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Medical-Malpractice Contingency-Fee Caps: A Big Victory for Florida's Voters and Tort Reformers? Maybe Not

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Medical-Malpractice Contingency-Fee Caps: A Big Victory for Florida's Voters and Tort Reformers? Maybe Not.

MICHAEL CRISTOFORO*

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I. INTRODUCTION

With continually rising health-care costs and constant news reports about attorneys bringing perceivably ridiculous lawsuits, such as the McDonald's coffee case,¹ it is no mystery why there is a concern for the future of the medical industry and a general distrust of lawyers, juries, and the legal system.² In 2004 Florida placed a proposed amendment ("Amendment 3") on the election ballot that limited the contingency-fee percentage an attorney could recover in a medical-malpractice action.

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1. *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994). The McDonald's coffee case did not involve medical malpractice. I use it only to illustrate how the case is viewed as "frivolous" in pop culture. See Wikipedia, The Free Encyclopedia, *Liebeck v. McDonald's Restaurants*, http://en.wikipedia.org/wiki/Liebeck_v._McDonald's_Restaurants (last visited Oct. 5, 2007). Although this case is often cited as an example of frivolous litigation—supposedly a lawsuit that won \$2.9 million for a woman who burned herself with hot coffee—the theory of the case was more complicated than most people think. See *id.* For example, the plaintiff's theory included arguments that the coffee was defective and much hotter than necessary. See *id.*; see also Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 CAP. U. L. REV. 701, 729 (1997).

2. See AM. BAR ASS'N TORT TRIAL & INS. PRACTICE SECTION, TASK FORCE ON CONTINGENT FEES, REPORT ON CONTINGENT FEES IN MEDICAL MALPRACTICE LITIGATION 3, 7 (2004) [hereinafter TASK FORCE], available at <http://www.abanet.org/tips/contingent/MedMalReport092004DCW2.pdf>; TOM BAKER, THE MEDICAL MALPRACTICE MYTH 5-6 (Univ. of Chi. Press 2005).

While many voters saw Amendment 3 as a perfect way to lower their medical costs and, at the same time, keep “greedy lawyers”³ from taking advantage of medical-malpractice victims, it is highly unlikely that they adequately considered the potential repercussions of their affirmative votes. But not too long after voters passed Amendment 3 in November 2004,⁴ and much to the dismay of the medical profession, those sneaky lawyers were at it again. Lawyers found a way to get around the restriction: “They ask clients to waive their rights under the amendment, allowing the attorneys to collect higher fees.”⁵ This idea of an intelligible waiver has caused a debate between the medical and the legal communities.⁶

In this note, I will set forth the current law as it stands based on Amendment 3, including the legal claims made by all parties on both sides of the issue, and I will use an economic analysis to analyze the benefits and costs of having a negotiable contingency fee by permitting a waiver. Through the analysis, I will show that the Florida Supreme Court should and most likely will find that a waiver of the rights granted by Amendment 3 is warranted. Finally, I will discuss the effect of default rules on individual decision making. This discussion will show that individuals will be less likely to waive their Amendment 3 rights and more likely to stick to their “assigned” rights because of limits on human decision making.

II. THE CURRENT STATUS OF FLORIDA’S CONTINGENCY-FEE CAP FOR MEDICAL MALPRACTICE

Amendment 3 was passed by over 4,500,000 voters in November 2004,⁷ and it immediately became the law in Florida.⁸ The Amendment, as passed, provides:

- (a) 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,

3. Brian Bandell, *Court Permits Contingency Fee Waiver*, BIZJOURNALS.COM/SOUTHFLORIDA, Dec. 30, 2005, <http://www.bizjournals.com/southflorida/stories/2005/12/26/daily18.html> (quoting a statement by the Florida Medical Association).

4. *Id.*

5. Gary Fineout, *Justices Scold Attorneys in Doctor-Lawyer Battle*, MIAMI HERALD, Dec. 1, 2005, at 5B.

6. *See id.*

7. Fla. Dep’t of State Div. of Elections, *The Medical Liability Claimant’s Compensation Amendment 03-34*, <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=37767&seqnum=1> (last visited Apr. 16, 2008).

8. FLA. CONST. art. I, § 26.

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.

(b) This Amendment shall take effect on the day following approval by the voters.⁹

Although commentators have argued that this language is clearly absolute on its face, some lawyers have had medical-malpractice claimants waive their rights under the fee cap,¹⁰ thereby opening the negotiations to determine a “fair” contingency fee between the lawyers and the clients. Many lawyers and judges felt that, similar to how other constitutional rights may be waived, the right to a cap on contingency fees could be waived as well.¹¹ These other freely waivable constitutional rights include the right to a speedy trial, the right to a lawyer, and the right to remain silent when questioned by police.¹²

Lawyers on the other side of the issue argued that allowing a client to waive fee restrictions would change the amendment the people voted for.¹³ Advocating the latter view, these lawyers, consisting of over fifty members of the Florida Bar and led by former Justice Stephen Grimes, petitioned the Florida Supreme Court to amend the bar’s contingency-fee rules to reflect what is included in the text of Amendment 3.¹⁴ One of the most practical arguments presented by the opponents of the waiver, who were in favor of an amendment to the Rules Regulating the Florida Bar, was that Amendment 3 is a straightforward policy statement by the voters.¹⁵ The opponents of the waiver also explained that the right could not be waived like other constitutional rights cited because Amendment 3 serves a “greater public purpose, including reducing the use of defensive medicine and thereby reducing medical costs.”¹⁶

On the other side, the proponents of the waiver, led by Barry Rich-

9. *Id.*

10. Bandell, *supra* note 3.

11. Fineout, *supra* note 5 (“‘I cannot think of any constitutional right that cannot be waived right now,’ said Justice Raoul Cantero, citing as examples the right to a speedy trial, the right to a lawyer and the right to remain silent when questioned by police.”).

12. *Id.*

13. Gary Blankenship, *Waiver Questions Highlight Contingency Fee Rule Debate*, FLA. BAR NEWS, Dec. 15, 2005, at 1, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/0/c5f37ff0b01f8a72852570d20066f5a7?OpenDocument>.

14. *Id.*

15. *Id.*

16. *Id.* Chief Justice Barbara Pariente was angered by this argument. She expressed that it is disingenuous for the proponents to make the reduced medical-cost argument when it was not placed in the ballot summary; the ballot summary only alluded to the intent of getting medical-malpractice victims the most recovery for their injuries. *Id.*

ard, argued that a final decision on amending the bar rules should be stayed because the “amendment has not been interpreted or its validity determined.”¹⁷ The proponents of the waiver offered the following three arguments in opposition of the new rule’s approval: (1) The “voters had no notice that the amendment’s fee structure could not be waived;” (2) “the Supreme Court cannot adopt a rule that essentially regulates nonlawyers by prohibiting them from waiving the fee schedule;” and (3) “the rule process is not the proper way to determine how to carry out the amendment.”¹⁸

On September 28, 2006, the Florida Supreme Court announced an opinion on the proposed amendment to the Rules Regulating the Florida Bar.¹⁹ The court explained that it had earlier received a petition from Stephen Grimes in which he argued for a rule that stated the converse to Amendment 3, but in more restrictive phrasing.²⁰ The court also received a petition from the Florida Bar. The bar’s main objection was that the proposed amendment lacked a provision allowing a medical-malpractice claimant to waive the right granted by Amendment 3 in order to obtain counsel of his or her choosing.²¹ After hearing oral arguments, the court issued an order directing the Florida Bar to draft a proposed amendment to Rule 4-1.5(f)(4)(B), including, but not limited to, certain requirements laid out by the court.²² The bar drafted a proposed amendment pursuant to the court’s order, and subsequently, the court adopted the bar’s proposed amendment.²³ The court, however, explained that it must examine two issues before the proposed rule could be fully adopted.²⁴

First, the court examined “whether the right granted in the constitution may be waived.”²⁵ The court rejected Grimes’s argument that the waiver was not valid because Amendment 3 embraces certain policies beyond the control of the claimants themselves.²⁶ In rejecting the greater public-purpose argument, the court explained that the amendment creates a personal right for the direct benefit of the claimant and

17. *Id.* (quoting Barry Richard) (internal quotation marks omitted).

