

2001

Heidi J. Judd personally and as the natural parent and guardian of Athan Motgomery for and on behalf of Athan Motgomery v. Gregory Drezga, M.D. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

HEIDI J. JUDD personally and as the
natural parent and guardian of ATHAN
MONTGOMERY for and on behalf of
ATHAN MONTGOMERY,

Plaintiffs and Appellants,

v.

GREGORY DREZGA, M.D.,

Defendant and Appellee.

**REPLY BRIEF OF THE
APPELLANTS**

Case No. 20010646-SC

Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROGER A. LIVINGSTON PRESIDING

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INTRODUCTION

Athan Montgomery was injured twice before he was even fully born--once by Dr. Drezga and once by the medical-insurance industry. As a result of Dr. Drezga's negligence in delivering him, Athan must go through his life with a traumatic brain injury that has left him unable to fully use his left side, with developmental, cognitive, speech and balance problems and subject to seizures. And as a result of the medical-insurance industry's successful lobbying of the Utah Legislature in the mid 1980s, Athan has not been fully compensated for his injuries. The general damage verdict a unanimous jury awarded Athan against Dr. Drezga was cut by 80 percent.

A jury found--and it remains undisputed--that, to fairly and adequately compensate Athan for the noneconomic aspects of his injuries, he should receive \$1,250,000. The trial court awarded Athan only one-fifth of that amount because the legislature, without any knowledge of Athan or the facts of his case, determined that no one injured by medical negligence should ever receive more than \$250,000 in noneconomic damages.¹

Dr. Drezga and the amici would have this court abdicate its responsibility and defer to the legislature in determining the constitutionality of the Utah Health Care Malpractice Act's damage cap. While some legislative enactments may be entitled to deference, when the legislature deprives injured children of their right to a complete

¹ Although the damage cap was increased in 2001 to try to keep up with inflation and although Dr. Drezga repeatedly refers to the cap as a \$400,000 cap, the cap at issue here is the \$250,000 cap applicable to cases that arose before July 1, 2001, UTAH CODE ANN. § 78-14-7.1 (1996).

remedy for their injuries, heightened scrutiny is required. The damage cap cannot pass such scrutiny. The damage cap is unconstitutional because it violates Athan Montgomery's constitutional rights to a remedy, to due process, to the uniform operation of the laws and to a jury trial. It also violates the constitutionally mandated separation of powers.

The plaintiffs will first address the general arguments of Dr. Drezga and the amici and then address their specific constitutional arguments.

ARGUMENT

I. *LEE v. GAUFIN*'S HOLDING THAT THERE WAS NO MEDICAL MALPRACTICE INSURANCE CRISIS IN UTAH IS DISPOSITIVE OF THIS CASE.

Dr. Drezga argues generally that the damage cap is constitutional because the legislature had good reasons to pass the cap, and the cap has achieved its intended purpose. The damage cap was passed without any statement of legislative purpose. Dr. Drezga claims, however, that the purpose of the cap is the same as the purpose of the original malpractice act, namely, to keep down medical malpractice insurance rates in Utah so that health-care providers could obtain affordable insurance. (Br. of Aplee at 5.)

This court has already rejected the argument that a medical malpractice insurance crisis existed that justified the legislature in limiting the rights of an injured minor to seek a full and fair remedy for his injuries. *Lee v. Gaufin*, 867 P.2d 572, 583-89 (Utah 1993).²

Dr. Drezga tries to distinguish *Lee* on the grounds that the information it reviewed was only what was before the legislature in 1976, when it first passed the malpractice act, and not what was before the legislature in 1986, when it passed the cap. (Br. of Aplee at 29.) There are several problems with this argument.

First, because the damage cap infringes on constitutional rights (including the right to a remedy, the right to the uniform operation of the law and the right to a jury trial, as discussed more fully below), the burden was not on the plaintiffs to show that the legislative history of the damage cap was inadequate to support the cap. Rather, the burden was on Dr. Drezga to show that the damage cap was “a reasonable, nonarbitrary means for lowering medical malpractice premiums in Utah.” *Lee*, 867 P.2d at 592 (Zimmerman, J., concurring in the result, joined by Hall, C.J.). *See also, e.g., id.* at 591; *Swayne v. L.D.S. Soc. Servs.*, 795 P.2d 637, 647 n.1 (Utah 1990) (Zimmerman, J., concurring & dissenting); *Velarde v. Board of Review of Indus. Comm’n of Utah*, 831 P.2d 123, 128 n.8 (Utah Ct. App. 1992). Although the damage cap has its own legislative history, Dr. Drezga relies primarily on the history of and purported justifications for the original malpractice act, enacted in 1976, to support the damage cap. (See Br. of Aplee at

² *Lee* struck down the malpractice act’s statute of limitations as applied to minors, UTAH CODE ANN. § 78-14-4(2).

5, 28.)³ Neither he nor the health-care amici have shown what the legislature considered in enacting the cap in 1986.⁴ Cf. Magleby, *supra* note 3, at 252 (“the numerical analysis

³ The only legislative history from the 1986 act that either Dr. Drezga or the amici cite is comments in the floor debates arguing that the cap would result in a 20% reduction in medical malpractice insurance rates, which were blamed for costing consumers an extra \$45 a day for hospital stays. (Br. of Aplee at 8 n.8 (citing James E. Magleby, *The Constitutionality of Utah’s Medical Malpractice Damages Cap Under the Utah Constitution*, 21 J. CONTEMP. L. 217, 251 (1995), an article that, incidentally, concluded that the damage cap would probably be found unconstitutional.) “No report on these figures was ever published by a legislative committee.” Magleby, *supra*, at 251 n.183. The 20% figure was based on a New York study, *see* Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #21), and “the medical and legal environments in New York differ substantially from those in Utah,” Matthew K. Richards, Comment, *The Utah Medical No-fault Proposal: A Problem-fraught Rejection of the Current Tort System*, 1996 B.Y.U. L. REV. 103, 116. In fact, the rates for the Utah Medical Insurance Association (UMIA), the largest malpractice insurer in Utah, increased 23.8% from the time the act took effect July 1, 1986, to 1994. (*See* Br. of Amici Curiae Intermountain Health Care, Inc., et al. [hereinafter “IHC Br.”], addendum at 15.) Moreover, the \$45 a day figure was based on a Missouri survey that had nothing to do with Utah. *See* Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #21).

⁴ The health-care amici rely principally on the 1994 Tillinghast report that two of them (along with UMIA) commissioned. They have not shown that the legislature knew about, much less considered, the substance of the Tillinghast report when it enacted the damage cap in 1986, nor have they cited any authority for considering such post-hoc justifications in determining whether the legislature had a sufficient basis for enacting the cap. The Tillinghast report does not show that any increase in insurance premiums for Utah physicians was attributable to large jury awards in Utah malpractice cases or that a \$250,000 cap on noneconomic damages would significantly reduce premiums, and, indeed, it could not, since in 1986 there had never been an award of noneconomic damages in Utah even half the size of the cap. *See* Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20). In fact, other studies have shown that the alleged crisis of the mid 1980s was not primarily caused by jury verdicts. *See infra* note 34. Moreover, any suggestion in the Tillinghast report that the damage cap was effective in meeting its objective is dubious at best. As the Tillinghast report acknowledged, the damage cap applied only to claims occurring after its effective date (July 1, 1986), and it took over four years to resolve claims for more than \$100,000. (*See* IHC Br. addendum at 94.) Yet the fortunes of malpractice insurers in Utah began to improve almost

conducted in *Lee* is probably still valid, unless the state can produce new evidence of a sudden increase in malpractice cases and the size of their verdicts”).

Second, in *Lee* this court relied in part on data from the 1980s, including information as recent as 1987, in rejecting the proposition that a medical malpractice crisis justified placing discriminatory limitations on the malpractice claims of minors. *See* 867 P.2d at 584, 587-89.⁵ That information included evidence that, from 1979 through 1983, UMIA collected over \$13 million in premiums and earned \$4.3 million in investments and had unpaid losses of about \$8.3 million. 867 P.2d at 587 n.24.⁶ Based on such evidence, this court in *Lee* rejected the notion that there was a medical malpractice insurance crisis in Utah as late as 1983, just three years before the cap was enacted. *See id.* at 587 n.24 (citing UMIA Financial Statement for 1983; *Best's Insurance*

immediately. (*See, e.g., id.* at 105-06.) For 1988, medical malpractice insurers in Utah collected \$22.8 million in premiums and incurred only \$4.7 million in losses. UTAH INSURANCE DEPARTMENT, REPORT TO GOV. NORMAN H. BANGERTE: BUSINESS OF 1988, at 31 (addendum at 2). Not surprisingly, the insurance industry's recovery coincided with the nation's economic recovery as a whole. The Dow Jones Industrial average decreased in 1988 and then rose steadily for the next thirteen years, until the next alleged malpractice crisis in 2001. *See, e.g.,* www.jamesbaker.com/data/djia.htm.

⁵ Some of the data the court relied on, such as the Utah State Medical Association's *Medical Care Cost Containment Proposals*, cited at 867 P.2d at 587, was actually part of the legislative history for the 1986 damage cap. *See* Mins. of the Agric. & Health Study Comm., May 16, 1984, attachment.

⁶ For 1985, the year before the damage cap was enacted, medical malpractice insurers in Utah wrote \$12,021,561 in premiums and paid losses of \$10,366,172. UTAH INSURANCE DEPARTMENT, REPORT TO NORMAN H. BANGERTE . . . : BUSINESS OF 1985, at 18 (addendum at 4). Thus, even at the height of the so-called crisis, malpractice insurers in Utah were still making money.

Reports for Property-Casualty Companies, 1983). Moreover, from the empirical evidence that was available in 1986, when the legislature enacted the cap, it was not at all clear that a damage cap would reduce premiums, especially enough to make any difference in health-care costs. See, e.g., Frank A. Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL., POL'Y & L. 629, 629, 639-43 (1985).

Third, the legislative history of the 1986 act suffers from the same defects this court found in the 1976 act. It does not show that there was any crisis in Utah--in terms of either malpractice verdicts or the unavailability of malpractice insurance--at the time the bill was passed. In fact, it shows just the opposite.

Senator Haven Barlow, the bill's sponsor, admitted that there had never been any award in Utah for pain and suffering higher than \$100,000. Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20). Senator Barlow also admitted that he was not aware of any Utah doctors who had stopped delivering babies because of the cost of malpractice insurance. *Id.* (audograph disc #21.) See also Remarks of Sen. Hillyard, Utah Senate, Jan. 23, 1986 (audograph disc #21) ("you admit here on the floor of the Senate that there is no problem with this right now"). Moreover, the number of medical malpractice cases filed in Utah had been cut in half the previous year. Remarks of Sen. Matheson, Jan. 23, 1986 (audograph disc #21). Cf. *Lee*, at 867 P.2d at 585 (rejecting the claim of a crisis in part because claims in Utah had been decreasing). Nevertheless, Senator Barlow thought that the bill was necessary, not so much to address a crisis in

Utah, but to send a message to insurers that Utah was doing something about medical malpractice insurance. Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #21).

Although the Utah State Medical Association claimed that “there have been a few substantial awards in this state,”⁷ it acknowledged that “certain states have a much greater problem than Utah.” Utah State Medical Association, *Medical Care Cost Containment Proposals* 17 (Mar. 1984).⁸

The legislative committee considering the proposed legislation reviewed a memorandum from the state Insurance Commissioner that stated, “Medical malpractice

⁷ Senator Barlow noted one jury verdict for \$4.3 million in Utah County three years earlier. Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20). The verdict (actually for \$4,775,000 in 1982) was for a newborn, who suffered severe brain damage during delivery resulting in spastic quadriplegia, and for his mother, who suffered a ruptured uterus, necessitating a hysterectomy. Their claimed future economic losses alone were \$7 million. *See Hunter v. Lewis*, JVR No. 17446, 1982 WL 244812. Senator Barlow also noted two recent settlements over \$2 million each but acknowledged that both were for economic losses and would not have been affected by the damage cap. Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20).

⁸ Utah has traditionally had some of the lowest malpractice verdicts in the United States. *See Magleby, supra* note 3, at 252 (footnote omitted). In fact, for the period from September 1, 1990, through December 31, 2000, Utah ranked 50th in the nation in median malpractice payments. U.S. Dep’t of Health & Human Servs., *National Practitioner Data Bank 2000 Annual Report*, table 9 (addendum at 7). The legislative committee considering the cap reviewed a paper commissioned by the Insurance Corporation of America that admitted that, “[a]lthough concern about the malpractice crisis [of the 1970s] was nationwide, subsequent studies have indicated that a true crisis existed in only nine states,” and Utah was not one of them. Karen Zellars & Jed Robinson, *Limitations on Damages for Acts of Medical Malpractice: Are Ceilings Constitutional?* (Jan. 1982) (attached to the committee’s Sept. 21, 1983 minutes), at 2 & n.4. The authors noted that, of 13 states that had passed damage caps, 10 “apparently did not have a crisis at the time their statute was enacted.” *Id.* at 2.

rates in Utah are still among the lowest in the country,” and concluded that “medical malpractice rates in Utah are not excessive.” Memo. from Roger C. Day to Members of the Agric. & Health Interim Study Comm., Aug. 16, 1983, at 2, attached to Mins. of Agric. & Health Study Comm., Sept. 21, 1983. The Commissioner also noted, “Additional companies are continually entering the market to provide medical malpractice coverage for Utah doctors. This will continue to improve the competitiveness of the Utah marketplace.” *Id.*⁹

The legislative history also does not show that a \$250,000 cap on noneconomic damages would likely make malpractice insurance more available in Utah. Senator Matheson related the experience of a Utah hospital that had its insurance canceled, not because any claims had been made against it but because of two lawsuits in California that caused its insurer to cancel all its policies. *See* Remarks of Sen. Matheson, Utah Senate, Jan. 23, 1986 (audograph disc #21). As one senator stated, “[Y]ou pass a law that limits a right to recovery for Utah citizens, but by the same token, our health-care providers are paying insurance based on a national standard, and we end up with no real influence on what happened here.” Remarks of Sen. Hillyard, Utah Senate, Jan. 23, 1986 (audograph disc #21).

⁹ By the end of 1985, there were 42 insurers writing medical malpractice insurance in Utah. UTAH INSURANCE DEPARTMENT, REPORT TO NORMAN H. BANGERTER . . . : BUSINESS OF 1985, at 27 (addendum at 5).

To the extent that Utah insurance rates were based on Utah experience, the evidence did not show that the cap was necessary to keep malpractice rates low because there had never been a verdict in Utah for pain and suffering of \$100,000, let alone \$250,000. Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20).

In passing the damage cap, the House acknowledged that the cause of the alleged insurance crisis was not malpractice awards but insurance companies setting their premiums too low to get an adequate return for their investors. *See* Remarks of Reps. Fox, Holt and Sykes, Utah House of Representatives, Feb. 12, 1986 (record #3). *See also infra* note 33.

The same cost containment proposals that the *Lee* court cited to show that “the dominant causes of increased health-care costs were other than increased malpractice insurance premiums,” 867 P.2d at 587, also admitted, “Setting the size of the limit [on noneconomic damages] is arbitrary.” Utah State Medical Association, *supra*, at 17.

In short, there is no evidence before the court that the legislature properly found either that a crisis existed in Utah or that a \$250,000 damage cap--or any cap at all--was necessary to assure continued affordable malpractice insurance or health care in Utah.¹⁰

¹⁰ Moreover, there is evidence that damage caps do *not* in fact lower premiums, at least not significantly. *See, e.g., Lee*, 867 P.2d at 587 (notwithstanding tort reform legislation, “malpractice premiums have continued to rise, while the ratio of physicians’ malpractice insurance costs to physicians’ incomes nationally has not changed significantly”) (citing Glen O. Robinson, *The Medical Malpractice Crisis of the 1970s: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 31 (1986)). *See also* Statement of Sen. Edward M. Kennedy in Opp’n to the Med. Malpractice Amend., July 26, 2002 (addendum at 10-11); William P. Gronfein & Elenor DeArman Kinney, *Controlling*

But even if damage caps lower premiums, as Dr. Drezga and the amici claim, that does not mean that they are constitutional. Theoretically, one could stabilize insurance premiums by limiting medical malpractice damages to \$1 or by immunizing doctors from all liability, yet such draconian steps would clearly be unconstitutional. See, e.g., *Condemarin v. University Hosp.*, 775 P.2d 348, 366 (Utah 1989) (striking down a \$100,000 cap on total damages against the University Hospital); *Masich v. United States Smelting, Refining & Mining Co.*, 113 Utah 101, 191 P.2d 612, 624 (“If the legislature were to abolish all compensation and all common law rights for negligence . . . , no contention could reasonably be made that it was a proper exercise of the police power”),

Large Malpractice Claims: The Unexpected Impact of Damage Caps, 16 J. HEALTH POL., POL’Y & L. 441, 458 (1991). In fact, in California, which has had a \$250,000 cap on noneconomic damages since 1975, the mean medical malpractice premium for self-employed physicians in 1998 was 19% higher than the national average and the median was the same. See AMERICAN MEDICAL ASSOCIATION, PHYSICIAN SOCIOECONOMIC STATISTICS, 2000-2002 EDITION 67 (John D. Wassenaar & Sara L. Thran eds., 2001). In 1994, California had the seventh highest insurance premiums in the nation for orthopedic surgeons. David Frum & Frank Wolfe, *If You Gotta Get Sued, Get Sued in Utah*, FORBES, Jan. 17, 1994, at 70, 72. Despite Utah’s damage cap, premiums for Utah’s largest malpractice insurer, UMIA, have increased 95.8% since the cap was enacted. (See IHC Br., addendum at 15.) The American Insurance Association (AIA), an insurance industry trade association, and tort reform advocates have denied promising that tort reform measures like the damage cap would reduce insurance rates. See AIA Press Release, Mar. 13, 2002 (“Insurers never promised that tort reform would achieve specific savings”) (addendum at 15); Michael Prince, *Tort Reforms Don’t Cut Liability Rates, Study Says*, BUSINESS INS., July 19, 1999, at 73 (addendum at 17, 18). In Nevada, after successfully lobbying for a \$350,000 damage cap, one of the largest insurers of Clark County OB/GYNs, said it had no plans to lower its premiums because “[m]eaningful tort reform was not expected to dramatically change the pricing of insurance premiums.” See Joelle Babula, *State Insurance Program Holds Off on Lowering Rates*, LAS VEGAS REVIEW-JOURNAL, Aug. 14, 2002 (addendum at 20).

appeal dismissed, 335 U.S. 866 (1948). An arbitrary cap of \$250,000 on noneconomic damages is no more constitutional.

II. THE DISTINCTION BETWEEN “HARD” AND “SOFT” DAMAGES IS IRRELEVANT IN THIS CASE.

Dr. Drezga suggests that limitations on noneconomic (so-called general) damages are legitimate because such damages are “soft,” as opposed to “hard” economic damages (*e.g.*, Br. of Aplee at 30-32, 35-36), meaning that the former are harder to calculate than the latter and hence more susceptible to abuse. That is not true in this case. The jury awarded \$1,022,735.30 in economic damages (\$22,735.30 in past special damages and \$1,000,000 in future special damages) and \$1,250,000 in noneconomic damages. (R. 360.) Dr. Drezga never challenged either the amount of noneconomic damages nor the evidence to support them--not at trial, not in a post-trial motion, and not on appeal. If a party thinks a jury’s award of damages is excessive or was influenced by passion or prejudice, the law provides ways to challenge the award. *See, e.g.*, UTAH R. CIV. P. 50 & 59. Dr. Drezga never availed himself of these remedies. Instead, he has “accede[d]” to the plaintiffs’ statement of facts (Br. of Aplee at 2), which provides a sufficient evidentiary basis for the award of \$1,250,000 in noneconomic damages. Where, as here, the jury has fixed the amount of damages and those amounts are unchallenged, both general (noneconomic) and special (economic) damages are equally “hard,” or firm.

Moreover, studies show that juries do not differ significantly from supposedly more rational, less emotional decisionmakers in assessing and evaluating noneconomic damages. *See, e.g.*, NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 221-35 (1995); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 812-13 (1999); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 898 (1998); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1141 (1992).¹¹

¹¹ Studies have also contradicted the implicit assumption of Dr. Drezga's argument, namely, that juries are "anti-doctor" and are swayed by their emotions in giving unfair, "windfall" awards to undeserving patients. Any bias seems to run in the opposite direction. *See, e.g.*, Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 398 (1999) (reporting the results of a study that "dramatically illustrate[s] pro-defendant trends" in medical malpractice and other cases); Thomas B. Metzloff, *Researching Litigation: The Medical Malpractice Example*, 51 LAW & CONTEMP. PROBS. 199, 236 (Autumn 1988) (studies show "there is little support for the contention that juries in malpractice cases are pro-plaintiff and consistently inclined to award large sums of money to prevailing plaintiffs"). One study, for example, found that plaintiffs in medical malpractice cases win at trial at a much higher rate before judges than before juries and that recoveries in bench trials are higher than recoveries in jury trials. Clermont & Eisenberg, *supra*, at 1126, 1137-38, 1177. The authors found "little support for the widespread perception that juries are biased or incompetent." *Id.* at 1126. *See also* Kenneth Jost, *Still Warring Over Medical Malpractice: Time for Something Better*, A.B.A. J., May 1993, at 68, 70 (citing two studies, one by Duke University School of Law researchers that found that juries ruled in favor of doctors in 13 of 17 cases insurers rated as tossups and in 6 of 11 cases they expected to lose, and a New Jersey study that showed that doctors won 76% of tried cases and that juries typically did not consider the severity of the patient's injury in deciding

Often, as in this case, noneconomic damages are more significant than economic damages, and a cap on the former denies the victim of malpractice the compensation he or she needs most:

The importance of these nonpecuniary losses can be seen by asking yourself whether you would be indifferent or even nearly indifferent between an uninjured state and a severely injured state, such as paraplegia, blindness, or severe brain damage, so long as your income and wealth remained constant. Your answer reveals the depth of nonpecuniary components captured roughly under the rubric of pain and suffering. Income and wealth are only in service of those myriad activities that make up life and living. These activities are the primary elements of life; pecuniary elements are secondary. It turns reality on its head to give transcendence to the pecuniary.^[12]

Neal K. Komisar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 58 (1990) (footnote omitted).

liability). See generally VIDMAR, *supra* page 12, at 161-82 (summarizing the research and concluding that, “[o]n balance, juries may have a slight bias in favor of doctors”). Studies also show that juries under-compensate, especially for serious losses. E.g., FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 198, 206, 223 (1993).

Moreover, the large verdicts frequently cited are misleading because they do not reflect the vast majority of cases that settle for nothing or nominal amounts. See Jost, *supra*, at 71; A. Russell Localio, *Variations on \$962,258: The Misuse of Data on Medical Malpractice*, 13 LAW, MED. & HEALTH CARE 126, 126 (1985). Nor do they accurately reflect the size of verdicts even where plaintiffs recover. See William Glaberson, *When the Verdict Is Just a Fantasy*, N.Y. TIMES, June 6, 1999, § 4, at 6 (addendum at 23) (the average size of a verdict in the New York area reported in 1989 in the *New York Times* was \$20.5 million, whereas the actual average verdict was only \$1.1 million). Thus, policy makers “can’t reliably use their impressions from reading the press about issues like whether the court system is out of control,” yet they do. *Id.* (quoting Oscar G. Chase, an NYU law professor who conducted the study of verdict sizes reported in the media).

¹² Not only that, but by allowing full recovery for economic damages while capping noneconomic damages, the statute assures full compensation to the medical insurance industry while denying it to the innocent victim of malpractice.

III. PUNITIVE DAMAGES ARE ALSO IRRELEVANT IN THIS CASE.

Dr. Drezga also suggests that the victims of malpractice are not left without an adequate remedy because they can collect unlimited punitive damages. Punitive damages are a red herring, for several reasons. First, punitive damages are not meant to compensate the plaintiff for his or her injuries. They are a “quasi-criminal” remedy meant to punish the defendant and deter future wrongdoing. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citations omitted). Second, punitive damages can only be awarded for egregious misconduct--“willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.” UTAH CODE ANN. § 78-18-1(1)(a). Negligence--even gross negligence--is not enough. *Rugg v. Tolman*, 39 Utah 295, 117 P. 54, 57 (1911). As bad as Dr. Drezga’s misconduct was, no one ever suggested he should be liable for punitive damages. (See R. 1-22.) Third, punitive damages have never been awarded for a medical malpractice case in Utah. See, e.g., Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20). Fourth, half of all punitive damages over \$20,000 do not go to the injured plaintiff but to the State of Utah. UTAH CODE ANN. § 78-18-1(3)(a). Fifth, punitive damages cannot be insured against under Utah law. *Id.* § 31A-20-101(4). This may explain why the insurance lobby was willing to throw the victims of medical malpractice this hollow bone.

IV. THIS COURT'S DECISIONS DO NOT EVIDENCE A TREND TOWARD MORE DEFERENTIAL JUDICIAL REVIEW.

Dr. Drezga also argues that there is a “discernable trend” in this court’s decisions towards a more deferential, less skeptical approach to “tort-limiting legislation applicable to private parties or governments performing non-governmental functions.” (See Br. of Aplee at 16-17.)¹³ The cases he cites do not support that proposition.

In two of the cases, the court rejected constitutional challenges to the Governmental Immunity Act’s damage cap. *Parks v. Utah Transit Auth.*, 2002 UT 55, 53 P.3d 473; *Lyon v. Burton*, 2000 UT 19, 5 P.3d 616. However, both those cases involved governmental actors performing core governmental functions. See *Parks*, 2002 UT 55, ¶ 14; *Lyon*, 2000 UT 19, ¶¶ 42-43. This court has consistently held that damages arising out of the performance of a core governmental function may constitutionally be limited

¹³ Dr. Drezga also suggests that there is a trend in the legislature to limit tort remedies. (See Br. of Aplee at 13-14 (citing various statutes).) If that is true, it is all the more reason the court should not defer to the legislative judgment. The judiciary is the only branch of government that is truly independent. The legislature is subject to intense political and special interest pressure. See, e.g., *United States v. Harriss*, 347 U.S. 612, 625 (1954); *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 36, 974 P.2d 1194 (Stewart, J., concurring) (citations omitted); CHARLES LEWIS & CENTER FOR PUBLIC INTEGRITY, *THE BUYING OF THE CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS* 2-8, 41-45 (1998). When the legislature is willing to sacrifice the rights of injured people--those most in need of protection and least able to protect themselves--to the interests of powerful corporations and industries, such as the medical and insurance industries, it is only the courts that stand between the people and tyranny. Cf. THE FEDERALIST NO. 78, at 400 (Alexander Hamilton) (William R. Brock ed., 1996) (“the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority”).

because, but for the government's waiver of its sovereign immunity, there could be no liability, and the same act that creates liability can also limit it. *See, e.g., McCorvey v. Utah State Dep't of Transp.*, 868 P.2d 41, 47-48 (Utah 1993).¹⁴

By contrast, people injured by medical malpractice in Utah have always been able to sue their negligent health-care providers.¹⁵ The malpractice act did not create a liability that otherwise would not have existed; instead, it limited remedies for an existing liability.

