

ALASKA STATE LEGISLATURE
SENATE LABOR AND COMMERCE STANDING COMMITTEE

March 2, 2004

1:35 p.m.

TAPE(S) 04-17, 18

MEMBERS PRESENT

Senator Con Bunde, Chair
Senator Ralph Seekins, Vice Chair
Senator Gary Stevens
Senator Hollis French

MEMBERS ABSENT

Senator Bettye Davis

COMMITTEE CALENDAR

SENATE BILL NO. 322

"An Act relating to the rate of the salmon enhancement tax."

MOVED SB 322 OUT OF COMMITTEE

SENATE BILL NO. 324

"An Act relating to floral business telephone listings and to acts involving those listings that are considered unlawful trade practices."

HEARD AND HELD

HOUSE BILL NO. 356

"An Act relating to operation of alcoholic beverage delivery sites; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 319

"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 322

SHORT TITLE: SALMON ENHANCEMENT TAX
SPONSOR(s): SENATOR(s) STEVENS B BY REQUEST OF SALMON INDUSTRY
TASK FORCE

02/11/04 (S) READ THE FIRST TIME - REFERRALS
02/11/04 (S) L&C, FIN
02/24/04 (S) L&C AT 1:30 PM BELTZ 211
02/24/04 (S) Heard & Held
02/24/04 (S) MINUTE(L&C)
03/02/04 (S) L&C AT 1:30 PM BELTZ 211

BILL: SB 324

SHORT TITLE: FLORAL BUSINESS TELEPHONE LISTINGS
SPONSOR(s): SENATOR(s) GUESS

02/13/04 (S) READ THE FIRST TIME - REFERRALS
02/13/04 (S) L&C, JUD
02/26/04 (S) L&C AT 1:30 PM BELTZ 211
02/26/04 (S) Scheduled But Not Heard
03/02/04 (S) L&C AT 1:30 PM BELTZ 211

BILL: HB 356

SHORT TITLE: EXTEND ALCOHOL DELIVERY SITE SUNSET
SPONSOR(s): REPRESENTATIVE(s) JOULE

01/12/04 (H) PREFILE RELEASED 1/2/04
01/12/04 (H) READ THE FIRST TIME - REFERRALS
01/12/04 (H) L&C
02/09/04 (H) L&C AT 3:15 PM CAPITOL 17
02/09/04 (H) Moved Out of Committee
02/09/04 (H) MINUTE(L&C)
02/12/04 (H) L&C RPT 4DP
02/12/04 (H) DP: LYNN, GATTO, DAHLSTROM, ANDERSON
02/19/04 (H) TRANSMITTED TO (S)
02/19/04 (H) VERSION: HB 356
02/20/04 (S) READ THE FIRST TIME - REFERRALS
02/20/04 (S) L&C
03/02/04 (S) L&C AT 1:30 PM BELTZ 211

BILL: SB 319

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS
SPONSOR(s): SENATOR(s) SEEKINS

02/11/04 (S) READ THE FIRST TIME - REFERRALS
02/11/04 (S) L&C, JUD
03/02/04 (S) L&C AT 1:30 PM BELTZ 211

WITNESS REGISTER

Senator Ben Stevens
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 322.

Senator Gretchen Guess
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 324.

Ms. Dorothy Zappa, Coordinator
Alaska Florist Association
Anchorage AK
POSITION STATEMENT: Supports SB 324.

Representative Reggie Joule
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of HB 356.

Ms. Christine Hess
Staff to Representative Joule
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on HB 356 for sponsor.

Mr. Brian Hove
Staff to Senator Ralph Seekins
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 319 for sponsor.

Mr. Jim Jordan, Executive Director
Alaska State Medical Association
4107 Laurel St.
Anchorage AK 99508
POSITION STATEMENT: Supports SB 319.

Dr. John Dudley
Alaska Physicians and Surgeons
Anchorage AK
POSITION STATEMENT: Supports SB 319.

Ms. Laurie Herman, Director
Government Affairs

Providence Health System
Anchorage AK
POSITION STATEMENT: Supports SB 319.

Mr. Philip Hinderberger
San Francisco AK
POSITION STATEMENT: Supports SB 319.

Dr. Alex Malter, President
Alaska State Medical Association (ASMA)
4107 Laurel St.
Anchorage AK 99508
POSITION STATEMENT: Supports SB 319.

Mr. Ron Neupauer, President
Medical Underwriters of California
No address provided
POSITION STATEMENT: Supports SB 319.

Mr. Mike Haugen, Executive Director
Alaska Physicians and Surgeons
4120 Laurel, Apt. 206
Anchorage AK 99508
POSITION STATEMENT: Supports SB 319.

ACTION NARRATIVE

TAPE 04-17, SIDE A

^#SB322

SB 322-SALMON ENHANCEMENT TAX

CHAIR CON BUNDE called the Senate Labor and Commerce Standing Committee meeting to order at 1:35 p.m. Present were Senators Gary Stevens, Ralph Seekins, Hollis French and Chair Con Bunde. The first order of business to come before the committee was SB 322.

SENATOR BEN STEVENS, sponsor, said he distributed the information that Senator French requested to the committee.

CHAIR BUNDE said he understands SB 322 would allow people in various fisheries to tax themselves.

SENATOR BEN STEVENS replied that is correct.

SENATOR HOLLIS FRENCH thanked Senator Stevens for sending the price per pound numbers to the committee and said, "Those price per pound numbers were sobering to a non-commercial fisherman. It was amazing to see those values flat and even down over more than a decade."

He asked if increasing the tax cap ten times was an idea he heard from the Joint Salmon Task Force.

SENATOR STEVENS replied that the debate was initiated by the fact that cost recovery fish were being required to pay for the operations of hatcheries. He did not just cook up the super assessment idea. Independent hatcheries have actually taken substantial steps in the past and assessed themselves to accelerate their debt reduction program. However, not all hatcheries fall under that statute.

SENATOR FRENCH said his concern is that the system appears to have worked for a long time to need such a radical adjustment.

