

HOUSE BILL 346

Introduced by Benedict, et al.

1/25	Introduced
1/25	Referred to Judiciary
1/25	First Reading
2/09	Hearing
2/12	Tabled in Committee
2/20	Committee Report--Bill Passed as Amended
2/22	2nd Reading Passed
2/24	3rd Reading Passed
	Transmitted to Senate
3/01	First Reading
3/01	Referred to Judiciary
3/24	Hearing
3/30	Committee Report--Bill Concurred as Amended
3/31	2nd Reading Concurred
4/01	3rd Reading Concurred
	Returned to House with Amendments
4/06	2nd Reading Amendments Not Concurred
4/06	Conference Committee Appointed
	Senate
4/12	Conference Committee Appointed
	Died in Process

1 *House* BILL NO. *346*  
 2 INTRODUCED BY *Benedit* *2/22/14* *2/22/14* *2/22/14*  
 3 *Carroll* *Griffith* *Kim* *Yager* *ORR* *Levitt*  
 4 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING MEDICAL *HARP*  
 5 MALPRACTICE CLAIMS AND RECOVERIES; LIMITING NONECONOMIC *Blid*  
 6 DAMAGES; LIMITING PLAINTIFF'S CONTINGENCY ATTORNEY FEES;  
 7 LIMITING HEALTH CARE PROVIDER LIABILITY; LOWERING THE  
 8 STATUTE OF LIMITATIONS; AMENDING SECTIONS 25-9-403,  
 9 25-10-301, 27-1-714, 27-1-734, 27-2-205, AND 27-2-401, MCA;  
 10 AND PROVIDING AN APPLICABILITY DATE."

11  
 12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13 NEW SECTION. Section 1. Medical malpractice  
 14 noneconomic damages limitation. (1) In a malpractice claim  
 15 action or actions against one or more health care providers  
 16 based on a single incident of malpractice, the combined  
 17 awards for past and future damages for noneconomic loss may  
 18 not exceed \$250,000, whether for one or more claimants in  
 19 the same or separate proceedings; whether based on the same  
 20 act or a series of acts that allegedly caused the injury,  
 21 injuries, death, or deaths that the action or actions are  
 22 based on; and whether the act or series of acts were by one  
 23 or more health care providers. A claimant has the burden of  
 24 proving separate injuries, each arising from a different act  
 25 or series of acts. An award or combination of awards in

1 excess of \$250,000 must be reduced to \$250,000, after which  
 2 the court shall make other reductions required by law. If a  
 3 combination of awards for past and future noneconomic loss  
 4 is reduced in the same action, future noneconomic loss must  
 5 be reduced first and, if necessary to reach the \$250,000  
 6 limit, past noneconomic loss must then be reduced. If a  
 7 combination of awards is reduced to \$250,000, a claimant's  
 8 share of the \$250,000 must be the same percentage as the  
 9 claimant's share of the combined awards before reduction.  
 10 For each claimant, further reductions must be made in the  
 11 following order:

12 (a) first, reductions under 27-1-702;  
 13 (b) second, reductions under 27-1-703; and  
 14 (c) third, setoffs and credits to which a defendant is  
 15 entitled.

16 (2) An award of future damages for noneconomic loss may  
 17 not be discounted to present value.

18 (3) The \$250,000 limit in subsection (1) may not be  
 19 disclosed to a jury.

20 (4) As used in this section the following definitions  
 21 apply:

22 (a) "Claimant" includes but is not limited to a person  
 23 suffering bodily injury; a person claiming as a result of  
 24 bodily injury to or the death of another; a person claiming  
 25 on behalf of someone who suffered bodily injury or death;

the representative of the estate of a person who suffered bodily injury or death, or a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, or health care facility, as defined in 27-6-103.

(c) "Malpractice claim" has the meaning as defined in 27-6-103.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to physical and mental pain or suffering; emotional distress; inconvenience; physical impairment or disfigurement; loss of society, companionship, and consortium (other than household services); injury to reputation; and humiliation.

**NEW SECTION. Section 2. Medical malpractice contingency attorney fees -- limits.** (1) An attorney may not contract for, charge, collect, or receive a contingency fee for representing a claimant in a malpractice claim, as defined in 27-6-103, against a physician, dentist, or health care facility, as defined in 27-6-103, in excess of:

(a) 40% of the first \$50,000 recovered;

(b) 33 1/3% of the next \$50,000 recovered;

(c) 25% of the next \$500,000 recovered; and

(d) 15% of any amount above \$600,000 recovered.

(2) The limits in subsection (1) apply whether the recovery is by settlement, arbitration, judgment, appeal

from a judgment, or otherwise. An attorney compensated under 72-3-633 in a malpractice claim against a physician, dentist, or health care facility is subject to the limits of subsection (1) of this section, but the court may approve a fee less than the maximum permitted by subsection (1) of this section.

(3) The percentage and dollar amount limits in subsection (1) apply to the combined recoveries in an action in which one or more attorneys represent one or more claimants for one or more injuries or deaths allegedly arising from the same act or series of acts.

(4) As used in this section, the following definitions apply:

(a) "Action" means a proceeding, including arbitration, prosecuted to seek redress for personal injury or wrongful death allegedly caused by malpractice or to assert a right to indemnity or subrogation arising out of a malpractice claim.

(b) "Claimant" includes but is not limited to a person suffering bodily injury; a person claiming as a result of bodily injury to or the death of another; a person claiming on behalf of someone who suffered bodily injury or death; the representative of the estate of a person who suffered bodily injury or death; or a person bringing a wrongful death action.

1 (c) "Recovery" means the net sum received by settlement  
2 or judgment after deductions for disbursements or costs  
3 incurred in connection with the prosecution or settlement of  
4 a claim. Costs of medical care, amounts deducted as  
5 collateral sources under 27-1-308, and an attorney's office  
6 overhead costs are not deductible disbursements or costs.

7 **Section 3.** Section 25-9-403, MCA, is amended to read:

8 **"25-9-403. Request for periodic payment of future**  
9 **damages.** (1) A party to an action for personal injury,  
10 property damage, or wrongful death in which \$100,000 or more  
11 of future damages is awarded may, prior to the entry of  
12 judgment, request the court to enter a judgment ordering  
13 future damages to be paid in whole or in part by periodic  
14 payments rather than by a lump-sum payment. Upon such a  
15 request, the court may shall enter an order for periodic  
16 payment of future damages if unless the court finds that  
17 such periodic payment is not in the best interests of the  
18 claimant. The total dollar amount of the ordered periodic  
19 payments must equal the total dollar amount of the future  
20 damages without a reduction to present value.

21 (2) A court ordering the payment of future damages by  
22 periodic payments shall make specific findings as to the  
23 dollar amount of periodic payments needed to compensate the  
24 judgment creditor for future damages ~~and-as-to-whether-an~~  
25 ~~order-for-periodic-payment-of-future-damages-is-in-the-best~~

1 ~~interests-of-the-claimant.~~

2 (3) The judgment order must specify the recipient or  
3 recipients of periodic payments, the dollar amount of the  
4 payments, the interval between payments, and the number of  
5 payments or the period of time over which payments ~~shall~~  
6 must be made.

7 (4) A court ordering periodic payment of future damages  
8 shall order that the payments be made, during the life of  
9 the judgment creditor or during the continuance of the  
10 compensable injury or disability of the judgment creditor,  
11 through the purchase of an inflation-indexed annuity  
12 approved by the court. The annuity must be in the form of an  
13 inflation-indexed annuity contract purchased from a  
14 qualified insurer that, in the most recent edition of A.M.  
15 Best, has an "A" (excellent) or higher rating and is in a  
16 class 7 or higher classification. The annuity also serves as  
17 any required supersedeas bond. Upon purchase of a  
18 court-approved annuity, the court may order that the  
19 judgment is satisfied and that the judgment debtor is  
20 discharged. If the judgment creditor dies before all  
21 periodic payments have been made, the remaining payments  
22 become the property of his the creditor's estate.

23 (5) For a malpractice claim, as defined in 27-6-103,  
24 attorney fees and litigation expenses for the periodic  
25 payment portion of a judgment must be calculated and paid as

provided in 25-9-404, and for purposes of the fee limitations in [section 2], the periodic payments may not be considered separate recoveries."

