1986 INTERIM

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

Proposal No. 29 -- Tort Reform and Liability Insurance

Review and make recommendations concerning the tort and insurance liability systems in Kansas, including but not limited to consideration of: liability insurance problems affecting a broad range of professions and occupational groups (including those mentioned in 1986 S.B. 540, as well as foster, child care, and handicapped facilities, truckers, manufacturers and other businesses); liability insurance problems and the issue of governmental immunity in regard to the state and its municipalities; activities of other states and jurisdictions to address these problems; and the impact, if any, of tort reform and insurance reform measures on the availability and affordability of liability insurance.

COMMITTEE MEMBERS

Chairman: Representative Joe Knopp
Vice Chairman: Senator Bud Burke

SENATORS	REPRESENTATIVES
Neil Arasmith	Arthur Douville
* Paul Feleciano	Ken Grotewiel
Robert Frey	Rex Hoy
Jeanne Hoferer	Robin Leach
Bill Mulich	Bruce Mayfield
Nancy Parrish	Mike O'Neal
Eric Yost	Michael Peterson
	John Solbach

* Designated minority member.

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(insurance)

MEETINGS:

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Kansas Legislative Research Department July 30, 1986

MINUTES

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

July 10 and 11, 1986
Room 514-S and 313-S, Statehouse

11-01/1

Members Present

Representative Joe Knopp, Chairman
Senator Paul Burke, Vice-Chairman
Senator Neil Arasmith
Senator Paul Feleciano
Senator Bob Frey
Senator Jeanne Hoferer
Senator Bill Mulich
Senator Nancy Parrish
Representative Art Douville
Representative Rex Hoy
Representative Robin Leach
Representative Bruce Mayfield
Representative Mike O'Neal
Representative Mike Peterson
Representative John Solbach

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Staff Present

Mike Heim, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Melinda Hanson, Kansas Legislative Research Department
Chris Courtwright, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Gordon Self, Revisor of Statutes Office
Nedra Spingler, Secretary

Conferees Present

Brenda Trolin, National Conference of State Legislatures
Dan Ramlow, Kansas Contractors Association
George Barbee, Kansas Consulting Engineers
Hank Booth, Kansas Association of Broadcasters
T. C. Anderson, Kansas Society of Certified Public Accountants
Vance Liston, Kansas Society of Architects
Richard Funk, Kansas Association of School Boards

Conferees Present (continued)

Bill Curtis, Kansas Association of School Boards
Jim Kaup, League of Kansas Municipalities
Carol Childers, Johnson County Risk Manager
Representative Nancy Brown, Kansas Association of Townships
Mike Sexton, Kansas Trial Lawyers Association
Tom Whitaker, Kansas Motor Carriers Association
Roland Smith, Wichita Independent Business Association
James Hughes, Puritan-Bennett Corporation
Don Schnacke, Kansas Independent Oil and Gas Association
David Litwin, Kansas Chamber of Commerce and Industry
Mavis Walters, Insurance Services Office, Inc.
Dan Conway, Reinsurance Association of America
Ron Todd, Kansas Insurance Department
Karl Koch, National Association of Insurance Commissioners
Ralph Wright, American Association of Retired Persons
Dee Ann Bernhard, Alliance of American Insurers
Mike Germann, Kansas Railroad Association
Ted Fay, Kansas Citizens Committee on Legal Liability

July 10, 1986
Morning Session

The Chairman, Representative Joe Knopp, called the meeting to order at 10:15 a.m., in Room 514-S of the Statehouse. He said the two-day meeting would provide a broad overview of tort reform issues, the liability insurance situation, and concerns of different interest groups. Specific issues and goals would be addressed at later meetings.

Staff called attention to materials provided in Committee notebooks regarding the request to the Legislative Coordinating Council (LCC) by a number of business groups for an interim study concerning tort reform (Attachment No. 1) and the charge to the Committee to review and make recommendations on the tort system and insurance liability problems in Kansas (Attachment No. 2). He referred to copies of the United States Justice Department's Tort Policy Working Group report and an analysis prepared for the National Association of State Attorneys General regarding the crisis in the availability and affordability of liability insurance which were also in the notebooks. He noted the National Association analysis attempts to rebut the Justice Department report. Staff reviewed an issues working paper on tort reform issues (Attachment No. 3) and a working paper on liability insurance issues (Attachment No. 4). Staff was requested to furnish a list of so-called tort reform legislation enacted in Kansas occurring during the past 12 years.

Brenda Trolin, National Conference of State Legislatures (NCSL), gave an overview of state and federal action on tort and insurance issues. She noted that emphasis had been placed on tort reform legislation during 1986 legislative sessions nationwide with some states convening special sessions.

She furnished copies of legislation enacted by Florida and staff analysis from Washington and Michigan which are representative of the way state legislatures are addressing the issue.

Ms. Trolin's remarks, for the most part, were in response to questions from the Committee. She said the tort system is not the only cause of the current insurance problems. She suggested that any legislation regarding changes in insurance or tort laws should include a mechanism to determine later on if they have been beneficial and to remedy a repeat of the insurance crisis cycle. Because of lack of data, other states are basing legislative action on common sense because hard data is not available. She said that NCSL has not had enough information to analyze what states can actually do to benefit the situation. Ms. Trolin believed tort reform would benefit insurance companies the most.

In response to questions regarding reasons for the current crisis, Ms. Trolin said it was not only related to problems developing because of lower interest rates on investment income of insurers but also because of the international exchange rates for the dollar which affects the ability of insurers to get reinsurance on claims that were underwritten for less than they should have been. She noted that some states are looking at interest rate data reporting requirements to allow insurance commissioners to look at investment income as part of the rate review process. She noted South Carolina has available a report which gives examples of how premiums were discounted by insurers. The Committee requested a copy of the report.

Ms. Trolin remarked that insurance commissioners should have actuaries on their staffs to properly analyze data. She said that it was a matter of choice if the same data were analyzed by actuaries on a state, regional, or national level. She noted federal legislation was pending that would establish a national data reporting requirement. Information regarding the awards made on the different categories of claims should be required at some level.

Ms. Trolin continued her responses by saying the current crisis was not due to small independent insurance companies but national companies took the lead in lowering rates which became too competitive. New York is attempting to prevent this situation from reoccurring by establishing a flexible rate system and going back to prior approval of rates by its insurance commissioner. She distributed copies of reports dealing with state actions in regard to tort reform (Attachment No. 5) and insurance regulation (Attachment No. 6).

On the federal level, Ms. Trolin said there is pending legislation regarding tort reform, insurance regulation, alternative financing mechanisms, and product liability, but noted nothing besides risk retention legislation would likely pass this year. See Attachment No. 7 for a summary of selected federal liability insurance legislation. Attachment No. 8 contains a summary of selected stated legislative action regarding affordability and availability of liability insurance. Many states have modified joint and several liability laws, and imposed restrictions or penalties for filing frivolous suits. A few states have changed laws regarding attorney contingency fees. She noted the Florida legislation recently passed has resulted in insurance companies and national trade associations filing lawsuits. The Florida statute capped noneconomic damages, rolled back insurance rates, modified joint and several

liability and statute of limitation for groups all across the board. It addresses excess profits and contains a section on reinsurance which allows financial institutions to become reinsurers. This relieves some dependency on the international market. The insurance commissioner rather than the bank commissioner would determine if an insurance company was solvent and if its investments were wise. The question was raised if any states had considered using its general fund as an insurance pool for selective lines of insurance. Ms. Trolin responded that there was no legislation enacting a separate fund for reinsurance, and she urged caution in this regard. Florida provides for assigned risks or joint underwriting associations (JUAs) for assigned risks.

In regard to a definition for "frivolous" lawsuit, Ms. Trolin said she could gather together various state laws addressing the issue and language used for a definition, but there is no uniform definition.

Ms. Trolin said the crisis has not reached the point where states were making insurance a public utility, but this may have to be considered if the cycle does not ease. No legislation is pending in this regard. States are looking at alternate financial mechanisms and pooling groups, she noted.

Ms. Trolin said states have to be concerned with solvency if legislation forces companies to lower rates. In Florida, companies are required to give detailed data as to why they would become insolvent. Questions were raised if states had the auditing capacity to determine if the insurance industry was making excess profits and why data reporting requirements were not required on the federal level. Ms. Trolin noted the current administration's policy was that states should handle their own affairs. The NCSL's position regarding federal intervention in the area of reporting requirements is that states should take care of their own business. There will be a major discussion on this issue at the NCSL annual meeting, and there may be a change in NCSL's position, she said.

Dan Ramlow, Assistant Manager, Kansas Contractors Association, gave a statement (Attachment No. 9) regarding the American General Contractors (AGC) position and the construction industry's perspective concerning the liability insurance crisis. The AGC established a special Task Force on Tort Reform to examine the relation between the civil justice system and the liability insurance crisis and to evaluate what effects tort reform would have on the availability, affordability, and adequacy of insurance for contractors. The Task Force recommended that the civil justice system is in need of reform which would benefit the construction industry as well as the nation. A copy of the Report of the American General Contractors Task Force is attached (Attachment No. 10).

In response to questions, Mr. Ramlow said most members of the Task Force were contractors, but the insurance industry was also represented. Kansas members were not surveyed, but his association has received many calls from them concerning liability insurance premiums going up with less coverage. Although they have no unique problems, Kansas contractors are experiencing the same problems which are occurring nationally. The Committee requested Mr. Ramlow to furnish information regarding the lines of liability insurance and the companies providing them to Kansas contractors.

George Barbee, Executive Director, Kansas Consulting Engineers, expressed the concern of this group, along with its national affiliate, regarding professional liability insurance problems. He gave his experience as an independent insurer for consulting engineers where savings had been provided clients in the past during "soft" years because of increased competition. When the market changed, underwriting companies have increased premiums, not renewed existing policies, and have reduced coverage. These same things have occurred nationwide. He recommended that legislation similar to 1986 H.B. 2661 regarding medical malpractice be enacted for other professionals and urged the Committee to consider the 13 suggested items as presented to the LCC. Mr. Barbee's statement is attached (Attachment No. 11).

In response to questions, Mr. Barbee said claims against his group have increased from 23 to 44 per 100 firms. He said that he was concerned with premiums and with deductibles being raised. He did not believe the increase in claims was due to injuries resulting from poorly designed buildings but occurred from construction accidents. Mr. Barbee was requested to furnish, in writing, the kinds and the number of claims his profession has experienced.

The Committee recessed for lunch.

Afternoon Session

The Chairman reconvened the meeting in Room 313-S of the Statehouse at 1:40 p.m.

Hank Booth, President-Elect of the Kansas Association of Broadcasters (KAB), said Kansas broadcasters are experiencing increasing costs of doing business because of insurance premiums they are now being forced to pay primarily due to the increased number of civil suits being filed and awards granted. A sense of fairness should be restored to the civil justice system. He urged the Committee to consider tort reform issues as outlined in Attachment No. 1. Mr. Booth's statement and a summary of a KAB survey of members regarding tort reform/liability insurance with suggestions for solution are in Attachment No. 12.

Mr. Booth was questioned regarding what lines of insurance liability besides slander exposure his industry was concerned with. He responded these lines included insurance on mobile units, radio station property, personal health, and weather and vandalism coverage on towers.

T. C. Anderson, Executive Director, Kansas Society of Certified Public Accountants (CPAs), said CPA professional liability insurance has become unstable because of their inability to predict risks and losses for clients. Premiums have escalated and policies provide less coverage, he said, with some carriers refusing to offer policies at all. He gave examples of increases in policies covering employees. Rates based on the number of employees put a hardship on CPA firms with part-time employees. Increased premium costs cannot be passed on in auditing fees. He said that each individual firm member faces personal liability for any partnership loss. Lawsuit judgments

may exceed assets of the firm. His group has formed a Kansas Society Task Force on Professional Liability which proposes reforms concerning joint and several liability and the privity rule. Mr. Anderson said he will furnish a suggested amendment to the Kansas comparative negligence statute and a privity section for accountancy statutes. His statement is attached (Attachment No. 13).

In response to questions, Mr. Anderson said he believed, due to a Kansas Supreme Court opinion, that CPAs were included in joint and several liability laws, and, if a company goes bankrupt and the CPA firm involved is the only solvent entity, it could bear the entire loss.

Vance Liston, Chairman of the Public Policy Committee of the Kansas Society of Architects, expressed this group's concern regarding rising costs and reduced availability of professional liability insurance which he attributed to increased lawsuits and to the insurance industry. His group is encouraged by the White House endorsement of a report calling for the return to fault-based standards for liability, limiting noneconomic damages, limiting attorney contingency fees to a sliding scale, and supporting mechanisms to resolve cases out of court. He recommended that bills similar to 1986 S.B. 540 be considered. Mr. Liston's statement is attached (Attachment No. 14).

A member expressed concern that the Kansas Society of Architects would support percentage limitation for attorney contingency fees when it does not support the same type of limitation for its own profession. It was pointed out that many of the items listed for change in the Justice Department report have already been implemented in Kansas.

Richard Funk, Assistant Executive Director, Kansas Association of School Boards (KASB), said his group was concerned about the potential liability of boards of education members. He requested that the KASB amendment to 1986 H.B. 3114, which was vetoed by the Governor on the grounds of two subject matters, be reconsidered. The amendment clarifies that individual board members are not to be held liable as individuals for actions resulting in damages to others while members are performing within the scope of their governmental function. His statement is attached (Attachment No. 15).

The question was asked if individual board members were currently being sued or if KASB's concern was that it might happen. Mr. Funk responded that the experience has not been for suits against individual members although a former board member said he had been sued personally. A member pointed out that, under present law, individuals are not personally liable and adding further exceptions to the law might open the door to naming individuals in suits.

Bill Curtis, Assistant Director, KASB, stated this group voted to form a foundation to provide self-insurance services for unified school districts in Kansas. It would be used, initially, for workers' compensation. The group is concerned regarding its statutory authority to proceed and requested the Committee to ask for an Attorney General's opinion on the matter. KASB may have further requests of the Committee to amend statutes once the opinion is received. Mr. Curtis' statement is attached (Attachment No. 16).

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In discussion, Mr. Curtis said KASB has not consulted with the State Board of Education regarding the establishment of the foundation. He said the concept was a nationally-endorsed program out of Pennsylvania. A member pointed out that, as elected officials, school board members could request an Attorney General's opinion themselves. Mr. Curtis said the KASB attorney suggested the board not do that. Upon receiving a written request from KASB, Representative Solbach moved to forward the letter to the Attorney General and request an opinion. The motion was seconded by Senator Feleciano and it carried.

Jim Kaup of the League of Kansas Municipalities, said cities continue to face problems in the area of tort liability which threaten to undermine basic services they provide to their citizens. Cities and other units of government, unlike other parties, cannot quit but must carry out certain functions. The local tax base must pay for increased costs for insurance protection and liability awards. He pointed out that insurance costs reflect a system of injury compensation which has gone crazy, and foreign reinsurance markets have abandoned this nation because of too many liability claims. He gave examples of types of insurance cancellations to cities and noted a recent court decision broke new ground for municipal tort liability -- cities can be held liable for what someone else did because the city failed to prevent something from happening. Mr. Kaup's statement (Attachment No. 17) contains the League's recommendations for tort and insurance reforms and proposals made to the Illinois Legislature by the Illinois Trial Lawyers Association which he suggested the Committee consider. The League, early this year, hired a consultant to study insurance availability in Kansas.

In response to questions, Mr. Kaup said the consultant investigated the feasibility of an insurance pool or self-insurance for cities. There was discussion regarding governmental immunity from liability. He said the cities' problem was not so much a dollar figure but was the failure of insurance companies to renew, higher deductibles, and the uncertainty of exposure. Lowering the cap to $250,000 as recommended may not bring insurers back to Kansas, but would be beneficial to municipalities in creating insurance pools and self-insurance programs, he said.

There was discussion regarding an insurance marketing analysis which includes insurance premium history for various cities (see Attachment No. 18).

Carol Childers, Johnson County Risk Manager, representing the Kansas Association of Counties, said counties are concerned about the lack of availability and affordability of liability insurance. In her statement (Attachment No. 19), Ms. Childers noted problems with the tort system, insurance reform, and listed suggestions for solutions. Also included in the attachment is a list of claims resulting in lawsuits being filed against Johnson County since 1980 and the amount of settlements. She explained that item 13, with a $4.4 million settlement, was paid by taxpayers and involved a government dispute regarding an overbuilt sewer system in Stanley. A summary of legislative action taken by 37 states regarding the insurance crisis is also in the attachment.

