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I. INTRODUCTION

During a routine gall bladder surgery, a physician negligently cut his patient's common bile duct.[1] The patient soon commenced a medical malpractice action against the physician to recover for her injuries.[2] However, this physician had opted to "go bare"[3] as authorized by the Florida Financial Responsibility statute section 458.320(5)(g).[4] On the day the medical malpractice case went to the jury, the physician peti-

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1. Sawczak v. Goldenberg (*In re* Goldenberg) (*Goldenberg I*), 218 F.3d 1264 (11th Cir. 2000), *certifying question to* 791 So. 2d 1078 (Fla.), *revisted by* 253 F.3d 1271 (11th Cir. 2001).

2. Sawczak v. Goldenberg (*In re* Goldenberg) (*Goldenberg II*), 253 F.3d 1271, 1272 (11th Cir. 2001).

3. "Going bare" is the term used when a physician does not carry medical malpractice liability insurance and is self-insured. Allen Kachalia, Niteesh K. Choudhry & David M. Studdert, *Physician Response to the Malpractice Crisis: From Defense to Offense*, 33 J.L. MED. & ETHICS 416, 419 (2005).

4. *Goldenberg I*, 218 F.3d at 1264.

tioned for Chapter 7 bankruptcy.[5] The injured patient had to file an emergency motion for relief from automatic stay so that the deliberations could proceed.[6] Ultimately, the jury awarded the patient over $4 million in damages.[7]

The physician-debtor "filed bankruptcy schedules listing $3,791,119 in assets, of which he claimed $3,751,678 as exempt" during the bankruptcy proceeding.[8] The exempt assets comprised $355,894 in unmatured annuity contracts and over $2.5 million in retirement funds.[9] The bankruptcy court classified the $4 million judgment as an unsecured debt[10] and discharged it. As a result, the physician-debtor held on to his almost $4 million in exempt assets, a portion of which was presumably accrued through monies saved as a result of the physician-debtor not having to pay any medical malpractice liability premiums. The injured patient was left without remedy.

The essence of the physician-patient relationship is trust. A patient trusts that his physician will properly diagnose and treat whatever ailments may arise. A physician trusts that the patient will provide any necessary information to make a proper diagnosis and will follow the physician's prescribed course of treatment. Medical malpractice litigation arises when a patient feels that his physician has violated this very trust,[11] whether with an improper or delayed diagnosis, insufficient informed consent, medical negligence, or even recklessness.

The Florida legislature embraced this framework of trust when it implemented section 458.320(5)(g), permitting physicians to "go bare" (self-insure) as long as they promised to pay any judgment against them up to $250,000.[12] Currently, over 10% of licensed physicians in the state of Florida have opted to "go bare."[13] In effect, section 458.320(5)(g) added another layer of trust to the physician-patient relationship. Now patients must trust that, if the physician first violated their trust by committing medical malpractice, the physician either will have medical mal-

5. *Goldenberg II*, 253 F.3d at 1272.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Goldenberg I*, 218 F.3d at 1266.

10. Tort judgments are classified as unsecured debts. Michelle J. White, *Why It Pays To File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 687 (1998).

11. "Blackstone declared that [medical] malpractice was an offense because 'it breaks the trust which the party placed in his physician.'" KENNETH ALLEN DE VILLE, MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA 157 (1990).

12. FLA. STAT. ANN. § 458.320(5)(g) (West 2004).

13. E-mail from Carla D. Ruiz, Management Analyst, Fla. Dept. of Health Div. of Med. Quality Assurance, to author (Jan. 8, 2010, 10:22 EST) (on file with author).

practice liability insurance or will stand by the promise to pay the judgment.

The federal bankruptcy arena provides a useful lens through which to evaluate section 458.320(5)(g) of the Florida Financial Responsibility statute. The Florida Financial Responsibility statute coupled with the federal Bankruptcy Code creates a loophole where physicians may "go bare" conditioned on the promise to pay a judgment up to $250,000 yet file for strategic bankruptcy and discharge any debts against them resulting from a finding of medical malpractice liability.[14] Unlike the section 458.320(1)(c)[15] requirement of an irrevocable line of credit or the section 458.320(1)(a)[16] requirement of an escrow account, section 458.320(5)(g)(1) permits a physician to self-insure without any safety-nets in the event that the physician cannot pay a medical malpractice judgment.[17] This is highly problematic for a meritorious plaintiff-patient.[18]

While the issue of self-insured physicians filing for bankruptcy to discharge medical malpractice debts is not unique to the State of Florida,[19] federal bankruptcy courts and appellate courts in the Eleventh Circuit and the Florida Supreme Court systematically have interpreted the language of the Florida Financial Responsibility statute in such a way as to erode patients' rights.[20] After describing the current law, this article proposes a change in the law to preserve the right of a meritorious patient-plaintiff to recover damages from a "bare" self-insured physician.

In particular, the article will focus on the loophole created by the

14. *See, e.g.*, Guerra v. Fernandez-Rocha (*In re* Fernandez-Rocha), 451 F.3d 813 (11th Cir. 2006); Hanft v. Church (*In re* Hanft), 315 B.R. 617 (S.D. Fla. 2002), *aff'd*, 73 F. App'x 387 (11th Cir. 2003); *In re* Farkas, 343 B.R. 336 (Bankr. S.D. Fla. 2006); Bakst v. Marks (*In re* Marks), 131 B.R. 220, 221 (S.D. Fla. 1991) (noting that the physician-debtor used strategic bankruptcy to prevent collection of state court awarded medical malpractice judgment). *See generally* Bob LaMendola, *Uninsured Doctors on the Rise in South Florida*, S. FLA. SUN-SENTINEL, July 27, 2008, http://www.sun-sentinel.com/business/custom/consumer/sfl-flrxdocs0727sbjul27,0,1966484.story (describing how physicians can "go bare" and then file for bankruptcy).

15. FLA. STAT. ANN. § 458.320(1)(c) (West 2004).

16. FLA. STAT. ANN. § 458.320(1)(a) (West 2004).

17. *See* Horowitz v. Plantation Gen. Hosp. Ltd., 959 So. 2d 176, 184 (Fla. 2007) (interpreting section 458.320(5)(g) as an opt-out provision that waives the requirements of liability insurance, escrow account, or letter of credit to satisfy financial responsibility).

18. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-702, REPORT TO CONGRESSIONAL REQUESTERS: MEDICAL MALPRACTICE INSURANCE MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 40 (2003) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d03702.pdf (explaining how injured patients have difficulty collecting judgments from self-insured physicians).

19. *See, e.g., W.Va. Doctor Facing Malpractice Lawsuits Files for Bankruptcy*, INS. J., Dec. 10, 2007, http://www.insurancejournal.com/news/southeast/2007/12/10/85509.htm.

20. *See* discussion *infra* Part IV.

intersection of the Florida statute on Financial Responsibility and bankruptcy law as to permit doctors to shield themselves from personal liability entirely without being required to carry medical malpractice insurance tethered to high premiums. Part II surveys the empirical data on medical malpractice awards in Florida and nationally, as well as medical malpractice liability insurance premiums in Florida. Part III provides some background on the legislative policy of section 458.320(5)(g) and a summary of relevant bankruptcy law. Part IV traces the progression of the intertwining of bankruptcy and medical malpractice cases. Part V of this article argues for the elimination of the loophole created by section 458.320(5)(g) in the context of bankruptcy. In this section, I propose that Congress should create a section 523(a) exception to discharge that specifically targets this type of debt. I also argue that the Florida State Legislature should repeal section 458.320(5)(g) in light of the other statutory provisions by which physicians can satisfy financial responsibility. Finally, Part VI briefly concludes.

II. DO THE DOLLARS MAKE SENSE?

Many approaches to reducing health care costs have placed too much emphasis on medical malpractice liability costs as a major contributor.[21] In reality, while national health care costs amount to trillions of dollars every year,[22] medical malpractice liability payouts in 2008 constituted less than 2% of national health care expenses.[23] In Florida, approximately $298 million in medical malpractice claims were paid out in 2004,[24] which amounts to only .3% of total health care spending in the state.[25] When the cost of litigation is factored in, Florida medical

21. *See generally* CONG. BUDGET OFFICE, ECONOMIC & BUDGET ISSUE BRIEF: LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE 2 (2004), http://www.alembik.com/Library/Objective%20Study%20of%20Tort%20Reform%20by%20the%20CBO.pdf ("even large savings in premiums can have only a small direct impact on health care spending—private or governmental—because malpractice costs account for less than 2 percent of that spending"); MICHELLE M. MELLO, THE ROBERT WOOD JOHNSON FOUND., UNDERSTANDING MEDICAL MALPRACTICE INSURANCE: A PRIMER 8–10 (2006), http://www.rwjf.org/pr/synthesis/reports_and_briefs/pdf/no10_primer.pdf (presenting empirical data that there was not a correlated increase in medical malpractice claims and the rise in health care costs in the early part of the 21st century).

22. In 2008, United States spent over $2.3 trillion on heath care. Centers for Medicare and Medicaid Services, National Heath Expenditure Data, https://www.cms.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp (last visited July 25, 2010).

23. *See* CONG. BUDGET OFFICE, *supra* note 21.

24. THE KAISER FAMILY FOUND., PAYMENTS ON MEDICAL MALPRACTICE CLAIMS, 2004, http://www.statehealthfacts.org/comparemaptable.jsp?yr=14&typ=4&ind=437&cat=8&sub=102 (last visited July 25, 2010).

25. THE KAISER FAMILY FOUND., FLORIDA: HEATH EXPENDITURES BY STATE OF RESIDENCE, http://www.statehealthfacts.org/profileind.jsp?cat=5&sub=143&rgn=11 (last visited May 11, 2010). In 2004, Florida spent over $95 billion on heath care. *Id.*

malpractice expenditures totaled $700 million in 2008.[26] Using $700 million as the real costs for physicians, medical malpractice costs account for .7% of health care spending in Florida.

