

Medical Malpractice Insurance and Consent to Settle Clauses:
A Tightrope Walk Through Competing Public Policy Concerns

Author: Erin McNeill

William and Mary School of Law
Third Year

I. Introduction

Unlike other types of liability insurance, professional liability insurance deals with more than just the economics of tort liability. In a professional liability case, the reputation and skill of the professional being sued for malpractice are at issue. The reputational interest of the professional being sued can greatly affect the way the defendant would like to handle the case: while a defendant accused of negligent driving may be happy to settle a claim as cheaply and easily as possible, a defendant doctor may wish to fight a claim, just to protect his professional reputation.

Because of the reputational interests at stake, some insurers have added “pride” clauses to their professional liability policies, giving the insured professional the right to veto or consent to settlement of a lawsuit, even settlements within policy limits.¹ Insured professionals may be willing to pay extra for pride provisions, because pride provisions allow insured professionals control over admissions of liability that are often a part of a settlement.² If the insured and his attorney believe that settlement is not in the insured’s best interest, despite the economic

¹ *Brion v. Vigilant Ins. Co.*, 651 S.W.2d 183 (1983).

² *See, e.g.*, FLA. STAT. § 627.4147 (2008) (requiring a clause allowing the insurer the right to admit liability attendant to settlement without consent of the insured in a medical malpractice policy). The Florida statute prohibits pride provisions, including those that allow the insured to consent to admissions of liability as well as those that allow the insured the right to veto settlement.

advantage to settling within policy limits, then the pride provision allows the insured to direct his attorney to veto settlement and litigate the claim in court.

Yet there is a public perception that the costs of medical malpractice lawsuits are out of control, impacting the cost of health insurance and medical malpractice insurance.³ Some states have responded to the rising cost of medical malpractice by enacted packages of legislation to respond to the resulting “crisis.”⁴ Two states included statutes prohibiting the use of pride clauses in medical malpractice insurance as part of their reforms.⁵ The incentive for the prohibition appears to be to reduce the number of medical malpractice cases that reach the jury and reduce the costs to the insurance company for defending the claims.⁶

This paper will begin in Part II by examining the many reasons why an insured medical professional would want to refuse settlement. Then, Part III will examine the insurer’s duty to settle claims, a duty that is theoretically limited to only when settlement is in the best interest of the insured professional. Part IV discusses Florida’s and Maryland’s laws prohibiting pride clauses, and the rationale behind them. This paper will focus on Florida in particular, because Florida is a state that has a publicly accessible database of physician information that makes the public policy issues associated with a prohibition on pride clauses particularly troublesome. Part IV will also examine whether the insurance companies realize any of the hoped-for financial gains. Part V will examine the interaction between medical malpractice insurance, pride clauses,

³ See, e.g., Dana E. Sullivan, *\$70M Med-Mal Award on the Line*, NEW JERSEY LAWYER: THE WEEKLY NEWSPAPER, Nov. 3, 2008, at 1 (discussing a record award in a malpractice case and its impact on the perceived medical malpractice crisis in New Jersey); Letters from Readers, Editorial, St. Louis Post-Dispatch (MO), Sept. 2, 2008, at B8 (printing letters from readers writing in to comment on the recent passage of a cap on damages in medical malpractice cases and the cap’s impact on the medical malpractice insurance crisis in Missouri).

⁴ See, e.g., 2003 Fl. ALS 416 (stating that the legislature was enacting the medical malpractice insurance reforms contained in the bill in response to a medical malpractice insurance crisis caused by medical malpractice tort claims).

⁵ FLA. STAT. § 627.4147; MD. INSURANCE CODE § 19-104(a)(2).

⁶ See discussion in Part IV, *infra*.

and the tort system. Part VI examines the risk of ethical conflicts created for attorneys hired by insurance companies to defend the insured in a professional liability case, when the insured and insurer do not agree on the settlement of the case. Finally, Part VI will conclude that the statutes prohibiting pride clauses are unsupported by public policy, particularly in light of the increased availability of settlement information, and the statutes should be repealed.

II. Why an Insured May Wish to Litigate a Claim Rather Than Settle at a Bargain Price

Settlement within policy limits prevents the insured from bearing any financial responsibility for paying the settlement amount or legal fees, but the insured may be harmed in other ways. Florida codified the duty to settle,⁷ and Florida case law reveals what harms the insured professional may suffer that are not part of the insurer's required "best interest" calculation.⁸ Higher insurance premiums and damage to the insured professional's reputation are not "bad faith" consequences of settlement, even when the claim is defensible and there is a legitimate question as to the insured professional's liability.⁹ Nor is it in bad faith or not in the insured professional's best interest if the settlement results in the professional being unable to obtain liability insurance required for his practice.¹⁰ Thus, even with the protection of a statutory requirement that the insurer act only in good faith and in the insured's best interest, the insurer can settle even a frivolous claim with negative consequences to the insured professional.¹¹

⁷ FLA. STAT. § 627.4147

⁸ *Freeman v. Cohen*, 969 So. 2d 1150, 1154 (2007) (citing *Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 281082 (Fla. 4th Dist. Ct. App. 2007); *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liability Ins. Trust*, 591 So. 2d 174 (Fla. 1992)).

⁹ *Id.*

¹⁰ *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liability Ins. Trust*, 591 So. 2d 174, 177 (Fla. 1992)

¹¹ *Freeman*, 969 So. 2d at 1154. Part III will discuss the duty to settle and the duty to act in good faith when settling in greater detail.

There are a number of reasons that an insured would wish to litigate a claim rather than settle, even if the settlement offer is within policy limits.¹² One compelling reason is the long-lasting impact on a medical professional's reputation, which in turn impacts the professional's ability to seek state licensure, liability insurance, employment, and hospital privileges.¹³ In the Internet age, state and federal data banks track information about medical malpractice payments, including those made in settlements, in addition to those awarded after a trial on the merits.¹⁴ This information is available to state agencies, private employers, and in some cases, even the public.¹⁵

As the public seeks information about physicians in their health care plans, databases such as the groundbreaking database in Massachusetts allows prospective patients to make their choice of health care provider based on information such as the number of claims brought against a physician in which the physician made a payment at the final dispensation of the claim, the settlement amount of those claims, arbitration outcomes, and any verdicts against the physician after a trial.¹⁶ The database tracks all complaints and settlements in the past ten years, and includes settlements in which the claimant did not file a complaint in court.¹⁷ Although exact

¹² See Jon Epstein, *Liability of Insurer to Insured for Settling Third-Party Claims Within Policy Limits*, 18 A.L.R.5th 474 §§ 3-12 (1994) (listing potential actionable harms resulting from settlement as loss of job, loss of income, adverse publicity, injury to reputation, increase in liability insurance premiums, mental anguish, emotional distress, and other psychological harms, loss of deductible, loss of insurance coverage, and loss of ability to counter-claim).

