IN THE SUPREME COURT OF FLORIDA
Case No. SC04-310

Upon Request from the Attorney General
for an Advisory Opinion as to the
Validity of an Initiative Petition

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: THE MEDICAL LIABILITY CLAIMANT'S COMPENSATION AMENDMENT

INITIAL BRIEF OF FLORIDIANS FOR PATIENT PROTECTION

IN OPPOSITION TO THE INITIATIVE

JON MILLS
Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
P.O. Box 2099
Gainesville, Florida 32602
Telephone: (352) 378-4154
Facsimile: (352) 336-0270

Counsel to Interested Parties/Opponents

BARNABY W. ZALL
Weinberg & Jacobs, LLP
11300 Rockville Pike # 1200
Rockville, MD 20852
Telephone: (301) 468-5500
Facsimile: (301) 468-5504

Pro Hac Vice Counsel to
Interested Parties/Opponents

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THE PROPOSED INITIATIVE

BALLOT TITLE: The Medical Liability Claimant's Compensation Amendment

BALLOT SUMMARY: Proposes to amend the State Constitution to provide that an injured claimant who enters into a contingent fee agreement with an attorney in a claim for medical liability is entitled to no less than 70% of the first $250,000.00 in all damages received by the claimant, and 90% of damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This amendment is intended to be self-executing.

FULL TEXT OF THE PROPOSED AMENDMENT:

Section 1.

Article I, Section 26 is created to read "Claimant's right to fair compensation."

> In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

Section 2.

This Amendment shall take effect on the day following approval by the voters.

STATEMENT OF THE CASE

This matter comes before the Court upon a request for opinion submitted by the Attorney General on March 8, 2004, in accordance with the provisions of Article IV, Section 10, Florida Constitution, and Section 16.061, Florida Statutes. This Brief is submitted by opponents, Floridians for Patient Protection, in response to this Court's Order of March 11, 2004, accepting jurisdiction and inviting interested parties to submit briefs.

PRELIMINARY STATEMENT

This Court's review addresses whether the proposed initiative amendment violates the single-subject and ballot title and summary standards. *See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 890 (Fla. 2000); *Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d 972, 974 (Fla. 1997). Although this Court does not consider the merits of a potential amendment, it must carefully look at the text of the proposed amendment to consider its operative effect. *See Treating People Differently Based on Race*, 778 So. 2d at 891.

This brief will discuss both the single-subject and ballot title and summary tests below; the purpose of this Preliminary Statement is to point out the inherent grammatical and definitional flaws which make application of those tests much more difficult. The proposed constitutional amendment considered in this case is simply badly drafted. As discussed below, one of the most difficult tasks is determining which of the several reasonable interpretations should be made for each of the proposal's many vague and ambiguous terms.

The simplest example of the flawed drafting of this proposed constitutional amendment is found in the first textual sentence: "the claimant is entitled to

receive no less than 70% of the first $250,000.00 in all damages **received** by the claimant, exclusive of reasonable and customary costs, whether **received** by judgment, settlement, or otherwise." (emphasis added.) What, exactly, do each of the three uses of the word "receive" mean in this sentence? How can one be entitled to "receive" what one has apparently already "received?" At what point are damages "received:" jury award, final judgment, actual receipt of awarded damages? After the "claimant" has "received" whatever is intended by this amendment, is there any further, lingering proscription on the payment of debts from what would be the "claimant's" received funds? Since the second textual sentence relating to damages in excess of $250,000 does not use the word "receive" in any fashion, is there an operative distinction between the two schemes?

Nor is this sentence the only vague or ambiguous material in the proposal. Florida courts will immediately have to answer many difficult questions so that they can implement the "Medical Liability Claimant's Compensation Amendment," including:

! Who is a "claimant" under this amendment? Is there a difference between "injured claimant" used in the Summary, and "claimant" as used in the text? Would this amendment be limited to only an injured party (as the Summary suggests), or would it extend to survivors or estates?

- What is meant by "medical liability claim"? Could this amendment logically apply to any injury that produces medical injuries? Could it apply to products liability involving medical devices? Could it involve medical malpractice? Could it involve workers' compensation claims?

- What is meant by the phrase "is entitled to receive," as used in the amendment? Does this phrase assume that there has been a finding of liability or fault? Or does it introduce some strict liability standard? How would this apply to issues of comparative fault? Or would anyone who suffers damage in any fashion be entitled to "receive" damages without a trial (as suggested by the phrase "judgment, settlement or otherwise")? What is meant by the word "otherwise" in this phrase?

- What is meant by "exclusive of reasonable and customary costs" – a term different from that used both in statutes and ordinary usage? What standard would govern a decision as to which costs are reasonable? What standard would be used for "customary?" Are attorneys fees "customary" costs of bringing suit?

- Does the phrase "regardless of the number of defendants" reinstitute full joint and several liability? Would a defendant even one percent liable but also comprising the only available and financially-sufficient defendant become wholly responsible for paying all damages? Does this language repeal the comparative fault statute, judicial modifications of joint and several liability, and the changes effected by the 1999 Civil Action "reforms"?

As discussed below, because the drafters chose to write into the Constitution a judicial determination that this language is immediately "self-executing" and that implementing legislation cannot be passed, each of these questions will **immediately** require an answer from every court in Florida, and no help from the legislative branch will be forthcoming.

This Court has rejected amendments which simply leave open this many

ambiguities. *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). Justice Shaw, in *Fine*, described an initiative as an "empty vessel" because it failed to address or answer reasonably foreseeable questions. 448 So. 2d at 998 (Shaw, J., concurring) ("Such an 'empty vessel' . . . serves to transfer power to the judiciary . . . which is directly contrary to the underlying purpose of citizen initiatives.").

This poor drafting may have been a conscious choice by the proponents. The proponents have been before this Court with related proposals twice before; the first was rejected for violations of the single-subject prohibition, but the second was upheld, only to be ultimately rejected by the voters.[1]

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[1] In 1984, in *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), this Court invalidated the proposed "Citizen's Rights in Civil Actions" initiative. That proposal would have capped non-economic damages at $100,000, limited liability for damages to a defendant's percentage liability, and required a grant of summary judgment when no genuine dispute existed as to material facts in a case. The Court found that the limitations on defendant liability were dual legislative functions, while the summary judgment provision substantially altered judicial functions. *Id.* at 1354. The court noted the broad scope of the proposal, which "would reach far beyond those civil actions in which liability and damages are at issue, *e.g.* declaratory judgments, mortgage foreclosures, dissolution proceedings." *Id.* The court, examining the summary, found that lowering litigation "costs" was the purpose of the summary judgment provision. However, such costs were "qualitatively different from liability for damages," and thus not directly connected as required by the single subject rule. *Id.*

Again, in 1988, this Court considered a similar proposal. In *In re Advisory Opinion to the Attorney General, Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d 284 (Fla. 1988), the Court upheld the proposed "Limitation of Non-Economic Damages in Civil Actions" initiative. That proposal sought to place a $100,000 cap on these damages. This Court found that, unlike the 1984

The result of the vague terms and ambiguous drafting is that the true scope of this proposed constitutional amendment is unknown. Whether by reading the language on its face, or by interpreting it to reach what the proponents are telling the public (which is far different from the text or the ballot title and summary), some impacts may be clear. Yet the ultimate actual effect of the proposed language is simply unknown. There is no way, with this sloppy language, for voters to know what this proposal really means or for reviewing courts to know when they have gone beyond the appropriate bounds of this proposed language.

Having produced valid language in the past (albeit language rejected by the voters), the proponents should be held to a standard of drafting which at least requires grammatical validity and clarity. This Court has struck down initiative proposals that were unclear and facially deficient, and it should again do so with the instant initiative.

