

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on February 2, 1995, at 7:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 253, HB 309
Executive Action: HB 176 DO PASS AS AMENDED
HB 244 TABLE
SB 36 BE CONCURRED IN AS AMENDED

{Tape: 1; Side: A}

EXECUTIVE ACTION ON HB 244

Motion: REP. DEBBIE SHEA MOVED HB 244 DO PASS.

Discussion: REP. SHIELL ANDERSON said he planned to vote against HB 244 because he believed it was a problem which was limited to a certain area. If they don't include all of these crimes and don't allow the judge the option of releasing a person on bail or on their own recognizance while awaiting appeal in order to get their affairs in order, (they will know in most communities if a defendant is likely to flee or not) this puts an extra burden on the jails or prison. He felt the cure was worse than the ailment. If the defendant is a risk, the judge can certainly order that he be detained while he is awaiting appeal. There are three or four misdemeanors listed and he felt it would be overstepping to put a misdemeanant in jail out of hand without any possibility of hearing from him while he may not be a risk at all. He preferred leaving this with the discretion of the judge rather than creating a law to put everybody in jail.

Motion/Vote: REP. ANDERSON MOVED TO TABLE HB 244. The motion carried 13 - 6, REPS. CLARK, WYATT, SOFT, MC CULLOCH, SHEA AND BOHARSKI voting no.

EXECUTIVE ACTION ON HB 176

Motion: REP. JOAN HURDLE MOVED HB 176 DO PASS.

Discussion: REP. ANDERSON said he would vote for it though he believed there was a better way to approach the underfunding though he knew the courts need a way to fund their automation and this would help.

REP. DEB KOTTEL said she was also going to vote for it but discussed her objections. She felt the state of Montana should not be exempt from the user surcharge.

Motion: REP. KOTTEL MOVED TO AMEND PAGE 1, LINE 20 (EXHIBIT 1).

Discussion: REP. WILLIAM BOHARSKI asked if there is anyone who cannot afford to pay \$5.

REP. KOTTEL said she did not know but gave her reasoning for the amendment.

CHAIRMAN BOB CLARK said the discussion was not aimed at \$5, but an additional \$5. There already is a \$15 surcharge on a misdemeanor.

Vote: The motion carried 18-1, REP. BOHARSKI voting no.

Motion: REP. ANDERSON MOVED HB 176 DO PASS AS AMENDED.

Discussion: REP. BRAD MOLNAR asked what the average person would pay in accumulated filing fees, surcharges and fines.

REP. ANDERSON said that in his experience with criminal cases, they would pay between \$60-\$150; a DUI case would be \$300-\$500.

REP. MOLNAR clarified that this isn't a fine but just a charge for using the system. He wanted to know if they would "cut" two separate checks.

REP. ANDERSON said they would "cut" one check and it would be separated into the categories of fee and fine.

REP. MOLNAR said that he understood that it costs the state \$5 to "cut" one check and that this would not provide anything toward the goal and would just cost the counties more in administration.

CHAIRMAN CLARK said that the counties get 50% off the top of all fines and are not getting shorted. The surcharges are separate and cities keep all of their fines.

REP. LIZ SMITH reminded the committee that there was a constitutional amendment addressing a cap on 4% users fee voted down in the last election for the reason that the voters thought it was suggestive of sales tax.

REP. BOHARSKI referred to lines 17 and 18 which indicate several steps in filing a probate and wanted to know how many times the person would have to pay the \$5. He also asked what is considered an appearance in a civil case.

Without objection from the committee, Pat Chenovick answered that the parties would pay the \$5 once when the probate was filed. He said an appearance would be the initial filing of the case and that is when the \$5 would be paid. It would not be paid on registration of each entry of action.

REP. BOHARSKI asked why a prevailing respondent should pay the \$5.

Mr. Chenovick said the idea behind it is that anyone using the system should pay.

REP. BOHARSKI said that as a respondent he would not be using the court by choice.

Mr. Chenovick replied that even though they are not there by choice, the people are still using the system.

REP. BOHARSKI suggested that the prevailing party pay the charges for the other party.

REP. KOTTEL explained reasons for not accepting that suggestion.

REP. ANDERSON added that it would necessitate adjusting the fiscal note downward drastically if the respondent were taken out of the requirement.

REP. DANIEL MC GEE said he heard it would not apply to each action in a probate, but lines 17 and 18 indicated it would apply to each action.

CHAIRMAN CLARK clarified that it means each action rather than each step of the action.

Motion: REP. BOHARSKI MOVED TO AMEND BY REMOVING ALL REFERENCES TO ALL STATUTORY APPROPRIATIONS, PUTTING THE MONEY INTO THE GENERAL FUND FOR THE APPROPRIATIONS COMMITTEE TO ADMINISTER.

Discussion: REP. BOHARSKI explained his amendment and that it would have the affect of de-earmarking the funds.

REP. HURDLE urged the committee to defeat the amendment. She felt only those using the criminal justice system should support it.

REP. ANDERSON said he would vote in favor of the amendment. He felt the assumption that taxpayers would pay for it was incorrect and that there would be no problem in allocating the funds to court automation from the general fund.

REP. DUANE GRIMES was sympathetic to the arguments and supported the amendment.

REP. DIANA WYATT said that the decision being made would pass down the tax universally without a justifiable specific reason. She was concerned about the fee being charged for the various actions involved in a divorce case. With the funds earmarked, it would be easier to justify it to the public.

CHAIRMAN CLARK said the majority of the money that would be raised would come from criminal cases, traffic fines primarily, and other misdemeanor cases though other types of cases would be somewhat affected. The amendment would not preclude the \$5 from being collected, it would just put it into the general fund without earmarking.

Motion: REP. BOHARSKI MOVED A CONCEPTUAL SUBSTITUTE AMENDMENT INDICATING THE AMOUNT COLLECTED AND SENT TO THE GENERAL FUND WOULD BE INTENDED TO BE USED FOR THE PURPOSES OF FUNDING COURT INFORMATION TECHNOLOGY.

Discussion: John MacMaster explained the amendment.

Vote: The motion carried 14 - 5, REPS. WYATT, KOTTEL, SHEA, MC CULLOCH AND HURDLE voting no.

Motion: REP. ANDERSON MOVED HB 176 DO PASS AS AMENDED.

Discussion: REP. AUBYN CURTISS wanted to know how much impact it would have on the general revenue if it were made a county option since some counties had already developed their system.

REP. MC GEE said this would allow the general fund to place the money necessary to fund those counties which are not yet set up.

Vote: The motion carried 14 - 5, REPS. SMITH, WYATT, MC CULLOCH, MOLNAR and BOHARSKI voting no.

EXECUTIVE ACTION ON SB 36

Motion: REP. WYATT MOVED SB 36 BE CONCURRED IN.

Discussion: REP. MOLNAR suggested that there be mention of a timely objection on page 5 rather than their losing all rights to an objection later. If there is now a 95-99% accuracy rate but technology improved or other information came to light, they should not be barred from filing an objection.

Motion/Vote: REP. MOLNAR MOVED TO STRIKE ON LINE 1 FROM "IF THE ALLEGED" THROUGH "RESULTS." ON LINE 3.

Discussion: REP. BILL CAREY said that the response to that suggestion during the hearing was that the sentence is required by the federal government.

REP. MOLNAR said that he did not believe that anyone has a right to raise an objection to new evidence. He would hope they had misinterpreted something there.

REP. KOTTEL felt that it was necessary to limit the time to bring an objection and that if the objection was not brought within that time period, the paternity issue was settled. Otherwise, the alleged father could protest his paternity for the entire lifetime of the child and avoid responsibility.

REP. MOLNAR rebutted the argument with possible valid reasons for delays in filing objections.

REP. KOTTEL felt that the child should be protected from prolonged or disrupted settlement of paternity issues which would result in negative financial, emotional and psychological ramifications.

REP. MOLNAR said that all his amendment would allow is that if truth is not evident and somebody wants to set the record straight, they have the right to do so without the legislature telling them to be quiet.

REP. BOHARSKI presented a scenario in which an alleged father might at first respond as the father while under emotional or psychological or moral persuasions where that might not be the truth and wanted to know if this was what was being protected.

REP. MOLNAR said his amendment seeks to provide for advanced technology in using blood tests to prove a man's innocence and leaving the door open for that eventuality if he finds later that there is reason to believe that he is not the father.

REP. KOTTEL asked the committee to consider the statistical probability of the two tests for paternity concurring and yet the person not being the father. Those two tests are the blood matching in 95% accuracy with the blood of the child and also the timing of intercourse with the mother. If the man still protests that he is not the father, he has 20 days in which to file the objection.

REP. MC GEE did not feel 20 days was sufficient for the alleged father to react to this and particularly if he is not the father. To restrict him to the 20 days and bar him from coming back to the court he felt was wrong. He supported the amendment.

REP. SHEA asked if this was not just for someone denying paternity, how would it work for someone who wanted to be the father but the test showed he was not the father.

REP. MOLNAR recalled that if the mother says he is the father and he accepts that he is the father, that settles it, but this deals with contested cases.

Vote: The motion carried 12 - 7, RESP. WYATT, MC CULLOCH, CAREY, GRIMES, KOTTEL, HURDLE and SOFT voting no.

Motion/Vote: REP. CHRIS AHNER MOVED SB 36 BE CONCURRED IN AS AMENDED. The motion carried 18 - 1, REP. MC GEE voting no.

{Tape: 1; Side: B}

HEARING ON HB 253

Opening Statement by Sponsor:

REP. BEVERLY BARNHART, HD 29, said this bill would not mandate that judges send parents involved in a divorce to a course designed to help the children of divorce. It provides that a judge may send them to a divorce mediation course. She presented a letter from Judge Olson in support of the bill. **EXHIBIT 2**

Proponents' Testimony:

George Studor, presented his personal testimony and submitted it to the committee. **EXHIBIT 3**

Pat Melby, State Bar of Montana, rose in support of the bill. He said the bar had supported this for sometime and had urged the Supreme Court to adopt it by rule but felt it was more appropriate to adopt it by statute.

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. LOREN SOFT asked if the material used in the course presupposes that divorce is inevitable or did it allow for reconciliation.

Mr. Studor said the material focuses on the children and the need for both parents to recognize the value and needs of the children. It does not take a stand on the matter of divorce or reconciliation.

REP. SOFT asked if the material should support an attempt toward reconciliation as part of the process.

Mr. Studor said that was a noble idea and he would support it. In some cases that has already been worked through during years of attempted reconciliation. He defined reconciliation as restoration of relationships which would involve considerate communication between parents, cooperative parenting and then being able to physically be in the same room together. From there it could move into friendship and beyond.

REP. MOLNAR asked for an explanation of the types of programs which currently exist would qualify under this bill.

REP. BARNHART said her research indicated that some judges are sending parents to classes but she did not have detailed information about them.

REP. MOLNAR asked if there was any harm in not specifying the length of time the course would take.

REP. BARNHART said she did not see any problem with that.

REP. MC GEE asked the sponsor to elaborate why she felt it was necessary to put this concept into statute.

REP. BARNHART said that it would have more affect on judges and others would also know about it and help to get a class started.

REP. MC GEE referred to Judge Olson's letter advocating that the bill include a provision for funding such a program where parties are unable to pay for it.

REP. BARNHART said she didn't include it but if it passed, she would work to get scholarships for those people. Grants might also be available for the courses.

REP. MC GEE asked if it would be appropriate to include in this bill language directing the court to authorize a counseling process by which reconciliation and reinstitution of the marriage would be the goal.

REP. BARNHART replied, "No."

REP. MC GEE asked her to elaborate on her answer.

REP. BARNHART said that may be another bill, but this bill addresses those marriages which are not reconcilable where the children can be helped by the tools provided to the parents through the course.

CHAIRMAN CLARK suggested a friendly amendment to change the wording from the court being directed to notify as optional. His reasoning was that when the court is given an option, it sometimes does not happen.

REP. BARNHART said she felt the language in the bill is more effective, but that that could be added.

REP. AHNER asked if divorces are granted too easily.

REP. BARNHART said she wouldn't have knowledge of that.

REP. AHNER asked if the sponsor felt that having these hours of class would provide the opportunity to see what is happening to their children and cause them to take a new look and perhaps reconcile.

REP. BARNHART saw that as a possibility.

REP. KOTTEL proposed that when a court system uses its power to impose guilt on the parties attempting to get a divorce where the women is being battered or abused, she would attempt reconciliation for what is best for the children and then stay in a relationship which is more destructive to the children than dissolution would be.

REP. BARNHART said there are many possibilities, but that anything she had read showed her that in a domestic abuse case there is no way that that is a healthy situation. So she did not see that a court would encourage it.

Closing by Sponsor:

In closing **REP. BARNHART** pointed out the statistics for divorce in Montana and the numbers which affected minor children. The intent of the bill is to alleviate some of the problems in those cases.

HEARING ON HB 309**Opening Statement by Sponsor:**

REP. DUANE GRIMES, HD 39, presented HB 309 which he characterized as a moderate tort reform bill which would be extremely important. It would set a cap on non-economic damages for medical malpractice of \$250,000 and set up periodic payments. Though there are few cases settled at that amount in Montana, because the current financial liability is open ended, the malpractice insurance rates for doctors are exorbitant. Economic awards for damages are not capped under this bill. He believed this would help encourage physicians to set up their practices in Montana.

