MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 21, 1995, at 9:00 a.m.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

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

Committee Business Summary:
Hearing: HB 309
Executive Action: None

HEARING ON HB 309

Opening Statement by Sponsor:

REPRESENTATIVE DUANE GRIMES, House District 39, Clancy, presented HB 309. Two years ago they had a tort reform bill before the legislature which was much larger and contained objectional elements. This bill contains the key elements to assist with medical malpractice tort reform in Montana. This bill accomplishes two objectives. First, it sets a cap on non-economic damages, which would be other than lost wages, medical expenses, and ongoing complications because of a malpractice issue. These awards can be in the tens of millions. This would

include pain and suffering. Because of the open ended liability on non-economic damages, insurance rates for doctors in this state are exorbitant. This bill will stabilize the insurance liability, lower the doctors rates and indirectly have benefits for every citizen in this state. The second part of this bill deals with periodic payments. This is necessary to stabilize the insurance environment for medical malpractice insurers. This would take any award given, both economic as well as non-economic, and make payments periodically. An annuity is bought and the present value award of the settlement is paid to the injured party. Those periodic payments can be adjusted in any way the court and the parties in the suit see fit. He referred to a large award in California amounting to $40 million. The entire settlement was satisfied through an annuity of approximately $7 million. The reason is that from the present value standpoint, the interest which accrued, paid off the entire $40 million settlement. That periodic payment was structured around the time that the actual needs would occur in the life of the person who won the award. This takes away the lottery type of award and puts the award back to an actual settlement for the damage which was done. This bill is good for patients in that it gives them more of the settlement. The trial lawyers who represent the suing party are paid out of the first part of the annuity. In the case of the settlement in California, if the first payment was $10 million, all the legal costs would have been paid as a percentage out of the first $10 million rather than out of the total $40 million. This bill is good for the providers and the state's medical access problem. It will help stem the rising doctors rates in this state which are exorbitant and driving doctors to seek other population centers where they can more easily cover their skyrocketing medical malpractice insurance.

Proponents' Testimony:

Laurie Ekanger, Governor's Office, stated the Governor recommends HB 309 and urges the committee's support. This bill represents an important piece of health care reform and will contribute to making health care more accessible and affordable to Montanans. Experience in other states that have enacted these kinds of reforms, such as Utah and California, indicate that these reforms do bring some stability and predictability to a major cost of medical business in Montana which is liability insurance. This can result in lower premium rates, which can be passed on to consumers in terms of cost savings, or increased accessibility to services. The premium for a family practitioner who practices obstetrics is about three times the premium of a family practitioner who does not practice obstetrics.

Jerome Loendorf, Montana Medical Association, stated that HB 309 contains two parts. The first is a limit on non-economic damages in the amount of $250,000; second, there is a requirement, if requested by a party, that future damages be paid in periodic payments. Non-economic damages include pain and suffering,

humiliation, emotional distress, and other non-monetary losses. This would not include loss of wages, medical expenses, loss of domestic services, and other monetary losses. More than half the states have placed limits on damages including non-economic damages. Limits on damages are not new in this state. The Montana Legislature has limited damages in suits against the state per claimant to $750,000 and per occurrence to $1.5 million. This would include economic as well as non-economic damages. If a person had $500,000 for lost wages, $500,000 for medical expenses and $500,000 for pain and suffering which resulted in an incident in a state hospital, the recovery would be limited to $750,000 which would be half of the amount which was awarded. If the same incident occurred in a private hospital, under this bill the recovery would be $1,250,000, the reduction being only that portion of the damages that were non-economic. The loss of wages and medical expenses would not be reduced. Montana imposes a greater limit on a recovery than this bill would propose in private actions. Since 1915, Montana has limited recoveries in workers' compensation cases. Currently, no non-economic damages can be recovered and even economic damages are limited. It limits recovery in wrongful discharge cases. The purpose of this bill is to provide stability in the liability insurance marketplace to make predictability for underwriters. When trying to negotiate a settlement, it is easy to get a handle on what lost compensation might be. Health care expenses have dollar amounts attributed to them. Non-economic damages are difficult to measure. That is why states are putting limits on non-economic damages. The second part of the bill would require periodic payment of future damages when the amount of those future damages exceeds $50,000. This would leave a lot of discretion to the judge to adjust the payments. It's important to the claimant because he will have known amounts of given income. These payments are adjusted for inflation. The judge can make adjustments for a child who may want to go to college or provide for future large medical expenses. The claimant can be assured the money will be there when needed. These payments would not be taxed. The principal amount and the projected interest which are components of the periodic payment are not subject to tax. If a person receives the award in a lump sum which would then be reduced to present value, that person would have to invest the money and the interest would be subject to tax. The person receiving an award by periodic payments should receive more money than they receive under a lump sum. There is also an advantage to the insurance carrier. The insurance carrier can purchase the annuity for less money than it would take to pay the lump sum. Annuities are cheaper to buy because of the differential in interest rates. He submitted his written testimony, **EXHIBIT 1.**

Mona Jamison, The Doctors' Company, stated The Doctors' Company is the primary insurer for medical malpractice in the state of Montana. They insure approximately 700 physicians. If this bill passes with a cap of $250,000 on non-economic damages and periodic payments for awards over $50,000, their rates will go

down in the range of five to seven years. HB 309 is about access of Montana citizens to physicians. By capping non-economic damages at $250,000, the area of volatility and unpredictability in the premium setting process is reduced. There are very few cases which have non-economic damage awards or settlements over $250,000. They are approximately 2% of the cases. The cap is important because of the unpredictability of the 2% of the cases. When California enacted the $250,000 cap and periodic payments, the rates went down substantially. Caps are not new to Montana. In workers' compensation cases there is a limitation on attorneys fees. By capping non-economic damages, the chance of settlement is increased and the overall cost of litigation is decreased. In litigation, the experts on both sides can come to agreement on what the economic losses are as to lost wages, future wages and medical costs. What they cannot agree on is the non-economic benefits. The loss due to pain and suffering is subjective. The plaintiff with a more effective attorney will secure a higher settlement for pain and suffering than another attorney can, where the pain and suffering was greater. Once non-economic damages are capped, the incentive to continue the case to trial or hold out for settlement, is removed. The lottery aspect of the damages has been limited. Other states have caps on both economic and non-economic damages. Indiana caps economic and non-economic damages at $750,000. The U.S. House of Representative has passed legislation capping non-economic damages at $250,000. The injured patient benefits from periodic payments by collecting more money. An existing statute clarifies the payment of attorneys fees, § 25-9-404, MCA. This statute states that when the plaintiff receives periodic payments, the fees incurred to recover future damages to be paid by periodic payments must be calculated on the basis of the present value of the future damages. If there is a $5 million settlement, there is always a lump sum payment which covers the medical bills and lost wages incurred and enough to compensate the attorney. If $1 million is paid up front, an annuity of $4 million would be needed. The plaintiff, over 20 years, will collect $4 million plus the imputed interest which is allocated in each payment. The attorneys fee, under Montana law, is 1/3 or 40 to 50% of that annuity reduced to its present value. If the annuity was $1 million for $4 million, it would be 40% of $1 million plus 40% of the original lump sum. This compares to 40% of $5 million. The plaintiffs recover more with periodic payments in terms of future dollars. The other beneficiary is the insurance company. It is easier to buy an annuity for $1 million than to pay out $4 or $5 million. The tax consequences are also significant. If the plaintiff recovers a lump sum, all investment earnings and interest are taxed. As the interest is imputed to these periodic payments is received by the plaintiff, they are not taxed. **Ms. Jamison** presented her written testimony, **EXHIBIT 2.**

Bill Olsen, American Association of Retired Persons, stated their support of HB 309.

Nancy Clark presented her written testimony is support of HB 309, **EXHIBIT 3.**

Jacqueline Lenmark, American Insurance Association, spoke in support of HB 309. The cost of malpractice insurance has been a significant problem in Montana and nationally since the early 1970s. Insurance rates in Montana are regulated by the Insurance Commissioner who has the ability to disapprove malpractice insurance premium rates whenever they are excessive, inadequate, or unfairly discriminatory. Insurance companies use a loss ratio to indicate profitability. When their loss ratio is at 100%, they are breaking even. When it falls below 100%, they are making some money. Medical malpractice loss ratios over the past four years have remained over 100%.

Arlette Randash, Eagle Forum, presented her written testimony in support of HB 309, **EXHIBIT 4.**

Laurie Koutnik, Christian Coalition of Montana, presented her written testimony in support of HB 309, **EXHIBIT 5.**

Jim Tutweiler, Montana Liability Coalition, stated their support of HB 309.

Jim Ahrens, Montana Hospital Association, stated their support of HB 309.

John Hanson spoke in support of HB 309. He is a physician from Billings. He does not know of a single physician who would knowingly or willingly harm his or her patient. When a patient is injured, the physician feels devastated, even more so if it might have been prevented. The doctor would like to make his or her patient whole. The main reason doctors carry liability insurance is to take care of those patients in a fair and reasonable manner. Unlimited awards for non-economic damages are unfair and, at times, unreasonable. They are not asking for limitation of losses of income, payments for future medical expense, etc.; however, they are asking the committee to define the upper limits of an area that may be almost undefinable but certainly as tragic and highly emotional. This legislation benefits the vast majority of Montana citizens because it caps liability insurance premiums and should increase services.

{Tape: 1; Side: B}

<u>Opponents' Testimony</u>:

Gene Jarussi, Montana Trial Lawyers Association, stated that a claim for medical malpractice arises when a patient fails to receive proper medical treatment and is injured by it. This bill is designed to limit the injured patient's recovery for medical malpractice claims. The theory behind this bill seems to be that

by limiting the recovery of Montana citizens, the insurance rates charged to doctors by their insurance companies, will go down. The bill does not ensure that any drop is passed on in the form of savings to the patients. Rates are based on what is paid out on claims. Who is responsible for the claims? The records from the Board of Medical Examiners shows that 8% of the physicians in Montana are responsible for 58% of the claims and more than 60% of the dollars paid on claims. Ninety two percent are good doctors who have little or no exposure to the system. The 8% are the ones who are burdening the system. These problem physicians pay the same premiums as the good physicians. The average claim payments for good doctors would be approximately $14,000. The claims paid for the repeater physicians are more than a quarter of a million dollars. Who are the repeater doctors? We do not have any knowledge of their identity. In the mid 1980s The Doctors Company insured a neurosurgeon named Albert Joern from Kalispell. In the early 1990s he declared bankruptcy and the claims which had been brought against him were made public. He presented **EXHIBIT 6,** a letter from The Doctors Company to Albert Joern's bankruptcy attorney listing the 16 claims which arose in a five year period. His income was $197,000 a year. The legislation which should be before this committee is legislation designed to correct the problem of the problem doctors. Over 90% of the doctors in Montana have little or no contact with medical malpractice claims. The public of this state should be protected from repeater doctors, not protect repeater doctors from the public. Additional handout from MTLA, **EXHIBIT 7.**

Tony Reis stated he hurt his back in 1983. It caused him pain, but he lived with him. In January of 1987, Dr. Joern performed two surgeries on him for a bulging disc. Neither surgery was successful. The neurosurgeons who have treated him since that time have said that the care provided by Dr. Joern violated the applicable standard of care and was negligent. He is worse off today than he was when he met Dr. Joern. The surgeries performed by Dr. Joern were not appropriate for his problems. His medical expenses to date are more than $130,000. He will never be able to work again. He will always have to be on pain medication. He has been told there is nothing medicine can do to repair the damage which has been done. He believes that any limit on damages in cases like his, is totally inappropriate.

Roxanne Kegel Rowe spoke in opposition to HB 309. Her brother died from complications after having his wisdom teeth removed. She is a school counselor and does her job as well as she can. She expects the medical profession to do that too. The doctor in the emergency room told her family that her brother's death was a mystery. The coroner's office said it must have been arrhythmia. The dental board found no wrongdoing with the oral surgeon. They found out that the oral surgeon chose to have antiquated equipment in his office. Why was this person insured and who insured him? She is glad they had a chance to sue. How does anyone make up for a death?

Marge Asken commented that for 20 years she had the same physician. He did not inform her about the possibility of surgery for the cancer she had. He wanted her to have radiation. If she had gone ahead with radiation, she would not be alive today. Because of her settlement, her doctor now refers patients to a specialist when he is not able to handle the case.

Joey Heddick stated she went in for a hysterectomy in 1984. The surgery seemed to have gone well; however, there were complications later that evening caused by an error her physician had made. She had three relapses during the next three months. She could not work. She had a hard time finding an attorney to take her case. They spent approximately $12,000 of their own money on her case. The victims of malpractice already have lifetime sentences to live with damages caused by doctors. Doctors need to be responsible for their actions. The only way to deal with these physicians is by money. Putting a cap on damages is to protect a very select group of people. She does not believe that doctors and insurance companies need to be protected that way. Insurance companies should be more selective about which doctors they insure.

Patrice Downey commented she had been an insurance broker in the past. When passing tort reform legislation, we need to ask what the effect will be of setting a limit of $250,000 for recovery of non-economic damages which includes physical impairment and disfigurement and pain and suffering. In the field of obstetrics and gynecology, there is one specialist who takes on a greater risk, is not in the business of providing long term care. This is the abortionist. We have 20 years of data compiled mostly by the abortion industry which indicates that there are complications associated with safe and legal abortions. These complications include mild depression, pelvic inflammatory disease, breast cancer and death. The most common serious condition to occur from an induced abortion is post abortal pelvic inflammatory disease. There are 1.6 million abortions performed annually in the United States. If 10% of these women contact pelvic inflammatory disease, 160,000 women receive permanent damage by health care providers who are not required by law to inform their patients of the risks associated with the surgery they are about to undergo. She posed the scenario of a young women of 21 years of age undergoing a safe and legal abortion and then contacts PID and as a result of that, will be sterile at the age of 23. HB 309 states her only recourse would be for physical impairment or pain and suffering. If she were able to find an attorney to represent her, he would require 40 to 50% to take her case. Her case would also require expert witnesses and court costs. The young woman may be able to receive $100,000. As an insurance broker, she specialized in errors and omission insurance. The insurance industry knows how to underwrite. They know how to differentiate whether or not a doctor is performing more dangerous procedures, informing his patients, and how many claims have been presented against him. The insurance industry knows how to differentiate a good driver

from a bad driver, a crane operator from a contractor, and also a good doctor from one is knowingly taking on risks every day of his practice.

Bob Jones stated that while in surgery he was given a blood transfusion and the blood given to him was full of the AIDS virus. One improperly tested and screened unit infected four patients. The other three died from their surgeries. The Red Cross accepted no responsibility. The victim has no protection. By putting caps on the victim, he is limited in obtaining a lawyer who will handle his case. A good attorney knows the cost of investigation, expert witness and other costs can exceed any recovery. He has had 20 to 40 years cut off of his life. Who can put a price on that?

John Schulte stated he was appearing on behalf of Felicia McLean. He is her guardian ad litem and conservator. Felicia received a judgment against Community Medical Center in the amount of approximately $3 million. When born, she was not given oxygen and as a result she is a spastic quadriplegic and has cerebral palsy. She will be confined to a wheelchair with no motion. She cannot talk. She has received a large award but her health care costs will continue throughout her life. The jury is the best check there is on runaway awards. Felicia's mother had a claim for $250,000 from the jury, she was not awarded any money. The jury gave Felicia what they thought would take care of her for the rest of her life. When there are damages at birth, the damage costs will be astronomical.

Mark O'Keefe, Commissioner of Insurance, stated they worked with the Joint Interim Committee for the last two years on tort reform. The Committee decided if it ain't broke, don't fix it. The Montana Health Care Authority decided that 31 cents out of a hundred dollars savings in terms of the total potential for tort reform was not enough to address the issue. He requested an amendment which would provide that all medical malpractice insurance carriers be required to file proof that the legislation actually reduces rates. Their numbers show that nationally there is a 29% profit margin in medical malpractice. Workers' compensation and auto insurance have a 5% profit margin. Perhaps there should be a cap for medical malpractice profit at 10% to 20%. That would greatly reduce rates.

Randy Bishop presented the written testimony of Jill Blunt whose husband died as a result of a failure to diagnose a highly treatable form of bone cancer, **EXHIBIT 8.**

Additional handouts, **EXHIBITS 9 THROUGH 14.**

Informational Testimony:

Questions From Committee Members and Responses:

SENATOR HOLDEN, referring to page 1, line 21, asked for clarification of the language in (i).

Ms. Jamison stated that the $250,000 cap on non-economic damages would be per incident, not per claimant. The cap is imposed on a per incident basis.

SENATOR HOLDEN asked if one or more people were involved in the same incident, would the one cap apply to all the people involved?

Ms. Jamison stated this only prevents family members to also sue over the same claim and each get a separate judgment for non-economic damages.

SENATOR NELSON asked what the average lump sum settlement would be in Montana?

Ms. Jamison stated in 1994 premiums earned were $7.4 million, settlements and judgments were $5.2 million, defense costs were $1.4 million and other costs exceeded $750,000.

SENATOR NELSON asked what would become of the periodic payment if the injured party died?

Ms. Jamison stated the bill makes it clear that the estate would receive the remaining payments left on the annuity.

SENATOR NELSON asked if the injured child is compensated for the future job that that child might have had.

Ms. Jamison stated a "bad" baby case had settled for $53 million which included economic damages for lost wages, future medical costs and pain and suffering. They look at the family history to project what the likely future of that child would be.

SENATOR DOHERTY asked what would happen if there was a problem with the annuity. How would the injured party receive full satisfaction of the judgment?

Ms. Jamison answered that the House amendments raised the rating to an A+ rating. The Doctors' Company purchases an assignment of interest at the time that the annuity and the settlement is structured. That would be insurance on the first insurance. The Doctors' Company pays approximately $500 for this assignment. The reason it is so inexpensive is because there is rarely a problem.

{Tape: 2; Side: A}

SENATOR DOHERTY questioned the periodic payments of $100,000 in Section 3 and $50,000 in Section 2.

Ms. Jamison stated that one of the things which killed the bill in the last legislative session was the over inclusive, over encompassing nature of addressing every tort imaginable. The focus of this bill is medical malpractice. The intent of this bill was to address the premium rate for physicians. The intent was not to change the entire tort reform area. Section 3 stands alone except for medical malpractice tort cases.

SENATOR DOHERTY asked about an amendment to the bill which Commissioner O'Keefe mentioned earlier of capping the profit margin of medical malpractice carriers in Montana or requiring proof that rates were reduced.

