**Andrew Bederman HB 113 -Cover- Speech- Photos.pdf**
Uploaded by: Andrew Bederman
Position: FAV

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February 17, 2025

Luke H. Clippinger, Esq.
Chairman, House Judiciary Committee
Taylor House Office Building, Room 101
6 Bladen St., Annapolis, MD 21401

**RE: HB 113**

Dear Chairman Clippinger:

I plan to testify in person in support of HB 113 on February 19 at 1:00 PM.

Attached please find my written testimony submission which includes photos of my client's horrible injuries.

I will also email all members of the Committee videos of the explosion and of my client immediately thereafter.

I urge the Committee to issue a favorable report for HB 113.

Thank you.

Very Truly Yours,

Andrew E. Bederman

On March 4, 2022, a poorly trained maintenance worker was performing plumbing repairs in the basement of the Friendly Garden Apartments in the 2400 block of Lyttonsville Road in Silver Spring. The worker negligently severed a gas line, which caused the basement to fill with dangerous, explosive gas. Later that morning, the gas ignited and exploded.

At the time of the explosion, Jane Doe, a 60-year-old grandmother, was sitting in her daughter's apartment at Friendly Gardens, waiting for her daughter and grandchildren to return. When the gas ignited, the apartment building was destroyed, with Doe still inside her daughter's apartment.

Concussed but fortunate to survive, Doe was taken by ambulance to the Burn Unit at Washington Hospital Center. When she woke up, she learned that she had suffered second and third-degree burns to most of her body, including her scalp, face, eyelids, wrists, hands, neck, arms, shoulders, and legs. She had to breathe through a tube because the searing heat from the explosion had burned her airway, making it hard to breathe on her own.

Over the next several months, Doe endured more than a dozen surgeries, including skin grafts to her arms, legs, shoulders and face. Her eyes and eyelids were so damaged by the fire that her eyesight was impaired and she could not close her eyes to sleep. She had muscle contractures in her hands, limiting her strength and range of motion. On April 15, 2022, a finger on her left hand was amputated because it could not be saved.

Doe was discharged from the hospital on May 26, 2022, but her nightmarish ordeal did not end then. She spent many, many months in and at the hospital for multiple scar revision procedures, occupational and physical therapy sessions, and treatments for ocular, pulmonary, and cardiovascular injuries that she suffered due to the gas explosion.

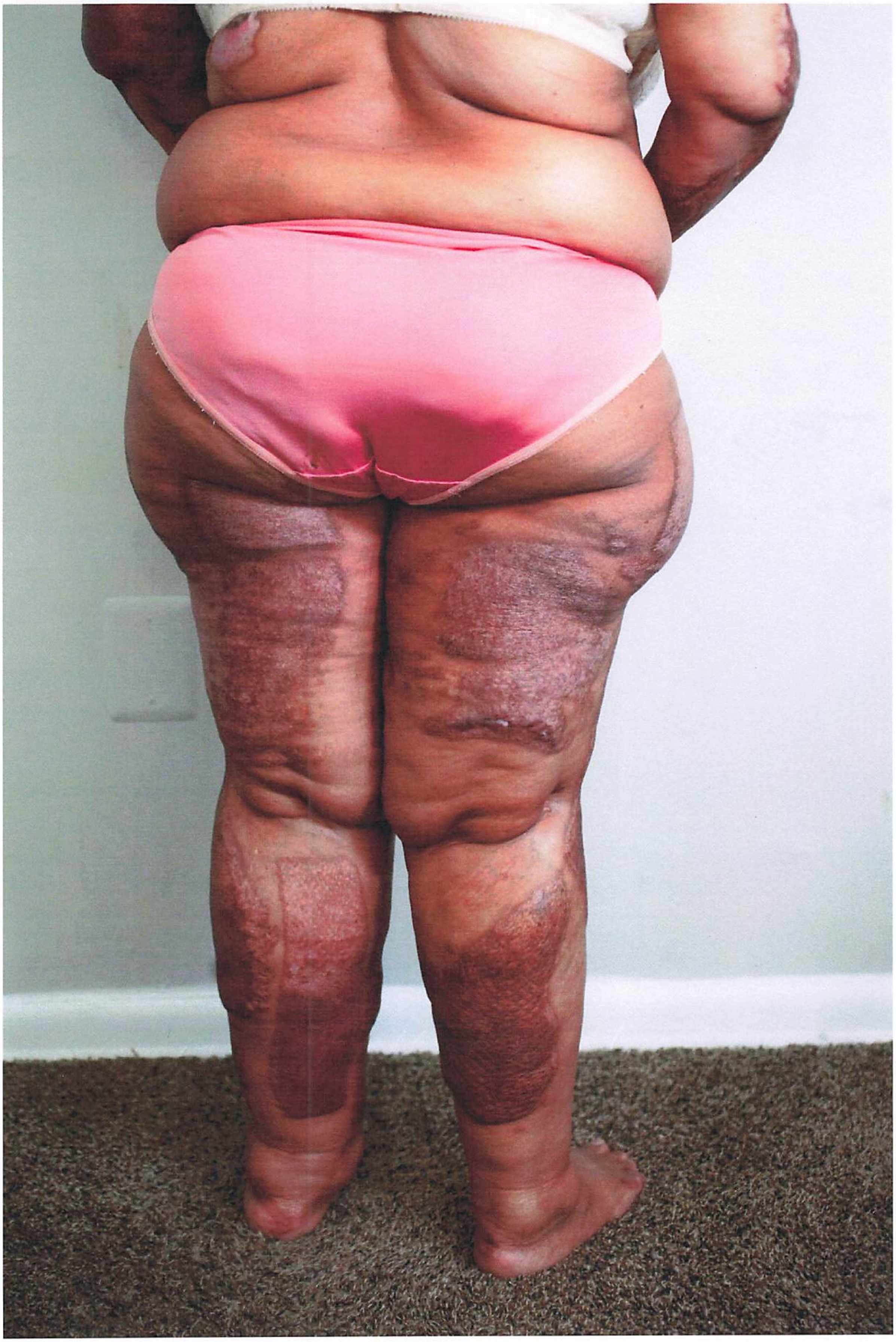
Doe has incurred more than $3 million in medical expenses to date, and her future medical, surgical, rehabilitation, and life care needs are estimated to be approximately $10 million.

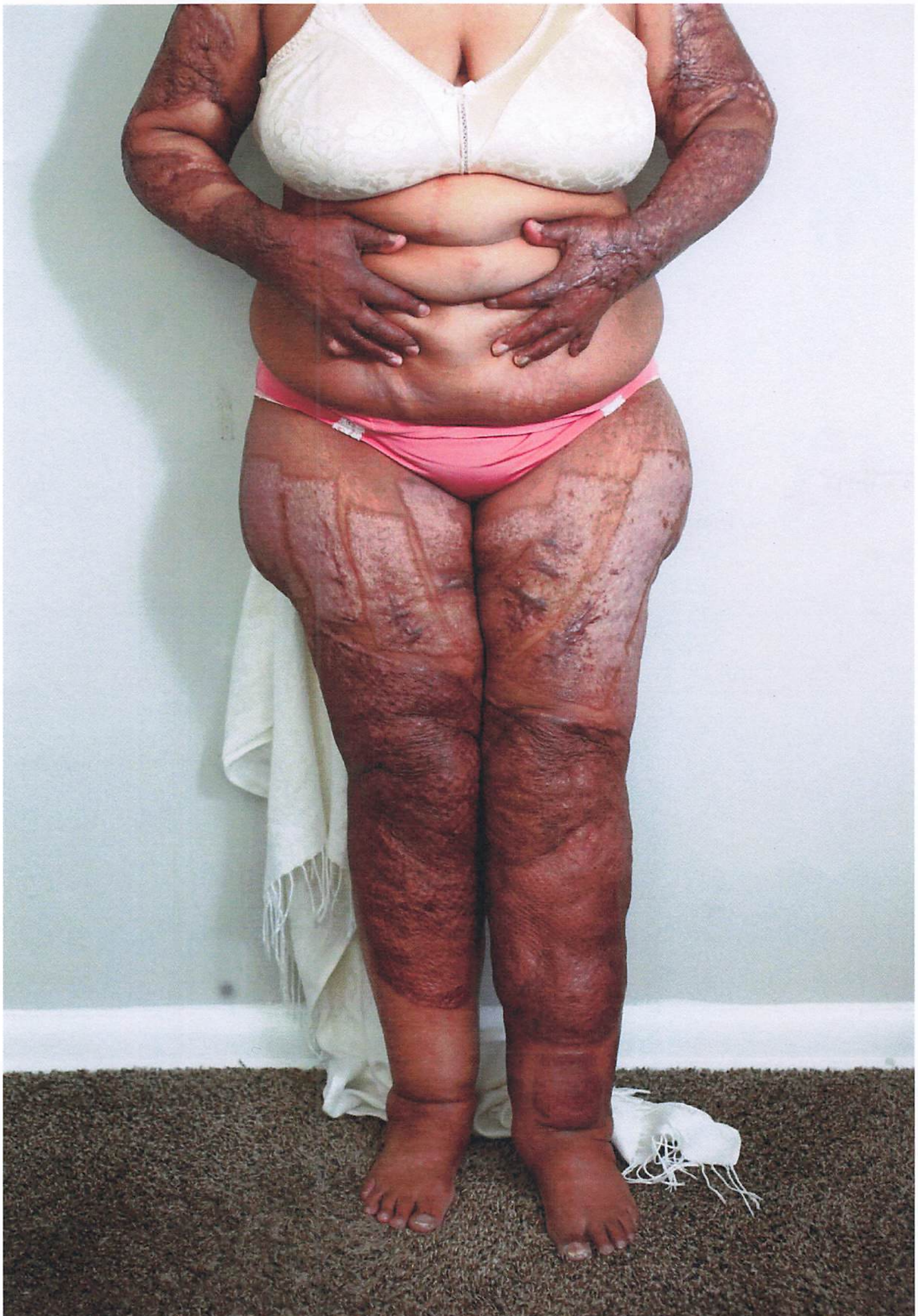
Doe's life was changed irrevocably on March 4, 2022. Although the Friendly Garden Apartments have ample insurance coverage, Maryland law arbitrarily and unfairly limits to $935,000.00 what Doe can recover as compensation for her persistent pain, anguish, disfigurement, and loss of enjoyment of the life she once had – the life that she would still be living, but for the unreasonably unsafe conduct of a poorly-trained maintenance worker.

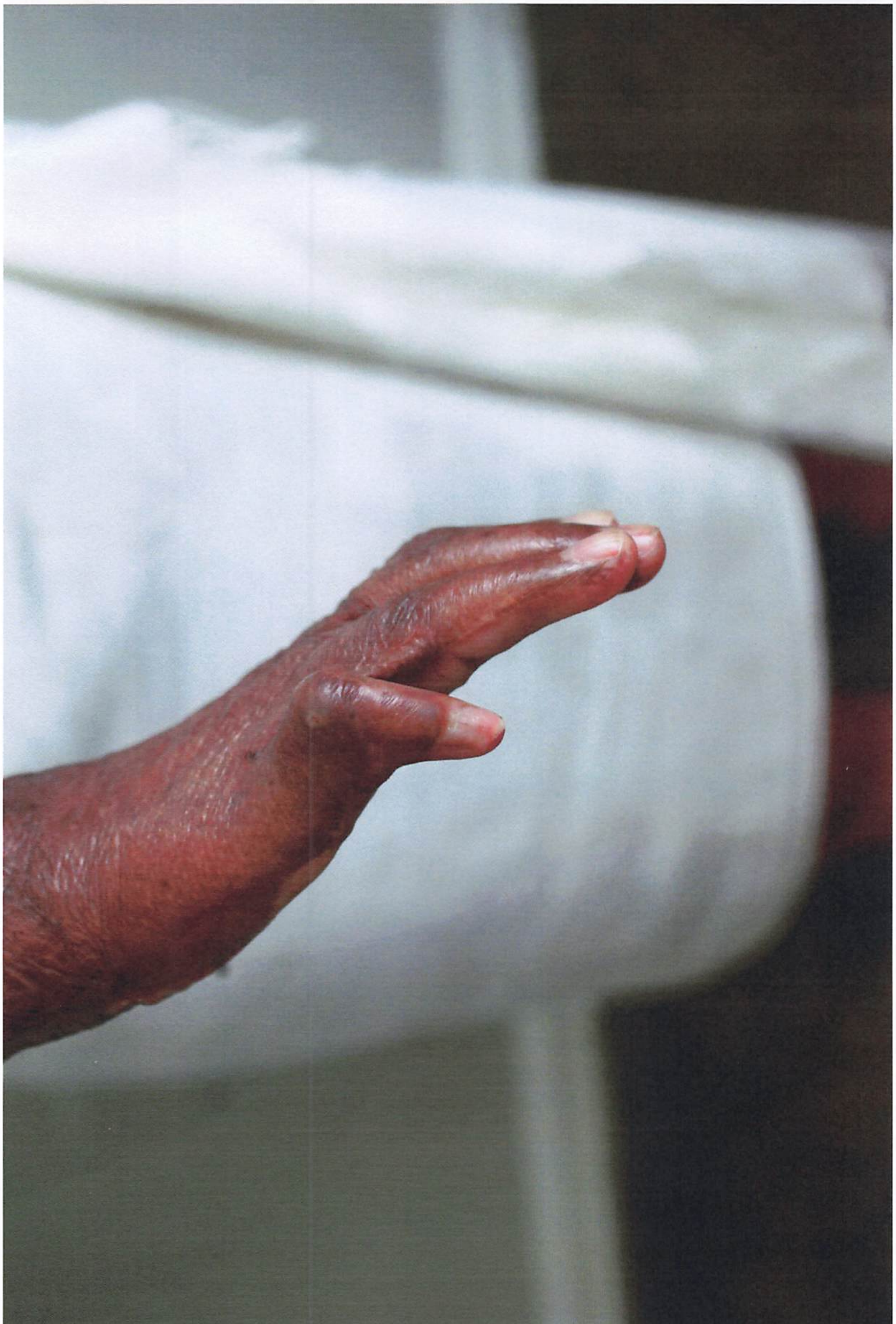
If the incident had happened just 2.0 miles away, in Washington DC, the law would not limit Doe's compensation unfairly. Maryland law should not limit fair and just compensation for injured Marylanders.

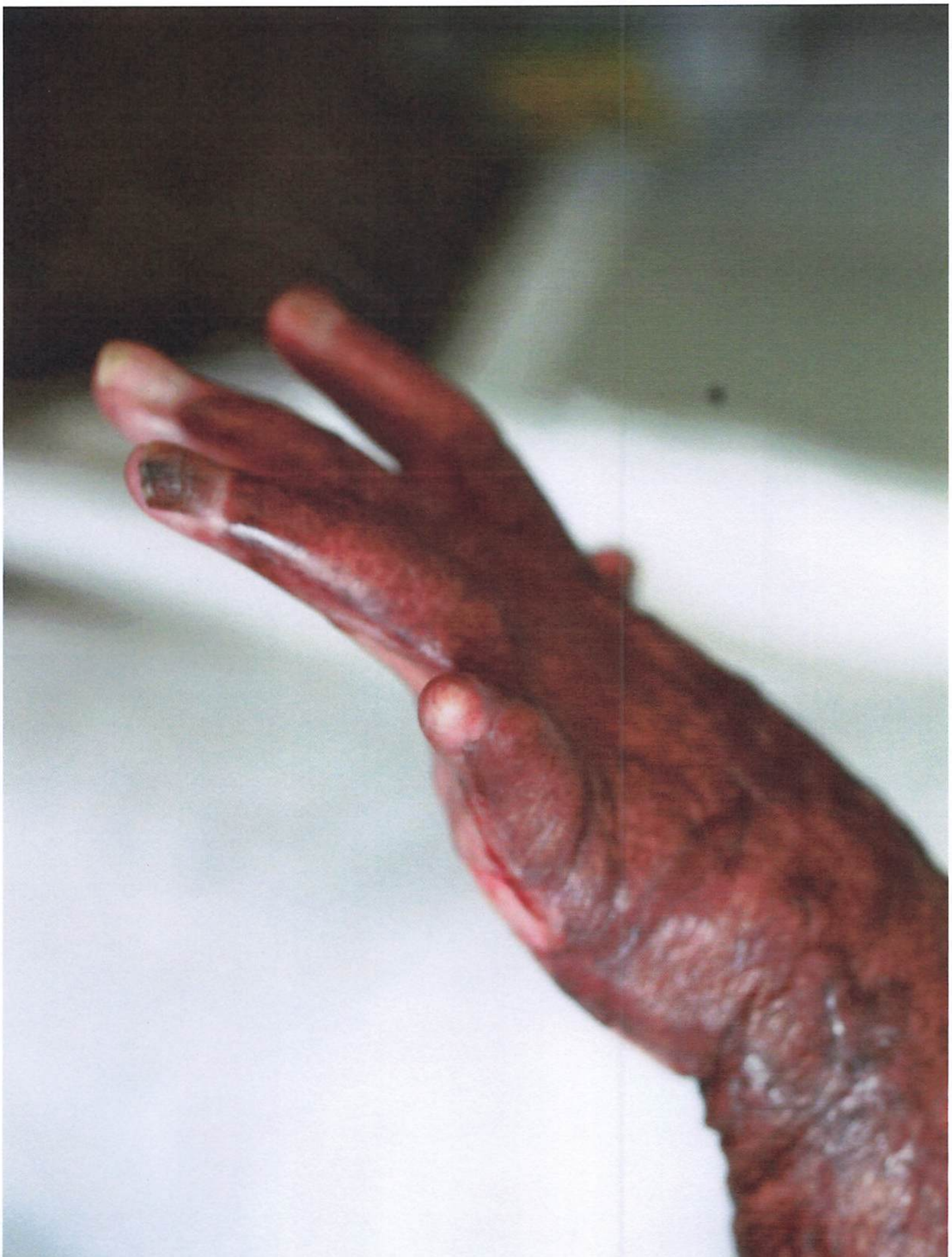
I invited my client to attend the Hearing today but she understandably declined. She is too embarrassed by, and self-conscious about, her horrible disfigurement which is shown in the attached photographs.

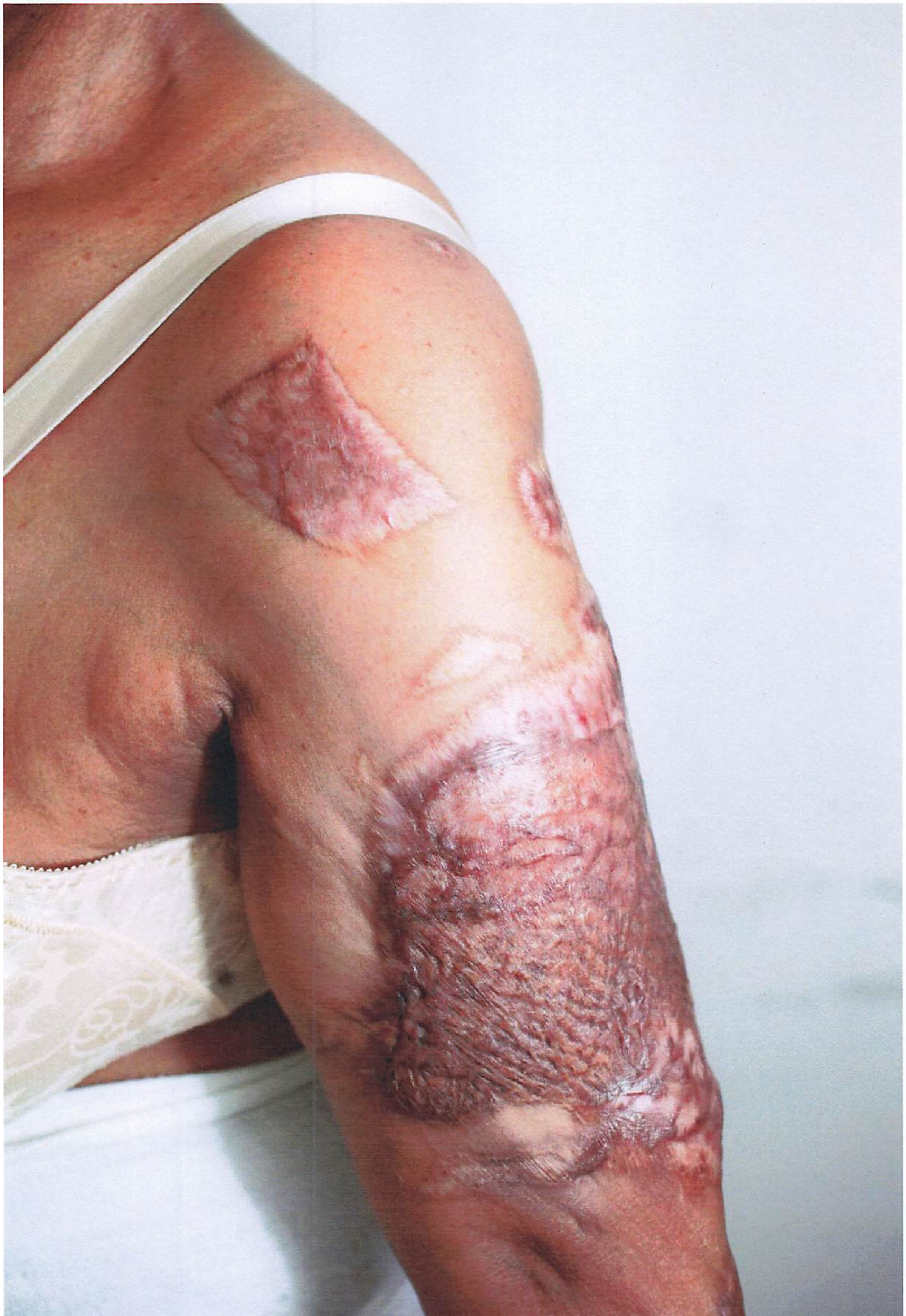
I urge this Committee to issue a favorable report for House Bill 113.

