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# Will Tort Reform Combat The Medical Malpractice Insurance Availability And Affordability Problems That Virginia'S Physicians Are Facing?

# WILL TORT REFORM COMBAT THE MEDICAL MALPRACTICE INSURANCE AVAILABILITY AND AFFORDABILITY PROBLEMS THAT VIRGINIA'S PHYSICIANS ARE FACING?

Virginia's physicians today are finding that medical malpractice insurance is both unavailable and unaffordable.[1] In September 1986, the Pennsylvania Hospital Insurance Company, which insured 1,100 of Virginia's physicians, announced that effective November 1, 1986, it no longer would insure a physician who a hospital does not employ or who does not practice in a group of at least ten physicians.[2] The Virginia Insurance Reciprocal and St. Paul Fire and Marine, two other major medical malpractice insurers in Virginia, both announced that they would not write new malpractice insur-

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1. *See* S. Doc. No. 11, Report of the Joint Subcommittee Studying the Liability Insurance Crisis and the Need for Tort Reform to the Governor and the General Assembly of Virginia of 1987, at 12-13 (1987) (medical malpractice insurance is unavailable and unaffordable to Virginia's physicians). A Joint Subcommittee of the Virginia General Assembly studied the liability insurance crisis in Virginia and made proposals to the 1987 Virginia General Assembly regarding the need for tort reform in Virginia. *Id.* at 3-4. The Joint Subcommittee stated that commentators believe that liability insurance coverage is unavailable and unaffordable because of the insurance industry's $3 billion annual increase in underwriting losses from 1979-1983. *Id.* at 6. The insurance industry initially was able to cover the underwriting losses with investment income earned during the late 1970s and early 1980s. *Id.* The insurance industry's investment income, however, declined as interest rates declined, resulting in a decreased surplus. *Id.* Because an insurance company must have a minimum surplus to protect the insurance company from insolvency, any reduction in the amount of an insurance company's surplus restricts that company's ability to write new insurance policies. *Id.* The Joint Subcommittee stated that commentators believe that the increase in underwriting losses occurred because the insurance companies wrote new policies at lower rates without carefully selecting their insureds. *Id.* The insurance companies offered low rates to get more premium dollars to invest at higher rates of interest. *Id.* at 7. As a result of the underwriting loss, the insurance companies have had to increase the cost of insurance premiums to compensate for the loss. *Id.*

The Joint Subcommittee also stated that while some commentators believe that the increase in liability premiums resulted from underwriting losses, other commentators claim that medical malpractice liability insurance is unavailable and unaffordable to physicians because insurance companies are unable to predict accurately the insurer's exposure, due to frequent and severe tort claims against physicians. *Id.* Although physicians' medical malpractice premiums accounted for only 2% of all property and casualty premiums written in 1985, underwriting losses attributable to medical malpractice premiums accounted for 5% of all underwriting losses. *Id.* at 6. Moreover, the average jury award in a medical malpractice action increased from $166,165 in 1974 to $1,179,095 in 1985. *Malpractice Suits: Doctors Under Seige*, Newsweek, Jan. 26, 1987, at 62. Furthermore, patients frequently file medical malpractice suits against physicians. *Id.* One out of every five physicians is subject to a patient's medical malpractice suit each year. *Id.* Physicians contend that tort reform is essential to ensure that tort actions against physicians do not destroy the practice of medicine. *Doctors and Lawyers Face Off*, A.B.A.J., July 1, 1986, at 38-39.

2. *See* S. Doc. No. 11, *supra* note 1, at 12-13 (1987) (medical malpractice insurer in Virginia placed restrictions on coverage for physicians).

ance policies providing coverage to obstetricians.[3] Additionally, for some of Virginia's physicians who have been able to obtain medical malpractice insurance, the cost of premiums nearly doubled in 1986.[4] Adding to the problems in the medical malpractice insurance area, in November 1986, the United States District Court for the Western District of Virginia declared unconstitutional Virginia's statutory damage limitation of $1,000,000 against a health care provider in a medical malpractice action.[5]

In response to the availability and affordability problems associated with medical malpractice insurance, organizations representing Virginia's physicians lobbied for tort reform before the 1987 Virginia General Assembly.[6] On the advice of the Medical Society of Virginia, the Virginia General Assembly passed the Virginia Birth-Related Neurological Injury Compensation Act, which establishes a no-fault reimbursement system for infants neurologically injured at birth.[7] In addition, the Virginians for Law Reform (VLR), a group composed of several industries and trade associations in Virginia, including the Medical Society of Virginia, was successful with proposals suggesting that the 1987 Virginia General Assembly pass legislation placing a cap on punitive damages in civil actions and sanctioning attorneys who file frivolous lawsuits and motions.[8] The 1987 Virginia General Assem-

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3. *See id.* at 13 (malpractice insurers placed moratorium on medical malpractice coverage for obstetricians in Virginia).

4. Intress, *Debate on Medical Malpractice Cap is Revived*, The Richmond Times Dispatch, Nov. 16, 1986, at A-2. In 1986, medical malpractice coverage nearly doubled for some of Virginia's physicians. *Id.* For example, one obstetrician in Virginia paid $70,000 for medical malpractice insurance coverage, one neurosurgeon paid $90,000, and one general surgeon paid $63,000. *Id.*

5. *See* Boyd v. Bulala, 647 F. Supp. 781, 790 (W.D. Va. 1986) (holding unconstitutional Virginia's statutory cap of $1,000,000 in medical malpractice action); *see also* VA. CODE §8.01-581.15 (1984) (limiting recovery against health care provider in medical malpractice action to $1,000,000); *infra* notes 42-72 and accompanying text (discussing Virginia's statutory cap on recovery in medical malpractice action).

6. *See Virginia Tort Reform Proposals- A Commentary* (pt. 1), RECIPROCAL NEWS, Nov./Dec. 1986, at 1 (defining Virginians for Law Reform as coalition of industries and trade associations in Virginia fighting for tort reform) (a copy of *Virginia Tort Reform Proposals* is on file in the Washington & Lee Law Review Office); Orndorff, *Medical Society Votes Dues Boost to Aid Insurance Fight*, The Richmond Times Dispatch, Nov. 11, 1986, at B-9 (stating that Medical Society of Virginia raised membership dues in 1986 to fight for tort reform in Virginia).

7. *See* VA. CODE §§ 38.2-5000-5021 (Virginia Birth-Related Neurological Injury Compensation Act); *see also* The Medical Society of Virginia's Position Paper on Liability Issues in the 1987 General Assembly Session, at 3 (stating that Medical Society of Virginia proposed that Virginia General Assembly enact Virginia Birth-Related Neurological Injury Compensation Act) (a copy of the Medical Society of Virginia's Position Paper on Liability Issues in the 1987 General Assembly Session is on file in the Washington & Lee Law Review Office); Summary of the Regular 1987 Session of the Virginia General Assembly, at 9 (noting that 1987 Virginia General Assembly passed Virginia Birth-Related Neurological Injury Compensation Act).

8. *See Virginia Tort Reform Proposals*, *supra* note 6, at 1 (stating that VLR proposed that Virginia General Assembly cap punitive damages and sanction attorneys who file frivolous

bly, however, did not adopt the VLR's proposal to cap noneconomic damages that a plaintiff may recover from a defendant in a tort action.[9] Moreover, the 1987 Virginia General Assembly rejected the VLR's proposal to allow a defendant to pay future damages to a plaintiff in periodic payments rather than in a lump sum payment.[10] Finally, the Virginia General Assembly rejected the VLR's proposal to place limits on an attorney's contingency fee.[11] However, an evaluation of the tort reform measures that the Medical Society of Virginia and the VLR proposed demonstrates that the proposals would improve the medical malpractice insurance situation in Virginia.

In an effort to persuade insurance companies to provide malpractice insurance to obstetricians, the Medical Society of Virginia proposed that the 1987 Virginia General Assembly enact the Virginia Birth-Related Neurological Injury Compensation Act (Act).[12] The Act compensates infants who are impaired by birth-related neurological injuries[13] through a no-fault system similar to workers' compensation.[14] Under the Act, an infant who sustains a birth-related neurological injury may not sue a participating

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claims and motions); VA. CODE § 8.01-38.1 (1987) (placing $350,000 cap on punitive damages in civil actions); VA. CODE § 8.01-271.1 (1987) (providing sanctions for attorneys who file claims and motions in bad faith).

9. *See Virginia Tort Reform Proposals*, *supra* note 6, at 1 (VLR's proposals that Virginia General Assembly cap noneconomic damages).

10. *See id.* (VLR's proposals that Virginia General Assembly allow defendant to pay future damages to plaintiff in periodic payments).

11. *See id.* (VLR's proposals that Virginia General Assembly limit contingency fees for attorneys).