Ms. Jamison stated she did not find any inherent evil or negative in an insurance company making a profit. Last year the loss ratio for The Doctors' Company in the state of Montana was 102%. You have to be below 100% to make a profit. Why should an insurance company be required to prove rates were reduced when no other proponent on any other bill has to show proof?

SENATOR DOHERTY asked why this legislature should treat doctors better than they treat anyone else in the state?

Ms. Jamison stated she did not feel that was the case. The legislature addresses the needs of various citizen groups and business groups which would include physicians and insurance companies.

SENATOR HALLIGAN stated the injured party would not actually be getting $250,000 because that would be reduced by the court. What are the usual reductions that a court would make?

Mr. Loendorf stated the reductions appear on page 2 and refer to statute numbers. The first refers to comparative negligence, the second is a reference to joint and several liability and the third refers to a situation wherein the defendant already had a judgment against the plaintiff that could be offset.

SENATOR HALLIGAN asked whether the House discussed making a real cap with no reductions?

Mr. Loendorf answered that comparative negligence, joint and several liability and judgments ought to be treated the same in these cases as all others.

SENATOR HALLIGAN asked **Mr. Hill** his opinion of the wording on page 1, line 21, in regard to the incident mentioned earlier wherein there may be three people injured by the same incident.

Mr. Hill commented the most common scenario is in a hospital setting where an error would injure several people. He further

commented about an incident in Billings wherein a computer error caused eight patients to receive overdoses of radiation. If the same act of malpractice contaminated four different people, under the bill that would be a single incident.

SENATOR BISHOP commented that if insurance rates are well regulated so as not to be excessive or inadequate, why do we need this bill?

Ms. Lenmark stated she meant that in the context of talking about excessive insurance company profits and correlating premium with pure loss information. Insurance rates reflect the cost of the risks which are being insured. The rates are high because the risks which are being insured, the amount which is being paid out under the policy, is high. The effect of this bill will be one factor in reducing the cost of the risk which is being insured. Once the cost of the risk is reduced, the premiums can come down.

SENATOR ESTRADA asked **Ms. Jamison** to clarify the possibility of the cap applying to all persons in one incident.

Ms. Jamison stated that if different individuals receive separate damages, they each have their own cause of action.

SENATOR BARTLETT asked **Ms. Jamison** how a premium for an individual doctor was set? What are the factors taken into account which would set a specific rate?

Ms. Jamison stated that the experience for Montana physicians is what is used in setting the rates. The actual rate making process is very complicated. One of the factors which is also looked at is the legislation that exists in a particular state. Caps and periodic payment legislation would be factored into the rate making process and cause stabilization of the rates.

SENATOR BARTLETT stated that according to previous testimony about 8% of the doctors in the state of Montana are responsible for the majority of the malpractice claims which are made. If she were one of the eight percent, how would her rate differ from anyone else who is not part of that eighth percent but works in the same field of medicine.

Ms. Jamison stated that the process The Doctors' Company uses for repeat physicians is to place a surcharge on their premium.

SENATOR BARTLETT stated that the Judiciary Committee hears many criminal justice bills and in many instances penalties for violating a law are graduated. The second time costs more money or there is a longer prison sentence. She is not suggesting that malpractice is a crime, but she would like to take that concept of increasing penalties for repeat offenses and apply it to the caps. What would The Doctors' Company response be if they looked at graduating the level of awards which could be made if the

provider is found guilty of malpractice for a second or subsequent time?

Ms. Jamison stated they would oppose that. The benefit of the caps is statewide per the different specialties. She would suggest looking toward the Board of Medical Examiners. They have the direct one on one enforcement against the repeat offenders. **SENATOR BARTLETT's** proposal would penalize the statewide physicians in terms of their premium rates in compensating for these adjustments.

SENATOR BARTLETT asked **Mr. Loendorf** if the Montana Medical Association has any consistent programs for the physicians who are members that focuses on reducing medical error?

Mr. Loendorf answered that there are a number of sources which provide that type of training. The insurers encourage it. There are programs through their own association and also their specialty associations. There are conferences held throughout the country. The Medical Association proposed the bills which enacted the laws which required reporting of any physicians who were not safely engaging in the practice. The board meets bimonthly to deal with physicians who have had claims of unprofessional conduct filed against them.

SENATOR DOHERTY stated that since malpractice premiums are a cost of doing business, is there any guarantee that that will be passed on to consumers or will that money be pocketed by the individual whose bottom line has improved? Given that there have been reductions in California and Colorado, how much did the costs for the medical consumer go down?

Mr. Loendorf stated that as a pure business proposition, assuming the physician has a designated amount of income he wants to make in a given year, after all expenses are deducted the total amount should go down.

Ms. Jamison stated there has been a lot of debate as to what extent does tort reform affect the fee for services actually charge by the physicians. The main part of tort reform is access. The second benefit is a reduction in fee for services. The marketplace will drive the prices down.

SENATOR BAER stated that they are only dealing with the law of negligence in medical malpractice cases. This bill would not affect any award of punitive or exemplary damages. In the example of a hospital employee working in the operating room who negligently operates an autoclave and instruments then become contaminated and are used on three different people. If these people develop infections and make claims, each injured person would have a separate action against the hospital.

SENATOR HALLIGAN asked **Ms. Jamison** if she could get a letter from The Doctors' Company indicating that they do base their premiums on Montana claims experience.

Ms. Jamison agreed to provide the letter.

CHAIRMAN CRIPPEN stated that 92% of the physicians in Montana have very few claims and 8% are the repeaters. He asked if all doctors were given a flat rate and then the 8% pay a surcharge on top of that premium.

Ms. Lenmark stated the rate filed with the Insurance Commissioner reflects the exposure of the specialty which is being insured. From that point, an individual company can then make some individual determinations about how to set premium. This is not handled uniformly by all companies.

CHAIRMAN CRIPPEN stated that this would be similar to a group policy. If there are large enough numbers, the law of averages will handle the situation. The surcharge is for the benefit of the insurance company. It would not go into the pool to bring down the balance of the rates to the others in the pool.

Ms. Lenmark stated the good physicians in the pool would not have to pay the surcharge to provide the dollars necessary to pay on the claim. Without the surcharge, everyone in the pool would be paying some increment higher.

CHAIRMAN CRIPPEN asked if attorneys could structure payments on their fees?

Ms. Lenmark stated that is not regulated by statute.

CHAIRMAN CRIPPEN stated that most claims fall below the $250,000 cap. Only 2% meet the cap or exceed it. He asked the amount of damages awarded per case for the other 98%?

Ms. Jamison stated the total number of closed claims over $200,000, exclusive of defense costs, were 11 and the amount was $6.3 million. The total number of closed claims over $500,000 were 3, and they amounted over $4 million. The current total reserves in 1990 to 1992 was $16.9 million and the number of open claims was 204. The total number of claims between 0 and $250,000 was 96%; $250,000 to $500,000 was 2%; $500,000 and up was 2%. The number of paid claims between 0 and $250,000 was 88%; $250,000 to $499,000 was 8%; and $500,000 and up was 4%.

CHAIRMAN CRIPPEN stated the chart he had indicated the amount to be $125,000. He stated that with a cap there is the suggestion that the injured party could get that amount. Everyone would ask for that amount.

Ms. Jamison stated she doesn't believe the jury is told about the cap. In California the average of all settlements and jury

verdicts is $11,615. The U.S., excluding California, is slightly over $20,000. The caps put a limit on the volatility.

Closing by Sponsor:

REPRESENTATIVE GRIMES stated that even if the insurance industry can identify the two percent and separate them, the rest of the 98% would still face the vulnerability of the unstable awards in non-economic cases. This legislation will in no way limit the ability to go after bad doctors. After a certain amount of surcharges, insurance companies can drop doctors from insurance coverage.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:00 p.m.

SENATOR BRUCE D. GRIPPEN, Chairman

JUDY J. KEINTZ, Secretary

BC/jjk

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 3/21/95
BILL NO. HB 309

TESTIMONY OF MONTANA MEDICAL ASSOCIATION OF HOUSE BILL 309

Thank you for the opportunity to present testimony in support of House Bill 309.

House Bill 309 makes two significant changes in the law. First, it provides that in a malpractice claim, based on a single incident of malpractice, the amount a claimant may recover for "non-economic loss" may not exceed $250,000. It must be made clear that this limit applies to non-economic damages only. A claimant is not limited as to the amount of economic damages he may recover, nor is there any limit placed on the amount of punitive damages that can be recovered.

Non-economic damages are defined as a subjective, non-monetary loss, including, but not limited to pain and suffering, emotional distress, inconvenience, and other non-monetary losses. Economic damages, on the other hand, are monetary losses, that is, actual dollar losses and include a loss of earning capacity; medical, hospital, and other health care costs; and a loss of domestic services.

A number of states have imposed limits on non-economic damages for the purpose of controlling liability insurance premiums, and in turn, controlling health care costs. For example, California has enacted a statute limiting the recovery of non-economic damages to $250,000, which is the same limit proposed by H 309.

An example of how the bill would work if enacted is as follows: Suppose a claimant was awarded $500,000 for lost earning capacity, $500,000 for health care expenses, and $500,000 for pain and

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 2/21/95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

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SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
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JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

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

TO: **Members of the Senate Judiciary Committee**

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

RE: **Testimony on HB 309 -- $250,000 Cap on Noneconomic Damages**

DATE: **March 21, 1995**

PLEASE SUPPORT HB 309 - TORT REFORM

Section 1 of HB 309 limits awards for ***noneconomic*** loss. Noneconomic damages are defined in Section (4)(d) of HB 309 to include subjective, nonmonetary losses such as pain and suffering, emotional distress, inconvenience, companionship, and other non-pecuniary damages. HB 309 does not limit recovery for ***economic damages*** such as lost wages and medical costs; they remain totally recoverable. These quantifiable, real damages are not affected by HB 309.

Skilled attorneys use the sympathy factor to manipulate juries into awarding high amounts for the subjective, noneconomic damages. Placing a cap on noneconomic damages significantly reduces the cost of all claims. The cap allows malpractice insurance carriers to keep premiums down, which in turn allows physicians to keep patient fees down and to continue delivering services. Lower premiums are 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 in Montana are settled out of court. The damages typically are not categorized as economic or noneconomic. The lack of a cap on noneconomic damages leads to increases in the amount of money 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." The lack of a cap for these subjective, non-quantifiable damages encourages a lottery approach to settlement. Unpredictability in the area of noneconomic awards is a significant factor in rising premium costs.

In California, an extremely litigious state, medical liability premiums decreased 51% (1976-1994) after a $250,000 cap on noneconomic damages and periodic payment legislation was enacted. In Colorado, similar legislation forced premiums down 53% (1986-1994).

A CAP ON NONECONOMIC DAMAGES IS SINGULARLY THE MOST IMPORTANT ELEMENT OF STABILIZING AND REDUCING PREMIUMS FOR MONTANA PHYSICIANS. *PLEASE VOTE FOR HB 309.*

-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: **Members of the Senate 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: **March 21, 1995**

PLEASE SUPPORT HB 309 - TORT REFORM

Section 2 of HB 309 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. Under this section, THE TOTAL DOLLAR AMOUNT OF THE PERIODIC PAYMENTS AWARDED TO THE PLAINTIFF MUST EQUAL THE TOTAL DOLLAR AMOUNT OF THE FUTURE DAMAGES WITHOUT A REDUCTION TO PRESENT VALUE (p. 2, lines 26-18). Major benefits of periodic payments are:

1. The injured patient receives more of an award under the periodic payment scheme proposed in Section 2 of HB 309 than with a lump sum award. The attorney, however, receives less. Under a lump sum scheme, the plaintiff's attorney's receives a greater fee because the fee is a percentage of a large amount (lump sum). With periodic payments, the plaintiff's attorney receives less because another section of the law requires the attorney's fee to be based on a percentage of the lump reduced to its present value.

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 interest 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.

EXHIBIT 2
DATE 3-21-95
HB 309

4. When periodic payments are mandatory, settlement negotiations are more successful. When the plaintiff's attorney knows that future damages will be periodicized, the attorney will be less likely to take the case to trial because trial will not increase his or her chances of receiving a higher fee--the fee will be lower than under a lump sum payment.

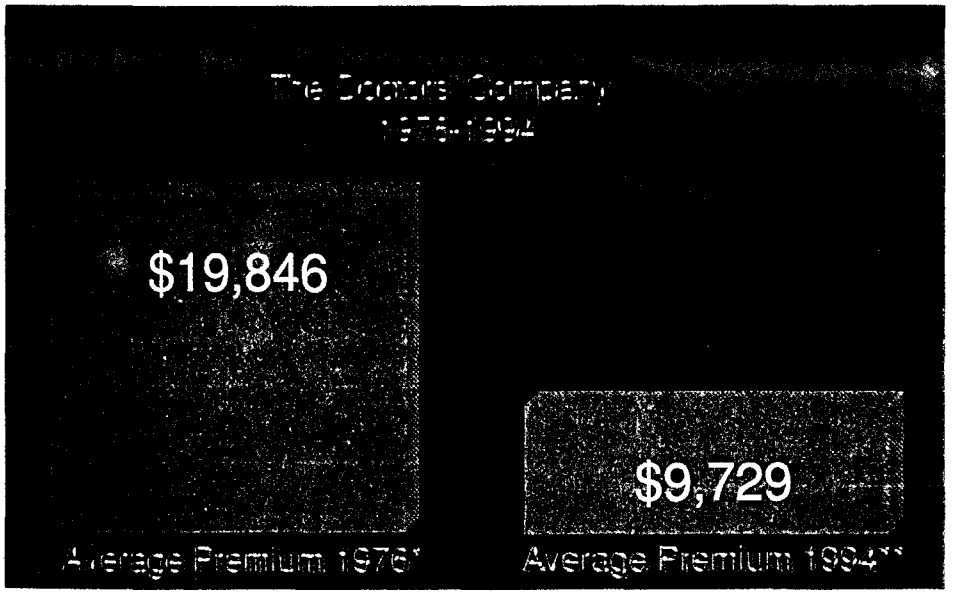
5. Experience shows that when periodic payment provisions are discretionary, such as in existing law, they are never ordered by the court. Thus, even though the mandatory periodic payment section is second in importance to the cap on noneconomic damages on premium stability, a mandatory requirement for periodic payments will contribute to premium stability.

6. Studies have shown that large lump sum payments are often depleted by the patient or the patient's conservator, often a family member. Since future damages awards 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 social purpose.

If you have questions concerning HB 309, please feel free to contact me.

-END-

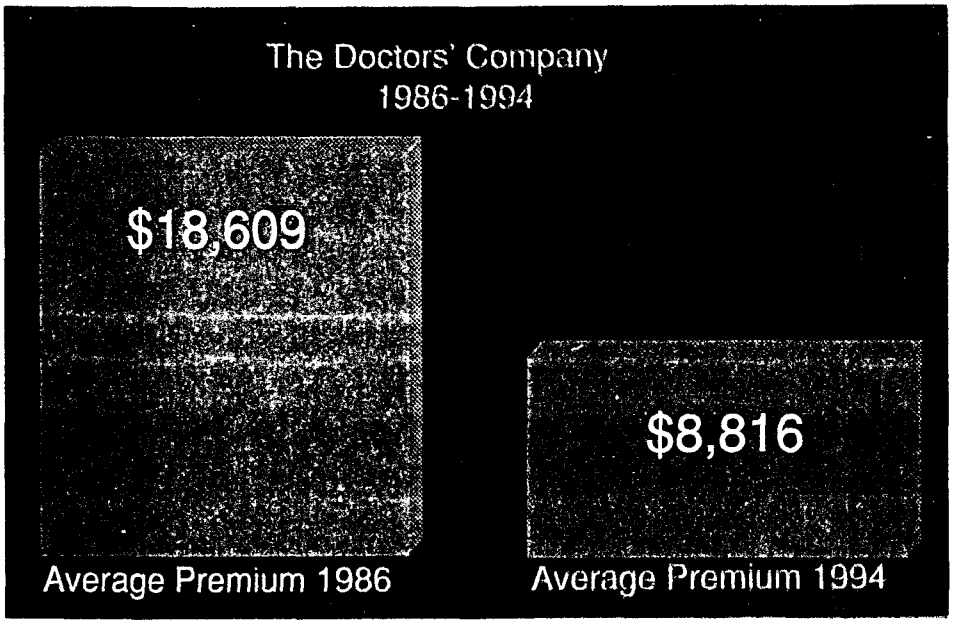
MICRA Reduces California Medical Liability Premium Rates by 51%



