



6-1-1999

Deselection under Harper v. Healthsource: A Blow for Maintaining Patient-Physician Relationships in the Era of Managed Care

Bryan A. Liang

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Bryan A. Liang, *Deselection under Harper v. Healthsource: A Blow for Maintaining Patient-Physician Relationships in the Era of Managed Care*, 72 Notre Dame L. Rev. 799 (1997).

Available at: <http://scholarship.law.nd.edu/ndlr/vol72/iss3/4>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

DESELECTION UNDER *HARPER v.*
HEALTHSOURCE: A BLOW FOR MAINTAINING
PATIENT-PHYSICIAN RELATIONSHIPS IN
THE ERA OF MANAGED CARE?

Bryan A. Liang*

I. INTRODUCTION

Managed care has swept the United States and is now the predominant form of health delivery for the vast majority of employed citizens, with an estimated 190 million patients enrolled in managed care forms.¹ As such, an extraordinarily large number of patients and physicians will have their relationships defined by the managed care framework for the foreseeable future.

Managed care is a business.² As such, it looks to minimize costs and maximize income through whatever methodology is available.³

* Assistant Professor of Law, Pepperdine University School of Law, Malibu, California. B.S. Massachusetts Institute of Technology 1983; Ph.D. Harris Graduate School of Public Policy Studies, University of Chicago 1989; M.D. Columbia University, College of Physicians & Surgeons 1991; J.D. Harvard Law School 1995. I wish to thank Richard Lee for invaluable research assistance.

1 "More than 100 million Americans—two-thirds of the working population—get their health care through a health maintenance organization or preferred provider organization." Denise Smith Amos, *Medical Balancing Act: Doctors Weigh Patient Needs Against Insurers' Rules*, ST. LOUIS POST-DISPATCH, Apr. 1, 1996, at 10. Seven of ten insured patients are enrolled in managed care plans. Janice Castro, *Who Owns the Patient, Anyway?*, TIME, July 18, 1994, at 38. Fifty million people are enrolled in health maintenance organizations and 140 million are enrolled in preferred provider organizations, the two predominant managed care forms. Mary Jane Fisher, *Health Care Reform Battles Shifting to States*, NAT'L UNDERWRITER & PROP. & CASUALTY-RISK & BENEFITS MGMT., July 31, 1995, at 9.

2 "Health care is a big business and doctors need to be held accountable for their practice." Managed care insurers hold physicians accountable in several ways: through oversight controls, financial incentives, and/or punishments and the power to deselect." Amos, *supra* note 1, at 10 (quoting John O'Rourke, president of the Managed Care Association of Metropolitan St. Louis).

3 Indeed, as a business entity, managed care plans act to obtain market share through other means. For example, in addition to minimizing costs, to obtain access

When, for example, a managed care organization (MCO) such as a health maintenance organization (HMO),⁴ preferred-provider organization (PPO),⁵ or other MCO attempts to enter a market, it will attempt to secure, or select, the services of as many providers (e.g., physicians, hospitals) as possible so that it may offer potential customers (e.g., employers) a desirable product: a cohesive network of physicians, hospitals, and other health care sources covering a large geographic area which effectively serve the health care requirements of the employer's employees. However, once the MCO has determined and assessed its market needs, it must adjust its provider base so as to minimize costs.⁶ Excess capacity of physicians, hospitals, and other services must be pared so as to maximize the bottom line.⁷ This

to markets as indicated *infra* notes 6-8 and accompanying text, managed care plans may sign up physicians and then deselect them after securing their patients in the plan. Jim Montague, *Joining the Race: State Medical Societies Try to Beat Managed Care Integrators to the Punch*, HOSPS. & HEALTH NETWORKS, Sept. 5, 1994, at 50; Jim Montague, *Striking Back: Managed Care Plans Are Dumping Physicians, But the Doctors Are Fighting Back*, HOSPS. & HEALTH NETWORKS, Oct. 20, 1994, at 38.

4 An HMO is an organized health care system that both finances and delivers health care services to its enrollees or subscribers. An HMO generally contracts with selected health care providers to arrange for the provision of comprehensive health care services for its covered members who prepay a fixed amount for care.

PATRICIA YOUNGER ET AL., LEGAL ANSWER BOOK FOR MANAGED CARE 2 (1995).

5 "Preferred provider organizations supply networks of health care providers to employer health benefit plans and health insurance carriers who wish to purchase health care services for covered beneficiaries." *Id.* at 7-8.

6 When managed-care companies move into virgin area, they tend to sign up as many physicians as possible. After they've determined how many doctors they need, they often drop some. . . . [O]nce a plan contracts with a physician, it will observe his practice patterns [costs]. That [cost] information will be used when the plan decides to shed doctors.

Ken Terry, *When Health Plans Don't Want You Anymore*, MED. ECON., May 23, 1994, at 138.

7 Edward Hirshfeld describes this evolution of the managed care market in the context of PPOs versus HMOs. He identifies five phases that represent progressive penetration of managed care; at phase two, "[a] large percentage of physicians is recruited to become part of the approved panel from which beneficiaries can obtain care, reducing concerns over a loss of freedom of choice. This wide choice and lower price allows them to gain market share more quickly than the HMOs." Edward Hirshfeld, *The Case for Physician Direction in Health Plans*, 2 ANNALS HEALTH L. 81, 88 (1994). The market then continues to evolve and plans reduce costs through deselection of providers "who use more resources per patient than average, or who use more resources than a predetermined or predicted level," generally without an inquiry as to why the providers used more or less resources than the predetermined or predicted level. *Id.* (citing *Deselection Predilection*, MED. STAFF & PHYSICIAN ORG. ADVISOR, Mar. 1994, at 1). Note that the focus is cost; indeed, a physician was recognized as the "physician of the month" and then deselected several months later for exceeding the

process, particularly for physicians, is accomplished through deselection.⁸

Deselection works through contract principles. Physicians who enter into agreements to serve as providers for MCOs must generally accept the standard "termination without cause" clauses,⁹ which allow either party to terminate the contract with some specified time of notice for any or no reason at all.¹⁰ Before managed care dominance, physicians were happy to sign contracts with such clauses;¹¹ however these clauses now put all the power in the hands of the MCO¹² be-

MCO's predicted cost level. *Id.* n.42 (citing *Deselection Predilection*, MED. STAFF & PHYSICIAN ORG. ADVISOR, Mar. 1994, at 1).

8 Deselection is that process where providers have their contracts with MCOs terminated under the termination without cause clauses of their contracts. Terminations are generally not related to quality of care issues, but instead are focused on economic conditions and business exigencies. Note that although deselection affects physicians and hospitals, physicians are more greatly impacted since deselection of hospitals is less frequent. *Physicians Hurt by Termination Clauses as Managed Care Penetration Builds*, MANAGED CARE WK., Dec. 11, 1995, available in 1995 WL 12838181. It is also interesting to note that the trend of MCOs contracting with physicians is not only to include termination without cause clauses but to expand reasons for termination with cause. This may be problematic for providers. For example, as in the Harper contract, *infra* note 34, the MCO can deselect for cause if there is any revocation or suspension of hospital privileges. But traditional suspension of hospital privileges is not only on the basis of quality of care problems, but is often a result of minor transgressions such as not exactly adhering to the medical records standards of the hospital which then results in a short suspension. Further, "discrimination against plan enrollees" and other such clauses, also in Harper's contract, *infra* note 34, are also problematic. These clauses may prevent physicians from severing relationships between themselves and disruptive or abusive patients of the MCO. See *Physicians Hurt by Termination Clauses as Managed Care Penetration Builds*, *supra*. This limitation assists neither party in obtaining the goal of improving and maintaining patient health.

9 Physicians "sign[] a standard contract allowing [the managed care company] to terminate [physicians] without cause." Terry, *supra* note 6, at 138.

10 "Nearly all HMOs and PPOs can abruptly fire, or 'deselect,' doctors without explanation." Amos, *supra* note 1, at 10; "Realize . . . that you [as a physician] may be let go from a managed care plan simply because they have too many doctors—or for no reason at all." Howard Larkin, *You're Fired; Physician Termination*, AM. MED. NEWS, Feb. 13, 1995, at 17.

11 While physicians used to embrace "termination without cause" clauses in managed care contracts, they are now finding that such clauses are being used to their disadvantage. These clauses generally allow either the plan or providers to bow out of a managed care agreement for no reason, with anywhere from 30 to 90 days notice.

Physicians Hurt by Termination Clauses as Managed Care Penetration Builds, *supra* note 8, at 1.

12 "The . . . power is with the insurance company. They're holding the purse strings." Amos, *supra* note 1, at 10 (quoting Dr. Octavio Chirino, president of the Metropolitan St. Louis Medical Society).

cause it is unlikely that physicians, in the current health care climate, would terminate their primary access to patients, and thus their financial lifeline, by severing their relationship with the MCO.¹³ Indeed, physicians will forego broad discretion in clinical decisionmaking and provide MCO-defined appropriate levels of care through the use of MCO-chosen clinical practice guidelines,¹⁴ as well as accept limitations on their care decisions (all on the basis of MCO cost) so as to preserve their patient base.¹⁵ The practical implication of this shift is

13 "HMO penetration is so high in many markets, physicians can't leave their plan because MDs need the income the plan's contract provides. This is reflected by the explosion of lawsuits brought by doctors for allegedly improper deselection." *Id.*; see also Bryan A. Liang, *Expensive Course of Treatment: Managed Care Organizations Should Bear a Burden for Malpractice*, L.A. DAILY J., Apr. 15, 1996, at 6:

Because of their market penetration, managed care organizations generally contract with physicians using "without cause" clauses, which reserve the organization's right to terminate its contract with the physician for any cause or no cause at all. Thus, managed care holds the key to patient access as well as the power to "deselect" physicians—to exclude them from access and income altogether. . . . [P]hysicians simply cannot afford to be so brazen as to disregard the dictates of care as communicated to them by their financial lifeline [the MCO].

Id. Since most patients are within the managed care infrastructure, as one physician put it, if more MCOs deselect him, "I'll have no patients, because there aren't any outside the HMOs." Terry, *supra* note 6, at 138 (quoting Dr. Satyn Chatterjee, a general surgeon). Note, however, that even when physicians are deselected, they may be under continuing obligation to serve patients they have been treating due to state abandonment laws. *Id.* (quoting attorney Alice Gosfield).

14 Clinical practice guidelines are systematically developed guides to practice for particular clinical situations. Deborah W. Hong & Bryan A. Liang, *The Scope of Clinical Practice Guidelines*, HOSP. PHYSICIAN, May 1996, at 46. However, clinical practice guidelines as an absolute standard of care are weak. First, clinical guidelines reflect only one perspective as to the medically appropriate action in a specific clinical scenario. However, there may be significant variation as to medical practice that does not reflect inappropriate care. Bryan A. Liang, *Medical Malpractice: Do Physicians Have Knowledge of Legal Standards and Assess Cases as Juries Do?* 3 U. CHI. L. SCH. ROUNDTABLE 59 (1996). Second, clinical practice guidelines are not all developed using rigorous, double blind studies; informal consensus, formal consensus, and other approaches are used. Hong & Liang, *supra*, at 46-47. In addition, guidelines may be biased due to the source that guidelines emanate from (e.g., a medical specialty society, academic medical center, HMO, etc.). *Id.* at 46, 48-49. Finally, clinical practice guidelines are not simply evidence-based, scientific pronouncements that leave little room for debate. These guidelines reflect the value judgments of those who participated in their formulation, including physicians, patients, and others with their own agendas. *Id.* at 49.

15 MCOs within the business context must contract with providers "who are both willing and able to abide by a particular MCO's practice protocols and other economically-oriented credentialing and performances standards. . . . Indeed, economic security in an MCO-dominated environment will depend on the physician's ability to

that physicians, to maintain their contract with the MCO, their access to patients, and thus their remuneration, must be low cost. This focus on cost encompasses not only the care provided to MCO enrollees; physicians must also follow administrative requirements of the plan,¹⁶ and, importantly, minimize hassles to the MCO in other, non-delivery aspects of care such as appealing patient care denials, requesting experimental treatments, and informing patients about treatments that may be beneficial to them but which are not covered by the plan.¹⁷

meet and abide by the MCO's economic credentialing criteria." Stephen E. Ronai, *Managed-Care Credentialing: Limited Access and Limited Rights*, CONN. L. TRIB., Sept. 18, 1995 (Supplement, Health Law), at S12. Selection, however, comes at a cost: "[o]nce selected, [physicians] will have a limited ability to contest a termination pursuant to severely circumscribed procedural rights," i.e., there will be limited due process if and when deselection occurs. *Id.*

16 [S]ince MCOs can reduce program costs only by controlling utilization, they are constrained to reappoint only those providers who adhere to the MCO's economic credentialing rules of the road [Thus, for providers who do not follow these rules,] [t]he MCO must then make a credentialing decision to drop such uncooperative or inefficient providers without regard to their clinical competence.

Id.

17 Thus, a physician will avoid being a "problematic" provider who "mak[es] trouble for the managed care organization" since these types of providers can be considered to be cost centers and be eliminated through deselection. Liang, *supra* note 13. In fact, "[t]here is an implied power that such [termination without cause clause] contracts have on physicians. They're afraid to speak up because they know they can be arbitrarily deselected.'" Janice Somerville, *Decision Gives Docs New Recourse on HMO Firings*, AM. MED. NEWS, May 6, 1996, at 10 (quoting Richard B. Friedman, immediate past president of the New Hampshire Medical Society). When doctors do insist on particular types of care for their patients, they can be deselected. See Terry, *supra* note 6, at 138 (recounting experience of physician who requested inpatient hospital admissions for two patients with gestational diabetes which were initially denied by HMO but approved after appeal; one week after the second episode, physician was sent a termination without cause letter deselecting her from the plan). Physicians in particular specialties and nonphysicians may be especially vulnerable. For example, for inpatient psychiatry, pre-admission screening may require the therapist to provide highly personal, sensitive, and detailed case histories of the patient before approval. Providers, fearful of being deselected, may not object to this potential violation of the patient-physician confidentiality relationship. Leigh Page, *Managed Care Has Psychiatrists in High Anxiety*, AM. MED. NEWS, Mar. 6, 1996, at 3. Overall:

[i]f it is easier for the [MCO] to hire a certain kind of doctor—one who is cost efficient, to be sure, but also one who is compliant, in agreement with [the MCO's] methods—then that is what [the MCO] is going to do. And if there comes a time when there are more doctors than necessary on a single plan in a given part of town or too many specialists on a given plan, the [MCO] will simply lay some of them off. The [MCO]'s only obligation is to provide a doctor, not a particular doctor. Skill is irrelevant.

Mimi Swartz, *Not What the Doctor Ordered*, TEX. MONTHLY, Mar. 1995, at 86.

The shift in the decisionmaking and practice structure under managed care has thus significantly altered the role of the physician.¹⁸

Many physicians have been deselected under a termination without cause clause; the few who have challenged these terminations have generally been denied relief.¹⁹ In fact, the fight is usually for some form of due process before termination rather than questioning the right to terminate itself.²⁰ Although the latter has generated some interesting legislation²¹ and case law,²² there have been no indications

18 [T]he Norman Rockwell vision of medicine, where the physician had sole discretion over the care the patient receives and the economy has enough money to fund this care, has gone the way of the dinosaur. . . . [Now,] the physician *may* be able to indicate what care *can* be given; the managed care organization indicates what care in fact *will* be given.

Liang, *supra* note 13, at 6.

19 See *infra* notes 39-52 and accompanying text. Note also that termination which affects clinical and medical staff privileges must be reported to the National Practitioner Data Bank (NPDB). The NPDB, 45 C.F.R. §§ 60.1-60.14 (1994), was created under the authority of the federal Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-152 (1994) for the purpose of ensuring that unethical or incompetent practitioners are restricted from moving from state to state to avoid discovery of previous poor quality care. The NPDB is a repository of records on all payments for malpractice claims in the United States; it also catalogues information on adverse actions taken against a health practitioner's license, privileges, or professional society memberships. Bryan A. Liang, *Beyond the Malpractice Suit: The National Practitioner Data Bank*, HOSP. PHYSICIAN, July 1995, at 11. Thus deselection can mandate a report to the NPDB.

20 The general rule is that "[i]f you're in a managed care plan, there's usually less you can do to protect yourself in the event of termination. Most have no provisions for peer review and you may not even get an administrative review." Larkin, *supra* note 10, at 17.

21 Note that under the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-152, physicians in managed care who are excluded, deselected, or terminated are afforded due process rights if the action was on the basis of professional conduct or quality of care grounds. However, this is quite inapplicable for deselection in the general circumstance of termination due to economic criteria under a without cause clause. Deselection is more akin to termination under an exclusive contract with a termination without cause clause, which does not generally invoke notice and hearing (i.e., due process) requirements. Bryan A. Liang, *An Overview and Analysis of Medical Exclusive Contracts*, J. LEGAL MED. (forthcoming Mar. 1997) (manuscript at nn.85-147 and accompanying text, on file with author). However, California and Connecticut have statutory provisions that provide for mandatory notice and due process for deselected physicians. See Larkin, *supra* note 10, at 17; Brian McCormick, *Patients, Doctors Sue CIGNA in Deselection Flap*, AM. MED. NEWS, Sept. 26, 1994, at 3.

22 The case that has become known for the proposition that providers are entitled to "due process" is *Delta Dental Plan of Cal. v. Banashy*, 33 Cal. Rptr. 2d 381 (Ct. App. 1994). In *Delta Dental*, the court held that a dispute regarding fees was contractually to be addressed in the plan resolution procedure but was subject to judicial review because of the dentists' common law right to fair procedure: "[b]ecause the dentists are entitled to fair procedure, they have the right to seek judicial re-

that termination without cause clauses are anything but valid, or that good faith or public policy considerations are required when exercising these clauses in health care contracts.²³ Thus, although terminations under these clauses may require some form of due process, the exercise of and terminations under them have been considered valid.²⁴

Until now.²⁵ The New Hampshire Supreme Court in *Harper v. Healthsource*²⁶ held that

[i]f a physician's relationship . . . is terminated without cause and the physician believes that the decision to terminate was, in truth, made in bad faith or based upon some factor that would render the decision contrary to public policy, then the physician is entitled to review of the decision.²⁷

The court thus provided a singular holding regarding deselection in health care under a termination without cause clause contract: that aside from due process considerations, the decision for termination

view . . . after exhausting the administrative remedy." *Id.* at 384. This right to fair procedure, however, appears limited to members of organizations that "control important economic interests" of the members. *Id.* at 385 (quoting *Applebaum v. Board of Dirs.*, 656, 163 Cal. Rptr. 831 (Ct. App. 1980)). It is important to note that the court did *not* indicate that MCO internal procedures were not to be used; the court rejected the dentists' claim that because the internal review was done by the organization itself, it is biased: "[d]espite the availability of mandamus review, the dentists still contend Delta's internal review procedure is infirm because Delta lacks the disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity. This argument is unavailing." *Delta Dental*, 33 Cal. Rptr. 2d at 386. Note also that the judicial review can only be sought under a writ of mandate; this limits the plaintiffs' remedy (e.g., no damages) and the court only reviews whether the hearing was fair and whether evidence supported the decision. Julie Johnsson, *Doctors Entitled to Due Process in HMO Disputes*, AM. MED. NEWS, Nov. 21, 1994, at 1. Finally, even though there may be some due process rights for providers, this case did not involve a termination without cause clause and thus its applicability may be limited.

