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LEGISLATIVE REGULATION OF ATTORNEYS' FEES—HEALTH CARE SERVICES—MALPRACTICE ACT—STATUTORY SEVERABILITY—SEPARATION OF POWERS—Without resolving an involved separation of powers issue, the Pennsylvania Supreme Court has held that the attorneys' fees limitation of the Health Care Services Malpractice Act was not severable from the Act's unconstitutional provisions, and that the decision in *Mattos v. Thompson* nullified all arbitration procedures of the Act.

Heller v. Frankston, ___ Pa. ___, 475 A.2d 1291 (1984).*

The Health Care Services Malpractice (Act) was enacted by the Pennsylvania legislature in 1975.¹ This multifaceted scheme was designed for the purpose of making professional liability insurance available at a reasonable cost, as well as for establishing a system through which a person who has been injured as a result of tort or breach of contract by a health care provider could obtain an expeditious adjudication of his claim and a determination of equitable compensation.² The title of the Act indicates that this legislation addresses the topics of "medical and health related malpractice insurance"; "powers and duties of the Insurance Department"; "providing for a joint underwriting plan"; "Arbitration Panels for Health Care, compulsory screening"; "collateral sources requirement"; "limitation on contingent fee compensation"; "establishing a Catastrophe Loss Fund"; and "penalties".³

On February 7, 1976, Dionisia Marquez's son sustained severe brain damage as a result of treatment received in a Philadelphia hospital.⁴ Ms. Marquez subsequently engaged a Philadelphia attorney to represent her son's interest, signing a contingent fee agreement which provided for an attorney's fee of a flat thirty-three

* Due to the unavailability of the *Heller* opinion in the Pennsylvania State Reports at the time of publication, citations to this reporter have been omitted.

1. Health Care Services Malpractice Act, 40 PA. CONS. STAT. ANN. §§ 1301.101-.1006 (Purdon Supp. 1984-85).

2. 40 PA. CONS. STAT. ANN. § 1301.102 (Purdon Supp. 1984-1985).

3. *Id.* at § 1301.101 (Purdon Supp. 1984-85) (emphasis added).

4. *Heller v. Frankston*, ___ Pa. ___, 475 A.2d 1291 (1984). The child was treated for bronchopneumonia; as a result of treatment, or lack of it, the child suffered severe brain damage and now requires twenty-four hour care. See also *id.* at 1298 (Hutchinson, J., dissenting).

percent of the plaintiff's recovery.⁵ This agreement was not in accordance with section 604(a) of the Health Care Services Malpractice Act, which provides a sliding scale limit on attorneys' fees, with a high of thirty percent and a low of twenty percent, depending on the amount of the recovery.⁶

Counsel filed a complaint with the Arbitration Panels for Health Care in Philadelphia on August 13, 1976.⁷ Before an arbitration panel was formed, the parties agreed to a one million dollar settlement in late 1977.⁸ Because a minor was involved in the action, the attorneys petitioned the court of common pleas for leave to compromise the case.⁹ That court approved the settlement and the attorneys' fees, despite the inconsistency of the fee with the limitation of section 604(a) of the Act.¹⁰

The parties also submitted the settlement for approval to the Administrator of the Arbitration Panels for Health Care, as required by section 307(b) of the Act.¹¹ The Administrator approved the settlement and that portion of the fee allowed by the Act.¹² Because counsel challenged the constitutionality of the attorneys' fees provision, the Administrator directed that the disputed amount be held in escrow, pending a final judicial determination.¹³

The Attorney General petitioned the Philadelphia County Court of Common Pleas to modify the order which had approved the thirty-three percent attorneys' fee. The court of common pleas did approve the settlement and the attorneys' fees, even though they exceeded the amount established by section 604(a).¹⁴ When that

5. *Id.* (Hutchinson, J., dissenting).

6. *Id.* at 1293. The pertinent part of the attorneys' fees provision reads as follows: § 1301.604 *Attorney's Fees* (a) When a plaintiff is represented by an attorney in the prosecution of his claim the plaintiff's attorneys' fees from any award made from the first \$100,000 may not exceed 30%, from the second \$100,000 attorneys' fees may not exceed 25%, and attorneys' fees may not exceed 20% on the balance of any award.

40 PA. CONS. STAT. ANN. § 1301.604 (Purdon Supp. 1984-85).

7. 475 A.2d at 1293.

8. *Id.* at 1293, 1298.

9. *Id.* at 1293. PA. R. Civ. P. 2039(a) provides that "[n]o action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor." *Id.* at 1293 n.1.

10. 475 A.2d at 1293.

11. *Id.* The pertinent part of the statute provides that "[t]he Administrator shall have the power to consider and approve offers of settlement for fiduciaries, minors and incompetent parties at any time prior to the first meeting of the arbitration panel." *Id.* 40 PA. CONS. STAT. ANN. § 1301.307 (Purdon Supp. 1984-85).

12. 475 A.2d at 1293.

13. *Id.*

14. *Id.* The Attorney General's role in this case is unclear. *See* 475 A.2d at 1293 n.5.

court denied the petition to modify and ordered that the fees in escrow be remitted to the attorneys, the Attorney General appealed to the Pennsylvania Commonwealth Court.¹⁵ While this appeal was pending, the Pennsylvania Supreme Court handed down the decision in *Mattos v. Thompson*,¹⁶ which involved the constitutionality of the Act.¹⁷ When the commonwealth court ruled on the Administrator's appeal, it made only a brief reference to *Mattos*, and never addressed the effect that *Mattos* had on the issue then on appeal.¹⁸ The commonwealth court held that only the Administrator was competent to consider and approve the settlement and fees, and that the common pleas court lacked jurisdiction to do so.¹⁹

The Administrator consequently directed the attorneys to relinquish the disputed fees.²⁰ This action of the Administrator was then appealed to the commonwealth court, where the court declared section 604(a) of the Act unconstitutional on the basis of an impermissible legislative interference with the responsibility of the judiciary.²¹ The commonwealth court decision was, in turn, appealed to the Pennsylvania Supreme Court.²² The supreme court held that the decision in *Mattos v. Thompson* nullified all arbitration procedures of the Health Care Services Malpractice Act, including the section that regulated attorneys' fees, and that exclu-

The court notes that the record was ambiguous as to whether the Attorney General was acting as counsel for the Administrator or was involved in the case pursuant to PA. R. APP. P. 521(b) which provides that "[t]he Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention. If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter." *Id.*

The Attorney General requested that the funds in escrow, plus interest, be paid to the guardian of the estate of the injured minor. 475 A.2d at 1293 n.5.