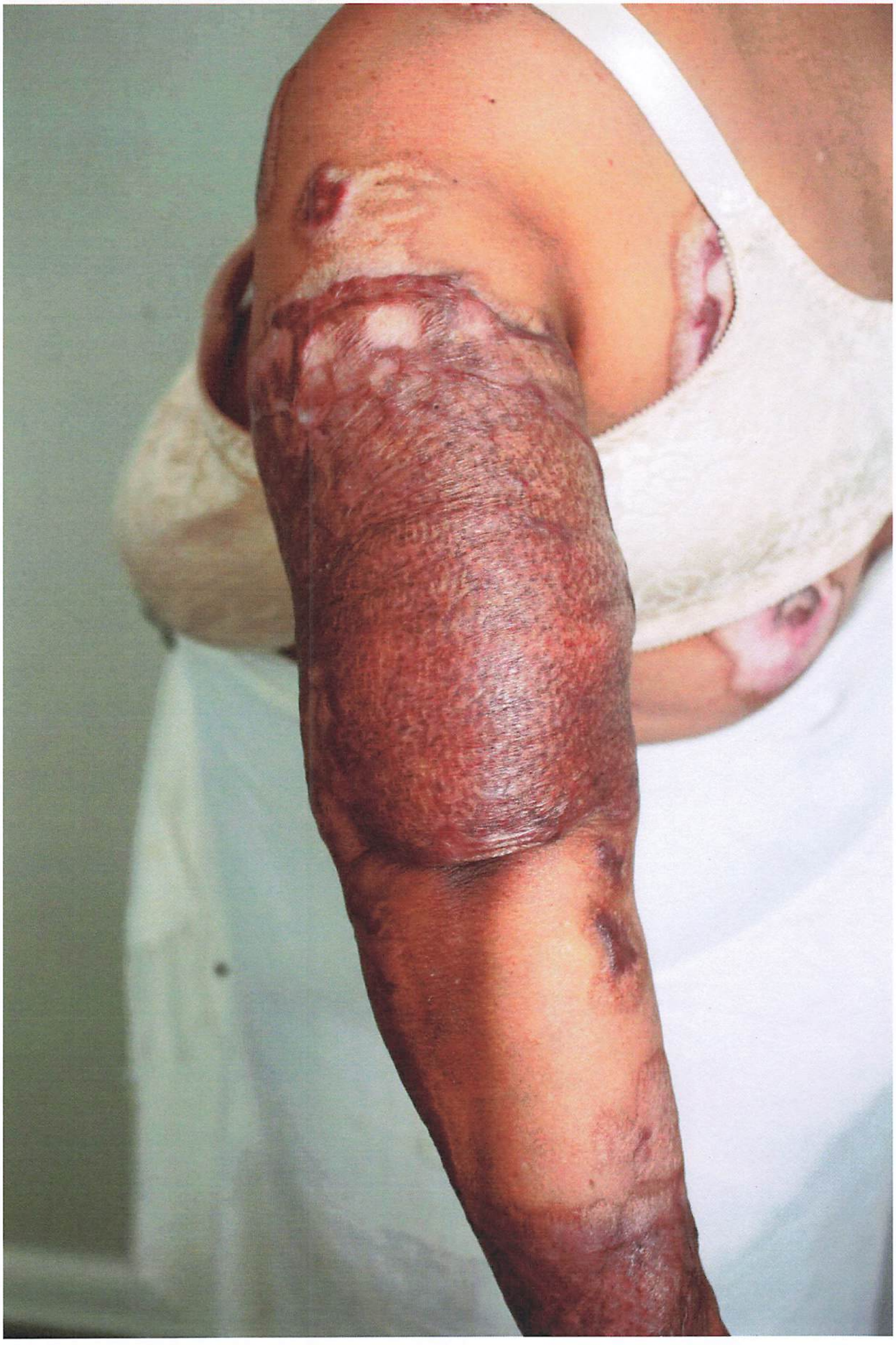


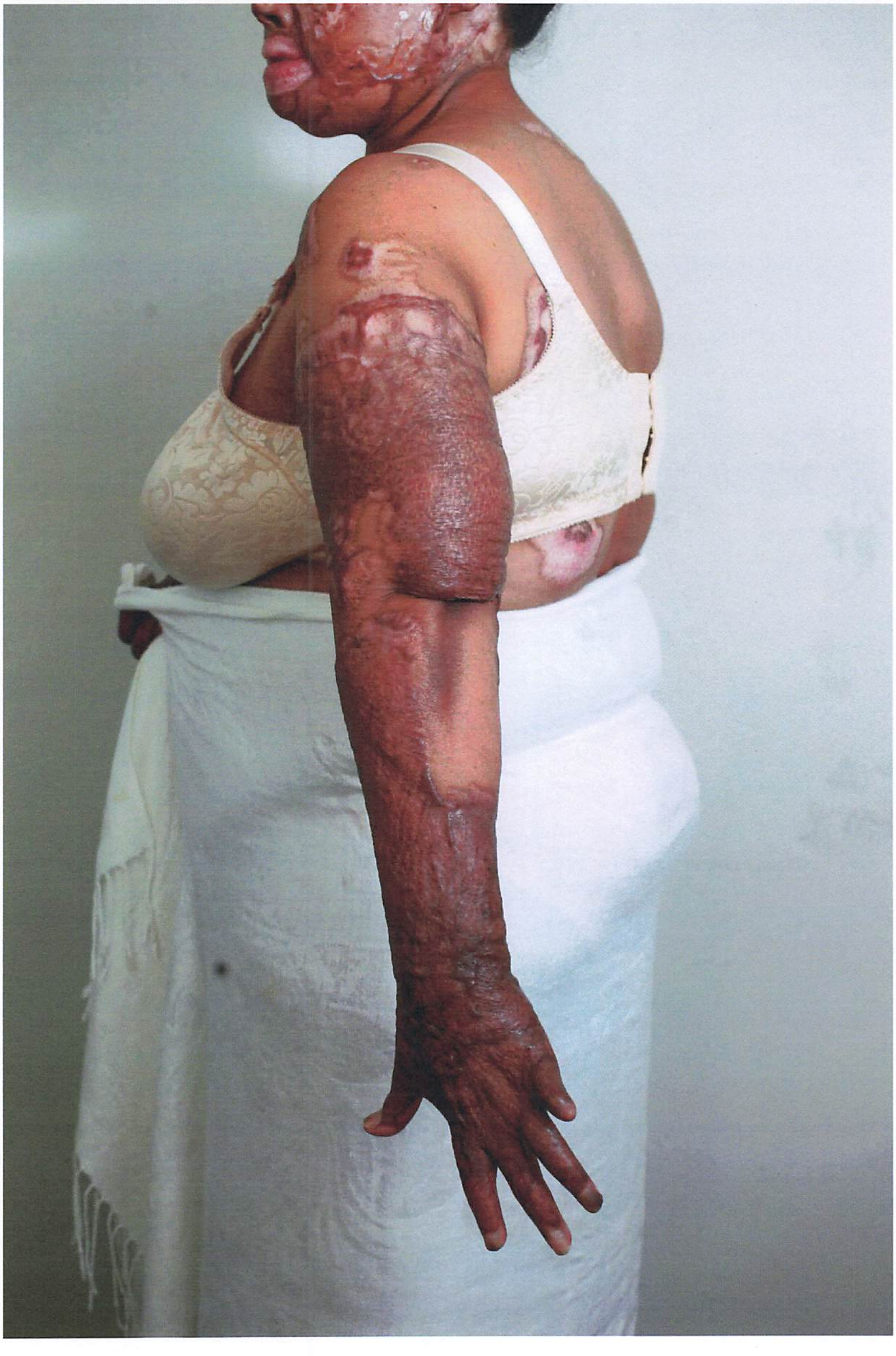


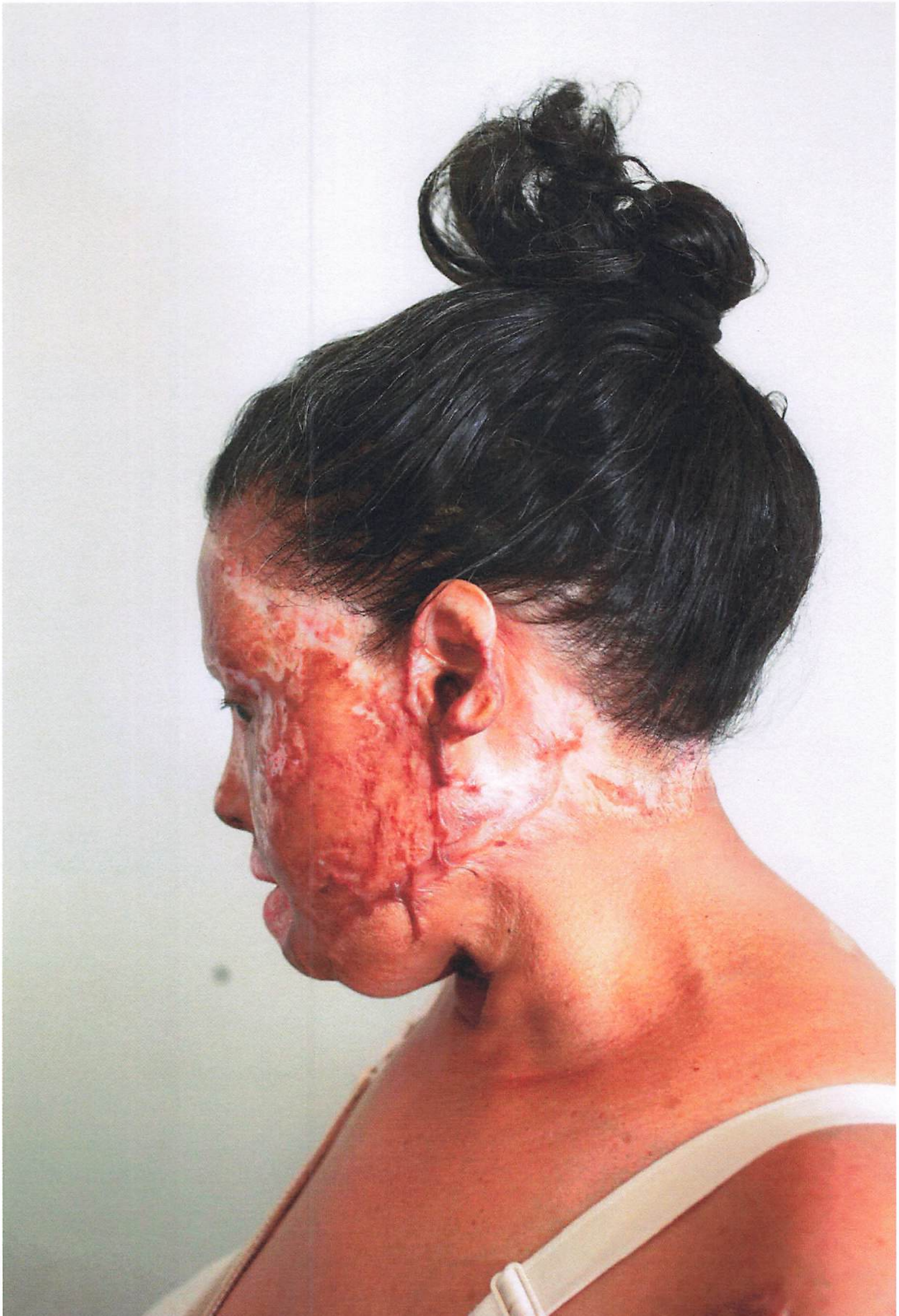












**Written Testimony, Caps, JUD, CSN.pdf**
Uploaded by: Christopher Norman
Position: FAV

Members of the Maryland House of Delegates,
Judiciary Committee

**RE: Favorable Support of HB113**
**Repeal of the 11-108 Cap**

Dear Chairman Clippinger and Members of the House Judiciary Committee:

I am a registered Republican. I am also a husband, father, lifelong Marylander, and third-generation small business owner. I am writing to strongly urge a favorable report on HB113, which would repeal an ill-conceived, antiquated (passed nearly four decades ago, in 1986), fear-driven piece of legislation which serves only to deprive injured Marylanders of just compensation when they are severely injured as a result of proven negligence.

Just as the 2nd Amendment to the United States Constitution protects the rights of Americans to bear arms, the 8th Amendment to the Constitution protects the rights of Americans to the right to a trial by jury in a civil case. The 2nd Amendment is not limited to the liability phase of a civil claim, but encompasses all aspects of those claims, including negligence, causation, and damages. **Both of these rights (the 2nd and 8th Amendment), which stand on equal constitutional footing, *shall not be infringed***. Similarly, Article 23 of the Maryland Constitution guarantees Marylanders the same right to a trial by jury in a civil case. As conservatives, we must not pick and choose which constitutional rights we decide to fight to uphold, or the proverbial slope will become progressively more slippery, undermining the foundational rights that fortify our democracy.

As a third-generation small business owner, I am understanding of other small business owners who fear that repealing this "cap" may have an adverse effect on their businesses. Simply put, those fears are unfounded, **unsubstantiated by data**, and are nothing more than the product of fearmongering by those who stand to gain by limiting Marylanders' Constitutional rights to a full measure of justice. The rare instances where unreasonably unsafe conduct severely injures innocent Maryland citizens do not drive the cost of doing business in our State. Rather, the biggest dangers to business owners in Maryland are suffocating taxes and regulations which have made it progressively more difficult to run a viable small business in our State. Only nine other states in the Country have such caps, and the vast majority of the most business-friendly, conservative states in the union have no such caps (ex: Texas, Florida, etc.).

Not only is this "cap" unnecessary to protect small businesses, but it is un-American and is inconsistent with true conservative values. I strongly urge a favorable vote on HB113.

Sincerely,

Christopher S. Norman

Christopher S. Norman

# Favorable on HB 113-Wright.pdf
Uploaded by: Christopher Wright
Position: FAV

# *ILIFF, MEREDITH, WILDBERGER & BRENNAN, P.C.*

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**Christopher D. Wright**


February 17, 2025

**VIA ELECTRONIC SUBMISSION**
Delegate Luke H. Clippinger, Esq.
Taylor House Office Building, Room 101
6 Bladen Street
Annapolis, Maryland 21401

Re: Adoption of House Bill 113

Dear Chairman Clippinger and Members of the House Judiciary Committee:

Thank you for allowing me the opportunity to express my support of House Bill 113 and ask for a favorable report. I am a resident of Anne Arundel County and have been a practicing attorney for over seventeen years. I began my legal career working for Peter Angelos, where I had the privilege of representing victims of various types of negligence, including personal injury, groundwater contamination, asbestos exposure and products liability. I was fortunate enough to spend over a decade working closely with Mr. Angelos and he instilled a passion in me to stand up for the "little guy."

In thinking about why this Bill is so important, I was reminded of my first case as a lead trial attorney. The case involved a man in his early thirties, Adam Rutkowski, who had moved into an upscale home in Calvert County, Maryland with his wife and their two young children. They were the second owners of the home that had been constructed several years earlier. The home had sliding glass doors in the kitchen on the main level, but because no deck had been constructed, there was a wooden railing/barrier attached to the home from the outside. Because of the landscape of lot and the design of the home, there was a drop of approximately twelve feet to the concrete pavers below. One morning while cleaning the home in preparation for a visit from Mr. Rutkowski's in-laws, he opened the sliding glass doors and gently leaned on the railing to shake off a small rug that had been in front of the kitchen sink. Unexpectedly, the railing detached from the home, causing Mr. Rutkowski to fall twelve feet to the concrete below and suffer serious injuries to his arms, upper body, ribs and head. Mr. Rutkowski was airlifted to a nearby hospital and suffered a seizure while in the helicopter. Fortunately for Mr. Rutkowski and his family, he was discharged from the hospital several weeks later, his broken bones healed and he was able to return to work a few months later. Unfortunately, he continued to suffer cognitive issues from his mild traumatic brain injury caused by the fall. Mr. Rutkowski did his best to continue working and there was never any claim made for lost wages or lost earning capacity. However, Mr. Rutkowski incurred significant past medical bills, would require some additional treatments and medication in the future, and suffered "non-economic" damages for the trauma he endured and would endure for the rest of his life.

It was later discovered that the railing had been attached to the outside of the home with very thin "finishing nails," and that the contractor forgot to use screws or lag bolts to properly attach the railing to the home. Because of the non-economic damages cap, $740,000 at the time, there was very little interest in settlement discussions on the part of the Defendants (which included the builder and the contractor) and the case was ultimately heard by a Calvert County jury for a week. The jury ultimately found that Mr. Rutkowski was not negligent and that the Defendant was negligent, and awarded a total verdict of $1,306,700, which included past medical charges of $80,700, future medical charges of $126,000, and non-economic damage awards of $900,000 to Mr. Rutkowski and $200,000 to Mrs. Rutkowski for her loss of consortium claim. After the jurors were dismissed and thanked for their service, the Defendant filed several motions, one of which was to reduce the non-economic damages to the "cap," and Mr. Rutkowski's non-economic damages award was reduced to $600,000, and Mrs. Rutkowski's non-economic damages award was reduced to $140,000. The Defendant also filed a motion for remittur asking the trial judge to reduce the non-economic damages award, arguing that it was excessive. This motion was denied. The six citizens of Calvert County, who spent a week listening to all of the evidence and awarding what they all agreed was just compensation, were never told that their verdict was reduced due to the laws in place.

The case was later appealed to the then Court of Special Appeals, and the reduced award was ultimately upheld in a reported opinion, *Marrick Homes LLC* v. *Rutkowski*, 161 A. 3d 53 (Md. 2017). I believe that this case is important for the committee to consider for several reasons. The first is that the cap on non-economic damages leads to less settlements and puts more strain on our court systems. The second is to show that the elimination of this arbitrary cap on damages would allow victims and jurors to properly exercise their Constitutional rights. The third is that if the arbitrary cap were removed, our elected judges who preside over these jury trials still have a right to reduce any award s that her or she deems excessive. The vast majority of personal injury cases are not catastrophic cases that would lead to very large unanimous jury awards.

Thank you for taking the time to read the Rutkowskis' story; I strongly urge you to pass House Bill 113.

Very truly yours,

Christopher D. Wright

**HB 113 -- FAV.pdf**
Uploaded by: George Tolley
Position: FAV

**Written Testimony of George S. Tolley III, Esq.**

**HB 113 Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death (cross-filed with SB 584)**

**FAVORABLE**

Dear Chairman Clippinger and Members of the House Judiciary Committee:

I respectfully ask for a **FAVORABLE** report on **House Bill 113**, which would repeal Md. Cts. & Jud. Procs. Code § 11-108, the cap on non-economic damages applicable to personal injury and wrongful death actions.

When innocent Marylanders suffer catastrophic injuries due to negligence, § 11-108 deprives them of fair compensation, determined by a jury of their peers after a fair and impartial trial. When a Maryland family loses a loved one to negligence, § 11-108 deprives that family of compensation for the harms done to them.

Eliminating the § 11-108 cap will make Maryland safer by increasing the deterrent effect of the tort law in our State. Tort law exists to compensate the victims of unreasonably unsafe conduct, and also to deter negligent conduct that would produce more injuries.

Moreover, HB 113 does not affect the cap in medical malpractice cases (which is found in § 3-2A-09), nor the damages caps applicable to the State or Local Governments or Boards of Education. Those caps will remain unchanged by HB 113.

The § 11-108 cap is arbitrary, unjust, and unfair. It must be repealed.

**The arbitrary § 11-108 cap has outlived its usefulness (assuming it was ever useful)**

The § 11-108 cap was enacted in 1986 in response to a perceived nationwide "crisis" in the availability and affordability of property and casualty insurance. A small number of state legislatures, including Maryland's General Assembly, enacted permanent caps on noneconomic damages in personal injury actions.

***The 1980s "crisis" was only temporary***. Across the country – in states with and without caps – the "crisis" ended, and property and casualty insurance industry returned to profitability. The § 11-108 cap doesn't keep insurance markets stable, because stable markets exist in states without caps.

Some states, including Arizona, Arkansas, Kentucky and Wyoming, have state constitutions that forbid damages caps altogether. In 1891, Kentucky added this language to its Constitution:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

Ky. Const. § 54. *See also* Ariz. Const., art. 2, § 31; Ark. Const, art. 5, § 32; Wyo. Const., art. 10, § 4(a). Obviously, these states have never had a § 11-108 cap, because caps are not allowed. Without caps, the 1980s "crisis" also ended in those jurisdictions, just like it did in Maryland.

**The arbitrary § 11-108 cap has no effect on *<u>verdicts</u>*, because juries are never told about the cap**

The opponents of HB 113 claim that repealing the § 11-108 cap will result in larger jury verdicts in Maryland. But that cannot be true: Since 1989, Maryland law has forbidden courts from telling juries anything about the § 11-108 cap. In Maryland, juries deliberate, and reach unanimous verdicts, without ever hearing any information about caps.

If the § 11-108 cap were repealed, juries would get the same information about caps on damages that juries get today – no information at all. Jury verdicts would continue to be based on the evidence presented at trial, without later being reduced to an arbitrary number.

**Repealing the arbitrary § 11-108 cap will not cause insurance rates to skyrocket**

As noted above, many states have no cap on non-economic damages like § 11-108. Those states without a § 11-108 cap are, nevertheless, growing their state economies much faster than Maryland.

Indeed, some states like Arizona, Arkansas, Kentucky and Wyoming forbid caps in their state constitutions. If having a cap like § 11-108 was so essential to a strong state economy – or to stable and affordable insurance markets – those states would have repealed those constitutional provisions and followed Maryland's example many years ago.

The fact is that, despite nearly four decades of § 11-108, even the opponents of HB 113 admit that Maryland's economy ranks no. 49 in job growth and no. 44 in new business applications since 2019. The § 11-108 cap is not helping Maryland's economy; if anything, the cap makes things worse.

**I ask for a FAVORABLE report on House Bill 113**. Thank you for your consideration.

**LTR Chair Judiciary TESTIMONT HB 0311 copy.pdf**
Uploaded by: John Breen
Position: FAV

Attorney John Williiam Breen Jr

3214 Chrisland  Dr

Annapolis, MD 21403

Email AttyJohnwbreenJr@gmail.com   701 471 0623

February 17, 2025

Re. Testimony HB 0113

NonEconomic Damages Personal Injury and Death Wrongful Death

Chairnan Luke Clippinger and Members

Judiciary Committee

Annapolis MD 21401

Chairman Luke Clippinger and Members

I am an attorney in Annapolis and have been admitted to 5 state bars.

There are only 9 state which have caps on noneconomic damage awards in personal injury and wrongful death matters. Neither Virginia or the District of Columbia have such a cap on noneconomic damages,   Please support this bill and allow your constituents to hold an equal standing in Maryland courts.

Please vote favorably to support this bill and allow it to be decided by the full membership of the both the  Maryland House and Senate

Very Truly yours

John W. Breen Jr John W Breen

**Cap repeal support letter.pdf**
Uploaded by: Michael Winkelman
Position: FAV

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February 17, 2025

Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
Annapolis, Maryland 21401

**Re: <u>HB 113 - Civil Actions - Noneconomic Damages</u>**

Dear Chairman Clippinger, Vice Chair Bartlett and Judiciary Committee Members:

I write to urge a FAVORABLE report on HB 113, which would restore constitutional protections to Maryland citizens.

The Constitution guarantees the right to a jury trial in civil cases. The Constitution provides a jury of one's peers as the appropriate entity to determine both liability and compensation for resulting injuries. 40 years ago, the Maryland legislature usurped this Constitutional right from juries, and passed legislation which provides legislators, who do not hear the evidence in any case, are better suited to determine damages than juries. I ask that you return the rights guaranteed in our Constitution to juries, rather than perpetuate the government over-reach into our legal system.

Thank you.

Sincerely,

Michael J. Winkelman

## SB 584- HB 113 - Caps Written Testimony - MAJ (001

Uploaded by: Patrice Clarke

Position: FAV

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**Patrice Meredith Clarke, Esq.**
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**February 17, 2025**

**SB584/HB113**
**Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death**
**FAVORABLE**

I respectfully request a favorable report on House Bill 113. The United States Constitution and the Maryland Declaration of Rights both protect the rights of individuals to seek justice by presenting civil cases to juries of their peers. In personal injury cases, when juries reach a ***unanimous*** decision that one party has negligently caused injury to another, it is the jury's duty to ***unanimously*** determine an amount that fairly and adequately compensates the injured party. Juries spend enormous amounts of time and energy listening to the facts of each case and determining the appropriate amount of compensation, if any. The cap on non-economic damages is arbitrary and amounts to the Government substituting its judgment for that of the Maryland Citizens who hear and decide the case. ***The Government should not usurp the role of the people***.

Moreover, the arbitrary cap on noneconomic damages does nothing to increase the "availability and affordability" of insurance in Maryland. Nor does it attract businesses to Maryland or increase job creation. The cap harms individual Maryland Citizens while insulating corporations from negligent actions.

The Center for Justice & Democracy ("CJ&D") has extensively studied whether caps truly affect insurance rates. The CJ&D's 2024 Update is attached hereto as Exhibit 1. Among other things, the Update reveals that "tort law limits do not lower insurance premiums; states with little or no tort law restrictions experience the same level of insurance rates as those states that enact severe restrictions on victims' rights."

The CJ&D Update cites to a 2023 article published in the Review of Law and Economics entitled "The Dark Side of Insurance" attached hereto as Exhibit 2. The article explains that "empirical studies reveal ***premium increases*** after states enact damage caps" specifically stating: "***in Maryland***, Missouri, and other states, insurers lobbied for damage caps claiming that they would reduce premiums. ***Ultimately, rates increased after legislature enacted reforms.***" Exhibit 2 at p. 38 (emphasis added).

In short, there is no objective evidence to indicate that limiting the rights of Maryland citizens to receive compensation for harms caused by the negligent actions of others benefits the economy or Maryland's citizens. For these reasons I urge a favorable report on House Bill 113.

Very truly yours,

/s/ Patrice Meredith Clarke

Patrice Meredith Clarke, Esq.

PMC/

# EXHIBIT 1

CENTER FOR JUSTICE & DEMOCRACY
at NEW YORK LAW SCHOOL

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# LIMITING LAWSUITS ("TORT REFORM") WILL NOT LOWER INSURANCE PREMIUMS

## 2024 UPDATE

Four decades of data and experience show that when states try to solve insurance problems on the backs of harmed victims, stripping away their legal rights and blocking legitimate lawsuits, insurance premiums do not drop.

**Studies of insurance data have long shown that litigation does not drive insurance rate hikes. As a result, limiting lawsuits will not stop them.**

- Decades of studies examining insurance data from Americans for Insurance Reform (a project of the Center for Justice & Democracy) and the Consumer Federation of America show that tort law limits do not lower insurance premiums; states with little or no tort law restrictions experience the same level of insurance rates as those states that enact severe restrictions on victims' rights; and liability insurance crises are driven by factors other than "tort law cost explosions" as insurance companies claim, so their "tort reform" remedy always fails.[1]

- A recent study of the insurance industry's failure to use its economic clout to reduce harm (loss prevention) found that while "one would expect that caps [on damages] would reduce premiums for doctors-insureds as a consequence … this did not happen. …Indeed, empirical studies reveal premium increases after states enact damage caps."[2]

- A 2022 study found that the insurance market "seems, in important ways, to defy economic logic" because while caps "drive down insurance costs," insurance premiums "do not fall in parallel with costs." Instead, caps lead to "sustained supranormal profits."[3]

- As recently reported in the *Tampa Bay Times*, "Kenneth Klein, a former defense lawyer and professor at California Western School of Law, gave a presentation to the National Association of Insurance Commissioners [in 2022] about how there was a lack of evidence for litigation having a material effect on rising premiums."[4]

**Industry insiders have long admitted that "tort reform" will not bring down insurance rates.**

For example:[5]

- American Insurance Association says, "[T]he insurance industry never promised that tort reform would achieve specific premium savings."

