixes

Appendix. Fifty-State Surveys ..... 13

## Contacts

Author Contact Information ..... 33
Acknowledgments ..... 33

# Introduction

This report does not examine the merits or possible effects of medical malpractice litigation or medical malpractice liability reform on the health care system or on the cost of liability insurance premiums.[1] Rather, this report explains specific tort reform proposals that are commonly considered in medical malpractice liability reform measures, and discusses their individual arguments in favor of and against such proposals from a legal perspective. These include imposing caps on noneconomic damages and punitive damages; permitting defendants to be held liable for no more than their share of responsibility for a plaintiff's injuries; requiring that damage awards be reduced by amounts plaintiffs receive from collateral sources such as health insurance; limiting lawyers' contingent fees; creating a federal statute of limitations; and requiring that awards of future damages in some cases be paid periodically rather than in a lump sum. Where appropriate, the report includes a brief summary of the tort reform measures included in H.R. 5.

# The Tort of Medical Malpractice

Medical malpractice is a tort, which is a civil (as distinct from a criminal) wrong, other than a breach of contract, that causes injury for which the victim may sue to recover damages. Actions in tort derive from the common law, which means that the rules that govern them were developed by the courts of the 50 states, and no statute is necessary in order to bring a tort action. Statutes, however, can change the court-made rules that govern tort actions, and many states have enacted tort reform statutes, including medical malpractice reform statutes. Congress also has the power, under the Commerce Clause of the U.S. Constitution (Art. I, § 8, cl. 3), to enact tort reform laws that would affect actions for medical malpractice liability brought under state law.

Medical malpractice liability arises when a health care professional engages in negligence or commits an intentional tort. Negligence has been defined as conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm."[2] In most instances it arises from a failure to exercise due care, but a defendant may have carefully considered the possible consequences of his conduct and still be found to have imposed an unreasonable risk on others. "Negligence is conduct, and not a state of mind."[3] The following is a traditional description of the standard of care to which doctors are held to avoid liability for medical malpractice:

[1] For example, advocates of medical malpractice liability reform argue that current state tort law provides a costly and inefficient mechanism for resolving claims of health care liability and compensating injured patients, and that increasing liability insurance premiums are forcing doctors to curtail their medical practices and to engage in excessive "defensive medicine." Opponents of medical malpractice reform have argued that there is a very minimal relationship between health care costs and malpractice litigation, and that, "in reality, very few injured patients ever file a medical negligence lawsuit." *See* American Association for Justice, *Medical Negligence: A Primer*, February 2011 at 8. *See also* David M. Studdert, Michelle M. Mello, Atul A. Gawande, Tejal K. Ghandi, Allen Kachalia, Catherin Yoon, Ann Lousie Puopolo, Troyen A. Brenna, *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 New Eng. J. Med. 2024 (2006). For more information on medical malpractice insurance and health reform, see CRS Report R40862, *Medical Malpractice Insurance and Health Reform*, by Baird Webel, Vivian S. Chu, and Bernadette Fernandez.

[2] Restatement (Second) of Torts, § 282.

[3] W. Page Keeton, Prosser and Keeton on Torts, § 31 (5th ed. 1984).

> This legal duty requires that the physician undertaking the care of a patient possess and exercise that reasonable and ordinary degree of learning, skill, and care commonly possessed and exercised by reputable physicians practicing in the same locality.[4]

Today, however, many jurisdictions utilize some variation of the national standard of care. As one U.S. court of appeals explained:

> The skill, diligence, knowledge, means and methods [required] are not those "ordinarily" or "generally" or "customarily" exercised or applied, but those that are "reasonably" exercised or applied. Negligence cannot be excused on the ground that others practice the same kind of negligence. Medicine is not an exact science and the proper practice cannot be gauged by a fixed rule.[5]

While most medical malpractice actions rely on the theory of negligence, medical malpractice liability, as noted, may arise from an intentional tort as well as from negligence. In such actions, the practitioner is generally alleged to have intentionally acted in a fashion that ultimately caused harm to the patient.[6] The general difference between an action based in negligence and one based in intentional tort is that "a medical procedure poorly performed might constitute negligence, while a medical procedure correctly performed that was not consented to might constitute an intentional tort."[7]

# Noneconomic Damages

Economic damages refer to monetary losses that result from an injury, such as medical expenses, lost wages, and rehabilitation costs. Noneconomic damages consist primarily of damages for pain and suffering. Determining the amount of noneconomic damages is traditionally subject to broad discretion on the part of juries, which must equate two variables—money and suffering—that are essentially incommensurable. Judges, however, have the authority to reduce damage awards that they find excessive.[8]

Section 4 of the H.R. 5 would not limit the amount of economic damages a claimant recovers in a health care lawsuit.[9] Economic damages under the bill would be defined as monetary losses incurred, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services, loss of employment, and loss of business or employment opportunities.[10] However, it generally would limit noneconomic damages, if awarded, to

[4] David M. Harney, Medical Malpractice § 21.2 (3d ed. 1993).

[5] Nalder v. West Park Hospital, 254 F.3d 1168, 1176 (10th Cir. 2001).

[6] Marcia M. Boumil, et al., Medical Liability 65 (2d ed. 2003).

[7] *Id.*

[8] *See* Michael Higgins, *Homogenized Damages: Judge suggests using statistical norms to determine whether pain and suffering awards are excessive*, American Bar Association Journal (Sept. 1997) at 22.

[9] H.R. 5, § 4(a). A "health care lawsuit," defined as: any health care liability claim ... or action concerning the provision of health care goods or services or any medical product in or affecting interstate commerce, brought in a State or Federal court or pursuant to an alternative dispute resolution system *against* a health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product regardless of the theory of liability on which the claim is based, or the number of claimants, plaintiffs, defendants, or other parties, or the number of claims or causes of action, in which the claimant alleges a health care liability claim (emphasis added). H.R. 5 § 9(7).

[10] H.R. 5, § 9(6).

$250,000, regardless of the number of parties against whom the action is brought, or the number of separate claims or actions brought with respect to the same injury.[11] Noneconomic damages would be defined as damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind of nature.[12]

## Arguments For Caps on Noneconomic Damages

Advocates for caps on noneconomic damages argue that a lack of caps guarantees inconsistency and unpredictability in the tort system, and forces insurers to counter this uncertainty by charging higher premiums. Disagreement over the amount of pain and suffering damages is a major obstacle to out-of-court settlement, thus increasing litigation and, as advocates maintain, coercing insurers to overpay on settlements of smaller claims. Further complicating the problem, they argue, is a tendency of juries to inflate pain and suffering awards to cover some or all of the plaintiff's attorney's fees.

## Arguments Against Caps on Noneconomic Damages

It has been argued that caps on noneconomic damages could have disparate effects on different patient populations.[13] For example, elderly plaintiffs and poorer individuals who are involved in a malpractice case may not be able to claim much in economic damages, such as lost wages. Thus, capping noneconomic damages would leave these types of plaintiffs little in damages from a malpractice suit and therefore decreased incentive for a lawyer to represent them. Furthermore, opponents of a cap assert that the $250,000, included in H.R. 5, was adopted by California in 1975 "at a time when pain-and-suffering awards rarely exceeded that amount," and that more than thirty years later inflation has taken a toll.[14]

# Punitive Damages

Punitive damages (also called exemplary damages) are awarded not to compensate plaintiffs but to punish and deter particularly egregious conduct on the part of defendants—generally meaning reckless disregard for the safety of others, and more than negligence or even gross negligence.

[11] H.R. 5, § 4(b). Section 11 of provides that H.R. 5 would not preempt "any State law (whether effective before, on or after the date of enactment ... ) that specifies a particular monetary amount of compensation or punitive damages (or the total amount of damages) that may be awarded in a health care lawsuit, *regardless of whether such monetary amount is greater or lesser* than is provided for under this Act." H.R. 5 § 11(c).

[12] H.R. 5, § 9(15).

[13] Health Affairs, Medical Malpractice and Errors: Issue Update, *Medical Liability and the Prospect of National Tort Reform*, September 7, 2010. *See also* Peter Perlman, *Don't Punish the Injured*, American Bar Association Journal (May 1986) at 34 ("By forever freezing compensation at today's levels, caps discriminate against a single class of Americans whose members are destined to suffer a lifetime of deprivation of dignity and independence.").

[14] An amendment to H.R. 5 to increase the $250,000 cap to $1,977,500 and index it to the Consumer Price Index Edward was rejected during the House Committee on the Judiciary mark up. *See also* Felsenthal, *Why a Medical Award Cap Remains Stuck at $250,000*, Wall Street Journal (Nov. 1995).

