Florida's 2003 Medical Malpractice Legislation: Potential Constitutional Challenges

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I. INTRODUCTION

Citing "skyrocketing"[1] medical malpractice insurance premiums, "erratic"[2] jury awards, and "rapidly rising healthcare costs,"[3] insurance companies and physicians, prior to the 2003 legislative session, proclaimed the state of Florida was floundering in a medical malpractice insurance crisis.[4] They complained that increased premiums forced physicians to choose from a variety of unpalatable options: pay the increased premiums, leave the state of Florida, retire prematurely, eliminate high-risk procedures, or practice without professional liability insurance.[5]

Not surprisingly, the cause of the increased rates is much debated. Most commonly, insurers and physicians blame excessive litigation instigated by those looking to win the "litigation

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[1] Christopher Oster, *Lawmakers seek GAO Examination of Insurers' Rates*, WALL ST. J., July 3, 2002 at D3.

[2] US DEP'T OF HEALTH AND HUMAN SVCS., CONFRONTING THE NEW HEALTHCARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 8 (2002).

[3] US DEP'T OF HEALTH AND HUMAN SVCS., *supra* note 2 at 1.

[4] *The Complicated History of Medical Malpractice Insurance*, TAMPA TRIB., December 15, 2002.

[5] Elizabeth Stewart Poisson, *Addressing the Impropriety of Statutory Caps on Pain and Suffering Awards in the Medical Liability System*, 82 N.C. L. REV. 759, 763 (2004); Rachel Zimmerman and Christopher Oster, *Assigning Liability: Insurers' Missteps Helped Provoke Malpractice Crisis*, WALL ST. J., June 24, 2002 at A1; TAMPA TRIB., *supra* note 4.

lottery."[6] They criticize both the quantity of claims filed and the exorbitant amounts of the awards. The American Medical Association faults the Florida "legal system [that] produces multimillion dollar jury verdicts on a regular basis" and the National Association of Independent Insurers criticizes potential plaintiffs: "people sue at the drop of a hat . . . ."[7] Often, critics attribute astronomical awards to the unpredictable and subjective nature of jury awards, particularly in the area of noneconomic damages.[8] Trial attorneys counter these claims with statistics that show both a decrease in the number of claims filed and a decline in average amount paid.[9] Moreover, research indicates that only 1.53% of patients injured by medical negligence even file a claim.[10]

Trial attorneys place blame for the crisis on the underwriting and investment practices of insurance companies. [11]

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[6] US DEP'T OF HEALTH AND HUMAN SVCS., *supra* note 2 at 9; Monique A. Anawis, *Tort Reform 2003*, 6 DEPAUL J. HEALTH CARE L. 309, 309 (2003).

[7] Zimmerman, *supra* note 5.

[8] US DEP'T OF HEALTH AND HUMAN SVCS., *supra* note 2 at 8.

[9] TAMPA TRIB., *supra* note 4;

[10] US DEP'T OF HEALTH AND HUMAN SVCS., *supra* note 2 at 8 (citing A.R. Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence. Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245-251 (1991)).

[11] *See* Anawis, *supra* note 6 at 309; Oster, *supra* note 1; TAMPA TRIB., *supra* note 4. *But see* GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE (2003) (at http://www.flatls.org/pdf/DOH-Large-Final%20Book.pdf) (indicating

Medical malpractice insurance was a booming business in the late 1980's and early 1990's and impressive profits brought new competitors into the industry.[12] Increased competition led to vigorous price wars in the mid-1990's.[13] Insurance companies were able to offset the low premiums with investment gains, but when the stock market crashed in 2000, this cushion was eliminated and insurance companies increased premiums to compensate for this loss of revenue.[14] "I don't like to hear insurance company executives say it's the tort system – it's self-inflicted," stated the CEO of a malpractice insurer.[15] Even some physicians are acknowledging that long-held beliefs about the reasons for increases in premiums may not be accurate. The American College of Obstetricians and Gynecologists admitted insurance practices have factored into the recent crisis; "[w]e are admitting it is a much more complex problem than we have previously talked about."[16] Interestingly, rising premiums are

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that claims paid to plaintiffs, not the underwriting cycle, was the main cause of increased malpractice premiums).

[12] Zimmerman, *supra* note 5.

[13] *Id.*; *see also* Georgia Trial Lawyers' Association, Setting the Record Straight: It's a Malpractice Insurance Cycle – *Not a Tort Crisis* (at http://www.gtla.org/public/justice-preservation/GTLA-Legislative-Packet.pdf).

[14] Zimmerman, *supra* note 5.

[15] *Id.* (quoting Donald J. Zuk, CEO of Scpie Holdings Inc., a major malpractice insurer in California).

[16] *Id.* (quoting Alice Kirkman, spokeswoman for the American College of Obstetricians and Gynecologists).

not exclusively encountered by physicians. Policies for legal malpractice, automobile, and homeowner's insurance are also commanding increased premiums.[17] Like physicians, attorneys are feeling the effects of the insurance industry's underwriting and investing practices. Insurers are either refusing to write or increasing premiums for "risky" practice areas even though American Bar Association statistics suggest no corresponding increase in the number of claims against attorneys. [18]

Plaintiffs point to physicians themselves. Preventable medical errors kill as many as 98,000 Americans each year – more than AIDS, automobile accidents, or breast cancer.[19] These errors can often be attributed to the disjointed nature of the healthcare system, licensing and accrediting of physicians, lack of focus and training on the prevention of medical errors, and impediments to uncovering and learning from errors.[20]

This is not the first time Florida has witnessed a malpractice insurance crisis. For decades, the Florida Legislature has enacted legislation aimed at alleviating the

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[17] David Hechler, *Malpractice Policies Going Up*, NAT'L L. J., June 3, 2002 at A1.

