EXPLANATION OF METHODS USED BY OTA TO COMPILE DATA

The tables, figures, and accompanying notes in appendix A *were* derived from a variety of sources and synthesized by OTA to reflect the most recent information available on selected State medical malpractice reforms.

The primary published sources were 1991 and 1993 editions of a compendium developed for the Federal Agency for Health Care Policy and Research (AHCPR), [1] selected State statutes. and judicial cases. Two additional sources were used to update. cross-check, and supplement the AHCPR compendia.[2]

After compiling information from these sources into summary tables, OTA sent draft copies of the information to the attorneys genera] in all 50 States on March 24, 1993, for confirmation or amendment. Information was changed to reflect respondents comments. Where conflicts arose between the attorney general response and information found elsewhere. the attorneys generals responses were favored. Unresolved questions were addressed through follow-up phone conversations with attorney general respondents and statutory research. The revised drafts ***were*** sent again to all 50 State attorneys general on June 25, 1993, for a final review and any corrections were incorporated.

For States that responded to the first survey only. information is current to March 1993. For States that responded to the second survey. information is current to June 1993. For the 10 States[3] that did not respond to either review and the District of Columbia, information was cross-checked and supplemented through followup telephone calls and/or review of the relevant State codes where possible. Where confirmation was not possible, information in this appendix reflects that presented in the 1993 edition of the AHCPR compendium.

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1 U.S Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spernak, Center for Health Policy Research, The George Washington University (Rockville, MD: AHCPR, April 1993), AHCPR Pub. No. 93-0053; U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spernak and P.P. Budetti, Center for Health Policy Research, The George Washington University (Rockville, MD: DHHS, February 1991), DHHS Pub. No. (PHS)91-3474.

2 These sources were: Fisk, M. C., "The Reform Juggernaut Slows Down," The National Law Journal 15(10): 1,.34-37, Nov. 9, 1992; American Nurses Association, "Report to ANA Board of Directors on Tort Reform, Part 3: Presentation of Selected Summary of State and Local Legislation Related to Tort Reform and Review of Insurance Company Practices and Policies Related to Nursing Negligence with Recom-mendations," December 1991.

3 DE, FL, HI, KS, KY, MS, NJ, NM, TX, WV.

Table A-l--Collateral Source Offset Provisions,[a] by State, 1993

Mandatory	Discretionary	No provision
co*	AK*	AR
CT	AL	DC
FL	AZ	GA[O]
1A	CA	HI
IL*	DE	LA
ID	IN	MO*
KS[O]*	KY	MS
MA*	MD*	NC
ME	N D[O]*	NE
MI	OR	N H[O]
MN*	SD	NV*
MT*		OK
NJ		P A[O]
NM		SC
NY		TX
OH*		VA
RI*		v-r
TN		WA*
UT		WI
		WV
		WY

aTh[e] traditional collateral source rule forbade evidence of the plaintiff's collateral sources of income and reimbursement (e.g., medical insurance, disability payments) from being entered into evidence, States classified as "mandatory" or "discretionary" in this table have modified the traditional evidence rule to allow certain types of collateral sources to be admitted as evidence. Statutes which require that the plaintiff's award be offset by certain collateral sources are classified as mandatory, Statutes that leave the decision of whether to offset to the jury or judge are classified as discretionary, States with no provision have not modified their traditional collateral source rules, It is of note that a number of States reduce the malpractice award by the collateral source payments, but credit the plaintiff with any premiums he or she has paid or will pay to obtain the insurance (e.g., MN, MI, CT, RI, IL and NY).

O = provision overturned,

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-1

Cases Overturning Collateral Source Offset Rules:

Georgia--Denton v. Con-Way Southern Express Inc,, 402 S.E.2d 269 (Ga. 1991) (statute mandating evidence of collateral sources violates guarantee of impartial and complete governmental protection).

Kansas--see explanation below.

New Hampshire--Carson v. Maurer, 424 A.2d. 825 (N.H. 1980).

North Dakota--Arneson v. Olson, 270 N.W.2d 125 (N. D. 1978) held an earlier statute for collateral source offsets unconstitutional.

Pennsylvania--The Pennsylvania Supreme Court struck down as unconstitutional the State statute providing for pretrial screening panels. The collateral source provision was a part of that statute and was nullified. Mattes v. Thompson 421 A.2d. 190 (1980).

Selected Additional Information:

Alaska--Collateral source offset determined by the court (Alaska Stat. Supp. Sees. 9.55.548; 9.17.070 (1992)).

Colorado--Collateral source offset determined by the court (Colo. Rev. Stat. Sec. 13-64-402 (1992)).

Illinois--Reduction of collateral source is for 50 percent of collateral payments for lost wages or disability benefits and 100 percent of medical benefits (with exceptions), but no more than 50 percent of the total verdict (735 ILCS 5/2-1 205 (West 1992)).

Kansas--When claimant demands $150,000 or more, evidence of collateral sources admissible. Reduction of award by collateral source amount is subject, however, to certain limitations (KSA Sees. 60-3801 - 3807 (Supp. 1992)). This statute applies to all personal injury suits. The original statute abrogating collateral source for medical malpractice suits only was struck down (Farley v. Engelken 740 P.2d 1058 (1987)). Also, in Wentling v. Medical Anesthesia Services, P. A., 701 P.2d 939 (Kan. 1985), court held that collateral source offsets were unconstitutional in wrongful death medical malpractice cases.

Maryland--An award of damages by a medical malpractice arbitration panel may be reduced by the amount of damages reimbursed by certain collateral sources (Md. Cts. & Jud. Proc. Code Ann. Sec. 3-2A-05(h) (Michie 1989)). (See table A-5 and Additional Notes to table A-5 for description of Maryland's arbitration panel provision.)