Punitive damages are noneconomic by nature, but state statutes that impose caps on punitive damages usually treat them separately from compensatory noneconomic damages.[15]

The mere commission of a tort is generally not sufficient to obtain an award of punitive damages. As one treatise states:

> There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme as to be characterized as "gross," a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages.[16]

Among the restrictions that have been proposed with regard to punitive damages, besides that they be capped, are (1) that the circumstances in which they may be awarded be narrowed, (2) that plaintiffs be required to prove by "clear and convincing" evidence that they are entitled to them (instead of having to prove it by a mere "preponderance of the evidence."), (3) that liability for punitive damages be determined in a separate proceeding from liability for compensatory damages, and (4) that punitive damages be paid in part to the government or to a fund that serves a public purpose instead of to the plaintiff.[17]

Section 7 of H.R. 5 would limit punitive damages to the greater of $250,000 or two times the amount of economic damages awarded, although a jury would not be informed of the limitation.[18] Punitive damages would not be awarded in a health care lawsuit where a judgment for compensatory (i.e., economic and noneconomic) damages is not rendered.[19]

Under the bill, a claimant would not be permitted to make a demand for punitive damages when initially filing the health care lawsuit. Upon a motion by the claimant, a court would be permitted to allow the claimant to amend his or her pleading only after a hearing and a finding by the court that the claimant has established by a substantial probability that he or she will prevail on the claim for punitive damages.[20] H.R. 5 provides that punitive damages only would be awarded if it is proven by clear and convincing evidence that the defendant acted with malicious intent to injure or that the defendant deliberately failed to avoid unnecessary injury that he or she knew the

[15] In 1851, the Supreme Court wrote: "It is a well-established principle of the common law, that in actions ... for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

[16] W. Page Keeton, *supra* note 3, § 2.

[17] In *BMW of North American, Inc. v. Gore*, 517 U.S. 559, 616 (1996), the Supreme Court listed state statutes that provide for this restriction.

[18] H.R. 5, § 7(b)(2).

[19] Like noneconomic damages, it is possible that a state's law on punitive damages would not be affected. Section 11 of H.R. 5 provides that the bill would not preempt "any State law (whether effective before, on or after the date of enactment ... ) that specifies a particular monetary amount of compensation or punitive damages (or the total amount of damages) that may be awarded in a health care lawsuit, *regardless of whether such monetary amount is greater or lesser* than is provided for under this Act" (emphasis added). H.R. 5 § 11(c)

[20] H.R. 5, § 7(a).

claimant would suffer.[21] Malicious intent to injure would be defined as intentionally causing or attempting to cause physical injury other than providing health care goods or services.[22]

After the claimant is permitted to amend his pleading to make a demand for punitive damages, either party would be allowed to request that the trier of fact consider: (1) whether punitive damages are to be awarded and the amount of such award, and (2) the amount of punitive damages following a determination of punitive liability. If there is a separate proceeding, then no evidence relevant to the claim for punitive damages would be admissible in any proceeding to determine whether compensatory damages, which cover both economic and noneconomic damages, are to be awarded.[23] In determining the amount of punitive damages, the trier of fact would be required to consider only the following: (1) the severity of the harm caused by the conduct of such party; (2) the duration of the conduct or any concealment of it by such party; (3) the profitability of the conduct to such party; (4) the number of products sold or medical procedures rendered for compensation, as the case may be, that caused the harm complained of by the claimant; (5) any criminal penalties imposed on such party as a result of the conduct complained of; and (6) the amount of any civil fines assessed against such party as a result of the conduct complained of by the claimant.[24]

## Arguments For Caps on Punitive Damages

Similar to the arguments for capping noneconomic damages, advocates argue that a lack of cap on punitive damages contributes to instability in the insurance system, among other things.[25] Critics charge that punitive damage awards in medical malpractice cases "are often unfair, arbitrary and unpredictable, and result in overkill.... [and] that reform is needed because there has been an outpouring of 'the most outrageous punitive damage awards' in medical malpractice."[26] Although it has been acknowledged that punitive damage awards occur in a small number of cases, "they can have a devastating impact on individual defendants and can impose big costs on the economy as a whole."[27]

## Arguments Against Caps on Punitive Damages

Some argue that a cap on punitive damages does not lead to a reduction in medical malpractice insurance premiums[28] and that awards are not "multimillion dollar jackpots," because of skewed

[21] H.R. 5, § 7(a).

[22] H.R. 5, § 9(13)

[23] H.R. 5, § 7(a).

[24] H.R. 5, § 7(b).

[25] John C. Nelson, M.D., AMA President-Elect, *AMA To Congress: Our Nation's Liability System Threatens Patients' Access to Health Care* (Oct. 2003). *See also* Steven Salbu, *Developing Rational Punitive Damage Policies: Beyond the Constitution*, 49 Fla. L. Rev. 247 (1997).

[26] Michael Rustad and Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 Rutgers L. Rev. 975, 978, 980-981 (1995).

[27] Mark Thompson, *Applying the Brakes to Punitives—But is There Anything to Slow Down?*, American Bar Association Journal (Sept. 1997) at 68, 69.

[28] Adam Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 Akron L. Rev. 417 (2004).

data.[29] Because punitive damages are meant to deter others, it has been said that they "must be allowed to fill the gaps the criminal law leaves open."[30] Finally, plaintiffs often do not recover the amounts that juries award, because trial judges often reduce punitive damages awards that they find excessive. Furthermore, a recent Supreme Court decision "makes it easier for appellate courts to reduce punitive damages."[31] It has been reported that "[s]ometimes, even before a jury rules, a plaintiff has signed an agreement that limits how much money actually changes hands."[32]

# Limiting Joint and Several Liability

Joint and several liability is the common-law rule that, if more than one defendant is found liable for a plaintiff's injuries, then each defendant may be held 100 percent liable. A plaintiff may not recover more than once, but he may recover all his damages from fewer than all liable defendants. Any defendant who pays more than its share of the damages is entitled to seek contribution from other liable defendants.

Some states have eliminated joint and several liability, making each defendant liable only for its share of responsibility for the plaintiff's injury. Other states have adopted compromise positions such as eliminating joint and several liability only for noneconomic damages, presumably with the view that it is more important for the plaintiff to recover all his economic damages than all his noneconomic damages; or, eliminating joint and several liability only for defendants responsible for less than a specified percentage (e.g., 50 percent) of the plaintiff's harm, presumably with the view that it is especially unfair for such defendants to be held liable for up to 100 percent of the damages.

Section 4 of the bill, which primarily addresses a cap on noneconomic damages, also provides that where there are multiple defendants, the bill would make each party responsible for an amount of damages that is in direct proportion to its individual percentage of fault, and it would not make an individual liable for the share of any other person. The trier of fact would determine the responsibility of each party for the claimant's harm.[33]

## Arguments For Limiting Joint and Several Liability

Advocates of abolishing or limiting joint and several liability argue that it "frequently operates in a highly inequitable manner—sometimes making defendants with only a small or even *de minimis* percentage of fault liable for 100% of plaintiff's damage. Accordingly, joint and several liability in the absence of concerted action has led to the inclusion of many 'deep pocket' defendants such as governments, larger corporations, and insured entities whose involvement is

[29] American Association for Justice, *Medical Negligence: A primer for the Nation's Health Care Debate* at 10.

[30] Lisa M. Broman, *Punitive Damages: An Appeal for Deterrence*, 61 Neb. L. Rev. 651, 680 (1982).

[31] Tania Zamorsky, *Impact of High Court's Ruling In "Leatherman": Punitive awards reduced in four cases*, National Law Journal (Aug. 1, 2001), *citing* Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), which held that appellate courts should perform *de novo* review, rather than apply an abuse-of-discretion standard, when determining whether punitive damages are excessive in violation of the Eighth Amendment.

[32] Joseph T. Hallinan, *In Malpractice Trials, Juries Rarely Have the Last Word*, Wall Street Journal (Nov. 30, 2004).

[33] H.R. 5, § 4(d).

only tangential and who probably would not be joined except for the existence of joint and several liability."[34]

## Arguments Against Limiting Joint and Several Liability

Advocates of joint and several liability cite the reason that the common law adopted it: it is preferable for a wrongdoer to pay more than its share of the damages than for an injured plaintiff to recover less than the full compensation to which he is entitled.

# Abolishing the Collateral Source Rule

The collateral source rule is the common-law rule that allows an injured party to recover damages from the defendant even if he is also entitled to receive them from a third party. Common third parties, i.e., collateral sources, include a health insurance company, an employer, or the government. To abolish the collateral source rule would be to allow or require courts to reduce damages by amounts a plaintiff receives or is entitled to receive from collateral sources.

