8-21-2008

Amicus Brief, Lebron v. Gottlieb Memorial Hospital

Neil Vidmar
Duke University Law School

Tom Baker
University of Pennsylvania School of Law

Ralph L. Brill
Chicago-Kent College of Law

Martha Chamallas
Ohio State University College of Law

Stephen Daniels
American Bar Foundation

See next page for additional authors

No. 105741
(consolidated with No. 105745)

IN THE SUPREME COURT OF ILLINOIS

ABIGAILE LEBRON, a minor by THE NORTHERN TRUST COMPANY, Guardian of the Estate of ABIGAILE LEBRON, a minor, *et al*.,	)	On Direct Appeal from the Circuit Court of Cook County, County Department, Law Division.
Plaintiffs-Appellees,	)	Case No. 2006 L 12109
v.	)	
GOTTLIEB MEMORIAL HOSPITAL, a corporation, *et al*.,	)	The Honorable Diane J. Larsen, Judge Presiding.
Defendants-Appellants.	)	
Lisa Madigan, Attorney General of Illinois,	)	
Intervenor-Appellant.	)	

AMICUS CURIAE BRIEF OF PROFESSORS NEIL VIDMAR, TOM BAKER, RALPH L. BRILL, MARTHA CHAMALLAS, STEPHEN DANIELS, THOMAS A. EATON, THEODORE EISENBERG, NEAL FEIGENSON, LUCINDA M. FINLEY, MARC GALANTER, VALERIE P. HANS, MICHAEL HEISE, EDWARD J. KIONKA, THOMAS H. KOENIG, HERBERT M. KRITZER, DAVID I. LEVINE, NANCY S. MARDER, JOANNE MARTIN, FRANK M. MCCLELLAN, DEBORAH JONES MERRITT, PHILIP G. PETERS, JR., JAMES T. RICHARDSON, CHARLES SILVER, AND RICHARD W. WRIGHT IN SUPPORT OF PLAINTIFFS-APPELLEES

Edward J. Kionka
Ill. Bar No. 1469290
Southern Illinois University School of Law
Lesar Law Building
1150 Douglas Drive, MS 6804
Carbondale, IL 62901
Phone: (618) 521-5555

August 21, 2008

TABLE OF POINTS AND AUTHORITIES

Galanter, Marc, *The Three-Legged Pig: Risk Redistribution and Antinomianism in American Legal Culture,* 22 MISS. C. L. REV. 47 (2002)..... 39, 41, 43

Klein, Sarah H., *Med-Mal Mess on the Mend?*, CRAIN'S CHICAGO BUS., June 14, 2004..... 39

Kysar, Douglas, *et al.*, *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785 (2006) . 39, 43

Studdert, David M., *Medical Malpractice,* 350 NEW ENG. J. MED. 283 (Jan. 15, 2004) 39

Black, Bernard, Silver, Charles, *et al*., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUDIES 207 (July 2005) 40

Daniels, Stephen & Martin, Joanne, CIVIL JURIES AND THE POLITICS OF REFORM (1995)..... 41, 42

Eaton, Thomas A., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1900s*, 34 GA. L. REV. 1049 (2000) 41, 42

Eaton, Thomas A., *et al.*, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627 (1996) 41

Hyman, David & Silver, Charles, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085 (2006) 41, 43

American Bar Association, *Facts About the American Civil Justice System* (1996)..... 42

American Board of Trial Advocates, *Civil Justice Reform Proposals* (1992) 42

American Law Institute, *Reporters' Study, Enterprise Responsibility for Personal Injury* (1991) 42

DeFrances, Carol J., *et al.*, U.S. Dept of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties* (1995) 42

DeFrances, Carol J., *et al.*, U.S. Dept of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties* (1999) 42

Galanter, Marc, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996)..... 42

Galanter, Marc, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986)..... 42

Gross, Samuel R. & Syverud, Kent D., *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996) 42

Jones-Merritt, Deborah & Barry, Kathryn Ann, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999)..... 42

Leebron, David W., *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989) 42

QUESTIONS PRESENTED FOR REVIEW

Illinois Public Act 82-280, § 2-1706.5, as amended by P.A. 94-677, § 330 (eff. Aug. 25, 2005), and as codified as 735 ILCS 5/2-1706.5(a), imposes a $500,000 "cap" on the noneconomic damages that may be awarded in a medical malpractice suit against a physician or other health care professional, and a $1 million "cap" on the noneconomic damages that may be awarded against a hospital, its affiliates, or their employees.

This brief will address two of the questions presented for review by the parties:

1. Does the cap violate the Illinois Constitution's prohibition on "special legislation," Art. IV, § 3, because it unnecessarily, arbitrarily, and irrationally grants exceptional benefits and privileges exclusively to certain classes of tort defendants.

2. Does the cap violate the Illinois Constitution's guarantee of "equal protection," Art. I, § 2, because it unnecessarily, arbitrarily, and irrationally imposes extraordinary burdens uniquely upon certain classes and sub-classes of tort plaintiffs.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amici are 24 professors of law and social science who teach at universities in Illinois and throughout the United States. *Amici* submit this brief to provide this Court with an accurate, empirical account regarding the alleged existence, extent, and causes of a "health care crisis" in Illinois. Four of the *amici*—Neil Vidmar, Marc Galanter, Stephen Daniels, and Joanne Martin—filed affidavits in support of constitutional challenges to P.A. 89-7 (2005), and specifically 735 ILCS § 5/2-1115.1, the cap on noneconomic damages that this Court invalidated on "special legislation" and other grounds in *Best v. Taylor Machine Works,* 179 Ill. 2d 367 (1997). Those affidavits were neither challenged nor rebutted. *Best* noted that "the uncontested empirical evidence . . . presented in" those affidavits "clearly show[ed] that the legislative 'findings' listed in the [statute's findings

and] preamble do not provide a rational justification for the limitation of compensatory damages for noneconomic injuries." *Id.* at 386.[1]

The arguments those four *Best* affiants and other *amici* advance in this brief are totally consistent with and derive from "the uncontested empirical evidence" that was submitted in *Best.* That evidence subsequently has been corroborated by additional research published in law reviews and peer review journals, much of which has been authored by several of the *amici*. The name of each *amicus* is listed below. Brief biographical sketches of all *amici* are contained in Appendix A.

Neil Vidmar is Russell M. Robinson, II Professor of Law at Duke University School of Law and Professor of Psychology at Duke University. **Tom Baker** is Professor of Law at the University of Pennsylvania School of Law. **Ralph L. Brill** is Professor of

---

[1] As *Best* noted, Prof. Vidmar "explains that many of the assertions about medical malpractice litigation contained in the preamble of [P.A.] 89-7 . . . have no empirical basis and were based on unsubstantiated perceptions or unreliable data. For example, the perception that damages caps result in a decrease in the number of medical malpractice cases filed was rebutted by the experience in Indiana, [where] caps were adopted in 1975 . . . [but] actually has experienced an increase in claims. Vidmar states that he is aware of no reliable evidence . . . that a limit on noneconomic damages corresponds to a significant impact on the cost or availability of health care."179 Ill. 2d at 387.

In a separate affidavit, Professor Galanter "agrees that there is little evidence, apart from anecdotes, to support the perceived deleterious effects of the present civil litigation system" and "that the only consequences which clearly flow from the passage of [P.A.] 89-7 are increased profitability of insurance companies and a reduction in the payments to the most seriously injured tort victims. According to Galanter, court filings in the law division of the circuit court of Cook County have actually declined during the period from 1980 to 1994" and "that arguments which rely on systemic costs of the civil litigation system and its negative effect on health care and jobs are purely speculative," as are "the salutary effects attributed to [caps]." 179 Ill. 2d at 387-88.

Finally, the joint affidavit of Professors Daniels and Martin "summarize the key empirical findings of scholarly literature and compare them to the factual underpinnings of [P.A.] 89-7." They "state that the facts which form the stated intention or goals of [P.A.] 89-7 are not substantiated by the empirical data" which actually "show that only a tiny fraction of accidental deaths and injuries are pursued through the litigation system as claims for compensation" and "that jury awards are not erratic or capricious, but rather relate closely to the severity of the particular injury." 179 Ill. 2d at 388.

Law at and Dean *Emeritus* of the Chicago-Kent College of Law, Illinois Institute of Technology. **Martha Chamallas** holds the Robert J. Lynn Chair in Law at the Moritz College of Law at the Ohio State University. **Stephen Daniels** is Research Professor and Senior Research Fellow at the American Bar Foundation. **Thomas A. Eaton** is J. Alton Hosch Professor at the University of Georgia School of Law. **Theodore Eisenberg** is the Henry Allen Mark Professor of Law at Cornell Law School. **Neal Feigenson** is Professor of Law at Quinnipiac University School of Law. **Lucinda M. Finley** is Vice Provost for Faculty Affairs and Frank G. Raichle Professor at the University at Buffalo Law School, the State University of New York. **Marc Galanter** is John and Rylla Bosshard Professor *Emeritus* of Law at the University of Wisconsin-Madison, and LSE Centennial Professor at the London School of Economics. **Valerie P. Hans** is Professor of Law at Cornell Law School. **Michael Heise** is Professor of Law at Cornell Law School. **Edward J. Kionka** is Visiting Professor of Law at the University of Georgia School of Law and Professor *Emeritus* at Southern Illinois University School of Law. **Thomas H. Koenig** is Professor of Sociology and Anthropology at Northeastern University. **Herbert M. Kritzer** is Professor at the William Mitchell College of Law at the University of Minnesota, and Professor of Political Science and Law *Emeritus* at the University of Wisconsin-Madison. **David I. Levine** is Professor of Law at the University of California, Hastings College of Law. **Nancy S. Marder** is Professor of Law and Norman and Edna Freehling Scholar at Chicago-Kent College of Law, Illinois Institute of Technology. **Joanne Martin** is Research Professor and Senior Research Fellow at the American Bar Foundation. **Frank M. McClellan** is the I. Herman Stern Professor of Law at Temple University. **Deborah Jones Merritt** is John Deaver Drinko-Baker & Hostetler Chair in Law and the Courtesy

Professor of Sociology, Public Policy, and Management at the Ohio State University. **Philip G. Peters, Jr.** is the Ruth L. Hulston Professor of Law at the University of Missouri-Columbia School of Law. **James T. Richardson** is Foundation Professor of Sociology and Judicial Studies at the University of Nevada, Reno, where he directs the National Judicial College's Judicial Studies degree program. **Charles Silver** is the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas Law School. **Richard W. Wright** is Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology.

INTRODUCTION, BACKGROUND, AND SUMMARY OF ARGUMENT

Like clockwork, every seven to ten years the medical malpractice insurance industry goes through the "down" part of the periodic insurance business cycle and individual insurers attempt to boost sagging profits by raising the premiums they charge to physicians, hospitals, and other health-care providers. And just like clockwork, health-care providers complain that the premium increases are so large as to be "unaffordable" and thus are causing a "health care crisis." Finally, just like clockwork, physicians and their insurers seek legislative relief, claiming that the crisis has been caused by flaws in the civil justice system and insisting that the only way the flaws can be fixed—and the "crisis" cured—is by enacting a "cap" on damages or similar "reforms."

Thus, this case marks the fourth time in the last 33 years that this Court has been asked to assess the constitutionality of a statute that capped a tort plaintiff's damages or otherwise limited a plaintiff's cause of action. Each of the statutes at issue in the three prior cases was predicated on legislative findings that Illinois faced an imminent and severe "medical crisis" or "health care crisis" because malpractice claims supposedly were "skyrocketing" in number and malpractice awards ostensibly were "exploding" in

size, which allegedly compelled insurers to raise premiums to "unaffordable heights," and thus putatively caused physicians to retire or flee the State. *See Wright v. Central Du Page Hosp. Ass'n.*, 63 Ill. 2d 313, 326 (1976) (invalidating cap on damages despite claim that it was "necessary to deal with . . . the 'medical malpractice crisis'"); *Bernier v. Burris*, 113 Ill. 2d 219, 229 (1986) (invalidating medical review panels despite a "malpractice crisis"); and *Best*, 179 Ill. 2d at 367 (invalidating cap notwithstanding legislative finding that the cap was needed to cure an "access[] to health care" crisis).

In *Wright*, *Bernier*, and *Best*, the defendants and their *amici* assured the Court that there was ample evidence to sustain the legislature's findings. And, in each case, the defendants and their *amici* warned the Court not to "second guess" the wisdom of the legislature and not to invalidate the statute, lest the Court revivify the "health care crisis" and reopen the wounds the legislature sagely had staunched.

The arguments and factual averments made in defense of the instant statute essentially are no different and certainly no better than the ones advanced in previous cases. As before, the legislature found that rising malpractice premiums had caused a "health care crisis." And, as before, the defendants in this case maintain that that finding is sound, the cap is needed, and invalidating the statute will have ruinous repercussions.

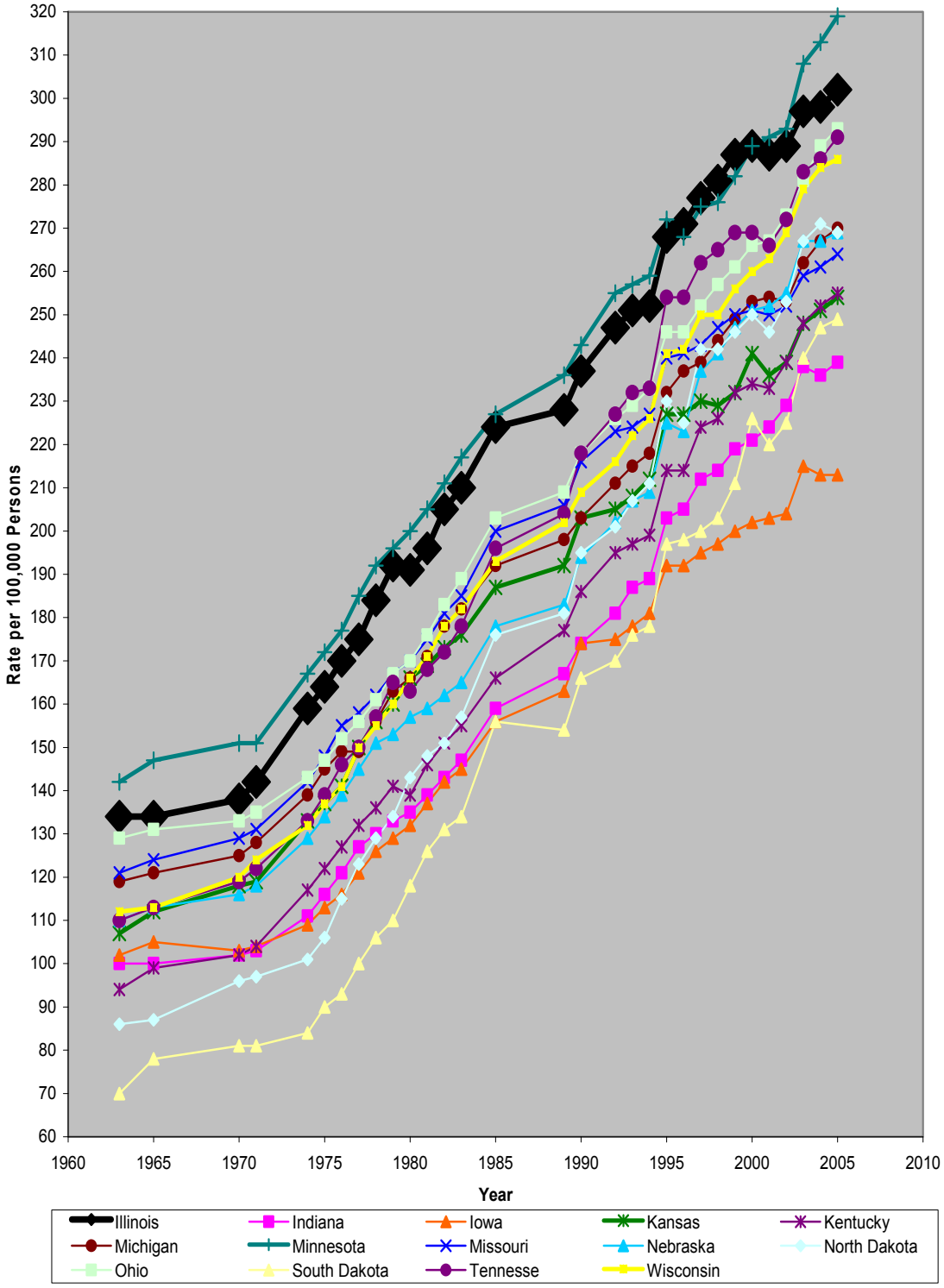
As detailed below, these claims are unquestionably invalid. There is no doubt that when the cap was enacted in 2005 malpractice premiums were spiking in Illinois—just as they had peaked before the enactment of every previous tort "reform" in the State and, according to the American Medical Association, just as they were spiking simultaneously in 42 other states. Yet, there was and there is no credible evidence that Illinois was suffering from a health care crisis that was induced by a supposed "physician exodus" or

that the insurance crisis truly was caused by an alleged "torrent" of malpractice claims and an alleged "explosion" of "malpractice payouts."

First, as discussed in Section II-A, below, *Illinois was not experiencing a "health care crisis"* because of a "staggering" "exodus" of physicians. To the contrary, as discussed in Section II-A-1, empirical evidence from the most reliable sources—official statistics compiled by the American Medical Association ("AMA") and the Illinois Department of Health—shows that *the number of physicians licensed and engaged in "patient care" in Illinois has steadily increased for the last 45 years, both in net numbers and in relation to Illinois' rising population*. In fact, Illinois consistently has had a higher rate of "physicians per 100,000" residents—the critical measure of physician availability the AMA uses to compare one state to another and one period to another—than twelve of Illinois' thirteen neighboring states, nine of which have caps on medical malpractice damages. (The sole state with a higher rate of physicians/100,000, i.e., more doctors per capita, is Minnesota, which does not have, and never has had, a cap). Illinois also has more doctors per capita than three other states—California, Ohio, and Texas—that the defendants and their *amici* tout as being non-crisis exemplars of health care availability because those states have caps on the books. In sum, contrary to the claims of the defendants and their *amici*, over five decades, physicians consistently have been *flocking to Illinois*, *not fleeing from it.* These data are depicted in the following GRAPH No.1, which is based on CHART 1, both of which are attached in Appendix B. (All of the eight charts and graphs created for this brief are attached in Appendix B).

GRAPH No. 1:

Rate of All Licensed Physicians Per 100,000 People—Illinois vs. 13 Bordering and Neighboring States: 1963-2005



Furthermore, as discussed in Section II-A-2, data from the AMA and the Illinois Department of Health demonstrate that *both the net number and per capita rate of licensed and patient care physicians who practiced in critical medical specialties* (such as neurosurgeons and obstetricians/gynecologists ("OB/GYNs")), *constantly were increasing*. Finally, as discussed in Section II-A-3, *licensed and patient care physicians practicing in the 51 counties in the largely rural half of the State "south of Springfield" steadily has increased, both in net numbers and in proportion to the region's population.*

Second, as discussed in Section II-B, one of the key reasons why physicians have not abandoned Illinois, rural areas, or medical specialties despite rising premiums, is that although premiums have spiked, the increases have not made insurance "unaffordable." Indeed, research shows that *malpractice premiums are a comparatively small and historically declining portion of gross practice revenues and net practice income*. Another reason why doctors have not fled Illinois is that the latest insurance crisis, like the crises that preceded the reforms struck down in *Wright*, *Bernier*, and *Best*, occurred simultaneously throughout the country. This fact not only suggests that the crisis was not caused by factors unique to each state but explains why few physicians would flee from one state to another, from an alleged "frying pan" into an unknown "fire."

Finally, as discussed in Section II-C, credible empirical evidence, much of which has been undertaken and published by the *amici* herein, contradicts the notions that the insurance crisis was caused by flaws in the civil justice system, i.e., by an alleged "torrent" of malpractice claims and a supposed "explosion" of "malpractice payouts." In fact, *malpractice claims were falling* in absolute number, *falling* in relation to the number of physicians in the State, and *falling* in proportion to the population. At the same time,

post-verdict "payouts" were rising in only modest amounts, on a par with increasing longevity and medical inflation.

ARGUMENT

The Illinois Constitution's guarantee of "equal protection," Art. I, § 2, bars the State from unreasonably treating some people worse than others who are similarly situated. The Constitution's proscription against "special legislation," Art. IV, § 3, bars the legislature from arbitrarily treating some classes better than similarly situated classes Viewed together, these precepts forbid the legislature from irrationally imposing unequal burdens on some groups and groundlessly bestowing special benefits, privileges, or immunities upon others.

I. THE CAP CREATES NEW AND ARBITRARY DIVISIONS AMONG TORT VICTIMS, WHICH ARE MIRRORED BY ARBITRARY DIVISIONS AMONG TORTFEASORS

Best held that a cap on noneconomic damages in tort cases "discriminates" between and among tort plaintiffs and tort defendants in at least three ways.