15. *Id.* at 1294.

16. 491 Pa. 385, 421 A.2d 190 (1980).

17. 475 A.2d at 1294-95. In *Mattos*, the court declared unconstitutional section 309 of the Act, which had given "the health care arbitration panels 'original exclusive jurisdiction' over medical malpractice claims, because the delays involved in processing these claims under the prescribed procedures set up under the Act resulted in an oppressive delay and impermissibly infringed upon the constitutional right to a jury." 491 Pa. 385, 396-97, 421 A.2d 190, 196 (1980).

18. 475 A.2d at 1294. *See* *Marquez v. Hahnemann Medical College and Hospital of Philadelphia*, 56 Pa. Commw. 188, 424 A.2d 975 (1981).

19. 475 A.2d at 1294, 424 A.2d at 976.

20. *Id.*

21. *Id.* *See* *Heller v. Frankston*, 76 Pa. Commw. 294, 464 A.2d 581 (1983).

22. 475 A.2d at 1294. The majority opinion does not indicate whether it was the Administrator or the Attorney General who appealed to the Pennsylvania Supreme Court from the commonwealth court decision. *Id.* *See supra* note 14 and accompanying text.

sive jurisdiction of attorney fee regulation reverted to the courts.²³

Chief Justice Nix, delivering the majority opinion,²⁴ first noted that the commonwealth court and the parties to the action had implicitly assumed the continuing validity of the Act after the *Mattos* decision.²⁵ The issue on appeal was framed as whether the attorneys' fees limitation imposed by section 604(a) of the Act constituted an impermissible interference with judicial authority to supervise the practice of law.²⁶ Neglecting to address the separation of powers issue, Chief Justice Nix declared that the *Mattos* holding had nullified all of the arbitration procedures of the Act, including section 604(a).²⁷ Thus, the majority failed to reach the separation of powers issue raised by the appeal.

Chief Justice Nix explained that *Mattos* had rendered the entire medical malpractice scheme, not merely the clause providing exclusivity of jurisdiction, unconstitutional.²⁸ Therefore, he reasoned, articles III, IV, V and VI which provided the administrative and procedural details relating to the arbitration process were struck down as well.²⁹ A narrow interpretation of *Mattos*, which would have permitted the arbitration panels to retain jurisdiction concurrent with the courts, was rejected by Chief Justice Nix for two reasons.³⁰ First, the majority found that the *Mattos* holding had clearly invalidated the only existing legislative grant of jurisdiction to the panels.³¹ Chief Justice Nix reasoned that since the legislature was the only body competent to confer a new jurisdictional predicate for panels, its failure to do so following *Mattos* rendered the panels powerless.³² Secondly, the majority reasoned, under the position favoring the post-*Mattos* viability of the arbitration system, the court would have been required to substitute concurrent jurisdiction for the exclusive jurisdiction designated by the legisla-

23. *Heller v. Frankston*, 475 A.2d at 1296 (1984).

24. *Id.* at 1292. Chief Justice Nix was joined by Justices Flaherty, McDermott, Zapala and Papadakos. Justice Larsen concurred in the result and Justice Hutchinson filed a dissenting opinion. *Id.*

25. *Id.* at 1294.

26. *Id.*

27. *Id.*

28. *Id.* at 1295-96.

29. *Id.* at 1295.

30. *Id.* at 1296.

31. *Id.*

32. *Id.* Chief Justice Nix found that "where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster." *Id.*

ture.³³ The majority concluded that the fashioning of an alternative scheme, however, would be an improper exercise of judicial authority when a statute is determined to be constitutionally defective.³⁴

Because the court struck down the arbitration process in *Mattos*, Chief Justice Nix contended that it necessarily followed that section 604(a) was no longer valid, because he viewed the power to regulate counsel fees as ancillary to the power to arbitrate the basic claim.³⁵ Although provisions of a statute are generally severable, Chief Justice Nix pointed out that this can only occur where the provisions are distinct and not so interwoven as to be inseparable.³⁶ The majority found that severability of the statutory provision was not possible in this case.³⁷

Justice Hutchinson, in a dissenting opinion, asserted that the crucial issue on appeal was not the ineffectiveness of the arbitration system, but rather the legislative power to control legal fees.³⁸ Justice Hutchinson strongly criticized the majority's reasoning that the difficulties with arbitration necessarily destroyed the substantive control that the legislature had placed on contingent fees in section 604(a) of the Act.³⁹ To support this contention, Justice Hutchinson cited numerous enactments which limit attorneys' fees charged in a variety of other actions.⁴⁰

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1297 (Hutchinson, J., dissenting).

39. *Id.*

40. *Id.* at 1299 n.7. Justice Hutchinson contended that an affirmation of the commonwealth court holding would cast doubt on a host of fee limitations previously enacted by the General Assembly. He proceeded to list Pennsylvania statutes which contain provisions limiting attorneys' fees.

