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## Accountable Managed Care: Should We Be Careful What We Wish For?

David A. Hyman

*University of Maryland School of Law*

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## ACCOUNTABLE MANAGED CARE: SHOULD WE BE CAREFUL WHAT WE WISH FOR?

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David A. Hyman\*

*Managed care is exceedingly unpopular of late. Many people believe that the problem is managed care organizations (MCOs) are unaccountable. Indeed, for many people, the creation of tort-based accountability for MCOs is the touchstone for assessing legislative "reform." The case for tort-based accountability is actually quite complex, and the merits of tort-based accountability cannot be resolved with sound bites and bad anecdotes. Tort-based accountability has both costs and benefits, and little attention has been paid to the extent to which alternatives to tort-based accountability are found in existing institutional arrangements.*

*This Article systematically considers the extent to which alternatives to the tort system have become widely accepted parts of the commercial landscape, and the trade-offs associated with the use of the tort system to deliver accountability. The Article concludes with ten suggestions for regulating managed care if the goal is actually to improve the care provided.*

It is very much as if one were to write an opinion which implied that everyone had a natural law right to a Rolls Royce and that an action in warranty would lie against all other automobile manufacturers if they provided anything less elegant. Many damage awards might follow, but eventually all other automobile manufacturers would be out of business, notwithstanding that very few Rolls Royces had come into the hands of those whom the opinion was intended to help.<sup>1</sup>

### INTRODUCTION

Managed care organizations (MCOs) may provide health care services to the majority of insured Americans, but public acclaim has lagged well behind market share. A flood of horror stories has solidly implanted the perception that life under managed care is nasty, brutish, and short. Although the specific complaints vary greatly depending on which group is complaining, the dominant

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\* Professor, University of Maryland School of Law. B.A. 1983, University of Chicago; J.D. 1989, University of Chicago Law School; M.D. 1991, University of Chicago. Bill Brewbaker and Don Gifford provided helpful comments. As always, errors of omission and commission are mine alone.

1. Teller v. McCoy, 253 S.E.2d 114, 133 (W. Va. 1978).

theme is that MCOs are not accountable for their actions. Unaccountability has become the sound bite for everything that is supposedly wrong with managed care, and accountability is the touchstone for assessing reforms. Little attention has been given to the costs and benefits of accountability as such, and the extent to which accountability in all its various manifestations is found in existing institutional arrangements.

Part I describes the common perception of an “accountability crisis” in managed care, and outlines the legal framework within which MCOs are regulated. Part II offers some observations on accountability, including the extent to which alternatives to the tort system have become widely accepted parts of the commercial landscape, and the trade-offs associated with the use of the tort system to deliver accountability. Part III considers what implied warranties of habitability, the bar admissions process, and shrink-wrap software licenses can teach us about accountability. The Article concludes with some suggestions for regulating managed care if our goal is to improve the status quo.

## I. THE ACCOUNTABILITY CRISIS

The common consensus about managed care is exceedingly negative. Newspaper columnists, providers, legislators and judges have formed a Greek chorus condemning the misdeeds of MCOs.<sup>2</sup> The dominant theme of these commentaries is that managed care is not accountable, and that legislation is necessary to redress that problem. The necessary implication is that the absence of accountability is an unmitigated evil. Indeed, the purported absence of accountability has become the mantra of opponents of managed care, justifying a flood of proposed “reforms” at the state and federal level, bearing names such as the Promoting Responsible Managed Care Act of 1999,<sup>3</sup> the Patient Protection Act of 1999,<sup>4</sup> the Access to Quality Care Act of 1999,<sup>5</sup> the Patients’ Bill of Rights Act of 1999 (of which there are four competing versions),<sup>6</sup> and the like.<sup>7</sup>

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2. See David A. Hyman, *Consumer Protection in a Managed Care World: Should Consumers Call 911?*, 43 VILL. L. REV. 409, 409–18 (1998) [hereinafter Hyman, *Call 911*].

3. S. 374, 106th Cong. (1999).

4. H.R. 448, 106th Cong. (1999).

5. H.R. 216, 106th Cong. (1999).

6. S. 6, 106th Cong. (1999); S. 240, 106th Cong. (1999); S. 300, 106th Cong. (1999); S. 326, 106th Cong. (1999).

7. See Hyman, *Call 911*, *supra* note 2, at 419 (collecting titles of proposed bills).

So is managed care accountable or not? To some extent, the answer depends on what one means by "accountable." The American Association of Health Plans has created a wonderful eighteen by twenty-four inch seven-color chart which demonstrates (with complexity worthy of a Rube Goldberg drawing) all of the different entities with regulatory authority over MCOs and those with whom the MCOs contract.<sup>8</sup> In addition, MCOs must come to terms with a host of other parties—including vendors, purchasers, and stockholders. Thus, if *unaccountable* is intended to imply that MCOs do not have to answer to anyone, the claim is false from both a positive and normative perspective.

There is, however, an important sense in which MCOs are unaccountable, if one treats susceptibility to state regulation and tort actions as a synonym for accountability. In order to understand the issue, it is necessary to briefly review two federal statutes: the McCarran-Ferguson Act (MFA),<sup>9</sup> and the Employee Retirement Income Security Act (ERISA).<sup>10</sup> The MFA delegates primary authority to the states to regulate insurance.<sup>11</sup> The states have enthusiastically taken up the challenge and aggressively regulated the terms on which health insurance may be offered. Thus, insurers are required to cover certain services, and to provide specified mechanisms for appeals and dispute resolution and the like.<sup>12</sup> State courts have also developed and deployed the doctrine of bad faith refusal to pay in order to encourage insurers to deliver promised services.<sup>13</sup> This doctrine has allowed some plaintiffs to secure eye-popping punitive damage verdicts against insurers and MCOs in cases where these entities have refused to cover what they have determined are experimental or unnecessary medical treatments.<sup>14</sup>

For the 150 million Americans who secure their health care coverage through an employee benefit plan, and receive a substantial tax subsidy for doing so, ERISA carves out of the MFA two large

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8. See American Association of Health Plans, *Chart: Summary of Health Plan Regulation* (visited Sept. 9, 1999) <<http://www.aahp.org/menus/index.cfm?CFID=155914&CFTOKEN=41060903>>.

9. 15 U.S.C. § 1012 (1945).

10. 29 U.S.C. §§ 1001-1461 (1974).

11. See ROBERT JERRY, UNDERSTANDING INSURANCE LAW 58 (1996) ("In essence, the McCarran-Ferguson Act gave supremacy to state regulation of the business of insurance to the extent the states chose to occupy the regulatory field.").

12. See *id.* at 93-94, 437-39.

13. See *id.* at 151-62.

14. See Hyman, *Call 911*, *supra* note 2, at 411 n.8. Recently, a jury imposed punitive damages of \$116 million for Aetna's refusal to cover a bone marrow transplant for a patient with stomach cancer. See Nancy Ann Jeffrey & Ron Winslow, *Aetna Told to Pay \$116 Million Damages*, WALL ST. J., Jan. 21, 1999, at A4.

exceptions.<sup>15</sup> State laws that apply to employee benefit plans are subject to a broad preemption provision, although these laws can be “saved” from preemption.<sup>16</sup> ERISA also specifies a limited array of options for enforcing its provisions. In general, lawsuits against an employee benefit plan are limited to the value of the denied services, and certain claims are simply preempted.<sup>17</sup>

Thus, the answer to the question “is managed care unaccountable?” depends a great deal on what one means by accountability. If one views susceptibility to the tort system as equivalent to accountability, then large portions of the managed care market are largely unaccountable. If one considers susceptibility to state regulation as the equivalent of accountability, the market falls closer to the accountability end of the spectrum, but still falls well short of

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15. See Employee Benefit Research Institute, *Preliminary EBRI HCS Findings: EBRI Survey Examines Americans' Confidence in the Health Care System* (visited Sept. 13, 1999) <<http://www.ebri.org/prrel/pr493.htm>> (on file with the *University of Michigan Journal of Law Reform*) (“Two-thirds of all those under age 65, amounting to 151.7 million Americans, get their health coverage through depend [sic] on employment-based health coverage.”). On the tax subsidy for such coverage, see I.R.C. § 106 (1994) (“Gross income of an employee does not include employer-provided coverage under an accident or health plan.”). The value of this subsidy is estimated at \$76.2 billion per year in fiscal year 1999. See David A. Hyman, *Drive-Through Deliveries: Is “Consumer Protection” Just What the Doctor Ordered?*, 78 N.C. L. REV. 5, 11 n.28 (1999) [hereinafter Hyman, *Drive-Through Deliveries*].

