Contingency Fees: Victim or Contributing Cause of Medical Malpractice Reform Acts - Roa v. Lodi Medical Group, Inc.

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CONTINGENCY FEES: VICTIM OR CONTRIBUTING CAUSE OF MEDICAL MALPRACTICE REFORM ACTS?

Roa v. Lodi Medical Group, Inc.
37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985)

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Medical malpractice has always been a sensitive area of litigation because the claims allege that health care providers failed to meet the standards of their chosen profession. With patients expecting more and better results from modern medicine, and with the breakdown of the family doctor-patient relationship, patients were more disposed toward suing doctors for perceived malpractice. As insurance premiums rose to match burgeoning claims, the medical community reacted. Doctors did not question the validity of the increases, but instead lashed out at the legal profession. They lobbied state legislatures for medical reform; their goal: to reduce premiums and frivolous lawsuits. All fifty states have various forms of medical malpractice acts. The acts generally pro-


3. Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 HARV. J. ON LEGIS. 143 (1981); Sohn, An Examination of Alternatives to Suit in Doctor-Patient Disputes, 48 ALB. L. REV. 669 (1984); see also Aitken, supra note 1.

vide for: (1) notice before suit; (2) a medical review panel; (3) qualifications for experts; (4) limitations on recovery for non-economic damages; (5) provisions for periodic payments in excess of a specified dollar amount; and (6) limitations on contingency fees. This comment focuses on the recent California Supreme Court case, *Roa v. Lodi Medical Group, Inc.*, which upheld the constitutionality of a limitation on contingency fees. The United States Supreme Court dismissed plaintiff's appeal for lack of a substantial federal question.

**HISTORICAL BACKGROUND**

As states passed medical malpractice legislation, courts subse-

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7. The medical malpractice "crisis" in California began as long ago as 1957. (Some commentators suggest that there was no such crisis in any state. Spence and Roth, *Closing the Courthouse Door: Florida's Spurious Claims Statute*, 11 STETSON L. REV. 283, 284-85 (1982); Cunningham & Lane, *Malpractice—The Illusory Crisis*, 54 Fla. B.J. 114 (1980); Sepler, *Professional Malpractice Litigation Crisis: Danger or Distortion?* 15 FORUM 493 (1980); Scherero, *Legislative Responses to the Medical Malpractice Crisis*, 5 J. L. & MED. 175, 176 n.2 (1979).) From that time to about 1974, the insurance industry failed to charge doctors premiums high enough to allow sufficient reserves to meet future claims. When the number of malpractice claims and the dollar amount of judgments began to surge, by 1975 insurers were paying out $180 for each $100 collected in premiums. Insurance companies either abandoned the market or raised premiums by several hundred percent. See Keene, *California's Medical Malpractice Crisis, A Legislator's Guide to the Medical Malpractice Issue* (Georgetown U. & Nat. Conf. of State Legs. 1976) at 27. Being unable to pass on the costs of skyrocketing premiums, doctors went on strike, and in certain areas of California, medical care came to a virtual halt. *Id.*


The primary purpose of MICRA was to reduce medical malpractice insurance costs. It affected four basic areas: (1) statutes of limitation, *Cal. Code Civ. Proc.* § 340.5; §§ 364, 365 (1979) require 90-day notice before filing suit; (2) damages, *Cal. Civ. Code* § 3333.2 (1979) limits non-economic losses to $250,000; (3) attorney's fees, *Cal. Bus. & Prof. Code* § 6146 (1979); and (4) arbitration *Cal. Code Civ. Proc.* § 1295 (1979) prescribes language for arbitration clauses in contracts for medical services. This article focuses on that provision which limits contingency fees. Section 6146 was included to help reduce medical malpractice insurance premiums by structuring a "sliding scale" fee schedule.
quently addressed their constitutionality. Most of the cases to date focus on the constitutionality of arbitration or review panels. In 1980, two cases were decided: one in New Hampshire and one in Indiana. The New Hampshire court invalidated the limitation on attorney fees as unconstitutional. The Indiana court, however, upheld its constitutionality. The reason for these opposite results is readily explained from the provisions in their respective medical malpractice legislation.

In *Carson v. Maurer*, six different cases were consolidated on appeal. All involved actions for medical injury, and all challenged the constitutionality of RSA ch. 507-C (Supp. 1979). Among other provisions, the legislation established a contingency fee scale for attorneys in medical malpractice actions.

8. DiFilippo v. Beck, 520 F. Supp. 1009 (D. Del. 1981) (referral of claims to panel and subsequent admission of panel's opinion at trial comport with equal protection, due process, and jury trial guarantee); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (review panel does not violate right to trial by jury, nor does it invade the judicial function); Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (medical review panel was unconstitutional because it delegated judicial functions to nonjudicial personnel and impermissibly restricted the right of trial by jury). It should also be noted that since the *Wright* decision, the Illinois legislature passed a new medical malpractice act effective August 15, 1985, under House Bill 1604. A trial court held the 1985 Act unconstitutional and the matter is pending before the Illinois Supreme Court under Bernier v. Burris, Docket No. 62876. Everett v. Goldman, 359 So. 2d 1256 (La. 1978) (upheld panel review required before filing suit); Oxtoby v. McGowan, 294 Md. 83, 447 A.2d 860 (1982) (medical injury arose before effective date of legislation and thus arbitration not required before filing suit); Attorney General of Md. v. Johnson, 282 Md. 274, 385 A.2d 57 (1978), appeal dismissed, 439 U.S. 805 (submission to nonbinding arbitration before filing suit does not violate separation of powers or right to trial by jury, nor significantly interfere with any fundamental right); Morris v. Metriyakool, 418 Mich. 423, 344 N.W.2d 736 (1984); State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (en banc) (unconstitutional because it violates individual's right of access to courts); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (before treatment patient may file election not to come within provisions of statute, which required, inter alia, submission of claim to medical review panel); Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983) (violates due process and access to courts); Trebyball v. Clark, 65 N.Y.2d 589, 483 N.E.2d 1136 (1985) (panels' recommendations are admissible, but not binding on trier-of-fact, at trial; the recommendations will assist rather than supplant the trier-of-fact in reaching a verdict; jury remains the final arbiter of questions of fact; panel recommendations will also better equip the parties to mediate a settlement); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (arbitration requirement declared unconstitutional due to impermissible delays in processing claims under procedures prescribed in Act); Mortensen v. Miller, 99 Wis. 2d 209, 298 N.W.2d 546 (1980) (filing with panel tolled statute of limitations for filing of lawsuit). See also Annot., 80 A.L.R.3d 583 (1977) and Comment, The Constitutional Considerations of Medical Malpractice Screening Panels, 27 AM. U.L. REV. 161, 161 n.2 (1977). There is a question whether these panels are accomplishing their purpose. See, e.g., Bedihian, Medical Malpractice Arbitration Act: Michigan's Experience with Arbitration, 10 AM. J.L. & MED. 287 (1984); and Note, A Practical Assessment of Arizona's Medical Malpractice Screening System, 1984 ARIZ. ST. L.J. 335 (1984).


11. 120 N.H. 925, 424 A.2d 825 (1980).