18. *Id.*

19. *In re* Amendment to the Rules Regulating the Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof’l Conduct, 939 So. 2d 1032 (Fla. 2006).

20. *See id.* at 1036 (outlining Grimes’s proposed rule that would *prohibit* an attorney from ever taking over the percentages prescribed by statute).

21. *Id.* at 1037.

22. *Id.* One of the requirements was a waiver provision, including safeguards for the client. *Id.*

23. *Id.* at 1039.

24. *Id.* at 1038.

25. *Id.*

26. *Id.*

that most personal constitutional rights may be waived.²⁷ The court strengthened its argument by pointing to judicial decisions that have allowed intelligible waivers of the *most basic fundamental constitutional rights* including, inter alia, the Fifth Amendment right to remain silent and the Sixth Amendment right to counsel.²⁸ Analyzing the plain wording of Article I, Section 26 of the Florida Constitution, the court noted that there is nothing that prohibits a waiver of the rights granted.²⁹ Unfortunately, all of this strong language in support of the waiver turned out to be dicta; the court withheld a final determination on the validity of the waiver until an actual case or controversy comes before it.³⁰

Next, the court confronted the suggestion of Grimes that if the court does adopt a waiver, the waiver should include numerous restrictions. According to Grimes, such restrictions are warranted due to the inherent conflicts that arise when a lawyer negotiates with a potential client to waive a constitutional right in order to obtain the lawyer's services.³¹ One of these restrictions, for example, would have required judicial approval of the waiver, "which could be given only if the client has been unable to retain an attorney because of the fee limitations imposed by the Florida Constitution and this rule."³² The court explained that such an approach would lead to an undue restriction on the right of competent adults to waive their rights and that the court's role is to only ensure that any waiver is made knowingly and voluntarily.³³ The court acknowledged that since the inception of Amendment 3, individuals had and were currently waiving their rights; therefore, there was a need for guidance and uniformity to protect lawyers and clients.³⁴

The court then held that the safeguards in the bar's proposal, with a minor modification laid out by the court, are sufficient to balance the conflicting interests involved.³⁵ In expressing its contentment with the extreme detail included in the bar's form of waiver, the court approved of the fact that the actual language of Article I, Section 26 of the Florida Constitution was included within its provisions.³⁶ The court added a specific modification stating that a client, if agreeing to a percentage above the increased fee, must also acknowledge the maximum contin-

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1038-39.

32. *Id.* at 1038 (internal quotation marks omitted).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

gency-fee percentages currently set forth in rule 4-1.5(f)(4)(B)(i),³⁷ which a lawyer and client can agree to without prior court approval.³⁸ The bar's rule incorporates the court's suggested modification and now provides that "judicial approval is mandatory only where a client waives his or her rights under article I, section 26 and agrees to a contingency fee *in excess of* the maximum contingency fee percentages set forth in rule 4-1.5(f)(4)(B)(i)."³⁹ According to the court, this provision, as modified, while not requiring judicial approval, does not prohibit a court from inquiring into whether a waiver was made knowingly and voluntarily; the court explained that it encourages trial judges to be alert and responsive to this issue.⁴⁰

The entire rule, as amended, is too lengthy to lay out in this note. The court, however, did specify provisions and safeguards that it found particularly important:

The major components of the rule as proposed by the Bar are: (1) a requirement that a lawyer entering into a contingency fee agreement with a medical liability claimant must inform the client, both orally and in writing, of the client's rights under article I, section 26; (2) a requirement that, if the lawyer chooses not to accept representation of a client under the terms of article I, section 26, the lawyer must advise the client, "both orally and in writing of alternative terms, if any, under which the lawyer would accept the representation of the client, as well as the client's right to seek representation by another lawyer willing to accept the representation under the terms of article I, section 26, Florida Constitution, or a lawyer willing to accept the representation on a fee basis that is not contingent;" and (3) a requirement that if a client desires to waive any rights under article I, section 26, such waiver must be in writing, under oath, and in the form provided for in the rule

. . . .

. . . . The waiver form . . . requires the client to specifically acknowledge that he or she (1) has been advised that signing the waiver releases an important constitutional right; (2) has been advised of the opportunity to consult with separate and independent counsel and to have the waiver explained or reviewed by the court; (3) agrees to an increase in the attorney fee that would otherwise be owed if the constitutional provision were not waived; (4) has three business days in which to cancel the waiver; (5) wishes to engage the

37. FLA. BAR REG. R. 4-1.5(f)(4)(B)(i) (2007). This section governs contingency-fee maximums without judicial approval for all nonmedical-malpractice personal-injury claims.

38. *Id.*; see also *In re Amendment to the Rules Regulating the Florida Bar*, 939 So. 2d at 1040.

39. *In re Amendment to the Rules Regulating the Florida Bar*, 939 So. 2d at 1040.

40. *Id.*

named lawyer or law firm, but is unable to do so because of the constitutional limitation and therefore knowingly and voluntarily waives the constitutional limitation in consideration of the lawyer or law firm's agreement to represent him or her; and (6) has selected the named lawyer or law firm as counsel of choice, could not otherwise engage their services without the waiver, and specifically states that the waiver is knowingly and voluntarily made.⁴¹

With the inclusion of both the court's modification and the actual language of Article I, Section 26, the court adopted this rule to control the waiver of the rights granted by Amendment 3.

III. THE ECONOMIC EFFECTS OF A CONTINGENCY-FEE CAP

There are four main benefits of contingency fees: access to justice, risk allocation, reduced moral hazard, and reduction of asymmetric information. Each will be analyzed in turn.

A. Access to Justice

Probably the most frequently cited argument made on behalf of the utility of contingency fees is access to the courts. Contingency fees, which are an American invention, allow people to bring legal claims when they would otherwise be financially unable to do so. For example, suppose a claim has a likely damage award ("D") of \$250,000, exclusive of costs; the cost of going to trial ("C") is \$50,000; and the probability of winning ("P") is 70%.⁴² If a client cannot afford to pay an attorney \$50,000 to bring a case, the client will not be able to recover the possible D available. However, once we factor in a contingency fee ("CF") of 33%, the lawyer's expected recovery ("LR") becomes \$57,750, making it equitable to bring this case.⁴³ If we now examine the same case under the Florida contingency-fee cap, it becomes slightly less equitable, as the possible recovery for the attorney drops to \$52,500.⁴⁴ According to the Task Force on Contingent Fees, which was created prior to the adoption of Amendment 3, "a medical malpractice claim must amount to

41. *Id.* at 1037-40.