12. *See* VA. CODE §§ 38.2-5000-5021 (Virginia Birth-Related Neurological Injury Compensation Act).

13. *Id.* The Virginia Birth-Related Neurological Injury Compensation Act (the "Act") defines a birth-related neurological injury as an injury to the brain or spinal cord that is caused by the deprivation of oxygen or by mechanical injury that occurs during the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital, which causes the infant to be permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living. VA. CODE § 38.2-5001 (1987). Moreover, the Act only applies to births in which the infant is born alive. *Id.*

14. *See* VA. H. 1216, 1987 General Assembly of Virginia at 3 (Act compensates neurologically injured infants through no-fault system similar to workers' compensation). To receive compensation under the Act, the legal representative of a neurologically-injured infant must file a petition with the Industrial Commission of Virginia within 10 years after the birth of the infant. VA. CODE § 38.2-5013 (1987). In the petition, the legal representative shall state, *inter alia*, the name of the physician who rendered obstetrical services at the birth of the infant, and the facts and circumstances of the birth that gave rise to a claim under the Act. VA. CODE § 38.2-5004 (1987). Moreover, the petitioner shall provide the Industrial Commission with any documentation regarding the amount of compensation that the Industrial Commission must provide for the birth-related neurological injury. *Id.* A panel of three qualified and impartial physicians will review the petition and advise the Industrial Commission whether the neurologically injured infant should receive compensation under the Act. VA. CODE § 38.2-5008 (1987). The Industrial Commission then holds a hearing for all parties at which time the Commission determines whether the infant sustained a birth-related neurological injury within the definition of the Act, and is, therefore, entitled to an award under the Act. *Id.*

obstetrician[15] or hospital[16] in tort, but must file a claim for compensation with the Industrial Commission of Virginia.[17] The Act creates the Virginia Birth-Related Neurological Injury Compensation Fund (Fund) to compensate victims of birth-related neurological injuries.[18] To participate under the Act, an obstetrician or hospital must make an annual contribution to the fund.[19] Moreover, the Act requires that all licensed physicians and liability insurers in Virginia contribute to the fund annually.[20] The obstetrician or hospital that elects to come under the Act must agree to submit to quality review each time a claimant files a petition for compensation against the obstetrician or hospital.[21] Moreover, the participating obstetrician or hospital must agree to provide medical care to indigent patients.[22] Finally, the Act is the injured infant's sole remedy against an obstetrician unless the obstetrician intentionally or willfully caused the birth-related neurological injury.[23]

The purpose of the Act is twofold. First, the Medical Society of Virginia designed the Act to ensure that infants mentally impaired because of birth-related neurological injuries timely receive compensation for their injuries without the financial and emotional difficulties of a lawsuit.[24] If an infant's injury is the result of a birth-related neurological injury, the infant can file for compensation under the Act without having to prove that a physician

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15. VA. CODE § 38.2-5001 (1987). The Act defines a participating physician as a physician who is licensed in Virginia to practice medicine, and practices obstetrics or performs obstetrics either full or part time. *Id.* Moreover, at the time of the birth-related neurological injury, the physician must have (i) had in force an agreement with the Commissioner of Health under which the physician agreed to participate in the development and implementation of a program to provide obstetrical care to indigent patients and patients eligible for Medical Assistance Services; (ii) had in force an agreement with the State Board of Medicine whereby the physician agreed to submit to the Board of Medicine review of a claim that a claimant files under the Act against the physician; and (iii) paid an assessment under the Act for the year in which the birth-related neurological injury occurred. *Id.*

16. *Id.* The Act defines a participating hospital as a hospital licensed in Virginia which at the time of the infant's injury (i) had in force an agreement with the Commissioner of Health under which the hospital agreed to participate in the development and implementation of a program to provide obstetrical care to indigent patients and patients eligible for Medical Assistance Services; (ii) had in force an agreement with the State Board of Health whereby the hospital agreed to submit to review of its obstetrical services; and (iii) paid an assessment under the Act for the year in which the birth-related neurological injury occurred. *Id.*

17. VA. CODE § 38.2-5002 (1987). The Act states that the rights and remedies that the Act grants an injured infant exclude all other common law rights and remedies that the infant, his personal representative, parents, dependents, or next of kin has against a participant in the Act's program for compensation. *Id.*

18. VA. CODE § 38.2-5015 (1987).

19. VA. CODE § 38.2-5018-5020 (1987).

20. *Id.*

21. VA. CODE § 38.2-5001 (1987).

22. *Id.*

23. VA. CODE § 38.2-5002 (1987).

24. The Medical Society of Virginia's Position Paper on Liability Issues in the 1987 General Assembly Session, *supra* note 7, at 3.

or hospital was negligent.[25] The second purpose of the Act is to stabilize the insurance climate for obstetricians in Virginia.[26] The Medical Society of Virginia contended that medical malpractice insurers would be more willing to provide medical malpractice coverage to obstetricians if the insurers could predict more accurately risks associated with the delivery of infants.[27] Indeed, the Act already has stabilized the insurance climate for Virginia's obstetricians.[28] Since the Virginia General Assembly passed the Act, the Virginia Insurance Reciprocal has agreed to provide coverage to obstetricians for the first time in nine months.[29]

Although the Medical Society of Virginia has claimed that the Act will ensure that a neurologically injured infant receives compensation from the fund efficiently and without the cost of litigation, Patricia Danzon, an associate professor of health care and insurance at the Wharton School in Philadelphia, questions the putative advantages of no-fault compensation programs such as the Act.[30] Danzon believes that no-fault compensation systems may not ensure that a plaintiff receives timely compensation without the expense of litigation.[31] Danzon reasons that litigation may arise over the issue of causation.[32] For example, under the Act, litigation may arise over whether the infant's injuries are compensable birth-related neurological injuries or other types of injuries that are not compensable under the Act.[33] Danzon, however, states that legislators may curtail litigation over causation if the no-fault system explicitly designates the types of injuries that are compensable under the no-fault system.[34] Whether the Act narrowly defines the types of birth-related neurological injuries that are compensable under the Act to reduce litigation will be determined after the Act goes into effect on January 1, 1988.[35]

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25. *See* VA. CODE §§ 5000-5021 (1987). To receive compensation under the Act, a petitioner must prove that an infant received a birth-related neurological injury, and that a physician who participates under the Act attended the infant at birth; *see* VA. CODE § 5001 (1987), *supra* note 7, at 1 (defining birth-related neurological injury); VA. CODE § 5001 (1987), *supra* note 7, at 1 (defining participating physician).

26. The Medical Society of Virginia's Position Paper, *supra* note 7, at 3.

27. *Id.*

28. *See infra* note 29 (discussing Act's impact on medical malpractice insurance for obstetricians in Virginia).

29. *Obstetricians Get Coverage for Malpractice*, Roanoke Times & World News, Mar. 6, 1987, at B1. Although the Virginia Insurance Reciprocal again is providing medical malpractice insurance to obstetricians since the Virginia General Assembly passed the Act, the Virginia Insurance Reciprocal will not reduce immediately the former cost of medical malpractice insurance premiums for obstetricians. *Id. See* notes 12-23 and accompanying text (discussing Act).

30. *See* P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY, at 213-19 (1985) [hereinafter DANZON] (discussing no-fault compensation programs).

31. *Id.* at 214.

32. *Id.* at 214-16.

33. *See* VA. CODE § 38.2-5001 (1987) (defining birth-related neurological injuries).

34. DANZON, *supra* note 30, at 215-17.

35. *See* 16, VA. CODE § 38.2-5001 (1987) (defining birth-related neurological injuries); VA. CODE § 38.2-5002-5014 (1987) (establishing effective date of Act).

In addition to the proposal by the Medical Society of Virginia for a no-fault compensation program for birth-related neurological injuries, the VLR proposed that the 1987 Virginia General Assembly cap noneconomic damages and punitive damages that a plaintiff may recover from a defendant in tort actions.[36] The VLR proposed that the Virginia General Assembly place a $250,000 cap on the noneconomic damages that a plaintiff may recover from a defendant in tort actions.[37] The 1987 Virginia General Assembly's House Bill 1085, which embodied the VLR's proposal, stated that the recovery of noneconomic damages in all personal injury or death actions, including medical malpractice actions, should not exceed the greater of three times the damage amount for economic losses or $250,000.[38] The VLR also proposed that the 1987 Virginia General Assembly place a $250,000 cap on the punitive damages that a plaintiff may recover from a defendant in a tort action.[39] Although the 1987 Virginia General Assembly rejected the VLR's proposal to place a $250,000 cap on both noneconomic and punitive damages, the General Assembly did adopt a $350,000 cap on punitive damages that a plaintiff can recover against a defendant in a civil action.[40]

Although the 1987 Virginia General Assembly adopted the VLR's proposal to cap punitive damages, the constitutionality of caps on damages is uncertain.[41] The Virginia General Assembly already has placed a $1,000,000 limit on the total damage amount that a plaintiff may recover against a health care provider in a medical malpractice action.[42] In *Boyd v. Bulala*,[43]

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36. *Virginia Tort Reform Proposals*, *supra* note 6, at 1.

