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TABLE OF CONTENTS

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INTRODUCTION

During heart surgery, a bolt came off a surgical instrument, and the doctor—a qualified health care provider (QHP) under the Louisiana Medical Malpractice Act (LMMA)[1]—never noticed and sewed the patient back up, leaving the bolt floating freely within the membrane enclosing the patient's heart.[2] Following continuous, excruciating chest pains, the patient obtained an x-ray that revealed the doctor's mistake. After timely filing for a medical review panel and receiving its decision, the plaintiff filed suit against the doctor for medical malpractice. While waiting on the panel hearing, the plaintiff asked via interrogatory about any possible third-party fault, and the doctor failed to name anyone. Later, in his answer to the petition, the doctor—for the first time—raised claims of third-party fault against the product manufacturer of the surgical instrument. Though it was now over a year since the plaintiff initially discovered the bolt, the plaintiff filed an amended and supplemental petition to join the product manufacturer, arguing that the timely suit against the doctor interrupted prescription for this joint tortfeasor. The manufacturer then filed a peremptory exception raising the objection of prescription, asserting that the one-year liberative prescription period barred this action.

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1. "Under the *Medical Malpractice Act* (MMA), one becomes a *qualified health care provider* (QHCP) by [falling within the definition of a healthcare provider found within Louisiana Revised Statutes § 40:1231.1(A)(10),] obtaining $100,000 in medical malpractice insurance (or proof of self-insurance)[,] and by paying an additional surcharge to the *Louisiana Patients' Compensation Fund* (PCF)." FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., 1 LOUISIANA TORT LAW § 19.03 (2022) [hereinafter TORT LAW].

2. These facts are based on the facts in *Cook v. Rigby*, 316 So. 3d 545 (La. Ct. App. 1st Cir. 2020).

According to Louisiana Civil Code article 2324(C), the prescriptive period is interrupted against all joint tortfeasors when a plaintiff files suit against any one joint tortfeasor.[3] But sometimes courts make an exception when one of the joint tortfeasors is a QHP liable under the LMMA.[4] In the situation described above, suppose the plaintiff files his petition in a court within the Louisiana Fifth Circuit Court of Appeal's jurisdiction. Binding precedent in that jurisdiction excludes interruption of prescription for any party jointly liable with a QHP sued for medical malpractice.[5] Thus, prescription would have accrued, and the plaintiff would permanently lose the claim against the product manufacturer. Meanwhile, the original defendant, who knew of this joint tortfeasor but did not reveal its existence until the prescriptive period expired, raises an affirmative defense alleging that the nonparty manufacturer was also at fault. The jury, influenced by that affirmative defense, delivers a $1 million verdict, finding the original defendant only 40% liable and the manufacturer 60% liable. Since prescription barred the action against the manufacturer, the plaintiff cannot recover 60% of his awarded damages.

These same facts and circumstances would render a contrary outcome if the suit was filed in a court within the jurisdiction of the Louisiana First Circuit Court of Appeal.[6] The First Circuit held in *Cook v. Rigby* that prescription can interrupt against anyone other than QHPs liable for medical malpractice no matter who they are jointly liable with, thus creating a circuit split.[7] So, under the same facts above, the plaintiff could recover from the product manufacturer if the suit was in Louisiana's First Circuit.[8]

Generally, under Louisiana law, filing an action against one joint tortfeasor interrupts prescription against all joint tortfeasors.[9] However, the Louisiana Supreme Court, in *LeBreton v. Rabito*, held that prescription cannot be interrupted against QHPs liable for medical malpractice, which the Fifth Circuit extended to non-QHP joint tortfeasors, eventually leading to the aforementioned circuit split.[10] The impetus for *LeBreton*'s narrow

3. LA. CIV. CODE art. 2324(C) (2023).

4. *See, e.g.*, *Cook*, 316 So. 3d at 559; Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018); Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

5. *See Matranga*, 254 So. 3d 1238; *Kampmann*, 7 So. 3d 675.

6. *See Cook*, 316 So. 3d 545.

7. *Id.* at 557.

8. *Id.* at 560.

9. LA. CIV. CODE art. 2324(C) (2023).

10. *See* LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998); *Matranga*, 254 So. 3d 1238; *Cook*, 316 So. 3d 545.

exception was preventing plaintiffs from purposefully violating statutory requirements.[11] Before *LeBreton*, many plaintiffs purposefully and improperly filed suit against a QHP before filing for a medical review panel, causing prescription to run anew.[12]

Subsequently, in *Borel v. Young*, the Louisiana Supreme Court held that the interruption-of-prescription exclusion still applies when QHPs are later joined as joint tortfeasors.[13] The Louisiana Fifth Circuit Court of Appeal interpreted overbroad language within *Borel* as extending the interruption-of-prescription exclusion to all tortfeasors jointly liable with a QHP.[14] Eleven years after the Fifth Circuit's initial interpretation of *Borel*, the Louisiana First Circuit Court of Appeal's decision in *Cook v. Rigby* formed a circuit split by holding that prescription can be interrupted for any non-QHPs.[15]

To resolve the circuit split, the Louisiana Supreme Court should grant writ in a future case to clarify that its holding in *Borel* applies only to QHPs liable for malpractice. This clarification will ensure equal protection of Louisiana's laws and prevent conflicting results solely based on the identity of a party's joint tortfeasors. The Fifth Circuit's precedent creates an exception that is judicially inefficient, unclear, and encourages manipulative gamesmanship. By concealing the identity of other tortfeasors until the prescriptive period expires, a plaintiff would be barred from bringing action against those other tortfeasors while the named defendant may still assert third-party fault as an affirmative defense—the "empty chair" defense.[16] To combat this, the Court should recognize the interruption of prescription against any non-QHPs from the moment suit is filed against the original defendant in accordance with Louisiana Civil Code article 3466. Additionally, or alternatively, the legislature should enact law to prevent affirmative defenses from deflecting liability onto prescribed joint tortfeasors when the party asserting that affirmative defense knew or should have known of the prescribed defendant's identity before prescription barred the action.

Part I of this Comment provides an overview of basic tort law, the LMMA, and the relevant Louisiana Supreme Court jurisprudence that has led to the current circuit split. Part II highlights the broad language of the *Borel* decision and the inconsistencies it created, analyzes the differing

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11. *LeBreton*, 714 So. 2d at 1230–31.
12. *Id.*
13. *See* Borel v. Young, 989 So. 2d 42 (La. 2007).
14. *See Matranga*, 254 So. 3d 1238; Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).
15. *See Cook*, 316 So. 3d 545.
16. *See, e.g.*, *Borel*, 989 So. 2d 42.

opinions of the First and Fifth Circuits, and ends by introducing the conflicts created by the Fifth Circuit's precedent. Part III focuses on the issues of extending the interruption-of-prescription exclusion, the inequity of that extension, and potential constitutional violations caused by that extension. Part IV proposes a solution for this issue by suggesting that the Louisiana Supreme Court grant a writ of certiorari in a case like *Cook*, *Matranga*, or *Kampmann* and clarify that the *Borel* holding applies to QHPs alone. Part IV then recommends an alternative solution through legislative action. Finally, this Comment concludes by applying the proposed solution from Part IV.

I. LOUISIANA TORT LAW: A PRIMER

The "fountainhead of responsibility"[17] is the principle that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[18] A tort, or delict, is defined as "conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability."[19] A person's responsibility for causing damages extends not only to intentional acts, but also to acts of negligence, imprudence, or want of skill.[20] Negligence occurs when an actor knows or reasonably should know of a risk and fails to take reasonable caution to avoid it.[21] Under Louisiana tort law, litigants have numerous defenses available to reduce their liability, but the most commonly raised defense is comparative fault.[22]

A. Introduction of a Pure Comparative Fault Regime

In 1979, Louisiana tort law adopted a pure comparative fault regime.[23] Under a pure comparative fault regime, in any action where a person suffers injury, death, or loss, a percentage of fault is allocated to every

17. Langlois v. Allied Chem. Corp., 249 So. 2d 133, 137 (La. 1971) (describing LA. CIV. CODE art. 2315 (1971)).

18. LA. CIV. CODE art. 2315 (2023).

19. TORT LAW, *supra* note 1, § 1.01 (citing DAN B. DOBBS ET AL., DOBBS LAW OF TORTS § 1 (2d ed. 2011)).

20. LA. CIV. CODE. art. 2316 (2023).

21. TORT LAW, *supra* note 1, § 1.05.

22. *See generally id.* at § 9.

23. LA. CIV. CODE art. 2323 (2023). Most states have adopted some kind of comparative fault regime. The alternative to comparative fault is contributory negligence, which bars recovery entirely when a plaintiff is found even 1% liable. *See* TORT LAW, *supra* note 1, §§ 9.01, 9.03.

person that caused or contributed to the damages.[24] This includes every named defendant, as well as any unnamed or unknown third parties, and it even includes any fault the plaintiff may share in causing the injuries.[25] Comparative fault can be used as an affirmative defense, which means that a defendant may deflect fault onto others to reduce the defendant's own liability.[26] Any fault assigned to the plaintiff reduces that plaintiff's recovery.[27] In other words, if a plaintiff contributed to or could have prevented his or her injuries, the amount recoverable from the defendant is reduced accordingly. Also, any fault assigned to prescribed, unnamed, unknown, immune, or settled third parties is unrecoverable since judgments are rendered against only the named parties in the litigation.[28] After a judgment is rendered, *res judicata* prevents a plaintiff from filing suit against unnamed third parties for those same injuries.[29] Plaintiffs can avoid these consequences by cumulating related actions into one suit.[30]

B. Cumulation of Actions

Under Louisiana Code of Civil Procedure article 461, "Cumulation of actions is the joinder of separate actions in the same judicial demand, whether by a single plaintiff against a single defendant, or by one or more plaintiffs against one or more defendants."[31] A plaintiff may cumulate multiple actions for injuries against multiple parties into one suit so long