*$7,611 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%*

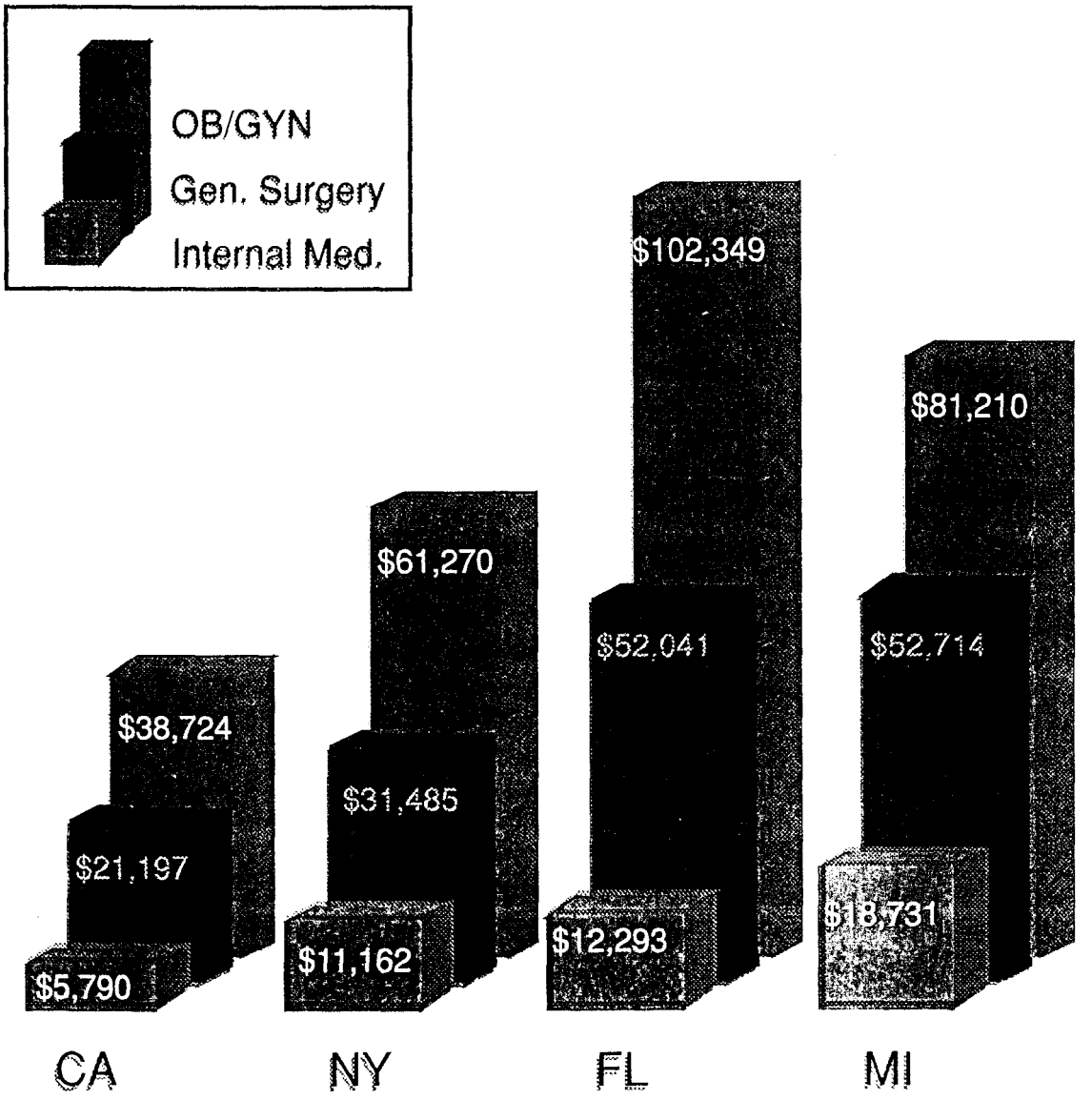


*The Doctors' Company's average of all specialties, including dividends for a $1 Million / $3 Million Claims-Made Policy Premium

EXHIBIT 2
DATE 3-21-95
HB 309

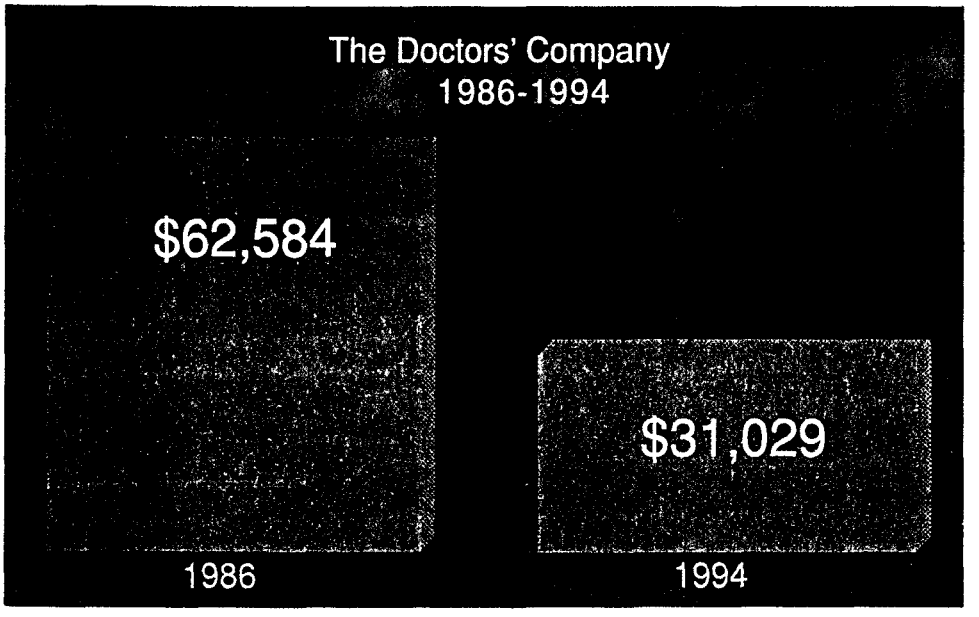
California Premiums Are Now Lower

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.



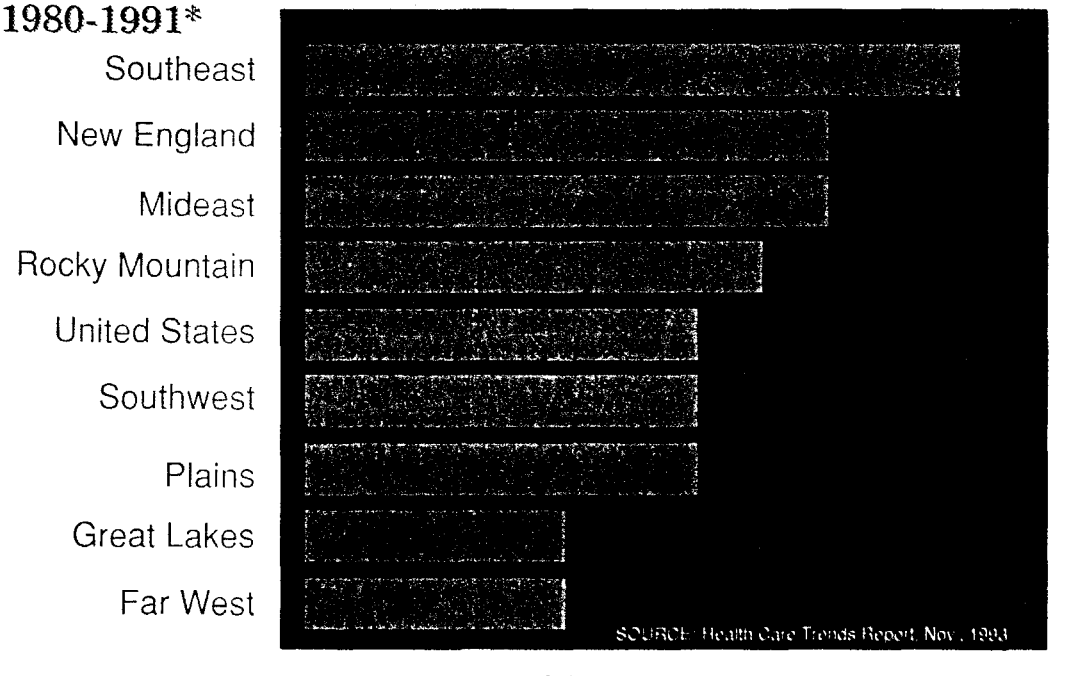
Based on average published rates excluding discounts or surcharges for $1 million/ $3 million in liabiltiy coverage.

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

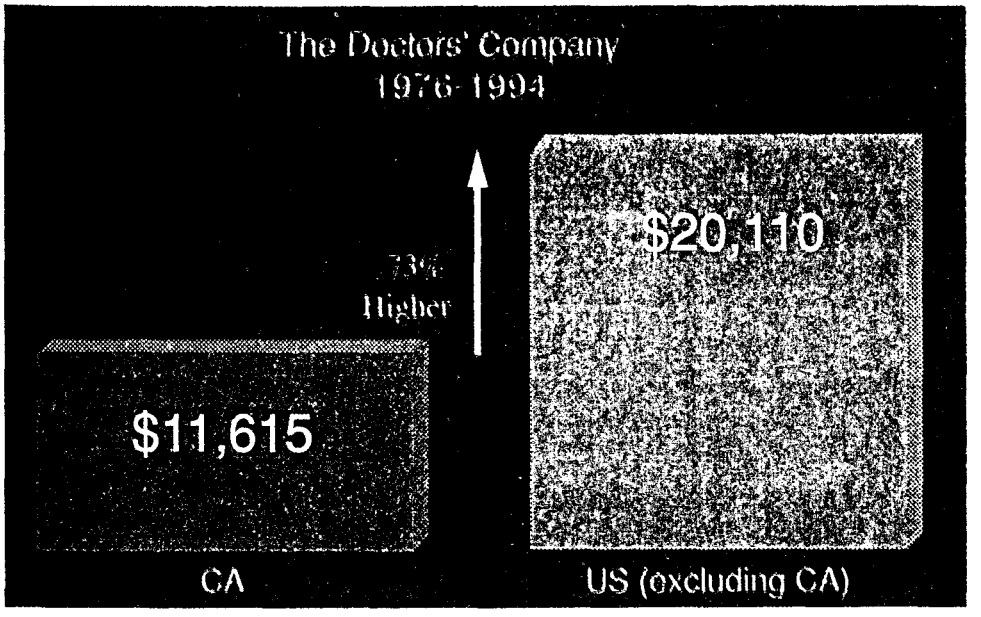
Average Annual Growth In Per Capita Spending 1980-1991*



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

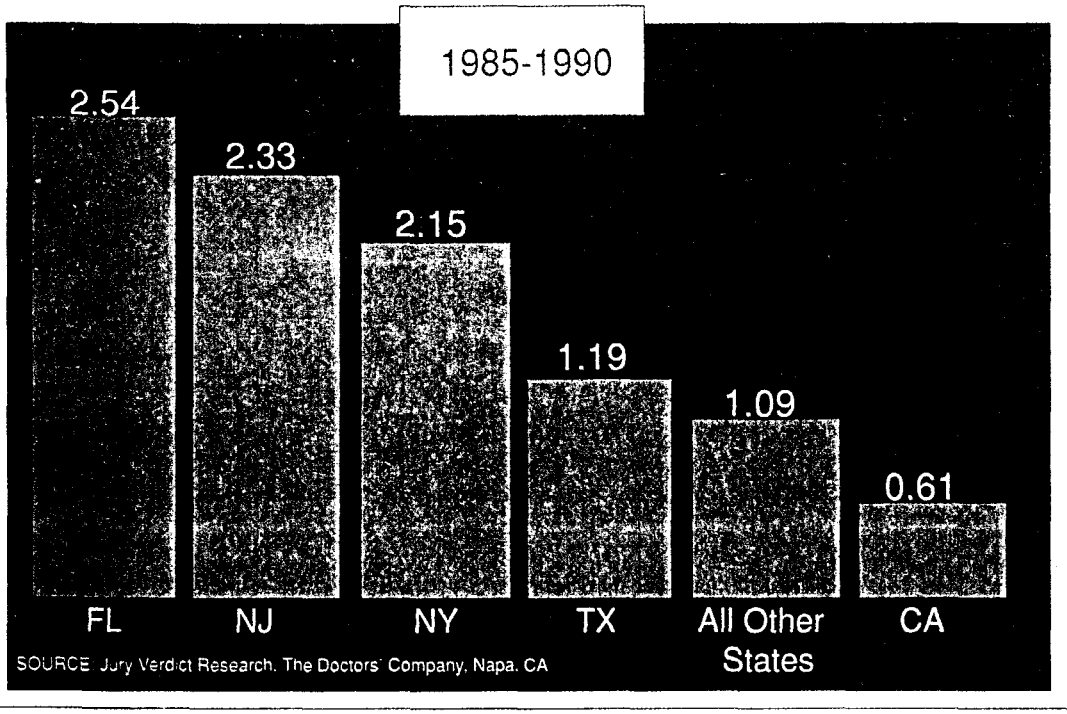
EXHIBIT 2
DATE 3-21-95
HB 309

Average of All Settlements & Jury Verdicts



MICRA Reduces Verdict Cost & Frequency

$1 Million + Verdicts Per 1,000 Doctors



HB 309

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 3/21/95
BILL NO. HB 309

March 21, 1995
~~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 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 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.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 3/21/95
BILL NO. HB 309

March 21, 1995

Senate 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, or $300 billion to the United states economy as a whole. 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 to often on those of child bearing age. A acquaintance calling on small businesses 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. A doctor, who specializes in delivery babies, I have consulted with over the past several months shared with me that their firm pays $64,000 a quarter for medical malpractice insurance and they've never had a case litigated against them! When similar legislation was successfully debated in the House of Representatives in Washington D.C. earlier this month, Representative Henry Hyde, Chairman of the House Judiciary, understood the implications for families saying "the people are important and they will benefit. The business community is important and they will benefit." He said the bills would cut down on frivolous lawsuits.

A spokesman for the Girl Scout Council in metropolitan Washington D.C. said recently that just that local area must sell 87,000 boxes of Girl Scout cookies each year just to meet their liability insurance.....funds that could otherwise be used to help fund Girl Scout activities! That's a lot of cookies!

Interestingly enough, their are huge political payoffs in this battle. A recent article in Human Events reported that in the two years leading up to the 1992 election the American Trial Lawyers Association representing a group whose members make around $20 billion a year gave $2.4 million in political contributions, 92% of it to the Democratic party.

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.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. ____
DATE 3/21/95
BILL NO. HB309

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. Placing a cap on noneconomic damages not to exceed $250,000 is a reasonable resolve.

If we are ever going to truly address cutting the runaway costs of health care, then torte reform is essential. I recommend a do pass on HB309.

Respectfully submitted: Laurie Koutnik, Executive Director, Christian Coalition of Montana
3/21/95

THE DOCTORS COMPANY

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 2/21/95
BILL NO. HB 309

December 30, 1991

Harold V. Dye
Milodragovich, Dale & Dye
620 High Park Way
Missoula, MT 59803

COPY FOR YOUR INFORMATION

RE: Albert T. Joern, M.D.

Dear Mr. Dye:

First, let me apologize for the delay in getting this to you. Dr. Joern was covered under policy #31365-0001. This policy became effective on 7/1/83 and was cancelled on 7/1/88. An extended reporting policy was purchased and became effective on 7/1/88. The extended reporting policy will cover claims that occurred between 7/1/83 and 7/1/88 but are not reported until after 7/1/88. Policy #31365-0001 carries policy limits of $1 million per claim and $3 million aggregate.

The following is a list of those claims reported under policy #31365-0001 and their disposition and/or current status:

File No: 65334A; Victor Peltier vs. Albert Joern, M.D.; status - closed 2/26/88; settlement - $32,000.

File No: 66010A; Dan Meritt vs. Albert Joern, M.D.; status - closed 2/25/88; settlement - $15,000.

File No: 66693A; Joe Foote vs. Albert Joern, M.D.; status - closed 3/26/90; settlement - $194,888.

File No: 66835A; Irene Butts vs. Albert Joern, M.D.; status - closed 5/25/88; settlement - $299,629.77.

File No: 66833A; Peter Tiffany vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 66844A; John Dunster vs. Albert Joern, M.D.; status - closed 9/15/87; longstanding inactivity.

File No: 69468A; Roger Bowman vs. Albert Joern, M.D.; status - closed 7/9/91; settlement - $383,000.

2033 Sixth Ave., Suite 400
Seattle, WA 98121-2526
206 / 448-1664
800 / 548-0799

File No: 70217A; Ivan Meyer vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 71314A; Leona Nedved vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 71718A; Robert Snyder vs. Albert Joern, M.D.; status - closed 8/31/89; settlement - $95,000.

File No: 73001A; Dale Guenther vs. Albert Joern, M.D.; status - closed 6/28/90; longstanding inactivity.

File No: 73339A; Rick Potuzak vs. Albert Joern, M.D.; status - closed 11/25/91; dismissed.

File No: 73877A; James Schreckendgust vs. Albert Joern, M.D.; status - closed 8/30/89; dismissed.

File No: 76432A; Donald Davis vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 79900A; Russell Wick vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 80280A; Anthony Araiz vs. Albert Joern, M.D.; status - open; litigation ongoing.

Those claims which remain open carry a $1 million per claim limit. I hope this information is helpful.

Best Regards,

Linda Adams Tucker

Linda Adams Tucker
Claims Director
Washington Office

LAT:pr

cc: Albert Joern, M.D.

EXHIBIT 6
DATE 3-21-95
HB 309

"PROBLEM" PHYSICIANS

An Example . . .

Dr. Albert T. Joern

Annual Income	**$197,000.**

Unpaid Taxes

--U.S.A.	$60,215.
--Montana	20,044.
--Flathead Co.	3,985.
TOTAL	$84,244.

91-51214-13

CHAPTER THIRTEEN STATEMENT

Each question shall be answered or the failure to answer explained. If the answer is "none" or "not applicable" so state. If additional space is needed for the answer to any question, a separate sheet, properly identified shall be used and attached.

The term "original petition" means the original petition filed under §301 of the Code or, if the Chapter Thirteen case was converted from another chapter of the Code, it means the petition by or against you which originated the first case.

This form must be completed in full whether a single or joint petition is filed. When a joint petition is filed, the requested information must be provided for each petitioner.

All questions are to be answered by debtor if unmarried, otherwise for each spouse whether a single or joint petition is filed unless spouses are separated and a single petition is filed.