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proposal considered in *Evans*, a proposal which only focused on limiting damages did in fact contain a "single subject and directly connected matter." 520 So. 2d at 286. The summary, which defined non-economic losses "to include pain and suffering, inconvenience, mental anguish, loss of capacity to enjoy life, loss of consortium and other losses," was held to "accurately track and describe the proposed amendment." *Id.* at 287. This proposal was, however, rejected by Florida voters in the 1988 general election. *See* http://election.dos.state.fl.us/initiatives/initdetail.asp?account=1937&seqnum=1.

SUMMARY OF ARGUMENT

The proposed "Medical Liability Claimant's Compensation Amendment" is so ambiguous that it misleads voters and, as highlighted in the Preliminary Statement, *supra*, so vague that it requires Florida courts to define and interpret multiple terms in order to implement the provision. Furthermore, that burden of implementation would be placed on Florida courts instantaneously with passage of the amendment because of its immediate effective date. Because the amendment states that it is self-executing, Florida courts would need to implement the provision without assistance from the Legislature.

While the wording of the proposal may be ambiguous, the single subject impacts of the proposed amendment are clear and definite. There are multiple violations - each of which is sufficient to require removal from the ballot. The proposal violates Article XI, Section 3 because it will have a substantial impact on every branch of government, and undisclosed impacts on several sections of the Florida Constitution.

The amendment's effects on the judiciary are most extreme:

- The proposal compels the courts to act as a legislature and define its vague terms (and they must do so immediately because of the effective date);
- The proposal usurps the duty of the courts to interpret the Constitution by declaring itself to be self-executing;

- The proposal precludes judicial authority in regulating attorneys' fees in cases involving "medical liability"; and

- The proposal eliminates judicial discretion to use remittitur for excess judgments where "medical liability" awards are "received".

The proposal will also clearly affect legislative policymaking power by completely controlling any future policymaking in the arena of "medical liability." Finally, there are effects on executive branch functions, especially with regard to Medicaid liens and residual effects on the state budget. "[W]here a proposed amendment changes more than one government function, it is clearly multi-subject." *Evans*, 457 So. 2d at 1354 (citing *Fine*, 448 So. 2d at 990).

While the impact on constitutional provisions is undisclosed in the proposal's text and title, the sponsors themselves on their website acknowledge a significant impact on Article II, Section 3's requirement of separation of powers due to the modification of this Court's authority over court rules and the practice of law. *See* Appendix A, at 2 (FAQ of Sponsors Citizens for a Fair Share). This Article II, Section 3 impact ultimately involves co-option of courts in a legislative, policymaking role to implement the amendment. The proposal further modifies the Article I, Section 10 right to contract between clients and attorneys, and the Article I, Section 21 right of access to courts and justice by making it more difficult to obtain counsel in certain cases. The amendment also has retroactive

effects on pending cases and existing settlement agreements. None of these impacts is disclosed.

Finally, both title and summary mislead voters in several ways in violation of Section 101.161, Florida Statutes. First, because of the inherent vagueness of this proposal, a reasonable voter cannot know its likely effects. The suggestive terminology implies that the amendment will do things, such as guarantee absolute percentage of recovery or absolutely modify attorney's fees, that the amendment will likely not be able to do. As a result, voters will be misled as to the effect of their vote. A further defect is the use of words in the summary that are different from those used in the text (*e.g.*, the terms "injured" or "attorney"). These differences in terminology may have a substantial difference in impact. The summary, therefore, does not fairly advise a voter "sufficiently to enable him intelligently to cast his ballot." *Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000) (quoting *Askew v. Firestone*, 421 So. 2dd 151, 155 (Fla. 1982)).

In sum, this proposal would have a "precipitous" and "cataclysmic" effect on multiple branches of state government, as well as multiple sections of the state Constitution. Voters are not given accurate notice as to these effects. As a result, the "Medical Liability Claimant's Compensation Amendment" is clearly and conclusively defective, and should be invalidated.

ARGUMENT

I. THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT RULE BECAUSE IT WILL HAVE SUBSTANTIAL EFFECTS ON MULTIPLE BRANCHES AND LEVELS OF STATE GOVERNMENT AND HAVE SUBSTANTIAL, UNDISCLOSED IMPACTS ON MULTIPLE SECTIONS OF THE FLORIDA CONSTITUTION.

The proposed constitutional amendment violates the single subject test because it performs multiple governmental functions and substantially affects and alters different branches of state government, and all levels of government. *Cf. Fine v. Firestone*, 448 So. 2d 984, 989-90 (Fla. 1984). The proposal likewise has undisclosed substantial impacts on multiple parts of the Florida Constitution, in effect working a "precipitous" change on the organic law of the state and the interaction of the branches of government. On their website (http://www.citizensforafairshare.org/faqs.html), the sponsors of this amendment themselves explicitly recognize that their proposal will perform multiple functions and affect multiple parts of the Florida Constitution. *See* Appendix A, at P. 2 (explaining the intent of the proposed amendment substantially to modify both substantive law and practice and procedure before Florida courts).

The vague terms and confusing grammar of this proposal were addressed in the Preliminary Statement, *supra*. Nevertheless, the overall effect of this proposal's poor drafting is that it violates the single subject requirement in several

ways, each of which is sufficient to invalidate the initiative. In combination, the single subject flaws discussed here demonstrate overwhelmingly that this Court cannot allow this proposed amendment on the ballot.

A. The Proposed Initiative Has a Substantial Effect on Legislative and Judicial Functions Because it Both Performs and Alters Functions of Different Branches of Florida Government.

A proposed constitutional amendment may not perform, alter or substantially affect multiple, distinct functions of government. *Advisory Opinion to the Attorney General re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 496 (Fla. 2002); *Advisory Opinion to the Attorney General - Save Our Everglades*, 636 So. 2d 1336, 1340 (Fla. 1994); *Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994); *Evans*, 457 So. 2d at 1354 (when an amendment "changes more than one government function, it is clearly multi-subject"); *Fine*, 448 So. 2d at 990. An initiative which "affects several branches of government will not automatically fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Treating People Differently Based on Race*, 778 So. 2d at 892 (quoting *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission*,

705 So. 2d 1351, 1353-54 (Fla. 1998)). The proposed amendment substantially alters the functions of all three branches of Florida's government.

1) <u>There is a significant and immediate impact on the Florida Judiciary</u>.

The effects of the proposal on judicial functions are likely to be the most severe and immediate. This dramatic impact will occur because the effective date compels Florida courts to implement immediately an amendment which is inherently vague and ambiguously drafted. There are three major areas of impact on the Judicial Branch: a) an enormous and immediate impact from interpreting the ambiguous language; b) the constitutional determination (in the proposed constitutional language itself) that the proposal is "self-executing" and bars implementing legislation; and c) restricting and exercising the Court's inherent powers over the Bar and procedural law.

a) The Vague and Ambiguous Language Imposes an Immediate and Crushing Burden on the Judiciary:

The most obvious problems of ambiguity, including the sentence fragment which reads: "the claimant is entitled to **receive** no less than 70% of the first $250,000 in all damages **received** by the claimant, exclusive of reasonable and customary costs, whether **received** by judgment, settlement, or otherwise" – were

described in the Preliminary Statement *supra*.

Many other terms used also are inherently susceptible of several reasonable interpretations. For example, what does "Claimant" mean in the textual title – merely an injured person, as suggested in the ballot summary, or would it also include survivors or estates? What is meant by "fair"? Is "compensation" the same as "damages," the term used in the text? What is meant by "medical liability" – a term which is not used in statutes except in the context of medical liability insurance?[2] What is a "claim" – is it a suit, an administrative complaint, a demand letter? These are but a few of the grammatical and definitional challenges in this proposed constitutional amendment.