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24. LA. CIV. CODE. art. 2323 (2023).
25. TORT LAW, *supra* note 1, § 9.03.
26. *Id.*
27. *Id.*
28. *See id.*
29. "A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." LA. CODE CIV. PROC. art. 425(A) (2023). *Res judicata* is

> [a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

Res Judicata, BLACK'S LAW DICTIONARY (11th ed. 2019) (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 (1982)).
30. LA. CODE CIV. PROC. art. 461 (2023).
31. *Id.*

as there is a community of interest between the parties joined,[32] both jurisdiction and venue are proper as to all parties,[33] and all the actions are mutually consistent and employ the same form of procedure.[34] In fact, the failure to cumulate could even subject plaintiffs to dismissal of their actions.[35] This occurs when more than one defendant causes the plaintiff's injuries and suing the defendants separately would expose the defendants to multiple or inconsistent obligations.[36]

When two or more persons' unintentional actions cause injury, the actors are considered joint tortfeasors liable to the injured party under a joint and divisible obligation.[37] Under this joint obligation, each joint tortfeasor is only liable for its allocated portion of fault.[38] This means each joint tortfeasor must pay only its allocated portion of damages.[39] However, the interruption of liberative prescription against one joint tortfeasor usually interrupts prescription against all joint tortfeasors.[40]

C. Prescription

Prescription is based on three major policies: (1) promotion of social and legal stability; (2) presumption of payment; and (3) prevention of a creditor from holding a debt over the debtor's head indefinitely.[41] In Louisiana, "[t]here are three kinds of prescription: acquisitive prescription,

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32. *Id.* art. 463. *Community of interest* means that the claims must bear some relation to another so as not to confuse the jury. *See generally* LA. CODE CIV. PROC. ANN. art. 463 cmt. b (2022).

33. LA. CODE CIV. PROC. art. 463 (2023). "Venue means the parish [or judicial district] where an action or proceeding may properly be brought and tried under the rules regulating the subject." *Id.* art. 41. "Jurisdiction is the legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties, and to grant the relief to which they are entitled." *Id.* art. 1.

34. *Id.* art. 463. "[A]ll of the actions cumulated must be enforceable by the same *form* of procedure, i.e., ordinary, executory, or summary procedure." LA. CODE CIV. PROC. ANN. art. 463 cmt. a (2022).

35. *See* LA. CODE CIV. PROC. art. 927(A)(4) (2023).

36. *Id.* art. 641(2)(b).

37. LA. CIV. CODE art. 2324(B) (2023). When the actions are intentional, the parties are solidary obligors, but this is not relevant to this Comment. *See id.* art. 2324(A).

38. *Id.* art. 2324(B).

39. *Id.*

40. *Id.* art. 2324(C).

41. LeBreton v. Rabito, 714 So. 2d 1226, 1228 (La. 1998).

liberative prescription, and prescription of nonuse."[42] Louisiana Civil Code article 3447 explains, "Liberative prescription is a mode of barring actions as a result of inaction for a period of time."[43] Unless an exception is established by law, liberative prescription runs against all persons.[44] All delictual actions are subject to a liberative prescription period of one year, starting from the date of injury.[45] For example, if someone was injured in a car wreck, the injured party has one year from the date of that incident to file suit. Once prescription runs, "the plaintiff bears the burden of [proving] that the claim has not prescribed."[46] A prescriptive period can be modified by four principles: (1) interruption; (2) suspension; (3) renunciation; and (4) relation back.[47]

Interruption of prescription is the complete cessation and resetting of prescription.[48] Once an interruption of prescription ends, the time that ran before the interruption is not counted, and the prescriptive period runs anew from the last day of the interruption.[49] Generally, in delictual actions, prescription is interrupted against all joint tortfeasors when a party files suit in a court of competent jurisdiction and venue or against only the served defendant if filed within an improper jurisdiction or venue.[50] The LMMA is one exception to that general rule.[51] In *LeBreton v. Rabito*, the Louisiana Supreme Court held that the suspension of prescription applied to the exclusion of interruption with respect to QHPs liable under the LMMA for malpractice.[52]

While interruption completely resets the prescriptive period, suspension of prescription merely temporarily halts the running of

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42. LA. CIV. CODE art. 3445 (2023). Only liberative prescription is pertinent to the topic of this Comment. For more on acquisitive prescription and prescription of nonuse, see *id.* arts. 3446, 3448.

43. *Id.* art. 3447.

44. *LeBreton*, 714 So. 2d at 1228. *See* LA. CIV. CODE art. 3467 (2023).

45. LA. CIV. CODE art. 3492 (2023).

46. *LeBreton*, 714 So. 2d at 1228.

47. *Id.* at 1229; LA CODE CIV. PROC. art. 1153 (2023). Renunciation is not pertinent to the topic of this Comment. For more information on renunciation, see *id.* arts. 3449–51.

48. LA. CIV. CODE art. 3466 (2023).

49. *Id.*

50. *Id.* arts. 2324(C), 3462. For a definition of jurisdiction and venue, see *id.* arts. 1, 41, respectively.

51. LA. REV. STAT. § 40:1231.8(A)(2)(a) (2023).

52. *See* LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998); Borel v. Young, 989 So. 2d 42 (La. 2007); Milbert v. Answering Bureau, Inc., 120 So. 3d 678 (La. 2013).

prescription.[53] It is a period "in which prescription slumbers."[54] The only causes for suspension within the Louisiana Civil Code are spousal relationships, children-to-guardian relationships during minority, and interdict-to-curator relationships during interdiction.[55] Suspension continues for as long as its cause, but the instant that cause ends, prescription resumes, including any time accrued before suspension began.[56] In other words, any time accumulated before the suspensive event is added to the time after the suspensive event ends—time does not reset.[57]

For example, assume that a man and woman get in a car wreck, and the wreck was the man's fault. Upon meeting, the two fell in love, and six months after the wreck, the couple got married. But, after one short, miserable year of marriage, the couple divorced. Since Louisiana Civil Code article 3469 suspends prescription between spouses for the duration of the marriage, the woman still has six months after the divorce to bring action against the man for the wreck since prescription was suspended during the marriage but resumed upon termination. This principle protects claimants from losing a legal claim during a period when the enforcement of that claim is prevented.[58] At first glance, suspension of prescription is limited only to instances found within Louisiana Civil Code article 3469.[59] But, as mentioned, the LMMA is one exception to that rule.[60]

Another procedural device affecting prescription is the relation-back doctrine codified at Louisiana Code of Civil Procedure article 1153.[61] Under article 1153, assertions in amended petitions or answers "relate[] back" when they arise out of the same transaction or occurrence as the original claim.[62] There are three scenarios where relation back arises: (1) plaintiff adds a new claim against the same defendant; (2) plaintiff adds a new defendant; or (3) a new plaintiff is added.[63] While there are three scenarios, this Comment only concerns the second instance of relation back: adding a new defendant. When an amended petition satisfies the elements of relation back, that additional claim is considered to have been

53. LA. CIV. CODE art. 3472 (2023).
54. *LeBreton*, 714 So. 2d at 1229.
55. LA. CIV. CODE art. 3469 (2023).
56. *LeBreton*, 714 So. 2d at 1228. *See* LA. CIV. CODE art. 3472 (2023).
57. LA. CIV. CODE art. 3472 (2023).
58. *LeBreton*, 714 So. 2d at 1229.
59. LA. CIV. CODE ANN. art. 3469 cmt. c (2022).
60. *See* LA. REV. STAT. § 40:1231.8(A)(2)(a) (2023).
61. LA. CODE CIV. PROC. art. 1153 (2023). This article is "based on Federal Rule of Civil Procedure 15." TORT LAW, *supra* note 1, § 10.04[11].
62. LA CODE CIV. PROC. art. 1153 (2023).
63. TORT LAW, *supra* note 1, § 10.04[11].

filed at the time of the original petition so long as that added claim was not prescribed at the time the original petition was filed.[64] However, the Louisiana Supreme Court held that relation back does not apply to medical malpractice suits under the LMMA.[65]

D. The Louisiana Medical Malpractice Act

Typically, general tort law governs the liability of service providers.[66] Under general negligence principles, a service provider "must (1) possess the skill normally possessed by persons who provide such services for a fee, (2) use reasonable care in performing the service, and (3) exercise his or her best judgment."[67] While non-professional service providers are sued for basic negligence, suits against professional service providers—doctors, lawyers, accountants, etc.—are considered "malpractice."[68] Malpractice actions typically apply general tort law unless a statute specifically provides otherwise.[69] One instance of statutory law providing differently is in medical malpractice actions governed by the LMMA.[70]

In 1975, the Louisiana legislature responded to a "perceived medical malpractice insurance 'crisis'" by enacting the LMMA.[71] With medical malpractice insurance rates spiking and doctors refusing to practice without reasonably priced liability insurance, patients' access to health care in Louisiana was threatened.[72] The legislature enacted the LMMA to remove the threat of curtailing health care to patients by reducing the prescriptive periods in malpractice suits.[73] The Louisiana Supreme Court

64. *Id.* The elements of relation back are: (1) the new claim arises out of the same transaction or occurrence as the original pleading; (2) the new or substituted defendant received such notice of the institution of the action that he would not be prejudiced in maintaining a defense; (3) the new or substituted defendant knew or should have known that but for a mistake concerning the identity of the proper party defendant, the original action would have been brought against him; and (4) the substitute defendant is not a wholly new or unrelated defendant. *See* Ray v. Alexandria Mall, 434 So. 2d 1083, 1085–86 (La. 1983).

65. *See* Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186 (La. 2008).

66. TORT LAW, *supra* note 1, § 19.01.

67. *Id.*

68. *Id.* at § 19.02.

69. *Id.*

70. *See* LA. REV. STAT. §§ 40:1231–1233 (2023).

71. Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson, 888 So. 2d 782, 785 (La. 2004) (citing Hutchinson v. Patel, 637 So. 2d 415, 419 (La. 1994)).