SENATOR STEVENS responded that is a valid point, but explained that the financial package for each association is different and there are 28 separate hatchery programs. Each of them has a loan portfolio with the Fisheries Enhancement Revolving Loan Fund and is managed differently. Some of the portfolios have a higher debt to capital ratio, for instance. "The important thing is this is an assessment that the harvesters choose to assess themselves to pay [down on their debt]. It's all voluntary."

He emphasized that the rates had never been adjusted from the time the fund was created in 1976.

SENATOR SEEKINS moved to pass SB 322 from committee with individual recommendations and attached fiscal note. Senators Stevens, French, Seekins and Chair Bunde vote yea; and SB 322 moved from committee.

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^#SB324

SB 324-FLORAL BUSINESS TELEPHONE LISTINGS

CHAIR CON BUNDE announced SB 324 to be up for consideration.

SENATOR GRETCHEN GUESS, sponsor, explained that SB 324 basically requires disclosure in advertising for the out-of-state floral industry. So, if a floral business in Seattle advertises its services in Alaska, it can't use a local phone number nor

indicate it is a local provider. Nineteen other states have this legislation. Although the floral business is a small industry, this is an important issue for it. Unsuspecting people will call a number thinking it's a local florist and will be transferred to an out-of-state florist, who, in turn, will come back to the local florist with the order and take a chunk of the charge with them.

I am not trying to prohibit out-of-state florists from advertising in Alaska, but I want to give Alaskans a choice so that they know am I ordering flowers from a local florist or am I ordering flowers from an outside florist.

CHAIR BUNDE asked if the fact that flowers are such a perishable product entered into the discussion.

SENATOR GUESS replied yes. The out-of-state florist is going to have to buy the flowers from the local florist, anyway. So, the customer will be charged even a little bit more for that transaction.

CHAIR BUNDE said he thought that out-of-state florists would also ask the local florist for a wholesale price.

SENATOR GUESS replied that is a good point. She reiterated that she didn't want to prohibit out-of-state florists from advertising in Alaska, but wanted their customers to have full information.

SENATOR RALPH SEEKINS said his reading of the bill indicates that a Fairbanks company could not use an Anchorage phone number or a number from anywhere else in the state.

SENATOR GUESS replied he is correct and that the calling area could be interpreted two ways - by area code and location.

MS. DOROTHY ZAPPA, Coordinator, Alaska State Florist Association, began by relating her extensive resume' in the floral area to the committee. She explained that the association has 20,000 members internationally including retailers, wholesalers and growers. She directed her comments toward the need to have a deceptive trade practices act, an idea from Charles F. Kremp, a florist in Philadelphia, who made a statement before the Committee on Economic Matters in the Maryland House of Representatives in 1997. He said:

This bill would make it an unfair trade practice to knowingly misrepresent the geographic origin or location of a business. It also requires that whenever someone uses the name of a locality in its business name, the actual address of the business must be disclosed in any telephone directory or any telephone directory assistance service.

She asserted that professional retail florists are being bombarded by new competitive forces every day, like super markets, chain stores and direct mail companies, featuring flowers and plants to be ordered from a full color catalogue within 24 hours.

The competitive challenges facing retail florists are almost too numerous to mention. As difficult as this competition is to deal with, I feel that the more exposure to flowers to express our innermost feelings for the public's awareness and availability is ultimately very encouraging. It is welcomed by our progressive, visionarily-thinking florists because it does two things. First, it compels us to try harder and there is nothing more fulfilling than figuring out ways to convince people to buy flowers exponentially from small traditional shops instead of from some other sources. Second, all of these sales outlets expose more people to growers more often. Therefore, the pleasure of flowers in our everyday lives adds extra beauty in our environment, plus it is known to be horticulturally therapeutic in reducing stress levels. The more that happens, the better chance all of us in the industry have of increasing our sales, improving profitability and making contributions to our local community. What does irritate, not only Mr. Kremp, but all our fellow florists and myself, is competition that is based on deceiving the public....

MS. ZAPPA said the most irritating thing about deceptive trade practice is the impact it has on the consumer. Companies that run nationwide 800 numbers make it quite clear to the consumer that they are national market makers. Once consumers know that, they can decide for themselves about where they want to buy their flowers. When consumers don't have a reasonable way to differentiate between an existing local business and one that claims to be local, that is unethical and deceptive.

MS. ZAPPA said she had sent Senator Guess copies of deceptive advertisements that are in the GCI Anchorage Mat-Su Valley telephone directory and Phone Directories Company, Inc. She closed saying:

As you deliberate over this issue, I ask only that you put yourselves in the shoes of the local retail florist. The vitality of any community across the country, whether it is a small town or large one, depends on our viability and that of schools, houses of worship, governing bodies and, of course, the businesses that operate within those boundaries. Those businesses provide goods and services to the public, but they also offer employment opportunities, pay taxes to support the local community and create a spirit that helps hold communities together. That spirit is being threatened by the deceptive trade practices that a law would hopefully end.

CHAIR BUNDE asked if she intended to prevent competition from outside the state.

MS. ZAPPA answered no, but she wants to eliminate unethical practices.

SENATOR SEEKINS pointed out that SB 324 is not placed within the deceptive trade practices title (AS 45.50.471.12), which reads:

...Using or employing deception, fraud, false pretense, false promise, misrepresentation or knowingly concealing, suppressing or omitting a material fact with intent that others rely upon the concealment suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has, in fact, been misled, deceived or damaged.

He asked if that is the issue she is talking about.

MS. ZAPPA replied yes.

SENATOR SEEKINS asked her if she felt this issue would apply to any business, not just floral. She said yes and he asked if anyone from her group had ever filed a consumer protection complaint with the Department of Law.

MS. ZAPPA replied no. The Society of American Florists has moved forward in the direction of SB 324.

SENATOR SEEKINS said he had dealt with yellow page sales people and it seems that is where part of the blame for the deceptive trade practices lies.

MS. ZAPPA agreed.

SENATOR SEEKINS asked Senator Guess why she didn't want to apply this issue across the board instead of to just one small industry.

