

A STUDY OF A NO-FAULT MEDICAL INJURY CLAIMS SYSTEM TO REPLACE LITIGATION

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Introduction

The purpose of this report is to propose that Oregon adopt a comprehensive plan for a no-fault medical injury claim system in Oregon. The need for such reform is evident. According to the American Medical Association, Oregon is one of twelve “hot states”¹ in the country that is experiencing a medical malpractice crisis.² Recently, Oregon insurers have either raised their rates, put a moratorium on new policies or they have stopped underwriting policies altogether. In turn, many doctors have accepted less high-risk patients, practice more defensive medicine, have quit high-risk medical specialties, or have retired early. Patients, especially those in the more rural areas, have fewer medical options in emergency services and obstetrical care, and their healthcare costs have increased.³

The cause of the medical malpractice crisis is debatable.⁴ Trial lawyers argue that high insurance rates are a result of poor investment decisions by insurance companies. They point to studies showing that insurance companies tend to raise their rates during hard markets and that the average medical liability payout is below \$30,000.⁵ Insurance companies counter by arguing that they overwhelmingly invest in high grade bonds, which are low investment risks. They point to high jury awards and the inability to cap non-economic damages as the root causes of the crisis.

To some degree, both sides are correct. For almost ten years insurance prices were flat. Then, in 2000, the hard market began, thus reducing investment income. At the same time, medical malpractice claims have increased and insurance defense costs have escalated.⁶ Reinsurance (insurance for the insurers) has become more expensive as insurers have stopped insuring against medical malpractice claims.⁷ On top of all this, it is estimated that the median medical malpractice jury award has almost doubled since 1996.

The current system is ineffective in compensating a patient with a legitimate claim. According to one study, out of every 100,000 patients discharged from hospitals across the nation, about 4,000 patients (4%) suffered from an adverse event,⁸ of which 1,000 (1%) patients were injured as a result of medical malpractice. Out of these patients, about 125 (.13%) tort claims were filed. Of these 125 claims, it was found that no malpractice occurred in eight-five of the cases, but compensation was received in about sixty (.06%) of the cases. Of those sixty who received compensation, only about thirty-five (.04%) used the legal system, with about only five (.005%) actually received compensation after a full trial.⁹

According to an Oregon Medical Association study, for every \$700,000 medical malpractice premium paid, on average thirty percent went to the injured patient, thirty percent went into the trial attorney’s pocket, twenty-four percent paid for defense attorneys, and sixteen percent went to administration (the state).¹⁰

A recent Gallup poll¹¹ suggests that a majority of people believe the current system needs reform. Of those polled, 57% believe there are too many lawsuits against doctors, 74% feel that there is a medical liability crisis in health care today, and 72% favor limits on the amount a patient can be awarded for emotional pain and suffering.

Federal efforts are underway to regulate medical malpractice claims on a national scale. On January 16, 2003, President Bush issued a proposal to adopt proven standards to reduce the costs of medical liability and create a system whereby the results are fair, predictable, and timely.¹² President Bush's proposal consists of the following seven points:

- Secure the ability of injured patients to get quick, unlimited compensation for their “economic losses,” including the loss of ability to provide unpaid services such as care for children or parents.
- Ensure that recoveries for non-economic damages are limited to cases where they are truly justified, and limit punitive damages to reasonable amounts (\$250,000).
- Provide for payments of judgments over time rather than in a single lump sum, to ensure that appropriate payments are there when patients need them.
- Ensure that old cases cannot be brought years after an event.
- Reduce the amount that doctors must pay if a plaintiff has received other payments from an insurer to compensate for their losses.
- Provide that defendants pay judgments in proportion to their fault.

The U.S. House of Representatives has introduced The Common Sense Medical Malpractice Reform Act of 2003¹³ and The Help Efficient, Accessible, Low Cost, Timely Healthcare (HEALTH) Act of 2003¹⁴ to achieve President Bush's agenda. The Senate is also expected to introduce similar legislation in the near future.

According to a recent report issued by the U.S. Department of Health and Human Services, medical malpractice reform in states like California, Montana, Indiana, and Utah has reduced insurance rates and costs, while increasing injured patient compensation. For example, in 2001, the average premium increase in these four states was 15%, while Oregon's was 56%.¹⁵

This report will review the medical malpractice law as it now exists in Oregon. Then, the report discusses the aspects of a no-fault system and whether such a system is feasible. Next, the report details the medical malpractice reforms that have taken place in Sweden, Virginia, Florida, and California. To determine whether a no-fault medical injury compensation system would be legally viable in Oregon, the report sets forth potential constitutional and legal challenges that may arise from such reform. In the end, the report sets forth a no-fault proposal to be adopted in Oregon.

Medical Malpractice Law in Oregon

Medical malpractice law in Oregon is complex. This section serves only to briefly describe the elements necessary to prove a medical malpractice case in Oregon. Simply put, to prevail on a medical malpractice tort claim against a medical provider the claimant must prove the following four elements:

- The medical provider had a duty to the patient;
- The medical provider breached that duty;
- The harm is measurable in damages; and
- There is a causal link between the breach of the duty and the harm that occurred.¹⁶

Medical providers in Oregon have a duty of care that is beyond the common-law duty to prevent foreseeable harm.¹⁷ Oregon law states that a medical provider's duty is to exercise reasonable care toward their patients.¹⁸ ORS 677.095(1) specifically sets forth a physician's duty:

(1) A physician or podiatric physician and surgeon licensed to practice medicine or podiatry by the Board of Medical Examiners for the State of Oregon has the duty to use that degree of care, skill and diligence that is used by ordinarily careful physicians or podiatric physicians and surgeons in the same or similar circumstances in the community of the physician or podiatric physician and surgeon or similar community.¹⁹

Similar standards of care have also been applied to chiropractors,²⁰ dentists,²¹ pharmacists,²² and hospitals and hospital personnel.²³ This standard of care is an objective standard that does not attempt to examine the physician's subjective state of mind.²⁴

Generally, to establish whether a physician breached the duty of care an expert medical witness must testify to such. The expert does not have to be familiar with the standard of care, but the expert must be knowledgeable of the medical treatment methods customary and proper in that or a similar community.²⁵

In cases where multiple defendants may be liable, but where it is unclear which defendant was negligent, an injured patient may argue, under the doctrine of *res ipsa loquitur*, that the injury would not have occurred in the absence of someone's negligence and that the negligence caused was probably that of the defendant.²⁶

Oregon law also allows claimants to reach deeper pockets by claiming vicarious liability. Under this theory, a physician and/or a hospital may be liable for the acts of the personnel the physician or the hospital directly controlled or supervised.²⁷

A medical provider may also be liable for battery and malpractice if he does not provide informed consent. ORS 677.097 sets forth the following duty to obtain informed consent:

(1) In order to obtain the informed consent of a patient, a physician or podiatric physician and surgeon shall explain the following:

- (a) In general terms the procedure or treatment to be undertaken;
- (b) That there may be alternative procedures or methods of treatment, if any; and
- (c) That there are risks, if any, to the procedure or treatment.

(2) After giving the explanation specified in subsection (1) of this section, the physician or podiatric physician and surgeon shall ask the patient if the patient wants a more detailed explanation. If the patient requests further explanation, the physician or podiatric physician and surgeon shall disclose in substantial detail the procedure, the viable alternatives and the material risks unless to do so would be materially detrimental to the patient. In determining that further explanation would be materially detrimental the physician or podiatric physician and surgeon shall give due consideration to the standards of practice of reasonable medical or podiatric practitioners in the same or similar community under the same or similar circumstances.

There is a two-year statute of limitations for medical malpractice tort claims. The statute begins running when the injury is first discovered or should have been discovered if reasonable care was exercised. However, no action can be brought later than five years from the treatment date.²⁸

No-Fault System in General²⁹

Essentially, a no-fault system eliminates the necessity of proving a medical provider's standard of care as discussed above. Instead, a no-fault system would compensate the patient if the injury was caused by medical care (so called iatrogenic injuries) regardless of the standard of care. Thus, although the standard of care is eliminated from the process, the injured person must still prove that the injury was a result of the medical care provided and not the result of an underlying medical condition.