[18] *Id.*

[19] NAT'L ACAD. OF SCI. INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (2000)

[20] *Id.*

crisis of increasing medical malpractice premiums.[21] Thus far, the Legislature has not received the anticipated results.

This paper first introduces the medical malpractice insurance crisis faced by the state of Florida. It describes the far-reaching effects of this crisis, the parties involved, and the reasons why this crisis exists. Part II describes the most recent attempt by the Florida Legislature to alleviate the crisis – Chapter 2003-416. Part III analyzes two of the constitutional challenges – single subject requirement and access to the courts – this new legislation is likely to encounter.

II. CHAPTER 2003-416

In response to the alleged crisis, Florida's Governor Jeb Bush created the Governor's Select Task Force on Healthcare Professional Liability Insurance to investigate the crisis and make recommendations.[22] Based on the final report of the task force, the Legislature concluded that Florida was experiencing a medical malpractice crisis of "unprecedented magnitude"[23] that threatened the availability and quality of healthcare for all

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[21] *See* Richard Young, Comment, *Medical Malpractice in Florida: Prescription for Change*, 10 FLA. ST. U. L. REV. 593 (1983).

[22] Fla. Exec. Order No. 02-041 (Aug. 2002).

[23] 2003 Fla. Laws ch. 416 § 1(1).

Florida citizens.[24] Malpractice premiums had increased substantially in the last decade[25] and Florida physicians faced some of the highest medical malpractice insurance premiums in the county.[26] In response to the escalating costs, the Legislature found that physicians were leaving the state of Florida, retiring early from practice, limiting their practice to low-risk procedures, and practicing medicine without professional liability insurance.[27] Additionally, as insurance companies cease writing policies in the state of Florida, physicians are having difficulty finding insurance companies willing to underwrite medical malpractice insurance at any price.[28]

The resulting legislation, Chapter 2003-416, attempts to comprehensively resolve the malpractice insurance crisis by enacting a broad spectrum of statutes focusing on patient safety and improved quality of healthcare,[29] medical malpractice

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[24] 2003 Fla. Laws ch. 416 § 1(2).

[25] 2003 Fla. Laws ch. 416 § 1(5).

[26] 2003 Fla. Laws ch. 416 § 1(4); *see also* GOVERNOR'S SELECT TASK FORCE *supra* note 11 at 1 (the average medical malpractice premium in Florida was 55% higher than the national average).

[27] 2003 Fla. Laws ch. 416 § 1(6).

[28] *See* GOVERNOR'S SELECT TASK FORCE *supra* note 11 at 56-57.

[29] *See, e.g.*, FLA. STAT. § 395.1012 (2003) (requiring that hospitals and surgical facilities adopt patient safety plans); FLA. STAT. § 1004.07 (2003) (requiring each public institution offering health-related degrees to incorporate into the curricula information on patient safety).

liability and litigation,[30] medical malpractice insurance,[31] and the Florida Birth-Related Neurological Injury Compensation Association.

The most controversial element of the legislation is its centerpiece, section 766.118, Florida Statutes, which imposes a limit on the amount of *noneconomic* damages a claimant may recover in a medical malpractice action.[32] Noneconomic damages include pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, and loss of capacity for the enjoyment of life.[33] In contrast, economic damages are limited to quantifiable financial losses, such as past and future medical expenses, lost wages and loss of earning capacity.[34]

Section 766.118(2) limits the amount of noneconomic damages

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[30] See, e.g., FLA. STAT. § 766.108 (2003) (requiring mandatory mediation within 120 days if parties have not agreed to binding arbitration).

[31] See, e.g., FLA. STAT. § 627.062 (2003) (creating additional requirements for medical malpractice insurance rate filings and imposing a rate freeze).

[32] FLA. STAT. § 766.118 (2003); *see also* Gail Leverett Parenti, *A New Prescription for an Old Headache: Calculating Judgments in Medical Malpractice Actions Under F.S. § 766.118 (2003)*, 78 FLA. B. J. 40 (January 2004). Imposing a limit on noneconomic damages is not exclusive to Florida. Currently twenty-one states restrict the amount of damages that a claimant may recover. William R. Padget, Comment, *Damage Limitations in Medical Malpractice Actions: Necessary Legislation or Unconstitutional Deprivation?*, 55 S.C. L. REV. 215, 218 (2003). Of these states, thirteen cap only noneconomic damages and eight cap both economic and noneconomic damages. *Id.*

[33] FLA. STAT. § 766.202(8) (2003).