In response to questions, Ms. Childers clarified that Proposition 51, mentioned in the statement, pertained to California. She believed it brought attention to recognized problems in the tort system. The cost-effectiveness of risk manager services was discussed. Ms. Childers said she would provide documented data which indicates its effectiveness in Johnson County. She noted that last year's cancellation of the county's liability policy was brought about because the insurer could not get reinsurance. Ms. Childers was requested to provide figures on the actual new premium when it is received and information regarding the total amount paid out by the insurance company on behalf of Johnson County.

Representative Nancy Brown, representing the Kansas Association of Townships (KAT), said that liability insurance is the number one concern of townships. She said officers, many of whom are volunteers, are resigning and it is difficult to get people to accept township offices because of tripled insurance rates, cancelled policies, liability insurance unavailability, and their fear of being sued. She said 1986 H.B. 3114 addressed officer liability and suggested the Committee consider similar legislation and also recommendations made by the Justice Department's Tort Policy Working Group. Representative Brown's statement is attached (Attachment No. 20).

She called attention to an insurance needs survey undertaken this year by KAT, the Independent Insurance Agents of Kansas, and the Kansas Insurance Department to which 34 percent of the townships responded. Samples of the survey form are attached (Attachment No. 21). Also attached is a copy of a letter from the Independent Insurance Agents to insurance company managers with the results of the survey summarized (Attachment No. 22). She also provided a copy of a policy statement on liability insurance of the National Association of Towns and Townships (Attachment No. 23); a copy of a report on liability insurance dated January 14, 1986, by the National Center of Small Communities (Attachment No. 24); an insurance needs survey (Attachment No. 25); and an insurance survey dealing with claims (Attachment No. 26).

In discussion, Representative Brown said many township officers do not know if they will be held individually liable and they get conflicting information from attorneys. Because of the possibility of being sued, they want liability coverage but cannot get it. There is a wide range in premiums charged townships. She noted that other volunteer organizations and not just public officials are also affected.

Mike Sexton, President of the Kansas Trial Lawyers Association, said legislators should ask why changes are needed and require adequate data to support the need for change. He noted the difficulty in getting data, not only from the court system, but especially from the insurance industry whose complicated accounting methods are unique to its industry. He believed Kansas' loss of liability coverage probably stems from insurance price construction with large profits being made before interest rates dropped. Facts do not support that the industry is going broke since rates have dropped, and it has not been proved that problems with claims have caused liability insurance to be unavailable. Mr. Sexton cited figures showing that insurance companies are making profits, noted the exemption of this industry from antitrust laws, and pointed out the General Accounting Office (GAO) is investigating the industry. The United States House Judiciary Committee has begun an inquiry into the liability insurance crisis. He noted changes in the

Kansas Tort Claims Act which have not stabilized and lowered rates for Kansans. See Attachment No. 27 for a copy of his statement. He said the National Center for State Courts found no evidence to support the existence of a national litigation explosion.

Other items Mr. Sexton presented included a list of questions and answers regarding the insurance industry (Attachment No. 28); an item showing the amount of disposable income spent on insurance in the United States in 1984 (Attachment No. 29); an item showing revenues and expenditures by insurers for different lines of insurance from 1975 through 1984 (Attachment No. 30); an item showing state court case filings for 1978, 1981, and 1984 (Attachment No. 31); an article from Business Week, April 21, 1986, entitled "The Explosion in Liability Lawsuits is Nothing but a Myth" (Attachment No. 32); and an article from the Seattle Times dated July 1, 1986, entitled "Tort Reform Legislation: Did State Get 'Suckered'?" (Attachment No. 33).

There was discussion regarding solutions for volunteer boards and the possibility that increases in the court caseload in Kansas was not due to increases in tort claims but related to the economy, foreclosures, bank default notices, and the population increase.

Tom Whitaker, representing the Kansas Motor Carriers Association (KMCA) noted the importance of the transportation industry and expectations from businesses of efficient, responsible transportation service. He said these are being hampered by problems with availability and adequacy of insurance at reasonable and stable costs. Since liability insurance is required by the state for this industry, he said the state had a responsibility to see to it that coverage is available. He gave a background of the financial cycles of the insurance industry, noting problems that contributed to the crisis and changes in available insurance. A company's safety record had little to do with premium rates and/or accessibility to underwriters. Mr. Whitaker noted the lack of supporting statistical data but listed problems his group is experiencing with insurance companies. He said tank truck operators, because of federal regulations regarding pollution, are hardest hit. He pointed out that information gathered from insurance companies by the Insurance Commissioner for the Kansas Insurance Assistance Plan will be important for this Committee. He believed reforms were needed in the way insurance companies do business and reforms in the tort system are needed to stop outrageous and unreasonable court awards. The KMCA's recommendations are contained in Mr. Whitaker's statement (Attachment No. 34).

In discussion, Mr. Whitaker stated that some high-risk carriers have gone to assigned risk coverage which shippers do not like and which creates a crisis for the transportation industry.

Roland Smith, Executive Director of the Wichita Independent Business Association (WIBA), said this group of businesses, most of whom are service oriented, is having trouble staying in business because of the insurance crisis much less making a profit. His statement (Attachment No. 35) contains ten suggestions for changes in the tort system. He said, because of the diversity of businesses in WIBA, he did not have data concerning their insurance problems but he would attempt to get it.

James Hughes, representing Puritan-Bennett Corporation, a critical health care product research and manufacturing firm with worldwide employees, said its products are used in the treatment of respiratory diseases and supplies are used for anesthesia and aviation oxygen. Because of the critical nature of products, his company is interested in tort reform and product liability. He said with only a few claims with no major payouts, its product liability insurance costs rose 656 percent in one year with less coverage. Three of its insurance carriers are insolvent. The company has had to pass on higher premium costs to buyers. He questioned if research on new products will be subjected to extravagant liability claims. He pointed out that medical device manufacturing was not covered in 1986 H.B. 2661 and suggested medical product manufacturers be included. Mr. Hughes' statement is attached (Attachment No. 36).

Don Schnacke, Kansas Independent Oil and Gas Association (KIOGA), called attention to a federal bill, S.B. 1999, regarding product liability which is presently on the floor of the Senate. He then gave a statement (Attachment No. 37) pointing out that liability insurance is a big concern of the oil and gas industry since it is reported to be one of the more dangerous occupations. KIOGA members have been able to get watered-down coverage through the Insurance Commissioner. A copy of the summary of a liability insurance survey taken of members is included with Mr. Schnacke's statement and also one conducted by the Independent Petroleum Association of America which is considering sponsoring an insurance company for its members. KIOGA is participating in the special citizens committee relating to liability insurance set up by the Insurance Commissioner. He recommended the Committee consider the Justice Department's Tort Policy Working Groups' recommendations.

During questioning, Mr. Schnacke said insurance premiums on lines covering environmental pollution have gone out of sight. There was discussion regarding regulations being placed on the industry to keep it from making environmental mistakes in the first place. Mr. Schnacke believed additional regulations added to the insurance problem would be detrimental to the growth of the state.

David Litwin, representing the Kansas Chamber of Commerce and Industry (KCCI), gave a statement (Attachment No. 38), noting that KCCI created a Liability Insurance and Tort Reform Committee to study the insurance crisis last year. His statement contains that group's policy calling for broad reform of the tort system. Also in the attachment are the results of a liability insurance survey of members and several local chambers of commerce which indicate a 100 percent to 500 percent increase in insurance premiums. Manufacturers are unanimous that product liability is a concern, he said. Mr. Litwin outlined the concerns of the business community, noted that Tort Policy Working Group's conclusion that the insurance market was too competitive to allow some carriers to overcharge for current policies in order to recoup past mistakes. In his remarks Mr. Litwin offered 11 suggestions for change.

In response to questions, Mr. Litwin agreed the current crisis was not due entirely to the tort system but has been influenced by the insurance industry.

The Chairman recessed the meeting at 4:50 p.m.

July 11, 1986
Morning Session

The Chairman reconvened the meeting at 9:15 a.m. in Room 313-S, to hear testimony from the insurance industry and those interest groups not heard previously.

Mavis Walters, Senior Vice-President, Insurance Services Office, Inc. (ISO), Washington, D.C., and a member of the American Academy of Actuaries, said ISO is a technical service organization providing information and help to property casualty companies nationwide and to 350 commercial insurers in Kansas. She reviewed Attachment No. 39, "Report on the Insurance Liability Crisis in Kansas," prepared by ISO, noting that in 1984 the insurance industry nationally experienced the largest operating loss in its history. Although there was an increase in income in 1985, it was due to unprecedented stock market increases. Underwriting losses in 1985 exceeded those of 1984. Losses did not result from bad risks but from insurance prices being too low. Except for 1975, investment income prior to 1984 had been sufficient to offset losses.

There was discussion regarding a bar graph on page 5 of the attachment and how underwriting losses relate to income received from premiums. Ms. Walters explained the term underwriting loss was the difference between premium earned and the amount that insurers have to pay out by way of claim costs and the expense of doing business. Underwriting loss includes incurred losses. The reason the industry showed a modest increase in 1985 was due to realized capital gains and tax credits. On page 6, she pointed out that Kansas tracks the national trend in underwriting loss experience in all lines combined and in major commercial lines.

Ms. Walters responded to questions regarding Attachment No. 39. Figures on pages 6, 7, and 8 indicate that Kansas tracks the national trend in underwriting loss experience although it showed a slight improvement in 1984. Kansas' combined ratios are lower than the nation's. She noted the first quarter of 1986, after nine quarters of operating losses, produced a pre-tax operating income increase or profit which she believed was due to the significant premium increases. Ms. Walters said loss reserves have been inadequate because premiums were reduced more than necessary, and during 1979-84, growth in losses exceeded economic growth, although growth in losses was not uniform in all lines. Commercial liability paid losses increased 130 percent and general and medical malpractice liability grew 167 percent over the five-year period (pages 19, 20, and 21). When premiums were reduced, nobody defined bad risks, and large losses can come from just a couple of bad risks. Sources of income to companies other than premiums were discussed. Ms. Walters believed companies do take investment income into consideration when determining prices, and in a free enterprise, competitive market, they cannot hide income figures as cartels used to do.

Ms. Walters was questioned concerning the source of ISO's information and if it came from the National Association of Insurance Commissioners (NAIC). She said it comes from statutory agents who are appointed by insurance commissioners. A member noted the lack of information on cash flow which could be provided by the NAIC to Congressman Peter Rodino's subcommittee regarding liability insurance. Ms. Walters said that group might not have provided information, but ISO did. Concern was expressed that over the past ten years there were figures to show that 49 percent to 57 percent has been paid in claims on every premium dollar taken in, but no investment income had been added in. Ms. Walters said she would provide a copy of a letter she sent Mr. Rodino (objecting to figures used in his subcommittee's report) explaining the difficulty of the subcommittee looking at just a piece and not the whole picture. She did not believe figures cited in the Rodino press release regarding overall profits in insurance liability and casualty areas were based on a current financial analysis and did not agree that these profits in the next four years would exceed $90 billion because that prediction contained in the Attorneys General report came from one person, the Attorney General for Massachusetts. The report was received by the Attorneys General Association but not endorsed by it. Members requested Ms. Walters to look at the Rodino press release and specifically list the statements or data therein which she questioned the accuracy of.

In response to questions from members and discussion regarding the cyclical nature of the insurance industry, Ms. Walters said the past ten-year cycle was longer than usual but was now ending. The industry has survived although a number of companies have not because of competition. She believed these cycles would continue unless the cartel system was resumed which she did not believe the American people and the economy would stand for. In a competitive market, income cannot be hidden. She did not believe the crisis was an in-house problem of the industry.

Ms. Walters was questioned regarding statements in a recent Government Accounting Office (GAO) statement before a United States House Ways and Means subcommittee. She said ISO did not have input into this statement or report, but some form of ISO information was used. GAO information was accurate but misguided, she said. ISO had no input in the National Association of Attorneys General or the Justice Department reports although the Justice Department obviously used some ISO material. It did have input concerning the Rodino press release She agreed with some of the information in the four reports and some she did not. It was noted that three of the reports indicated that insurance companies are the problem, not tort reform. Ms. Walters' personal opinion was that no legislative body should enact tort reform to benefit competitive insurance companies but should enact it, if it is necessary, for insurance consumers. She believed the insurance industry will recover and be profitable and legislatures should not look after its economy.

In regard to the GAO statement, Ms. Walters believed the accurate figures for property and casualty insurance net gains over the last ten years should be $50 billion rather than $75 billion which includes unrealized capital gains. Any accountant including unrealized capital gains would be subject to disciplinary action, she said. The figure also fails to recognize the policy handling dividend which is a legitimate business expense and should be

deducted from income. ISO has not projected a figure for net income for the insurance industry for the next ten years, but, if it recovers from the down cycle, in 1988 the return on net worth should be 9.9 percent.

A member requested that Ms. Walters look at the Kansas picture regarding its Health Care Stabilization Fund regarding medical malpractice which is not a private insurer, but where premiums have escalated. She noted that her figures in her attachment were not based on private insurance companies only, but included self-insurers which have had the same kind of experience in the number of claims and losses as the Kansas malpractice situation.

Ms. Walters was questioned regarding assigned risk plans. She believed assigned risk plans for c mercial insurance was a step in the wrong direction because by going back to sound underwriting principles the crisis situation will improve and pricing will be more in line. Company managers should be allowed to decide risks they can handle and any action removing the responsibility of managers to direct future financial success would remove the ability to underwrite. In regard to lowering the cap on liability, she said this would not eliminate competitive prices among insurance companies. Rather than being a monopoly, industries operate under the free enterprise system. She stated it could not be estimated what effect any specific reform measure would have on the situation as there are too many unknown and conflicting pressures which will continue to influence insurance losses. She believed if effective tort reforms are enacted and not reversed by judicial decisions, the effect on the availability and coverage will benefit the insurance industry.

Ms. Walters said all lines of insurance rates in Kansas are made by reviewing the actuary experience. Whatever happens which affects claim costs and frequency translates into rates.

A member noted that Kansas, in the past ten years, has made favorable changes such as with municipalities in the tort system creating a favorable climate to predict losses but there is still a crisis because premiums have been raised and policies cancelled. Ms. Walters referred to pages 12, 13, and 14 of Attachment No. 39 which indicate that even though Kansas is in better shape than average, premiums are still below costs. There is no big difference between ISO advisory rates and prices charged in the marketplace. ISO advisory rates are determined by staff exclusively from information furnished by states and provide a standard against which insurers should make prices, but companies do not have to use it. She explained how companies determine rates, taking into consideration various factors pertinent to each company. In regard to complaints of premiums going up when the insured has never had an accident, she pointed out that insurance rates are not retrospective but are prospective. Companies must determine rates in advance by adjusting the best data to anticipate future experience. Basing rates on past claim history is not indicative of future losses when changes such as court decisions may occur. Large price increases are not attempts to recoup money lost as companies cannot get back money lost in the past. Policies underwritten in 1986-87 have to be sufficient to cover claims coming in.

She said that it was not true that insurance loss reserves have been overstated. The historic pattern consistent through previous cycles is true in the most recent past. In examining loss figures for the last cycle starting in 1976, which by now have matured, incurred losses, $47.1 billion was set

aside for all claims. In 1984, $48.6 billion had actually been paid out. An additional $8 billion was still held in reserves for the same claims making the losses $56.6 billion rather than $47.1 billion originally expected. On an industrywide basis, losses are still underreserved although there has been some help through distribution of financial conditions among companies where they can get new funds through the capital market to boost reserves.

There was discussion regarding fudging losses on reports by insurance accountants, how ISO figures losses, and what the definition of "loss" was. Ms. Walters provided a pamphlet, "Countrywide Results for Selected Commercial Liability Classes" (Attachment No. 40) which includes definitions.

Some states have limited the right for mid-term cancellations and nonrenewals. She did not say insurance companies should not be restricted. Regarding tort reform, she noted the Institute of Civil Justice has taken a good look at Cook County and San Francisco, and a pattern is emerging of more cases, more costly litigation, and a big increase in financial awards.