FILED
BERNARD F. McCARTHY, CLERK
JUL 23 1991
BANKRUPTCY COURT
by Kathy Schelin
Deputy Clerk

	DEBTOR	SPOUSE
1. Name and residence		
(a) Full name	Albert Terry Joern	Heather Joern
(b) Residence	188 Terrace Road Kalispell, MT 59901	188 Terrace Road Kalispell, MT 59901
(1) Mailing address	Same as above	Same as above
(2) Telephone number including area code.	(406) 257-8155 H (406) 752-2141 W	(406) 257-8155
(c) What does debtor consider his residence if different from that listed in (b) above.	N/A	N/A
2. Occupation and Income		
(a) Present occupation. If more than one, list all.	Physician	Housewife
(b) Name, address and telephone number of employer. Badge or card number of employee.	575 Sunset Blvd, Suite 207 Triangle Building Kalispell, MT 59901 Self-employed	188 Terrace Road Kalispell, MT 59901
(c) How long has debtor been employed by present employer?	Eight Years	Six Years
(d) Name of previous employer and nature of employment if employed less than one year by present employer.	N/A	N/A

EXHIBIT 6
DATE 3-21-95
HB 309

	DEBTOR	SPOUSE
(e) Has debtor operated a business, in partnership or otherwise, during the past three years.	Northwest Neurosurgical & Rehabilitation Clinic. (debtor and spouse). Northern Rockies Rehabilitations (partnership. Northern Health Care.	
If so, give particulars, including names, dates and places.	January 1988 thru June 1988 1280 Burns Way, Kalispell, Montana	
(f) Answer the following questions.		
(1) Gross wages, salary or commissions per pay period.	$ 197,000.00 per year	$ -0- per
(2) Payroll deductions per pay period.		
(a) Payroll taxes including social security.	$ -0-	$
(b) Insurance	$ -0-	$
(c) Credit union	$ -0-	$
(d) Union dues	$ -0-	$
(e) Other deductions Norwest Bank loan	$ 3,000.00	$
Specify	$	$
Specify	$	$
(3) Take home pay per pay period. (monthly)	$ 13,416.67	$ -0-
(4) Gross income for last calendar year.	$ 150,401.00	$ -0-

12. Debts

(a) Debts having priority

(1) Nature of claim	(2) Name of creditor and complete mailing address including zip code.	(3) Specify when claim was incurred and the consideration therefore: when claim is subject to setoff, evidenced by a judgment, negotiable instrument or other writing or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	(4) Indicate if claim is contingent, unliquidated or disputed.	(5) Amount of claim
(a) Wages, salary and commissions, including vacation, severance and sick leave pay owing to employees not exceeding $2.000.00 to each, earned within 90 days before filing of petition or cessation of business. (If earlier specify date.)				-0-
(b) Contributions to employee benefit plans for services rendered within 180 days before filing of petition or cessation of business. (If earlier specify date.)				-0-
(c) Deposits by individuals, not exceeding $900.00 for each, for purchase, lease or rental of property or services for personal, family or household use that were not delivered or provided.				-0-
(d) Taxes owing Itemize by type of tax and taxing authority				
(1) To the United States	✓IRS Ogden, UT 84201		Back Taxes 1990 Taxes	30,083.52 30,133.00
(2) To any state	Montana Dept of Rev. ✓Mitchell Bldg. Helena, MT 59620		Back Taxes 1990 Taxes	11,142.28 8,902.00
(3) To any other taxing authority				-0-

TOTAL ..... $ 80,260.80

EXHIBIT 6
DATE 3-21-95
HB 309

FILED
BERNARD F. McCARTHY, CLERK
OCT 9 1991
BANKRUPTCY COURT
by Kathy Schelin

Harold V. Dye, Esq.
MILODRAGOVICH, DALE & DYE, P.C.
Attorneys at Law
P.O. Box 4947
Missoula, Montana 59806-4947
Telephone: (406) 728-1455
Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

IN RE	
ALBERT TERRY JOERN and HEATHER JOERN,	Case No. 91-51214 (Chapter 13)
Debtors.	

AMENDMENT TO SCHEDULES

COMES NOW Harold V. Dye, attorney for debtors in the above voluntary proceeding, and pursuant to Bankruptcy Rule 1009 amends the Schedule A-2 filed herein as follows:

Flathead County Treasurer Flathead County Courthouse Kalispell, MT 59901	Real estate taxes (Secured by tax lien)	$3,985.47

DATED this 6th day of October, 1991.

MILODRAGOVICH, DALE & DYE, P.C.
P.O. Box 4947
Missoula, Montana 59806-4947
Telephone: (406) 728-1455
Fax: (406) 549-7077
Attorneys for Debtors

By _____
Harold V. Dye

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 3/21/95
BILL NO. HB309

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Director Emeritus
te D. Beck
abeth 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

Montana Trial Lawyers Association

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

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Paul M. Warren
Governor

March 20, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: House Bill 309

Mr. Chair, Members of the Committee:

Thank you for this opportunity, in advance, to express MTLA's opposition to HB 309, which (1) severely limits compensation for ***both physical and mental*** injuries resulting from substandard medical care and (2) allows hospitals and doctors responsible for future damages, ***both economic and noneconomic***, to dictate installment payments.

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 competetive 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)

House Bill 309. The bill itself prescribes complex and unjust side-effects for even the most innocent victim of the most inexcusable medical negligence:

1. Section 1, which limits recovery for "noneconomic loss," protects the worst Montana health-care providers most. *No matter how gross the negligence may be, no matter*

how hungover or bored or debilitated by age the provider may be, no matter how many previous acts of malpractice the provider has committed, House Bill 309 insulates them from accountability for the damage they cause.

2. Section 1, which purportedly limits recoveries for "noneconomic loss" in order to control medical-liability premiums, insulates ***even those Montana health-care providers who choose to "go bare."*** Why protect providers who won't protect their own patients?

3. Section 1, which limits recovery for "noneconomic loss," ***abandons the common-sense recommendation of Governor Stephens' Health Care for Montanans Committee that any such caps on non-economic damages exclude physical impairment and disfigurement.*** In fact, for the first time in Montana history, the bill (at page 2, lines 22-29) creates an entirely new and ill-defined category of civil damages for something called "subjective, nonmonetary loss." The proponents of HB 309 apparently presume that the definition of "noneconomic loss" encompasses such *objective* losses as paralysis, chronic vomiting, blindness, sterility, and death, even when expert testimony and authoritative data establishes for a jury the *monetary* value of such losses. MTLA disagrees.

4. Section 1 (unlike its California "model") actually reduces compensation for "noneconomic losses" ***far below $250,000*** whenever ***multiple*** claimants or ***multiple*** health-care providers are involved. The pink attachment illustrates circumstances in which multiple patients of a hospital or clinic are injured by a single act of medical negligence. Far more often, House Bill 309 will subject the members of large families and the members of small families to dramatically different caps, even when both families lose a mother or father to substandard medical care under identical circumstances.

5. Section 1 requires that *other* statutory reductions already required by Montana law (i.e., benefits received from a patient's *own* health-insurance policy) 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.

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

7. Section 1 ***prevents a jury from considering*** the real consequences of their decision. Nothing undermines House Bill 309 more than its insistence on *tricking* the jury. Nothing refutes the artificial distinction between economic and noneconomic losses better than this admission that juries *can* react to caps by compensating others types of loss more generously. And nothing more profoundly confirms the fact that *defendants* in medical-malpractice cases, not plaintiffs, demand jury trials and refuse judge trials.

8. Sections 2 and 3 allow a losing provider or its insurer to ***dictate installment payments for economic and noneconomic damages alike.*** And (again unlike its California "model") HB 309 permits a losing provider and its insurer to ***walk away*** after purchasing the lowest-priced annuity available, even if the annuity company it selected fails.

9. Sections 2 and 3, which mandate periodic payment of future damages at the request of a losing provider or liability insurer, impose additional hardships on those few victims of medical malpractice--*especially elderly and critically injured victims*--who survive litigation but may not live for the full installment period. 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.

10. By forcing successful claimants to bear the risk of insurance-company insolvency, Sections 2 and 3 allow a losing provider or liability insurer to shift costs onto the victim of medical negligence--or, more often, *onto Montana taxpayers,* who finance such social services as Medicare and Medicaid.

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 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 (see blue attachment). 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. (See yellow attachment.)

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. Contrary to proclamations by proponents of House Bill 309, "***the sky is NOT the limit***" in determining noneconomic damages: no medical-liability insurance policy provides unlimited liability coverage. In fact, insurance companies themselves could easily "cap" noneconomic damages simply by distinguishing in their policies, as they now ask the Montana Legislature to distinguish in law, between economic and noneconomic losses. And regardless of House Bill 309, two factors will continue to dominate the liability premiums paid by Montana doctors: first, the potentially ***catastrophic nature*** nature of injuries caused by medical malpractice; and second, the ***refusal of medical-liability insurance companies*** to significantly raise premiums for repeatedly careless doctors or lower premiums for rural doctors who treat fewer patients. The only certain result of HB 309 will be increased insurer profits (see green attachment).

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 (see salmon attachment).

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. In the decade 1984-1994, *only 8 percent of Montana doctors* have paid more than one malpractice claim, yet that minority has accounted for *58 percent of all malpractice settlements* and *63 percent of all payments* to malpractice victims (see purple attachment). In fact, according to the Montana Board of Medical Examiners, "repeater" physicians averaged $273,627 in payments to malpractice victims over the decade, compared to just $76,209 for those Montana physicians who paid a single claim and $34,642 for all Montana physicians combined. *Yet the patients of Montana's worst "repeater" physicians 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 thus lowers the enormous 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. Moreover, 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) and mandatory screening panels which require victims to await action by an administrative panel before filing suit (1977). The proponents of HB 309 ignore the absence of similar "reforms" in other states.

In short, the very health-care providers who thrive by treating the pain and suffering of Montanans now ask this Legislature to disregard the pain and suffering caused by substandard medical treatment. The same health-care providers who resist "cookbook medicine" and describe proper treatment as an art now ask this Legislature to discount noneconomic damages because of their "subjectivity." Montanans deserve better.

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

Respectfully,

Russell B. Hill, Executive Director

EXH 7 3-21-95 HB 309

SATURDAY
arch 26, 1994

Billings Gazette

TEMPO

Miroslav Kocman is the envy of many of his countrymen in the Czech Republic. He's attending school in the U.S.

PAGE 1C

108th year, No. 331

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THE WEATHER SOU

■ **CANCER CENTER INVESTIGATION**

Patients get wrong radiation

8 women received overdoses because of computer error

By PAT BELLINGHAUSEN
Of The Gazette Staff

A computer miscalculation that caused eight cancer patients to get more than their prescribed doses of radiation treatment has prompted the Nuclear Regulatory Commission to investigate the Northern Rockies Cancer Center in Billings.

In a press conference Friday morning, the cancer center and its owners, Deaconess Medical Center and St. Vincent Hospital, issued a joint statement saying that all eight women who received an incorrect dose of radiation and their doctors have been notified of the situation.

No known complications have occurred, the hospitals said in a joint press release read by radiological physicist Marc Edwards, associate director of physics at the cancer center, which treats more than 600 patients a year.

"There has been no escape of radiation into the environment," Edwards said at the press conference. "The problem has involved only eight patients."

Early this week, it was found that a patient had actually received more radiation than prescribed because of the computer problem. Since then, the other seven cases were identified and the hospitals and cancer center focused on notifying all affected patients before making the problem public.

He said that even the overdoses found were "within the range of accepted dosages."

The computer problem has been corrected, Edwards said.

"We have researched all calculations," he said. "There are no other patients. No one else is in[illegible]d, but we would be glad to [illegible] any patient's questions."

Marie Mackay, public relations director for the cancer center, suggested that patients who have concerns should call the center at 248-2212. Over the weekend, that

(More on Cancer, Page 14A)

Gazette photo by James Woodcock

Radiological physicist Marc Edwards talks to the media.

> "There has been no escape of radiation into the environment."
>
> —Marc Edwards
> cancer center official

Gazette photo by Larry Mayer

From left, Drs. Fred Deigert, Mark Dion and Walter Gunn discuss concerns about the management of Northern Rockies Cancer Center at a Friday afternoon press conference. They made their comments in the office of attorney Rob Stephens, right.

Doctors criticize policies at center

By PAT BELLINGHAUSEN
Of The Gazette Staff

Three Billings radiation oncologists leveled criticism at management and staffing policies of the Northern Rockies Cancer Center Friday in the wake of a revelation that eight patients received overdoses of radiation.

One thing Drs. Fred Deigert, Mark Dion and Walter Gunn want people to know is that none of their patients was overdosed. They said the same is true for their partner, Dr. Fred Lindemann of Sheridan, Wyo., who wasn't present at the press conference.

The doctors, who are partners in Radiation Oncology Associates, aired their grievances in a Friday afternoon press conference at the office of their attorney, Rob Stephens. The physicians provide radiation treatment to patients at cancer centers in Sheridan, Wyo.; Miles City; Bozeman; and Billings, Deigert said. About half of their patients are seen in Billings.

Attorney states opinions

Stephens, who talked at length during the conference, prefaced most of his remarks by saying he was stating only "his opinion" and "conjecture." Asked if his clients planned litigation against the cancer center or its owners, St. Vincent Hospital and Deaconess Medical Center, Stephens said he wouldn't say.

But he did discuss a lawsuit the medical group filed in 1994 against the cancer center over medical staff policy.

The radiologists in Stephens' office said they were notified in November that the cancer center staff would be closed. Their newest associate, Dion, has not been able to get on staff.

The radiologists also criticized the cancer center's closed staff policy for radiological physicists. "The idea of having a so-called closed staff ... inhibits the free exchange of ideas and the ability to pick up mistakes," Gunn said.

On the computer problem that will be the subject of a Nuclear Regulatory Commission Investigation beginning next week, Deigert said that as of Friday, the doctors in his group had been unable to get information from the hospitals on exactly what had happened and the patients involved.

"We had to call the Nuclear Regulatory Commission to find out what was going on in Billings and that is unacceptable," he said.

Official confirms staffing

Later Friday, Cancer Center Administrator Doug Carpenter confirmed that the only two radiological physicists at the cancer center are employees of the center and that the radiologists were notified Nov. 30 that the staff was closed to new applicants.

But Carpenter declined to comment on the radiologists' criticisms, citing the previous lawsuit and uncertainty about future litigation.

THE NEW YORK TIMES A12
September 27, 1993

19,000 Cancer Tests Rechecked After Misreading

Special to The New York Times

NEWPORT, R.I., Sept. 26 — An independent laboratory is re-examining 19,000 Pap smears performed at Newport Hospital since 1988 after a woman who had tested negative four times in eight years died of cervical cancer last spring.

Of 1,190 Pap smears rechecked so far, investigators have found that in 17 cases women were told they did not have cancer when the tests actually indicated early signs of cervical cancer.

A separate re-examination of 407 of the hospital's Pap tests by Federal investigators in May turned up 12 that had been misread.

Acknowledging that "terrible mistakes" had been made, Robert J. Healey, the president of the private nonprofit hospital, offered a public apology at a news conference on Friday and announced that the hospital was offering to pay for a new Pap smear for any woman whose test had been evaluated in its laboratory in the last five years.

Federal Investigation

The problem at Newport Hospital came to light when state and Federal agencies began investigating the laboratory's results in May, just days after the woman's death. Investigators reported finding many technical and procedural errors in the way the hospital's laboratory handled and read Pap smears. As a result of the investigation, the hospital was instructed to conduct an extensive review of tests in which it reported no signs of pre-cancerous or malignant cells.

The Pap smear, a test named for its inventor, Dr. George Papanicolaou, is widely used to detect cancer of the cervix. In the 65 years since its introduction, the death rate from cervical cancer has dropped by 70 percent, medical experts say.

Among the Pap smear slides being re-examined are tests performed at the hospital and tests sent to the hospital's laboratory by private doctors. Since the laboratory's problems were reported a week ago by The Providence Journal Bulletin, gynecologists in Newport County have received a steady stream of calls from angry and worried women.

Investigators found evidence that the hospital laboratory was using incorrect or misleading terms when reporting its results, that training for the technicians who examined the slides was inadequate, and that procedures in the laboratory were sloppy.

Without any public announcement, Newport Hospital stopped processing Pap smears in May but resumed testing in August with State Health Department approval after overhauling its procedures and increasing training for its lab workers.

Rechecking Slides

Since early June, a private laboratory approved by the state has been rechecking the slides examined by the hospital from May 20, 1988, to May 20 of this year. The examination will probably not be completed until next spring.

In each of the 17 misread cases found so far, the hospital had classified the results as normal or near normal. But the re-examination showed that 10 had indicated "low-grade pre-cancerous cells" and seven had indicated "high-grade pre-cancerous cells."

In each of these cases the women should have been informed of their conditions so they could have taken sought cancer treatments. Hospital officials say the 17 women have since been notified.

Federal investigators who checked 407 slides in May, also found 12 misread tests, but hospital officials say those tests were among the 17 found by the private laboratory.

The investigations of the hospital's laboratory were prompted in large part by the case of Helene Lewis, a special education teacher and vice chairwoman of the Newport School Committee, who died of cervical cancer on May 3. Officials say there was also another case in which a woman

A Rhode Island hospital admits that Pap smears were mishandled.

has informed the hospital that she believed her Pap smear was misread. The hospital has declined to release details of that case, though Mr. Healy said today that the woman was still alive.

Multiple Misreadings

The hospital laboratory had misread four Pap smears of Ms. Lewis between 1984 and 1992, telling her that the results were normal or nearly normal when in fact she had a tumor. Investigators re-checking the slides found precancerous cells in the 1984 slide and malignant cells in her 1989 and 1991 Pap smears. Ms. Lewis, a daughter of a former Newport Mayor, Dean Lewis, had been told she was free of cancer three weeks before her malignant tumor was found.

Ms. Lewis's sister, Katherine Lewis Saleh, said that Ms. Lewis had been suffering with pain for quite a while before her cancer was actually discovered. "Helene was going back and forth to the emergency room because she had this pain in her abdomen," she told The Journal Bulletin. "I remember one time they sent her home with antibiotics and told her it was a vaginal infection. One week would go by and she'd say it's getting worse. Then she'd go back to the E.R. and they'd send her off with painkillers. She must have gone at least three times."

When Newport Hospital later discovered that it had misread the Pap test results of Miss Lewis, it notified its insurer but not the Health Department.

An official of the Rhode Island Health Department said that hospitals in this state have no legal ouligation to notify patients or the state of medical errors, regardless of how serious.

At Friday's press conference Mr. Healey said, "We are deeply sorry for the anguish we have caused the community and we offer our condolences to the Helene Lewis family who have suffered most of all.

"Like any other human endeavor we are not perfect," the hospital president said. "This hospital will not run away from what happened here. Our laboratory made some terrible mistakes and I am here to stand up to them and to tell you what we are doing about them."

Four lab technicians "who had problems reading Pap smears, no longer work here at this hospital, Mr. Healy said. He said they had either resigned or had been dismissed.

The pathologist who formerly headed the lab, Dr. Marvin Chernow, has retired and the hospital has announced plans to conduct "an outside audit of his other diagnostic work."

New Notifications

The hospital will notify by mail every woman who has had a Pap smear read at its laboratory within the last five years about the potential problems relating to those analyses and of the hospital's offer to pay for another test and a re-examination of their most recent test.

If further mistakes are uncovered in the review of the 19,000 Pap smears, the hospital will immediately notify both the patient and her doctor by certified mail, Mr. Healey said.

He said Dr. Scott Wang who heads the hospital's new pathology team "is one of the best in his profession." Dr. Wang is a board-certified cyto-pathologist, a specialty that includes the interpretation of cervical Pap smears.

Mr. Healey said the hospital will also establish an outside review system to continually monitor the performance of its laboratory technicians and the doctors who supervise them.

Plains hopes to get back in the baby business

By JOHN STROMNES
of the Missoulian

PLAINS – Clark Fork Valley Hospital in Plains has embarked on a $122,000 fund-raising campaign among Sanders County's 9,000 residents to help outfit a new obstetric unit.

"We've never gone to the community before to fund a major hospital project," said Bina Eggensperger of Thompson Falls, a board member of the nonprofit hospital and the fund-raising coordinator.

