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## The Tension between Statutes of Repose and the Accrual Date of a Cause of Action for Indemnification: Considering the Implications of *Christus St. Vincent v. Duarte-Afara*

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**THE TENSION BETWEEN STATUTES OF REPOSE  
AND THE ACCRUAL DATE OF A CAUSE  
OF ACTION FOR INDEMNIFICATION:  
CONSIDERING THE IMPLICATIONS OF  
*CHRISTUS ST. VINCENT V. DUARTE-AFARA***

Erin K. Jackson (Joyce)\*

I. INTRODUCTION

In April 2011, the New Mexico Court of Appeals issued its decision in *Christus St. Vincent v. Duarte-Afara*,<sup>1</sup> a case wherein Christus St. Vincent Regional Medical Center (“the Hospital”) filed a cause of action for indemnification against two negligent doctors. The court of appeals held that the indemnification claim, which was filed by the Hospital after the passage of the statute of limitations in the Medical Malpractice Act (“the Act”), was barred by the Act’s statute of repose.

This note reviews the decision of the New Mexico Court of Appeals in *Christus St. Vincent* and then discusses the competing purposes of indemnification and the statute of repose in the Act. Additional information about the policies that support statutes of repose and indemnification is discussed, including the court of appeals’ review or neglect of these principles. Finally, this note discusses the potential implications of the *Christus St. Vincent* decision, which is likely to affect areas of law beyond medical malpractice.

II. HISTORY OF *CHRISTUS ST. VINCENT V. DUARTE-AFARA*

*A. Basic Factual and Procedural Background*

The New Mexico Court of Appeals’ holding in *Christus St. Vincent* addressed the Hospital’s third-party complaint for indemnifica-

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1. 2011-NMCA-112, 267 P.3d 70, cert. quashed, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

tion<sup>2</sup> against two doctors employed at its facility.<sup>3</sup> The case arose when Lillian Martinez and her husband, Jose Martinez, brought a medical malpractice action against the Hospital, claiming that it was vicariously liable<sup>4</sup> for the negligent medical treatment Mrs. Martinez received from Doctors Duarte-Afara and Dickinson. The Hospital subsequently sought indemnification from the two doctors for any judgments that could be rendered against it at trial.

On December 6, 2004, Mrs. Martinez underwent a hysterectomy at the Hospital. Shortly thereafter, on December 9 and 10, she experienced respiratory problems and suffered brain damage. Mr. and Mrs. Martinez filed a medical malpractice action against the Hospital on December 4, 2007,<sup>5</sup> which was only six days before the statute of limitations period expired under the Act.<sup>6</sup> The Hospital was served with the Martinezes' complaint on December 11, 2007, which was exactly one day after the limitations period expired under the Act.<sup>7</sup> The Martinezes' complaint alleged that the Hospital failed to adequately monitor Mrs. Martinez after surgery, administered inappropriate or excessive medications, failed to timely and properly diagnose and treat her respiratory problems, and failed to timely diagnose and treat her during a life-threatening emergency.<sup>8</sup>

The Martinezes filed their petition with the New Mexico Medical Review Commission (NMMRC) on March 6, 2008, as required by the Act.<sup>9</sup> On March 12, 2008, the Martinezes amended their complaint to include the doctors as defendants, but the district court granted the doctors' motions for summary judgment and dismissed them as parties based on the statute of repose.<sup>10</sup> More than a year after receiving service of the

2. The court of appeals' opinion stated that the Hospital did not specify whether it was seeking traditional or proportional indemnification. *Id.* ¶ 14, 267 P.3d at 73. However, the Hospital's Petition for Writ of Certiorari to the New Mexico Supreme Court stated that it sought proportional equitable indemnification. Petition for Writ of Certiorari at 3, *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCERT-010 (No. 30,343, Oct. 12, 2011), *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

3. *Christus St. Vincent*, 2011-NMCA-112, ¶ 5, 267 P.3d at 71–72.

4. Petition for Writ of Certiorari, *supra* note 2, at 4–5 (The district court also held that the Hospital was vicariously liable for alleged negligence of Doctors Duarte-Afara and Dickinson as a matter of law.).

5. *Christus St. Vincent*, 2011-NMCA-112, ¶ 2, 267 P.3d at 71.

6. See NMSA 1978 § 41-5-13 (1976).

7. *Christus St. Vincent*, 2011-NMCA-112, ¶ 28, 267 P.3d at 76–77.

8. *Id.* ¶ 2, 267 P.3d at 71.

9. *Id.* ¶ 3, 267 P.3d at 71; see also *infra* Part III.A.3 (discussion of New Mexico Medical Review Commission creation and importance).

10. *Id.* ¶¶ 3–4, 267 P.3d at 71.

Martinezes' complaint, the Hospital filed third-party complaints for indemnification against Doctors Duarte-Afara and Dickinson on December 22, 2008, and March 19, 2009, respectively.<sup>11</sup> The doctors then each moved to dismiss the Hospital's third-party complaint based on the expiration of the Act's limitations period.<sup>12</sup> The district court granted their motions but then granted the Hospital's motion to reconsider the dismissals.<sup>13</sup> The doctors requested interlocutory review by the court of appeals, which issued the opinion discussed herein on May 9, 2011.<sup>14</sup> The court of appeals held that the Hospital's indemnification action was subject to the Act's statute of limitations period and was thus time-barred.<sup>15</sup> Upon the issuance of the court of appeals' decision, the Hospital filed a petition for certiorari with the New Mexico Supreme Court on September 14, 2011,<sup>16</sup> which the court granted. It then quashed certiorari on May 24, 2012.<sup>17</sup>

Two primary concerns arise with the court of appeals decision in *Christus St. Vincent*. First, the opinion neglects to comprehensively consider the competing policy concerns and legal principles supporting statutes of repose and indemnification. The opinion evidences the court's view that the policy supporting the Act's statute of repose takes precedence over those behind indemnification. This note discusses the importance of indemnification, which is not articulated by the court, and explains its apparent conflict with statutes of repose. Second, the court of appeals did not thoroughly explore the clash between fairness and the application of the Act's statute of repose to hospitals' indemnification claims against their doctors. In *Christus St. Vincent*, the Hospital's cause of action for indemnification was time-barred before the Hospital had knowledge of it. This undermines basic concepts of fairness while demonstrating the potential need for the New Mexico Legislature and courts to

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11. *Id.* ¶ 5, 267 P.3d at 71–72.

12. *Id.* ¶ 6, 267 P.3d at 72.

13. *Id.* ¶ 7, 267 P.3d at 72.

14. *Id.*

15. *Id.* ¶ 32, 267 P.3d at 77.

16. Petition for Writ of Certiorari, *supra* note 2, at 4–5. In its petition, the Hospital made several arguments. First, it contended that the case concerns an issue of considerable public interest that should be decided by the New Mexico Supreme Court. *Id.* at 9. Second, it claimed that its equitable indemnity cause of action was an independent, equitable claim, rather than a malpractice claim. *Id.* at 10. Third, it argued that a plain language interpretation of the Act does not include indemnification. *Id.* at 13. Fourth, it stated that the application of Section 41-5-13 to the Hospital's indemnification claim violates due process. *Id.* at 15.

17. N.M. SUP. CT., CERTIORARI TABLE 2012-NMCERT-005 (May 2012), <http://www.nmcompcomm.us/nmcases/NMCERT/2012/12cert-05.pdf> (quashing cert for *Christus St. Vincent*).

revisit New Mexico's laws governing the accrual date of a medical malpractice action under the Act.

### III. BACKGROUND OF INDEMNIFICATION LAW AND THE NEW MEXICO MEDICAL MALPRACTICE ACT

#### A. *Medical Malpractice Act*

##### 1. Background and Purpose of the New Mexico Medical Malpractice Act

In 1976, the New Mexico Legislature adopted the Medical Malpractice Act in response to a medical malpractice crisis.<sup>18</sup> The Act specifically applied to malpractice claims<sup>19</sup> against healthcare providers,<sup>20</sup> and it also provided benefits to both healthcare providers and patients.<sup>21</sup> Moreover, it imposed new provisions to guide future malpractice claims, such as a limitations period and the creation of the NMMRC.<sup>22</sup> Since its adoption,

18. *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 251, 837 P.2d 442, 445 (1992). This crisis encompassed a national scope, and forty-five states enacted legislation to resolve it in 1975 and 1976. Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. REV. 5, 7 (1976-77). In New Mexico, the crisis began when Travelers Insurance Companies withdrew as the underwriter of the New Mexico Medical Society's professional liability insurance due to rising costs. *Id.* at 7-8. At that time, ninety percent of the state's healthcare practitioners and institutions participated in the Society's liability program. *Id.* at 8 n.11.

19. The Act broadly defines the term "malpractice claim" as "any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract." NMSA 1978 § 41-5-3(C) (1977). Claims that have been excluded from the meaning of malpractice claim include those relating to a physician's alleged intentional infliction of emotional distress and those originating from deliberate indifference to a prison inmate's medical needs. *See Trujillo v. Puro*, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984); *Cordray v. Cnty. of Lincoln*, 320 F.Supp.2d 1171 (D.N.M. 2004).

20. The term "health care provider" is equally inclusive and is defined as a "person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant." NMSA 1978 § 41-5-3(A).

21. NMSA 1978 § 41-5-2 (1976) (purposes include promoting the health and welfare of the people of New Mexico by providing professional liability insurance to providers).

22. NMSA 1978 § 41-5-13 (1976) (creating the statute of limitations and repose); NMSA 1978 § 41-5-14 (1976) (establishing the NMMRC).

the courts have promoted a broad interpretation of the Act and its scope.<sup>23</sup>

## 2. Benefits to Providers

The Act provides numerous benefits to healthcare providers, but it requires them to seek “qualification” under the Act to reap these benefits. This distinction between qualified and nonqualified providers impacts both providers and patients.<sup>24</sup> To reap the benefits and be obligated by the burdens of the Act, a provider must meet several requirements outlined by Section 41-5-5.<sup>25</sup> Providers who choose not to abide by these

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23. *See* *Wilschinsky v. Medina*, 108 N.M. 511, 775 P.2d 713 (1989) (holding that physicians owe a duty to third persons who may be foreseeably harmed by that physician’s negligence in treatment of his patient, and that the Act encompasses such third-party claims).

24. *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 252, 837 P.2d 442, 446 (1992). Providers who are not qualified under Section 41-5-5 do not benefit from the Act’s statute of limitations or damages award cap, and they do not receive secondary insurance coverage from the Patient Compensation Fund. NMSA 1978 § 41-5-5 (1992). Patients who receive treatment from nonqualified providers may still go before the NMMRC in the event of alleged malpractice, but participation in NMMRC hearings by the provider is voluntary. NMSA 1978 § 41-5-14. Moreover, patients are not bound by the statute of limitations in the Act if they receive negligent treatment from a nonqualified provider; instead, their action does not begin to accrue until three years following their discovery of their injury. NMSA 1978 § 37-1-8 (1976); NMSA 1978 § 41-5-13 (1976), *held unconstitutional in Jaramillo v. Heaton*, 2004-NMCA-123, 100 P.3d 204.

25. NMSA 1978 § 41-5-5; *see also* Div. of Ins., N.M. Pub. Reg. Comm’n, *New Mexico Patient’s Compensation Fund Frequently Asked Questions*, INSURANCE, <http://www.nmprc.state.nm.us/insurance/docs/PCFFAQs.pdf> (last visited Dec. 20, 2012). The Patient Compensation Fund provides secondary insurance coverage to qualified providers who are sued under the Act. It also caps the damage awards against these providers at \$600,000, although this is exclusive of medical expenses and punitive damages. To seek qualification, an individual physician must obtain \$200,000 in coverage per occurrence from an authorized insurer. *Id.* Doctors and individual physicians must carry primary coverage for up to three claims per year. For a hospital to receive qualification, it must first obtain a primary layer of coverage in an occurrence-based policy from an authorized insurer, complete a detailed application, and hire an actuary to estimate its future losses that will require coverage by the Patient Compensation Fund. *Id.*

According to the Division of Insurance, which manages the Patient Compensation Fund, the majority of the policies for providers covered by the Patient Compensation Fund are written by one insurance company (American Physicians Assurance Corporation) with the remaining claims being written by two remaining companies. *Id.*

requirements are considered to be nonqualified providers,<sup>26</sup> and they do not receive the benefits of qualification under the Act.<sup>27</sup>

By offering specific benefits to practitioners who seek qualification under the Act, the legislature sought to curb the medical malpractice crisis by encouraging participation.<sup>28</sup> Thus, the legislative intent supporting the Act included an interest in “making available professional liability insurance for health care providers in New Mexico.”<sup>29</sup> The two primary benefits of qualification are a limitations period that includes a statute of repose and a cap on damage awards for malpractice liability.<sup>30</sup>

The limitations period is the most relevant benefit to the discussion of indemnification herein, and it is thus explored in greater detail.<sup>31</sup> The Act provides a patient three years from the date of the malpractice occurrence in which to file an action against the provider.<sup>32</sup> Depending upon when the patient discovers the injury from malpractice, the statute functions either as a statute of limitations or a statute of repose.<sup>33</sup> It acts as a statute of limitations when it limits the plaintiff to filing a malpractice

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26. NMSA 1978 § 41-5-5; *see also* Div. of Ins., *supra* note 25. The types of providers who can seek qualification under the Act include doctors, chiropractors, podiatrists, nurse anesthetists, physician’s assistants, hospitals, and outpatient healthcare facilities. Division of Insurance, *supra* note 25. The Division of Insurance estimates that the Patient Compensation Fund currently covers about 1,800 doctors, including doctors’ business entities, one hospital, and a few podiatrists, chiropractors, and physician’s assistants. *Id.*

27. NMSA 1978 § 41-5-5(C). Malpractice actions against nonqualified providers are governed by Section 37-1-8. NMSA 1978 § 37-1-8 (1976).

28. *Moncor Trust Co. v. Feil*, 105 N.M. 444, 446, 733 P.2d 1327, 1329 (Ct. App. 1987).

29. NMSA 1978 § 41-5-2 (1976).

30. *See* NMSA 1978 § 41-5-5; NMSA 1978 § 41-5-6 (1992).

31. NMSA 1978 § 41-5-13 (1976), the limitations period, is the most relevant portion in this decision because its date of accrual directly conflicts with the date of accrual of an indemnification claim.

32. NMSA 1978 § 41-5-13 (coined the “date of occurrence” rule of accrual). The only enumerated exception in the statute relates to minors under the age of six who are victims of malpractice, and the court has separately addressed the due process ramifications of this exception in *Jaramillo v. Heaton*, 2004-NMCA-123, 100 P.3d 204 (A child’s due process rights are violated by requirement that a victim under the age of six must file by his ninth birthday or forever lose claim to his action when his guardian fails to file the suit in time.).