Theoretically, the goal of a medical no-fault system is two-part: to compensate more injured persons at a lower cost while at the same time enhancing quality control. Costs are reduced as a result of reducing the adversarial nature of the proceedings and tailoring payments to individual needs as they arise. Further, a no-fault system encourages medical providers and insurers alike to investigate medical errors and provide the means to improve medical care without the fear of being stigmatized.

In general, medical no-fault systems include the following components:

- An administrative system, either public or private, that includes the decision making, processing, dispute resolution, and risk-bearing;
- A combination of formal and informal procedures;
- Coverage that is either mandatory or voluntary and third-party or first-party;
- Eligibility criteria, including injury thresholds;
- Schedule of benefits covered and compensation packages;

- Coordination of benefits with other insurance payers;
- Source of funding;
- Premium-setting determined by community or experience rating;
- Assurance of solvency; and
- Loss-prevention mechanisms.

As the following sections will detail, parties may fall under the jurisdiction of a no-fault system through consensual agreements, by accepting service from a medical provider participating in such a system, or by accepting healthcare insurance that participates in the system.

One study found that a comprehensive no-fault medical injury claim system run by a state agency could cost just as much as the current tort system and compensate almost twice the number of injured patients. The study estimated that a comprehensive no-fault system in Utah would cost the same as the tort system, but would save between \$18 million to \$28 million dollars in Colorado. This included a \$100,000 cap on pain and suffering, a four week disability period, and 66% wage replacement.³⁰

Sweden's Patient Insurance Compensation (PIC) & Pharmaceutical Insurance (PI)³¹

In 1975 and 1978, Sweden established the Patient Insurance Compensation and Pharmaceutical Insurance Funds, respectively. The Pharmaceutical Insurance Fund is a collective insurance agreement between pharmaceutical manufacturers and a private Swedish insurance consortium to cover injuries resulting from prescriptions drugs and other such medicines. The Patient Insurance Compensation Fund was created through contract negotiations between the Swedish Federation of County Councils³² and a private insurance consortium.

Under Sweden's "no-fault" system, medical providers voluntarily participate within the program and the system does not provide an exclusive remedy for compensation. Claimants are free to bring a tort claim against medical providers, but under a collateral source type rule, a claimant's tort award is offset by any compensation awarded in the PIC or PI. Generally, claimants do not file tort claims because their awards do not exceed the compensation received under the PIC or PI.

Patients are not directly involved within the PIC or PI contracting process and they do not directly fund the system. Instead, medical providers contract directly with insurance providers to pay premiums. System costs are eventually passed onto patients when taxes are levied to fund the public health care system.

Compensability

Under the PI, a claim is compensable if the pharmaceutical product caused the injury and it is reasonable to provide compensation. The PI also reviews the nature of the disease and whether the injury was unexpected or serious.

The PCI requires a showing of medical causation and a determination that the injury could have been avoided. However, the PCI provides a rebuttable presumption that the injury was caused

by an act or omission to act, for which the medical provider is accountable, if the injury could have been avoided through an alternative manner of treatment. The presumption is rebutted by showing that the injury did not occur, with substantial probability, as a direct consequence of the medical treatment. For example, compensation is not awarded if the injury, to a preponderant extent, has a connection in or was caused by a disease or other comparable condition in the patient.

The Swedish system has categorized medical injuries five different ways:

- Real treatment injuries;
- Unreasonably severe injuries for common illnesses;
- Incorrect diagnosis;
- Infections; and
- Accidents.

Real treatment injuries are defined as those injuries that, with substantial probability, occurred as a direct consequence of an examination, treatment or other similar measure, and constitutes the type of complication related to a medically justified measure that could have been avoided. The focal inquiry is whether the treatment was medically justified (motivated) or whether there was an alternative treatment method. The term “medically justified” is determined by how a comparable experienced physician would have acted. Such injuries, however, will not be compensated if the medical provider was using an accepted method that causes unavoidable complications.

An incorrect diagnosis is compensable only if an experienced physician would have recognized the symptoms and drawn the right conclusions. Such compensation is awarded only to cover the additional loss caused by the misdiagnosis. For example, failure to diagnose an untreatable disease would result in minimal compensation.

Infectious injuries are compensated if it was likely that the infection was caused by bacteria transmitted through treatment rather than through the patient’s own bacteria. For example, compensation is not given for infections acquired during surgeries on the intestines, oral cavities, or for cancer.

If the medical provider is responsible or if medical equipment is defective, accidental injuries are compensable. However, injuries resulting from a normal risk (e.g., competent patient falling out of bed) or self-inflicted injuries (e.g., mentally ill patients hitting their heads) are not considered accidental.

Specifically excluded from coverage are minor injuries. Minor injuries are those injuries *other than* the following:

- Disability lasting more than 30 days.
- Hospitalization more than 10 days.
- Death.
- Treatment costs and income losses that are in excess of \$100 after compensation from other collateral sources.

Further exclusions are psychological injuries not resulting from physical injury, injuries caused by a policy decision to limit resources to medical providers, and injuries where the risks were assumed to avoid a serious threat to life or seriously disabling injury (i.e., emergency situations).

Finally, for a claim to be compensable, it must be filed within three years of the date the claimant became aware of the injury, but no later than ten years from the time the injury occurred.

Benefits

Much like a tort case, the PIC and PI award benefits for lost wages, medical expenses, and even non-economic damages. Pain and suffering benefits are only awarded if the claimant suffered a physical injury. Pain and suffering benefits are not awarded to family members or to third parties.

Typically, future damages and income replacement benefits are awarded through annuity payments. However, lump sum payments are paid out if the award is less than ten percent of the claimant's income. If the claimant returns to work, annuity payments may be decreased by the PIC or PI. Conversely, if the claimant can later show that the injury was more severe than originally thought, annuity payments may be increased. As to non-economic damages, the claimant has a choice as to whether annuity payments or a lump sum payment should be made.

Overall benefits are limited to about \$714,000 per person or \$3.57 million dollars per loss event. If PIC or PI fails to pay benefits within sixty days after knowing that a medical injury existed, the accrued interest is paid.

Benefits are calculated in the following manner:

- *Net Income & Household Production Costs* = (Gross wage loss + fringe benefits + household production loss) – (Taxes + consumption deduction + household production + SSDI benefit)
- *Health Care Costs* = (Gross costs) – (Collateral sources)
- *Other Compensable Costs* = (Burial expenses + Pain and Suffering)

Claim Adjudication

To file a medical injury claim the claimant obtains a form from his medical provider, completes it, and then files the form with the local insurance consortium. Insurance claims adjusters decide whether the claim is compensable or not. The adjuster may seek advice from a panel of medical consultants in reaching his decision.

If a claimant disagrees with the adjuster's decision, an appeal can be filed with the Patient Claims Panel. An appeal must be filed within one year of the adjuster's decision. On appeal, the Panel may issue an advisory opinion after hearing testimony from both the claimant and the adjuster.

If the claimant disagrees with the Panel's decision, the claimant may then appeal the case to binding arbitration. At arbitration, each party appoints an arbitrator and the government appoints a third arbitrator. Written evidence is usually relied upon; however, testimony may be taken.

The adjudicatory process is not open to the public. Still, precedent setting cases are published once a year.

Virginia's Birth Injury Fund (BIF) & Florida's Neurological Injury Compensation Association (NICA)³³

Both Virginia and Florida enacted laws in the 1980's to create a no-fault system for newborn injuries with severe neurological impairments. In 1987, Virginia was the first state to enact a no-fault medical liability program. Florida enacted legislation in 1989, and its no-fault system encompasses more claims than does Virginia's system. Below is an outline of how the two systems operate, along with some discussion of their strengths and weaknesses.

Funding

To initially start Florida's system, the state contributed \$40 million from a surplus account in the Insurance Department. Florida's no-fault system is funded mainly by those who voluntarily participate within the system. Participating obstetricians are assessed a \$5,000 fee each year, while non-participating physicians are assessed a \$250 fee each year. Nonpublic hospitals are assessed \$50 per live birth each year.

Much like Florida, Virginia's system assesses a \$5,000 fee to participating obstetricians and hospitals pay a \$50 per delivery assessment. However, unlike Florida's system, the hospital assessment is capped at \$150,000 per year and non-participating physicians are not assessed a fee. Further, if assessments fail to provide sufficient funding, Virginia may seek funding from liability and casualty insurers (whether they provide malpractice insurance or not) by issuing pro rata assessments up to 0.25% of their insurance premiums. Thus far, Virginia has yet to assess insurance companies, and Virginia has even reduced the assessments of participants according to the length of time they have been in the system.

