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Comment

***509 THE MEDICAL MALPRACTICE CRISIS - WHO WILL DELIVER THE BABIES OF
TODAY,
THE LEADERS OF TOMORROW?**

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"The nation's health care system is confronting a crisis." [FN1] Throughout the country, obstetricians have refused to take new patients, [FN2] and some have even refused to deliver the pregnant women to whom they were providing prenatal care. [FN3] Skyrocketing medical liability premiums are forcing doctors in high-risk specialty areas, such as obstetrics, to stop practicing medicine. [FN4]

In order to save our health care system and its patients, action must be taken by Congress. Currently, Republicans in Congress have proposed the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act in response to the crisis. [FN5] Although not passed into law, the HEALTH Act is the first federal statute that has the ability to tame the out of control malpractice premiums doctors are now forced to pay.

***510** This comment will focus on the problem of escalating medical malpractice liability insurance premiums and the concomitant effects on physicians, particularly those specializing in obstetrics. Part I establishes that excessive jury awards in medical malpractice lawsuits have caused the current crisis in America's health care system. Particular attention will be paid to states that have experienced a virtual exodus of physicians, and this comment will argue that fear of liability without limits is the cause of this exodus. Part II will discuss the success of California's venture to limit malpractice liability and curtail medical malpractice insurance premiums. This comment argues that California serves as the model for other states to follow. In contrast, Part III discusses New Hampshire's failed attempt to limit medical malpractice liability.

This comment uses New Hampshire's failure as an invitation for Congress to enact statutory reform that would be binding on the States pursuant to Congress' preemption power in the Constitution. Part IV thus examines the Federal government's proposed response to the medical malpractice crisis and argues that Congress has the authority to promulgate tort reform legislation to curtail the medical malpractice problem. If the Federal government does not act in this manner, there will be a lack of doctors to deliver the leaders of tomorrow and the mothers of today.

I. THE CURRENT PROBLEM

In the past thirty years, "[m]edicine has been transformed. It's as if someone smashed the vial containing professional judgment. Legal fear has a 'corrosive effect' on the doctor-patient relationship ... as 'physicians, in a corner of their minds, regard patients as potential medical malpractice claimants.'" [FN6] As liability insurance premiums increase at alarming rates, [FN7] many obstetricians find that they cannot afford to **deliver babies**. [FN8] Without liability insurance most states will not allow doctors to practice medicine; therefore, as rates continue to *511 rise drastically, [FN9] doctors leave the profession, retire early, or move to states with lower liability insurance premiums or more hospitable legal systems. [FN10]

The American College of Obstetrician and Gynecologists (ACOG) has identified nine "Red Alert" hot states [FN11] where patient care may soon be jeopardized because of the insurance crisis facing America's doctors. [FN12] These nine "hot states" include Pennsylvania, West Virginia, Florida, Mississippi, Nevada, New Jersey, New York, Texas, and Washington. [FN13] These are all states in which liability insurance premiums are driving doctors out of the state [FN14] or completely out of the practice of medicine. [FN15]

Insurance companies argue that the rates of high-risk specialty doctors have to be increased because of excessive jury awards to injured patients. One example involves a five-year-old child who suffered injuries during birth. A New Jersey jury awarded the family *512 \$84 million. [FN16] The cause of drastically high jury awards can usually be correlated to how convincing or likeable the plaintiff's attorney can be. [FN17] Catherine Crier in *The Case Against Lawyers* asserts, "Litigation is no longer a crapshoot, it is becoming a sure thing Human life is now quantified in astronomical terms. In 1999 the ten biggest jury awards to individual plaintiffs totaled almost \$9 billion - three times the amount in 1998. One verdict delivered \$1.2 billion to the family of [a woman who died after a go-cart accident]." [FN18]

The beginning of 2003 saw a surgeon walkout in West Virginia. [FN19] The surgeons chose not to renew their contracts which had expired on December 31, 2002, in protest to soaring medical malpractice insurance costs. The surgeon walkout caused elective surgeries in "northern West Virginia [to be] canceled or ... moved. In Pennsylvania, a similar walkout was averted." [FN20] The nine "hot states" have all attempted to fix the problem of ever increasing liability premiums; however, most of the legislation enacted by these states will have a difficult time surviving state constitutionality challenges. [FN21] One state that has placed an effective cap on non-economic damages is California. [FN22] California's Medical Injury Compensation Reform Act (MICRA) of 1975 has not only passed legal challenges by trial lawyers, it is also viewed as the most "successful model of reform." [FN23]

In order to fully understand how the crisis has affected patients and doctors throughout the country, a brief look at three "Red Alert" hot states -- Mississippi, Nevada and Pennsylvania -- will illustrate the severity of the crisis.

*513 A. Mississippi

In December 2002, the Mississippi state legislature voted to tighten rules on where cases can be tried, cap punitive damage awards, limit the state's joint-and-several liability rule so that companies with little blame can't be soaked as deep pockets, bar advertising by attorneys who aren't licensed to practice in Mississippi and slap a fine on the filing of frivolous lawsuits. [FN24]

This legislation was passed in response to a doctor shortage in the state which started months before any legislative action took place. [FN25]

In Mississippi, the crisis is evident by the more than half of all physicians who have left the profession in the Delta region. [FN26] The doors to clinics and medical offices are being closed because the doctors' liability insurance is routinely cancelled. [FN27] These are doctors who had initially chosen to practice in rural towns throughout Mississippi but have been forced to close their doors because their malpractice insurance was cancelled.

The increase in cost has led more than half of the medical doctors in Mississippi to stop practicing in the state. [FN28] Although challenging to any state, this is particularly devastating to Mississippi which has one of the lowest doctor-to-patient ratios in the United States. [FN29] The American Medical Association (AMA) found that there were "152 practicing physicians per 100,000 people in ... Mississippi." [FN30] Mississippi is suffering from a persistent shortage of doctors throughout the state, particularly in rural communities. In fact, few *514 cities under 20,000 have a practicing obstetrician. For example, Yazoo City, with a population of 14,550, has no practicing obstetricians. [FN31]

The drastic cost increase and subsequent loss of liability insurance is due in part to "'forum shopping,' by which plaintiffs' attorneys deliberately file their cases in counties known to award high damages - even if the case originates elsewhere." [FN32] The practice of forum shopping is becoming more common because of excessive jury awards by Mississippi juries.

B. Nevada

Nevada approved legislation [FN33] providing a \$350,000 cap on damages for pain and suffering which can only be exceeded if there is clear and convincing evidence that this amount is insufficient. [FN34] However, this legislation arose only after the state found itself with a virtual exodus of doctors. [FN35] Doctors in all specialties, especially high-risk specialties, have been leaving the profession because of the considerable increase in malpractice awards. [FN36] The insurance rates in Nevada were extremely high in the summer of 2002, as obstetricians were paying an average medical malpractice premium of \$108,000, representing a one-third increase from the previous year. [FN37]

The bill passed by the Nevada legislature was needed as doctors continue to feel the pinch of high liability insurance which has not *515 decreased as a result of the legislative measures thus far taken. [FN38] Instead, "One company raised Nevada malpractice base rates 25 percent last month [December 2002] and others have since requested increases of 93 percent and 17 percent." [FN39] The malpractice insurance rates that doctors in Nevada are paying will not decrease until the new legislation is challenged and upheld by the Nevada Supreme Court. Such challenges generally take years to make it up to the state supreme court as a result of the lengthy appellate processes. The insurance companies have seen numerous other states attempt to pass similar pieces of legislation which are then struck down by the highest state courts. [FN40]

C. Pennsylvania

Pennsylvania ranks second highest in the nation for total payouts for medical liability -- \$352 million in fiscal year 2000. [FN41] Although it had been **delivering babies** since its inception in 1892, Methodist Hospital of South Philadelphia was forced to stop providing this service. [FN42] The hospital indicated in its press release that it would continue to provide prenatal care to its patients, but that all deliveries would take place at Thomas Jefferson University Hospital. [FN43]

