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☞ Details: Tort reform information

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1995-96
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance, Securities and Corporate Policy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (October 2012)

Wisconsin Academy of Trial Lawyers

EXECUTIVE DIRECTOR:
Jane E. Garrott
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Suite 103
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January 10, 1995

Dear Wisconsin Legislator:

For two centuries, American judges and juries have developed rules that punish misbehavior and force those who harm others to pay compensation. These rules define the civil justice system. It is a system which allows an individual, who's been injured or who's suffered because of the careless action of others, **to hold the wrongdoer accountable.**

In Wisconsin, the insurance industry, big business, and the medical profession want to escape their responsibilities and no longer be accountable to the consumers they have injured. By stringing together anecdotes, half-truths and phony statistics, they call for radical changes in the civil justice system. However they have failed to show the Legislature or the public that these changes will significantly lower insurance rates or benefit society in any way.

The Wisconsin Academy of Trial Lawyers (WATL) is a statewide, voluntary bar association dedicated to preserving the civil jury trial system and improving the administration of justice. Our members are attorneys who represent consumers seeking to hold wrongdoers accountable for injuries arising from unsafe products or procedures. We meet our goals through daily member contact with the courts, by providing facts and information on legislative action, and by continuing legal training in all fields and phases of advocacy.

To answer some of the questions that are sure to arise during the legislative session, we have enclosed the following information:

(1) **"Voters Value Their Rights"** Brochure. Election results of voter initiatives involving tort "reform."

(2) ***"Quick Facts on Medical Malpractice: What You Need to Know to Protect Consumers,"*** and an insert entitled, ***"Perceptions v. Reality: Facts about Medical Malpractice in Wisconsin."*** The booklet documents the facts and figures on the true costs of medical malpractice within the health care system.

(3) Reprints of two Bob Herbert editorials from the *New York Times*, one involving Karin Smith, a Wisconsin medical malpractice victim.

(4) **"The Civil Justice Primer."** A question and answer piece reviewing stacking, joint and several liability, the cap on non-economic damages in medical malpractice cases, and the "Loser pays" rule.

We hope the information provided will aid you in the ongoing legislative debate regarding the civil justice system. Please feel free to contact the WATL office if you have questions or comments.

Very truly yours,

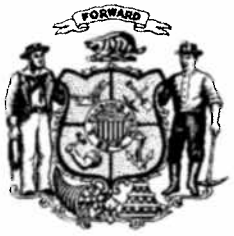
John C. Peterson

John C. Peterson
President

Enclosures

Wisconsin Academy of Trial Lawyers


WISCONSIN STATE LEGISLATURE


FORWARD

Voters have basic rights no politician should take away.

In America, justice belongs to people, not politicians, to juries, not insurance companies, to individuals, not government.

Wisconsin Academy of Trial Lawyers

The Wisconsin Academy of Trial Lawyers (WATL), established as a voluntary trial bar, is a non-profit corporation under the laws of Wisconsin. Members of the Academy are attorneys who represent consumers seeking to hold wrongdoers accountable for injuries arising from unsafe products or procedures. The Academy's principle objectives are to promote continuing legal education for the betterment of the trial bar profession and to preserve Wisconsin's civil jury trial system by working with the state legislature and other governmental bodies as an advocate for the legal rights of all Wisconsin citizens.

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What Do Voters Say When Asked About Tort "Reform?"

☑ **No Way**

Find out why...

Voters Value Their Rights

In the past six years, tort "reform" initiatives have been placed on the ballot for voters in the states of Arizona, Florida, California and Michigan. **All were voted down by the majority of the voters.** This is sound proof that when voters are given a choice to limit or take away their rights, they refuse to do it. Check the record. Voters have soundly defeated tort "reform" ballot initiatives, many by margins of nearly two-to-one. The following is a summary of the measures as well as the margins by which the measures were defeated.

1994

Arizona:

Proposition 103. Currently the Arizona Constitution precludes the legislature from restricting or capping an individual's damages. This ballot initiative would have removed this prohibition and allowed the legislature to impose caps on damages and other limitations to a trial by jury.
The measure was defeated by a 61% to 39% margin.

Proposition 301. This measure was passed by the Arizona Legislature during the 1993 session, but was forced on the ballot by Arizona citizens because of its adverse effect on consumers. The measure would have required periodic payments to injured consumers, abolished the collateral source rule, allowed insurers unlimited access to hospital and physician records, and adjusted the comparative fault statute.
The measure was defeated by a 62% to 38% margin.

Michigan:

Proposition C. This proposal would have limited medical benefits under auto insurance policies to $1 million, while allowing the insurance industry to sell additional coverage for expenses exceeding $1 million to policyholders.
The measure was defeated by a 61% to 39% margin

1992

Michigan:

Proposition B. The measure was identical to Proposition C in 1994.
The measure was defeated by a 62% to 38% margin.

1990

Arizona:

Proposition 105. The measure would have permitted limits on an individual's right to sue and collect damages.
The measure was defeated by an 83% to 17% margin.

Proposition 203. The measure would have implemented a "consumer choice" no-fault plan with no threshold limits on the right to file suit for those choosing the no-fault option.
The measure was defeated by an 85% to 15% margin.

1988

California:

Proposition 101. The measure would have reduced bodily injury liability rates in auto cases by 50%, capped damages and limited contingency fees.
The measure was defeated by an 86% to 13% margin.

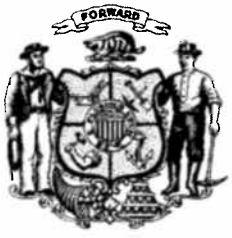
Proposition 104. The measure would have enacted a no-fault auto insurance system, reduced rates 20 percent from those in effect on election day and limited contingency fees in auto cases.
The measure was defeated by a 74.4% to 25.3% margin.

Proposition 106. The measure would have limited contingency fees in all tort cases to 25 percent of the first $50,000 award, 15 percent of the next $50,000; and 10 percent of any amount above $100,000.
The measure was defeated by a 53.3% to 46.7% margin.

Florida:

Amendment 10. The measure would have placed a $100,000 cap on non-economic damages in all tort cases.
The measure was defeated by a 57% to 43% margin.

WISCONSIN STATE LEGISLATURE



TORT "REFORMS" WILL HAVE NO EFFECT ON SO-CALLED "DEFENSIVE MEDICINE"

Congress's Office of Technology and Assessment (OTA) recently released a study entitled, **Defensive Medicine and Medical Malpractice,** which examined the nature of defensive medicine and how it might be impacted by malpractice "reforms."

OTA defined defensive medicine as the conscious and unconscious ordering of tests and/or avoiding certain high-risk procedures primarily because of concern about malpractice liability. The following findings were reported:

- Doctors overestimate the risk of being sued and liability concerns play only a minor role in doctors' decisions to test and treat patients. In reality, most procedures are ordered primarily for proper medical reasons – to improve patient outcomes.
- Most defensive medicine benefits patients. A majority of diagnostic tests are ordered "to minimize the risk of being wrong when the medical consequences of being wrong are severe."
- Conventional tort "reforms" – damage caps, limitations on attorneys fees, shortening the statutes of limitations, pretrial screening of claims, require offsets from collateral sources, and periodic payment of damages – only tinker with the current claim resolution process. These "reforms" have not proven effective in reducing the occurrence of defensive medicine and in altering physician behavior.
- Overall, a small percentage of diagnostic tests – certainly less than 8 percent – are performed primarily out of a doctor's fear of being sued.
- If managed care shifts financial incentives toward reducing diagnostic testing, then malpractice liability could be a check on a tendency to provide too few services.
- Tort reforms that limit physician liability could adversely affect the quality of care.

U.S. Congress, Office of Technology Assessment, ***Defensive Medicine and Medical Malpractice****. OTA-H-602 (Washington DC: U.S. Government Printing Office, July 1994).*

QUICK FACTS ON MEDICAL MALPRACTICE

What You Need to Know to Protect Consumers

The Association of Trial Lawyers of America
1994

Barry J. Nace, President
Larry S. Stewart, President-Elect

involved (for example, neurosurgery and obstetrics and gynecology) have no one with whom to share the risk. In order to spread the risk and lower premiums, rate categories can be compressed into three or four categories.

- Consider Experience Rating. When a driver seeks automobile insurance, the insurer looks at the driver's experience over a period of time. Many medical malpractice insurers do not look at experience, and as a result, bad doctors are not being penalized for their actions. Experience rating would deter malpractice and encourage good medicine.

- Watch for Over-Reserving Practices. An independent governmental agency should review insurance company records to determine when insurance companies are over-reserving. On the basis of the information collected, government can better monitor insurance premiums.

- Improve Access to Justice. Streamlining litigation will allow more injured persons access to courts. One measure, the implementation of prejudgment interest at the state level, would take away the advantage that medical defendants have in delaying case resolution.

FOREWORD

More than 200 years ago, our forebears enshrined the right to trial by jury -- to justice! Today, Americans continue to cherish this sacred right, which forms the very cornerstone of our justice system. Many countries are even trying to emulate our justice system.

We also cherish our freedom to choose health care providers, and, in the great American spirit, are willing to sacrifice some freedom to make health care affordable to all. But make no mistake, changing our justice system and restricting the right to trial by jury will do nothing to extend affordable health care.

When objectives clash, compromise may be necessary. But this is not the time for compromise because there is no conflict between trial by jury and affordable health care. The facts speak for themselves: The cost of our justice system has a very minimal effect on total health care costs. We must stand firm and protect the constitutional right that is the envy of the world.

Barry J. Nace, President
Larry S. Stewart, President-Elect
Association of Trial Lawyers of America

Introduction

The United States Chamber of Commerce, upon learning that the Federal Election Commission had issued a regulation that adversely affected the chamber's ability to raise money, consulted its lawyers and prepared to sue to have the regulation rescinded.

The American Society of Association Executives, upon learning that changes in the tax code would disallow certain dues payments as business expenses, consulted its lawyers and prepared to sue.

Amtrak and CSX Transportation Corporation, after the November 30th, 1993, derailment of Amtrak's New York- bound Silver Meteor, which injured 61 passengers, consulted their lawyers and proceeded to sue a Fort Lauderdale trucking company for failing to notify them that a truck with an 82-ton generator was using one of their railroad crossings.

The American Medical Association, after listening to First Lady Hillary Rodham Clinton expound on the Administration's health care plan, consulted its lawyers and announced that if the plan restricted a doctor's ability to earn professional fees, the AMA would sue.

It is remarkable that all these special interests at one time or another have sought to restrict or eliminate consumers' access to the courts. Yet for the protection of their own rights -- when they perceive they are being threatened -- they turn to our civil justice system.

They are completely correct to do so, but they are wrong when they work to limit the right of ordinary, less powerful, far less well positioned citizens to do the very same thing. And they are wrong to attempt to lay at the feet of the civil justice system the problems that abound in the health care system.

What follows are the facts.

the collateral insurers when a consumer receives an award. To suggest that a health care consumer receives double recoveries is not accurate.

- Mandatory Periodic Payments. Allowing negligent health care providers to keep money awarded to the injured and make periodic payments permits insurers to continue earning income on the unpaid portion of the award. Such a plan gives a windfall to the negligent health care provider and the insurance company and unfairly disadvantages the injured person, who usually incurs the bulk of expenses in the first few years after an injury.

- Caps on Damages. Arbitrarily capping damages is unjust and unfair and further punishes those who have had the misfortune of being severely injured since their damages are most likely to exceed the noneconomic damage cap (for example, the elderly, the poor and women). Also, damage caps permit a negligent wrongdoer to evade accountability for his or her acts. Ultimately, taxpayers must make up the difference when an injured consumer's damages exceed the cap.

Solutions to the Real Problems

- Strengthen Physician Discipline. Reduce the amount of malpractice by improving physician discipline. Institute tougher licensing requirements and increase funding to police physician discipline.

- Eliminate Physician Self-Referral. Eliminate the financial incentive for physicians to refer patients to their own testing/lab facilities.

- Create Unified Pools and Collapse Insurance Rate Categories. This would prohibit insurers from "skimming" -- insuring only the least risky -- and force the insurers to spread the risk. Many insurers divide doctors into too many risk categories. As a result, specialties with high risk

Small Percentage of Malpractice Losses (GAO/HRD-93-126, August, 1993); Helen R. Burstin et al., "Do the Poor Sue More?" 270 Journal of the American Medical Association 1697 (1993); U.S. Congress, Office of Technology Assessment, "Do Medicaid and Medicare Patients Sue Physicians More Often Than Other Patients?" (1992).

The Proposed Changes Will Not Cure the Problem

In the health care debate, the medical[1] and insurance industries have touted tort reform as the answer to the nation's health care problems. The list of proposed changes includes the following:

- Alternative Dispute Resolution (ADR). ADR can be beneficial to the civil justice system in providing a process for early settlements while still allowing a consumer to proceed to a trial. Court-controlled mediation or voluntary arbitration are programs that should be increased in use. But to some, ADR is seen as an opportunity to preclude a trial by jury or to impose penalties designed to force settlements or postpone the right to proceed in court until ADR has been completed. In today's society, all should be accountable for their actions, and the right to trial by jury guarantees that they can be.

[1] Ironically, American physicians and their families already are the recipients of special treatment that is not available to other citizens. "Professional courtesy," the delivery of health care at no charge or a reduced rate by physicians to other physicians and their families, is offered and supported by almost all physicians in the United States. *Mark A. Levy et al., "Professional Courtesy--Current Practices and Attitudes," 329 New England Journal of Medicine 1627 (1993).*

- Abolishing the Collateral Source Rule. The collateral source rule ensures that the wrongdoer will bear the financial burden of an injury. The negligent health care provider should not profit if an injured person has the foresight to secure benefits from a collateral source, which in many cases the plaintiff pays for personally. That is not "gaming the system." Furthermore, the insurance policies include subrogation clauses that require reimbursement of

The Medical Malpractice System Is Not a Factor in Rising Health Care Costs

- According to the U.S. Congressional Budget Office, "[Medical m]alpractice premiums amount to less than 1% of national health care costs."

  United States Congressional Budget Office, Economic Implications of Rising Health Care Costs 4 (October 1992).

- Malpractice insurance premiums represent only **1%** of total health care spending, so although they grew rapidly between 1980 and 1990, they can explain little of the growth in total health care outlays.

  Ellen M. Nedde, U.S. Health Care Reform 15 (International Monetary Fund, December 1993).

- In 1991, medical malpractice insurance represented **0.64% (64¢ out of every $100)** of national health care costs.

Cost of Med. Mal. Ins. Prems.	National Health Care Costs
$4.784 billion[1]	$751.8 billion[2]

[1] *Best's Review, December 1992, at 30, 33. This figure represents direct premiums earned.*

[2] *Health Care Financing Administration (HCFA) of the U.S. Department of Health and Human Services (HHS) (1992).*

- In 1991, losses paid by insurance companies for medical negligence amounted to **0.31% (31¢ out of every $100)** of national health care costs.

Med. Mal. Direct Losses Paid	National Health Care Costs
$2.33 billion[3]	$751.8 billion[4]

[3] Taken from a specialty database prepared by A.M. Best (1991).

[4] Health Care Financing Administration (HCFA) of the U.S. Department of Health and Human Services (HHS) (1992).

- Using these ratios, every time you go to a doctor and pay a $40 office visit charge, 26¢ goes toward paying for medical malpractice insurance.

What is causing increasing national health care costs? Factors responsible for inflated national health care costs include the following (each addressed further below):

- Insurance company practices;
- A failure to police and discipline the relatively small percentage of doctors responsible for a large percentage of medical malpractice expenses;
- Physician-owned equipment and physician-owned laboratories that produce a financial incentive to refer patients for expensive procedures. Where testing is truly "unnecessary," there may be a profit incentive at work and not defensive medicine.

negligence. Neither state has experienced lower health care costs or shown any indications that its system has improved as a result.

California's changes were effective in 1985, and Indiana's changes were effective in 1980.

State	Increases in Per Capita Spending, 1980-90	Rank
CA	143.9%[1]	17
IN	139.2%[1]	31
National Average	138.7%[1]	
District of Columbia	108.4%[1]	51

[1]Lewin/ICF estimates as published by Families USA Foundation (October 1990). Lewin/ICF is now known as Lewin/VHI.

If changing the tort system were truly the answer to lowering health care costs, California's and Indiana's increases should be lower than the national average. Moreover, the District of Columbia, where the tort system has remained intact, experienced **the lowest** per capita health care expenditure of all the states.

One of the reasons given for changing the tort system is a fear that people of low economic means see a lawsuit as a chance to "strike it rich." In fact, this is not a legitimate concern.

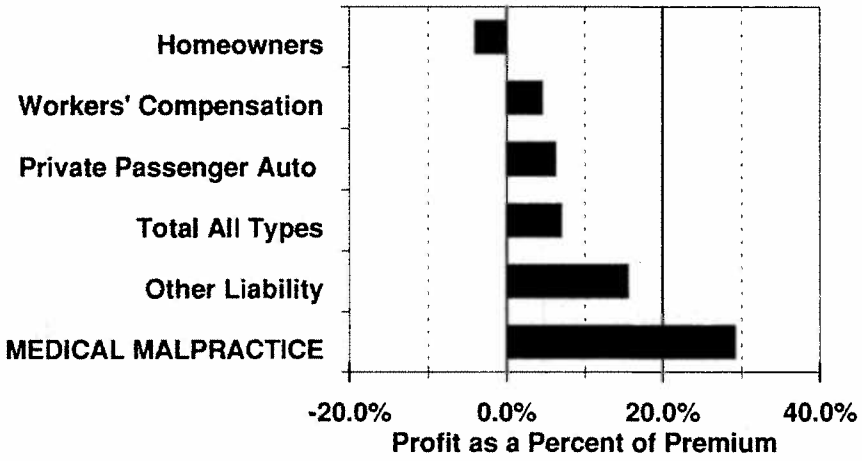
- Poor and uninsured patients are significantly less likely to sue for malpractice. Fear of malpractice risk should not be a significant factor in a doctor's decision to serve the poor. Tort reforms that would protect physicians who serve the medically indigent from malpractice suits may not be warranted.