33. NMSA 1978 § 41-5-13; *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 31, 918 P.2d 1321, 1331. That is, if a patient discovers an injury one year after the occurrence, the Act functions as a statute of limitations and provides the patient two years in which to file a claim. If the patient instead discovers an injury four years after the occurrence, the Act functions as a statute of repose and bars the patient’s claim.

claim within three years of the date of accrual, which is defined by the date on which the malpractice occurred.<sup>34</sup> It also functions as a statute of repose by barring a malpractice claim after three years from the date of occurrence.<sup>35</sup> The fundamental difference between these two applications of the limitations period is that the statute of limitations does not expressly place a time bar on the plaintiff's cause of action based on the date of occurrence.<sup>36</sup> Instead, it describes the accrual date and the length of time in which the plaintiff may file his or her action. The statute of repose is thus more final, as it provides the date on which the plaintiff is barred from pursuing a claim, regardless of knowledge of the injury.<sup>37</sup>

This distinction is more easily understood in a jurisdiction where the discovery rule is applied to a medical malpractice cause of action. In such a jurisdiction, the statute of limitations provides that the plaintiff's claim accrues on the date that the injury is discovered, and it gives the plaintiff a specified amount of time to file that claim after the accrual date. The statute of repose may state that a plaintiff has a maximum of five years after the date of occurrence in which to file a malpractice action. Thus, a plaintiff who does not discover an injury until six years after the date of occurrence is barred from filing an action, regardless of the jurisdiction's use of the discovery rule. New Mexico's approach is complicated by the fact that the date of occurrence rule applied to the accrual of malpractice actions essentially creates a system in which the statute of limitations transforms into a statute of repose exactly three years after the date of occurrence.<sup>38</sup>

When crafting statutes of limitations, the legislature uses one of three approaches to define the accrual date: (1) the day of the wrongful act ("date of occurrence rule"); (2) the day when pain is first experienced by the plaintiff; or (3) the day that the cause of the pain and wrongful act is discovered ("discovery rule").<sup>39</sup> Prior to the adoption of the Act, New Mexico courts established that the date of occurrence rule<sup>40</sup> governed

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34. NMSA 1978 § 41-5-13; *see also* *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 250, 837 P.2d 442, 250 (1992). The date that the malpractice occurred is commonly referred to as the "date of occurrence."

35. NMSA 1978 § 41-5-13.

36. RESTATEMENT (SECOND) OF TORTS § 899(c) (1979) ("Statutes of limitations ordinarily provide that an action may be commenced only within a specified period after the cause of action arises.").

37. *Id.* § 899(g).

38. *See id.* § 899 (general explanations of statutes of repose and limitations).

39. Ron Horn, *The Statute of Limitations in Medical Malpractice Actions*, 6 N.M. L. REV. 271, 272 (1975-76).

40. This is also called the "wrongful act rule." *Id.* at 273.

medical malpractice actions.<sup>41</sup> The application of the occurrence rule survives today.<sup>42</sup> After the three-year period following the date of occurrence, the statute becomes a statute of repose and completely bars claims against the provider stemming from that date.<sup>43</sup> Thus, patients are effectively prohibited from bringing claims that do not accrue within three years of the date of occurrence.<sup>44</sup> This strict application of the limitations period is rooted in the legislature's desire to see claims litigated before the parties' memories fade or evidence is lost or destroyed.<sup>45</sup>

The courts have addressed the constitutionality of this limitations period and held that it is supported by rational basis.<sup>46</sup> With few exceptions, it does not violate a patient's rights to due process, equal protection,<sup>47</sup> and access to the courts.<sup>48</sup> However, the courts have been more flexible in their determination of the date of accrual when possible viola-

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41. *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963).

42. *See, e.g., Pacheco v. Cohen*, 2009-NMCA-070, 213 P.3d 793.

43. NMSA 1978 § 41-5-13 (1976). According to the Restatement (Second) of Torts, statutes of repose are typically longer than statutes of limitations. RESTATEMENT (SECOND) OF TORTS § 899 (g) (1979). The Act does not comply with this norm and instead uses a three-year time period for both.

44. *See Tomlinson v. George*, 2005-NMSC-020, ¶ 23, 116 P.3d 105, 113.

45. *Moncor Trust Co. v. Feil*, 105 N.M. 444, 446, 733 P.2d 1327, 1329 (Ct. App. 1987). The courts have articulated two primary objectives of statutes of limitations, which are: "(1) preventing revival of stale claims where 'evidence has been lost, memories have faded, and witnesses have disappeared,' and (2) acting as statutes of repose by creating a time when 'one is freed from the fears and burdens of threatened litigation.'" Horn, *supra* note 39, at 283 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944); *Ruth v. Dight*, 75 Wash. 2d 660, 453 P.2d 631, 632 (1969)).

46. *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 37, 918 P.2d 1321, 1332.

47. Although the patients who are injured by nonqualified providers are permitted three years after the date that they discover their injuries to file a claim, and patients who are injured by qualified providers only have three years following the date of occurrence under Section 41-5-13, the supreme court has held that this does not violate the latter patient's equal protection rights. *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 538, 893 P.2d 428, 434 (1995) (holding that equal protection is not implicated because the classification in the Act "classifies claims not according to the status or character of the plaintiff but according to the status or character of the defendant").

48. *Cummings*, 1996-NMSC-035, ¶ 27, 918 P.2d at 1330; *La Farge*, 119 N.M. 532, 893 P.2d 428. The court applied the same test and reached the same conclusion in *Armijo v. Tandysh*, which affirmed the constitutionality of applying a limitations period to wrongful death actions. 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *overruled by Roberts v. Sw. Cmty. Health Serv.*, 114 N.M. 248, 837 P.2d 442 (1992). Plaintiffs have also brought claims alleging that the distinction between qualified and nonqualified providers violates their due process rights by limiting the amount of time in which

tions of these rights arise.<sup>49</sup> For example, in *Garcia ex rel. Garcia v. La Farge*, the court addressed a medical malpractice claim that did not become known to the patient until near the end of the three-year period.<sup>50</sup> The court determined that the application of Section 41-5-13 would violate the patient's substantive due process rights,<sup>51</sup> and instead applied the three-year statutory period as an accrual-based limitation applicable to other personal injury claims,<sup>52</sup> as if the statute of repose did not exist.<sup>53</sup> For a patient to bring a successful constitutional challenge to the limitations period in the Act, he or she must demonstrate that there is no rational basis for the legislature's application of unique rules to qualified healthcare providers compared to other tortfeasors.<sup>54</sup> However, these challenges are unlikely to succeed because New Mexico's courts have clearly established the intention to permit different limitations periods for malpractice compared to other personal injury actions.<sup>55</sup>

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they can bring a claim; the courts have found these arguments to be unsubstantiated. See *Armijo*, 98 N.M. 181, 646 P.2d 1245.

49. *La Farge*, 119 N.M. at 537, 893 P.2d at 433. Additional exceptions have been made in cases involving fraudulent concealment. See *Keithley v. St. Joseph's Hosp.*, 102 N.M. 565, 689 P.2d 435 (Ct. App. 1984); *Tomlinson*, 2005-NMSC-020, 116 P.3d 105 (places burden of proving fraudulent concealment on patient to toll statute of limitations and requires patient to still file fraudulently concealed claim discovered within three-year period before expiration of limitations period if remaining time is "constitutionally adequate"); *Juarez v. Nelson*, 2003-NMCA-011, 61 P.3d 877, *overruled by Tomlinson*, 2005-NMSC-020, 116 P.3d 105; *Kern ex rel. Kern v. St. Joseph Hosp., Inc.*, 102 N.M. 452, 697 P.2d 135 (1985) (statute of limitations not tolled when patient should have known of the malpractice in spite of fraudulent concealment, and that silence can constitute fraudulent concealment).

50. *La Farge*, 119 N.M. at 534, 893 P.2d at 430.

51. *Id.* at 539-40, 893 P.2d at 435-36. The supreme court provided minimal reasoning for this holding, stating that the Act's limitations period "left an unconstitutionally short period of time within which the [plaintiffs] could file suit after [the injured party's] cause of action accrued." *Id.* at 540, 893 P.2d at 436. Although the injured party in *La Farge* was a child and the malpractice suit was brought by the minor's parents on his behalf, the supreme court did not address this factor in its consideration.

52. *Id.* at 542, 893 P.2d at 438 (applying the general personal injury statute of limitations in Section 37-1-8, which would have applied to the plaintiff's negligence claim had the Act never been enacted). NMSA 1978 § 37-1-8 (1976).

53. *La Farge*, 119 N.M. at 542, 893 P.2d at 438.

54. *Id.* at 539, 893 P.2d at 435.

55. *Kern ex rel. Kern v. St. Joseph Hosp., Inc.*, 102 N.M. 452, 459, 697 P.2d 135, 142 (1985) (citing departure from general personal injury limitations period based upon the date of injury applied by the supreme court in *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963)). Moreover, the supreme court has held that Section 41-5-13 is not ambiguous and that it must therefore be followed as written. *Id.* at 459, 697 P.2d at 142.

### 3. Benefits to Patients

The Act also benefits patients, primarily by streamlining the process of bringing a medical malpractice suit.<sup>56</sup> Prior to the passage of the Act, plaintiffs were required to locate expert providers from the same locality as the defendant.<sup>57</sup> At the time of the Act's passage, many perceived a "judicial inhospitability in New Mexico to reducing the plaintiff's burden of establishing a malpractice claim."<sup>58</sup> Since plaintiffs have traditionally found it very difficult to locate willing expert witnesses to participate in medical malpractice trials,<sup>59</sup> the Act had the effect of loosening the challenge for plaintiffs of obtaining an expert to present testimony at trial.<sup>60</sup> The trial courts are also vested with the power to determine whether an expert witness is required,<sup>61</sup> although they do so in the majority of circumstances,<sup>62</sup> but the unwaivable requirement is gone.<sup>63</sup> This change made it easier for plaintiffs to bring malpractice suits based in *res ipsa* or other

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Prior to the passage of the Act, medical malpractice actions were subject to the same limitations periods as other personal injury actions. Horn, *supra* note 39, at 271. Medical malpractice, however, is distinct from other torts since the plaintiff may not be immediately aware of medical malpractice and an injury may be latent. *Id.* For other types of personal injuries, the date of occurrence and date of discovery are typically the same. Nonetheless, the Act applies a date of occurrence rule for accrual of actions to medical malpractice. *Id.*

56. The Act's purpose in Section 41-5-2 aims to "promote the health and welfare of the people of New Mexico," and Section 41-5-23 provides expert witness assistance to patients who are successful at the NMMRC. NMSA 1978 § 41-5-2 (1976); NMSA 1978 § 41-5-23 (1976).

57. Kovnat, *supra* note 18, at 12.

58. *Id.* at 17.

59. *Id.* at 10–11.

60. *Id.* at 17.

61. *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978) (medical expert should be used when trial court reasonably decides that it is necessary to inform jurors); *Lopez v. Reddy*, 2005-NMCA-054, ¶ 9, 113 P.3d 377, 380 (expert should be used when physician's standard of care is challenged).

62. The year after the Act was passed by the legislature, the Supreme Court announced in *Pharmaseal Laboratories, Inc. v. Goffe* that: "[i]t is not mandatory in every case that negligence of the doctor be proved by expert testimony," although "[n]egligence of a doctor in a procedure which is peculiarly within the knowledge of doctors, and in which a layman would be presumed to be uninformed, would demand medical testimony as to the standard of care. However, if negligence can be determined by resort to common knowledge ordinarily possessed by an average person, expert testimony as to standards of care is not essential." *Id.* at 758, 568 P.2d at 594.

63. UJI 13-1101 NMRA (permits court to omit certain parts of instruction "in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person"). The court also held in *Lopez v. Reddy*, that "[i]n a medical malpractice case, because of the technical and specialized subject matter, expert medi-

doctrines that are easily understandable to lay jurors and do not require expert testimony.<sup>64</sup>

The Act also required plaintiffs to bring their claims against qualified providers before the NMMRC in advance of filing a complaint with the court.<sup>65</sup> The NMMRC assembles a panel of attorneys and doctors who determine whether the plaintiff presents sufficient evidence of the act upon which the complaint is based and whether there is a reasonable medical probability that the plaintiff's injuries resulted from malpractice in relation to that act.<sup>66</sup> Because the NMMRC will determine if the allegedly negligent physician is a qualified provider after receiving the plaintiff's complaint, it accepts complaints against both qualified and non-qualified providers.<sup>67</sup> In the event that the Department of Insurance notifies the NMMRC that the allegedly negligent provider is not qualified under the Act, the patient may still receive a NMMRC hearing upon the stipulation of the parties and the patient's payment of a nominal fee.<sup>68</sup> The hearing is held within sixty days of the NMMRC's receipt of the patient's application.<sup>69</sup> If the NMMRC finds for the plaintiff, it will assist the plaintiff with locating an expert to assist with trial preparation and testimony.<sup>70</sup> These provisions seek to encourage the settlement of meritorious claims<sup>71</sup> and to provide credible plaintiffs with expert assistance at trial.<sup>72</sup>

While the NMMRC requirement in Section 41-5-14 can provide useful assistance to plaintiffs, it also serves as a benefit to qualified provid-

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cal testimony is usually required to establish departure from recognized standards in the community." 2005-NMCA-054, ¶ 9, 113 P.3d at 380.

64. *Mireles v. Broderick*, 117 N.M. 445, 448, 872 P.2d 863, 866 (1994) (expert *may* be used in *res ipsa* medical malpractice cases but is not required).

65. This process tolls the statute of limitations provided by the Act until thirty days after the NMMRC mails its decision to the parties' attorneys. NMSA 1978 41-5-22 (1976); *see also* N.M. Med. Soc'y, Policies and Procedures, N.M. MED. REV. COMM'N 7, part 9(c)(1), <http://www.nmms.org/files/uploaded/files/Handbook2011.pdf> (last visited Dec. 20, 2012).

66. No expert testimony is permitted at the NMMRC hearing, and the Commission's policies state that "[t]he policy of the Commission is to provide an inexpensive forum that does not involve the need for expert testimony . . . The panelists are the experts." N.M. Med. Soc'y, *supra* note 65, at 5, part 8(c)(4).

67. *Id.* at 2, part 3 (providing for voluntary panel for claims against nonqualified providers).

68. *Id.*

69. *Id.* at 3, part 5.

70. NMSA 1978 § 41-5-23 (1976); *see also* Kovnat, *supra* note 18, at 30.

71. *Otero v. Zouhar*, 102 N.M. 493, 503, 697 P.2d 493, 503 (Ct. App. 1984).

