

1 HOUSE OF REPRESENTATIVES

2 FLOOR PROCEEDINGS

3 March 22, 1977

Second Reading

4  
5 H.B. 1048

6 SPEAKER CLAYTON: The Chair lays out on second  
7 reading, H.B. 1084. The clerk will read the bill.

8 CLERK: H.B. 1048 by Henderson and Uher, relating  
9 to medical professional discipline, liability, and insurance.

10 SPEAKER: The Chair recognizes Rep. Uher for an  
11 explanation of H.B. 1048.

12 REP. UHER: Mr. Speaker and Members, by a popular  
13 request of the Texas Medical Association, we bring to you  
14 a most popular bill. It's so popular that it's made all  
15 the newspapers and million dollar advertising. Members,  
16 two years ago this House considered a bill called S.B. 635,  
17 which addressed many problems that effected the rising cost  
18 of medical malpractice insurance in this state. As you  
19 may recall, after a long and bitter debate, S.B. 635 was  
20 defeated in this House at 2 a.m. in the morning. Since  
21 that time serious negotiations have been made by members  
22 of the Texas Medical Association representatives and by  
23 the Texas Trial Lawyers Association, in an effort of joint  
24 cooperation to reach a solution dealing with this very  
25 serious problem. I don't have to tell you that medical

1 malpractice cost affect every one of us, and every person  
2 in this state. There's a factor that has increased hospital  
3 per day cost. It has affected our physicians, and the  
4 cost that they must charge to their patients. In nursing  
5 homes, pediatricists, all those who may be affected in this  
6 area to reach some type of rational solution. The  
7 negotiations that have taken place in the last year and  
8 a half have resulted in no agreement, in package or in  
9 total, but an agreement as to certain concepts. When this  
10 session was convened I was well aware, as was my committee,  
11 and I know as each and every one of you, that we must  
12 face this issue timely, and with as great a depth as  
13 possible. We called and set for early hearings in the  
14 State Affairs Committee, dealing with this subject. We  
15 had one bill, H.B. 370, which was sponsored by TMA. We  
16 had another bill, H.B. 722, and then a series of separate  
17 bills dealing with the same concepts as suggested by  
18 H.B. 722 by our colleague, Mr. Davis, which in effect was  
19 the Keeton Report, and other bills that were filed by  
20 other members trying to address this problem.

21 After the initial major bills were filed, I called for  
22 early hearings beginning in early February. The Committee  
23 on State Affairs spent approximately two, two and a half  
24 weeks in hearing testimony.

25 After the evening of our first session, I asked the

1 representatives from the three major participants, the  
2 Texas Hospital Association, the Texas Trail Lawyers, and  
3 the Texas Medical Association, to come to my office at  
4 8:30 the next morning. And in our conversation in my  
5 office the next morning, I asked them to seriously negotiate,  
6 resolve the issues, and be prepared to give us an answer  
7 within three weeks of that meeting.

8 The negotiations were set up. The committee that I  
9 appointed early in the session, before we ever even had  
10 the first bill, the subcommittee on malpractice, monitored  
11 and observed these negotiations, many of which were held  
12 here in the Capitol building in an open forum, to attempt  
13 to know the issues, understand the feelings of all parties  
14 involved, so that we can also give advice and suggestions  
15 as to what a bill should contain.

16 After four weeks of hard deliberation, give and take,  
17 I asked if the parties could support a bill containing  
18 certain subjects. This was as a result of a meeting of the  
19 subcommittee, and considering various concepts, and  
20 the bill that we recommended that each side take back to  
21 their membership, to their associations, to support is the  
22 framework that you have in front of you this morning,  
23 H.B. 1048.

24 What we have is an acceptance by the following people,  
25 who believe that H.B. 1048 is a reasonable and sound

1 approach on a long journey that we're going to have with  
2 this problem of malpractice insurance cost. The Texas Trial  
3 Lawyers Association agreed to support H.B. 1048. They  
4 did not like it, but they would support it. The Texas  
5 Hospital Association said they would support H.B. 1048,  
6 but they did not like it. We've had the doctors of  
7 osteopathic medicine to support the bill, pharmacists,  
8 the nonprofit nursing homes. Yesterday the nursing homes  
9 for profit said that they could live with H.B. 1048 if  
10 we would take them out from under the JUA, which we have  
11 agreed to do. The State Bar of Texas has endorsed H.B. 1048  
12 as an approach, as a step in the right direction toward  
13 bringing some sanity back to the rising cost of malpractice  
14 insurance.