  U.S. General Accounting Office, Medical Malpractice: Medicare/Medicaid Beneficiaries Account for a Relatively

- Surprisingly, only 34.7% of this amount, or $2.4 billion, was paid to injured consumers in the form of awards or claims in 1991.

Medical malpractice insurance is the most profitable line of insurance written nationwide.

1991 Insurer Profitability by Type of Insurance in the United States



Source: National Association of Insurance Commissioners Report on Profitability By Line By State 1991 (1992)

TORT REFORM WILL NOT INCREASE ACCESS TO HEALTH CARE OR STOP SPIRALING HEALTH CARE COSTS

To assume that tort reform will increase access to health care and lower health care costs is to assume 1) that limits on payments to victims will lower insurance premiums, 2) that insurers will in turn lower the medical malpractice premium rates they charge, and 3) that doctors will pass along their savings to patients. Experience shows otherwise.

- California and Indiana have drastically changed their tort systems to limit compensation for victims of medical

DEFENSIVE MEDICINE: FEAR OF LAWSUITS OR FINANCIAL INCENTIVE?

Defensive medicine has never been formally defined by the medical industry. The medical industry labels as defensive medicine anything driven by a physician's motive to protect him/herself from malpractice liability. As a result, no one knows the difference between good medicine and defensive medicine.

An article in the *Journal of the American Medical Association* has concluded that defensive medicine is good medicine.

- "Generally, it is recognized that 'defensive driving' is a good practice for motorists to follow. Similarly, it appears that 'defensive medicine' is essentially beneficial for patients."

  R.P. Bergen, "Defensive Medicine Is Good Medicine," 228 Journal of the American Medical Association 1188 (1974).

Where physicians order "unnecessary tests," it may not be out of fear of liability but because of a profit motive. The root of the problem is that physicians often have a financial incentive in referring patients to their own testing facilities.

- Physicians with financial interests in labs order 34-96% more tests than those without such interests; prices in physician-owned labs are 2-38% higher than at independent, non-physician-owned labs; and the total bill was 26-125% higher for physician-owned labs than for independent labs.

  Mark N. Cooper, Physician Self-Dealing for Diagnostic Tests in the 1980s: Defensive Medicine vs. Offensive Profits 8-9 (Consumer Federation of America, October 3, 1991).

- As a safeguard for its citizens, the following states have adopted statutes requiring physicians to disclose to patients any financial interest in lab facilities before referral: California, Kansas, Maryland, Minnesota, Missouri, Nevada, New Hampshire, New York, Pennsylvania, Tennessee and Virginia. The states of Florida, Georgia and Michigan have completely prohibited the ownership of financial interests in testing facilities.

- The United States Congress has prohibited certain financial arrangements between referring physicians and clinical laboratories in response to the abuse of the Medicare system and physician reimbursements.

  Sec. 6204, P.L. 101-239, Sect. 1877 (codified at 42 U.S.C. §1395 nn.) of Title XVIII of the Social Security Act, effective January 1, 1992.

- Even the AMA once advised physicians that self-referral should take place only "where physicians can demonstrate the absence of alternative facilities . . . and the absence of alternative financing. . . ." The AMA later softened this policy to require that physicians disclose any financial interest in a testing facility to patients.

  Spencer Rich, "AMA to Caution Doctors About Lab Self-Referrals," Washington Post, December 10, 1991, at A5.

Yesterday's defensive medicine really becomes tomorrow's good medicine. For example:

- Doctors previously diagnosed patients through exploratory surgery, a procedure that was intrusive, expensive and painful to the patient. Today a doctor can use an MRI to make the same diagnosis, which costs less and causes no pain or intrusion to the patient's body. The medical industry would call an MRI defensive medicine, but isn't the doctor simply practicing good medicine?

- Dr. Ignaz Semmelweis was a physician in an obstetrics clinic in Vienna in the mid-1840s. Semmelweis found that

- A.M. Best reports that insurers saw a 51.5% investment gain during 1992. This translates to $2.09 billion, higher than any of the past 10 years.

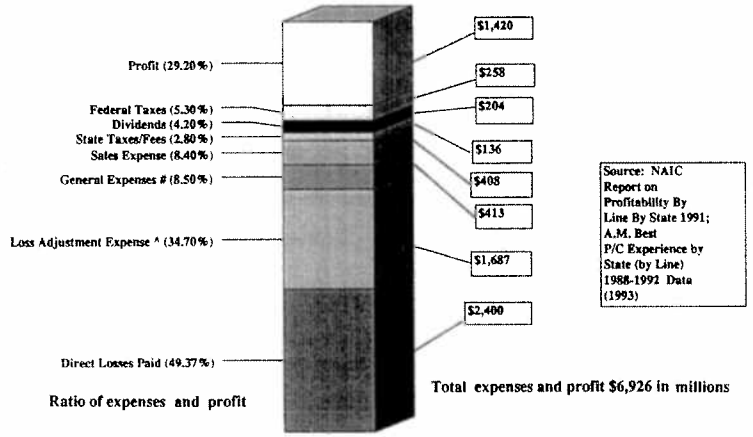
  Best's Aggregates & Averages 157 (1992).

- The National Association of Insurance Commissioners reports a 29.2% profit margin on direct premiums earned in 1991. This translates to a $1.4 billion profit on $4.8 billion in premiums.

  Report on Profitability by Line by State (National Association of Insurance Commissioners, December 1992).

The following chart shows a breakdown of how the medical malpractice insurance industry spent its premiums and investment income in 1991.

1991 Insurer Profitability by Type of Insurance In the United States

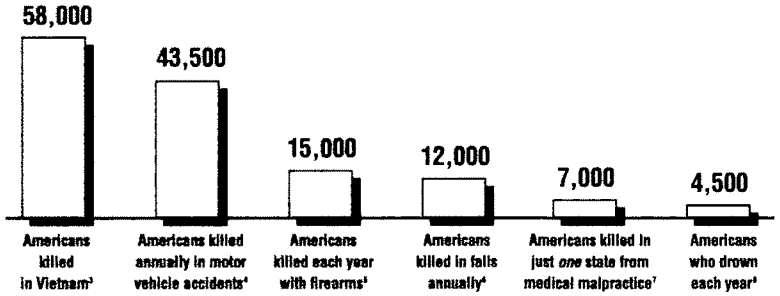


General expenses includes salaries, benefits, infrastructure, general overhead costs
^ Loss adjustment expense includes costs associated with paying claims such as inspections, adjusters, claim processing and legal defense costs

The National Association of Insurance Commissioners reports 1991 industry premiums as $4.8 billion. Combining this with investment income after taxes gives the industry $6.9 billion to cover losses, administrative costs and reserves.

- Comparing the incidence of malpractice in only one state, New York, to fatalities nationwide shows the extent of the problem we face.

Medical Malpractice in Perspective



[3] *Eric Schmitt, "Female Vietnam Veterans Welcomed Home," New York Times, November 12, 1993, at A1.*

[4] *National Safety Council, Accident Facts 4 (1992).*

[5] *FBI, Uniform Crime Reports (1992).*

[6] *Supra note 4.*

[7] *Supra note 1.*

[8] *Id.*

The tort system fosters better health care. Medical researchers and the medical establishment alike have acknowledged the deterrent effect of medical liability.

- "The advantage of the tort system is that it provides a continual, ongoing system of 'regulation by incentives.'

Despite these alarming statistics, dangerous doctors often remain untouched.

- Only 1,974 doctors out of 623,000 doctors nationwide were disciplined as a result of their actions. This represents approximately 0.32% or 3.2 doctors out of 1,000.

  Sidney Wolfe et al., 10,289 Questionable Doctors 8 (Public Citizen Health Research Group, September 1993).

- The total number of disciplinary actions decreased 2% from 2,013 reported in 1991 to 1,974 in 1992.

  Id. at 11.

- Less than half of the actions taken resulted in revocations, license surrender or suspension. Doctors guilty of substandard care, prescription violations and drug or alcohol abuse are most commonly placed on probation.

  Id. at 15.

States do not have the resources available to adequately investigate claims and discipline doctors.

- 53.6% of the doctors disciplined by the Drug Enforcement Administration and 44.6% of the doctors disciplined by Medicare were not disciplined by the states in their disciplinary process.

  Id. at 15.

- To protect state disciplinary agencies seeking disciplinary action from the threat of a lawsuit by a physician, the Health Care Quality Improvement Act was passed. The Act protects the disciplinary board if it can be shown that the board operated in good faith, and forces the physician to pay the board's legal expenses.

  Richard Greene, "Quackus tyrannus," Forbes, October 5, 1987, at 67.

- An article published in an American Medical Association publication states that since 1985, the overall claims rate has declined at an average annual rate of 8.9%. *Martin L. Gonzales, "Medical Professional Liability Claims and Premiums, 1985-1990," in Socioeconomic Characteristics of Medical Practice 23 (American Medical Association, 1992).*

It is not medical malpractice cases that are crowding court dockets.

- Businesses suing businesses in contract disputes constitute nearly half of all federal court cases filed between 1985 and 1991.

  Milo Geyelin, "Suits by Firms Exceed Those by Individuals," Wall Street Journal, December 3, 1993, at B1.

- Only 9.8% of all medical malpractice claims ever go to trial.

  Brian Ostrom et al., "What Are Tort Awards Really Like? The Untold Story from the State Courts," 14 Law & Policy 77, 81 (1992) (conducted by the National Center for State Courts covering cases decided by trial in 27 state trial courts during the period July-October 1989).

- Since 1985 only 5% of all medical malpractice claims filed went to verdict.

  Mark Holoweiko, "What Are Your Greatest Malpractice Risks?" Medical Economics, August 3, 1992, at 141.

- In 1989, 17.3 million new civil cases were filed in state courts nationwide. Of these, only 950,000 -- about 5% -- were tort cases. This 5% includes all tort cases, not only medical negligence cases. That estimate is based on the National Center for State Courts's 1989 data, Deborah Hensler, senior social scientist with the Rand Institute for Civil Justice.

  Deborah Hensler, "Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform," Judicature, February-March 1992, at 245.

- Between 1982 and 1987 fewer than half of 1% of all malpractice claims went to trial and received compensation from a jury; the frequency of claims did not change; and claims determined by the insurance company to be frivolous did not increase.

  Michael Hatch, Medical Malpractice Claim Study, 1982-1987 31 (Minnesota Department of Commerce, 1989) (focuses on the states of Minnesota, North Dakota and South Dakota during the years 1982-87).

- Only about 2% of those injured by physicians' negligence ever seek compensation through a lawsuit.

  A. Russell Localio et al., "Relation Between Malpractice Claims and Adverse Events Due to Negligence," 325 New England Journal of Medicine 245-51 (1991).

Juries are not running rampant in giving awards, as some would like you to believe.

- Defendants win 70.7% of medical malpractice cases.

  Brian Ostrom et al., "What are Tort Awards Really Like? The Untold Story from the State Courts," 14 Law & Policy 77, 81 (1992).

"Sympathetic" juries are not overcompensating injured plaintiffs.

- The severity of injury actually has little effect on the jury's payment.

  Mark Taragin et al., "The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims," 117 Annals of Internal Medicine 780 (1992).

- Less than 1% of the verdicts in plaintiffs' favor were for $1 million or more.

  U.S. General Accounting Office, Medical Malpractice: Characteristics of Claims Closed in 1984 3 (GAO/HRD-87-55, April 1987).

WHAT IS THE REAL PROBLEM BEHIND MEDICAL NEGLIGENCE? BAD DOCTORS

A small percentage of doctors is responsible for a large percentage of medical malpractice expenses.

- Less than 2% of all physicians practicing in Cook County were defendants in 36% of the medical negligence litigation filed from 1972 to 1986.

  Natalie Miller et al., Medical Malpractice: Crisis of Litigation or Crisis of Negligence? (Health Resources, Inc., March 18, 1987).

- Less than 4% of the physicians practicing in Florida in 1986 were responsible for approximately 45% of paid claims to injured victims.

  Testimony of Blaine F. Nye from Pubic Meeting entitled Academic Task Force for the Review of the Insurance and Tort Systems, at 169 (June 11, 1987).

- "20,000 physicians, or 5% of the total, 'for one reason or another probably ought not to be practicing medicine.' They are either alcoholics, drug addicts, senile, criminals or simply incompetent physicians."

  Dr. Arnold S. Relman, editor of the New England Journal of Medicine. Richard Greene, "Quackus tyrannus," Forbes, October 5, 1987, at 67.

And it does not rely on enforcement by the medical profession, which, like any other profession, is notoriously reluctant to police its own members."

Testimony of Patricia M. Danzon, presented to the Committee on Labor and Human Resources, U.S. Senate, July 10, 1984.

- "It is sad but true that many physicians practice more carefully than they did in the past because they have one eye on the potential litigant. . . . If the courts and insurance companies and the fear of malpractice become the most important disciplinary weapon in medicine -- distasteful as the idea may be to physicians -- so be it."

  Robert S. Derbyshire, "Malpractice, Medical Discipline and the Public," 19 Hospital Practice 209, 216 (1984). See also William B. Schwartz and Neil K. Komesar, "Doctors, Damages and Deterrence: An Economic View of Medical Malpractice," 298 New England Journal of Medicine 1282 (1978).

- "For all of its ills, the tort system's fault-based standard of care has prompted hospitals, medical societies and, most notably, physician-owned insurance companies to become very active in a variety of endeavors to reduce the risk of patient injuries."

  "Harvard Study Finds That Few Hurt by Malpractice File Suits," Liability Week, March 5, 1990, at 9 (statement of Dr. James Todd, executive vice president of the American Medical Association).

PATIENT LAWSUITS AND VERDICTS ARE NOT OVERLOADING THE COURTS

The number of medical malpractice claims and the size of verdicts are not increasing.

THE ROLE OF THE MEDICAL MALPRACTICE INSURANCE INDUSTRY

The insurance industry's pattern of setting premium rates is cyclical in nature and often has little to do with the rate of medical malpractice claims or national health care costs. Price competition and price cutting to gather a larger group of people to insure are followed by extreme price increases and market withdrawals or the threat of market withdrawals. Moreover, the cost of a doctor's medical malpractice premium may depend more on his or her insurance company's reserving practices than on claim frequency.

- "Despite unchanging claim frequency, declining loss payments and loss expense, on average, doctors paid approximately triple the amount of premiums for malpractice insurance in 1987 than in 1982."

  Michael Hatch, Medical Malpractice Claim Study, 1982-1987 at 31.

- "Insurers have consistently and significantly over-reserved."

  Id. at 19.

- After being forced to cut insurance in 34 states and refund $1.5 million to Minnesota doctors, the St. Paul Companies transferred a whopping $250 million from reserves (set aside to cover future claims) and moved it into a surplus account (potentially recognized as profit). This follows a similar transfer of $14.5 million just one year earlier. St. Paul is the nation's largest medical malpractice insurer.

  Anthony Carideo, "Can It Continue Putting Reserves into Earnings?" Minneapolis Star Tribune, April 16, 1990, at 2D.

The insurance industry is not losing money on medical malpractice insurance.

the women seeking hospitalization due to poverty or complications during childbirth faced a 25-30% mortality rate from childbed fever. Semmelweis investigated, implemented a procedure, and saw mortality rates decrease to 18.27%, to 1.27% and finally to no deaths at all. His colleagues, outraged at his persistence in posting new procedures to save lives, ousted him from his post in Vienna, sending him jobless back to Budapest, where he eventually found a similar position in a hospital. There he implemented the same procedure, cutting the mortality rate to 0.85%, while back in Vienna, the mortality rate had risen to 10-15%.

The procedure he implemented? Requiring the students to wash their hands with a chlorinated lime solution after leaving the dissecting room and before visiting the maternity ward.

Is this defensive medicine, performed out of fear of liability, or good medicine?

S.I. McMillen, None of These Diseases 13-15 (1968).

RESTRICTING PATIENTS' RIGHTS WILL NOT IMPROVE THE QUALITY OF CARE

- Malpractice occurs daily in America. For example, in one state, New York, it was estimated that in 1984 a whopping 23,736 to 31,104[1] people suffered injuries from negligent care while hospitalized, and of those, 7,000[2] people died from the injuries they sustained. Imagine what is happening nationwide if 7,000 people died in only one state!

[1]*Harvard Medical Practice Study, Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York 6 (1990).*

[2]*Id. at 11-1.*

The Wisconsin Academy of Trial Lawyers (WATL), established as a voluntary trial bar, is a non-profit corporation under the laws of the state of Wisconsin. Members of the Academy are attorneys who represent consumers seeking to hold wrongdoers accountable for injuries arising from unsafe products or procedures. The Academy's principle objectives are to promote continuing legal education for the betterment of the trial bar profession and to preserve Wisconsin's civil jury trial system by working with the state legislature and other governmental bodies as an advocate for the legal rights of all Wisconsin citizens.

Wisconsin Academy of Trial Lawyers

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PERCEPTIONS v. REALITY

QUICK FACTS ON MEDICAL MALPRACTICE IN WISCONSIN

January, 1995

Medical Malpractice Is Not A Factor In Rising Health Care Costs In Wisconsin

Total medical malpractice spending in Wisconsin is less than 1% of total health care spending.

- In Wisconsin, health care costs are about $12 billion per year.

  The Department of Health and Social Services reported 1989 total health expenditures in Wisconsin at $10.2 billion. Medical Benefits, 8(3) February 15, 1991. The figure for 1991 reflects an approximate 7% - 8% increase per year.

- Wisconsin medical malpractice insurance costs for all health care providers in 1991 were $117.4 million, including $73.5 million from primary insurers and $43.9 million for the Patients Compensation Fund.

  Office of the Commissioner of Insurance, Wisconsin Insurance Report: Business of 1991, pp. 98, 111.

The amount paid in malpractice premiums is so small that eliminating it entirely would have no effect on the cost of health care.

There are Far More Incidents of Medical Malpractice Than Claims Filed

- The Harvard Medical Practice Study, the most comprehensive evaluation of hospital care, found that only one in eight patients who suffered an injury from negligence while hospitalized brought a legal claim.

  Harvard Medical Practice Study, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York, Boston: 1990. Executive Summary at 3-4, 6.

- There were 673,499 hospitalizations in Wisconsin in 1990. Applying the percentages from the Harvard study yields 6,853 injuries from negligent treatment here.