In *Craftsman Builder's Supply, Inc. v. Butler Manufacturing Company*, 1999 UT 18, 974 P.2d 1194, the court upheld the new builders statute of repose after having held the prior statute unconstitutional. However, the court did *not* defer to the legislature but exercised its constitutional role to review the reasonableness of the legislation under the test set out in *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985). *See* 1999 UT 18, ¶¶ 15-23.¹⁶

¹⁴ Similarly, in *Hirpa v. IHC Hospitals, Inc.*, 948 P.2d 785 (Utah 1997), also cited by Dr. Drezga, the court held that Utah's Good Samaritan Act, which immunized doctors from liability under certain circumstances, did not violate the open courts provision of the Utah Constitution because, even without the act, the defendant had no duty to act and hence no liability.

¹⁵ *See, e.g., Meyer v. Bartholomew*, 690 P.2d 558 (Utah 1984); *Nixdorf v. Hicken*, 612 P.2d 348 (Utah 1980); *Christiansen v. Rees*, 20 Utah 2d 199, 436 P.2d 435 (1968); *Ricks v. Budge*, 91 Utah 307, 64 P.2d 208 (1937); *Everts v. Worrell*, 58 Utah 238, 197 P. 1043 (1921); *Gitzhoffen v. Sisters of Holy Cross Hosp. Ass'n*, 32 Utah 46, 88 P. 691 (1907).

¹⁶ The court in *Craftsman* emphasized that the new statute was "substantially different" from the old one, 1999 UT 18, ¶ 19, that the new statute added significant safeguards for injured persons, *id.* ¶ 22, and that there was undisputed evidence that the

Finally, in *Laney v. Fairview City*, 2002 UT 79, 453 Utah Adv. Rep. 40, a majority of this court reaffirmed *Berry* as stating the test to be applied in determining the constitutionality of legislation that impinges on one's right to a remedy under article I, section 11 of the Utah Constitution. See 2002 UT 79, ¶¶ 29, 41-48, 72 (Durham, C.J., with Howe, J., concurring) & 79 & 81 (Russon, J.).¹⁷ The court in *Laney* did *not* defer to the legislature's judgment that all acts of municipalities (specifically, the operation of an electrical power system) are governmental functions but instead held the statute at issue there unconstitutional. See 2002 UT 79, ¶¶ 65-71.¹⁸

new statute would cut off less than 1% of valid claims, *id.* ¶¶ 21, 23. The damage cap at issue here does not provide any safeguards for those most seriously injured but, as in this case, deprives them of a substantial percentage of their actual damages.

¹⁷ The amici can be excused for not citing *Laney* in their briefs because the decision came out after they filed their briefs. The health-care amici have submitted to the court as "supplemental authority" a new federal government report that is irrelevant to the issue of the 1986 damage cap, yet neither they nor the State has identified *Laney* as new, supplemental authority. One can only assume they have not done so because they thought that the court was well aware of the decision and of its relevance to this case and that Dr. Drezga had adequately covered it in his brief.

¹⁸ The plaintiffs are at a loss to understand how the court's conclusion in *Laney* that the legislature had not specifically identified any "clear social or economic evil" and that "the broad sweep of the [statute] is arbitrary and unreasonable" as applied, 2002 UT 79, ¶ 71, is "consistent with a de facto more deferential approach" to the legislative judgment, as Dr. Drezga claims (Br. of Aplee at 17).

V. THE DAMAGE CAP VIOLATES THE RIGHT-TO-A-REMEDY PROVISION OF THE UTAH CONSTITUTION, ARTICLE I, SECTION 11.

A. *Berry v. Beech Aircraft* States the Test for Determining Constitutionality Under Article I, Section 11.

In *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985), this court held that a statute that deprives an injured person of a remedy satisfies article I, section 11 of the Utah Constitution if it provides him with “an effective and reasonable alternative remedy ‘by due course of law’ for vindication of his constitutional rights.” 717 P.2d at 680. If it does not, it “may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.” *Id.* (citations omitted). Dr. Drezga criticizes the *Berry* test but stops short of asking the court to overrule *Berry*. (See Br. of Aplee at 14-25.) The State of Utah, on the other hand, urges the court to abandon the *Berry* test, claiming it exalts the judicial branch over the legislative branch. (Br. of Amicus Curiae - State of Utah [hereinafter “State Br.”] at 3-26.)¹⁹

¹⁹ If the State’s amicus brief sounds familiar, it is because it repeats, often verbatim, arguments the State has made--and this court has rejected--in other cases, including *Parks*, No. 991023-SC, 2002 UT 55, and *Laney*, No. 981729-SC, 2002 UT 79. However, the State has backtracked from the extreme position it took earlier, that article I, section 11 was meant only as a limit on the judiciary and not on the legislature. Instead, it now argues that the legislature should be able to alter the common law “so long as its enactments are not arbitrary or completely unreasonable.” (State Br. at 14.) Thus, not even the State advocates the minority position Justices Wilkins and Durrant took in *Laney*, namely, that article I, section 11 only guarantees procedural rights (i.e., the right to go to court) and offers no substantive protection. See 2002 UT 79, ¶ 132 (Wilkins, J., concurring & dissenting).

The State's argument ignores precedent and rejects the most recent pronouncement of this court. In a "long line of cases," from *Masich v. United States Smelting, Refining & Mining Co.*, 113 Utah 101, 191 P.2d 612, *appeal dismissed*, 335 U.S. 866 (1948), to the present, the nearly "unanimous view of each and every justice of this Court who has ever ruled on the construction of Article I, section 11--some thirteen justices in all"--has been "that Article I, section 11 impose[s] a substantive guarantee of a remedy by due course of law that the Legislature [can] not ignore without having a substantial, nonarbitrary basis for doing so."²⁰ *Craftsman*, 1999 UT 18, ¶¶ 38 & 86 (Stewart, J., concurring).²¹ This court's construction of the open courts provision is consistent with the vast majority of decisions from other jurisdictions construing similar constitutional provisions. *See Craftsman*, 1999 UT 18, ¶ 33 (of the thirty-eight jurisdictions that have an open courts provision, "most courts 'interpret the remedy guarantee to proscribe [at least] some

²⁰ The only exceptions are Justices Zimmerman, Wilkins and Durrant. For nearly fifteen years, Justice Zimmerman agreed with the court's article I, section 11 jurisprudence and, in fact, forcefully defended its philosophical underpinnings in *Condemarin v. University Hospital*, 775 P.2d 348, 367-68 (Utah 1989) (Zimmerman, J., concurring in part). Shortly before he left the bench, he abruptly changed his position. *See Craftsman*, 1999 UT 18, ¶¶ 108-55 (Zimmerman, J., concurring). Justice Wilkins (joined by Justice Durrant) agreed with Justice Zimmerman's position in *Laney*, 2002 UT 79, ¶¶ 85-139 (Wilkins, J., concurring & dissenting, joined by Durrant, Assoc. C.J.).

²¹ Justices Russon and Durham agreed with the analysis of the open courts provision set out in Justice Stewart's concurring opinion in *Craftsman*. *See Craftsman*, 1999 UT 19, ¶ 15 n.5 & ¶ 103. Thus, that opinion represented the view of the majority of the court. *See also Day v. State ex rel. Utah Dep't of Pub. Safety*, 1999 UT 46, ¶ 37 n.9, 980 P.2d 1171.

legislation affecting remedies’”) (quoting David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1208 (1992)).²²

Despite the State’s repeated efforts to overthrow *Berry*, it remains the law of this state. The *Berry* test has been applied in numerous cases over the last seventeen years,²³ and the court recently reaffirmed its place in its article I, section 11 jurisprudence. See *Laney*, 2002 UT 79, ¶ 47 (Durham, J., with Howe, J., concurring) & ¶¶ 79 & 81 (Russon, J., concurring).

Dr. Drezga cites *Laney* primarily for its dissent, but the position of the dissenters has never carried a majority of this court. If the rule of stare decisis and “principles of institutional integrity,” see *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 845-

²² Even those courts that the State claims review legislative enactments more deferentially under an open courts provision recognize that there are limits to what the legislature may do: “*Certainly, the legislature may not declare to be right that which is essentially wrong, nor say that which is a definite, substantial injury to fundamental rights to be no injury, nor abolish a remedy given by the common law to essential rights without affording another remedy substantially adequate.*” *Gallegher v. Davis*, 183 A. 620, 624 (Del. Super. Ct. 1936) (emphasis added), overruled in part on other grounds by *Wagner v. Chanks*, 194 A.2d 701 (Del. Super. Ct. 1963).

²³ See, e.g., *Laney*, 2002 UT 79, ¶¶ 49-71 (per Durham, J.) & 82 (Russon, J., concurring); *Day*, 1999 UT 46, ¶¶ 40-48, 980 P.2d 1171; *Craftsman*, 1999 UT 18, ¶¶ 15-23, 974 P.2d 1194; *Hirpa*, 948 P.2d 785, 792-94; *Ross v. Schackel*, 920 P.2d 1159, 1162-66 (Utah 1996); *Lee*, 867 P.2d 572, 581 (majority opinion) & 590-92 (Zimmerman, J., concurring); *Horton v. Goldminer’s Daughter*, 785 P.2d 1087, 1091-96 (Utah 1989); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 191-93 (Utah 1989); *Condemarin*, 775 P.2d at 357-61 (per Durham, J.) & 366-69 (Zimmerman, J., concurring in part); *Warren v. Melville*, 937 P.2d 556, 559-60 (Utah Ct. App. 1997); *Currier v. Holden*, 862 P.2d 1357, 1362, 1365-72 (Utah Ct. App. 1993), cert. denied, 870 P.2d 957 (Utah 1994); *Velarde v. Board of Review of Indus. Comm’n*, 831 P.2d 123, 125-30 (Utah Ct. App. 1992).

46 (1992), are to mean anything, the court should reject any argument to abandon the *Berry* test. If a court were to abandon established precedents with each change in its composition, the public would soon lose faith in the judicial process. *See State v. Shoulderblade*, 905 P.2d 289, 292 (Utah 1995) (*stare decisis* “reinforces confidence in judicial integrity”). “[N]o judicial system could do society’s work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” *Planned Parenthood*, 505 U.S. at 854 (citations omitted). Thus, “arguments which in their ultimate formulation” conclude that *Berry* should be overruled, as well as any “reservations” individual members of the court may have about reaffirming *Berry*, should be outweighed by “the force of *stare decisis*.” *See id.* at 853.

B. Article I, Section 11 Does Not Constitutionalize the Common Law.

The State of Utah persists in making an argument that this court has repeatedly rejected, namely, that this court’s interpretation of article I, section 11 of the Utah Constitution impermissibly constitutionalizes the common law.²⁴ *See, e.g., Day*, 1999 UT

²⁴ The State also suggests that Utah historically rejected the common law. The early Mormon pioneers spurned the common law because it outlawed polygamy and because of their distrust of the non-Mormon judges the federal government sent to enforce it. *See* Michael W. Homer, *The Judiciary and the Common Law in Utah Territory, 1850-61*, 21 *DIALOGUE* 97, 98 (1988). By the time Utah became a state in 1896, the Mormon Church had abandoned polygamy, *see* DOCTRINE & COVENANTS

46, ¶¶ 35-37, 980 P.2d 1171; *Craftsman*, 1999 UT 18, ¶¶ 39 & 68-70, 90-99 (Stewart, J., concurring); *DeBry v. Noble*, 889 P.2d 428, 435-36 (Utah 1995); *Horton*, 785 P.2d at 1090-91; *Cruz v. Wright*, 765 P.2d 869, 871 (Utah 1988); *Berry*, 717 P.2d at 676 (citation omitted). *See also* *Ross*, 920 P.2d at 1169 n.2 (Stewart, J., dissenting) (“Notwithstanding the flatly erroneous assertions to the contrary by the Attorney General, . . . this Court has made it abundantly clear that the guaranteed remedy provision of the open courts clause does not constitutionalize the common law”) (citations omitted).²⁵ In determining what the framers intended by a “remedy by due course of law,” the court can look to the legal

Official Decl. 1, and Utah had accepted the common law, *see, e.g., Thomas v. Union Pac. R.R. Co.*, 1 Utah 232, 234 (1875) (“Although the Common Law has not been adopted in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here, so far as it is not incompatible with our situation and government, and that it is to be resorted to as furnishing . . . the measure of personal rights and the rule of judicial decision”); *First Nat’l Bank of Utah v. Kinner*, 1 Utah 100, 107 (1873) (the people of Utah have “tacitly agreed upon maxims and principles of the Common Law suited to their conditions and consistent with the Constitution and Laws of the United States”). The first code of the new state expressly adopted the common law of England “so far as it was not repugnant to, or in conflict with,” Utah or federal law. REV. STAT. OF UTAH § 2488 (1898), *now codified at* UTAH CODE ANN. § 68-3-1. Whatever the early Mormon pioneers thought of the common law in the 1850s, by 1896, when the Utah Constitution was adopted, the historical antipathy toward the common law had softened, and public distrust had shifted away from the courts and toward legislatures, with their ties to big business and powerful corporations. *See, e.g., Craftsman*, 1999 UT 18, ¶¶ 50-54 (Stewart, J., concurring), and authorities cited therein.

²⁵ Although this court has denied that article I, section 11 constitutionalizes the common law, the history of the origins of right-to-remedy provisions in this country suggests that they were in fact meant to prevent legislatures from overriding common-law rights. *See* Ned Miltenberg, *The Revolutionary “Right to a Remedy,”* TRIAL, Mar. 1998, at 48, 52. “In the final analysis, the issue is not . . . a legislature’s abstract ‘right to alter the common law.’ This power, of course, exists, but only so long as legislative ‘change[s] do[] not interfere with constitutional rights.’” *Id.* at 52 (footnote omitted).

rights and remedies that existed when the constitution was adopted, but that is just the beginning of the court's analysis, not the end. *See Lyon*, 2000 UT 19, ¶ 35, 5 P.3d 616 (Stewart, J., concurring) (citing *DeBry*, 889 P.2d 428).

The wrong that article I, section 11 was meant to address was the abolition of remedies to redress injuries done to a person “in his person, property or reputation.” The threat to a remedy may come from any of the three branches of government--the legislative, executive or judicial branch. There is nothing in the text or history of article I, section 11 to show that the framers intended it to apply to only one branch and not the others.²⁶ Constitutional limitations “are not peculiar to any one branch of the government” but apply to each department; “they are imposed as a security to the rights of the principal,—the people.” *Ritchie v. Richards*, 14 Utah 345, 47 P. 670, 675 (1896) (Bartch, J., concurring).²⁷ A construction of article I, section 11 that did not limit the legislature's ability to alter or abolish established remedies would do “violence to logic as well as tradition.” JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW § 6-2(c), at 352 (2d ed. 1996).

²⁶ At the time Utah adopted article I, section 11, such a provision was “in nearly every constitution and declaration of rights in the country. It [was] a provision that has come to us with the approval of the ages.” 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION . . . TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 304 (1898). At that time, the evil the remedy guarantee was meant to redress “was renegade legislatures.” *See Schuman, supra* page 20, at 1201.

²⁷ Justice Miner joined Justice Bartch's concurring opinion in *Ritchie*, making it the opinion of the three-member court. *See* 47 P. at 681 (Miner, J., concurring).

The State quotes dicta from one early Utah case to the effect that article I, section 11 “applies only to judicial questions. It is not meant thereby that this court may reach out and usurp powers which belong to another independent and co-ordinate branch of the state government.” (State Br. at 7 (quoting *Salt Lake City v. Utah Light & Traction Co.*, 52 Utah 210, 173 P. 556, 563 (1918)).) Although the court did not define what it meant by “judicial question,” determining whether a statute violates an express constitutional provision has always been a “judicial question.”²⁸ See *Marbury v. Madison*, 5 U.S. 87, 111, 1 Cranch 137, 178 (1803) (“if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty”).

C. The Court’s Interpretation of Article I, Section 11 Does Not Violate the Separation of Powers.

The State argues that this court’s interpretation of article I, section 11 violates the separation of powers provision of the Utah Constitution, article V, section 1.

²⁸ The issue in *Utah Light* was whether the legislature could properly limit judicial review of an order of the Public Utilities Commission approving a rate increase. Although the statute in question provided that the commission’s findings and conclusions on questions of fact “shall be final and shall not be subject to review,” see 173 P. at 558, the court nevertheless reviewed the commission’s findings to determine whether there was substantial evidence to support them. See *id.* at 563. Thus, even in the case the State relies on, the court did not simply defer to the legislature’s judgment.

Alexander Hamilton refuted such an argument long ago:

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable. . . .

. . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . .

. . . [A]ccordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

THE FEDERALIST NO. 78, at 400-01 (Alexander Hamilton) (William R. Brock ed., 1996).

The State's argument proceeds from a false premise, namely, that the court has somehow exalted the common law over legislation. The court's interpretation of article I, section 11 does not constitutionalize the common law. *See supra* pt. V.B. Instead, it gives meaning to the constitution's guarantee of a "remedy by due course of law" for an

injury done to one's "person, property or reputation." Exalting either legislation or the common law "over a clear constitutional limitation strikes at the heart of constitutional government." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 634 (Utah 1990). Under the separation of powers doctrine, the court is the ultimate arbiter of the constitutionality of legislation. *See, e.g., Marbury v. Madison*, 5 U.S. at 111, 1 Cranch at 177-78. In exercising its constitutional power to review legislation that is claimed to violate the constitution, the court is not acting as "the critic of the legislature, but rather, the guardian of the Constitution." *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 256 (Kan. 1988) (citation omitted), *disapproved of on other grounds by Bair v. Peck*, 811 P.2d 1176, 1191 (Kan. 1991). By enforcing constitutional guarantees, the court does not violate the separation of powers provision of the Utah Constitution, nor does it impermissibly "trench upon the domain of the legislative department." *Ritchie*, 47 P. at 676 (Bartch, J., concurring). "The power to declare what is the law is delegated to the judicial department, and therefore the courts have the unquestioned right to declare any act of the government, in any of the departments, which violates the constitution, to be utterly void." *Id.* at 675-76.

The State's position, on the other hand, "would virtually write article I, section 11 out of the Utah Constitution," *Laney*, 2002 UT 79, ¶ 29 (Durham, C.J.), "would deny citizens of this state the constitutional right secured by the Framers to a remedy by due course of law for an injury to their persons, property, or reputations" and would frustrate

“the Framers’ very purpose and intent in adopting the remedy clause in the Utah Declaration of Rights,” *Craftsman*, 1999 UT 18, ¶ 32 (Stewart, J., concurring).

[T]he basic purpose of Article I, section 11 is to impose some limitation on [the legislature’s power to create new, and abrogate old, rules of law] for the benefit of those persons who are injured in their persons, property, or reputations since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid.

Sun Valley, 782 P.2d at 191 (quoting *Berry*, 717 P.2d at 676).

D. The Damage Cap Fails the *Berry* Test.

Dr. Drezga reluctantly recognizes *Berry* as stating the test for determining whether a statute violates article I, section 11, but urges the court to adopt a “classwide, deferential analytical approach” to *Berry* because the legislature is in the best position to balance detriments and benefits to the class affected by the legislation and can expand or contract tort rights “for larger public purposes.” (Br. of Aplee at 25.)²⁹ However, the legislature is

²⁹ Dr. Drezga cites *Masich*, 113 Utah 101, 191 P.2d 612 (1948), for the proposition that the court should consider the impact of the legislation on the class affected by the act and that the class affected by the act is the public at large. *Masich* did not consider the effect of the statute involved there (the Occupational Disease Act) on the public at large but on those directly affected by the legislation--the class of affected workers. See 191 P.2d at 624. The public is always affected, however indirectly, by any legislation. The damage cap does not directly affect the public at large but only those victims of medical malpractice. The statute involved in *Masich* provided benefits to the affected class, by doing away with the employer’s common-law defenses of contributory negligence, assumption of risk and the fellow servant doctrine. See *id.* The damage cap and the medical malpractice act as a whole provide no benefits to the victims of medical malpractice but only deprive them of benefits they previously enjoyed. In any event, this court has rejected the argument that *Berry* is inconsistent with *Masich*. See *Laney*, 2002

also in the best position to be influenced by special interests and to sacrifice the rights of the defenseless to the interests of the powerful and the influential. *See supra* note 13.

The purpose of a constitution, and particularly of a bill or declaration of rights, is to protect certain rights of minorities from infringement by the majority. As Justice

Zimmerman recognized:

[T]he very act of drafting a constitution such as ours, which does not bestow unlimited power on the legislature and which does reserve certain rights to the people, constitutes a recognition that there must be some limits on the legislature, that some interests of the people deserve special protection in the maelstrom of interest group politics that is the legislative process. Among the interests to which the Utah Constitution's drafters assigned a degree of sanctity are those mentioned in article I, section 11.

To accord these rights the respect the drafters intended requires that we approach challenges to legislation alleged to infringe article I, section 11 differently than we otherwise view claims of unconstitutionality that are directed at ordinary economic legislation. . . . [I]n weighing the proffers of the legislation's defenders, we should not use as our analytical model the permissive and perfunctory standard of reasonable relation Instead, we should give the legislation and its justifications careful scrutiny to assure that redress of legally cognizable injuries is not unreasonably impaired.

Condemarin, 775 P.2d at 368 (Zimmerman, J., concurring) (citations omitted). Where, as here, the legislature decides to confer a benefit on the rich and powerful insurance industry at the expense of brain-injured children, something more than deferential review is required. *See Berry*, 717 P.2d at 678-69 (the court is "not at liberty to eviscerate a

UT 79, ¶ 43 (Durham, C.J.); *Craftsman*, 1999 UT 18, ¶¶ 64, 83-90 (Stewart, J., concurring). Moreover, even if it were inconsistent (and it is not), *Berry* and *Laney*, as the court's more recent pronouncements on the subject, should control over *Masich*, a decision over half a century old. *See, e.g., Purtell v. Tehan*, 139 N.W.2d 655, 658 (Wis. 1966).

mandatory provision of our Declaration of Rights” by resorting merely to legislative prerogative; that kind of analysis “would result in the legislative power prevailing in every case, and would deprive the constitutional rights embraced in the remedies clause of any meaningful content or force”).

1. Neither the Cap nor the Malpractice Act as a Whole Provides Any Alternative Remedy.

Dr. Drezga claims that the damage cap passes the first prong of the *Berry* test because the malpractice act as a whole provides an injured person “an effective and reasonable alternative remedy.” Dr. Drezga has not pointed to any provision of the act that provides any alternative remedy to injured patients or to the public generally. The act, as a whole, only restricts or eliminates remedies; it doesn’t provide alternative remedies. *See, e.g.*, UTAH CODE ANN. §§ 78-14-4 (shortening the statute of limitations), 78-14-4.5 (reducing damages for amounts paid by collateral sources), 78-14-6 (requiring a writing for any claim for breach of warranty, guarantee or contract), 78-14-7.1 (limiting noneconomic damages), 78-14-8 & -12 to -14 (imposing procedural hurdles to bringing an action), 78-14-9.5 (limiting awards of future damages). Only some kind of Orwellian “newspeak” could find an effective and reasonable alternative remedy in a statute that only limits or does away with existing rights and remedies.

The only provision of the act Dr. Drezga cites that is arguably of benefit to the public is section 78-14-9, which authorizes the insurance commissioner to provide for professional liability insurance coverage through a joint underwriting program where

such coverage is not “readily available in the voluntary market.” To the plaintiff’s knowledge, the insurance commissioner has never had to invoke section 78-14-9 and has never even held hearings to determine whether malpractice insurance is not readily available in any area of this state. In any event, this provision had existed for a decade before the legislature eliminated an injured person’s right to a remedy in excess of \$250,000 in noneconomic damages. When the legislature passed the damage cap, it only eliminated a remedy--it did not provide an alternative remedy, much less an effective and reasonable alternative remedy.

Dr. Drezga argues, however, that by continuing to make affordable, insured health care available, the malpractice act satisfies *Berry*’s first prong. But the act does not require any doctor to carry any insurance, let alone sufficient insurance to guarantee a recovery within the damage cap. Utah has always had affordable, insured health care, both before and after passage of the act and passage of the cap.

[W]hen the legislature removes a particular right or remedy, it cannot simply rely on other preexisting rights or remedies to fill the void left behind, but must rather provide a *quid pro quo* in the form of either a substitute remedy *for the individual* or the removal of a perceived social or economic evil for society.

Sun Valley, 782 P.2d at 192 (second italics added). The malpractice act and its damage cap provide no *quid pro quo* or substitute remedy for Athan Montgomery. The right to sue his doctor (who may or may not have insurance) was a preexisting right.

Moreover, “access to a source of recovery is vastly different from the right to a remedy.” *Kansas Malpractice Victims*, 757 P.2d at 263.³⁰

“[T]o provide a remedy is not to guarantee a right, or indemnify against wrong. Obviously, the extent of the assets of a judgment debtor are not guaranteed by any Constitution. This argument evades the issue.” . . . [T]he legislature cannot abolish the right to a remedy by capping a plaintiff’s *recovery* at \$250,000, \$1,000,000, or even \$3,000,000 without providing an adequate substitute remedy. The “substitute” they propose here is nothing new in the law. [The damage cap] removes a substantial right of the plaintiff and gives him *nothing* in return.

Id. at 263-64 (citations omitted).³¹ The same is true of the damage cap in this case.