Often a collateral source, such as a health insurer or the government, has a right of subrogation against the tortfeasor (the person responsible for the injury).[35] This means that the collateral source takes over the injured party's right to sue the tortfeasor, for up to the amount the collateral source owes or has paid the injured party. Though the collateral source rule may enable the plaintiff to recover from both his insurer and the defendant, if there is subrogation, the plaintiff must reimburse his insurer the amount it paid him. If the collateral source rule were eliminated, then the defendant would not have to pay the portion of damages covered by a collateral source, and the collateral source would apparently not be able to recover the amount it paid the plaintiff through subrogation. In the medical malpractice context, therefore, eliminating the collateral source rule would benefit liability insurers at the expense of health insurers.

There are some jurisdictions, however, have abolished the collateral source rule only in cases in which there is no right of subrogation. In jurisdictions where there is no right of subrogation, the collateral source would be unaffected by elimination of the collateral source rule (i.e., the health insurer would still not recover its money), and the defendant would benefit by not having to pay the plaintiff.[36]

Some proposals to abolish the collateral source rule have taken into account that the plaintiff may have paid insurance premiums for his collateral source benefit. Such proposals, instead of allowing a damage award to be reduced by the full amount of a collateral source benefit, allow it

[34] *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 64 (Feb. 1986).

[35] The Medical Care Recovery Act, 42 U.S.C. § 2651(a), provides: "In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment ... to a person who is injured or suffers a disease ... under circumstances creating a tort liability upon some third person ..., the United States shall have a right to recover ... from said third person, or that person's insurer, the reasonable value of the care and treatment ... and shall as to this right be subrogated to any right or claim that the injured or diseased person ... has against such third person to the extent of the reasonable value of the care and treatment...."

[36] Michael F. Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?*, 22 U. Told. L. Rev. 39, 49 (1990).

to be reduced by the full amount of a collateral source benefit minus the amount the plaintiff paid to secure that benefit. Other proposals would allow the defendant to introduce evidence of collateral source payments, but do not specify whether the jury must reduce economic damages awards by the amount of such payments.

Eliminating the collateral source rule could also indirectly reduce noneconomic damages awards, because juries often set such awards as a multiple of economic damages. If the collateral source rule were abolished, then the plaintiff could disclose to the jury only her out-of-pocket expenses, or she could disclose her total economic damages before collateral source payments are deducted. If the former, then the plaintiff might receive a lesser award of noneconomic damages.

H.R. 5 included a provision on collateral source benefits and introduction of evidence.. An amendment that was adopted during the House Committee on the Judiciary mark-up eliminated this provision from the bill.[37]

## Arguments For Abolishing the Collateral Source Rule

Advocates of abolishing the collateral source rule object to the fact that it "permits the plaintiff to obtain double recovery for certain components of his damages award," unless the collateral source is subrogated to the plaintiff's claim against the defendants.[38] Abolishing the collateral source rule will reduce damage awards without denying plaintiffs full recovery of their damages.

## Arguments Against Abolishing the Collateral Source Rule

Advocates of the collateral source rule cite the reason that the common law adopted it: it is preferable for the victim rather than the wrongdoer to profit from the victim's prudence (as in buying health insurance) or good fortune (in having some other collateral source available). One commentator has also noted that, when the collateral source is the government, and the benefit it provides are future services, such as physical therapy, there is no guarantee that it will provide such services for as long as they are needed, as government programs may be cut back.[39]

# Limiting Attorneys' Contingent Fees

A contingent fee is one in which a lawyer, instead of charging an hourly fee for his services, agrees, in exchange for representing a plaintiff in a tort suit, to accept a percentage of the recovery if the plaintiff wins or settles, but to receive nothing if the plaintiff loses. Payment is thus contingent upon there being a recovery. Plaintiffs agree to this arrangement in order to afford representation without paying anything out-of-pocket, and lawyers agree to it because the percentage they receive—usually from 33⅓ to 40%—generally amounts to more than an hourly fee would. Many states regulate contingent fees in medical malpractice cases in one or more of the following ways: "(1) establishment of a sliding scale for the attorney fees; (2) establishment

[37] Amendment 14 to H.R. 5.

[38] *Report of the Tort Policy Working Group, supra* note 35.

[39] Barry J. Nace and Virginia C. Nelson, *Plaintiffs' Lawyers Have Already Seen Many of the Proposed Tort Reforms in the States, and Find Them Disastrous for Clients*, National Law Journal (Jan. 17, 1994) at 29.

of a maximum percentage of the award that may be paid for attorney fees; and (3) provision for court review of the reasonableness of the attorney fees."[40]

Legislation to limit contingency fees might consider specifying whether plaintiffs' attorneys would be allowed to add costs, including expert-witness fees, travel, and photocopying on top of the cap, or whether costs would only be recovered from the amount the attorney recoups under the cap. In medical malpractice cases, where costs can skyrocket, the difference is significant.

Section 5 of the H.R. 5 would empower the court to supervise the arrangements for the payment of damages to protect against conflicts of interest (e.g., a claimant's attorney having a financial stake in the outcome by virtue of a contingency fee). The court would have the power to restrict the payment of a claimant's damage recovery to such attorney, and to redirect the damages to the claimant.

The bill would impose a sliding scale for attorney fees. In any health care lawsuit, the total of all contingency fees for representing all claimants would not exceed: (1) 40% of the first $50,000 recovered by the claimant(s); (2) 33⅓ % of the next $50,000 recovered by the claimant(s); (3) 25% of the next $500,000 recovered by the claimant(s); and (4) 15% of any amount where the recovery is in excess of $600,000. The sliding scale would be applicable regardless of whether the recovery is by judgment, settlement, mediation, arbitration, or any other form of alternative dispute resolution.[41]

## Arguments For Limiting Attorneys' Contingent Fees

Advocates of limiting contingent fees argue that such fees cause juries to inflate verdicts, result in windfalls for lawyers, and prompt lawyers to file frivolous suits in the hope of settling. They also argue that, where there is no dispute as to liability, but only as to damages, there is no contingency and therefore no justification for contingent fees. One study proposed that, if a defendant makes a prompt settlement offer, then counsel fees be "limited to hourly rate charges and capped at 10% of the first $100,000 of the offer and 5% of any greater amounts.... When plaintiffs reject defendants' early offers, contingency fees may only be charged against net recoveries in excess of such offers."[42]

## Arguments Against Limiting Attorneys' Contingent Fees

Opponents of limiting contingent fees argue that such fees enable injured persons, faced with medical bills and lost wages, to finance lawsuits that they otherwise could not afford—especially if their injuries have disabled them from working. They argue that lawyers are unlikely to file frivolous lawsuits if they stand to recover nothing if they lose,[43] and that studies have shown that

[40] *See* National Conference of State Legislatures, *State Medical Malpractice Laws 2010*, available at http://www.ncsl.org/default.aspx?tabid=18516.

[41] H.R. 5, § 5.

[42] The Manhattan Institute, *Rethinking Contingency Fees* 28, 29 (1994).

[43] Stephen Daniels and Joanne Martin, *It's Deja Vu All Over Again: Plaintiff's Lawyers and the Evolution of Tort Law and Practice in Texas*, American Bar Foundation (Mar. 2009), http://www.americanbarfoundation.org/research/project/20.

contingent fees do not encourage frivolous lawsuits.[44] Finally, they note, "[a]n hourly fee arrangement [such as defendants' lawyers use] can encourage delay, inefficiency, and unnecessary action," whereas "[a] contingent fee is an added inducement for a lawyer to be efficient and expeditious."[45]

# Periodic Payment of Damages

Traditionally, damages are paid in a lump sum, even if they are for future medical care or future lost wages. In recent years, however, "attorneys for both parties in damages actions have occasionally foregone lump-sum settlements in favor of structured settlements, which give the plaintiff a steady series of payments over a period of time through the purchase of an annuity or through self-funding by an institutional defendant."[46] Many forms of periodic payment statutes exist throughout the United States, and they can involve complicated calculations, "creating barriers for those who use the periodic payment process."[47]

Proposals concerning the periodic payment of damages have been applied to future damages as well as to all damages. An issue that may arise in connection with awards of future damages is whether such awards should be converted to present value. Not to require such conversion "could be a very major change, significantly reducing awards, if it is intended to allow a defendant to pay, for example, a $1 million award over a 10-year period at $100,000 a year."[48] Yet, if a jury is required to convert an award—an annuity with a present value of $1 million—into its present value, then the reform doesn't mean that much. As a practical matter, the defendant would be paying the same amount as before, because it would have to spend $1 million for an annuity that, as it earned interest over the years of its distribution, would yield the plaintiff more than $1 million. Had the defendant paid the plaintiff a lump sum of $1 million, then the plaintiff could have purchased that same annuity.[49]

If Congress addresses periodic payment of future damages, it may consider utilizing the Uniform Periodic Payment of Judgments Act for guidance. For example, the uniform act includes sections that would account for inflation and for the effect of the plaintiff's death on unpaid amounts. Section 5(a) of the uniform act provides that, in a trial, "evidence of future changes in the purchasing power of the dollar is admissible on the issue of future damages." Section 13 provides that "liability to a claimant for periodic payments not yet due for medical expenses terminates upon the claimant's death." Damages for other economic losses, however, except in actions for wrongful death, must be paid to the plaintiff's estate.

