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State Of New York
Insurance Department
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Richard F. Daines, M.D., Commissioner
Department of Health
Corning Tower, Empire State Plaza
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Dear Superintendent Dinallo and Commissioners Daines:

For the next task force meeting, we are asked to discuss: 1) Does the tort system encourage safer medical practices? 2) Does the tort system best serve malpractice victims? 3) What costs does it add and how can costs be reduced without compromising fair compensation to victims?

We will do our best to answer these questions, although #1 is somewhat repetitive and will require reference to past submissions. To the extent we have any new material, we will present it below. As to question #3, we are aware of proposals made to you by both the New York State Academy of Trial Lawyers and the New York State Trial Lawyers Association that address lowering system transactional costs. We support these proposals. We will also discuss why replacing the tort system with an administrative compensation scheme will raise system costs, not lower them.

In light of the now obvious inclination by task force leaders to recommend eliminating the right to jury trial in certain cases, we believe there should at least be some discussion of the fundamental nature of the right that is being discussed. These rights are priceless and thus cannot be "scored."

WHAT THE CIVIL JUSTICE SYSTEM MEANS.

"The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence.... A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded...."[1]

[1] *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979) (Rehnquist dissenting).

The words are those of the late conservative U.S. Supreme Court Chief Justice William H. Rehnquist. Along with a number of his colleagues, conservative Rehnquist wrote eloquently in defense of the civil jury, warning against even limited intrusions into the right to civil jury trial.

Not surprisingly, health care lobbies and trade associations and their insurers, which dominate this task force by a 3 to 1 margin, have been at the forefront of attacks on civil juries in recent years. Throughout history and in New York State, these groups have taken quick advantage of cyclical liability insurance crises, which are not caused by spikes in lawsuits or claims,[2] to seek limits on their liability exposure. They do this by seeking to take compensation judgments away from judges and juries, limiting their power and authority, and in some cases, seeking to replace the system with a statutory structure over which they can have more control.

Unlike other weaker democracies in the world that have abolished the civil jury, our system, thus far, has largely withstood the assaults. There have been cuts to this system, including in New York State,[3] but the jury's roots are deeper in America than elsewhere in the world. The American colonists fought the Revolutionary War in significant part over England's repeated attempts to restrict jury trials. The U.S. Constitution was nearly defeated over its failure to guarantee the right to civil jury trial.[4] (The Seventh Amendment eventually resolved the problem.) The right to jury trial has been secured not only by the U.S. Constitution, but by every state as well, including New York.[5]

Concerns over issues like costs of this system are misplaced and trivial when compared to the democratic principles at stake. As Justice Rehnquist has stated:

> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.[6]

Clearly many Americans rely on the civil jury system for reasons other than monetary compensation. The opportunity to file a lawsuit is sometimes the only means available for people who have been harmed to obtain personal justice. In her book *The Suing of America: Why and How We Take Each Other to Court,* Marlene Adler Marks observed, "The use of lawsuits is an affirmation that the individual can fight against big corporations, the government, his own employer, the faceless bureaucracies that rule his life—that he has equal power against

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[2] See, e.g., Americans for Insurance Reform" Stable Losses, Unstable Rates 2007, http://www.insurance-reform.org/pr/CFA_070108.pdf; Tom Baker, *The Medical Malpractice Myth* (2005).

[3] The American Tort Reform Association's "medical liability reform" platform consists of 4 items: (1) a $250,000 limit on noneconomic damages; (2) a sliding scale rule for attorney's contingent fees; (3) periodic payment of future damages; and (4) abolition of the collateral source. In 1985, during the state's last liability insurance crisis, New York lawmakers succumbed to pressure by providers and insurers and enacted items 2, 3 and 4, giving the state the distinction of having some of the harshest tort restrictions of any state in the country, and providing doctors and hospitals with more liability protections than nearly any other profession or industry in the state.

[4] See, e.g., Charles W. Wolfram, "The Constitutional History of the Seventh Amendment," 57 Minn. L. Rev. 639 (1973).

[5] New York State Constitution, Article I, §2.

[6] *Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322 (1979) (Rehnquist dissenting).

his adversaries through the courts."[7] The same could certainly be said of those who bring suits against a health care system, particularly a system whose negligence catastrophically injures a child.

On February 11, 2003, dozens of medical malpractice victims came to Capitol Hill for a Forum on Malpractice, Chaired by Congressman John Conyers (D-MI), now Chairman of the House Judiciary Committee. These patients so strongly opposed measures that would take away the constitutional right to jury trial that they traveled hundreds, in some cases thousands of miles, some with severely injured children, to plead their case. Many members of Congress attended who spoke against restrictions on the right to civil jury trial, such as Congressman Anthony Weiner (D-NY), who said in reference to one victim's story, "If there was ever a power grab, if there was ever an attempt to show disdain for the average, for the knowledgeable, for the regular America, this is it because I have much more confidence in Kathy Olsen, a jury of Kathy Olsen's peers than I do in a group of insurance lobbyists on Capitol Hill."[8]

The following victims were among many who testified about how important it is for victims to have the right to tell their stories to impartial juries – even if their cases eventually settle:

- Ariba Morris of Florida, whose young child is now a quadruple amputee due to malpractice after birth:[9] "Taking away the right of a jury to decide what is fair on a case-by-case basis … will not solve the medical malpractice insurance crisis. It will only cause more suffering to victims who have already suffered enough through no fault of their own."

- Richard Flagg of New Jersey, whose surgeon removed the wrong lung leading to his eventual death:[10] "[I]t seems to me that back in 1789 when the Constitution of the United

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[7] Marlene Adler Marks, *The Suing of America; Why and How We Take Each Other to Court* (1981) at 9.

[8] Kathy's son Steven is blind and brain-damaged after an HMO refused to give him an $800 CAT scan when he was two years old. He had fallen on a stick in the woods while hiking. In 2001, Steven had 74 doctor visits, 164 physical and speech therapy appointments and three trips to the emergency room. Kathy had to leave her job to care of him. He must be watched constantly. The jury awarded Steven $7.1 million in non-economic compensation for his doomed life of darkness, loneliness, pain, physical retardation and around-the-clock supervision. However, the judge was forced to reduce the amount to $250,000 because of a California law capping non-economic damages.

[9] Ariba and Archie Morris' daughter, Alisha, was born in 2000 with a congenital syndrome commonly known as "heterotaxia syndrome," of which she had numerous signs and symptoms at birth. Although Alisha was hospitalized at two hospitals for some twenty days for surgeries, tests and monitoring, none of her healthcare providers checked to see if she had a functioning spleen. Thus, she was sent home without antibiotics and without warning to her parents that any sign of infection or illness in such a child is a medical emergency. When Alisha was six months old, she developed overwhelming sepsis; she suffered infarctions, which caused her arms and legs to become gangrenous. Both legs were amputated above the knee. Her left arm was amputated above the wrist. Her right hand has several finger stumps remaining. She was hospitalized, fighting for her life, from July until December, 2000, but she pulled through, and will now live a life as a quadruple amputee. Various defendants have reached settlements with the family.

[10] 63-year-old Richard Flagg, a barge captain in New York harbor and a Vietnam vet, died on September 8, 2003 due to complications related to malpractice. Three years before, Richard was diagnosed with a benign bleeding tumor in one of his lungs that had to be removed. A surgeon removed the wrong lung and, therefore, doctors could not remove his only remaining lung. After the ill-fated surgery, Richard needed oxygen 24 hours a day and was permanently connected to oxygen tanks. He carried the tanks on an electric cart that he rode wherever he went. His lawsuit was pending when he died. Despite great physical limitations, Richard traveled twice to Washington DC – driving himself in his own van - to fight anti-patient medical malpractice legislation that would have limited patients' legal rights.

States was written our forefathers had in mind one thing. Justice in this country was to be decided by a jury of our peers. This is not true today. It is in criminal cases. It is in murders. It is in robberies. It isn't in medical malpractice."

- Linda McDougal of Wisconsin who received an unnecessary double mastectomy after being mistakenly told she had cancer:[11] "Victims deserve to have their cases decided by a jury that listens to the facts of their individual case and makes a determination of what is fair compensation based on the facts of that case. And now proposals are being discussed that would further hurt people like me, all for the sake of helping the insurance industry."

