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HEALTH, TORTS, AND CIVIL PRACTICE Georgia Hospital and Medical Liability Insurance Authority Act: Provide for Legislative Findings with Respect to a Crisis in the Field of Hospital and Medical Liability Insurance; Address This Crisis Through Provision of Insurance and Certain Civil Justice Reforms; Create the Georgia Hospital and Medical Liability Insurance Authority; Provide for the Members of the Authority and Their Selection, Service, and Terms of Office; Provide for the Filling of Vacancies; Provide for the Powers, Duties, Operations, and Financial Affairs of the Authority; Provide for the General Purpose of the Authority;

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Provide for other Related Matters; Repeal Conflicting Laws; and for Other Purposes

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HEALTH, TORTS, AND CIVIL PRACTICE

Georgia Hospital and Medical Liability Insurance Authority Act: Provide for Legislative Findings with Respect to a Crisis in the Field of Hospital and Medical Liability Insurance; Address This Crisis Through Provision of Insurance and Certain Civil Justice Reforms; Create the Georgia Hospital and Medical Liability Insurance Authority; Provide for the Members of the Authority and Their Selection, Service, and Terms of Office; Provide for the Filling of Vacancies; Provide for the Powers, Duties, Operations, and Financial Affairs of the Authority; Provide for the General Purpose of the Authority; Prescribe Standards Relating to Vicarious Liability of Medical Facilities for Actions of Health Care Providers; Provide for Limited Liability for Certain Medical Facilities and Health Care Providers for Treatment of Certain Emergency Conditions Under Certain Conditions; Provide for Qualifications of Experts; Change Provisions Relating to the Allocation of Liability and Recovery of Damages in Tort Actions; Provide for the Degree of Care Expected of Medical Professionals in an Emergency Room Setting; Provide for the Consideration by the Jury or Other Trier of Fact of Certain Factors Affecting This Care in Determining Whether Defendants Met This Degree or Standard of Care; Require the Approval by the Commissioner of Insurance of All Medical Malpractice Rates, Rating Plans, Rating Systems, and Underwriting Rules Prior to These Rates, Rating Plans, Rating Systems, and Underwriting Rules Becoming Effective; Change Certain Provisions Relating to Actions Against Certain Codefendants Residing in Different Counties; Change Provisions Relating to the Required Filing of Affidavits in Professional Malpractice Actions; Provide for Other Related Matters; Repeal Conflicting Laws; and for Other Purposes

BILL NUMBER:

HB 1028

SUMMARY:

The bill would have created an authority with power to provide rural hospitals with the ability to self-insure. The bill would have allowed emergency facilities to limit liability

associated with doctors who are independent contractors. The bill would have also restricted recovery from each defendant based on apportionment of liability rather than the usual joint and several liability schemes. The bill failed after a standoff on an amendment to cap non-economic damages.

History

The Georgia General Assembly has confronted tort reform in the past several legislative sessions.¹ Tort reform is especially politically contentious because of the many players involved, the rights affected, and its potential re-adjustment of our traditional legal system.² Disputes between trial lawyers and the medical industry often drown out the voices of injured plaintiffs.³ Incomplete and contradictory sources of information complicate the issue and lead to factually bereft perceptions.⁴ Furthermore, tort reform proponents rely “heav[ily] on anecdote, opinion and advocacy[, but their contentions are] light on fact[s].”⁵ Perhaps no other civil justice issue “in contemporary life [is] more polarizing than tort reform.”⁶

While some argue that the entire system of tort liability requires reform, medical malpractice cases are often the focus of the debate.⁷ Although there is much disagreement over the causes of increasing medical costs, no one disputes the existence of these large increases.⁸ While patients must pay more for the same medical care, doctors

1. See Janet L. Conley, ed., *Tempest Over Torts: Lawyers for Plaintiffs, Defense Discuss Whether Statistics, Recent Awards Make a Case for a Legislative Cap on Damages*, FULTON COUNTY DAILY REP., Mar. 15, 2004, at 1B, available at 3/15/2004 FULTONDAILY B1; Albert M. Pearson, III, *Tort Reform in Georgia: Apocalypse Now?*, FULTON COUNTY DAILY REP., Feb. 26, 2004, at 7, available at 2/26/2004 FULTONDAILY 7 (“Tort reform has been a persistent political movement in Georgia since 1987 when the first wave of reform legislation was passed.”).

2. See Pearson, *supra* note 1 (“[T]he driving political force remains a volatile mix of public fear about the costs of suits, doubts about the competence of jurors and public anger directed toward trial lawyers.”).

3. See *id.*

4. See *id.* (“[T]his issue has been unusually resistant to calm, factual examination.”).

5. *Id.*

6. *Id.*

7. See *id.*

8. See Conley, *supra* note 1.

must pay more in insurance premiums.⁹ Doctors, hospitals, and insurance companies blame increased litigation expenses for rising insurance and healthcare costs.¹⁰ Injured patients and plaintiff advocacy groups argue that tort reform will take remedies from those who need them most.¹¹

Despite the disagreement over the causes of rising medical costs, there is perhaps even more disagreement concerning the costs' effect on the industry.¹² Doctors, hospitals, and insurance companies argue that, because of exorbitant increases in malpractice insurance premiums, doctors are leaving the State or abandoning the profession altogether.¹³ The alleged "doctor-flight" decreases the supply of doctors in the State, and decreases overall access to medical care.¹⁴ Doctor-flight increases existing shortages of adequate healthcare, which in turn disproportionately affects rural hospitals and high-risk specialties.¹⁵ Additionally, hospitals argue that increased operating costs and insurance premiums affect their bottom lines and drive them into bankruptcy.¹⁶ Increased regulation further affects hospitals' bottom lines by preventing price increases that would normally offset cost increases.¹⁷

9. *See id.*

10. *See* Bill Rankin, *Ga. House Panel OKs Tort Reform Legislation: Medical Groups Complain Biggest Problem Ignored*, ATLANTA J. CONST., Feb. 28, 2004, at E1, available at 2004 WL 68886015 [hereinafter *House Panel*] (stating that medical associations and the Georgia Chamber of Commerce claim that tort reform measures are necessary to "halt skyrocketing malpractice insurance premiums").

11. *See id.* ("Bill Clark, lobbyist for the Georgia Trial Lawyers Association, said the medical community has failed to show a connection between the civil justice system and the skyrocketing premiums suffered by doctors and hospitals.").

12. Editorial, *Our Opinions: Proposed 'Tort Reform' Bill Makes Victims Pay Twice*, ATLANTA J. CONST., Feb. 24, 2004, at A10, available at 2004 WL 68885323 [hereinafter *Victims Pay Twice*] (arguing that accounts of the effects of rising medical costs are "incomplete, at best, and, on some specifics, flat-out false.").

13. *See id.*

14. FRED J. HELLINGER & WILLIAM E. ESCINOSA, THE IMPACT OF STATE LAWS LIMITING MALPRACTICE AWARDS ON THE GEOGRAPHIC DISTRIBUTION OF PHYSICIANS 1, 12 (U.S. Dept. Health and Human Servs. 2003) (noting that states that have capped non-economic damages see an increase in physicians per capita).

15. *See* Rachel Tobin Ramos, *Tort Crisis or Market Woes? Panel Questions: Speaker Appoints Board to Review Tort Reform Bill*, FULTON COUNTY DAILY REP., Dec. 18, 2003 at 1, available at 12/18/2003 FULTONDAILY 1 [hereinafter *Panel Questions*] ("Business and insurance representatives and doctors [say] runaway malpractice verdicts in Georgia are driving doctors and hospitals out of business.").

16. *Victims Pay Twice*, *supra* note 12 (noting the alleged relationship between "skyrocketing" malpractice awards and hospitals being driven into bankruptcy).

17. *Id.* ("Today, with much tighter cost controls in place, the medical industry has a much harder time raising its prices, and the result has been terrible damage to their bottom lines.").

Tort reform critics contend that insurers and physicians overstate adverse effects, especially statistics concerning the number of doctors leaving the industry or the State.¹⁸ Furthermore, critics take aim at insurance companies' use of stock market investments to make profits.¹⁹ They argue that insurance companies have raised their premiums to offset stock market losses, not litigation costs.²⁰ Because fluctuations in the stock market affect industry profits, critics argue that insurance companies' harder times are the result of bad investments rather than adverse jury awards.²¹ Most notably, critics argue that injured plaintiffs will bear the brunt of tort reform; for instance, caps on non-economic damages limit the amount of money courts can award plaintiffs who otherwise deserve this compensation.²²

Against this backdrop, the General Assembly considered the significance of rising insurance premiums to hospitals, particularly to smaller rural hospitals.²³ Because of their remote locations, small rural hospitals treat fewer patients and maintain different staffing standards than metropolitan hospitals.²⁴ Citing the State's interest in providing adequate healthcare for its citizens, the legislature sought to create the Georgia Hospital Insurance Authority ("GHIA").²⁵ The GHIA would have provided a way for small rural hospitals—those with 200 beds or less—to float bonds to raise capital for paying high malpractice premiums.²⁶ HB 1028's narrow focus on increasing small rural hospitals' ability to pay their rising insurance premiums did not

18. *See id.*

19. *See Panel Questions, supra* note 15.