Pennsylvanians almost suffered the fate of their neighbors in West Virginia until, in late 2002, Governor-elect Ed Rendell announced a proposal which halted a planned doctors strike. [FN44] Rendell "appointed a special commission to consider short-term aid packages that would *516 keep the doctors working while the state trie[d] to develop a permanent solution." [FN45]

The Pennsylvania Medical Society Alliance [FN46] published statistics in 2002 that not only shocked the state of Pennsylvania but also the nation. The report found that in 2001, Pennsylvania Hospitals paid over \$180 million in additional premiums compared to the previous year. [FN47] These figures were a main reason why the "number of practicing obstetricians dropped 18% in the years 1997-2000." [FN48] The large rate increases in Pennsylvania are a direct result of "multiple verdicts in excess of \$50,000,000 in just the past two years." [FN49] Insurance companies claim that it is jury awards that force them to increase premiums paid by doctors. [FN50]

The nine "hot states" have all tried to fix the problem of increasing liability premiums; however, most of the legislation enacted by these states will have a difficult time passing state constitutionality challenges. [FN51] A state that has placed an effective cap on non-economic damages is California. [FN52] California's law not only passed legal challenges but also is viewed as the most "successful model of reform," because it has withstood state constitutional challenges. [FN53]

*517 II. A REFORMED STATE: CALIFORNIA

The Medical Injury Compensation Reform Act (MICRA) was enacted by the California legislature in 1975 [FN54] in an effort to ameliorate a medical liability insurance crisis. [FN55] The legislature enacted eight different civil code sections [FN56] to effect one of the largest overhauls of medical liability insurance. [FN57] The California Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing

serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments. [FN58]

Each section of the statute concerns a specific problem which arose in the mid-1970s with respect to soaring liability insurance premiums. [FN59] To understand the proposed Federal legislation, it is necessary to discuss each section of MICRA. [FN60]

A. California Civil Code Section 3333.1, Negligence of health care provider;
evidence of benefits and premiums paid; subrogation

This section of MICRA is extremely important because it provides the following:

***518** the defendant ... may produce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. [FN61]

In other words, this code section gives judges the power to reduce a jury verdict award by any amount contributed by a collateral source. [FN62] A collateral source generally refers to any source of payments other than from the defendant which compensates a plaintiff for damages suffered as a result of the defendant's alleged wrongdoing. [FN63] The purpose of this provision in MICRA, which, for purposes of discussion will be referred to as the "contra-collateral source provision," is to avoid "'double recovery' obtained by plaintiffs who have their medical expenses paid by their own health insurance and still obtain damages for such expenses from defendant tortfeasors." [FN64] The contra-collateral source provision in MICRA is one part of the act which was meant as a means of reducing the cost of medical malpractice insurance premiums paid by doctors. Not allowing victims to recover monies that their insurance company has already paid in medical expenses was thought to help lower jury awards and thus the premiums paid by doctors. [FN65] This provision is important because it illustrates that California is treating medical malpractice suits differently than other tort cases. In suits that do not fall under state medical malpractice statutes, victims are entitled to be fully compensated by the tortfeasor.

***519** Section 3333.1 of the California Civil Code was challenged in the case of *Barme v. Wood*, [FN66] where a wife brought suit on behalf of her husband for medical malpractice after he suffered brain damage following open heart surgery. [FN67] The husband, a police officer, had insurance through the city, which was a self-insurer. [FN68] In response the city filed a complaint in intervention to recover the expenses incurred by providing workers' compensation benefits to the officer. [FN69]

In *Barme*, the California Supreme Court held that the contra-collateral source provision of MICRA did not violate due process or equal protection under the California Constitution [FN70] because "the due process clause does not demand that the Legislature invariably allocate liability

on a negligence or fault basis." [FN71] The California Supreme Court in *Helfend v. Southern California Rapid Transit District* [FN72] explained that the rationale underlying the traditional collateral source rule excludes evidence of collateral source benefits:

This reasoning does not apply to workers' compensation benefits, because under California law plaintiffs have not been permitted to obtain a double recovery of such benefits. Either the employer has been entitled to obtain reimbursement from the tort recovery or the tort judgment has been reduced by the applicable workers' compensation benefits obtained by the employee. [FN73]

The court explained that by requiring a defendant in medical malpractice cases to reimburse workers' compensation or health insurance costs, many insurance companies would quickly exit the medical liability field, leaving a large number of doctors uninsured. [FN74] In dictum, the court observed that the legislature did not intend for the plaintiff's insurance or workers' compensation to be reimbursed. [FN75] By not allowing the plaintiff's insurance company to be reimbursed, MICRA allows for the high cost of medical bills and wages to be paid by someone other than the negligent doctor or his insurance provider.

***520 B. Section 3333.2, Negligence of health care provider; non-economic losses; limitation**

The heart of the MICRA statute is embodied in Section 3333.2. This section places a limit on the amount of money a plaintiff can receive for non-economic losses. The statute states that "[i]n no action shall the amount of damages for non-economic losses exceed two hundred fifty thousand dollars (\$250,000)." [FN76] Therefore, the plaintiff will recover a judgment lower than the actual jury award in the event that the jury awards over \$250,000 in non-economic damages. [FN77] By placing a cap on the amount of money an insurance company may have to pay, these companies are able to lower medical malpractice premiums paid by doctors, which in turn keeps medical doctors working in California. [FN78]

Non-economic damages are commonly defined as pain, suffering, inconvenience, disfigurement and other non-pecuniary damages. [FN79] The cap in this section of the statute only applies to non-economic damages, not pecuniary damages, such as lost wages or medical expenses. [FN80] As the Health Coalition on Liability and Access described it, the MICRA cap on non-economic damages "would guarantee full and unlimited recovery of a patient's economic damages: medical expenses, lost wages, ... and so on. These reforms would reasonably limit only the non-economic portion of an award." [FN81]

In *Fein v. Permanente Medical Group*, [FN82] the plaintiffs challenged the constitutionality of the cap on non-economic damages imposed by MICRA. With a statutory cap on non-economic damages mandated, the trial judge has the authority, and in fact is required, to reduce any *521 jury verdict awarding a plaintiff non-economic damages exceeding \$250,000. [FN83] In *Permanente*, the Supreme Court of California held that "placing a ceiling of \$250,000 on the recovery of noneconomic damages is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." [FN84] The California Supreme Court also found that "[s]o long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature." [FN85]

Therefore, since the Legislature restricted non-economic damages, the court refused to act, finding instead that section 3333.2 was "rationally related to legitimate state interests." [FN86] It is important to note that the California Supreme Court did not look at the cap placed on non-economic damages from a public policy perspective. Instead, the court affirmed the legislature's law-making ability as being rationally related to how the legislature wanted to solve the crisis in the mid-1970s.

C. Section 667.7, Action against health care provider; periodic payments of future damages; contempt; legislative intent

Sections 667.7 and 3333.2 of the California Civil Code are closely related as they both concern a money-related, legislatively imposed cap. Whereas section 3333.2 placed a cap on non-economic damages, section 667.7 allows for periodic payments of any award for future earnings exceeding \$50,000. [FN87] The Code requires that the award exceed \$50,000 in future damages and that the court must "make a specific finding as to the dollar amount of periodic payments" [FN88] and "the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment." [FN89] Along with requiring the court to make a finding as to the specific dollar amount of the future payments, it also has to specify the "interval between payments, and the number of payments or the period of time over which payments *522 shall be made" [FN90] and that "[s]uch payment shall only be subject to modification in the event of the death of the judgment creditor." [FN91] The statute further provides that if a court finds that the debtor fails to make payments to the creditor (plaintiff), the debtor will be found in contempt and forced to pay the damages. [FN92] The "loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support ... immediately prior to his death"; [FN93] however, "upon petition of any party in interest, [the court may] modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision." [FN94] The intent of the California legislature was to eliminate a windfall from a lump-sum recovery. [FN95]

This statutory provision allows a defendant to purchase an annuity paying a set sum for a stated length of time. This form of payment ensures that the plaintiff will have money for health care as needed for the rest of his life expectancy and will help keep premiums stable. [FN96] The Supreme Court of California has ruled that a large award is usually spent or poorly invested before the injured plaintiff incurs the medical expense or earnings loss which the award was intended to cover. [FN97] Jury awards, however, are meant to compensate victims throughout their life for losses they sustain as a result of the malpractice. The court noted that this structured pay-out eliminated a windfall to plaintiffs' heirs and only compensated the victim for sustained losses. [FN98]