  Data from Wisconsin's Office of Health Care Information found in "Hospital Stay Costs Up 17%, Agency Says," Milwaukee Sentinel, *October 10, 1991, p. D1.*

Patients Compensation Fund
1975 - 1991

Fees Paid In vs. Losses Paid Out

Year	Fees Earned	Losses Paid	Paid Loss Ratio
1975-76	$3,036,224	$0	0.00%
1976-77	$3,055,015	$0	0.00%
1977-78	$1,351,034	$700,000	51.81%
1978-79	$1,416,068	$252,257	17.81%
1979-80	$2,395,653	$3,815,529	159.27%
1980-81	$4,412,548	$2,121,336	48.08%
1981-82	$4,652,749	$3,404,012	73.16%
1982-83	$7,350,449	$7,406,388	100.76%
1983-84	$10,272,293	$13,042,445	126.97%
1984-85	$17,400,806	$12,377,692	71.13%
1985-86	$32,704,660	$9,611,503	29.39%
1986-87	$30,539,911	$16,778,242	54.94%
1987-88	$33,642,751	$25,259,786	75.08%
1988-89	$37,969,575	$15,579,910	41.03%
1989-90	$43,161,220	$23,945,717	55.48%
1990-91	$43,936,723	$24,383,757	55.50%
1991-92	$42,350,118	$41,733,144	98.54%
1992-93			
TOTAL PCF	$319,647,797	$200,411,718	62.70%

Panels Administrator, State Bar of Wisconsin 1993 Midwinter Convention, January 28, 1993.

- The number of medical malpractice cases filed in Wisconsin declined nearly 40% from 1985 to 1993. The following table shows the number of cases filed annually with the Patients Compensation Panels (1985 and earlier) or the Medical Mediation Panels:

  Director of State Courts, "Status Report on the Medical Mediation System in Wisconsin," March 1, 1994.

Year	Cases Filed	Year	Cases Filed	Year	Cases Filed
1981	307	1985	454	1989	339
1982	413	1986	***	1990	348
1983	376	1987	398	1991	338
1984	441	1988	353	1992	313
				1993	276

***The Patients Compensation Panels were abolished on June 12, 1986. The Medical Mediation Panels did not become operational until September 1, 1986. During the interim, parties could proceed directly to circuit court. Accordingly, no filing statistics are available for 1986.

WHAT IS THE REAL PROBLEM BEHIND MEDICAL NEGLIGENCE? BAD DOCTORS

- In Wisconsin's closed claim study, a small percentage of doctors was responsible for a large percentage of malpractice claim dollars. The top 10 physician defendants, ranked by total dollars paid out, accounted for 2.4% of the claims and 23% of the total indemnity payments.

  Office of the Commissioner of Insurance, "WHCLIP: Preliminary Report on Medical Malpractice in Wisconsin," IP 13-92.

- Four Wisconsin physicians were involved in more than 1 Patients Compensation Fund claim; these 4 accounted for 17.8% of all the losses paid for all 2,904 claims studied.

MEDICAL MALPRACTICE PREMIUMS WISCONSIN 1979-1991

YEAR	DIRECT PREMIUMS EARNED MEDICAL MALPRACTICE	DIRECT LOSSES PAID MEDICAL MALPRACTICE	PAID LOSS RATIO
1979	10,581,208	3,193,161	30.18
1980	10,770,733	3,662,964	34.01
1981	10,260,828	5,732,577	55.87
1982	9,810,152	6,308,283	64.30
1983	10,633,778	8,288,986	77.95
1984	13,847,351	9,588,281	69.24
1985	21,892,172	12,429,247	56.77
1986	31,254,606	9,672,158	30.95
1987	37,132,348	10,671,788	28.74
1988	49,200,412	12,579,577	25.57
1989	58,396,287	19,799,690	33.91
1990	57,925,473	15,633,634	26.99
1991	59,226,118	15,774,276	26.63
STATE/LINE TOTAL	380,931,466	133,334,622	35.00

- Some Wisconsin health care providers may pay more for malpractice insurance than providers in other states because of their enhanced level of coverage.

  For a comprehensive review of Wisconsin's medical malpractice system, especially of the legislative changes made in 1975, see Wisconsin Legislative Council Staff Brief 84-4, "Medical Malpractice: The Legal Framework," July 30, 1984.

The medical establishment in Wisconsin vigorously protects its access to the Cadillac of insurance coverage for itself, while pursuing changes in the law that would weaken the medical malpractice system for patients injured by medical providers.

Data Shows Insurers' Profitability

- Data shows Wisconsin has followed the national trend, yet with substantially *lower* paid loss ratios here. The Fund has followed the same trend: Dramatic premium increases and modest paid loss increases.

  Based on data from a specialty database prepared by A.M. Best, 1990. The data for the U.S. as a whole and for Wisconsin is included at the back of this book.

- Wisconsin premiums were set too high and reserves consistently overstated. In February, 1994 – for the sixth year in a row – the Fund's actuaries reduced their estimates of the cost of prior years' claims, noting "We attribute this apparent improvement primarily to the tempering – if not reduction – of claim frequency that we have previously discussed with the Board, both with respect to the Fund as well as the Wisconsin Health Care Liability Insurance Plan (WHCLIP)."

  "Wisconsin Patients Compensation Fund Recommended July 1, 1994 Fund Fees Executive Summary," Milliman and Robertson, Inc., February 17, 1994, p. 4

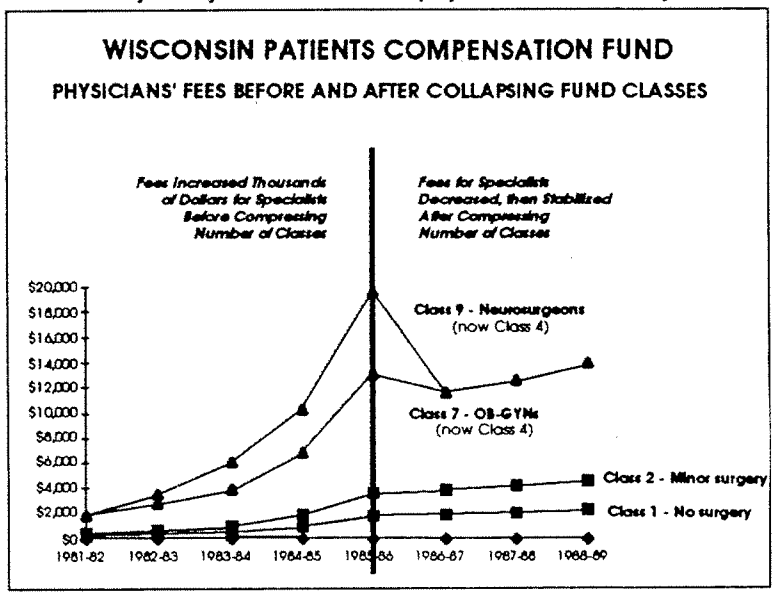
Tort Reform Will Not Increase Access to Health Care or Stop Spiraling Health Care Costs

Health care costs – and physician incomes – do not follow a cyclical pattern. Both have risen *every year.* In the last five

MEDICAL MALPRACTICE PREMIUMS U.S. TOTAL 1979-1988

YEAR	DIRECT PREMIUMS EARNED MEDICAL MALPRACTICE	DIRECT LOSSES PAID MEDICAL MALPRACTICE	PAID LOSS RATIO
1979	1,362,000,006	391,799,909	28.77
1980	1,401,130,787	521,848,976	37.24
1981	1,516,741,885	665,570,105	43.88
1982	1,663,904,105	847,543,403	50.94
1983	1,927,301,621	1,079,862,221	56.03
1984	2,196,774,875	1,212,417,600	55.19
1985	2,951,517,050	1,555,106,584	52.69
1986	3,934,321,045	1,708,473,267	43.42
1987	4,490,235,262	1,899,806,509	42.31
1988	4,838,759,190	2,115,741,792	43.72
STATE/LINE TOTAL	26,282,685,826	11,998,170,366	45.65

general practicitioners. Unfortunately, the Fund is the only entity which classifies physicians in this way.



Strengthen Physician Discipline

Institute tougher licensing requirements and increase funding to police physicians. Wisconsin's Board should be given more disciplinary authority and greater staff capabilities, and the disciplinary process should be made more efficient. Disciplinary actions should not be stalled or delayed by litigation.

End Conflicts of Interest that Lead to Financial Malpractice

Eliminate the financial incentive for physicians to refer patients to their own testing facilities. Until the profit motive is removed from medical practice, physicians will continue to order unnecessary and expensive medical procedures.

Watch for Over-Reserving Practices

The driving force behind the contrived malpractice crisis is the cash flow underwriting practices of the insurance industry. An independent governmental agency should review insurance company records to determine when insurance companies are

over-reserving. With the information collected, government can better monitor insurance premiums.

Improve Access to Justice

Streamlining litigation will allow more injured persons access to the courts. One measure, the implementation of prejudgment interest at the state level, would take away the advantage that medical defendants have in delaying case resolution.

Encourage Physicians to Improve the Doctor-Patient Relationship

Better communication with patients has a demonstrable effect on reducing malpractice claims. Doctors have suggested the following recommendations:

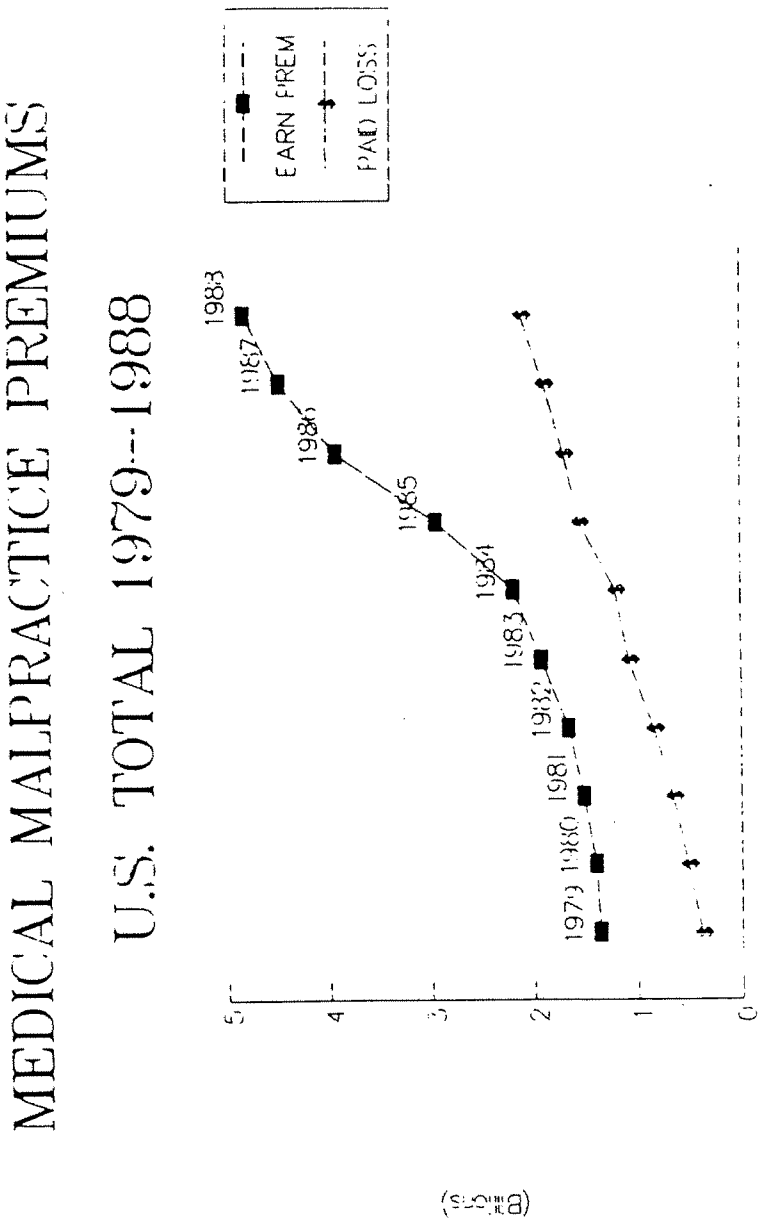
- Develop close and friendly relationships with patients;
- Respect the patient's dignity and privacy;
- Listen to patients;
- Be straightforward about bad results — never lie or cover-up;
- Have patients join in the decision-making;
- Treat the patient as you would like to be treated.

Improve Consumer Access

Consumers should have full access to the information at the National Practitioner Data Bank (NPDB). The NPDB, taxpayer-funded and operated by the federal government, tracks doctor disciplinary actions, hospital revocation of physicians' privileges and malpractice claims paid by insurers. The data is available to hospital and state medical boards but not to consumers.

Prohibit Secrecy Agreements

Many doctors and hospitals accused of malpractice refuse to settle their cases unless the victim and his or her attorney agree to keep the facts of the case and the details of the settlement a secret. Unfortunately, these secrecy agreements shield incompetent doctors and dangerous hospitals from public scrutiny and make it impossible for potential patients to avoid these individuals and facilities.



years, as medical malpractice premiums levelled off or even declined, health care costs increased at double digit rates.

- The index of medical care prices shows a 291% increase from 1975 to 1988, with increases every year.
  Statistical Abstract of the United States, 1990, pp. 99, 468.

- Physician incomes increased well over 200% from 1975 to the late 1980's.
  See *Historical Annual Fees for the Wisconsin Health Care Liability Insurance Plan and Patients Compensation Fund, prepared by Milliman and Robertson, Inc.*

Solutions to the Real Problems

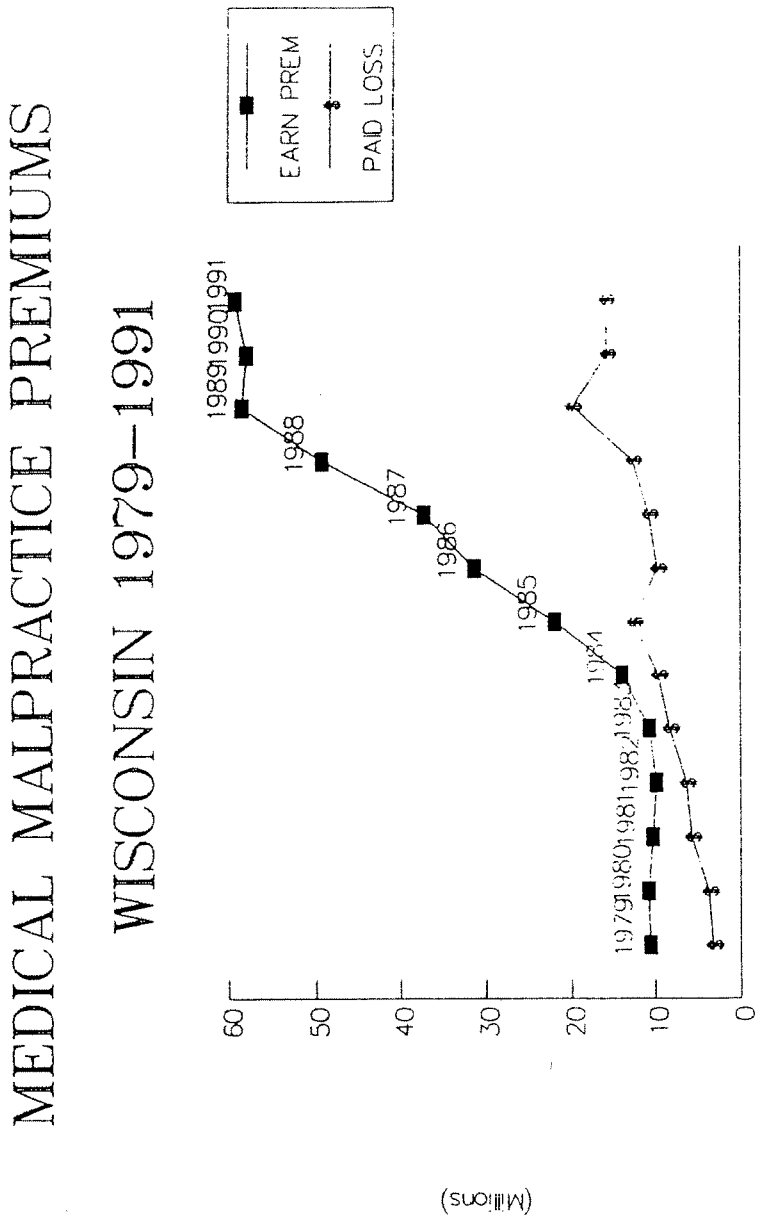
Mandate Fair Rating Practices to Reward Good Doctors

A standard insurance principle violated by medical malpractice insurers is experience rating. Medical malpractice insurers should charge bad providers higher rates and allow good providers to benefit from lower premiums for "clean records."

Force Medical Malpractice Insurers to Spread Risk

Insurers must be required to adopt a less arbitrary strategy to spread risk more broadly across the health care provider pool. The smaller the pool of providers, the greater the impact of even one large claim. Underwriters have destroyed the cardinal rule of insurance: Spread the risk. Total premiums will not increase but will be re-allocated among classes of providers.

- Some states subdivide providers into 12 to 19 classes; in Wisconsin there are 10 to 12. In the 1960s and before, physicians were typically divided into only 3 classes of high, medium or low risk.
- In 1986, Wisconsin compressed the number of classes in the Fund to no more than 4 classes. The chart below illustrates the dramatic decrease in premiums for OB-GYNs and neurosurgeons, with minimal effect on



"WHCLIP: Preliminary Report on Medical Malpractice in Wisconsin."

- In 1989 and 1990 Wisconsin ranked 47th and 40th, respectively, in the number of disciplinary actions per 1,000 doctors. Under a broader definition of "serious disciplinary actions," Wisconsin ranked 34th and 26th in frequency of discipline in 1991 and 1992, respectively.