Section 8 of the bill would permit any party to request to the court that future damages be paid by period payment, if an award of future damages is made that equals or exceeds $50,000, without a

[44] *See* studies cited in Association of Trial Lawyers of American, *Keys to the Courthouse: Quick Facts on the Contingent Fee System* (1994) at 4, 5.

[45] *Id.* at 6.

[46] Annotation, *Propriety and Effect of "Structured Settlements" Whereby Damages are Paid in Installments Over a Period of Time, and Attorneys' Fees Arrangements in Relation Thereto*, 31 ALR 4th 95, 96.

[47] Paul J. Lesti, Structured Settlements § 21.5 (2d ed., 1993).

[48] Victor E. Schwartz, *Doctors' Delight, Attorneys' Dilemma*, Legal Times, Health-Care Law Supplement (Feb. 28, 1994) at 30.

[49] *Id.*

reduction to a present value. This would be permitted so long as the party against whom the judgment was made has sufficient insurance or other assets to fund a periodic payment of such judgment. H.R. 5 provides that "the court may be guided by the Uniform Periodic Payment of Judgments Act promulgated by the National Conference of Commissioners on Uniform State Laws."[50]

## Arguments For the Periodic Payment of Damages

Advocates argue that generally, both parties are benefitted by a period payment scheme because the defendant need not immediately pay out a large sum of money, and the plaintiff is prevented from dissipating a recovery and is provided a secure, tax-free income for a long period, without having to assume the costs and risks of managing an investment portfolio.[51] Periodic payments are not very different than the structured settlements that lawyers utilize in other transactions. "Periodic payment of malpractice awards is nothing more than what lawyers have been doing for years in structured settlements. It is workable and often the only means of providing full compensation for an injured claimant when resources are otherwise unavailable."[52]

## Arguments Against the Periodic Payment of Damages

Some argue that if periodic payments will in fact benefit plaintiffs, then they will agree to them, as they sometimes do, without the need for legislation. Some plaintiffs may prefer to invest their awards themselves and not risk the insolvency of the defendant or the company from which the defendant purchases an annuity.

# Creating a Federal Statute of Limitations

The statute of limitations—the period within which a lawsuit must be filed—for medical malpractice suits under state law is typically two or three years, starting on the date of injury. Sometimes, however, the symptoms of an injury do not appear immediately, or even for years after, malpractice occurs. Many states therefore have adopted a "discovery" rule, under which the statute of limitations starts to run only when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered, his injury—or, sometimes, his injury and its cause. Plaintiffs would favor allowing a statute of limitations to run only upon discovery of an injury and its cause because it may take additional time after symptoms become manifest to discover that an injury was caused by medical malpractice.

Section 3 of H.R. 5 would require a health care lawsuit to be brought within either three years after the date of manifestation of the injury, or within one year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. No lawsuit could be brought after three years of the date of manifestation of the injury, but such a limitation could be extended upon a showing of (1) proof of fraud; (2) intentional concealment; or

[50] This uniform act was promulgated in 1990; it was preceded by the 1980 Model Periodic Payment of Judgments Act. Both appear in volume 14 of the UNIFORM LAWS ANNOTATED.

[51] *Annotation, supra* note 46, at 96.

[52] A. Blackwell Stieglitz, *Defense Counsel Will Find the President's Medical Malpractice Proposals So Benign as to be Meaningless*, National Law Journal (Jan. 17, 1994) at 27.

(3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured party. For minors, the action must be commenced within three years from the date of the manifestation of injury, except that actions by a minor under the full age of six must be commenced within three years of the manifestation of the injury or prior to the minor's eighth birthday, whichever provides a longer period. In the event of fraud, the statute of limitations for a minor could be tolled.[53]

[53] To toll the statute of limitations means to stop its running.

# Appendix. Fifty-State Surveys

**Table A-1** summarizes state laws that impose caps on punitive damages and noneconomic damages in medical malpractice cases. If a box states "no statute found," this indicates that the state apparently imposes no cap in medical malpractice suits, either because the state constitution prohibits caps or because the state legislature has chosen not to enact a cap. We quote some, but not necessarily all, state constitutional provisions that prohibit caps.

The term "economic damages" refers to past and future monetary expenses of an injured party, such as medical bills, rehabilitation expenses, and lost wages. "Noneconomic damages" refers primarily to damages for pain and suffering. Economic and noneconomic damages are both compensatory damages; i.e., they are intended to compensate the injured party. As mentioned earlier, punitive damages are awarded not to compensate plaintiffs but to punish and deter particularly egregious conduct on the part of defendants. Though noneconomic by nature, punitive damages are usually treated separately from noneconomic damages.

The dollar amount in the right-hand column refers to the cap on compensatory noneconomic damages, except that "total cap" means a cap on all damages—economic, noneconomic, and punitive damages—combined. We have attempted to note where a state's highest court has declared the cap to violate the state's constitution.

The caps listed in the chart, as well as the entry "punitive damages prohibited," do not necessarily apply to tort actions other than for medical malpractice, though in many cases they do.