2. There Was No Clear Social or Economic Evil to Be Eliminated.

Dr. Drezga argues that, even if the act fails the first prong of the *Berry* test, the cap still meets the *Berry* test because it eliminates a clear social and economic evil in a reasonable manner by keeping the cost of medical malpractice insurance within the reach of more doctors. To support this argument, the health-care amici inundate the court with information and propaganda about the alleged medical malpractice insurance crisis. The vast majority of the material (some 80%) deals with conditions in other states--not in

³⁰ The court in *Kansas Malpractice Victims* held that Kansas’s caps of \$1,000,000 for total damages and \$250,000 for noneconomic damages in medical malpractice cases violated a malpractice victim’s constitutional right to a remedy under the Kansas Constitution. 757 P.2d at 264.

³¹ The court further noted that the continued availability of affordable health care is a questionable benefit to malpractice victims because, but for the malpractice they might not need the continuing health care. 757 P.2d at 263.

Utah--and with current conditions, not conditions in 1986.³² Of the over 250 pages of materials the amici have submitted, none was before the legislature in 1986 when it passed the cap; it all post-dates the cap.

The burden was on Dr. Drezga to show that the alleged medical malpractice insurance crisis of the mid 1980s was a “*clear social or economic evil*,” *Berry*, 717 P.2d at 680 (emphasis added), and he has not shown either that it was clear or that it was an evil. A problem is not necessarily the same as an “evil,” and to proclaim it is not to make it “clear.” At best, the evidence shows that doctors had to pay more for liability insurance in 1986 than they had previously paid. However, a problem for one sector of the economy is not the same as a clear social or economic evil, particularly where the problem is largely of the industry’s own making.³³ Cf. Rob M. Alston, Comment, *Utah’s*

³² For critiques of the most recent wave of tort reform propaganda, see, e.g., Daniel J. Capra, *‘An Accident and a Dream’: Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339 (2000); Merritt & Barry, *supra* note 11; Statement of Sen. Edward M. Kennedy in Opp’n to the Med. Malpractice Amend., July 26, 2002 (addendum at 8-14); Testimony of Travis Plunkett, Legislative Dir., Consumer Fed’n of Am., Before the Subcomm. on Health of the House Comm. on Energy & Commerce, July 17, 2002 (addendum at 24-38).

³³ As this court recognized in *Lee*, “a significant cause of dramatically increased malpractice insurance premiums [is] the cyclical pricing and investment practices of insurance companies.” 867 P.2d at 588. When the economy is good, insurance companies set artificially low rates to attract business so that the premiums can be invested for high returns. When the economy turns sour, premiums are insufficient to cover losses, and insurers raise their premiums dramatically. *See id.* at 588-89 (citation omitted). *See also*, e.g., Capra, *supra* note 32, at 376 (“the evidence now indicates that the insurance crisis [of the 1980s] was caused not by lawsuits, but rather by a cyclical downturn combined with questionable underwriting practices and a drop in interest rates”); Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 567-68 (1990) (book review) (“The insurance industry did

Statute of Limitations Barring Minors from Bringing Medical Malpractice Actions:

Riding Roughshod over the Rights of Minors? 1992 UTAH L. REV. 929, 967 (it is ironic that “the growing number of persons willing to bring claims for injury--a constitutionally protected right--should be viewed as an evil to be eliminated”).

The primary cause of the alleged medical malpractice crisis is medical malpractice.³⁴ *E.g.*, Alston, *supra*, at 967 (footnote omitted). If there is an evil, it is “the

experience a profit crunch during the years 1981-1983 but, as industry studies themselves acknowledge, this crunch was not the result of expanded tort liability”) (citing NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND INSURANCE SERVICES OFFICE, 1985: A CRITICAL YEAR 30 (1985)); Eliot M. Blake, Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401, 411-12 (1988) (accord). The same is true of the current crisis. *See, e.g.*, Rachel Zimmerman & Christopher Oster, *Insurers' Missteps Helped Provoke Malpractice 'Crisis'*, WALL ST. J., June 24, 2002, at A1 (*see addendum at 39-43*); Todd Sloane, *Back on the Tort Reform Merry-Go-Round*, MODERN HEALTHCARE, July 15, 2002 (addendum at 44); Testimony of Travis Plunkett, Legislative Dir., Consumer Fed'n of Am., Before the Subcomm. on Health of the House Comm. on Energy & Commerce, July 17, 2002 (addendum at 25-31). In fact, the insurance cycle affects all insurance markets. *See, e.g.*, Remarks of Sen. Finlinson, Utah Senate, Jan. 24, 1986 (audograph disc #23) (the availability of liability insurance is an industry-wide problem); Christopher Oster, *Workers' Comp Insurers Shy from Business in Big Cities*, WALL ST. J. ONLINE, July 22, 2002 (premiums in nearly all insurance lines have increased by an average 10 to 50 percent). For 1985, the year before the damage cap was passed, the loss ratio for medical malpractice insurance in Utah (86) was only slightly higher than the loss ratio for all lines of insurance in Utah (75). UTAH INSURANCE DEPARTMENT, REPORT TO NORMAN H. BANGERTE . . . : BUSINESS OF 1985, at 18 (addendum at 4). Significantly, it is only the malpractice insurance industry that has secured special treatment from the legislature.

³⁴ Studies show that about 1% of hospital patients are injured by negligent medical care each year. *See, e.g.*, Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 MED. CARE 261, 264-65 (2000); PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 43 (1993). *See also* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 20 (1985) (based on a California study of hospital records, an estimated 260,000 injuries nationwide occur each

large number of malpractice victims that receive no compensation under the current tort system.” *Id.* at 966.³⁵ That is because the number of patients injured by medical malpractice greatly exceeds the number who ever file a claim.³⁶ As one expert concluded:

The visible costs of the malpractice system--insurance premiums, defensive practices--are small compared with the less visible but far larger costs of malpractice--the injuries that occur because of medical negligence.

year as a result of negligent health care). A Harvard study estimated that over 150,000 people die each year from medical malpractice. WEILER, *supra*, at 55. “Medical injury, then, accounts for more deaths than all other types of accidents combined, and dwarfs the mortality rates associated with motor vehicle accidents (50,000 deaths per year) and occupation-related mishaps (6,000 deaths per year).” *Id.* (footnote omitted). Based on a study of patients discharged from Utah and Colorado hospitals, one team of researchers recently concluded that health-care caused injury “continues to be a significant public health problem.” Thomas, *supra*, at 61.

³⁵ Cf. *Wry v. Dial*, 503 P.2d 979, 991 (Ariz. Ct. App. 1972) (“If anything is to be considered ‘socially unacceptable’ it would be for an individual [wrongfully] injured by another to receive less for pain and suffering than that amount to which he is entitled”).

³⁶ Less than one victim of malpractice in seven ever asserts a claim. WEILER, *supra* note 34, at 70. See also David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250, 250 (2000) (in a study of Utah and Colorado patients who suffered negligent injury, 97% did not sue); A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 NEW ENG. J. MED. 245, 250 (1991) (concluding that “the civil-justice system only infrequently compensates injured patients”). A Utah Department of Health study determined that, from 1995 to 1999, 4,248 patients at Utah hospitals had a “misadventure of surgical and medical care,” meaning that the adverse event was the result of an error. Utah Department of Health, *Adverse Events Related to Medical Care, Utah: 1995-99* iii (June 2001) (addendum at 48). Another study determined that the adverse effects of medical treatment accounted for 4.7% of all injury- and poisoning-related emergency department visits in 1997, or over 26,000 visits. Norma Wagner, *Medical Mistakes Make Life Busier for E.R.*, SALT LAKE TRIB., Oct. 21, 2000, at A1, A6 (addendum at 50). Yet UMIA, the largest medical malpractice insurer in the state, only reported a total of 3,263 claims for the ten-year period 1991-2000. UMIA Newsletter, 1st Quarter, 2001 (addendum at 51).

. . . A rough estimate of the cost of these injuries is \$24 billion, or ten times the cost of malpractice insurance premiums.

Patricia M. Danzon, *The Medical Malpractice System: Facts and Reforms*, in

BROOKINGS INSTITUTION, *THE EFFECTS OF LITIGATION ON HEALTH CARE COSTS* 28, 30

(Mary Ann Baily & Warren I. Cikins eds., 1985) (footnote omitted).

3. The Cap Is an Arbitrary and Unreasonable Means of Achieving Its Objective.

Even if the self-inflicted wounds of the insurance industry were considered a clear social or economic evil, the damage cap is an arbitrary and unreasonable means of remedying the problem. It is as irrational as the legislature trying to reduce the effects of crime on society by denying crime victims compensation for their injuries. As this court stated in *Sun Valley*: “[W]e do not believe that abrogation of an individual’s section 11 constitutional right is a reasonable way to provide for an industry’s peace of mind. We simply cannot justify a policy favoring [a defendant’s] economic interest in avoiding liability over a plaintiff’s economic interest in recovering damages.” 782 P.2d at 193.

Not only have Dr. Drezga and the amici failed to show that health care from insured providers was threatened or unavailable in Utah in 1986, when the legislature enacted the cap, but they have also failed to show that taking away the rights of victims is a reasonable means of solving the alleged problem. And in fact it is not, for at least two reasons.

First, all the evidence shows that the entire cost of the malpractice legal system (plaintiffs, defendants, attorneys, prelitigation proceedings, pretrial discovery and

proceedings, trial or settlement) is less than 1% of the total health-care dollar. *See, e.g., Lee*, 867 P.2d at 587-88 (citations omitted). Thus, even if the legislature did entirely away with a cause of action for medical malpractice, the cost of medical care would only be reduced by about 1% at the most.

Second, a reduction in the severity of malpractice claims in Utah has little effect on insurance premiums for Utah providers, since the cost of insurance in Utah is not driven primarily by what happens in Utah. Utah is a small market. The majority of Utah providers are insured by UMIA, and UMIA reinsures above certain limits.³⁷ Because UMIA must necessarily reinsure with national companies, reinsurance costs are determined by national experience. Thus, whatever happens in Utah has little effect on malpractice premiums here. And because “it is highly unlikely that lower insurance rates are inextricably tied to the existence of” the damage cap, *cf. Sun Valley*, 782 P.2d at 193, the cap cannot meet the second prong of the *Berry* test.

This court in *Laney* rejected the argument that a statute passed “in the ‘hope that passage . . . will make it easier or cheaper for a government entity to obtain liability insurance’” met the second prong of the *Berry* test. 2002 UT 79, ¶ 66 (citation omitted). The court noted that, while “that objective is worthy,” the “general nature of the

³⁷ Reinsurance is “[i]nsurance of all or part of one insurer’s risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium.” BLACK’S LAW DICTIONARY 1290 (7th ed. 1999). In 1991 and 1992, for example, UMIA had two reinsurance treaties. One insured losses over \$300,000 (plus an indexed amount) up to \$1,000,000, and the other insured losses over \$1,000,000. *Utah Med. Ins. Ass’n v. Commissioner*, 76 T.C.M. (CCH) 1100, 1106 (1998).

legislative findings do not show that large damage awards have been made against municipalities in connection with their operation of an electrical power system, or that such operation has been affected in any way by potential liability.” *Id.* Similarly, in this case, Dr. Drezga and the amici have not shown that large damage awards against physicians in Utah had adversely impacted either the availability of liability insurance or the availability of health care. In fact, when the legislature passed the damage cap, there had never been an award of noneconomic damages in Utah of even \$100,000, let alone \$250,000. Remarks of Sen. Barlow, Utah Senate, Jan. 23, 1986 (audograph disc #20).

Because “the dramatic increases in medical malpractice insurance premiums and the increased costs of health care were not caused by significant increases in malpractice lawsuits or claims in Utah, . . . or by significant increases in the size of jury verdicts,” the legislative means for solving the insurance problem by depriving injured patients of their right to full recovery “simply does not further the legislative objective.” *Lee*, 867 P.2d at 588. “It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.” *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980).

Whatever slight benefit damage caps have in increasing the affordability of liability insurance and even slighter benefit in slowing the rapid rise in the cost of health care, are more than offset by the harm they cause to the catastrophically injured, like Athan Montgomery, and the harm they cause to society, by deflecting attention away

from the real cause of any alleged medical malpractice crisis. *See, e.g.,* Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. 53, 63 (1998) (“On their face,” damage caps “do little or nothing to improve deterrence, compensation, and fairness in the administration of justice”) (footnote omitted). They do nothing to address the problem of “the large number of uncovered medical injuries.” *Id.* Moreover, they are “counterproductive in terms of public safety” since they provide health-care providers “with less incentive to take adequate precautions.” *Sun Valley*, 782 P.2d at 193. “[The] economic function [of liability for negligence] . . . is to deter uneconomical accidents,” which “is produced by compelling negligent injurers to make good the victim’s losses.” *Id.* n.46 (quoting R. Posner, *Economic Analysis of Law* § 6.12, at 143 (1972)). *See also* Komesar, *supra*, at 59 (“Any determination of the desirable level of prevention that ignored nonpecuniary losses would grossly underestimate the desire for prevention”).

In short,

the legislation’s supporters have not carried their burden of proof. . . . [T]he justifications advanced for the legislature’s severe abridgement of the right of this narrow category of potential plaintiffs to bring their actions for actual injuries suffered are speculative, to put it charitably. The defenders of this legislation certainly have not shown that the effective elimination of the minor’s legal right to sue for medical malpractice [or, as in this case, for noneconomic injuries greater than \$250,000] is a reasonable, nonarbitrary means for lowering medical malpractice premiums in Utah. Absent such a showing, they have failed to rebut the presumption of unconstitutionality that attaches to legislation that so severely limits a common law right of action protected by article I, section 11.

Lee, 867 P.2d at 592 (Zimmerman, J., concurring, joined by Hall, C.J.).

VI. THE DAMAGE CAP VIOLATES THE UNIFORM OPERATION OF THE LAWS.

As this court recently explained, article I, section 24 of the Utah Constitution, the “uniform operation of the laws” provision, embodies “‘the same general principle’” as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, namely, that persons similarly situated should not be treated differently, but article I, section 24 “‘establishes different requirements from the federal Equal Protection Clause’” that are “‘at least as exacting and, in some circumstances, more rigorous than the standard applied under the federal constitution.’” *Gallivan v. Walker*, 2002 UT 89, ¶¶ 31, 33, 455 Utah Adv. Rep. 3 (citations omitted).³⁸ A statute that “‘implicates a ‘fundamental or critical right’ or creates classifications which are ‘considered impermissible or suspect in the abstract’” is analyzed under “a heightened degree of scrutiny.” *Gallivan*, 2002 UT 89, ¶ 40 (emphasis added and citations omitted).

The damage cap implicates fundamental or critical rights, namely, the constitutional rights to a remedy and to a jury trial. It also creates impermissible or

³⁸ For that reason, *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), which applied a federal equal-protection analysis to the Price-Anderson Act’s \$560 million damage cap on liability for nuclear accidents resulting from the operation of a federally-licensed private nuclear power plant, is not controlling on this point. *Duke Power* also did not involve a constitutional right to a remedy. The case is also distinguishable because the statute that capped damages also did away with defenses, allowing recovery without proof of fault; furthermore, the statute provided a fund for recovery, and Congress further agreed to “take whatever action is deemed necessary . . . to protect the public from the consequences of” a nuclear accident. *See* 438 U.S. at 90-92. Here, the damage cap does not guarantee a malpractice victim any recovery.

suspect classifications, including classifications between the victims of medical malpractice and of other torts and between malpractice victims who suffer serious noneconomic injuries and those who do not. “[F]or a discriminatory classification to be constitutional it must be reasonably necessary to further, and in fact must actually and *substantially* further, a legitimate legislative purpose.” *Id.* ¶ 42 (citation omitted).

Dr. Drezga argues that the damage cap does not violate article I, section 24 because the classifications the cap makes are not discriminatory. He argues that there are legitimate differences between medical malpractice victims and other tort victims because of the “high and unpredictable exposure to soft damages awards in the medical malpractice area.” (Br. of Aplee at 35.) The distinction between so-called soft and hard damages does not apply in this case because all of Athan Montgomery’s damages meet Dr. Drezga’s definition of “hard”; that is, their existence has been determined, and they have been measured. (*See supra* pt. II.) Moreover, there is no evidence that medical malpractice victims are exposed to greater “soft” damages than other tort victims. The amount of pain and suffering one suffers is determined by the nature of the person’s injuries and his or her pain threshold and not by the identity of the tortfeasor.³⁹

Dr. Drezga also argues that the distinction between victims of medical malpractice and other tort victims is a straw man because everyone is a potential victim of medical

³⁹ If medical malpractice victims suffer greater noneconomic damages than other tort victims, that does not justify the discrimination against them but only makes it worse, by making it more likely that they will not be fully compensated for their injuries.

malpractice. But the statute does not cap the damages of *potential* victims because they have no damages to cap. It only caps the damages of *actual* victims of medical malpractice and not even all of them--only those who have actually suffered noneconomic damages greater than \$250,000.

By Dr. Drezga's reasoning, the court's most recent article I, section 24 decision was wrong. In *Gallivan*, the court concluded that the statute at issue there impermissibly discriminated against a subclass of registered voters--those who reside in urban counties. 2002 UT 89, ¶¶ 44-49. Since every registered voter is potentially an urban resident, under Dr. Drezga's argument, the statute could not violate the uniform operation of the laws.

By Dr. Drezga's reasoning, a statute that imposed restrictions on, say, Democrats but not Republicans would also raise no article I, section 24 concern because everyone could potentially join the Republican Party and avoid the statute's restrictions. In fact, such a statute, like the statute struck down in *Gallivan*, would raise less of an equal protection issue than the damage cap because people could avoid the restriction merely by choosing to change parties or moving from the city to the country, whereas victims of medical malpractice do not choose their status any more than one chooses his or her race or gender.

Even if the class is all potential victims of medical malpractice, the cap still violates article I, section 24, since that section "protects against discrimination *within* a class," *Gallivan*, 2002 UT 89, ¶ 38, and within the class of potential victims, only those

with noneconomic damages greater than \$250,000 have their recoveries artificially limited. In short, even by Dr. Drezga's reasoning the statute does not operate uniformly on all persons similarly situated. *See id.*

Dr. Drezga argues that the statute does not discriminate against the most severely injured because the plaintiffs have not shown a correlation between the severity of the injury and high noneconomic damages. Both courts and the insurance industry itself have historically considered the amount of the plaintiff's special damages as an indication of the value of his or her pain and suffering. *See, e.g., Goertz v. Chicago & N.W. Ry. Co.*, 153 N.E.2d 486, 494 (Ill. App. Ct. 1958) (Kiley, J., concurring); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 239 (1970) ("The calculation of general damages is for the most part a matter of multiplying the medical bills by a tacitly but generally accepted arbitrary constant"). In any event, the plaintiff does not have to establish such a correlation empirically because, by definition, plaintiffs who suffer noneconomic damages greater than \$250,000 are more severely injured (at least noneconomically) than those whose noneconomic damages are less than \$250,000.

Finally, for the reasons stated in point V.D, *supra*, the damage cap is not "reasonably necessary to further, and in fact [does not] actually and substantially further, a legitimate legislative purpose." *See Gallivan*, 2002 UT 89, ¶ 42.

VII. THE DAMAGE CAP VIOLATES THE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Dr. Drezga claims that the plaintiffs' argument that the cap violates the constitutional right to a jury trial under article I, section 10 is not only without support in but contrary to Utah law. (Br. of Aplee at 39-41.)⁴⁰ *McCorvey v. Utah State Department of Transportation*, 868 P.2d 41 (Utah 1993), and *Parks v. Utah Transit Authority*, 2002 UT 55, the two cases Dr. Drezga cites for his argument, are distinguishable from this case.⁴¹ Both involved the Governmental Immunity Act cap as applied to governmental entities performing governmental functions. Because there was no right to recover for injuries arising out of such activities at common law, the statute that created a limited right to recover did not impinge on any fundamental right and did not violate the constitution because, in creating a right, the legislature can also put limits on it. *See McCorvey*, 868 P.2d at 47-48.

⁴⁰ Dr. Drezga overstates the plaintiffs' argument when he says that the plaintiffs appear to argue that the constitutional right to a jury trial is a right to have damages determined exclusively by the jury "without any oversight by a court, other than the possibility of a remittitur coupled with an opportunity for a new trial." (Br. of Aplee at 39.) In fact, the court exercises great control over the jury's determination of damages, by determining what evidence the jury hears and the instructions given to the jury, as well as by its power to review the jury's verdict. The jury's verdict is also subject to appellate review. The appellate court can reverse if the jury's damage award is not supported by the evidence or is excessive and influenced by passion or prejudice. These are all judicial functions that provide sufficient oversight to prevent the type of irrational and unsupported jury verdicts Dr. Drezga fears. *See Vidmar, supra* page 12, at 898 (concluding that the judicial system's "corrective mechanisms for wayward jury verdicts" are effective in controlling the rare "outlier" award).

⁴¹ Moreover, neither specifically analyzed article I, section 10. *See Parks*, 2002 UT 55, ¶ 18; *McCorvey*, 868 P.2d at 46-48.

Dr. Drezga acknowledges that “logic seems to require, that the right of the jury to determine damages without interference . . . is absolute.” (Br. of Aplee at 39-40.) He argues, however, that the only Utah authority the plaintiffs cite--Justice Durham’s separate opinion in *Condemarin*, 775 P.2d at 365-66--“does not take this logical absolutist approach.” (Br. of Aplee at 40.) He ignores Justice Durham’s clear statement: “I believe that the Utah state constitutional right to jury trial on the question of civil damages is absolute.” 775 P.2d at 366.⁴²

Dr. Drezga also claims that, under Justice Durham’s *Condemarin* analysis, the cap would be upheld because it is “significantly higher than” the cap in *Condemarin*, applies only to soft damages and is amply justified. In fact, when the \$100,000 cap struck down in *Condemarin* was passed in 1965, it was relatively higher than the \$250,000 medical malpractice cap when it was passed in 1986.⁴³ As for Dr. Drezga’s arguments regarding soft versus hard damages and justification for the cap, see points I, II and V.D, *supra*.

Dr. Drezga and the health-care amici suggest that the cap does not violate the constitutional right to a jury trial because the jury’s role is to determine the facts, and it is

⁴² Justice Durham went on to say that, “[u]nder the *due process* balancing approach,” she “would not hold *any* limitation in actions against the government was *per se* invalid because of the infringement of the right to jury trial,” 775 P.2d at 366 (first emphasis added), but she clearly believed that the damage cap in *Condemarin* violated the constitutional right to a jury trial, *id*.

⁴³ Based on the Consumer Price Index, \$100,000 in 1965 dollars was worth \$347,936.51 in 1986 dollars.

the legislature's role to determine the legal consequences of the jury's factual findings; a cap merely sets the outer limits of the remedy, which is a matter of law.

Damages, however, are a question of fact, not law. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Under Utah law, damages in medical malpractice cases--even damages for "mental and physical suffering"--are for the jury to decide: "While the law cannot measure with exactness such suffering and cannot determine with absolute certainty what damages, if any, plaintiff may be entitled to, still those are questions which a jury under proper instructions from the court *must* determine." *Ricks v. Budge*, 91 Utah 307, 64 P.2d 208, 213 (1937) (emphasis added). *See also Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) ("if a party so demands, a jury must determine the actual amount of . . . damages . . . in order 'to preserve "the substance of the common law right of trial by jury"'") (citation omitted). As this court has indicated "numerous times . . . , the right of trial by jury is one which should be carefully safeguarded by the courts, and when a party ha[s] demanded such a trial, he is entitled to have the benefit of the jury's findings on issues of fact" *Mel Hardman Prods., Inc. v. Robinson*, 604 P.2d 913, 917 (Utah 1979) (emphasis added).

Dr. Drezga argues that the Supreme Court's holding in *Cooper Industries* supports his argument that the right to a jury trial is not violated when a court reduces a damage award to an amount the legislature has set. *Cooper* did not involve any statute and thus is inapplicable. Nevertheless, its reasoning supports the plaintiffs' position. The issue in *Cooper* was the standard of review an appellate court was to apply in considering the

constitutionality of a punitive damage award. 532 U.S. at 426. The Court held that *de novo* review was required. *Id.* at 436. In doing so, the Court distinguished between punitive and compensatory damages: “Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a “fact” “tried” by the jury.” *Id.* at 437 (emphasis added and citations omitted). *See also id.* at 432 (“A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation”). Therefore, appellate review of a lower court’s determination that an award of punitive damages is consistent with due process “does not implicate” the constitutional right to a jury trial. *Id.* (footnote omitted). Altering a jury’s award of compensatory damages, on the other hand, *does* impinge on a jury’s factual finding and hence on the right to a jury trial. *See, e.g., Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 258 (Kan. 1988) (“When the trial judge enters judgment for less than the jury verdict . . . he clearly invades the province of the jury. *This is an infringement on the jury’s determination of the facts, and, thus, is an infringement on the right to a jury trial.*”) (emphasis added).⁴⁴ To argue that a statute that fixes noneconomic damages without regard to the jury’s factual determination does not infringe on the constitutional right to a jury trial is not only “illogical,” 757 P.2d at 258, but also pure

⁴⁴ The trial court’s power to order a remittitur does not violate the constitutional right to a jury trial because the plaintiff retains the option to have a second jury determine his or her damages. *See infra* note 45.

sophistry. The “constitutional protection cannot be evaded by the semantic argument” that the jury’s factual finding is not ignored but only limited. *Cf. Berry*, 717 P.2d at 679. To argue that the right to a jury trial is not violated when the jury’s factual determination goes unheeded “pays lip service to the form of the jury but robs the institution of its function.” *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999) (quoting *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721, *amended*, 780 P.2d 260 (Wash. 1989)). The court should “not construe constitutional rights in such a manner.” *Id.* (quoting *Sofie*, 771 P.2d at 721). *See also Berry*, 717 P.2d at 678 (“We are simply not at liberty to eviscerate a mandatory provision of our Declaration of Rights . . .”). Otherwise, the legislature could find the facts in every case and deprive all of the jury’s factual findings of their legal effect.

Dr. Drezga’s article I, section 10 argument is particularly ironic in light of his other arguments. He criticizes the unelected judiciary for what he sees as invading the province of the legislature, the people’s representatives. Yet he is only too willing to allow the legislature to override a jury--“the purest democratic institution we have.” David C. Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg*, 31 SETON HALL L. REV. 631, 641 (2001). This is not a case of a court acting as a super-legislature but of the legislature overstepping its bounds and acting as a super-jury. *See Robert S. Peck, In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672, 676 (2001).