Massachusetts--Collateral source offset determined by the court (Mass, Gen. Laws Ann. ch. 231, Sec. 60G (Lexis 1992)).

Minnesota--Offset is mandatory if defendant brings in evidence of payments made to plaintiff by collateral sources (Minn. Stat. Sec. 548.36 (1992)).

Missouri--Damages paid by defendant (or his insurer or any authorized representative) prior to trial may be introduced as evidence. Such introduction shall constitute a waiver of any right to a credit against a judgment (R. S. MO. Sec. 490.715 (1991)).

Montana--Collateral offset determined by judge after jury verdict (Mont. Code Ann. Sec. 27-1-308 (1992)).

Nevada--In actions against providers of health care, damage awards must be reduced by the amount of any prior payment made by health care provider to the injured person or claimant to meet reasonable expenses and other essential goods or reasonable living expenses (Nev. Rev. Stat. Sec. 42.020 (Supp. 1991)).

ADDITIONAL NOTES FOR TABLE A-1 (Continued)

North **Dakota--Under North Dakota law, collateral** source "does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages" (N. D.C.C. Sec. 32-03.2-06 (Lexis 1991). (An earlier collateral source offset provision was overturned in the courts--see above.)

Ohio--Collateral sources do not include insurance benefits paid for by plaintiff or employer (Ohio Rev. Code Ann. Sec. 2305.27 (Baldwin 1992)).

Rhode Island--Collateral source is mandatory if evidence is admitted (R. i. Gen. Laws Sec. 9-19-34 (1992)).

Washington--Washington's statute allows information on collateral source to be entered into trial, except the collateral source rule excludes insurance purchased by the plaintiff or insurance purchased by the employer for the plaintiff (RCW Sec. 7.70.080). However, offset of collateral sources is governed by case law, and in practice there is no offset for collateral sources. See Sutton v. Shufelberger, 643 P.2d 920 (Ct. App. Wash. 1982); Bowman v. Whitelock, 717 P.2d. 303 (Ct. App. Wash. 1986).

SOURCE: Office of Technology Assessment, 1993.

Table A-2--Caps on Damages[a] and State Patient Compensation Funds, by State, 1993

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
AK: $500,000'	AL: Total recovery capped at $1 mill ion.*	AR	FL: Physicians may participate in fund by obtaining liability coverage of $250,000 per claim and $500,000 per occurrence. Fund will pay malpractice awards exceeding maximum physician liability of $250,000 per claim, up to $1 million per claim and $3 million aggregate per policy.
CA: $250,000		AZ	
FL: $350/250,000	CO: Total recovery capped at $1 million. $250,000 cap on noneconomic. *	CT	
HI: $375,000		DC	
ID: $400,000'		DE	
KS: $250,000'	IN: $750,000	GA	
MD: $350,000	LA: $500,000'	1A	
MA: $500,000	NE: $1,250,000	I LO	
MO: $465,000'	NM: $500,000'	KY	
OR: $500,000	SD: $1 ,000,000'	ME	
UT: $250,000	VA: $1,000,000	MN	
WV: $1,000,000		MS	IN: Provider not liable for that portion of any malpractice award which exceeds $100,000 Any amount due the plaintiff which is in excess of the total liability of all health care providers, shall be paid from the PCF, with total payments from the PCF not to exceed $750,000.
WI: $1,000,000		MT	
		NC	
		*ND	
		NH	
		NJ	
		NV	
		NY	
		OH	
		OK	
		PA	
		RI	KS: Physicians must carry $200,000 in malpractice insurance per claim ($600,000 per annum) then can choose one of three options for excess coverage from PCF. For each, option, the physician pays the initial $200,000 in damages and then the fund will pay some portion of the remainder depending on how the physician chooses to distribute fund liability across potential claims: 1) fund liable for next $100,000 per claim ($300,000 aggregate per provider); 2) fund liable for next $300,000 ($900,000 aggregate per provider); and 3) fund liable for up to $800,000 per claim.
		SC	
		TN	
		*TX	
		v-r	
		WA	
		WY	

Table A-2-Caps on Damages[a] and State Patient Compensation Funds, by State, 1993 (Continued)

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
			LA: Provider liability limited to $100,000 for injuries or death to plaintiff. Fund will pay total amount recoverable for all injuries or death of a plaintiff exclusive of future medical care and related benefits, up to $400,000 for private providers. The State pays all damages up to $500,000 for State health care providers.
			NE: The PCF shall cover liability exceeding $200,000 up to $1.25 million.
			NM: Health care provider liability is capped at $100,000, with the remainder to be paid by the PCF. Total payment from PCF not to exceed $500,000 per occurrence per year.
			PA: The fund shall pay any amount exceeding $100,000 per occurrence, up to $1 million per claim.
			SC The fund will pay awards in excess of $100,000 per claim (no upper limit).
			WI: Physicians must have $400,000 of malpractice coverage per incident and $1,000,000 in coverage per annum. The fund will pay for damages exceeding the physician's coverage. Each health care provider is also assessed an annual fee to help finance the fund.

[a]NOTE: OTA's review did not include caps that apply only, or separately, to claims against State-employed or State-owned health care providers.

O = provision overturned,
R = provision repealed.

*See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-2

Cases Overturning Caps on Damages:

Alabama--Moore v. Mobile Infirmary, 592 So.2d 156 (Ala. 1991) ($400,000 cap on noneconomic and punitive damages overturned, but $1 million cap on total recovery not challenged--see notes below).

Florida--Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

Idaho--Jones v. State Board of Medicine 555 P.2d 399 (Idaho 1976) *cert denied* 431 U.S. 914 (1977).