Margie Tororiello, whose New York City Park Ave OB-GYN subjected her to horrible malpractice, said this:

> He was my OB-GYN for 15 years, and I started going to him at age about 32, and no particular problems, healthy, and I met him. I was impressed. He wrote books. He had stars as patients, very high-level celebrities, and I continued to go to him.
>
> During the first year he told me that I had a condition called endometriosis. He then said I had cysts and tumors. I'll spare you all of the details for the time's sake, but he operated on me 14 times.…
>
> During the last portion of the surgeries, I found out that he was -- the 1998 surgery my insurance no longer covered in-office procedures. You see, he had an in-office surgical suite so more money could line his pockets. He didn't have to share with the hospitals. So there was no notation of what he was doing. There was no peer review. There was nothing other than whatever he gobbled down. Till this day I don't have his records. They're shredded somewhere. We never got them.
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> Later his anesthesiologist that he used in his office flipped on him for FBI purposes because they had him on a drug charge. Yes, they did. He was giving anesthesia to me 14 times as a cocaine addict, a morphine addict, and he passed out on the floor. I don't know why I'm here, but I'm here to tell you this is wrong. Fifteen operations on a woman that was healthy.…
>
> There's no money that could bring back years of pain and suffering that I went through 14 operations and then a 15th one to try to solve the problem. Just a simple thing like urinating is a chore for me, but I sit with people like this who are so brave. …
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> Let the jury decide. Isn't that what our nation is about? Let the jury decide. When the jury walks into that box, they listen to the facts. It works; our system works. Let it work now. Let us have our day in court. Let these people tell their stories to their peers.

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[11] 46-year-old Linda McDougal, a U.S. Navy Veteran, received an unnecessary double mastectomy after being told she had an aggressive form of breast cancer. Forty-eight hours after her extremely painful and mutilating surgery, the surgeon walked in her room and said, "I have bad news for you. You don't have cancer." She never did. Two doctors and a technician had mixed up her test results with another woman, who was falsely told she was cancer-free. Linda has 31 inches of scar tissue on her chest. She has had ongoing infections and has undergone one emergency surgery as a result of the unneeded mastectomies. She has settled her lawsuit with the lab.

In his recent book on medical malpractice, Tom Baker, Connecticut Mutual Professor of Law and Director of the Insurance Law Center at the University of Connecticut School of Law, wrote,

> Lawsuits make people work through the system, not against it. Lawsuits take place in the open. Lawsuits provide procedural protections for everyone involved. To win a lawsuit you have to be right. It is not enough just to be angry….
>
> Responsibility lies at the heart of tort law. A tort lawsuit is a public statement that a defendant has not accepted responsibility, coupled with the demand to do so. Malpractice lawsuits ask doctors and hospitals to take responsibility for their mistakes, not just prevent future mistakes or to compensate the patient, but also because taking responsibility is the morally proper thing to do.[12]

FAR FROM BEING "BROKEN," THE CURRENT MEDICAL MALPRACTICE SYSTEM WORKS WELL.

The Harvard School of Public Health recently found that the current medical malpractice system works: legitimate claims are being paid, non-legitimate claims are generally *not* being paid, and "portraits of a malpractice system that is stricken with frivolous litigation are overblown."[13] The authors found:

- Sixty-three percent of the injuries were judged to be the result of error and most of those claims received compensation; on the other hand, most individuals whose claims did not involve errors or injuries received nothing.

- Eighty percent of claims involved injuries that caused significant or major disability or death.

- "The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win are high. Rather, our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers."

- **"**Disputing and paying for errors account for the lion's share of malpractice costs."

- **"**Previous research has established that the great majority of patients who sustain a medical injury as a result of negligence do not sue. … [F]ailure to pay claims involving error adds to a larger phenomenon of underpayment generated by the vast number of negligent injuries that never surface as claims."

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[12] Tom Baker, *The Medical Malpractice Myth* (2005) at 112, 113.

[13] David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006.

Moreover, Public Citizen's analysis of National Practitioner Data Bank statistics shows that payments usually correspond with injury severity. In 2005, more than 64 percent of payments involved death or significant injury, less than one-third were for insignificant injury, and less than three percent were for million-dollar verdicts.[14]

As Duke Law professor Neil Vidmar, who has extensively studied medical malpractice litigation, recently testified in the U.S. Senate, "the magnitude of jury awards in medical malpractice tort cases positively correlated with the severity of the plaintiffs' injuries, except that injuries resulting in death tended to result in awards substantially lower than injuries resulting in severe permanent injury, such as quadriplegia. I and two colleagues conducted a study of malpractice verdicts in New York, Florida, and California. We also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury."[15]

It should also be noted that medical malpractice claims and premiums are a tiny percentage of the total costs of health care in this country.

- Medical malpractice payouts are less than one percent of total U.S. health care costs. All "losses" (verdicts, settlements, legal fees, etc.) have stayed under one percent for the last 18 years. Moreover, medical malpractice premiums are less than one percent of total U.S. health care costs as well. Dropping for nearly two decades, malpractice premiums have stayed below one percent of health care costs.[16]

- The Congressional Budget Office found that "Malpractice costs account for less than 2 percent of [health care] spending," and that all the provisions of the federal medical malpractice bill, including a $250,000 cap on non-economic damages, "would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small."[17]

JURIES PROVIDE THE INCENTIVE FOR THE VAST MAJORITY OF TRUE MEDICAL MALPRACTICE CASES TO SETTLE; "FRIVOLOUS" CASES DO NOT SETTLE.

- In the Harvard closed claims study, referenced above, 15 percent of claims were decided by trial verdict.[18] Other research shows that 90 percent of cases are settled without jury trial, with some estimates indicating that the figure is as high as 97 percent.[19]

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[14] Public Citizen, Congress Watch, *The Great Medical Malpractice Hoax: NPDB Data Continue to Show Medical Liability System Produces Rational Outcomes,* (January 2007) at 2.
[15] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 10.
[16] *See,* Americans for Insurance Reform, "Think Malpractice is Driving Up Health Care Costs? Think Again," http://www.insurance-reform.org/pr/AIRhealthcosts.pdf
[17] Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* 1, 6 (Jan. 8, 2004).
[18] David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006.
[19] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 17. (citations omitted).

- According to Vidmar, "Research on why insurers actually settle cases indicates that the driving force in most instances is whether the insurance company and their lawyers conclude, on the basis of their own internal review, that the medical provider was negligent.…. An earlier study by Rosenblatt and Hurst examined 54 obstetric malpractice claims for negligence. For cases in which settlement payments were made there was general consensus among insurance company staff, medical experts and defense attorneys that some lapse in the standard of care had occurred. No payments were made in the cases in which these various reviewers decided there was no lapse in the standard of care."[20]

- Vidmar testified, "In interviews with liability insurers that I undertook in North Carolina and other states, the most consistent theme from them was: 'We do not settle frivolous cases!' The insurers indicated that there are minor exceptions, but their policy on frivolous cases was based on the belief that if they ever begin to settle cases just to make them go away, their credibility will be destroyed and this will encourage more litigation."[21]

- Vidmar further testified, "Without question the threat of a jury trial is what forces parties to settle cases. The presence of the jury as an ultimate arbiter provides the incentive to settle but the effects are more subtle than just negotiating around a figure. The threat causes defense lawyers and the liability insurers to focus on the acts that led to the claims of negligence.[22]

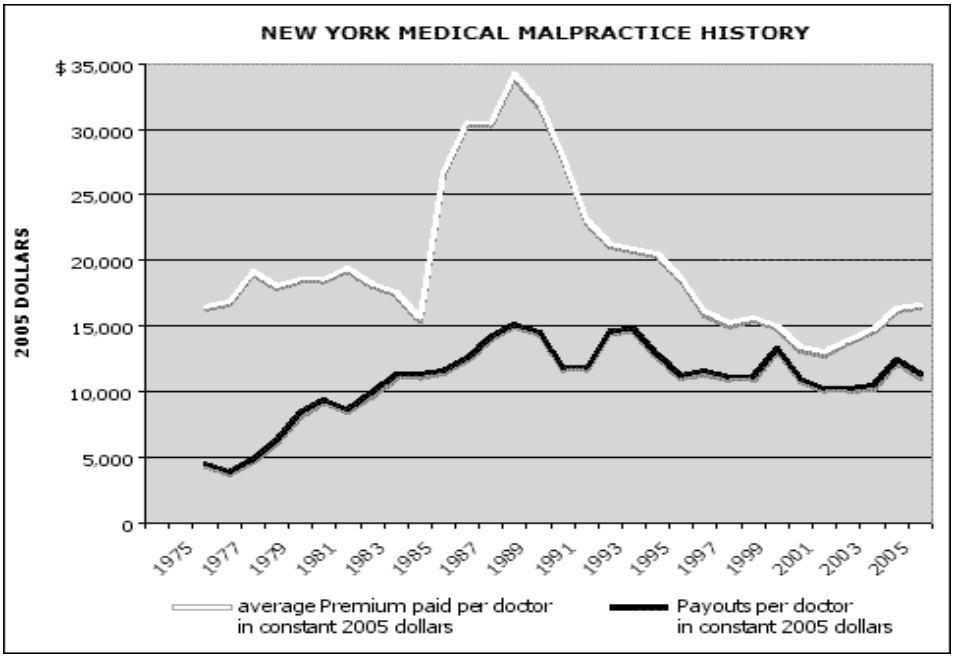
IN NEW YORK STATE, THERE HAS BEEN NO RECENT INCREASE IN MEDICAL MALPRACTICE PAYOUTS.

