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**Telling Stories About Health Insurance: Using New Films in the
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TELLING STORIES ABOUT HEALTH INSURANCE: USING NEW FILMS IN THE CLASSROOM

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In keeping with the theme of "The Mass Media's Influence on Health Law and Policy," this essay is designed to share my experience using clips from three recent popular films as a method of enhancing coverage and discussion of legal and policy issues surrounding the private health insurance system, and to provide some practical advice for others interested in doing the same. It builds upon a presentation that I gave along with Professors Timothy S. Hall and Ross D. Silverman at the 2004 Health Law Teachers Conference entitled "Health Law, Policy and Media," and was inspired by Professor Paul Bergman's entertaining and informative essay, Teaching Evidence the 'Reel' Way.¹ I am grateful to the Houston Journal of Health Law and Policy for the invitation to contribute to this issue.

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¹ The content and structure of Paul Bergman's *Teaching Evidence the "Reel" Way*, 21 QUINNIPIAC L. REV. 973 (2003), was a major source of inspiration for this article.

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INTRODUCTION

Last year, I wrote an article analyzing the first three popular films to focus on the policies and practices of private health insurance companies: Sidney Lumet's *Critical Care*,² Francis Ford Coppola's *The Rainmaker*,³ and Nick Cassavetes's *John Q.*⁴ These films caught my interest because they were the first to focus on the private health insurance system as a central element of the plot, and because they presented vivid and disturbing images of insurance companies from the perspective of a doctor, a lawyer, and a parent.⁵ Each film also reflects common beliefs about insurance and insurance companies, including the loss of adequate health coverage for workers and their families, the link between lack of coverage and lack of care, the influence of managed care reimbursement arrangements on physicians' decisionmaking, and the lack of adequate legal remedies for consumers.⁶

These stories about health insurance and health care are exciting—they force us “to contemplate our physical and economic vulnerability, even our death.”⁷ Moreover, health law and policy scholars have noted that films and media coverage can play an important role in the development of health care policy because of their potential to inform and educate the public.⁸ Teaching these doctrines, however, can sometimes be dull. While teaching Health Law, I decided to share some of the more memorable scenes with

² *CRITICAL CARE* (Live Film & Mediaworks 1997).

³ *THE RAINMAKER* (Paramount Pictures 1997).

⁴ *JOHN Q.* (New Line Cinema 2002).

⁵ *Critical Care* was generally released to the U.S. market on October 31, 1997, and *The Rainmaker* on November 21, 1997. See The Internet Movie Database, <http://imdb.com> (last visited Aug. 12, 2005). *John Q.* appeared five years later and was generally released to the U.S. market on February 15, 2002. *Id.*

⁶ For legal and policy analysis of the issues raised by the films, see Elizabeth A. Pendo, *Images of Health Insurance in Popular Film: The Dissolving Critique*, 37 J. HEALTH L. 267 (2004).

⁷ Thomas Morawetz, *Insurance: How It Matters as Psychological Fact and Political Metaphor*, 6 CONN. INS. L.J. 1, 6 (1999–2000).

⁸ See Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. L.J. 11, 32 (1999–2000) (“The publicity about coverage denials, deaths, suits and plaintiffs’ victories stirs public outrage and fuels activist mobilization. Popular culture can vastly amplify widespread media coverage of insurance coverage controversies.” (referring to the film version of *The Rainmaker* and to the John Grisham novel of the same name)).

my students. The vivid and often nightmarish images of the private health care industry depicted in these films captured my students' interest just as they captured the interest of a concerned public, politicians, and the health insurance industry when they were released. These films also dramatize and personalize issues in a way that cases often do not. Many law students are young enough never to have seriously considered the issues these films raise, such as what type of coverage, if any, they can expect upon starting their first job after law school; what happens when they change jobs or insurance plans; or what to do if a request for coverage is denied. Often students are not even aware of what type of coverage they currently have. I found that by using a few dramatic clips, the doctrines and issues "came alive" for students. This provided an opportunity for a deeper contextual understanding by helping students connect to the narratives, and sometimes to their own powerful, even raw, experiences with the health insurance and health care systems.

Using film to teach law is increasingly popular. In just the last few years, the subject has been addressed in legal scholarship,⁹ at our professional conferences,¹⁰ and in two new coursebooks on the subject of law and popular culture.¹¹ I have used documentary and popular films in Health Law and other classes,¹² but *Critical Care*, *The Rainmaker*, and *John Q.* offered the first opportunity to use clips from recent popular films to illuminate the legal concepts, relationships, and issues surrounding the private health insurance system.

⁹ See *id.*; Philip N. Meyer & Stephen L. Cusick, *Using Non-Fiction Films as Visual Texts in the First-Year Criminal Law Course*, 28 VT. L. REV. 895 (2004).