20. *See id.*; *see also* Tracy Dellacona, *This Is Perspectives for Saturday, March 13, 2004*, MACON TELEGRAPH, Mar. 13, 2004, available at 2004 WL 56200498 ("Insurance companies, suffering profit margin losses through bad investments and downward stock market cycles, have mobilized the medical community to take up their cause for additional profits by striking out at attorneys and jurors."); Editorial, *Our Opinions: Fans of Tort Reform Try Deception*, ATLANTA J. CONST., Mar. 9, 2004, at A12, available at 2004 WL 68887354 [hereinafter *Deception*] ("No longer flush with cash, insurance companies are resorting to rate increases to maintain profit margins. . . . In the past, doctors and hospitals have been able to pass higher insurance costs onto patients, but they can't do that now because of stricter ceilings on health care pricing. So they end up absorbing the hit themselves.").

21. *See Deception, supra* note 20.

22. *See, e.g.,* Conley, *supra* note 1.

23. *See* Audio Recording of House Proceedings, Mar. 17, 2004 (remarks by Rep. Alan Powell), at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter *House Audio*].

24. *See id.*

25. *See id.*

26. *See id.*

trigger a myriad of tort reform issues at its inception.²⁷ The bill's path through the Senate, however, demonstrated the dynamic politicization that often surrounds tort reform legislation.²⁸

Bill Tracking of HB 1028

The progress of HB 1028 through the General Assembly was an interesting journey.²⁹ The bill began with a speedy debate and near unanimous approval in the House.³⁰ In the Senate, HB 1028 morphed from a relatively simple bill that addressed one major issue into a comprehensive tort reform package that dealt with four major tort reform issues.³¹ HB 1028 eventually reached a Conference Committee, but the General Assembly dissolved the Committee at the end of the legislative session before the Committee's members reached a compromise.³²

Consideration by the House

As introduced in the House, HB 1028 would have added Code sections 31-46-1 to -18.³³ In what would have been the Georgia Hospital Insurance Authority Act, the General Assembly noted that some hospitals were "having increasing difficulty in locating liability insurance" and that the provision of insurance would "result in the increased availability of health care services for the citizens of [Georgia]."³⁴

27. *See id.* The bill, as initially presented, passed almost unanimously in the House. *See* Georgia House of Representatives Voting Record, HB 1028 (Mar. 17, 2004).

28. *See* Audio Recording of Senate Proceedings, Mar. 31, 2004 (remarks by Sen. Preston Smith) at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter Senate Audio One]. *Compare* HB 1028, as introduced, 2004 Ga. Gen. Assem., *with* HB 1028, as passed by the Senate, 2004 Ga. Gen. Assem.

29. *Compare* HB 1028, as introduced, 2004 Ga. Gen. Assem., *with* HB 1028, as passed by the Senate, 2004 Ga. Gen. Assem.

30. *See* House Audio, *supra* note 23; Georgia House of Representatives Voting Record, HB 1028 (Mar. 17, 2004) (approving by a vote of 167 to 1); *cf.* Anthony Ventry, III, *Review of Selected 2003 Georgia Legislation*, 20 GA. ST. U. L. REV. 256, 260 & n.41 (2003) (describing a lengthy floor debate).

31. *Compare* HB 1028, as introduced, 2004 Ga. Gen. Assem., *with* HB 1028, as passed, 2004 Ga. Gen. Assem.

32. *See* State of Georgia Final Composite Status Sheet, HB 1028, Apr. 7, 2004 (May 19, 2004); *see* Bill Rankin, *Legislature 2004: Award Debate Stalls Tort Reform*, ATLANTA J. CONST., Apr. 7, 2004, at B4, available at 2004 WL 73420224 [hereinafter *Award Debate*].

33. HB 1028, as introduced, 2004 Ga. Gen. Assem.

34. *Id.*

As introduced, the bill would have established the GHIA, a public corporation with 13 members, including three individuals appointed by the Governor, three appointed by the President of the Senate, three appointed by the Speaker of the House, and four individuals serving in certain state offices.³⁵ The GHIA's "general purpose" would have been to "provid[e] or procur[e] insurance for public and private medical facilities which provide any indigent health care services."³⁶ In addition, the GHIA would have the authority to issue bonds and borrow money, but it provided that the State would not be liable for any of these debts.³⁷ On March 17, 2004, the House passed HB 1028 by a vote of 167 to 1.³⁸

Consideration by the Senate

Senate Committee Substitute to HB 1028

In the Senate, the Health and Human Services Committee added three major provisions and changed the Code section designations.³⁹ First, the Committee added provisions to exempt hospitals from liability for the acts of independent contractor physicians using the hospital's facilities.⁴⁰ For a hospital to qualify for this exemption, it would have needed to post "conspicuous[] [notice in the] lobby or a public area of the medical facility and in the admitting area of the medical facility's emergency department [in characters] at least one inch high."⁴¹

35. *Id.* (defining the membership of the Georgia Hospital Insurance Authority ("GHIA") in what would have been O.C.G.A. § 31-46-4).

36. *Id.* (explaining the purpose of the GHIA in what would have been O.C.G.A. § 31-46-8).

37. *Id.* (providing that the GHIA would have had the right to issue bonds and borrow money under what would have been O.C.G.A. § 31-46-13). This part of the bill would have also exempted the GHIA from property taxes. *Id.*

38. Georgia House of Representatives Voting Record, HB 1028 (Mar. 17, 2004).

39. Compare HB 1028, as passed by the House, 2004 Ga. Gen. Assem., with HB 1028 (SCS), 2004 Ga. Gen. Assem.

40. See HB 1028 (SCS), 2004 Ga. Gen. Assem. (providing for this exemption in what would have been O.C.G.A. § 31-46-51).

41. *Id.* The bill would have required that a hospital's notice be "substantially similar" to the following language for the hospital to claim the exemption:

Some or all of the physicians and other health care providers performing services in this medical facility are independent contractors and are not medical facility employees. Independent contractors are responsible for their own actions, and the medical facility shall not be liable for the acts or omissions of any such independent contractors.

Id.

Second, the Committee sought to change the rules of admissibility for expert witnesses in medical malpractice cases by requiring experts attesting “to the standard of conduct of a health care provider whose conduct is at issue” to have “actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given.”⁴² Further, the bill would have required the expert to have “been regularly engaged in . . . his or her [specialty] for at least half of his or her professional time during three of the last five years.”⁴³

Third, the Committee added a provision that would have destroyed joint and several liability in medical malpractice cases and would have called on the trier of fact to “apportion its award of damages among the persons who are liable according to the degree of fault of each person.”⁴⁴ Furthermore, the amended bill would have called on triers of fact to “reduce the amount of damages . . . awarded to the plaintiff in proportion to [the plaintiff’s] negligence compared with that of the person or persons liable for the injury or damages claimed.”⁴⁵ The plaintiff would “not be entitled to receive any damages if [he or she was] 50 percent or more responsible for the injury or damages claimed.”⁴⁶

The Senate debated HB 1028, as amended in the Health and Human Services Committee, on March 31, 2004.⁴⁷ Unlike the debate in the House, the Senate debate was lengthy, was contentious, and spawned several attempts to amend the bill.⁴⁸ The most fervent debate centered on amendments that invoked Senate Rule 143, which requires that bills return to the Rules Committee in certain situations.⁴⁹ Some participants in the debate felt that these proposals were “poison-pill” amendments designed to stop the bill’s progress. These poison-pill amendments would have delayed the floor debate,

42. *Id.* (stating the requirements in what would have been O.C.G.A. § 31-46-52).

43. *Id.*

44. *Id.* (providing for apportionment of damages in what would have been O.C.G.A. § 31-46-53).

45. HB 1028 (SCS), 2004 Ga. Gen. Assem.

46. *Id.*

47. See State of Georgia Final Composite Status Sheet, HB 1028, Mar. 31, 2004 (May 19, 2004).

48. See *infra* Senate Floor Amendments.

49. See Senate Audio One, *supra* note 28; RULES OF THE GEORGIA STATE SENATE 143(b) (2003) (“Any amendment offered by a Senator which contains more than three pages or is more than one-half the verbiage of the document which it amends (whichever is less) shall be treated as a substitute for the purposes of this subsection.”).

which was already occurring late in the session, at least one more day.⁵⁰ Senators that supported the Committee substitute of HB 1028 believed that this would have effectively killed the bill since only one day remained in the session.⁵¹ As detailed below, the amendments offered on the floor were great in number and very complex.⁵² Moreover, some amendments that appeared to further the cause of tort reform may have actually been procedural efforts to do just the opposite.⁵³

Senate Floor Amendments

Amendment 1 sought to protect the personal assets of doctors and nurses by requiring that plaintiffs recover from the unused insurance of the hospital in cases where a doctor or nurse and a hospital are codefendants.⁵⁴ Before voting on the amendments took place, sponsors of amendment 1 withdrew it in a complex procedural move.⁵⁵ Opponents of amendment 1 proposed amendment 6B. Amendment 6B, dubbed “the poison-pill amendment,” would have sent HB 1028 to the Rules Committee and precluded a vote on the amendments that followed it numerically.⁵⁶ As a result, Senator Thomas Price of the 56th district introduced amendment 1A, which would have instituted caps on non-economic damages and sent the bill to the Rules Committee, preempting votes on all subsequent amendments including amendment 6B.⁵⁷ While Senator Price offered to withdraw amendment 1A if the proponents of 6B withdrew their amendment, other tort reform advocates apparently disagreed with Senator Price’s strategy and withdrew amendment 1, taking Senator Price’s amendment 1A off the table as well.⁵⁸

50. See Senate Audio One, *supra* note 28 (remarks by Sens. Charles Clay and Preston Smith); Telephone Interview with Sen. Preston Smith, Senate District No. 52 (June 23, 2004) [hereinafter Smith Interview].