## Table A-1. State Caps on Noneconomic and Punitive Damages in Medical Malpractice Lawsuits

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Alabama** | **Ala. Code § 6-5-544 (2011)**<br>Imposes a $400,000 cap on noneconomic losses, including punitive damages.<br>Held unconstitutional. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991).<br>**Ala. Code § 6-5-547 (2011)**<br>$1,000,000 total cap in wrongful death actions against a health care provider.<br>This provision was held to violate state constitution. Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995), cert. denied, 517 U.S. 1220 (1996). | **Ala. Code § 6-11-21 (2011)**<br>The greater of three times compensatory damages or $500,000 ($1.5 million if physical injury), with exceptions. |
| **Alaska** | **Alaska Stat. § 09.17.010 (2011)**<br>Imposes a $400,000 cap or the injured person's life expectancy in years multiplied by $8,000, whichever is greater, but $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement. | **Alaska Stat. § 09.17.020 (2011)**<br>The greater of three times compensatory damages or $500,000, except if defendant was motivated by financial gain and actually knew the adverse consequences, then the greatest of four times compensatory damages, four times financial gain, or $7,000,000. |
| **Arizona** | **Ariz. Const. Art. II, § 31 (2011)**<br>No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person. | **Ariz. Const. Art. II, § 31 (2011)**<br>No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person. |
| **Arkansas** | **Ark. Const. Art. 5, § 32 (2010)**<br>No law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property. | **Ark. Code Ann. § 16-55-208 (2010)**<br>The greater of $250,000 or three times compensatory damages, not to exceed $1,000,000, to be adjusted as of January 1, 2006 and at three-year intervals thereafter, in accordance with the Consumer Price Index. No cap if defendant intentionally caused injury or damage. |
| **California** | **Cal. Civ. Code § 3333.2 (2010)**<br>$250,000. | No statute found. |
| **Colorado** | **Colo. Rev. Stat. §§ 13-21-102.5, 13-64-302 (2010)**<br>$250,000 noneconomic cap, but $500,000 cap if court finds justification for more than $250,000. Both caps adjusted for inflation. $1,000,000 total cap in suits against health care providers. | **Colo. Rev. Stat. § 13-21-102 (2010)**<br>The amount of actual damages awarded, but three times that amount if the defendant continues to act in a willful and wanton manner during the pendency of the case. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Connecticut** | **Conn. Gen. Stat. § 52-228c (2010)**<br>Whenever, the jury renders a verdict specifying noneconomic damages in an amount exceeding one million dollars, the court shall review the evidence presented to the jury to determine if the amount is excessive as a matter of law. | No statute found. |
| **Delaware** | No statute found. | No statute found. |
| **District of Columbia** | No statute found. | No statute found. |
| **Florida** | **Fla. Stat. Ann. § 766.118(2) (2010)**<br>$500,000, except $1 million cap on all practitioners in the aggregate if permanent vegetative state or death, or if, because of special circumstances, noneconomic harm is particularly severe and injury was catastrophic. For non-practitioners, above caps are $750,000 and $1.5 million, respectively. For emergency services, caps are $150,000 for practitioners, $750,000 for non-practitioners, with maximum damages recoverable by all claimants $300,000 and $1.5 million, respectively. | **Fla. Stat. Ann. § 768.73(1) (2010)**<br>The greater of three times compensatory damages or $500,000, except, if wrongful conduct was motivated solely by unreasonable financial gain, and unreasonably dangerous nature of the conduct and high likelihood of injury were known, then the greater of four times compensatory damages or $2 million. No cap where specific intent to harm plaintiff.<br>**Fla. Stat. Ann. § 766.207(7)(d) (2010)**<br>Punitive damages prohibited in voluntary binding arbitration. |
| **Georgia** | **Ga. Code Ann. § 51-13-1 (2011)**<br>Health care providers or medical facility: $350,000. Medical facilities: $750,000. The aggregate amount of noneconomic damages recoverable under such subsections shall in no event exceed $1,050,000.00.<br>This provision held unconstitutional. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010). | **Ga. Code Ann. § 51-12-5.1 (2011)**<br>$250,000.<br>If it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded. |
| **Hawaii** | **Haw. Rev. Stat. Ann. § 663-8.7 (2010)**<br>$375,000 (cap does not apply to intentional torts). | No statute found. |
| **Idaho** | **Idaho Code Ann. § 6-1603 (2010)**<br>For actions accruing after July 1, 2003, $250,000 subject to increase or decrease in accordance with the average annual wage. | **Idaho Code Ann. § 6-1604 (2010)**<br>For actions accruing after July 1, 2003, the greater of $250,000 or three times compensatory damages. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Illinois** | **735 Ill. Comp. Stat. Ann. 5/2-1706.5 (2011)**<br>Hospital and its personnel or hospital affiliates: $1 million.<br>Physician and the physician's business or corporate entity and personnel or health care professional: $500,000.<br>This provision held unconstitutional. Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895 (Ill. 2010). | **735 Ill. Comp. Stat. Ann. 5/2-1115 (2011)**<br>Punitive damages are not recoverable in healing art and legal malpractice cases. |
| **Indiana** | **Ind. Code Ann. § 34-18-14-3 (2011)**<br>$1,250,000., total cap.<br>Qualified health care provider: $250,000 total cap. | **Ind. Code Ann. § 34-51-3-4 (2011)**<br>Greater of three times compensatory damages or $50,000. |
| **Iowa** | No statute found. | No statute found. |
| **Kansas** | **Kan. Stat. Ann. § 60-19a02(b) (2009)**<br>$250,000 by each party from all defendants. | **Kan. Stat. Ann. § 60-3702(e), (f) (2009)**<br>The lesser of the defendant's annual gross income or $5,000,000, but if the profitability of the misconduct exceeds such amount, the cap is 1.5 times the profit. |
| **Kentucky** | **Ky. Const. § 54 (2010)**<br>The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property. | **Ky. Const. § 54 (2010)**<br>The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property. |
| **Louisiana** | **La. Rev. Stat. Ann. § 40:1299.42 (2011)**<br>$500,000 total cap, exclusive of future medical care and related benefits.<br>Qualified health care provider: $100,000 total cap per patient. | Punitive damages prohibited at common law. |
| **Maine** | **Me. Rev. Stat. tit. 18-A, § 2-804(b) (2011)**<br>Wrongful death actions: $500,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts. | **Me. Rev. Stat. tit. 18-A, § 2-804(b) (2011)**<br>Wrongful death actions: $250,000. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Maryland** | **Md. Code Ann., Cts. & Jud. Proc. § 3-2A-09 (2011)**<br><br>1) (i) Except as provided in paragraph (2)(ii), a cause of action arising between January 1, 2005, and December 31, 2008, inclusive, may not exceed $650,000.<br>(ii) The limitation increase by $15,000 on January 1 of each year beginning January 1, 2009. The increased amount shall apply to causes of action arising between January 1 and December 31 of that year, inclusive.<br><br>(2) (i) Except as provided in subparagraph (ii) of this paragraph, the limitation under paragraph (1) shall apply in the aggregate to all claims for personal injury and wrongful death arising from the same medical injury, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants.<br>(ii) If there is a wrongful death action in which there are two or more claimants or beneficiaries, whether or not there is a personal injury action arising from the same medical injury, the total amount awarded for noneconomic damages for all actions may not exceed 125% of the limitation established under paragraph (1) of this subsection, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants.<br><br>**Md. Code Ann., Cts. & Jud. Proc. § 11-108 (2011)**<br><br>$500,000 if cause of action arises on or after October 1, 1994, increased by $15,000 on October 1 of each succeeding year for causes of action that arise on or after the date of the increase. | No statute found |
| **Massachusetts** | **Mass. Ann. Laws, ch. 231, § 60H (2010)**<br><br>$500,000, unless death resulted or "special circumstances" are found.<br><br>**Mass. Ann. Laws, ch. 231, § 85K (2010)**<br><br>Charitable institution: $20,000 total cap. | **Mass. Ann. Laws, ch. 229, § 2 (2010)**<br><br>In wrongful death cases, not less than $5,000 where decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.<br><br>Punitive damages otherwise prohibited at common law. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Michigan** | **Mich. Comp. Laws. Serv. § 600.1483 (2011)**<br>$280,000, recoverable by all plaintiffs, resulting from the negligence of all defendants, but $500,000 if a serious injury enumerated in the statute occurred. | No statute found. |
| **Minnesota** | No statute found. | No statute found. |
| **Mississippi** | **Miss. Code Ann. § 11-1-60 (2010)**<br>$500,000 cap for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for aged or infirm. | **Miss. Code Ann. § 11-1-65 (2010)**<br>$20 million if defendant's net worth exceeds $1 billion; $15 million if it exceeds $750 million but is not more than $1 billion; $10 million if it exceeds $500 million but is not more than $750 million; $7½ million if it exceeds $100 million but is not more than $500 million; $5 million if it exceeds $50 million but is not more than $100 million; 4% of defendant's net worth if defendant's net worth is $50 million or less. |