Illinois--Wright v. Central DuPage Hospital, 347 N.E.2d 736 (Ill. 1976).

Kansas--Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) (cap on total damages and noneconomic damages in medical malpractice cases overturned).

New Hampshire--Brannigan **v.** Usitalo, **587** A.2d 1232 (N.H. 1991).

North Dakota--Arneson v. **Olson, 270 N.** W.2d. **125** (N.D. **1978).**

Ohio--Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

Texas--Lucas v. U. S., 757 S.W.2d 687 (Tex. 1988); Baptist Hospital of S.E. Texas v. Barber, 672 S.W.2d 296 (Tex. App. 1984), *aff'd.* 714 S.W.2d 310 (Tex. 1986).

Washington--Sophie v. Fibreboard Corporation, 771 P.2d 711 (Wash. 1989).

Selected Additional Information:

Alabama--Total recovery in medical malpractice cases must not exceed $1 million. If jury returns a verdict in excess of $1 million, judge must reduce it to $1 million or lesser amount as deemed appropriate. Mistrial declared if jury is informed of cap beforehand. Total cap is adjusted annually to reflect changes in the consumer price index. (Ala. Rev. Stat. Sec. 6-5-547 (1987)) Separate cap on noneconomic damages was overturned (see above).

Alaska--Limit does not apply to damages for disfigurement or severe physical impairment (Alaska Stats. Supp. Sec. 9.17.010 (1992)).

Colorado--Court has some discretion to exceed cap limit (Colo. **Rev. Stat. Sec. 13-64-302 (1992)).**

Florida--In arbitration, noneconomic damages limited to $250,000 per incident. Economic damages limited to 80 percent of wage loss and loss of earning capacity and medical expenses, offset by collateral sources, If defendant refuses to arbitrate, the claim will proceed to trial and there will be no limit on damages. In addition, if plaintiff wins at trial, she will be awarded prejudgment interest and attorney fees up to 25 percent of award. If claimant rejects arbitration, noneconomic damages at trial limited to $350,000. Economic damages limited to 80 percent of wage losses and medical expenses (Fla. Stat. Sees. 766.207-209 (1993 Supp.)). This provision was recently challenged. The trial court found the provision unconstitutional, as did the District Court of Appeals. However, the Supreme Court of Florida reversed holding the limitation on damages imposed if the plaintiff does not accept arbitration is not unconstitutional. University of Miami v. Echarte, 585 So.2d 293 (Fla. App. 3 Dist. 1991) *reversed arm' remanded* University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993).

Idaho--Original cap applied to malpractice suits only and was overturned (see above). Existing cap applies to all torts. Cap increases or decreases yearly ac-

ADDITIONAL NOTES FOR TABLE A-2 (Continued)

cording to the State's adjustment of the average annual wage (Idaho Code Sec. 6-1603 (Lexis 1993)).

Kansas--Original cap for malpractice suits only was overturned (see above). Existing cap applies to all personal injury suits.

Louisiana--The total amount of damages for a medical malpractice claim against a "qualified provider" may not exceed $500,000, plus interest and costs, exclusive of future medical care and related benefits. Qualification under the patient compensation fund requires a private health care provider to pay into the fund and provide evidence of insurance up to $100,000 per claim. "Qualified providers" exclude State health care providers. For qualified providers, the provider is liable for up to $100,000 and the State patient compensation fund for the remaining amount not to exceed $400,000 exclusive of future medical care and related benefits. For State health care providers, total damages, exclusive of future medical care and related benefits, may not exceed $500,000 (LA-R.S. Sec. 40:1299.42-45; LA-R.S. Sec. 40: 1299.39-39.1) Future medical expenses and related benefits in excess of $500,000 are paid as submitted.

Massachusetts--Pain and suffering capped at $500,000 unless there is substantial or permanent loss or impairment of bodily function or substantial disfigurement or other circumstances making limitation unfair (Mass. Gen. Laws Ann. ch. 231, Sec. 60H (Lexis 1992)).

Michigan--Noneconomic damages limited to $225,000 unless there has been a death, intentional tort, injury to reproductive system, foreign body wrongfully left inside the patient's body, concealment of injury by health care provider, limb or organ wrongfully removed or patient has lost vital bodily function. The limit on damages increases each year by the increase in Consumer Price Index (M.C. L. Sec. 600.1483 (1990)). The exceptions to the cap are so extensive that, as of August 1993, the cap had yet to be applied to a single case (154).

Missouri--Noneconomic damages recoverable by injured party capped at $465,000 per defendant per occurrence (1993 limit). Original limit was $350,000, but this is adjusted annually to reflect changes in the implicit price deflator for personal consumption published by the U.S. Department of Commerce (R. S.Mo., Sec. 538.210 (1986)).

New Mexico--The limitation on caps on damages does not apply to past and future medical care and related benefits (N.M. Stat. Ann. Sec. 41-5%,41-5-7 (Michie 1989)). These expenses will be paid on an ongoing basis. In 1995, the cap on damages will be increased to $600,000 and the Patient Compensation Fund will require the physician to be responsible for the first $200,000 of a malpractice claim (N.M. Stat. Ann. Sec. 41-5-6 (Michie 1989)).

North Dakota--Awards in excess of $250,000 may be reviewed for reasonableness (N.D.C.C. **Sec. 32-03.2-08** (Lexis **1991)).**

South Dakota--South Dakota's medical malpractice cap is currently being challenged in the court on constitutional grounds (Schultz, J. S., Legal Counsel, Division of Administration, Office of Administrative Services, Department of Health, South Dakota, letter to the Office of Technology Assessment, U.S. Congress, Washington, DC, April 2, 1993).