**Section 4.** Section 25-10-301, MCA, is amended to read:

"25-10-301. Determining compensation of attorneys. (1) Except as provided in [section 2] and subsection (2), The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, except that in

(2) In probate proceedings, the court may fix and allow the compensation of attorneys representing administrators, executors, guardians, trustees, and agents appointed by the court.

(3) ~~But--parties~~ Parties to actions or proceedings are entitled to costs and disbursements as provided by law."

**Section 5.** Section 27-1-714, MCA, is amended to read:

"27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency. (1) Any person licensed as a physician and surgeon under the laws of the state of Montana, any hospital or its agents or employees, any volunteer firefighter or officer of any nonprofit volunteer fire company, or any other person who in good faith renders emergency care or assistance without compensation except as provided in subsection (2) at the scene of an emergency or accident is not liable for any

civil damages for acts or omissions other than damages occasioned by gross negligence or by willful or wanton acts or omissions by such the person in rendering such emergency care or assistance.

(2) Subsection (1) includes a person properly trained under the laws of this state who operates an ambulance to and from the scene of an emergency or renders emergency medical treatment on a volunteer basis so long as the total reimbursement received for such volunteer services does not exceed 25% of his the person's gross annual income or \$3,000 a calendar year, whichever is greater.

(3) If a nonprofit subscription fire company refuses to fight a fire on nonsubscriber property, such the refusal does not constitute gross negligence or a willful or wanton act or omission.

(4) As used in this section, the following definitions apply:

(a) "Emergency" means a situation that requires immediate services for the alleviation of severe pain or immediate diagnosis or treatment of medical conditions that, if not immediately diagnosed or treated, could reasonably be expected to lead to serious disability or death.

(b) "Scene of an emergency or accident" includes but is not limited to hospitals, including their emergency rooms, and the offices and homes of licensed physicians and

1 surgeons, if the party seeking the benefit of this section  
 2 had no preexisting legal obligation arising from a voluntary  
 3 provider-patient relationship to care for or assist the  
 4 person cared for or assisted at the time of the rendering of  
 5 the care or assistance in question."

6 **Section 6.** Section 27-1-734, MCA, is amended to read:

7 "27-1-734. Limits on liability of health care provider  
 8 when prenatal care not obtained and in emergency situations.  
 9 A physician licensed under Title 37, chapter 3, a nurse  
 10 licensed under Title 37, chapter 8, or a hospital licensed  
 11 under Title 50, chapter 5, rendering care or assistance in  
 12 good faith to a patient of a direct-entry midwife in an  
 13 emergency situation or during the delivery of a child to a  
 14 woman who did not obtain adequate prenatal care from a  
 15 physician is liable for civil damages for acts or omissions  
 16 committed in providing such emergency care or assistance or  
 17 obstetrical care or assistance only to the extent that those  
 18 damages are caused by gross negligence or by willful or  
 19 wanton acts or omissions and only if the party seeking the  
 20 benefit of this section had no preexisting legal obligation  
 21 arising from a voluntary provider-patient relationship to  
 22 care for the person rendered the care or assistance at the  
 23 time of the rendering of the care or assistance in question.  
 24 "Adequate prenatal care" means substantial compliance by the  
 25 woman with a routine schedule of physical examinations by a

1 physician and generally includes monthly visits for the  
 2 first 28 weeks of pregnancy, visits every 2 weeks for the  
 3 next 8 weeks, and weekly visits after the 36th week and  
 4 until delivery."

5 **Section 7.** Section 27-2-205, MCA, is amended to read:

6 "27-2-205. Actions for medical malpractice. (1) Action  
 7 in tort or contract for injury or death against a physician  
 8 or surgeon, dentist, registered nurse, nursing home or  
 9 hospital administrator, dispensing optician, optometrist,  
 10 licensed physical therapist, podiatrist, psychologist,  
 11 osteopath, chiropractor, clinical laboratory bioanalyst,  
 12 clinical laboratory technologist, pharmacist, veterinarian,  
 13 a licensed hospital or long-term care facility, or licensed  
 14 medical professional corporation, based upon alleged  
 15 professional negligence or for rendering professional  
 16 services without consent or for an act, error, or omission,  
 17 shall must, except as provided in subsection (2), be  
 18 commenced within 3 years after the date of injury or 3-years  
 19 1 year after the plaintiff discovers or through the use of  
 20 reasonable diligence should have discovered the injury,  
 21 whichever occurs last, but in no case may such action be  
 22 commenced after 5 years from the date of injury first, and  
 23 the provisions of 27-2-401 do not apply. However, this time  
 24 limitation shall must be tolled for any period during which  
 25 there has been a failure of a defendant to disclose any act,

error, or omission upon which such the action is based and which that is known to the plaintiff defendant or through the use of reasonable diligence subsequent to said the act, error, or omission would have been known to him the defendant.

(2) Notwithstanding the provisions of 27-2-401, in an action for death or injury of a minor ~~who was under the age of 4 on the date of his injury, the period of limitations in subsection (1) begins to run when the minor reaches his eighth birthday or dies, whichever occurs first, and the~~ must be commenced within 3 years after the date of the death or injury, except that if the minor was under 6 years of age on the date of the death or injury, the action must be commenced within 3 years after the date of the death or injury or prior to the time the minor reaches 8 years of age, whichever occurs last. The time for commencement of the action is tolled during any period during which the minor does not reside with a parent or guardian and for any period during which a parent or guardian and either the defendant or the defendant's insurer failed through fraud or collusion to bring an action on behalf of the minor.

**Section 8.** Section 27-2-401, MCA, is amended to read:

"27-2-401. When person entitled to bring action is under a disability. (1) If a person entitled to bring an action mentioned in part 2, except 27-2-205 and 27-2-211(3),

is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not a part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by any such disability except minority.

(2) If an action is barred by 27-2-304, any of the heirs, devisees, or creditors who at the time of the transaction upon which the action might have been founded was under one of the disabilities mentioned in subsection (1) may, within 5 years after the cessation of such the disability, maintain an action to recover damages. In such the action he the plaintiff may recover such the sum or the value of such property ~~as he~~ that the plaintiff would have received upon the final distribution of the estate if an action had been seasonably timely commenced by the personal representative.

(3) ~~No person may avail himself of a~~ A disability does not apply unless it existed when his a person's right of action or entry accrued.

(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until all are removed."

**NEW SECTION. Section 9.** Saving clause. [This act] does

1 not affect rights and duties that matured, penalties that  
2 were incurred, or proceedings that were begun before [the  
3 effective date of this act].

4 NEW SECTION. **Section 10. Severability.** If a part of  
5 [this act] is invalid, all valid parts that are severable  
6 from the invalid part remain in effect. If a part of [this  
7 act] is invalid in one or more of its applications, the part  
8 remains in effect in all valid applications that are  
9 severable from the invalid applications.

10 NEW SECTION. **Section 11. Applicability.** [This act]  
11 applies to causes of action arising on or after October 1,  
12 1993.

-End-



APPROVED BY COMMITTEE  
ON JUDICIARY

## HOUSE BILL NO. 346

INTRODUCED BY BENEDICT, RYE, JACOBSON, ZOOK,  
WEEDING, GROSFIELD, GRIMES, WAGNER, ORR, DAVIS,  
PAVLOVICH, QUILICI, J. RICE, JERGESON, HARP, BIRD

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING MEDICAL  
MALPRACTICE CLAIMS AND RECOVERIES; LIMITING NONECONOMIC  
DAMAGES; LIMITING PLAINTIFF'S CONTINGENCY ATTORNEY FEES;  
~~LIMITING--HEALTH--CARE--PROVIDER--LIABILITY,--LOWERING---THE~~  
~~STATUTE--OF--LIMITATIONS~~ PROVIDING FOR PERIODIC PAYMENT OF  
FUTURE DAMAGES UNDER CERTAIN CONDITIONS; AMENDING SECTIONS  
25-9-403, AND 25-10-301, ~~27-1-714, 27-1-734, 27-2-205, AND~~  
~~27-2-401~~ MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Medical malpractice**  
**noneconomic damages limitation.** (1) In a malpractice claim  
action or actions against one or more health care providers  
based on a single incident of malpractice, the combined  
awards for past and future damages for noneconomic loss may  
not exceed ~~\$250,000~~ \$500,000, whether for one or more  
claimants in the same or separate proceedings; whether based  
on the same act or a series of acts that allegedly caused  
the injury, injuries, death, or deaths that the action or  
actions are based on; and whether the act or series of acts

were by one or more health care providers. A claimant has  
the burden of proving separate injuries, each arising from a  
different act or series of acts. An award or combination of  
awards in excess of ~~\$250,000~~ \$500,000 must be reduced to  
~~\$250,000~~ \$500,000, after which the court shall make other  
reductions required by law. If a combination of awards for  
past and future noneconomic loss is reduced in the same  
action, future noneconomic loss must be reduced first and,  
if necessary to reach the ~~\$250,000~~ \$500,000 limit, past  
noneconomic loss must then be reduced. If a combination of  
awards is reduced to ~~\$250,000~~ \$500,000, a claimant's share  
of the ~~\$250,000~~ \$500,000 must be the same percentage as the  
claimant's share of the combined awards before reduction.  
For each claimant, further reductions must be made in the  
following order:

- (a) first, reductions under 27-1-702;
  - (b) second, reductions under 27-1-703; and
  - (c) third, setoffs and credits to which a defendant is  
entitled.
- (2) An award of future damages for noneconomic loss may  
not be discounted to present value.
- (3) The ~~\$250,000~~ \$500,000 limit in subsection (1) may  
not be disclosed to a jury.
- (4) As used in this section the following definitions  
apply:

(a) "Claimant" includes but is not limited to a person suffering bodily injury; a person claiming as a result of bodily injury to or the death of another; a person claiming on behalf of someone who suffered bodily injury or death; the representative of the estate of a person who suffered bodily injury or death, or a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, or health care facility, as defined in 27-6-103, OR A NURSE LICENSED UNDER TITLE 37, CHAPTER 8.

(c) "Malpractice claim" has the meaning as defined in 27-6-103.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to physical and mental pain or suffering; emotional distress; inconvenience; physical impairment or disfigurement; loss of society, companionship, and consortium (other than household services); injury to reputation; and humiliation.

NEW SECTION. **Section 2. Medical malpractice contingency attorney fees -- limits.** (1) An attorney may not contract for, charge, collect, or receive a contingency fee for representing a claimant in a malpractice claim, as defined in 27-6-103, against a physician, dentist, or health care facility, as defined in 27-6-103, OR AGAINST A NURSE LICENSED UNDER TITLE 37, CHAPTER 8, in excess of:

(a) 40% of the first \$50,000 recovered;

(b) 33 1/3% of the next \$50,000 recovered;

(c) 25% of the next \$500,000 recovered; and

(d) 15% of any amount above \$600,000 recovered.

(2) The limits in subsection (1) apply whether the recovery is by settlement, arbitration, judgment, appeal from a judgment, or otherwise. An attorney compensated under 72-3-633 in a malpractice claim against a physician, dentist, or health care facility is subject to the limits of subsection (1) of this section, but the court may approve a fee less than the maximum permitted by subsection (1) of this section.

(3) The percentage and dollar amount limits in subsection (1) apply to the combined recoveries in an action in which one or more attorneys represent one or more claimants for one or more injuries or deaths allegedly arising from the same act or series of acts.

(4) As used in this section, the following definitions apply:

(a) "Action" means a proceeding, including arbitration, prosecuted to seek redress for personal injury or wrongful death allegedly caused by malpractice or to assert a right to indemnity or subrogation arising out of a malpractice claim.

(b) "Claimant" includes but is not limited to a person

suffering bodily injury; a person claiming as a result of bodily injury to or the death of another; a person claiming on behalf of someone who suffered bodily injury or death; the representative of the estate of a person who suffered bodily injury or death; or a person bringing a wrongful death action.

(c) "Recovery" means the net sum received by settlement or judgment after deductions for disbursements or costs incurred in connection with the prosecution or settlement of a claim. Costs of medical care, amounts deducted as collateral sources under 27-1-308, and an attorney's office overhead costs are not deductible disbursements or costs.

**Section 3.** Section 25-9-403, MCA, is amended to read:

**"25-9-403. Request for periodic payment of future damages.** (1) A party to an action for personal injury, property damage, or wrongful death in which \$100,000 or more of future damages is awarded may, prior to the entry of judgment, request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. Upon such a request, the court may shall enter an order for periodic payment of future damages if unless the court finds that such periodic payment is not in the best interests of the claimant. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future

damages without a reduction to present value.

(2) A court ordering the payment of future damages by periodic payments shall make specific findings as to the dollar amount of periodic payments needed to compensate the judgment creditor for future damages ~~and-as-to-whether-an order-for-periodic-payment-of-future-damages-is-in-the--best interests-of-the-claimant.~~

(3) The judgment order must specify the recipient or recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments ~~shall~~ must be made.

(4) A court ordering periodic payment of future damages shall order that the payments be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A" (excellent) or higher rating and is in a class 7 or higher classification. The annuity also serves as any required supersedeas bond. Upon purchase of a court-approved annuity, the court may order that the judgment is satisfied and that the judgment debtor is

1 discharged. If the judgment creditor dies before all  
2 periodic payments have been made, the remaining payments  
3 become the property of his the creditor's estate.

4 (5) For a malpractice claim, as defined in 27-6-103,  
5 attorney fees and litigation expenses for the periodic  
6 payment portion of a judgment must be calculated and paid as  
7 provided in 25-9-404, and for purposes of the fee  
8 limitations in [section 2], the periodic payments may not be  
9 considered separate recoveries."

10 **Section 4.** Section 25-10-301, MCA, is amended to read:

11 "25-10-301. Determining compensation of attorneys. (1)  
12 Except as provided in [section 2] and subsection (2), The  
13 the measure and mode of compensation of attorneys and  
14 counselors at law is left to the agreement, express or  
15 implied, of the parties, except that in

16 (2) In probate proceedings, the court may fix and allow  
17 the compensation of attorneys representing administrators,  
18 executors, guardians, trustees, and agents appointed by the  
19 court.

20 (3) But parties Parties to actions or proceedings are  
21 entitled to costs and disbursements as provided by law."

22 **Section 5.** Section 27-1-714, MCA, is amended to read:

23 "27-1-714. limits on liability for emergency care  
24 rendered at scene of accident or emergency--(1) Any person  
25 licensed as a physician and surgeon under the laws of the

1 state of Montana, any hospital or its agents or employees,  
2 any volunteer firefighter or officer of any nonprofit  
3 volunteer fire company, or any other person who in good  
4 faith renders emergency care or assistance without  
5 compensation except as provided in subsection (2) at the  
6 scene of an emergency or accident is not liable for any  
7 civil damages for acts or omissions other than damages  
8 occasioned by gross negligence or by willful or wanton acts  
9 or omissions by such the person in rendering such emergency  
10 care or assistance.

11 (2) Subsection (1) includes a person properly trained  
12 under the laws of this state who operates an ambulance to  
13 and from the scene of an emergency or renders emergency  
14 medical treatment on a volunteer basis so long as the total  
15 reimbursement received for such volunteer services does not  
16 exceed 25% of his the person's gross annual income or \$3,000  
17 a calendar year, whichever is greater.

18 (3) If a nonprofit subscription fire company refuses to  
19 fight a fire on nonsubscriber property, such the refusal  
20 does not constitute gross negligence or a willful or wanton  
21 act or omission.

22 (4) As used in this section, the following definitions  
23 apply:

24 (a) "Emergency" means a situation that requires  
25 immediate services for the alleviation of severe pain or

immediate diagnosis or treatment of medical conditions that, if not immediately diagnosed or treated, could reasonably be expected to lead to serious disability or death.

(b) "Scene of an emergency or accident" includes but is not limited to hospitals, including their emergency rooms, and the offices and homes of licensed physicians and surgeons, if the party seeking the benefit of this section had no preexisting legal obligation arising from a voluntary provider-patient relationship to care for or assist the person cared for or assisted at the time of the rendering of the care or assistance in question."

**Section 6.** Section 27-1-734, MCA, is amended to read:--

"27-1-734. Limits on liability of health care provider when prenatal care not obtained and in emergency situations. A physician licensed under Title 37, chapter 3, a nurse licensed under Title 37, chapter 6, or a hospital licensed under Title 50, chapter 5, rendering care or assistance in good faith to a patient of a direct-entry midwife in an emergency situation or during the delivery of a child to a woman who did not obtain adequate prenatal care from a physician is liable for civil damages for acts or omissions committed in providing such emergency care or assistance or obstetrical care or assistance only to the extent that those damages are caused by gross negligence or by willful or wanton acts or omissions and only if the party seeking the

benefit of this section had no preexisting legal obligation arising from a voluntary provider-patient relationship to care for the person rendered the care or assistance at the time of the rendering of the care or assistance in question.