12. In enacting the statute, the New Hampshire legislature found: that substantial increases in the incidence and size of claims for medical injury pose a major threat to effective delivery of medical care in the state and that the risks and conse-
The issue in *Carson* was whether the medical malpractice statute violated equal protection under the fourteenth amendment. In determining which judicial standard to apply, the court found that although the statute established several classes, none involved a suspect class, such as race, alienage or nationality, which would require strict scrutiny. On the other hand, the court found that the right to recover for personal injuries was sufficiently important to require a more rigorous judicial scrutiny than allowed under the rational basis test. By applying an intermediate test, *Carson* held the statute unconstitutional because it (1) denied medical malpractice victims equal protection of the law and (2) unreasonably discriminated in favor of health care defendants and unduly burdened seriously injured malpractice plaintiffs.

*quizzes of medical injury must be stabilized* in order to encourage continued provisions of medical care to the public at reasonable cost, the continued existence of medical care institutions and the continued readiness of individuals to enter the medical care field.

*Id.* at 930, 424 A.2d at 829-30. (Emphasis added). Exactly what did the legislature mean by “stabilize” the risks and consequences of medical injury? Must a state legislature reduce the risks and consequences of a medical care provider’s negligence to ensure the availability of medical care to the public? Whether health care costs increase or potential recovery is reduced, the public bears the burden. Perhaps such legislation constitutes “surgery,” when the patient could have been cured with aspirin. See Attorney General of Md. v. Johnson, 282 Md. 274, 385 A.2d 57 (1978).

13. The classes are: (1) tortfeasors who are health care providers receive benefits not afforded to other tortfeasors; (2) tort claimants injured by medical malpractice are distinguished from other tort claimants; (3) medical malpractice victims whose non-economic loss exceeds $250,000 are distinguished from medical malpractice victims whose non-economic loss is $250,000 or less; and (4) medical malpractice victims whose future damage awards exceed $50,000 are distinguished from those who are awarded $50,000 or less for future damages. *Carson*, 120 N.H. at 931, 424 A.2d at 830.

14. *Id.* Courts apply strict scrutiny as the standard for judicial review when legislation burdens fundamental rights or suggests prejudice against racial or other minorities. This standard subjects legislation to closer analysis in order to preserve substantial values of equality and autonomy. L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 1000, 1012 (1978).

15. *Carson*, 120 N.H.2d at 931, 424 A.2d at 830. Under the rational basis test, the court merely determines whether the statute enacted by the legislature is rationally related to the legislative purpose. This standard accords much deference to the legislature. See generally, Tussman & ten Broeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

With respect to equal protection, rational basis requires some rationality in the nature of the classes singled out, with “rationality” tested by the classification’s ability to serve the purposes intended by the legislature. Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966). The courts also determine whether the classifications created by a statute are reasonable in light of its purpose. McLaughlin v. Florida, 379 U.S. 184, 191 (1964). See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 994-1000 (1978).


Under intermediate judicial scrutiny, Carson also held the limitation on attorney fees unconstitutional. The court reasoned that because there was no direct evidence that juries consider attorney fees in reaching a verdict, reapportionment of jury awards would not significantly affect the size of such awards. Thus, reducing attorney fees would do little to reduce medical malpractice insurance premiums or control health care costs. In addition, the court found that by reducing attorney fees solely in the area of medical malpractice, such cases would become less attractive to the plaintiffs' bar. Consequently, the statute would deter litigation of legitimate causes of action, thereby creating a potential impediment to a victim's access to courts and counsel.

Finally, the court held that the statute unjustly discriminated because it interferes with the freedom of contract between a single class of plaintiffs and their attorneys. The court reasoned that not only did the statute fail to regulate contingency fees in all tort actions, it did not even apply to defense counsel in medical malpractice cases. Only plaintiffs in medical malpractice cases were limited as to what amount they could pay their attorneys. Thus, the court held this provision unconstitutional.

An issue not raised in Carson was the separation of powers argument. This issue was raised in Heller v. Frankston, although the plaintiffs also raised the issues of due process and equal protection. Of primary importance to the Heller court was the question of the interplay between the legislative and judicial branches in regulating various aspects of attorney conduct. Pennsylvania appears to have strong precedent that the judiciary exclusively regulates attorney conduct, which in-

18. The court summarized the legislature's purpose in enacting the limitation on attorney fees: The purpose of this provision is to assure that the malpractice victim receives the bulk of any award, thereby increasing the cost effectiveness of awards to plaintiffs and of the medical reparations system as a whole. Id. at 945, 424 A.2d at 839.

19. One study shows that juries do not consider the lawyer's contingency fee in any award of damages. Note, supra note 16, at 943.


23. Id. at 299-300, 464 A.2d at 584.

24. The Pennsylvania Supreme Court has the exclusive and inherent power to regulate the conduct of attorneys. Ballou v. State Ethics Comm'n, 56 Pa. Commw. 240, 424 A.2d 983 (1981), modified on appeal, 496 Pa. 127, 436 A.2d 186. In addition to prescribing general rules for admission to and regulation of the bar, the power of the Supreme Court includes the continuous monitoring of the practice of law. Cantor v. Supreme Court of Pa., 353 F. Supp. 1307, 1316 n.21 (E.D. Pa. 1973), aff'd, 487 F.2d 1391. To the extent that legislation governs the admission, professional conduct and discipline of lawyers, it encroaches upon the power of the judiciary. In re Spline, 123 Pa. 527, 16 A. 481 (1889). Such encroachments are viewed as vain attempts by the legislature to exercise a power which it does not possess. Hoopes v. Bradshaw, 231 Pa. 485, 487, 80 A. 1098, 1099 (1911).
cludes fees charged by lawyers. Because the Pennsylvania courts have exclusive power and authority to examine and approve those fees, such power and authority cannot be usurped the the legislature. Under this separation of powers analysis, the Pennsylvania court held the limitation of attorney fees in medical malpractice cases unconstitutional.

Other jurisdictions uphold the constitutionality of limitations on contingency fees in medical malpractice cases and even in all negligence cases. Essentially, these courts hold that the legislation enjoyed a presumption of constitutionality, which presumption its challengers failed to overcome. In Johnson v. St. Vincent’s Hospital, Inc., the Indiana court held that neither a fundamental right nor suspect classification was involved. Therefore, the applicable standard of review is that the classification not be arbitrary or oppressive or unreasonable, and that a fair and substantial relationship exist between the classification and the purpose of the legislation creating it. The court found that the limitation on attorney fees is a rational means to achieve the legislative goal of preventing attorneys from receiving inordinantly large fees under contingency agreements.

In Indiana, physicians may voluntarily qualify to come under the provisions of the Act. If they do, the Act limits their liability to $100,000 and the patient’s recovery to $500,000. The remaining $400,000 liability is paid from a patient’s compensation fund. The Act only limits attorney fees paid out of that fund. It does not at all affect the amount of fees which may be paid out of the first $100,000 recovery, as that amount is not paid from the compensation fund. In addition, a patient may elect to pay attorney fees on a per diem basis, but such election must be exercised in written form at the time of employment. Under this scenario, the court held the limitation constitutional.