| **Missouri** | **Mo. Rev. Stat. § 538.210 (2011)**<br>Not to exceed $350,000 irrespective of the number of defendants. | No statute found. |
| **Montana** | **Mont. Code Ann. § 25-9-411 (2010)**<br>$250,000 cap on noneconomic damages for actions based on the same act or series of acts that allegedly caused the injury, injuries, death or deaths; or regardless the number of defendant health care providers. | **Mont. Code Ann. § 27-1-220 (2010)**<br>$10 million or 3% of a defendant's net worth, whichever is less. |
| **Nebraska** | **Neb. Rev. Stat. Ann. § 44-2825 (2010)**<br>Healthcare provider and the Excess Liability Fund: $1,750,000, total cap.<br>Healthcare provider: $500,000. | Punitive damages prohibited at common law. |
| **Nevada** | **Nev. Rev. Stat. Ann. § 41A.035 (2010)**<br>Not to exceed $350,000. | **Nev. Rev. Stat. Ann. § 42.005 (2010)**<br>Three times compensatory damages if compensatory damages are $100,000 or more; $300,000 if the compensatory damages are less than $100,000. |
| **New Hampshire** | **N.H. Rev. Stat Ann. § 507-C:7 (2010)**<br>Not to exceed $250,000.<br>This provision held unconstitutional. Carson v. Maurer, 424 A.2d 825 (N.H. 1980). | **N.H. Rev. Stat Ann. § 507:16 (2010)**<br>No punitive damages shall be awarded in any action, unless otherwise provided by statute.<br>No statute provides for punitive damages in medical malpractice actions. |
| **New Jersey** | No statute found. | **N.J. Rev. Stat. 2A:15-5.14 (2011)**<br>Greater of five times compensatory damages or $350,000. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **New Mexico** | **N.M. Stat. Ann. § 41-5-6 (2010)**<br>$600,000 total cap. Monetary damages shall not be awarded for future medical expenses in malpractice claims. | **N.M. Stat. Ann. § 41-5-6 (2010)**<br>Punitive damages and medical care and related benefits are not subject to the $600,000 cap. |
| **New York** | No statute found. | No statute found |
| **North Carolina** | No statute found. | **N.C. Gen. Stat. § 1D-25 (2010)**<br>Greater of three times the amount of compensatory damages or $250,000. |
| **North Dakota** | **N.D. Cent. Code § 32-42-02 (2011)**<br>Not to exceed $500,000 cap on noneconomic damages regardless the number of health care providers. | **N.D. Cent. Code § 32-03.2-11(4) (2011)**<br>Greater of two times compensatory damages or $250,000. |
| **Ohio** | **Ohio Rev. Code Ann. § 2323.43 (2011)**<br>The greater of $250,000 or three times plaintiff's economic loss, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence. But, if specified serious injuries occur, cap is $500,000 for each plaintiff or $1 million for each occurrence. | **Ohio Rev. Code Ann. § 2315.21 (2011)**<br>Punitive or exemplary damages in excess of two times the amount of the compensatory damages;<br>Small employer or individual: lesser of two times the amount of the compensatory damages or 10% of the employer's or individual's net worth, up to $350,000.<br>Except where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states described in statute. |
| **Oklahoma** | **Okla. Stat. tit., 23, § 61.2 (2010)**<br>$400,000.00, regardless of the number of parties against whom the action is brought or the number of actions brought.<br>No limit on noneconomic damages arising from a claimed bodily injury resulting from professional negligence against a physician if the judge and jury finds, by clear and convincing evidence, that:<br>1. The plaintiff or injured person has suffered permanent and substantial physical abnormality or disfigurement, loss of use of a limb, or loss of, or substantial impairment to, a major body organ or system; or<br>2. The plaintiff or injured person has suffered permanent physical functional injury which prevents them from being able to independently care for themselves and perform life sustaining activities; or<br>3. The defendant's acts or failures to act were: a. in reckless disregard for the rights of others,<br>b. grossly negligent, c. fraudulent, or d. intentional or with malice. | **Okla. Stat. tit., 23, § 9.1 (2010)**<br>Where reckless disregard, greater of $100,000 or actual damages awarded. Where intentional and with malice, greatest of $500,000, twice actual damages awarded, or financial benefit derived by defendant. If court finds beyond a reasonable doubt that defendant engaged in conduct life-threatening to humans, then no cap. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Oregon** | **Or. Rev. Stat. § 31.710 (2009)**<br>Not to exceed $500,000.<br>This provision held unconstitutional where damages are recoverable under common law. Lakin v. Senko Products, Inc., 987 P.2d 463 (Ore. 1999). | **Or. Rev. Stat. § 31.740 (2009)**<br>Prohibited against specified health practitioners. |
| **Pennsylvania** | **Pa. Const. Art. 3, § 18 (2010)**<br>The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted.<br>**40 Pa. Cons. Stat. § 1303.712(c)(2)(i) (2010)**<br>Caps total liability of the Medical Professional Liability Catastrophe Loss Fund at $500,000 for each occurrence and $1,500,000 per annual aggregate. | **40 Pa. Cons. Stat. § 1303.505(d) (2010)**<br>Except in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of the compensatory damages awarded. Punitive damages, when awarded, shall not less than $100,000 unless a lower verdict amount is returned by the trier of fact. |
| **Rhode Island** | No statute found. | No statute found. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **South Carolina** | **S.C. Code Ann. § 15-32-220 (2010)**<br>A single health care provider or a single health care institution: $350,000 for each claimant, regardless of the number of separate causes of action.<br>One health care institution, or more than one health care provider, or any combination thereof, the limit of civil liability for noneconomic damages for each health care institution and each health care provider is limited to an amount not to exceed $350,000 for each claimant, and the limit of civil liability for noneconomic damages for all health care institutions and health care providers is limited to an amount not to exceed $1,050,000 for each claimant.<br>(E) The limitations for noneconomic damages rendered against any health care provider or health care institution do not apply if the jury or court determines that the defendant was grossly negligent, willful, wanton, or reckless, and such conduct was the proximate cause of the claimant's noneconomic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant altered or destroyed medical records with the purpose of avoiding a claim or liability to the claimant. | **S.C. Code Ann. § 15-32-220 (2010)**<br>This section does not limit the amount of punitive damages in cases where the plaintiff is able to prove an entitlement to an award of punitive damages as required by law. |
| **South Dakota** | **S.D. Codified Laws § 21-3-11 (2010)**<br>The total general damages which may be awarded may not exceed the sum of five hundred thousand dollars. There is no limitation on the amount of special damages which may be awarded. | No statute found. |
| **Tennessee** | No statute found. | No statute found. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Texas** | **Tex. Civ. Prac. & Rem. §§ 74.301, 302 (2010)**<br>$250,000 per claimant against a physician or health care provider and $250,000 per claimant against a health care institution. If more than one health care institution is liable, cap against them all is $500,000 per claimant.<br>**Tex. Civ. Prac. & Rem. § 74.303 (2010)**<br>In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based, subject to increase or decrease in accordance with consumer price index. | **Tex. Civ. Prac. & Rem. § 41.008 (2010)**<br>Greater of (1) two times the amount of economic damages plus the amount of noneconomic damages up to $750,000; or (2) $200,000.<br>**Tex. Civ. Prac. & Rem. § 74.303 (2010)**<br>In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based, subject to increase or decrease in accordance with consumer price index. |
| **Utah** | **Utah Code Ann. § 78B-3-410 (2011)**<br>(1)(a) for a cause of action arising before July 1, 2001, $250,000;<br>(b) for a cause of action arising on or after July 1, 2001 and before July 1, 2002, the limitation is adjusted for inflation to $400,000;<br>(c) for a cause of action arising on or after July 1, 2002, and before May 15, 2010 the $400,000 limitation described in Subsection (1)(b) shall be adjusted for inflation as provided in Subsection (2); and<br>(d) for a cause of action arising on or after May 15, 2010, $450,000.<br>(2) (a) Beginning July 1, 2002 and each July 1 thereafter until July 1, 2009, the limit for damages under Subsection (1)(c) shall be adjusted for inflation by the state treasurer. | **Utah Code Ann. § 78B-3-410 (2011)**<br>The limitations provided in this section do not apply to punitive damages. |
| **Vermont** | No statute found. | No statute found. |
| **Virginia** | **Va. Code Ann. § 8.01-581.15 (2010)**<br>$1.5 million total cap, to increase by $50,000 every July 1 from 2000 through 2006, and by $75,000 on July 1, 2007 and 2008. The July 1, 2008, increase shall be the final annual increase. | **Va. Code Ann. § 8.01-38.1 (2010)**<br>Not to exceed $350,000 cap. |