¹³ Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 Iowa L. Rev. 1303, 1306 (2002) (discussing the National Practitioner Data Bank, which collects information about physicians, including malpractice payments reported by insurance companies, and releases the information to "state licensing boards, hospitals, and other health care entities that are considering entering into an employment relationship with a physician").

¹⁴ *Id.* (discussing the Federal database); Jeffrey P. Donohue, Notes and Comments, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 Am. J. L. and Med. 115, 116-17 (1997) (discussing Massachusetts state database, which is publicly accessible).

¹⁵ Baczynski, *supra* note 24, at 1306; Donohue, *supra* note 14, at 115.

¹⁶ Donohue, *supra* note 14, at 116-17. Information about pending claims is not available, however. *Id.* at 125.

¹⁷ *Id.* at 125-26.

dollar figures are not released, settlements are categorized by comparison to other settlements by other physicians in the same practice specialty.¹⁸

Massachusetts created their database as a legislative response to negative publicity about medical malpractice incidents that resulted in lawsuits, but no formal discipline.¹⁹ The public demanded information about the number of lawsuits brought against their physicians, so that they could make a more informed choice about which physician to select as a health care provider.²⁰ The public no longer trusted the Massachusetts Board of Registration of Medicine (Board), the body responsible for regulating physicians, to sanction physicians who committed malpractice.²¹ The database was also intended to counter the perception that the Board protected physicians through not disciplining doctors accused of malpractice, in some instances repeatedly, without sanction and then keeping the records of the complaints confidential, when the information could be valuable to the public in selecting a physician from the lists of those available through their healthcare plans.²²

The Act authorizing the creation of the database of physician information and its release of information to the public does require a statement that settlements “do not necessarily reflect negatively on the professional competence or conduct of the physician,” but no other information is given about why a physician would settle a claim without merit, or that settlement can occur without the physician’s consent.²³ The Board is permitted under the law to add additional information beyond just the disclaimer.²⁴ Currently, the Board adds a statement that some physicians treat “high risk” patients and may have more claims brought against them as a

¹⁸ MASS. GEN. LAWS 112 § 5 (1996).

¹⁹ Donohue, *supra* note 14, at 115.

²⁰ *Id.* at 116.

²¹ *Id.* at 115.

²² *Id.* at 116.

²³ MASS. GEN. LAWS 112 § 5 (1996)

²⁴ *Id.*

result.²⁵ For physicians with a record of a payment made on a claim of medical malpractice in their physician profile, the Board currently includes information about the number of physicians licensed in the specialty, and the number who have had to pay out on a medical malpractice claim in the past ten years.²⁶ The data in Massachusetts database reveals that 15% of the Obstetricians in Massachusetts have paid on a malpractice claim.²⁷ The database does not reveal how many claims were brought in which the physician was vindicated, but it places the payment of claims in some context. It is important to note, however, that this information is voluntarily added by the Board, and is not required by the law. In addition, despite the disclaimer, even educated consumers are likely to draw conclusions about the quality of a physician based on the payment of past medical malpractice claims, without information about whether the claim was meritorious.²⁸

For example, one law student commenter argues in favor of disclosure of medical malpractice settlements in her Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*.²⁹ Although Baczynski is a law student and is presumably more familiar with the settlement of malpractice claims than the lay public, she analogizes past payment of malpractice claims to sex offender criminal records without acknowledging that registered sex offenders have been found guilty of their offense beyond a reasonable doubt.³⁰ She theorizes that although there may not be a strong link between past payments and the quality

²⁵ Donahue, *supra* note 14, at 126 n.127; *see also* Massachusetts Board of Registration in Medicine Physician Profile, <http://profiles.massmedboard.org/MA-Physician-Profile-View-Doctor.asp?ID=6237> (last visited Dec. 18, 2008) (displaying a Massachusetts' physician's profile for a doctor in a high risk specialty, obstetrics).

²⁶ Massachusetts Board of Registration in Medicine Physician Profile, <http://profiles.massmedboard.org/MA-Physician-Profile-View-Doctor.asp?ID=6237> (last visited Dec. 18, 2008) (displaying a Massachusetts' physician's profile for a doctor in a high risk specialty, obstetrics).

²⁷ *Id.* Obstetricians had a higher payment rate than Neurosurgeons, another high-risk specialty. The Neurosurgeon payment rate was 13.8%. In comparison, General Surgeons, a medium-risk specialty, had a payment rate of 10.1%. Family practitioners, a low-risk specialty, had a payment rate of only 5.5%.

²⁸ Baczynski, *supra* note 24, at 1325-26.

²⁹ *Id.* at 1303.

³⁰ *Id.* at 1325-26.

of future care, patients “would want to know” if a potential physician had even one higher than average settlement of a malpractice claim when making their selection of health care providers.³¹

Although Baczynski may be correct that a consumer would want to know of a past settlement of a malpractice claim, the concern that consumers will misuse the information by drawing unfair inferences argues against publication. In contrast with a convicted criminal, or even a person found civilly liable for malpractice, physicians may have had no such adjudication of the merits of the claim brought against them before settlement.³² Case law from Florida, for example, reveals that the insurer may not conduct a thorough examination into the merits of a claim before settling.³³ Although the Florida case law is not necessarily reflective of the quality of the settlement data in the Massachusetts’ database, it is worth noting that Florida has a publicly-accessible database of physician information similar to the one in Massachusetts.³⁴ Physicians in Florida, therefore, face similar reputational harms as do physicians in Massachusetts. Physicians in Florida also have the protection of a codified rule requiring good faith in the settlement of claims against them.³⁵ Yet, physicians in Florida still face the specter of a damaged reputation and all the attendant difficulties resulting from the settlement of potentially meritless claims that appear on their record in the state-run physician information database. It seems likely that there are similar settlements of meritless claims for any medical malpractice policy without a pride provision that would allow a physician to litigate a meritless claim in order to protect his reputation.

³¹ *Id.*

³² *See, e.g.,* Shuster v. S. Broward Hosp. Dist. Physician’ Prof’l Liab. Ins. Trust, 591 So. 2d 174, 175 (Fla. 2002) (holding that there is no bad faith when an insurance company settles three claims of medical malpractice without fully investigating the merits of the claim).

³³ *See, e.g., id;* Rogers v. Chicago Ins. Co., 2007 Fla. App. LEXIS 7489 at *3 (Fla. Dist. Ct. App. 4th Dist. May 16, 2007) *substituted opinion at*, 964 So. 2d 280 (Fla. 2007).

³⁴ Baczynski, *supra* note 24., at 1311-12.

³⁵ FLA. STAT. § 627.4147. Florida case law reveals that this protection is largely illusory, however, as discussed *infra* in Part III, c.