"Adequate prenatal care" means substantial compliance by the woman with a routine schedule of physical examinations by a physician and generally includes monthly visits for the first 28 weeks of pregnancy, visits every 2 weeks for the next 8 weeks, and weekly visits after the 36th week and until delivery."

**Section 7.** Section 27-2-205, MCA, is amended to read:--

"27-2-205. Actions for medical malpractice. (1) Action in tort or contract for injury or death against a physician or surgeon, dentist, registered nurse, nursing home or hospital administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility, or licensed medical professional corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, shall must, except as provided in subsection (2), be commenced within 3 years after the date of injury or 3 years 1 year after the plaintiff discovers or through the use of

1 reasonable diligence--should--have--discovered--the--injury,  
2 whichever--occurs--last,--but--in--no--case--may--such--action--be  
3 commenced--after--5--years--from--the--date--of--injury first,--and  
4 the--provisions--of--27-2-401--do--not--apply. However, this time  
5 limitation shall must be tolled for any period during--which  
6 there has been a failure of a defendant to disclose any act,  
7 error,--or--omission upon which the action is based and  
8 which that is known to the plaintiff defendant or--through  
9 the--use--of--reasonable--diligence--subsequent--to--said the act,  
10 error,--or--omission--would--have--been--known--to--him the  
11 defendant.

12 (2)--Notwithstanding the provisions of 27-2-401,--in--an  
13 action--for--death--or--injury--of--a--minor--who--was--under--the--age  
14 of--4--on--the--date--of--his--injury, the period of limitations in  
15 subsection (1) begins to run--when--the--minor--reaches--his  
16 eighth--birthday--or--dies,--whichever--occurs--first,--and--the  
17 must be commenced within 3 years after the date of the death  
18 or injury, except that if the minor was under 6 years of age  
19 on the date of the death or injury, the action must be  
20 commenced within 3 years after the date of the death or  
21 injury or prior to the time the minor reaches 8 years of  
22 age, whichever occurs last. The time for commencement of the  
23 action--is--tolled--during any period during which the minor  
24 does not reside with a parent or guardian and for any period  
25 during which a parent or guardian and either the defendant

1 or the defendant's insurer failed through fraud or collusion  
2 to bring an action on behalf of the minor."

3 **Section 8.**--Section 27-2-401, MCA, is amended to read:--

4 "27-2-401.--When--person--entitled--to--bring--action--is  
5 under a disability:--(1)--if a person--entitled--to--bring--an  
6 action mentioned in part 2, except 27-2-205 and 27-2-211(3),  
7 is, at the time the cause of action accrues, either a minor,  
8 seriously--mentally--ill, or imprisoned on a criminal charge  
9 or under a sentence for a term less than for life, the--time  
10 of--such--disability--is--not a part of the time limited for  
11 commencing the action. However, the time so--limited--cannot  
12 be--extended more than 5 years by any such disability except  
13 minority.

14 (2)--If an action is barred by--27-2-304,--any--of--the  
15 heirs,--devisees,--or--creditors--who--at--the--time--of--the  
16 transaction upon which the action might--have--been--founded  
17 was--under--one--of the disabilities mentioned in subsection  
18 (1) may, within 5 years after--the--cessation--of--such the  
19 disability, maintain an action to recover damages, in such  
20 the action he the plaintiff may recover such the sum or--the  
21 value--of--such property as he that the plaintiff would have  
22 received upon the final distribution of--the--estate--if--an  
23 action--had--been seasonably timely commenced by the personal  
24 representative.

25 (3)--No person may avail himself of a A disability does

1 ~~not--apply--unless--it--existed--when--his~~ a person's right-of  
2 ~~action-or-entry-accrued-~~

3 {4}--When-two-or-more-disabilities-coexist-at--the--time  
4 the--right--of--action-or-entry-accrues--the-limitation-does  
5 not-attach-until-all-are-removed-"

6 NEW SECTION. Section 5. Saving clause. [This act] does  
7 not affect rights and duties that matured, penalties that  
8 were incurred, or proceedings that were begun before [the  
9 effective date of this act].

10 NEW SECTION. Section 6. Severability. If a part of  
11 [this act] is invalid, all valid parts that are severable  
12 from the invalid part remain in effect. If a part of [this  
13 act] is invalid in one or more of its applications, the part  
14 remains in effect in all valid applications that are  
15 severable from the invalid applications.

16 NEW SECTION. Section 7. Applicability. [This act]  
17 applies to causes of action arising on or after October 1,  
18 1993.

-End-

## 1 HOUSE BILL NO. 346

2 INTRODUCED BY BENEDICT, RYE, JACOBSON, ZOOK,  
3 WEEDING, GROSFIELD, GRIMES, WAGNER, ORR, DAVIS,  
4 PAVLOVICH, QUILICI, J. RICE, JERGESON, HARP, BIRD

5  
6 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING MEDICAL  
7 MALPRACTICE CLAIMS AND RECOVERIES; LIMITING NONECONOMIC  
8 DAMAGES; LIMITING PLAINTIFF'S CONTINGENCY ATTORNEY FEES;  
9 ~~LIMITING--HEALTH--CARE--PROVIDER--LIABILITY;--LOWERING--THE~~  
10 ~~STATUTE--OF--LIMITATIONS~~ PROVIDING FOR PERIODIC PAYMENT OF  
11 FUTURE DAMAGES UNDER CERTAIN CONDITIONS; AMENDING SECTIONS  
12 25-9-403, AND 25-10-301, 27-1-714, 27-1-734, 27-2-205, AND  
13 27-2-401, MCA; AND PROVIDING AN APPLICABILITY DATE."

14  
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 NEW SECTION. Section 1. Medical malpractice  
17 noneconomic damages limitation. (1) In a malpractice claim  
18 action or actions against one or more health care providers  
19 based on a single incident of malpractice, the combined  
20 awards for past and future damages for noneconomic loss may  
21 not exceed \$250,000 \$500,000, whether for one or more  
22 claimants in the same or separate proceedings; whether based  
23 on the same act or a series of acts that allegedly caused  
24 the injury, injuries, death, or deaths that the action or  
25 actions are based on; and whether the act or series of acts

1 were by one or more health care providers. A claimant has  
2 the burden of proving separate injuries, each arising from a  
3 different act or series of acts. An award or combination of  
4 awards in excess of \$250,000 \$500,000 must be reduced to  
5 \$250,000 \$500,000, after which the court shall make other  
6 reductions required by law. If a combination of awards for  
7 past and future noneconomic loss is reduced in the same  
8 action, future noneconomic loss must be reduced first and,  
9 if necessary to reach the \$250,000 \$500,000 limit, past  
10 noneconomic loss must then be reduced. If a combination of  
11 awards is reduced to \$250,000 \$500,000, a claimant's share  
12 of the \$250,000 \$500,000 must be the same percentage as the  
13 claimant's share of the combined awards before reduction.  
14 For each claimant, further reductions must be made in the  
15 following order:

- 16 (a) first, reductions under 27-1-702;  
17 (b) second, reductions under 27-1-703; and  
18 (c) third, setoffs and credits to which a defendant is  
19 entitled.  
20 (2) An award of future damages for noneconomic loss may  
21 not be discounted to present value.  
22 (3) The \$250,000 \$500,000 limit in subsection (1) may  
23 not be disclosed to a jury.  
24 (4) As used in this section the following definitions  
25 apply:



(a) "Claimant" includes but is not limited to a person suffering bodily injury; a person claiming as a result of bodily injury to or the death of another; a person claiming on behalf of someone who suffered bodily injury or death; the representative of the estate of a person who suffered bodily injury or death, or a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, or health care facility, as defined in 27-6-103, OR A NURSE LICENSED UNDER TITLE 37, CHAPTER 8.

(c) "Malpractice claim" has the meaning as defined in 27-6-103.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to physical and mental pain or suffering; emotional distress; inconvenience; physical impairment or disfigurement; loss of society, companionship, and consortium (other than household services); injury to reputation; and humiliation.

