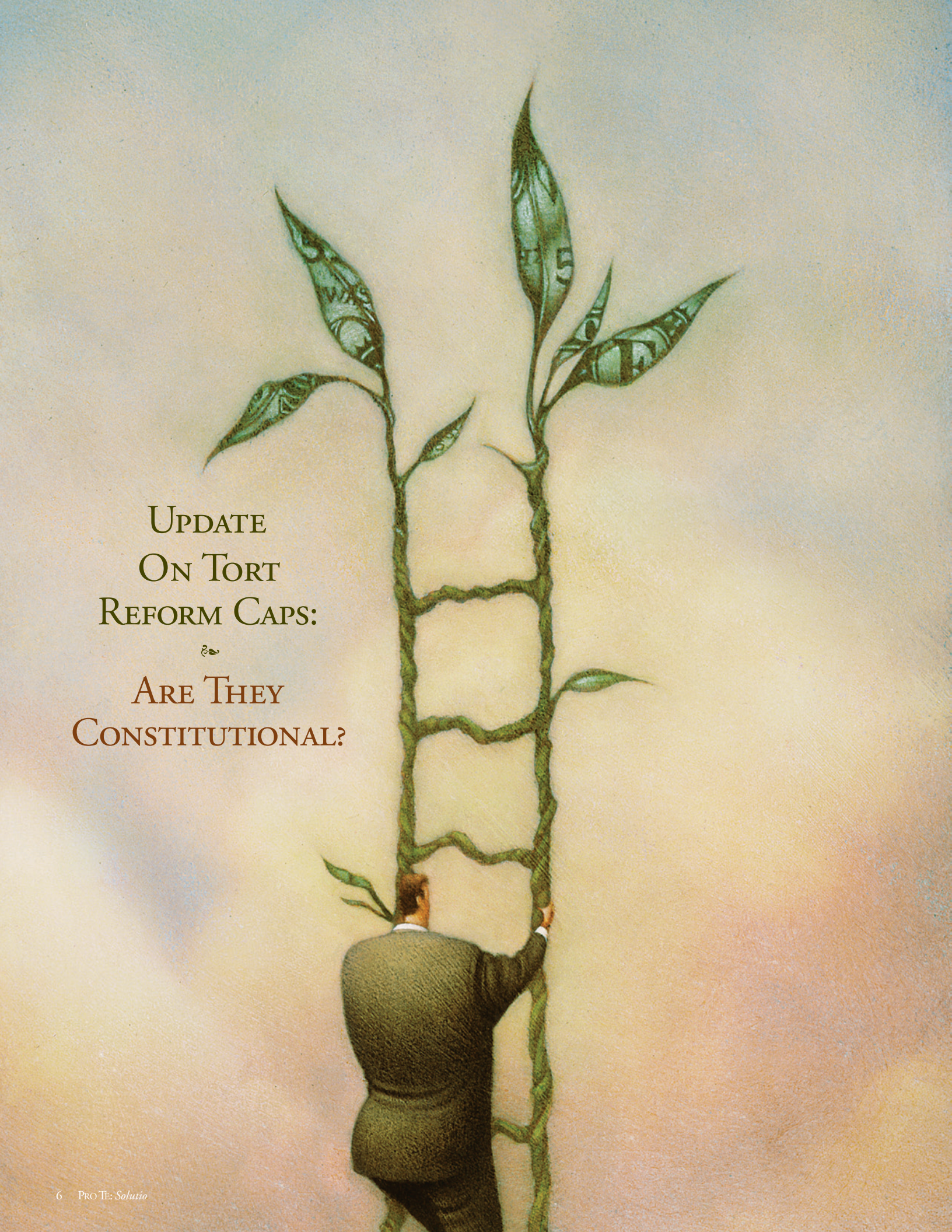

Update On Tort Reform Caps: Are They Constitutional?

Our October 2008 edition of *Pro Te Solutio* featured the *Double-Quick, Inc. v. Lymas* case now pending in the Mississippi Supreme Court and represents the first challenge to Mississippi's statute that limits the amount of non-economic damages recoverable in tort suits to $1 million.[1] The court heard oral argument in *Lymas* on June 8, 2010.[2] This update addresses the recent decisions handed down on the issue of the constitutionality of caps on damages as we await a ruling from the Mississippi Supreme Court on the issue.

In July 2009, a challenge was again made to Miss. Code Ann. 11-1-60 and its cap on damages in *Learmonth v. Sears Roebuck & Co.*, No. 4:06cv2252878, 2009 WL 2252878 (S.D. Miss. July 28, 2009). The court upheld the constitutionality of the statute. This decision has been appealed to the 5th Circuit and is still in the briefing stage.