15 In personal conversations that I have had with many  
16 doctors from around the state, and meeting with some of the  
17 doctors from areas in the state, we have been able to  
18 discuss with them what H.B. 1048 does, and we have had  
19 expressions of support from the ranking file of the medical  
20 profession. There is a division within TMA that H.B. 1048  
21 is a good bill, or a bill that doesn't go far enough. I  
22 believe what we have here is a bill that we can pass in  
23 this House, a bill that we can pass in the Senate, and give  
24 to the Governor, and I think can have some immediate impact  
25 as to what it does, how it's going to effect the insurance

1 cost. But I must stress to you that the bill we have is a  
2 tenuous, fragile compromise, of which we have acceptance.  
3 A change substantially in this bill could result in the  
4 death of H.B. 1048. It could blow the compromise. It  
5 could blow the support, and the doctors of this state would  
6 not have a bill dealing with this issue until at least 1979.  
7 And I say that because on the Constitution of this State,  
8 either House in killing a matter of substance, a subject  
9 matter, then kills that subject matter for further  
10 consideration by the other House, or other legislation  
11 dealing with that. We are in a fragile position. I ask  
12 that you listen to the arguments and listen to what the  
13 committee tells you.

14 The State Affairs Committee has spent now, almost seven  
15 weeks living with this issue, and particularly so those  
16 five members who were on the subcommittee, and myself.

17 Listen to what we can tell you that we know was said  
18 under oath, and not what was said out of oath, without the  
19 security of a person being sworn, and telling you something  
20 in their opinion as to how this affects the cost of insurance.

21 We are departing, in some areas, from what is known  
22 as the general law of this state. I suggest to you that if  
23 we had this bill before you, and it provided some of the  
24 changes in tort law for the trucking industry, for the  
25 chemical industry, for the manufacturing industry, or for

1 big business, or for organized labor in general, this bill  
2 would be a laughing stock, because it goes far beyond  
3 what we expect of justice in this state. It is an  
4 experimental package. It self-destructs within 16 years,  
5 and we hope that by providing for 16 years, that we have  
6 ample time in which to evaluate the reforms that have been  
7 suggested. I also suggest to you that H.B. 370, and  
8 H.B. 1048, and H.B. 722, any one of them under your  
9 consideration, would be just a first step in a long journey  
10 that we're going to have to face each session of legislature  
11 for the foreseeable future. It is not a perfect answer.  
12 Neither is H.B. 370, nor H.B. 722, and it will be back  
13 Members, and you'll be faced with it. But unless that --  
14 at least address this question in this legislature, let's  
15 not risk killing this bill on the floor today, or tomorrow  
16 when we consider it on third reading. Let's attempt to pass  
17 a good bill, the first step in the right direction.

18 And I'll yield for questions, Mr. Speaker.

19 REP: GRANT: Mr. Speaker, will the gentleman  
20 yield?

21 REP. UHER: I yield, Mr. Speaker.

22 SPEAKER: The gentleman yields, Mr. Grant.

23 REP. GRANT: Mr. Uher, just a couple of questions  
24 about the content of the bill. Is there anything in the bill  
25 that makes mandatory that a physician carry a certain amount

1 Thank you.

2 SPEAKER: Mr. Powers to close on his amendment.

3 MR. POWERS: Mr. Speaker, Members: I think this  
4 amendment is a reasonable amendment, it's a fair one,  
5 it was recommended word for word by the study commission  
6 and I ask you to vote "aye" on the amendment.

7 SPEAKER: Alright, Members, the questions now occurs  
8 on the adoption of the Powers amendment. All those in favor  
9 of the adoption of the Powers amendment, vote "aye", all those  
10 opposed will vote "no". It's a record vote, the Clerk will  
11 ring the bell.

12 I show Mr. Powers voting "aye". I show Mr. Uher  
13 voting "no". Have all members voted? I show Ms. Glossbrenner  
14 voting "no". There being 65 "ayes" and 81 "nos", the amendment  
15 fails of adoption.

