# HOW AFFIDAVIT OF MERIT REQUIREMENTS ARE RUINING ARIZONA'S MEDICAL LIABILITY SYSTEM

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## I. INTRODUCTION

The purpose of the civil justice system is to compensate those who were wrongfully injured and deter unreasonably risky behavior.[1] More specifically, tort claims for medical malpractice aim to compensate patients who are injured due to negligent care and improve health care by deterring doctors from engaging in negligent care in the future.[2] Despite these noble goals, the medical malpractice legal regime has come under attack in recent years. Opponents of the system claim medical malpractice cases are to blame for skyrocketing health care costs and a shortage of physicians.[3] In response to these accusations, many state legislatures—including Arizona's—have passed regulations to reform medical liability. Proponents of these regulations hope that limiting medical liability will lead to decreased insurance premiums, which will ultimately lead to lower health care costs and more available physicians.

Arizona's law requiring an affidavit of merit is an example of such reform. In Arizona, plaintiffs filing medical malpractice cases that will require expert testimony at trial must submit a sworn statement by a qualified expert witness claiming the plaintiff has a legitimate claim within sixty days of filing the lawsuit.[4] At its best, this statute prevents frivolous lawsuits and decreases medical malpractice insurance premiums because the

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1. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Off., to Senator Orrin G. Hatch (Oct. 9, 2009), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/106xx/doc10641/10-09-tort_ reform.pdf.

2. Arizona State Senate Research Staff, Issue Paper: Medical Malpractice, at 1 (2010), *available at* http://www.azleg.gov/briefs/Senate/MEDICAL%20MALPRACTICE%20_UPDATE3.pdf.

3. *See id.*

4. *Id.*; ARIZ. REV. STAT. ANN. § 12-2603 (2012).

insurance companies will not have to waste money defending claims without merit. At its worst, the statute blocks legitimate lawsuits from being litigated, resulting in wrongfully injured patients not receiving compensation and a decrease in the deterrent effect of the medical liability system.[5]

This Article weighs the costs and benefits of affidavit of merit requirements and concludes that the requirement prevents plaintiffs from recovering from unjust injuries by blocking access to the court system and limits the deterrent effect of civil lawsuits. Part II analyzes the goals of these requirements and how well the requirements achieve their goals. Part III explores the consequences of these statutes and their impact on the health care system. Part IV concludes that Arizona's affidavit of merit requirement does not achieve its stated purpose of lowering health care costs and improving health care. It then proposes Arizona adopt a reviewing committee modeled after the Virgin Islands medical malpractice liability system.

## II. AFFIDAVIT OF MERIT REQUIREMENTS IN ARIZONA

Arizona's affidavit of merit requirements are laid out in two statutes. The first, section 12-2603 of the Arizona Revised Statutes, lays out the basic rules of what must be filed and when. The second, section 12-2604 of the Arizona Revised Statutes, details who qualifies as an expert for purposes of providing an affidavit of merit.[6] According to section 12-2603, when bringing a claim against a health care professional, a claimant must first say whether expert testimony will be necessary to prove the health care professional's standard of care or liability for the claim.[7] Expert testimony is almost always required for medical malpractice cases.[8] When expert testimony is necessary, the claimant must submit a preliminary expert opinion within sixty days of filing the lawsuit.[9] The opinion must include the (1) expert's qualifications to express opinion, (2) factual basis for each claim, (3) licensed professional's acts, (4) errors or omissions that the

5. *See* Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 541 (1997).

6. § 12-2603; ARIZ. REV. STAT. ANN. § 12-2604 (2012).

7. § 12-2603.

8. B. Sonny Bal, *The Expert Witness in Medical Malpractice Litigation*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Dec. 4, 2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628518/.

9. Arizona State Senate Research Staff, *supra* note 2, at 2.

expert considers to be a violation of the applicable standard of care resulting in liability, and (5) the manner in which these errors caused the injury.[10] If a claimant fails to comply with this statute, the court may dismiss the claim without prejudice, but the court shall allow any party reasonable time to cure this problem if necessary.[11]

Section 12-2604 of the Arizona Revised Statutes lays out the qualifications an expert witness must possess in order for the affidavit to be valid.[12] These requirements aim to ensure that the expert and the defendant have similar training and education.[13] According to the requirements, an expert must be a licensed health professional in Arizona or another state.[14] If the defendant claims to be a specialist, the expert witness must have been a specialist in the same area at the time of the occurrence that is the basis for the cause of action. If the defendant claims to be board certified, the expert must have been board certified at the time of the occurrence.[15] During the year before the occurrence the expert must have devoted a majority of his or her professional time to the clinical practice or instruction at an accredited health professional school in the same health profession as the defendant and if the defendant claims to be a specialist, in the same specialty.[16] For example, if the defendant specialized in a field, the expert witness must have specialized in the same field at the time of the incident and if the defendant is board certified, the expert must also be board certified.[17]

Arizona's legislature passed these statutes requiring affidavit of merits in 2004 due to what doctors called a "crisis situation regarding the increasing expense of liability premiums."[18] According to these claims, many physicians were being forced to leave the field, especially those practicing in high-risk specialties, because they were unable to afford their increasing insurance premiums.[19] This act aims to "reduce the filing of frivolous lawsuits against health care professionals and to reduce nonparty at fault designations by health care professionals."[20] The reasoning behind these