Texas--The $500,000 limit on damages in medical malpractice (Vernon's Texas Civil Stat. Art. 4590i, Sec. 16.02-11.03 (Supp. 1992)) was struck down as unconstitutional in Lucas v. U. S., 757 S.W.2d 687 (Tex. 1988). The Texas Supreme Court subsequently decided that the damage limitation was constitutional in wrongful death cases only (Rose v. Doctors HOSP., 801 S.W.2d 841 (Tex. 1990)).

SOURCE: Office of Technology Assessment, 1993.

Table A-3--Periodic Payment of Awards,[a] by State, 1993

Mandatory	Discretionary	No provision
AL > $150,000'	AK*	DC
AZ	AR >$100,000	GA
CA > $50,000	CT > $200,000*	Hl
co >$150,000	DE	KS°
IL > $250,000'	FL >$250,000	KY
LA > $500,000'	1A	MA
ME > $250,000	ID >$100,000	MS
Ml	IN	NC
MO >$1 00,000'	MD	NE
NM	MN >$100,000	NH°
OH >$200,000	MT >$100,000	NJ
SD >$200,000	ND*	NV
UT >$100,000	NY > $250,000'	OK
WA >$100,000'	OR	PA
	RI > $150,000'	TN
	SC >$100,000	TX
		VA
		VT
		Wl
		WV
		WY

aperiodic payment provisions are often not triggered unless the award reaches a threshold amount The specific thresholds are noted parenthetically in the table, Periodic payment provisions apply only to future damages. The schedule of payments is either negotiated by the parties or determined by the court. Some statutes offer guidelines for determining the schedule, The mandatory category includes statutes in which periodic payment is mandatory upon reaching the threshold or upon unilateral request by defendant or plaintiff.

O = Provision overturned,

* See additional notes on following page.

SOURCE Office of Technology Assessment, 1993

ADDITIONAL NOTES FOR TABLE A-3

Cases **Overturning Periodic Payment Provisions:**

Kansas--Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. **1988).**

New Hampshire--Carson v. Maurer, 424 A.2d 825 (N.H. **1980).**

Selected Additional Information:

Alabama--A recent Alabama Supreme Court case overturned a periodic payment provision that applied to personal injury suits, excluding malpractice. This provision was similar to the medical malpractice periodic payment provision, thereby calling its constitutionality into question (Clark v. Container Corp., 589 So.2d 184 (Ala. 1991)).

Alaska--Periodic payment of future damages is discretionary in personal injury cases except if requested by injured party (Alaska Stat. Supp. Sec. 09.17.040 (1992)).

Connecticut--When award reaches $200,000 or more, parties have 60 days to negotiate periodic payment agreement. If no agreement reached, a lump sum award will be awarded (Corm. Gen. Stat. Sec. 52-225 d).

Florida--Mandatory periodic payment of future losses exceeding $250,000, but defendant may elect to pay lump sum for future economic loss and expenses, reduced to future present value (Fla. Stat. Sec. 766.78 (1986)).

Illinois--Both parties can agree to elect periodic payment, or, if future damages exceed $250,()()(), plaintiff can unilaterally elect periodic payment. Defendant can elect periodic payment if: 1) the future economic damages are in excess of $250,000, 2) defendant can produce a security (e.g. bond, annuity) in the amount of the claim for both past or future damages, or $500,000, whichever is less, and 3) future damages likely to occur over a period of more than one year (735 ILCS Sec. 5/2-1705 (West 1992)).

Louisiana--If damages exceed $500,000, the PCF or the State pays future medical care and related benefits as they are submitted. (See table A-2 for a description of Louisiana's cap on damages provision.)

Missouri--Mandatory periodic payment of future damages at request of any party (R. S. MO. Sec. 538.220, (1991)).

New York--Any requirement to pay periodically applies to no more than the portion of future damages in excess of $250,000. The parties may agree to lump sum payments of future damages otherwise payable periodically (N.Y. CPLR Sec. 5031 (McKinney 1992)).

North Dakota--The court has discretion to permit the trier of fact to make a special finding regarding future economic damages if an injured party claims future economic damages for continuing institutional or custodial care that will be required for a period of more than two years (N. D.C.C. Sec. 32-03.2-09 (1989)).

Rhode Island--Mandatory conference for purposes of determining viability of voluntary agreement for periodic damage (R.I. Gen. **Laws Sees. 9-21-12; 9-12-13** (Lexis **1991)).**

Washington--Mandatory at the request of parties (Wash. Rev. Code Sec. 4.56.260 (1986)).

SOURCE: Office of Technology Assessment, 1993.

Table A-4--Statutes of Limitations,[a] by State, 1993

	Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception**
AL:	2 years	6 months	4 years	
AK:		*2 years		
AR:	2 years			1 year
AZ:		2 years		
CA:	3 years	1 year	3 years	1 year
CO:		2 years	3 years	2 years
CT:		2 years	3 years	
DC:	3 years			
DE:	2 years	3 years		
FL:	2 years	2 years	4 years	
GA:	2 years*		5 years	1 year
Hl:		2 years	6 years	
ID:	2 years			1 year*
IN:		2 years		
IL:		2 years	4 years	
1A:		2 years	6 years	2 years
KS:		2 years	4 years	
KY:		1 year	5 years	
LA:	1 year*	1 year	3 years	
MA:	3 years		7 years	General Exception
ME:	3 years		3 years	Upon "reasonable discovery"
MD:	5 years	3 years		Exception for minors only
Ml:	2 years*	6 months	6 years	6 months
MN:	2 years*			
MS:		2 years		
MO:		2 years	10 years	2 years after discovery 10 years max.
MT:	3 years	3 years	5 years	
NE:	2 years	1 year	10 years	
NV:	4 years	2 years		
NH:	3 years	3 years		
NJ:		2 years*		
NM:	3 years*			
NY:	2 years, 6 months			1 year
NC:	3 years		4 years	1 year after discovery, 10 year max
ND:		2 years	6 years	
OH:		1 year		
OK:		2 years	3 years 0.	
OR:		2 years	5 years	
PA:	2 years	2 years		
Rl:	3 years	3 years		
SC:	3 years	3 years	6 years	2 years
SD:	2 years			
TN:		1 year	3 years	1 year
TX:	2 years*			
UT:		2 years	4 years	1 year

