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Analysis of Florida Amendment 3
Prepared by
The Foundation for Taxpayer and Consumer Rights
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Summary of Analysis: Based on experience in California and nationwide with similar tort restrictions, we conclude that Amendment 3 will (1) dramatically interfere with the right of Floridians to hire a lawyer to protect them in a dispute with a doctor, hospital or other health care provider, to the point where only the wealthy will be able to hire an attorney; (2) encourage reckless and dangerous conduct by health care providers, particularly HMOs and incompetent or irresponsible medical staff, thus having a devastating effect on the safety of Florida patients; (3) not lower the price of medical malpractice insurance premiums; (4) result in increased taxes for Floridians as they are forced to absorb the medical and other uncompensated expenses of victims of medical malpractice.

Description of Measure: Amendment 3, sponsored by the leadership of the Florida Medical Association, would have the effect of placing a constitutional restriction on the amount of money a consumer can pay a lawyer to represent him or her on a contingency fee basis. Specifically, Amendment 3 would bar a plaintiff from paying an attorney more than 30% of the first $250,000 in compensation and 10% of any compensation above $250,000.

The measure places no limits on the amount that defendants such as negligent doctors or HMOs can pay their attorneys.

Drafting Issue -- Scope of Amendment 3 May Exceed Medical Malpractice: Because the amendment refers to "medical liability claims" rather than "medical malpractice claims," the measure could be interpreted to apply to *all* suits that include a claim for compensation for medical bills, not just malpractice cases. Thus, in any case in which a person seeks compensation to pay for medical bills (i.e., lawsuits against drunk drivers, manufacturers of defective products), Amendment 3's cap would apply. Whether this drafting decision was deliberate or not, defendants in all lawsuits are sure to argue for the broadest possible application of the Amendment if it passes. The impact of such an interpretation, should it be upheld by the courts, would be to radically alter the civil justice system and consumer rights in Florida in general.

Explanation of Contingency Fee System: Virtually all trial lawyers who represent victims of medical injury do so on a contingency fee basis: the attorney is paid for his or her efforts only if the injured plaintiff wins or settles the case. The attorney then takes a percentage of the amount recovered for the plaintiff, which is typically between 25 percent and 40 percent of the funds received. If the victim loses the case (is not awarded compensation by a judge or after a jury trial), they do not pay the attorney, and the attorney receives no compensation. This is the "contingency" that characterizes the relationship between client and lawyer in most malpractice death or injury cases. As Justice Harry A. Blackmun wrote in a 1987 United States Supreme Court opinion: "The premium added for contingency compensates for the risk of nonpayment if the suit does not succeed and for the delay in payment until the end of the litigation--factors not faced by a lawyer paid promptly as litigation progresses."[1]

The contingency fee is a uniquely American instrument of justice. If access to the legal system depended upon the ability to pay a lawyer $400 or more per hour for her or his services, most Americans would be excluded from the civil justice system. The contingency fee system encourages lawyers to accept all worthy cases, regardless of the consumer's ability to pay. And it encourages lawyers to seek the maximum possible compensation for the injured victim by offering the attorney a significant percentage of the money obtained for the client.

An important structural advantage of this system is that it precludes frivolous lawsuits. Attorneys operating under a contingency fee contract will not accept a frivolous case when there is no chance of winning such a lawsuit and thus no opportunity to receive compensation for bringing it. As a policy analyst for the Heritage Foundation noted, "rather than encourage baseless lawsuits, the contingency fee actually helps screen them out of the system."[2]

I. Impact of Amendment 3 on Patients Subjected to Medical Malpractice.

Amendment 3's caps on fees will significantly restrict the legal options of a person injured by medical malpractice, or his next of kin. A victim of medical negligence (or even such intentional acts as assault or rape by a health care provider) would only be able to hire a lawyer if (1) he or she could afford to pay an attorney on an hourly basis, including expenses, which could reach into the hundreds of thousands of dollars; or (2) if the lawyer is willing to take the case on a contingency basis and accept the statutory caps on fees.

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[1] Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (1987) 483 U.S. 711, 735 (dis. opn. of Blackmun, J.).
[2] James L. Gattuso, "Don't Rush to Condemn Contingency Fees," *Wall Street Journal*, May 15, 1986, Sec. 1, p. 28.