Notably, neither state allows its no-fault program to have access to the state general fund or other state revenues.

Compensability

In Virginia, in order for a claim to be compensable, the following six conditions must be met:

- The infant was born alive.
- An injury occurred to the spinal cord or brain.
- The cause of the injury was deprivation or mechanical injury during labor, delivery, or resuscitation.
- The infant is permanently disabled as a result and is in need of assistance in all activities of daily living.

- The injury was not caused by a congenital or genetic abnormality, a degenerative neurological disease, or maternal substance abuse.
- The injury was either caused by a physician participating in the program or occurred in a participating hospital.

Florida's compensability criteria are considered less stringent than Virginia's criteria. Florida's system provides compensation only to those infants weighing over 2,500 grams if those infants are permanently and substantially mentally and physically impaired. Also, Florida has no requirement that the infant be in need of assistance in all activities of daily living. Much like Virginia, Florida bars claims if the injury was caused by a genetic or congenital abnormality.

Benefits

Both Virginia and Florida cover medically necessary and reasonable expenses of medical, residential, and custodial care (i.e., custodial care costs, supplies and equipment, rehabilitation and special education, and transportation incident to care).

All such expenses are offset by collateral sources of payment. This means that private health insurance, disability insurance and even Medicaid³⁴ payments are primarily liable for medical expenses. Only after these collateral sources are exhausted will the no-fault system contribute to medical expenses.

There are no set statutory guidelines for what is considered medically necessary and reasonable. Thus, requests for the installation of swimming pools for hydrotherapy and travel expenses to other countries to experiment with alternative treatments have been granted. Also, alterations to living quarters and even the purchase of a new house to accommodate wheelchair access have been granted.

Virginia's program pays lost wages at fifty percent of the average wage of those working from ages 18-65. Florida's program does not pay for lost wages. Instead, Florida has created a so called parental payment whereby payment of up to \$100,000 is granted to the family of the injured infant. Full payment depends upon the infant's duration of life. This parental payment serves as a substitute for the non-economic damages awarded in the tort system, such as pain and suffering.

Reasonable attorney fees are also awarded to the prevailing claimant's attorney. In practice, such fees are paid on an hourly basis, rather than a contingency fee basis. The reasonableness of the attorney fees is determined by the factors set forth by the bar.

All benefits in both systems are paid on a periodic basis for the lifetime of the child; in other words, when the expense is incurred. This allows the programs to be flexible with their benefits; however, it has also created some debate as to what expenses are specifically covered.

Administrative Structure and Claim Process

Virginia's BIF and Florida's NICA are independent entities created by the legislature to assess and collect premiums, maintain funds, and make recommendations regarding eligibility and benefits. The Virginia BIF is governed by a board of seven unsalaried directors, which are appointed by the Governor. Four of the directors represent medical providers and liability insurers. Three of the directors are appointed from the public at large. The Florida NICA has five directors (one of whom is a citizen appointee) that are all appointed by the Insurance Commissioner. Day-to-day operation of both systems is performed by an Executive Director with support staff. The legal status of BIF and NICA is unclear. Because they do not operate under administrative procedure acts, sunshine laws, or civil service provisions, both systems resemble an advisory commission. However, their decisions carry more weight than an advisory commission.

Both states require that medical providers give notice of the no-fault program to possible beneficiaries. Virginia's standard of notice states that obstetrical patients must be given a clear and concise explanation about their rights and limitations under the program. In Florida, the NICA has created pamphlets that medical providers are required to give to patients upon receiving care.

Neither state requires that medical providers report potential claims to BIF or NICA. Instead, claimants must gather discovery (i.e., medical records), which is generally done through an attorney, and file a claim with the Department of Administrative Hearings (Florida)³⁵ or the Workers' Compensation Commission (Virginia). In Virginia, the statute of limitations for a no-fault claim is ten years, and in Florida, the statute of limitations is five years.

In both Virginia and Florida, the no-fault system operates to provide the exclusive remedy for compensable injuries involving participating medical providers. However, the no-fault systems do not cover claims if the injuries were caused intentionally or willfully, in bad faith, with malicious purpose, or with willful and wanton disregard of human rights. If the no-fault system rejects a claim, the claimant is then free to bring a tort claim against the medical provider. The statutes toll the statute of limitations during the pendency of a no-fault claim.

After claims are filed, they are referred to BIF or NICA for their review and recommendation. In both states, the legislation provides that BIF or NICA has a certain period of time to inform the Commission or the Department as to whether the claim is compensable and what benefits should be provided. Determinations of compensation and benefits are based mainly upon medical records. Both BIF and NICA contract with physicians to provide an independent medical evaluation. In Florida, the physician may examine the infant.

Within a short period of time, a claimant may choose to contest a BIF or NICA recommendation by requesting a hearing as to compensability or benefits. The only parties to the hearing are the claimant and BIF or NICA representatives. Medical evidence may be discovered and presented through depositions and interrogatories. The Commission or Department may also seek the testimony of the physician providing the independent medical evaluation. Significantly, the treating medical provider does not directly offer an opinion on the matter.

In Virginia, if a claimant disagrees with the decision of the judge, the claimant has twenty-one days to request that the full Commission rehear the case. In both states, administrative decisions are final as to matters of fact, and questions of law may be appealed to the Court of Appeals.

Exclusive Remedy Issue: Florida

The Florida program ran into two problems when trying to create an exclusive remedy. First, the statutes did not clearly spell out whether the Department of Hearing Divisions or whether the trial court could determine a claimant's eligibility for the NICA program. Thus, claimants were filing two claims, one with the trial court and one with the Department, to recover for injuries. Second, the statutes did not clearly spell out how a participating medical provider was to obtain informed consent from a patient (and providers were not properly obtaining such consent), thereby allowing claimants to successfully avoid NICA by arguing that they did not waive their right to bring a tort claim.

Unfunded Liability and Informed Consent Issues: Virginia

Virginia's program has run into problems since its inception. For one, the program was projected to have an \$88 million unfunded liability by December 2002. The main cause of this unfunded liability was that the program underestimated the true costs of care. To make the program more accountable, it has been proposed that the program be clearly defined as a governmental organization, thereby subjecting it to annual auditing by a certified public accountant and allowing it to obtain legal advice from the Office of Attorney General.

Moreover, the program initially lacked written benefit guidelines for the first nine years. This resulted in inconsistent benefit awards and hurt the program's credibility. It also was found that not enough was being done by physicians and hospitals to inform claimants of the program. In general, claimants became aware of the program through their attorneys. To cure this problem, it has been proposed that health care providers be mandated to obtain informed consent from patients prior to care.

No-Fault System v. Tort System

One goal in implementing a no-fault system in Virginia and Florida was to decrease medical malpractice insurance premiums. Early estimates showed that in both Florida and Virginia premiums decreased, both absolutely and relative to national averages. For example, in Virginia, immediately after passing this legislation, one major malpractice insurer lifted its ban on writing new policies for obstetricians and gynecologists. Since its inception, obstetricians and gynecologists have been able to receive lower malpractice insurance rates than their counterparts in other states. In fact, insurance discounts in some cases have exceeded the costs incurred by hospitals and physicians participating in the program.

In Virginia, experience has shown that benefits under the program are more favorable than awards received under the Virginian tort system. The main reason for this is that the benefits tend to exceed the malpractice caps placed on tort claims. In 2002, the program paid out \$15.2

million, whereas the estimated payout for severe birth injury tort claims was \$10.8 million. In contrast, Florida's no-fault compensation was comparable to compensation received in tort cases.

One positive result of both systems is that a greater percentage of the no-fault benefits awarded actually ended up in the claimant's, not the claimant attorney's, pocket. It is estimated that the claimant receives about ninety percent of the total no-fault payout, versus fifty-three percent in comparable tort cases.

