

1987

The Constitutionality of Medical Malpractice Legislative Reform: A National Survey

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Recommended Citation

Larry S. Milner M.D., J.D., *The Constitutionality of Medical Malpractice Legislative Reform: A National Survey*, 18 Loy. U. Chi. L. J. 1053 (1987).

Available at: <http://lawcommons.luc.edu/lucj/vol18/iss3/10>

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The Constitutionality of Medical Malpractice Legislative Reform: A National Survey

I. INTRODUCTION

During the 1960's and early 1970's, a rapid rise in the cost of medical malpractice insurance across the country caused many physicians and insurance providers to conclude that a "malpractice crisis" existed.¹ The Secretary of the United States Department of Health, Education, and Welfare responded to this alleged crisis by forming a commission to evaluate the situation.² Based on its findings, the commission suggested a variety of legislative reforms.³

Subsequently, many state legislatures passed statutes designed to ease the perceived crisis.⁴ Because the statutes modified the existing litigation process in favor of malpractice defendants, the constitutionality of these measures was quickly challenged.⁵ The resulting decisions have been inconsistent, in part due to differ-

1. The "malpractice crisis" was perceived by physicians and insurance providers based on the increase in the number of medical malpractice claims and the dollar amount of judgments, causing insurance carriers to be reluctant to risk coverage of physicians without dramatic increases in malpractice insurance premiums. See, e.g., Jones, *Medical Malpractice Litigation: Alternatives for Pennsylvania*, 19 DUQ. L. REV. 407 (1981); Smith, *Battling A Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195 (1985); Taylor & Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH L. REV. 799 (1982). The classification of this rise in insurance cost as a "crisis" has not been unanimously accepted. See Neubauer & Henke, *Medical Malpractice Legislation: Laws Based on a False Premise*, 21 TRIAL 64 (Jan 1985); Taylor & Shields, *supra*, at 811. The Rhode Island Supreme Court determined that no such crisis existed in its state. *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983).

2. U.S. DEP'T OF H.E.W., *MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE* 13 (1973).

3. The commission's suggestions for reform included a sliding scale of contingency fee awards, *id.* at 34; written notice of intent to file a malpractice suit, *id.* at 37; continuing experimentation with voluntary mediation devices like screening panels, *id.* at 91; adoption of ad damnum clauses, *id.* at 38; and increased use of imposed arbitration to resolve small disputes, *id.* at 93.

4. See Jones, *supra* note 1, at 408; Karzon, *Medical Malpractice Statutes: A Retrospective Analysis*, ANN. SURV. OF AM. LAW 693 (1984).

5. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). Illinois was the first state to find some aspect of malpractice legislation unconstitutional. The legislative "[a]ct to revise the law in relation to medical practice" was approved September 12, 1975. *Id.* at 318, 347 N.E.2d at 737-38. The Illinois Supreme Court ruled on May 14, 1976, that medical review panels were "an impermissible restriction on the right of trial by jury." *Id.* at 324, 347 N.E.2d at 741. The court also held that a limitation on recovery amounts was "arbitrary and constitute[d] a special law," in violation of the Illinois Constitution. *Id.* at 330, 347 N.E.2d at 743. Ten years later, the Illinois

ences in the language of the various statutes.⁶ More significantly, however, the inconsistencies stem from differences in constitutional interpretations among various state supreme courts.⁷

Although at least one state attempted to adopt legislation resembling that adopted in other states,⁸ there has been little effort to develop reforms on a national basis. Dissatisfied with the state by state approach, the American Medical Association began pressuring the federal government for change on a federal level.⁹ In addition, the insurance industry and other business and community groups across the country extended pleas for federal reform involving other aspects of the tort system.¹⁰ In response, United States Attorney General Edwin Meese agreed to support malpractice reform as well as general tort reform on a federal level,¹¹ and several legislative proposals were introduced in Congress.¹²

Supreme Court addressed the constitutionality of a similar statute. *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986). See *infra* notes 74-76 and accompanying text.

6. See, e.g., *Arneson v. Olson*, 270 N.W.2d 125, 130 (N.D. 1978) ("None of the statutes to which we have been referred is identical to that of North Dakota, and the attacks on constitutionality have varied from State to State.").

7. *Karzon*, *supra* note 4, at 694. Similarly drafted provisions have been interpreted differently by state and federal courts. The varied interpretations often are due "to a particular feature of a state constitution, to a notably higher level of judicial scrutiny than is normally applied to social/economic legislation, or to unusual interpretations of standard constitutional language." *Id.*

8. See, e.g., ALASKA STAT. § 09.55.530 (1983) ("The legislature considers that there is a need in Alaska to codify the law with regard to medical liability in order to establish that the law in Alaska in this regard is the same as elsewhere.").

9. See AM. MED. ASSN'S SPECIAL TASK FORCE ON PROF. LIAB. & INS., PROFESSIONAL LIABILITY IN THE 80'S, REPORT 1, at 3 (Oct. 1984). The American Medical Association developed a plan recommending, among other items, a federal incentive program to encourage state tort reforms. Under this proposal, states would be given federal grants to help undertake liability reform. *Id.*

10. *Wagner, Liability Insurance Crisis: Coming to Grips With Long Tails and Deep Pockets*, 8 ILL. ISSUES 1 (1986). According to the Illinois Coalition on Insurance Crisis, the insurance industry desires changes that will hold down the costs of civil cases, including ceilings on liability awards, limits on contingency fees for plaintiffs' lawyers, and the elimination of joint and several liability. *Id.* at 5. Organizations supporting limits on damage judgments include the following: Alliance of American Insurers, American Consulting Engineers Council, American Medical Association, National Association of Home Builders, National Association of Manufacturers, National Association of Realtors, National Association of Towns and Townships, National Federation of Independent Business, National School Boards Association, and the U.S. Chamber of Commerce. See *Wall St. J.*, April 9, 1986, at 64, col. 1.

11. *Chi. Daily L. Bull.*, April 21, 1986, at 6, col. 2. The proposals included a \$100,000 cap on noneconomic damages and limitations on attorney contingency fees. *Id.*

12. The Moore-Gephardt Alternative Medical Liability Act created a compensation mechanism in federally funded health care programs if states failed to provide for "alternative liability systems." H.R. 5400, 98th Cong., 2d Sess., 130 CONG. REC. 2553 (April 10, 1984). A proposal submitted in 1985 by Senator Orrin Hatch provides for federal incentive grants to encourage state health care professional liability reform. S. Res. 1804,

Whether malpractice reform is undertaken on a national level or continues to be proposed on a state by state basis, an understanding of the constitutional issues raised over the past decade of litigation is necessary.¹³ In order to avoid legislation that invites litigation, states drafting or amending their medical malpractice statutes should consider decisions that have recognized constitutional violations. Moreover, if this area of legislation shifts to the federal arena, Congress, in the name of comity, must be sensitive to what has been happening at the state level. Accordingly, this article analyzes state supreme court decisions regarding the constitutionality of common provisions within medical malpractice reform statutes. Additionally, this article promotes the development of a state model act by setting forth provisions that respond to constitutional challenges raised at the state court level.¹⁴

II. BACKGROUND

Over the past decade, state legislatures have passed a variety of statutory reforms to address the malpractice crisis.¹⁵ Nine provisions commonly have appeared in these statutes.¹⁶ First, to satisfy constitutional requirements for legislative intervention, a declara-

99th Cong., 1st Sess., 131 CONG. REC. 14349 (Oct. 29, 1985). Senator Hatch has recently introduced another proposal that is backed by the American Medical Association. A.M.A. News, Aug. 14, 1987, at 1, col. 1. A proposal submitted by Congressmen John Porter and Pete Stark would require states to enact reforms because the federal government "pays 30 percent of the total health-care bills in the United States." H.R. Res. 386, 99th Cong., 1st Sess. (1986). A proposal submitted by Senator Robert Kasten was a composite of suggestions from a White House working group on tort reform. Chi. Daily L. Bull., May 1, 1986, at 3, col. 2. This bill created much debate and was removed from the legislative agenda for 1986 and placed on the legislative calendar. Chi. Daily L. Bull., Sept. 26, 1986, at 1, col. 1.

13. Federal intervention in this area raises the question of whether federal government involvement is appropriate because tort law generally has been within the gambit of state control. See *Kenyon v. Hammer*, 142 Ariz. 69, 79, 688 P.2d 961, 971 (1984) (states are free to "create, define, limit and regulate tort law" within the limits of federal due process). Even when tort liability cases are heard in federal court, the substantive law of the state controls. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). A state's interest in "fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. State of Cal.*, 444 U.S. 277, 282 (1980).

14. The decisions of the New Hampshire Supreme Court to date indicate that the provisions recommended in this article will not pass constitutional muster in that state because of a heightened level of scrutiny applied to malpractice reform. See *infra* note 30 and accompanying text.

15. See *supra* note 4 and accompanying text.

16. The nine common provisions, as discussed in this paper, are as follows: the declaration of purpose clause, malpractice review panels, collateral source provisions, periodic payment plans, damage caps, statute of limitations, ad damnum clauses, attorneys' fees restrictions, and notice of intent to sue.

tion of purpose section typically introduces the legislation.¹⁷ This declaration sets forth the objectives of the legislation and the reasons underlying the adoption of the particular substantive provisions.

The substantive provisions follow the declaration of purpose section. Typically, one of those provisions mandates that a medical review panel evaluate the merits of a case before a claim may proceed through the court system.¹⁸ The third common provision, a periodic payment provision, allows for the payment of a judgment over time.¹⁹ The next provision, a collateral source provision, reduces any damage award by the amount already paid by health insurance sources.²⁰ A provision limiting attorneys' fees also commonly is enacted.²¹ The sixth provision generally appearing in medical malpractice statutes, the damage cap provision, limits the allowable amount of the total award.²² Malpractice statutes also often revise the statutes of limitations or repose.²³ The eighth provision, an ad damnum clause, prevents a plaintiff from requesting a specific amount of damages in his complaint.²⁴ Finally, a provision requiring notice of the intent to sue has been enacted in several states.²⁵

III. CONSTITUTIONAL ANALYSIS OF STATUTORY PROVISIONS

A. Declaration of Purpose

A state's police power provides legislative authority to address public health problems.²⁶ Several state courts have identified the malpractice crisis as a public health problem,²⁷ and thus have pro-

17. See *infra* notes 26-35 and accompanying text.

18. See *infra* notes 36-90 and accompanying text.

19. See *infra* notes 91-102 and accompanying text.

20. See *infra* notes 103-20 and accompanying text.

21. See *infra* notes 121-30 and accompanying text.

22. See *infra* notes 131-74 and accompanying text.

23. See *infra* notes 175-210 and accompanying text.

24. See *infra* notes 211-15 and accompanying text.

25. See *infra* notes 216-22 and accompanying text.

26. *State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner*, 583 S.W.2d 107, 114 (Mo. 1979) (Morgan, J., dissenting).