[34] FLA. STAT. § 766.202(3) (2003).

recoverable from practitioners[35] to $500,000 per claimant, regardless of the number of claimants and regardless of the number of defendants.[36] Claimants can "pierce" the $500,000 limit if the defendant's negligence resulted in death, permanent vegetative state, or catastrophic injury.[37] Nevertheless, these claimants still face a limitation on the recovery of noneconomic damages, albeit a higher limit of $1 million.[38]

Because of the serious ramifications of the act, constitutional challenges will inevitably be mounted seeking a declaration that the entire act, or parts thereof, are unconstitutional, and therefore invalid.

III. CONSTITUTIONAL CHALLENGES TO CHAPTER 2003-416

A. Single Subject Requirement

Article III, section 6 of the Florida Constitution provides

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[35] Practitioners include: individuals licensed under chapters 458, 459, 460, 461, 462, 463, 466, 467, and 486; any business entity under which the practitioner practices; and any employee of the practitioner or entity. FLA. STAT. § 766.118(1)(c) (2003). Section 766.118(3) of the Florida Statutes provides the ability for a greater recovery, $750,000, from nonpractioners. FLA. STAT. § 766.118(3) (2003).

[36] FLA. STAT. § 766.118(2)(a) (2003).

[37] FLA. STAT. § 766.118(2)(b) (2003). To pierce the cap based on catastrophic injury, the trial court must determine that "manifest injustice" would occur if the increased recovery was not allowed and the trier of fact must determine that the defendant's negligence resulted in a catastrophic injury as defined in section 766.118(1)(a) of the Florida Statutes. FLA. STAT. § 766.118(2)(b) (2003).

[38] FLA. STAT. § 766.118(b) (2003).

that "[e]very law shall embrace but one subject and matter properly connected therewith . . . ."[39] The purpose of this constitutional provision is to "prevent hodgepodge, logrolling, and omnibus legislation."[40] A finding that an act violates the single subject requirement renders the entire act unconstitutional.[41]

The constitutionality of the Florida Insurance and Tort Reform Act of 1977, Chapter 77-468, Laws of Florida, was challenged in *State v. Lee*.[42] The Florida Legislature enacted a variety of provisions designed to combat substantial increases in automobile insurance rates.[43] The fifty-two sections of Chapter 77-468 covered a variety of topics that could be generally divided into three categories: 1) insurance, 2) tort law, and 3) augmented penalties for moving violations.[44] The Supreme Court of Florida adopted a deferential standard and stated that only a plain violation by the Legislature would result in the Act being declared unconstitutional.[45] The subject

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[39] FLA. CONST. art. III, § 6.

[40] Colonial Inv. Co. v. Nolan, 131 So. 178, 179 (Fla. 1930).

[41] State v. Lee, 356 So. 2d 276, 282 (Fla. 1978).

[42] 356 So. 2d 276 (Fla. 1978).

[43] *Id.* at 282.

[44] *Id.* at 286-87 (Sundberg, J., dissenting) The sections included wide-ranging provisions, such as eliminating compulsory liability insurance, revising civil and criminal law regarding fraudulent insurance claims, and altering license and registration reinstatement procedures. *Id.*

[45] *Id.* at 282.

of the law, the court declared, was "that which is expressed in the title and the subject can be as broad as the legislature chooses, provided the matters included in the law have a natural and logical connection."[46] Holding Chapter 77-468 constitutional, the court acknowledged that the legislation addressed a broad subject comprehensively, but given the impact of tort litigation on the automobile insurance industry, found that tort law and automobile insurance were logically connected.[47]

Summarily, the Supreme Court of Florida in *Chenoweth v. Kemp*[48] concluded that Chapter 76-260 did not violate the single subject requirement because the provisions of the comprehensive legislation, which dealt with medical malpractice and insurance, related to tort litigation and insurance reform, which were logically and naturally connected.[49] Deriding the majority opinion as "ill-advised and unarticulated," the dissent characterized the legislation as "haphazard and disjointed."[50]

The test to determine whether legislation satisfied the

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[46] *Id.*

[47] *Id.*

[48] 396 So. 2d 1122 (Fla. 1981).

[49] *Id.* at 1124.

[50] *Id.* at 1126 (Sundberg, J., dissenting) (questioning the natural and logical connection among life insurance for funeral directors, liability standards in medical malpractice actions, and use of credit cards to purchase insurance).

single subject requirement shifted from "natural and logical"[51] to "common sense."[52] Legislation designed to stem the crisis of increasing liability insurance premiums for professionals, businesses, and governmental entities, the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida, came under fire in *Smith v. Department of Insurance*.[53] In the preamble to the act, the Florida Legislature set forth the following findings: a financial crisis existed in the liability insurance industry; if the crisis continued, many individuals would not be able to purchase insurance leaving injured persons without a means for recovering damages; the existing tort system contributed to the crisis; and tort law and liability insurance system were "interdependent and interrelated."[54] The court examined the various sections of the act and grouped them into five areas: 1) long-term insurance reform, 2) tort reform, including a cap on noneconomic damages; 3) temporary insurance reform, which instituted a rate freeze; 4) creation of a task force to study tort reform and insurance law; and 5) modification of financial responsibility requirements of physicians.[55] The court characterized the test to determine

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[51] Lee, 356 So. 2d at 282.

[52] Smith v. Dept. of Ins., 507 So. 2d 1080, 1087 (Fla. 1987)

[53] 507 So. 2d 1080 (Fla. 1987).