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10. § 12-2603.
11. *Id.*
12. ARIZ. REV. STAT. ANN. § 12-2604.
13. *Governale v. Lieberman*, 250 P.3d 220, 226 (Ariz. Ct. App. 2011), *review denied* (May 24, 2011).
14. § 12-2604(A).
15. § 12-2604(A)(1).
16. § 12-2604(A)(2).
17. § 12-2604(A)(1).
18. Arizona State Senate Research Staff, *supra* note 2, at 2.
19. *Id.*
20. Arizona House of Representatives, *House of Representatives Bill Summary of SB 1113*, ARIZONA STATE LEGISLATURE,

statutes is that by preventing frivolous lawsuits, insurers will have fewer claims to defend, and if insurers have fewer claims to defend, their costs will decrease.[21] Ideally, this would lead to lower medical malpractice insurance premiums for physicians, which would decrease the cost of health care because physicians could charge less and would increase access to health care by allowing more physicians to continue their practice.[22]

Critics of the affidavit of merit requirement argue that these statutes have not obtained these desired results.[23] Affidavit of merit requirements have been attacked as being unfair, unnecessary, and ineffective. In addition, plaintiffs frequently challenge the constitutionality of affidavit of merit requirements by alleging the requirements violate anti-abrogation, equal protection, due process, special law, separation of powers, and right to a jury trial requirements.[24] Thus far, Arizona courts have found these claims to be insufficient and upheld the affidavit of merit requirements in sections 12-2603 and 12-2604 of the Arizona Revised Statutes. [25]

### *A. Judicial History of Challenges to Affidavit of Merit Requirements*

Arizona courts have upheld the affidavit of merit requirement as constitutional despite arguments that in some cases the statutes block access to the court, violate the equal protection clause, and are an unconstitutional violation of separation of powers.[26]

#### 1. Blocks Access to the Courts and Deprives Parties of Cause of Action

Those opposing affidavit of merit requirements argue that the extra requirements are too burdensome and deprive plaintiffs of a cause of

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http://www.azleg.state.az.us/legtext/46leg/2r/summary/h.sb1113_03-10-04_aspassedthehouse.doc.htm (last visited Jan. 21, 2014).

21. U.S. GEN. ACCOUNTING OFFICE, GAO-03-702, MEDICAL MALPRACTICE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 4 (2003), *available at* http://www.gao.gov/new.items/d03702.pdf.

22. *Id.*

23. Kay M. Cooper, *Medical Malpractice: The Prognosis*, ARIZ. ATT'Y, Feb. 2007, at 17–18 (2007) (citing David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024–33 (2006)).

24. Baker v. Univ. Physicians Healthcare, 269 P.3d 1211, 1217 (Ariz. Ct. App. 2012), *vacated in part*, 296 P.3d 42 (Ariz. 2013).

25. *Id.*; Governale v. Lieberman, 250 P.3d 220 (Ariz. Ct. App. 2011), *review denied* (May 24, 2011).

26. *Baker*, 269 P.3d at 1217; *Governale*, 250 P.3d at 227.

action.[27] In *Governale v. Lieberman*, the court determined that Arizona's statute dictating who is qualified to provide an affidavit of merit neither abolishes the right to bring a medical malpractice claim nor deprives the claimant of the ability to bring the action.[28] The court looked at whether the statute leaves plaintiffs with a reasonable probability of obtaining legal redress and determined that it does because even though the statute limits the potential expert witness a plaintiff may use, it does not create "insurmountable hurdles to recovery for large and foreseeable classes of plaintiffs."[29]

*Baker v. University Physicians Healthcare*, a recent Arizona case, was brought by the father of a 17-year-old who died after being hospitalized for blood clots.[30] The trial court granted summary judgment against the plaintiff for failure to provide an affidavit of merit from a qualified expert.[31] The plaintiff argued that statute of merit requirements violated the anti-abrogation clause of the Arizona Constitution by abolishing his cause of action.[32] The Court of Appeals determined that the statute does not "completely abolish the cause of action" as long as the plaintiff is allowed reasonable time to cure his affidavit and remanded the case.[33] The plaintiff appealed and the Supreme Court of Arizona upheld the statute as constitutional.[34] The Court remanded the case to the trial court to give the plaintiff an opportunity to produce an affidavit of merit from a qualified expert.[35]

In contrast with Arizona, other jurisdictions have struck down similar affidavit of merit requirements as unconstitutional special laws that block access to the courts.[36] In Oklahoma, the *Zeier v. Zimmerman, Inc*. court ruled affidavit of merit requirements created an unconstitutional monetary barrier to the court after a patient's medical malpractice action was dismissed due to failure to attach an affidavit of merit.[37] The decision explained that affidavits of merit cost between $500 and $5,000 and

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27. ARIZ. CONST. art. XVIII, § 6; *Baker*, 269 P.3d at 1216–17; *Governale*, 250 P.3d at 225.
28. *Governale*, 250 P.3d at 225.
29. *Id.* at 224–25.
30. Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 45 (Ariz. 2013).
31. Baker v. Univ. Physicians Healthcare, 269 P.3d 1211, 1213 (Ariz. Ct. App. 2012).
32. *Id.* at 1216.
33. *Id.* at 1216–17.
34. Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 52 (Ariz. 2013).
35. *Id.* at 53.
36. Zeier v. Zimmer, Inc., 152 P.3d 861, 869 (Okla. 2006).
37. *Id*. at 867.

therefore create a financial barrier to the courts for plaintiffs with medical malpractice claims who cannot afford the added costs.[38] Despite critics and other jurisdictions stating that affidavit of merit requirements block access to the courts, Arizona has consistently found the requirements to be constitutional because even though they give plaintiffs an extra hurdle, they do not completely block access to the courts.