27. See *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 159, 211 Cal. Rptr. 368, 383, 695 P.2d 665, 680 (1985), *dismissed*, 106 S. Ct. 214 (1985); *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981); *Prendergast v. Nelson*, 199 Neb. 97, 114, 256 N.W.2d 657, 667 (1977). The Rhode Island Supreme Court held that a malpractice crisis was non-existent in that state and therefore any type of legislative action in the medical malpractice area was unnecessary. *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983). This holding has been criticized by the Illinois Supreme Court. *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986).

ceeded to consider the constitutionality of malpractice statutes by applying the rational basis test.²⁸ A statute survives the rational basis test if the legislature determines that a malpractice crisis existed, and the court observes a rational relationship between the crisis and the legislative solution.²⁹ A number of state courts, however, have departed from this approach and interpreted their state constitutions to require legislation that not only is reasonable, but also has "a fair and substantial relation to the object of the legislation."³⁰

When the constitutionality of a particular statute is questioned, courts generally review the wording of the statute to determine whether the legislative intent is clearly expressed.³¹ If the intent is

28. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 84 (1978). Many state courts apply the rational basis test in cases considering the constitutionality of malpractice reform. *See, e.g.*, *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); *Lacy v. Green*, 428 A.2d 1171 (Del. Super. 1981); *Florida Patients Comp. Fund v. Von Stetina*, 474 So. 2d 783 (Fla. 1985); *Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484 (1983); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980); *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983) (court uses term "minimal scrutiny"); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978); *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30 (Utah 1981); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

29. *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 374, 204 Cal. Rptr. 671, 680, 683 P.2d 670, 679 (1984). The United States Supreme Court has held that the right to recover damages in tort is not a fundamental right. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978). Every state that has addressed the question of whether the right to recover damages for malpractice is a "fundamental right" has held that it is not. *See, e.g.*, *Simpson v. Fuller*, 281 Ark. 471, 665 S.W.2d 269 (1984); *American Bank & Trust Co. v. Community Hosp.*, 33 Cal.3d 674, 190 Cal. Rptr. 371, 660 P.2d 829 (1983); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); *Florida Patients Comp. Fund v. von Stetina*, 474 So. 2d 783 (Fla. 1985); *Jones v. State Bd. of Med.*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57 (1978), *cert. denied*, 439 U.S. 805 (1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

30. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). This higher standard of review is known as the "means-scrutiny analysis," *Kenyon v. Hammer*, 142 Ariz. 69, 78, 688 P.2d 961, 970 (1984) (defining but not applying the "means-scrutiny analysis" test), or the "intermediate review" test. *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984).

The rationale supporting the higher standard when determining the constitutionality of malpractice reform statutes, according to the New Hampshire Supreme Court, is that the rights of malpractice plaintiffs are "sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test." *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825, 830 (1980). This more rigid substantive due process test also has been used in Idaho, *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Indiana, *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980); and North Dakota, *Arneson v. Olson*, 270 N.W. 125, 133 (1978).

31. *Thomasson v. Diethelm*, 457 So. 2d 397, 399 (Ala. 1984) ("We must look to the

not clearly expressed, the legislation may not be presumed valid and the inquiry must proceed to a study of the legislative history.³² Thus, the reasons underlying malpractice reform legislation should be articulated in an introductory section.³³ Legislation also should connect the expressed intent with any procedural changes.³⁴

Typically, the promotion of the health and general welfare of the public will be the primary objective of malpractice reform. This objective easily can be connected to the procedural changes by noting that the public good is threatened by the rising cost of malpractice claims and the malpractice act is intended to alleviate this threat.³⁵

A consideration of statutes that have survived constitutional challenges supports the use of the language in the following declaration of purpose provision:

It is the purpose of the act to promote the health and general welfare of the inhabitants of this state through the adoption of reforms in health care malpractice claims. The legislature finds that the cost of malpractice claims has risen in recent years and that this affects the availability, cost, and delivery of health care.

statute to determine legislative intent."'). *See also* *Aldana v. Holub*, 381 So. 2d 231, 235 (Fla. 1980) ("Had the legislature intended otherwise, it easily could have included a provision for time extensions in the medical mediation statute."); *Sibley v. Board of Superiors of La. State Univ.*, 477 So. 2d 1094, 1101 (La. 1985) (if the legislature had intended to protect a specific class of persons "it easily could have done so by specifically including" it in the statute).

32. *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983). Courts generally will consider whether the action is "arbitrary and capricious." If the legislative intent is clearly expressed in the statute, courts are reluctant to find the statute unconstitutional because of the general presumption of validity that attends such considerations. *Id.* *See also* *Lacy v. Green*, 428 A.2d 1171, 1174-75 (Del. Super. 1981); *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

33. Medical malpractice reform statutes often are challenged on equal protection grounds by parties claiming that the statutes provide special protective benefits to one class of tortfeasor, physicians, or deny special benefits to one class of plaintiff, the medical malpractice victim. *See American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 370, 204 Cal. Rptr. 671, 678, 683 P.2d 670, 677 (1984).

For the statute to withstand equal protection challenges, there must be a showing of a "compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618 (1969). This interest may be clearly expressed in the "declaration of purpose" section, and thus aid the reviewing court in determining the governmental interest. If there is a rational connection between the compelling state interest and the statutory reform, differential treatment is justified. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). If the classification involves restriction of suspect classes or fundamental rights, however, the scrutiny utilized by the court is heightened. *Loving v. Virginia*, 388 U.S. 1 (1967).

34. *See McGuffey v. Hall*, 557 S.W.2d 401, 406 (Ky. 1977).

35. The Indiana Supreme Court noted that a threatened loss of health services to the community is a valid legislative purpose. *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 387, 404 N.E.2d 585, 594 (1980).

It has determined that there is a need to codify the law with regard to this issue. It is the purpose of each of the sections to assure that the public is adequately protected against malpractice losses by guaranteeing that the availability of malpractice insurance is maintained and that unnecessary expenditures of time and money by the courts in nonmeritorious claims is eliminated.

B. Medical Review Panels

Medical review panels typically are mandatory committees that review the evidence for malpractice in a formal hearing and render non-binding recommendations regarding liability.³⁶ The panels are established to discourage baseless actions and to encourage the early disposition of cases.³⁷ They also may provide an additional, independent expert witness judgment.³⁸

The constitutionality of medical review panels generally has been challenged on three grounds. First, litigants often claim that the panels, which conduct hearings before lawsuits may be filed, constitute impermissible restrictions on the guaranteed right of access to the courts or violate due process rights.³⁹ Second, because in some states the composition of the panel includes members of the judiciary while non-judicial members vote on the findings, the statutes have been challenged for violating separation of powers clauses in federal and state constitutions.⁴⁰ Finally, considerable controversy exists over whether findings of the panels are binding or even admissible into evidence if a lawsuit is filed.⁴¹

1. Are Medical Review Panels Unconstitutional Per Se?

Arguably, requiring a case to be presented to a malpractice panel prior to the filing of a lawsuit is not unconstitutional per se.⁴² In *Wright v. Central DuPage Hospital Association*,⁴³ the first state supreme court decision finding a statute of this type unconstitu-

36. See Karzon, *supra* note 4, at 718-19.

37. Perna v. Pirozzi, 92 N.J. 446, 454, 457 A.2d 431, 435 (1983).

38. Comiskey v. Arlen, 55 A.D.2d 304, 309, 390 N.Y.S.2d 122, 126 (App. Div. 1976), *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977). Due process problems also arise if the panel requirement is shown to cause an undue delay in the filing of the lawsuit. See Comment, *Illinois' Medical Malpractice Review Panel Provision: A Constitutional Analysis*, 17 LOY. U. CHI. L.J. 275 (1986)[hereinafter *Constitutional Analysis*].

39. See *Constitutional Analysis*, *supra* note 38, at 275.

40. Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

41. Courts often have evaluated how jurors may be affected by the introduction of medical review panel findings into evidence. See *infra* notes 79-90 and accompanying text.

42. See *infra* text accompanying notes 43-45.

43. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

tional, the Illinois Supreme Court was careful to note that a valid pretrial panel could be devised.⁴⁴ Also, in the fourteen state supreme court decisions holding review panels constitutional, the courts reasoned that the requirement that a panel meet within a specified time after the filing of the case did not present a restriction of access to the courts.⁴⁵

A statute may be found unconstitutional, however, if the requirement to first present the issue to the panel causes an impermissible delay in the judicial process.⁴⁶ In *State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*,⁴⁷ the Missouri Supreme Court held that the statutory review panel requirement violated the plaintiff's right of access to the courts.⁴⁸ The Missouri statute required litigants to provide written notice of the details of the claim to the secretary of the review board prior to the filing of an action.⁴⁹ If an attempt at settlement then failed within a specified period of time, an action could be filed in court.⁵⁰ The Missouri Supreme Court held that because the Missouri Constitution guaranteed that justice "shall be administered without . . . delay,"⁵¹ requiring notice to the panel prior to allowing judicial action was unconstitutional.⁵²

44. *Id.* at 324, 347 N.E.2d at 741.

45. *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977) ("Once the panel has considered the evidence and a decision has been rendered, either party is free to proceed to trial and present his case to a jury."). *See also* *Plumley v. Hale*, 594 P.2d 497 (Alaska 1979); *Eastin v. Broomfield*, 116 Ariz. 576, 507 P.2d 744 (1977); *Lacy v. Green*, 428 A.2d 1171 (Del. 1981); *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57 (1978), *cert. denied*, 439 U.S. 805 (1978); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977); *Linder v. Smith*, 629 P.2d 1187 (Mont. 1981); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983); *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (App. Div. 1976), *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200, (1977); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981); *Baldwin v. Knight*, 569 S.W.2d 450 (Tenn. 1978); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978). In addition, the constitutionality of one state's panel provision has been upheld at the federal appellate level. *See DiAntonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287 (4th Cir. 1980) (applying Virginia law).

46. *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).

47. 583 S.W.2d 107 (Mo. 1979).

48. The court reasoned that the right of access to the courts is guaranteed by the Missouri Constitution which provides that "right and justice shall be administered without sale, denial or delay." *Id.* at 110.

49. *Id.* at 109.

50. *Id.*

51. *Id.* at 110.

52. *Id.* The *Gaertner* court acknowledged that the New York Supreme Court in *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (App. Div. 1976), upheld the consti-

Similarly, in *Jiron v. Mahlab*,⁵³ the New Mexico Supreme Court held a medical review panel statute unconstitutional. Under the New Mexico statute, the plaintiffs were unable to serve process on a defendant physician who was about to leave the country because they had failed to file a suit with the Medical Review Commission.⁵⁴ Thus, plaintiffs' action was dismissed.⁵⁵ The New Mexico Supreme Court in *Jiron* held that, with respect to the particular plaintiffs before it, the delay caused by the statute represented an unconstitutional infringement on the right of access to the courts.⁵⁶ The court noted, however, absent undue delay, a panel requirement would not violate a plaintiff's right of access to the courts.⁵⁷

The Florida Supreme Court initially upheld the constitutionality of medical review panels in *Carter v. Sparkman*.⁵⁸ Three years later, however, the panels were found unconstitutional.⁵⁹ In *Aldana v. Holub*, the Florida Supreme Court held that the "practical operation and effect of the statute" led to jurisdictional problems.⁶⁰ The Florida statute provided that if a final hearing on the merits of a case was not concluded within a ten month period, the court's jurisdiction was terminated.⁶¹ Because of the statute's rigid time limitation, continuances were not allowed when a congested court docket caused delays.⁶² The Florida Supreme Court held that this offended the petitioners' due process rights because a valuable legal right was denied arbitrarily by "fundamental unfairness in the mediation process."⁶³

tutionality of a similar provision, but explained that in New York "the screening panel is convened *after* the court proceedings are commenced." *Id.* (emphasis in original).

53. 99 N.M. 425, 659 P.2d 311 (1983).

54. *Id.* at 426, 659 P.2d at 312.