26. The court distinguished statutes which limit attorney fees in worker's compensation claims, actions relating to unemployment compensation, and losses or injuries due to crime as being remedies created by the legislature and not previously existing at common law, as medical malpractice. Heller v. Frankston, 76 Pa. Commw. at 304, 464 A.2d at 586-87.
29. Id. at 374, 404 N.E.2d 585 (1980).
30. Id. at 397, 404 N.E.2d at 600.
31. Id. at 394, 404 N.E.2d at 598.
32. Id. at 401, 404 N.E.2d at 602.
33. Id. at 402, 404 N.E.2d at 603.
34. Id. at 401, 404 N.E.2d at 602.
Unlike cases limited to medical malpractice, *American Trial Lawyers Association v. New Jersey Supreme Court*,35 upheld a limitation which applies to all negligence cases. *American Trial Lawyers* is cited as persuasive authority by courts which upheld the constitutionality of limiting contingency fees. Yet, unlike cases limited to medical malpractice, *American Trial Lawyers* upheld a limitation which applied to all negligence cases. Moreover, the limitation was not enacted by the legislature, but was adopted by the New Jersey Supreme Court.

Contingency fees had been of concern to the New Jersey Supreme Court for some fifteen years before the rule was adopted. In the summer of 1971, the court published a proposed rule and held a public hearing on November 6, 1971. After considering objections, both oral and written, from bar associations at the hearing, the New Jersey Supreme Court amended the rule and adopted it on December 21, 1971.36 The rule37 provides for contingency fees as follows:

1. 50% on the first $1,000 recovered;
2. 40% on the next $2,000 recovered;
3. 33 1/3% on the next $47,000 recovered;
4. 20% on the next $50,000 recovered;
5. 10% on any amount recovered over $100,000; and
6. Where the amount recovered is for the benefit of an infant or in-

37. Rules Governing the Courts of the State of New Jersey, Rule 1:21-7 (West 1971). A comparison of the New Jersey contingency fee scale to other jurisdictions is as follows:

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<th>New Jersey (as adopted in 1971)</th>
<th>New Jersey (as adopted in 1984)</th>
<th>Pennsylvania</th>
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<tr>
<td>1st $1,000.00 = 50%</td>
<td>1st $250,000.00 = 33 1/3%</td>
<td>1st $100,000.00 = 30%</td>
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<tr>
<td>2nd 2,000.00 = 40%</td>
<td>2nd 250,000.00 = 25%</td>
<td>2nd 100,000.00 = 25%</td>
</tr>
<tr>
<td>next 47,000.00 = 33 1/3%</td>
<td>+ 500,000.00 = 20%</td>
<td>+ 200,000.00 = 20%</td>
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<td>next 50,000.00 = 20%</td>
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<td>(held unconstitutional by <em>Heller v. Frankston</em>, 76 Pa. Commw. 294, 464 A.d 581 (1983), <em>aff'd</em> on other grounds, 504 Pa. 528, 475 A.2d 1292 (1984)).</td>
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<td>+ 100,000.00 = 10%</td>
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<th>Illinois</th>
<th>California</th>
<th>Michigan</th>
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<tr>
<td>1st $150,000.00 = 33 1/3%</td>
<td>1st $50,000.00 = 40%</td>
<td>1st $5,000.00 = 40%</td>
</tr>
<tr>
<td>next 850,000.00 = 25%</td>
<td>next 20,000.00 = 35%</td>
<td>next 225,000.00 = 25%</td>
</tr>
<tr>
<td>+ 1,000,000.00 = 20%</td>
<td>+ 225,000.00 = 20%</td>
<td>+ 500,000.00 = 10%</td>
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competent and the matter is settled without trial the foregoing limits apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%.

The fee is computed after deducting disbursements made in connection with prosecution of the claim. The permissible fee also includes legal services rendered on any re-trial, appeal or review. In the event that attorneys feel the fee is inadequate for the services rendered, the rule gives the trial judge discretion to determine whether the fee is reasonable in light of all the circumstances.

In *American Trial Lawyers*, the trial court held the rule invalid on state constitutional grounds. It noted that before adoption of the rule, the 33 1/3 contingency fee was prevalent in New Jersey and elsewhere. The rule not only interfered with the freedom of contract, but it restricted attorneys’ incomes without support in the record or in matters subject to judicial notice. In reversing, the appellate court held that the trial court improperly placed the burden on the defendant. Instead, the New Jersey Supreme Court rule was presumed to be constitutional. Because plaintiffs failed to submit financial and other data showing that the rule was unfair, the trial court was required to presumed the rule was valid.

**FACTS OF THE CASE**

In a 4-3 decision, with Chief Justice Bird strongly dissenting, the California Supreme Court narrowly upheld the constitutionality of section 6146 of the California Business and Professions Code, which limits

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38. *Rules Governing the Courts of the State of New Jersey, Rule 1:21-7(d) (West 1971).*
39. *Rules Governing the Courts of the State of New Jersey, Rule 1:21-7(f) (West 1971).*
41. *Id.* at 586, 316 A.2d at 26-27.
42. *Id.* at 583, 316 A.2d at 26.
43. *Id.*
44. *Section 6146 provides in relevant part:*

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person’s alleged professional negligence in excess of the following limits:

1. Forty percent of the first fifty thousand dollars ($50,000) recovered.
2. Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.
3. Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.
4. Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).

The limitations shall apply regards whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

* * *
the amount of a contingency fee in a medical malpractice claim. Frank and Yvonne Roa sued on behalf of themselves and as guardian ad litem for their infant son, Frank Joseph Roa. During their child's birth, the defendants failed to perform the requisite Caesarean section when they knew or should have known that the baby was in danger. Due to a lack of oxygen, their baby suffered permanent brain damage.

After much discovery, plaintiffs negotiated a settlement with two defendants: Lodi Medical Group, Inc. and Dr. Roget. The settlement provided that $495,000 be apportioned to the minor and that $5,000 be paid to the parents. The plaintiffs requested court approval for the payment of attorney fees. The parents informed the court that they knew that section 6146 limited attorney fees to about $90,800. They explained, however, that under the contingency fee agreement, they believed their attorneys were entitled to 25% of the minor's net recovery—about $122,800. In support of this request, their attorneys filed points and authorities that section 6146 was unconstitutional because it violated the first amendment, due process, equal protection, and the separation of powers.

The trial court found that plaintiffs and their attorneys had entered into an agreement providing for attorney fees of 25% of any net recovery. It also found that the requested $122,800 in fees was a fair and reasonable amount for attorney fees in this case and was in no way disproportionate to the quality or quantity of the legal services rendered. The court noted that were it not for section 6146, it would award the amount of fees requested. However, the court rejected the constitutional challenges to section 6146 and approved fees of only $90,800—the statutory limitation. Plaintiffs appealed to the California Appellate and

(c) For purposes of this section:
   (1) 'Recovered' means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

46. Id. at 924, 695 P.2d at 165, 211 Cal. Rptr. at 78.
47. Id. at 925, 927 n.5, 936, 695 P.2d at 166, 167-68 n.5, 174, 211 Cal. Rptr. at 79, 80-81 n.5, 87.
48. Id. at 925, 695 P.2d at 166, 211 Cal. Rptr. at 79.
49. Amicus briefs were filed on behalf of both sides. One brief questioned whether the plaintiffs could even properly prosecute the appeal. Since the order provided that more of the settlement than requested be preserved for the minor, plaintiffs had not been aggrieved. The court noted, however, that one of plaintiffs' contentions was that section 6146 is invalid because it impinged on the right of medical malpractice plaintiffs to retain competent counsel. Plaintiffs argued that if the statutory limits are enforced, their attorneys will have little incentive to pursue additional recovery against the remaining defendants. The court concluded that plaintiffs could pursue this substantive argument
Supreme\textsuperscript{51} Courts, reasserting their constitutional challenges.