Statutes limiting attorneys' fees in cases superseding former common law actions include: Motor Vehicle Sales Finance Act, Act of June 28, 1947, P.L. 1110, as amended July 1, 1978, P.L. 725, No. 130, 69 PA. CONS. STAT. ANN. § 623 (Purdon Supp. 1983-84) (relating to limitation of \$50 for attorneys' fees prior to commencement of legal action for repossession); Act of January 30, 1974, P.L. 13, No. 6, 41 PA. CONS. STAT. ANN. § 503 (Purdon Supp. 1983-84) (relating to determination of reasonable attorneys' fees when borrower, residential mortgage debtor, or other debtor prevails); Home Improvement Finance Act, Act of August 14, 1963, P.L. 1082, 73 PA. CONS. STAT. ANN. § 500.209 (relating to home installment contracts, collection of delinquencies, payment of court costs and attorneys' fees not exceeding twenty percent of amount due); Act of June 22, 1964, P.L. 84, § 610, added by Act of December 29, 1971, P.L. 640, No. 169, 26 PA. CONS. STAT. ANN. § 1.610 (Purdon Supp. 1983-1984) (relating to reimbursement for owners of any rights, titles or interest in real property, with attorneys' fees not to exceed \$500).

Moreover, Justice Hutchinson claimed that based on section 1925 of the Statutory Construction Act,⁴¹ section 604(a) was not essentially or inseparably connected with the voided provisions of the Act.⁴² He buttressed his contention by pointing out that in section VI of the Act which deals with awards, only two of the six sections refer to arbitration panels.⁴³ Justice Hutchinson set forth the Act's other remedial devices to illuminate the breadth of the legislature's effort to combat the medical malpractice insurance crisis.⁴⁴ He stated that he failed to see how the entire Act could be

Other Pennsylvania statutes limiting attorneys' fees include: Pennsylvania No-Fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 PA. CONS. STAT. ANN. § 1009.107 (Purdon Supp. 1983-1984) (relating to limiting reasonable attorneys' fees to that based on actual time expended on behalf of a claimant); Act of December 15, 1959, P.L. 1774, No. 672, 53 PA. CONS. STAT. ANN. § 7445 (relating to attorneys' fees of five percent for collection of liens for municipal improvement); Adoption Act, Act of October 15, 1980, P.L. 934, No. 163, as amended Act of June 23, 1982, P.L. 617, No. 174, 23 PA. CONS. STAT. ANN. § 2313 (relating to limitation of attorneys' fee to \$150 for representing child in involuntary termination proceeding); The Workmen's Compensation Act, Act of June 2, 1915, P.L. 736, as amended Act of March 29, 1972, P.L. 159, No. 61, 77 PA. CONS. STAT. ANN. § 998 (Purdon Supp. 1983-1984) (relating to limitation of attorneys' fee to twenty percent of amount awarded); Act of December 13, 1982, P.L. 1127 No. 257, 71 PA. CONS. STAT. ANN. § 2032 (Purdon Supp. 1983-1984) (relating to attorneys' fees for administrative agency actions of not more than \$75 per hour—none if total less than \$250, no more than \$10,000). See 475 A.2d at 1299 n.7.

The commonwealth court had distinguished codifications of common law causes of action, such as medical malpractice actions, from remedies created by the legislature. See 76 Pa. Commw. 294, 304, 464 A.2d 581, 586. The supreme court opinions, however, did not discuss this distinction, although Justice Hutchinson did list the two types of enactments separately. See 475 A.2d at 1299 n.7 (Hutchinson, J., dissenting).

41. 1 PA. CONS. STAT. ANN. § 1925 (Purdon Supp. 1964-83). The pertinent part of the provision reads as follows:

The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to the other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent [sic] upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

1 PA. CONS. STAT. ANN. § 1925 (Purdon Supp. 1964-83).

42. 475 A.2d at 1300 (Hutchinson, J., dissenting).

43. *Id.*

44. *Id.* Justice Hutchinson set forth the framework of the Act in the following manner: Article II sets forth the liability of non-qualified health care providers. Articles III, IV, and V create the arbitration panels and the office of Administrator. Article VI deals with awards . . . [and] contains [the attorneys' fee limitation] . . . Article VII creates the Medical Professional Liability Catastrophe Loss Fund and provides for the liability of excess carriers. Article VIII requires the Insurance Commissioner to create a plan, consisting of all authorized insurers, which would . . . "provide equita-

viewed as unconstitutional merely because the panels were unworkable. Additionally, he regarded the attorneys' fee limitation and the arbitration system as separate, independent remedial devices embraced by the same multifaceted Act.⁴⁵

Finally, Justice Hutchinson addressed the power of the legislature to enact provisions regulating attorneys' fees. He refuted the commonwealth court's holding, based upon the separation of powers doctrine, that the legislature was incompetent to pass legislation involving the regulation of attorneys' fees.⁴⁶ Instead, emphasizing that rules prescribed by the court to govern the practice of law may not abridge, enlarge, or modify the substantive rights of any litigant,⁴⁷ Justice Hutchinson stated in conclusion that it was inconceivable that the litigant's right to a greater or lesser portion of his recovery should be viewed as a mere matter of procedure, and thus outside the realm of legislative policy.⁴⁸

During the early and mid-1970's, the nation experienced what was characterized by the media and numerous commentators as a medical malpractice crisis.⁴⁹ While an escalating number of medical malpractice claims were being filed, the dollar amount of judgments awarded skyrocketed.⁵⁰ As a result, malpractice insurance

ble apportionment of the financial burdens of insurance provided to all applicants . . . and the cost of operating the plan among all participating insurers. . . ." Article IX directs the Medical, Osteopathic and Podiatry licensing boards to appoint investigators, attorneys and hearing examiners to fully implement their authority to revoke, suspend, limit or otherwise regulate the licenses of physicians. Finally, Article X contains six miscellaneous provisions for immunity from liability for the licensing boards establishing the Act's prospective application only, setting forth penalties for nonpayment of assessments and establishing a joint committee.

Id. at 1301 (Hutchinson, J., dissenting) (emphasis added).

45. *Id.*

46. *Id.*

47. *Id.* at 1303. The Pennsylvania Constitution provides:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeal among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant.

PA. CONST. art. 5, § 10(c).

48. 475 A.2d at 1301 (Hutchinson, J., dissenting).