III. The Duty to Settle

a. The Rationale Behind Imposing a Duty to Settle

Despite the harms to the insured from settling meritless claims, as discussed *supra* in Part II, there are strong public policy reasons for requiring insurance companies to settle claims for a reasonable amount when it is possible to do so within policy limits and the liability is clear.³⁶ Because liability policies cover the costs of defending the claim as well as the cost of the final award, most liability policies include a provision that allows the insurance company to direct the defense, which allows the insurer to limit defense costs.³⁷ Liability policies also typically allow the insurer to settle the claim without the insured's consent, if the settlement is within policy limits.³⁸

Policy limits underlie the doctrine of the Duty to Settle, because the insurer's liability is limited to the amount of the policy.³⁹ The insured, on the other hand, must pay any judgment amount exceeding the limits of the liability policy.⁴⁰ To illustrate how policy limits can affect the decision to settle a case, it is helpful to consider how a typical liability case progresses through settlement or trial.⁴¹

Before going to trial, a plaintiff usually demands settlement in some amount that is often within the policy limits.⁴² If the insurer rejects settlement, and goes to trial, a judgment against the insured will only result in a loss for the insurer of the money expended on the defense and the

³⁶ See generally Francis J. Mootz III, *Holding Liability Insurers Accountable for Bad Faith Litigation Tactics with the Tort of Abuse of Process*, 9 Conn. Ins. L.J. 467 (2002) (discussing the public policy rationales behind holding insurers liable for failing to settle claims in good faith).

³⁷ Kent D. Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113, 1118 (1990).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1120.

different between the offered settlement amount and the policy limit.⁴³ If the plaintiff's settlement offer was at or near the policy limit, the amount risked by the insurance company by going to trial may be small, particularly if the case is a simple one to defend, without requiring complex and expensive expert testimony.⁴⁴ The insured, by contrast, must pay the additional amount of the judgment that is in excess of the policy limits out of his or her personal assets.⁴⁵

If our hypothetical case goes to trial and a judgment is returned that relieves the insured of liability, then the insurance company gains the amount that for which they could have settled the case, less the costs expended to successfully defend the suit.⁴⁶ At the same time, the insured does not benefit financially from the risk, although he could gain protection to his professional reputation if he prevails at trial.⁴⁷ The insured would not pay anything from his or her personal assets if the settlement was within policy limits, even if the settlement was at or close to the limit.⁴⁸ The insured may, in fact, prefer to settle a case for an amount far in excess of what the claim is worth, provided the amount was within policy limits, to prevent any risk to his or her personal assets.⁴⁹

Because trial is uncertain and involves a gamble, risking the insured's private assets at risk in the event of a high award to protect the assets of the insurer potentially saved from paying a settlement in excess of what the claim is worth, the common law evolved the doctrine of Duty to Settle.⁵⁰ The duty to settle requires an insurer to settle a claim within policy limits if it can do so in good faith.⁵¹ If the insurer rejects a settlement within policy limits, the insured can sue the

⁴³ *Id.*

⁴⁴ *Id.* at 1129-31.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1131.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1120-22.

⁵¹ *Id.* at 1122.

insurer for at least the amount of the judgment in excess of the policy limit.⁵² Claims for the breach of the duty to settle help limit the insurer's incentive to gamble with the insured's assets by going to trial when a settlement within policy limits was on the table.⁵³ The duty did not evolve in the specific context of professional liability policies, however, where there are more than just economic interests at stake. Instead, the duty to settle assumes that there are only financial interests involved in the decision to settle or litigate a claim.⁵⁴

c. The Duty to Settle Only in "Good Faith"

Although there is a duty to settle, the insurance company can only settle a claim if settlement is made in good faith and is in the best interest of the insured professional.⁵⁵ The protection of the requirement to settle only in good faith may be illusory, because even in Florida where the duty has been codified, nearly any rationale for settlement will carry the burden of acting in good faith. For example, in the case of *Rogers v. Chicago Ins. Co.*, the insurer had ninety days to investigate the medical malpractice claim against the insured.⁵⁶ The insurer did not begin its investigation, however, until only a week remained in the ninety day period.⁵⁷ Although they hired a physician to review the materials provided by the plaintiff in the suit, they did not contact the insured for any additional, potentially exculpatory information.⁵⁸ There is no record that they conducted any additional investigation, other than the physician's review of the

⁵² *Id.* at 1121. The insured would have to prove that the insurer's rejection of settlement was in bad faith, however, such as if liability was clear and the settlement offer was reasonable in light of the damages claimed.

⁵³ *Id.* at 1126.

⁵⁴ *Id.* at 1159.

⁵⁵ Although the duty to act in good faith was developed in the common law, in some states the duty has been codified. See FLA. STAT. § 627.4147. ("[A]ny offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured.").

⁵⁶ 2007 Fla. App. LEXIS 7489 at *3.

⁵⁷ *Id.*

⁵⁸ *Id.*

file.⁵⁹ The insured professional later brought suit against the insurer, alleging that the decision to settle the claim was based on the insurance company's delay in investigating the claim until time pressure lead them to settle the claim rather than attempt to defend the suit.⁶⁰

The Florida appellate court held that the insurance company's failure to timely investigate the claim did not mean their settlement was in bad faith or against their client's best interest.⁶¹ The decision was upheld on rehearing, even after the physician amended his complaint.⁶² Instead the decision to settle was based on the "good faith" notions of saving the cost of an investigation and reducing the risk of proceeding to litigation with an inadequately-investigated claim. The court, in its opinion upon rehearing, held that an insurer in Florida did not violate its duty toward its insured, even when it settled a frivolous claim, if the insurance company's decision was backed by a business reason for settlement.⁶³

The Florida courts have not found a case in which they have decided that an insurance company settled in bad faith. In a case decided only months after *Rogers*, however, the Florida Appellate Court stated in dictum that the only case in which settlement within policy limits would be in bad faith would be in the "exceedingly rare" circumstance in which settlement would prejudice the doctor's case in a pending counterclaim.⁶⁴ In nearly any other circumstance the court would hold that the insurance company was acting in good faith by settling a claim within policy limits.⁶⁵

b. Limiting the Duty to Settle by Consent to Settle (Pride) Clauses

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 285 (Fla. 2007)

⁶³ *Id.* (citing *Shuster v. S. Broward Hosp. Dist. Physician' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 176-77 (Fla. 2002)).

⁶⁴ *Freeman v. Cohen*, 969 So.2d 1150, 1155 (Fla, 2007).

⁶⁵ *Id.* The court also stated that settling for over policy limits could be bad faith.