16 The following amendment, the Clerk will read the amendment.

17 CLERK: Amendment by Nugent to amend C.S.H.B. 1048 by  
18 adding a new section.

19 SPEAKER: Mr. Nugent to explain his amendment.

20 MR. NUGENT: Mr. Speaker and Members, I will bring you  
21 an amendment to the Bill that is short and sweet. We have  
22 been saying that the doctors are greedy, you have been saying  
23 that the doctors want to shove the people of the State of Texas  
24 face in the ground. Well, this is a doctor's amendment. This  
25 amendment simply says "Give us the law that allows us to self-

1 insure under the trust provisions whatever judgments may be  
2 had against us as professional practitioners. You might call  
3 this a self-help amendment. By not paying agents and all of  
4 the other allied costs in it, they will be able to have coverage  
5 under this amendment that will allow the payment of any claims  
6 that may be made against those who involved themselves in this  
7 trust. Now I know you have favored this because only a few  
8 days ago for Texas A & M and for the University of Texas, you  
9 passed through this House, a Bill almost identical to this  
10 for those two institutions and there was not a single negative  
11 vote. Mr. Speaker, I move adoption of the amendment.

12 SPEAKER: Chair recognizes Mr. Uher.

13 MR. UHER: Mr. Speaker: This is an area that in the  
14 front part of the Bill is speaking to the insurance area,  
15 is one that is being pushed by the Texas Medical Association  
16 as an important part of the Bill. On your desk, I have had laid  
17 out a copy of a letter that I have from the American  
18 Physicians and Insurance Exchange which was a insurance company  
19 form by doctors to write malpractice insurance in this State.  
20 These doctors who support the API (American Physicians Insurance  
21 Exchange) believe that a self-insurance trust would do great  
22 harm to their type of carriers if wholly regulated by the  
23 Insurance Code that we now have in the State. There are other reasons  
24 why I am opposed to this Section and ask that you vote with  
25 me. The amendment gives an appearance that the Insurance Board



1 is going to regulate the self-insurance trust. I think if you  
2 read this amendment, you will find that their control is not  
3 even there. It has also been suggested to us in our hearings  
4 that the private market for insurance is coming back and that  
5 this is a result of insurance companies and the people who  
6 write the insurance excess coming to the belief that they  
7 have now some statistics and hopefully, in the near future,  
8 they will have sufficient statistics to address the problem  
9 in malpractice insurance costs. Another effect that has been  
10 suggested to us on the self-insurance trust is that it would  
11 create higher costs to some low risks doctors because the  
12 regular market for spreading the hazard, for spreading the  
13 risk would have diminished. Another argument that has been  
14 made in opposition to this area is that there is no other  
15 vehicle to turn to except the self-insurance trust and yet,  
16 we have re-extended the JUA which makes the insurance  
17 available.. Also, you will find the self-insurance trust  
18 goes in the direction of doctors only and does not include  
19 other health care providers. This Bill would be very harmful  
20 to your hospital associations and would affect them. There is  
21 no requirement for financial stability, no requirement for the  
22 payment of claims and no requirement on the contracts and  
23 contents of the insurance company contract, no requirements on  
24 advertising, no requirements for competency of management. It  
25 avoids the insurance laws that we have in the State that

1 makes sure the insurance companies are solvent--

2 MR. GARCIA: Would the gentleman yield, Mr. Speaker?

3 MR. UHER: I'll yield, Mr. ---

4 SPEAKER: The gentleman yields, Mr. Garcia.

5 MR. GARCIA: Mr. Uher in reading Section 4 of the  
6 amendment proposed by Representative Nugent, it speaks of  
7 said being trust, said trust not being construed as being  
8 engaged in the business of insurance and exempts any trust  
9 from any of the laws applicable to insurance companies.  
10 Can you enlighten the Members of this House as to what we  
11 would do by permitting the creation of the self-insurance  
12 trust with any degree of certainty?

13 MR. UHER: My concern is that there is not going to be  
14 any effective regulation. My concern is that we may have a  
15 self-insurance trust out here that is truly regulated by no  
16 one. We have no way of knowing whether their investments are  
17 sound investments, whether or not they have set up projections  
18 as to the reserves they may need for potential claims in the  
19 future. What we may have is a physician believing that the  
20 self-insurance trust has provided him or her with protection  
21 that they expect to buy when they buy insurance, and when a  
22 claim is made, a large judgment is taken or a large settlement  
23 is entered into and lo and behold the self-insurance trust  
24 is bankrupt. Who do we point the finger to? I don't know.  
25 But I do know that there won't be any protection possibly for

1 the patient, injured party or for the physician who expects  
2 insurance protection to protect him from the catastrophic  
3 loss.

4 MR. GARCIA: Do you read this Bill as I do that this  
5 would completely exempt them, other than the acquisition of  
6 permission, that this would exempt them from all the regulatory  
7 laws that are imposed by the State Board of Insurance.