37. *Id.*

38. *See* Va. H. 1085, 1987 General Assembly of the Commonwealth of Virginia (proposal to limit noneconomic damages to $250,000). House Bill 1085 proposes that the Virginia General Assembly place a $250,000 cap on noneconomic damages. *Id.* House Bill 1085 states that noneconomic damages include damages for pain, suffering, mental anguish, inconvenience, loss of consortium, disfigurement or deformity, associated humiliation or embarrassment and other nonpecuniary injuries. *Id.*

39. *Virginia Tort Reform Proposals*, *supra* note 6, at 1.

40. *See* Summary of the Regular 1987 Legislative Session of the Virginia General Assembly, at 8-9 (stating that 1987 Virginia General Assembly placed $350,000 cap on punitive damages in civil action but rejected proposed legislation to cap noneconomic damages). The VLR proposed that the Virginia General Assembly codify the standard for punitive damages in tort actions and limit a plaintiff's punitive damage recovery to $250,000, with 80% of the punitive damage award payable to a public fund. *Virginia Tort Reform Proposals*, *supra* note 6, at 1. While the Virginia General Assembly's version of the cap on punitive damages places a $350,000 cap on punitive damages, the General Assembly's Senate Bill does not codify the standard for punitive damages or make 80% of the punitive damage award payable to a public fund. VA. CODE § 8.01-38.1 (1987).

41. *See* Boyd v. Bulala, 647 F. Supp. 781, 790 (W.D. Va. 1986) (holding unconstitutional Virginia's statutory cap of $1,000,000 in medical malpractice action); *Damage Cap Ruled Unconstitutional*, The Daily Progress, Feb. 22, 1987, at B2 (stating that Fairfax County Circuit Court declared unconstitutional Virginia's statutory cap of $1,000,000 in medical malpractice action); *see also* VA. CODE §8.01-581.15 (1984) (limiting to $1,000,000 recovery against health care provider in medical malpractice action).

42. *See* VA. CODE §8.01-581.15 (1984) (limiting to $1,000,000 recovery against health

however, the United States District Court for the Western District of Virginia declared unconstitutional Virginia's statutory limitation on recovery in a medical malpractice action.[44]

In *Boyd v. Bulala*, plaintiffs Helen and Roger Boyd filed a medical malpractice action against Dr. R. A. Bulala in the United States District Court for the Western District of Virginia.[45] The plaintiffs in *Boyd* alleged that Dr. Bulala negligently had failed to provide Mrs. Boyd adequate care during the labor and delivery of the Boyds' infant daughter.[46] A seven-member jury found that Dr. Bulala was negligent and awarded the Boyds

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care provider in medical malpractice action); *infra* notes 42-72 and accompanying text (discussing §8.01-581.15 of Virginia Code). In 1976, the Virginia General Assembly adopted section 8.01-581.15 of the Virginia Code which limits a plaintiff's total recovery in a medical malpractice action against a health care provider to $1,000,000. VA. CODE Section 8.01-581.15 (1984). §8.01-581.15 of the Code of Virginia provides:

> In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after October 1, 1983, which is tried by a jury, or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed one million dollars.

VA. CODE §8.01-581.15 (1984).

Virginia is not the only state with a cap on the total damage amount that a plaintiff may recover in a medical malpractice action. *See* NEB. REV. STAT. §44-2825 (1984) (limiting to $1,000,000 total amount of damages that plaintiff may recover in medical malpractice action, and limiting to $100,000 health care provider's liability in medical malpractice actions); IND. CODE §16-9.5-2-2 (1978) (limiting to $500,000 total amount of damages that plaintiff may recover in medical malpractice action); IND. CODE §16-9.5-2-2(b) (1978) (limiting to $100,000 health care provider's total liability in medical malpractice actions); *see also* Johnson v. St. Vincent Hosp. Inc., 404 N.E.2d 585, 598 (Ind. 1980) (declaring constitutional Indiana's cap on recovery in medical malpractice actions); *infra* notes 74-90 and accompanying text (discussing *Johnson v. St. Vincent Hosp. Inc.*).

43. 647 F. Supp. 781 (W.D. Va. 1986).

44. Boyd v. Bulala, 647 F. Supp. 781, 790 (W.D. Va. 1986); *Damage Cap Ruled Unconstitutional*, The Daily Progress, Feb. 22, 1987, at B2 (Fairfax County Circuit Court declared unconstitutional Virginia's statutory cap of $1,000,000 in medical malpractice action).

45. *Boyd*, 647 F. Supp. at 784. In *Boyd v. Bulala*, plaintiffs Helen and Roger Boyd filed a medical malpractice action in the United States District Court for the Western District of Virginia on behalf of themselves and their infant daughter. *Id.* at 784. The Boyds alleged that Dr. Bulala, an obstetrician, failed to provide adequate medical care while Mrs. Boyd was in labor and during the delivery of the child. *Id.* The Boyds claimed that Dr. Bulala had advised the delivery room nurses to refrain from calling Dr. Bulala from his home, several miles away, until crowning occurred. *Id.* The Boyds maintained that as a result of Dr. Bulala's instructions to the nurses, Dr. Bulala was absent during an emergency delivery of the Boyds' infant daughter. *Id.* The Boyds claimed that because Dr. Bulala was not present during the delivery of the Boyds' infant daughter, only nurses who were untrained in emergency care attended Mrs. Boyd during labor and delivery. *Id.* The Boyds maintained that if Dr. Bulala had been present during the birth and delivery of the Boyds' infant, Dr. Bulala could have performed emergency measures that would have prevented the injuries to Mrs. Boyd and her daughter. *Id.* The plaintiffs alleged that because of Dr. Bulala's negligence, their daughter was physically and mentally handicapped. *Id.* The Boyds' infant daughter died six weeks after the trial of the Boyds' claim against Dr. Bulala. *Id.*

46. *Id.*

and their infant daughter $8.3 million.[47] Subsequently, the defendant moved the district court, *inter alia*, to reduce the $8.3 million verdict to conform to section 8.01-581.15 of the Virginia Code.[48] Section 8.01-581.15 is Virginia's statutory limit of $1,000,000 on the total damages that a plaintiff may recover in a medical malpractice action.[49] In response, the plaintiffs alleged that Virginia's statutory limit on damages was unconstitutional, infringing the plaintiffs' rights to due process, equal protection, and a jury trial.[50]

In addressing the plaintiffs' contention that Virginia's cap on damages in a medical malpractice action was unconstitutional, the district court first reviewed the plaintiffs' claim that section 8.01-581.15 of the Virginia Code violated the plaintiffs' constitutional right to equal protection of the laws.[51] The court in *Boyd* noted that the Virginia Constitution guarantees equal protection through the anti-discrimination clause and the clause prohibiting special legislation.[52] The district court stated, however, that the equal protection provisions of the Virginia Constitution provide no more protection than the equal protection clause of the fourteenth amendment to the United States Constitution.[53] The district court stated that absent a court's

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47. *Id.* In *Boyd*, the $8.3 million verdict that the Boyds received consisted of $1,850,000 in compensatory damages for the Boyds' infant daughter, $1,575,000 in compensatory damages for Helen Boyd, and $1,175,000 in compensatory damages for Roger Boyd. *Id.* The jury awarded Helen and Roger Boyd, jointly, $1,700,000 in compensatory damages for their infant's past and future medical costs until the infant reached the age of eighteen. *Id.* The jury awarded $1,000,000 in punitive damages for the infant and $1,000,000 in punitive damages for Helen Boyd. *Id.*

48. *Id.* at 784-85; *see also* VA. CODE §8.01-581.15 (1984) (limiting recovery against health care provider in medical malpractice action to $1,000,000).

49. VA. CODE §8.01-581.15 (1984).

50. *Boyd*, 647 F. Supp. at 785. In addition to maintaining that Virginia's statutory limitation on recovery in a medical malpractice action violates equal protection and due process, the plaintiffs in *Boyd* also maintained that Virginia's statutory limitation on recovery in a medical malpractice action violates the Virginia Constitution's separation of powers clause and prohibition against special legislation. *Id.*

51. *Id.* at 785. In *Boyd*, the district court stated that state courts that have reviewed the constitutionality of medical malpractice legislation to determine whether the legislation denies a plaintiff equal protection of the law have found that their respective state constitutions require that the court exercise a more strict scrutiny than the review that a court normally affords economic legislation. *Id.* The district court in *Boyd*, however, found that the equal protection provisions in the Virginia Constitution are no stronger than the equal protection guarantees of the fourteenth amendment to the United States Constitution. *Id.* at 785-86; *see also* U.S. CONST. amend. XIV (equal protection clause). The equal protection clause of the fourteenth amendment to the United States Constitution provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction equal protection of the laws. U.S. CONST. amend. XIV; *see* VA. CONST. art. 1, § 11 (antidiscrimination clause); VA. CONST. art. 4, § 14 (prohibiting against special legislation).