72. Kandy G. Webb, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 655 (1976).

73. Borel v. Young, 989 So. 2d 42, 50–51 (La. 2007).

in *Borel v. Young* alluded that the crisis itself may have been a product of that legislative action.[74] It found that the sharp increases in malpractice insurance rates correlated with the statute's enactment because it constrained the time that plaintiffs had to file malpractice suits.[75] Nonetheless, the legislature mitigated the threat of rising insurance costs by awarding QHPs with various protections under the LMMA.[76]

1. The Advantages Provided by the LMMA

Under the LMMA, QHPs are given two substantial advantages when they are sued. First, general damages[77] are statutorily limited to $500,000 in medical malpractice actions.[78] Second, a medical review panel must review every alleged malpractice claim before a plaintiff can file suit in a court of law.[79] The Louisiana Supreme Court gave QHPs even more advantages by excluding interruption of prescription[80] and relation back from claims raised against them.[81] Especially coupled with the damages cap, these two jurisprudentially created exclusions offer QHPs unique and significant benefits. Not only are QHPs assured they will owe a maximum of $100,000[82] in general damages to any given patient, but they also benefit from knowing that prescription never resets and claims never relate back.[83] While all these benefits are ideal for those receiving them, the

74. *Id.* at 51.

75. *Id.*

76. *Id.* at 50–51.

77. The primary categories of general damages are pain and suffering and mental distress but scarring and disfigurement may also be included. General damages do not include medical expenses, loss of earning capacity, or loss of enjoyment of life as these are all separate compensatory schemes. *Id.* § 7.02.

78. While $500,000 is the general damages cap, each individual QHP is only personally liable for $100,000 because the patient compensation fund covers the remaining $400,000. *See id.* § 19.03.

79. LA. REV. STAT. § 40:1231.8 (2023). A medical review panel consists of three health care providers, all of the same practice area as the doctor in question, and one attorney chairperson. The panel's duty is to hear the plaintiff's case and vote as to whether they believe malpractice was committed; however, if the panel does not find malpractice, plaintiff may still file suit. *See* TORT LAW, *supra* note 1, § 19.03 n.70.

80. *See* LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998).

81. *See* Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186 (La. 2008).

82. *See* discussion *supra* note 78.

83. *See LeBreton*, 714 So. 2d 1226; *Warren*, 21 So. 3d 186.

inverse is true for the plaintiffs suing QHPs. Thus, litigants frequently contend that these benefits are overbearing, unjustified, and unconstitutional.[84]

2. The Frequently Raised Issues with the LMMA

Because this special legislation derogates from the general rights of tort victims, the LMMA is strictly construed and applies only in cases of liability for medical malpractice.[85] In fact, the Louisiana Supreme Court held in *Billeaudeau v. Opelousas General Hospital Authority* that "this court has, without exception, emphasized that the LMMA and its limitations on tort liability for a [QHP] apply strictly to claims 'arising from medical malpractice'"[86] and also that "any other liability of the [QHP] is governed by general tort law."[87] Despite the LMMA's alleged strict construction, it remains one of Louisiana's most litigious areas of law[88] and faces tremendous criticisms on its constitutionality,[89] applicability,[90] and prescriptability.[91]

Despite arguably infringing on equal protection rights,[92] the United States Supreme Court previously refused to address the constitutionality of medical malpractice damages caps for "want of a substantial federal question," so the cap remains a state issue.[93] Since 1975, the LMMA has limited general damages to $500,000, resulting in several cases questioning its constitutionality.[94] Still, the Louisiana Supreme Court has

84. *See, e.g.*, Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012); Arrington v. ER Physician Grp., Inc., 110 So. 3d 193 (La. Ct. App. 3d Cir. 2013).

85. Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson, 888 So. 2d 782, 786 (La. 2004) (citing Sewell v. Drs. Hosp., 600 So. 2d 577, 578 (La. 1992)).

86. Billeaudeau v. Opelousas Gen. Hosp. Auth., 218 So. 3d 513, 520 (La. 2016) (quoting Coleman v. Deno, 813 So. 2d 303, 315 (La. 2002)).

87. *Id.* (citing *Williamson*, 888 So. 2d at 786).

88. Natalie J. Dekaris & Michael C. Mims, *Recent Developments: Louisiana Medical Malpractice Law*, 74 LA. L. REV. 873, 873 (2014).

89. *See, e.g.*, *Oliver*, 85 So. 3d 39; *Arrington*, 110 So. 3d 193.

90. *Coleman*, 813 So. 2d at 315; Sarah M. Nickel, *The Medical Malpractice Cure: Stitching Together the Coleman Factors*, 78 LA. L. REV. 311, 312 (2017).

91. *See, e.g.*, LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998); Borel v. Young, 989 So. 2d 42 (La. 2007); Milbert v. Answering Bureau, Inc., 120 So. 3d 678 (La. 2013).

92. *See* discussion of the Equal Protection Clause *infra* Part III.C.

93. Randall B. Keiser, *"Does This Hurt?": Constitutional Challenges of Damage Caps and the Review Panel Process in Medical Malpractice Actions in Louisiana.*, 51 LA. L. REV. 1233, 1234 (1991) (quoting Fein v. Permanente Med. Grp., 474 U.S. 892, 892 (1985)).

94. Nickel, *supra* note 90, at 317.

upheld the damage cap's constitutionality several times, finding that it ensures insurance affordability for health care providers and affordability of health care for citizens.[95] In fact, the Court refuses to even address the Act's failure to adjust for inflation.[96] In *Oliver v. Magnolia Clinic*, the Louisiana Supreme Court deflected arguments for inflation adjustments, finding that the issue concerned the adequacy of the cap's amount, not its constitutionality.[97] Thus, absent legislative action, the general damages cap remains $500,000.

Another issue affecting plaintiffs under the LMMA is the courts' inconsistent application of the Act.[98] In *Coleman v. Deno*, the Louisiana Supreme Court provided six factors to determine whether a claim constituted medical malpractice under the LMMA.[99] Unfortunately, judges drastically differ in applying these factors, reaching inconsistent conclusions as to whether wrongful conduct was treatment-related—malpractice applying the LMMA—or unrelated to treatment—general negligence applying general tort law.[100] Two recent decisions exemplify that inconsistency.[101]

First, in *Billeaudeau*, the Louisiana Supreme Court considered whether negligent credentialing[102] claims fell under general tort law or medical malpractice.[103] This caused extensive conflict in the judiciary,

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95. Dekaris & Mims, *supra* note 88; Oliver v. Magnolia Clinic, 85 So. 3d 39, 45 (La. 2012).

96. *See Oliver*, 85 So. 3d at 46.

97. "The effects of inflation and economic changes touch on the adequacy of the cap's amount, rather than its constitutionality. . . . Once satisfied that legislation does not infringe upon constitutional rights, any other perceived infirmity is to be addressed by the legislature." *Id.* (citing New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098, 1098 (La. 2002)).

98. Nickel, *supra* note 90, at 321.

99. The six factors are: (1) whether the wrong is treatment related; (2) whether expert medical evidence is required to determine a breach of care; (3) whether the pertinent act or omission involved assessing the patient's condition; (4) whether the incident occurred within the context of a doctor-patient relationship; (5) whether the injury would have occurred if the patient had not sought treatment; and (6) whether the alleged tort was intentional. *See* Coleman v. Deno, 813 So. 2d 303, 315–16 (La. 2002).

100. Nickel, *supra* note 90, at 321.

101. *See* Billeaudeau v. Opelousas Gen. Hosp. Auth., 218 So. 3d 513 (La. 2016); Thomas v. Reg'l Health Sys. of Acadiana, LLC, 347 So. 3d 595 (La. 2020).

102. Negligent credentialing is a claim alleging that the hospital was negligent by hiring or "credentialing" a doctor that caused the alleged injuries. *Billeaudeau*, 218 So. 3d at 514.

103. *Id.*

evidenced by split decisions at both the appellate court and Louisiana Supreme Court levels because of the judges' and justices' varying applications of the *Coleman* factors.[104] In a 4–3 decision, the Louisiana Supreme Court affirmed the appellate court decision, holding that negligent credentialing fell outside the purview of the LMMA and its liability limitations.[105] Then, in *Thomas v. Regional Health Systems of Acadiana, LLC*, the Court again faced whether negligent credentialing fell within the LMMA but this time held that it did.[106] Once again, the decisions were fractured at every level of the judiciary as to whether this claim constituted malpractice.[107]

Irrespective of the outcome of these two cases, both show a distinct pattern of inconsistency regarding the application of the *Coleman* factors. An incorrect application not only determines the amount recoverable against that QHP—whether the LMMA damages cap applies or not—but it also determines whether prescription may be interrupted as to the claim against that QHP.[108] Further, depending on which jurisdiction the suit is filed within, whether a QHP is liable for malpractice may also determine whether prescription can be interrupted as to any joint tortfeasor claims as well.[109]

E. Louisiana Supreme Court Jurisprudence: The Impetus of the Circuit Split

The newest issue concerning the LMMA is the Act's unique rules and exceptions to the general prescription laws.[110] Louisiana Revised Statutes § 40:1231.8(A)(2)(a) provides:

> The filing of a request for review of a claim shall suspend the running of prescription against all joint and solidary obligors, and all joint tortfeasors, including but not limited to health care

104. *See id.*
105. *Id.* at 527.
106. *See Thomas*, 347 So. 3d 595.
107. *See, e.g.*, *id.*; *Billeaudeau*, 218 So. 3d 513.
108. *See* discussion *infra* Part II.
109. *Compare* Cook v. Rigby, 316 So. 3d 545, 559 (La. Ct. App. 1st Cir. 2020) (applying interruption against a jointly liable product manufacturer), *with* Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238, 1245 (La. Ct. App. 5th Cir. 2018) ("[T]he rule of *Borel* . . . is equally applicable to a plaintiff who subsequently adds a claim not based in medical malpractice."), *and* Kampmann v. Mason, 7 So. 3d 675, 681 (La. Ct. App. 5th Cir. 2009) (refusing to apply interruption of prescription to a jointly liable drug manufacturer).
110. *See* discussion *supra* Part I.B; *see also* discussion *infra* Part II.