A. *The Reality of Medical Malpractice Claims in Florida*

The reality of the medical malpractice litigation scene in Florida is one with far fewer suits than imagined, and with many damage awards well below the $250,000 liability insurance threshold.[27] However, despite the continuing decline of medical malpractice suits, the media and physicians' interests groups continue to lobby for tort reform that further limits an injured patient's paths to recovery.[28]

From 2000–2004, Florida-based medical malpractice insurers reported payouts in 8519 cases.[29] Of these 8519 cases in a five-year span, only 5.5% resulted in payments over $1 million and 66.2% of the claims were closed out for less than $250,000.[30] The average insurance payout from 2000–2004 was $133,000.[31]

Of the 8519 cases, only 156, or less than 2%, actually made it to jury verdict with a jury-determined damage award.[32] The jury determined awards averaged $322,000—almost 2.4 times the average settlement of $131,000.[33] However, from 1990–2003, 93% of cases that resulted in payouts over $1 million were the result of settlements, with juries being responsible for only 7.5% of million-dollar awards.[34] Further, when compared to a 2001 national survey, Florida's jury-deter-

26. FLA. OFFICE OF INS. REGULATION, 2009 ANNUAL REPORT 40 (2009), http://www.floir.com/pdf/MedicaMalReport10012009.pdf [hereinafter 2009 ANNUAL REPORT] (calculating Florida insurance company medical malpractice liability expenditures at $700 million, which takes into account the cost of litigation).

27. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MEDICAL MALPRACTICE INSURANCE CLAIMS IN SEVEN STATES, 2000–2004 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/mmicss04.pdf.

28. *See, e.g.*, Robert E. White, *First Professionals Insurance Company Files for 8 Percent Base Rate Decrease—Florida Doctors Begin to Reap the Benefits of Amendment 3*, FLORIDA OBSTETRIC AND GYNECOLOGICAL SOCIETY, http://www.flobgyn.org/socioeconomics/items/2135.php (last visited May 11, 2010) (championing tort reform despite acknowledging that insurance premiums are not reflecting the decrease in litigation). *See generally* GAO REPORT, *supra* note 18, at 41; Kimberly Morrison, *Tort Reform Complicates Health Care Debate*, JACKSONVILLE BUS. J., Sept. 4, 2009, http://www.bizjournals.com/jacksonville/stories/2009/09/07/story2.html (explaining how tort reform falls on party lines).

29. U.S. DEPT. OF JUSTICE, *supra* note 27. Insurers in Florida are only required to report the number of closed cases, and not the number of total cases filed. *Id. See also* Neil Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL L. REV. 315, 332 (2005).

30. U.S. DEPT. OF JUSTICE, *supra* note 27; *see also* Vidmar et al., *supra* note 29.

31. U.S. DEPT. OF JUSTICE, *supra* note 27.

32. *Id.*

33. *Id.*

34. Vidmar et al., *supra* note 29.

mined damage awards were approximately 25% below the 2001 national average of $425,000.[35]

There was a record low number of claims paid in Florida in 2008.[36] In 2008, there were 842 paid claims in Florida, with a mean average payout of $278,620.[37] The national mean average payout that year was $326,992.[38] In total, insurance companies in Florida paid out approximately $700 million for medical malpractice claims, $500 million of which went directly to damage payouts.[39] However, decreased medical malpractice litigation may not be proof that instances of medical malpractice have declined, as a famous Institute of Medicine study showed that there are many more instances of medical malpractice than of claims filed.[40]

B. *Medical Malpractice Liability Insurance*

In comparison to actual medical malpractice payouts by insurance companies, insurance premiums for physicians and surgeons in Florida remain quite high.[41] For example, in 2009, the American College of Obstetricians and Gynecologists revealed that "[p]hysicians reported spending an average of 18.0% of their gross income on liability insurance premiums each year."[42] The good news is that Florida has seen a steady decline in premiums over the past few years.[43] The 2007 premi-

35. U.S. DEPT. OF JUSTICE, *supra* note 27.

36. *New Public Citizen Report: Medical Malpractice Payments Fall to Record Low*, FLA. JUSTICE ASS'N, July 16, 2009, http://www.floridajusticeassociation.org/inTheNews_detail.asp?ID=146.

37. THE KAISER FAMILY FOUND., FLORIDA: MEDICAL MALPRACTICE, http://www.statehealthfacts.org/profileind.jsp?cat=8&sub=102&rgn=11 (last visited May 11, 2010) [hereinafter 2008 FLORIDA CLAIMS]. These numbers refer to paid claims against allopathic physicians, allopathic interns and residents, osteopathic physicians, and osteopathic interns and residents.

38. *Id.*

39. 2009 ANNUAL REPORT, *supra* note 26, at 4. The $700 million includes claims against physicians, as well as hospitals.

40. INST. OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (Linda T. Kohn et al. eds., 1999); *see, e.g.*, Jessica Fonseca-Nader, *Florida's Comprehensive Medical Malpractice Reform Act: Is It Time For A Change?*, 8 ST. THOMAS L. REV. 551, 552 (1996). *But see* Robert J. Blendon, et al., *Views of Practicing Physicians and the Public On Medical Errors*, 347 NEW ENG. J. MED. 1933, 1944 (2002).

41. Jennifer Liberto, *Last Insurance "Fix" Hasn't Slashed Rates*, ST. PETERSBURG TIMES, Mar. 1, 2007, http://www.sptimes.com/2007/03/01/State/Last_insurance__fix__.shtml.

42. THE AMER. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, OVERVIEW OF THE 2009 ACOG SURVEY ON PROFESSIONAL LIABILITY 3 (2009), http://www.acog.org/departments/professionalLiability/2009PLSurveyNational.pdf [hereinafter 2009 ACOG NATIONAL SURVEY].

43. *Trends in 2001 Rates for Physicians' Medical Professional Liability Insurance*, 25 MED. LIAB. MONITOR (Oct. 2001); *accord* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM (2002), http://aspe.hhs.gov/daltcp/reports/litrefm.pdf.

ums decreased about 10% from 2006.[44] Also, seven new insurance companies entered the Florida medical malpractice liability insurance market in 2008.[45]

The media is quick to credit litigation and excessive jury awards for the high insurance premiums in Florida.[46] In reality, studies show that insurance premiums fluctuate with the market and there is little data to support the proposition that there is a direct correlation between an increase in the occurrence of medical malpractice claims and an increase in insurance premiums.[47] In particular, insurance companies raise their premium rates when the financial market is down.[48] Furthermore, providing insurance is a business and insurance companies invest the premiums for profit, raking in higher profits when litigation declines and premiums remain high.[49]

The bad news is that Florida insurance premiums remain high, especially for certain specialties and regions, and, in response, many physicians in Florida have opted to "go bare."[50] The Florida Department of Health Division of Medical Quality Assurance reported via e-mail in January of 2010 that out of the 41,440 physicians licensed to practice medicine in Florida, 4607 have elected to "go bare" under section

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44. 2009 ANNUAL REPORT, *supra* note 26, at 4; Amy Lynn Sorrel, *Cautious Optimism Greets Second Year of Stable, Lower Liability Premiums*, AMER. MED. NEWS, Dec. 17, 2007, http://www.ama-assn.org/amednews/2007/12/17/prl11217.htm. Premiums for internists averaged $68,867 and for surgeons and OB-GYNs averaged $275,466. *Id.* (referencing the *Medical Liability Monitor* 2007 Rate Survey).

45. 2009 ANNUAL REPORT, *supra* note 26, at 36. The increase in the number of insurers in Florida is beneficial because the increase in competition should decrease premiums for physicians. *See* GAO Report, *supra* note 18, at 28 (explaining how when there are fewer insurers, there is less price competition).

46. *See generally Medical Malpractice Policy: Background Brief*, KAISEREDU.ORG, http://www.kaiseredu.org/topics_im.asp?id=226&imID=1&parentID=59 (last visited Oct. 6, 2010) ("there is no solid research on whether the cost of malpractice insurance is the primary factor in these cases and if this is a systemic barrier to care or whether these are anecdotal situations that have generated media attention").

47. GAO REPORT, *supra* note 18, at 4–5 (noting "malpractice insurers experienced decreases in their investment income as interest rates fell on the bonds that generally make up around 80 percent of these insurers' investment portfolios. . . . a decrease in investment income meant that income from insurance premiums had to cover a larger share of insurers' costs"); *see also* Joseph B. Treaster, *Consumer Groups Unite To Track Insurance Prices*, N.Y. TIMES, July 30, 2002, at C2.

48. GAO REPORT, *supra* note 18, at 5 n.12; *see also* Treaster, *supra* note 47.

49. Treaster, *supra* note 47; FLA. DEPT. OF HEALTH, GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE 24 (2003), http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf [hereinafter TASK FORCE].

50. *See, e.g.*, 2009 ACOG NATIONAL SURVEY, *supra* note 42, at 3 (In 2009, almost a significant number of OB-GYNs in Florida reported dropping all liability insurance coverage in response to insurance affordability and availability.); *see also* LaMendola, *supra* note 14; Kachalia et al., *supra* note 3, at 420–21.