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

- Victor Schwartz, General Counsel, American Tort Reform Association says, "[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and 'I've never said that in 30 years.'"[6]

**Lawsuits against insurance companies are not frivolous; policyholders are forced to go to court against insurers because they fail to pay legitimate claims.**

- According to the *Tampa Bay Times*, in Florida, for example, "insurers who dominate the market receive an outsize percentage of the nation's complaints, and one company has been accused by its own adjusters of manipulating reports to lowball or deny homeowners' claims." Said former state senator and now insurer Locke Burt, "I believe that an insurance company's litigation rate is directly related to how it handles its customers."[7]

- "In 2020, Florida Insurance Consumer Advocate Tasha Carter surveyed 7,000 people whose claims were represented by a lawyer. The survey found that 78% of them said they hired a lawyer because of a poor claims experience, either from their insurer delaying payments, denying payments or not offering enough money. Another 20% said they hired a lawyer based on advice from a contractor, a consultant or an insurance adjuster."[8]

**Insurers hide data which could disprove their position yet lawmakers never demand to see these data before stripping away victims' rights.**

It is unforgivable for public officials to strip away the legal rights of harmed individuals without obtaining basic insurance data, which can be opened up to public inspection. Yet that is exactly what is happening. Lawmakers considering whether to take away legal rights must first demand the following:

- Full "closed claims" studies for each insurer for at least a 10-year period, and continuing on an ongoing basis. The public must have access to this information.

- Frequency and severity trends for the industry and for each company, going back at least six years.

- Careful studies of reserves (including "Incurred But Not Reported" claims or IBNR) of all insurers within the state.[9]

- All recent rate filings, with full information, unrestricted by overbroad "trade secret" assertions.

## NOTES

[1] *See*, *e.g.*, J. Robert Hunter, Joanne Doroshow and Douglas Heller, Consumer Federation of America and Center for Justice & Democracy, *Inventing Social Inflation 2023* (2023), https://centerjd.org/content/inventing-social-inflation-2023; J. Robert Hunter, Joanne Doroshow and Douglas Heller, Consumer Federation of America and Center for Justice & Democracy, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation* (2020), https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation; J. Robert Hunter and Joanne Doroshow, Americans for Insurance Reform, *Premium Deceit 2016: The Failure of "Tort Reform" to Cut Insurance Prices* (2016), https://www.centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices; J. Robert Hunter and Joanne Doroshow, Center for Justice & Democracy, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices* (1999, 2002), http://centerjd.org/system/files/PremiumDeceit.pdf

[2] Ronen Avraham and Ariel Porat, "The Dark Side of Insurance," 19 *Review of Law & Economics* 13 (February 2023), https://www.degruyter.com/document/doi/10.1515/rle-2022-0054/html ("For instance, after Oklahoma passed insurer-supported damages caps, medical malpractice premium rates increased by 83 percent. Likewise, in Maryland, Missouri, and other states, insurers lobbied for damage caps claiming that they would reduce premiums. Ultimately, rates increased after legislature enacted reforms." [Although omitted here, citations for these facts can be found in many publications written by the Center for Justice & Democracy, such as "Caps Do *Not* Lower Insurance Premiums for Doctors," https://www.centerjd.org/sites/default/files/ckfinder/userfiles/files/CapsDontWorkF(1).pdf] "Other studies support this conclusion, finding that caps above $750,000 increase premiums substantially (Nelson et al. 2007))."

[3] Bernard S. Black, Jeffrey Traczynski and Victoria Udalova, "How Do Insurers Price Medical Malpractice Insurance?, IZA Institute of Labor Economics, Discussion Paper No. 15392 (June 2022), https://ssrn.com/abstract=4151271

[4] Lawrence Mower, "Florida leaders blame insurance crisis on lawsuits, but evidence is thin; Fighting lawsuits was Florida's response to the insurance crisis, but evidence hasn't materialized," *Tampa Bay Times*, October 19, 2023, https://www.tampabay.com/news/florida-politics/2023/10/19/florida-leaders-blame-insurance-crisis-lawsuits-evidence-is-thin/. *See* Ken Klein, "Unpacking 'Social Inflation,'" August 12, 2022, https://content.naic.org/sites/default/files/national_meeting/AttmtFive_Consumer_Social%20Inflation_kenklein.pdf (presentation during National Association of Insurance Commissioners Summer 2022 National Meeting).

[5] *See* Americans for Insurance Reform, "Industry Insiders Admit – And History Shows: Tort Reform Will Not Lower Insurance Rates" (2003), https://centerjd.org/air/pr/Quotes.pdf

[6] Ibid.

[7] Lawrence Mower, "Florida leaders blame insurance crisis on lawsuits, but evidence is thin; Fighting lawsuits was Florida's response to the insurance crisis, but evidence hasn't materialized," *Tampa Bay Times*, October 19, 2023, https://www.tampabay.com/news/florida-politics/2023/10/19/florida-leaders-blame-insurance-crisis-lawsuits-evidence-is-thin/

[8] Ibid.

[9] To understand IBNR and other insurance industry accounting tricks, *see* Center for Justice & Democracy, *Insurance: The Essential Guide to a Bewildering Industry* (2021), https://www.insurancefatcat.com/

# EXHIBIT 2

Ronen Avraham and Ariel Porat*

# The Dark Side of Insurance

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**Abstract:** When insurance works properly it provides insureds with optimal incentives to prevent losses, alongside coverage for losses that could not be prevented efficiently. But insurance has an overlooked dark side to it as well. Insurers employ various tactics to shift losses to their insureds or to their victims in order to minimize their own costs instead of reducing their insureds' losses. Worse, insurers might also act to increase or maintain long term risks, ensuring the future of the insurance business that can't exist without risks. We focus on the incentives of insurers to engage in anti-competitive practices and trigger harmful behaviors of their insureds or third parties, in order to increase demand for insurance coverage. Policymakers should be aware and critical of insurers' perverse incentives that counteract the interests of the insureds and society.

**Keywords:** insurance, regulation, risk

**JEL Classification:** G22, G28

## 1 Introduction

What do we think when we think about insurance? Many people think about protecting their family, about peace of mind in hard times, about financial security, defending against catastrophic loss, and other similarly bright features that insurance provides. This is all true. When insurance works properly it provides insureds with optimal incentives to prevent losses, alongside coverage for losses that could not be prevented efficiently.

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But insurance has an overlooked dark side to it as well. Insurers employ various tactics to shift losses to their insureds or to their victims. More troubling, however, is insurers' potential motivation, as a group, to increase or maintain long term risks in society in order to increase demand for their services. Whether insurers *intentionally* increase or maintain risks is not for us to judge. The goal of this article is to expose insurers' *potential* interest in increasing risks in society and point out some tactics employed by them which *could* serve this interest.

As mentioned in the article, over the years there were a few references to the idea that insurance companies profit from risks. Syverud, for example, suggested that both plaintiffs and insurers benefit from the expansion of liability insurance, and have a mutual interest in increasing it. Therefore, an increase in liability insurance gives rise to an increase in lawsuits. In fact, insurers need to keep the threat from lawsuits at a certain level, in order to keep selling liability insurance policies (Syverud 1994). In a more recent article, Hinloopen argues that insurers benefit from expensive damages, because it encourages people to buy policies and allows insurers to increase premium rates. Thus, they tend to turn to more expensive repair services–not in a collusive manner, but as a result of market reasoning (Hinloopen 2010). Hinloopen's approach received some media attention in the Netherlands.[1] It was even examined by the government Authority for Consumers and Markets, which eventually reached the conclusion that there was no violation of competition law.[2]

This Article is the first to focus on the dark side of insurance, put it in a theoretical framework and provide multiple examples for its existence. Let us begin by illustrating insurers' practices which result in increasing risks in society. Consider first Kidnap and Ransom (K&R) insurance. K&R is an insurance coverage plan that covers ransom payments for those who travel frequently and are thus at risk of getting kidnapped. But K&R insurance also has a dark side to it. Indeed, some commentators believe that the reason the market for K&R insurance has been increasing so vastly is because the mere existence of insurance fuels more kidnapping (as getting ransom money is easier when there is insurance in place), and more kidnapping increases the demand for insurance. The resulting 'collusive' cycle never ends; kidnappers profit from insurance and insurers profit from kidnapping. Consequently, as we later explain, there is also the risk that insurers employ tactics which increase, or at least maintain, K&R's risks in society.

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**1** *Schadesturing om Tarieven Hoog te Houden*, AUTOMOTIVE, https://automotive-online.nl/management/laatste-nieuws/schade/7395-lsquoschadesturing-om-tarieven-hoog-te-houdenrsquo (Last visited 07/25/2022).

**2** *NMa*: *Carglass® Houdt Zich Aan Mededingingswet*, CARGLASS, https://www.carglass.nl/over-ons/persberichten/p/r/nma-carglassr-houdt-zich-aan-mededingingswet/(LAST VISITED 07/25/2022).

And if K&R insurance seems like an esoteric insurance field consider cyber insurance, the 'new kid in the block' of insurance coverage. The U.S. cyber insurance market was $3.15 billion in 2019 and it is estimated to exceed $20 billion by 2025 (and these numbers understate coverage of cyber risk, because many cyber claims are filed under other policies) (Zhang 2021). One of the main losses cyber insurance covers is ransomware. Ransomware is a malicious software that locks and encrypts users' data until the user pays ransom to restore access. Ransomware attacks come in various forms, including encryption, spreading viruses, and presenting attackers as law enforcement, among others. Common to all is a ransom demand associated with the data takeover. Ransomware attacks surged 300% in 2020 alone, with the sums demanded in these attacks increasing by over 170% in just one year.

Like other types of insurance, cyber insurance has bright sides to it. Because ransomware is such a disruptive cybercrime that creates costly and unpredictable financial outcomes for companies, having insurance on your side can be very helpful. Insurers have special teams that negotiate and buy more time from the attackers while cyber experts try to neutralize the attack. Of course, insurers provide financial coverage in case these experts fail, covering loss of revenue, reputational loss, and more.

But cyber insurance also has dark sides to it. Ransom payments made by insurance companies fuel the vicious hacking cycle and help hackers fund more frequent and more sophisticated cyberattacks. This of course increases the demand for insurance so the result is that hackers profit from insurance and insurers profit from hacking. Again, this raises the concern that insurers might even take steps that increase, rather than decrease cyber risks in society.

The dark side of insurance goes even deeper than that. Insurance companies have incentives to collaborate in order to increase the level of harm and the probability of risks, so as to maximize profits Avraham and Gilo (2022). For example, insurance companies can use their lobbying power to block technological progress that threatens their bottom line. Consider the car insurance industry's reaction to autonomous cars. As is now well known, autonomous cars are expected to reduce fatal traffic accidents by 90 percent, causing the insurance industry's largest segment of coverage to shrink by an estimated 60% by 2050. Not surprisingly, commentators have observed that insurers have tried to slow down (if not completely stop) the progress. They have done so in various ways, from attempting to convince the public that autonomous cars are dangerous, to lobbying for more regulations that raise the barriers for entry to the industry.

These three examples belong to a list of phenomena that characterize what we call the "dark side of insurance." Indeed, we hold this truth to be self-evident that all insurers depend on the existence of risk to stay in businesses. In this Article, we show how insurers act on and protect their intrinsic interest to maintain or increase risk in the world.

Notably, insurers have an individual short-term interest in providing their insureds with incentives to reduce risks. But all insurers as a group have a long-term interest to provide all insureds with incentives *not* to reduce risks and sometimes even to increase them. In short, if we imagine that insurers could collectively control a knob that sets the level of risks in society, we claim that they have an interest to turn it a few notches above the socially optimal level, or at least to make sure it is turned to that point or merely not prevent it from being turned to that level. Bluntly put: a private, profit-driven industry has incentives to maximize its profits, even if that means externalizing costs onto others.

Indeed, we are concerned that insurers find ways to serve their long-term interests in increasing risks even though they have no direct access to a knob. For example, insurers have significant influence over directing laws and regulations that affect the industry, allowing their risk-prone attitude to have broader impact. Thus, insurers can collaborate through the National Association of Insurance Commissioners (NAIC),[3] advocating for the adoption of laws and regulations drafted by its subcommittees as proposals to legislators. Such activism raises concerns that insurers, through NAIC, would increase statewide risk if it serves their long-term interest. Metaphorically speaking, they might have access to the knob that affects the level of long-term risks in society and set it above the optimal point.

These issues comprise the first focus of this Article: insurers' long-term interest in increasing rather than reducing risks in society. The second issue of focus in the Article is insurers' interest in *shifting* rather than *reducing* short-term risks in society. While shifting risks typically results also in increasing risks in the long run, this latter effect is indirect and possibly unintentional.

The conventional wisdom is that insurers serve as private regulators of societal risks.[4] The baseline argument is that in order to reduce the insurers' liability, each insurer monitors its insureds' behavior to reduce the insureds' own losses, such as by providing them with a discounted premium in exchange for installing

**3** The NAIC is defined as a voluntary organization of insurance commissioners that "ensure[s] the solvency of insurers, protect[s] policyholders, and preserve[s] state regulation." (Talesh 2015).

**4** This has not always been the conventional wisdom. In the early days of modern insurance, the conventional wisdom among commentators was that insurance was problematic because it might facilitate insureds' moral hazard (Baker 1996).

smoke alarms.[5] And if all companies incentivize their insureds to reduce fire risk, the world becomes a safer place.

However, we argue that at least some of the time, the conventional wisdom confounds *loss-shifting* with *loss reduction*. In other words, while we agree that insurers exert effort to reduce their own *liability under the policy*, we notice that this reduction is not always done through real *reduction of losses* in the world. Rather, often insurers simply escape paying under the policy by *shifting losses* from themselves to their insureds, or to the insureds' victims, such as when they unjustifiably deny coverage. Both loss-reduction and loss-shifting ultimately reduce insurers' liability under the policy; however, loss-reduction reduces accident frequency or magnitude—leading to a safer world—while loss-shifting only reduces the *insurers' liability* under a policy for the accident without concern for accident frequency or magnitude. The difference is crucial, as loss-shifting does not decrease risk in the world and may instead create more risk. Note the difference between the former and the latter focus or argument of the Article: while the former argument is that insurers intentionally increase long-term risks in society in order to increase demand for insurance, the latter argument is that in the short-term they do not care whether they affect the level of risks or not; they just care about reducing their immediate costs, even if this is accomplished through risk shifting to others rather than risk reduction.

The Article proceeds as follows: Part I starts with the last point and explores the "myth of risk reduction." This Part explores systematic examples of insurers reducing only their own liability under the policy and not losses in the world. We begin by disputing directly the notion that insurers often provide quality, risk-reducing private regulation – by noting instances in which insurers barely regulate or do so in a socially undesirable fashion. After discussing how insurers stand idly by while their insureds continue their socially inefficient risky behavior, we move on to examine other, more active practices insurers engage in, perhaps for the purpose of shifting loss. We show how insurers obscure contractual manipulations of the policies that help them deny coverage after the fact, without providing any incentives to their insureds to take due care in advance. Worse, we show how insurers instruct their insureds to escape compensating their victims after the fact, instead of how to prevent losses in advance.

5 Steven Shavell famously laid out the theoretical groundwork for this new conventional wisdom in the law. Shavell 1979. The origins can be found in Arrow 1971a; Pauly 1968.Various prominent scholars have since demonstrated the applicability of this argument in practice, claiming that insurers not only can but actually do serve as private regulators. *See* Baker and Silver (2019), Ben-Shahar and Logue (2012).

Part II, which is the more important and ambitious part of our project, discusses insurers' long-term interest in setting the societal risk level knob a few notches higher than optimal. To be sure, we do not mean to suggest that insurers always favor more risk.[6] Thus, insurers may want to reduce extreme risks to which even they are averse (Baker and Farrish 2005). Furthermore, it is not in the insurers' interest to increase risks infinitely. Very high risks would cause some insureds to prefer not to buy insurance at all, while others would refrain altogether from engaging in the underlying risky activity, such as driving. Rather, our argument is more nuanced and centers on the claim that insurers seek to self-interestedly set risk levels higher than what is socially desirable.

We then explain how insurers can coordinate in achieving their long-term interest despite federal antitrust laws that prohibit coordination. We start by exploring how the very nature of some insurance policies gives rise to third-party moral hazard. Third-party (as opposed to first-party) moral hazard happens when the mere existence of insurance encourages third parties to harm, or be harmed by, the insureds in order to collect on the policy. We show this phenomenon in the contexts of kidnapping and ransom insurance, cyber insurance, and health insurance. We show that not only are insurers aware of this phenomenon, they also actively fuel it in various ways. We then turn to discuss another example of how insurers utilize their collective power to increase risk directly by objecting to risk-decreasing technologies (such as autonomous cars, seatbelts and genetic testing).

Part III exhibits insurance practices that combine "the worst of both worlds" from Parts I and II. That is, we show practices that shift loss to the insureds (or their victims) and consequently make for a riskier world in the long term. Put differently, we argue that sometimes the mechanism by which insurers increase long-term risk is in fact by shifting loss onto others. Tort reform is our primary example. While in the cases discussed in Part I increasing risks for the long run is mostly a by-product of shifting losses, we suspect that in the cases discussed in Part III increasing risk is a major motivation of the insurers.

Table 1 below summarizes the structure of this Article. The top-left cell represents the baseline conventional wisdom, which assumes that insurers regulate insureds' behavior and therefore do not engage in loss-shifting in the short term or in risk increasing in the long term. The top-right cell represents the discussion in Part I, where we begin deconstructing the conventional wisdom first by contending that some insurers' practices aim at short-term *loss shifting*, rather than any *loss reduction*. The discussion in Part II is represented in the bottom-left cell, where

6 By risk we mean the multiplication of the probability of loss and the magnitude of loss. It can be shown that insurers have incentives to impact both the probability and the magnitude of loss to levels that are above the socially optimal ones (Avraham and Gilo 2022).

**Table 1:** Exploring short-and long-term interests of insurers' behavior.

| Short term/Long term | No loss shifting | Loss shifting |
|---|---|---|
| Risk decreasing/maintaining | Conventional wisdom | Part I |
| Risk increasing | Part II | Part III |

we further contest the conventional wisdom by highlighting insurers' behavior that has the potential to increase or maintain long-term risk levels. Lastly, the bottom-right cell—a mirror image of the conventional wisdom—represents the discussion in the last chapter of our Article and synthesizes the insights brought in the two preceding parts by presenting insurer practices that both shift loss and increase total risk levels. To be sure, there is some overlap between the cells; yet, each cell represents insurers' practices that best capture the relevant interplay between long- and short-term interests in that cell.

In the Conclusion, we recommend some policy reforms.

## 1.1 Shifting Losses: Rebutting the Myth of Loss Reduction

The conventional wisdom is that insurers instruct the insureds on how to decrease the risk or the level of harm. When insurers instruct insureds to install smoke alarms, the result is fewer fires; when they instruct them to install sprinklers the result is smaller damage. This led many scholars to view insurers as capable of serving as private risk regulators and insurance as a potential mechanism for creating a safer world (Arrow 1971b; Baker 1996; Ben-Shahar and Logue 2012, at 199; Hölmstrom 1979; Rappaport 2017; Shavell 1982; Talesh 2017).[7]

We begin this Article by outright disputing the prevalence of this common perception. We think it is a myth. We argue that often, insurers do not engage in active risk regulation; and even when they do, they do it inefficiently and not for the purpose of reducing risk. Instead, we claim that insurers focus on loss shifting: rather than aiming to reduce liability under the policy by preventing *losses*, insurers' primary goal is to reduce their *liability* by shifting these losses onto others; in this sense, insurers fail to live up to their socially desirable institutional role as private regulators.

7 Ben-Shahar and Logue built upon Shavell and Baker's theories that insurers' relationship with tort liability induces optimal incentives to take care by exploring the means by which the insurance industry's distinctive methodology and business practice complement or even replace government regulation of risk.

In a recent article Abraham and Schwarcz also confront what they call the "Regulation Thesis", the idea that insurance can be a replacement for, or a complement to, state regulation. Abraham and Schwarcz argue that evidence shows that insurers often fail to act as regulators and to reduce risk. That is because insurance is designed to incentive risk-taking by offering compensation for losses. This incentive results in moral hazard, when the insured's cost of loss prevention is greater than the benefits. Abraham and Schwarcz present evidence that insurers have a "net-negative" effect on loss prevention (Abraham and Schwarcz 2022). Other scholars also reached the conclusion that the conventional wisdom is inaccurate, and that the reduction of risks is not always on the insurer's agenda (Mendoza 2020; Schlesinger and Venezian 1990; Schwartz 1990).

While we join this literature and dispute the conventional wisdom claim that insurers generally focus on loss-reduction, we do identify a general exception where insurers indeed attempt to prevent losses on the ground. The exception is in the case of *extreme correlated losses*, because these are losses that risk insurers' solvency if not significantly reduced. We start by describing insurers' passive loss shifting and continue with demonstrating their active loss shifting.

### 1.1.1 Passive Loss Shifting

We are not the first to argue that insurers can do better in reducing risks. Prior scholars have also recognized that insurers are not "as rigorous in monitoring" insureds' conduct as many presume (Abraham 2011; Logue 2015).

In this Section we proffer two arguments; first, that insurers barely engage in direct risk regulation; and second, that even when insurers do directly regulate, their regulation is focused on liability-reduction, not loss-reduction; hence effectively shifting loss onto others. Thus, we conclude that insurers fail to live up to their socially desirable institutional role as effective risk reducers.

#### 1.1.1.1 Why Insurers Fail *to Engage in Direct Risk Regulation*

We start by providing several theoretical explanations for why in contrast to the conventional wisdom, insurers do not directly regulate to reduce risks. First, as Kyle Logue identifies and illustrates through negligent inspection law, direct regulation may *increase* insurers' liability. Under negligent undertaking law, if an accident occurs after the insurer has regulated enough to have legally "undertaken" the insured's responsibility for safety incidents, the insurer has dramatically increased its liability for the incident (Logue 2015).

The second reason insurers do not engage in direct regulation is that in cases like Corporate Directors and Officers ("D&O") insurance, if insurers engage in direct regulation or even raise awareness of potential risks, they can increase their *insureds'* liability. Specifically, D&O insurers neither require insureds to adopt any practices nor monitor insureds' behavior; many such insurers do not advise insured on any loss-preventing practices, as a director's awareness of the risk in itself can give rise to liability down the line if a loss does occur (Heimer 2013). In D&O insurance, insurers notoriously "do almost nothing to monitor the behavior of the corporations that they insure." (Abraham 2011).

Finally, if insurers' regulation is effective, it creates two types of positive externalities; one for other insurers who now know how to improve their insureds' risks, and another one for insureds, since the safety regulation reduces their risk to the point that possessing any insurance at all may not be necessary (Cohen 1997). And, as is well known, whenever positive externalities are involved, under-provisions of safety regulation are likely unavoidable.

The next sections address the question of what can explain insurers' motivation to regulate insured's behavior in the occasions they do so. We stress that even in instances when insurers oversee their insured's behavior, they are likely to strictly adhere their advice to the rules set by preexisting—often outdated—legislation, thus failing to fully fulfil their potential to privately regulate.

#### 1.1.1.2 Self-Interested Interpretation of Existing Legislation

We now turn to the argument that even when insurers directly instruct their insureds, often it is not for the purpose of getting them to *efficiently* invest in precautions. Quite the contrary, insurers may distort the interpretation of existing legislation they provide to their insureds, which in turn leads to suboptimal incentives to take care. Punitive damages serve as an excellent example. Although many states prohibit insurers from providing coverage for punitive damage, insurers often include venue clauses or jurisdictional clauses that ultimately enable such coverage to be provided (Talesh 2015). However, coverage for punitive damages may well decrease deterrence, and that, from insurers' perspective, may ultimately result in more demand for insurance coverage.

Insurers similarly frame their discussions of U.S. Supreme Court decisions "around shifting risk and avoiding liability." Consider insurers' recent focus on interpreting a Supreme Court decision, Vance v. Ball State, in which the Court narrowed the definition of "supervisor." In Vance, the question was whether a coworker who is vested with the authority to oversee the daily work of another worker is considered a "supervisor" for the purpose of determining employer liability for harassment under Title VII. Rather than developing an understanding of the supervisor's role under this new regime, insurers generally offer recommendations for employers that would better situate the insurer to avoid liability or defend a case should an incident arise. This type of interpretive discretion is concerning, as insurers become chiefly focused on legal risk-management instead of loss prevention, providing a service that "leans more toward making claims defensible rather than fostering a discrimination-free workplace." (Talesh 2017).