> providers, both qualified and not qualified, to the same extent that prescription is suspended against the party or parties that are the subject of the request for review.[111]

This section of the LMMA suspends prescription for all joint tortfeasors while medical malpractice claims await a medical review panel hearing.[112] Before *LeBreton v. Rabito*, plaintiffs intentionally and unfairly gained up to an additional year to file suit in medical malpractice cases.[113] Until that decision, a plaintiff could improperly file suit against a QHP in district court without first filing the claim with the medical review panel.[114] That would effectively interrupt prescription, awarding the plaintiff with an additional year to file suit.[115] To mitigate unfair litigation practices, the Louisiana Supreme Court established in *LeBreton* that the suspension of prescription applied to the exclusion of interruption for QHPs liable under the LMMA.[116]

1. Getting the Ball Rolling: LeBreton v. Rabito

Unlike general tort claims, suits under the LMMA are premature *ab initio* until a medical review panel hears the claim.[117] In *LeBreton*, the Court thus found that allowing these improper interruptions to continue "condone[d] and encourage[d] the technique of unnecessarily prolonging malpractice litigation by a lesser standard."[118] Consequently, the *LeBreton* Court rectified that inequitable benefit by holding that the suspension of prescription under the LMMA is the exclusive means of delaying prescription for medical malpractice claims.[119] So, under *LeBreton*, plaintiffs cannot interrupt prescription against QHPs liable for malpractice.[120] Notably, the Court stipulated that "regard[ing] the non-qualified health care provider and cases not involving medical malpractice, La. Civ. Code art. 3462, the general provision, provides for

111. LA. REV. STAT. § 40:1231.8(A)(2)(a) (2023).
112. *See* LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998).
113. *Id.* at 1231.
114. *Id.* at 1230.
115. *Id.*
116. *Id.* at 1231.
117. *Id.* at 1230–31.
118. *Id.* at 1230.
119. *Id.* at 1231.
120. *See id.*

interruption of prescription."[121] In other words, the Court acknowledged that interruption applies *unless* a QHP is liable for malpractice.[122]

In dissent, Chief Justice Calogero argued plaintiffs can simultaneously rely on suspension and interruption and found the majority's concern over premature filings unwarranted.[123] Citing *Foster v. Breaux*, Chief Justice Calogero stated, "Where there are two permissible interpretations of a prescriptive statute, the courts must adopt the one that favors maintaining rather than barring the action."[124] From that, Chief Justice Calogero argued that harmonizing the two statutes by applying both suspension and interruption against QHPs is "*mandated* by the long-standing jurisprudential rule [found in *Foster*]."[125] Finally, he concluded that curing any alleged loopholes created by the concurrent application of two unambiguous and non-conflicting laws is the legislature's task alone.[126] Thus, Chief Justice Calogero saw no detriment to applying both interruption and suspension of prescription to QHPs.[127]

Nonetheless, the *LeBreton* opinion put a stop to litigious games. To illustrate, suppose Bob underwent surgery to repair a minor orthopedic injury. Unfortunately, Bob's doctor, Doc, performed the surgery on the wrong leg. A little less than a year later, Bob hired Larry Lawyer to sue Doc for medical malpractice. Since Larry only had one week before prescription barred Bob's claim, Larry hurriedly filed suit in a district court of proper jurisdiction and venue despite knowing that the LMMA requires Larry to file for a medical review panel first. Doc immediately filed a dilatory exception raising the objection of prematurity, which the judge granted. Before *LeBreton*, Larry's actions would have afforded Bob an additional year to file suit, as prescription would reset. However, after *LeBreton*, Larry no longer benefits from his intentionally wrongful actions, as his improper filing no longer interrupts prescription.

2. A Step in the Wrong Direction: Borel v. Young

Then, the Louisiana Supreme Court extended *LeBreton* to a QHP that was jointly liable to the original medical malpractice defendant.[128] In *Borel v. Young*, the survivors of a woman who died from surgery complications

121. *Id.* at 1231 n.7.
122. *See id.*
123. *Id.* at 1233 (Calogero, C.J., dissenting).
124. *Id.* (citing Foster v. Breaux, 270 So. 2d 526 (La. 1972)).
125. *Id.*
126. *Id.*
127. *Id.* at 1232–33 (Calogero, C.J., dissenting).
128. *See* Borel v. Young, 989 So. 2d 42 (La. 2007).

filed for a medical review panel hearing for alleged malpractice.[129] After the medical review panel found no breach in the standard of care by any of the parties, the plaintiffs filed a malpractice suit against the hospital alone.[130]

After two years of ongoing litigation, the plaintiffs discovered, for the first time, that the hospital's expert witness planned to testify that the two QHPs who treated the decedent fell below the applicable standard of care.[131] Before that time, the plaintiffs had no reason to believe that there were viable negligence claims against these doctors.[132] Plaintiffs then amended their petition to add the two QHPs as defendants for malpractice, arguing that the initial, timely filed suit interrupted prescription.[133]

After granting certiorari, the Louisiana Supreme Court extended *LeBreton* to the facts of *Borel*.[134] The Court held that "the more specific provisions of the Medical Malpractice Act regarding suspension of prescription against joint tortfeasors appl[ied] to the exclusion of the general code article on interruption of prescription against joint tortfeasors."[135] So, even though the plaintiffs amended to add the doctors as soon as they discovered the doctors may have been liable, these claims were barred; meanwhile, the hospital's expert could still deflect blame on the doctors.[136] Thus, when a QHP is sued for malpractice, interruption of prescription is excluded regardless of if the QHP is the original defendant or is jointly liable and subsequently joined.[137]

Reiterating his disagreements in *LeBreton*, Chief Justice Calogero again dissented.[138] He found that the majority's holding significantly extended the *LeBreton* rationale and argued that the *LeBreton* decision should not be extended beyond the facts of that case.[139] Chief Justice Calogero favored a ruling congruent with the general code articles that prescription is interrupted against all by the original filing.[140] Under his belief, interruption of prescription would be excluded for the initial

129. *Id.* at 54.
130. *Id.*
131. *Id.*
132. *Id.* at 54–55.
133. *Id.* at 55.
134. *Id.* at 69.
135. *Id.*
136. *See id.*
137. *See id.*
138. *Id.* at 70 (Calogero, C.J., dissenting).
139. *Id.*
140. *Id.*

defendant *at most* and have *no effect* on any joint tortfeasors, even other QHPs.[141]

Expanding on the earlier illustration, assume Bob's surgery is not only on the wrong leg, but the anesthesia fails, keeping him awake the entire time. A few years after the incident, during the litigation, Doc reveals—for the first time—that this anesthesia complication resulted from another doctor's, Fred's, negligence. On the advice of counsel, Doc avoids naming Fred until prescription ran for two reasons. First, Doc and Fred are coworkers, and Doc knows that Fred would do the same for him. Second, Doc's lawyer believes blaming an "empty chair" is easier than blaming a fellow litigant. Upon discovering Fred's potential liability, Bob immediately amends his petition to join Fred, asserting that Fred's identity as a joint tortfeasor interrupted prescription. In response, Fred files a peremptory exception raising the objection of prescription because he is a QHP against whom prescription cannot interrupt. Unfortunately for Bob, *Borel* clarifies that the interruption-of-prescription exclusion applies to all QHPs.[142] Thus, Bob's action against Fred is barred by prescription, even though he discovered that claim only after it prescribed.

3. Continuing the Downward Spiral: Warren v. Louisiana Medical Mutual Insurance Co.

Once again, the Court extended the benefits afforded to QHPs by holding that relation back was inapplicable to claims under the LMMA.[143] In *Warren v. Louisiana Medical Mutual Insurance Co.*, a widow and daughter filed wrongful death and survival actions, alleging that the decedent's death resulted from medical malpractice.[144] Following the medical review panel's decision, the plaintiffs timely filed suit.[145] However, two years after the initial filing, the plaintiffs amended the petition to add the decedent's other daughter as a plaintiff.[146] Both the district and appellate courts denied the defendant's exception of prescription, finding that the claim related back to the initial filing.[147]

The Louisiana Supreme Court initially affirmed that the second daughter's claim was not prescribed because it related back to the filing of

141. *See generally id.*
142. *Id.* at 69.
143. *See* Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186, 208 (La. 2008).
144. *Id.* at 203.
145. *Id.*
146. *Id.*
147. *Id.*

the original petition.[148] But on rehearing, the Court reversed its own judgment.[149] Citing *Borel* and *LeBreton*, the majority held that relation back—just like interruption of prescription—cannot apply to QHPs liable for medical malpractice under the LMMA.[150]

Meanwhile, Chief Justice Calogero, Justice Johnson, and Justice Weimer disagreed.[151] These justices argued that the claim should relate back because it is as if the amended claim had been filed with the original.[152] Justices Johnson and Weimar believed that the general codal provisions should prevail when there is no conflict.[153] Chief Justice Calogero essentially agreed: he believed that *LeBreton* was fact specific and that the LMMA provisions should be read *in pari materia* with the general tort provisions.[154]

Even Justice Knoll, who concurred, expressed strong feelings of hesitation.[155] Justice Knoll found "displeasure [in] the broadening of the *LeBreton* holding, which she herself had authored."[156] She found that both *Borel* and *Warren* extended her *LeBreton* opinion too far because in "[n]either . . . case did the plaintiffs seek simultaneous application of the interruption and suspension provisions, [sic] and the holding in *LeBreton* does not support the conclusion reached in [*Warren*]."[157] Unfortunately, Justice Knoll disagreed with the plurality's reasoning but agreed with the outcome, as she believed peremption barred the claim.[158]

Returning to Bob, assume that Bob died from his surgery. Bob's wife and one of his two sons filed wrongful death and survival actions alleging malpractice, and though the other son, Jimmy, did not join in the initial filing, Doc knew Jimmy existed. A few years into the litigation, Jimmy changed his mind and wanted to join the lawsuit. Although Jimmy satisfies every element of relation back, the *Warren* opinion provides QHPs with

148. *Id.* at 194.
149. *Id.* at 208.
150. *Id.* at 205–08.
151. *See id.* at 208. In the initial hearing of this case, Chief Justice Calogero wrote the majority opinion, and Justice Weimer authored a concurrence. *Id.* at 187, 196. These became their written reasons for dissent after the adverse outcome upon rehearing. *Id.* at 218 (Weimer, J., dissenting).
152. *Id.* at 209 (Johnson, J., dissenting).
153. *Id.* at 194; *id.* at 209 (Johnson, J., dissenting).
154. *Id.* at 194.
155. *Id.* at 210 (Knoll, J., concurring).
156. Daniel A. Kramer, *An Uncertain Prescription—Medical Malpractice Actions in Louisiana*, 72 LA. L. REV. 487, 504 (2012); *see Warren*, 21 So. 3d at 218 (Knoll, J., concurring).
157. *Warren*, 21 So. 3d at 218 (Knoll, J., concurring).
158. *Id.* at 211.

yet another exception to the general laws and prevents his claim from relating back.