| State | Noneconomic Damages | Punitive Damages |
|---|---|---|
| **Washington** | **Wash. Rev. Code Ann. § 4.56.250 (2011)**<br>Amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner.<br>This provision held unconstitutional. Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989). | Punitive damages prohibited at common law. |
| **West Virginia** | **W. Va. Code Ann. § 55-7B-8 (2011)**<br>$250,000 per occurrence, regardless of the number of plaintiffs or defendants, except cap is $500,000 if (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities. Annual increases based on Consumer Price Index. Caps apply only if defendant has insurance of at least $1 million per occurrence. | No statute found. |
| **Wisconsin** | **Wis. Stat. §§ 655.017, 893.55(4)(d)(1) (2010)**<br>$750,000 for each occurrence under on or after April 6, 2006.<br>A $350,000 cap was held unconstitutional in Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (2005). | **Wis. Stat. § 895.043(6) (2011)- 2011 Wis. Act 2, enacted on 1/27/2011**<br>Not to exceed twice the amount of any compensatory damages recovered by the plaintiff or $ 200,000, whichever is greater. |
| **Wyoming** | **Wyo. Const. Art. 10, § 4 (2011)**<br>No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. | **Wyo. Const. Art. 10, § 4 (2011)**<br>No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. |

**Source:** LexisNexis.

**Table A-2** sets forth the burden of proof and standards for awards of punitive damages in medical malpractice suits in the 50 states, as well as whether the state requires or permits a separate hearing to determine punitive damages. The burden of proof refers to the plaintiff's duty to present evidence to prove his case. Although the lowest burden, which usually applies in civil cases, is "preponderance of the evidence," many states impose a higher burden of proof to recover punitive damages—proof by "clear and convincing evidence." One state—Colorado—however, requires proof "beyond a reasonable doubt," which is the highest standard—usually the burden that the government must meet in criminal prosecutions.

Standards for awards of punitive damages refer to what the plaintiff must prove to receive an award of punitive damages. To recover compensatory damages in a medical malpractice case, the plaintiff typically must prove negligence. To recover punitive damages, the plaintiff must prove that the defendant's conduct was more egregious than negligence, and usually more egregious than gross negligence.