In *American Bank and Trust Co. v. Community Hospital*, the plaintiff claimed that section 667.7 of the California Civil Code violated the state constitution's promise of equal protection. [FN99] The California Supreme Court held that "there can be no question but that - from the information before it - the Legislature could rationally have decided that the enactment might serve its insurance cost reduction *523 objective." [FN100] With its decision in *American Bank*, the court began employing a rational basis test when evaluating any provision of MICRA. If one

could rationally conclude that the provision passed by the Legislature would accomplish the goals set forth, then the provision was rational, and there was no violation of equal protection because the court concluded that the state legislature had rationally decided to limit awards. [\[FN101\]](#)

The plaintiff in *American Bank* also claimed that section 667.7 was unconstitutional because it impaired his constitutional right to a jury trial. [\[FN102\]](#) The court held that "new procedures better suited to the efficient administration of justice may be substituted if there is no impairment of the substantial features of a jury trial." [\[FN103\]](#) The court concluded that section 667.7 "should be interpreted to require the jury to designate the portion of its verdict that is intended to compensate the plaintiff for future damages," [\[FN104\]](#) and that the court's ability to structure the payments does not infringe upon a plaintiff's right to trial by jury. [\[FN105\]](#)

D. Section 340.5, Action against health care provider, three years from injury
or one year from discovery exceptions; minors

Section 340.5 changes the statute of limitations period during which California patients may bring suit by stating "the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." [\[FN106\]](#) This section of MICRA is designed to protect health care providers from having suits brought against them years after an alleged wrongful act.

There are two time requirements which an adult must satisfy in order to file a malpractice suit. [\[FN107\]](#) Even if an adult brings an action *524 within three years from the date of injury, he or she must still satisfy the one year "reasonable discovery" period. [\[FN108\]](#) However, even if the adult was to file suit within one year of "reasonable discovery," the action can still be barred if the one-year time limitation has expired. [\[FN109\]](#) When dealing with minors, the timing requirements to file a suit are different. Specifically, a suit "shall be commenced within three years from the date of the alleged wrongful act except that action by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday[,] whichever provides a longer period." [\[FN110\]](#) However, these timing requirements are inapplicable if the case involves fraud, intentional concealment, or the presence of a foreign body. [\[FN111\]](#)

E. Section 1295, Contract for medical services; mandatory provision; waiver of
right to sue; form of notice; nature of contract

This section of MICRA allows for a clause to be inserted into contracts for medical services, stating,

It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration. [\[FN112\]](#)

The use of arbitration, as opposed to going to trial, allows for medical malpractice disputes to be resolved with reduced economic cost to both parties and is usually more expedient than traditional court proceedings. [FN113] Although the insurance companies save a lot of time *525 and money through arbitration, plaintiffs do as well. Trials usually take years and verdicts are often appealed, whereas arbitration takes a shorter period of time and is more cost efficient. [FN114]

F. Section 6146, Limitations; periodic payments

This section of MICRA deals specifically with the pay structure of the legal fees of plaintiffs' counsel. In particular, this section does not allow attorneys to contract with plaintiffs on a contingency fee basis. Instead, the statute sets a pay schedule stating the percentage of the total recovery to which the attorney is entitled. Attorneys are unable to contract around these provisions in order to gain more money. Rather, they are only entitled to 40 percent on the first \$50,000; 33.3 percent on the next \$50,000; 25 percent on the next \$500,000 and only 15 percent on any amount which exceeds \$600,000. [FN115] Moreover, if either party elects to have periodic payments made pursuant to section 667.7, then the court must place a "total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated." [FN116]

The reasoning behind the rate structure limitation was to allow a greater portion of a settlement or jury award to go directly to the plaintiff. [FN117] Consequently, this fee schedule has been challenged in the California state courts. Attorneys, and at times their clients, assert that the rate structure set by section 6146 is inadequate and may have a detrimental effect on the willingness of attorneys to take medical malpractice cases.

In *Roa v. Lodi Medical Group, Inc.*, [FN118] the Supreme Court of California held that section 6146 is constitutional. [FN119] The plaintiff in this case claimed that it was a violation of due process rights and a violation of the separation of powers doctrine under the California constitution. [FN120] The court responded that it knew "of no authority which suggests that due process requires a single, uniform attorney fee *526 schedule for all areas of practice." [FN121] The next argument proffered by the plaintiff was that section 6146 violated the equal protection clause of California's constitution. Here, the Court held that the "Legislature could rationally have believed that unregulated contingency fee contracts - calling for potentially huge attorney fee awards if cases are won - play at least some part in leading so many plaintiffs to pursue malpractice claims that ultimately prove unsuccessful." [FN122] Hence, the legislature may have concluded that limiting contingency fees was an appropriate way of protecting plaintiffs from excessively high contingency fee arrangements which only diminish the plaintiff's award. [FN123]

G. Sections 364 and 365, Notice of intention; time; law governing; fictitious name; effect of failure to comply

These two sections require that no lawsuit for a medical malpractice claim will be filed "unless the defendant has been given at least 90 days prior notice of the intention to commence the action." [FN124] The defendant must be notified of "the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered." [FN125] Although a

violation of these sections does not mean that the plaintiff loses his right to sue, there may be grounds for the State Bar of California to investigate the attorney and impose sanctions. [FN126]

H. MICRA Conclusion

MICRA has become a national model for other states as well as the federal government. MICRA allows injured plaintiffs to receive unlimited relief for economic damages, while imposing a cap on non-economic damages. The California Supreme Court applied a rational basis test to determine whether the statutes were constitutional under the California Constitution. Although MICRA has been redrafted by *527 numerous other states, no one state has proven as successful as California. Instead, various state supreme courts have stricken replica MICRA Acts for violating state constitutions. One such state is New Hampshire.

III. NEW HAMPSHIRE'S FAILED ATTEMPT TO REGULATE MEDICAL MALPRACTICE

In the case of *Carson v. Hitchcock Clinic, Inc.*, [FN127] the New Hampshire Supreme Court found that legislative measures enacted "to address the problems of the medical injury reparations system" [FN128] violated New Hampshire's constitution. These measures were almost identical to California's MICRA Act of 1975.

The legislature found, prior to enacting this legislation, that the cost and size of claims posed a major threat to the state's health care system. [FN129] "Accordingly, RSA ch. RSA 507-C (Supp. 1979) was intended to codify and stabilize the law governing medical malpractice actions and to improve the availability of adequate liability insurance for health care providers at reasonable cost." [FN130]

The legislation enacted by New Hampshire included a cap on non-economic damage awards; [FN131] standards for expert witness qualifications; [FN132] a statute of limitations; a requirement of notice to the defendant by the plaintiff; [FN133] collateral sources of compensation to further reduce the non-economic recovery by the plaintiff; [FN134] and a contingent fee scale for plaintiffs' attorney's fees. [FN135]

The New Hampshire Supreme Court, although not oblivious to the crisis surrounding New Hampshire's medical doctors, found that the new legislation violated the state constitution. [FN136] The court held that the legislation unconstitutionally distinguishes medical malpractice *528 victims from victims of other forms of negligence. [FN137] The court was concerned that victims of other torts could receive unlimited recovery whereas victims of medical malpractice were limited in their non-economic loss awards to \$250,000 or less as stipulated by the legislation. [FN138]

Another section of the New Hampshire legislation required a testifying witness to have been an expert at the time the negligence occurred, and the court had to find "that the witness was competent and dully qualified to render or supervise equivalent care to that which is alleged to have caused the injury, at the time that such care was rendered." [FN139] The New Hampshire Supreme Court stated that it is reasonable and necessary that experts be competent to render the care to which they are testifying. [FN140] However, the court found that "the requirement that the witness be an expert in the field at the time the defendant rendered the alleged negligent care

does not substantially further those objectives and places too burdensome a restriction on medical malpractice claimants who require expert testimony." [FN141] Consequently, the court invalidated that portion of the statute having the greatest impact on expert testimony in medical negligence suits. The state legislature may have gone too far by including this provision in the statute, because it is possible that without this provision the court would not have felt compelled to strike it down.