Ms. Walters said placing a cap on noneconomic damages might hold down costs to some extent but would only affect certain claims. It would have no effect on filings or frequency. She said she was not advising state legislatures on what action to take but believed action taken by Kansas and other states has gone a long way to address problems. In regard to help for day care and nonprofit groups, she gave examples of reasons why companies do not write or have increased these premiums but noted some homeowner policies cover up to three children and companies are looking at coverage for four or more. She said other conferees could cover these issues in more detail.

Ms. Walters noted that in 1985, insurance stock did well because management had started taking steps in 1984 to control their financial situation. She provided additional data on Kansas liability lines (Attachment No. 41) and a pamphlet entitled "The Rising Costs of General Liability Legal Defense" (Attachment No. 42).

Dan Conway, General Counsel, Reinsurance Association of America, a trade association of professional reinsurers, said member companies assure property and casualty reinsurance in the United States and abroad and are licensed by and subject to the regulatory system of states. He said that reinsurance is the insurance of insurance companies, providing reimbursement for the insurer's losses under policies covered by the reinsurance contract. Reinsurance allows the insurer to spread risks and limit liability from large losses. In his statement (Attachment No. 43) Mr. Conway pointed out that United States insurers have paid out more for reinsurance coverage abroad than in the United States, but the domestic reinsurance market is growing. However, 1984 was a disastrous year for reinsurance because it absorbed a disproportionate percentage of total insurance losses. He cited figures which indicate the reinsurance industry's loss ratio exceeded that of insurers in 1983 by 4 percent but increased to 15 percent in 1985. Retention limits on old contracts are being reached today with unexpected frequency in most lines because of unexpected changes in the civil justice system which results in past and future liability exceeding premiums received. Although there are signs of improvement, loss ratio remains at an inadequate level. He believed the availability and affordability of reinsurance in critical product lines will depend on restructuring of the civil justice system and restoration of a

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fair balance. Forcing insurers and reinsurers to absorb losses would ultimately result in mass insolvencies or market withdrawals. Additional information provided by Mr. Conway was a copy of a paper entitled "U.S. Reinsurance Market Reaction to the U.S. Civil Justice System" which is available in the Legislative Research Department.

In discussion, a member suggested that large reinsurance losses were due to the unpredictable nature of catastrophic losses such as earthquakes and not on the unpredictable nature of the court system. Mr. Conway stated that tort liability has expanded in the court system due, in part, to the number of environmental liability policies that are written. With liability hanging over the industry, companies cannot hold to the same policy because of the unpredictability of claims being made on past and future environmental mistakes and the unpredictable amounts awarded by courts. He said losses take longer to impact on the reinsurance level than on the primary level, but the impact is greater. It was pointed out that Kansas is concerned with smaller risks such as day care, stores, officers, truckers, etc., and not with exotic areas. Mr. Conway said reinsurers were more concerned with risks that might result in very large losses and noted that medical malpractice would fit in that category. In regard to programs such as Kansas' Health Care Stabilization Fund, he stated that whether or not the underwriting entity is a JUA, mutual, or self-insurance it will face the same loss development as any other insurer.

In response to further questions, Mr. Conway stated when reinsurers enter into a contract with insurers, they do not look at the type of insurance line being covered but at the bottom line result of the treaty as to profit. He did not know if principle insurers were increasing premiums of some lines in order to make up for losses in others. A member noted that the expense of cleaning up the environment either had to be paid for by the public or by private insurers or the choice would be to leave a terrible environment for the future. Mr. Conway said the reinsurance industry has been studying and hopes to have a solution for environmental coverage by establishing a super fund for liability. The Environmental Protection Agency (EPA) standards and regulations are better understood today so prospective liability will be easier to handle. He did not believe the situation would work itself out if nothing was done. Predictability should be worked into the system because tort laws have increased the amounts of awards on theories not recognized before. He supported the ISO testimony and noted that where states have implemented reforms, insurance companies have come back. He suggested that the tort law in Kansas needed to be clarified.

A member pointed out that Kansas has made changes such as eliminating contributory negligence to create a good environment for insurance, but competition changed that environment and the state still has high coverage costs. The member questioned if the state should change the tort system because the insurance industry has big losses from catastrophic events.

Mr. Conway believed specific legislation should be passed to improve predictability rather than relying on common law. He had no statistics regarding amounts actually paid out as a result of litigation but would attempt to get this information from claims people. Reinsurance groups are not involved with claims settled with attorneys although they have a right to be involved under most contracts. Mr. Conway was requested to furnish

information regarding the percentage of claims awarded without counsel, the percentage of claims settled with counsel for the claimant but no insurance company counsel, and the percentage of cases filed where defense costs are incurred by the insurance company.

Ron Todd, Assistance Insurance Commissioner, addressed the liability situation. In his statement (Attachment No. 44), he noted that even though prior approval of rates by the Insurance Commissioner is required in Kansas, the state has experienced increased liability rates particularly in certain areas. Since states with other regulatory methods also have problems, rate regulation is neither the cause nor the solution. Rate regulation by the Insurance Commissioner cannot take care of price problems because he must consider availability as well as affordability. If a certain rate is disapproved, the company may refuse to sell a needed product. He did not believe the business cycle, which cannot be eliminated by legislative mandate, was totally responsible for the problem as it would have caused problems in all lines rather than mostly in the commercial liability coverage. Mr. Todd noted the good and bad points in legislation passed in West Virginia and Florida regarding liability insurance, stating that insurance companies doing business in Florida have threatened to stop writing new businesses. Mr. Todd said the Insurance Commissioner has submitted some insurance related recommendations to the Kansas Citizens Committee on Legal Liability which are contained in his statement. He pointed out that the recommendations have not been presented to nor approved by the Citizens Committee at this time.

Karl Koch, Executive Vice-President of the National Association of Insurance Commissioners (NAIC), presented a statement (Attachment No. 45) outlining NAIC activities and concerns regarding the liability insurance availability crisis which is the No. 1 concern of state regulators. He noted the forums and meetings held with property and casualty insurers and trade associations to discuss problems have resulted in the belief that the crisis was due to the civil justice system increasing claims costs and frequency, cash flow underwriting due to high interest rates, and a "market share" view on the part of carriers. Mr. Koch's statement contains the results of studies on the tort system and a NAIC survey of "Property and Casualty Coverage Availability, Lines Experiencing Availability Problems." He believed an independent expert with no vested interest in either the tort system or liability insurance should examine the relation between the two. NAIC has created the Legal Liability Insurance Task Force to meet that need. Members are state regulators and it is chaired by the Kansas Insurance Commissioner, Fletcher Bell. It has also been given the charge to develop a program to obtain the necessary statistical data with which to measure the impact of the tort system on insurance.

In response to questions, Mr. Koch said there was no specific deadline for the Task Force to complete its findings but estimated it would take 6 to 12 months. If the study is well done and creditable, NAIC will put great value on it because members do not have a vested interest in the findings. A member pointed out that facts resulting from the findings should be available before Congress and states address and take action on the tort system. Mr. Koch said information is being gathered as fast as possible and noted that NAIC's position regarding the tort system was neutral.

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There was discussion regarding tort costs. Mr. Koch defined them as being any payment to a party as the result of some involvement with the policy whether or not the court was involved. A member noted that courts may never have been involved since the amount of the claim paid and routine business costs were added in as tort cost when claims may have been settled out of court. The importance of separating true litigation costs from the total amount of payouts was noted. Mr. Koch believed the Task Force would gather court cost data through insurance carrier attorneys.

In response to a question concerning the summary of availability survey in his attachment and if these figures indicate the crisis is overstated, Mr. Koch said state regulators have never thought the availability crisis was overstated.

Ralph Wright, representing the Kansas group of the American Association of Retired Persons (AARP), noted his was the only consumer representative to testify. Everything a consumer does involves some kind of insurance, and he supported the Committee's efforts to resolve the crisis. In his statement (Attachment No. 46), Mr. Wright said there was little information to support the insurers' assertation that tort reform will reduce premiums, and the insurance industry itself may have played a part in the current liability crisis. He listed four things that can be done regarding insurance to affect the crisis without overhauling the civil justice system and four suggestions for legal reform. The position of the AARP is outlined in Attachment No. 47. Its research indicates the major culprit in the liability crisis is the insurance industry.

In additional remarks, Mr. Wright noted the importance of the Committee receiving accurate data from sources that do not have a vested interest in the situation and suggested information could be obtained from three universities in Florida, from Harvard University, and from the Oklahoma Press Association who have studies underway. He suggested that the mean figure regarding losses would provide a more accurate picture since adding in large, unusual losses can dramatically affect the loss average. He believed attention should be given to addressing the large claim problem.

Dee Ann Bernhard submitted publications prepared by the Alliance of American Insurers, "Current Issues, Civil Justice" (Attachment No. 48) and "Questions and Answers on Availability" (Attachment No. 49). In her remarks, she said the crisis involved commercial, business, environmental areas, pharmaceutical and other critical care products, and professional lines and goes beyond legislative action. It involves court interpretation and the definition of coverage and tort liability which no one could have predicted. The crisis in the tort system is related to the crisis in investment income no longer being sufficient to cover losses. The fear of lawsuits without protection is a major concern of professionals, and she believed the tort system has elevated the problem. Although it is too early to see the effects of tort reform taken, states are beginning to respond with tort reforms which should be considered by this Committee. Recommendations for tort reform from the Alliance are in Attachment No. 49. Ms. Bernhard also recommended that 1986 S.B. 540, which limits liability of professional people, should be considered. A cap of $250,000 should be placed on pain and suffering, and the loser should pay costs and attorney fees on frivolous suits. The definition of "frivolous"

was discussed. Ms. Bernhard believed an alternative to keep frivolous suits out of court would be an automatic dispute resolution system similar to one in Kansas City, Missouri, where it is not necessary to go to court.

It was pointed out that the cycle was ending and the insurance industry projects an increase in net profit over the next four years without tort reform. Ms. Bernhard said availability and affordability were still problems, and the projection was based on only nine months' figures which may not continue to be up. In regard to the insurance industry's accounting system and the difficulty in determining costs and profits, Ms. Bernhard said it would be helpful if the Committee could hear from one of her group's research actuaries concerning accounting differences. In her concluding response, Ms. Bernhard said a mechanism to market an assistance plan through a national clearinghouse has been in effect in Kansas since January. The industry voluntarily gets in line on a rotation basis to see if risks can be accepted.

Mike Germann, representing the Kansas Railroad Association, expressed the concerns of this group on trends occurring in the civil justice system. He said the railroad industry sees the problem as the unpredictable nature of the tort system. Railroads have no problems with insurance availability since they are mostly self-insured. Statistics from the railroad industry indicate an increase in the numbers of personal injury lawsuits and more dollars paid out in judgments. Recommendations for changes in the tort system are contained in Mr. Germann's statement (Attachment No. 50).

Ted Fay, Attorney for the Kansas Insurance Department, gave an overview of the membership, reason for, and proposals to be studied by the Citizens Committee appointed by the Insurance Commissioner in February to review the liability insurance environment in Kansas and to make recommendations regarding the possibility for public and legislative action. The Committee has met four times and has heard testimony from the business and insurance industries). Testimony from the legal community will be heard at the next meeting. Transcripts of the meetings are available. Mr. Fay's statement (Attachment No. 51) lists areas to be studied (new ones being added as necessary), the membership list, and the charge to the Committee. He said that the Citizens Committee requests that this special interim Committee delay final action on its findings until the Citizens Committee completes its final report prior to November when it will be presented to this Committee.

The Chairman stated that neither Committee may want to delay until studies are complete. He noted that transcripts of meetings are available and information could be furnished as it is completed. He requested that one copy of the Citizens Committee transcripts of the four meetings be provided to him and one to staff.

Written testimony in support of tort reform from Tom Slattery, Executive Vice-President of Associated General Contractors of Kansas (Attachment No. 52), Janet Stubbs, Executive Director, Home Builders Association of Kansas (Attachment No. 53), Bill Henry, Executive Vice-President, Kansas Engineering Society (Attachment No. 54) along with a publication "The Liability Crisis," of Professional Engineers in Private Practice (Attachment No. 55), and Richard Willborn, Vice-President, Farmers Alliance Mutual Insurance Company, McPherson (Attachment No. 56) was distributed to Committee members.

The agenda for future meetings was discussed. The Chairman said the Committee would study three or four items concerning its charge that have a reasonable chance for favorable consideration by the 1987 Legislature, although he was open to adding certain items to the agenda. At the next meeting, a day will be devoted to tort reform issues and one to insurance issues, he said.

The next meeting of the Committee will be August 14 and 15, 1986. The Chairman adjourned the meeting at 4:20 p.m.

Prepared by Mike Heim

Approved by Committee on:

Sept. 12, 1984
(Date)

tort-July.min/MH

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April 1986

The Honorable Mike Hayden
Speaker of the Kansas House of
Representatives and Chairman of the
Legislative Coordinating Council
Statehouse
Topeka, KS 66612

Dear Speaker Hayden:

We, the undersigned, respectfully petition the Legislative Coordinating Council to appoint a Special Committee to study tort reform during the 1986 interim. To restore some resemblance of balance to the civil justice system, we believe the following tort reform issues require examination and serious consideration.

1. Limitations on non-economic damages
2. Mandatory structuring of large awards and settlements
3. Elimination of the collateral source rule
4. Elimination of punitive damage awards
5. Limitations on attorney contingency fees
6. Elimination of frivolous lawsuits
7. Implementation of a system for alternative dispute resolution
8. Utilitization of screening panels
9. Curtailment of venue shopping
10. Enactment of a reasonable no-fault law
11. Establishment of specific criteria for qualifying expert witnesses
12. Elimination of discovery abuses
13. Mandatory settlement conferences

We urge your favorable consideration of our petition.

cc: Hon. Robert V. Talkington
Hon. Paul "Bud" Burke, Jr.
Hon. Michael L. Johnston
Hon. David J. Heinemann
Hon. James D. Braden
Hon. Marvin W. Barkis

Attachment 1

Name	Representing
Emmanuel J. Mohr	KCCI.
Ronald Gaches	BMAC - WICHITA
Janet Stubbs	HBAK
Donald P. Schnacke	KIOGA
James L. Yonally	NFIB/Kansas
Paul E. Fleener	Kansas Farm Bureau
Ross Martin	Ks. Petroleum Council
William M. Denny	Kansas Engineering Society
John W. Koephe (tort claims act)	Kansas Association of School Board
Karin J. Lange	Ks. Assn. of Broadcasters
Charles H. Nicoley	Ks Oil Marketers Assn
George Barber	Ks. Consulting Engineers
Daniel Ramlow	Kansas Contractors Association
[illegible]	Kansas Railroad Association
Darrell Hover	Ks Bankers Assn
Robert O. Anderson	Self
Landis D. Belt	Wichita Area Chamber of Commerce
Mary Ellen Conlee	Ks. Assoc. for Small Business

Name	Representing
Willis W. Sneed	Ks Assn of Defense Counsel
Dick Hummel	Ks. Health Care Assn.
Rick Enenwold	AT+T
Lee E. Wolf	Farmers Insurance Group
[illegible]	Kansas Association of Property and Casualty Insurance Companies

Proposal No. 29 -- Tort Reform and Liability Insurance

Review and make recommendations concerning the tort and insurance liability systems in Kansas, including but not limited to considerations of: liability insurance problems affecting a broad range of professions and occupational groups (including those mentioned in 1986 S.B. 540, as well as foster, child care, and handicapped facilities, truckers, manufacturers and other businesses); liability insurance problems and the issue of governmental immunity in regard to the state and its municipalities; activities of other states and jurisdictions to address these problems; and the impact, if any, of tort reform and insurance reform measures on the availability and affordability of liability insurance.

Attachment 2

ISSUES WORKING PAPER

July 9, 1986

TO: Special Committee on Tort Reform and Insurance Liability

FROM: Kansas Legislative Research Department

RE: Tort Reform Proposals

The issues working paper is designed to help the Committee begin to focus on certain tort reform issues many of which have been recommended recently either by the United States Attorney General's Tort Policy Working Group (hereinafter cited as the Justice Department Report) or by representatives of a number of Kansas businesses, industries, and the Kansas Association of School Boards. The latter group's letter hereinafter cited as the Business Group letter to House Speaker Mike Hayden requesting an interim study on tort reform states that their list of 13 tort reform issues merits "examination and serious consideration."

The working paper is intended to acquaint members of the Committee with the major tort reform issues which will likely be proposed -- not to treat the issues in depth. The format will be to specify an issue, discuss the current Kansas law and note any recent legislation proposed on the subject and state the main arguments or rationale in favor and those against the suggested change.