**THE MAJORITY’S REASONING**

The California Supreme Court rejected one-by-one all of plaintiffs’ constitutional challenges. The majority responded to plaintiffs’ first amendment argument in a footnote.\textsuperscript{52} Although the court deemed the argument as creative,\textsuperscript{53} it rejected any attempt to invoke strict judicial scrutiny, since it would preclude a state from imposing any limitations on attorney fees.\textsuperscript{54} The majority went on to contrast limitations on contingency fees to the complete prohibition of contingency fees to political lobbyists.\textsuperscript{55} The court reasoned that section 6146 is constitutional because it does not completely prohibit plaintiffs from retaining attorneys on a contingency basis; it merely limits the percentage paid to the attorney.\textsuperscript{56}

In another brief section, the majority rejected plaintiffs’ separation of powers argument. Plaintiffs’ contended that in light of the court’s inherent power to review attorney fee contracts, the question of the appropriateness of attorney fees is a matter solely committed to the judiciary.\textsuperscript{57} The majority held that section 6146 did not violate the separation of powers doctrine because legislature has imposed fee limitations in the past and applicable California authority expressly refutes plaintiffs’ argument that the legislature has no power to so act.\textsuperscript{58}

The majority next rejected plaintiffs’ due process claim. It reasoned that section 6146 does not abrogate the right of medical malpractice victims to retain counsel, but simply limits the compensation an attorney may receive under a contingency fee agreement.\textsuperscript{59} The court noted that statutory limitations on attorney fees are not uncommon in California,\textsuperscript{60} on appeal. It also noted that since numerous amicus briefs had been filed on both sides, the competing viewpoints were adequately represented. Finally, the court stated in passing that it was not deciding whether there was a potential conflict of interest between plaintiffs and their attorneys on the attorney fee question, requiring separate representation of their interests. \textit{Id.} at 925 n.4, 695 P.2d at 166 n.4, 211 Cal. Rptr. at 79 n.4.

50. 129 Cal. App. 3d 318, 181 Cal. Rptr. 44 (3rd Dist. 1982).
52. \textit{Id.} at 927-28 n.5, 695 P.2d at 167-68 n.5, 211 Cal. Rptr. at 80-81 n.5.
53. \textit{Id.} at 927 n.5, 695 P.2d at 167 n.5, 211 Cal. Rptr. at 81 n.5.
54. \textit{Id.} at 927-28 n.5, 695 P.2d at 167-68 n.5, 211 Cal. Rptr. at 80-81 n.5.
55. \textit{Id.} at 928 n.5, 695 P.2d at 168 n.5, 211 Cal. Rptr. at 81 n.5.
56. \textit{Id.} at 926, 927 n.5, 695 P.2d at 166, 168 n.5, 211 Cal. Rptr. at 79 81 n.5.
57. \textit{Id.} at 933, 695 P.2d at 172, 211 Cal. Rptr. at 85.
58. \textit{Id.}
59. \textit{Id.} at 926, 695 P.2d at 166, 211 Cal. Rptr. at 79.
60. \textit{E.g.}, workers’ compensation proceedings (\textit{CAL. LAB. CODE} § 4906 (1979)) and probate matters (\textit{CAL. PROB. CODE} §§ 901, 910 (1979)).
or other states, and have even been legislated by Congress. Moreover, the validity of such legislation has been upheld by the United States Supreme Court. The court concluded that legislative ceilings on attorney fees were not constitutionally suspect and thus not subject to strict judicial scrutiny.

Having rejected strict judicial scrutiny, the court applied the lesser standard of rational basis. Under this standard, the court also rejected plaintiffs’ due process argument that section 6146 was invalid because the fees permitted were so low that in practice the statute would make it impossible for injured persons to find an attorney to represent them. The court viewed the adequacy of fees as an empirical matter, and plaintiffs did not produce any data or other evidence showing that malpractice victims would be unable to retain counsel. The court also noted that fees under the California statute were generous compared to the New Jersey statute, which provided something of a model for section 6146. The sliding scale schedule also did not impinge on a malpractice victim’s right to counsel, nor create a conflict of interest between attorney and client. First, the court reasoned that conflicts are inherent in all contingency fee arrangements. Second, the decreasing sliding-scale approach is recommended as the preferable form of regulation. Thus, the legisla-
ture could rationally determine that the fee schedule is an appropriate regulation.

Finally, the court rejected out-of-hand plaintiffs' argument that section 6146 violates due process because it applies only to medical malpractice actions. The court found that it was entirely rational for the legislature to limit the application to the medical malpractice field, since it was trying to alleviate a "crisis" situation.70 The court also emphasized plaintiffs' failure to make any factual showing to support their contentions. It noted that similar claims can be made against all statutes which limit attorney fees in particular claims, and such statutes are commonplace. Because no authority suggested that due process required a single, uniform attorney fee schedule for all areas of practice, the court upheld the constitutionality of section 6146 on due process grounds.71

The court next addressed plaintiff's equal protection argument. The majority did not expressly discuss whether there was a suspect class, requiring strict judicial scrutiny. Rather, it appeared that they relied on their previous rejection of the stricter standard.72

Under equal protection analysis, the majority held that section 6146 is rationally related to the objectives of MICRA: to reduce medical malpractice insurance premiums and deter frivolous suits. First, even though the contingency fee is paid out of the total recovery, the court stated that plaintiffs are more likely to agree to a lower settlement because they obtain the same net recovery from that lower settlement. Lower settlements result in lower costs to the insurance company, which, in turn, lead to lower premiums. Second, limitations on fees deter attorneys from either filing frivolous suits73 or encouraging clients to hold out for unrealistically high settlements. Third, section 6146 is rationally related to the objectives of MICRA because it attempts to preserve the already diminished compensation74 of the victim by protecting it from

[I]n order to relate the attorney's fee more to the amount of legal work and expense involved in handling a case and less to the fortuity of the plaintiff's economic status and degree of injury, a decreasing maximum schedule of attorney's fees, reasonably generous in the lower recovery ranges and thus unlikely to deny potential plaintiffs access to legal representation, should be set on a state-by-state basis.