The state legislature also provided for a statute of limitations on medical malpractice suits requiring a plaintiff to bring suit within two years of the injury or two years from discovery of the injury. [FN142] If the plaintiff was under age eight when the alleged negligence took place, she had until her tenth birthday to bring suit under this legislation. [FN143]

The New Hampshire Supreme Court found that Section 507-C:4 of the New Hampshire Revised Statutes was "invalid insofar as it makes *529 the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon the discovery of a foreign object in the injured person's body." [FN144] The court also found that the rule is unfair because it denies a plaintiff recovery before he had a reasonable chance to discover the existence of the negligence. [FN145] The New Hampshire Supreme Court boldly stated that "in all medical malpractice cases in which the cause of action is not discovered and could not reasonably be discovered during the applicable limitation period, that period will not begin to run until the time the plaintiff discovers both his injury and its cause." [FN146] This statement by New Hampshire's highest court reflects the view that if a plaintiff does not discover the cause of an injury for many years, he should not lose the right to sue simply because he could not identify the source of the negligence.

The court then moved on to the notice requirement set forth in Section 507-C:5 of the New Hampshire Revised Statutes. This part of the legislation required "that no action for medical injury shall be commenced until at least sixty days after service upon the defendant, by registered or certified mail, of a written notice ... setting forth ... the alleged injuries and damages claimed." [FN147] The court acknowledged that the legislative intent of the notice requirement was "to provide the malpractice defendant with some sort of warning before the commencement of expensive litigation," [FN148] which would allow the defendant to "evaluate the claim and consider the possibility of settlement before costly litigation is undertaken." [FN149] While acknowledging that the legislature had a legitimate reason for including a notice requirement, the court held that the legislature did not have a legitimate objective for the notice requirement. [FN150] The court, in dictum, stated that the malpractice defendant has enough time to decide to settle the suit after he is "served with process." [FN151] Once served, the defendant can assess the plaintiff's stated claims and decide whether he is willing to settle the claim immediately or if he believes he was not negligent and can prove this in court. The court believed allowing a notice requirement would only unjustly hinder *530 plaintiffs. [FN152] The court considered the notice requirement to be a "procedural trap for the unwary and not an effective means to encourage pretrial settlement or investigation," [FN153] holding that this "procedural hurdle" [FN154] had the ability to "prolong the time and increase the cost of medical malpractice litigation" [FN155] because if a plaintiff does not comply with the notice requirement, she then has the ability (within one year) to file "a second suit to recover for [her] medical injuries." [FN156] For this

reason the notice requirement has the ability of postponing the time period over which a malpractice victim may recover. Therefore, the court found that any benefit from the legislation was outweighed by the restrictions it imposed on plaintiffs. The court voided Section 507-C:5 because it found the statute to be unconstitutional. [FN157]

When considering the damages a plaintiff may recover, the court reviewed the limit on non-economic damages, which was capped at \$250,000, and the plaintiff's compensation from collateral sources.

RSA 507-C:7 I (Supp.1979) provides that the defendant may introduce evidence of the plaintiff's compensation from collateral sources, that the plaintiff may then offer evidence of any costs incurred in securing such compensation, and that the jury shall be instructed to reduce the award ... by a sum equal to the difference. [FN158]

Collateral sources include workers' compensation as well as the plaintiff's own insurance. The court stated:

Abolition of the [collateral source] rule ... presents the anomalous result that an injured party's insurance company may be required to compensate the victim even though the negligent tortfeasor is fully insured. Not only does this abolition patently discriminate against the victim's insurer, it may eventually result in an increased insurance burden on innocent parties. [FN159]

The court pointed out that this section prevented plaintiffs from fully recovering the economic losses suffered by malpractice plaintiffs, when *531 it allowed collateral sources to pay the medical bills of plaintiffs. [FN160] The state supreme courts of California and New Hampshire have taken opposite views with regards to the collateral source rule. California has taken a more liberal view while the New Hampshire Supreme Court has decided not to differentiate between malpractice victims and other tort victims.

The Carson court found the "relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak for two reasons: 'First, paid-out damage awards constitute only a small part of total insurance premium costs. Second, and of primary importance, few individuals suffer non-economic damages in excess of \$250,000.'" [FN161] As mentioned earlier, the court did not approve of treating malpractice victims differently than other tort victims by limiting the amount of recoverable non-economic damage. [FN162] The court considered it "unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore more in need of compensation." [FN163] For all of these reasons, the court found the cap on damages and the abolition of the collateral source rule invalid. The court did state, however, that remittitur is always available to help curb excessive awards by juries. [FN164]

Attorney's fees were the final aspect of the legislation addressed by the court. Section 507-C:8 of the New Hampshire Revised Statutes "establishes a contingent fee scale for attorneys representing parties in medical injury actions." [FN165] The legislature implemented a contingent fee scale in order to ensure that malpractice plaintiffs, not their attorneys, received the bulk of the jury award. The court found that "the regulation of attorney's fees solely in the area of medical malpractice inevitably will make such cases less attractive to the *532 plaintiff bar."

[FN166] and thus would unfairly discriminate against medical malpractice plaintiffs. [FN167]

As shown above, the New Hampshire Supreme Court held that although the legislature had a noble intent to curb the cost of medical malpractice insurance in the late 1970s, they did not succeed. Instead, the court found that the legislature singled out the medical malpractice plaintiffs as opposed to other tort victims. Despite the strong similarities between New Hampshire's legislation and California's MICRA, the states' distinct constitutions and their judiciaries' unique beliefs contribute to diverse legislative environments. For these reasons, California was successful in their attempt to reform medical malpractice suits while New Hampshire failed.

IV. FEDERAL RESPONSE TO A NATIONAL CRISIS

In response to the medical malpractice crisis reports issued by numerous states, non-profit organizations, and physicians, President George W. Bush endorsed the HEALTH Act of 2002. [FN168] Beginning in mid-July 2002, the House of Representatives Energy and Commerce Health Committee as well as the Judiciary Committee's Subcommittee on Commercial and Administrative Law held hearings concerning this crisis affecting the United States. [FN169]

*533 A. The Opposition to Federal Legislation

Lauren Townsend, President of Coalition for Consumer Justice (CCJ), [FN170] testified in front of the House of Representatives Energy and Commerce Committee on July 17, 2002, [FN171] arguing against the passage of the HEALTH Act (H.R. 4600). Ms. Townsend and her organization "vehemently oppose H.R. 4600" [FN172] and believe that the proposed legislation, if passed, would "immunize wrongdoers and be a boon for the monolithic giant that should be the target of everyone's ire: the insurance industry." [FN173]

Ms. Townsend urged Congress to adopt measures which would hold doctors accountable to their patients and their fellow doctors when they are negligent. [FN174] This would involve "strong sanctions from medical review boards," [FN175] safer prescription technology which would automatically check prescriptions against a patient's record and his or her known allergies, [FN176] as well as reasonable schedules for all doctors and nurses working in hospitals to lower the risk of medical error. [FN177]

In addition to Ms. Townsend's recommendations to the congressional committee, she also indicated that limiting the non-economic compensation to \$250,000 is an "arbitrary and paternalistic price tag hung on another person's life. And this is wrong." [FN178]

Even Democrats, who generally agree that there is a problem, take issue with capping the amount of money that can be awarded to a victim of medical malpractice. For example, Senator Edward Kennedy of Massachusetts has argued that "[r]ecent premium increases have been an attempt to maintain high profit margins despite sharply *534 declining investment earnings." [FN179] These Senators stress the importance of looking at the entire picture in order to ensure that when Federal legislation is enacted it will help doctors be more accountable to their patients and their profession while lowering malpractice insurance premiums that doctors pay. [FN180]

CCJ, Public Citizen, and trial lawyers are just a few of those speaking out against medical liability reform. However, at the Congressional hearings many of the voices heard were proponents of the HEALTH Act, speaking of benefits they hope it will provide to doctors, patients, health care providers, and insurance companies.