458.320(5)(g).[51] That means 11% of practicing physicians with active licenses in Florida carry no medical malpractice liability insurance. The Florida Division of Medical Quality Assurance also reported that only 860 physicians with hospital privileges opted to satisfy financial responsibility under section 458.320(1)(a) with an irrevocable letter of credit.[52] According to the Florida Medical Association, the reason why so many self-insured physicians opt to "go bare" as opposed to establishing irrevocable letters of credit or escrow accounts is the cost associated with the latter options.[53] However, the FMA assumes that "bare" physicians will be responsible by setting aside assets to pay any judgments against them.[54]

Physicians who practice obstetrics and gynecology, the group that faces the highest insurance premiums, comprise a large percentage of the "bare" physician population in Florida. The 2009 Survey on Professional Liability conducted by the American College of Obstetricians and Gynecologists (ACOG) revealed that 23% of OB-GYNs in Florida dropped all forms of medical liability insurance since 2006.[55] Currently, only 59.4% of OB-GYNs in Florida carry medical liability insurance.[56] This number is striking compared to the national data. Nationally, 95.7% of OB-GYNs reported that they carried medical malpractice liability insurance.[57] Of the remaining physicians nationally who elected not to carry liability insurance, almost half maintained an escrow account, bond, or irrevocable letter of credit.[58]

III. THE WAITING ROOM

A. *But Didn't You Read the Sign?*

The Florida legislature passed the Tort Reform and Insurance Act in 1986, which established Chapter 458 and first permitted physicians to "go bare," to further the following policies: 1) to ensure that physicians have access to affordable medical malpractice liability insurance; 2) to ensure stability for insurers; 3) to ensure that injured patients are reason-

51. E-mail *supra* note 13.

52. *Id.*

53. E-mail from Janis Indindoli, Legal & Legis. Assist., Fla. Med. Ass'n, to author (Apr. 27, 2010 15:23 EST) [on file with author].

54. "It costs nothing to simply not carry insurance and *to set aside or have sufficient assets available to pay any judgment.*" *Id.* (emphasis added).

55. 2009 ACOG NATIONAL SURVEY, *supra* note 42.

56. THE AMER. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, FLORIDA LIABILITY LOWDOWN (2009), http://www.acog.org/departments/professionalLiability/2009PLSurveyDistrictFlorida.pdf.

57. 2009 ACOG NATIONAL SURVEY, *supra* note 42.

58. *Id.*

ably compensated; and 4) to encourage pre-trial settlements.[59] Specifically, the legislature developed section 458.320(5)(g) in response to the rising costs of medical malpractice liability insurance.[60]

Section 458.320(5)(g)(1) allows physicians to "go bare," in other words, forego medical malpractice insurance while sidestepping the statute's alternative means to satisfy financial responsibility, such as proof of financial responsibility via letters of credit or escrow accounts.[61] Section 458.320(5)(g)[62] permits physicians with hospital privileges not to

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59. TASK FORCE, *supra* note 49, at 44–46.

60. *Id.* at 46; N. Miami Med. Ctr., Ltd. v. Miller, 896 So. 2d 886, 888 n.4 (Fla. Dist. Ct. App. 2005) (describing the legislative policy of section 458.320(5)(g)).

61. FLA. STAT. ANN. § 458.320(1) (West 2004).

> (1) As a condition of licensing and maintaining an active license, and prior to the issuance or renewal of an active license or reactivation of an inactive license for the practice of medicine, an applicant must by one of the following methods demonstrate to the satisfaction of the board and the department financial responsibility to pay claims and costs ancillary thereto arising out of the rendering of, or the failure to render, medical care or services:
>
> (a) Establishing and maintaining an escrow account consisting of cash or assets eligible for deposit in accordance with s. 625.52 in the per claim amounts specified in paragraph (b). The required escrow amount set forth in this paragraph may not be used for litigation costs or attorney's fees for the defense of any medical malpractice claim.
>
> (b) Obtaining and maintaining professional liability coverage in an amount not less than $100,000 per claim, with a minimum annual aggregate of not less than $300,000, from an authorized insurer . . . . The required coverage amount set forth in this paragraph may not be used for litigation costs or attorney's fees for the defense of any medical malpractice claim.
>
> (c) Obtaining and maintaining an unexpired, irrevocable letter of credit, established pursuant to chapter 675, in an amount not less than $100,000 per claim, with a minimum aggregate availability of credit of not less than $300,000. The letter of credit must be payable to the physician as beneficiary upon presentment of a final judgment indicating liability and awarding damages to be paid by the physician or upon presentment of a settlement agreement signed by all parties to such agreement when such final judgment or settlement is a result of a claim arising out of the rendering of, or the failure to render, medical care and services. The letter of credit may not be used for litigation costs or attorney's fees for the defense of any medical malpractice claim . . . .

Id.

62. FLA. STAT. ANN. § 458.320(5)(g)(1) (West 2004).

> The requirements of subsections (1), (2), and (3) do not apply to:
>
> Any person holding an active license under this chapter who agrees to meet all of the following criteria: Upon the entry of an adverse final judgment arising from a medical malpractice arbitration award, from a claim of medical malpractice either in contract or tort, or from noncompliance with the terms of a settlement agreement arising from a claim of medical malpractice either in contract or tort, the licensee shall pay the judgment creditor the lesser of the entire amount of the judgment with all accrued interest or either $100,000, if the physician is licensed pursuant to this chapter but does not maintain hospital staff privileges, or $250,000, if the physician is licensed pursuant to this chapter and maintains hospital staff privileges, within 60

carry medical malpractice insurance conditioned on their promise to pay any medical malpractice judgment against them up to $250,000 within a sixty-day period.[63] To be in compliance, physicians who opt to "go bare" must display a sign in their office indicating that they have elected not to carry medical malpractice liability insurance.[64] Physicians who elect to "go bare" are subject to disciplinary action and possible license revocation if they do not pay a judgment up to $250,000 within the mandated time frame.[65]

B. *Bankruptcy's Basics*

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"[66] In a Chapter 7 bankruptcy, the court discharges all of the debtor's remaining debts after the trustee liquidates all nonexempt assets and distributes the sum amongst

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> days after the date such judgment became final and subject to execution, unless otherwise mutually agreed to in writing by the parties. Such adverse final judgment shall include any cross-claim, counterclaim, or claim for indemnity or contribution arising from the claim of medical malpractice.

Id.

63. FLA. STAT. ANN. § 458.320(5)(g) (West 2004). This article focuses on the $250,000 cap since most physicians maintain hospital privileges.

64. FLA. STAT. ANN. § 458.320(5)(g)(5) (West 2004).

> The licensee has completed a form supplying necessary information as required by the department.
>
> A licensee who meets the requirements of this paragraph shall be required either to post notice in the form of a sign prominently displayed in the reception area and clearly noticeable by all patients or to provide a written statement to any person to whom medical services are being provided. Such sign or statement shall state: "Under Florida law, physicians are generally required to carry medical malpractice insurance or otherwise demonstrate financial responsibility to cover potential claims for medical malpractice. YOUR DOCTOR HAS DECIDED NOT TO CARRY MEDICAL MALPRACTICE INSURANCE. This is permitted under Florida law subject to certain conditions. Florida law imposes penalties against noninsured physicians who fail to satisfy adverse judgments arising from claims of medical malpractice. This notice is provided pursuant to Florida law."

Id.

65. FLA. STAT. ANN. § 458.320(5)(g)(8) (West 2004).

> Notwithstanding any other provision of this section, the department shall suspend the license of any physician against whom has been entered a final judgment, arbitration award, or other order or who has entered into a settlement agreement to pay damages arising out of a claim for medical malpractice, if all appellate remedies have been exhausted and payment up to the amounts required by this section has not been made within 30 days after the entering of such judgment, award, or order or agreement, until proof of payment is received by the department or a payment schedule has been agreed upon by the physician and the claimant and presented to the department.

Id.

66. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007).

creditors.[67] While bankruptcy should never be viewed as "an easy way out,"[68] the federal bankruptcy code tends to favor debtors' relief over creditors' ability to recover.[69]

The combination of Florida's strong debtor-protective homestead and exemption laws[70] and the ability of a Chapter 7 debtor to discharge debt under the Code, regardless of a finding of good or bad faith,[71] makes strategic bankruptcy a viable option for Florida debtors who seek to discharge large tort judgments. A creditor who wants to collect the full debt owed despite the Chapter 7 bankruptcy petition may file an adversary complaint seeking to except the debt from discharge under one of the provisions of 11 U.S.C. § 523(a).[72] However, any creditor who attempts to except a debt from discharge under 11 U.S.C. § 523(a) bears the burden of proof and "the discharge exception provisions of the Bankruptcy Code are interpreted narrowly in favor of debtors."[73]

There are four common theories by which tort creditors attempt to except debts from discharge.[74] Section 523(a)(2)(a) excepts from discharge debts that result from fraudulent representations made by the debtor, other than a statement about the debtor's own financial situation.[75] Section 523(a)(2)(b) excepts from discharge debts obtained by written statement of the debtor that is materially false about the debtor's financial condition, upon which the creditor relied, and which the debtor published with the intent to deceive the creditor.[76] Section 523(a)(4) excepts from discharge debts that arise from fraud in a fiduciary capacity.[77] Section 523(a)(6) excepts from discharge debts that result from

67. *Id.* at 367.

68. Michael D. DeFrank, Note & Comment, *An Ineffective Escape Hatch: The Textualist Mistake in* Geiger, 16 BANKR. DEV. J. 467, 473 (2000).

69. *See, e.g.*, Vans Inc. v. Rosendahl (*In re* Rosendahl), 307 B.R. 199, 214 (Bankr. D. Or. 2004); *see generally* White, *supra* note 10, at 685.

70. White, *supra* note 10, at 688–91 (explaining how some states, including Florida, are more favorable bankruptcy settings due to their exemption laws).

71. Bankruptcy courts in the Eleventh Circuit have consistently held that there is no implicit "good faith" requirement for a Chapter 7 petition. *See, e.g., In re* RIS Inv. Group, Inc., 298 B.R. 848, 852 (Bankr. S.D. Fla. 2003) (holding "so long as the debtor is willing to surrender all of its assets, regardless of whether debtor's motive was grounded in good faith, the debtor is entitled to Chapter 7 protection.").

72. 11 U.S.C. § 523(a) (2010).

73. *In re Rosendahl*, 307 B.R. at 214.

74. 11 U.S.C. §§ 523(a)(1)–(19) (2010). Sections 523(a)(1), (5), (7), (8), (9), (11)–(19) are not relevant because they refer to specific types of debts (e.g., tax, domestic support, educational) that do not have the potential to include medical malpractice tort judgments. Sections 523(a)(3) & (10) are not ordinarily relevant because they except certain debts from discharge as a result of actions by the debtor in the course of the bankruptcy proceedings (e.g., not listing the debt on the schedules).