23 See Liang, *supra* note 21 and *infra* notes 280-92 and accompanying text.

24 However, the termination cannot be in violation of that provider's civil rights. See *Ambrosino v. Metropolitan Life Ins.*, 899 F. Supp. 438 (N.D. Cal. 1995), *infra* notes 53-61 and accompanying text.

25 "This is the first state Supreme Court ruling of its kind." *Doctor Sues HMO for Dropping Him as a 'Preferred Provider'*, LAW. WKLY. USA, May 6, 1996, at 9; "[T]he AMA is celebrating a New Hampshire Supreme Court decision that gives physicians legal recourse when HMOs terminate their contracts without cause. The unanimous decision, a first, provides legal ammunition for cases in other states" Somerville, *supra* note 17, at 10; "The case [is] the first of its kind to be heard by a state supreme court" Ralph Jimenez, *Court to Hear Insurers on Right to Drop MDs*, BOSTON SUNDAY GLOBE, Jan. 28, 1996, at 1.

26 *Harper v. Healthsource N.H., Inc.*, 674 A.2d 962 (N.H. 1996).

27 *Id.* at 966.

itself is reviewable under a good faith and public policy basis, and not simply the *procedure* by which it is accomplished.

This Article will briefly review the facts of this remarkable case in Part II and then turn to an overview of deselection in Part III. In Part IV an analysis of the legal reasoning of the court is provided, which will show that on the basis of general common law, jurisdictionally relevant law, and the court's own citations and discussion, Harper (and the court) simply cannot justify a traditional cause of action. However, in Part V, on the basis of the court's correct recognition of the new role of the physician under managed care, a health policy is proposed that would protect vulnerable patients—those currently at highest risk for injury in this new social health delivery framework. The Article concludes in Part VI.

II. *HARPER V. HEALTHSOURCE*. THE FACTS

Paul J. Harper, M.D. (Harper) is a board-certified surgeon who is licensed to practice medicine in New Hampshire.²⁸ He has contracted and periodically renewed his relationship with Healthsource New Hampshire, Inc.²⁹ (Healthsource) as a participating physician. He provided both surgical and primary care services to Healthsource enrollees from 1985 to 1989. However, in 1989, although Healthsource continued to contract with Harper as a primary care provider, it did not contract for his surgical services.³⁰ According to the records examined by the court, thirty to forty percent of Harper's patient base came from Healthsource.³¹

However, Harper claimed that in June 1994, Healthsource began to "manipulat[e] and skew[] the records of treatment he had provided to several of his patients and that such inaccuracies adversely affected other subsequent reports."³² Harper apparently notified Healthsource of these claimed inaccuracies in patient records. In response, Healthsource indicated to Harper that the credentialing committee had reviewed his patient records and had not found any quality of care problem; however, at the same time, it informed Harper that the credentialing committee was recommending that his contract be

28 The facts as stated here are those assumed by the court in *id.* at 963-64.

29 The HMO is the state's largest, with approximately 122,000 enrollees. Somerville, *supra* note 17, at 10.

30 *Harper*, 674 A.2d at 963.

31 *Id.* This would most likely entitle Harper to "common law due process" rights. See *Delta Dental Health Plan of Cal. v. Banasky*, 33 Cal. Rptr. 2d 381 (Ct. App. 1994).

32 *Harper*, 674 A.2d at 963 (quoting Harper's writ to the court).

terminated because he had not satisfied Healthsource's recredentialing criteria.³³

Harper then appealed the credentialing committee's recommendation to the clinical quality assurance committee and requested the documentation on which the credentialing committee made its determinations. The materials were not forthcoming. However, although Healthsource refused to provide the documents, it advised Harper that he could present evidence to counter the Healthsource evidence at the clinical quality assurance committee hearing. Subsequently, Harper did not attend or participate in the subsequent clinical quality assurance meeting due to Healthsource's refusal to provide the documentation. Without Harper present, the clinical quality assurance committee affirmed the credentialing committee's decision and recommendation to terminate Harper for cause, but added that Harper should be terminated without cause as well.³⁴

33 *Id.* A Healthsource spokeswoman indicated that this occasion was the first time Healthsource had ever canceled a physician contract. Somerville, *supra* note 17, at 10.

34 *Harper*, 674 A.2d at 963. The relevant provisions of Harper's contract are as follows:

2.02. Termination Without Cause. This Agreement may be terminated by either party without cause upon six (6) months prior written notice.

2.03. Termination With Cause. This Agreement may be terminated immediately by [Healthsource] at any time with cause upon written notice of cause to [Harper].

Cause shall include, but not be limited to:

(i) repeated failure to comply with quality assurance, peer review and utilization review procedure;

(ii) unprofessional conduct as determined by the appropriate state professional licensing agency;

(iii) conviction for any criminal offense related to the practice of medicine or any felony unrelated to such practice;

(iv) failure to meet Credentialing Committee standards and procedures;

(v) revocation, reduction, or suspension of privileges at any participating provider hospital or any hospital where [Harper] conducts his principal practice;

(vi) failure by [Harper] to meet the "Conditions of Participation" specified in Section 3;

(vii) interference by [Harper] with [Healthsource]'s employer relations and business contracts;

(viii) discrimination against [Healthsource] Members as described in Section 4.03; or

(ix) repeated failure of [Harper] to comply with the terms of this Agreement.

Id. at 964.

Harper appealed again, this time to the Executive Management Committee. The Executive Management Committee held a hearing at which Harper was present. Healthsource did not present any evidence at this hearing and it continued to refuse Harper access to the evidence which supported Healthsource's decision to terminate him. The Executive Management Committee voted to uphold the clinical quality assurance committee's decision to terminate Harper without cause, but did not terminate Harper with cause. This last hearing exhausted Harper's internal administrative appeals.³⁵

Harper then filed a suit in equity with the New Hampshire Superior Court; Healthsource moved to dismiss all of Harper's causes of action. The superior court granted the motion. Harper then appealed this grant in four areas:

(1) that the 'termination without cause' provision in the agreement, or the termination in this case, is void against public policy; (2) that Healthsource was a state actor required to afford him equal protection and due process; (3) that he properly pleaded a cause of action for civil conspiracy; and (4) that Healthsource violated RSA 420-B:26, II in refusing to provide him with certain records.³⁶

The supreme court dismissed all but his termination without cause claim due to potential bad faith and violation of public policy; it then remanded the case.³⁷

III. HEALTH CARE DESELECTION

Few deselection cases have been published. Generally, it would appear that the termination without cause clauses appear to deter providers from challenging such terminations.³⁸

³⁵ *Id.*

³⁶ *Id.*

³⁷ The court terminated without prejudice Harper's damages claim against Healthsource for not providing him with the records he requested since it related to a privilege claim which may be relevant to the case on remand. The court affirmed the trial court's decision to dismiss both the state actor claim as well as the civil conspiracy claim. *Id.* at 967-68.

³⁸ Many physicians have been reported to be deselected but there have been no successful published challenges to these terminations except under antidiscrimination laws (*see* *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp. 438 (N.D. Cal. 1995); *infra* notes 53-60 and accompanying text). *See, e.g., Select Preferred Provider Plan of Blue Cross Blue Shield of the National Capital Area: Before the Compensation and Employee Benefits Subcomm. of the House Post Office and Civil Service Comm.*, 103d Cong. (1994) (statement of Rodney Ellis, M.D., Vice-President, Medical Society of the District of Columbia) (indicating that a Blue Cross plan "'deselected' almost 4,000 doctors who were previously included in the regular [Blue Cross] indemnity program"); Julie Johnsson, *Hospital Medical Staffs: Next Managed Care Casualty?*, AM. MED. NEWS, Oct. 17,

Further, in some circumstances the merits of a deselection challenge have not been reached when denying provider relief. For example, in Texas a group of providers had a termination without cause clause in their PPO agreement with an insurance company. These providers were subsequently deselected; they then sought to have these clauses deemed void and unenforceable because, they claimed, the clauses violated the Texas statutes regulating PPOs which require PPO contracts to be based solely on economic, quality, and accessibility considerations, and because the physicians were not provided due process upon termination.³⁹ The Fifth Circuit affirmed the district court's grant of summary judgment for the insurance company because the state statutes did not provide for private causes of action for enforcement of the PPO rules.⁴⁰ Thus, without reaching the merits of deselection under termination without cause clauses, the court held that the physicians had no cause of action and dismissed their suit.⁴¹

However, one court has held that the preemptive effects of ERISA may not be used to dismiss a challenge to physician deselection. In *Hollis v. CIGNA Healthcare of Connecticut*,⁴² physicians and patients brought suit against CIGNA after the physicians were deselected from the provider panel. The patients claimed that CIGNA misrepresented the nature of specific provider access in their advertisements in violation of the state's unfair insurance statute; that these advertisements were unfair or deceptive in violation of the state's unfair trade practices statute; that the removal of specific physicians who were listed as providers with the state without informing the physicians as to the criteria the physicians failed to meet was in violation of the state's man-

1994, at 1 (reporting that there has been a large increase in deselected physicians in the past year on medical staffs); Terry, *supra* note 6, at 138 ("Thousands of doctors have been 'deselected'—or denied participation in the first place.")

39 Texas Med. Ass'n v. Aetna Life Ins. Co., 80 F.3d 153 (5th Cir. 1996).

40 *Id.* at 160. Note that in another Texas Medical Association case, *Texas Med. Ass'n v. Prudential*, No. 93-65003 (80th Dist. Ct., Harris County, Tex., Dec. 22, 1993) (removed to federal court, Dec. 29, 1993), physicians claimed that under the Texas Administrative Code, they were entitled to due process rights before deselection and an opportunity to present evidence and refute Prudential's evidence. Prudential indicated that their decision to deselect the providers was "business judgment" and deselection occurred under the termination without cause clause. Larry A. "Max" Maxwell, *Healthcare Law*, 48 SMU L. REV. 1303, 1323 (1995). However, this suit was dropped in 1996. See *infra* note 41.

41 According to a Texas Medical Association representative, the Association has dropped its suit against Prudential, see Maxwell, *supra* note 40, and has not filed an appeal in the Aetna case (personal communication, June 12, 1996).

42 Nos. 705357, 705358, 1994 WL 757530 (Conn. Super. Ct. Dec. 5, 1994), *rev'd sub nom.* *Napoleitano v. CIGNA Healthcare of Conn., Inc.*, 680 A.2d 127 (Conn. 1996).

aged care statute; and that CIGNA had perpetrated the common law tort of misrepresentation on them. The physicians brought claims of common law breach of contract, breach of an implied covenant of good faith and fair dealing, tortious interference with business expectancies, and violation of the state's unfair trade practice and managed care statutes.⁴³

The trial court granted CIGNA's motion to strike all claims of all plaintiffs.⁴⁴ The trial court based its decision on the preemptive effects of ERISA on the state laws.⁴⁵ The court indicated first that the CIGNA health plan was an employee benefit plan under the auspices of ERISA; as such, the court noted that the patients' cause of action clearly "relate[d] to"⁴⁶ the plan because the plaintiffs "challenge the administration of the plan in question. . . . The complaint here . . . focuses on CIGNA's removal of certain physicians from its plan. This is, in essence, a complaint about plan administration. This is a core ERISA concern."⁴⁷

However, the Connecticut Supreme Court reversed.⁴⁸ The Supreme Court indicated that, indeed, the critical issue was "whether the plaintiffs' claims 'relate to' the employee benefit plan offered by CIGNA."⁴⁹ But, the court disagreed with the trial court's analysis of the issue and concluded that the claims did not "relate to" the plan because they did "not attempt to prescribe the substantive administrative aspects of a plan, such as a determination of an employee's eligibility, the nature and amount of employee benefits, the amount of an employer's contribution to a plan, and the rules and regulations under which the plan operates."⁵⁰ Instead, the court held that the plaintiffs' claims, "merely [sought] to enforce the plan that CIGNA ha[d] chosen to create and administer."⁵¹ Thus, the court reversed

43 *Id.* at *2.

44 *Id.* at *10.

45 Employee Retirement Income Security Act, 29 U.S.C. § 1144 (1994). ERISA pre-empts an extremely broad array of state statutory and common law claims which significantly affects state efforts at health care reform. *See generally* Devon P. Groves, *ERISA Waivers and State Health Care Reform*, 28 COLUM. J.L. & SOC. PROBS. 609 (1995); Nicole Weisenborn, *ERISA Preemption and Its Effect on State Health Reform*, 5 KAN. J.L. & PUB. POL'Y 147 (1995); Jolee Ann Hancock, Comment, *Diseased Federalism: State Health Care Laws Fall Prey to ERISA Preemption*, 25 CUMB. L. REV. 383 (1994-1995).

46 *Hollis*, 1994 WL 757530, at *6-*7.

47 *Id.* at *7.

48 *Napoletano v. CIGNA Healthcare of Conn., Inc.*, 680 A.2d 127 (Conn. 1996).

49 *Id.* at 138.

50 *Id.* at 142.

51 *Id.* at 136.

the trial court's dismissal and remanded the case for trial on the merits.⁵²

The sole published case involving a termination without cause clause that resulted in judgment for the plaintiff is *Ambrosino v. Metropolitan Life Insurance Company*,⁵³ where the court held that a podiatrist's termination as a provider under his contract with the insurance company violated California's anti-discrimination statute. The provider had been addicted to narcotics; this past chemical addiction was considered by the court as a "disability" on the basis of the definition imported from the Americans with Disabilities Act.⁵⁴ Termination of the provider was discriminatory under the statute because the insurance company did not show "why either a drug-free history or a non-probationary status [of the provider's license to practice] is an essential qualification [U]se of . . . generalizations about a class of disabled persons instead of evaluating the actual qualification of a disabled individual is a prohibited form of discrimination on the basis of disability."⁵⁵ Hence, termination even under a without cause clause on the basis of "race, creed, religion, color, national origin, sex, or disability of the person" was held to violate the statute and thus be prohibited.⁵⁶

The court also found that the podiatrist

had a common law right to fair procedures, including the right not to be expelled from membership for reasons which are arbitrary, capricious and/or contrary to public policy. . . . For the same reasons that [Ambrosino's] termination is discriminatory as a matter of law, it is also arbitrary and capricious and violative of public policy as a matter of law.⁵⁷

Substantively, since Metropolitan Life

applied the at-will termination provision of its participating physician agreement . . . in a discriminatory manner, thereby breaching [the California anti-discrimination statute] in that [Ambrosino's] disability, a former chemical dependency, was a cause of [his] termination from participation in [Metropolitan Life's] network, and [since Metropolitan Life] did not show freedom from the disability to be an essential qualification of participation,

52 *Id.* at 146.

53 899 F. Supp. 438 (N.D. Cal. 1995).

54 42 U.S.C. §§ 12101-213 (1994).

55 *Ambrosino*, 899 F. Supp. at 444.

56 *Id.* at 442 (citing CAL. CIV. CODE § 51.5).

57 *Id.* at 445.

Metropolitan Life violated Ambrosino's civil rights when it deselected him from the plan.⁵⁸

This result is not surprising. Although there was a termination without cause clause within the contractual agreement itself, parties cannot contract around, and one party cannot discriminate on the basis of prohibited criteria within, civil rights statutes.⁵⁹ Thus, for example, if Metropolitan Life had terminated Ambrosino because he was Asian, or Catholic, or female, the court would have held that Metropolitan Life was discriminatory in its termination and that the termination was arbitrary, capricious, and violated public policy.⁶⁰ However, apart from circumstances which invoke civil rights or constitutional provisions, it would appear that deselection under a termination without cause clause is a legally viable business method to maintain a sound economic basis of an MCO.⁶¹

IV. *HARPER V. HEALTHSOURCE*. ANALYSIS OF THE DECISION

The New Hampshire Supreme Court began its analysis of Harper's contract with the recognition that the contract between Harper and Healthsource was one with a termination without cause clause: "Harper contends that we should strike the provision in his agreement with Healthsource allowing Healthsource to terminate the relationship without cause as being against public policy."⁶² Their relationship thus appears to rest more upon contract rather than a traditional hire and fire employer-employee relationship.⁶³ However, the

58 *Id.* at 446. The case is currently on appeal for costs and attorney's fees; the appeal was filed on May 22, 1996.

59 *See* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII."); *Moses v. Burleigh County*, 438 N.W.2d 186, 189-90 (N.D. 1989) ("We conclude that a contract cannot excuse later unlawful discrimination. . . . Intrinsically, a law against discrimination outlaws contradictory contracts."); *see also* RESTATEMENT (SECOND) OF CONTRACTS: BASES OF PUBLIC POLICIES AGAINST ENFORCEMENT § 179 (1981) ("A public policy against the enforcement of promises or other terms may be derived by the court from . . . legislation relevant to such a policy . . .").

60 *See supra* note 56 and accompanying text.

61 Decisions to terminate providers under deselection are very analogous to similar decisions under exclusive contract arrangements. Both involve contracts with terminations without cause clauses and both are not considered to impugn the quality reputation of the provider. Exclusive contracts and terminations thereunder are seen to be based on economic criteria and thus to reflect "medical business judgment." As such, they are held in "great deference" by the courts. Liang, *supra* note 21, at nn.173-76 and accompanying text.

62 *Harper*, 674 A.2d at 964.

63 *See infra* note 267.

court continued its substantive discussion of the case by reviewing the law of employment relationships. This emphasis upon employer-employee law is a recurrent theme throughout the opinion and, although there are concerns regarding this emphasis, this section will take the lead of the court and begin the discussion with an analysis of the law in this area.

A. *Employer-Employee Relationships*

Employment at will relationships under the traditional common law rule can be terminated under virtually any condition, good, bad, or ugly.⁶⁴ However, this rigid rule has become softened over the past several decades and currently some exceptions have been carved out of this legal doctrine. These generally fall under conceptions of a breach of a covenant of good faith and fair dealing, public policy concerns, and implied-in-fact contracts.