B. Supporters of Federal Legislation

Testifying before the committee the same day as Ms. Townsend was Dr. Richard Anderson, [FN181] the Chief Executive Officer (CEO) of The Doctor's Company, [FN182] one of the forty-five doctor-owned and/or operated medical liability insurers that comprise the Physician Insurers Association of American (PIAA). [FN183] These organizations collectively insure over sixty percent of the nation's practicing physicians. [FN184] Dr. *535 Anderson reviewed with members of Congress the two other medical liability crises that have taken place in the United States in the last thirty years. [FN185] The first medical malpractice crisis took place in the mid-1970s, and the second ten years later in the mid-1980s. [FN186] The first crisis in the mid-1970s came about mainly because of the rapid increase in new medical technologies and the use of general pharmaceuticals coupled with a decline in insurance companies' investment revenue. [FN187] The crisis in the mid-1980s was due mainly to the same causes, coupled with insurance companies' inability to raise insurance premiums. [FN188]

Alongside the Doctor's Company was the American College of Obstetrics and Gynecology (ACOG), [FN189] which "fully supports President Bush's attempt to deal with a national crisis through Federal legislation." [FN190] The ACOG fears that if the federal government does not step in and help doctors, women's health will be in jeopardy.

The ACOG is fearful that "[w]ithout insurance, ob-gyns are forced to stop **delivering babies**, stop surgical services, or close their doors. Pregnant women and newborns are hurt the most." [FN191] In the states which the ACOG claimed were in a state of "Red Alert," a recent survey indicates "that in Pennsylvania, 18.6 percent of respondents said they have dropped obstetrics due to the liability insurance situation, and over 13 percent have decreased the number of high-risk obstetrics cases they take. Over thirteen percent have decreased gynecologic surgery and more than ten percent have stopped major gynecologic surgery." [FN192] These are not just numbers. They are *536 patients' lives that are now at a greater risk for complications and possibly even death.

The HEALTH Act is modeled after California's MICRA; therefore, in order to fully understand the HEALTH Act, a full analysis of a state statute which has not been able to withstand state constitutional challenges and a look at the MICRA Act is necessary before analyzing the federal legislation.

C. Constitutional Concerns

Recent Federal legislation has been modeled after California's MICRA and will overcome any State constitutional problem but will certainly face federal constitutionality challenges.

First, it is necessary to ask whether Congress has the power to enact legislation such as the HEALTH Act. In *Crosby v. National Foreign Trade Council*, [FN193] the Supreme Court found

that "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law." [FN194] The Court found that even though there is no express provision for preemption in the Constitution, "When Congress intends federal law to 'occupy the field,' state law in that area is preempted." [FN195] Hence, if the HEALTH Act is enacted into law by Congress then it will preempt any previously written or future plans for state legislative action.

Many Democratic House of Representative members [FN196] are concerned that the HEALTH Act may be unconstitutional under the Commerce Clause, the Fifth Amendment, and the Seventh Amendment. These members first claim that Congress' ability to enact legislation such as the HEALTH Act is questionable when applied to intrastate medical and hospital services. They point to Section 2 of the Act [FN197] and are dismayed at the unsubstantiated finding *537 by Congress that the bill regulates interstate commerce. They question how medical treatments that take place in one state can be called "interstate commerce." This is a constitutional argument which has been recited by many Democratic members of Congress.

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law," [FN198] a proscription which has been held to include an equal protection component. [FN199] Victims of medical malpractice will doubtlessly argue that the Act does not provide a legislative quid pro quo and, as such, violates the Fifth Amendment.

Finally, the bill may violate the Seventh Amendment, which provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." [FN200] The bill eliminates the right of a jury to determine the proper amount of punitive and non-economic damages, which some argue deprives a plaintiff of the right to have a jury determine what a victim of malpractice deserves for pain and suffering. These problems are highlighted by the fact that courts in some states that have enacted similar liability limitation laws, such as caps on non-economic damages and collateral source offsets, have ruled such reforms unconstitutional as violative of equal protection, due process, and the right to a trial by jury and access to courts. [FN201]

*538 However, supporters of the HEALTH Act would allow for an injured patient, or their family members, to receive unlimited economic damages such as lost wages and all future medical expenses paid. [FN202] Although there would be a cap on the patient's recovery for non-economic damages, [FN203] which mainly include pain and suffering, supporters claim that plaintiffs still have access to the courts and the amount victims can recover in economic damages is unlimited. [FN204]

The HEALTH Act also allocates to the defendants "that party's several share of any damages only and not for the share of any other person." [FN205] The trier of fact maintains the responsibility to sever the total amount of compensation amongst the various parties to the suit. [FN206] Also, damages will still be assessed by juries. Juries will not be instructed on the \$250,000 limit on non-economic damages. [FN207] Instead, an award exceeding that allowed by law would be reduced by the judge to comply with the federal law. [FN208]

Attorney's fees are also covered by the HEALTH Act, which has taken the California model of attorneys' fees [FN209] allowing for a larger percentage of legal fees to be paid on lower recoveries. The percentage of the total award received by the victim paid to attorneys slowly decreases as the recovery amount of the plaintiff increases. [FN210]

The HEALTH Act also provides that collateral source benefits can be introduced as evidence during a trial, [FN211] but that "[n]o provider of collateral source benefits shall recover any amount against the claimant or receive any lien or credit against the claimant's recovery or be equitably or legally subrogated to the right of the claimant in a health care lawsuit." [FN212]

*539 V. CONCLUSION

There are currently two main schools of thought on how to fix the current medical malpractice liability crisis. First, the supporters of the HEALTH Act of 2003 want to see federal legislation enacted to cope with the radically high insurance premiums that are facing thousands of doctors around the country. Supporters of the Act tend to be Republicans, [FN213] doctors, [FN214] insurance companies, [FN215] and doctors' lobbying groups. [FN216] Those who support enacting federal legislation continue to fight and raise awareness around the country, with the intent of ensuring that the voters as well as lawmakers understand the desperation felt by thousands of doctors as they are forced to either go to a state that has some form of a cap or to retire early.

The main issue that those who do not support the HEALTH Act have with the federal legislation is the low cap that it places on non-economic damages. Critics of the legislation worry that everyday people, the patients of doctors, will lose their voice if juries are not able to deliver verdicts that send a powerful message to doctors. [FN217] Those who do not support the HEALTH Act believe that courts are a "place for ordinary people to be heard, often when other institutions have failed them." [FN218] Senator John Edwards (D-NC), for example, is afraid that the HEALTH Act would restrict access to courts. Instead, Edwards believes that medical malpractice attorneys "should have to bring their cases to independent experts who certify that the complaints have merit before they are filed. And lawyers who bring frivolous cases should face tough, mandatory sanctions with a 'three strikes' penalty." [FN219] It is a solution like this that many critics of the Act may be willing to support. Critics of HEALTH Act include legal *540 organizations, [FN220] many Democrats, [FN221] patients, and victims of medical malpractice.

In the end, the only thing that supporters and critics of the Act should be concerned about is whether there will be an obstetrician available to **deliver** their child, their grandchild, or their friend's child. If nothing is done, the question must be asked: **who will deliver the babies of today, the leaders of tomorrow?**

[FN1]. J.D. candidate, 2004, The Catholic University of America, Columbus School of Law; B.A. 2001 Miami University (Ohio). The author wishes to thank her fiancé, M. Heath Haley for all of his support, encouragement, and understanding throughout her time in law school; her family for everything they taught her growing up and their love; Katherine Conover for her constant friendship; and the editorial board of the Journal.

[FN1]. Review and Outlook, Health Reform, Piece by Piece, N.Y. TIMES, Nov. 22, 2002, at A25.

[FN2]. Lawyers v. Patients, WALL ST. J., Jan. 2, 2003, at A14 (op-ed article); see also Marilyn Elias, Obstetricians Dwindle Amid High Malpractice Costs, USA TODAY, May 6, 2002, at D8.

