Robert Klitzkie, Esq.
[redacted]

Re: Testimony on Bill 112-86

Honorable Senators:

When an irresistible force such as you
Meets an old immovable object like me
You can bet as sure as you live
Something's gotta give, something's gotta give,
Something's gotta give

So sayeth Johnny Mercer in in 1954. Even though Johnny wrote before our own paradox, *i.e*., The Big Lubofskies (all those advocating repeal of Mandatory Medical Malpractice Arbitration Act (MMMAA) v. the Docs (medical practitioners) arose he called it right—something's gotta give. What follows is a humble approach to resolving the paradox. Consider the following four points.

1. The Big Lubofskies[1] demand free access to the courts to bring actions for malpractice against errant Docs. The Docs are unyielding in their assertion that access to the courts in the absence of arbitration as required by the MMMAA would be the ruination of healthcare on the island causing many to limit the scope of their practice and some to close up shop and leave.

   Channeling President Obama: if you like your arbitration, you can keep your arbitration. But for the sweetener would be that the Docs would fund the arbitration.

   It could work like this. A putative plaintiff would be required to serve, in accordance with GRCP rule 4, on contemplated defendants in a malpractice action a paper called Notice of Intent to Bring a Malpractice Claim (NIBMC.) Upon receipt of the NIBMC the defendant(s) would have 30 days to serve an arbitration notice on the

[1] Name selected to recognize David Lubofsky whose son, Aaron's tragic death rekindled interest in this issue.

plaintiff setting forth the details of the arbitration and an undertaking to fund the arbitration (with each party to bear his own costs and attorney fees.) The defendant can invoke the arbitration scheme

The 30 day period allows the parties to meet and confer and possibly enter into settlement negations. Completion of the arbitration scheme would be a condition precedent to filing suit evidenced by the NIBMC and the arbitration notice which become a part of the record in the suit along with the arbitration award, if any.

The defendant can elect the arbitration procedure set out at 10 GCA Ch. 10 or the Guam International Arbitration Law (7 GCA Ch. 42A.) While the former may currently be preferable as the more expensive thus increasing the burden on The Big Lubofskies, the Docs may prefer the latter when they are picking up the tab.

If this approach were adopted The Big Lubofskies would have access to the courts, the Docs would have the protection of mandatory arbitration and the Superior Court Magistrate would have no role thus mooting out the objection of the Chief Justice.

2. The Docs suggest fear of frivolous litigation. Here's a way that frivolous litigation can be discouraged:

   After the verdict is received and filed, or the court's decision rendered in a trial de novo, the trial court *sua sponte* shall issue findings of fact and conclusions of law announcing whether plaintiff filed a frivolous suit and if so, impose sanctions, as appropriate against plaintiff in accordance with the standards set forth in GRCP 11 (b) (1) through (3) in addition to any sanctions imposed on counsel.

   This language would require the trial judge to determine whether or not the litigation was frivolous. The court's determination that plaintiff filed a frivolous action would result in sanctions against him and his attorney. The findings of fact and conclusions of law announcing the frivolous litigation would be forwarded to the Ethics Committee of the Bar Association for appropriate action.

3. The statute setting out the standard of care for Docs could be amended to assuage the fears of the Docs who fill the professional gaps created by the absence of certain specialists. I submit:

Standard of Care.

The prevailing standard of duty, practice, or care by a reasonable physician in the same field practicing medicine in the community at the time of the alleged malpractice shall be the standard applied in arbitration and at trial, *provided that it shall be an affirmative defense for a physician who in good faith with the informed consent of the patient provided care in another specialty because of the unavailability of a practitioner on island who offers said specialty when the failure to provide said care would have adverse consequences for the patient.*

4. The three suggestions set out above could find their way into Bill 112. A separate bill appropriating funds sufficient to allow the health boards to retain counsel (*i.e.* if the Attorney General continues to fail to provide counsel to the boards) and investigators to enhance the ability of healthcare professionals to regulate themselves would be salutary.

5. The demise of the MMMAA has been identified by the Docs as a precursor to higher premiums for the Docs malpractice insurance premiums. To allay the fears of the Docs, consideration could be given to a tax break for insurers that would provide a *pro tanto* reduction of tax based on the percentage of malpractice insurance in force in a company's total liability portfolio.

Somethings gotta give. I submit:

- The MMMAA is replaced by an amended Bill 112.
- Bill 112 provides Docs alternate forms of arbitration after a 30-day cooling off period.
- Docs pay for arbitration thereby allowing The Big Lubofskies access to the courts.
- Docs are protected from frivolous litigation and higher insurance premiums.

- The standard of care is amended to give Docs who are attempting to provide care to patients in what are often adverse circumstances some comfort.

Respectfully submitted,

Robert Klitzkie