[54] *Id.* at 1084 n.2.

[55] *Id.* at 1086.

whether the single subject requirement was satisfied as "common sense."[56] The analysis hinged on whether the provisions of the act were "fairly and naturally germane" to the subject and were necessary to achieve the objects and purposes of the legislation.[57] The court found that Chapter 86-160 had one goal, ensuring the availability of affordable insurance, and each of the sections was integral to achieving that goal.[58] The dissent argued that the majority failed to properly distinguish between the subject of the legislation and the object.[59] Tort reform comprised one subject and insurance reform comprised one subject; simply because each impacted the other did not "make it any less than two subjects."[60] The dissent continued, adding that the provisions addressing these two subjects may have been enacted to achieve a single goal, availability of affordable liability insurance, but article III, section 6 of the Florida Constitution did not "mandate single goals or objectives in legislation, but does mandate that each bill contain a single subject."[61]

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[56] *Id.* at 1087.

[57] *Id.* (quoting State v. Canova, 94 So. 2d 181, 184 (Fla. 1957).

[58] *Id.*

[59] *See id.* at 1097 (Erlich, J., dissenting) ("the subject is the matter to which an act relates; the object, the purpose to be accomplished") (quoting Nichols v. Yandre, 9 So. 2d 157 (Fla. 1942).

[60] *Id.* at 1098 (Erlich, J., dissenting).

[61] *Id.* (Erlich, J., dissenting).

Two trends have emerged in the single subject requirement analysis. First, the court is more likely to find the act constitutional if the Legislature has propounded findings indicating that a crisis exists.[62] Second, even an act comprising seemingly unrelated sections can be found constitutional if each section is placed into a category and those categories are deemed related to each other and to the purpose of the legislation.[63] Until *Heggs v. State*,[64] it seemed that either a finding of a crisis or comprehensiveness of an act would support a finding of constitutionality. The comprehensive legislation at issue in *Heggs*, Chapter 95-184, was described as "an act relating to the justice system" and contained 40 sections.[65] The State argued that the act was comprehensive and

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[62] *See, e.g.*, Burch v. State, 558 So. 2d 1 (Fla. 1990) (finding crisis of rapidly escalating crime rate); Smith v. Dept. of Insurance 507 So. 2d 1080 (Fla. 1987) (finding crisis regarding availability of affordable liability insurance).

[63] *Compare* Burch v. State, 558 So. 2d 1 (Fla. 1990) (dividing seventy-six provisions into three areas); Smith v. Dept. of Ins. 507 So. 2d 1080 (Fla. 1987) (combining more than sixty-six sections into five categories); Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981) (condensing sections into two general categories, medical malpractice and insurance); State v. Lee, 356 So. 2d 276 (Fla. 1978) (categorizing approximately fifty-two sections as tort law or insurance reform), *with* State v. Thompson, 750 So. 2d 643 (1999) (finding that the eight sections did not comprise a single subject); Bunnell v. State, 453 So. 2d 808 (Fla. 1984) (finding Chapter 82-150 unconstitutional because its three provisions did not embrace a single subject).

[64] 759 So. 2d 620 (Fla. 2000).

[65] *Id.* at 625.

designed to define, punish and prevent crime, and protect the rights of victims, and like the comprehensive acts in *Burch*, *Smith*, *Chenoweth*, and *Lee*, should be upheld.[66] The court distinguished the legislation in *Heggs* by observing that the legislation in each of the previous cases, the Legislature made specific findings of a crisis it was attempting to remedy.[67] As no such finding was made by the Legislature in *Heggs*, the court held that Chapter 95-184 violated the single subject requirement of the Florida Constitution.[68]

In section one of the legislation currently in the spotlight, Chapter 2003-416, the Legislature identified a crisis and enacted a comprehensive act in an attempt to resolve that crisis.

The Legislature made specific findings that Florida is experiencing a medical malpractice insurance crisis of an "unprecedented magnitude" that threatens the availability and quality of healthcare for all citizens of the state.[69] Medical malpractice insurance premiums have risen significantly in the last decade and premiums in Florida are among the highest in the

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[66] *Id.* at 626.

[67] *Id.* at 627.

[68] *Id.* Presumably, the court did not intend to require a finding of a crisis for every legislative enactment, but only for those comprehensive acts with seemingly unrelated sections consolidated into related categories.

[69] 2003 Fla. Laws ch. 416 § 1(1), (2).

country.[70] These factors have led to physicians retiring prematurely, leaving the state, limiting their practice, and practicing without insurance.[71]

Taking its cue from the Supreme Court of Florida in *Heggs*, the Legislature specifically identified a crisis that it is attempting to resolve. The language describing the crisis in Chapter 2003-416 is clearly patterned after Chapter 86-160, which was held to comprise a single subject in *Smith*[72] and Chapter 87-243, which was found constitutional in *Burch*.[73] The findings supporting the legislation at issue in *Smith* and *Burch* both begin with the statement that Florida is facing a crisis and then generally describe the far-reaching consequences of the crisis.[74] The findings in section one of Chapter 2003-416 follow the same format. The Legislature begins by identifying the crisis – medical malpractice insurance – and then gives an overview of the ramifications of the crisis – the threat to the quality and availability of healthcare for all citizens.[75] The Legislature has probably satisfactorily illustrated that a crisis exists. While debates continue regarding the causes of and best solutions for the crisis, no argument is seriously

[70] 2003 Fla. Laws ch. 416 § 1(4), (5).