49. Jones, *Medical Malpractice Litigation: Alternatives for Pennsylvania*, 19 DUQ. L. REV. 407, 407 (1981).

50. Note, *Medical Malpractice Screening Panels: A Judicial Evaluation of Their Practical Effect*, 42 U. PITT. L. REV. 939 (1981). See *After Mattos v. Thompson - The Fu-*

rates rose dramatically and insurance carriers grew increasingly unwilling to extend coverage to physicians.⁵¹

In response to this growing crisis, state governments and a federal commission investigated the contributory factors behind this national problem.⁵² The studies linked high court costs and attorneys' fees,⁵³ increased availability of a claim against health care providers for lack of informed consent, extended statutes of limitation, use of *res ipsa loquitor* in medical malpractice actions and an accelerated practice of defensive medicine to the crisis.⁵⁴ In consideration of these findings, many state legislatures responded by enacting remedial legislation.⁵⁵ These programs sought to provide medical malpractice insurance to health care providers at a reasonable cost, as well as to insure adequate relief to medical malpractice victims.⁵⁶

The medical malpractice insurance crisis in Pennsylvania became exacerbated in 1975, when the Argonaut Insurance Company announced its intention to stop underwriting malpractice policies.⁵⁷ The Health Care Services Malpractice Act was the Pennsylvania legislature's effort to make reasonably-priced malpractice insurance available to all health care providers in the state.⁵⁸ This complex statutory scheme sought to accomplish its objectives by implementing changes in tort law, insurance practice, professional discipline and malpractice adjudication.⁵⁹ A significant part of the

ture of Pennsylvania's Health Care Services Malpractice Act. [hereinafter cited as *After Mattos*] 86 DICK. L. REV. 313, 316 n.17 (1982), which reported that the average amount paid in settlement of judgment of malpractice suits increased steadily from 1968 to 1974. The St. Paul Fire and Marine Insurance Company estimated an 11% increase over that time period. *Id.*

51. *Jones, supra* note 49, at 407. See Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 490 (1977), which indicated that in 1969, the largest medical malpractice insurance company in the nation reported one claim for every twenty-three doctors it insured. By 1974, this ratio had risen to one in every ten doctors, representing a 139% increase in claim incidence. *Id.*

52. *After Mattos, supra* note 50, at 317.

53. *Id.* at 317. It has been estimated that over one-fifth of the dollar settlements in malpractice cases is attributable to payments of plaintiff's legal fees. See generally J. Green, *Medical Malpractice and the Propensity to Litigate*, in *ECONOMICS OF MEDICAL MALPRACTICE* 193, 197 (S. Rottenberg ed. 1978). *After Mattos, supra* note 50, at 317 n.24.

54. *Id.* at 317.

55. *Jones, supra* note 49, at 407.

56. *Id.* at 407, 408.

57. *After Mattos, supra* note 50, at 313. See generally Note, *Medical Malpractice-A Question of Insurability*, 80 DICK. L. REV. 594 (1976), for a discussion of Argonaut's activities in Pennsylvania.

58. *After Mattos, supra* note 50, at 313.

59. *Id.* at 318.

Act addressed the problems of expense and delay associated with malpractice adjudication.⁶⁰ One provision limited attorneys' fees⁶¹ and other provisions established the arbitration system.⁶²

Heller presented the Pennsylvania Supreme Court with two issues of first impression. The first concerned whether, as the majority held, section 604(a) of the Health Care Services Malpractice Act was nullified by the *Mattos* decision or, alternatively, whether section 604(a) was severable from the unconstitutional provisions of the Act. The latter involved the true issue on appeal; that is, whether section 604(a) constituted an impermissible legislative usurpation of judicial power. The majority addressed only the first issue, basing its opinion on a broad reading of *Mattos*, and failed to reach the important separation of powers issue.

In *Mattos v. Thompson*,⁶³ the supreme court struck down section 309 of the Health Care Services Malpractice Act which conferred original, exclusive jurisdiction over medical malpractice claims on the arbitration panels.⁶⁴ The *Mattos* court found that the delays involved in processing claims under the Act's prescribed procedures resulted in an impermissible infringement upon the constitutional right to a jury trial.⁶⁵ The language in the *Mattos* opinion explicitly invalidated only section 309, which contained the panels' jurisdictional predicate.⁶⁶ Only Justice Larsen, who filed a

60. *Id.* at 320.

61. 40 PA. CONS. STAT. ANN. § 1301.604 (Purdon Supp. 1984-85).

62. 40 PA. CONS. STAT. ANN. §§ 1301.301-.514 (Purdon Supp. 1984-85).

63. 491 Pa. 385, 421 A.2d 190 (1980).

64. *Id.* at 396, 421 A.2d at 196. See *infra* notes 74-75 and accompanying text.

65. 491 Pa. at 396, 421 A.2d at 196. The Act had previously survived the same constitutional attack in *Parker v. Children's Hospital of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978). In that case, the court found that on a theoretical level, the Act and its procedures did not violate any constitutional guarantees. The *Parker* court held that the Act was too new to properly determine whether its actual operation resulted in an unconstitutional infringement upon the right to jury trial. When presented with the *Mattos* case, the commonwealth court studied the Act's operation over a period of years and made factual findings regarding claims filed under the arbitration system. On the basis of these findings, the commonwealth court determined that the Act failed to provide an efficacious alternative dispute-resolution procedure. The supreme court in *Mattos* was satisfied that sufficient time had been allowed to resolve the Act's initial problems. The court, at that point, was willing to step in and undertake a meaningful evaluation of the arbitration system. *Id.*

66. 491 Pa. at 396, 421 A.2d at 196. Justice Nix, speaking for the majority of the *Mattos* court asserted, "We are compelled, therefore, to declare unconstitutional section 309 of the Act, . . . giving the health care arbitration panels original exclusive jurisdiction over medical malpractice claims because the delays involved in processing these claims under the prescribed procedures set up under the Act result in an oppressive delay and impermissibly infringes on the constitutional right to a jury." Section 604(a) was nowhere mentioned in the *Mattos* opinion. *Id.*

concurring and dissenting opinion in the case, stated that he would have struck down all provisions dealing with the arbitration system, specifying articles III, IV and V.⁶⁷ The *Mattos* court expressed no opinion advocating a broad finding of unconstitutionality as to invalidate provisions of the Act that were unrelated to the arbitration process. Neither article VI nor section 604(a) were mentioned in any of the *Mattos* opinions.