55. *Id.*

56. *Id.* The *Jiron* court stated: "When a statute or rule operates to deprive an individual of a protected right, it may be held constitutionally invalid as applied to that individual." *Id.* The New Mexico statute required that an application to the medical review commission be made before filing a malpractice action. *Id.*

57. *Id.* at 427, 659 P.2d at 313. Similarly, in *Roethler v. Lutheran Hosp. & Homes Soc'y*, 709 P.2d 487 (Alaska 1985), the Alaska Supreme Court noted that plaintiffs' right of access to the courts will be protected by allowing discovery to continue during the statutory delay required for panel deliberation.

58. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

59. *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980).

60. *Id.* at 237.

61. *Id.* at 235. The statute specified that the time limitation for holding hearings was "unalterable," not allowing for tolling or extensions of time for any reason. *Id.*

62. *Id.* at 236.

63. *Id.* The court noted that an attempt to remedy the jurisdictional problem by extending the time period would, ironically, offend the right of access to the courts. *Id.* at 238.

Similarly, in *Parker v. Children's Hospital of Philadelphia*,⁶⁴ the Pennsylvania Supreme Court initially held that the statute requiring medical review panels was constitutional. In *Mattos v. Thompson*,⁶⁵ however, the Pennsylvania Supreme Court held that the procedural directives of the statute caused an unconstitutional delay in processing claims.⁶⁶ Because the legislative intent of providing prompt adjudication of claims was not fulfilled, the original jurisdiction of the panels was held unconstitutional.⁶⁷

Such procedural delay problems, however, have not uniformly led to holdings of unconstitutionality. In *Cha v. Warnick*,⁶⁸ the Indiana Supreme Court reasoned that a simple potential for delay was not a reason to find a medical review panel provision unconstitutional, particularly if the provisions were a reasonable method of addressing the malpractice crisis.⁶⁹

To survive constitutional challenges in most states, however, a medical review panel provision should allow an action to be filed first with the court and then referred to the malpractice review panel. Such a provision would not impede access to the judicial system, a problem inherent in the Missouri and New Mexico statutes. Additionally, the medical review panel provision should set a 120 day time limitation within which the panel must issue its findings. If the panel does not complete its report within 120 days, the litigants should be allowed to proceed into the court system. Under such a provision there would be no loss of jurisdiction by the court. Moreover, because the discovery process may be initiated at any time if a plaintiff can show prejudice due to delay, due process problems are avoided.

Additionally, a panel provision should avoid the rigid time limitations on judicial jurisdiction, such as those set out in the Florida and Pennsylvania statutes and held unconstitutional by their respective supreme courts. On the other hand, as evidenced by the

64. 483 Pa. 106, 394 A.2d 932 (1978).

65. 491 Pa. 385, 421 A.2d 190 (1980).

66. The arbitration panels, according to the Pennsylvania Supreme Court, were simply "incapable of providing the prompt determination and adjudication of medical malpractice claims intended by the Act." *Id.* at 395, 421 A.2d at 195. The court noted that 73% of the cases filed with the Administrator under the Health Care Services Malpractice Act had not been resolved. *Id.* at 396, 421 A.2d at 195.

67. *Id.* at 396, 421 P.2d at 196. The *Mattos* court added that arbitration remained an alternative method of dispute resolution. *Id.*

68. 476 N.E.2d 109 (Ind.), *cert. denied*, 106 S. Ct. 249 (1985).

69. *Id.* at 112-13. The problem of undue delays caused by medical review panels, as raised in Florida, Pennsylvania, and Indiana has not been litigated in other states that have passed similar provisions. *See supra* note 45 and accompanying text.

Indiana Supreme Court decision in *Cha*, a mere potential for delay should not present problems of unconstitutionality.⁷⁰

2. Panel Selection

The composition of a panel also may affect its constitutionality. In *Wright*, the Illinois Supreme Court held that providing lawyers and physicians with voting power equal to that exercised by the judge who served on the medical malpractice panel violated the constitutional provision vesting exclusive judicial power in the courts.⁷¹ The court reasoned that, by granting nonjudicial members voting authority equal to judges, the statute contemplated an impermissible vesting of judicial function, in violation of the separation of powers provision of the Illinois Constitution.⁷²

Although this interpretation has been criticized by other state courts,⁷³ the Illinois Supreme Court recently reaffirmed its objection to this sharing of powers in *Bernier v. Burris*,⁷⁴ by holding unconstitutional a revised statute with a similar panel provision. The amended Illinois statute established a panel that allowed the judge to rule on the substantive law and allowed the other members of the panel to rule only on the factual findings.⁷⁵ The Illinois Supreme Court held that the amended system was unconstitutional due to the impermissible sharing of judicial authority with nonjudicial panel members.⁷⁶

Three states continue to allow judges on the panel.⁷⁷ In most

70. See *supra* notes 68-69 and accompanying text.

71. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

72. *Id.* at 322, 347 N.E.2d at 740.

73. See, e.g., *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57, cert. denied, 439 U.S. 805 (1978). The *Johnson* court stated that "[t]he mere performance by a nonjudicial body of a function that would in another context be considered purely judicial . . . cannot alone suffice to support a conclusion that the separation of powers principle has been violated." *Id.* at 284, 385 A.2d at 63.

The court in *Eastin v. Broomfield*, 116 Ariz. 576, 582, 570 P.2d 744, 750 (1977), noted that the Illinois statute examined in *Wright* was distinguishable from the Arizona statute because in Illinois, if the parties agreed to be bound by the panel's recommendation, that recommendation could serve "as the sole basis for the entry of judgment." In *Prendergast v. Nelson*, 199 Neb. 67, 113, 256 N.W.2d 657, 666 (1977), the Nebraska court also noted that the panel in Illinois was not "a panel to provide evidence but was [instead] a panel to decide the controversy."

74. 113 Ill. 2d 219, 497 N.E.2d 763 (1986).

75. *Id.* at 231, 497 N.E.2d at 769.

76. *Id.* at 233, 497 N.E.2d at 770. The supreme court noted that a panel composed of all judges would not solve the problem of sharing judicial authority because the creation of a panel of judges was, in effect, the creation of a new court, a task which is beyond the legislature's authority. *Id.*

77. ARIZ. REV. STAT. ANN. § 12-567 (West 1986); MASS. GEN. LAWS ANN. ch. 231, § 60B (1986); N.Y. JUD. LAW ANN. § 148-A(2) (West 1987).

states that have held panel provisions constitutional, however, the advisory panels do not include judges.⁷⁸ The provision presented below addresses the concerns of the Illinois Supreme Court and heeds the majority of state decisions by prohibiting judicial participation.

3. Admissibility of Findings

The primary purpose of admitting, at a later trial, panel findings regarding the merits of the case is not to utilize them as evidentiary substitutes for expert testimony, but rather to encourage settlements.⁷⁹ Critics of this practice argue that the routine admission of panel findings is unconstitutional because the weight of the evidence may unduly prejudice the jury against the malpractice litigant.⁸⁰ Another argument is that the admissibility of evidence

78. ALASKA STAT. § 09.55.536(a) (1983) (a "three person expert advisory panel" appointed by the court); DEL. CODE ANN. § 18-6804(a) (Supp. 1984) (panel consists of two health care workers, one attorney, and two lay persons); HAWAII REV. STAT. § 671-11 (Supp. 1984) (panel includes an attorney, a physician, and "one chairperson selected from among persons who are familiar with and experienced in the personal injury claims settlement process"); IND. CODE ANN. § 16-9.5-9-3 (West 1986) (panel consists of one attorney and three health care providers); LA. REV. STAT. ANN. § 40:1299.47 (West 1987) (panel consists of one attorney and three health care providers); ME. REV. STAT. ANN. § 24-2851 to -59 (West 1986) (panel includes one retired judge or person with judicial experience, one attorney, and one physician member); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A04(b) (Michie Supp. 1986) (panel includes an attorney, a health care provider, and a member of the general public); MICH. COMP. LAWS ANN. § 600.4905 (West 1986) (panel consists of three attorneys, one health care provider selected by the defendant, and one health care provider selected by the plaintiff); MONT. CODE ANN. § 27-6-401 (1985) (panel includes three attorneys and three physicians); NEB. REV. STAT. § 44-2841 (1984) (panel includes one attorney and three physicians); NEV. REV. STAT. ANN. § 41A.043 (1986) (panel includes an attorney, a physician, and a hospital administrator if a hospital is sued); N.M. STAT. ANN. § 41-5-17 (Supp. 1986) (panel consists of three health care providers and three attorneys); UTAH CODE ANN. § 78-14-12(4) (1986-87) (panel includes an attorney, a physician, and a lay member); VA. CODE § 8.01-581.3 (Supp. 1986) (panel consists of two "impartial" attorneys and two "impartial" health care professionals with a judge sitting as a chairman but having no vote except to break a tie vote).

See also IDAHO CODE § 6-1002 (Supp. 1985) (panel included an attorney, a physician, and if a hospital is sued, a hospital administrator; law has since been repealed); TENN. CODE ANN. § 29-26-101 to -114 (Supp. 1985) (law providing panel with one attorney, one physician, and one member of the general public has been repealed); WIS. STAT. ANN. § 655.03(1) (West 1985) (law providing screening panel has been repealed and replaced with a mediation system at § 655.42).

79. *Baldwin v. Knight*, 569 S.W.2d 450 (Tenn. 1978). The *Baldwin* court noted that experts at trial can be examined or cross examined on the panel's statements. *Id.* at 453.

80. *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. 1976). The Ohio Court of Common Pleas noted that the admissibility of the panel's findings can substantially reduce a party's ability to prove his case and thereby deny him the right to a trial by jury. *Id.* at 170, 355 N.E.2d at 908. The Ohio statute in question,

adds an extra burden to the plaintiff's case and thus unconstitutionally interferes with the right to a jury trial.⁸¹ A number of state supreme courts, however, have held that the subsequent admission of a panel's findings, without calling panel members as witnesses, creates only a rebuttable presumption and poses no obstacle to a fair determination of the issues.⁸² Thus, in effect, a panel's recommendation are considered expert opinions to be evaluated by the jury in the same manner as any other opinion.⁸³ Nevertheless, as a safeguard against prejudice, some statutes mandate that the panel's findings never be the sole basis for the entry of judgment.⁸⁴

Because of these concerns, four states have enacted statutes that allow for medical review panel deliberations, but prohibit the subsequent admission of panel findings.⁸⁵ Thus, in *Beeler v. Downey*,⁸⁶ the Massachusetts Supreme Court held that the findings of the panel were not admissible into evidence at trial because they were considered "rulings" of a judge comparable to that of a directed verdict.⁸⁷ The *Beeler* court stated that the legislature had authority to prescribe rules of evidence addressing hearsay and opinion evidence rules.⁸⁸ The court concluded, however, that rulings were not evidence to be submitted to a jury for their consideration.⁸⁹

however, allowed the panel members to be called as witnesses in a subsequent trial. *Id.* at 169, 355 N.E.2d at 907.

81. *Simon*, 3 Ohio Op. 3d 164, 355 N.E.2d 908. See also *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

82. *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430 (1915) (submission to the jury of an interstate commission's finding does not violate the seventh amendment). See also *Lacy v. Green*, 428 A.2d 1171, 1176 (Del. Super. 1981) (panel's opinion is not conclusive; at trial any party can call witnesses who appeared before the panel); *Eastin v. Broomfield*, 116 Ariz. 576, 582, 570 P.2d 744, 749 (1977) (if only the findings themselves are admitted into evidence, there is no violation of the right to trial by jury.); *Prendergast v. Nelson*, 199 Neb. 97, 109, 256 N.W.2d 657, 666 (1977) (The effect of the findings on the jury "is a two-way street which equally affects the parties on both sides.").