75. 11 U.S.C. § 523(a)(2)(a) (2010).

76. 11 U.S.C. § 523(a)(2)(b) (2010).

77. 11 U.S.C. § 523(a)(4) (2010).

"willful and malicious" conduct by the debtor.[78]

In 2005, Congress shifted the advantage in the direction of creditors when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) with the addition of the Chapter 7 means test.[79] While the means test was included to prevent debtors with the ability to pay debts from filing for Chapter 7, it does not affect physician-debtors because the means test only applies to debtors with "primarily consumer debts."[80] The BAPCPA defines a consumer debt as a "debt incurred by an individual primarily for a personal, family, or household purpose."[81] Under this definition, a medical malpractice judgment would not constitute a consumer debt, meaning physician-debtors petitioning for Chapter 7 bankruptcies do not have to meet the means test.[82]

Ultimately, bankruptcy courts tend to view a physician-debtor as independent from her profession. The courts defer to the state licensing board to handle any compliance issues with financial responsibility and medical malpractice liability coverage.[83] The courts will grant a self-insured physician a discharge in bankruptcy regardless of whether he is compliance with state licensing requirements.[84] And as long as the physician-debtor receives a discharge of the medical malpractice debt in bankruptcy, the Florida Board of Medicine cannot suspend or revoke the physician's license as a disciplinary action or penalty for not paying the

78. 11 U.S.C. § 523(a)(6) (2010); *see generally* Carrillo v. Su (*In re* Su), 290 F.3d 1140, 1146 (9th Cir. 2002) (holding successful plaintiff must meet both "willful" and "malicious" prongs of section 523(a)(6)).

79. 11 U.S.C. § 707(b)(1) (2010).

80. *Id.*

81. 11 U.S.C. § 101(8) (2010).

82. Jordana Mishory, *Med Mal Loophole Despite 2005 Overhaul, Doctors Can Still Dodge Big Judgments by Filing Chapter 7*, BROWARD DAILY BUS. REV., Jan. 11, 2007, *available at* 2007 WLNR 28028703 (quoting bankruptcy experts as saying that the means test will not affect the ability of "bare" self-insured physicians to discharge medical malpractice debts). *Cf. In re* Alvarez, 57 B.R. 65, 66 (Bankr. S.D. Fla. 1985) (holding that tort liability from a car accident was not a consumer debt); *In re* White, 49 B.R. 869, 872 (Bankr. N.C. 1985) (holding that judgment from car accident was not a consumer debt because the debt was incidental to the primary purpose of driving a car for personal use); *In re* Marshalek, 158 B.R. 704, 707 (Bankr. N.D. Ohio 1993) (holding civil judgments for negligence were not consumer debts because they were not incurred voluntarily for a "personal, family or household purpose")

83. *See, e.g., In re* Farkas, 343 B.R. 336, 337–38 (Bankr. S.D. Fla. 2006); *see also* Hanft v. Church (*In re* Hanft), 315 B.R. 617 (S.D. Fla. 2002), *aff'd*, 73 F. App'x 387 (11th Cir. 2003).

84. Guerra v. Fernandez-Rocha (*In re* Fernandez-Rocha), 451 F.3d 813, 818 (11th Cir. 2006) (acknowledging that the physician-debtor was not in compliance with the financial responsibility statute, a condition of medical licensing, but granting discharge anyway). Unsurprisingly, the Florida Medical Association agrees that licensing issues are matter only for the licensing board and not for the courts. Amy Lynn Sorrel, *Florida Lawsuit Takes Swing at 3-Strikes Liability Rule*, AMER. MED. NEWS, Oct. 5, 2009, http://www.ama-assn.org/amednews/2009/10/05/prca1005.htm (quoting Jeffery M. Scott, General Counsel for the Florida Medical Association, as saying licensing issues should be determined by the medical licensing board not by juries).

judgment.[85] Thus, "bare" self-insured physicians are able to discharge medical malpractice debts in bankruptcy and remain in compliance with the Florida Financial Responsibility statute.[86]

IV. FINANCIAL IRRESPONSIBILITY: A SELF-INSURED PHYSICIAN'S ABILITY TO DISCHARGE MEDICAL MALPRACTICE JUDGMENTS IN BANKRUPTCY WHILE "GOING BARE"

The Florida State Legislature enacted section 458.320 with the distinct policy of lightening the burden of increasing insurance premiums on physicians while ensuring that injured patients receive compensation.[87] On the other hand, the policy behind section 523(a) of the Bankruptcy Code is generally to favor the debtor's opportunity for a fresh start over the creditor's right to recover debts owed.[88] These two policies, stemming from two separate governmental bodies, were each enacted without thought of the impact on the policies behind the other. When both are in play in a single case, courts seem unable to reconcile the policies into a fair result for an injured patient.

A large judgment against any tortfeasor—including physicians—is a life-altering event that can have devastating financial consequences. Whether a physician is insured or is "bare," a large medical malpractice judgment against a physician can be a catalyst for bankruptcy. Being aware of the frequency of medical malpractice suits and the financial repercussions of a medical malpractice judgment, many physicians engage in extensive asset-protection schemes to shield themselves from personal liability yet continue to live comfortable lifestyles.[89] A "bare"

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85. 11 U.S.C. § 525(a) (2010). "[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license [of] a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act . . . or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act." *Id.*

86. *See, e.g.*, Mishory, *supra* note 82 (explaining how a discharge in bankruptcy distinguishes the debt owed so that a self-insured physician is still in compliance with financial responsibility). Calls and e-mails with questions regarding the repercussions for a "bare" physician who petitions for bankruptcy were not returned by the Florida Board of Medicine or the Communication Office of the Department of Medical Quality Assurance.

87. TASK FORCE, *supra* note 49, at 44–46.

88. *See generally* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'") (quoting Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554–55 (1915)).

89. *See, e.g., Goldenberg I*, 218 F.3d at 1264; Abrahamson v. Doyan (*In re* Doyan), 204 B.R. 250, 259 (Bankr. S.D. Fla. 1996) (describing how the physician-debtor sheltered his assets to make him judgment-proof). *See generally* Personal Asset Protection for Physicians, http://www.assetprotectionlawjournal.com/2009/09/articles/physician-asset-protection/personal-asset-protection-for-physicians/ (Sept. 1, 2009) (suggesting ways for physicians to shield assets in the

physician with minimal or no nonexempt assets is no longer a viable defendant in a medical malpractice suit because there is no incentive for a plaintiff or a plaintiff's attorney to sue a defendant without any means to pay a judgment.

Sometimes insured physicians also petition for bankruptcy after a large judgment is issued against them. Bankruptcy courts across the country have consistently given medical malpractice plaintiffs relief from the automatic stay to pursue their claims against an insured physician-debtor in state court.[90] However, the bankruptcy courts condition the relief from automatic stay on the caveat that the plaintiff may only establish the physician's nominal liability in order to trigger an insurance payment, and not to recover from the physician personally.[91] The Fifth Circuit has commented that "a discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt."[92]

The Eleventh Circuit has acknowledged in the context of bankruptcy that "[t]he 'fresh-start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured."[93] However, the bankruptcy courts in the Eleventh Circuit and the Florida legislature appear not to have anticipated the effect on a meritorious plaintiff's recovery when the insurer and the insured are the same entity—in other words, self-insured physicians who seek bankruptcy protection.

In 2003, the U.S. General Accounting Office considered the implications of self-insured physicians.[94] The report expressed general disapproval of state statutory provisions for self-insurance because of lack of

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event of a medical malpractice claim); White, *supra* note 10, at 703–07 (describing strategic bankruptcy and asset protection).

90. Owaski v. Jet Fla. Sys., Inc. (*In re* Jet Fla. Sys., Inc.), 883 F.2d 970, 975 (11th Cir. 1989); Venn v. St. Paul Fire and Marine Ins. Co. (*In re* Kimbell), 99 F.3d 1058, 1061 (11th Cir. 1996) (describing in the facts as to how the bankruptcy court granted relief from automatic stay so that the plaintiff could establish liability against the physician-debtor in order to recover from the insurance company; the remaining judgment balance was classified as a "general, non-priority, unsecured claim" that could not be enforced against the bankruptcy estate). *See generally* Milton v. Sewell (*In re* Sewell), 2004 WL 3623506, at *1 (Bankr. N.D. Ga. 2005) (stating "a creditor may be permitted to establish the debtor's nominal liability for a claim solely for the purpose of collecting the debt from a third party, such as an insurer or guarantor").

91. *Venn*, 99 F.3d at 1061.

92. Houston v. Edgeworth (*In re* Edgeworth), 993 F.2d 51, 53 (5th Cir. 1993) (holding that a patient may commence a medical malpractice suit against an insured physician-debtor to establish liability in order to recover from the physician's insurer).

93. *In re Jet Fla.*, 883 F.2d at 975; *see also In re* Castle, 289 B.R. 882, 889 (Bankr. E.D. Tenn. 2003) (acknowledging it would be "fundamentally wrong" to permit a medical malpractice liability insurance company to receive a windfall because the insured physician filed for bankruptcy).

94. The main goal of the report was to explain the reasons for the high medical malpractice

oversight, increased insolvency risk for the self-insured physician, and reduced access to remedy for the claimants.[95] With the underlying bankruptcy policy rationale in mind coupled with the federal government's disapproval of self-insured statutory schemes, it is difficult to understand why the Florida legislature has continued a statutory scheme whereby the "bare" self-insured physician-tortfeasor does not have to conform to the nationally-accepted insurance system,[96] yet may escape his obligations to an injured party via bankruptcy.[97]

Under the current statutory scheme, if a self-insured physician without adequate non-exempt assets files for bankruptcy and seeks to discharge a medical malpractice debt, no matter if it is a settlement sum or jury-determined damages, the bankruptcy court will discharge the debt and leave the injured patient without remedy.[98] Further, the Florida Medical Licensing Board does not consider a discharge in bankruptcy to be a failure to pay a judgment under section 458.320, therefore making the "penalty for not paying a judgment" meaningless in the context of bankruptcy.[99] Additionally, once a physician instigates a bankruptcy proceeding, any attempt by the patient to bring the unpaid judgment to the attention of the State of Florida Department of Professional Regulation (DPR) constitutes a violation of the section 362(a) automatic stay, subjecting the patient to sanctions.[100]

A. *Empty Promises*

After the enactment of section 458.320(5)(g), it was not immediately clear how the option to "go bare" would affect a meritorious patient-plaintiff's ability to recover damages. If a successful patient-plaintiff was concerned about the self-insured physician-defendant's

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insurance premiums throughout the country and in Florida, in particular. GAO REPORT, *supra* note 18, at 39–41.