42. See James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349, 352 (1993) (providing an example on which the above scenario is based).

43. One can find the value of LR by multiplying the value of the case ("V") by CF. V equals D multiplied by P. LR is \$7500 greater than C. Therefore, the attorney expects to make \$7500 more than he stands to lose. Keeping the P constant, the more LR exceeds C, the more likely the attorney is to take the case. This equation assumes that the attorney and client have agreed that the attorney will not be reimbursed for costs if he or she loses the case.

44. With the 30% cap on any recovery up to \$250,000, the lawyer's expected recovery drops to \$52,500. Because the LR is only \$2500 more than C, it is not as equitable for the attorney to take the risk associated with this case.

\$100–200,000 simply to break even.”⁴⁵ The practical effect of such restrictions on contingency fees is that they will likely preclude many medical-malpractice actions from being filed because the prospective damages and resulting attorneys’ fees will not justify the time and expense associated with the litigation.⁴⁶

According to proponents of the contingency-fee waiver, medical-malpractice cases under Florida law are extremely complex, and it would be “impossible for the vast majority of clients to navigate the hazards of the medical malpractice statutes” without the assistance of a knowledgeable and experienced attorney.⁴⁷ Florida also imposes extra procedural safeguards that make it very costly to bring a medical-malpractice claim.⁴⁸ For example, Florida has a requirement that a physician must swear under oath that the facts of the particular case demonstrate a sufficient complaint of medical malpractice.⁴⁹

The public also seems to mistakenly believe that medical-malpractice claimants always win; however, just the opposite is true.⁵⁰ Only about one in every fifty actual malpractice incidents result in a claim; this is only about 2% of cases in which medical malpractice occurs.⁵¹ The major reason for this lack of accountability is that many of the cases go undetected; the cases that are detected, however, often do not result in claims because the “potential damages do not justify the high cost of investigation and litigation.”⁵² Astonishingly, out of the very few cases that actually make it to trial, medical-malpractice defendants win about three out of every four trials.⁵³

With an uphill battle already in place, a nonwaivable contingency-fee cap forces attorneys to focus on cases with high “economic” losses, which thus create the most damages.⁵⁴ Article I, Section 26, conse-

45. TASK FORCE, *supra* note 2, at 32.

46. *Id.* at 20.

47. Comments and Objections to Proposed Amendment to Rule 4-1.5(f)(4)(B) of the Trial Lawyers Section of the Florida Bar at 11, *In re* Amendment to the Rules Regulating the Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof’l Conduct, 939 So. 2d 1032 (Fla. 2006) (No. SC05-1150), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/32CF3B0DDC625D06852570DF0054758A/\\$FILE/Comments%20Of%20Trial%20Lawyers%20Section.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/32CF3B0DDC625D06852570DF0054758A/$FILE/Comments%20Of%20Trial%20Lawyers%20Section.pdf?OpenElement).

48. TASK FORCE, *supra* note 2, at 19.

49. *Id.* at 19 (discussing FLA. STAT. § 766.203(2) (2002)).

50. *Id.* at 18.

51. *Id.*

52. *Id.*

53. *Id.* (citing Thomas H. Cohen, *Medical Malpractice Trials and Verdicts in Large Counties*, 2001, CIV. JUST. DATA BRIEF (Bureau of Justice Statistics, U.S. Dep’t of Justice, Wash., D.C.), Apr. 2004, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlc01.pdf>).

54. FOUND. FOR TAXPAYER AND CONSUMER RIGHTS, ANALYSIS OF FLORIDA AMENDMENT 3, 5 (2004) [hereinafter FTCCR], available at <http://www.consumerwatchdog.org/documents/2013.pdf>.

quently, punishes the poor, senior citizens, unemployed women or stay-at-home moms, students, and children because these groups are unable to show high economic losses.⁵⁵ This type of constraint unduly hinders the medical-malpractice litigation market. When lawyers' fees are fixed below what the market would yield, lawyers will have an incentive to employ their services elsewhere, where they can maximize the use of their skills.⁵⁶ Lawyers are especially encouraged to leave the medical-malpractice market because these cases are extremely expensive and complex.⁵⁷ Another way in which a nonwaiver provision punishes plaintiffs is that it provides no cap on fees that a defense lawyer can be paid.⁵⁸ Some law-and-economics commentators have suggested that the more money that a party spends on litigation, the more likely he or she is to win.⁵⁹ Economists do not view both parties spending large amounts of money as waste because the more money the parties spend, the closer we get to a fully informed court and jury.⁶⁰ When the court and the jury are fully informed, the argument continues, they can both make unbiased and more accurate decisions.⁶¹ But if the contingency-fee cap is only enforced on the plaintiffs, as it is here, the defense, with its interest in winning the case, will be able to out-price the plaintiff who already has to deal with high expenses and limited recovery.⁶² This creates a heavy imbalance in favor of a defendant.⁶³ According to the Task Force on Contingent Fees, the practical effect of the Florida contingency-fee cap, combined with no option for a waiver, is that it will "squeeze lawyers

Damages in this context refers to the amount of money a victim of medical malpractice may recover to compensate him for his losses.

55. *Id.* at 3.

56. TASK FORCE, *supra* note 2, at 29.

57. FTCR, *supra* note 54, at 3.

58. TASK FORCE, *supra* note 2, at 29.

59. See Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29, 35 (1995). In discussing a hypothetical lawn mower case, Hay states,

[o]ne influential factor . . . is the pool of admissible evidence potentially available to the parties. . . . Yet the outcome of trial also depends on what the parties *make* of this stock of evidence. In preparing a case, each party decides how many expert consultants to hire, how much research in the engineering literature to undertake, how much effort to put into investigating the background of eyewitnesses, how many doctors to talk to, and (in the plaintiff's case) how many medical tests to undergo. Each decides how much to invest in reviewing the evidence and assembling it for trial, which witnesses to call and documents to introduce, and what questions to ask on direct and cross-examination. These and other aspects of case preparation may have a considerable impact on the rulings of judge and jury.

Id. (citation omitted).

60. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 446 (1994).

61. *Id.*

62. FTCR, *supra* note 54, at 2.

63. See *id.*

out of medical malpractice litigation, leaving some, perhaps many, victims with no representation.”⁶⁴

The view that access to the legal system is hindered by contingency-fee caps has been heavily contested by Grimes, attorneys, and doctors who oppose the waiver.⁶⁵ First, they point out that contingency-fee caps are not unique and that there is no reason to believe that persons with legitimate claims cannot obtain the services of competent counsel among the thousands of lawyers practicing personal-injury law in Florida.⁶⁶ But as we have seen above, this argument seems dubious because of the expensive nature of medical-malpractice claims. Unlike other tort actions, medical-malpractice claims involve many procedural hurdles and, therefore, more of a need for large damages to make these claims equitable.

