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ANALYSIS OF HOUSE BILL 2122

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My name is Joanna Hamill Flum. I am president of the Pennsylvania Trial Lawyers Association. I would like to thank Chairman Gannon and the other distinguished members of this committee for permitting me to testify before you today.

The Pennsylvania Trial Lawyers Association, through its several thousand members, is the only statewide bar association that speaks exclusively on behalf of the injured and innocent consumers and workers of this Commonwealth. Therefore, it is with a profound sense of duty and commitment that I testify today concerning how House Bill 2122 would drive a stake into the heart of rights currently guaranteed to injured patients.

May I initially state that there are many fine physicians and other healthcare providers in this Commonwealth who every day deliver superior services to their patients and often perform acts of heroism in saving lives. However, physicians, as all of us, sometimes make mistakes and, just as you and I and every other citizen must be held accountable for our mistakes, so must physicians. Any system of accountability must

not be a sham and must not protect the wrongdoer to the detriment of the innocent. There is nothing as magnificent or fair as the common law in dispute resolution. Our current system is equitable and protects the rights of both plaintiffs and defendants. However, House Bill 2122, which is nothing more than special interest legislation protecting physicians and limiting patient rights, would drastically tip the scales in favor of wrongdoers permitting them to evade accountability for their mistakes.

Permit me to point out to you that, according to extrapolations from the Harvard Medical Practice Study, approximately 80,000 Americans die and hundreds of thousands more are seriously injured each year due to medical negligence. While the Harvard Study is the most comprehensive study produced to date with respect to the incidence of malpractice, Harvard only studied malpractice in hospitals and counted only cases where the negligence was blatant and resulted in serious injury or death. More than a million other Americans who experienced unforeseen injuries during hospitalization were relegated by Harvard to a benignly described category: "adverse incidents."

Research and polling show that the American consumer fears being on the wrong end of negligent medical care, particularly in hospitals.

Recent headlines tell the tragic story:

* A Tampa, Florida, man had the wrong leg amputated.

* A Boston Globe reporter died of an overdose of chemotherapy.

* An eight year old Colorado boy died when his anesthesiologist put him under and then fell asleep.

* A New York neurosurgeon operated on the wrong side of a patient's brain.

* A caesarean section was not timely performed on a Pennsylvania woman, causing permanent brain damage to her baby.

* A Pennsylvania physician ignored the repeated reports of a lump in a woman's breast which the physician misdiagnosed as a cyst, without proper testing. She was belatedly diagnosed as

suffering from breast cancer.

These are only the reported cases. Many of you may not know that when a medical negligence case settles, the injured patient is forced, as a condition of the settlement, to sign an agreement that he or she will not discuss the case or in any way publicize it. So, there are many more egregious cases of medical negligence about which we never hear because of this restriction.

The fact that a physician commits medical negligence does not mean that he or she is a bad or incompetent physician. It means that in that instance he or she made a mistake and fell below the applicable standard of care. However, because physicians do make mistakes, patients must not be deprived of their rights against these wrongdoers.

As I am sure you can appreciate, a patient suing a physician is akin to David fighting Goliath. A conspiracy of silence, wherein physicians do not want to testify against their colleagues, and the battery of lawyers that healthcare providers retain in order to defend themselves, work to the advantage of physicians. Despite this, physicians have requested the legislature

to pass special interest legislation that would limit patient rights while providing physicians with virtual immunity against their negligence. Certainly, any fair minded, reasonable person must abhor the mighty sword that the physicians are attempting to use against injured patients.

The recent emergency surcharge by the Pennsylvania Medical Professional Catastrophe Loss (CAT) Fund impelled physicians to call once again for limitations upon the rights of injured patients. However, careful analysis reveals that the surcharge is not the result of problems with Pennsylvania's tort system, but rather the result of structural problems with the CAT Fund and the normal insurance cycles which effect the handling of claims.

Neither the number of malpractice claims in Pennsylvania nor the amount of payments has changed dramatically in recent years. Periodically, court dockets will create clusters of cases which must be resolved, causing temporary pressure on insurance premiums. As you have heard today, Pennsylvania remains in the lowest one-third of states nationwide with respect to the cost of malpractice premiums, and

legislation to improve the operation of the CAT Fund can remedy the problems it faces in resolving claims without limiting patient rights.