95. *Id.*

96. MELLO, *supra* note 21, at 1.

97. It is interesting to note that in the late 1990s, various bills were introduced in Congress to attempt to prevent physicians who owed money to Medicare and Medicaid from filing for bankruptcy and discharging the monies owed to the government. SAMUEL R. MAIZEL, AMER. HEALTH LAWYERS ASS'N, Seminar Materials, HEALTHCARE FRAUD AND ABUSE: COMPLIANCE AND ENFORCEMENT (1997), *available at* AHLA-PAPERS P10309733.

98. *See, e.g.*, Guerra v. Fernandez-Rocha (*In re* Fernandez-Rocha), 451 F.3d 813 (11th Cir. 2006); Hanft v. Church (*In re* Hanft), 315 B.R. 617 (S.D. Fla. 2002), *aff'd*, 73 F. App'x 387 (11th Cir. 2003); *In re* Farkas, 343 B.R. 336 (Bankr. S.D. Fla. 2006).

99. 11 U.S.C. § 525(a) (2010) (prohibiting state licensing boards from suspending or revoking licenses for failure to pay a debt discharged in bankruptcy); *see also* LaMendola, *supra* note 14.

100. 11 U.S.C. § 362(a) (2006); *In re* Grau, 172 B.R. 686, 689 (Bankr. S.D. Fla. 1994) (holding indicates that reporting the bankruptcy to the licensing board post-petition would violate automatic stay as coercing the physician-debtor to either pay the judgment-debt or face discipline from the licensing board).

willingness and ability to satisfy the judgment, an astute patient-plaintiff could file an inquiry with the DPR to ensure that the physician would pay the judgment.[101] A "bare" self-insured physician has only 60 days to pay a medical malpractice judgment before being subject to disciplinary action by the Florida Board of Medicine.[102] However, if the physician petitioned for bankruptcy before the patient launched an inquiry with the DPR, then the automatic stay provision of the bankruptcy code[103] would prevent the patient inquiry as a willful violation of the automatic stay "designed to place the debtor in a position of either paying a pre-petition claim . . . or losing his medical license for failure to pay [the patient's] judgment."[104]

As more physicians who had opted to "go bare" began to petition for bankruptcy, an interesting plaintiff strategy developed. Patient-plaintiffs who had been successful in state court medical malpractice suits filed in the bankruptcy proceedings to except the medical malpractice judgments from discharge under 11 U.S.C. § 523(a)(2).[105] They alleged that self-insured physician-debtors committed fraud by promising to pay a judgment up to $250,000 under section 458.320(5)(g), and then filing for bankruptcy once an actual judgment was entered against them.[106] The U.S. Bankruptcy Court for the Southern District of Florida rejected this argument.[107]

In March of 1992, the parents of infant Tyler Caccamo alleged that Dr. Pouliot, an OB-GYN who had elected to "go bare," negligently caused a skull fracture, resulting in neurological damage to Tyler during his delivery.[108] At the time of Tyler's delivery, Dr. Pouliot was in compliance with section 458.320(5)(g)(5) and Ms. Caccamo (the injured child's mother) acknowledged that she had read the sign in Dr. Pouliot's office that stated he did not carry medical malpractice liability insurance and that he would satisfy a judgment up to $250,000 or face disciplinary action by the licensing board.[109] In November of 1992, Dr. Pouliot petitioned for Chapter 7 bankruptcy after the incident but before a lawsuit

101. *See, e.g., In re Grau*, 172 B.R. at 686. *In re Grau* addressed a situation where the patient-plaintiff filed an inquiry with the DPR thirty days after order of a $350,000 judgment against the physician. The "bare" physician-debtor then petitioned for bankruptcy and attempted to sanction the patient-plaintiff for following up with the DPR inquiry post-petition. *Id.*

102. FLA. STAT. ANN. § 458.320(5)(g) (West 2004).

103. 11 U.S.C. § 362(a) (2006).

104. *Cf. In re Grau*, 172 B.R. at 689–690 (denying physician-debtor's motion to enforce automatic stay because the DPR inquiry was initiated *pre*-petition).

105. *See, e.g.,* Caccamo v. Pouliot (*In re* Pouliot), 196 B.R. 641 (Bankr. S.D. Fla. 1996).

106. *Id.*

107. *Id.*

108. *Id.* at 644.

109. *Id.* at 645.

was filed.[110] Then, three years later in 1995, the Caccamos entered into a consent judgment with Dr. Pouliot for $10 million[111] and subsequently filed an advisory complaint in Dr. Pouliot's ongoing bankruptcy proceeding to except the consent judgment from discharge[112] under 11 U.S.C. §§ 523(a)(2)(a),[113] 523(a)(2)(b),[114] 523(a)(4),[115] and 523(a)(6).[116]

It would seem to be fair that a physician who saved money because he did not pay liability insurance premiums and posted a sign for patients to read that said he would pay a judgment up to $250,000 should have to pay that sum upon execution of a consent judgment forty times as large. However, on the debtor's motion for summary judgment, the U.S. Bankruptcy Court for the Southern District of Florida ruled that the sign in Dr. Pouliot's office was insufficient alone to establish fraud on behalf of the debtor to except the medical malpractice debt from discharge under section 523(a)(2)(a) because the debtor's statement on the sign only referred to his own financial condition.[117] Further, the bankruptcy court held that the sign was not a materially false statement under section 523(a)(2)(b) because it provided that the physician-debtor had the *option* to either pay a judgment up to $250,000 *or* be subjected to disciplinary action; therefore the physician-debtor never actually promised to pay the judgment.[118] This decision effectively turned the sign requirement of section 458.320(5)(g)(5) into a formality that lacks enforceability once a bankruptcy court grants discharge.[119] Although the *In re Pouliot* Court read the sign as giving the physician the option to pay the judgment or face disciplinary action, the state cannot discipline

110. *Id.*

111. *Id.* at 644. The Caccamos fought Dr. Pouliot's attempt to discharge the judgment since the consent judgment for a pre-petition act was entered into post-petition. *Id.* at 652–53.

112. *Id.* at 645.

113. Section 523(a)(2)(a) excepts from discharge debts that result from fraudulent representations made by the debtor, other than a statement about the debtor's own financial situation. 11 U.S.C. § 523(a)(2)(a) (2010).

114. Section 523(a)(2)(b) excepts from discharge debts obtained by written statement of the debtor that is materially false, about the debtor's financial condition, upon which the creditor relied, and which the debtor published with the intent to deceive the creditor. 11 U.S.C. § 523(a)(2)(b) (2007).

115. Section 523(a)(4) excepts from discharge debts that arise from fraud in a fiduciary capacity. 11 U.S.C. § 523(a)(4) (2010).

116. Section 523(a)(6) excepts from discharge debts that result from "willful and malicious" conduct by the debtor. 11 U.S.C. § 523(a)(6) (2010).

117. *In re Pouliot*, 196 B.R. at 646.

118. *Id.* at 648–49.

119. *Cf.* Abrahamson v. Doyan (*In re* Doyan), 204 B.R. 250, 257–58 (Bankr. S.D. Fla. 1996) (holding "bare" physician-debtor's displayed sign stating that he did not carry medical malpractice liability insurance because it was not affordable as opposed to including the boilerplate language as provided by section 458.320(5)(g)(5) was an intentional effort to defraud patients and thus made his medical malpractice judgment non-dischargeable under section 523(a)(2)(a)).

physicians for non-payment when they discharge their judgments in bankruptcy.[120]

The bankruptcy court also rejected the patient's claim that the financial responsibility statute created a fiduciary relationship between the physician and patient under section 523(a)(4).[121] A few years later, in 2002, the United States District Court for the Southern District of Florida held that "Florida's Financial Responsibility Act [provisions requiring insurance, an escrow account, or letter of credit] create neither a fiduciary duty nor a technical trust" within the province of section 523(a)(4) and cited *In re Pouliot* to support this proposition.[122] Specifically, the District Court reasoned that patients injured subsequent to the creation of an escrow account or irrevocable letter of credit cannot be considered "identifiable beneficiaries."[123]

Finally, the plaintiffs alleged two additional theories for why the medical malpractice judgment should be excepted from discharge under section 523(a)(6).[124] The first theory was that Dr. Pouliot willfully and maliciously violated the Financial Responsibility statute by electing to "go bare" and then sheltering assets and filing for bankruptcy post judgment.[125] The bankruptcy court rejected this argument, reasoning that "even if Dr. Pouliot transferred his assets with the intent of putting them beyond the reach of Plaintiffs, such acts do not constitute wilful [sic] and malicious injury to Plaintiffs or their property."[126] The bankruptcy court undermined the requirements of section 458.320(5)(g) when it rejected the argument that the medical malpractice debt was the result of Dr. Pouliot's willful and malicious misrepresentations that he would pay $10 million in damages in accordance with the consent judgment (or a judgment up to $250,000 in accordance with the sign in his office), knowing he would attempt in his bankruptcy to discharge his responsi-

120. 11 U.S.C. § 525(a) (2010). "[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license [of] a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act . . . or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act." *Id.*

121. *In re Pouliot*, 196 B.R. at 651.