16. See generally *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85 (1983); Wendy K. Mariner, *State Regulation of Managed Care and the Employee Retirement Income Security Act*, 335 NEW ENG. J. MED. 1986 (1996). The extent of this “savings” is quite restricted for the 50 million Americans in self-funded employee benefit plans, although the boundaries remain in dispute. Compare *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (finding state mental health care mandate applicable only to non-self-funded employee benefit plans) with *Prudential Ins. Co. v. National Park Med. Ctr.*, 154 F.3d 812 (8th Cir. 1998) (finding preemption of Arkansas Patient Protection Act, and noting “[t]he precise scope of ERISA preemption of state law has left courts, including the Supreme Court, deeply troubled”), *Washington Physicians Servs. Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998) (finding no preemption of Washington Alternative Provider Statute), and *Texas Pharmacy Ass'n v. Prudential Ins. Co.*, 105 F.3d 1035, 1038 (5th Cir. 1997) (finding preemption of Texas any-willing-provider law).

17. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). Potential state tort actions that may be preempted include vicarious liability for medical malpractice, direct liability for utilization review, negligent selection and credentialing of providers, and the use of inappropriate incentive programs to contain costs. See Peter D. Jacobson & Scott D. Pomfret, *Form, Function and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence*, 35 HOUS. L. REV. 985, 1060–70 (1998). However, the precise boundaries of preemption remain a matter of hot dispute; some courts have attempted to employ a quality/quantity distinction to allow certain suits to proceed. See, e.g., *Dukes v. U.S. Healthcare*, 57 F.3d 350, 356 (3d Cir. 1995) (finding no preemption of state common-law claims); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 52–53 (D. Mass. 1997) (finding preemption of state common-law claims); Stuart Auerbach, *Law Guarding HMOs from Suit Challenged; Patients Find Doctors Easier to Sue*, WASH. POST, Dec. 17, 1996, at Z8. For an interesting article arguing that MCOs should be deemed to offer an implied warranty of quality to subscribers, see William S. Brewbaker, *Medical Malpractice and Managed Care Organizations: The Implied Warranty of Quality*, L. & CONTEMP. PROBS., Winter & Spring 1997, at 117.

full accountability.<sup>18</sup> Part II explores whether this deviation from full tort-based accountability is consistent with existing institutional arrangements in other sectors of the economy.

## II. ACCOUNTABILITY: WHO NEEDS IT?

Efforts to bring tort-based accountability to managed care have been positioned as a motherhood and apple-pie campaign, but the issue is actually quite complex. Part II explores the practical and theoretical issues raised by accountability, and the implications of treating the tort system as necessary and sufficient to deliver the same. The section is organized around ten reasons why tort-based accountability is overrated.

At the outset, it is important that the case against tort-based accountability for managed care not be overstated. Even if one does not believe that health care is so "special" that government should provide it (or at least pay for it), it certainly does not follow that the health care market is perfectly competitive, or that it provides services with the appropriate mix of cost and quality, let alone does so in a fashion that is consumer-friendly.<sup>19</sup> Indeed, health care is everyone's favorite example of market failure in action. Aggregation of coverage at the employer level may have helped solve one set of problems (bounded rationality, adverse selection), but it has clearly created others (portability, constrained coverage choice, and perceived unresponsiveness).<sup>20</sup> No less a market-oriented

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18. The combination of ERISA and the MFA substantially restricts the ability of state legislatures to regulate the health care coverage offered to citizens of the state, and those who receive such care within the state's borders. For example, an individual could live in state A, secure insurance through his job in state B, and receive health care in state C, but only state B's laws would govern the insurance contract—unless, of course, coverage was secured from a self-funded employee benefit plan, in which case none of the states would have regulatory authority. The net result is that state insurance departments regulate about one-third of the health insurance coverage in an average state. See Mariner, *supra* note 16, at 1987. Even when state regulation could encompass a particular population, it does not follow that it will—especially if the costs of the regulation are on-budget. See Hyman, *Drive-Through Deliveries*, *supra* note 15, at 26 (noting that a majority of states excluded Medicaid beneficiaries and state employees from scope of drive-through delivery statutes).

19. With regard to quality, it is clear that American medicine is marked by a considerable degree of variation in quality without regard to cost. See Hyman, *Drive-Through Deliveries*, *supra* note 15, at 26. In like fashion, the quality of service leaves much to be desired. See John W. Kenagy et al., *Service Quality in Health Care*, 281 JAMA 661 (1999) (analyzing health care delivery from a service quality point of view, and finding it woefully inadequate).

20. See David A. Hyman, *Regulating Managed Care: What's Wrong with a Patient Bill of Rights*, 73 S. CAL. L. REV. (forthcoming 2000) [hereinafter Hyman, *What's Wrong with a Patient Bill of Rights*].

authority than Professor Clark Havighurst has declared that the efforts of tort lawyers should be harnessed to encourage MCOs to step up to the plate and take responsibility for the quality of care provided by those with whom they contract.<sup>21</sup> A little tort liability might well be helpful in focusing everyone's attention on what patients actually desire.

However, the issue cannot be resolved at the level of a blanket statement that accountability/tort liability is good, and the absence of accountability/tort liability is evil. A balanced assessment must consider both the costs and benefits of accountability, and the extent to which alternatives to the tort system provide a different form of accountability at lower cost. Unfortunately, the debate over accountability/tort liability has become completely polarized, with each side insisting that its preferred approach is absolutely required to prevent low quality medical care on the one hand, and the complete destruction of managed care on the other.<sup>22</sup> This Article charts a different course by exploring the implications of viewing the tort system as a synonym for accountability when alternative institutional arrangements are available.

Let me start with a home-spun (pun intended) example. I buy lots of clothing from Lands' End. As a purchaser of goods, I have certain legal rights which I can enforce with a lawsuit. In my dealings with Lands' End, I don't attach any importance to these legal rights, and I suspect neither does Lands' End. Instead, Lands' End has decided the best way to get me to buy things from them is to offer me an ironclad guarantee. If I am ever unhappy with any Lands' End product for any reason or no reason, I just send it back, and they either refund my money or send me a replacement, no questions asked.<sup>23</sup>

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21. See Clark C. Havighurst, *Making Health Plans Accountable for the Quality of Care*, 31 GA. L. REV. 587, 589 (1997).

22. See Carol Marie Cropper, *In Texas, a Laboratory Test on the Effects of Suing H.M.O.'s*, N.Y. TIMES, SEPT. 13, 1998, § 3, at 3 ("To hear lobbyists and lawmakers in Washington tell it, giving patients the right to sue insurers that refuse to approve medical treatment would be either the death of managed care or the salvation of patients.").

23. The text of this guarantee reads:

Guaranteed. Period.

The world is full of guarantees, no two alike. As a rule, the more words they contain, the more their protection is limited. The Lands' End guarantee has always been an unconditional one. It reads: "If you are not completely satisfied with any item you buy from us, at any time during your use of it, return it and we will refund your full purchase price."