First, caps discriminate among plaintiffs and tortfeasors based on the severity of the injuries. A cap "discriminates between slightly and severely injured plaintiffs;" although slightly injured individuals receive the "full amount of fairly assessed compensatory damages," a cap deprives the most profoundly injured plaintiffs of much of the damages that the factfinder already has determined is reasonably justified by the evidence. *Best,* 179 Ill. 2d at 403. This is perverse, as those who suffer minor injuries receive their full measure of damages but those who are severely injured do not. Indeed, the more catastrophic the injury the greater the cap strips away the share of the victim's recovery and the smaller the fraction of noneconomic damages a victim will receive. *Id*. Conversely, a cap "discriminate[s] . . . between tortfeasors who cause severe

and moderate or minor injuries," capriciously allowing wrongdoers who cause the greatest harm to pay only partial damages, while compelling those who cause slight injuries to pay in full. *Id.*

Second, caps discriminate between individuals with similar injuries based on the type of tortfeasor. A cap discriminates "between injured individuals who suffer identical injuries," with the application of the cap depending on whether the cap shields a particular tortfeasor in a particular case. *Id.* The cap in dispute in this case discriminates between malpractice plaintiffs (whose damages are capped) and all other tort plaintiffs (whose damages are not), even if different plaintiffs suffer the exact same injuries. Conversely, the cap discriminates between malpractice defendants (who receive a special and substantial immunity from noneconomic damages above $500,000) and all other tort defendants (who receive no such legislative largesse). *Id.*

Third, caps discriminate among types of injuries. A cap "discriminates among types of injuries" because "the supposed difficulties of assessing damages for noneconomic injuries apply equally to all tort claims for pure noneconomic loss, and not just those involving death, bodily injury or property damage," *id.* at 404, or just injuries caused solely by malpractice.

Numerous courts in other states, before and since *Best*, have echoed this Court's views on the ways a cap discriminates and accordingly have struck down caps on special legislation or equal protection grounds.[2]

---

[2] E.g., *Ferdon v. Wisc. Patients Comp. Fund*, 701 N.W.2d 440, 465 (Wisc. 2005); *State ex. rel. OATL v. Sheward*, 715 N.E.2d 1062, 1095 (Ohio 1999); *Trujillo v. City of Albuquerque*, 965 P.2d 305, 317 (N.M. 1998); *Hanvey v. Oconee Mem. Hosp.*, 416 S.E.2d 623, 625-26 (S.C. 1992); *Morris v. Savoy*, 576 N.E.2d 765, 769 (Ohio 1991); *Brannigan v. Usitalo*, 587 A.2d 1232, 1236-37 (N.H. 1991); *Moore v. Mobile Infirm.*

Furthermore, **caps disproportionately affect traditionally disadvantaged groups**. Empirical research by neutral, well-regarded scholars not only corroborates *Best's* insights but clearly establishes that a cap discriminates—against some tort plaintiffs and in favor of some tortfeasors—in several other ways besides the one described in *Best*. This objective research demonstrates that a cap disproportionately affects traditionally disadvantaged groups, such as women, children, people of color, the elderly, and people of low income in general, reducing the damages such people receive because their economic damages, such as lost wages, either are nonexistent or disproportionately low, e.g., juries award such victims a greater proportion of their overall compensatory damages in the form of noneconomic damages.

For example, empirical research shows that a **cap on noneconomic damages exacerbates existing gender-based disparities** in the tort system. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263 (2004). This is so because, overall, jury awards to men tend to be higher than women, due in part to men's higher wage-based economic damages. *Id*. at 1280-81. Thus, because a cap operates to deprive women of a greater portion of an overall award, it effectively exacerbates the disparity between the average amounts that injured men recover compared to the amounts that women recover. *Id.* at 1282-85, 1288-99.[3]

Ass'n, 592 So. 2d 156, 169 (Ala. 1991); *Condemarin v. Univ. Hosp*., 775 P.2d 348, 353 (Utah 1989); *Sofie v. Fibreboard Corp*., 771 P.2d 711, 715-23 (Wash. 1989); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988); *Sibley v. Bd. of Super. of La. State Univ.*, 477 So. 2d 1094, 1108-09 (La. 1985); *Arneson v. Olson*, 270 N.W.2d 125, 133, 135-36 (N.D. 1978).

[3] Professor Finley found that although "women's pre-cap median jury award was 94% of the men's median," post-cap "women's median was down to 58.6% of the male median." 53 EMORY L.J. at 1286. Even greater gender disparities were found when malpractice causes death; post-cap, the female median recovery was only 71.3% of the

By like token, **caps disproportionately disadvantage children and the elderly**. Because the elderly (age sixty-five or older) often live on fixed and limited incomes, while children generally do not have income of any substantial kind, and because juries also award elderly and minor plaintiffs a much greater portion of their overall damage awards as noneconomic damages compared to other plaintiffs, caps effectively discriminate against these claimants. Finley, 53 EMORY L.J. at 1286-88 & 1302-04. For example, elderly plaintiffs, whose working days are behind them, do not incur the same extent of past or future wage loss as non-elderly plaintiffs. Moreover, given their shorter life expectancy, elderly plaintiffs will not incur as many years of projected future medical expenses. Despite these reduced areas of economic loss, elderly tort victims still suffer debilitating pain and reduced life activities. *Id.* at 1288-91. Noneconomic damages

---

male median, and women's average recovery was 51.7% of the average male. *Id.* at 1291. Finley further noted: "[s]everal types of injuries that are disproportionately suffered by women—sexual assault, reproductive harm, such as pregnancy loss or infertility, and gynecological medical malpractice—do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market, and there is social resistance to seeing them solely or primarily in commodified, market-based terms." *Id.* at 1281. *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts, Classrooms, and Constituencies*, 59 SMU L. REV. 55 (2006). *See also* Thomas Koenig & Michael Rustad, IN DEFENSE OF TORT LAW 114 (2001); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467, 499-502, 519-21, 528-30 (1998); Thomas Koenig & Michael Rustad, *His and Her Tort Reform*, 70 WASH. L. REV. 1, 84-85 (1995).

In general, Harvard School of Public Health researchers who studied California jury verdicts to assess the impact of that state's $250,000 cap on noneconomic damages found "the burden of caps falls on injuries that cause chronic pain and disfigurement but do not lead to declines in physical functioning that would generate lost work time or high health care costs. . . . Notwithstanding their limited economic impact, the injuries involved are by no means trivial." David Studdert, *et al., Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFFAIRS 54, 63 (2004).

become the principal way for the jury to assess and provide compensation for the severity and life-altering effects of the injury.[4]

A cap's disparate impact on youth is also glaringly evident. The Wisconsin Supreme Court recently observed that "[y]oung people are most affected by [a cap] . . . because many can expect to be affected by their injuries over a sixty-or seventy-year life expectancy." *Ferdon*, *supra*, 701 N.W.2d at 466. Lastly, Professor Finley also found "[t]he impact of the cap in cases where an infant or child died as a result of malpractice was even more draconian than in the adult death cases," as their families endure a 79 percent reduction in the median award. 53 EMORY L.J. at 1293.

Finally, **caps effectively discriminate against members of racial and national minorities**, who are disproportionately unemployed and disproportionately employed in the lowest-paying occupations. *See* Amanda A. Edwards, *Medical Malpractice Non-Economic Damages Caps: Recent Developments*, 43 HARV. J. LEGIS. 213, 219-21 (2006) (examining how such caps affect minority populations, and explaining how the data tables used to calculate economic damages project lower earnings for non-white workers, and this results in lower economic damages and more harm from non-economic damage

[4] Finley reported that, on average, noneconomic damages for elderly female patients in malpractice cases that did not result in death were reduced an average of 31.7% by a $250,000 cap. 53 EMORY L.J. at 1289. The median recovery for elderly women after application of the cap was 53.7% of the pre-capped amount; the recovery for elderly men was 72.8% of the pre-cap median. *Id. See also* Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331 (2006). Empirical research also shows that when the gender of plaintiff is combined with the age of plaintiff, juries tend to award women an even greater proportion of their total compensatory award as noneconomic damages than elderly men. Finley, 53 EMORY L.J. at 1291. In addition, if an elderly plaintiff dies, juries allocate a substantial majority of the damages to noneconomic damages. *Id.* Thus, caps have an especially disparate impact on elderly women. *Id.*

caps); Joanne Doroshow & Amy Widman, *The Racial Implications of Tort Reform*, 25 WASH. U. J.L. & POL'Y 161, 169-70 & fn. 37-38 (2007).[5]

In sum, **caps discriminate against people of low income**. For plaintiffs with low or nonexistent economic damages, caps on noneconomic damages constitute a form of discrimination that limits total compensation for similar injuries merely because of the plaintiff's age, gender, race, status, or wealth. *Finley*, 53 EMORY L.J. at 1292-93 & 1313. *See* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access*, 55 DEPAUL L. REV. 635, 644-46, 648-55, & 669 (2006).

In light of *Best*'s precedential determinations that caps discriminate in three fundamental ways and in light of the foregoing demonstration that caps discriminate in several other ways, the critical question for this Court is whether the legislature acted reasonably in enacting the instant cap, i.e., was the cap truly needed to fix an alleged "health care crisis." *See Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003) (a statute must "bear a rational relationship to the public interest sought to be served"). *Amici* show, based on the empirical evidence discussed in detail below, that the cap was wholly unnecessary and that it is thus violates both the Constitution's guarantee of equal protection and the Constitution's proscription against special legislation.

---

[5] *See generally* Myron Orfield, *Segregation and Environmental Justice*, 7 MINN. J.L. SCI. & TECH. 147, 151 (2005); A.J. Schultz, *et al.*, *Racial and Spatial Relations as Fundamental Determinants of Health*, 80 MILBANK Q. 677, 683 (2002); Michael Rustad, *Nationalizing Tort Law: The Republican Attach on Women, Blue Collar Workers, and Consumers*, 48 RUTGERS L. REV. 673, 734 (1996); Richard Abel, *A Critique of Torts*, 37 UCLA L. Rev. 785, 798-802 (1990); Andrew Hacker, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 115-17 (2003).

II. THERE IS NO RATIONAL BASIS FOR THE INSTANT CAP

In 2005, the General Assembly found that a cap was needed because "[t]he increasing cost of medical liability insurance in Illinois" had caused a "health care crisis" throughout the State. P.A. 94-677, Art. 1, § 101. As detailed below, the defendants and their *amici* insist that this finding was justified and that the cap must be upheld on rational basis grounds because of three interrelated and allegedly indisputable facts:

(1) "staggering" numbers of Illinois physicians allegedly were retiring early or "fleeing" from: (a) the State; (b) high-risk medical specialties such as neurosurgery or obstetrics/gynecology; and (c) rural areas of the State;

(2) the physician "exodus" was caused because physicians allegedly could not afford to pay rising malpractice premiums; and

(3) malpractice premiums were rising because of alleged flaws in the civil justice system, i.e., an escalating "torrent" of malpractice claims and an "explosion in the size of payouts."

Neither the legislature's finding, nor the efforts by the defendants' and their *amici* to substantiate that finding, are supported by any empirical studies or other credible research. To the contrary, the claims that Illinois was suffering from a "health care crisis"—and that the civil justice system was to blame—were debunked at the time by empirical studies authored by government agencies and neutral scholars. Subsequent research, as summarized in this brief, confirmed the earlier studies. For these reasons, neither the legislature's skeletal finding nor the defendants' strained attempts to validate that finding justify the cap's enactment. In light of these facts this Court is not required to uphold a statute that, as noted above, burdens so many groups in so many ways while providing mirror-image special privileges and immunities to so many other groups.

A. The Physician "Exodus" Is a Myth, as Illinois Has Never Suffered a Decline in the Number of Physicians in the State, in Rural Areas, or Among Critical Medical Specialists, Either in Net Numbers or the Critical Ratio of Physicians per Capita

1. The supply of licensed physicians throughout Illinois steadily has *increased* over the last 45 years, both in net numbers and in relation to the Illinois population

The defendants and their *amici* insist that the $500,000 "cap" on noneconomic damages in medical malpractice cases is a necessary and rational solution to "'the health care crisis,'" a crisis caused by the "early retirement" of an unspecified number of physicians, Gottlieb Mem. Hosp. Br. at 44, or the "flight from Illinois" of an unspecified number of other doctors. Levi-D'Ancona Br. at 8. According to two of the defendants' *amici*, the Illinois State Medical Society ("ISMS") and the American Medical Association ("AMA"), rising malpractice premiums caused nothing less than a "staggering"—but again, unspecified—"exodus" of physicians from Illinois during an unspecified period before the cap was enacted in 2005. ISMS/AMA Br. at 13. Finally, the ISMS and AMA warn the Court that blood will be on its hands unless it upholds the constitutionality of the cap, as "[a]ny decision to overturn such a rational Public Act would unnecessarily undo two years of successful reform—which has provided expanded access to health care services and greater availability of life saving care." *Id.* at 9. *See also* Levi-D'Ancona Br. at 12.

This threat is hollow and these allegations are false. *First*, the allegations are not supported by any reliable empirical data or by analyses published in any reputable journal. To the contrary, each claim is bottomed on either anecdotal "horror stories" or unverified surveys by doctors' organizations and insurance companies—sources of

information that numerous courts and neutral researchers have castigated as unreliable.[6] The ISMS and the AMA rely upon "Illinois and other newspapers [which] contained many examples of physicians relocating outside of Illinois." ISMS/AMA Br. at 12. *See id.* at 12-13 (citing Dorothy Schneider, *State Legislators Look to Limit Doctors' Rising Malpractice Insurance Premiums*, STATE J.-REG., Jan. 15, 2004, at 19, for the proposition that "the aggregate number of physicians lost from Illinois is *staggering*." (Emphasis added)). If the "aggregate number" is truly "staggering," the ISMS and the AMA—which have ready access to data about the number of physicians annually licensed and practicing in Illinois—could have and should have provided that "number."

Tellingly, they do not.

[6] Both kinds of "evidence" of a physicians' "exodus"—anecdotal horror stories and self-serving surveys—have been condemned as completely untrustworthy by numerous courts and objective scholars. For example, federal government researchers who have studied anecdotal accounts of physicians fleeing from one state or another and examined survey designs and results regarding physicians' future plans have found such reports and surveys to be unreliable. For example, "'very few physicians tend to respond to these surveys, raising doubt about how accurately their responses reflect the practices of all [health care providers]. [The results] cannot be generalized more broadly [beyond anecdotal evidence].'" *Ferdon,* 701 N.W.2d at 488 (quoting U.S. General Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836 (Aug. 2003) at 6 http:www.gao.gov/new.items/d03836.pdf.). Furthermore, federal researchers also found that newspaper reports and legislative testimony that physicians had retired or would move their practices to another state often were false or unsubstantiated. *See* GAO, *Medical Malpractice: Implications* at 5-7, 13-14, 17-20, & 28. More recent research by Professor Michelle Mello regarding Pennsylvania, where medical society surveys reported that doctors were planning to flee the state in droves, found that such alarms were false and that such surveys, "including [her] own," were neither accurate nor reliable. Michelle Mello, et al., *Changes in Physician Supply and Scope of Practice During a Malpractice Crisis: Evidence from Pennsylvania*, 26 HEALTH AFFAIRS 425, 433 (2007). ("Previous survey work ha[d] elicited information about specialists' intentions to restrict their scope of practice, but . . . [o]ur analysis found more modest effects of the liability crisis on physician supply than have been suggested by physician survey studies, including our own.").

Second, the reason why the defendants and their *amici* do not cite any credible data or studies to buttress their claims is obvious: because no such data or studies exist. In fact, their claims are completely contradicted by research published in the most widely used and respected source of such data: the AMA's own authoritative annual compendium, *Physician Characteristics and Distribution in the U.S.* ("PC&D").[7]

Indeed, as shown by GRAPH 1 and CHART 1 (*see* Appendix B), AMA data over the last 45 years makes five things abundantly clear:

a. The *net* number of licensed physicians in Illinois consistently has increased over the last five decades. The *net* number of licensed physicians in Illinois, i.e., the number of physicians licensed in the State, minus the physicians who died, retired, or moved out of state, plus the physicians who started practices in or moved to the State, grew constantly from 1963 (the earliest year for which comprehensive data was publicly available from the AMA) to 2005 (the year the cap was enacted). Indeed, the net number nearly tripled in size, from 13,835 in 1963 to 38,513 in 2005.[8] During this 45-year span, the net number of licensed physicians never declined in Illinois. Significantly, this unbroken string covers both the "crisis" periods that preceded enactment of the caps and other "reforms" struck down in *Wright*, *Bernier*, and *Best*, and

[7] The AMA describes the PC&D as "the most accurate and complete source for statistical data about Doctors of Medicine . . . supply in the United States." AMA Press Online Catalog, https://catalog.ama-assn.org (last visited Aug. 12, 2008). PC&Ds are routinely relied upon by courts and scholars. *See, e.g.*, *FormyDuval v. Bunn*, 530 S.E.2d 96, 101 (N.C. App. 2000); *Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1998); Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71, 83 n.89 (2008); Lawrence P. Casolino, *Physicians and Corporations: a Corporate Transformation of American Medicine*, 29 J. HEALTH POL. POL'Y & L. 869, 881 (2004).

[8] *Compare* AMA, PC&D (1967 ed.), Tbl. 8, *with* PC&D (2007 ed.), Tbl. 5.17.

the periods after those decisions were rendered, i.e., the years in which the defendants in those cases had prophesized that doctors would flee unless the caps were upheld.

The fact that the net number of licensed physicians was increasing, not decreasing, was hardly a secret. Before the present cap was enacted, Crain's Chicago Business, among several other Illinois papers, published numerous reports noting that although "*[t]ales of doctors fleeing Illinois to escape soaring malpractice insurance costs have captured media attention* and fueled the push for limits on jury awards, . . . *the numbers tell a different story*." Bob Tita, *More Docs in Illinois*, CRAIN'S CHICAGO BUS., July 5, 2004 (emphasis added).

> *Overall, the number of doctors in Illinois is rising*, according to data from the state agency that licenses physicians. . . . Some 39,950 doctors were licensed to practice in Illinois as of May 31, [2004] *up 5.3% from a year earlier*, according to figures from the Illinois Department of Professional Regulation. . . . The agency's numbers for 2003 reflect the most recent renewal year, and show 37,925 doctors licensed in Illinois. *That's a 5.2% rise over 2000, the last renewal figures, and a 22.6% increase since 1994.*

Id. A year later, Crain's reported

> *[t]he number of doctors licensed in Illinois rose 9% in the last three years*, despite assertions that physicians are fleeing to neighboring states with lower malpractice insurance rates, . . . *counter[ing] claims that doctors are leaving the state in droves . . . . "We're not seeing an unstable market for docs in Illinois*," says Susan Hofer, a spokeswoman for the Illinois Department of Financial and Professional Regulation.

Brett Chase, *Caps or No, Illinois Adds to Doc Totals*, CRAIN'S CHICAGO BUS., Sept. 12, 2005 (emphasis added).

b. The *relative* number of licensed physicians in Illinois, i.e.**, compared to Illinois' population, also has consistently increased over the last five decades, including the decade before the cap's enactment**. More important than net numbers, the *relative* number of licensed physicians in the State—relative to Illinois'

population—also has grown steadily over the last five decades.[9] As a result, the critical "physician/population ratio," i.e., the rate of licensed physicians per capita, has increased in Illinois, year after year, for more than forty years, rising from 134 physicians per 100,000 persons in 1963 to 302 physicians per 100,000 persons in 2005. This means that *the number of licensed physicians in Illinois has grown more than twice as fast as the State's population*. The steadiness of this increase—before, during, and after all four of Illinois' malpractice insurance "crises"—also is reflected in CHART 1 and GRAPH 1. Once again, the number of physicians per capita grew during the most recent "crisis" (the five years before the most recent cap was enacted), just as the number of physicians per capita grew during the previous "crisis" periods and, in spite of various defendants' dire warnings, actually grew after this Court invalidated the previous caps.

c. Illinois has, and consistently has had, more physicians per capita than twelve of its thirteen neighbors. As also reflected in CHART 1 and GRAPHS 1 and 2 (*see* Appendix B), Illinois' licensed physician-to-population ratio consistently has outpaced the same ratio for twelve of Illinois' thirteen neighbors, including nine states that have had malpractice caps on the books for years, if not decades.[10] The sole exception is Minnesota, whose rate of physicians per 100,000 has

[9] A superficial glance at CHART 1 and GRAPH 1 reveals slight downturns in the rate of physicians per 100,000 in Illinois, and nearly every other state, on a periodic basis, e.g., for the year 2000. This does not reflect a real downturn in the rate but rather is an artifact of the AMA's unexplained decision to vary the type of physicians counted from year to year, such as from only "non-federal" physicians in the PC&Ds' 1997-2002 and 2003-2004 editions (covering 1996-99 and 2001-02), to adding "federal" physicians to the mix in the 2005-2008 editions (covering 1990, 1995, 2000, & 2003-05). Similarly, the AMA often, but not always, varies the population measured, from only the "civilian population" to the "civilian population and military personnel in the U.S."