122. Hanft v. Church (*In re* Hanft), 315 B.R. 617, 623 (S.D. Fla. 2002), *aff'd*, 73 F. App'x 387 (11th Cir. 2003); *see also* Guerra v. Ramon (*In re* Ramon), No. 05-20073-CIV, 2005 WL 2465606, at *2–3 (S.D. Fla. Sept. 27, 2005) (holding escrow account under section 458.320(1) does not create fiduciary duty or technical trust to satisfy section 523(a)(4)), *aff'd*, 189 F. App'x 910 (11th Cir. 2006).

123. *Id.* at 623–24.

124. *In re Pouliot*, 196 B.R. at 651–53.

125. *Id.* at 652–53.

126. *Id.* at 653. *But see* Abrahamson v. Doyan (*In re* Doyan), 204 B.R. 250, 259 (Bankr. S.D. Fla. 1996) (finding that the self-insured physician's acts of sheltering assets constituted "conduct [that] was willfully and maliciously undertaken with the express purpose of making himself judgment-proof").

bility to pay any sum.[127]

The plaintiffs' final theory, under section 523(a)(6), was that Dr. Pouliot's medical treatment was grossly negligent and constituted willful and malicious injury because the physician's acts were substantially certain to result in injury to the patient.[128] The court denied summary judgment on whether the physician's injury-causing acts were willful and malicious so as to except the judgment from discharge.[129] Specifically, the court found "that a genuine issue of fact remains as to whether Dr. Pouliot's alleged malpractice constituted a 'wilful' [sic] injury to Tyler when he committed certain intentional acts the purpose which may have been substantially certain to cause Tyler's injuries."[130]

The bankruptcy court judgment left the Caccamos and subsequent patient-plaintiffs in adversarial proceedings against physician-debtors with one last bit of hope when it reaffirmed the Eleventh Circuit's "substantially certain to cause injury" standard as an applicable test for whether the physician intended to injure the patient.[131] Unfortunately, a unanimous Supreme Court in *Geiger* effectively eliminated the option of using section 523(a)(6) to except a medical malpractice judgment from discharge, by reasoning that the negligence-based tort of medical malpractice can never be willful and malicious.[132]

B. Geiger *and Section 523(a)(6)*

Up until the pivotal 1998 Supreme Court decision of *Kawaauhua v.*

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127. *In re Pouliot*, 196 B.R. at 652–53.

128. *Id.*

129. *Id.* at 651–53.

130. *Id.* at 653.

131. *Id.* at 652; Hope v. Walker (*In re* Walker), 48 F.3d 1161, 1163 (11th Cir. 1995) (holding established "substantially certain" standard under section 523(a)(6) in the Eleventh Circuit); *see also* Abrahamson v. Doyan (*In re* Doyan), 204 B.R. 250, 258–59 (Bankr. S.D. Fla. 1996) (holding the physician-debtor's medical malpractice debt was non-dischargeable under section 523(a)(6)).

132. Kawaauhua v. Geiger (*In re* Geiger) (*Geiger III*), 523 U.S. 57 (1998) (holding an act that results in injury absent the intent to cause injury cannot be "willful and malicious" under section 523(a)(6) without addressing whether the subjective "substantially certain to result in injury" standard may also apply). Although most circuits have reaffirmed the "substantially certain to result in injury" standard post-*Geiger*, the courts nevertheless continue to reject section 523(a)(6) arguments to except medical malpractice debts from discharge. Ditto v. McCurdy (*In re* McCurdy), 510 F.3d 1070, 1077–78 (9th Cir. 2007) (holding "[t]he failure to obtain informed consent, without evidence of intent to injure, does not give rise to a willful and malicious injury within the meaning of § 523(a)(6)"); Kowalski v. Romano (*In re* Romano), No. 01-1822, 2003 WL 731723 (6th Cir. Mar. 3 2003) (holding this particular judgment could not be excepted from discharge under section 523(a)(6) because it sounded in "negligence and medical malpractice" yet preserved "substantially certain to cause injury" standard). *Contra* Wagner v. Schulte (*In re* Schulte), 385 B.R. 181, 189–91 (Bankr. S.D. Ohio 2008) (holding medical malpractice was excepted from discharge under section 523(a)(6) where prior state court decision found that the physician willfully and maliciously injured the patient).

Geiger,[133] a number of bankruptcy courts around the country, and in Florida specifically, used 11 U.S.C. § 523(a)(6) to except medical malpractice judgments from discharge.[134] The bankruptcy courts reasoned that if a physician made too many consecutive errors[135] or the physician's care was suffuciently far below the acceptable standard,[136] then the physician intentionally acted in a way that injured the patient and thus satisfied the "willful and malicious" criterion. The *Geiger* Court held that an intentional act that resulted in injury was not sufficient—instead, the physician must have acted in a way to intentionally injure the patient—the injury, not just the act, must have been intentional.[137]

In 1983, Dr. Paul Geiger, a self-insured physician in Hawaii, treated Margaret Kawaauhau after she dropped a box on her foot.[138] Hawaii law, like that in Florida, permitted physicians to "go bare".[139] Although Dr. Geiger acknowledged that Mrs. Kawaauhua was exhibiting symptoms of a bacterial infection, he left town on a business trip and subsequently ceased prophylactic antibiotics that had been prescribed by his colleagues in his absence.[140] As a result, Ms. Kawaauhau's right leg had to be amputated below the knee.[141] A jury awarded Ms. Kawaauhau and her husband $355,000 in damages.[142] Shortly thereafter, Dr. Geiger filed for bankruptcy in Missouri.[143]

The Kawaauhaus attempted to except the medical malpractice judgment from discharge as willful and malicious injury under 11 U.S.C.

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133. 523 U.S. at 57.

134. *See, e.g.*, Corsi v. Berman (*In re* Berman), 154 B.R. 991, 1003–04 (Bankr. S.D. Fla. 1993) (excepting medical malpractice debt from discharge under section 523(a)(6) where physician made intentional misrepresentations about his qualifications and the procedure); Abrahamson v. Doyan (*In re* Doyan), 204 B.R. 250, 258–59 (Bankr. S.D. Fla. 1996) (excepting medical malpractice debt from discharge under section 523(a)(6) where Board of Medicine found the physician's care to be below standard of care and bankruptcy court determined that the physician's intentional acts were substantially certain to injure the patient); Kawaauhau v. Geiger (*In re* Geiger) (*Geiger I*), 172 B.R. 916 (Bankr. E.D. Mo. 1994) (excepting medical malpractice debt from discharge under section 523(a)(6) where court found the physician's repeated errors constituted substandard care), *rev'd*, 93 F.3d 443 (8th Cir. 1996), *aff'd*, 523 U.S. 57 (1998); *see also* Perkins v. Scharffe (*In re* Scharffe), 817 F.2d 392 (6th Cir.) (excepting medical malpractice debt from discharge under section 523(a)(6) where physician used unsterile needle), *cert. denied*, 484 U.S. 853 (1987), *overruled by* Markowitz v. Campbell (*In re* Markowitz), 190 F.3d 455 (6th Cir. 1999).

135. *See, e.g., Geiger I*, 172 B.R. at 916.

136. *See, e.g., In re Doyan*, 204 B.R. at 258–59.

137. *Geiger III*, 523 U.S. at 61.

138. *Geiger I*, 172 B.R. at 917.

139. *Geiger III*, 523 U.S. at 59 n.2.

140. *Id.* at 59.

141. *Id.*

142. *Id.*

143. *Id.* at 60. Dr. Geiger moved to Missouri after the medical malpractice incident in Hawaii.

§ 523(a)(6).[144] The bankruptcy court in the Eastern District of Missouri ruled that the medical malpractice debt should be excepted from discharge.[145] The bankruptcy court found that "the repeated errors Dr. Geiger made in treating Mrs. Kawaauhau evidence . . . 'disregard of acceptable medical practice'" and that both the expert testimony and Dr. Geiger's own testimony in state court demonstrated that "Dr. Geiger's egregious errors of judgement [sic] led to the worsening of Mrs. Kawaauhau's condition and to the eventual amputation of part of her leg."[146]

However, on appeal, both the Eighth Circuit Court of Appeals and the Supreme Court disagreed with the bankruptcy court's interpretation of section 523(a)(6).[147] The Supreme Court of the United States adopted the Eighth Circuit's definition of "willful" as limited to conduct that the actor intends to cause injury and not merely intentional conduct that results in injury.[148]

The Kawaauhaus also argued that "as a policy matter, malpractice judgments should be excepted from discharge, at least when the debtor acted recklessly or carried no malpractice insurance."[149] The Court rejected the policy argument because Congress did not address this specific scenario.[150] Ultimately, the Court held that a medical malpractice debt based on grossly negligent or reckless behavior should not be excepted from discharge under section 523(a)(6).[151] Only debts that arise from intentional injury trigger the exception to discharge.[152] As a result, the bankruptcy court awarded Dr. Geiger a "fresh start" and the Kawaauhaus never recovered any part of the judgment awarded for the injury that resulted from Dr. Geiger's negligent care of Ms. Kawaauhau.[153]

After the *Geiger* decision, bankruptcy courts had to determine

144. *Id.*

145. *Geiger I*, 172 B.R. at 923.

146. *Id.*

147. Kawaauhau v. Geiger (*In re* Geiger) (*Geiger II*), 113 F.3d 848, 854 (8th Cir. 1997), *aff'd*, 523 U.S. 57 (1998).

148. *Geiger III*, 523 U.S. at 61. This limited definition of "willful and malicious" has been used to foreclose recovery of various other tort judgments. *See, e.g.*, McGee v. Marcum (*In re* Marcum), 184 F. App'x 464, 466–67 (6th Cir. 2006) (denying section 523(a)(6) exception to discharge for wrongful death judgment where court did not consider coal mine owner's failure to comply with federal coal mine safety regulations as evidence of intent to injure).

149. *Geiger III*, 523 U.S. at 64.

150. *Id.*

151. *Id.* at 58, 62, 64. The Supreme Court did not elaborate a definition of "malice" in this case.