Grimes also argues that if clients are allowed to waive their right to the contingency-fee cap, there will be a rise in the number of frivolous lawsuits.⁶⁷ This idea has been heavily disputed by economists who claim just the opposite: “Attorneys operating under a contingency fee contract will not accept a frivolous case when there is no chance of winning such a lawsuit and thus no opportunity to receive compensation for bringing it.”⁶⁸ Contingency fees, according to economists, encourage lawyers to take all worthy cases, regardless of the client’s ability to pay, and to seek maximum possible compensation.⁶⁹ Procedural safeguards, the extremely high cost of medical-malpractice cases, and the difficulty of winning ensure that few frivolous cases are brought.⁷⁰ In a contingency-fee situation where the lawyer’s recovery depends solely on winning, it is unlikely that an attorney will take a case and expend the large amount of money necessary to bring the case where there is no possibility of success. In contrast, hourly-fee agreements allow an attorney to be paid regardless of the outcome of the case; therefore, hourly-fee arrangements are much more likely to engender frivolous suits.⁷¹ As shown, contingency-fee caps do not lower the occurrence of frivolous lawsuits; they only restrict access to the legal

64. TASK FORCE, *supra* note 2, at 29.

65. See Comments in Support of Petition at 5, *In re* Amendment to the Rules Regulating the Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof’l Conduct, 939 So. 2d 1032 (Fla. 2006) (No. SC05-1150), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/40E72989DBE128A9852570DF005487AE/\\$FILE/Comments%20of%20Stephen%20Grimes.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/40E72989DBE128A9852570DF005487AE/$FILE/Comments%20of%20Stephen%20Grimes.pdf?OpenElement).

66. *Id.* at 4–5.

67. See *id.* at 9.

68. FTICR, *supra* note 54, at 2.

69. *Id.*

70. TASK FORCE, *supra* note 2, at 19.

71. *Id.*

system for claimants with low-damage claims and for those with more risk involved in their claims.

B. Risk Allocation

Many clients may refrain from filing a valuable suit because they have a strong fear of losing the case. This is particularly true with risk-averse individuals.⁷² By contrast, a lawyer working on a contingency-fee basis will not be risk averse because he or she can take on more cases and, therefore, spread the risk;⁷³ this is similar to the way in which an investment banker works. To further draw on that analogy, a client will be unlikely to do something risky because the client only has one "stock," while the lawyer has many "stocks."⁷⁴ The risk of bringing a claim is further increased in medical-malpractice cases because the likelihood of prevailing at trial is only approximately one in four.⁷⁵ The net result, then, is that attorneys are not compensated for their professional time and services or for the costs associated with the actions incurred on behalf of their clients.⁷⁶ Because costs are especially high in malpractice actions and because the likelihood of prevailing is very low, the typical malpractice claim will result in a significant amount of risk.⁷⁷ Lawyers, with their amount of skill and experience, are able to gauge the value of a potential claim, resulting in the possibility of negotiations between the client and the attorney.⁷⁸ The ability to negotiate freely allows the attorney, who is risk-loving or risk-neutral, and the client, who is risk-averse, to decide what percentage would be best for them. Thus, one of the problems with prohibiting potential clients from waiving the contingency-fee cap is that it puts an inefficient restraint on the negotiation process between clients and lawyers. Because of this constraint, lawyers will become increasingly unwilling to take cases where the expected chance of winning drops, even if it drops only marginally.

Going back to the prior example, if the D is \$250,000, the P is

72. A risk-averse individual "is defined as one who, starting from a position of certainty, is unwilling to take a bet which is actuarially fair." Note, *Risk-Preference Asymmetries in Class Action Litigation*, 119 HARV. L. REV. 587, 588 n.6 (2005) (citing KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 90 (1971)). "A risk-neutral person is indifferent between the certain payment and the actuarially identical bet. A risk seeker prefers the gamble to the sure payoff." *Id.*

73. *See id.* at 595-96.

74. *See id.* at 595 n.39.

75. *See supra* note 53 and accompanying text.

76. TASK FORCE, *supra* note 2, at 22 ("Although the out-of-pocket costs of the action can be charged back to the client, the clients' financial conditions usually preclude that. . . . [E]thical rules now allow contingent fee agreements to make repayment of expenses also contingent upon the successful outcome of the case.").

77. *Id.* at 22-23.

78. *Id.* at 23.

70%, the CF is 33%, and the C is \$50,000, the case would be equitable because the expected amount the lawyer will receive is \$57,750, which is greater than the cost to bring the case. Under the uncapped contingency fee, if the expected D drops to \$230,000, keeping the other variables constant, a lawyer might still bring the case because the expected legal fee, \$53,130, would still be greater than the cost to bring the suit, \$50,000. However, under the contingency-fee cap in Florida, the lawyer would only be able to take up to 30% of the first \$250,000;⁷⁹ consequently, the lawyer would not take this case because the expected recovery would only amount to \$48,300, which is less than the \$50,000 it costs to bring the suit. A drop of only \$20,000, which seems like a very reasonable difference between expected and actual damages, would cause a victim to go uncompensated on a claim worth over \$200,000, especially in an area of law where it is already difficult to make predictions and to win. The cap, therefore, reduces the opportunity for the attorney to diversify risk and consequently, causes the attorney to be less risk-seeking or neutral. Without such a cap, the attorney and the client would be free to negotiate who would take the bigger risk and, therefore, make the fee agreement more equitable.

C. *Moral Hazard and Asymmetric Information*

A moral hazard arises in hourly-fee arrangements because the attorney has an incentive to work the maximum number of hours, if not more hours than necessary, on a case even if the attorney knows that the probability of winning is low.⁸⁰ The attorney will be paid regardless of the outcome of the case based on how many hours of work he or she has put into the case. Also, it is impossible for the client to measure the quality of the attorney's work because it is a credence good; the reputation sanctions are imperfect because of the lack of evaluation.⁸¹ The contingency-fee model solves this problem.⁸² Because the lawyer will only get paid based on the client's recovery, the lawyer's and client's

79. FLA. CONST. art. I, § 26.

80. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 48 (1989) ("An hourly fee provides incentive to work longer than absolutely necessary"); Dana & Spier, *supra* note 42, at 350 (citing Patricia M. Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213, 223 (1983)); Murray L. Schwartz & Daniel J. B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1125 (1970).

81. Credence goods are defined as "goods and services for which consumers never discover their need and their quality." Winand Emons, *Credence Goods Monopolists*, 19 INT'L J. INDUS. ORG. 375, 375 (2001). According to Emons, sellers "act as experts [in] determining the customers' requirements, simply because consumers are unfamiliar with the good in question." *Id.* Emons lists legal services as a credence good. *Id.* at 376.

82. *Id.* at 350.

interests are aligned, encouraging the attorney to get as much work done as quickly as possible.⁸³

Problems of asymmetric information also arise when a client hires an attorney.⁸⁴ Asymmetric information comes in two forms in the contingency-fee model: First, clients know more about the facts of the case when a contingency fee is set; and second, the lawyers know more about their own abilities.⁸⁵ Contingency fees also correct the asymmetric-informational issue.⁸⁶ Contingency fees are able to reduce asymmetric information because they allow a lawyer and a client to signal to one another their perceived strength of the claim and ability to win.⁸⁷ A client who is well informed about the facts of a high-quality case will be willing to pay a high fixed fee and a low contingency fee.⁸⁸ Conversely, a client with a low-quality case will prefer to pay a low fixed fee and a high contingency fee because the client will not want to take the bulk of the risk.⁸⁹ A lawyer who is well informed and is of high quality will be willing to work for a relatively high contingency fee, while a low-quality lawyer will be more inclined to work for a low contingency fee.⁹⁰ By using this type of signaling, attorneys and clients can correct the asymmetric-information issue by negotiating an optimal contract.⁹¹ Because it can be assumed that high-quality attorneys win more cases, then clients with low-quality cases will need to go to a high-quality lawyer to have a better shot at winning.⁹² In the ideal world described above, this type of lawyer-client relationship is easily formed because both of these parties desire the same type of high contingency-fee agreement. However, the issue with this, as explained earlier, is that the medical-malpractice world is far from ideal for lawyer-client negotiations. There are many factors in medical-malpractice claims that make hiring a high-quality lawyer to litigate such claims nearly impossible. These factors

83. See Brickman, *supra* note 80, at 44 (citing Lee S. Kreindler, *The Contingent Fee: Whose Interests Are Actually Being Served?*, 14 FORUM 406 (1979)) ("Contingent fees also motivate lawyers to work more diligently, since their compensation depends upon their clients' recovery."); see also James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 246 (2003) (arguing that acquisition of interest and financial assistance are justified under the same rationales as contingency fees by pointing out the positive effects of contingency fees and explaining how attorney and client interests are aligned).

84. Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343, 343 (1993).

85. *Id.*

86. *Id.* at 355.

87. See *id.* at 343.

88. *Id.*

89. *Id.*

90. *Id.* at 345.

91. See *id.*

92. *Id.* at 355.

include the contingency-fee cap, the expense of medical-malpractice claims, and the difficulty in winning these claims. Because of these practical barriers, it is inequitable for attorneys to take risky cases at such a low fee percentage as imposed by Amendment 3. As explained below, in these risky cases, waiver of the contingency-fee cap is needed most.

The issues of moral hazard and asymmetric information work in a close relationship. When dealing with markets, it is a prerequisite that—in addition to price—consumers are able to determine the relative attorney quality levels so they can make informed tradeoffs between price and quality.⁹³ However, because legal quality is a credence good, asymmetrical information prevents most consumers from evaluating the lawyers' work.⁹⁴ While logically it should follow that an attorney could signal high quality by accepting a low contingency fee over many cases, it actually works in just the opposite way.⁹⁵ Clients will view such a low rate as low quality, and they will believe that paying a low price will cause their attorney to put less effort into their case.⁹⁶ Therefore, it is likely that a high-quality lawyer will demand a high-quality contingency fee.⁹⁷ When the contingency-fee cap is applied, the ability of the lawyer and the client to signal their perceived probability of winning is reduced. The lawyer, who is already climbing uphill, will not be able to show high quality because of the cap. Although it could be argued that there will be competition below the cap, as we have already seen, this is nearly impossible—many claims are already impossible to bring based on other economic factors. Because both low-quality and high-quality lawyers will be forced to charge almost identical prices, and because legal services are a credence good, clients will not be able to tell high-quality from low-quality lawyers. It is unlikely that low-quality lawyers will win as many cases as high-quality lawyers; as a result, fewer medical-malpractice cases will be won. Clients are also handicapped because they cannot affectively signal the quality of their cases if they are unable to waive the cap. The cap, therefore, has the effect of destroying one of the major benefits of the contingency fee: the correction of asymmetric information between a client and an attorney.

93. See Dana & Spier, *supra* note 42.

94. Emons, *supra* note 81, at 375–76.

95. Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 415, 418 (Peter Newman ed., 1998).

96. Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 550 (2001).

97. Rubinfeld & Scotchmer, *supra* note 84, at 345.

IV. STATUTORY DEFAULTS

The opponents of the waiver believed that Amendment 3, which passed without the explicit inclusion of a waiver, was a rule that could not be altered.⁹⁸ However, when the Florida Bar amended Florida Rule of Professional Conduct 4-1.5(f)(4)(B) and implemented the form of waiver, it transformed the constitutionally mandated contingency-fee cap into the equivalent of a statutory default. When viewing Amendment 3 in the context of statutory defaults, it can be seen that (1) the way that the amendment originally passed was biased because its sponsors, Citizens For a Fair Share, Inc.,⁹⁹ ("Sponsors"), framed it in a way that took advantage of the voters' bounded rationality, and (2) the form of waiver possibly will not have the broad effect that its proponents desired because of the coercive nature of default rules.

A. *Framing and Bounded Rationality*

Framing refers to the wording of possible options;¹⁰⁰ such options may include, for example, administration of employment-benefit options and patient consent to medical decisions.¹⁰¹ There is an ongoing debate about whether people actually make judgments on their own free will or whether their decisions can be elicited by the framing of the options they are given or both.¹⁰² Especially in situations where people lack well-ordered preferences, framing may play a large role in what decision the individual makes.¹⁰³ An example of framing can be seen in the election of whether or not to undergo a risky medical procedure.¹⁰⁴ As Redelmeier, Rozin, and Kahneman discovered, "[w]hen people are told, 'Of those who undergo this procedure, 90 percent are still alive after five years,' they are far more likely to agree to the procedure than when they are told, 'Of those who undergo this procedure, 10 percent are dead after five years.'"¹⁰⁵ As this example shows, the design features or wording of options has a powerful influence on people's choices.¹⁰⁶ Amendment 3, as presented to the voters, was titled "Claimant's *right* to fair com-

98. Blankenship, *supra* note 13.

99. See Fla. Dep't of State Div. of Elections, *supra* note 7.

100. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003).

101. *Id.* at 1176-77.

102. *Id.* at 1179.

103. *Id.* at 1161.

104. *Id.*

105. *Id.* (citing Donald A. Redelmeier, Paul Rozin & Daniel Kahneman, *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 J. AM. MED. ASS'N 72, 73 (1993)).

106. *Id.*

pensation.”¹⁰⁷ Amendment 3 also explicitly stated the high percentages of recovery that a claimant must be able to receive based on the amount recovered in the litigation.¹⁰⁸ First, Amendment 3 provided that “the claimant is *entitled to receive no less than 70%* of the first \$250,000.00 in all damages received by the claimant.”¹⁰⁹ It further provided that “[t]he claimant is *entitled to 90%* of all damages in excess of \$250,000.00.”¹¹⁰ As shown by the medical-treatment example above, desirable answers may be elicited from individuals based on the framing of different options. For example, if the same amendment had been written emphasizing the lawyer’s fees of no more than 30% of the first \$250,000 and no more than 10% on any amount over \$250,000, perhaps the voters would have been more hesitant to adopt such a strict limitation.¹¹¹ Or, perhaps, if the Sponsors juxtaposed Amendment 3’s fee scheme with the current contingency-fee scheme in nonmedical-malpractice cases (40% of the recovery up to \$1 million, and 30% of the recovery between \$1 million and \$2 million), the voters would have at least asked themselves, “What lawyer is going to want to take a medical-malpractice case for only 10% of the possible recovery?”¹¹²

Another factor that greatly affects the individual’s ability to make completely informed, uncoerced decisions is that people suffer from what is referred to as bounded rationality. Bounded rationality is a social science concept used “to describe the process of making decisions using decision making heuristics, limited time, and incomplete information.”¹¹³ One of the oft-cited heuristics affecting bounded rationality is the concept of the availability heuristic. The availability heuristic

107. FLA. CONST. art. I, § 26 (emphasis added).

108. *Id.*

109. *Id.* (emphasis added).

110. *Id.* (emphasis added).

111. If the Amendment had been written in terms emphasizing the lawyer’s maximum fees, it might read as follows:

(a) Article I, Section 26 is created to read “Claimant’s right to fair compensation.”

In any medical liability claim involving a contingency fee, the lawyer is entitled to receive no more than 30% 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 lawyer is entitled to no more than 10% 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.