NEW SECTION. Section 2. Medical malpractice contingency attorney fees -- limits. (1) An attorney may not contract for, charge, collect, or receive a contingency fee for representing a claimant in a malpractice claim, as defined in 27-6-103, against a physician, dentist, or health care facility, as defined in 27-6-103, OR AGAINST A NURSE LICENSED UNDER TITLE 37, CHAPTER 8, in excess of:

(a) 40% of the first \$50,000 recovered;

(b) 33 1/3% of the next \$50,000 recovered;

(c) 25% of the next \$500,000 recovered; and

(d) 15% of any amount above \$600,000 recovered.

(2) The limits in subsection (1) apply whether the recovery is by settlement, arbitration, judgment, appeal from a judgment, or otherwise. An attorney compensated under 72-3-633 in a malpractice claim against a physician, dentist, or health care facility is subject to the limits of subsection (1) of this section, but the court may approve a fee less than the maximum permitted by subsection (1) of this section.

(3) The percentage and dollar amount limits in subsection (1) apply to the combined recoveries in an action in which one or more attorneys represent one or more claimants for one or more injuries or deaths allegedly arising from the same act or series of acts.

(4) As used in this section, the following definitions apply:

(a) "Action" means a proceeding, including arbitration, prosecuted to seek redress for personal injury or wrongful death allegedly caused by malpractice or to assert a right to indemnity or subrogation arising out of a malpractice claim.

(b) "Claimant" includes but is not limited to a person

suffering bodily injury; a person claiming as a result of bodily injury to or the death of another; a person claiming on behalf of someone who suffered bodily injury or death; the representative of the estate of a person who suffered bodily injury or death; or a person bringing a wrongful death action.

(c) "Recovery" means the net sum received by settlement or judgment after deductions for disbursements or costs incurred in connection with the prosecution or settlement of a claim. Costs of medical care, amounts deducted as collateral sources under 27-1-308, and an attorney's office overhead costs are not deductible disbursements or costs.

**Section 3.** Section 25-9-403, MCA, is amended to read:

"25-9-403. Request for periodic payment of future damages. (1) A party to an action for personal injury, property damage, or wrongful death in which \$100,000 or more of future damages is awarded may, prior to the entry of judgment, request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. Upon such a request, the court may shall enter an order for periodic payment of future damages if unless the court finds that such periodic payment is not in the best interests of the claimant. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future

damages without a reduction to present value.

(2) A court ordering the payment of future damages by periodic payments shall make specific findings as to the dollar amount of periodic payments needed to compensate the judgment creditor for future damages ~~and-as-to-whether-an order-for-periodic-payment-of-future-damages-is-in-the--best interests-of-the-claimant.~~

(3) The judgment order must specify the recipient or recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall ~~must~~ be made.

(4) A court ordering periodic payment of future damages shall order that the payments be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A" (excellent) or higher rating and is in a class 7 or higher classification. The annuity also serves as any required supersedeas bond. Upon purchase of a court-approved annuity, the court may order that the judgment is satisfied and that the judgment debtor is

1 discharged. If the judgment creditor dies before all  
2 periodic payments have been made, the remaining payments  
3 become the property of his the creditor's estate.

4 (5) For a malpractice claim, as defined in 27-6-103,  
5 attorney fees and litigation expenses for the periodic  
6 payment portion of a judgment must be calculated and paid as  
7 provided in 25-9-404, and for purposes of the fee  
8 limitations in [section 2], the periodic payments may not be  
9 considered separate recoveries."

10 **Section 4.** Section 25-10-301, MCA, is amended to read:

11 "25-10-301. Determining compensation of attorneys. (1)  
12 Except as provided in [section 2] and subsection (2), the  
13 the measure and mode of compensation of attorneys and  
14 counselors at law is left to the agreement, express or  
15 implied, of the parties, except that in

16 (2) In probate proceedings, the court may fix and allow  
17 the compensation of attorneys representing administrators,  
18 executors, guardians, trustees, and agents appointed by the  
19 court.

20 (3) But parties Parties to actions or proceedings are  
21 entitled to costs and disbursements as provided by law."

22 **Section 5.** ~~Section 27-1-714, MCA, is amended to read:~~

23 ~~"27-1-714--limits--on--liability--for--emergency--care~~  
24 ~~rendered-at-scene-of-accident-or-emergency--(1)--Any--person~~  
25 ~~licensed--as--a--physician-and-surgeon-under-the-laws-of-the~~

1 ~~state-of-Montana; any-hospital-or-its-agents--or--employees;~~  
2 ~~any--volunteer--firefighter--or--officer--of--any--nonprofit~~  
3 ~~volunteer--fire--company,--or--any--other-person-who-in-good~~  
4 ~~faith--renders--emergency--care--or--assistance--without~~  
5 ~~compensation--except--as--provided--in-subsection-(2)--at-the~~  
6 ~~scene-of-an-emergency-or-accident--is--not--liable--for--any~~  
7 ~~civil--damages--for--acts--or--omissions--other-than-damages~~  
8 ~~occasioned-by-gross-negligence-or-by-willful-or-wanton--acts~~  
9 ~~or--omissions-by-such the person-in-rendering-such-emergency~~  
10 ~~care-or-assistance;~~

11 ~~(2)--Subsection-(1)--includes-a-person--properly--trained~~  
12 ~~under--the--laws--of-this-state-who-operates-an-ambulance-to~~  
13 ~~and-from-the-scene-of--an--emergency--or--renders--emergency~~  
14 ~~medical--treatment-on-a-volunteer-basis-so-long-as-the-total~~  
15 ~~reimbursement-received-for-such-volunteer-services-does--not~~  
16 ~~exceed-25%--of--his the-person's-gross-annual-income-or-\$3,000~~  
17 ~~a-calendar-year-whichever-is-greater;~~

18 ~~(3)--If-a-nonprofit-subscription-fire-company-refuses-to~~  
19 ~~fight--a--fire--on--nonsubscriber-property,--such the refusal~~  
20 ~~does-not-constitute-gross-negligence-or-a-willful-or--wanton~~  
21 ~~act-or-omission;~~

22 ~~(4)--As--used-in-this-section, the following definitions~~  
23 ~~apply:~~

24 ~~(a)--"Emergency"--means--a--situation--that--requires~~  
25 ~~immediate--services--for--the--alleviation-of-severe-pain-or~~

immediate diagnosis or treatment of medical conditions that, if not immediately diagnosed or treated, could reasonably be expected to lead to serious disability or death;

(b) "Scene of an emergency or accident" includes but is not limited to hospitals, including their emergency rooms, and the offices and homes of licensed physicians and surgeons, if the party seeking the benefit of this section had no preexisting legal obligation arising from a voluntary provider-patient relationship to care for or assist the person cared for or assisted at the time of the rendering of the care or assistance in question."

**Section 6.** Section 27-1-734, MCA, is amended to read:

"27-1-734. Limits on liability of health care provider when prenatal care not obtained and in emergency situations. A physician licensed under Title 37, chapter 3, a nurse licensed under Title 37, chapter 8, or a hospital licensed under Title 59, chapter 5, rendering care or assistance in good faith to a patient of a direct-entry midwife in an emergency situation or during the delivery of a child to a woman who did not obtain adequate prenatal care from a physician is liable for civil damages for acts or omissions committed in providing such emergency care or assistance or obstetrical care or assistance only to the extent that those damages are caused by gross negligence or by willful or wanton acts or omissions and only if the party seeking the

benefit of this section had no preexisting legal obligation arising from a voluntary provider-patient relationship to care for the person rendered the care or assistance at the time of the rendering of the care or assistance in question; "Adequate prenatal care" means substantial compliance by the woman with a routine schedule of physical examinations by a physician and generally includes monthly visits for the first 28 weeks of pregnancy, visits every 2 weeks for the next 8 weeks, and weekly visits after the 36th week and until delivery."

**Section 7.** Section 27-2-205, MCA, is amended to read:

"27-2-205. Actions for medical malpractice. (1) Action in tort or contract for injury or death against a physician or surgeon, dentist, registered nurse, nursing home or hospital administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopathy, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility, or licensed medical professional corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, shall must, except as provided in subsection (2), be commenced within 3 years after the date of injury or 3 years 1 year after the plaintiff discovers or through the use of

reasonable diligence--should--have--discovered--the--injury,  
 whichever--occurs--lasty--but--in-no-case-may-such-action-be  
 commenced-after-5-years-from-the-date-of-injury firsty--and  
the--provisions-of-27-2-401-do-not-apply. However, this time  
 limitation shall must be tolled for any period during which  
 there has been a failure of a defendant to disclose any act,  
 error,--or--omission upon which the action is based and  
 which that is known to the plaintiff defendant or--through  
 the--use-of-reasonable-diligence-subsequent-to-said the act,  
 error,--or--omission--would--have--been--known--to--him the  
defendant.