[71] 2003 Fla. Laws ch. 416 § 1(6).

[72] Smith v. Dept. of Ins. 507 So. 2d 1080 (Fla. 1987).

[73] Burch v. State, 558 So. 2d 1 (Fla. 1990).

[74] *See id.* at 2-3; Smith, 507 So. 2d at 1084.

[75] 2003 Fla. Laws ch. 416 § 1(1), (2).

being made that challenges the existence of a crisis combining rising malpractice insurance premiums and the corresponding response by physicians.

In contrast, whether the eighty-seven sections of Chapter 2003-416 can be compartmentalized into a few logically related categories is a more complicated analysis. The title of Chapter 2003-416 is "Medical Incidents;" logically, then, each of the sections must fit into a category that is related to the subject – medical incidents.[76] The Senate Staff Analysis and Economic Impact Statement delineates four areas of medical incidents: 1) patient safety and improved quality of healthcare, 2) medical malpractice insurance, 3) medical malpractice liability and litigation, and 4) Florida Birth-Related Neurological Injury Compensation Association.[77]

The court's analysis could take several approaches. First, the relationship between the four categories and the subject. The link between each of these areas and the subject, medical incidents, can be made quickly: 1) improved patient safety and improved quality of healthcare should decrease the prevalence of medical incidents, 2) medical malpractice insurance is designed to compensate victims of medical incidents, 3) medical

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[76] *See* State v. Lee, 356 So. 2d 276, 282 (Fla. 1978) (stating that the subject of legislation is its title).

[77] *See* STAFF OF FLORIDA SENATE COMM. ON JUDICIARY, CS/SB 2-D: SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 4-7 (Aug. 12, 2003) [hereinafter SENATE COMM. REPORT].

malpractice liability and litigation concerns the ability of victims to seek redress for injuries arising from medical incidents, and 4) Florida Birth-Related Neurological Injury Compensation Association is a specific remedy for a particular type of medical incident. If the court's analysis stops here, the act would likely be deemed to comply with the single subject requirement. Second, the relationship between each of the eighty-seven sections and the category in which it was placed. By employing broad categories and subcategories, the Legislature was able to create logical relationships between the sections and the categories. For example, instituting a short-term rate freeze,[78] requiring notice before cancellation of insurance,[79] and requiring notice before any rate increase[80] all relate to the category: medical malpractice insurance. This analysis would most likely lead to a finding of constitutionality. Third, the relationship among the eighty-seven sections. The Supreme Court of Florida has previously ruled that this analysis is not required.[81] The court indicated as long as the sections can be grouped into categories, and those categories relate each other and to the subject, the single subject requirement is satisfied. Fourth, the relationship between each section and the subject.

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[78] FLA. STAT. § 627.062 (2003)

[79] FLA. STAT. § 627.4147(1)(c) (2003)

[80] FLA. STAT. § 627.4147(1)(d) (2003)

[81] *See* cases cited supra note 63 and accompanying text.

This is an essential analysis that has not been performed by the court. This analysis requires that every section relate to the subject. Most of the sections pose no real threat to the constitutionality of the act, however the relationship between medical incidents and any of the following: instituting a short-term rate freeze,[82] requiring notice before cancellation of insurance,[83] or requiring notice before any rate increase,[84] may be attenuated. Nevertheless, it is likely that the subject – medical incidents – is so broad and encompassing that the single subject requirement will be satisfied.

However, it seems that the *Burch* court, intentionally or unintentionally, may have altered the analysis. Finding Chapter 87-243 constitutional, the court remarked that it "is a comprehensive law in which all of its parts are directed toward meeting the *crisis* of increased crime."[85] Notably, each of the parts was required to relate to the *crisis*, not the *subject*; the impact of this change in language was not readily apparent in *Burch*, because the crisis and the subject were the same – addressing the rising crime rate.[86] The *Burch* court did not address the situation created by Chapter 2003-416: the subject –

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[82] FLA. STAT. § 627.062 (2003)

[83] FLA. STAT. § 627.4147(1)(c) (2003)

[84] FLA. STAT. § 627.4147(1)(d) (2003)

[85] Burch v. State, 558 So. 2d 1, 3 (1990) (emphasis added).

[86] *Id.*

medical incidents is different than the crisis – medical malpractice insurance and its impact on the quality and availability of healthcare. The legislation may not fare as well if the analysis is whether each of the parts is directed toward meeting the crisis.