The Justice Department's Tort Reform Policy Working Group is an interagency working group consisting of representatives of ten federal agencies and the White House. Copies of the above cited report and the letter containing the issues raised by the Business Group are included in the Committee notebooks. The working paper will also reference a recent report of

Attachment 3

the National Association of (State) Attorneys General hereinafter referred to as National Association Report which attempts to rebut many of the assumptions and analyses contained in the Justice Department Report.

I. Should a cap be placed on noneconomic damages?

A $250,000 cap on noneconomic damages was imposed on medical malpractice plaintiffs under provisions of 1986 H.B. 2661. The Kansas Wrongful Death Act (K.S.A. 1985 Supp. 60-1903) limits nonpecuniary damages to no more than $100,000.

The Justice Department Report recommends a $100,000 cap on noneconomic damages and would include punitive damages within the cap. The Report states that the rationale for the change is that noneconomic damages are inherently open-ended, entirely subjective and often defy quantification, lead to lottery-like awards, inhibit the settlement process, and create particular problems from the standpoint of achieving predictability.

The main argument against such a limitation is that victims of negligence or a defective product need to be fully compensated and to be made as whole as possible, that juries and those involved in settlement negotiations are capable of placing a value on pain and suffering and other noneconomic losses and that large jury awards where noneconomic losses constitute a significant portion of the award are rare and when they occur these awards are justified by the extent of the plaintiff's injuries. The National Association Report (page 35) notes no evidence is contained in the Justice Department Report to indicate that awards for noneconomic losses are increasing in either frequency or amount.

II. Should punitive damages be abolished or limited?

Kansas law (K.S.A. 1985 Supp. 60-3402) which was enacted in 1985 limits punitive damage awards in medical malpractice liability actions to 25 percent of the defendant's annual gross income earned from services as a

health care provider or $3 million, whichever is less. Fifty percent of a punitive damage award must be paid into the Health Care Stabilization Fund. The law requires a separate proceeding before the court to determine the amount of damages. The Kansas Tort Claims Act prohibits punitive damage awards against the state or its local governments. Such damages can be awarded against public employees who act with malice or fraud.

H.B. 2457 which died in the House Judiciary Committee provided 95 percent of a punitive damage award would go to the state and would have limited such awards to one time for the same wrong.

The Justice Department Report recommends punitive damage awards not be totally abolished but that the $100,000 cap on noneconomic loss include any punitive damage award. The rationale presented is that such damages add considerable uncertainty and have little deterrent effect and that punishment should be primarily the function of public law enforcement not private litigation. The Business Group letter suggests punitive damages be abolished.

The arguments against abolishing or limiting punitive damages are that such awards are made only when there is intentional, wanton or reckless conduct on the part of a tortfeasor and that one of the primary underpinning of the tort system -- deterrence -- would be seriously eroded. The National Association Report notes punitive damages are awarded infrequently and could have no major effect on tort claims payments since they represent such a small percent of all tort awards and the Justice Department Report ignores the effects of reductions.

III. Should there be mandatory structuring of large settlements or awards?

The medical malpractice legislation enacted in 1986 (H.B. 2661) contains a provision that all future economic damages that are awarded must be structured. The court is required to reduce these damages to their present value and enter judgment for an annuity contract.

Both the Justice Department Report and the Business Group letter advocate mandatory structuring of large awards. The Justice Report cites advantages to include permitting defendants to digest major adverse judgments by spacing payments, thereby giving plaintiffs a guaranteed stream of income thus preventing depletion of their awards, and permitting the use of the marketplace assessment rather than the court assessment of the applicable interest rate.

Arguments against such mandatory structuring include: that a plaintiff may need a lump sum to pay costs incurred, that such a scheme is presumptively paternalistic and that there is insufficient evidence to show that plaintiffs who receive large awards or settlements squander the money.

IV. Should attorney contingency fees be limited?

The Kansas Workers Compensation Act limits attorney contingency fees to 25 percent of the amount of compensation recovered. The new medical malpractice law (H.B. 2661) requires an evidentiary hearing prior to approval of attorney fees. 1986 H.C.R. 5053 urges the Kansas Supreme Court to adopt a court rule regulating attorney fees including contingency fees. The concurrent resolution passed both houses. 1986 H.B. 2918 would have established a sliding scale limitation on attorneys fees. The bill passed the House Federal and State Affairs Committee, but later was rereferred to that Committee and died there.

The Justice Department Report argues for a contingency fee schedule as follows: 25 percent of the first $100,000; 20 percent of the next $100,000; 15 percent of the next $100,000; and 10 percent of the remainder. Arguments for the limitation include: that verdicts and settlements are often inflated to account for attorney fees; that such fees provide incentives for attorneys to hold out for higher noneconomic damages; and that limits will reduce transaction costs of the system. The Business Group letter also contains a contingency fee limit suggestion.

The arguments against limiting contingency fees include that this unfairly limits plaintiffs' attorneys with no comparable limit on defendants' attorneys; the current system permits the poor and those with modest means to have their day in court which they would be denied if contingency fees are abolished or unduly limited; and the current system permits the spreading of costs among injured plaintiffs thus compensating plaintiffs' attorneys who spend time on cases where no recovery is ever obtained.

V. Should the collateral source rule be abolished?

The collateral source rule in medical malpractice liability actions was amended in 1985 (K.S.A. 1985 Supp. 60-3403) to insure admissibility of the following evidence: (1) medical disability or other insurance coverage except life insurance; or (2) workers' compensation, military service benefit plans, employment wage continuation plans, social welfare benefit programs or other benefit plans or programs provided by law. The claimant or plaintiff is entitled to present evidence of any amounts paid to secure the right to reimbursement and the extent to which the recovery is subject to a lien or subrogation right. The provision is subject to sunset on July 1, 1989.

Both the Justice Department Report and the Business Group letter advocate elimination of the collateral source rule. The Report argues the collateral source rule permits double recovery or windfalls since most such sources are provided by the government or a third party such as employers. As to private sources, the Report notes that the best approach is to take into account collateral sources as long as the third party is not subrogated to that part of the plaintiff's claim. See page 71 of the Report.

Arguments against eliminating the collateral source rule include that the wrongdoer or tortfeasor should not have his liability reduced due to the plaintiff's collateral sources. It is better to permit a double recovery on the part of an innocent injured party than to reward a wrongdoer. Further, even a full recovery in tort often does not make the plaintiff whole, especially due to the cost of attorneys fees the plaintiff must bear.

VI. Should a system of alternative dispute resolution be implemented?

The Bill of Rights Section 5 of the Kansas Constitution provides that the right to trial by jury shall be inviolate. The section may prohibit binding arbitration or mandatory mediation type laws.

Both the Justice Department Report and the Business Group letter suggest that alternative dispute resolution methods be implemented. Neither source discusses this issue with much detail.

The arguments in favor of alternative dispute resolution mechanisms are that they save costs and expedite settlement of controversies. A counter argument is that an injured party should have a right to his day in court before a jury or judge.

VII. Should screening panels be more fully utilized?

Screening panel legislation for medical malpractice litigation was first enacted in 1976. An amendment was added in 1986 (H.B. 2661) to provide that the findings of screening panels are admissible at trial. Costs of the panel are to be borne by the party in whose favor a decision is rendered. Proposed legislation in 1986, S.B. 540, which would have enacted tort reform measures for a number of professions and groups parallel to that contained in H.B. 2661, contained a screening panel provision.

The Business Group letter addressed this issue. Arguments in favor of screening panels include that this process will weed out unworthy cases, help both sides gauge the strength of their case and permit the alleged negligence of a defendant to be reviewed by a group of his peers who understand the standards of conduct required of the defendant.

Arguments against screening panels are that they add to the expense of litigation, delay the recovery of needy plaintiffs, impede the right to a jury trial and are an unnecessary further step.

VIII. Should mandatory settlement conferences be implemented?

H.B. 2661 contains a provision that in medical malpractice actions mandatory settlement conferences must be conducted by the trial judge not less than 30 days before trial. A similar provision was contained in S.B. 540, which died in the House Judiciary Committee.

The Business Group letter contained the above suggestion. The Justice Department Report suggests, when discussing the closely related issue of nonbinding arbitration, that a provision for shifting costs to the party who rejects an arbitration award and subsequently obtains a less favorable result at trial is desirable.

The arguments in favor of mandatory settlement conferences are that this procedure will save time and money for both parties and help resolve disputes.

An argument against the procedure includes that a judge can use this conference to coerce parties to settle to help clear his trial docket.

IX. Should criteria for expert witnesses be established?

The new medical malpractice legislation (H.B. 2661) contains a provision that medical experts are required to have devoted 50 percent of their professional time to clinical practice in the past two years. A similar expert witness provision was proposed in 1986 S.B. 540, which did not pass.

The Justice Department Report argues causation findings be based on credible scientific and medical evidence and opinions. The Report states that, "One of the most pernicious developments in tort law has been the extent to which causation findings are based on fringe scientific or medical opinions well outside the mainstream of accepted scientific or medical beliefs." The Report suggests that greater deference be paid to government agencies and

certain private institutions that have devoted decades of attention and millions of dollars to research; that courts should be more aggressive in determining the credibility of scientific and medical evidence before trial; that studies and opinions not subjected to peer review should be rejected; and, that courts must learn to accept the reality of uncertainty. The Business Group letter suggests that the issue of establishing criteria for expert witnesses be reviewed.

Arguments against establishing such criteria are that members of a jury should be able to sort out fact from fiction and that cross examination permits exposing of unqualified experts or fallacious "expert" opinions.

X. Should the Kansas Products Liability Law be altered?

The Kansas Products Liability Act is found at K.S.A. 60-3301 et seq. Some of the more important features of the law include a provision that a product seller's exposure to liability terminates once the product's useful safe life has expired. The Act creates a rebuttable presumption that the safe life expires after ten years. This presumption may be rebutted by "clear and convincing evidence." Certain exceptions from the ten-year limitation are listed. The Act provides that if the injury causing aspect of the product complied with regulatory standards in effect at the time of manufacture, then the product shall not be deemed defective. Other features include limits on the duty to warn and the liability of sellers of the product.

The 1986 Legislature enacted S.B. 668 which prohibits the admission of evidence, in any product liability case, of any advancements or changes in technology made after the product was designed or manufactured or changes in the product actually made after the product was designed and sold unless used for impeachment purposes.

The Justice Department Report recommends that fault be retained as a basis for tort liability and that for nonproduct liability cases, negligence should remain the standard as the basis of liability. The Report states that criteria for strict product liability should include: the existence of a

defect which makes the product unreasonably dangerous; liability should be for reasonable and foreseeable uses; no liability should incur where there has been adequate warning or where the defect is readily apparent; and manufacturers should be held liable only for state of the art at the time of manufacture of the product.

It is not clear at this time what changes might be suggested in the current Kansas law.

XI. Should the Kansas No-Fault Automobile Insurance Law be modified?

The Kansas Automobile Injury Reparations Act is a modified no-fault law whose purpose is "to provide a means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance, or use of motor vehicles in lieu of liability for damages to the extent provided herein."

The compulsory insurance requirement is contained in K.S.A. 1985 Supp. 40-3104. Accordingly, all motor vehicles in Kansas must be insured, unless they are exempt or owned by an authorized self-insurer. K.S.A. 40-3107 and 40-284 require the following insurance coverages: minimum bodily injury liability limits of $25,000 per person and $50,000 per accident; a personal injury protection (PIP) benefits package containing disability benefits of $650 per person, per month, medical expense benefits of $2,000 per person, funeral expense benefits of $1,000 per person, rehabilitation expense benefits of $2,000 per person, and substitute service expense benefits of $12 per day, per person; and uninsured motorist coverage.

The tort threshold contained in K.S.A. 40-3117 requires that an injured party sustain one of the following before suing for nonpecuniary loss: medical expenses of $500 or more; permanent disfigurement; the fracture of a weight-bearing bone; a compound, comminuted, displaced, or compressed fracture; the loss of a body member; permanent injury or loss of a body function; or death.

Legislation was passed in 1984 (H.B. 2833) to increase benefits and to raise the dollar portion of the tort threshold to $1,000. The bill was vetoed by the Governor.

Similar legislation was passed in 1986 (H.B. 2422) raising benefits, creating a new category of PIP benefits called general benefits and raising the dollar portion of the tort threshold to $3,000. The Governor also vetoed this bill.

The Business Group letter called for the enactment of a "reasonable no-fault law."

XII. Should the Kansas Tort Claims Act be modified?

The Kansas Tort Claims Act (K.S.A. 75-6101 et seq. applies to the state and municipalities which is defined to include any county, township, city, school district or other political or taxing subdivision. The Act is open ended meaning the entity will be liable for negligence of or the wrongful act of its employees to the same extent that a private person would be liable. Exceptions from liability are listed in K.S.A. 75-6104 and include such basic things as legislative, judicial, and discretionary functions.

The Act contains a $500,000 cap for any number of claims arising out of a single incident unless the entity purchases insurance coverage in excess of this amount in which case the policy limit applies as well as a prohibition against the payment of punitive damages by the entity or its employees acting within the scope of their employment unless the employee acted with actual malice or fraud. The Act specifically grants municipalities the power to enter into interlocal cooperation agreements to purchase insurance or to enter into insurance pooling arrangements.

Several bills were considered by the 1986 Legislature dealing with the Kansas Tort Claims Act. H.B. 3114, which passed but was vetoed by the Governor on the grounds of two subjects in one bill, would have added a new

exemption from liability for any claim for damages resulting from the performance of community service work.

It is not clear at this time what issues may be raised regarding the Kansas Tort Claims Act or liability insurance problems of municipalities.

XIII. Other Issues

The Business Group letter also requested that the issue of "venue shopping" and "discovery abuses" be considered. Other so-called tort reform issues will likely arise during the course of the Committee's study this interim.

086-152/MH

MEMORANDUM

July 9, 1986

TO: Special Committee on Tort Reform and Liability Insurance

FROM: Kansas Legislative Research Department

RE: Preliminary Working Paper -- Liability Insurance Issues

1. **Should insurance companies be forced to lower premiums if significant tort reform legislation is enacted?**

This question embodies one of the essential dilemmas faced by the Committee: defining the relationship between tort reform and liability insurance rates.

One line of thought, represented generally by the insurance industry and some segments of the business and professional community, sees the tort system as the basic cause of problems affecting the availability and affordability of liability insurance. According to this view, the predictability necessary for stability in insurance ratemaking has been eroded by the random nature of jury verdicts and by legal theories used to justify what seem to some to be "speculative" lawsuits and to permit injured parties to recover from defendants who are only tangentially at fault for the harm. Persons holding this point of view see insurance rate stabilization as a necessary corollary to tort reform targeted toward increasing the predictability of losses. They would find it unnecessary to enact legislation to force insurance companies to lower premiums because appropriate tort reform

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would enable insurers to make decisions affecting rates and loss reserves based on less volatile criteria.

An alternative point of view, at times articulated by some members of the legal community and by public interest organizations, finds that inadequate research has been done and insufficient data collected to document a causal relationship between tort reform and lower insurance rates. Some espousing this view see a number of tort reforms to be desirable for reasons independent of any consequences relevant to insurance rates. Others see a need to gather more information concerning the specific effects on insurance rates in jurisdictions where tort reforms of various kinds have been enacted before making a blanket assumption that tort reform measures will automatically produce lower insurance premiums. Persons or groups sensitive to insurance availability and affordability problems but unconvinced of the cause and effect relationship between tort reform and lower insurance rates are likely to feel that if tort reforms are enacted, a quid pro quo should be required in the form of a requirement that insurance companies lower premiums. Such a requirement could be limited to a certain time through a sunset provision or could be triggered in the event that tort reform did not achieve the anticipated results.

2. Should the state establish a joint underwriting association (JUA) to make liability insurance available to entities unable to obtain it in the marketplace?

Current Kansas law authorizes joint underwriting associations in the contexts of automobile liability insurance and medical malpractice insurance, and under the FAIR plan.* In recent years, legislation has been introduced, but not passed, to authorize the establishment of a pooled risk mechanism to meet the health care needs of persons who, usually because of a chronic medical condition, are unable to obtain health care coverage in the marketplace.

The primary benefit of a JUA would be to assure the availability of liability insurance to those unable to obtain it elsewhere. Affordability, however, would not be guaranteed unless premiums were limited to, for example, either a specific dollar amount or a fixed percentage of the average premium for comparable coverage.