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

112. See FLA. BAR REG. R. 4-1.5(f)(4)(B)(i)(b) (2007).

113. Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 295 (2006) (citing 2 HERBERT A. SIMON, *Theories of Bounded Rationality*, in *MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION* 408 (MIT Press 1982)).

“refers to the tendency of decision makers to overestimate the relevance of significant or memorable incidents, and underestimate the base rates.”¹¹⁴ The availability heuristic is especially prevalent in medical-malpractice legal-fee discussions due to the “medical malpractice myth.”¹¹⁵ The theory underlying the medical-malpractice myth is that the myth fills doctors, patients, legislators, and voters with frightening information that “short circuits” critical thinking.¹¹⁶ This misinformation likely played a part in the Florida voters’ decision to pass Amendment 3 in 2004. As pointed out by Baker and discussed in Section III.A above, research shows that the real instigator in medical-malpractice issues is too much medical malpractice, not too much litigation.¹¹⁷ However, medical malpractice is a highly debated political issue and medical-malpractice reform has become a very partisan issue.¹¹⁸

As with all highly politicized issues, there is an abundance of news media on the subject, which succeeds in further adding credence to the medical-malpractice myth.¹¹⁹ The media stories also keep the poor-doctors-and-greedy-lawyers idea alive in the minds of the constituents.¹²⁰ Many medical professionals and allied organizations have successfully used the legislature and the media for their own personal benefit, solely seeking to impose limits on the fees lawyers may charge clients in successful malpractice claims and actions.¹²¹ Their theories are based on the assumption that there are excessive claims, ridiculous jury awards, and consequently, large, unwarranted contingency fees for lawyers.¹²²

Many political figures, including President Bush, have felt the need to weigh in on the issue of medical-malpractice reform.¹²³ Unfortunately though, in a speech regarding medical-malpractice reform, the President, point by point, affirmed the lies that the medical-malpractice myth exposes, only further substantiating the misconceptions of the public: The President spoke of frivolous lawsuits, courts’ biases against doc-

114. *Id.* at 298.

115. BAKER, *supra* note 2, at 1. The medical-malpractice myth discounts the argument that the reason why there are so many issues in the medical field, such as skyrocketing medical-malpractice premiums, can be attributed to, among other things, exploding litigation, greedy lawyers, litigious plaintiffs, overly generous juries, and the necessity to settle to avoid the so-called “civil justice” system. *Id.* Baker argues that the medical-malpractice myth is only supported by “urban legend mixed with the occasional true story, supported by selective references to academic studies, . . . exaggeration, half truth, and outright misinformation . . .” *Id.*

116. *Id.*

117. *Id.* at 2; *see supra* notes 53–56.

118. BAKER, *supra* note 2, at 10–11.

119. TASK FORCE, *supra* note 2, at 3, 9.

120. *See id.* at 47–48.

121. *Id.* at 3.

122. *Id.*

123. BAKER, *supra* note 2, at 12.

tors, rising jury awards, and the huge settlements in cases where doctors did nothing wrong.¹²⁴ Because of the bounded rationality of the Florida voters and the availability heuristic, it is unlikely that their decision to vote for Amendment 3 was completely voluntary and rational.¹²⁵ The medical professionals, tort reformers, and the media know exactly how the availability heuristic works: They know that if they continuously scare people with a constant influx of negative information, the voters will carry that fear into the voting booths. They also know that if they keep correct information—i.e., the low number of medical-malpractice plaintiffs who actually win and the extreme expense in bringing medical-malpractice claims—in the dark, while keeping constant and shocking news about the so-called medical-malpractice crises in the minds of the voters, they will subconsciously be able to manipulate the political process. With Amendment 3 taking full advantage of an uninformed, disconcerted electorate, the doctors, media, and Sponsors did just that.

B. *Default Rules*

A default rule governs the terms of a contract, unless the parties contract around it.¹²⁶ Default rules are to be distinguished from immutable rules in that, unlike default rules, immutable rules may not be waived by the parties—i.e., they govern regardless of the parties' agreement.¹²⁷ When a legislature wants to indicate that a rule can be waived, and is therefore only a default rule, it will usually enact a statute that includes language informing the governed that they may waive the rule.¹²⁸ For example, a statute may provide that its terms govern "[u]nless otherwise unambiguously indicated."¹²⁹ This analysis heavily supports the opponents of the waiver's claim that Amendment 3 was meant to be immutable and that the rights that it creates may not be waived by agreement between the client and the attorney. However, courts, having the authority to interpret statutes and amendments, may construe the language used by the drafters as merely creating a default rule which can be

124. *Id.* at 13.

125. The President's speech occurred in 2005; therefore, I in no way assert that this particular speech had any effect on the 2004 election. *Id.* at 12. I use it only as an example of how politicians perpetuate the medical-malpractice myth.

126. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87 (1989).

127. *Id.* A great example distinguishing between the two types of rules is the Uniform Commercial Code's ("U.C.C.") duty of good faith and the warranty of merchantability. See U.C.C. § 1-203 (2004); Ayres & Gertner, *supra* note 126, at 87. The duty to act in good faith is an immutable rule in the U.C.C.; the parties may not waive it. *Id.* However, the warranty of merchantability, a statutory default, may be waived by the agreement of the parties. *Id.*

128. Ayres & Gertner, *supra* note 126, at 88.

129. *Id.* (internal quotation marks omitted).

altered by the parties.¹³⁰ This is what the Florida Supreme Court most likely did in *In re Amendment to the Rules Regulating the Florida Bar*.¹³¹

The Florida Supreme Court also took the creation of the default rule one step further. Instead of solely providing that Article I, Section 26 may be waived, it instructed the Florida Bar to create the form of waiver, equipped with procedural safeguards, to ensure that the client “knowingly and voluntarily” waived his right under Article I, Section 26 of the Florida Constitution.¹³² This is a tremendous step taken by the Florida Supreme Court in favor of restoring medical-malpractice claimants’ access to the justice system; however, the residual effect of default rules will likely play a large part in limiting attorneys’ recoveries in medical-malpractice cases.

There have been numerous studies that have shown that default rules have a remarkable effect on decision making and also on price negotiations.¹³³ One of the most interesting studies on default rules is a study conducted on organ donation.¹³⁴ The organ donation study highlights the unwillingness of individuals to shift from a statutory-default to a bargained-for or changed term. In the United States, the default rule is that human organs will not be available for others, unless the individual affirmatively says so, usually through an explicit notation on the individual’s driver’s license.¹³⁵ In many other nations, there is a presumption that people have consented to having their organs used after death for the benefit of others; this presumption may be overcome by an explicit notation on the driver’s license to the contrary.¹³⁶ The results of the study were shocking in showing the dramatic effect that the default rules have on individual peoples’ decisions. In the nations that presume consent, over 90% of the people consented to making their organs available for donation.¹³⁷ However, in the United States, where people have to take affirmative action to consent to organ donation, only about 28% of individuals consented to organ donation.¹³⁸ Because studies have shown

130. *Id.*

131. *In re Amendment to the Rules Regulating the Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof’l Conduct*, 939 So. 2d 1032 (Fla. 2006). Although it is highly likely that a court would find that clients may waive their rights under Article I, Section 26, the Florida Supreme Court withheld a final determination on the validity of the waiver until an actual case or controversy arose. *Id.* at 1038. For readability purposes and argument, in this section, I will assume that the form of waiver is valid and constitutional.

132. *In re Amendment to the Rules Regulating the Florida Bar*, 939 So. 2d at 1040.