In July 2007, the Center for Justice & Democracy, Center for Medical Consumers, and New York Public Interest Research Group (NYPIRG) released data that confirmed there has been no increase in the amounts medical malpractice insurers have paid out in claims in recent years, including all jury awards and settlements.

The analysis of 30 years of New York insurance data was done by actuary J. Robert Hunter (Director of Insurance for the Consumer Federation of America, and former Federal Insurance Administrator and Texas Insurance Commissioner). Hunter's research found that since the mid-1980s, payouts have generally tracked the rate of medical inflation—but premiums have not.

See the following chart:

[20] *Ibid*. at 17-18, 22.
[21] *Ibid*. at 23.
[22] *Ibid*. at 21.



Sources: Premiums Written (Net), A.M. Best and Co., special data compilation for Americans for Insurance Reform, reporting data for as many years as separately available; Number of Total NonFed Doctors: U.S. Bureau of the Census, 2002 estimated; Inflation Index: Bureau of Labor Statistics. Access the data and graph on page one of this release at www.nypirg.org/Hunter_Med_Mal_75-05NYMM.pdf

Moreover, according to this data, total medical malpractice payouts, for injuries and deaths caused by medical negligence in New York, have recently averaged around $800 million annually. This is about what New Yorkers pay for dog and cat food each year.[23]

Vidmar testified "research evidence indicates that outlier verdicts seldom withstand post verdict proceedings.… Post-trial reductions have been documented in a number of studies. I and two colleagues found that some of the largest malpractice awards in New York ultimately resulted in settlements between five and ten percent of the original jury verdict.[24]

JURIES ARE COMPETENT AND ABLE TO HANDLE MEDICAL MALPRACTICE CASES.

Consistent empirical studies show juries to be competent, effective, and fair decision makers able to handle complex cases. Vidmar's testimony extensively analyzes the academic literature on this subject. [25]

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[23] The Pet Food Institute puts these figures at $13 to $14 billion annually over the past few years - $800 million for New York's population. *See*, http://www.petfoodinstitute.org/reference_pet_data.cfm

[24] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 13.

[25] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 10 ("The overwhelming number of the judges gave the civil jury high marks for competence, diligence, and seriousness, even in complex cases …Systematic studies of jury

Also interestingly, a March 2000 survey of federal judges by the *Dallas Morning News* and SMU School of Law found overwhelming support of juries. Over 81 percent of respondents thought that most jurors come into a civil case favoring neither side, with nearly 77 percent believing that juries did very well in reaching a just and fair verdict.[26] In addition, 59 percent said they would prefer the dispute to be decided by a jury if they were a litigant in a civil case, with only 21 percent preferring a judge as the decisionmaker. [27]

"CAPS" DO NOT CAUSE INSURANCE RATES TO DROP.

In recent years, during the medical malpractice insurance "crisis" for doctors that hit some states beginning in 2001/2002, great pressure was brought to bear on state legislatures to restrict the rights of injured patients to be compensated for their injuries. As during past insurance "crises,"[28] the insurance industry told lawmakers that enacting "tort reform," particularly caps on

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responses to experts lead to the conclusion that jurors do not automatically defer to experts and that jurors have a basic understanding of the evidence in malpractice and other cases. Jurors understand that the adversary system produces experts espousing opinions consistent with the side that called them to testify. Moreover, jurors carefully scrutinize and compare the testimony of opposing experts. They make their decisions through collective discussions about the evidence.… We also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury.")(citations omitted); Peters Jr., Philip G., "Doctors & Juries," U of Missouri-Columbia School of Law Legal Studies Research Paper No. 2006-33 Available at SSRN: http://ssrn.com/abstract=929474 ("Four important findings emerge from the data. First, negligence matters. Plaintiffs rarely win weak cases. They have more success in toss-up cases, and fare best in cases with strong evidence of medical negligence. Second, jury verdicts are most likely to square with the opinions of experts hired to evaluate the jury's performance when the evidence of provider negligence is weak. This is the very set of cases that most worries critics of malpractice litigation. Juries agree with expert reviewers in 80 to 90 percent of these cases - a better agreement rate than physicians typically have with each other. Third, jury verdicts are much more likely to deviate from the opinion of an expert reviewer when there is strong evidence of negligence. Doctors consistently win about 50 percent of the cases which experts believe the plaintiffs should win. Fourth, the poor success of malpractice plaintiffs in these cases strongly suggests the presence of factors that systematically favor medical defendants in the courtroom. The most promising explanations for that advantage are the defendant's superior resources, the social standing of physicians, social norms against 'profiting' from an injury, and the jury's willingness to give physicians the "benefit of the doubt" when the evidence of negligence is conflicting.") See also, Marc Galanter, "Real World Torts: An Antidote to Anecdote," 55 *Md. L. Rev.*1093, 1109, note 45 (1996), citing Michael J. Saks, *Small-Group Decision Making and Complex Information Tasks* (1981); Robert MacCoun, "Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries," in *Verdict: Assessing the Civil Jury System* 137 (Brookings Institution, Robert E. Litan ed., 1993); Christy A. Visher, "Juror Decision Making: The Importance of Evidence," 11 *Law & Hum. Behav.* 1 (1987); Richard O. Lempert, "Civil Juries and Complex Cases: Let's Not Rush to Judgment," 80 *Mich. L. Rev.* 68 (1981).

[26] Allen Pusey, "Judges Rule In Favor Of Juries; Surveys by Morning News, SMU law school find overwhelming support for citizens' role in court system*," Dallas Morning News*, May 7, 2000

[27] *Ibid.*

[28] Volcanic eruptions in insurance premiums for doctors have occurred three times in the last 30 years – in the mid 1970s, again in the mid-1980s, and between 2001 and 2005 (the "hard" insurance market.) *See, e.g.*, "Malpractice - Doctors in Revolt," *Newsweek*, June 9, 1975; "Malpractice: MD's Revolt," *Newsweek*, June 9, 1975; "Some of the Losers who 'Won,'" *Newsweek*, June 9, 1975; George J. Church, "Sorry, Your Policy Is Canceled," *Time Magazine,* March 24, 1986; "Let the Free Market End Malpractice Warfare," *Business Week*, Aug. 3, 1987. The cause is always the same: a severe drop in investment income for insurers compounded by underpricing in prior years (the "soft" insurance market). Because insurers make most of their money from investment income, insurance is a cyclical business. Americans for Insurance Reform [AIR], "Insurance Industry Admits: Insurance Business Practices and Investment Cycle to Blame for Insurance Liability 'Crisis,'" http://centerjd.org/air/pr/Investments.pdf. But each time the "hard" market takes hold, insurers have tried to blame lawyers and the legal system for the problems caused

compensation for patients, was the only way to reduce skyrocketing insurance rates - even though other statements by industry insiders repeatedly contradicted this. For example, see the following quotes:[29]

- "We wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates." Sherman Joyce, president of the American Tort Reform Association, *Liability Week* (July 19, 1999).

- "[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and 'I've never said that in 30 years.'" Victor Schwartz, General Counsel, American Tort Reform Association *Liability Week* (July 19, 1999).

- "Insurers never promised that tort reform would achieve specific savings." Debra Ballen, AIA executive vice president, March 13, 2002 news release.

Both the above ATRA and AIA statements were made in direct response to our study, *Premium Deceit – the Failure of "Tort Reform" to Cut Insurance Prices*. We found that enactment of laws that restrict injured patients' rights to go to court did not succeed in lowering insurance loss costs or rates. This study, released in 1999 – two years before the most recent hard market hit around the country– was the first-ever look at 14 years of property/casualty insurance price trends nationwide.

It found that despite years of claims by insurance companies that rates would go down following enactment of tort reform, tort law limits between the mid-1980s and 1999 did not lower insurance rates. States with little or no tort law restrictions experienced approximately the same changes in insurance rates as those states that enacted severe restrictions on victims' rights.

Indeed, in 1986, after Florida enacted what Aetna Casualty and Surety Co. characterized as "full-fledged tort reform," including a $450,000 cap on non-economic damages, Aetna did a study of cases it had recently closed and concluded that Florida's new laws would not effect Aetna's rates. Aetna explained that "the review of the actual data submitted on these cases indicated no reduction of cost."[30] Similarly, St. Paul's found "a total effect of about 1% savings" from Florida's 1986 tort reforms, but that even this 1% might be inflated. St. Paul concluded that "the noneconomic cap of $450,000, joint and several liability on the noneconomic damages, and

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by this cyclical underwriting. Compounding the impact of the most recent cycle was some insurers' misleading business and accounting practices. As the *Wall Street Journal* found in a front page investigative story on June 24, 2002: "[A] price war that began in the early 1990s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims.… A decade of short-sighted price slashing led to industry losses of nearly $3 billion last year." Christopher Oster & Rachel Zimmerman, "Insurers' Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, June 24, 2002.