[10] The nine neighboring states with caps on damages in malpractice cases are Indiana (Ind. Code Ann. § 34-18-14-3); Kansas (Kan. Stat. Ann. §§ 60-19a02, 60-

exceeded Illinois' rate for forty of the last forty-five years, including since 2000. Significantly, however, Minnesota does not have, and never has had, a cap on damages.

d. Illinois has, and consistently has had, more physicians per capita than the three cap states touted as exemplars by the defendants and their *amici.* As reflected in CHART 2 and GRAPH 2 (*see* Appendix B), the rate of licensed physicians per 100,000 in Illinois has, since 2000, consistently exceeded the comparable rate in California, despite the fact that California's 1975 medical malpractice reform statute, the Medical Injury Compensation Reform Act—which served as a model for the latest Illinois cap—was supposed to be a panacea for all that ailed the medical community. Illinois's physician/population ratio has, since 1963, consistently exceeded the comparable rates for Texas and Ohio, notwithstanding the fact that those cap states also supposedly are much more "physician-friendly." Levi-D'Ancona Br. at 13. *See* ISMS/AMA Br. at 11. Indeed, in 2005, only fifteen states in the country had a higher rate of licensed physicians per 100,000 than Illinois—namely, Connecticut, Hawaii, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. *See* AMA, PC&D (2007 ed.), Tbl. 5.19. And only three of those fifteen states have caps: Maryland, Massachusetts, and Virginia.

e. The net number and rate of practicing, "patient care" physicians steadily has increased in Illinois. Finally, the same upward trends—showing

---

1903(a)); Michigan (Mich. Comp. Laws Ann. § 600.1483(1)); Missouri (Mo. Rev. Stat. § 538.210); Nebraska (Neb. Rev. Stat. § 44-2825); North Dakota (N.D. Cent. Code § 32-42-02); Ohio (Ohio Rev. Code Ann. § 2323.43); South Dakota (S.D. Codified Laws § 21-3-11); and Wisconsin (Wisc. Stat. Ann. § 655.017). Four of Illinois' thirteen neighbors do not have caps: Iowa, Kentucky, Minnesota, and Tennessee.

the opposite of a physician "exodus" and the opposite of a "health care crisis" in Illinois—are evident when measured by the sub-set of licensed physicians who are engaged in what the AMA describes as "patient care" (including both "office based" and "hospital based" practitioners) as distinct from those licensed physicians engaged in "other," non-patient care "professional activit[ies]," such as medical "research," "teaching," or "administration," or who self-report themselves as being retired. *See* AMA, PC&D (2007 ed.), Tbl. 3.7. Comprehensive AMA data regarding this criterion was first published in the 1994 edition of the PC&D (covering the 1993 period). (*See* Appendix B, CHART 3). The hard empirical data show that the *net number* of physicians engaged in "patient care" in Illinois steadily increased from 1993 to 2005: from 24,515 in 1993 to 31,172 in 2005. Thus the data reflect an actual 27.15 percent jump in the number of physicians who treat patients. The *relative number* of Illinois physicians, i.e., per capita, engaged in patient care increased 16.54 percent during the same twelve-year period, from 209.58 physicians per 100,000 in 1993 to 244.24 physician per 100,000 in 2005. (*See* Appendix B, CHART 3 and GRAPH 3).

In summary, there is no truth at all to the claim that Illinois suffered "doctor flight," as the Defendants and their *amici* assert. Doctors, like other human beings, move, switch professions or specialties, retire, and die. But however many physicians may have left the State, their practices, or this mortal coil, their numbers were exceeded, year-in and year-out, by new doctors beginning their practices in the State or experienced physicians moving their practices to the State. The doctor "exodus" is a complete canard.

2. Contrary to the allegations of the defendants' *amici*, the net number and per capita rate of "'high-risk' medical specialists" was rising—not falling—in Illinois

Three of the defendants' *amicus* briefs maintain that even if the net number of all licensed physicians has not fallen in Illinois, "'high risk' medical specialties—such as orthopedics, neurosurgery, obstetrics-gynecology, and general surgery—were particularly hard hit by massive spikes in the cost of liability coverage," Ill. Hosp. Ass'n Br. at 10, which supposedly led to severe but unenumerated "staffing shortages" in these specialties. Health & Hosp. Corp. Br. at 7. *See* AMA Br. at 12.

There is no truth to these claims, either.

Although AMA data regarding physician specialization in Illinois prior to 1990 is unavailable and although post-1990 data is available only for certain years, according to the AMA data that is available, the net number of licensed Illinois physicians who specialized in "orthopedics, neurosurgery, [and] obstetrics-gynecology" consistently increased, from 2,462 in 1990 to 3,037 in 2005. (*See* Appendix B, CHART 4). More important, as also reflected in CHART 4 and GRAPH 4, the per capita rate of Illinois physicians who specialized in "orthopedics, neurosurgery, [and] obstetrics-gynecology" grew during that period from 21.54 per 100,000 in 1990 to 23.79 per 100,000 in 2005.

Significantly, changing the focus from all licensed physicians to just "patient care" physicians does not change the picture. Thus, as also shown in CHART 4 and GRAPH 4, the net number of patient care neurosurgeons, orthopedic surgeons, and OB/GYNs in Illinois rose from 2,396 in 1990 to 2,957 in 2005, while the per capita rate of patient care physicians in these three specialties steadily increased from 20.96 per 100,000 in 1990 to 23.17 per 100,000 in 2005.

Once again, the fact that the number of OB/GYNs and neurosurgeons was increasing, not decreasing, was no secret to anyone who read Crain's, the state's leading business journal, which reported: "*data likewise fail to support the medical lobby's claims that Illinois is losing doctors in those specialties.* An analysis by the American Board of Medical Specialties shows *Illinois registered 3% more neurosurgeons and 2% more OB/GYNs [just] in the past year.*" Brett Chase, *Caps or No, Illinois Adds to Doc Totals*, CRAIN'S CHICAGO BUS., Sept. 12, 2005 (emphasis added).

Moreover, consistent with Crain's research, a study published earlier this year in the peer-reviewed Journal of Empirical Legal Studies reported the results of a longitudinal research design assessing state-year-level data on the supply of OB/GYNs in all 50 states and the District of Columbia between 1992 and 2002. Tony Yang, *et al., A Longitudinal Analysis of the Impact of Liability Pressure on the Supply of Obstetrician-Gynecologists*, 5 J. EMPIRICAL LEGAL STUDIES 21 (2008). Yang and his fellow researchers found that the supply of OB/GYNs had no statistically significant association with liability insurance premiums or tort reforms. The authors concluded:

> Although *the costs of malpractice insurance* are substantial for OB/GYNs, they *do not appear to be significantly associated with the supply of physicians in a state*. Most practitioners in this specialty do not respond to liability risk by relocation or discontinuing their practice.

Yang, 5 J. EMPIRICAL LEGAL STUDIES at 53 (emphasis added).

To be sure, as portrayed in CHART 4, the net number of licensed and patient care *general surgeons declined* during the same period, from 1,681 and 1,619, respectively, in 1990 to 1,553 and 1,501, respectively, in 2005. The relative number (rate of physicians per capita) of licensed and patient care general surgeons fell even more, from 14.21 and 13.69, respectively, per 100,000 in 1990 to 12.17 and 11.76, respectively, per 100,000 in

2005. Yet, this decline in the net numbers and relative rates of general surgeons began long before the start of the latest insurance "crisis" and reflects long-term trends towards surgical sub-specialization throughout the country. Thus, historically, the number of general surgeons has declined, throughout the nation: (a) in net numbers; (b) as a percentage of all physicians; and (c) in relationship to the country's population. i.e., in the rate of general surgeons per 100,000 persons.

(a) The net number of licensed general surgeons in the nation declined, from 38,376 in 1990 to only 37,857 general surgeons in 2005. *Compare* AMA, PC&D (1992 ed.) Tbl. 1; PC&D (2007 ed.) Tbl. 1.2.

(b) The fall-off in the net number of general surgeons occurred while the overall net number of physicians increased by nearly 50 percent, from 615,421 licensed physicians in the nation in 1990 to 902,053 physicians in 2005. Thus, while general surgeons comprised 6.36 percent of all physicians nationwide in 1990, they made up only 4.2 percent of all physicians in 2005. *Compare* AMA, PC&D (1992 ed.), Tbl. 1; PC&D (2007 ed.), Tbl. 1.2.

(c) Put another way, while there were 15.43 licensed general surgeons per 100,000 persons in the U.S. in 1990 there were only 12.79 licensed general surgeons per 100,000 persons in 2005, a 17 percent decline.[11]

Thus, *the decline in the net number and per capita rate of general surgeons in Illinois cannot sensibly be attributed to any malpractice "crisis" in Illinois or to factors unique to the State. Rather, the decline reflects a well-known, long-run, nationwide and,*

[11] U.S. Census Bureau, *Census 1990*, http://www.census.gov/main/www/cent1990.html (reporting the U.S. population in 1990 as 248,709,873); U.S. Census Bureau, *American FactFinder*, http://factfinder.census.gov) (reporting the U.S. population in 1990 as 295,895,897).

indeed, worldwide trend toward surgical sub-specialization. While many surgical sub-specialties (e.g., Cardiac Surgery, Colorectal Surgery, Neurological Surgery, Oncological Surgery, Oral and Maxillofacial Surgery, Orthognathic Surgery, Orthopedic Surgery, Plastic Surgery, Thoracic Surgery, and Vascular Surgery), have maintained approximately the same percentage of the total U.S. physician workforce as they did in 1975, General Surgery has steadily declined across the country in the last three decades, from 8 percent of the total U.S. physician workforce in 1975 to nearly half that figure, i.e., to 4.2 percent of all physicians in 2005. AMA, PC&D (2007 ed.), Tbl. 5.3. In fact, "approximately 70% of graduating surgical residents pursue specialized surgical training, and this percentage may be increasing." Josef E. Fischer, *The Impending Disappearance of the General Surgeon*, 298 JAMA 2191, 2193 (Nov. 14, 2007).[12]

3. Contrary to the allegations of the defendants' *amici*, Illinois was gaining—not losing—physicians in the largely rural half of the state "south of Springfield"

One of the defendants' *amici*, the Illinois Hospital Association ("IHA"), relies on third-hand hearsay for its twin claims that: (a) "forty-four percent of the residents in southern Illinois reported to have lost a physician because of the physician's liability concerns;" and (b) "[n]ot a single neurosurgeon south of Springfield treated head trauma." IHA Br. at 10 (citing "Feb. 23 Hr'g at 9" and a pamphlet privately published by

[12] *See also* Karyn B. Stitzenberg & George F. Sheldon, *Progressive Specialization Within General Surgery: Adding to the Complexity of Workforce Planning*, 201 J. AM. COLL. SURG. 925 (2005); C.D. Johnson, *Specialization in General Surgery*, 78 BRITISH J. SURG. 259 (1991). "There are several reasons for surgeons to specialize," Fischer, *Impending Disappearance*, 298 JAMA at 2191, none of which have anything to do with malpractice insurance "crises." "To be thoroughly competent in the face of a knowledge base that is increasing in all areas, many surgeons choose to limit the number and type of surgical procedures they perform. Additionally, it may be easier to develop expertise in some subspecialties, and *more refined expertise often leads to economic rewards*. In some large urban environments, *subspecialists bill at higher fees than general surgeons performing the same procedures*." *Id*. (emphasis added).

the Illinois Medical Society and not available on the Internet, *The Illinois Medical Liability Crisis,* at 6). These claims are not only unsupported by any credible empirical research, they are contradicted by calculations derived from physician data published by the AMA and county population data published by the Illinois Department of Health.

The population of the 51 counties in the half of the State "south of Springfield"[13] rose from 1,760,700 in 1995 to 1,768,200 in 1999 (just before the latest malpractice insurance "crisis" began) to 1,776,440 in 2005.[14] At the same time, the net number of licensed physicians also increased: from 2,495 in 1995, to 2,895 in 1999, to 3,196 in 2005. *Compare* AMA, PC&D (1996-97 ed.), Tbl. 12; PC&D (2001-02 ed.), Tbl. 3.13; PC&D (2007 ed.), Tbl. 3.11. The net number of patient care physicians similarly increased during this period, from 2,095 in 1995, to 2.373 in 1999, to 2,629 in 2005. *Id.*

Matching physician data to population data yields the critical per capita rates of all licensed physicians and all patient care physicians in southern Illinois. Notably, the rate of all licensed physicians in southern Illinois *rose* from 141.71 per 100,000 in 1995, to 163.73 per 100,000 in 1999, to 179.91 per 100,000 in 2005. Similarly, the rate of all patient care physicians in southern Illinois *rose* from 118.99 per 100,000 in 1995, to 134.20 per 100,000 in 1999, to 147.99 per 100,000 in 2005. Put differently, the rate of

---

[13] The 51 counties "south of Springfield" (including Sangamon County) are: Alexander, Bond, Calhoun, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Franklin, Gallatin, Greene, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Macoupin, Madison, Marion, Massac, Monroe, Montgomery, Morgan, Moultrie, Perry, Pike, Pulaski, Randolph, Richland, Saline, Sangamon, Scott, Shelby, St. Clair, Union, Wabash, Washington, Wayne, White, and Williamson.

[14] Illinois Dept. of Health, *Illinois Population from the Decennial Censuses, by County, 1980, 1990 and 2000*, http://www.idph.state.il.us/health/census809000.htm; *Illinois Estimated Population [by County], 2000-2005*, http://www.idph.state.il.us/health/estpop2000_to_2009.htm.

licensed physicians per 100,000 *increased* 26.96 percent in the decade before the cap was enacted, Similarly, the rate of patient care physicians per 100,000 *increased* 24.31 percent during the same span.

In light of the above and in light of the fact that Illinois, as a whole, has gained rather than lost physicians, it is impossible to credit the IHA's allegation that "forty-four percent of the residents in southern Illinois reported to have lost a physician because of the physician's liability concerns." IHA Br. at 10. Not only has the IHA failed to provide any supporting data, the IHA's claim is absolutely contradicted by the research summarized above.[15]

Nevertheless, it is readily apparent that the rate per 100,000 of licensed and patient care physicians in rural Illinois does not come close to matching the rates for the State as a whole. Although tort "reform" advocates often assert that this disparity—which is manifest in most states and in most poor urban areas, too—has been caused by malpractice crises and can be cured by caps, neither notion withstands minimal scrutiny.

The idea that physicians are fleeing rural counties in Illinois, or for that matter, in other states, because of rising malpractice insurance rates is terribly simplistic. The difficulty in *recruiting and retaining talented physicians to serve in rural areas has been a nationwide problem for more than a century*,[16] and one that the federal government and

---

[15] It is difficult to imagine that the IHA or any other organization polled all of the "residents of southern Illinois." It is also difficult to believe that "forty-four percent of the residents" truly "lost a physician" given that Illinois, as a whole, had gained rather than lost physicians. Finally, even if some of the residents "lost" a physician, it is difficult to credit their views about why their physicians supposedly left.

[16] There is no doubt that physicians have been leaving rural areas for decades, and have been doing so in the absence of malpractice insurance "crises" of any kind. In fact, perceptions of physician shortages in the U.S. date back more than a hundred years, to the late 1800s, Roger Rosenblatt, *Physicians and Rural America,* in RURAL HEALTH IN THE

state governments have attempted to address for many decades. For example, the National Health Service Corps ("NHSC") was created by Congress in 1970 "due to the [rural] health care crises that emerged in the U.S. in the 1950's and 1960's," National Health Service Corps, *About NHSC*, at 1, http://nhsc.bhpr.hrsa.gov/about/history.asp (last visited Aug. 13, 2008),[17] while the Illinois Rural Health Association ("IRHA") was created in 1989 to deal with identical problems. *See Welcome to the Illinois Rural Health Association*, at 1, http://www.ilruralhealth.org (last visited Aug. 13, 2008).

> According to the American Academy of Family Physicians ("AAFP"), America's
>
> *rural areas have been medically underserved for decades*. While about 20 percent of the U.S. population lives in rural areas, rural physicians comprise only about 10 percent of the net number of working physicians in the country. In rural communities of fewer than 10,000 inhabitants, there are about 90 physicians per 100,000 persons. In major metropolitan areas, the ratio is about 300 physicians to every 100,000 persons. In rural cities with populations of more than 10,000 persons, there are about 170 physicians per 100,000 persons.

AAFP, *Rural Practice, Keeping Physicians In (Position Paper)* (2002) 1, http://www.aafp.org/online/en/home/policy/policies/r/ruralpracticekeep.html (emphasis added). These "[p]ersistent, intractable" problems are "most likely" to be found in rural

---

U.S. 38-51 at 38 (T. Ricketts ed. 1999), and measured declines in the number of rural physicians and concerns about these shortages date back to the 1940s. Jack M. Colwill, *Increasing Numbers of Family Physicians–Implications for Rural America, in* U.S. Dept. of Health & Human Serv., *Update on the Physician Workforce* (Aug. 2000), 29-39, http://www.cogme.gov/00_8726.pdf.

[17] As the NHSC explains, the rural health care crises that emerged in the U.S. in the 1950's were caused by everything but rising medical malpractice premiums: "Physicians who served rural communities began to retire which left many areas of the country without health care services. Several factors contributed to the crises including the increasing specialized nature of medical practices and rapid technological advances. Smaller proportions of medical students entered family medicine. Rural areas and inner-city neighborhoods competed unsuccessfully with affluent medical practices that offered higher compensation, more interaction with other professionals, and job opportunities for spouses. Rural communities lacked resources to provide the technologically sophisticated facilities that many physicians desired." *About the NHSC, supra*, at 1.

communities with "[s]parse population, extreme poverty, high proportions of racial and ethnic minorities, and lack of physical and cultural amenities." *Id. See also* Nat'l Rural Health Ass'n, *Physician Recruitment & Retention* (1998) 1-2, http://www.nrharural.org/dc/issuepapers/ipaper13.html.[18]

The principal reason why rural areas around the country have faced, and are currently facing, physician shortages is sparse population and the resulting lack of patients needed to support a medical practice, especially a specialty practice. Rural populations, in Illinois, and the U.S. as a whole, have been declining for tens of decades, almost invariably in proportion to urban populations and often even in absolute numbers as well. (For example, the Illinois Department of Health reports that 30 of the 51 counties in the southern half of Illinois declined in population between 2000 and 2005. IDH, *Illinois Population from the Decennial Censuses, by County, 1980, 1990 and 2000*, *supra*; IDH, *Illinois Estimated Population [by County], 2000-2005*, *supra*).

Notably, the declining population base in rural areas, and the declining number of potential patients, plague other medically-related professions, like dentistry and

[18] These "[p]ersistent, intractable" problems have nothing to do with the size of or changes in malpractice premiums, as shown by the ongoing "brain drain" of physicians from the rural areas of many countries (developed, developing, and undeveloped alike, including Canada, Australia, and Japan as well as India, Pakistan, Argentina, Mexico, South Africa, and Zimbabwe, none of which have tort systems like the U.S. or medical malpractice insurance "crises." *See* Fitzhugh Mullan, *The Metrics of the Physician Brain Drain*, 354 N. ENGL. J. MED. 529 (Feb. 2, 2006). Indeed, recruitment of foreign physicians to serve in rural areas of the U.S., often aided by subsidies from the federal and state governments, began early in the 20th century and continues today. *See* AMA, *International Medical Graduates in the U.S. Workforce: A Discussion Paper* (Oct. 2007), http://www.ama-assn.org/ama1/pub/upload/mm/18/img-workforce-paper.pdf.

veterinary medicine, in which there has been no hint of malpractice insurance "crises."[19] Finally, the falling rural population and the consequent lack of potential clients, also affect other non-medical businesses and professions.[20]

B. The Malpractice Insurance Crisis Has Not Caused a "Health Care Crisis" Because Malpractice Insurance Premiums Constitute a Comparatively Small and Historically Declining Portion of the Expenses of Running a Small Medical Practice

It is beyond dispute that, beginning the start of this decade, medical malpractice insurance premiums increased in Illinois—just as they did in nearly every state, and just as they had across the country in the early 1970s, early 1980s, and early 1990s. Jan M.

---

[19] *See* Clemencia Vargas, *et al.*, *Oral Health Care Utilization by U.S. Rural Residents*, 63 J. PUB. HEALTH DENTISTRY 150 (Summer 2003); Pam Belluck, *A New Problem for Farmers: Few Veterinarians*, NY TIMES, Feb. 6, 2007, A-1.

[20] Thus, rural areas have trouble attracting and keeping a patent attorney, a ballet company, a stock brokerage firm, a pro hockey team, a molecular biology teacher, a violin repairman, and a shoe repair shop. *See* Timothy Egan, *Vanishing Point; Amid Dying Towns of Rural Plains, One Makes a Stand*, NY TIMES, Dec.1, 2003, at A-1. Nowadays, rural communities in Texas and many other states are often too small to field 11-man football squads. *See* Jere Longman, *Football; Not Everything Is Bigger In Texas*, NY TIMES, Dec.14, 2003, at A-1.

The population necessary to support a medical practice tends to be inadequate in rural areas; the sparser the population, the fewer the doctors who are needed or willing to live and serve in that area; indeed, to support a single general practice doctor, a population of at least 2,000 people is necessary and, because physicians prefer to work in groups of at least three (so that no one physician need be "on call" 24 hours a day, 365 days a year), a population of more than 6,000 people is needed to support a three-physician general practice. U.S. Dept. of HHS, *Update on the Physician Workforce*, *supra*, at 33. The absence of a population necessary to support a practice is especially severe for sub-specialists, such as neurosurgeons; although the number of people needed to support a single family-practice doctor is only 2,000, the number needed to support a single neurosurgeon is 100,000. Roger Rosenblatt, *Rural Health in the United States*, *supra* at 41. Thus, 300,000 people are needed to support a three-person neurosurgical group. U.S. Dept. of HHS, *Update on the Physician Workforce*, *supra* at 33. *See also* U.S. Congress, OTA, *Health Care in Rural America,* OTA-H-434 (1990) at 318 ("Health care professionals may be dissuaded from choosing a rural practice location due to either a perceived or actual lack of professional opportunities and benefits.").

Ambrose, *Medical Malpractice Reform*, 32 J. HEALTH POL. POL'Y & L. 843, 846 (2007); Michelle Mello, *Empirical Health Law Scholarship,* 96 GEO. L.J. 649, 680 (2008).