8 MR. UHER: Exactly.

9 MR. GARCIA: That they would be denied access to a lot  
10 of information that the Board of Insurance Commission could  
11 use to establish whether the rate being charged by insurance  
12 companies are reasonable?

13 MR. UHER: Exactly. If this amendment were to be corrected  
14 to the point where we do have some control and some regulation  
15 by the Insurance Board, I would have no objections to it. I  
16 am mostly concerned that it will not, and in essence what it  
17 may do, it may destroy the companies that have been set up  
18 like API to provide malpractice insurance to our doctors.

19 MR. GARCIA: Thank you very much. I have concerns  
20 about this too. Primarily, because I don't understand what  
21 it will do, not only to the doctors but to the insurance industry in  
22 the State of Texas to the patient. I am concerned about the  
23 nebulous content of this amendment.

24 MR. LOONEY: Mr. Speaker.

25 SPEAKER: Mr. Looney.

1 MR. LOONEY: Would the gentleman yield?

2 SPEAKER: Do you yield, Mr. Uher?

3 MR. UHER: I yield, Mr. Looney.

4 SPEAKER: The gentleman yields, Mr. Looney.

5 MR. LOONEY: Tom, did your committee have any testimony  
6 as to the effect, if any, that this provision would have  
7 on, any measurable effects, on medical malpractice rates?

8 MR. UHER: We had some opposition expressed in testimony  
9 and as I recall, this was an area that was taken at the  
10 hearings that I guess just didn't draw my attention. But, as  
11 I recall, there was some suggestion that what this would mean  
12 was for those lawyers, I mean for those doctors who do not  
13 take part in the self-insurance trust, that their rate of  
14 insurance, the premiums they would pay, would go up, particularly  
15 for some of our low risk doctors like G.P.'s. That this would  
16 affect them because they may not be in self-insurance areas.  
17 My greatest concern is the fact that there is no real control  
18 over the physical affairs of this type of trust. Perhaps this  
19 should be approached by a separate piece of legislation.  
20 Perhaps a more comprehensive amendment would meet the objections  
21 that I have had. The Insurance Board has come to me and has  
22 asked we not to put this in the Bill because they have great  
23 concerns for the effect it might have and for those of you  
24 who remember back in the 1950's and the 1960's, we have had  
25 some insurance company failures. You will remember the

1 anguish and the loss that many people suffered. This is my  
2 concern that we may have created something that has no control  
3 and yet it runs as it wants to run, without no one really  
4 looking over their shoulders and saying this is a wise invest-  
5 ment and this is not. This is my real concern for this area.

6 MR. GARCIA: But the indications you had, if any, about  
7 how this would affect the insurance rate, the medical malpractice  
8 insurance rate, would be adversely affect them rather than  
9 favorably affect them.

10 MR. UHER: No sir, I don't remember a thing, at all,  
11 as I said, that was said by anyone on this as to how it could  
12 affect other than it could cause regular insurance companies  
13 premiums to go up for some of our doctors.

14 MR. GARCIA: Thank you.

15 MR. GONZALES: Mr. Speaker, would the gentleman yield?

16 SPEAKER: Will you yield Mr. Uher?

17 MR. UHER: Yes.

18 SPEAKER: The gentleman yields, Mr. Gonzales.

19 MR. GONZALES: Mr. Uher, a while ago you said that this  
20 might hurt the hospitals. Could you explain this.

21 MR. UHER: Well, the hospitals have created one of these  
22 little companies, it is my understanding, they have created  
23 a company to operate under the insurance laws of the State  
24 and their objection to this is the fact that there really is  
25 no control as this amendment is drafted for the physical affairs,

1 managment, investments, etc. of a self-insurance trust. We  
2 have under law now, the ability of anyone to come in and  
3 form a company but that company would be subject to the tight  
4 control, I think sound controls that we have developed in our  
5 Insurance Code for a period of years. This amendment has none  
6 of those controls because they have been specifically exempted.  
7 This is my concern and I think it would hurt the hospitals,  
8 it would hurt the health care providers in the long run.

9 MR. GONZALES: Would the rates go up?

10 MR. UHER: It has been suggested this, but I really can't  
11 tell you. I don't think anyone can really tell you on that.

12 MR. CLARK: Mr. Speaker, would the gentleman yield?

13 SPEAKER: The gentleman yields, Mr. Clark:

14 MR. CLARK: What your saying right now under the present  
15 laws of insurance that people or health care providers, hos-  
16 pitals can self-insure at the present time and they have  
17 certain abilities to do it. Now under this Bill, under this  
18 amendament, there may be constraints which will keep them from  
19 doing it under the process of law at the present time. For  
20 instance, several of the hospitals that I know in Houston have  
21 self-insured up to a certain amount and certainly I would not  
22 want any amendments passed that might affect their insurance  
23 and what they have worked out already with the Insurance Board  
24 and with their providers.