{Tape: 1; Side: B; Approx. Counter: 38.8}

CHAIRMAN CLARK limited testimony to 35 minutes per side.

Proponents' Testimony:

Laurie Ekanger, Governor's Office, said the Governor's Office recommended HB 309 be approved.

Jerry Loendorf, Montana Medical Association (MMA), American Association of Retired Persons (AARP), explained the bill. He said that non-economic damages are those things which are not tied to a dollar amount such as pain, humiliation, suffering, anguish, or grief. Economic damages include health care expenses, loss of earnings, or loss of domestic services. He said this bill requires that the payments be made over a period of time. The advantages are that an annuity can be purchased while still paying the same amount to the person injured. The savings results in less litigation costs for the insurer and he explained how that works. Periodic payments provide flexibility to the injured as the amounts can be increased for future needs such as college. The claimant would have the most say in setting those payments to meet his needs.

Mona Jamison, Doctors Company, said she would guarantee that with the passage of this bill within a three- to five-year period their rates would decrease. They based this guarantee on experience. She distributed written testimony with supporting charts to demonstrate their support of HB 309. **EXHIBIT 4**

{Tape: 2; Side: A}

John Gregory, MD, Billings Surgeon, MMA, said he had long supported tort reform in this area. He believed this to be the year to effect the changes needed. He believed patients should receive legal remedies for injuries and strongly supported the need for Montana's citizens to be made whole economically when they have been injured while under medical care. In the past when liability insurance premiums have increased, these costs were passed on through, but at present they can no longer do that because of serious constraints by payers such as Medicaid and private insurers.

Nancy Clark, Ryegate, Montana, Wheatland Memorial Hospital, presented her written testimony in support of HB 309. **EXHIBIT 5**

Pat Melby, Montana Podiatric Medical Association and Montana Optometric Association, submitted his testimony in support of HB 309 and asked that those specialties be included within the purview of the protections offered by it. Suggested amendments are included in **EXHIBIT 6.**

Mark Staple, Montana Chiropractors Association, said they would support the second amendment proposed by the previous testimony.

Steve Browning, Montana Hospital Association, spoke in favor of the bill. He briefly addressed some causes of increases in health care costs and what he expected opponents to say about capping non-economic damages. He said it is the accumulation of small increases in health care factors which cause the substantial increase in health care costs and it is these factors which must be monitored to guard against rising costs. He amplified the testimony presented by **Nancy Clark** and said that many rural hospitals are experiencing this same dynamic.

Jim Tutwiler, Montana Liability Coalition, supported HB 309 as interested parties in tort reform in liability matters. They believed this bill would bring balance and predictability.

Steve Turkiewicz, Montana Auto Dealers Association, urged support for HB 309.

Laurie Koutnik, Executive Director, Christian Coalition of Montana, submitted written testimony in favor of HB 309. **EXHIBIT 7**

Mary McCue, Montana Dental Association, supported this legislation.

Jim Smith, Montana Pharmaceutical Association, rose in support of HB 309.

REP. ROGER DEBRUYCKER, HD 89, representing three small hospitals in his area, supported HB 390. He presented written testimony from the hospital in Big Sandy. **EXHIBIT 8**

Steve Shipero, Montana Nurses Association, said they support the bill.

Tanya Ask, Blue Cross and Blue Shield of Montana, supported the bill.

Jacqueline Lenmark, American Insurance Association, supported HB 309.

Tom Ebzeny, St. Vincent's Hospital and Montana Associated Physicians, supported the bill.

Rose Hughes, Montana Health Care Association, supported the bill.

{Tape: 2; Side: A; Approx. Counter: 20.8}

Informational Testimony:

Supporting testimony is included as **EXHIBITS 9 and 10.**

Additional written testimony was submitted February 9, 1995 in support of HB 309. **EXHIBIT 11**

Opponents' Testimony:

Randy Bishop, Montana Trial Lawyers Association (MTLA), felt from his experience that he knew both sides and the reality of how the jury system works. He said that HB 309 says yes to government interference and that it does not trust the registered voters to make intelligent decisions about their lives, property and the future of their fellow citizens. He said the committee needed to ask what the problem is and what the proposed solution is. Then he said they needed to ask who would benefit from the proposed solution and who would get hurt. He said they were being asked to impose a solution on a problem without being told what the problem is. He said the problem was carelessness. He presented **EXHIBIT 12** in support of his argument.

D. P. Carestia came as a person who had been involved in placement of periodic payment or structured sum annuities over the course of at least ten years. He presented his credentials as an opponent of HB 309. Although annuities can be a very good tool, he did not believe they should be mandated or universally applied in every case. Annuities are inflexible contrary to previous testimony and he explained why that is true from his experience. The second factor he wanted the committee to consider was the risk associated with the life insurance industry. He said that the company which rates the insurance companies has changed its criteria and therefore, there is a change in the categories where investments are being made. Therefore the financial stability upon which the industry relies is troubled.

He gave extensive testimony to back up his claims.

Mark O'Keefe, State Auditor, Commissioner of Insurance and Securities, stood in opposition to the bill mainly because they take 27,000 calls a year from insured people with compelling stories about the harm they have endured. He told of the recommendation and observation of **SEN. GAGE** and that is submitted as **EXHIBIT 13**. He refuted previous testimony that this type of legislation was responsible for decreases in rates by saying that competition in the Colorado industry helped drive down the rates. He felt that free-market competition was a better solution than regulating benefits in tort reform. The "med-mal" (sic) industry has six times the profit of any other insurance industry that does business in the state. He further stated that the Doctors' Company had asked for a premium rate increase of 17.7% in 1994 though they claimed they could actually charge an increase of over 62% if they wanted to. The state auditor asked for proof to back up the claim. They received 170 days later a withdrawal of the 17.7% increase and a request for only a 6.6% increase. He said the committee must make the Doctors' Company prove their claims and give the auditor's office the authority to collect the data and bring it back to the legislature to see if the tort reform has resulted in their claims.

{Tape: 2; Side: B}

Russell Hill, MTLA, presented written testimony in opposition to HB 309 as well as a complete copy of **SEN. GAGE'S** committee report which represented a two-year exhaustive study.

Edmund Caplis, Executive Director, Montana Senior Citizens' Association, opposed the bill.

John Morrison, Attorney in Helena, opposed the bill.

Tom Keegan, Attorney, opposed the bill.

Questions From Committee Members and Responses:

REP. SHEA asked **Mr. Morrison** to present more of his testimony.

Mr. Morrison cited a case which involved a woman dying of breast cancer and how the husband and children would be compensated for their loss under the provisions of this bill.

REP. BILL TASH asked how many malpractice insurance companies had responded to the State Auditor's recruitment letters to enter Montana.

David Gallik, Insurance Commissioner's Office, said he did not know the exact figures but there had been more interest than there was in the past. He said there are about nine who are expressing interest or who have begun to do business in Montana.

REP. TASH asked if he understood that there are basically only two companies in the state.

Mr. Gallik said there are three, the Doctors' Company, Utah Medical and St. Paul Fire and Marine, who are active.

REP. ANDERSON wanted to discuss the *Billings Gazette* editorial on punitive damages and asked if they were talking about something other than punitives here.

Mr. Bishop agreed that they were. It has been made clear to the press that punitive damages against doctors are not the problem. He said MTLA offered \$1,000 for each case that could be filed in the last 25 years where an award of punitive damages was made against a doctor. That \$1,000 was offered to charity and the offer was printed as an ad in a Great Falls paper. There was only one case which surfaced as a result of the ad. The Billings paper studied the information and concluded that punitive damages are not an issue. He pointed out the rest of the editorial which was included in the materials he distributed during testimony.

EXHIBIT 12

REP. ANDERSON stated that nothing this bill does affects punitive damages and asked for confirmation.

Mr. Bishop said that was true.

REP. ANDERSON again referred to EXHIBIT 12 which showed that 40% of the claims are against 4% of the providers. He asked if they are a particular type of provider.

Mr. Bishop was not sure the data which is available would give that information. The information upon which the decisions should be made is very limited.

REP. ANDERSON asked rhetorically if Mr. Bishop would support a fully informed jury since he suggested in testimony that juries should be given more credit in settling these malpractice cases.

Mr. Bishop said he would not and then explained why. Within the context of the law, they are saying that juries should be free to exercise their community judgment in malpractice cases.

REP. TASH asked how many awards are denied when it is mal_____ (inaudible) rather than malpractice.

Mr. Bishop said only 19 cases have gone to trial against doctors in the last ten years and of those cases 15 were won by the doctor. The jury made a determination that the doctor did not do wrong. The majority of those cases settle and the average settlement is less than \$100,000.

{Tape: 2; Side: B; Approx. Counter: 14.2}

REP. LINDA MC CULLOCH asked Mr. Hill to give a brief rundown of the content of SEN GAGE'S study.

Mr. Hill asked the committee to read the first two paragraphs of his written testimony for two of the conclusions of the study. Professional liability insurance for health care providers is available at competitive rates and very few claims result in lawsuits and that those that do are settled more often than not in favor of the defendant. The evidence presented did not support the contention that there was a medical malpractice crisis in Montana that warranted the passage of specific tort reform measures. No evidence was presented that supported the contention that the passage of tort reform measures would result in health care cost savings either to health care providers or consumers.

REP. MC CULLOCH asked **Mr. Bishop** if juries are not told there is a cap on the awards and if so to please explain it.

Mr. Bishop said that under the bill, there is an express provision which says the jury is not to be informed that there is a \$250,000 cap. He did not know exactly what the reasoning was but suspected that it is an effort to keep that information from the jury so that they won't know that the hand of government is in there controlling their decision.

REP. MC CULLOCH asked if there are multiple claims against a series of doctors by a single patient, would they be limited to the \$250,000 or would it be \$250,000 against each doctor in the case.

Ms. Jamison said there is only one \$250,000 cap.

REP. MC CULLOCH asked if they could guarantee that these reduced rates would be eventually passed down to the patients.

Ms. Jamison answered, "No." She said that is not what tort reform is about.

REP. MC CULLOCH asked what the average non-economic claim is in Montana.

Ms. Jamison said she did not have that information and referred the question.

Mr. Loendorf said he did not have the figure, but didn't think the average figure was important where the large awards are important which would affect premiums.

REP. MC CULLOCH referred to **Dr. Gregory's** testimony where he said a doctor's pay would go down as a result of reduced premiums being passed on to the patient. She asked if the reason for the reduced payment to the doctor would be because he wouldn't have that premium to pay.

Dr. Gregory answered that he was speaking to the fact that in the past premium increases could be passed on to the patient. At

present they cannot do that because reimbursement rates are static and falling slightly. In the future, reimbursement will go down significantly because entitlements probably will have to include Medicare as a significant portion of lower reimbursement. There would be no place to pass on premium increases. They want premiums to stabilize.

REP. MC CULLOCH suggested that if the pay goes down by \$100 because the premium has gone down by \$100 and they wouldn't be charging the patient that \$100, he wouldn't be losing money because of this.

Dr. Gregory said that if this bill passed, the premiums should go down.

{Tape: 2; Side: B; Approx. Counter: 27.3}

REP. WYATT asked for a definition of non-economic damages and she set up a scenario which included a child born with physical defects to gain understanding.

Mr. Bishop said the outlined scenario was complicated with pre-existing problems. They would have to segregate out any economic expense that would be directly related to the surgical attempt to correct the defects which may have failed due to malpractice and thus shortened the life of the child. HB 309 would result in taking the possibility away from that child to live the life it was given to the full by telling the jury what they can compensate.

REP. SOFT asked for a response from **Ms. Jamison** to the testimony of **Mr. Bishop** which related to over collection by the Doctor's Company.

Ms. Jamison rebutted the testimony with statistics of their collection of premiums in relation to claims paid.

REP. SOFT asked for her response to the State Auditor's testimony about the rate increases.

Ms. Jamison said that when that was first submitted at 17% and was later dropped to 6.6% because of competition. She wanted the committee to know that the increase which was finally submitted and approved was not adequate to cover all of the outstanding claims in the way the actuaries figure it out. She said there is a benefit to competition, but tort reform would encourage more companies to come because they would know they could reduce the volatility in non-economic damages. The information was given in good faith and was adjusted to reflect the market.

REP. SOFT asked her to address the discussion on the credibility of the best rating system and about variable annuities not being covered by the Montana Guarantee Association.

Ms. Jamison rebutted the testimony and offered options for the committee to consider. She said amendments in that area might be appropriate which would reduce the fears associated with the ratings. She could not recall if the opponent's testimony was the case regarding the variable annuities.

REP. SOFT asked for her response to **SEN GAGE'S** report that summarized says, "If it ain't broke, don't fix it."

Ms. Jamison said the report was replete with statements that say the data was insufficient and inadequate. She said she would provide those pages to the committee. She referred to a letter submitted to the committee from **SEN GAGE** explaining and modifying his personal opinion of what happened during that committee report.

REP. SOFT asked what **Dr. Gregory** had seen happen to his liability premiums in the last ten years.

Dr. Gregory did not know because they were with a new company and he is insured with a group.

REP. SOFT asked who pays his premiums.

Dr. Gregory answered, "The clinic."

REP. SOFT asked the doctor to respond to the testimony that 80,000 Americans are killed due to malpractice per year.