[29] Americans for Insurance Reform, "Insurance Industry Admits: Tort Reform Will Not Lower Insurance Rates," http://centerjd.org/air/pr/Quotes.pdf; Americans for Insurance Reform, *"ATRA Admits Tort Reform Won't Lower Rates,"* http://www.insurance-reform.org/AIRATRARelease.pdf; CJ&D, *"Center for Justice & Democracy Response to AIA Attack on Premium Deceit: The Failure of Tort Reform to Cut Insurance Prices,"* http://centerjd.org/press/release/020319.response.pdf.

[30] Aetna Casualty & Sur. Co., Commercial Ins. Div., Bodily Injury Claim Cost Impact of Florida Tort Law Change, at 2 (Aug. 8, 1986).

mandatory structured settlements on losses above $250,000 will produce little or no savings to the tort system as it pertains to medical malpractice."[31]

Today, with the exception of New York with its peculiar MMIA-MMIP problems, medical malpractice rates have stabilized and availability has improved around the country.[32] The flattening of rates has had nothing to do with tort law restrictions enacted in particular states, but rather to modulations in the insurance cycle everywhere. Texas is a good example.

In 2003, the Texas insurance industry and regulators made many promises that if caps on damages were passed in that state, insurance companies would lower rates. For example, in a March 2003 letter, Texas Insurance Commissioner Jose Montemayor promised lawmakers that capping damages would cause companies to reduce rates up to 19 percent.[33]

One reason these promises were made was because lawmakers were threatening to enact mandatory rate rollbacks in 2003. This is because rates had shot up so high.[34] These rate hikes had nothing to do with increased claims in Texas, but rather the insurance industry's own economic cycle. A study of Texas Department of Insurance data found, "the rapid changes in insurance premiums that sparked the crisis appear to reflect insurance market dynamics, largely disconnected from claim outcomes."[35]

Despite promises to cut rates, after caps passed, major insurers requested rate *hikes* as high as 35 percent for doctors and 65 percent for hospitals.[36] In a 2004 filing to the Texas Department of Insurance, GE Medical Protective revealed that the state's non-economic damage cap would be responsible for no more than a 1 percent drop in losses.[37] After the company's rate hike request was denied, it announced it was using a legal loophole to avoid state regulation and increase premiums 10 percent without approval.[38]

Only one major carrier, the doctor-owned Texas Medical Liability Trust (TMLT), lowered rates in 2004, but its customers were still paying 130% more than they were from 5 years earlier.[39] This development outraged Texas lawmakers, who called a hearing, chastised the insurance commissioner, and threatened again to legislatively roll back rates.

As reported in the *Houston Chronicle*, "House lawmakers sent a stern message to insurance companies Thursday: Medical malpractice lawsuit reforms passed last year were meant to help

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[31] St. Paul Fire & Marine Ins. Co., Medical Professional Liability, State of Florida–Addendum at 1 (1986).
[32] Americans for Insurance Reform, "Commercial Insurance Rates Continue to Fall While Insurer Profits Continue to Skyrocket to Record Levels," (October 25, 2006) http://www.insurance-reform.org/AIRSoftMarketProfits.pdf
[33] Jim Vertuno, "House takes insurance firms to task over malpractice rates, *Houston Chronicle,* April 23, 2004.
[34] *Ibid.* ("Lawmakers nearly approved a rate rollback last year but stopped short when insurance companies promised reductions."); David Pasztor, "Malpractice rate rollback proposed; Rose's measure calls for lower premiums for doctors if a $250,000 cap on damages is set," *Austin American-Statesman,* March 27, 2003.
[35] Black, Silver, Hyman, and Sage, "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," *Journal of Empirical Legal Studies* (2005).
[36] *E.g.* Darrin Schlegel, "Some Malpractice Rates to Rise Despite Prop. 12," *Houston Chronicle*, Nov. 19, 2003; Darrin Schlegel, "Malpractice Insurer Fails in Bid for Rate Hike," *Houston Chronicle*, Nov. 21, 2003; (October 2003 rate filing from Texas Medical Liability Insurance Association (JUA) to Texas Department of Insurance).
[37] The GE Medical Protective filing can be found at: http://www.consumerwatchdog.org/insurance/rp/rp004689.pdf.
[38] "Insurer Switching to Unregulated Product to Raise Premiums," *Associated Press*, April 10, 2004.
[39] "Medical Malpractice Insurance: Overview and Discussion," Texas Department of Insurance, Feb. 12, 2003.

doctors - not boost profits. Republicans and Democrats who supported the legislation suggested that lawmakers might consider mandatory rate rollbacks if doctors don't get significant rate relief …. Texas Medical Liability Trust is the only major carrier to agree to reduce rates. Others have tried to raise rates. About 60 percent of Texas doctors have not seen a rate decrease, the commissioner said."[40] Only later did some rates drop, with the advent of the soft insurance market.

Texas Watch, the Texas consumer group, reviewed trends from major carriers and found wide discrepancies between eventual rate reductions and rate hikes that preceded them. For example: TMLT (the physician-owned carrier with currently 41% of the market) had increased their rates by 147% between 1999 and 2003. Since 2003, TMLT has lowered their rates 20%. MedPro, the state's second largest insurer with a 23% market share, had raised rates 92.5% between 1999-2003. They are down just 3.7% since 2003. The Doctor's Company saw rates up 101.5% between 1999-2003. They are now down 24.5%. Again, because the insurance cycle has turned, doctors' insurance rates are stabilizing everywhere, whether or not a state has enacted "caps."

What happened in Texas in this decade, and during earlier liability insurance crises, are confirmed by numerous credible studies that reject the notion that enactment of caps on damages lead to lower insurance rates. For example, a study by law professors at the University of Texas, Columbia University and the University of Illinois based on closed claim data compiled by the Texas Department of Insurance since 1988 concluded that "the rapid changes in insurance premiums that sparked the crisis appear to reflect insurance market dynamics, largely disconnected from claim outcomes."[41] That study further concluded that, after controlling for the quantity of health care delivered, the frequency of large paid claims declined, the number of small paid claims declined sharply, and payout per claim on large claims remained constant over a 15-year period.

Similarly, an econometric analysis of the malpractice market by two Dartmouth economists found that "past and present malpractice payments do not seem to be the driving force behind increases in premiums," and that premium growth may be affected by many factors beyond increases in claims payments, such as industry competition and the insurance underwriting cycle.[42]

Weiss Ratings, an independent insurance-rating agency, found that between 1991 and 2002, states with caps on noneconomic damage awards saw median doctors' malpractice insurance premiums rise 48 percent – *a greater increase than in states without caps*. In states without caps,

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[40] Jim Vertuno, "House takes insurance firms to task over malpractice rates," *Houston Chronicle,* April 23, 2004.
[41] Black, Silver, Hyman, and Sage, "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," *Journal of Empirical Legal Studies* (2005).
[42] Katherine Baicker and Amitabh Chandra, National Bureau of Economic Research, "The Effect of Malpractice Liability on the Delivery of Health Care," at 14 and 20 (Aug. 2004). *See also,* Amitabh Chandra, Shantanu Nundy, Seth A. Seabury, "The Growth of Physician Medical Malpractice Payments: Evidence from the National Practitioner Data Bank," *Health Affairs*, May 31, 2005. The study analyzed National Practitioner Data Bank data on payments, as well as data on premiums, physicians, and treatments.

median premiums increased only 36 percent. Moreover, according to Weiss, "median 2002 premiums were about the same" whether or not a state capped damage awards.[43]

On the other hand, insurance regulatory reform does help. The following are a few recent case examples:

- **Illinois**. In October 2006, Illinois Division of Insurance announced that an Illinois malpractice insurer, Berkshire Hathaway's MedPro, would be expanding its coverage and cutting premiums for doctors by more than 30 percent. According to state officials and the company itself, this was made possible because of new *insurance* reforms enacted by Illinois lawmakers in 2005, and expressly *not* the cap on compensation for patients that was enacted at the same time.[44] The law requires malpractice insurers to disclose data on how to set their rates. This, according to Michael McRaith, director of the state's Division of Insurance, allows MedPro to "set rates that are more competitive than they could have set before."

- **Connecticut:** "Rate increases are even slowing or stopping in some states that have not limited awards for pain and suffering, including Connecticut, where premium increases in the past have soared as much as 90 percent in a single year."[45] Connecticut has no cap on damages.