The guarantee far exceeds the rights provided to me as a purchaser of goods, and I need not resort to the legal system to vindicate my interests. To be sure, both Lands' End and I are bargaining in the shadow of the law, but both *ex ante* and *ex post*, I rely on the reputation of Lands' End for fair dealing far more than on what I anticipate the results would be if I retained counsel and proceeded to court.<sup>24</sup> Lawyers and judges may find it comforting to believe that legal rights are both necessary and sufficient to ensure accountability, but that perspective is a self-aggrandizing fantasy; for both consumers and vendors, alternative institutional arrangements are often a far more cost-effective way of accomplishing their mutual objectives, including (but by no means limited to) the appropriate quantum of accountability.<sup>25</sup>

Second, the absence of legal accountability does not necessarily mean that one party will take advantage of the other, or otherwise behave inappropriately, no matter how one chooses to define those terms. In any continuing relationship involving mutual gain, the parties are likely to act cooperatively, and prefer informal norms to whatever the law has to say about the matter. The fact that there is law on the subject does not mean the "legal" outcome is necessarily better, let alone optimal. As Grant Gilmore noted, "[i]n Heaven there will be no law, and the lion will lie down with the lamb . . . . In Hell there will be nothing but law, and due process will be meticulously observed."<sup>26</sup>

Indeed, there are many examples of markets in which the parties routinely go well beyond what the law requires, to the mutual benefit of all. Consider the market for real estate leaseholds as outlined by Richard Epstein:

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We mean every word of it. Whatever. Whenever. Always. But to make sure this is perfectly clear, we've decided to simplify it further.

GUARANTEED. PERIOD.®

Lands' End, *Guaranteed. Period.* (visited Sept. 13, 1999) <<http://www.landsend.com/spawn.cgi?sid=0947538557620&target=EDITGUARXXXX&refer=NODECOMP0795&mode=GRAPHIC>> (on file with the *University of Michigan Journal of Law Reform*).

24. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (discussing "the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom").

25. Whether reputation can have the same impact in a market where individual choice and exit are constrained is a more complex question. It is important to recognize, however, that even if reputation is a less significant impediment to opportunistic behavior in such a market, a different solution to the accountability problem could well disrupt the equilibrium solution to different and more severe problems, such as cost and adverse selection.

26. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).



[T]he pattern of legal opposition and social compliance is a common one, and there are good reasons for it. . . . When my wife and I moved to Chicago in 1972 we rented a two-bedroom apartment in a new high-rise that was then only partly rented. As a young law professor I did something that I might not do today: I read the lease. In doing so, I discovered that the landlord assumed no obligations for repairs of damage that took place inside the units. But I also noted that the building had a full-time maintenance staff at the beck and call of the tenants. I asked the rental agent to explain the difference between the tough talk in the lease and the prompt service in the building—even then I knew it was better than the reverse situation of a promise of service with no maintenance staff.

Her answer made perfectly good sense. The building owners knew that reputation matters in attracting and keeping tenants in a building, but they drafted the lease such that they could have control, without judicial intervention, of any bad-apple tenant whom they distrusted. Should they have to demonstrate to an independent third party that they were in compliance with some “for cause” norm for withholding repair services, they could easily fail. The private knowledge that they had about the behavior of tenants, the conditions of the units, and the source of the damage easily could be lost in translation, and they would lose control over their own operations. Furthermore, if good tenants left because bad tenants stayed, then the whole building could fall into disarray. Knowing that the landlord had the tools to protect us from neighboring tenants who might otherwise make life unpleasant, my wife and I eagerly signed the lease, and the two years we lived there repaid our confidence. The legal risk that the landlord might deny its obligation to repair never came to pass. . . .<sup>27</sup>

As a long-time lessee, and short-time lessor of property in Hyde Park, I can confirm that this pattern continued well into the 1990s. Indeed, the pattern of “tough talk” in the lease and “prompt maintenance” in the building appears to prevail (and work without difficulty) in most locations, unless rent control and other forms of

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27. Richard A. Epstein, *Why Is This Man a Moderate?*, 94 MICH. L. REV. 1758, 1761–62 (1996).

housing regulation have disturbed the equilibrium of mutual advantage through exchange.<sup>28</sup>

Third, if legal accountability through the tort system is such a wonderful default term, how does one explain the widespread enthusiasm for limiting or eliminating access to the tort system through "tort reform?" Many states have passed "tort reform" legislation.<sup>29</sup> Congress recently enacted laws restricting tort liability for biomaterials manufacturers and volunteers.<sup>30</sup> These steps would not be necessary if legislators and the public had confidence in the performance of the tort system.

More significantly, those most directly affected by the tort system have concluded it is in their best interests to contract out of it. A wide variety of firms are embracing mandatory arbitration clauses in their consumer contracts,<sup>31</sup> and pledging to pursue mediation for all commercial disputes.<sup>32</sup> Auto choice and

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28. See Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 949 (1991) ("Rent control . . . tends to lock landlords and tenants into continuing uncooperative relationships . . . . By keeping mutual antagonists in the same cage, rent control breeds nastiness in landlord-tenant interactions."); John Tierney, *At the Intersection of Supply and Demand*, N.Y. TIMES, May 4, 1997, § 6 (Magazine), at 42 (analyzing the destructive consequences of rent control and housing regulation on landlord-tenant relationships).

29. See American Tort Reform Association, *1999 State Tort Reform Enactments* (last modified Nov. 17, 1999) <<http://www.atra.org/enact/99june.htm>> (on file with the *University of Michigan Journal of Law Reform*) (listing tort reform legislation passed by 13 states in the first six months of 1999).

30. See, e.g., Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1602-1606 (1999); Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501-14505 (1999).

31. See Stephanie Armour, *Consumers in Bind?*, USA TODAY, Nov. 27, 1998, at B6 ("Some consumers with disputes are finding they may be barred from taking claims to court. Instead, they are required to take complaints to mandatory arbitration. The clause is cropping up in agreements drafted by banks, brokers, health plans, insurance providers and a host of other firms."); Christine Dugas, *Arbitration Might Be Only Choice*, USA TODAY, Aug. 27, 1999, at B3 (noting increasing use of arbitration clauses by banks and credit card issuers). Indeed, one of my students recently told me that his telephone bill included an arbitration clause!

32. See Margaret A. Jacobs, *Industry Giants Join Movement to Mediate*, WALL ST. J., July 21, 1997, at B1. The article notes:

While the vow to mediate only applies to disputes with other companies that have signed on, the agreements cover everything from false advertising and trademark claims to suits to prevent executives from joining a competitor. The signers include rivals in the nonprescription-drug and insurance industries, as well as food makers, banks and chemical companies. Under a separate agreement, major franchisers have committed to mediating disputes with their franchisees. And similar pacts are being negotiated in aviation, telecommunications and computers.

alternative dispute resolution have attracted the interest of everyone except trial lawyers.<sup>33</sup>

My personal experiences as a consumer confirm these trends. When I go skiing, the lift ticket contains a near-absolute waiver of liability, coupled with choice of forum and choice of law clauses forcing me to bring suit on the ski area's home turf.<sup>34</sup> In order to rent ski equipment, I have to sign away all of my legal rights.<sup>35</sup> If my

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33. See Peter Passell, *A Call For 'Auto Choice' and Lower Premiums*, N.Y. TIMES, Aug. 30, 1998, § 3, at 1 (noting opposition of trial lawyers and some self-styled consumer advocates to auto choice "which stands for a set of legal changes based on the idea of cutting premiums by limiting the right to sue for damages").

34. The peel off wrapper on the pass warns in bold print and all capital letters as follows: "On this pass, *please read* the notice of inherent risks jurisdiction limitation and notice of equipment on the slopes and unmarked obstacles. Ski in control." Ski Lift Ticket (on file with the *University of Michigan Journal of Law Reform*). Both the pass and the area map contain the following legend:

Notice—Inherent Risks of Skiing Act

No skier shall recover from a ski area operator for injuries resulting from any of the inherent risks of skiing which means those dangers or conditions which are an integral part of skiing, including but not limited to:

1. Changing weather conditions
2. Variations or steepness in terrain
3. Snow or ice conditions
4. Surface or subsurface conditions such as bare spots, forest growth, rocks, and stumps
5. Impact with lift towers and other structures and their components
6. Collisions with other skiers
7. Failure to ski within your ability

If you cannot accept the inherent risks of skiing, please do not ski at this area.