SENATOR GUESS replied that is a good question, but it is mainly because other industries didn't seem to have this problem. Sometimes unintended consequences happen from applying a policy broadly, but she would entertain his suggestions.

SENATOR SEEKINS said he felt that these situations were already unlawful and it might be time for the Attorney General's Office to intervene.

CHAIR BUNDE said SB 324 would be set aside for further work.

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^#HB356

HB 356-EXTEND ALCOHOL DELIVERY SITE SUNSET

CHAIR CON BUNDE announced HB 356 to be up for consideration.

REPRESENTATIVE REGGIE JOULE, sponsor, said some larger communities in his district have elected to go damp, which means being able to import alcohol, but not legally being able to sell it. Dry means not being able to import any liquor to communities at all. Barrow, Kotzebue and Bethel are damp; Nome is wet. All of the villages surrounding Barrow and Kotzebue are dry. Bootlegging is a challenge in these communities and residents are constantly voting on whether to be either wet, damp or dry. Finally in 2001, the Alcohol Delivery Site Law allowed Barrow to vote on using a distribution center. Now, Gold Streaks, freight and luggage coming into Barrow arrived through that distribution center. A permit is required and an ordinance has established amounts of alcohol that can be brought in. Barrow, with a little over 1,700 permits, has found that this system helped smooth out the emotional turmoil it continually went through in voting on whether to be wet, dry or damp. Kotzebue and Bethel have chosen not to utilize this method. Representative Joule said SB 356

simply extends the sunset provision for the alcohol delivery site to July 1, 2008.

CHAIR BUNDE asked how much alcohol a Barrow resident can bring in.

REPRESENTATIVE JOULE replied they may not import more than 13 gallons of malt beverages, 20 liters of wine or 4.5 liters of distilled spirits per month. If an alcoholic beverage is being carried as luggage, it's supposed to be marked on the luggage. After people got fined a few times, it worked pretty well.

CHAIR BUNDE noted that at Christmas time, at least one Anchorage post office refused to accept presents that were wrapped in alcohol-labeled boxes, because they might be going to a distribution center. He asked how much people were charged to pay for the program.

REPRESENTATIVE JOULE replied a \$25 annual fee.

SENATOR HOLLIS FRENCH asked how the distribution center kept alcohol from being shipped through Barrow to Nuiqsut, for instance.

REPRESENTATIVE JOULE answered that first of all, you have to be a resident of Barrow. Theoretically, alcohol could be smuggled to the smaller villages, but then the permit is at risk. Most of those villages have flights from Fairbanks through Prudhoe Bay and Barrow could be easily bypassed. This program has not stopped alcohol from going to the villages, but it has cut down on the amount.

SENATOR GARY STEVENS said he assumed the goal of the program was to reduce alcohol problems and he wanted to know if the program reduced consumption.

REPRESENTATIVE JOULE replied that the Department of Public Safety on the North Slope feels that it has. It has also improved the emotional wars over what status to be in.

CHAIR BUNDE asked if anyone else wanted to testify on HB 356. There was no response and he said this was the first hearing and he would hold the bill for a future date.

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^#SB319

SB 319-CLAIMS AGAINST HEALTH CARE PROVIDERS

CHAIR CON BUNDE announced SB 319 to be up for consideration.

MR. BRIAN HOVE, staff to Senator Seekins, sponsor, said SB 319 amends AS 09.55.548 and AS 09.55.556 and is intended to alleviate a growing crisis in Alaska's healthcare industry with respect to the availability of liability insurance. It places a hard cap on damage awards, clarifies informed consent language and limits liability with respect to healthcare advice communicated through an electronic means.

He stated that Alaska's healthcare system is breaking down and ranks near the bottom in number of physicians per capita. Most of Alaska's physicians exceed the age of 50 and will retire in the next 10 years. Attracting and keeping physicians is of utmost importance and availability of liability insurance plays a critical role in solving this crisis. Half of the insurers have ceased doing business in Alaska in the last 12 months. Other professional liability carriers have not shown an interest in doing business in the state due to the volatile medical liability environment.

One solution that has proved especially effective in other states is capping non-economic damages. SB 319 intends to help establish a predictable risk assessment environment by placing a \$250,000 cap on this type of award. It does not change awards for quantifiable economic damages such as lost wages and past and future medical expenses. The bill also makes provisions, which limit liability in cases where patients elect to not follow advice that was communicated by a healthcare provider through electronic means. Lastly, qualifying language is added to informed consent.

Instituting a \$250,000 cap on non-economic damages will help stabilize the professional medical liability insurance market here in Alaska... [END OF SIDE A]

TAPE 04-17, SIDE B

CHAIR BUNDE said he participated in previous tort reform legislation, which allowed actual damages without caps. He thought, then, that there was a cap on non-economic damages. He asked how this would change existing law.

MR. HOVE said he wasn't aware of an existing cap.

SENATOR RALPH SEEKINS said that there is currently a \$400,000 cap.

CHAIR BUNDE asked him to explain the informed consent language.

MR. HOVE said he would like better-informed people to testify on that.

MR. JIM JORDAN, Executive Director, Alaska State Medical Association (ASMA), said he also serves on the Board of Directors of the Medical Underwriters of California, the operating company for the Medical Insurance Exchange of California (MIEC).

MIEC is one of the two remaining providers of medical liability insurance coverage for physicians in Alaska. You will be receiving testimony later from an executive representing MIEC.

Also, Dr. Alex Malter, MD, MDH, current president of the Alaska State Medical Association, will provide testimony regarding SB 319. He will speak to the critical shortage of physicians in Alaska today and how SB 319 will help us recruit those doctors that we need.

Today, I will specifically address the informed consent issues, because I heard that question earlier. The starting point is that there are two Alaska State Supreme Court cases that play on the informed consent issue. The first is the Korman v. Mallin case, which is a 1993 case. The second is a more recent case, Marsingill v. O'Malley, in 2002.