### 2. Violates Equal Protection Requirements

Affidavit of merit requirements have also survived accusations of violating equal protection and due process requirements.[39] After determining that the statute does not block the right to bring forward a medical malpractice action, Arizona courts have ruled that it is valid as long as there is a legitimate interest served and that the statute rationally relates to achieving that interest.[40]

The plaintiff in *Governale* argued that the affidavit of merit requirement violated the equal protection clause and was forbidden special law.[41] Nevertheless, the court decided that the legislation was not special law and did not violate the equal protection clause because it did not infringe on a fundamental right, the state had a legitimate interest in avoiding a shortage of qualified doctors due to increasing insurance premiums, and affidavit of merit requirements rationally relate to achieving that interest.[42] The decision stated that a special law is one that "confers rights and privileges on particular members of a class or to an arbitrarily-drawn class that is not rationally related to a legitimate governmental purpose."[43] Having determined that the statute is related to a legitimate purpose, the court rejected the special law argument.[44]

In Oklahoma, the *Zeier v. Zimmerman, Inc* court came to a different conclusion and held that Oklahoma's affidavit of merit requirement was an unconstitutional special law because it divided plaintiffs alleging negligence into two classes by requiring different evidence from those with general

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38. *Id*. at 873.

39. Governale v. Lieberman, 250 P.3d 220, 225 (Ariz. Ct. App. 2011), *review denied* (May 24, 2011).

40. *Id.*

41. Special law is, "[a] law that pertains to and affects a particular case, person, place, or thing, as opposed to the general public." BLACK'S LAW DICTIONARY (9th ed. 2009).

42. *Governale*, 250 P.3d at 226.

43. *Id*.

44. *Id*. at 227.

negligence claims and those with medical negligence claims.[45] The court concluded that affidavit of merit requirements prevented legitimate claims from being litigated and did not reduce malpractice insurance rates because despite paying out fewer claims, insurance companies did not lower their premiums.[46]

### 3. Violation of Separation of Powers

Arizona courts have also considered whether the affidavit of merit requirements in sections 12-2603 and 12-2604 of the Arizona Revised Statutes violate the separation of powers doctrine and infringe on the rulemaking authority of the Arizona Supreme Court.[47] In *Jilly v. Rayes*, a medical malpractice case brought forward after a 28-year-old died following cardiac surgery, the plaintiff argued that section 12-2603 gave the defense an unfair advantage by requiring preliminary disclosure of the plaintiff's expert witness.[48] The trial court ruled in favor of the plaintiff and found that the statute conflicts with Arizona Rules of Civil Procedure 16(c), which calls for simultaneous disclosure of expert witnesses thirty to ninety days after the pretrial conference.[49] The Court of Appeals reversed, upheld the statute as constitutional, and justified the discrepancy by explaining that the expert providing an affidavit of merit does not have to be the expert that testifies at trial.[50]

The Arizona Court of Appeals in *Seisinger v. Siebel* held that the affidavit of merit requirement violates the separation of powers doctrine by enforcing different standards than the Arizona Rules of Evidence require for who may serve as a witness.[51] Rule 702 permits expert testimony when the "witness is qualified as an expert by knowledge, skill, experience, training or education" and the degree of qualification determines how much weight a jury may place on the expert's testimony but does not determine whether the testimony is admissible.[52] In contrast, Arizona Revised Statutes section 12-2604 lays out tight guidelines for who may serve as an expert and failure

45. Zeier v. Zimmer, Inc., 152 P.3d 861, 867–869 (Okla. 2006).
46. *Id.* at 870.
47. Seisinger v. Siebel, 203 P.3d 483, 485 (Ariz. 2009); Jilly v. Rayes, 209 P.3d 176, 177 (Ariz. Ct. App. 2009).
48. *Jilly*, 209 P.3d at 178–79.
49. *Id.* at 178.
50. *Id.* 178–79.
51. *Seisinger*, 203 P.3d at 486.
52. *Id.* at 488.

to meet the requirements makes that expert's testimony inadmissible.[53] On appeal, the Arizona Supreme Court overturned the decision. The Court acknowledged the conflict between the laws, but determined that requirement of expert testimony is a substantive component and therefore the statute, not judicial rules, should control.[54]

Arkansas provides an example of a jurisdiction that struck down its affidavit of merit requirement as unconstitutional because it was a procedural rule that directly conflicted with the state's Rules of Civil Procedure.[55] In *Summerville v. Thrower* the Supreme Court of Arkansas held that the statute requiring an affidavit of merit to be filed within thirty days of filing a complaint contradicted the Rules of Civil Procedure because it added "a legislative encumbrance to commencing a cause of action that is not found in Rule 3 of our civil rules."[56] Contrarily, even though affidavit of merit requirements provide different rules than those found in the Arizona Rules of Civil Procedure and Arizona Rules of Evidence, the Arizona Supreme Court has upheld the affidavit of merit statutes.

## III. ANALYZING ARIZONA'S AFFIDAVIT OF MERIT REQUIREMENTS

In analyzing whether Arizona should continue requiring affidavit of merits in medical malpractice actions, this Article first considers the purpose that the requirements serve. Then it examines the efficacy of the requirements. Third, it looks at the consequences the statute inflicts. Finally, the Aricle proposes an alternative system that likely will be more successful in achieving the goals of the current system and is less likely to create harmful consequences.