51. See Senate Audio One, *supra* note 28 (remarks by Sens. Charles Clay and Preston Smith); Smith Interview, *supra* note 50.

52. See *infra* Senate Floor Amendments.

53. See Senate Audio One, *supra* note 28; Smith Interview, *supra* note 50.

54. See Withdrawn Senate Floor Amendment 1 to HB 1028, introduced by Sens. David Shafer, Thomas Price, and Don Balfour, Mar. 31, 2004.

55. See Senate Audio One, *supra* note 28.

56. See Senate Audio One, *supra* note 28 (remarks by Sens. Preston Smith and Thomas Price).

57. See *id.* (remarks by Sen. Thomas Price); Failed Senate Floor Amendment 1A to HB 1028, introduced by Sen. Thomas Price, Mar. 31, 2004.

58. See Senate Audio One, *supra* note 28 (remarks by Sens. Thomas Price and David Shafer).

Amendment 2, as altered by amendment 2A, would have changed the standard of care for emergency room doctors, and passed by a vote of 28 to 27.⁵⁹ Amendment 2 proposed changing the standard of care for emergency room physicians to the “degree of care and skill ordinarily employed by the profession generally under similar conditions and like surrounding circumstances.”⁶⁰ In addition, amendment 2 would have mandated that when determining whether the physician “met the standard of care” the trier of fact consider circumstances such as the emergency room doctor’s access to the patient’s history, the other emergency room patients under the doctor’s care, and “all other circumstances.”⁶¹ Amendment 2A modified amendment 2 by deleting “all other circumstances surrounding the operation of the emergency facility,” which some tort reform advocates believed would actually broaden the standard of care for emergency room doctors.⁶²

The sponsors of amendments 3, 3A, 4, 5, and 5A withdrew these amendments prior to voting.⁶³ Amendments 3 and 3A would have increased the prescription power of physician’s assistants and advanced registered nurses.⁶⁴ Amendment 4 would have provided prescriptive authority to mental health workers.⁶⁵ Senator Valencia Seay of the 34th district withdrew amendments 5 and 5A, which would have created the Georgia Health and Medical Insurance Authority to provide coverage for uninsured Georgians while they were between jobs or working for employers that did not provide medical insurance, in favor of amendment 27.⁶⁶

59. HB 1028 (SFA2), 2004 Ga. Gen. Assem.; HB 1028 (SFA2A), 2004 Ga. Gen. Assem.; Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

60. HB 1028 (SFA2), 2004 Ga. Gen. Assem.

61. *Id.*

62. HB 1028 (SFA2A), 2004 Ga. Gen. Assem.; see Senate Audio One, *supra* note 28 (remarks by Sen. Thomas Price).

63. See Withdrawn Senate Floor Amendments 3 and 3A to HB 1028, introduced by Sen. Nadine Thomas, Mar. 31, 2004; Withdrawn Senate Floor Amendment 4 to HB 1028, introduced by Sen. Vincent Fort, Mar. 31, 2004; Withdrawn Senate Floor Amendment 5 to HB 1028, introduced by Sens. Valencia Seay, Gloria Butler, Sam Zamarripa, Steve Thompson, and Kasim Reed, Mar. 31, 2004; Withdrawn Senate Floor Amendment 5A to HB 1028, introduced by Sen. Valencia Seay, Mar. 31, 2004.

64. See Withdrawn Senate Floor Amendments 3 and 3A to HB 1028, introduced by Sen. Nadine Thomas, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Nadine Thomas).

65. See Withdrawn Senate Floor Amendment 4 to HB 1028, introduced by Sen. Vincent Fort, Mar. 31, 2004.

66. See Withdrawn Senate Floor Amendment 5 to HB 1028, introduced by Sens. Valencia Seay, Gloria Butler, Sam Zamarripa, Steve Thompson, and Kasim Reed, Mar. 31, 2004; Withdrawn Senate

Amendment 6B, discussed above, was comprehensive and, perhaps more importantly, long enough to invoke Rule 143.⁶⁷ The amendment sought to avoid a complete end to joint and several liability because of the fear that, in cases with multiple defendants, defendants would combat each other without the existence of joint and several liability.⁶⁸ The amendment would have allowed the jury to reconvene and apportion damages to aid defendants in seeking direct contribution from other defendants.⁶⁹

Senator Michael Meyer von Bremen of the 12th district withdrew amendment 6A in favor of amendment 6B.⁷⁰ Amendment 6B provided hospitals with qualified immunity for the acts of emergency room physicians who are independent contractors.⁷¹ For a hospital to avail itself of this protection, however, it would have had to post notice of the immunity in the emergency room and in the local newspaper annually.⁷² The amendment would have also allowed the trier of fact, in determining whether the emergency room physician's conduct met the standard of care, to consider the circumstances faced by the doctor "when treating the patient," the doctor's prior relationship with the patient, and all other circumstances.⁷³ The amendment would have allowed a defendant to move for dismissal if the plaintiff's expert was not a physician and did not share a specialty certification with the defendant or if the expert did not have experience treating the patient's injury, performing the procedure

Floor Amendment 5A to HB 1028, introduced by Sen. Valencia Seay, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Valencia Seay).

67. *See* Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004.

68. *Id.*; Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen).

69. Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen).

70. Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen); Withdrawn Senate Floor Amendment 6A to HB 1028, introduced by Sen. Michael Meyer Von Bremen, Mar. 31, 2004.

71. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen); Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004.

72. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen); Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004.

73. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen); Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004.

involved, or working in the specific set of circumstances at issue.⁷⁴ Finally, the amendment would have preserved some of the original language of HB 1028 regarding the establishment of the GHIA.⁷⁵

Amendment 6B appeared to contain meaningful tort reform provisions, but some tort reform advocates viewed it as the greatest threat to the bill's passage.⁷⁶ As a result, opponents of the amendment narrowly defeated it by a vote of 27 to 28.⁷⁷ However, despite amendment 6B's failure, amendment 6 passed by a vote of 30 to 25, and included provisions regarding the distribution of liability in malpractice cases. Yet, amendment 6 did not include the sweeping reform sought in the withdrawn and failed amendments 6A and 6B.⁷⁸

Amendment 7 narrowly failed by a vote of 27 to 28, and while the Senate voted 29 to 26 to reconsider the amendment, it failed by the same 27 to 28 vote on reconsideration.⁷⁹ The amendment sought to require that Georgia insurers take into account only Georgia statistics when calculating rates for Georgia's medical malpractice insurance.⁸⁰ Some tort reform advocates felt that this could have had a negative impact on Georgia's rates.⁸¹ Amendment 8, which failed by a vote of 25 to 28, would have created an authority to assist senior citizens in securing drug benefits.⁸² Amendment 9 would have imposed a \$750,000 cap on non-economic damages in medical malpractice suits, and it would have limited these damages to \$250,000 per

74. See Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen); Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004. Additionally, to testify against nurses, the bill would have required the doctor to have experience supervising nurses in this context and to have knowledge of the standard of care for nurses in the type of circumstances involved. See *id.*; Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen).

75. See Senate Audio One, *supra* note 28 (remarks by Sen. Michael Meyer von Bremen). Compare HB 1028, as introduced, 2004 Ga. Gen. Assem., with Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer Von Bremen, Mar. 31, 2004.

76. See Senate Audio One, *supra* note 28; Smith Interview, *supra* note 50.

77. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004). The Senate also narrowly defeated an effort to reconsider Amendment 6B by the same 27 to 28 vote. *Id.*

78. *Id.*; see HB 1028 (SFA6), 2004 Ga. Gen. Assem.

79. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

80. See Failed Senate Floor Amendment 7 to HB 1028, introduced by Sen. Horacena Tate, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Horacena Tate).

81. See Senate Audio One, *supra* note 28 (remarks by Sen. Preston Smith).

82. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Failed Senate Floor Amendment 8 to HB 1028, introduced by Sen. Faye Smith, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Faye Smith).

defendant for up to three defendants.⁸³ The sponsors withdrew this amendment, and the withdrawal of amendment 9 rendered amendment 9A, which would have exempted these caps in cases of a wrongful death action, invalid.⁸⁴ Amendment 9B, which also died due to the withdrawal of amendment 9, would have limited excessive jury awards by means other than a cap.⁸⁵ The amendment called for a bifurcated damages phase in which the court would give the jury a range of non-economic damages based on awards in similar cases, and if the jury exceeded this range by 25% the court would review the award.⁸⁶

Amendment 10 passed by a vote of 29 to 26 and would have limited the liability for some hospitals and medical care providers in certain circumstances when performing specified procedures.⁸⁷ Amendment 11 passed by a vote of 28 to 26, and it restored the provisions precluding joint and several liability from the bill.⁸⁸ Amendment 12 would have prohibited the use of credit reports in rating malpractice premiums, and it initially passed by a 29 to 24 vote.⁸⁹ However, after some confusion, tort reform advocates discovered that the amendment was of the length to invoke Rule 143, and they called for reconsideration, which the Senate approved 30 to 25.⁹⁰ On reconsideration, the amendment failed by a vote of 25 to 30.⁹¹ Amendments 13 and 13A would have required that the Insurance Commissioner examine insurers annually in an effort to reduce rates by 15% unless the reduction would render the company

83. See Withdrawn Senate Floor Amendment 9 to HB 1028, introduced by Sens. Don Thomas, Thomas Price, Eric Johnson, Ralph Hudgens, and Dan Moody, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Don Thomas).