Defendants and their *amici* insinuate, without evidence, that rising premiums are not merely undesirable but completely unbearable—so "unaffordable" as to compel thousands of Illinois physicians to abandon their practices and flee the State. But this thesis is untenable. Empirical research establishes that insurance premiums, while periodically rising (and falling) and always irksome, *actually constitute a comparatively small and historically declining part of the expenses of running a medical practice.*

If the practice of medicine were viewed as a business—and the AMA certainly encourages its members to regard it that way, *see* Arnold S. Relman, *Business and Professionalism in Medicine at the AMA*, 279 JAMA 169 (Jan. 14, 1998)—any rational businessperson would realize that malpractice insurance premiums are just one of many expenses, and a small one at that, at least in comparison to other business expenses.

In 2006, Suffolk Law Professor Marc Rodwin and several colleagues published an article in Health Affairs (the leading peer-reviewed journal of health policy and research) in which he examined thirty years of AMA data and concluded that while the "list price" of malpractice premiums periodically rose and fell from 1970 to 2000, the premiums actually paid by physicians rarely exceeded 10 percent of a physician's "total practice expenses"—typically amounting to only 6 percent or 7 percent of those expenses—and an even smaller percentage of a physician's "total practice income" or gross revenue. Marc A. Rodwin, *et al.*, *Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence*, 25 HEALTH AFFAIRS 750 (May/June 2006). Notably, several other expenses, such as office rent, medical supplies and equipment, and

health insurance for staff, absorb a far greater portion of a physician's expenses, and the prices of these items appear to be rising just as fast, if not faster, than the cost of malpractice insurance.

A recent follow-up study by Rodwin and colleagues focused on the prices paid by physicians for malpractice insurance from 1975 to 2005 in Massachusetts, which, despite a $500,000 cap on noneconomic damages (Mass. Gen. Laws, ch. 231, § 60H), has the fourth-highest median malpractice payouts in the country and thus has been categorized by the AMA as a "crisis state." Marc A. Rodwin, *et al.*, *Malpractice Premiums in Massachusetts, A High-Risk State: 1975 to 2005*, 27 HEALTH AFFAIRS 835 (May/June 2008). Rodwin's 2008 article found that *in 2005 mean malpractice premiums,* for the coverage level and policy type most frequently purchased, *were only $17,810*.[21] In fact, Rodwin found that *most physicians paid lower inflation-adjusted premiums in 2005 than in 1990. Id.* at 835. Nothing in the cap's legislative record or the record of this case indicates that things are different in Illinois.

Rodwin's 2006 article also reported that *a far greater cause of physicians' overall frustration is declining gross practice revenues*, which stem from the policies of Medicare, Medicaid, and HMOs/PPOs to "capitate" (or limit) reimbursements for most medical procedures. Although physicians tend to scapegoat malpractice plaintiffs as the

[21] By comparison, the College of Medicine of the University of Illinois at Urbana-Champaign charges in-state residents $28,342 a year in tuition and fees while Northwestern University Medical School charges students $69,276 a year for tuition, fees, room, and board. *See* College of Medicine at Urbana-Champaign-Office of Student Affairs, *Gen'l Info. for New Medical Students* http://www.med.uiuc.edu/students/m1/pdf/General%20Information.pdf (last visited July 31, 2008); Northwestern Univ.-Chicago Financial Aid Office, *How Much Does a Medical Education Cost at Northwestern?*, http://chicagofinancialaid.northwestern.edu/medical/2008-09/cost.htm (last visited July 31, 2008).

sole source of their pain, malpractice premiums are a minor irritant compared to other reasons why physicians' gross practice revenues and net practice incomes have been declining over the past decade. This explains why the size of, or increases in, malpractice premiums have scant effect on the number or rate of physicians practicing in a state. *See,* e.g., Katherine Baicker & Amitabh Chandra, *Defensive Medicine and Disappearing Doctors?*, 28 REGULATION 24 (Fall 2005). Moreover, as rational business persons, physicians are unlikely to make decisions as fundamental as whether or where to practice based on cost increases that are episodic, minor in comparison to other practice expenses, and minor in comparison to both gross practice revenue and net practice income.

It is also useful to compare the situation faced by physicians in Illinois with that faced by their colleagues in California. California's Medical Injury Compensation Reform Act ("MICRA") of 1975 often is described as a panacea and that statute served as a model for the latest Illinois cap. Similarly, the Golden State frequently is extolled as a paradisiacal place to practice, a state where MICRA has enabled physicians to live free from fear, rancor, or want.

But this picture is a mirage. Seven years ago, the AMA's in-house magazine reported "[m]ore than half of the physicians in California are so dissatisfied" with the state of medicine there "that they plan to quit, retire or move out of state in the next three years" Jay Greene, *Dissatisfied Docs May Soon Be Singing "California, Here I Go!": Managed Care and Low Reimbursement Cited as Reasons Why More than Half of the Doctors in California May Quit or Leave the State by 2004*. AM. MED. NEWS (Aug. 6, 2001), http://www.ama-assn.org/amednews/2001/08/06/prsd0806.htm. The AMA article relied on a comprehensive 2001 study by the California Medical Association ("CMA")

2001 Physician Survey Findings: *And Then There Were None: The Coming Physician Supply Problem* (2001), http://www.cmanet.org/upload/Physician_Supply_(Acrobat).pdf. The CMA, in turn, "blame[d] the physician exodus on low reimbursements [because] California has the greatest managed care penetration in the nation," and because California physicians are more likely than doctors in other states to have Medicare/Medicaid contracts, which "capitates" the fees a physician may collect.[22]

Medicare, Medicaid, and HMO/PPO "caps" on physician reimbursements are far more disruptive than increases in malpractice premiums, as shown by the fact that California physicians—unlike their Illinois colleagues—actually have followed through on their threats to flee. The AMA's 2001 article reported "[t]he U.S. Census Bureau reports that over the past decade, *California has fallen from 8th to12th place in the nation in per capita ratio of doctors to population," despite MICRA*. Greene*, Dissatisfied Docs, supra*. The latest AMA data, from 2005, show that *California now ranks as the 17th state in the nation in licensed physicians per 100,000 population, behind Illinois*, which ranks 16th. AMA, PC&D (2007 ed.), Tbl. 5.19. Furthermore, *California now ranks 21st in "patient care" physicians, even further behind Illinois, which ranks as the 12th state* in that category. *Id.* Finally, Illinois ranks ahead of every one of its thirteen neighbors in patient care physicians per 100,000, with the exception of Minnesota. *Id.*

---

[22] According to the California Medical Association, "Seventy-five percent of physicians have become less satisfied with medical practice in the past five years. . . . *Low reimbursement, managed care hassles and government regulation are the greatest sources of dissatisfaction*. 4 percent of physicians plan to leave medical practice in the next 3 years. Another 12 percent will reduce their time spent in patient care. 58 percent have experienced difficulty attracting other physicians to join a practice. More than 1/4 of physicians would no longer choose medicine as a career if starting over today, and more than 1/3 of those who would still choose medicine would not choose to practice in California." CMA, *And Then There Were None*, *supra*, at ii (emphasis added).

As described in Rodwin's article and as reflected in the California situation, *medical malpractice premiums are a comparatively small part of a physician's total practice expenses and, as such, should rarely, if ever, have any impact on decisions about whether or where to practice medicine.* In fact, simple economics suggests there is a greater likelihood of physicians withdrawing from practice in a given location due to increases in office rents, payroll costs, and automobile lease rates than due to increases in malpractice insurance costs. Although insurance industry economics cause periodic and temporary spikes in malpractice premiums, it is necessary to look at the larger and longer-term picture. Specifically, although physicians spend three to five percent of their gross practice income on medical malpractice costs, they spend substantially more on payroll costs and office rent. A physician who stops practicing because of a malpractice insurance increase would be just as likely to retire due to increased health insurance costs for his or her office staff, or because of increased rent for office space. If increased malpractice insurance costs justify legislation to bail out physicians, they could just as easily demand a repeal of minimum wage laws. Affordability is a relative term, not an absolute one, which explains why extremely few physicians—largely older ones with substantial assets—have the will and the wherewithal to carry out their threats to retire.

This insight about physicians' hollow retirement threats leads to similar insights about their threats to flee one state for another or from rural areas to urban ones. In March 2005 the AMA reported that malpractice claims had skyrocketed simultaneously "across America" and that malpractice awards also had exploded simultaneously across the country, producing a "full-blown crisis" in twenty states (including Illinois) and near "crisis" conditions in twenty-three more states. AMA, *America's Medical Liability*

Crisis: A National View (March 21, 2005), http://www.ama-assn.org/ama/noindex/category/11871.html. (last visited Jan. 12, 2008); *see AMA President Warns Kansans About Lawsuit Abuse*, 3 BUS. ADVOCATE No. 9 (Mar. 4, 2005), http://www.legalreforminthenews.com/Reports/kansas%203-4-05(3).doc. (citing the AMA' 2005 *National View* report)). Given that forty-three states were in or near "crisis" in 2005, any rational businessperson would think twice about moving his or her practice and family out of a known "frying pan" and into an unknown "fire."

Similar considerations apply to rural physicians who might contemplate fleeing to urban counties. Even if they could find positions compatible with their training and experience (which might not be easy given that rural physicians are proportionately more likely to practice in primary-care specialties), malpractice premiums are rarely lower in urban areas, while the cost of living is higher and competition is stiffer. Thus, in addition to the not inconsiderable costs of relocating both one's practice and one's family, rural physicians face a lower "real" standard of living in urban areas.[23]

Finally, along the same vein, it should be noted that it is rather difficult and extremely rare for a physician to switch specialties, e.g., from obstetrics/gynecology to ophthamology, in mid-career. This fact, combined with the fact that the AMA says that,

---

[23] Although "[a]verage annual physician incomes are somewhat lower in rural areas than in urban areas—$204,000 vs. $218,000," a very "different picture emerges when one looks at physicians' 'real' compensation, or the purchasing power of their incomes after accounting for differences in the cost of living, which varies considerably across the nation and generally is lower in rural areas. . . . The average income of rural physicians adjusted for the cost of living was significantly higher than urban physicians' —$225,000 vs. $199,000. This translates into rural physician incomes providing about 13 percent more purchasing power than urban physician incomes." James D. Reschovsky & Andrea Staiti, *et al. Physician Incomes in Rural and Urban America*, ISSUE BRIEF 92 (Center for Studying Health Systems Change Jan. 2005), § 1 & Tbls. 1 & 2, http://www.hschange.com/CONTENT/725/725.pdf.

to a greater or lesser extent, almost all specialties are suffering from malpractice premium increases, make it extremely unlikely that a physician would make the difficult and expensive jump from one beleaguered specialty—one in which they have trained for years and established a reputation in the community—to a different and potentially equally beleaguered specialty. The AMA's data confirm that most physicians, like most people, prefer to stick with the devil they know.

The alleged "fact" that rising prices are unaffordable is not a fact at all. It is an untested, untenable, and irrational assumption, one that this Court should not indulge.

C. There Is No Credible Evidence that a "Torrent" of Malpractice Claims and an "Explosion in the Size of Payouts" Existed, Let Alone Caused the Latest Insurance Crisis or the Crises that Periodically Have Bedeviled Doctors in Illinois—and Nearly Every Other State—Over the Last Thirty Years.

1. Government and academic researchers agree that malpractice insurance crises are not caused by "skyrocketing" malpractice claims and "exploding" malpractice awards

Although there is no dispute that, beginning around the turn of this century, medical liability insurance premiums for some doctors rose dramatically in Illinois, the cause of the problem is hotly contested. The defendants contend that insurance "rate increases are 'driven almost entirely by the *explosion* in the size of payouts in the state'" and the unprecedented "*torrent* of medical malpractice litigation." Levi-D'Ancona Br. at 11, 10 (emphasis added; citation deleted). The AMA and the American Tort Reform Association ("ATRA") agree. AMA, *Medical Liability Reform–NOW!* (2008), 1-5, http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnow.pdf; ATRA, *Medical Liability*

Reform (http://www.atra.org/issues/index.php?issue=7338 (last visited Aug. 7, 2008). Such explanations reprise ones offered in every previous "crisis."[24]

On the other hand, state insurance regulators (including Deirdre K. Manna, Illinois' Director of Insurance; *see* Manna testimony, 94th Ill. Gen. Ass'y, H. Proceedings, Mar. 1, 2005, at 7:15-24; 94th Ill. Gen. Ass'y, S. Proceedings, Mar. 1, 2005, at 33), private insurance watchdog groups, and consumer organizations—joined by many independent scholars, such as *amicus* Tom Baker, a professor at the University of Pennsylvania Law School and formerly the Director of the Insurance Law Center at the University of Connecticut Law School—explain that periodic premium spikes are caused by cut-throat "cash-flow" underwriting policies and what business reporters commonly describe as the boom-and-bust, "wildly cyclical nature of the property-casualty insurance business," which includes the medical insurance industry. Sarah H. Klein, *Med-Mal Mess on the Mend?*, CRAIN'S CHICAGO BUS., June 14, 2004, at 1. *See* Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 394 (2005); Finley, *Hidden Victims*, 53 EMORY L. J. at 1270.

In the regulators' and scholars' view, the problem arises from the fact that in good economic times insurers underestimate future payouts and under-price premiums. In addition, downturns in the bond and stock markets, where insurers invest much of their reserves, exacerbate their financial problems. "[I]nsurers compete too hotly for years at a

---

[24] *See,* e.g., Tom Baker, THE MEDICAL MALPRACTICE MYTH 45-67 (2005); Marc Galanter, *The Three-Legged Pig: Risk Redistribution and Antinomianism in American Legal Culture,* 22 MISS. C. L. REV. 47, 48-49 (2002) (summarizing tort "reformers'" arguments); Douglas Kysar, *et al.*, *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785, 786-87 (2006) (same); David M. Studdert, *Medical Malpractice,* 350 NEW ENG. J. MED. 283 (Jan. 15, 2004) (same); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System,* 40 ARIZ. L. REV. 717, 734-52 (1998) (same).

time, pricing policies cheaply because they want to collect premium dollars and invest them," as well as to build market share; *"[d]octors don't complain much during these periods." Id.* (emphasis added). In his recent book on the medical malpractice "crisis" controversy, Professor Baker carefully reviewed the best available empirical evidence and then concluded:

> the two most recent medical liability insurance crises [mid-1980s and early 2000s] did not result from sudden or dramatic increases in medical malpractice settlements or jury verdicts. Instead … the crises resulted from dramatic increases in the amount of money that the insurance industry put in reserve for claims. Those reserves increases were so big because the insurance industry systematically under reserved in the years leading up to the crisis.

Tom Baker, THE MEDICAL MALPRACTICE MYTH 53-54 (2005). *Amicus* Charles Silver and his colleagues share Baker's conclusion. After systematically analyzing fifteen years of "closed" medical malpractice claims collected by the Texas Department of Insurance, they found no connection between medical malpractice claim outcomes and any medical liability insurance crisis.

> This evidence suggests that no crisis involving malpractice claim outcomes occurred. It thus also suggests a weak connection between claims-related costs and short-to-medium-term fluctuations in insurance premiums. . . . [T]he more likely explanation is that much of the rise in premiums reflects insurance market dynamics, not litigation dynamics.

Bernard Black, Charles Silver, *et al*., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUDIES 207, 210 (July 2005).

The end result, these and other scholars contend, is that when economic fluctuations in the business cycle squeeze insurers' income and reserves, they feel compelled to raise their rates and feel it convenient to scapegoat malpractice victims (who supposedly file frivolous claims at the drop of a hat), malpractice lawyers (who allegedly take on the expense of preparing for any case regardless of its evident lack of

merit), credulous jurors (who ostensibly sympathize with all plaintiffs and despise all "deep-pocket" defendants), and craven or incompetent trial and appellate judges (who putatively are in the pocket of the plaintiffs' bar). As Professor Galanter explains:

> This "jaundiced view" is particularly prevalent among business, media and political elites. Corporate spokesmen and their political allies mournfully recite the woes of a legal system in which Americans, egged on by avaricious lawyers, sue too readily, and irresponsible juries and activist judges waylay blameless businesses at enormous cost to social and economic well-being. The legal system, we are told, is arbitrary, berserk, crazy and demented. It has "spun out of control." The resulting "litigation explosion" is unraveling the social fabric and undermining the economy.

Galanter, *The Three-Legged Pig*, *supra*, 22 MISS C.L. REV. at 48. *See* David Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1086-87 (2006) (noting that "[m]any of the preceding claims are facially implausible," and "[m]ost of the preceding claims are also inconsistent with empirical studies of the medical malpractice liability system.").

While complaints about "too many lawsuits and excessive jury awards have been a feature of the tort reform political rhetoric" since the 1970s, Thomas A. Eaton, *et al.*, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 631 n.6 (1996), *see* Stephen Daniels & Joanne Martin, CIVIL JURIES AND THE POLITICS OF REFORM 58-59 (1995), a "growing body of research indicates that the tort system in operation is much different from the one portrayed in the popular and political rhetoric of tort reform. *There is no evidence [nationally] of an explosion in tort filings, and there are few signs of runaway juries*." Thomas A. Eaton, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1900s*, 34 GA. L. REV. 1049, 1058 (2000) (emphasis added).

Much of the "growing body of research" published before 2000 was undertaken by state and federal government researchers.[25] That early research was corroborated by empirical research conducted by national bar associations and research institutes.[26] Finally, this early research was confirmed by still more empirical research published in law reviews and peer reviewed social science journals.[27]

---

[25] *See* Eaton, 34 GA. L. REV. at 1058 n.6 (citing Carol J. DeFrances, *et al.*, U.S. Dept of Justice, Bureau of Justice Statistics ("DOJ/BJS"), *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties* (1999); Carol J. DeFrances, *et al.*, DOJ/BJS, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties* (1995); Marika F.X. Litras & Carol J. DeFrances, DOJ/BJS, *Federal Justice Statistics Program: Federal Tort Trials and Verdicts, 1996-97* (1999); Erik Moller, *et al.*, DOJ/BJS, *Trends in Civil Jury Verdicts Since 1985*, at xiii (1996); Steven Smith, *et al.*, DOJ/BJS, *Civil Justice Survey of State Courts, 1992: Tort Cases in Large Counties* (1995).

[26] *See,* e.g., American Bar Association, *Facts About the American Civil Justice System* 1-2, 5, 7 (1996); American Board of Trial Advocates, *Civil Justice Reform Proposals*, 5 (1992); American Law Institute ("ALI"), *Reporters' Study, Enterprise Responsibility for Personal Injury* 5 (1991); Thomas D. Rowe, *ALI Study on Paths to a "Better Way,"* 1989 DUKE L.J. 824, 829-47 (1989).

[27] *See,* e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Daniels & Martin, CIVIL JURIES AND THE POLITICS OF REFORM (1995); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 5 (1996); Deborah Jones-Merritt, & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999); David J. Nye, & Donald G. Gifford, *The Myth of a Liability Insurance Explosion: An Empirical Rebuttal*, 41 VAND. L. REV. 909 (1988); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 302-06, 324 (1989); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

This "body of research" has continued to grow since 2000.[28] Moreover, this research, new and old, has been recently recapitulated by two scholars, with impeccable credentials, Arthur R. Miller, Professor of Law at New York University,[29] and Lucinda M. Finley, Vice-Provost for Faculty Affairs at the University at Buffalo Law School. As Professor Miller noted, "claims of the alleged 'litigation explosion' are exaggerated; indeed, that evidence casts doubt on the very existence of a significant increase." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 992-95 (2003). Professor Finley similarly notes:

> *There is little empirical evidence to support the claims of the critics of the tort system. Indeed, most of the available empirical research refutes the criticisms.* Tort filings as a percentage of civil case filings have been on a continual decline since 1990. Overall tort case filings in the thirty-five most populous states declined 4% between 1993 and 2002. When adjusted for increasing population, *there was a median decline of 19% in tort cases from 1992 to 2001.*

Finley, *Hidden Victims,* 53 EMORY L.J. at 1268 (emphasis added; footnotes deleted).

Professor Finley specifically found no empirical support for medical malpractice claims were "skyrocketing" in number or that medical malpractice awards were

---

[28] *See,* e.g., Brian J. Ostrom, *et al.*, Nat'l Ctr. for State Courts, EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (2001); Douglas A. Kysar, *et al.*, *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785 (2006); Hyman & Silver, *Medical Malpractice Litigation & Tort Reform: It's the Incentives Stupid, supra*, 59 VAND. L. REV. 1085; William Haltom & Michael McCann, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 73-110 (2004); Galanter, *The Three-Legged Pig, supra*, 22 MISS. C. L. REV. 47; Seth A. Seabury, *et al.*, *Forty Years of Civil Jury Verdicts*, 1 J. EMPIRICAL LEGAL STUDIES 1, 3 (March 2004).

[29] Professor Miller previously served as the Bruce Bromley Professor of Law at Harvard. He is, *inter alia*, a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, the reporter for the American Law Institute's Project on Complex Litigation, and a member of Special Advisory Group to the Chief Justice of the United States Supreme Court on Federal Civil Litigation.

"exploding" in size. In fact, the empirical evidence showed the contrary to be true.

> Medical malpractice case filings dropped 4% nationally from 1997 to 2000. There was an increase in medical malpractice case filings in 2001, but *when adjusted for population increases there was an overall decline of 1% in medical malpractice case filings from 1992 to 2001*. Medical malpractice case filings rose again in 2002, for a total increase in filings for the five year period from 1998 to 2002 of 6%, which amounts to an average increase of just over 1% annually. During this five-year period the U.S. population grew by 4.5%, so the per capita increase in filings is negligible. … The median jury award in 1992 in the seventy-five largest U.S. counties was $253,000; in 1996 the median medical malpractice jury verdict was $286,000. In 2001, *the median verdict increased to $431,000. This is a 70% increase from the median ten years prior in 1992, but during this decade medical costs increased by 51.7%, and general inflation, which would drive up wage-based damage awards, was up 26.2%*. In addition to inflation, this growth in median awards can also be explained by the fact that in 2001, 90% of medical malpractice trials involved plaintiffs who suffered the most severe injuries of death or permanent disability, and damage awards are the highest in these types of cases.