72. NMSA 1978 § 41-5-23 (provision of expert).

ers.<sup>73</sup> While patients who prevail at the NMMRC receive assistance from the panel, unsuccessful patients may be deterred from filing a malpractice complaint with the court.<sup>74</sup> Additionally, a panel decision that is favorable to a doctor may increase the likelihood that the plaintiff will accept a low settlement offer. The pendency of panel proceedings also tolls the Act's limitations period,<sup>75</sup> which is a policy that the courts have approved.<sup>76</sup> The NMMRC is not required to hear claims brought against nonqualified providers.<sup>77</sup> The courts have held that this limited jurisdiction of the NM-MRC does not violate the substantive due process rights of nonqualified providers<sup>78</sup> and comports with the legislative purpose of the Act.<sup>79</sup>

## B. Indemnification in New Mexico

### 1. Basics

Indemnification is fundamentally rooted in principles of liability, and it exists to "allow a party who has been held liable for an injury but who was not at fault to seek recovery from one who was at fault."<sup>80</sup> The fundamental principles of indemnification in New Mexico were articulated in *In re Consolidated Vista Hills Retaining Wall Litigation*.<sup>81</sup> As stated in that case, the cause of action for indemnification is rooted in equity, can arise by operation of law to prevent an unjust result, and can arise without an express or implied agreement.<sup>82</sup> New Mexico recognizes

73. *Otero*, 102 N.M. at 503, 697 P.2d at 503 (NMMRC benefited providers by reducing the filing of frivolous or non-meritorious claims).

74. *Id.* at 503, 697 P.2d at 503 (NMMRC benefited providers by reducing the filing of frivolous or non-meritorious claims).

75. NMSA 1978 § 41-5-22 (1976). Because Section 41-5-13 functions as both a statute of limitation and repose, the plaintiff's claim will not be barred during the pendency of these proceedings based upon either the passage of the statute of limitation or repose. However, if a plaintiff is granted a stay by the court to first file an application with the NMMRC and fails to file the NMMRC petition as instructed, his or her action may be dismissed by the court. *Belser v. O'Cleireachain*, 2005-NMCA-073, 114 P.3d 303.

76. *Tomlinson v. George*, 2005-NMSC-020, 116 P.3d 105.

77. N.M. Med. Soc'y, *supra* note 65, at 2 part 3.

78. *Otero*, 102 N.M. 493, 697 P.2d 493.

79. *Id.*

80. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 550, 893 P.2d 438, 446 (1995).

81. 119 N.M. 542, 893 P.2d 438 (1995); *see also id.* at 545, 893 P.2d at 441 (explaining the difference between contribution and indemnification).

82. *Id.* at 546, 893 P.2d at 442 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 341 (5th ed. 1984)); *see also* Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 97, 628 P.2d 337, 342 (Ct. App. 1981) (quoting

two distinct types of indemnification: traditional and proportional.<sup>83</sup> In *Christus St. Vincent*, the Hospital did not identify which type of indemnification it sought when filing its third-party complaint against Doctors Duarte-Afara and Dickinson.<sup>84</sup>

New Mexico allows employers who have been held vicariously or derivatively liable for their employees' negligent conduct to bring actions of equitable indemnification.<sup>85</sup> Equitable indemnification is available only when the indemnitor and indemnitee are both liable for the third party's injuries.<sup>86</sup> The lack of a mutual agreement and several other circumstances<sup>87</sup> can preclude the indemnity action, and the burden rests upon the indemnitee to demonstrate that the indemnitor is "at least partly liable to the original plaintiff for his or her injuries."<sup>88</sup>

## 2. Traditional Indemnification

Traditional indemnification allows an indemnitee who is held liable for damages to recover compensation from a third-party tortfeasor (in-

*Aalco Mfg. Co. v. City of Espanola*, 95 N.M. 66, 618 P.2d 1230 (1980) (Indemnity is "deeply rooted in the principles of equity, fair play and justice.").

83. *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 23, 198 P.3d 342, 349 (citing *Otero v. Jordan Rest. Enters.*, 1996-NMSC-047, ¶ 14, 922 P.2d 569 (traditional indemnification for vicarious liability); *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 551–53, 893 P.2d at 447–49 (equitable proportional indemnification in limited situations)).

84. *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 14, 267 P.3d 70, *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

85. *Gallagher*, 2008-NMSC-067, ¶ 22, 198 P.3d at 348; *see also* *Yelin v. Carvel Corp.*, 119 N.M. 554, 556, 893 P.2d 450, 452 (1995) (listing situations in which equitable indemnification applies). Either a traditional or proportional indemnification claim can be crafted as an equitable indemnification claim, where applicable. *Gallagher*, 2008-NMSC-067, ¶ 23, 198 P.3d at 349.

86. *Gallagher*, 2008-NMSC-067, ¶ 25, 198 P.3d at 349. In *Christus St. Vincent*, the Hospital was held directly liable for the actions of its nurses and vicariously liable for the actions of Doctors Duarte-Afara and Dickinson. At trial, the jury awarded damages to the Martinezes in the amount of \$1.1 million. Petition for Writ of Certiorari, *supra* note 2, at 5–6.

87. *Gallagher*, 2008-NMSC-067, ¶ 27, 198 P.3d at 349 (citing examples of when equitable indemnification is not available: "(1) the indemnitor and the indemnitee have an express or implied contractual relationship of any kind; (2) the indemnitee is not at fault for the injury; and (3) allowing an indemnity claim would prevent the unjust enrichment of the indemnitor").

88. *Id.* ¶ 28, 198 P.3d at 350 (citing RESTATEMENT (SECOND) OF TORTS § 886(B)(1)).

demnitor) who may or may not be the primary wrongdoer.<sup>89</sup> Primarily, “the whole purpose of traditional indemnification is to shift liability from one who is not at fault to one who is at fault.”<sup>90</sup> By shifting the blame, it allows a party who has been held responsible for damages but who was not actively at fault to recover compensation.<sup>91</sup> The court must find that the indemnitee was passive in its relation with the indemnitor, rather than active<sup>92</sup> or equally at fault.<sup>93</sup> Typically, traditional indemnification applies only when an independent, preexisting legal relationship exists between the indemnitee and indemnitor.<sup>94</sup> Despite New Mexico’s adoption of comparative negligence<sup>95</sup> and proportional indemnification,<sup>96</sup> traditional

89. *Budget Rent-a-Car Sys., Inc. v. Bridgestone*, 2009-NMCA-013, ¶ 12, 203 P.3d 154; *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 545, 893 P.2d 438, 441 (1995).

90. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 549, 893 P.2d at 445.

91. *Id.* at 546, 893 P.2d at 442.

92. *Id.* at 542, 546, 893 P.2d at 442 (citing *Krametbauer v. McDonald*, 44 N.M. 473, 104 P.2d 900 (1940)). In *In re Consolidated Vista Hills Retaining Wall Litigation*, the court recognized New Mexico’s adoption of the active/passive and *in pari delicto* tests for indemnification. An active indemnitee “has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform. *Id.* at 547, 893 P.2d at 443.

However, a passive indemnitee “fail[ed] to discover and remedy a dangerous situation created by the negligence or wrongdoing of another.” *Id.* at 547, 893 P.2d at 443; Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 154 (1932–33). If the court determines that both the indemnitee and the indemnitor were active parties, then indemnification is denied. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 546, 893 P.2d at 442 (citing *Krametbauer*, 44 N.M. at 481, 104 P.2d at 904).

93. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 546, 893 P.2d at 442 (citing *Krametbauer*, 44 N.M. 473, 104 P.2d 900 (New Mexico adopted active/passive and equally-at-fault tests for indemnification)). The concept of being equally at fault is based in the legal doctrine of *in pari delicto*, which is Latin for “in equal fault.” BLACK’S LAW DICTIONARY 676 (9th ed. 2009). If the parties are *in pari delicto*, indemnification is not permitted. *Dessauer v. Mem’l Gen. Hosp.*, 96 N.M. 92, 97, 628 P.2d 337, 342 (Ct. App. 1981) (citing *Standhardt v. Flintkote Co.*, 84 N.M. 796, 508 P.2d 1283 (1973); *Harmon v. Farmers Mkt. Food Store*, 84 N.M. 80, 499 P.2d 1002 (Ct. App. 1972)).

94. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 545–46, 893 P.2d at 441–42 (citing *Peak Drilling Co. v. Halliburton Oil Well Cementing Co.*, 215 F.2d 368, 370 (10th Cir. 1954)); *also see id.* at 546, 893 P.2d at 442 (referencing that no New Mexico case has ever denied indemnification to a passive wrongdoer solely because this relationship was absent).

95. *See Trujillo v. Berry*, 106 N.M. 86, 87, 738 P.2d 1331, 1333, *cert. denied*, 106 N.M. 24, 738 P.2d 518 (1987) (The court explained the goals of comparative negligence as: “(1) apportionment of fault among *negligent* parties whose *negligence* proxi-

indemnification, which shifts 100 percent of liability, remains applicable in certain situations.<sup>97</sup> It can be used by one tortfeasor to recover from the primary tortfeasor, and it may also be used by a nonnegligent employer to recover from his employee for that employee's negligence.<sup>98</sup>

### 3. Proportional Indemnification

In 1995, the New Mexico Supreme Court adopted the doctrine of proportional indemnification,<sup>99</sup> whereby a partially responsible indemnitee can recover from another partially responsible indemnitor.<sup>100</sup> This approach “appl[ies] comparative fault principles to indemnification claims and replac[es] the all-or-nothing rule of traditional indemnification with a system of apportioning damages according to relative fault.”<sup>101</sup> A state typically adopts proportional indemnification principles after replacing its doctrine of contributory negligence with comparative fault.<sup>102</sup> New Mexico's use of proportional indemnification was expected when it adopted comparative fault in 1981.<sup>103</sup>

mately causes any part of a loss or injury, and (2) apportionment of the total damages resulting from such loss or injury in proportion to the fault of each party.”) (emphasis in original) (citation omitted).

96. See discussion of proportional indemnification *supra* Part III.B.3.

97. *Trujillo*, 106 N.M. at 87, 738 P.2d at 1333 (citing *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir. 1983)).

98. *Id.* at 87–88, 738 P.2d at 1333–34 (citing *Dessauer*, 96 N.M. 92, 628 P.2d 337).

99. This concept is often confused with the doctrine of contribution by practitioners, the courts, and legal scholars.

100. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 552, 893 P.2d 438, 448 (1995).

101. *Id.* at 551, 893 P.2d at 447 (citing as an example *Allison v. Shell Oil Co.*, 113 Ill.2d 26, 32–34, 99 Ill.Dec. 1115, 119–20 (1986) (replacing active/passive distinction with comparative-fault doctrine); *Schneider Nat'l Inc. v. Holland Hitch Co.*, 843 P.2d 561, 576–77 (Wyo. 1992) (replacing “all-or-nothing rule” with relative-fault doctrine)).

102. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 551, 893 P.2d at 447 (citing as examples *Am. Motorcycle Ass'n v. Super. Ct.*, 20 Cal.3d 578, 146 Cal.Rptr. 182 (Cal. 1978); *Herndon*, 716 F.2d at 1332).

103. *Id.* at 547, 893 P.2d at 443 (citing *Herndon*, 716 F.2d at 1332 (reasoning that New Mexico's adoption of comparative negligence suggested it would also join other comparative-negligence states' adoption of comparative indemnification); *id.* at 447, 893 P.2d at 551 (citing New Mexico's adoption of comparative fault by “judicial fiat” in *Scott v. Rizzo*, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981)); see also *Bartlett v. N.M. Welding Supply, Inc.*, 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App. 1982), *cert denied*, 98 N.M. 336, 648 P.2d 794 (1982), *superseded by statute*, NMSA 1978 § 41-3A-1 (1987), *as recognized in* *Payne v. Hall*, 2006-NMSC-029, ¶ 11, 137 P.3d 599, 604 (New Mexico Court of Appeals abrogated joint and several liability among joint tortfeasors, adopted apportionment of damages on basis of individual tortfeasor fault).

However, the court limited the scope of proportional indemnification by holding it inapplicable when a factfinder determines that concurrent tortfeasors are proportionally liable to the injured party.<sup>104</sup> New Mexico's prior adoption of comparative negligence and several liability ensures that a joint tortfeasor will be held liable only for the percentage of damages for which he or she is responsible.<sup>105</sup> The doctrine of proportional indemnification is applicable, however, when no other doctrine is available by which the joint fault of tortfeasors can be prorated.<sup>106</sup>

#### 4. Effect of Vicarious Liability upon Indemnification Action

Indemnification actions are further complicated by allegations of negligence as a result of a party's vicarious liability.<sup>107</sup> If the party who settles or against whom a judgment is assessed is the primary wrongdoer, he or she may not make a claim for indemnification against the employer who was also joined as a party under the doctrine of respondeat superior.<sup>108</sup> Rather, "[w]here a master is vicariously liable for the tort of his servant, the servant has no possible claim to contribution from the master."<sup>109</sup> However, if a judgment is assessed against a "blameless employer" sued under respondeat superior rather than the primarily responsible party, that employer may "recover[ ] from a negligent employee, after the employer has been held liable to the injured third person under the theory of respondeat superior."<sup>110</sup>

#### 5. Accrual of Indemnification Action

A cause of action for indemnification<sup>111</sup> accrues when one party discharges another party's liability through a settlement or the satisfaction

104. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 552, 893 P.2d at 448.

105. *Id.* at 551, 893 P.2d at 447 (referencing *Scott*, 96 N.M. 682, 634 P.2d 1234); *Bartlett*, 98 N.M. at 159, 646 P.2d at 586.

106. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 553, 893 P.2d at 449.

107. *Dessauer v. Mem'l Gen. Hosp.*, 96 N.M. 92, 97-98, 628 P.2d 337, 342-43 (Ct. App. 1981) (citing NMSA 1978 § 41-3-1).

108. *Id.* (citing *Melichar v. Frank*, 78 S.D. 58, 98 N.W.2d 345 (1959)).

109. *Id.* at 98, 628 P.2d at 343.

110. *Id.* at 97, 628 P.2d at 342 (citing *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969)); *Employers' Fire Ins. Co. v. Welch*, 78 N.M. 494, 433 P.2d 79 (1967)).