133. See Sunstein & Thaler, *supra* note 100, at 1191–93.

134. *Id.* at 1191–92.

135. *Id.* at 1192.

136. *Id.* at 1191.

137. *Id.* at 1192.

138. *Id.*

that over 85% of Americans support organ donation generally,¹³⁹ it is unlikely that this result is the product of deep cultural differences.¹⁴⁰ Instead, it is likely the massive effect of default rules.¹⁴¹ There are three residual effects of default rules that are in play in this study: (1) suggestion, (2) inertia, and (3) endowment effect.¹⁴² Among these three effects, inertia is likely the most influential in the organ-donation context. All three will be discussed below.

Before I delve into the three effects already mentioned, there is another way that default rules affect price and the market: They may have an anchoring effect.¹⁴³ The theory underlying anchors is that “[s]tated values will often be affected, at least across a range, by how the questions are set up.”¹⁴⁴ Sunstein and Thaler describe a study that was conducted to examine the willingness of individuals to pay to reduce annual risks of death and injury in motor vehicles.¹⁴⁵ The authors of the study, Michael Jones-Lee and Graham Loomes “attempted to elicit both maximum and minimum willingness to pay for safety improvements” through a process of increasing amounts, until the subject was no longer willing to pay.¹⁴⁶ The authors found that when they began with a higher starting point, the maximum willingness to pay was always higher than when they began with a lower starting point.¹⁴⁷ Sunstein and Thaler concluded that “[t]he most sensible conclusion is that people are sometimes uncertain about appropriate values, and whenever they are, anchors have an effect—sometimes a startlingly large one.”¹⁴⁸ It is important now to discuss the applicability of these four effects to Article I, Section 26.

The suggestion effect implies that when faced with an uncertainty, “people might rely on one of two related heuristics: Do what most people do, or do what informed people do.”¹⁴⁹ In many situations, people will view the default rule as the sensible starting point for their analysis, and these heuristics will become major players in their choice;¹⁵⁰ this is especially true in the context of Amendment 3. Amendment 3 was pro-

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1180–81.

143. *See id.* at 1177–79.

144. *Id.* at 1177.

145. *Id.* at 1177–78 (citing Michael Jones-Lee & Graham Loomes, *Private Values and Public Policy*, in *CONFLICT AND TRADEOFFS IN DECISION MAKING* 205, 208–12 (Elke U. Weber et al. eds., Cambridge Univ. Press 2001)).

146. *Id.* at 1178.

147. *Id.*

148. *Id.*

149. *Id.* at 1180.

150. *Id.* at 1180–81.

posed by the Citizens For a Fair Share, Inc., a group presumed to be informed about medical-malpractice issues, and ratified by the Florida voters. In addressing the first heuristic—do what most people do—it is completely plausible to believe that individuals will entertain a thought process, such as the following: If the majority of voters voted for Amendment 3, this must be what most people do. The second heuristic—do what informed people do—is also easily satisfied in the context of Amendment 3. People will assume that the Sponsors were informed about medical-malpractice issues considering they proposed Amendment 3, and that voters were informed when they voted; therefore, they will do as informed people do. Unfortunately, as shown, the Sponsors and the voters were likely uninformed or misinformed about Amendment 3 due to the medical-malpractice myth.¹⁵¹ Consequently, the default is likely not what an informed person would do; it is what a misinformed and uninformed person might do. The likely result of the suggestion effect in the context of waiving the contingency-fee cap is that people will be more reluctant to sign the form of waiver because they might deem their choice to be in the minority, uninformed, and incorrect.

Next, default rules often create what has been labeled as an endowment effect.¹⁵² According to Sunstein and Thaler, “[i]t is well known that people tend to value goods more highly if those goods have been initially allocated to them than if those goods have been initially allocated elsewhere.”¹⁵³ When the endowment effect is involved, the initial allocation affects people’s valuation of the good (or in this case the right) consequently affecting their choice.¹⁵⁴ Because of the endowment effect, medical-malpractice clients will view the contingency-fee cap as a right allocated to them, and they will therefore value it higher than they would in the absence of such a right. The result will be that, because of their high valuation of *their* right, many claimants will be more reluctant to “give it away,” and therefore the default rule will be less likely to be waived.

Finally, signing the form of waiver requires inertia; this simply means that a change from the default rule requires some action.¹⁵⁵ Inertia is the likely driving force that creates the dramatic difference in the organ-donation study. Although most Americans support organ donation, the simple procedure of checking a consent box to opt-in, rather than the selection to opt-out, creates a tremendous drop in available

151. See BAKER, *supra* note 2, at 1.

152. Sunstein & Thaler, *supra* note 100, at 1181.

153. *Id.*

154. *Id.*

155. *Id.*

donors.¹⁵⁶ The probable reason for such an effect is that taking action requires a person to stop and think about what they are doing. Although we do want people to stop and think about what they are consenting to, especially in the attorney-client relationship, people's bounded rationality in the form of the suggestion effect and endowment effect plays on their thinking. It is very likely, then, that in light of the established distrust of lawyers, clients will become distrustful and suspicious of their attorneys' motives in asking them to waive a constitutionally protected right. As a result, clients may be unwilling to take action to waive *their* constitutional right. If the opponents of the waiver had been able to persuade the Florida Supreme Court to require that judicial approval of the waiver was necessary, as they attempted to do,¹⁵⁷ the inertia effect would have been even more profound. Instead of the slight action that clients have to take to sign the waiver under oath as the rule requires, clients would not only have had to sign the waiver, but also would have had to present the waiver to the court in a hearing, while carrying the burden of proof. Because of the formality of the legal system, it is likely that this amount of action would have further restricted lawyers' abilities to persuade their clients to waive the cap.

Assuming that an attorney is able to persuade his or her client to sign the form of waiver, the anchoring effect will likely limit the lawyer's ability to freely negotiate an adequate fee. As we have seen above, people are willing to pay higher maximum amounts when the starting points are higher and lower maximum amounts when starting points are lower.¹⁵⁸ This effect is even more profound when people are unsure about valuation.¹⁵⁹ As we know, a legal service is a credence good without a readily ascertainable value.¹⁶⁰ This means that a client will either have to rely on what the lawyer says the services are worth, or the client may decide to rely, at least as a starting point, on another valuation system: Article I, Section 26. Because the lawyer has a personal interest in monetary compensation from the client's case, the client will be more likely to view the constitution as the unbiased, and therefore, correct starting place. After all, according to the suggestion effect, the contingency-fee percentage in the constitution is both what informed people do and what most people do. Before Amendment 3 passed, the only sections in the Rules Regulating the Florida Bar that dealt with contingency fees were remarkably more favorable to attorneys; these

156. *Id.* at 1193.

157. *In re* Amendment to the Rules Regulating the Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof'l Conduct, 939 So. 2d 1032, 1038 (Fla. 2006).