52. *Boyd*, 647 F. Supp. at 786; *see* VA. CONST. art 1, § 11 (antidiscrimination clause); VA. CONST. art. 4 § 14 (prohibition against special legislation).

53. *Boyd*, 647 F. Supp. at 786; *see* U.S. CONST. amend. XIV (equal protection clause). In *Boyd*, the district court stated that under an equal protection analysis, a court must accord a statutory economic regulation a liberal standard of review unless the statute creates a suspect classification or infringes a fundamental right. *Id.*

finding that legislation infringes a fundamental right or creates a suspect classification, a court must uphold a statutory economic regulation against a plaintiff's equal protection challenge if the statute reasonably relates to a valid legislative purpose.[54] The district court concluded that Virginia's cap on damages reasonably relates to the Virginia legislature's purpose of preserving health care services for Virginians by ensuring that physicians in Virginia may obtain affordable medical malpractice insurance.[55]

In determining whether section 8.01-581.15 creates a suspect classification, the district court recognized that section 8.01-581.15 discriminates between plaintiffs whose damages exceed $1,000,000 and plaintiffs whose damages are less than $1,000,000.[56] Moreover, the district court recognized that the legislation distinguishes plaintiffs whose tort claims are based on a medical malpractice action from plaintiffs whose claims are based on other torts.[57] The district court, however, again reasoned that the Virginia General Assembly's purpose in enacting section 8.01-581.15 was to preserve health care services in Virginia by ensuring that Virginia's physicians may obtain medical malpractice liability coverage.[58] The district court, therefore, concluded that section 8.01-581.15 did not create a suspect classification because the Virginia General Assembly had sufficient justification for enacting section 8.01-581.15.[59]

In determining whether section 8.01-581.15 infringed upon a right that the United States Constitution and the Virginia Constitution explicitly guarantee, the district court in *Boyd* stated that the right to a full recovery in tort is not a right that the United States Constitution or the Virginia Constitution guarantees.[60] The district court, therefore, concluded that because section 8.01-581.15 does not create a suspect classification or infringe upon a fundamental right, the district court must uphold the constitutionality of the statute if the statute is a rational means to achieve the legislature's goal in enacting the statute.[61] The district court in *Boyd* concluded that section 8.01-581.15 is a rational means to secure health care services in Virginia.[62] The district court, therefore, held that section 8.01-581.15 is constitutional under equal protection and due process analyses.[63]

After holding that section 8.01-581.15 did not deny plaintiffs equal protection of the laws and due process of law, the district court considered whether the statute violated the plaintiffs' right to a jury trial that the

54. *Boyd*, 647 F. Supp. at 786.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 786-87.
59. *Id.* at 787.
60. *Id.*
61. *Id.* at 787-88.
62. *Id.*
63. *Id.* at 787.

United States Constitution and the Virginia Constitution guarantee.[64] The district court recognized that the United States Constitution's seventh amendment jury trial guarantee does not apply to the states through the fourteenth amendment.[65] The district court stated, however, that the seventh amendment applies in federal diversity cases such as the case at bar.[66] The court in *Boyd* stated that the seventh amendment to the United States Constitution provides that a court may not interfere with an individual's right to have a jury determine issues of liability and assess damages.[67] Moreover, the district court stated that the Virginia Constitution provides that it is within the province of the jury to settle questions of fact, including the question of damages.[68] The district court concluded that section 8.01-581.15 interfered with the jury's factfinding function.[69] The district court reasoned that the statute requires that a court ignore a verdict that the evidence supports.[70] Moreover, the court in *Boyd* noted that a legislature cannot preempt a jury's factual determination on an issue that a judge has submitted to the jury.[71] The district court, therefore, held unconstitutional section 8.01-581.15 and affirmed the $8.3 million verdict against Dr. Bulala.[72]

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64. *Id.* at 788. The seventh amendment to the United States Constitution provides that:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend VII.

Article I, section 11 of the Virginia Constitution provides that:

> In controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.

VA. CONST. art I, §11.

65. *Boyd*, 647 F. Supp. at 788.

66. *Id.*

67. *Id.*

68. *Id.* at 789.

69. *Id.* In *Boyd*, the district court criticized section 8.01-581.15 of the Virginia Code for its failure to provide practical guidelines for applying the statute. *Id.* at 788-89. The district court reasoned that the statute does not state whether a court should instruct the jury on the statutory limitation of $1,000,000 before the issue of damages goes to the jury, or whether a court should not instruct the jury on the cap and then refuse to enter judgment above that statutory limitation. *Id.*

70. *Id.* at 789.

71. *Id.*

72. *Id.* at 790. Following the district court's ruling in *Boyd*, the Medical Society of Virginia raised its dues from $195.00 to $300.00 per year to fight for tort reform in Virginia. Orndorff, *Medical Society Votes Dues Boost to Aid Insurance Fight*, The Richmond Times Dispatch, Nov. 11, 1986, at B-9. Moreover, the Attorney General of Virginia, Mary Sue Terry, asked the district court judge in *Boyd* to either abandon his decision or reopen the case so that the Commonwealth of Virginia might present arguments to the district court on the constitutionality of Virginia's statutory cap on damages in a medical malpractice action. *Vacate Malpractice Ruling or Reopen Case, Terry Asks*, Richmond Times-Dispatch, Nov. 13, 1986, at C-20. The attorney general argued that the district court judge's decision could affect both the cost and availability of health care in the Commonwealth of Virginia. *Id.*

Although the district court in *Boyd* declared unconstitutional a statutory cap on damages in medical malpractice actions, other jurisdictions lend support to the VLR's proposal to cap damages in medical malpractice actions.[73] In *Johnson v. St. Vincent Hospital, Inc.*,[74] the Indiana Supreme Court held constitutional the Indiana legislature's cap on recovery in a medical malpractice action.[75] In *Johnson*, the plaintiffs challenged the constitutionality of the Indiana Medical Malpractice Act which, *inter alia*, limits the total amount of damages that a plaintiff in Indiana may recover in a medical malpractice action.[76] The Indiana Medical Malpractice Act limits a plaintiff's recovery against a health care provider to $100,000.[77] A state-operated patient's compensation fund pays any amount over the $100,000 cap on the health care provider's, liability up to a cap of $500,000.[78] In *Johnson*, the plaintiffs claimed that Indiana's cap on damages was unconstitutional because the cap on damages denied the plaintiffs due process, equal protection, and the right to trial by jury.[79] The Indiana Supreme Court, however, rejected the plaintiffs' contention that the cap denied the plaintiffs due process and equal protection.[80] The court in *Johnson* concluded

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73. *See* Fein v. Permanente Medical Group, 38 Cal.3d 137, 164, 695 P.2d 665, 684, 211 Cal Rptr. 368, 387 (1985) (declaring constitutional statutory limitation on recovery in medical malpractice action); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985) (same); Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585, 602 (Ind. 1980) (same); Prendergast v. Nelson, 256 N.W.2d 657, 672 (Neb. 1977) (same); State ex rel. Strykowski v. Wilkie, 261 N.W.2d 434, 448 (Wis. 1978) (same).

74. 404 N.E. 2d 585 (Ind. 1980).

75. *Id.* at 598.

76. *See* IND. CODE §16-9.5-2-2 (1978) (limiting to $500,000 total amount of damages that plaintiff may recover in medical malpractice action); IND. CODE §16-9.5-2-2(b) (1978) (limiting to $100,000 health care provider's total liability). In *Johnson v. St. Vincent Hosp. Inc.*, the Supreme Court of Indiana stated that in addition to limiting the total amount of damages that a plaintiff may recover from a defendant in a medical malpractice action, the Indiana Medical Malpractice Act limits the amount of attorney's fees that the plaintiff's attorney may receive. Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 590-91 (Ind. 1980). Moreover, the Indiana Medical Malpractice Act limits the time in which a plaintiff may bring a medical malpractice claim. *Id.* Finally, the Indiana Medical Malpractice Act establishes a patients' compensation fund for damage awards exceeding the cap on damages. *Id.*; *see* IND. CODE §16-9.5-1-1 to 16-9.5-10.5 (Indiana Medical Malpractice Act) (1978).

77. *Johnson*, 404 N.E. 2d at 598; *see* IND. CODE §16-9.5-2-2(b) (1978) (limiting to $100,000 health care provider's total liability).