At first glance, the relationships between the four categories and the crisis, medical malpractice insurance and its impact on the quality and availability of healthcare, seem logical, however, facts do not necessarily support this cursory assumption. The first category, improved patient safety and improved quality of healthcare, seems to relate obviously to a crisis involving the quality of healthcare. But, the crisis is really about the availability of medical malpractice insurance and its impacts on the quality of healthcare. It is unclear how patient safety and improved quality of healthcare influence medical malpractice insurance. Naturally, the second area, medical malpractice insurance, relates to a crisis involving medical malpractice insurance and its impacts. The third category, medical malpractice liability and litigation, seems to suggest that a decrease in medical malpractice liability and litigation would result in lower insurance premiums. This conclusion is unsupported. In a press release, the insurance industry attempted to rectify this erroneous assumption, "the insurance industry never promised that tort reform would achieve

specific premium savings . . . ."[87] Notably, in its findings, the Florida Legislature specified that the high cost of medical malpractice *claims* could be alleviated by imposing a cap on noneconomic damages.[88] Of course the cost of claims can be limited by capping those claims. The more important question is whether capping claims alleviates the high cost of medical malpractice *insurance*. No evidence suggests that it does. Finally, the fourth category, Florida Birth-Related Neurological Injury Compensation Association, suffers from the same infirmity as the third. If the analysis relies on cursory assumptions about the relationships between the categories and the crisis, then the single subject requirement is likely to be satisfied. If, conversely, the assumptions upon which these relationships are based are scrutinizesd Chapter 2003-416 may be found to contain more than one subject.

The legislation would most certainly be found to contain more than one subject if the court analyzed the relationship between each section and the crisis. It is difficult to ascribe a natural and logical relationship between the crisis of medical malpractice insurance and its impacts on the availability and

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[87] Press Release, American Insurance Association, CJ & D Attack on Tort Reform: An Incomplete, Distorted, and Erroneous Picture of the Impact of Tort Reform on Liability Insurance Costs (Mar. 13, 2002) (available at http://www.aiadc.org/DocFrame.asp?DocID=7027).

[88] 2003 Fla. Laws ch. 416 § 1(15).

quality of healthcare and: deleting the requirement for facilities to notify authorities within one day of an adverse incident,[89] decreasing the monetary threshold of what constitutes gross or repeated malpractice for disciplinary purposes,[90] prohibiting contingency fee arrangements for expert witnesses,[91] and revising the qualifications for expert witnesses.[92]

While the connections between the various provisions of Chapter 2003-416 may seem attenuated, the Legislature may be saved by the very deferential approach of the Supreme Court of Florida. It is likely that Chapter 2003-416 will be found to have complied with the single subject requirement of article III, section 6 of the Florida Constitution.

B. Access to the Courts

Article I, section 21 of the Florida Constitution provides "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[93] Access to the courts exists for the purpose of redressing injuries.[94] The ability to file a lawsuit is meaningless without the ability to collect the judgment.[95]

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[89] FLA. STAT. § 395.0197 (2003).

[90] FLA. STAT. § 459.015 (2003).

[91] FLA. STAT. § 766.202 (2003).

[92] *Id.*

[93] FLA. CONST. art. I, § 21.

[94] Smith v. Dept. of Ins., 507 So. 2d 1080, 1088 (Fla. 1987).

[95] *Id.* at 1096 (Overton, C.J., specially concurring).

The seminal case in Florida regarding access to the courts is *Kluger v. White*.[96] The statute at issue in *Kluger* abolished the cause of action for property damage arising out of automobile actions and required the claimant to seek redress from the claimant's insurer.[97] The statute provided an exception for a claimant without property damage insurance when the total amount of property damages exceeded $550.[98] The claimant in *Kluger* did not have property damage insurance, but her damages only totaled $250; thus, she was precluded from recovering for her damages.[99] In this case of first impression, the Supreme Court of Florida relied upon Corpus Jurisdiction Secundum in formulating the rule that the Legislature cannot abolish a statutory or common law right that existed at the time of the adoption of the state constitution unless the Legislature 1) provided a reasonable alternative or 2) demonstrated an overpowering public need for the abolishment of the right and no alternative method of meeting that public need existed.[100] The court discussed two causes of action and their subsequent abolition by Legislature.[101] In the first, the cause of action allowing employees to sue their employers was abolished and

[96] 281 So. 2d 1 (Fla. 1973)

[97] *Id.* at 2.

[98] *Id.*

[99] *Id.* at 3.

[100] *Id.* at 4.

[101] *Id.*

replaced by worker's compensation, which was touted as an adequate, sufficient, and even superior alternative.[102] The second, the right to sue for alienation of affections, was abolished entirely because the Legislature illustrated a public necessity – the cause of action had become an method of extortion and blackmail and no longer served a legitimate purpose.[103] In finding the statute unconstitutionally denied the claimant access to the courts, the court held that the cause of action for property damages arising out of an automobile accident existed prior to the adoption of the Florida Constitution and the Legislature did not provide an adequate alternative remedy, nor did it alternatively show that public necessity demanded abolition of the cause of action.[104]

Interestingly, the next significant case, *Smith v. Department of Insurance*,[105] addressed access to the courts in terms of a $ 450,000 limit on noneconomic damages.[106] The court began by declaring that the right to recover noneconomic damages existed at the time of the adoption of the Florida Constitution and that the applicable test was found in *Kluger*. First, the court determined that the Legislature did not satisfy the first

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[102] *Id*.

[103] *Id*.

[104] *Id*. at 4, 5.

[105] 507 So. 2d 1080 (Fla. 1987).

[106] *Id*. at 1087.