158. Sunstein & Thaler, *supra* note 100, at 1178.

159. *Id.*

160. *See supra* note 81 and accompanying text.

rules are still the default rules for all personal-injury cases, except for the medical-malpractice context.¹⁶¹ Under the rules regulating non-medical-malpractice personal-injury cases, a lawyer may collect up to 33 $\frac{1}{3}$ % of any recovery up to \$1 million,¹⁶² and if the case goes to trial, the lawyer may recover up to 40% on any recovery of that amount.¹⁶³ However, under the medical-malpractice contingency-fee cap without the signed waiver, a lawyer can only receive no more than 30% of the first \$250,000 and only 10% of anything over \$250,000, regardless of whether the case goes to trial or settles.¹⁶⁴ The inherent unfairness is shown, for example, when a lawyer attempts to negotiate a claim, estimating that it will result in a settlement or in a verdict in the \$1 million range. When negotiations start, ignoring the medical-malpractice cap, the lawyer would be able to ask the client to sign a form awarding the attorney the statutory defaults of 33 $\frac{1}{3}$ % if the case settles and 40% if it goes to trial; this results in possible recovery for the attorney of \$333,000 or \$400,000 on a favorable verdict. However, applying the cap, the attorney will only be able to start negotiations out at 30% of the first \$250,000 and 10% of the recovery from \$250,000 to \$1,000,000 for a total fee of \$150,000. Given the anchoring effect, it is highly unlikely that an attorney will be able to move a client from 10% to anywhere near 33 $\frac{1}{3}$ % recovery.

Another way in which the cap hurts both the attorney and client can be seen when the attorney, under the pre-Amendment 3 regime, agrees to a 33 $\frac{1}{3}$ % contingency fee, even if the case goes to trial. We will sup-

161. FLA. BAR REG. R. 4-1.5(f)(4)(B)(i)(a)–(b) (2007). The rules provide the following:

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to \$ 1 million; plus
2. 30% of any portion of the recovery between \$ 1 million and \$ 2 million; plus
3. 20% of any portion of the recovery exceeding \$ 2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to \$ 1 million; plus
2. 30% of any portion of the recovery between \$ 1 million and \$ 2 million; plus
3. 20% of any portion of the recovery exceeding \$ 2 million.

162. *Id.* at (f)(4)(B)(i)(a)(1).

163. *Id.* at (f)(4)(B)(i)(b)(1).

164. FLA. CONST. art. I, § 26.

pose that the lawyer's rationale for agreeing to a lower fee is because the attorney is confident in the likelihood of receiving a favorable verdict of \$1 million and knows the client is in need of money. The attorney can, under the Rules Regulating the Florida Bar, ask for up to 40% without judicial approval when the case goes to trial; therefore, we will use a 40% fee as the starting point. Because the client will view this concession down to 33 $\frac{1}{3}$ % by the attorney as relinquishing 6 $\frac{2}{3}$ % of the attorney's fee, the client will likely readily agree to such a fee. This, then, gives the attorney a fee of 33 $\frac{1}{3}$ % and the client a recovery of 66 $\frac{2}{3}$ %. On the other hand, in the same scenario, but this time incorporating the Amendment 3 cap, the client's starting point is 90% recovery, instead of 66 $\frac{2}{3}$ %. It is highly unlikely that a client will shift from this 90% recovery starting point to a 66 $\frac{2}{3}$ % recovery ending point. The client will most likely view the lawyer's attempt to decrease the client's recovery as self-serving instead of mutually beneficial as seen in the other context.

Although the proponents of the waiver celebrated a big victory in persuading the Florida Supreme Court to most likely allow waivers, it is highly likely that attorneys' ability to receive the fees that they were once able to recover and that are necessary to make medical-malpractice cases equitable will be incredibly reduced.

V. CONCLUSION

There are many important concerns on both sides of the contingency-fee cap issue. From a legal standpoint, the availability of people to waive their rights seems as natural as enforcing the right itself. There are already procedural safeguards in place to ensure that a client is given full disclosure before waiving a constitutionally granted right. A client should have choice in representation, and the court should try not to be too paternalistic in restricting the contracts that a competent adult may enter into. Although the Florida Supreme Court decided to leave open the issue of whether a knowing and voluntary waiver can be entered into to circumvent the contingency-fee restriction found in Article I, Section 26 of the Florida Constitution, based on its strong dicta and satisfaction with the new Florida Bar rule and form of waiver, it is likely that the court will find that a citizen is entitled to waive these rights. Also, if a case or controversy is brought before the Florida Supreme Court, based on the economic arguments in favor of permitting a waiver, the court should decide to allow a client to waive the rights granted by Amendment 3.

Turning to the issues facing medical-malpractice attorneys, we have seen that a contingency-fee cap without the option for waiver negates the benefits provided by the contingency-fee model. Because

medical-malpractice cases are already expensive to bring and the likelihood of winning is low, additional burdens placed on plaintiffs will only restrict access to the legal system without lowering the number of frivolous suits. The cap has the effect of lowering the amount of lawyers in the medical-malpractice field and allowing only the rich or claimants with the most obvious claims, the highest expected damages, and expected damages over \$200,000 to be compensated. Also, as I have explained, the benefit of correcting risk aversion is negated by the contingency-fee cap because the slightest miscalculation can lead an attorney into performing compelled pro bono work at a major loss. Finally, because lawyers and clients will be effectively unable to signal their positions, the moral hazard and asymmetric information issues are no longer corrected as they would normally be in a contingency-fee model without a cap. Because a lawyer cannot signal in the conventional way that contingency fees usually permit and the client cannot properly evaluate the lawyer's quality because it is a credence good, the lawyer will be forced to charge the same rate as other attorneys. There will be no way to distinguish then between low-quality and high-quality lawyers; therefore, assuming low-quality lawyers will not win as many cases, doctors will be further protected from malpractice actions.

Next, we have seen that the Sponsors used framing and bounded rationality to elicit a favorable vote on Amendment 3 during the 2004 election. Amendment 3 was presented in a way that promised the voters that lawyers in medical-malpractice cases would no longer take advantage of them; from now on, claimants were going to get large chunks of their recovery. The wording of the Amendment failed to point out how it would limit the ability of attorneys to accept and litigate medical-malpractice claims in an equitable manner. Also, the Sponsors, medical professionals, and the media used their knowledge of bounded rationality to subconsciously induce the voters into passing Amendment 3. These groups created an abundance of propaganda to "inform" the public of the medical-malpractice crises and the need for reform.¹⁶⁵ Because of the availability of this information, including stories of ridiculous verdicts and the reporting of claimant victories, people were inclined to believe that these occurrences happen more often than they do. When people believe this, they tend to buy into the medical-malpractice myth, especially when they are uninformed of the true nature of medical-malpractice claims. The final effect of the availability heuristic then is a favorable vote to rid Florida of what these voters falsely perceived as excessive attorneys' fees.

Although there is a major benefit for lawyers in the Florida

165. See *supra* Part IV.A.

Supreme Court's finding that Article I, Section 26 was likely a default rule, and not an immutable rule, the long-term benefits of such a determination are questionable at best. While the form of waiver was created to waive the right of Article I, Section 26, it is unclear how many clients will do so. Now that clients have an entitlement to the right, they will likely value it more and be less likely to waive it. Furthermore, because of the stop-think-and-act action that inertia causes, along with individual's bounded rationality, it is likely that claimants will become more distrustful of an attorney telling them to waive a right for the attorney's benefit. Also, clients are going to be less likely to waive Article I, Section 26 when they perceive the waiver as the minority view as espoused in the suggestion effect. Finally, the anchoring effect that the statutory maximum has on lawyer-client negotiations will inevitably limit an attorney's ability to negotiate for a higher fee.

In conclusion, although the proponents of the waiver may justifiably feel that they won a big victory in the Florida Supreme Court by successfully arguing for a waiver, it is unclear that this victory will have the effect that they had hoped.