### *A. Purpose of the Affidavit of Merit Requirements*

As mentioned earlier, the goal of affidavit of merit requirements is to prevent frivolous lawsuits.[57] By requiring an expert to review the case and verify that it is meritorious, plaintiffs presumably will not be able to burden insurance companies by filing frivolous claims, which can be costly for insurance companies to defend.[58] Ideally, insurance companies would use

53. ARIZ. REV. STAT. ANN. § 12-2604 (2012).
54. *Seisinger*, 203 P.3d at 493.
55. Summerville v. Thrower, 253 S.W.3d 415, 421 (Ark. 2007).
56. *Id.*
57. U.S. GEN. ACCOUNTING OFFICE, *supra* note 21, at 4.
58. *Id.*

the savings provided by the decrease in cases they face to offer lower premiums to doctors purchasing medical malpractice insurance.[59] This would then allow doctors to charge less, lowering the cost of health care. Also, more doctors could afford the cost of insurance premiums in high-risk specialties, which may increase the quality of health care.[60] Lastly, monitoring medical malpractice cases to ensure that frivolous cases are barred decreases doctors' fears of being sued, which in turn would increase their likelihood to engage in high-risk specialties and decrease their likelihood to practice defensive medicine.[61]

Critics of the affidavit of merit requirements argue that serving this interest is not necessary for three reasons. First, critics claim frivolous lawsuits are rare. For example, one study found that only three percent of claims have no verifiable injuries. Therefore, even if affidavit of merit requirements perfectly executed their purpose, it would still only result in a decrease of three percent of medical malpractice claims.[62]

Second, critics point to studies that show that medical malpractice actions, both frivolous and meritorious, have little effect on cost and access of health care.[63] Even if frivolous lawsuits did constitute a large portion of medical malpractice claims, the argument that medical malpractice reform can drastically lower health care costs is less persuasive when one considers that the entire medical liability system only accounts for 2.4 percent of health care spending.[64]

Third, the claim that lower insurance premiums will increase access to health care by making it easier for doctors to pay their insurance premiums is not substantiated by evidence.[65] Because frivolous medical malpractice claims are rare and medical malpractice actions have little affect on health care cost and access, the statute likely does not serve a legitimate interest because it is unnecessary.[66]

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59. *Id.*

60. *Id.*

61. *Id.*

62. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2026 (2006).

63. Richard D. Topper Jr., *Up In Smoke: Myth of the Litigation Explosion*, COLUMBUS B. LAW. Q., Winter 2008 16, 16; Cooper, *supra* note 23, at 17–18; U.S. GEN. ACCOUNTING OFFICE, *supra* note 21, at 4.

64. Michelle M. Mello, Amitabh Chandra, Atul A. Gawande & David M. Studdert, *National Costs of the Medical Liability System*, 29 HEALTH AFF. 1569, 1569 (2010).

65. *See generally* U.S. GEN. ACCOUNTING OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE (2003), *available at* http://www.gao.gov/new.items/d03836.pdf.

66. Mello et al., *supra* note 64, at 1569.

### *B. Effectiveness of Affidavit of Merit Requirements*

Despite the minimal impact medical malpractice claims seem to have on the health care system, if frivolous claims do pose a problem, it is important to analyze whether the affidavit of merit requirement achieves its goals of decreasing the number of frivolous lawsuits; lowering health care costs through lower premium rates and eliminating defensive medicine; and increasing health care quality and access.

#### 1. Decreasing Frivolous Lawsuits

Lawsuits have decreased since the statute was passed. The number of medical malpractice cases filed in Maricopa County dropped from 446 in 2005 to 323 in 2006.[67] However, there is no conclusive evidence of whether those lawsuits were frivolous.[68] Moreover, there are other plausible explanations for this drop: doctors could be committing fewer errors, legitimate claims may be being blocked due to plaintiffs being unable to afford another step in the litigation process or attorneys might be less likely to take on cases due to the hassle of finding an expert witness.[69]

Even though the number of claims is decreasing, the affidavit of merit requirement adds an extra step to the claims that are litigated. This means there are more requirements that can be disputed and draws out the process, making it more expensive.[70] Confusion over when an expert is needed and who qualifies as an expert has led to several drawn out appeals and cases being remanded.[71] For example, in *Simon v. Maricopa Medical Center*, the trial court dismissed the case because the plaintiff failed to state whether an expert was necessary.[72] On appeal, the court decided that dismissal was not appropriate and remanded the case, drawing out the litigation process.[73] In *Baker v. University Physicians Healthcare*, the trial court granted the defendant doctor summary judgment when a father brought a medical

67. Cooper, *supra* note 23, at 17–18.

68. Catherine T. Struve, *Improving the Medical Malpractice Litigation Process*, 23 HEALTH AFF. 33, 37 (2004).

69. *Id.*

70. Jacob J. Beausay, *A Rogue Rule?: An Exposé on the Unresolved Issues and Needless Litigation Created by Ohio's Affidavit of Merit Rule*, 37 CAP. U. L. REV. 1155, 1159 (2009).

71. Baker v. Univ. Physicians Healthcare, 269 P.3d 1211, 1213 (Ariz. Ct. App. 2012), *vacated in part*, 296 P.3d 42 (Ariz. 2013); Governale v. Lieberman, 250 P.3d 220, 223 (Ariz. Ct. App. 2011), *review denied* (May 24, 2011); Simon v. Maricopa Med. Ctr., 234 P.3d 623, 625–27 (Ariz. Ct. App. 2010), *review denied* (Jan. 4, 2011).