83. *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122, 126 (App. Div. 1976), *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200, (1977) ("At most, subdivision 8 constitutes another legislative exception to the hearsay rule."). See also *Beeler v. Downey*, 387 Mass. 609, 442 N.E.2d 19 (1982).

84. *Comiskey*, 55 A.D.2d 304, 390 N.Y.S.2d 122. N.Y. JUD. LAW ANN. § 148-a(8) (West 1983)(upheld in *Treyball v. Clark*, 65 N.Y.2d 589, 493 N.Y.S.2d 1004, 483 N.E.2d 1136 (1985)).

85. HAWAII REV. STAT. § 671-16 (Supp. 1984); IDAHO CODE § 6-1001 (Supp. 1985); ME. REV. STAT. ANN. § 24-2857 (West 1986); MONT. CODE ANN. § 27-6-704(2) (1985).

86. 387 Mass. 609, 442 N.E.2d 19 (1982).

87. The Massachusetts Supreme Court held that the task of the tribunal is comparable "to that of a trial judge ruling on a defendant's motion for a directed verdict." *Id.* at 617, 442 N.E.2d at 23. The Massachusetts panel included "a single justice of the superior court." MASS. ANN. LAWS ch. 60B (Supp. 1986).

88. *Beeler*, 387 Mass. at 615, 442 N.E. at 22.

89. *Id.* at 617, 442 N.E. at 23.

Although the panel's findings in *Beeler* were inadmissible, the expert witness testimony before the tribunal and the decision to call that expert witness was admissible into evidence.⁹⁰

Drafters of review panel provisions can begin addressing the constitutional concerns set out above by utilizing the following language:

After the initial filing of the complaint, no action against any health care provider may proceed in any court of this state until the complaint has been presented to a medical review panel established pursuant to this chapter, and an opinion is rendered by the panel. This opinion must be filed within 120 days of the filing of the complaint. If the opinion is not filed within this time period, the claimant may proceed in any court of this state with jurisdiction to hear the case. If a claimant can show prejudice by the delay with respect to discovery of any witness, the court shall order the discovery of that witness to proceed.

The medical review panel shall consist of one (1) attorney and three (3) health care providers. The attorney shall serve as chairman of the panel and in an advisory capacity but shall have no vote. The panel may compel the attendance of witnesses, interview the parties, physically examine the injured person if alive, consult with the specialists or learned works they consider appropriate, and compel the production of and examine all relevant hospital, medical, or other records.

After the trial court has reviewed the panel's written opinion based on all of the evidence presented, the court shall strike any portions that it finds to be based on error of law or not supported by substantial evidence. The panel's judicially approved written opinion will then be admissible, in the discretion of the judge, as prima facie evidence in the pending court action brought by the claimant but shall not be considered conclusive.

C. Periodic Payment

Periodic payment provisions allow for the payment of a judgment over time, rather than in a lump sum.⁹¹ Generally, periodic payments are terminated upon the victim's death.⁹² These provisions are designed to ensure the availability of necessary funds for the long term treatment of a claimant with substantial injuries.⁹³

90. *Id.* at 618, 442 N.E.2d at 24.

91. *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359 369, 204 Cal. Rptr. 671, 681, 683 P.2d 670, 680 (1984).

92. *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 510, 261 N.W.2d 434, 443 (1978).

93. *Id.*

Because periodic payment provisions prevent an award from being dissipated by "improvident expenditures or investment," they often benefit both the plaintiff and defendant.⁹⁴ Moreover, the provisions lessen insurers' costs and prevent plaintiffs' heirs from collecting windfall awards.⁹⁵

Most of the state courts that have reviewed their periodic payment provisions have found them constitutional.⁹⁶ In *Carson v. Maurer*,⁹⁷ however, the New Hampshire Supreme Court held that a periodic payment provision violated equal protection guarantees. The *Carson* court held that the statute unreasonably discriminated in favor of health care defendants and burdened the seriously injured malpractice plaintiff on several equal protection grounds.⁹⁸ First, it did not allow for the accumulation of interest on the unpaid portion of plaintiffs' awards.⁹⁹ Moreover, it provided a windfall benefit to defendants' insurers.¹⁰⁰ Finally, seriously injured malpractice victims were singled out, offending "basic notions of fairness and justice."¹⁰¹

Legislation could avoid some of the *Carson* court's criticisms by

94. *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 362, 204 Cal. Rptr. 671, 675, 683 P.2d 670, 674 (1984).

95. *Karzon*, *supra* note 4, at 700.

96. Seventeen state statutes provide for periodic payments. ALA. CODE § 6-5-486 (Supp. 1986) (periodic payments for judgments over \$100,000); ALASKA STAT. § 09.55.54.548(a) (1986); ARK. STAT. § 34-2619(D) (Supp. 1985) (periodic payments for judgments over \$100,000); CAL. CODE CIV. PROC. ANN. § 667.7 (West 1987) (periodic payments for awards over \$50,000; upheld in *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, *dismissed*, 106 S. Ct. 214 (1985)); DEL. CODE ANN. tit.18, § 6864 (Michie Supp. 1986) (periodic payment for any award); FLA. STAT. ANN. § 768.78 (West 1987) (periodic payment for award over \$250,000); Hawaii (*see* A.M.A. News, Aug. 15, 1986, at 10); ILL. REV. STAT. ch. 110, paras. 2-1705-19 (1985) (upheld in *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986)); IND. CODE ANN. § 16-9.5-2-2.2 (West 1986) (periodic payments for awards over \$75,000); KAN. STAT. ANN. § 60-2609 (1983); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-08(b) (Michie 1984); MICH. COMP. LAWS ANN. §§ 600.6309 and 6311 (West 1986) (periodic payments only for plaintiffs below the age of 60); N.M. STAT. ANN. § 41-5-7 (Supp. 1986) (periodic payments from compensation fund); OR. REV. STAT. ANN. § 752.070 (1983) (periodic payments from compensation fund); S.C. CODE ANN. § 38-59-180(3) (Law. Co-op 1985) (periodic payments from compensation fund); S.D. COD. LAW § 21-3A-1 to -13 (Supp. 1986); UTAH CODE § 78-14-9.5 (1987); WISC. STAT. ANN. § 655.015 (West 1986) (periodic payments from compensation fund for judgments over \$25,000).

97. 120 N.H. 925, 424 A.2d 825 (1980).

98. *Id.* at 944, 424 A.2d at 838. Conversely, the Illinois Supreme Court commented that the allowance of periodic payments in healing arts malpractice, but not in others, does "not offend equal protection or constitute special legislation." *Bernier v. Burris*, 113 Ill. 2d 219, 239, 497 N.E.2d 763, 773 (1986).

99. *Carson*, 120 N.H. at 944, 424 A.2d at 838.

100. *Id.*

101. *Id.*

requiring payment of interest on the unpaid balance. This feature would lessen the benefit to insurance companies.¹⁰² Thus, assuming a state is not inclined to consider a periodic payment provision unconstitutional per se, the following periodic payment section supplies a guideline for such a provision:

If the plaintiff's award for future damages exceeds \$100,000.00, the court may, at the request of either party, order that the future damages be paid in whole, or in part, by periodic payments as determined by the court, rather than by lump sum payment, on such terms as the court deems just and equitable. Included in these terms will be an allowance for interest accumulation on the unused balance.

D. Collateral Source

The collateral source rule excludes from the trial any evidence of benefits received by the injured party from sources other than the tortfeasor.¹⁰³ The rule was developed to ensure that all damages are paid by the negligent party and to prevent the penalization of plaintiffs who have the foresight to obtain insurance.¹⁰⁴ An increase in insurance protection nationwide, combined with utilization of this rule, however, has resulted in multiple recoveries.¹⁰⁵ Payments for treatment of the injury often are received from the insurance company and from the defendant in a later settlement. To alleviate this problem, states have passed statutes that stipulate that the damage award to the plaintiff must be reduced by any payments received from a collateral source, thus modifying the collateral source rule.¹⁰⁶ Nineteen states have passed statutory collateral source provisions.¹⁰⁷

102. The insurance industry is not the sole beneficiary of the federal relief package that has been proposed by Attorney General Edwin Meese. See *supra* note 12 and accompanying text.

103. *Eastin v. Broomfield*, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977).

104. *Id.* See also Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, DUKE L.J. 1417, 1447 (1975); *Eastin v. Broomfield*, 116 Ariz. 576, 585, 570 P.2d 744, 751 (1977) (admission into evidence of collateral source payments does not require the jury to diminish the damages and only acts as a setoff rather than a true restriction on damages allowed).

105. *Eastin v. Broomfield*, 116 Ariz. 576, 585, 570 P.2d 744, 751 (1977).

106. See *infra* note 107.

107. See ALASKA STAT. § 09.55.548(b) (1986) (excepting federal program payments and death benefits); ARIZ. REV. STAT. § 12-565 (West 1986); CAL. CIV. CODE ANN. § 3333.1 (West 1987) (upheld in *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, cert. dismissed, 106 S. Ct. 214 (1985)); DEL. CODE ANN. tit. 18, § 6862 (Michie Supp. 1986) (except for private collateral sources or life insurance payments); FLA. STAT. ANN. § 768.76 (West 1987) (excepting benefits under Medicaid or from Department of Health and Rehabilitative Services); Hawaii (A.M.A. News, Aug.

In some jurisdictions, however, statutes modifying the collateral source rule have been declared unconstitutional. The Kansas legislature passed a statute allowing a jury in a malpractice case to hear evidence of reimbursement or indemnification for damages from insurance payments.¹⁰⁸ In *Wentling v. Medical Anesthesia Services, P.A.*,¹⁰⁹ the Kansas Supreme Court held that this collateral source provision violated equal protection clauses under both the United States and Kansas Constitutions.¹¹⁰ The *Wentling* court concluded that the statute accorded preferential treatment to certain defendants because the collateral source provision applied only if the putative tortfeasor was a health care provider.¹¹¹ The court also held that the provision discriminated between those who pay for insurance and those who do not.¹¹²

Similarly, in *Carson v. Maurer*,¹¹³ the New Hampshire Supreme Court held that the collateral source provision violated the equal protection clause by arbitrarily and unreasonably discriminating in

15, 1986 at 10); ILL. REV. STAT. ch. 110, para. 2-1205 (1985) (upheld in *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763, (1986)); IOWA CODE ANN. § 147.136 (West 1986) (upheld in *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 559 (1980), *reaff'd*, *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 41 (1985)); MD. CRTS. & JUD. PROC. § 3-2A-08(a) (Michie 1984), MICH. COMP. LAWS ANN. § 6301 (West 1986); Minnesota, Laws for 1986, § 80, 546.36; NEB. REV. STAT. §§ 44-2826, 44-2819 (1984); N.M. STAT. ANN. § 41-5-11 (Supp. 1986); N.Y. CIV. PRAC. LAW § 4545(a) (McKinney Supp. 1986) (upheld in *Huntley v. State*, 62 N.Y.2d 134, 476 N.Y.S.2d 467 (1984)); PA. STAT. ANN. tit. 40, §§ 1301.602 and 1301.513 (West 1986); S.D. CODIFIED LAWS ANN. § 21-3-12 (1979); TENN. CODE ANN. § 29-26-119 (1980); UTAH CODE ANN. § 78-14-4.5 (1986-87); WASH. REV. CODE ANN. § 7.70.080 (West 1987).