How are the voters or a reviewing court supposed to know which interpretation is correct? Even if sponsors can explain their intentions, that

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[2] Florida statutes speak of "medical negligence," defined as "medical malpractice, whether grounded in tort or contract." § 766.202(7), Fla. Stat. (2003). Likewise, the statutes speak of a "claim for medical negligence" or "claim for medical malpractice," defined as "a claim arising out of the rendering of, or the failure to render, medical care or services." § 766.106(1)(a), Fla. Stat. (2003). Liability, and even "medical liability" may logically be an expansion of the statutory terms to product liability involving medical devices, workers compensation, contract claims for collections for medical services by doctors or hospitals, and even any injury that produces medical injuries or requires treatment. This Court allows tort and contract law in the same statute to withstand single-subject attack only when there was a unity of interests between the two. *See Smith v. Dept. of Insurance*, 507 So. 2d 1080, 1087 (Fla. 1987). Where is the unity of interests in these cases?

intention cannot be discerned from the text of the amendment: the proposed amendment is susceptible to multiple reasonable interpretations, no single one of which is controlling or exclusive of other equally reasonable interpretations.

On occasion, a proposal which is susceptible of multiple reasonable interpretations can be rescued by definitions, legislative implementation, reliance on previous interpretations, or judicial intervention.[3] The sponsors have chosen to

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[3] For example, some amendments have included definitions sections that carefully explained difficult terms to ensure clarity and accuracy. *See, e.g., Advisory Opinion to the Attorney General Re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 599 (Fla. 2002) (section with definitions, exemptions and penalties was part of a "functionally and facially unified" amendment); *Advisory Opinion to the Attorney General Re Protect People From the Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d 415, 419 (Fla. 2002) (definitions section provided to make clear the scope and effect of the proposed amendment). Similarly, the successful *Limitation of Non-Economic Damages in Civil Actions* initiative also carefully explained its scope by defining non-economic losses in the text of the amendment to "include pain and suffering, inconvenience, mental anguish, loss of capacity to enjoy life, loss of consortium and other non-pecuniary losses." *Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d 284 at 286.

In other cases, a successful proposal has ensured clarity of scope and effect by referring to statutes in existence at the time of passage. *See, e.g., Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 493 (defining terms both in text and by reference to statutes); *Advisory Opinion to the Attorney General re Fee on the Everglades Sugar Production*, 681 2d 1124, 1128 (Fla. 1996) (defining of amendment coverage by reference to statutes).

Other proposals have avoided definitional quagmires by simply stating policy while permitting the legislature to enact implementing legislation. *See Advisory Opinion to the Attorney General English - The Official Language of Florida*, 520 So. 2d 11, 12 (Fla. 1988). Others have been subsequently declared not to be self-executing. *Advisory Opinion to the Governor - 1996 Amendment 5*

submit a proposal without any opportunity for redemption. In fact, the sponsors have explicitly made this flawed language "self-executing" and effective immediately upon enactment.[4] Thus, no intermediate or clarifying assistance will be available when this amendment becomes operative.

Here, there are no preambles, no definitions, no legislative history, no opportunities for implementing legislation, and no interim period for courts to work out solutions to the questions the language presents. These aids are all absent by specific choice of the drafters.

The entire burden of figuring out whether a given interpretation is both plausible and reasonable will fall on the courts, and that burden will fall immediately upon enactment. Even current cases, including those now facing this Court, will be affected; this is a constitutional amendment declaring entitlements

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(Everglades), 706 So. 2d 278, 281 (Fla. 1997) (polluter pays provision of Article II, Section 7(b), Florida Constitution).

[4] Unfortunately, the Court does not have the option of saving this proposed amendment by severing the self-executing and immediate effect clauses. Unlike other successful initiative petitions, this proposal does not have a severability clause. *Cf. Limiting the Cruel & Inhumane Confinement of Pigs*, 815 So. 2d at 598; *Prohibiting Public Funding*, 693 So. 2d at 974; *Advisory Opinion to the Attorney General - Limited Marine Net Fishing*, 620 So. 2d 997, 998-99 (Fla. 1993); *Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elected Offices*, 592 So. 2d 225, 226 (Fla. 1991); *Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d at 286 (specifically upholding use of severability clauses in the one-subject review context).

and rights upon the conclusion of a liability claim, with no indication that cases now pending in the judicial branch are exempted from immediate application. This is not a minor administrative problem for the courts; it is a constitutional issue, shifting huge law-making responsibilities to the judicial branch in a short period of time. The result, quite clearly, will be judicial chaos.

b) The Judicial Determinations That the Provision is "Self-Executing" and That Implementing Legislation Is Not Required Are Separate Judicial Functions In Addition to the Legislative Function of Setting Policy:

The proposal declares that it is "self-executing and does not require implementing legislation."[5] This declaration is found in the text to be inserted into the Florida Constitution, unlike the effective date in proposed Section 2.

The fact that this initiative itself decides that it is self-executing is the performance of a judicial function. The determination of whether a constitutional provision is self-executing is a matter of constitutional interpretation and construction. *See Gray v. Bryant,* 125 So. 2d 846, 851 (Fla. 1960). Interpreting

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[5] The drafters of the instant proposal apparently sought to avoid the fate of 1996 Amendment 5, adopted as Article II, Section 7(b), by forcing courts to give it immediate effect, without any assistance from policy-making bodies. *Cf. Advisory Opinion to the Governor - 1996 Amendment 5 (Everglades),* 706 So. 2d 278, 281 (Fla. 1997) (holding that amendment not to be self-executing because of required policy determinations as to what was "water pollution," who was a "polluter," how liability should be imposed, and how to assess costs etc.).

the Constitution is a quintessential judicial function. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Florida Dept. of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) ("A court's function is to interpret statutes as they are written and give effect to each word in the statute."). As can be seen in the Preliminary Statement, *supra*, a constitutional provision such as the instant proposal which does not define its terms fails to "lay down a sufficient rule for accomplishing its purpose," and would not be self-executing. *See, e.g., Advisory Opinion to the Governor - 1996 Amendment 5 (Everglades),* 706 So. 2d at 281 (quoting *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960)).

By declaring the amendment to be self-executing, the amendment and its drafters perform the judicial function of construing the Constitution. With this amendment, the sponsors have set themselves up as both a legislature and a court. "[T]hese two disparate functions cannot be combined in a single initiative." *Advisory Opinion to the Attorney General Re Authorization for County Voters to Approve or Disapprove Slot Machines*, 813 So. 2d 98, 102 (Fla. 2002) (citing *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1310 (Fla. 1997)); *Advisory Opinion to*

the Attorney General re Tax Limitation, 644 So. 2d 486, 496 (Fla. 1994) (*Tax Limitation I*); *Save Our Everglades*, 636 So. 2d at 1340.

Although two previous amendments have stated that they "do not need additional implementing legislation," those amendments were simple prohibitions on certain acts, contained explicit and extensive definitions, and were therefore easily distinguishable from the instant proposal with its inherent complexity and vagueness and its absence of definitions. *Cf. Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d at 599 (creating a clear and simple criminal penalty for certain behavior under explicitly defined conditions); *Limited Marine Net Fishing*, 620 So. 2d at 998-99 (similar clear prohibitions on behavior under clearly defined conditions).

Given the enormity of the ambiguities outlined above, this initiative would likely not be self-executing. Similarly, ordinarily a proposal of this complexity (without definitions) would require the assistance of the Legislature to define terms, scope and processes through implementing legislation. But the question for this Court is not whether the judicial determination which the proponents seek to write into the Constitution is correct; the question is only whether the language of the proposed amendment can itself both set policy (legislative) and determine the interpretation of that policy in a manner which this Court cannot modify (judicial).