By using this pass I agree that any litigation, arbitration or mediation that I or my representative or family bring against Alta Ski Lifts Company shall be brought in Salt Lake County, Utah and that the laws of the State of Utah shall be the applicable laws.

Be aware that snowmaking equipment, snowmobiles and snowcats may be on the slopes at any time. Always ski in control! Unmarked obstacles may exist or present themselves at any time.

*Id.*

35. On the front of the rental receipt, the following text appears in bold red letters: "I HAVE READ THE RENTAL AGREEMENT ON THE BACK OF THIS FORM RELEASING THE SHOP FROM LIABILITY. I VOLUNTARILY AGREE TO THE TERMS OF THAT STATEMENT." Ski Rental Agreement (on file with the *University of Michigan Journal of Law Reform*). On the back, the following appears in smaller type:

RENTAL AGREEMENT  
PLEASE READ CAREFULLY BEFORE SIGNING

children wish to participate in an organized sport, I must sign a detailed waiver and release.<sup>36</sup> The local batting cages are posted

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1. I accept for use as is the equipment listed on this form, and accept full responsibility for the care of the equipment while it is in my possession.
  2. I will be responsible for the replacement at full retail value of any equipment rented under this form, but not returned to the shop.
  3. I agree to return all rental equipment by the agreed date in clean condition to avoid any additional charges.
  4. I have received instruction on the use of my equipment and fully understand its use and function.
  5. I have made no misrepresentations to the ski shop in regard to my height, weight, age or skier type.
  6. I verify that the visual indicators on my bindings correspond to the settings as shown on this rental agreement form.
  7. I agree to hold harmless and indemnify the ski shop and its owners, agents and employees, as well as the equipment manufacturers and distributors for any loss or damage, including any that results from claims for personal injury, death or property damage related to the use of the equipment, except reasonable wear and tear.
  8. I understand that there are inherent and other risks involved in the sport for which this equipment is to be used, snow skiing, that injuries are a common and ordinary occurrence of the sport, and I freely and voluntarily assume those risks.
  9. I understand that a ski-binding-boot system will not release at all times or under all circumstances where release may prevent injury or death, nor is it possible to predict every situation in which it will release, and is, therefore, no guarantee of my safety.
  10. I hereby release from any legal liability the ski shop and its owners, agents and employees, as well as the equipment manufacturers and distributors of this equipment from any and all liability for damage and injury or death to myself or to any person or property resulting from the selection, installation, maintenance, adjustment or use of this equipment, and for any claim based upon negligence, breach of warranty, contract or other legal theory, accepting myself the full responsibility for any and all such damage, injury or death which may result.
  11. This agreement is governed by the applicable law of the state or province. If any part of this agreement is determined to be unenforceable, all other parts shall be given full force and effect.

*Id.*

36. While I was writing this Article, my son asked if he could join a recreational lacrosse league. The waiver and release states:

I am fully aware of and appreciate the risks, including the risk of catastrophic injury, paralysis, and even death, as well as other damages and losses associated with participation in a lacrosse event. I further agree on behalf of myself, my heirs, and personal representatives that US Lacrosse, the host organization, and sponsors of any US Lacrosse sanctioned event, along with the coaches, volunteers, employees, agents, officers and directors of these organizations, shall not be liable for any injury, loss of life or other loss or damage occurring as a result of my participation in the event.

with a large sign warning of its perils.<sup>37</sup> The roller rink contains a large sign warning of the perils of falling and collisions, and disclaiming responsibility for the same.<sup>38</sup>

What of the home of American justice, the Supreme Court, whose facade bears the legend "Equal Justice Under Law"? Visitors entering the building must deposit their belongings in a locker where a prominently posted sign warns that the Court assumes no liability for the loss of anything that is placed in the locker.<sup>39</sup>

If you build a better mousetrap, people will generally beat a path to your door. What does the reluctance of well-informed market participants (including, ironically enough, the Justices of the Supreme Court) to subject themselves to the tort system say about the mousetrap that lawyers and judges have built? Claims about the dictates of justice may sound inspirational,<sup>40</sup> but they will not reverse the reluctance of those most involved to subject themselves to the hazards of litigation—particularly when a single jury, inclined to "send a message," can put them out of business.<sup>41</sup>

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Lacrosse Waiver (on file with the *University of Michigan Journal of Law Reform*). If participants are under 18, their parent or guardian must "verify by my signature below that I fully understand and accept each of the above conditions for permitting my child to participate in any US Lacrosse sanctioned event." *Id.*

37. The sign reads as follows: "WARNING!! This Amusement Game involves a degree of skill and of risk. All participants or spectators assume full responsibility for any injuries incurred. The Management." For more information about this sign, please contact the author.

38. The sign reads as follows:

Falling is a normal part of roller skating. Because of the normal risk of maintaining balance on skates and the probability of occasional contact between skaters accidents can and do happen. You must voluntarily assume the risks of injury when you skate. By purchasing an admission or skate rental ticket, customer acknowledges and accepts this risk. Management is not responsible for accidents. We do not carry insurance covering injury to skaters.

For more information about this sign, please contact the author.

39. The sign reads as follows: "Lockers are provided for your convenience. The Court assumes no liability for loss." For more information about this sign, please contact the author.

40. See, e.g., *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 52–53 (D. Mass. 1997) ("Consider just one of her claims—breach of contract. This cause of action . . . predates Magna Carta. It is the very bedrock of our notion of individual autonomy and property rights. . . . Our entire capitalist structure depends on it.").

41. To be sure, one's assessment of the tort system should not be based on anecdotes, whether they are offered by its opponents or its enthusiasts. See David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 *IND. L. J.* 797, 804–05 (1998) (juxtaposing anecdotal claims made by opponents and supporters of the tort system). Of course, that goes for mandatory arbitration as well. See Marc A. Rodwin, *Backlash as Prelude to Managing Managed Care*, 24 *J. HEALTH POL. POL'Y & L.* 1115, 1118 (1999) ("Consider [*Engalla v. Permanente Medical Group*,] a case that reveals a systemic problem.").

Fourth, when it comes to managed care, there is no evidence indicating that the absence of legal accountability has had any effect on the quality or value of the medical services that are provided.<sup>42</sup> Indeed, given past performance, should we really expect the tort system to cost-effectively encourage high quality managed care and penalize low-quality managed care? It is far more likely that the tort system will perform erratically, sometimes blessing low-quality managed care, and sometimes penalizing high quality managed care, while simultaneously imposing a significant loading cost on all managed care transactions and under-compensating those who are most badly injured.<sup>43</sup> Physicians have consistently derided the ability of jurors to resolve issues of medical negligence, and argued that the tort system provides such a noisy signal with regard to quality of care at such a high cost that it is worse than nothing. Why have doctors suddenly become so enthusiastic about using the tort system to bring accountability to managed care? Is it just that misery loves company?

Fifth, the imposition of legal accountability can have a profound impact on the underlying institutional arrangements—with results not necessarily anticipated by those lobbying for such protections. At present, the simple phrase “managed care” encompasses a wide array of entities employing a diverse set of incentive structures. The financing and delivery of care can be integrated to a greater or lesser extent; the corporate structure can be non-profit or for-profit; providers can be employees of the managed care organization or independent contractors; and providers can be selected and compensated and the risks shared in a wide variety of ways. The predictable adaptive response by a health plan to the imposition of legal accountability for quality of care is to sharply constrain the number of providers a patient can see, screen them more carefully, and micro manage their work so as to more closely supervise the care individual patients receive.<sup>44</sup> It is hard to believe that patients and doctors will be enthusiastic about that result, when the pressure for “consumer protection” derives from the erosion of free choice regarding such matters.<sup>45</sup>

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42. See Hyman, *What's Wrong with a Patient Bill of Rights*, *supra* note 20.

43. See PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE* 75 (1993) (“Malpractice litigation appears, then, to be sending as confusing a signal as would our traffic laws if the police regularly gave out more tickets to drivers who go through green lights than to those who go through red lights.”).