The Duty to Settle doctrine described *supra* assumes that the insurer and the insured are solely concerned with limiting the final payout each would bear to settle a claim.⁶⁶ In many liability contexts this is indeed the case.⁶⁷ Lawsuits arising out of premises liability or automobile accidents are often just a matter of economics for both the insurer and the insured.⁶⁸ Professional liability claims, such as medical malpractice, often have an impact on the insured's life far beyond just the amount of money paid to the plaintiff and the defense attorney.⁶⁹ The additional harms that may befall an insured professional following the payment of a medical malpractice claim following settlement or trial are beyond the scope of the medical malpractice liability policy and therefore are not harms that the medical malpractice insurer would consider when determining whether a claim should be settled.⁷⁰

A line of cases from Florida demonstrates that courts do not consider reputational harms as interests within the scope of medical malpractice policies.⁷¹ Harms such as inability to renew or obtain medical malpractice insurance following the settlement of a claim, loss of license to practice medicine, and emotional harms created by the stress of having one's career placed in jeopardy following the settlement of a medical malpractice claim are all outside the scope of medical malpractice insurance.⁷² Insurers are therefore justified in not considering these harms when making the business decision to settle a claim within policy limits.⁷³ Although there is a duty to settle when an insurance company can do so in good faith, there does not seem to be a

⁶⁶ *Id.* at 1158.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1159.

⁷⁰ *Id.* at 1173; *see also* Freeman v. Cohen, 969 So. 2d 1150, 1154 (2007) (citing Rogers v. Chicago Ins. Co., 964 So. 2d 280, 281082 (Fla. 4th Dist. Ct. App. 2007); Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liability Ins. Trust, 591 So. 2d 174 (Fla. 1992)) (holding that damages stemming from the settlement of the claim, such as the inability to get medical malpractice insurance required for the doctor to continue his medical practice, was a damage beyond the scope that the insurance policy was intended to cover).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

parallel duty *not* to settle when the insurance company may do so in good faith to protect the reputational harms to the physician.⁷⁴

Because of the heightened non-monetary interests in professional liability policies, insurers and insured professionals have contracted to shift control over settlement to include consent to settle clauses in malpractice liability policies.⁷⁵ Consent to settle clauses, also known as pride provisions, allow the insured professional to veto settlement if the professional believes that the non-economic harms outweigh the benefits of settlement.⁷⁶ A doctor may choose to veto settlement when the claim has little evidence of actual liability, even when the proposed settlement amount is relatively small and within policy limits.⁷⁷ The doctor may see the risk of a plaintiff's verdict at trial as very small, and the vindication of a defense verdict well worth the risk of an excess judgment.⁷⁸ Pride provisions allow the insured to guard his own professional reputation, instead of giving all control to the insurer, who will make the decision to settle based on economic factors without consideration of the harms that are beyond the scope of the liability policy that may befall the physician following settlement.⁷⁹ In fact, insured professionals value the control they gain by pride provisions; data from New York and Michigan suggests that insured professionals are willing to pay an extra one-to-three percent in premium for policies that include pride provisions.⁸⁰

There is concern that pride provisions allow physicians to block settlements unfairly, such as when the physician believes he did nothing wrong, but objectively the plaintiff can prove

⁷⁴ Syverud, *supra* note 47, at 1175. As discussed in Part II, however, the duty to settle only in good faith may be an illusory protection, limited only to rare circumstances in which the settlement prejudices the doctor's case in a counterclaim.

⁷⁵ *Id.* at 1175.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1176.

the claim by a preponderance of the evidence. Data from California, a state that allows consent to settle clauses in medical malpractice insurance policies, suggests this is not often the case. In California, the physician can use his veto power to avoid any offer of settlement to a plaintiff.⁸¹ In California, medical malpractice defendants went to trial without offering to settle 60% of the time, while other kinds of personal injury cases proceed to trial without a previous offer to settle only 18% of the time.⁸² Despite fewer offers to settle before trial, more trials resulted in a judgment releasing the defendant from all liability.⁸³

The supposition that consent to settle clauses result in more trials is likely correct, however.⁸⁴ Studies indicate that nationally approximately 7% of all medical malpractice claims eventually make it to trial, compared to an average of only 2% for other kinds of personal injury claims.⁸⁵ Therefore, it seems likely that doctors are taking cases to trial that normally the insurance company would settle, but the doctors are largely winning when they exercise this option.⁸⁶ The success rate of doctors at trial suggests that consent clauses do not block the settlement of meritorious claims, but frivolous ones.⁸⁷

Pride provisions also expand the considerations the insurance company may account for when settling a claim.⁸⁸ Although in an ordinary liability contract an insured cannot bring a claim against an insurer for settling within policy limits for reputational harms resulting from the

⁸¹Samuel R. Gross and Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 362 (1991).

⁸²*Id.* at 363, tbl.7.

⁸³*Id.* at 360. Plaintiffs won 30% of medical malpractice trials, 38.9% of products liability trials, and 38.4% of vehicular negligence cases.

⁸⁴See *University of Miami v. Echarte*, 618 So. 2d 189, 191 (Fla. 1993) (suggesting that the rationale behind banning consent to settle clauses in medical malpractice policies is an attempt to limit the number of cases reaching trial).

⁸⁵Gross and Syverud, *supra* note 80, at 364.

⁸⁶*Id.* at 366.

⁸⁷*Id.* (“It is not that doctors are *avoiding* trials when the fear they will *lose*, but that they are *seeking* trials when they expect to *win*.” (emphasis in original)).

⁸⁸Epstein, *supra* note 25, § 4[a].

settlement.⁸⁹ Pride provisions, however, make reputational harms within the scope of the damages the professional can claim in the event the insurance company breaches his contractual right to veto settlement.⁹⁰ Courts have allowed physicians to bring breach of contract claims against insurers for settling without consent when the insured had a right to veto or consent to settlement, when the physician alleged damages such as emotional distress⁹¹ stemming from the harm to the physician's career and increased medical malpractice premiums.⁹² The expansion of harms to the insured that the insurer must consider when accepting or rejecting settlement offers better reflects the concerns of insured professionals seeking to limit their liability while protecting their livelihoods.

IV. Statutory Prohibitions Against Pride Provisions

a. Florida's Prohibition

Although pride provisions are a valuable part of professional liability contracts from the perspective of the insured professional, there are public policy considerations that argue against them. In fact, at least two states have imposed a statutory prohibition on pride clauses in medical malpractice cases.⁹³ The legislative histories behind Florida's and Maryland's prohibitions on pride provisions are difficult to find. One Florida court, however, noted that Florida's prohibition was passed in 1985, as part of a package of legislation effecting "major medical malpractice reform."⁹⁴ The legislature intended to balance the interests of the insured, the insurers, and the plaintiffs bringing medical malpractice claims with the passage of the prohibition.⁹⁵

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Brion v. Vigilant Ins. Co.*, 651 S.W.2d 183, 184-85 (Mo.Ct.App.1983)

⁹² *Lieberman v. Employers Ins. Of Wausau*, 419 A.2d 417, 419 (N.J. 1980).