111. *Black's Law Dictionary* defines indemnify as "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default; hold harmless" and indemnification as "[t]he action of compensating for loss or damage sustained." *BLACK'S LAW DICTIONARY* 658 (9th ed. 2009); see also *RESTATEMENT (SECOND) OF TORTS* § 886B cmt. a (1979) (providing that a "suit for indemnity is brought to recover

of a judgment.<sup>112</sup> However, a court may not dismiss an indemnification suit as premature if an indemnitor has not yet paid the underlying judgment.<sup>113</sup> A cross-claim or third-party complaint for indemnification can be filed while the underlying suit is pending, with the indemnification judgment to be determined after the underlying judgment is rendered.<sup>114</sup> An indemnification claim is not viable if one of multiple joint tortfeasors discharges its liability through a settlement and the disputes with the remaining tortfeasors remain unresolved.<sup>115</sup>

### C. Due Process – Statutes of Limitation

In New Mexico, statutes of limitation are “purely creatures of statute” established by the legislature.<sup>116</sup> Statutes of limitation are to be strictly construed<sup>117</sup> and interpreted “according to their plain, literal meaning, provided such an interpretation does not result in injustice, absurdity, or contradiction.”<sup>118</sup> The Act’s statute of limitations seeks “to protect prospective defendants from the burden of defending against stale claims while providing an adequate period of time for a person of ordinary diligence to pursue lawful claims.”<sup>119</sup> The Act’s statute of repose “put[s] an end to prospective liability for wrongful acts that, after the passage of a period of time, have yet to give rise to a justiciable claim.”<sup>120</sup>

the total amount of the payment by the plaintiff, on the ground that the plaintiff’s conduct was not as blameworthy as the defendant’s”).

112. *Budget Rent-a-Car Sys., Inc. v. Bridgestone*, 2009-NMCA-013, ¶ 14, 203 P.3d 154, 159 (citing generally *N.M. Pub. Schs. Ins. Auth. v. Gallagher & Co.*, 2008-NMSC-067, ¶¶ 22–26, 198 P.3d 342, 348–50).

113. *Bd. of Ed., Sch. Dist. 16, Artesia, Eddy Cnty. v. Standhardt*, 80 N.M. 543, 547, 458 P.2d 795, 799 (1969).

114. *Id.* (citing NMSA 1953 § 24-1-12(2); 3 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶¶ 13.34, 14.08–14.10 (2d ed. 1961)) (additional citations omitted).

115. *Standhardt*, 80 N.M. at 547, 458 P.2d at 799 (citing NMSA 1953 § 24-1-12(3)).

116. *Jaramillo v. State*, 111 N.M. 722, 725, 809 P.2d 636, 639 (Ct. App. 1991) (citing 51 AM. JUR. 2D *Limitation of Actions* § 9 (1970)).

117. *Slade v. Slade*, 81 N.M. 462, 463, 468 P.2d 627, 628 (1970).

118. *Regents of Univ. of N.M. v. Armijo*, 103 N.M. 174, 175, 704 P.2d 428, 429 (1985) (citing *Atencio v. Bd. of Ed.*, 99 N.M. 168, 655 P.2d 1012 (1982)).

119. *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995). Attempts in the New Mexico courts to argue that statutes of limitation violate due process have been generally unsuccessful, and the supreme court has emphasized that the U.S. Supreme Court views them as congruent with due process. *Id.* at 541, 893 P.2d at 437. Equal protection challenges to statutes of limitation have also proved unsuccessful. *Jaramillo*, 111 N.M. at 723, 809 P.2d at 637.

120. *La Farge*, 119 N.M. at 537, 893 P.2d at 433.

Deference to legislative intent has been evident in the courts' treatment of the statutes of limitation and repose under the Act. However, the court has permitted flexibility in the statute of limitations when necessary to avoid a due process violation. In *Garcia ex rel. Garcia v. La Farge*,<sup>121</sup> the New Mexico Supreme Court extended the statute of limitations when the plaintiff remained unaware of his claim until eighty-five days before the expiration of the deadline.<sup>122</sup> The supreme court determined that "due process requires that [the plaintiffs] have a reasonable time within which to bring suit."<sup>123</sup> It held eighty-five days to be an "unconstitutionally short" period of time in which to file a medical malpractice action.<sup>124</sup> Thus, the case established that a statute of repose that gives a plaintiff an "unreasonably short period of time within which to bring an accrued cause of action" violates due process.<sup>125</sup> A year later, the supreme court ruled in *Cummings v. X-Ray Associates of New Mexico* that the year-and-a-half time period in which the plaintiff had to file her claim was sufficient to comport with due process and to bar her untimely claim.<sup>126</sup>

#### IV. RATIONALE OF THE COURT IN *CHRISTUS ST. VINCENT V. DUARTE-AFARA*

##### A. Introduction

The New Mexico Court of Appeals reviewed this matter de novo, as it principally concerned a question of statutory construction and required the court to apply the requirements of the Act to the facts of the case.<sup>127</sup> The court began its review by recounting the history and purpose of the Act, which was enacted in response to a perceived medical malpractice

121. 119 N.M. 532, 893 P.2d 428. In *La Farge*, the defendant physician failed to diagnose the minor plaintiff's medical condition, which caused the child cardiac arrest and irreversible brain damage. *Id.* at 532, 893 P.2d at 428.

122. Although the plaintiffs initially claimed that the statute of limitations should be tolled because the malpractice was fraudulently concealed from them until eighty-five days before the statute expired, the supreme court held that this issue was moot. *Id.* at 537, 893 P.2d at 433.

123. *Id.*

124. *Id.* at 540, 893 P.2d at 436.

125. *Id.* at 542-43, 893 P.2d at 437-38.

126. 1996-NMSC-035, ¶ 42, 918 P.2d 1321, 1333. The supreme court has emphasized that its holdings in these two important medical malpractice cases, *Cummings* and *La Farge*, are to be viewed as "complementary." *Tomlinson v. George*, 2005-NMSC-020, ¶ 23, 116 P.3d 105, 113.

127. *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 9, 267 P.3d 70, 72, cert. granted, 2011-NMCERT-010 (Oct. 12, 2011) (No. 33,166) (citing *Bd. of Comm'rs of Rio Arriba Cnty v. Greacen*, 2000-NMSC-016, ¶ 4, 3 P.3d 672, 674)

insurance crisis in New Mexico.<sup>128</sup> The Act provides professional liability coverage to healthcare providers who become qualified providers under the provisions of the Act and accept the associated burdens and benefits of qualification.<sup>129</sup> One such benefit of qualification under the Act is the limitations period enumerated in Section 41-5-13, which states that, “[n]o claim for malpractice arising out of an act of malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred.”<sup>130</sup> Moreover, the court articulated that while the Act applies only to healthcare providers, the legislature intended a broad interpretation of the concept of medical malpractice.<sup>131</sup> The parties in this case did not appear to dispute the fact that Doctors Duarte-Afara and Dickinson were both qualified healthcare providers under the meaning of the statute.<sup>132</sup>

### B. Indemnification Discussion

The court then proceeded to a discussion of indemnification, noting that the issue raised by the interlocutory appeal was “whether an equitable indemnification claim falls within the ambit of this broadly defined concept [of medical malpractice].”<sup>133</sup> The court defined both traditional and proportional equitable indemnification, the two types recognized in New Mexico, and stated that while the Hospital failed to mention which type of indemnification it sought, the New Mexico Supreme Court standard for each is identical.<sup>134</sup> To succeed on an indemnification claim, the indemnitor must be partially liable to the original plaintiff for her injuries.<sup>135</sup> Moreover, the indemnitee must claim in its indemnification com-

128. *Id.* ¶ 10, 267 P.3d at 72 (citing *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 251–52, 837 P.2d 442, 445–46 (1992)).

129. *Id.* (citing *Cummings*, 1996-NMSC-035, 918 P.2d 1321, for a discussion of the benefits and burdens of qualification under the Act).

130. NMSA 1978 § 41-5-13 (1976).

131. *Christus St. Vincent*, 2011-NMCA-112, ¶ 13, 267 P.3d at 73 (citing *Wilschinsky v. Medina*, 108 N.M. 511, 517, 775 P.2d 713, 719 (1989)).

132. *See id.* (As the issue of Doctors Duarte-Afara and Dickinson being qualified under the Act is not discussed in the court of appeals’ opinion, it is not considered to be a central issue of dispute in this case.)

133. *Id.* ¶ 13, 267 P.3d at 73.

134. *Id.* ¶ 14, 267 P.3d at 73 (citing *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 23, 198 P.3d 342, 349 (defining traditional and proportional indemnification)). *Gallagher* defines traditional indemnification as an all-or-nothing right of recovery from a third party by the person who has been held liable for another’s wrongdoing. 2008-NMSC-067, ¶ 23, 198 P.3d at 349. It defines proportional indemnification as partial recovery from another for his or her fault by a defendant. *Id.*

135. *Gallagher*, 2008-NMSC-067, ¶ 28, 198 P.3d at 350.

plaint that the indemnitors caused direct harm to the original plaintiff and in some way discharged their liability for this harm.<sup>136</sup>

The *Christus St. Vincent* opinion reiterated that the legislature intended a broad construction of the term “malpractice claim” as it is used in the Act.<sup>137</sup> In the court’s view, a claim constitutes malpractice under the Act if the “gravamen of the third party action is predicated upon the allegation of professional negligence by a practicing physician.”<sup>138</sup> On this point, the court held that the gravamen of the Hospital’s equitable indemnification claim was predicated upon the allegation that Doctors Duarte-Afara and Dickinson caused and were partially liable for Lillian Martinez’s injuries.<sup>139</sup> Thus, the court held that the Hospital’s third-party indemnification claim constituted a malpractice claim under the Act.<sup>140</sup>

Although the court of appeals’ holding adopted the view advanced by the doctors, the court addressed the arguments presented by the Hospital.<sup>141</sup> The Hospital argued that prior cases clearly demonstrated that the limitations period for an indemnification action begins running at the time of the payment of the underlying claim, judgment, or settlement.<sup>142</sup> Additionally, the Hospital asserted that a third-party plaintiff’s cause of action for either indemnification or contribution is recognized as being distinct from the tort claim asserted by the plaintiff in the underlying suit.<sup>143</sup> Two Missouri cases cited by the Hospital held that Missouri’s medical malpractice statute of limitations did not apply to indemnification or contribution suits.<sup>144</sup>

The New Mexico Court of Appeals found these arguments posited by the Hospital unpersuasive, and it held that the Act is based on different policy concerns than those articulated in the Missouri decisions.<sup>145</sup> While the court admitted that a cause of action for indemnification had

136. *Id.* ¶ 30, 198 P.3d at 350.

137. *Christus St. Vincent*, 2011-NMCA-112, ¶ 15, 267 P.3d 70, 73–74.

138. *Id.* ¶ 15, 267 P.3d at 74 (citing *Wilschinsky v. Medina*, 108 N.M. 511, 517–18, 775 P.2d 713, 719–20 (1989)). Black’s Dictionary defines “gravamen” as the substantial point or essence of a claim, grievance, or complaint. BLACK’S LAW DICTIONARY 604 (9th ed. 2009).

139. *Christus St. Vincent*, 2011-NMCA-112, ¶ 15, 267 P.3d at 74.

140. *Id.* ¶ 20, 267 P.3d at 75.

141. *Id.* ¶¶ 17–19, 267 P.3d at 74.

142. *Id.* ¶ 17, 267 P.3d at 74.

143. *Id.*

144. *Id.* ¶ 19, 267 P.3d at 74–75 (citing *Rowland v. Skaggs Co.*, 666 S.W.2d 770 (Mo. 1984) (holding that the medical malpractice statute of limitations does not apply to contribution suits) and *Aherron v. St. John’s Mercy Med. Ctr.*, 713 S.W.2d 498 (Mo. 1986) (applying *Rowland* holding to indemnification suits)).

145. *Id.*

long been recognized as a separate and distinct suit from the underlying tort, it determined that the gravamen inquiry was the controlling test.<sup>146</sup> Therefore, it held that indemnification falls under the term “malpractice claim” as used in the Act, as the gravamen of the claim is the allegation of professional negligence by the doctors.<sup>147</sup>

Because indemnification, in the court’s view, is a “malpractice claim” under the Act, the district court properly dismissed the Hospital’s third-party complaint as untimely.<sup>148</sup> If the Hospital were permitted to proceed with its indemnification claim after the limitations period expired, this would make the doctors susceptible to ongoing potential liability and would contravene the purpose of the Act.<sup>149</sup>

### C. Due Process Discussion

After determining that indemnification qualified as a malpractice claim under the Act, the court proceeded to the Hospital’s argument that the application of the Act’s limitations period in this situation violated due process.<sup>150</sup> The Hospital alleged that the limitations period gave it an unreasonably short amount of time in which to file its indemnification claim. By filing their negligence complaint on December 4, 2007, the Martinezes allowed the Hospital only six days in which to file a third-party complaint.<sup>151</sup> However, since the Hospital was not served with the Martinezes’ complaint until the day after the statutory limitations period expired, it claimed that it had no time in which to file its indemnification claim and that the application of Section 41-5-13 to dismiss its claim was an impermissible violation of due process.<sup>152</sup>

In its *de novo* review of this question, the New Mexico Court of Appeals emphatically disagreed with the Hospital’s contentions.<sup>153</sup> The court reiterated that the legislature may concurrently impose statutory time limitations for filing claims and comply with due process.<sup>154</sup> Statutes of limitation are permissible so long as they allow a “reasonable time

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146. *Id.* ¶ 18, 267 P.3d at 74 (citing Maurice T. Brunner, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867 § 4(a) (1974)); *id.* ¶ 15, 267 P.3d at 74 (discussion of gravamen inquiry); *see also* BLACK’S LAW DICTIONARY 604 (9th ed. 2009) (explanation of gravamen inquiry).

147. *Christus St. Vincent*, 2011-NMCA-112, ¶ 18, 267 P.3d at 74.

148. *Id.* ¶ 30, 267 P.3d at 77.

149. *Id.* ¶ 16, 267 P.3d at 74.

150. *Id.* ¶¶ 21–30, 267 P.3d at 75–77.

151. *Id.* ¶ 21, 267 P.3d at 75.

152. *Id.*

153. *Id.* (*de novo* review because addresses constitutional questions).

154. *Id.* ¶ 22, 267 P.3d at 75.

within which existing or accruing causes of action may be brought.”<sup>155</sup> To determine whether the limitations period comports with due process, the court considered cases in which plaintiff-patients filed medical negligence actions after the limitations period expired.<sup>156</sup> Since the Hospital and the doctors did not address the issue of whether the due process rights of plaintiff-patients differ from those of third-party indemnitees, the applicability of these cases to the present dispute was not questioned.<sup>157</sup>

Three cases highlight the court’s understanding of the interplay between Section 41-5-13 and due process. In *Garcia ex rel. Garcia v. La Farge*, a boy learned that he was a victim of possible medical malpractice only eighty-five days before the Act’s statute of limitations expired.<sup>158</sup> The court held that due process required an extension, and he was permitted to file his action for malpractice seven months after the statutory deadline.<sup>159</sup> The second case referenced by the court was *Cummings v. X-Ray Associates of New Mexico*, wherein the patient knew that she was a victim of medical malpractice for a year and a half before the expiration of the limitations period.<sup>160</sup> When she failed to file her claim before the Act’s deadline, the court held that due process had not been violated since she had “more than adequate time to take action, but failed to do so.”<sup>161</sup> Finally, the court considered *Tomlinson v. George*, which concerned a plaintiff who discovered he had suffered malpractice only a few months after the occurrence, but he failed to file his claim until seven months after the limitations period expired.<sup>162</sup> The court there held that due process was not violated when his claim was barred for noncompliance with Section 41-5-13.<sup>163</sup>

In the court of appeals’ view, these three cases required it to identify three specific dates in a case’s history to make a due process evaluation.<sup>164</sup> These included the date of occurrence (when medical malpractice occurred), the discovery date (when the existence of medical malpractice is

155. *Id.* ¶ 21, 267 P.3d at 75 (citing *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995)).

