I understand that the Senate Judiciary Committee is holding a hearing on S. 79 this Wednesday and would like to submit the following critique in opposition to this legislative proposal. It would be appreciated if you were to share my analysis with the Committee. It should be noted that I am pursuing this initiative on my own and have not been retained by any entity or client. Having practiced in this area for many decades I believe that my perspective may have some merit and should be
given consideration. James L. Levy
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>>> I have been asked to review and comment on S. 79, officially denominated "an act relating to limitations on hospital liens," but which more accurately could be dubbed " an act to benefit trial lawyers at the expense of Vermont's fourteen non-profit, community based hospitals." With this in mind, I would offer the following observations:
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>>> 1. S.79 in its present form is identical to a similar legislative initiative then titled S. 257 which was introduced in the last session sponsored by Senators Pearson, Brock, Clarkson, and Hooker. It was referred to the Senate Judiciary Committee, chaired then and now by Senator Sears, where it fortuitously "died" only to resurface yet again this year. I personally campaigned last year (seemingly all alone, a figurative "voice in the wilderness") against this ill-advised bill, contacting the chief financial officers of all fourteen Vermont hospitals(in most instances leaving lengthy voice messages) and several legislators as well, all in an effort to sound the alarm.
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>>> 2. S.257, and presumably its identical successor S.79, appears to be the brainchild of various members of the Vermont Association for Justice, formerly known as the Vermont Trial Lawyers Association (but by any name the representative group of the Vermont plaintiff lawyers' tort bar). It was vigorously advocated by Attorney David Mickenberg, a respected and highly regarded trial attorney, who circulated to numerous legislators, among other materials, a highly provocative and controversial article, dated February 1,2021, from the New York Times entitled "How Rich Hospitals Profit From Patients in Car Crashes." Not surprisingly, his initiatives received a generally sympathetic response and facilitated sponsorship of S.257.
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>>> 3. There are several significant legal and public interest issues presented by S.79 including the following:
>>> a. The proposed revision requiring hospitals to pay a pro rata share of the legal and administrative expenses incurred by plaintiff's counsel flies in the face of existing established Vermont case law including Guiel v. Allstate Insurance Co.,170 Vt. 464 et seq. (2000), Daniels v. Vermont Center for Crime Victim Services, 173 Vt. 521 et seq. (2001), and In re Butson, 179 Vt.599 et seq. (2006). A seminal lower court decision, Fletcher Allen Health Care v. Michael B. Clapp, decided in 2010 unequivocally holds that " The common fund doctrine has not been extended beyond the insurance arena in Vermont... Moreover,there is no basis for applying the equitable doctrine here because there is a statute [Title 18, Chapter 51] expressly declaring the parties' relative rights with

regard to attorney's fees." It is precisely this longstanding, revered statute which S.79 is designed to gut and consequently impose the onerous Common Fund Doctrine upon the health care industry.
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>>> b.S. 79 also seeks to preclude Vermont hospitals from asserting a lien in any instance where a patient has health insurance, including coverage under Medicare, Medicaid,or a health plan issued by a health insurer. This provision, if it is enacted, will prove to be very costly for non-profit, community based hospitals since the recovery of a patient statement from a third party insurer generally amounts to 100% as opposed to a substantially lesser percentage form a first party source. Most disturbingly, I believe that both The Medicare Providers Manual (Chapter 3, Section 301.2) and The Medicaid Providers' Manual (Section1.2.8) in their original drafts have stipulated that Medicare and Medicaid each are to be considered "payers of last resort,"meaning that they should only be billed in situations where automobile and/or non-automobile liability coverage is not available. In effect, third party insurance resources need to be exhausted before either Medicare or Medicaid can be involved in the payment of claims, a process that saves taxpayers and the health care industry billions of dollars nationwide annually.One would think that this commendable objective, serving the public interest, would be nurtured, preserved, and respected in Vermont as well as in all other forty-nine states.
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>>> c.The proposed 25% limitation to be placed on patient bill recovery is most inequitable and discriminatory. Conceptually, if a 25% cap on hospitals is to be implemented, then in fairness the same limitation should be imposed on the patient's attorney. I do not understand why Vermont's fourteen non-profit community based hospitals should be required to discount substantially their statements, thereby shifting health care costs to ratepayers, self-insured individuals, and taxpayers, while relatively affluent trial lawyers enjoy a windfall at the public's expense.
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>>> 4. In sum, S.79 as proposed constitutes an ill-advised revision to Vermont's long existing hospital lien statute. Premised on false perceptions, it bears no resemblance to the actual realities of hospital debt collection practices in Vermont. Succinctly put, it constitutes, in my opinion, a trial lawyer's relief bill subsidized by the health care community and the public at large.
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>>> Hopefully, this abomination of a legislative proposal will be “killed” in committee and unceremoniously “buried” once and for all.
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>>> Best wishes.
>>> James L. Levy
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