Originally, it was thought that a no-fault system would compensate a claimant faster than a tort system. Experience has shown that no-fault claims were filed no faster than tort claims. In both states, claimants tend to consult attorneys first before filing any claim, and attorneys tend to investigate the claim as a potential tort case. For example, one study found that all claimants in Virginia sought attorney advice prior to filing a claim; whereas, in Florida 94% did so. Nevertheless, once a claim is filed, the claim is resolved faster within the no-fault system, about six months, versus a comparable tort claim, which can take years. One study of Florida's system found that no-fault claims were generally resolved in two thirds the time needed for tort cases.

In Florida, about half of the contested cases in the no-fault system related to eligibility disputes, such as severity of injury and causality. Only about half of these cases received compensation, whereas the tort system traditionally compensated about seventy percent of the obstetrical tort cases. However, almost thirty percent of the no-fault claims are quickly resolved through voluntary withdrawal. Claimants who voluntarily withdraw do so without prejudice, which allows a no-fault claim to be later filed if the infant's injury becomes more severe.

Overall, claimants have been satisfied with the Virginia and Florida no-fault system and they appear to net more in benefits when compared to the tort system.

California's Medical Injury Compensation Reform Act (MICRA)

In 1975, the California legislature enacted the Medical Injury Compensation Reform Act (MICRA).³⁶ Among other things, MICRA capped non-economic damages at \$250,000, ensured compensation for economic damages,³⁷ created a sliding scale for contingency fees, provided for periodic payments for future damages, and allowed for binding arbitration of disputes.

The central component of MICRA, and what makes California a quasi no-fault system, is the allowance of private arbitration system that is binding if contractually elected (full text of statute in note 38).³⁸ Section 1295 of the California Code of Civil Procedure sets forth the contractual language that must be included in any medical malpractice arbitration agreement and where that language must be located within the agreement. It allows a time period in which to rescind the agreement and it dictates when an agreement is considered a contract of adhesion, unconscionable, or otherwise improper.

Section 1295 has faced many legal challenges since its inception. The following five issues have plagued the California arbitration clause:³⁹

1. Whether a non-signatory spouse is bound to arbitration by the signature of a spouse;
2. Whether heirs of a signatory are bound to arbitration in a wrongful death action;
3. Whether unborn children are bound to arbitration under a mother's arbitration agreement;
4. Whether non-signatory physicians are bound to arbitration if they are employed or associated with a signatory physician; and
5. Whether section 1295 protects against actions questioning the validity of the arbitration agreement itself.

In resolving these issues, the California courts have come to the following conclusions:

1. Arbitration provisions are binding when an authorized agent or fiduciary (i.e., an employer) contracts for medical treatment on behalf of a beneficiary (i.e., an employee).⁴⁰
2. Originally, the California appellate courts did not bind non-signatory spouses to arbitration.⁴¹ However, more recently, the appellate courts have bound non-signatory spouses to arbitration if section 1295 provisions are complied with.⁴² Thus far, the California Supreme Court has not spoken to this issue.
3. Arbitration provisions must be specific if any heir is to be bound to the agreement.⁴³
4. In order for an unborn child to be bound to the agreement, the agreement must specifically state that it binds all derivative claims arising from the health care rendered to the signatory.⁴⁴
5. Non-signatory physicians may be bound as employees of a professional corporation if the corporation contracts with health care plans with arbitration clauses⁴⁵ and patients are bound to arbitration against non-signatory physicians if the agreement so provides.⁴⁶
6. An arbitration agreement may be invalid if there is an absence of mutual assent, intentional or criminal conduct exists, agreement terms disturb finality of agreement, fraud in the inducement exists, or the arbitrator lacked neutrality.⁴⁷

Section 1295, along with the other MICRA statutory provisions, has proven successful in reducing medical malpractice insurance premiums and compensating injured patients. For example, over the last twenty-five years, insurance rates have increased in California by 167%, while the rest of the country saw a 505% increase.⁴⁸ Also, research has shown that large jury awards have decreased and the total number of claims resolved through settlement and arbitration has increased (resulting in more money actually ending up in the pockets of the injured patient).⁴⁹

Oregon Constitutional Challenges

The following research shows that, in general, no-fault systems and arbitration clauses in Oregon have survived judicial scrutiny dating back to the early 1900's. This is especially the case when parties enter into these systems on a voluntary and mutual basis.

Article 1, Section 10: Remedy Clause

Article I, section 10 of the Oregon Constitution states: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

In *Smothers v. Gresham Transfer, Inc.*⁵⁰ the Oregon Supreme Court performed a detailed analysis of Oregon's Remedy Clause. In determining whether legislation is unconstitutional under the Remedy Clause, the court set forth a two part test. The first inquiry is whether the injury is one for which the Remedy Clause guarantees a remedy. In other words, “when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury?”⁵¹ If so, the second inquiry is whether the legislature “provided a constitutionally adequate remedy for the common-law cause of action for that injury.”⁵²

In *Smothers*, the court found that an employee could bring a negligence action against its employer outside of the workers' compensation system because the employee had an absolute common-law right to do so.⁵³ Later, in *Storm v. McClung*,⁵⁴ the Oregon Supreme Court declared that the plaintiff did not have an absolute common-law right to a wrongful death claim.⁵⁵ The court held that the right of action was statutory in nature, and therefore, was subject to legislature limitations.⁵⁶ In *DeMendoza v. Huffman*,⁵⁷ the court held that punitive damage awards were not a guaranteed remedy under the Remedy Clause.⁵⁸

At common law, physicians were held liable for their misfeasance through assumpsit on the case actions.⁵⁹ From the earliest date of 1374⁶⁰ up to 1767,⁶¹ claims against physicians were filed in England. Thus, a medical malpractice claim, as we know it today, would be considered by the Oregon Supreme Court to be a guaranteed common law remedy under the Remedy Clause. Therefore, if the legislature enacted a no-fault medical liability system, the system would have to provide a constitutionally adequate remedy.

Article 1, Section 17: Right to a Trial by Jury⁶²

Article I, section 17 of the Oregon Constitution declares that “[i]n all civil cases the right of Trial by Jury shall remain inviolate.” The Oregon Supreme Court has held a jury trial is guaranteed “in those classes of cases in which the right was customary at the time the [Oregon] constitution was adopted or in cases of like nature.”⁶³ The right to a jury trial does not create “an independent guarantee of the existence of a cognizable claim.”⁶⁴ And, a right to a jury trial does not exist in an equitable action.⁶⁵

The “assessment of damages was a function of a common law jury in 1857.”⁶⁶ However, the state may allocate a portion of a punitive damages award to the state without violating section 17.⁶⁷

Adjudicatory proceedings that are permissive do not violate the right to jury trial because the claimant or the insurer is not required to arbitrate the claim and can demand jury trial.⁶⁸ Conversely, the Oregon Court of Appeals has found that a statute requiring that an award determined through mandatory adjudicatory proceeding be binding on both parties violates the right of a nonrequesting party to a jury trial.⁶⁹ Accordingly, the courts have fashioned a two part test to determine whether an arbitration proceeding requires a jury trial: “First, was the statutory . . . process permissive or mandatory? That is, did the statute require that some, or all, of the parties participate in the process? Second, was the resulting [process] binding with respect to mandatory participants?”⁷⁰

Although a right to a trial by jury may exist, that right may be waived by the parties. The Oregon Supreme Court has stated that “in cases where the negligence of the defendant is to be determined, . . . that party, in our judgment, is entitled under [Article I, section 17] to the verdict of a jury, *unless waived* . . .”⁷¹ The court has further declared that the legislature can pass statutes that allow parties to waive a trial by jury.⁷² However, the court has specifically stated that “[t]he legislature cannot itself ‘waive’ [a] right to a jury trial by requiring the inclusion of such provisions in insurance policies.”⁷³ In other words, the terms of the waiver may not be “dictated by the legislature;” the person waiving their right must “bargain for or consent” to it.⁷⁴

The Oregon Supreme Court has specifically stated that a right to a jury trial is not violated if “the arbitration was conducted by agreement of the parties, not under statutory compulsion.”⁷⁵ If the arbitration agreement is statutorily required, then the arbitration award must be nonbinding.⁷⁶

It is important to note that the Oregon Supreme Court has consistently held that the U.S. Constitution’s Seventh Amendment guarantee of a right to a jury trial in civil cases does not apply to the States through the Fourteenth Amendment.⁷⁷