156. *Id.* ¶¶ 22–26, 267 P.3d at 75–76.

157. *Id.* ¶ 26, 267 P.3d at 76.

158. *Id.* ¶ 23, 267 P.3d at 75 (citing *La Farge*, 119 N.M. at 542, 893 P.2d at 438).

159. *Id.* ¶ 23, 267 P.3d at 75–76 (citing *La Farge*, 119 N.M. at 542, 893 P.2d at 438).

160. *Id.* ¶ 24, 267 P.3d at 76 (citing *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 57, 918 P.2d 1321, 1336).

161. *Id.* (citing *Cummings*, 1996-NMSC-035, ¶¶ 57–58, 918 P.2d at 1336–37).

162. *Id.* ¶ 25, 267 P.3d at 76 (citing *Tomlinson v. George*, 2005-NMSC-020, ¶ 4, 116 P.3d 105, 107).

163. *Id.* (citing *Tomlinson*, 2005-NMSC-020, ¶¶ 23–24, 116 P.3d at 113–14).

164. *Id.* ¶ 27, 267 P.3d at 76.

discovered), and the Section 41-5-13 expiration date.<sup>165</sup> In the present case, the dates of occurrence were December 9 and 10, 2004, the statutory limitations period expired on December 10, 2007, and the discovery date was December 11, 2007.<sup>166</sup> The Hospital claimed that the discovery date should have been construed as December 4, 2007—the date that the Martinezes filed their complaint. However, the doctors believed that the discovery date should have been December 9 or 10, 2004—the dates that the malpractice occurred, or December 11, 2007—the date that the Martinezes' complaint was served upon the Hospital. The court agreed with the doctors and held that the earliest possible discovery date was December 11, 2007, and may indeed have been much later.<sup>167</sup>

The actual discovery date was relevant to this determination since the Act's limitations period functions as both a statute of limitations and a statute of repose.<sup>168</sup> Section 41-5-13 functions as a statute of limitations during the three years following the alleged act of malpractice.<sup>169</sup> When the three-year limitations period expires, Section 41-5-13 functions as a statute of repose and bars any claims relating to that occurrence of malpractice.<sup>170</sup> The Hospital received service of the Martinezes' complaint on December 11, 2007, but Section 41-5-13 transitioned into a statute of repose the previous day.<sup>171</sup> Because the Hospital did not discover its indemnification claim until Section 41-5-13 was already functioning as a statute of repose, it was essentially barred from bringing its claim before it discovered its existence.<sup>172</sup> The court of appeals thus affirmed that the Hos-

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165. *Id.*

166. The discovery date used by the court references the date on which the plaintiff in the third-party complaint, the Hospital, discovered its injury, which was the filing of the Martinezes' negligence complaint. *Id.* ¶¶ 28–29, 267 P.3d at 76.

167. *Id.* ¶ 29, 267 P.3d at 77. On this point, there is insufficient reasoning given for why the discovery date may be actually much later. Rather, the Hospital previously requested that the court allow it to modify the record proper submitted to the New Mexico Court of Appeals to include an affidavit by the Hospital's risk manager, which would establish that the Hospital received notice of the Martinezes' claims on December 8, 2007. Motion for Rehearing at 4, *Christus St. Vincent*, 2011-NMCERT-010 (No. 30,343, Oct. 12, 2011), *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

168. *Christus St. Vincent*, 2011-NMCA-112, ¶ 30, 267 P.3d at 77.

169. *Id.*

170. *Id.* (citing *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 50, 918 P.2d 1321, 1335).

171. *Id.* ¶ 29, 267 P.3d at 77.

172. The Act's limitations period bars claims that are brought more than three years after the date of occurrence, which here was either December 9 or 10, 2004. *Id.* ¶ 27, 267 P.3d at 76 (noting that date of occurrence is not in dispute between parties).

pital's claim was permissibly barred without violating its due process rights.<sup>173</sup>

#### D. Equal Protection Discussion

Although the Hospital claimed that its equal protection rights were violated by the application of Section 41-5-13 to its indemnification claim, this argument was not well developed.<sup>174</sup> Essentially, it claimed that if the indemnification claim was dismissed as untimely, it would be the only party responsible for compensating Lillian Martinez for her injuries.<sup>175</sup> Additionally, the Hospital reiterated that the legislature did not include third-party claims in the Act's definition of "malpractice claim."<sup>176</sup> The court of appeals did not address any question of equal protection, and it instead held that the Hospital had merely rehashed its previous arguments without raising any new ones about this issue.<sup>177</sup>

### V. ANALYSIS OF THE *CHRISTUS ST. VINCENT* DECISION

#### A. Clash Between Indemnification and Statute of Repose

Although the court of appeals' holding may be congruent with the doctor-protective policy goals of the Act, the court failed to adequately address the apparent conflict between indemnification law and the Act's statute of repose. The court held that because the indemnification action here is in the nature of medical malpractice, it falls under the Act's definition of medical malpractice.<sup>178</sup> In so holding, the court ignored the two competing public policies of protecting physicians and patients—public health versus provider protection.<sup>179</sup> It also failed to address the inconsistency between New Mexico's principles of indemnification and the Act's

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Thus, the Hospital's cause of action for indemnification was time-barred under Section 41-5-13 on December 10, 2007. NMSA 1978 § 41-5-13 (1976).

173. *Christus St. Vincent*, 2011-NMCA-112, ¶ 30, 267 P.3d at 77.

174. *Id.* ¶ 31, 267 P.3d at 77.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* ¶ 18, 267 P.3d at 74 (gravamen of the claim is predicated upon the allegation of professional negligence).

179. The Act's dual purpose of protecting the health and welfare of New Mexicans and providing professional liability insurance to doctors was clearly articulated by the legislature. NMSA 1978 § 41-5-2 (1976). In the Act, the legislature did not provide that one of these interests was to dominate the other. Thus, any analysis that considers extending the Act's scope or purpose, as was done by the court in *Christus St. Vincent*, should consider the potential ramifications upon both patients and providers.

statute of repose.<sup>180</sup> By masking the tension between the very nature of indemnification and medical malpractice actions, the court missed an opportunity to consider and weigh the unique policies behind indemnification and the statute of repose. Moreover, the court of appeals' holding implied that in the area of medical malpractice, the statute of repose is supported by stronger public policy interests and concerns than is indemnification.

The court of appeals notably neglected to define the concepts so crucially implicated by its decision. First, black letter indemnification law provides that an indemnification action does not accrue until the underlying judgment or settlement is obtained.<sup>181</sup> Second, a statute of repose absolutely bars any suits brought after the expiration of the limitations period,<sup>182</sup> and the accrual of a medical malpractice action for statute of repose purposes begins on the date of occurrence.<sup>183</sup> By calling an indemnity claim that arises in the context of a medical malpractice "medical malpractice," the court ignored the potential inconsistency between these two concepts. If indemnification falls under the Act's definition of medical malpractice and is subject to the Act's statute of repose, due process concerns arise when the indemnitee does not receive notice of its potential indemnification claim before the Act's statute of repose arises.<sup>184</sup>

While the courts have firmly held that even an undiscovered injury is barred by the statute of repose,<sup>185</sup> this problem is likely to become more

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180. Rather than evidencing a discourse of the competing interests implicated by its decision, the court of appeals ruling seems to convey that indemnification in this context is medical malpractice simply "because we say so," thus stifling any further discussion of how it reconciled these two conflicting legal concepts.

181. Maurice T. Brunner, Annotation, *When statute of limitations commences to run against claim for contribution or indemnity based in tort*, 57 A.L.R.3d 867 § 3(a) (1974).

182. RESTATEMENT (SECOND) OF TORTS § 899(g) (1979).

183. NMSA 1978 § 41-5-13.

184. According to the facts in *Christus St. Vincent*, the Hospital was served with notice of the Martinezes' complaint one day after the statutory period expired under Section 41-5-13. 2011-NMCA-112, ¶ 29, 267 P.3d at 77. Thus, it had no notice that its claim for indemnity existed, which contradicts the prior standard under indemnification law that provided that such a claim was not ripe until a judgment or settlement was entered. It could be argued that the NMMRC petition filed by the plaintiffs against the Hospital and doctors, as well as the subsequent hearing, served as both notice and a determination of negligence by the doctors.

185. *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 50, 918 P.2d 1321, 1335. In *Cummings*, the supreme court also held that New Mexico does not follow the precedent set by other states that have determined that the injured party's awareness of their injury is relevant to determining the date of accrual in a medical malpractice action. *Id.* ¶ 53, 918 P.2d at 1336.

endemic after the court of appeals' ruling here. Medical malpractice plaintiffs often file their negligence claims late in the statute of limitations period because of its relatively short duration and the incapacity caused by the presumed gravity of their injuries that support their malpractice suit.<sup>186</sup> Thus, potential indemnitees will likely be met with frequent instances where they are not notified of their right to file an indemnification action until their opportunity to do so has passed.

Moreover, while the court of appeals may have sought to uphold the intent and black letter of the statute of repose laws, it neglected well-developed indemnification concepts. Indemnification exists to prevent unjust results in the payment of judgments or settlements, which may result if a passive participant in the allegedly negligent behavior pays for the entirety of the plaintiff's damages without assistance from the actively negligent parties.<sup>187</sup> It is also premised upon the view that it is important to hold all responsible parties accountable for their negligence by providing an avenue for parties held liable to collect from those who were actively responsible for the plaintiff's injuries.<sup>188</sup> Rights to indemnity are not limitless, however, and restraints have been placed on their boundaries.<sup>189</sup> The *Christus St. Vincent* decision illustrates that, in spite of the valid and clearly articulated policy reasons supporting indemnification, the Act's statute of repose takes priority over these policies.

While New Mexico appellate courts have not previously addressed the tension between indemnification and statutes of repose, the clash has been resolved in other states. Some states have held that claims for equitable indemnity are subject to their medical malpractice statutes. South

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186. The number of cases available in which injured patients filed medical malpractice suits shortly before the expiration of Section 41-5-13 supports this statement. See, for example, the three cases referenced by the court in *Christus St. Vincent*, which were: (1) *Tomlinson v. George*, 2005-NMSC-020, 116 P.3d 105 (learned of malpractice months after limitations period began running but did not file claim until seven months after expiration of the Section 41-5-13 limitations period); (2) *Cummings*, 1996-NMSC-035, 918 P.2d 1321 (learned of malpractice one and a half years before running of limitations period but did not file claim until eleven months after 41-5-13 expiration date); and (3) *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 893 P.2d 428 (1995) (learned of malpractice eighty-five days before expiration of limitations period).

187. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 545, 893 P.2d 438, 441 (1995).

188. *Id.*

189. For example, in the statute governing commercial instruments and transactions, the New Mexico Legislature provided that any provision in an equipment lease or rental contract that contains an indemnification agreement "is void, unenforceable and against the public policy of this state." NMSA 1978 § 56-7-3 (2007).

Carolina<sup>190</sup> and Illinois<sup>191</sup> encountered factually similar situations and addressed them earlier in 2011. The Illinois Supreme Court determined that its medical malpractice statute of repose applied to suits for contribution or indemnification “because a suit for contribution against the insured for damages arising out of patient care exposes insurance companies to the same liability as if the patient were to have brought a direct action against the insured.”<sup>192</sup> The court also cited a prior decision wherein it held that the same concerns apply in indemnification suits, which should therefore also fall under the medical malpractice statute of repose.<sup>193</sup>

Using a similar approach, the South Carolina Supreme Court held that a hospital’s indemnity claim against a doctor was properly dismissed due to the passage of South Carolina’s medical malpractice statute of repose.<sup>194</sup> The court premised its holding on the rule that the doctor’s liability for the third party’s injury must be shown before a hospital can prove its entitlement to equitable indemnification.<sup>195</sup> Because the injured plaintiff failed to include the negligent doctor as a defendant in the suit before the statutory limitations period expired, the doctor’s negligence was never established at trial.<sup>196</sup> Judgment was rendered only against the hospital, which then pursued indemnification against the doctor. Because no finding of negligence by the doctor was ever made, the court couched the hospital’s purported indemnification claim in the case as an “action to recover damages for injury to person,” not an action for indemnity.<sup>197</sup> Moreover, the court found it persuasive that the South Carolina’s medical malpractice statute “does not expressly exclude actions for equitable indemnification predicated upon proving liability in the underlying medical malpractice action.”<sup>198</sup>

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190. South Carolina also applies a different standard to medical malpractice actions than other personal injuries, and it utilizes a separate medical malpractice statute of limitations and statute of repose. S.C. CODE ANN. § 15-3-545 (1976) (applying three-year discovery-based statute of limitations and six-year occurrence-based statute of repose).

191. § 735 ILL. COMP. STAT. 5/13-212 (1982) (providing a statute of repose for medical malpractice actions).

192. *Uldrych v. VHS of Ill., Inc.*, 942 N.E.2d 1274, 1280 (Ill. 2011).

193. *Id.* at 537, 942 N.E.2d at 1277 (citing *Ashley v. Evangelical Hosps. Corp.*, 594 N.E.2d 1269 (Ill. Ct. App. 1992)).

194. *Columbia/CSA HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n*, 713 S.E.2d 639, 640 (S.C. Ct. App. 2011).

195. *Id.* at 641.

196. *Id.* at 642.

197. *Id.* at 641.