The county has only about 9,000 residents, so it will be a significant challenge to raise that amount by September, when the hospital administration hopes to begin delivering babies again. About 120 babies are born in the county each year, and the hospital expects about half of that number to use the hospital OB unit if it is opened.

In 1986, citing high costs caused by skyrocketing malpractice insurance rates and a lack of physicians willing to offer obstetric services, the hospital closed its obstetric unit.

Since then, pregnant women have traveled to Sandpoint or Missoula for pre-natal care and delivering babies.

Sometimes they forego needed prenatal care, because of the long and occasionally dangerous drive required, Eggensperger said. And the hospital has handled some births in its emergency room, when pregnancies come to term unexpectedly.

In 1992, the hospital was acquired by St. Patrick Hospital and Missoula Community Medical Center in Missoula, who operate it jointly. Subsequently, the hospital attracted three board-certified family practice physicians. With only one or two OB physicians, it is difficult to offer OB services, because a doctor must be on call at all times. With three doctors, it is feasible to share these on-call duties, said Tom Mitchell, hospital administrator.

The other factor allowing the service to resume a significant decline in the cost of malpractice insurance. Mitchell said he did not know if it was a national trend.

"But the way it results for us, it's now more feasible (to offer OB) than in 1986," he said.

The hospital will only do low-risk deliveries.

"If a patient is identified as being high-risk, we'll refer to Missoula," he said.

Although the hospital is a nonprofit entity, and contributions are tax deductible, it does not have taxing authority, so it cannot seek a mill levy to help pay for the needed equipment, he said.

Immediate needs include about $51,000 worth of equipment to outfit the birthing room and nursery. Another $71,000 is needed for a second anesthesia machine, portable ultrasound unit and a fetal monitor. The hospital is licensed for 16 acute care beds and 28 long-term care beds, and operates clinics in Thompson Falls, Hot Springs and Plains.

It is too much to expect the hospitals in Missoula to subsidize such an expensive service for Sanders County residents, although the Missoula hospitals do provide training and support for doctors and nurses, Mitchell said. The hospital's financial analysis indicates that a volume of 50-60 babies a year will make the OB services self-supporting, once it is up and running.

"But we will not be able to generate the up-front cost of the equipment necessary to allow us to implement the service," the hospital board said in a fact sheet. Thirty-five percent of the babies born to Sanders County residents are covered by Medicaid, which does not pay physicians or the hospital an amount adequate to properly fund the service, the fact sheet said.

The initial investment to outfit the OB service poses the dilemma, the board said, and OB services should then be self-supporting.

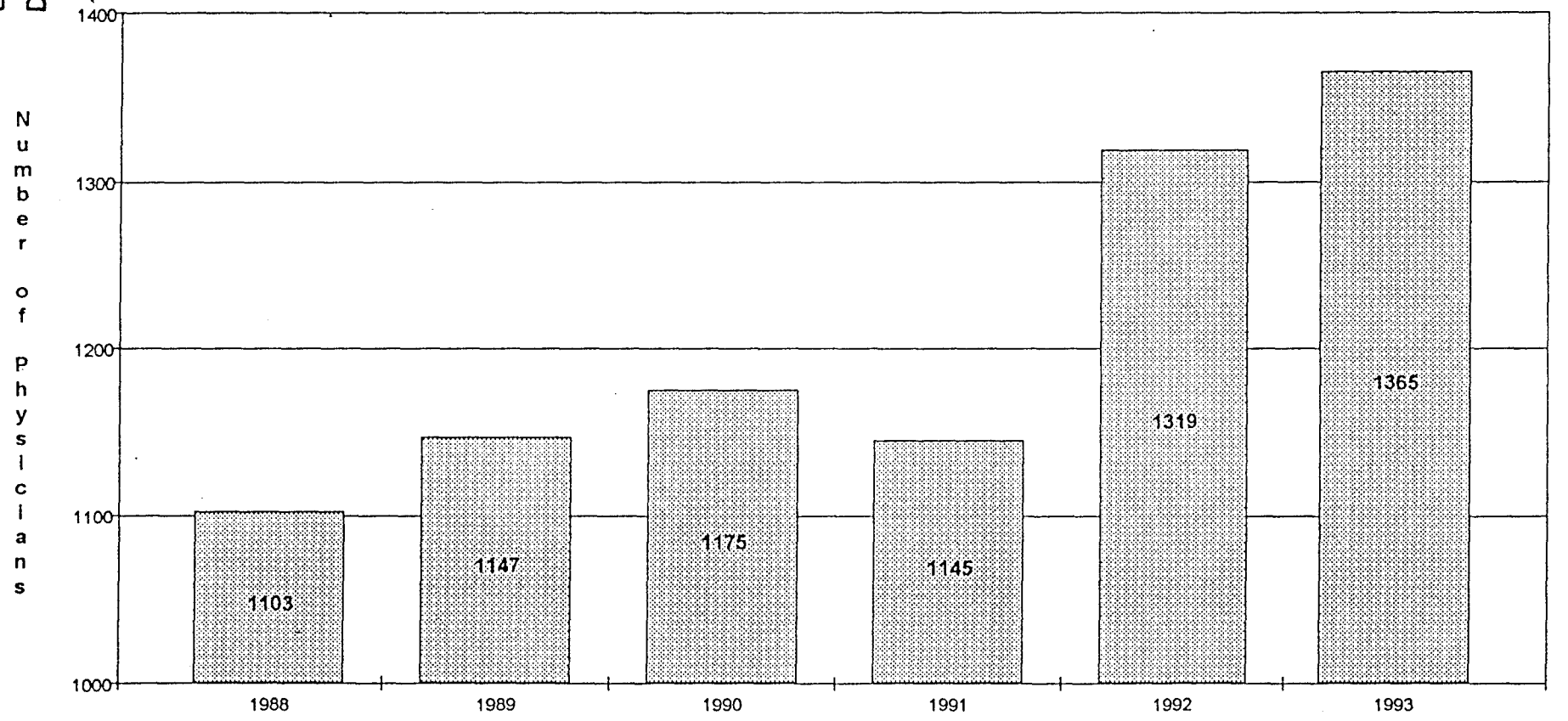
"It's 100 miles from here (Thompson Falls) to Missoula, and 85 miles to Sandpoint. If you have to drive down an icy highway while you're almost ready to give birth, it's a frightening experience," Eggensperger said.

She speaks from experience. She drove to Sandpoint in 1987 to give birth to one of her children.

Missoulian, February 22, 1995

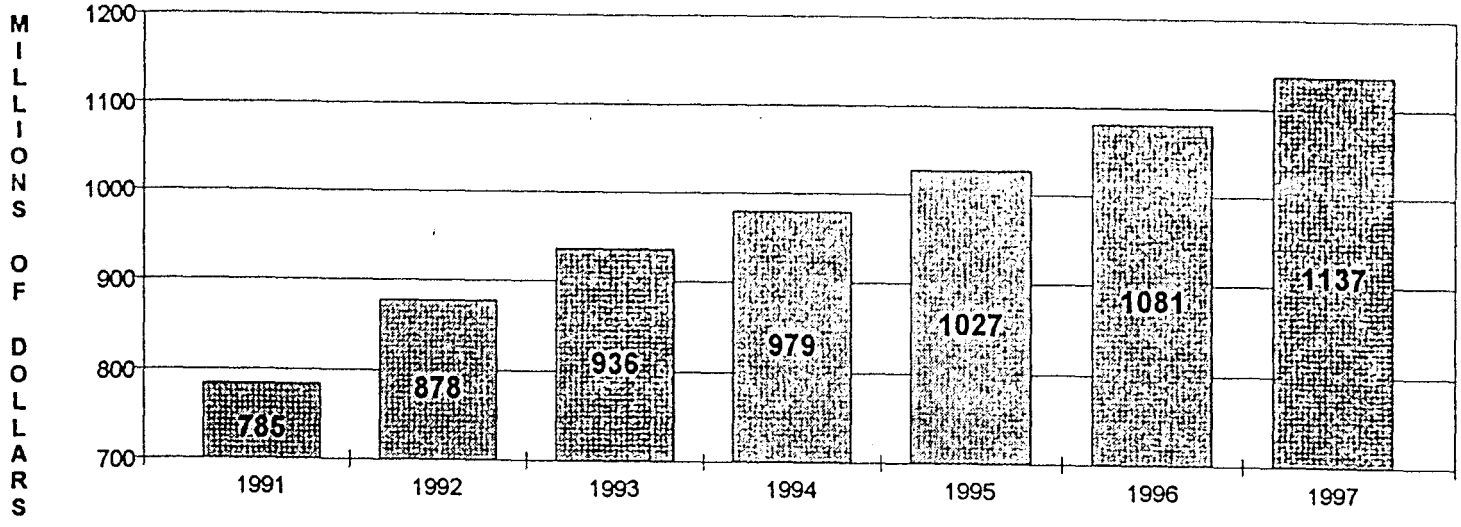
EXHIBIT 7
DATE 3-21-95
HB 309

ACTIVE MONTANA PHYSICIANS, 1988-1993



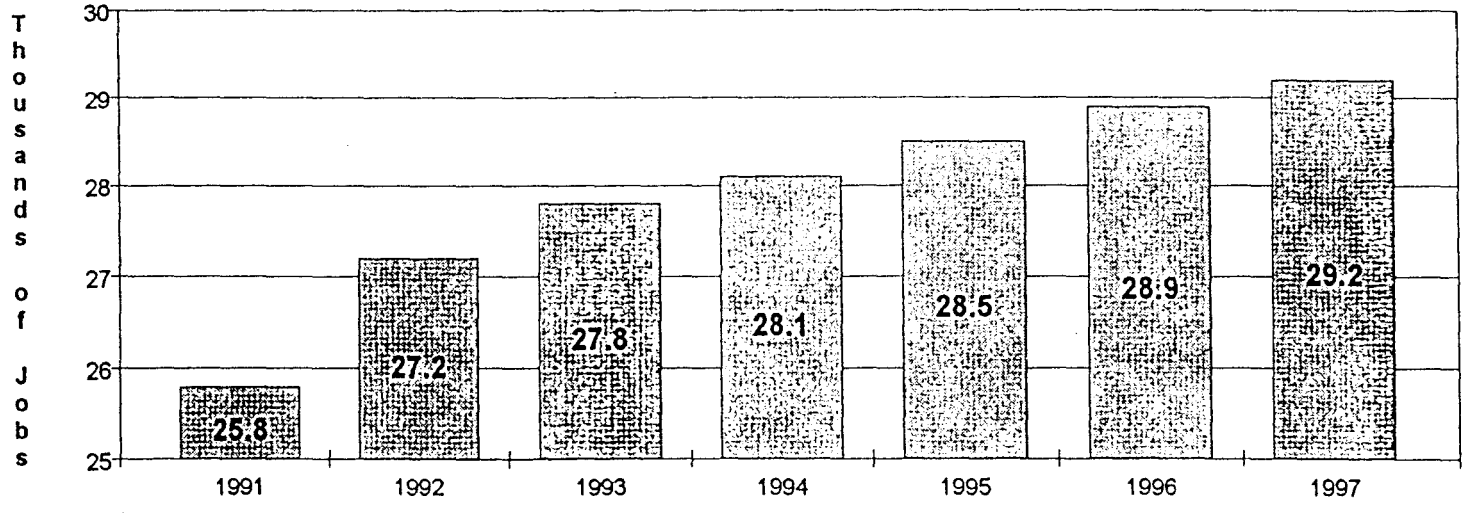
Based on assessments reported by the Montana Medical-Legal Panel

Montana Health-Services Personal Income, 1991-1997 (Actual/Projected)



Source: Bureau of Business & Economic Research, Univ. of Montana (Dec. 1994)

Montana Health-Services Employment, 1991-1997 (Actual and Projected)



Source: Bureau of Business & Economic Research, Univ. of Montana (Dec. 1994)

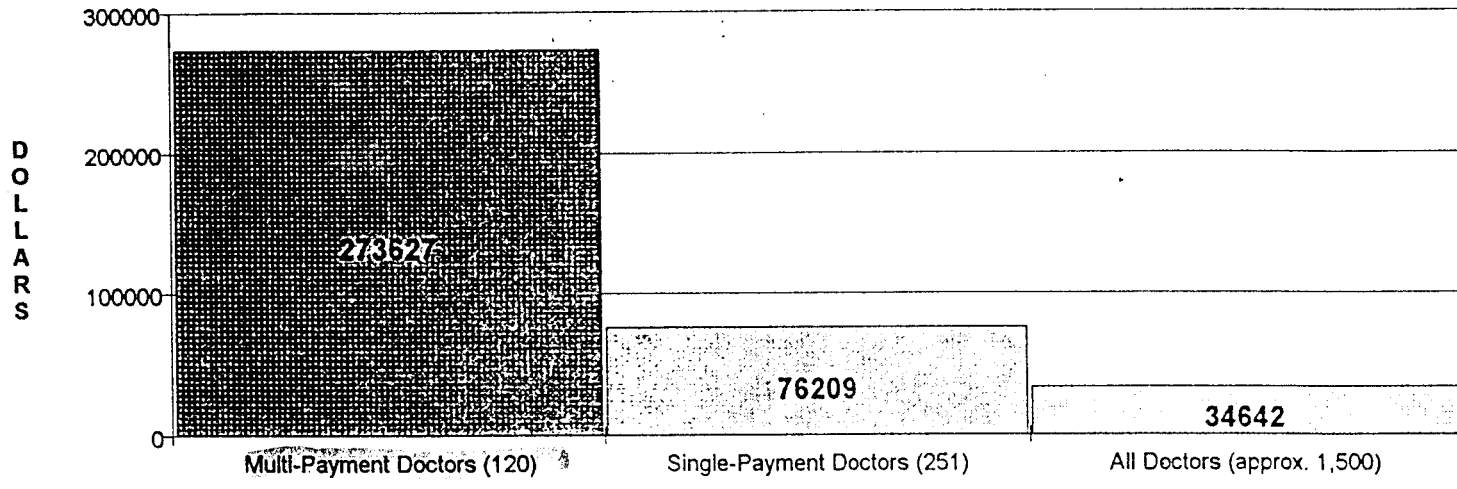
Medical Malpractice Claims Data, 1984-1994

Based on Reports to Montana Board of Medical Examiners

- Total Number of Claims Reported to MBME: 2315
- Total Number of Claims Resolved: 1961
- Total Number of Claims Resolved with No Payment: 1382 (70.5% of resolutions)
- Total Number of Claims Paid: 579 (29.5% of resolutions)
- Total Amount of Claims Payments: $51,964,013
- Total Number of Doctors Paying Claims: 371 (25% of total*)
- Total Number of Doctors Paying Multiple Claims: 120 (8% of total*)
- Total Number of Payments by Doctors Paying Multiple Claims: 333 (58% of total*)
- Total Amount Paid by Doctors Paying Multiple Claims: $32,835,313 (63% of total)

** Because of difficulty in calculating the total number of different, individual physicians practicing in Montana during the period 1984-1994, these percentages are conservatively based upon a total number of 1,500 (the Montana Medical-Legal Panel assessed 1,365 active Montana physicians in 1993).*