VIII. THE PLAINTIFFS PRESERVED THEIR DUE PROCESS AND SEPARATION OF POWERS ARGUMENTS.

Dr. Drezga urges this court to disregard the plaintiffs' due process and separation of powers arguments because, he claims, they were not preserved below. As Dr. Drezga notes, to sufficiently preserve an issue for appeal, the trial court must have an opportunity to rule on the issue. The trial court has that opportunity if the issue is "specifically raised" in "a timely fashion," and the party introduces "supporting evidence *or* relevant legal authority." *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) (emphasis added and citations omitted).

Admittedly, the plaintiffs did not brief their due process and separation of powers arguments in the trial court. However, there is no requirement that an issue be briefed to be preserved. At oral argument, the plaintiffs argued that the damage cap should be reviewed with heightened scrutiny because it violated due process (R. 810, at 20, 26, 45) and separation of powers (R. 810, at 43, 45), among other things. At oral argument, plaintiffs' counsel also gave the trial court a copy of *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) (*see* R. 810, at 21, 44), an Illinois case cited in the plaintiffs' memorandum (R. 472) that held that Illinois's cap on noneconomic damages violated the separation of powers doctrine. In ruling on the motion, the trial court indicated that it had considered both the briefs of the parties and the oral argument. (R. 785.) Thus, the plaintiffs specifically raised the due process and separation of powers issues in a timely fashion and supported them with relevant legal authority.

IX. THE DAMAGE CAP VIOLATES DUE PROCESS.

Dr. Drezga argues that, because there is no fundamental right to unlimited noneconomic damages, the court should defer to the legislature's conclusion that there is a rational basis for the damage cap and that the cap therefore does not violate the right to due process under article I, section 7 of the Utah Constitution.

Regardless of whether there is a "fundamental" right to recover unlimited noneconomic damages, the right to recover for negligently caused personal injuries is "an 'important substantive right,'" *Condemarin*, 775 P.2d at 354 (per Durham, J.) (quoting *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980)), and "a substantial property right, not only of monetary value but in many cases [such as this one] fundamental to the injured person's physical well-being and ability to continue to live a decent life," *Hunter v. North Mason High Sch.*, 539 P.2d 845, 848 (Wash. 1975). *See also Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989) ("Certainly, the right to the protection of the law for one's person [and] property . . . is a right that is as essential to the happiness of an individual as is liberty"); *Condemarin*, 775 P.2d at 373 (per Stewart, J.) ("Whether or not the right involved here is thought to be 'fundamental,' . . . it is certainly an important right that ought not to be discriminatorily abrogated or diminished unless there is a strong countervailing public interest"). Moreover, the damage cap infringes on Athan Montgomery's constitutional right to a remedy under article I, section 11, his right to the uniform operation of the laws under article I, section 24, and his right to a jury trial under article I, section 10. All are certainly important, if not fundamental rights. Heightened

scrutiny is therefore required. *Hipwell ex rel. Jensen v. Sharp*, 858 P.2d 987, 988-89 n.4 (Utah 1993).

Because Dr. Drezga has not shown that the damage cap was necessary for the continued availability of medical malpractice insurance in Utah, much less for the continued availability of insured health care, and because the cap can have only the slightest impact, if any, on the cost of health care in Utah, the damage cap is not “narrowly tailored” to achieve “a compelling state interest”; it therefore violates due process. *See Wells v. Children’s Aid Soc’y of Utah*, 681 P.2d 199, 206 (Utah 1984) (citation omitted) (stating the test for due process where heightened scrutiny is required).

X. THE DAMAGE CAP VIOLATES THE SEPARATION-OF-POWERS DOCTRINE.

Dr. Drezga argues that the cap does not violate the separation of powers provision of the Utah Constitution, article V, section 1, because the legislature has the power to determine what the substantive law of Utah should be.

The amount of damages, however, is a question of fact, not law. *See, e.g., Cooper Indus.*, 532 U.S. at 432 (2001). Juries determine the facts in a medical malpractice case, *see, e.g., Ricks v. Budge*, 91 Utah 307, 64 P.2d 208, 213 (1937), and juries are an arm of the judicial branch, not the legislative, *e.g., Bell v. State*, 381 P.2d 167, 173 (Okla. Crim. App. 1962). A cap on damages contravenes the traditional authority of the judicial branch to assess, case by case, whether a damage award is excessive. *See Best v. Taylor*

Mach. Works, 689 N.E.2d 1057, 1080 (Ill. 1997). It “directly changes the outcome of a jury determination” by “taking a jury’s finding of fact and altering it to conform to a predetermined formula.” *Sofie*, 771 P.2d at 720. It is a judge who is empowered to draw the legal conclusion that a jury award is excessive based on the evidence in the case. Because the legislature “cannot make such case-by-case determinations,” the legislature’s attempt to do so violates the separation of powers. *See id.* at 721; *Best*, 689 N.E.2d at 1081.⁴⁵

CONCLUSION

Constitutions were created to protect and preserve certain critical rights of individuals in the face of changing political winds. *See, e.g., West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Horton v. Goldminer’s Daughter*, 785 P.2d 1087, 1091 (Utah 1989). The courts “are to be considered as the bulwarks of a limited Constitution against legislative encroachments” THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (William R. Brock ed., 1996). “[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a

⁴⁵ The judicial branch may order a remittitur of a jury verdict. *See Best*, 689 N.E.2d at 1079 (“For over a century it has been a traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur, in appropriate and limited circumstances, to correct excessive jury verdicts”). The legislature, however, may not. *Sofie*, 771 P.2d at 720-21. A judicial remittitur preserves the right to a jury trial because, if the plaintiff does not accept the remittitur, he is entitled to have his case heard by another jury. The damage cap does not preserve that right. *See Lakin*, 987 P.2d at 472.

majority of their constituents, incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions”

Id. What Justice Moffat said in another time and context applies equally today:

It is an easy method to avoid the plain terms of the State Constitution. If constitutional limitations may thus by a process of definition be eliminated, evaded, or evaporated out of the Constitution, the stabilizing purposes and restraints of Constitutions intended to tide the people over periods of emergency, excitement, or trouble until calm reflection may analyze and measure the needs will cease to accomplish the purposes for which they are intended. Constitutions are drawn during sober hours, upon careful and painstaking consideration. It is beside the question to say the framers of the Constitution did not anticipate [an alleged medical malpractice insurance crisis, for example]. It is certain, however, that the framers of the Constitution and the people who adopted it intended that certain . . . policies and limitations should be maintained.

Lehi City v. Meiling, 87 Utah 237, 48 P.2d 530, 553-54 (1935) (Moffat, J., dissenting).

The Utah Constitution guarantees injured persons a right to a remedy, the right to the uniform operation of the laws, the right to a jury trial and the right to due process.

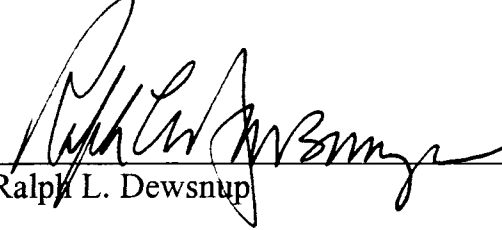
Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78, at 399 (Alexander Hamilton). To allow the legislature to eliminate or evade these rights by defining them out of the constitution because of an alleged crisis that did not in fact exist in Utah violates both the spirit and the letter of the constitution.

Admittedly, “it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community.” *Id.* at 402-03. Nevertheless, for the foregoing reasons and those stated in the plaintiffs’ opening brief, the court should reverse the trial court’s decision to limit the amount of the judgment, vacate the amended judgment and reinstate the original judgment.

DATED this 1st day of November, 2002.

DEWSNUP, KING & OLSEN



Ralph L. Dewsnup



Paul M. Simmons

(Original signature)

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of November, 2002, I caused two true and correct copies of the foregoing to be served by U.S. mail, first-class postage prepaid, on each of the following:

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ADDENDUM

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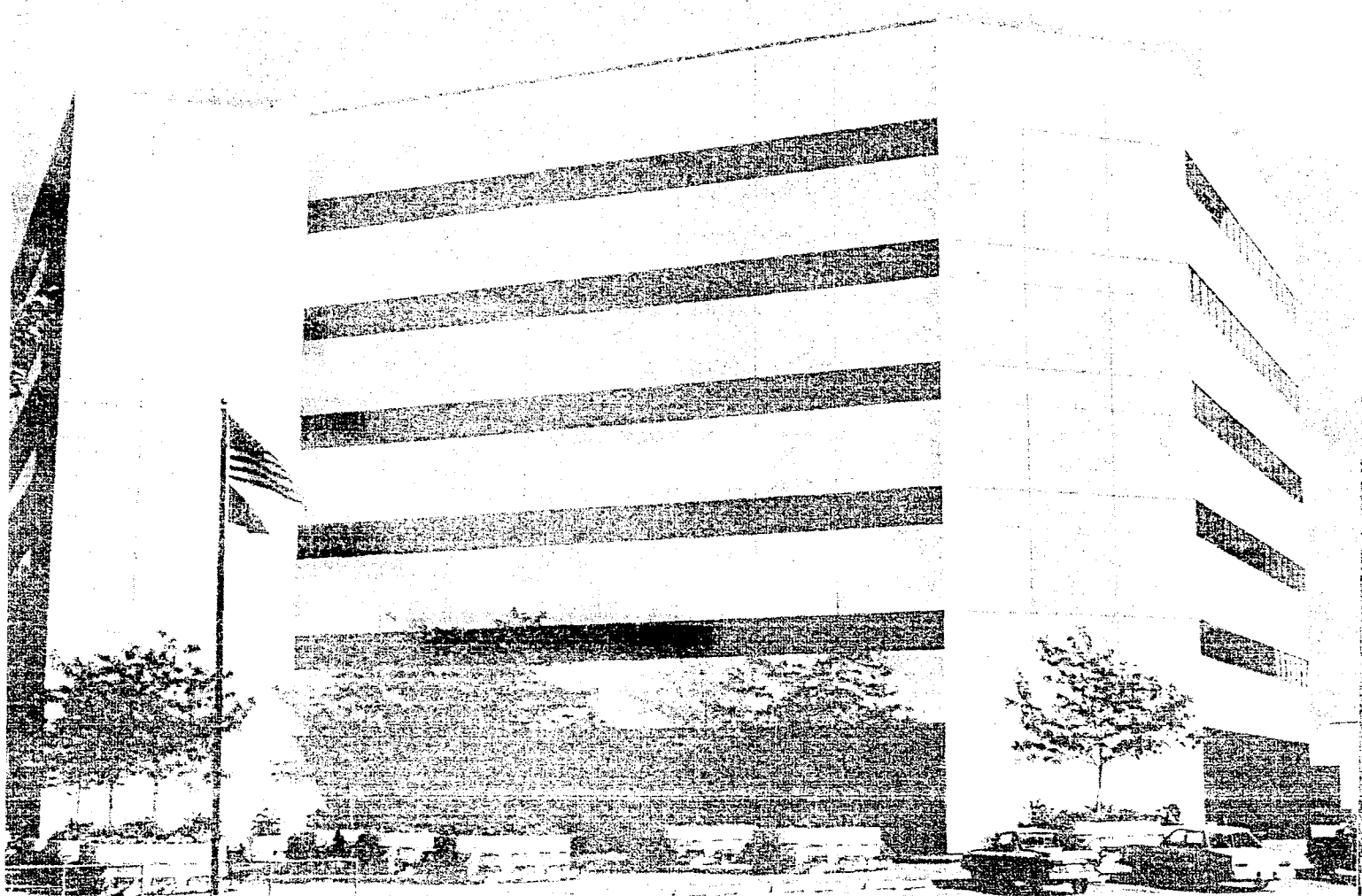


Utah Insurance Department

Harold C. Yancey
Insurance Commissioner

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Report To
Governor Norman H. Bangerter



Business of
1988

TABLE C
1988 SUMMARY OF UTAH OPERATIONS
OF ALL INSURERS BY LINE OF INSURANCE

	WRITTEN PREMIUMS	BENEFITS PAID
LIFE INSURANCE:		
ORDINARY	\$279,657,184	\$182,041,084
CREDIT LIFE	15,554,555	6,295,386
GROUP	54,734,607	79,091,612
INDUSTRIAL	<u>43,153</u>	<u>1,394,764</u>
TOTAL LIFE INSURANCE:	349,989,499	268,822,846
ANNUITIES:	352,302,899	111,541,939

	PREMIUMS EARNED	LOSSES INCURRED	LOSS RATIO
ACCIDENT & HEALTH:			
GROUP ACCIDENT & HEALTH	306,579,221	322,647,821	105
CREDIT A & H, (GROUP & IND.)	13,651,969	5,329,150	39
COLLECTIVELY RENEWABLE A & H	3,244,827	1,987,030	61
NON-CANCELLABLE A & H	8,026,867	4,449,851	55
GUARANTEED RENEWABLE A & H	22,841,783	10,789,885	47
NON-RENEWABLE - STATED REASONS	2,459,331	1,447,735	59
OTHER ACCIDENT ONLY	765,953	340,139	44
ALL OTHER A & H	<u>4,951,498</u>	<u>3,322,795</u>	67
TOTAL A & H:	362,521,449	350,314,406	96
FIRE AND ALLIED LINES:			
FIRE	14,342,296	2,842,224	20
ALLIED LINES	7,407,412	2,668,294	36
OCEAN MARINE	1,040,750	217,288	21
INLAND MARINE	<u>19,901,999</u>	<u>8,219,466</u>	41
TOTAL FIRE & ALLIED LINES:	42,692,457	13,947,272	32
MULTIPLE PERIL:			
FARMOWNERS MULTIPLE PERIL	2,576,138	1,652,688	64
HOMEOWNERS MULTIPLE PERIL	77,693,190	49,505,288	64
COMMERCIAL MULTIPLE PERIL	<u>90,009,236</u>	<u>29,811,783</u>	33
TOTAL MULTIPLE PERIL:	170,278,564	80,969,759	47
AUTOMOBILE:			
PRIVATE PASSENGER AUTO NOFAULT	33,342,632	20,870,888	63
OTHER PRIVATE PASSENGER AUTO	156,373,386	109,550,202	70
COMMERCIAL AUTO NOFAULT	2,829,111	640,410	23
OTHER COMMERCIAL AUTO	53,571,689	22,397,182	42
PRIVATE PASS. PHYSICAL DAMAGE	147,224,237	75,351,025	51
COMM. AUTO PHYSICAL DAMAGE	<u>25,720,517</u>	<u>7,552,415</u>	29
TOTAL AUTOMOBILE:	419,061,572	236,362,122	56

ALL OTHER LINES:			
FINANCIAL GUARANTY	2,667,618	149,006	6
MEDICAL MALPRACTICE	22,863,554	4,789,404	21
EARTHQUAKE	693,543	1,723	
WORKERS' COMPENSTATION	42,808,598	29,670,858	69
OTHER LIABILITY	68,752,722	40,623,072	59
AIRCRAFT (ALL PERILS)	8,280,314	5,656,138	68
FIDELITY	5,785,800	1,114,614	19
SURETY	11,589,995	5,362,791	46
GLASS	248,579	8,695	3
BURGLARY AND THEFT	321,446	41,918	13
BOILER AND MACHINERY	2,348,375	308,726	13
CREDIT	<u>3,571,158</u>	<u>8,128,371</u>	228
TOTAL ALL OTHER LINES:	169,931,702	95,835,316	56

*** REPORT TOTAL *** \$1,866,778,142 \$1,157,793,660 62



UTAH
INSURANCE DEPARTMENT

Report to
NORMAN H. BANGERTER
Governor

From
HAROLD C. YANCEY
Commissioner of Insurance

BUSINESS OF 1985

TABLE C

**1985 SUMMARY OF UTAH OPERATIONS
OF ALL INSURERS BY LINE OF INSURANCE**

	WRITTEN PREMIUMS	BENEFITS PAID	
LIFE INSURANCE:			
ORDINARY	254,037,097	155,942,340	
CREDIT LIFE	15,298,159	5,395,839	
GROUP	54,664,845	59,124,306	
INDUSTRIAL	68,547	1,449,882	
TOTAL LIFE INSURANCE:	324,068,648	221,912,367	
ANNUITIES:	175,754,897	75,616,425	
	PREMIUMS EARNED	LOSSES INCURRED	LOSS RATIO
ACCIDENT & HEALTH:			
GROUP ACCIDENT & HEALTH	273,272,076	219,339,430	80
CREDIT A & H, (GROUP & IND.)	12,730,596	5,728,375	45
COLLECTIVELY RENEWABLE A & H	4,048,729	1,766,543	44
NON-CANCELLABLE A & H	6,401,099	3,156,601	49
GUARANTEED RENEWABLE A & H	18,233,689	9,108,409	50
NON-RENEWABLE - STATED REASONS	2,099,166	1,214,092	58
OTHER ACCIDENT ONLY	803,170	319,564	40
ALL OTHER A & H	4,238,051	3,871,083	91
TOTAL A & H:	321,826,576	244,504,097	75
FIRE AND ALLIED LINES:			
FIRE	10,628,277	33,010,899	311
ALLIED LINES	5,122,386	3,238,257	63
OCEAN MARINE	869,030	588,948	68
INLAND MARINE	16,710,290	46,700,663	279
TOTAL FIRE & ALLIED LINES:	33,329,983	83,538,767	250
MULTIPLE PERIL:			
FARMOWNERS MULTIPLE PERIL	2,524,833	1,560,311	62
HOMEOWNERS MULTIPLE PERIL	62,137,091	39,600,960	64
COMMERCIAL MULTIPLE PERIL	63,461,291	67,817,976	107
TOTAL MULTIPLE PERIL:	128,123,215	108,979,247	85
AUTOMOBILE:			
PRIVATE PASSENGER AUTO NOFAULT	19,574,330	13,966,359	71
OTHER PRIVATE PASSENGER AUTO	101,552,356	88,833,772	87
COMMERCIAL AUTO NOFAULT	1,655,927	256,834	16
OTHER COMMERCIAL AUTO	38,892,696	33,307,059	86
PRIVATE PASS. PHYSICAL DAMAGE	113,609,632	70,608,984	62
COMM. AUTO PHYSICAL DAMAGE	25,150,686	12,666,440	50
TOTAL AUTOMOBILE:	300,435,627	219,639,448	73
ALL OTHER LINES:			
MISCELLANEOUS	1,971,545	2,447,158	124
MEDICAL MALPRACTICE	12,021,561	10,366,172	86
EARTHQUAKE	434,341	21,334-	5-
WORKERS' COMPENSTATION	50,660,977	38,018,504	75
OTHER LIABILTY	39,374,674	38,143,767	97
AIRCRAFT (ALL PERILS)	6,202,295	5,823,204	94
FIDELITY	3,526,094	2,285,023	65
SURETY	13,237,056	14,668,220	111
GLASS	81,243	21,126	26
BURGLARY AND THEFT	385,732	64,080	17
BOILER AND MACHINERY	1,778,853	225,960	13
CREDIT	4,756,936	6,247,953	131
TOTAL ALL OTHER LINES:	134,431,307	118,289,833	87
*** REPORT TOTAL ***	1,417,970,253	1,072,480,184	75

MEDICAL MALPRACTICE

RANK	NAME OF INSURER	% OF MARKET	PREMIUMS WRITTEN
1	UTAH MEDICAL INSURANCE ASSOCIATION	56.17	\$ 6,327,289
2	INSURANCE CORPORATION OF AMERICA	12.75	1,437,168
3	ST PAUL FIRE & MARINE INS CO	8.17	920,639
4	AMERICAN CONTINENTAL INSURANCE COMPANY	6.56	739,056
5	AETNA CASUALTY & SURETY CO THE	5.71	643,931
6	PROFESSIONAL INSURANCE EXCHANGE	1.65	186,867
7	CONTINENTAL CASUALTY CO	1.36	153,384
8	CHICAGO INSURANCE COMPANY	1.30	146,807
9	FREMONT INDEMNITY COMPANY	1.25	141,882
10	ST PAUL MERCURY INS CO, THE	1.21	137,045
11	PACIFIC EMPLOYERS INSURANCE CO	.72	82,164
12	NATIONAL CHIROPRACTIC MUTUAL INSURANCE CO	.69	78,315
13	AMERICAN CASUALTY CO OF READING PA	.44	49,866
14	NATIONAL FIRE INS CO OF HARTFORD	.22	25,132
15	RANGER INSURANCE COMPANY	.20	23,075
16	JEFFERSON INSURANCE CO OF N Y	.19	21,494
17	TRUCK INSURANCE EXCHANGE	.18	20,480
18	INSURANCE CO OF THE STATE OF PENN	.16	19,146
19	NORTHWESTERN NATIONAL INS CO	.16	18,824
20	INSURANCE CO OF NORTH AMERICA	.12	14,205
TOTAL FOR TOP 20 RANKED INSURERS		99.31	\$ 11,186,769
TOTAL FOR ALL 42 INSURERS WRITING THIS LINE		100.00	\$ 11,263,510

WORKERS COMPENSATION

RANK	NAME OF INSURER	% OF MARKET	PREMIUMS WRITTEN
1	INSURANCE CO OF NORTH AMERICA	12.56	\$ 5,859,093
2	WAUSAU UNDERWRITERS INSURANCE COMPANY	9.27	4,324,007
3	INDUSTRIAL INDEMNITY CO	6.89	3,213,197
4	LIBERTY MUTUAL FIRE INS CO	4.89	2,281,343
5	EMPLOYERS INSURANCE OF WAUSAU A MUTUAL CO	4.14	1,932,721
6	NATIONAL UNION FIRE INS CO OF PITTS	3.97	1,854,854
7	ENERGY MUTUAL INSURANCE COMPANY	3.89	1,814,841
8	BIRMINGHAM FIRE INS CO OF PA	3.35	1,563,925
9	STANDARD FIRE INSURANCE CO THE	2.95	1,377,821
10	TRANSAMERICA INSURANCE CO	2.90	1,352,338
11	AMERICAN MOTORISTS INSURANCE CO	2.77	1,291,600
12	PACIFIC EMPLOYERS INSURANCE CO	2.36	1,100,547
13	ARGONAUT INSURANCE CO	2.35	1,097,495
14	TRUCK INSURANCE EXCHANGE	2.12	992,195
15	TRAVELERS INDEMNITY CO THE	1.94	906,432
16	TRANSPORTATION INSURANCE CO	1.78	831,114
17	HOME INDEMNITY COMPANY THE	1.74	811,226
18	OLD REPUBLIC INSURANCE CO	1.47	688,265
19	FIRE & CASUALTY INS CO OF CONN THE	1.46	682,148
20	LIBERTY INSURANCE CORPORATION	1.46	680,874
TOTAL FOR TOP 20 RANKED INSURERS		74.33	\$ 34,656,036
TOTAL FOR ALL 197 INSURERS WRITING THIS LINE		100.00	\$ 46,621,650

National Practitioner Data Bank

2000 Annual Report



U.S. Department of Health and Human Services
Health Resources and Services Administration
Bureau of Health Professions
Division of Quality Assurance
5600 Fishers Lane, Suite 8A-55
Rockville, MD 20857



Requests for copies of this report and information on the National Practitioner Data Bank should be directed to the Data Bank Customer Service Center, 1-800-767-6732. This report and other information is also available on the Internet at www.npdb-hipdb.com.

**TABLE 9: Mean and Median Physician Malpractice Payment and Mean Delay Between Incident and Payment by State
(National Practitioner Data Bank, September 1, 1990 - December 31, 2000)**

State	2000 Only		Cumulative			2000 Only	Cumulative
	Mean Payment	Median Payment	Mean Payment	Median Payment	Rank of Median	Mean Delay Between Incident and Payment (Years)	Mean Delay Between Incident and Payment (Years)
Alabama	\$419,757	\$200,000	\$340,185	\$149,900	5	4.47	4.30
Alaska	190,851	100,000	215,891	75,357	33	4.17	3.92
Arizona	260,077	150,000	204,043	90,000	24	4.03	3.80
Arkansas	220,591	91,880	156,838	90,000	24	3.80	3.43
California	142,637	55,000	122,562	41,500	51	3.03	3.42
Colorado	236,919	84,997	163,957	55,000	48	3.67	3.33
Connecticut	432,536	200,000	321,721	135,000	6	5.84	5.45
Delaware	300,780	150,000	203,762	90,000	24	4.35	4.55
Florida*	259,354	175,000	215,619	125,000	7	3.96	4.06
Georgia	334,301	166,667	272,735	125,000	7	3.77	3.60
Hawaii	252,541	120,000	236,383	75,000	36	3.42	4.11
Idaho	259,187	100,000	206,974	50,000	49	3.33	3.33
Illinois	457,855	250,000	314,680	175,021	1	5.45	5.82
Indiana*	208,834	75,001	154,875	75,001	35	5.87	5.40
Iowa	224,947	100,000	158,868	64,875	46	3.26	3.19
Kansas* **	152,740	175,000	164,208	106,000	15	3.77	4.03
Kentucky	173,676	75,000	181,917	75,000	36	4.45	4.07
Louisiana*	174,110	99,999	136,913	85,000	30	5.26	4.91
Maine	291,497	262,482	239,370	125,000	7	3.82	4.07
Maryland	282,403	150,000	241,140	115,000	13	4.82	4.74
Massachusetts	370,782	250,000	282,111	150,000	4	5.64	5.96
Michigan	118,501	85,000	100,363	67,500	43	4.28	4.35
Minnesota	219,533	100,000	176,093	72,555	41	2.99	3.16
Mississippi	211,725	127,750	187,358	97,500	22	4.29	4.05
Missouri	244,638	130,000	210,058	100,000	16	3.97	4.53
Montana	235,909	125,000	149,354	60,000	47	4.30	4.30
Nebraska*	181,255	116,250	118,679	70,000	42	3.65	3.89
Nevada	317,017	175,000	241,242	100,000	16	4.84	4.27
New Hampshire	265,192	111,000	242,281	125,000	7	4.70	4.85
New Jersey	309,435	175,000	237,788	115,000	13	5.65	6.24
New Mexico*	189,018	100,000	132,400	90,000	24	4.22	3.83
New York	299,572	150,000	256,071	125,000	7	6.28	7.06
North Carolina	312,132	132,500	237,975	100,000	16	3.93	3.66
North Dakota	294,939	143,750	167,869	77,500	32	3.31	3.49
Ohio	241,636	115,000	215,103	90,000	24	4.58	4.50
Oklahoma	275,620	121,000	241,215	75,128	34	3.56	3.85
Oregon	280,034	141,500	177,817	75,000	36	3.42	3.41
Pennsylvania*	250,754	192,755	211,680	150,710	3	5.71	5.99
Rhode Island	266,061	100,000	252,707	100,000	16	6.03	6.12
South Carolina*	181,771	100,000	157,092	93,750	23	4.34	4.66
South Dakota	208,319	100,000	199,158	65,500	44	3.34	3.48
Tennessee	195,664	100,000	216,666	87,500	29	3.71	3.61
Texas	194,039	110,000	175,346	100,000	16	3.68	3.90
Utah	242,311	90,000	148,231	49,950	50	3.34	3.50
Vermont	144,273	75,000	144,227	65,000	45	3.36	4.37
Virginia	227,289	150,000	189,753	100,000	16	4.00	3.79
Washington	238,655	90,000	193,612	75,000	36	4.34	4.38
West Virginia	254,881	100,000	202,043	80,000	31	5.26	5.68
Wisconsin*	358,075	162,857	322,035	125,000	7	4.54	4.89
Wyoming	252,422	100,000	162,380	75,000	36	3.18	3.19
Washington, DC	584,338	197,500	397,915	175,000	2	4.92	4.88
All Reports	\$248,947	\$125,000	\$202,301	\$99,500		4.66	4.83

This table includes only disclosable reports in the NPDB as of December 31, 2000. The All Reports row includes jurisdictions not listed above (Puerto Rico, Virgin Islands, etc.).