198. *Id.*; *see also id.* (citing *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 576 S.E.2d 150, 153 (S.C. 2003) (stating that “[t]he enumeration of

While the South Carolina case rested on the crucial fact that there had been no finding of negligence by the doctor,<sup>199</sup> in *Christus St. Vincent*, the trial court's determination that the Hospital was vicariously liable for the actions of the two doctors evidenced the jury's finding of their negligence.<sup>200</sup> The uniform jury instruction governing a hospital's vicarious liability for its employees begins with the statement that "[a] hospital is responsible for injuries proximately resulting from the negligence of its employees," indicating that it is predicated upon a finding of negligence by said employees.<sup>201</sup>

In addition to the South Carolina ruling that may hinge on the lack of a finding of negligence by the doctor, other states have also applied their medical malpractice statutes of limitations to indemnification. Illinois held in 1992 that its medical malpractice statute of repose barred an indemnification action brought by a hospital against alleged joint tortfeasors.<sup>202</sup> In so holding, the Illinois Court of Appeals mentioned the legislature's intent to abate a medical malpractice insurance crisis in Illinois at the time of its statute's creation.<sup>203</sup> Although the application of the statute of repose to certain contribution actions may entirely bar them, the court found this result predictable and believed that the legislature was both aware of and intended it.<sup>204</sup> Because of this, it ruled that the same policy concerns require it to apply the statute of repose to indemnification actions.<sup>205</sup> Other courts have made similar holdings and applied their statutes of repose or limitations to indemnification actions.<sup>206</sup>

While the above cases<sup>207</sup> lend support to the *Christus St. Vincent* decision, the Hospital argued that it is well-established that an indemnification or contribution<sup>208</sup> action is a distinct cause of action from the

exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."); discussion of Act's purpose *infra* Part III.A.1.

199. *Columbia*, 713 S.E.2d at 642.

200. Petition for Writ of Certiorari, *supra* note 2, at 5–6.

201. UJI 13-1120A NMRA; *see also* UJI 13-1101 NMRA (defining negligence as a provider's failure to abide by his or her "duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances").

202. *Ashley v. Evangelical Hosp. Corp.*, 594 N.E.2d 1269 (Ill. Ct. App. 1992).

203. *Id.* at 1274.

204. *Id.* at 1274–75.

205. *Id.* at 1274.

206. *See Uldrych v. VHS of Ill., Inc.*, 942 N.E.2d 1274 (Ill. 2011).

207. *See Ashley*, 594 N.E.2d at 1274–75; *Columbia/CSA HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 713 S.E.2d 639, 641 (S.C. Ct. App. 2011).

208. Indemnification is recognized as a distinct cause of action from contribution, as contribution requires that the joint tortfeasors share a common liability. Black's

underlying tort claim.<sup>209</sup> In *State ex rel. General Electric Co. v. Gaertner*,<sup>210</sup> the Supreme Court of Missouri stated that the relator’s “contention that we should measure the statute of limitations applicable to [a cause of action for contribution] from the time the plaintiff’s claim accrues reflects a basic misconception of both the nature of a third party claim and our decision in [the case creating a right of contribution].”<sup>211</sup>

Although there are significant differences between indemnification and contribution,<sup>212</sup> several states have expressly held that their medical malpractice limitations periods are inapplicable to contribution actions.<sup>213</sup> The Georgia Supreme Court held that the medical malpractice statute of repose was inapplicable when a hospital’s insurer brought a contribution action against a doctor as a joint tortfeasor in a medical malpractice suit.<sup>214</sup> The Delaware Supreme Court also held that a general limitations period, not the medical malpractice limitations period, governs contribution claims.<sup>215</sup> An action for contribution is by definition distinct from the

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Dictionary defines contribution as “[o]ne tortfeasor’s right to collect from joint tortfeasors when – and to the extent that – the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined as percentages of causal fault.” BLACK’S LAW DICTIONARY 301 (9th ed. 2009); *see also* NMSA 1978 § 41-3-6 (1947) (providing that right to contribution among joint tortfeasors does not impair any existing rights to indemnity); AMERICAN LAW OF PRODUCTS LIABILITY 3D § 52:38 (Russell J. Davis et al. eds., 1987) (indemnity existed at common law but contribution is statutory creation); *In re* Consol. Vista Hills Retaining Wall Litig., 119 N.M. 542, 553, 893 P.2d 438, 449 (1995) (citing *Loucks v. Albuquerque Nat’l Bank*, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966) for liability standard for punitive damages).

In personal injury cases specifically, indemnity seeks to recover the entire amount of the damages, while contribution requests compensation for only the indemnitor’s portion of the damages. *Dessauer v. Memorial Gen. Hosp.*, 96 N.M. 92, 97, 628 P.2d 337, 342 (Ct. App. 1981) (citing *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969)).

209. *Christus St. Vincent Reg’l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 17, 267 P.3d 70, 74, *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

210. 666 S.W.2d 764, 766 (Mo. 1984) (en banc).

211. *Id.*; *see also* *State Farm Mut. Auto. Ins. Co. v. Schara*, 201 N.W.2d 758, 759–60 (Wis. 1972) (holding that a contribution claim “has its roots in the underlying incident that gave rise to personal injury” but that “[t]he cause of action accrues—becomes a right enforceable in a court action—when one of the joint tortfeasors pays more than his proportionate share of the damages.”).

212. *See Ashley*, 594 N.E.2d at 1273 (discussion of differences between contribution and indemnification).

213. *See Va. Ins. Reciprocal v. Pilzer*, 599 S.E.2d 182 (Ga. 2004); *Reddy v. PMA Ins. Co.*, 20 A.3d 1281 (Del. 2011).

214. *Pilzer*, 599 S.E.2d 182.

215. *Reddy*, 20 A.3d 1281.

underlying tort, and it “originates with the establishment of a joint obligation on a liability shared by the tort-feasors.”<sup>216</sup>

However, the New Mexico Court of Appeals dismissed the persuasive value of these other states’ holdings in *Christus St. Vincent* by claiming that the policy motivations behind New Mexico’s Act are different from those of other states’ comparable acts.<sup>217</sup> While the original purpose may have been to resolve New Mexico’s medical malpractice crisis of the 1970s,<sup>218</sup> that crisis has since passed. New concerns and problems now plague New Mexico’s medical community and resources.

Had the legislature intended to include indemnification within the definition of medical malpractice, the Act would have explicitly stated that. Moreover, when a law potentially conflicts with the courts’ established notions of fairness,<sup>219</sup> the New Mexico courts have routinely held that, “[a]s a general rule, statutes in derogation of the common law are to be strictly construed.”<sup>220</sup> The legislature has articulated its intent to include indemnity claims within other statutes of repose.<sup>221</sup> For example, the New Mexico statute that permits causes of action arising from architectural defects explicitly provides that its statute of repose also binds indemnification and contribution suits arising from these defects.<sup>222</sup> The architectural defect statute of repose was passed nine years before the Medical Malpractice Act, which demonstrates that the legislature was cognizant of its ability to exclude or include indemnification or contribu-

216. *Id.* at 1286; *see also* *Rowland v. Skaggs Co.*, 666 S.W.2d 770 (Mo. 1984).

217. The Hospital argued that other states’ courts have held that medical malpractice statutes of repose do not apply to indemnification or contribution actions. *Christus St. Vincent Reg’l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 19, 267 P.3d 70, 74, *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012). The court of appeals dismissed these arguments and wrote: “We distinguish these cases from New Mexico law based on policy considerations . . . New Mexico law is based on the converse of the policy concerns articulated and acted upon in [other courts’ holdings].” *Id.* ¶ 19, 267 P.3d at 74–75.

218. *See* Kovnat, *supra* note 18 (discussion of medical malpractice crisis).

219. Cases such as *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 893 P.2d 428 (1995), show that the New Mexico’s courts have been at times hesitant to restrict injured patients’ rights to file malpractice claims when they did not learn of their injuries until near the end of the limitations period under Section 41-5-13. This suggests that the courts, while they have been deferential to the legislature’s creation of the statute of repose, are wary of potential due process or equal protection implications for patients.

220. *Albuq. Hilton Inn v. Haley*, 90 N.M. 510, 512, 565 P.2d 1027, 1029 (1977) (citation omitted).

221. Petition for Writ of Certiorari, *supra* note 2, at 14.

222. NMSA 1978 § 37-1-27 (1967).

tion actions when crafting statutes of repose.<sup>223</sup> Because the Act's statutes of limitation and repose do not expressly include these causes of action, it can be reasonably presumed that the legislature did not intend for these actions to fall under the umbrella of "medical malpractice."<sup>224</sup>

The determination of whether the *Christus St. Vincent* decision serves important policy goals that parallel the original intent of the Act depends upon the lens through which one examines its potential effects. On the one hand, this decision may encourage hospitals to employ non-qualified providers who are not subject to the Act's statute of repose, which would directly contradict the purpose of the Act. A hospital employing a non-qualified healthcare provider has until it knows or should have known of a possible indemnification action to file an indemnification suit against the allegedly negligent doctor.<sup>225</sup> However, hospitals like the Hospital in *Christus St. Vincent* that employ qualified providers are barred from bringing indemnity actions against those doctors potentially before the hospital even becomes aware of their negligent acts.<sup>226</sup>

The court's *Christus St. Vincent* holding reiterates its concern with protecting medical providers from unpredictable liability. The holding may encourage doctors to seek qualification under the Act to secure the additional protection against indemnification suits. Additionally, the decision implicitly emphasizes that hospitals do not require the same protection as doctors.<sup>227</sup> Hospitals, unlike doctors, are less mobile and less likely to shut their doors as a result of foreclosed opportunities for indemnification suits. Contrarily, a doctor may leave a state that treats him unfavorably in search of a practice locale that protects and immunizes him from various types of suits. Professional liability insurers may also support the decision, and it may lead to lower cost professional liability insurance for

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223. Petition for Writ of Certiorari, *supra* note 2, at 14.

224. See NMSA 1978 § 41-5-13 (1976). In *Brink v. Smith Company Construction*, 703 N.W.2d 871, 875 (Minn. Ct. App. 2005) (two-year statute of limitations and ten-year statute of repose provided that causes of action for contribution or indemnity accrued upon payment of a final judgment), the Court of Appeals of Minnesota held that its construction defect statute of repose applied to contribution and indemnity claims because the statute specifically provided a date of accrual for such actions.

225. The statute of limitations in NMSA 1978 § 37-1-8 (1976) governs general personal injury actions, which accrue when a plaintiff discovers or should have discovered the cause of action. *Pacheco v. Cohen*, 2009-NMCA-070, ¶ 9, 213 P.3d 793, 795.

226. See *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, 267 P.3d 70, *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

227. Moreover, if a public hospital is the defendant in a medical malpractice action, recovery against that hospital is already limited to the statutory cap, and taxpayers will not be severely burdened by the judgment. See NMSA 1978 § 41-4-19 (2007).

doctors who are now insulated from an additional layer of claims.<sup>228</sup> Finally, this holding may encourage doctors to practice at hospitals, where the timing of a patient's lawsuit may mean that they cannot be held liable via indemnification for damages resulting from their medical malpractice. Where doctors may have previously been motivated by the higher profits and less structure to practice in solo or smaller medical offices, this holding may encourage them to practice at hospitals that see multitudes of patients and where their services are most needed.<sup>229</sup> Nonetheless, these potentially positive outcomes of the decision are mere hypothetical benefits, and the financial consequences to hospitals unable to seek indemnification are quantifiable.

### *B. Balancing the Statute of Repose with Fairness*

The court of appeals prioritized the policy concerns supporting the Act's statute of repose above those supporting the right to indemnification.<sup>230</sup> It recognized the potential due process concerns that arise with the application of a statute of repose but determined that these were outweighed by the need to protect doctors with a strictly applied time bar to suits.<sup>231</sup> Although the court's holding clearly demonstrates that it considered the policy support for the statute of repose to be stronger, its opinion failed to include a dialogue about these issues.<sup>232</sup>

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228. If doctors cannot be sued for indemnification after the passage of the statute of limitations, then their liability insurance carrier will not be at risk for these types of suits. Thus, those insurers may be able to entice doctors who are qualified and practice at hospitals that may pay claims with lower insurance premiums, knowing that they will be insulated from some future claims.

229. The continual increase in emergency room wait times illustrates that most people are seeking their medical care and treatment from hospitals. If doctors are encouraged to practice at hospitals, this may help serve the greatest number of patients. See Tammy Worth, *Agencies warn of coming doctor shortage*, LOS ANGELES TIMES, June 7, 2010, available at <http://articles.latimes.com/2010/jun/07/health/la-he-doctor-shortage-20100607>; see also Richard Gulla, *MMS News Releases, Massachusetts Medical Society Releases 2011 Study of Patient Access to Health Care*, MASS. MED. SOC'Y (May 9, 2011), [http://www.massmed.org/AM/Template.cfm?Section=MMS\\_News\\_Releases&CONTENTID=54338&TEMPLATE=/CM/ContentDisplay.cfm](http://www.massmed.org/AM/Template.cfm?Section=MMS_News_Releases&CONTENTID=54338&TEMPLATE=/CM/ContentDisplay.cfm) (This report indicates that many people seek routine and emergent care from hospitals, namely emergency rooms, and that doctor shortages are likely to contribute to longer emergency room and regular physician wait times. For the past five years, Massachusetts has reported "critical and severe shortages" of internists and family physicians, with a slim majority of those practices refusing new patients.).

230. See *Christus St. Vincent*, 2011-NMCA-112, 267 P.3d 70.

231. *Id.* ¶¶ 16, 30, 267 P.3d at 74, 77.

232. *Id.*

Consider a hypothetical scenario that slightly skews the facts of the *Christus St. Vincent* case. Suppose that instead of being served with process of the Martinezes' complaint on December 11, the Hospital was instead served on December 9. When the Act's statute of limitations period expired on December 10, the Hospital would have had prior notice of the negligence action. On December 9, the Hospital could have moved the trial court to extend the statute of limitations so that it could file an indemnification or cross-claim against the doctors. Courts have allowed this in other medical malpractice actions when a plaintiff received late notice of his or her injuries.<sup>233</sup> Alternatively, even if the Hospital still waited to file its indemnification claim until a judgment or settlement was entered in the Martinezes' negligence case, its receipt of notice of the action before the limitations period expired would have satisfied due process. By framing the issue in this manner, it appears unfair that the Hospital's claim for indemnification was barred solely because the plaintiff waited until the eleventh hour to file her negligence action.

The primary purpose behind the statute of repose was to resolve the medical malpractice crisis of the 1970s.<sup>234</sup> About twenty years after that crisis, the court of appeals still held that a less restrictive limitations period "would place an unfair burden upon the medical profession."<sup>235</sup> Then, last year, the *Christus St. Vincent* court again acted to protect doctors from liability for medical malpractice damages by emphasizing the finality of the statute of repose.<sup>236</sup> The court may have many reasons for its continued protection of New Mexico's medical community, including the ongoing struggle to entice doctors to practice here.<sup>237</sup> However, many alternative policies besides a restrictive statute of repose could be used to encourage doctors to practice in New Mexico. These include generous

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233. See *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 893 P.2d 428 (1995) (cited by the court in *Christus St. Vincent* as due process violation tolling statute of limitations).

234. See discussion *supra* note 18. Furthermore, in the time that has lapsed since the enactment of the Act, some have disputed the severity of the medical malpractice crisis of the 1970s, and it is now sometimes referred to as the "perceived medical malpractice crisis." *Cummings v. X-Ray Assoc. of N.M., P.C.*, 1996-NMSC-035, ¶ 40, 918 P.2d 1321, 1333.