Kluger exception – providing a reasonable alternative.[107] The court found that the cap benefited defendants, who would face a maximum liability of $ 450,000, without providing any commensurate benefit for the plaintiffs.[108] Next, the court concluded that the Legislature did not show that the cap was necessary to meet an overpowering public need and that no alternative remedy to the cap existed.[109] They court drew a distinction between finding the existence of a crisis, the availability of affordable liability insurance, and finding an overpowering public need justifying the abolition of a right. The court acknowledged that a crisis existed; yet found that the Legislature did not demonstrate an overpowering public necessity.[110] Accordingly, the court held that the limit on noneconomic damages impermissibly restricted access to the courts and found the section unconstitutional.[111]

A limitation on noneconomic damages imposed when a party requests arbitration did not impermissibly deny access to the courts because a commensurate benefit was provided in exchange for the cap.[112] *University of Miami v. Echarte* reviewed two statutes imposing monetary caps in medical malpractice

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[107] *Id.* at 1088.

[108] *Id.*

[109] *Id.* at 1089.

[110] *Id.* at 1098-90.

[111] *Id.*

[112] Univ. of Miami v. Echarte, 618 So. 2d 189, 190 (Fla. 1993).

arbitration.[113] If the parties entered into binding arbitration, noneconomic damages were limited to $ 250,000.[114] If the defendant proposed arbitration and the claimant refused, noneconomic damages were limited to $ 350,000, but if the claimant offered arbitration and the defendant declined, the claim would proceed to trial without any limitation.[115] The court found that the limitations did not deny access to the courts because commensurate benefits were provided.[116] The most significant benefit inuring to the claimant was that by entering arbitration, the defendant conceded liability for economic damages and reasonable attorneys fees, thus allowing the claimant to avoid the uncertainty and costs of litigation.[117] Additionally, the claimant would benefit form early resolution of the claim, prompt payment by the defendant, and arbitration costs paid by the defendant.[118]

The court went further and stated that even if a commensurate benefit was not provided, the Legislature had demonstrated an overpowering public need and that no less onerous alternative was available.[119] The Legislature found that

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[113] *Id.*

[114] Echarte, 618 So. 2d at 193 (citing Fla. Stat. § 766.207(7) (1988)).

[115] *Id.* (citing Fla. Stat. § 766.209(3), (4) (1988)).

[116] *Id.* at 194.

[117] *Id.* at 192 n.13, 194

[118] *Id.* at 194.

[119] *Id.* at 196-97.

Florida was in the midst of a financial crisis in the medical insurance industry that could only be alleviated through comprehensive reforms.[120] It stated that increased malpractice insurance premiums translated into increased costs for patients.[121] The key reason for the increased premiums was due to an increase in the amount paid to claimants.[122] The Legislature concluded that reducing noneconomic damages could alleviate the cost of the claims.[123] The court declared that legislative determinations of policy and facts are presumed correct and entitled to great deference and held that the Legislature demonstrated an overpowering public need for the cap.[124] The court also held that the legislative findings supported the conclusion that no less onerous alternative existed.[125] Although the legislation enacted myriad provisions designed to alleviate the crisis, such as increased regulation of physicians and financial relief for physicians experiencing difficulty based on the increased premiums,[126] which the dissents argued indicated availability of alternatives,[127] the court

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[120] *Id.* at 192 n.12.

[121] *Id.* at 192 n.13.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 196.

[125] *Id.* at 197.

[126] *Id.*

[127] *Id.* at 199 (Barkett, C.J., dissenting), 201 (Shaw, J., dissenting).

stated that "[a]ll are necessary" to remedy the complex situation.[128] Further, the court instructed that the legislation as whole, rather than individual parts of the plan must be considered when determining that no alternative remedy exists.[129]

Whether the current legislation, Chapter 2003-416, provides adequate access to the courts depends on whether the Legislature has either: 1) provided a commensurate benefit or 2) demonstrated an overwhelming public necessity for the abolition of the right and shown that no alternative remedy exists. Based on the data and recommendations from the task force and other groups, the Legislature found that ensuring high-quality healthcare for Florida citizens,[130] retaining practicing physicians Florida,[131] and endeavoring to obtain affordable liability insurance[132] were overwhelming public necessities, which could not be met without a limit on noneconomic damages.[133]

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[128] *Id.* at 197.

[129] *Id.*

[130] 2003 Fla. Laws ch. 416 § 1(11).

[131] 2003 Fla. Laws ch. 416 § 1(12).

[132] 2003 Fla. Laws ch. 416 § 1(13).

[133] 2003 Fla. Laws ch. 416 § 1(14); *see also* FLA. STAT. § 766.201(1)(b) (2003) (stating that the main reason for increased medical malpractice liability insurance premiums is the "tremendous" increase in the amounts paid to claimants). Interestingly, the insurance industry has not given any assurances that caps on noneconomic damages will result in lower malpractice premiums. *See* Press Release, American Insurance Association, CJ & D Attack on Tort Reform: An Incomplete, Distorted, and Erroneous Picture of the Impact of Tort Reform on Liability Insurance Costs (Mar. 13, 2002) (at

The Legislature further found that these results could not be achieved by an alternative method without further limiting the ability of individuals to recover damages for medical malpractice claims.[134] As a result, the Legislature enacted section 766.118 of the Florida Statutes, which places a limitation on the amount of noneconomic damages that can be recovered by a claimant.[135]

The analysis of whether access to the courts has been impermissibly denied can proceed in two different ways. The first involves determining whether claimants are provided an alternative remedy or commensurate benefit in return for the limitation on noneconomic damages. Much like the legislation found unconstitutional in *Smith*, Chapter 2003-416 restricts the ability of claimants to collect damages in excess of the statutory cap without providing a benefit in return. The benefit of the cap inures entirely to insurance companies, which will be required to pay out less in claims. Proponents of the cap would argue that the limitation on noneconomic damages does provide a benefit, not only to claimants, but also to all citizens of Florida. The benefit is that less money paid to claimants results in lower medical malpractice premiums for

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http://www.aiadc.org/DocFrame.asp?DocID=7027) ("[T]he insurance industry never promised that tort reform would achieve specific premium savings.").