Arguments against such a proposal include a philosophical stance against the state acting as an insurer and acknowledgment of the fact that because it would not affect affordability, a JUA would benefit only those for whom availability was the problem. In addition, in the event premiums collected did not cover paid losses, negative balances would have to be absorbed by the State General Fund or would have to be assessed against

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* Fair Access to Insurance Requirements Plan, developed in the late 1960s in the interest of making necessary property insurance more readily available, permitting insurers to participate in a federal program of reinsurance against unusually high property insurance losses, and creating a residual market mechanism for obtaining property insurance.

participating insurers (self insurers would be exempt), thus to be paid eventually by insurance consumers at large.

Legislation recently enacted in Florida establishes a JUA to make property and casualty insurance available to qualified applicants.

3. Should changes be made in the insurance ratemaking or rate review process?

Proponents of insurance reform often recommend changes in the rate making or rate review processes as means that would facilitate better control and more effective monitoring of the price of insurance. The following are among suggested reforms:

a. Shift rate authority from the Commissioner to a board.

Those suggesting such a change point to benefits that could result from breadth of input in the decision making process and suggest that as a matter of public policy, it might be wise to diffuse the responsibility for rate decisions from one person to a board, of which the Commissioner might be a member.

Opponents note that creating a board adds to the bureaucracy of the process and would be less efficient because decision making would take more time and would not necessarily lead to a better result.

1986 H.B. 2872 would have established a five-member state board of rate regulation, chaired by the Insurance Commissioner. The board would have had the exclusive power to administer the state regulation of insurance rates and rate practices.

b. Require that insurers submit certain specific documentation to support rate filings and require that the Insurance Commissioner consider particular data, such as specific loss experience, in the rate review process.

Current Kansas law includes a broad framework governing the rate making process. K.S.A. Chapter 40, Article 9 deals with fire insurance companies; Article 11 deals with all other companies, except life insurance companies.

Article 11 reflects a rate regulation philosophy intended to assure that rates are not excessive, inadequate or unfairly discriminatory (40-1111). Ratemakers may consider, among other things, past loss experience, the hazard, margin for profit and contingencies, and dividends. Rates may be grouped by classification, but all rates must be reasonable, adequate, and not unfairly discriminatory (40-1112).

Every insurer must file rates with the Commissioner, who must approve or disapprove the rates; any filing is deemed approved unless disapproved within 30 days. In the event of a

disapproval any aggrieved party has 30 days in which to request a hearing. No insurer may issue a policy except in accordance with its filed rates (40-1113). In lieu of each company filing separate rates, companies may request that the Commissioner accept on its behalf rates filed by a licensed rating organization (40-1114). Companies may request that the Commissioner allow a deviation from the approved rates (40-1115). Persons aggrieved by an action of a rating organization may request a hearing as set out in 40-1116 and 40-1117. (This hearing procedure is not a part of the Kansas Administrative Procedures Act.)

K.S.A. 40-1118 requires the Commissioner to "promulgate rules and statistical plans" to be used by insurers in recording and reporting its loss and countywide expense experience. The Commissioner may make reasonable rules and regulations related to these procedures (40-1118).

Those wishing legislative changes to list expressly the data to be submitted with rate filings as well as a list of factors that must be considered during the approval process suggest that the insurers would not be able to hide information that might be relevant to rates but is currently not revealed because it is in the insurers' interest to withhold the information. In addition, proponents of specific law to require (rather than simply to permit) consideration of the loss experience of an insurer and of any specific insured suggest

that consideration of such facts, would, in many cases, lead to lower rates, especially in instances when risks had incurred no losses.

1986 S.B. 729, which was not enacted, would have amended two statutes relating to property and casualty insurance companies concerning recording and reporting of loss and expense experience.

The bill would have removed a restriction on the authority of the Insurance Commissioner to adopt statistical plans different from the rating systems filed with the Commissioner by the companies. The effect would have been to empower the Commissioner to develop statistical plans requiring property and casualty companies to record and report loss and expense experience on specific classifications of insurance.

The bill was originally requested by the Commissioner of Insurance and was supported by the Joint Subcommittee on Insurance as legislation necessary to gather data on actual claim losses on and expenses related to property and casualty insurance policies issued in Kansas.

Law recently enacted in Florida adds to the number of records that insurance companies must make available to the Insurance Department for ratemaking purposes.

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c. Require regular audits of relevant insurance documents.

Two bills introduced during the 1986 Legislative Session dealt with examinations of documents related to the alleged insurance company role in creating or contributing to liability insurance problems. Neither was enacted into law.

1986 H.B. 3104 would have required the Insurance Commissioner to designate a rate or advisory organization to administer examinations of certain documentation related to insurance to determine whether insurance contracts conformed to the rules, rates, and forms approved for the particular company's use. A company would have been permitted to become an affiliate of the rating organization only for purposes of the examination or could have arranged for an alternative examination procedure, acceptable to the Insurance Commissioner.

The Commissioner would have been granted rule and regulation authority necessary to identify the kinds, types, and numbers of policies to be examined and to administer the audit program.

The audit program established by the bill would have expired June 30, 1988.

The bill was originally requested by the Insurance Department and was recommended by the Joint Subcommittee on Insurance as

one means of addressing current liability insurance availability and affordability problems.

1986 H.B. 3144 would have amended K.S.A. 40-928 to provide that insurance companies reimburse the state for the cost of actuarial services incurred by the Insurance Commissioner in reviewing rate submissions. The bill would have allowed the Insurance Commissioner to require additional information from insurers when filings did not contain sufficient information for evaluation; and would have permitted the Commissioner to obtain an evaluation by an independent actuary at the expense of the insurer.

Opponents of both measures indicated that compliance with the mandated procedures could be very expensive for the insurance industry.

d. Create a citizens' board to represent consumer interests in the rate making process.

Current law requires that rate filings and any supporting data be open to public inspection after they are filed with the Insurance Commissioner (K.S.A. 40-1113). Those seeking establishment of a citizens' board claim that such a provision is, at a practical level, useless because of the transaction costs associated with getting a group of people mobilized to

act for the common good. They see a board as the best means of assuming an ongoing role as an advocate for the public at-large in the insurance rate making system.

Opponents feel that such a group is unnecessary and question how such an entity would be funded.

4. Should the state set more stringent guidelines for the cancellation and renewal of insurance policies and for refusals to grant coverage?

Current law, enacted during this past legislative session and effective July 1, 1986, sets forth criteria that must be met before property and casualty insurance for business and professional needs can be cancelled. Specifically, for any such policy that has been in effect for at least 90 days, cancellation is authorized only for expressly listed reasons. In addition, new law requires insurers to give at least 60 days' notice to policyholders in cases when renewal of a policy is denied or when substitution of similar coverage for the same exposure is offered. Finally, insurance companies that cancel a policy or refuse to renew a policy must provide to the insured a written explanation detailing the reasons for the action. Similar law was recently enacted in West Virginia, Illinois, and Florida.

Those favoring even more stringent and comprehensive criteria governing notice requirements wish to require for nonrenewal or denial of coverage a listing of permissible reasons similar to the enumeration currently applicable to cancellations.

In addition, some favor legislation to set out notice criteria to be met prior to the charging of increased premiums for property and casualty insurance. 1986 S.B. 528, which was not enacted, would have established the premium rates for any renewal policy to be the same rates charged for the preceding policy period unless and until the insured was notified of any increase. The bill was originally requested by the Insurance Commissioner, whose representative testified during hearings on the bill that there had been brought to the Commissioner's attention instances when a company had renewed a risk and subsequently billed the insured at a premium significantly greater than that paid during the previous year.

Generally, proponents of more stringent notice criteria justify such changes as consumer protection measures. Those opposed to such measures see them as unnecessary intrusions on the business practices of the insurance industry and see current law as adequate to protect consumers.

5. Should insurance rates be frozen or "rolled back"?

A freeze on insurance premium levels, perhaps in conjunction with a rate rollback, represents the most direct regulatory approach to the affordability issue. Proponents see such a straightforward approach as an appropriate way to break the "cycle" currently reflecting the phase that requires skyrocketing premiums to recoup insurance company losses attributable to poor underwriting done in the past, when interest rates were high and significant investment income permitted underpricing of coverages. A freeze or

rollback could be sunsetted, with provision for new rate filings in accordance with limits to be set by statute or by the Insurance Commissioner under legislated authority.

Opponents see such efforts as intrusive upon the marketplace, possibly unconstitutional, and as having the potential to impair the financial stability of many companies, even to the point of bringing about insolvency.

6. Should the state enact a "windfall profits" tax or "excess profits" law applicable to insurance companies?

Under current law, insurance companies are subject to an insurance premiums tax (K.S.A. 40-252, 40-253, 49-246c, 40-254), a 5 percent privilege tax (K.S.A. 40-2801 et seq., applicable solely to domestic companies), and a tax for the purpose of maintaining the Department of the State Fire Marshal (K.S.A. 75-1508).

A windfall profits tax or an excess profits law applicable to insurance companies are alternative indirect approaches to price control through regulation of the level of profit for the insurer. Proponents see insurance companies as at least quasi-public entities that should be entitled to no more than a "reasonable" profit, similar to that of public utility, for example. Enactment of a windfall profits tax, with revenue going to either the State General Fund or another named fund, perhaps earmarked for a specific purpose, or an excess profits law with the excess being returned to eligible consumers, would, in instances of high premium, assure that some of the financial benefit would accrue to policyholders or the public at large.

Opponents point out that because such measures control excessive rates but have no corresponding value for adjustment of inadequate rates, they are a poor means of correcting errors made in earlier projections and regulatory decisions. In addition, they suggest that unless regulators look carefully at an insurer's expenses there is a danger that excess profits law could discourage efficient business practices by fostering unnecessary expenses.

Among the states, Florida has recently enacted an excess profits law applicable to property/casualty insurers. Under the new law, excess profit is determined annually, based on a four-year period, and is refunded to eligible policyholders, as defined by statute.

7. Should governmental entities be encouraged or required to self insure?

Both the state and municipalities have been among the hardest hit by the availability and affordability problems that characterize the current liability insurance market because they are often named defendants in lawsuits involving, for example, serious bodily injury on public property or damage resulting from toxic chemical discharge from landfills or waste dumps.

Under current Kansas law, there is no prohibition against self- insurance. Likewise, there is no requirement that governmental entities self insure. Many smaller units would find the practice too expensive, and pooling among communities might be a more realistic alternative. The Tort Claims Act

contains a statute (K.S.A. 75-6111) that authorizes interlocal agreements for joint purchases of liability insurance and for the sharing payment for judgments, settlements, attorney fees, etc.

Arguments in support of requiring self-insurance for governmental entities generally cite the need of governmental units to be relieved from dependency on conditions set solely by the insurers and which are perceived by some to be unrelated to the loss experience of the particular municipality.

On the negative side, the few opposed to the concept point out that self-insurance is a misappropriation of taxpayers' money and that it is unfair to shift the costs of damage to future taxpayers rather than impose them on someone damaged due to the negligence of a public employee. Such persons might favor self-insurance, as long as there were limitations on awards to safeguard tax moneys.

8. Should law be enacted to facilitate alternative mechanisms by which various entities might obtain liability insurance coverage (self-insurance; groups for commercial risks; risk retention groups, etc.)?

Proponents of measures to broaden the range of options available to entities seeking liability insurance support a variety of mechanisms in the interest of increasing the availability of insurance.

Opponents point less to the harm inherent in the proposals than to the need to be sure that new options be accompanied by regulatory oversight

that would assure accountability to the insured and would avoid costly errors of misjudgment that could occur if, for example, self-insurance turned out to be, in fact, "going bare."

With regard to specific proposals, current law stands as follows:

Risk Retention Groups. 1986 S.B. 541 enacted new insurance statutes incorporating the model Product Liability Risk Retention Act adopted by the National Association of Insurance Commissioners. As its title suggests, the law applies only to risk retention pools established for the purpose of purchasing product liability coverage. Some would support similar legislation to permit governmental units, businesses, or other classes of insureds to buy liability coverages collectively and to self-insure through risk retention groups.

Self-Insurance. Statutes neither prohibit nor encourage self-insurance.

Pools for Groups. The Kansas Tort Claims Act contains specific statutory authority for interlocal cooperation among governmental units for the purchase of liability insurance.

The basic obstacle to formation of groups for the purpose of facilitating the purchase of insurance is the prohibition, found at K.A.R. 40-3-6, against the formation of "fictitious groups" that have in common nothing but the desire to purchase insurance at an attractive price.

Law recently enacted in Florida specifically authorizes commercial property and casualty risk to form groups for insurance purposes. In addition, the new Florida law expressly permits certain named professional groups to self-insure.

9. Should the state more strictly regulate reinsurance companies or organize its own reinsurance program?

The states generally do not strictly regulate reinsurance. Proponents of greater regulation in this area or of the creation of a state-operated reinsurance program employ the same rationale as is given for the establishment of a JUA, namely, that greater availability of insurance would ensue.

Opponents, as in the JUA debate, see such actions as an intrusion on the marketplace and suggest that reinsurance markets would probably open up if appropriate tort reform were enacted to add greater predictability to insurance underwriting.

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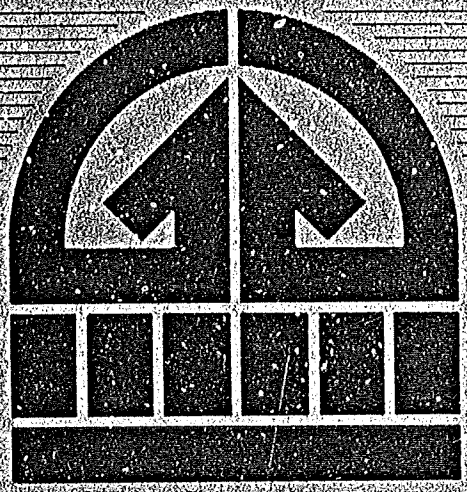
STATE LEGISLATIVE REPORT



CONTROLLING LIABILITY INSURANCE COSTS: STATE ACTIONS AND FUTURE INITIATIVES IN THE AREA OF CIVIL JUSTICE REFORM

by

Brenda Trolin

Volume 11, No. 1 January, 1986

An Information Service of the National Conference of State Legislatures
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(Vol. 11, No. 1) (ISBN 1-55516-157-X) January, 1986

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CONTROLLING LIABILITY INSURANCE COSTS: STATE ACTIONS AND FUTURE INITIATIVES IN THE AREA OF CIVIL JUSTICE REFORM

The rising costs and increasing unavailability of casualty insurance affects government, business and consumers, who are facing mid-term cancellations and non-renewals of their insurance, as well as society as a whole. Governments are often drawn into lawsuits and are drained financially by payment of huge awards, not because of their responsibility for the damage but because of their financial base. The price of products is increased to cover the cost of insurance. Fear of suits causes businesses to abandon new products involving risk. Research for developing technologies is hampered because companies are unable to afford the insurance necessary to test and market the research. Insurance costs for municipalities, day care centers, common carriers, schools, accountants, lawyers and physicians are doubling and tripling. Coverage for liquor liability and pollution is virtually impossible to obtain.

The question facing lawmakers is whether the problem will arrest itself or whether state legislatures will need to resolve it. A 1985 study by Insurance Services Office, a provider of statistical data to the insurance industry, projected that available property/casualty insurance may fall short of projected demand by $62 billion in the next three years. Ninety percent of that will affect commercial lines. According to the study, three factors must be addressed in order to relieve the problem: the unpredictability of judicial awards; the size of the awards; and the litigious nature of American society.

AN OVERVIEW

The tort liability problem is two-pronged. It affects both the public and the private sectors. Because governmental activities are broader in scope than business activities, governments are more susceptible to suit. It is only recently that government has lost its immunity from suit, either by judicial or legislative action. Historically, under the doctrine of sovereign immunity, citizens could not sue the government.

With the elimination or restriction of the doctrine of sovereign immunity, governments and governmental employees are responsible for damages in the same way that private individuals are. Some legal experts maintain this is a fair and equitable situation, while others maintain that the nature of governmental activities requires that governmental immunity be regarded in different terms. These are philosophical considerations with important practical effects.

With regard to the insurance problem itself, there appear to be four aspects of the issue which require review by the states: regulation of the insurance industry; reform of tort law; education of the public regarding the impact of an increasingly litigious society; and the development of effective risk management programs. Part of the current problem can be attributed to poor management practices of the insurance companies: reliance on high interest rates for profit margins rather than charging adequate premium rates to cover losses; increase of rates in certain lines without losses to justify the increase; and undercapitalization of many new entrants

into the market. These practices could be avoided by tighter regulation of the industry.