84. See Senate Audio One, *supra* note 28 (remarks by Sens. Don Thomas and David Shafer); Failed Senate Floor Amendment 9A to HB 1028, introduced by Sen. Seth Harp, Mar. 31, 2004.

85. Failed Senate Floor Amendment 9B to HB 1028, introduced by Sens. David Shafer, Seth Harp, Charles Clay, David Adelman, and Jeff Mullis, Mar. 31, 2004.

86. See Senate Audio One, *supra* note 28 (remarks by Sen. David Shafer); Failed Senate Floor Amendment 9B to HB 1028; introduced by Sens. David Shafer, Seth Harp, Charles Clay, David Adelman, and Jeff Mullis, Mar. 31, 2004.

87. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Senate Audio One, *supra* note 28 (remarks by Sen. Renee Unterman); HB 1028 (SFA10), 2004 Ga. Gen. Assem.

88. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see HB 1028 (SFA11), 2004 Ga. Gen. Assem.; see also Senate Audio One, *supra* note 28.

89. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Senate Audio One, *supra* note 28 (remarks by Sen. Renee Unterman); Failed Senate Floor Amendment 12 to HB 1028, introduced by Sen. Renee Unterman, Mar. 31, 2004.

90. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Senate Audio One, *supra* note 28.

91. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

insolvent.⁹² The amendments failed by votes of 24 to 30 and 25 to 30, respectively.⁹³

Amendment 14 would have allowed cross-examination of expert witnesses about their own practices, and the amendment passed by a vote of 34 to 20.⁹⁴ Senator Seth Harp of the 16th district withdrew amendments 15 and 15A without a debate on the floor because amendment 6B contained, among other things, essentially the same language as amendments 15 and 15A, which would have strengthened the requirements for expert witnesses.⁹⁵ Amendment 16 passed by a vote of 29 to 26 and would have required the Insurance Commissioner to actively approve insurers rather than approving insurers through inaction.⁹⁶ Amendment 17, which passed by a vote of 35 to 19, attempted to end “forum shopping.”⁹⁷ The amendment added a provision to the bill that would have allowed codefendants to move to dismiss a case if the court dropped the defendant through whom the plaintiff secured venue for the suit, requiring the plaintiff to refile in an appropriate jurisdiction for the remaining defendant or defendants.⁹⁸ Additionally, Senator Sam Zamarripa of the 36th district withdrew amendment 18 prior to floor debate, but it would have instituted reporting requirements for certain medical professionals disciplined by a licensing board.⁹⁹

Senator David Adelman of the 42nd district withdrew amendment 19 because it was essentially identical to a provision contained in amendment 6A.¹⁰⁰ Amendment 20 passed overwhelmingly by a 47 to

92. See Failed Senate Floor Amendments 13 and 13A to HB 1028, introduced by Sen. Robert Brown, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Robert Brown).

93. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

94. *Id.*; see Senate Audio One, *supra* note 28 (remarks by Sen. Seth Harp); HB 1028 (SFA14), 2004 Ga. Gen. Assem.

95. Compare Withdrawn Senate Floor Amendments 15 and 15A to HB 1028, introduced by Sen. Seth Harp, Mar. 31, 2004, with Failed Senate Floor Amendment 6B to HB 1028, introduced by Sen. Michael Meyer von Bremen, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sen. Seth Harp).

96. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Senate Audio One, *supra* note 28 (remarks by Sen. Steve Henson); HB 1028 (SFA16), 2004 Ga. Gen. Assem.

97. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Senate Audio One, *supra* note 28 (remarks by Sen. Charles Clay); HB 1028 (SFA17), 2004 Ga. Gen. Assem.

98. HB 1028 (SFA17), 2004 Ga. Gen. Assem.

99. See Senate Audio One, *supra* note 28 (remarks by Sen. Sam Zamarripa); Withdrawn Senate Floor Amendment 18 to HB 1028, introduced by Sen. Sam Zamarripa, Mar. 31, 2004.

100. See Senate Audio One, *supra* note 28 (remarks by Sen. David Adelman). Compare Withdrawn Senate Floor Amendment 19 to HB 1028, introduced by Sen. David Adelman, Mar. 31, 2004, with Withdrawn Senate Floor Amendment 6A to HB 1028, introduced by Sens. Michael Meyer von Bremen, Charlie Tanksley, Seth Harp, and Robert Brown, Mar. 31, 2004.

7 vote, and it would have changed the time period during which a defendant in a medical malpractice case must file an answer.¹⁰¹ Currently, a defendant must file an answer 30 days after the plaintiff files the complaint even if the plaintiff has not filed the legally mandated affidavit from an expert.¹⁰² Amendment 20 would have changed the law to require the answer 30 days after the plaintiff filed the affidavit, giving the defendant an opportunity to see the affidavit before filing the answer.¹⁰³ Amendment 21 passed overwhelmingly—53 to 1—and made it clear that taxpayers were not liable for any debt incurred by the GHIA created by HB 1028.¹⁰⁴ Senator Daniel Lee of the 29th district withdrew amendment 22 because he believed that it was identical to amendment 11.¹⁰⁵

Senator Don Thomas of the 54th district withdrew amendment 23A, an amendment that would have made only minor changes to the bill.¹⁰⁶ Amendment 23B passed by a vote of 35 to 19 and added an exemption to the bill for plaintiffs in wrongful death cases from caps on non-economic damages.¹⁰⁷ Amendment 23C would have capped non-economic damages; it passed initially by a vote of 28 to 27.¹⁰⁸ The Senate then voted to reconsider the amendment, and on reconsideration, it failed by a vote of 24 to 31.¹⁰⁹ Amendment 23D, which passed by a vote of 31 to 22, would have required courts to instruct juries on the typical range of non-economic damages in similar cases, and would have included a provision providing for automatic judicial review if the award exceeded this range by a

101. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Bill Hamrick); HB 1028 (SFA20), 2004 Ga. Gen. Assem.

102. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Bill Hamrick).

103. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Bill Hamrick); HB 1028 (SFA20), 2004 Ga. Gen. Assem.

104. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Daniel Lee); HB 1028 (SFA21), 2004 Ga. Gen. Assem.

105. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Daniel Lee). *Compare* Withdrawn Senate Floor Amendment 22 to HB 1028, introduced by Sens. Daniel Lee and Dan Moody, Mar. 31, 2004, *with* HB 1028 (SFA11), 2004 Ga. Gen. Assem.

106. *See id.* (remarks by Sen. Don Thomas); Withdrawn Senate Floor Amendment 23A to HB 1028, introduced by Sens. Don Thomas and Thomas Price, Mar. 31, 2004.

107. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Seth Harp); HB 1028 (SFA23B), 2004 Ga. Gen. Assem.

108. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Don Thomas); Failed Senate Floor Amendment 23C to HB 1028, introduced by Sen. Don Thomas, Mar. 31, 2004.

109. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

requisite amount.¹¹⁰ Amendment 23, as amended by 23D, passed by a vote of 30 to 25.¹¹¹ Amendment 24 passed overwhelmingly—50 to 5—and would have mandated mediation in medical malpractice cases.¹¹² Amendment 25 passed in a near unanimous vote—53 to 1—and would have allowed the GHIA to assist in paying for the costs of malpractice insurance for doctors in certain fields, as well as for hospitals as the bill originally provided.¹¹³

There was a question regarding the germaneness of amendment 26, which would have expanded the prescription power of physician's assistants and advanced registered nurses, similar to amendments 3 and 3A.¹¹⁴ The Senate ultimately ruled the amendment was germane, but it failed in a 25 to 26 vote.¹¹⁵ Amendment 27 failed by a vote of 25 to 29 and would have allowed the GHIA proposed by the House to insure unemployed Georgians.¹¹⁶ Amendment 28 was an attempt to remove the GHIA, which was the only provision in the original bill.¹¹⁷ The amendment failed 21 to 33.¹¹⁸ The Parliamentarian ruled that amendment 29 was not germane, and the amendment never came to a vote.¹¹⁹ The amendment would have given psychologists

110. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. David Shafer); HB 1028 (SFA23D), 2004 Ga. Gen. Assem.

111. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Don Thomas); HB 1028 (SFA23), 2004 Ga. Gen. Assem.

112. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Seth Harp); HB 1028 (SFA24), 2004 Ga. Gen. Assem.

113. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Senate Audio One, *supra* note 28 (remarks by Sen. Charles Clay); HB 1028 (SFA25), 2004 Ga. Gen. Assem.

114. *See* Senate Audio One, *supra* note 28 (remarks by Sens. Preston Smith and Nadine Thomas). *Compare* Failed Senate Floor Amendment 26 to HB 1028, introduced by Sen. Nadine Thomas, Mar. 31, 2004, *with* Withdrawn Senate Floor Amendments 3 and 3A to HB 1028, introduced by Sen. Nadine Thomas, Mar. 31, 2004.

115. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004). Lieutenant Governor Mark Taylor, the Chair of the Senate, ruled the amendment germane, but the Parliamentarian disagreed. *See* Senate Audio One, *supra* note 28 (remarks by Lieutenant Governor Mark Taylor and Secretary of the Senate Frank Eldridge, Jr.). The Senate voted 26 to 27, disagreeing with the Parliamentarian. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004). In addition, a motion to reconsider the amendment, after its initial failure, failed in a 27 to 28 vote. *See id.*

116. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); *see* Failed Senate Floor Amendment 27 to HB 1028, introduced by Sens. Valencia Seay, Gloria Butler, Sam Zamarripa, Kasim Reed, and Terrell Starr, and others, Mar. 31, 2004. Senator Smith questioned the germaneness of Amendment 27, but the Lieutenant Governor and the Parliamentarian agreed that the amendment was germane due to the broad scope of the underlying bill. *See* Senate Audio One, *supra* note 28 (remarks by Sen. Preston Smith, Lieutenant Governor Mark Taylor, and Secretary of the Senate Frank Eldridge, Jr.).

117. Senate Audio One, *supra* note 28 (remarks by Sen. Robert Lamutt); *see* HB 1028, as introduced, 2004 Ga. Gen. Assem. *Compare* Failed Senate Floor Amendment 28 to HB 1028, introduced by Sen. Robert Lamutt, Mar. 31, 2004, *with* HB 1028, as introduced, 2004 Ga. Gen. Assem.

118. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

119. *See* Senate Audio One, *supra* note 28 (remarks by Secretary of the Senate Frank Eldridge, Jr.).

prescriptive authority.¹²⁰ In what some considered a last ditch effort to kill HB 1028, Senator Charlie Tanksley of the 47th district offered a floor substitute, which would have invoked Rule 143.¹²¹ However, the Senate never voted on the floor substitute because it approved the committee substitute as amended.¹²² The Senate then adopted the Committee substitute, as amended, in a 28 to 26 vote.¹²³ The Senate then passed the substituted bill by a final vote of 36 to 17.¹²⁴

The most significant failed amendment was amendment 23C, an effort by Senators Don Thomas, Thomas Price, Eric Johnson, Ross Tolleson, and Dan Moody of the 49th, 36th, 27th, 53rd, and 34th districts, respectively, to limit non-economic damages to an aggregate of \$750,000 and to limit these damages to \$250,000 in some cases.¹²⁵ After initially passing the amendment, the Senate later removed it from the bill, only to have the amendment's provisions arise again in the Conference Committee.¹²⁶

Reconsideration by the House

While the amended HB 1028 passed the Senate, the House disagreed with the changes made by the Senate.¹²⁷ An effort by Conference Committee members to reconcile the markedly different versions of the bill ensued.¹²⁸ Although negotiations seemed promising, an impasse occurred when Senate members of the Conference Committee insisted on the inclusion of jury award caps,

120. See Failed Senate Floor Amendment 29 to HB 1028, introduced by Sen. Vincent Fort, Mar. 31, 2004.

121. See Failed Senate Floor Substitute to HB 1028, introduced by Sen. Charlie Tanksley, Mar. 31, 2004; Senate Audio One, *supra* note 28 (remarks by Sens. Preston Smith and Charlie Tanksley); Smith Interview, *supra* note 50.

122. Senate Audio One, *supra* note 28 (remarks by Lieutenant Governor Mark Taylor and Sen. Tommie Williams.).

123. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004).

124. *Id.*

125. See *Award Debate*, *supra* note 32; Failed Senate Floor Amendment 23C to HB 1028, introduced by Sens. Don Thomas, Thomas Price, Eric Johnson, Ross Tolleson, and Dan Moody, Mar. 31, 2004.

126. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see *Award Debate*, *supra* note 32.

127. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004) (passing the Committee substitute by a vote of 36 to 17); Georgia House of Representatives Voting Record, HB 1028 (Apr. 1, 2004) (disagreeing with the Senate by a unanimous vote of 157 to 0); see State of Georgia Final Composite Status Sheet, HB 1028, Apr. 1, 2004 (May 19, 2004).

128. See *Award Debate*, *supra* note 32 (“[F]rustrated Senate and House members initially accused one another of failing to negotiate in good faith.”).

which the Senate itself had rejected just days before.¹²⁹ When the Conference Committee could not come to a resolution, the Senate dissolved the Committee, and HB 1028 failed to pass in the 2004 legislative session.¹³⁰

Analysis

Political Undercurrents Surrounding HB 1028

HB 1028 was this year's "vehicle" to address the issue of tort reform.¹³¹ Senators disagreed strongly on the reasons behind the lengthy debate on and unusual death of HB 1028.¹³² However, most senators would have probably agreed that HB 1028 created one of the most contentious atmospheres in the Senate in recent history, and that the issues brought out by HB 1028 will return to the legislature in the future.¹³³ For the novice to legislative politics, it is often difficult to ascertain who was in favor of tort reform and who was against it since efforts to kill HB 1028 often took the form of seemingly pro-tort reform amendments meant to disrupt the bill procedurally or politically.¹³⁴ Furthermore, the division among interested parties led to confusion and a lack of consensus as even tort reform advocates sometimes disagreed over certain provisions.¹³⁵

Some senators, alleged to have been against tort reform,¹³⁶ maintained that insurance companies, particularly Medical

129. *See id.* ("Senate negotiators, led by Sen. Thomas Price (R-Roswell), a doctor, startled their House counterparts by putting the issue of caps on jury awards back on the table just days after their own chamber rejected them 31-24. . . . The Senate proposal prompted the House conferees . . . to question whether their Senate colleagues really wanted a tort reform bill.").

130. *See* Georgia Senate Voting Record, HB 1028 (Apr. 7, 2004); State of Georgia Final Composite Status Sheet, HB 1028, Apr. 7, 2004 (May 19, 2004); Audio Recording of Senate Proceedings, Apr. 7, 2004 [hereinafter Senate Audio Two] (remarks by Sen. Seth Harp).

131. *See* Telephone Interview with Bill Clark, Georgia Trial Lawyers Association (June 23, 2004) [hereinafter Clark Interview].

132. *Compare* Smith Interview, *supra* note 50, and Telephone Interview with Sen. Thomas Price, Senate District No. 36 (June 23, 2004) [hereinafter Price Interview], with Telephone Interview with Rep. Alan Powell, House District No. 23 (June 23, 2004) [hereinafter Powell Interview], and Telephone Interview with Sen. Seth Harp, Senate District No. 21 (June 23, 2004) [hereinafter Harp Interview].

133. *See* Smith Interview, *supra* note 50; Price Interview, *supra* note 132; Telephone Interview with Sen. Daniel Lee, Senate District No. 31 (June 23, 2004); Harp Interview, *supra* note 132.

134. *See* Smith Interview, *supra* note 50; Telephone Interview with David Cook, Executive Director, Medical Association of Georgia (June 24, 2004) [hereinafter Cook Interview].

135. *See* Harp Interview, *supra* note 132.

136. *See* Cook Interview, *supra* note 134.

Association of Georgia (“MAG”) Mutual, unrealistically pressed for damage caps and for the use of HB 1028, in particular, as the tort reform package.¹³⁷ Those senators contended that MAG Mutual pressed for the damage caps in an effort to destroy the proposed Authority, which would have created competition for MAG Mutual in a market where it holds a virtual monopoly.¹³⁸ Representative Alan Powell, who sponsored HB 1028 in the House, expressed extreme distaste for MAG Mutual based on what he perceived as underhanded tactics and the hijacking of the bill.¹³⁹ Representative Powell maintained that MAG Mutual insured virtually all of the “credential docs” that would have been eligible for insurance provided by the Authority.¹⁴⁰ Representative Powell, who served on the Conference Committee, also accused the Senate conferees of negotiating in bad faith.¹⁴¹

Those on the opposite side of the issue leveled equally harsh criticism at those whom they believed were against meaningful tort reform.¹⁴² Senator Preston Smith, who introduced HB 1028 into the Senate, described the process of getting HB 1028 to the Senate floor and then maneuvering through all of the procedural efforts to kill the bill as laborious.¹⁴³ Regarding the idea that MAG Mutual attempted to kill HB 1028 by insisting on damage caps when it knew that caps would not pass the House, Senator Smith, and others allied with him, held that it was the legislators and interest groups opposed to tort reform that used subterfuge to kill HB 1028.¹⁴⁴ When asked why the Senate conferees insisted on damage caps when even the Senate did not pass a cap on non-economic damages, Senator Smith, who was on the Conference Committee, explained that the House conferees started a free-for-all by bringing up provisions not passed by either house and that the Senate conferees were merely responding when they put everything on the table for negotiation.¹⁴⁵

137. See Powell Interview, *supra* note 132; Harp Interview, *supra* note 132.

138. See Powell Interview, *supra* note 132; Harp Interview, *supra* note 132.

139. See Powell Interview, *supra* note 132.

140. See *id.*

141. See *id.*

142. See Smith Interview, *supra* note 50; Price Interview, *supra* note 132.

143. See Smith Interview, *supra* note 50 (explaining the delays that created a time sensitive situation for debating and passing HB 1028 and describing “poison-pill” amendments that would have invoked Senate Rule 143 or rendered HB 1028 unconstitutional).