1. Implied-in-Fact Contracts

To dispense with the latter first, implied-in-fact contracts as applied to the at will employment relationship allow the traditional at will employee to maintain a breach of contract action when some act by the employer has made the employee reasonably believe that his or her employment tenure will continue or that the employer has promised some set of actions that will occur before the employee is terminated.⁶⁵ The classic circumstance where this arises is through modification of an employment at will relationship. In *Pine River State*

64 See, e.g., *NLRB v. McGehey*, 233 F.2d 406, 413 (5th Cir. 1956) (stating that termination of an at will agreement may be for "good cause, or bad cause, or no cause at all"); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1031 (Ariz. 1985) (Termination can be "for no cause, or even for a cause morally wrong." (using language from *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-20 (1884), *rev'd sub nom. on other ground*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915))); *Fawcett v. G.C. Murphy & Co.*, 348 N.E.2d 144, 147 (Ohio 1976) (holding that an employer's right to discharge is absolute and not limited by considerations and principles that protect individuals from gross or reckless conduct, willful, wanton or malicious acts, or acts done intentionally, with insult, or in bad faith); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-20 (1884), *rev'd sub nom. on other ground*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915) (holding that termination of employment at will contracts can be "for good cause, for no cause, or even for cause morally wrong"); W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 130, at 1027 (5th ed. 1984) (pointing out that termination can be "even for reasons of spite or malice").

65 Essentially, the at will nature of an employment relationship is rebuttable if the employer and employee take particular action. See *Minihan v. American Pharm. Ass'n*, 812 F.2d 726 (D.C. Cir. 1987) (indicating that employment at will doctrine is a rebuttable presumption).

Bank v. Mettille,⁶⁶ procedural restraints on termination of employees added to an employee handbook were held to have formed an implied-in-fact contract between the at will employee and employer and was binding as a promise on the employer. In traditional contract terms, the added provisions in the employee handbook were the offer; "[t]he employee's retention of employment constitute[d] acceptance . . . ; [and] by continuing to stay on the job, although free to leave, the employee supplie[d] the necessary consideration"⁶⁷ The requisite components for an implied-in-law modification of an at will relationship thus appear to be some promise by the employer related to employment,⁶⁸ consideration given by the employee, an employee acceptance, and a breach of that promise through inappropriate termination.⁶⁹

It does not appear that Harper as a contracting physician falls within this rubric of legal fiction.⁷⁰ According to the facts as laid out by the court, there were no outward manifestations or promises that his tenure with Healthsource would be subject to any additional terms

66 333 N.W.2d 622 (Minn. 1983).

67 *Id.* at 627. However, note that this "continuing to stay on the job" conception of legal consideration is a double-edge sword. See *Lee v. Sperry Corp.*, 678 F. Supp. 1415 (D. Minn. 1987) (granting summary judgment for employer when postemployment amendment to employee manual which transformed employment relationship into one terminable at will was considered accepted by employee's continuation of work).

68 Note also that employees can obtain success if the court believes that there can be reasonable reliance upon these promises; see *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) (holding that employees who justifiably rely on expressed policies in employment manuals make these policies binding upon the employer and the employer cannot treat these policies as illusory promises).

69 Certainly one can argue that Mettille, by simply staying on the job, was doing what he was otherwise obligated to do. If that is the case, then the legal duty rule would dictate that Mettille furnished no additional consideration for the "contract." See RESTATEMENT (SECOND) OF CONTRACTS: PERFORMANCE OF LEGAL DUTY § 73 (1981). Indeed, instead of "protecting" the employee, the court's holding that such employee handbook provisions, which have a doubtful audience to begin with, constitute a potential modification of the contractual relationship may in fact harm the employee through a subsequent employer policy of disclosing nothing and keeping their employees in the dark so as to avoid potential court reckoning in the future.

Further, implied-in-fact promises can be considered weaker than any express promises, to the point where a court might conclude that the implied-in-fact promise cannot be used to successfully support an employee's wrongful dismissal. See *Brousard v. CACI, Inc.-Federal*, 780 F.2d 162 (1st Cir. 1986) (holding that express promises regarding employment security are distinguishable from implied promises from employee handbooks and negotiations, with implied promises insufficient to sustain a wrongful termination claim).

70 See *supra* note 69.

past those in his written contract. Indeed, Harper himself did not claim any such modification nor implied-in-fact duty on the basis of any additional oral or written promise(s) between him and Healthsource. There was thus no offer, no acceptance, or any consideration to be noted. Thus, it would appear that there is no implied-in-fact contract issue here.⁷¹

Note, however, that even within a framework of implied promises which can potentially provide for continued employment or additional rights, employers may limit their obligations to employees explicitly through various disclaimers in handbooks or on employment applications.⁷² These disclaimers are express provisions that indicate to employees that any general actions or informal agreements by employers are not to be construed as implied agreements. For example, in *Novosel v. Sears, Roebuck & Co.*,⁷³ the court held that a clause on an employment application which expressly reserved the company's right to terminate with or without cause effectively refuted any possible implied agreement to the contrary.⁷⁴ Similarly, in *Goos v. National Association of Realtors*,⁷⁵ the court held that a conspicuous disclaimer in the employment handbook barred an implied-in-fact contract claim as a matter of law due to the lack of reasonableness of reliance on any inferable offer therein. Hence, these disclaimers basically make any reliance upon implied or other promises that contradict an express disclaimer unreasonable.⁷⁶ Indeed, even a written contract for contin-

71 Of course, somehow the thread of law can always be found in the fabric of life. See *supra* note 69. Thus, for example, if Healthsource requested Harper to change his performance by requesting him to provide only primary care services rather than surgical services, i.e., to devote 100% of his time to primary care for Healthsource patients, this change could furnish consideration for some modification of his relationship with Healthsource if an enterprising attorney could find an implied or express promise on the part of Healthsource to terminate for cause only. Of course, a simpler approach would be that which the *Pine River Bank* court used: simply by continuing to work, consideration was provided for any modification.

72 See *infra* notes 73-77 and accompanying text.

73 495 F. Supp. 344 (E.D. Mich. 1980).

74 The clause read, "In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself." *Id.* at 346; see also *Cutter v. Lincoln Nat'l Life Ins. Co.*, 794 F.2d 352 (8th Cir. 1986) (upholding a JNOV ruling for an employer where written employment agreement provided for termination with or without cause).

75 715 F. Supp. 2 (D.D.C. 1989).

76 See also *Hogge v. Champion Lab., Inc.*, 546 N.E.2d 1025 (Ill. App. Ct. 1989) (holding handbook disclaimer made reliance upon terms therein unreasonable); *Fournier v. United States Fidelity & Guar. Co.*, 569 A.2d 1299 (Md. Ct. Spec. App.

uous employment under circumstances deemed "mutually agreeable" between the employer and employee has been interpreted as to allow the employer to unilaterally terminate the employee at will on the basis of the disclaimer.⁷⁷

Thus, even if Harper were to have claimed some form of implied contractual duty on the part of Healthsource to keep him and not deselect him, the conspicuous disclaimer represented by the express termination without cause clause in his contract would most likely have precluded his action under this theory.⁷⁸

2. Public Policy Exception

a. The General Common Law

Another major legal doctrine which has carved out an exception to the traditional terminable at will employment doctrine is based upon public policy. If the termination of the employee was against some clear manifestation of public policy,⁷⁹ and the employer does not have a requisite legitimate business interest or just cause that overrides the public policy interest,⁸⁰ the termination can be held to be wrongful. However, note that the background rule under this public policy exception remains that the employment relationship is at will,

1990) (holding disclaimer on employment application precluded reasonable reliance on later general statements in the handbook or letter offer); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786 (Md. Ct. Spec. App. 1986) (holding that disclaimers in employment handbooks can preclude implied-in-fact claims). However, order may be important; thus, one court has held that oral manifestations of continued employment *before* the written disclaimer was issued could sustain recovery on an implied promise for employment tenure. *Ohanian v. Avis Rent a Car Sys., Inc.*, 779 F.2d 101 (2d Cir. 1985); *see also* *Prout v. Sears, Roebuck & Co.*, 772 P.2d 288 (Mont. 1989) (holding that clear disclaimer of at will relationship allowing termination for no reason did not extend to allowing dismissal thereunder for a "false cause" when employee was dismissed for falsifying time sheets). *But see* *Carpenter v. American Excelsior Co.*, 650 F. Supp. 933 (E.D. Mich. 1987) (holding that oral assurances of employment tenure that were given *before* the employment application with disclaimer was signed could not defeat the disclaimer without further oral assurances or promises in the handbook reinforcing the oral promise of continued employment).

⁷⁷ *Murray v. Kaiser Aluminum & Chem. Corp.*, 591 F. Supp. 1550 (S.D. W. Va. 1984), *aff'd*, 767 F.2d 912 (4th Cir. 1985). Of course, if an employee actually agrees to an at will relationship, implied actions are generally precluded. *See* *Haas v. Montgomery Ward*, 812 F.2d 1015 (6th Cir. 1987) (holding that an implied contract claim was barred because employee signed a form acknowledging that employment could be terminated at any time).

⁷⁸ *See supra* note 34.

⁷⁹ From whatever source, including the common law or statute. *See infra* note 123 and accompanying text.

⁸⁰ *See infra* note 174.

and only if the employee can manifest some evidence that there has been a violation of some articulable public policy will he or she have the potential to prevail.⁸¹

The varying public policies that have been implicated by this exception are numerous, but all share the underlying feature of an employer requirement or action that simply violates some statutory or common law notion of legal morality.⁸² Thus, a litany of actions have been considered in concert with the public policy exception.

First, several statutory frameworks are fundamental to and represent the basis of support under the public policy exception. For example, discriminatory dismissal in violation of Title VII of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, religion, sex, or national origin, is within the exception.⁸³ Discharge discrimination is also prohibited on the basis of age under the Age Discrimination in Employment Act of 1967⁸⁴ and on the basis of disability under the Rehabilitation Act of 1973.⁸⁵ Discharge for engaging in union activities also violates public policy under federal statutory law.⁸⁶

Far more variable, but still somewhat cohesive, are the common law public policy exceptions.⁸⁷ Generally, these exceptions follow the

81 See *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (indicating that plaintiff-employee has the burden of proof of unjust termination which the employer can refute).

82 See *infra* notes 83-174 and accompanying text; see also *Haynes v. Zoological Soc'y of Cincinnati*, 567 N.E.2d 1048, 1050 (Ohio C.P. 1990) (finding a violation of public policy that is "deeply ingrained in community and moral values").

83 42 U.S.C. § 2000e-2 (1994).

84 29 U.S.C. § 623 (1994). But see *Yoho v. Triangle P.W.C. Inc.*, 336 S.E.2d 204 (W. Va. 1985) (holding that clause of collective bargaining agreement mandating termination of seniority after employee's absence from work for one year for work-related injury was not contrary to public policy, even though loss of seniority also resulted in termination of employee).

85 29 U.S.C. § 794 (1994); see also *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp. 438 (N.D. Cal. 1995); *supra* notes 53-58 and accompanying text.

86 29 U.S.C. § 158(a) (1994).

87 These public policy cases may be brought in either contract or tort. Since I am simply focusing on the qualitative nature of this particular action, i.e., the question of whether the facts present *any* cause of action, I will not delve into the nuances of the contract-torts distinction. To obtain a greater flavor of these distinctions, see generally Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187 (1990); Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583 (1994); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

ideal that an employee cannot be terminated for refusing to engage in activities that violate (or for engaging in activities to thwart violations of) the law or that prevent an employee from performing a civic duty. The cases run the gamut. For example, the public policy exception has extended to circumstances where an employee refused to give false testimony,⁸⁸ refused to engage in a price fixing scheme for gasoline,⁸⁹ insisted that the employer comply with the Food, Drug and Cosmetics Act requirements,⁹⁰ reported violations of public health and safety statutes,⁹¹ attempted to comply with jury duty,⁹² filed a workmen's compensation claim,⁹³ engaged in whistleblowing,⁹⁴ and refused to take a polygraph test which would violate a state statute.⁹⁵

88 *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959).

89 *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

90 *Sheets v. Teddy's Frosted Foods*, 427 A.2d 385 (Conn. 1980); *Boyle v. Vista Eyewear*, 700 S.W.2d 859 (Mo. Ct. App. 1985). But note that there may be some distinction as to employees who are *responsible* for reporting such actions of an employer versus reporters who do not have such responsibility and are terminated. See *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338 (3d Cir. 1990) (reversing verdict of \$400,000 for an employee who had been terminated after reporting water pollution activities).

91 *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088 (9th Cir. 1990) (reversing summary judgment for employer who terminated employee for filing a complaint with the federal Occupational Safety and Health Administration). Note that the Occupational Health and Safety Act, 29 U.S.C. § 660(c)(1) (1994), provides protection against employers who fire employees on the basis of reporting violations of the Act. In addition, the Clean Air Act, 42 U.S.C. § 7622(a) (1994), and the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1994), provide statutory protection against termination for reporting violations of its dictates.

92 *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. Ct. 1978); see also *Juror Protection Act*, 28 U.S.C. § 1875 (1994) (allowing for recovery of compensatory and punitive damages by an employee who is dismissed or threatened to be dismissed for jury service).

93 *Hartlein v. Illinois Power Co.*, 568 N.E.2d 520 (Ill. App. Ct. 1991); *Smith v. Smithway Motor Xpress*, 464 N.W.2d 682 (Iowa 1991); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1976); *Hopkins v. Tip Top Plumbing & Heating Co.*, 805 S.W.2d 280 (Mo. Ct. App. 1991). However, note that there are cases which do not allow a cause of action for challenging termination after filing a workmen's compensation claim. See, e.g., *Smith v. Gould, Inc.*, 918 F.2d 1361 (8th Cir. 1990); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

94 *Palmer v. Brown*, 752 P.2d 685, 689 (Kan. 1988) ("Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law . . ."); see also 10 U.S.C. § 2409 (1994), CONN. GEN. STAT. ANN. §§ 31-51m (West 1987 & Supp. 1996), ME. REV. STAT. ANN. tit. 26, §§ 831-40 (West 1964), and MICH. COMP. LAWS ANN. §§ 15.361-369 (West 1994) as examples of statutes which protect whistleblowers.

95 *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979); *Wilcox v. Hy-Vee Food Stores*, 458 N.W.2d 870 (Iowa Ct. App. 1990). Note, however, that not

Other egregious behavior within the public policy exception beyond actions by employers in retaliation for an employee's refusal to violate (or actions to report employer violations of) the law include actions that, although potentially couchable in legal terms, simply offend the sensibilities of social and professional norms. For example, public policy exceptions to the at will rule include the case of *Monge v. Beebe Rubber Co.*,⁹⁶ where an employee was fired due to her rejection of a foreman's sexual advances towards her, and *O'Sullivan v. Mallon*,⁹⁷ where a radiology technician was terminated after refusing to perform a procedure to which her license did not extend.

Applying these courts' considered ideals to the *Harper* circumstance, it appears difficult to reconcile the nature of the Harper-Healthsource relationship and Harper's subsequent termination with any identifiable public policy exception in the employment context. For example, there has been no discrimination in violation of civil rights statutes, no union activities of note, no retaliatory actions against Harper on the basis of his participating in jury or other civic duties, no retaliatory action against Harper related to non-performance or reporting of illegal acts, and no retaliation against him for filing a worker's compensation claim. There have been no allegations of sexual impropriety, nor has Healthsource asked, and Harper refused, to perform some action outside the scope of his abilities or duties. There simply appears to be no cognizable or directly applicable circumstance that would immediately call one's attention to a public policy exception that the court so readily applied when considering Harper's termination. And importantly, no source of public policy was identified expressly by the court or Harper.

b. The Jurisdictionally Relevant Common Law

Indeed, in addition to the hornbook common law on the subject which does not seem to bolster Harper's arguments or the court's contentions, the cases the court itself cites appear to have limited applicability and usefulness in support of the purported public policy exception. New Hampshire has engaged in much of the development of exceptions to the traditional rule in employee termination cases. Thus, the court first pronounces this rule, indicating that it has

all courts follow this rule; see *Larsen v. Motor Supply Co.*, 573 P.2d 907 (Ariz. Ct. App. 1977) (indicating that no cause of action is sustainable for employee's refusal to take polygraph test and subsequent termination).

96 316 A.2d 549 (N.H. 1974).

97 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978) (involving a catheterization procedure).

"carved out exceptions to the common law employment-at-will doctrine."⁹⁸ The court then cites *Monge*⁹⁹ simply for the proposition that there must be a balance between "the employer's interest in running his business . . . against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."¹⁰⁰ However, the court also cites *Cloutier v. Great Atlantic & Pacific Tea Co.*,¹⁰¹ but *only* for the proposition that common law employment relationships are generally considered to be at will.¹⁰² But *Cloutier* is the court's most recent conception of the law to be applied in analyzing and deciding if exceptions to the at will doctrine apply to a particular employee termination. It is thus instructive to review the case to elucidate the jurisdictionally required standard to be applied in *Harper*.

First, with regard to this standard of application, the *Cloutier* court emphasized a major limitation of *Monge*,¹⁰³ not noted by the *Harper* court, by reviewing *Howard v. Dorr Woolen Co.*,¹⁰⁴ where the court confined the holding in *Monge* to circumstances "'where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn'"¹⁰⁵ Thus, the *Cloutier* court noted, "'unless an employee at will identifies a *specific* expression of public policy, he may be discharged with or without cause.'"¹⁰⁶ On the basis of *Monge* and *Howard*, the court then fashioned a two-part test that a plaintiff must fulfill in order to maintain an action for wrongful termination under the public policy auspice:

First, the plaintiff must show that the defendant was motivated by bad faith, malice, or retaliation in terminating the plaintiff's employment. . . . Second, the plaintiff must demonstrate that he was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn.¹⁰⁷

98 *Harper*, 674 A.2d at 964.

99 See *supra* note 96 and accompanying text.

100 *Harper*, 674 A.2d at 964-65 (quoting *Monge*, 316 A.2d at 551).

101 436 A.2d 1140 (N.H. 1981).

102 *Harper*, 674 A.2d at 964.

103 316 A.2d 549 (N.H. 1974).

104 414 A.2d 1273 (N.H. 1980).

105 *Cloutier*, 436 A.2d at 1143 (quoting *Howard*, 414 A.2d at 1274).

106 *Id.* (quoting *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980)) (emphasis added).

107 *Id.* at 1143-44.