The admission of evidence of collateral source payments is permissive in Arizona, California, Delaware, Nebraska, South Dakota, and Washington. Admission of such evidence is mandatory in Alaska, Florida, Iowa, Nebraska, New York, Pennsylvania, Tennessee, and Utah. "It is well recognized that the collateral-source rule is of common law origin and can be changed by statute." *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 920A, comment d (1979)).

108. See *Wentling v. Medical Anesthesia Services, P.A.*, 237 Kan. 503, 515, 701 P.2d 939, 949 (1985). Under the statute, if the insurance was purchased privately or by an employer, or if the services were provided by a Health Maintenance Organization ("HMO"), the evidence was not presented to the jury. *Id.* at 516, 701 P.2d at 949.

109. 237 Kan. 503, 701 P.2d 939 (1985).

110. *Id.* at 518, 701 P.2d at 951. The *Wentling* court noted that if a husband and wife were treated by the same health care provider with disastrous results, and the insurance of one was paid for by an employer while the other was paid for privately, evidence of collateral payments would be allowed in one case and not the other; a distinction that "makes no sense whatsoever." *Id.* at 517, 701 P.2d at 950.

111. *Id.*

112. *Id.* Arguably, the *Wentling* court utilized the "substantial relationship" test rather than the "rational basis" test in reviewing the collateral source provision. *Id.* at 521, 701 P.2d at 953.

113. 120 N.H. 925, 424 A.2d 825 (1980).

favor of health care providers.¹¹⁴ The *Carson* court also held that the provision discriminated against the victim's insurer, who would be required to compensate the injured patient regardless of whether the negligent tortfeasor was fully insured.¹¹⁵

In *Graley v. Satayatham*,¹¹⁶ an Ohio court of common pleas also ruled that a collateral source provision was unconstitutional on equal protection grounds. The court noted that the collateral source provision applied only to medical malpractice claims and concluded there was no "compelling governmental interest" supporting this separate treatment.¹¹⁷

In the *Carson* and *Graley* decisions, the courts applied a "substantial relationship" test to conclude that the collateral source provision was unconstitutional.¹¹⁸ In the vast majority of cases considering collateral source provisions, however, state supreme courts have used the less stringent "rational basis" test and concluded that the provisions are constitutional.¹¹⁹

Assuming a state court follows the majority and applies the rational basis test in reviewing its collateral source provision, the following language addresses the constitutional concerns of equal protection:

Evidence of an advance payment from any public collateral source of compensation payable to the person seeking damages for recovery of medical expenses shall not be admissible until a final judgment is entered in favor of the plaintiff in which event the court shall reduce the judgment to the plaintiff by the amount of such payment. Compensation from life insurance or private collateral sources are not to be used in reducing such payments.

E. Attorneys' Fees

Attorneys' fees are sometimes regulated in tort litigation to pre-

114. *Id.* at 940, 424 A.2d at 836.

115. *Id.* at 939, 424 A.2d at 835. The *Carson* court utilized the "substantial relationship" test to conclude that the collateral source provision was unconstitutional. *Id.* at 939, 424 A.2d at 836.

116. 74 Ohio Op. 2d 316, 343 N.E.2d 832 (Com. Pl. 1976).

117. *Id.* at 320, 343 N.E.2d at 837.

118. *See supra* notes 116, 118. "Although the statute may promote the legislative objective of containing health care costs, the potential cost to the general public and the actual cost to many medical malpractice plaintiffs is simply too high." *Carson v. Maurer*, 120 N.H. 925, 941, 424 A.2d 825, 836 (1980).

119. In cases in which the rational relationship standard was applied, statutes that abrogate the collateral source rule have been upheld as constitutional. *Wentling v. Medical Anesthesia Services, P.A.*, 237 Kan. 503, 521, 701 P.2d 939, 953 (1985) (McFarland, J., dissenting).

vent the "stirring up" of unjust claims.¹²⁰ Courts generally have approved the regulation of attorneys' fees in medical malpractice cases.¹²¹ Similar regulation has been found acceptable in state workmen's compensation acts,¹²² unemployment insurance laws,¹²³ and in the Federal Tort Claims Act.¹²⁴

New Hampshire is the only state in which a provision regulating attorneys' fees for medical malpractice purposes has been held unconstitutional.¹²⁵ The court in *Carson* reasoned that because legitimate claims might be deterred, the regulation of attorneys' fees impeded access to the courts.¹²⁶

As indicated by the majority of cases that have considered the regulation of attorneys' fees in medical malpractice statutes, such regulation typically survives constitutional challenges.¹²⁷ Contingent fee contracts, under which an attorney receives a percentage

120. *Calhoun v. Massie*, 253 U.S. 170, 174 (1920).

121. *Roa v. Lodi Medical Group, Inc.*, 37 Cal. 3d 920, 926, 211 Cal. Rptr. 77, 80, 695 P.2d 164, 167, *cert. dismissed*, 106 S.Ct. 421 (1985). The *Roa* court stated that "[t]he validity of such legislative regulation of attorneys' fees is well established." *Id.* The *Roa* court also quoted the remarks of Justice Brandeis in *Calhoun v. Massie*, 253 U.S. 170, 174 (1920): "the constitutionality of such legislation . . . has long been settled." *Roa*, 37 Cal. 3d at 926, 211 Cal. Rptr. at 80, 695 P.2d at 167.

Nineteen states allow some limitation on attorneys' fees in medical malpractice cases. See ARIZ. REV. STAT. ANN. § 12-568 (1985); CAL. BUS. & PROF. CODE § 6146 (West 1986) (upheld in *Roa*); DEL. CODE ANN. tit. 18, § 6865 (Supp. 1984) (upheld in *DiFilippo v. Beck*, 520 F. Supp. 1009, 1015 (D. Del. 1981)); FLA. STAT. ANN. § 768.595 (West 1986) (upheld in *Florida Patients Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985)); HAWAII REV. STAT. § 671-2 (1984); ILL. REV. STAT. ch. 110, para. 2-1114(d) (1985); IND. CODE ANN. § 16-9.5-5-1 (West 1984) (upheld in *Johnson v. St. Vincent Hospital Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980)); IOWA CODE ANN. § 147.138 (West 1986); KAN. STAT. ANN. § 7-121(b) (1982); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-07 (Supp. 1986); NEB. REV. STAT. § 44-2834 (1984); N.J. CT. R. § 1:21-7(c) (West 1985); N.Y. JUD. LAW § 474-a (West 1987); OR. REV. STAT. ANN. § 752.150 (1983); PA. STAT. ANN. tit. 40, § 1301.604 (West 1986); TENN. CODE ANN. § 29-26-120 (1980); UTAH CODE ANN. § 78-14-7.5 (Supp. 1985); WASH. REV. CODE ANN. § 7.70.070 (1987); WIS. STAT. ANN. § 655.013 (West 1986).

Legislation to regulate fees is pending in 18 states. A.M.A. News, April 25, 1986, at 1, col. 3.

122. See generally *Attorney Gen. v. Johnson*, 282 Md. 274, 306, 385 A.2d 57, 75, *cert. dismissed*, 439 U.S. 805 (1978).

123. *Id.*

124. *Id.*

125. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). The New Hampshire Supreme Court held that there was no apparent relationship between the control of attorneys' fees and the desired effect of controlling jury awards. *Id.* at 945, 424 A.2d at 839.

126. *Id.*

127. See, e.g., *Florida Patients Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985); *Johnson v. St. Vincent Hospital Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980). In Pennsylvania, an intermediate court held that an attempt by the legislature to control attorneys' fees in medical malpractice litigation was unconstitutional. *Heller v. Frankston*, 76 Pa. Commw. 294, 464 A.2d 581 (Comm. Ct. 1984). Though the Pennsylvania

of the final award as remuneration for services, are sanctioned by the Code of Professional Responsibility. Such fees must, however, be reasonable.¹²⁸ The recovery in tort litigation typically ranges from 20% to 35% of the total recovery.¹²⁹ Because restriction of awards to such percentages generally have not been considered an impediment to access to the courts, an attorneys' fees regulation utilizing the following language should avoid constitutional objections:

The amount of the claimant's attorneys' fees may not exceed the amounts in the following schedules:

35% of the first \$100,000.00 of damages;

25% of the next \$100,000.00 of damages;

10% of the balance of any awarded damages.

F. Damage Cap

Damage cap provisions impose a ceiling on plaintiffs' recoveries.¹³⁰ Twenty-one states have enacted such provisions.¹³¹ Be-

Supreme Court did not uphold the lower court's reasoning, it affirmed the holding. *Heller v. Frankston*, 504 Pa. 528, 538, 475 A.2d 1291, 1296 (1984).

128. *Johnson v. St. Vincent Hospital Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

129. *Id.* at , 404 N.E.2d at 603.

130. *See generally* Karzon, *supra* note 4, at 697.

131. ALASKA STAT. § 09.17.010(b)(1986) (\$500,000 limit on noneconomic damages); CALIF. CIV. CODE ANN. § 3333.2 (West 1987) (\$250,000 on noneconomic damages); COLO. REV. STAT. § 13-21-102.5 (Supp. 1986) (\$250,000 limit unless the court finds "justification by clear and convincing evidence."); FLA. STAT. ANN. § 768.80 (West 1987) (\$450,000 limit on noneconomic damages); HAWAII REV. STAT. §§ 663-8.7, 663-10.9(2)(Supp. 1986) (\$375,000 cap on physical pain and suffering but not mental anguish or loss of enjoyment of life or loss of consortium); IND. CODE ANN. § 16-9.5-2-2 (West 1984) and §§ 16-9.5-4-1 to -4-3 (West 1986) (\$500,000 cap; upheld in *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980)); KAN. STAT. ANN. § 60-3407 (Supp. 1986) (\$1 million overall cap with noneconomic damages limited to \$250,000); LA. REV. STAT. ANN. § 40:1299.42 (West 1987) (\$500,000 cap except for medical expenses; upheld in *Sibley v. Board of Sup'rs. of La.*, 462 So. 2d 149, 157, *aff'd*, 446 So. 2d 760 (La. 1984)); Maryland, Senate Bill No. 558, ch. 639, 11-108(1986) (\$350,000 cap on pain and suffering); MICH. COMP. LAWS ANN. § 600-1483 (West 1987) (\$225,000 cap on noneconomic losses unless there is death, intentional tort, foreign objects left in the body, reproductive system injuries, fraudulent conduct, wrongful removal of a limb, or loss of a vital bodily function and then there is no limitation of recovery); MINN. STAT. ANN. § 549.23 (West 1987) (\$400,000 limit on "intangible losses"); Missouri, *see* A.M.A. News, July 25, 1986, at 14; NEB. REV. STAT. § 44-2825 (1984) (\$1 million cap); N.M. STAT. ANN. § 41-5-6 (Supp. 1986) (\$500,000 cap excepting future medical expenses); S.D. CODIFIED LAWS § 21-3-11 (Supp. 1986) (\$1 million total recovery cap); TEX. REV. CIV. STAT. ANN. Art. 4590i, § 11.02 (Vernon 1987) (\$500,000 total recovery cap); UTAH CODE ANN. § 78-14-7.1 (1986-1987) (\$250,000 cap on noneconomic damages to take effect July 1, 1987); VA. CODE § 8.01-581.15 (1984) (\$1 million total recovery cap); Washington, Senate Bill No. 4630, Section 301(2) (1986) (limits noneconomic damages to an amount determined by multiplying plaintiff's wage by 0.43 and by plaintiff's life expectancy, assuming it is greater than 15 years); W. VA. CODE § 55-7B-8 (Supp. 1986) (\$1

cause damage caps have a direct impact on the amount of the award received by the plaintiff, they have received a great deal of attention from the legal profession.¹³² Most of those provisions affect only the amount of noneconomic damages recovered, though some states have adopted provisions that limit the total award.¹³³

Damage cap provisions have been accepted as constitutional by four state supreme courts. In *Fein v. Permanente Medical Group*,¹³⁴ the California Supreme Court held the California damage cap provisions did not violate due process guarantees. The \$250,000 statutory cap in California applies only to noneconomic losses.¹³⁵ The court reasoned that a plaintiff has no vested property right in a particular measure of damages.¹³⁶ Therefore, the California Supreme Court held that the legislature had authority to modify the nature of damages.¹³⁷ The court also stated that because only noneconomic damages were limited, a rational relationship existed between the limitation on damages and the desired intent to control the malpractice crisis.¹³⁸

An Indiana statute providing that damage payments be paid from a compensation fund established by the state also sustained constitutional challenges.¹³⁹ In Indiana, economic damages, as well as noneconomic damages, are capped.¹⁴⁰ In *Johnson v. St.*

million noneconomic cap); WIS. STAT. ANN. § 893.55 (West 1986) (\$1 million noneconomic cap).