In light of the *Mattos* opinion, it is difficult to accept the rationale adopted by the supreme court majority in this case. Chief Justice Nix attempted to clarify the parameters of the *Mattos* holding by declaring that *Mattos* had implicitly invalidated the entire medical malpractice arbitration scheme.⁶⁸ Reasoning that the provisions furnishing the administrative and procedural details of the arbitration process were subordinate to the compulsory arbitration, Chief Justice Nix found that when the panels were stripped of their jurisdictional predicate by *Mattos*, these provisions became meaningless. Chief Justice Nix further asserted that the power to regulate attorneys' fees was ancillary to the power to arbitrate the basic claim.⁶⁹ Therefore, he reasoned that when the panel lost jurisdiction over the claim itself, as a result of the *Mattos* decision, it obviously could not regulate attorneys' fees in such matters.⁷⁰ The fallacy underlying this explanation is that the legislature neither explicitly nor implicitly vested the panels with any authority to regulate attorneys' fees.⁷¹ It clearly appears that the substantive control placed on attorneys' fees by section 604(a) is to be enforced directly by the legislature. While an expansive interpretation of *Mattos* may support the implicit nullification of other arbitration-related provisions of the Act, *Mattos* clearly had no impact upon section 604(a).⁷²

Principles of statutory interpretation and case law support Justice Hutchinson's conclusion that section 604(a) survived the *Mattos* decision, providing further support for the suggestion that the majority's analysis of the first issue was too superficial. The structure of the Act itself demonstrates the distinct areas that the legis-

67. *Id.* at 399, 421 A.2d at 196 (Larsen, J., concurring and dissenting). See *infra* note 74, and accompanying text.

68. 475 A.2d at 1295-96.

69. *Id.* at 1296.

70. *Id.*

71. 40 PA. CONS. STAT. ANN. § 1301.604 (Purdon Supp. 1984-85). See also *infra* note 75 and accompanying text.

72. See *infra* notes 74-75 and accompanying text.

lature sought to address.⁷³ Articles III (which contains section 309, conferring jurisdiction on the panels), IV and V create the arbitration panels and the office of administrator, as well as provide the administrative and procedural details relating to the arbitration system.⁷⁴ Article VI deals with awards. Of the six sections contained in article VI, only two refer to arbitration panels.⁷⁵ Section 604(a) limits the plaintiff's attorneys' fees from any award and contains no reference to either the arbitration panels or the administrator.⁷⁶

The majority failed to address section 1925 of the Statutory Construction Act,⁷⁷ under which separate statutory provisions enjoy a presumption of severability. Section 604(a) satisfies the requirements of section 1925 and is clearly severable; the section is not inextricably intertwined with the arbitration system,⁷⁸ and the legislature would have undoubtedly included this section in the Act, even without the creation of the arbitration system. In view of the Act's stated purposes⁷⁹ and its panoply of remedial devices,⁸⁰ section 604(a) is independently complete and capable of execution in accordance with legislative intent.

Pennsylvania case law supports this construction of the section 1925 codification for determining statutory severability. In *Saulsbury v. Bethlehem Steel Co.*,⁸¹ the Pennsylvania Supreme Court

73. See *supra* note 44 and accompanying text.

74. 40 PA. CONS. STAT. ANN. § 1301.301-.514 (Purdon Supp. 1984-85). Articles III, IV and V were the provisions of the Act that were implicitly invalidated by the *Heller* majority's broad reading of the *Mattos* case. *Id.*

75. 40 PA. CONS. STAT. ANN. § 1301.601 (Purdon Supp. 1984-85) provides that if the arbitration panel finds that the defendant's conduct was tortious or constituted a breach of contract, the plaintiff retains the same right to recover damages as are now provided by law. *Id.* 40 PA. CONS. STAT. ANN. § 1301.603 (Purdon Supp. 1984-85) permits the arbitration panel to award punitive damages against the defendant if it finds that the defendant's wilful or wanton misconduct caused the plaintiff's injury. *Id.* Since these two sections of Article VI relate to the arbitration process, they are implicitly nullified by a broad reading of the *Mattos* case.

The other four sections of Article VI, which contain no reference to the arbitration process, deal with: the reduction of awards by any public collateral source of compensation or benefits, the attorneys' fee limitation, the statute of limitations on the liability of the Catastrophe Loss Fund established in Article VII, and the requirements of a special written contract to create a guaranty of cure. These sections clearly survive the *Mattos* decision. See *infra* notes 77-91 and accompanying text.

76. See *supra* note 6 and accompanying text.

77. See *supra* note 41 and accompanying text.

78. See *supra* note 44 and accompanying text.

79. See *supra* note 2 and accompanying text.

80. See *supra* note 44 and accompanying text.

81. 413 Pa. 316, 196 A.2d 664 (1964).

was faced with deciding the constitutionality of two occupational tax ordinances.⁸² Although the court held that the ordinances in question were indivisible, the court did enunciate a two prong test for determining statutory severability.⁸³ First, the legislature must have intended that the act be severable; the court indicated that the legislative intent was of primary significance.⁸⁴ Second, the act must be capable of separation in fact.⁸⁵ The court explained that the valid portion of the enactment must be independent and complete within itself.⁸⁶

Section 604(a) of the Health Care Services Malpractice Act obviously satisfies both prongs of the *Saulsbury* test. Section 1007.1 of the Act, added in 1979, states that "the provisions of this act are declared to be severable."⁸⁷ The legislature's addition of this clause to the Act strongly indicates its desire for severability. Moreover, since section 604(a) was independently complete, it was capable of separation in fact.⁸⁸

To support his assertion that section 604(a) was invalidated when the arbitration panels lost jurisdiction over medical malpractice claims, Chief Justice Nix cited the *Saulsbury* case for the proposition that a statute may be partially valid and partially invalid only where the provisions are distinct and not inextricably interwoven.⁸⁹ Since Chief Justice Nix had mistakenly assumed that the panel itself was vested with authority to enforce section 604(a),⁹⁰ he failed to undertake a thorough analysis of the Act based upon the *Saulsbury* criteria. Chief Justice Nix consequently drew the premature conclusion that severability of section 604(a) would be patently erroneous.⁹¹ Indeed, a statutory analysis of the Health Care Services Malpractice Act strongly indicates that section

82. *Id.* at 318, 196 A.2d at 665. In *Saulsbury*, two municipalities levied an annual occupational privilege tax on every employed individual whose yearly earnings were at least \$600. Since the tax lacked the uniformity required by the Pennsylvania Constitution, the municipalities urged the court to construe the ordinances as imposing the tax on all employed individuals and to ignore the unconstitutional effort to exempt those who earn less than \$600. *Id.*

83. *Id.* at 321, 196 A.2d at 667.