  I. Van Tuinen and S. Wolfe, "State Medical Licensing Board Serious Disciplinary Actions in 1989," Public Citizen Health Research Group, February, 1991, p. 4. and Public Citizen Health Research Group, Health Letter, *Vol. 9, No. 8, August, 1993.*

THE ROLE OF THE MEDICAL MALPRACTICE INSURANCE INDUSTRY

PREMIUM COSTS ARE CYCLICAL AND NOT DIRECTLY RELATED TO HEALTH CARE COSTS

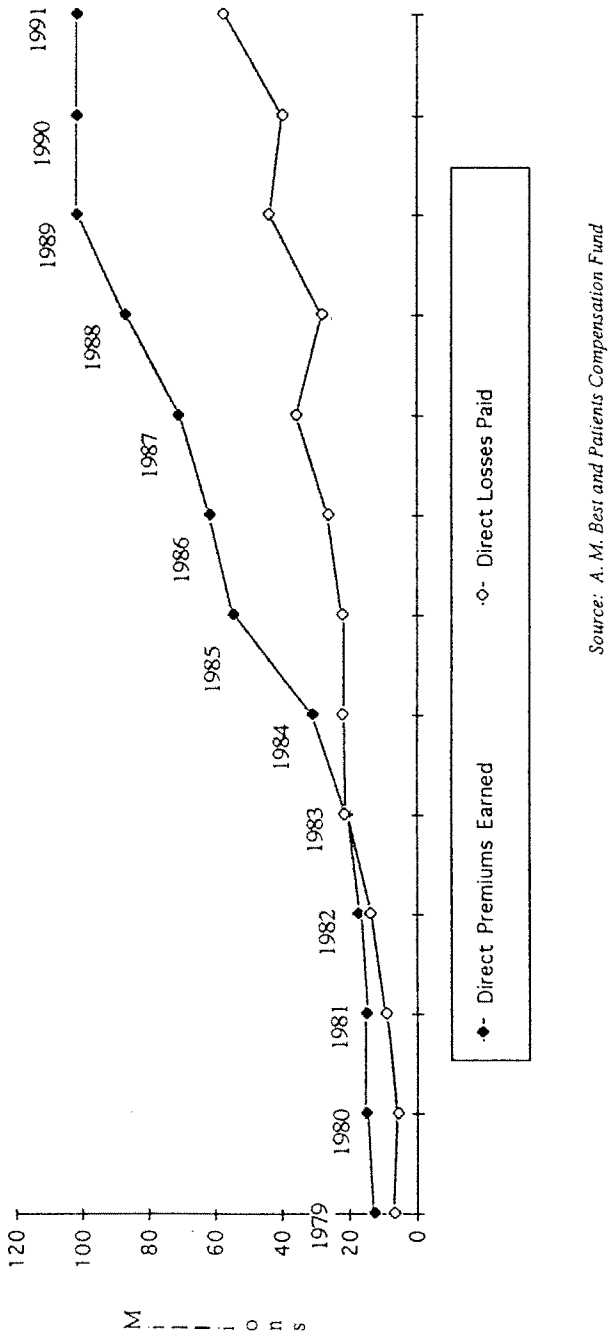
- Wisconsin's non-profit Patients Compensation Fund (the Fund) followed the same cyclical pattern as private companies in the 1970's and 1980's. At one time, the Fund was offering unlimited coverage for an annual premium of $58 for a general practitioner and $480 for an obstetrician. Poor underwriting practices required huge fee increases in the mid-1980s.

  See *Historical Annual Fees for the Wisconsin Health Care Liability Insurance Plan and Patients Compensation Fund, prepared by Milliman and Robertson, Inc.*

MEDICAL MALPRACTICE INSURANCE COVERAGE FOR WISCONSIN MDS IS THE BEST AVAILABLE

- Wisconsin's medical malpractice insurance structure is unique. Insurance is mandatory; for physicians, it is a condition of licensure. The provider chooses where to buy primary coverage of $400,000; fees paid to the Fund provide unlimited coverage for everything over $400,000. No deductibles are allowed, and all defense costs are paid by the insurers and the Fund.

MEDICAL MALPRACTICE PREMIUMS 1979-1991
All Wisconsin Companies and Patients Compensation Fund



Source: A. M. Best and Patients Compensation Fund

- In 1990, there were 348 requests for medical malpractice mediation filed in Wisconsin.

  Director of State Courts, Medical Mediation Panels, "Status Report on the Medical Mediation Panel System in Wisconsin," March 1, 1991.

- The Wisconsin medical malpractice closed claim study reported, for the 6,727 closed claim files covering the period 1976-1988, over half (3,831 or 56.9%) were determined to be incident reports in which no legal claim was filed and the patient did not claim any money.

  Office of the Commissioner of Insurance, "WHCLIP: Preliminary Report on Medical Malpractice in Wisconsin," IP 13-92, p. 2.

Obviously, most incidents of medical negligence in Wisconsin are never filed as claims.

PATIENT LAWSUITS AND VERDICTS ARE NOT OVERLOADING WISCONSIN COURTS

- In the Wisconsin closed claim study, of the 2,904 legal claims filed, only 85 received more than $200,000. The average payment was $27,017 dollars, a number that has been fairly stable since 1980.

  Office of the Commissioner of Insurance, "WHCLIP: Preliminary Report on Medical Malpractice in Wisconsin," IP 13-92, p. 2.

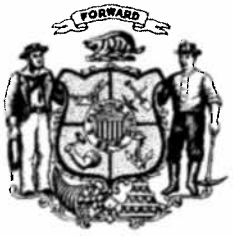
- During the five-year period of 1988-1992, of the 194 medical malpractice jury trials in Wisconsin, plaintiffs won only 51 cases (26%).

  Correspondence from Randy Sproule to Wisconsin Academy of Trial Lawyers, July 13, 1993.

- Wisconsin statutes require all medical malpractice actions to start with mediation, before a circuit court lawsuit can be filed. About one-third of the cases filed with the Mediation Panel System never are filed as lawsuits in circuit court.

  Figure reported during presentation, "Medical Mediation: Current Trends," Randy F. Sproule, Medical Mediation


WISCONSIN STATE LEGISLATURE


FORWARD

Wisconsin Academy of Trial Lawyers

A CIVIL JUSTICE

PRIMER

Questions & Answers About: *Page*

The Civil Justice System in General

Q *What is the Civil Justice System?*

A For two centuries, judges and juries have developed rules that punish misbehavior and force those who harm others to pay compensation. This is the civil justice system. It is a system which allows an individual, who's been injured or who's suffered because of careless actions by others, to hold the wrongdoer accountable.

Q *Who's trying to change the Civil Justice System?*

A Powerful special interests — insurance companies, big business and the medical industry — have influenced the public to believe the civil justice system is unfair. Stringing together anecdotes, half-truths and phony statistics, the public has been lead to believe there is a "lawsuit crisis." There is not. Their real motive is far simpler: profits and escape from responsibility.

Since 1985, these powerful special interests have cried for "reform," without promising to lower insurance rates or consumer costs. Wisconsin hasn't bought their story. And what has been the result? Our civil justice system is among the fairest, most efficient, least costly in the country. For example:

- Tort liability cases in Wisconsin amount to less than 1% of state court cases. (Businesses suing businesses are twice that. Yet no one suggests "reforms" to curtail the rights of business owners.)

- Wisconsin's liability insurance rates are among the lowest in the nation. (Why? A 1991 *Milwaukee Sentinel* article, "Insurance Rates Here Rank Low," said "Several people noted that Wisconsin residents resort to litigation far less than residents of other states...")

- The number of medical malpractice cases filed in Wisconsin dropped nearly 40 percent since 1985, from 454 to 276 in 1993.

- Wisconsin is one of the most fertile profit centers for liability insurance companies. Wisconsin insurance loss ratios – money taken in compared to money paid out to satisfy claims – are outstanding, as compared to national ratios. For example: American Family has a national loss ratio of 78%, but a state loss ratio of just 65%. Sentry has a national loss ratio of 75%, but a state loss ratio of just 57%.

- Wisconsin health insurance rates are 22% below the national average, among the lowest in the country.

There are other examples. But the point is, Wisconsin is in an enviable position. If injured by another's negligence, citizens are protected by the same legal rights they have enjoyed during most of the state's history, and their insurance and other liability related costs are among the lowest in the nation.

The "Anti"-Stacking Bill

Q *What is stacking?*

A Stacking allows owners of two or more cars to combine ("stack") uninsured motorist (UM) or underinsured motorist (UIM) coverages purchased on each of the cars. UM & UIM coverages are indemnity policies that compensate policyholders for injuries by drivers with no coverage or inadequate coverage. Liability coverages, which protect against suits by others, cannot be stacked.

Q *Why would a person buy more than one UM or UIM policy covering the same loss?*

A Presently, people pay separate premiums based on the number of vehicles they want covered. No one has a "motive" for buying more than one UM policy. It is mandated by law. If a family insures two cars, it must buy two UM policies; three cars, three policies, etc. Although UIM coverage is not mandated, it is generally sold as a package with UM protection.

If people are injured, the maximum amount they can collect is the combined amount of coverage they have for all the vehicles they own. In other words, for every premium paid, there is coverage available under that policy, in the event of an accident.

The insurance industry would like legislators to think there is something wrong about stacking UM & UIM coverage. The fact is, it's no different than buying two or more life insurance policies. No one questions a beneficiary collecting on two or more life policies. The insurer has an obligation to pay on each policy for which it collected premiums. UM & UIM policies work the same.

Q *What's wrong with eliminating stacking, as long as consumers are properly informed about the consequences?*

A Continuing the life insurance analogy, if legislation limited coverage to a single life insurance policy, no matter how many were bought and paid for, consumers would be outraged, especially if the insurer was permitted to charge a premium for the coverage that was no longer allowed. That is exactly the procedure that has been proposed for UM/UIM coverage.

Coverage would be limited to one policy, but there would be no reduction in premiums from current levels: Insurers testified before the Senate Judiciary Committee they will not reduce premiums they now charge with stacking allowed.

Passage of this proposal would be a classic "windfall" for the insurance industry. Insurance consumers would, quite literally, be robbed of premium dollars and robbed of coverage they have paid for.

Q *Haven't Wisconsin insurers lost money on UM & UIM coverages ever since the Supreme Court and the Court of Appeals ruled stacking is permissible?*

A No, the cost of those two coverages has been factored into premiums charged by Wisconsin insurance companies for many years. While inexpensive for the individual consumer, UM/UIM premiums are worth millions to insurers. That would be good news for Wisconsin insurers, who already have a more profitable business in Wisconsin than in other states, but bad news for Wisconsin insurance consumers.

The change would not affect the business of Wisconsin insurers in other states. It would be ironic if this proposal became law and the many Wisconsin-based insurance companies were allowed to deny stacking to instate policyholders, while granting it to insureds in other states which are less profitable.

Q *Isn't the insurance industry's request kind of routine or, as the industry likes to say, "merely a technical correction"?*

A We're not aware of any previous insurance legislation that permits insurers to keep charging for

coverage that has been removed by law. That can hardly be considered a "technical correction." Insurers made it clear to the Legislature they have charged consumers more because stacking is allowed in Wisconsin. An amendment to 1993 SB 135, offered in the Senate to force insurers to return the money saved once stacking is eliminated, failed on a 17-16 vote.

Q *Isn't it a fact most consumers don't understand UM & UIM coverage – don't understand what they paid for – don't understand they can "stack" UM & UIM coverages? If that is true, are they really losing anything if it is eliminated?*

A Those disquieting thoughts were expressed by the chair of the Senate Judiciary Committee. She, in effect, said it's okay to eliminate stacking, even though consumers would continue to pay for it, because "consumers were getting something they didn't expect with the stacking."

In her view, since insurers fail to advise insureds regarding what they purchased – and, therefore, insureds don't understand their rights under the policies – it's okay for the Legislature to eliminate coverage yet allow insurers to keep charging for it.

That amounts to officially sanctioned theft.

The Elimination of Joint & Several Liability

Q *What is joint and several liability? Doesn't joint and several liability result in the plaintiff suing everyone in sight in the hope that someone with "deep pockets" can be found?*

A Joint and several liability has been around for a long time. It was first developed and is routinely used by businesses for commercial law — bills, notes, guarantees. In the area of personal injury law, the rule says if two or more people combine to cause an injury, both people are responsible for the full damages.

For a joint defendant to be found responsible, a jury must find a "causal" connection between the actions of that defendant and the injury. It's not enough to just "be there," as some proponents of the change insist is the case. Some call it the "but for" rule. "But for" the actions of a defendant or the combined actions of joint defendants, the injury would not have occurred.

A case making that point occurred a few years ago in northeast Wisconsin. A speeding driver missed a turn on a road with loose gravel and crashed into a tree, rendering a passenger quadriplegic.

Experts testified "but for" the speed, loose gravel would not have caused the driver to lose control, and the accident probably would not have occurred. And "but for" the "ball-bearing" effect of the gravel, placed on the road by a roadbuilder who had allowed tar to harden before gravel was applied the day earlier, the speed would probably not have caused the driver to miss the turn. The jury found the actions of the driver and roadbuilder combined to injure an innocent plaintiff.

When asked to apportion responsibility, the jury found the speeding driver more responsible than the road-builder. The jury also found the passenger was not at fault.

The driver had minimal insurance. The major part of the plaintiff's recovery came from the roadbuilder's insurance. Is that entirely "fair" to the roadbuilder? Of course not. An inherently "unfair" situation is always created when a guilty joint defendant can't or won't pay a full share. However, it is more "fair" than making the innocent injured party or taxpayers pay, especially in view of the fact that "but for" the input of the defendant, the accident would not have occurred at all.

Those who understand our system consider joint and several liability the most even-handed, equitable manner in which to handle personal injury legal disputes.

Q *What happens if a joint defendant is found less negligent than the plaintiff? Does that defendant get*

stuck for more than his or her share if another defendant can't or won't pay?

A No. A defendant less at fault than the plaintiff pays nothing under Wisconsin's modified comparative negligence system. Even if his or her actions, combined with the actions of others, amount to a greater degree of fault than that of the plaintiff. For example, if two defendants are each assessed 30% of the negligence, together totaling 60%, and the plaintiff is assessed 40%, neither defendant pays. The plaintiff bears the loss. *Our law protects the person least at fault – plaintiff or defendant.*

No good argument has been offered to counter the logic of our law of joint and several liability by those who want to eliminate it. Insurance consumers should be aware that eliminating joint and several liability would mean – in all cases in which an adjudged wrongdoer can't or won't pay his or her share – the loss would have to be borne by the innocent injured party. What could be more unfair or illogical?

Adding to the unfairness and illogic, the insurance industry promises no reduction in premiums if Wisconsin lawmakers go along with eliminating joint and several liability.

Q *Don't joint and several liability cases tie up our courts?*

A No. A State Bar of Wisconsin study found there were 833 personal injury jury verdicts in 1985 and 1986 together. Just 13 involved joint and several liability. That is an average of 6 1/2 per year.

Q *Proponents of eliminating joint and several liability acknowledge its elimination would be unfair to plaintiffs. They suggest a fund or pool to protect plaintiffs damaged by elimination. Wouldn't that be a viable solution to the problem created by the elimination of joint and several?*

A The best solution would be to retain joint and several in the first place. But whenever proponents of elimination are backed into a corner regarding the obvious unfairness to the plaintiff from elimination, they offer the fund or pool idea. It is a cop-out. There is no fund or pool now, nor is there likely to be one.

A bill proposed in the last legislative session, SB 152, made an abortive attempt to create a fund with money from punitive damage awards. Reformers were fooled by their own past rhetoric that proclaimed huge punitive damages were routinely awarded. Reality caught up with them during a spring Senate hearing. They discovered those awards are so infrequent and so small that the special fund would not have enough money to cover its own operating expenses. The idea was deleted from SB 152.

The fiasco was obviously an attempt by "reformers" to correct the injustice to innocent plaintiffs caused by the elimination of joint and several liability. It would have made sense to withdraw the bill entirely when the fund/pool idea failed. The fact it wasn't withdrawn indicates "reformers" are not interested in justice for innocent injured persons. It also showed total disdain for taxpayers who would have to pick up the tab when those injured persons couldn't meet the obligations forced on them by the injury and an unjust law.

Q *We've heard a lot about the 1% liable joint defendant in a "multi-million-dollar" case getting stuck for the whole tab. Isn't that a major consideration?*

A No. There are very few "multi-million-dollar" lawsuits in our state. The average case is less than $50,000. There has only been one Wisconsin case in which a defendant found 1% liable faced the prospect of paying 100% of the damages.

In the usual case involving joint and several liability, a defendant is substantially responsible. The State Bar study found the average degree of negligence was 34%. The 1% argument, because those cases are virtually nonexistent, is a sham.

The Cap on Medical Malpractice Noneconomic Damages

Q *Most people believe the cost of medical malpractice is a major factor in the overall cost of health care. Placing an upper limit or cap on awards will limit recoveries and reduce the cost of medical malpractice insurance, which in turn will mean lower health care costs for all of us. Is that a true perception?*

A It is not. Those who choose to ignore the facts find that scenario plausible, reasonable and acceptable. It appears to hold a simple solution to a very complex problem. But the fact is the cost of medical malpractice insurance is less than 1 percent of the total cost of health care. It is an amount so small that eliminating it entirely would have no effect on the cost to individual patients.

Q *Given that fact – and "reformers" have produced no data to refute it – what impact could a $250,000 cap have on the cost of health care and where would the money come from?*

A If there is an impact, it could only amount to something less than 1 percent. And, considering all the other variables involved, it would be an extremely small fraction of 1 percent. Whatever money was "saved" would come from the compensation now given to the most seriously injured health care consumers.

States like Indiana, which have made major changes in their medical malpractice laws, have experienced the same kind of health care cost increases as states with no changes in their medical malpractice laws.

Q *Isn't it important to get medical malpractice premiums down so our doctors don't leave the state in search of less expensive malpractice insurance?*

A Wisconsin's physician population continues to grow at about 3% per year. The Wisconsin medical establishment enjoys insurance coverage that has no equal anywhere in the United States, an important benefit for physicians. Annual premiums most often cited from other states are for $1 million/$3 million of claims made coverage. That means the policy covers up to $1 million for one incident and up to $3 million in one policy year. Compare that to Wisconsin where the medical establishment enjoys the comfort of unlimited coverage.

Q *Indiana was one of the first and severest practitioners of medical malpractice "reform," starting in 1975. Aren't there some valuable lessons we can learn from the Indiana experience?*

A Yes, there are. Any state considering changes in medical malpractice should carefully study the Indiana experience. An *Indianapolis Star* investigative reporting team dug into the records to see what the first 15 years of Indiana's laws had produced. Its series, "A Case of Neglect: Medical Malpractice in Indiana," won a 1991 Pulitzer Prize for investigative journalism.