The proposal's ambiguity, however, is only an illustration of the flaws in the drafting. The performance of both legislative policy-making and judicial determination and interpretation – two separate functions appertaining to two separate branches – in one initiative is sufficient by itself to invalidate this proposed language. *See Authorization for County Voters to Approve or Disapprove Slot Machines*, 813 So. 2d at 102.

On its face, the proposed initiative resembles in extent and scope the one invalidated by the Supreme Court in *Evans v. Firestone.* That amendment would have limited damages payable by a party to the percentage of liability, required summary judgment when no material dispute existed and would have capped total non-economic damages at $100,000. The Court found that the amendment violated the single subject requirement by performing functions of both the legislative and judicial branches. 457 So. 2d at 1354. The instant proposal attempts to do the same thing.

c) The Proposed Amendment Also Performs and Substantially Affects the Performance of Judicial Functions Concerning the Regulation of the Bar and Procedural Law:

The proposed amendment affects the judiciary's responsibility under the Florida Constitution for regulation of the Bar and for enactment of procedural law. *See, e.g., Allen v. Butterworth*, 756 So. 2d 52, 59-60 (Fla. 2000) (under separation

of powers analysis holding that this Court has the exclusive authority to adopt rules for practice and procedure in all courts.); *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976).[6] The proposed amendment affects both those judicial powers.

On their website, the proponents are quite clear about their intent to limit the Court's authority and discretion. *See, e.g.*, Appendix A, at 2 ("Therefore, the only way to adopt a contingency fee schedule different from the one adopted by the Supreme Court is through a constitutional amendment.").

Attorneys' fees are governed by the Court's Rules of Professional Conduct. *See* R. Regulating Fla. Bar 4-1.5. The proposed amendment apparently intends to affect the Court's Rules concerning the factors to be considered in determining a reasonable fee. *Id.* at Rule 4-1.5(b) & (c)). Contingency fees are addressed in Rule 4-1.5(f). Although the apparent intent of the proposed amendment is to affect the amount of a contingency fee arrangement, as worded, the amendment also affects other aspects of a contingency fee contract. For example, the contingency

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[6] This Court, in *Allen v. Butterworth*, quoted Justice Adkins in defining the difference between substantive and procedural law: "As to the term 'procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term 'rules of practice and procedure' includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Id.* at 60 (quoting *In re Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

fee rule requires that a fee agreement be in writing and state with specificity the method by which the fee is determined, "including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." R. Regulating Fla. Bar 4-1.5(f)(1). This rule assumes that the recovery is paid to the lawyer and the lawyer makes both an accounting and a payout to the client. Thus, the client "receives" damages after deduction of the attorney's fees. Depending on how the amendment is to be interpreted, the proposed language may or may not affect this Rule.

In addition, however, the proposed amendment also affects the working of courts in the areas of additur and remittitur. This would appear to be the case even where the award was grossly disproportionate either to the injury sustained or the comparative fault of the defendant. Although Section 768.74, Florida Statutes, sets out basic standards for remittitur and additur, the actual determination of such adjustments is a judicial function, where the court, on motion, reviews "the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. (2003). The proposed language, depending on how it is

interpreted, adds a further factor to be considered: whether and how the amount awarded would be restricted by the proposed constitutional amendment. A court's determination may be affected by the competing claims for the 30% of damages "received" by a "claimant."

Whether or not a constitutional amendment can so affect the Court's jurisdiction and function, under the single-subject rule, no proposed amendment can make several such changes at once, especially without clear definitions and delineations. The proposed amendment should be invalidated.

2) There is a substantial effect on legislative functions.

In addition to these effects on the judicial branch, however, the proposed language also affects the other branches of government. The proposed amendment performs the legislative function of establishing substantive law (in addition to the judicially-prescribed roles of interpreting the Constitution and setting court and procedural rules, described *supra*).

As a necessary by-product, the proposed language also restricts the Legislature from enacting laws which conflict with the constitutional provision.[7]

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[7] Of course, existing laws which are found to be "inconsistent" with the new amendment will also be invalidated, a process which may be particularly problematic given the ambiguities inherent in the instant proposal. *See In re Advisory Opinion to the Governor*, 132 So. 2d 163, 169 (Fla. 1961).

The initiative purports to make substantial changes in the current liability policy for "medical liability." In so doing, the proposed amendment nullifies recent legislation establishing limits on recoveries in tort actions. *See, e.g.*, Ch. 99-225, Laws of Fla. This may affect legislation concerning comparative fault and joint and several liabilities. *See* § 768.81, Fla. Stat. (2003) (apportionment of damages in cases of comparative fault and joint and several liability). It may further affect other legislation concerning contracts, statutes of limitations, or statutes of repose.

Thus, the proposed amendment affects both the judicial and legislative branches. Both branches are restricted from performing specific actions in the future and, depending on how the proposed amendment is interpreted, current rules and laws enacted by both branches will be invalidated or changed.

3) <u>There are significant additional impacts on the Executive Branch</u>.

That, however, is not all the proposed amendment does. As with the judicial branch, however, there are also secondary effects from the proposed language. There is no limitation in the proposed language to just attorney's fees. The limitations described have no limits or descriptions at all, other than to state that a "claimant" shall be "entitled to receive" at least 70% of damages "received." Thus, in cases where there are multiple claims against the proceeds, as for

example, by the State for taxes, or for repayment of Medicaid, the "claimant" is "entitled to receive" 70% of damages, apparently without reduction.

In other words, under the proposed amendment, a "claimant" is "entitled to receive" at least 70% of damages "received," no matter whether there are tax liens, attorneys liens, Medicaid liens, hospital liens, subrogated insurance claims or any other claims totaling more than 30% against the damages awarded in a "claim." Competing liens, whether by attorneys or by the State, will have to simply fight over the remaining 30%.

The effect on state-Federal relations, for example, raises troubling questions of incompatibility with a federal mandate. Federal law requires states to provide for recouping Medicaid expenditures from third parties who are liable. 42 U.S.C. § 1396a. Florida has implemented this mandate through Florida's Medicaid Third-Party Liability Act, Section 409.910, Florida Statutes. The proposed amendment would seem to make portions of that act unconstitutional for any "medical liability claim." Such a result would, however, be incompatible with the mandates of Federal law. The State would have to make up the difference or simply violate federal statutes.[8]

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[8] In the past, opponents have raised arguments that a proposed amendment would have substantial effects on federal government with mixed or inconclusive results. For example, in *Restricts Laws Related to Discrimination,*

These percentage limitations will thus have an effect on the taxing and budgeting power of the Legislature and the Executive.[9] Obviously, any reduction on revenues would have an effect on the availability of funds to all branches of government, including by the judiciary. The Legislature, for example, would not be able to tax or require payments (by lien or otherwise) for amounts in excess of the percentages specified in this proposed amendment. Similarly, the Executive Branch sometimes imposes or attempts to collect on Medicaid liens to recover payments on behalf of eligible beneficiaries (and, as shown in more detail below, it is required by federal law to do so in Medicare cases). If damages are recovered

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632 So. 2d at 1019 n. 1, the Court refused to consider possible federal constitutional infirmities of that initiative proposal. Justice Kogan, however, wrote a concurring opinion, noting that collateral impacts of an initiative, including important likely issues involving federal law, were relevant in the single-subject context. *Id.* at 1023 (Kogan, J., concurring) ("A proposed amendment obviously has more than one subject and violates the ballot-summary requirement if it may have one or more unstated effects on the operation of Florida law or government either internally or in the context of the American federal system or existing Florida law, beyond the obvious subject matter of the amendment.").