Total Payout Per Montana Physician, 1984-1994



Source: Montana Board of Medical Examiners

Montana Medical Malpractice Payments ($ Millions), 1984-1994

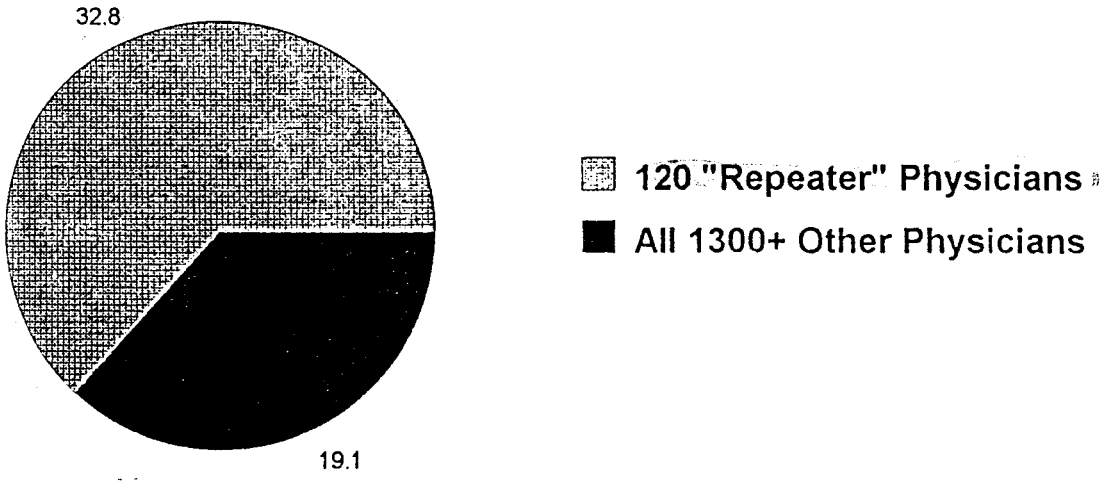


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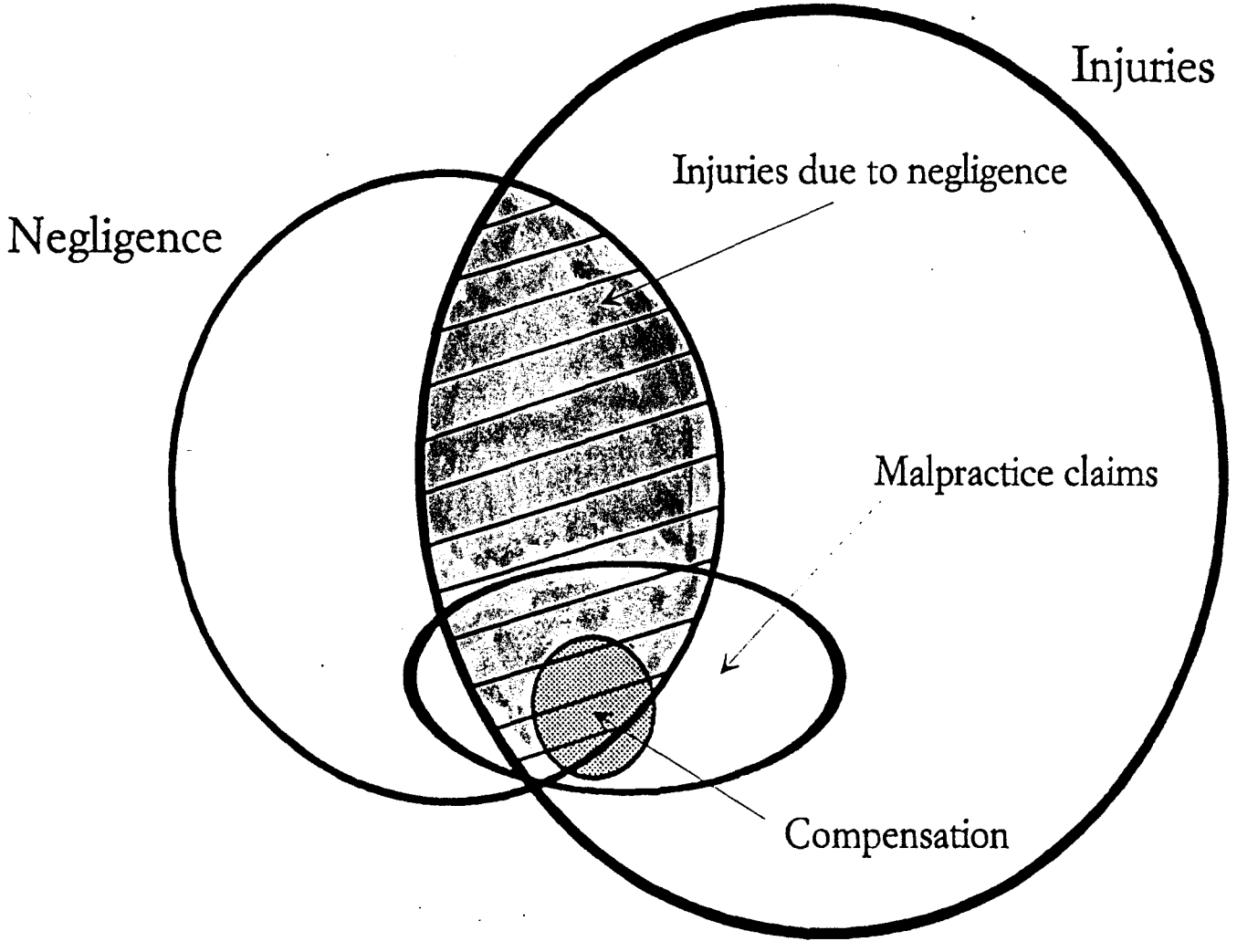
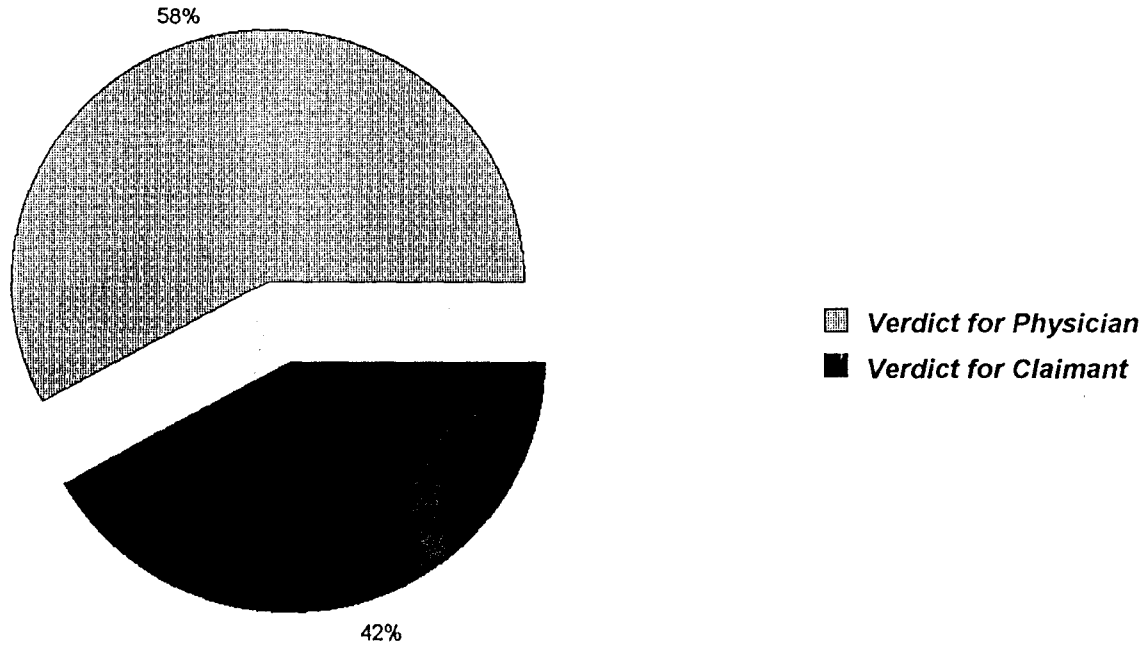
Figure 1-1--Medical Injuries, Negligent Conduct and Malpractice Claims

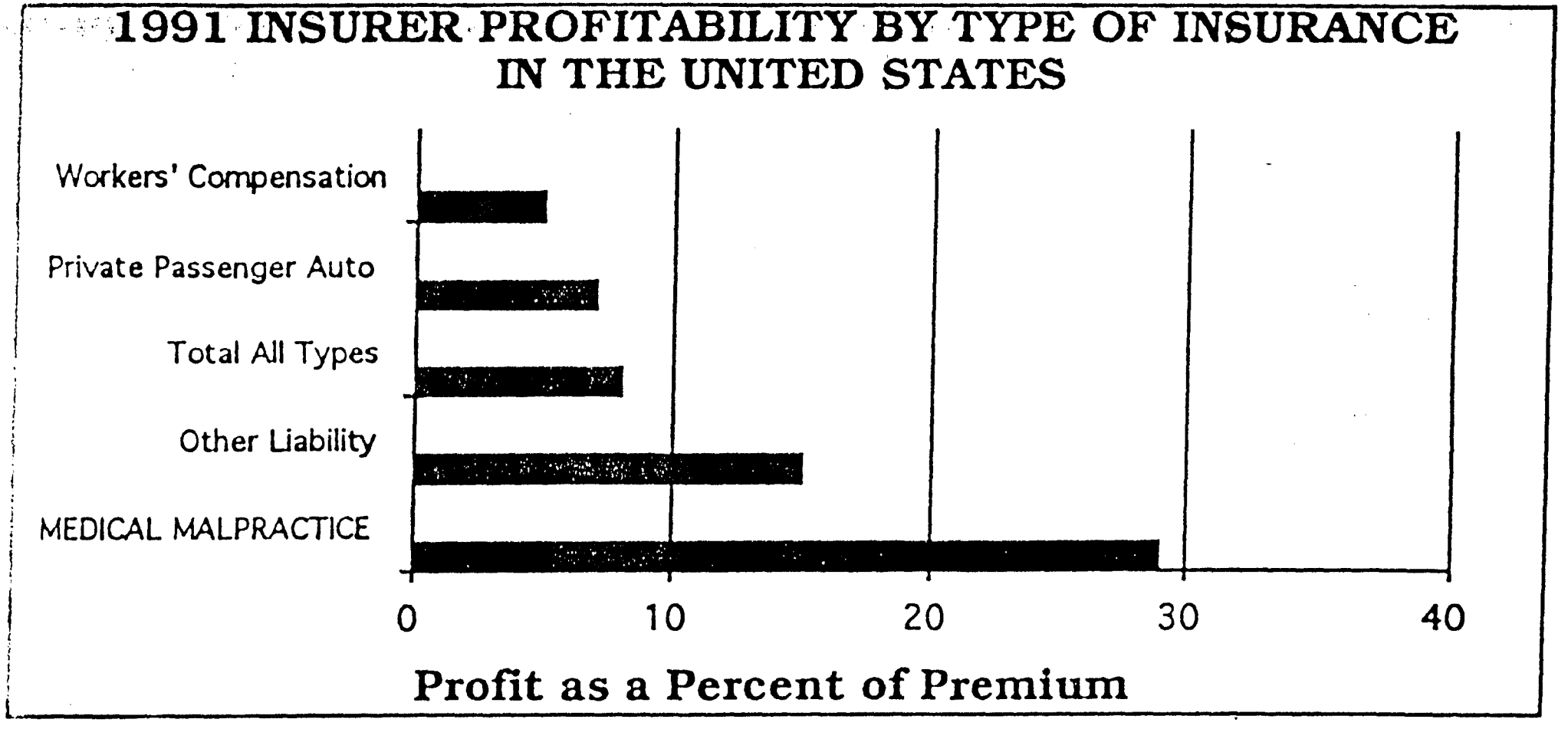


U.S. Congress, Office of Technology Assessment,
"Impact of Legal Reforms on Medical Malpractice Costs,"
OTA-BP-H-119 (Washington, D.C.: U.S. Government Printing Office, October 1993).

EVEN WHEN PHYSICIAN CONDUCT IS INDEFENSIBLE . . .

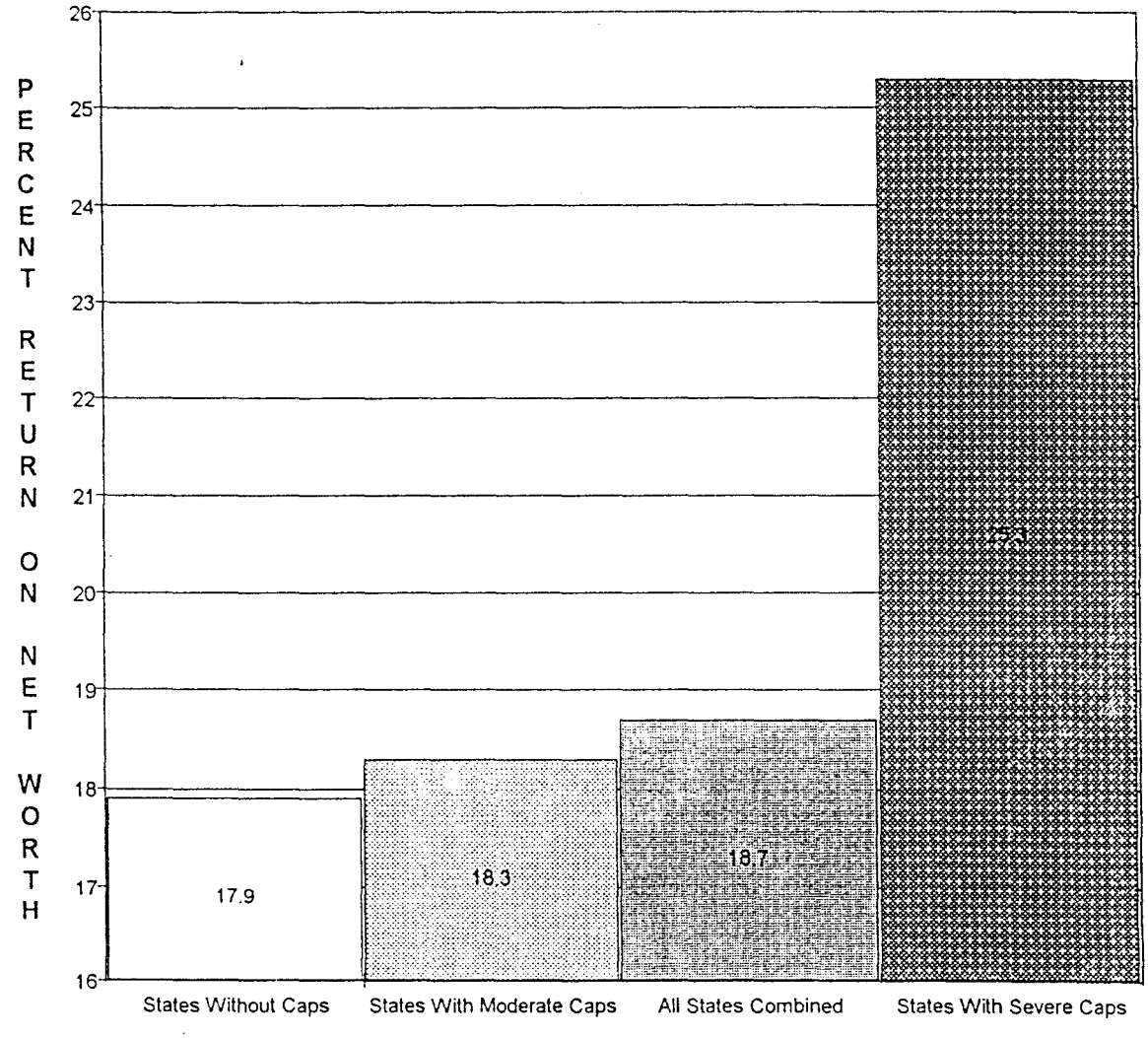


Findings based on a survey of 8,231 closed medical negligence claims involving 12,829 physicians insured by The New Jersey Medical Insurance Exchange from 1977 to 1992. According to the insurer's own internal evaluations, approximately 25 percent of those claims involved "indefensible" physician care, 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.



-National Association of Insurance Commissioners Report on Profitability By Line By State 1991 (1992).

IF DAMAGE CAPS REDUCE RISK, THEN WHY DO THEY INFLATE PROFITS?



A fundamental financial principle correlates risk with profitability: higher levels of risk demand higher expectations of return; conversely, lower risk should be accompanied by lower expected return. If, as proponents insist, damage caps reduce the risk and cost of writing medical liability insurance, then liability insurers in states which cap medical malpractice awards should exhibit lower rates of profitability. But according to figures compiled by the National Association of Insurance Commissioners, the *opposite* is true: the more severe damage caps are, the more profitable liability insurance companies are.

Ratios of after-tax earnings to net worth, reflecting the most commonly used measure of profitability, are based on the NAIC's "Report on Profitability By Line By State 1990." States with "severe" caps on total recovery include Colorado, Indiana, Nebraska, South Dakota, and Virginia; states with "moderate" caps of some type include California, Florida, Louisiana, Massachusetts, Missouri, Mississippi, New Mexico, Utah, West Virginia, and Wisconsin.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 3/21/95
BILL NO. HB 309

March 8, 1995

Senator Bruce Crippen
Senate Judiciary Committee
Rm. 325
State Capital
Helena, MT.
59620

Dear Senator Crippen:

I will regretfully not be able to testify on March 21, 1995, concerning HB 309. I therefore am setting forth my testimony in writing. I sincerely thank you for your consideration in this matter.

Jill Blunt

My name is Jill Sebring-Blunt. I am writing this in representation of my late husband Bradford Blunt. I would like to tell you about him... I feel it will bring us closer to the issue here at hand today.

His boyhood was filled with the love to run, whether on a track or on a football field. This love and ambition brought him a football scholarship to Colorado University. He then went to Princeton Theological Seminary, where he received his Masters of Divinity.

Brad's love of life, his ministry and running became interrupted by a dull aching pain in his right thigh; a pain for which Brad Sought medical help. Overtime the diagnosis would change as did the amount of pain masking drugs to help Brad get through the day. All of these changed diagnosis causing too much time to pass by.

The correct diagnosis was finally discovered by accident. Brad had cancer. Cancer that had gone untreated for too long. By this time he could only go up the stairs by dragging his right leg up with his hand.

In September of '92 I watched a nurse have Brad put on a gurney while he cried, because they were taking him to surgery where he would have his right leg and right buttocks removed. The series of misdiagnosis had now, we thought, had its full impact.

I have an excerpt from Brad's diary that he kept for over 17 years. It is a way I feel that I can bring part of him here to you. The part that contains his innermost private thoughts. They reflect his emotions of this surgery.

"As we entered St. Mary's Hospital on the tenth day of September I became frightened. Jill and I had been here several times before. Once to look around. Mostly to catch the shuttle to the Mayo Clinic. Now I was here for another event. One that I did not want to happen. We checked in at eleven a.m. The doctor had another surgery that morning. He called over at three p.m. to get me ready. John said a prayer. I got onto the other cart. As they rolled me out of the room, I waved at mom. She smiled. I began to cry out of shear fear. I knew I was about to die. I was not sure I would live. Jill was next to me and told me to go ahead and cry...when I woke up I did as I planned. I slowly reached down and laid my hand where my leg was. The numb feeling was horrible. It felt like they yanked the leg off instead of surgically removed it. I was mentally coping..." A month later Brad continues,..."As I walked through the house on my crutches I did not anticipate the overwhelming feelings that would rush out as I entered my office. I wasn't in two feet before I stopped to brace myself. The room was the same. All my memorabilia from football and business days. My books. Typewriter. I was overwhelmed again with who I was now and who I had been. My mind and lips repeated the words, 'My God what have they done to me!' I cried and turned away and cried some more. What have they done to me? That is the lasting question that I see on people's faces. That is the question today. I'm getting back to work as I thought I would. But, in the morning, briefly, sometimes for just a split second, a voice inside asks, 'What happened?" Then, I ask myself again, what have they done to me? Usually I don't cry now."

On Sept. 25th of 1993, I watched, our son and neighbors all watched and cried, as the coroner put Brad on a gurney and removed his body from our house. He was 45.

EXHIBIT 8
DATE 3-21-95
HB 309

What concerns me now; is putting a limit on settlement damages. Trying to put one figure to cover all cases; taking away the respect each case and life deserves. Your own life, your mother, daughter, sons, or fathers life would deserve more respect than that. When you place a cap on damages of any kind, we are the very people that need it the most. You cannot be at each case anymore than you can make one monetary figure to fit all people and cases. Let each case be decided by the people and let the lawyers pick the jury. Take the responsibility off of yourselves and give it to the people.

This is not a story about financial euphoria. Brad is dead, our childrens father that used to kiss them goodnight and always read them a story is now remembered by them at bedtime in their prayers, when they say "I hope Daddy has a good nights sleep up in heaven."

Medical malpractice can happen to anyone, there's no rhyme or reason to it. Often times it will be a very quiet deadly mistake in a sunny doctors office. Don't by your own hand take away the right for an individual settlement; by doing so you are only offering one umbrella to cover thousands of people. Leaving so many of your voters out in the cold. I sincerely doubt the people left out in the cold will give up their need to be heard.

I would like to close with an excerpt from Brad's diary, he wrote; "Two sides of the Mayo Clinic Building have art on them. One side has a group of people in various stages of health. Some of them do not have all their body parts. On the other side there is a nude statue of a man reaching up with both arms, hands out. He is looking up with his head fully tilted back. The first time I saw it I noticed the nudity. Now, after my last Dr. visit, I saw that this was me. I was reaching for any help I could get."

We are now reaching out to you for help, because nothing seems to protect us from the mistakes, but you have the power to protect us from some of the financial devastation; the impact of medical malpractice.

Thankyou for your time.