70. Roa, 37 Cal. 3d at 930, 695 P.2d at 170, 211 Cal. Rptr. at 83.
71. Id. at 929-30, 695 P.2d at 170, 211 Cal. Rptr. at 82.
72. Id. at 927-28 n.5, 695 P.2d at 167-68 n.5, 211 Cal. Rptr. at 80-81 n.5.
73. Here the court seems to accuse plaintiffs of making contradictory arguments. First, plaintiffs argue that medical malpractice claims should not be regulated because an unusually high percentage of cases that are tried result in defense verdicts. But then they argue that frivolous suits are not a real problem. Id. at 930, 695 P.2d at 170-71, 211 Cal. Rptr. at 83.
74. MICRA is similar to other statutes which allow recovery to be reduced by collateral source benefits (CAL. CIV. CODE § 3333.1(a) (1979) and which place limits on recovery for non-economic losses (CAL. CIV. CODE § 3333.3(b) (1979)).
further reduction by high contingency fees. 75

Finally, the court held that section 6146 does not violate equal protection even though it does not limit defense fees. The court noted that statutes in California and other jurisdictions limit contingency fees without limiting fees earned on some other basis. Moreover, the court held that the decreasing-sliding-scale component does not discriminate against the more seriously injured malpractice victims. 76 The court stated that the legislature could have reasonably concluded that this approach produces more equitable fees, because it ensures that an attorney does not receive a windfall merely because a client is seriously injured. It also ensures that the seriously injured plaintiff receives the major portion of any recovery. 77

THE DISSENT

Chief Justice Bird strongly dissented, joined by Justices Mosk and McClosky. The dissent argued that section 6146 was unconstitutional because it: (1) violates the first amendment right to petition the government for redress and discriminates between litigants according to the content of their views; (2) violates the due process right of medical malpractice victims to retain counsel and exacerbates the conflict of interest between attorney and client; and (3) violates equal protection by arbitrarily applying attorney fee limitations only in medical malpractice cases, only to plaintiffs, and in a manner particularly burdensome to severely injured malpractice victims with limited resources. 78

Addressing the first amendment issue, the dissent stated that the expenditure of money for attorney fees is as essential to the exercise of the right to petition 79 as in the expenditure of funds to pay for the use of the electronic media by political candidates. 80 The dissent extensively quoted Walters v. National Association of Radiation Survivors 81 that the right to petition is an empty promise if individuals or others are denied the means to meet the cost of legal representation in pursuing their right to petition. The dissent noted that in contrast to its reliance on the 1984

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75. Roa, 37 Cal. 3d at 932, 695 P.2d at 171, 211 Cal. Rptr. at 84.
76. Id.
77. Id. at 933, 695 P.2d at 172, 211 Cal. Rptr. at 85.
78. Id. at 936, 695 P.2d at 174, 211 Cal. Rptr. at 87.
79. Id. at 937, 695 P.2d at 175, 211 Cal. Rptr. at 88.
81. 589 F. Supp. 1302 (N.D. Cal. 1984), 105 S. Ct. 588 (probable jurisdiction noted); 105 S. Ct. 11 (government's application to stay injunction granted by Rehnquist, J.; lower court had enjoined enforcement of 38 U.S.C. §§ 3404 and 3405 which prohibited payment of more than $10.00 by a Veteran to an attorney); 105 S. Ct. 238 (request to vacate stay denied) (1984) rev'd, 105 S. Ct. 3180 (1985).
decision in Walters, the principal cases relied upon by the majority were decided before 1930, and none addressed the right to petition.82

Because section 6146 regulates economic activity essential to the effective exercise of a first amendment right, the dissent applied strict scrutiny and compelling state interest. It first noted that the attorney fee limitation violates the constitutional ban on content discrimination.83 Only plaintiff contingency fees are regulated, thus affecting which views are heard.84 Section 6146 also facially discriminates, since it restricts fees only paid by the person seeking damages.85 Although allowing plaintiffs to retain a greater percentage of their recovery is a legitimate interest, the dissent concluded that it is not a compelling one.86 It reasoned that such a paternalistic argument is disfavored in the context of the first amendment.87 Finally, the limitation on attorney fees will not accomplish the legislative purpose of reducing medical malpractice insurance premiums, because it merely reapportions the award between the plaintiffs and their attorneys.88

Under a due process analysis, the dissent found section 6146 unconstitutional because it is not reasonable or proper, but is arbitrary and oppressive. Although the statute does not completely abrogate the right to retain counsel, it significantly interferes with that right.89 The dissent reasoned that by lowering the attorney's compensation in a medical malpractice action where there is a high risk of zero recovery, many attorneys will cease representing malpractice victims, even victims with valid claims. The dissent rejected the majority's comparison of section 6146 to

82. Roa, 37 Cal. 3d at 939, 695 P.2d at 176, 211 Cal. Rptr. at 89.
84. Roa, 37 Cal. 3d at 940, 695 P.2d at 177, 211 Cal. Rptr. at 90. The government may not pick and choose what views may be heard. See, e.g., Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).
85. Roa, 37 Cal. 3d at 940 n.9, 695 P.2d at 177 n.9, 211 Cal. Rptr. at 90 n.9. The dissent noted that even if the statute restricted contingency fees paid by defendants, it would have no practical effect because defendants utilize hourly per diem fee arrangements. Rather, the effect of limiting contingency fees is to intentionally discourage use of attorney time in prosecuting medical malpractice claims.
86. Id. at 940, 695 P.2d at 177, 211 Cal. Rptr. at 90.
88. Roa, 37 Cal. 3d at 941, 695 P.2d at 178, 211 Cal. Rptr. at 91.
89. Id. at 942, 695 P.2d at 178, 211 Cal. Rptr. at 91.
other legislated fee limits. The dissent noted that where fees are regulated in Workers’ Compensation claims, the injured parties do not have to prove negligence. As a result, the risk of a zero recovery is substantially reduced. In addition, the statute provides for “a reasonable attorney’s fee,” which allows flexibility to take into consideration the complexity of the case and the time and effort of the attorney.

The dissent concluded that section 6146 was also arbitrary and oppressive. At the time MICRA was enacted, there was no evidence of an inordinate number of frivolous claims. Nor was there evidence that such claims contributed to the cost of medical malpractice premiums. The dissent believed that the absence of such evidence strongly suggested that section 6146 attempted to reduce malpractice premiums by reducing the total number of meritorious claims—exactly the sort of arbitrary and oppressive legislative action which due process guarantees must operate to prevent.

The dissent also found that section 6146 violated equal protection because it singled out and imposed a burden on only one narrow subclass of personal injury victims. The dissent reasoned that given the high risks and costs associated with prosecuting medical malpractice claims, attorneys would abandon the field for areas where the risk and costs were lower and the compensation greater.

Section 6146 also violated equal protection, according to the dissent, because it created several classifications which did not bear a substantial and rational relation to a legitimate state purpose. The first class created is that between medical malpractice victims and other tort victims. The dissent reasoned that if the legislative purpose is to ensure that plaintiffs receive the bulk of the recovery, there is no rational basis to single out medical malpractice contingency fees for special treatment. The second class created is that between plaintiff attorneys and defense attorneys. Here, the statute was underinclusive because only plaintiff fees

90. Id. at 942, 695 P.2d at 178-79, 211 Cal. Rptr. at 92.
91. Id.
93. Roa, 37 Cal. 3d at 947-48, 695 P.2d at 182, 211 Cal. Rptr. at 95.
94. Id. at 943, 695 P.2d at 179, 211 Cal. Rptr. at 92.
96. Roa, 37 Cal. 3d at 950, 695 P.2d at 184, 211 Cal. Rptr. at 97.
97. Not only did the dissent believe that section 6146 would fail to reduce premiums, they argued that the statute would even increase them. They reasoned that while section 6146 discouraged attorneys from representing plaintiffs, it encouraged defense attorneys (who are paid on a per diem basis) to undertake extensive and costly discovery prior to settlement. By so doing, defendants could
are regulated, whereas both defendant and plaintiff legal fees consume about the same proportion of the premium dollar and plaintiff fees are not significantly greater than defendant fees.