53 EMORY L.J. at 1268-69 (emphasis added; citations deleted).

> Indeed, as Professor Baker has explained:
>
> *Litigation behavior and malpractice claim payments did not change in any significant, systemic sense between 1970 and 1975, between 1981 and 1986, or between 1996 and 2001. What changed, instead, were insurance market conditions and the investment and cost projections* that the insurance market built into medical malpractice insurance premiums over those periods. Insurers that had offered low prices based on rosy scenarios in 1970, 1981, and 1996 switched to high prices based on pessimistic scenarios in 1975, 1986, and 2001.

Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. at 394 (emphasis added; citations deleted).[30]

[30] Professor Finley echoes Professor Baker's views: "During the 1990s, the insurance market, including medical malpractice, experienced what is known as a 'soft market'—with profits padded by the burgeoning stock market, insurance companies reduced premiums, relaxed underwriting criteria, and liberally wrote policies. But, at the beginning of the new century, the liability insurance market significantly hardened. Investment returns plummeted, and some of the poor underwriting decisions made in the previous decade began to generate claims. Insurance companies, particularly in the

Collectively, these data undercut the claims of tort and medical malpractice "reformers" about "runaway" juries.

> *Far from the picture of overly generous, plaintiff friendly, "runaway" juries painted by tort reform proponents, the empirical reality of the tort system and medical malpractice cases is one of case filings holding steady with population increases, juries who skeptically assess plaintiffs' cases, and juries who award damages commensurate with the seriousness of the injury and with medical inflation*. The empirical reality picture—that it is not the actions of injured plaintiffs that are driving the sharp increase in medical malpractice insurance premiums—does not change when overall claims filed with insurance companies are added to the canvas. Similar to the downward trend in court cases, the trend in overall malpractice claims is also down. The National Association of Insurance Commissioners reports a 4% decrease in claims between 1995 and 2000, from 90,212 claims filed in 1995 to 86,480 in 2000. According to the federal government's National Practitioner Data Bank, the median total physician payment to a malpractice claimant rose 35% from 1997 to 2001—the years that should have fueled the current crisis in rising insurance premiums—from $100,000 to $135,000. This is less than the medical cost inflation rate. While total medical malpractice insurance costs have increased less than half the rate of medical cost inflation, premiums have increased at a much higher rate.

53 EMORY L.J. at 1270 (emphasis added; footnotes deleted).

As Professor Finley summarizes the consensus view among social scientists and legal scholars who have researched the issues and studied the data:

> the empirical picture shows tort filings are down, medical malpractice case and claim filings are flat or declining per capita, median verdicts are increasing only marginally more than medical inflation and are commensurate with injury severity, median claims payouts are increasing

---

medical malpractice area, began to raise premium rates dramatically while restricting coverage." 53 EMORY L.J. at 1263. *See id.* at 1263. *See also* U.S. General Accounting Office ("GAO"), *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* 03-702 (June 2003), http://www.gao.gov/new.items/d03702.pdf; Rachel Zimmerman, *Insurers' Malpractice Helped Provoke Malpractice "Crisis*," WALL ST. J., June 24, 2002, at A1; Attorney General of Massachusetts Francis X. Bellotti, *et al.*, National Association of Attorneys General ("NAAG"), ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND "UNAFFORDABILITY" OF LIABILITY INSURANCE 45 (1986); J. Robert Hunter, Americans for Insur. Reform, *Medical Malpractice Insurance: Stable Losses/Unstable Rates* (Oct. 10, 2002), 2-3, http://www.insurance-reform.org/StableLosses.pdf.

> less than the recent rates of increase in insurance premiums, and numbers of doctors are not declining in states hit hard by huge increases in insurance premiums.

53 EMORY L.J. at 1271-72 (footnotes deleted).

2. Recent, Illinois-specific empirical research regarding malpractice claims and awards is consistent with analyses of long-running national trends and completely undermines the myth that a "torrent" of malpractice claims and an "explosion" of "malpractice payouts" existed and were the cause of spiking insurance premiums and that a cap on noneconomic damages was needed or is rational.

It is conceivable, of course, that Illinois is unique, that malpractice claims truly were "skyrocketing" and that malpractice "payouts" truly were "exploding" in the State, and that "skyrocketing claims" and "exploding awards" truly caused a malpractice insurance crisis. ATRA and President George W. Bush certainly thought so, urging the legislature to enact a cap because Cook, Madison, and St. Clair counties were three of nation's worst five "judicial hellholes." ATRA, *Judicial Hellholes—2005,* 20-28 (2005), http://www.atra.org/reports/hellholes/2005/hellholes2005.pdf.[31]

In order to test these claims, the Illinois Bar Association commissioned Professor Vidmar to investigate several interrelated questions:

> Have medical malpractice claims increased? Have jury trials increased? Have jury awards for medical malpractice increased? Have Madison and St. Clair counties earned their reputation as "judicial hellholes" insofar as medical malpractice claims are concerned? Is there evidence that doctors are leaving the state or certain areas of the state as a result of jury awards?

Neil Vidmar, *Med. Malpractice & the Tort System in Ill.*, 93 ILL. BAR. J. 340, 341 (2005).

[31] President Bush kicked off his campaign for a federal cap on malpractice damages by visiting Madison County and announcing that he had found it to be a "judicial hellhole." Georgina Gustin & Phillip Dine, *Insurance Regulations Bear Blame, Critics Say*, ST. LOUIS POST-DISPATCH, Jan. 2, 2005, at A1.

As detailed in both Professor Vidmar's 85-page identically titled report to the State Bar (which the Bar adopted in its entirety and tendered to the legislature in 2005, before the cap was enacted, *see* http://www.isba.org/medicalmalpracticestudy.pdf) and in his follow-up law review article, Neil Vidmar & Kara MacKillop, *"Judicial Hellholes:" Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois*, 59 VAND. L. REV. 1309 (2006), he carefully combed all relevant sources of data, including Cook County Jury Verdict Reporter, Southwestern Illinois Jury Verdict Reporter, databases in Westlaw, Lexis, and Findlaw, the U.S. Justice Department's Bureau of Justice Statistics ("DOJ/BJS"), the AMA's annual reports on PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S., and the National Practitioner Data Bank. *See* 93 ILL. BAR. J. at 341.[32] He focused on two regions: Cook County (an ostensible "judicial hellhole") and DuPage County (which, along with Cook, comprises almost half the State's population of and more than half of its physicians); and Madison and St. Clair Counties, because of their status as "judicial hellholes."

Professor Vidmar's findings are completely consistent with the research undertaken and published by many other scholars. In brief, Professor Vidmar's analysis of malpractice filings, verdicts, and post-verdict adjustments to awards, i.e., net payouts, revealed the following about Cook and DuPage counties:

a. The 10-year data show *no upward trends in total medical malpractice filings* or in malpractice filings per 100 treating physicians from 1994 through 2004, when adjusted for population growth.

[32] It should be noted especially that although detailed records on closed medical malpractice claims are collected by the Illinois Department of Insurance from all insurers that provide such coverage in Illinois, as mandated by state law, those records were requested by, but not made available to, Professor Vidmar. *See* 93 ILL. BAR. J. at 342.

b. There was a *modest decrease in the number medical malpractice trials* between 1996 and 2001.

c. *Plaintiff "win rates"* at trial increased to a modest degree, but this change reasonably may be ascribed to other factors related to how cases are selected for trial. At the same time, a different set of data showed no increase in jury trials or in plaintiff win rates between 2001 and 2004.

d. Settlement mechanisms—such as pre-verdict "high-low agreements," acceptance of the limits of the doctor's insurance policy, and other devices—showed that *many jury verdicts were substantially reduced in the post-verdict phase of the lawsuit, as well as on appeal*.

See 93 ILL. BAR. J. at 342-44 (emphasis added).

Professor Vidmar's analysis of Madison and St. Clair data similarly showed:

a. Over the 13.5 year period from 1992 through the first six months of 2005, there were *only eleven jury verdicts favoring the plaintiff in medical malpractice cases* were found in the courts of Madison and St. Clair counties, counties whose combined population exceeds 520,000.

b. During that same 13.5 year period, *only two verdicts exceeded $1 million*, and one of those was overturned on appeal.

c. There was no evidence to support the perception that medical malpractice jury trials in these counties were frequent or that jury verdicts were, by any standard, undeserved let alone "outrageous."

93 ILL. BAR. J. at 344-45; 59 VAND. L. REV. at 1313. (Emphasis added; citations deleted).

After investigating each verdict, Professor Vidmar concluded:

> *These data lend scant support to the claims that Madison and St. Clair counties are "judicial hellholes" for medical malpractice defendants who go before juries*. Overall, jury trials are rare, plaintiff verdicts are infrequent, and a strong case can be made that the amounts awarded were justified. While the intense media coverage of [one large] verdict likely helped further public perceptions of excessive jury verdicts, it is imperative to note that [that case] was decided by a judge, not a jury. Further, since the defendant was a federal employee, the U.S. government, not private liability insurers, is responsible for the award.

59 VAND. L.R. at 1320 (emphasis added).

In summary, in view of the consistent results of these numerous studies of national and Illinois-specific data, it is clear that the civil justice system was not the cause of large increases in malpractice premiums but merely the pretext for such increases.

CONCLUSION

Empirical research by the *amici* and other scholars establish that malpractice "payouts" were not "explo[ding]" in size and there was no "torrent" of malpractice claims in Illinois; to the contrary, claims were declining and payouts were flat.

The State's civil justice system did not cause malpractice premiums to rise in Illinois. To the contrary, premiums rose in Illinois, as they periodically do nationwide, because of nationwide insurance industry practices and the "boom-and-bust" malpractice insurance business/underwriting cycle.

Although malpractice premiums rose in Illinois, the increases were not unbearable, as malpractice insurance comprised a comparatively small and historically declining portion physicians' gross expenses and net income; consequently, malpractice insurance never became unavailable or unaffordable.

Although physicians were frustrated by rising premiums, in reality there was a net increase in the number of doctors licensed and practicing in the State and in the rate of licensed and "patient care" physicians per capita. Physicians were not fleeing Illinois,

rural areas, or specialty practices. The civil justice system did not cause a physician "exodus" or "health care crisis" in Illinois. Indeed, there was no such "crisis" in the State.

John Adams said "'[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.'" John Adams, *Argument in Defense of the [British] Soldiers in the Boston Massacre Trials* (1770), *in* John Adams, 3 LEGAL PAPERS OF JOHN ADAMS 269 (L. Wroth., ed., 1965). *See* David McCullough, JOHN ADAMS 68 (2001). Here, the facts stubbornly show no "health care crisis," no other need for a cap on noneconomic damages, and no rational basis for the enactment of the cap at issue. Consequently, inasmuch as 735 ILCS 5/2-1706.5(a) does not "bear a rational relationship to the public interest sought to be served," *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003), that statutory cap violates the Illinois constitution's prohibition on special legislation and the Illinois Constitution's guarantee of equal protection.

For these reasons, *amici* urge this Court to uphold the trial court's decision invalidating the cap.

Respectfully submitted,

EDWARD J. KIONKA
Southern Illinois University School of Law
Lesar Law Building
1150 Douglas Drive, MS 6804
Carbondale, IL 62901
Phone: (618) 521-5555

Attorney for Amici Curiae Neil Vidmar, et al.

APPENDIX A

BRIEF BIOGRAPHIES OF *AMICI*

NEIL VIDMAR is the Russell M. Robinson II Professor of Law, Duke Law School, and Professor of Psychology at Duke University. He holds a Ph.D. in social psychology from the University of Illinois and conducts empirical studies on issues in the legal system, including the subject of medical malpractice litigation. He is co-author (with Cornell Law Professor and fellow amicus) Valerie P. Hans of THE AMERICAN JURY: THE VERDICT (2007) and JUDGING THE JURY (1986); author of MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS (1995); and editor and author of WORLD JURY SYSTEMS (2000). He has published more than 125 articles in law reviews and social science journals (e.g., Stanford Law Review; Law & Human Behavior; Law & Society Review; Harvard Journal on Legislation; Duke Law Journal). He reviews research proposals for the National Science Foundation and serves or has served on the editorial boards of peer review journals such as Law & Human Behavior; Law & Society Review; Law & Social Inquiry; Journal of Applied Social Psychology; Public Policy & Law; and the Journal of Empirical Legal Studies. Among those articles are: *Million Dollar Medical Malpractice Cases in Florida: Post-verdict and Pre-suit Settlements*, 59 VANDERBILT L. REV. 1343 (2006); *"Judicial Hellholes," Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois*, 59 VANDERBILT L. REV. 1309 (2006); *Medical Malpractice and the Tort System in Illinois*, 93 ILL. B. J. 340 (2005); *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries and Social Policy,* 38 LOYOLA L.A. L. REV. 1217 (2005); *Uncovering the "Invisible" Profile of Medical*

Malpractice Litigation: Insights from Florida. 54 DEPAUL L. REV.315 (2005); *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISSISSIPPI COLL. L. REV. 9 (2002); *Jury Awards for Medical Malpractice and Post-verdict Adjustment of Those Awards*. 48 DEPAUL L. REV. 265 (1998); *The Performance of the American Civil Jury: An empirical perspective*, 40 ARIZONA L. REV. 849 (1998); *Pap and Circumstance: What jury verdict statistics can tell us about jury behavior and the tort system*, 27 SUFFOLK U. L. REV. 1205 (1994/1996); *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/ Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885 (1994); *The Unfair Criticism of Medical Malpractice Juries*, 76 JUDICATURE 118 (1992); *Empirical Evidence on the "Deep Pockets" Hypothesis: Jury awards for pain and suffering in medical malpractice cases*, 43 DUKE L.J. 217 (1993); *Assessments of non-economic damage awards in medical negligence: a comparison of jurors with legal professionals*, 78 Iowa L. Rev. 883 (1993). He has authored amicus briefs submitted to the U. S. Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. ___, 127 S.Ct. 1057 (2007): *Ledbetter v. Connecticut*, 547 U.S. 1082 (Mem.) (2006); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). He has also tendered affidavits bearing on tort cases in various states, including *Best v. Taylor Machine*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997). Vidmar has lectured on judging scientific evidence for judicial education programs in the United States, Canada, Australia and New Zealand.

Professor Vidmar's complete *Curriculum Vita* can be viewed at http://www.law.duke.edu/fac/vidmar/cv

TOM BAKER is Professor of Law at University of Pennsylvania School of Law. From 1997 to 2008, he was the Connecticut Mutual Professor of Law and Director of the Insurance Law Center at the University of Connecticut. He teaches, researches, and writes about insurance, risk, and responsibility in a wide variety of settings, using methods and perspectives drawn from economics, sociology, and history, as well as law. His book, THE MEDICAL MALPRACTICE MYTH (Univ. of Chicago Press 2005), pulls together the empirical research on medical malpractice and liability and proposes an evidence-based approach to medical liability reform. He is the author of INSURANCE LAW AND POLICY: CASES, MATERIALS AND PROBLEMS (Aspen 2003; 2nd ed. 2008) and many articles and book chapters. He also is a contributing editor of EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY (Univ. of Chicago Press 2002), which helped to establish the emerging sociology of risk and insurance. Among his numerous articles are: *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV.393 (2005) and *Reconsidering the Harvard Medical Practice Study Conclusions about the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501 (2005). Baker has taught insurance and related courses at Columbia Law School, the University of Miami School of Law, Vanderbilt Law School, Yale Law School, and the Faculty of Law at the Hebrew University of Jerusalem, in addition to the University of Connecticut and the University of Pennsylvania. A member of the Scientific Committee of the Geneva Association for Risk and Insurance Studies, he regularly lectures on insurance in academic and professional settings. He is the founder and facilitator of the Insurance and Society Study Group, an interdisciplinary group of scholars engaged in insurance-related research. Before entering law teaching at the University of Miami,

Professor Baker clerked for Hon. Juan R. Torruella of the United States Court of Appeals for the First Circuit, practiced with the firm of Covington & Burling, and served as Associate Counsel in the Office of Independent Counsel (Walsh) investigating Iran-Contra. He received his B.A. and J.D. from Harvard University, *magna cum laude*.

Professor Baker's complete biographical profile can be viewed at http://www.law.upenn.edu/cf/faculty/thbaker/

RALPH L. BRILL has been a member of the faculty of Chicago-Kent College of Law, Illinois Institute of Technology, since 1961. He has served in administrative positions as Dean, Associate Dean and Director of Research and Writing during that time. He has taught Torts and Tort-related courses for most of those years. He also has served as consultant to lawyers and law firms in several landmark cases, including as co-author of the Illinois Trial Lawyers Association amicus briefs in *Wright v. Central DuPage Hospital*, 63 Ill. 2d 313 (1976) (caps on damages and required screening panels in malpractice cases unconstitutional), and *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432 (1992) (CTA had duty to warn foreseeable trespasser of dangers of the electrified third rail). For three years, Professor Brill published, for Shepard's Inc., The Illinois Tort Reporter, and published numerous articles analyzing aspects of Illinois tort law and practice. Active in all aspects of professional activity, Professor Brill has served as chairs of the Civil Rights and Responsibilities Committee and the Communication Skills Committee of the American Bar Association, the Development of the Law Committee and Legal Education Committee of the Chicago Bar Association, and on the Boards of the Legal Writing Institute, the Association of Legal Writing Directors, The Illinois Institute for Continuing Legal Education, and the Children's Legal Clinic. For a

combined task force of the Illinois Bar Association and Chicago Bar Association, Professor Brill drafted the Minimum Continuing Legal Education Rules adopted by the Illinois Supreme Court.

Professor Brill's complete biographical profile can be viewed at http://www.kentlaw.edu/faculty/rbrill/

MARTHA CHAMALLAS holds the Robert J. Lynn Chair in Law at the Moritz College of Law at the Ohio State University, where she teaches Torts, Employment Discrimination and Feminist Legal Theory. The University recognized her excellence by naming her as one of the two campus-wide University Distinguished Lecturers for the academic year 2006-2007. Prior to joining the Moritz College of Law in 2002, Professor Chamallas was on the faculty at the University of Pittsburgh School of Law. She also has taught at Louisiana State University Law Center, the University of Iowa College of Law, Washington University School of Law, and the University of Richmond School of Law. Professor Chamallas earned a B.A., *cum laude* in Sociology from Tufts University in 1971 and a J.D. (Order of the Coif), from Louisiana State University Law Center in 1975. Following graduation from law school, Professor Chamallas clerked for the Honorable Charles Clark of the U.S. Court of Appeals for the Fifth Circuit and served as an attorney for the U.S. Department of Labor, Office of the Solicitor, Civil Rights Division. She is the author of INTRODUCTION TO FEMINIST LEGAL THEORY (2d ed. 2003) and more than 50 book chapters, articles, essays, and other scholarly publications including, *Vanished From the First Year: Lost Torts and Deep Structures in Tort Law* in CANONS OF LAW (Jack Balkin & Sanford Levinson, eds., 2000); *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003);

Removing Emotional Harm from the Core of Tort Law, 54 VAND. L. REV. 751 (2001); *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); *Condensed in A Woman's Worth: Gender Bias in Damage Awards*, 31 TRIAL 38 (1995); *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).

Professor Chamallas' complete *curriculum vita* can be viewed at http://moritzlaw.osu.edu/faculty/cv/chamallas_martha.pdf.

STEPHEN DANIELS is a Research Professor and Senior Research Fellow at the American Bar Foundation in Chicago, IL and an Adjunct Professor of Political Science at Northwestern University. He holds a Ph.D. in political science from the University of Wisconsin-Madison. His research focuses on law and public policy and the various aspects of the American civil justice system. He has written on trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. He is co-author (with American Bar Foundation Research Professor and Senior Research Fellow, and fellow amicus, Joanne Martin) of CIVIL JURIES AND THE POLITICS OF REFORM (Northwestern Univ. Press, 1995), and author or co-author of numerous articles in law reviews (e.g., Texas Law Review, Minnesota Law Review, Wisconsin Law Review) and social science journals (e.g., Law & Society Review, Law & Policy, Justice System Journal) focusing on law and public policy. Included among those articles are: *Alive and Well (Maybe) in Texas: Plaintiffs' Practice in the Age of Tort Reform*, 51 N.Y. L. REV. 286 (2007); *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VANDERBILT L. REV. 1051 (2006); *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access*, 55

DEPAUL L. REV. 635 (2006); *The Strange Success of Tort Reform*, 53 EMORY L. J. 1225 (2004); *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEXAS L. REV. 1781 (2002); *Personal Injury Law Practice*, in The Oxford Companion to American Law. (Oxford Univ. Press, Kermit Hall, ed., 2002); *The Impact That It Has Had is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000); *Access Denied: The Subtle Effects of Tort Reform*, TRIAL, 263 (July 1997); *Persistence Is Not Always a Virtue: Tort Reform, Civil Liability for Health Care, and the Lack of Empirical Evidence*, 15 BEHAVIORAL SCIENCES & THE LAW 3 (1997); *Tracing the Shadow of the Law: Jury Verdicts in Medical Malpractice Cases*, 14 JUSTICE SYSTEM J. 4 (1990); *Caseload Dynamics and the Nature of Change: The Civil Business of Trial Courts in Four Counties,* 1870 to 1960, 24 LAW & SOCIETY REVIEW 299 (1990); *The Question of Jury Competence and the Politics of Tort Reform*, 52 LAW & CONTEMP. PROBLEMS 269 (1989); *Are Jury Awards Increasing?* 26 JUDGES' JOURNAL 10 (1987); *Jury Verdicts and the "Crisis" in Civil Justice: Some Findings from an Empirical Study*, 11 JUSTICE SYSTEM J. 321 (1986). He reviews research proposals for the National Science Foundation and manuscripts for peer reviewed journals in the law and society field and in political science. He is a current member of the editorial board for Justice System Journal, a peer-reviewed journal.