Article 1, Section 20: Equal Protection Clause

Article I, section 20 of the Oregon Constitution declares that “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” Section 20 applies to civil laws⁷⁸ and requires that a legislative decision to offer or deny some advantages “be made by permissible criteria and consistently applied.”⁷⁹ Oregon courts have explicitly rejected construing this section as mirroring the federal due process clause.⁸⁰

In deciding whether section 20 has been violated, the courts first ask whether a governmental decision to offer or deny some advantage to a person has been made by permissible criteria and consistently applied.⁸¹ Next, the court engages in the following three part analysis: First, has one group been granted a privilege or an immunity which their group has not been granted; Second, has a true class been discriminated on the basis of characteristics they have apart from the relevant statute; and Third, is the distinction between classes either impermissibly based on

immutable characteristics, which reflect invidious social or political premises, or does the state's purpose lack a rational basis.⁸²

The opportunity to sue is a "privilege."⁸³ A "true class" is defined as "one that is not created by the challenged statute itself and is defined in terms of characteristics independent of the challenged statute."⁸⁴ If a true class exists, the level of judicial scrutiny applied depends on whether that class is a suspect (strict scrutiny) or nonsuspect (rational basis) true class.⁸⁵

Exclusive liability provisions of Workers' Compensation Act do not violate this section.⁸⁶ Further, statutes that divide tort victims into two nonsuspect classes have been upheld as constitutional.⁸⁷

Article III, Section I & Article VII (Amended), Section I: Separation of Powers

Article III, section I states:

The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Article III, section I does not require an absolute separation of governmental branches.⁸⁸ To determine if a constitutional violation exists, a three step analysis is performed: First, is there is clear separation of powers problem; Second, has one department of government unduly burdened the actions of another department in an area of responsibility or authority committed to that other department so as to have a coercive influence; and Third, has one department fully performed the functions committed to another department so as to concentrate separate powers in one department.⁸⁹

Article VII (Amended), section I sets forth that "[t]he judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." Article VII, section I is violated if "some other department of the government, by legislation or otherwise, prevents or obstructs the courts' exercise of its judicial power."⁹⁰

The key to constitutional validity is whether the administrative decision is subject to review by the courts. The Oregon Supreme Court will generally find no violation of the doctrine of separation of powers under the following conditions:

The statute prescribing the duties to be performed . . . does not confer judicial powers or duties upon the board or such officers in any sense as indicated by the Constitution. Their duties are executive or administrative in their nature. In proceedings under the statute the board is not authorized to make determinations which are final in character. Their findings and orders are *prima*

facie final and binding until changed in some proper proceeding. The findings of the board are advisory rather than authoritative. It is only when the courts of the state have obtained jurisdiction of the subject matter and of the persons interested and rendered a decree in the matter determining such rights that, strictly speaking, and adjudication or final determination is made. It might be said that the duties of the . . . board are *quasi* judicial in their character. Such duties may be devolved by law on boards whose principal duties are administrative.⁹¹

To date, the courts have upheld the establishment of the State Industrial Accident Commission⁹² and of the Land Use Board of Appeals under the doctrine of separation of powers.⁹³

A separation of powers argument does not arise if the parties involved mutually agree to resolve their dispute in a private fashion.

Federal Constitutional Challenges

“[T]he State’s interest in fashioning its own rule of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.”⁹⁴

The above quote summarizes the deference federal courts give to state legislatures when they enact tort reforms. The below federal constitutional summaries demonstrate that the federal courts have found previous no-fault tort reforms and arbitration provisions constitutional⁹⁵ and that the proposed medical no-fault system will most likely survive the constitutional challenges.

Procedural Due Process

The Fourteenth Amendment of the United States Constitution declares, “No State shall . . . deprive any person of . . . property, without the due process of law . . .”⁹⁶

Both the Oregon Supreme Court and the U.S. Supreme Court have stated that a “state may not deprive a person of life, liberty, or property without ‘notice and opportunity for hearing appropriate to the nature of the case.’”⁹⁷ If a hearing is held “at a meaningful time and in a meaningful manner”⁹⁸ then the hearing is deemed appropriate to the nature of the case. Generally, written submissions are unsatisfactory if “important decisions turn on assessments of credibility and veracity.”⁹⁹ The notice and opportunity for a hearing “must be tailored to the capacities and circumstances of those who are to be heard.”¹⁰⁰

The courts balance three factors: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the government’s interest.”¹⁰¹

Oral evidentiary hearings are necessary when a person's livelihood is at stake and when the deprivation of benefits is final.¹⁰² However, such hearings are only necessary if the plaintiff can show that they have a property interest (i.e., they are entitled to benefits) in payments for injuries resulting from medical malpractice.¹⁰³

In regard to no-fault compensation systems, the U.S. Supreme Court has held at least on two occasions that, in lieu of allowing a common-law action, a statute may provide for compulsory compensation without regard to fault without violating the Due Process Clause of the Fourteenth Amendment.¹⁰⁴

Substantive Due Process

Generally, substantive due process claims have proven unsuccessful were economic regulations are a concern. The limitation of liability via statutory provisions is considered a classic example of economic regulation.¹⁰⁵ When a legislature engages in economic regulation the regulation is presumed constitutional. The complaining party has the burden of showing that the legislature has acted in an arbitrary and irrational way.¹⁰⁶

In holding that statutory caps for non-economic damages for wrongful death claims did not violate the substantive due process clause, the court in *Greist* relied upon the following language relating to the regulation's legislative history:

In enacting the cap, the Oregon Legislature sought to control the escalating costs of the tort compensation system. The legislature determined that the cap would put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians. The legislature listened to hours of testimony on the insurance and tort crisis, and how reform was needed in order to salvage the system.¹⁰⁷

If a medical no-fault system is implemented in Oregon, a substantive due process challenge would most likely fail as long as the legislative record demonstrates a rational basis for such regulation.

Equal Protection

The U.S. Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁸ The first question asked in a constitutional analysis of the Equal Protection Clause is what level of scrutiny applies to the governmental action.¹⁰⁹ If a fundamental right is regulated or the regulation is based upon a suspect characteristic (i.e., race, sex, or alienage), then strict scrutiny applies.¹¹⁰ However, where tort reforms are at issue, the courts generally analyze the case under a rational basis test.¹¹¹

As to no-fault liability systems, the Oregon courts have consistently upheld the exclusive liability provisions of the Workers' Compensation Act as constitutional under the Equal Protection Clause, as well as under Article I, section 20 of the Oregon Constitution.¹¹²

NOTES

¹ The other states are Florida, Georgia, Mississippi, Nevada, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington, and West Virginia. Connecticut, Illinois, Kentucky, and Missouri may join the list in the near future.

² See Susan Tom, *U.S. Malpractice Crisis Hits Oregon*, Statesman Journal, Feb. 5, 2003, available at http://news.statesmanjournal.com/article_print.cfm?i=56179; American Medical Association, *Medical Liability Reform: The Medical Liability Crisis: Talking Points*, January 21, 2003, available at <http://www.ama-assn.org/ama/pub/print/article/9255-7188.html>.

³ See Patrick O'Neill, *Obstetricians Vanishing From Rural Oregon*, The Oregonian, March 10, 2003, available at http://www.oregonlive.com/printer/printer.ssf?/base/front_page/1047128456267990.xml.

⁴ Recently, a joint hearing, entitled "Patient Access Crisis: the Role of Medical Litigation," was held by the Senate Committee on the Judiciary and the Committee on Health, Education, Labor and Pensions regarding American's medical malpractice crisis. For links to testimony and member statements visit <http://judiciary.senate.gov/hearing.cfm?id=600>. A similar hearing was held on June 12, 2002 before the Subcommittee on Commercial and Administrative Law in the U.S. House of Representatives.

⁵ For more information on this argument, visit <http://insurance-reform.org>.

⁶ Some estimates show that the average payment per claim has increased from \$110,000 in 1987 to \$250,000 in 1999 and that defense expenses per paid claim have increased by \$24,000 over the same period. PIAA in Health Care Financial Trends Report, April 2002.

⁷ For example, St. Paul Companies, the largest malpractice carrier in the United States, announced in December 2001 that it would no longer offer coverage to any doctor in the country. See Modern Healthcare, January 7, 2002.

⁸ Defined as an injury that caused the patient's stay in the hospital to extend at least one day or caused the patient's death.