#### 1.1.1.3 Other *Motives* to Regulate (Inadequately)

Omri Ben-Shahar and Kyle Logue explore the argument that insurers are motivated to reduce liability through loss-reduction by cataloging multiple real-world examples. These examples center on using premium reduction or other methods to regulate areas where the government has not intervened, such as through homeowner's insurance. However, several of Ben-Shahar and Logue's examples only reveal the *potential* for insurers to perform private regulation, without satisfactorily showing that insurers actually regulate insureds and prevent loss. For instance, their best example for loss-reduction is environmental liability insurance, which Ben-Shahar and Logue identify as a "striking example" of insurers reducing moral hazard and loss. They argue that insurers seek to reduce liability through loss-reduction by offering site-specific environmental coverage and ensuring licensing and regulation compliance, enforcing government regulation compliance, and even going beyond minimal government standards to promote stricter safety (Ben-Shahar and Logue 2012).

However, we note four problems with this view. First, if the environmental liability insurance example works as Ben-Shahar and Logue claim it does, it merely exemplifies our prior point that insurers pay significant attention to extreme correlated losses (indeed, the potential liability for an environmental harm can be enormous), but will not refrain from shifting medium and smaller losses to preserve the demand for insurance. Second, there is no broad consensus that insurers (at least those operating in the United States) always realize their full potential to mitigate environmental risk even when it relates to large correlated losses. Such is the case with climate change. In 2018, the Asset Owners Disclosure Project provided an analysis of the world's eighty largest insurers rated on their approach to climate-related risks and opportunities. Twenty-four of the eighty were US insurers, and twenty-one of those insurers scored the lowest. They are viewed as "bystanders" for failing to consider the financial impact of climate change (Asset Owners Disclosure Project 2018).

Third, while insurers' actions may incidentally result in loss-reduction, loss-reduction is not the motivating factor to enact such policies. While this reality may be convenient for now, it means that insurers have no reason to maintain this incidental loss-reduction and that these loss-reduction practices can disappear as soon as cheaper liability reduction measures emerge.

The fourth and greatest problem is that we have no reason to assume that the regulations or other metrics insurers use are optimal. The literature on regulation has made clear that government-provided regulation is problematic; among other shortcomings, scholars have noted administrations' hostile agendas, regulatory capture, and the inability to update the regulation in a timely fashion (Avraham 2009).

Against all this, one might wonder whether firm competition would not eventually solve the current unsatisfactory condition of insurers' lax private regulation. After all, firms are known to operate in a cartel-like environment and might have inherent incentives to deviate from the rest of the pack and offer better, cheaper products to gain market power. Although it is possible that heightened competition would eventually ease the severity of the inefficiencies in the insurance market, notably, insurers have strong instruments in place – such as NAIC-to secure their long-term collective interest (Randall 1999). In Part II below we demonstrate how insurers accomplish this, for example by lobbying against risk-reducing technological progress.

In sum, in this section we rebutted the myth of risk reduction by focusing on ways insurers omit to take efficient actions that would reduce the risk generated by their insureds. The next section will focus on practices insurers *actively* engage in to prevent their own liability under the policy by shifting losses onto the insureds and third parties, further disproving the myth of effective loss reduction.

### 1.1.2 Active Loss Shifting

#### 1.1.2.1 Contractual Manipulations

The most notorious example of how insurers shift loss onto the insured is through policy-term misdirection. The idea of contractual manipulations or deceptive contracting that violates consumer expectations was recognized at least since the case of C & J Fertilizer Inc. There the Supreme Court of Iowa ruled that a policy that violates the reasonable expectations of the policyholder is unconscionable, and should be interpreted from the viewpoint of an ordinary person (C&J Fertilizer Inc. v. Allied Mut. Ins. 1975).

Loss shifting occurs when insurers place liability-limiting terms into a policy without pointing those terms out to a potential insured, or in such a way that it is impracticable and unlikely for a potential insured to see the terms. Normally, these liability-limiting terms may be justifiable, for instance, in that they might reduce moral hazard. However, such a regulating effect is only realized when the insured knows about the term, and thus can make an informed decision to adjust future behavior in compliance (Schwarcz 2014). This means that as no precaution is being taken to limit the harm that the insurer has disclaimed liability for, the insurer is merely shifting the loss onto the insured, rather than actually reducing it (Schwarcz 2017).

#### 1.1.2.2 Apology Law and the Sorry Works! Coalition

Another example that highlights insurers' concern with reducing liability regardless of loss is the Sorry Works Coalition ("Sorry Works!"). Sorry Works! is a development of "apology law," which includes "laws designed to privilege apologies made by injurers" by making the apologies inadmissible at trial (Arbel and Kaplan 2016). In other words, these laws prohibit the use of physicians' apologies as a legal admission of fault. Moreover, as Baker and Silver note, some of the leading figures heading these programs and occupying their boards are (you guessed it …) insurance executives (Baker and Silver 2019). Apology laws spurred a 60% reduction in hospital payments to victims, roughly \$32,000–\$73,000 per case. These astounding reductions are explained through victims' documented desire to receive an apology, leading to a greater willingness to settle once the apology is received. Moreover, apology laws and the resulting payout reductions prompted many commercial players to engage in a highly orchestrated, commercialized practice of apologizing complemented by apology training, psychological techniques, and professional guidance to create the most effective apology at the lowest cost. Apology law and Sorry Works! are often featured as positive methods to meet both patient and insurer interests—i.e., reducing insurer liability while satisfying patients' need for compensation through the apology. Observing the orchestrated system of apology law through Sorry Works! demonstrates that insurers are motivated and exert efforts to ultimately reduce liability only, making any consequential loss-reduction incidental and unrelated to insurers' primary interests. Although one might think that apologies really do mitigate emotional harm due to their therapeutic value—and as such, are an efficient loss-reduction tool—scholars argue that the real motives for victims' decision to settle are much less auspicious; indeed, several apology practices are meant to "create emotional pressure on victims to accept them, a decision that the victim will later come to regret." Apology programs not only fail to diminish loss, they might even increase risk. Specifically, as healthcare providers know they can easily escape liability by later generating an apology, their incentives to take care decrease. Thus, notably, even if apology programs actually do carry *some* potential to reduce emotional harm *ex-post*, they still distort doctors' incentives to take proper care *ex-ante*. This example shows that even if harm mitigation is an incidental benefit of apology programs, insurers are primarily focused on liability reduction through loss-shifting, in this case shifting loss onto the patient, and remain at best indifferent to actual loss-reduction practices for future patient safety events (Arbel and Kaplan 2016).

#### 1.1.2.3 Dash Cameras

Consider an example recently analyzed by Yotam Kaplan and Yonathan Arbel (2016): dashboard cameras ("dash-cams"). Insurers encourage drivers to use dash-cams, which sounds like a good policy to encourage safer driving, much like smoke alarms. However, at least until every car has them, dash-cams merely shift risks to the other drivers, thereby diluting the incentives of the insured drivers to take precautions. Why? Because insureds know that if the accident is their fault, they can argue that they did not have a camera or that it did not work, thus improving their chance to escape liability. On the other hand, if the accident is not their fault, then insureds can use the camera as proof, again improving their chance to escape liability.[8] The option for such a strategic use of the dash-cam might lead insured-drivers to drive less carefully. The important point is that insurers only care about the fact that their own insureds escape liability (losses were shifted to the other driver) and do not care that driving becomes more dangerous. In fact, they might benefit financially from it.

Our discussion so far has demonstrated that the myth contending that insurers habitually engage in risk reduction is not always true; many times, insurers do not reduce risk, but merely reduce the payouts they will owe for the materialization of such risk. Of course, in the long run such practices may indirectly increase risks in society. For example, instructing employers on how to escape liability by making sure their supervisors are not deemed legally as supervisors is problematic in the long term not just because the victims are left to bear the losses, but also because this practice leads to suboptimal behavior, to more harm, and (importantly from the insurers' perspective) to increased demand for insurance coverage. In the next Part we revisit this example and explore the more radical and concerning claim that insurers have an intrinsic, long-term interest in maintaining sufficient levels of risk within society. We demonstrate this claim through additional direct evidence.

**8** Furthermore, dash-cams may also be in the best interest of those with prior accidents, as they know that they will be held suspect in any future claims they are involved in; dash-cams are a way for such drivers to protect their own interests by shifting the loss of any potential accident as they drive safely in the future (Lando 2006). Furthermore, insurers also seem to prefer that insureds have dash-cams, although this preference is not particularly intense; insurers in the US have yet to find a strong enough benefit to having dash-cams (Allan 2015). Insurers do find utility in cases that can otherwise be ambiguous, but where fault is obvious to a direct observer. In those cases, the harm either is not the insured's fault, so the insurer can loss-shift onto the other driver, or it *is* the insured's fault, and the insurer can loss-shift onto the insured directly by raising premiums in the future (Fereiro 2019). The dash-cam is particularly useful since 94% of crashes are caused by driver error (Singh 2015). Additionally, through a dash-cam, the insured gives huge amounts of data to the insurer, which is something insurers have demonstrated they find useful (Allen 2018). Still, in the US, most insurers do not offer an upfront discount for having a dash-cam (George 2019).

## 1.2 Increasing or Maintaining Risks

In this Part we switch to our more ambitious claim that insurers engage in creating, maintaining, or at least not preventing long-term risks. We commence with the observation that in a world with no accidents, no one will need insurance; there is no need for fire insurance without fires. Since the insurance business model depends on the existence of risk, the conclusion that insurers possess an intrinsic interest in having sufficient levels of risk in the world is quite sensible. This is worrisome because it means that insurers are intrinsically incentivized to act against society and insureds' best interests. It may be important to mention that scholars have identified a different set of incentives when it comes to mutual insurers as opposed to ordinary for-profit insurance. Mutual insurers are much more willing to promote loss (or risk) prevention efforts than for-profit insurers, who are naturally more likely to channel their efforts to maximize profits (Abraham and Schwarcz 2022). With that said, the reality for most policies is that insurers may be encouraged to maintain or even increase risks.

Much of what we argue below that insurers can do, requires cooperation between them. Indeed, insurers often collude by lobbing together in order to increase risks to gain profits (Avraham and Gilo 2022). But how can they do that? Don't antitrust rules prohibit anti-social cooperation? We begin this Part by discussing the history and present of collusive behavior within the insurance industry, not only in private agreement to increase rates but also in efforts to enable regulatory capture of insurance commissioners and legislation surrounding the industry. This overview provides the theoretical background for how insurers can possibly increase risk in the world.

We next turn to showing how this plays out in practice. We start by discussing the phenomenon of third-party moral hazard. Scholars have acknowledged for years that the very existence of insurance might dissuade insureds from behaving carefully; this is the "classic" problem of first-party moral hazard, to which insurers responded by introducing contractual tools aimed at mitigating the problem, such as a deductible or discounts for installing safety devices in one's home or car. The problem of third-party moral hazard differs from the "classic" moral hazard in that it describes how the existence of insurance incentivizes *third parties* to increase risk, rendering old contractual tools irrelevant to the solution of the problem. We start by discussing kidnapping and ransom insurance and show how the mere existence of coverage feeds the kidnapping industry. We then move on to cyber insurance and health insurance and show similar phenomena.

We continue Part II by turning to show how insurers advance their long-term interest in having, maintaining, and even increasing risk by objecting to risk-reducing technologies. We demonstrate this claim by describing the conflict regarding autonomous cars, passive restraints in cars, and the genetic testing.

### 1.2.1 Anti-competitive Behavior in the Insurance Market

At least since the 19th century, insurers engaged in collusion and anticompetitive behaviors between companies. The earliest organization of insurance companies designed to promote their political goals was the National Board of Fire Underwriters, established in 1866. The Board was hostile to state regulation, and decided therefore to promote the adoption of federal regulation (Meier 1988). As the business of insurance spread throughout the different states, each had an independent agency to regulate insurance within its borders, the industry sought federal oversight that would weaken state regulation (Randall 1999). In 1869 the Board took this battle to the Supreme Court in Paul v. Virginia, but to their disappointment the Court ruled that insurance was not a matter of interstate commerce, and therefore can be regulated only by states. Soon after state insurance commissioners decided to establish the National Association of Insurance Commissioners (NAIC) (Meier 1988).

The brighter side of Paul was that insurance companies were exempted from federal antitrust laws. This cartel-like nature of interstate insurance, was disrupted only 75 years later in U.S. v. South-Eastern Underwriters Association (1944). After the revealing of a large-scale price fixing conspiracy, the Supreme Court (partially) overruled Paul v. Virginia, and ruled that interstate business of insurance is an act of commerce and therefore the Sherman Antitrust Act applies. Only a few days after the Supreme Court's decision, the insurance industry presented a bill to exclude the entire industry from federal antitrust law. Though it was almost passed by both houses, the bill was eventually defeated, and another bill, the McCarran-Ferguson Act offered by NAIC, was the one that passed. At this point, both insurers and state commissioners were on the same side, promoting state regulation (Meier 1988). The new act largely granted immunity to insurance companies from federal antitrust laws, save for cases involving boycott, coercion, or intimidation (Anderson 1983).

Indeed, since its creation in the 19th century NAIC has been influencing the regulatory law on insurance through the creation of universal model laws on the various kinds of insurance throughout the states (Meier 1988).[9] For many years the NAIC has explicitly set rate standards within these model laws, including implementing a rate approval system.[10] Indeed, NAIC has not necessarily acted exclusively on behalf of state commissioners. Being a voluntary and private organization, it was closely related to the insurance industry. Towards the end of the 20th century, about a half of the organization's budget arrived from insurance companies' fees (Randall 1999).

Overtime, free from federal scrutiny, the NAIC gained lots of control over states' insurance laws by developing a comprehensive accreditation program that pushes for standardized regulation (Randell 1999).[11] For example, when New York stalled in adopting some of the NAIC's proposed model laws in the 1990s, the NAIC suspended New York's accreditation. This pushed some, such as state Senator Guy Velella, to accuse the NAIC of acting "in a collusive manner" and of committing antitrust violations. Likewise, many insurance commissioners expressed concerns that the NAIC was exercising inappropriate control over regulators and threatening the notion of state sovereignty.

Insurance companies' anti-competitive behavior goes beyond lobbying for more lenient regulation. In Hartford Fire Ins. Co. v. California (1993), there was an alleged conspiracy between American insurers and foreign reinsurers. The Supreme Court ruled that the US market was in fact harmed by the collusion, and that American antitrust law should therefore apply to foreign reinsurers. Indeed, the conspiracy attempted to limit the coverage and applicability of existing policies, and therefore resulted in shifting losses.

Another big concern in policing insurers involves the practice of 'revolving door,' referring to insurance companies' practice of hiring former insurance commissioners who have ended their terms (Heath and Crenshaw 1993). One recent

**9** Some model laws were drafted by an All-Industry Committee–a group of industry representatives organized by the NAIC. Randall, at 634.

**10** *McCarran-Ferguson Act*, NAIC, https://content.naic.org/cipr_topics/topic_mccarran_ferguson_act.htm [https://perma.cc/Z4MC-S432] (last updated May 20, 2020). The NAIC openly states its mindset to maintain conformity amongst the state-level insurance laws, stating itself to be "the US standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories." *FAQ*, NAIC, https://www.naic.org/documents/about_faq.pdf [https://perma.cc/TBW4-EYF6] (last visited Feb. 2, 2021).

**11** While all states and many territories are accredited now, early controversies developed as the NAIC would sanction states that did not fall in line with the accreditation standard, which mandated certain model rules written by the NAIC to be adopted; these sanctions would risk insurance companies based in unaccredited states to be subject to manifold financial examinations at their cost whenever they did business in an accredited state that had adopted the regulations (Randall 1999).

study looking at the employment history of 271 insurance commissioners between 2000 and 2018 found that 38% end up working in the insurance industry after their term, and that 29% of those 271 commissioners ended up working in the insurance industry within a year of leaving office (Tenekedjieva 2020). The same study also found that those commissioners who did go into the insurance industry after their term were generally and measurably laxer regulators, with those entering the industry immediately being the most lax.

In sum, the combination of a weak *de jure* enforcement of federal and state antitrust laws with strong *de facto* enforcement of industry collaboration through the NAIC and its 'revolving doors' system, enabled the industry to collaborate according to its long-term interest in maintaining risks in society (Burns 2020).

In subsection B below we start with the less controversial claim that the mere existence of insurance facilitates some long-term risks, and that insurers contribute their share to the persistence of this phenomenon. In Subsection C we make the more ambitious claim that anti-social collaboration between insurance companies is not just possible, as we have shown above, but also plausible.

### 1.2.2 Third-Party Moral Hazard

Third-party moral hazard, as recently identified by Parchomovsky and Siegelman, differs from the "classic" (first party) moral hazard because its influence is indirect in that the mere *existence* of insurance incentivizes actors unconnected to the insurance contract to behave less carefully, thus increasing overall risks. Stated differently, what distinguishes third-party moral hazard is its focus on losses caused by third parties, instead of the insureds themselves. Examples range from bus passengers who are aware that bus companies have insurance and might intentionally engage in dangerous behaviors on buses resulting in injuries to themselves to murders motivated by life-insurance plans. Third-party moral hazard is a particularly insidious mechanism for increasing risk, since for insureds the increasing risky behavior appears exogenous—i.e., the harm appears to be independent of the insurance policy. But often, the root of the risk is the incentives to third parties caused by the existence of the insurance policy itself and compounded by the behavior of the insurance companies handling this risk.

More specifically, we identify several problems related to third-party moral hazard. First, the mere existence of some insurance policies gives rise to third-party moral hazard; third parties—be it kidnappers, hackers, or medical providers—are attracted to the deep pocket behind the insureds. Second, insurers, aware of this phenomenon, often exacerbate third-party moral hazard by avoiding to protect their insureds against it, thus facilitating their long-term interest in increasing risk levels. Third, insurers too easily pay money on the policy to those third parties.

Although it is in the short-term interest of insurers to reduce these payouts, they avoid doing so because abstaining from action serves their long-term interests.

The next sections demonstrate these three problems in the cases of kidnapping and ransom insurance, cyber insurance and health insurance.

#### 1.2.2.1 Kidnapping and Ransom Insurance

Kidnapping and ransom insurance coverage ("K&R") exemplifies the phenomenon that insurers seek to increase risks in the world by fueling third-party moral hazard. K&R is an insurance coverage plan designed for wealthy individuals and those who travel frequently and are thus at risk of getting kidnapped (Bell 2015). K&R policies, offered by dozens of insurance companies, typically cover "ransom payments, loss of income, interest on bank loans," and medical and psychiatric care.[12]

K&R demonstrates insurers' long-term interests in increasing and maintaining risk, because the coverage for negotiated ransom and other costs arguably energizes more kidnappings and thereby fuels the kidnapping industry (Clendenin 2006). Specifically, the existence of K&R results in "an unintentional conspiracy" between "the terrorist, the victim, and the insurance companies" because as long as K&R exists, the kidnappers continue to be paid, victims continue to purchase insurance, and the insurance company continues to receive premiums. This exchange perpetuates the cycle beyond what may have been if insurers were not providing continuous and definite payouts for the kidnapping victims. But the problem does not end with the mere existence of insurance; insurers' behavior before and after the occurrence is problematic as well.

After the occurrence, insurers are "softer" with kidnappers than one would expect, paying out and conceding as a matter of policy. Indeed, insurers' unwillingness to cooperate with U.S. government hostage-crises stances of being "tough" on kidnapping further supports their interest in increasing risk. The Department of State holds that making concessions to hostage takers ultimately increases the danger that others will be taken hostage and thus prohibits concessions when government employees are kidnapped. The Department of State is clear that any U.S. private organizations engaging in hostage resolution in a manner differing from U.S. government policy undertake such action without U.S. approval (Clendenin 2006). Despite this clear policy and warning that concessions lead to future hostage

12 In Canada for example, such policy can be purchased from one of 26 companies offering it: Insurance Business Canada, Kidnap and Ransom Insurance Products https://www.insurancebusinessmag.com/ca/business-insurance-products/?inclusion=30&p=1.

takings, K&R insurers continue to concede, potentially enabling kidnapping for the sake of K&R premiums.[13]

Anja Shortland, on the other hand, who has extensively studied the K&R insurance market suggested that the K&R market is governed by, effectively, a cartel that keeps payments to kidnappers at levels that are not too high (Shortland 2019). We conjecture however that insurers make sure that payments are neither too low.

Insurers' behavior seems suboptimal not just after-the-fact. Indeed, a big puzzle is why insurers do not focus on kidnapping-reduction or rescue missions rather than on ransom negotiations (Prochnau 1998). Insurers' tendency to resolve the extortion risk only *after* the action has occurred, rather than make preventative efforts prior to a kidnapping incident, furthers the argument that insurers' primary interest is to continue fueling the "unintentional conspiracy" (or tacit collusion) of kidnapping and extortion to serve their intrinsic interest of increasing or maintaining risk in the world.

To be sure, there is a short-term/long-term tension here: insurers still have an interest in lowering payout in individual cases. Indeed, many K&R plans may be voided if unnecessarily revealed to the kidnappers; this is because insurers know that such disclosure creates incentives for kidnappers to target *their* insureds and demand higher ransoms from *them* specifically. As insurance companies would like to limit their own liability, they take precautions to keep their involvement undisclosed, even in negotiations (Prochnau 1998). And yet, the idea that K&R incentivizes kidnappings is so clear that in some countries K&R insurance is banned to prevent increases in the extortion market and harm to travelers (Parchomovsky and Siegelman 2022).

#### 1.2.2.2 Cyber Insurance

Insurers' interest in fueling third-party moral hazard is also present in ransomware attacks and payouts from cyber insurance. Ransomware is a malicious software that locks and encrypts a users' data until the user pays ransom to restore access (Fruhlinger 2018). Ransomware attacks vary in harm, but common to all is a ransom demand associated with the data takeover. Insurers have developed cyber insurance plans to protect users against these attacks; indeed, this model is eerily similar if not exactly identical to the K&R model. Just like K&R, cyber insurers effectively incentivize ransomware attackers by providing a certain payout for their attack (Murphy 2017). Just like our theoretical framework predicts, this cycle consequently

**13** In consistence with the policy and with our claim that K&R insurance increases risks (though not necessarily as a causal proof), when Italy instituted a legal ban on paying ransoms in 1991, the local rate of kidnappings dropped substantially. From 1969 to 1991, 653 kidnappings occurred; in the seven years following the ban, only 38 occurred (Bohlen 1998).

fuels the ransomware practice, ultimately increasing the number of ransom attacks. In fact, the number of cyberattacks increases annually, leading to greater claim frequency, premiums and profit for insurers.

Insurers' disregard for increased risk in the world is supported by cyber insurance policies that lack essential characteristics intended to prevent ransom attacks—thus further solidifying the claim that insurers are not only aware of the issue of third-party moral hazard, but also fuel it. For example, few cyber insurance policies require security software or policies, security system vetting, or an audit of the organization. Very rarely do insurers base premiums on the presence or lack of such measures.[14] Indeed in a recent article Tom Baker and Anja Shortland argue that these kinds of loss prevention techniques are not cost-effective for insurers (Baker and Shortland forthcoming).

However, Kyle Logue and Adam Shniderman argue in a recent article that the "common sense intuition" that the availability of cyber insurance increases ransomware attacks and that it makes cyber-attacks more profitable, is inaccurate. The authors suggest that cyber insurance may increase social welfare because of two major properties: the risk-spreading benefits may be greater than the moral hazard harms, and insurers may implement ex-ante and ex-post regulatory measures to reduce losses. However, as the authors themselves admit various market failures prevent these benefits from materializing (Logue and Shniderman).

#### 1.2.2.3 Health Insurance

Perhaps the clearest example of third-party moral hazard lies within the health insurance industry. One salient example is physicians' and providers' widespread practice of recommending and administering procedures that have little-to-no medical value and cause overutilization of the health care services (Silver et al. 2018).

Indeed, over utilization can happen for many reasons. The two important ones are defensive medicine, where physicians provide (and health insurers cover) excessive care to avoid legal liability, and offensive medicine (what economists call-induced demand) where physicians pursue excessive care to maximize their reimbursements (Avraham 2009). As Charlie Silver and David Hyman have shown, "only 10–20% of the medical procedures used" have had proper clinical trials to determine if they are medically effective. The mere existence of health insurance incentivizes physicians to administer and recommend even those procedures that have not undergone adequate scrutiny, because if the patient has insurance s/he does not bear the cost and the physician herself may

14 *See generally CyberRisk Coverage Application*, TRAVELERS, https://www.travelers.com/iw-documents/apps-forms/cyberrisk/cyb-1100-ind-0116.pdf (last visited Apr. 11, 2020).

profit from it. Indeed, it has been estimated that the costs associated with offensive medicine are much higher than the costs associate with defensive medicine (Avraham 2009, pp 560).