Dr. Gregory thought **Mr. Bishop** was referring to a Harvard study of several New York Hospitals and had presented it selectively. He cleared it up according to his interpretation which included that these statistics involved patients who were critically ill and in essence "doomed" because in those cases there was vastly more room for human error since several complicated steps were involved in their treatment.

REP. SOFT asked how medical malpractice cases are monitored in Montana.

Dr. Gregory did not know who were involved in the data represented in the testimony about repeat offenders. He said the majority are specialists who do very complex work though there are some in the statistics who are general practitioners who do not do good work. As the complexity of case increases the opportunity for "mal-care" (sic) and negligence also increases.

REP. SOFT referred to the amendments offered to include podiatrists, etc., and asked how the sponsor was responding to those amendments.

REP. GRIMES said he would not object to those amendments.

{Tape: 2; Side: B; Approx. Counter: 46.9}

REP. KOTTEL asked **Mr. Hill** if passage of HB 309 would have a direct impact on the increase of doctors in rural areas.

Mr. Hill replied that in his opinion, it would not and might even worsen the situation and he explained. He said there is a problem with liability for rural physicians not because of the numbers of times they are sued but because of the refusal of insurers to charge different premiums for the rural family practitioner who delivers a smaller number of babies than they charge for the urban physician who delivers a larger number for instance. He also felt that rural people are very mobile and prefer to receive their medical treatment in urban medical centers.

REP. KOTTEL asked if there was a decrease in the numbers of physicians practicing in Montana.

Mr. Hill said there had been a dramatic increase in the numbers of physicians in Montana over the last several years.

REP. KOTTEL asked why the reduction in premiums would not decrease health care costs to the consumers.

Mr. Hill thought there was no evidence in Montana or elsewhere that those savings would ever get passed on to consumers. It might be appropriate for the MMA and insurance carriers to desire the passage of HB 309 because it would lower premiums.

REP. KOTTEL repeated testimony of **Ms. Jamison** about the \$250,000 cap as being enough payment for something which cannot be itemized and asked **Mr. Hill** to respond.

Mr. Hill thought the proponents were saying that if it can't be documented, if it is not economic damages, it's not real. He said that the proponents want the committee to believe there is a vertical line drawn with economic damages on one side and non-economic damages on the other. He said that is incorrect and explained his opinion. He said this bill would create a situation where the injured party would recover damages limited by the cap while the doctor suing a manufacturer and citing his loss of reputation as cause would recover a much greater amount. He felt this was grossly unfair.

REP. KOTTEL cited a case in Great Falls to continue the rebuttal of the proponent's position.

Mr. Hill responded that the whole debate was turning on the difference between economic and non-economic damages and he challenged the committee to ask why that distinction is important in terms of the argument about the volatility of the market and the need to stabilize rates to decrease costs. The carriers don't write separate coverage for economic or non-economic damages. An insurance policy already has limits which act as a cap.

REP. KOTTEL asked if it was a valid parallel between automobile insurance rates depending on the quality of the driver's record and medical insurance.

Mr. Hill said it is not. Medical insurance companies refuse to experience-rate their doctors. "Bad doctors don't pay more than good doctors."

{Tape: 3; Side: A}

REP. KOTTEL referred to **EXHIBIT 12** to shore up the reply by **Mr. Hill** who expanded on his testimony by asking the committee to ask the proponents to be specific about how much the rates would go down and why doctors who are being repeatedly sued are not known by the general public.

REP. WYATT asked for clarification of **Dr. Gregory's** testimony about the seriously ill patients who were included in the Harvard study. She was concerned that he implied that their standard of care was different from the usual patient.

Dr. Gregory said he was trying to point out that the majority of patients in the Harvard study were critically ill and elderly and as such required much more complex care and as the complexity of care increases, the opportunity for errors increases. That was why most cases of negligence were found in this patient population. To assume that these errors are all preventable is not realistic in his view.

REP. WYATT asked how the data could be incorporated into this bill so that the auditor's office will have the statistical information to track this to determine the impact.

Margaret Miksch, Actuary, Insurance Department, State Auditor's Office, said it would be helpful to have the loss experience exposures rated by a rating organization such as Insurance Services Office.

{Tape: 3; Side: A; Approx. Counter: 5.4; Comments: The testimony above is barely audible on the tape and therefore may be incomplete.}

CHAIRMAN CLARK asked the administrator of the Harlowton Hospital to respond to the testimony about why rural hospitals do not have obstetric care any longer.

Diane Jones, RN, Administrator, Wheatland Memorial Hospital, said that during the time she worked as a staff nurse at that hospital they had stopped OB care due to the high cost of malpractice insurance. She saw that causing a further loss to the families in that area in follow-up care of the children. They felt that having no limits on malpractice costs is debilitating for the community because they cannot afford it and it has also caused that community to go without a physician for long periods.

REP. SMITH asked if nurse practitioners and midwives would be as liable as physicians in their scope of care primarily in delivery services.

Mr. Hill said his understanding was that those health care providers are not held to a physician standard of care, but held to the standard of care within their own category of licensing.

REP. SMITH asked **Ms. Jamison** the same question.

Ms. Jamison said the standard of care applied to a doctor is different from the standard of care applied to a midwife or a nurse practitioner. The physician is held to a higher standard. She replied to further questioning that the Doctor's Company does not cover midwifery malpractice. She emphasized said that there are sometimes just bad outcomes and it isn't always somebody's fault with someone to pick up the cost of those bad outcomes.

REP. SMITH asked what the impact of caps on premiums would have.

Mr. Hill replied that even if these caps are passed, they will not apply to certain malpractice cases because they are cases governed by federal law that state law can't supersede. The money doesn't come from reducing volatility, but it comes from taking money from somebody who is horribly disfigured or physically impaired.

REP. AHNER commented that sometimes it isn't people who cause the outcome, sometimes it is just life.

REP. ANDERSON referred to line 25 on page 1 where it says, "the claimant's share of the \$250,000 must be the same percentage as the claimant's share of the combined awards before deduction." He asked if the jury were to award \$1 million and lawyers' fees of one-third were deducted, would the lawyers' fees apply by one-third to the \$250,000; or did it mean that if the claimant's award was \$660,000 he would receive the entire \$250,000.

Mr. Loendorf replied that the attorney's fee isn't in anyway affected by this bill or that particular sentence. Whatever agreement the attorney has with the client determines the percentage deducted from the award.

REP. ANDERSON said he was confused about the claimant's share being the same percentage as the claimant's share of the combined awards before reduction.

Mr. Loendorf explained by example that if there were awards to three people receiving the same award, they would receive an equal share. If they received unequal awards, they would each receive proportionate shares.

{Tape: 3; Side: A; Approx. Counter: 21.5}

Closing by Sponsor:


REP. GRIMES pointed out that though SEN. GAGE'S report included remarks that there was insufficient data, the interim subcommittee was representative of the 1993 Legislature with a bias against tort reform. In addition, another subcommittee report of October 1992 did look in detail at these issues and did compare to other states and their conclusion was the opposite of this subcommittee report which was mentioned in testimony. Their response was that medical malpractice tort reform was needed. He continued to point out the deficiencies of the more recent report. He said this is a common sense bill good for Montana by giving citizens who have been wronged a larger share of the damages. This gives trial lawyers less because they will get paid at the current value of the annuity. He gave an example to back up his statement. He said this bill simply caps non-economic pain and suffering damages and would stabilize the insurance market. He further stated that the big government argument is a smoke-screen. The real issue is not negligence, but what is fair. Insurance companies share the risk and that poor doctors will be assessed a surcharge for what they do and if they continue to have a problem, they will be dropped from the insurance.

Motion: REP. ANDERSON MOVED TO ADJOURN.

{Comments: This set of minutes is complete on three 60-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 11:30 AM.



BOB CLARK, Chairman



JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 2/2/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		



HOUSE STANDING COMMITTEE REPORT

February 2, 1995

Page 1 of 2

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 176** (first reading copy -- white) **do pass as amended.**

Signed: *Bob Clark*
Bob Clark, Chair

And, that such amendments read:

1. Title, line 7.

Following: "SURCHARGE"

Insert: "MUST BE DEPOSITED IN THE STATE GENERAL FUND AND IS
INTENDED TO"

2. Title, lines 7 and 8.

Strike: "PROVIDING" on line 7 through "MCA;" on line 8

3. Page 1, line 20.

Following: "case or"

Insert: "determines pursuant to 25-10-404 that"

4. Page 1, line 26.

Strike: "account established in [section 2]"

Insert: "state general fund and is intended to be appropriated
and used"

5. Page 1, line 28, through page 3, line 4.

Strike: sections 2 and 3 of the bill in their entirety

Renumber: subsequent sections

6. Page 3, line 6.

Strike: "(1)"

M.H.
Committee Vote:
Yes 19, No 5.

281620SC.Hdh

7. Page 3, lines 8 and 9.
Strike: subsection (2) in its entirety

-END-



HOUSE STANDING COMMITTEE REPORT

February 3, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 36 (third reading copy -- blue) be concurred in as amended.

Signed: Bob Clark
Bob Clark, Chair


Carried by: Rep. Grimes

And, that such amendments read:

1. Page 5, lines 1 through 3.

Strike: "If the" on line 1 through "results." on line 3

-END-


Committee Vote:
Yes 18, No 1.

291418SC.Hbk

HOUSE OF REPRESENTATIVES

ABSENTEE VOTE

Date 2-2-95

Mr. Chairman/Mr. Speaker:

I, the undersigned member, hereby vote absentee on:

SB Bill No. 36
yes-but
no-amend

Representative Bill Lamy voting (aye or no)
" and all amendments pertaining thereto. Wye

EXHIBIT 1
DATE 2/2/95
HB 176

Amendments to House Bill No. 176
First Reading Copy

Requested by Rep. Kottel
For the Committee on the Judiciary

Prepared by John MacMaster
January 24, 1995

1. Page 1, line 20.

Following: "case or"

Insert: "determines pursuant to 25-10-404 that"



EXHIBIT 2
 DATE 2/2/95
 HB 253

January 31, 1995

TO: Representative Bob Clark
 Chairman of the House Judiciary Committee
 c/o Beth Furbush
 Legislative Council
 FAX 444-2588

STATE OF MONTANA

DISTRICT COURT

EIGHTEENTH JUDICIAL
 DISTRICT

DEPARTMENT ONE

THOMAS A. OLSON
 DISTRICT JUDGE

NONA FAITH
 MEDIATOR
 COURT ADMINISTRATOR

JANICE YURK
 SECRETARY
 COURT RECORDER

TAMZIN G. BROWN
 LAW CLERK

FROM: HON. Thomas A. Olson, District Judge (Gallatin Co.)

RE: House Bill No. 253 (Divorce Education)
 Introduced by Beverly Barnhart
 Hearing Date-Thursday, February 2, 1995

This court implemented a divorce mediation program almost four years ago for many of the same reasons which are the basis for HB 253. Specifically, the court supports programs and legislation aimed at assisting families in dealing with divorce issues in a manner that is the least destruction to all concerned, especially the children. The mediation program has been tremendously well received by the public and they are grateful to have a means available to them to resolve their disputes which does not further alienate them.

The issues that these families struggle with the most are custodial and visitation arrangements of their children. Any program aimed at assisting them in clearly recognizing the impact of their actions, positions and decisions on the children would be invaluable.

Many of the families however are indigent. Unfortunately public funds are limited and the district court budgets are already stretched to the limit. It would therefore be extremely important that the bill include a provision and funding for such a program where the parties are unable pay for it. Without such a provision, the court would be limited to ordering the educational program only for those privileged families capable of paying for it.

Representative Bob Clark
Montana State Legislature
House Judiciary Committee
Helena, Montana

Dear Mr. Chairman,

I am writing to support Representative Beverly Barnhart's proposal, HB 253, to institute a policy for education programs for divorcing parents which will protect the rights of the affected children. I have five children and went through a divorce in Coeur d'Alene Idaho on May 2, 1994. There were many difficulties surrounding the inclusion and manipulation of the children which became apparent to both lawyers, the mediator, school and church leadership. The court decided to direct that we attend their video and 3 hour class and work with a mediator to settle custody, visitation and property issues.

The video "In the Best Interests of the Child" was shown at the court house at only specific times two days a month. This was a major inconvenience for those having to travel a great distance to be there. It would seem to me that it would have been better to have an opportunity for everyone to watch it individually in addition to providing the group viewing. I would recommend this for Montana. The video itself was OK but not so effective as the ones I have viewed since. When I returned to Montana I contacted Judge Moran and Olsen's offices in Bozeman and asked if they would be interested in developing a program like there is in Idaho. Due to funding considerations we began looking at videos from programs around the country. Then I found the Family Law Section of the State Bar Association had already been perusing the recommendation of a video for the State. So I worked with Mr. Andy Suendram of Dillon, MT. I learned about the many sweeping programs being mandated by court systems around the United States and reviewed a few of the most highly recommended programs.

The videotape I would most highly recommend to be viewed by all divorcing parents that is available today is "Listen to the Children", by Victor-Harder Productions. It consists of moving and honest testimonies of 30 different children of varying ages and backgrounds. The purpose of this tape is to increase the sensitivity of all parents to the children's predicament, feelings and vulnerabilities. It does not appear "staged" as others do, but instead the children appear candid and open. At the end there are 10 or so clear written recommendations to the parents to do right away. I would also recommend that the judges in each district add some frank and direct words to divorcing parents at the beginning and end of the tape if at all possible and make the tape available for regular group viewing as well as checkout at the local courthouses.