⁹ Stephen D. Sugarman, *Doctor No, Review of Medical Malpractice on Trial* by Paul C. Weiler, 58 U. CHI. L. REV. 1499, 1500-02, 1504 (1991).

¹⁰ Dr. William C. Pierce, *Reform Malpractice System*, Statesman Journal, Feb. 6, 2003, available at http://news.statesmanjournal.com/article_print.cfm?i=56209.

¹¹ See <http://www.gallup.com/poll/tb/healthcare/default.asp?YR=2003&MO=2>.

¹² See <http://www.whitehouse.gov/news/release/2003/01/print/20030116.html>.

¹³ H.R. 321, 108th Cong. (2003).

¹⁴ H.R. 5, 108th Cong. (2003).

¹⁵ U.S. Department of Health and Human Services, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System*, 14 (July 24, 2002).

¹⁶ *Delaney v. Clifton*, 180 Or. App. 119, 123, 41 P.3d 1099 (2002); see also *Rustvold v. Taylor*, 171 Or. App. 128, 132, 14 P.3d 675 (2000), citing *Zehr v. Haugen*, 318 Or. 647, 653-54, 871 P.2d 1006 (1994).

¹⁷ *Conway v. Pacific University*, 324 Or 231, 239, 924 P.2d 818 (1996).

¹⁸ *Dowell v. Mossberg*, 226 Or. 173, 190, 355 P.2d 624 (1961).

¹⁹ See also *Zavalas v. Dept. of Corrections*, 124 Or. App. 166, 171-72, 861 P.2d 1026 (1993) (holding that in a medical malpractice case the *prima facie* element of duty is ORS 677.095(1)).

²⁰ See *Sutton v. Cook*, 254 Or. 116, 458 P.2d 402 (1969).

²¹ See *Wintersteen v. Semler*, 197 Or. 601, 250 P.2d 420 (1953); *Malila v. Meacham*, 187 Or. 330, 211 P.2d 747 (1949).

²² See *Griffith v. Blatt*, 158 Or. App. 204, 973 P.2d 385 (1999).

²³ See *Rhodes v. Moore*, 239 Or. 454, 398 P.2d 189 (1965); *Livingston v. Portland Gen. Hospital*, 225 Or. 416, 357 P.2d 543 (1960).

²⁴ *Macy v. Blatchford*, 330 Or. 444, 449-50, 8 P.3d 204 (2000) (holding that evidence of a sexual relationship between a physician and a patient was not relevant to patient's claim that the physician lacked the objectivity required of physicians when treating their patients).

²⁵ *Sanderson v. Mark*, 155 Or. App. 166, 172 n.6, 962 P.2d 786 (1998); see also OEC 702 (stating that medical expert is qualified to testify if it can be shown that the expert has specialized training or experience that could assist the jury).

²⁶ See *Fieux v. Cardiovascular & Thoracic Clinic, P.C.*, 159 Or. App. 637, 978 P.2d 429 (1999) (where both the surgeon and the hospital were successfully sued for leaving a serrefine in the patient's chest after surgery); see also

Mckee Electric Co. V. Carson Oil Co., 301 Or. 339, 723 P.2d 288 (1986); Watzig v. Tobin, 292 Or. 646, 642 P.2d 651 (1982).

²⁷ See e.g., Jennison v. Providence St. Vincent Medical Center, 174 Or. App. 219, 25 P.3d 358 (2001) (holding that in order for a hospital to be liable under the doctrine of apparent agency, the hospital must hold itself out as a provider of medical services, and unless a patient has actual knowledge of the physician's actual status as an independent contractor, the patient can recover against the hospital for the physician's negligence if it is objectively reasonable for the patient to believe the physician was a hospital employee); Fieux v. Cardiovascular & Thoracic Clinic, P.C., 159 Or. App. 637, 978 P.2d 429 (1999) (holding that when there is evidence of a surgeon's probable direct negligence, the negligence of the hospital employees who assisted in the surgery may be inferred under the doctrine of *res ipsa loquitur*); Themins v. Emanuel Lutheran Charity Board, 54 Or. App. 901, 908, 637 P.2d 155 (1981) (holding that if a physician performs an inherent function of the hospital or if the hospital has explicitly or implicitly held the physician out as an agent, the hospital is vicariously liable).

²⁸ ORS 12.110(4). See also Jones v. Salem Hospital, 93 Or. App. 252, 762 P.2d 303 (1988) (upholding the statute of limitations).

²⁹ For further discussion, see David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 Am. J.L. & Med. 225 (2001); Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. Cin. L. Rev. 53 (1998); David M. Studdert, et. al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury*, 60 Law & Contemp. Probs. 1 (1997); U.S. Congress, Office of the Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BP-H-1 19 (Washington, DC: U.S. Government Printing Office, October 1993).

³⁰ David M. Studdert, et. al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury*, 60 Law & Contemp. Probs. 1 (1997).

³¹ Information on the Swedish Patient Insurance Compensation and Pharmaceutical Insurance Funds was gathered from the following resources: Patricia M. Danzon, *The Swedish Patient Compensation System*, 15 J. Legal Med. 199 (1994); David M. Studdert, et. al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury*, 60 Law & Contemp. Probs. 1 (1997); Carl Oldertz, *Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden*, 34 Am. J. Comp. L. 635 (1986).

³² In Sweden, county councils own and fund, through taxes, the nation's health care system.

³³ The following information was gathered from the following articles and reports that studied these two programs: Virginia Joint Legislative Audit and Review Commission, *Review of the Virginia Birth-Related Neurological Injury Compensation Program*, January 2003, available at <http://jlarc.state.va.us/Reports/Rpt284.pdf>; David M. Studdert, et. al., *The Jury is Still In: Florida's Birth-Related Neurological Injury Compensation Plan After a Decade*, 25 J. Health Pol. Pol'y & L. 499 (2000); Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. Cin. L. Rev. 53 (1998); Randall R. Bovbjerg, et. al., *Administrative Performance of "No-Fault" Compensation for Medical Injury*, 60 Law & Contemp. Probs. 71 (1997); Frank A. Sloan, et. al., *The Road From Medical Injury to Claims Resolution: How No-Fault and Tort Differ*, 60 Law & Contemp. Probs. 35 (1997); Peter H. White, Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 Va. L. Rev. 1487 (1988).

³⁴ Both systems operate under an informal waiver from Medicaid. The Virginia Attorney General opined that Medicaid can pay before the no-fault system because it normally pays after other private health insurance coverage, but before residual state or local assistance.

³⁵ Initially, claims in Florida were filed with the Workers' Compensation Commission. However, the Commission's performance was not satisfactory and, after three years, the state legislature moved jurisdiction to the Department of Administrative Hearings.

³⁶ 1975 Cal. Stat. 2d Ex. Sess., ch. 1, § 1, at 349, amended by 1975 Cal. Stat. 2d Ex. Sess., ch. 2, § 12.5, at 4007.

³⁷ Including medical bills, lost wages, future earnings, custodial care, and rehabilitation.

³⁸ Cal. Civ. Proc. Code § 1295:

(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "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."

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

(d) Where the contract is one for medical services to a minor, it shall not be subject to disaffirmance if signed by the minor's parent or legal guardian.

(e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b), and (c) of this section.

(f) Subdivisions (a), (b), and (c) shall not apply to any health care service plan contract offered by an organization registered pursuant to Article 2.5 (commencing with Section 12530) of Division 3 of Title 2 of the Government Code, or licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code, which contains an arbitration agreement if the plan complies with paragraph (10) of subdivision (a) of Section 1363 of the Health and Safety Code, or otherwise has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision, and the plan contracts conform to subdivision (h) of Section 1373 of the Health and Safety Code.

(g) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

³⁹ For a detailed discussion of these issues, see Weldon E. Havins, M.D. & James Dalessio, *Limiting the Scope of Arbitration Clauses in Medical Malpractice Disputes Arising in California*, 28 Cap. U.L. Rev. 331 (2000). See also Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 Pepp. Disp. Resol. L.J. 45, 53-61 (2000)(discussing constitutional and legal issues in other states); David Zukher, *The role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 Syracuse L. Rev. 135 (1998).

⁴⁰ *Madden v. Kaiser Foundation Hospitals*, 552 P.2d 1178 (Cal. 1976).

⁴¹ See *Baker v. Birnbaum*, 248 Cal. Rptr. 336 (Ct. App. 1986).