84. *Id.*

85. *Id.*

86. *Id.*

87. 40 PA. CONS. STAT. ANN. § 1301.1007.1 (Purdon Supp. 1981-82), Act of December 14, 1979, P.L. 562. Although this section is acknowledged in the Preliminary Provisions of Article I in the latest issue of Purdon Supplement, it nowhere appears in the statute. *Id.*

88. See *supra* note 75 and accompanying text.

89. 475 A.2d at 1296.

90. See *supra* notes 70-71 and accompanying text.

91. 475 A.2d at 1296.

604(a) is severable.

Once it has been established that section 604(a) is clearly severable from the unconstitutional portions of the Act, it is impossible to evade the difficult separation of powers issue raised by this case. This was the first time that Pennsylvania courts were invited to decide the appropriate distribution of power between the legislature and the judiciary with regard to the regulation of attorneys' fees. Pennsylvania courts have previously held that legislation touching upon the practice of law, however slightly, was an impermissible encroachment on judicial power.⁹² This case presented the Pennsylvania Supreme Court with the opportunity to reevaluate its previous approach. It is unfortunate that the court declined the opportunity.

Neither the commonwealth court nor the two supreme court opinions provide sufficient analysis of the total considerations raised by the delicate separation of powers issue. The commonwealth court addressed the constitutional question when it struck down section 604(a) as an impermissible legislative interference with judicial responsibilities.⁹³ That court, however, neglected to consider the ramifications that its holding, if affirmed, would have on the numerous other statutory fee limitations in effect.⁹⁴ The *Heller* court majority managed to completely evade the separation of powers issue. Since it failed to adequately examine article VI of the Act itself and its purpose in the context of the entire statutory scheme, the majority abruptly concluded that *Mattos* had invalidated section 604(a) and never reached the constitutional question.

Justice Hutchinson, in his dissenting opinion, strongly criticized the majority for avoiding the true issue on appeal.⁹⁵ The shortcoming in the dissenting opinion, however, is Justice Hutchinson's failure to include any discussion concerning the interrelationship between article V, section 10(c) of the Pennsylvania Constitution and the host of statutory fee limitations that he implied were

92. See *infra* notes 102-06 and accompanying text.

93. 76 Pa. Commw. 294, 464 A.2d 581 (1983). See *infra* notes 106-08 and accompanying text.

94. See *supra* note 40 and accompanying text.

95. 475 A.2d at 1297 (Hutchinson, J., dissenting). In his discussion of whether the legislature may permissibly regulate attorneys' fees, Justice Hutchinson objected to the commonwealth court's use of the separation of powers doctrine to support its holding that the legislature lacked any authority to set fees. He illustrated the fallacy underlying that court's holding by citing numerous other fee limitations enacted by the General Assembly and by qualifying the rulemaking power conferred on the court for the governance of the bar. *Id.* at 1297, 1299-1300 n.7 & 1302-03.

constitutional.

The General Assembly is vested with authority by the Pennsylvania Constitution to promulgate the substantive law of the Commonwealth and to enunciate public policy.⁹⁶ Through the exercise of its police power, the legislature is empowered to enact statutes in furtherance of laudable public goals, except where such legislation is prohibited.⁹⁷ In light of the nationwide malpractice insurance crisis and its acute effect in Pennsylvania in 1975, the Health Care Services Malpractice Act was certainly a valid exercise of the legislature's police power. As one of the Act's remedial devices designed to halt the ever-spiraling medical malpractice costs and to further the Commonwealth policy of protecting medical malpractice victims, section 604(a) also appears to be a legitimate exercise of legislative power.⁹⁸

Article V, section 10(c) of the 1968 Pennsylvania Constitution bestowed upon the Pennsylvania Supreme Court an express grant of rulemaking authority over matters of practice and procedure and over conduct of the bar.⁹⁹ In accordance with this authority, the supreme court adopted the ABA Code of Professional Responsibility in 1974. The Code does not articulate precise rules; rather it enunciates general guidelines to promote high professional standards among attorneys.¹⁰⁰ Canon 2 of the Code contains several sections concerning attorneys' fees.¹⁰¹ These provisions merely set

96. The Pennsylvania Constitution provides: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. 2, § 1.

The Pennsylvania Constitution further provides: "No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose." PA. CONST. art. 3, § 1.

97. See *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964) (enunciation of public policy rests with the legislature not the judiciary); *Kotch v. Middle Coal Field Poor Dist.*, 329 Pa. 390, 197 A. 334 (1938) (the General Assembly has jurisdiction of all subjects on which legislation is not prohibited).

98. See *supra* notes 49-62 and accompanying text.

99. See *supra* note 47.

100. The Code of Professional Responsibility contains Ethical Considerations, which "represent the objectives toward which every member of the profession should strive," and Disciplinary Rules, which "unlike the Ethical Considerations are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement, 42 PA. CONS. STAT. ANN. (Purdon 1984).

101. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17, 42 PA. CONS. STAT. ANN. (Purdon 1984) provides:

The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protec-

forth factors to consider in the determination of a reasonable fee, but do not establish exact amounts.

The legislature, through its extensive police power, and the judiciary, pursuant to its rulemaking authority, each have power to regulate attorneys' fees. The potential for conflict between the two branches is obvious.