144. See *id.*; Price Interview, *supra* note 132.

145. See Smith Interview, *supra* note 50.

Senator Seth Harp, who moved to dissolve the Conference Committee believed that although the final proposal from the Senate conferees to the House did not include caps, as stated by Senator Smith, the Senate conferees wasted political capital by insisting on the caps.¹⁴⁶ Senator Harp felt that, while the interested parties were far apart on a possible compromise, the trial lawyers were willing to compromise whereas MAG Mutual insisted on caps and refused to acquiesce.¹⁴⁷ Others believed quite the opposite—that any willingness to compromise by those opposed to tort reform was superficial and that most of the offers from the House conferees would have been detrimental to the efforts of tort reform advocates.¹⁴⁸

The Senate initially passed HB 1028 by a vote of 36 to 17.¹⁴⁹ However, while Senator George Hooks of the 14th district declined to vote because of a conflict of interest between his family business and the bill, two doctors, Senators Thomas Price and Don Thomas of the 56th and 54th districts, respectively, and Senator Renee Unterman of the 45th district, a registered nurse and doctor's wife, did not abstain.¹⁵⁰

Senate Judiciary Committee Chairman Charles Tanksley noted that, while there was a healthcare crisis, the current bill did not address the real culprits—Medicare, the managed care industry, and the national medical malpractice insurance industry as a whole.¹⁵¹ Senator Tanksley, a Republican, also vocalized impatience with his colleagues stating, “All of this is complicated because the insurance industry refuses to come to the table. They’re not coming because my party won’t make them.”¹⁵²

146. See Harp Interview, *supra* note 132; see also Smith Interview, *supra* note 50.

147. See Harp Interview, *supra* note 132.

148. See Smith Interview, *supra* note 50; Price Interview, *supra* note 132; Cook Interview, *supra* note 134.

149. Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); see Bill Rankin, *Senate OKs Curbs in Malpractice Law*, ATLANTA J. CONST., Apr. 1, 2004, at C1, available at 2004 WL 73419597 [hereinafter *Senate OKs Curbs*].

150. See *Senate OKs Curbs*, *supra* note 149. The conflict of interest rule states that no senator shall vote if he, or his immediate family, has a direct monetary interest in the outcome of the vote. *Id.* Senator Hooks invoked the rule because his family business underwrote insurance for hospitals and healthcare professionals. *Id.*

151. *Id.*

152. Christian Boone, *Georgia Senate Passes Tort Reform Legislation*, MACON TELEGRAPH, Apr. 1, 2004, available at 2004 WL 56201106.

Despite its failure, HB 1028 is significant because it represents the culmination of at least two years of attempts at tort reform in the State of Georgia.¹⁵³ Advocates of tort reform in the medical malpractice arena, usually doctors, hospitals, and insurers, maintain that the skyrocketing costs of medical malpractice insurance are driving many practitioners to leave the State or the practice of medicine altogether.¹⁵⁴ Those opposing tort reform argue that many reforms, especially the controversial damage caps, would further harm injured plaintiffs.¹⁵⁵ The next subsections delve into the following issues: the arguments surrounding whether tort reform is necessary in Georgia; what type of tort reform, if any, is necessary; some of the reforms suggested in HB 1028; and alternative strategies for dealing with increasing medical insurance rates.

Joint and Several Liability

In states adhering to the doctrine of joint and several liability, multiple defendants are liable for the entire amount of any damages.¹⁵⁶ If one defendant is unable to pay or, in cases such as automobile accidents, is unknown the remaining defendants will pay the missing or insolvent defendant's portion of the damages.¹⁵⁷ In some instances, this scheme leads to perverse results—the least culpable defendant may pay all the damages.¹⁵⁸ “But what most people forget is that the first question the jury . . . determine[s is] but for this defendant's negligence the plaintiff's injury would not have occurred.”¹⁵⁹

The policy argument for joint and several liability is that between an innocent plaintiff and a tortious actor the tortious actor should bear the costs of the plaintiff's injuries.¹⁶⁰ After the trial, those defendants who pay more than their apportioned damages may file for a

153. See Telephone Interview with Allison Wall, Executive Director, Georgia Watch (June 22, 2004) [hereinafter Wall Interview].

154. See *House Panel*, *supra* note 10.

155. See Wall Interview, *supra* note 153.

156. See RESTATEMENT (SECOND) OF TORTS § 875 (1979) [hereinafter RESTATEMENT]; cf. Clark Interview, *supra* note 132.

157. RESTATEMENT, *supra* note 156.

158. See RESTATEMENT, *supra* note 156.

159. See *id.*

160. See *id.*

judgment against any nonpaying defendants—the paying defendants have the right of contribution.¹⁶¹ “The real problem in Georgia is the delay between the original trial and any recovery through contribution.”¹⁶²

Tort reform advocates often argue for the abandonment of joint and several liability, stating that it is unfair for a less culpable defendant to pay all the damages.¹⁶³ Interestingly, a change in joint and several liability could cause serious problems for negligent doctors.¹⁶⁴ In many medical malpractice cases, juries apportion a greater percentage of fault to doctors or other healthcare professionals.¹⁶⁵ But individuals rarely carry enough insurance to pay off larger judgments.¹⁶⁶ In those cases, codefendant hospitals pay greater percentages of judgments, while the individual defendants’ insurance policies pay the policy limit.¹⁶⁷ Instead of suing a doctor for contribution, the hospital, which has a business interest in maintaining a working relationship with the doctor, carries the loss.¹⁶⁸ This system actually protects doctors and other individual workers from attacks against their personal assets for any difference between their insurance and the judgment.¹⁶⁹ “Doing away with joint and several liability is not just a double-edge sword that hurts both doctors and patients, it is a meat-cleaver to doctors.”¹⁷⁰

Independent Contractors

The Committee substitute to the bill would have allowed hospitals to limit their own liability for the negligent acts of independent contractor physicians and staff.¹⁷¹

161. See RESTATEMENT, *supra* note 156.

162. Clark Interview, *supra* note 131. This delay can be up to 18 months in some cases. *Id.* The Georgia Trial Lawyers Association has suggested an immediate apportionment and contribution hearing at the conclusion of trials to ease the burden on defendants. *Id.*

163. See *id.*

164. See *id.* (“MAG doesn’t make this information known to the doctors it represents.”).

165. *Cf. id.*

166. See Clark Interview, *supra* note 131.

167. See *id.*

168. See *id.*

169. See *id.* (“I’m not aware of a case in Georgia where a plaintiff has gone after the personal assets of a doctor, and that may happen if we do away with joint and several liability.”).

170. *Id.* (“At the end of the day, doctors are worried that after doing a lifetime of good, one case will cost them everything.”).

171. HB 1028 (SCS), 2004 Ga. Gen. Assem.

Opponents of this proposed change in the law argued that hospitals should be more responsible when it comes to hiring contract workers, but they agreed with the amendment's proponents that hospitals should be able to limit this liability.¹⁷² The Committee substitute would have required a hospital to place a sign in the emergency room indicating that the hospital was not liable for the negligence of doctors whom it hired as independent contractors.¹⁷³ One hospital administrator stated, "[This portion of the bill] would have really helped me out. The emergency room is my biggest liability in the hospital."¹⁷⁴ She went on to say that "because doctors have to pay more in insurance premiums, they have to make up for that expense through volume. Consequently, they are traveling further distances for work."¹⁷⁵ According to this hospital administrator, the independent contractor provision would have had two beneficial consequences.¹⁷⁶ First, it would have helped the hospital by reducing its emergency room liability for acts done by independent contractors.¹⁷⁷ Second, it would have increased the demand for doctors who are looking for extra work to offset their rising insurance premiums.¹⁷⁸ Certainly at this 25-bed hospital, the independent contractor provision of the bill would have been a welcome relief.¹⁷⁹

Expert Testimony

The bill also sought to alter Georgia law by restricting expert testimony at trial to those experts who share the same specialty as the doctor defendant.¹⁸⁰ This provision of the bill would have reduced the possibility that a podiatrist would testify to the standard of care for a neurologist.¹⁸¹

172. See Rachel Tobin Ramos, *House Lawmakers to Tackle Slew of Tort Reform Bills*, FULTON COUNTY DAILY REP., Feb. 16, 2004, at 1, available at 2/16/2004 FULTONDAILY 1 [hereinafter *Slew*].

173. See *id.*; HB 1028 (SCS), 2004 Ga. Gen. Assem.

174. Telephone Interview with Joan Hartley, Hospital Administrator, Telfair Regional Hospital (June 23, 2004) [hereinafter *Hartley Interview*].