Malpractice itself, as noted, remains a serious problem nationwide. If anything, statistics confirm that it is under-reported and that fewer victims are compensated than should be. Professional regulation of physicians remains lax, and it is only through the courts that patients can secure their rights to quality care. House Bill 2122 does nothing to reduce the incidence of malpractice or the number of incompetent physicians. If it is passed, Pennsylvania citizens would be without an adequate remedy for negligent medical care.

Let me now turn my attention to specific sections of this bill that would essentially emasculate the rights of injured patients and make it virtually impossible to maintain a cause of action when they have suffered because of medical negligence. I will not discuss every section in depth, since to do so would require a treatise by a law professor, because of the devastating changes in the law this bill proposes. However, I believe that after I discuss with you how

this bill robs injured patients and rewards negligent doctors, you will have to agree that it is unfair and ill conceived.

DECLARATION OF POLICY (§102)

The declaration of policy accompanying House Bill 2122 asserts the existence of a crisis in resolving medical negligence claims, when, as noted, malpractice premiums in Pennsylvania are in the lowest one-third nationwide. It suggests that the tort system adds dramatic expense to healthcare, when statistics show that malpractice costs constitute less than one percent of the cost of healthcare. The bill then establishes a system for resolving claims which purports to be fairer and more efficient; however, it would in practice operate to undermine dramatically the common law protections for victims of medical negligence. There is no reason to abandon existing law for a cumbersome system that is unfairly protective of negligent physicians. Finally, the bill in no way assures that healthcare providers will competently practice medicine within the applicable standard of care.

INFORMED CONSENT (§201-A)

Under present law, before undergoing surgery a patient is entitled to be advised of any risk or alternative which a reasonable person would want to know. The patient's right to know is paramount, and physicians are not permitted to decide on their own what a patient should be told. This doctrine, known as the "prudent patient standard," has long been Pennsylvania law. House Bill 2122 eliminates this protection, and instead allows the medical profession to define the standard for what patients should know. This standard has been specifically rejected by our Courts. See, Cooper v. Roberts, 720 Pa. Super 260, 286 A.2d 647 (1971).

Under this bill, doctors would be permitted to withhold information from patients, based upon their concepts of what is important, and thereby define the scope of their patients' right to know. This is poor public policy, because patients, as consumers of medical services, should be entitled to whatever information the average person would consider important, without information being withheld by the medical profession.

The bill also allows a physician to withhold

information from a patient if the physician determines that it would be "detrimental" to the patient's health if the information were revealed, further undermining patient autonomy.

The proposed legislation also creates a presumption, which can only be overcome by clear and convincing evidence (a virtually impossible standard and contrary to current law), that so long as the patient signed a written consent form, consent was obtained, regardless of what was set forth in the document, and regardless of whether the patient was provided with any meaningful information about risks or alternatives.

This section is contrary to well-established principles of law which provide that a signed consent is a <u>defense</u> to an informed consent case.

In practical terms, such a provision totally undermines the law of informed consent, inasmuch as patients are frequently requested to sign broadly worded documents on short notice, without explanation, in order to obtain necessary treatment.

Under present law, principles of informed consent apply to any surgery, whereas under the proposed legislation a physician would be required to secure the

patient's consent only for a "major invasive procedure." This alone would create unnecessary legal issues in order to determine what types of procedures are "major" and "invasive." Indeed, the bill mandates that expert testimony is required to determine whether the procedure was a major invasive procedure. This is certainly not designed to economically resolve medical negligence cases since, currently, expert testimony is not required to determine whether a procedure is "surgical," but rather is limited to purely medical issues such as known risks of a procedure. The limitation of requiring informed consent for only a "major invasive procedure" is unduly restrictive of patient rights. Although a tonsillectomy arguably may not be a "major invasive procedure," there have been numerous cases where young children have died or been seriously injured during tonsillectomies. Furthermore, the language "major invasive procedures" is contrary to existing law. See, Cooper v. Roberts, supra.