¹⁰ For example, at the 2004 Association of American Law Schools Annual Meeting, the section on Law and the Humanities presented a panel discussion, "Law Professors Go to the Movies," with Professors David A. Black, John Denvir, Philip N. Meyer and David Ray Papke, available at <http://aalsweb.aals.org/am2004/programs/details/4250.shtml> (last visited Aug. 12, 2005). The 2004 Southeastern Association of Law Schools Annual Meeting included a panel discussion moderated by Professor Richard Saver, "Law and Film: the Use of Films in the Classroom," with Professors Thomas Mezloff, Elaine Shoben, Robert Felix and Mark Niles, available at <http://www.nsulaw.nova.edu/seals/program04revision7.pdf> (last visited Aug. 12, 2005).

¹¹ See MICHAEL ASIMOW & SHANNON MADER, *LAW AND POPULAR CULTURE: A COURSEBOOK* (2004); ROBERT M. JARVIS ET AL., *LAW AND POPULAR CULTURE: TEXT, NOTES AND QUESTIONS* (forthcoming 2006).

¹² In recent years, I have shown *Frontline* documentaries *Dr. Solomon's Dilemma* and *The High Price of Health* in Health Law; *Gattaca* in a seminar on Law and Disability; and the award-winning NBC reports documentary *Pensions: The Broken Promise* (credited with spurring Congress to consider enacting pension legislation) in Employee Benefits Law. *Frontline: Dr. Solomon's Dilemma* (PBS television broadcast Apr. 4, 2000); *Frontline: The High Price of Health* (PBS television broadcast, Apr. 14, 1998); *GATTACA* (Columbia Pictures 1997); *NBC Reports: Pensions: The Broken Promise* (NBC television broadcast, Sept. 11, 1972).

To paraphrase Professor Asimow, these films can help teach us what an insurance company does and what is wrong with health insurance and managed care institutions.¹³ They can also teach us how health insurance and managed care arrangements affect consumers and their families. Because these three films are the first to focus on the private health insurance system,¹⁴ they provide a unique opportunity to explore certain widely-held beliefs about the health insurance system, and to challenge students to determine whether or not those beliefs are accurate.

I. USING CLIPS IN THE CLASSROOM

After a brief introduction, I show a short clip to the class. Sometimes the scene illustrates the legal issue, and sometimes it serves as a shared set of facts that can be built upon to discuss other issues not directly addressed. I make an effort to integrate the scenes into the course by tying the scenes into the substantive discussion materials, and returning to the clips as a point of reference in later discussions and on the final exam. The films are on reserve in the library so students who missed class that day can watch the clip on their own, or use the films to review.

Like others before me, I found that students are skilled at analyzing and interpreting film clips. As Professor Michael Asimow and Mr. Shannon Mader have observed, “[e]very student is already an expert in interpreting popular culture. They know the language of film. They have been practicing that language since before they learned to talk, much less read.”¹⁵ As a result, using clips as a reference point for class discussion can also generate a sense of competence and confidence that fosters student engagement with the material.

I also found that the use of a few brief, well chosen film clips brings energy and passion to the classroom discussion. The most animated and thoughtful discussions usually took place after the clips. Like the students of other professors using film in the classroom, my students were “moved and inspired, or infuriated . . . They [were] full of ideas, arguments, and interpretation. They speak up in class. They argue with each other and with the instructor . . .

¹³ Michael Asimow, *Introduction to Papers from UCLA's Law and Popular Culture Seminar*, 9 UCLA ENT. L. REV. 87, 88 (2001).

¹⁴ Pendo, *supra* note 6, at 268.

¹⁵ MICHAEL ASIMOW & SHANNON MADER, *LAW AND POPULAR CULTURE: A COURSEBOOK* (13th ed. 2004).

The level of interactivity in the classroom far surpasses what normally occurs even in the most engaging and best-taught classes."¹⁶ Students also appeared to retain the information more readily, frequently referring back to the clips in connection with other related doctrines and cases throughout the semester. Some students were inspired to continue their discussion outside the classroom, by relating issues covered in class to other aspects of their lives and popular culture.

In light of the overwhelmingly negative public opinion of private health insurance and managed care strategies, the biggest challenge is making sure that students critically analyze the scenes, rather than simply enjoying (or being outraged by) them. Films are powerful; in the case of *John Q.*—the most melodramatic and most widely seen of the three films—there is evidence that the public believes that the film truthfully reflects the reality of modern private health insurance for workers and their families.¹⁷ Although the portrayals of the health insurance system and its impact on doctors, lawyers, patients, and their families in these films often have factual support, they also contain significant inaccuracies and omissions that need to be critically examined.

To facilitate that process, I provide discussion questions to the class before I show the clip. This allows students to think about the questions, and to prepare to apply legal doctrines to the clip they will see in class. My impression is that students are more likely to raise both substantive legal and policy issues after seeing a clip than after reading cases or text alone. Sometimes the discussion questions require students to research legal or policy issues, and most of the resources that they need are contained in the text or are linked from my web page. It seems that students are more likely to visit the linked sites in connection with a film clip than otherwise; for example, visiting the Kaiser Family Foundation web site to find out how many Americans get their health insurance coverage from work.¹⁸

¹⁶ *Id.*

¹⁷ The Henry J. Kaiser Family Foundation conducted a survey and found that most people believe that the refusal of coverage in *John Q.* was an accurate reflection of reality. HENRY J. KAISER FAM. FOUND., SURVEY SNAPSHOT: RESPONSE TO THE MOVIE JOHN Q. (July 2002), http://www.kaisernet.org/health_cast/uploaded_files/John_Q_Survey_Snapshot.pdf (last visited Aug. 12, 2005) (reporting that 42% say they think health insurers refuse to pay for treatments like those in the movie "a lot"; 30% "sometimes"; 9% "rarely"; and 2% "never").