Rank for payments is based on the median payment amount for each State; 1 is highest, 51 is lowest

* These data are not adjusted for State compensation funds and other similar funds. Mean and median payments for States with payments made by these funds understate the actual mean and median of amounts received by claimants. Payments made by these funds may also affect mean delay times between incidents and payments. States with these funds are marked with an asterisk.

** The 2000 mean malpractice payment for Kansas was less than the median payment, which is very unusual. There were no very large payments to pull the mean above the median.

from the office of
Senator Edward M. Kennedy
of Massachusetts

**STATEMENT OF SENATOR EDWARD M. KENNEDY IN OPPOSITION
TO THE MEDICAL MALPRACTICE AMENDMENT**

July 26, 2002

For Immediate Release

**Contact: Jim Manley / Stephanie Cutter
(202) 224-2633**

Mr. President, this amendment has nothing to do with the price of prescription drugs, the cost of health care, or even the insurance premiums of doctors. It has everything to do with the profits of the insurance industry.

At a time in which Americans want greater corporate accountability - in this time of Enron, WorldCom, and other corporate scandals - it is unbelievable that our Republican friends now cozy up to big insurance corporations to give them a break.

Let me remind my colleagues that the legislation before us is about the high price of prescription drugs and providing a Medicare prescription drug benefit. Now the Republican side is trying to divert attention from this important debate by offering this amendment.

It is an attack on the very people which the underlying legislation was designed to help - those in need of quality medical care. The McConnell Amendment is designed to shield health care providers from basic accountability for the care they provide. While those across the aisle like to talk about doctors, the real beneficiaries will be insurance companies. This amendment would enrich the insurance industry at the expense of the most seriously injured patients; men, women and children whose entire lives have been devastated by medical neglect and corporate abuse.

This proposal would also shield HMOs that fail to provide needed care, drug companies whose medicine has toxic side effects, and manufacturers of defective medical equipment. In recent months the entire nation has been focused on the need for greater corporate accountability. The McConnell Amendment does just the reverse.

It would drastically limit the financial responsibility of the entire

health care industry to compensate injured patients for the harm they have suffered. When will the Republican Party start worrying about injured patients and stop trying to shield big business from the consequences of its wrongdoing? Less accountability will never lead to better health care.

This amendment places major new restrictions on the right of seriously injured patients to recover fair compensation for their injuries by placing arbitrary caps on compensation for non-economic loss. These caps only serve to hurt those patients who have suffered the most severe, life-altering injuries and who have proven their cases in court.

Non-economic damages compensate victims for the very real, but not easily quantifiable, losses they sustain when they suffer a serious injury, such as loss of mobility, paralysis, loss of bodily functions, blindness, disfigurement, severe and chronic pain, loss of consortium, or loss of reproductive capacity. These are life-altering conditions which can deprive a person of the ability to engage in many of the normal activities of day to day living. They are the last ones we should be depriving of fair compensation.

Caps are totally arbitrary. They do not adjust the amount of the compensation ceiling with either the seriousness of the injury, or with the length of years that the victim must endure the resulting disability. Someone with a less serious injury can be fully compensated without reaching the cap. However, a patient with severe, permanent injuries is prevented by the cap from receiving full compensation for their more serious injuries. The person with a life-altering injury may only be permitted to receive a relatively small portion of the compensation to which he or she is entitled. Is it fair to apply the same limit on compensation to a person who is confined to a wheelchair for life that is applied to someone with a temporary leg injury?

Caps discriminate against younger victims. A young person with a severe injury such as paralysis must endure it for many more years than an older person with the same injury. Yet, that young person is prohibited from receiving greater compensation for the many more years he will be disabled. Is that fair?

Caps on noneconomic damages discriminate against women, children, minorities, and low income workers. These groups do not receive large economic damages attributable to lost earning capacity. Thus, noneconomic damages are particularly important to these vulnerable populations.

Caps in medical cases discriminate against women:

- * Women are the victims of medical negligence more frequently than men. AMA reviewed 48 studies and determined gender discrimination in patient care is real.

- * Women more frequently sustain certain types of injuries which have grievous consequences, such as miscarriage and loss of reproductive capacity, disfigurement from cosmetic surgery, psychological injuries, but do not result in an extended inability to work.

- * Women who are homemakers and caregivers for their families sustain no lost wages when they are injured, so they only receive minimal economic damages. Ignoring the value of the work they do within the home violates

the most basic family values.

* Working women tend to have lower earnings than their male counterparts, and fewer years in the labor force. Thus, their economic damages are lower.

Caps on noneconomic damages discriminate against children. Children who sustain lifelong injuries lack a documented earning capacity, and are often shortchanged in projecting their future lost earnings. Also, caps do not permit higher compensation for the greater number of years an injured child must live with his or her disability.

Caps also discriminate against minorities and other low wage workers. Since they receive less in economic damages for the time they are incapacitated than higher paid workers, the only way to fairly compensate them is with noneconomic damages that are not arbitrarily capped.

The elderly are also ill served by caps on noneconomic loss because caps put the primary focus for compensation on lost wages. For senior citizens, their life work is at or near an end. Thus, placing limits on how much can be recovered for pain and incapacity is really an arbitrary cap on their entire compensation. For patients in nursing homes, noneconomic damages are the principal financial incentive deterring medical neglect of the frail and elderly.

If we were to arbitrarily restrict the compensation which seriously injured patients can receive as the sponsor of this amendment proposes, what benefits would result? Certainly less accountability for health care providers will never improve the quality of health care. It will not even result in less costly care. The cost of medical malpractice premiums constitutes less than two-thirds of 1% (0.66%) of the nation's health care expenditures each year. Malpractice premiums are not the cause of the high rate of medical inflation. Over the decade from 1988 to 1998, the cost of medical care rose 13 times faster than the cost of malpractice insurance.

Caps are not only unfair to patients, they are also an ineffective way to control medical malpractice premiums. There is scant evidence to support the claim that enacting malpractice caps will lower insurance rates. There is substantial evidence to the contrary. There are other much more direct and effective ways to address the cost of medical malpractice insurance that do not hurt patients.

The supporters of the McConnell amendment have argued that restricting an injured patient's right to recover fair compensation will reduce malpractice premiums. They cite a report released just yesterday by the Department of Health and Human Services. However, that data is neither comprehensive or persuasive. It looks at only ten of the twenty-seven states that do not currently have a cap on malpractice damages, and it looks at the rate of increase in those states for only one year. In essence, that report "cherry picks" the data to support a politically preordained conclusion.

Let's look at the facts. Twenty-three states currently have a cap on medical malpractice damages. Most have had those statutes for a substantial number of years. Twenty-seven states do not have a cap on malpractice damages. The best evidence of whether such caps effect the cost of malpractice insurance is to compare the rates in those two groups

of states. Based on data from the Medical Liability Monitor on all fifty states:

- * the average liability premium in 2001 for doctors practicing internal medicine was slightly less (2.2%) for doctors in states without caps on malpractice damages (\$7,715) than in states with caps on damages (\$7,887). Internists actually pay more for malpractice insurance in the states that have caps.

- * the average liability premium in 2001 for general surgeons was also slightly less (2.3%) for doctors in states without caps (\$26,144) than states with caps (\$26,746). Surgeons are also paying more in the states that have caps.

- * the average liability premium for OB/GYN physicians in 2001 was only 3.3% more for doctors in states without caps (\$44,485) than states with caps (\$43,010), a very small difference.

This evidence clearly demonstrates that capping malpractice damages does not benefit the doctors it purports to help. Their rates remain virtually the same. It only helps the insurance companies earn even bigger profits.

Since malpractice premiums are not effected by the imposition of caps on recovery, it stands to reason that the availability of physicians does not differ between states that have caps and states that do not. AMA data shows that there are 233 physicians per 100,000 residents in states that do not have medical malpractice caps and 223 physicians per 100,000 residents in states with caps. Looking at the particularly high cost specialty of obstetrics and gynecology, states without caps have 29 OB/GYNs per 100,000 women while states with caps have 27.4 OB/GYNs per 100,000 women. Clearly there is no correlation.

California is the state that has had the lowest cap on malpractice damages the longest. It set a \$250,000 cap on non-economic damages in the mid 1970s which has not been adjusted for inflation since. If the tort reformers are correct, you would expect California to have had a smaller percentage of growth in premiums since those caps were enacted. Between 1991 and 2000, premiums in California actually grew more quickly (3.5%) than did premiums nationwide (1.9%).

If this amendment were to pass, it would sacrifice fair compensation for injured patients in a vain attempt to reduce medical malpractice premiums. Doctors will not get the relief they are seeking. Only the insurance companies, which created the recent market instability, will benefit.

Even supporters of the industry acknowledge that enacting tort reform will not produce lower insurance premiums:

- * Sherman Joyce, President of the American Tort Reform Association, told the Liability Week publication, "We wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates."

- * Victor Schwartz, the Association's General Counsel, told Business Insurance, "...many tort reform advocates do not contend that restricting litigation will lower insurance rates, and 'I've never said that in 30 years.'"

* The American Insurance Association even released a statement earlier this year (March 13, 2002) acknowledging, "'[T]he insurance industry never promised that tort reform would achieve specific premium savings..."

A National Association of Insurance Commissioners study shows that in 2000, the latest year for which data is available, total insurance industry profits as a percentage of premiums for medical malpractice insurance was nearly twice as high (13.6%) as overall casualty and property insurance profits (7.9%). In fact, malpractice was a very lucrative line of insurance for the industry throughout the 1990's. Recent premium increases have been an attempt to maintain high profit margins despite sharply declining investment earnings.

Insurance industry practices are responsible for the sudden dramatic premium increases which have occurred in some states in recent months. The explanation for these premium spikes can be found not in legislative halls or in courtrooms, but in the boardrooms of the insurance companies themselves.

There have been substantial increases in recent months in a number of insurance lines, not just medical malpractice. In 2001, rates for small commercial accounts have gone up 21%, rates for mid-size commercial accounts have gone up 32%, and rates for large commercial accounts have gone up 36%. These increases were attributable to general economic factors and industry practices, not medical liability tort law.

Insurers make much of their money from investment income. During times when investments offer high profit, companies compete fiercely with one another for market share. They often do so by underpricing their plans and insuring poor risks. When investment income dries up because interest rates fall, the stock market declines, and/or cumulative price cuts lower profits, the insurance industry then attempts to increase its premiums and reduce its coverage. This is a familiar cycle which produces a manufactured crisis each time their investments turn downward.

For example, St. Paul, one of the largest medical malpractice insurers, which has been experiencing serious financial difficulties lately, actually released \$1.1 billion in reserves between 1992 and 1997 to enhance its bottom-line and make those dollars available for investment. Some of the company's investments did not go well. It lost \$108 million in the collapse of Enron alone. When claims became due, those reserves were not available to pay them.

A recent study by the Consumer Federation of America presented at a hearing of the Health Subcommittee of the House Committee on Energy and Commerce last week, documented this industry trend: "It is the "hard" insurance market and the insurance industry's own business practices that are largely to blame for the rate shock that physicians have experienced in recent months." The Consumer Federation's findings are highly enlightening:

* "Medical malpractice rates are not rising in a vacuum. Commercial insurance rates are rising overall. * The rate problem is caused by the classic turn in the economic cycle of the industry, sped up - but not caused by - terrorist attacks. * Insurers have under-priced malpractice premiums over the last decade. It would take a 50 percent hike to increase inflation-adjusted rates to the same level as existed ten years ago. * Further limiting patients' rights to sue for medical injuries would have

virtually no impact on lowering overall health care costs. Medical malpractice insurance costs as a proportion of national health care spending are minuscule, amounting to less than 60 cents per \$100 spent. Insurer losses for medical malpractice have risen slowly in the last decade, by just over the rate of inflation. * Malpractice claims have not "exploded" in the last decade. Closed claims - which include claims where not payout was made - have remained constant, while paid claims have averaged just over \$110,000. * Medical Malpractice profitability over the last decade has been excellent, at just over 12 percent (per year), despite a decline in profits in the last two years."

This analysis of why we are seeing a sudden spike in premiums was basically confirmed by a June 24, 2002 Wall Street Journal article describing what happened to the malpractice insurance industry during the 1990s.

"Some of these carriers rushed into malpractice coverage because an accounting practice widely used in the industry made the area seem more profitable in the early 1990s than it really was. A decade of short-sighted price slashing led to industry losses of nearly \$3 billion last year.

"I don't like to hear insurance - company executives say it's the tort [injury-law] system - it's self-inflicted," says Donald J. Zuk, chief executive of Scpie Holdings Inc., a leading malpractice insurer in California...

"The losses were exacerbated by carriers' declining investment returns. Some insurers had come to expect that big gains in the 1990s from their bond and stock portfolios would continue, industry officials say. When the bull market stalled in 2000, investment gains that had patched over inadequate premium rates disappeared."

Let's look at the type of severely injured patients who would be denied fair compensation under the McConnell Amendment. These are the people who are being asked by those across the aisle to pay for the mismanagement of the insurance industry and the wrongdoing of health care providers:

Leyda Uuam (from Massachusetts) underwent surgery to correct a protruding belly button when she was 5 weeks old. Leyda will never walk, talk, move, or have any normal function after she suffered brain injury due to a series of errors by anesthesiologists, nurses, and a transport team.

When Mrs. Oliveira's unborn baby showed fetal distress her doctor failed to perform a timely cesarean birth as common sense would indicate. Instead, he attempted a forceps delivery. When this didn't work, he made three attempts at vacuum extraction, which were also unsuccessful. A different physician then attempted a second forceps delivery, which also failed. Finally, Oliveira underwent a cesarean section, yet her son died within an hour of his birth. An autopsy report identified the cause of death as asphyxia. The hospital, in an attempt to cover its negligence, amended the report falsely, listing the cause of death as probably fetal sepsis.

Twelve year-old Steven Olsen is blind and brain damaged today because of medical negligence. When he was hiking, he fell on a stick in the woods. The hospital refused his parents' request for a CAT scan, and instead

pumped Steven full of steroids and sent him home with a growing brain abscess. The next day, Steven Olson became comatose and wound up back in the hospital. Had he received the \$800 CAT scan, which would have detected the brain mass growing in his skull, Steven would be perfectly healthy today. The jury awarded Steven \$7.1 million in non-economic damages for his life-sentencing of serious illness and disability.

Harry Jordan, a man from Long Beach, underwent surgery to remove a cancerous kidney. The surgeon took out his healthy kidney instead. Jordan had been living for years on 10% kidney function, and he is now no longer able to work.

Elizabeth, a former fashion model, went to the emergency room complaining of nausea, vomiting, and "the worst headache of her life." The doctor misdiagnosed her as having an acute neck sprain and sent her home. Unfortunately, he failed to diagnose her symptoms as the warning leak of a brain aneurysm even though he had written a textbook which included an entire chapter on warning leaks. Ten days after her hospital visit, Elizabeth's aneurysm ruptured and she had a stroke. The bleeding destroyed brain tissue, requiring the removal of 1/3 of the frontal lobe of her brain. Elizabeth was left paralyzed as a result of her misdiagnosed aneurysm.

Philip Lucy's nasal cancer was misdiagnosed by doctors as high blood pressure and nerve damage for 2 years, although he continued to complain of pain. It was finally discovered that his left sinus was completely filled with a cancerous mass. This necessitated the removal of his left palate, left cheek, left orbit and his left eye.

LeVern Dostal, a recent retiree, died a slow and painful death after her surgeon failed to give her antibiotics before her gallbladder surgery. She developed sepsis and was hospitalized for a lengthy period of time, during which she underwent 3 more surgeries, as her condition slowly deteriorated.

Ms. Keck, 63, was admitted to the hospital for pneumonia. She sustained brain injuries because a nurse failed to monitor her oxygen level as instructed, and failed to notify the doctors of her worsening condition. She now suffers from paralysis and cannot speak. The hospital was purposefully understaffed to increase profits.

Under the McConnell Amendment, each of these people would be prevented from recovering more than \$250,000 in non-economic compensation. Can anyone claim that would be fair?

As we debate this amendment, let us all remember that we are dealing with people's lives - many of them have suffered life-altering injuries as a result of substandard medical care. The law is there to protect them, not to shield those who caused their injuries.



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FOR IMMEDIATE RELEASE

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AIA CITES FATAL FLAWS IN CRITIC'S REPORT ON TORT REFORM

Washington, D.C., March 13, 2002 - A recent report claiming that state tort reform laws have failed to lower insurance premiums is a grossly inaccurate and misleading attempt to sabotage the continuing need for meaningful tort reform, according to the American Insurance Association's (AIA) review of the report.

"Premium Deceit - The Failure of Tort Reform to Cut Insurance Prices," issued by the Center for Justice and Democracy and co-authored by insurance industry critic J. Robert Hunter, is a report whose hypothesis, methodology and conclusions are riddled with flawed logic, bias and inaccurate statements," said Debra Ballen, AIA executive vice president.

"The report is neither 'the most extensive review of insurance rate activity....ever taken,' nor an accurate evaluation of the tort reform movement in the late twentieth century," said Ballen. "Instead, the authors have spun a biased yarn reflecting their own distaste for tort reform and efforts to mislead readers as to the continuing need for meaningful tort reform."

The report's conclusion that, contrary to insurers' promises, state tort reform laws have failed to achieve lower premiums, fails in four crucial respects:

1. Insurers never promised that tort reform would achieve specific savings, but rather focused on the benefits of fairness and predictability.
2. The authors' methodology is deeply flawed. Problems include an incorrect time period analysis and an irrational method of classifying states.
3. The authors' "success test" is overly simplistic and misleading, since liability rules are just one factor determining claim costs, and claim costs are just one factor determining the ultimate cost of insurance. Claim costs are also influenced by accident frequency, population density, medical inflation and underlying economic conditions. And there are other state-specific factors that affect premium levels, such as taxes, fees and the degree of market competition.
4. The report ignores all data and evidence of the broader benefits of tort reform, such as increased equity for all parties and improved system predictability.

Businesses, citizen groups, and insurers across the country view tort reform as enhancing the rights of those who are truly injured to obtain compensation from those who are truly at fault, while weeding out frivolous and fraudulent claims. "In other words, a more balanced legal system for all parties," said Ballen.

"Contrary to the authors' erroneous conclusions, tort reform has helped to make the civil justice system fairer, and it has improved insurance market conditions by making insurance costs more stable and predictable. And that is what happened

during the late 1980s and 1990s, due in part to the reforms of the mid-to-late 1980s."

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The American Insurance Association represents more than 412 major insurance companies that provide all lines of property and casualty insurance and write more than \$87 billion annually in premiums. The association is headquartered in Washington, D.C. and has representatives in every state. All AIA press releases are available at www.aiadc.org.



Record: 6

Title: *Tort reforms* don't cut liability rates, study says.
Subject(s): TORTS -- United States -- States; INSURANCE, Liability -- Rates -- United States -- States
Source: Business Insurance, 07/19/99, Vol. 33 Issue 29, p73, 1/2p
Author(s): Prince, Michael
Abstract: Reveals study findings that *tort reform* measures enacted by states in the United States do not result to decreased liability rates. Assessment that *tort reforms* have no impact on commercial rates; Evaluation of *tort reform* laws passed by states from 1985 through 1998 which include caps on punitive damages or modifications to the rule of joint-and-several liability.
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TORT REFORMS DON'T CUT LIABILITY RATES, STUDY SAYS

Insurance premiums have not dropped in states where tort reform measures have been enacted, a new study by a consumers group concludes.

By comparing tort reform measures enacted by states since 1985 with the states' insurance rates, the report found that tort reform has had no impact on commercial rates. This finding contradicts claims by tort reform supporters that laws restricting litigation will reduce insurance costs, according to the study, issued by the Citizens for Corporate Accountability & Individual Rights, a New York-based non-profit consumer group.

"Officials have been severely misled into believing that if they passed these laws, insurance rates would drop in their states," Joanne Doroshow, CCAIR's executive director and co-author of the study, said at a press conference last week in New York announcing the findings.

"There is a hoax being perpetrated on the public and lawmakers in this country," she further stated. "This report undermines the principal argument used today by tort reform proponents that the system is too costly."

Tort reform advocates, however, say the study misstates their position and fails to take into account all the factors that influence insurance rates.

The study looked at tort reform laws passed by states from 1985 through 1998. These laws include caps on punitive damages or modifications to the rule of joint-and-several liability.

By examining the number of laws and providing greater weight to those enacted in earlier years, the states were divided into three groups: those with the fewest tort limits, those with moderate limits and those with the most.

The study then gathered information from the Insurance Services Office Inc. on rates it recommends insurers charge in each state for the different liability lines.

Then, the study compared the different state laws and rates to see if those states with more tort reform laws had lower insurance rates.

Three areas of insurance were examined: general liability, product liability and medical malpractice liability.

The results showed that there is no relation between more tort reform and lower insurance rates.

"It's clear as to the whole system, tort reform has not worked," concluded J. Robert Hunter, co-author of the study and director of insurance for the Consumer Federation of America in Washington, D.C.

For example, the states with the fewest tort reforms saw general liability rate increases of 45.6% between 1985 and 1998, while those with modest reforms saw general liability rates rise 49.1% and those with the most tort reforms saw such rates rise by 48.8% during that period, the report states.

In the area of product liability, the states with fewest reforms saw rates increase by 80.4%, those with modest reforms saw 52% increases, and those with the most reforms saw rates increase by 74.8%.

Medical malpractice results show the same lack of direct correlation between tort reform and lower insurance rates, the report found.

Even though medical malpractice rates showed the lowest increase in states with the most reforms, the rates were lower in states with few reforms than they were in states with moderate reform. In states with the fewest reforms, medical malpractice rates increased 179.5% between 1985 and 1998, while those with moderate reforms saw rates increase 214.5% and those with the most reforms saw rate hikes totaling 120.2% during that period.

Based on these findings, the report calls illogical the assumption that more tort reform measures will result in lower rates.

"The only reasonable conclusion is that no clear evidence of tort law change impacting insurance prices is determinable from these data," the report states.

A similar picture appeared when individual states' experience was examined.

For example, in Wisconsin, where few reforms were passed, general liability rates climbed 19.2%, while neighboring Minnesota, a high reform state, saw its rates rise by 19.5%. Similarly, in Massachusetts, which passed no tort reform laws at all, rates rose by 25.9%, while Connecticut, where three laws were passed in the 1980s, saw rates rise 61.5%.

The report was criticized by tort reform advocates.

Victor Schwartz, a partner with the Washington law firm of Crowell & Moring and a leading tort reform advocate, said "just looking at rates doesn't answer the question," as many insurance policies may have higher rates because they offer broader coverage or a lower deductible.

But, more importantly, he said, many tort reform advocates do not contend that restricting litigation will lower insurance rates. "I've never said that in 30 years," he said.

He also pointed out that insurers can't rely on tort reform measures in formulating rates because the laws are often watered down with exceptions or are struck down by courts as unconstitutional. But a solid tort reform measure without easy exceptions that is upheld as constitutional will reduce insurance rates, Mr. Schwartz said.

Sherman Joyce, president of the American Tort Reform Assn. in Washington, agreed, saying that tort reform is not just about lower insurance rates.

"We think the real focus (of tort reform) should be on (restricting) the payment of punitive damages," rather than on lowering insurance costs, he said.

Although he hadn't yet seen the study, Patrick Watts, assistant vp for the Alliance of American Insurers in Downers Grove, Ill., questioned its sponsor's goal.

"Do they want to eliminate all restrictions on litigation?" he asked.

While, in theory, tort reform measures should reduce insurance costs, "tort reform is only one thing in the mix" that determines insurance rates, he said.

Copies of "Premium Deceit -- The Failure of 'Tort Reform' to Cut Insurance Prices" are available for \$100 by sending a check or money order to CCAIR, P.O. Box 3326, Church Street Station, New York, N.Y. 10008.

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By Michael Prince

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Wednesday, August 14, 2002  
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## **State insurance program holds off on lowering rates**

**By JOELLE BABULA**  
**REVIEW-JOURNAL**

Doctors insured by the state's emergency liability insurance program will not see a drop in premiums soon.

The state's Medical Liability Association of Nevada is the second insurance company in two weeks to announce premiums will not be lowered despite passage of a new medical malpractice bill. The bill was passed to help stem the exodus of doctors who cannot find malpractice insurance or afford the skyrocketing rates.

"We're not lowering rates anytime soon," said Bob Byrd, chairman of the Medical Liability Association of Nevada. "It's really premature to jack prices back right now. We're very pleased with the tort reform package, and we're optimistic about the future and the end result, but we won't know the end result for another year or two."

The company was formed in April as a last resort for Nevada doctors who cannot find medical malpractice insurance. The company insures 251 doctors.

Last week American Physicians Assurance said it would not be reducing premiums soon.

Although doctors were hoping insurance companies would roll back premiums after the passage of new legislation, most say they realize the laws will take several years to have an effect on the insurance industry.