Among its findings were that doctors and insurance firms were big winners and health care consumers who suffered injuries were the big losers. "Because of the law, doctors in Indiana enjoy some of the cheapest insurance premiums in the country," the series reported. "Their premiums consistently ranked between 45th and 50th (among the states)."

Yet, Indiana's "reforms" did not deliver on two of the most common promises made by those who want them put into law: the promise to lower health care costs and the promise "reforms" will mean more doctors in practice, especially in rural and inner-city areas.

In an October, 1994 study, Employers Health Insurance, one of Wisconsin's largest health insurance companies, compared the health insurance costs of 11,400 claims from 41 states for one of the most common procedures in the nation: having a baby.

It found "reformed" Indiana had an average cost per normal birth of $4,387.07, 13.8% below the national average. *"Unreformed" Wisconsin had an average cost of $3,827.14, 24.8% below the national average. And $560 less per birth than Indiana.*

The promise of more physicians did not come true either. The Department of Commerce's Statistical Abstract of the United States, years after Indiana's "reforms" had been enacted, showed Indiana had 151 physicians per 100,000 population in 1987; "unreformed" Wisconsin had 181 per 100,000 population. *Indiana, with its low awards and low malpractice premiums, had 20% fewer physicians per capita than Wisconsin.*

Q *Wouldn't a cap on noneconomic damages keep doctors from having to practice "defensive medicine?"*

A The medical industry claims extra tests and procedures are done to reduce malpractice liability, making doctors practice "defensively." However, a 1994 study by the Office of Technology Assessment found when doctors order additional tests or procedures they do so for proper medical reasons — to improve patient outcomes. What doctors are really practicing is "protective" medicine. It protects both the patient and the doctor when the medical consequences of being wrong are severe.

Q *What's wrong with the legislature deciding how much someone's noneconomic damages are worth?*

A Who would you want to decide how much your pain and suffering was worth: the jury which sits in the same room with you and judges the merits of your case or a state legislature sitting in the state capitol? By instituting a cap, the legislature is acting the part of "Big Brother," deciding it knows more about your case ahead of time than the jury which hears all the evidence.

Caps on noneconomic damages demonstrate a belief that intangible and unseen injuries are less important than economic injuries. This discriminates against women, children and older adults, particularly, since their economic injuries (such as lost wages) are generally lower.

Q *Are the threat of medical malpractice actions beneficial to consumers of medical care?*

A There is no question about it. It is a very important factor in Wisconsin because of the failure of our state's medical establishment to police its own activities. Disciplining of doctors in our state is totally inadequate when compared with the rest of the nation.

According to the highly regarded Public Citizen Health Research Group *Health Letter*, Wisconsin ranked 47th and 40th in the frequency of doctor discipline in 1989 and 1990, respectively. That is a sorry record, that can only get worse if there are disincentives, such as caps on awards and other reform measures, offered to offending doctors rather than increased discipline.

Q *Shouldn't we be concerned at all about the amount the medical establishment pays for medical malpractice insurance?*

A We must be very concerned with costs to rural and inner-city practitioners. However, a cap will do nothing for them. Aside from them, medical doctors are the highest paid professional group in America. Their average annual net income is about $170,000, according to the AMA. The cost of insurance is a cost of doing business like heat, light and salaries, all of which come out before that hefty net is arrived at. It amounts to about 2.9% of gross income, a percentage comparable to that paid by other professionals.

However, just compensation for injured health care consumers must be the focal point of any discussion about changes in medical malpractice, not what percentage of Dr. X's gross income went to protect patients against his negligence. A cap puts the few dollars a doctor may save in malpractice premiums ahead of concerns about the most catastrophically injured victims of medical negligence. That is wrong.

Q *Won't the $250,000 cap on noneconomic damages save malpractice premium dollars for doctors, who will then lower fees charged patients?*

A Premiums for medical malpractice are unlikely to decrease. If they do, it may amount to about $1 a day for general practitioners and $5 – $8 a day for specialists. The notion that the medical establishment would or could pass that tiny saving on to individual patients is beyond belief.

The "Loser Pays" Rule

Q *What is the "loser pays" rule?*

A "Loser pays," also known as the "English Rule," means the losing party pays all costs and attorneys fees for both sides, no matter how close the case.

That may sound reasonable to most people; unfortunately, it is very unfair. In fact, it would be an injured consumer's worst nightmare because the parties usually have unequal bargaining power. Who would be more threatened by a "loser pays" provision – an individual consumer or General Motors?

Q *But wouldn't "loser pays" rules prevent frivolous cases from being filed?*

A The American system of justice is structured so there is always a winner and a loser. Just because someone loses a lawsuit doesn't mean a frivolous claim was filed. Such a position is preposterous. Many attorneys who represent consumers are only paid if they win their case. Why would anyone waste time and effort on a case he or she knew was frivolous?

The American Rule in which each party pays his or her own legal costs and the contingent fee keep frivolous lawsuits at a minimum. Wisconsin law already penalizes attorneys who pursue nonmeritorius claims or defenses. Costs and attorney fees can be awarded to a winning party if a claim or defense is found frivolous. In addition, the offending attorney may be subject to sanctions by the Wisconsin Board of Professional Responsibility.

Q *But won't a "loser pays" rule make the legal system fairer for both plaintiffs and defendants?*

A No. "Loser pays" is a concept that is alien to America's system of justice. It is potentially the most inequitable item in the "reform" package for American consumers. Conversely, it is potentially an enormous windfall for big business defendants and their insurers.

All consumer groups oppose "loser pays" because it will prevent middle-class people with legitimate complaints from seeking access in the courts. The threat of financial disaster will be too great for ordinary consumers to handle.

Q *Will an average consumer be able to sue a wrongdoer if there is a "loser pays" rule?*

A It is hard to imagine how any U.S. citizen or business, short of a corporate giant, could afford to risk the result of a "loser pays" award. This proved true in Florida when "loser pays" was passed in 1985. The legislation was repealed one year later. It didn't work.

The civil justice system is often the only means of compensation for consumers harmed by dangerous or defective products or goods. If the system is unavailable to consumers because of the risk of unreasonable costs, those who are damaged will be left without a remedy.

Q *So, will the "loser pays" rule apply to all cases or only those cases which go to trial?*

A It is directed at the entire spectrum of suits, even the cases which would gladly settle. It is well established that over 90 percent of all cases settle without trial. Why? The fact is, when injured consumers are offered reasonable amounts to settle, they gladly accept.

For example, last year's federal product liability legislation provided that, if an injured consumer chose to go to court rather than accept a settlement and the court award turned out to be equal to or less than the offer, the injured consumer would have to pay the defendant's attorneys fees and costs.

Such a law would encourage defendants to submit low offers on all cases with little risk of penalty. On the other hand, injured consumers would be in the position of accepting undercompensation or risk losing – even if their case is meritorious – if its value was even slightly miscalculated.

Q *Reformers have made a big point about England's "loser pays" system. How do they pay for the services of an attorney?*

A To begin with, there is a means test. If an injured party's assets fall below a certain amount, legal expenses are paid by Legal Aid. The amount of assets that are allowed is high enough that most people qualify for aid.

Another large segment, those involving work-related cases, are funded by unions, many using union solicitors (lawyers who do trial work). Others buy legal expense insurance. But the vast majority of the people outside of the system are often out of luck. English legal scholar Patrick Devlin says, "The unassisted litigant citizen must take what is offered to him and be glad that he has got something."

Is that what we want in America? Are "reformers" ready to pay for massive government financial assistance to litigants? We don't think Americans should adopt a costly legal system that will keep middle-class consumers from seeking justice.

Q *Will I still have access to justice if I am injured in an accident under a "loser pays" system?*

A Because of our democratic system, Americans have a unique opportunity to seek justice whenever they've experienced injustice through the irresponsibility of others — including big business, the medical industry and insurance companies.

By exposing wrongdoers in a court of law, our country's consumers have won fights to improve the standards of care for the injured and the quality of life for their families.

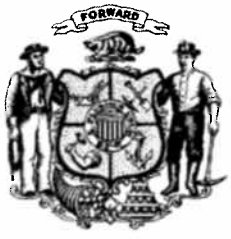
America's civil justice system is a powerful vehicle for consumers to demand negligent wrongdoers be accountable for the injuries they cause. Tort litigation can perform its task of compensating injured consumers only if those consumers have access to justice. The contingent fee and the American rule that each side pays its own fees and costs ensures access to justice for all Americans.

Wisconsin Academy of Trial Lawyers

The Wisconsin Academy of Trial Lawyers (WATL), established as a voluntary trial bar, is a non-profit corporation under the laws of Wisconsin. Members of the Academy are attorneys who represent consumers seeking to hold wrongdoers accountable for injuries arising from unsafe products or procedures. The Academy's principle objectives are to promote continuing legal education for the betterment of the trial bar profession and to preserve Wisconsin's civil jury trial system by working with the state legislature and other governmental bodies as an advocate for the legal rights of all Wisconsin citizens.

Wisconsin Academy of Trial Lawyers
44 E. Mifflin Street, Suite 103
Madison, Wisconsin 53703-2897
(608) 257-5741 · FAX (608) 255-9285

WISCONSIN STATE LEGISLATURE



Newsletter of the State Bar of Wisconsin

Vol. 14, No. 12
December 1994

State Bar redistricting up for court hearing

At its Jan. 17 hearing, the Wisconsin Supreme Court will consider a Bar proposal to make Board of Governors districts better reflect the lawyer population.

Currently, 33 State Bar governors are elected from geographical districts, but some governors now represent significantly more members than others. Since the districts vary in size – with the smallest now at 287 lawyers and the largest at 4,337 – the number of governors representing each district is supposed to reflect the lawyer population in it. However, the ratio of voting members to governors now ranges from a low of 287 members per governor to a high of 778 per governor – technically giving some districts a disproportional amount of influence on the board. The proposed solution: periodic adjustment to keep board districts within about 10 percent of the mean members-to-governor ratio.

Redistricting was one of many changes proposed by the Board Policy Review Committee appointed by Past President Pamela Barker. The committee was co-chaired by Joan Kessler and Catherine Furay; James Collis, Milo Flaten and Robert Goepel formed a subcommittee focusing on Bar organization.

The State Bar's petition, published on page 48 of the December *Wisconsin Lawyer*, proposes amending Supreme Court Rule 10.05 to provide for periodic review and adjustment of the board districts. Under this proposal, the Board of Governors would submit a proposed district plan to the supreme court every 10 years, beginning in 1994, to reflect any changes in the lawyer population. As with bylaw amendments, proposed districts would be published in the *Wisconsin Lawyer* and subject to challenge.

Along with the petition the board proposed changes to 10 of the board's 16 districts for 1995. The counties affected are: Adams, Brown, Buffalo, Calumet, Clark, Columbia, Crawford, Dodge, Door, Dunn, Eau Claire, Fond du Lac, Grant, Green, Green Lake, Iowa, Jackson, Jefferson, Juneau, Kenosha, Kewaunee, La Crosse, Lafayette, Manitowoc, Marinette, Marquette, Menominee, Monroe, Oconto, Outagamie, Ozaukee, Pepin, Pierce, Portage, Richland, Rock, St. Croix, Sauk, Shawano, Sheboygan, Trempealeau, Vernon, Walworth, Washington, Waupaca, Waushara, Winnebago and Wood (see page 54 of the December *Wisconsin Lawyer* for details). Waukesha County would get an additional governor.

If the court approves the petition and proposed redistricting, the changes could affect the 1995 State Bar elections.

January Board of Governors meeting

Special rules to streamline tort law debate

The State Bar's Board of Governors has adopted special rules to facilitate debate during its Jan. 25 meeting, when it will consider whether to maintain its 11 tort law-related legislative positions. The board revisited all other legislative positions in September, as it does each year, but some governors questioned whether the State Bar should have any legislative positions in the controversial tort reform area. So that all interested parties could participate, the board postponed discussion of the tort law positions until its preconvention meeting. Board Chair Kathleen Grant asked the governors to adopt the special rules, to ensure a productive session. Similar rules were used during the board's 1991 debate on the unified bar.

Discussion of the tort law positions begins at 10 a.m., with two hours available for guests to address the board. Guests will be asked to limit their comments to five minutes each and to preregister at the start of the meeting so that pro and con speakers can be scheduled alternately. The governors will speak in the afternoon, with each governor's comments limited to four minutes each, unless the board unanimously grants an extension. Discussion will continue until all governors have spoken or the board consents unanimously to stop. The board will vote by written, signed ballot, to avoid confusion. As always, adoption of any legislative position requires approval of at least 60 percent of those voting.

The board will vote on whether to maintain these tort law positions: to oppose the elimination of joint and several liability; to oppose a $250,000 cap on noneconomic damages; to oppose limits on contingent fee agreements; to oppose reduction of awards by payments from collateral sources that do not have subrogation rights; to oppose elimination of stacking of automobile insurance policy limits; to oppose no-fault automobile insurance; to support development of product liability law at the state rather than the federal level; to support elimination of limits on wrongful death awards for loss of society and companionship; to support state takeover of jury verdict survey research; to support limiting liability of the broadcast media for defamation in cases in which timely retractions are made; and to support an open records concept for most court files and litigation documents.

The Jan. 25 board meeting begins at 9 a.m. at the Holiday Inn Madison West. To address the board on tort law issues, please register at the beginning of the meeting.

'Mystery survey' is no survey

I am writing in response to the November State Bar newsletter article on the "mystery survey." I also was called by the research firm doing the "survey." The caller's method was to first try to lull me by asking me several simple, noncontroversial questions. The caller then proceeded to ask loaded questions that certainly indicated that whoever commissioned the survey is trying their best to torpedo the public-domain citation plan. When I asked who was conducting the survey, I got the run-around.

I am sure that the purpose of the survey is not to come up with any sort of numbers to persuade the State Bar and/or the Wisconsin Supreme Court to go one way or another with this plan. Instead, the whole purpose of the survey was to put doubt in the minds of the recipients of the call as to whether the citation plan is wise. The scare tactics seemed to be especially aimed at small-town practitioners, individual practitioners, and those, like me, who tend to believe that the role of the government ought to be somewhat more limited that it has been in recent years.

The survey reminds me of some of the tactics that were supposedly used during the recent election campaigns. People would call unsuspecting voters and ask them whether they would support a certain candidate if they knew certain things about that candidate. Of course, those things were very often untrue.

I hope that those who get calls from the firm doing the mystery survey will be wise enough to recognize and ignore these scare tactics.

Thank you for noting the survey in the newsletter. I am glad to know that I am not the only one who received these disturbing telephone calls.

Charles C. Adams
Waupun, Wis.

How will the 'survey' results be used?

I am writing to add my concerns to those already received about the survey on the State Bar's public-domain citation plan. I was also contacted by phone to participate in that confusing enterprise. First of all, it took an inordinate amount of time to respond to all the questions. And it was confusing even to the questioner; she needed to call me back because she had missed some items.

The article in the November newsletter properly expresses my feelings about the survey (except for the anger). But I will be angry if the survey-taker reports that I was against the proposal to use public-domain citation in Wisconsin. (I don't have a firm opinion now.) Upon reflection, it seems my answers to the survey may be used that way – but the questions were so poorly phrased, I'm unsure what position I expressed!

When the sponsorship and agenda behind this flawed survey become known, I ask that the State Bar do everything possible to expose any misconceptions that arise from the results. I don't believe the questions asked of me can lead anyone to a valid conclusion about my position on any issue. If my assistance would be of help, I am willing to provide it.

Jeffrey S. DeCora
Milwaukee

Why do we need public-domain citation?

I found the newsletter article on public-domain citation to be unconvincing. I was unable to discern any great benefit from this new form of citation, and it sounds like just something new for us to learn. Why can't the publishers and CD-ROM producers simply use the current official reports citation format? It does not seem any more difficult to cite the hard-copy volume and page than to cite the year of release, sequential case number and paragraph. Why change the system with which everyone is familiar and that works very effectively?

J. David Rice
Sparta, Wis.

What are your thoughts?

If you have comments, concerns or questions about the public-domain citation proposal, please contact Tom Watson at the State Bar, at P.O. Box 7158, Madison, WI 53707-7158, fax (608) 257-5501, phone (608) 257-3838, (800) 362-8096 (statewide) or (800) 728-7788. Those who wish an in-depth explanation of the citation proposal may want to ask Watson for a copy of the report written by the subcommittee that drafted the proposal.

What public-domain citation can and cannot do

Thank you all for writing in to let us know your thoughts about the public-domain citation proposal (and I hope even more members will follow your example). I too am disturbed to find an unidentified organization calling State Bar members and asking misleading questions about Bar activities. I will do all I can to correct any misunderstandings that result.

In his letter, attorney Rice raises an issue that was only touched on in the November newsletter article. Publishers now cannot "simply use the current official reports citation format" because of changes in the way that cases are reported, accessed and searched. Increasingly, cases are searched and accessed electronically on computers. This currently is done both through online services like Lexis® and Westlaw® and through the fast-growing CD-ROM libraries that lawyers are purchasing. In the future, no doubt there will be additional methods.

Since computer displays are all different and different providers use different methods of presenting information, page numbering simply doesn't fit. While page numbers can be provided, and are in Westlaw and Lexis, they are an appendage and are anything but "simply use[d]." A system that allows us to find information irrespective of format will increase the ease with which we all can move from one form of access to another at our own convenience. Otherwise, it is as if half of your set of reports is from West and the other half from Callaghan's. You can use it that way, but that is not very convenient.

This is of particular interest to sole practitioners and members of small firms. It is less expensive to maintain a library in electronic format than in books. Of course, we will always have books in our law libraries, but the new proliferation of electronic formats allows those of us who cannot afford to maintain a large library and who do not work near a large law library to have access to a much broader range of legal materials that we otherwise would. And this means that we have resources available to us that allow us to compete more easily with bigger firms.