44. See Michael Weinstein, *In Health Care, Be Careful What You Wish For*, *N.Y. TIMES*, May 31, 1998, § 4, at 1.

45. To be sure, there are compelling arguments that what is actually going on is provider protection. See Hyman, *Call 911*, *supra* note 2, at 425 n.63.

Sixth, it is useful to consider the institutional arrangements and practices which prevail in government-operated health care programs. Congress has quite deliberately insulated broad aspects of the Medicare program from judicial review.<sup>46</sup> In a recent case, the Department of Justice unflinchingly defended the Secretary of Health & Human Services' handling of the Medicare managed care program, even though the district court found that the Secretary had failed to "implement and enforce effective notice, hearing, and appeals procedures for HMO service denials."<sup>47</sup> The district court entered an injunction which was affirmed by the Ninth Circuit, but the Supreme Court vacated, and instructed the Ninth Circuit to reconsider its judgment in light of a more recent Supreme Court decision holding that a private actor administering an insurance plan whose existence was mandated by the state was not subject to the due process requirements which would bind the government if it ran the program itself.<sup>48</sup> If these deviations from full accountability and effective notice, hearing, and appeals procedures are good enough for governmental health plans, why are they not good enough for the private market?

Seventh, if tort-based accountability is such a wonderful thing, why have lawyers been completely unwilling to insist on it among their own ranks? Only one state requires lawyers to purchase malpractice insurance.<sup>49</sup> The best available figures indicate that as many as fifty-five percent of lawyers have chosen to "go bare," with the percentage much higher among solo practitioners and small firms.<sup>50</sup> Absent such insurance, a malpractice case against a lawyer will simply not be brought.<sup>51</sup>

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46. See 42 U.S.C. §§ 405(h), 1395hh(a)(2) (1994).

47. *Shalala v. Grijalva*, 946 F. Supp. 747, 747 (D. Az. 1996), *aff'd*, 152 F.3d 1115, 1120 (9th Cir. 1998), *vacated and remanded for further consideration*, 119 S. Ct. 1573 (1999). Indeed, the plaintiffs alleged the Secretary had abdicated "her responsibility to monitor HMOs and to ensure that HMOs provide Medicare covered benefits." *Id.*

48. See *Grijalva v. Shalala*, 119 S. Ct. 1573 (1999) (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999)). In its order, the Court also instructed the Ninth Circuit to consider the significance of Sections 4001 and 4002 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 275-330, which directed the Secretary of Health and Human Services to issue certain regulations. See *id.*

49. See David A. Hyman, *Professional Responsibility, Legal Malpractice and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353, 370 (1997) ("Although reformers have frequently proposed that state bars should mandate the purchase of malpractice insurance, only Oregon has succeeded in imposing this requirement.").

50. See *id.* at 369-70 ("Although estimates vary somewhat, the conventional wisdom is that between 25%-55% of lawyers have chosen to 'go bare.' These averages mask a distinct distributional skew: lawyers in solo practice and small firms are overwhelmingly uninsured.").

51. See Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2613 (1996) ("[S]olo practitioners, earning only \$35,730 a year, who are

What about accountability among law professors? The last time I checked, grades were effectively unreviewable, whether through the tort system or otherwise. Although some students seem to believe that grades may be appealed to the associate dean, that is, of course, a fallacy.<sup>52</sup> None of the legal scholars who have written so eloquently about the need for bringing accountability to managed care through the tort system have volunteered the same solution for dealing with their personal lack of accountability in the assignment of grades.

Why limit ourselves to grades? How is the institution of tenure consistent with the desire for accountability when it comes to teaching and research?<sup>53</sup> In the view of many, tenure is *the* major impediment to faculty accountability.<sup>54</sup> Attempts to create such accountability through post-tenure review have been opposed by tenured faculty and the American Association of University Professors.<sup>55</sup> Indeed, the efforts of the University of Minnesota to unilaterally impose post-tenure review triggered a unionization drive.<sup>56</sup> Maybe we should ladle some sauce on the lawyer and law professor-accountability goose at the same time we are basting the MCO-accountability gander.<sup>57</sup>

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probably supporting families, living from receivable to receivable, knowing enough about creditor and bankruptcy laws to shelter assets, quickly recognize that for the same reason that they would not sue an uninsured motorist, plaintiffs' legal malpractice lawyers will not sue them if they are uninsured.").

52. See Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L.Q. 171, 175-76 (1998).

53. Those who wonder how tenure is viewed by those who do not have it should consider the card game, *Survival of the Witless*, which defines tenure as "'the key to fame, wealth, happiness and most importantly, to never having to put in a single day's work again.'" Denise K. Magner, *Play Your Cards Right and You, Too, Can Earn Tenure*, CHRON. HIGHER EDUC., Sept. 11, 1998, at A16. To secure tenure, the candidate must draw cards showing they have published a book and garnered sufficient status to insure a favorable review committee vote. See *id.* However, "[d]rawing the 'Lousy Teaching' card . . . has no effect on a tenure bid." *Id.*

54. See, e.g., Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 810 (1996) ("Many schools have already faced productivity assessments, hourly time sheets, cries for abolition of tenure, imposition of post-tenure review, and demands for accountability."); David Leonhardt, *Tenure: An Idea Whose Time Has Gone*, BUS. WK., Oct. 21, 1996, at 130 ("Many see tenure . . . as an outdated system that drives up costs and lessens accountability.").

55. See Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL'Y REV. 387, 388-91 (1998).

56. See Fred. L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369, 371 (1997) (describing the formation of a union organization committee as one consequence of the proposed changes in tenure regulations, which included post-tenure review); Rene Sanchez, *Minnesota Faculty, Regents Put Tenure to the Test*, WASH. POST, Nov. 9, 1996, at A1.

57. Those who demur from this suggestion should explain why they are not responding in the manner predicted by Professor Herbert Wechsler in a spectacularly mixed



What about the tenure protections accorded federal judges? Article III of the Constitution quite deliberately creates a structure in which traditional forms of accountability are completely absent.<sup>58</sup> Predictably enough, some judges have behaved badly—although with extraordinarily rare exceptions, not badly enough to justify their removal from the bench.<sup>59</sup> As yet, I have not heard any proposals to bring accountability to the federal judiciary by allowing unhappy litigants to sue their judge. Indeed, engaging in such conduct is a good way to be labeled a vexatious litigant, and limited in one's ability to file further lawsuits.<sup>60</sup> As long as we are discussing accountability, let us not forget diplomatic immunity, sovereign immunity, the limitations on tort liability created by the First and Eleventh Amendments to the Constitution, and the limited to nonexistent circumstances in which an ordinary citizen can sue a state or federal employee for failings in their official capacity. Does anyone really believe the country would be better off if we scrapped these limitations on the tort system?<sup>61</sup>

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metaphor: "What's sauce for the goose depends on whose ox is being gored." Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, 145 F.R.D. 149, 180 (1992).

58. See, e.g., U.S. CONST., art. III, § 1 (providing that federal judges shall have lifetime tenure so long as they demonstrate "good Behaviour," and their compensation "shall not be diminished during their Continuance in Office").

59. To date, approximately a dozen federal judges have been impeached, for conduct ranging from bribery and perjury to persistent drunkenness. See Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 133 (1998) ("Over the course of American history, the House of Representatives has impeached fifteen individuals, including a President, twelve judges, a senator, and a cabinet member. The Senate has convicted seven of the fifteen.") (footnotes omitted). Impeachable behavior does not appear to encompass a judge's persistent refusal to figure out how the Supreme Court would decide a case, or at least one judge on the Ninth Circuit would be in serious trouble. See David G. Savage, *Getting the High Court's Attention: Liberal Leaning 9th Circuit Is Often Reversed*, A.B.A. J., Nov. 1997, at 46 (noting that Judge Stephen Reinhardt of the Ninth Circuit has said it is his job to uphold the Constitution, not to predict how the Supreme Court will decide an issue); David M. O'Brien, *Reinhardt and the Supreme Court: This Time, It's Personal*, L.A. TIMES, Dec. 15, 1996, at M2.