Even if a victim of malpractice is able to find an advocate willing to take their case on a contingency fee basis, the ability of the attorney to mount the strongest possible case on behalf of the victim will be undermined. Medical malpractice cases are typically complex and expensive. They require lengthy investigation and expert witnesses. Such suits are more costly and difficult than many other types of litigation. Because Amendment 3 will limit the attorney's fee, an attorney may be unable to afford to mount a full investigatory effort and trial.

This debilitating constraint on proper litigation will be exacerbated by the non-level playing field Amendment 3 would establish. The offending health care providers and their insurers pay their defense attorneys by the hour, and thus are not restricted by the cap. They will be able to spend unlimited sums on their own defense. This disparity in resources will undermine the injured plaintiff's ability to prosecute a defendant.

Amendment 3's caps on attorneys' fees must also be assessed in the context of the caps on damage awards approved by the Florida Legislature in 2003. Since the compensation of attorneys operating under a contingency arrangement is subject to the amount of damages awarded, Amendment 3 further reduces the amount an attorney can obtain for his services in any single malpractice case. Thus, when Amendment 3 is combined with the cap on damages — which reduces the plaintiffs' attorneys' fees — medical malpractice cases will become prohibitively expensive for many Florida attorneys to accept on a contingency basis. Those plaintiffs' attorneys who do take such cases may require patients to pay them in advance at an hourly rate, since the statute does not control hourly fees. Of course, most consumers cannot afford to pay hourly fees.

Furthermore, Amendment 3 and the damage cap both alter the economics of litigation, forcing the attorney to focus on the cases that would provide the most damages. Caps thus discriminate against the suffering of people whose "economic" losses – wages – are limited. Who is harmed by this approach? All those who do not have large "economic" losses: senior citizens, unemployed women or stay-at-home moms, the poor, students and children. A strictly "economic" evaluation based on wages devalues what victims will create or produce in the future, their quality of life, as well as an injury's impact on their ability to nurture others. For instance, a laborer may lose an arm due to the exact same act of medical negligence as a corporate CEO, but the CEO would be able to hire a lawyer and collect millions in economic damages while the laborer would be entitled to much less compensation and thus find it difficult to hire a lawyer. A non-wage earning housewife would be similarly discriminated against.

Case Study: California. The campaign for Amendment 3 is part of a national campaign by the insurance industry and the American Medical Association to cap plaintiff attorneys' fees and compensation. The amendment is modeled on a law passed by the California Legislature in 1975. Under California's Medical Injury Compensation Reform Act (MICRA), fees are limited to 40% of the first $50,000 recovered; 33 1/3% of the next $50,000; 25% of the following $100,000, and 15%

of any amount exceeding $200,000. Like Amendment 3, MICRA does not limit the fees of the defendant's lawyers.

As a result of MICRA, only the most seriously injured victims with clear-cut cases and substantial economic damages are able to find legal representation in California. In states with caps on attorney contingency fees for medical malpractice cases (and particularly in states such as California where a victim's pain and suffering compensation is also capped), legal representation for many, if not most, victims of medical malpractice is simply not available. It is not cost effective for attorneys to take the vast majority of such cases. According to the President of Safe Medicine For Consumers, a California-based medical malpractice survivors group, "The vast majority of individuals who contact us are women, parents of children or senior citizens. Ninety percent of these individuals are unable to pursue meritorious medical malpractice cases because they cannot find legal representation on a contingency basis and their savings have been wiped out."

Confirming this assessment, Robert C. Baker, a leading defense attorney for insurance companies and doctors in California and an expert on MICRA, told a congressional committee that, "As a result of caps on damages, as well as limitations on attorneys' fees, most of the exceedingly competent plaintiff's lawyers in California will simply not handle a medical malpractice case."[3]

A recent report by the RAND Corporation confirms that MICRA has harmed California consumers. It concludes that the most significant impact of California's malpractice caps law falls on patients and families who are severely injured or killed as a result of medical negligence or mistakes. Among the RAND report's findings:

"[W]ith the effects of the award caps and sliding scale, attorney fees were reduced by 60 percent overall (59 percent for injury cases and 65 percent for death cases). . . . These results suggest that MICRA has had a major impact on plaintiffs' attorney fees in medical malpractice cases and that the sliding scale has a greater effect on those fees than has the damage cap."[4]

"[I]t appears that MICRA has caused a sea change in the economics of the malpractice plaintiffs' bar in California."[5]

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[3] Testimony of Robert C. Baker, President, American Board of Trial Advocates, Presented by Karl Keener, Member, American Board of Trial Advocates, before the Subcommittee on Economic and Commercial Law, Judiciary Committee, U.S. House of Representatives, June 22, 1994, p. 2.
[4] "Capping Non-Economic Awards in Medical Malpractice Trials," RAND Institute for Civil Justice, July 2004, pp. xxiii-xxiv.
[5] Id., p. 51.