72. *Simon*, 234 P.3d 625–26.

73. *Id.* at 632.

malpractice action after his 17-year-old daughter died when she was hospitalized for blood clots.[74] The court found that the plaintiff's expert witness was not qualified because he did not specialize in the same area as the defendant.[75] The Court of Appeals upheld this decision and the plaintiff appealed.[76] The Supreme Court of Arizona then remanded the case to the trial court so that the plaintiff could find a qualified expert witness.[77]

### 2. Lowering Medical Malpractice Insurance Premiums

If the cost of defending medical liability claims were the reason insurance companies charge high premiums, medical malpractice reform would make sense; but the evidence shows that insurance companies' premiums are not affected by the costs of medical malpractice claims.[78] From 2000 to 2004 the fifteen largest medical malpractice insurers in the United States doubled the amount they collected in premiums, but claim payouts remained essentially flat.[79] In fact, medical malpractice insurers have accumulated record amounts of surplus during that time period.[80] The leading insurer collected approximately three times the amount in premiums as it paid out in claims.[81]

There are multiple explanations for increased insurance premiums besides losses on malpractice claims. First, investment income makes up about eighty percent of insurer's investment portfolios, and investment income has dramatically fallen.[82] Second, reinsurance costs are rising.[83] Third, in the past insurance companies had to compete to provide low rates, so insurance companies offered premiums that were lower than what they would need to cover the amount they paid out in claims.[84] They were able to do this because investment returns covered their losses. However, after investment returns decreased, some companies became insolvent and were

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74. *Baker*, 269 P.3d at 1213.
75. *Id.* at 1214–15.
76. *Id.* at 1217.
77. Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 52–53 (Ariz. 2013).
78. Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry* (July 2005), http://www.shevlinsmith.com/library/Failing_Claims_and_Rising_Premiums_in_the_Medical_Malpractice_Insurance_Industry.pdf.
79. *Id.*
80. *Id.*
81. *Id.*
82. U.S. GEN. ACCOUNTING OFFICE, *supra* note 65.
83. *Id.*
84. *Id.*

driven out of the market.[85] Because of market consolidation, the remaining companies can charge high premiums because there is less competition to provide lower rates due to the other companies being driven out of the market.[86]

### 3. Preventing Defensive Medicine

Supporters of medical malpractice reform also argue that the risk of being sued causes doctors to practice defensive medicine.[87] Defensive medicine refers to the practice of doctors trying to reduce their chances of being sued by performing extra tests and procedures that are unlikely to be necessary.[88] These supporters argue that the cost of defensive medicine dramatically increases the cost of health care.[89] But, defensive medicine has not been shown to be as prevalent as claimed; therefore, even if reducing chances of getting sued reduces a doctor's likelihood to practice defensive medicine, it is unlikely to have a major effect on health care costs.[90] Overall, the argument that tort reform will lower health care costs by preventing defensive medicine is weakened because the prevalence and cost of defensive medicine has not been reliably measured.[91]

### 4. Impact on Health Care Quality

Even if medical malpractice reform lowers the cost of health care, it is important to look at how the reform will affect the quality of care. Supporters of medical malpractice reform argue that by reducing doctor's risk of being sued, more doctors will be willing to practice in high-risk specialties and therefore, more people will have access to quality health care.[92] However, noneconomic damage caps are the only medical

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85. *Id.*

86. *Id.*

87. SIDNEY SHAPIRO & THOMAS MCGARITY, THE TRUTH ABOUT TORTS: DEFENSIVE MEDICINE AND THE UNSUPPORTED CASE FOR MEDICAL MALPRACTICE 'REFORM' 3 (Center for Progressive Reform Feb. 2012).

88. *Id.*

89. *Id.*

90. U.S. Office of Technology Assessment, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE, Pub. no. OTA H-602 (1994).

91. U.S. GEN. ACCOUNTING OFFICE, *supra* note 21.

92. Jonathan Klick & Thomas Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, 36 J. LEGAL STUD. S121, S122 (2007) (this study compared medical malpractice reform efforts in various jurisdictions and found that the only correlation between

malpractice reform measure found to have an impact on access to health care and doctor's willingness to practice high-risk specialties.[93] This suggests that affidavit of merit requirements are ineffective for promoting health care quality and access.

Contrarily, studies have found that tort reform measures may increase the nation's overall mortality rate. According to a 2009 study, a ten percent reduction in medical malpractice liability costs would increase the nation's mortality rate by .2 percent.[94] This increase in deaths seems unreasonable when balanced against the minimal effect medical malpractice actions have on overall health care spending. By reducing medical malpractice insurance premiums ten percent, health care expenditures would only be decreased by .2 percent.[95]

### *C. Consequences of Affidavit of Merit Requirements*

Even if affidavit of merit requirements were proven to be successful in preventing frivolous claims, lowering the cost of health care, and increasing access to health care, it would be essential to consider the consequences the statute may present, such as blocking access to the courts for those with legitimate claims.

#### 1. Excess Costs of Affidavit of Merit Requirements

The extra costs of affidavit of merit requirements do create a monetary barrier to the court for some plaintiffs. In *Westmoreland v. Vaidya*,[96] a West Virginia case, a plaintiff lost his case when he was unable to afford the additional fee his potential expert demanded in exchange for his signature on an affidavit of merit. That case was blocked by the affidavit of merit requirement, not because the case was frivolous, but instead because the plaintiff could not afford the fee.[97] As mentioned earlier, the Oklahoma court in *Zeier v. Zimmer, Inc.*, found that affidavit of merits create a

number of doctors willing to practice in high-risk specialties and medical malpractice reforms occurred in jurisdictions that had implemented caps on non-economic damages).