First, I should address the term informed consent.... In essence, informed consent is a process required in Alaska law whereby a physician is required to provide sufficient information to the patient about a proposed procedure or course of treatment. The information provided is obviously intended for the patient and is the information that is necessary so that the patient can decide whether she or he decides to embark on the course of treatment that has been recommended.

Section 3 of SB 319 makes minor stylistic changes to Alaska's informed consent law and those were the colons and periods and other punctuation marks.... However, I will move on to the Alaska Supreme Court case in the Korman v. Mallin. Korman v. Mallin held that when jurors evaluate whether or not the healthcare provider has adequately informed the patient of the common risks and reasonable alternatives of treatment, they are to evaluate the information based on what a reasonable patient would expect to hear under the circumstances. However, the reasonable patient standard, set by the court, fails to provide a healthcare provider with any objective basis upon which to determine at the time of treatment what risks and alternatives should be conveyed to the patient.

Section 4 of SB 319 establishes the standard of disclosure to be what a skilled healthcare provider of the same or reasonably similar specialty would disclose under similar circumstances. This paves the way for the healthcare profession to adopt reasonable guidelines so that patients are insured to receive the adequate information, without subjecting the healthcare provider to later second-guessing.

Marsingill v. O'Malley deals with another problematic situation. Ms. Marsingill called Dr. O'Malley at night. Dr. O'Malley had previously performed surgery on Ms. Marsingill and, I forget what the time period was before this particular circumstance. However, the doctor advised her over the phone to go to the emergency room for treatment and she declined to do so and several hours later suffered a cerebral injury. The court held that the jury under the circumstances would still be able to find Dr. O'Malley negligent of not providing informed consent.

Section 4 of SB 319, in the new subsection AS 09.55.556(d), protects healthcare providers from legal liability who are consulted other than in person and who are, therefore, unable to personally evaluate the patient and assess firsthand the nature of the patient's condition. This only holds true if their recommendation is for the patient to seek further treatment and the patient chooses not to follow that advice. This provision applies to healthcare providers

who are contacted by phone, e-mail, or who provide telemedicine services, for example, to our remote communities not otherwise served.

Since the Marsingill decision, some physicians will not take phone calls at all after hours and instead, all patients are directed right to the emergency room or to call 911. This is not optimal healthcare with patients being directed to the most expensive care setting - the hospital emergency room.

ASMA supports SB 319 and urges you to support it as well.

CHAIR BUNDE asked him to address how SB 319 changes the existing cap.

MR. JORDAN replied:

The non-economic damage cap, which applies to all wrongful death and personal injury actions in Alaska, is \$400,000 or 8,000 times the life-expectancy of the claimant, whichever is greater, for most injuries. For severe physical impairment or severe disfigurement, the cap amount is \$1 million or 25,000 times the life-expectancy, whichever is greater. SB 319 changes that to \$250,000.

CHAIR BUNDE asked if he knew how that has turned out in practical terms.

MR. JORDAN replied that the potential exists for an injured baby with a life-expectancy now approaching 80 years to have a \$2 million award at 80 years times \$25,000.

CHAIR BUNDE asked if he knew of actual awards like that since the last tort reform.

MR. JORDAN replied that he didn't have that information.

CHAIR BUNDE asked if he knows what happened after the original tort reform.

MR. JORDAN replied that those questions could better be answered by the insurers who deal with this day in and day out.

SENATOR SEEKINS asked him to expand on Mr. Hove's comment about the difficulty of recruiting and retaining physicians in this state.

MR. JOHN DUDDEY, president, Alaska Physicians and Surgeons, said he is an orthopedic surgeon in Anchorage and related how he stayed in Alaska when he was first deciding where to practice.

At that time, the practice environment in Alaska was pretty good. Practicing physicians in the Midwest were complaining about malpractice rates and availability of insurance while the doctors I spoke with in Alaska were upbeat and happy, which is a really marked change from my experience in Ohio.

After moving to Alaska, the practice environment remained relatively good for a matter of two or three years. The practice environment began to change about three years ago when the AMA [American Medical Association] declared that the state was at risk with respect to potential medical malpractice prices. Very few physicians, including myself, noticed the gradual change until May 2003 when my insurance company, Northwest Mutual Insurance Company, notified my practice and other Alaska physicians that they were no longer going to issue policies in Alaska.

This is a first wakeup call for myself and many other physicians. In the last year, the loss of half of the medical malpractice carriers, as I said before, we're down to two, has had a negative impact on our creating new physicians. The state's only neurosurgeons have been unsuccessful in attracting new neurosurgeons. Internists and family practice specialists are leaving the state and not being replaced in adequate numbers. Not only has it become difficult to attract new or practicing physicians to the state, but also when a crisis develops, many of the practicing physicians including my senior associate will retire early.

SB 319 is about access to high quality medical care, continued care for our loved ones in Alaska. We have a shortage of practicing physicians. Dr. Malter will comment on that later. The July 3, 2003 study from the Agency of Healthcare Research and Quality looked at the distribution of physicians across states with and without caps on non-economic damages since 1970. After

adjusting for multiple factors, AHRQ found that by the year 2000, states with caps averaged 12 percent more physicians per capita than states without caps. This study also found that caps are effective in improving the supply of physicians and patients' access to care. The lower the cap, the greater its effect on insuring patients' access to care.

A February 2003 poll on what Americans think about the healthcare liability crisis showed that 84 percent of Americans fear that skyrocketing medical liability costs could limit their access to medical care. A Blue Cross Blue Shield survey also showed that rising medical malpractice premiums are causing access and cost problems in crisis states. The Blue Cross Blue Shield study also validates the conclusion that reduced access to care is the result of the current medical liability crisis. For example, 56 percent of Blue Cross Blue Shield plans in crisis states respond that the physicians are refusing some high-risk procedures. In non-crisis states, only 32 percent find this. Fifty-six percent of Blue Cross Blue Shield plans in crisis states report that physicians are leaving their practices or retiring whereas only 42 percent of plan in non-crisis states report this finding. One-third of Blue Cross Blue Shield in crisis states are moving practices out of state; in non-crisis states, it's only 20 percent. Currently, only six states are considered stable. Alaska is among the 25 states that have the potential to be deemed in crisis. In the last year, the situation has worsened and both the American Medical Association and the Academy of Orthopedic Surgeons feels that we'll be moved into the crisis state within the next year.