Table A-4--Statutes of Limitations,[a] by State, 1993 (Continued)

Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception**
VT: 3 years	2 years	7 years	2 years
VA: 2 years		10 years	1 year
WA: 3 years	1 year	8 years	1 year
WV: 2 years	2 years	10 years	
WI: 3 years	1 year	5 years	1 year
WY: 2-2.5 years	2 years		

Explanatory Notes for Table A-4

Column **1: Statutory time limit** for bringing a suit is measured from the time the injury oc**curs or from the date of termination of the medical treatment that led to the claim.**

Column 2: The statutory time limit for bringing suit is measured from the time at which the plaintiff could have reasonably discovered the injury. Often States allow the time limit to run from either the time of injury or the time of discovery, depending on the nature of the injury.

Column 3: The maximum period in which a claim can be brought, regardless of whether the limit is measured from the date of injury or act or the date of discovery. In most States, this maximum does not apply to the foreign body exception (see column 4).

Column 4: Because of the difficulty of discovering a foreign body (e.g., a surgical sponge) left inside a patient during invasive procedures, a number of States make special exceptions to the statute of limitations for these cases.

[a] This table does not cover special provisions for minors, disabled plaintiffs or cases involving fraud Or concealment on the part of the healthcare provider,

O = provision overturned.

* See additional notes on following page.

** Within year of discovery, maximum number of years do not apply unless stated,

SOURCE: Office of Technology Assessment, 1993,

ADDITIONAL NOTES FOR TABLE **A-4**

Selected Additional Information:

Alaska--General statute of limitations is two years from date the "cause of action" accrues (Alaska Stat. Sec. 09.10.070 (1962)). Cause of action does not accrue until person discovers or reasonably should have discovered injury. (Dalkovski v. Glad, 774 P.2d 202 (Alaska 1989); Cameron v. State, 822 P.2d 1362 (Alaska 1991)).

Georgia--The statute of limitations in a medical malpractice action may be tolled (i. e., does not accrue) in cases where the parties agree to submit the case to arbitration (0. C.G.A. **Sec. 9-9-63).**

Louisiana--Time limitation is suspended upon filing a request for review by a medical review panel until 90 days following issuance of the panels opinion (LA-R.S. 40:1299.391A (2)(a); LA-R.S. 40:1299.47A (2)(a)).

Michigan--Special exceptions made in cases involving undiscovered injuries to reproductive system or the presence of a foreign body wrongfully left inside the patient, and in cases where the discovery of basis for claim was prevented by the fraudulent conduct of the health care provider (M.C. L. Sec. 600.5838a(2) (a-c) and (3) (1990)). Claims may be brought two years from injury if discoverable or six months from discovery, whichever is later (M.C.L. Sec. 600.5805(4) (1990)).

Minnesota--Statute of limitations is 2 years from termination of treatment (Minn. Stat. Sec. 541.07 (1992)). Discovery rule has been rejected (Francis v. Hansing 449 N.W. 2d 479 (Minn. Ct. App. 1989); Willette v. Mayo Foundation, 458 N.W. 2d 120 (Minn. Ct. App. 1990)).

New Jersey--Years within date of injury apply after accrual of claim (N.J. Rev. Stat. Sec. 2A: 14-2 (1986)). Claim accrues upon reasonable discovery of injury.

New Mexico--The statute is tolled upon submission to pretrial screening panel and shall not run until 30 days after panel makes final decision (N. M. Stat. Ann. Sec. 41-5-22 (Michie 1989)).

Ohio--Suit must be brought within one year from the date of a "cognizable event" or termination of the physician-patient relationship, whichever occurs later (Flowers v. Walker, 589 N.E.2d 1284 (Ohio 1992); Frysinger v. Leech, 512 N.E.2d 337 (Ohio 1987)).

Oklahoma--Oklahoma's statute includes a limitation on damages brought 3 years after the injury, but limitation declared unconstitutional. Wofford v. Davis, 764 P.2d 161 (Okla. 1988); Reynolds v. Porter, 76o P.2d 816 (Okla. 1988).

Texas--Statute has been held unconstitutional by the Texas Supreme Court when the injury was not discoverable (See e.g. Neagle v. Krusen, 678 S.W.2d 918 (Tex. 1984); Neagle v. Krusen, 678 S.W.2d 11 (Tex. 1985); Deluna v. Rizkallah, 754 S.W.2d 366 (App. 1st Dist. 1988); but see Rascoe v. Anablawi, 730 S.W.2d 460 (App. 9th Dist. 1987)). The courts have essentially modified the statute into a discovery standard.

SOURCE: Office of Technology Assessment, 1993.