One of the most outlandish and even ridiculous proposed provisions on informed consent in this bill is the one that states that "nothing in this section [on informed consent] shall be construed as imposing a duty

on a physician to apprise a patient of information the patient knows or should know...." (§201-A (e)(1)) This, in essence, shifts the duty to be informed from the physician to the patient. Can we tolerate a law that places the burden on the patient to independently research and inform himself or herself about the risks of treatment? How is the physician supposed to know what the patient already understands about the procedure? Who is to determine what the patient should know already about the procedure? To state the questions is to highlight the absurdity of the proposition inherent in this section. The patient's knowledge of risks is not, nor should it be, the defining issue since the inquiry has always been, and should continue to be, whether adequate information was provided to the patient.

In the final analysis, the bill turns existing law inside out, and adopts the premise that doctors should hold greater authority over a patient's body than the patient himself or herself.

The danger in permitting a physician to hold such power over a patient has been made starkly clear in a case, that has been widely reported, involving the Hershey Medical Center wherein a physician unilaterally

decided to remove life support from a three year old girl with a brain tumor without the family's consent or a court order. Physicians are not God, and we must never permit them to forget that it is the patient who must have ultimate control over his or her body. If the Hershey Medical Center incident can occur under our present system, imagine the flagrant disregard of patient rights that could prevail if §201-A of this bill were to become law.

COLLATERAL SOURCE (§203-A)

House Bill 2122 reverses the traditional common law rule under which a party found liable for wrongful conduct is not, as a matter of fairness, entitled to a credit against the damages owed, simply because benefits are available to the victim from another source. By abolishing the collateral source rule, it provides a windfall to culpable defendants, at the expense of the plaintiff or a third party providing benefits. Nor does it bar subrogation. Thus, an injured patient may be in the inequitable position of not being able to recover an item of damages for which there is a subrogation interest asserted.

The negligent physician should not be relieved of paying full monetary damages on account of his or her negligence because the injured patient has other benefits available to him or her.

The prohibition against recovery of damages paid by a public source is particularly inappropriate. A similar provision under the Health Care Services Malpractice Act has already been invalidated by the Pennsylvania Supreme Court, Chiesa v. Fetchko, 504 Pa. 503, 475 A.2d 740 (1984), and the effect of such a rule is to make taxpayers subsidize negligent physicians.

The collateral source rule is not repealed in instances where an injured patient paid for premiums "out of pocket," but this limitation fails to recognize that fringe benefits are an important part of most employees' compensation package, and often the subject of bargaining. Particularly in the case of union employees, wage concessions will often be made in order to secure better benefits. Such benefits ought not to be devoted to subsidizing wrongful conduct of physicians.

As written, the bill is particularly onerous, because a negligent physician benefits not simply from payments already made to a victim, but also from any

payments which the victim may receive in the future. House Bill 2122 fails to take into account the fact that under many policies of insurance, particularly health insurance, there is a lifetime maximum provided to the injured patient. Why should a victim's long-term protection under health or disability policies be eroded for the benefit of a negligent physician?

PUNITIVE DAMAGES (§204-A)

Punitive damages are rarely awarded against a healthcare provider, and are most likely to arise where a physician was impaired by drugs or alcohol, or engaged in intentional misconduct such as sexual abuse.

There is no justification for imposing an arbitrary upward limit on the amount of punitive damages which can be awarded. As the courts have recognized, punitive damages are meant to serve as a sanction for wrongful conduct, and the amount of the sanction necessarily varies from case to case. In some instances, a physician may engage in truly outrageous conduct, where the actual harm which results is modest in dollar terms. In such instances, the purpose of punitive damages, deterring future misconduct, would be

undermined if the amount were limited to twice the compensatory damages sustained.

This section, as many others in the bill, will increase litigation time and expense because it provides that evidence of a defendant's wealth or financial condition would be delayed until after a finding of liability, thus requiring bifurcated trials.

It further provides that a court may sua sponte impose attorney fees and expenses if it finds the claim for punitive damages to be without a reasonable basis to support a good faith belief that a punitive damage claim exists. Since the imposition of punitive damages is a jury issue, this would undermine the jury's function and, notably, have a deterrent effect.