93. *Id.*
94. Elmendorf, *supra* note 1.
95. *Id.*
96. 664 S.E.2d 90, 98 (W. Va. 2008).
97. *Id.*

monetary block to the court by requiring plaintiffs to pay an extra $500 to $5,000 to obtain an affidavit of merit.[98]

This is a common occurrence whether a plaintiff is bringing a case with representation or *pro se*.[99] Plaintiffs who are represented by an attorney usually agree on a contingency fee, meaning the attorney's fee is taken out of the award.[100] In these cases the attorney often fronts the costs of obtaining an expert witness—but with the additional cost of obtaining an expert witness to file an affidavit before trial, along with the cost of finding an expert to testify at trial—plaintiff's lawyers are less likely to take on cases that will only produce a small award because the cost of the affidavit of merit will severely decrease the amount they can collect.[101] Many plaintiffs proceeding *pro se* have difficulty affording an expert witness to testify at trial, and adding the extra cost of finding an expert to submit an affidavit of merit before trial makes it even more difficult for *pro se* plaintiffs to afford the costs of bringing a medical malpractice case.[102]

### 2. Unavailable Information

Obtaining an affidavit of merit before completing discovery can be impossible. Affidavit of merit requirements often require the plaintiff to find an expert willing to attest to the merits of their case without fully knowing the facts, and many experts are uncomfortable doing so.[103] Before discovery the plaintiff will lack access to the defendant, other witnesses, and medical records.[104] Medical professionals will be more hesitant to give an opinion when they are unable to see the full records.[105]

While the plaintiffs are disadvantaged by being required to submit an affidavit before they have had the opportunity to complete discovery, the defendant has the advantage of knowing what the plaintiff will be arguing.[106] Also, if the plaintiff uses the expert who provided the affidavit of merit as an expert witness at trial, the defense may argue that the expert was biased because he had prematurely made up his mind before discovery was

98. 152 P.3d 861, 869 (Okla. 2006).
99. Struve, *supra* note 68 at 35.
100. *Id.*
101. *Id.*
102. *Id.*
103. Telephone Interview with Larry Cohen, Medical Malpractice Plaintiff's Attorney (Oct. 4, 2012).
104. Struve, *supra* note 68.
105. *Id.*
106. *Id.*

completed.[107] *Jilly v. Rayes* held that because plaintiffs do not have to use the expert providing an affidavit of merit as their expert witness during trial, the argument that affidavit of merits give defendants an unfair advantage is weakened.[108] However, that finding ignores the inequity that would result from requiring a plaintiff to hire two expert witnesses instead of one.

3. Finding an Expert who Qualifies

Even if plaintiffs are able to find experts willing to testify, they then have the challenge of making sure the experts are qualified. Section 12-2604 of the Arizona Revised Statutes lays out stringent requirements for potential experts.[109] Not only does the expert need to specialize in the same area as the defendant, but if the defendant has a subspecialty the expert must also match that.[110] There are twenty-four medical specialty boards under the American Board of Medical Specialties and each specialty has subspecialties, so there are abundant possible combinations that an expert must match in order to qualify.[111] Further confusion arises when a doctor has multiple specialties. In Martha Rabaut's article, *Where's (Dr.) Waldo? Finding the Medical Malpractice Expert Witness who Has Earned His Stripes*, she explains that if a physician is board certified in both internal medicine and emergency medicine he is qualified under either specialty to treat pneumonia, so if malpractice occurs, it is unclear what specialty the expert must practice.[112] As well as matching specialties, if a defendant is board certified, the plaintiff must also find an expert who is board certified.

According to *Awsienko v. Cohen*,[113] even if the expert's criticism does not deal with the defendant's specialty, the expert must still match specialties. *Awsienko* involved a medical malpractice and wrongful death action against doctors who treated a man who suffered cardiac arrest and died.[114] One defendant was board-certified in cardiovascular disease and interventional cardiology and the expert was board-certified in internal medicine and nephrology.[115] Even though the action was not based on

107. *Id.*
108. Jilly v. Rayes, 209 P.3d 176, 179 (Ariz. Ct. App. 2009).
109. ARIZ. REV. STAT. ANN. § 12-2604 (2012).
110. Baker v. Univ. Physicians Healthcare, 269 P.3d 1211 (Ariz. Ct. App. 2012).
111. Martha Rabaut, *Where's (Dr.) Waldo? Finding the Medical Malpractice Expert Witness Who Has Earned His Stripes*, 9 MICH. ST. U. J. MED. & L. 289, 303–04 (2005).
112. *Id.* at 298.
113. 257 P.3d 175, 176 (Ariz. Ct. App. 2011), *review denied* (Nov. 29, 2011).
114. *Id.*
115. *Id.*

defendant's cardiac treatment, the expert witness was deemed to be unqualified because he wasn't a board-certified cardiologist.[116] In *Baker v. University Physicians Healthcare*, the appellate court ruled that an expert witness who did not specialize in pediatrics could not testify against a pediatrician even though the patient was a seventeen-year-old and did not need to be treated by a pediatrician.[117] This reasoning implies that even if a forty-year-old patient is treated by a pediatrician, an expert witness must also specialize in pediatrics to be qualified, even though that specialty would not have any use for the treatment of the 40-year-old patient.[118] On review, the Supreme Court of Arizona held that a medical malpractice expert witness is only required to share a specialty with the defendant doctor if the care or treatment at issue was within that specialty.[119] However, the Court upheld the lower court's decision that the non-pediatric hematologist was not a qualified expert witness when the defendant doctor was a pediatric hematologist.[120] The Court found that although the seventeen-year-old patient could have been treated by either a pediatric or non-pediatric hematologist, the expert witness had to match the defendant's specialist of pediatric hematologist.[121]