The course in Idaho was called "Divorce: A Sensible Approach for Parents." It was extremely helpful for me and helped me to have a better attitude towards mediation subjects. In the class of 25 people I was able to see many people who were much more angry than myself, others who were expressing similar problems as myself and still others who seemed to have it all together. I was able to look more objectively at my attitudes and also felt affirmed in my desires and opinions of what was right for the children's sake. I learned about what were typical reactions of children of different ages to divorce and what things to do or avoid as parents to help them through it. I

realized my 2 year old daughter probably wasn't ready for overnight visits yet even though I felt I was being denied that right. I realized that I couldn't expect to force my fourteen year old son to come visit with me even though I had the right to visit him. I realized how much a major battle over custody would damage the children and how much stability in their lives means at that time. The class cost \$20, run at the North Idaho College only once a month.

The Center for New Directions handles the Divorce education programs along with other essential services. They grant funded programs are run by the State of Idaho in six cities in cooperation with the university facilities and systems. Counselors are paid and certified and a Masters in counseling(or Grad Student) is required. Courts have not mandated the programs for every divorcing parent, but many states do. The Center for New Directions includes other programs for re-entering the workforce, teaching of non-traditional job skills(welding, construction, auto repair for women), career counseling, personal counseling and special workshops for financial planning, self-esteem, etc.

At the Center for Divorce Education in Boise, they:

- show one video 6 times a month, handling about 200 divorcing people.
- the instructional book includes a helpful "Parenting Plan"
- sell books like "Mom's House, Dad's House" in class.
- have the divorcing parents view "Listen to the Children" with the children - great idea!
- have parents in custody battles watch 2 other videos:
"Pain Games" & "Don't Forget the Children"
- have those directed toward mediation watch 2 more videos:
"Its Still Your Choice" & "Mediation, Its Up to Your"
- the center puts out a newsletter every month as well

In Lewiston, they use a video series called "Children in the Middle" which is put out by the very well known Center for New Directions in Athens, Ohio (a non-profit part of Ohio University). This series has one video for adults and another for teaching children how to best handle the same situations that are in the video for adults - it was meant to be used in a classroom setting. The Association for Family and Conciliation Courts is also very active in this area. In 1994, the 1st International Conference on Parent Divorce Education was held in Chicago Sep 29, 30 & Oct 1.

I am not a counselor, lawyer, judge or psychologist. I am a father of five wonderful children who have been victimized by divorce. I feel very strongly about the benefits of these programs for the ignorant and distracted divorcing couple - not to solve their problems but to wake them up to the needs of their children. Contrary to judicial opinion, I believe divorce should be recognized as a process and the children are victims over a long period. I only wish there were some way to give remedial training to people who didn't get the message the first time; but I think the books and videos recommended by these programs can really help divorced parents to be reminded of the important principles first introduced in the heat of battle. In Bozeman, I started an series of divorce recovery workshops, a professionally run on-going divorce support group and reference list of programs and materials to help individuals make it through the rest of the process. Idaho programs meet great needs and protect the future, please support something similar in Montana.

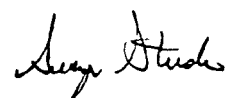


EXHIBIT 4
DATE 2/21/95
HB 309

JAMISON LAW FIRM
ATTORNEYS AT LAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

MONA JAMISON
STAN BRADSHAW

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee
FROM: Mona Jamison, Lobbyist for "The Doctors' Company"
RE: Testimony on HB 309 -- \$250,000 Cap on Noneconomic Damages
DATE: February 2, 1995

Section 1 of HB 309, however, limits awards for *noneconomic* loss. Noneconomic loss is defined in HB 309 as "pain, suffering, inconvenience, loss of consortium, physical impairment, disfigurement, and other non-pecuniary damages." No provision on HB 309 limits payments for *economic damages* such as lost wages and medical costs. These real damages are not affected by this bill.

Skilled attorneys can use the sympathy factor to manipulate juries into awarding high amounts for noneconomic damages. Placing a cap on such damages significantly reduces the cost of all claims, regardless of noneconomic factors. The cap allows malpractice insurance carriers to keep premiums down, which in turn allows physicians to continue delivering services. This is a benefit in rural areas and also for physicians practicing in high risk specialties, such as obstetrics.

The vast majority (over 95%) of medical malpractice cases are settled out of court and the damages typically are not categorized as economic or noneconomic. The lack of a cap on noneconomic damages leads to increases in the amount required to settle cases without a trial even though the actual settlement may not involve damages specifically categorized as an award for "pain and suffering."

A cap on noneconomic damages is singularly the most important element of stabilizing and reducing premiums for medical malpractice insurance for physicians.

-END-

JAMISON LAW FIRM

ATTORNEYS AT LAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

MONA JAMISON
STAN BRADSHAW

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee

FROM: Mona Jamison, Lobbyist for "The Doctors' Company"

RE: Testimony on HB 309 -- Periodic Payments of Future Damages
in Excess of \$50,000

DATE: February 2, 1995

This provision allows settlements and judgments for "future" damages to be made in payments at regular intervals. Future damages are defined as payment for future medical treatment, care or custody, loss of earnings, or future noneconomic damages such as pain and suffering.

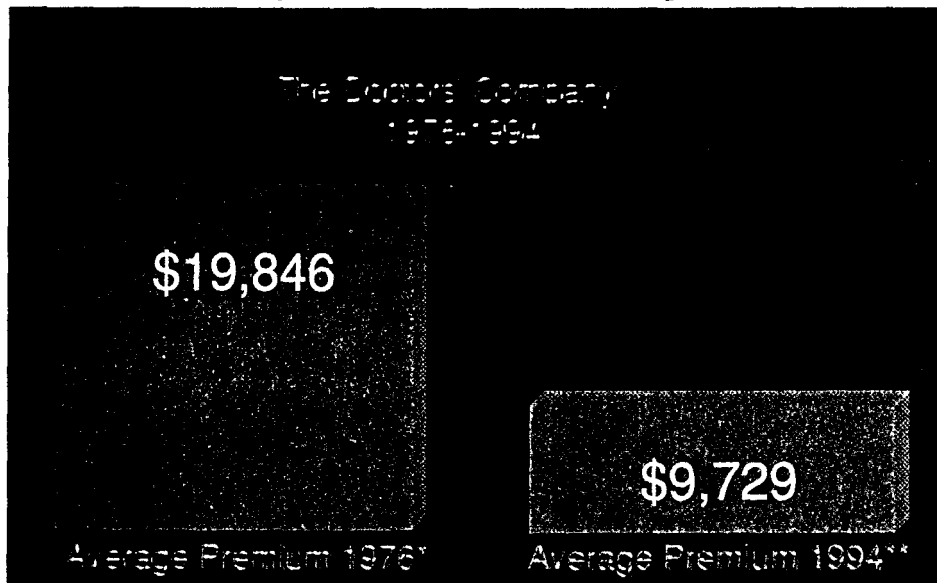
1. The injured patient receives more of an award under the periodic payment scheme proposed in Section 2 of HB 309. The attorney, however, receives less. Under a lump sum scheme, the plaintiff's attorney's fee is much higher because the fee is a percentage of a large amount instead of a percentage of a large amount reduced to its present value. This is also one aspect of the inherent conflict of interest presented by the contingency fee arrangement.

2. Periodic payments contribute to insurance premium stability. When the periodic payment of future damages is mandatory, as proposed in HB 309, it is easier for the insurer to calculate appropriate reserves. When an annuity can be bought within premium limits, reserves are calculable. Large lump sum losses that exceed premium limits wreak havoc with reserves and contribute to premium instability. In less populated states, substantial premium increases can result from even one large verdict or settlement that must be paid in a lump sum.

3. The tax consequences of periodic payments are much more favorable to the plaintiff. A lump sum payment itself is not taxable. However, when that sum is invested, the interested is taxable. Likewise, when payments are periodicized, each payment (which includes imputed interest) is not taxable. Where a portion of the payment is invested, the taxable income is taxed at a lower rate than income from a larger, lump sum.

4. When periodic payments are mandatory, settlement negotiations are more successful. When the plaintiff's attorney knows that future damages will be periodicized, he will be less likely to take the case to trial because it will not increase his chances receiving a higher fee--his fee will be lower than under a lump sum award. Overall, however, the patient receives the same amount of money (including imputed interest).

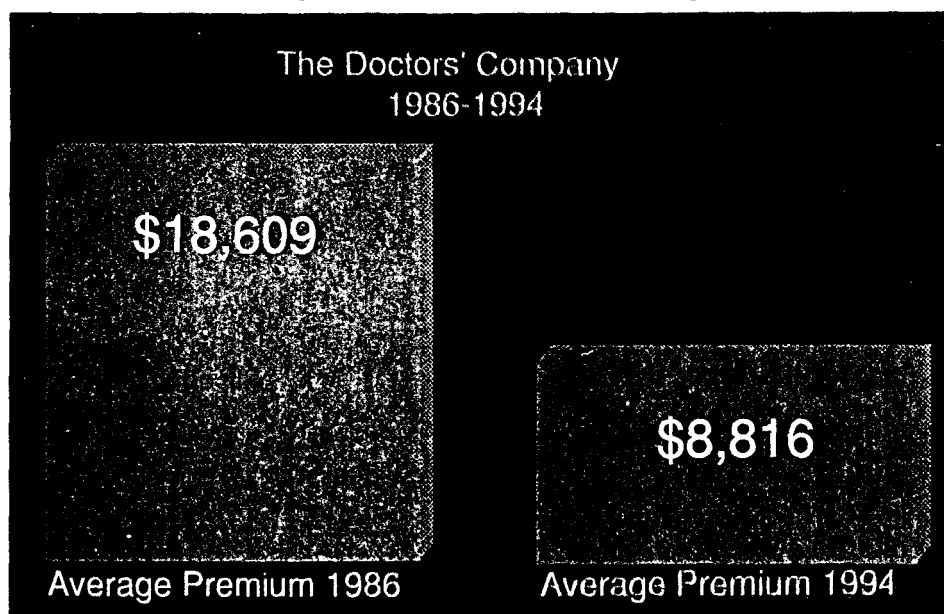
MICRA Reduces California Medical Liability Premium Rates by 51%



*\$7,604 average premium adjusted to 1994 dollars on the December Urban, CPI Index for a \$1 Million / \$3 Million Claims-Made Policy Premium

**After dividend deduction (where applicable) for a \$1 Million / \$3 Million Claims-Made Policy Premium

Tort Reform Reduces Colorado Medical Liability Premium Rates by 53%*



*The Doctors' Company's average of all specialties, including dividends for a \$1 Million / \$3 Million Claims-Made Policy Premium

HB 309 Testimony
February 2, 1995
Page 2

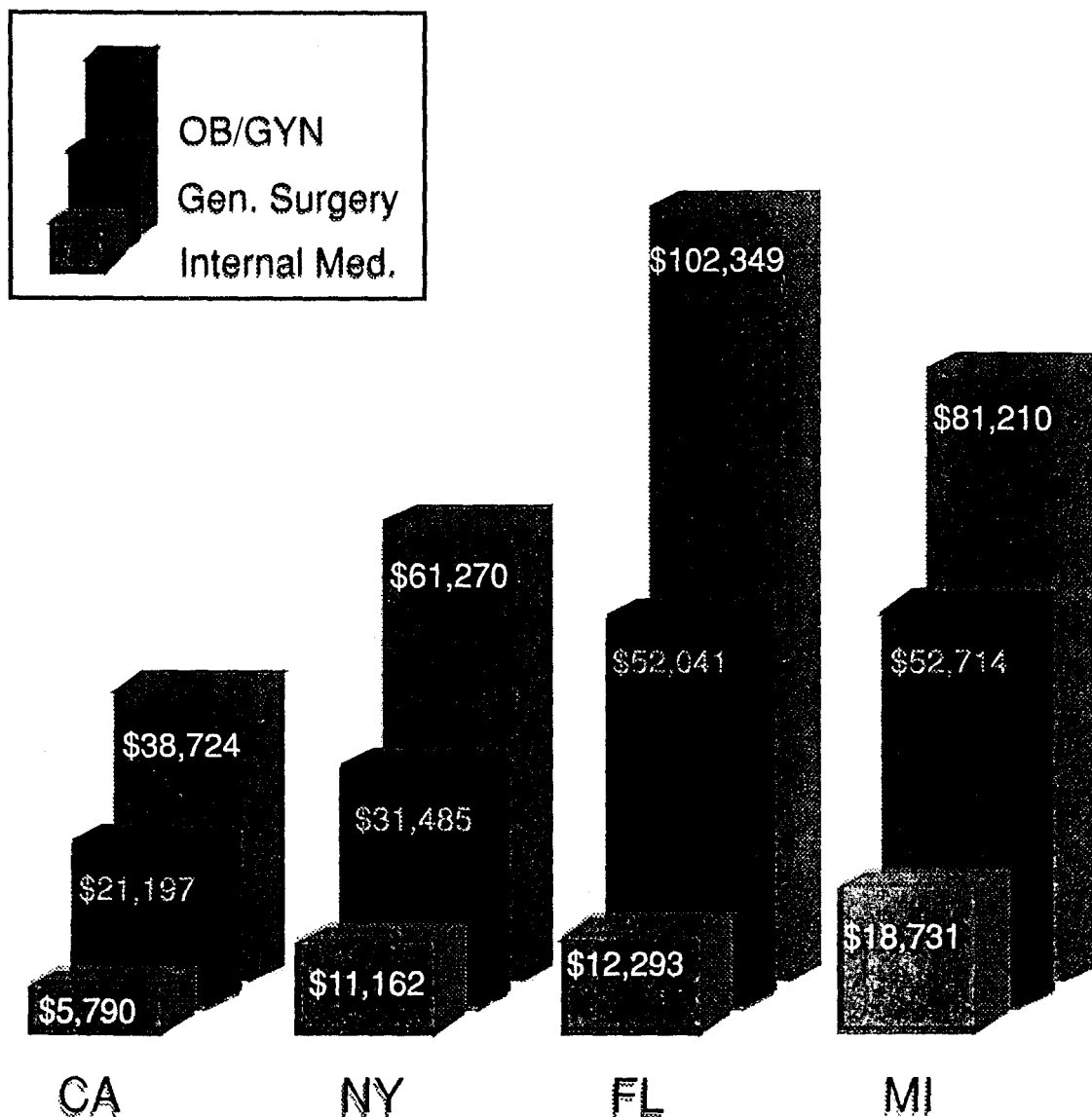
5. Experience shows that when periodic payment provisions are discretionary, such as in existing law, judges, more often than not, will not exercise their discretion and order such payments. Thus, even though the mandatory periodic payment section is second in importance to the cap on non-economic damages on premium stability, only a mandatory provision will be effective.