Table A-5--Pretrial Screening Panels, by State, 1993

Pretrial Screening Panels[a]		
Mandatory	Voluntary	No provision
AK*	AR	AL
HI*	CT	AZ[R]
ID*	DE*	CA
IN	KS*	co*
LA*	NH*	DC
MA*	VA	FL[O]
MD*		GA
ME		1A
Ml		I LO*
MT		KY
NE*		MN
NM*		MO[O]
NV		MS
TN		NC*
UT		
VT*		

N D[R]	
N J[R]	
N Y[R]*	
OH	
OK	
OR	
PA[O]*	
R I[O]	
Sc	
SD	
TX	
WA	
@ *	
WV	
WY[O]	

[a] "Mandatory" includes provisions that allow a waiver of the pretrial screening process upon the request of one or both parties. "Voluntary" refers to provisions that allow but do not require parties to submit their claim to pretrial screening panels.

R = Provision repealed
O = provision over-turned

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES TO TABLE A-5

Cases **Overturning Pretrial Screening Panels:**

Florida--Aldana v. Holub, 381 So.2d 231 (Fla. 1980).

Illinois--Bernier v. Burrio, 497 N.E.2d 763 (Ill. 1986).

Missouri--State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W.2d 107 (Me. Bane. 1979).

Pennsylvania--Mandatory nonbinding arbitration panel provision struck down by Pennsylvania Supreme Court in Mattes v. Thompson, 421 A.2d 190 (Pa. 1980) and Heller v. Frankston, 475 A.2d 1291 (Pa. 1984).

Rhode island--Boucher v. Sayeed, **459** A.2d **87** (R.I. 1983).

Wyoming--Hoem **v. State, 756 P.2d 780** (Wyo. 1988).

Selected Additional Information:

Alaska--Mandatory unless the parties agree to arbitrate or the court determines an advisory panel is not necessary (Alaska Stats. Sec. 09.55.536 (Lexis 1992)).

Colorado--Court may refer cases for mediation at its discretion (Colo. **Rev. Stat. Sec. 13-22-301** *et.* **seq. (1992)). In addition, the State requires in every action against a licensed professional that the plaintiff file a "Certificate of Review" declaring that the plaintiff has consulted a person with expertise in the area of the alleged conduct and the expert has concluded that the filing of the claim does not lack substantial justification** (Colo. **Rev. Stat. Sec. 13-20-602 (1987)).**

Delaware--Any party can demand that a claim be submitted to a "malpractice screening panel. " Results are admissible as prima facie evidence at any subsequent trial. Expert witness testimony may be required for panel (Del. Code Ann. tit. 18, Sees. 6801-6814 (1976)).

Hawaii--Mandatory submission of claim to "medical conciliation panel" but decisions, conclusions, findings, or recommendations of panel are not admissible at trial (Hawaii Rev. Stat. Sees. 671-11 *et. seq.* (Lexis 1992)).

Idaho--Proceedings of informal pretrial screening are confidential and not admissible at any subsequent trial (Idaho Code Sees. 6-1001-1011 (1976)).

Illinois--The State requires medical malpractice plaintiffs to file an affidavit and report of a reviewing health care professional supporting his or her determination that a meritorious cause of action exists. This may be referred to as a "certificate of review" (735 ILCS 5/2-622 (West 1992).

Kansas--Decision of panel is admissible at subsequent trial (Kan. Stat. Ann. Sees. 60-3501-3509 (1987)).

Louisiana--Pretrial screening mandatory unless both parties agree to waive it (La-R.S. Sec. 40:1299 .47 B(C).

Maine--Mandatory pretrial screening, except if parties agree to waive. Decision is admissible in subsequent trial only if unanimous and unfavorable to claimant as to negligence or causation (24 Me. Rev. Stat. Ann. Sec. 2857 (1990)).

Maryland--All medical injury claims must be submitted to a "health claims arbitration panel" for review prior to trial, unless all parties agree in writing to waive the requirement (which rarely occurs). Although this is called an arbitration panel, it operates more like a pretrial screening panel, with very formal rules of discovery and procedure. The Panel's decision on fault and is admissible at subsequent trial and is "presumed to be correct" (Md. Cts. & Jud. Proc. Code Ann. Sec. 3-2A-03 to -06 (Michie 1989)). The statute was un-

ADDITIONAL NOTES TO TABLE A-5 (Continued)

successfully challenged by plaintiffs on constitutional grounds, Attorney General v. Johnson, 385 A.2d 57 (Md. 1978) *appeal dismissed* 439 U.S. 805 (1978).

Massachusetts--If the panel finds for the defendant and the plaintiff goes to court, they must first file a bond of at least $6000 **that will be payable to the defendant if plaintiff ultimately loses bond covers court costs and fines.** For indigent plaintiffs, the amount of the bond may be reduced, not eliminated (Mass. Ann. Laws ch. 231, Sec. 60B (Lexis 1992)).

Nebraska--Parties can agree to waive the panel (Neb. Rev. Stat. Sec. 44-2840(4) (1988)).

New Hampshire--Decision of panel not admissible at subsequent trial (N. H. Rev. Stat. Ann. Sec. 519-A:1to -A:10 (1972)).

New Mexico--Decision of panel not admissible at subsequent trial (N. M. Stat. Ann. Sec. 41-5-20 (Michie 1989)).

New York--A precalender conference in each malpractice case is mandated by law in order to promote settlement, simplify issues and set a timetable for discovery **and further judicial proceedings. There is no formal hearing on the merits of the case** (N.Y. **CPLR Sec. 3406** (McKinney **1985)).**

North Carolina--Pilot program (ends in 1995) in which parties to Superior Court civil litigation may be required at the court's discretion to attend a pretrial settlement conference conducted by a mediator (N.C. Gen. Stat. Sec. 7A-38(1991)).

Pennsylvania--Panels providing "mandatory nonbinding arbitration" were ruled unconstitutional (see above). However, these panels continued to exist and hold "voluntary nonbinding" settlement conferences. In addition, some jurisdictions have standing judicial orders for pretrial settlement conferences for all medical malpractice cases.