In Arizona it is particularly difficult to find an expert who meets the standards required in § 12-2604 because ninety percent of medical professionals practicing in Arizona are insured by Mutual Insurance Company of Arizona.[122] This means that if a plaintiff is suing a doctor represented by Mutual Insurance Company of Arizona, ninety percent of Arizona doctors will likely be hesitant to sign an affidavit of merit against that doctor because they may fear the consequences of testifying against their own medical malpractice insurers.

The *Governale* court analyzed the requirements of § 12-2604 and came to the conclusion that the affidavit of merit requirements dictating who may serve as an expert did not infringe on the plaintiff's fundamental rights. In determining that the statute does not violate the Anti-Abrogation Clause, the court determined that the statute does not create "insurmountable hurdles to recovery for large and foreseeable classes of plaintiffs."[123] The court

116. *Id.* at 177.
117. 269 P.3d 1211, 1215–16 (Ariz. Ct. App. 2012).
118. *Id.*
119. Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 47 (Ariz. 2013).
120. *Id.* at 50.
121. *Id.*
122. Arizona State Senate Research Staff, *supra* note 2, at 2.
123. Governale v. Lieberman, 250 P.3d 220, 225 (Ariz. Ct. App. 2011), *review denied* (May 24, 2011).

ostensibly failed to consider that the difficulty of obtaining an appropriate expert witness combined with the other burdens affidavit of merit requirements place on medical malpractice plaintiffs, may result in a block of access to the court.

### 4. Constitutional Challenges to Affidavit of Merit Requirements

As explained earlier, the court in *Jilly v. Rayes* ruled that § 12-2603 did not unconstitutionally conflict with Arizona Rules of Civil Procedure, Rule 16(c), which calls for simultaneous disclosure of expert witnesses thirty to ninety days after the pretrial conference, because the witness signing the affidavit of merit does not have to be the same expert witness who testifies at trial.[124] However, expecting a plaintiff to find two different witnesses places an extra burden on the plaintiff and may violate the Special Law rule by treating medical malpractice plaintiffs differently than other plaintiffs filing negligence claims.

The *Governale v. Lieberman* court held that § 12-2604, which determined that the plaintiff's witness in *Governale* was not qualified, did not violate the Anti-Abrogation Clause because the statute did not effectively deprive claimants of the ability to bring an action.[125] Yet, when considering the extra costs associated with an affidavit of merit, the difficulty of finding an expert who qualifies due to the strict requirements and the fact that ninety percent of Arizona physicians are insured by the same insurance company, and plaintiff's lawyers unwillingness to take on cases with small awards due to increased costs through affidavit of merits, it seems evident that some legitimate claimants will effectively be deprived of the ability to bring action. Plaintiffs may either be unable to afford the extra costs of litigation, may be unable to find the requisite expert, or in cases that would result in a small award, the plaintiff may decide that it is not worthwhile to bring the case forward because the extra requirements add too great of a financial burden.

*Governale* also determined that affidavit of merit requirements do not violate the equal protection clause.[126] The court reached this conclusion by applying the rational basis test, which involves first determining whether the statute infringes on fundamental rights and if it does not infringe on fundamental rights, analyzing what interest is served by the statute and

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124. *See supra* Section II.A.
125. *Governale*, 250 P.3d at 224–25.
126. *Id.* at 226.

whether the statute is rationally related to achieving that end.[127] As analyzed in this Article, the affidavit of merit requirement seems likely to infringe on a fundamental right by blocking legitimate lawsuits from being litigated due to the creation of an insurmountable hurdle for some plaintiffs to get to the court.[128] Therefore, the statute infringes on the right to due process. This finding should be sufficient to invalidate the statute.

Nevertheless, because the *Governale* court did not agree with that conclusion, this Article analyzes the next two prongs of the test: the interest served by the statute and whether the statute rationally relates to serving that interest.[129] As explained earlier, medical malpractice has a minimal effect on the cost of the health care system, evidence does not support the claim that medical malpractice claims are causing a shortage of doctors, and frivolous lawsuits are rare so it appears that the affidavit of merit requirement does not serve a legitimate interest.[130] Even if lowering the cost of medical malpractice actions was deemed to be a legitimate interest, affidavit of merit requirements have not been proven to be reasonably related to this goal. The evidence does not show that affidavit of merit requirements have reduced the cost of medical malpractice litigation.[131] Furthermore, even if the cost of medical malpractice litigation decreases, there is no evidence that the decrease in cost will result in lower premiums, lower health care costs, and improved health care quality.[132] For these reasons, affidavit of merit requirements fail to satisfy the rational basis test and therefore should be found to be unconstitutional.[133]

### *D. Proposed System*

The Virgin Islands medical malpractice system provides an example of a possible solution to this problem. The system features a Medical Malpractice Action Review Committee that arranges for review of all prospective malpractice claims before civil actions may be commenced.[134] To commence a medical malpractice action, a claimant files a proposed complaint with the Commissioner of Health who forwards a copy to each