235. *Cummings*, 1996-NMSC-035, ¶ 38, 918 P.2d at 1332.

236. 2011-NMCA-112, ¶ 30, 267 P.3d at 77 (citation omitted).

237. New Mexico has only 194 physicians per 100,000 people, whereas the national average is 226 physicians for the same population. N.M. Dep't of Health, *New Mexico Comprehensive Strategic Health Plan 5* (2006), [http://www.health.state.nm.us/pdf/NM\\_CSHP.pdf](http://www.health.state.nm.us/pdf/NM_CSHP.pdf).

subsidies for their education<sup>238</sup> and low medical malpractice recovery caps.<sup>239</sup> Since other options exist for protecting doctors, a less restrictive limitations period is appropriate.

The statute of repose itself contains inherently unfair attributes. The Act's use of a date of occurrence rule for determining the accrual date of an action is outdated and no longer a useful standard. In 1976, New Mexico affirmatively adopted a date of occurrence rule<sup>240</sup> to govern the accrual of a medical malpractice action while incorporating a statute of repose into the Act.<sup>241</sup> While many believe that a discovery rule<sup>242</sup> would be fairer than the existing date of occurrence rule, such a determination must be made by the legislature and is not subject to the court's discretion.<sup>243</sup> Arguably, the limitations period guiding medical malpractice actions should be particularly sensitive to the unique nature of these suits. However, the legislature's use of a date of occurrence rule rather than a discovery rule ignores the primary distinction between the accrual of medical malpractice and other personal injury actions.<sup>244</sup>

The date of occurrence rule as applied to medical malpractice actions was accepted by New Mexico courts even before the passage of the modern Act. The New Mexico Supreme Court approved the same date of occurrence rule in 1963 in *Roybal v. White*.<sup>245</sup> The legislature's adoption of this court-approved accrual rule followed with the enactment of the

238. For example, Maine offers a tuition subsidy that covers fifty percent of a medical student's cost of attendance to encourage doctors to practice in the state. ME. REV. STAT. 20-A, § 12103-A (2009) (enacting Doctors for Maine's Future Scholarship Program). New Mexico utilizes a more limited medical student loan repayment program contingent upon the doctor's service in a designated medical service shortage area. N.M. Higher Ed. Dep't, *Health Professional Loan Repayment Program*, LOAN REPAYMENT PROGRAMS, <http://hed.state.nm.us/HPLRP.aspx> (last visited Dec. 20, 2012). New Mexico also offers student loans to medical students in an effort to encourage them to practice in the state, and a portion of the loans will be forgiven if the student practices medicine in New Mexico upon graduation. N.M. Higher Ed. Dep't, *Medical Loan-For-Service*, LOAN-FOR-SERVICE, <http://hed.state.nm.us/Medical.aspx> (last visited Dec. 20, 2012).

239. See discussion *supra* note 24 (explanation of current levels of damages caps).

240. See discussion of different date of accrual rules *supra* Part III.A.2.

241. See NMSA 1978 § 41-5-13 (1976) (adopting date of occurrence rule for accrual of actions).

242. See discussion of different date of accrual rules *supra* Part III.A.2.

243. The court already rejected this argument in *Cummings v. X-Ray Assoc. of N.M., P.C.*, 1996-NMSC-035, 918 P.2d 1321.

244. See discussion *supra* note 55 (explaining the distinction between accrual of medical malpractice actions under the Act and other personal injury actions).

245. Horn, *supra* note 39, at 273 (citing *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963)).

Act in 1976,<sup>246</sup> and it was also used by the majority of other jurisdictions at the time of the Act's adoption.<sup>247</sup> However, the authority upon which the New Mexico Supreme Court relied in *Royal* has since been discredited.<sup>248</sup> This dismantling of the precedent upon which New Mexico's accrual date rule is based suggests that the legislature should adopt a discovery rule for the accrual of medical malpractice actions.<sup>249</sup> It is fundamentally illogical to require plaintiffs in indemnification actions to file lawsuits before they become aware of the existence of a claim. Many other courts have supported this position. Justice Finley, formerly of the Washington Supreme Court, wrote that:

To say that the patient had a cause of action all the while, although no one *knew about it or suspected it*, may meet some tests of legal logic or theory, but the result would hardly meet the tests of abstract, generally applicable, or lay standards of justice.<sup>250</sup>

Emphasizing the same point, the Tennessee Supreme Court wrote that:

We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown and unknowable.<sup>251</sup>

Thus, the state should abandon the date of occurrence rule that prevented the Hospital from filing its indemnity suit until after it became aware of its potential liability for damages. As articulated by the Oregon Supreme Court, “[t]o say to one who has been wronged, ‘You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,’ makes a mockery of the law.”<sup>252</sup> Although the court of appeals may have been unable to alter the Act's date of occurrence rule

246. NMSA 1978 §§ 41-5-1 to -29 (1976).

247. In *Roberts v. Southwest Community Health Services*, 114 N.M. 248, 252, 837 P.2d 442, 446 (1992), the court determined that, “it is . . . plausible that the legislature, in response to the perceived medical malpractice crisis, chose the time of the negligent act rule specifically to confer its benefit on qualified health care providers” and “we cannot blithely assume that the legislature was not aware that the time of the negligent act rule had been under what had been characterized as a ‘constant intellectual bombardment.’”

248. Horn, *supra* note 39, at 273.

249. *See id.*

250. *Id.* at 275 (quoting *Lindquist v. Mullen*, 277 P.2d 724, 728 (Wash. 1954) (Finley, J., dissenting) (emphasis in original)).

251. *Id.* at 275 n. 34 (quoting *Teeters v. Currey*, 518 S.W.2d 512, 515 (Tenn. 1974)).

252. *Id.* at 275 n. 33 (quoting *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966) (en banc)).

simply because it constituted “bad policy,” it could have avoided a further extension of an unfair rule by refusing to subject medical indemnification claims to the same rule.<sup>253</sup>

Statutes of repose raise concerns of fairness to injured plaintiffs who do not become aware of their injuries until after the limitations period has passed. Although a discovery-based date of accrual would still see instances of unfairness arise when plaintiffs fail to identify their injury by the passage of the limitations period, it would allow for a greater balance between the interests of injured patients and doctors. Moreover, if malpractice-related indemnification is to be classified as medical malpractice under New Mexico law, then the same concern applies to indemnitees who do not become aware of the underlying negligence suit until after the expiration of the statute of limitations. The fundamental distinction between statutes of limitation and repose is that statutes of repose bear no relation to the date of accrual and instead limit the time period in which an action can be brought based upon the date of occurrence. Statutes of limitations determine the time period in which claims must be filed after the cause of action accrues.<sup>254</sup> While the court has demonstrated some minimal flexibility in its application and interpretation of statutes of limitations, it strictly enforces statutes of repose.<sup>255</sup>

Regardless of this concern, many jurisdictions have held, like New Mexico, that statutes of repose as applied to medical malpractice actions do not violate due process.<sup>256</sup> In *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, a thirteen-year-old plaintiff brought a medical malpractice claim after sustaining blindness in one eye as a result of mal-

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253. See *Bd. of Trs. of the Town of Las Vegas v. Montano*, 82 N.M. 340, 343, 481 P.2d 702, 705 (1971) (“Every presumption is to be indulged in favor of the validity and regularity of legislative enactments, and they will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting them.”) (citation omitted).

254. *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 613 N.W.2d 849, 859 (Wis. 2000) (providing excellent explanation of the distinction between statutes of limitation and repose).

255. See *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995).

256. See *Aicher*, 613 N.W.2d 849; *Hoffner v. Johnson*, 660 N.W.2d 909 (N.D. 2003); *Mishek v. Stanton*, 616 P.2d 135 (Colo. 1980) (en banc); *Bowlin Horn v. Citizens Hosp.*, 425 So. 2d 1065 (Ala. 1982); *Brubaker v. Cavanaugh*, 741 F.2d 318 (10th Cir. 1984); see also *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005) (holding that medical malpractice statute of repose is constitutional as applied to minor plaintiff); *Mills v. Wong*, 155 S.W.3d 916 (Tenn. 2005) (holding that medical malpractice statute of repose is constitutional as applied to temporarily mentally incompetent patient).

practice during her newborn examination.<sup>257</sup> Wisconsin's medical malpractice statute of repose required a plaintiff to file no later than five years after the date of the act or by the time the injured plaintiff reaches the age of ten, whichever is later.<sup>258</sup> The Wisconsin Supreme Court overruled a prior decision<sup>259</sup> and held that the statute of repose did not violate Wisconsin's right-to-remedy clause.<sup>260</sup> It also held that the statute of repose comported with an injured patient's equal protection and procedural due process rights.

Since New Mexico's Act requires an NMMRC hearing to determine the liability of any qualified provider for alleged negligence before a plaintiff can proceed with a claim in court,<sup>261</sup> the indemnitee does not entirely lack knowledge of the likelihood of a negligence suit. Thus, the date upon which a determination of negligence is made by the NMMRC may suffice to provide an indemnitee with notice of an impending negligence claim. This notice may also provide a hospital with sufficient time in which to file a protective indemnity claim.<sup>262</sup>

The courts are unable to change the legislatively articulated line drawn in the Act that distinguishes, at three years after the date of occurrence, between the statute of limitations and statute of repose.<sup>263</sup> Moreover, the line must be drawn somewhere, and statutes of repose are

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257. *Aicher*, 613 N.W.2d at 853–54.

258. *Id.* at 854.

259. *Id.* at 854–55 (overruling *Estate of Makos v. Wis. Health Care Fund*, 564 N.W.2d 662 (Wis. 1997)).

260. *Id.*

261. NMSA 1978 § 41-5-14 (1976).

262. See discussion of protective indemnity claims *infra* Part VI.B.

263. The court can, however, interpret this statute to align with both due process and legislative intent. When reviewing a statute, the court's "primary goal is to ascertain and give effect to the intent of the Legislature." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 218 P.3d 868, 870 (citing *State v. Davis*, 2003-NMSC-022, ¶ 6, 74 P.3d 1064, 1067). To do this, the court "examine[s] the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Id.* ¶ 11, 218 P.3d at 870–71 (citing *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 11, 164 P.3d 934, 938).

When the court examines a term that is not explained or defined elsewhere in the statute, then it "must consider the ordinary meaning most likely to have been in the minds of the enacting legislators." *Id.* ¶ 18, 218 P.3d at 872 (citing *State v. Gutierrez*, 2007-NMSC-033, ¶ 30, 162 P.3d 156, 167). Perhaps most important to the current discussion, the court "must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." *Id.* ¶ 11, 218 P.3d at 871 (citing *N.M. State Bd. of Educ. v. Bd. of Educ.*, 95 N.M. 588, 591, 624 P.2d 530, 533 (1981)).

inherently arbitrary in nature.<sup>264</sup> The courts have made clear that if notice of a cause of action occurs on the statute of limitations “side” of the line, they are able and willing to extend the limitations period to allow the plaintiff additional necessary time to file the complaint.<sup>265</sup> However, if a plaintiff does not receive notice of malpractice until after the statute of repose takes effect, the court cannot allow a claim to be filed despite the statutory bar. This strict adherence to the distinction made in the Act adheres to legislative intent and serves the purpose of the statute.<sup>266</sup>

The New Mexico Court of Appeals also failed to adequately address its reason for applying the due process analyses given to patient-physician medical malpractice negligence claims to the indemnity action here.<sup>267</sup> From one perspective, the court of appeals was correct in applying the patient-physician due process analysis to this case. If the court believed that indemnification against doctors by a hospital meets the Act’s definition of malpractice, then the same analysis is applicable here as to other types of medical malpractice.<sup>268</sup> If the Act’s limitations period passes muster and does not constitute a violation of due process for injured plaintiffs, then the hospital’s right to seek monetary compensation for

264. *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 37, 918 P.2d 1321, 1332 (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (“Statutes of limitation are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.”)).

265. *See Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 893 P.2d 428 (1995).

266. NMSA 1978 § 41-5-2 (1976) (purpose is to provide professional liability insurance to providers, which is affordable only because of the limitations provided for in statute of repose); NMSA 1978 § 41-5-13 (1976) (providing statute of repose that bars claims).

267. *Christus St. Vincent Reg’l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 26, 267 P.3d 70, 76, *cert. quashed*, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012). The court of appeals stated that since the parties failed to provide cases that evaluated due process concerns in more factually-similar situations, it would use the three cases discussed, all of which related to malpractice suits between patients and physicians. *Id.*

268. If the supreme court opts to use the same due process precedent as the court of appeals, the South Carolina Court of Appeals shed light on why this analysis is legitimate. In *Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab.*, 713 S.E.2d 639, 641 (S.C. Ct. App. 2011), the court of appeals held that “[b]ecause [the Hospital] must establish [the doctor]’s liability for [the patient]’s damages in order to show it is entitled to equitable indemnification, we find [the] Hospital’s action is an action to recover damages for injury to the person.” By converting an equitable indemnification claim into a personal injury claim, the South Carolina Court of Appeals effectively disregarded an important distinction that is typically made between the two causes of action.

damages assessed against it is necessarily also barred.<sup>269</sup> However, an alternative view of the applicable due process standard indicates that the use of a patient-physician medical practice analysis for indemnification may ignore a fundamental difference between negligence and indemnification actions. Negligence actions allow an avenue of recovery for personal injuries, while indemnification actions sound in equity and seek to equalize the distribution of damages. Thus, the due process and procedural concerns applicable to each are likely to be unique and varied. Regardless of which due process analysis is correct, the parties failed to address this issue with the court of appeals and it remains an open question.<sup>270</sup>

On prior occasions, New Mexico's courts have determined that some statutes of repose do violate due process. In *Schirmer v. Homestake Mining Co.*,<sup>271</sup> the New Mexico Supreme Court addressed the ten-year statute of repose previously included in the Workers' Compensation Act.<sup>272</sup> The court considered the legislature's goal for the statute of repose of "assur[ing] the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers while at the same time maintaining reasonable costs to the employers" to be legitimate and rationally related to the statute of repose.<sup>273</sup> However, the supreme court found it to be unconstitutional in spite of this because the statute's distinctions between the time periods applicable to individuals with different injuries "arbitrarily discriminates against a group of claimants that . . . may well contract cancer ten to fifteen years after exposure to radiation."<sup>274</sup> Thus, the statute violated the substantive due process rights of claimants who contracted cancer as a result of radiation exposure years after the passage of the statute of repose.<sup>275</sup> The court's invalidation of the Workers' Compensation Act's statute of repose was based in its understanding that the legitimate legislative goals of the statute were overcome by concepts of

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269. The limitations period in the Act, NMSA 1978 § 41-5-13, applies equally to any party or entity that falls under it, so it will apply uniformly to hospitals, doctors, or anyone else who is qualified under the Act.