4. A Calculated Side-Step: Milbert v. Answering Bureau

Most recently in *Milbert v. Answering Bureau, Inc.*, the Court could have confirmed that its *LeBreton* and *Borel* opinions apply only to QHPs but tactfully avoided doing so.[159] Only days after the *Milbert* plaintiff was discharged from the hospital with a broken ankle, he began experiencing immense pain in his leg, which led him to return to the hospital.[160] After waiting six hours, the plaintiff was finally brought into surgery where the doctor performed numerous debridement[161] procedures to combat extensive tissue damage to the lower leg.[162] Soon after, the plaintiff timely filed for a medical review panel for alleged malpractice against the doctors and the hospital—all of which were QHPs.[163] While the medical review panel suspended prescription, the plaintiff amended and supplemented his petition to add a negligence claim against the hospital's phone answering service—a non-QHP.[164]

The Louisiana Supreme Court held that that the suspension of prescription under Louisiana Revised Statutes § 40:1299.47(A)(2)(a)[165] extended to all joint obligors, even non-medical providers.[166] The Court found its ruling paralleled the "clear and unambiguous" legislative intent as well as the *LeBreton* and *Borel* decisions.[167] Notably, the claim against the joint tortfeasor was not medical malpractice.[168] Rather than addressing interruption, the Court side-stepped the issue since prescription remained suspended by the medical review panel.[169] Thus, filing for a medical review panel suspends prescription for both QHPs and any joint tortfeasors

159. Milbert v. Answering Bureau, Inc., 120 So. 3d 678, 680 (La. 2013).
160. *Id.*
161. "Debridement is the removal of dead (necrotic) or infected skin tissue to help a wound heal." Kristen Nunez, *What is Wound Debridement and When Is It Necessary?*, HEALTHLINE (Feb. 13, 2019), https://www.healthline.com/health/debridement [https://perma.cc/AES9-KB64].
162. *Milbert*, 120 So. 3d at 680.
163. *Id.* at 680–81.
164. *Id.* at 681.
165. This is now LA. REV. STAT. § 40:1231.8(A)(2)(a) (2023).
166. *Milbert*, 120 So. 3d at 684–85.
167. *Id.* at 684; *id.* at 686–87.
168. *Id.* at 689–90.
169. *Id.* at 686.

of QHPs, but the interruption of prescription for non-QHP joint tortfeasors remains unaddressed by the Court.[170]

Like the *Borel* illustration, assume that Doc once again divulges the identity of a joint tortfeasor via interrogatory after the one-year prescriptive period expired but while Bob's claim against Doc awaited a medical review panel decision. This time, Doc identifies Good Gas, LLC, the anesthesia manufacturer, claiming its product was to blame for Bob's consciousness throughout the surgery. Bob immediately supplements his petition to assert a product liability claim against Good Gas. Good Gas then argues that the claim is barred by prescription. According to the Court's *Milbert* opinion, prescription is suspended for *every* claim against *every* joint tortfeasor while awaiting a medical review panel hearing, so Bob's claim against Good Gas is not barred by prescription.

II. A CULMINATION OF CONFUSING JURISPRUDENCE

In its three opinions, the Louisiana Supreme Court never faced—thus, never analyzed—whether interruption of prescription still applied to jointly liable, non-QHP tortfeasors.[171] Though the *Milbert* defendant was liable under general tort law, the Court did not consider interruption because suspension remained in effect when the third party was added.[172] Arguably, *Borel*'s language applied to all joint tortfeasors because of its broad language, but that case only concerned adding an additional QHP for medical malpractice.[173] While *LeBreton* qualified that the interruption-of-prescription exclusion applied only to malpractice suits under the LMMA and Louisiana Civil Code article 3462 otherwise provides for interruption, *Borel* and *Milbert* did not address that issue.[174] Without explicit instruction and following the overly broad language in *Borel*, Louisiana courts of appeal have differed in their application of interrupting prescription against non-QHP joint tortfeasors, causing a circuit split.[175]

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170. *See* LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998); Borel v. Young, 989 So. 2d 42 (La. 2007); *Milbert*, 120 So. 3d 678.

171. *See LeBreton*, 714 So. 2d 1226; *Borel*, 989 So. 2d 42; *Milbert*, 120 So. 3d 678.

172. *See Milbert*, 120 So. 3d at 686.

173. *Borel*, 989 So. 2d 42.

174. *See LeBreton*, 714 So. 2d 1226; *Borel*, 989 So. 2d 42; *Milbert*, 120 So. 3d 678.

175. *Compare* Cook v. Rigby, 316 So. 3d 545 (La. Ct. App. 1st Cir. 2020), *with* Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018), *and* Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

A. Creation of the Issue: Kampmann v. Mason

The Louisiana Fifth Circuit Court of Appeal became the first appellate court to rule on this issue in *Kampmann v. Mason*.[176] In *Kampmann*, the plaintiff was prescribed various medications to combat mental health issues.[177] The plaintiff's doctor apparently failed to inform the plaintiff that priapism[178] was a possible side-effect of one of the prescribed medications.[179] Consequently, the plaintiff filed a medical malpractice suit after he experienced priapism, which resulted in a thirteen-day hospitalization and four emergency surgeries.[180] The plaintiff then timely amended and supplemented his petition to add a claim against the presumed manufacturer of that medication, asserting joint liability with the defendant-doctor.[181] After four years of litigation, that manufacturer moved for, and was granted, summary judgment because it was not the manufacturer that made the medication.[182] The plaintiff then requested to amend and supplement his petition to join the proper manufacturer, asserting that the timely suit of the original joint tortfeasor—the doctor—interrupted prescription.[183] That new manufacturer filed a peremptory exception raising the objection of prescription, which the trial court granted.[184]

On appeal, the Fifth Circuit affirmed the trial court's decision that the claim prescribed.[185] Citing *Borel*, the court held that the suspension of prescription under the LMMA applied to the exclusion of interruption for all joint tortfeasors.[186] So, the plaintiff could not rely on the timely filing against the doctor for malpractice for interruption of prescription against the manufacturer.[187] Thus, the Fifth Circuit extended *LeBreton* and *Borel*,

176. *Kampmann*, 7 So. 3d 675.
177. *Id.* at 676.
178. "Priapism is a prolonged erection of the penis. The full or partial erection continues hours beyond or [is not] caused by sexual stimulation." Mayo Clinic Staff, *Priapism*, MAYO CLINIC (Aug. 31, 2021), https://www.mayoclinic.org/diseases-conditions/priapism/symptoms-causes/syc-20352005 [https://perma.cc/VWQ5-3YNQ].
179. *See Kampmann*, 7 So. 3d at 677.
180. *Id.*
181. *Id.*
182. *Id.* at 678.
183. *Id.*
184. *Id.* at 678–79.
185. *Id.* at 682.
186. *Id.* at 681.
187. *See id.*

finding interruption of prescription was excluded for any tortfeasors jointly liable with QHPs.[188]

Circling back to the Bob example, the luck he had under *Milbert* was short-lived because assume now his surgery was performed in Metairie—within the Fifth Circuit's jurisdiction. This time, Doc divulges the fault of both Fred and Good Gas years into the litigation—long after the medical review panel decision—but while the suit remained pending in district court. Bob amends and supplements his petition to assert claims against these newly discovered litigants, and both litigants file peremptory exceptions raising objection of prescription. The trial court, sympathetic to poor Bob, denies both exceptions. On appeal, the Fifth Circuit reverses that decision, dismissing both claims. As to Fred, the Fifth Circuit cites *LeBreton* and *Borel*, ruling that interruption of prescription cannot apply to QHPs liable for malpractice. For Good Gas, the court relies on broad language in *Borel*, finding that interruption cannot apply to *any* tortfeasor jointly liable to a QHP.