[9] The Legislature has certain budgeting authority. *See, e.g.*, Art. VII, § 1(c) & (d), Fla. Const. The Legislature also determines the amount and scope of taxes and liens. *See, e.g.*, Florida's Medicaid Third-Party Liability Act, § 409.910, Fla. Stat. (implementing a federal mandate for Medicaid expenditures, imposed by 42 U.S.C. § 1396a). The Governor is the chief budgeting officer of the State. *See, e.g.*, Art. IV, § 1(a), Fla. Const. The Executive Branch also imposes, enforces and collects liens, and can be stymied from doing so. § 409.910, Fla. Stat. (2003).

on behalf of the beneficiary in any action, as noted above, a court will have to determine which lien gets paid from the available 30% of damages "received" by the "claimant." This constitutional amendment will substantially affect these branches' attempts to perform these duties.

Because the proposed "Medical Liability Claimant's Compensation Amendment" alters or performs the functions of multiple branches of Florida's government, this Court should find that it violates the single subject requirement of Article XI, Section 3.

B. The Proposed Amendment Would Also Substantially Affect Multiple Levels of Government.

This Court has held initiatives invalid under the single subject requirement of Article XI, Section 3 when they were found to have a substantial effect on the operation of multiple levels or branches of Florida government. *See, e.g.*, *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1308 (Fla. 1997) (finding impacts on special districts and local governments, as well as on the executive branch).

In *Tax Limitation I*, the Court invalidated the proposed tax limitation initiative because it affected not only legislative and executive functions, but also

had "a very distinct and substantial [e]ffect on each local governmental entity." 644 So. 2d at 494-95. *Restricts Laws Related to Discrimination* invalidated an initiative which would have encroached not only on the legislative branch, but also on the home rule powers of local governments. 632 So. 2d at 1020.

In addition to effects on different branches of government, the proposed constitutional amendment also has substantial effects on different levels of government. For example, the effect on Florida's Medicaid Third-Party Liability Act, required by federal law, is described *supra*. In addition, the proposed amendment would substantially affect individuals who contract as counsel and client, local governments which negotiate settlement agreements, and state and federal taxes and liens.

C. The Initiative Proposal Violates the Single Subject Requirement Because it Has Substantial and Undisclosed Impacts on Several Provisions of the Florida Constitution.

The proposed amendment also causes substantial impact on multiple sections of the Constitution. *See Tax Limitation I*, 644 So. 2d at 490; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019; *Fine*, 448 So. 2d at 989-90. An initiative will not be removed just because there is some "possibility that an amendment might interact with other parts of the Florida Constitution." *Advisory*

Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798, 802 (Fla. 1998). The test is whether there are multiple parts of the constitution which are substantially affected by the proposed initiative amendment, in order both to inform the public of the proposed changes and to avoid ambiguity as to the effects. *Tax Limitation I*, 644 So. 2d at 490; *Fine*, 448 So. 2d at 989.

The proposed amendment identifies no sections of the Constitution which it may affect or modify. However, the amendment would substantially affect several distinct sections of the Constitution. An apparent intended effect would be on the freedom of contract between counsel and client. *See, e.g.*, Appendix A, at 2. The right to contract is protected under Article I, Section 10, Florida Constitution.[10] The Court has held that laws which impair contracts are possible under a balancing test that weighs the degree of impairment against the importance of the public benefit. *See, e.g., Pomponio v. Claridge of Pompano Condominium*, 378 So. 2d 774, 780 (Fla. 1979). Florida's constitutional provision is interpreted more strictly than under the comparable federal constitution provision. *See id.* The proposed amendment would eliminate or restrict the freedom to contract in specific cases; the determination of exactly which cases will depend how the

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[10] In addition, the retroactive effect on existing contracts would likely violate the "Obligation of Contract" clause of the Federal Constitution. *See* U.S. CONST. art. I, § 10, cl. 1.

amendment is interpreted.

Second, the proposed amendment would substantially affect the access to the courts protected by Article I, Section 21, Florida Constitution. Access to courts is a fundamental right reserved to Floridians. *Id*. Most Florida access to courts cases involve legislative actions that destroy an existing common law right of action or remedy. *See, e.g.*, *Univ. of Miami v. Echarte*, 618 So. 2d 189, 193-94 (Fla. 1993) (legislative cap on non-economic damages in medical malpractice claims); *Smith v. Dept. of Ins.*, 507 So. 2d at 1088-89; *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). However, other Florida cases have noted that access to the courts may be burdened by less complete means. "[I]n order to find that [the right of access] has been violated it is not necessary for the statute to produce a procedural hurdle which is *absolutely* impossible to surmount, only one which is significantly difficult. ... [A] violation occurs if the statute obstructs or infringes that right to any significant degree." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) (emphasis in original); *G.B.B. Inv. v. Hinterkopf*, 343 So. 2d 899 (Fla. 3d DCA 1977) (holding that courts could not condition hearing of a counterclaim in a mortgage foreclosure suit on counterclaimant's payment into court registry); *cf. Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992), *receded from on other grounds, Agency for Health Care Admin. v. Assoc. Indus. of Fla.*, 678 So. 2d

1239 (Fla. 1996) ("The constitutional right of access sharply restricts the imposition of financial barriers to asserting claims or defenses in court."). The proposed amendment will interfere with the fundamental right of access to the courts by making it substantially more difficult for one party (plaintiffs) to obtain competent counsel in certain instances.[11] Whether or not this restriction on access to the courts should be adopted is not the test here; the test is whether more than one section of the Constitution is substantially affected by the proposed language, and this is a second section which is so affected by the proposed amendment.[12]

Third, Article V, Section 1, Florida Constitution, vests the judicial power in

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[11] The U.S. Supreme Court has stated that placing significant burdens on finding competent counsel in matters where legal expertise is required may constitute a violation of the right of access to justice under the Due Process Clause of the 14th Amendment. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 329-30 (1985) (upholding a fee limitation statute on the grounds that legal counsel was infrequently used in certain matters and was unnecessary). Certainly, in medical malpractice cases (and other cases that may involve "medical liability"), competent counsel is essential.

[12] The amendment abolishes attorneys' right to a lien for their services in certain circumstances, a right acknowledged under common law prior to adoption of the current Constitution. *See, e.g., Miller v. Scobie,* 152 Fla. 328, 331, 11 So. 2d 892, 894 (1943) (recognizing enforceable attorney's liens); *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom,* 428 So. 2d 1383, 1874-85 (Fla. 1983) (equitable nature of attorneys' liens). The abrogation of a common law right of action on the part of attorneys without provision of a reasonable alternative would constitute a substantial, additional effect on Article I, Section 21's right of access to the courts.

the constitutionally established courts. As noted above, the proposed amendment has substantial impacts on the judiciary in areas of regulation of the Bar and of procedural law. The proponents explicitly recognize this section in their material. *See, e.g.*, Appendix A, at 2.

Fourth, to the extent that implementing policy-making power is delegated to the judiciary by the proposed amendment, the proposal would also affect the separation of powers restriction in Article II, Section 3, whereby each branch is not to exercise powers appertaining to the other branches.[13] Again, material released by the sponsors explicitly discusses impacts of the proposal on separation of powers. *See* Appendix A, at 2 (FAQ by Floridians for a Fair Share). In addition, the proposal forces the judiciary to engage in the indisputably legislative act of determining the scope and application of an amendment so inherently ambiguous and lacking in definition.

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[13] Under Florida's separation of powers provision, the making of substantive policy decisions is the province of the Legislature. *See State v. Ashley*, 701 So. 2d 338 (Fla. 1997). Likewise, the Legislature may only delegate power (as for example to agencies to enact rules) when it provides sufficient standards or guidelines to ensure that the will and intent of the Legislature is being followed. *See, e.g.*, *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978). Although Article II, Section 3 does allow transfer of powers among branches if "expressly provided [in the Constitution]," any such transfer would amount to a substantial effect on the Florida Constitution and, would need to be referenced by a proposed initiative.