Currently, considerable debate surrounds the role of the legal system in the insurance crisis. Critics contend that the system is responsible for the high cost of insurance (two to five times greater than in 1984) and, in some cases, its unavailability. They argue that the lengthy process, high awards and unpredictability of the outcome have made financial planning for future claims difficult and have created severe financial problems for insurance companies.

On the other hand, expanded services provided by state, and particularly local, government attract many more suits. Doctrines such as joint and several liability and the collateral source rule force governments to assume responsibility for a larger proportion of the damages than they were in fact responsible for in the past.

A corollary to the reform of the civil justice system is the litigious nature of American society. An NCSL survey (December 1985) found that even in states where tort reform legislation has been enacted and has effectively reduced the size of damage awards, there has been a steady increase in the number of suits filed. There seems to be a general perception that when the public sues the state, it is suing some abstract entity, when in fact taxpayers are ultimately the source of the money used to pay these judgments. The same is true of suing insurance companies. Policyholders buy into a risk pool with finite resources made up of the premium payments. Huge damage awards which drain this pool create deficits for insurance companies which then must increase premiums to cover losses or refuse to insure the activity due to its highly risky nature.

Effective risk management programs can minimize losses by financing and controlling exposure to risk. Elements of such a program include risk identification, risk evaluation, safety programs designed to avoid or reduce risk and funding mechanisms for losses due to unavoidable risk.

This State Legislative Report is the first in a three-part series which addresses the issue of tort liability as it affects state and local governments. This report highlights state and federal tort reform proposals, and the possible effectiveness of such proposals.

PUBLIC POLICY ISSUES

Because reform of the civil justice system involves the determination of important public policy questions, revisions in the existing system must be approached cautiously. As John Prather Brown of the Law Firm of Principal, Chase, Brown & Blaxall, Inc., points out, "The legal responsibility for personal injury is at the center of an intricate web of issues. Crafting a wise alternative to the present legal system will require care, consideration and meticulous attention to detail. The issues raised by the tort system and by the impact of possible changes are not just legal issues, and they are not just lawyers' issues. They are broad in effect and raise important political, philosophical and economic questions."

The goal of reform is the creation of a civil justice system which balances the right of the individual to recover damages for injuries resulting from the negligent acts of others and the rights of society to be free

from the specter of financial ruin resulting from the uncertainty of the results of these lawsuits. The development of a system providing fair and adequate awards for legitimate claims, which does not overcompensate or create legal rules which inhibit day-to-day activities, is not easy to achieve. Consideration must be given to balancing the litigants' constitutional rights of due process and equal protection with the necessity of streamlining court procedures.

Changes in tort law can encourage or discourage lawsuits. Lowering the cost of litigation could, for example, increase the number of cases filed because more people could afford to sue. If it were coupled with a stringent law on the filing of frivolous suits, the result might be that individuals with legitimate claims would find it easier to use the system.

Legislation can provide incentives or disincentives, so careful consideration must be given to the effects of each proposal individually and in combination with other proposals. The present system, for example, provides incentives for doctors to require additional tests that may be unnecessary to provide evidence that will show "reasonable behavior" in anticipation of a lawsuit. The lawsuit may or may not happen, but the patient has been subjected to unnecessary testing and increased medical expenses.

The needs of a variety of interest groups must be weighed within the framework of reform. Business cites the need for new product liability laws which will encourage a better climate to research, develop and market products. Professionals cite the need for freedom to practice their professions without constant fear of lawsuits and unaffordable insurance costs. Many non-profit organizations state they are unable to carry out public programs because of unaffordable insurance premiums. These interests must be balanced against the necessity of providing compensation to individuals who are injured by the carelessness and negligence of others.

Many states that did pass medical malpractice tort reforms are still experiencing problems related to medical malpractice liability insurance and raise a number of questions. Were the reforms extensive enough? Were there conflicting reforms which cancelled each other out? Did some reforms create more problems than they solved, or are other factors substantially responsible for the current situation? Should serious alternatives be considered for compensating individuals who have been injured?

The gravity of revising the civil justice system argues for evaluation and data collection in order to judge the outcome of any tort reforms.

ALTERNATIVES

Many proposals to reform the civil justice system are currently being considered by state legislatures. The following discussion provides a description of the major proposals and an example of an alternative to the present system. These alternatives are only examples and are not intended as suggested solutions.

AWARD OF DAMAGES

Establish Limits on Non-economic Damages

Because it is difficult to assign dollar amounts to non-economic damages, such as pain and suffering and mental anguish, awards vary greatly from one jury to the next. While compensation for physical, mental or emotional stress may in fact be justified, the unpredictability of jury awards has resulted in higher insurance premiums.

Alternative Measures: A $250,000 cap on non-economic awards for medical malpractice suits enacted in California was upheld by the U.S. Supreme Court in October, 1985. Such a ceiling or cap on pain and suffering awards provides some predictability to the system and provides some rational limits to an issue which is highly emotional. A study conducted by the Rand Corporation on the effects of caps on medical malpractice suit awards found that "when a state moved to cap verdicts or eliminate specific dollar requests by plaintiffs or permit payment of awards for future losses in periodic installments, the net effect was to reduce trial awards by 30 percent, cut the average out-of-court settlement by 25 percent, raise the portion of cases dropped from 43 percent to 48 percent, and reduce the share of cases going to actual verdict from 5.1 to 4.6 percent." [The Resolution of Medical Malpractice Claims: Research Results and Policy Implications (R-2793-ICJ), by Patricia Munch Danzon and Lee A. Lillard]

Abolition or Restriction of Punitive Damages

Punitive damages are those awarded in addition to compensatory damages and designed to punish the defendants for malicious acts. Since damages are intended to provide the plaintiff with compensation for an injury, the nature of punitive damages may make the judgment overvalued in that they represent monies in addition to the cost of compensation for injury.

Alternative Measure: Punitive damages contribute to the unpredictability and size of awards. Alternatives to the complete abolition of punitive damages include options such as placing caps on awards, redefining standards of conduct and shifting the burden of proof for such awards, as well as placing limitations on multiple punitive damage awards, and may be workable alternatives.

Itemized Jury Verdicts

The unpredictability of jury awards contributes to the inability of insurance companies to plan for claims and thus encourages higher premiums. It may also result in inequities to the plaintiff since recovery for damages is dependent on the makeup of the jury and the emotional state of the jurors.

Alternative Measure: To create a more consistent standard, the jury could be instructed to itemize damages into categories based on medical expenses, lost wages, non-economic compensation and other specific items. Such an accounting could provide a framework for the jury to use.

Adoption of Structured Settlements

Lump sum payments of awards have several drawbacks. Large awards payable at one time create unnecessary financing problems for the defendant and do not necessarily work in favor of the plaintiff. For example, studies of lump sum payments in workers' compensation indicate that the money is not always wisely invested and may not sustain the injured party through his lifetime.

Alternative Solution. The adoption of structured settlements permits payment of awards in periodic payments. Such installment payments are less expensive to finance and guarantee the injured party financial security. The Danzon-Lillard study (R-2793-ICJ) concluded that structured settlements reduced the average settlement by 25 percent and reduced the number of cases going to verdict from 5.1 percent to 4.6 percent.

Abolition of Collateral Source Rule

Under the collateral source rule, the jury is not permitted to hear evidence regarding compensation which the plaintiff may receive from other sources. A plaintiff may therefore be doubly compensated since various sources of compensation are not considered. In addition, the rule may increase litigation by forcing the defendants to go through the legal process to resolve the controversy related to overpayment by one defendant.

Alternative Solution: Relaxation of the collateral source rule to allow consideration of all sources of funding available for payment of damages. Another alternative would be the mandatory offset of the collateral source rule. That is, additional recoveries received would be subtracted from the award. The Rand study suggests that this revision would result in an 18 percent savings.

Contingent Fees

Contingent fees are received by a lawyer who contracts with a client for a percentage of the award rather than receiving a fee based on an hourly rate or some predetermined amount. Attorneys' contingent fees generally range from 25-50 percent of the settlement. Contingent fees may encourage demands for higher settlements and may not reflect the time, effort, skill or value of the service rendered. A 1984 study conducted by the American Bar Association indicated that reduction in time spent on a case by an attorney resulted in savings to clients who paid an hourly rate, but not to clients who had a contingent fee arrangement.

Alternative Measure: The adoption of mandatory sliding fee schedules, such as the plan adopted in California, would allow for the legitimate benefits which are derived from contingent fees (providing legal services for those who might not otherwise be able to afford them). Sliding fee schedules also ensure a greater share for the injured client.

In November, 1985, the U.S. Supreme Court upheld a California statute limiting legal fees paid by the client. The sliding fee schedule permits a 40 percent fee when the damages are $50,000 or less; 33.3 percent for an additional $50,000; 25 percent on the next $100,000; and 10 percent above $200,000.

The Danzon-Lillard study (R-2793-ICJ) found that limitations on attorneys' contingent fees apparently "cut the average settlement by 9 percent; raised the portion of cases dropped from 43 percent to 48 percent; and reduced the share of cases going to verdict from 6.1 percent to 4.6 percent."

Abolition of Joint and Several Liability Doctrine

The doctrine of joint and several liability is based on the concept that when the negligence of two or more individuals results in injury to a person, the tortfeasors are jointly and individually liable for damages. It permits a plaintiff to recover the entire amount of the judgment from one defendant, forcing that individual to recover from the other defendants. The degree of negligence of the defendants is not a consideration since the defendant who is 1 percent negligent may end up paying the entire judgment. State and local governments, often viewed as having unlimited resources, become favorite targets in lawsuits.

Alternative Measure: One means of addressing this problem is to adopt a form of comparative negligence which allows the plaintiff to recover damages only if the defendant's negligence is greater than the plaintiff's. The justification for such a policy is the fact that a plaintiff who is more responsible for his injury than the defendant should not be able to recover damages.

Another alternative found in the Uniform Comparative Fault ' makes each defendant liable for their proportionate share based on their degree of fault. According to a national survey on governmental tort liability by the New York City Law Department, language for such a bill would be as follows:

"Upon motion made no later than [one year] after judgment is entered, the court shall determine whether all or part of the party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among other parties, including a claimant at fault, according to their respective percentages at fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment."

This alternative also has the advantage of assuring compensation to the plaintiff and distributing any portion an insolvent defendant owes among the remaining defendants based on their percentage of fault. Another alternative distributes liability proportionally but does not provide for insolvent defendants. A complete discussion can be found in Pearson, Apportionment of Losses Under Comparative Fault Laws - An Analysis of the Alternatives, 40 La. L. Rev. 343, 364 (1980) and Note, Damage Apportionment in Maine: A Proposal for Reform, 34 Me. L. Rev. 367, 396 (1982).

PROCEDURAL REFORMS

Four major proposals include:

1) Modification of the Statute of Limitations. A number of state laws permit negligence suits to be filed many years after the alleged negligent act occurred. Where minors are involved, the payment of damages may result 18 years or longer after the incident. A statute of limitations which would provide a more reasonable time period for discovery of the

injury and filing of the claim would contribute to an insurance company's ability to predict claims and plan for their payment.

2) Allow Affidavits for Noninvolvement. To discourage the practice of joining every individual in a lawsuit who may have some remote connection, a defendant should be allowed to file an affidavit of noninvolvement denying connection to the negligent act. A hearing would then be held requiring the plaintiff to show reasonable cause for naming the individual as a defendant in the suit.

3) Permit a System of Binding, Voluntary Arbitration. Arbitration could be used in less complex cases as a faster, less costly means of resolving small claims. By diverting these cases to an alternative system, the traditional court system would be freed to more quickly expedite more complex cases, reducing costs to the courts and litigants. The Institute of Civil Justice is currently conducting a study to evaluate litigant reactions and litigant costs in court-annexed arbitration in federal courts.

4) Expedite Proceedings. Patricia A. Ebener of the Rand Institute conducted a national survey of state court procedures designed to reduce delays in civil court procedures. Her study found 25 procedures implemented in 47 states. These include:

1. "Fast tracks" for certain types of cases;
2. Dismissal of inactive cases;
3. Penalties for last minute settlements made after courtroom assignment and jury selection;
4. Procedures designed to simplify and limit filing of motions and pleadings; procedures limiting discovery;
5. Procedures which set firm trial dates;
6. Procedures which provide faster and less expensive means of resolving disputes.

Evaluation of Reforms

Critical to the process of revising the legal system is developing procedures for measuring the effectiveness of these reforms. During the 1970s, a number of legislatures enacted tort reforms addressing the medical malpractice liability issue, but many did not establish monitoring systems to measure the effectiveness of the reforms or procedures to collect and analyze data. It is difficult to determine which reforms were effective and which were not since these states are still experiencing problems related to availability of insurance.

The Rand Institute on Civil Justice has conducted some studies on these state reforms, but they have been hampered by a lack of data. According to the Institute, "The model must be regarded as preliminary; it must be applied to more data sets before its validity can be precisely judged. Gaps and inadequacies in the data used so far make the conclusions tentative."

With these precautions in mind, certain observations on tort reform related to medical malpractice can be made.

Current practices have resulted in a system in which the cost of litigation equals the compensation received by the plaintiffs. Small claims, even with merit, are often dropped due to the cost of litigation. However, policymakers must realize that a reduction in litigation costs could result in an "increase in the number of cases filed, a decrease in the percentage dropped without payment, an increase in average settlement size and an increase in the number of cases taken to verdict." With an increase in litigation, there would be more pressure on the already congested judicial system.

Effects of Changes in Tort Law

An analysis of the Rand study provides evidence on the direction and order of magnitude of the short-run effects of some of the changes enacted in the mid-1970's. Dollar caps on awards, elimination of specific dollar claims by the plaintiff and authorization of installment payment of large awards appear to have significantly reduced jury awards and settlements in the states where they were enacted. Modification of the collateral source rule to admit evidence that the plaintiff is eligible for compensation from other sources has apparently had a much weaker effect. Statutory limits on the contingent fees charged by plaintiffs' attorneys appear to have had moderately depressive effects on settlement amounts and on the number of cases going to verdict, while somewhat increasing the proportion of cases dropped.

The study did not attempt to identify the effects of other measures enacted by various states, including measures to reduce the statute of limitations; to limit the circumstances in which a presumption of defendant liability is created (res ipsa loquitur); to make it easier to prove the patient's informed consent to a medical procedure; to introduce expert pretrial panels to screen claims for their merit; or to permit binding arbitration.

This study suggests that there are standards of measurement available to evaluate tort reforms. By compiling statistics on whether there has been a reduction or an increase in suits settled out of court, whether there has been a reduction in size of judgments, whether judges have revised jury verdicts, whether there has been a reduction in the number of suits filed, legislators would have objective standards to judge the effectiveness of tort reform. It would be worthwhile, upon passage of tort reform legislation, to establish a system for collecting data to develop a statistically significant measure of the effectiveness of tort reform. Development of such information would put an end to the controversy surrounding tort reform and be useful in revision of ineffective reforms in the future.

FEDERAL INITIATIVES ON TORT REFORM

After the United States Supreme Court held that the insurance industry was subject to federal regulation (United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), Congress enacted the McCarran Act of 1945, 59 Stat. 33, U.S.C. Sec. 1011 et seq., supporting the continued regulation of the insurance industry by the states. Current discussion in Washington includes a review of the efficacy of this federal position as

well as numerous other proposals to modify the regulatory scheme. Bills pertaining to the regulation of product liability and medical malpractice litigation provide examples of federal initiatives.

Product Liability

Two federal bills were introduced in 1985 dealing with product liability. Senator Bob Kasten (Wisconsin) introduced S.B. 100 to regulate interstate commerce by providing a uniform product liability law. The bill requires proof of negligence on the part of the manufacturer and provides for a two-year statute of limitations on the filing of a suit.

An alternative to S.B. 100 is an amendment to S.B. 44, The Product Liability Act, introduced in 1984. The amendment is sponsored by Senators Christopher Dodd (Connecticut) and Slade Gorton (Washington). The amendment does not require proof of negligence, but provides an alternative for injured parties to the traditional lawsuit by allowing them to receive compensation in a speeded-up claims process, which recognizes economic losses such as medical costs and lost earnings. Disagreements would be resolved by arbitration.