Challenges to these limitations have been made in other states as well. On March 22, 2010, the Georgia Supreme Court, in a unanimous decision, ruled that the statutory cap on medical malpractice damages is unconstitutional in *Nestlehutt v. Atlanta Oculoplastic Surgery, P.C.*, 691 S.E.2d 218 (Ga. 2010). The statute at issue in *Nestlehutt* was OCGA §51-13-1, enacted in 2005. This section of Georgia's statutory code limits awards of non-economic damages in medical malpractice actions to $350,000. After a jury award of $900,000 in non-economic damages, the plaintiff moved to have the statute declared unconstitutional. The trial court granted the motion, refused to limit the award pursuant to OCGA §51-13-1, and found that the statute violates the Georgia Constitution by encroaching on the right to a jury trial, governmental separation of powers, and the right to equal protection.

The Georgia Supreme Court affirmed the trial court's ruling that the non-economic damages cap in OCGA §51-13-1 violates the right to a trial by jury. The court noted that the purpose of OCGA §51-13-1 was "to address what was classified as a crisis affecting the provision and quality of healthcare services in this state."[3] The amount of damages sustained by a plaintiff is an issue of fact. The court stated that this has long been the law, and rulings establishing that damages are an issue of fact date back to 1935. Further, the court found that non-economic damages existed with even the very first claims of negligence that preceded the adoption of Georgia's constitution in 1798.[4]

In its analysis of the arguments in favor of the cap, the court refused to accept that cap limitations are analogous to remittitur statutes or statutes authorizing doubling or treble damages. The court distinguished the Legislature's ability to modify or abrogate common law and the inability of the Legislature to abrogate constitutional rights. The court held: "The very existence of caps, in any amount, is violative of the right to trial by jury."[5] Of particular interest is that the court specifically considered and held that the ruling that OCGA §51-13-1 is unconstitutional applies retroactively.[6]

Limitation of *non-economic* damages in *personal injury* suits, and *particularly medical malpractice* suits, are *vital parts* of the *tort reform efforts undertaken in many* U.S. jurisdictions *in the early* 2000s. Current *challenges* to the *constitutionality* of those caps may be *ominous* harbingers of the future of *tort reform*.

Three weeks before the ruling in *Nestlehutt* by the Georgia Supreme Court, Illinois' high court struck down its cap on non-economic damages in medical malpractice actions in *Lebron v. Gottlieb Memorial Hospital*, No. 105741, 2010 WL 375190 (Ill. Feb. 4, 2010). The *Lebron* Court held that the statutory cap violated the separation clause of Illinois Constitution (Ill. Const. 1970, art. II, §1). The result is not surprising given Illinois precedent. In 1997, the Illinois Supreme Court struck down the limitation on non-economic damages in personal liability suits that had set a $500,000 cap.[7] The *Best* and *Lebron* courts relied specifically on the purpose of the separation of powers clauses which is "to ensure that the whole power of two or more branches of government shall not reside in the same hands" and to prohibit the legislature from enacting laws that unduly fringe upon the inherent powers of judges.[8]

Kansas also has a case before its Supreme Court challenging a limit of $250,000 on non-economic damages in personal injury lawsuits.[9] That court heard oral argument on October 29, 2009. The Kansas legislature enacted the statute in 1988. It was challenged in 1990, and the court, which at that time was a conservative court, upheld the limit on damages.[10] The Kansas court has not issued a ruling.

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[1] *Double-Quick v. Lymas*, No. 2008-CA-01713-SCT (Miss. Sup. Ct.); see *Pro Te Solutio*, October 2008, Vol. 1 No. 4, available at http://www.butlersnow.com/news/newsletters.htm.

[2] Oral argument can be downloaded at http://mssc.wmlive.internapcdn.net/live_mssc_vitalstream_com_main-court-room.

[3] *Nestlehutt*, 621 S.E.2d at 732.

[4] *Nestlehutt*, 621 S.E.2d at 734.

[5] *Nestlehutt*, 621 S.E.2d at 736.

[6] *Nestlehutt*, 621 S.E.2d at 739-40.

[7] *Best v. Taylor Machine Works*, 689, NE2d 1057 (Ill. 1997).

[8] *Best*, 689 NE2d at 1078.

[9] *See Miller v. Johnson*, No. 99818, oral argument heard on October 29, 2009; *see also* KSA 60-19a02.

[10] *Samsel v. Wheeler Transportation Servs., Inc.*, 789 P.2d 541 (Kan. 1990).

Written *by* Alyson Jones