DR. DUDDEY said that the only trauma center in Las Vegas closed its doors for 10 days this past summer when orthopedic surgeons couldn't afford professional liability insurance. In Pennsylvania, over the past five years, eight companies have stopped offering medical liability insurance with only two companies remaining. In Florida, the average time for women seeking mammography rose from 20 days in 2000 to 150 days in 2002. Many radiologists couldn't find or afford the necessary liability insurance. In a recent survey of Palm Beach, Miami Dade and Broward counties, seven out of 29 radiologists said they had stopped reading mammograms and eight others were considering this possibility.

Sixty-two percent of Texas physicians prior to their recent malpractice reform had begun denying or referring high-risk cases and 52 percent stopped providing certain services to their patients. Home to about 20 malpractice carriers in 1999, Texas only had four carriers three years later in 2002.

Alaskan physicians have lost all but two medical malpractice carriers. As we have seen in other states, as insurance becomes unavailable, physicians will relocate, close their practices or drop vital services - all of which will seriously impede patient access to care. Some officials in the AMA and the Academy of Orthopedic Surgeons feel that Alaska is less than one year from a crisis. We know the experience in the Lower 48 is that high-risk procedures such as obstetrics, neurosurgery and trauma would certainly be sent south to Washington or elsewhere. We have a chance to avert such a crisis in Alaska. We know it's only a matter of time before the crisis that is affecting those states without liability and reform will affect Alaskans. This bill's hard cap is just what the citizens of Alaska ordered for the dying medical malpractice system in Alaska.

A study from Tillinghast Towers & Perrin found that savings could be expected with a \$250,000 cap on non-economic damages whereas a cap of \$500,000 is likely to be of little benefit to physicians. AHRQ also found that the lower the cap, the greater its effectiveness in insuring a patient's access to care. Physicians in the state feel that SB 319 is good for Alaskans.

CHAIR BUNDE asked when he had begun his practice in reference to the first tort reform.

DR. DUDDEY replied 1999 - after the first tort reform.

SENATOR GARY STEVENS asked what "severe" means and what has gone wrong in the past that warranted a \$1 million lawsuit.

DR. DUDDEY replied that anything is considered severe.

SENATOR STEVENS wanted specifics.

CHAIR BUNDE said that specifics were listed in current legislation as one eye, one limb, etc.

SENATOR HOLLIS FRENCH asked Dr. Dudley what his liability insurance had done.

DR. DUDDEY replied that his insurance with Northwest Mutual went up 1800 percent since he has been in Alaska and he has had no claims.

SENATOR FRENCH asked what he was paying in 1999.

DR. DUDDEY replied almost \$3,000 and now he pays about \$42,000.

SENATOR FRENCH asked if his insurance carrier had promised him anything about his insurance rates if this bill is passed.

DR. DUDDEY replied no, not a definitive promise. Experience in other states has shown that rates would level out and start dropping.

SENATOR FRENCH said that California is making a study of this phenomenon, because its medical malpractice reform was passed in 1975 and the cap was set at \$250,000. "If we had done the same thing in 1975 and set our caps at \$250,000, do you think those awards should go up over time to compensate for inflation?"

DR. DUDDEY replied:

The economic damages are certainly linked to inflation and I think they do go up. Medical costs and rehab costs will go up and linked to inflation with economic losses.

SENATOR FRENCH pointed out that \$250,000 in 1975 is not worth \$250,000 today. Dr. Dudley agreed.

SENATOR FRENCH asked if it was true that insurance rates continued to climb in California after the reform was put into effect in 1975. "What made the California insurance industry work better was insurance reform. Isn't that really what it took to get those rates under control?"

DR. DUDDEY replied, "I can get you specific data on that, but no, Prop 103 did not do that."

Proposition 103 was the reformation of the insurance industry in California.

SENATOR FRENCH asked if he is contending that rates went up after Proposition 103.

DR. DUDDEY replied that Proposition 103 passed in 1988 and went into effect by 1990. Rates were already leveling out from 1975 through '90 and they dropped a little faster after Proposition 103.

SENATOR FRENCH asked if he disputes statistics that show that malpractice insurance rates continue to climb in California after the 1975 reforms.

DR. DUDDEY replied that everything continued to climb, but not as steeply and much less steeply than in the rest of the country. He offered to get the specific numbers.

MS. LAURIE HERMAN, Director, Government Affairs, Providence Health System, wholeheartedly supported SB 319. A 2002 study commissioned by Providence Hospital indicated that Anchorage is facing a physician shortage. Limiting the amount of damage for medical malpractice cases will help a great deal in attracting new physicians to Alaska. However, the study indicates that a majority of physicians begin their practice not farther than a 50-mile radius from the hospital where they completed their residency. Providence's WAMI (Washington-Alaska-Montana-Idaho Medical School Program), a family practice residency program, is designed to help in this area, but of the 32 graduates who have completed the program, 75 percent are practicing in Alaska - half in rural and half in urban Alaska. The WAMI program costs \$2 million per year, but ways of mitigating its costs are being investigated.

MS. HERMAN said that Alaska is facing an aging physician workforce with the average age of 51 and recruitment is not happening at a rate that will replace them when they retire. Alaska is one of the costliest states in the nation for physicians and medical liability insurance is a large component of that cost. Putting a limit on non-economic damages in medical malpractice cases would be a big help in their effort to bring more physicians to Alaska.

CHAIR BUNDE said he was glad to hear the WAMI program was so successful.

SENATOR FRENCH asked how many doctors there are per 10,000 Alaskans.

MS. HERMAN said she didn't have a study in front of her, but she would get back to him with an answer.

SENATOR FRENCH asked who did the counting for the Providence study.