"The analysis suggests that the savings to defendants and their insurers are funded by both plaintiffs and their attorneys. . . . [T]he legislation's provisions regarding awards and fees could be characterized as shifting some of the costs for compensating medical malpractice from defendants to not only plaintiffs but also to plaintiffs' counsel."[6]

Referring to MICRA's impact on individual plaintiffs who are not wealthy and/or whose case is complex, the study states: "Clients most likely to find representation in malpractice cases may well be those with the most clear-cut claims of medical negligence and the most substantial economic losses."[7]

RAND has called for more investigation on the critical issue of MICRA's impact on the ability of an injured victim of medical malpractice to obtain the representation of an attorney.[8]

II. Impact of Amendment 3 on Health Care Quality.

Extensive research shows that the legal system saves money by deterring costly instances of malpractice. The economic costs of physician-caused injuries may be 10 times the total cost of malpractice premiums, or about $50 billion per year in 1990; based on that estimate, under a purely economic analysis, the tort liability system would justify its costs even if it deterred only a relatively small proportion — ten percent — of medical injuries.[9] This means that undermining the restraints placed on malpractice by the legal system would *increase*, not decrease, health costs. The Congressional Budget Office came to a similar conclusion: "The current tort liability system may deter some medical injuries, thereby tending to lower spending on health care. If so, changing the system could raise national health expenditures and other costs associated with medical injury. . . "[10] As a former president of the Federation of State Medical Boards put it: "[M]any

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[6] Id., p. xxviii.
[7] Id., p. 51.
[8] Id., p. 52.
[9] Statement of Robert D. Reischauer, Director, Congressional Budget Office, [on economic implications of rising health care costs], before the Committee on Ways and Means, U.S. House of Representatives, March 4, 1992, p. 32, citing Patricia M. Danzon, "The Medical Malpractice System: Facts and Reforms," in *Brookings Dialogues on Public Policy: The Effects of Litigation on Health Care Costs,* ed. by M.A. Baily and W.J. Cikins (Washington, D.C.: Brookings Institution, 1985), pp. 28, 30. See also the testimony of Patricia M. Danzon, [on medical malpractice], before the Committee on Labor and Human Resources, U.S. Senate, July 10, 1984, printed in Committee on Labor and Human Resources, U.S. Senate, *Defensive Medicine and Medical Malpractice,* 98th Cong., 2nd sess., (Washington, D.C.: U.S. Government Printing Office, 1984).
[10] Statement of Robert D. Reischauer, Director, Congressional Budget Office, [on economic implications of rising health care costs], before the Committee on Ways and Means, U.S. House of Representatives, March 4, 1992, p. 32.

physicians practice more carefully than they did in the past because they have one eye on the potential litigant."[11]

In a report to the Congress, the U.S. General Accounting Office made the same point: "Placing greater emphasis on not making mistakes, providers may be performing additional tests and treatment procedures, giving more attention to increased medical recordkeeping, spending more time with patients explaining alternative treatments, obtaining patients' informed consent, and refusing to treat certain high-risk patients. Some of these actions may, in fact, be desirable."[12] The GAO concluded that, "[c]oncerns about the threat of malpractice claims and associated financial losses have been a motivating force in the development of quality assurance activities."[13]

Dr. Troyen Brennan, an expert from the Harvard School of Public Health, has also concluded that the malpractice laws discourage malpractice: "[R]ecent empirical analyses demonstrate that at the level of the hospital, as claims increase per 1,000 discharges, the risk of negligent injury for patients decreases. This is the first statistically significant evidence that there is a deterrent effect associated with malpractice litigation. It suggests that tort litigation, with all of its warts, nonetheless accomplishes the task for which it is primarily intended, that is the prevention of medical injury."[14]