B. Exacerbation Rather than Reconciliation: Matranga v. Parish Anesthesia of Jefferson, LLC

The Fifth Circuit later faced a similar issue in *Matranga v. Parish Anesthesia of Jefferson, LLC*.[189] In *Matranga*, the plaintiffs filed a medical malpractice claim against the doctor and nurse who allegedly caused their mother's death.[190] After prescription expired, the plaintiffs supplemented their petition to join the hospital, asserting that the timely filing against the original defendants interrupted prescription because the hospital was jointly liable.[191]

The Fifth Circuit again refused to allow the interruption of prescription.[192] The court reiterated its view that Louisiana Revised Statutes § 40:1231.8(A)(2)(a) superseded the general rule of interruption of prescription.[193] Accordingly, the court ruled that § 40:1231.8(A)(2)(a) applies to all joint tortfeasors of QHPs.[194] Analyzing *Milbert*, the court found a statement in dicta as "reveal[ing] a reservation on the part of the Supreme Court to allow a plaintiff to rely upon the benefits of suspension

188. *Id.* at 682.
189. Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018).
190. *Id.* at 1240.
191. *Id.* at 1242.
192. *Id.* at 1246.
193. *Id.* at 1242.
194. *Id.* at 1243.

provided by [the LMMA] and also rely upon the benefits of interruption provided by La. C.C. art. 2324(C) . . . ."[195] The Fifth Circuit found this decision also fell in line with both *Borel* and its own precedent.[196] Thus, the court reinforced its *Kampmann* holding that the interruption-of-prescription exclusion extends to joint tortfeasors liable under general tort liability.[197]

C. A Breath of Fresh Air: Cook v. Rigby[198]

Disagreeing with the Fifth Circuit's interpretation of the law, the First Circuit's *Cook v. Rigby* opinion created a circuit split on the issue.[199] In *Cook*, the defendant-doctor's failure to notice that a retractor bolt fell off a surgical instrument and into the plaintiff's body cavity resulted in that bolt floating freely inside the plaintiff until its discovery more than six months after surgery.[200] The plaintiff then timely filed suit against the doctor that performed the surgery.[201] Later, the plaintiff amended the petition to join both an additional doctor for malpractice under the LMMA and the manufacturer for product liability. In response, both joined defendants filed peremptory exceptions raising the objection of prescription.[202] The trial court, under the persuasive authority of *Matranga*, sustained both exceptions for prescription.[203]

On appeal, the Louisiana First Circuit Court of Appeal reversed the trial court's decision concerning the product manufacturer while acknowledging that its decision created a circuit split.[204] The First Circuit agreed with *Milbert* that suspension of prescription under Louisiana

195. *Id.* at 1244 (citing Milbert v. Answering Bureau, Inc., 120 So. 3d 678, 685 (La. 2013)) (stating "The Milberts do not seek the benefits of both the suspension of prescription provisions of the MMA and the interruption of prescription under the codal articles.").

196. *Id.* at 1245 (citing Borel v. Young, 989 So. 2d 42 (La. 2007)).

197. *Id.* (citing Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009)).

198. On appeal, the two claims were bifurcated but used the same name. The appeal against the product manufacturer—which is the one most pertinent to this Comment—is *Cook v. Rigby*, 316 So. 3d 545 (La. Ct. App. 1st Cir. 2020), while the appeal against the QHP is *Cook v. Rigby*, 316 So. 3d 482 (La. Ct. App. 1st Cir. 2020).

199. *Cook*, 316 So. 3d 545.

200. *Id.* at 548.

201. *Id.* at 549.

202. *Id.*

203. *Id.*

204. *Id.* at 557.

Revised Statutes § 40:1231.8(A)(2)(a) applied to all joint tortfeasors but noted that the LMMA was "special legislation in derogation of the rights of tort victims."[205] Analyzing *LeBreton*, *Borel*, *Milbert*, *Kampmann*, and *Matranga*, the First Circuit noted that in *LeBreton*, the Louisiana Supreme Court held that "*medical malpractice claims* were governed by the specific provisions of the LMMA regarding the suspension of prescription, and not the general code articles on the interruption of prescription."[206] The court emphasized that "the supreme court noted that '*[a]s regards the non-qualified health care provider and cases not involving medical malpractice, [La. C.C.J] art. 3462, the general provision, provides for interruption of prescription*.'"[207]

The First Circuit refused to extend *Borel* to claims against non-QHPs or joint tortfeasors not liable for malpractice claims.[208] The court held that "[i]t defies logic and common sense to apply *Borel* to a situation involving a subsequently added non-medical malpractice claim against a non-health care provider who is subject to the liberative prescription period contained in La. C.C. 3492."[209] It also noted that the Louisiana Supreme Court "has *never* expanded the holdings of either *LeBreton* or *Borel*" to non-QHPs.[210] Lastly, the court found that *Milbert* did not expand prior holdings to non-QHPs; instead, it simply followed prior precedent, applying suspension to all jointly liable defendants without ruling on interruption.[211] Therefore, under the First Circuit precedent, the interruption-of-prescription exclusion applies only to QHPs liable for malpractice.[212] So, Louisiana courts are now faced with a circuit split as to the applicability of the interruption-of-prescription exclusion for non-QHPs.[213]

Nonetheless, the First Circuit agreed in finding that interruption of prescription was excluded for QHPs.[214] However, the court was reluctant in so ruling, identifying that it was "constrained to agree that the claims

205. *Id.* at 551 (quoting Spraldin v. Acadia-St. Landry Med. Found., 758 So. 2d 116, 120 (La. 2000)).

206. *Id.* at 553 (citing LeBreton v. Rabito, 714 So. 2d 1226, 1231 (La. 1998)).

207. *Id.* at 554 (alterations in original) (quoting *LeBreton*, 714 So. 2d at 1231 n.7).

208. *Id.* at 557.

209. *Id.* at 558.

210. *Id.* (emphasis added).

211. *Id.* at 559 (citing Milbert v. Answering Bureau, Inc., 120 So. 3d 678, 685 (La. 2013)).

212. *Id.* at 560.

213. *See id.*; Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018); Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

214. *See* Cook v. Rigby, 316 So. 3d 482 (La. Ct. App. 1st Cir. 2020).

against these defendants are prescribed" under the binding jurisprudence of *LeBreton* and *Warren*.[215] The Louisiana Supreme Court denied writ for these preliminary motions from *Cook v. Rigby*.[216] Notably, Justices Crichton and Griffin would have granted writ for the product manufacturer decision.[217] Justice Crichton noted that he would have granted writ specifically to decide whether both suspension and interruption apply to non-QHP defendants.[218] So, it is possible that the Court will soon hear this issue.

Assuming the same facts as those under the *Kampmann* illustration,[219] Bob pleads the court for sympathy, begging for a chance to sue all his wrongdoers so that he may recover what he is owed. Restrained by the only jurisprudence on the issue, the trial court grants both Fred and Good Gas's peremptory exceptions. On appeal, the First Circuit reluctantly affirms the dismissal of Bob's claim against Fred due to binding jurisprudence of *LeBreton* and *Borel*. Fortunately, the First Circuit overturned the trial court as to the product manufacturer, finding the interruption-of-prescription exclusion applied to QHPs alone. Therefore, the First Circuit would likely hold that the timely suit of Doc interrupted prescription against Good Gas.

III. THE PROBLEMS PRESENTED BY EXCLUDING INTERRUPTION

Currently, Louisiana courts uniformly recognize the interruption of prescription against joint tortfeasors so long as no defendant is a QHP liable for medical malpractice.[220] Under *LeBreton*, if all joint tortfeasors are QHPs, courts uniformly apply suspension of prescription—only while the medical review panel is pending—to the exclusion of interruption for those defendants.[221] In all circumstances, filing suit against a QHP or any joint tortfeasor cannot interrupt, or even suspend, prescription against QHPs.[222] However, if one defendant is a QHP liable for medical

215. *Id.* at 487–88 (citing LeBreton v. Rabito, 714 So. 2d 1226, 1231 (La. 1998); Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186 (La. 2008)).

216. *See* Cook v. Rigby, 312 So. 3d 559 (La. 2021).

217. *Id.* at 559.

218. *Id.*

219. Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

220. *See, e.g.*, Forbes v. Superior Elec. Prods. Corp., 567 So. 2d 594 (La. 1990).

221. *See, e.g.*, LeBreton v. Rabito, 714 So. 2d 1226, 1231 (La. 1998); Cook v. Rigby, 316 So. 3d 482 (La. Ct. App. 1st Cir. 2020); Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018); *Kampmann*, 7 So. 3d 675.

222. *See LeBreton*, 714 So. 2d 1226.

malpractice and another is a non-QHP, the applicability of interrupting prescription as to that non-QHP depends on which circuit is hearing the case.[223]

In the First Circuit, the interruption of prescription will apply to joint tortfeasors—according to codal authority—except for QHPs, which are subject to the narrow exceptions of the LMMA.[224] In the Fifth Circuit, plaintiffs suing a QHP for malpractice may not interrupt prescription against any joint tortfeasors.[225] In resolving this circuit split, the Louisiana Supreme Court should consider: (1) whether allowing interruption of prescription against non-QHPs causes any inequitable benefits; (2) whether excluding interruption of prescription against non-QHPs is constitutional; and (3) whether excluding interruption of prescription against non-QHPs incentivizes litigious gamesmanship.

A. Suspension and Interruption are Independent and Distinguishable From One Another

Both suspension and interruption should apply for non-QHP defendants.[226] As Chief Justice Calogero acknowledged, long-standing jurisprudence requires that courts adopt the interpretation that favors maintaining rather than barring the action.[227] The legislative purpose behind suspension for the duration of the medical review panel was to protect claimants from losing a legal claim during the waiting period since litigants cannot file suit until the panel renders a decision.[228] The Court rationalized the exclusion against QHPs as preventing inequitable benefits that plaintiffs deceptively incurred by purposefully violating procedural requirements.[229] However, that same rationale is deficient when applied to non-QHPs since they do not require any preliminary measures like a medical review panel hearing. Nonetheless, suspension is still necessary for all tortfeasors jointly liable with QHPs liable for malpractice because of the delay in filing suit against those QHPs caused by the required medical review panel hearing.[230] While excluding the interruption of

223. *Compare* Cook v. Rigby, 316 So. 3d 545 (La. Ct. App. 1st Cir. 2020), *with Matranga*, 254 So. 3d 1238, *and Kampmann*, 7 So. 3d 675.

224. *Cook*, 316 So. 3d 545.

225. *See Matranga*, 254 So. 3d 1238; *Kampmann*, 7 So. 3d 675.

226. *LeBreton*, 714 So. 2d at 1232 (Calogero, C.J, dissenting).

227. *Id.* at 1233 (Calogero, C.J, dissenting) (citing Foster v. Breaux, 270 So. 2d 526 (La. 1972)).

228. *See LeBreton*, 714 So. 2d at 1230.