Separate proceedings for punitive damages refer to whether the computation and award of punitive damages occurs during the initial trial or in a subsequent trial. Such punitive damages proceedings usually include the same jury as in the original trial, but additional discovery can occur and additional evidence can be presented (such as evidence related to the financial condition of the defendant). This report sets forth the specific availability of this bifurcated trial process, noting whether the process is available on the motion of one of the parties, or is mandatory in all proceedings resulting in the award of punitive damages. Where "N/A" is entered does not mean that bifurcation of a punitive damages claim is prohibited or non-existent. Rather, it means that the state: (1) may not have a specific statute that addresses bifurcation with respect to punitive damages, or (2) that the its civil procedure rules grants the courts the discretion to have a separate trial on any claim if it would be conducive to expedition or economy. For example, Rule 42 of West Virginia Civil Procedure states that the court may have separate trials on any claim if it would be conducive or expeditious to do so.

Most of the provisions listed in the chart apply to punitive damages not only in medical malpractice cases, but in other tort cases as well. Where "punitive damages prohibited" appears, the prohibition may be limited to medical malpractice cases, or it may apply to other tort cases as well.

## Table A-2. Punitive Damages—Burden of Proof, Standard, and Separate Proceeding

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Alabama** | **Ala. Code § 6-11-20 (2011)**<br>Clear and convincing evidence. | **Ala. Code § 6-11-20 (2011)**<br>"[T]he defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice." | **Ala. Code § 6-11-23 (2011)** Available. |
| **Alaska** | **Alaska Stat. § 09.17.020 (2011)**<br>Clear and convincing evidence. | **Alaska Stat. § 09.17.020 (2011)** "[D]efendant's conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person." | **Alaska Stat. § 09.17.020 (2011)** Mandatory. |
| **Arizona** | Clear and convincing evidence.<br>*Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (1986). | Defendant engaged in "reprehensible conduct" and acted "with an evil mind." *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 680 (1986). | N/A. |
| **Arkansas** | **Ark. Code Ann. § 16-55-207 (2010)**<br>Clear and convincing evidence. | **Ark. Code Ann. § 16-55-206 (2010)** "[D]efendant knew or ought to have known ... that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences ..." or "defendant intentionally pursued a course of conduct for the purpose of causing injury or damages." | **Ark. Code Ann. § 16-55-211 (2010)**<br>Available. |
| **California** | **Cal. Civ. Code § 3294 (2010)**<br>Clear and convincing evidence. | **Cal. Civ. Code § 3294 (2010)**<br>"[O]ppression, fraud, or malice." | N/A. |
| **Colorado** | **Colo. Rev. Stat. §13-25-127(2) (2010)**<br>Beyond a reasonable doubt. | **Colo. Rev. Stat. § 13-21-102 (2010)**<br>"[F]raud, malice, or willful and wanton conduct." | N/A. |
| **Connecticut** | Preponderance of the evidence.<br>*Freeman v. Alamo Management Co.*, 607 A.2d 370, 373 (Conn. 1992). | "{A] reckless indifference to the rights of others or an intentional and wanton violation of those rights."<br>*Sorrentino v. All Seasons Servs.*, 717 A.2d 150, 161 (Conn. 1998). | N/A. |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Delaware** | Undefined, but likely preponderance of the evidence. | **Del. Code Ann. tit. 18, § 6855 (2010)**<br>"[I]njury complained of was maliciously intended or was the result of wilful or wanton misconduct by the health care provider." | N/A. |
| **District of Columbia** | Clear and convincing evidence.<br>*Croley v. Republican Nat'l Comm*., 759 A.2d 682, 695 (D.C. 2000). | "[E]gregious conduct."<br>*Railan v. Katyal*, 766 A.2d 998, 1012 (D.C. 2001).<br>"[M]alice or its equivalent."<br>*Croley v. Republican Nat'l Comm*., 759 A.2d 682, 695 (D.C. 2000). | N/A. |
| **Florida** | **Fla. Stat. Ann. § 768.72(2) (2010)**<br>Clear and convincing evidence. | **Fla. Stat. Ann. § 768.72(2)(2010)**<br>"[I]ntentional misconduct or gross negligence." | N/A. |
| **Georgia** | **Ga. Code Ann. § 51-12-5.1(b) (2011)**<br>Clear and convincing evidence. | **Ga. Code Ann. § 51-12-5.1(b) (2011)**<br>"[W]illful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." | **Ga. Code Ann. § 51-12-5.1(d)(2) (2011)**<br>Mandatory. |
| **Hawaii** | Clear and convincing evidence.<br>*Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 839 P.2d 10, 37 (1992) | "[D]efendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or that entire want of care which would raise the presumption of conscious indifference to the consequences."<br>*Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 839 P.2d 10, 37 (1992) | N/A. |
| **Idaho** | **Idaho Code Ann. § 6-1604 (2010)**<br>Clear and convincing evidence. | **Idaho Code Ann. § 6-1604(2010)**<br>"[O]ppressive, fraudulent, malicious or outrageous conduct." | N/A. |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Illinois** | **735 Ill. Comp. Stat. Ann. 5/2-1115 (2005)**<br>Punitive damages prohibited in medical malpractice cases. | | |
| **Indiana** | **Ind. Code Ann. § 34-51-3-2 (2011)**<br>Clear and convincing evidence. | "[A]ct[ing] with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing."<br>*USA Life One Ins. Co. of Indiana v. Nuckolls*, 682 N.E.2d 534, 541 (Ind. 1997). | N/A. |
| **Iowa** | **Iowa Code Ann. § 668A.1 (2010)**<br>"[P]reponderance of clear, convincing, and satisfactory evidence." | **Iowa Code Ann. § 668A.1 (2010)**<br>"[W]illful and wanton disregard for the rights or safety of another." | N/A. |
| **Kansas** | **Kan. Stat. Ann. § 60-3701 (2009)**<br>Clear and convincing evidence. | **Kan. Stat. Ann. § 60-3701 (2009)**<br>"[W]illful conduct, wanton conduct, fraud or malice." | **Kan. Stat. Ann. § 60-3701 (2009)**<br>Mandatory. |
| **Kentucky** | **Ky. Rev. Stat. Ann. § 411.184 (2010**)<br>Clear and convincing evidence. | **Ky. Rev. Stat. Ann. § 411.184 (2010)**,<br>"[O]ppression, fraud or malice." | N/A. |
| **Louisiana** | Punitive damages unavailable in medical malpractice claims.<br>*See Naquin v. Fluor Daniel Services Corp.*, 935 F. Supp. 847, 849) (E.D. La. 1996) (noting that punitive damages are only available under Louisiana law if specifically permitted by a statute). | | |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Maine** | Clear and convincing evidence.<br>*St. Francis de Sales Federal Credit Union v. Sun Insurance Company of New York*, 818 A.2d 995, 1001 (Me. 2002, revised 2003). | Malice, either express (where the defendant "is motivated by ill will toward the plaintiff"), or implied (defendant's conduct "is so outrageous that malice toward a person injured as a result of that conduct can be implied.") Implied malice is not established "by the defendant's mere reckless disregard of the circumstances."<br>*St. Francis de Sales Federal Credit Union v. Sun Insurance Company of New York*, 818 A.2d 995, 1001 (Me. 2002, revised 2003). | N/A |
| **Maryland** | Clear and convincing evidence.<br>*Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992). | "[E]vil motive, intent to injure, ill will, or fraud."<br>*Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 652 (Md. 1992). | N/A. |
| **Massachusetts** | **Mass. Ann. Laws, ch. 229 § 2 (2010)**<br>Preponderance of the evidence in wrongful death cases.<br>But, punitive damages for medical malpractice otherwise prohibited. | **Mass. Ann. Laws, ch. 229 § 2 (2010)**<br>In wrongful death cases, "malicious, willful, wanton or reckless conduct ... or gross negligence."<br>But, punitive damages for medical malpractice otherwise prohibited. | N/A. |
| **Michigan** | Undefined, but likely preponderance of the evidence. | Conduct that "inspires feelings of humiliation, outrage and indignity" and is "malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights."<br>*Veselenak v. Smith*, 327 N.W.2d 261, 264 (1982). | N/A. |
| **Minnesota** | **Minn. Stat. Ann. § 549.20 (2010)**<br>Clear and convincing evidence. | **Minn. Stat. Ann. § 549.20 (2010)**<br>"[D]eliberate disregard for the rights or safety of others." | **Minn. Stat. Ann. § 549.20 (2010)**<br>Mandatory. |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Mississippi** | **Miss. Code Ann. § 11-1-65(1)(a)(2010)**<br>Clear and convincing evidence. | **Miss. Code Ann. § 11-1-65(1)(a)(2010)**<br>"[A]ctual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." | **Miss. Code Ann. § 11-1-65(1)(e)(2010)**<br>Mandatory. |
| **Missouri** | Clear and convincing evidence.<br>*Rodriguez v. Suzuki Motor Corp*., 936 S.W.2d 104, 111 (Mo. 1996). | **Mo. Rev. Stat. § 538.210.5 (2011)**<br>For medical malpractice actions, "willful, wanton, or malicious misconduct." § 538.210.5 (2010). | **Mo. Rev. Stat. § 510.263 (2011)**<br>Available. |
| **Montana** | **Mont. Code Ann. § 27-1-221 (2010)**<br>Clear and convincing evidence. | **Mont. Code Ann. § 27-1-221 (2010)**<br>"[A]ctual fraud or actual malice." | **Mont. Code Ann. § 27-1-221 (2010)**<br>Mandatory. |
| **Nebraska** | Punitive damages prohibited.<br>*Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975). | | |
| **Nevada** | **Nev. Rev. Stat. Ann. § 42.005 (2010)**<br>Clear and convincing evidence. | **Nev. Rev. Stat. Ann. § 42.005 (2010)**<br>"[O]ppression, fraud or malice, express or implied." | **Nev. Rev. Stat. Ann. § 42.005 (2010)**<br>Mandatory. |
| **New Hampshire** | **N.H. Rev. Stat. Ann. § 507:16 (2010)**<br>Punitive damages prohibited. | | |
| **New Jersey** | **N.J. Rev. Stat. § 2A:15-5.12 (2011)**<br>Clear and convincing evidence. | **N.J. Rev. Stat. § 2A:15-5.12 (2011)** "[A]ctuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed." | N/A. |
| **New Mexico** | Preponderance of the evidence.<br>*United Nuclear Corp. v. Allendale Mut. Ins. Co*., 709 P.2d 649, 654 (N.M. 1985). | "[M]alicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." *Albuquerque Concrete Coring Co., Inc. v. Pan Am World Services, Inc.*, 879 P.2d 772, 775 (1994). | N/A. |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **New York** | Undefined, but likely preponderance of the evidence. | "[I]ntentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton disregard of another's rights"<br>*Pearlman v. Friedman, Alpern & Green, LLP*, 750 N.Y.S.2d 869 (2002). | Recommended.<br>*Rupert v. Sellers*, 368 N.Y.S.2d 904, 912 (N.Y. App. Div. 1975) |
| **North Carolina** | **N.C. Gen. Stat. § 1D-15 (2010)**<br>Clear and convincing evidence. | **N.C. Gen. Stat. § 1D-15 (2010)**<br>"(1) Fraud. (2) Malice. (3) Willful or wanton conduct." | **N.C. Gen. Stat. § 1D-30 (2010)**<br>Available. |
| **North Dakota** | **N.D. Cent. Code § 32-03.2-11 (2011)**<br>Clear and convincing evidence. | **N.D. Cent. Code § 32-03.2-11 (2011)**<br>"[O]ppression, fraud, or actual malice." | **N.D. Cent. Code § 32-03.2-11 (2011)**<br>Available. |
| **Ohio** | **Ohio Rev. Code Ann. § 2315.21 (2011)**<br>Clear and convincing evidence. | **Ohio Rev. Code Ann. § 2315.21 (2011)**<br>"[M]alice or aggravated or egregious fraud." | Mandatory.<br>**Ohio Rev. Code Ann. § 2315.21 (2011)**, *overruled by Havel v. Villa St. Joseph*, No. 94677, (Ohio Ct. App. Oct. 28, 2010). |
| **Oklahoma** | **Okla. Stat. tit., 23, § 9.1. (2010)**<br>Clear and convincing evidence. | **Okla. Stat. tit., 23, § 9.1 (2010)**<br>Lower cap on punitive damages for "reckless disregard," but a higher cap for "intentionally and with malice toward others." | N/A. |
| **Oregon** | **Or. Rev. Stat. § 31.730 (2009)**<br>Clear and convincing evidence. | **Or. Rev. Stat. § 31.740 (2009)**<br>"Malice" for medical malpractice cases. | N/A. |
| **Pennsylvania** | Preponderance of the evidence.<br>*DiSalle v. P.G. Pub. Co.*, 544 A.2d 1345, 1371 n. 24 (Pa. Super. Ct. 1988) (*citing Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 (Pa. 1985)). | **40 Pa. Const. Stat. § 1303.505 (2010)**<br>"[W]illful or wanton conduct or reckless indifference to the rights of others." | N/A. |
| **Rhode Island** | Preponderance of the evidence | "[E]vidence of such willfulness, recklessness, or wickedness, ... as amounts to criminality."<br>*Palmisano v. Toth*, 624 A.2d, 314 (1993). | N/A |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **South Carolina** | **S.C. Code Ann. § 15-33-135 (2010)**<br>Clear and convincing evidence. | "[W]illful, wanton, or in reckless disregard of the plaintiff's rights." *Mellen v. Lane*, 377 S.C. 261 (2008). | N/A |
| **South Dakota** | **S.D. Codified Laws § 21-1-4.1 (2010)**<br>Before one can submit a claim for punitive damages, "the court shall find, after a hearing based upon clear and convincing evidence, that there is reasonable basis to believe that there has been willful, wanton, or malicious conduct on the part of the party claimed against." | **S.D. Codified Laws § 21-3-2 (2010)**<br>Preponderance of the evidence "[W]here defendant has been guilty of oppression, fraud, or malice, actual or presumed."<br>*See also Flockhart v. Wyant*, 467 N.W.2d 473 (1991) (upheld trial court decision to instruct jury to decide an award of punitive damages based on the preponderance of the evidence standard). | N/A. |
| **Tennessee** | Clear and convincing evidence.<br>*Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). | "[I]ntentional, fraudulent, malicious, or reckless conduct."<br>*Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) | Available.<br>*Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) ("[T]he court, upon motion of the defendant , shall bifurcate the trial."). |
| **Texas** | **Tex. Civ. Prac. & Rem. § 41.003 (2010)**<br>Clear and convincing evidence. | **Tex. Civ. Prac. & Rem. § 41.003 (2010)**<br>"[D]amages result from: (1) fraud; (2) malice; or (3) wilful act or omission or gross neglect in wrongful death actions." | **Tex. Civ. Prac. & Rem. § 41.009 (2010)**<br>Available. |
| **Utah** | **Utah Code Ann. § 78B-8-201 (2011).**<br>Clear and convincing evidence. | **Utah Code Ann. § 78B-8-201 (2011).**<br>"[W]illful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." | N/A. |
| **Vermont** | Undefined but likely preponderance of the evidence.<br>*McCormick v. McCormick*, 621 A.2d 238 (Vt. 1993). | "[C]onduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of [a party's] rights." *McCormick v. McCormick*, 621 A.2d 238 (Vt. 1993). | N/A. |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Virginia** | Undefined but likely preponderance of the evidence.<br><br>*Woods v. Mendez*, 574 S.E.2d 263 (2003). | "[D]efendant's conduct was willful or wanton. Willful and wanton negligence is action undertaken in conscious disregard of another's rights or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another."<br><br>*Woods v. Mendez*, 574 S.E.2d 263 (2003). | N/A. |
| **Washington** | Punitive damages not allowed unless authorized by state legislature.<br><br>*Barr v. Interbay Citizens Bank*, 635 P.2d 441 (1981). | | |
| **West Virginia** | Undefined, but likely preponderance of the evidence.<br><br>*TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (1992). | "[N]ot only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm"<br><br>*TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (1992). See also *Mayer v. Frobe*, 22 S.E. 58 (1895) ("[D]efendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations."). | N/A. |
| **Wisconsin** | Unclear after re-codification of punitive damages statute, but likely clear and convincing evidence.<br><br>*See City of W. Allis v. Wisc. Elec. Power Co.*, 635 N.W.2d 873 (Wisc. App. 2001) ("Before the question of punitive damages can be submitted to a jury, the circuit court must determine ... that to a reasonable certainty the conduct was 'outrageous.' ... The evidence must also be 'clear and convincing.'"). | **Wis. Stat. § 895.043(3) (2010)**<br><br>"The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."<br><br>*See also Groshek v. Trewin,* 784 N.W.2d 163 (2010). | N/A. |

| State and Citation | Burden of Proof | Standard | Separate Proceeding |
|---|---|---|---|
| **Wyoming** | Preponderance of the evidence. | "Outrageous conduct, malice, and willful and wanton misconduct" *Alexander v. Meduna*, 47 P.3d 206 (Wyo. 2002). | N/A. |

**Source:** LexisNexis.

## Author Contact Information

Vivian S. Chu
Legislative Attorney
vchu@crs.loc.gov, 7-4576

## Acknowledgments

Cassandra Foley, Law Librarian, contributed to this report.

Joseph Schoorl, Law Clerk, contributed to this report.