78. *Johnson*, 404 N.E.2d at 598; *see* IND. CODE §16-9.5-2-2 (1978) (limiting to $500,000 total amount of damages that plaintiff may recover from patient's compensation fund in medical malpractice action).

79. *Johnson*, 404 N.E.2d at 585.

80. *Id.* at 599-601. In addressing the plaintiffs' claims that Indiana's cap on damages denied plaintiffs due process of law and complete relief for injuries, the Indiana Supreme Court in *Johnson* stated that it would uphold the statute under a due process challenge if the statute was a rational means to achieve the legislature's goal of ensuring the availability of health care services. *Id.* at 598. The court recognized that a plaintiff whose damages exceed the $500,000 cap will not recover full damages. *Id.* at 600. The court, however, further recognized that a victim benefits from the medical malpractice legislation because the cap on damages ensures that health care is available to the plaintiff. *Id.* at 599. The court reasoned

that the Indiana legislature had a rational justification for placing a cap on damages that a plaintiff may recover against a health care provider in a medical malpractice action.[81] The court in *Johnson* reasoned that a cap on damages ensures the availability of health care services because the cap provides a medical malpractice insurer with a mechanism for determining the insurer's risks.[82]

After determining that Indiana's cap on damages in a medical malpractice action did not deny plaintiffs due process and equal protection, the court in *Johnson* addressed the plaintiffs' claim that the Medical Malpractice Act's cap on damages violated the plaintiffs' right to a jury trial.[83] The plaintiffs claimed that the right to trial-by-jury includes the right to have a jury determine all damages for which a defendant must compensate a plaintiff.[84] The Indiana Supreme Court denied the plaintiffs' claim on two grounds. First, the court stated that under the Medical Malpractice Act the

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that a cap on damages provides the insurance company with a mechanism for calculating premiums. *Id.* The court in *Johnson* stated that an insurer cannot remain solvent if the insurance premiums that the insurer collects are insufficient to meet the insurer's liabilities. *Id.* The court concluded that the provision of the Medical Malpractice Act that places a cap on damages is a rational means to ensure that health care services are available. *Id.* The court in *Johnson*, therefore, held the statute constitutional. *Id.*

After determining that Indiana's cap on damages did not deprive plaintiffs of due process or complete relief for injury, the court in *Johnson* considered plaintiffs' claim that the cap denied plaintiffs equal protection. *Id.* In *Johnson*, the plaintiffs claimed that the cap gives physicians a special benefit, a cap on damages, that other defendants do not enjoy. *Id.* Moreover, the plaintiffs claimed that a plaintiff whose damages exceed $500,000 has a burden that a plaintiff whose damages do not exceed $500,000 does not have. *Id.* The Indiana Supreme Court, however, stated the cap did not deny plaintiffs equal protection. *Id.* at 600. The court reasoned that because the Act did not create a suspect classification or infringe upon a fundamental right, the court must hold that the statute is constitutional if the legislature had a reasonable purpose for creating the classification. *Id.* The court in *Johnson* emphasized that the plaintiffs had the burden to show that there existed no correlation between the statutory limitation on recovery and the promotion of health care. *Id.* The court concluded that the legislature had a rational justification for placing a cap on the total amount of damages that a plaintiff can recover against a health care provider in a medical malpractice action. *Id.* at 600-01. The court reasoned that because of the size and number of malpractice claims, the insurance industry had discontinued medical malpractice insurance for many health care providers in Indiana. *Id.* at 601. To protect society's interest in the availability of health care services, the legislature enacted the Medical Malpractice Act to ensure that physicians can obtain medical malpractice insurance coverage. *Id.* at 601.

81. *Id.* at 598-99.

82. *Id.* In *Johnson*, the Supreme Court of Indiana discussed the condition of the health care industry prior to the Medical Malpractice Act. *Id.* at 589. The court stated that before the Indiana legislature enacted the Medical Malpractice Act, a majority of insurance companies doing business in Indiana either stopped writing, or limited the number of medical malpractice insurance policies that the insurers wrote. *Id.* The court stated that because health care providers could not obtain medical malpractice insurance, some health care providers stopped providing health care to patients. *Id.* at 589-90. The court noted that because some physicians were unable to obtain malpractice insurance coverage, some hospitals discontinued emergency services, and surgeons in some rural areas stopped providing surgical services. *Id.*

83. *Id.* at 601-02.

84. *Id.* at 602.

jury only determines the amount of damages that the plaintiff will receive, up to the $500,000 statutory cap.[85] Second, the court stated that a legislature may set limits on damages that a jury determines.[86] The court explained that in several circumstances a legislature may interfere with a plaintiff's right to a jury trial.[87] The court noted, for example, that a legislature may deny a jury trial if a party does not comply with the procedural requirements for asserting a right to a jury trial.[88] Moreover, the court noted that a legislature may terminate a plaintiff's lawsuit through the statute of limitations.[89] The court in *Johnson* concluded that the Medical Malpractice Act allowed the jury to determine damages up to $500,000 and that the Indiana Constitution required no more.[90]

Although jurisdictions are split on whether caps on damages are constitutional under the United States Constitution or state constitutions, many commentators support the VLR's proposal to cap noneconomic damages.[91] The motivation behind the recommendation to cap noneconomic damages is that the amounts of jury awards for damages such as pain and suffering are escalating.[92] Moreover, some commentators believe that placing a mon-

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85. *Id.* In *Johnson*, the Indiana Supreme Court stated that the jury in a medical malpractice action determines damages up to $500,000. *Id.* The court stated that once the jury determines the amount of damages against the health care provider up to the $100,000 cap on the health care provider's liability, the trial court then instructs the jury to determine the amount of damages due from the patient compensation fund up to the $500,000 cap on the total damages that a plaintiff can recover from a physician in a medical malpractice action. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; *see* IND. CONST. art I, § 20 (providing right to jury trial in civil actions).

91. *Compare* Boyd v. Bulala, 647 F. Supp. 781, 790 (W.D. Va. 1986) (declaring unconstitutional Virginia's cap of $1,000,000 on damages in medical malpractice action); *with* Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985) (upholding constitutionality of limits on medical malpractice damages).

Congress supports a limit on noneconomic losses in tort actions. *See* Robinson, *The Medical Malpractice Crisis of the 1970'S: A Retrospective*, 49 L. & CONTEMP. PROBS. 5, 32-33 (Spring 1986) (Congressional legislation supporting caps on noneconomic damages in tort actions). As a result of the American Medical Association's lobbying efforts, Congress proposed tort reform legislation, the Federal Incentives for State Health Care Professional Liability Reform Act of 1985 (Hatch bill). *Id.* The Hatch bill proposes a $250,000 limit on noneconomic damages in a medical malpractice action. S. 1804, 99th Cong., 1st Sess. 131 CONG. REC. S14356-59 (daily ed. Oct. 29, 1985). The Hatch bill provides financial incentives to states that enact the model legislation. *Id.* Moreover, Congress has proposed the Medical Offer and Recovery Act of 1985 (Moore/Gephardt bill), which not only serves as model legislation for the states, but independently affects those who benefit from Medicare, Medicaid, and health plans for federal employees. *See* Robinson, *supra* at 32-33. Under the Moore/Gephardt bill, if a health care provider offers to pay all economic damages in periodic installments, the health care provider does not have to compensate the plaintiff for noneconomic damages and the claimant is precluded from bringing a tort action against the health care provider. H.R. 3084, 99th Cong., 1st Sess. 131 CONG. REC. H6353 (daily ed. July 25, 1985).

92. *See States Seek to Curb Awards for Pain and Suffering*, HOSPITALS, May 5, 1986, at 126. (noting that jury awards of noneconomic damages are escalating).

etary amount on noneconomic damages such as pain and suffering inherently is difficult.[93] Additionally, noneconomic damages constitute the largest component of the damage award in a medical malpractice action.[94] Because insurers have difficulty predicting the amount of noneconomic damages that a jury will award, noneconomic damages place both the health care provider

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93. *See* Fein v. Permanente Medical Group, 38 Cal.3d 137, 159, 695 P.2d 665, 680-81, 211 Cal.Rptr. 368, 383-84 (1985) (stating that jurist and legal scholars have noted inherent difficulty in placing monetary amounts on damages for pain and suffering). In *Fein v. Permanente Medical Group*, the plaintiff challenged the California legislature's $250,000 cap on noneconomic damages in medical malpractice cases. *Id.* at 374, 695 P.2d at 671, 211 Cal.Rptr. at 145-46. *See* CAL. CIV. CODE §3333.2 (West 1987) (placing $250,000 cap on noneconomic damages that plaintiff can recover against health care provider based on professional negligence). In *Fein*, the plaintiff filed a medical malpractice claim against a physician. *Fein*, *Id.* at 373, 695 P.2d at 670, 211 Cal.Rptr. at 144-45. After trial of the plaintiff's claim, a jury awarded the plaintiff $500,000 in noneconomic damages. *Id.*, 695 P.2d at 670, 211 Cal. Rptr. at 145. Pursuant to California's statutory limitation of $250,000 for noneconomic damages in medical malpractice cases, however, the trial court reduced the plaintiff's damage award. *Id.* at 382, 695 P.2d at 679, 211 Cal.Rptr. at 157. Claiming that California's cap on noneconomic damages in medical malpractice actions is unconstitutional, the plaintiff appealed the trial court's reduction of damages to the Supreme Court of California. *Id.*, 695 P.2d at 679, 211 Cal.Rptr. at 157.