Dr. Brennan warned Congress that the restrictions on the tort rights of malpractice victims would be costly and devastating: "[T]hese reforms may . . . have detrimental effects. Tort litigation is intended to compensate individuals who have been injured and deter practices that lead to injuries. Most of the proposals by [tort legislation] will not improve the ability of the tort system to undertake these critical functions. In fact, if enacted, the [legislation] will likely lead to less compensation for individuals injured by medical practice, will reduce deterrence of practices that cause such injuries and overall will increase the costs of the medical care system."[15]

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[11] Robert C. Derbyshire, "Malpractice, Medical Discipline, and the Public," *Hospital Practice* (January 1984), pp. 209, 216.
[12] Statement of Lawrence H. Thompson, Assistant Comptroller General, U.S. General Accounting Office, on "Medical Malpractice: Experience with Efforts to Address Problems," before the Subcommittee on Health, Committee on Ways and Means, U.S. House of Representatives, May 20, 1993, p. 6.
[13] Id., p. 7.
[14] Testimony of Dr. Troyen A. Brennan, Harvard School of Public Health, on "Medical Malpractice and Health Care Reform," before the Subcommittee on Health and the Environment, Committee on Energy and Commerce, U.S. House of Representatives, November 10, 1993, p. 9.
[15] Testimony of Dr. Troyen A. Brennan, Harvard School of Public Health, on "Medical Malpractice and Health Care Reform," before the Subcommittee on Health and the Environment, Committee on Energy and Commerce, U.S. House of Representatives, November 10, 1993, p. 3.

Undermining the contingency fee mechanism contributes to a deteriorating quality of health care. Left without legal representation in California, victims go uncompensated, and dangerous doctors go undeterred.

Low-income patients are particularly affected by the weakening of the contingency fee mechanism. The contingency fee system is a poor patient's only hope of affording an attorney to challenge a negligent physician. Undermining this system through caps on fees that reduce incentives for attorneys to take malpractice cases, gives dangerous doctors, hospitals and HMOs a license to be negligent in poor neighborhoods.

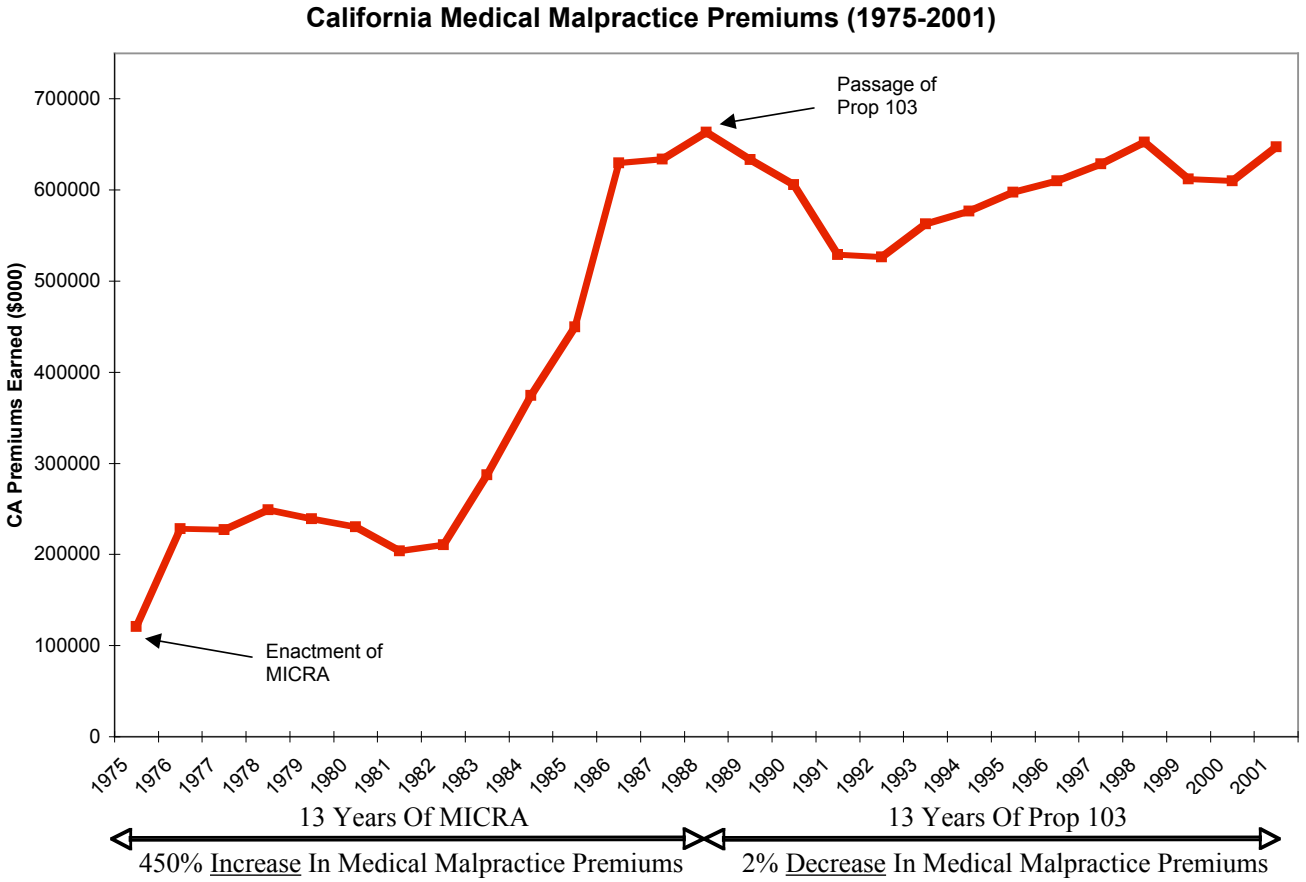
III. Impact of Amendment 3 on Insurance Premiums.