I do not believe that the proposed

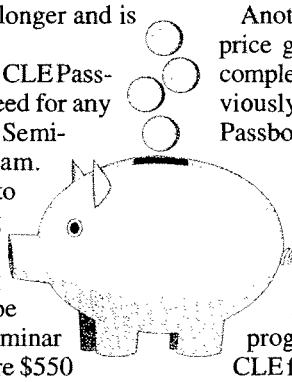
(continued on page 8)

CLE Seminars

CLE Passbook is a ticket to inflation-busting seminar prices

With a low price that hasn't changed since 1992, the State Bar's CLE Passbook is a real inflation buster. But while the price is the same, your Passbook now is worth more, lasts longer and is easier to share.

Bigger savings. Now a CLE Passbook voucher is all you need for any full- or partial-day CLE Seminars Department program. (Previously, you needed to pay any tuition exceeding $130.) Now a voucher is all you need – meaning that each voucher can be worth up to $199 in seminar tuition. CLE Passbooks are $550 and contain five vouchers, so the potential savings are a hefty $445.



Lasts longer. CLE Passbook vouchers now last two years from the date of purchase (double the previous one-year life). So a single CLE Passbook is your ticket to the 30 hours of CLE you need for a two-year CLE reporting period.

Easier to share. CLE Passbooks now are completely transferable. (Previously, there were different vouchers for new lawyers, which sometimes interfered with sharing.) Now, you can share Passbooks with anyone.

Another bit of good news: the new price guarantee, two-year life and complete transferability apply to previously purchased State Bar CLE Passbooks.

"The 'new, improved' Passbook makes State Bar seminars an even better value," says CLE Seminars Director Janice Wexler. "As a self-supporting, nonprofit program, we can offer top-quality CLE for less than other providers."

Please note that Passbooks can only be used for CLE Seminars Department programs. For budgetary reasons, they cannot be used for conventions or seminars offered by divisions, sections or committees.

You can purchase CLE Passbooks at any State Bar seminar; or to order them by phone, please contact Chris Boman or CLE Seminars at the State Bar.

CLE Books

Revised appellate practice book includes new Wisconsin forms

Next month marks the debut of the revised *Appellate Practice and Procedure in Wisconsin*, the definitive guide to practicing in the state appeals and supreme courts. This 1995 edition includes the current forms for these courts, both in print and on computer disk.

In 26 chapters, the guide covers all aspects of appellate procedure, for civil and criminal cases as well as appeals of administrative decisions. It shows you how to preserve your client's rights at all stages of the proceedings and what to expect when you argue your case.

Appellate Practice and Procedure combines practical information, a wealth of case citations, and a point-by-point discussion of all of Wisconsin's appellate rules. The authors offer valuable insights about how the appellate courts operate and why some appeals are more successful than others. The standards of review for findings of fact, questions of law, and discretionary acts are dissected and analyzed. Procedures such as computing the time for filing an appeal and expediting an appeal are clearly explained. Pointers on writing briefs and preparing and making oral arguments will help you present cases effectively.

Appellate Practice includes:

- a checklist of appellate procedures;
- an outline of appellate review standards, prepared by Judge Paul C. Gartzke, District IV Court of Appeals;
- a summary of procedures for expedited appeals; and
- addresses and phone numbers for Wisconsin appellate and circuit courts.

The 1995 edition was revised by Michael S. Heffernan, who authored the original 1986 edition with David L. Walter and Patricia L. Grove.

Appellate Practice is $125 ($145 for nonmembers), plus tax and shipping. To order, call Chris Boman at the State Bar.

Reminder: CLE report deadline approaches

If you were admitted to Wisconsin's bar in an even-numbered year, you have until Dec. 31 to meet the continuing legal education (CLE) requirement for this reporting period (Jan. 1, 1993, to Dec. 31, 1994). To maintain licensure, most lawyers are required to earn and report 30 hours of approved CLE, including 3 hours of ethics CLE. However, lawyers in their first year of practice, those who have filed for inactive or emeritus status, and "judicial lawyers" are not required to earn or report CLE. And you can obtain an exemption if you do not practice law in Wisconsin.

CLE must be reported to the supreme court's Board of Bar Examiners (BBE) with a Report of Compliance with Continuing Legal Education Requirements (CLE Form 1) listing credits you earned through Dec. 31. Or use the form to claim an exemption if you did not practice in Wisconsin. The BBE will assess a $50 late fee if they have not received the form by the Feb. 1 after your reporting period. Failure to report CLE or pay a late fee can result in suspension.

"Lawyers should note that CLE Form 1 should be filled out very carefully," says Charles Wheeler, chair of the Bar's BBE Review Committee. "One member reports that eight of his CLE credits were disallowed because he wrote the wrong course sponsor's name on the form – so the BBE held that he had not established he was entitled to the credits by the due date of his CLE form. To avoid such problems, be sure your form is accurate and to the BBE before the deadline."

You can amend your CLE Form 1 after you file it, if you discover an error, or if you earn credits that you want to carry into the next reporting period. But the BBE must have the written request to amend by the Feb. 1 after the reporting period in which you earned the credits.

For more information on CLE, please call the BBE at (608) 266-9760.

Calling the State Bar?

You can use any of these numbers:

(608) 257-3838
(800) 362-8096 (statewide)
(800) 728-7788 (nationwide)

1995 STATE BAR MIDWINTER CONVENTION

January 26 - 28, 1995 - Holiday Inn Madison West

CLE Programs
Thursday - Friday - Saturday

The convention may have moved to Madison, but the wealth of continuing legal education offerings remains the same. With 27 CLE programs available for the price of registration, the Midwinter Convention is a great professional development value.

The varied CLE lineup includes programs on health care issues for Wisconsin businesses, changing views on child placement, environmental law issues for rural Wisconsin, conflicts of interest for government lawyers, international protection of intellectual property, and developing effective negotiation skills.

Can't make the whole conference? Single day registration is available.

Single-day registration is available if your schedule will not allow you to attend the entire convention. Registering for the entire convention remains your best CLE value. However, you can attend on Thursday or Friday for a special "one-day-only" registration fee or attend Saturday morning for a "half-day" fee.

Why Did Baseball Strike Out in 1994? Get a Behind-the-Scenes Look at the Members Luncheon
Thursday - 12:15 p.m.

Wisconsin Supreme Court Chief Justice Nathan Heffernan will address the seventeen honored 50-year members and their guests.

Then go into the negotiating room to find out the real issues of the baseball strike with our luncheon keynote speaker, Robert DuPuy, a partner with Foley and Lardner in Milwaukee. In 1990, DuPuy was appointed special counsel to Major League Baseball. Since 1993, he also has acted as special counsel to the Major League Baseball Council, the governing body of baseball in the absence of a baseball commissioner.

State Bar Reception
Thursday - 5:00 p.m.

Here's the perfect opportunity to mingle in a relaxed social setting. Enjoy complimentary hors d'oeuvres, beer and soda while visiting with your colleagues and vendors who help support the convention.

This complimentary reception is sponsored by First American Title Insurance Company.

Second City Dinner and Performance
Thursday - 6:30 p.m.

This special evening begins with a delightful dinner followed by a rollicking roller coaster ride of comedy as the Second City National Touring Company performs. Enjoy topical comedy sketches that create a slice-of-life environment, lampooning our modern lives.

The oldest comedy ensemble in North America, Second City has become a comedy dynasty of sorts, launching or at least contributing to the careers of John Candy, Dan Akroyd, John Belushi, Bill Murray, Gilda Radner and Madison's own Chris Farley of *Saturday Night Live.*

"Celebrity Justice?" by Paul Lisnek
Friday - 12:15 p.m.

A behind-the-scenes look at the O.J. Simpson trial will be offered by Dr. Paul Lisnek, a respected jury communications expert. Serving as the Simpson trial analyst to NBC News, he has appeared regularly on the *Today Show* and *Nightly News with Tom Brokow.*

Lisnek will discuss the effects of the press on the trial, the costs to the judicial system's image, and the ways in which the public trial will be changed for the future.

This luncheon is sponsored by West Publishing Company.

BARgaritaville Reception
Friday - 5:00 p.m.

Jimmy Buffet sings about "Changes in Latitudes, Changes in Attitudes." Overcome the winter blues by joining your colleagues and "head south" for some simulated "sun-and-sand" relaxation.

The reception is sponsored jointly by the Young Lawyers Division, the Diversity Outreach Committee and the Sole & Small Firm Practice Committee.

State Street Crawl
Friday - 6:00 p.m.

A stroll down State Street is always exciting and educational, even on a winter's evening. Linking the State Capitol to the UW-Madison campus, State Street features an eclectic collection of restaurants, cafes, specialty shops, galleries and boutiques.

So that you don't have to worry about driving and parking, regularly scheduled shuttle buses will make the round-trip from the Holiday Inn to State Street. Grab your State Bar *Guide to Dining & Doing Madison,* hop a bus and enjoy a fun evening in downtown Madison.

Need to fulfill your mandatory ethics requirement?

Portions of these two programs have been submitted to the Board of Bar Examiners for consideration.

Thursday, January 26
9 a.m. to 11:30 a.m.
Government and Administrative Law Section

Friday, January 27
9 a.m. to 12:15 p.m.
Office Management Section

Look for your registration materials in the mail or call the State Bar at 1-800-728-7788 for more information.

State Bar committee to evaluate audit of Public Defender

The Legislative Audit Bureau last month released a report on the State Public Defender's Office. The report is thorough and critical, presenting challenges to both the agency and the legal profession. At the suggestion of State Public Defender Nicholas Chiarkas, the State Bar's Indigent Defense Committee has formed a special subcommittee to work with the agency on issues raised by the audit.

The audit report calls on the State Public Defender to be more aggressive in determining client indigency and recouping costs. The agency is reviewing the recommendations and making specific budget proposals. However, more vigorous efforts likely would require more administrative resources and statutory changes.

The audit also calls for more efficiency and improved management of the private attorneys who accept cases from the State Public Defender. According to the audit, these private attorneys take 66.7 percent longer than staff attorneys to handle misdemeanor cases, and 41.3 percent longer to complete felony cases.

The Legislative Audit Bureau's report also claims that private bar billing fraud is caught in only the most extreme cases – even though the auditors did not uncover any new cases of such fraud during their extensive six-month investigation.

To boost private public defender efficiency, the report recommends that the agency adopt such measures as time standards for the private bar, fixed-fee contracts and recertification based on past performance.

"Since the State Public Defender was created in Wisconsin, there has been a special partnership between the public agency and the private bar to provide quality representation to those who cannot afford attorneys," says James Brennan, who is chair of the State Bar's Indigent Defense Committee. "Now we will work together to make sure we maintain quality and obtain more efficiency."

For a summary of the Legislative Audit Bureau's report on the State Public Defenders Office, please contact Jennifer Smith at the State Bar.

Convention sessions map out 'information superhighway' on-ramps

If you wonder if there is any reason for you to bother with the "information superhighway," you can get some answers at Midwinter Convention events sponsored by the Computerized Legal Research Service (CLRS).

This will be the first State Bar convention to offer a session on the Internet and how lawyers can benefit from this much-ballyhooed "network of networks." The popular Computer Corner information booth, open Thursday and Friday, will have experts on hand to answer your technology questions. And free online research classes will offer test drives of the Lexis®/Nexis® services.

"The Internet: What's On It and How Do I Get On It?" will be offered Friday, Jan. 27, 1:45 to 5 p.m., in the Holiday Inn's Mendota Room. In addition to practical explanations of why and how to use the Internet, the program offers a sampling of the network's treasure trove of law-related resources – such as U.S. Supreme Court opinions, copyright data, SEC filings, weather data (past and present), and electronic mail links that can be used to locate experts and obscure information. The session is co-sponsored by CLRS, the Bar's Technology Resource Committee and the Law Librarians Association of Wisconsin.

CLRS will offer the free Lexis seminars on Thursday and Friday, Jan. 26 and 27, in the Badger Room at the Budgetel (free shuttle service is available to and from the Holiday Inn, where most convention events will take place). "Learning MVP – The Most Valuable Part of Lexis for Small Law Firms" will be offered twice, on Thursday, 9 to 11 a.m., and on Friday from 10:30 a.m. to noon. "Public Records – Fact-Finding Information" is also offered twice, on Thursday from 1:30 to 3 p.m. and on Friday from 9 to 10:30 a.m. "Freestyle," covering the "plain English" search feature recently added to Lexis and Nexis, will be offered only once, on Thursday, 3:30 to 5 p.m. To reserve a seat before the convention (reservations are recommended, but not required), please call Kris Wenzel at the State Bar.

CLRS is a joint State Bar-State Law Library project. For information, please call Kris Wenzel at the State Bar.

Changing of the guard

New pro bono coordinator joins Bar staff


Deborah Tobin

Attorney Deborah Kilbury Tobin has joined the State Bar as pro bono coordinator. Tobin replaces Sara Clarenbach, who in July returned to private practice in California.

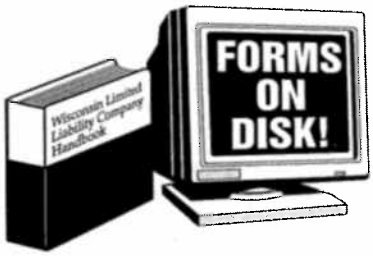
"I'm excited about working with the Wisconsin legal community to encourage and support pro bono efforts," Tobin says. "Those who participate in pro bono service convey the message – loudly and clearly – that we are a group of professionals who are concerned about much more than just the 'bottom line.' "

Tobin formerly was with West Publishing in Minnesota, first as a research consultant and later as editor of a magazine for Westlaw® users. She also has practiced in family law, real estate and civil litigation in a 10-lawyer Minnesota firm. Tobin has a law degree from Minnesota's William Mitchell College of Law and a bachelor's in sociology from U.W.-River Falls. She moved to Madison when her husband, Michael Tobin, was named director of the State Public Defender's Trial Division.

The pro bono coordinator position was created by the Bar's Board of Governors in 1993. The coordinator's function is not to run a referral service but to work with the Bar's Legal Assistance Committee and many others statewide to facilitate pro bono by individuals and programs. The State Bar's goal is to increase pro bono service by making it both more convenient and rewarding. For example, the Bar publishes a *Pro Bono Handbook* with a statewide list of programs that screen and refer pro bono clients. And the Legal Assistance Committee recognizes firms and lawyers with Pro Bono Awards and *Wisconsin Lawyer* profiles.

For a free *Pro Bono Handbook,* or to discuss pro bono, please contact Deborah Tobin at the State Bar.

NOW AVAILABLE!



Wisconsin Limited Liability Company Handbook

The first and only *WISCONSIN* LLC practice handbook

If you advise business clients, you cannot afford to be without this book

Effective January 1, 1994, Wisconsin became the 36th state to authorize the LLC as a legal entity. The LLC was virtually unknown in the U.S. before 1990, but it has already become an immensely popular form of doing business. The *Wisconsin Limited Liability Company Handbook* will teach you what you need to know about LLCs.

Tap the full potential of Wisconsin's new law

Wisconsin's LLC law, unlike the "bulletproof" statutes of some other states, permits an LLC's members to modify the statutory default provisions to achieve desired goals. The *Wisconsin Limited Liability Company Handbook* will show you how to take full advantage of the statute's flexibility without losing the advantages of pass-through tax treatment under the partnership tax rules.

Sample forms drafted specifically for Wisconsin LLCs

Save yourself time and uncertainty by taking advantage of this new handbook's sample forms and instructions. And when you purchase the book, you'll receive all the forms on disk.

Written by Wisconsin LLC experts!

When you turn to the *Wisconsin Limited Liability Company Handbook*, you can expect that the guidance you receive will be top-notch because it comes from the attorneys who drafted Wisconsin's new LLC law:

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Neider & Boucher, S.C., Madison

Mark J. Christopher
Anchor Food Products, Inc., Appleton

Robert M. Fahrenbach
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Law-related education

Lawyers help combat school violence

There are no easy answers for educators faced with escalating violence in today's schools. But the State Bar's Law-Related Education (LRE) Committee, chaired by Thorp lawyer Charles Senn, is helping educators deal with these challenges. In its newest effort, the committee is working with the Attorney General's Office on a new peer mediation program for elementary schools. And, for the second year in a row, the committee offered a school violence workshop at the Wisconsin Education Association Council (WEAC) convention.

Lawyers to help keep the PEACE. PEACE – an acronym for "Peers in Education Addressing Conflict Effectively" – is the name of the peer mediation program being started by the State Bar and Attorney General's Office. Modeled on successful efforts nationwide, PEACE will help schools teach kids nonviolent conflict resolution skills. The long-term goal is to have a decentralized program in which participants help neighboring schools adopt mediation.

PEACE was announced at a press conference in October, as a prelude to a statewide search for 12 schools and attorneys to participate in the program's pilot phase this summer and fall. Each of the 12 schools will form a PEACE team comprising a local lawyer volunteer, a member of the school district's legal counsel, the school principal, three teachers and two parents. In August the teams will attend a two-day peer mediation training session in Madison. This session will focus both on how to teach peer mediation skills and how to fund and design programs tailored to school needs.

Teachers' convention workshop. "School Violence: Field of Nightmares" was the theme of the workshop the LRE Committee presented at the WEAC Convention, held in Madison in October. Volunteers acted out two vignettes depicting school violence situations; another volunteer gave a talk on gang activity in Wisconsin.

The first vignette depicted an "educationally disabled" sixth-grader who becomes increasingly disruptive, focusing on issues that arise when parents, teachers and school administrators disagree on what measures to take. WEAC Staff Counsel Bruce Meredith served as moderator and attorney Gary Ruesch, author of *Discipline in the School*, played the role of the school's counsel and explained legal difficulties that arise when disciplining such students. A teacher, principal and school social worker volunteers joined in the scenario.

When is a tattoo more than just a tattoo? *As part of a program on school violence, Frank Medina (left) and his son John (right) demonstrate how to recognize signs of gang affiliation.* Photo: Nancy Repyak

Assistant State Public Defender Stephanie Stoltman moderated a vignette depicting a custody and dispositional hearing for a disruptive seventh-grader who is a suspected gang member. His parent ignores calls and letters about his problems; meanwhile, other students begin to imitate his behavior, parents press for his expulsion, the teachers' union wants him jailed or placed in a special school, and the superintendent worries about legal constraints. Assistant District Attorney Don Garber and Juvenile Court Commissioner James Olds played the roles of district attorney and judge; Madison Police Officer John Montgomery played an arresting officer.