Professor Daniels complete biographical profile can be viewed at http://www.americanbarfoundation.org/faculty/profile/1/bio.html

THOMAS A. EATON is the J. Alton Hosch Professor at the University of Georgia School of Law where he has taught for more than twenty-five years. He has conducted

numerous empirical studies on tort litigation. These studies have been published in the Georgia Law Review, the Yale Law and Policy Review, the Yale Journal on Regulation, and the Journal of Legal Studies. Among the many articles he has written are: *Of Frivolous Litigation And Runaway Juries: A View From The Bench*; 34 GA. L. REV. 1049 (2007); *Another Brick In The Wall: An Empirical Look At Georgia Tort Litigation In The 1990s*, 41 GA. L. REV. 431 (2000); and *A Profile Of Tort Litigation In Georgia And Reflections On Tort Reform,* 30 GA. L. REV. 627 (1996). In 2005, Professor Eaton became the first law professor at the University of Georgia to be awarded a Creative Research Medal for his collaborative empirical studies of the civil justice system.

Professor Eaton's complete biographical profile can be viewed at http://www.law.uga.edu/academics/profiles/eaton.html

THEODORE EISENBERG is the Henry Allen Mark Professor of Law at Cornell Law School. He graduated from Swarthmore College in 1969 and from the University of Pennsylvania Law School in 1972. He clerked for the U.S. Court of Appeals for the D.C. Circuit, and for Chief Justice Earl Warren (ret.). Before entering teaching, he practiced law in New York with Debevoise & Plimpton. He began his teaching career at UCLA Law School and has been a Professor at Cornell Law School since 1981. He has been a Visiting Professor at Harvard, Stanford, and NYU Law Schools. He is founder and co-editor of the Journal of Empirical Studies, a Fellow of the Royal Statistical Society, and a member of the Law and Society Association, the American Bar Association, and the Association of the Bar of the City of New York. He serves on the editorial board of the American Law and Economics Review and has served on the Board of Directors of the American Law and Economics Association. He has been a National Science Foundation

and American Bar Foundation grantee. He is Editor-in-Chief of a multi-volume treatise on DEBTOR-CREDITOR LAW and is the author of BANKRUPTCY AND DEBTOR-CREDITOR LAW (3d ed. 2004) and CIVIL RIGHTS LEGISLATION (5th ed. 2004). Professor Eisenberg's empirical studies of the legal system have appeared in many law reviews, and cover the death penalty, civil rights, torts, judge and jury trials, bankruptcy, and litigation models. He has served as a referee for the following: journals and organizations: Am. Econ. Rev., NSF, Law & Soc'y Rev., Justice System J., Rev. of Econ. & Statistics, Econ. Inquiry, Oxford Univ. Press, Harvard Univ. Press, Cornell Univ. Press, Yale Univ. Press, Alfred P. Sloan Found'n; Social Science & Medicine; J. Legal Studies, Internat'l Rev. Law & Econ., The Rockefeller Found'n, Social Sciences & Humanities Research Council of Canada, J. Law & Econ., Smith Richardson Found'n, Univ. of Chicago Press, NeuroToxicology, RAND Institute for Civil Justice; Louisiana Board of Regents; Harvard Law Review; Harvard School of Public Health; Law & Social Inquiry; American Political Science Review. Among his published articles are: *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUDIES 551 (2005); *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004); *Appeal Rates and Outcomes in Tried and Non-Tried Cases*, 1 J. EMPIRICAL LEGAL STUDIES 659 (2004); *Litigation Realities*, 88 CORNELL L. REV. 119-154 (2002); *Trial Outcomes and Demographics: Is There A Bronx Effect?*, 80 TEXAS L. REV. 1839-75 (2002); *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 WAKE FOREST L. REV. 1129 (2001); *Empirical Methods and the Law*, 95 J. AMERICAN STAT. ASS'N 665 (2000); *Do Case Outcomes Really Reveal*

Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581-607 (1998); *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. OF ECONOMICS S92 (1997); *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992); *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

Professor Eisenberg's complete *Curriculum Vita* can be viewed at http://ww3.lawschool.cornell.edu/faculty/faculty_cvs/Eisenberg.pdf

NEAL R. FEIGENSON is Professor of Law at Quinnipiac University School of Law in Hamden, CT, and has been Visiting Professor of Law at Cornell Law School and the University of Connecticut Law School. He studies the cognitive and social psychology of jury decision making and the role of visual communication and persuasion in law. He is the author of LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (American Psychological Association Books, 2000), and has authored or co-authored more than two dozen articles and book chapters, including in leading journals such as Law and Human Behavior; Psychology, Public Policy, and Law; and Law, Probability, and Risk. Among his published articles are: *Merciful Damages: Some Remarks about Forgiveness, Mercy, and Tort Law*, 27 FORDHAM URBAN L. J. 1633 (2000); *Accidents as Melodrama*, 43 N.Y. L. REV. 741 (2000); *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); *The Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases,* 21 LAW AND HUMAN BEHAVIOR 597 (1997).

Professor Feigenson's complete *Curriculum Vita* can be viewed at http://webspace.quinnipiac.edu/feigenson/CV%20CURRENT%20WINTER%202007.doc

LUCINDA M. FINLEY is Vice Provost for Faculty Affairs and Frank G. Raichle Professor of Trial and Appellate Advocacy, University at Buffalo Law School, The State University of New York. A graduate of Columbia University School of Law, she is the former Chair of the Torts Section of the Association of American Law Schools (AALS), and the co-author of TORT LAW & PRACTICE (3d ed., 2006), a leading casebook published by LEXIS?NEXIS and Matthew Bender that has been widely adopted at law schools throughout the U.S. An active participant in litigation and legislative advocacy, she has argued several cases before the U.S. Supreme Court and U.S. Courts of Appeals and is the author of numerous amicus curiae briefs, including a brief to the U.S. Supreme Court on behalf of several women's health and women's rights advocacy organizations, and she has presented legislative testimony before U.S. Senate and House of Representative committees, the New York State and Connecticut legislatures, and an Ohio legislative commission. Prior to joining the University of Buffalo, she was associate professor of law at Yale University. Her teaching and research subjects include Torts, Toxic Torts, Women and the Law, and Feminist Jurisprudence. She has published more than 20 law review articles and book chapters and has lectured about legal topics in the U.S., Canada, Australia, New Zealand, Germany, Italy, and Turkey. Her most important articles, for the purposes of the instant case, are *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L. J. 1263 (2004); *Putting "Protection" Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists' Understandings of Equality*, 13 TEMPLE POLITICAL & RIGHTS L. REV. 429 (2004); and

Female Trouble: The Implications of Tort Reform for Women, 64 TENN. L. REV. 847 (1997). She also is the author of *The Priceless-Worthless Dilemma: In Defense of Individualized Non-Economic Damages* in CULTURAL FOUNDATIONS OF TORT LAW (D. Engel and M. McCann, editors) (Stanford Univ. Press, forthcoming).

Professor Finley's complete biographical profile can be viewed at http://www.law.buffalo.edu/Faculty_And_Staff/submenu/ScholarPages/Finley.pdf

MARC GALANTER is John and Rylla Bosshard Professor *Emeritus* of Law and South Asian Studies at the University of Wisconsin-Madison and LSE Centennial Professor at the London School of Economics. He received degrees in philosophy and law from the University of Chicago. In addition to the University of Wisconsin and the London School of Economics, he has taught at Chicago, Buffalo, Columbia and Stanford. From 1990 to 1998, he was Director of Wisconsin's Institute for Legal Studies, one of the leading centers for empirical study of the legal system. He is the author of five books and over one hundred articles on litigation, lawyers and legal culture, including articles on jury trials and on punitive damages. He has been editor of the Law & Society Review, President of the Law and Society Association, Chair of the International Commission on Folk Law and Legal Pluralism, a member of the Council on the Role of Courts, a Guggenheim Fellow, and a Fellow of the Center for Advanced Study in the Behavioral Sciences. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences. Among his most relevant articles are: *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); *The Day After The Litigation Explosion*, 46 MD. L. REV. 3 (1986); *News from Nowhere: The*

Debased Debate on Civil Justice, 71 DENVER U. L. REV. 77 (1993); *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L REV. 633 (1994); *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647 (2000); *The Turn Against Law: the Recoil Against Expanding Accountability*, 81 TEXAS L. REV. 285 (2002); *The Three-Legged Pig: Risk Redistribution and Antinomianism in American Legal Culture*, 22 MISSISSIPPI COLL. L. REV. 47(2002); *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUDIES 459 (2004).

Professor Galanter's complete *Curriculum Vita* can be viewed at http://www.marcgalanter.net/cv.htm

VALERIE P. HANS is Professor of Law at Cornell Law School. She holds a Ph.D. in Social Psychology from the University of Toronto. She conducts empirical studies of law. Professor Hans has carried out extensive research, lectured, and written widely about the American jury system and other social science and the law topics, including six books and one hundred research publications. Her books on the jury include BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000); THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP (2006); AMERICAN JURIES: THE VERDICT (2007, with Duke Law Professor and fellow amicus Neil Vidmar) and JUDGING THE JURY (1986, with Duke Law Professor and fellow amicus with Neil Vidmar). She has served on the National Science Foundation's Law and Social Sciences Advisory Panel, and regularly functions as an external reviewer for National Science Foundation grant proposals. She

has served on the editorial boards of Journal of Empirical Legal Studies, Journal of Psychology, Public Policy, and Law, Law and Human Behavior, Law and Policy, Law & Society Review, and Psychology, Crime, and Law. Among her published articles are: *Empirical Research And Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497 (2003); *Whiplash: Who's To Blame? (Symposium: Responsibility And Blame: Psychological And Legal Perspectives)*, 68 BROOK. L. REV. 1093 (2003); *Avoid Bald Men And People With Green Socks? Other Ways To Improve The Voir Dire Process In Jury Selection (Symposium: The Jury at a Crossroad: The American Experience III—the Jury in Practice)*, 78 CHI.-KENT L. REV. 1179 (2003); *Nullification At Work? A Glimpse From The National Center For State Courts Study Of Hung Juries (Symposium: The Jury at a Crossroad: The American Experience III—the Jury in Practice),* 78 CHI.-KENT L. REV. 1249 (2003); *U.S. Jury Reform: The Active Jury And The Adversarial Ideal—The Jury's Role in Administering Justice in the United States*, 21 ST. LOUIS U. PUB. L. REV. 85 (2002); *The Illusions And Realities Of Jurors' Treatment Of Corporate Defendants (Symposium: The American Civil Jury: Illusion and Reality)*, 48 DEPAUL L. REV. 327 (1998).

Professor Hans' complete *Curriculum Vita* can be viewed at http://ww3.lawschool.cornell.edu/faculty/faculty_cvs/Hans.pdf

MICHAEL HEISE is Professor of Law at Cornell Law School, where he specializes in empirical legal scholarship and bridging empirical methodologies, legal theory, and policy analysis. He writes in public and private law areas, including civil justice reform, punitive damages, education policy, criminal sentencing, and judicial decision-making. Professor Heise's teaching areas include torts, empirical methods for lawyers, insurance

law, constitutional law, business torts, education law, and law and social science. Professor Heise has received numerous awards for his scholarship and teaching, including the Law & Society Association's Best Article Prize in 1999. Professor Heise has co-edited the since 2005. He earned an A.B. from Stanford University, a J.D. from the University of Chicago, and a Ph.D. from Northwestern University, and was admitted to the Illinois Bar in 1987. He is the author of 50 law review articles, peer-reviewed articles, book chapters, and other scholarly publications, including: *Essays Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUDIES ___ (forthcoming 2009)(with Cornell Prof. Theodore Eisenberg); *Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts, 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUDIES 263 (2006) (with Cornell Professor Theodore Eisenberg, *et al.*); *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. L. REV. 745 (2005); *Litigated Learning and the Limits of Law*, 57 VANDERBILT L. REV. 2417 (2004); *The Past, Present, and Future of Empirical and Experimental Legal Scholarship: Judicial Decision-making as a Case Study*, 2002 UNIV. OF ILL. L. REV. 819 (2002); *The Future of Civil Justice Reform and Empirical Legal Scholarship: A Reply*, 51 CASE WESTERN RES. L. REV. 251 (2000); *The Importance of Being Empirical*, 26 PEPPERDINE L. REV. 807 (1999).

Professor Heise's complete *Curriculum Vita* can be viewed at http://ww3.lawschool.cornell.edu/faculty/faculty_cvs/Heise.pdf.

EDWARD J. KIONKA is Visiting Professor of Law at the University of Georgia School of Law where he leads courses in the areas of torts and federal courts. For 30 years, Kionka taught law at Southern Illinois University where he was a member of the

founding faculty and served as associate dean during 1984-85. Kionka has been a visiting professor at law schools across the country including Washington University in St. Louis, Emory University, the University of San Diego and Saint Louis University. Before his tenure at Southern Illinois, he served as assistant dean and assistant professor at the University of Illinois College of Law and as executive director of the Illinois Institute for Continuing Legal Education. He was also an associate at Leibman, Williams, Bennett, Baird and Minow in Chicago. Professor Kionka is the co-author of EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES and the author of TORTS IN A NUTSHELL and TORTS BLACK LETTER. He has also written numerous articles appearing in journals such as the Louisiana Law Review and the Illinois Bar Journal. Most pertinent among his published articles is: *Things To Do (Or Not) To Address The Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469 (2006).

Professor Kionka's complete biographical profile can be viewed at http://www.kionkalaw.com/ted-kionka.html

THOMAS H. KOENIG is a Professor of Sociology and Anthropology at Northeastern University and a founding core faculty member of Northeastern's Law, Policy and Society Ph.D. program. He is the lead author of IN DEFENSE OF TORT LAW (NYU Press, 2001). His empirical studies on American tort law have been published in leading academic journals such as American Behavioral Scientist, American University Law Review, Berkeley Technology Law Journal, Justice System Journal, Law & Policy, Rutgers Law Review, Washington Law Review and Wisconsin Law Review. Among his published articles is: *Taming The Tort Monster: The American Civil Justice System As A Battleground Of Social Theory*, 68 BROOK. L. REV. 1 (2002).

Professor Koenig's complete *Curriculum Vita* can be viewed at http://www.socant.neu.edu/faculty/koenig/documents/Thomas_Koenig_Vita_September_2007.pdf

HERBERT M. KRITZER is Professor of Law, William Mitchell College of Law, Saint Paul, Minnesota, Adjunct Professor of Political Science, University of Minnesota, and Professor of Political Science and Law *Emeritus*, University of Wisconsin-Madison. He has conducted extensive empirical research on the American civil justice system, as well as research on other common law systems. His most recent book is RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (Stanford Univ. Press, 2004). He is the author, coauthor, or editor of six other books and has published over 100 articles in professional journals. Over the last 20 years, he has conducted research on the American civil justice system dealing with contingency fee legal practice, the impact of Rule 11 sanctions, alternative forms of advocacy and representation, and the adult guardianship process in Wisconsin. Research with a cross-national element has included writing on the English Rule, propensity to sue, the frequency of criminal and civil trials in England, and politics in the English judicial system. His current research includes changing patterns in judicial elections (a first article appeared in DePaul Law Review), insurance defense legal practice (recently published in Vanderbilt Law Review), and the impact of the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) (recently published in the Journal of Empirical Legal Studies), and a study of local television news coverage of the courts and the legal profession. Professor Kritzer recently completed a term as editor of Law & Society Review, the leading journal in interdisciplinary legal studies. In July 2007, Professor Kritzer joined the faculty of the William Mitchell College of Law

after having taught for 30 years at the University of Wisconsin-Madison. Among his published articles are: *Advocacy And Rhetoric vs. Scholarship And Evidence In The Debate Over Contingency Fees: A Reply To Professor Brickman*, 82 WASH. U. L.Q. 477 (2004); *Seven Dogged Myths Concerning Contingency Fees, 80* WASH. U. L.Q. 739 (2002); *Lawyer Fees And Lawyer Behavior In Litigation: What Does The Empirical Literature Really Say? (Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Polity)*, 80 TEX. L. REV. 1943 (2002); *The Wages Of Risk: The Returns Of Contingency Fee Legal Practice (Symposium: Contingency Fee Financing Of Litigation In America Third Annual Clifford Seminar On Tort Law And Social Policy)*, 47 DEPAUL L. REV. 267 (1998); *Data, Data, Data, "Drowning In Data": Crafting The Hollow Core*, 21 LAW & SOC. INQUIRY 761 (1996).

Professor Kritzer's complete biographical profile can be viewed at http://www.wmitchell.edu/academics/faculty/kritzer.asp

DAVID I. LEVINE is Professor of Law, University of California, Hastings College of the Law. A Phi Beta Kappa graduate of the University of Michigan in psychology and history, Professor Levine also studied at University College, University of London on the London Exchange Fellowship, researching in the area of developmental psychology. He went on to graduate from the University of Pennsylvania Law School, where he was an editor of the law review and a legal writing instructor. Before joining the Hastings faculty in 1982, Professor Levine lived in New Orleans while serving as a law clerk to Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit and was also an associate in the litigation department of Morrison and Foerster in San Francisco. He served as Associate Academic Dean from 1989-1991. He is co-author or co-editor of six

books, including REMEDIES: PUBLIC AND PRIVATE AND CALIFORNIA CIVIL PROCEDURE, as well as the author of articles on civil procedure, torts and institutional reform litigation. He has served as the Reporter for the District of Nevada's Committee on the Implementation of the Civil Justice Reform Act and as a research analyst for the Northern District of California's Early Neutral Evaluation Program. He is a member of the American Law Institute and the Law and Society Association. He has been a peer reviewer for Law and Policy.

Professor Levine's complete *Curriculum Vita* can be viewed at http://w3.uchastings.edu/levine/bio.htm

NANCY S. MARDER is a Professor of Law at Chicago-Kent College of Law. She is a graduate of Yale College, Cambridge University, and Yale Law School, where she was an Articles Editor of the Yale Law Journal. Professor Marder has clerked at every level of the United States federal court system, including a two-year clerkship with Justice John Paul Stevens at the U.S. Supreme Court, and one-year clerkships with Judge William A. Norris at the U.S. Court of Appeals for the Ninth Circuit and Judge Leonard B. Sand in the Southern District of New York. Professor Marder has written numerous articles on the jury; they have appeared in law reviews such as Northwestern University Law Review, Texas Law Review, Iowa Law Review, and Southern California Law Review. She has written a book on the jury entitled THE JURY PROCESS (2005). Her work on the jury has covered a wide range of issues from the jury and the medical malpractice debate to the proper roles of peremptory challenges, jury instructions, and jury nullification. She has presented her work on the jury at many conferences and symposia in this country and abroad and regularly teaches a law school course on the jury entitled "Juries, Judges &

Trials." Among her published articles are: *The Medical Malpractice Debate: The Jury As Scapegoat (Symposium Access to Justice: Can Business Coexist with the Civil Justice System?)*, 38 LOY. L.A. L. REV. 1267 (2005); *The Myth Of The Nullifying Jury*, 93 NW. U. L. REV. 877 (1999); *Juries And Damages: A Commentary (Symposium: The American Civil Jury: Illusion and Reality)*, 48 DEPAUL L. REV. 427 (1998).

Professor Marder's complete biographical profile can be viewed at http://www.kentlaw.edu/faculty/nmarder/

JOANNE MARTIN is a Senior Research Fellow at the American Bar Foundation in Chicago, IL. She holds a J.D. for Loyola University of Chicago and an M.M. from Northwestern University's Kellogg School of Management. Her research focuses on law and public policy and the various aspects of the American civil justice system. She has written on trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. She is co-author (with fellow amicus Stephen Daniels) of CIVIL JURIES AND THE POLITICS OF REFORM (Northwestern University Press, 1995), and author or co-author of 36 articles in law reviews (e.g., Texas Law Review, Minnesota Law Review, Wisconsin Law Review) and social science journals (e.g., Law & Policy, Justice System Journal) focusing on law and public policy, as well as 27 ABA Survey Reports for the American Bar Association. She reviews research proposals for the National Science Foundation and is a current member of the editorial board for Law & Social Inquiry, a peer-reviewed journal. Among her published articles are: *Alive and Well (Maybe) in Texas: Plaintiffs' Practice in the Age of Tort Reform*, 51 N.Y. L. REV. 286 (2007); *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VANDERBILT L. REV. 1051 (2006); *The Texas Two-Step:*

Evidence on the Link Between Damage Caps and Access, 55 DEPAUL L. REV. 635(2006); *The Strange Success of Tort Reform*, 53 EMORY L. J. 1225 (2004); *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEXAS L. REV. 1781 (2002); *The Impact That It Has Had is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000); *Access Denied: The Subtle Effects of Tort Reform*, TRIAL, 263 (July 1997); *Persistence Is Not Always a Virtue: Tort Reform, Civil Liability for Health Care, and the Lack of Empirical Evidence*, 15 BEHAVIORAL SCIENCES & THE LAW 3 (1997); *Are Jury Awards Increasing?* 26 JUDGES' J. 10 (1987); *Jury Verdicts and the "Crisis" in Civil Justice: Some Findings from an Empirical Study*, 11 JUSTICE SYSTEM J. 321 (1986).