⁴² See *Gross v. Recabaren*, 253 Cal. Rptr. 820 (Ct. App. 1988) (holding that a husband's signature bound his wife to arbitration on a loss of consortium claim); *Pietrelli v. Peacock*, 16 Cal. Rptr. 2d 688 (Ct. App. 1993)(non-signatory wife was held bound to husband's collective bargaining agreement); *Michaelis v. Schori*, 24 Cal. Rptr. 2d 380 (Ct. App. 1993) (finding that an unmarried father of a stillborn child was bound by mother's signature).

⁴³ *Compare Weeks v. Crow*, 169 Cal. Rptr. 830 (Ct. App. 1980)(holding that a parent's arbitration agreement must expressly include unborn child), with *Herbert v. Superior Court*, 215 Cal. Rptr. 477 (Ct. App. 1985)(holding that arbitration term "all heirs" was sufficient to bind signatory and all blood relatives).

⁴⁴ See *Bolanos v. Khalatian*, 283 Cal. Rptr. 209 (Ct. App. 1991)(arbitration provision stating "all medical malpractice claims relating to obstetric services" bound newborn to mother's agreement).

⁴⁵ *Harris v. Superior Court*, 233 Cal. Rptr. 186 (Ct. App. 1986)

⁴⁶ *Michaelis v. Schori*, 24 Cal. Rptr. 2d 380 (Ct. App. 1993).

⁴⁷ See *Victoria v. Superior Court*, 710 P.2d 833 (Cal. 1985)(arbitration agreement did not apply to negligent hiring of orderly that perpetrated a criminal act); *Benyon v. Garden Grove Medical Group*, 161 Cal Rptr. 146 (Ct. App. 1980)(arbitration provision that permitted health care provider to reject decision and resubmit to arbitration panel was invalid); *Engalla v. Permanente Medical Group*, 938 P.2d 903 (Cal. 1997)(agreement held invalid because HMO fraudulently induced participant to agree to arbitration); *Wheeler v. Saint Joseph Hospital*, 133 Cal Rptr. 775

(Ct. App. 1976)(arbitrator's decision was reversed by the court because arbitrator failed to disclose a conflict of interest).

⁴⁸ NAIC Profitability by Line by State, 2001, presented before the House Judiciary Committee by PIAA June 2002.

⁴⁹ U.S. Dept. of Health and Human Services, *Update on the Medical Litigation Crisis: Not the Result of the "Insurance Cycle*, Office of Disability, Aging, and Long-Term Care Policy (Sept. 25, 2002), available at <http://aspe.hhs.gov/daltcp/reports/mlupd2.htm>.

⁵⁰ 332 Or. 83, 23 P.3d 333 (2001).

⁵¹ *Id.* at 124, 23 P.3d 333.

⁵² *Id.*

⁵³ *Id.* at 135, 23 P.3d 333.

⁵⁴ 334 Or. 210, 47 P.3d 476 (2002).

⁵⁵ *Id.* at 222, n.4, 47 P.3d 476; see also *Shaughnessy v. Spray*, 55 Or. App. 42, 50, 637 P.2d 182 (1981) (stating that at common law a wrongful death claim deriving from medical malpractice could not have been brought after the patient died).

⁵⁶ *Id.* at 222, 47 P.3d 476.

⁵⁷ 334 Or. 425, 51 P.3d 1232 (2002).

⁵⁸ *Id.* at 434, 51 P.3d 1232.

⁵⁹ Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 Wis. L. Rev. 1193 (1992).

⁶⁰ Y.B. Hill. 48 Edw. III. F. 6 (1374) (holding that the surgeon would have been held liable for failure to treat in a competent manner had the suit been pled in trespass on the case, rather than trespass vi et armis). See also Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 550 (1959); C. Joseph Stetler, *The History of Reported Medical Professional Liability Cases*, 30 Temp. L.Q. 366, 367 (1957).

⁶¹ *Slater v. Baker*, 95 Eng. Rep. 860 (King's Bench 1767) (holding that in order to recover damages against a surgeon, a patient had to show that the defendant had violated the usage and law of surgeons and the rules of the profession as testified to by other surgeons themselves).

⁶² See also Or. Const. art. VII, sec. III, which says:

In actions at law, where the value in controversy shall exceed \$750, 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 this state, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the supreme court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court. . . .

⁶³ *Lakin v. Senco Products, Inc.*, 329 Or. 62, 69, 987 P.2d 463 (1999) (giving a detailed description of the history of a guarantee of trial by jury), citing *Molodyh v. Truck Insurance Exchange*, 304 Or. 290, 295, 744 P.2d 992 (1987). See also *State v. 1920 Studebaker Touring Car*, 120 Or. 254, 259, 251 P. 701 (1926) ("The right of trial by jury guaranteed by the Constitution of this state, embraces every case where it existed before the adoption of the Constitution, and it is not within the power of the legislature to enact any law which deprives any litigant of that right."); *Tribou v. Strowbridge*, 7 Or. 156, 159 (1879) (Article I, Section 17 states "that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution.").

⁶⁴ *Sealey v. Hicks*, 309 Or. 387, 396, 788 P.2d 435 (1990) (holding that a products liability statute of repose precluding persons injured in a motor vehicle accident more than eight years after purchase of vehicle from bringing a products liability claim did not violate Article I, section 17).

⁶⁵ *Phillips v. Johnson* 266 Or. 544, 549, 514 P.2d 1337 (1973).

⁶⁶ *Lakin*, 329 Or. at 73, 987 P.2d 463.

⁶⁷ *Demendoza*, 334 Or. at 447, 51 P.3d 1232 ([I]f a “right” to receive an award that reflects the jury’s determination of the amount of punitive damages exists, then it must arise from some source other than Article I, section 17. . . . [P]laintiffs have no underlying “right to receive and award” that reflects the jury’s determination of the amount of punitive damages, nor are those damages necessary to “compensate” plaintiffs for a “loss or injury [to them].”).

⁶⁸ *Carrier v. Hicks*, 316 Or 341, 851 P.2d 581 (1993); *Mazorol v. Coats*, 316 Or. 367, 852 P.2d (1993); In determining whether the Employers’ Liability Act violated the right of a trial by jury, the Oregon Supreme Court stated:

The allegations that the defendants threaten to deprive plaintiff of the right of trial by jury and wrongfully claim to have power to determine the amount that plaintiff shall recover, etc., have no force whatever. If plaintiff has a right to sue in the courts, there is manifestly no method whereby the defendants can prevent his so doing. If they have no right to determine his case for any reason, there is no law which compels him to present his claim to them or to abide their award if made against his remonstrance. He can test their authority by ignoring them and bringing his action either at common law or under the Employers’ Liability Act as the fact may warrant.

Evanhoff v. State Ind. Acc. Compensation Commission, 78 Or 503, 513, 154 P. 106 (1915).

⁶⁹ *Lind v. Allstate Insurance Co.*, 134 Or App 395, 895 P.2d 327 (1995), *modified* 136 Or App 532, 902 P.2d 603 (1995).

⁷⁰ *Id.* at 400, 895 P.2d 327; see also *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 744 P.2d 992 (1987) (holding that a statute which requires that all fire insurance policies sold in state include provision that disputed amounts of loss be submitted to appraisal does not violate this section by depriving plaintiff of right to jury trial when construed as nonbinding as to party who does not demand appraisal.)

⁷¹ *Shobert v. May*, 40 Or. 68, 73, 66 P. 466 (1901).

⁷² See e.g. *Union Central Life Ins. Co. v. Deschutes Valley Loan Co.*, 139 Or 222, 8 P.2d 587 (1932) (stating that a jury trial can be “waived in the method pointed out in the statute”).

⁷³ *Molodyh v. Truck Insurance Exchange*, 304 Or. 290, 295, 744 P.2d 992 (1987).

⁷⁴ *Id.* at 295, 744 P.2d 992.

⁷⁵ *Carrier v. Hicks*, 316 Or. 341, 352, 851 P.2d 581 (1993).

⁷⁶ *Foltz v. State Farm Mutual Automobile Insurance Co.*, 326 Or. 294, 301, 952 P.2d 1012 (1998).