152. *Id.*

153. Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 AM. BANKR. L.J. 449, 479–80 (1999).

whether to apply exclusively the Supreme Court sanctioned standard that requires an intent to injure or whether a subjective "substantially certain to cause injury" standard as propounded by the Restatement (Second) of Torts[154] was also applicable.[155] The *Geiger* Court did not discuss the "substantially certain to result in injury" standard at all.[156] Post-*Geiger*, the Eleventh Circuit has reaffirmed the "substantially certain to result in injury" standard outside the context of medical malpractice debts.[157] However, it has yet to address the applicability of the "substantially certain" standard to medical malpractice debts in particular. Further, bankruptcy courts around the country continue to reject section 523(a)(6) arguments to except medical malpractice debts from discharge.[158]

C. *Keeping the (Bad) Faith*

After the Supreme Court in *Geiger* declined to address the policy argument of whether medical malpractice judgments should always be excepted from discharge where the physician is "bare,"[159] the U.S. Bankruptcy Court for the Southern District of Florida set forth an opin-

154. RESTATEMENT (SECOND) OF TORTS § 8A (1964).

155. *See, e.g.*, Carrillo v. Su (*In re* Su), 290 F.3d 1140, 1146 (9th Cir. 2002).

156. *Geiger III*, 523 U.S. at 61 (holding an act that results in injury absent the intent to cause injury cannot be "willful and malicious" under section 523(a)(6) without addressing whether the subjective "substantially certain to result in injury" standard may also apply); *see also In re Su*, 290 F.3d at 1143 (discussing whether *Geiger* foreclosed "substantially certain" standard). The courts consider the debtor's intent to be the crux of whether "willful and malicious" is satisfied. Therefore, whether the debtor subjectively realized her actions would be substantially certain to cause injury becomes the alternative inquiry. *Geiger* leaves open the question of whether a debtor-physician should be liable for a debt where the physician's motive was not necessarily to injure the patient, yet the physician nevertheless acted in a way whereby she knew her actions were likely to injure the patient.

157. Thomas v. Loveless (*In re* Thomas), No. 07-14357, 2008 WL 1765264, at *2 (11th Cir. Apr. 18, 2008) (holding cites the "substantially certain" standard from Hope v. Walker (*In re* Walker), 48 F.3d 1161 (11th Cir. 1995)). The bankruptcy courts, however, disagree as to which standard applies. *Compare* New Buffalo Sav. Bank v. McClung (*In re* McClung), 335 B.R. 466, 474 (Bankr. M.D. Fla. 2005) (holding willful requires the intent to injure and rejecting substantially certain standard) *with* Hernandez v. Pulido (*In re* Pulido), No. 08-23367-CIV, 2009 WL 1442010, at *5 (S.D. Fla. May 22, 2009) (holding rejects interpretation of *Geiger* that only debts stemming from conduct intended to injure may be excepted from discharge as too limited).

158. Ditto v. McCurdy (*In re* McCurdy), 510 F.3d 1070, 1077–78 (9th Cir. 2007) (holding "[t]he failure to obtain informed consent, without evidence of intent to injure, does not give rise to a willful and malicious injury within the meaning of § 523(a)(6)"); Kowalski v. Romano (*In re* Romano), 59 F. App'x 709, 715 (6th Cir. 2003) (holding this particular judgment could not be excepted from discharge under section 523(a)(6) because it sounded in "negligence and medical malpractice" yet preserved "substantially certain to cause injury" standard). *Contra* Wagner v. Schulte (*In re* Schulte), 385 B.R. 181, 189–91 (Bankr. S.D. Ohio 2008) (holding medical malpractice was excepted from discharge under section 523(a)(6) where prior state court decision found that the physician willfully and maliciously injured the patient).

159. 523 U.S. 57 (1998).

ion that outlined its view on how the bankruptcy courts should handle "bad faith" allegations against "bare" physician-debtors.[160] *In re Farkas*[161] provides a prime example of a physician who used section 458.320(5)(g) to avoid paying medical malpractice liability insurance premiums, petitioned for strategic bankruptcy to avoid personal liability for potential medical malpractice judgments, and then faced no real consequence because the Florida Board of Medicine did not discipline him for failing to satisfy financial responsibility.[162]

Before Dr. Farkas, the physician-debtor, petitioned for bankruptcy, two former patients had sued him for medical malpractice.[163] The first patient alleged that Dr. Farkas negligently inserted metal rods into his spine that eventually migrated to the patient's brain and caused spinal instability.[164] The second patient alleged that Dr. Farkas negligently injured her back when a drill fell out of his hand during surgery.[165] Before either case went to trial, Dr. Farkas petitioned for Chapter 7 bankruptcy.[166]

Both former patients offered proofs of claim in the bankruptcy proceeding for the amounts of $9 million and $800,000 respectively.[167] They also filed motions to dismiss the bankruptcy proceeding for bad faith under 11 U.S.C. § 707 alleging that the sole purpose of the physician-debtor's bankruptcy was to interfere with the medical malpractice claims.[168] The bankruptcy court rejected this argument and held that there cannot be a finding of "bad faith" where the debtor has volunteered to give up his non-exempt assets.[169] The opinion neglected to mention that the physician-debtor had $2.6 million in exempt assets and a $1.6 million oceanfront home, but only $16,200 of assets available for creditors.[170]

The patients also argued that the physician-debtor's bankruptcy proceeding interfered with the licensing board's regulation of physicians because the physician was not complying with the Financial Responsibility statute by his chosen method—a promise to pay—if he discharged

160. *In re* Farkas, 343 B.R. 336 (Bankr. S.D. Fla. 2006).

161. *Id.*

162. Mishory, *supra* note 82 (reporting that the Florida Board of Health did not discipline Dr. Farkas).

163. *In re* Farkas, 343 B.R. at 337.

164. *Id.* A jury trial was set for March 2005. *Id.*

165. *Id.*

166. *Id.* Dr. Farkas originally petitioned for Chapter 11 bankruptcy in 2004 and converted the case to Chapter 7 in 2005. *Id.*

167. *In re Farkas*, 343 B.R. at 337.

168. *Id.* at 338.

169. *Id.* at 339–40.

170. LaMendola, *supra* note 14.

the judgments in bankruptcy.[171] Finally, the patients contended that if the bankruptcy court discharged the claims before judgment then those two judgments would not qualify as strikes against the physician under Florida's recent "Three Strikes" Amendment.[172]

The *In re Farkas* Court adopted the physician-debtor's argument that "alleged violations of both the Florida Medical Financial Responsibility Law and Florida's 'Three Strikes' Amendment should be directed to the Florida Board of Medicine and not the Bankruptcy Court."[173] The court went on to state: "While the Court is sympathetic to the [patients'] desire to have the merits of their case adjudicated without this bankruptcy case 'derailing' their efforts, this Court finds that neither Dr. Farkas, nor the [bankruptcy] provisions contained in Title 11, interfere with the State of Florida's protection of public health."[174] After the bankruptcy court discharged the patients' claims, a local newspaper reported that neither patient ever received any remedy for their injuries from the physician.[175]

D. *The Florida Supreme Court Relieves Hospitals of Liability*

Most recently, the Florida Supreme Court used section 458.320(5)(g) to limit injured patients' ability to recover by removing any incentive for hospitals to require physicians with privileges to carry medical malpractice insurance independent from the Financial Responsi-

171. *In re Farkas*, 343 B.R. at 337–38.

172. *Id.* at 338; FLA. CONST. art. X, § 26. Amendment 8, more commonly known as the "Three Strikes" amendment, has proved to be blatantly ineffective due the implementing legislation's definition of a strike. Sorrel, *supra* note 84.

173. *In re Farkas*, 343 B.R. at 338. Not surprisingly, Jeffery M. Scott, general counsel for the Florida Medical Association, agrees that licensing issues should be determined by the medical licensing board not by the courts. Sorrel, *supra* note 84.

174. *In re Farkas*, 343 B.R. at 338.

175. *Id.* at 336; LaMendola, *supra* note 14.

bility statute.[176] In *Horowitz v. Plantation General Hospital Ltd.*,[177] the Florida Supreme Court overruled existing Florida precedent[178] and rejected a claim that hospitals should be strictly liable for the acts of "bare" physicians to whom they had granted privileges.[179] In *Horowitz*, the successful patient-plaintiff had won an $859,200.73 judgment against a physician.[180] When the "bare" self-insured physician-defendant fled the country, the plaintiff attempted to collect $250,000 of the judgment from the hospital at which the physician had committed the malpractice.[181] The patient alleged that the hospital should be liable under section 458.320(2) for failing to confirm that the physician was in compliance with the financial responsibility statute.[182]

Prior to this case, district courts of appeals throughout Florida had held hospitals liable if a "bare" physician with privileges did not pay a medical malpractice judgment.[183] The courts reasoned that the intent of section 458.320(2)[184] "was to make sure that a person injured by the medical malpractice of a doctor with staff privileges would be able to

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176. Hospitals require physicians to sign a form stating they are in compliance with financial responsibility. *See, e.g.*, Certificate of Financial Responsibility, Baptist Health (on file with author).

> I, _____ hereby attest that to the best of my knowledge, I am in full compliance with the Florida Tort Reform and Insurance Act of 1986, meet the financial responsibility requirements of Florida Law through one of the following arrangements listed below. (check one)
>
> . . . .
>
> ☐ I have agreed to be personally responsible for the payment of any settlement for final judgment up to $250,000 including all court fees and accrued interest for which the physician is responsible.

Id.

However, most do not independently require the physicians to carry medical malpractice insurance as a condition of privilege. E-mail from Baptist Hospital of Miami, to author (Apr. 29, 2010, 14:09 EST) (on file with author). About half of the physicians with privileges at Baptist Hospital do not carry medical malpractice liability insurance. *Id.*

177. 959 So. 2d 176 (Fla. 2007).