A previous collision between the legislature and the judiciary, with regard to supervising the conduct of attorneys, occurred in the context of litigation arising from the Pennsylvania Ethics Act.¹⁰² The Ethics Act was enacted in 1978 to enhance public confidence in state government by assuring that the pecuniary interests of public officials would not conflict with their public duties.¹⁰³ Among other provisions, the Ethics Act contains a post-employment restriction which prohibits a former public employee from

tion of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

Id.

CODE OF PROFESSIONAL RESPONSIBILITY EC 2-18, 42 PA. CONS. STAT. ANN. (Purdon 1984) provides: "The determination of the reasonableness of a fee requires consideration of all relevant circumstances . . . including the time required . . . the nature of the employment, the responsibility involved, and the results obtained. . . ." *Id.*

CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20, 42 PA. CONS. STAT. ANN. (Purdon 1984) provides: "Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. . . ." *Id.*

CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106, 42 PA. CONS. STAT. ANN. (Purdon 1984) provides in part:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Id.

102. 65 PA. CONS. STAT. ANN. § 401-413 (Purdon Supp. 1984-1985).

103. *Id.* § 401.

representing a person on any matter before the government body with which he was associated for a one year period after leaving that body.¹⁰⁴ Additionally, the Ethics Act contains a financial disclosure provision which requires public employees to file financial statements listing certain personal interests.¹⁰⁵

Similar to section 604(a) of the Health Care Services Malpractice Act, the post-employment restriction and the financial disclosure requirement of the Ethics Act induce friction between the legislature and the judiciary. The two Ethics Act provisions appear to be legitimate exercises of legislative authority to prevent conflicts-of-interest among public employees. When the provisions are applied to attorneys, however, this legislation impacts upon judicial control over the conduct of the bar.

Pennsylvania courts previously held the two Ethics Act provisions unconstitutional as applied to attorneys and judges, ruling that the requirements imposed constituted a legislative usurpation of judicial power.¹⁰⁶ The rationale behind this result was premised on the assumption that the regulation of the bar is an exclusively judicial function, and that any legislation affecting the practice of law is unconstitutional. Under this approach, such legislation is invalid whether or not it actually conflicts with the rules prescribed by the Pennsylvania Supreme Court. The commonwealth court followed this rationale, citing Ethics Act cases as authority,¹⁰⁷ when it

104. *Id.* § 403(e).

105. *Id.* § 404(a).

106. See *Wajert v. State Ethics Comm'n*, 491 Pa. 255, 420 A.2d 439 (1980) (the supreme court invalidated the post-employment restriction as applied to a former judge); *Pennsylvania Public Utility Bar Association v. Thornburgh*, 62 Pa. Commw. 88, 434 A.2d 1327 (1981), *aff'd*, 498 Pa. 589, 450 A.2d 613 (1982) (the commonwealth court invalidated the post-employment restriction as applied to attorneys employed by a state administrative agency); *Kremer v. State Ethics Comm'n*, 503 Pa. 358, 469 A.2d 593 (1983) (the supreme court struck down the financial disclosure requirement as applied to judges); *Ballou v. State Ethics Comm'n*, 56 Pa. Commw. 240, 424 A.2d 983 (1981), *aff'd on other grounds*, 496 Pa. 127, 436 A.2d 186 (1981) (the commonwealth court struck down the financial disclosure requirement as applied to publicly-employed attorneys).

107. 76 Pa. Commw. at 301, 464 A.2d at 585. The commonwealth court cited the following cases which challenged the constitutionality of the financial disclosure requirement of the Ethics Act as applied to attorneys: *Ballou v. State Ethics Comm'n*, 56 Pa. Commw. 240, 424 A.2d 983 (1981), *aff'd on other grounds*, 496 Pa. 127, 436 A.2d 186 (1981) (the commonwealth court struck down the financial disclosure requirement as applied to publicly-employed attorneys, finding that it infringed upon the judiciary's inherent and exclusive power to regulate the conduct of the bar); *Snelbaker v. State Ethics Comm'n*, 70 Pa. Commw. 529, 453 A.2d 709 (1982), *aff'd*, 468 A.2d 746. (the court applied the *Ballou* holding); *Yost v. State Ethics Comm'n*, 56 Pa. Commw. 250, 424 A.2d 611 (1981). (the court cited the *Ballou* holding, although it determined that the petition for review stated no cause of action) 76 Pa. Commw. at 294, 464 A.2d at 581.

struck down section 604(a) of the Health Care Services Malpractice Act.¹⁰⁸ The question, therefore, of whether section 604(a) may be considered a similar intrusion upon judicial functions represented a significant issue before the supreme court in this case.

The Pennsylvania Supreme Court has expressly recognized that the separation of powers between the judicial and legislative branches is not absolute. In 1978, the legislature explicitly made the Public Agency Open Meeting Law¹⁰⁹ applicable to the supreme court's rulemaking deliberations.¹¹⁰ As a result, the supreme court was required to give public notice of its meetings¹¹¹ and to admit the public to its deliberations.¹¹² Moreover, the supreme court became subject to the Law's sanctions for noncompliance: judicial rulemaking was invalid unless undertaken during public meetings,¹¹³ and those who participated in non-public meetings were guilty of a summary offense punishable by fine.¹¹⁴

The supreme court held that the Open Meeting Law was inconsistent with the supreme court's express authority to prescribe rules governing practice, procedure and the conduct of the court.¹¹⁵ Although it excised judicial rulemaking functions from the scope of the Open Meeting Law, the supreme court, with respect to certain governmental functions, acknowledged an existing overlap of legislative and judicial power.¹¹⁶ The court, however, failed to include any discussion of specific areas in which overlap exists and how power should be allocated in such areas.

The judiciary has also impliedly recognized the existence of overlapping legislative and judicial power.¹¹⁷ Criminal statutes of general applicability have been said to be illustrative of an area of accepted overlap.¹¹⁸ When attorneys and judges acting in their professional capacities are charged with statutory offenses such as witness tampering¹¹⁹ or accepting illegal bribes,¹²⁰ the legislature is

108. *Id.* at 303, 464 A.2d at 586.