[FN3]. Kamal Wallace, More Doctors Getting Out of the Baby Delivery Business (May 30, 2002), at www.WRAL.com/health/1487393/detail.html. "Dr. John Schmitt is leaving 2,000 patients partly because of the skyrocketing cost of medical liability insurance, which went up 150 percent from last year. Obstetrics is a high-risk specialty." Id.; see also Rita Rubin, Fed-up Obstetricians Look for a Way Out, USA TODAY, July 1, 2002, at D1; Elias, *supra* note 2.

[FN4]. See Rubin, *supra* note 3.

[FN5]. The Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2003, H.R. 5, 108th Cong. § 4(b) (2003).

[FN6]. PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD 24-25 (2001).

[FN7]. Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance, MEDICAL LIABILITY MONITOR, October, 2002, at 1 [hereinafter Trends in 2002]. Medical Liability Monitor is a journal which deals exclusively with medical professional liability and which has been published since 1990.

[FN8]. Press Release, The American College of Obstetrician and Gynecologists, ACOG Lauds President Bush in Call for Liability Reform (July 30, 2002), available at http://www.acog.org/from_home/publications/press_releases/nr07-30-02.cfm.

[FN9]. See Trends in 2002, *supra* note 7, at 1-16.

[FN10]. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUT MEDICAL LIABILITY SYSTEM (2002) 1 [hereinafter HHS REPORT].

[FN11]. Press Release, American College of Obstetricians and Gynecologists, Nation's Obstetrical Care Endangered by Growing Liability Insurance Crisis (May 6, 2002) available at http://www.acog.org/from_home/publications/press_releases/nr05-06-02-1.cfm [hereinafter Obstetrical Care Endangered]; see also Robert S. McIlwain, Federal Tort Reform Needed to Save Delivery Rooms, PHYSICIAN'S WEEKLY, July 1, 2002, at <http://www.physweekly.com/index.asp?issueid=24> (focusing on Pennsylvania's medical liability crisis and the alarming rate at which doctors premiums are increasing). Pennsylvania is one of the nine "Red Alert" states listed by the ACOG in May, 2002. Id.

[FN12]. See *Obstetrical Care Endangered*, supra note 11.

[FN13]. *Id.*

[FN14]. HHS REPORT, supra note 10, at 2. Dr. Edwards was forced to close her obstetrics practice in Las Vegas because her insurance premium jumped from \$37,000 to \$150,000 in one year. She had moved her practice to West Los Angeles, California. California's MICRA Act caps non-economic damage awards at \$250,000, which has helped to keep medical malpractice insurance at affordable rates. *Id.*; see also Joelle Babula, *Doctors Group's Petition Forces Legislature to Consider Proposal*, LAS VEGAS REV. J., Dec. 3, 2002, at 1A.

[FN15]. *Health Care Litigation Reform: Does Limitless Litigation Restrict Access to Health Care?: Hearing Before the Subcommittee on Commercial Administrative Law of the House Committee on the Judiciary, 107th Cong. 22-24 (2002)* (statement of Donald J. Palmisano, MD, JD, Secretary-Treasurer, American Medical Association) [hereinafter Palmisano Congressional Statement].

[FN16]. Fran Wood, *Doctors Pained By Insurance Crisis*, THE STAR-LEDGER (New Jersey), Feb. 2, 2003, at 3.

[FN17]. *Id.*

[FN18]. CATHERINE CRIER, *THE CASE AGAINST LAWYERS* 9 (2002).

[FN19]. Associated Press, *Surgeons Walk Out in West Virginia*, WALL ST. J. (Jan. 2, 2002) at D4.

[FN20]. *Id.*

[FN21]. See Wright v. Central Du Page Hospital, 347 N.E.2d 736 (Ill. 1976); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Baptist Hospital of Southeast Texas, Inc. v. Baber, 672 S.W.2d 296 (Tex. App. 1984).

[FN22]. *Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing Before House Energy and Commerce Committee, 107th Cong. (2002)* (statement of Mr. Stuart H. Fine, CEO, Grand View Hospital).

[FN23]. McIlwain, supra note 11.

[FN24]. *Miracle in Mississippi*, WALL ST. J., Dec. 3, 2002, at A22; see also Tim Lemke, *Mississippi Restricts Lawsuit Damages*, WASH. TIMES, Nov. 27, 2002, at A1.

[FN25]. Tanya Albert, *Accepting No Deliveries: Obstetricians are Hard to Find in the Mississippi Delta.*, AM. MED. NEWS, Sept. 9, 2002, at 15-16 [hereinafter *No Deliveries*]; see

also Wendy McElroy, Law Suites Fueling Care Crisis, at <http://www.foxnews.com/story/0,2933,52684,00.html> (May 14, 2002).

[FN26]. McElroy, *supra* note 25. Patients who were able to walk or drive a short distance for their prenatal check-ups now have to drive at least forty-five minutes to the nearest obstetrician-gynecologist. *Id.*

[FN27]. *Id.*

[FN28]. *Id.*

[FN29]. *Id.* "Mississippi ranks 50 out of 51 states in the nation for the number of physicians per 100,000." *Id.*

[FN30]. *Id.*

[FN31]. ACOG Fact Sheet, Red Alert: The Hot States (May 6, 2002), available at www.acog.org/from_home/publications/press_release.nr05-06-05-2.cfm [hereinafter ACOG Fact Sheet].

[FN32]. McElroy, *supra* note 25.

[FN33]. Assemb. B. 1, 18th Spec. Sess. (Nev. 2002). This bill was passed during a special legislative session of Nevada's Legislature.

[FN34]. Joelle Babula, Health Care: Governor Signs Liability Bill, LAS VEGAS REV. J., Aug. 8, 2002, at 1B. Preponderance of the evidence is the normal standard for awarding damages in a civil case.

[FN35]. Palmisano Congressional Statement, *supra* note 15, at 3.

[FN36]. *Id.* "Doctors have been shutting down their practices, retiring early or limiting their service because they cannot find malpractice insurance or afford the skyrocketing rates." *Id.*

[FN37]. Steve Friess, Liability Costs Drive Doctors from Practice, THE CHRISTIAN SCIENCE MONITOR, July 17, 2002, at 15-16. Although \$108,000 is not the highest amount paid for malpractice insurance, it is high enough to require some doctors to take out loans to pay their insurance premiums. *Id.*

[FN38]. Ryan Pearson, Nevada Legislature Takes Fresh Look at Malpractice Laws, ASSOCIATED PRESS NEWSWIRE, Jan. 16, 2003. In fact, the legislative reform "had no immediate effect, mainly because insurers say it's uncertain whether the law will withstand legal challenges." *Id.*

[FN39]. *Id.*

[FN40]. Id.

[FN41]. ACOG Fact Sheet *supra* note 31, at 2.

[FN42]. Press Release, Methodist Hospital Division Thomas Jefferson University Hospital, South Philadelphia Feels the Effect of Medical Malpractice Premium Increases (April 24, 2002) (on file with the author).

[FN43]. Id. (stating that Thomas Jefferson University Hospital is located twenty blocks north of Methodist Hospital).

[FN44]. Surgeons Threaten Walkout Over Insurance Costs, ASSOCIATED PRESS, Dec. 27, 2002, available at www.colaco.net/3/healthinsurance.htm.

[FN45]. Id.

[FN46]. The Pennsylvania Medical Society Alliance is a consortium of medical practitioners and insurance companies which tracks important data, such as medical liability costs. See http://www.pamedsoc.org/Template.cfm?section=The_Society (last visited May 15, 2004).

[FN47]. McIlwain, *supra* note 11.

[FN48]. Id.

[FN49]. Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing on H.R. 4600 Before House Comm. On Energy and Commerce Health, 107th Cong. (2002) (statement of Richard Anderson, M.D., CEO, The Doctor's Company) [hereinafter Anderson statement].

[FN50]. Patient Access Crisis: The Role of Medical Litigation: Joint Hearing Before the Committee on the Judiciary and the Committee on Health, Education, Labor and Pensions, 108th Cong. (2003) (statement of Senator Judd Gregg, Chairman of the Senate Committee on Health, Education, Labor and Pensions).

[FN51]. See Wright v. Central Du Page Hospital, 347 N.E.2d 736 (Ill. 1976); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Baptist Hospital of Southeast Texas, Inc. v. Baber, 672 S.W.2d 296 (Tex. App. 1984).