Medical Malpractice

The Medical Offer and Recovery Act of 1985 (H.R. 3084) sponsored by Congressmen Henson Moore (Louisiana) and Richard Gephardt (Missouri) addresses issues related to malpractice litigation. Provisions of the bill outline a model for state legislation and federal provisions for states which do not enact similar mechanisms. Provisions of the bill include:

1) An alternative allowing health care providers, within 180 days of incident, to authorize payment of patient's economic loss;

2) Foreclosure of a patient's right to sue for medical malpractice once the provider's commitment to pay for economic loss is made, with two exceptions: a) cases where the provider intentionally caused the injury; b) wrongful death;

3) Offer of provider must by definition encompass all of patient's economic losses;

4) Provider may join all other responsible parties with disputes between joined parties being settled by arbitration;

5) Periodic payments.

The patient's right to sue for enforcement should the provider default or breach the agreement is protected under the bill's provisions. It also allows lump sum payments under certain circumstances; assures patients of payment; permits patients to demand compensation for economic loss without going through the expensive, lengthy litigation process; requires reporting to state health care licensing authorities to reduce malpractice by incompetent health care providers.

FEDERAL COURTS AND LOCAL GOVERNMENT LIABILITY

In recent years local governments have experienced rapidly expanding liability under federal antitrust and civil rights laws. Time spent litigating these cases has proved expensive for states in terms of the attorneys' general time and private attorneys' fees and damages. According to Beth Farmer of the National Association of Attorneys General, the states received some relief in regard to antitrust laws with passage of federal legislation in May, 1985. This legislation clarified the application of the federal antitrust laws to the official conduct of local governments, reducing suits against them. The primary benefit to local government was that awards under antitrust laws included triple damages. However, litigation arising from 42 U.S.C. Section 1983 (civil rights legislation) continues to be a significant source of state litigation and may increase for several reasons. First, the argument which persuaded Congress to provide relief under antitrust laws was that the injured party could still, in many cases, file suit under 42 U.S.C. Section 1983 for damages (no triple damage awards). George Yuhas, Chairman of the American Bar Association Committee on Government Liability, points out that some suits currently filed against local governments for tort actions also carry elements of violation of civil rights actions under 42 U.S.C. Section 1983. With the passage of state tort reform laws, suits of this nature may be filed under the federal law to avoid tort reform measures such as caps, structured settlements and limitations on attorneys' fees. States should be prepared to deal with such contingencies.

SURVEY

A survey on tort reform legislation is included in this report (Appendix A). The respondents were legislative drafting offices and state attorneys' general offices.

Generally, states are listing the following topics for serious consideration: municipal immunity; limitation on pain and suffering awards; limitations on attorneys' fees; dram shop legislation; comparative negligence (several states are considering adoption of the Uniform Comparative Fault Act), medical malpractice legislation; elimination of joint and several liability doctrine; reduction of statute of limitations; limitation of governmental liability for damage or injury resulting from hazardous recreational activities; limitation of liability for providing emergency medical care rendered by a physician-trained mobile intensive care paramedic.

Topics also include abolition of jury trials in cases against public entities or trial to judge on damage issue; establishment of legal duty for various activities; limitation of liability for torts related to toxic wastes; creation of pretrial screening panels; limitation on liability for highway design, construction and maintenance; modification of statute of limitations for legal actions against architects, construction managers, professional engineers or contractors for improper or negligent improvements to real property; requiring that losing litigants pay court costs and attorneys' fees in some circumstances (similar to Federal Rules of Procedure 68).

While most states that have enacted tort reforms report that the legislation has been effective in limiting the size of awards, they note steady increases in the number of suits filed due to decline in the use of the doctrine of sovereign immunity. States also cite the increasing number of

suits filed under 42 U.S.C. 1983 statutes and the lack of control that the states have in modifying these federal statutes.

The State of Tennessee reported that portions of the "Medical Malpractice Review Board and Claims Act of 1975," Tennessee Code Annotated, Sections 29-26-114, 29-26, 121, were repealed in 1985 due to ineffectiveness. Statistics for total tort or damage suits filed in Circuit and Chancery Courts in 1974 numbered 11,064; in 1984, 11,775 (Source: Executive Secretary, Supreme Court of Tennessee, Annual Report 1974 and 1984).

Recommendations

The majority of states responding to the survey supported two proposals:

1) Cap on "non-economic damages," and

2) Modification of collateral source rule.

Various states made the following suggestions.

1) Limitation of punitive damages to a set amount or percentage of assets, whichever is greater.

2) Legislation that treats public entities and public employees identically for procedural requirements.

3) Legislation limiting public entities' contribution to any judgment to an amount not greater than its pro rata share of liability.

4) In assessing legislation, an important consideration is the ramifications of proposed legislation on practical as well as constitutional issues. Critical to the selection of appropriate legislation is the determination of the source from which the so-called problems originate--attorneys' actions, insurance industry actions or other causes.

5) Enactment of standards permitting waivers of rights to sue for damages for use by schools, churches, and non-profit organizations.

6) Enactment of market assistance plans.

7) Enactment of more limited standards of duty than are currently in use.

8) Abolition of jury trials in cases against public entities or trial to judge on damages issues;

9) Return to restricted form of sovereign immunity;

10) Creation of pretrial screening panels to determine validity of suit.

11) Legislation prohibiting a public entity's contributing to a judgment more than its pro rata share of liability.

12) Awards to state of any assessment of punitive damages.

Virtually every state has created a task force to study the liability insurance problem. In addition to tort reform measures, states are also reviewing regulations in the insurance industry.

Recommendations for the upcoming sessions include legislation which would: 1) place tighter restrictions on cancellation and renewal policies of insurance companies; 2) establish self-insurance plans for state and local governments; 3) regulate capital fund requirements of foreign and domestic insurers; alter structure of insurance settlement payments; 4) create joint underwriting associations; 5) modify "open competition" rating act; 6) increase insurance department's authority to regulate rates; 7) provide for an excess profits law for commercial liability rates; 8) allow for group insurance for commercial liability risks; expand to various professional groups the authority to form a self-insurance trust; and 9) revise requirements for businesses to form a limited reciprocal insurer.

The State of Montana has been able to address some of the current problems through judicial decisions. The Montana Supreme Court has recognized the tort of violation of insurer's implied-in-law duty of good faith and fair dealing. First Security Bank v. Goddard, 181 M407, 593 P.2d 1040 (1979); Fowler v. State Farm Mutual Automobile Insurance Co., 153 M74, 454 P.2d 76 (1969).

CONCLUSION

The issues surrounding the liability insurance crisis are complex and do not admit to any easy solution. They require thoughtful, careful consideration. The success or failure of reform will depend to a great extent on the development of accurate data upon which decisions will be made. The majority of the states are presently engaged in this search. This report provides some information regarding the direction that states are taking. As legislatures consider this subject in 1986, NCSL will continue to monitor the progress of the legislatures and provide this data to interested persons.

The information in this State Legislative Report is based in part on committee meetings conducted in Williamsburg, Virginia in November, 1985. Participants included David Childers, Insurance Commissioner (Arizona); Matt Coffee, Lee Ruck, National Association of Counties; Don Jones, National League of Cities; John Gunther, United States Conference of Mayors; Jody Thomas, National Governors' Association; Wayne Campbell, National Federation of Independent Business; and Winnie Austerman, Office of Management and Budget. Additional information was supplied by the states in response to surveys. State reports also supplemented the research. A complete bibliography as well as more detailed information is available upon request.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION

ALABAMA	Ala. Code §6-5-485 (1975)
ALASKA *	Alaska Stat. §09.55.535 (Supp. 1983)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Proc. Code §1295 (West 1981)
COLORADO	--
CONNECTICUT	C.G.S.A. §§52-549 et seq. and 4-141 et seq.
DELAWARE	Chapter 682 (Arbitration Code)
FLORIDA *	-- Medical Mediation Panels ruled unconstitutional
GEORGIA	OCGA §§28-5-60 through 28-5-86
HAWAII *	Hawaii Revised Statutes, §§671-11 to 671-20
IDAHO	IC §6-1001 et seq. (medical malpractice claims)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, par. 2-611.1
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	K.R.S. Chapter 44
LOUISIANA	La. Rev. Stats. 13:5141-5157; 40:1299.41-1299.48
MAINE	14 MRSA §§1151-1155
MARYLAND *	Courts & Judicial Proceedings (CJ) Title 3, Subtitle 2 (1976)
MASSACHUSETTS *	-- See comments.
MICHIGAN	Mich. Comp. Laws Ann. §500.3051 to .3062
MINNESOTA *	Minnesota Statutes 1984, Ch. 494; see also 115B.25-115B.37 and 572.30
MISSISSIPPI	--
MISSOURI	Uniform Arbitration Act, §§435.350 to 435.470, RSMo, 1980, and H.B. 1203
MONTANA *	Ch. 449, L. 1977 (Title 27, Ch. 6, MCA); Ch. 684
NEBRASKA	--
NEVADA *	NRS 41A
NEW HAMPSHIRE	NHRSA 541-B
NEW JERSEY *	Yes
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	Ohio Rev. Code Ann. §2711.21 to .24
OKLAHOMA	120.S.1984 §§1801 et seq.
OREGON *	See comments.
PENNSYLVANIA *	--
RHODE ISLAND	R.I. Gen. Laws §8-17-1
SOUTH CAROLINA *	§§56-11-510 et seq. of S.C. Code
SOUTH DAKOTA	--
TENNESSEE	T.C.A. §§9-8-101 through 9-8-406, as to claims against state only
TEXAS *	Article 4590, §6.03, Revised Statutes
UTAH	--
VERMONT	Vt. Stat. Ann. Title 12, §7002(a) (Supp. 1982)
VIRGINIA	Va. Code §§8.01-581.1 to 581.12:2 (Supp. 1983)
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING *	Proposal to create a pretrial screening panel
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

ALASKA
1) AS 09.43.190-.220 (arbitration of small claims)
2) AS 09.43.010-.180 (Uniform Arbitration Act)
3) AS 09.55.535 (Voluntary Arbitration of Medical Malpractice Claims)

HAWAII
Hawaii Medical Malpractice; Haw. Rev. Stat. Ch. 672, Design Professionals

MARYLAND
Health Care Malpractice Claims

MASSACHUSETTS
Maximum amount increased in area of small claims; Superior court can now remand cases to District Court for trial when amount is under $15,000.

MINNESOTA
See also Minn. Stat. §§115B.25 to 115B.37 (only for hazardous substance injury); see also Minn. Stat. 572.30.

MONTANA
Montana L. 1985 (Title 27, Ch. 5, MCA). Medical Legal Panel Act; Uniform Arbitration Act.

NEVADA
Screening panel for medical malpractice actions.

NEW JERSEY
The State Supreme Court has instituted an arbitration program for automobile negligence claims where the amount in controversy does not exceed $15,000. Any party has a right to de novo trial in Superior Court.

NEW YORK
The state may only be sued in Court of Claims (Court of Claims Act, §9). Arbitration is available in any case if all parties agree (CPLR, §7501). Medical malpractice actions must go to a medical malpractice panel (Judiciary Law, §148-a), but this does not preclude a civil trial.

OHIO
See R.C. 2711.21-2711.24 relative to medical claims arbitration. See R.C. 9.83(E) relative to administrative "compromises" of motor vehicle, watercraft, and aircraft claims against the state. See entire R.C. Chapter 2711. relative to arbitration (often contract disputes). Also see Municipal Court Superintendence Rule 15 and Common Pleas Court Superintendence Rule 15.

OREGON
Trial Court Rules establish non-binding arbitration for cases where less than $15,000 in damages are sought.

PENNSYLVANIA
Cities of Philadelphia and Pittsburgh provide arbitration for claims of $20,000 or less; others for $10,000 or less.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

SOUTH CAROLINA
South Carolina Laws, 1976, as amended (Arbitration of Property Damage Liability Claims); South Carolina Supreme Court has issued rules for voluntary arbitration of appeals and disputes over attorney fees.

TEXAS
Creation of Texas Medical Disclosure Panel to determine proper disclosure for every medical and surgical procedure.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY

ALABAMA *	--
ALASKA *	AS 09.50.250-.280; AS 09.65.070
ARIZONA	A.R.S. §12-820 et seq.
ARKANSAS	A.S.A. §12-2901
CALIFORNIA	Cal. Govt. Code §815.2
COLORADO *	24-10-101 through 118 C.R.S. (1973); H.B. 1001 (1985)
CONNECTICUT *	C.G.S.A. §4-165; §7-308; §4-160
DELAWARE *	--
FLORIDA	§768.28, Fla. Stat. Ann.
GEORGIA	Article I, Sec. II, Par. IX (Georgia Constitution)
HAWAII	Haw. Rev. Stat. §662-1 (State Tort Liability Act)
IDAHO	I.C. §6-901 et seq.
ILLINOIS *	
INDIANA *	Ind. Code 34-4-16.5-1 et seq.
IOWA	I.C.A. §525A.1; I.C.A. §613A.1
KANSAS	K.S.A. 75-6101 et seq.
KENTUCKY	K.R.S. 44.070 (Board of Claims Act)
LOUISIANA *	La. Const. Art. 12, Sec. 10 (1974); R.S. 13:5106
MAINE	14 MRSA §8101 et seq. (Tort Claims Act)
MARYLAND	Md. Code Ann. Art. 43, §12-104
MASSACHUSETTS *	Massachusetts General Laws (Chapters 258 & 258A)
MICHIGAN	Mich. Stat. Ann. §3.996 (107)
MINNESOTA *	
MISSISSIPPI	H.B. 983 (1985); M.C. §11-46-1 et seq.
MISSOURI	§537.600, RSMo (L. 1978, H.B. 1650; A.L. 1985, S.B. 323)
MONTANA *	Chapter 675, L. 1983 (2-9-206, 2-9-207, 2-9-101 MCA)
NEBRASKA	Neb. Rev. Stat. §81-8.215 et seq.; §23-2307; §23-2413
NEVADA	NRS 41.031 et seq. ($50,000 limit under NRS 41.035)
NEW HAMPSHIRE *	1985 Laws, Chapter 441; N.H. Rev. Stat. Ann. §412.3
NEW JERSEY *	N.J.S.A. 59:1-1 et seq.
NEW MEXICO	N.M.S.A. §41-4-1 et seq.
NEW YORK	Court of Claims Act, Art. II §8; N.Y. Gen. Mun. Law §50-d
NORTH CAROLINA	N.C. §143-291; N.C. §153A-435
NORTH DAKOTA	North Dakota Century Code NDCC §32-12.1-03
OHIO *	O.R.C. §2743.01
OKLAHOMA	51 O.S.A. 1985, §151 et seq.
OREGON	ORS 30.260-30.300
PENNSYLVANIA *	42 Pa.C.S. §8522; 42 Pa. Stat. Ann. §8540
RHODE ISLAND *	R.I. Gen Laws §9-31-1; §9-31-2; §9-31-3; §9-31-4; §9-31-12
SOUTH CAROLINA *	--
SOUTH DAKOTA *	SDCL §§21-32-15 to 18
TENNESSEE	Tenn. Code Ann. §§29-20-101--29-20-407 (1980, 1985 Supp.)
TEXAS	Tex. Civ. Stat. Art. 6252-19b; Art. 6252-26
UTAH	U.C.A. §63-30-3 et seq.
VERMONT *	Vt. Stat. Ann. Tit. 12, §5601; Vt. Stat. Ann. Tit. 29, §1403
VIRGINIA	--
WASHINGTON	R.C.W. §4.92.010
WEST VIRGINIA	--
WISCONSIN *	--
WYOMING *	"Closed end" (1979) W.S. 1-39-101 through 119
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

ALABAMA
Article I, Section 14 of the Alabama Constitution prohibits the state from being made a party in a lawsuit. The legislature cannot consent to suit against the state, but it can pass bills to appropriate money for persons injured by state actions.

Two judicial decisions -- Jackson v. City of Florence, 294 Ala. 592, 320 So.2d 68 (1975) and Lorence v. Hospital Board of Morgan County 294 Ala. 614, 320 So.2d 631 (1975) abolished local government immunity. Section 11-1-2, Code of Alabama, has established liability limits to $100,000 per claim and $300,000 per occurrence.

ALASKA
1) Claims against state
2) Suits against incorporated units of local government

COLORADO
H.B. 1001 revised governmental immunity statutes (September 15, 1985). Evans v. Board of County Commissioner, 174 Colo. 97, 482 P.2d 968 (1971).

