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# Montana Trial Lawyers ASSOCIATION

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March 4, 2005

TO: Senate Judiciary Committee  
RE: HB 222

Thank you for the opportunity to present our perspective to the Committee. Before I specifically address the issues before you, I'd like to offer a couple of general comments.

Please keep in mind that there is a continuing need for malpractice insurance because Montanans will be the victims of preventable medical injuries - and all those citizens are not here to speak for themselves, simply because those people do not yet know that they will be injured. MTLA supports the basic, conservative, principle that individuals, corporations and governmental entities should be accountable and responsible for their actions or omissions that cause harm to another - whether or not they are doctors or hospitals. This principle is set forth in Article II, Section 16 of our Montana Constitution which provides that "**Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character.**"

Those of you that have been around here for a while, and those of you that heard the testimony on other medical malpractice bills, have heard health care providers say that they do not want to take away the rights of patients who have been injured by malpractice and have a legitimate claim. HB 222 does just that - it unconstitutionally takes away the rights of injured people with legitimate claims. It caps damages for people who have proven to a judge or jury that they were injured by medical malpractice.

In Montana this debate is not about so-called "frivolous lawsuits" or an explosion in the number of malpractice cases, there is just no empirical evidence for any of those assertions. In fact, information from the National Practitioner Data Bank shows that the number of medical malpractice cases in Montana for which a payment has been made have **decreased** from 93 in 1999 to 62 in 2003.

You will hear no facts to justify this bill - no explosion in the number of Emergency Room cases;

no multi-million dollar jury verdicts for Emergency Room cases; no Emergency Rooms closing down; no exodus of ER doctors from the state; and, **absolutely no information on what the costs of noneconomic damages in Emergency Room cases have been in Montana.** Most importantly, you will hear no factual testimony from the insurance industry that passing this bill will lower insurance rates.

Liability insurance rates have not increased dramatically over the past decade, they were stable or even decreased for much of the past decade. In the short term, premiums have spiked in the last couple of years, especially for some high risk specialties and for small rural hospitals. But premiums over the last 15 years have averaged 6.5% increase per year.

The SJR 32 Subcommittee heard testimony from healthcare providers who testified that they had never been sued or had been sued once years ago, yet their premiums were going up and up. If the evidence is predominately that there are no or few lawsuits, the cause for premium increases cannot logically be attributed solely or mainly to lawsuits - **and** therefore any 'reforms' of the legal system will not be a meaningful solution that brings lower and more stable premiums.

The "crisis" is in the insurance industry. It is well documented that over the past 30 years the insurance industry, including medical liability to general liability insurance, has gone through cycles of so-called "crisis" and each time has responded by dramatically increasing rates and calling for "tort reforms" - restrictions of citizens' rights to hold legally accountable and responsible those that harm them. *Premium Deceit* (*Premium Deceit* is one of several reports and studies provided to the Subcommittee during its deliberations, and they are identified herein in *italics*.)

In the past few years we have had declining investment income for insurance companies - insurance companies make money by investing the premiums they collect, and both the bond and stock markets have declined. The investment problems were aggravated by the devastating effect of the 9/11 attacks on the reinsurance market, which helped trigger increasing rates in all lines of insurance. Those two factors have combined with poor business decisions by insurers in the 1990's to hit the medical malpractice insurance business particularly hard.

Throughout the 1990's many insurers tried to expand their market share in medical malpractice premiums, in part because they perceived the market to be very profitable based upon the returns of industry main stays like St. Paul. Those favorable returns, however, were due to previously charging more for premiums than they eventually needed for claims, building up much larger reserves than were necessary. In St. Paul's case, from 1992 to 1997 over \$1 billion of those reserves became net income - not premium dividends paid back to physicians, not lower premiums, but profit.

In order to get in on such profits, many insurers aggressively sold policies by moving into new geographic regions and undercutting the premium prices of established insurers in those markets. By 1995, many insurers were offering policies for less than the amount needed to cover malpractice claims. This trend was able to continue through 2000 because insurers were able to make up the difference with investment income. But, as investments went down insurers began dramatically raising rates, decreasing their numbers of policies and tightening their underwriting standards, and some insurers began withdrawing from the malpractice line all together. The

result - fewer insurers, tighter underwriting standards, fewer policies being written, higher premiums - is our current "crisis."