Sincerely,

Jill Blunt

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 3/21/95
BILL NO. HB 309

MONTANA MEDICAL ASSOCIATION

2021 Eleventh Avenue • Helena, Montana 59601-4890
Telephone (406)443-4000 or In-State 1-800-MMA-WATS (662-9287)
FAX (406)443-4042

March 21, 1995
Tuesday

TO: SENATOR BRUCE CRIPPEN, CHAIR, SENATE JUDICIARY COMMITTEE AND EACH COMMITTEE MEMBER

FROM: JOHN W. McMAHON, M.D., PRESIDENT-ELECT

It is a pleasure for me to be able to represent the Montana Medical Association testifying in support of House Bill 309; we believe this bill is vital to the interest of the citizens of Montana. We want to make it clearly known the Montana Medical Association believes that any actual loss a patient my have suffered from any medical misadventure should be compensated fully. We want our patients so injured to be made whole as much as possible.

We are currently seeing in Montana a significant loss of necessary patient services because of the cost of medical malpractice insurance. In Missoula, all but one of the practicing ophthalmologists are refusing to examine children with potential retinal injury from prematurity and possibly oxygen therapy because of the cost of their medical malpractice insurance. The number of instances in which such examinations are required are not frequent enough to pay for the increased cost of this insurance. These children are then, of necessity, obligated to be transferred as premature infants to a medical center where a physician who does this regularly is able to examine them.

The physicians in Missoula are perfectly capable from a quality standpoint to examine these children. However, some recent court cases and testimony associated with them have suggested that a physician has to examine at least one hundred of these infants per year just to keep current. This is absolutely not necessary; however, insurance companies have taken the position that the defense of physicians who do not regularly examine this volume of children will be quite costly.

It is common that any child who falls on the playground ends up with an ambulance ride to the hospital and upon arrival immediately receives x-rays of his skull and neck. These x-rays in 99% of the cases are not medically necessary. They are done to protect the physician from a liability standpoint. The fact is that even if a small skull fracture is found, it will not make any difference in how the patient is managed.

(over)

Many family practice physicians are no longer delivering babies in our small rural communities because they will have to pay an additional $15,000 per year in malpractice premiums. Obstetrics is the highest area of litigation in the medical malpractice field. Physicians are being held responsible in some jurisdictions for any adverse outcomes. Over 90% of these outcomes are the result of circumstances far beyond the control of the physician.

Many of our rural hospitals no longer have an obstetrical service. The one single factor that would decrease the cost of medical malpractice insurance in tort reform legislation is a cap on non-economic damages. This would allow the actuaries of insurance companies to predict the potential costs of litigation in setting up premium schedules on a more consistent basis.

We totally support payment of every single patient cost as a result of medical negligence. Our opposition is to the unpredictability of damages for non-economic losses. We believe the cap of $250,000 is appropriate as is mandatory periodic payment of future damages.

Thank you for the opportunity to testify in support of House Bill 309.

MONTANA MEDICAL ASSOCIATION

2021 Eleventh Avenue • Helena, Montana 59601-4890
Telephone (406)443-4000 or In-State 1-800-MMA-WATS (662-9287)
FAX (406)443-4042

March 21, 1995
Tuesday

TO: SENATOR BRUCE CRIPPEN, CHAIR
SENATE JUDICIARY COMMITTEE
and EACH COMMITTEE MEMBER

Dear Senators:

I am here to testify in support of House Bill 309. I am representing the vast majority of caring, compassionate Montana physicians who take care of you and your families' medical needs 24 hours a day, 7 days a week. We ask you to pass this important legislation.

I do not know of a single doctor who would knowingly or willingly harm his or her patient. When a patient is injured the physician feels devastated and even more so if it might have been prevented. The doctor would like to make his/her patient whole. The main reason doctors carry medical liability insurance is to take care of these patients fairly and reasonably. We feel unlimited awards for non-economic damages are unfair and at times unreasonable. We are not asking you to limit loss of income, payments for future medical expenses, etc. We are asking you to define the upper limits of an area that may be almost undefinable but certainly is tragic and highly emotional.

I believe this legislation benefits the vast majority of citizens in Montana because:

1. A cap lowers liability insurance premiums. In California there was a 51% reduction in premiums and in Colorado the reduction was 53%.

2. Services may be increased with lower liability premiums. The Governor's Health Task Force in October of 1992 found 42% of Montana doctors had given up practicing obstetrics, 22 counties and 14 hospitals have no obstetric services. In Missoula ophthalmologists have stopped examining premature infants for retinopathy because of the liability risk.

(over)

3. There is the area of "defensive medicine" where direct costs to patients occur because a physician is attempting to ward off a lawsuit. Do you want your doctor shying away from the complicated and sometimes dangerous procedure that might save you or a loved one's life or limb? I certainly do not. Some estimates of these costs are in the billions of dollars. A doctor I know has had 1 suit filed against him in 20 years of practice yet it went on for 2 years after a 6-0 vote for him at the Panel. The attorney was asking for $6,000,000. The threat of that suit influences how he practices - on the defensive.

Because of the complexity and variance of human biology and human behavior medical practice involves risks and the imperfections of our humanness. Perfection can never be the standard. We are not asking to be excused for our failings. We are asking that some fairness and reasonableness be legislated into this very difficult area of medical liability. Please pass House Bill 309 unamended for Montana's patients.

Sincerely,

John V. Hanson, M.D.
President

JVH:le

THE DOCTORS' COMPANY

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 3/21/95
BILL NO. HB 309

STATE AUDITOR'S
FEB 9 4 14 PM '94
HELENA, MONT.

Via Certified Mail

February 3, 1994

Commissioner Mark O'Keefe
Commissioner of Insurance
Montana Department of Insurance
126 North Sanders
Helena, Montana 59604

RE: All Specialty Rate Filing
NAIC Number 831-34495

Dear Commissioner O'Keefe:

On behalf of The Doctors' Company, I hereby submit for your review and approval, our new All Specialty Rates. These new rates will replace the all specialty rates currently approved (2/3/92) and on file with the Department. The overall claims made rate change for the state is 17.7%, based on TDC's current distribution of doctors. We are also proposing an 11% rate increase to our Tail Coverage charge. Proper justification for said changes are included within this filing. We would like to request a May 1, 1994 effective date.

The following items complete this filing:

- Two copies of this letter
- One copy of the filing
- Check for $20.00 to cover any applicable filing fees
- A prepaid, self addressed envelope

If you have any questions or if I can be of any assistance please call me at 800/421-2368, my extension is 397. Thank You.

Sincerely,

Tim Dixon

Tim Dixon
Regulatory Compliance Analyst II

cc: Cheri Priddy
/enclosures

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.

185 Greenwood Rd.
P.O. Box 2900
Napa, CA 94558-0900
707 / 226-0100
800 / 421-2368

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 3/21/95
BILL NO. HB 309

PO Box 4553, Missoula, MT 59806-4553
(406) 721-7334 (406) 721-7016 fax

MEMORANDUM

DATE: March 17, 1995

TO: Senator Nelson
Senate Judiciary Committee

FROM: Gail Wheatley, P.T.
President, Montana Physical Therapy Association

RE: H.B. 309 - To limit non-economic damages in medical malpractice awards

The Montana Physical Therapy Association supports HB 309 which would cap non-economic damage in medical malpractice cases at $250,000. The Association believes this cap will make a significant impact on the cost of malpractice insurance for those providers whose rates have become astronomical.

Physical therapists commonly treat the same clients as physicians who may be involved in litigation. We support the inclusion of physical therapists in this language. Without it, we see the potential for an increase in physical therapist suits as clients seek the provider with the "deepest pocket" for awards. I do not believe it is the intention of the legislature to put physical therapists at risk by leaving them as the practitioners without this protection and thank you for including us in this important piece of health care reform legislation. We ask for your support on HB 309.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 3/21/95
BILL NO. HB 309

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

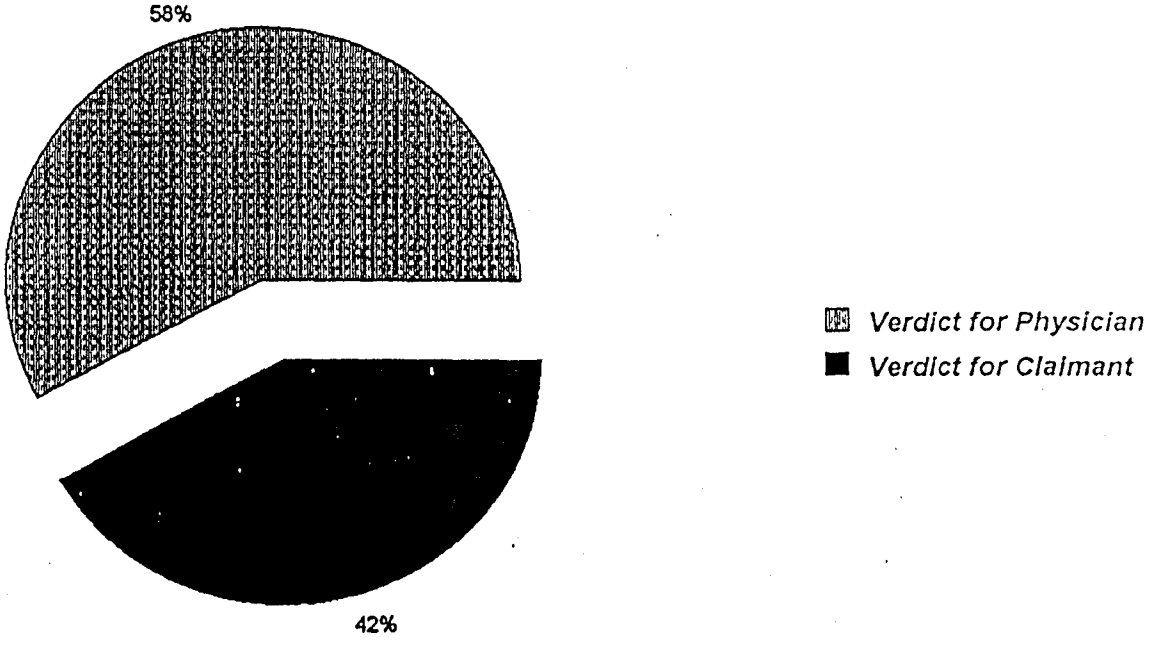
From January 1 through November, 30 1994, a total of 84 civil jury verdicts were reported from the state courts. Defendants won 48 of these verdicts (57%.) During the same period, 18 civil jury cases were tried in the Montana federal courts. Defendants won 10 of these (56%). (Data compiled from the Montana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

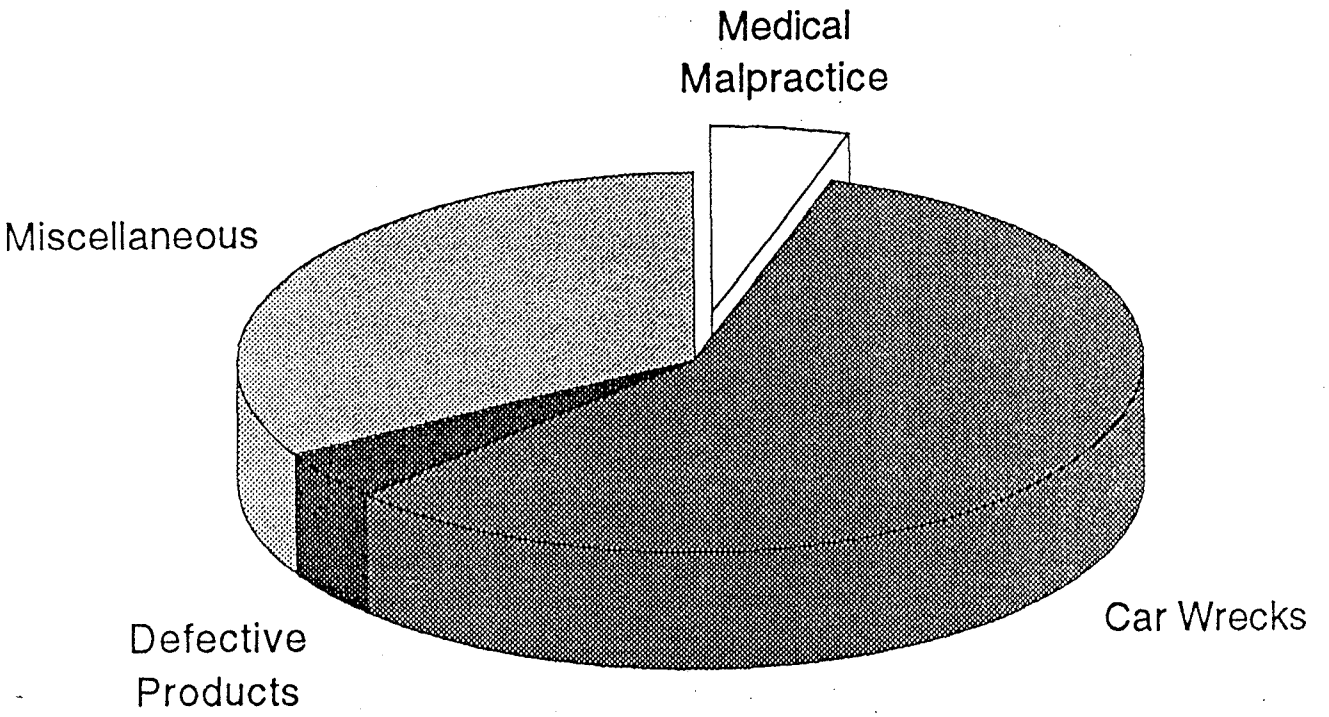


Findings based on a survey of 8,231 closed medical negligence claims involving 12,829 physicians insured by The New Jersey Medical Insurance Exchange from 1977 to 1992. According to the insurer's own internal evaluations, approximately 25 percent of those claims involved "indefensible" physician care, 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.

EXHIBIT 12
DATE 3-21-95
HB 309

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).

EXHIBIT 12
DATE 3-21-95
HB 309

GAZETTE OPINION

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 insurors, even though that's not nearly so easy, nor so popular, as blaming the health-care crisis on lawyers.

Tuesday, January 31, 1995

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 3/21/95
BILL NO. HB 309

TESTIMONY ON HOUSE BILL 309

My name is Fran Marceau, I am the State Legislative Director for the United Transportation Union. I am here today to speak in opposition to House Bill 309.

Under provisions of this bill, if a doctor or other medical provider is drunk or otherwise negligent and causes, for example, a person to be rendered paraplegic, his liability for non-economic damages would be limited to $250,000.00.

The bill also provides that, in an action for damages in excess of $100,000.00, the defendant may request the court to order that the judgment for future damages be paid in whole or in part by periodic payments rather than a lump sum payment. In many cases, the injuries to the members I represent are severe enough to prohibit them from ever returning to their jobs. Wise investment of a lump sum payment will guarantee a monthly income to a disabled person. With periodic payments they would not have that security.

The Federal Employers' Liability Act, and the general tort law in the state of Montana, have worked well for over one hundred years and should not be tampered with so as to remove economic benefits from victims of railroad negligence or medical malpractice.

I urge a <u>do not pass</u> recommendation for HB309.

Thank you for the opportunity to give testimony before this committee.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 3/21/95
BILL NO. HB309

Montana State AFL-CIO

Donald R. Judge
Executive Secretary

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624 406-442-1708

TESTIMONY OF DARRELL HOLZER, COPE DIRECTOR, MONTANA STATE AFL-CIO ON HOUSE BILL 309, MEDICAL MALPRACTICE CAPS BEFORE THE SENATE JUDICIARY COMMITTEE MARCH 21, 1995

Mr. Chairman, members of the committee, for the record my name is Darrell Holzer of the Montana State AFL-CIO. I'm here today in opposition to House Bill 309.

Mr. Chairman, the idea of capping medical malpractice awards is enjoying a resurgence of political popularity, but it is by no means a new concept. The history of these kinds of laws is very enlightening for the discussion we're having here.

That history is very clear and very simple: the caps don't work. They don't reduce health-care costs, they don't reduce litigation, and they don't entice doctors to locate or remain in the states that have caps.

In Indiana, they've had 20 years of experience with a complete cap on malpractice awards, and it simply hasn't done what it's supporters said it would do. In fact, one of the most compelling stories **AGAINST** caps on damage awards comes out of Indiana and from one of the key lobbyists who helped pass that state's cap.

I've attached a copy of the report on this issue from the National Underwriter Company. In summary, Frank Cornelius was an insurance reform lobbyist who helped pass Indiana's $500,000 cap on damage awards. After the law passed, Mr. Cornelius was the victim of gross medical malpractice — repeatedly.

At the time he was lobbying for the cap, he was in relatively good health, had a vigorous work life and was walking around like you and me. After routine minor surgery for a knee problem, Mr. Cornelius was the victim of repeated snafus and egregious errors. He now is bound to a wheelchair, uses a respirator and is unable to work at all.

As an insurance specialist, he is well able to calculate what all of this has cost him to date and into the future. He estimates that his losses from medical costs and the lost ability to work are about $5 million. But his damage award was capped — as a result of his own work — at only one tenth of his losses: $500,000.

In recent weeks, our televisions and newspapers have brought us several outrageous examples of similarly horrible medical malpractice from around the country.

In Florida, a diabetic man went to the hospital to have a gangrenous foot removed in order to save his life. The surgeon took off the wrong foot. Because of the gangrene, he later had to have the infected foot removed, too. Who here would be willing to look that man in the eye and say his loss of mobility — of BOTH feet — is only worth $250,000.

At that same Florida hospital in the last few weeks, another patient got surgery on the wrong knee and a 77-year-old man died when a therapist disconnected his respirator — he allegedly was in the wrong bed, and the person assigned to that bed was scheduled to go off the respirator. Who here would say to that man's family that their loss is capped at $250,000?

Also in the last few weeks, a doctor mistook a woman's dialysis catheter for a feeding tube and ordered food pumped into it. The woman died as a result.

And just last week, the news was filled with reports of the Michigan mastectomy patient who came out of her surgery successfully, only to discover that the wrong breast had been removed.

The response from the medical community? In the future, let's use magic markers to write "NO" on organs and limbs that are **NOT** supposed to be operated on.

Mr. Chairman, the list of these atrocities could go on and on, and clearly, $250,000 is a paltry sum that doesn't even come close to compensating those people or their surviving family members for their losses.

The issue for these people is not runaway litigation — it's runaway malpractice. It's not that there are too many lawsuits — it's that there are too many victims of too much incompetence.