"Meaningful tort reform was not expected to dramatically change the pricing of insurance premiums," Dr. Ikram Khan said. "The stability in the market comes after a period of time. It's unrealistic to expect dramatic change."

Khan said doctors must decide whether they can wait a few years to see relief.

Nearly 150 doctors have left the state, retired early or are preparing to leave. Others, such as obstetricians and trauma surgeons, have stopped providing high-risk surgeries or delivering babies.

Most Clark County obstetricians stopped taking new patients in May because they said they could not afford to deliver more babies. Many of them began taking new patients again after the legislation's passage.

Dr. John Nowins, president of the Clark County OB/GYN Society, said many obstetricians began taking new patients this week in good faith that insurance companies would start to lower prices. He said the doctors may have to close their doors again if prices do not come down.

"Obstetricians are still in a bind," he said. "I can't be too optimistic."

According to the society, 33 obstetricians have closed their practices, retired early or have stopped delivering babies because of medical liability problems.

This story is located at:

[http://www.lvrj.com/lvrj\\_home/2002/Aug-14-Wed-2002/news/19408288.html](http://www.lvrj.com/lvrj_home/2002/Aug-14-Wed-2002/news/19408288.html)



whether the capitulation of the Serbs — if, indeed, it is a capitulation, and not another maneuver by the wily Mr. Milosevic to gain time and consolidate his gains — heralds the acceptance of a new global police mission by the West, however bold the pronouncements and self-congratulation last week.

From the outset, the United States

Returning from a bombing mission over Yugoslavia, the pilot of an F-15E Eagle awaits the signal to shut the plane's engines.

of the Kurds or Indonesia's repression of separatists in East Timor, and why it has kept silent about Kashmir. The notion of NATO planes bombing Israel to get its troops out of the West Bank, or Canada to free Quebec, or England to get it out of Northern Ireland, have become the

Continued on Page 4

## The \$2.9 Million Cup of Coffee

# When the Verdict Is Just a Fantasy

By WILLIAM GLAVIN

**H**ERE'S another story about America's out-of-control courts: Southern Pacific Railroad was so besieged by frivolous lawsuits in one Texas county that it ripped up 28 miles of track and shut down operations in the early 1990's.

Like similar anecdotes in almost every state, the tale of the disgraced railroad has been repeated for years in Texas. It even made its way into a conservative research center's report as proof of what most people believe anyway: havoc is being wreaked and jobs lost by an irrational legal system.

But, like many legal horror stories, it may not have been 100 percent true. "It was kind of a coincidence of timing," said Mark Davis, a spokesman for Union Pacific, which merged with Southern Pacific in 1996. "Southern Pacific was studying that line to be abandoned anyway."

For years across the country, accounts of bizarre jury verdicts and huge damage awards (like the McDonald's customer who spilled coffee on herself and collected \$2.9 million) have been used to prove that the courts are wacky or worse. But increasingly, some political scientists, legal scholars and consumer advocates are suggesting that outlandish examples have created a distorted picture of the legal system.

Huge punitive damage awards, for example, have become everyday events, right? Actually, a study of courts in the nation's 75 largest counties conducted by the National Center for State Courts found that only 364 of 762,000 cases ended in punitive damages, or 0.047 percent.

O.K., but isn't it true that more and more liability claims are filed every year? Actually, a study of 16 states by the same center showed that the number of liability suits has declined by 6 percent since 1986.

Well, didn't that McDonald's coffee drinker laugh all the way to the bank? Maybe, but she was 81 years old, the coffee was scalding and she needed skin grafts for third-degree burns. And she settled for about \$600,000 after a judge re-

duced the 1994 jury award.

Marc Galanter, a law professor at the University of Wisconsin, described these popular stories about the courts as "legal legends" in the Arizona Law Review last year. The label is sticking and some scholars and consumer advocates are starting to systematically challenge their accuracy.

They say legends like the one about the Texas railroad have been used to maximum effect by a national business-supported movement to make it harder for plaintiffs to win lawsuits under tort law, which governs civil injury claims. Just last week, the Alabama Legislature passed sweeping tort law changes, including a bill that would put a cap on punitive damages awarded by juries.

Every state has considered similar measures since the mid-1980's, and most have passed some measures to limit lawsuits.

"The story of tort reform across the country is that it is one of the most carefully developed and exquisitely executed political campaigns ever," said Andrew F. Popper, a law professor at American University in Washington who is an expert on personal injury law and identifies himself as a supporter of consumer rights.

One advocate's distortion, of course, is another's innocent spin. David Shaffer, president of the Public Policy Institute, a New York business group pushing for lawsuit limits in New York, said examples of ostensible outrages are used by consumer advocates as well as business groups. "It's done on both sides," he said. "The trial lawyers drag in pictures portraying some person who has been a victim of a terrible accident."

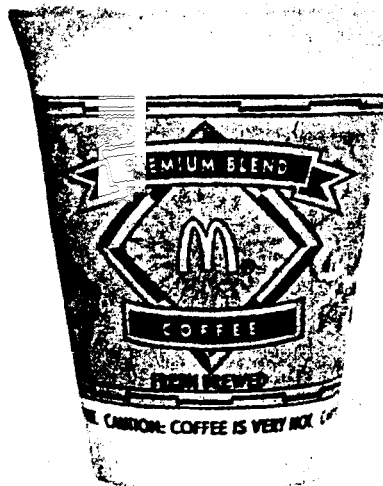
**E**VEN if there are occasional exaggerations, some business lobbyists say, there are enough large verdicts to intimidate corporations into large settlements and inhibit innovation by making companies fearful of bringing out new products that might attract lawsuits. The possibility of huge jury awards and the expense of battling suits, they say, combine to keep useful products off consumers' shelves.

But some lawyers and academics argue that consistently far-fetched accounts of court rulings have warped the debate about the legal system. And shrewd public relations by business and other groups pushing to limit lawsuits may only be part of the reason.

Unusual or big verdicts make news, said Michael W. McCann, a political science professor at the University of Washington. Professor McCann and William Haltom of the University of Puget Sound in Tacoma, Wash., found in a study that the large McDonald's verdict got extensive front-page coverage in 1994. But only about half the newspapers carried articles when the judge later reduced the punitive damages to \$480,000.

In similar research, Oscar G. Chase, a law

Continued on Page 6



Tony Cenicola for The New York Times

McDonald's now posts warnings on its coffee cups.

What freedom India has an elected tomorrow, but it's no democracy.

By Seth Mydans

Nigeria looks at a maturing South Africa and sighs.

By Norimitsu Onishi



Worried Sick When it comes to mental health, money follows the money.

By Joe Sharkey

This Is Big! Science finally learns to measure the universe.

By George Johnson

6



But estimating distances beyond the range of parallax — recently set at a mere few hundred light-years — has required more imagination. The Carnegie observations rely on stars called Cepheid variables, which blink at a rate believed to vary with their brightness. If two of these beacons are pulsating at the same pace and one appears dimmer, then it is assumed to be farther away. But the system is fraught with uncertainty. To confidently measure absolute as opposed to relative distance, you have to calibrate the yardstick by directly measuring how far away the nearest Cepheids are. Astronomers have tried to do this using parallax observations by the European Space Agency satellite Hipparcos. But the measurements are tricky and the data unsure.

And there are other problems. A Cepheid's rhythm may be thrown off by its metallic content. More guesswork comes in when astronomers try to judge how much of the dimming of a Cepheid's light comes not from distance but intervening cosmic dust.

**T**HE results from the Very Long Baseline Array cut through these assumptions, measuring the distance of a galaxy (NGC 4258 in the constellation Ursa Major) with old-fashioned parallax. By using computers to coordinate the data from 10 radio telescopes, ranging from Hawaii across North America to the Virgin Islands, the astronomers essentially simulated a dish antenna thousands of miles wide. This let them measure the galaxy's radio wave emissions with a resolution so fine that it puts even the Hubble telescope to shame.

The astronomers focused on a rotating disk of gas at the galaxy's core. First they calculated how fast it was spinning by measuring how much the Doppler effect stretched and squeezed its radio waves. Then they compared this intrinsic velocity to how fast the disk appears to spin from Earth. The farther something is, the slower it seems to move — parallax again. Think of how a jet plane seems to inch across the sky. Trigonometry then yields the distance.

Though this new method greatly expands the power of parallax, it still has its limits. The galaxy was measured at 23.5 million light-years away; the universe is billions of light-years wide. Reaching farther will still require Cepheids and other indirect methods. But now there may be a better way to ensure the accuracy of these yardsticks, putting a more solid foundation under astronomers' feet.

nearly 566,000 visitors. The recent Jackson Pollock show at the Museum of Modern Art in New York also proved a bonanza, drawing nearly 330,000 visitors, a striking number, if still short of the 940,000 — more than 8,000 a day — who swamped the museum's Matisse show of 1991.

The John Singer Sargent show, which closed last week at the National Gallery in Washington, drew about 425,000 visitors, or nearly 4,500 a day, catapulting it into the realm of the smash 1995



A motorcycle exhibit drew a record half-million visitors last year to the Guggenheim Museum.

## Sometimes, the Verdict Is a Fantasy

Continued From Page 1

professor at New York University, found in a survey of cases in the New York area that the average verdict reported by The New York Times in 1989 was \$20.5 million. But including the much larger number of cases that did not attract media attention, the average verdict was really \$1.1 million.

"Policy makers," Mr. Chase said in an interview, "can't reliably use their impressions from reading the press about issues like whether the court system is out of control."

The problem, some legal experts say, is that policy makers do rely on such impressions. In his law review article, Professor Galanter traced the long afterlife of an infamous 1986 case involving a Philadelphia psychic who won a \$1 million verdict. She had claimed she had an allergic reaction to medical treatment and lost her psychic powers.

The story of the psychic's verdict was widely circulated. Eventually, Professor Galanter found, it found its way into a 1991 report of the President's Council on Competitiveness, which referred to such bizarre cases as "almost commonplace" but did not disclose that the psychic's verdict had been reversed and that she had collected nothing.

Business groups say they are at a disadvantage in a public relations war that often spotlights alarming accounts of supposedly risky products, dangerous drugs and cancer-causing chemicals. "Emotions are stirred more when people are frightened for their own safety than they are by large damage awards that are not going to be paid out of their own money," said Victor E. Schwartz, a Washington lawyer who lobbies for businesses on tort issues.

But consumer groups say accounts of ostensible outrages in the courts seem more methodically misleading than reports about product dangers. A recent report by Citizens for Corporate Accountability and Individual Rights, a New York con-

sumer group, said the Public Policy Institute had "misreported and misused" every case it described in its efforts to show that the New York courts were out of control.

"They usually don't mention that the defendant did anything wrong," said the consumer group's executive director, Joanne Doroshov, a former associate of Ralph Nader.

One supposedly outrageous case the Institute cited in a report last year involved an award of \$650,000 given by New York City to the family of a drunk driver who was killed in an accident while driving the wrong way on a parkway. The Institute did not disclose that the court said the city's signs "virtually invited wrong-way entry," the consumer group said.

**A**SKED whether the report was misleading, Mr. Shaffer of the Public Policy Institute said anecdotes were less important than the harmful impact of the overall legal system on corporate innovation. "It is impossible," he added, "to include complete information about everything."

True or false, legal legends do make effective debating points. In a series of interviews recently in Texas, several leaders of a movement to end "lawsuit abuse" mentioned the case of the railroad that abandoned Matagorda County in Texas because of excessive lawsuits.

Richard W. Weekley, a Houston businessman who is a leader of Texans for Lawsuit Reform, said in a recent interview he had used the railroad story for years in speeches as an example of legal craziness. Audiences are horrified, he said. "People sit there and say, 'Why is a railroad tearing up 28 miles of track?'" Mr. Weekley said.

In response to an inquiry from a reporter, Mr. Davis, the railroad spokesman, said "Litigation was last on the totem pole" among reasons for ceasing operations in Matagorda County. "Traffic was down to one freight car a year."

### Legal Legends: A Quiz

Consumer advocates and some legal scholars say the public's image of the legal system is colored by myths. Test your susceptibility.

*A woman won a multi-million dollar award from McDonald's in 1994 after she spilled ordinary coffee on herself.*



**False.** McDonald's coffee was at least 20 degrees hotter than in other restaurants and the company had received some 700 complaints about burns in the previous decade. The woman later settled for \$600,000 after a judge reduced the \$2.9 million jury award.

*A West Virginia convenience store worker won more than \$2.7 million a few years ago after she injured her back while opening a pickle jar.*



**True.** But a court said her employer discharged her because her injury restricted her activity, then retaliated against her and engaged in "willful, mean-spirited acts indicative of an intent to cause physical or emotional harm."

*Cities are routinely forced to pay gargantuan awards for frivolous suits.*



**False.** In New York City, for example, 29,835 new claims were filed in 1997. In the same year 38 cases were resolved for \$1 million or more, representing 26 percent of the total paid out that year. The plaintiffs were found to have major injuries like paralysis and brain damage as a result of accidents with city vehicles and of malpractice at city hospitals.

*America has 70 percent of the world's lawyers.*



**False.** This has been repeated for years by figures like Dan Quayle and Ross Perot, as well as news organizations from New York to Singapore. Marc Galanter, a University of Wisconsin law professor, says it is "global folklore" and estimates that America has a quarter of the total. He is not, however, arguing for more lawyers.

*Liability cases are out of control.*



**True and false.** A study of 16 states found that there were 58 percent more liability cases filed in 1997 than in 1975. But the same study showed that there were 9 percent fewer cases filed in 1997 than in 1986.

Sources: Citizens for Corporate Accountability and Individual Rights; National Center for State Courts; Marc Galanter, University of Wisconsin

The New York Times, Illustrations by Jody Emery

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**Testimony of  
Travis Plunkett, Legislative Director  
Consumer Federation of America**

**Before the  
Subcommittee on Health  
of the House Committee on Energy and Commerce**

**Regarding Medical Malpractice Insurance Rates**

*July 17, 2002*

Good morning. I am Travis Plunkett, legislative director for the Consumer Federation of America. CFA is a non-profit association of more than 290 organizations founded in 1968 to advance the consumer interest through advocacy and education. Ensuring the provision of fairly priced and adequate insurance has been one of our core concerns since CFA's inception.

I would like to thank Chairman Bilirakus, Ranking Member Brown and the other members of the Subcommittee for the opportunity to offer our comments on this extremely important issue. For the third time in less than thirty years, Congress and state legislators across the country are grappling with the problem of fast-rising medical malpractice rates. Insurers insist that a sharp increase in large, unwarranted jury verdicts is to blame for the crisis. As a result, lawmakers on this Subcommittee and in a variety of states are considering legislation to place further limits on the legal rights of Americans who have been harmed or killed by medical malpractice.

But research by actuary and CFA Director of Insurance J. Robert Hunter shows that insurers are pointing fingers when they should be looking in the mirror. It is the "hard" insurance market and the insurance industry's own business practices that are largely to blame for the rate shock that physicians have experienced in recent months. CFA has found that:

- ✧ Medical malpractice rates are not rising in a vacuum. Commercial insurance rates are rising overall.
- ✧ The rate problem is caused by the classic turn in the economic cycle of the industry, sped up--but not caused by--terrorist attacks.
- ✧ Insurers have under-priced malpractice premiums over the last decade. It would take a 50 percent rate hike to increase inflation-adjusted rates to the same level as existed ten years ago.
- ✧ Further limiting patients' rights to sue for medical injuries would have virtually no impact on lowering overall health care costs. Medical malpractice insurance costs as a proportion of national health care spending are miniscule, amounting to less than 60 cents per \$100 spent.
- ✧ Insurer losses for medical malpractice have risen slowly in the last decade, by just over the rate of inflation.
- ✧ Malpractice claims have not "exploded" in the last decade. Closed claims—which include claims where no payout was made-- have remained constant, while paid claims have averaged just over \$110,000.
- ✧ Medical Malpractice profitability over the last decade has been excellent, at just over 12 percent, despite a decline in profits in the last two years.

## **I. Putting Medical Malpractice Insurance Rates into Context: Insurer Practices and the Insurance Cycle**

### **A. Commercial Insurance Rates Overall Are Rising**

To put price increases in insurance anywhere in America today into context, you have to be aware of a general tendency toward higher rates nationally. According to data released by the

Council of Insurance Agents (CCIA) and Brokers,<sup>1</sup> commercial premiums are increasing quickly. According to estimates made by CFA based upon the CCIA data for the 12-month period ending December 31, 2001, average prices rose as follows:

|                              |      |
|------------------------------|------|
| Small Commercial Accounts    | +21% |
| Mid-size Commercial Accounts | +32% |
| Large Commercial Accounts    | +36% |

The worst hit are, not surprisingly, “terrorist target” risks, such as skyscrapers. According to the CCIA survey, CFA calculates the average increases over the last year by line of insurance as:

|                       |      |
|-----------------------|------|
| Business Interruption | +30% |
| Construction          | +46% |
| Commercial Cars       | +28% |
| Property              | +47% |
| General Liability     | +27% |
| Umbrella Liability    | +56% |
| Workers’ Compensation | +24% |

Interestingly, the broad rate increases are **occurring** even when terrorism is excluded. The market shows all the earmarks of a classic cycle **bottom**, which is discussed in some detail below.

**B. There is a Classic “Hard” Cycle Nationally--with Prices Rising Accelerated by the Events of September 11<sup>th</sup>**

Insurance is a cyclical business. This is **particularly** true in the medical malpractice insurance business. In the mid-1970s, the country **experienced** the first liability insurance crisis. In this case, the crisis was particularly acute in product liability insurance and medical malpractice insurance.

At the mid-70s cycle low, the industry’s rate of return was “2.6% in 1975,” rose “to 19.7% in 1977, a gain of almost 17 points in the course of only two years. The industry’s rate of return then fell by more than 17 points over the next 7 years to 1.9% in 1984, the nadir of that soft market. During the subsequent hard market, profits once again shot up...to 15.4%” (by 1987).<sup>2</sup>

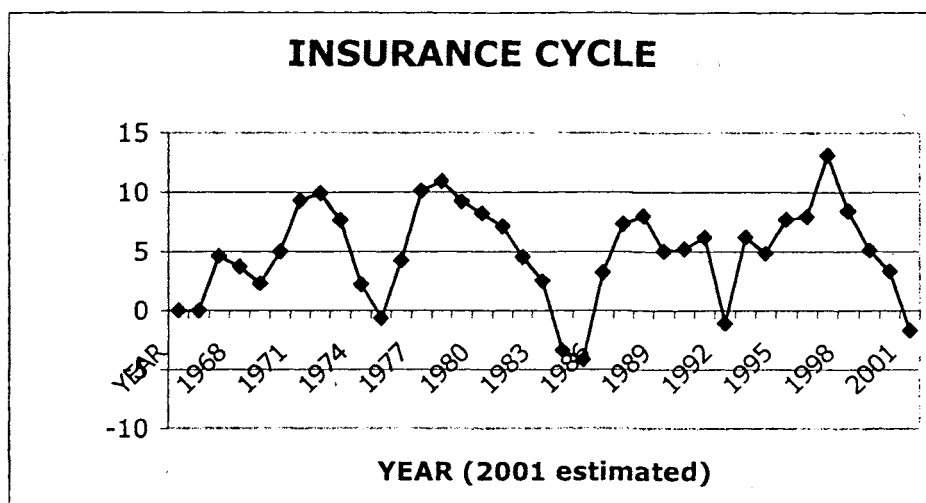
The mid-1980s crisis was in commercial liability **generally**, hitting **municipalities**, day care centers, environmental liability, medical malpractice and many other liability risks and lines. *Time* magazine had a cover story called “Sorry America, Your Coverage is Cancelled.”

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<sup>1</sup> 4<sup>th</sup> Quarter 2001 Survey, released January 2002.

<sup>2</sup> Cycles and Crises in Property/Casualty Insurance: Causes and Implications, edited by Cummings, Harrington and Klein, NAIC, 1991. Page 11.

Two charts below show the cyclical nature of insurance.<sup>3</sup> The first chart, "Insurance Cycle" shows the operating income as a percentage of premium from 1967 to 2001. The operating income of the industry falls below zero four times on the chart – in 1975, in 1984 and 1985, in 1992, and in 2001 (the last number estimated by CFA).



The 1992 data point was not a classic cycle bottom, but reflected the impact of Hurricane Andrew and other catastrophes in that year.

The 1975 and mid-80s bottoms were both classic cycle bottoms with very sizeable price increases and coverage availability problems immediately following the bottom. Consider the mid-80s cycle turn: between 1977 and 1984, insurance premiums had "...actually declined (by) 4.4%...from 1984 to 1987, net premiums written increased 63.3%..."<sup>4</sup>

The price increases in this cycle turn began in late 2000.<sup>5</sup> The rate of change was accelerating upward before September 11<sup>th</sup>. The terrorist attacks sped up the price increases into what some seasoned industry analysts see as gouging.<sup>6</sup> Many examples of unjustified price increases have surfaced in the last few months.<sup>7 8</sup>

<sup>3</sup> Both of these charts use data from A. M. Best and Co., Aggregates and Averages, 2001 edition for all years except 2001, where CFA made estimates of the results based on current information.

<sup>4</sup> Cycles and Crises in Property/Casualty Insurance: Causes and Implications, edited by Cummings, Harrington and Klein, NAIC, 1991. Page 8.

<sup>5</sup> "The Big Question For 2002: Will Hard Market Last Long?" By Sean F. Mooney, National Underwriter, January 7, 2002 edition.

<sup>6</sup> "...there is clearly an opportunity now for companies to price gouge – and it's happening...But I think companies are overreacting, because they see a window in which they can do it." Jeanne Hollister, consulting actuary, Tillinghast-Towers Perrin, in, "Avoid Price Gouging, Consultant Warns," National Underwriter, January 14, 2002.

<sup>7</sup> "As Insurers Hike Prices, State Regulators Consider Reducing Regulatory Authority," Consumer Federation of America, December 5, 2001.

<sup>8</sup> "We've seen premiums go up as much as 40-70 percent," says [Jenny] Jones [CEO of Elkins/Jones insurance brokerage]. She points out that commercial buildings which now pay five or six cents per square foot for insurance need to budget for costs to go up to as much as seven or eight cents a foot. She says the increases could be across the board for all types of properties. Single family housing developers could be sharply affected, she notes, citing

Gouging usually **does occur as the cycle turns.**<sup>9</sup> The **evidence** is very strong **that what we** are experiencing is a classic **underwriting cycle turn** into a “hard,” from a prolonged “soft,” market.

According to the National Association of Insurance Commissioners, “...underwriting cycles may be **caused** by some or all of the following factors:

1. Adverse loss shocks...unusually large loss shock...may lead to supra-competitive prices.
2. Changes in interest rates...
3. Under pricing in soft markets...”<sup>10</sup>

Prior to September 11<sup>th</sup>, the industry had been in a soft market since the late 1980s. The usual six to ten year economic cycle had been expanded by the amazing stock market of the 1990s. No matter how much they cut their rates, the insurers wound up with a great year when investing the float on the premium in this amazing market (the “float” occurs during the time between when premiums are paid into the insurer and losses paid out by the insurer – e.g., there is about a 15 month lag in auto insurance). Further, interest rates were relatively high in recent years as the Fed focused on inflation.

But, in the last two years, the market turned with a vengeance and the Federal Reserve cut interest rates again and again. Item 2 above had occurred well before September 11<sup>th</sup>.

Item 3 above, the low rates, were also apparent. The chart, “Insurance Cycle,” shows the operating profit drop from about 13% of premium in 1997 to about 3.5% of premium in 2000.

So, before September 11<sup>th</sup>, the cycle had turned, rates were rising and a hard market was developing. An anticipated price jump of 10% to 15% in 2001 was predicted by CFA and confirmed by the Insurance Information Institute.

Item 1, the shock loss was all that was missing. September 11<sup>th</sup> provided that in an achingly painful way.

However, the **increases are** mostly due to the cycle turn. The price increases were sped up by the terrorist attack, **collapsing** two years of anticipated increases into a few months, but the bulk of the increases are not related to pricing for terrorism, per se. This is a classic economic cycle.

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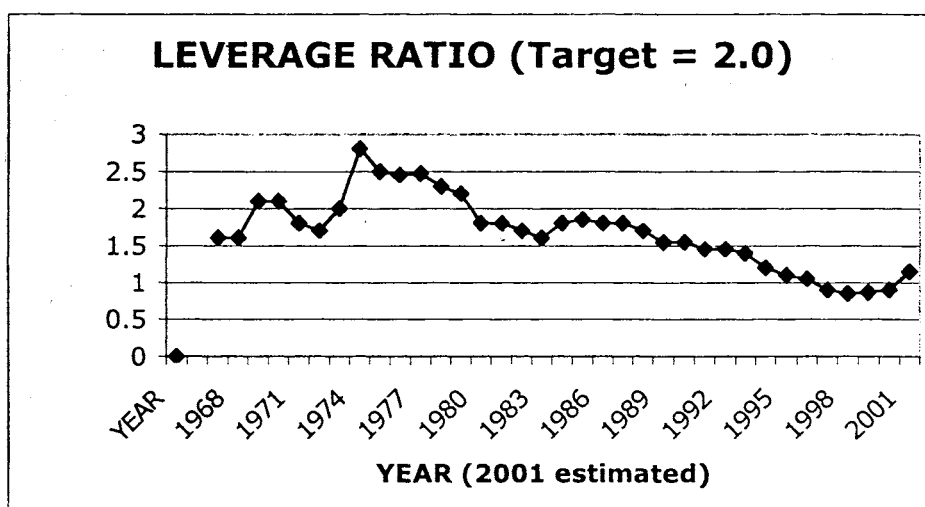
one homebuilder whose liability premium doubled at the November 11 renewal.” “Large Insurance Premium Increases in 2002 as September 11 Ricochets Through Industry, Expert Advises,” Business Wire, January 3, 2002.

<sup>9</sup> “To be sure, the market began firming in 2000. But the Sept. 11 terrorist attacks sent insurance prices skyrocketing far beyond the estimates of increases that earlier were being attributed to a normal hard cycle.” “Year in Review,” Business Insurance, December 24, 2001.

<sup>10</sup> Cycles and Crises in Property/Casualty Insurance: Causes and Implications, edited by Cummings, Harrington and Klein, NAIC, 1991. Page 339.