In addressing the plaintiff's claims, the Supreme Court of California in *Fein* stated that the California legislature can expand or limit the amount of damages that a plaintiff may recover against a defendant if the legislative purpose of the statutory cap is reasonably related to a legitimate state interest. *Id.* at 383, 695 P.2d at 680, 211 Cal.Rptr. at 158-59. The court concluded that the California legislature's statutory cap on noneconomic damages in a medical malpractice action reasonably relates to a legitimate state interest in ensuring the availability of health care in California. *Id.* at 384-87, 695 P.2d at 681, 211 Cal. Rptr. at 160. The court reasoned that the rising costs of medical malpractice insurance premiums had threatened the availability of health care in California. *Id.* at 383, 695 P.2d at 680, 211 Cal.Rptr. at 158-59. Moreover, the court noted that unless insurance companies reduced the cost of malpractice insurance, physicians may practice without medical malpractice insurance coverage. *Id.*, 695 P.2d at 680, 211 Cal.Rptr. at 158-59. The court stated that if physicians practice without medical malpractice insurance, plaintiffs may not be able to recover any damages from a physician. *Id.*, 695 P.2d at 680, 211 Cal.Rptr. at 158-59. The court in *Fein* further noted that judges and juries have difficulty placing a monetary value on noneconomic damages. *Id.* at 383-84, 695 P.2d at 680-81, 211 Cal.Rptr. at 159-60. The Supreme Court of California, therefore, held constitutional the California legislature's statutory limitation on noneconomic damages in medical malpractice actions. *Id.* 387, 695 P.2d at 684, 211 Cal.Rptr. at 164.

The plaintiff in *Fein* subsequently appealed the California Supreme Court's decision to the United States Supreme Court. *Fein*, 695 P.2d 665 (Cal. 1985), *app. dismissed*, 106 S.Ct. 214 (U.S.). The Supreme Court, however, refused to hear the appeal. *Id.* Since the Supreme Court's refusal to hear the *Fein* case, commentators say that California courts are enforcing more scrupulously the cap on noneconomic damages. *See States Seek to Curb Awards for Pain and Suffering*, HOSPITALS, May 5, 1986, at 128 (California courts enforce cap on noneconomic damages more scrupulously after *Fein*).

94. *See* Ginsburg, *Contractual Revisions to Liability*, 49 L. & COMTEMP. PROBS. 253, 262 (Spring 1986) (discussing proportion of noneconomic damages in medical malpractice award). The largest portion of a medical malpractice award is the plaintiff's compensation for noneconomic damages. *Id.* For example, in *Boyd v. Bulala*, $6.6 million of the $8.3 million verdict against Dr. Bulala was to compensate the Boyds for noneconomic and punitive damages. *Boyd*, 647 F. Supp. at 784.

and the insurance company at an unpredictably high risk.[95] One commentator states that limitations on the amount that a plaintiff may recover in a medical malpractice action will improve the insurer's ability to predict risks.[96] If the insurer can predict its risks, the insurer is more likely to make medical malpractice insurance both available and affordable to a physician.[97] Additionally, Danzon states that though caps on damages have no effect on the frequency of claims that patients file against physicians, placing caps on the plaintiff's recovery in a medical malpractice action is the most effective measure to decrease the severity of judgments against physicians.[98] Danzon claims that placing a cap on all or part of a plaintiff's award in a medical malpractice action would reduce by 23% the severity of judgments against physicians.[99]

In addition to capping damages that a plaintiff may recover in a tort action, the VLR proposed that the 1987 Virginia General Assembly permit a defendant to pay all future damage awards to the plaintiff in periodic payments.[100] At common law, courts required defendants to pay to plaintiffs all past and future damages in a lump sum after the courts entered final judgment against the defendants.[101] Future damages include such damages as the cost of future medical care and lost earning capacity and, therefore, constitute the major components of a personal injury award.[102] Future damages generally reach multimillion dollar proportions if the plaintiff is a child or young adult because the life expectancy is longer and continuing medical needs are costly.[103] The 1987 Virginia General Assembly's Senate Bill 411, which embodied the VLR's proposal, would have required the trier of fact in a personal injury or wrongful death action to itemize all damages, distinguishing between past and future damages.[104] Senate Bill 411 also

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95. *See* Ginsburg, *supra* note 94, at 262. (stating that escalating trend of noneconomic damage awards has placed health care providers and medical malpractice insurers at high risk). The plaintiffs' bar claims that a cap on damages is unfair to a plaintiff whose damages exceed the cap. *States Seek to Curb Awards For Pain and Suffering*, HOSPITALS, May 5, 1986, at 126. Kirk Johnson, general counsel of the American Medical Association, however, responds that the plaintiffs' bar believes that caps are unfair because a cap will reduce the amount of an attorney's contingency fee. *Id.*

96. *See* Robinson, *supra* note 91, at 30 (stating that ceilings on megabuck damage recoveries improve predictability of insurer's risk).

97. *See id.* (caps on damages improve insurer's ability to predict risks).

98. *See* Danzon, *supra* note 30, at 158 (stating that empirical analysis of trend in medical malpractice claim severity demonstrates that cap on damages has been most effective means of holding down damage awards).

99. *Id.*

100. *See Virginia Tort Reform*, *supra* note 6, at 1 (VLR's proposal to allow defendants to pay future damages in periodic payments).

101. *See* Ginsburg, *supra* note 94, at 259 (stating that at common law, physician compensated plaintiff for past and future damages in one lump sum payment).

102. *Id.* at 260.

103. *Id.*

104. *See* Va. S. 411, 1987 General Assembly of Virginia, at 1 (proposed legislation to allow defendants to pay future damages in periodic payments).

would have required that after the trier of fact itemized all damages, the trial court would enter judgment in a lump sum for all future damages up to an aggregate of $250,000.[105] The trial court, at its discretion, would then order the defendant to pay in periodic payments any future damages that exceeded $250,000.[106] To ensure that the defendant paid the future damages, the court would have required that the defendant post a bond with the court.[107] The 1987 Virginia General Assembly, however, rejected Senate Bill 411, which embodied the VLR's proposal regarding periodic payments of future damages.[108]

Although the Virginia General Assembly rejected the VLR's proposal regarding periodic payments of future damages, commentators claim that legislation permitting a defendant to pay future damages in periodic payments is advantageous to both plaintiffs and defendants.[109] From a plaintiff's point of view, periodic payments of future damages eliminate any uncertainty of the valuation of the plaintiff's damages.[110] Certainty of damages is important because a jury awards damages to a plaintiff to compensate the plaintiff for all damages that the defendant's negligence caused.[111] Uncertainty exists because a jury cannot measure, with exactness, the length of the plaintiff's life and the subsequent future medical and financial needs of the plaintiff.[112] As a result, a plaintiff may live longer than a jury anticipated and a lump sum damage award may dissipate before the plaintiff's death or recovery from the injury that the defendant's negligence caused.[113] Additionally, a plaintiff may diminish a lump sum damage award by making a bad investment or improvidently expending the award before the plaintiff actually needs the funds.[114] Periodic payments, however, guarantee that the defendant compensates the plaintiff for all future damages.[115] Moreover, periodic payments ensure that a plaintiff does not prematurely exhaust the damage award.[116]

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105. *Id.*

106. *Id.*

107. *Id.*

108. Summary of the Regular 1987 Legislative Session of the Virginia General Assembly, at 9.

109. *See* Ginsburg, *supra* note 94, at 254, 259 (supporting periodic payment of future damages).

110. *Id.* at 259.

111. *See* Danzon, *supra* note 30, at 3 (stating that jury's damage award in tort action designed to compensate plaintiff for all damages that defendant's negligence caused).

112. *See* Ginsburg, *supra* note 94, at 260 (discussing uncertainty of damages associated with lump sum damage awards).

113. *See id.* (discussing probability that lump sum damage award in tort action may dissipate before plaintiff's death or recovery from injury).

114. *Id.*

115. *See id.* (discussing plaintiff's advantages to receiving award for future damages in periodic payments).