Finally, the bill provides that punitive damages may be awarded only where there is a showing by clear and convincing evidence that the defendant's conduct was outrageous. The bill flagrantly changes the standard of evidence from a preponderance of the evidence to clear and convincing. There is absolutely no good and sound reason why the hurdle that already exists in proving the right to punitive damages should be raised higher.

The great virtue of the common law is its

flexibility, and the ability of the courts to devise a remedy appropriate under the circumstances. Given the rarity of punitive damages, the legislature should not tie the hands of the courts when it comes to making certain that the "punishment fits the crime."

STATUTE OF LIMITATIONS (§205-A)

The proposed legislation maintains the existing two year statute of limitations, but establishes a four year statute of repose, which would absolutely bar a malpractice claim even where the plaintiff neither knew, nor had reason to know, that he or she had been a victim of malpractice. This would abolish case law dating back to the nineteenth century which extends the statute of limitations when the plaintiff lacked knowledge of his or her injury. Claims would be barred even if the defendant made misrepresentations or committed fraudulent acts, such as altering or falsifying medical records, to prevent the plaintiff from learning of the malpractice. Therefore, the bill both penalizes innocent patients and protects physicians who hide acts of malpractice.

The statute also erodes protection for minors

created by the legislature in 1984, by establishing a four year statute of limitations for their claims. Virtually every state protects children by tolling the statute of limitations throughout the period of their minority. If the proposed legislation is adopted, Pennsylvania would become one of a handful of states which does not provide full protection for the rights of children.

In Pennsylvania, were this proposal to be in effect, a brain damaged baby would be obliged by statute to act on his or her own behalf by age four or be forever barred. Does that make any sense?

PRETRIAL PROCEDURE (Article III-A)

The proposed legislation establishes unreasonable and burdensome requirements upon counsel representing malpractice victims. It provides that a suit may not be commenced unless counsel already has a signed expert report identifying deviations from the standard of care. (§301-A(b)) Such a requirement is unworkable for a variety of reasons. First, because of the "conspiracy of silence" which still protects negligent physicians, many physicians serving as an

expert witness on behalf of the plaintiff will do so only on a confidential basis. Such physicians will evaluate potential claims, and confirm their validity, but refuse either to testify, or to be identified in any way with the case. If experts who perform such review on behalf of patients are subject to a certification requirement, patients will be deprived of an invaluable resource, and ultimately it will be more difficult to screen for meritorious claims.

Second, at the outset of a case, it is often difficult to determine with precision all of the acts of malpractice which occurred. Medical records and hospital records (which can be voluminous and take months to get because hospitals do nothing quickly) are often sketchy, and in some cases have even been altered. In cases where there was a problem with patient care, many times critical events are simply not recorded in the chart. It is not until discovery proceeds, and witnesses are required to give sworn testimony, that many cases can be fully evaluated. Forcing the patient to have a written expert report before litigation even begins is not only impractical, but also unfair in that the plaintiff's experts will be forced to commit themselves to an

opinion without a full record in the case.

In some instances, attorneys must commence litigation in order to toll an impending statute of limitations. Obtaining medical records and securing expert review can be a time-consuming process. Sometimes, because of a lack of cooperation from hospitals or physicians, counsel must actually file suit simply to obtain records. As a result, unless the patient has retained counsel early in the statute of limitations period, it would be impossible for an attorney to comply with the certification requirement.

Section 302-A provides that discovery shall be completed within one year after a claim is commenced. This is wholly unrealistic and has absolutely no relevance to the "real world" of litigation where it may take three to five years to get to trial. This is also unrealistic when there are multiple defendants and counsel since coordinating everyone's schedule for depositions can be a paralegal's worst nightmare. There is no reason to suspect that such a quick discovery schedule will encourage resolution of claims since, as every plaintiff's attorney knows, physicians very, very rarely give consent to settle after discovery is

completed, but wait until a case is on the trial list. Even when there is the rare occasion of an early consent to settle and a tender, the CAT Fund is notorious for not considering resolution of claims until, again, the case is on a trial list. Indeed, every plaintiff's lawyer knows as well that often the CAT Fund does not consider a case until the trial has actually commenced.