6. Studies have shown that large lump sum payments are often depleted by the patient and/or the patient's conservator, often a family member. Since large lump sum payments are intended for future medical costs and lost wages, bad investments or extravagant expenditures use up the funds, which then become unavailable for their intended purpose.

-END-

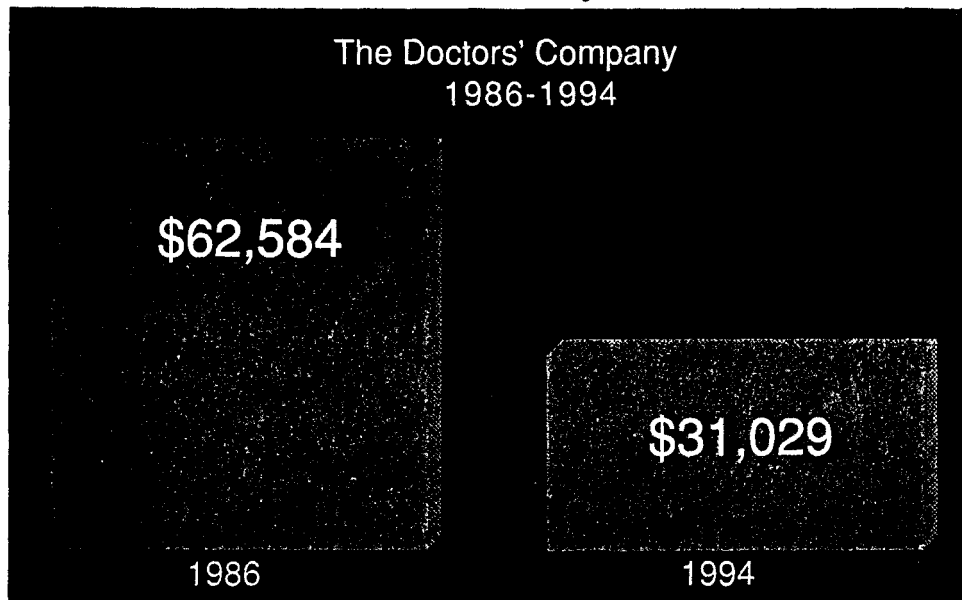
California Premiums Are Now Lower

Thanks to MICRA, liability insurance rates for California physicians are now one-third to one-half those paid by physicians in states that have failed to enact MICRA-like reforms, and that benefits all Californians.



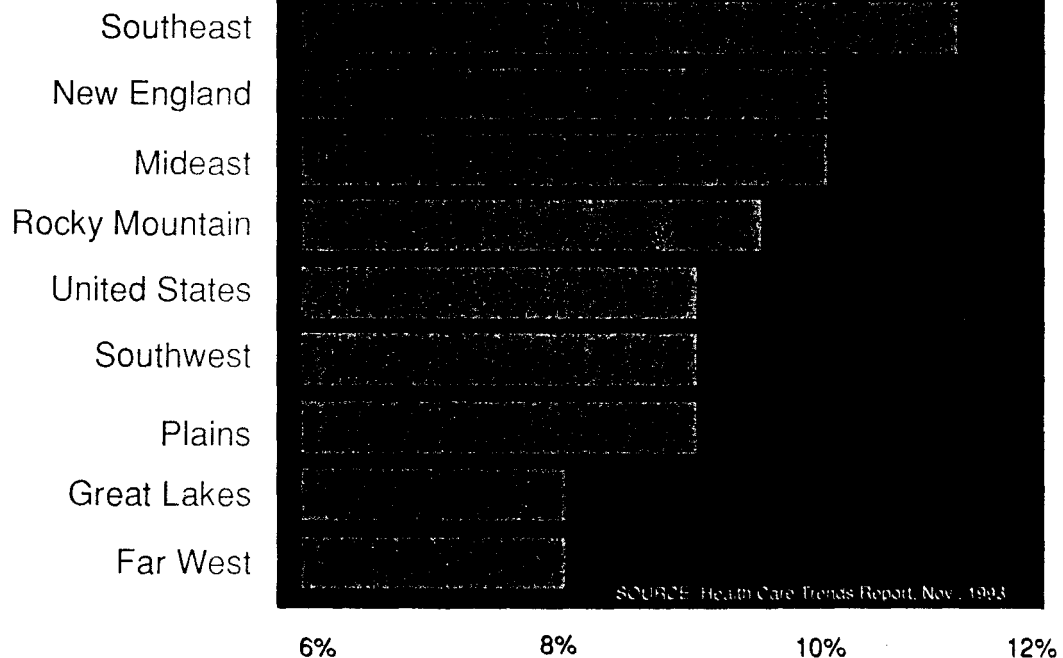
Based on average published rates excluding discounts or surcharges for \$1 million/
\$3 million in liability coverage.

Tort Reform Reduces Colorado OB/GYN Rates by 51%*



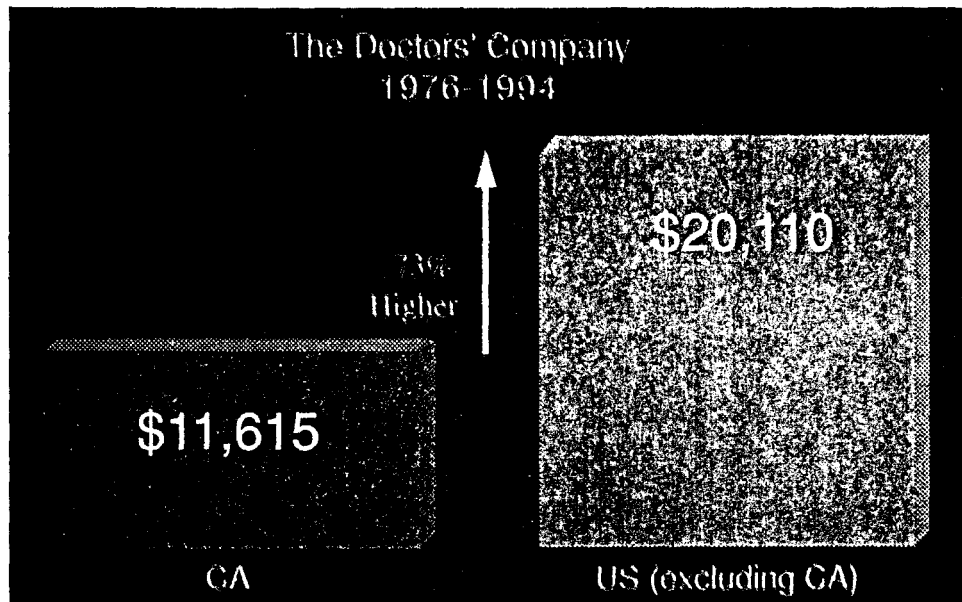
*The Doctors' Company's premiums, including dividends for a \$1 Million / \$3 Million Claims-Made Policy

Average Annual Growth In Per Capita Spending 1980-1991*



*Includes per capita spending for hospital care, physician services, and prescription drugs

Average of All Settlements & Jury Verdicts



MICRA Reduces Verdict Cost & Frequency

\$1 Million + Verdicts Per 1,000 Doctors

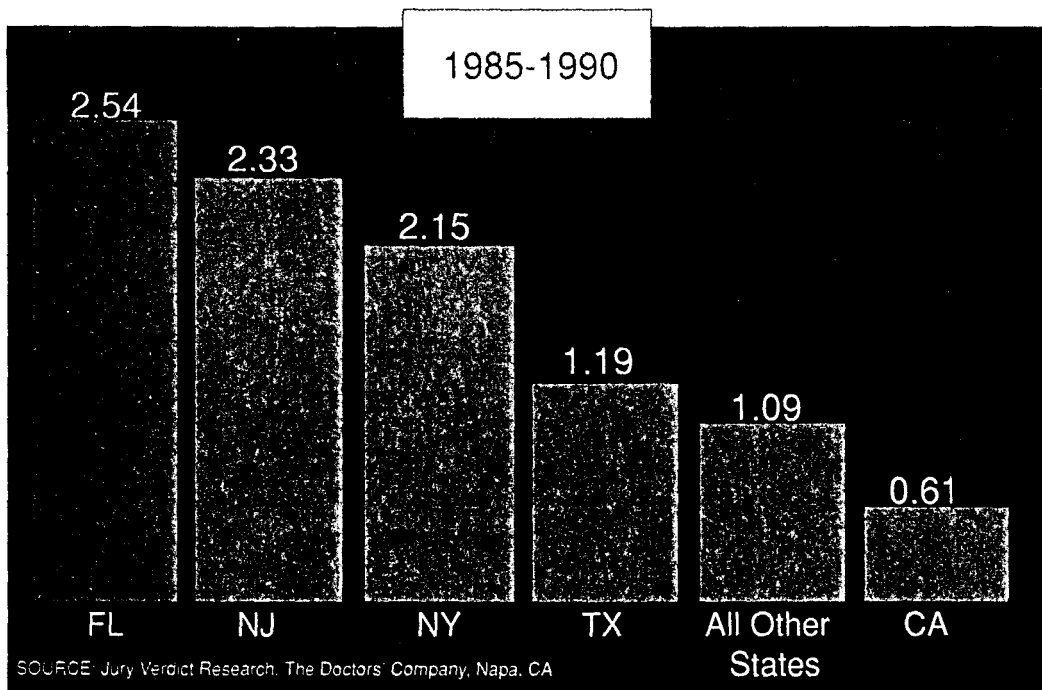


EXHIBIT 5
DATE 2/2/95
HB 309

February 2, 1995

Mr. Chairman and members of the committee.

My name is Nancy Clark, I'm from Ryegate, MT . I'm on the board of Trustees for the Wheatland Memorial Hospital in Harlowton Montana.

I speak in support of this bill.

It has been demonstrated that the states who have adopted similar legislation to this bill have lowered their mal-practice premiums rate

There is a direct correlation between insurance premiums - hospital cost - and services that can be offered.

In ¹⁹⁸⁷~~1978~~ the Harlowton Hospital was forced to discontinue offering obstetrical services because of the increase in medical mal-practice insurance premiums for our doctors. We would no longer deliver babies.

This meant the women would have to travel 90 miles to Billings or 60 miles to Lewistown.

An average of 35 babies are born in Wheatland Co. per year. This means since 1987 280 babies have been born, granted not all these mothers would have delivered in Harlowton but a good share would have. Calculating the 280 births at the 1987 cost of \$1800 dollars the Harlowton Hospital has lost revenue in the

neighborhood of \$500,000. (5 Hundred thousand dollars). In a large number of cases the mother continues seeing a pediatrician ~~else~~ ^{where} where ever she deliver and we therefore lose additional revenue.

I think we have an obligation to the people of Montana to do everything we can to keep the cost of hospital care affordable and to offer quality service in each community. The end means of this bill will enable us to do this . I urge you to support this bill. Thank you.

M E M O R A N D U M

TO: House Judiciary Committee
FROM: Pat Melby *PM*
DATE: February 1, 1995
RE: House Bill 309: Testimony on behalf of Montana Podiatric Medical Association & Montana Optometric Association

I represent the Montana Optometric Association and the Montana Podiatric Medical Association. Both of those professional associations support House Bill 309 but feel that there is no reason why optometrists and podiatrists should not be included in the purview of the protection offered other health care professionals in the bill.

I have reviewed the statutes of the states which have caps on economic damages in malpractice actions to determine whether the statutes of those other states are limited to only a few providers, as is House Bill 309, or cover other health care providers. I reviewed the laws of states identified in a May 23, 1994, study prepared by the Center for Economic Policy Research at Stanford University, as states having caps on damages. According to that study, ten states currently have some type of cap on damages.

Alaska has a cap on noneconomic damages, except for disfigurement or severe physical impairment, which is applicable to all personal injury actions, not just medical malpractice.