The proposed amendment would also seem to affect Article X, Section 4(a)'s exemption from seizure or forced sale, currently applicable to homestead property. Depending on how the proposed amendment is interpreted, and especially on whether the effects of the amendment reach beyond the moment in which damages are "received" by a "claimant," the proposed amendment may also *sotto voce* create a new exemption from creditors for funds received from "claims" involving "medical liability" and contingency fee agreements.

Because the proposed amendment substantially alters several sections of the Florida Constitution, without identifying or clarifying its effect, the amendment violates the single-subject rule.

D. The Amendment Lacks a "Logical Oneness of Purpose."

The vague and ambiguous reach of the proposed amendment implicates whether it has the required fundamental foundation for a unified constitutional amendment: a "logical and natural oneness of purpose." *Advisory Opinion to the Attorney General Re Local Trustees & Statewide Governing Board to Manage Florida's University System*, 819 So. 2d 725, 729 (Fla. 2002) (quoting *Fine*, 448 So. 2d at 990). The proposed amendment must have "a natural relation and connection as component parts of a single dominant plan or scheme. Unity of object and plan is the universal test ..." *Floridians Against Casino Takeover v.*

Let's Help Florida, 363 So. 2d 337, 339 (Fla. 1978) (quoting *City of Coral Gables v. Gray*, 154 Fla. 881, 884, 19 So. 2d 318, 320 (1944)).

Normally, opponents would argue that a proposed amendment constitutes impermissible logrolling by combining disparate subjects in a single question, forcing "the voter who may favor or oppose one aspect of the ballot initiative to vote ... in an 'all or nothing' manner." *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998). However, because of the vague and ambiguous nature of the proposed Medical Liability Claimant's Compensation Amendment, discussed *supra*, we are unable to say whether the sponsors in fact intentionally combined disparate subjects in a single question. What can be said, however, is that because the proposed constitutional amendment apparently combines several separate and disparate topics into one measure, it does not have the logical oneness of purpose required by Article XI, Section 3 for a constitutional amendment proposed through the initiative process.

II. THE PROPOSED AMENDMENT IS MISLEADING BECAUSE THE BALLOT SUMMARY USES TERMS CAPABLE OF MULTIPLE INTERPRETATIONS, DOES NOT DISCLOSE LIKELY EFFECTS OF THE AMENDMENT AND USES TERMS DIFFERENT FROM THOSE USED IN THE TEXT.

The purpose of the Court's review of a proposed measure's ballot title and summary is to insure "that the electorate is advised of the true meaning, and ramifications, of an amendment." *Tax Limitation I,* 644 So. 2d at 490; *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). A voter "'must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.'" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976). This Court has stated that it will not approve a ballot summary containing "an ambiguity that will in all probability confuse the voters who are responsible for deciding whether the amendment should be included in the state constitution." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1021.

The Court requires that the summary and ballot title of a proposed initiative amendment be: (1) "accurate and informative" *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992); and (2) "objective and free from political rhetoric." *Tax Limitation I,* 644 So. 2d at 490; *cf. Save Our Everglades*, 636 So. 2d at 1341; *Evans,* 457 So. 2d at 1355. The Court, however, recognizing the statutory word

limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982). The Court also recognizes that the voters "must be presumed to have a certain amount of common sense and knowledge" when reading the petition. *Advisory Opinion to the Attorney General re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996) (*Tax Limitation II*) (voters, by learning and experience, would understand the general rule that a simple majority prevails).

Yet the ballot summary and title must tell voters enough about the amendment proposal so that the voters can cast an intelligent vote. Likewise, a summary which cannot accurately describe the amendment's "legal effect," *Evans*, 457 So. 2d at 1355, or its "true meanings and ramifications," *Askew*, 421 So. 2d at 156, is clearly and conclusively defective. The proposal facially fails to so describe itself to the voters, and this Court's several individual tests for ballot title and summary demonstrate further that this proposed amendment is fatally flawed.

A. The Summary Flies under False Colors because It Promises More than the Amendment Will Actually Deliver.

The Ballot Title and Summary promise more than will actually be done by the amendment. As a result, voters will be "misled as to its purpose" and unable

to "cast an intelligent and informed ballot." *See Fee on the Everglades Sugar Production*, 681 So. 2d at 1127. The Ballot Title and Summary fail to do either what the proponents claim they will (restrict attorney's fees) or what a plain reading of the material suggests (provide an entitlement to at least 70% of damages received).

First, the Attorney General suggests that the purpose of the proposed amendment is "to limit the amount of attorney's fees that may be collected under a contingency fee agreement in a claim for medical liability." *See* Letter of the Atty. Gen'l to The Chief Justice and the Court, March 8, 2004, at 1. Similarly, in their statements on this proposed amendment, the sponsors make broad claims, such as: "This amendment will ensure that patients in a medical liability case will receive the vast majority of the money awarded to them." *See* Appendix B (FMA Press Release, Aug. 30, 2003). Likewise, the FMA notes, "trial attorneys are walking away with thirty to forty percent of these awards," promising that the Medical Liability Claimant's Compensation Amendment will redress this wrong. *Id*.

A review of the Summary and text of the amendment, however, show that the proposed Amendment likely **will not** affect Attorneys' Fees. In fact, the amendment text does not use the word "attorney" at all. The text simply states that "claimants" are "entitled to receive" at least 70% of "all damages received." As

noted above, especially in light of the Court's Rules of Professional Conduct, damages are generally received by the client **after** the attorneys fees are accounted for and paid. *See* R. Regulating Fla. Bar 4-1.5(f)(1). No change in this usual course of conduct is mandated by the language as proposed. It would require a re-interpretation and an expansion of the proposed language to cover attorneys' fees.

Secondly, the amendment will not guarantee that claimants always "receive" 70% of damages "received," as the summary suggests. Federal Medicare liens, for example, prohibit recoveries of such percentages by many claimants. *See* 42 C.F.R. § 411.37 (providing the required formula for calculating the amount of a Medicare lien on a claimant's recovery). With Florida's population, Medicare liens are a significant element in many recoveries when persons are injured.[14]

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[14] By way of a simple example illustrating how Medicare and Medicaid liens work, if a claim subject to a $50,000 Medicare lien were settled for $100,000, the claimant would not recover the promised 70% of the damages received, even before any attorneys fees were considered.

Likewise, in a settlement of a claim subject to a Medicaid lien of $50,000, the formula set under Section 409.910(f)(3), Florida Statutes, for an existing recovery of damages would be as follows:

Total settlement:	$100,000
Less Attorney's Fees:	-30,000
Less Costs:	-5,000
Remaining Recovery:	$65,000
"One-half of the remaining recovery up to the full amount of the Medicaid assistance provided"	-$37,500

Finally, both summary and text make clear that it entitles claimants to "receive" the required percentage of funds "received." However, any such entitlement, though it may abrogate certain liens (including those placed by an attorney for fees under a contingency fee agreement), would not extinguish debts owed by claimants. Claimants would still be liable for any debts they have incurred. Thus, "entitled to receive" does not necessarily mean "entitled to have and hold under all circumstances."

This simple illustration shows that the phrase "entitled to receive" is essentially meaningless. The proposed language is simply an "empty vessel." *Fine*, 448 So. 2d at 998 (Shaw, J., concurring). However, the wording of the summary will lead voters to believe that they have a right to this percentage of funds in all cases.