- **Maryland.** "[T]he state's largest malpractice insurer said it does not need a rate increase for next year, leading some to question whether the much-debated malpractice crisis ever existed."[46] In 2006, Maryland's largest malpractice insurer, Med Mutual, announced plans to cut their malpractice rates by 8 percent in 2007.[47] Maryland has had a cap on damages since 1986. Sixteen years later, during the most recent insurance crisis, the state still experienced premiums that "rose by more than 70 percent in the last two years."[48]

- **Pennsylvania.** In recent years in Pennsylvania, rates across the med mal marketplace "have found a new plateau," according to an associate counsel and director of patient

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[43] Weiss Ratings, "Medical Malpractice Caps Fail to Prevent Premium Increases," http://weissratings.com/News/Ins_General/20030602pc.htm; http://www.weissratings.com/malpractice.asp In addition, a study released by the congressional General Accounting Office in 2003, "Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates," found absolutely no support for capping damages as a solution to bring down insurance rates for doctors. Americans for Insurance Reform, "New GAO Study Finds No Support For Caps on Damages; Findings On 'Losses' Challenged by Consumer Groups," http://centerjd.org/air/pr/AIRGAO.pdf See also, Americans for Insurance Reform, "Measured Costs," July 2005, http://www.insurance-reform.org/measured_costs.pdf; Americans for Insurance Reform" Stable Losses, Unstable Rates," October 2004, http://www.insurance-reform.org/StableLosses04.pdf; See, also, Jay Angoff, "Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry," July 2005, http://www.centerjd.org/ANGOFFReport.pdf

[44] See, Adam Jadhav, "Minor insurer is cutting malpractice rates for doctors," *St. Louis Post-Dispatch*, October 13, 2006; 10/13/2006; http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=5414 http://www.dailysouthtown.com/business/blesch/100695,1BIZ3-18.article

[45] Diane Levick, "Malpractice Premiums Begin to Level Off," *Hartford Courant,* September 18, 2005

[46] M. William Salganik, "Doctor insurer says malpractice rate increase not needed this year," Baltimore Sun, August 20, 2005.

[47] M. William Salganik, "Physicians' insurer to lower premiums," *Baltimore Sun*, Dec. 15, 2006.

[48] James Dao, "A Push in States to Curb Malpractice Costs," *New York Times*, Jan. 14, 2005.

safety and risk management at the University of Pittsburgh Medical Center, Richard P. Kidwell.[49] Pennsylvania has no cap.

- **Washington.** In 2005, the state's largest med mal insurer Physicians Insurance, which is owned by doctors, requested a 7.7 percent reduction in medical malpractice rates, with the company reporting record-breaking net income.[50] Washington does not have a cap on damages.

- **The California Experience.** Thirteen years after the state's severe $250,000 cap on damages was enacted (MICRA, passed in 1975), "doctors' premiums had increased by 450 percent and reached an all-time high in California." But in 1988 California voters passed a stringent insurance regulatory law, Proposition 103, which "reduced California doctors' premiums by 20 per within three years," and stabilized rates.[51]

  In the 13 years after MICRA, but before the insurance reforms of Prop. 103, California medical malpractice premiums rose faster than the national average. In the twelve years after Prop. 103 (1988-2000), malpractice premiums dropped eight percent in California, while nationally they were up 25 percent.[52] Moreover, the law has led to public hearings on recent rate requests by medical malpractice insurers in California, which resulted in rate hikes being lowered three times.[53]

WHAT HAPPENS TO PEOPLE WHEN THE RIGHT TO CIVIL JURY TRIAL IS TAKEN AWAY – SYSTEMIC PROBLEMS WITH ALL ALTERNATIVE SYSTEMS.

Over the years, there have been many proposals that would require wrongly injured persons to have their disputes resolved outside the court system. Often, these proposals are encouraged based on the experience of workers' compensation, an administrative system to compensate injured workers that was instituted throughout this country almost a century ago.

The workers' compensation system has been rife with problems almost since its inception. Employers who pay into it, employees who rely on it, analysts who look at it, and scholars who study it all have a long list of complaints about how it does not work. It is a heavily bureaucratic adversarial system that shortchanges injured workers, even while employers struggle now and then with rapidly rising workers' compensation insurance rates. [54]

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[49] KIertesz, Louise, "Medical malpractice rates stable, but still at 'very high levels'," *Business Insurance,* October 30, 2006.
[50] Rebecca Cook, "How Sick is Malpractice Mess?" *Associated Press*, Jan. 17, 2005.
[51] Foundation for Taxpayer and Consumer Rights, "How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California and How Malpractice Caps Failed" (March 7, 2003), http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf.
[52] Foundation for Taxpayer and Consumer Rights, "Insurance Regulation, Not Malpractice Caps, Stabilize Doctors' Premiums," http://www.ftcr.org/healthcare/fs/fs003013.php3.
[53] Foundation for Taxpayer and Consumer Rights, "California Group Successfully Challenges 29.2% Rate Hike Proposed by California's Ninth Largest Medical Malpractice Insurer; Proposition 103 Invoked to Slash Medical Protective Company's Requested Increase by 60%," Sep 16, 2004, http://consumerwatchdog.org/insurance/pr/pr004625.php3.
[54] See., e.g., Center for Justice & Democracy, *Workers Compensation - A Cautionary Tale* (September 20, 2006) http://centerjd.org/Workers'Comp(National).pdf

Like all administrative schemes, workers compensation benefits have been severely reduced over the years as politicians try to appease insurers and hospitals, which has left many permanently injured individuals barely able to survive. Indeed, state legislatures have been chipping away at workers' compensation systems at an alarming rate in direct response to the requests of insurance carriers and businesses.[55] In many states, the process workers must go through to make claims and receive compensation has become longer, less efficient, and ultimately less successful in terms of its original goals.[56] According to one legal scholar who studies workers' compensation, "injured workers often face denials and delays of apparently legitimate claims, high litigation costs, discrimination, and harassment by employers and coworkers.… [M]any reports suggest that recent reforms have substantially increased injured workers' financial burdens."[57]

And to the extent that rate reductions have taken place, they inevitably have come at the expense of the injured, where lawmakers have slashed benefits and pushed many of the injured entirely out of the system.

Workers compensation is example of how a seemingly fair program is inevitably manipulated by political forces into a nightmare for those it was originally meant to help. By the early 1970s, the law had evolved so that injured workers were far less likely to be shut out of the court system as they had been in the earlier part of the century. In fact, having ceded their right to jury trial at a time when the law would have left most of their injuries uncompensated, workers now faced serious disadvantages relative to those with access to the judicial system.

The universal point is this: once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts.

No system has demonstrated these faults more clearly than Virginia's Birth-Related Neurological Injury Compensation Program, a program that was flawed from the start. The following simply repeats what we submitted for the last task force meeting about this program:

VIRGINIA'S BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM.

The Virginia program was established in the mid-1980s, during this country's last so-called "insurance crisis," as another misguided attempt to reduce insurance rates for doctors. This program was set up as an injury compensation system for catastrophically injured newborns. It is the exclusive remedy for children delivered by a participating OB/GYNs and hospital. All

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[55] See "Worker's Comp: Falling Down on the Job," Consumer Reports, 2000 (discussing the legislative reforms of the 1990s and the resulting profits for worker's compensation insurance providers).

[56] According to a 1980 Rand Institute study, other developments in worker's compensation include new links between work and diseases, as well as a judicial doctrine that has slowly altered the original balance of worker's compensation by reintroducing fault, inflation. See Hammond and Kniesner, "The Law and Economics of Worker's Compensation," Rand Institute for Civil Justice, 1980.

[57] McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation "Reform," 50 Rutgers L. Rev 657, 699-700, 711 (1998) n. 158, 159, 160

claims go before an administrative panel, established within the workers compensation system. The panel is "aided" by an "expert" panel of three doctors who determine if the injury is a covered birth-related neurological injury.