(2)--Notwithstanding the provisions of 27-2-401,--in--an  
 action--for-death-or-injury-of-a-minor-who-was-under-the-age  
 of-4-on-the-date-of-his-injury, the period of limitations in  
 subsection (1) begins to run--when--the--minor--reaches--his  
 eighth--birthday--or--dies,--whichever-occurs-first, and the  
must-be-commenced-within-3-years-after-the-date-of-the-death  
or-injury, except that if the minor was under 6 years of age  
on the date of the death--or--injury, the--action--must--be  
commenced--within--3--years--after--the-date-of-the-death-or  
injury-or-prior-to-the-time-the-minor--reaches--8--years--of  
age, whichever-occurs last. The time for commencement of the  
 action--is--tolled--during-any-period-during-which-the-minor  
 does-not-reside-with-a-parent-or-guardian and-for-any-period  
during-which-a-parent-or-guardian-and-either--the--defendant

or-the-defendant's-insurer-failed-through-fraud-or-collusion  
to-bring-an-action-on-behalf-of-the-minor.<sup>A</sup>

**Section 8.**--Section 27-2-401, MCA, is amended to read:--

"27-2-401.--When--person--entitled--to--bring--action-is  
 under-a-disability,--(1)--if-a-person--entitled--to--bring--an  
 action-mentioned-in-part-2, except 27-2-205 and 27-2-211(3),  
 is, at the time the cause of action accrues, either a minor,  
 seriously--mentally--ill, or imprisoned on a criminal charge  
 or under a sentence for a term less than for life, the--time  
 of--such--disability--is--not-a-part-of-the-time-limited-for  
 commencing the action. However, the time so--limited--cannot  
 be--extended-more-than-5-years-by-any-such-disability-except  
 minority.

(2)--If an action is barred by--27-2-304,--any--of--the  
 heirs,--devisees,--or--creditors--who--at--the--time--of--the  
 transaction upon which the action might--have--been--founded  
 was--under--one--of--the-disabilities-mentioned-in-subsection  
 (1)--may, within 5 years after--the--cessation--of--such the  
 disability,--maintain--an-action-to-recover-damages--in-such  
the action he the plaintiff may recover such the sum or--the  
 value--of--such-property-as-he that the plaintiff would have  
 received upon the final distribution of--the--estate--if--an  
 action--had-been-seasonably timely commenced by the personal  
 representative

(3)--No person may avail himself of a A disability does

1 ~~not--apply--unless--it--existed--when--his--a--person's~~ right-of  
2 ~~action--or--entry--accrued--~~

3 (4)--When-two-or-more-disabilities-coexist-at--the--time  
4 the--right--of--action--or--entry--accrues,--the--limitation--does  
5 not-attach-until--all--are--removed--"

6 NEW SECTION. Section 5. Saving clause. [This act] does  
7 not affect rights and duties that matured, penalties that  
8 were incurred, or proceedings that were begun before [the  
9 effective date of this act].

10 NEW SECTION. Section 6. Severability. If a part of  
11 [this act] is invalid, all valid parts that are severable  
12 from the invalid part remain in effect. If a part of [this  
13 act] is invalid in one or more of its applications, the part  
14 remains in effect in all valid applications that are  
15 severable from the invalid applications.

16 NEW SECTION. Section 7. Applicability. [This act]  
17 applies to causes of action arising on or after October 1,  
18 1993.

-End-

SENATE STANDING COMMITTEE REPORT

Page 1 of 3  
March 28, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 346 (third reading copy -- blue), respectfully report that House Bill No. 346 be amended as follows and as so amended be concurred in.

Signed: Wm Yellowtail  
Senator William "Bill" Yellowtail, Chair

That such amendments read:

1. Title, line 8.  
Following: "DAMAGES;"  
Strike: remainder of line 8
2. Title, lines 11 and 12.  
Strike: "SECTIONS" on line 11  
Insert: "SECTION"  
Strike: "AND 25-10-301" on line 12
3. Title, line 13.  
Following: "DATE"  
Insert: "AND A TERMINATION DATE"
4. Page 1, line 18.  
Strike: "action or actions"
5. Page 1, lines 19 and 20.  
Following: "malpractice," on line 19  
Strike: remainder of line 19 through "awards" on line 20  
Insert: "an award"
6. Page 1, line 21.  
Following: "\$500,000"  
Insert: "per claimant"
7. Page 1, line 21 through page 2, line 13.  
Strike: ", whether" on line 21 through "reduction" on page 2, line 13
8. Page 2, line 14.  
Strike: "For each claimant, further"  
Insert: "Prior to applying the \$500,000 limitation per claimant specified in this subsection (1), other"

9. Page 2, line 24.

Following: line 23

Insert: "(4) The \$500,000 limit in subsection (1) must be adjusted annually in accordance with the last previous calendar year's consumer price index for all urban consumers, U.S. department of labor, bureau of labor statistics."

Renumber: subsequent subsection

10. Page 3, lines 9 and 10.

Following: "27-6-103," on line 9

Strike: "OR"

Following: "8" on line 10

Insert: ", of a physician assistant-certified licensed under Title 37, chapter 20, part 4"

11. Page 3, lines 11 and 12.

Following: "claim" on line 11

Strike: remainder of line 11 through "27-6-103" on line 12

Insert: "means a claim based on a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death"

12. Page 3, lines 15 and 16.

Following: "inconvenience;" on line 15

Strike: remainder of line 15 through "disfigurement;" on line 16

13. Page 3, line 19.

Following: line 18

Insert: "(6) This section does not limit in any manner a claimant's recovery for physical impairment or disfigurement."

14. Page 3, line 19 through page 5, line 12.

Strike: section 2 in its entirety

Renumber: subsequent sections

15. Page 5, line 21.

Following: "order"

Insert: "and supporting findings of fact"

16. Page 6, line 21.

Following: "an"

Strike: "'A" (excellent)"

Insert: "'A++" (superior)"

Page 2 of 3  
March 28, 1993

Wm Amd. Coord.  
Wm Sec. of Senate

Wm  
Senator Carrying Bill

691655SC.Sma

SENATE

HB 346

691655SC.Sma

17. Page 6, line 22.

Strike: "7"

Insert: "10"

18. Page 6, line 23 through page 7, line 1.

Following: "bond." on line 23

Strike: remainder of line 23 through "discharged." on page 7,  
line 1

Insert: "The judgment is not satisfied and the judgment debtor is  
not discharged until all periodic payments have been made.  
As a condition to ordering periodic payments of future  
damages, the court shall require a judgment debtor who is  
not adequately insured to post security adequate to ensure  
full payment of damages awarded by the judgment. Upon  
termination of periodic payments of future damages, the  
court shall order the return of this security or any  
remainder to the judgment debtor. Following the occurrence  
or expiration of all obligations specified in the periodic  
payment judgment, any obligation of the judgment debtor to  
make further payments ceases and any security given reverts  
to the judgment debtor."

19. Page 7, lines 10 through 21.

Strike: section 4 in its entirety

Renumber: subsequent sections

20. Page 13, line 19.

Following: line 18

Insert: "NEW SECTION. Section 6. Termination. [This act]  
terminates October 1, 1995."

-END-



## 1 HOUSE BILL NO. 346

2 INTRODUCED BY BENEDICT, RYE, JACOBSON, ZOOK,  
3 WEEDING, GROSFIELD, GRIMES, WAGNER, ORR, DAVIS,  
4 PAVLOVICH, QUILICI, J. RICE, JERGSON, HARP, BIRD

5  
6 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING MEDICAL  
7 MALPRACTICE CLAIMS AND RECOVERIES; LIMITING NONECONOMIC  
8 DAMAGES; ~~LIMITING--PLAINTIFF'S--CONTINGENCY--ATTORNEY-FEES;~~  
9 ~~LIMITING--HEALTH--CARE--PROVIDER--LIABILITY;~~ ~~LOWERING--THE~~  
10 ~~STATUTE--OF--LIMITATIONS~~ PROVIDING FOR PERIODIC PAYMENT OF  
11 FUTURE DAMAGES UNDER CERTAIN CONDITIONS; AMENDING SECTIONS  
12 SECTION 25-9-403, ~~AND~~ 25-10-301, 27-1-714, 27-1-734,  
13 27-2-205, ~~AND~~ 27-2-401, MCA; AND PROVIDING AN APPLICABILITY  
14 DATE AND A TERMINATION DATE."