Consider percutaneous vertebroplasty, which is a procedure that involves injecting bone cement into the spine to treat vertebral fractures. As of a decade ago, it was well publicized that this procedure is essentially worthless. However, insurers would still cover the costs of the procedure; consequently, physicians still provided the procedure. The reason for coverage may be twofold: (1) more procedure payouts creates more profits for the insurers, as they receive back a small percentage of each payout directed at covering medical procedures; and (2) facilitating a false need for medical procedures incentivizes patients to purchase insurance by maintaining high enough perceived risk levels to support the insurance business (Silver et al. 2018). Notably, these unnecessary procedures carry risk, even if mild (Al-Nakshabandi 2011). As of today, recent studies found that percutaneous vertebroplasty does have some advantages in treating a specific uncommon disease (Xiao et al. 2021), but this understanding does not apply to all complications, and was not known in the last decade. The results were a continuous subjecting of patients to risk without reason, solely to sustain business and profit. These interests cause insurers to develop coverage policies that give physicians and treatment centers strong financial incentives to continue procuring these unnecessary or ineffective tests and treatments, thereby perpetuating the cycle. Thus, just like K&R or cyber insurance, unnecessary and ineffective tests and procedures in the healthcare industry amount to another way in which insurers can and sometimes do increase risk through third-party moral hazard.

Overall, the phenomenon of insurers fueling risk through third-party moral hazard is rife in the healthcare field. The rise of HMOs in the past decades is best explained as an attempt by society to combat this phenomenon; but, as Silver and Hyman explain, this attempt ended with a "managed care backlash," which "made it clear to insurers that there would be real costs in trying to reduce health care providers' revenue streams." (Silver et al. 2018).

### 1.2.3 Objecting to Technological Progress

Insurers' approach to innovative technologies that significantly reduce risk reveals their capacity to promote their long-term interest. In this Section we show that in several key areas, insurers were fierce opponents to the adoption of such technologies. We argue that their opposition might have been motivated by their understanding that more rather than less risks better serve their long-term interests.

#### 1.2.3.1 Autonomous Vehicles

The claim that insurers might be better off with a more dangerous world could best be illustrated by their reaction to autonomous cars.[15] Reportedly, autonomous cars will reduce fatal traffic accidents by 90 percent. With the introduction of driverless cars, the insurance industry's largest segment of coverage would shrink an estimated 60% by 2050 (Hammond 2018). Not surprisingly, insurers are already claiming that there are issues when drivers rely too heavily on autonomous systems (Cellan-Jones 2018).

Moreover, insurance companies are pushing against the adoption of autonomous vehicles in multiple arenas. For example, insurance companies are putting insurance pricing pressure on the consumer. At least some companies are charging higher premiums for autonomous vehicles, with premium quotes reaching up to $10,000 a year to insure a Tesla vehicle (Tullis 2019). One could argue that the increased price of the technology justifies this cost; however, even for luxury vehicles, insurance barely broaches the range of $4000 (Vallet 2019). This price difference may suggest that insurance companies have a strong aversion towards insureds having autonomous vehicles.

Insurance companies have also been lobbying on regulations for autonomous vehicles (Levin 2018). In 2018, GM launched a petition with the National Highway Traffic Safety Administration (NHTSA) to seek regulatory changes that would allow their fully autonomous vehicles on the market (Shepardson 2019). When the NHTSA put the petition out for public comment, insurance companies advocated for more regulations, for more data being collected before these autonomous vehicles made it onto the roads, and even for a complete denial of the petition. The Insurance Institute for Highway Safety (IIHS), a group funded by a multitude of insurance companies, said that GM should not be allowed to withhold safety features such as high-beam headlights from their autonomous vehicle designs. On the surface this would seem rational, until one recalls that autonomous vehicles do not have a need for high-beam lights, using radar and lidar sensors instead. Such features, while useful for human drivers, may well serve only as a regulatory and cost barrier for autonomous vehicles.

The federal government is "all in" on autonomous vehicles, indicating enthusiastic support without adding new regulation (Shepardson 2020). The Advocates for Highway and Auto Safety, a group at least partially directly funded and run by insurance companies, responded negatively to the government's position, calling

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15 The whole discussion about autonomous cars can be understood as an insurance companies' genuine resistance to a threat on their very existence, and not as a risk increasing method. One way or another, it is a representative example for insurers' use of political power to prevent risk mitigation.

its response inadequate for public safety. As the next section shows, this is not the first time the insurance industry puts its interest first.

#### 1.2.3.2 Passive-Restraint Battle

Another example of how insurers utilize institutional power to object to risk-reducing technology is their reaction to passive restraints (airbags and seat belts) in the 1970s and 1980s. Ben-Shahar and Logue bring this example to demonstrate that insurers can increase safety in the world. While ultimately auto-insurers led the charge in lobbying and promoting mandatory passive restraint laws, the picture is more nuanced. Insurers fought for these laws through litigation, leading to a unanimous Supreme Court decision in favor of passive restraints and a decision from the Secretary of Transportation that all newly manufactured cars must include passive restraints (Kneuper and Yendel 1994). Car manufacturers initially favored neither seatbelts nor airbags because both make cars more expensive, but ultimately decided to go with seatbelts because they were the cheaper of the two. In contrast, insurers strongly supported airbags while providing "at best only lukewarm support for seat-belts." At first blush, it seems insurers should have been interested in advocating for both airbags and seatbelts to decrease total insurance claims; but upon closer inspection, supporting only air bags presented a much more profitable strategy. Specifically, air bag technology required insurers to deem a car with deployed air bags as a "total loss" due to the need to repackage the airbag after deployment. Insurers preferred total losses in car crash contexts because they represented a certain loss in property damage, compared to volatile bodily injuries. So, even though promoting seatbelts would translate into a dramatic reduction of bodily injury claims, insurers could significantly increase the number and certainty of property losses across all accidents if more airbags deployed. At the end, the insurance industry won the battle and car manufacturers needed to install airbags (Lemov 2015).

The point to pull from this battle is how insurers were willing to achieve their long-term goal of airbag mandates even if it meant sacrificing seatbelt restraint mandates—i.e., additional loss prevention—along the way. This history illuminates the concerning dynamic of insureds valuing their own long-term financial interest over the safety interests of their insureds and the world at large.

#### 1.2.3.3 Genetic Testing

Another concerning example is insurers' objection to genetic testing and coverage for genetic testing. Consider BRCA (commonly known as the 'Angelina Jolie') gene. Blood testing can detect mutations for the gene that have been associated with breast and ovarian cancer, allowing women who are at risk for an inherited breast or ovarian cancer gene to act proactively to mitigate risk of the cancer manifesting. In 2015, insurers raised concerns about the utility of genetic tests and limited doctors' ability to order tests, even though screening for BRCA can save lives.[16] This was not the first time insurers objected to such technological progress. Insurers in the past have "vehement[ly] object[ed]" to genetic nondiscrimination legislation, most notably the Genetic Information Nondiscrimination Act (GINA) (Rothstein 2008). GINA prevents insurers from requiring genetic tests or inquiring about results in making coverage decisions. Fortunately, GINA overcame these objections and was eventually signed into law. Because genetic testing is used to prevent or mitigate illness and disease, failing to pass GINA would have increased patients' overall risk (Sandler Alfino and Saleem 2018). Insurers framed their objections to genetic testing as a legitimate concern for the stability of the insurance industry. Genetic tests threaten to send health insurance industries into a "death spiral" or at least "perturb the market," (Kolata 2017) given the risk arising from adverse selection. Namely, those who take cheaply administered genetic tests will discover an impending illness and then insure against such illness, making it more difficult for insurers to manage risk pools (Avraham Logue and Schwarcz 2014). These insurers' claims make sense in theory, but are much less convincing in practice as the reality is that genetic testing does not really place at risk the stability of the insurance industry, making insurers' disapproval indicative of their interest in hindering risk-decreasing technologies. First, the demand for health insurance is consistently found to be price-inelastic, such that the likelihood of low-risk individuals dropping their health insurance is very small (Ringel et al. 2002); and second, because GINA prevents *all* insurers from utilizing genetic information, the risk of cream-skimming by other insurers simply does not exist. Indeed, GINA has existed for over a decade without any visible risk to the insurance industry. Again, we are not saying there might not be alternative explanations for insurers' behaviour other than maintaining or increasing risks. It is totally possible that the (unfounded in advance, and unmaterialized in hindsight) fear from death spiral motivated insurers' resistance, yet we believe our framework should not be overlooked as it provides at least as good as explanation for their behavior.

Policymakers and lawmakers must be aware of insurers' interests when considering regulation or implementation of future technological advances, to ensure that new legislation or regulations surrounding technological developments comport with society's interest in optimal risk levels. This awareness is critical because technology will continue to develop and present novel ways to reduce risk. Properly assessing insurers' arguments against these advances will further society's and insureds' interest in producing a safer world.

16 *BRCA Gene Test for Breast and Ovarian Cancer Risk*, Mayo Clinic, https://www.mayoclinic.org/tests-procedures/brca-gene-test/about/pac-20384815.

In sum, examination of insurers' practices in fueling third-party moral hazard and objecting to risk-reducing technological progress, seems to indicate that insurers have a stake in maintaining or increasing risk levels in society. Moreover, what is worrisome is not merely the prospect of an actor interested in increasing risk, but also the fact that this interest is diametrically opposed to the insureds and society's interest in optimally reducing risk and overall harm. Thus, considering this far-reaching impact, it is essential that policymakers incorporate insurers' potential ulterior interest in risk-increasing when assessing future regulations, laws, or other policies, particularly when those decisions involve legislation that may increase risks, impact technological progress, or manifest in third-party moral hazard.

We now turn to discuss a final category of insurer practices that policymakers should be especially aware of. This category harbors practices that combine the demerits described in the last two chapters; that is, practices that are motivated by both shifting losses and increasing total risk.

## 1.3 Shifting Losses and Increasing Risks Simultaneously

The first two Parts of the Article attempted to classify insurers' harmful activities into two categories: those that are primarily aimed at shifting loss once the risk has materialized and those primarily aimed at increasing or maintaining risk in the long term. Yet some insurers' actions are particularly detrimental, as they are not only intended to shift loss to the insureds or third parties, but also to increase long-term risk. In fact, the very mechanism insurers use to increase risk involves shifting it to others.

To get an initial sense of how such mechanisms operate, consider auto insurers' strict control of choice of repairs (Ben-Shahar and Logue 2012). By controlling the repairs, insurers control the cost of mitigating the insured's damage regardless of the quality of the repair, potentially shifting costs to the insured who may not only lose money when later selling his repaired car, but worse, may drive a car that is less safe. And because this phenomenon is prevalent, road safety is in danger. Or consider insurers' opportunism at the underwriting stage, a problem discussed above. Insurers often ask intentionally vague questions on the applications to "create the opportunity for a misrepresentation defense" later on should litigation arise (Ben-Shahar and Logue 2012). By this process, the insurer shifts loss to the insured, who is unaware of that shift at the time of the application. Through this loss-shifting practice, insurers also achieve another important objective: if the insured is unaware of the full scope of coverage and overestimates it, she is unlikely to invest in efficient precautions aimed at reducing risks. Actually, the same can be said anytime insurers limit their liability via obscure and hidden clauses in the insurance policy, as long as these clauses can potentially provide insureds with incentives for optimal precautionary behavior.

Perhaps no better example exists to demonstrate the interaction of insurers' short- and long-term interests in handling risks than the battle for tort reform, wherein insurers promote their long-term interest in increasing risks, while also shifting loss to insureds. Consider insurers' lobbying efforts for caps on damages (Medical misdiagnosis 2003). Studies have shown that these coverage limits for physicians act as a "*de facto* cap on payments" in a vast majority of cases (Zeiler et al. 2007), meaning total liability is determined "as much by coverage limits in defendants' policies as by the magnitude of loss incurred by plaintiffs." This practice shifts losses to the insureds' victims. Hence, for example, med mal insurance companies lobbied under the Trump administration to propose stricter limits on non-economic damages for some plaintiffs (Kindy 2017).

Caps on damages initially appear to benefit only insurers' short-term interest in reducing their own liability, as the cap cuts off total coverage costs, shifting uncompensated losses to their doctors-insureds' patients. One would expect that caps would reduce premiums for doctors-insureds as a consequence. Unfortunately, this did not happen. Why? Perhaps because caps on damages also have the ulterior consequence of de-incentivizing doctors to behave carefully, as the caps reduce the total potential liability risk on their actions. This relaxation in care might result in a riskier world as doctors-insureds have suboptimal incentives to take due care. This of course is one possible explanation to the phenomenon, that should not be disregarded even if there might be other explanations.

Indeed, empirical studies reveal premium *increases* after states enact damage caps. For instance, after Oklahoma passed insurer-supported damages caps, medical malpractice premium rates increased by 83 percent. Likewise, in Maryland, Missouri, and other states, insurers lobbied for damage caps claiming that they would reduce premiums. Ultimately, rates increased after legislature enacted reforms. Other studies support this conclusion, finding that caps above $750,000 increase premiums substantially (Nelson et al. 2007). Considering the widespread evidence of premium increases under cap regimes, especially with higher-level caps, we see that insurers' motives in supporting caps on damages or other reforms do not stem only from their short-term interest in liability reduction but may also stem from their long-term interest in increasing or maintaining risk.

Texas's 2003 tort reform displays this interest precisely. Specifically, the Texas legislature adopted HB 4 in 2003, which among other restrictions, capped non-economic damages (Silver et al. 2018). After the bill, med mal premiums dropped; however, despite this drop, no reduction in loss or risk emerged, as healthcare spending remained steady and "hospitals made more avoidable errors." These empirical findings show that damage caps, despite insurers' lobbying, do not necessarily reduce risk and in fact may increase it.

With HB 4 and other state's caps, the number of mistakes that hospitals and physicians made increased. Indeed, preventable events occurred more frequently after these reforms. As Zabinski and Black noted, these declines square with traditional tort law deterrence theory, as the damage caps reduced physicians' and providers' incentives to care. Despite lack of risk-reduction, insurers benefited immensely from HB 4, as their profits soared. In fact, their medical malpractice premia-to-payout ratio increased from 4.4 prior to HB 4 to 24.9 after HB 4. Zabinski and Black argue that this premia-to-payout ratio jump demonstrates how insurers benefit from reforms like HB 4 and that insurers lobby for them because they can take advantage of significant drops in premiums by "slowly and gradually reflecting those lower payouts in lower premia" (Zabinski and Black 2019). We suspect that another reason insurers lobby for such reforms may be that they increase risks in the long term.

## 2 Conclusion

The conventional wisdom that insurers make the world a safer place is overstated. Against the conventional wisdom we revealed insurers' interests in increasing or maintaining long-term risks in society, as well their interests in shifting losses away from themselves to injured parties or their victims, rather than reducing those losses overall. Specifically, contrary to the conventional wisdom, in many cases insurers are not interested in purely reducing loss and only incidentally reducing their liability under the policy, but rather vice versa—insurers are interested in reducing their liability, and only incidentally in reducing loss.

We have demonstrated this phenomenon first by showing that the cornerstone of the conventional wisdom—the notion that insurers effectively regulate their insureds' behavior—often is mistaken. We then moved on to discuss more active strategies insurers deploy, like contractual manipulations and apology laws. This phenomenon is concerning, as these loss-shifting practices under-deter potential wrongdoers who are incentivized to rely on these practices that reduce future *legal liability* rather than what they believe they are reducing—future loss. Accordingly, insureds do not guard their behavior optimally and might well create a more dangerous world.

Observations about insurers' interest in loss-shifting compared to loss-reduction form just part of our criticism of the conventional wisdom. The more ambitious claim we make is that insurers have an intrinsic, long-term interest in increasing or at least preserving sufficient levels of risk. We argue that insurers carry out this interest through behaviors such as failing to combat moral hazard of insureds and fueling third-party moral hazard, and opposing risk-reducing technologies.

Lastly, we warned that in some situations, such as those involving health and medical malpractice, a perfect storm might emerge. In such instances, insurers' actions are particularly detrimental, as they not only aimed at shifting loss to the insureds or third parties, but also at increasing long-term risk. As we explained, the very mechanism insurers use to increase long-term risk involves shifting it to others. We demonstrated that through highlighting insurers' lobbying effort to pass federal and state tort reforms, primarily caps on damages. By limiting payouts, victims are left to bear the uncompensated costs, and this under-compensation of victims results in under-deterrence of care-providers and consequently in increased risks in society.

In Table 2 below, we summarize all the insurance practices discussed in this Article, using the framework set out in Table 1, in the Introduction.

As we noted above, the boundary separating these categories is sometimes vague and unstable. Any of the examples discussed in Part I can also make insureds and other parties lower their investment in precautions, thus rendering itself an example suited for Part III. Yet we propose that these categories form a valuable theoretical framework, enabling us to better understand and assess the merit of different insurers' practices.

More specifically, we criticize the conventional wisdom that insurance reduces overall risk in society by managing risks and controlling moral hazard through our observation that the interaction between the short-term, liability-reducing interest and the long-term, risk-increasing interest reveals more surprising insurer interests. Insurers' interest in creating a riskier world is two-fold: as an industry, insurers attempt to increase total risk values—to turn the knob a few inches higher; but as competitors in the market, they often fail to engage in loss-reduction and focus instead on attaining the lowest liability coverage payout.

We do not argue that insurers engage in such practices exclusively. Yet to better formulate future policy, it is important to understand when insurers improve safety and when they do not, and why this difference might occur.

An urgently needed reform would be to eliminate the McCarren-Ferguson Act, which provides the insurance industry exemption from federal antitrust laws. Whereas the chances for abolishing this seventy-seven-year-old federal statute

**Table 2:** Summary – classifying insurers' practices.

| Short term/Long term | No loss shifting | Loss shifting |
|---|---|---|
| Risk decreasing/ maintaining | Conventional wisdom Directing insured on how to efficiently reduce risk (e.g., smoke alarms). | Part I Abstaining from regulating insured's behavior;<br><br>Engaging in active loss-shifting actions, including: Obscure contractual language; apology laws and instructing insureds (e.g., police officers, employers) how to avoid liability rather than harm. |
| Risk increasing | Part II<br>– Third-party moral hazard<br>– Lobbying against risk-reducing technology | Part III<br>Tort reforms |

have always seemed negligible, in early 2021, in the last days of the Trump administration, Congress passed the Competitive Health Insurance Reform Act or CHIRA, which removes the exception for health insurers. The law not only removes the antitrust immunity for that subset of insurers, but also places practical limits on the sharing of sensitive data for all insurers, which was ostensibly one of the main purposes of the McCarren-Ferguson Act. Even though some kinds of lobbying efforts may be allowed in the US under the Noerr-Pennington antitrust doctrine (Avraham and Gilo 2022), the new act limits the range of possibilities for insurers to collude. This is increasingly important as market concentration seems to be especially high for health insurers. But other kinds of insurers in the U.S. also seem to have high market concentration levels, such as auto insurance, property and liability insurance, and life insurance. Notably, it seems that high market concentration in the U.S. insurance market leads to greater profitability for those insurers.

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# Bionotes

**Ronen Avraham** is Professor of Law at the Tel Aviv University Faculty of Law and a lecturer at the University of Texas at Austin.

**Ariel Porat** is the President of Tel Aviv University. Formerly, he was Alain Poher Professor of Law, Tel Aviv University Faculty of Law, and Associate Member and Fischel-Neil Distinguished Visiting Professor of Law, the University of Chicago Law School.

# Medical Mutual Testimony in Opposition to House Bi
Uploaded by: Alexis Braun
Position: UNF

**Bill:** House Bill 113 – Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

**Date:** February 19, 2025

**Position:** Oppose

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Medical Mutual opposes House Bill 113. Eliminating the cap on noneconomic damages in personal injury and wrongful death actions would expose Maryland residents and businesses to unpredictable and potentially unlimited liability that could adversely affect the availability and affordability of casualty insurance in the State.

In 1986, the General Assembly enacted a $350,000 cap on noneconomic damages for personal injury actions.[1] Effective October 1, 1994, the cap was raised to $500,000, and in an effort to address inflation, an annual escalator was enacted that increases the cap by $15,000 each year beginning on October 1, 1995.[2] Since then, the cap has steadily increased to $950,000 for causes of action arising on or after October 1, 2024.[3] This amount increases to $1,425,000 (150% of the individual cap) in wrongful death actions involving two or more claimants or beneficiaries.[4] And the cap in a combined survival and wrongful death action can be as high as $2,375,000.[5]

The General Assembly enacted a reasonable limit on noneconomic damages. This measured response to disproportionate jury awards continues to provide predictability and stability in Maryland's civil justice system today. The noneconomic damages cap also preserves "the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for

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[1] 1986 Md. Laws, ch. 639. Noneconomic damages include pain and suffering and other nonpecuniary losses. Economic damages, which are not capped, include past and future loss of earnings, past and future medical expenses, and other pecuniary losses.

[2] 1994 Md. Laws, ch. 477.

[3] Md. Code, Cts. & Jud. Proc. § 11-108(b)(2).

[4] Md. Code, Cts. & Jud. Proc. § 11-108(b)(2), (3). The cap for wrongful death actions increases by $22,500 annually. *Id.*

[5] *Goss v. Estate of Jennings*, 207 Md. App. 151, 173, 51 A.3d 761, 773-74 (2012) (holding that the § 11-108 cap applies separately to damage awards in combined survival and wrongful death actions). The cap for combined survival and wrongful death actions increases by $37,500 annually. Md. Ann. Code, Cts. & Jud. Proc. § 11-108(b)(2), (3).

personal injuries to members of the public."[6] Eliminating the noneconomic damages cap would upend these legitimate legislative objectives and disturb the careful balance that the General Assembly struck when enacting the cap.

Medical Mutual was created in 1975 by an act of the General Assembly at a time when other medical professional liability (MPL) insurers withdrew from the State, leaving most physicians without insurance protection. Thanks to the wisdom of the General Assembly, the Governor, and others who were involved in Medical Mutual's creation, we are celebrating our 50th year as a physician-owned and directed mutual insurer, providing comprehensive MPL insurance to Maryland Physicians.

As the largest provider of MPL insurance to private practice physicians in Maryland, Medical Mutual is concerned that a repeal of the cap on noneconomic damages in civil actions for personal injury or wrongful death may lead to a proliferation of judicial challenges that seek to invalidate the cap on noneconomic damages applicable to medical liability actions. The bill file for the 1986 legislation that created the cap bears this out.[7]

The bill file includes a letter from Attorney General Sachs to Governor Hughes, which approved the constitutionality and legal sufficiency of the bill.[8] In the letter, the Attorney General stated that the bill, which as introduced would only have applied to medical liability actions, was amended to apply to all personal injury actions, thus removing "an alleged constitutional objection that the legislation impermissibly treats medical liability actions differently from other types of cases." Repealing the cap on noneconomic damages in civil actions for personal injury or wrongful death could lead to the very judicial challenges the General Assembly sought to avoid. Medical Mutual believes those challenges should ultimately fail. However, the mere possibility of a successful challenge would lead to costly and protracted litigation and could destabilize the market for MPL insurance in Maryland.

Private practice physicians are already struggling with increasing labor and other practice costs and decreasing reimbursement rates. Adding MPL insurance premium increases to these struggles could negatively impact the availability of quality healthcare for Maryland citizens.

For these reasons, Medical Mutual respectfully requests an UNFAVORABLE report on House Bill 113.

For more information contact:
Alexis Braun / abraun@weinsuredocs.com
(443) 689-0208

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[6] *Murphy v. Edmonds*, 325 Md. 342, 369 (1992).

[7] Bill File, Senate Bill 558, 1986 Session, Maryland General Assembly.

[8] Letter from Stephen H. Sachs, Attorney General, Maryland, to Harry Hughes, Governor, Maryland (May 6, 1986) (included in bill file for Senate Bill 558, 1986 Session).

# HB 113_noneconomic damages_oppose.pdf
Uploaded by: Allison Taylor
Position: UNF

KAISER PERMANENTE®

Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc
2101 East Jefferson Street
Rockville, Maryland 20852

February 19, 2025

The Honorable Luke Clippinger
House Committee on Judiciary
Room 100, House Office Building
6 Bladen Street
Annapolis, Maryland 21401

**RE: HB 113 – Oppose**

Dear Chair Smith and Members of the Committee:

Kaiser Permanente respectfully opposes HB 113, " Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death." The bill proposes to remove the existing caps on noneconomic damages in personal injury and wrongful death cases in Maryland.

Kaiser Permanente is the largest private integrated health care delivery system in the United States, delivering health care to over 12 million members in eight states and the District of Columbia.[1] Kaiser Permanente of the Mid-Atlantic States, which operates in Maryland, provides and coordinates complete health care services for over 825,000 members. In Maryland, we deliver care to approximately 475,000 members.

Kaiser Permanente opposes efforts to eliminate caps on non-economic damages awards. Caps ensure that injured patients receive fair compensation while preserving access to health care by keeping doctors, nurses, and health care providers in practice and hospitals and clinics open.