The last class created is between the injured and the seriously injured medical malpractice victim. The dissent found that the statute unduly burdens the more seriously injured malpractice victim because lawyers have less incentive to pursue larger recoveries, since their fee is only 10% of that additional recovery. The dissent concluded that the statute could not withstand any meaningful level of judicial scrutiny and stated that “[b]y upholding section 6146, the majority [does] a grave injustice to victims of medical malpractice in [California] and to well-established principles of constitutional law.”

**ANALYSIS**

**The First Amendment**

In a 4-3 decision, California became the third state to judicially validate whole-scale limitations on contingency fees in medical malpractice claims. In upholding section 6146, the majority treated the statute merely as a routine business regulation and neglected any meaningful first amendment analysis as a basis for strict judicial scrutiny. The court reposed great authority in a 1920 United States Supreme Court case and ignored major first amendment decisions rendered in the subsequent 65 years. Since the California Supreme Court relied so extensively on *Calhoun*, the facts of that case merit some discussion and will reveal a problem with the majority's asserted support.

Mr. Massie retained attorney C.C. Calhoun to prosecute his claim
against the United States for property taken by Federal forces during the Civil War. In a written contract, Mr. Massie agreed to pay attorney Calhoun 50% of any recovery.\textsuperscript{108} Through Calhoun’s efforts, Congress enacted legislation which made appropriations for payment of 1,115 claims arising out of the Civil War.\textsuperscript{109} The legislation also provided that no more than 20% could be paid to an agent or attorney for services rendered in prosecuting the claim.\textsuperscript{110} Massie’s claim was decided favorably, and the Government issued two Treasury warrants, one for $380 (representing 20%) made payable to Calhoun and one for $1,520 made payable to Massie. Calhoun pursued his claim against Massie for the remaining 30% all the way to the United States Supreme Court. The Court upheld the decisions of the lower courts, stating that the money was paid and received under the Act. Payment to Calhoun by the Treasury of 20% could be made \textit{only} under that Act. He could not take under the Act and then repudiate its provisions.\textsuperscript{111}

Unlike \textit{Calhoun}, the legislation affecting \textit{Roa} does not also fund the payments which are made. Where the government appropriates money to pay claims, it has clear authority to protect that fund from fraud and imposition by controlling to some extent the conditions under which those claims are made.\textsuperscript{112} But where the State of California has not established a patient compensation fund, it is questionable whether the legislature may regulate the distribution of recoveries from non-State funds. The court’s reliance on \textit{Calhoun} is thus highly questionable, because section 6146 which limits the contingency fee does not also finance the funds to be paid.

Nonetheless, the court relies on \textit{Calhoun} to support its reasoning that because contingency fees have been regulated from time immemorial,\textsuperscript{113} legislative ceilings on attorney fees are not constitutionally suspect or subject to strict judicial scrutiny.\textsuperscript{114} In a footnote, the majority rejects any first amendment arguments which would trigger strict judicial scrutiny.\textsuperscript{115} The majority fails to answer how individuals exercise their first amendment right to petition without the resources to meet the costs of legal representation necessary to pursue that right. Instead, the majority insists that the right to obtain counsel is not infringed because the

\textsuperscript{108} Id. at 172.
\textsuperscript{109} Id. at 171, 176.
\textsuperscript{110} Id. at 172.
\textsuperscript{111} Id. at 177.
\textsuperscript{112} See, e.g., Calhoun v. Massey, 253 U.S. at 173.
\textsuperscript{113} Id. at 174.
\textsuperscript{114} \textit{Roa}, 37 Cal. 3d at 927, 695 P.2d at 167, 211 Cal. Rptr. at 80.
\textsuperscript{115} Id. at 927-28 n.5, 695 P.2d at 167-68 n.5, 211 Cal. Rptr. at 80-81 n.5.
statute only limits the amount of fees that may be paid.\textsuperscript{116} By so doing, the majority ignores post-Calhoun decisions which hold that not only are litigants entitled to petition the courts under the first amendment to obtain monetary damages,\textsuperscript{117} but that economic activity essential to the effective exercise of that first amendment right may be restricted only where necessary to serve a compelling governmental interest.\textsuperscript{118}

The ability to petition for a redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights.\textsuperscript{119} It is also recognized that the legal advocacy involved in such litigation is itself protected speech.\textsuperscript{120} Although recovery of damages in medical malpractice actions are a primary goal, such action is often the only way for society to communicate to health care providers the need for improved medical care.\textsuperscript{121} With important first amendment interests such as petition and speech at stake, any restrictions on a plaintiff's financial ability to retain legal counsel should be carefully scrutinized.

It is well-acknowledged that medical malpractice cases constitute complex litigation.\textsuperscript{122} It is therefore most important that qualified attorneys are available to represent victims. The right to be heard is of little avail if it does not encompass the right to be heard by counsel.\textsuperscript{123} If attorney fees are limited in medical malpractice cases, a problem in retaining counsel may arise.

Limitations on attorney fees are likely to produce a basic economic result. There is a direct relation between prices and supply. As prices increase, the supply increases. However, as prices decrease, supply also decreases. If by decreasing prices section 6146 decreases the supply of qualified attorneys to litigate complex medical malpractice claims, the statute effectively denies the victim a right to redress.

\textsuperscript{116} \textit{Id.} at 926, 695 P.2d at 166, 211 Cal. Rptr. at 79.
\textsuperscript{121} See Spence and Roth, \textit{supra} note 7, at 309.
\textsuperscript{122} \textit{Roa}, 37 Cal. 3d at 938, 695 P.2d at 174, 211 Cal. Rptr. at 87. See also Carpenter, \textit{supra} note 1, at 22; Keene, \textit{supra} note 7, at 29-30; and Moore and O'Connell, \textit{Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss}, 44 L.A. L. REV. 1267, 1268 (1984).
\textsuperscript{123} Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
The majority fails to answer how a medical malpractice victim will, in practice, be able to retain counsel at the reduced compensation under section 6146. It also fails to provide any assurance that attorneys will not abandon malpractice claims for other tort actions where compensation is not regulated. Instead, the majority seems to blame the plaintiffs for failing to produce factual data showing that victims will, in fact, be unable to retain counsel and showing that attorneys are or will abandon malpractice claims. Not only is such data difficult to obtain during the pendency of an appeal, but more importantly, it is impossible to predict today how many victims will be adversely affected by this statute in the future. Consequently, the majority placed an onerous burden on the plaintiffs.

The California court viewed section 6146 merely as a limitation on fees and not as a restriction or complete bar to retain counsel. Yet, if filing a medical malpractice action constitutes speech, restrictions which limit the quantity of spending devoted to protected expression are unconstitutional. In *Buckley v. Valeo*, the legislative purpose was to reduce skyrocketing costs of political campaigns and to prevent corruption and the appearance of corruption. In light of these purposes, the Supreme Court held that limitations on donations to political candidates was constitutional. However, those purposes were not sufficient to justify restrictions on expenditures by a political candidate. Not only did the expenditure restriction fail to serve any governmental interest, it heavily burdened first amendment expression.