Gang activity was explored further in a talk by Frank Medina, a Burlington probation and parole agent. He offered pointers on recognizing and responding to gang colors, graffiti and tattoos.

Want to get involved? To volunteer for PEACE or find out about other LRE projects, please contact Lori Phelps at the State Bar.

A comic-book approach to LRE

The State Bar's first law-related education (LRE) comic book debuted at an educators' convention this fall (described at left). Teachers gave high marks to the comic book, *Adventures in Law*, which the Bar's LRE Committee developed for use with fourth- and fifth-graders. The new comic follows six lawyers as they embark on careers, to give kids an idea what real-life lawyers do.

The new comic book was on display at a State Bar booth during the educators' convention, along with other resources for teaching about the law and the justice system. Along with booklets like *On Being 18*, the booth offered information on the popular High School Mock Trial competition, the new peer mediation program, and a Family Law Section-sponsored high school course on the realities of marriage and divorce.

For free copies of *Adventures in Law* or other LRE materials, or for information about organizing LRE in your community, please contact LRE Coordinator Lori Phelps at the State Bar.

If you find yourself saying, "I just can't take it anymore" ...

... why not call the COAL Helpline at (800) 543-2625? The Helpline is there for you if stress is taking too high a toll on your personal and professional life.

From 8 a.m. to 10 p.m., daily, a Helpline operator can connect you to a trained volunteer lawyer who wants to help. And through December, on Thursday afternoons the Helpline is staffed by a lawyer with a counseling Ph.D. All calls are confidential and can be kept anonymous.

The Helpline is a free service of the Committee on Assistance for Lawyers.

Newsletter

This newsletter is published monthly by the State Bar of Wisconsin's Periodicals and Consumer Publications Department. If you have information for the newsletter, please submit it by the first of the month preceding the month in which you wish it to appear. (For example, information received by Feb. 1 can appear in the March issue, if space allows.) If you have a suggestion or question about this newsletter, please contact Publications Director Joyce Hastings or Assistant Editor Roxanna Nakamura at the State Bar.

Call the State Bar at (608) 257-3838, (800) 362-8096 (statewide) or (800) 728-7788 (nationwide); send faxes to (608) 257-5502. The Bar's street address is 402 W. Wilson St., Madison, WI 53703-3689; the mailing address is P.O. Box 7158, Madison, WI 53707-7158.

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Leadership opportunities

Bar's nonresidents, government lawyers seek candidates

The following State Bar divisions are selecting candidates for races in their 1995 elections:

Nonresident Lawyers Division (NRLD) – NRLD members will elect a president-elect, secretary, treasurer and five directors in the 1995 election. Division members interested in running are invited to send a resume and letter of interest to the NRLD Nominating Committee in care of the State Bar – P.O. Box 7158, Madison, WI 53707-7158, fax (608) 257-5502 – by Jan. 15.

Government Lawyers Division (GLD) – GLD members will elect a president-elect, secretary, treasurer and three division directors in the 1995 election. Division members interested in running are invited to write to the GLD Nominating Committee in care of the State Bar – P.O. Box 7158, Madison, WI 53707-7158, fax (608) 257-5502 – by Feb. 15.

Member perspectives

What public-domain citation can and cannot do *(from page 2)*

system would be difficult to learn or use. Most legal materials, other than cases, are referred to by section number rather than page number. Paragraph numbers are no different than section numbers and will allow much greater accuracy in pinpoint citations. The sequentially assigned numbers should already be familiar to most attorneys as being the system used for session laws. On the whole, a public-domain citation (e.g., *Smith v. Jones,* 1996 Wis 61, 27) looks a great deal like a citation to a session law (e.g., 1993 Wis. Act 16, § 362).

There are other practical benefits – more than I can detail here. But there are certain things the citation proposal will *not* do, and I should mention them.

The proposal does *not* seek to outlaw parallel citations. If the system works well without them, parallel citations may ultimately fall into disuse, but nothing in the proposal would keep people from continuing to use them.

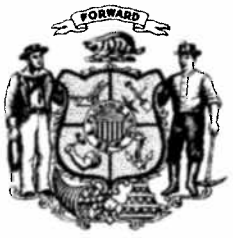
The proposal also is *not* an attempt to promote electronic formats at the expense of print. The proposed citation format works just as well in print as in electronic form, and most print publishers have expressed their support of the public-domain citation system.

Finally, the public-domain citation system would *not* meddle in the market or attempt to have the government provide services currently provided in the private sector. All publishers, print and electronic, would have the same access to case materials that they currently have and it is hoped that the system would enhance the speed and accuracy with which publishers have that access (and, consequently, the speed and accuracy with which you have access to case law).

I invite all interested members to call the State Bar for more information on the public-domain citation proposal. (See blue box on page 2.) Once you have all the facts, I think you'll see why the Board of Governors and Judicial Council voted overwhelmingly to petition the Wisconsin Supreme Court to adopt it.

Gary E. Sherman
President, State Bar of Wisconsin
Port Wing, Wis.

WISCONSIN STATE LEGISLATURE



REVIEW & OUTLOOK

Boggs v. Brown

The Senate takes up legal reform this week at a moment of rare political opportunity. The opportunity is that the general public has caught on to a huge problem normally confined to lawyers and their targets. The bumper-sticker event here was the McDonald's coffee case. Meanwhile Texas is passing its own tort overhaul, partly out of embarrassment over the state's notorious reputation as a litigation mill. So now we have a Republican Senate, fresh off its winning mandate at the ballot box last November, and led by presidential candidate Bob Dole, about to take up liability reform. But if you are expecting a glorious House-like victory here, don't hold your breath. The Republican Senate may show us why it's still safe to call Washington "the Beltway."

For to rein in runaway litigation across the country, Senate Republicans first must choose between Tommy Boggs and Glen Brown. Mr. Boggs, a.k.a. Tommy Torts, is the fabled trial-lawyer lobbyist who has managed to keep legal reform from even coming to a vote in the Senate for 15 years. His secret? Buckets of campaign cash. From 1989 to 1994, his employers, the trial lawyers, contributed $30,939,319 to federal races, according to a study by ATRA, the American Tort Reform Association. (That compares with a little more than $2 million from the Big Three automakers and just under $7 million from the 10 largest oil and gas companies.)

Mr. Brown is one of the countless victims of lawsuit abuse who won't get any relief as long as Mr. Boggs holds sway. Mr. Brown is the president of a small firm of consulting engineers in Dallas. In 1985 his company designed a detour along a country road in Texas; the detour was carefully marked with a speed limit of 45 mph and lots of flashing lights. But Howard Ray Clymer and two friends were drinking some beer and they drove into the detour at 75 mph. Mr. Clymer was injured.

Naturally he sued everyone in sight—the state, the contractors, the utility and Mr. Brown's firm. After three years of haggling, Mr. Brown settled the case for $35,000. But combined with legal fees, the case cost his firm $200,000. And he can no longer get liability insurance.

half their profits on liability costs, even though 40% of cases are eventually dismissed. More broadly, all Americans feel the toll of runaway litigation. Everything from stepladders to vaccines costs significantly more because of the legal system. Soaring liability fees have driven many people, from obstetricians to football helmet manufacturers, out of business. By one estimate, the "tort tax" costs the economy $132 billion annually.

The House this year finally passed a bill that offers some relief. By a large *bipartisan* majority, the House approved limits on joint and several liability (the "deep pockets" doctrine that made Mr. Brown a target in that case), a $250,000 cap on punitive damages in all cases, and a $250,000 ceiling on noneconomic damages in medical malpractice cases.

The Senate now has a chance to follow the House's lead. But things don't look as rosy there. Some reform supporters want to settle for a mild product-liability bill supported by Senators Jay Rockefeller, Joe Lieberman and other Democrats. But this is the year that the Republican-controlled Senate should be able to bring tort relief not only to manufacturers but to Main Street as well.

It's easy to see how Bob Dole, running for president as a conservative, would want to enact a bill that would lift liability costs off everyone from town athletic leagues to major manufacturers. Once again, though, his fate rests in the hands of the Old Bulls. Last year, six senior Senators—Thad Cochran '78, Bill Cohen '78, Al D'Amato '80, Larry Pressler '78, Bill Roth '70, and Alan Simpson '78—voted against even bringing a watered-down product-liability bill to the floor. This year, the Tort Six will once again hold the balance of power. And when a cloture vote comes up on this bill, liability victims should check out the votes of freshmen GOP Senators Olympia Snowe of Maine and Fred Thompson of Tennessee. Again, there's still a reason why they call it the Beltway.

Whether it's judged on politics or the merits, the case of Boggs v. Brown isn't really very tough to decide. It comes down to 60,000 trial lawyers vs. the rest of America. Campaign contributions aside, it remains to be seen whether the Senate's new Republican

The FB

By Steven Emerson

In early December 1993, I learned of t meeting of a radical Muslim umbrella ganization to be held in Detroit duri Christmas week. This annual gathering Islamic extremists and their supporte was scheduled to feature representativ and leaders from such militant Islam fundamentalist organizations as Ham Moslem Brotherhood, Egyptian Gam Hizba-Tahrir and others.

I approached FBI officials and asked they knew about the existence of this traordinary conclave. Yes, I was told, th did. But the Federal Bureau of Investig tion would not be attending this conf ence even though the officials conceded could provide one of the most concentrat sources of intelligence on U.S. militant tivity. Why? Sighing in resignation, FBI official didn't say a word. He simp clasped his hands above his head. T handcuff gesture said it all.

I attended the conference in Detro collecting a treasure trove of manu calling for the extermination of all Je as I listened to speakers urging Musli to rise up against the West. Toward t end of the five-day conference, I was st tled to learn about an unschedul speaker: a senior FBI official from the D troit field office. After giving a brief, p functory talk about civil rights, the offic fielded questions from the visibly host and scornful audience. Someone ask tongue clearly in cheek, what advice t official could give the group's members "shipping weapons" overseas to th friends. The FBI official said matter factly that he hoped that anyone w wanted to ship weapons overseas wo follow Bureau of Alcohol, Tobacco a Firearms guidelines.

Not the Rotary Club

Returning to Washington, I asked F officials if they knew that their Detroit league had spoken at this radical gath ing. At first they insisted that was imp sible. But hours later, they conceded t their man had indeed spoken before t radical group, mistakenly thinking he w addressing an innocent civic group like "Rotary Club."

This episode demonstrates several portant points as the nation grapples w how to respond effectively to the Oklaho terror bombing that authorities susp was committed by right-wing extremist

- First, the FBI is severely restricted monitoring, infiltrating and conduct surveillance of known extremist groups
- Second, the FBI is not even allowed collect "open source" investigative ma ial—such as newspaper articles—with receiving prior statutory permission open up an "investigation."
- Third, the FBI is aware of but pow less to stop extremist groups from m querading as "religious," "civic," "c rights" or "charitable" groups

How Much Is Too Much?

Congressional tort reform could cap the cost of wrongdoing for business

By Benjamin Weiser
Washington Post Staff Writer

Two years ago in Atlanta, General Motors Corp. was ordered to pay $101 million in punitive damages to the parents of 17-year-old Shannon Moseley, who was killed in the fiery crash of his GM pickup truck. The Moseley verdict was overturned by a higher court. Last month, before a new trial could be held, both sides announced an out-of-court settlement for an undisclosed amount.

But had the Moseley case been tried under a new bill being fought out in Congress, the results could have been vastly more favorable to GM, which denied liability in the case. The punitive damages could have been capped at $8.4 million, and GM would have had more leverage in a settlement as well.

House Republicans promised tort reform in their "Contract With America" and pushed early this year for the broadest possible legislation, including caps on punitive damages. The Senate has been more cautious, limiting such awards to two times the amount of compensatory damages in a case, or $250,000, whichever is greater. Compensatory damages are assessed to cover a plaintiff's medical bills, lost wages, and pain and suffering.

The Senate bill has an exception: If a judge finds that a defendant's wrongdoing is so "egregious" that a capped award is insufficient to deter or punish, the judge could increase the award. The defendant, however, could then demand a new trial.

The bill would not have affected some of the most notable punitive damage awards in recent years, such as the $5 billion assessed in the Exxon Valdez oil spill, or the $6.9 million (later reduced by a judge to $3.5 million) awarded to a former legal secretary who sued the law firm Baker & McKenzie for sexual harassment. Those suits do not involve product liability.

■

PRODUCT SUITS COMPRISE ONLY A FRACTION OF THE 14 million civil cases filed each year, according to the National Center for State Courts. And despite claims by critics that punitive damage awards run rampant, there have been relatively few—approximately 355 nationwide over the 25 years

In one area—suits alleging widespread injuries from mass-produced products—there has been rapid growth, a recent Rand Corp. study noted. The number of federal court cases alleging injuries in women who received silicone gel breast implants, for example, rose from 1,000 in 1993 to more than 10,000 the next year.

And more than 400,000 women have filed claims since the announcement of a $4.2 billion settlement with implant manufacturers last year—so many that the settlement may have to be renegotiated.

Tort reform advocates complain that some firms, including Dow Corning Corp., an implant maker; A.H. Robins, maker of the Dalkon Shield; and Johns-Manville, the asbestos manufacturer, have had to seek protection under bankruptcy laws because of the threat of mass litigation.

The tort reform debate will reach the Supreme Court Oct. 11 when the justices hear an appeal of an Alabama jury's $4 million punitive damages verdict against BMW in a suit brought by a BMW owner who alleged fraud because he was not told the new car he bought had been repainted. A key question for the court is whether an award is so excessive it violates the due process of law.

Gingrich of Georgia has said he wants tort reform—"as good a bill as possible"—this year. That may mean a much narrower bill than House Republicans and the business community had sought.

Business and trade lobbyists, who have pushed for civil reforms for more than a decade, have argued that companies need protection from frivolous lawsuits and runaway jury awards.

Consumer groups and trial lawyers have disagreed, saying that juries ought to have the right to punish companies that are found to have manufactured dangerous products and to deter future conduct.

The Senate in May passed a bill that would limit jury awards in lawsuits involving products—drugs, cars, toys, medical devices—that are alleged to have caused injuries. The House earlier passed a much broader bill that would apply to all civil litigation, including medical malpractice.

The two sides have been deadlocked over the final form of the legislation, but if a compromise can be reached, it will include the provisions that were passed by the Senate.

The Washington Post interviewed lawyers, judges and litigants over the summer and reviewed dozens of cases to see how they would fare in the real world of civil litigation if the Senate bill became law.

The Senate bill, which would apply in state and federal courts, would impose a cap on punitive damage awards in product cases, professor Michael Rustad. Yet, because such suits involve some of the most popular consumer goods, they attract disproportionate attention from both regulators and the public.

BUT THOSE WHO DEFEND THE TORT SYSTEM ARGUE that punitive damages are a powerful deterrent to corporate misconduct. As to criticism that the system primarily benefits "America's money-grubbing lawyers," as Republican Sen. Slade Gorton of Washington, co-sponsor of the Senate bill, puts it, the proponents note that the contingency system rewards lawyers only when they win cases and ensures that even the poorest of victims have access to representation.

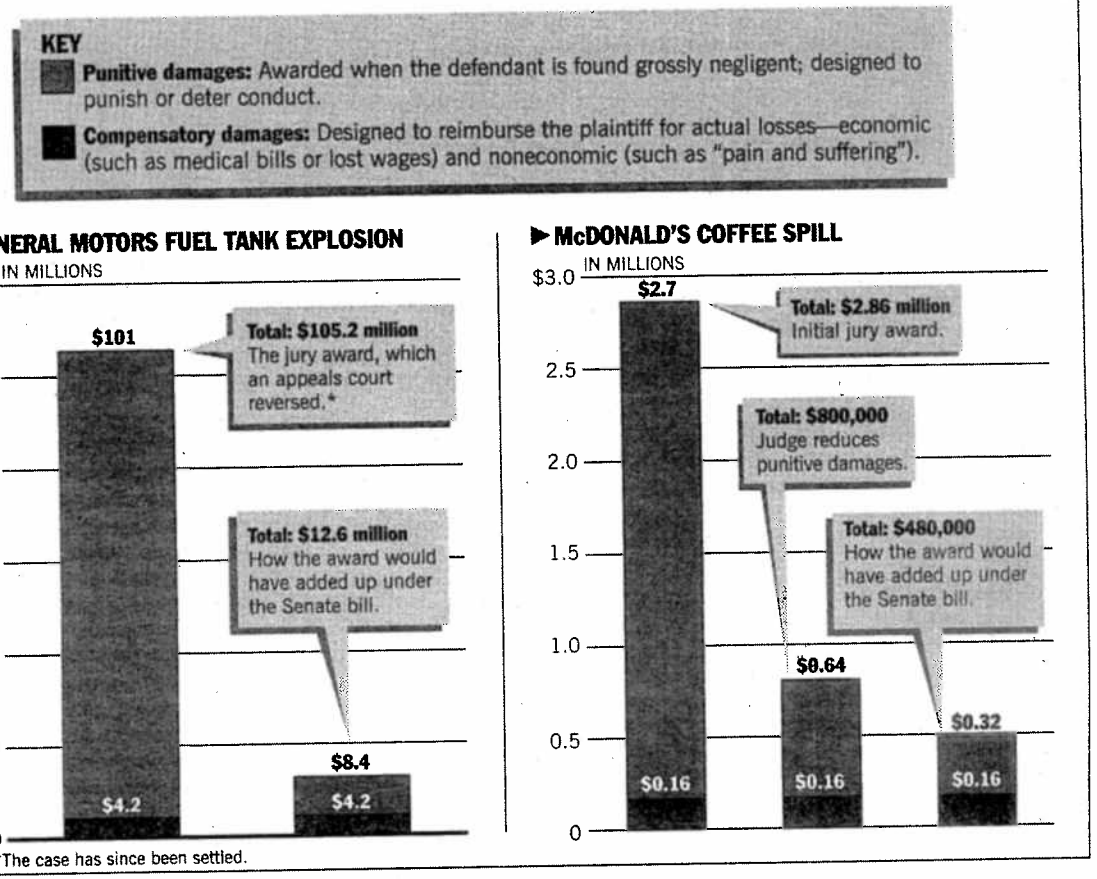
Stephen Gillers, a legal ethics professor at New York University Law School, says that in an era when Congress is attempting to cut back on the regulatory powers of government, the tort system assumes an even more critical role. If lawyers lose their incentive to take cases, "we are going to leave people without adequate remedies," he says.