¹⁸ HENRY J. KAISER FAMILY FOUND. AND HEATH RES. & EDUC. TR., EMPLOYER HEALTH BENEFITS 2004 ANNUAL SURVEY, <http://www.kff.org/insurance/7148/index.cfm> (last visited Aug. 12, 2005).

II. SELECTED FILM CLIPS

The following is a list of clips that I have used or am planning to use in my Health Law course. I did not use all of these clips in a single course, or use them to illustrate every possible issue they raise. There are also many more clips in these films (and others) that could have been used, so please consider this a list of examples only.¹⁹

I used *Health Law: Cases, Materials and Problems* by Professors Barry F. Furrow, Thomas L. Greaney, Sandra H. Johnson, Timothy S. Jost and Robert L. Schwartz²⁰ as the class text, and have included footnotes with chapter references to materials in the text that corresponds to each clip. I also provided markers on the DVD and VHS versions of the films so you can find them easily.

A. Controlling Costs: The Erosion of Employer-Sponsored Insurance

Clip (John Q.): John Q. Archibald and his wife have just learned that their son, Mikey, needs an immediate heart transplant and would be placed at the top of the heart transplant waiting list. Unfortunately, the hospital administrator explains that Archibald's insurance is insufficient to cover the minimum cost of \$250,000, and the hospital will not place Mikey on the organ transplant waiting list without a cash payment of \$75,000. John assumes there must be an error. In this scene, John speaks with his Human Resources representative at the factory, and is told that he now has a \$20,000 lifetime limit on his health insurance benefits as a result of two factors: the factory switched from a PPO to a less expensive and more restrictive HMO plan, and John recently went from full-time to part-time employment, making him eligible for a less comprehensive level of coverage.²¹

¹⁹ Sources for finding films for classroom use include: *Picturing Justice: The On-Line Journal of Law & Popular Culture*, <http://www.usfca.edu/pj/> (last visited Aug. 12, 2005); The Internet Movie Database, <http://www.imdb.com> (last visited Aug. 12, 2005); U.S. National Library of Medicine, National Institutes of Health LocatorPlus (audiovisuals available in the National Institutes of Medicine collections), <http://locatorplus.gov> (last visited Aug. 12, 2005); U.S. National Library of Medicine, National Institutes of Health, History of Medicine Online Syllabus Archive, <http://www.nlm.nih.gov/hmd/collections/digital/syllabi/> (last visited Aug. 12, 2005).

²⁰ BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* (5th ed. 2004).

²¹ JOHN Q., *supra* note 4, at ch. 6. This scene is about 1½ minutes long, and appears at the beginning of Chapter 6 of the DVD version, and from approximately 0:27.27 to 0:28.54 of the VHS version. The VHS counter markers for all of the scenes are measured from the beginning of the videotape (including the previews). *See id.*

Discussion Questions: How many Americans get health insurance through employment? Like John's fictionalized employer, real employers are also offering fewer benefits, often to fewer employees, trying to control costs by raising annual deductibles and specific co-payments, limiting benefits, and limiting or eliminating coverage for part-time or low-wage workers. Have you seen any stories in the news about employers reducing or eliminating benefits for workers or their families? Although not raised by the film, how do specific federal laws limit an employer's ability to reduce or eliminate health insurance benefits for certain workers or classes of workers?

Analysis: I use this clip to illustrate the erosion of employer-sponsored health insurance benefits.²² Discussion of this scene helps students learn that, like John, most Americans get their health insurance through their employment,²³ but that employment does not guarantee coverage, adequate or otherwise. As the clip suggests, employers are also offering fewer benefits, often to fewer employees, and trying to control costs by raising deductibles and co-payments, limiting benefits, or limiting coverage for certain groups of workers. Students are particularly interested in bringing in articles from newspapers or the Internet, reporting that employers are cutting health insurance benefits for employees, or their spouses and children. Unfortunately, many students and their family members have experienced a reduction or loss of health insurance benefits.

Although not raised by the film, this scene also sets the stage for exploration of limitations on an employer's ability to reduce or eliminate health insurance benefits based on race, sex,²⁴ pregnancy,²⁵

²² This corresponds to material in FURROW ET AL., *supra* note 20, at 494–527, 566–76 (discussing cost and access problems of employer-sponsored plans and discussing concepts of managed care). If you have not addressed this material elsewhere, this scene also provides an opportunity to introduce or review some basic concepts of insurance and managed care, such as individual versus group coverage, and a variety of organizational, managerial, and reimbursement strategies of managed care, including preauthorization requirements, HMOs and PPOs.