The court then applied this new test to the facts of the case. In *Cloutier*, David Cloutier was assigned to be the manager of a new A & P store in a "dangerous" area.¹⁰⁸ Cloutier, being on the managerial staff, was not covered by the collective bargaining agreement the store had with its other workers. The implication of this fact was that Cloutier was the only person who could use his own vehicle to conduct employer business.¹⁰⁹

Due to the dangerous nature of the area, Cloutier obtained permission from his employer to secure protection for company employees who made cash deposits on their way from the store to the bank. Thus, Cloutier retained, again with his employer's permission, the services of local police who charged \$3 for each trip.¹¹⁰ However, five to six months later, Cloutier's employer indicated to him that the police services and payment therefor would no longer be provided. Cloutier and the assistant manager protested this decision.¹¹¹ Cloutier knew that his employees feared injury when making the deposits and indicated to his employer that the policy was "jeopardizing [his] help's lives."¹¹² Unfortunately, his employer simply told Cloutier to "lock up any funds for deposit in the safe located in the store if any of the employees . . . were afraid to go to the bank at night or during the weekend";¹¹³ his employer did nothing else. One evening, the day after Cloutier had completed his seventh straight day at work, he was notified that the store had been broken into and the safe had been burglarized.¹¹⁴ When he went to investigate, he determined that there had not been a deposit that day, and thus there had been approximately \$30,000 stolen from the store; apparently, the funds had been placed into the regular store safe rather than a "barrel safe" as was required by company policy.¹¹⁵ One month later, Cloutier was terminated due to his "violation of company bookkeeping procedure."¹¹⁶ Cloutier filed a wrongful termination cause of action against his employer and obtained a jury verdict in his favor.¹¹⁷ His employer appealed.

108 *Id.* at 1141.

109 *Id.* at 1144. This included making store receipt deposits. *See infra* note 121.

110 *Id.* 1141.

111 *Id.*

112 *Id.* at 1144.

113 *Id.* at 1141.

114 *Id.* at 1142.

115 *Id.*

116 *Id.*

117 *Id.*

On appeal, the court applied the two-part public policy exception test.¹¹⁸ First, the court noted that "[t]he plaintiff presented evidence from which reasonable persons could find that the defendant acted with bad faith, malice or retaliation."¹¹⁹ The court found that the very action that was complained of by the employer (leaving the money in the store safe overnight) and which resulted in Cloutier's termination was in fact "condoned" by the employer.¹²⁰ Thus, "[d]ischarging the plaintiff because a burglary occurred, when the defendant's loss resulted from actions it condoned, could be found to involve bad faith and retaliation"¹²¹

In applying the second prong of the two-part test,¹²² the court first noted that the public policy exception need not be based solely on public policies delineated by statute and that non-statutory policies were also relevant.¹²³ Cloutier claimed that the public policy supporting his cause of action was that articulated by the Occupational Safety and Health Act of 1970 (OSHA), which requires that "[a]n employer has the duty to 'furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.'"¹²⁴ The court then found that Cloutier's employer:

118 *Id.* at 1143-44; see *supra* text accompanying note 107.

119 *Id.* at 1143.

120 *Id.* at 1143-44.

121 *Id.* at 1144. The court also held that bad faith could also be found in the method through which Cloutier was terminated. The court noted that after 36 years of employment with the employer, "plaintiff was suspended after a five-minute meeting and then discharged in an equally cursory manner." *Id.* Further, the assistant manager on duty, who admitted he forgot to make the deposit, was suspended but was also reinstated while Cloutier was not. The employer's rationale for this dichotomy in treatment was that the manager was responsible for the cash in the store "at all times." *Id.* But since only the assistant manager was at the store, and he was subject to the collective bargaining agreement, Cloutier was the only one who could in fact make the deposit. The court indicated that:

[t]hus, the plaintiff was always responsible for [the store's] cash, even on his day off, and could not delegate that responsibility. Certainly, under these circumstances, bad faith could be found to have motivated the defendant to discharge the plaintiff, particularly in light of the fact that [the employer] had administered discipline only three times as a result of the ninety-six robberies that had occurred in the [employer's] various stores during the past five years.

Id.

122 See *supra* text accompanying note 107.

123 *Cloutier*, 436 A.2d at 1144.

124 *Id.* at 1144-45 (quoting 29 U.S.C. § 654(a)(1) (1994)).

could be found to have breached this duty by requiring the plaintiff to travel to the bank, unprotected, with substantial sums of money. . . . By creating a hazardous environment, [the employer] ignored OSHA policy. The plaintiff, however, enforced the OSHA directive by not forcing those in charge in his absence to imperil themselves by making deposits. However, with or without the existence of OSHA, the facts before us support the conclusion that the plaintiff was discharged for furthering the laudable public policy objective of protecting the employees who worked under him.¹²⁵

Thus, since Cloutier's circumstances met both prongs of the public policy exception test, the court affirmed the lower court judgment.¹²⁶

The *Harper* court did not apply its own test in assessing Harper's public policy claim. If these most recent analyses of the public policy exception to the at will employment doctrine are in fact applied to *Harper*, it is difficult to see how a public policy exception for employment termination applies. Assuming that Harper pleaded the facts of his case and cause of action correctly, under the first prong of the *Cloutier* two-part test, was Healthsource's termination of Harper "motivated by bad faith, malice, or retaliation"?¹²⁷ Potentially. Harper alleges that his termination was in fact a result of his challenging Healthsource's alleged "manipulating and skewing" of his patient records.¹²⁸ Assuming this is true, Harper's termination could certainly be considered retaliation in a general sense.¹²⁹

However, under the second prong of the *Cloutier* test, has Harper "demonstrate[d] that he was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn" in the manner which is consonant with previous cases?¹³⁰ It would appear not. In *Cloutier*, the articulable pol-

125 *Id.* at 1145. The court also indicated that an additional public policy ground to hold for *Cloutier* was the fact that the employer violated the state statute which requires a day of rest; thus, when the employer made *Cloutier* responsible for the cash in the store "at all times," it was contravening the public policy of the day of rest statute. *Id.*

126 *Id.*

127 See *supra* text accompanying note 107.

128 *Harper*, 674 A.2d at 963.

129 However, this is not quite the "retaliation" as indicated in *supra* notes 88-95 and accompanying text. Those retaliations seem to relate more to actions by the employee with respect to third parties which potentially harm the employer; for example, when an employee basically refuses to lie in testimony, in pricing, or in government reporting to protect the pecuniary and other interests of the employer.

130 *Cloutier*, 436 A.2d at 1143-44; *supra* note 107 and accompanying text.

icy was a safe working environment;¹³¹ in the other statutory cases, the policy to be furthered was non-discrimination¹³² or the policy of maintaining open and honest communications between private employees and government;¹³³ in *Monge*,¹³⁴ although not necessarily reached by that court, it is arguable that the public policy would be to provide a working environment free from sexual harassment consistent with federal civil rights law; in *O'Sullivan*,¹³⁵ it would appear that the policy to be furthered was to protect an employee from being required to perform duties outside the scope of his or her competence, thereby safeguarding the public health. Most importantly, has either Harper or the court identified "a *specific* . . . public policy"¹³⁶ that has been contravened by Healthsource? Decidedly not; instead, the court simply makes vague allusions to "public policy concerns . . . [of] the health care arena."¹³⁷ Thus, the public policy goals and actions in *Harper* do not appear to fall within the overriding themes of the public policy exception regarding employment, nor has Harper or the court identified the relevant nexus between his circumstance and the violated public policy.

c. The Court's Other Citations

In addition to the fact that it is questionable whether the court (or Harper) has articulated a *specific* public policy that has been violated as required, and thus has not applied its own rules on the issue to the case, many of its other citations also work against it. In *Lampe v. Presbyterian Medical Center*,¹³⁸ Lampe was a licensed practical nurse and the head nurse of the intensive care unit. Due to the method of scheduling, Lampe's staff was required to work long hours and extensive overtime. She was directed by her employer to minimize the overtime hours of her staff; however, Lampe believed that "she could not fully comply with this request without jeopardizing the care of her patients."¹³⁹ After several meetings with her employer in an attempt to work out this problem, Lampe received a termination notice. She then sued her employer, alleging, inter alia, that her termination was

131 See *Cloutier*, 436 A.2d 1140; *supra* notes 101-26 and accompanying text.

132 See *supra* notes 83-86 and accompanying text.

133 See *supra* notes 90-91, 93 and accompanying text.

134 316 A.2d 549 (N.H. 1974).

135 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978).

136 See *Cloutier*, 436 A.2d at 1143 (quoting *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980)) (emphasis added); *supra* note 106 (emphasis added).

137 *Harper*, 674 A.2d at 966.

138 590 P.2d 513 (Colo. Ct. App. 1978).

139 *Id.* at 514.

against public policy and thus this exception to the at will employment doctrine should apply. The basis of her public policy argument rested on state statutes regarding the nursing profession: First, she alleged that the public policy embodied in the statute which created the nursing board was violated by her termination. The statute states that "[a]ny person who practices as a professional nurse . . . without submitting to the provisions of this part . . . endangers the public health thereby."¹⁴⁰ Second, Lampe based her public policy claim on the power of the State Board of Nursing as articulated in the statute to "withhold, deny, revoke, suspend, or refuse to renew any license or permit or to place on probation a professional nurse, . . . upon proof that such person . . . has negligently or willfully acted in a manner inconsistent with the health or safety of persons under her care."¹⁴¹ Lampe thus claimed that "the public policy enunciated in these statutes imposed on her a responsibility to take certain actions, and that her job was terminated because she attempted to fulfill that responsibility."¹⁴² However, even though Lampe made specific reference to arguably applicable statutes and the public policies expressed therein, the court rejected her claim. The court relied on cases that allowed for the public policy exception in circumstances where termination occurred after employees filed workmen's compensation claims or went on jury duty.¹⁴³ The court indicated that the public policy exception applied only when the public policy in question was "a *specifically* enacted right and a duty, respectively."¹⁴⁴ Lampe, on the other hand:

relies on a broad, *general* statement of policy contained in a statute which creates the State Board of Nursing and which gives that Board the authority to discipline a nurse [who acts] in a manner inconsistent with the health or safety of persons under her care. Given the *general* language used in the statute . . . , we cannot impute to the General Assembly an intent to modify the contractual relationships between hospitals and their employees in such situations.¹⁴⁵

Thus, the court held that the public policy exception did not extend to circumstances where medical care could be potentially jeopardized even though the statute regulating the employee's profession

140 *Id.* at 515 (quoting COLO. REV. STAT. § 12-38-201 (1973)).

141 *Id.* (quoting COLO. REV. STAT. § 12-38-217 (1973)).

142 *Id.*

143 *Id.* (citing *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (workmen's compensation); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (jury duty)).

144 *Id.* at 515 (emphasis added).

145 *Id.* at 515-16 (emphasis added).

mandated actions and provided for penalties if these dictates were not adhered to. Lampe's cause of action failed due to the "general" nature of the statutes on which she relied. This requirement of specificity is consistent with the *Cloutier* court's second prong of its two part test.¹⁴⁶

Once again, it is difficult to see just how the *Harper* court's own citation assists it. The only discussion in *Harper* that would seem relevant to *Lampe*¹⁴⁷ would be the court's references to the New Hampshire statute that relates to preferred provider agreements between health insurers and physicians.¹⁴⁸ But by the court's own characterization, "the legislature [only] stated the *general* policy behind the chapter, that is, that preferred provider agreements must be 'fair and in the public interest.'"¹⁴⁹ Thus, by its own words, the court does not fulfill its own specificity test with respect to the public policy exception as articulated in *Cloutier*,¹⁵⁰ nor does it fulfill the public policy exception standard of another court to which it cites.¹⁵¹

Further, the *Harper* court's interesting choice of citations does not end there. The court's cited cases in support of its general refusal to enforce contracts "that contravene[] public policy"¹⁵² also seem inapplicable. The court relies on two cases: *Audley v. Melton*¹⁵³ and *Technical Aid Corp. v. Allen*.¹⁵⁴ However, in *Audley*, the court in fact

146 See *supra* notes 107, 122-25 and accompanying text.

147 See *supra* notes 138-45 and accompanying text.

148 N.H. REV. STAT. ANN. § 420-C:1 (1991).

149 *Harper*, 674 A.2d at 966 (emphasis supplied). The statute states that:

The purpose of this chapter is to assure that health benefit plans encourage covered persons to seek health care services from preferred providers and that contracts or agreements between preferred providers and health care insurers are fair and in the public interest. Further, this chapter establishes reasonable regulatory requirements for health care insurers in a manner to contain health care costs while preserving the quality of care.

N.H. REV. STAT. ANN. § 420-C:1 (1991).

Further, the court cites somewhat backhandedly N.H. REV. STAT. ANN. § 420-C:5-a (Supp. 1996); "RSA chapter 420-C creates some parameters for preferred provider agreements between health insurers and physicians, similar to the one in this case. See, e.g., RSA 420-C:5-a (Supp. 1995) (prohibiting health care insurers from limiting their liability in preferred provider agreements for actions of physicians)." *Harper*, 674 A.2d at 966. However, this reference is somewhat disingenuous because the referenced statute only became effective January 1, 1996, after the facts of the current cause of action, and thus has no applicability herein.

150 See *Cloutier*, 436 A.2d 1140; *supra* notes 101-26 and accompanying text.

151 See *supra* notes 138-45 and accompanying text.

152 *Harper*, 674 A.2d at 965.

153 640 A.2d 777 (N.H. 1994).

154 591 A.2d 262 (N.H. 1991).

held that general releases against liability *are* enforceable and *not* void against public policy.¹⁵⁵ This holding would appear to support the termination without cause clause in *Harper*. And in *Technical Aid*, the court held that although an employer did *not* act in good faith when obtaining an employee's signature on a set of restrictive covenants, the covenants were generally enforceable against the employee.¹⁵⁶ So even when covenants are imposed upon the employee in bad faith by the employer, the court has in fact enforced them. Applying this to *Harper*, his termination without cause clause would seem ever more unchallengeable.

Finally, "appl[ying] public policy concerns to the health care arena,"¹⁵⁷ the court cites *Bricker v. Sceva Speare Memorial Hospital*.¹⁵⁸ However, the *Bricker* case is a case of termination of medical staff privileges at a hospital where the court simply reviewed the *process* of termination to assure it was not "arbitrary, capricious or unreasonable,"¹⁵⁹ i.e., whether the promise made by the hospital that it would follow certain procedures for termination was fulfilled. However, in *Harper*, the court is not simply assessing the *process* of termination (i.e.,

155 *Audley*, 640 A.2d at 779. The court held that since there was no explicit disclaimer against liability for the defendant's own negligence, although enforceable if it had been in the appropriate form, the plaintiff was entitled to have the opportunity to show that defendant was negligent. *Id.* (citing *Barnes v. New Hampshire Karting Ass'n*, 509 A.2d 151, 154 (N.H. 1986)). Note also that disclaimers have been held to generally not be against public policy. See *Anders v. Mobil Chem. Co.*, 559 N.E.2d 1119 (Ill. App. Ct. 1990) (affirming summary judgment for employer under a disclaimer that prevented the formation of a contract which would limit employer's right to terminate at will and rejecting employee's claim that these disclaimers should be limited as against public policy); see also *supra* notes 72-77 and accompanying text.

156 There were three paragraphs of restrictive covenants; the court held that two of them were valid. *Technical Aid*, 591 A.2d at 275. The covenant that was unenforceable was a geographic limitation; because the goodwill associated with the employee extended only to customers he had contact with in his capacity as an employee in the local area, the unlimited geographic scope of the covenant was too broad to protect the legitimate interests of the employer. *Id.* at 267. However, covenants that restricted employee from soliciting or diverting business from clients that became known to him through his former employment for an 18 month period were enforceable, as were covenants that prohibited the employee from soliciting, diverting, competing for accounts and personnel, or attempting to influence employer's customers or technical personnel not to do business with employer. *Id.* at 268-74. It bears emphasizing that these provisions were enforceable despite an absence of good faith on the part of the employer. *Id.* at 271.

157 *Harper*, 674 A.2d at 966.

158 281 A.2d 589 (N.H. 1971).

159 *Id.* at 592. *Bricker* simply reflects the due process nature and right of appeal when a physician's quality of care is being questioned and does not reach whether the hospital had the *right* to vote to deny or revoke a physician's privileges.

whether Healthsource in fact followed appropriate and promised termination procedures) but indeed the *merits* of the termination itself. Thus, this case "appl[ying] public policy concerns to the health care arena"¹⁶⁰ would appear to have little direct applicability to *Harper*.

Overall, with regard to direct support of the public policy exceptions to the at will employment doctrine through common law, the *Harper* court does not provide reference to a *specific* public policy that has been violated by Healthsource's actions as required by its own jurisdictional and cited standards.¹⁶¹ Further, the court's other case citations seem to contravene its reasoning or be simply inapplicable to the case.

d. The Court's "Several Relationships" Discussion

To bolster its public policy arguments, the court alludes to the "[s]everal relationships in our society [which] stand on a different footing from the rest. The most visible are those between wife and husband, lawyer and client, pastor and penitent, and physician and patient."¹⁶² The discussion of these relationships, supported only by citations to New Hampshire rules on evidence and Wigmore's treatise on evidence, somehow show that there is a significant public policy justifying review of Harper's termination.¹⁶³ These allusions and citations also somehow support the "substantial interest in the relationship between health maintenance organizations and their preferred physicians"¹⁶⁴ However, again, it is difficult to see just how a *specific* public policy is violated by a termination of a physician under a termination without cause clause by reference to the rules of evidence or a policy regarding privileged patient-physician communications.¹⁶⁵ Further, on closer examination, the listing of these "several relationships" (without citations) does not assist the court in its desired special treatment of the Harper-Healthsource relationship. First, the reference to spousal relations seems to have no relevance here. In this discussion, Harper is, as the court notes, apparently challenging his termination because "the termination of his relationship with Health-

160 *Id.*

161 *See supra* notes 107, 122-25, 138-45 and accompanying text.

162 *Harper*, 674 A.2d at 966.

163 *Id.* (citing N.H. R. EVID. 503 and 8 JOHN H. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. 1961)).

164 *Id.* (citing N.H. H.R. J. 1135-36 (1996) ("describing access to health care at a competitive price via health maintenance organizations as a 'broad, generalized social and economic problem of great importance to New Hampshire citizens'")).

165 *Id.*

source affects more than just his own interest."¹⁶⁶ However, the circumstance is that Healthsource, with some power to terminate Harper, has somehow affected third parties by terminating him, which in turn, somehow, is in violation of some *specific* public policy as illustrated by the patient-physician evidentiary privilege. Thus, the reference by the court to the special relationship *between* spouses, equivalent to the special relationship *between* Harper and his patients, seems to be inappropos since there is no party that can threaten to sever the spousal relationship akin to Healthsource's ability to sever the patient-physician relationship.¹⁶⁷

The reference to lawyer and client relationships, however, appears more relevant. If a lawyer who is terminated by a law firm or other employer illustrates some specific public policy that has been violated due to the lawyer's severance or potential severance from his or her clients, Harper and the court may be on more firm ground. However, again, the court's own citations work against it. The court cites *Wieder v. Skala*,¹⁶⁸ where the New York Court of Appeals considered the termination of an attorney from a law firm. On the issue of whether the termination of the attorney was "in violation of this State's public policy,"¹⁶⁹ the court stated that

[p]laintiff argues . . . that the dictates of public policy . . . have such force as to warrant our recognition of the tort of abusive discharge While the arguments are persuasive and the circumstances here compelling, we have consistently held that "significant alteration of employment relationships, such as plaintiff urges, is best left to the Legislature."¹⁷⁰

166 *Id.*

167 Of course, perhaps if one spouse's parent had the power to terminate the marriage, thus affecting the other spouse, the analogy might be more appropriate. Although this may be the actual circumstance in some marriages, the law usually does not delve into such family matters. "In respect of these promises [between spouses] each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted." *Balfour v. Balfour*, 2 K.B. 571, 579 (1919) (Atkin, L.J.).