⁹³ FLA. STAT. § 627.4147; MD. INSURANCE CODE § 19-104(a)(2).

⁹⁴ *Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 285 (Fla. 4th Dist. Ct. App. 2007) (Warner, J., dissenting).

⁹⁵ *Id.*

Another opinion by the same Florida appellate court suggests that the legislature was concerned that pride clauses prevent medical malpractice insurers from limiting their liability through settlement for less than policy limits.⁹⁶ The court noted that if courts allowed insured professionals to bring claims against their insurers for settling claims over their objection, alleging reputation-based damages, such as increased insurance premiums, or inability to obtain medical malpractice insurance, then insurers would find their exposure on a given claim to be far in excess of policy limits, due to the risk of suit by their own insured for settling without his consent.⁹⁷ On the other hand, if insurers refused to settle claims without the consent of the insured, to avoid this additional risk, then more claims would reach juries, which is what the legislature was attempting to avoid with the passage of the prohibition against pride clauses.⁹⁸ The court was concerned that the requirement to settle only when the insured consented would take the control of the defense out of the insurance company's hands and place it in the hands of the insured.⁹⁹ Under such a scenario, the court could not "imagine why a malpractice insurer would even right coverage in Florida under that scenario,"¹⁰⁰ despite the fact that in most states consent clauses are a part of most malpractice insurance policies.¹⁰¹

An opinion by the Supreme Court of Florida provides insight into why the legislature wished to reduce the number of medical malpractice claims reaching the courts.¹⁰² According to the court, Florida's medical malpractice reforms were passed following the recommendations of a task force commissioned by the legislature to review the causes of rising medical malpractice

⁹⁶ Freeman v. Cohen, 969 So. 2d 1150, 1156 (Fla. 4th Dist. Ct. App. 2007) (Klein, J., concurring).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Gross and Syverud, *supra* note 80, at 361.

¹⁰² University of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993).

insurance premiums.¹⁰³ The task force found that the increased costs were not a result of an increase of claims brought against physicians or increased insurance company profits.¹⁰⁴ Instead, the task force found that there were an increasing number of payouts on claims, and the size of the payouts was also increasing.¹⁰⁵

Finally, the task force attributed another factor in the rise of the cost of medical malpractice insurance to the high cost of defending against claims.¹⁰⁶ Attorneys' fees and other costs associated with litigation nearly equaled the amount paid to claimants.¹⁰⁷ In the period preceding the reforms, the cost associated with defending against claims rose at an annual compound rate of 17% for eleven years running.¹⁰⁸ Tellingly, the package of reforms recommended by the task force, and passed by the legislature, included economic incentives to encourage litigants to arbitrate their claims, rather than litigate them in court.¹⁰⁹ It seems likely, therefore, that the prohibition against pride clauses was an attempt by the legislature to limit the number of cases that would reach the court, and save insurers the considerable expense of defending the suits.

The limitation may be successful in reducing the number of cases that reach trial. One commentator attempted to quantify the number of cases that reached trial after a physician's veto of settlement.¹¹⁰ Although trial court decisions do not typically report the details of the pre-trial settlement negotiations or the details of the insurance contract protecting the defendant, Syverud was able to obtain settlement information through survey information provided by California

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Syverud, *supra* note 47, at 1178-79.

attorneys to a trade publication.¹¹¹ By his estimate physicians exercised their right to veto settlement prior to trial in 14% of physician malpractice trials in California between 1987 to mid-1989,¹¹² the same period in which Florida was undergoing a perceived medical malpractice crisis.¹¹³

Yet it is unclear if the reduction in cases reaching the trial courts is actually creating a savings to the insurers. In the same review of reported medical malpractice cases, Syverud found that the physician's veto was vindicated by a defense verdict 73% of the time.¹¹⁴ If the Florida task force's conclusion is correct, and payment of claims is approximately 43% of insurer's costs, and defense costs are 40% of the total, then reducing defense costs at the expense of increased payment of claims is likely not a major source of cost savings.¹¹⁵ Instead, insured professionals must bear the reputational harms of settlement without the ability to bargain for consent clauses, all without a strong showing that there is a cost savings to insurers which could then be passed on to physicians. The claim of savings by prohibiting the clauses is particularly telling in light of statistical evidence suggesting that physicians cause more cases to go to trial, but they also win more often than other defendants.¹¹⁶

Tellingly, the American Medical Association declared Florida as one of eighteen states experiencing a "medical malpractice crisis" in 2003, which suggests that the reforms either have

¹¹¹ *Id.* at 1178 n.174.

¹¹² *Id.* at 1179.

¹¹³ Echarte, 618 So. 2d at 191.

¹¹⁴ Syverud, *supra* note 47, at 1179 n.175. Of the cases in which there was no information as to whether the insured vetoed settlement or not, the success rate at trial was 76%. In those cases it is not known whether the physician vetoed settlement and it simply was not reported by the attorney, or if the insurer rejected the plaintiff's offer of settlement, or if the plaintiff rejected settlement. Accordingly, it is difficult to draw any meaningful conclusions in comparison with the physician-vetoed-settlement rate.

¹¹⁵ Echarte, 618 So. 2d at 191.

¹¹⁶ Gross and Syverud, *supra* note 80, at 363 tbl. 7.

not solved the crisis or they have not prevented its re-occurrence.¹¹⁷ Florida's restriction on consent clauses is therefore almost completely without support: physicians sacrifice the chance to veto settlement of frivolous claims, when in the large majority of cases they would be vindicated by trial,¹¹⁸ without any evidence of saving to insurance companies or that the sacrifice has prevented the medical malpractice insurance crisis from reoccurring.

b. Maryland's Prohibition

Both Florida's and Maryland's prohibition against pride provisions are limited only to medical malpractice policies.¹¹⁹ Like Florida, the rationale in Maryland appears to be the medical malpractice is best settled outside the courthouse. The Maryland prohibition on consent clauses was originally enacted in 1976, as part of a package of medical malpractice laws that were geared toward arbitration of claims, rather than litigation.¹²⁰ The reasoning behind the package of legislation was the concern that juries are inadequate to evaluate complex medical testimony required in a medical malpractice case, jury emotionalism in awarding plaintiffs high dollar figures for pain and suffering without a clear showing of liability by the physician, and the long delays in resolution stemming from crowded trial dockets and attorney delay tactics.¹²¹ Maryland's statute prohibits clauses in medical malpractice insurance policies that allow the

¹¹⁷ American Medical Association, Press Release, *AMA Survey Shows Patients Losing Access to Care*, available at <http://www.asahq.org/news/ama0403.htm> (last visited Nov. 19, 2008).

¹¹⁸ Gross and Syverud, *supra* note 80, at 363 tbl. 7.