Ultimately, the requirement of pretrial certification will simply add to the cost of litigation and diminish the quality of review because attorneys will be forced to deal with unrealistic time constraints. Currently, because of the cost of litigation, few malpractice actions are brought without counsel investigating the merits of the claim. In cases where attorneys proceed irresponsibly, there are sufficient sanctions under present law to address their conduct without increasing the expense and complexity of such litigation.

EXPERT REPORTS (§303-A)

The time limitations upon discovery established by House Bill 2122 are wholly unrealistic. The patient is expected to serve an expert report within three

months after filing suit, at a point where it is unlikely that testimony has even been heard from the defendant healthcare providers. In three months time, counsel for the defendants may not even have identified all of the various physicians and nurses involved in caring for the plaintiff. This is particularly true in large teaching hospitals, where residents involved in patient care may have scattered throughout the country.

The legislature should not impose arbitrary time limitations which are divorced from the realities of complex civil litigation. The courts have ample tools under existing law to manage malpractice litigation, and in most counties are able to do so with the assistance of an experienced trial bar. Attempts by the legislature to micro-manage court dockets with respect to a single type of litigation are impractical.

AFFIDAVIT OF NON-INVOLVEMENT (§308-A)

This provision provides a safe harbor for negligent physicians. It <u>requires</u> the court to dismiss a case whenever a physician files an affidavit verifying that he or she did not treat, or was otherwise not involved in caring for the patient. Significantly,

although such dismissal is without prejudice, there is no provision tolling the statute of limitations with respect to a physician who is dismissed. As a result, there is a serious risk that culpable defendants could secure dismissal from a case, and have the statute of limitations against them expire, if they are not reinstated in time.

Furthermore, as drafted, there is no provision through which the patient can challenge a physician's assertion of non-involvement. As everyone knows, one cannot cross-examine an affidavit. The bill only provides a remedy for other healthcare providers seeking to reinstate a defendant; it gives absolutely no rights to the patient. All the rights and remedies under this section are given to the physicians.

EXPERT QUALIFICATIONS (§401-A)

Under present law, a witness is qualified to testify as an expert if the witness possesses specialized knowledge concerning a subject, either by experience or education. Pennsylvania courts have consistently held that a physician who is familiar with the medical issues involved need not be in the same

specialty as the defendant to render expert opinions. See, Kearns v. Clark, 343 Pa. Super. 30, 493 A.2d 1358 (1985). The proposed legislation establishes a special rule for malpractice cases, requiring as well that the witness have "personal experience" and "practical familiarity" with the medical subject in question. The difficulty with such terms is that they have no defined meaning under the law and could result in qualified experts being precluded from giving testimony.

The statute also provides that where the defendant is board-certified, a witness may not testify as an expert against him or her unless the witness is also board-certified, reversing well established principles which leave issues of expert credibility for the jury. See, e.g., Junge v. Garlock, Inc., 427 Pa. Super. 592, 629 A.2d 1027 (1993). This raises several problems. In many cases, experts in several different medical specialities will testify, many of whom are not certified in the same specialty as the defendant. To preclude such testimony makes no sense, particularly because an expert in a different field may actually have greater knowledge than the defendant in a case. For example, an orthopedic surgeon may have negligently

undertaken procedures which would have been better performed by a neurosurgeon. To suggest that a neurosurgeon could not offer testimony against an orthopedist under such circumstances simply makes no sense. Similarly, sometimes family practitioners purport to practice psychiatry. To limit the testimony of a psychiatrist under such circumstances is illogical.

Many well-qualified specialists simply are not board-certified. In some cases, board certification in a particular specialty may not have been available when a physician completed his or her training. In other specialties, when an exam for certification is created, there may be a delay in certifying all the qualified physicians. For example, there is at the present time no board certification in neuroradiology, although one is being established. Once the exam has been created, only a limited number of physicians can take the exam in a given year. Indeed, those physicians charged with responsibility for creating the initial exam must, by definition, await certification at some later date, by means of an exam created by others. Obviously, such physicians are hardly unqualified to render opinions concerning their peers, but the artificial limitations

established by the proposed legislation would prohibit such testimony.