²³ U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 2001, at 2 (2002), available at <http://www.census.gov/prod/2002pubs/p.60-220.pdf> (last visited Aug. 12, 2005) (indicating that 62.6% of workers and their families were covered by employer-sponsored health plans in 2001).

²⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000) (prohibiting employment practices that “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin,” including discrimination in employment benefits such as health insurance benefits).

²⁵ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000) (requiring that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all

age,²⁶ and disability²⁷ imposed by federal civil rights law.²⁸ In addition, students have an opportunity to discuss the limitation imposed by the Employee Retirement Income Security Act of 1974 (ERISA),²⁹ which prohibits an employer from terminating an employee for the purpose of interfering with the worker's protected rights to benefits, such as its health insurance plan.³⁰

B. Continuation of Private Coverage Under COBRA & HIPAA

Clip (John Q.): Although not directly presented in the above-described scene, I have also used the same clip to explore the important but limited opportunities for workers and their families to extend their employer-sponsored health insurance.³¹

Discussion Question: In the scene in which John speaks with his Human Resources representative, he is told that he now has a \$20,000 lifetime limit on his health insurance benefits because of the switch to a more restrictive HMO plan and his reduction to part-time status. If John had lost his factory job instead of being reduced to part-time status, what options would he have for continuation of coverage under federal law, and on what terms?

employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . ."); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (holding that an employer-provided health insurance plan violated the Pregnancy Discrimination Act because it provided less coverage to spouses of male employees for pregnancy-related conditions than to female employees).

²⁶ Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1967) (protecting older individuals from discrimination based on age with respect to any term, condition, or privilege of employment, including health insurance benefits); Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 623(a)(1) (2000) (amending the ADEA to specifically prohibit employers from denying benefits to older employees); 29 U.S.C. § 623(f)(2)(B)(i) (2000) (providing that an employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers).

²⁷ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000) (prohibiting, among other things, an employer from discriminating on the basis of disability against a qualified individual with a disability in regard to health insurance benefits); see also 29 C.F.R. § 1630.4(f) (2004) (making it unlawful for a covered entity to discriminate in regard to "fringe benefits" because of an individual's disability).

²⁸ This corresponds to material in *FURROW ET AL.*, *supra* note 20, at 717–30.

²⁹ Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000).

³⁰ See *id.* § 1140. This does not, however, prevent an employer from amending the plan to change benefits generally. See *McGann v. H & H Music Co.*, 946 F.2d 401, 407–08 (5th Cir. 1991).

³¹ JOHN Q., *supra* note 4, at ch. 6. This scene is about 1½ minutes long, and appears at the beginning of Chapter 6 of the DVD version, and from approximately 0:27.27 to 0:28.54 of the VHS version. See *id.*

Analysis: Here, I want students to analyze and apply the federal initiatives to provide continuation of private insurance coverage under the Consolidated Omnibus Reconciliation Act of 1985 (COBRA)³² and the Health Insurance Portability and Accessibility Act (HIPAA).³³ I usually assign a student or group of students to explain that if John had lost either his benefits or his job entirely, he probably would be eligible to continue his health insurance coverage for eighteen months at the group rate under COBRA, which could not be denied on the basis of Mikey's health.³⁴ Usually, someone in the class has used COBRA to extend his or her own benefits, and knows that John would have to pay the entire premium plus administrative costs.³⁵ I also want students to realize that once John exhausted his COBRA extension period,³⁶ he could buy an individual policy pursuant to HIPAA without exclusion for pre-existing conditions, such as Mikey's heart condition, and the policy would be guaranteed renewable.³⁷ However, cost could be prohibitive under this option as well, because HIPAA does not limit the premium that the offering insurer may charge.³⁸

C. Public Health Care Programs

Clip (John Q.): After John speaks with his human resources representative, his request for authorization for the transplant is denied, and he abandons his appeal as futile. A succession of scenes shows John trying to secure coverage or funds elsewhere by: applying for Illinois's Medicaid program; inquiring at the public hospital; accepting donations from friends; and selling the family's belongings, including the refrigerator, the car, and his wife's engagement ring. John's applications for public and private coverage are denied,

³² You could also ask students whether COBRA would apply. Based on the depiction of John's workplace, it appears that it would because the factory appears to have more than 20 employees. See Consolidated Omnibus Reconciliation Act of 1985 (COBRA), 29 U.S.C. § 1161(b) (2000). Similarly, you could go into more detail on "qualifying events" such as termination for reasons other than misconduct and reduction in hours that result in the loss of coverage for the employee or a covered beneficiary. See *id.* § 1163.

³³ 42 U.S.C. §§ 300gg to 300-gg-92 (2000). This corresponds to material in FURROW ET AL., *supra* note 20, at 717-30.

³⁴ 29 U.S.C. § 1162(4) (2000) (providing that "[t]he coverage may not be conditioned upon, or discrimination on the basis of lack of, evidence of insurability").

³⁵ See *id.* § 1162(3).

³⁶ Assuming that other conditions were met, see *id.* § 300gg-41(a)(1).