109. 65 PA. CONS. STAT. ANN. § 261-269 (Purdon Supp. 1984-85).

110. 42 PA. CONS. STAT. ANN. § 1703 (Purdon 1981).

111. 65 PA. CONS. STAT. ANN. § 265 (Purdon Supp. 1984-85).

112. *Id.* § 262.

113. *Id.*

114. *Id.* § 268.

115. *In re* 42 PA. C.S. § 1703, 482 Pa. 522, 394 A.2d 444 (1978).

116. *Id.* at 534, 394 A.2d at 451.

117. See Shapiro, *Judicial Control Over the Bar Versus Legislative Regulation of Governmental Ethics: The Pennsylvania Approach and a Proposed Alternative*, 20 DUQ. L. REV. 13, 39 (1981).

118. *Id.* at 23.

119. 18 PA. CONS. STAT. ANN. § 4952 (Purdon 1983).

clearly controlling the conduct of the bar; yet such action is not regarded as a usurpation of judicial power. Legislative and judicial responsibilities also overlap in the areas of fiscal control of the judiciary and in setting the salaries of judges.¹²¹ In both of these cases, primary responsibility rests with the legislature.¹²² The judiciary is permitted to intervene only if the available funds fall below the level necessary to maintain efficient operation of the judicial branch.¹²³

The Pennsylvania Constitution implicitly recognizes that the legislature has inherent power to enact statutes that may affect matters within the supreme court's control.¹²⁴ Because article V, section 10(c) requires the suspension of laws inconsistent with rules prescribed by the supreme court,¹²⁵ it can be inferred that legislation not inconsistent with supreme court rules is valid.

A functional approach to analyzing areas of overlapping legislative and judicial power has been proposed by Professor Stephen J. Shapiro.¹²⁶ The functional analysis involves two steps.¹²⁷ The first measures the extent to which the statutory requirement is inconsistent with supreme court rules; the second evaluates possible deleterious effects of the statute on the state justice system.¹²⁸ The functional approach assesses the extent of legislative impingement upon the realm of supreme court control.¹²⁹ By taking a more flexible view of the separation of powers doctrine, this approach minimizes artificial distinctions as well as practical problems in application.¹³⁰ This form of analysis has the additional advantage of

120. *Id.* § 4701.

121. Shapiro, *supra* note 117, at 39.

122. Commonwealth *ex rel.* Carrol v. Tate, 442 Pa. 45, 55, 274 A.2d 193, 198-99 (1971). Should the legislature act arbitrarily or capriciously and fail or neglect to furnish adequate funds, the court possesses inherent power to compel the deficiency, but the burden is on the Court to establish that the money it requests is necessary for the efficient administration of justice.

123. *Id.* at 55, 274 A.2d at 198.

124. Shapiro, *supra* note 117, at 39.

125. After granting rulemaking power to the supreme court over court procedures and the practice of law, the Pennsylvania Constitution provides: "All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions." PA. CONST. art. 5, § 10(c).

126. Shapiro, *supra* note 117, at 27.

127. *Id.*

128. *Id.*

129. *Id.*

130. For example, use of the functional approach would permit the court to assess the impact of a given statutory provision on the judicial realm of control without casting doubt on other legislation touching upon the conduct of attorneys. This serious problem was not

allowing the judiciary to retain paramount control over the practice of law, since the courts have the final word on the constitutionality of legislation.¹³¹

Section 604(a) of the Health Care Services Malpractice Act would undoubtedly be regarded as a valid exercise of legislative power under this functional analysis. Although the Pennsylvania Supreme Court, in accordance with its article V, section 10(c) rulemaking authority, has addressed the topic of attorneys' fees, it has set forth mere guidelines to uphold the professional character of the bar.¹³² The attorneys' fees permitted under section 604(a) of the Act would clearly fall within the range of reasonableness contemplated by the supreme court guidelines. Any inconsistency between section 604(a) and the supreme court rules would, therefore, be negligible. It is highly unlikely that the application of this statutory requirement would adversely affect the state justice system. Section 604(a) admittedly reduces potential earnings in medical malpractice actions; however, this restriction would probably not dissuade qualified attorneys from taking medical malpractice cases.

The severity of Pennsylvania's medical malpractice insurance crisis demonstrated the urgent necessity to halt rising medical malpractice costs. The legislature was compelled to exert control over all factors contributing to the problem, including high attorneys' fees. The gravity of the crisis and the complexity of the issue of regulating attorneys' fees strongly suggest that the *Heller* majority should have undertaken a more thorough consideration of the arguments presented in the dissenting opinion.

The Pennsylvania Supreme Court will undoubtedly again be faced with the question of whether the regulation of attorneys' fees is a matter of legislative, or, alternatively, judicial concern. The court should have decided the important issue of the proper allocation of power between the legislative and judicial branches in the

contemplated by the commonwealth court when it held that the legislature was wholly incompetent to regulate attorneys' fees. 475 A.2d at 1302 (Hutchinson, J., dissenting).

Furthermore, this approach would minimize unnecessary interference with the legislature's legitimate exercise of its police power. By openly acknowledging that the legislature has some power in areas of overlapping judicial and legislative functions, it is unnecessary to rely on a procedural/substantive distinction as Justice Hutchinson did to prevent a rigid application of the separation of powers doctrine. *Id.* at 1302, 1303 (Hutchinson, J., dissenting).

131. Because of its inherent power of judicial review, the court would not sacrifice any control over the bar by adopting a more flexible approach in cases presenting matters of legislative and judicial concern. *See supra* note 125 and accompanying text.

132. *See supra* notes 100-101 and accompanying text.

regulation of attorneys' fees. While a future decision may not eliminate the doubt cast upon the surviving provisions of the Health Care Services Malpractice Act as a result of this case, it hopefully would resolve the broader and much more significant issue of whether the legislature may permissibly limit the fees charged by attorneys.

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