The concept that government may restrict the speech of some in

125. *Id.* at 929-30, 695 P.2d at 169-70, 211 Cal. Rptr. at 82.
126. *Id.* at 925-26, 695 P.2d at 166, 211 Cal. Rptr. at 79.
127. See *Buckley v. Valeo*, 424 U.S. 1, 51 (1975). In *Buckley*, the Court invalidated a statute which limited how much political candidates could spend in their campaigns. The legislation passed by Congress in 1971, and amended in 1974, concerned elections of the President, Vice-President, and members of Congress. Summarized in broad terms, the statute provided that individual political contributions are limited to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor; independent expenditures by individual and groups "relative to a clearly identified candidate" are limited to $1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits. *Id.* at 1, 7. The Court found that the provisions limiting political contributions were constitutionally valid. The limitations on expenditures, however, placed substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expressions, restrictions that the first amendment cannot tolerate. *Id.* at 58-59. Consequently, the Court held the restrictions on expenditures unconstitutional.
128. *Id.* at 57.
129. *Id.* at 25-26.
130. *Id.* at 45.
131. *Id.* at 47-48.
order to enhance the relative voice of others is wholly foreign to the first amendment. The amendment was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The first amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

In light of an important first amendment right, the majority should have applied strict scrutiny. Not only does the limitation select which views are heard, it also violates the ban on content-based discrimination. Section 6146 facially discriminates against the victim prosecuting the claim, while the defendant retains his right to pay any amount consistent with general law. The majority failed to reconcile how the right to petition is protected in our adversary system when plaintiffs are intentionally prevented from paying fees comparable to their opponent's. Instead, the majority justified this intentional limitation by saying, essentially, that some recovery is better than no recovery.

The majority analogized the limitation on contingency fees to the complete ban on contingency fees being paid to lobbyists. This analogy is severely flawed. First, lobbyists do not usually work to recover a sum of money, a percentage of which is then paid to them. Second, and more significantly, the ban on contingency fees for lobbyists applies to representatives of all viewpoints. It therefore does not select or favor which views may be heard. Section 6146, on the other hand, does not apply to all parties in a medical malpractice claim. It therefore indeed selects the views which are ultimately heard.

But reducing attorney fees may not be necessary to meet the goal of reducing malpractice premiums. The attorney fee is paid out of the plaintiff's recovery. Section 6146 serves only to reapportion that recov-

132. An ancillary interest underlying the Act was to mute the voices of affluent persons and groups in the election process and thereby equalize the relative ability of all citizens to affect the outcome of elections. Id. at 25-26.
133. Id. at 48-49.
136. Some commentators suggest that strict scrutiny should apply even to facially neutral statutes which restrict content. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW AT 591-94 (1978); J. Ely, DEMOCRACY AND DISTRUST at 111-15 (1980).
137. Roa, 37 Cal. 3d at 940, 695 P.2d at 177, 211 Cal. Rptr. at 90 (Bird, C.J., dissenting).
138. Id. at 930, 695 P.2d at 170, 211 Cal. Rptr. at 83.
139. Id. at 941, 695 P.2d at 178, 211 Cal. Rptr. at 91 (Bird, C.J., dissenting).
CONTINGENCY FEES

ery between the plaintiff and his attorney. It does not affect the total amount paid by the insurance company. Only if attorney fees are a significant factor in deciding whether to accept a settlement will section 6146 operate to reduce premiums.\(^\text{140}\) Although the intended reduction in premiums may not necessarily follow, section 6146 is probably valid under a rational basis standard.

Yet, there may be less restrictive means to reduce premiums and frivolous suits. Premiums cannot constitutionally be reduced by preventing meritorious claims from being filed.\(^\text{141}\) Frivolous suits can be appropriately screened by medical review panels.\(^\text{142}\) Even if a frivolous suit should slip through, physicians may seek damages through malicious prosecution actions. Many states have reduced the physician’s burden in obtaining recovery by eliminating the burden to prove special damages.\(^\text{143}\) Other provisions, such as requiring a doctor’s report to be appended to the complaint, accomplish the goals of reducing premiums and frivolous suits without interfering with the victim’s ability to obtain legal representation at the generally accepted rate.

The right to petition under the first amendment implies by necessity the right to obtain counsel in pursuing that claim. The California Supreme Court refused to accept that the limitation on contingency fees would abrogate any first amendment right. By refusing to apply strict scrutiny, the majority validated the right of health care providers to spend freely for their defense at the expense of their victims.

**Due Process**

Substantive due process requires that legislation be reasonable and proper, not arbitrary and oppressive.\(^\text{144}\) Some statutes limiting attorney fees have been held constitutional. Legislation regulating workers’ compensation claims, probate fees, and Federal Tort Claims\(^\text{145}\) at first glance,

140. Under professional standards of ethics, however, the client decides whether to accept or reject a settlement.

141. Most medical malpractice reform acts include a provision requiring the case to first be heard by a medical review panel. In Illinois, for example, the panel consists of three members: judge, physician, and lawyer, who conduct a full trial. [ILL. REV. STAT. ch. 110, §§ 2-1012–2-1020 (1985).](#) In Indiana, the panel consists of one attorney and three health care providers, and is more of a review of records and documentation than a full trial. [IND. CODE §§ 16-9.5-9.3, 16-9.5-9.4 (1982).](#) See also supra note 8.

142. Illinois eliminated the physician’s burden to plead and prove special injury in a malicious prosecution action. [ILL. REV. STAT. ch. 110, § 2-614 (1985).](#)


144. [CAL. LAB. CODE § 3600 (1979).](#)

appear to support the majority. However, a more discerning analysis reveals vast differences between those statutes and MICRA. First, although fees are regulated by statute in workers' compensation claims, there is *quid pro quo*, in that injured employees are not required to prove negligence.¹⁴⁶ Thus, in exchange for statutory compensation and attorney fees, employees benefit from a lower standard of proof. Accordingly, the risk of zero recovery is also reduced. No such reciprocity is provided in MICRA.¹⁴⁷ The medical malpractice victim must still meet the difficult burden of proving negligence. This often results in the battle of experts, assuming the plaintiff can retain one.

Probate statutes are also inapposite. These statutes provide that the attorney be compensated for the actual work performed.¹⁴⁸ MICRA does not guarantee that the victim's attorney will be compensated for at least the hours worked in the event of a recovery. Nor is there any provision to adjust the statutory limitation if the fee proves to be inadequate for the services performed.¹⁴⁹

The limitation in Federal Tort Claims also fails to support the majority's position. Under sovereign immunity, the government can completely prohibit tort actions against itself. In exchange for the ability to sue the government in tort, certain limitations, including those on attorney fees, are imposed. The tort victim receives something in exchange, even though limits are imposed.¹⁵⁰ MICRA not only imposes limitations on fees, but the victim has the same awesome burden of proof. More-

consent of the government to be sued in tort, though the consent was subject to several particular restrictions. First, jurisdiction is vested exclusively in the federal district court. Second, consent to the suit is limited to provide consent for non-jury trials only. Third, within two years after the claim arises, it must be presented in writing to the administrative agency whose conduct is deemed responsible for the damages. If the agency denies the claim, the action must be filed within six months. W. PROSSER, *HANDBOOK OF THE LAW ON TORTS* at 1032-35 (5th ed. 1984).