State statutes that have established patient compensation funds include FLA. STAT. ANN. § 768.54 (West 1986); LA. REV. STAT. ANN. § 40:1299.44 (West 1986); NEB. REV. STAT. ANN. § 44-2829 (1984); N.M. STAT. ANN. § 41-5-25 (Supp. 1985); and WIS. STAT. ANN. § 655.27 (West 1986).

132. The ABA Action Commission to Improve the Tort Liability System recently recommended that ceilings not be imposed in tort reform statutes. Chi. Daily L. Bull., Jan. 12, 1987, at 4, col. 1.

133. IND. CODE ANN. § 16-9.5-2-2 (West 1984) and §§ 16-9.5-4-1 to -4-3 (West 1986); LA. REV. STAT. ANN. § 40:1299.42 (West 1987); NEB. REV. STAT. § 44-2825 (1984); S.D. CODIFIED LAWS § 21-3-11 (Supp. 1986); TEX. REV. CIV. STAT. ANN. ART. 4590i, § 11.02 (West 1987); VA. CODE ANN. § 8.01-581.15 (1984).

134. 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, cert. dismissed, 106 S. Ct. 214 (1985).

135. CALIF. CIV. CODE § 3333.2(b) (West 1987).

136. *Fein*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665. "We know of no principle of California — or federal — constitutional law which prohibits the Legislature from limiting the recovery of damages in a particular setting in order to further a legitimate state interest." *Id.* at 161, 211 Cal. Rptr. at 385, 695 P.2d at 682. The United States Supreme Court did not hear arguments regarding the California holding because the case lacked a federal question, but Justice White specifically stated that the compensation question had not been resolved by the United States Supreme Court. *Fein*, 106 S. Ct. 214.

137. *Fein*, 38 Cal. 3d at 161, 211 Cal. Rptr. at 385, 695 P.2d at 682.

138. *Id.* at 160, 211 Cal. Rptr. at 384, 695 P.2d at 681.

139. *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

140. IND. CODE ANN. § 16-9.5-2-2 (West 1984) and § 16-9.5-4-1 to -4-3 (West 1986).

Vincent Hospital, Inc.,¹⁴¹ the Indiana Supreme Court upheld the \$500,000 cap on the total amount recoverable for any patient's injury or death. The court utilized the rational means test, concluding that the limitation was consistent with the due process and equal protection clauses of the federal and state constitutions.¹⁴² The court reasoned that a statutory limitation upon money damages was a natural consequence of the establishment of an insurance program intended to pay for those damages.¹⁴³ The court thus determined that the provision was consistent with constitutional guarantees.¹⁴⁴

A Louisiana statute also limited total medical malpractice awards to \$500,000.¹⁴⁵ In *Sibley v. Board of Supervisors of Louisiana State University*,¹⁴⁶ the Louisiana Supreme Court held the cap constitutional on both equal protection and due process grounds, though no compensation fund existed.¹⁴⁷ The *Sibley* court applied the rational basis test and held that the damage cap provision was rationally related to the legislative intent of assuring the continued availability of quality health care.¹⁴⁸

Similarly, in *Prendergast v. Nelson*,¹⁴⁹ the Nebraska Supreme Court held a \$1,000,000 damage cap provision constitutional.¹⁵⁰ The court observed that Nebraska's statutory procedure is voluntary and allows the claimant an assured fund of \$500,000, an amount not otherwise guaranteed to be available if the treating physician fails to obtain malpractice insurance.¹⁵¹ The Nebraska

141. 273 Ind. 374, 404 N.E.2d 585 (1980).

142. *Johnson*, 273 Ind. at 394, 404 N.E.2d at 598.

143. *Id.* at 393, 404 N.E.2d at 599 ("An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred.").

144. *Id.* at 398, 404 N.E.2d at 600. The court noted that statutes that limit recovery to less than provable damages are constitutional if they fit the rational basis test. *Id.* See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *Sidle v. Majors*, 266 Ind. 29, 360 N.E.2d 171 (1977), *cert. denied*, 434 U.S. 825 (1978).

145. LA. REV. STAT. ANN. §§ 40:1299.39, :1299.42 (West 1987). The Louisiana statute consists of separate sections for the liability of the state and for the health care provider.

146. 462 So. 2d 149 (La. Ct. App.), *aff'd*, 446 So.2d 760 (La. 1985).

147. *Id.* at 157. The *Sibley* court applied the rational basis test, reasoning that a plaintiff's right to full tort recovery does not constitute a fundamental right requiring strict scrutiny. *Id.* at 156. In addition, the court noted that the supreme courts of Indiana and California, and the United States Supreme Court have upheld damage cap limitations. *Id.* The Louisiana court's decision came after the legislature retroactively repealed the statute's provision limiting the recovery of medical expenses. *Sibley*, 477 So. 2d 1094, 1098 (La. 1985).

148. *Sibley*, 462 So. 2d at 156.

149. 199 Neb. 97, 256 N.W.2d 657 (1977).

150. NEB. REV. STAT. § 44-2825 (1984).

151. *Id.* at 115, 256 N.W.2d at 669.

statute also provides the claimant with a determination by an impartial medical review panel in return for the ability to have an assured fund to pay for his damages.¹⁵² By providing a quid pro quo benefit, the court held that the damage cap was reasonably related to a legitimate statutory intent and did not violate equal protection guarantees.¹⁵³

Three state supreme courts have held medical malpractice damage cap provisions unconstitutional. In *Wright v. Central DuPage Hosp. Ass'n*,¹⁵⁴ the Illinois Supreme Court held that restricting recovery of only economic damages violated equal protection guarantees. The Illinois court did not hold the concept of a damage cap unconstitutional per se,¹⁵⁵ but instead decided that the statute under consideration was "arbitrary and constitute[d] a special law" in violation of the Illinois Constitution.¹⁵⁶

The New Hampshire Supreme Court criticisms of damage cap

152. *Id.*

153. *Id.* "We affirm the right of the Legislature to exercise the police power to promote the general health and welfare of the citizens of this state." *Id.* at 114, 256 N.W.2d at 668. The court did not perceive the legislation as protection for only the medical care provider, but rather relied on the doctrine of quid pro quo. *Id.* at 115, 256 N.W.2d at 669.

Though the precise source of the quid pro quo doctrine is unclear, it dates back to consideration given injured employees under workmen's compensation laws. *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) (as discussed in *Everett v. Goldman*, 359 So. 2d 1256, 1270 (La. 1978)). Under the workmen's compensation programs, employees surrender common law remedies against the employer for work related injuries. *Washington Metro. Transit Auth. v. Johnson*, 467 U.S. 925, 931 (1984). As a quid pro quo, the reward for the employer is immunity from employee tort suits. *Id.* The United States Supreme Court has refused to assert that states always must provide a "reasonably just substitute" when state action affects common law remedies. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 201 (1983). Nevertheless, a number of state courts have required that the legislature provide some remedy for every legally recognized wrong. *See, e.g., Kenyon v. Hammer*, 142 Ariz. 69, 74, 688 P.2d 961, 967 (1984); *McDonald v. Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 471 A.2d 646, 651 (1984) (Speziale, J., concurring); *Saylor v. Hall*, 497 S.W.2d 218, 222 (Ky. 1973); *White v. State*, 661 P.2d 1272, 1275 (Mont. 1983); *Kaugard v. The Baltic Coop. Bldg. Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984). States that require the provision of a remedy for every wrong arguably offer greater due process protections than guaranteed by the United States Constitution. This distinction has led some state courts to assert that they should be allowed to have a voice in the constitutional effects of tort reform on their own citizens. *See, e.g., Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980) ("In interpreting our State constitution, however, we are not confined to federal constitutional standards and are free to grant individuals more rights that the Federal Constitution requires.").

154. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

155. *Id.* at 329, 347 N.E.2d at 743. "We do not hold or even imply that under no circumstances may the General Assembly abolish a common law cause of action without a concomitant quid pro quo. . . ." *Id.*

156. *Id.* at 330, 347 N.E.2d at 743.

provisions took a broader sweep. In *Carson v. Maurer*,¹⁵⁷ the New Hampshire Supreme Court held a \$250,000 cap on noneconomic damages unconstitutional, concluding that the statute violated equal protection guarantees by precluding only the most seriously injured victims of medical negligence from receiving full compensation.¹⁵⁸ The court concluded that limiting plaintiff awards to economic recovery was improper because pain and suffering was a "material element" of a tort claim for damage.¹⁵⁹ The court reasoned that the malpractice plaintiff with the most serious injuries would be unfairly burdened and forced to support the medical care industry.¹⁶⁰

The North Dakota Supreme Court adopted an alternative approach in *Arneson v. Olson*.¹⁶¹ In *Arneson*, the court concluded that a \$300,000 cap on total liability failed to promote the intent of the statute: to assure the availability of competent medical services at reasonable cost, to reduce the expense of nonmeritorious claims, and to encourage physicians to remain in practice in North Dakota.¹⁶² The court found no evidence that limitation of recovery would promote these aims and held the statute unconstitutional.¹⁶³ The *Arneson* court reviewed other state supreme court decisions, concluding that none had upheld a cap as low as the North Dakota statute.¹⁶⁴ The court also observed that the incidence of malpractice claims in North Dakota was far lower than the national average and that insurance premiums were the sixth lowest in the country.¹⁶⁵ Because the meager evidence of a demonstrable crisis was considered insufficient to justify the drastic limitation on recovery, the provision was held violative of equal protection guarantees.¹⁶⁶

Damage cap provisions also have been considered by appellate level state courts. In Ohio, the appellate courts are divided regarding the constitutionality of damage caps.¹⁶⁷ In Texas the two ap-

157. 120 N.H. 925, 424 A.2d 825 (1980).

158. *Id.* at 943, 424 A.2d at 836.

159. *Id.* A new legislative package, which includes a cap of \$875,000, recently has been signed into law in New Hampshire. A.M.A. News, July 11, 1986, at 16, col. 2.

160. *Carson*, 120 N.H. at 944, 424 A.2d at 837.

161. *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

162. *Id.* at 135.