Indiana and California have caps that don't work. Insurance companies are telling the Legislature in Florida that a proposed cap there won't work. Here in Montana, we should take advantage of other states' history and experience by rejecting House Bill 309 and its bogus claims. We should focus our collective attention on fixing the problem of negligence, incompetence and malpractice, rather than setting up a litigation "bogeyman" to take the fall for skyrocketing health-care costs.

Attached to my testimony are several articles from various news sources about damage-award caps and medical malpractice, as well as a fact-sheet we produced about the issue. I hope the information is helpful to the committee, and I urge you to vote "No" on House Bill 309.

Thank you.

Printed on Union-made paper

The dark side of med mal reform: one man's story

(Medical malpractice; Frank Cornelius)

(Column) by David M. Katz (text via National Videotex Network) National Underwriter Property & Casualty-Risk & Benefits Management Nov 7 '94 p15 (2)
1995 National Underwriter Company

With the death of ambitious health care reform this year, the federal debate seems likely to shift to more modest proposals -- like medical malpractice reform, for instance.

Despite vigorous opposition by trial lawyers, the time seems ripe for med mal reform as a centerpiece of a more limited plan -- maybe not as modest as the Bush administration's, which offered only tort reform -- but modest nonetheless.

Med mal reform, after all, focuses on health care costs, a much easier flag to rally round than universal access. And there's bipartisan support for it in Congress, a rare thing to come by these days.

From President Clinton's point of view, the mere fact that curbing med mal liability at the federal level offers a way to actually do something on health care is a great temptation.

Further, the President and Hillary Rodham Clinton are unlikely to face insurance industry wrath if they propose such a program.

Insurers love liability caps because they make risks more predictable. Med mal reform also has great appeal for health care risk managers, for it allows them to manage their greatest exposure.

But before this becomes a no brainer, the politicians need to look very carefully at the dark side of med mal reform. For specifics, they should listen to the story of Frank Cornelius.

Mr. Cornelius, who has testified before Congress on health care reform, comes across as a man in pain. He is bound to a wheelchair, needs a respirator, isn't able to work.

The "continuous physical pain" in his legs and feet is curtailed only by morphine, Mr. Cornelius wrote in an op-ed piece in The New York Times last month. He has twice received last rites from his church, and his marriage is on the rocks.

He attributes most of his condition to medical malpractice and his struggles to pay for care to Indiana's med mal reforms. There are many other victims of medical malpractice and a very vocal opposition to reform. But what makes Frank Cornelius unique is that he's a former tort reformer himself.

In 1975, says Mr. Cornelius, a former lobbyist whose clients included the Insurance Institute of Indiana, he helped persuade the Indiana legislature to pass a med mal law capping damage awards at $500,000 and eliminating pain-and-suffering awards.

"Today, from my wheelchair, I rue that accomplishment," he writes.

Mr. Cornelius suffered a grotesque chain of mishaps by health care providers after he underwent routine arthroscopic surgery in 1989 for a knee injury caused by a fall.

The day after he left the hospital, he experienced a great deal of pain. The surgeon told his wife to get Mr. Cornelius a bed pan and then left on a skiing trip.

"He campaigns hard against (caps) — even though he doesn't expect to see the results of his efforts: He's been told he has less than two years to live."

Not surprisingly, Mr. Cornelius sought out another surgeon, who diagnosed his condition as "a degenerative nervous disorder brought on by trauma or infection, [which occurs] often during surgery," in the patient's words.

A short time later, because of a physical therapist's mistake in reading the instructions on a medical device, "I received a tremendous current of electricity through my left leg," Mr. Cornelius writes.

In 1990, with his condition already seriously complicated, another doctor working on him used the wrong instrument, producing holes in the main vein running from Mr. Cornelius' legs to his heart.

"I would have bled to death in my room if my wife had not come to see me that evening and called for help," he says.

And then he goes on: "As another physician tried to save my life, he punctured my left lung."

Mr. Cornelius, 49, records no further provider mishaps. His medical costs and lost wages, projected to retirement age, amount to over $5 million, he says.

But his claims against the original hospital and the physical therapist were settled for $500,000, which was the cap on damages for a single malpractice incident at the time of the settlement.

Because the Indiana Legislature has since raised the cap to $750,000, he may be able to collect some more money in a separate malpractice suit involving the 1990 incident. But the Indiana medical review panel has yet to act on the claim.

"Meanwhile," he told a House Energy and Commerce subcommittee last year, "Medicare pays little or Nothing."

In his argument against med mal reform in the Times, Mr. Cornelius asserts that "the damage cap has done nothing to curb health care spending...." His main point is that the cost of med mal lawsuits are only a tiny piece of medical spending, and he notes that doctors have not flocked to his state because of a lack of litigation or lower med mal premiums.

Theorists advocating med mal reform, of course, argue that its virtues go beyond curbing lawsuit costs. They point to its negative incentives on the use of "defensive medicine" and on excessive spending on medical technology.

But Mr. Cornelius' personal experience of medical malpractice and his bitter knowledge of the reform effort should make theorists pause. Here, after all, was a man who believed in reform at least enough to lobby for it.

Now he must strain to provide for his own care and livelihood because of deprivations he sees as having been inflicted upon him by those very same reforms.

So he campaigns hard against them — even though he doesn't expect to see the results of his efforts: He's been told he has less than two years to live.

EXH 14 3-21-95 HB 309

Damage caps ADD to pain & suffering

By Larry S. Stewart il v10 Insight on the News Nov 7 '94 p20(3) (text via National Videotex Network; emphasis added)

Washington Times Corporation

Liability claims have been blamed for everything from rising health care costs to hindering America's ability to compete in the global marketplace. As a result, advocates of legal reform argue that limiting damage awards will reduce costs and prompt insurers to lower premiums, particularly for doctors and product manufacturers. According to theory, any savings will be passed on to consumers by magnanimous insurers.

But these arguments are either naive or disingenuous. Damage caps, which limit an injured consumer's award to a predetermined amount, are arbitrary and capricious. Unlike a jury, which can weigh facts and tailor an appropriate award, a cap blindly applies regardless of the nature and severity of the injured party's pain and suffering.

If a 62-year-old insurance agent must rely on dialysis for the rest of his life because doctors removed his healthy kidney instead of the diseased one, is it fair that his jury award is slashed by California's $250,000 cap?

Is it fair to reduce the jury award to a limit of $430,000 for an 8-year-old Missouri girl who sustains brain damage and blindness as a result of her doctor's negligence during surgery?

Is it fair to reduce an award of $1.2 million to $500,000 for the survivors of a 50-year-old pipe fitter who died as a result of a doctor's misdiagnosis?

Such cases illustrate the insidious nature of damage caps. Juries, who hear all of the evidence and are in the best position to determine the seriousness of the damage to an injured consumer, are stripped of their role as evaluators of just compensation. Moreover, caps allow the wrongdoer to avoid responsibility for the harm he or she has caused (in law, a "tort"). Perhaps the cruelest irony is that the rationale for damage caps and some other tort "reforms" is unfounded by the facts.

Contrary to the assertions of some tort reformers, America is not awash in tort suits. According to the National Center for State Courts, a nonpartisan group in Williamsburg, Va., tort claims represented little more than 1 percent of the cases filed in state courts in 1992. Nearly 60 percent of all tort claims stemmed from automobile accidents, while only 7 percent were for medical malpractice and another 4 percent involved liability for defective products. During the last eight years, the center reported, tort claims have remained constant; since 1990 they actually have decreased.

These findings are not unique. The overall malpractice claims rate between 1985 and 1990 declined at an average annual rate of 8.9 percent, according to the American Medical Association publication Socioeconomic Characteristics of Medical Practice. Harvard University researchers, in a comprehensive study of malpractice in 1990, found that only one in eight negligently injured patients ever files a claim. "We do not now have a problem of too many claims; if anything, there are too few," the researchers concluded. Most studies of medical malpractice conclude that fewer than 10 percent of the claims that are filed are ever tried before a jury.

In contrast, litigation between businesses has exploded in recent years. The Wall Street Journal reported last December that contract disputes between businesses accounted for nearly half of all federal court cases filed between 1985 and 1991. "Businesses may be their own worst enemies when it comes to the so-called litigation explosion," the newspaper stated.

During the same period, litigation has had scant effect on America's global competitiveness. The business-backed Council on Competitiveness, a private, nonpartisan think tank, reported in September that the United States had "significantly strengthened" its position in a dozen important technologies and held a big lead in several others. And the 1994 World Competitiveness Report from the International Institute for Management and Development and the World Economic Forum recently ranked the United States as the world's most competitive economy.

The corporate proponents of damage caps, understandably, complain little when businesses vindicate their legal rights. Instead, it's the injured consumer who bears the brunt of their hostility.

Proponents of damage caps seemingly assume that juries, for all their democratic splendor, cannot be trusted. Juries, they claim, are out of control and make awards that have no connection to consumers' actual damage.

However, the General Accounting Office has found that the size of compensatory awards in product-liability cases varies by type and severity of injury in a manner that is consistent with the underlying economic loss. A 1989 GAO study concluded that compensatory awards were neither erratic nor excessive.

Further, the most comprehensive study of punitive damages in product-liability cases to date, by law professor Michael Rustad of Boston's Suffolk University, found only 355 such awards between 1965 and 1990. Nearly 25 percent of those punitive awards were in asbestos-related cases. Another 25 percent were reversed or remanded on appeal.

Moreover, the evidence shows that juries are not biased against doctors and awards are not unjustified. For example, a 1992 group study headed by Mark Taragin of New Jersey's Robert Wood Johnson Medical School and published in the Annals of Internal Medicine found that awards generally are consistent with severity of injury. "Our findings suggest that unjustified payments are probably uncommon," the authors concluded.

Possibly the most compelling evidence against damage caps is the states' own experience with this anticonsumer measure in malpractice cases.

In 1975, Indiana sought to control health care costs by enacting a total cap on damages in malpractice cases. Interestingly, Otis Bowen, the governor who signed the law into effect, was a physician. Under this cap, injured consumers could recover no more than $500,000 (subsequently amended to $750,000) for noneconomic damages such as pain and suffering and economic damages such as medical expenses. Nonetheless, between 1980 and 1990, Indiana's health care spending increased 139.4 percent, according to the health care consulting firm Lewin/VHI. This increase was higher than the national average of 138.7 percent.

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Damage caps **ADD** to pain and suffering

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Ironically, one of the insurance company lobbyists who worked for the passage of Indiana's damage cap switched sides when he became a malpractice victim himself. Frank Cornelius underwent knee surgery in 1989. He argues that a series of botched medical procedures since then will end up costing him $5 million over the course of his life.

Another canard is that damage caps entice doctors to remain in the state because of supposedly lower insurance premiums. Indiana, however, had 45 fewer physicians per 100,000 residents than the national average, according to the 1991 Statistical Abstract of the United States. The Indiana Medical Association says that half of the graduates of the Indiana University School of Medicine leave the state upon graduation.

California's experience with a damage cap is similar to Indiana's. In 1975, California enacted the Medical Injury Compensation Reform Act, which limited noneconomic damages to $250,000. The law also imposed a short statute of limitations and allowed health care providers to require patients to waive their right to a jury trial in the event of malpractice.

These changes, however, have failed to contain California's health care costs, which rose 143.9 percent between 1980 and 1990. A 1986 GAO study found that malpractice premiums for doctors in Southern California increased from 16 percent for general practitioners to 337 percent for radiologists between 1980 and 1986.

In contrast to Indiana and California, the District of Columbia has not enacted any major changes to its medical liability laws. Nevertheless, the per capita increase in health care spending in the district between 1980 and 1990 was 108.4 percent, far below the national average increase.

That caps have not cut health care costs is abundantly clear for three reasons. First, medical malpractice litigation plays no appreciable role in health care costs. In fact, malpractice-insurance premiums account for less than 1 percent of total health costs, the Congressional Budget Office reported in 1992.

The National Association of Insurance Commissioners, or NAIC, and the A.M. Best Co., which monitors the insurance industry, report that in 1991 malpractice premiums accounted for about 64 cents out of every $100 of national health care expenditures. In everyday terms, that amounts to only 26 cents out of a $40 office visit. (By comparison, product-liability insurance premiums in 1991 accounted for 14 cents out of every $100 of product retail sales, according to the National Insurance Consumer Organization.)

Even though malpractice-insurance premiums constitute such a small share of costs, the NAIC reports that medical malpractice as a line of insurance had the highest profit as a percentage of premiums in 1991. Losses paid by insurers in 1991 for medical negligence amounted to only 0.31 percent (or 31 cents out of every $100) of national health care costs.

Second, damage caps have failed to harness costs, since insurers do not automatically lower their premiums when a cap is enacted. In fact, insurers consistently have denied that changes to tort laws, including the adoption of damage caps, will result in lower malpractice premiums.

For instance, the St. Paul Cos. and Aetna Casualty and Surety Co. concluded that Florida's cap on noneconomic damages in addition to other restrictions on consumer rights would not result in savings. Robert Trunzo, a spokesman for the St. Paul Cos., explained: "Nowhere has it been proved that tort reform will affect our loss costs. Experience tells us that these reforms don't always have the intended effect."

Third, proponents of medical-liability reform charge that so-called "defensive medicine," physicians' practice of ordering unnecessary medical tests because of the fear of malpractice suits, drives up health care costs. The American Medical Association estimated in 1983 that unnecessary medical tests cost consumers between $15 billion and $40 billion a year. However, a January 1993 study by Lewin/VHI estimates that changing medical-liability laws could save little more than $7 billion a year in insurance premiums and more cost-effective medical testing.

But the myth of defensive medicine as the villain of the health care industry was exposed in a July study by Congress' Office of Technology Assessment. According to that office, most physicians who order aggressive diagnostic procedures do so because they believe they are medically indicated, not because of concerns about liability. Only a small percentage of diagnostic procedures — "certainly less than 8 percent" — is likely to be caused primarily by conscious concern about malpractice liability. Physicians also tend to overestimate the risk of being sued, the study concludes.

Given that medical liability accounts for such a minute portion of health care costs, it should surprise no one that damage caps have not lowered costs. On the other hand, as long as proponents of damage caps can focus attention on the nonexistent litigation explosion and defensive medicine, they can deflect attention from the real cost-drivers of medical liability: the incidence of malpractice itself and the practice of physicians referring patients to laboratories owned partly by the physicians themselves.

The Consumer Federation of America reported in 1991 that the growth in diagnostic services "is more likely to be driven by self-interested, economically motivated ordering of tests," including clinical laboratory tests, Pap smears, X-rays and other imaging services. The federation report found that doctors with a financial interest in a lab ordered 34 to 96 percent more tests; those labs' prices for individual tests were 2 to 38 percent higher and total bills were 26 to 125 percent more than for independent labs.

At least five recent studies published by the New England Journal of Medicine and the Journal of the American Medical Association show that self-referring doctors order testing more often than other doctors, and their costs were up to 7.5 times higher than when outside services were used. The medical industry has vehemently opposed measures eliminating or regulating self-referral, even though such measures would be far more effective in controlling costs than damage caps. State legislatures and Congress have begun to regulate such practices.

The elimination of medical negligence, however, is by far the most effective way to reduce liability costs. Unfortunately, malpractice in America occurs far too frequently. The 1992

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"Harvard Medical Practice Study" estimated that in hospitals in New York state in one year alone, there were 27,000 negligent adverse events, including nearly 7,000 deaths and 900 cases of permanent disability. Extrapolating the study's findings to the entire country, researchers have estimated that medical negligence kills more than 80,000 Americans a year and injures hundreds of thousands more.

In response to this threat to public health, the medical industry — through damage caps and other "reforms" — has sought to make it harder for injured consumers to receive adequate and just compensation for their injuries. At the same time, the medical industry has shown that it is incapable of policing itself. In 1991, less than 1 percent of the nation's 615,000 physicians were disciplined by state medical boards. Only about 200 doctors lose their licenses each year, and many of those who do have committed fraud or felonies.

In the absence of appropriate oversight, it has fallen upon America's civil justice system to deter negligent and reckless conduct. For more than 200 years, American juries made up of citizens drawn from the community have attempted to mete out justice in a fair and evenhanded manner, regardless of the parties' wealth or social standing. Their efforts have strengthened America and created consumer protections that are second to none.

The proponents of damage caps seek to undo these advances. With facts and fortitude, injured consumers will prevail and — through the justice system — will create a safer, healthier America.

EXHIBIT 14
DATE 3-21-95
HB 309

DATE 3/21/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 309

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Anthony Araiz		HB309		✓
Kimberly Araiz		HB309		✓
John Kutzman	Tony & Kim Araiz	HB309		✓
RANDY BISHOP	Jill Sebring-Blunt	HB309		✓
Lane Jarussi	Mont. Trial Lawyers Ass	HB309		✓
Patrice Downey	herself	HB309		✓
MIKE MEloy	Self	HB309		✓
Darrell HOLZER	AFL-CIO	HB309		✓
Fran Marceau	UTU	HB309		✓
Nancy Clark	WheatLand Mem. Hosp	HB309	✓	
Bill Olson	AARP	HB309	✓	
Arlette Randash	EAGLE Forum	HB309	✓	
Laurie Koutnik	Christian Coalition of MT	HB309	✓	
Rotting Regel Rowe	Self	HB309		✓

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DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

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Name	Representing	Bill No.	Check One: Support	Check One: Oppose
GREGORY S. MIKES	MT. TRIAL LAWYERS	HB309		X
Jim Tutwiler	MT Chamber of Commerce	HB309	✓	
Jacqueline Lenmark	AM. Ins. Assn	HB309	✓	
Steve Browning	MT Hosp Assn	HB309	✓	
MARK O'Keefe	STATE AUDITOR	HB309		✓
Laurie Ekanger	Governor's Office	HB309	✓	
Marjorie Askin	myself	HB309		✓
JAY Driscoll	MFT/MFSE	HB309		X
Terri Ahrens	MT Hosp Assn	HB309	✓	
John Hanson	Physicians MMIA	HB309	✓	
John C Smith	Executive Director of Elicia Millan	HB309		✓
Riley Johnson	NFIB/MT. Liability Coal.	HB309	✓	
Kate Cholewa	MT Women's Lobby	309		✓
Ed Caplis	MSCA	309		X

VISITOR REGISTER

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REGISTER.F10

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

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Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Monte Beck	Self	309		X
Brad Martin	MT Democratic Party	309		X
Sue Keingardner	MT Optometric Assn MT. Osteopathic Assn	309	X	
Doug Cites	MT. Med. Assn.	H-309	X	

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