25 MR. UHER: I think that is right Mr. Clark.

1 MR. CLARK: Thank you.

2 MR. UHER: Members, I respectfully move to table.

3 SPEAKER: The Chair recognizes Mr. Nugent to close  
4 on his amendment.

5 MR. NUGENT: Mr. Speaker and Members: I can appreciate  
6 Mr. Uher's worry about the American Physicians Insurance  
7 Exchange but one of the problems that has been pounded home  
8 to us, week after week, is the doctors of this State can't  
9 get malpractice insurance and now, when I bring to you an  
10 amendment that would allow them to set up a self-insurance  
11 proposition, you have a company coming forward and listing  
12 all of the companies that are writing medical malpractice.  
13 Let's listen to their argument in the light of the months  
14 of information that has been given to us saying the doctors  
15 can't buy malpractice, it just isn't available. All the in-  
16 surance companies are moving out of the field. There's not  
17 going to be but one or two left. They are not going to be  
18 able to buy at all and yet when there beholds on the scene  
19 the possibility of the doctors setting up a trust and writing  
20 their own medical malpractice, what happens? We have the  
21 insurance companies saying "Oh, don't do this, you may injure  
22 us cause listen who's writing this insurance at the present  
23 time." You have got insurance in Texas like Aetna Casualty  
24 and Surety, American Physicians Insurance Exchange, Chubb  
25 Group, Continental Insurance, Empire Casualty Company,

1 Hartford, Insurance Corporation of America, Medical Protectors,  
2 Professional Mutual and St. Paul Companies all on the insurance  
3 company letterhead. I think, if you will look at this amend-  
4 ment, you will find that what is being done here is a simple  
5 trust arrangement in which the normal capital and surplus  
6 required in an insurance company is substituted for the  
7 assets of the members of the trust, who will be the doctors.  
8 In addition to that, you find in paragraph 4, the last three  
9 lines it says "except the State Board of Insurance may require  
10 any trust enacted herein to satisfy reasonable minimum require-  
11 ments to insure the capability of the trust to satisfy its  
12 contractual obligations". There you are placing it under the  
13 Insurance Commission, you are giving them the duty to see that  
14 this mutual or this trust has adequate assets to satisfy its  
15 contractual obligations. You are giving the physicians of this  
16 State an opportunity to band together, use their collective  
17 assets to cut out the middle man, to pay liability claims on  
18 their own experience and not on the experience of the California  
19 or Florida or New York but upon their experience here in Texas  
20 and which most people, I think, will tell you is materially less  
21 than it is elsewhere and it allows them to self-help and  
22 affect their premiums by paying it on their own history. I ask  
23 that you vote against the motion to table and if you have any  
24 further questions, we'll attempt to answer them for you at that  
25 time.



1           SPEAKER: Members, Mr. Nugent sends up an amendment.  
2 Mr. Uher moves to table. The question occurs on the motion to  
3 table. All those in favor of the motion to table, vote "aye"  
4 and all those opposed, vote "no". It's a record vote and the  
5 Clerk will ring the bell. Have all members voted? I show  
6 Mr. Edwards voting "no". I show Mr. Nugent voting "no". Have  
7 all members voted? I show Mr. Waters voting "no". There being  
8 30 "ayes" and 115 "nos" the motion to table fails. The  
9 question now occurs on the adoption of the amendment. All  
10 those in favor of the adoption of the amendment say "aye" and  
11 all opposed say "no". The amendment is adopted.

12           The following amendment, the Clerk will read the  
13 amendment. Mr. Hill or Potter.

14           CLERK: Amendment by Hill or Potter--

15           SPEAKER: The Chair recognizes Mr. Hill to explain his  
16 amendment.

17           MR. HILL: Mr. Speaker and Members: All this amendment  
18 does is change the statute of limitations on page 48, line 10.  
19 The statute of limitations is changed at 12 and 14 to 6th and  
20 8th. As the present law at this time is passed by this  
21 Legislature at the last Session, and which, there is no way  
22 that Mr. Uher and those objecting to the Minutes being filed  
23 can state that this will have no affect on the costs of medical  
24 malpractice. After the Bill was passed last session, the  
25 Texas Board of Insurance in effect instructed the underwriters