Alabama's limit on noneconomic damage awards is applicable only in malpractice actions against doctors, dentists and hospitals.

The laws of the remaining eight states, however, provide that the limits on noneconomic damages are applicable in actions against most health care providers, including podiatrists and optometrists. The definitions of health care provider in those states either 1) contain a simple reference to a practitioner of the healing arts, 2) contain a long laundry list of health care providers, or 3) refer to health care providers licensed by the state. Those states are California, Colorado, Louisiana, Massachusetts, Michigan, Missouri, New Mexico and Utah. (Louisiana's limitation applies to all damages.)

Optometrists and ophthalmologists often work cooperatively on cases. For instance following eye surgery by an ophthalmologist,

Memorandum

Page - 2

a patient may be referred to an optometrist for follow up care. If the patient experiences a problem, such as a detached retina, both the optometrist and the ophthalmologist will be sued. Under House Bill 309 as introduced, there would be a cap on the noneconomic damages that could be recovered from the ophthalmologist, but the amount of non economic damages that could be recovered from the optometrist would remain unlimited.

Likewise, a podiatrist and an orthopaedic surgeon are both licensed to perform surgery on the foot. Yet, in a malpractice action, the orthopaedic surgeon would have the protection of a cap on noneconomic damages under House Bill 309 as introduced, while the podiatrist would not.

We think it makes sense to include all similarly situated health care professionals within the definition of "health care provider" in House Bill 309.

I have attached some suggested amendments, one expanding the definition of health care provider to add only podiatrists and optometrists, and another to expand the definition to include those health care professionals listed in the statute applicable to the statute of limitations for malpractice actions. Either alternative would be acceptable to my clients.

I urge that the committee amend House Bill 309 to include podiatrists and optometrists and then give the bill a do pass recommendation.

Proposed Amendments to House Bill 309

February 1, 1995

Prepared by Pat Melby
for

The Montana Optometric Association &
The Montana Podiatric Medical Association

First Alternative is to simply expand the definition to add only podiatrists and optometrists as follows:

1. Page 2, line 11.

Following: "27-6-103,"

Insert: "a podiatrist licensed under Title 37, chapter 6, an optometrist licensed under Title 37, chapter 10,"

Second Alternative is to provide a broader definition of health care provider as follows:

1. Page 2, line 10.

Following: "means"

Strike: "remainder of line 10 and line 11 in their entirety

Insert: " a health care professional listed in 27-2-205, or a health care facility licensed under Title 50, chapter 5."

action commenced on or after October 1, 1993, regardless of when the cause of action arose. To this extent, [sections 3 and 4] [27-7-217 and

27-2-204] apply retroactively, within the meaning of 1-2-109."

27-2-205. Actions for medical malpractice. (1) Action in tort or contract for injury or death against a physician or surgeon, dentist, registered nurse, nursing home or hospital administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility, or licensed medical professional corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, shall, except as provided in subsection (2), be commenced within 3 years after the date of injury or 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may such action be commenced after 5 years from the date of injury. However, this time limitation shall be tolled for any period during which there has been a failure to disclose any act, error, or omission upon which such action is based and which is known to the plaintiff or through the use of reasonable diligence subsequent to said act, error, or omission would have been known to him.

(2) Notwithstanding the provisions of 27-2-401, in an action for death or injury of a minor who was under the age of 4 on the date of his injury, the period of limitations in subsection (1) begins to run when the minor reaches his eighth birthday or dies, whichever occurs first, and the time for commencement of the action is tolled during any period during which the minor does not reside with a parent or guardian.

History: En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973; R.C.M. 1947, 93-2624; amd. Sec. 1, Ch. 499, L. 1987; amd. Sec. 38, Ch. 83, L. 1989.

Cross-References

Montana Medical Legal Panel Act, Title 27, ch. 6.

27-2-206. Actions for legal malpractice. An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

History: En. 93-2625 by Sec. 1, Ch. 220, L. 1977; R.C.M. 1947, 93-2625.

27-2-207. Injuries involving property. Within 2 years is the period prescribed for the commencement of an action for:

- (1) injury to or waste or trespass on real or personal property;
- (2) taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;
- (3) killing or injuring stock by a railroad corporation or company.

History: Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 510, C.

Chairman, Members of the committee:

For the record my name is Laurie Koutnik, Executive Director of Christian Coalition of Montana our states largest family advocacy organization.

Christian Coalition of Montana Supports HB 309.

From the beginning of the Health Care reform debate, our organization recognized the need for torte reform. From our initial conference with Governor Racicot on Health Care reform, he assured us that this issue would be addressed. All of us recognize that torte liability is one of the primary factors in driving up the cost of health care. So if we truly want "affordable" health care as prescribed in SB 285 - torte reform needs to be addressed.

Although we do not know exactly how much the torte system adds to our medical costs, it is perceived to be quite large when you take into account attorney fees, damage awards, court costs and all the unseen costs, such as defensive medicine practiced by doctors where extra tests are conducted out of fear of a lawsuit.

The medical torte liability alone is estimated to cost about \$360.00 per year per household - far beyond what a family spends on routine preventive services.

In a report issued by the National Center for Policy Analysis, the torte system is referred to as "another bureaucracy, replete with its own perverse incentives. Moreover, it is a bureaucracy that feeds off the health care sectors with little consideration of the damage it causes '.

And this is what Representative Grimes has addressed today - a framework to address this bureaucracy's damages and to reduce the liability aspect. Those with profit motivation would have you think otherwise.

In the Christian Coalition legislative candidate survey conducted prior to the November election, we asked you, the respondents your positions on torte reform in health care.

Overwhelmingly 94% of the respondents checked "supports" - the other 6% were "undecided". Some of you were concerned with the direction torte reform would take.

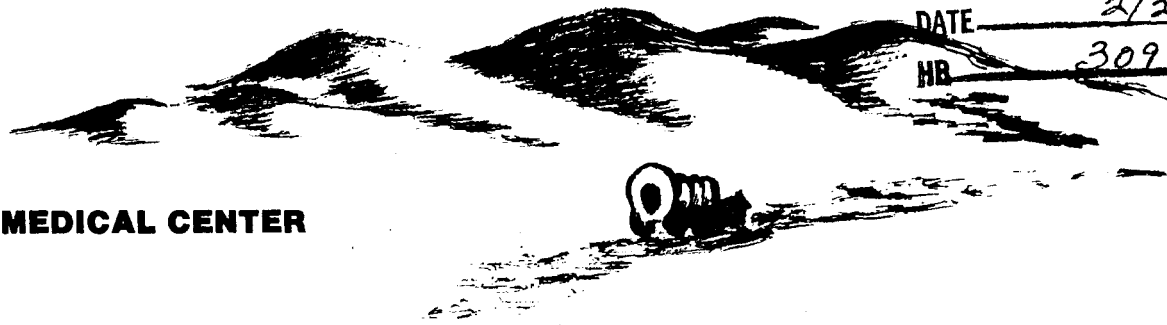
However, the Governor and his staff have thoroughly studied this issue and have in our opinion presented a fair plan.

If we are ever going to truly address cutting the runaway costs of health care, then torte reform is essential.

We recommend a do pass on HB 309.

Submitted : Laurie Koutnik, Executive Director, Christian Coalition of Montana

EXHIBIT 8
DATE 2/2/95
HB 309



BIG SANDY MEDICAL CENTER

P.O. Box 530

Big Sandy, MT. 59520

(406) 378-2188

January 27, 1995

The Honorable Roger DeBruycker
Montana House of Representatives
Capitol Station
Helena, MT 59620

Dear Representative DeBruycker:

Big Sandy Medical Center would like to support the passage of HB 309. This deals with reform of medical malpractice claims. It is no secret that malpractice and liability insurance is expensive and helps to drive the cost of health care upwards.

We feel that passage of a bill such as HB 309 would put some control on keeping claims reasonable if and when a person did have a legitimate claim. The present system encourages astronomical amounts to be sought in all cases, consequently driving up the price of insurance and health care costs.

Small rural hospitals in Montana are all operating on very fine margins even after receiving support from local tax payers. One of our greatest expenses is insurance. We feel that passage of HB 309 would afford us insurance relief while still protecting the rights of the health care consumers.

If my schedule allowed, I would testify at this hearing. However I am unable to do so, thus I would encourage you to submit this letter as testimony from Big Sandy Medical Center supporting HB 309.

Thank you.

Cordially yours,

Harry Bold
Harry Bold
Administrator

EXHIBIT 9
DATE 2/2/95
HB 309

February 2, 1995

House Judiciary / HB 309
Arlette Randash

Families across Montana have been impacted by the staggering costs of litigation and higher insurance premiums that result from product-liability and personal injury suits. It is estimated that the cost to the average household is \$1,000 a year. As I followed the MHCA across the width and breadth of the state in its deliberations this past year, medical malpractice reform was a high a high priority on everyone's mind. In the electronic forums conducted by the MHCA in Glasgow, Kalispell, and Great Falls 81% of surveyed said reducing malpractice suits was either extremely important or important in health care reform. And the realities for Montana's families fall all too often on those of child bearing age. A acquaintance representing small business in eastern Montana told me that one of the remaining OB-GYN's in Billings recently told him that in 1977 he delivered 3 babies a year to pay his liability insurance. In 1994 it took him 60 babies to pay his liability insurance. No wonder rural Montana families find it difficult to find a doctor to deliver their babies, being forced to drive long distances to find good medical care.

You have undoubtedly felt intense pressure from the trial lawyers to gut or kill medical malpractice reform that is meaningful. I urge you to resist the pressure and give the careful scrutiny this bill deserves and favorable consideration to its passage. Montana's families deserve as much.



Wheatland Memorial Hospital
and Nursing Home

530 - 3rd Street N.W.
Box 287
Harlowton, Montana 59036
406 632-4351

EXHIBIT 10
DATE 2/2/95
HB 309

February 2, 1995

Re: HB 309 - A Bill For An Act Entitled, "An Act Relating to Medical Malpractice Claims and Recoveries, Limiting Noneconomic Damages in Medical Malpractice Cases; Reversing the law relating to periodic payment of future damages in Malpractice Cases;"

Chairman Clark and Honorable Members of the Judiciary Committee:

My name is Diane Jones and I am a Registered Nurse and the Administrator for Wheatland Memorial Hospital and Nursing Home in Harlowton, Md. Thank you for allowing me this opportunity to share my views as a representative of rural health care perspective. I returned yesterday from Washington D.C. and the American Hospital Association meetings where representatives from our Montana hospitals gained important information from our leaders on the National level and shared our views and concerns for our state and the healthcare we proudly provide.

It was evident to me in our discussions with Senators Burns and Baucus and ^{Representative} Rep. Williams how deeply committed they are to supporting health care in Montana and how hard they are working to study and identify how probable budget cuts to entitlement programs of Medicare and Medicaid can be done in such a manner that is fair and not devastating to the more rural states such as Montana.

Certainly there was also discussion of malpractice issues and the effects of skyrocketing costs on our physicians. Sadly it is unknown how soon decisive action will come on these issues on the National level.

However, we in Montana, have an opportunity with HB 309 to set a precedent and be a leader in bringing about positive change to limit the costs of malpractice insurance.

In 1987 we stopped providing labor & delivery services to our community when the rising costs of the malpractice insurance became too great for us to bear. We lost one of the most delightful and uplifting services hospitals can provide to other communities and now the 35 babies born each year to Wheatland County Moms and Dads are delivered in other counties. We then must work hard to reconnect these people unto our local health care system so that the immunization of the children and follow up of the family unit is not lost in the system and sometimes it is because of the lack of overall continuity.

From 1990 to 1992 our community was without permanent physicians. The question would need to be asked if those 2 years without permanent Docs could be at least in part because of ~~the~~ the physician's concern about



Wheatland Memorial Hospital
and Nursing Home

530 - 3rd Street N.W.
Box 287
Harlowton, Montana 59036
406 632-4351

the isolation of rural practice and the difficult decisions made 90 miles from specialists, practicing essentially alone. Coupling that issue with the tremendous responsibilities of providing care while facing a continually litigious society is indeed quite a challenge.

The very reasonable and responsible approach of HB 309 to limit the noneconomic damages is an excellent measure to provide some necessary structure to a system that must be restructured if we would expect to retain physicians in our communities and continue to try to afford the costs of malpractice insurance.

Thank you for your time and serious consideration of HB 309

Dana Jones RN
Administrator

EXHIBIT 11
DATE 2/2/95
HB 309

February 9, 1995

Rep. Robert Clark, Chairman
House Judiciary Committee
Capitol Building
Helena, MT 59620

Re: House Bill No. 309

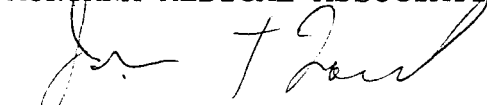
Dear Rep. Clark:

Enclosed for your consideration are the following:

- (1) That portion of Health Care for Montanans, Phase II: Steps to Implementation dated October 7, 1992, addressing physician's liability.
- (2) Report prepared by Gerald J. Neeley for the Montana Medical Association entitled, "Montana Board of Medical Examiners Data."
- (3) Appendix to report prepared by Gerald J. Neeley for the Montana Medical Association entitled, "Montana Board of Medical Examiners Data."