163. *Id.*

164. *Id.*

165. *Id.* at 136.

166. *Id.*

167. *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 482 N.E.2d 1358, 1363 (Common Pl. 1985). The *Duren* court mentioned three other cases in Ohio that

pellate courts that have considered the issue held that state's \$500,000 limitation unconstitutional.¹⁶⁸

The damage cap provision in Virginia recently was held unconstitutional by a federal district court.¹⁶⁹ The court concluded that the provision was not a per se violation of equal protection or due process guarantees.¹⁷⁰ Nevertheless, it held the provision unconstitutional on the grounds that setting aside a jury verdict supported by evidence because damages were above the statutory limit violates the guaranteed right to jury trial.¹⁷¹

Although a majority of states consider damage caps an acceptable part of the malpractice reform package, questions remain regarding whether damages may be restricted to economic injuries alone, and what dollar amount limit is reasonable and non-violative of equal protection guarantees.¹⁷² Thus, in drafting damage cap provisions, states might consider restricting recovery of noneconomic damages to one million dollars. While this amount does not exceed any existing state statutory limitations, it exceeds caps in those states in which the damage cap provision has been held unconstitutional.¹⁷³ Applying these guidelines, the provision might read as follows:

Noneconomic damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, or other nonpecuniary injury will not exceed \$1 million. This does not affect the amount of damages awarded for recovery of expenses, both past and future, and for recovery of lost wages.

G. Statute of Limitations and Repose

Statutes of limitations and statutes of repose bar courts from awarding remedies to dilatory plaintiffs.¹⁷⁴ Thus, these limitation periods are intended to encourage prompt presentation of evi-

found the act unconstitutional and two that held it constitutional. *See id.* at 31, 482 N.E.2d at 1361.

168. *Detar Hosp., Inc. v. Estrada*, 694 S.W.2d 359 (Tex. App. 1985); *Baptist Hosp. of Southeast Tex. v. Baber*, 672 S.W.2d 296 (Tex. App. 1984), *aff'd*, 714 S.W.2d 310 (1986). In *Baptist Hosp.*, the Texas Supreme Court originally granted writ to decide the constitutionality of the statute but recently revoked this grant because the judgment in the case was reduced so that it no longer exceeded the statutory limit. *Baptist Hosp.*, 714 S.W.2d 310 (1986).

169. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986).

170. *Id.* at 787.

171. *Id.* at 789. The court held that the legislature may not "preempt a jury's findings" on a factual issue without violating the right to jury trial. *Id.* at 790.

172. *See supra* notes 132-72 and accompanying text.

173. *See supra* notes 155, 158, 162, 168, 169, 170 and accompanying text.

174. *William Danzer Co. v. Gulf R.R.*, 268 U.S. 633 (1925).

dence,¹⁷⁵ and to avoid stale claims.¹⁷⁶ A statute of limitations restricting the right to file a lawsuit generally has been considered constitutionally permissible, providing there are allowances for reasonable discovery.¹⁷⁷

In medical malpractice actions, time extensions for reasonable discovery of injuries result in longer intervals or "tails" during which health care personnel remain accountable for negligent actions.¹⁷⁸ Unlike ordinary statutes of limitations, which begin running upon accrual of the claim, "tails" begin running only when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has yet resulted.¹⁷⁹ In an attempt to limit the length of time during which health care personnel remain liable, thirty states have adopted statutes of repose, that place an absolute outer limit on when a suit may be filed.¹⁸⁰

175. *United States v. Kubrick*, 444 U.S. 111 (1979).

176. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1944), *quoted by Myrick v. James*, 444 A.2d 987 (Me. 1982). *See, e.g., Clark v. Singer*, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983) (statutes of limitation generally are designed to prevent surprises that can occur from filing of claims when "evidence has been lost, memories have faded, and witnesses have disappeared.").

177. *William Danzer*, 268 U.S. 633 (1925). *See generally Werthmann, MEDICAL MALPRACTICE LAW: HOW MEDICINE IS CHANGING THE LAW* 146 (1984).

178. *See generally Karzon, supra note 4*, at 695.

179. *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985).

180. ALA. STAT. § 6-5-482 (Supp. 1986) (upheld in *Reese v. Rankin Fite Memorial Hosp.*, 403 So. 2d 158 (1981)); ARIZ. REV. STAT. ANN. § 12-542 (1986); ARK. STAT. ANN. § 34-2616 (Supp. 1985); CAL. CIV. PROC. CODE § 340.5 (West 1982); CO. REV. STAT. § 13-80-102(c) (Supp. 1986) (upheld in *Austin v. Litvak* 682 P.2d 41, 53 (Colo. 1984) though plaintiffs whose claims were premised on negligent misdiagnosis were excepted from application of the statute); CONN. GEN. STAT. ANN. § 52-584 (West 1987) (upheld in *McDonald v. Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 471 A.2d 646 (1984)); DEL. CODE ANN. tit. 18, § 6856 (Michie 1984) (upheld in *Dunn v. St. Francis Hosp., Inc.* 401 A.2d 77 (Del. 1979)); HAWAII REV. STAT. § 657-7.3 (Supp. 1984) (*noted with approval in Yamaguchi v. Queen's Medical Center*, 65 Hawaii 84, 648 P.2d 689 (1982)); IDAHO CODE § 5-219 (Supp. 1985) (upheld in *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983)); IND. CODE ANN. § 16-9.5-3-1 (West 1986); KAN. STAT. ANN. § 60-513 (1983) (upheld in *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 631 P.2d 222 (1981)); LA. REV. STAT. ANN. § 9:5628 (West 1986) (upheld in *Lott v. Haley*, 370 So. 2d 521 (1979)); ME. REV. STAT. ANN. tit. 24-2902 (1986), MD. JUD. PROC. ANN. § 5-109 (1984) (upheld in *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985)); MASS. GEN. LAWS ANN. ch. 231, § 60D (West 1986) (upheld in *Cioffi v. Guenther*, 374 Mass. 1, 370 N.E.2d 1003 (1977)); MO. ANN. STAT. § 516.105 (West 1987) (upheld in *Windscheffel v. Benoit*, 646 S.W.2d 354 (1983)); NEB. REV. STAT. § 44-2828 (1984), NEV. REV. STAT. § 41A.097 (1986); N.M. STAT. ANN. § 41-5-13 (Supp. 1986) (limited in *Otero v. Zouhar*, 102 N.M. 482, 697 P.2d 482, (1985); N.Y. CIV. PRAC. L. & R. § 214-a (West 1987); N.C. GEN. STAT. § 1-15(c) (1983) (upheld in *Roberts v. Durham County Hosp. Corp.*, 56 N.C.App. 533, 289 S.E.2d 875 (1982), *aff'd*, 307 N.C. 465, 298 S.E.2d 384 (1983); N.D. CENT. CODE § 28-01-18 (Supp. 1985); OHIO REV. CODE ANN. tit. 23, § 2305.11 (Supp. 1986); OKLA. STAT. ANN. tit. 76 § 18 (West 1987); R.I. GEN. LAW § 9-1-14.1 (Supp. 1980); TENN. CODE ANN. § 29-26-116 (1980) (upheld in *Harrison v. Schrader*, 569

Constitutional challenges to statutes of limitations or statutes of repose have been partially successful in five states. In Georgia, the statute of limitations provision required medical malpractice actions to be brought within two years of the date of the negligent act, rather than the actual injury.¹⁸¹ In *Hamby v. Neurological Associates*,¹⁸² the Georgia Supreme Court held this distinction constitutional in response to the assertion that it violated equal protection guarantees by separating medical malpractice claims from other tort actions. Subsequently, in *Allriell v. Emory Univ.*,¹⁸³ the Georgia Supreme Court approved that part of the act that provides a one year statute of limitations period from the date of discovering a foreign object left in a body. In *Shessel v. Stroup*,¹⁸⁴ however, the Georgia Supreme Court held that it was unconstitutional to measure malpractice cases from the date of negligence rather than the date of injury, as required for all other tort actions.¹⁸⁵ The *Shessel* court reasoned that all general tort claims must survive until there is some injury.¹⁸⁶

In *Carson*, the New Hampshire Supreme Court held a statute of limitations provision unconstitutional on two grounds.¹⁸⁷ First, the statute's "reasonable discovery" provision applied only to plaintiffs whose actions were based upon the discovery of a foreign object in their body.¹⁸⁸ This restriction deprived other plaintiffs of a similar reasonable opportunity to discover the existence of harm resulting from negligence.¹⁸⁹ Second, because the statute required a child less than eight years old at the time of the negligent act to

S.W.2d 822 (1978)); UTAH CODE ANN. § 78-14-4 (1986-87) (upheld in *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30 (Utah 1981)); VT. STAT. ANN. tit. 12, §§ 521 and 1909 (Supp. 1985); W. VA. CODE § 55-7B-4 (Supp. 1986); WYO. STAT. § 1-3-107 (1977).

181. GA. CODE ANN § 3-1102 (1986).

182. 243 Ga. 698, 256 S.E.2d 378 (1979).

183. 249 Ga. 35, 285 S.E.2d 521 (1981).

184. 253 Ga. 56, 316 S.E.2d 155 (1984).

185. See also *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984). Most statutes of limitation begin running when the plaintiff discovers, or should have discovered, the "negligent act, the damage, and the causal connection" between the two. *Yamaguchi v. Queen's Medical Center*, 65 Hawaii 84, 648 P.2d 689, 693 (1982).

186. *Id.* at 158.

187. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

188. *Id.* at 936, 424 A.2d at 833.

189. *Id.* The New Hampshire statute required the malpractice plaintiff to bring an action within two years of the alleged negligence or, if the action was based on a foreign object discovered in the body of the injured person, "within 2 years of the date of discovery or of the date of discovery of facts which would reasonably lead to discovery." *Id.* at 935, 424 A.2d at 833. Under the intermediate scrutiny test, such a limitation is unconstitutional because the legislature may not abolish the discovery rule with respect to only "one class of medical malpractice plaintiff". *Id.* at 936, 424 A.2d at 833.

commence an action for injury by the time of his tenth birthday,¹⁹⁰ the court held the statute unconstitutional under equal protection principles.¹⁹¹ The court reasoned that this restriction, which affected only a small number of people, did not "substantially" further any legislative objectives.¹⁹²

In some states, the time restrictions on minors' filing of actions also conflicts with common law restrictions regarding minors' rights to file suit.¹⁹³ Because minors must depend on someone else to file an action within the statutory time limit, the time limitations may bar all adequate remedies.¹⁹⁴ Accordingly, three courts have held restrictions on filing by minors unconstitutional. In *Sax v. Votteler*,¹⁹⁵ the Texas Supreme Court held that the legislature cannot abrogate the right to bring a common law cause of action unless the defendant demonstrates that the basis for the legislation outweighs the denial of plaintiff's guaranteed right of redress.¹⁹⁶ Relying on the reasonable relationship test, the court held that denying this right to infants over the age of eight was unconstitutional.¹⁹⁷

A similar decision was reached in Ohio in *Schwan v. Riverside Methodist Hospital*.¹⁹⁸ The Ohio statute required minors under the age of ten at the time of discovery of the injury to file a malpractice action by age fourteen.¹⁹⁹

An Arizona statute protecting only minors under the age of seven similarly was held unconstitutional.²⁰⁰ In *Kenyon v. Ham-*

190. *Id.*

191. *Id.* at 937, 424 A.2d at 834. A separate New Hampshire statute protected infants and incompetent persons who were allowed to bring personal actions within two years after the disability was removed, thus tolling the statute of limitations. N.H. REV. STAT. ANN. § 508:8 (1983).