¹¹⁹ FLA. STAT. § 627.4147; MD. INSURANCE CODE § 19-104(a)(2).

¹²⁰ Kevin G. Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 U. BALT. L. REV. 74, 78-79 (1980). The statute was originally enacted as MD. CODE ANN., INS. § 482A (LexisNexis 1957).

¹²¹ *Id.*

insured to veto settlement.¹²² As discussed above, provisions allowing claims to settle are supposed to keep insurer costs down, savings they can then pass on to customers in the form of lower premiums.

c. Potential Costs to Insurers Resulting from a Restriction on Pride Provisions

In fact, not only may there not be much savings on a per case basis, as decreased litigation costs are off-set by increases in payments to plaintiffs who would lose at trial, but the provision may dis-incentivize plaintiffs' attorneys from screening claims that do not have much merit. Models of settlement behavior indicate that when cases can settle for an amount that is relatively low compared to the expected cost of defense of the claim at trial, it makes economic sense to settle even frivolous claims.¹²³ Logically, settlement rates will also increase when the insurer or defense attorney estimate that there is some risk of a multi-million dollar judgment at trial and the plaintiff is willing to settle for far less than that amount. For example, surveys suggest that plaintiffs only win awards greater than the amount of the offered settlement about 30% of the time at trial.¹²⁴ When plaintiffs do win an award larger than the settlement offer, however, it is often much larger.¹²⁵ In fact, 54% of the damages awarded at trial were won by only 3% of the plaintiffs.¹²⁶ If a plaintiff's lawyer evaluates a potential claimant to have a 10% chance of prevailing at trial, but the claim could pay out \$10 million dollars, then he will expect the claim to be worth \$1,000,000 in expected value. A meritorious claim with a 90% chance of success at trial, but that is worth \$30,000 in damages will only have a \$27,000 expected value.

¹²² MD. INSURANCE CODE § 19-104(a).

¹²³ Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1615 (2003) (citing mathematical models of settlement behavior done by George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 20 (1984)).

¹²⁴ Gross and Syverud, *supra* note 80, at 360.

¹²⁵ *Id.* at 384.

¹²⁶ *Id.*

The plaintiff's attorney, who is likely working on a contingency basis based on a percentage of the total settlement, will be incentivized to take the higher value claim, even those with the lower merit, than lower value, high merit claims. If the attorney is nearly certain to get some amount at settlement, regardless of the merit of the claim because for high-value claims insurers are economically incentivized to settle, there is a strong incentive to bring the claim and attempt to reach some amount at settlement with the insurer. If insurers were reluctant to settle claims without merit, as their insured physicians would be because of the attendant reputational harms, there would be a down-side to bringing claims without merit or with a low probability of success. In those cases, at least 76% of the time the plaintiff's attorney would not only not earn a fee, but would lose the amount he invested in the trial.¹²⁷ Because plaintiffs' attorneys advance the cost of trial, a 76% loss rate means that instead of the claim being worth little or zero 76% of the time, the claim would actually be a significant cost a vast majority of the time.

Therefore, because plaintiffs' lawyers value high dollar claims more than low dollar claims, if insurers are reluctant to litigate and impose a cost for bringing meritless claims, then plaintiffs lawyers should file more high dollar claims than lower dollar ones, regardless of their merit. Worse, if insurers are reluctant to litigate high dollar, low merit claims then plaintiff's lawyers will be able to settle the claims, even those with low merit.¹²⁸

Finally, there is another negative potential financial impact on insurance companies as a result of the restriction on pride clauses. Even in Maryland, where pride provisions are prohibited by statute, some insurance carriers will not settle a claim without the consent of the insured.¹²⁹

¹²⁷ Syverud, *supra* note 47, at 1179 n.175. In fact, because Syverud found that doctors prevail at trial 76% of the time, if one were to consider the plaintiff's success rate for meritless claims, it is likely to be far lower.

¹²⁸ See Gross and Syverud, *supra* note 80, at 343 (discussing the value to the defense of not settling a personal injury claim for any dollar amount, even if settlement is lower than expected defense costs).

¹²⁹ Robert Michael, *The Art of Litigating: Mediation in Maryland Medical Negligence Cases*, MARYLAND BAR JOURNAL, July/August 2004.

Mutual assurance societies, in which the insured physician is a customer and has an ownership interest in the company, are particularly reluctant to settle claims without the consent of their insured.¹³⁰ Although the mutual assurance societies may market themselves as aggressive champions of their insured physicians, they cannot profit from their consideration by charging an extra premium.¹³¹ Pride provisions likely cost insurers money in a majority of the 30% of cases in which the physician exercises his veto authority and then loses at trial.¹³² Even if the jury verdict at trial is identical to the amount for which the insurer could have settled the case, the added cost of litigation on top of the judgment amount made the verdict more costly.¹³³ Therefore, unless the jury verdict is so much lower than the settlement amount that it pays for the defense costs, the pride provision costs the insurer money when they lose at trial. Yet, by not allowing the provision explicitly in the contract, it makes it more difficult for insurance companies to charge an extra premium, or offer a discount for those insured professionals opting out of pride provisions.¹³⁴ Mutual assurance societies and other insurance companies wishing to gain customers by positioning themselves as allowing the insured professional to refuse settlement when his liability is in doubt, cannot recoup the cost of this consideration by explicitly charging more for the privilege.

V. The Tort System and Professional Liability

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Syverud, *supra* note 47, at 1179 n.175.

¹³³ University of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993) (citing Academic Task Force for Review of the Insurance and Tort Systems, Medical Malpractice Recommendations at 10-11 (Nov. 6, 1987) (on file with H.R. Comm. on Ins., The Capitol)) (estimating that litigation costs are 40% of the costs incurred in medical malpractice liability policies).

¹³⁴ Brion v. Vigilant Ins. Co., 651 S.W.2d 183 (Mo. Ct. App. 1983).

Florida's prohibition on pride provisions is particularly troublesome in light of Florida's adoption of Massachusetts' approach to an Internet-accessible physician information database.¹³⁵ Although the statute was passed without a clear a clear statement of legislative findings that motivated the passage of the statute,¹³⁶ a Federal district court in New Jersey took judicial notice that Florida's statute, along with New Jersey's reporting statute, were enacted as part of a "growing multi-state trend to provide citizens with *better* information about their physicians' backgrounds."¹³⁷ The Federal court found that New Jersey statute was supported by "a significant and legitimate public purpose."¹³⁸ Citing statements made by the governor of New Jersey when New Jersey's reporting statute was signed into law, the court found that information about a physician's past payment of malpractice awards, even in the context of pre-litigation settlement or in arbitration agreements, was relevant to consumers in selecting a health care provider.¹³⁹

Florida's reporting law varies from New Jersey's in that settlements must be over \$100,000 to trigger reporting in the database, but the settlement remains on the physician's record for ten years.¹⁴⁰ Presumably, the requirement to only report settlements over a \$100,000 threshold is an attempt to screen out settlements that are for frivolous claims and that the information is relevant to the public searching for information on their prospective physician. Yet Florida does not provide the same contextual information as Massachusetts, such as the number of physicians in the specialty with claims.¹⁴¹ One commentator noted that without any

¹³⁵ FLA. STAT. § 456.041 (2001).