³⁷ See *id.* § 300gg-42(a).

³⁸ See *id.* § 300gg-41(f)(1).

and he is unable to raise the required \$75,000 down payment.³⁹ The hospital insists on releasing Mikey to die at home.⁴⁰

Discussion Questions: Based on the limited facts provided by the film, do you think Mikey may be eligible for Medicare? Medicaid? Illinois's CHIP program?

Analysis: This clip provides students an opportunity to distinguish between Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP), and to challenge what appears to be an inaccurate portrayal of the Medicaid and SCHIP programs.⁴¹

Medicare is easy to rule out, as there are no facts to suggest that Mikey would be eligible for Medicare. Medicare provides benefits to people over the age of sixty-five who have paid at least forty quarters of payroll taxes, people with disabilities who have received Social Security Disability Income Benefits, and people with end-stage renal disease.⁴²

Medicaid and SCHIP eligibility are trickier to determine. Students can miss John's salary, so I go back and freeze on the scene in which John fills out an application listing his income as \$18,200.⁴³ I usually ask someone to look up eligibility criteria for Medicaid⁴⁴ and SCHIP⁴⁵ in Illinois (where the movie is set) prior to class. Based on the limited facts provided by the film, the class can determine that Mikey might be eligible for Medicaid coverage in Illinois, which in 2004 provided coverage for children between the ages of six and

³⁹ JOHN Q., *supra* note 4, at ch. 6. This scene immediately follows the scene in which John speaks to the human resources representative. The montage of scenes is several minutes long, but if you show only up through what appears to be the Medicaid application scene, it is about 1½ minutes long. It appears in Chapter 6 of the DVD version, and from approximately 0:28.54 to 0:30.34 of the VHS version.

⁴⁰ *Id.*

⁴¹ This corresponds to material in FURROW, ET AL., *supra* note 20, at 731-808.

⁴² Social Security Act, 42 U.S.C. § 1395c (2005); *see also* Medicare Eligibility Tool (General Enrollment), The Official U.S. Government Site for People with Medicare, <http://www.medicare.gov/MedicareEligibility/Home.asp?dest=NAV/Home/GeneralEnrollment#TabTop> (last visited Aug. 12, 2005).

⁴³ JOHN Q., *supra* note 4. This scene appears at 0:28.58-59 of the VHS version. It is unclear whether that represents his salary at full-time employment or his reduced, part-time hours, or includes any additional income from his wife's job as a grocery store clerk.

⁴⁴ Students can learn about Medicaid coverage and eligibility criteria at CTRS. FOR MEDICARE & MEDICAID SERVS., WELCOME TO MEDICAID, <http://www.cms.hhs.gov/medicaid/> (last visited Oct. 7, 2005); HENRY J. KAISER FAM. FOUND., <http://www.kff.org/medicaid/index.cfm> (last visited Oct. 7, 2005).

⁴⁵ Students can learn about SCHIP coverage and eligibility criteria at HENRY J. KAISER FAM. FOUND., MEDICAID/SCHIP, <http://www.kff.org/Medicaid/index.cfm> (last visited Oct. 7, 2005).

nineteen at an income level of \$20,841.⁴⁶ More likely, Mikey would be eligible for Illinois's SCHIP program, KidCare, which covered children in families at 200% of the federal poverty level, or \$31,348 for a family of three in 2004.⁴⁷ You could also ask students to look up eligibility criteria for your own state or their home states to demonstrate variability.

D. Physician Incentives

Clip (Critical Care): The central character, Dr. Werner Ernst, is an exhausted resident in charge of a futuristic intensive care unit filled with comatose patients. Throughout the film, he is counseled by Dr. Butz, a physician so impaired by alcoholism that he has been named Chairman of Intensive Care Medicine, presumably to keep him away from the patients. Dr. Butz (played to comedic effect by a disguised Albert Brooks) repeatedly tries to teach Dr. Ernst about managed care, such as in this scene where Dr. Ernst questions further invasive treatment for an unresponsive patient:

Butz: What's wrong with Bed 5? He's all paid up. Got three insurance companies paying off his bills monthly. . .

Ernst: If there is no reasonable prospect of cure, why should we proceed?

Butz: Where have you been all of your life? It's called revenue! He's got catastrophic health insurance, long term health care, the works! . . . If the patient were part of the HMO then I could understand your dilemma. With those babies we get paid not to perform medical procedures. It's a little like when the government pays the farmers not to grow crops. But with insurance we get paid to perform medical procedures. Do you understand the difference?. . . We'll do it. My god! I get a cut of every procedure we do on the guy. He's got catastrophic health insurance.

⁴⁶ *Id.*

⁴⁷ The State of Illinois recently raised the eligibility level for the KidCare program to 200% of the federal poverty level. See Press Release, Office of the Governor of the State of Illinois, Blagojevich Delivers on Pledge to Expand Health Care (Dec. 10, 2003), available at <http://www.illinois.gov//PressReleases/PrintPressRelease.cfm?RecNum=2516> (last visit-ed Oct. 7, 2005).