178. Mercy Hosp., Inc. v. Baumgardner, 870 So. 2d 130 (Fla. Dist. Ct. App. 2003) (holding hospitals strictly liable when "bare" physician with privileges did not pay judgment), *cert. denied*, 879 So. 2d 622 (Fla. 2004), *invalidated by* Horowitz v. Plantation General Hosp. Ltd., 959 So. 2d 176 (Fla. 2007).

179. *Horowitz*, 959 So. 2d at 176.

180. *Id.* at 178.

181. *Id.*

182. *Id.*

183. Robert v. Paschall, 767 So. 2d 1227 (Fla. Dist. Ct. App. 2000); Baker v. Tenet Healthsystem Hosps., Inc., 780 So. 2d 170 (Fla. Dist. Ct. App. 2001); *Mercy Hosp., Inc.*, 870 So. 2d at 130.

184. Section 458.320(2) requires physicians with hospital privileges to carry medical malpractice insurance, establish an escrow account, or attain an irrevocable letter of credits. Section 458.320(5)(g) allows physicians to opt of out of the requirements of section 458.320(2) if they promise to pay a judgment up to $250,000.

ultimately recover at least $250,000 of compensable damages."[185] But in *Horowitz*, the Florida Supreme Court adopted the rationale presented by the Florida Hospital Association's AMICUS CURIAE BRIEF that "given . . . the 'opt-out' provision in section 458.320(5)(g), it would be inconsistent to read section 458.320(2) as requiring a hospital to ensure or guarantee payment of the first $250,000 of a malpractice judgment against a physician" when the physician herself is not required to guarantee payment.[186]

While the holding in *Horowitz* was met with praise by hospitals and physicians throughout the state, trial lawyers expressed concern about the legal repercussions of this additional loophole in physician oversight.[187] By this time, the bankruptcy courts had already foreclosed the various attempts to except medical malpractice judgments from discharge under section 523(a)[188] and to dismiss "bare" physicians' bankruptcy petitions for bad faith.[189] The *Horowitz* opinion eliminated the last legal option for patients to recover for injuries caused by "bare" physician determined not to pay any judgment.

V. CLOSING THE LOOPHOLE

Section 458.320(5)(g) provides physicians in Florida with fairly lenient conditions to satisfy financial responsibility as a requirement of medical licensing. Just having to post a sign in the waiting room and promising to pay a judgment up to $250,000,[190] a sum less than the national average medical malpractice award,[191] seems to be a pretty generous exchange for being allowed to forego the extremely high liability insurance premiums for some specialties in Florida. From a pure numbers standpoint, an OB-GYN who elects to "go bare" for just one year has already saved enough money from not having to pay the average annual liability insurance premiums of $275,000 to pay the $250,000 judgment cap if a medical malpractice incident should occur. But the physicians who opt to "go bare" tend to take the money saved from not having to pay the medical malpractice liability premiums and make it

185. *Mercy Hosp., Inc.*, 870 So. 2d at 131 (quoting *Robert*, 767 So. 2d at 1228).

186. *Horowitz*, 959 So. 2d at 184 (explaining that a hospital should not have to guarantee the future financial state of a physician). The Florida Hospital Association claims it is too hard for hospitals to police physicians as to whether they are complying with state licensing requirements. Amy Lynn Sorrel, *Hospital in Florida Not Liable for Uninsured Doctor*, AMER. MED. NEWS, June 18, 2007, *available at* http://www.ama-assn.org/amednews/2007/06/18/prsa0618.htm.

187. Sorrel, *supra* note 186.

188. *See* discussion *supra* Parts IV.A–C.

189. *See* discussion *supra* Part IV.C.

190. FLA. STAT. ANN. § 458.320(5)(g) (West 2004).

191. The national average medical malpractice payout in 2008 was $326,992. 2008 FLORIDA CLAIMS, *supra* note 37.

judgment-proof instead of setting it aside for future medical malpractice judgments.[192] This amounts to a windfall for "bare" physicians at the expense of an available remedy for an injured patient. I set forth below proposed statutory changes in federal bankruptcy law and then in Florida law.

A. *A New Exception*

The express policy of bankruptcy is to alleviate an honest and unfortunate debtor from excess debt in exchange for the debtor's relinquishment of his assets to his creditors.[193] Currently, the bankruptcy courts insist that all Chapter 7 debtors, except those with mainly consumer debts, are equally entitled to a "fresh start."[194] The bankruptcy courts impose no requirement of good faith, even where the physician-debtor is found to be petitioning for bankruptcy solely to avoid paying a medical malpractice judgment.[195] Additionally, a medical malpractice judgment debt had been held not to fit any of the current exceptions from discharge under 11 U.S.C. § 523(a).[196]

While a "fresh start" for an unfortunate debtor is the overarching policy of bankruptcy relief,[197] it should not be the only policy, as recognized in the existing exceptions. The bankruptcy code takes into account that certain debts should always be paid.[198] Congress has already taken steps to protect credit card companies by imposing a means test on Chapter 7 debtors with mostly consumer debts.[199] Congress should similarly enact legislation to protect injured patients by eliminating the type of loophole created by section 458.320(5)(g) in the bankruptcy arena.

As with the existing exceptions to discharge recognized by section 523(a), Congress should create an additional exception that specifically references medical malpractice judgments owed by "bare" self-insured physicians. This new exception would acknowledge the policy argument presented in *Geiger* that the Court was unwilling to address because

192. *See, e.g., Goldenberg II*, 253 F.3d at 1272; LaMendola, *supra* note 14.

193. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (bankruptcy "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.").

194. *In re* Farkas, 343 B.R. 336, 338 (Bankr. S.D. Fla. 2006).

195. *Id.*

196. *See* discussion *supra* Parts IV.A–B.

197. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007).

198. *See, e.g.*, 11 U.S.C. § 523(a)(5) (2010) (excepting domestic support debts from discharge).

199. 11 U.S.C. § 707(b)(1) (2010).

Congress had not yet referenced the scenario in the Bankruptcy Code.[200] A new section 523(a) exception to discharge for medical malpractice judgment debts would be analogous to the section 523(a)(9) exception to discharge for tort judgments resulting from driving while intoxicated.[201] The new section could read:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—up to $250,000 or the state statutorily prescribed maximum liability, whichever is greater, for death or personal injury caused by a self-insured physician's medical malpractice where the physician per state statute lawfully opted out of carrying medical malpractice liability insurance on the condition of payment of a judgment.

B. *Repeal Section 458.320(5)(g)*

The Florida Legislature enacted the Financial Responsibility statute to increase the availability of medical services in light of increasing costs of medical malpractice liability insurance premiums.[202] Amongst the various attempts to decrease health care spending via tort reform,[203] the 1986 Act's decision to permit physicians in Florida to "go bare" may be the most nonsensical. In 2005, bills were introduced in both the Florida Senate and House that attempted to increase the minimum medical malpractice liability coverage, to expand the other self-insurance options of escrow accounts and letters of credit, and to eliminate the opt-out provision in section 458.320(5)(g).[204] Unfortunately, both bills died in committee. The Florida Legislature should repeal section 458.320(5)(g), particularly in light of how the legislation has intersected with bankruptcy law to produce unexpectedly harsh and unjust results.[205]

Along with the option to "go bare," the Florida Financial Responsi-

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200. *Geiger III*, 523 U.S. at 64 (rejecting patient's argument that as a policy matter all medical malpractice debts of uninsured physicians should be excepted from discharge).

201. 11 U.S.C. § 523(a)(9) (2010). This section excepts from discharge debts "for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." *Id.*

202. N. Miami Med. Ctr., Ltd. v. Miller, 896 So. 2d 886, 888 n.4 (Fla. Dist. Ct. App. 2005) (describing the legislative policy of section 458.320(5)(g)).

203. Mary Coombs, *How Not To Do Medical Malpractice Reform: A Florida Case Study*, 18 HEALTH MATRIX: J.L. & MED. 373 (2008).

204. H.R. 665C1, 2005 Leg., Reg. Sess. (Fla. 2005), *available at* http://www.flsenate.gov/data/session/2005/House/bills/billtext/pdf/h066501c1.pdf; S. 972, 2005 Leg., Reg. Sess. (Fla. 2005), *available at* http://www.flsenate.gov/data/session/2005/Senate/bills/billtext/pdf/s0972.pdf.

205. Another major repercussion of section 458.320(5)(g) is that injured patients lack the incentive to bring a case against a physician who is "bare." Kachalia, *supra* note 3, at 420; Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH & LEE L. REV. 603, 621 (2006); GAO REPORT, *supra* note 18, at 41–42 (explaining how damage caps reduce incentive for attorneys to take on medical malpractice cases).

bility statute provides for two other ways for physicians to fulfill financial responsibility that guarantee remedy for an injured patient without requiring physicians to pay the high liability insurance premiums. Florida physicians may satisfy financial responsibility by establishing an irrevocable letter of credit or maintaining an escrow account specifically allocated for medical malpractice judgments.[206] The only cost associated with establishing an escrow account would be the loss of any investment income. These options provide the same benefit to physicians of eliminating expensive medical malpractice liability insurance premiums. Yet these options do not compromise an injured patient's ability to recover. As long as these comparably affordable self-insurance options exist, section 458.320(5)(g) is unnecessary to ensure that physicians have affordable insurance options to satisfy financial responsibility.

VI. CONCLUSION

A series of cases over the past few decades has severely limited an injured patient's ability to recover a judgment award or settlement sum from a "bare" self-insured physician who complies with Florida's Financial Responsibility statute section 458.320(5)(g). The availability of bankruptcy protection—including broad exemption guidelines and homestead rules in Florida—and the bankruptcy court's hands-off approach to the Financial Responsibility statute are serious roadblocks for patient recovery. Congress or the Florida Legislature or both should address the loophole created by section 458.320(5)(g) in the context of bankruptcy and amend current legislation so that "bare" physician-debtors can no longer discharge medical malpractice debts.

206. FLA. STAT. ANN. § 458.320(2)(b) (West 2004).