168 609 N.E.2d 105 (N.Y. 1992).

169 *Id.* at 106.

170 *Id.* at 110 (quoting *Sabetay v. Sterling Drug*, 506 N.E.2d 919 (N.Y. 1987)); *see also* *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990).

The courts of this state have consistently held that they will not usurp the legislative function, and, under the rubric that they are the propounders of 'public policy' [I]n the absence of any express statutory provision for such a civil remedy . . . , we decline to create judicially such a remedy. Courts may interpret laws, but may not change them.

Id. (citations omitted).

The court thus rejected any public policy exception when an attorney is terminated from a law firm.¹⁷¹ Similarly, there does not seem to be any applicable public policy exception for termination of pastors.¹⁷² And of course, physicians have not succeeded on any public policy arguments when terminated by managed care or other providers.¹⁷³

Thus, on the basis of the general common law, jurisdictionally relevant law, court-cited law, and other considerations, it appears that the required bases for an application of the public policy exception to the traditional at will nature of general employment relationships is lacking in this case.¹⁷⁴

171 Interestingly, the court did not dismiss the implied-in-fact potential of the relationship. It noted that because of the "unique characteristics of the legal profession," *Wieder*, 609 N.E.2d at 109 (i.e., because they are not only employees of the firm but are also officers of the court and thus "responsible in a broader public sense for their professional obligations," *id.* at 108), there was an implied-in-fact understanding that "both the associate and the firm in conducting the practice [of law] will do so in accordance with the ethical standards of the profession." *Id.* The attorney was challenging the firm's reluctance to report a fellow associate to the bar for violation of the Code of Professional Responsibility. However, even in this "unique" case between lawyer and law firm, where both plaintiff and the firm are engaged in "a common professional enterprise," *id.* at 110, the court indicated that "we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers." *Id.* at 109.

This seems to be consistent with other courts. There is a significant burden to overcome when alleging that the code of ethics or responsibility acts as the basis for the public policy exception.

The courts require that the Code represent a clear expression of public policy, the Code provisions relied on define a standard of conduct beneficial to the public and not only the member of the profession, the member of the profession explicitly refers to rights and responsibilities pursuant to the Code, and that the member is not solely motivated by his or her own morals. Frank J. Cavico, *Employment At Will and Public Policy*, 25 AKRON L. REV. 497, 527 (1992) (citations omitted).

172 See *Blauert v. Schupmann*, 63 N.W.2d 578 (Minn. 1954). The court found that:

2. Where 'Solemn Call' [of the church] in writing constitutes employment contract between pastor and church organization, and there is nothing therein or in the church constitution or bylaws which provides that such employment be for any definite term, under principles generally applicable to employment contracts at will, pastor may be discharged by church at any time without cause. *Id.* at 579.

173 See, e.g., *Liang*, *supra* note 21. Further, there is no prohibition against termination for wholly economic reasons with the courts giving great deference to "medical business judgment." *Id.*, nn.173-76 and accompanying text.

174 Note that in addition to the lack of support that the law or facts give to a public policy exception here, the employer may also assert a business necessity defense

3. Good Faith and Fair Dealing

a. The General Common Law

The implied covenant of good faith and fair dealing is a specific, legally implied promise imputed to the employer which imposes a legally enforceable obligation not to terminate an employee in bad faith or in violation of public policy.¹⁷⁵ Thus, it can be considered a subset of the public policy exception to at will agreements.¹⁷⁶

This duty has been generally recognized in two distinct circumstances: when an employee is terminated without cause after long years of service, and when an employer terminates an employee to avoid paying the employee bonuses or compensation.¹⁷⁷ For example, in the classic case to find this duty in the employment context, *Cleary v. American Airlines*,¹⁷⁸ Cleary had been employed by the airline for eighteen years when he was discharged. Although the company claimed that it fired Cleary due to theft, he claimed that, in fact, the company fired him because he was engaged in union activities.¹⁷⁹ The court apparently agreed, and held that Cleary's termination was wrongful because it violated the implied covenant of good faith and

which could override a public policy exception. If situations within the employment context occur which result in the termination of an employee under the prohibited rubric of some public policy, the employer can still prevail if it can show, even admitting that the reason for termination was in violation of the public policy, that there was a legitimate business reason for the termination. *See, e.g., Zoerb v. Chugach Elec. Ass'n*, 798 P.2d 1258 (Alaska 1990) (holding that a reduction in work force due to legitimate and sufficient business reasons may constitute good cause to terminate an employee); *Alexander v. Kay Finlay Jewelers*, 506 A.2d 379 (N.J. 1986) (holding that the termination of an employee who was fired for filing suit against employer in pay dispute was not against public policy since employer had legitimate business interest in being free from employee suit harassments); *Geary v. United States Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974) (holding that employer termination of employee for complaints regarding safety of company products was allowable since plaintiff "made a nuisance of himself, and the company discharged him to preserve administrative order in its own house").

175 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 4.9 (1992).

176 To illustrate the sometimes widely overlapping considerations, *see, e.g., Shepard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784 (Ct. App. 1990) (holding that the implied covenant of good faith and fair dealing may be violated by terminating an employee immediately after his move across country to take the job offered to him by the employer even though he was clearly at will); *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App. 1990) (holding that termination of an employee for refusal to take a drug test might be violative of the implied covenant of good faith and fair dealing).

177 Pennington, *supra* note 87, at 1592.

178 168 Cal. Rptr. 722 (Ct. App. 1980).

179 *Id.* at 724.

fair dealing found within every contract including that of at will employment.¹⁸⁰ Thus, because the airline acted in an attempt to deprive its employee of the benefits of employment without just cause, and particularly on the basis of the employee's long-term employment, the company exhibited a lack of good faith and breached the implied covenant.¹⁸¹

The standard case for demonstrating the implied covenant of good faith and fair dealing in the compensation setting is *Fortune v. National Cash Register Co.*¹⁸² In this case, the Supreme Judicial Court of Massachusetts recognized the implied covenant of good faith and fair dealing in the context of a termination of an employee who had twenty-five years of experience with the company and who had just closed a multimillion dollar sales order entitling him to substantial bonuses. The court affirmed the jury verdict which found that the employer had acted in bad faith in terminating the employee because it was attempting to deprive him of the full commission on his sale.¹⁸³ The court specifically noted that it was not recharacterizing the at will nature of the relationship but instead, stated "that where, as here, commissions are to be paid for work performed by the employee, the

180 *Id.* at 729.

181 *Id.* at 728, 729. Note that the *Cleary* decision has come to stand for the proposition that a good faith and fair dealing covenant is implied only when there is longtime employment or the employer has established a policy for adjudicating disputes. *Shapiro v. Wells Fargo Realty Advisors*, 479, 199 Cal. Rptr. 613, 619 (Ct. App. 1984).

182 364 N.E.2d 1251 (Mass. 1977).

183 *Id.* at 1258; *see also* *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984) (holding that even though sales representative compensation agreement allowed for retroactive monthly sales quota increases at management's sole discretion, discretion limited by covenant of good faith and fair dealing such that the representative would not be deprived of his reasonably earned compensation); *Mitford v. Lasala*, 666 P.2d 1000 (Alaska 1963) (holding that good faith and fair dealing prevents termination of an employee to prevent the employee from sharing in future profits); *Gram v. Liberty Mutual Ins. Co.*, 429 N.E.2d 21, 29 (Mass. 1981), *with later appeal regarding damages after remand*, 461 N.E.2d 796 (Mass. 1984) (holding that "the obligation of good faith and fair dealing imposed on an employer requires that the employer be liable for the loss of compensation that is . . . clearly related to the employee's past service"); *Maddaloni v. Western Mass. Bus Lines*, 422 N.E.2d 1379 (Mass. App. Ct.) (affirming a jury finding that the implied covenant of good faith and fair dealing was breached by employer terminating employee to avoid paying bonuses), *modified*, 438 N.E.2d 351 (Mass. 1982); *Nolan v. Control Data Corp.*, 579 A.2d 1252 (N.J. 1990) (embracing the *Tymshare* analysis and holding that employer, with sole discretion to retroactively adjust sales quotas, was acting in bad faith if it prevented the employees from receiving bonuses earned). *But see* *Kumpf v. Steinhaus*, 779 F.2d 1323 (7th Cir. 1985) (holding that termination to satisfy greed of a supervisor for a larger share of commissions does not violate public policy).

employer's decision to terminate its at will employee should be made in good faith."¹⁸⁴

However, the implied covenant is the "least recognized exception to [the] employment at will" doctrine.¹⁸⁵ The majority of states assessing this issue have in fact refused to recognize this cause of action.¹⁸⁶ Even those courts which have given some legitimacy to the doctrine severely limit its application:

[T]he implied obligation [of good faith and fair dealing] is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. [Here], . . . plaintiff's employment was at-will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination.¹⁸⁷

184 *Fortune*, 364 N.E.2d at 1256.

185 Pennington, *supra* note 87, at 1592.

186 CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* § 10.1, at 184 (1989).

187 *Murphy v. American Home Prods. Corp.*, 58 N.Y. 2d 293, 304-05 (1983); *see also* *Orthonet v. A.B. Med., Inc.*, 990 F.2d 387, 392 (8th Cir. 1993) (independent claim of breach of implied covenant of good faith and fair dealing cannot stand independent of underlying breach of contract claim); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 1990) (implied duty of good faith and fair dealing is not an independent contract term subject to breach apart from other contract terms, but only modifies meaning of express terms); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1989) (implied covenant of good faith and fair dealing cannot be invoked to contradict express term and prevent employer from terminating at will contract); *Tollefson v. Roman Catholic Bishop of San Diego*, 268 Cal. Rptr. 550 (Ct. App. 1990) (implied covenant of good faith and fair dealing cannot contradict an express contract term); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, (Utah 1991) (implied covenant of good faith and fair dealing assists in interpreting contract rights but cannot add rights or override express provisions). Other cases have held that there is no covenant exception. *See, e.g.,* *Horne v. Gibson Well Serv. Co.*, 894 F.2d 1194 (10th Cir. 1990); *Minihan v. American Pharm. Ass'n*, 812 F.2d 726 (D.C. Cir. 1987); *English v. General Elec. Co.*, 765 F. Supp. 293 (E.D.N.C. 1991), *aff'd*, 977 F.2d 572 (4th Cir. 1992); *Hew-Len v. Woolworth*, 737 F. Supp. 1104 (D. Haw. 1990); *Hostettler v. Pioneer Hi-Bred Int'l Inc.*, 624 F. Supp. 169 (S.D. Ind. 1985); *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985); *Grant v. Butler*, 590 So. 2d 254 (Ala. 1991); *Kelly v. Gill*, 544 So. 2d 1162 (Fla. Dist. Ct. App. 1989); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982); *Harrison v. Sears, Roebuck & Co.*, 546 N.E.2d 248 (Ill. App. Ct. 1989); *Keystone Carbon Co. v. Black*, 599 N.E.2d 213 (Ind. Ct. App. 1992); *Morris v. Coleman Co.*, 738 P.2d 841 (Kan. 1987); *Wyant v. SCM Corp.*, 692 S.W.2d 814 (Ky. Ct. App. 1985); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984); *Cockels v. International Bus. Expositions, Inc.*, 406 N.W.2d

Further, courts in the limited number of jurisdictions that have accepted the implied covenant as applied to employment relationships have not extended the doctrine to require that an at will employee be terminated only for good cause.¹⁸⁸ And, of course, the burden is on the employee to show that there was bad faith in his or her termination.¹⁸⁹

In addition, even aside from the fact that it has been specifically held that the implied covenant of good faith and fair dealing may *not* apply to health care contracts,¹⁹⁰ and assuming that the implied cove-

465 (Mich. Ct. App. 1987); *Hunt v. IBM Mid-America Employees Fed. Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086 (Miss. 1987); *Neighbors v. Kirksville College of Osteopathic Med.*, 694 S.W.2d 822 (Mo. Ct. App. 1985); *White v. Ardan, Inc.*, 430 N.W.2d 27 (Neb. 1988); *Melnick v. State Farm Mut. Auto. Ins. Co.*, 749 P.2d 1105 (N.M. 1988); *Sadler v. Basin Elec. Power Co-op*, 409 N.W.2d 87 (N.D. 1987); *Hillesland v. Federal Land Bank Ass'n*, 407 N.W.2d 206 (N.D. 1987); *Brandenburger v. Hilti, Inc.*, 556 N.E.2d 212 (Ohio Ct. App. 1989); *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989); *Elliott v. Tektronic, Inc.*, 796 P.2d 361 (Or. Ct. App. 1990); *Breen v. Dakota Gear & Joint Co.*, 433 N.W.2d 221 (S.D. 1988); *Winograd v. Willis*, 789 S.W.2d 307 (Tex. Ct. App. 1990); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984); *Armstrong v. Richland Clinic, Inc.*, 709 P.2d 1237 (Wash. Ct. App. 1985); *Shell v. Metropolitan Life Ins. Co.*, 396 S.E.2d 174 (W. Va. 1990); *Mobil Coal Producing Inc. v. Parks*, 704 P.2d 702 (Wyo. 1985).

188 See, e.g., *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982) (holding that an employment agreement which expressly provides for termination at will of either party will not have an implied term not to terminate except for good cause); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985) (holding that a no-cause termination of an employee does not breach the implied covenant of good faith and fair dealing in an at will employment relationship); *Magnan v. Anaconda Indus.*, 479 A.2d 781 (Conn. 1984) (accepting the implied covenant of good faith and fair dealing but indicating that claim for breach cannot be based simply on the absence of good faith in the termination); *Cort v. Bristol-Meyers Co.*, 431 N.E.2d 908 (Mass. 1982) (holding that there is no breach of good faith or fair dealing implied covenant on the basis of lack of good cause in termination, and even if employer provides a pretext or false reason for the discharge, the employer is not liable unless the actual reason is contrary to public policy). Note that it is important to distinguish between termination that would be only "for cause" versus a promise only to provide pretermination procedures. The former limits the power of the employer to in fact discharge the employee generally unless some articulable valid reason is provided. The latter, however, does not limit the employer to terminate, but only requires the employer to satisfy his or her obligations by providing such procedure.

189 See *Kravetz v. Merchants Distrib., Inc.*, 440 N.E.2d 1278, 1281 (Mass. 1982) (placing burden of proving breach of good faith and fair dealing implied covenant on the plaintiff-employee).

190 Courts have not necessarily found such an implied obligation in medical contexts; see, e.g., *Mayer v. Pierce County Med. Bureau, Inc.*, 909 P.2d 1323 (Wash. Ct. App. 1995) (indicating good faith exception to employment at will doctrine not applicable in a contract which specifically permitted no cause termination); *Hrehorovich*

nant does apply to this case, it still appears that the *Harper* court is on shaky ground. Harper does not seem to be within the general categories of the doctrine where it is recognized, i.e., where the employee has extended employment tenure or where the employer is attempting to avoid payment of some compensation or bonus.¹⁹¹ Specifically, Harper's nine year relationship with Healthsource would not appear to be within the bounds of *Cleary*,¹⁹² where the plaintiff had an employment tenure double that time, nor within the circumstances of *Fortune*,¹⁹³ where the plaintiff had a twenty-five year tenure as well as substantial bonuses to which he was entitled. The *Harper* court seems to be using the terms "good faith" and "fair dealing" in a context outside of the legal terms of art they are according to the caselaw. Although there could have been some articulable action by Healthsource that fell within the traditional common law notions of good faith and fair dealing in the employment context, the court did not identify it within the parameters as understood by other jurisdictions which accept the implied covenant.

b. The Jurisdictionally Relevant Common Law

Further, the court is once again hoist by its own petard through the citations it utilizes in support of its contentions. With regard to the good faith and fair dealing covenant, the major case the court relies upon is *Centronics Corp. v. Genicom Corp.*¹⁹⁴ In that case, Justice Souter (then sitting on the New Hampshire Supreme Court) concluded that a buyer's refusal to release a portion of an escrow amount pending determination of the sale price of the company by a third party was not a breach of an implied duty of good faith and fair dealing.¹⁹⁵ The *Centronics* court cited with favor the trial court's assessment of the case:

"[we] the [trial] Court cannot insert a provision in the contract for partial payments [from the escrow] where such provision does not exist. ¶ [Seller] should have demanded a mechanism for partial

v. Harbor Hosp. Ctr., 614 A.2d 1021 (Md. Ct. Spec. App. 1992) (holding that there is no implied covenant of good faith and fair dealing for at-will employees such as physicians on a hospital staff); Aung v. Fontenot, No. 05-91-00846-CV, 1992 WL 57471 (Tex. App. Mar. 24, 1992) (no implied covenant of good faith if bargaining power between parties is equal).

191 See *supra* notes 175-89 and accompanying text.

192 168 Cal. Rptr. 722 (Ct. App. 1980); see *supra* notes 178-81 and accompanying text.

193 364 N.E.2d 1251 (Mass. 1977); see *supra* notes 182-84 and accompanying text.

194 562 A.2d 187 (N.H. 1989).

195 *Id.* at 195.

payments from the Escrow Fund if the arbitration process [by the third party] lagged The Court will not renegotiate the contract between the parties to obtain this result. To the extent [the Seller] made a less advantageous contract, it must now *abide by the terms of that contract as originally agreed*.”¹⁹⁶

Thus, the *Centronics* court agreed with the trial court and gave great weight to the express terms of the agreement.¹⁹⁷ This alone would seem to be damaging to Harper, as the terms of his contract simply stipulated that he could be terminated without cause. Even if Harper “made a less advantageous contract, [he] must now abide by the terms of that contract as originally agreed.”¹⁹⁸

However, the court also went through an extensive analysis of the implied covenant of good faith and fair dealing. Although the *Harper* court only quoted the employment section of the case,¹⁹⁹ it is instructive to consider each area that *Centronics* covered since it is the most thorough, jurisdictionally relevant treatment of the issue.

According to the *Centronics* court, the implied duty of good faith and fair dealing has been applied in three categories of cases: circumstances of contract formation, termination of at will employment relationships, and circumstances where one party has discretion in contract performance.²⁰⁰ In contract formation, the implied duty requires that a party refrain from misrepresentation and correct any subsequently discovered error “insofar as any representation is intended to induce, and is material to, another party’s decision to enter into a contract in justifiable reliance upon it.”²⁰¹ Violation of this implied good faith duty could thus allow for voidability of a subsequently formed agreement by the adversely affected party due to its antecedent nature.²⁰²

The obligation under this category would appear to be inapplicable in the *Harper* case. Harper does not claim any fraud in the inducement of the contract between the parties. Further, even if there was, the resultant remedy would simply be rescission of the contract,²⁰³ which would effectively be a victory for Healthsource since it merely seeks an end to its relationship with Harper.