This program has been a tremendous failure on every level. It has hurt patients, has done nothing to help doctors with their insurance problems and may have allowed the state to become a safe harbor for negligent and reckless doctors who should not be practicing medicine at all. Virginia's Joint Legislative Audit and Review Commission suggested "abandoning or overhauling" the program[58] and "ridding the board of its heavy presence of medical professionals," [59] and has found that the program could not be made fiscally sound.[60] In testimony before the Virginia Legislature, one parent called the program "a generous system of care gone awry, of state-sanctioned impunity for doctors and hospitals, and of the struggle families face caring for society's weakest children."[61]

To begin the program has been in fiscal crisis for years. The fund is close to $130 million short of cash and it now looks like the legislature will decide to fix the problem on the backs of the victims and their families, in complete contradiction to the law's original intent, i.e., "by giving up their right to bring suit, families were promised lifelong medical care for eligible children."[62] As recently reported in the *Richmond Post-Dispatch*, "documents obtained by *The Times-Dispatch* show that the [legislative] plan would erase as much as half the shortage, about $70.3 million, by capping benefit payments to children and through accounting adjustments that lessen cash obligations by some $44 million."[63]

But the fiscal problems and the potential for additional burdens on these devastated and struggling families are by no means the only problems. The following are some of its more notable shortcomings:

- **Prevents patients from receiving adequate compensation and understanding the medical errors and negligence responsible**: "Children born in Virginia with catastrophic neurological injuries are promised lifetime medical care by the birth-injury program. But these children and their families also have been forced to absorb stunning disparities in program benefits because of shifting priorities and cost reductions over which they had no control or voice. . . . 'The program can end up providing very little,' said Christina Rigney, referring to the minimal benefits her family received in the face of her son's traumatic birth and brief life. 'We believed there was negligence involved, but nothing ever came of it.'" Her son died three years after he was severely injured due to oxygen loss during birth. Because of the birth injury law, the family couldn't file a malpractice suit, the obstetrician was never even asked to explain what happened, and the

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[58] Bill McKelway, "Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," *Richmond Times Dispatch*, Nov. 13, 2002; Liz Szabo & Elizabeth Simpson, "Birth Injuries Get 'Minimal Review; State Report Says Board Must Hold Doctors Accountable," *Virginian-Pilot*, Nov. 15, 2002.
[59] Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002.
[60] *Ibid*.
[61] Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.
[62] Bill McKelway, "Plan could restore financial soundness," *Richmond Times Dispatch*, September 17, 2007.
[63] *Ibid*.

family could learn nothing from illegible notes that failed to account for long periods of time. Families of two other brain-injured infants he delivered faced the same limits on their ability to learn what happened, or seek to show he was negligent. He is facing a lawsuit, however, for a fourth case in which a woman giving birth bled to death after delivering a healthy baby. [64]

- **Has allowed Virginia to become a safe harbor for bad doctors:** National birth-injury experts have reportedly expressed fear about Virginia becoming a safe harbor for bad doctors because of a lack of disciplinary actions under this law. "The birth-injury cases … are not reported to national databases that track actions against doctors and measure physicians' insurability. With no court action, settlement or disciplinary actions, a doctor's involvement in birth-injury cases can go undetected." [65] In fact, as of four years ago, not a single case in the program's history had produced a disciplinary action against a hospital or doctor, even though those cases "pose a high risk for findings of negligence against doctors, nurses and hospitals."[66]

- **Cannot adjust to new medical research:** The program has been unable to adjust to current medical understanding because definitions of which injuries are covered have not changed in 15 years, despite important advances in understanding the causes of brain damage in babies. The program has rejected claims because it used out-dated criteria for assessing birth injuries. "Decisions in the [Virginia program's] cases can mean the difference between lifetime care for some of society's most-disabled children and no guarantees that medical expenses will be covered. Many families have had to opt for institutionalizing their children."[67]

- **Families of infants who died minutes after birth denied any compensation:** Until recently, the program provided for lifetime care but nothing for wrongful death (a new provision to provide up to $100,000 to deceased children went into effect in July 2003). That led to perverse situations such as a recent case where the obstetrician and hospital successfully argued before the administrative body that an infant who lived only minutes qualified for the program, protecting them from any liability other than the care provided during the deceased infant's 30-minute lifetime.[68]

- **Has not led to reduced malpractice insurance rates:** Doctors claim that the program has failed to protect them from unacceptable malpractice insurance rate increases.[69]

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[64] Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.
[65] Bill McKelway, "Brain Injuries Spur No Action; Case Review, Required by Law, Is Not Being Done, Va. Study Found," *Richmond Times Dispatch*, Jan. 14, 2003.
[66] Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002.
[67] Bill McKelway, "Old Rules Deny New Benefits; Children Rejected for Brain-Injury Program," *Richmond Times Dispatch*, June 5, 2003
[68] Bill McKelway, "Deceased Infant Put into Program; Ruling Blocks Suits Over Death of Baby," *Richmond Times Dispatch*, June 27, 2003
[69] *See, e.g.*, Novelda Sommers, "Peace of Mind is Pricey; Some Malpractice Insurance Soars," *Daily Press* (Newport News, VA), June 5, 2003.

In sum, adopting any program that resembles Virginia's would be simply trading one crisis for another, and would place the burden of solving an insurance problem, not to mention a patient safety problem, on the backs of sick and injured children and their families.

FAULT-BASED ALTERNATIVE SYSTEMS, LIKE HEALTH COURTS, ARE INTOLERABLY UNFAIR.

Another commonly discussed "alternative" med mal system is so-called "health courts," which would remove all medical malpractices cases from the court system. These proposals are all burdened with the same inherent problems of so-called "no-fault" systems, explained above, and for patients, they are even worse.

First, unlike other administrative compensation schemes, such as workers' compensation, health "courts" are not "no-fault" models. Health courts are based on an "avoidability" standard, which is similar to negligence. In other words, in a health court, a patient would still have a high burden to prove, but would have none of the protections the legal system provides. And patients will find it harder to get an attorney.

Moreover, while proposals vary, in every health "court" scheme, the decision-making authority is put in the hands of either the hospital or insurer involved, or "experts" appointed and commissioned by a panel heavily weighted toward health industry representatives.[70] This is completely unfair to patients.

Compensation for injuries under health courts would be determined by a "schedule" developed by political appointees (e.g., a certain amount for a lost eye or severed limb) instead of decided on a case-by-case basis by a jury. There is no room for consideration of circumstances for these types of injuries. As pointed out in recent congressional testimony by Neil Vidmar, "Even when some leeway is built into compensation schedules, they cannot take into account the number of factors and extreme variability of pain and suffering, physical impairment, mental anguish, loss of society and companionship, and other elements of damages that fall under the rubric of non-economic damages. That is why these matters have been entrusted to juries. They provide justice on an individualized basis."[71]

What's more, every state, including New York, guarantees the right to trial by jury in civil cases.[72] Because of the requirement to prove fault, health courts require that patients give up these rights without any reasonable substitute. This is unconstitutional.[73]

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[70] See, e.g., Peters Jr., Philip G., "Doctors & Juries," U of Missouri-Columbia School of Law Legal Studies Research Paper No. 2006-33 Available at SSRN: http://ssrn.com/abstract=929474 at 44 ("[T]he public setting in which these experts will render their opinions could place considerable pressure on them to demonstrate their loyalty to the profession. As a consequence, these 'neutral' experts may show the same reluctance to label another physician's care as negligent that physicians have exhibited in other settings. …[R]esearchers have found that physicians are so unwilling to label another physician's care as negligent that they refuse to do so even when the treatment given to the patient was 'clearly erroneous.')(citations omitted).

[71] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 18 (citations omitted).

[72] Colorado and Louisiana do not have such provisions in their constitutions, but have statutory provisions.

[73] Amy Widman, "Why Health Courts are Unconstitutional," 27 Pace L. Rev. 55 (Fall 2006).

THE COSTS OF ALTERNATIVE SYSTEMS ARE SIGNIFICANT.

In their book *Medical Injustice: The Case Against Health Courts* (2007), Case Western Reserve professors Maxwell J. Mehlman and Dale A. Nance, made the following observations:

- Alternative systems, like health courts "would entail some huge potential increases in total system costs.… If we take health care proponents at their word, their goal is to bring … currently non-claiming people into the process." This, however "would multiply the number of claims involving negligence by a factor between 33 and 50."[74]
- "[C]laims involving error account for at least 84 percent of total system costs … so that, even if we assume that only claims involving error are brought into the system, the system costs should increase by a factor of at least 28, all other things (like system efficiency) being equal.[75]
- "[E]ven if we assume that the average per patient damages under a new system embracing all potential claimants (including those who claim under the existing system) would be only 30 percent of the average damages for claims now paid, that still leaves total direct system costs multiplied by a factor of about 8.5, again as a low end estimate."[76]
- "Health court proposals involve the creation of a new judicial bureaucracy, including specially-trained judges, a cadre of experts to advise them, and what are effectively investigating magistrates located within hospitals or otherwise working with providers." Costs "would certainly be substantial, vastly more than the public (taxpayer borne) judicial costs currently associated with the adjudication of malpractice claims.[77]
- "Some health court advocates concede that, if the system actually compensated substantially more patients, it might not be cheaper than the tort system. The Republican Policy Committee states, for example: 'The health court proposal is not about reducing costs overall (since many more people may be compensated at smaller amounts).'"[78]
- "[O]ther pressures can be expected as well. …[A] number of processes can be expected to be implemented, processes that suppress the levels of patient recoveries below any fair measure of actual losses sustained.[79]

Finally, Mehlman and Nance sum it up this way, in an analysis that is apropos for all alternative compensation systems:

> "[I]n one of the most telling objections to the health court concept, [David A. Hyman, Professor of Law and Medicine at the University of Illinois College of Law, and Charles Silver of the University of Texas at Austin School of Law] point out that it is completely disingenuous for health court proponents to criticize the current system for failing to compensate more patients more quickly at lower cost when providers and insurers could do this under the tort system if they wanted to:

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[74] Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 72.
[75] *Ibid*.
[76] *Ibid*.
[77] *Id*. At 73.
[78] *Id*. At 74.
[79] *Id*. At 75.