⁷⁷ See *Lakin*, 329 Or. at 73, n. 8, 987 P.2d 463 (“[T]he Seventh Amendment to the United States Constitution does not apply through the Fourteenth Amendment to the states . . .”); *Sealey*, 390 Or. at 398, 788 P.2d 435 (“The Seventh Amendment right to a jury trial does not apply to the states).

⁷⁸ *Libertarian Party of Oregon v. Roberts*, 305 Or. 238, 248-51, 750 P.2d 1147 (1988).

⁷⁹ *City of Salem v. Bruner*, 299 Or. 262, 268-69, 702 P.2d 70 (1985) (internal quotation marks omitted).

⁸⁰ *Roberts v. Gray’s Crane & Rigging, Inc.*, 73 Or. App. 29, 35, 697 P.2d 985 (1985) (“Article I, section 20, is not a due process provision: it does not mention ‘life,’ ‘liberty,’ ‘property’ or ‘due process of law.’ In fact, as both the Supreme Court and this court have recently stressed, this state’s constitution has no due process clause.”); see also *State v. Stroup*, 290 Or. 185, 200, 620 P.2d 1359 (1980).

⁸¹ *Delgado v. Souders*, 334 Or. 122, 145-46, 46 P.3d 729 (2002)

⁸² *Jungen v. State*, 94 Or. App. 101, 105, 764 P.2d 938 (1988) *rev. den.* 307 Or. 658, 772 P.2d 1341, *cert. den.* 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 313 (1989); see also *Withers v. State*, 163 Or.App. 298, 306, 987 P.2d 1247 (1999).

⁸³ *Jungen*, 94 Or. App. at 105, 764 P.2d 938 (“The opportunity to sue the state is a “privilege” which [the Tort Claims Act] denies to person who have recovered workers’ compensation benefits.”).

⁸⁴ *Gunn v. Lane County*, 173 Or. App. 97, 103, 20 P.3d 247 (2001).

⁸⁵ *Tanner v. OHSU*, 157 Or. App. 502, 520-23, 971 P.2d 435 (1998).

⁸⁶ *Rock v. Peter Kiewit Sons’ Co.*, 77 Or. App. 469, 713 P.2d 673 (1986) (“We hold that classification as a subject employer under the Workers’ Compensation Act, and the exclusive liability provisions contained therein, is rationally related to the legitimate state purpose of maintaining a balanced Workers’ Compensation scheme.”).

⁸⁷ See *Gunn v. Lane County*, 173 Or. App. 97, 20 P.3d 247 (2001) (“ORS 30.265 divides tort victims into two classes: those injured by government employees and those injured by private citizens. . . . A statute that distinguishes on the basis of government employment is not suspect. It does not define an immutable or ‘distinct, socially recognized groups of citizens,’ nor have people, to any significant extent, been ‘the subject of adverse social and political stereotyping’ on the basis of whether they are or are not employed by the government.” (internal

citations omitted); *Jungen v. State*, 94 Or. App. 101, 105 764 P.2d 938 (1988)(“The distinction drawn between person receiving workers’ compensation benefits and those not receiving benefits is established workers’ compensation laws and exists independently of the [Tort Claims Act]. That distinction is not based on immutable personal characteristics, such as race or gender. . . . We conclude . . . that there is a rational basis for retaining governmental immunity as to those persons receiving workers’ compensation benefits.” (internal citations omitted).

⁸⁸ *Rooney v. Kulongoski*, 322 Or 15, 28 902 P2d 1143 (1995), *citing* *State ex rel. Acocella v. Allen*, 288 Or. 175, 180-81, 604 P.2d 391 (1980) & *Boyle v. City of Bend*, 234 Or. 91, 100-02, 380 P.2d 625 (1963).

⁸⁹ *Id.* at 28, 902 P2d 1143; *see also* *State ex rel. Frohnmayer v. Oregon State Bar*, 307 Or. 304, 310, 767 P.2d 893 (1989); *State ex rel. Emerald PUD v. Joseph*, 292 Or. 357, 361, 640 P.2d 1011 (1982); *Ramstead v. Morgan*, 219 Or. 383, 399, 347 P.2d 594 (1959); *Monaghan v. School District No. 1*, 211 Or. 360, 364, 315 P.2d 797 (1957).

⁹⁰ *DeMendoza*, 334 Or. at 454, 51 P.3d 1232, *citing* *Circuit Court v. AFSCME*, 295 Or. 542, 547, 669 P.2d 314 (1983).

⁹¹ *In re Willow Creek*, 74 Or. 592, 610-11, 144 P. 505 (1915).

⁹² *See* *Evanhoff v. State Ind. Acc. Compensation Commission*, 78 Or 503, 515, 154 P. 106 (1915), *citing* *re Willow Creek*, 74 Or. 592, 610-11, 144 P. 505 (1915). Today, the Workers’ Compensation Board and Division perform many of the adjudicatory function performed by the State Industrial Accident Commission.

⁹³ *See* *Baxter v. Monmouth City Council*, 51 Or. App. 853, 670 P.2d 500 (1981); *Wright v. KECH-TV*, 300 Or. 139, 707 P.2d 1232 (1985) (“Previous cases make it clear that the doctrine of separation of powers does not prevent the exercise of adjudicatory functions by administrative agencies. We now hold that the doctrine of separation of powers does not prevent the exercise of adjudicatory functions by LUBA.” (internal citations omitted)).

⁹⁴ *Martinez v. State of California*, 444 U.S. 277, 282 (1980)(upholding California statute that provided immunity to official responsible for making parole decision, stating that it did not deprive life or property in a wrongful death action.).

⁹⁵ For a detailed constitutional analysis of mandatory arbitration programs, *see* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 Or. L. Rev. 487 (1989).

⁹⁶ U.S. CONST. amend. XIV, § 1.

⁹⁷ *Koskela v. Willamette Ind. Inc.*, 331 Or. 362, 378 (2000)(quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950)).

⁹⁸ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁹⁹ *Koskela*, 331 Or. at 378.

¹⁰⁰ *Id.* at 378.

¹⁰¹ *Gilbert v. Homar*, 520 U.S. 924, 931 (1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹⁰² *Koskela*, 331 Or. at 378-79.

¹⁰³ *See* *Koskela v. Willamette Ind. Inc.*, 331 Or. 362, 378 (2000)(holding that claimant had established entitlement to compensation benefits because the claim had been accepted under the statutory provision setfort).

¹⁰⁴ *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917)(holding that New York’s Workmen’s Compensation Act did not violate the due process of law); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917)(holding that Washington’s Workmen’s Compensation Act did not violate the due process of law).

¹⁰⁵ *Greist v. Phillips*, 322 Or. 281, 298, 906 P.2d 789 (1995)(quoting *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 83-84 (1978).

¹⁰⁶ *Id.* at 298, 298 P.2d 789.

¹⁰⁷ *Id.* at 299 n. 10, 298 P.2d 789 (quoting Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 WILLAMETTE L. REV. 283, 292 (1988)).

¹⁰⁸ U.S. CONST. amend XIV, § 1.

¹⁰⁹ *Sealey*, 309 Or. at 398, 788 P.2d 435.

¹¹⁰ *Greist*, 322 Or. at 300, 906 P.2d 789 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

¹¹¹ *See e.g.* *Sealey v. Hicks*, 309 Or. 387, 788 P.2d 435 (1990)(stating that a eight year statute of limitation for products liability had a rational relationship to an end of government); *Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995)(holding that there existed a rational basis for the legislature to impose statutory cap on non-economic damages in a wrongful death case); *Rock v. Keiwit Sons’ Co.*, 77 Or. App. 469, 713 P.2d 673 (1986)(holding that the exclusive liability provisions of the Workers’ Compensation Act were rationally related to a legitimate state purpose of maintaining a balance system).

¹¹² *Rock v. Peter Kiewit Sons’ Co.*, 77 Or. App. 469, 713 P.2d 673 (1986) (“We hold that classification as a subject employer under the Workers’ Compensation Act, and the exclusive liability provisions contained therein, is rationally related to the legitimate state purpose of maintaining a balanced Workers’ Compensation scheme.”);

Leech v. Georgia-Pacific Corporation, 259 Or. 161, 485 P.2d 1195 (1971)(exclusive remedy provisions of the Workers' Compensation Act were not unconstitutional as being palpably arbitrary even though no benefit were given to plaintiff because she was not a minor at her father's death).