Vermont--[implementation of the following provisions (part of a law passed in 1991) is contingent on future passage of a universal health care coverage plan.] Requires all medical malpractice claims be submitted to nonbinding arbitration prior to a trial. Parties may agree in advance that the arbitrator's decision will be limited to matters of law. If parties do not agree to make the arbitration decision binding, they can proceed to trial. Arbitration decision is admissible at trial but is not definitive (12 V.S.A. Sees. 701 et seq. (1991)).

Washington--Mandatory mediation of all medical malpractice claims prior to trial. Results not admissible at subsequent trial unless both parties agree (State of Washington, Engrossed Second Substitute Senate Bill 5304, 53rd Legislature, 1993 Regular Session).

Wisconsin--Repealed VOl untary pretrial screening provision and replaced with mandatory mediation for all medical injury claims ((Wis. Stat. Sees. 655.01-.03 (1977--repealed in 1986; Wis. Stat. Sees. 655.42 et seq. (1985--amended 1989)).

SOURCE: Office of Technology Assessment, 1993.

Table A-6--Attorney Fee Limits,[a] by State, 1993

Sliding scale	Maximum %	Court-determined/ court approved	No statutory limits
CA: 40% of first $50,000	IN-15%*	AZ	AK
33.33% of next $50,000	MI-33.33%	HI	AL
25°/0 of next $50,000	OK-500/o	1A	AR
15°/0 damages that exceed $600,000	TN-33.33%	KS	**CO**
	UT-33.33°A	MD*	DC
CT: 33.33% of first $300,000		NE	FL[R]
25°/0 of next $300,000		NH[O]*	GA
20% of next $300,000		WA	ID
15% of next $300,000			KY
10% damages that exceed $1.2 million			LA
			MN
DE: 35% of first $100,000			MO
25% of next $100,000			MS
10% of damages that exceed $200,000			MT
			NC
IL: *33.33% of first $150,000			ND
25% of next $850,000			NM
20% of damages exceeding $1 million			NV
			OH
MA: 40% of first $150,000			OR[R]
33.33% of next $150,000			PA[O]
30% of next $200,000			RI
25% of damages that exceed $500,000*			SC
			SD
ME:33.33% of first $100,000			TX
25°A of next $100,000			VA
20% of damages that exceed $200,000			VT
			WV
NJ: 33.33°4 of first $250,000			WY
25°A of next $250,000			
20°A of next $500,000			
Amount shall not exceed 25°/0 **for a minor or an incompetent plaintiff**			
NY: 30°/0 of **first $250,000**			
25°/0 of next $250,000			
20°/0 of next $500,000			
15% of next $250,000			
10% of damages exceeding $1.25 million			

Table A-6--Attorney Fee Limits,[a] by State, 1993 (Continued)

Sliding scale	Maximum %	Court-determined/ court approved	No statutory limits
WI: 33.33% of first $1 million OR 25% of first $1 million recovered if liability is stipulated within **180 days, and not later than 60 days before the first day of trial and 20% of any amount exceeding $1 million**			

[a]NOTE: Most attorney fee limits are not direct limits on the amount attorneys can charge their clients. Rather, they are limits on the portion of the damage award that may go toward attorney fees,

O = Provision **overturned,**
R = Provision **repealed.**

* See additional notes on following page.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-6

Cases **Overturning Limits on Attorney Fees:**

Pennsylvania--Mattos v. Thompson (421 A.2d **190** (Pa. 1980)) and Heller v. Frankston (475, A.2d 1291 (Pa. 1984)) declared the Health Care Services Malpractice Act unconstitutional because of its mandatory arbitration provision. These rulings also nullified the attorney fee limitations of the Act.

New **Hampshire--Carson v. Maurer (424** A.2d 825 (N. H. 1980)) overturned an earlier provision. Another provision has since been implemented.

Selected Additional Information:

Illinois--Where attorney performs extraordinary services involving more than usual participation of time and effort, the attorney may apply to the court for additional compensation (735 ILCS Sec. 5/2-1 114 (1992)).

Indiana--For compensation paid from State Patient Compensation Fund, attorney fees may not exceed 15 percent of payments (Burns Ind. Code Sec. 16-9.5-5-1. (Lexis 1992)). However, there are no limits on attorney fees for funds not paid out of the Patient Compensation Fund.

Massachusetts--Court will reduce attorney fees further if they cause plaintiff's final compensation to be less than unpaid past and future medical expenses (Mass. Gen. Laws Ann. ch. 231 Sec. 601 (1986)).

Maryland--Only when legal fees are in dispute must the court or pretrial screening panel approve fees before lawyer collects (Md. Cts. Jud. Proc. Code Ann. Sec. 3-2A-**07** (Michie **1989)).**

New Hampshire--Court determined attorney fee limits apply only if fees are greater than $200,000 (N.H. Rev. Stat. Ann. Sec. 508:4-e (1986)).