Professor Martin's complete biographical profile can be viewed at http://www.americanbarfoundation.org/faculty/profile/16.

FRANK M. MCCLELLAN is the I. Herman Stern Professor of Law at Temple University, Beasley School of Law, where he has taught since 1981 and where he teaches Torts, Bioethics, Medical Malpractice, and Drug Product Liability. He also lectures at Temple University School of Medicine on various topics related to law, medicine and ethics and at American Law Institute-American Bar Association ("ALI-ABA") conferences, currently serving as the Co-Chair and Planner of the ALI-ABA course medical malpractice course. In 1995, Temple University awarded him the Friel-Scanlon Prize for outstanding scholarship. Professor McClellan has written numerous law review articles on medical malpractice, bioethics and tort law. Professor McClellan earned his B.A. from Rutgers University (1967), his J.D. from Duquesne University (1970), and his LL.M. degree from Yale University (1974). At Duquesne, he was a member of the law

review and received a merit award for academic excellence. At Yale, he was awarded the Felix S. Cohen Prize in Jurisprudence. From 1970-71 he served as a law clerk for the late Honorable William H. Hastie, Chief Judge of the U.S. Court of Appeals for the Third Circuit. He then practiced as an associate with the Washington, D.C. law firm of Wilmer, Cutler & Pickering before joining the law faculty of Duquesne University, where he taught from 1972 through 1981. Professor McClellan devotes much of his public service time to projects aimed toward eliminating racial and other group-based biases in higher education and in the justice system. In 2002-2003 he served a the Chair of a Workgroup that spent two years exploring perceptions of racial bias in the court system of attorneys, litigants and judges throughout the state of Pennsylvania, as a part of an overall study of bias in the justice system conducted by the Pennsylvania Supreme Court Committee on Racial and Gender Bias. He is the author of MEDICAL MALPRACTICE: LAW, TACTICS AND ETHICS (Temple Univ. Press 1994), co-author of TORTS: CASES, PROBLEMS AND MATERIALS (3rd ed. 2002), and author of 30 scholarly articles, including: *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437 (2007); *Medical Malpractice Law, Morality and the Culture Wars: A Critical Assessment of the Tort Reform Movement*, 27 J. LEGAL MED. 33 (2006); *Litigating Medical Malpractice Claims: Developments in the Law*, in LITIGATING MEDICAL MALPRACTICE CLAIMS (ALI-ABA 2001, updates 2002, 2004, 2005) (with E. Ihuekwumere); *Tort Law and the Pharmacist*, in LITIGATING MEDICAL MALPRACTICE CLAIMS (ALI-ABA 2001, update 2002, 2004, 2005) (with L. Fierro); *Tort Liability of Physicians, Hospitals, and Other Health Care Providers*, in LITIGATING MEDICAL MALPRACTICE CLAIMS (ALI-ABA 2001, updates 2002, 2004, 2005); *Tort Reform for Medical Malpractice Cases: Stories v. Statistics*, 3 L.

& BIOETHICS REP. 7 (2003); *Bendectin Revisited: Is There a Right to a Jury Trial in an Age of Judicial Gatekeeping?*, 37 WASHBURN L.J. 261 (1998); *Confronting Racial, Ethnic, or Gender Bias in Product Liability Cases*, in LITIGATING MEDICAL MALPRACTICE CLAIMS (ALI-ABA 1997); *Recent Decisions on Institutional and Practitioner Liability*, in LITIGATING MEDICAL MALPRACTICE CLAIMS (ALI-ABA 1997); *Symposium, The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996).

Professor McClellan's complete biographical profile can be viewed at http://www.law.temple.edu/servlet/RetrievePage?site=TempleLaw&page=Faculty_McClellan.

DEBORAH JONES MERRITT is John Deaver Drinko-Baker & Hostetler Chair in Law; Courtesy Professor of Sociology; Courtesy Professor of Public Policy and Management; and Associate Faculty Member in Women's Studies, all at the Ohio State University. Professor Merritt graduated from Harvard College *summa cum laude* in 1977 and from Columbia Law School in 1980. While at Columbia, she was Managing Editor of the Columbia Law Review and won the Robert Noxon Toppan Prize. After graduation, Professor Merritt clerked for Judge (now Justice) Ruth Bader Ginsburg on the U.S. Court of Appeals for the District of Columbia Circuit and for Justice Sandra Day O'Connor on the Supreme Court of the United States. Professor Merritt practiced law in Atlanta, Georgia, and joined the law faculty at the University of Illinois in 1985. She served there as Professor of Law, Professor of Women's Studies, Advisor to the Joint JD/MD Program, and Associate Dean for Academic Affairs before moving to Ohio State, where she accepted the Drinko Chair in 1995. Professor Merritt has been honored as both an

Ohio State University Distinguished Lecturer (1999) and as a University Distinguished Scholar (2002), awards conferred on the University's most outstanding researchers. In 2004, the University recognized her work promoting diversity with one of its Distinguished Diversity Enhancement Awards. She also served as the University's general commencement speaker for the Autumn 2004 commencement. From 2000-2005, Merritt directed the John Glenn Institute, a University-wide institute devoted to encouraging public service and informing public policy. Much of her work has focused on public policy issues, and she has made numerous presentations to judges, legislators, and other policymakers. She has also co-taught courses in Europe with both Justice Ginsburg and Justice O'Connor. Professor Merritt teaches Evidence, Law and Psychology, Law and Social Science, and Women and Law has published widely on issues of equality, affirmative action, federalism, health and technology, legal education, tort reform, and law and social science. She is the author of more than 100 scholarly articles, essays, papers, and presentations, including: *Justice Sandra Day O'Connor: The Framers' "First Woman,"* 31 J. OF SUPREME COURT HISTORY 107 (2006) (invited contribution to tribute issue honoring Justice O'Connor); *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUMBIA L. REV. 39 (2004) (invited contribution to Symposium Honoring Justice Ginsburg's Tenth Anniversary on the Supreme Court) (with David Lieberman); *Constructing Identity in Law and Social Science*, 11 J. OF CONTEMP. LEGAL ISSUES 731 (2001); *Constitutional Fact and Theory: A Reply to Chief Judge Posner*, 97 MICH. L. REV. 1287 (1999); *Affirmative Action: An International Human Rights Dialogue*, 54 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 278 (May/June 1999) (with Ruth Bader Ginsburg; excerpted in

BROOKINGS REVIEW (Winter 2000); *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO STATE L. J. 315 (1999) (with Kathryn Barry).

Professor Merritt's complete *Curriculum Vita* can be viewed at http://moritzlaw.osu.edu/faculty/cv/merritt_deborah.pdf.

PHILIP G. PETERS, JR. is the Ruth L. Hulston Professor of Law at the University of Missouri-Columbia School of Law, where he has also served as the Associate Dean for Faculty Research. His specialty is health law. Before coming to MU, he practiced law in Louisville, Kentucky defending product liability and medical malpractice lawsuits. After moving to Missouri, he was the malpractice consultant for Governor Mel Carnahan's Health Reform Commission. He has written extensively on health law, focusing most recently on medical malpractice law. He work has been published by Oxford University Press, Michigan Law Review, Northwestern Law Review, UCLA Law Review, Regulation, the Journal of Empirical Legal Studies, and many other legal and medical journals. He has been asked to serve as an external reviewer by Oxford University Press, JAMA and Health Affairs, has served for many years as an elected member of the American Law Institute, and is a Life Fellow at Clare Hall, Cambridge University. He speaks often before both medical and legal audiences. In the community, he is the past President of the Board of Directors of the Family Health Center, a community health center whose doors are open to everyone regardless of ability to pay. Professor Peters received his undergraduate degree in economics from Harvard University and his JD from the University of California at Berkeley (Boalt Hall). Among his published articles are: *Cultures of Claiming: Local Variation in Malpractice Claim Frequency*, 5 J. EMPIRICAL LEGAL STUDIES 77 (2008); *Health Courts?*, 88 BOSTON U. L. REV. 227

(2008); *Doctors & Juries*, 105 MICH. L. REV. 143 (2007); *What We Know About Malpractice Settlements*, 92 IOWA L. REV. 1783 (2007).

Professor Peters' complete biographical profile can be viewed at http://law.missouri.edu/faculty/petersp.html

JAMES T. RICHARDSON is Foundation Professor of Sociology and Judicial Studies at the University of Nevada, Reno, where he directs the graduate Judicial Studies degree program for trial judges, offered in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges. He teaches a seminar, "Social and Behavioral Sciences and the Law" in the program. He has a Ph.D. in Sociology from Washington State University, as well as a J.D. from Old College, Nevada School of Law. He has done research on the legal system, including research on jury behavior. He has published work in Law and Human Behavior, Behavioral Sciences and Law, Brigham Young University Law Review, University of Queensland Law review, University of New South Wales Law Journal, The Justice System Journal, Judicature, and other books and journals in the social sciences. He reviews for a number of journals in the social sciences and in law related fields.

Professor Richardson's complete biographical profile can be viewed at http://www.unr.edu/cla/soc/jtr.htm

CHARLES SILVER holds the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure and is Co-Director of the Center on Lawyers, Civil Justice, and the Media at the University of Texas School of Law. He obtained an M.A. in Political Science at the University of Chicago in 1982, served as the Managing Editor of Ethics from 1982-1984, graduated from the Yale Law School in 1987, and joined the Texas

faculty that year. He has published widely on class actions and complex lawsuits, attorneys' fees, the professional responsibilities of lawyers, insurance, and health care law and policy. Professor Silver currently serves as Associate Reporter on the American Law Institute's project on aggregate litigation. Additionally, Professor Silver co-authored a series of empirical studies of insured tort litigation in Texas, including medical malpractice litigation. Among his published articles are: *Physician's Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990-2003*, 36 J. LEGAL STUDIES S9 (2007); *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VANDERBILT L. REV. 1085 (2006); *Medical Malpractice Reform REDUX: Déjà Vu All Over Again?*, 12 WIDENER L. REV. 121 (2005); *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. (2005); *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. OF EMPIRICAL LEGAL STUDIES 207 (2005); *Speak Not of Error: Does Legal Fear Increase the Risk of Medical Error?*, REGULATION 52 (Spring 2005); *Does Civil Justice Cost Too Much? (Symposium: The Impact of Civil Justice on the American Economy & Polity)*, 80 TEX. L. REV. 2073 (2002).

Professor Silver's complete *Curriculum Vita* can be viewed at http://www.utexas.edu/law/faculty/cvs/csilver_cv.pdf

RICHARD W. WRIGHT is a Professor of Law at the Illinois Institute of Technology's Chicago-Kent College of Law. He is an elected member of the American Law Institute, past chair of the Torts and Compensation Systems Section of the Association of American Law Schools, and a member of the Advisory Boards of the Torts, Product Liability and Insurance Law Journal of the Social Science Research

Network, the Journal of Tort Law, and the Center for Justice and Democracy. He has been a visiting professor or fellow at the University of Texas in Austin, the University of Canterbury in New Zealand, Brasenose College and the University of Oxford in England, the University of Melbourne in Australia, and the Universidad Torcuato di Tella in Buenos Aires, Argentina. His published work appears in several international collections of leading scholarship on tort law and jurisprudence. Among his published articles are:

The Grounds and Extent of Legal Responsibility (Symposium Baselines and Counterfactuals in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate?), 40 SAN DIEGO L. REV. 1425 (2003); *Justice And Reasonable Care In Negligence Law,* 47 AM. J. JURIS. 143 (2002); *Negligence In The Courts: Introduction And Commentary (Symposium on Negligence in the Courts: The Actual Practice)*, 77 CHI.-KENT L. REV. 425 (2002); *The Principles Of Justice*, 75 NOTRE DAME L. REV. 1859 (2000).

Professor Wright's complete biographical profile can be viewed at http://www.kentlaw.edu/faculty/rwright/

APPENDIX B

CHARTS AND GRAPHS

CHART No. 1

Rate of All Licensed Physicians Per 100,000 People: Illinois vs. 13 Bordering and Neighboring States: 1963-2005

PHYSICIANS PER 100,000 (AMA, Physician Characteristics & Distribution in the US ("PC&D")	Year	IL	IN	IA	KS	KY	MI	MN	MO	NE	ND	OH	SD	TN	WI
1963-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs only; civ. pop. only)	**1963**	134	100	102	107	94	119	142	121	110	86	129	70	110	112
1965-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1965**	134	100	105	112	99	121	147	124	113	87	131	78	113	113
1970-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1970**	138	102	103	118	102	125	151	129	116	96	133	81	119	120
1971-AMA, PC&D 1971 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1971**	142	103	104	119	104	128	151	131	118	97	135	81	122	124
1974-AMA, PC&D 1974 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1974**	159	111	109	133	117	139	167	142	129	101	143	84	133	132
1975-AMA, PC&D 2007 ed., Tbl. 5.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1975**	164	116	113	137	122	145	172	148	134	106	147	90	139	137
1976-AMA, PC&D 1976 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1976**	170	121	116	141	127	149	177	155	139	115	152	93	146	141
1977-AMA, PC&D 1977 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1977**	175	127	121	150	132	149	185	158	145	123	156	100	150	150
1978-AMA, PC&D 1978 ed., Tbl. G (non-fed. MDs; civ. pop.)	**1978**	184	130	126	156	136	156	192	162	151	129	161	106	157	155
1979-AMA, PC&D 1979 ed., Tbl. G (non-fed. MDs; civ. pop.)	**1979**	192	133	129	160	141	163	196	167	153	134	167	110	165	160
1980-AMA, PC&D 2008 ed., Tbl. 6.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1980**	191	135	132	166	139	166	200	170	157	143	170	118	163	166
1981-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1981**	196	139	137	169	146	171	205	175	159	148	176	126	168	171
1982-AMA, PC&D 1983 ed., Fig. 5 (non-fed. MDs; civ. pop.)	**1982**	205	143	142	173	151	178	211	181	162	151	183	131	172	178
1983-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1983**	210	147	145	176	155	182	217	185	165	157	189	134	178	182
1985-AMA, PC&D 2008 ed., Tbl. 6.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1985**	224	159	156	187	166	192	227	200	178	176	203	156	196	193
1989-AMA, PC&D 1992 ed., Tbl. A-11 (non-fed. MDs; civ. pop.)	**1989**	228	167	163	192	177	198	236	206	183	181	209	154	204	202
1990-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**1990**	237	174	174	203	186	203	243	216	194	195	218	166	218	209
1992-AMA, PC&D 1994 ed., Tbl.A-18 (non-fed. MDs; civ. pop.)	**1992**	247	181	175	205	195	211	255	223	202	201	226	170	227	216
1993-AMA, PC&D 1995-96 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1993**	251	187	178	208	197	215	257	224	207	207	229	176	232	222
1994-AMA, PC&D 1996-97 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1994**	252	189	181	212	199	218	259	227	209	211	233	178	233	226
1995-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**1995**	268	203	192	227	214	232	272	240	225	230	246	197	254	241
1996-AMA, PC&D 1997-98 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1996**	271	205	192	227	214	237	268	241	223	225	246	198	254	242
1997-AMA, PC&D 1999 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1997**	277	212	195	230	224	239	275	243	237	242	252	200	262	250
1998-AMA, PC&D 2000-01 ed., Tbl. 5-18 (non-fed. MDs; civ. pop.)	**1998**	281	214	197	229	226	244	276	247	241	242	257	203	265	250
1999-AMA, PC&D 2001-02 ed., Tbl. 5.18 (non-fed. MDs; civ. pop.)	**1999**	287	219	200	232	232	249	282	250	247	246	261	211	269	256
2000-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2000**	289	221	202	241	234	253	289	251	251	250	266	226	269	260
2001-AMA, PC&D 2003 ed., Tbl. 5.17 (non-fed. MDs; civ. pop.)	**2001**	287	224	203	236	233	254	291	250	252	246	267	220	266	263
2002-AMA, PC&D 2004 ed., Tbl. 5.17 (non-fed. MDs; civ. pop.)	**2002**	289	229	204	239	239	253	293	252	255	253	273	225	272	269
2003-AMA, PC&D 2005 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2003**	297	238	215	248	248	262	308	259	267	267	281	240	283	279
2004-AMA, PC&D 2006 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2004**	298	236	213	251	252	267	313	261	267	271	289	247	286	284
2005-AMA, PC&D 2007 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2005**	302	239	213	254	255	270	319	264	269	269	293	249	291	286

GRAPH No. 1:

Rate of All Licensed Physicians Per 100,000 People—
Illinois vs. 13 Bordering and Neighboring States: 1963-2005

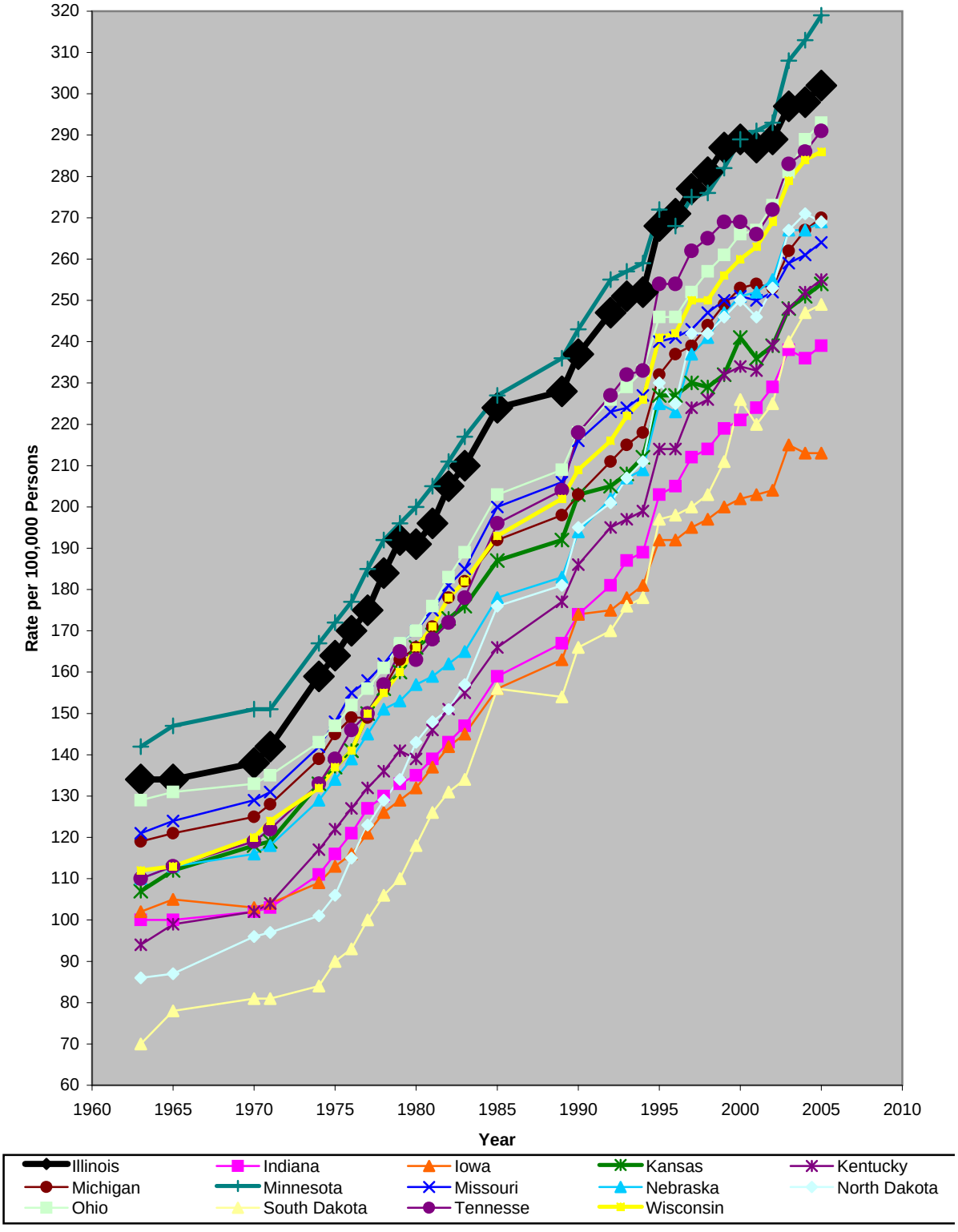


CHART No. 2: Rate of All Licensed Physicians per 100,000 People—Illinois vs. the Nine Bordering and Neighboring States with "Caps" and Two Non-Neighboring States with Caps Extolled by Lebron Defendants: 1963-2005