270. *Christus St. Vincent*, 2011-NMCA-112, ¶ 26, 267 P.3d at 77.

271. 118 N.M. 420, 882 P.2d 11 (1994). The plaintiff, a uranium miner, died of lung cancer years after being exposed to radiation, and his spouse was unable to collect workers' compensation benefits due to the passage of the Workers' Compensation Act's statute of repose.

272. NMSA 1978 § 52-3-10 (1986) (barring ability to seek benefits under Workers' Compensation Act unless disability or death occurred within ten years of the last day of employment with the employer from whom workers' compensation was claimed).

273. *Schirmer*, 118 N.M. at 423, 882 P.2d at 14 (internal quotation marks omitted).

274. *Id.*

275. *Id.*

fairness.<sup>276</sup> In many ways, the implications of the Medical Malpractice Act statute of repose are indistinguishable from those of the Workers' Compensation Act. In light of the courts' history of treating statutes of repose cautiously, the court of appeals should not have overextended the Medical Malpractice Act's statute of repose or applied it to a situation for which it was not originally intended.

## VI. IMPLICATIONS OF *CHRISTUS ST. VINCENT* ON NEW MEXICO LAW

The *Christus St. Vincent* holding is certain to have widespread consequences for future cases. The issues involved are complex and have deeply rooted origins in various policy concerns and legal doctrines.

### A. Widespread Effect on Other Indemnification Claims

Indemnification is a particularly large and complex field of law, and the consequences of *Christus St. Vincent* are a worryingly open question. As simply stated by the Restatement (Second) of Torts, “[t]he unexpressed premise has been that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the indemnitor should bear the total responsibility.”<sup>277</sup> This broad definition of indemnification suggests that principles of equity may require a broader application of the court of appeals' decision to other areas of law. Because the court did not specify whether the decision applied only to indemnification in medical malpractice actions,<sup>278</sup> it remains unclear if all indemnifications claims will be subject to the statutes of limitation and repose that govern the underlying tort. In addition to medical malpractice, the legislature has also crafted statutes of repose to govern claims arising from injuries from architectural or construction defects<sup>279</sup> and personal injuries caused by public officials or government entities.<sup>280</sup>

While various permutations and extensions of the court of appeals' holding here may be within its intended scope, the opinion fails to clarify

276. *Id.*

277. RESTATEMENT (SECOND) OF TORTS 886B(1) cmt. c (1979).

278. *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 32, 267 P.3d 70, 77, cert. quashed, 2012-NMCERT-005, \_\_\_ P.3d \_\_\_ (No. 30,343, May 24, 2012).

279. NMSA 1978 § 37-1-27 (1967).

280. NMSA 1978 § 41-4-15(A) (1977) (“New Mexico Tort Claims Act”); see *Maestas v. Zager*, 2007-NMSC-003, 152 P.3d 141 (interpretation of accrual date and intent of the New Mexico Tort Claims Act statute of limitations).

any such applicability.<sup>281</sup> Lower courts applying this decision may examine the legislative intent behind other statutes of repose and hold that the policy concerns protecting those responsible for other types of injuries deserve the same preferential treatment given to healthcare providers under this decision. For example, the statute of repose applicable to injuries from construction defects was crafted to protect builders from claims “arising years after [the] substantial completion” of their construction projects.<sup>282</sup> The legislature enacted this statute to protect builders from “the wake of judicial decisions exposing those involved in the construction industry to greater liability,” which the supreme court found to be a valid social and economic policy.<sup>283</sup> This purpose echoes the legislature’s motivation for the Medical Malpractice Act, which sought to protect doctors from a feared flurry of liability and litigation.<sup>284</sup> Just as the court of appeals held in *Christus St. Vincent* that the Act’s statute of repose does not differentiate among claims for medical error or indemnification, it previously determined that the construction defect statute of repose does not recognize distinctions between different types of defect claims.<sup>285</sup> Thus, lower courts may determine that the resemblance in the legislative protection of doctors and builders may justify the application of the construction defect statute of repose to indemnity claims arising out of construction defects. However, such an extension is not necessarily in line with legislative intent, and the court of appeals left open the question of why doctors remain entitled to such a special level of protection.<sup>286</sup>

Another example of a possible overextension of the *Christus St. Vincent* holding may arise in cases brought under the New Mexico Tort Claims Act,<sup>287</sup> which was created to govern personal injury suits against governmental entities and public employees. The Act includes a statute of

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281. *Christus St. Vincent*, 2011-NMCA-112, 267 P.3d 70.

282. *Coleman v. United Eng’rs & Constructors, Inc.*, 118 N.M. 47, 51, 878 P.2d 996, 1000 (1994).

283. *Id.*

284. NMSA 1978 § 41-5-2 (1976) (purpose includes providing professional liability insurance to doctors).

285. *Howell v. Burk*, 90 N.M. 688, 694, 568 P.2d 214, 220 (Ct. App. 1977).

286. Moreover, the court of appeals did not clarify whether the level of protection given to doctors under the Medical Malpractice Act should exceed the level of protection given to builders under the construction defect statute or to public officials and government entities under the Tort Claims Act, NMSA 1978 § 41-4-15(A) (1977). Without articulating the specific concerns that caused the court to treat doctors with special care, lower courts are left to wonder whether the statute of repose itself is indicative of a higher level of protection, or whether doctors are to be treated as a unique class, entitled to unique protections not applicable to others who are protected by less expansive statutes of repose.

287. NMSA 1978 § 41-4-1 (1981).

repose that bars any claims brought more than two years after the date of occurrence.<sup>288</sup> Just as the Medical Malpractice Act<sup>289</sup> sought to balance the interests of providers and patients,<sup>290</sup> the Tort Claims Act aimed to “achieve balance between the public policy supporting compensation of those injured by public employees and the public policy militating in favor of limiting government liability.”<sup>291</sup> By applying the *Christus St. Vincent* holding to the statute of repose in the Tort Claims Act, a court could reasonably find that social workers,<sup>292</sup> public officials responsible for waste collection,<sup>293</sup> or school athletic coaches<sup>294</sup> acting within the scope of their employment<sup>295</sup> are entitled to the same level of protection as qualified healthcare providers. Although motivated by different policy concerns, a reasonable court could easily determine that the purposes of the two Acts’ statutes of repose are sufficiently congruent and legitimate that the decision can be extended to these actors.

### B. Predicted Reaction from Hospitals

To avoid being time-barred in claims for indemnification, potential indemnitees may seek to preemptively insulate themselves from liability by including express provisions in contracts providing them with a right to indemnification or contribution.<sup>296</sup> Hospitals can require indemnity provisions in employment contracts as a condition of employment for any pro-

288. NMSA 1978 § 41-4-15(A).

289. Both the Medical Malpractice Act and the Tort Claims Act were enacted in 1976. NMSA 1978 § 41-5-1; NMSA 1978 § 41-4-1.

290. See discussion *supra* note 179 (explaining dual purpose of the Act).

291. *Niederstadt v. Town of Carrizozo*, 2008-NMCA-053, ¶ 14, 182 P.3d 769, 772 (2008).

292. *Whitley v. N.M. Children, Youth & Families Dep’t*, 184 F.Supp.2d 1146 (D.N.M. 2001) (holding that state social workers responsible for the placement of children in foster care are covered by the New Mexico Tort Claims Act).

293. *City of Albuquerque v. Redding*, 93 N.M. 757, 605 P.2d 1156 (1980) (holding that the New Mexico Tort Claims Act is applicable to public employees responsible for waste collection and disposal).

294. *Gerald v. Locksley*, 785 F.Supp.2d 1074 (D.N.M. 2011) (holding that University of New Mexico assistant football coach was a “public employee” under the New Mexico Tort Claims Act when accused of intentional torts of assault and battery).

295. *Henning v. Rounds*, 2007-NMCA-139, 171 P.3d 317 (New Mexico Tort Claims Act applies to public employees acting within the scope of their public duty and employment.).

296. This option was suggested by the court in *Saiz v. Belen School District*, 113 N.M. 387, 401, 837 P.2d 102, 116 n.13 (1992) (“Nevertheless, the statute [of repose in the construction defect statute] leaves open the possibility that a party can protect himself from the effect of the shift in liability by expressly contracting for a right of contribution not subject to the ten-year limitation.”).

vider eligible for qualification under the Act.<sup>297</sup> This would subject physicians to ongoing liability in direct contradiction to the Act's goal and would create tension within the hospital-physician employment relationship. As an alternative to crafting such adversarial employment agreements, hospitals can hire nonqualified providers or forbid their providers from seeking qualification under the Act to prevent time-barred indemnity claims as was seen here.<sup>298</sup>

Additionally, hospitals may be encouraged to file protective indemnity claims, even though they are typically discouraged by the courts. One court held that “[a]n indemnitee . . . is not generally in a position to bring suit until actual payment has been made,” rejecting “the notion that ‘protective’ suits for indemnity could be filed before payment and then stayed indefinitely.”<sup>299</sup> Protective indemnity claims “run[ ] counter to the standard indemnity law that a cause of action does not arise until there is a determination of liability.”<sup>300</sup> In addition to contradicting black-letter indemnification law, protective indemnity claims will create unnecessary litigation and compromise overextended judicial resources. Thus, these claims will counteract the courts’ interest in decreasing rather than increasing the amount of litigation before the courts. This “solution” is likely to have several negative effects on hospitals.<sup>301</sup>

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297. Providers, however, are frequently discouraged from agreeing to these clauses. See *Nine items you don't want to find in your employment contract*, TODAY'S HOSPITALIST, Nov. 2006, [http://todayshospitalist.com/index.php?b=articles\\_read&cnt=95](http://todayshospitalist.com/index.php?b=articles_read&cnt=95).

298. This result would directly contradict the purpose of the Act, which was to encourage doctors to seek qualification under the Act. See NMSA 1978 § 41-5-2 (1976).

299. *U.S. Cold Storage v. Matson Navigation Co.*, 162 Cal. App. 3d 1228, 1232–33 (1984).

300. *Id.* at 1233.

301. Hospitals filing protective indemnity claims may attract the attention of injured patients who were either unaware of their injuries or had not yet determined if the severity of their injuries warranted suit. If the hospital files a protective indemnification claim against the patients’ doctors to insulate itself from liability, that action is likely to signal to the patients that their injuries must be worthy of litigation, since the indemnification claim will lead to the belief that the hospital is obviously concerned about excessive liability.

Additionally, these protective claims lead to confidentiality problems with hospital ethics boards. Hospitals currently encourage participation in ethics committees, whereby doctors routinely review the questionable or potentially negligent conduct of their peers. Strict rules of confidentiality surround these committees, in an attempt to encourage forthrightness and frankness about the doctors’ conduct and to encourage joint problem-solving among the hospital’s practitioners. However, in light of the decision in *Christus St. Vincent*, hospitals may be tempted to use the information about

### C. *Call to Action to the New Mexico Legislature to Amend the Act*

To circumvent potentially undesirable extensions of the court of appeals' decision in *Christus St. Vincent*, the New Mexico Legislature should revisit the Medical Malpractice Act and update its provisions to reflect the current climate of New Mexico's medical services community. The question of the fairness of the statute of repose is ripe for review again. The legislature should act promptly to resolve the confusion surrounding this issue and resulting from this case.

The legislature included a statute of repose within the Act to rescue New Mexico from the medical malpractice crisis of the 1970s.<sup>302</sup> That crisis no longer exists, and transposing current policy concerns upon the Act does not accord with its original intent.<sup>303</sup> By 1995, the supreme court defended the Act on the grounds that "[t]he high cost of insurance justifies the legislative conclusion that a shorter limitations period for medical malpractice claims *was and is* necessary to make malpractice insurance more affordable and thereby encourage more physicians to carry such insurance."<sup>304</sup> If the legislature wishes to maintain the relevance of the Act, it should amend the Act's purpose to reflect New Mexico's current needs. Such an amendment would include the use of a discovery rule for the date of accrual and would explain what current threats to the medical community warrant the continued protection of the Act.<sup>305</sup> While the legislature may opt to retain the date of occurrence rule,<sup>306</sup> a clearer and

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potential medical mistakes garnered from these committees to file protective indemnity claims against its doctors.

302. See Kovnat, *supra* note 18, at 7; see also discussion *supra* note 18.

303. Some may argue that need for medical services in New Mexico's economically disadvantaged communities basically yields the same result of the Medical Malpractice Act, but this is irrelevant. The Act was created to respond to a medical malpractice crisis as it existed in 1976; that crisis has been abated, and the Act's relevance and applicability is now called into question. See discussion *supra* note 18 (discussion of medical malpractice crisis).

304. *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 539, 893 P.2d 428, 435 (1995) (emphasis added).

305. See discussion *supra* Part V.B.

306. The court may opt to retain the date of occurrence rule to which it has clung in prior decisions. In *Roberts v. Southwest Community Health Services*, 114 N.M. 248, 252, 837 P.2d 442, 446 (1992), the Supreme Court of New Mexico held that "we believe that the legislature specifically chose to insulate qualified health care providers from the much greater liability exposure that would flow from a discovery-based accrual date." If it believes that qualified providers remain in need of these additional protections, it may choose to disregard the potential due process concerns surrounding the date of accrual rule.

updated presentation of the purpose of the Act would be useful for the courts interpreting its applicability to today's medical climate.<sup>307</sup>

Moreover, even if the courts determine that indemnification arising as between two qualified providers should be subject to the Act's statute of repose, that rule should be limited to qualified providers. The courts' past use of the date of discovery rule for nonqualified providers should apply to the Hospital here, as it was not qualified under the Act.<sup>308</sup>

### CONCLUSION

In light of the confusion left by the court of appeals' decision in *Christus St. Vincent*, New Mexico's legal and medical communities could benefit from a clarification of the issues involved. The court of appeals failed to give due consideration to well-established legal doctrine of the right to indemnification and the modern relevance of Act's statute of repose. By updating the Act and expressly excluding indemnification actions from its scope, the legislature can reassure both the medical and legal communities that it has exhaustively balanced the potential competing interests and consequences of the *Christus St. Vincent* holding.

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307. The legislature may choose to retain the date of occurrence rule, and the New Mexico Tort Claims Act includes a date of occurrence rule for its statutes of limitations as well, indicating the legislature's intent to specifically protect certain defendants from the more flexible and enduring discovery rule. NMSA 1978 § 41-4-15 (1977). The distinction, however, is that the Tort Claims Act's original purpose and intent remains a concern today, while the legislature's desire to quell a medical malpractice insurance crisis has long since dissipated.

308. Petition for Writ of Certiorari, *supra* note 2, at 2 n.2.