[134] 2003 Fla. Laws ch. 416 § 1(16).

[135] FLA. STAT. 766.118 (2003).

physicians, which in turns dissuades Florida physicians from retiring early, leaving the state, limiting their practice, and practicing without insurance and translates into improved availability and quality of healthcare for all Florida citizens. While this logic is appealing, the Legislature never actually made this argument. The Legislature never directly stated that the large amount of claims paid is responsible for the increased premiums. Nor did the Legislature indicate that a reduction in the amount of claims paid would reduce medical malpractice insurance premiums and thereby ensure the availability of healthcare to Florida citizens. The only assertion the Legislature made was that a limit on claims paid would reduce the cost of claims.[136] In other words, the Legislature did not connect the abrogation of the right to seek redress with any expected benefit.

This declaration by the Legislature is markedly different than the findings the Supreme Court of Florida found sufficient in *Echarte*.[137] The Legislature in *Echarte* noted that the primary cause of increased medical malpractice premiums was due to the "tremendous" increase in the amount paid in claims and limiting damages could reduce the amount paid in claims.[138] The

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[136] 2003 Fla. Laws ch. 416 § 1(15).

[137] 618 So. 2d 189 (Fla. 1993)

[138] *Id*. at 192 n.13.

Legislature then described the arbitration provisions and enumerated the benefits that would inure to the claimant.

Even though courts are bound to give deference to legislative determinations of fact and policy, [139] it is difficult to perceive what, if any, benefit the claimant is receiving in return for the limitation on noneconomic damages.

Alternatively, the Legislature could demonstrate that an overpowering public necessity required the abolition of the right to sue and recover an unlimited amount of noneconomic damages and that no alternative remedy was available. In section one of Chapter 2003-416, the Legislature does just that. The findings conclude that an overwhelming public necessity exists for making high quality healthcare available for all citizens of Florida, ensuring that physicians continue to practice in the state, and ensuring the availability of affordable medical malpractice insurance, and that those necessities cannot be met without imposing a cap on noneconomic damages.[140] The Legislature supports its findings with the report of the Governor's Select Task Force on Healthcare Professional Liability Insurance.[141]

The stringent requirement of "*no* alternative"[142] method for

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[139] *Id.* at 196.

[140] 2003 Fla. Laws ch. 416 § 1(11)-(14).

[141] *See* GOVERNOR'S SELECT TASK FORCE *supra* note 11.

[142] Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) (emphasis added).

meeting the public necessity has evolved into a less burdensome "no alternative or less onerous" method.[143] Additionally, a showing by Legislature that the legislation as a whole, as a combination of provisions, is essential to meet the public necessity is sufficient.[144] This holding thwarts the argument that the enactment of a multitude of provisions signals that other alternatives of meeting the public necessity exist. The shift in the application of the no alternative method requirement benefits Chapter 2003-416. The Legislature maintains no alternative method of meeting the public necessity exists "without imposing even greater limits upon the ability of persons to recover damages."[145] Finally, the Legislature asserts that "each of the provisions of this act is necessary to alleviate the crisis relating to medical malpractice insurance."[146]

The Legislature has established a strong case supporting a finding that access to the courts has not been denied because the limitation on noneconomic damages was enacted due to an overpowering public necessity and no alternative remedy exists. Because of the strong deference accorded the Legislature, it is likely that courts will find that Legislature has complied with

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[143] Univ. of Miami v. Echarte, 618 So. 2d 189, 197 (Fla. 2003).

[144] *Id.*

[145] 2003 Fla. Laws ch. 416 § 1(16).

[146] 2003 Fla. Laws ch. 416 § 1(18).

the standards as applied in *Echarte*. If, however, the court scrutinizes the data and information supporting these findings, the outcome could be markedly different.

IV. CONCLUSION

A review of the reports and testimony relied upon by the Legislature leads to the inescapable conclusion that a medical malpractice insurance crisis truly exists. While condemnation of the resulting legislation persists, none of these critics really challenge the existence of the crisis. The objection of these critics concentrates on the reasons for the crisis. They charge that when the Legislature fixates on the improper explanation for the crisis, the resulting legislation is misguided and inappropriate. Until the catalyst for the crisis is incontrovertibly identified, these debates will continue and the resulting legislation will be challenged.

This paper discusses just two of the constitutional challenges Chapter 2003-416 is likely to encounter, article III, section 6 single subject requirement and article I, section 21 access to the courts. Additionally, opponents of the legislation will also mount challenges based on article I, section 22, trial by jury, article I, section 9, due process, and article I, section 2, equal protection.