229. *See id.*

230. *See generally* LA. REV. STAT. § 40:1231.8 (2023).

prescription has a justifiable need—as expressed in *LeBreton*[231]—the same cannot be true for non-QHPs. Instead, allowing both interruption and suspension for non-QHPs provides no inequitable benefits and furthers judicial fairness.

B. Maintaining the Status Quo: How Extending the Exclusion Would Overturn Current Jurisprudence

Case law has expanded the LMMA and its interruption-of-prescription exclusion far beyond its intended application.[232] Allowing interruption of prescription for non-QHPs does not create any inequitable benefits.[233] Each defendant in litigation is liable for a separate legal theory, so the laws applicable to one do not automatically bind the other to an identical application.[234] In fact, the Louisiana Supreme Court recognized this very principle in *Billeaudeau*: "this court has, without exception, emphasized that the LMMA and its limitations on tort liability for a qualified health care provider apply *strictly* to claims 'arising from medical malpractice'"[235] and also that "any other liability of the health care provider is governed by general tort law."[236]

Despite the LMMA limiting the recoverable compensation for general damages from a QHP to $100,000, a plaintiff is entitled to unlimited damages against any non-QHP and any QHP liable for anything other than malpractice.[237] This distinction proves that courts already interpreted the LMMA procedural rules strictly to only malpractice actions against those qualifying parties, so extending this interruption-of-prescription exception to non-QHPs is not only unwarranted but also against binding jurisprudence.[238] Just as the courts do not extend LMMA benefits to QHPs liable for non-medical malpractice, it is improper to extend the

231. *See LeBreton*, 714 So. 2d 1226.

232. *See* Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018); Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

233. *See generally* Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186 (La. 2008) (Knoll, J., concurring); *see LeBreton*, 714 So. 2d 1226.

234. *See, e.g.*, Cook v. Rigby, 316 So. 3d 482 (La. Ct. App. 1st Cir. 2020).

235. Billeaudeau v. Opelousas Gen. Hosp. Auth., 218 So. 3d 513, 520 (La. 2016) (emphasis added).

236. *Id.* (citing Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson, 888 So. 2d 782, 786 (La. 2004)).

237. *Billeaudeau*, 218 So. 3d at 520 (holding "any other liability of the health care provider is governed by general tort law.").

238. *Id.*

interruption-of-prescription exclusion to any non-QHP joint tortfeasors.[239] Restricting damages to $100,000 against a non-QHP would undoubtedly be an unjust reduction of recovery; thus, extending other LMMA privileges to non-QHP defendants would also unjustly affect a plaintiff's recovery.[240]

The generally applicable laws prevent any unfair benefits for plaintiffs.[241] When tortfeasors are jointly liable, a plaintiff must join or cumulate all actions against the joint tortfeasors into one suit; otherwise, *res judicata* prevents that plaintiff from later raising the claims not brought therein.[242] When one of multiple defendants is a QHP liable for malpractice, a plaintiff—impatiently waiting for the medical review panel's decision—may file suit against a non-QHP defendant; however, a plaintiff likely gains nothing by doing so. [243] The two possible outcomes are either the court suspends proceedings until the medical review panel decision or the plaintiff continues against the non-QHP defendant without joining the QHP.[244]

The plaintiff's first option is directly analogous to the effect that the LMMA has on all joint tortfeasors: the suspension of prescription until the medical review panel's decision.[245] Proceedings involving a QHP for malpractice cannot advance in a court of law before the medical review panel decision.[246] Therefore, filing suit against a joint tortfeasor before that panel decision will, at best, suspend proceedings until the panel decision, creating the same effect as the medical review panel itself.[247]

Alternatively, impatient plaintiffs could argue that the QHPs are not necessary parties and proceed only against the joint tortfeasor(s) that are not governed by the LMMA rather than waiting for the medical review panel decision, but significant consequences also accompany this decision. Under the comparative fault regime, plaintiffs have the right to choose who to name as a party in the litigation; however, plaintiffs cannot bring later action against any party not listed that is or could be liable for those same injuries.[248] As mentioned, the injuries caused by a doctor and joint tortfeasors in cases like *Cook*, *Matranga*, or *Kampmann* occur within the

239. *Id.*
240. *Id.*
241. *See, e.g.*, Cook v. Rigby, 316 So. 3d 482 (La. Ct. App. 1st Cir. 2020).
242. *Res Judicata*, *supra* note 29.
243. *See generally* LA. REV. STAT. § 40:1231.8(A)(2)(a) (2023).
244. *Id.*
245. *Id.*
246. *Id.*
247. *See Res Judicata*, *supra* note 29.
248. *See generally* TORT LAW, *supra* note 1, § 19.03.

same transaction or occurrence as another, so the plaintiffs must bring all claims against all parties in the same litigation or the plaintiffs will lose them.[249] Should a plaintiff choose to sue the non-QHPs alone, that plaintiff would permanently lose the right to recover any damages attributable to the QHP, effectively limiting that plaintiff's potential compensation.[250] As a result, plaintiffs are left with merely two options: wait for the medical review panel decision and optimize their chances at full recovery or avoid the wait but recover only those damages caused by the non-QHPs.

Moreover, these illustrations illuminate the ineptitude of excluding interruption for non-QHPs. As mentioned, filing suit against non-QHPs before filing for a panel hearing does not interrupt prescription of a malpractice claim against a QHP.[251] Likewise, plaintiffs who originally file suit against non-QHPs alone but later change their mind may voluntarily dismiss those claims and refile upon the conclusion of the medical review panel hearing; however, voluntary dismissals deem interruption never to have occurred.[252] In other words, allowing interruption of prescription against non-QHPs neither harms the QHPs nor the non-QHPs themselves. Additionally, the code article governing joint liability supports allowing the interruption of prescription against non-QHP joint tortfeasors,[253] which is further reinforced by the jurisprudence acknowledging that QHPs are owed LMMA benefits only when they are liable for malpractice.[254] Therefore, there are no unfair advantages accompanied with allowing interruption of prescription for non-QHPs. Furthermore, disallowing interruption of prescription against non-QHPs might even violate the Equal Protection Clause.[255]

C. A Side of Equality: Ensuring Constitutionality Under the Equal Protection Clause

A fundamental tenet of the United States Constitution's Equal Protection Clause is that all citizens similarly situated should be treated alike.[256] When state legislation or other state action is challenged under

249. LA. CODE CIV. PROC. art. 425(A) (2023).
250. *See generally* TORT LAW, *supra* note 1, § 19.03.
251. *See* discussion *supra* Part I.E.
252. LA. CIV. CODE art. 3463 (2023).
253. *Id.* art. 2324(C).
254. Billeaudeau v. Opelousas Gen. Hosp. Auth., 218 So. 3d 513, 520 (La. 2016).
255. *See* discussion *infra* Part III.C.
256. *See generally* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985) (providing general background and applicability of the Equal Protection Clause).

equal protection, it is generally presumed valid so long as the classification drawn by the statute is rationally related to a legitimate government interest.[257] The Equal Protection Clause gives states wide latitude when the legislation at issue is social or economic but considerably constrains that latitude when a statute classifies by race, alienage, or national origin.[258] The LMMA is merely an economic issue, which is a state issue according to the United States Supreme Court.[259]

Throughout the LMMA's nearly fifty-year life, litigants have continually raised Equal Protection Clause concerns regarding the Act's general-damages cap.[260] Regardless, the Louisiana Supreme Court has consistently upheld its constitutionality.[261] Since the LMMA limits a plaintiff's monetary recovery, the state must articulate a rational basis for the discriminatory treatment reasonably related to the interest that the government seeks to advance.[262] In *Oliver v. Magnolia Clinic*, the Court acknowledged that the general-damages cap is discriminatory since those with worse injuries are not fully compensated whereas those with injuries equal to or less than $500,000 are fully compensated.[263] However, the Court again reaffirmed the constitutionality of this discrimination, finding that the cap furthered the legitimate state interest of providing affordable health care to its residents.[264]

Nonetheless, that discrimination is only constitutional when QHPs are sued for medical malpractice.[265] Extending the *LeBreton* and *Borel* rationale to non-QHP joint tortfeasors violates the Equal Protection Clause. It divests plaintiffs of the otherwise applicable benefits of interrupting prescription with the sole justification being that the non-QHP is now jointly liable with a QHP subject to the LMMA protections.[266] In other words, a plaintiff otherwise entitled to interruption of prescription in

257. *Id.* at 433.

258. *Id.* at 440.

259. Fein v. Permanente Med. Grp., 474 U.S. 892 (1985) (dismissing the writ for constitutionality of the medical malpractice damages cap for "want of a substantial federal question").

260. *See, e.g.*, Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012).

261. *Id.* at 50 (citing Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992)).

262. *Id.* at 44.

263. *Id.* at 45.

264. *Id.*

265. *See generally Oliver*, 85 So. 3d 39.

266. *See generally* Cook v. Rigby, 316 So. 3d 545 (La. Ct. App. 1st Cir. 2020) (citing LeBreton v. Rabito, 714 So. 2d 1226, 1231 (La. 1998); Borel v. Young, 989 So. 2d 42 (La. 2007)) (holding that the interruption of prescription exclusion for QHPs liable under the LMMA does not extend past the reach of the LMMA).

every circumstance would now be deprived of that right solely because a defendant is jointly liable with a QHP entitled to LMMA protections.[267] The same defendant liable under the same legal theory for the same injury would be treated differently without any justification and without furthering any identified legitimate government interests, violating the Equal Protection Clause.[268]

Yet, that is exactly what the Fifth Circuit's line of jurisprudence created.[269] Without justification, the Fifth Circuit took what was already seen by several Louisiana Supreme Court justices as an over-reaching rule and extended it even further.[270] In doing so, the Fifth Circuit relied only on the Supreme Court's broad language in *Borel* without any further justification or any mention of governmental interests furthered.[271] Not only did the Fifth Circuit fail to provide additional reasoning behind the decision to extend that narrow exclusion, but it also failed to even acknowledge the inequity created by that extension; instead, the court's sole justification was that one of the other joint tortfeasors was a QHP covered by *LeBreton* and *Borel*.[272]

Although the LMMA's entire purpose is treating QHPs differently than anyone else entirely because of who they are, the legitimate state interest of affordable health care for its residents justifies that unequal treatment; however, there is no identifiable state interest furthered by inconsistently applying the laws of prescription against non-QHPs.[273] The LMMA provides QHPs with special privileges.[274] Those privileges are constrained to suits for malpractice and apply only to health care providers that comply with the LMMA's qualification standards.[275] One such privilege of that Act under *LeBreton* and *Borel* is the exclusion from the

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267. *Compare Cook*, 316 So. 3d 545, *with* Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018), *and* Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

268. *See generally* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985); *Oliver*, 85 So. 3d at 44.