The Court has held that use of such empty promises is sufficient to invalidate a ballot title and summary. *See Save Our Everglades*, 636 So. 2d at 1341-42 (use of term "help pay to clean up" wrongly suggested that others were

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Net to claimant: $37,500

The net $15,000 is approximately 39.47% of the amount of the damages, net of costs. If the proposed constitutional amendment is effective to increase the percentage to 70%, that would invalidate the legislative determination of the formula for computing Medicaid reimbursement, as well as requiring litigation to determine the distribution of the balance of the proceeds of such a settlement.

also sharing pollution abatement expenses, but amendment only targeted sugar producers); *In re Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (summary falsely suggested it would help ban casinos); *Armstrong,* 773 So. 2d at 17 (citizens reading summary may have voted for amendment thinking they were protecting state rights, when in reality they were lessening them). Because the summary and proponents are promising more than the proposed amendment actually does, the Ballot Title and Summary are misleading.

B. The Proposed Amendment Will Likely Do Things Which the Ballot Title and Summary Do Not Disclose to the Voters.

A ballot summary is defective "if it omits material facts necessary to make the summary not misleading." *Term Limits Pledge*, 718 So. 2d at 803 (quoting *Limited Political Terms*, 592 So. 2d at 228). The Court has stated: "We are most concerned with relationships and impact on other areas of law when we consider whether the ballot summary and title mislead the voter with regard to effects and impact on other constitutional provisions." *Hazards of Second-Hand Smoke*, 814 So. 2d at 419 (citing *Treating People Differently Based on Race,* 778 So. 2d at 899-900).

The proposed constitutional amendment language simply cannot meet this

test. The ambiguity of the proposed "Medical Liability Claimant's Compensation Amendment" makes it impossible to describe adequately its effect to voters. In addition, none of the disparate effects of the proposed language (described *supra*) are described to the voters in this ballot title and summary.

In *Advisory Opinion to the Attorney General Re Stop Early Release of Prisoners*, 642 So. 2d 724 (Fla. 1994), the Court found that undisclosed collateral consequences could make a ballot summary so misleading as to require its invalidation. In that case, the amendment would have had the undisclosed effect of modifying the constitutional powers of the Clemency Commission. Here likewise, the delegation of lawmaking to the judiciary, the probable effects on areas other than attorneys' fees, and the effects on the State (among other effects) should properly be disclosed to voters in order for them to cast an informed ballot.

Because the proposed constitutional amendment will have numerous significant effects which are not disclosed to the voter, and because the amendment will not do what its proponents promise, the proposed ballot title and summary are fatally misleading. *Cf. Askew*, 421 So. 2d at 156 ("A proposed amendment cannot fly under false colors; this one does. The burden of informing the public should not fall only on the press and opponents of the measure - the ballot title and summary must do this.").

C. The Ballot Summary Uses Legal Terminology That Cannot Easily Be Understood by the Average Voter.

Although voters are presumed to have normal intelligence and common sense, they are not presumed to have special knowledge or legal expertise. *Cf. Tax Limitation II*, 673 So. 2d at 868. An amendment such as this one, however, which introduces significant substantive and procedural modifications into one specific area of tort law needs to be much more clear in explaining its effects to the voters. *Treating People Differently Based on Race*, 778 So. 2d at 899 (term "bona fide qualifications based on sex" not defined and subject to broad and differing interpretations by voters); *People's Property Rights Amendments*, 699 So. 2d at 1309 ("common law nuisance" and "increases in tax rates" undefined).

On its face, the instant proposal's guaranteed minimum percentage award to plaintiffs excludes "reasonable and customary costs." Just what is included in these "reasonable and customary costs" to which this amendment does not apply is never explained. Arguably, these costs may include court costs and fees, but they may also be read to include attorney's fees. The problem is that neither the summary nor the amendment itself explain just what is covered by the exclusion. This ambiguity is heightened by the use of the term "with an attorney" in the summary but not in the text of the amendment. As the Court said with regard to the initiative in *Treating People Differently Based on Race*, the phrase "is a legal

phrase, and voters are not informed of its legal significance." 778 So. 2d at 899 (discussing the phrase "bona fide qualifications based on sex").

It is plausible that, to the average voter, the proposed amendment may be understood to apply to any claim which includes injuries that involve medical costs. Such voters may well not understand what is meant by the term "claim for medical liability."[15] If the sponsors meant to cover "medical malpractice" or "negligence by a physician," they should have used those terms instead of making the scope of the amendment appear more broad than it actually is. In *People's Property Rights*, the Court addressed a proposal which sought to require government to compensate owners of real property for any loss in value caused by governmental restrictions on its use. The Court found that the terms "common law nuisance" and "which in fairness should be borne by the public" were not understandable to the average voter and required definition. 699 So. 2d at 1309.

A similar determination has been made by the Court with respect to the term "contingency fees," which is used without definition in the ballot summary and proposed amendment. The Rules of Professional Conduct, promulgated by this

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[15] As discussed *supra*, Florida statutes speak of "claim for medical malpractice" or "claim for medical negligence." *See* § 766.106(1)(a), Fla. Stat. (2003). The use of the much broader term "claim for medical liability" suggests a broader, as yet undefined application of the amendment.

Court, require that a contingency fee agreement be in writing and state with specificity how the fee is determined. *See* R. Regulating Fla. Bar 4-1.5. This requirement manifests a conviction that clients do not understand the term "contingency fee" without a careful, written explanation. Voters deserve no less when attempting to regulate such fees through a constitutional amendment.

D. The Discrepancy Between the Ballot Summary and the Text of the Proposed Amendment Is Substantial and Makes the Summary Misleading.

Divergent terminology has been a ground for invalidation of a ballot summary. Thus, in *Treating People Differently Based on Race*, the Court invalidated a summary which used the term "people," while the text of the amendment referred to "persons," terms which the Court found legally distinct. 778 So. 2d at 896-97. Similarly, in *Right of Citizens to Choose Health Care Providers*, the Court invalidated a summary which used the term "citizens" in the summary, when the amendment used the term "natural persons." 705 So. 2d at 566 (uncertain as to whether the terms and coverage were intended to be synonymous). Likewise, in *People's Property Rights Amendments*, the summary referred to "owners" of real property, but did not define the term and the accompanying use of the term "people" in the title might cause confusion as to whether the amendment would apply to corporately owned property. 699 So. 2d at

1308-09. Similarly, in *Casino Authorization, Taxation and Regulation,* 656 So. 2d at 468-69, the summary used the term "hotel," while the text of the proposed amendment used the term "transient lodging establishment," which the Court found much broader in scope than a simple hotel.

The following discrepancies between summary and text are notable:

SUMMARY	**TEXT**
"injured claimant"	"claimant"
"contingency fee agreement with an attorney"	"claim involving a contingency fee"
"is entitled to no less than ... of damages received"	"is entitled to receive no less than ... in all damages received by the claimant"
Nothing	"whether received by judgment, settlement or otherwise"

These are more than semantic differences; they have substantive legal effect. For example, the summary refers to "an injured claimant," while the text of the amendment applies to "the claimant." This may be significant in a wrongful death case where the claimant is a survivor or estate. Is the ballot language different in an effort to suggest a smaller impact than the actual text will impose?

The summary likewise limits its application to where claimants enter "into a contingency fee agreement with an attorney," while the text of the amendment

applies to all medical liability claims "involving a contingency fee" without using the term attorney. As noted above, there are a variety of contingency fee cases which will be affected by the proposed constitutional amendment, including State claims, medical device liability claims, insurance claims, workers compensation claims, and so on. Ballot summary language limiting only attorneys' fees has no basis in the operative text and misleads the voters.

The divergent terminology used in the summary is rhetorically significant in that it reassures voters that it only applies to "injured" claimants (injury being undefined), and is targeted at attorney fee agreements. The summary is misleading because the text of the amendment uses neither of those limiting terms.

This Court has said that ballot summaries must be invalidated "when they fail to define terms adequately or to use consistent terminology." *Hazards of Second-Hand Smoke*, 814 So. 2d at 419-20 (citing *Treating People Differently Based on Race*, 778 So. 2d at 899-900). The failure to define necessary terms and the inconsistency between summary and amendment require the invalidation of the proposed "Medical Liability Claimant's Compensation Amendment."