> Providers, insurers, and tort reformers often criticize the malpractice system for delivering compensation to only a minority of patients who deserve it, and for taking too long to process valid claims. This argument strikes us as an example of the 'chutzpah defense,' best exemplified by the individual who killed his parents, and then threw himself on the mercy of the court because he was an orphan. Nothing prevents providers or liability carriers from offering payments before patients sue or from paying valid claims expeditiously.... A few hospitals and insurers have implemented a pro-active approach on which they reach out to patients as soon as possible, and its widespread use would surely enable the malpractice system to operate more accurately, more quickly, and with smaller transaction costs."[80]

THE TORT SYSTEM INCREASES SAFETY.

As with the two prior task force discussions, we are asked again to describe how that the tort system encourages safer medical practices. Rather than resubmitting all of this information, we would like to incorporate those submissions by reference and add the following new information.

While there has been much discussion about the steps anesthesiologists took to reduce errors, their experience responding to lawsuits by increasing safety is by no means unique. Many unsafe practices in this country have been made safer only after lawsuits were filed against those responsible. The amount of money saved as a direct result of this litigation — injuries prevented, health care costs not expended, wages not lost, etc. — is incalculable. The following cases are just a few examples, showing how the system can work:

- **Tube misinsertion caused death.**

FACTS: Rebecca Perryman was admitted to Georgia's DeKalb Medical Center after suffering from kidney failure. While undergoing dialysis, a catheter inserted in her chest punctured a vein, causing her chest cavity to fill with blood. Perryman suffered massive brain damage and lapsed into a coma. She died two weeks later. Perryman's husband Henry filed suit against DeKalb and its Radiology Group, as well as the doctor who failed not only to spot the misplaced catheter in Perryman's chest x-ray but also to quickly respond to the victim's excessive bleeding. DeKalb and the Radiology Group settled before trial for an undisclosed amount; a jury awarded $585,000 against the doctor.[81]

EFFECT: "After the award, the radiology department instituted new protocol for verifying proper placement of catheters." [82]

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[80] *Id*. at 97, citing citing David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 1122 (2006).

[81] *Perryman v. Rosenbaum et al.*, No. 86-3453 (DeKalb County Super. Ct., Ga., verdict June 5, 1991).

[82] Koenig, Thomas & Michael Rustad, *In Defense Of Tort Law*. New York: New York University Press (2001), citing letter correspondence from W. Fred Orr, III, Henry Perryman's attorney, dated April 26, 1994.

- **Emergency room failed to diagnose heart disorders.**

FACTS: Three Air Force servicemen died after being discharged from the emergency room without proper examination. Though each had a history of heart problems and displayed classic symptoms of heart disorder, all three were misdiagnosed with indigestion.[83]

EFFECT: "As a result of malpractice litigation, the Air Force investigated the deaths and instituted stringent new requirements for diagnostic testing ... These procedures are now standard practice at Air Force medical facilities throughout the world."[84]

- **HMO forced psychiatrists to prescribe psychiatric drugs.**

FACTS: On April 10, 2000, Dr. Thomas Jensen filed a lawsuit against Kaiser Permanente, California's largest health maintenance organization, after he was fired for refusing to prescribe medications for mental health patients whom he did not personally examine. Kaiser required psychiatrists to prescribe antidepressant drugs for depression and anxiety at the recommendation of non-medical psychotherapists, such as social workers, family therapists and social work interns.[85]

EFFECT: The lawsuit prompted state regulators to investigate Kaiser's prescription policy. Faced with an on-slaught of negative publicity arising from Jensen's lawsuit, Kaiser eliminated the practice in August 2000. Kaiser now requires psychiatrists to rely on their own examination of patients before writing prescriptions.[86]

- **Newborns left in nursery without supervision.**

FACTS: In September 1982, James Talley was born at Doctors Hospital in Little Rock, Arkansas. He was left alone for 35 minutes, 10 to 15 of which he stopped breathing. When a nurse came to check on him, his heart had stopped and he had turned blue. The oxygen depravation caused permanent brain damage. The Talleys sued Hospital Corporation of America

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[83] Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), pp. 567, citing *Downey v. U.S.*, No. MCA 84-2012/RV (N.D. Fla., filed 1984), *Evans v. U.S.* and *Dutka v. U.S .Evans* and *Dutka* were filed as administrative complaints but settled prior to filing of complaints in federal district court. Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), n. 153, citing telephone interview with C. Wes Pittman, one of the servicemen's attorneys.

[84] Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), p. 57, citing telephone interview with C. Wes Pittman, one of the servicemen's attorneys.

[85] Fong, Tony, "Kaiser sued over policy on medicine; S.D. psychiatrist says doctors must prescribe drugs to unseen patients," *San Diego UnionTribune*, April 13, 2000; Bernstein, Sharon & Davan Maharaj, "Kaiser Drug Policy Prompts State Inquiry," *Los Angeles Times*, April 12, 2000.

[86] "Kaiser Permanente has reached a settlement with Thomas Jensen, M.D. of San Diego," *Managed Care Week*, Vol. 10, No. 32, September 11, 2000; Bernstein, Sharon, "Kaiser Settles Doctor's Suit Over Drug Policy, *Los Angeles Times,* August 26, 2000; Maharaj, Davan, "Kaiser Tightens Rule On Writing Prescriptions," *Los Angeles Times*, May 3, 2000; Abate, Tom, "Kaiser to End Controversial Prescriptions," *San Francisco Chronicle*, May 3, 2000; "California Investigates Kaiser Prescriptions Policy," *BestWire*, April 17, 2000; Abate, Tom, "State Probing Kaiser's Protocol for Depression; Prescriptions allegedly given without exams," *San Francisco Chronicle*, April 13, 2000.

(HCA), Doctors Hospital's parent company, arguing that HCA's cost cutting procedure of reducing the number of nurses in the pediatric unit placed newborns at risk of injury or death. At trial, evidence showed that it would have cost Doctors Hospital an additional $70,000 per year per nurse to have someone in the nursery at all times and that the hospital was consistently two nurses short on the nightshift. The jury awarded $1.85 million in compensatory damages for James, $777,000 to his mother and $2 million in punitive damages.[87]

EFFECT: "As a result of this decision, HCA changed its policy on staffing pediatric units throughout its chain of hospitals, potentially saving hundreds of new lives and preventing as many injuries."[88]

- **Staffing problem endangered patients.**

FACTS: On January 26, 1998, Dr. Roberto C. Perez suffered severe brain damage after a nurse, who had been working over 70 hours a week and was just finishing an 18-hour shift, injected him with the wrong drug. Perez had been admitted to Mercy Hospital in Laredo, Texas, two weeks earlier after a fainting spell and was almost ready to be discharged. His family filed a medical malpractice suit against Mercy Hospital, among others, arguing that hospital administrators knew since 1994 that staffing problems existed yet failed to do anything about the nursing short-age. The case settled before trial, with the hospital paying $14 million.[89]

EFFECT: As part of the settlement, Mercy Hospital agreed that no nurse in the ICU would be allowed to work more than 60 hours per week.[90]

- **Bacterial infection spread to hospital roommate.**

FACTS: In 1983, 72-year-old Julius Barowski contracted a bacterial infection from a fellow patient after undergoing knee replacement surgery. His condition required 11 hospitalizations and 9 surgeries; his leg lost all mobility. As the infection spread, he suffered excruciating pain and was institutionalized for depression until his death one year later. Barowski's representative filed suit, alleging that the hospital breached its own infection control standards. The jury awarded $500,000.[91]

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[87] "Saving The Newborn," *Trial Lawyers Doing Public Justice* (July 1987), citing *National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, No. 84-160 (Saline County Cir. Ct., Ark., verdict October 6, 1986). *See also*, Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), pp. 578.
[88] "Saving The Newborn," *Trial Lawyers Doing Public Justice* (July 1987).
[89] *Perez v. Mercy Hospital*, No. 98 CVQ 492-D3 (341st Judicial Dist., Webb County Ct., Tex., settlement October 28, 1999); *Perez v. Mercy Hospital*, No. 98 CVQ 492-D3 (341st Judicial Dist., Webb County Ct., Tex., fourth amended original petition, filed October 22, 1999)(on file with CJ&D).
[90] *Perez v. Mercy Hospital*, No. 98 CVQ 492-D3 (341st Webb County Ct., Tex., settlement October 28, 1999); *Perez v. Mercy Hospital*, No. 98 CVQ 492-D3 (341st Judicial Dist., Webb County Ct., Tex., release and settlement agreement, October 28, 1999)(on file with CJ&D).
[91] *Widmann v. Paoli Memorial Hospital*, No. 85-1034 (E.D. Pa., verdict December 9, 1988). *See also*, Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), pp. 556.