MS. HERMAN replied that it was conducted by a professional organization and that she would get the entire study for him.

MR. PHILIP HINDERBERGER, General Counsel, NORCAL Mutual Insurance Company, a physician-owned and managed company in San Francisco and a successor to MICRA [Medical Injury Compensation Reform Act in California], said the company was established by the Legislature to handle medical malpractice in Alaska after the 1975 crisis. He supported SB 319 saying it would make healthcare more readily available to the citizens of Alaska where NORCAL has provided hundreds of physicians medical malpractice insurance over that period of time. It has also helped Alaska reform its tort laws by providing information to bring its medical liability laws into parity with other states. Unfortunately those efforts have not had the desired effect. The major cost for Alaskan physicians is medical liability insurance at an average of \$30,627 per year, the highest average cost in the country. In Harris, California, physicians pay \$14,564 per year. This means that Alaskan physicians pay about 110 percent more on average each year than California physicians.

During 2001 the average medical liability payment in Alaska was \$308,476, the 14th highest in the country. Health payments by comparison averaged \$178,499. Alaska payments are about 70 percent higher than in California. Alaska has some of the most dramatic increases in the cost of medical liability in the country. The National Association of Insurance Commissioners (NAIC) said that they have increased by approximately 1,600 percent between 1976 and 2001. Studies have tried to determine why some states' premiums go up faster than others and have uniformly found that medical liability reform is the single most important factor. California's Medical Injury Compensation Reform Act (MICRA) passed in 1975 and has been identified as the most successful effort in the country to control these costs. It has a \$250,000 cap on non-economic damages.

CHAIR BUNDE asked if he had figures that compared Alaska to other states that have a small population and two insurers.

MR. HINDERBERGER said he had statistics on A-rated insurers who have 3 percent or more of market share in a state. It ranges from one or two up to eight or nine insurers per state. New York, Massachusetts, Alaska and Wyoming have only two insurers who are A-rated doing business in the state. He pointed out that none of those states has medical liability reform.

California, by comparison, has seven A-rated insurers. So, we have a pretty healthy and competitive market in California and I think it's because the insurers feel that they can set their prices at an appropriate level... due to MICRA.

CHAIR BUNDE said, "Apparently, the number of insurance companies has not been related to the number of doctors who are buying insurance if New York and Alaska both have two companies."

MR. HINDERBERGER agreed and said it has to do with the environment. "It's not the size of the state; it's not the number of doctors; it's really the reliability of the judicial system...."

SENATOR SEEKINS asked if Mr. Hinderberger could give the committee NORCAL's perspective on its risk portfolio in the State of Alaska versus other states.

MR. HINDERBERGER replied that the doctors in Alaska are as good as the doctors in all the other states where NORCAL does business. Alaska is at the most volatile end of the spectrum in terms of jury awards, which influences the settlement perspectives. Couple that with the fact that a small number of doctors have to shoulder the cost, it's difficult to predict what the year-to-year costs are going to be. In California, premiums have been going up for a long period of time at a slightly higher rate than medical inflation. In Alaska, premiums go up 22 percent a year.

SENATOR FRENCH asked if he thought the \$250,000 cap that California passed in 1975 should be adjusted for inflation.

MR. HINDERBERGER replied that obviously there is a difference in dollars between then and now, but this is not the only element that is in play. Total awards in California have gone up faster than medical inflation, about two times faster than the CPI. In 1975 the average award in California was around \$10,000. Today it's around \$170,000. Those costs have been trending upwards and

will continue to do so because the underlying costs are primarily economic losses, including the cost of lost wages, medical care and rehabilitation.

SENATOR FRENCH asked if Alaska has had any outrageous jury awards on the non-economic losses.

MR. HINDERBERGER replied that he hadn't had a chance to pull those numbers, but he would provide them as soon as he could.

SENATOR FRENCH asked how big this issue is in the total healthcare picture. "Aren't medical malpractice claims and paid losses really a very small and tiny part of healthcare costs? Aren't they something like less than a half of one percent?"

MR. HINDERBERGER replied that studies show it is more like 5 percent depending on what is included in the total cost. Insurance premiums, self-insured costs borne by governmental entities, defensive medicine, defending claims are included in the 5 percent of the medical system. In a state like Alaska, with a specialty like obstetrics, malpractice costs are a material part of a physicians' practice and a determining factor many times on whether a physician chooses to continue in Alaska.

SENATOR FRENCH said it looks like insurance rates are abnormally skyrocketing and asked why insurance reform hasn't been looked at as a potential solution.

MR. HINDERBERGER replied:

If you take a look at insurance premiums and match them to the underlying losses, you'll find they are trending on the same line. Underlying losses in Alaska are up dramatically, even since 1997. So, there is a direct link between the cost of medical malpractice insurance and the major driver, which are judgments and settlements. Your Alaska Insurance Department works us over pretty good every year when we put our rate filing in.... We are not making undue profits on the positions in Alaska.

SENATOR FRENCH asked after Proposition 103 passed, what dollar amount did NORCAL refund in medical malpractice premiums.

MR. HINDERBERGER replied that there are five medical malpractice companies and they were the first companies to voluntarily pay

rollback refunds at the request of California Insurance Commissioner Garimendi.

The reason was that the commissioner allowed the dividends that we were paying, the micro dividends, to be considered as rollback refunds. So, we were paying dividends in the neighborhood of 25 to 30 percent, which translated in the neighborhood of \$30 million over the last few years. That wasn't the only dividend we paid. We have paid over \$250 million to our policyholders in California, Alaska and Rhode Island over the last 15 or 20 years.

SENATOR FRENCH said in California he heard Mr. Hinderberger to say reform led to a \$30 million rebate.

MR. HINDERBERGER responded:

In California, we refunded \$250 million to our policyholders over the last 15 or 20 years. Of that, \$30 million was characterized by the commissioner as a rollback refund. It was part of an overall return of redundant reserves here in California that were generated through MICRA. MICRA substantially reduced the anticipated cost of paying claims and all those funds were refunded. As a practical matter, whether Prop 103 had come along or not, we would have refunded those dollars.