Finally, in some specialties, the number of practitioners is exceedingly small, and the peer pressure not to testify on behalf of an injured patient is immense. If a patient is restricted to the limited pool of physicians who are board-certified within a given specialty, meritorious claims may be defeated simply because no physician in the group is willing to break ranks with his or her peers.

Under present law, courts have the authority to preclude testimony from unqualified experts, and cross-examination provides a very effective means of exposing a lack of qualifications. The legislature should not tamper with well-established rules governing the admission of expert opinions.

DELAY DAMAGES (§403-A)

This bill treats healthcare providers as a privileged class, exempting them from damages for delay, when every other party to civil litigation is subject to such a rule. There is no justification for conferring such a privilege.

This section rewrites well established delay damage law which imposes delay damages on the defendant where it does not make an appropriate settlement offer. The principle behind this rule is to compensate the plaintiff for money he or she could have earned on his or her award if it had been promptly received, while simultaneously preventing a defendant from being unjustly enriched by interest earned during the pendancy of litigation on money rightfully owed to the plaintiff. See, Costa v. Lauderdale Beach Hotel, 534 Pa. 154, 626 A.2d 566 (1993).

Furthermore, an attempt to limit the imposition of delay damages has been rejected by the Pennsylvania Supreme Court as a violation of the doctrine of separation of powers. Woods v. Commonwealth Department of Transportation, 531 Pa. 295, 612 A.2d 970 (1992).

PERIODIC PAYMENT OF FUTURE DAMAGES (§404-A)

The bill further penalizes malpractice victims by leaving them dependent upon the defendant even after a judgment has been won. Under the proposed legislation, the courts are required to restrict payment of future damages in any case where the amount at stake exceeds

$200,000. As a practical matter, this may leave a prevailing patient virtually penniless, because in complex, multi-party cases, the costs of litigation alone could exhaust a substantial portion of the first $200,000 awarded.

Beyond that, the rights of the victim are then contingent upon the court's determination as to what the patient's future needs will be. Under present law, the plaintiff is free to invest funds and spend them as need requires. Under House Bill 2122, the plaintiff is deprived of such flexibility and left at the mercy of the court's prediction as to what future needs will be. However, there is no provision in the bill to permit any adjustment of the amount or timing of future payments.

More importantly, the plaintiff remains financially dependent upon the defendant's ability to pay. Although there is a provision for the judgment debtor to post security, this obligation can be fulfilled through the purchase of an annuity. As was demonstrated by the numerous failures of insurance companies through the late 1980's, and in particular Executive Life, a large annuity carrier, purchase of an insurance contract is no guarantee of future security.

Furthermore, annuity payments are made in fixed monthly or yearly amounts, leaving the victim without a pool of resources to tap in the case of emergencies or special needs. There is no justification for subjecting an injured plaintiff, who has prevailed under the law, to future risks by blocking access to the judgment won and requiring the plaintiff to wait for future payments which might or might not be secure. Under the bill, the only way for the plaintiff to avoid the problems inherent in periodic payments is to accept a discounted sum, which would then leave the plaintiff vulnerable to future inflation.

One of the most appalling parts of the section on periodic payment of future damages is §404-A(d) which provides that, if the plaintiff dies without dependents, all payments cease and the remaining money reverts back to the negligent physician. This means that all single people without dependents and married people with spouses but no dependents would be treated as less than second class citizens. They would be deprived of the basic human right to pass on to their heirs that which is rightfully theirs. Under the bill, the estate and heirs of the injured patient would be robbed, and the

physicians would receive a windfall because of the death of the patients whom they injured. This section would abrogate laws that have been existence in one form or another for over 150 years. These laws, enacted by our forefathers, recognize that when someone dies prematurely because of a party's negligence, his or her estate suffers a loss and, therefore, his or her heirs also suffer a loss. This section ultimately would return money to negligent physicians. It doesn't take much depth of intelligence to apprehend the inherent unfairness in this arrangement.