Sincerely,

MONTANA MEDICAL ASSOCIATION



Jerome T. Loendorf

jw
Enclosures

EXHIBIT 11
DATE 2-2-95
1 HB 309

PHASE II: STEPS TO IMPLEMENTATION

Governor Stan Stephens

October 7, 1992

Part A and Part B

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

(unbound report)



HEALTH CARE FOR MONTANANS

"Repeater" Physicians

Montana Board of Medical Examiners
Claims Data 1984-1992

1. 295 Claims Paid From 1984-1992
2. Claim Payments Made on Behalf of 231 Physicians (15% of Total Active)
3. Multiple Claims Paid on Behalf of only 51 Physicians (Less than 4%)
4. Thirty Nine Percent (39%) of Claims Paid on Behalf of Multiple Claim Physicians
5. Fifty Eight Percent (58%) of Dollar Total of Claims Paid on Behalf of Multiple Claim Physicians

Fewer Than 4% of Active Montana Physicians Are Responsible For 40% of the Claims Paid and Nearly 60% of the Dollar Loss Requiring Compensation

HB 309: Solution to a Non-existent Problem

In Montana, Civil Filings Are Down More Than Ten Percent

Civil case filings dropped in Montana both in 1992 and 1993. In 1993, 10.5% fewer civil cases were filed in our state courts than in 1991. In half of the districts, civil filings dropped both in 1992 and 1993. Montana Supreme Court Judicial Reports, 1991-93. *This rate of decrease is five times greater than the national trend.* State Court Caseload Statistics: Annual Report 1992, at 16-17, National Center for State Courts. In Montana's federal courts, fewer civil cases have been filed each year since 1991 and the number of pending civil cases has decreased more than 14%.

Only Five Percent of Montana's Civil Cases Are Tort Cases

In Montana, personal injury cases comprise only about 5% of the total number of cases filed each year. (Montana Supreme Court Statistics, years 1987 and later.) Most cases involve crime, domestic relations, debt collection, estates and probate.

In Montana, Defendants Win Nearly 60% of All Civil Trials

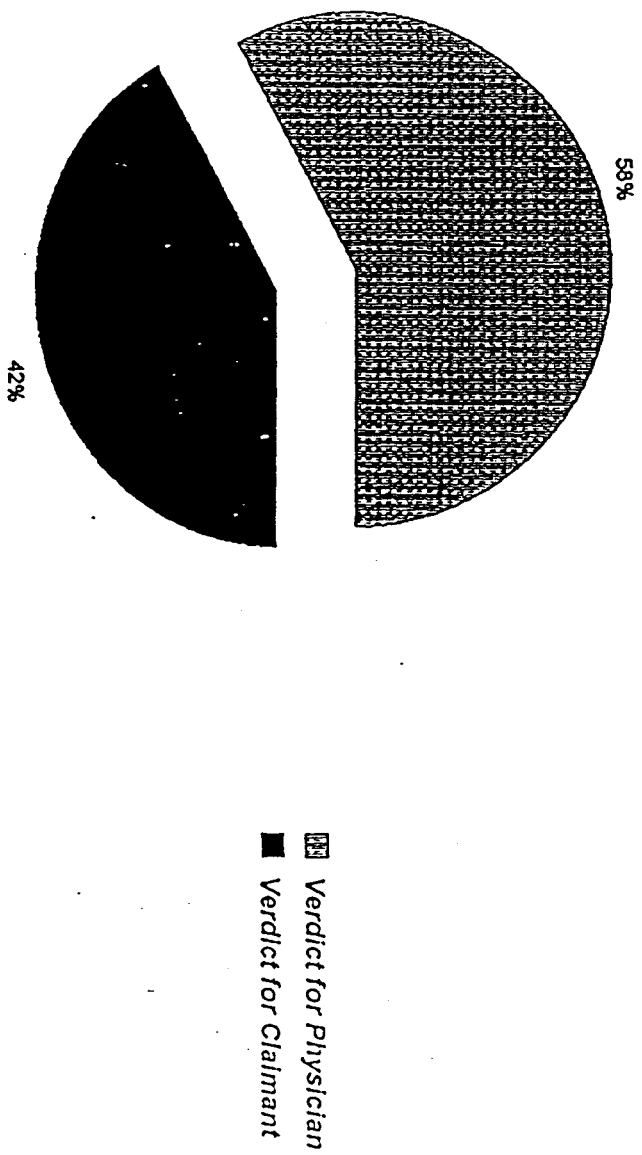
From January 1 through November, 30 1994, a total of 84 civil jury verdicts were reported from the state courts. Defendants won 48 of these verdicts (57%). During the same period, 18 civil jury cases were tried in the Montana federal courts. Defendants won 10 of these (56%). (Data compiled from the Montana Law Week).

Montana's Doctors Win In Court Nearly 80% of the Time

Doctors won at trial in 15 of the 19 cases tried in Montana in the last ten years. (*That's right, according to the Montana Insurance Department and the Montana Legislative Counsel, only 19 doctor negligence cases have been tried in all of Montana in the last ten years.*)

If It Ain't Broke, Don't Fix It!
Say No To More Government Interference
Vote No! on HB 309

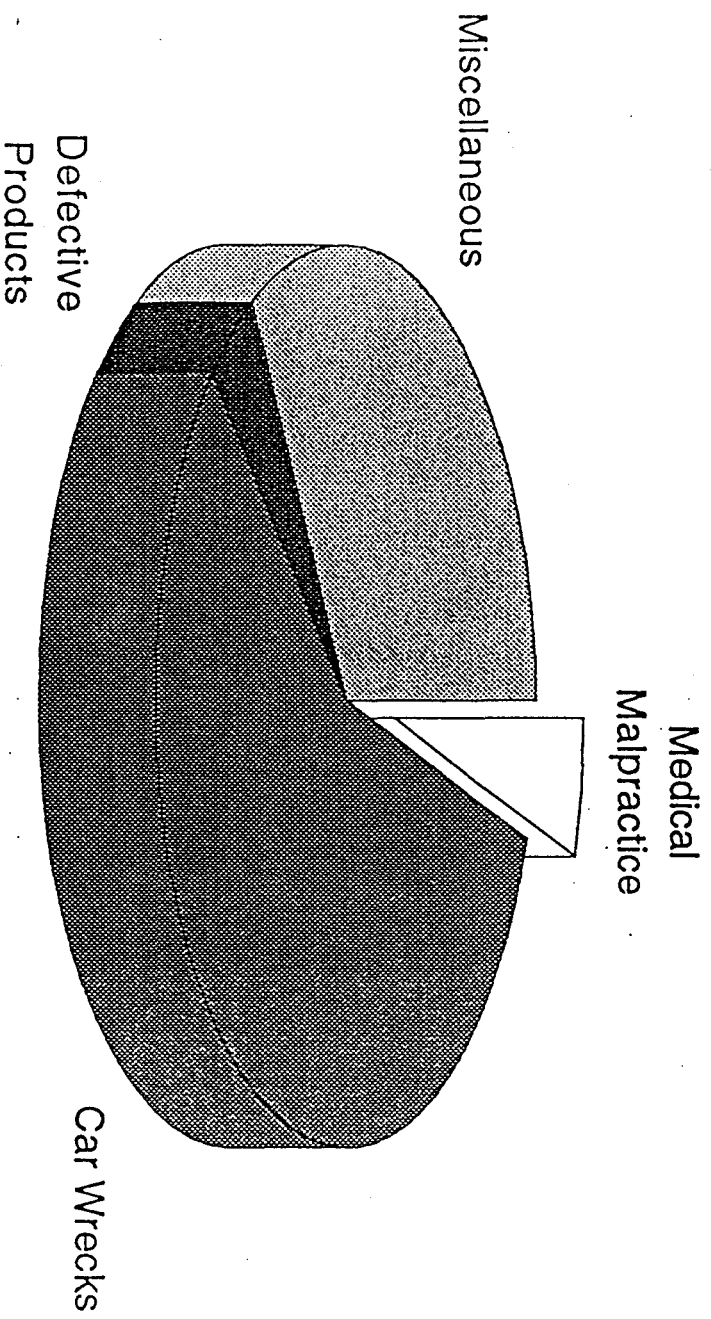
EVEN WHEN PHYSICIAN CONDUCT IS INDEFENSIBLE...



Findings based on a survey of 8,231 closed medical negligence claims involving 12,829 physicians insured by The New Jersey Medical Insurance Exchange from 1977 to 1992. According to the insurer's own internal evaluations, approximately 25 percent of those claims involved "indefensible" physician care, with physicians admitting liability in almost half of those cases. Yet whenever those "indefensible" cases went to a court verdict, physicians usually won. Results published in the November 1992 issue of *Annals of Internal Medicine*, Vol. 117, No. 9, and copyrighted by the American College of Physicians, 1992.

Composition of Tort Filings

General Jurisdiction Courts (1991)



National Center for State Courts (1991)

HB 309: DAMAGE CAPS

Damage caps punish only the most severely injured Montanans, especially those who are paralyzed, brain-damaged, or otherwise incapacitated. The more severe the injury, the greater the likelihood that damage caps will leave these Montanans financially dependent upon society -- and burden Montana taxpayers.

Disfigurement, blindness, paralysis, loss of unborn children, loss of reproductive capacity or sexual function, destruction of the family unit and severe depression are just a few examples of non-economic damages. If an inept physician or careless hospital causes you, a member of your family or one of your constituents to live forever with such a loss, shouldn't compensation be paid by the guilty party? Each person and each case is different. The common sense of Montana citizen jurors are best able to hear the evidence and decide how much should be paid to compensate for the loss, based upon the particular evidence presented in the case. *You were elected because Montanans do not want the heavy hand of government taking control of their lives and their decisions.*

The Montana Medical Association, in its extensive 1988 reports on obstetrical care in Montana, concluded that a flat-dollar limit on damages is "misguided for a number of reasons. It doesn't work, is often held unconstitutional, and impacts more severely on the people who are injured the most." ("Who's Going to Deliver Your Baby: The Loss of Obstetrical Services in Montana -- Revised," June 1988, p. 19).

Wisconsin capped non-economic damages in medical-negligence cases at \$1 million in 1985 and abandoned caps at the end of 1991 after six years of unsatisfactory results (*National Law Journal*, November 16, 1992, p. 37).

A 1991 report by Washington's insurance commissioner Richard Marquardt to that state's legislature denied that "tort reform" changes were responsible for stabilizing rates and increased availability of coverage. To the contrary, a 1989 law requiring insurers to consider investment income in setting rates was projected to have a much greater impact on insurance rates than changes in the tort system. ("A Study of the Effect of Tort Reform on Insurance Rates and Availability and Its Impact on the Civil Justice System," Report to the Washington State Legislature, January 1991).

Exception proves rule

Punitive damages rare in
medical malpractice cases

REMEMBER WHEN Gary Hart was running for the presidency, and he dared the press to find any wrongdoing on his part — and the press did?

This session of the Legislature, the Montana Trial Lawyers Association challenged the public to find any evidence that punitive damages had been assessed in state medical malpractice cases — and the public did.

But the one exception proves the trial lawyers' rule: Punitive damages are almost non-existent in medical malpractice cases in Montana. What's more, in recent years, most insurance companies have dropped punitive damage coverage entirely.

So removing punitive damages will accomplish little in reducing medical malpractice insurance costs.

Perhaps the Legislature should look elsewhere for the culprit of climbing health-care costs, including the high administrative costs of private insurers, even though that's not nearly so easy, nor so popular, as blaming the health-care crisis on lawyers.

MONTANA STATE SENATE

SENATOR DELWYN GAGE
SENATE DISTRICT 5
HOME ADDRESS:
BOX 787
CUT BANK, MONTANA 59427

COMMITTEES:
TAXATION
BUSINESS & INDUSTRY
RULES

CAPITOL STATION
HELENA, MONTANA 59620
PHONE (406) 444-4800
HOME PHONE (406) 873-4662



Jan. 31, 1995

To: House Judiciary Committee

Re: HB309

Since I was the chairperson of the Interim study on insurance this last interim I would like to share some observations with the members of your committee. I have three bills before the Senate Business and Industry Committee today or I would present this testimony in person. I will be happy to appear before your committee to respond to any questions your committee members may have regarding this testimony if you will let me know when you would like me to appear.

These observations are my own and do not necessarily reflect the opinions of other committee members or the committee as a whole.

It is my opinion that the reason the committee did not make any kind of recommendations regarding caps on non-economic damages is that we did not have sufficient information upon which to conclude that if caps are placed on non-economic damages or if caps are placed on legal fees that malpractice insurance premiums would go down. There was some indication that in states where caps have been put in place the premiums for malpractice insurance have decreased within a couple of years or so. However there are a number of factors involved in the computation of insurance rates and it is my opinion that the committee could not determine how large a factor caps were in the reduction of rates in those instances where rates did decrease.

One other factor that I want to bring to the attention of your committee is the rate making process. We had about a 2½ hour presentation by a person who was deemed to be a specialist in this field. He told us that the population and incidence of malpractice in Montana is not statistically sufficient to write rates specific to Montana so our data is grouped with data from other areas to compute rates for our area. I have been told however that there is at least one company who does rate Montana specifically on data from Montana only. The specialist did however state that one area that is considered for each state is the individual statutes of the state that may have an affect on claims.

It would be extremely beneficial to your deliberations if you could get that person to address your committee on rate making in the area of state statutes on caps. You can get that persons name I am sure from Susan Fox or Connie Erickson who staffed our committee. You might also wish to read the report from the Insurance Study Committee for further insight on this matter. Thank you.