¹⁴⁶. None of the medical malpractice acts enacted to date lessen the victim's burden of proof. The due process clause of the fourteenth amendment, however, prohibits abrogation of a common law right to sue in tort unless an adequate substitute remedy is provided. The "adequate substitute remedy test" is derived from dictum in New York Central R.R. v. White, 243 U.S. 188 (1917). See also Spence and Roth, *supra* note 7, at 300.

¹⁴⁷. Roa, 37 Cal. 3d at 942-44, 695 P.2d at 179-81, 211 Cal. Rptr. at 91-93 (Bird, C.J., dissenting).


¹⁴⁹. Roa, 37 Cal. 3d at 944, 695 P.2d at 180, 211 Cal. Rptr. at 93. Illinois provides that the court may review contingent fee agreements for fairness. In special circumstances where an attorney performs extraordinary services involving more than usual participation in time and effort, the attorney may apply to the court for approval of additional compensation. ILL. REV. STAT. ch. 110, § 2-114(c) (1985). New Jersey appears to have such a provision. See Donaghy v. Napoleon, 543 F. Supp. 112, 115 (D.N.J. 1982).

¹⁵⁰. Roa, 37 Cal. 3d at 944, 695 P.2d at 180, 211 Cal. Rptr. at 93. Under the Federal Tort Claims Act, a victim received the right to sue the government, which before the Act enjoyed sovereign immunity. See also *supra* note 145.
over, it imposes an unfair disadvantage on one party in a legal dispute.\textsuperscript{151}

The majority upholds legislation which gives all to the medical provider and drastically takes away from the victim, to the point of depriving him of needed legal representation to pursue a potentially sophisticated claim. MICRA thus proves to be arbitrary and oppressive, and is not sufficiently related to its purpose of reducing frivolous claims.\textsuperscript{152}

\textbf{Equal Protection}

Section 6146 creates three basic classes: (1) medical malpractice victims vs. other tort victims; (2) wealthy victims vs. victims without financial resources; and (3) plaintiff attorneys vs. defendant attorneys. Under California law, the statute must bear a substantial and rational relation to a legitimate state purpose in order to pass an equal protection challenge.\textsuperscript{153} From a very narrow perspective, the majority's view seems reasonable. The limitation presumably protects the pre-diminished compensation of a victim, and a reduced fee will certainly deter the filing of lawsuits. To the extent that a statute limits or eliminates one's right to receive compensation for injuries, there is a logical and equal reduction in the need for the insurance protection, which has traditionally provided the source for these compensation payments.\textsuperscript{154}

A more realistic view, however, is Chief Justice Bird's dissent. Although ensuring that medical malpractice victims receive the bulk of any recovery is a legitimate state interest, there is no reason to distinguish them from other tort victims.\textsuperscript{155} Additionally, it is ironic that the

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\item \textsuperscript{151} Roa, 37 Cal. 3d at 944, 695 P.2d at 180, 211 Cal. Rptr. at 93.
\item \textsuperscript{152} Id. at 944, 948, 695 P.2d at 180, 183, 211 Cal. Rptr. at 93, 96.
\item \textsuperscript{153} Id. at 950, 695 P.2d at 185, 211 Cal. Rptr. at 98; see Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (automobile guest statute held unconstitutional because classifications created did not bear a substantial and rational relation to statute's purpose). See also Aitken, \textit{supra} note 1, at 91.
\item \textsuperscript{154} See Roa, 37 Cal. 3d at 951, 695 P.2d at 185, 211 Cal. Rptr. at 98 (Bird, C.J., dissenting).
\item \textsuperscript{155} In the event of a crisis, however, there might be a rational basis to distinguish medical malpractice plaintiffs from other tort plaintiffs. If drastic increases in insurance premiums resulted in a threat to the continuing availability of health care, the interests of the public and the interests of malpractice victims would need to be balanced. Some commentators believe such a crisis actually occurred. See Carpenter, \textit{supra} note 1; Keith, \textit{supra} note 8; and Moore and O'Connell, \textit{supra} note 122. Others strongly refute that a crisis ever existed. See Aitken, \textit{supra} note 1; Bartimus, \textit{Protecting Plaintiff's Rights in the Medical Malpractice "Crisis."} 53 UMKC L. REV. 1 (1984); Keith, \textit{supra} note 4; Sepler, \textit{supra} note 7; and Spence and Roth, \textit{supra} note 7. See also Jones v. State Bd. of Medicine, 97 Idaho 859, 872, 555 P.2d 399, 412 (1976), \textit{cert. denied}, 431 U.S. 914 (1977) ("[i]t is argued that the Act is a necessary legislative response to a 'crisis in medical malpractice insurance' in Idaho, but the record does not demonstrate any such 'crisis' "). According to Spence and Roth, the only "crisis" is that health care providers must absorb higher operating costs [i.e., higher insurance premiums] to insure themselves against their own negligent conduct. Thus, the only certain effect of medical malpractice legislation is that health care providers will be insulated from the financial burden tradition-
statute deprives a victim of full compensation with one provision and then makes a seemingly noble gesture to "protect" that recovery by prohibiting the victim from paying the market rate for legal representation. The majority ignores the fact that the victim may not even be able to obtain an attorney at the reduced fee.\(^{156}\)

With respect to the second classification, wealthy\(^{157}\) plaintiffs who can afford to pay a retainer are not prohibited from doing so under section 6146. Thus, a victim with financial resources is in a position to compensate the attorney for at least the hours worked. As is more often the case, however, a medical malpractice victim has already expended large sums in seeking medical treatment, and a request for a retainer becomes an insurmountable block. Consequently, the victim without financial resources may be prohibited from pursuing a claim, in contrast to a wealthier plaintiff who could subsidize the fee authorized by statute.

A third problem is the classification created between plaintiff attorneys and defendant attorneys. Although victims are prohibited from paying the market rate for legal representation, a medical provider may spend freely for his defense. The majority did not see this as an inequity in our adversarial system. Instead, it justified the classification on the basis that the limitation on contingency fees is rationally related to reducing malpractice premiums. The majority ignored documentation showing that defense fees consume the same percentage of premiums as do plaintiff fees.\(^{158}\) Moreover, defense fees are paid directly out of insurance funds in contrast to plaintiff fees which are deducted from the total recovery. It is therefore questionable whether section 6146 is really rationally related to reducing premiums.

**CONCLUSION**

The limitations on attorney fees proscribed by section 6146 seriously abridge first amendment rights. By limiting contingency fees, the statute limits the number of qualified attorneys willing to petition on behalf of medical malpractice victims. Without a qualified attorney, a malpractice
victim's right to petition for redress is a nullity. Insofar as lawsuits constitute speech, restrictions which limit spending devoted to protected expression are unconstitutional. The first amendment protects against government abridging free expression based on one's financial ability. Contrary to this protection, section 6146 restricts the amount spent by victims while health care providers may spend freely in their defense. As a result, it imposes an unfair disadvantage on victims in medical malpractice claims. Such a disadvantage runs afoul of our adversary system where the scales of justice are supposedly balanced at the outset.