Dr. Butz goes on to explain that he has a plan to avoid a similar fate himself—he simply does not have any health insurance.⁴⁸

This clip is a little longer than most—about five minutes—but well worth it. I have shown this clip to students, law school colleagues, and the Bioethics and Health Law Consortium of South Florida (which includes professors of law, medical disciplines, education and philosophy; graduate and professional students; and practicing medical professionals and attorneys), and it never fails to get a laugh.

Clip (John Q.): After John's attempts to secure coverage or sufficient cash fail, he takes the emergency room hostage in a desperate attempt to force the hospital to put Mikey on the heart transplant list. He starts a discussion with the hostages about Mikey's experience with managed care:

John: How could the doctors not pick [Mikey's condition] up?

Dr. Turner: He might not have been tested thoroughly enough.

John: Why not?

Intern: You got an HMO, right? Well that's your answer. HMOs pay their doctors not to test. That's their way of keeping costs down. Let's say Mike did need additional testing and insurance says they won't cover them. The doctor keeps his mouth shut and come Christmas the HMO sends the doctor a fat ass bonus check.

John: Is that true?

Dr. Turner: Possible. Not likely, but possible.⁴⁹

Discussion Question: These scenes suggest that the professional and medical judgment of doctors is distorted by the reimbursement arrangements of managed care. Do you believe this occurs? Is there any evidence that this occurs? How have such claims fared in court?

Analysis: For patients who have insurance, both *Critical Care* and *John Q.* suggest that the professional judgment of their doctors is distorted by the reimbursement arrangements of managed care.⁵⁰

⁴⁸ CRITICAL CARE, *supra* note 2, at ch. 17. This clip is about 5 minutes long, and appears in Chapter 17 of the DVD version, or from approximately 0:49.36 to 0:54.17 of the VHS version.

⁴⁹ JOHN Q., *supra* note 4, at ch. 12. This clip is about 50 seconds long, and it appears in Chapter 12 of the DVD version, or from approximately 0:59.56 to 1:00.47 of the VHS version.

⁵⁰ This corresponds to material in FURROW ET AL., *supra* note 20, at 566–730.

The first scene shows patients with traditional fee-for-service insurance being subject to unnecessary and futile care for profit. The second scene shows patients with managed care plans being denied care that will not be reimbursed.

These clips provide an opportunity to discuss the widely-held belief that financial incentives affect physicians' decisions to provide certain types of care. Although there is a scholarship on financial incentives used by managed care to reduce the use of health care services and the conflicts of interest they create for physicians,⁵¹ it is far from clear that physicians actually withhold medically necessary or appropriate care as a result. Despite the lack of conclusive evidence, many students — along with many consumers, physicians, and managed care executives — believe that reimbursement arrangements distort physicians' clinical judgments to the detriment of their patients. Students can also discuss the outcome of legal claims raised by consumers in connection with physician incentive systems during the last decade.

E. The Uninsured and Access to Care

Clip (The Rainmaker): The idealistic young attorney, Rudy Baylor, tries and fails to take the depositions of key executives of the insurance company, Great Benefit. Feeling outmaneuvered by a powerful and wealthy foe, he returns to visit his client, Donny Ray. As Baylor meets with his client's family to prepare the case, he considers the fate of Donny Ray:

So this is how the uninsured die. In a society filled with brilliant doctors and state-of-the-art technology. It's obscene to let this boy just wither away and die. He was covered by an insurance policy that his mother paid good money for. It wasn't big money, but it was good money. I'm alone in this trial. I'm seriously outgunned and I'm scared, but I'm right. I sit here with this poor suffering kid and I swear revenge.⁵²

Clip (John Q.): In the last part of the above-described scene from *John Q.*, the emergency room intern describes the dire situation of the uninsured in the emergency room — notwithstanding “the law”— “if you ain't got no money, you get a Band-Aid, a foot

⁵¹ See, e.g., MARC RODWIN, *MEDICINE, MONEY, AND MORALS: PHYSICIANS' CONFLICTS OF INTEREST* 135–75 (1993); Timothy S. Hall, *Bargaining with Hippocrates: Managed Care and the Doctor-Patient Relationship*, 54 S.C. L. REV. 689, 693–96 (2003).

⁵² *THE RAINMAKER*, *supra* note 3, at ch. 16. This clip is about 30 seconds long, and it appears in Chapter 16 of the DVD version, or from approximately 1:14.45 to 1:15.15 of the VHS version.

in the ass, and you're out the door."⁵³ A discussion about the obligation to provide emergency care follows.⁵⁴

Clip (Critical Care): During another meeting with Dr. Butz regarding the same unresponsive patient, Dr. Ernst is called to the emergency room to treat a 19-year old patient with a head injury. Dr. Butz counsels Dr. Ernst to disregard the call because the patient has no insurance:

Butz: He's 19. He's got no medical coverage and he is some rowdy kid. What do you think would happen if I got in my car one Sunday and drove over to this kid's house and said "hey kid, come next door, cut my grass and if I ever get any money I'll pay you. Just send me the bill, kid." What do you think would happen?