¹³⁶ *Cf.* 2003 Fla. Laws 416. (enacting a package of medical malpractice insurance reforms, and starting with a statement of findings by the Florida Legislature which motivated the enactment).

¹³⁷ *Med. Soc'y v. Mottola*, 320 F. Supp. 2d 254, 262 n.4 (D.N.J. 2004) (emphasis added).

¹³⁸ *Id.* at 272.

¹³⁹ *Id.*

¹⁴⁰ Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 471-72 (2005).

¹⁴¹ *Id.* at 472.

qualitative information about the settlement, other than the dollar amount, Florida's database was likely to only give valuable information to potential plaintiffs, who have an idea of how a potential defendant would settle a claim.¹⁴²

Florida also has a prohibition on pride provisions, which further reduces the value of settlement information.¹⁴³ Florida's data on the number of settlements a physician has paid in the previous ten years may therefore be less probative of liability for settled claims. If the statistical data compiled by Syverud may be extrapolated to Florida, in 73% of the claims in which the physician would exercise the veto power of a pride provision, he would later be exonerated at trial.¹⁴⁴ Under Florida's statutory scheme, however, these claims will appear on the physician's profile as settlements, without an opportunity for the physician to vindicate himself at trial.

The effect of multiple settlements on a physician's profile are likely to have an impact on a physician's ability to practice in states such as Florida where the information is available to the public as they use profile information to "shop" for health care providers from lists provided by their health insurance policies. It seems unrealistic that the standard disclaimer that settlements "do not necessarily reflect negatively on the professional competence or conduct of the practitioner" will mitigate the influence that settlements will have on the public.¹⁴⁵

VI. Consent to Settle Clauses and Attorney Ethics

Professional liability insurance policies, such as medical malpractice policies protecting doctors, nurses, pharmacists, and other health care professionals from paying the costs of a

¹⁴² *Id.*

¹⁴³ FLA. STAT. § 627.4147 (prohibiting consent to settle clauses in medical malpractice insurance).

¹⁴⁴ Syverud, *supra* note 47, at 1178 n.175

¹⁴⁵ *See, e.g.* Baczynski, *supra* note 24, at 1325-26 in which a law student suggested that settlement information would be a factor in selecting a physician, despite her research on Massachusetts' reporting statute, which included the disclaimer language.

medical malpractice lawsuit, can also create a tension between the insured professional, the lawyer hired by the insurance company to defend the professional from a lawsuit, the insurance company footing the bill for the insured's defense, and the alleged victim of the professional's negligence.¹⁴⁶ When an insured medical professional is sued for medical malpractice, the insurance company will appoint counsel to defend the insured professional in the lawsuit.¹⁴⁷ The appointed attorney represents the insured professional, but may find himself with allegiance to the insurance company that is paying the bills as well.¹⁴⁸ The appointed attorney may find himself in a balancing act of competing interests: to protect his client's interest, he may have to limit the amount of information he shares with the insurance company, draft jury instructions in such a way that the verdict finds liability in areas covered by the insurance policy, or take a case to trial that he could have settled within policy limits, because liability was not clear and trial is the best way to protect the insured's professional reputation.¹⁴⁹

Yet, because he has a working relationship with the insurance company as well, some commentators and courts have been concerned about the loyalty the attorney may owe to the insurer.¹⁵⁰ An attorney may unconsciously favor the insurance company's interests when defending a case, given that the insurance company is paying for his hours spent researching and

¹⁴⁶ See TOM BAKER, *INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS* 588-89 (2nd ed. 2008) (describing the tensions in the relationship between the insurer, the insured, and the defense lawyer hired by the insurer). Baker also discusses how the plaintiff in a professional liability case creates an additional person with competing interests in a "tetrahedron" relationship, where settlement discussions and trial strategy are defined by several "triangles" that illustrate the parties' relationships and competing interests.

¹⁴⁷ Earl Sutherland, *One Client, One Defense: Revisiting CHI with the Alaska Rules of Professional Conduct*, 11 ALASKA L. REV. 1, 4 (1994).

¹⁴⁸ *CHI of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1116 (Alaska 1993).

¹⁴⁹ *Id.* at 1116-17; *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liability Ins. Trust*, 591 So. 2d 174 (Fla. 1992). In *Shuster* the insured doctor brought suit against his medical malpractice insurance company alleging a number of damages, including damage to his professional reputation, loss of malpractice insurance, and mental and emotional distress, as a result of the insurer's settlement below the policy limit of a lawsuit brought against the insured without adequate investigation into the merits of the patient-plaintiff's claim.

¹⁵⁰ *CHI of Alaska*, 844 P.2d at 1117 (citing Thomas A. Ford, *The Insurance Contract: The Conflicts of Interest it Breeds*, *INS. COUNS. J.* 610, 620 (Oct. 1969)).

arguing the case.¹⁵¹ In addition to the payment for work already done in the insured's defense, an attorney may also wish to earn work on additional cases from the insurance company.¹⁵² There may also be a danger that an attorney specializing in professional liability defense work would need to cultivate a reputation for cooperativeness with insurance companies paying for the defense of professional liability claims if he hopes to continue to have a job.¹⁵³

The Rules of Professional Responsibility that govern attorneys' ethical obligations help resolve of these conflicts.¹⁵⁴ One commentator believes that Rule 1.8(f), which places limitations on when an attorney can accept payment from a third party, including a specification that the payment cannot interfere with the attorney's professional judgment, is protection enough from the concern that an attorney will be unduly influenced by the insurer.¹⁵⁵ Other courts and commentators recognize that an appointed attorney who consistently ignores the interests of the insurer will find himself without additional work from that insurer, suggesting that trust in a state's ethics rules alone is unlikely to be protection enough for insured professionals in conflict with their insurer.¹⁵⁶

In fact, the Rules of Professional Responsibility themselves may heighten the conflict, such as Rule 1.2(a), which requires that an attorney abide by a client's decision to settle or try a case.¹⁵⁷ At the same time, an insurance policy may have a provision that gives the insurance company control over the defense of a suit, including the authority to settle the claim within

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See, e.g.,* ALASKA RULES OF PROFESSIONAL RESPONSIBILITY R. 1.8(f), which specifies when an attorney may accept payment from third parties, and requires that an attorney only accept payment when it will not interfere with the attorney's professional judgment. Because Alaska's Rules of Professional Responsibility are based on the ABA Model Rules of Professional Responsibility, a similar rule exists in nearly all U.S. states. New York, which still follows the older Model Code of Professional Responsibility, is the exception.