116. *Id.*

From the defendant's point of view, periodic payments of future damages eliminate the defendant's risk of overpaying the plaintiff.[117] Traditionally, in paying a medical malpractice award, a physician had to compensate a plaintiff for all future damages in one lump-sum payment.[118] If the plaintiff died or recovered from his injuries earlier than the jury anticipated, the physician may have compensated the plaintiff for future medical expenses that were never rendered.[119] When a physician pays future damages in periodic payments, however, a physician pays only those future damages that the plaintiff will incur.[120] The defendant physician, therefore, does not run the risk of paying a windfall to the plaintiff.[121]

A second advantage to a physician who pays future damages in periodic payments is that periodic payments eliminate the possibility that a lump sum damage award will exceed the physician's insurance coverage and financially and professionally ruin a physician.[122] By paying a future damage award in periodic payments, a physician may spread the payment of the damage award over an extended period of time.[123] The physician may, therefore, obtain medical insurance to meet the future needs of the plaintiff, or establish a trust or other device to guarantee that the physician pays all of the plaintiff's damages.[124]

In addition to the VLR's tort reform proposals to cap damages and allow a defendant to pay future damages in periodic payments, the VLR proposed that the 1987 Virginia General Assembly limit contingency fees for attorneys in tort actions.[125] Although the General Assembly did not

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117. *See id.* at 259-60 (stating that lump sum payment to plaintiff may result in windfall to plaintiff if plaintiff dies or recovers earlier than jury anticipated).

118. *Id.* at 259.

119. *Id.* at 259-60.

120. *See id.* at 261 (periodic payment of future damages eliminates guesswork regarding future medical and living expenses of plaintiff).

121. *Id.*

122. *See id.* at 260 (stating that large lump sum damage awards may exceed physician's medical malpractice coverage causing physician economic and professional hardships).

123. *See id.* at 260-61 (discussing periodic payment of future damages).

124. *Id.* at 261.

125. *See Virginia Tort Reform Proposals*, *supra* note 6, at 1. (VLR's proposal to limit attorneys' contingency fee). Florida has placed limits on attorneys' contingency fees in personal injury cases. In *The Florida Bar Re Amendment to the Code of Professional Responsibility*, the Supreme Court of Florida upheld the Florida legislature's limitation on attorneys' contingency fees in all personal injury cases, including medical malpractice actions. The Florida Bar Re Amendment to the Code of Professional Responsibility, 494 So. 2d 960, 962 (Fla. 1986). The Florida Supreme Court recognized that there exists no evidence that attorneys are abusing the contingent fee system. *Id.* at 961. Moreover, the court recognized that some commentators consider contingency fees the "poor man's door to the courthouse." *Id.* The Florida Supreme Court, however, reasoned that the public views contingency fees as abusive in light of large jury awards and the rising cost of liability insurance. *Id.* Moreover, the court stated that the Florida legislature had perceived abuses in the contingent fee system since the legislature had enacted a model for contingent fees in medical malpractice actions. *Id.* The court, therefore, upheld the legislation limiting attorneys' contingency fees. *Id.* at 962.

adopt the VLR's proposal to limit an attorney's contingency fee, several arguments support limits on contingency fees. First, limits on an attorney's contingency fee will encourage an attorney to be more selective in deciding whether to file a plaintiff's lawsuit against a physician.[126] Some commentators claim that a plaintiff is more likely to pursue a meritless medical malpractice claim against a physician when the plaintiff compensates his attorney on a contingency fee basis.[127] The rationale is that the plaintiff has nothing to lose because the plaintiff compensates his attorney only if the plaintiff recovers from the physician.[128] A second argument for limiting an attorney's contingency fee is that the plaintiff's attorney sometimes will receive a windfall if the plaintiff obtains a large damage award.[129] When a plaintiff compensates his attorney on a contingency fee basis, the attorney usually retains up to fifty percent of the amount that the plaintiff recovers from the defendant.[130] For example, when a jury verdict is $8.3 million such as in *Boyd v. Bulala*, the attorney's fee, could range from $2.5 million, if the contingency fee were thirty percent, to $4.15 million, if the contingency fee were fifty percent.[131] A plaintiff's attorney in a medical malpractice action, therefore, sometimes receives compensation greater than the compensation required for the actual time that the plaintiff's attorney put into the case.[132] A third argument for limiting an attorney's contingency fee is that when a plaintiff compensates his attorney on a contingency fee basis, the attorney has a stake in the litigation and is more likely to gamble or impede settlement.[133]

Despite commentators arguments in favor of limiting an attorney's contingency fee, Danzon believes that legislative limits on an attorney's contingency fee does not provide a solution to the problems associated with medical malpractice insurance.[134] Danzon disagrees with the contention that contingency fees lead attorneys to bring frivolous lawsuits.[135] Danzon argues that if an attorney's sole means of compensation for representing a plaintiff

126. *Id.*

127. *See* Danzon, *supra* note 30, at 196 (stating that plaintiff is more likely to bring meritless malpractice claim against physician when plaintiff compensates his attorney on contingency fee basis).

128. *Id.*

129. *See* Danzon, *supra* note 30, at 197 (stating that on average, contingency fees overcompensate plaintiff's attorney for amount of time attorney spent on case).

130. *See* Danzon, *supra* note 30, at 197 (stating that contingency fees for attorneys generally do not exceed 50%); *see also Doctors and Lawyers Face Off*, A.B.A.J., July 1, 1986, at 39 (stating that only 28 cents of each dollar awarded in medical malpractice action is paid to plaintiff).

131. *See* Boyd v. Bulala, 647 F. Supp. 781, 784 (W.D. Va. 1986) ($8.3 million dollar verdict against physician).

132. *See* Danzon, *supra* note 30, at 197 (stating that empirical analysis shows that attorney's contingency fee overcompensates attorney by 66% for attorney's time spent on cases that attorney wins).

133. *Id.* at 195.

134. *Id.* at 195-98.

135. *Id.* at 196.

is a contingency fee, this conditional means of compensation will deter the attorney from bringing a potentially unsuccessful lawsuit.[136] Danzon, therefore, maintains that an attorney whom a plaintiff compensates on a hourly basis, regardless of the outcome, is more likely to bring a meritless lawsuit than the attorney who works on a contingency fee basis.[137] Finally, Danzon believes that limits on contingency fees not only limit the attorney's fees, but also reduce the plaintiff's recovery.[138] Danzon concludes that unless legislators constrain the defense attorney's fee, there exists no ground for limiting the contingency fee of the plaintiff's attorney in a medical malpractice action as a measure to ease the medical malpractice insurance situation.[139]

Although Danzon does not believe that limits on an attorney's contingency fee will remedy completely the medical malpractice insurance availability and affordability problems, Danzon does concede that medical malpractice suits against physicians will decrease if contingency fees are unavailable to plaintiffs.[140] Danzon reasons that with a contingency fee, the plaintiff is risk-free and, therefore, more likely to bring a meritless complaint.[141] Danzon also states that a plaintiff overcompensates an attorney who works on a contingency fee basis for cases that the attorney wins.[142] Danzon maintains, however, that a plaintiff benefits from a contingency fee arrangement because the plaintiff is able to bring a medical malpractice action even if the plaintiff cannot afford to pay an attorney's fee.[143]

Although the VLR did not persuade the 1987 Virginia General Assembly to limit contingency fees for attorneys, the General Assembly did adopt the VLR's proposal to sanction attorneys who file frivolous lawsuits and motions.[144] Section 8.01-271.1 of the Virginia Code, which is modeled after Rule 11 of the Federal Rules of Civil Procedure,[145] requires that an attorney certify that all pleadings, motions, and other papers are filed in good

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136. *Id.* at 196-97.

137. *Id.*

138. *Id.* at 198. Danzon states that statutory limits on an attorney's contingency fee reduces the average settlement size by 9%; increases the percentage of cases that a plaintiff withdraws from 43% to 48%; and reduces the percentage of cases litigated to verdict from 6.1% to 4.6% *Id.*

139. *Id.*

140. *See* Danzon, *supra* note 30, at 196-98 (stating that number of medical malpractice suits is greater with contingency fees, but regulation of contingency fees will not ease medical malpractice crisis).

141. *Id.* at 196-97.

142. *Id.* at 197.

143. *Id.*

144. *See Virginia Tort Reform Proposals*, *supra* note 6, at 1. (VLR's proposal to sanction attorneys who filed frivolous lawsuits); VA. CODE § 8.01-271.1 (1987) (legislation sanctioning attorneys who file pleadings, motions, or other papers in bad faith).