60. Admittedly, this strategy appears to be a perfectly appropriate response to the suits which have been brought. Consider the litigation practices of Mr. Martin-Trigona:

[Mr.] Martin-Trigona has over the years filed a substantial number of lawsuits of a vexatious, frivolous and scandalous nature. He has been a persistent and calculating litigator. There is a long trail of such actions commenced by him against federal and state judges, bar examiners, public officials, public agencies, lawyers and individuals who in one way or another had any relationship, directly or indirectly, to any matter concerning him.

Martin-Trigona v. Brooks & Holtzman, 551 F. Supp. 1378, 1384 (S.D.N.Y. 1982).

61. No picking and choosing, either. Most of my colleagues would happily scrap the Eleventh Amendment and sovereign immunity, but would have a heart attack if similar treatment were proposed for the First Amendment.

Eighth, accountability is not a binary option which when selected provides only benefits. Indeed, it is easy to build too much accountability into a system. Accountability may deter some "bad" behavior, but it will predictably lead to the deterring of some "good" behavior as well, as risk-averse decisionmakers decide the potential gain is not worth the risk of being second-guessed by jurors subject to hindsight bias.<sup>62</sup> Although the precise location of the equilibrium point (and the dynamics of the underlying trade-offs) will predictably vary across different transactions, at some point, the gains from deterring "bad" behavior are swamped by the costs of over-deterring "good" behavior.<sup>63</sup>

Behavioral research similarly indicates that accountability has both good and bad effects:

A decision-maker who expects to be evaluated is likely to engage in a more careful search of information and alternatives, with a view—perhaps conscious, perhaps not—toward improving the chances that she will be favorably evaluated at the appropriate time. Many common cognitive biases, including the tendency toward overconfidence and the availability/representativeness heuristics, are reduced or eliminated. On the other hand, there is evidence that the ultimate quality of the decision sometimes suffers because of accountability. Actors may overload in their information searches, for instance, thus diluting the effect of the most important evidence. Or, too much attention to what others might think can distort the process of inference, given the difficulty of making that judgment.<sup>64</sup>

In short, when it comes to accountability, we should be careful how much we wish for.

Ninth, accountability is being used as a stalking horse by groups with considerably less public-spirited objectives. The medical profession wants to regain its ability to dictate the terms of trade with regard to cost and quality. States wish to tap a new revenue source by regulating a larger share of the health insurance market. The

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62. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1525–26 (1998).

63. The point has long since been passed in health care, if the reaction of physicians to the threat of legal liability is any guide. See generally MARSHALL B. KAPP, *OUR HANDS ARE TIED* 27 (1998) ("Physicians almost uniformly perceive the behavior caused by their legal apprehensions as negative on the quality of patient care.").

64. Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 426–27 (1997).

plaintiffs' bar is in search of additional defendants. Each of these groups has a predictable and self-interested incentive to dismiss the merits of the status quo, and offer their chosen terms of trade as a solution without collateral costs. Of course, this tactic is not unique to those involved in this debate; one's view of how the world should work has a remarkable tendency to coincide with the terms of trade that one finds personally advantageous.<sup>65</sup>

Finally, given the choice between unaccountable but affordable insurance coverage and accountable insurance coverage which is unaffordable for some percentage of those currently insured, why are we so quick to conclude that the latter should be not just the default term, but a mandatory minimum? As the Supreme Court observed in *Pilot Life Insurance Co. v. Dedeaux*, ERISA sets "forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."<sup>66</sup> Once we insist that health care coverage must be bundled with legal accountability, we will predictably close down the low end of the market.<sup>67</sup> Perhaps that result accords with

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65. See, e.g., Rebecca Buckman, *Merrill Says Online Trading Is Bad for Investors*, WALL ST. J., Sept. 23, 1998, at C1 (noting that a representative of Merrill Lynch has attacked Internet-based discount stock trading because it "encourages people to trade too much at the expense of long-term returns," but "[s]ome industry experts contend Merrill is attacking Internet trading simply because it fears the lower-cost trading mechanism could threaten its 'full-service,' higher commission business").

The issue is not limited to commercial competition, but is well-known in legal academic circles. Cf. Stewart Macaulay, *Frank Remington: Defining the Law Professor's Job*, 1992 WIS. L. REV. 553, 556 (1992) ("I've defined 'The Wisconsin Idea' as: 'it ain't good but its [sic] cheap!' "); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 301, 301 n.32 (1997) (cataloging concerns about providing unbundled legal services, and noting that "some of my concerns about unbundling reflect my personal beliefs about how I want to conduct my professional life").

66. 481 U.S. 41, 54 (1987).

67. To be sure, there are widely varying estimates scoring the cost of accountable managed care. See, e.g., Jonathan Cohn, *Managed Careless*, NEW REPUBLIC, Mar. 16, 1998, at 6 ("Citing a study by the accounting firm of Muse and Associates, reformers say Norwood's bill [the Patient Access to Responsible Care Act, H.R. 1415, 105th Cong. (1997)] would increase premiums by, at most, 2.6 percent; their opponents, pulling out a study they commissioned from Milliman and Robertson, say the increase could top 22 percent."); Amy Goldstein & Helen Dewar, *Health Care Bill's Price Debated: CBO Says Democratic Plan Would Hike Premiums 4%; GOP Differs*, WASH. POST, July 17, 1998, at A7 (finding considerable variation in estimated costs of consumer protection bills).

Unfortunately, most estimates do not rise much beyond the level of educated guesswork. Even if MCOs are made subject to tort liability, it is not clear how many lawsuits will be brought or how they will come out, let alone whether MCOs will start to practice "defensive coverage," and how elastic the demand is for health care coverage. The available empirical evidence is not sufficient to resolve these matters. See David M. Studdert et al., *Expanded Managed Care Liability: What Impact on Employer Coverage?*, HEALTH AFF., Nov./Dec. 1999, at 7.

our ethical sensibilities, but it is cold comfort to those who must now choose between nothing but the best and nothing.<sup>68</sup>

To summarize, tort liability is one way of delivering accountability, but it is not the only way of doing so. Lots of people believe that the tort system causes more problems than it solves, if their efforts to avoid it are any indication. Alternative institutional arrangements are quite common, even in health plans run by the government. The current performance of the tort system also leaves much to be desired, especially if one is depending on it to address quality of care issues. In short, the case for increased tort liability against MCOs cannot be resolved simply by deploying the symbolic claim that accountability is a good thing, and there should be more of it.

### III. WHAT CAN WE LEARN ABOUT ACCOUNTABILITY FROM TENANTS' RIGHTS LITIGATION, BAR ADMISSIONS, AND SHRINK-WRAP SOFTWARE LICENSES?

The issues raised by the campaign for making MCOs accountable in tort are not *sui generis*. Indeed, a brief review of the battles over tenants' rights, bar admissions, and shrink-wrap software licenses provides an interesting perspective on the costs and benefits of providing accountability through tort. Accordingly, an abbreviated case study of each issue is provided.

#### *A. Tenants' Rights Litigation*

Affordable high quality housing for all Americans has been a dream of housing advocates for decades. Their "solution" was

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It is interesting to note that managed care executives typically argue that the cost of coverage will increase dramatically if liability rights are extended, while simultaneously insisting that they provide non-tortious care. At the same time, the plaintiffs' bar insists that liability rights will not dramatically increase costs, while they argue that tortious care is endemic. The internal inconsistency of each side's position remains to be explained.