269. *See Matranga*, 254 So. 3d 1238; *Kampmann*, 7 So. 3d 675.

270. *See Kampmann*, 7 So. 3d at 681.

271. *Id.*

272. *See Matranga*, 254 So. 3d 1238; *Kampmann*, 7 So. 3d 675.

273. *Oliver*, 85 So. 3d at 45 (upholding the constitutionality of general damages cap).

274. *See* LA. REV. STAT. § 40:1231 (2023); LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998); Borel v. Young, 989 So. 2d 42 (La. 2007); Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186 (La. 2008); Milbert v. Answering Bureau, Inc., 120 So. 3d 678 (La. 2013).

275. *See LeBreton*, 714 So. 2d 1226.

general rule of interruption of prescription.[276] However, not even QHPs receive that benefit, or any other benefits within the LMMA, when they are not sued for medical malpractice.[277] Thus, depriving plaintiffs of their right to interrupt prescription does not further any identified or identifiable legitimate government purpose and violates the Equal Protection Clause.[278]

D. Lips are Sealed: How Allowing this Exclusion Incentivizes Silence and Litigious Gamesmanship

Finally, extending the interruption-of-prescription exclusion to all joint obligors will incentivize silence and litigious gamesmanship. In addition to all the protections already awarded to QHPs, extending the interruption-of-prescription exclusion would incentivize defendants to withhold the identity of all joint tortfeasors until prescription runs.[279] In a tight-knit community like the practice of medicine, staying silent about another's joint liability serves two purposes. First, that colleague may return the favor if the roles ever reversed, and second, casting dispersions at an empty chair is much easier than when a fellow litigant is in that chair rebutting those claims.

Under such a rule, a plaintiff in a malpractice case that learns of a non-QHP-liable party through discovery a year or later into litigation is barred from joining that party.[280] Meanwhile, the defendant in that litigation may deflect all fault for the injuries onto that barred third party, creating unjust reductions of recovery.[281] Under this application, a plaintiff's only solution is the "shotgun approach" naming every potential tortfeasor by joining every person that might be affiliated with the injuries suffered by the plaintiff from the beginning.[282] Naming every potential tortfeasor is not only tedious and likely impossible, but it would also severely adversely

276. *LeBreton*, 714 So. 2d 1226; *Borel*, 989 So. 2d 42.

277. *See* Billeaudeau v. Opelousas Gen. Hosp. Auth., 218 So. 3d 513, 520 (La. 2016).

278. *See generally* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985) (providing general background and applicability of the Equal Protection Clause).

279. Brief for Appellant at 2, Cook v. Rigby, 316 So. 3d 482 (La. Ct. App. 1st Cir. 2020) (No. 19-1475).

280. *See generally* Matranga v. Par. Anesthesia of Jefferson, LLC, 254 So. 3d 1238 (La. Ct. App. 5th Cir. 2018); Kampmann v. Mason, 7 So. 3d 675 (La. Ct. App. 5th Cir. 2009).

281. *See generally* TORT LAW, *supra* note 1, § 19.03.

282. Brief for Appellant, *supra* note 279, at 6.

affect judicial efficiency as many of the now-named defendants are not actually liable for the injury.[283] Moreover, frivolously naming parties can also subject the plaintiff to sanctions and possible dismissal with prejudice, so the shotgun approach is less than ideal.[284] In fact, the inequalities associated with extending this exclusion are reminiscent of those quashed by *LeBreton*. Thus, extending the exclusion of interruption of prescription to non-QHPs creates an inequitable benefit in the defendants' favor and should not be allowed.

IV. A SIMPLE SOLUTION

The Louisiana Supreme Court must grant a writ of certiorari in a future case to clarify its *Borel* opinion.[285] The Court should reiterate its acknowledgements in *Billeaudeau* that the LMMA strictly applies to QHPs liable for medical malpractice alone and any other claim is subject to general tort principles.[286] If QHPs cannot benefit from the LMMA when they are not liable for medical malpractice, there is no justification for allowing non-QHPs to benefit from the interruption-of-prescription exclusion. Also, allowing the interruption of prescription to these joint tortfeasors will not unjustly benefit plaintiffs because that allowance will not alter the exclusion of interruption for QHPs. Instead, it will only ensure equitable treatment of the laws and prevent litigious gamesmanship.

Additionally, should the opportunity arise, when granting a writ of certiorari, the Court should also find the interruption-of-prescription exclusion unconstitutional when applied to non-QHP litigants. Though this becomes unnecessary should the Court hold as recommended in the preceding paragraph, that does not negate the fact that the interruption-of-prescription exclusion violates the Equal Protection Clause. That extension hinders the rights of plaintiffs and applies the law differently to the same litigant liable for the same injury solely because of a joint tortfeasor's identity without any identifiable state purpose.

Additionally, or alternatively, the Louisiana legislature should enact legislation that will protect litigants from litigious gamesmanship and incentivized silence. The interruption-of-prescription exclusion incentivizes defendants to remain silent or deflect their knowledge of joint

283. *Id.* at 13–14.

284. LA. CODE CIV. PROC. art. 864 (2023).

285. *Cook v. Rigby* has not yet been tried on the merits, which presents an opportunity for the Court to grant writ following a verdict. *See* discussion *supra* Part III.C. Nonetheless, *Cook* is merely an example of an opportunity the Court has to grant a writ to clarify this issue.

286. Billeaudeau v. Opelousas Gen. Hosp. Auth., 218 So. 3d 513 (La. 2016).

tortfeasors until prescription runs. After prescription runs, defendants may then assert the joint-tortfeasor fault as an affirmative defense, but the plaintiff would be barred from bringing the claim by prescription. To combat this incentive, the legislature should implement legislation that would prevent defendants from raising these affirmative defenses when they knew or should have known the identity of the prescribed joint tortfeasor before that claim prescribed. Otherwise, judicial efficiency and fairness will suffer as plaintiffs will either use the shotgun approach or will lose valid claims through litigious gamesmanship—defendants concealing third parties.

First, the legislation should require that defendants name all other parties known to have caused plaintiffs' alleged injuries at the outset of litigation. When a plaintiff proves that the defendant knew or reasonably should have known of the party before prescription ran, the rule should prohibit those defendants from using the empty chair defense since plaintiffs are barred by prescription. While this contradicts the general code articles regarding affirmative defenses, so does the decision to digress from the general rules of interrupting prescription. This solution also encourages equity instead of creating yet another disadvantage against plaintiffs bringing malpractice claims. Even if the Court clarifies that *LeBreton* and *Borel* apply to QHPs alone, such legislation will still protect against the incentive of silence against fellow qualified health care providers.[287]

CONCLUSION

As determined above, the LMMA derogates from plaintiffs' general rights and should be strictly construed. Extending the interruption-of-prescription exclusion beyond those LMMA parties is both unjust and contrary to binding jurisprudence. Just as *LeBreton* protected QHP defendants from inequitable benefits, ensuring that plaintiffs can interrupt prescription against non-QHP defendants protects plaintiffs from similar inequities. First, the Louisiana Supreme Court's *LeBreton* and *Borel* opinions ensure that this clarification would not affect QHPs liable for malpractice. Second, allowing interruption does not unfairly prejudice any party in the litigation as all joint tortfeasors are normally subject to the interruption of prescription. Finally, excluding the interruption of prescription for these parties may also violate constitutional rights.

287. For more discussion on QHPs and the *LeBreton* and *Borel* decisions, see Kramer, *supra* note 156, at 504.

The interruption-of-prescription exclusion violates the Equal Protection Clause when applied to non-QHP defendants. Under such an application, identical parties liable under the same legal theory would be treated in two separate ways. Derogations from the generally applicable law in a discriminatory manner such as this must be shown to further a legitimate government interest.[288] There is no legitimate state interest furthered by extending the interruption-of-prescription exclusion to non-QHPs.

Finally, the legislature should alternatively enact legislation that will combat the litigious gamesmanship and incentivize silence accompanied with allowing the interruption-of-prescription exclusion. This exclusion incentivizes silence and litigious gamesmanship by rewarding defendants for withholding the identities of their joint tortfeasors until prescription runs against those joint tortfeasors. Enacting legislation that prevents affirmative defenses when a party knew or should have known the identity of a fellow defendant and withheld it until prescription ran would cure that incentive.

The fundamental principle of litigation is returning parties to the conditions they were before their injuries.[289] The LMMA severely hinders this tenet by capping general damages, prolonging litigation by requiring a medical review panel hearing before filing suit, and excluding the interruption of prescription and relation back against QHPs. Excluding the interruption of prescription against all other tortfeasors only incentivizes deception and further reduces plaintiffs' compensability. Plaintiffs do not volunteer to be permanently injured through another's negligence, yet these restrictions seemingly insinuate just that by punishing unknowing plaintiffs and rewarding deceptive defendants. A negligent actor should not benefit from the provisions of the LMMA only because they were fortunate enough to be jointly liable with a QHP. The LMMA already takes so much away from plaintiffs. It is time to restore a little balance into that relationship.

288. *See generally* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985) (providing general background and applicability of the Equal Protection Clause).

289. LA. CIV. CODE art. 2315 (2023).