The question we hear a lot of debate about is how long the hard market can last. Given the amazing inflow of capital, can the prices hold for long? While the jury is still out on that question, there are some factors that make it seem likely that the hard market will be brief. They include:

- ? The capital inflow in excess of the after-tax terrorism loss,
- ? The relatively overcapitalized position of the industry as shown in the chart, “Leverage Ratio,” below,
- ? The availability of alternative risk mechanisms to the larger client risks, the insureds with the biggest price hikes,
- ? The pattern of risk managers blaming insurers, not the terrorism event, for renewal problems, and shopping for better deals.<sup>11</sup>



A “leverage ratio” is the ratio of net premiums written (i.e., after reinsurance) to the surplus, the amount of money the insurer has to back up the business; assets less the liabilities. Surplus is not reserves, which are liabilities set up to cover claims. The leverage ratio has always been the key measure of insurer strength.

The rule of thumb used for decades by insurance regulators and other experts in determining solidity is the so-called “Kenny<sup>12</sup> Rule” of \$2 of premium for each \$1 of surplus as safe and efficient use of capital. Some now say that this rule is antiquated, given the new level of catastrophe possible, but new ways of spreading the risk, such as securitizing it, may offset this. CFA still believes a 2:1 ratio is safe. But even those proposing a lower ratio do not go below 1.5:1. The NAIC uses a 3:1 ratio as the standard for determining if an individual insurer warrants solvency inspection.

When the cycle turned in the mid-70s, the premium/surplus ratio was as high as 2.8 to 1. This was a dangerously high average ratio since many insurers exceeded the 3:1 NAIC problem

<sup>11</sup> “Risk Managers Blame Insurers for Renewal Woes,” National Underwriter, January 14, 2002

<sup>12</sup> Named after a famous insurance financial writer, Roger Kenny.



ratio. When the mid-80s cycle turned, the ratio was as high as 1.8 to 1 – a relatively safe level. In today's cycle turn, CFA projects the ratio for 2001 year-end to be about 1.2 to 1, extremely safe and, indeed, overcapitalized.

## II. The Facts About Medical Malpractice Claims and Losses

As the lengthy explanation above demonstrates, the practices of the insurance industry itself are to largely to blame for the wildly gyrating business cycle of the last thirty years. Each time the cycle turns from a soft to a hard market the response by insurers is predictable: they shift from inadequate under-pricing to unconscionable over pricing, cut back on coverage and blame large jury verdicts for the problem. It is particularly appalling to see a crisis caused by insurer action being blamed, by the very insurers that caused the problem, on others. Insurers seem to expect legislators and the American public to swallow the dubious line that trial lawyers have managed to time their million-dollar jury verdicts to coincide precisely with the bottom of the insurance cycle three times in the last thirty years. Medical malpractice insurance rates are now rising fast. Insurers tell the doctors it is the fault of the legal system and urge them to go to state legislatures or to Congress and seek restrictions on the rights of their patients. Physician associations, unfortunately, are only too willing to accept this faulty logic.

Although rates are obviously now increasing, medical malpractice insurance losses are not “exploding” and have actually declined by one significant measure. CFA's Director of Insurance, J. Robert Hunter, conducted an actuarial analysis of medical malpractice insurance using the most recent insurance data available from the National Association of Insurance Commissioners and A.M. Best and Company. He found the following:

1. **Inflation-adjusted medical malpractice premiums have declined by one -third in the last decade.** Exhibit A shows that the average medical malpractice premium per doctor barely climbed from \$7,701 in 1991 to \$7,843 in 2000, an increase of 1.9 percent. Rates in constant 2000 dollars have declined by 32.5 percent, when the medical care services Consumer Price Index is taken into consideration. It would take a rate increase of 48 percent to bring premium rates in 2000 back to the 1991 price level. This chart points to insurer pricing practices (e.g. under-pricing during a soft market followed by a sharp increase in premiums as the market has hardened) as a key culprit in the rate shock that many physicians are now experiencing.
2. **Medical malpractice as a percentage of national health care expenditures are a fraction of the cost of health care in this nation.** Over the last decade, for every \$100 of national health care costs in the United States, medical malpractice insurance cost 66 cents. In the latest year (2000) the cost is 56 cents, the second lowest rate of the decade. Exhibit B shows that malpractice premiums as a share of health costs have declined from .95 percent in 1988 to .56 percent in 2000. Medical malpractice insurance is actually an amazing value as it covers all medical injuries for about one-half of one percent of all health costs. Moreover, this chart shows that proposals to further limit patients' rights to sue for medical injuries have little, if any, value in terms of lowering

overall health care costs. The maximum potential savings of eliminating all rights for injured patients to seek legal redress would be under 60 cents on a \$100 medical bill.

3. **There is no “explosion” in the severity of medical malpractice claims** . Only about one in four persons who bring a claim (24.6%) get any payment at all. Each closed claim in America—which includes all million-dollar verdicts—averaged only \$27,824 for the decade ending December 31, 2000. This includes costs for insurer defense and claims adjustment. The figures over the decade showed no growth in average paid claim. If one looks at average payout just for claims with payments (as opposed to all closed claims) the average loss was \$112,987. This includes costs for defense of claims settled, adjudicated or otherwise closed with no payment, thereby overstating the cost per claim paid. (See Exhibit C.)
4. **Medical malpractice insurance losses have risen very slowly** . Incurred losses, including loss adjustment expense (LAE) has risen by one-half of one percent over the last decade on a per-capita basis more than medical inflation. (See Exhibits A and C.) Furthermore, Exhibit D shows that medical malpractice losses haven’t come anywhere close to approaching or exceeding premiums, as they did in the early 1980s. In other words, losses have increased on a fairly regular, predictable basis, like most goods and services subject to inflation. The problem, as pointed out in 1 above, is that premiums have not kept up with losses.
5. **Medical Malpractice profitability over the last decade has been excellent.** Despite a decline in profitability in the last three years, the average return on net worth for medical malpractice lines was still a handsome 12.3% over the last decade. (See Exhibit E.)

### **III. Solutions**

Both the states and Congress must act to deal with the true source of the malpractice insurance price increases: insurer pricing practices and the volatile insurance cycle. As usual with insurance issues, state regulators must take the lead. CFA has called on the National Association of Insurance Commissioners to thoroughly investigate rate hikes in both personal and property/casualty lines and to consider a number of specific reforms to freeze or rollback unwarranted rate hikes and to prevent rate shock in the future. States can also take steps to spur private market development of increased insurance alternatives (such as captive insurance companies, risk retention groups, purchasing groups and the creation of new mutual insurance companies) and to increase the availability of insurance through public resources (such as joint underwriting associations and insurance facilities.)

The states could also act to provide relief to the medical specialists, such as obstetricians and neurologists, who bear the brunt of medical malpractice costs. The problem, from an insurance point-of-view, is that the risk is too concentrated on too few providers. The highest risk patients, who have illnesses or conditions where a slight provider error can cause grave harm or death, are usually “referred up” from general practitioners and internists to specialists. For example, only the very worst risks of all bad backs in a particular state end up being treated by

neurosurgeons. Yet a few neurosurgeons bear the full cost of these risks; none of the risk is borne by referring physicians. This risk should be spread somewhat, because non-specialist physicians benefit financially from this structure (lower risk patients are less costly in malpractice terms.) States should consider requiring insurers to impose a “high-risk referral” fee on all physicians, that could then be adjusted upward for risk depending on the class of practitioner and used to lower insurer costs in the highest-risk classes.

**Congress could act to address rising malpractice rates by creating a national reinsurance facility.** All insurers writing medical malpractice would be members of the facility. Members would cede the premiums and claims over a set catastrophic amount to the facility. The facility would take all risk over this retention and would charge an actuarially-based premium for this coverage. The premium would NOT be allowed to fluctuate downward during the economic cycle of the medical malpractice insurance market, thereby serving to stabilize the premium cycle as well as make insurance more readily available through spreading the cost of large injuries to a national base. The reinsurance plan would have to be administered by a federal agency—the Department of Health and Human Services is probably the best bet—but there would be no taxpayer funding. Cost of premiums and of program administration would be paid out of the premiums ceded to the facility. HHS would utilize the data generated on these catastrophic claims to report to Congress on ways to decrease medical errors and malpractice.

There have been three medical malpractice crises, in the mid-1970s, the mid-1980s and currently. This appears to be (so far) the mildest of the three events in terms of price increases and coverage unavailability, even with the withdrawal of malpractice insurer St. Paul from the market.

The crises are caused by the economic cycle of the insurance industry. The cost of claims has been relatively flat, of the order of \$110,000 per claim closed with payment and under \$30,000 per claim closed when those claims closed without payment are included in the averages (as they must be since the adjustment expense for such claims is included in the data).

Thus, in order to control the periodic malpractice insurance rate flare-ups, the cycle must be controlled. This requires the discipline of a regulator to do a very difficult thing, keep prices somewhat higher than competition would dictate during the “soft” phase of the cycle and escrow the excess to help when the “hard” phase sets in.

The “hard” phase is related to reinsurance becoming unavailable or high priced. This is why a national reinsurance facility makes sense. Further, if the facility is regulated by the federal government, the government would have incentives to make sure that rates remained actuarially sound and stable throughout the cycle and would be able to use the data on large claims for risk reduction research.

#### **IV. Conclusion**

A lot is at stake in this debate. The 1999 report regarding medical errors by the Institute on Medicine (IOM) demonstrates that far too many Americans face the serious possibility of an

injury, or even death, due to medical mistakes in the hospital. Using the IOM's low estimate of 44,000 deaths per year, medical errors are the eighth leading cause of death in this country, ahead of breast cancer and AIDS. The IOM's high-range estimate of 98,000 deaths a year would make medical errors the fifth leading cause of death, more than all accidental deaths.<sup>13</sup> Of course, some medical errors are directly attributable to physician negligence and some are not, but the IOM report clearly demonstrates the serious implications of rolling back the legal rights of Americans who have been harmed or killed by malpractice. If Congress gets it wrong, the pain and suffering incurred by many families across the country will only increase.

Before this Committee rushes through tort reform legislation, I urge you to get the facts. As the evidence I've presented you with today shows, insurers have only themselves to blame for the predicament they—and physicians and patients throughout the country—face.

<sup>13</sup> *To Err is Human, Building a Safer Health System*, Institute of Medicine, National Academy of Sciences; November, 1999.

**EXHIBIT A: MEDICAL MALPRACTICE PREMIUMS 1991-2000**

| YEAR                                                     | U.S.A.<br>NUMBER OF<br>DOCTORS | U.S.A.<br>MEDICAL<br>MALPRACTICE<br>PREM EARNED<br>(in thousands) | AVERAGE<br>MED MAL<br>PREMIUM<br>PER DOCTOR<br>U.S.A. | MEDICAL<br>CARE<br>SERVICES<br>CPI-U<br>7/1 OF YEAR | MED MAL<br>AVERAGE<br>PREMIUM<br>AT 2000<br>DOLLARS |
|----------------------------------------------------------|--------------------------------|-------------------------------------------------------------------|-------------------------------------------------------|-----------------------------------------------------|-----------------------------------------------------|
| 1991                                                     | 631400                         | 4862170                                                           | 7700.62                                               | 176.1                                               | 11614.33                                            |
| 1992                                                     | 652100                         | 5138395                                                           | 7879.77                                               | 189.7                                               | 11032.50                                            |
| 1993                                                     | 670300                         | 5174055                                                           | 7719.01                                               | 202.6                                               | 10119.30                                            |
| 1994                                                     | 684400                         | 5931898                                                           | 8667.30                                               | 212.6                                               | 10828.01                                            |
| 1995                                                     | 720300                         | 6080639                                                           | 8441.81                                               | 223.5                                               | 10031.97                                            |
| 1996                                                     | 737800                         | 5992394                                                           | 8121.98                                               | 231.9                                               | 9302.27                                             |
| 1997                                                     | 756700                         | 5917038                                                           | 7819.53                                               | 238.7                                               | 8700.74                                             |
| 1998                                                     | 777900                         | 6195047                                                           | 7963.81                                               | 246.5                                               | 8580.88                                             |
| 1999                                                     | 797600                         | 6155241                                                           | 7717.20                                               | 254.6                                               | 8050.62                                             |
| 2000                                                     | 812800                         | 6375401                                                           | 7843.75                                               | 265.6                                               | 7843.75                                             |
| 1991 to 2000 PERCENT CHANGE                              |                                |                                                                   |                                                       | 50.8                                                | -32.5                                               |
| RATE INCREASE REQUIRED TO BRING 2000 TO 1991 PRICE LEVEL |                                |                                                                   |                                                       |                                                     | 48.10%                                              |

Sources:

Doctors USA: Statistical Abstract of the United States  
 Earned Premiums: NAIC Report on Profit By Line By State  
 Medical Care Services Inflation: Bureau of Labor Statistics

**EXHIBIT B: RATIO OF MEDICAL MALPRACTICE PREMIUM COSTS  
TO NATIONAL HEALTH CARE EXPENDITURES**

| <b><u>YEAR</u></b> | <b><u>DIRECT PLUS<br/>ASSUMMED MEDICAL<br/>MALPRACTICE<br/>PREMIUMS EARNED<sup>14</sup></u></b> | <b><u>NATIONAL<br/>HEALTH<br/>EXPENDITURES<sup>15</sup></u></b> | <b><u>MEDICAL<br/>MALPRACTICE<br/>PREMIUM AS A %<br/>OF HEALTH COSTS</u></b> |
|--------------------|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------|------------------------------------------------------------------------------|
| 1988               | \$5322                                                                                          | \$562,000                                                       | 0.95%                                                                        |
| 1989               | 5379                                                                                            | 623,900                                                         | 0.86                                                                         |
| 1990               | 5157                                                                                            | 699,400                                                         | 0.74                                                                         |
| 1991               | 5015                                                                                            | 766,800                                                         | 0.65                                                                         |
| 1992               | 5127                                                                                            | 836,500                                                         | 0.61                                                                         |
| 1993               | 5367                                                                                            | 898,500                                                         | 0.60                                                                         |
| 1994               | 5896                                                                                            | 947,700                                                         | 0.62                                                                         |
| 1995               | 6207                                                                                            | 993,700                                                         | 0.66                                                                         |
| 1996               | 6190                                                                                            | 1,042,500                                                       | 0.59                                                                         |
| 1997               | 6402                                                                                            | 1,092,400                                                       | 0.59                                                                         |
| 1998               | 6559                                                                                            | 1,146,000                                                       | 0.57                                                                         |
| 1999               | 6703                                                                                            | 1,211,000                                                       | 0.55                                                                         |
| 2000               | 7360                                                                                            | 1,311,000                                                       | 0.56                                                                         |
| <b>TOTAL</b>       | <b>\$56,062</b>                                                                                 | <b>\$8,463,400</b>                                              | <b>0.66%</b>                                                                 |

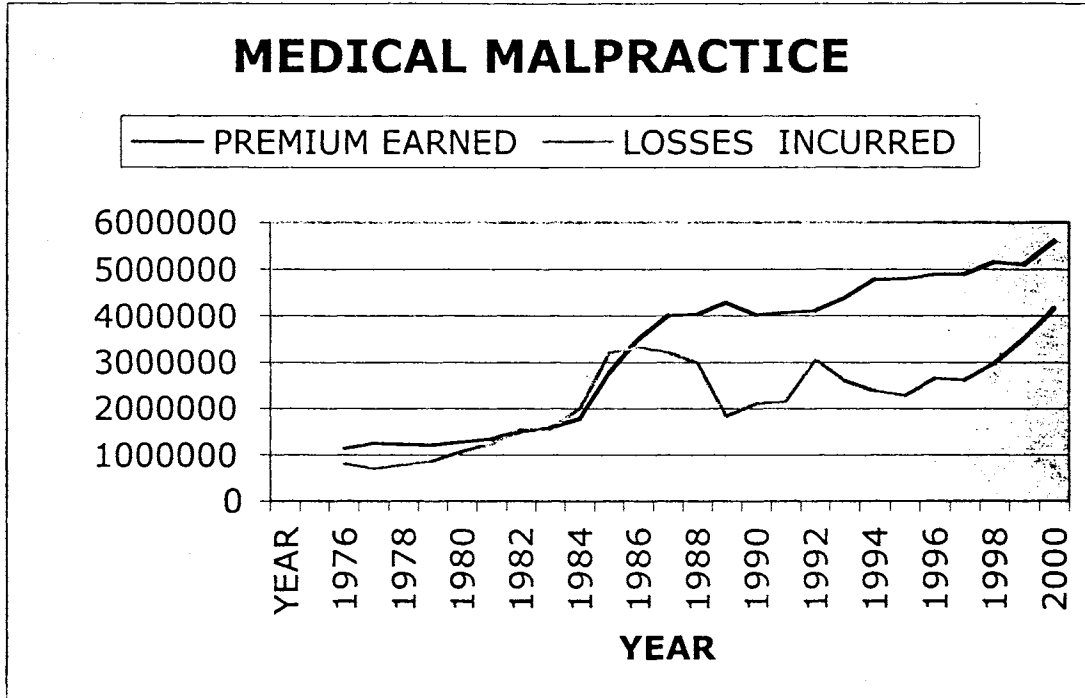
<sup>14</sup> Best's Aggregates and Averages, 1998 and 2001 Editions. Figures in millions of dollars. Using direct plus assumed slightly overstates the size of medical malpractice premiums.

<sup>15</sup> U.S. Department of Health and Human Services web site.

***EXHIBIT C: MEDICAL MALPRACTICE CLAIMS BY AMERICANS 1991-2000***

| YEAR  | Claims<br>closed<br>with<br>Payment | Claims<br>closed<br>without<br>Payment | USA Number<br>of Doctors | Claims w/<br>pay<br>per 100<br>Doctors | Total claims<br>closed per<br>100 Doctors | Percent of<br>total claims<br>With<br>payment | Paid losses<br>and LAE<br>Expense<br>(000) | Average<br>Loss for all<br>Claims<br>closed | Average<br>Loss<br>for paid<br>claims only |
|-------|-------------------------------------|----------------------------------------|--------------------------|----------------------------------------|-------------------------------------------|-----------------------------------------------|--------------------------------------------|---------------------------------------------|--------------------------------------------|
| 1991  | 30841                               | 75348                                  | 631400                   | 4.9                                    | 16.8                                      | 29.0                                          | 3089412                                    | 29093.52                                    | 100172.24                                  |
| 1992  | 31079                               | 82737                                  | 652100                   | 4.8                                    | 17.5                                      | 27.3                                          | 3270128                                    | 28731.71                                    | 105219.86                                  |
| 1993  | 32821                               | 87728                                  | 670300                   | 4.9                                    | 18.0                                      | 27.2                                          | 3438042                                    | 28519.87                                    | 104751.29                                  |
| 1994  | 31147                               | 92788                                  | 684400                   | 4.6                                    | 18.1                                      | 25.1                                          | 3696608                                    | 29826.99                                    | 118682.63                                  |
| 1995  | 31237                               | 94180                                  | 720300                   | 4.3                                    | 17.4                                      | 24.9                                          | 3903960                                    | 31127.84                                    | 124978.71                                  |
| 1996  | 30522                               | 92888                                  | 737800                   | 4.1                                    | 16.7                                      | 24.7                                          | 3641179                                    | 29504.73                                    | 119296.87                                  |
| 1997  | 24326                               | 79178                                  | 756700                   | 3.2                                    | 13.7                                      | 23.5                                          | 2560484                                    | 24738.02                                    | 105257.09                                  |
| 1998  | 17835                               | 67094                                  | 777900                   | 2.3                                    | 10.9                                      | 21.0                                          | 2488737                                    | 29303.74                                    | 139542.30                                  |
| 1999  | 10419                               | 50363                                  | 797600                   | 1.3                                    | 7.6                                       | 17.1                                          | 1192560                                    | 19620.28                                    | 114460.12                                  |
| 2000  | 3035                                | 22280                                  | 812800                   | 0.4                                    | 3.1                                       | 12.0                                          | 204248                                     | 8068.26                                     | 67297.53                                   |
| TOTAL | 243262                              | 744584                                 | 7241300                  | 3.4                                    | 13.6                                      | 24.6                                          | 27485358                                   | 27823.53                                    | 112986.65                                  |

**EXHIBIT D: PREMIUMS EARNED AND LOSSES INCURRED 1976-2000**





***EXHIBIT E: MEDICAL MALPRACTICE INSURANCE PROFITABILITY  
1991-2000***

PROFITABILITY DATA --  
RETURN ON NET WORTH

| YEAR        | NATIONAL<br>RETURN |
|-------------|--------------------|
| 1991        | 15.9               |
| 1992        | 15.5               |
| 1993        | 15.3               |
| 1994        | 13.7               |
| 1995        | 12.7               |
| 1996        | 12.6               |
| 1997        | 12.6               |
| 1998        | 7.6                |
| 1999        | 5.1                |
| 2000        | 5.4                |
| Average ROR | 12.3               |

Source: Profitability By-Line,  
*By-State, National Association*  
of Insurance Commissioners,  
2000 Edition.



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Insurers' Price Wars Contributed  
To Doctors Facing Soaring Costs

Lawsuits Alone Didn't Inflate Malpractice Premiums;  
Reserves at St. Paul Distorted Pricing Picture in 1990s

By **RACHEL ZIMMERMAN** and **CHRISTOPHER OSTER**  
Staff Reporters of **THE WALL STREET JOURNAL**

As medical-malpractice premiums skyrocket in about a dozen states across the country, obstetricians and doctors in other risky specialties, such as neurosurgery, are moving, quitting or retiring. Insurers and many doctors blame the problem on rising jury awards in liability lawsuits.

"The real sickness is people sue at the drop of a hat, judgments are going up and up and up, and the people getting rich out of this are the plaintiffs' attorneys," says David Golden of the National Association of Independent Insurers, a trade group. The American Medical Association says Florida, Nevada, New York, Pennsylvania and eight other states face a "crisis" because "the legal system produces multimillion-dollar jury awards on a regular basis."

But while malpractice litigation has a big effect on premiums, insurers' pricing and accounting practices have played an equally important role. Following a cycle that recurs in many parts of the business, a price war that began in the early 1990s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims.

**Price Slashing**

Some of these carriers had rushed into malpractice coverage because an accounting practice widely used in the industry made the area seem more profitable in the early 1990s than it really was. A decade of short-sighted price slashing led to industry losses of nearly \$3 billion last year.

"I don't like to hear insurance-company executives say it's the tort [injury-law] system -- it's self-inflicted," says Donald J. Zuk, chief executive of Sepie Holdings Inc., a leading malpractice insurer in California.

What's more, the litigation statistics most insurers trumpet are incomplete. The statistics come from Jury Verdict Research, a Horsham, Pa., information service, which reports that since 1994, jury awards for medical-malpractice cases have jumped 175%, to a median of \$1 million in 2000. During that seven-year period, the median award for negligence in childbirth was \$2,050,000 -- the highest for all types of medical-malpractice cases, Jury Verdict Research says. (In any group of figures, half fall above the median, and half fall below.)

**Gaps in Database**

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**COMPANIES**[Dow Jones, Reuters](#)[Sepie Holdings Inc. \(SKP\)](#)

|              |           |
|--------------|-----------|
| PRICE        | 6.99      |
| CHANGE       | -0.02     |
| U.S. dollars | 2:59 p.m. |

But Jury Verdict Research says its 2,951-case malpractice database has large gaps. It collects award information unsystematically, and it can't say how many cases it misses. It says it can't calculate the percentage change in the median for childbirth-negligence cases. More important, the database excludes trial victories by doctors and hospitals -- verdicts that are worth zero dollars. That's a lot to ignore. Doctors and hospitals win about 62% of the time, Jury Verdict Research says. A separate database on settlements is less comprehensive.

A spokesman for Jury Verdict Research, Gary Bagin, confirms these and other holes in its statistics. He says the numbers nevertheless accurately reflect trends. The company, which sells its data to all comers, has reported jury information this way since 1961. "If we changed now, people looking back historically couldn't compare apples to apples," Mr. Bagin says.

Some doctors are beginning to acknowledge that the conventional focus on jury awards deflects attention from the insurance industry's behavior. The American College of Obstetricians and Gynecologists for the first time is conceding that carriers' business practices have contributed to the current problem, says Alice Kirkman, a spokeswoman for the professional group. "We are admitting it's a much more complex problem than we have previously talked about," she says.

### Scrambling for Doctors

The upshot is beyond dispute: Pregnant women across the country are scrambling for medical attention. Kimberly Maugaotega of Las Vegas is 13 weeks pregnant and hasn't seen an obstetrician. When she learned she was expecting, the 33-year-old mother of two called the doctor who delivered her second child but was told he wasn't taking any new pregnant patients. Dr. Shelby Wilbourn plans to leave Nevada because of soaring medical-malpractice insurance rates there. Ms. Maugaotega says she called 28 obstetricians but couldn't find one who would take her.



**Kimberly Maugaotega**

Frustrated, she called the office of Nevada Gov. Kenny Guinn. A staff member gave her yet another name. She made an appointment to see that doctor today but says she is skeptical about the quality of care she will receive.

In the Las Vegas area, doctors say some 90 obstetricians have stopped accepting new patients since St. Paul Cos., formerly the country's leading provider of malpractice coverage, quit the business in December. St. Paul had insured more than half of Nevada's 240 obstetricians. Carriers still offering coverage in the state have raised rates by 100% to 400%, physicians say.

Dr. Wilbourn says his annual malpractice premium was due to jump to \$108,000 next month, from \$33,000. The 41-year-old solo practitioner says the increase would come straight out of his take-home pay of between \$150,000 and \$200,000 a year. In response, he is moving to Maine this summer.

Dr. Wilbourn mourns having "to pick up and leave the patients I cared for and the practice I built up over 12 years." But in Maine, he has found a \$200,000-a-year position with an insurance premium of only \$9,800 for the first year, although the rate rises significantly after that. Premiums in Maine are relatively low because a dominant doctor-owned insurance cooperative there hasn't pushed to maximize rates, the heavily rural population isn't notably litigious and its court system employs an expert panel to screen out some suits, says Insurance Commissioner Alessandro Iuppa.

Until the 1970s, few doctors faced big-dollar suits. Malpractice coverage was a small specialty. As courts expanded liability rules, malpractice suits became more common. Dozens of doctor-owned insurance cooperatives, or "bedpan mutuals," formed in response. Most stuck to their home states.