[FN52]. Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing before the House of Representative Energy and Commerce Committee, 107th Cong (2002) (statement of Mr. Stuart H. Fine, CEO Grand View Hospital).

[FN53]. McIlwain, *supra* note 11.

[FN54]. American Bank and Trust v. Community Hospital of Los Gatos, 683 P.2d 670, 674 (Cal. 1984).

[FN55]. Id. at 673.

[FN56]. See Cal. Civ. Code § § 3333.1, 3333.2, 667.7, 340.5, 1295, 6146 (West 2002).

[FN57]. Michigan has modeled its tort reform after MICRA, but it has not been as successful in keeping premiums affordable to doctors as MICRA has been in California. See Patricia J. Fowler, *Medical Liability Insurance: Another Costly Crisis*, MSU FACULTY PERSPECTIVES, 2002 (on file with the author).

[FN58]. Fein v. Permanente Medical Group, 695 P.2d 665, 680 (Cal. 1985).

[FN59]. Anderson statement, *supra* note 49.

[FN60]. Id. The HEALTH Act of 2003 is closely related to California's MICRA Act. The Act was intentionally drafted this way because not only has MICRA been successful in keeping down the cost of malpractice liability insurance for California doctors, it has withstood the test of the California Supreme Court. Id.

[FN61]. Cal. Civ. Code § 3333.1(a) (West 2002).

[FN62]. See id.

[FN63]. See Health Coalition on Liability and Access, *Cost Saving Elements of the Medical Injury Compensation Reform Act of 1975 (MICRA) (Oct. 18, 2002)* [hereinafter HCLA], available at www.hcla.org/solution.htm. HCLA is a coalition united in bringing greater fairness and cost-effectiveness to federal health liability laws. This organization believes that legal reform is the best way to protect medical progress and to ensure that affordable health care is accessible to all Americans. Id. An example of a collateral source would be a workers' compensation fund, which pays for expenses incurred by employees who are injured. The code would prohibit defendants from collecting once from their workers compensation fund and again from the plaintiff doctor.

[FN64]. Barne v. Wood, 689 P.2d 446, 449 (Cal. 1984).

[FN65]. Id. at 448-49.

[FN66]. See id.

[FN67]. Id. at 447.

[FN68]. Id. at 447-48.

[FN69]. See *id.*

[FN70]. *Id.* at 450.

[FN71]. *Id.*

[FN72]. 465 P.2d 61 (Cal. 1970).

[FN73]. *Barme*, 689 P.2d at 449 n.5 (citations omitted).

[FN74]. *Id.* at 449.

[FN75]. *Id.*

[FN76]. Cal. Civ. Code § 3333.2 (West 2002).

[FN77]. 695 P.2d 665, 669 (Cal. 1985).

[FN78]. For example, if a jury awards a plaintiff one million dollars in non-economic damages, this state statute requires the judge to limit the amount of non-economic damages from one million dollars to two hundred and fifty thousand dollars. This eliminates the insurance industry's fear of million dollar non-economic awards to plaintiffs and, theoretically, should prompt them to lower premiums paid by doctors.

[FN79]. Noneconomic damages are defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." Cal. Civ. Code § 1431.2, subd (b)(2) (West 2002).

[FN80]. *Fein*, 695 P.2d at 681.

[FN81]. HCLA, *supra* note 63.

[FN82]. *Fein*, 695 P.2d at 665.

[FN83]. Cal. Civ. Code § 3333.2.

[FN84]. *Fein*, 695 P.2d at 680.

[FN85]. *Id.*; *Am. Bank & Trust Co. v. Cmty. Hosp. of Los Gatos-Saratoga, Inc.*, 683 P.2d 670, 678 (Cal. 1984).

[FN86]. *Fein*, 695 P.2d at 680.

[FN87]. Cal. Civ. Proc. Code § 667.7(a) (West 2002).

[FN88]. Id.

[FN89]. Id.

[FN90]. Id. § 667.7(b)(1).

[FN91]. Id.

[FN92]. Id. § 667.7(b)(2).

[FN93]. Cal. Civ. Proc. Code § 667.7(c) (West 2002).

[FN94]. Id.

[FN95]. Id. § 667.7(f).

[FN96]. HCLA, supra note 63.

[FN97]. Am. Bank & Trust Co., 683 P.2d at 676.

[FN98]. Id. at 678.

[FN99]. Id. at 677.

[FN100]. Id. at 681.

[FN101]. Id. at 681 (quoting Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 466 (1984)).

[FN102]. Am. Bank & Trust Co., 683 P.2d at 681; Cal.Const., art. I, § 16.

[FN103]. Am. Bank & Trust Co., 683 P.2d at 681.

[FN104]. Id. at 681.

[FN105]. Id.

[FN106]. Cal. Civ. Proc. Code § 340.5 (West 2002).

[FN107]. HCLA, supra note 63.

[FN108]. § 340.5.

[FN109]. Id.

[FN110]. Id.

[FN111]. Id.

[FN112]. Cal. Civ Proc. Code § 1295 (West 1981).

[FN113]. See Arbitration vs. Lawsuits, National Arbitration Forum, Forum Whitepaper Series (on file with author).

[FN114]. Id.

[FN115]. Cal. Bus. & Prof. Code § 6146 (West 1993).

[FN116]. Id.

[FN117]. HCLA, *supra* note 63.

[FN118]. Roa v. Lodi Medical Group Inc., 695 P.2d 164 (Cal. 1985).

[FN119]. Id. at 165.

[FN120]. Id. at 166.

[FN121]. Id. at 170.

[FN122]. Id. at 171.

[FN123]. Id. (citing Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585, 602-603 (Ind. 1980)).

[FN124]. Cal. Civ. Proc. Code § 364 (West 2002).

[FN125]. Id.

[FN126]. HCLA, *supra* note 63.

[FN127]. Carson v. Maurer, Inc., 424 A.2d 825 (N.H. 1980).

[FN128]. Id. at 829.

[FN129]. Id.

[FN130]. Id. at 830.

[FN131]. See N.H. REV. STAT. ANN § 507-C (1979).

[FN132]. See id. § § 507-C:3, 507-C:3 I.

[FN133]. See id. § 507-C:5.

[FN134]. See id. § 507-C:7.

[FN135]. See id. § 507-C.

[FN136]. See N.H. CONST. pt. I, arts. 2 & 12.

[FN137]. Carson, 424 A.2d at 832.

[FN138]. See § 507-C.

[FN139]. Carson, 424 A.2d at 832.

[FN140]. Id. See N.H. REV. STAT. ANN § 507-C:3 I (1979).

[FN141]. Id.

[FN142]. The statute states that if the action is based upon the discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such 2-year period, the action may be commenced within 2 years of the date of discovery or of the date of discovery of facts which would reasonably lead to discovery, whichever is earlier.

§ 507-C.

[FN143]. Id.

[FN144]. Carson, 424 A.2d at 833.

[FN145]. Id. (citations omitted).

[FN146]. Id.

[FN147]. Id. at 834.

[FN148]. Id.

[FN149]. Carson, 424 A.2d at 833.

[FN150]. Id.

[FN151]. Id.

[FN152]. Id.

[FN153]. Id.

[FN154]. Carson, 424 A.2d at 835.

[FN155]. Id.

[FN156]. Id. at 834-835.

[FN157]. Id. at 835.

[FN158]. Id.

[FN159]. Carson, 424 A.2d at 835-36 (quoting R. Scott Jenkins and Win C. Schweinfurth, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 S. CAL. L. REV. 829, 948 (1979)).

[FN160]. Id. at 836. The plaintiff will not recover in full because of another New Hampshire state law, N.H. REV. STATE. ANN. § 281:14 I & II (West 2003), gives "the workmen's compensation carrier a lien on any damages recovered by the plaintiff, less certain costs and expenses incurred by the plaintiff, up to the amount paid in compensation benefits." Carson, 424 A.2d at 836 (citing Tarr v. Republic Corp., 352 A.2d 708, 711 (N.H. 1976)).

[FN161]. Carson, 424 A.2d at 836 (quoting Jenkins & Schweinfurth, *supra* note 159, at 951).