Ernst: Cutting grass is a little different from emergency medical care.

Butz: I know that, but it's still a service economy and if you want service in a service economy you pay for it. And if you don't pay for services in a service economy you will ruin the whole country.⁵⁵

Discussion Questions: How many Americans have no insurance coverage? How many are children? Full-time workers? All three films suggest that people without insurance are routinely denied care, including life-saving care. In *John Q.*, the intern reports that even in the emergency room, "if you ain't got no money, you get a band aid, a foot in the ass, and you're out the door."⁵⁶ Is the intern correct? What limits, if any, exist with regard to emergency treatment?

Analysis: This clip provides an opportunity to discuss the growing problem of the uninsured, the relationship between access to coverage and access to care, and the obligation to provide care.⁵⁷ Students can access the data on the number of uninsured in the United States, or a given state, county, or city prior to class. Many are surprised to learn that as many as one in five workers is unin-

⁵³ JOHN Q., *supra* note 4, at ch. 12. This clip immediately follows the clip from *John Q.* dealing with physician incentives, and is about one minute long. It appears in Chapter 12 of the DVD version, or from approximately 1:00.52 to 1:01.40 of the VHS version.

⁵⁴ *Id.*

⁵⁵ CRITICAL CARE, *supra* note 2, at ch. 21. This clip is about 2 minutes and 45 second long, and appears in Chapter 21 of the DVD version, or from approximately 1:06.57 to 1:09.30 of the VHS version.

⁵⁶ See JOHN Q., *supra* note 4, at ch. 12.

⁵⁷ This corresponds to material in FURROW ET AL., *supra* note 20, at 494–565.

sured, and more than 80% of the uninsured come from working families.⁵⁸ Students can see the evidence documenting that people without insurance receive less care, delayed care, and suffer worse outcomes than people with insurance.⁵⁹

Despite these bleak data and findings, critical analysis of the scene reveals that the intern's characterization of the treatment of the uninsured in the emergency room appears inaccurate, as the Emergency Medical Treatment and Active Labor Act (EMTALA) requires that a patient who arrives at the emergency room of a hospital participating in the Medicaid program be provided with a medical screening and stabilization of any emergency medical condition, regardless of ability to pay.⁶⁰ I typically ask a student or group of students to apply the requirements of EMTALA to Mikey's treatment in *John Q.* Although the hospital did not provide complete or continuous care beyond stabilization of Mikey's immediate emergency condition, Mikey was diagnosed upon arrival at the emergency room, and his condition was stabilized. Even though Mikey's case is fairly straightforward, you could lead the discussion to the definitions of "emergency medical condition" and "stabilized," as well.⁶¹

F. Legal Remedies for Claim Denial

Clip (John Q.): After John speaks with his human resource representative, his request for authorization for the transplant is denied. He files an appeal with the insurance company, but the

⁵⁸ Cathy Schoen & Karen Davis, *Erosion of Employer-Sponsored Health Insurance Coverage and Quality*, ISSUE BRIEF—THE COMMONWEALTH FUND, Sept. 1998, at 1, available at http://www.cmwf.org/programs/insurance/schoen_erosion_ib_297.asp (last visited Aug. 12, 2005); ROBERT WOOD JOHNSON FOUND., *Going Without Health Insurance: Nearly One in Three Non-Elderly Americans* 5 (Mar. 2003), available at <http://www.familiesusa.org> (last visited Aug. 12 2005); see also HENRY J. KAISER FAM. FOUND. AND HEALTH RESEARCH & EDUC. TR., *EMPLOYER HEALTH BENEFITS 2000 ANNUAL SURVEY 42-44*, available at <http://www.kff.org> (last visited Aug. 12, 2005) (analyzing health insurance coverage by size of employer); Catherine Hoffman & Marie Wang, *Health Insurance Coverage in America: 2001 Data Update 3-4* (Jan. 2003) (finding that the majority of the uninsured come from families with at least one full time worker).

⁵⁹ See INST. OF MED., *CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE* (May 2002), available at <http://www.iom.edu/includes/dbfile.asp?id=4160> (last visited Aug. 12, 2005); AM. C. OF PHYSICIANS, *NO HEALTH INSURANCE? IT'S ENOUGH TO MAKE YOU SICK—SCIENTIFIC RESEARCH LINKING THE LACK OF HEALTH COVERAGE TO POOR HEALTH*, available at <http://www.acponline.org/uninsured/lack-contents.htm> (last visited Aug. 12, 2005) (summarizing research over a ten-year period).

⁶⁰ 42 U.S.C. § 1395dd (2000).