EFFECT: "The Widmann ruling and similar cases have had a catalytic impact in health care facilities around the country. Facilities are much more attentive to the clinical importance of cleanliness in all its dimensions — handwashing, routine monitoring of infection risks, and more vigorous reviews of hospital infection control protocols." [92]

- **Inadequate monitoring led to patient's death.**

FACTS: In 1996, 78-year-old Margaret Hutcheson lapsed into a coma and died after a two-and-a-half month stay at Chisolm Trail Living & Rehabilitation Center. Hutcheson had been admitted to Chisolm for short-term rehabilitation after fracturing her hip and wrist at home. While residing at the center, she suffered severe pressure sores, malnourishment and dehydration, which required three hospitalizations. Hutcheson's family sued the facility and its personnel for wrongful death, arguing that Chisolm was understaffed and failed to follow internal procedures to ensure Hutcheson's safety. The jury awarded $25 million.[93]

EFFECT: As part of the settlement, Diversicare, the nursing home operator, "agreed to adopt a policy requiring the residents' charts be monitored on a weekly basis to ensure their needs are being met. This policy has been implemented in all 65 nursing homes owned or operated by Diversicare, and will benefit over 7,000 nursing home residents."[94]

- **Lack of supervision caused patient's death.**

FACTS: On May 31, 1989, Mr. Beale, a 79-year-old nursing home patient suffering from Alzheimer's disease, drowned in a bathtub after being left unattended. Beale was found with an abrasion on his head and blood on the back of the bathtub, indicating that he had slipped and fallen. Beale's family filed suit against Beechnut Manor Living Center, arguing that the nursing home failed to properly care for and supervise him. Evidence produced at trial showed that Beechnut Manor never reviewed Beale's records from earlier nursing homes and had attempted to cover up the drowning by getting the autopsy report changed. The jury awarded $1 million, $950,000 of which was punitive.[95]

EFFECT: After the punitive damage award, Beechnut Manor installed safety strips in bathtubs and exercised closer supervision of its elderly patients.[96]

- **Bed rungs entrapped patients.**

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[92] Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), pp. 556.
[93] *Olson et al. v. Chisolm Trail Living & Rehabilitation Center et al.*, No. 98-0363 (Caldwell County Ct., Tex., verdict August 26, 1999). *See also*, Osborn, Claire, "Family of care center resident who died awarded $25 million," *Austin AmericanStatesman*, August 27, 1999.
[94] *Texas Reporter Soele's Trial Report* (November 1999). *See also*, Malone, Julia, "Lawyers Filling Gap Left By Regulators," *Palm Beach Post*, September 25, 2000.
[95] *Beale v. Beechnut Manor Living*, No. 90-18826 (Harris County Dist. Ct., Tex., verdict May 21, 1992).
[96] Koenig, Thomas & Michael Rustad, *In Defense Of Tort Law*. New York: New York University Press (2001), citing questionnaire of Vanessa Gilmore, Mr. Beale's attorney, dated May 10, 1994.

FACTS: On September 28, 1993, Billie Trew, a 63-year-old Alzheimer patient at Lakeview Christian Home Northgate Center in Carlsbad, New Mexico, was strangled to death by the restraints in her bed rails while sleeping. Trew's family filed suit against Lakeview Christian, which settled the case for $900,000 before trial, and the Smith & Davis Manufacturing Company, maker of the bed rail. Evidence produced at trial showed that at least 20 elderly nursing home patients died and more than 60 suffered injuries after becoming entrapped in beds similar to that used by Trew. Additional evidence revealed that Everest & Jennings, Smith & Davis' parent company, had received complaints of strangling prior to Trew's death yet failed to act. The jury awarded $4.6 million; the case settled in February 1997 for $3 million.[97]

EFFECT: As part of the settlement, Lakeview Christian "committed to a package of operational reforms, including a reduction in the use of patient restraints and bed rails, increased staff training, and the hiring of a full-time quality assurance administrator to monitor patient treatment." The nursing home also agreed to "certify to plaintiff's attorney, in writing, that from the time plaintiff had filed this lawsuit and until the time the suit had settled, there was a 90% reduction in the use of restraints." In addition to paying $3 million, Everest & Jennings "agreed to issue a warning to its customers about the dangers of bed rail entrapment."[98]

- **Nurses feared consequences of challenging doctors' actions.**

FACTS: On April 30, 1979, Jennifer Campbell suffered permanent brain damage after becoming entangled in her mother's umbilical cord before delivery. Although a nurse had expressed concern when she noticed abnormalities on the fetal monitor, the obstetrician failed to act. Despite the doctor's unresponsiveness, the nurse never notified her supervisor or anyone else in her administrative chain of command. The child developed cerebral palsy, requiring constant care and supervision. Evidence revealed that the hospital lacked an effective mechanism for the nursing staff to report negligent or dangerous treatment of a patient. In addition, the nursing supervisor testified that an employee could be fired for questioning a physician's judgment. The jury awarded the Campbells over $6.5 million.[99]

EFFECT: "Because of this verdict and its subsequent publicity, hospitals throughout North Carolina have adopted a new protocol that allows nurses to use their specialized training and judgment on behalf of patients, without risking their jobs." [100]

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[97] Amos, Denise Smith, "E&J Hit With $4.6 Million Judgment In Liability Case," *St. Louis PostDispatch*, September 5, 1996, discussing *Trew v. Smith & Davis Mfg. Co.*, No. SF 95-354 (Santa Fe County Jud. Dist. Ct., N.M., verdict July 19, 1996); Toppo, Greg, "Strangled woman's family wins damages," *Santa Fe New Mexican*, July 20, 1996.

[98] Romo, Rene, "Bedrail Maker Settles Death Suit," *Albuquerque Journal*, February 28, 1997; "Briefs; Bed rail company makes settlement," *Santa Fe New Mexican*, February 28, 1997; Romo, Rene, "Nursing Home Agrees to Reforms," *Albuquerque Journal*, September 21, 1996; *Verdicts, Settlements & Tactics* (August 1996), discussing *Trew v. Smith & Davis Mfg. Co.*, No. SF 95-354 (Santa Fe County Jud. Dist. Ct., N.M.).

[99] *Campbell v. Pitt County Memorial Hospital, Inc.*, 84 N.C. App. 314 (1987). *See also*, Mahlmeister, Laura, "The perinatal nurse's role in obstetric emergencies: legal issues and practice issues in the era of health care redesign," *Journal of Perinatal & Neonatal Nursing* (December 1996); Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), p. 57.

[100] Rosenfeld, Harvey, *Silent Violence, Silent Death*. Washington, DC: Essential Books (1994), p. 57.

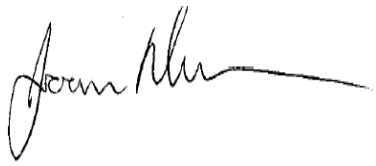
- **Patient prescribed incorrect chemotherapy dosage.**

FACTS: When 41-year-old Vincent Gargano was diagnosed with testicular cancer in 1994, he was given a 90 percent to 95 percent chance of survival. On May 26, 1995, he entered the University of Chicago Hospitals to undergo his last phase of chemotherapy. For four consecutive days Gargano received a dosage that was four times the needed amount, a mistake that went undetected by at least one doctor, two pharmacists and four nurses until four overdoses had already been administered. Hospital records showed that the prescribing doctor wrote the incorrect dosage and that three registered nurses failed to double-check the prescription against the doctor's original order. As a result, Gargano suffered hearing loss, severe kidney damage, festering sores and ultimately the pneumonia that caused his death the following month. The case settled for $7.9 million.[101]

EFFECT: The hospital implemented new policies to ensure that doctors and nurses better document and cross-check medication orders.[102]

We hope this submission helps to answer your questions. Please do not hesitate to contact us with any questions or comments.

Very sincerely,



Joanne Doroshow
Executive Director

[101] Berens, Michael J., "Problem nurses escape punishment; State agency often withholds key details of violations," *Chicago Tribune*, September 12, 2000; "Notable settlement," *National Law Journal*, November 8, 1999, citing *Gargano v. University of Chicago Hospitals*, 95 L 10088 (Cook County Cir. Ct., Ill., settled October 7, 1999); "University hospital to pay $7.9 million for fatal doses of chemotherapy," *Associated Press*, October 8, 1999; "Cancer Patient in Chicago Dies After Chemotherapy Overdose," *New York Times*, June 18, 1995; "Cancer Patient Dies After Chemo Overdose," *Legal Intelligencer*, June 16, 1995.

[102] Berens, Michael J. & Bruce Japsen, "140 Nurses' Aides Fired By U. Of C. Hospitals; Registered Nurses Fear Work Burden," *Chicago Tribune*, October 31, 2000; Berens, Michael J., "U. Of C. To Pay $7.9 Million In Death Of Cancer Patient," *Chicago Tribune*, October 8, 1999.