SENATOR SEEKINS asked for a further explanation of the rollback if it was funded from redundant reserves, not excess profits.

MR. HINDERBERGER replied that NORCAL was not required to rollback its premiums, at all, but to pay back collected funds that weren't needed.

3:10 p.m.

TAPE 04-18, SIDE A

DR. ALEX MALTER, President, Alaska State Medical Association, supported SB 319. He concurred with all the previous testimony and wanted to focus his comments on how strong medical liability reforms would help Alaskans to recruit and retain enough physicians to provide adequate care for the state's citizens in the future.

Access to medical services is limited in much of the state. Alaska has one of the smallest, if not the smallest, number of physicians per capita in the country. A report in the American Medical News recently noted that our situation was quite precarious. 'Alaska has long ranked amongst the worst states in terms of physician supply.' In 2002, the state had fewer than 1,350 doctors in private practice. Only six states have a lower doctor-to-patient ratio.

That article went on to identify Idaho as having the worst physician shortage, estimating it had one non-government physician for every 544 patients. However, numbers from ASMA's own database, which we believe to be more accurate than those used in the article, showed approximately one physician here for 578 patients.

It's likely that Alaska actually has the lowest physician-to-patient ratio for the country in 2002. More updated estimates show that that is most likely still true. By comparison, to reach the national average of one doctor per 360 patients, the state would need about 500 more actively practicing physicians right now.

Exacerbating the problem as we've heard, over half the state's practicing physicians are greater than 51 years old. A 2002 local study of physicians by Providence, which was alluded to earlier, confirmed that Anchorage physicians were aging quickly and highlighted immediate shortages of psychiatrists, surgeons and general internists. This looming recruitment challenge is the main reason medical liability reform is so important in Alaska right now. Unfortunately, the state does not have the capacity to grow all the physicians we need. We have no medical schools and of the small number of WAMI students, some do not return to practice. Likewise, the state's lone residency training program is quite small.... The WAMI students still often do not return to the state or occasionally don't. The numbers that the Providence representative was referring to were the residents who were trained by the Providence residency program. Those are the folks who are staying in the state, but that program is actually quite small. In any case,

Alaska is and will continue to be a net importer of doctors and, as such, we have to compete for new doctors with other states facing physician shortages.

A recent study of medical students found the availability of affordable liability insurance plays a major part in a graduate's decision regarding where to set up practice. Alaska needs to optimize its medical legal environment to help us recruit the doctors we need. That is why ASMA supports SB 319. With its \$250,000 cap on non-economic damages, the bill provides the accepted gold standard in liability reform.

ASMA understands that this legislation is only one element in developing a healthy practice environment. Still, because the state had the foresight to enact other important medical practice legislation, liability reform is the most critical remaining element. ASMA is proud to have worked with the Legislature on the key statutory changes. We have also worked with our congressional delegation on Medicare payment updates specifically targeted to Alaska. The Association has even offered the current administration strategies to actively market Alaska to out-of-state physicians. As a result of these initiatives, ASMA believes that with the exception of strong medical liability reform, the state's practice environments are actually quite favorable....

ASMA's greatest concern is that Alaskan citizens have access to high quality healthcare and it's for this reason that the association would urge you to support SB 319.

SENATOR FRENCH asked if the 2002 study he referred to was the same Providence study on numbers of physicians practicing in Alaska.

DR. MALTER replied that there are two analyses, one conducted by Providence, which is primarily focused on Anchorage physicians and shows large shortages of doctors. Other numbers were done nationally by the AMA, which ASMA reanalyzed. ASMA believes its numbers are probably more accurate.

SENATOR FRENCH asked what number of doctors he had for Alaska statewide.

DR. MALTER replied that the nationwide estimate is that Alaska might have 1,350 private practice physicians. ASMA's local database is more accurate and estimates it to be closer to 1,115 for 2002.

So, our estimate is, while that national study made us look like we were perhaps seventh in the country, we are actually worst in the country in that our calculations show we are worse than Idaho, which was the state they touted as having the worst physician shortage.

SENATOR FRENCH asked how doctors who aren't in private practice - working for the Air Force, the Alaska Native Medical Center and the Army - are counted.

DR. MALTER replied that is a good question and ASMA doesn't do a great job of counting those. However, the national study also excluded Army physicians, as well.

I would contend that we very well may be about the worst in the country in terms of physician shortage, but even if we aren't perhaps the worst, I think the numbers are clear that we are very close to the worst and when you think about the average nationwide one physician per 360 patients and Alaska's apparent average of 1 physician per 578 patients, you really see that we're lacking almost 50 percent of the doctors that you would expect compared to nationwide averages. It really is substantial whether we're worst or whether we're second from the worst....

SENATOR FRENCH asked how the 1997 reforms affected the number of physicians.

If we enact this law, if we restrict a patient's right to recover for pain and suffering, can you promise me that we're going to get more doctors so that we'll have better medical care statewide?

DR. MALTER replied that he couldn't promise anything, but data presented by his colleagues indicate that states with liability reforms have a better supply of physicians. One of the problems with the 1997 reforms is that the soft caps are not as tight as the caps, which are necessary to really see benefits. The 1997 reforms did not implement a \$250,000 cap.

SENATOR FRENCH concluded that any representations that were made during those reforms on the part of the medical community should have all been preceded by the caveat that this reform was not going to go far enough to do any real good.

DR. MALTER pled ignorance of that situation, because he had just started to practice in Alaska in 1997 and mused:

I guess in-as-much as we didn't get the tight reform that we thought we needed back then, I personally am not that surprised that there might not have been an enormous jump in the number of physicians in the state.

SENATOR SEEKINS asked what the two remaining companies in the state are now.

DR. MALTER replied that one is NORCAL and the other is the Medical Exchange of California (MIEC).

SENATOR SEEKINS asked Mr. Hinderberger if NORCAL is a mutual company.

MR. HINDERBERGER replied yes.

SENATOR SEEKINS asked what the difference is between a mutual company and a for-profit company.