Gene Kimmelman, a co-director of Consumers Union's Washington office, says the fear of punitive damage awards without limit creates "a stronger incentive than the marketplace itself to ensure that manufacturers are careful about putting dangerous products on the market, or withdraw them as soon as they learn of the dangers."

Trial lawyers note that judges don't hesitate to reduce verdicts that seem too high: Thirty of the 72 jury verdicts in 1994 for $10 million or more were reduced, set aside or found to be essentially uncollectible, according to the National Law Journal.

REFIGURING THE AWARDS

The product liability bill passed by the Senate would limit punitive damage awards to twice the compensatory damages. Had this bill been law, the jury awards in two well-publicized cases would have been considerably different.



THE WASHINGTON POST

Perhaps the shrewdest accomplishment of those seeking to reform the civil laws, says law professor Stephen Gillers, is that they successfully recast a highly technical issue that had no great popular support into one with which people could identify: attacking lawyers and their fees.

"This whole debate has been the battle of the anecdotes, and the anecdotes on either side are examples of rare happenings," says Republican Sen. Fred Thompson of Tennessee, a former Nashville trial lawyer who voted in favor of the product liability bill. "In the overwhelming number of cases, the bad ones are ferreted out early on, the good ones go through the system, lawyers don't charge exorbitant fees, juries do their job . . . and the system works."

■

IN THE 1993 MOSELEY TRIAL, THE JURY FIRST awarded $4.2 million in compensatory damages to Moseley's parents to cover his lost earnings, as well as a symbolic $1 for pain and suffering. Their lawsuit alleged that Moseley had survived the initial collision of his GM pickup with a drunk driver's vehicle but burned to death when his truck's fuel tank exploded. The suit asserted that the tank was designed defectively and vulnerable to rupture in collisions. GM denied liability and said its fuel tank was not defective.

propensity to roll over. Suzuki defended the Samurai's safety record and said the accident was caused by the driver's carelessness.

Suzuki, indicating it would appeal, said the verdict "highlights the need for tort reform in this country."

The Senate's tort reform measure would not have reduced the Suzuki verdict, however, as the award was twice the compensatory damages—the same as the Senate's formula.

Suzuki general counsel George Ball complained that plaintiffs' lawyers who take a percentage of the damages as their fee have "enormous financial incentive . . . for putting huge numbers on the board and encouraging huge awards."

■

BUT MANY PLAINTIFF LAWYERS SAY THAT, WITHOUT a contingency fee system, the economics of bringing some lawsuits would be prohibitive.

In 1991, for example, a Wisconsin jury awarded $12.3 million—including $10 million in punitive damages—to a Green Bay man who had fractured his neck and was partially paralyzed on a Slip 'n Slide. The lawsuit alleged that the slippery lawn toy did not carry adequate warnings against adult use. The manufacturer, Kransco Corp., maintained that its warnings were adequate.

After the verdict, the case was settled out of court for $7.5 million and other considerations, with Kransco admitting no liability.

Plaintiff attorney Timothy Aiken says he and another lawyer collected a fee of $2.5 million—one-third of the recovery. They billed roughly $50,000 in expenses, leaving the plaintiff with $5 million, Aiken says.

Aiken says his firm took the case only after four other firms had passed. He says the cost of preparing the suit, its novelty, and the time it would consume—because no other lawyer had previously staked out the legal territory—presented a formidable risk.

publicity surrounding those cases prompted an avalanche of new claims, leading to last year's $4.2 billion settlement.

A Senate cap might have given extra leverage to the defendants in the initial settlement talks.

"I doubt very much that you could have had a settlement with the implant makers," says Stanley M. Chesley, one of the two lead plaintiff negotiators. "There would have been more incentive for them to go try cases."

■

THE SENATE BILL COULD AFFECT OTHER recoveries. James Holton died in 1991 after a fire engulfed his 1967 Ford pickup, which had been sideswiped by a driver on an Alabama interstate highway. His widow, Annie Mae, sued Ford, alleging the truck's fuel tank was defective. Ford, while admitting no liability, settled with her for $1 million in 1993, says her attorney, Scott Powell.

But because the Senate bill would prohibit suits if a product is more than 20 years old—and Holton's truck was 24 years old—his widow could not have sued if it were law.

Or take the case of Leggette McNiel, a Sparrows Point, Md., steelworker awarded $1.2 million in compensatory damages in a 1992 trial. After the verdict, one of the four asbestos firms sued in the case sought protection under the bankruptcy laws, which meant it could not be forced to pay damages in the suit.

Under current law, McNiel could have gone after the other defendants for the full extent of the damages. But under another provision of the Senate bill, he could recover damages only in proportion to each defendant's liability—in this case $417,000, says Patricia J. Kasputys, one of his lawyers.

"Give us a verdict that says never again," said plaintiff attorney James E. Butler Jr. when it came time to argue for a large punitive award. He asked the jury to impose a penalty of $20 for each of the 5 million GM pickups still on the road.

When the jurors met to decide the punitive damages against GM, the amounts suggested ranged from $50 million to $45 billion, before they settled on $101 million, almost exactly what Butler had sought, according to The American Lawyer.

General Motors, in its appeal, called the award "unreasonable, outrageous and inordinately large" and "out of proportion to the conduct it punishes." Last year, the verdict was reversed by the Georgia Court of Appeals. The recent settlement occurred before a new trial could be held.

Butler's proposed formula to the jury was the kind of raw appeal that business groups and the defense bar complain bitterly about, saying juries are given no limits in determining punitive damages. But plaintiff lawyers say it produces results in the only language corporations understand: "fear of the unknown," says Colorado attorney James Gilbert.

In another widely cited case, lawyers trying a case in New Mexico last year asked a jury to award an elderly woman, who had spilled scalding McDonald's coffee on herself, punitive damages equal to "one or two days'" worth of McDonald's national coffee sales to get "their attention."

Plaintiff lawyer S. Reed Morgan cited his client's injuries and what he alleged was McDonald's insensitivity to hundreds of earlier complaints of coffee burns.

The jury awarded punitive damages of $2.7 million—about two days' worth of coffee sales. The judge later reduced the award to $640,000. McDonald's, which denied liability, then settled with Morgan's client for an undisclosed sum.

In that case, the Senate cap would have limited the jury award to $320,000, or twice the $160,000 compensatory damages the jury had returned.

In a St. Louis trial this summer against Suzuki Motor Corp., a jury sought help from the judge in devising a penalty. "Are there general or Missouri legal guidelines regarding the calculation of punitive damages?" the jury wrote.

The judge declined to offer any assistance, and the jury awarded punitive damages of $60 million, on top of $30 million in compensatory damages, to a woman who had been paralyzed in an accident involving a Suzuki Samurai. The suit alleged that her vehicle was defectively designed and had a

Had they lost, Aiken would have received no fee and would have absorbed the costs. The prospect of unlimited punitive damages probably tipped the balance in making the venture worthwhile from a cost-benefit point of view, he says.

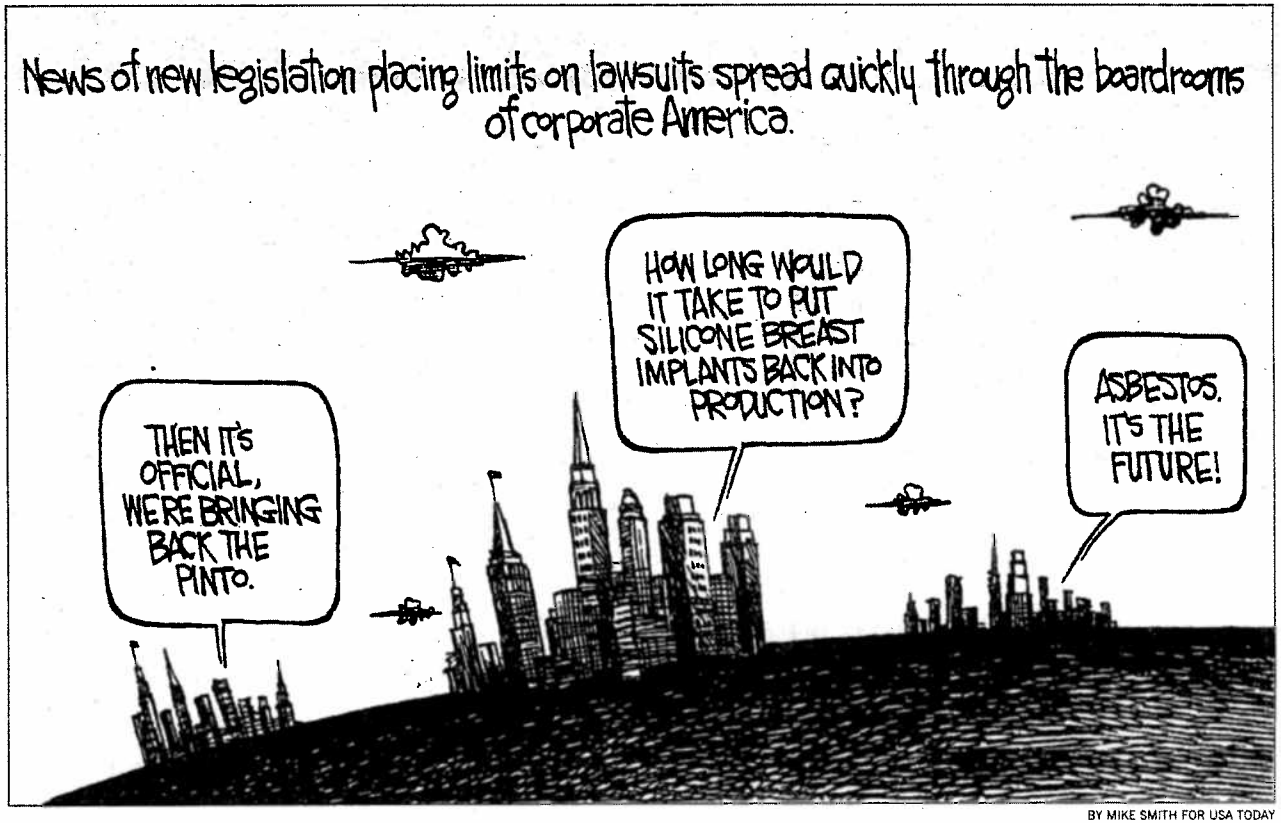
The Senate cap would have reduced the punitive damages in the case to $4.6 million, and any settlement would have been lower, Aiken says.

The Senate cap may influence the handling of massive numbers of lawsuits against one company or industry. There had been only a handful of trials involving breast implant manufacturers, but five resulted in large punitive awards, including two in Texas of $20 million and $15 million. The

Though the Senate bill would apply nationwide, its authors added a provision that, where states already have more strict tort reform laws, the new law would not supersede them.

Perhaps the shrewdest accomplishment of those seeking to reform the civil laws, says NYU law professor Gillers, is that they successfully recast a highly technical issue that had no great popular support into one with which people could identify: attacking lawyers and their fees.

"I don't think the public understands it at all," Gillers says. "But the public is always ready to vote for anything that is bad for lawyers." ■



BY MIKE SMITH FOR USA TODAY

The New York Times

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In America

BOB HERBERT

Punishing the Victims

There is a raging epidemic of medical incompetence and malpractice in this country, but as the national debate over health care intensifies, the most powerful elements of the health-care industry are engaged in a cruel campaign to limit the legal rights of malpractice victims.

Lobbyists for doctors, hospitals, the insurance industry and others claim that they are fighting on behalf of malpractice "reform," but that is not so. True reform would be an effort to prevent malpractice. This so-called reform effort is geared solely toward preventing victims (or their survivors) from collecting the damages they deserve for the dreadful injuries they have suffered.

The carnage from malpractice is astonishing. If you add up all the deaths each year from crime, from motor vehicle accidents and from fires, they will not equal the estimated 80,000 people who die in hospitals annually from some form of medical negligence or malpractice. That is a conservative estimate and it applies only to hospital foul-ups. It does not take into account those who die at the hands of incompetent health providers in clinics, Medicaid mills, doctors' offices and elsewhere.

Scores of thousands of patients each year are left paralyzed, brain-damaged, blind or otherwise horribly disabled from malpractice. Most are never adequately compensated. Yet virtually all the health-care reform bills that are growing like weeds in Congress contain provisions that would hinder the ability of malpractice victims to recover damages. The exceptions are the single-payer bills in both the House and the Senate.

The health-care bill that emerged from the Senate Finance Committee was particularly egregious in its approach to malpractice victims. That bill would put a $250,000 cap on damages that could be awarded for pain and suffering; would limit attorneys' fees for plaintiffs (but not for defendants), and would have required that 75 percent of all punitive damages go to the state, not the plaintiff.

Those are insidious proposals and they are still making the rounds in Congress. Caps on pain and suffering hurt the people most vulnerable to low-quality care — women, the elderly and low-income people. There is no cap on compensation for lost income, which is a significant measure of protection for wealthy victims of malpractice. But others, without the cushion of wealth, would be limited to the maximum of $250,000 for even a lifetime of suffering.

Mern Horan, an attorney with Public Citizen, a health advocacy group in Washington, said, "What they're saying is that if you don't make a large income we're not concerned about your disfigurement, your paralysis, your inability to bear children or the fact that you're in extreme pain and living on morphine for the rest of your life."

Medical industry representatives have complained for years that malpractice lawsuits have been a major factor in the surge of health-care costs. It is a bogus argument. Doctors, on average, spend 2.9 percent of their gross income on malpractice insurance, just a shade over the 2.3 percent they pay for "professional car upkeep."

Meanwhile, the insurance companies are cleaning up. Figures from 1991 showed that malpractice policies

Malpractice 'reform' fakery.

earned the companies $1.4 billion in profits.

Big-time operators throughout the medical industry are cleaning up. Top executives of the leading health-care companies often earn millions of dollars annually — in some cases, tens of millions.

But medical malpractice victims are not cleaning up. Only 1 out of 16 victims gets anything in the way of compensation. Many refuse to sue because they don't want to fight the phalanx of doctors who are sure to come to the aid of the defendant. Some victims of malpractice don't even know they have the right to sue.

Of those who sue and are awarded damages, very few receive payments that are unjustified, according to a study published two years ago in the "Annals of Internal Medicine."

Nevertheless, under the umbrella of reform, the assault on malpractice victims continues.

As the consumer advocate Ralph Nader noted, "All these health-care bills have some sort of restriction on malpractice victims, and none of them have anything in the way of malpractice prevention, which tells you where the balance of power is." □

THE NEW YORK TIMES
Sunday, September 11, 1994

In America

BOB HERBERT

Profits Before Patients

The doctors at Karin Smith's health maintenance organization kept telling her she was fine. She knew that wasn't true. She was sick and getting sicker. Frustrated and frightened, she went to an independent physician. The news couldn't have been worse. Ms. Smith had advanced cervical cancer. If she had been properly diagnosed when she first sought help, at age 22, her chances of survival would have been 95 percent or better. Now she is 28 and doctors say it is unlikely she will see 30.

Ms. Smith (her real name) is a certified public accountant who lives with her husband, Pete, in Nashotah, Wis. Her H.M.O. is the Family Health Plan Cooperative of Milwaukee. Testifying in July before a Congressional committee investigating health care fraud, Ms. Smith said:

"Even though my medical records were fully documented with the classic physical characteristics and symptoms of cervical cancer, no doctor or medical practitioner associated with my H.M.O. or its lab ever made the correct diagnosis."

Karin Smith could have been saved.

Three Pap smears and three biopsies were performed. "All but the fifth test were misread by the lab my H.M.O. contracted with," Ms. Smith said. "Unfortunately, the one Pap smear they did read correctly was dismissed when they misread the biopsy they performed to confirm it. All six tests clearly indicated that I did, in fact, have cervical cancer."

Ms. Smith tried for three years to convince her H.M.O. doctors that she was ill. Her pleas for help went unheard because there is a new world of medicine in the United States, a world that pulsates to the impersonal and incessantly driving rhythms of corporate greed. Patients are not important in this world. They are little more than data entries in elaborate schemes to cut costs and bolster profits as radically as possible.

The smart set calls it managed care. The corporate types love it. They have plunged into all phases of the health care system with their single-minded pursuit of financial gain, often at the expense of patients and over the concerns of caregivers.

Ms. Smith's H.M.O. is a nonprofit consumer cooperative. But it is inextricably entwined with the corporate culture that dominates American health care. Managed care is, in essence, corporate care. Decisions that once were made by doctors are being taken over by executives obsessed with the bottom line. In that environment patients can be processed as impersonally as any other commodity.

Ms. Smith testified that the owner of the laboratory that handled her tests, CBC Clinilab, had been on her H.M.O.'s board of directors, "and in order to receive the H.M.O.'s business he was provided with the competitors' bids in advance." That, she pointed out, is a form of "managed competition" that encourages contractors to offer services at "artificially low prices, which can only lead to a severe lack of quality control and excessive workloads."

Indeed, it turned out that the laboratory technician who misread Ms. Smith's Pap smears had been reading five times the federally recommended number of slides, and was working for four other labs simultaneously.

Efficiency and productivity are the twin shrines at which corporate executives worship. They are the stuff that bonuses are made of. But the effect of such devotion on patients like Ms. Smith can be catastrophic.

She said: "My cancer has spread throughout my lymphatic system, from my pelvis to my abdomen and, as of six months ago, to my neck. The fifth vertebrae of my upper spine is so completely infiltrated with the cancer that at any moment I could become paralyzed."

Ms. Smith sued and a settlement of $6.3 million was reached with a dozen defendants, including the laboratory and the H.M.O. A spokesman for the H.M.O. said it ended its contract with CBC Clinilab in 1991. He said it was only later that H.M.O. officials learned that there were "very few" standards for screening Pap smears at the laboratory.

Ms. Smith and her husband had planned to take a vacation trip to Alaska last week. Haunted by uncertainty, they are trying to cram in as many experiences together as possible. But the spread of the cancer has been relentless and the trip had to be postponed. Ms. Smith was hospitalized unexpectedly, and on Friday she underwent surgery for the ninth time. □