15  
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17 NEW SECTION. Section 1. Medical malpractice  
18 noneconomic damages limitation. (1) In a malpractice claim  
19 action or actions against one or more health care providers  
20 based on a single incident of malpractice, the combined  
21 awards AN AWARD for past and future damages for noneconomic  
22 loss may not exceed \$250,000 \$500,000 PER CLAIMANT, whether  
23 for one or more claimants in the same or separate  
24 proceedings, whether based on the same act or a series of  
25 acts that allegedly caused the injury, injuries, death, or

1 deaths that the action or actions are based on, and whether  
2 the act or series of acts were by one or more health care  
3 providers, A claimant has the burden of proving separate  
4 injuries, each arising from a different act or series of  
5 acts. An award or combination of awards in excess of  
6 \$250,000 \$500,000 must be reduced to \$250,000 \$500,000,  
7 after which the court shall make other reductions required  
8 by law. If a combination of awards for past and future  
9 noneconomic loss is reduced in the same action, future  
10 noneconomic loss must be reduced first and, if necessary, to  
11 reach the \$250,000 \$500,000 limit, past noneconomic loss  
12 must then be reduced. If a combination of awards is reduced  
13 to \$250,000 \$500,000, a claimant's share of the \$250,000  
14 \$500,000 must be the same percentage as the claimant's share  
15 of the combined awards before reduction. For each claimant,  
16 further PRIOR TO APPLYING THE \$500,000 LIMITATION PER  
17 CLAIMANT SPECIFIED IN THIS SUBSECTION (1), OTHER reductions  
18 must be made in the following order:

19 (a) first, reductions under 27-1-702;

20 (b) second, reductions under 27-1-703; and

21 (c) third, setoffs and credits to which a defendant is  
22 entitled.

23 (2) An award of future damages for noneconomic loss may  
24 not be discounted to present value.

25 (3) The \$250,000 \$500,000 limit in subsection (1) may

not be disclosed to a jury.

(4) THE \$500,000 LIMIT IN SUBSECTION (1) MUST BE ADJUSTED ANNUALLY IN ACCORDANCE WITH THE LAST PREVIOUS CALENDAR YEAR'S CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS, U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS.

~~(4)~~(5) As used in this section the following definitions apply:

(a) "Claimant" includes but is not limited to a person suffering bodily injury; a person claiming as a result of bodily injury to or the death of another; a person claiming on behalf of someone who suffered bodily injury or death; the representative of the estate of a person who suffered bodily injury or death, or a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, or health care facility, as defined in 27-6-103, OR A NURSE LICENSED UNDER TITLE 37, CHAPTER 8, OR A PHYSICIAN ASSISTANT-CERTIFIED LICENSED UNDER TITLE 37, CHAPTER 20, PART 4.

(c) "Malpractice claim" ~~has the meaning as defined in 27-6-103~~ MEANS A CLAIM BASED ON A NEGLIGENT ACT OR OMISSION BY A HEALTH CARE PROVIDER IN THE RENDERING OF PROFESSIONAL SERVICES, WHICH ACT OR OMISSION IS THE PROXIMATE CAUSE OF A PERSONAL INJURY OR WRONGFUL DEATH.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to physical and mental pain or suffering; emotional distress; inconvenience; physical impairment or disfigurement; loss of society, companionship, and consortium (other than household services); injury to reputation; and humiliation.

(6) THIS SECTION DOES NOT LIMIT IN ANY MANNER A CLAIMANT'S RECOVERY FOR PHYSICAL IMPAIRMENT OR DISFIGUREMENT.

~~NEW SECTION. Section 2. Medical malpractice contingency attorney fees limits. (1) An attorney may not contract for, charge, collect, or receive a contingency fee for representing a claimant in a malpractice claim, as defined in 27-6-103, against a physician, dentist, or health care facility, as defined in 27-6-103, OR AGAINST A NURSE LICENSED UNDER TITLE 37, CHAPTER 8, in excess of:~~

~~(a) 40% of the first \$50,000 recovered;~~

~~(b) 33 1/3% of the next \$50,000 recovered;~~

~~(c) 25% of the next \$500,000 recovered; and~~

~~(d) 15% of any amount above \$600,000 recovered.~~

~~(2) The limits in subsection (1) apply whether the recovery is by settlement, arbitration, judgment, appeal from a judgment, or otherwise. An attorney compensated under 72-3-633 in a malpractice claim against a physician, dentist, or health care facility is subject to the limits of~~

1 subsection--(1)--of--this--section,--but--the--court--may--approve--a  
2 fee--less--than--the--maximum--permitted--by--subsection--(1)--of  
3 this--section;

4 (3)--The---percentage---and---dollar--amount---limits---in  
5 subsection--(1)--apply--to--the--combined--recoveries--in--an--action  
6 in--which--one--or--more--attorneys--represent--one--or--more  
7 claimants--for--one--or--more--injuries--or--deaths--allegedly  
8 arising--from--the--same--act--or--series--of--acts;

9 (4)--As--used--in--this--section,--the--following--definitions  
10 apply:

11 (a)--"Action"--means--a--proceeding,--including--arbitration,  
12 prosecuted--to--seek--redress--for--personal--injury--or--wrongful  
13 death--allegedly--caused--by--malpractice--or--to--assert--a--right  
14 to--indemnity--or--subrogation--arising--out--of--a--malpractice  
15 claim;

16 (b)--"Claimant"--includes--but--is--not--limited--to--a--person  
17 suffering--bodily--injury,--a--person--claiming--as--a--result--of  
18 bodily--injury--to--or--the--death--of--another,--a--person--claiming  
19 on--behalf--of--someone--who--suffered--bodily--injury--or--death,  
20 the--representative--of--the--estate--of--a--person--who--suffered  
21 bodily--injury--or--death,--or--a--person--bringing--a--wrongful  
22 death--action;

23 (c)--"Recovery"--means--the--net--sum--received--by--settlement  
24 or--judgment--after--deductions--for--disbursements--or--costs  
25 incurred--in--connection--with--the--prosecution--or--settlement--of

1 a---claim,--costs--of--medical--care,--amounts--deducted--as  
2 collateral--sources--under--27-1-308,--and--an--attorney's--office  
3 overhead--costs--are--not--deductible--disbursements--or--costs;

4 **Section 2.** Section 25-9-403, MCA, is amended to read:

5 "25-9-403. Request for periodic payment of future  
6 damages. (1) A party to an action for personal injury,  
7 property damage, or wrongful death in which \$100,000 or more  
8 of future damages is awarded may, prior to the entry of  
9 judgment, request the court to enter a judgment ordering  
10 future damages to be paid in whole or in part by periodic  
11 payments rather than by a lump-sum payment. Upon such a  
12 request, the court may shall enter an order AND SUPPORTING  
13 FINDINGS OF FACT for periodic payment of future damages if  
14 unless the court finds that such periodic payment is not in  
15 the best interests of the claimant. The total dollar amount  
16 of the ordered periodic payments must equal the total dollar  
17 amount of the future damages without a reduction to present  
18 value.

19 (2) A court ordering the payment of future damages by  
20 periodic payments shall make specific findings as to the  
21 dollar amount of periodic payments needed to compensate the  
22 judgment creditor for future damages and as to whether an  
23 order for periodic payment of future damages is in the best  
24 interests of the claimant.

25 (3) The judgment order must specify the recipient or

recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall must be made.