175. *Id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See *id.*

180. HB 1028 (SCS), 2004 Ga. Gen. Assem.

181. See *id.*

The addition of this provision might be a boon in disguise to plaintiffs.¹⁸² Some plaintiffs' attorneys argue that allowing only board certified physicians to testify at trial might hamper the available pool of physicians willing to testify.¹⁸³ However, as one prominent defense attorney argued, "[I]t's not going to help the defendants. I'd much prefer . . . [that the plaintiff] have some general practitioner talking bad about my neurosurgeon than [for the plaintiff] to go out and find . . . a neurosurgeon that will do it."¹⁸⁴

Damage Caps

The Senate attempted to add a non-economic damage cap provision to HB 1028, and although it passed once, the Senate later struck it down on reconsideration.¹⁸⁵ While the amendment's proponents contended that the proposed \$750,000 cap was generous, detractors argued that the \$750,000 maximum would be attainable only in cases with multiple defendants and the most one plaintiff could receive in non-economic damages from a single defendant would be \$250,000.¹⁸⁶ The cap is perhaps the most controversial measure advocated by tort reform proponents.¹⁸⁷ Medical industry lobbyists pushed for the cap because of a perceived crisis in the insurance industry, whereby large jury awards to plaintiffs for pain and suffering have caused malpractice rates to soar.¹⁸⁸ However, opponents argue that caps affect the wrong group—those individuals who have been through litigation and whom juries have found to have injuries caused by practitioners' negligence.¹⁸⁹ Caps may also limit the availability of legal recourse for poor individuals who may have valid claims but not enough resources to bring an action.¹⁹⁰ Pain and suffering awards typically pay plaintiffs' attorneys who operate

182. See Conley, *supra* note 1.

183. *Id.* (stating that a desire to remain in the "good boy" network will prevent some physicians from testifying against their fellow physicians).

184. *Id.* (quoting Thomas William Malone).

185. See Failed Senate Floor Amendment 23C to HB 1028, introduced by Sen. Don Thomas, Mar. 31, 2004; Georgia Senate Voting Record, HB 1028 (Mar. 31, 2004); Senate Audio One, *supra* note 28 (remarks by Sen. Don Thomas).

186. *Senate OKs Curbs*, *supra* note 149.

187. *Id.*

188. See Cook Interview, *supra* note 134.

189. See Wall Interview, *supra* note 153.

190. See *id.*

on a contingency fee basis, and capping the damages at \$250,000 might effectively determine which cases plaintiffs' attorneys will pursue.¹⁹¹

Yet, when one looks outside of Georgia it seems that tort reform has not necessarily reduced insurance premiums.¹⁹² After passing caps on damages last year, the State of Oklahoma approved an 81% cumulative rate increase for the State's largest medical malpractice insurance provider.¹⁹³ Texas recently approved raises in premiums for two of its five largest insurance providers by 35% and 19%, and the State is considering a rate increase of 16% for a third carrier.¹⁹⁴ In Ohio, five malpractice providers received approval for increases of between 10% and 40% after passing caps on damages.¹⁹⁵ Therefore, it appears that tort reform may not always equate to lower insurance premiums.

Insurance Crisis?

The medical and insurance industries have pushed hard for caps because they perceive runaway jury verdicts as a reason for the higher premium costs.¹⁹⁶ These groups claim that large verdicts have created a "crisis" in the insurance industry.¹⁹⁷ The insurance industry, led in part by MAG Mutual, claims that huge jury payouts for pain and suffering have led to inflated malpractice premiums.¹⁹⁸ Additionally, a multivariate regression study released by the United States Department of Health and Human Services "found that States with caps on non-economic damages experienced [an increase of] about 12 percent more physicians per capita than States without such a cap."¹⁹⁹ Another study verifies past research, which shows that "[d]espite the fact that most physicians are fully insured against the financial costs of malpractice, . . . 'direct' reforms—designed to

191. See Conley, *supra* note 1.

192. See Wall Interview, *supra* note 153.

193. *Id.*

194. *Id.*

195. *Id.*

196. See Linda S. Morris, *Coalition Travels State to Push Tort Changes*, MACON TELEGRAPH, Mar. 16, 2004, available at 2004 WL 56200577.

197. *House Panel*, *supra* note 10; see also Morris, *supra* note 196 ("[T]he current unrestricted jury award is having 'a devastating effect on the Georgia health-care system.'").

198. See *House Panel*, *supra* note 10.

199. HELLINGER & ESCINOSA, *supra* note 14, at 1.

reduce the level of compensation to potential claimants—improve productivity in health care by reducing the prevalence of defensive treatment practices.”²⁰⁰ However, opponents claim that insurance companies dramatically overstate the “crisis” within the industry.²⁰¹

Those who do not believe that the insurance industry is in a crisis due to malpractice payouts claim that stock market declines and medical industry cost increases are the real reason for the inflated malpractice costs.²⁰² Additionally, since the insurance industry is exempt from antitrust laws, they can collectively fix malpractice prices. Some also cite inflation as a partial culprit for the higher costs.²⁰³ Insurance industry advocates counter these claims by noting that they have not sought to lower premiums so much as to check the rate of growth by stabilizing and controlling the marketplace.²⁰⁴

Doctors’ groups claim that fear of liability has reduced the performance of certain procedures.²⁰⁵ Doctors fear that their life’s work is potentially on the line; some even predict that less accurate procedures like mammograms will be the subject of the next big wave of litigation.²⁰⁶ The current Chair of the Georgia Chamber of Commerce, Robert L. Brown, Jr., argued that the crisis harms Georgia’s economic progress and puts it at a competitive disadvantage with those states with tort reform.²⁰⁷

Conversely, some argue that insurance premiums are not so much a result of jury awards as they are of the market as a whole.²⁰⁸ The Assistant Chief Deputy Commissioner of Insurance for the State of Georgia, Amy Atkinson, attributed the increasing premiums to the “perfect storm” conditions of the boom market in the 1990s coupled with the September 11, 2001 attacks.²⁰⁹ For example, “[T]he St. Paul

200. Daniel P. Kessler & Mark McClellan, *How Liability Law Affects Medical Productivity*, 21 J. HEALTH ECON. 931, 952 (2002).

201. See *House Panel*, *supra* note 10. Representative Nick Moraitakis of the 42nd district asserted that the Medical Association of Georgia (“MAG”) Mutual had assets of \$654 million and a \$180 million surplus, and that the company insures about 75% of the Georgia’s doctors. *Id.*

202. See *Slew*, *supra* note 172.

203. See *id.*

204. See *id.*

205. See *Panel Questions*, *supra* note 15.

206. See *id.*

207. See *id.* The Chamber also advocates pre-treatment agreements that limit patients to arbitration rather than allowing remedies in the courts. See *id.* But see Conley, *supra* note 1 (noting that contracting out such important rights beforehand leads to claims of unequal bargaining power and undue influence).

208. See *Panel Questions*, *supra* note 15.

209. *Id.*

Companies, one of the nation's largest medical malpractice insurance carriers, withdrew from the market in 2000 . . . but [this was attributable] to business decisions."²¹⁰ Further, there are fewer carriers in Georgia now, which means less competition; it is uncertain if new legislation will change the situation.²¹¹ Regardless of how the insurance companies incurred losses, higher premiums are one way to recoup these losses.²¹² Nonetheless, the insurance industry is nationwide in scope, so large verdict trends outside of Georgia will affect the pricing here regardless of the existence of excessive verdicts within the state.²¹³

Public Outcry

The people of Georgia have not remained silent in this debate; the topic of tort reform has provoked responses from the public in the form of letters to the editor or Op-Ed pieces in local newspapers.²¹⁴ Authors often question the existence of an insurance crisis or doctor shortage, or they argue it is not a result of the jury awards but of market conditions.²¹⁵ One editorial piece addressed the common contention that large malpractice verdicts and greedy plaintiffs are driving doctors out of Georgia.²¹⁶ The Federation of State Medical Boards stated that, between 2000 and 2003, the total number of doctors in Georgia rose from 17,151 to 18,134.²¹⁷ The piece argues, however, that the weak stock market and the reinsurance fallout after September 11th, which had wide-ranging ripple effects, are to blame for the current crisis.²¹⁸ Additionally, the managed healthcare industry does not allow doctors to pass cost increases on to patients as they once did, resulting in lower profit margins for doctors and a less profitable industry overall.²¹⁹ The piece notes that the General Assembly would do better targeting lawyers who file frivolous

210. *Id.*

211. *Id.*

212. *See id.*

213. *See id.*

214. *See Panel Questions, supra* note 15.

215. *Id.*

216. *See Deception, supra* note 20.

217. *See id.*

218. *See id.*

219. *See id.*

lawsuits rather than to punish injured plaintiffs through damage caps.²²⁰

Both proponents and opponents of tort reform frame the issue as a lack of willingness for the other side to take responsibility for their actions.²²¹ Doctors claim that unscrupulous trial attorneys and greedy plaintiffs are too quick to sue for a quick buck without fear of repercussions for abusing the process.²²² Others note that medical malpractice actions are costly to pursue and that attorneys often front all the costs.²²³ Attorneys argue that the expensive nature of actions keeps frivolous claims in check.²²⁴ Additionally, those opposing reform argue that juries are capable of sorting through baseless claims and that award caps prevent remuneration of injured plaintiffs.²²⁵

In analyzing whether soaring insurance costs are actually the result of malpractice actions, one article notes that the General Accounting Office (“GAO”), a nonpartisan accounting office of the federal government, found an increase in insurance malpractice payouts—around 8.2% per year—from 1998 to 2001.²²⁶ However, these payouts alone do not account for the soaring malpractice insurance rates seen in the same years.²²⁷ Good economic conditions in the 1990s led to lower premium increases, but when the bottom fell out of the market, malpractice premium increases grew.²²⁸ The medical malpractice market, like insurance as a whole, is prone to cyclical swings, but managed care prevents passing on costs directly to the patients in hard times.²²⁹ Further, based on the GAO report, doctors are not fleeing the State or the industry as some maintain.²³⁰ Further, the article notes that industry-wide cost-cutting has led to lower patient care standards, which may be contributing to an increase in

220. *See id.*

221. *See Dellacona, supra* note 20.