The high cost of physician liability insurance premiums influences where physicians practice and affects patients' access to care and treatment. Research has demonstrated that physician supply is higher and patients' access to care is enhanced in areas where physicians are under less pressure from the liability system. States without caps suffer from provider shortages, leading to the closing of hospitals, clinics, and trauma centers and leaving patients with no doctors in their immediate vicinity.[2]

A cap on non-economic damages reduces health care costs, thereby making health care more affordable. Caps lower loss costs by limiting the average size of liability awards and reducing the incentive for individuals and their lawyers to litigate weak or non-meritorious claims. An AMA study found that 68% of all liability claims are dropped, dismissed or withdrawn. Further, of those claims that do go to a trial verdict, physicians win 88% of the time.

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[1] Kaiser Permanente comprises Kaiser Foundation Health Plan, Inc., the nation's largest not-for-profit health plan, and its health plan subsidiaries outside California and Hawaii; the not-for-profit Kaiser Foundation Hospitals, which operates 39 hospitals and over 650 other clinical facilities; and the Permanente Medical Groups, self-governed physician group practices that exclusively contract with Kaiser Foundation Health Plan and its health plan subsidiaries to meet the health needs of Kaiser Permanente's members.

[2] See, e.g., American Medical Association, Medical Liability Reform Now! 2024.

By reducing the costs of medical liability insurance, a cap makes health care more affordable and increases the public's access to physicians and hospitals when they require care. For these reasons we urge an unfavorable report for HB 113.

Thank you for the opportunity to comment. Please feel free to contact me at Allison.W.Taylor@kp.org or (919) 818-3285 with questions.

Sincerely,

Allison Taylor

Allison Taylor
Director of Government Relations
Kaiser Permanente

**AUC of Maryland_HB113_UNFAV.pdf**
Uploaded by: Andrew Griffin
Position: UNF

Whitney Beall
EXECUTIVE DIRECTOR

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AUC of MD est. 1950
Associated Utility Contractors of Maryland, Inc.



February 19, 2025

Legislative Position: Unfavorable
House Bill 113
Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
House Judiciary Committee

Dear Chairman Clippinger and members of the committee:

Established in 1950, the Associated Utility Contractors of Maryland, Inc. (AUC) is dedicated to advancing the utility contracting industry across the state. Our mission is to foster strong relationships between utility contractors and their clients, uphold the highest professional standards within the industry, and elevate the reputation of utility professionals within the business community. We actively advocate for public policies that address industry challenges and contribute to improving Maryland's overall business environment.

As the statewide association for underground utility contractors, we are writing to express opposition to HB 113, which would eliminate the cap on non-economic damages. If passed, this legislation would have far-reaching, negative implications for Maryland businesses and consumers. I urge you to oppose this dangerously misguided bill.

According to studies, non-economic damages, which involve no direct economic loss and have no precise value, are one of the leading components of so-called "nuclear" verdicts, which are typically $10 million and more. Rightfully, many states have caps on non-economic damages and Maryland's cap is already one of the highest in the nation. Passing HB 113 and eliminating the non-economic damages cap could lead to more frequent and excessive nuclear verdicts, as well as potential bankruptcies, for Maryland businesses. It would also lead to a significant increase in frivolous lawsuits that drive up the costs of defense, settlement, and claims administration—contributing to increased legal system abuse that Maryland businesses will pay for via higher "tort taxes."

This misguided bill would also put upward pressure on insurance premiums for businesses across the state. In fact, when some lawmakers tried to remove Maryland's cap on non-economic damages last year, an analysis conducted by an independent actuarial firm found that it could have increased personal liability by as much as 19% and

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commercial auto liability by up to 30%. These increases would pile new cost burdens on the backs of Maryland businesses, at a time when we can least afford it.

Please help keep insurance rates for Maryland businesses low by rejecting HB 113. **We encourage an unfavorable report.**

Sincerely,

The Associated Utility Contractors of Maryland (AUC)

**HCCC_HB113_UNFAV.pdf**
Uploaded by: Andrew Griffin
Position: UNF

HOWARD COUNTY CHAMBER

February 19, 2025

Legislative Position: Unfavorable
House Bill 113
Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
House Judiciary Committee

Dear Chairman Clippinger and members of the committee:

Founded in 1969, the Howard Chamber of Commerce is dedicated to helping businesses—from sole proprietors to large international firms—grow and succeed. With the power of 700 members that encompass more than 170,000 employees, the Howard County Chamber is an effective partner with elected officials and advocates for the interests of the county's business community.

As introduced, HB 113 would eliminate the cap on non-economic damages. If passed, this legislation would have far-reaching, negative implications for Maryland businesses and consumers. We strongly urge you to oppose this misguided bill.

According to studies, non-economic damages, which involve no direct economic loss and have no precise value, are one of the leading components of so-called "nuclear" verdicts, which are typically $10 million and more. Rightfully, many states have caps on non-economic damages and Maryland's cap is already one of the highest in the nation. Passing HB 113 and eliminating the non-economic damages cap could lead to more frequent and excessive nuclear verdicts, as well as potential bankruptcies, for Maryland businesses. It would also lead to a significant increase in frivolous lawsuits that drive up the costs of defense, settlement, and claims administration—contributing to increased legal system abuse that Maryland businesses will pay for via higher "tort taxes."

This bill would also put upward pressure on insurance premiums for businesses across the state. In fact, when this legislation was considered in the 2024 session, an analysis conducted by an independent actuarial firm found that it could have increased personal liability by as much as 19% and commercial auto liability by up to 30%. These increases would pile new cost burdens on the backs of Maryland businesses, at a time when they can least afford it.

Please help keep insurance rates for Maryland businesses low by rejecting HB 113. **We encourage an unfavorable report.**

Sincerely,

Kristi Simon
President & CEO
Howard County Chamber of Commerce

# Maryland Noneconomic Damages House Bill 113 Opposi
Uploaded by: Axel Carrion
Position: UNF

**Testimony to the Maryland Legislature**

**Judiciary Committee**

**Re: House Bill 113: Noneconomic Damages- Personal Injury and Wrongful Death**

**February 13, 2025**

Honorable members of the Judiciary Committee, thank you for the opportunity to submit testimony on House Bill 113: Noneconomic Damages- Personal Injury and Wrongful Death. UPS strongly opposes this bill and is overly concerned about the effort to remove Maryland's cap on non-economic damages. As the largest logistics company in the world that employs Teamsters, I am here to express my concerns about the proposed bill allowing unlimited noneconomic damage awards in personal injury and wrongful death cases.

Non-economic damages are a major factor in "nuclear verdicts" of $10 million or more. In states without limits on these damages, these verdicts are becoming more common and larger, causing higher costs for consumers and businesses and driving up insurance rates. If HB 113/SB 584 were to pass into law, it could have serious negative effects. An independent study found it could raise personal auto insurance by up to 19% and commercial auto insurance by up to 30%. Higher insurance premiums would increase the costs which would be passed on to consumers. Maryland already has one of the highest caps on non-economic damages in the country. Keeping Maryland's cap on non-economic damages is crucial for controlling costs and keeping insurance premiums lower for everyone.

The trucking industry has seen an increase in nuclear verdicts and fake truck accidents that have troubled the trucking industry recently. Verdicts from 2006 to 2019 of over $10 million nearly doubled in that time and the average verdict against a trucking company rose from about $2.6 million in 2012 to $17 million by 2019. These large awards have made the trucking industry a magnet for staged accidents and fraud with vehicles deliberately crashing into trucks or buses hoping for a big jury award or insurance payout. Maryland law already allows the non-economic damages cap to increase each year. This change will lead to higher settlement demands and unpredictable awards, which could raise insurance rates and the cost of doing business for everyone in Maryland.

UPS urges the legislature to maintain the current limits on noneconomic damages to ensure a stable and fair civil justice system in Maryland. Removing these limits could lead to unpredictable and excessive awards while also raising prices for consumers in Maryland.

Thank you for your time and consideration.

Sincerely,

Axel Carrion
Vice President – State Public Affairs
UPS

INDEPENDENT INSURANCE AGENTS
OF MARYLAND, INC.

DBA BIG I MARYLAND

BIG i MARYLAND

**House Judiciary Committee**
**House Bill 113**
**Position: Oppose**

Dear Chairman Clippinger and the Members of the House Judiciary Committee,

The BIG I MARYLAND ("Big I") is the State's oldest trade association of independent insurance agents. It represents 200 independent agencies, which employ over 2000 people in the state. We represent independent insurance agents and brokers who present consumers with a choice of policy options from a variety of different insurance companies. These small, medium, and large businesses offer a variety of insurance products – including property, casualty, life, health, employee benefit plans, and retirement products.

The Big I oppose HB113 because the insurance market is experiencing an unprecedented confluence of circumstances that stem in part from COVID and the dramatic recent increase in inflation. Claims severity and frequency have been consistently on the rise which have caused increases in premiums, as well as a number of reasons outside the control of anyone. This proposed legislation would exacerbate this dynamic by making insurance even less affordable. Our members are on the front lines of these issues and our clients, both individuals and businesses, do not want this legislation.

Current Maryland law automatically increases the cap on punitive damages annually and DLS's own study has shown it tracks very close to inflation. As such, we respectfully oppose this legislation

We appreciate the opportunity to provide these comments.

Sincerely,

Brett Lininger, Legislative Counsel

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**HB0113 -- Civil Actions - Noneconomic Damages - Pe**
Uploaded by: Brian Levine
Position: UNF

**House Bill 113 -- *Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death***
**House Judiciary Committee**
**February 19, 2025**
**Oppose**

The Montgomery County Chamber of Commerce (MCCC), the voice of business in Metro Maryland, opposes House Bill 113 -- *Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death.*

House Bill 113 repeals limitations on noneconomic damages in civil actions for personal injury or wrongful death. Non-economic damages compensate injuries and losses that are not easily quantified by a dollar amount while economic damages can be calculated from documents or records, such as medical expenses and earnings.

MCCC is concerned about House Bill 113 and its potential impact on the state's business competitiveness. Limiting noneconomic damages is generally seen as beneficial for a state's business climate, particularly for small businesses that are more vulnerable in litigation involving such damages. Increased exposure and financial burdens from this bill could harm not only small businesses but also the overall perception of Maryland's business environment.

A positive business climate in Maryland can be measured in various ways, including its legal and tort environment. When businesses consider locations for expansion, the tort environment is a significant factor. Therefore, Maryland must ensure it remains competitive with neighboring and rival states in terms of tort climate, alongside other factors like taxation, regulations, education, and transportation infrastructure.

**For these reasons, the Montgomery County Chamber of Commerce opposes House Bill 113 and respectfully requests an unfavorable report.**

*The Montgomery County Chamber of Commerce (MCCC), on behalf of its members, champions the growth of business opportunities, strategic infrastructure investments, and a strong workforce to position Metro Maryland as a premier regional, national, and global business location. Established in 1959, MCCC is an independent, non-profit membership organization.*

*Brian Levine | Vice President of Government Affairs*
*Montgomery County Chamber of Commerce*
*51 Monroe Street | Suite 1800*
*Rockville, Maryland 20850*
*301-738-0015 | www.mcccmd.com*

**HB 113_IAB_UNF.pdf**
Uploaded by: Bryson Popham
Position: UNF

**Bryson F. Popham, P.A.**

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February 17, 2025

The Honorable Luke Clippinger
Chair, House Judiciary Committee
101 Taylor House Office Building
Annapolis, Maryland 21401

RE: House Bill 113 - Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
UNFAVORABLE

Dear Chairman Clippinger and Members of the Committee

On behalf of the Insurance Agents & Brokers of Maryland (IA&B) I am writing in opposition to House Bill 113. IA&B is a trade association comprised of nearly 200 independent agencies, employing approximately 1,800 licensed Maryland insurance producers, which are located in and doing business throughout the Maryland and the surrounding states.

The Committee is well aware of significant natural disasters, from fires in California to hurricanes in the Southeast, that have caused enormous losses to Americans and their property. Those same losses have depleted the capacity of the insurance industry to make people whole again.

This legislation presents a different hazard: by eliminating a law that has governed liability awards in Maryland for over 40 years, House Bill 113 introduces substantial uncertainty to the ability of insurance companies to fulfill their obligations <u>and</u> maintain a reasonable price for doing so. At a minimum, the General Assembly should require the Maryland Insurance Commissioner, which serves, in a very real sense, as your expert on the functioning of the insurance market, to examine the potential impact this legislation may have in Maryland.

As just one example, insurers that rely heavily on reinsurance (i.e., insurance for insurance companies), may find that reinsurance is more difficult to obtain and more expensive if this bill were to pass. That result, we submit, is unacceptable when, as now, insurance has already been subject to substantial inflationary pressure.

Although the insurance market is cyclical and expectedly fluctuates between what are known as hard and soft markets, we are currently in the midst of an insurance crisis that has been unparalleled in recent decades. These crisis conditions have been driven primarily by a corresponding increase in the frequency and severity of claims, which itself has been driven by several factors, including inflation, supply chain issues, severe weather events, litigation abuse, and counterproductive regulatory measures. Many of these factors are uncertain and uncontrollable, but the regulatory environment is not one of them.

Homeowners, auto, and commercial liability insurance have become increasingly difficult to afford. The removal of the cap on noneconomic damages, as proposed under House Bill 113, would only serve to further increase the severity of losses in liability claims, which will result in even higher premiums for your constituents in an already hard market.

For these reasons, IA&B urges an unfavorable vote on House Bill 113.

Very truly yours,

Bryson Popham

cc: Kip White, President IA&B
John Savant, IA&B Government Relations

**HB 113_MAMIC_UNF.pdf**
Uploaded by: Bryson Popham
Position: UNF

MAMIC
Maryland Association of Mutual Insurance Companies

191 Main Street, Suite 310 – Annapolis MD 21401 – 410-268-6871

February 17, 2025

The Honorable Luke Clippinger
Chair, House Judiciary Committee
101 Taylor House Office Building
Annapolis, MD 21401

RE: House Bill 113 - Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death - UNFAVORABLE

Dear Chairman Clippinger and Members of the Committee,

On behalf of the Maryland Association of Mutual Insurance Companies (MAMIC), we respectfully oppose House Bill 113.

As you may recall, MAMIC is comprised of 12 mutual insurance companies that are headquartered in Maryland and neighboring states. Approximately one-half of our members are domiciled in Maryland, and are key contributors and employers in our local communities. Together, MAMIC members offer a wide variety of insurance products and services and provide coverage for thousands of Maryland citizens.

House Bill 113 completely upends the system of determining noneconomic damages under Maryland's tort liability law that has been in place for many years. MAMIC is aware of no evidence that would support such a radical change; in fact, there is not even a requirement that the Maryland Insurance Commissioner study and determine the impact of such a change on the Maryland insurance market. The Committee is well aware that inflation has been a major driver in the increasing cost of property and liability insurance in Maryland and across the country. As smaller insurers in the highly competitive Maryland market, MAMIC members strive to keep costs as low as possible for our policyholders.

Like all insurers, MAMIC members must purchase reinsurance – essentially, insurance for insurance companies. The cost of reinsurance has been rising rapidly as well and that places extra pressure on our members who are offering their Maryland policyholders various products and services.

We should point out that MAMIC includes the second oldest mutual insurer in the United States, located in District 46 in Baltimore City. We have other domestic insurer-members headquartered in Bel Air, Hagerstown and Frederick. Other members may be headquartered in adjoining states, but Maryland is a very important market for them. For example, one MAMIC member is a major writer of residential property (homeowners) insurance on the Lower Eastern Shore. Experienced legislators know that coastal insurance exposures are among the most difficult to insure.

All MAMIC members depend heavily on solid, stable, reinsurance programs. Reinsurers in Maryland, by extension, depend on a solid, stable, tort liability environment in order to offer their products at affordable rates. The passage of House Bill 113 would completely disrupt our statutorily constructed model for assessing noneconomic damages in our State. This model has developed over decades, and it serves Maryland citizens well. To be effective, the model requires a healthy, competitive liability insurance market that can pay claims, including claims for noneconomic damages, when necessary.

For these reasons MAMIC and its members do not believe that any material change to the system of ascertaining noneconomic damages is warranted. In fact, we believe the dangers far outweigh any speculative benefit offered by the proponents of this bill. We respectfully request an unfavorable report on House Bill 113.

Sincerely,

Jeane A. Peters, President

**Opposes HB 113.pdf**
Uploaded by: Carville Collins
Position: UNF

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**MARYLAND EMPLOYERS FOR CIVIL JUSTICE REFORM COALITION**

**OPPOSES HB 113**

Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Maryland Employers for Civil Justice Reform Coalition, comprised of many of the largest employers, businesses, and health care providers in Maryland, opposes HB 113. The bill calls for the full repeal of Maryland's noneconomic damages caps, an unjustified public policy.

**Historical Context**

Caps on noneconomic damages have been an important public policy in Maryland for more than 38 years. Back in 1985, when the State faced a liability insurance crisis, two task forces were created to conduct a careful study of the problem and recommend solutions. One of those groups, the Governor's Task Force to Study Liability Insurance, concluded in its 1985 Report:

> *The current availability and affordability crisis in certain lines of insurance… is not a manufactured crisis, as some have charged… The civil justice system can no longer afford unlimited awards for pain and suffering.*
>
> *The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, and lead to more accurate [insurance] rates because of the greater predictability of the size of the judgments. The limitation [cap] is designed to lend greater stability to the insurance market…*
>
> *A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.*[1]

The House Judiciary Committee helped craft the 1986 legislative solution to the crisis, noting in its Committee Report that the legislative purpose was "assuring the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injury."

[1] Franklin v. Mazda Motor Corp., *704 F. Supp. 1325, 1328 (D. Md. 1989) (quoting the Report of the Governor's Task Force to Study Liability Insurance, issued Dec. 20,1985). This issue also studied in 1985 by the Joint Executive/Legislative Task Force on Medical Insurance, resulting in a similar recommendation for statutory limits or caps.*

In light of this well studied foundation for the current caps on noneconomic damages, why *ever* would the General Assembly want to risk inviting back the insurance crisis of 1985 by removing these caps? This foundation explains why more than a dozen legislative proposals identical or similar to HB 113 have failed each and every legislative session since first introduced back in the early 2000s.

A central reason favoring the preservation of caps on noneconomic damages has always been that these damages, for pain and suffering and other nonpecuniary injuries, are difficult to quantify. Quite simply, these damages involve no direct economic loss and have no precise monetary value. Given the emotional sensitivities and differing perspectives surrounding these injuries, courts and juries often struggle to calculate fair and rational awards. Caps have proven to be the correct and best public policy to balance the need for recovery for these injuries with the avoidance of unrealistically high and excessive awards. For these reasons, more than half the states have caps currently in effect on noneconomic damages.

**Maryland's Current Caps Are Reasonable**

The caps were originally set at $350,000 when first enacted in 1986, and then in 1994 they were raised to $500,000 and tied to an annual escalator of $15,000 to adjust for inflation. Today, these inflation-adjusted caps in personal injury actions have risen to $950,000 for the injured party. In most other states with caps, the caps range from $250,000 to $1,000,000, placing Maryland at the top of the range among the states.

Significantly, the caps do not end at $950,000, they go higher under current law. In wrongful death cases, pain and suffering can be recovered on behalf of the person who died as a result of the negligent conduct, and in addition, two or more beneficiaries, such as immediate family members, can also recover noneconomic damages in wrongful death cases. Accordingly, in actions where a person is alleged to have died as a result of negligence, the total availability of noneconomic damages in Maryland is up to $2,375,000 ($950,000 for the decedent, plus $1,425,000 for the immediate family). Noneconomic damages are not even a sole remedy, as damages for the full and unlimited amount of *economic* losses, together with *punitive* damages, are also available to plaintiffs in these actions. Cleary, the rights of injured parties to recover for their injuries are protected under current law.

**Consequences of HB 113**

Each year that cap repeal legislation is introduced, the proponents contend there is no effect on insurance premiums or availability, an utterly false narrative. To the contrary, insurance costs for consumers and businesses will increase, as determined by the Maryland Insurance Administration (MIA) and the National Association of Insurance Commissioners. Last year's SB 538, which as amended would have raised the cap to $1,750,000, would have produced insurance premium increases of 15.7% to 21.4% across all liability lines, according to an independent actuarial analysis.[2] HB 113's outright repeal of the cap – a more extreme measure – would produce much larger adverse impacts on insurance costs.

As identified in the Fiscal Note, HB 113 creates a *material fiscal liability* for the State of Maryland in the transportation sector. Specifically, while most state agencies are covered by the

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[2] *Analysis of the Impact of Increasing Maryland's Economic Damages Cap*, Pinnacle Actuarial Resources, Inc., April 3, 2024 (actuarial analysis of Maryland insurance rates (all lines) conducted on a noneconomic damages cap of $1,750,000 and an annual escalator of $20,000).

liability limits of the Maryland Tort Claims Act, the Maryland Transit Administration (MTA) is governed by the Transportation Article which, like HB 113, does *not* include a limit on liability. According to Fiscal Services, HB 113 creates significantly greater awards and settlements against MTA, a lack of predictability in litigation and settling MTA cases, and financial liability in the millions of dollars.

The real purpose of HB 113 becomes evident when understanding who the *only* proponents of the bill are – plaintiffs' lawyers. Removing the cap to make for unlimited noneconomic damages produces the same effect of unlimited attorneys' fees, which are based on a percentage of the damages recovered. While the only persons supporting this legislation are plaintiffs lawyers, bill opponents include Maryland drivers, homeowners, consumers, employers, health care providers, insurers, the hospitality and transportation sectors, and small businesses across a spectrum of industries. Such self-interested conduct by bill proponents, seeking unlimited increases in the fees they extract from their clients who are victims of negligence, has no place in the public policy of Maryland.

**False Assertions**

Proponents of HB 113 falsely assert that remittitur ensures that verdicts will not be excessive in personal injury cases, and therefore this readily-available safeguard obviates the need for a damages cap. What the proponents omit from this assertion is that the standard for remittitur is profoundly high, and thus the incidence of remittitur is extremely rare. The Supreme Court of Maryland established this high standard, requiring that the verdict "be grossly excessive" or "shock the conscience of the trial judge."[3] The notion that remittitur would serve as a readily available safeguard or cure for excessive verdicts in Maryland has no basis in fact or law.

Finally, the proponents question the constitutionality of the current caps, but unfortunately for them this issue has been reviewed on three separate occasions by the Court of Appeals (now Supreme Court) of Maryland. In every instance, the noneconomic damages caps have been upheld by the high court. [4] Allegations that caps on noneconomic damages are unconstitutional are unfounded and inconsistent with established case law.

**Conclusion**

For all these reasons, the Coalition respectfully urges an unfavorable report on HB 113.

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February 19, 2025

Counsel for Maryland Employers for
Civil Justice Reform Coalition

[3] *Rodriguez v. Cooper*, 458 Md. 425, 437 (2018).

[4] DRD Pool Service v. Freed, 416 Md. 46, 62 (2010); Oaks v. Connors, 339 Md. 24, 37 (1995); Murphy v. Edmonds, 325 Md. 342, 366 (1992). *See also*, Martinez v. Hopkins, 212 Md. App. 634, 656 (2013) (constitutionality of the caps was challenged but not struck down, finding that the constitutionality of the caps was moot).

## ATRA HB113 2025 Maryland Noneconomic Damages Testi

Uploaded by: Cary Silverman

Position: UNF

Testimony Before the Maryland House Judiciary Committee
in Opposition to H.B. 113: A Bill That Would Allow Unlimited Noneconomic
Damage Awards in Personal Injury and Wrongful Death Cases
Cary Silverman
On Behalf of the American Tort Reform Association
February 19, 2025

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On behalf of the American Tort Reform Association ("ATRA"), thank you for providing me with the opportunity to testify today. ATRA opposes H.B. 113, which would eliminate Maryland's statutory limits on noneconomic damages in personal injury cases. As a result, the bill would lead to unreasonable settlement demands and unpredictable awards in a wide range of cases, which will be felt by Maryland's drivers, homeowners, and businesses in the form of higher insurance rates.

ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that share the goal of having a fair, balanced, and predictable civil justice system. I am a Maryland resident, a member of the Maryland Bar, and a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. As part of my practice, I have studied noneconomic damage awards, authoring law review articles and research papers on the topic. I have had the privilege of testifying before this Committee when it considered legislation to raise or repeal Maryland's limits on noneconomic damages in past sessions.

There is no true way to place a monetary value on the pain and suffering associated with an injury. The instinct to permit large awards for pain and suffering to those who have suffered serious injuries, on top of what is already likely to be a large award for medical expenses, lost income, and other economic losses, must be balanced against the adverse effects that rising damage awards have on homeowners, drivers, and businesses, the economy, and the civil justice system. H.B. 113 would disturb the careful balance that the General Assembly has set, which has positively contributed to a stable civil liability environment in Maryland for decades.