Where a malpractice victim has established a right to compensation, there is no reason why such compensation should be delayed, and no reason why such victim should be forced to endure further risks of non-recovery. In the final analysis, this section is contrary to current procedure and damage law wherein an award of damages need not be reduced to present value, and medical expenses and/or wage loss are not required to be by periodic payments. See, Pennsylvania Suggested Standard Jury Instructions; Kaczkowski v. Bolubasz, 491 Pa. 461, 421 A.2d 1027 (1980); Link v. Highway Expressway Lines, Inc., 444 PA. 447, 282 A.2d 727 (1971); Messer v. Beighley, 409 Pa.

551, 187 A.2d 168 (1963); and Holtom v. Gibson, 402 Pa. 37, 166 A.2d 4 (1960).

ARBITRATION (Article VI-A)

The proposed legislation contemplates a system of arbitration which would destroy the injured patient's constitutional right to trial by jury. Under the bill, a patient who signed an arbitration agreement at the outset of treatment, would be precluded from bringing a claim in court if malpractice later occurs. Although the statute states that the right to receive care cannot be made dependent upon the patient's agreeing to arbitration, there is no practical means to police such a system, and little question but that patients would surrender valuable rights with little knowledge of the consequences. As with informed consent forms, the reality is that most healthcare providers simply shove a piece of paper in front of the unwary patient and ask him or her to sign it without the patient being advised that very valuable rights are being waived.

The arbitration agreement would eliminate for a minor the right of a trial by jury if a parent signs the arbitration agreement even if the parent himself or

herself is a minor.

Astonishingly enough, the bill does not provide that a person receiving emergency medical care may execute an arbitration agreement only after emergency care is completed. Nor does it take into account that a patient may be too sick to knowingly waive the right to trial by jury.

The bill proposes a complicated system of arbitration, ignoring the fact that such a system previously failed in Pennsylvania because of a lack of qualified arbitrators and inordinate delays, ultimately forcing the Supreme Court to declare it unconstitutional. Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980). In most states where arbitration systems have been implemented, the practical difficulties in administering them as a shadow court system have proven to be substantial, and there is no reason to believe that such a program would succeed in Pennsylvania if it were implemented again.

These are only a few ways in which this bill would further disadvantage the most vulnerable in our

society - those who have been injured by physicians through medical negligence. May I assure you that there is not one comma in this bill that the Pennsylvania Trial Lawyers Association supports because of its devastating effect on the rights of injured patients.

Thank you for your indulgence in permitting me to testify at length about this bill. I shall be pleased to answer any questions.

troubles of another noted financier, Bert Lance," a 1985 story in this newspaper reported. At one point Mr. Riady had offered to buy Mr. Lance's 16% stake in the National Bank of Georgia, but later withdrew, and the shares were eventually sold to Ghaith Pharaon, front man for the corrupt Bank of Credit & Commerce International.

Curiously, Lippo brushed up against the BCCI scandal again in 1991, when its Hong Kong Chinese Bank offered to buy the Hong Kong Bank of Credit & Commerce after regulators seized it. The purchase fell clearly he did have a prior relationship with Lippo, presumably through the Rose Law Firm.

The fact remains, though, that while Mr. Hubbell was negotiating his plea bargain with Mr. Starr, he was being paid by a billionaire pal of the President. In the plea bargain, he admitted to mail fraud and tax evasion and agreed to cooperate in exchange for a reduced-sentence recommendation. When the time for sentencing came, Mr. Starr showed what he thought of Mr. Hubbell's cooperation; there was no recommendation for leniency.

Haven for Lawyers

The American Bar Association and the legal profession in general consistently deny that the litigation explosion is anything to worry about—indeed they even deny that there *is* a litigation explosion. At least that's what they say for outside consumption. When lawyers talk among themselves, it seems, it's a different story.

Pick up the January issue of the ABA Journal and you can read an article called "Protect Assets Before Lawsuit Arises" by business journalist Jon Newberry. The premise of this piece is that lawyers, as much as any other professionals, can easily fall victim to warrantless suits. "Expanding theories of liability, disregard for precedent by judges and juries, and unpredictable damage awards all conspire to promote the pursuit of claims that might not have been considered 10 years ago," Mr. Newberry writes. One lawyer is quoted as saying, "I don't want someone to do to me what I do to people all day in court."