196 *Id.* at 190 (citing trial court) (emphasis added).

197 *Id.*

198 *Id.*

199 *Harper*, 674 A.2d at 965.

200 *Centronics*, 562 A.2d at 191.

201 *Id.*

202 *Id.*

203 *Id.*

The *Centronics* court then goes on to discuss the application of the implied duty of good faith and fair dealing in the employment at will context.²⁰⁴ Here, the court relies on *Cloutier*²⁰⁵ for its discussion. As indicated above,²⁰⁶ employers violate the implied duty of good faith and fair dealing against an employee at will if the employer terminates the employee in bad faith or with malice in relation to some act of omission or commission that the employee takes "in consonance with public policy."²⁰⁷ Also as noted above, Harper appears not to fall within this employment at will doctrine exception as articulated by *Cloutier*.²⁰⁸

Finally, the court discusses the discretion cases²⁰⁹ which are arguably the most relevant to Harper and Healthsource, since Healthsource has the discretion to terminate the contract at will. Good faith and fair dealing cases have as their common thread the prevention of one party from retaining a benefit of the bargain that is reasonably due the other. Thus, for example, the court reviews the "seminal case on the implied obligation of good faith performance":²¹⁰ *Griswold v. Heat Inc.*,²¹¹ which held that "a contract to pay \$200 a month for 'such [personal] services as [the plaintiff], in his sole discretion, may render' required the plaintiff to provide a level of services consistent with good faith."²¹² Here, to save the agreement from unenforceability, the court limited the discretion of the plaintiff to some amount of performance reasonable under the circumstances.²¹³ Thus, so as to prevent one party who has given consideration for the contract (the \$200 a month) from not obtaining the benefits of the bargain (at least some services), the court implied a reasonable amount of services was required.²¹⁴

As applied to *Harper*, *Griswold* may not be helpful. Indeed, *Griswold* seems to speak to circumstances where one party has given consideration and the other, with the apparent power *not* to give the understood return consideration, is required to provide at least some reasonable amount. However, there is no issue in *Harper* as to

204 *Id.* at 190-91.

205 436 A.2d 1140 (N.H. 1981); see *supra* notes 101-26 and accompanying text.

206 See *supra* notes 101-26 and accompanying text.

207 *Centronics*, 562 A.2d at 191.

208 *Supra* notes 127-37 and accompanying text.

209 *Centronics*, 562 A.2d at 191.

210 *Id.* at 191-92.

211 229 A.2d 183 (N.H. 1967).

212 *Centronics*, 562 A.2d at 191 (quoting *Griswold*, 229 A.2d at 187).

213 *Id.* at 192.

214 *Id.*

whether Healthsource is providing consideration (remuneration) in exchange for Harper's services. Consideration flows from both to both with Healthsource paying Harper for services and Harper agreeing to render services in exchange for payment. It is only the *termination* of that flow, not the reasonableness of the amount after one party has provided its consideration, that is in question.²¹⁵

The *Centronics* court then goes on to review the case where an implied duty to act was held to be within the duty of good faith and fair dealing: *Seaward Construction Co. v. City of Rochester*.²¹⁶ Here, the city of Rochester contracted with Seaward Construction to perform construction work for the city; however, the city was only obligated to pay for the work done with funds it received from the federal government.²¹⁷ The contract between the city and the company did not expressly state any duty on the part of the city to in fact try and secure the funds.²¹⁸ After a conflict arose as to the charges made by the construction company, the city, in an attempt to take advantage of the lack of an express duty to obtain the funds, refused to ask for the federal money.²¹⁹ The *Seaward* court held that the city could not defend against the construction company's claim by pointing to the lack of federal funds to pay the company without also showing that it had fulfilled its duty of good faith and fair dealing by attempting to obtain the money.²²⁰ Thus, the goal of preventing one party from not receiving the benefits under the contract after providing its consideration through requiring the other to provide the reasonably expected consideration was also accomplished here as in *Griswold* using the implied covenant of good faith and fair dealing.²²¹

The application of the *Seaward* case's conception of the implied covenant to the Harper and Healthsource dispute is as unhelpful as *Griswold*.²²² *Seaward* had a right to at least some remuneration for its

215 An analogy could be the concept of *quantum meruit*. When one party provides services with no naked obligation of the other to pay (analogizing in this case to a discretion that includes, without the law stepping in, the option to "pay" nothing), the law will provide that the latter party must pay some reasonable amount in line with the reasonable value or action related to the first party's services. However, again, in the Harper circumstance, there is no question as to an exchange which would allow one party, Healthsource, to get something for nothing.

216 *Centronics*, 562 A.2d at 192 (citing *Seaward Constr. Co. v. City of Rochester*, 383 A.2d 707 (N.H. 1978)).

217 *Id.*

218 *Id.* (citing *Seaward Constr.*, 383 A.2d at 708).

219 *Id.* (citing *Seaward Constr.*, 383 A.2d at 708).

220 *Id.*

221 *Id.*; see *supra* notes 211-14 and accompanying text.

222 See *supra* note 215 and accompanying text.

work under the construction agreement; the city attempted to "spring a legalism"²²³ to avoid liability through a maneuver which could be literally interpreted as part of its set of options regarding its obligation to pay. However, because Seaward had already provided its consideration for the contract, the city could not avoid its obligation to furnish its expected return consideration for the endeavor.

Similarly, in *Lawton v. Great Southwest Fire Insurance Co.*,²²⁴ the *Centronics* court discussed the good faith and fair dealing duty in the context of the timing of insurance company payouts. The court held that the insurance company "would violate an implied obligation of good faith if it delayed payment owed to its own insured for the purpose of coercing the insured into accepting less than the full amount due."²²⁵ Thus, as in the previous cases, one party's discretion as to performance or "spring[ing] a legalism" will be limited by a good faith and fair dealing duty so as to provide the benefit that was bargained for. Relating the cases, the *Centronics* court indicated that "[s]ince the timeliness of payment is often essential to the value of insurance, the insured in *Lawton*, like the corporation in *Griswold* and the contractor in *Seaward*, could otherwise have been effectively deprived of consideration for his own prior performance."²²⁶ Again, the dispute between

223 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 125-26 (3d ed. 1988). A similar circumstance to the case is hypothesized by White and Summers:

Buyer butchers and sells poultry for Kosher poultry markets in the area. Buyer's competitors can produce larger volumes and therefore sell at lower prices. To meet this competition, buyer enters negotiations with seller for processing equipment which will enable buyer to produce larger volumes. Seller visits buyer's plant and learns that the equipment is to be for "Kosher operation." Yet the contract later signed says nothing of "Kosher operation" and includes the following conspicuous merger clause which buyer specifically signs: "I understand that the contract between the parties consists solely of this written agreement and that there are no implied warranties whatsoever." The equipment is delivered and it turns out not to be for a Kosher operation. If buyer refuses to pay the price or seeks damages, he will want to prove an express oral warranty of fitness for a particular purpose. And a court might permit him to do this, for seller inserted the merger clause, so far as the Kosher operation warranty was concerned, in bad faith (at least if the seller and not just the seller's salesman knew of "Kosher operation"). In other words, he was fully aware of the buyer's needs and knowingly tried to spring a legalism on him as an excuse for not meeting these needs. This violates the general and nonvariable obligation of good faith performance imposed by section 1-203 of the [U.C.C.].

Id.

224 392 A.2d 576 (N.H. 1978).

225 *Centronics*, 562 A.2d at 192 (citing *Lawton*, 392 A.2d at 580).

226 *Id.*

Harper and Healthsource does not seem to be grounded in such deprivation of consideration or avoidance of obligation; and thus, the *Centronics* court's position on the doctrine of good faith and fair dealing does not seem to encompass or support *Harper*.

Finally, the *Centronics* court briefly reviewed other similar cases cited by the parties.²²⁷ In each, the court found that again, the imposition of the implied duty of good faith and fair dealing was of import so as to prevent one party from using legal form to prevent the other from obtaining at least some reasonable return and expected consideration. The court discussed three cases. First, in *Atlas Truck Leasing, Inc. v. First NH Banks, Inc.*,²²⁸ which held that a contract for the use of automobiles, payment of which would only be on a per mile basis, required the lessee to make some reasonable good faith efforts to use the cars; the *Centronics* court noted that "[a]bsent such a construction, the contract would have obligated the lessor to make vehicles available to the lessee [as consideration], but without any right to receive consideration in return except at the lessee's unfettered sufferance in choosing to drive the lessor's vehicles."²²⁹ The court then discussed *Wakefield v. Northern Telecom, Inc.*,²³⁰ which held that an employer violated his good faith duty when firing an employee so as to take advantage of a clause in the employee's contract that eliminated the employee's right to commissions if he was discharged. These employment commission cases have been noted previously.²³¹ The *Centronics* court reiterated the importance of an expected return benefit: "[h]ere, too, we see an otherwise unregulated right to discharge limited so as to preclude the employer from depriving his employee of contract consideration to which the employee had already become entitled by virtue of his own performance."²³² Finally, the court noted that in *Zilg v. Prentice-Hall, Inc.*,²³³ similar to the above cases, a book publisher was obligated in good faith to attempt to market an author's book even though the contract did not contain any restriction as to the amounts to be spent on promotion. Thus, the *Centronics* court concluded that after the author had written and the publisher had accepted the book, the book publisher was required to make some reasonable efforts to market the book due to its implied duty of good faith and fair dealing, since "[a]bsent such a construction, the pub-

227 *Id.* at 193.

228 808 F.2d 902 (1st Cir. 1987).

229 *Centronics*, 562 A.2d at 193.

230 769 F.2d 109 (2d Cir. 1985).

231 See *supra* notes 182-84 and accompanying text.

232 *Centronics*, 562 A.2d at 193.

233 717 F.2d 671 (2d Cir. 1983).

lisher would have been free to decline to publicize the book and so to deprive the author of virtually the entire value of the contract."²³⁴ Once again, the recurring theme is to invoke the implied duty of good faith and fair dealing in the context of preventing one party from withholding from the other its expected consideration. And again, these cases seem inapplicable to the Harper and Healthsource relationship, since there is no attempt to avoid providing a return consideration by a retreat to legal form. In *Harper*, both parties have performed in line with their respective obligations: Harper has rendered health care services to Healthsource's patients, and Healthsource has paid for those services.²³⁵

c. The Functional Analysis of Bad Faith

The *Centronics* court also reviewed an objective theory of the implied duty of good faith and fair dealing, or perhaps more appropriately, reviewed what is bad faith, through a functional analysis.²³⁶ In describing this idea, the court noted that:

functional analysis of the obligation to observe good faith in discretionary contract performance applies objective criteria . . . to identify the unstated economic opportunities intended to be bargained away by a promisor as a cost of performance, and it identifies bad faith as a promisor's discretionary action subjectively intended . . . to recapture such an opportunity, thereby refusing to pay an expected performance cost.²³⁷

Applying this notion to some of the cases reviewed, the court noted that similar results would ensue. As the *Centronics* court put it:

In *Lawton*, for example, by refusing to pay the policy proceeds, the insurance company retained control of the funds, for whatever investment opportunity might be to its advantage. The company had the money and kept it. So too in *Wakefield v. Northern Telecom, Inc.*, where the employer kept the commission money, and in *Zilg v. Prentice-Hall, Inc.*, where the publisher retained the money it refused to spend on advertising the author's book. In each of these cases, the

234 *Centronics*, 562 A.2d at 193.

235 It might be different, and the cases reviewed might be more applicable, if, for example, Harper rendered services to Healthsource patients and, before payment, Healthsource terminated Harper and refused payment for the previous services due to a contract provision that only required payment to providers if they were active members of Healthsource's medical staff.

236 *Centronics*, 562 A.2d at 194 (citing Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980)).

237 *Id.* (citations omitted).

defendant's discretionary act of bad faith kept money in its pocket, with the attendant opportunities to use that money as it saw fit.²³⁸

Thus, from an economic perspective, when one party relinquishes economic opportunities as bargained-for consideration and then later tries to recapture those opportunities, that party is acting in bad faith, assessed objectively.²³⁹

This functional analysis approach works quite strongly against Harper. First, an "objective analysis of the parties' '[e]xpectations . . . may be inferred from the express contract terms in light of the ordinary course of business and customary practice.'" ²⁴⁰ This standard would distinctly require attention to Harper's express contract term: the termination without cause clause.²⁴¹ Further, these clauses are standard within the industry and deselection is currently an ordinary business maneuver and custom.²⁴² Thus, this contract with the termination without cause clause represents bargained-away economic opportunities from the perspective of the parties at the time they contracted for services and payment thereof. Harper, in accepting the contract clause within his contract, bargained away the economic opportunities that would have been attendant if the clause did not exist as part of his cost of performance. Healthsource assessed the economic value of the contract with the termination clause, and returned a level of consideration (agreed-to payment levels) for services reflecting that contract's value. So in fact, under this analysis, it is Harper that is acting in bad faith, not Healthsource. Since Harper is the party that is trying to recapture foregone economic opportunities that were "bargained away at the time of contracting"²⁴³ by challenging the termination clause's validity, he is acting in bad faith under a functional analysis. Indeed, if the lower court on remand were to give Harper judgment by invalidating the termination *without* cause clause due to actions by Healthsource which are deemed a violation of the implied duty of good faith and fair dealing, it would be giving Harper the economic value of a contract with some form of a termination *only with* cause clause, an *express* part of his consideration bargained away,²⁴⁴ and in fact would be penalizing the wrong party under this economic analysis of good faith.

238 *Id.* at 195.

239 *Id.*

240 *Id.* (quoting Burton, *supra* note 236, at 389).

241 *See supra* note 34.

242 *See supra* note 9 and accompanying text.

243 *Centronics*, 562 A.2d at 195 (quoting Burton, *supra* note 236, at 389).

244 Indeed, it would be likely that if there was no termination without cause clause in the contract, Healthsource would never have entered into the relationship. Again,

Thus, the extensive and thorough discussion of the *Centronics* court regarding the duty of good faith and fair dealing provides no support for a cause of action by Harper. In fact, there may be some basis for a bad faith cause of action by Healthsource against Harper.

d. The Court's Other Citations

The other cases the *Harper* court cites in its discussion of good faith and fair dealing are similarly unavailing to its cause. The court cites *Douglas v. United States Fidelity & Guaranty Co.*²⁴⁵ in support of the good faith and fair dealing implied covenant.²⁴⁶ However, as related to the Harper-Healthsource dispute, it would appear again to be inappropos. The *Douglas* court held that an insurance company which assumes responsibility of settlement negotiations for the insured owes a duty of reasonable care to the insured to settle in good faith and the insurance company can be held liable for negligently failing to settle.²⁴⁷ However, *Douglas* relied on an agency theory of action for its analysis:

[w]here one acts as agent under such [settlement negotiation] circumstances, he is bound to give the rights of his principal at least as great consideration as he does his own. . . . The insurer cannot betray the trust it had undertaken nor be relieved from the usual rule that in such a case an agent must serve as he has promised to serve.²⁴⁸

Thus, the agency nature of the case completely takes it outside of the relationship between the parties in *Harper*, who are clearly dealing at arm's length. Further, the court notes that such a duty can in fact be abrogated if "the contract so provides in explicit terms."²⁴⁹ That appears to be the case in *Harper*, i.e., the explicit termination without cause clause. Hence, even if there was some ephemeral duty of good faith and fair dealing, under *Douglas*, the "explicit terms" of Harper's contract effectively avoid it.

The *Harper* court then cites *Great Lakes Aircraft Co. v. City of Claremont*²⁵⁰ for New Hampshire's broad view of the implied duty of good faith and fair dealing. In fact, most of the case (and the quote within

these clauses are standard and the economic value of being able to terminate at will is an extremely important provision for businesses like Healthsource. See *supra* notes 2-9 and accompanying text.

245 127 A. 708 (N.H. 1924).

246 *Harper*, 674 A.2d at 965.

247 *Douglas*, 127 A. at 711.

248 *Id.*

249 *Id.* at 712.

250 608 A.2d 840 (N.H. 1992).

the *Harper* decision that was attributed to *Great Lakes*) is reasoned on the basis of (and quoted from) the *Centronics* decision.²⁵¹ The *Great Lakes* case was centered on fraudulent actions by a city in selling property which it represented as suitable for the activities of the buyer when it knew the land was not.²⁵² The buyer claimed a violation of good faith and fair dealing on the basis of a lack of timely cure of the fraud perpetrated on the buyer which resulted in its insolvency.²⁵³ The *Great Lakes* court noted that the good faith duty was within the third aspect of the *Centronics* discussion of good faith, i.e., when one party has discretion²⁵⁴ (although it might be argued that in fact, the *Great Lakes* circumstance was actually more appropriately considered within the first section of the *Centronics* discussion on good faith, i.e., contract formation²⁵⁵). The court indicated that the city was obligated to provide the consideration it bargained for after the other party had performed, i.e., the city was obligated to take actions to make the property suitable for the needs of the buyer as was represented by the city to the buyer when it sold the property.²⁵⁶ Thus, similar to the cases that were discussed in *Centronics*,²⁵⁷ a party is obligated to provide the reasonable and expected consideration to the other party under a good faith duty after the other party has provided its consideration.

Finally, the *Harper* court cites *Bak-A-Lum Corp. v. Alcoa Building Products*²⁵⁸ as a general gesture toward the contention that the implied covenant of good faith is contextual.²⁵⁹ However, again, its applicability to the *Harper* case is unclear. *Bak-A-Lum* was a dispute between a manufacturer and a distributor with regard to the appropriate extent of notice needed to cancel an exclusive dealings arrangement in good

251 *Harper*, 674 A.2d at 965.

252 *Great Lakes*, 608 A.2d at 843-44.

253 *Id.* at 844-45.

254 *Great Lakes*, 608 A.2d at 855 (citing *Centronics*, 562 A.2d at 193).

255 See *supra* notes 200-02 and accompanying text. The *Centronics* court noted that there is an implied duty of good faith so as to prevent a party from misrepresenting and placing on a party the obligation to correct subsequently discovered errors that would be central to one party entering into the contract. *Centronics*, 562 A.2d at 190. That would appear to be the case here. However, perhaps because this type of action would most likely only give Great Lakes Aircraft the power to void the contract rather than damages, the court allowed a breach of contract action.

256 *Great Lakes*, 608 A.2d at 855-56. The court characterized the city's duty as one of a duty of cooperation.

257 See *supra* notes 209-35 and accompanying text.

258 351 A.2d 349 (N.J. 1976).