## Damages Available Under Maryland Law

In considering the limit on noneconomic damages, it is helpful to consider the full picture of damages in personal injury and wrongful death cases.

**Economic Damages.** Maryland residents who experience an injury as a result of the negligence or other wrongful conduct of others are entitled to be made whole for their losses. They can seek and recover compensation for medical expenses, lost income or earning capacity, and other expenses incurred or expected. Recoveries for these types of expenses—economic damages—are *not* limited by Maryland law. Basically, any past cost or anticipated future expense resulting from an injury that has a measurable market value falls into this unlimited category.

For example, under Maryland law, the value household services that a person who has been injured or who has died can no longer perform is considered *economic* damages. The Maryland Supreme Court has indicated that these tasks may include "cooking, cleaning, and gardening" and can range from "polishing the family silver to pulling up weeds from the garden."[1] Hauling out the garbage, mowing the lawn, and making repairs are other examples recognized by Maryland courts as having an economic price.[2] A plaintiff can recover the cost of hiring someone to perform these services, which can add up to hundreds of thousands of dollars.

In cases of severe permanent injuries or death, economic damages can reach into the millions of dollars.

**Noneconomic Damages.** Plaintiffs can also recover noneconomic damages, the subject of H.B. 113. Noneconomic damages provide plaintiffs with compensation for types of harms that cannot be documented with a dollar value, such as pain, suffering, inconvenience, and loss of consortium.[3] In wrongful death cases, Maryland law allows for an especially broad range of noneconomic damages – more expansive than most other states (but which are constrained by the statutory limit).[4]

Traditionally, noneconomic damage awards were relatively small in amount and high awards were uniformly reversed.[5] For various reasons,[6] the size of pain and suffering awards increased exponentially between the 1950s and 1980s.[7] By that time, pain and suffering awards had become the largest single item of recovery in personal injury cases, exceeding medical expenses and lost wages.[8] This prompted state legislatures to enact limits on these inherently subjective damage awards.

**Punitive Damages.** Finally, when an injury or death is caused by malicious conduct, a plaintiff can also recover punitive damages in Maryland. About half of the states limit punitive damages to an amount set by statute or a multiple of compensatory damages. A half dozen other states generally do not authorize punitive damage awards. In Maryland, punitive damages are available and *uncapped*. Such awards are permissible so long as they are supported by the evidence of malicious conduct and are not unconstitutionally excessive.

## Maryland's Limit on Noneconomic Damages

The General Assembly first limited noneconomic damages in 1985 in response to an insurance crisis and initially set the cap at $350,000. It did so after Maryland Governor Harry Hughes and the General Assembly established two task forces, the Governor's Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Insurance, both of which, after hearings, meetings, and substantial research, recommended statutory limits. As the Governor's Task Force concluded:

> [T]he civil justice system can no longer afford unlimited awards for pain and suffering.

> The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lead to more settlements, and enable insurance carriers to set more accurate rates because of the greater predictability of the size of judgments. The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters.
>
> A substantial portion of the verdicts being returned in liability cases are for noneconomic loss. The translation of these losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.
>
> A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.

*Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1328 (D. Md. 1989), (quoting report of the Governor's Task Force to Study Liability Insurance issued Dec. 20, 1985).

There are now separate limits applicable to general personal injury and medical malpractice cases that rise to account for inflation by $15,000 per year.[9] The Maryland Supreme Court has repeatedly upheld the limit on noneconomic damages as constitutional.[10]

Today, the inflation-adjusted limit on noneconomic damages in personal injury actions is $950,000. This amount rises to $1,425,000 (150% of the individual limit) in wrongful death actions involving two or more beneficiaries. In wrongful death cases, pain and suffering can also be recovered on behalf of the person who died as a result of negligent conduct in addition to beneficiaries, such as a spouse or children. In those actions, the limit on noneconomic damages is also $950,000. Combined, in actions alleging that a person died as a result of negligence, total noneconomic damaged can reach $2,375,000 million ($950,000 for the decedent plus $1,425,000 for his or her family). These limits automatically increase to $965,000/$1,447,500/$2,412,500 in October 2025.

The statutory limit is accomplishing its goal. It has prevented outlier awards and provided for greater consistency and predictability in Maryland's civil justice system. It has ensured that those who are injured as a result of another party's tortious conduct can receive full compensation for economic losses plus a reasonable, though not unlimited, amount for pain and suffering. It has also provided consistency for plaintiffs by precluded widely varying noneconomic damage awards for similar injuries.

## The Proposed Legislation

H.B. 113 would eliminate the limit on noneconomic damages that applies in general personal injury cases effective October 1, 2025. This bill goes even further than prior proposals that the General Assembly chose not to enact, which proposed increasing the limit or eliminating it only in certain cases.

## Implications for Maryland for Eliminating the Statutory Limit

The Maryland Supreme Court has recognized that the General Assembly enacted the statutory limit to preserve "the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public."[11] Limiting noneconomic damages "may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services."[12]

As we see a resurgence of massive pain and suffering awards nationwide, now is certainly not the time to eliminate this limit. Awards in excess of $10 million, known as "nuclear verdicts," are rising in frequency and size in personal injury and wrongful death cases.[13] The largest component of these awards are noneconomic damages.[14] While about 20% of nuclear verdicts are reached in medical liability cases that would remain subject to Maryland's separate noneconomic damage limit, many occur in auto accident (23%), product liability cases (23%), and premises liability cases (14%) nationwide.[15] In other states, we have seen juries, prompted by plaintiffs' lawyers, award amounts for past and future pain and suffering for $12 million, $33 million, $40 million, even $85 million or more.[16] These verdicts are sometimes improperly prompted by a push by the plaintiffs' lawyer for the jury to "send a message," even if a defendant has not committed misconduct that would warrant punitive damages.

In states that lack limits on noneconomic damages, personal injury lawyers have long understood that the more you ask for, the more you get,[17] and they have become increasingly bold in their requests to juries for extraordinarily high pain and suffering awards. This tactic, known as "anchoring," implants in the minds of jurors an arbitrary sum or a mathematical formula (such as an amount per day or hour, referred to as a "per diem" argument) designed to lead to an excessive award. An "anchor" creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to pain and suffering. Once a lawyer provides an anchor, jurors accept the suggested amount or "compromise" by negotiating it upward or downward. Studies show that both use of a specific sum or mathematical formula leads juries to reach a substantially higher award—double[18] or quadruple[19] the amount they would have if left to determine a just and reasonable award on their own.

Fortunately, Maryland is not known for excessive awards. While anchoring is permissible in Maryland,[20] this type of manipulation and the potential for excessive awards has been constrained by the statutory limit on noneconomic damages. I'll give you one example that is a preview of what is to come if the statutory limit is eliminated. In a case arising from a Maryland inmate who fractured his wrist during a fight, the plaintiffs' attorney requested that the jury award his client $100 per day for pain and suffering for his remaining life expectancy of fifty years. That doesn't sound like much, but it adds up to nearly $2 million. The defendant's counsel objected to the arbitrary amount as highly prejudicial, noting that he had never seen this done before, but the trial court allowed it. Prompted by that high figure, the jury ultimately returned a $3 million verdict. The trial court reduced that $3 million award pursuant to the noneconomic damage limit in place at the time, $770,000. That judgment was affirmed on appeal.[21] Without a statutory limit, these types of arguments, and awards at significantly higher levels, will become the norm in Maryland.

## How Maryland's Noneconomic Damage Limit Compares to Other States

Maryland is not alone in trying to restrain rising pain and suffering awards. When Maryland enacted its statutory limit in 1986, it was the first state to adopt a limit generally applicable to personal injury cases.[22] Now, it is among several states that have done so outside of healthcare liability. For example:

- **Alaska** limits noneconomic damages in personal injury cases to the greater of $400,000 or injured person's life expectancy in years multiplied by $8,000. In cases involving "severe physical impairment or severe disfigurement," the limit increases to the greater of $1 million or injured person's life expectancy in years multiplied by $25,000.[23]

- **Colorado** adjusted its noneconomic damage limit, effective 2025, to $1.5 million in any tort action other than medical liability actions, and to $2.125 million for surviving parties entitled to bring wrongful death actions. Includes adjustments every two years, beginning in 2028, for inflation.[24]

- **Hawaii** limits damages for pain and suffering in personal injury actions to $375,000, though the limit does not apply to auto accident, product liability, toxic tort, and other cases.[25]

- **Idaho** limits noneconomic damages in personal injury cases to $490,512, as adjusted for inflation.[26]

- **Michigan** limits noneconomic damages in product liability actions to $569,000, rising to $1,016,000 in catastrophic injury cases, as adjusted for inflation.[27]

- **Mississippi** limits noneconomic damages in personal injury cases outside of healthcare liability to $1 million.[28]

- **Ohio** limits noneconomic damages in personal injury cases (other than medical liability claims) to $250,000, or three times economic loss, up to a maximum of $350,000, which does not apply to certain permanent and substantial physical injuries, or wrongful death claims.[29]

- **Tennessee** limits noneconomic damage awards to $750,000 for each injured plaintiff, which rises to $1 million in cases involving certain catastrophic injuries or deaths. These limits do not apply if the defendant intended to harm the plaintiff, falsified or destroyed records, was impaired by alcohol or drugs, or was convicted of a related felony.[30]

In addition, some states limit noneconomic damages in their wrongful death acts, such as:

- **Indiana** limits damages for loss of an adult's love and companionship in wrongful death cases to $300,000.[31]

- **Kansas** limits nonpecuniary damages in wrongful death case to $250,000.[32]

- **New Hampshire** law, as amended in 2024, limits a surviving spouse's damages for loss of comfort, society, and companionship to no more than $500,000. A parent's damages for loss of the comfort, society, affection, guidance, and companionship of a deceased child is limited to $300,000.[33]

- **Wisconsin** limits damages for nonpecuniary injuries to $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship.[34]

About half of states, like Maryland, limit noneconomic damages specifically in medical liability actions. Generally, theses caps are at levels similar to or lower than those above.

As these state laws show, Maryland's current limit on noneconomic damages – at nearly a million dollars in personal injury cases, significantly more in wrongful death cases, and adjusted upward each year – is well within the mainstream. Indeed, it is at the higher end of these limits.

## Conclusion

The General Assembly's foresight in enacting a reasonable limit on noneconomic damages is an important, rational approach that continues to control outlier awards. It provides consistency and predictability in Maryland's civil justice system. It has avoided the rise of awards to the astounding levels that we have seen in other states.

The bill's proposal to allow unlimited pain and suffering awards outside of healthcare liability claims will have adverse effects. It will:

- Complicate the ability to reach reasonable settlements, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm. Some may hold out for the chance of a jackpot verdict.

- Result in more trials, imposing unnecessary costs on all litigants, depleting court resources and using juror time, and delaying compensation to injured plaintiffs.

- Lead to more frequent excessive verdicts for a wide range of businesses and nonprofit organizations and lengthy appeals.

- Result in higher insurance costs for Maryland drivers, homeowners, and businesses.

Thank you for considering our concerns. We respectfully ask for an unfavorable report.

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[1] *See Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992) (affirming $245,000 award for past and future loss of household services); *see also Choudhry v. Fowlkes*, 219 A.3d 107 (Md. Ct. Spec. App. 2019) (reaffirming that loss of household services are recoverable as uncapped *economic* damages so long as the plaintiff supports the request by identifying the tasks, providing their market value, and showing a reasonable expectation that a decedent would have performed those tasks).

[2] *Choudhry,* 219 A.3d at 113-14 (citing *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 633 (6th Cir. 1978)).

[3] Md. Cts. & Jud. Code Ann. § 11-108(a)(1).

[4] Md. Cts. & Jud. Code Ann. § 3-904(d) (providing that damages in wrongful death actions are not limited to pecuniary losses and may include "damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education"). As the American Law Institute's (ALI) tentatively approved new Restatement of the Law Third Torts: Remedies recognizes in examining Wrongful Death Acts, "most states do not compensate grief or emotional distress," unlike Maryland.

[5] *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Studies 365, 396-87 (2007) (finding that prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages); *see also* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

[6] Scholars largely attribute the initial rise in noneconomic damage awards to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower value cases; (4) the rise in affluence of the public and a change in attitude that "someone should pay"; and (5) a campaign to increase such awards by the organized plaintiffs' bar. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 553-68 (2006); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004); *see also Melvin M. Belli, The Adequate Award*, 39 Cal. L. Rev. 1 (1951) (seminal article arguing for higher noneconomic damage awards).

[7] *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989).

[8] *See Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971). Judge Paul Niemeyer, a former Maryland federal judge who currently serves on the U.S. Court of Appeals for the Fourth Circuit, observed, "Money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004).

[9] The noneconomic damage limit in personal injury cases increases each year on October 1. Md. Cts. & Jud. Proc. Code Ann. § 11-108(b)(2)(ii).

[10] *Martinez v. The John Hopkins Hosp.*, 70 A.3d 397, 410 n.19 (2013); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 63 (Md. 2010); *Oaks v. Connors*, 660 A.2d 423, 430 (Md. 1995); *Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992).

[11] *DRD Pool Serv.,* 5 A.3d at 67 (Md. 2010) (quoting *Murphy,* 601 A.2d at 115).

[12] *Id.*

[13] Cary Silverman & Christopher E. Appel, Nuclear Verdicts: An Update on Trends, Causes, and Solutions, at 9-10 (U.S. Chamber Inst. for Legal Reform, May 2024) (examining 1,288 reported personal injury and wrongful death verdicts over $10 million between January 1, 2013 and December 31, 2022).

[14] *Id.* at 13.

[15] *Id.* at 8.

[16] *See* Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages*, 44 Am. J. of Trial Advoc. 321, 327-29 (2021) (providing examples from several states).

[17] Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychology 519, 534 (1996).

[18] *See* Bradley D. McAuliff & Brian H. Bornstein, *All Anchors are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 L. & Human Behavior 164, 167 (2010).

[19] *See* John Campbell, et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash. U. L. Rev. 1, 22 (2017).

[20] *Bauman v. Woodfield*, 223 A.2d 364, 373 (Md. 1966*); E. Shore Pub. Serv. Co. v. Corbett*, 177 A.2d 701, *adhered to sub nom.*, 180 A.2d 681 (Md. 1962); *Giant Food Inc. v. Satterfield*, 603 A.2d 877, 881 (Md. Ct. Spec. App. 1992).

[21] *Rivera-Ramirez v. Hall*, No. 756, 2023 WL 1987860, at *4 (Md. Ct. Spec. App. Feb. 14, 2023). This case was brought against a contractor that provided medical services to correction facilities, alleging that its physician provided inadequate care for the inmate's injury. The same tactics, however, can be used in any personal injury case.

[22] *See Maryland Legislature Puts Ceiling on Personal Injury Awards*, N.Y. Times, Apr. 13, 1986.

[23] Alaska Stat. § 09.17.010.

[24] Colo. Rev. Stat. §§ 13-21-102.5(3)(a), 13-21-203(1) (as amended by H.B. 24-1472 (Colo. 2024)).

[25] Haw. Rev. Stat. § 663-8.7.

[26] Idaho Code § 6-1603, as adjusted, https://iic.idaho.gov/wp-content/uploads/2024/07/Benefits-Non-economic-caps-effective-07_01_24.pdf.

[27] Mich. Comp. Laws § 600.2946a, as adjusted, https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/Uncategorized/2024/Economic-Reports-and-Notices-2024/Limitation-on-NonEconomic-Damages-Jan-24-Signed.pdf.

[28] Miss. Code Ann. § 11-1-60(2)(b).

[29] Ohio Rev. Code Ann. § 2315.18.

[30] Tenn. Code § 29-39-102.

[31] Ind. Code Ann. § 34-23-1-2(e).

[32] Kan. Stat. Ann. § 60-1903(a).

[33] N.H. Rev. Stat. § 556:12 (as amended in 2024).

[34] Wis. Stat. § 895.04(4).

**MSDA Opposition to HB 113 Noneco. damages.pdf**

Uploaded by: Daniel Doherty

Position: UNF

**The Maryland State Dental Association Opposes HB 113 – Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death**

***Submitted by Daniel T. Doherty, Jr. on Behalf of the Maryland State Dental Association***

The limitations on the amount of non-economic damages were enacted in 1985 in response to the serious threat that physicians, dentists and some other health care providers would cease practicing in Maryland due to the exposure to huge jury awards to noneconomic damages, and the withdrawal of many insurers from the medical malpractice market. Noneconomic damages include emotional pain and suffering, loss of society, and many other results of injury or death that cannot be quantified on a monetary basis, leaving valuation to the subjective determination of a jury. Initially the cap on these damages was set in statute as $350,000 for personal injury after July 1, 1986, and $500,000 for personal injury or wrongful death after October 1, 1994. Beginning on October 1, 1995 that cap amount increased by $15,000 each year. The enactment of this legislation in 1985 stabilized the medical insurance crisis in Maryland.

While the provisions of HB 113 do not repeal the limitations on noneconomic damages for medical malpractice cases, passage will be the first step in accomplishing that result. Today, we are in an environment where health insurance companies are consistently reducing reimbursement rates to a point that the profitability of many medical or dental practices are operating at paper thin margins. To repeal the cap on noneconomic damages likely will lead to a negative domino effect. Malpractice rates will increase significantly, narrowing even more the profitability of medical practices, driving many practitioners either into retirement or force them to move to another state with better tort protections.

**For these reasons the Maryland State Dental Association requests that HB 113 receive an unfavorable report.**

**Submitted by**
**Daniel T. Doherty, Jr.**
**February 7, 2025**

NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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February 17, 2025

Members of the House Judiciary Committee

*Via email*

**Re: NAMIC opposition to HB 113 — Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death**

Members of the Committee:

The National Association of Mutual Insurance Companies (NAMIC) is reaching out to express our concerns with House Bill 113, which repeals the existing limitations on noneconomic damages in civil actions for personal injury or wrongful death which have been in place for over 25 years.

NAMIC is the largest property and casualty insurance trade association in the country, with more than 1,300 member companies. NAMIC supports regional and local mutual insurance companies as well as some of the country's largest national insurers. NAMIC member companies write $383 billion in annual premiums nationally, and our members account for 61 percent of homeowners, 48 percent of automobile, and 25 percent of the business insurance markets.

House Bill 113 proposes the repeal of the long-standing limitations on noneconomic damages in civil actions for personal injury or wrongful death. These damage caps have been in place for over 25 years, and their removal would significantly disrupt the stability of the insurance marketplace. Caps on damages help create a more predictable environment for modeling insurance costs. Without these caps, inconsistent and unpredictable judgments could result in outlier verdicts, creating one of the highest cost drivers for Maryland's insurance market. This unpredictability makes it difficult for insurers to accurately model potential losses.

Inconsistent, uncapped noneconomic damages are detached from the economic realities of a potential loss and make it difficult for juries to assign damage amounts with little direction and an open-ended scope—maintaining noneconomic damages caps alleviate that burden and ultimately provide for better price stability of insurance rates for all involved

For these reasons, NAMIC strongly opposes House Bill 113 and respectfully requests that an unfavorable report be issued for this bill.

Sincerely,

Gina Rotunno

Gina Rotunno
Regional Vice President
Mid-Atlantic Region

**HB 113_MDCC_Civil Actions - Noneconomic Damages -**
Uploaded by: Grason Wiggins
Position: UNF

MARYLAND
Chamber of Commerce

# House Bill 113

Date: February 19, 2025
Committee: House Judiciary
**Position: Unfavorable**

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Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 7,000 members and federated partners working to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

House Bill 113 seeks to repeal limitations on noneconomic damages in civil actions in specified personal injury or wrongful death incidents. The Maryland Chamber of Commerce is deeply concerned about the negative impact this bill would have on employers and their employees. For employers, they will see their property and casualty insurance rates increase due to the greater liability exposure this higher limit on noneconomic damages will bring. This is especially problematic for small businesses with razor-thin revenue margins. For both employers and employees, they will see their healthcare costs rise as a product of physicians and hospitals passing along their increased premium rates to patients. This cost will be even more burdensome with the consistently rising cost of insurance premiums. The National Assocation of Insurance Commissioners found that premium rates were lower in states that regulated the number of noneconomic damages.[1]

In the fiscal note for similar legislation introduced in the 2020 Legislative Session that would have lifted limitations on noneconomic damages, Maryland's Department of Legislative Services indicated that, "Under this bill, liability risk for small businesses, including health care providers, significantly increases." In the fiscal note for this legislation introduced in the 2023 Legislative Session, the fiscal note included that the bill would have meaningful impact on small businesses that are parties to civil actions. If passed, HB 113 could lead to more frequent excessive verdicts for a wide range of businesses and nonprofit organizations, along with lengthy appeals. With Maryland's consumers already struggling to adjust in this historic and prolonged inflation crisis, continuing to increase the cost of doing business in Maryland will devastate our small business community and deliver worse outcomes for our most vulnerable communities.

Maryland's current limits on noneconomic damages in personal injury and wrongful death cases contribute to a predictable and stable business and healthcare environment.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **unfavorable report** on **HB 113**.

[1] *NAIC, Profitability by Line by State, various reports*

MDCHAMBER.ORG
60 West Street, Suite 100, Annapolis 21401 | 410-269-0642

## HB 113-Noneconomic Damages - Personal Injury and W
Uploaded by: Jake Whitaker
Position: UNF

Maryland
Hospital Association

**House Bill 113- Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death**
**Position: *Oppose***
February 19, 2025
House Judiciary Committee

**MHA Position**

On behalf of the Maryland Hospital Association's (MHA) member hospitals and health systems, we appreciate the opportunity to comment on House Bill 113. Maryland hospitals oppose efforts that would make the state's highly litigious environment even more unsustainable. HB 113 would needlessly raise the cost of health care and make it difficult to attract and retain the doctors necessary to continue to provide the highest quality care.

A plaintiff in Maryland currently can seek economic and noneconomic damages for an injury. Compensation for economic damages, which are calculated to include lost wages or earning capacity and future medical care, is unlimited. These damages ensure the plaintiff will be cared for and that any income losses are adequately compensated not only to the plaintiff, but also to their family.

Noneconomic damages, on the other hand, are not established using traditional methods. These damages purport to consider the plaintiff's pain and suffering as a result of the injuries sustained. **Maryland currently has one of the highest caps in the country at $950,000, and it automatically increases each year by $15,000. For combined survival and death actions the damages can be as much as $2,375,000.**

In 1986, the General Assembly enacted reasonable limits on noneconomic damages in response to disproportionate jury awards. These limits on noneconomic damages help to ensure the stability of Maryland's liability insurance market and civil justice system, while allowing reasonable compensation for pain and suffering. Reasonable limits on jury awards for noneconomic damages help preserve "the availability of sufficient liability insurance, at reasonable cost, in order to cover claims for personal injuries to members of the public."[1] Eliminating the caps on noneconomic damages would threaten the viability of Maryland's liability insurance market, raise insurance costs, and potentially limit access to care.

For these reasons, we request an unfavorable report on HB 113.

For more information, please contact:
Jake Whitaker, Assistant Vice President, Government Affairs & Policy
Jwhitaker@mhaonline.org

[1] Murphy v. Edmonds, 325 Md. 342, 369 (1992)

**MDC Opposition to HB 113 - 2-17-25.pdf**
Uploaded by: Joseph Johnston
Position: UNF

MARYLAND DEFENSE COUNSEL, INC.
*Promoting justice. Providing solutions.*



February 17, 2025

Chairman Luke Clippinger
House Judiciary Committee
100 Taylor House Office Building
Annapolis, Maryland 21401

**RE: <u>HB 113 - Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death - OPPOSE</u>**

Dear Chairman Clippinger, Vice Chair Bartlett, and Members of the House Judiciary Committee:

On behalf of the Maryland Defense Counsel, Inc. ("MDC") we oppose House Bill 113, which seeks to repeal the current cap on non-economic damages in Section 11-108 of the Courts and Judicial Proceedings Article.

Founded in 1962, MDC endeavors to attain equal justice for all, improve Maryland's courts and laws, and strengthen the defense of civil lawsuits through political activism, judicial candidate interviews, and educational conferences. With a focus on promoting the efficiency of the legal profession in dealing with common problems facing civil litigants, this statewide defense organization, among other things, funds a PAC and works with a lobbyist to promote defense interests in the state legislature on behalf of its members.