192. *Carson* 120 N.H. at 937, 424 A.2d at 834. This conclusion was not reached in Alabama where a rational basis standard is used. *Reese v. Rankin Fite Memorial Hosp.*, 403 So. 2d 158 (Ala. 1981).

193. *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983) (child has no right to bring a cause of action on his own unless disability is removed).

194. *Id.* at 667. Under the Texas statute, the child would be precluded from suing his parents who negligently failed to file an action due to the doctrine of parent-child immunity. *Id.*

195. 648 S.W.2d 661 (Tex. 1983).

196. *Id.* at 665-66.

197. *Id.* at 667.

198. *Schwan v. Riverside Methodist Hosp.*, 6 Ohio St. 3d 300, 302, 452 N.E.2d 1337, 1339 (1983) (unconstitutional to distinguish between minors older than 10 years from those younger).

199. *Id.*

200. *Kenyon*, 142 Ariz. 69, 688 P.2d 961 (1984). "It is hard to envision why claims of a six year old child are likely to be more meritorious than those of children over seven." *Id.* at 84, 688 P.2d at 976.

mer,²⁰¹ the Arizona Supreme Court did not dispute the legislature's power to regulate statutes of limitations, but nevertheless cautioned that when fundamental rights were affected, the method must pass the strict scrutiny test.²⁰² The court noted that the Arizona Constitution is "unique" in its protection of the right to recover tort damages,²⁰³ and thus distinguished the rights of tort plaintiffs in Arizona from other states.²⁰⁴ Subsequent to defining a "fundamental right" as one guaranteed by the state constitution, the *Kenyon* court held that the right to "bring and pursue" an action in Arizona was a "fundamental right."²⁰⁵ Applying a strict scrutiny analysis, the court concluded that the statutory limitations did not pass constitutional muster, because medical malpractice plaintiffs were singled out for discrimination.²⁰⁶

Finally, in *Strahler v. St. Luke's Hospital*,²⁰⁷ the Missouri Supreme Court held that the application of a statute of limitations to minors' claims violated constitutionally guaranteed rights of access to the courts.²⁰⁸ The court reasoned that by depriving minors the right to assert their own claims, the statute "ma[de] them dependent on the actions of others."²⁰⁹

State legislatures might avoid the concerns raised by these courts by drafting a statute of limitations provision that tolls the statute of limitations until minors reach the age of majority. Heeding the varied concerns of state courts, the statute of limitations might appear as follows:

No person who has attained majority age shall be permitted to maintain an action against a health care provider unless such action is instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury. In no event may such action be instituted more than four years after the act or omission unless there was intentional concealment, the action is

201. 142 Ariz. 69, 688 P.2d 961 (1984).

202. *Id.* at 87, 688 P.2d at 979. The Massachusetts Supreme Court noted that arguments of influence "have force" but are properly presented to the legislature rather than the courts. *Cioffi v. Guenther*, 374 Mass. 1, 4, 370 N.E.2d 1003, 1005 (1977).

203. *Kenyon*, 142 Ariz. at 79, 688 P.2d at 971. The *Kenyon* court also noted that within the wide limits of federal due process, the states are "free to create, define, limit and regulate tort law." *Id.*

204. *Id.* at 81, 688 P.2d at 973.

205. *Id.* at 83, 688 P.2d at 975.

206. *Id.* at 87, 688 P.2d at 979.

207. 706 S.W.2d 7 (Mo. 1986).

208. *Id.* at 11.

209. *Id.* at 12.

on the behalf of a minor under the age of 18, or a foreign body was left in the person without authorization.

H. *Ad Damnum Clause*

An ad damnum clause prevents a plaintiff from seeking a specified sum of money in his complaint. These limitations have been instituted because the named sum is often vastly inflated.²¹⁰ Thirteen states have passed statutory ad damnum provisions.²¹¹

In *McCoy v. Western Baptist Hospital*,²¹² however, a Kentucky appellate court held that the regulation of prayers for damages unconstitutionally invaded the rulemaking power of the courts.²¹³ This rationale has not been advanced in any other state. Moreover, in a subsequent Kentucky case, before different appellate judges, a similar statute was considered a constitutional legislative regulation.²¹⁴

The Kentucky appellate court's challenge to its ad damnum clause has provided the only reason for pause in drafting ad damnum clauses to medical malpractice statutes. Thus, the language of the clause might appear as follows:

The ad damnum clause, or prayer for damages, in complaints alleging medical liability against health care providers shall be eliminated and the complaint shall contain only a general claim for relief as may be necessary to satisfy the jurisdictional requirements of the court to which the complaint is addressed.

I. *Notice of Intent to Sue*

A notice of intent to sue provision allows insurance carriers and

210. *Everett v. Goldman*, 359 So. 2d 1256, 1266 (La. 1978).

211. ALA. CODE § 6-5-483 (Supp. 1986); ALASKA STAT. § 09.55.547 (1983); ARIZ. REV. STAT. ANN. § 12-566 (1982); ARK. STAT. § 34-2618 (Supp. 1985); COLO. REV. STAT. § 13-21-12 (Supp. 1986); HAWAII REV. STAT. § 671-4 (Supp. 1984); ILL. REV. STAT. ch. 110, par. 2-604 (1985); LA. REV. STAT. ANN. § 40:1299.41(E)(2) (West 1987) (upheld in *Everett v. Goldman*, 359 So. 2d 1256, 1266 (1978)); ME. REV. STAT. ANN. tit. 24 § 2901 (1986); MD. CRTS. & JUD. PROC. CODE ANN. § 3-2A-02(b) (Supp. 1986); MASS. GEN. L. ANN. ch. 231, § 60C (1986); N.M. STAT. ANN. § 41-5-4 (Supp. 1986); OHIO REV. CODE ANN. tit. 23, § 2307.42(C) (1981); TEX. REV. CIV. STAT. ANN. art. 4590 i, § 5.01 (Vernon 1987); UTAH CODE ANN. § 78-14-7 (1986-87); W. VA. CODE § 55-7B-5 (Supp. 1986); WISC. STAT. ANN. § 655.009 (West 1986). In Tennessee, the pleading may contain a specific sum though it cannot be disclosed to the jury. TENN. CODE ANN. § 29-26-117 (Supp. 1985).

212. 628 S.W.2d 634 (Ky. App. 1981).

213. The court noted that the Kentucky Supreme Court in *McGuffey v. Hall* commented on this section with "deep misgivings" regarding its apparent conflict with the rule-making authority of the court. *Id.* at 635.

214. See *Lewis v. Smother*, 663 S.W.2d 228 (Ky. App. 1984) (addressing legislative control over the use of court injunctions to revoke a liquor license).

the potential defendant time to settle with the aggrieved party before incurring the expense of trial preparation.²¹⁵ It also provides sufficient time to "investigate a claim, determine its merits, and prepare a defense, if necessary."²¹⁶ Only five states have adopted legislation proposals requiring notice for medical malpractice claims.²¹⁷ Similar provisions, however, have been enacted in other substantive areas in a number of states.²¹⁸

One state's notice of intent to sue provision for medical malpractice claims has been held unconstitutional. In *Carson*, the New Hampshire Supreme Court held that the provision of notice to medical care providers, but not other tort defendants, bore no substantial relationship to "any legitimate legislative objective."²¹⁹ The court noted that the legislative intent underlying the provision was to contain the costs of the medical injury reparation system, and concluded that implementing a notice provision would not effect any significant changes.²²⁰ Accordingly, the *Carson* court concluded that the notice was a "procedural trap for the unwary" and

215. See *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983), *aff'd*, *Simpson v. Fuller*, 281 Ark. 471, 665 S.W.2d 269 (1984). See also *McGuire v. University of Utah Medical Center*, 603 P.2d 786 (Utah 1979).

216. *Newlan v. State*, 96 Idaho 711, 714, 535 P.2d 1348, 1351 (1975) (upheld 120 day notice for tort claims against the state).

217. ARK. STAT. ANN. § 34-2617 (Supp. 1985) (60 day notice requirement upheld in *Jackson v. Ozment*, 283 Ark. 100, 671 S.W.2d 736 (1984)); CAL. CODE CIV. PROC. ANN. § 364 (West 1982) (90 day notice required though failure to provide notice is not jurisdictional, but simply a ground for attorney discipline, *Lesko v. Superior Court*, Marin County, 127 Cal. App. 3d 476, 179 Cal. Rptr. 595 (1982)); ME. REV. STAT. ANN. tit. 24 § 2903 (West 1986) (90 day notice requirement upheld in *Givertz v. Maine Medical Center*, 459 A.2d 548 (1983)); UTAH CODE ANN. § 78-14-8 (1986-87) (90 day notice requirement upheld in *McGuire v. Univ. of Utah Medical Center*, 603 P.2d 786 (Utah 1979)), VA. CODE § 8.01-581.2 (Supp. 1986) (notice tolls the statute of limitations, *Baker v. Zirkle*, 307 S.E.2d 234 (Va. 1983)).

218. See, e.g., *Guzman v. McDonald*, 194 Colo. 160, 570 P.2d 532 (1977) (notice to sue for return of tenant deposit); *Sullivan v. Board of Police Comm'rs*, 196 Conn. 208, 491 A.2d 1096 (1985) (notice to proceed with unlawful discrimination suit); *Burks v. Bolerjack*, 427 N.E.2d 887 (1981) (notice to sue the county under the Tort Claims Act); *Howell v. Lazaruk*, 388 Mich. 32, 199 N.W.2d 188 (1972) (notice to file claim in a motor vehicle accident); *Thomas v. Consolidated Fire Dist. No. 1*, 428 N.Y.S.2d 443, 405 N.E.2d 1009 (1980) (notice of intent to sue for municipal liability.)

219. *Carson v. Maurer*, 120 N.H. 925, 937, 424 A.2d 825, 834 (1980). The court concluded that such special treatment of medical providers was unnecessary because the serving of process would suffice as a warning to the physician prior to excessive litigation. *Id.* The New Hampshire Supreme Court applied the more stringent intermediate test. That test required not only that the state interest be important, and the remedial method reasonable, but also that there be a "fair and substantial relation to the object of the legislation," thus ensuring equal treatment for all persons affected. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

220. *Carson*, 120 N.H. at 937, 424 A.2d at 829.

an unjust burden on the prosecution of claims.²²¹ Because no other court has expressed similar concerns, drafters of medical malpractice statutes might include notice requirement resembling the following provision:

No action for medical injury shall be commenced until at least sixty days after service upon the person or persons alleged to be liable.

V. CONCLUSION

The "malpractice crisis" continues to be a source of concern to the legal and medical professions, and, more importantly, to consumers of health care. Many states have responded by passing medical malpractice reform legislation. Additionally, federal legislation has been considered as a means of addressing the problem on a national level.

State supreme court decisions addressing the constitutionality of medical malpractice reform packages illustrate that statutory reforms may be constitutional if appropriate protections are included. The suggested medical malpractice act provisions set forth in this article represent an attempt to address many of the constitutionality problems identified by the state courts. The provisions are worded similarly to provisions that have withstood constitutional challenges in states applying a "rational basis" test when analyzing constitutionality. Because this test is followed in a majority of states, the provisions represent a starting point for states considering medical malpractice legislation.

LARRY STEPHEN MILNER, M.D., J.D.

221. *Id.* at 938, 424 A.2d at 834.