⁶¹ See *id.* § 1395dd(e)(1); § 1395dd(e)(3)(B).

hospital administrator informs him that he needed to file an immediate “grievance” to contest the denial of coverage, not a drawn-out “appeal” which relates to an existing claim. John abandons his appeal as futile.⁶²

Clip (The Rainmaker): Rudy Baylor’s client, Donny Ray Black, needs a lifesaving bone marrow transplant for treatment of his leukemia, but his claim has been denied eight times and for several different reasons, including exclusion of the bone marrow transplant as experimental. The insurer’s final letter to Mrs. Black states, “[o]n seven prior occasions this company has denied your claim in writing. We now deny it for the eighth and final time. You must be stupid, stupid, stupid. Sincerely, Everett Lufkin. Vice President, Claims Department.”⁶³

Discussion Questions: These scenes and tag line from *John Q.*—“Give a father no options and you leave him no choice”—suggest that people like John are left without legal remedy. If John’s health insurance plan was regulated by ERISA, what possible causes of action could he pursue and what relief could he request?

Analysis: The first scene provides an opportunity for students to discuss the internal appeal process for claim denials.⁶⁴ The second scene provides an opportunity for students to compare claims traditionally available under state law and federal law, as well as the impact of ERISA preemption on claims and remedies.⁶⁵

As many of us know, it can be hard to interest students in ERISA, and I have used the clips to help students apply each step of ERISA’s three-part preemption analysis, and to see the significance of ERISA’s provision of the exclusive remedial scheme for claims relating to employee benefit plans.⁶⁶ With a “real” story to use as a focus, students are interested to know that if John were an ERISA

⁶² This clip is about 1 minute long, and appears at the end of Chapter 6 of the DVD version, or from approximately 0:30.34 to 0:31.42 of the VHS version. *JOHN Q.*, *supra* note 4, at ch. 6.

⁶³ This clip is about 1 minute long, and appears in Chapter 3 of the DVD version, and from approximately 0:18.40 to 0:19.25 of the VHS version. *THE RAINMAKER*, *supra* note 3, at ch. 3.

⁶⁴ *JOHN Q.*, *supra* note 4. This corresponds to material in *FURROW, ET AL.*, *supra* note 20, at 644–730. Interestingly, a study by the Harvard School of Public Health and the RAND Corporation found that the majority of such appeals did not involve life-threatening situations, and in cases involving claims of medical necessity, consumers prevailed more than half of the time. David M. Studdert & Carole Roan Gresenz, *Enrollee Appeals of Preservice Coverage Denials at 2 Health Maintenance Organizations*, 289 *JAMA* 864 (2003).

⁶⁵ This corresponds to material in *FURROW, ET AL.*, *supra* note 20, at 566–730.

⁶⁶ See 29 U.S.C. §§ 1144(a), 1144(b)(2)(A), 1144(b)(2)(B) (2005), 1132 (2005).

plaintiff, he would most likely face a bench trial⁶⁷ governed by an arbitrary and capricious standard of review⁶⁸ and be limited to the evidence in the administrative record.⁶⁹

CONCLUSION

These three films provide teachers of health law with an opportunity to add variety to their teaching techniques, and to present vivid, relevant, and entertaining scenarios for class discussion. When used properly, clips can enhance coverage and discussion of substantive legal concepts and important policy issues surrounding health insurance and health care. They can also be fun for you and your students. I encourage anyone teaching health insurance systems to experiment with these clips or others, and invite you to contact me to share your experiences.

⁶⁷ The majority of the Circuit Courts of Appeal have held that there is no statutory right to a jury trial in an action for benefits under ERISA § 502(a)(1)(B). See *Wardle v. Cent. States, Se. & Sw. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Katsaros v. Cody*, 744 F.2d 270 (2nd Cir. 1984); *Berry v. Ciba-Geigy*, 761 F.2d 1003 (4th Cir. 1985); *Nevill v. Shell Oil Co.*, 835 F.2d 209 (9th Cir. 1987); *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3rd Cir. 1990); *Bair v. Gen. Motors Corp.*, 895 F.2d 1094 (6th Cir. 1990); *Smith v. City of Des Moines Iowa*, 99 F.3d 1466 (8th Cir. 1996); *Zimmerman v. Sloss Equip. Inc.*, 72 F.3d 822 (10th Cir. 1996); *Broadus v. Florida Power Corp.*, 145 F.3d 1283 (11th Cir. 1998).

⁶⁸ See *Firestone v. Bruch*, 489 U.S. 101 (1989).

⁶⁹ In a case governed by the arbitrary and capricious standard of review, the circuit courts are uniform in holding that a court is allowed to consider only the evidence presented to the decisionmaker at the time of the decision. See generally *Jett v. Blue Cross & Blue Shield of Alabama, Inc.*, 890 F.2d 1137 (11th Cir. 1990); *Miller v. Metro. Life Ins. Co.*, 925 F.2d 979 (6th Cir. 1991); *Oldenberger v. Cent. States, Se. & Sw. Areas Teamsters Pension Fund*, 934 F.2d 171 (8th Cir. 1991); *Sandoval v. Aetna Life & Cas. Co.*, 967 F.2d 377 (10th Cir. 1992); *S. Farm Bureau Life Ins. Co. v. Moore*, 993 F.2d 98 (5th Cir. 1993); *Donato v. Metro. Life Ins. Co.*, 19 F.3d 375 (7th Cir. 1994); *Winters v. Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995); *Bernstein v. Capitalcare, Inc.*, 70 F.3d 783 (4th Cir. 1995).