Senator Del Gage, Dist. 43

Del Gage
MEDICAL MALPRACTICE

Montana Trial Lawyers

ASSOCIATION

Directors:

Wade Dahood
Director Emeritus
ate D. Beck
Elizabeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

February 2, 1995

Officers:

Gregory S. Munro
President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

Rep. Bob Clark Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 309

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to HB 309, which imposes severe caps on non-economic damages in medical-negligence cases and allows careless doctors and hospitals to pay compensation in installments.

MTLA agrees with the findings of Sen. Del Gage's Joint Interim Subcommittee on Insurance Issues:

"The data does not support claims that there is a medical malpractice crisis in Montana. Professional liability insurance for health care providers is available at competitive rates. Very few claims result in lawsuits, and those that do are settled, more often than not, in favor of the defendant." (Page 41)

"After 12 months of study, the Subcommittee concluded that the evidence presented to the Subcommittee did not support the contention that there was a medical malpractice crisis in Montana that warranted the passage of specific tort reform measures. Further, no evidence was presented that supported the contention that the passage of tort reform measures would result in health care cost savings, either to health care providers or consumers." (Page 64)

Background. Montana does not need HB 309:

1. Medical malpractice accounts for less than one percent of Montana's annual health care bill. If absolutely all liability for medical malpractice were abolished and all

health care providers were somehow completely protected from frivolous lawsuits, the price of a \$40 office visit would decline *approximately 25 cents*.

2. The absence of doctors in rural areas of Montana is *not* attributable to medical liability premiums. HB 309, by benefitting far more urban doctors and specialists than rural doctors, will *not* improve rural access.

3. The number of Montana doctors, including family physicians and OB-GYNs, is *increasing*. Montana's health-care industry is growing vigorously.

4. The average Montana doctor earned well more than \$100,000 last year, even *after* they paid all liability premiums and other expenses. *Montana doctors pay a smaller proportion of their net income for liability insurance than Montana truckers do.*

5. Three factors more than any other influence the liability premiums paid by Montana doctors: first, the potentially *catastrophic nature* of injuries caused by medical malpractice; second, the *small pool of providers* among which to spread the insurance costs of those injuries; and third, the *refusal of medical-liability insurance companies* to raise premiums for repeatedly careless doctors or lower premiums for rural doctors who treat fewer patients.

6. *Only one in 16 victims of medical malpractice receive compensation for their injuries.* In fact, *even in cases where the liability insurer labels the doctor's conduct indefensible*, victims who go to trial lose as often as they win.

7. The costs of medical malpractice insurance are determined by the costs of medical malpractice. *More Montanans die every year because of medical malpractice than because of traffic accidents.*

8. Montana doctors and their insurance companies choose to settle the vast majority of malpractice claims, often in order to keep those settlements confidential. Since 1984, *fewer than 5 percent of Montana doctors* have paid multiple malpractice claims, yet that minority has accounted for *40 percent of all malpractice settlements* and *60 percent of all payments* to malpractice victims. One doctor, for example--identified by the Montana Board of Medical Examiners only as Doctor 43--settled with malpractice victims for \$600,000 in 1986, \$391,000 in 1989, and \$105,000 in 1992. *Yet the patients of Doctor 46 have no right to that information.*

9. Doctors grossly misperceive the threat of malpractice suits. Consequently, HB 309 will not reduce the "bad defensive medicine" which results from doctors' exaggerated, persistent misperceptions about legal liability. HB 309 will, however, reduce the "good defensive medicine" which ensures quality care and lowers the cost of medical accidents.

10. The proposals contained in HB 309 differ significantly from statutes in California, Colorado, and other states. The proposals in HB 309 have not reduced

medical liability premiums or payments to malpractice victims, restrained overall health care costs, or improved access to medical care in other states.

11. Montana has already enacted numerous so-called tort reform proposals at the request of health care providers, including drastic reductions in the statutes of limitations applicable to children (1987 and 1989); mandatory screening panels which require victims to await action by an administrative panel before filing suit (1977); immunity for negligent providers when the victim happens to be the patient of a direct-entry midwife (1989); and immunity for providers who render negligent emergency care in emergencies without compensation (1987). The proponents of HB 309 weren't satisfied by these so-called tort reforms. They ignore the absence of similar "reforms" in California, Colorado, and other states. And they won't be satisfied with HB 309.

HB 309. The bill itself works complex and unjust hardship on the victims of medical negligence:

1. Section 1, which caps non-economic damages, *abandons the recommendation of Governor Stephens' Health Care for Montanans Committee that any such caps exclude non-economic damages for physical impairment and disfigurement.*

2. Section 1 actually reduces those damages *far below \$250,000* whenever multiple victims or multiple health-care providers are involved.

3. Section 1 requires that *other* statutory reductions already required by Montana law (i.e., Secs. 27-1-702 and 27-1-703, MCA) must be applied *after, not before*, the application of the new \$250,000 cap. In other words, \$250,000 is merely a *theoretical* cap--most awards will actually be far smaller.

4. Section 1 particularly *disadvantages women and children*, who use--and need--the majority of health care services. Women and children often cannot demonstrate the economic damages associated with loss of long-term, high-paying employment, and they suffer more from such non-economic injuries as disfigurement, humiliation, emotional distress, and sterility.

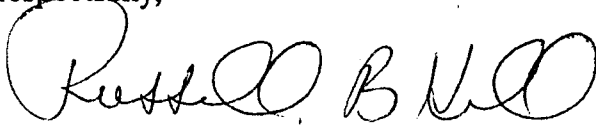
5. Section 2 *prevents a jury from considering* the consequences of their decision.

6. Sections 2 and 3, which mandate periodic payment of future damages at the request of a careless provider or liability insurer, imposes additional burdens on those few victims of medical malpractice who survive litigation. Many claimants and providers voluntarily agree to periodic payments now. And *Montana law already permits judges to order periodic payments* when they are in the best interest of the victim.

7. By forcing successful claimants to bear the risk of insurance-company insolvency, Sections 2 and 3 allow a careless provider or liability insurer to shift costs onto the victim of medical negligence--or, more often, *onto Montana taxpayers.*

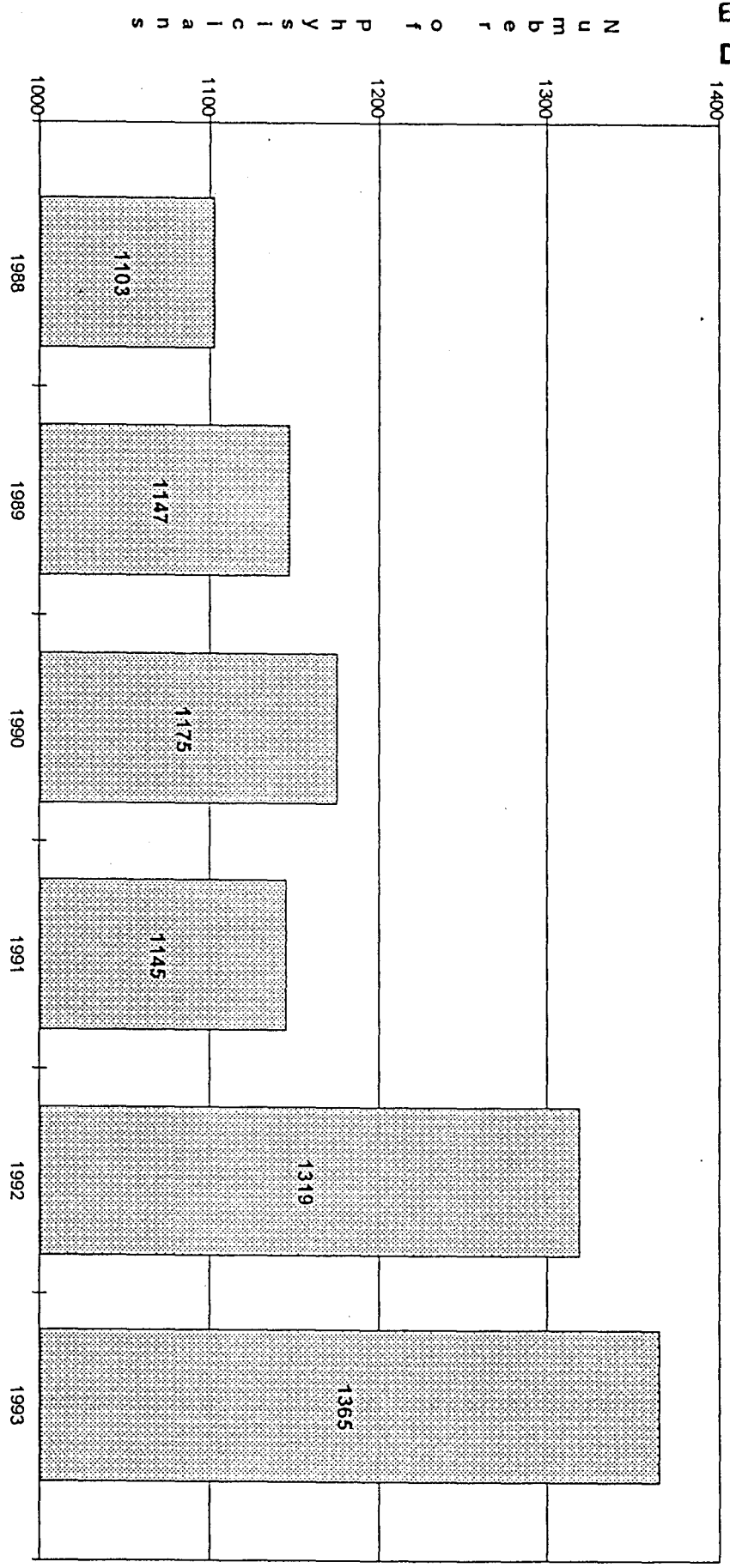
Thank you for considering these comments and the accompanying materials. If I can provide additional information, verification, or assistance, please contact me.

Respectfully,

A handwritten signature in black ink, appearing to read "Russell B. Hill". The signature is fluid and cursive, with the first name "Russell" written in a larger, more prominent script than the last name "Hill".

Russell B. Hill, Executive Director

ACTIVE MONTANA PHYSICIANS, 1988-1993



Based on assessments reported by the Montana Medical-Legal Panel

**MEDICAL MALPRACTICE AND TORT REFORM:
ISSUES OF INSURANCE COSTS, COVERAGE,
CAPS, AND COMPENSATION**

A Report to the 54th Legislature
from the
JOINT INTERIM SUBCOMMITTEE ON INSURANCE ISSUES

Prepared by
Connie F. Erickson, Staff Researcher
and
Susan Byorth Fox, Staff Researcher

November 1994

Published by
Montana Legislative Council
Room 138, State Capitol
Helena, MT 59620-1706
(406) 444-3064

The original of this document is stored at
the Historical Society at 225 North Roberts
Street, Helena, MT 59620-1201. The phone
number is 444-2694.

(unbound report)

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE

2/2/95

BILL NO. HB 253

SPONSOR(S)

Rep. Barnhart

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Pat Melby	State Bar of MT	✓	
Greggo Stador	Citizen	✓	
J. L. Hays			

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993

wp:vissbcom.man

CS-14

DAVID
GALLIK

Man.
MIKSCHE
Actuary

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE 2/2/95

BILL NO. HB 309

SPONSOR(S)

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Jacqueline Denmark	Am. Ins. Assoc	✓	
Peggy Driscoll	MFS E/MFT/MFHCS		—
RANDY BISHOP	MTLA		✓
Roei Hughes	Mt. Zcalch Care Assn	✓	
Tom Ebzeny	St Vincent Hospital / MAPI	✓	
Melissa Case	HERE		✓
Steve Turkienicz	Mt. Auto Dealers Assn	✓	
Steve Browning	MT Hospital Assn	✓	
LARRY AREY	MT ASSOC OF LIFE UNDERWRITERS	✓	
MICHAEL JAMMIS	Doctors' CO	✓	
D.P. CRESTIA	SELF		✓
Michael D. Cook	SELF		✓
TOM KEEGAN	INJURED PEOPLE		✓

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Pat Melby	MT Optometric Assn	✓	
Laurie Kowchik	MT Podiatric Med. Assn	Amend	
Christian Coalition of MT		✓	
STUART ZINS	MT Medical Assn	✓	
John Gregory	" "	✓	
B. H. Olson	AARP	✓	
Russell B Hill	MT Trial Lawyers Assn		✓
David Ditzel	BRO. OF LOCOMOTIVE ENGRS		✓
Jerome Loendorf	MT. Med. Assn	✓	
Nancy Clark	Hardown Hosp	✓	
Bob Decker ^{Stedon} Stedon	MT Nurses Assoc	✓	
Ole Weingarten	MT Optometric Assn MT Podiatric Med Assn	✓	
Frank Marceau	U.T.U		✓
Mary McCue	MT Dental Assn	✓	

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Jim Smith	mt RL	X	
Tanya ABK	Blue Cross & Blue Shield	X	
Jim Turner	mt Call Ability conclusion	✓	
Lauree Hanger	Governor's Office	X	
Ed Capl's	MSCA		X
Arlette Randash	Eagle Forum	X	
Roger DeBruyckere	H.P. 89	X	

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Diane Jones	Rural Hospital	✓	

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