There is a wealth of evidence that insurance industry practices - from rate setting to investments to profit taking - are the primary culprits in the medical liability insurance "crisis." Resources and studies available to demonstrate the problems with the insurance industry - *GAO Reports, Premium Deceit Report, Weiss Report, FTCR Reports, Wall Street Journal, Business Week* - are just a few of the resources that demonstrate that insurance reform is needed. It is worth noting that the profits of the 13 largest insurers were up 30% last year - the industry is coming out of it's hard market, without 'tort reforms.' The best evidence that insurance practices are the problem is the testimony of the Billings Deaconess representative - they went with a captive insurer alternative and **decreased** premiums in 2003 and they expected a **decrease** again in 2004. They also took aggressive risk management steps to **decrease** the chances of preventable medical injuries taking place

**Insurance Reform Is Necessary:** Insurance reform is the only answer that will actually keep premium rates in check, now and in the future. It is quite clear that the rates have remained relatively stable in California in large part because of insurance reforms passed in 1988 as Proposition 103. *FTCR Report, How Insurance Reform Lowered Doctors Medical Malpractice Rates in California.* That was again proven, when a consumer challenge to a proposed medical malpractice insurance premium rate hike in California resulted in a **36% decrease** in the rate hike requested by the insurer. *FTCR News Release, September 3, 2003*

Insurance reforms such as those passed in California make sense, especially the provisions that: insurers have the burden to justify rate increases, or decreases, **before** they are instituted; and, that any individual has standing to challenge an insurers rate increase request. Such reforms would limit price gouging and it would also serve to protect insurers from their own propensities to ignore sound actuarial standards in favor of quick profits

Additionally, encouraging or aiding captive insurance arrangements, cooperative purchasing and other alternatives to purchasing insurance from private carriers should be considered by the committee - remember, Billings Deaconess **decreased** their rates.

You also won't hear anything about the single most important factor in decreasing medical malpractice insurance rates - **decreasing the incidences of malpractice.** Medical studies indicate that 48,000 to 96,000 Americans die each year from medical errors - statistically that is about 175 to 350 Montanans each year. A recent report from the American Association of Critical Care Nurses, entitled **Silence Kills**, found that 63% of physicians were concerned about the competence of a colleague, yet **less than 1%** spoke with the colleague and shared their full concerns. These physicians reported that this questionable physician had: done something dangerous at least once a month in 21% of the cases; had the problem for at least a year in 66% of the cases; and, had harmed a patient during the last year in 19% of the cases.

## What The Legislature Should Not Do

**Further Limit Victims' Compensation:** We already have a non-economic (amputation, disfigurement, permanent disability, loss of fertility, loss of a child, pain and suffering, etc) damages cap of \$250,000 in Montana. Such caps disproportionately limit the amount of damages awarded to women, children and the elderly. If caps that are the lowest in the nation have not worked, let's try something else, like insurance reforms, rather than further limiting the rights of victims.

**HB 222 seeks a cap of \$100,000 for non-economic damages. This "solution" only harms people with legitimate malpractice claims - those that win a jury trial where negligence is established would be limited to \$100,000 - no more.**

**Blame Malpractice Costs For Increasing Health Care Costs** Contrary to current political posturing, the costs of malpractice suits **are not** a significant factor in overall health care costs. If all malpractice claims were eliminated - no verdicts, no settlements, no premiums paid - that would amount to less than 2% of total health care costs in Montana. *Diagnosing The Ailment*, pp 88-92.