(4) A court ordering periodic payment of future damages shall order that the payments be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A\*--~~excellent~~" "A++" (SUPERIOR) or higher rating and is in a class 7 10 or higher classification. The annuity also serves as any required supersedeas bond. Upon ~~purchase of a court approved annuity, the court may order that the judgment is satisfied and that the judgment debtor is discharged.~~ THE JUDGMENT IS NOT SATISFIED AND THE JUDGMENT DEBTOR IS NOT DISCHARGED UNTIL ALL PERIODIC PAYMENTS HAVE BEEN MADE. AS A CONDITION TO ORDERING PERIODIC PAYMENTS OF FUTURE DAMAGES, THE COURT SHALL REQUIRE A JUDGMENT DEBTOR WHO IS NOT ADEQUATELY INSURED TO POST SECURITY ADEQUATE TO ENSURE FULL PAYMENT OF DAMAGES AWARDED BY THE JUDGMENT. UPON TERMINATION OF PERIODIC PAYMENTS OF FUTURE DAMAGES, THE COURT SHALL ORDER THE RETURN OF THIS

SECURITY OR ANY REMAINDER TO THE JUDGMENT DEBTOR. FOLLOWING THE OCCURRENCE OR EXPIRATION OF ALL OBLIGATIONS SPECIFIED IN THE PERIODIC PAYMENT JUDGMENT, ANY OBLIGATION OF THE JUDGMENT DEBTOR TO MAKE FURTHER PAYMENTS CEASES AND ANY SECURITY GIVEN REVERTS TO THE JUDGMENT DEBTOR. If the judgment creditor dies before all periodic payments have been made, the remaining payments become the property of his the creditor's estate.

(5) For a malpractice claim, as defined in 27-6-103, attorney fees and litigation expenses for the periodic payment portion of a judgment must be calculated and paid as provided in 25-9-404, and for purposes of the fee limitations in [section 2], the periodic payments may not be considered separate recoveries."

**Section 4.** ~~Section 25-10-301, MCA, is amended to read:--~~

~~"25-10-301. Determining compensation of attorneys. (1) Except as provided in (section 2) and subsection (2), the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, except that in~~

~~(2) In probate proceedings, the court may fix and allow the compensation of attorneys representing administrators, executors, guardians, trustees, and agents appointed by the court.~~

~~(3) But parties Parties to actions or proceedings are~~

entitled-to-costs-and-disbursements-as-provided-by-law."

**Section 5.** Section 27-1-714, MCA, is amended to read:--

"27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency. (1) Any person licensed as a physician and surgeon under the laws of the state of Montana, any hospital or its agents or employees, any volunteer firefighter or officer of any nonprofit volunteer fire company, or any other person who in good faith renders emergency care or assistance without compensation except as provided in subsection (2) at the scene of an emergency or accident is not liable for any civil damages for acts or omissions other than damages occasioned by gross negligence or by willful or wanton acts or omissions by such the person in rendering such emergency care or assistance.

(2) Subsection (1) includes a person properly trained under the laws of this state who operates an ambulance to and from the scene of an emergency or renders emergency medical treatment on a volunteer basis so long as the total reimbursement received for such volunteer services does not exceed 25% of his the person's gross annual income or \$3,000 a calendar year, whichever is greater.

(3) If a nonprofit subscription fire company refuses to fight a fire on nonsubscriber property, such the refusal does not constitute gross negligence or a willful or wanton

act or omission.

(4) As used in this section, the following definitions apply:

(a) "Emergency" means a situation that requires immediate services for the alleviation of severe pain or immediate diagnosis or treatment of medical conditions that, if not immediately diagnosed or treated, could reasonably be expected to lead to serious disability or death.

(b) "Scene of an emergency or accident" includes but is not limited to hospitals, including their emergency rooms, and the offices and homes of licensed physicians and surgeons, if the party seeking the benefit of this section had no preexisting legal obligation arising from a voluntary provider-patient relationship to care for or assist the person cared for or assisted at the time of the rendering of the care or assistance in question."

**Section 6.** Section 27-1-734, MCA, is amended to read:--

"27-1-734. Limits on liability of health care provider when prenatal care not obtained and in emergency situations. A physician licensed under Title 37, chapter 3, a nurse licensed under Title 37, chapter 8, or a hospital licensed under Title 50, chapter 5, rendering care or assistance in good faith to a patient of a direct entry midwife in an emergency situation or during the delivery of a child to a woman who did not obtain adequate prenatal care from a

1 ~~physician is liable for civil damages for acts or omissions~~  
 2 ~~committed in providing such emergency care or assistance or~~  
 3 ~~obstetrical care or assistance only to the extent that those~~  
 4 ~~damages are caused by gross negligence or by willful or~~  
 5 ~~wanton acts or omissions and only if the party seeking the~~  
 6 ~~benefit of this section had no preexisting legal obligation~~  
 7 ~~arising from a voluntary provider-patient relationship to~~  
 8 ~~care for the person rendered the care or assistance at the~~  
 9 ~~time of the rendering of the care or assistance in question.~~  
 10 ~~"Adequate prenatal care" means substantial compliance by the~~  
 11 ~~woman with a routine schedule of physical examinations by a~~  
 12 ~~physician and generally includes monthly visits for the~~  
 13 ~~first 28 weeks of pregnancy, visits every 2 weeks for the~~  
 14 ~~next 8 weeks, and weekly visits after the 36th week and~~  
 15 ~~until delivery."~~

16 **Section 7.** ~~Section 27-2-285, MCA, is amended to read:--~~

17 ~~"27-2-285. Actions for medical malpractice. (1) Action~~  
 18 ~~in tort or contract for injury or death against a physician~~  
 19 ~~or surgeon, dentist, registered nurse, nursing home or~~  
 20 ~~hospital administrator, dispensing optician, optometrist,~~  
 21 ~~licensed physical therapist, podiatrist, psychologist,~~  
 22 ~~osteopathy, chiropractor, clinical laboratory bioanalyst,~~  
 23 ~~clinical laboratory technologist, pharmacist, veterinarian,~~  
 24 ~~a licensed hospital or long-term care facility, or licensed~~  
 25 ~~medical professional corporation, based upon alleged~~

1 ~~professional negligence or for rendering professional~~  
 2 ~~services without consent or for an act, error, or omission,~~  
 3 ~~shall must, except as provided in subsection (2), be~~  
 4 ~~commenced within 3 years after the date of injury or 3 years~~  
 5 ~~1 year after the plaintiff discovers or through the use of~~  
 6 ~~reasonable diligence should have discovered the injury,~~  
 7 ~~whichever occurs last, but in no case may such action be~~  
 8 ~~commenced after 5 years from the date of injury first, and~~  
 9 ~~the provisions of 27-2-481 do not apply. However, this time~~  
 10 ~~limitation shall must be tolled for any period during which~~  
 11 ~~there has been a failure of a defendant to disclose any act,~~  
 12 ~~error, or omission upon which such the action is based and~~  
 13 ~~which that is known to the plaintiff defendant or through~~  
 14 ~~the use of reasonable diligence subsequent to said the act,~~  
 15 ~~error, or omission would have been known to him the~~  
 16 ~~defendant.~~

17 ~~(2) Notwithstanding the provisions of 27-2-481, in an~~  
 18 ~~action for death or injury of a minor who was under the age~~  
 19 ~~of 4 on the date of his injury, the period of limitations in~~  
 20 ~~subsection (1) begins to run when the minor reaches his~~  
 21 ~~eighth birthday or dies, whichever occurs first, and the~~  
 22 ~~must be commenced within 3 years after the date of the death~~  
 23 ~~or injury, except that if the minor was under 6 years of age~~  
 24 ~~on the date of the death or injury, the action must be~~  
 25 ~~commenced within 3 years after the date of the death or~~

~~injury or prior to the time the minor reaches 8 years of age, whichever occurs last. The time for commencement of the action is tolled during any period during which the minor does not reside with a parent or guardian and for any period during which a parent or guardian and either the defendant or the defendant's insurer failed through fraud or collusion to bring an action on behalf of the minor.~~

**Section 8.** Section 27-2-401, MCA, is amended to read:--

"27-2-401. When person entitled to bring action is under a disability, (1) if a person entitled to bring an action mentioned in part 2, except 27-2-205 and 27-2-211(3), is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not a part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by any such disability except minority;

(2) if an action is barred by 27-2-304, any of the heirs, devisees, or creditors who at the time of the transaction upon which the action might have been founded was under one of the disabilities mentioned in subsection (1) may, within 5 years after the cessation of such the disability, maintain an action to recover damages in such the action he the plaintiff may recover such the sum or the

value of such property as he that the plaintiff would have received upon the final distribution of the estate if an action had been seasonably timely commenced by the personal representative.

(3) No person may avail himself of a A disability does not apply unless it existed when his a person's right of action or entry accrued.

(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until all are removed."

**NEW SECTION. Section 3. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

**NEW SECTION. Section 4. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**NEW SECTION. Section 5. Applicability.** [This act] applies to causes of action arising on or after October 1, 1993.

**NEW SECTION. SECTION 6. TERMINATION. [THIS ACT] TERMINATES OCTOBER 1, 1995.**