145. *See* FED. R. CIV. P. 11 (1986) (requiring that attorney sign all pleadings, motions, or other papers, and providing that attorney's signature constitutes attorney's certification of good faith filing).

faith.[146] If an attorney certifies a pleading, motion, or other paper in violation of section 8.01-271.1, a court may require that the attorney compensate an opposing party whom the filing prejudices for any reasonable expenses, including attorneys fees, that the opposing party incurred because of the frivolous filing.[147]

Section 8.01-271.1, which imposes sanctions on attorneys who file frivolous suits, may be an effective measure to combat the medical malpractice insurance availability and affordability problems that Virginia's physicians are facing.[148] Insurance companies determine the availability and cost of medical malpractice insurance to a physician, *inter alia*, based on the number of claims that patients have filed against a physician.[149] Therefore, if a plaintiff withdraws his claim or a court dismisses the plaintiff's claim against a physician before the plaintiff establishes that the physician was negligent, a medical malpractice insurer will consider this claim when determining whether to insure the physician and at what rate.[150] Under section 8.01-271.1, however, a plaintiff's attorney has an affirmative obligation to examine the merits of a case against a physician before filing a medical malpractice claim.[151] Section 8.01-271.1, therefore, may reduce the number of meritless claims against physicians. Consequently, insurers would consider fewer meritless claims when determining the availability and cost of a physician's medical malpractice insurance.[152]

Section 8.01-271.1, which imposes sanctions on attorneys who file frivo- attorney from filing meritless claims or motions against a physician. Without the aid of legislation such as section 8.01-271.1, a physician's only recourse against an attorney who files a frivolous lawsuit against the physician is to file a countersuit against the attorney alleging malicious prosecution or, in Virginia, abuse of process.[153] Physicians, however, generally must sustain a high burden of proof to recover on a claim of malicious prosecution against an attorney who files a frivolous medical malpractice suit against a physician.[154] In *Berlin v. Nathan*,[155] for example, the Appellate Court of Illinois

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146. *See* VA. CODE § 8.01-271.1 (1987) (proposing addition to Virginia Code requiring that courts sanction attorneys who file pleadings, motions, or other papers in bad faith).

147. *Id.*

148. *Id.*

149. *See* Danzon, *supra* note 30, at 89-96 (discussing factors that medical malpractice insurers consider when determining whether to insure physician); Telephone interview with Richard J. Olten, attorney, Virginia Professional Underwriters, Inc. (June 1987).

150. *Id.*

151. *See* VA. CODE § 8.01-271.1 (1987) (proposed section to Virginia Code that requires that courts sanction attorneys who file pleadings and motions in bad faith).

152. *See* Danzon, *supra* note 30, at 89-96 (discussing factors that medical malpractice insurers consider when determining whether to provide medical malpractice coverage to physician).

153. *See* Danzon, *supra* note 30, at 204-07 (stating that physician's recourse against plaintiff who files groundless litigation is countersuit for malicious prosecution).

154. *See* Berlin v. Nathan, 64 Ill. App. 3d. 940, 945-46, 381 N.E.2d 1367, 1370-71 (Ill. App. Ct. 1978) (physician's claim against attorney not sufficient to justify finding of malicious

held that to support a claim of malicious prosecution, a physician must prove that an attorney acted maliciously and with an improper motive in filing a medical malpractice claim against a physician.[156]

Analysis of the tort reform legislation that the 1987 Virginia General Assembly adopted reveals that the reforms are effective measures to combat the availability and affordability problems that Virginia's physicians are facing in obtaining medical malpractice insurance.[157] The Medical Society of Virginia's Birth-Related Neurological Injury Compensation Act already has made available to obstetricians medical malpractice insurance coverage.[158] Additionally, the Virginia Birth-Related Neurological Injury Compensation Act may benefit infants by allowing an infant to recover for birth-related neurological injuries in a timely manner, without the expense of litigation.[159]

The VLR's tort reform proposals that the 1987 Virginia General Assembly adopted also will enable physicians to obtain medical malpractice in-

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prosecution because physician did not allege that attorney acted in malicious manner in filing medical malpractice claim against physician); *infra* notes 155-56 and accompanying text (discussing *Berlin v. Nathan*).

155. 64 Ill. App. 3d. 940, 381 N.E.2d 1367 (Ill. App. Ct. 1978).

156. Berlin v. Nathan, 64 Ill. App. 3d 940, 944-45, 381 N.E.2d 1367, 1373 (Ill. App. Ct. 1978). In *Berlin v. Nathan*, a physician filed a countersuit against a patient's attorneys, alleging that the attorneys brought the patient's medical malpractice suit against the physician without having reasonable cause to believe that the physician had committed malpractice. Berlin v. Nathan, 63 Ill. App. 3d 940, 943-44, 381 N.E.2d 1367, 1369 (Ill. App. Ct. 1978). The physician alleged that before initiating a medical malpractice suit, the attorneys failed to obtain an opinion from another physician confirming that the physician had committed medical malpractice. *Id.*, 381 N.E.2d at 1369. Moreover, the physician claimed that the patient's ad damnum clause did not relate reasonably to the patient's alleged injuries. *Id.*, 381 N.E.2d at 1369. The physician argued that because of the high ad damnum clause, the physician would be unable to obtain medical malpractice insurance at a reasonable rate. *Id.* at 943-44, 381 N.E.2d at 1369.

In *Berlin*, the trial jury determined that both the patient and her attorneys had acted in a malicious manner in prosecuting a medical malpractice claim against the physician. *Id.* at 945, 381 N.E.2d at 1370. The jury awarded the physician compensatory and punitive damages. *Id.*, 381 N.E.2d at 1370. On appeal, however, the Appellate Court of Illinois reversed the decision of the trial court. *Id.* at 945, 381 N.E.2d at 1370. The court noted that to prove a claim for malicious prosecution against an attorney, the physician must show that the attorney acted maliciously or knew that his client acted in a malicious manner. *Id.* at 948-50, 381 N.E.2d at 1372-73. The court in *Berlin* stated that the physicians's complaint did not support a finding that the attorneys acted maliciously or knew that their client had acted maliciously. *Id.* at 949-50, 381 N.E.2d at 1372-73. The court further stated that willful and wanton misconduct does not rise to the level of malicious conduct and that the physician's complaint only stated that the attorneys did not get an opinion from a second physician before filing suit. *Id.*, 381 N.E.2d at 1372. The court, therefore, held that the physician's complaint was insufficient to show a claim of malicious prosecution. *Id.* at 948-49, 381 N.E.2d at 1373.

157. *See supra* notes 6-11 and accompanying text (discussing proposals for tort reform in Virginia).

158. *See supra* notes 12-29 and accompanying text (discussing Virginia Birth-Related Neurological Injury Compensation Act).

159. *Id.*

surance. The VLR-supported legislation that limits punitive damages and sanctions attorneys who file frivolous lawsuits will assist Virginia's physicians in obtaining medical malpractice insurance.[160] First, a $350,000 cap on punitive damages will provide an insurer with a mechanism for determining liability risks.[161] The new law assures a medical malpractice insurer that a plaintiff may recover no more than $350,000 in punitive damages.[162] Second, court-imposed sanctions on attorneys who file frivolous lawsuits will reduce the number of meritless claims and motions that attorneys file against physicians.[163] Because medical malpractice insurers base their decisions to insure a physician on the number of claims that patients have filed against the physician, a reduction in the number of meritless complaints against the physician will help the physician obtain medical malpractice insurance at affordable rates.[164]

Acceptance by the Virginia General Assembly of the VLR's rejected proposals would improve further the medical malpractice situation for Virginia's physicians.[165] The VLR's proposal to allow physicians to pay future damages in periodic payments would ensure that defendants compensate plaintiffs for all future damages while protecting the physician from paying to the plaintiff a windfall beyond the physician's medical malpractice insurance coverage.[166] Moreover, the VLR's proposal to limit an attorney's contingency fee would influence the plaintiffs' attorneys to ascertain that a patient's malpractice claim against a physician is meritorious before the attorney files a medical malpractice claim against a physician.[167]

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160. *See supra* note 39 and accompanying text (discussing VLR's proposal to cap punitive damages); notes 144-47 and accompanying text (discussing VLR's proposal to sanction attorneys who file frivolous suits).

161. *See supra* notes 98-99 and accompanying text (discussing effects of caps on damages).

162. *See* VA. CODE § 8.01-38.1 (1987) (limiting punitive damages to $350,000 in civil actions).

163. *See supra* notes 148-56 and accompanying text (discussing effects of court-imposed sanctions on attorneys who file frivolous lawsuits).

164. *Id.*

165. *See supra* note 9-11 and accompanying text (discussing VLR's tort reform proposals that 1987 Virginia General Assembly did not adopt).

166. *See supra* notes 100-07 and accompanying text (discussing proposals for tort reform that would allow defendant to pay future damages in periodic payments rather than in lump sum payment).

167. *See supra* notes 126-33 & 140-43 and accompanying text (discussing proposals for tort reform that would limit attorney's contingency fees).