259 *Harper*, 674 A.2d at 965-66.

faith.²⁶⁰ But there was no question in the case as to the manufacturer's right to *terminate* the relationship; as the court notes, "[p]laintiff's contention that the agreement was not terminable at will without 'cause' . . . is without merit"²⁶¹ even in the context of some rather unvalorous, indeed, bad faith, behavior on the part of the manufacturer.²⁶² But termination and bad faith are in fact the critical issues in the *Harper* case, and to use *Bak-A-Lum*²⁶³ for any proposition regarding these issues is daring to say the least.

Thus, overall, it appears that the general legal theories which illustrate the exceptions to the traditional common law employment at will doctrine do not support the *Harper* court's assessment in favor of a cause of action for Harper. Further, the court's own citations provide fodder for this proposition rather than supporting its own contentions. Hence employer-employee law seems rather a weak foundation on which to build the house of contract and termination reviewability as asserted by the court in this case.

B. Independent Contractors

The *Harper* court consistently makes reference to, and its legal analysis relies heavily upon, employer-employee relationships. For example: "In the pure employment context, a common law employment relationship that is terminable by either the employee or the employer at any time is referred to as 'at will'";²⁶⁴

Like most courts, we have carved out exceptions to the common law employment-at-will doctrine, noting that in some cases "the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two";²⁶⁵

260 *Bak-A-Lum*, 351 A.2d at 352.

261 *Id.* (citations omitted).

262 The manufacturer was secretly planning to terminate the distributor's exclusive status. However, during the preparation to do this, the manufacturer induced the distributor to make a large order for materials from the manufacturer, and the manufacturer encouraged the distributor to enter into a new (more expensive) lease and expand its warehouse facilities. *Id.* at 351.

263 See *supra* notes 258-62 and accompanying text.

264 *Harper*, 674 A.2d at 964 (citing *Cloutier v. A. & P. Tea Co.*, 436 A.2d 1140, 1142 (N.H. 1981)).

265 *Id.* at 964-65 (quoting *Monge v. Beebe Rubber Co.*, 316 A.2d 849, 551 (N.H. 1974)).

and

The obligation to act in good faith in employment termination cases "is an obligation implied in the contract itself, where it fulfills the . . . function of limiting the power of an employer to terminate a wage contract by discharging an at-will employee [A]n employer violates an implied term of a contract for employment at-will by firing an employee out of malice or bad faith in retaliation for action taken or refused by the employee in consonance with public policy."²⁶⁶

However, the court in a refreshing show of erudition notes that "[s]trictly speaking, Harper's relationship with Healthsource is not an employer-employee relationship."²⁶⁷ And indeed, even though it itself relies almost exclusively on employer-employee law for its holding in

266 *Id.* at 965 (quoting *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 191 (N.H. 1989)).

267 *Id.* at 965. The court goes on to say that "Healthsource does not control, and has no right to control, the manner of performance of Harper's duties, for example" in support of its contention that Harper is not an employee of Healthsource. *Id.* First, physicians who contract with MCOs may in fact be under the control of the MCO. See Liang, *supra* note 13. Second, there are a variety of tests to assess whether an actor is an employee; since worker's compensation coverage, civil rights claims, disability coverage, tort liability, and tax duties depend on this status, several tests have been developed. See generally BAKALY & GROSSMAN, *supra* note 186, at § 2.1; John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337 (1991); Patricia A. Davidson, Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203 (1984); Michelle M. Lasswell, Note, *Workman's Compensation: Determining the Status of a Worker as an Employee or an Independent Contractor*, 43 DRAKE L. REV. 419 (1994); Cliff E. Spencer, Comment, *Oregon's Independent Contractor Statute: A Legislative Placebo for Employers*, 31 WILLAMETTE L. REV. 647 (1995). The court was most likely referring to the standard common law test as stated in the RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) which lists ten factors used to determine whether an employment relationship exists:

- (a) the extent of control which, by the agreement, the [employer] may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;

the case, the court indicates that "[t]he trial court treated Harper as making only a wrongful termination of employment argument and applied the legal standards applicable in the employment context. . . . Although the relationship in this case is similar to an employment relationship, *this was error*."²⁶⁸

If Harper is not considered an employee by the court, notwithstanding the fact that much of the court's analysis based on the employer-employee context would then be rendered moot, the traditional dichotomy then makes him an independent contractor.²⁶⁹ Independent contractors who deliver services under at will agreements are generally unilaterally terminable,²⁷⁰ even in bad faith,²⁷¹

(i) whether or not the parties believe they are creating the relation of [employer] and [employee]; and

(j) whether the principal is or is not in business.

Id.

The principal factor usually considered by courts, like the *Harper* court, is the right of control. BAKALY & GROSSMAN, *supra* note 186, at 18 ("Courts frequently cite many or all of these factors before concluding that by far the most important is the right to control.") (citing *Jones v. Atteberry*, 396 N.E.2d 104 (Ill. App. Ct. 1979); *Eagle Trucking Co. v. Texas Bitulithic Co.*, 590 S.W.2d 200 (Tex. Civ. App. 1979), *aff'd in part, rev'd in part on other grounds*, 612 S.W.2d 503 (Tex. 1981)); Davidson, *supra*, at 205 ("The employer or 'master' controls and directs the details and means of the employee's or 'servant's' work. It is this element of control that distinguishes the employer-employee relationship from the independent contractor relationship at common law.") (citing *Khouri v. Edison Elect. Illuminating Co.*, 164 N.E. 77, 78 (Mass. 1928); *Hollingsbery v. Dunn* 411 P.2d 431, 435-36 (Wash. 1966)); RESTATEMENT (SECOND) OF AGENCY §§ 1-2, 220 (1958); Lasswell, *supra*, at 423 ("Although other factors are relevant, the primary focus is on 'the right to control the physician conduct of the service being performed.'") (quoting *D & C Express, Inc. v. Sperry*, 450 N.W.2d 842, 844 (Iowa 1990)). Other tests for employee status include the economic reality test (using control test and other factors to assess employment status as a whole), relative nature of the work test (focusing on the kind of work done by individual in relation to the regular business of the employer), (Lasswell, *supra*, at 422-24); and other, statute-specific tests on both the federal (Spencer, *supra*, at 671-73) and state (Lasswell, *supra*, at 424-33) levels.

²⁶⁸ *Harper*, 674 A.2d at 965 (emphasis added).

²⁶⁹ See *supra* note 267. The court's cited cases also only concern the employee-independent contractor dichotomy. See *Boissonnault v. Bristol Federated Church*, 642 A.2d 328 (N.H. 1994) (holding that a volunteer church worker delivering financial documents to church treasury was an independent contractor, not an employee, and thus church not reachable for injuries sustained by third party when volunteer worker got into accident with him); *Merchants Ins. Group v. Warchol*, 560 A.2d 1162 (N.H. 1989) (declaratory action by insurer with court holding that injured individual was an employee and not a subcontractor as designated by employer and thus was under exclusionary clause of insurance policy excluding employees from coverage).

²⁷⁰ *Puretest Ice Cream, Inc. v. Kraft, Inc.*, 806 F.2d 323, 324 (1st Cir. 1986). Courts have refused to extend wrongful discharge actions to commercial contexts. See Pre-

and actions based on termination against public policy are precluded.²⁷² Physicians have traditionally been considered independent contractors when providing services to hospitals and MCOs.²⁷³ Under such circumstances, health care organizations have inserted termination without cause clauses, and the courts have routinely upheld them

mier Wine & Spirits v. E. & J. Gallo Winery, 846 F.2d 537 (9th Cir. 1988) (no cause of action for discharge at will in commercial agreements); Triangle Mining Co. v. Stauffer Chem. Co., 753 F.2d 734, 740 (9th Cir. 1985) ("[C]ourts generally conclude that '[w]hen the right to terminate a contract is absolute under the clear wording in the agreement [and] the motive of the party in terminating such an agreement is irrelevant to the question of whether the termination is effective.'" (quoting Augusta Med. Complex, Inc. v. Blue Cross, 608 P.2d 890, 896 (Kan. 1980))). And some courts do not make a distinction between employees and independent contractors with respect to the power of employer termination under an at will agreement. Daniel Adams Assocs., Inc. v. Rimbach Publ'g Co., 519 A.2d 997, 1003 (Pa. Super. Ct. 1987).

271 *Puretest*, 806 F.2d at 324 (citing *Rockwell Eng'g Co. v. Automatic Timing & Controls Co.*, 559 F.2d 460, 463 (7th Cir. 1977)); see also *New Horizons Elecs. Mktg., Inc. v. Clarion Corp.*, 561 N.E.2d 283 (Ill. App. Ct. 1990) (plaintiff independent contractor assertion of bad faith termination untenable and would alter specific express terms of at will agreement); *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992) (no cause of action for independent contractor terminated by company under an express termination at will contract, regardless of bad faith).

272 *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (wrongful termination against public policy cause of action only applicable to employer-employee relationships); *New Horizons*, 561 N.E.2d at 283 (retaliatory discharge actions not tenable by independent contractors).

273 *Raglin v. HMO Ill., Inc.*, 595 N.E.2d 153, 156 (Ill. App. Ct. 1992) ("[I]n this case there seems to be no question that HMOI is an IPA model health maintenance organization and, therefore, does not directly employ its own physicians. . . . For this reason the medical groups, and thus the physicians who work within the medical group, may be considered independent contractors . . ."); *Huber v. Protestant Deaconess Hosp. Ass'n of Evansville*, 133 N.E.2d 864, 870 (Ind. App. 1957) ("the duty of a hospital corporation, in respect to physicians and surgeons, would be complied with by using reasonable and ordinary care to employ reasonably qualified, reputable, licensed physicians, and in such cases the physicians or surgeons are independent contractors"); *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994) ("a physician is customarily regarded as an independent contractor, not an employee of the facility served"); *Chase v. Independent Practice Ass'n, Inc.*, 583 N.E.2d 251, 254 (Mass. App. Ct. 1991) ("physicians have traditionally been viewed as independent contractors"); *Drennan v. Community Health Inv. Corp.*, 905 S.W.2d 811, 819 (Tex. App. 1995) ("[a] doctor chosen by a patient is considered an independent contractor with regard to hospitals at which he has staff privileges"); *Harris v. Galveston County*, 799 S.W.2d 766, 768 (Tex. App. 1990) ("Generally, a physician is considered to be an independent contractor with regard to hospitals at which he has staff privileges."); see also *Lakes Emergency Care Physicians, Ltd. v. Commissioner of Econ. Sec.*, No. C0-95-1895, 1996 WL 81504 (Minn. Ct. App. Feb. 27, 1996) (physicians who worked for temporary emergency room physician staffing company considered independent contractors).

under theories of breach of contract,²⁷⁴ antitrust analysis,²⁷⁵ and constitutional law.²⁷⁶ Further, injunctive relief has been denied when physician-contractors have requested it.²⁷⁷ Indeed, the courts have assessed the relationship between physicians and health care organizations as one of business; and thus, a "medical business judgment rule" applies to termination where the courts grant great discretion to the business decisions of management.²⁷⁸

Specifically in the physician termination context, as independent contractors, physicians cannot claim wrongful discharge. Indeed, employment relationships with termination without cause clauses are not "engrafted" with covenants of good faith and fair dealing, even when the employer promises to renew the agreement.²⁷⁹ In the hornbook case on the matter, *Abrahamson v. NME Hospitals, Inc.*,²⁸⁰ Abrahamson was hired to manage the laboratory and pathology department for the hospital under a one year contract which included within it a termination without cause clause.²⁸¹ The agreement was then extended by a letter sent by the hospital to Abrahamson, indicating that the letter "will serve as an extension of your contract which expires June 30, 1984. We will continue to do business under the terms of the contract until a new contract is prepared for signature, in no event later than November, 1984."²⁸² The parties continued their relationship until November 30, 1984, when the hospital, instead of presenting Abrahamson with a new agreement, notified him that under the terms of the original agreement, it was exercising its power to terminate him

274 For a discussion of these claims in an exclusive contracts context, see Liang, *supra* note 21, at nn.120-46 and accompanying text.

275 For a discussion of these claims in an exclusive contracts context, see *id.* at nn.13-84 and accompanying text.

276 For a discussion of these claims in an exclusive contracts context, see *id.* at nn.85-119 and accompanying text.

277 For a discussion of these claims in an exclusive contracts context, see *id.* at nn.147-61 and accompanying text.

278 See *id.* at nn.173-76 and accompanying text.

279 *Abrahamson v. NME Hosps., Inc.*, 241 Cal. Rptr. 396 (Ct. App. 1987).

280 *Id.*

281 *Id.* at 397. The clause read:

VI. TERM AND TERMINATION

....

B. Either party may terminate this agreement without cause upon ninety (90) days written notice to the other party and shall duly inform the Hospital's Governing Board of such termination.

Id.

282 *Id.* (quoting letter from hospital).

without cause.²⁸³ After the 90 day notice period ended, Abrahamson filed suit.²⁸⁴

Abrahamson claimed that he was terminated by the hospital because he would "not condone or acquiesce in the hospital's failure to provide patient care and to require staff physicians to practice good medicine [T]he hospital did these things to increase revenue."²⁸⁵ For this reason, Abrahamson claimed that the termination thus represented a violation of the implied covenant of good faith and fair dealing and was contrary to public policy.²⁸⁶ The court rejected these claims. First, the court noted that "[d]ischarge of an employee during the term of employment contract may be a wrongful discharge if the employee pleads and provides the discharge was for a reason contravening fundamental principles of public policy."²⁸⁷ However,

[t]hese concepts concerning causes of action sounding in wrongful discharge and breach of the covenant [of good faith and fair dealing] arising out of the employment relationship are not on point. Abrahamson was engaged as an independent contractor for the term of one year under a contract terminable without cause on 90 days written notice. He was not an employee and was not discharged from employee status.²⁸⁸

Thus, even while acknowledging that there may have been a cause of action against the hospital had Abrahamson been an employee, the court distinctly noted that because he was not, the public policy employment at will exceptions were not available to him.²⁸⁹

Further, the court placed great import upon the independence of the termination without cause clause to any implied covenant of good faith and fair dealing.²⁹⁰ The court noted that:

[i]ndeed, the hospital and Abrahamson agree good cause was not the reason for termination. To declare the existence of the covenant of good faith and fair dealing in these circumstances engrafts upon the agreement a requirement that the right of either party to terminate without cause upon 90 days notice the further condition the termination must be free of any suggestion of violation of fundamental public policy or of law. This we decline to do.²⁹¹

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.* at 398.

287 *Id.* (citation omitted).

288 *Id.* at 399.

289 *Id.*

290 *Id.*

291 *Id.*

Thus, the court held strongly that independent contractors did not have the status to challenge their termination without cause clauses by "engrafting" an implied duty of good faith and fair dealing onto the agreement.²⁹²

If Harper were considered to be an independent contractor, *Abrahamson*²⁹³ would appear to be quite damaging to him. Note first that physicians such as Harper are generally considered to be independent contractors with the healthcare entities with which they contract.²⁹⁴ In the context of *Abrahamson*, because termination without cause clauses do not appear to provide any protection for independent contractors under any good faith²⁹⁵ or public policy rationales,²⁹⁶ Harper's sustained cause of action, and the court's reasoning, would seem specious.²⁹⁷ Thus, the lack of foundation based on independent contractor law, in addition to the inapplicability of the employment at will exceptions,²⁹⁸ would appear to give Harper and the court little room for legal recognition and remedy of his termination claim.

V. *HARPER V. HEALTHSOURCE*: A POLICY OPPORTUNITY

When is a physician not an employee nor an independent contractor? When that physician works in New Hampshire and is litigating in its Supreme Court. The court, in addition to holding that "Harper's relationship with Healthsource is not an employer-employee relationship,"²⁹⁹ also held that "Harper [is not] really an independent contractor for Healthsource"³⁰⁰ Given that a worker is traditionally described as either an employee or an independent contractor,³⁰¹ it is difficult to fathom by what standards the lower court on remand should judge the case. This is all the more difficult because the court itself did not identify or articulate any standard by

292 *Id.*

293 241 Cal. Rptr. 396 (Ct. App. 1987); see *supra* notes 279-92 and accompanying text.

294 See *supra* note 273.

295 *Abrahamson*, 241 Cal. Rptr. at 399; see also *supra* notes 290-92 and accompanying text.

296 *Abrahamson*, 241 Cal. Rptr. at 399; see also *supra* notes 272 and 289 and accompanying text.

297 The *Abrahamson* court explicitly noted that the protections of the exceptions to the at will employment doctrine do not apply to independent contractors. *Abrahamson*, 241 Cal. Rptr. at 399.

298 See *supra* notes 64-263 and accompanying text.

299 *Harper*, 674 A.2d at 964.

300 *Id.*

301 See *supra* note 267.

which to judge the case, other than indicating that the relationship was "similar" to an employment relationship, but in the same sentence indicating the trial court was in "error" when it treated the case as such.³⁰²

However, perhaps the mode by which the court assessed what could be considered the relevant law may simply illustrate the court's shrewdness. Because it appears that Harper does not have a claim under any traditional analysis, by holding that Harper does not fall into an employee or independent contractor category, the court gave itself the power to develop the common law as a response to significant social change. Of course, the common law has such a jurisprudential tradition; the New Hampshire Supreme Court is thus in good company if and when it placed itself in such a position.³⁰³

Note, however, that any development of the law to be made by the court must be considered in the context of a world of limited resources.³⁰⁴ The common law power should hence be used to effect

302 *Harper*, 674 A.2d at 964.

303 See, e.g., Harlan F. Stone, *Some Phases in American Legal Education, Address at Yale University*, 97 CENT. L.J. 241 (1924), where Chief Justice Stone indicated that law should not be seen as "a hermetically sealed compartment of social science, to be explored and its principles formulated without reference to those social and economic forces which call law into existence, . . . law must derive its form and substance [from these forces], if it is to serve adequately its purpose." *Id.* at 244-45. This conception of law as an integral part, rather than a simple observer of, social and economic norms is a core jurisprudential concern. This development during Stone's era on the Supreme Court is generally argued to be a direct result of the common law's philosophical change in stance in the 19th century, again as a function of social change. Horwitz has made this observation:

What dramatically distinguished nineteenth century common law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. . . . Indeed, judges gradually began to shape common law doctrine with an increasing awareness that the impact . . . had expanded beyond the necessity merely of doing justice in the individual case.

MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* xii-xv (1977). Indeed, the changes stem not necessarily from "crisis" cases, but from discrete cases whose changes are "almost unnoticed." KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 109 (1960); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115 (1986) ("[T]here are sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining and yet enlarging context of a real controversy leads to sounder and more enduring judgments.").