## Conclusion

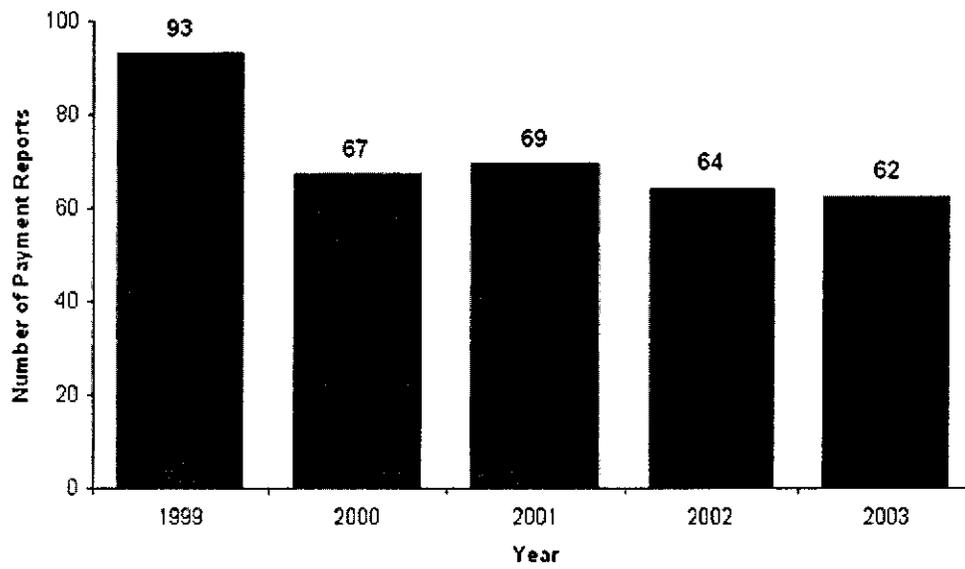
The reality is that malpractice premiums should increase, just as all other costs increase. For example, a major component of most malpractice cases is future medical care, so it logically follows that as medical costs increase, so will malpractice awards. In Montana, premiums have increased an average of about 6.5% over the past decade, the problem for health care providers is that the bulk of that increase has occurred in the past couple years, after years of little or no increases.

There is not an easy direct correlation between malpractice premiums collected and claims paid. So long as insurers are allowed to reap the profits when investments are productive, and then be relieved from the consequences of their bad business decisions - by charging higher premiums or limiting the damages awarded to injured people - when investment markets have soured, we will be on this continual merry-go-round of insurance "crisis." Malpractice premiums have gone up across the country - in states like Montana and California that have "tort reform" and in states without "tort reforms." It's time to address the real problem - the insurance industry - by regulation and by utilizing viable alternatives.

Finally, the Nevada legislation mentioned by the sponsor, has not had any effect on malpractice rates in Nevada. Rates have not gone down there. The \$50,000 cap in Nevada is being challenged in the courts - just as a \$100,000 cap would be challenged in Montana.



### Number of Montana Medical Malpractice Payments Reported to the National Practitioner Data Bank



Source: National Practitioner Data Bank Annual Report 2003



# UTAH MEDICAL INSURANCE ASSOCIATION

## Summary of Rate Changes by Year

### MONTANA

12/01/83	0.0%
12/01/84	0.0
12/01/85	38.0
12/01/86	58.0
12/01/87	52.5
01/01/89	13.0
01/01/90	0.0
01/01/91	-18.3
01/01/92	0.0
01/01/93	0.0
01/01/94	0.0
01/01/95	0.0
01/01/96	0.0
01/01/97	0.0
01/01/98	0.0
01/01/99	0.0
01/01/00	9.8
01/01/01	21.5
01/01/02	35.0
01/01/03	25.0
01/01/04	25.0

(Rate filing to follow)

# SILENCE KILLS

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### Nurses and Other Clinical Care Providers' Concerns about Incompetence

53% are concerned about a peer's competence.	This peer does something dangerous at least once a month.	27%
12% have spoken with this peer and shared their full concerns.	The problem with this peer has gone on for a year or more.	48%
	A patient has been harmed by this person's actions during the last year.	7%
34% are concerned about a physician's competence.	This physician does something dangerous at least once a month.	19%
Less than 1% have spoken with this physician and shared their full concerns.	The problem with this physician has gone on for a year or more.	54%
	A patient has been harmed by this physician's actions during the last year.	8%

Table 1-a

### Physicians' Concerns about Incompetence

81% are concerned about a nurse's or other clinical-care provider's competence.	This person does something dangerous at least once a month.	15%
8% have spoken with this person and shared their full concerns.	The problem with this person has gone on for a year or more.	46%
	A patient has been harmed by this person's actions during the last year.	9%
68% are concerned about a physician's competence.	This physician does something dangerous at least once a month.	21%
Less than 1% have spoken with this physician and shared their full concerns.	The problem with this physician has gone on for a year or more.	66%
	A patient has been harmed by this physician's actions during the last year.	19%

Table 1-b