### St. Paul Cos. (SPC)

|              |           |
|--------------|-----------|
| PRICE        | 40.11     |
| CHANGE       | 0.29      |
| U.S. dollars | 3:01 p.m. |

\* At Market Close

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Shelby Wilbourn

St. Paul, a mid-sized national carrier named for its base in Minnesota, saw an opportunity. An insurer of Main Street businesses, St. Paul became the leader in the malpractice field. By 1985, it had a 20% share of the national market. Overall, the company had revenue of \$8.9 billion last year, with about 10% of its premium dollars coming from malpractice coverage.

The frequency and size of doctors' malpractice claims rose steadily in the early 1980s, industry officials say. St. Paul and its competitors raised rates sharply during the 1980s.

Expecting malpractice awards to continue rising rapidly, St. Paul increased its reserves. But the company miscalculated, says Kevin Rehnberg, a senior vice president. Claim frequency and size leveled off in the late 1980s, as more than 30 states enacted curbs on malpractice awards, Mr. Rehnberg says. The combination of this so-called tort reform and the industry's rate increases turned malpractice insurance into a very lucrative specialty.

A standard industry accounting device used by St. Paul and, on a smaller scale, by its rivals, made the field look even more attractive. Realizing that it had set aside too much money for malpractice claims, St. Paul "released" \$1.1 billion in reserves between 1992 and 1997. The money flowed through its income statement and boosted its bottom line.

St. Paul stated clearly in its annual reports that excess reserves had enlarged its net income. But that part of the message didn't get through to some insurers -- especially bedpan mutuals -- dazzled by St. Paul's bottom line, according to industry officials.

In the 1990s, some bedpan mutuals began competing for business beyond their original territories. New Jersey's Medical Inter-Insurance Exchange, California's Southern California Physicians Insurance Exchange (now known as Scpie Holdings), and Pennsylvania Hospital Insurance Co., or Phico, fanned out across the country. Some publicly traded insurers also jumped into the business.

With St. Paul seeming to offer a model for big, quick profits, "no one wanted to sit still in their own backyard," says Scpie's Mr. Zuk. "The boards of directors said, 'We've got to grow.' " Scpie expanded into Connecticut, Florida and Texas, among other states, starting in 1997.

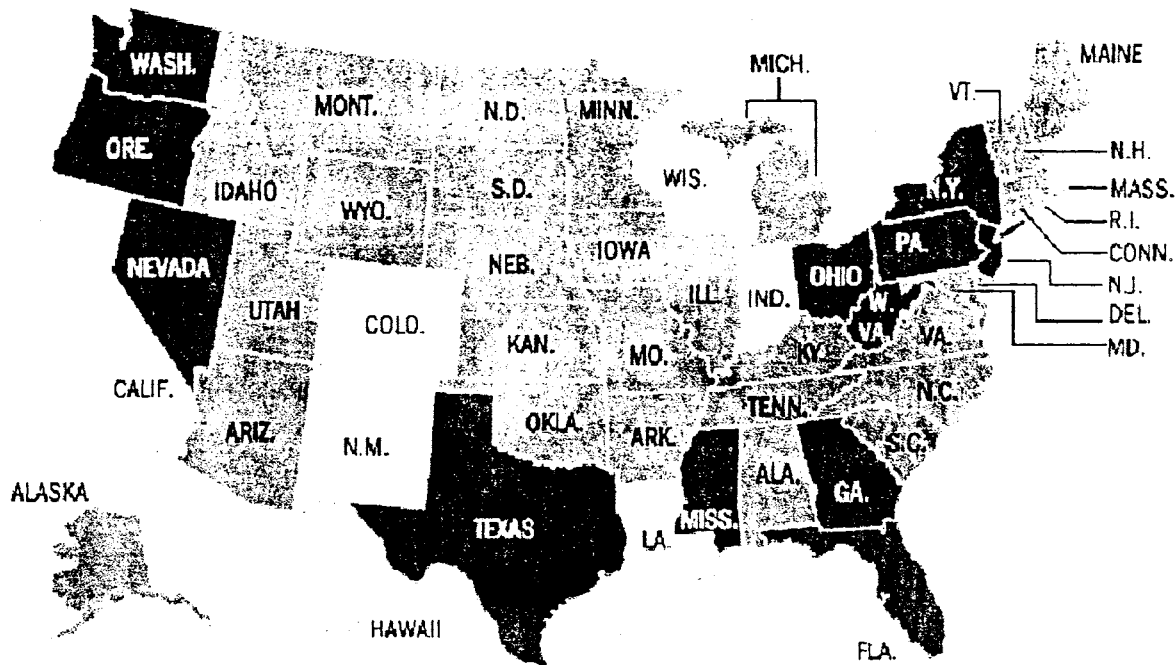
As they entered new areas, smaller carriers often tried to attract customers by undercutting St. Paul. The price slashing became contagious, and premiums fell in many states. The mutuals "went in and aggravated the situation by saying, 'Look at all the money St. Paul is making,' " says Tom Gose, President of MAG Mutual Insurance Co., which operates mainly in Georgia. "They came in late to the dance and undercut everyone."

## SOARING PREMIUMS

Insurance-industry accounting and pricing practices have contributed to sharply rising medical-malpractice rates that are causing doctors in some states to quit or move.

■ States in 'crisis'

▨ States showing problem signs



The newer competitors soon discovered, however, that "the so-called profitability of the '90s was the result of those years in the mid-80s when the actuaries were predicting the terrible trends," says Donald J. Fager, president of Medical Liability Mutual Insurance Co., a bedpan mutual started in 1975 in New York. Except for two mergers in the past two years, his company mostly has held to its original single-state focus.

The competition intensified, even though some insurers "knew rates were inadequate from 1995 to 2000" to cover malpractice claims, says Bob Sanders, an actuary with Milliman USA, a Seattle consultancy serving insurance companies.

### Alleged Fraud

In at least one case, aggressive pricing allegedly crossed the line into fraud. Pennsylvania regulators last year filed a civil suit in state court in Harrisburg against certain executives and board members of Phico. The state alleges the defendants misled the company's board on the adequacy of Phico's premium rates and funds set aside to pay claims. On the way to becoming the nation's seventh-largest malpractice insurer, the company had suffered mounting losses on policies for medical offices and nursing homes as far away as Miami.

Pennsylvania regulators took over Phico last August. The company filed for bankruptcy-court protection from its creditors in December. A trial date hasn't been set for the state fraud suit. Phico executives and directors have denied wrongdoing.

In the late 1990s, the size of payouts for malpractice awards increased, carriers say. By 2000, many companies were losing money on malpractice coverage. Industrywide, carriers paid out \$1.36 in claims and expenses for every premium dollar they collected, says Mr. Golden, the trade-group official.

The losses were exacerbated by carriers' declining investment returns. Some insurers had come to expect that big gains in the 1990s from their bond and stock portfolios would continue, industry officials say. When the bull market stalled in 2000, investment gains that had patched over inadequate premium rates disappeared.

Some bedpan mutuals went home. Scpie stopped writing coverage in any state other than California. "We lost money, and we retreated," says the company's Mr. Zuk.

New Jersey's Medical Inter-Insurance Exchange, now known as MIIX, had expanded into 24 states by the time it had a loss of \$164 million in the fourth quarter of 2001. The company says it is now refusing to renew policies for 7,000 physicians outside of New Jersey. It plans to reformulate as a new company operating only in that state.

St. Paul's malpractice business sank into the red. Last December, newly hired Chief Executive Jay Fishman, a former [Citigroup](#) Inc. executive, announced the company would drop the coverage line. St. Paul reported a \$980 million loss on the business for 2001.

As carriers retrench, competition has slumped and prices in some states have shot up. Lauren Kline, 6½ months pregnant, changed obstetricians when her long-time Philadelphia doctor moved out of state because of rate increases. Now, her new doctor, Robert Friedman, may have to give up delivering babies at his suburban Philadelphia practice. His insurance expires at the end of the month, and he says he is having difficulty finding a carrier that will sell him a policy at any price.

Last year, Dr. Friedman says he paid \$50,000 for coverage. If he gets a policy for next year, it will cost \$90,000, he predicts, based on his broker's estimate. "I can't pass a single bit of that off to my patients," because managed-care companies don't allow it, he says.

Dr. Friedman says he is considering dropping the obstetrics part of his practice. Generally, delivering babies is seen as posing greater risks than most gynecological treatment. As a result, insurers offer less-expensive policies to doctors who don't do deliveries.

Mr. Golden of the insurers' association argues that whatever role industry practices may play, the current turmoil stems from lawsuits. The association says that from 1995 through 2000, total industry payouts to cover losses and legal expenses jumped 52%, to \$6.9 billion. "That says there are more really huge verdicts," Mr. Golden says. Even in the majority of cases in which doctors and hospitals win -- the zero-dollar verdicts -- there are still legal expenses that insurers have to pick up, he adds.

Industry critics point to different sets of statistics. Bob Hunter, director for insurance at Consumer Federation of America, an advocacy group in Washington, prefers numbers generated by A.M. Best Co. The insurance-rating agency estimates that once all malpractice claims from 1991 through 2000 are resolved -- which will take until about 2010 -- the average payout per claim will have risen 47%, to \$42,473. That projection includes legal expenses and suits in which doctors or hospitals prevail.

While the statistical debate rages, pregnant women adjust to new limits and inconveniences. Kelly Biesecker, 35, spent many extra hours on the highway this spring, driving from her home in Villanova, Pa., to Delran, N.J., so she could continue to use her obstetrician. Dr. Richard Krauss says he moved the obstetrics part of his practice from Philadelphia because malpractice rates had skyrocketed in Pennsylvania. Ms. Biesecker, who gave birth to a healthy boy on June 5, says Dr. Krauss was the doctor she trusted to guard her health and the health of her baby: "You stick with that guy no matter what the distance."

Dr. Krauss, 53, left Philadelphia last year only after his malpractice premium rose to \$54,000, from \$38,000, and then was canceled by a carrier getting out of the business, he says. After getting quotes of about \$80,000 on a new policy, he moved. New Jersey hasn't been a panacea, however. His policy there expires July 1, and the carrier refuses to renew it. The doctor says he hopes to go to work for a hospital that will pay for his coverage.

**Write to Rachel Zimmerman at [rachel.zimmerman@wsj.com](mailto:rachel.zimmerman@wsj.com) and Christopher Oster at [chris.oster@wsj.com](mailto:chris.oster@wsj.com)**

*Updated June 24, 2002*

 **FORMAT FOR PRINTING**

REPRINTS INFORMATION:



### Addition to the family

Crain Communications, the parent company of *Modern Healthcare*, has acquired *Workforce* magazine from ACC Communications, Costa Mesa, Calif. The monthly magazine covers human resources news and trends and has a circulation of 47,500. "*Workforce* is a good fit for us, particularly when considering both the family-owned philosophy and the potential readership dually reached in the pensions, investment and employee benefits areas of the insurance markets," with Crain publications *Pensions and Investments* and *Business Insurance*," Crain officials said in a written statement.

## Back on the tort reform merry-go-round

**T**hose of us who have been around a while are used to the cyclical nature of medical malpractice insurance. Every 10 years or so there's a huge jump in premium costs, always accompanied by a clamor for limiting plaintiffs' rights to sue and collect for pain and suffering. And each time around, providers have joined in pursuit of the wrong culprit.

This year, the uproar is the loudest yet, and though Congress is unlikely to adopt a national tort reform law (despite the American Medical Association's best efforts), governors and state legislatures from New Jersey to Nevada are scrambling to respond.

For hospitals and physicians, this crisis is very real. Malpractice premiums are skyrocketing, and some doctors can't even find coverage, opting to "go bare." Worst hit is obstetrics, with some physicians picking up their practices and moving to states with lower premiums and less litigious residents. Hospitals in a number of states are self-insuring and paying dearly for "excess coverage" of claims that go beyond their set-asides.

Things turned dramatic earlier this month, when University Medical Center in Las Vegas closed its Level I trauma center, the only such facility in a four-state region, after surgeons refused to work there unless lawmakers stopped the big malpractice awards. Nevada Gov. Kenny Guinn quickly called for a special legislative session to capitulate to the docs.

In truth, the medical liability insurance crisis has very little to do with jury awards and everything to do with an out-of-control insurance industry. Insurers such as St. Paul Cos. and PHICO Insurance Co. engaged in a premium price war in the 1990s, using the go-go stock market to cover the spread. The invested reserves grew so large that some of the funds were released to the bottom line as profit. Meanwhile, PHICO and other mutuals that had been started by providers overexpanded.

Then the music stopped at the stock party, leaving most "med mal" insurers scrambling, either out of the market or toward huge premium increases. PHICO is in bankruptcy and its executives and directors are awaiting trial in a state fraud lawsuit.

Now the insurers have reached back into their bag of tricks, pointing the finger of blame at our litigious society. The problem is, our society was litigious a couple of years ago, too, but we didn't see big premium increases then. To listen to the industry and its unwitting provider allies, America's juries go haywire every 10 years or so, only to become socially responsible once insurance profits go back up.

The study being used to bolster such claims—compiled by Jury Verdict Research—found that since 1994, jury awards for medical malpractice cases have jumped 175%, to a median of \$1 million in 2000, with the average settlement being \$3.5 million. That's shocking, at least until you read the fine print.



**TODD SLOANE**

Assistant Managing Editor/Op-Ed

When the *Wall Street Journal* called, Jury Verdict admitted that its 2,951-case malpractice database has large gaps in it. "It collects award information unsystematically, and it can't say how many cases it misses," the *Journal* reported. "Jury Verdict" says it can't calculate the percentage change in the median for childbirth negligence cases. More important, the database excludes trial victories by doctors and hospitals—verdicts that are worth zero dollars. A separate database on settlements is less comprehensive.

Meanwhile, a study by the Physician Insurers Association of America found that the average payout by individual defendants in 2000 was \$328,396. Then A.M. Best Co., an insurance-rating agency, came out with an estimate that once all malpractice claims from 1991 through 2000 are resolved,

which will take until about 2010, the average payout per claim will have risen 47%, to \$42,473. That projection includes legal expenses and suits in which doctors or hospitals prevail. This crisis is shrinking.

A coalition of consumer groups and some members of Congress have called for a General Accounting Office investigation of the insurance industry's responsibility for creating nationwide medical malpractice insurance problems for doctors. That's a start. In the longer term, self-insurance through shared-risk pools may be the solution, so we don't have to go through another cycle like this one again.

# **Adverse Events Related to Medical Care Utah: 1995-99**

**JUNE 2001**

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Utah Health Data Committee  
Center for Health Data**

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(801)538-7048**

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Utah Inpatient Hospital Discharge Data File (1995-99), Utah Health Data Committee/Office of Health Care Statistics, Utah Department of Health. Salt Lake City, Utah, 2001.

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## Definitions

The following terms are used in this report:

- “Medical error” or “error” - The failure of a planned action to be completed as intended or the use of a wrong action to achieve an aim. Errors can include problems in practice, products, procedures, and systems.
- “Adverse outcomes” - Undesirable and unintended outcomes of care such as death, disability, or temporary disability.<sup>1</sup>
- “Adverse events” - Undesirable and unintended incidents in care that may result in adverse outcomes or may require additional care efforts to thwart an adverse outcome.<sup>2</sup>
- “Adverse drug event” - an adverse event attributable to the administration of a drug.
- “Adverse event indicators” - the 3 broad and 37 refined categories indicating misadventures of surgical and medical care, complications of surgical and medical procedures, and adverse drug events, which are listed in Table 1.
- “Preventable adverse events” - a subset of adverse outcomes that are judged to have been avoidable if appropriate and reasonable steps had been taken.<sup>3</sup>
- “Near misses” - Events in which the unwanted consequences were prevented because the failure was identified, and corrected. Such a recovery could be by a planned or unplanned barrier.<sup>4</sup>
- “System” - Set of interdependent elements interacting to achieve a common aim. These elements may be both human and nonhuman (equipment, technologies, etc.).<sup>6</sup>
- “Complications of medical care” - Concurrence of injuries, lesions, or diseases with another disease due to medical care.

## Executive Summary

The United States' healthcare system, while known to offer the most technically advanced healthcare, is characterized by unacceptably high levels of adverse events due to medical errors. Proper investigation, data collection and analysis are critical first steps to effective prevention.

This report is the first attempt in Utah to use the hospital discharge abstracts and International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM) codes, including E-codes, to estimate the frequency of occurrence, trends and patterns of risk of adverse events related to medical care. This report should help inform healthcare workers of the existence and potential value of these data, and attract their attention to the problem of patient safety. The report also proposes a classification scheme for adverse events, using ICD-9-CM codes. Although limited, the proposed classification should prompt dialogue and feedback to further refine this classification scheme. In the interim, this scheme can equip analysts with a tool to sensibly categorize adverse events.

### *Methods*

This report captures assessments and evaluations from the 1995-99 inpatient hospital discharge abstract from acute care hospitals in Utah. ICD-9-CM codes currently used in hospital discharge records have been used to identify three main categories and 37 subcategories of adverse events. Tables and graphs depict variations in numbers and rates of adverse events by risk factors such as age, sex, and hospital characteristics (urban vs. rural, teaching vs. non-teaching, and accredited by Joint Commission for Accreditation of Health Organizations (JCAHO) vs. non-JCAHO).

### *Limitations*

These data have important limitations, including:

- our inability to separate adverse events prior to hospitalization from those occurring during hospitalization,
- our inability to determine the clinical significance of the event, and
- our inability to distinguish variation in completeness of reporting from variation in true occurrence of adverse events.

### *Results*

- From 1995 to 1999 in Utah, about one in 250 hospital discharges or 4,248 patients had a "misadventure of surgical and medical care," (a term used in the ICD-9-CM Codes Book to imply that the event occurred as a result of an error) with an overwhelming majority of those (93% or 3,939 discharges) comprising cuts, punctures, or perforations during medical care.
- A total of 60,000 (6 % of all discharges) involved other adverse events (ICD-9-CM category "complications of medical and surgical procedures").
- Finally, 25,000 discharges (2.5 %) involved complications of medications. (See Table 1)

- No substantial annual variation existed for any of the adverse events (See page 13.)
- A slightly greater proportion of males suffered adverse events than females. However, the actual number of adverse events was considerably higher for women because they were hospitalized more often than men (See page 14.)
- The rate of adverse events increased substantially with age. Older patients were at a higher risk, probably because they tended to have more complex conditions than other patients. (See page 16.)
- Patients in urban hospitals, teaching hospitals, and JCAHO-accredited hospitals reported higher rates of adverse events, particularly complications of medications. This is likely due to higher volume and acuity of patients, and possibly more accurate reporting of adverse events (See page 18.)

### ***Conclusions***

There is growing recognition that the health care system is not as safe as it can be. Information about frequency of errors and other adverse events is needed to guide and evaluate improvement in the healthcare system. This report used the available data from the Utah Hospital Discharge Database to provide information on adverse events during medical care.

Despite their limitations, these data add to the evidence presented in the Institute of Medicine's report, "To Error is Human", that the healthcare system can be made safer. The Utah Department of Health has been working in partnership with Utah hospitals and healthcare providers, to address this challenge. The Utah Hospital Association (UHA), jointly with Utah Medical Association, HealthInsight, and Utah Department of Health (UDOH), has organized a Utah Hospital Patient Safety Task Force

As part of its efforts, that Task Force has helped the Utah Department of Health to develop two proposed administrative rules. One of these proposed rules would call upon hospitals to establish a mechanism to prevent adverse drug events. The other calls upon hospitals to report sentinel health events and establish a review process for such events designed to identify and remedy their root causes. The Utah Department of Health's Utah Health Data Committee is committed to work collaboratively with these parties to provide information to assist with these efforts.

# Medical Mistakes Make Life Busier for E.R.

Utah Health Department says errors, allergies to prescribed drugs bring thousands to hospitals

BY NORMA WAGNER

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A state Department of Health analysis shows thousands of Utahns end up in hospital emergency rooms for care costing more than \$40 million because of mistakes made during medical treatment, mostly medication errors but also side effects from the drugs they are prescribed.

For the second year in a row, the health department analyzed records from

hospitals statewide in an effort to design prevention programs to reduce emergency-room visits, which cost nearly \$700 million in 1997 — the latest year for which such emergency-room data has been compiled.

"The adverse effects of medical treatment constituted 4.7 percent of all injury- and poisoning-related emergency department encounters, claiming a total charge of \$40,076,396," said Don Wood, program director of the Bureau of Emergency Medical Services. "So the adverse effects

of medical treatment really stuck out.

"It can be anything from the guy who has a sponge left in him from surgery who leaves the hospital and a day later has an infection . . . to problems associated with medication administration problems, the wrong medication or the wrong dose and not necessarily by the hospital, but by a private physician or an urgent care clinic. And these people get charged for that mistake because they

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Salt Lake Tribune, Oct. 21, 2000, P. A1.

## Medical Errors Bring Thousands To Hospitals

■ Continued from A-1

end up in the emergency room."

Still, the data is not specific enough yet to discern which problems resulted from poor medical care or simply a patient's bad reaction to the drug they were prescribed, Wood pointed out.

"We know the majority are medication administration problems, but it doesn't mean that all of them were given a wrong medication or dose," Wood said. "Some could result from an allergic reaction to the medication. Give us five years and we'll start getting there, figuring it out."

Wood and his colleagues also analyzed 1996 emergency-room department data, but he said two years' worth of number-crunching does not leave much room for analyzing trends. The number of emergency-room visits in 1996

involved 502,000 patients, compared with 562,000 in 1997.

The total charges for outpatient treatment for adverse effects from medical treatment increased from \$29 million to \$40 million, "but there were 60,000 more patients in 1997," Wood said, "and the cost of medicine goes up every year."

What struck him equally in the report was the utilization of hospital emergency rooms, though no other state he knows of gathers the data so it is hard to tell how Utah compares.

"What we do know is that about one in four Utahns utilizes the emergency room for whatever reason. It may be that they don't have insurance or they're underinsured so they use the E.R., or they don't have a primary care physician," he said. "Then we also have all these motor vehicle accidents and a whole slew of other reasons that result in trauma. We're a recreation state, after all. Look at all the opportunities we have for injury. Maybe that's why we have such a high number of falls."

Falls and car crashes were logged among the most frequent causes of unintentional injury that required hospitalization, with an

average charge of \$8,286 for falls and \$13,808 for motor vehicle accidents.

Wood said hospitals, which provide his department with the information, can use the Utah Emergency Department Encounter Data Report to better gear their services to provide better care for their patients and, along with the Health Department, use the data to plan prevention programs.

"If the report shows that of the 100,000 people coming into their emergency room every year are geriatric patients, they may want to focus more on geriatric treatment," Wood said.

"If Primary Children's Medical Center starts seeing increasing numbers of injuries due to falls, whether it's a 1-to-4-year-old falling off steps or a 10-to-12-year-old falling off their Rollerblades, they can look at that and do something with it.

"That's what we're here to do."

As Wood's bureau has grown accustomed to crunching the data, it is getting better at it, and faster.

"We expect the 1998 report to be done within 60 to 90 days," he said, "and to be right up to date with this information one year from now."

If you are interested in purchasing the increased MEDEFENSE limits or would like an application to apply for the separate "BILLING ERRORS AND OMISSIONS COVERAGE" and have not received a separate mailing with a postcard to change or add this additional coverage please contact Marlene Hotchkiss or Stewart Pierce at 801-531-0375 or 1-800-748-4380.

## Claim Summary 2000

UMIA is committed to communicating as much information as possible to our members about issues that impact health care professionals. Many of our members have expressed an interest in receiving information about the Claim Department activity and want to be kept abreast of claims as they develop.

### *Claims by Specialty*

|                         |     |
|-------------------------|-----|
| OB/GYN                  | 383 |
| Family Practice         | 314 |
| General Surgery         | 300 |
| Emergency Medicine      | 258 |
| Internal Medicine       | 256 |
| Family Practice with OB | 229 |
| Orthopedics             | 224 |
| Radiology               | 206 |
| Anesthesiology          | 177 |
| Plastic Surgery         | 116 |
| Neurosurgery            | 89  |

In 2000, the Claim Department opened 394 new claims and closed 380 claims. Of claims closed, 32% involved a settlement payment to patients; 68% closed without a payment to the patient.

Of the closed claims in 2000, five went to trial and were all defense verdicts in favor of the physician. The cost to defend these five claims was \$637,600. The average cost for these five claims was \$127,500 with the low being \$34,900 and the high \$213,000.

### 10 year Claim data 1991 -2000

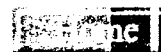
During the past ten years from January 1, 1991 through December 31, 2000 there have been 3,263 claim reported to UMIA. During this 10-year time frame 825 claims closed with a payment and 2,438 closed without any payment being made. Our reported claims for the past 10 years are listed by medical specialty and the type of claims below.

### *Type of Claims*

|                               |                       |     |
|-------------------------------|-----------------------|-----|
| <b>Surgery</b>                | Post-op Complications | 483 |
|                               | Surgical error/injury | 440 |
|                               | Retained foreign body | 93  |
| <b>Failure/delay Diagnose</b> |                       |     |
|                               | Cancer                | 228 |
|                               | Fracture/dislocation  | 138 |
|                               | Infection             | 110 |
|                               | Cardiac related       | 69  |
|                               | Pregnancy related     | 25  |

|                  |      |
|------------------|------|
| Ophthalmology    | 82   |
| Pediatrics       | 72   |
| Gastroenterology | 63   |
| Urology          | 54   |
| Cardiology       | 50   |
| Otolaryngology   | 48   |
| Urgent Care      | 34   |
| Vascular Surgery | 32   |
| Psychiatry       | 30   |
| Neurology        | 28   |
| Gynecology       | 28   |
| Pathology        | 28   |
| Phys Med/Rehab   | 27   |
| Cardiovascular   | 22   |
| Dermatology      | 21   |
| Thoracic Surgery | 20   |
| All Others       | 72   |
|                  | 3263 |

|                           |      |
|---------------------------|------|
| Other                     | 398  |
| <b>Improper Treatment</b> |      |
| Drug side effect          | 121  |
| Insufficient Therapy      | 62   |
| Incorrect medication      | 51   |
| Fracture/dislocation      | 48   |
| Lack of supervision       | 29   |
| Infection                 | 26   |
| X-ray related             | 14   |
| During exam               | 8    |
| Obstetrical birth injury  | 188  |
| Anesthesia related        | 136  |
| Fen/Phen                  | 60   |
| Consent/Confidentiality   | 36   |
| Abandonment               | 7    |
| Equipment failure         | 5    |
| Other                     | 488  |
|                           | 3263 |



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