The sponsors of Amendment 3 claim it will lower the price of the medical malpractice insurance that health care providers purchase to cover themselves in the event they harm a patient. However, experience in California demonstrates that caps on attorneys' fees will not lower insurance rates.

MICRA was enacted in 1975 at the height of the so-called "insurance crisis" of the 1970s, when the national economy was weak and insurers' investment returns were low. Insurance companies were increasing malpractice premiums at an unprecedented rate. At the time, striking doctors joined with insurance companies – as they have today all over the United States – to promote changes in the tort laws ("tort reform") as a solution to soaring malpractice premiums. However, after a modest decline in both California and nationwide premiums reflecting improved insurance company investment returns in the late 1970s, malpractice premiums were higher than ever, and rising, by 1983.

During the insurance crisis of the mid-1980s, insurers once again blamed their conduct on extraordinary increases in lawsuits and claims. During that same period, despite MICRA, California malpractice premiums increased by an average of more than 20% annually. By 1988, thirteen years after the passage of MICRA, California medical malpractice premiums had reached an all-time high – 450% higher than in 1975, when MICRA was enacted.

It was not until California voters imposed a 20% rate reduction and stringent regulation of insurance company rates that medical malpractice premiums dropped. Medical malpractice rates in California began to fall immediately after the passage of 1988's Proposition 103, and, within three years of the passage of insurance reform, total medical malpractice premiums had dropped by 20.2% from the 1988 high. The following table illustrates the failure of MICRA to lower insurance premiums.



IV. Impact of Amendment 3 on Taxpayers.

Because Amendment 3 will discourage malpractice lawsuits and restrict the amount of compensation negligent health care providers must pay to victims of medical malpractice, an unknown number of malpractice victims will be left with less than full compensation for their injuries. To the extent these individuals do not have resources to cover their medical and other expenses, they will be forced to rely on public assistance and other governmental programs to survive.

While we are unable at this time to quantify Amendment's 3 impact in shifting the financial expense of malpractice from defendants to victims and taxpayers, the potential cost to taxpayers could be enormous.

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The Foundation for Taxpayer and Consumer Rights is a non-profit, non-partisan citizen research and advocacy organization based in Los Angeles, California. Extensive information on MICRA, medical malpractice, and insurance rates and reform can be found at the organization's special medical malpractice resource page: www.consumerwatchdog.org/healthcare/medmal.php. The press release associated with this analysis is also available there. The organization's address is 1750 Ocean Park, Suite 200, Santa Monica, CA 90405. Phone 310-392-0522. Fax: 310-392-8874.