127. *Id.* at 225.
128. *See supra* Section III.C.
129. *Governale*, 250 P.3d at 226.
130. *See supra* Section III.A.
131. *See supra* Section III.B.
132. *Id.*
133. *Id.*
134. V.I. CODE ANN. tit. 27, § 166i(a) (2011).

defendant who may file a proposed answer.[135] The Committee then reviews the complaint and response and determines what expertise is necessary and arranges for expert review.[136] The committee has power to obtain all necessary information from health care providers and can examine preexisting health care reports as necessary, so the plaintiff is not disadvantaged by the lack of information available before discovery.[137] Committee members include the Commissioner of Insurance, the President of the Virgin Islands Bar Association or a designee, and the President of the Virgin Islands Medical Society or a designee.[138] If a designee fills in for the President of the Virgin Island Bar Association, he must be an attorney admitted to practice in the territory.[139] A designee for the President of the Virgin Islands Medical Society must be a health care provider licensed under the laws of the territory.[140] If only a nurse or nurse institution is named as a defendant, the president of the Virgin Islands Nurses' Association or his designee may replace the President of the Virgin Islands Medical Society position.[141] This process is funded by the Medical Expert Fund.[142]

Either side can then use the report in a subsequent civil action, but if they wish to call the expert at trial they must pay for that cost themselves. The statute does not require that the Committee find in favor of the plaintiff for the plaintiff to be able to file a lawsuit. It simply requires the plaintiff to file with them. Therefore, even if the Committee decides against the plaintiff, he is not barred from filing suit.[143]

This system seems to accomplish the goal of reducing frivolous lawsuits with fewer negative consequences than Arizona's system. The proposed reform will reduce frivolous lawsuits by encouraging withdrawal of meritless complaints and encouraging settlement for claims with merit because both sides will know whether a claim is legitiamte. At the same time, there is no risk of preventing legitimate claims from being litigated, because if the Committee incorrectly determines that there is no merit to the claim, the plaintiff may still choose to file. The proposed reform also streamlines the process by instantly providing a non-biased expert opinion

135. § 166i(c) (2011).
136. *Id.*
137. § 166i(d)(2) (2011).
138. § 166i(a) (2011).
139. *Id.*
140. *Id.*
141. *Id.*
142. § 166i(d) (2011).
143. *Id.*

for both sides and allowing both sides to have a clearer idea of how legitimate the claim is. Because the Review Committee chooses the expert witness, there is no risk of drawn out litigation debating whether the expert is qualified. Finally, plaintiffs are not burdened with extra litigation costs since the Medical Expert Fund covers it.

The system is not perfect and does present two possible problems. First, presenting the claims to the Review Committee is still an extra step in litigation and has the potential to prolong cases. When compared to the current Arizona system though, this risk is much less severe. Because plaintiffs can still file regardless of what the Committee says, there would be no need to appeal the Committee's decision. Also, as mentioned above, because the Committee itself ensures that a qualified expert is consulted, there will not be lengthy appeals debating the expert's qualifications. The second issue with this proposed system is funding. The Virgin Islands has a Medical Expert Fund to pay for its system but it is unclear how Arizona would cover the costs. The costs may get passed on to parties through increased court costs. In order to implement this system, Arizona would need to conduct a study to determine whether the Review Committee's costs that are passed on to parties create less of a financial burden than the current affidavit of merit costs. Because Review Committees appear to encourage quicker settlements and are less likely to lead to lengthy appeals than affidavit of merit requirements, it seems likely that Review Committees will reduce the cost of the medical liability system. Overall, this system solves the majority of the problems with Arizona's current system and could be very useful in Arizona by providing a way to lower the burden medical malpractice insurance companies face when defending frivolous lawsuits, but also ridding plaintiffs of the burden of finding and paying for an expert qualified to provide an affidavit of merit.

## IV. CONCLUSION

The current affidavit of merit requirement should be repealed because it is unnecessary, does not reach its goals, and places an unfair burden on plaintiffs. The few benefits that the statute could possibly achieve by preventing frivolous lawsuits do not outweigh the costs the statute imposes by blocking meritorious lawsuits. Overall, the statute prevents the medical malpractice system from achieving its primary two goals. First, the affidavit of merit requirement hinders the goal of deterring doctors from making careless mistakes because they know there is a smaller chance the claim will be litigated in jurisdictions requiring an affidavit of merit. Second, affidavit of merit requirements hinder the goal of allowing patients to be

compensated for damages by blocking their access to the court system through this burden.

Despite acknowledging that affidavit of merit requirements may not have the desired effects, the courts have been unable to repeal these requirements because they are required to analyze statutes with the goal of upholding them. As the court explained in *Sanchez v. Old Pueblo Anesthesia, P.C.*,[144] "[w]e are not at liberty to overlook the requirements of a statute merely because we think those requirements might be unnecessary or cumbersome when applied to a particular case or class of cases." However, the legislature has the freedom to repeal the statute and should do so considering the overwhelming injustice of the requirement and its inability to reach its goals.

If the legislature does determine some sort of screening system is necessary, it should follow the Virgin Islands' model of a medical malpractice action review committee. This would allow for claims to be screened before they are litigated, would not burden plaintiffs with extra costs, and would provide experts with all the necessary information when determining whether the case has merit.

144. 183 P.3d 1285, 1290 (Ariz. Ct. App. 2008).