PHYSICIANS PER 100,000 (AMA, Physician Characteristics & Distribution in the US ("PC&D")	Year	IL	CA	OH	TX	IN	MO	NE	ND	SD	WI	KS	MI
1963-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs only; civ. pop. only)	**1963**	134	175	129	105	100	121	110	86	70	112	107	119
1965-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1965**	134	178	131	110	100	124	113	87	78	113	112	121
1970-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1970**	138	194	133	117	102	129	116	96	81	120	118	125
1971-AMA, PC&D 1971 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1971**	142	198	135	119	103	131	118	97	81	124	119	128
1974-AMA, PC&D 1974 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1974**	159	214	143	130	111	142	129	101	84	132	133	139
1975-AMA, PC&D 2007 ed., Tbl. 5.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1975**	164	219	147	135	116	148	134	106	90	137	137	145
1976-AMA, PC&D 1976 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1976**	170	222	152	140	121	155	139	115	93	141	141	149
1977-AMA, PC&D 1977 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1977**	175	232	156	150	127	158	145	123	100	150	150	149
1978-AMA, PC&D 1978 ed., Tbl. G (non-fed. MDs; civ. pop.)	**1978**	184	237	161	157	130	162	151	129	106	155	156	156
1979-AMA, PC&D 1979 ed., Tbl. G (non-fed. MDs; civ. pop.)	**1979**	192	246	167	161	133	167	153	134	110	160	160	163
1980-AMA, PC&D 2008 ed., Tbl. 6.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1980**	191	248	170	159	135	170	157	143	118	166	166	166
1981-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1981**	196	253	176	162	139	175	159	148	126	171	169	171
1982-AMA, PC&D 1983 ed., Fig. 5 (non-fed. MDs; civ. pop.)	**1982**	205	258	183	164	143	181	162	151	131	178	173	178
1983-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1983**	210	262	189	168	147	185	165	157	134	182	176	182
1985-AMA, PC&D 2008 ed., Tbl. 6.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1985**	224	273	203	186	159	200	178	176	156	193	187	192
1989-AMA, PC&D 1992 ed., Tbl. A-11 (non-fed. MDs; civ. pop.)	**1989**	228	272	209	185	167	206	183	181	154	202	192	198
1990-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**1990**	237	270	218	196	174	216	194	195	166	209	203	203
1992-AMA, PC&D 1994 ed., Tbl.A-18 (non-fed. MDs; civ. pop.)	**1992**	247	273	226	196	181	223	202	201	170	216	205	211
1993-AMA, PC&D 1995-96 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1993**	251	274	229	197	187	224	207	207	176	222	208	215
1994-AMA, PC&D 1996-97 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1994**	252	270	233	196	189	227	209	211	178	226	212	218
1995-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**1995**	268	281	246	215	203	240	225	230	197	241	227	232
1996-AMA, PC&D 1997-98 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1996**	271	276	246	208	205	241	223	225	198	242	227	237
1997-AMA, PC&D 1999 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1997**	277	278	252	213	212	243	237	242	200	250	230	239
1998-AMA, PC&D 2000-01 ed., Tbl. 5-18 (non-fed. MDs; civ. pop.)	**1998**	281	278	257	218	214	247	241	242	203	250	229	244
1999-AMA, PC&D 2001-02 ed., Tbl. 5.18 (non-fed. MDs; civ. pop.)	**1999**	287	280	261	222	219	250	247	246	211	256	232	249
2000-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2000**	289	286	266	224	221	251	251	250	226	260	241	253
2001-AMA, PC&D 2003 ed., Tbl. 5.17 (non-fed. MDs; civ. pop.)	**2001**	287	282	267	219	224	250	252	246	220	263	236	254
2002-AMA, PC&D 2004 ed., Tbl. 5.17 (non-fed. MDs; civ. pop.)	**2002**	289	284	273	221	229	252	255	253	225	269	239	253
2003-AMA, PC&D 2005 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2003**	297	294	281	230	238	259	267	267	240	279	248	262
2004-AMA, PC&D 2006 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2004**	298	295	289	231	236	261	267	271	247	284	251	267
2005-AMA, PC&D 2007 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2005**	302	299	293	234	239	264	269	269	249	286	254	270

GRAPH No. 2: Rate of All Licensed Physicians per 100,000 People—Illinois vs. the Nine Bordering and Neighboring States with "Caps" and theTwo Non-Neighboring States with Caps Extolled by the *Lebron v. Levi-D'Ancona* Defendants and Their *Amici* : 1963-2005

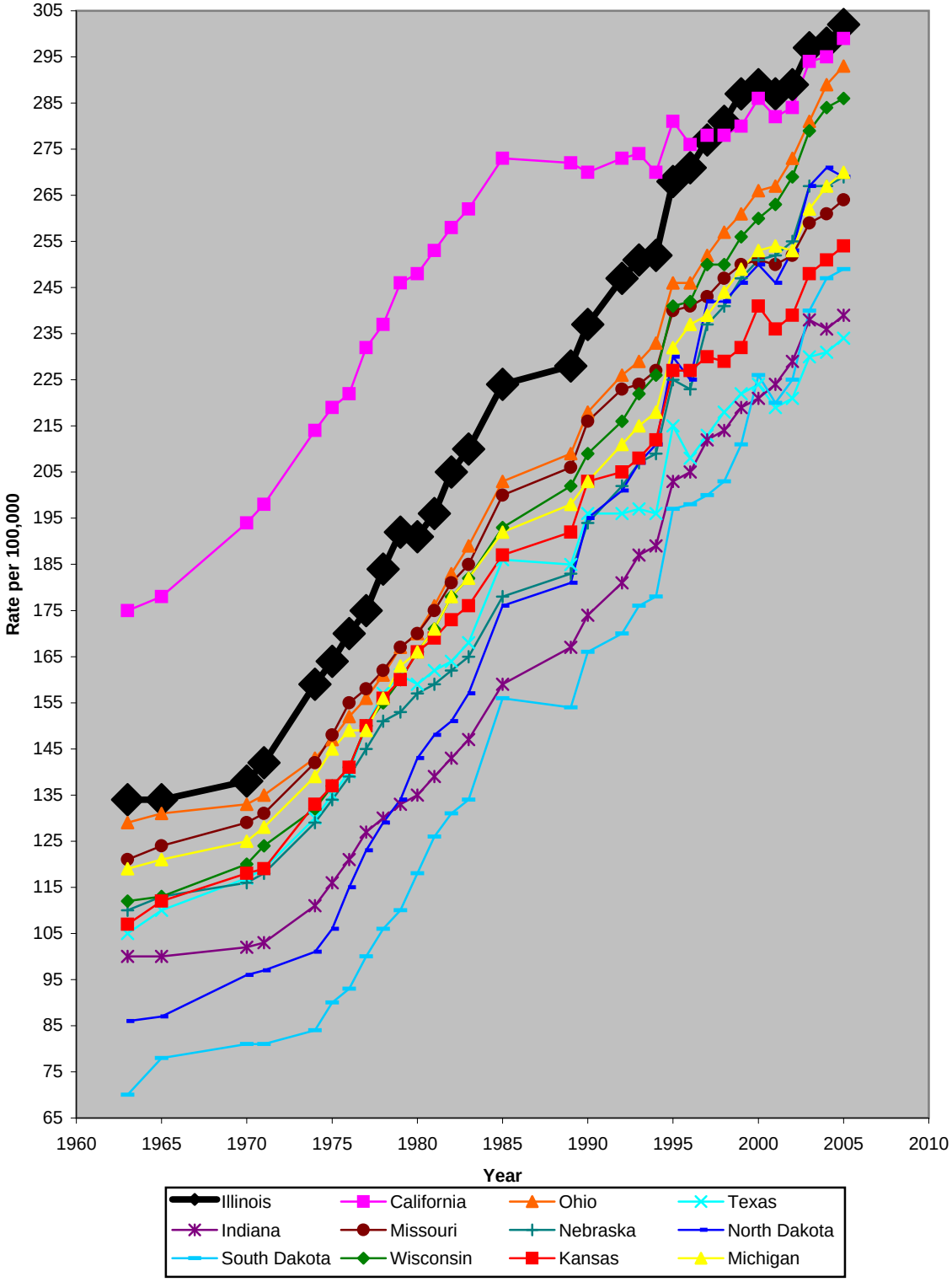


CHART No. 3: Rate of All Licensed "Patient Care" Physicians in Illinois per 100,000 People: 1993-2005

	Year	All Licensed "Patient Care" Physicians	Rate of All Licensed "Patient Care" Physicians
1993 -- AMA, PC&D 1994 ed., Tbl 12	**1993**	24515	209.58
1995 -- AMA, PC&D 1996-97 ed., Tbl 12	**1995**	26054	220.24
1997 -- AMA, PC&D 1994 ed., Tbl D-12	**1997**	27733	233.13
1999 -- AMA, PC&D 2001-02 ed, Tbl 3.13	**1999**	27779	229.05
2001 -- AMA, PC&D 2003-04 ed., Tbl 3.9	**2001**	29116	233.26
2003 -- AMA, PC&D 2005 ed., Tbl 5.19	**2003**	30264	239.18
2005 -- AMA, PC&D 2007 ed., Tbl 3.7	**2005**	31172	244.24

**All calculations of rates of physicians per 100,000 are either taken from the relevant editions of the AMA'S PC&Ds or, if the AMA does not provide such figures, calculated on the basis of:*
a) AMA data regarding physicians distribution (again drawn from the relevant editions of the AMA's PC&Ds)

b) Illinois population data from the Illinois Dept. of Public Health, e.g., "Illinois Estimated Population, 2000-2005" (http://www.idph.state.il.us/health/estpop2000_to_2009.htm; avail. July 24, 2008)

GRAPH No. 3: Rate of All Licensed "Patient Care" Physicians in Illinois per 100,000 People: 1993-2005

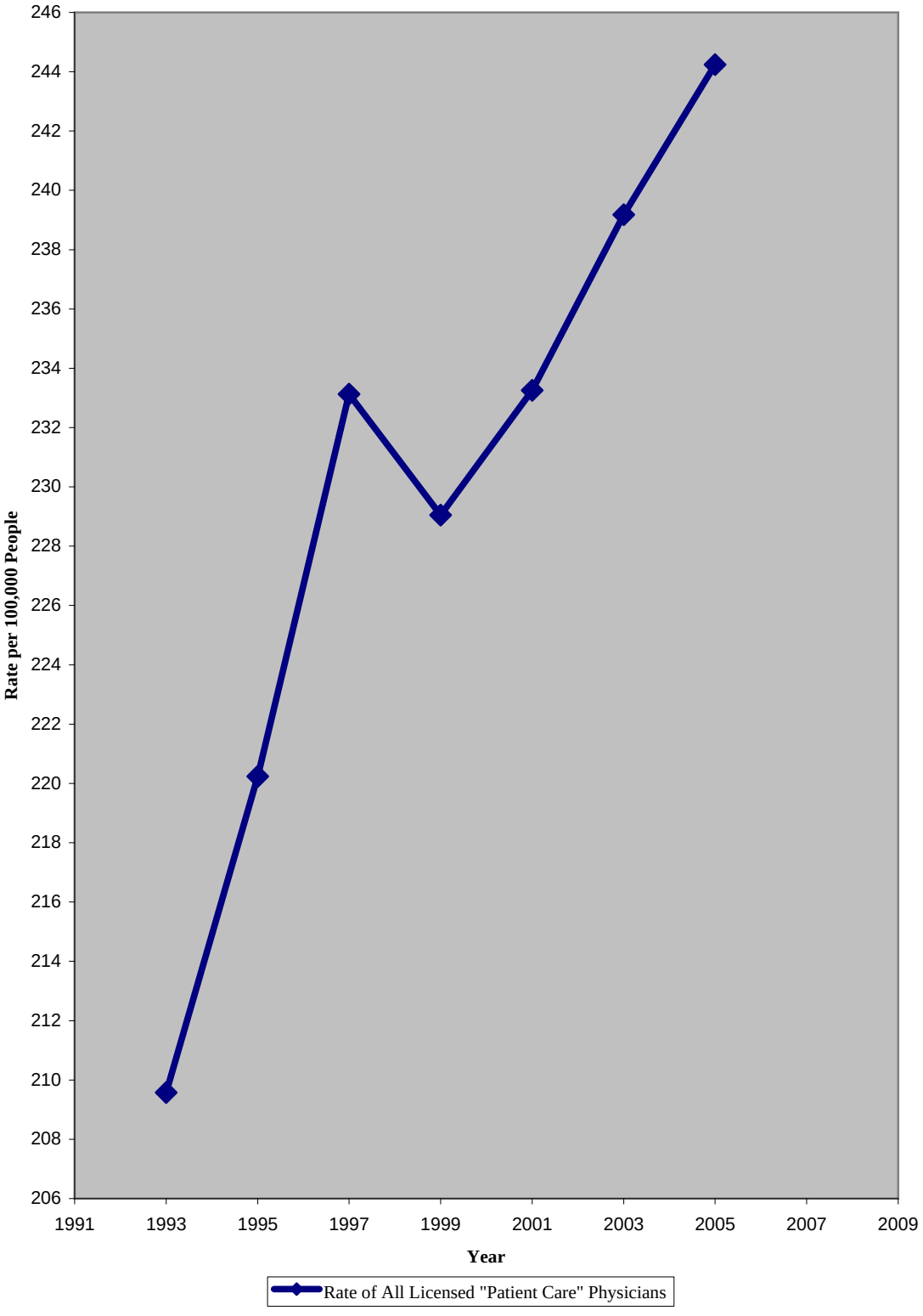
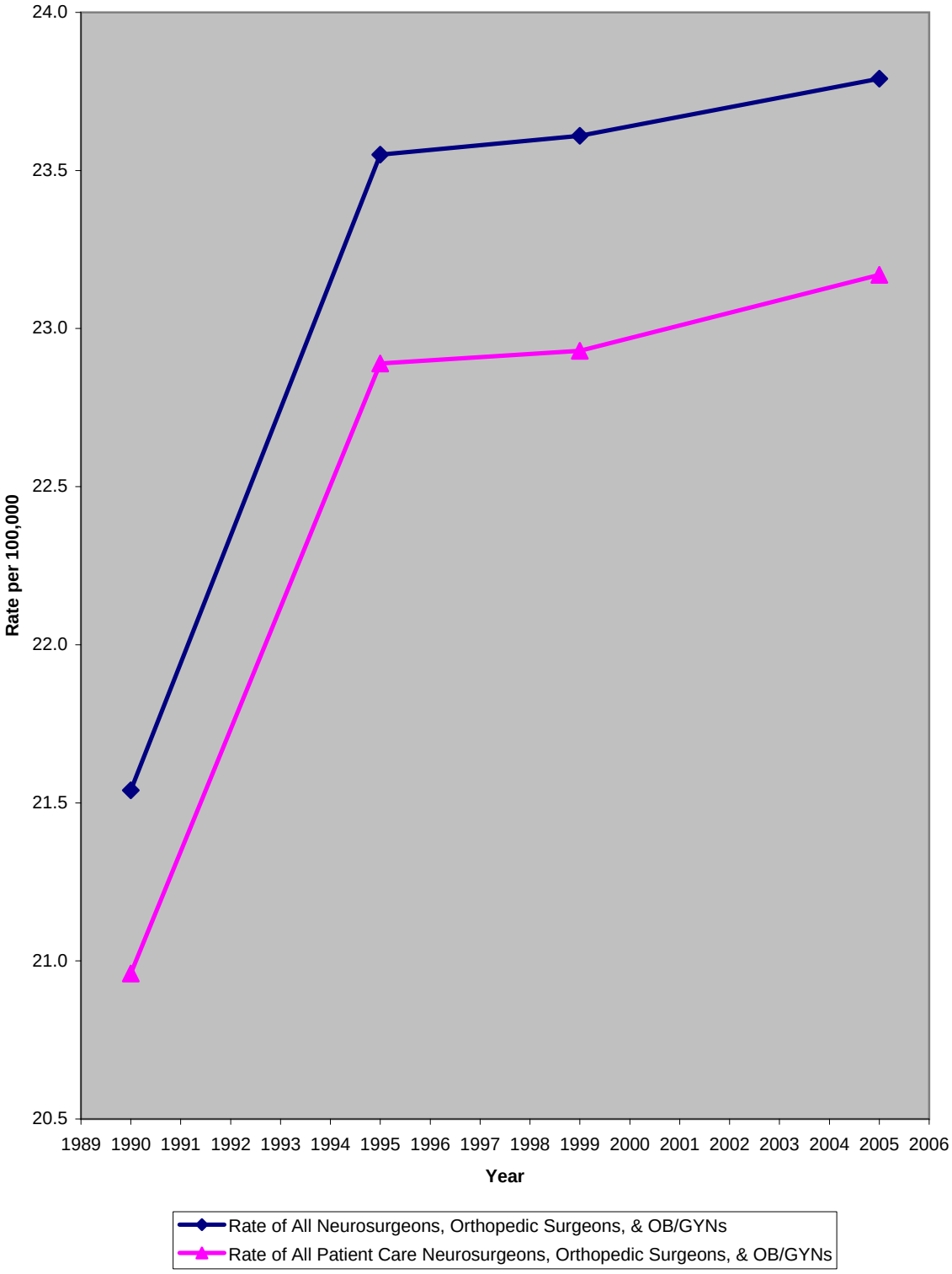


CHART No. 4: Rate of Illinois Specialists and "Patient Care" Specialists Per 100,000: 1990-2005

		All Licensed Physicians	All Licensed "Patient Care" Physicians	All Licensed General Surgeons	All Licensed "Patient Care" General Surgeons	All Licensed Neurosurgeons, Orthopedic Surgeons & OB/Gyns	All Licensed "Patient Care" Neurosurgeons, Orthopedic Surgeons & OB/Gyns	Rate of All Licensed Neurosurgeons, Orthopedic Surgeons & OB/Gyns per 100,000	Rate of All Licensed "Patient Care" Neurosurgeons, Orthopedic Surgeons & OB/Gyns per 100,000
1990 -- AMA, PC&D 1992 ed., Tbl. 9	1990	26603	22396	1681	1619	2462	2396	21.54	20.96
1995 -- AMA, PC&D 1996-97 ed., Tbl. 9	1995	29614	26054	1573	1516	2786	2709	23.55	22.89
1999 -- AMA, PC&D 2001-02 ed., Tbl. 3.9	1999	33803	27779	1663	1593	2866	2782	23.61	22.93
2005 -- AMA, PC&D 2007 ed., Tbl. 3.7	2005	38513	31172	1553	1501	3037	2957	23.79	23.17

**All calculations of rates of physicians per 100,000 are either taken from the relevant editions of the AMA'S PC&Ds or, if the AMA does not provide such figures, calculated on the basis of:*
a) AMA data regarding physicians distribution (again drawn from the relevant editions of the AMA's PC&Ds)
b) Illinois population data from the Illinois Dept. of Public Health, e.g., "Illinois Estimated Population, 2000-2005" (http://www.idph.state.il.us/health/estpop2000_to_2009.htm; avail. July 24, 2008)

<u>GRAPH No. 4</u>: Rate of Illinois Specialists and "Patient Care" Specialists Per 100,000: 1990-2005



CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief is, excluding the Certificate of Service and Appendix is 50 pages.

EDWARD J. KIONKA
Southern Illinois University School of Law
Lesar Law Building
1150 Douglas Drive, MS 6804
Carbondale, IL 62901
Phone: (618) 521-5555

Attorney for Amici Curiae Neil Vidmar, et al.

CERTIFICATE OF SERVICE

The undersigned certifies that he submitted an original and one copy of the foregoing *Amicus Brief* of the Twenty-Four Professors to an overnight courier service on August 21, 2008 for next day delivery to the following address:

Clerk of the Court, Illinois Supreme Court
Supreme Court Building
200 E. Capitol Ave.
Springfield, IL 62701

In addition, the undersigned certifies that copies of the foregoing *Amicus Brief* of the Twenty-Four Professors were served on counsel of record by depositing the same in the United States mail, with postage prepaid, on August 21, 2008, addressed to:

Jeffrey M. Goldberg
Jeffrey M. Goldberg & Associates
20 North Clark Street
Suite 3100
Chicago, IL 60602

Eugene A. Schoon
Gary Feinernan
Sidley & Austin LLP
One South Dearborn Street
Chicago, IL 60603

Todd A. Smith
Devon Bruce
Power Rogers & Smith, P.C.
Three First National Plaza
70 West Madison Street, 55th Floor
Chicago, IL 60602

Christopher Bargione
Collins & Bargione
One North LaSalle Street
Suite 2235
Chicago, IL 60602

Robert S. Peck
Francine A. Hochberg
Center for Constitutional Litigation, P.C.
777 6th Street, NW, Suite 520
Washington, D.C. 20001

Michael A. Scodro
Solicitor General
Office of the Illinois Attorney General
100 West Randolph Street
12th Floor
Chicago, IL 60601

David C. Hall
Hugh Griffin
Hall, Prangle & Schoonveld, LLC
200 South Wacker Drive, Suite 3300
Chicago, IL 60606

Brian Murphy
Hofeld & Schaffuer
30 North LaSalle Street, Suite 3120
Chicago, IL 60602

Diane I. Jennings .
Anderson Rasor & Partners
55 East Monroe Street, Suite 3650
Chicago, IL 60603

Marc W. Martin
53 West Jackson Boulevard, Suite 1420
Chicago, IL 60604

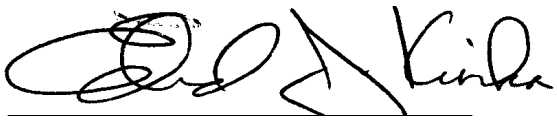
Richard H. Donohue
Karen Kies DeGrand
Donohue Brown Mathewson & Smyth
140 South Dearborn Street, Suite 800
Chicago, Illinois 60603

Brett E. Legner
Office of Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, IL 60601

Saul J. Morse
Brown Hay & Stephens LLP
205 South Fifth Street, Suite 700
Springfield, Illinois 62701

Theodore B. Olson
Douglas. R. Cox
Andrew S. Tulumello
Gibson, Dunn, & Crotcher, LLP
1050 Connecticut Avenue·
Washington, D.C. 20036

John B. Kralovec
Andrew B. Tarnoff
Kralovec, Jambois & Schwartz
60 West Randolph Street, 4th Floor
Chicago, IL 60601



Edward J. Kionka
Bar No. 1469290
Southern Illinois University School of Law
Lesar Law Building
1150 Douglas Drive, MS 6804
Carbondale, IL 62901
Phone: (618) 521-5555
Fax: (815) 642-9477
Email: ted@KionkaLaw.com