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See Victims Pay Twice, supra* note 12.

227. *See id.*

228. *See id.*

229. *See id.*; *see also* Conley, *supra* note 1 (“There’s no doubt that doctors are caught between the proverbial rock and the hard place. The main thing that’s happened to them is managed care. The business interests have taken over the practice of medicine. Their reimbursements have gone down.”).

230. *See Victims Pay Twice, supra* note 12.

malpractice actions.²³¹ Therefore, caps on awards may only harm successful litigants—injured individuals who are not presenting bogus claims.²³²

Finally, some editorials present novel ideas for making the practice of medicine safer, thereby decreasing tort actions.²³³ One writer viewed tort reform as a way for doctors to evade responsibility for their actions.²³⁴ Stating that individuals' lives are worth more than their economic potential, the article suggests that physicians should police themselves more efficiently, perhaps by implementing a point system for evaluating doctors and by then disciplining error-prone doctors.²³⁵ A Washington, D.C. consumer advocacy group noted that "84.9 percent of doctors have had no malpractice payouts since 1990, [that] 3.5 percent [of doctors] are responsible for 40 percent of [Georgia's] medical malpractice awards[, and that] . . . [o]nly 24.2 percent of the doctors with four or more malpractice payouts were disciplined."²³⁶

Tort Lotto?

Regardless of whether the insurance industry is in a crisis, many commentators believe that the current jury system in Georgia does not suffer from the "Jackpot Justice" syndrome that some believe plagues malpractice suits.²³⁷ Despite the popular press, a recent study by University of Georgia Political Science Professor Susette M. Talarico and Law Professor Thomas A. Eaton found that only 6.5%

231. *See id.*

232. *See id.*; *see also* Conley, *supra* note 1 ("Caps are intended only to apply to those who have proven that they have a meritorious case and that they have been seriously injured. [Caps inflict] a double injury on them.") (quoting William Q. Bird).

233. *See, e.g.,* Randee Head, *This Is Viewpoints for Friday*, MACON TELEGRAPH, Apr. 9, 2004, at 9, available at 2004 WL 56201347.

234. *See id.*

235. *See id.*

236. Editorial, *Doctors Must Look Inward for a 'Tort Reform' Solution*, MACON TELEGRAPH, Feb. 22, 2004, available at 2004 WL 56199769. The article also notes that, in states with damage caps, malpractice rates have not fallen, and some have risen higher. *See id.* Several factors may influence malpractice premiums; for instance, the unpredictability of jury awards makes underwriters loath taking on the unforeseen risks. *See id.* However, some claim that risk is part of the insurance industry. *See* Conley, *supra* note 1 ("[Tort reformists] want to bring in an arbitrary cap so they can bring predictability to the system. . . .") (quoting Thomas William Malone).

237. *See Panel Questions, supra* note 15; David Horrigan, *Recent Appellate Decisions Show that Warnings About the So-Called 'Tort Lotto' May Be Overstated*, FULTON COUNTY DAILY REP., Mar. 15, 2004, available at 3/15/2004 FULTONDAILY B9 [hereinafter *Appellate Decisions*].

of tort cases involved personal injuries.²³⁸ The professors noted that, when adjusted for population growth, tort cases have declined slightly in Georgia and that “plaintiffs prevailed in just over half of all jury trials.”²³⁹ Further, large damages just do not appear in Georgia, as the following findings demonstrate:

‘When the plaintiff does prevail, compensatory damages tend to be modest, and punitive damage awards are exceedingly rare.’ . . . [T]he tort system in operation is much different from the one portrayed in the popular and political rhetoric of tort reform. There is no evidence of an explosion in tort filings, and there are few signs of runaway juries.²⁴⁰

Considerations and Potential Solutions

As Albert M. Pearson, III noted, there are many public accountability features built into the judicial system that advocates of tort reform may have discounted.²⁴¹ Every judicial proceeding and record is open to the public, and both sides have access to qualified counsel in an adversarial proceeding.²⁴² Also, the trial judge must control and observe the whole proceeding, and to prevail at trial a plaintiff in Georgia must receive a unanimous verdict.²⁴³ Additionally, a defendant may move for a directed verdict before the end of trial and a judgment as a matter of law after the jury has returned, and there are two levels of appeal to protect the defendant.²⁴⁴ In all cases, “trial lawyers watch each other; the judge and the jury watch the trial lawyers; the appellate courts watch the trial judges; and the press and the public watch everybody. There is no activity in modern life . . . subject to closer, more continuing . . .

238. See *Panel Questions*, *supra* note 15.

239. See *Appellate Decisions*, *supra* note 237.

240. *Id.*

241. See Pearson, *supra* note 1; see also Conley, *supra* note 1 (“[Y]ou’ve got a system really that is designed to provide protection ultimately against an undue award. . . . [J]uries will usually do the right thing and when they do not . . . then you are going to have better adjudications even after the verdicts.”) (quoting William Q. Bird).

242. See Pearson, *supra* note 1.

243. See *id.* But see Conley, *supra* note 1 (“The first thing we could do is give our judiciary the tools to do its job[—]more judges [and] higher pay. . . . It makes it very hard for the courts to do the court’s job as well as it should. The court is the least provided for in the system.”) (quoting Earl W. Gunn).

244. See Pearson, *supra* note 1.

public scrutiny than a lawsuit.”²⁴⁵ Some believe proponents of tort reform ignore these safeguards since they do not fit with the vignette of runaway juries.²⁴⁶ Further, claims of statistical evidence showing the failings of the judicial system are not completely realistic because, in Georgia, “there is no statistical count of the total number of medical malpractice . . . cases filed or resolved in the trial courts. At the appellate level in Georgia, the story is much the same.”²⁴⁷

Pearson, also studied the use of Georgia’s two abusive litigation statutes and found that fewer than 20 personal injury cases cited these abusive litigation statutes.²⁴⁸ Thus, if “medical malpractice cases involve such high potential for abuse, as tort reform advocates contend, what accounts for their conspicuous absence . . . from reported appellate decisions [under the abusive litigation statutes]?”²⁴⁹ This leads one to question how one can view the system as “broken” if defendants currently do not use the remedies available to them.²⁵⁰

Pearson proposed two solutions to the current “crisis.”²⁵¹ First, he proposed that the State process and catalogue information about cases differently.²⁵² He also proposed that the Georgia General Assembly demand the following: a catalog of civil cases disposed of by trial courts arranged by subject; the number and dollar amount of cases that settle; the number of cases actually tried, including the verdict amount; and the number of cases where the judge granted a new trial or reduced damages.²⁵³ To obtain the information in the immediate future, he proposed that the State obtain it from the two most interested parties—trial lawyers and insurance companies.²⁵⁴ Insurance companies keep detailed records on all settlements, trials, and verdicts that involve the companies as a part of their routine business practices.²⁵⁵ “Where vital and highly relevant information exists and is in the possession of one of the interest groups actively

245. *Id.*

246. *See id.*

247. *Id.*

248. *See id.* (citing to Georgia’s abusive litigation statutes—O.C.G.A. §§ 9-15-14, 51-7-81).

249. *Id.*

250. Pearson, *supra* note 1.

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.*

seeking legal change, such information should be in the public record before a vote is taken on any piece of legislation.”²⁵⁶

Second, Pearson proposed that the market as a whole—not just the doctors, who are a very small group—should share the costs of medical malpractice insurance.²⁵⁷ He argued that insurance companies should offer medical error or malpractice coverage to the general public.²⁵⁸ By doing so, the increase in premiums would significantly increase the reserves available to pay out medical malpractice claims.²⁵⁹ This would also give relief to physicians and additional coverage to those most afraid of something going wrong with their procedures.²⁶⁰ Additionally, providing this insurance could diminish the need and incentive for parties to litigate.²⁶¹ As Pearson concluded, “[T]his approach would permit—indeed would compel—insurance companies to lower malpractice premiums for all medical care providers.”²⁶²

It is highly significant that insurance companies are presently unwilling to promise that tort reform will lead to any of these benefits. As such, tort reform advocates offer no real promise at all—no real relief to health care providers, no real relief to patients and no real relief to legislators trying desperately to serve their constituents.

A market-based approach could well be the optimal solution for everyone involved. Best of all, this approach would not require our citizens—or their elected officials—to choose between access to the civil justice system and access to the health care system.²⁶³

Conclusion

The medical industry has undergone huge changes in the past few years.²⁶⁴ Managed care, medical malpractice awards, and insurance

256. Pearson, *supra* note 1.

257. *See id.*

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.*

262. Pearson, *supra* note 1.

263. Pearson, *supra* note 1. *But see* Conley, *supra* note 1 (stating that pain and suffering is a valuable commodity and that the fact that insurers do not currently insure for it does not mean that it has no value).

264. *See supra* Analysis.

industry fallout likely affect the inability of some doctors to procure insurance.²⁶⁵ But whether government imposed solutions will provide relief for any of the concerned parties is as of yet unknown.²⁶⁶ What is foreseeable is a long and arduous road to positive reform that leads to improved patient care and financial stability for healthcare providers.²⁶⁷

David Boohaker
Jon Gallant
Ramsey Knowles
A. Robin Teal

265. *Id.*

266. *Id.*

267. *Id.*