68. See David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 973 (1998) (modeling impact of requirement for "nothing but the best" in legal services, and concluding that limited performance agreements can enhance access to legal services for poor and middle class); Allen R. Myerson, *In Principle, a Case for More 'Sweatshops'*, N.Y. TIMES, June 22, 1997, § 4, at 5 ("A policy of good jobs in principle, but no jobs in practice, might assuage our consciences, . . . but it is no favor to its alleged beneficiaries.") (quoting Professor Paul Krugman).

virtually self-evident in its moral and legal correctness: if landlords were offering low-quality apartments or summarily evicting tenants, the solution was to make them liable for doing so—Q.E.D. Housing advocates accordingly persuaded courts and state legislatures to adopt warranties of habitability, procedural restrictions on evictions, and rent withholds, among other measures.<sup>69</sup>

The consequences of this campaign were quite predictable to anyone with the slightest familiarity with basic microeconomics. Over time, the low end of the housing market was effectively obliterated, and the rents for the apartments that remained increased dramatically.<sup>70</sup> Even housing advocates are ever-so-slowly coming to realize that their efforts have hurt those they were intended to help:

[Tenants now have] rights to repairs; rights against evictions without a court order; rights to trial by judge and jury, rather than landlord friendly magistrates. What they don't have is money to pay for the improved housing stock. [Legal Services lawyer] Fillette . . . is ambivalent about the trade-off. "Were people better off when they were cold and paying \$150 for their own place?" he asks. "Or are they better off with heat and plumbing, but living doubled up or paying every last cent for rent? I don't know."<sup>71</sup>

Similar difficulties have dogged the effort to raise the standard of the housing available to migrant workers. As one commentator noted

[i]n the 1960's, farmers usually provided free, though sometimes substandard, housing to their workers. But Federal laws that were enacted a decade ago to set standards for those farmers who provide housing have instead caused many growers to stop providing lodging, concluding it is too difficult and costly to meet the regulations. As a result, farm workers must

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69. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 HOFSTRA L. REV. 533, 534 n.3 (1992) ("In the mid-1970s, many jurisdictions across the United States enacted new or enhanced protections of residential tenants' legal interests in possession, habitability, rent control or conversion of rented premises."); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 558-62 (1984).

70. See Werner Z. Hirsch, *From "Food For Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604, 604-11 (1984); Edgar O. Olsen, *Is Rent Control Good Social Policy?*, 67 CHI.-KENT L. REV. 931, 931-35 (1991).

71. Jason DeParle, *Slamming the Door*, N.Y. TIMES, Oct. 20, 1996, § 6 (Magazine), at 38.

pay for their own shelter, a cost that often claims at least one-third of their paychecks. That change has also forced many farm workers to find their own transportation to work, since they no longer live on the farm.<sup>72</sup>

Affordable high quality housing through regulation and litigation doubtless sounded like a good idea at the time to those involved, but it turned out to be a singularly rotten strategy for achieving that end. This case study makes clear that good intentions, coupled with liability rights against vendors who fall short, does not ensure access, let alone beneficial results. Indeed, these elements can easily lead to disastrous consequences if they cause us to oversimplify the underlying problem and ignore the costs of "reform."

### *B. Bar Admissions Proceedings*

Admission into a bar requires an applicant to satisfy certain requirements with regard to character and fitness.<sup>73</sup> Those who are turned down for admission are understandably inclined to litigate the issue.<sup>74</sup> The House of Delegates of the American Bar Association recently voted to recommend that state governments adopt a model immunity rule "to facilitate the enforcement of bar admissions standards."<sup>75</sup> The rule would extend absolute immunity to bar admissions administrators and "the agencies for which they work," and limited immunity to persons and organizations providing information to bar admissions administrators.<sup>76</sup> The ABA report argued that "[w]ithout immunity, officials may properly worry

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72. Steven Greenhouse, *U.S. Surveys Find Farm Worker Pay Down for 20 Years*, N.Y. TIMES, Mar. 31, 1997, at A13.

73. See Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331, 332-49 (1995) (compiling questions asked on state bar applications to assess moral fitness, mental stability, and character).

74. See Paul Teich, *Immunity Rule Proposed to Facilitate Enforcement of Bar Admissions Standards*, SYLLABUS (American Bar Ass'n Section of Legal Educ. & Admissions to the Bar), Summer 1998, at 1, 18 ("Today, suits against bar examiners and others connected with the admissions process are commonplace and are aggressively pursued. This is not surprising, given the stakes for those disappointed by the process.").

75. *Id.* at 1.

76. *Id.* The ABA determined that nine states currently provide some form of civil immunity to those providing information regarding applicants to the Bar, and twelve states provide some form of immunity to boards or administrators involved in the Bar admissions process. Forty-two states currently provide immunity to state officials and witnesses involved in lawyer disciplinary proceedings. See *id.* at 1, 18.

about both personal and agency exposure to unwarranted litigation. Worry about liability exposure is potentially destructive to the central goal of the admissions process—the maintenance of a competent bar.”<sup>77</sup>

Bar examiners face a difficult decision matrix. If they deny admission to a deserving candidate, his life is permanently blighted, and his career prospects are destroyed. If they admit an undeserving candidate, there is a significant risk to the public and damage to the prestige of the bar. The evidence which is available to the bar examiners to resolve these issues leaves much to be desired; those seeking admission are unlikely to present a full picture of their past misdeeds, and bar examiners do not have the time or resources to investigate every case with the care it requires. The standard of character and fitness which applicants are required to satisfy is both intangible and ephemeral. Finally, because those admitted to the bar compete with those who are current members, bar examiners have an economic incentive to resolve any doubts about character or fitness by denying the application.

The decisions of a bar examiner thus bear a distinct similarity to the coverage decisions made by an MCO. Given the nature of these decisions, the desire of those involved in making bar admissions decisions to have some degree of immunity is perfectly understandable, and is, on balance, probably sound policy. Yet, it is difficult to believe that those involved in making bar admissions decisions are so much more virtuous than those making coverage decisions on behalf of MCOs that the former should get sweeping immunity (if the ABA succeeds in its lobbying campaign) and the latter should get nothing (if ERISA is amended to eliminate the preemption provisions). Sauce for the goose, anyone?

### *C. Shrink-Wrap Licenses*

I recently purchased a new computer which I (or, as is more typically the case, my children) use every day. Like most computers one can purchase these days, it came with various pieces of pre-loaded software. In the intervening months, I have purchased a variety of additional software. The software works well, although the computer occasionally freezes up and has to be rebooted. Less frequently, the computer flashes incomprehensible error messages. The company which sold me the computer maintains a help line,

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77. *Id.* at 18.

but I have to pay for a long distance call, and I typically wait on hold for twenty or thirty minutes before I get to talk to anyone. My experience is not unique; reports of such difficulties are common.<sup>78</sup>

All of the software was secured subject to what is known in intellectual-property circles as a shrink-wrap license agreement. The terms of these licenses are non-negotiable, and they disclaim, in extraordinarily fine print, any and all responsibility for everything under the sun.<sup>79</sup> Under limited circumstances, the

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78. See, e.g., Kasey Jones, *Learning Computer Setup the Hard Way*, *BALT. SUN*, Nov. 30, 1998, at C1. The article reports:

When people buy a computer, they want to plug it in and start writing letters or surfing the Internet. Most buyers will find this won't happen. I spent the better part of a day buying, setting up and configuring a computer for my mother. It's a wonder more people don't hurl the things through the plate-glass windows of computer stores.

*Id.*

79. The original IBM license agreement is fairly typical:

YOU SHOULD CAREFULLY READ THE FOLLOWING TERMS AND CONDITIONS BEFORE OPENING THIS DISKETTE(S) OR CASSETTE(S) PACKAGE. OPENING THIS DISKETTE(S) OR CASSETTE(S) PACKAGE INDICATES YOUR ACCEPTANCE OF THESE TERMS AND CONDITIONS. IF YOU DO NOT AGREE WITH THEM, YOU SHOULD PROMPTLY RETURN THE PACKAGE UNOPENED; AND YOUR MONEY WILL BE REFUNDED.

#### LIMITED WARRANTY

THE PROGRAM IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE PROGRAM IS WITH YOU. SHOULD THE PROGRAM PROVE DEFECTIVE, YOU (AND NOT IBM OR AN AUTHORIZED PERSONAL COMPUTER DEALER) ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION.

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IBM's entire liability and your exclusive remedy shall be:

1. the replacement of any diskettes(s) or cassette(s) not meeting IBM's "Limited Warranty" and Which is returned to IBM or an authorized IBM PERSONAL COMPUTER dealer with a copy of your receipt, or
2. if IBM or the dealer is unable to deliver a replacement diskette(s) or cassette(s) which is free of defects in materials or workmanship, you may terminate this Agreement by returning the program and your money will be refunded.