¹⁵⁵ Sutherland, *supra* note 146, at 30-31.

¹⁵⁶ *Chi of Alaska*, 844 P.2d at 1117 (citing a variety of court opinions and law review articles all noting the economic incentive for an attorney to place the interest of the insurer ahead of the insured).

¹⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

policy limits.¹⁵⁸ Under this type of provision, the client must cede control of the lawsuit to the insurer, and the attorney must then follow the direction of the insurer, rather than his client.¹⁵⁹ The attorney will still owe the client a duty to represent the client competently,¹⁶⁰ yet the insurer may determine that a quick and relatively affordable settlement outweighs the risk and expense attendant with defending against a frivolous claim brought against the insured.¹⁶¹ Therefore, the insurer may direct settlement of even a meritless claim in order to limit costs and risk, at the expense of the insured's reputation, and career.¹⁶² The defense attorney appointed by the insurer is then caught between the directive of the insurance company to settle the meritless claim and what the client and the attorney agree is in the client's best interest: litigating the claim.¹⁶³ If the statutory scheme of the state or the terms of the insurance policy require that the insurer control settlement of the claim without a need to obtain the consent of the insured, the conflict is resolved in the insurer's favor and the claim is settled. An ethical attorney may resolve the conflict with the duty to represent his client competently with settlement of the case by rationalizing that the sure settlement of a claim the insurer will pay is far better from a risk adverse position than litigating a claim without the protection of medical malpractice liability insurance, even if there is a high likelihood that his client would be vindicated at trial.

VII. Conclusion

¹⁵⁸ *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liability Ins. Trust*, 591 So. 2d 174, 176 (Fla. 1992).

¹⁵⁹ *Id.*

¹⁶⁰ MODEL RULES OF PROF'L CONDUCT R. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

¹⁶¹ *Shuster*, 591 So. 2d at 117.

¹⁶² *Id.*

¹⁶³ See Nolan N. Atkinson, Jr., *How the National Practitioner Data Bank Affects Medical Malpractice Clients*, *The Practical Litigator*, Vol. 5., January 1994 (suggesting that attorneys representing a physician who has the right to refuse settlement of a meritless claim should do so to prevent the settlement from being reported in the National Practitioner Data Bank).

The statutory approach found in Maryland and Florida, prohibiting consent to settle clauses, are no longer supported by public policy. Although the prohibition likely increases the settlement rate of claims in those states,¹⁶⁴ the increased settlements may disguise the amount of meritless claims brought against physicians who have committed no malpractice.¹⁶⁵ The increased settlement of primarily meritless claims are particularly disfavored in states such as Florida, in which settlements are part of a public database of physician profiles.¹⁶⁶ As these public databases grow increasingly more popular in states, the need to ensure the information in the databases is as relevant as possible is a duty of the state legislature's enacting them. Placing the information in context, such as by disclosing the rate of claims against other physicians in the same specialty and providing a baseline against which the size of the settlement may be compared, are a start. But allowing physicians to litigate claims in which there is a high likelihood that he will be vindicated at trial is another way to ensure that there are fewer settlements for frivolous claims appearing in the database.¹⁶⁷

If physicians cannot control settlement of medical malpractice claims brought against them, they are more likely to find ways to limit the likelihood that a claim will be brought. Physicians may flee to states with more physician-friendly medical malpractice laws.¹⁶⁸ People who are economically disadvantaged may also find it harder to find a physician willing to provide them with medical care, particularly in high risk specialties such as obstetrics.¹⁶⁹ People who are poor and without health insurance are less likely to have adequate preventative care, including prenatal care.¹⁷⁰ The lack of preventative care leads to an increase in bad outcomes.¹⁷¹

¹⁶⁴ Syverud, *supra* note 47, at 1178-79

¹⁶⁵ *Id.* at 1179 n.175.

¹⁶⁶ See discussion *supra* in Part V,

¹⁶⁷ See Gross and Syverud, *supra* note 80, at 366.

¹⁶⁸ Maxwell J. Mehlman, *Bad "Bad Baby" Bills*, 20 Am. J. L. and Med. 129, 145 (1994).

¹⁶⁹ *Id.* at 134.

¹⁷⁰ *Id.*

Physicians who are powerless to block meritless claims, where the bad outcome stems from the patient's lack of preventative care rather than malpractice, may refuse to treat these patients entirely, fearing that a high likelihood of a bad outcome means a higher likelihood of a malpractice claim.¹⁷² In fact, obstetricians are more reluctant to treat economically-disadvantaged patients.¹⁷³

Nor are insurers demonstrably benefited by the prohibition. As discussed *supra* in Part IV, the savings in defense costs may be offset by increased payment to claimants who would not prevail at trial. The prohibition on including consent to settle clauses may also deprive insurers of the ability to charge additional premium for pride provisions. Also as discussed *supra* in Part IV, prohibiting pride provisions may result in plaintiff's attorneys bringing claims with a high potential dollar value, even when the connection between the damages suffered by the plaintiff and the liability of the physician is tenuous. The plaintiff's bar can provide an important gate-keeping function, by refusing to accept plaintiff's claims unless they have enough merit to succeed in court.

Defense attorneys who specialize in medical malpractice are placed in the difficult position of having to settle a case their client may not want to settle when the attorney himself believes that settlement is not in his client's best interest.¹⁷⁴ The conflict is resolved by a pride provision, which allows the attorney and client to litigate a claim if it is in the client's best interest to do so. Accordingly, attorneys should also support the repeal of laws that prohibit pride clauses, in order to decrease the tension created by third-party payors.

¹⁷¹ *Id.*

¹⁷² *Id.* Even if this fear is not supported by empirical evidence, physician fears seem to affect physician availability in impoverished communities.

¹⁷³ *Id.*

¹⁷⁴ Atkinson, *supra* note 15.

A blanket prohibition against consent-to-settle clauses, also known as pride provisions, is therefore not well supported by public policy. Insurers can provide economic incentives to doctors willing to waive the pride provision in their medical malpractice contracts, and insurers are the ones who are most likely to benefit from the inclusion or exclusion of these provisions from their policies. Not only should legislatures in other states refuse to follow the lead set by Maryland and Florida in this area, but Maryland and Florida should repeal their statutes prohibiting consent to settle clauses. Although they are successful in reducing the cases that reach the courthouse, it seems they are mostly reducing the cases the physicians would have won.¹⁷⁵ With the increased availability of settlement information to hospitals, insurance companies, licensing boards, and the public, there are more policy reasons to repeal the statutes than to keep them.

¹⁷⁵ Gross and Syverud, *supra* note 80, 366.