The solution recommended by Mr. Newberry is for lawyers to shelter their money overseas. He particularly recommends the Cook Islands in the South Pacific, whose laws offer "stronger protection and greater control of assets than U.S. laws." Let's see if we understand this: The ABA thinks the U.S. legal system is just wonderful, but its own members think the Cook Islands do a better job of preserving the rule of law? We can't help thinking that rather than moving money offshore, a cheaper scheme to "protect assets" would be to pass tort reform in America. Maybe that way our legal system can someday measure up to the standards of the Cook Islands.

Asides

Global Tax Reform?

About the time tax reformer Steve Forbes was winning Delaware, the newly named economic spokesman for Germany's ruling CDU, Gunnar Uldall, proposed an income-tax rate structure of 8%-18%-28%. For Germany, which boasts top marginal rates of 53% on personal income, 28% is a nearly revolutionary notion. We guess it took the combination of U.S.-side tax fervor and a winter of record unemployment in Germany to wake up Bonn to the growth potential of tax cuts. But it's all too revolutionary for the country's cautious policy makers, who, like their U.S. counterparts, instinctively threw cold water on the proposal.

Carolina Booming

Pat Buchanan is expected to do pretty well in this weekend's South Carolina primary. If so, some other Carolina numbers suggest it won't have much to do with his protectionism. The number of jobs resulting from foreign direct investment doubled there in the 1980s. Today more than 110,000 South Carolinians, 9% of the work force, work at subsidiaries of foreign firms. (Their salaries don't appear to have been driven down by the evil winds of international competition: They earn 21% more a month than the average worker.) Even as Mr. Buchanan took on the world in Carolina, Sweden's SKF announced it would make ball bearings in Aiken, S.C. That's 276 new jobs.

unity. If religious voters are seen driving Mr. Buchanan to a nomination that loses to Bill Clinton, they'll be blamed.

Mr. Reed goes out of his way to cite his own exit polls showing that religious voters weren't Mr. Buchanan's bulwark in Iowa. His data show Pitchfork Pat losing to Mr. Dole, 23% to 22%, among Christian voters who attend church at least four times a month. And while Mr. Reed helped bury Steve Forbes in Iowa, he was planning yesterday to "smoke the peace pipe" with the publisher, who has been looking for common ground with cultural conservatives himself.

Gary Bauer

All of which differs from Mr. Bauer, who thinks Mr. Forbes's refusal to endorse a constitutional abortion ban makes him unacceptable. Moreover, he's reveling in the Buchanan challenge. On the day after Iowa, Mr. Bauer tracked me down in Des Moines to attribute Mr. Buchanan's strength to "the tin ear of a lot of economic conservatives." He says cultural conservatives are turning to the Beltway brawler because other GOP leaders have ignored them. "They want to know, have they been played for suckers?" He thinks the Buchanan run has finally put economic and social conservatives "on an equal footing."

It doesn't matter that this Congress has passed a ban on partial-birth abortions, a family tax credit, or welfare reform that doesn't subsidize illegitimacy. "I concede we had action," he says, "but it was in most cases like pulling teeth." What about Mr. Buchanan's risk to the GOP coalition? "It all depends on how you feel about the current coalition," he replies. He suggests sympathy with the Buchanan gambit of dumping "the Fortune 500" and others in return for grabbing culturally conservative Democrats.

How religious voters fall on this Reed-Bauer divide will determine who wins in South Carolina tomorrow, and maybe how unified the GOP will be in November. Mr. Buchanan is appealing to those who feel neglected, while Mr. Dole is counting on the pragmatists, especially local Christian Coalition leaders. No GOP governor is closer to the Coalition than South Carolina's 39-year-old David Beasley, who is backing the Kansan.

Mr. Dole planned to skip Mr. Reed's "God & Country" rally in Columbia last evening, sending his wife, Elizabeth, instead. Mr. Reed thought that would be a mistake. The schedule was changed.

Mr. Reed believes that if Bob Dole does win tomorrow, the Buchanan rocket will have returned to earth, while Mr. Forbes will be too weak in the South to overtake the Kansan. If he's right, he'll have gone a long way to vindicating his strategy of changing the party by assimilating into it. Mr. Dole will owe him, and religious voters, big time.

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