A noneconomic damages cap was first enacted in 1986. That legislation was enacted to address an insurance crisis in the State, which was studied in 1985 by a Governor's Task Force to Study Liability Insurance and a Joint Executive/Legislative Task Force on Medical Insurance. The Governor's Task Force findings included: (1) "[T]he civil justice system can no longer afford unlimited awards for pain and suffering[;]"and (2) "A cap on allowable pain and suffering awards will help reduce the incident of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of the economic loss, including all lost wages and medical expenses."[1] In 1994, the General Assembly increased the cap on noneconomic damages from $350,000 to $500,000, added an annual escalator increase to the cap of $15,000, and applied the cap to wrongful death cases. Maryland's highest court has repeatedly upheld the constitutionality of the noneconomic damages cap.[2]

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[1] *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1328 (D. Md. 1989) (quoting the Governor's Task Force report, issued Dec. 20, 1985)).
[2] *See DRD Pool Service v. Freed*, 416 Md. 46, 62 (2010); *Murphy v. Edmonds*, 325 Md. 342, 366 (1992).

As of October 1, 2024, the cap in personal injury actions is $950,000. The maximum potential recovery for noneconomic damages in a combined survival action and wrongful death action is $2,375,000 ($950,000 for the decedent's pain and suffering while they were alive, plus $1,425,000 if there are two or more beneficiaries for their pain and suffering arising from the decedent's death). Maryland's current noneconomic damage limits are among the highest in the country. There is **no cap** for past or future **economic** losses, nor is there any cap on punitive damages. [3]

House Bill 113 seeks to repeal in its entirety the noneconomic damages set forth in 11-108. MDC opposes HB 113 for four primary reasons.

*First*, the General Assembly enacted the noneconomic damages cap based on an in-depth study. Repealing the cap in its entirety could thrust the State into the position that necessitated the General Assembly enacting the noneconomic damages cap in the first instance. The capped amount is quite high – as it currently stands $950,000 for personal injury actions, and $2,375,000 for survival and wrongful death actions where there are two or more beneficiaries – and increases every year. In its wisdom the General Assembly has put a high upper bound on a number that has no meaningful measure. The cap represents the General Assembly, in a disciplined and measured fashion, reigning in the judicial system from awarding inordinate sums of money. Those who will testify in support of HB 113 have not explained what it is that is broken about the noneconomic damages cap, nor have they taken into consideration the negative downstream effects of eliminating the noneconomic damages cap.

*Second*, nuclear verdicts – verdicts in excess of $10 million – are on the rise.[4] Noneconomic damages are often a driving factor behind such verdicts. Maintaining a noneconomic damages cap is, therefore, a guardrail to protect against an increasing number of such verdicts.

*Third*, eliminating the cap on noneconomic damages in the context of non-medical malpractice personal injury cases will result in calls for eliminating the cap in medical malpractice cases. The State's hospital systems are under significant stress as it is *with* a cap on noneconomic damages, and no cap on future economic damages, which makes hospitals prime targets of medical malpractice lawsuits, especially hospitals that deliver babies. In the absence of such a cap, the increased stress is unfathomable and will lead to more verdicts like

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[3] An award of punitive damages requires proof of "actual malice," instead of mere negligence. *See Beall v. Holloway-Johnson*, 446 Md. 48, 72 (2016) ("negligence alone, no matter how gross, wanton, or outrageous, will not satisfy [the] standard [of actual malice]" to support recovery of punitive damages).

[4] Amy Buttell, Nuclear Verdicts Escalate, Inside Medical Liability (April 2021).

*Byrom*, a medical malpractice case tried in Baltimore City in 2019 in which the plaintiff claimed future economic damages of **$42,275,000**. The jury awarded, among other damages, $200,000,000 in future economic damages and $25,000,000 for non-economic damages.[5]

*Fourth*, eliminating the noneconomic damages cap, first and foremost, will benefit plaintiff's attorneys. Plaintiff's attorneys typically charge a contingency fee of around one-third (33%) on any recovery at settlement or trial, and in more complex personal injury cases, they may charge up to 40%. Personal injury litigation already is "big business" in Maryland, which is evident just based on the number of billboards and bus signs of attorneys advertising their services throughout Baltimore City and other counties. Eliminating the noneconomic damages cap will provide a windfall to plaintiff's attorneys and, in turn, make Maryland an even more litigious State.

In conclusion, the General Assembly studied the issue and determined there was a need to enact a noneconomic damages cap. The need to retain such caps still exists. Further, the noneconomic damages cap strikes a balance by controlling noneconomic damages – those that cannot be reduced to a value in any systematic way – and allowing for the full recovery of any economic loss.

For all these reasons, MDC urges an unfavorable report on HB 113.

Sincerely,

*/s/ Joseph S. Johnston*

jjohnston@gdldlaw.com
410-783-4984
on behalf of Maryland Defense Counsel, Inc.

5 *Johns Hopkins Bayview Med. Ctr., Inc. v. Byrom*, No. 1585, 2021 WL 321745, at *6 n.9 (App. Feb. 1, 2021).

**HB 113 - Civil Actions - Noneconomic Damages - Per**
Uploaded by: Kimberly Routson
Position: UNF

MedStar Health

9 State Circle, Ste. 303
Annapolis, MD 21401
**C** 410-916-7817
kimberly.routson@medstar.net

**Kimberly S. Routson**
Assistant Vice President,
Government Affairs - Maryland

**HB 113 – Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death**

Position: ***Oppose***
House Judiciary Committee
February 19, 2025

MedStar Health is the largest healthcare provider in Maryland and the Washington, D.C. region. MedStar Health offers a comprehensive spectrum of clinical services through over 300 care locations, including 10 hospitals, 33 urgent care clinics, ambulatory care centers and an extensive array of primary and specialty care providers.

HB 113 would remove the cap on non-economic damages, injuries that are challenging to quantify and are commonly referred to as *pain and suffering*. These are different from economic damages, which can be quantified and documented with information like a medical bill or lost wages. There is no cap on *economic damages* in Maryland, which are unlimited and fully recoverable. These damages ensure the plaintiff will be cared for and that any income losses are adequately compensated not only to the plaintiff, but also to their family.

A non-economic damage cap was first enacted in Maryland in 1986 and set at $350,000. This cap has been adjusted over the years and increases automatically at a rate of $15,000 per year. It is currently set at $950,000 and automatically increases next year.

HB 113 would negatively impact Maryland's healthcare system. Maryland's litigation and insurance environment is already one of the most troubling in the country. HB 113 would make that environment even more problematic. Many of the same insurers that provide general liability insurance provide medical liability insurance. A number of these insurers have stopped writing coverage in the state, or they have significantly reduced the amount of coverage they are willing to provide and, in addition, have raised their rates in responses to the losses they are experiencing. HB 113 would cause a self-inflicted increase in cost for all businesses, including healthcare, which in turn would raise healthcare costs. At a time where hospitals are experiencing staffing shortages, HB 113 will be one more issue that makes it difficult to attract and retain the nurses and doctors we need to continue providing Marylanders with the high quality of care they have come to expect.

These crushing expenses take resources from important needs like new clinical programs, expanded services, and public health initiatives to reduce social determinants, as well as from investments in infrastructure for new technology, modern equipment, and training and support (including compensation) for nurses and other healthcare professionals. A better balance between a desire to fairly compensate plaintiffs and these extraordinarily important needs must be struck.

For the reasons above, MedStar Health urges an ***unfavorable*** report on **HB 113**.

## HB113 testimony.pdf

Uploaded by: Kirk McCauley

Position: UNF

WMDA/CAR Service Station
and Automotive Repair Association

Chair: Vanessa E. Atterbeary, Vice Chair Wilkins and Members of Ways and Means Committee

RE: HB113 Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Position: Oppose

My name is Kirk McCauley, my employer is WMDA/CAR, we represent service stations convenience stores and repair facilities across the state as a non- profit trade group.

This is a loser for business and employees, both would experience increases in insurance rates. Businesses for property and casualty insurance, medical community would pass on higher costs of their insurance premiums to employees. Consumers and small businesses are struggling now with higher costs, let us not add to that.

HB113 would benefit a few, at a higher cost too many.

Please give HB113 an unfavorable vote.

Any questions can be addressed to Kirk McCauley, 301-775-0221 or kmccauley@wmda.net

**HB113_NFIB_unfav (2025).pdf**
Uploaded by: Mike O'Halloran
Position: UNF

NFIB-Maryland – 60 West St., Suite 101 – Annapolis, MD 21401 – www.NFIB.com/Maryland

TO: House Judiciary Committee

FROM: NFIB – Maryland

DATE: February 19, 2024

RE: **OPPOSE HOUSE BILL 113** – Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Founded in 1943, NFIB is the voice of small business, advocating on behalf of America's small and independent business owners, both in Washington, D.C., and in all 50 state capitals. With more than 250,000 members nationwide, and nearly 4,000 here in Maryland, we work to protect and promote the ability of our members to grow and operate their business.

On behalf of Maryland's small businesses, NFIB opposes House Bill 113 – legislation repealing the caps on noneconomic damages in civil actions for personal injury or wrongful death.

Limitlessly raising injury awards will expose our state's small employers to increased litigation and place upward pressure on liability insurance rates. When damage awards increase, so do insurance costs. Businesses who cannot operate without liability protection, must then reallocate scarce resources to cover this subsequent increase as the "cost of doing business" in Maryland.

Too many small businesses are working off of small and diminishing profit margins and we cannot keep asking them to pass on these sorts of new or increased costs to their customers and clients.

Maryland's limits on noneconomic damages are already among the highest in the nation. We are one of the few states that statutorily increases noneconomic damages each year – currently it is $950,000 for personal injury. Maryland's small business owners fear that exorbitant damage claims and the associated costs to defend against them will easily bankrupt their business.

For these reasons, **NFIB opposes HB113** and requests an unfavorable report.

# HB113 APCIA UNF Non Economic Caps 02192025 FINALv3
Uploaded by: Nancy Egan
Position: UNF

**Testimony of**

**American Property Casualty Insurance Association (APCIA)**

**House Judiciary Committee**

**House Bill 113 - Civil Actions - Noneconomic Damages - Personal Injury or Wrongful Death**

**February 11, 2025**

**Unfavorable**

The American Property Casualty Insurance Association (APCIA) is the primary national trade organization representing nearly 66.9% of the personal auto market, 82.4% of commercial auto, and 75.4% of commercial general liability.in the Maryland property casualty insurance market. House Bill 113 would be a significant policy shift that would have a detrimental impact on Maryland civil defendants, residents, businesses, and insurers due to increased claims, litigation jury verdicts and settlements. APCIA appreciates the opportunity to provide written comments in opposition to House Bill 113.

Repealing the noneconomic damages caps for personal injury cases, which currently exceeds $950,000 and increases by $15,000 every year, will also significantly complicate the ability to settle lawsuits, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm. The current law strikes a reasonable balance between unlimited subjective awards and the consistency and predictability that contribute to a stable civil justice system in Maryland. The escalating noneconomic personal injury damage caps should be retained. The practical effect of this repeal is to provide yet another avenue for plaintiffs to seek uncapped and subjective noneconomic damage awards, placing businesses, consumers and insurers at greater risk for nuclear verdicts, since noneconomic damages have been shown to be the key drivers of nuclear verdicts.[1]

Noneconomic damages may far exceed the amount of economic damage awards because of intangible factors such as subjective values, beliefs, emotional sensitivities and differing perspectives, and courts and juries often struggle to calculate fair and rational noneconomic damage award. The repeal of the noneconomic damages cap only provides incentives for plaintiff's attorneys to file litigation, which will significantly increase the number of lawsuits going forward and increase Maryland's already high tort tax of $3,694 per household and decreases the state's GDP by 1.78%.[2]

An actuarial study was conducted by Pinnacle Actuarial Resources, Inc, an independent actuarial firm in response to last year's bill SB 538 which raised the cap to $1,735,000 and the escalator to $20,000. The study found that last year's change would have raised personal auto rates by as much as 19% and **commercial auto liability premiums by as much as 30**%, and general liability premiums for businesses up to 14.2%.This bill would remove the caps entirely, which would only further increase these costs. In this time of high inflation and economic stress, this would only add to the cost of doing business in the state which would translate to higher cost to all consumers.

The broad discretion given juries in awarding damages for noneconomic loss is the single greatest contributor to the inequities and inefficiencies of the tort liability system. It is a difficult issue to address objectively because of the emotions involved in cases of serious injury and because of the financial interests of plaintiffs' lawyers.

Pain and suffering awards are typically subject to imprecise and ineffective standards of review, such as whether the amount is so high that it "shocks the conscience." Increasing the available damages in this manner will almost certainly result in an increase in claims and lawsuit filings, and will drive up the costs of defense, settlement and claims administration, including

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[1] *US Chamber of Commerce Institute for Legal Reform Nuclear Verdicts Report, November 2024*
Noneconomic damages may far exceed the amount of economic damage awards because of intangible factors such as subjective values, beliefs, emotional sensitivities and differing perspectives, and courts and juries often struggle to calculate fair and rational non- economic damage award.

[2] *US Chamber of Commerce Institute for Legal Reform Tort Costs in America Empirical Analysis, November 2024.* For purposes of the study, tort costs are defined as the aggregate amount of judgments, settlements, and legal and administrative costs to adjudicate private claims and enforcement actions.

to the increased need for experts now necessary to testify about pain and suffering on both sides given that caps would be eliminated.

- Studies have shown that caps on noneconomic damages caps lead to a significant reduction in the number of court cases filed.[3]

- Caps on noneconomic damages have also been found to be especially effective in controlling tort liability costs.[4]

- Studies document that noneconomic damages caps are linked to lower insurance premiums. For example, using state-specific data, the National Association of Insurance Commissioners (NAIC) found that premium rates were lower in states that regulated the amount of noneconomic damages. [5]

There is no need to repeal Maryland's noneconomic damage caps. When Maryland enacted its statutory limit in 1986, it was the first state to adopt a limit generally applicable to personal injury cases. Now, nearly two thirds of states have statutory limits on noneconomic damages that apply to all personal injury cases, medical malpractice cases, or both.[6] Eighteen states cap or disallow wrongful death noneconomic damages. Maryland's current limits on personal injury noneconomic damages are among the highest amounts in the country.[7]

Maryland's current limits on noneconomic damages in personal injury and wrongful death cases contribute to a predictable and stable business and healthcare environment in Maryland. They are within the mainstream of how other states have treated noneconomic damages and should not be altered. Repeal of the caps would disturb this careful balance that the legislature has set by exposing Maryland residents and businesses to unpredictable and potentially extraordinary liability. Eliminating the statutory limit on subjective noneconomic damages will result in unpredictability and will place upwards pressure on insurance rates for Maryland consumers, businesses, and insurers as the amount of insured losses skyrockets.

The legislature's foresight in enacting a reasonable limit on noneconomic damages is an important, rational measure that continues to control outlier awards and provide predictability in Maryland's civil justice system today. A statutory limit only facilitates reasonable settlements and keeps insurance rates stable if its application is predictable and consistent. If noneconomic damage caps for personal injury cases are repealed, plaintiffs will increasingly utilize such tactics as summation 'jury anchoring,' arguing for an excessive pain and suffering award, which will cause Maryland to become a nuclear verdict state, with all of the associated adverse consequences. Empirical evidence confirms that anchoring "dramatically increases" noneconomic damage awards. [8]

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[3] https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/report_2.pdf

[4] https://www.insurance-research.org/sites/default/files/news_releases/IRCsocinfFINAL..pdf

[5] *NAIC, Profitability by Line by State, various reports*

[6] See e.g., Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H; Mich. Comp. Laws Ann. § 600.1483; Miss. Code Ann. § 11-1-60(2)(a); Mont. Code Ann. § 25-9- 411; Neb. Rev. Stat. § 44-2825; Nev. Rev. Stat. § 41A.035; N.M. Rev. Stat. § 41-5-6; N.C. Gen. Stat. § 90- 21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32- 220; S.D. Codified Laws §21-3-11; Tex. Civ. Prac. & Rem. Code Ann. § 74.301; Utah Code § 78B-3-410; Va. Code Ann. § 8.01-581.15; W. Va. Code § 55-7B-8.

[7] A few states limit noneconomic damages to $250,000. Most states with caps have limits in $350,000 to $600,000 range. Maryland is one of only seven states that automatically adjust the limit on noneconomic damages on a regular basis to account for inflation. While some states adjust or lift the cap for catastrophic injuries or wrongful death, many are still at levels that are lower than Maryland's limit.

[8] John Campbell et al., Time Is Money: An Empirical Assessment of Noneconomic Damages Arguments, 95 WASH. U. L. REV. 1, 28 (2017).

Finally, when an injury or death is caused by malicious conduct, a plaintiff can also recover punitive damages in Maryland. About half of the states limit punitive damages to an amount set by statute or a multiple of compensatory damages. A half dozen other states generally do not authorize punitive damage awards. In Maryland, punitive damages are available and uncapped.

APCIA is not alone in its opposition but rather is part of a large alliance of business, health care and other interests in opposition to this bill.[i] For all these reasons, APCIA respectively requests an unfavorable report on House Bill 113.

Nancy J. Egan

State Government Relations Counsel, DC, DE, MD, VA, WV

Nancy.egan@APCIA.org/Cell: 443-841-4174

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[i] A copy of the alliance opposition is attached with permission.

**MARYLAND ALLIANCE for Fair Liability Laws**

FairLiabilityMaryland.com FairLiabilityMD

# Say **NO** to removing caps on Non-Economic Damages

**STOP HB 113 AND SB 584** Protect Maryland Businesses from **HIGHER COSTS.**

## WHY IT MATTERS

A non-economic damages cap was first enacted in Maryland in 1986 at $350,000. This cap has been adjusted over the years by an annual escalator. Maryland chose to cap non-economic damages because pain and suffering are difficult to quantify, and putting a reasonable cap on damages is the best public policy to balance a need for injury recovery with the avoidance of excessive awards.

## THE FACTS

- Non-economic damages may be awarded for pain and suffering in negligence actions. In Maryland, these damages are capped at $950,000, and they go up each year by $15,000.
- Many states have caps on non-economic damages and Maryland's cap is already one of the highest in the nation.
- In the 2024 session, some legislators attempted to raise Maryland's cap. **If passed, it could have increased personal auto liability premiums by as much as 19% and commercial auto liability premiums by as much as 30%**, according to an analysis conducted by Pinnacle Actuarial Resources, Inc., an independent actuarial firm.
- Plaintiffs' attorneys typically seek 30% to 40% of awards. Removal or increase in caps for non-economic damages can attract more litigation that burdens the legal system and causes price inflation across much of the economy due to its burden on business.
- Economic damages, by contrast, are harms that can be quantified with information like medical bills or lost wages. Maryland does not cap economic damages, and these expenses have no caps and are paid by insurers.

### REMOVING THE NON-ECONOMIC DAMAGES CAP INCREASES COSTS FOR PRODUCTS LIKE PERSONAL AUTO LIABILITY INSURANCE

**22%** HIGHER[1] CLAIMS → **19%** HIGHER[1] PREMIUMS → CONSUMERS PAY **$189** MORE PER YEAR[2]

**Keep our liability laws fair. Don't remove our caps.**

Visit **FairLiabilityMaryland.com** to get engaged with our effort to say **NO** to removing caps on non-economic damages.

1 Analysis of the Impact of Increasing the Maryland Noneconomic Damages Cap, Pinnacle Actuarial Resources (2024)
2 Estimated using Bankrate.com data on average Maryland personal auto liability cost

**MARYLAND ALLIANCE for Fair Liability Laws**

FairLiabilityMaryland.com FairLiabilityMD

## Say NO to removing caps on Non-Economic Damages

**STOP HB 113 AND SB 584** Protect Maryland Businesses from **HIGHER COSTS.**

# Coalition Members

AIG

Allstate Insurance Company

APCIA

American Tort Reform Association

Chubb

CNA Insurance

The Doctors Company

Enterprise

FedEx Corporation

GEICO

Independent Agents of MD

The Hartford

Lennar Corporation

Liberty Mutual Insurance

Maryland Chamber of Commerce

Maryland Defense Counsel

Maryland Hispanic Chamber of Commerce

Medical Mutual of Maryland

MedChi, The Maryland State Medical Society

Maryland Building Industry Association

Maryland Employers for Civil Justice Reform

Maryland Hospital Association

Maryland Motorcoach Association

Maryland Motor Truck Association

Maryland Retailers Alliance

Maryland Transportation Builders & Materials Association

NAMIC

Nationwide Mutual Insurance Company

NFIB

Owner-Operator Indep. Drivers Assn.

Professionals Advocate

Restaurant Association of Maryland

Selective Insurance Company of America

Sentry

State Farm

Uber

UPS

USAA

Westfield

Zurich North America

Visit **FairLiabilityMaryland.com** to get engaged with our effort to say **NO** to removing caps on non-economic damages.

FEB 3, 2025

0225 | 3649SGR

**HB0113_UNF_MedChi, MDAFP, MDACEP, MDACOG, MDAAP, M**
Uploaded by: Steve Wise
Position: UNF

House Judiciary Committee
February 19, 2025
House Bill 113 – *Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death*
**POSITION: OPPOSE**

On behalf of MedChi, The Maryland State Medical Society, the Maryland Academy of Family Physicians, the Maryland Chapter of the American College of Emergency Physicians, the Maryland Section of The American College of Obstetricians and Gynecologists, the Maryland Chapter of the American Academy of Pediatrics, the Maryland/District of Columbia Society of Clinical Oncology, and the Maryland Society of Eye Physicians and Surgeons, we submit this letter of opposition for House Bill 113.

House Bill 113 would repeal the State's cap on non-economic damages that applies to cases other than health care claims. While the physician groups joining in this letter would not be directly affected by its repeal, they know that the next effort by the plaintiff's bar after this one will be to seek a similar repeal of the cap which applies to health care claims, either by future legislation or through litigation. For this reason, these groups oppose House Bill 113.

Noneconomic damages are the damages awarded to plaintiffs for pain and suffering. One of the reasons for a cap on noneconomic damages is that pain and suffering and emotional distress are inherently subjective and there is no method to accurately calculate or measure how much money to pay someone for these items. These damage awards are the most likely to be disproportionate because by their very nature they are based on emotion. On the other hand, loss of income from employment or the cost of nursing and custodial care for a seriously injured person, and actual medical bills from hospitals, nursing homes and the like, can be calculated and determined with reasonable accuracy. These "economic damages" have always been fully compensable under Maryland law; they are not capped.

Recognizing that our insurance market could not withstand repeatedly large noneconomic damage awards, the General Assembly intervened in the 1980s and implemented a cap on them, as have many other states. Even with that cap in place, in 2004, a Special Session of the Legislature was called because of a medical liability insurance crisis, driven by excessive verdicts, which was forcing OB-GYNs to leave obstetrics practice and causing some doctors to leave Maryland or to retire early. The Legislature again stepped in and enacted a separate cap on noneconomic damages for actions in medical malpractice.

Today, Maryland has one of the highest noneconomic damage caps in the country for medical malpractice cases at over $900,000. For wrongful death medical malpractice actions involving two or more claimants or beneficiaries, the total amount awarded is limited to 125% of the cap, or over $1.1

million. These amounts automatically increase each year by $15,000.

Passage of House Bill 113 will undoubtedly be followed by legislation calling for a repeal of the medical malpractice cap, or by litigation seeking the same. The General Assembly should heed the lessons of past Legislatures, which recognized the need for these damage caps, and not accept this invitation from the plaintiff's bar to once again inject instability into the State's insurance market and to make even worse our current healthcare workforce shortages. We respectfully request that you oppose House Bill 113.

**For more information call**:
J. Steven Wise
Danna L. Kauffman
Andrew G. Vetter
Christine K. Krone
410-244-7000

# HB0113 - MTA - LOI - Civil Actions – Noneconomic D
Uploaded by: Patricia Westervelt
Position: INFO

MARYLAND DEPARTMENT OF TRANSPORTATION

Wes Moore
Governor
Aruna Miller
Lieutenant Governor
Paul J. Wiedefeld
Secretary

February 19, 2025

The Honorable Luke Clippinger
Chair, House Judiciary Committee
100 Taylor House Office Building
Annapolis MD 21401

***RE: Letter of Information – House Bill 113 – Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death***

Dear Chair Clippinger and Committee Members:

The Maryland Department of Transportation (MDOT) takes no position on House Bill 113 but offers the following information for the Committee's consideration.

HB 113 removes the cap on noneconomic damages in civil actions for personal injury and wrongful death.

Unlike other State agencies, the Maryland Transit Administration's (MTA) tort liability is governed by the Transportation Article, not the Maryland Tort Claims Act. The Transportation Article does not include a limit on liability. Current law provides a cap on noneconomic damages, which provides plaintiffs with significant levels of recovery while protecting MTA from unlimited exposure to noneconomic damages.

Removal of the noneconomic damages cap will likely lead to significantly greater awards and settlements against MTA and could result in a lack of predictability in litigating and settling MTA cases. HB 113 may also affect MTA's access to excess insurance or deductible amounts.

The Maryland Department of Transportation requests that the Committee consider this information during its deliberations on House Bill 113.

Respectfully submitted,

Jalen Sanders
Director of Governmental Affairs
Maryland Transit Administration
410-491-0133

Matthew Mickler
Director of Government Affairs
Maryland Department of Transportation
410-865-1090