SOURCE: Office of Technology Assessment, 1993,

Table A-7--Arbitration Provisions[a] by State, 1993

Specific provision for medical malpractice claims	General arbitration provision	
AK	AL	NC
CA	AR	ND[R]
CO*	AZ	NE*
FL*	CT	NH
GA	DC	NM
HI*	DE	NV
IL	1A	OK
LA*	ID	OR
MI	IN	PA
NJ*	KS	RI
NY*	KY	SC*
OH*	MA	TN
SD	MD	TX*
UT*	ME	VT
VA	MN	WA
	MO	WI*
	MS	WV
	MT	WY

[a]NOTE: Voluntary, binding arbitration provisions only, unless otherwise noted. This table does not indicate statutory provisions for court-annexed, nonbinding arbitration. Several States have provisions authorizing mandatory, nonbinding arbitration for civil suits where expected damages are below a certain threshold (most thresholds range from $10,000 to $50,000). However, because the vast majority of medical malpractice cases involve expected awards in excess of these thresholds, the provisions are rarely relevant to medical malpractice, One exception is the State of Hawaii, which requires court-ordered nonbinding arbitration for all civil tort actions having a probably jury award (exclusive of costs and interest) of $150,000 or less (Hawaii Rev. Stats. Sec. 601-20 (Lexis 1992)). However, medical malpractice claimants may elect to bypass court-ordered arbitration if a decision has been rendered under the State's mandatory medical malpractice pretrial screening provision (Hawaii Rev. Stats. Sec. 671-16,5 (Lexis 1992)).

[b]Many States have adopted the Uniform Arbitration Act (UAA) (Uniform Arbitration Act, Uniform Laws Annotated (Vol. 7) (St. Paul, MN: West Publishing Company, 1992)).

R = provision repealed
O = provision overturned

* See additional notes on following pages,

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-7

Selected Additional Information:

Colorado--A medical malpractice insurer can not require a physician to utilize arbitration agreements with patients as a condition of malpractice insurance (Colo. **Rev. Stat. Sec.** 13-64-403 **(1992)). Mandatory arbitration pilot program for all claims ended July 1, 1990** (Colo. **Rev. Stat. Sec. 13-22-402).**

Florida--In any arbitration, noneconomic damages limited to $250,000 and economic damages limited to past and future medical expenses and 80 percent of wage loss and loss of earning capacity. Defendant will pay claimant's reasonable attorney fees up to 15 percent of award, reduced to present value. Defendant will also pay all costs of arbitration proceedings and fees of arbitration. If defendant refuses to arbitrate, the claim will proceed to trial and there will be no limit on damages. In addition, if plaintiff wins at trial, she will be awarded prejudgment interest and attorney fees, up to 25 percent of award. If claimant rejects arbitration, non-economic damages at trial limited to $350,000. Economic damages **limited to 80 percent of wage losses and medical** expenses (Fla. Stat. Sees. **766.207, 766.209 (1993** Supp.)). **This provision was recently challenged.** The trial court found the provision unconstitutional, as did the District Court of Appeals. However, the Supreme Court of Florida recently held the limitation on damages imposed if the plaintiff does not accept arbitration is not unconstitutional. University of Miami v. Echarte, 585 So. 2d. 293 (Fla. App. 3 Dist. 1991) *reversed and remanded* **University of Miami v.** Echarte, **618** So.2d **189** (Fla. 1**993).**

Hawaii--Mandatory nonbinding arbitration for all civil actions in tort having probable jury award value exclusive of costs and interest of $150,000 or less (Hawaii Rev. Stat. Sec. 601-20 (1986)). Medical malpractice claims may bypass court ordered arbitration after the claim has been submitted to a medical claim conciliation panel that has rendered a decision (Hawaii Rev. Stat. Sec. 671.16.5 (Lexis 1992)).

Louisiana--No arbitration for claims against State (public) health care providers (LA-R.S. **Sec. 40:1299.39.1A(1)). No arbitration for claims against health care providers who are not "qualified" under** the PCF requirements (LA-R.S. 40:1299.41 (D)).

Nebraska--Pre-in jury arbitration agreements are not presumed to be valid, enforceable and irrevocable (R. R.S. Neb. Sec. 25-2602 (Lexis 1992)).

New Jersey--Voluntary arbitration of medical injury claims upon written agreement if greater than $20,000. Applies to all personal injury torts except certain automobile claims (NJ Stat. Sec. 2A:23A-20 (1991)).

New York--Allows defendant to concede liability if the plaintiff agrees to arbitrate. If **plaintiff refuses, defendant's concession** of liability cannot be used for any other purpose (N.Y. CPLR Sect 3045 (McKinney 1991)). HMOS can put arbitration clauses in contract, but cannot require arbitration as a condition of joining HMO (N.Y. Public Health § 4406-2 (McKinney 1991)).

Ohio--The Ohio statute permits parties to submit a claim to nonbinding arbitration or to enter an agreement to submit the claim to binding arbitration. Such agreements may be made pre-injury. (Ohio Rev. Code Sees. **2711.21-271.24 (1992)). The former provision which requiring submission to arbitration prior to trial and allowed the arbitration decision to be entered into subsequent judicial**

ADDITIONAL NOTES FOR TABLE A-7 (Continued)

proceedings was declared unconstitutional **by a** lower court. Simon v. St. Elizabeth Medical Center 355 N.E.2d 903 (Ohio Ct. Common Pleas 1976).

South Carolina--Statutory provision that sets forth conditions under which arbitration agreements for existing and future controversies will be considered valid, enforceable and irrevocable, does not apply to arbitration agreements for personal injury claims (S. C. Code **Ann. Sec. 15-48-10 (1991)).**

Texas--Uniform Arbitration Act procedures only apply to personal injury if upon advice of counsel to both parties and both attorneys sign written opinions to this effect (Vernons Ann. Tex. Civ. St. **art. 224** (1992)).

Utah--Upon written agreement by all parties, the **mandatory** prelitigation **hearing panel proceeding may be considered a binding arbitration hearing and proceed under the provisions of the general arbitration statute (Utah Code Ann. Sec. 78-14-16 (1985).**

Wisconsin--Mediation required prior to initiating or continuing court action (M/is. Stat. Sec. **655.465 et. seq. (1989-1990)). Therefore, general arbitration provision unlikely to be used.**

SOURCE: Office of Technology Assessment, 1993.