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licensor will replace the software—maybe—but that is about it. Consequential and punitive damages are not even in the realm of possibility. Of late, courts have upheld the terms of these licenses,<sup>80</sup> and the National Conference of Commissioners on Uniform State Laws has reached agreement on model legislation authorizing such contracts.<sup>81</sup> The net effect is that if the computer does something seriously wrong, like calculating my taxes incorrectly or swallowing an article I spent a year working on, I have no recourse. The problem is not unique to my home computer; when Oxford Health Plan's Information System failed, there were huge delays in payments to providers, some patients found it difficult to obtain needed care, and the financial position of Oxford was seriously misstated (in possible violation of federal securities laws).<sup>82</sup> If the computer at a cutting-edge hospital goes on the fritz, patients are likely to die.

In health care, a series of standard explanations (imperfect information, bounded rationality, and agency problems) have historically justified a wide range of regulatory interventions.<sup>83</sup> However, as my computer example demonstrates, these problems are not at all unique to health care. I know little or nothing about the technical specifications for my computer, and even if I did, that information would be dated within a month or two. I did not even know about the shrinkwrap license agreement when I bought the computer, because I purchased it over the phone from a company I knew only through its advertisements. The person on the other end of the phone was perfectly nice, but I did not know him from Adam. He did not really know what I needed in a computer, and I had no reason to expect him to put my interests above those of his

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80. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (upholding arbitration clause in sales agreement for computer); *Pro CD Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (upholding terms of license packaged with computer software).

81. See Hiawatha Bray, *Will One-Sided License Become Law?*, BALT. SUN, Aug. 30, 1999, at C1 (noting agreement of National Conference of Commissioners on Uniform State Laws on a Uniform Computer Information Transactions Act).

82. See Ron Winslow & George Anders, *Management: How New Technology Was Oxford's Nemesis*, WALL ST. J., Dec. 11, 1997, at B1.

83. See Hyman, *What's Wrong with a Patient Bill of Rights*, *supra* note 20. The same explanations are offered to justify the need for additional regulations when the original regulations deliver something short of perfection. No effort is devoted to explaining why the new regulations will not also fall short of perfection, triggering a call for still more regulations. See *id.*

employer. Even if everything worked fine when I took the computer out of the box (which it did not—but that is another story), the company I bought it from could be out of business in two years. The computer business is a long way from the economist's model of a market based on perfect information and equal bargaining power, but it somehow seems to work—and prosper.

### CONCLUSION

The implicit claim of the proponents of accountable managed care is that no one would buy the current (i.e. at least partially unaccountable) managed care products offered by employee benefit plans if they had any choice in the matter. Leave aside for the moment the important question of whether consumers would be willing to pay for legal accountability (however much or little it costs), and instead consider the connection between accountability and consumer demand. If you compare the guarantee offered by Lands' End (described in Part II) with the shrinkwrap software license agreement (reproduced in Part III.C), it is quite clear that Lands' End is far more accountable than software manufacturers, both legally and otherwise. Microsoft has used a shrinkwrap software license which is essentially indistinguishable from the one outlined in Part III.C since it opened its doors. Both Lands' End and Microsoft have been successful, so it is not at all clear that accountability as such has any necessary and automatic correlation with consumer demand. However, the last time I checked, the Department of Justice was not accusing Lands' End of monopolizing the market for clothing—although they were using computers running Microsoft Windows to prepare their pleadings for their antitrust case against Microsoft. Microsoft had declared record profits, and had a Price/Earnings ratio five times that of Lands' End—and Lands' End was having problems with excess inventory.<sup>84</sup> Which company has been more successful in meeting consumer demand?

To summarize, legal accountability through the tort system is far from the universal rule if one looks past the rhetoric of ERISA-haters, and considers how the real world actually works. The

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84. See Rekha Balu & Calmetta Y. Coleman, *Retailing: Is Lands' End's Turmoil a Ghost of Christmas '98?*, WALL ST. J., Oct. 29, 1998, at B1 ("In what may be the first casualty of the Christmas retail season, Lands' End Inc. fired two top executives—its chief executive and vice chairman of sales—following a nine-month decline in sales growth.").

“favored” legal position of ERISA plans and the MCOs with which they contract turns out to be quite analogous to that of most software manufacturers, who have unilaterally disclaimed all liability for their products. It is particularly ironic that the National Conference of Commissioners on Uniform State Laws has reached agreement on model legislation authorizing the disclaiming of liability for computer software, and the ABA is promoting similar protections for those involved in bar admissions decisions, while a storm of protest has led Congress to consider amending ERISA to accomplish the opposite result for MCOs. Although legal accountability through the tort system is obviously an important institutional arrangement, it is not the only one—and parties routinely contract out of it or develop alternatives when they conclude that it does not serve their mutual best interests.

What, then, should be done? ERISA provides a partial market test of the merits of state-based oversight of health care services through the tort system and state regulation. The available evidence indicates that the regulatory vacuum created by ERISA has had little or no effect on quality, while lowering costs and thus increasing access—facts which cast serious doubt on the merits of the campaign to bring “accountability” to managed care.<sup>85</sup>

At the same time, the current system is far from ideal, even if one ignores the costs of sorting out the borderlines of ERISA preemption. There is no particular reason why health care coverage should be tied to employment with a sizeable tax subsidy, nor is there any compelling logic behind making employment-based coverage the predicate for preemption of state tort remedies. Admittedly, employers need not offer insurance at all, and the drafters of ERISA opted for preemption with the expectation that the elimination of inconsistent state regulatory regimes would encourage employers to offer such benefits.<sup>86</sup> However, it does not follow that one must necessarily bundle preemption with employment-based coverage, or preclude that result for non-employment based coverage. A “check-the-box” coverage strategy (with those opting-in bearing the full cost of their decision to purchase liability rights) would provide a true test of the merits of tort-based accountability.

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85. See Hyman, *What's Wrong with a Patient Bill of Rights*, *supra* note 20.

86. See J. Daniel Plants, *Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment*, 89 MICH. L. REV. 2000, 2030–31 (1991) (explaining how ERISA drafters did not want to raise costs unless absolutely necessary because they recognized that creation and maintenance of employee benefit programs was voluntary; they embraced sweeping preemption in order to lower the costs associated with inconsistent state regulatory regimes).

I am certainly not suggesting we should dispense with regulatory oversight entirely; there will always be the need for some level of enforcement to prevent force, fraud, and duress in all their various manifestations. However, it does not follow that “full” accountability, as least as it has been defined of late, is necessary or cost-effective, or that every bad outcome requires a regulatory response. Indeed, a non-zero incidence of managed care ‘shipwrecks’ is inevitable—and fully consistent with the correct institutional arrangements.<sup>87</sup> Assuming that a regulatory solution is in fact required, the regulatory toolbox includes incentives, disclosure, command and control, and performance based measures. Each of these approaches has strengths and weaknesses; our goal should be to pick the least worst regulatory response across all cases.

In a number of other articles, I have offered some preliminary thoughts on possible regulatory responses to these problems. I will not belabor these suggestions by repeating them here. Instead I conclude, with apologies to David Letterman, with my top ten rules for regulating managed care, in the (faint) hope it will encourage Congress and the state legislatures to look before they leap:

10. Perfection is Unattainable, and Expensive to Attempt
9. Shocking Cases are Unrepresentative
8. Outrage is Cheap; Health Care is Expensive
7. Symbolic Legislation is Nothing of the Sort
6. Consumer Protection is Usually Provider Protection
5. Sauce for the Goose should be Sauce for the Gander
4. Off-Budget is Not the Same as Free
3. It All Washes Out in the Premium
2. Reform can Easily Make Things Worse
1. Structural Problems Demand Structural Solutions.

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87. See Hyman, *Call 911*, *supra* note 2, at 463 (“It is no answer to point to isolated examples that have gone wrong, because there will always be such cases.”).