CONCLUSION

Simply put, the proposed "Medical Liability Claimant's Compensation Amendment" is badly drafted, presenting ambiguous terminology, subject to more than one reasonable interpretation. The proposed amendment is so vague and ambiguous that it presents significant challenges to the courts, which will face heavy administrative and lawmaking burdens immediately upon passage.

In addition, the proposed amendment violates the single subject requirement of Article XI, Section 3 by performing multiple government functions, by substantially affecting multiple branches and levels of government and by substantially modifying multiple undisclosed sections of the Florida Constitution. The ballot summary and title likewise fail to meet the statutory requirements of Section 101.161, Florida Statutes. The summary and title are vague and misleading to voters because they both promise more than the amendment will actually perform and fail to reveal many significant likely collateral effects of the amendment.

For these reasons, the proposal is clearly and conclusively defective and should be invalidated by this Court.

RESPECTFULLY SUBMITTED,

JON MILLS
Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
P.O. Box 2099
Gainesville, Florida 32602
Telephone: (352) 378-4154
Facsimile: (352) 336-0270

Counsel to Interested Parties/Opponents

BARNABY W. ZALL
Weinberg & Jacobs, LLP
11300 Rockville Pike #1200
Rockville, MD 20852
Telephone: (301) 468-5500
Facsimile: (301) 468-5504

Pro Hac Vice Counsel to
Interested Parties/Opponents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30th day of March, 2004, to The Honorable CHARLES J. CRIST, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050; The Honorable SANDRA B. MORTHAM, Citizens for a Fair Share, P.O. Box 10269, Tallahassee, Florida 32302; and The Honorable STEPHEN H. GRIMES, Esquire, Holland & Knight, LLP, P.O. Box 810, Tallahassee, Florida 32302-0810.

_____

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP. P.

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Attorney

APPENDIX

APPENDIX A

P.O. BOX 10269
Tallahassee, Florida 32302
(850) 224-6496

Frequently Asked Questions

SPANISH FAQs | Letter to Patients (Spanish) | (English)

Q: Where can I send the petition?
A: All completed, original petitions should be mailed or delivered to your local county medical society. The County Medical Society will take charge of gathering the petitions in your area and getting them to the local elections office. Please do not fax your petition to the FMA. Your local County Medical Society information can be found on the FMA Web site at www.fmaonline.org.

Q: Can I fax my signed petition?
A: No, the local elections office must receive original signatures, therefore faxes and copies of a signed petition are invalid.

Q: Does the petition have to be legible?
A: Yes, it must be clear enough to be read to verify registration status. All lines must be clearly printed and filled in. The signature must appear as it does on the voter's identification card.

Q: Can I use colored ink or pencil?
A: It is recommended that the petitions be signed in any color ink. Pencils are NOT recommended.

Q: Can I use colored paper?
A: No, the petition must not be tampered with, and must be on plain white paper. You can attach instructions on a separate sheet of paper.

Q: Does the petition need to be a certain size?
A: Yes, the petition form must be no smaller than 3" x 5" and no larger than 8.5" x 11" (the standard size for a sheet of paper). The current size we are distributing is 8.5" x 11".

Q: Can I fold the petition?
A: Yes, the petition can be folded.

Q: Does it matter that the petition was faxed to me and the fax number appears at the top?
A: The petition is NOT valid if the petition was signed then faxed to someone. The petition IS valid if a blank petition was received via fax then signed. The signed petition should be mailed or delivered to the local county medical society. If you receive a blank petition via fax and make copies, cutting off the top information, which includes the fax number before copies are made, will provide a cleaner copy for distribution. (However, copies including this information at the top will not invalidate the petition).

Q: Does the Serial Number need to be printed on the petition?
A: No, the serial number provided by the division of elections does not need to be on the petition. This number is provided by the division of elections and is sent to each local elections office. The serial number is 03-34.

Q: Does it matter which supervisor of elections receives the petitions for verification?
A: Yes, the petition must be submitted to the supervisor of elections of the county in which the person is a registered voter.

Q: Once the petition is signed, should it be submitted to the Division of Elections for verification?
A: No, the petitions should be delivered to your local county medical society and they will

deliver them to the local supervisors of elections' offices. The supervisors of elections submit their certifications to the division.

Q: Can there be more than one signature on each petition?
A: No, each form must contain space for only one elector's signature.

Q: I made a contribution to Citizens For Tort Reform, what happens to that?
A: The money collected from Citizens for Tort Reform was utilized to fight the challenges faced during past legislative session to pass meaningful professional liability insurance legislation. Expenditures, such as, radio and television advertisements, ad development, legal and political advice, polling, actuarial studies and miscellaneous meetings were made on behalf of Citizens for Tort Reform. The remaining funds, over $400,000 is being transferred to Citizens for a Fair Share to help pass the constitutional amendment.

Q: Why must this be a constitutional amendment? A: There are several reasons this must be a constitutional initiative and cannot be just legislative action. First, Article II, section 3 "Branches of Government" of the Florida Constitution clearly states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

There are several Florida Supreme Court opinions which suggest that any statute enacted by the legislature that seeks to regulate attorney contingency fees that is in conflict with the Rule of Procedure adopted by the Supreme Court would violate the separations of powers doctrine in the Florida Constitution. Therefore, the only way to adopt a contingency fee schedule different from the one adopted by the Supreme Court is through a constitutional amendment.

Second, Article V, section 15 "Attorneys: admission and discipline" of the Florida Constitution continues to support the above by stating:

> The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

This puts the attorneys under the judicial branch of government; therefore, the legislative branch is restricted in the ways it can regulate the legal profession, including the regulation of attorney contingency fees. There are also several opinions by the Florida Supreme Court that provide that only the Supreme Court will regulate this profession. Hence, the only way to ensure that the patient receives the vast majority of an award is to have the people of the state speak out and demand it by amending the Florida Constitution.

APPENDIX B

FLORIDA MEDICAL ASSOCIATION, INC.

P.O. Box 10269 ◆ Tallahassee, Florida ◆ 32302 ◆ 113 E. College Ave. ◆ 32301
(850) 224-6496 ◆ (850) 224-6627-FAX ◆ Internet Address: www.fmaonline.org

For Immediate Release

For Information:
Lisette Gonzalez Mariner
850-224-6496
lmariner@medone.org

The Florida Medical Association Moves Forward with Constitutional Amendment

Hollywood, Fla. – August 30, 2003 – The Florida Medical Association House of Delegates met today and voted to move forward with a constitutional amendment.

"This amendment will ensure that patients in a medical liability case will receive the vast majority of the money awarded to them," stated Robert Cline, M.D., Florida Medical Association President. "Currently, trial attorneys are walking away with thirty to forty percent of these awards. Under this proposal the patient will receive seventy percent of the first $250,000 awarded and ninety percent of the remainder," continued Dr. Cline, a thoracic surgeon in Ft. Lauderdale.

As an example, this initiative will increase the amount that a patient receives in a million dollar settlement from $600,000 to $850,000.

"The FMA looks forward to continuing to work with the Coalition to Heal Healthcare in Florida," stated Sandra Mortham, Florida Medical Association EVP/CEO. "We will serve as a liaison between affiliated organizations to accomplish this goal," continued Mrs. Mortham.

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About the Florida Medical Association

The Florida Medical Association is the largest, most effective organization representing the interests of all Florida physicians and their patients. Based in Tallahassee, the FMA provides its 16,000 member doctors with a strong voice and active representation in state legislation, medical economics, practice issues and medical, ethical and legal affairs. For more information about the FMA, visit www.fmaonline.org or contact Lisette Gonzalez Mariner, director of communications, at (800) 762-0233 or lmariner@medone.org.