MR. HINDERBERGER explained that mutual companies were formed for doctors to provide basic medical malpractice insurance as close to at-cost as possible. It's composed almost substantially of doctors. NORCAL has redundant reserves, which are returned in the way of dividends. There are no shareholders.

MR. RON NEUPAUER, President, Medical Underwriters of California, said it is the management company on whose board Mr. Jordan sits. It is a physician-owned insurance exchange.

MIEC started in California during the 1975 crisis and began insuring doctors in Alaska at the invitation of the Alaska State Medical Association in 1977-78 when there was a shortage of insurance companies willing to insure doctors there and practically all of them had no choice but the state-run program. Some of the doctors in the medical association wanted an alternative. We have insured doctors consistently

since 1978. I believe we now have just under 50 percent - roughly the same size that Mr. Hinderberger described on behalf of NORCAL.

He emphasized that MIEC is physician-owned and does not seek a profit from being in the insurance business and tries to keep rates as low as possible. He strongly supported the \$250,000 cap on non-economic damages saying, "Chiefly the \$250,000 cap seems to stabilize situations in malpractice costs more than anything else that we can identify...."

MR. NEUPAUER said the average malpractice premiums paid by doctors in California are less than half of what they are in the five highest-cost states according to a comparative rate survey.

Alaska rates are more volatile because of the limited number of physicians who practice there and the occasional large verdicts and settlements that are made. That volatility, I think, has something to do, perhaps, with the decision of other insurance companies to withdraw from the market in the last few years. But that situation has occurred before, but I think this time it's more acute. The stakes seem to be higher. We're committed to stay with the physicians who choose to insure with us in Alaska, but obviously we have to charge the rates that our actuaries say are necessary in the environment we find ourselves. Those rates in Alaska, of late, have been going up a bit.

SENATOR FRENCH asked if he had any specific examples of large awards in Alaska recently.

MR. NEUPAUER replied that his company hadn't experienced any in its policyholder base. However, less than 5 percent of all malpractice claims end up in a verdict through court action. Some are settled. Most are dropped, sometimes with substantial legal expense. Those that go to verdict act as sort of the bellwether for settlement negotiations in other cases that have to be settled. He hastened to add that they have had substantial settlements.

MR. MIKE HAUGEN, Executive Director, Alaska Physicians and Surgeons, said he wanted to explain where the malpractice premiums go.

I think it's important for the members to understand just how the tort system and medical malpractice

works.... Over 60 percent of the malpractice claims are actually dropped or dismissed. Most people don't know that. About another 32 percent of claims are settled.

SENATOR FRENCH interrupted to ask if this is nationwide or here in Alaska.

MR. HAUGEN replied:

This is nationwide. The 61 percent that are actually dropped or dismissed still cost the defendant in defense costs about \$16,000 per claim. Those that are settled cost about \$40,000 per claim. Only 7 percent of claims that are actually filed make it to trial. In six out of those seven, the defendant actually wins, the doctor wins, but those on average cost about \$85,000 per claim. So, you add up the numbers of claims that are filed and this turns into some real money. Only about 20 percent of every tort dollar actually goes to the plaintiff if they win. Approximately 58 percent of every tort dollar never goes to the plaintiff. It pays for defense attorney costs or plaintiff attorney costs or expert witnesses or administrative costs. It's an extremely inefficient system. In the time period of 1995 through 1997, 36 percent of plaintiff verdicts were for over \$1 million. By 2000-2001, that percentage had gone up to 54 percent for over \$1 million. The tort system in this country costs all of us over 2 percent of GDP (gross domestic product). That number is expected to go up to 2.4 percent next year.

Now, with all this money in the system and the increase in the amount of the claims, you'd think that doctors are committing more malpractice. Well, it turns out that the frequency of malpractice claims has actually decreased over the last 10 or 12 years. On average, in 1990, there were about 30 claims per 1,000 physicians. In 2002, that number had actually gone to about 24 claims per 1,000 physicians. During that same time period, the mortality rates for things like heart disease went down 20 percent, cancers went down 7 percent, stroke went down 8 percent and child mortality went down 25 percent.

Research has shown that the medical malpractice liability crisis is actually causing doctors to practice what's known as defensive medicine. In other studies, three out of four doctors have actually admitted to doing this. They order more tests; they practice more conservative medicine. They refuse to do riskier procedures. The [2002 study] estimates that adds between 5 and 9 percent to the total healthcare costs in this country. And when you turn that into dollars, they estimate that's between \$60 billion and \$108 billion in additional defensive medicine costs.

The question is do non-economic caps actually help with patient access to physicians, as has been alluded to previously, in states that have instituted non-economic damage caps. Studies have concluded that on average they have 12 percent more physicians per capita than states that don't. In addition, premiums in the states with caps are on average 17 percent lower than the states without caps. In California, which has been referenced several times, MICRA, their tort reform legislation, between the years 1975, when it was introduced, and the year 2001, their premiums did go up. They went up 182 percent over that 25-year period, but nationally, on average, they went up 569 percent. The idea of insurance reform in California has been brought up actually in many states that are looking at this idea as maybe the real reason why California was successful.

I'd like to read you very quickly the AMA's response to that. Question: What about those who suggest California insurance market is stable because of Proposition 103, not the '75 MICRA law? The truth is Proposition 103 had very little to do with medical liability insurance. Since 1975, California's medical liability reforms have been responsible for protecting California's patients and keeping the insurance market stable. Prop 103 was passed in 1988, thirteen years later, to address mainly auto insurance issues. Prop 103 does not prohibit insurers from raising rates. It says that if an insurer wants to raise rates by more than 15 percent, there must be public hearings. That's only happened once and the request was recalled by the insurer after the public objected. Anyone who tells you Proposition 103 is the reason for California's

successful medical liability reform is not dealing with the facts. I'll just leave it at that.

CHAIR BUNDE noted that the time was late and the bill would come before the committee again. There being no further business to come before the committee, he adjourned the meeting at 3:33 p.m.

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