[FN162]. Id. at 836-837.

[FN163]. Id. at 837.

[FN164]. Id.

[FN165]. Id. at 839.

[FN166]. Id.

[FN167]. Carson, 424 A.2d at 839.

[FN168]. Associated press, Bush to Address Malpractice Insurance Cost (July 25, 2002), available at cnn.com/health; see Press Release, ACOG, Ob-Gyns Support President's Call for Medical Liability Reform Urge National, Bipartisan Solutions (Jan. 16, 2002) [hereinafter Ob-Gyns Support President], available at www.acog.org/from_home/publications/press_release/nr01-16-03.cfm. The ACOG "applauded President George W. Bush for addressing the nation's medical liability insurance crisis at a roundtable discussion in Scranton, PA." Id. The HEALTH Act of 2002 (H.R. 4600) is identical

in content and structure to the HEALTH Act of 2003 (H.R. 5).

[FN169]. See Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing Before the House Energy and Commerce Comm., 107th Cong. (2002) (statement of Lauren Townsend) [hereinafter Townsend Statement]; see also Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing Before the House Energy and Commerce Comm., 107th Cong. (2002) (statement of Mr. Stuart H. Fine, CEO, Grand View Hospital).

[FN170]. The mission of Citizens for Consumer Justice is as follows: "Citizens for Consumer Justice (CCJ) is a nonprofit, social welfare organization founded in the summer of 1997 to promote economic, racial, social, civil and environmental justice through citizen action and campaigns to educate the public. CCJ has become the leading nonprofit consumer rights organization in Pennsylvania." Information available at www.ccjustice.org/aboutccj.htm (last visited May 14, 2004).

[FN171]. Townsend Statement, *supra* note 169.

[FN172]. *Id.*

[FN173]. *Id.*

[FN174]. *Id.*

[FN175]. *Id.*

[FN176]. Townsend Statement, *supra* note 169.

[FN177]. *Id.*

[FN178]. *Id.*

[FN179]. Patient Access Crisis: The Role of Medical Litigation: Joint Hearing Before Comm. on the Judiciary and the Comm. on Health, Education, Labor and Pensions, 108th Cong. (2003) (statement of Senator Edward Kennedy).

[FN180]. *Id.*

[FN181]. Anderson statement, *supra* note 49.

[FN182]. The mission of the Doctor's Company is designed to help doctors understand the issues and advances that affect them, across every specialty, nationwide[. This] is the most effective way we know to limit their liability risk. As America's first national, physician-owned medical malpractice carrier, we've cultivated a uniquely informed perspective on the special needs, emerging national trends, and special challenges doctors face every day.

The Doctor's Company website available at <http://www.thedoctors.com> (last visited May 14,

2004).

[FN183]. "The Physician Insurers Association of America (PIAA) is a trade association of more than 60 professional liability (medical malpractice) insurance companies owned and operated by doctors and dentists. Collectively, these companies insure approximately 60 percent of America's private practice physicians, as well as dentists, hospitals, and other healthcare providers." Mission statement at www.thepiaa.org/about_piaa/what_is_piaa.htm (last visited May 14, 2004).

[FN184]. Anderson Statement, *supra* note 49.

[FN185]. See *id.*

[FN186]. The Council of State Governments, *The Medical Malpractice Crisis in the States*, at <http://www.csg.org/NR/rdonlyres/emenpj434dxvfgkn7evch2nqwgxx3jtwinasay6lk/Taylor+Med+Malpractice+ppt.ppt> (last visited May 3, 2004).

[FN187]. *Id.*

[FN188]. *Id.*

[FN189]. The ACOG today has over 45,000 members and is the nation's leading group of professionals providing health care for women. The ACOG is based in Washington, DC, and is a private, voluntary, nonprofit membership organization. See http://www.acog.org/from_home/acoginfo.cfm (last visited May 14, 2004).

[FN190]. Press Release, ACOG, ACOG Lauds President Bush for call for Liability Reform; Ob-Gyns Urge Federal Response to the Professional Liability Insurance Crisis (July 30, 2002), available at www.acog.org/from_home/publications/press_releases/nr07-30-02.cfm [hereinafter ACOG Lauds].

[FN191]. Ob-Gyns Support President, *supra* note 168.

[FN192]. *Id.*

[FN193]. Crosby v. National Foreign Trade Council, 530 U.S. 363, 371 (2000).

[FN194]. *Id.*

[FN195]. JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW* 206 (9th ed. 2001).

[FN196]. John Conyers, Jr.; Rick Boucher; Jerrold Nadler; Robert Scott; Melvin Watt; Sheila Jackson Lee; William Delahunt; Robert Wexler; Tammy Baldwin; Anthony Weiner; Linda Sanchez [hereinafter Critics].

[FN197]. Section 2(a)(2) of the bill states:

Congress finds that the health care and insurance industries are industries affecting interstate commerce and the health care liability litigation systems existing throughout the United States are activities that affect interstate commerce by contributing to the high costs of health care and premiums for health care liability insurance purchased by health care system providers.

The Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2003, H.R. 5, 108th Cong. § 2(a)(2) (2003).

[FN198]. U.S. CONST. amend. V.

[FN199]. See Bolling v. Sharpe, 347 U.S. 497 (1954) (Fifth Amendment Due Process Clause found to incorporate equal protection guarantees in case involving public school desegregation by the Federal Government in the District of Columbia).

[FN200]. U.S. CONST. amend. VII.

[FN201]. Specifically, thirty-one states (AL, AZ, CA, CO, FL, GA, ID, IL, IN, KS, KY, LA, MO, NE, NH, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, WA, WI, WY) have ruled that such sweeping restrictions on the rights of medical malpractice victims are unconstitutional. Courts in twenty states (AL, CO, FL, GA, ID, IL, KS, NE, NH, ND, OH, PA, OK, OR, SC, SC, TX, UT, WA, WI) have ruled caps or limitations on medical malpractice damages to be unconstitutional. Courts in New Hampshire and Pennsylvania have ruled that statutory limitations on attorney's fees in medical malpractice cases are unconstitutional, unfairly burdening medical malpractice victims and their lawyers, or resulting in an unconstitutional infringement on the right to jury trial.

[FN202]. H.R. 5 § 4(b).

[FN203]. *Id.* The cap on non-economic damages, commonly called pain and suffering or punitive damages, is \$250,000 per victim.

[FN204]. Patient Access Crisis: The Role of Medical Litigation: Joint Hearing Before the Comm. on the Judiciary and the Comm. on Health, Education, Labor and Pensions, 108th Cong. (2003) (statement of Dr. Shelby L. Wilborn, ACOG).

[FN205]. H.R. 5 § 4(d).

[FN206]. *Id.*

[FN207]. *Id.* § 4(c).

[FN208]. *Id.*

[FN209]. See *id.* § 5(a); Cal. Civ. Proc. Code § 6146 (2002).

[FN210]. H.R. 5 § 5(a); see also Cal. Civ. Proc. Code § 6146 (2002).

[FN211]. H.R. 5 § 6.

[FN212]. Id.

[FN213]. President George W. Bush, Senator Judd Gregg, Chairman of the Senate Comm. On Health, Education, Labor and Pensions; and Senator Bill Frist are all vocal supporters of H.R. 5.

[FN214]. See supra Part I.

[FN215]. See, e.g., Patient Access Crisis: The Role of Medical Litigation: Joint Hearing Before the Comm. on the Judiciary and the Comm. on Health, Education, Labor and Pensions, 108th Cong. (2003) (statement of Jose Montemayor, Commissioner of Insurance for Texas).

[FN216]. One of the leading supporters of H.R. 5 is the ACOG.

[FN217]. Senator John Edwards, Juries: 'Democracy in Action,' NEWSWEEK, Dec. 15, 2003, at 53.

[FN218]. Id.

[FN219]. Id.

[FN220]. See, e.g., Association of Trial Lawyers of America website, at http://www.atlanet.org/ConsumerMediaResources/Tier3/press_room/FACTS/medmal/medmal.aspx (last visited May 14, 2004).

[FN221]. See generally Critics, supra note 196.

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