304 See, e.g., Bryan A. Liang, *Cocaine Justice: Why Harsher Sentences for Crack Dealers are Appropriate*, L.A. DAILY J., Jan. 22, 1996, at 6 (arguing that limited resources require prosecutors to target minority communities because that is where crack dealers focus

change only if it is needed; i.e., if and when the social change results in some negative transformation in the status of the individuals concerned. Bluntly put, the court needs to assess whether there is harm associated with the social change. If so, a case must be considered as a reification of the social change and potential remedies should specifically address it. If there is no harm, then the social change does not require intervention by the court.

Thus, for the common law to have a positive impact on furthering a social goal of progress,³⁰⁵ its development must reflect the actual modifications inherent in evolving relationships that come with the relevant social change. However, these common law developments are only justified, even in the face of significant modifications, if those modifications in fact result in excess costs or harm.

Have there been any modifications of relationships in the social change of managed care? It appears so. A new and unique physician role³⁰⁶ has been identified by the court—one that is neither an employee nor an independent contractor.³⁰⁷ This is not an implausible characterization. In the days of traditional indemnity insurance, physicians had virtually unfettered discretion in decisionmaking. Conventional indemnity insurance provided a clear distinction between provider and payer; the physician simply rendered services, billed the insurance company, and was paid. There were no financial or other limitations or controls exercised by the insurance company over the physician under this blank check approach. Physicians then were true independent contractors.³⁰⁸ And by comparison, even in those days, there were physicians who were typical employees. For example, the government and companies employed physicians; even managed care, at that time a minority player, employed physicians traditionally in staff model HMOs.³⁰⁹

But as the mode of health care delivery has changed, the distinction between these traditional categories for physicians has become increasingly blurred. The physician can no longer exercise unfettered

their efforts); Bryan A. Liang, *The Bottom Line Isn't Racism, It's Economics*, L.A. DAILY J., Dec. 18, 1995, at 6 (indicating that California Proposition 187 was not based upon racist tendencies but on limited resources available which in fact inadequately cover citizens' needs for education and non-emergency medical care).

305 As compared to the limited effect it may have as a deterrence structure. See Liang, *supra* note 14.

306 See Liang, *supra* note 18 and accompanying text.

307 *Harper*, 674 A.2d at 964.

308 See *supra* note 267 and accompanying text.

309 "In a staff model HMO, the participating physicians are employees. The HMO typically pays them on a salary basis, with bonus or incentive payments based on performance and profits." YOUNGER ET AL., *supra* note 4, at 3.

discretion in his or her clinical decisionmaking.³¹⁰ The MCO, in fact, has the power to control the physician on the most practical of all bases—financial.³¹¹ Yet the physician continues to be a professional, and, for example, like Harper, need not provide all of his services to one master.³¹² He or she may contract with several entities and indeed provide services at his or her own location, clearly outside the bounds of the typical employee and clearly within the bounds of the typical independent contractor.³¹³ Thus, although the court's reasoning in support of its decision may have been questionable, its characterization was right—Harper is neither a traditional employee nor a traditional independent contractor in the health care context. This new genre of worker is a modification created by the social change; it is thus a necessary component for consideration if the common law is to be developed in this area.

Have there been any other modifications? It appears that the patient's options have been limited as well. Recall that the previous relationships between physicians and patients were in the era of traditional indemnity. Among other things, patients had their own virtually unfettered discretion—their choice of provider. The patient could always follow the physician if he or she wished. Neither a patient's change of employer, nor a physician's change of medical situs or group severed the relationship. Only the patient made that decision.

But now we are in a brave new world where things have significantly changed. As is apparent, third parties can and do interpose themselves into the patient-physician relationship to the point of severing it without the patient's assent—through deselection. Thus, although the actual physician and patient remain the same, from the patient's point of view, a new risk of uncontrollable physician loss has resulted from the new dominant social infrastructure known as managed care. This modification should also be considered when determining the extent to which the common law should be developed, if at all.

The physician's role has changed, and the patient has lost autonomy. However, if there is no apparent impact or harm associated with these new changes, no action is in fact necessary. Is there no cost or no harm emanating from the modifications of the patient-physician relationship under the social change of managed care? Although in

310 See *supra* notes 11-19 and accompanying text.

311 See *supra* notes 11-19 and accompanying text.

312 See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

313 *Id.*

many circumstances there may be little harm by deselection to patients who are not sick,³¹⁴ there is indeed the potential for a great deal of harm for the minority of patients who are.³¹⁵

Back in the days of traditional indemnity, this potential patient injury was not a risk. Thus, the courts did not need to address the issue because any harm associated with a theoretical termination was just that—theoretical, since the patient with indemnity insurance was never required to involuntarily sever his or her medical ties. Now, however, in those circumstances where patients have sensitive diseases such as chronic illness (e.g., diabetes, end-stage renal disease),³¹⁶ terminable diseases such as the myriad forms of cancer,³¹⁷ “intimate” but non-terminal diseases such as those involving the genital tract, AIDS,³¹⁸ and other sensitive diseases,³¹⁹ termination of an established patient-physician relationship requires the patient to undergo the significant burden of obtaining the services of another physician with its concomitant costs associated with, importantly, reestablishing confidence and trust in the physician and his or her staff. In addition, there are the large practical costs to both the patient and the new physician associated with recounting and analyzing the patient’s past

314 “Like so many other aspects of American culture, managed care rewards winners—stay healthy and you’re fine.” Swartz, *supra* note 17, at 86.

315 See *infra* notes 316-21 and accompanying text.

316 Any long-term, life-threatening illness represents a threat to [the MCO’s] bottom line. “When we started seeing insurance companies trying to shaft these guys,” says one physician who was treating AIDS patients for more than a decade, “we knew they were going to extrapolate that to cancer patients or heart patients. They’d do it to anybody.”

Swartz, *supra* note 17.

317 Dr. B [a family practitioner] was not the only one wrangling with the insurance companies. One morning a woman [in an MCO plan] came weeping into his office. Her oncologist had been dropped from the plan, and she could not afford to pay him on her own. The man had been her doctor for a dozen years and had guided her through not only her own ongoing treatment but also the death of her husband from the same disease. “I cannot bear facing a recurrence without him,” she told Dr. B. But she would have to.

Id.

318 AIDS is the most glaring example [of difficulties with not maintaining a patient-physician relationship]. Even though the disease is terminal, the right doctor can make an enormous difference in the quality and length of time a patient has left. But ask an AIDS doctor about managed care and you get horror stories in return . . . [for example,] of doctors fired from plans because they fought back.

Id.

319 These considerations should also be applied to patients who are pregnant; disruption of pre- and post-natal care could have a potentially devastating effect on the mother and child and should also be considered a medical state warranting a continued patient-physician relationship. See Terry, *supra* note 6, at 138 (describing how one physician, Dr. Marciana Wilkerson, was deselected while her patients were pregnant, two with gestational diabetes).

history of his or her present illness, physical exams, previous testing, previous therapies attempted and their results, and previous medications attempted and their effects. Of course all these new costs and their associated time allocations have a significant impact on the patient's health and the quality of care that is delivered—while merely reinventing the wheel.³²⁰

And further, there are incentive costs accompanying physician deselection that must be overcome by the patient. In managed care,

320 Long-term patient-physician relationships do not simply confer psychic benefits. If physicians have a basic understanding of their patients, particularly those with complex, sensitive diseases, they can then better evaluate their patients' signs and symptoms. Further, because medicine is not a black and white endeavor and there are significant variations as to patient expression, the physician with a longstanding relationship with a patient can assess better those reactions which require immediate action and those which do not. As well, with long term relationships, patients who trust and have confidence in their physicians are more apt to see their physicians early in a disease's progression rather than later, when the disease becomes more difficult to treat. This continuity of care also has been shown to lead to greater patient satisfaction and a higher probability of patient compliance with medical treatment. See David Orentlicher, *Health Care Reform and the Patient-Physician Relationship*, 5 HEALTH MATRIX 141, 143 (1995). Further, maintaining a long term physician relationship arguably is more efficient and can result in higher quality of care. Indeed, as indicated in the text, when a patient changes physicians, a litany of events must occur so that the new physician can obtain some baseline information about the patient. However, inevitably, the new physician will have to rely on at least some second-hand information from the previous physician's notes and notations in the medical record. This sacrifices the complete understanding of the patient that is garnered through a long term relationship and potentially reduces the quality of care that the patient will receive from the new physician. See *id.* at 144. Additionally, there may be long term effects on the patients due to a disruption of an established patient-physician relationship. Paula Berg, *Judicial Enforcement of Covenants Not To Compete Between Physicians: Protecting Doctors' Interests at Patient's Expense*, 45 RUTGERS L. REV. 1, 31 (1992).

Further, long term, continuous relationships are reported to reduce emergency room visits; as well, intensive care stays of patients with continuing relationships with physicians are shorter compared with those patients who lack such a relationship. *Id.* at 31-32. This may be because a long term relationship may contribute to a physician's diagnostic abilities. *Id.* It appears that patients who have had their patient-physician relationships severed involuntarily require a significant amount of time to find an acceptable replacement, obtain care from the emergency room more frequently for non-emergency care, and require two to five years after a new physician is found to "feel confident that their new physician knows their medical problems well and more than five years to trust that their emotional problems are understood." *Id.* at 33-34. Thus,

medical research on continuity and discontinuity in provider care has established that the involuntary loss of a primary care physician is a significant physical and psychological hardship and may be experienced by the patient for an extended period. Public policy . . . should foster provider continuity in health care, not undermine it.

there is a financial incentive to do less; thus, patients who are ill are those with the highest negative risk for the provider and the MCO because these patients will have the highest costs associated with their care. This makes them extremely undesirable: the MCO may lose money on these patients and the physician may be deselected due to the patients' high cost profile. So simply because the patient is afflicted with disease, his or her potential for harm is not only that associated with his or her physician's deselection per se, but also the cost associated with involuntary and more frequent physician shopping as compared with those patients who are not sick (and thus are more financially desirable).³²¹ However, these sick patients are the very individuals who need the most intensive and stable care and accrue the most harm by delay. Hence, deselection and the current managed care infrastructure add insult to injury to the vulnerable patient by taking his or her physician away *and* making it more difficult to find another.

Thus, there have been modifications in the patient-physician relationship and identifiable costs and harms associated with the managed care form of health delivery and finance. These modifications and particularly the significant costs, virtually unheard of in the indemnity world, argue for some change in social policy to take into account these new roles and risks accompanying the sweeping changes in health care delivery.

Coming full circle, *Harper* provides that opportunity through the common law. Since the new developments arising from the shift of medical care delivery forms into managed care have created new risks of patient injury (i.e., the costs and harms), the deselection issue should be assessed in an attempt to avoid these costs and harms. The source of these costs and harms is the break-up of the patient-physician relationship; the crux of the solution thus must focus on maintaining these relationships for these patients.

Id. at 34. This is particularly important for those with sensitive disease conditions which would make any of the potential problems of discontinuity of care magnified with concomitant potentially devastating results.

321 The professional ethos has limited to some extent financial concerns regarding the care to be received. See Liang, *supra* note 13. Undoubtedly, some physicians will continue to uphold their ethic; others will leave the profession because of their inherent inability to accept managed care's terms and limitations. However, others, with little choice, must accept these terms: those with families, bills to pay, children in college, parents in nursing homes, and relatives with cancer, AIDS, and other expensive diseases. These physicians must work because they need to support themselves and the loved ones who rely on them. Thus, these doctors must accept the terms of their managed care agreements, curry favor with those who maintain the provider lists, and make no trouble lest they be deselected resulting in financial death.

To do this, the court should allow a physician "defense" against deselection which allows continuance of the patient-physician relationship³²² if the physician has patients who wish to continue the relationship and the patients are within a defined sensitive disease state category. This "defense" would preserve the most important and critical patient-physician relationships while avoiding the harms associated with their severance. Further, by preserving medical relationships only for those substantively affected by the social change, deselection could continue to be a viable business tool. And, by recognizing a deselection standard based on a patient-centered viewpoint, the court can express its condemnation of potential bad faith against vulnerable patients/enrollees and affirm a public policy of weighing the existence of harm to these patients and indicate concrete actions MCOs can take to avoid these harms.³²³ This "defense" would also give substance to the court's statement that "the termination of [Harper's] relationship with Healthsource affects more than just his own interest"³²⁴ by identifying specifically who is affected and by what rationale and methodology those interests should be assessed and protected. Thus, this physician "defense" against deselection would take into account the new role of the physician, the new patient risks created by the managed care infrastructure, and the new potential costs and losses that may be placed upon certain vulnerable patient populations while simultaneously recognizing a world of limited financial resources.

Other proposals have some similarities. New federal legislation allows patients to maintain health insurance across employment through portability provisions (the Health Insurance Portability and Accountability Act of 1996 (HIPA)).³²⁵ Although this statute addresses the maintenance of insurance, it does not address the substantive issue of the actual health of most vulnerable patients and the care

322 Interestingly, New Hampshire enacted a law which would allow patients to maintain their physicians for a minimum of five years if the patient loses the physician due to an exclusive contractual arrangement with another MCO. However, this law focuses on the elimination of exclusive contracts rather than addressing directly the problem of deselection. Of course, a marginal step could include amending the law to cover deselection. N.H. REV. STAT. ANN. §§ 420-I:1-7 (1996).

323 This is consistent with Learned Hand's well known $B < PL$ formula, where if the injurer can spend some amount (B) that is less than the expected harm to the victim (calculated by multiplying the probability of harm (P) times the loss if it occurs (L)), then the injurer should spend the amount (B). *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

324 *Harper*, 674 A.2d at 966.

325 Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

they receive. A sensitive disease state patient may carry insurance between different employers, but that does not assist him or her in obtaining the optimal care if a physician change is required and does little to alleviate the tremendous burden³²⁶ on the patient who can least withstand it.

This proposal, allowing only vulnerable patients to maintain their patient-physician relationships, would not affect most of the managed care infrastructure so its marginal costs should be limited—certainly, much less than the HIPA portability provisions will entail. And, as a point of comparison, other proposals such as “any willing provider laws”³²⁷ (AWPs) which have the same effect are much broader; they would effectively allow the physician common law “defense” to deselection for any and all patients. These broad and all-inclusive AWP have been estimated to potentially increase the health premium costs for a family by \$1248 and individuals by \$458 annually.³²⁸ Assuming that this *entire* increase in cost would apply to the more limited proposal of allowing only those with sensitive disease states to maintain their patient-physician relationships through the common law “defense,” the increase would still dwarf the costs associated with care if the patient were required to pay the entire cost of treatment out-of-pocket; it would also avoid the non-pecuniary costs attendant with physician change.³²⁹

Of course, although *Harper* does provide an opportunity for such a policy change, the most efficient method would be through the leg-

326 See *supra* notes 316-21 and accompanying text.

327 Any willing provider laws are statutes that place a duty upon MCOs to allow all providers who fulfill the MCO requirements for service provision to participate in the MCO as a selected provider. Thus, the power of the MCO to deselect is non-existent as long as the provider complies with the MCO's criteria. See *supra* note 15. At least 26 states have passed some form of any willing provider laws. Jan Ziegler, *Turning Up the Heat on Managed Care*, 14 BUS. & HEALTH 33 (1996). However, first, few cover physician services; and second, it is questionable whether these laws will impact the significant proportion of enrollees covered by ERISA plans. Janice Somerville, *States Chip Away at HMOs with Regulations*, AM. MED. NEWS, Apr. 22, 1996, at 10.

328 Julie Johnsson, *State Laws on Managed Care Spur New Battles*, AM. MED. NEWS, July 24, 1995, at 3.

329 This proposal would in fact require that patients pay this increased marginal cost (perhaps with the any willing provider law increase estimates as a cap). However, for a family or individual facing the costs associated with sensitive disease states to pay for treatments for such diseases as cancer (e.g., chemotherapy, bone marrow transplants, etc.), an additional \$100 per month for families and \$40 per month for individuals would be minimal as compared to the cost of attempting to maintain a chosen patient-physician relationship and the pecuniary and non-pecuniary costs of treatment and change thereof. See also *supra* notes 316-21 and accompanying text.

islative process.³³⁰ If Congress recognizes the extensive social ills associated with terminated patient-physician relationships for patients with highly sensitive disease states, and passes such legislation consonant with the proposal described herein (perhaps as an amendment to HIPA³³¹), there would be a significant alleviation of the difficulties these patients face when their physicians are deselected. And since this dictate would be through Congress, it would have national application, and thus, standard rules and amounts as to the disease states to be covered and the additional costs to be borne by the patients could be made at the federal level, avoiding redundant regulations by each of the states. However, probably more realistic because of legislative inertia,³³² will be the use of the common law—i.e., *Harper*. But regardless of the source from which the legal change emanates, the policy goals outlined here first requires the key recognition that it is too costly from a societal point of view to constantly force the creation of new patient-physician relationships for sensitive disease state patients due to an involuntary change of physician because of a third party's business needs.

VI. CONCLUSION

If *Harper* is a blow for maintaining patient-physician relationships, it is a glancing blow at best. However, it provides a window of opportunity for action to protect the most unprotected of patient interests in the current health delivery climate. The case appears to be the first general case of deselection where the court has allowed for a review of the actual merits of termination of the physician rather than simply reviewing the process by which it was accomplished.³³³ Although the decision of the New Hampshire Supreme Court does not square with much of the traditional case law in the area, it appropriately recog-

330 Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982) (indicating that legislation is a more efficient and effective method to achieve social change than common law).

331 See *supra* note 325.

332 No matter how little dispute there is as to the desirability of such legislation, there is comparatively little chance of overcoming legislative inertia and securing its passage unless some accident happens to focus attention upon it. The best hope is that the courts will feel free to take appropriate action without specific legislation authorizing them to do so.

Gulf Oil Co. v. Gilbert, 330 U.S. 501, 517 (1947) (Black, J., dissenting) (quoting Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 52 (1930)).

333 Note that in *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp. 438 (N.D. Cal. 1995), the court reviewed the deselection termination itself due to potential violations of Ambrosino's civil rights; see *supra* notes 53-60 and accompanying text,

nizes a new physician status which can allow the social issues created by fracturing patient-physician relationships under deselection to be addressed. By focusing on the newly created burden on vulnerable patients and allowing them to continue their medical relationships through a physician defense to deselection, the patient harm avoided by the machinations required when these sensitive disease patients must find other providers would be substantial. A vulnerable patient's health status is an expensive chip to play in this country's efforts at cost containment. Hence, it is important to assure that the managed care revolution and its concurrent effects include a mandate, or an incentive, for MCOs to manage care in the best interest of at least its most vulnerable patients rather than simply managing costs.³³⁴ *Harper* has given this country that opportunity as it moves almost totally into a system of managed care.

334 In an attempt to assure that the patient and his or her care is an important focus in managed care decisions, placing a fiduciary duty on the managed care organization may effect a positive change. At least this would give the substantive decision-maker some incentive [in addition] to the simple management of costs—an incentive to provide medical care in the patient's best interest.

Liang, *supra* note 13, at 6.