CONNECTICUT
State sovereign immunity is not abolished; State Claims Commission hears and may approve claims but only under $5,000; municipal immunity retained except in limited circumstances.

DELAWARE
Retains sovereign immunity (Article I, Section 9 of Delaware Constitution). The Supreme Court of Delaware has held that the defense of sovereign immunity may be waived only by legislative act.

FLORIDA
Caps of $100,000/$200,000 or greater amount for which insurance is provided.

ILLINOIS
Illinois Constitution, Article XIII, Section 4 abolishes sovereign immunity except as provided by General Assembly. Ill. Rev. Stat. 1983, Ch. 127, Par. 801 provides that the state may be a party only in the Court of Claims.

INDIANA
Campbell v. State (1972) Ind., 284 N.E.2d 733

LOUISIANA
Act No. 451-R.S. 42:1441.1-1441.4; R.S. 29:23.1
Act No. 452-R.S. 13:5106; 5109(A)
Act No. 453-R.S. 9:2798.1
Act No. 454-R.S. 9:2800

MASSACHUSETTS
$100,000 cap per occurrence where immunity is waived.

MINNESOTA
Minn. Stat. §§3.732 and 3.736 (Supp. 1985) (State); Minn. Stat. Ch. 466 (Supp. 1985) (Political Subdivisions).

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

MONTANA
Chapter 419, L. 1985; Chapter 389, L. 1985 (2-9-101, 2-9-107, MCA).
Sovereign immunity abolished in Constitutional Convention (1973).

NEW HAMPSHIRE
(Cont'd) §507-B:4.
$100,000 cap per occurrence where immunity is waived.

NEW JERSEY
Prohibits damages for pain and suffering except in cases of severe injury where medical expenses exceed $1,000.

OHIO
1) In the case of the State of Ohio, sovereign immunity was abolished in Am. Sub. H.B. 800 of the 110th General Assembly (Effective 1/1/75). R.C. 2743.01-2743.20.

2) In the case of Ohio's political subdivisions, sovereign immunity was abrogated by the Supreme Court in a series of decisions, but recently reestablished subject to specified areas of liability (Am. Sub. H.B. 176 of the 116th General Assembly, effective 11/20/85). R.C. 2744.01-2744.09.

PENNSYLVANIA
$500,000 cap per occurrence where immunity is waived; damages for pain and suffering prohibited except in cases of severe injury where medical expenses exceed $1,500.

RHODE ISLAND
$50,000 cap per occurrence where immunity is waived.

SOUTH CAROLINA
Doctrine of sovereign immunity was abrogated by McCall v. Batson (1985), 329 S.E.2d 741, H.B. 2266 "South Carolina Tort Claims Act" is pending.

SOUTH DAKOTA
Reinstatement and strengthening. The Governor has cancelled the state's liability policy as of December 1, 1985.

VERMONT
No liability except to extent of insurance coverage.

WISCONSIN
State employees, officers and agents can be sued in tort if the claimant complies with the notice requirements of §893.82 Stats; see also 895.52.

WYOMING
Judiciary Committee sponsoring bill for 1986 session which will further limit liability for highway design, construction and maintenance.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY

ALABAMA	--
ALASKA	A.S. 09.16 (Alaska Uniform Contribution Among Tortfeasors Act)
ARIZONA	A.R.S. 12-2501 et seq.
ARKANSAS	--
CALIFORNIA	--
COLORADO	§13-21-111(3.5), C.R.S. H.B. 1231 (1985)
CONNECTICUT *	--
DELAWARE *	--
FLORIDA	No -- legislation proposed
GEORGIA	Enacted greater statutory protection against excessive exposure
HAWAII	No -- proposals for 1986 session
IDAHO	--
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 70, Par. 301 et seq.
INDIANA *	
IOWA *	
KANSAS	K.S.A. 60-258a
KENTUCKY	--
LOUISIANA *	La. Civil Code Art. 2324; R.S. 9:3921
MAINE *	14 MRSA §156 (comparative negligence)
MARYLAND	--
MASSACHUSETTS *	
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA *	NRS 41.141(3)
NEW HAMPSHIRE *	
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	--
NORTH CAROLINA	N.C. Gen. Stat. §1B-1 to 1B-6 (1983)
NORTH DAKOTA	NDCC §32-38-01
OHIO *	--
OKLAHOMA *	510.5 1984, §154(E)
OREGON	ORS 18.440 - 18.460 (Contribution Among Joint Tortfeasors)
PENNSYLVANIA *	See comments.
RHODE ISLAND *	R.I. Gen. Laws §10-6-3 (see 9-20-4)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS *	Chapters 32 and 33, Civil Practice & Remedies Code
UTAH	Enacted greater statutory protection against excessive exposure
VERMONT	Eliminated the concept of joint and several liability
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	Legislation proposed - repeal of doctrine
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See Comments.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

CONNECTICUT
Retains state sovereign immunity; State Claims Commission hears and may approve claims under $5,000; municipal liability retained (except in limited circumstances).

DELAWARE
State waives immunity but mandates insurance coverage; retains sovereign immunity for local governmental immunities and provides a $300,000 cap per occurrence where immunity is waived (see §1515, Tit. 6).

INDIANA
Eliminated the concept of joint and several liability: abolished effective 1/1/85.

IOWA
Generally, there is joint and several liability, but not with respect to defendants who are found to bear less than 50% of the total fault assigned to all parties.

LOUISIANA
Generally, there is joint and several liability but not where defendant's fault is less than that of the plaintiff, in which case defendant is liable only to the extent of own fault.

MAINE
$300,000 cap per occurrence where immunity is waived.

MINNESOTA
Generally, joint and several liability, but if plaintiff's negligence is greater than that of any of several defendants, plaintiff cannot recover at all from that defendant.

NEVADA
Generally, joint and several liability except that a defendant who is less at fault than the plaintiff is liable only for that portion of the judgment which represents the percentage of negligence attributable to him.

NEW HAMPSHIRE
Eliminated the concept of joint and several liability. $100,000 cap per occurrence where immunity is waived.

NEW YORK
See Civil Practice Law and Rules (CPLR) 1404.

OHIO
Based upon computer searches of Ohio court decisions and statutes, this state still has instances of joint and several liability (see memo R-114-2395, which still is generally correct. However, the effect of the doctrine may be mitigated in some cases by Ohio's contributions among joint tortfeasors statutes (R.C. 2307.31-2307.32, see memo's appendices) and possibly by the comparative negligence statute (R.C. 2315.19). See also these cases: Barry v. Schorling, 2 Ohio App.3d 110 (1981); Lattea v. Akron, 9 Ohio App.3d 118 (1982); and National Mutl. Ins. Co. v. Whitmer, 70 Ohio St.2d 149 (1982).

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

OHIO, Cont'd
Recent legislation places a cap of $250,000 per person and $500,000 per occurrence, as well as a limitation on recovery for pain and suffering to cases of wrongful death or substantial permanent disability/disfigurement and $5,000 in medical expenses.

OKLAHOMA
No joint and several liability except where damages cannot be apportioned.

PENNSYLVANIA
Generally, joint and several liability except where plaintiff's fault is greater than a defendant's in which case the defendant is liable only for the percentage attributable to him.

RHODE ISLAND
$50,000 cap per occurrence where immunity is waived.

TEXAS
Generally, joint and several liability, but if plaintiff's negligence is greater than that of any of several defendants, plaintiff cannot recover at all from that defendant.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE

ALABAMA	--
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	A.R.S. 12-565 (medical malpractice only)
ARKANSAS.	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	P.A. 85-574
DELAWARE	--
FLORIDA	§672.7372 Fla. Stat. (automobile cases only)
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE	17-A MRSA §1322
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 42.020 (limited in scope)
NEW HAMPSHIRE	--
NEW JERSEY *	N.J.S.A. 59:9-2
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	N.C. Gen. Stat. §8C-1, Rule 411
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	510,5 (1984), §153(D)
OREGON *	Yes
PENNSYLVANIA	42 Pa.C.S.A. §8553(d)
RHODE ISLAND	R.I. Gen. Laws §9-19-34 (medical malpractice only)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE - Comments

MASSACHUSETTS
Domenic Corsetti, et al. v. The Stone Company, et al., 396 Mass. 1 (September 19, 1985). Admission of collateral source evidence is a matter for the Trial Judge. Evidence may be admitted to contradict plaintiff's testimony that his injury had caused him loss of money and where relevant to his motive for staying out of work.

NEW JERSEY
Gives public entities a credit for all collateral sources except for life insurance.

NEW YORK
Civil Practice Law & Rules 4545 - actions for medical and dental malpractice and certain actions against public employers.

OHIO
Based upon computer searches of Ohio court decisions and statutes, Ohio still generally follows this doctrine. See Shearer v. Motorists Mut. Ins. Co., 53 Ohio St.2d 1 (1978); Suchy v. Moore, 29 Ohio St.2d 99 (1972); and Pryor v. Webber, 23 Ohio St.2d 104 (1970). See also Evidence Rule 411 (inadmissibility of liability insurance information). However, in the recent political subdivision sovereign immunity act, there is a requirement of the disclosure and deduction of insurance and other collateral benefit sources (R.C. 2744.05(B)); additionally, R.C. 2305.27 relates to limited consideration of collateral benefits in "medical claims" cases; and, finally, recoveries against the State of Ohio in the Court of Claims must be reduced by insurance, disability awards, and other collateral benefits (R.C. 2743.02(D)).

OREGON
1) O.R.S. 18.500-18.530 (advance payment by or on behalf of tortfeasor)
2) O.R.S. 743.792(7) (uninsured motorist coverage in motor vehicle liability policy)
3) O.R.S. 743.800-743.835 (Personal injury benefits protection in motor vehicle liability policy)

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE

ALABAMA	--
ALASKA *	A.S. 09.50.280; A.S. 45.45.010
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	C.S.G.A. §52-192a
DELAWARE	--
FLORIDA	--
GEORGIA	--
HAWAII *	H.R. Stat. §636-16; see also H.R. Stat. §661-68
IDAHO	I.C. §28-22-104
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	K.S.A. 16-205
KENTUCKY	--
LOUISIANA	La. Civil Code Art. 2924; La. Rev. Stat. 13:5112 and 13:5117
MAINE	14 MRSA §§1427-1430
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. §549.09 (Supp. 1985)
MISSISSIPPI	--
MISSOURI	--
MONTANA	Chapter 523, L. 1985 (27-1-210, MCA)
NEBRASKA	--
NEVADA	N.R.S. 17.130(2)
NEW HAMPSHIRE	--
NEW JERSEY *	Rule of Court - R. 4:42-11
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 5001, 5002, 5003
NORTH CAROLINA	N.C.Gen. Stat. §24-5
NORTH DAKOTA *	Yes
OHIO *	Yes
OKLAHOMA	12 O.S. Supp. 1985, §727; 36 O.S. Supp. 1985, §3629
OREGON	--
PENNSYLVANIA	Pa. R.C.P. 238
RHODE ISLAND	R.I. Gen. Laws §9-21-10
SOUTH CAROLINA	§34-31-20, S.C.R.S.
SOUTH DAKOTA	S.D.C.L. §21-1-11
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	--
WYOMING	
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE - Comments

ALASKA
State v. Phillips, 470 P.2d 266 (1970)

HAWAII
Prejudgment interest may accrue as early as date of injury.
H.R.S. §662-2 (no prejudgment interest against state).

NEW JERSEY
Public entities do not pay prejudgment interest. N.J.S.A. 59:9-2.

NEW YORK
Interest in tort actions, except certain actions dealing with property, is available from verdict, report or decision to judgment and upon judgment.

NORTH DAKOTA
North Dakota Century Code §32-03-04 only applies to situations where damages are certain or capable of being made certain by calculation and generally applies to contract actions. However, it is conceivable that if the plaintiff could show damages with some degree of certainty, i.e., legal malpractice, negligent bailment, etc., this statute would be applicable in a negligence action. However, North Dakota has not expressly adopted the prejudgment interest accrual principle.

WISCONSIN
Provisions for interest accrual from date of settlement offer - see §807.01 Stats.

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES

ALABAMA	--
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Code §3333.2 (West. Supp. 1984)
COLORADO	--
CONNECTICUT	--
DELAWARE	--
FLORIDA	-- Legislation proposed.
GEORGIA	--
HAWAII	Hawaii Rev. Stat. Ch. 294 ("no fault" statute for autos and vehicles)
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA *	La. Rev. Stats. 13:5106; 13:5149 (punitive damages) (cont'd in comments
MAINE	18-A M.R.S.A. §2-804 (wrongful death action)
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	§§383.075 to 383.083, R.S.Mo. Supp. 1985 (H.B. 657 and 337)
MONTANA *	Chapter 507, L. 1985 (27-1-221, MCA)
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY *	--
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	R.C. 2744.05(C); R.C. 2307.43
OKLAHOMA	--
OREGON	--
PENNSYLVANIA *	42 Pa.C.S.A. §8528
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	S.D.C.L. §21-3-11
TENNESSEE	T.C.A. §147-14-123 (1984) (as to claims against state only)
TEXAS	Article 4590, Section 11.02, Revised Statutes
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	Sec. 893.82(6)
WYOMING *	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES - Comments

LOUISIANA
(Cont'd) La. Rev. Stats. 40:1299.39; 40:1299.42 and 40:1299.43.

MASSACHUSETTS
Limits under Tort Claims Act $100,000; in Highway Defect Cases as to Commonwealth of Massachusetts, $5,000; and on malpractice cases considered as to total damages.

MONTANA
Generally, statute providing immunity for all non-economic damages was overturned by state Supreme Court (1983). However, this amendment was passed in 1985 session in response to the increasing number of wrongful termination cases being filed, partially as a result of the Montana Supreme Court's recognition of a number of causes of action related to termination of employment.

NEW JERSEY
No limitations except for claims under wrongful death statute. N.J.S.A. 2A-31-1 et seq.

NEW YORK
Limitation of exclusion of damages only in the case of workers' compensation (Workers' Compensation Law Section 11) and no-fault automobile insurance (Insurance Law Section 5104).

OHIO
No statute applicable to all tort cases, but in the recent political subdivision sovereign immunity act, there is a $250,000 cap on non-economic damages in civil actions other than wrongful death actions (R.C. 2744.05(C)). The Ohio Constitution prohibits caps in wrongful death cases (Article I, Section 19A). There also is a $200,000 cap in medical malpractice (nondeath) cases, which may apply to economic as well as non-economic damages and may be subject to constitutional challenge (R.C. 2307.43).

PENNSYLVANIA
Subject to attack on constitutional grounds; issue in state Supreme Court; Lyles v. Philadelphia.

TEXAS
Medical malpractice found unconstitutional in Baptist Hospital of Southeast Texas v. Baber, 672 S.W.2d 296 (Tex. App. Beaumont 1984, writ granted).

WISCONSIN
Applies only to limits of $250,000 per claimant for each state employee sued and denial of punitive damages.

WYOMING
Proposal to eliminate constitutional prohibition (Article X, Section 4, Wyoming Constitution.

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS

ALABAMA	Ala. Code §6-5-486 (1975)
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	--
ARKANSAS	Ark. Stat. Ann. §34.2619 (Supp. 1983)
CALIFORNIA	Cal. Civ. Proc. Code §667.7 (West 1980)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6801 (Supp. 1984)
FLORIDA *	§768.57 Fla. Stat. (1985)
GEORGIA	--
HAWAII *	--
IDAHO	--
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA *	Yes
IOWA	--
KANSAS	Kan. Stat. Ann. §60-2609 (1983)
KENTUCKY	--
LOUISIANA	La. Rev. Stats. 13:5114 (Act No. 45) 450
MAINE	--
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	--
MISSOURI	--
MONTANA *	Yes
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 50-A
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	R.I. Gen. Laws §28-33-25 (workers' compensation only)
SOUTH CAROLINA *	--
SOUTH DAKOTA *	--
TENNESSEE *	Tenn. Code Ann. §7-51-202 (1985); §9-8-307 (1985 Supp.) (see comments
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- Proposed legislation
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS - Comments

FLORIDA
Structured awards for future losses in excess of $500,000 against health care providers.

HAWAII
Bills introduced in last session were rejected. Will be introduced again in 1986 session.

INDIANA
Permitted by custom and practice, not by statute or case law.

MONTANA
Workers' Compensation Law specifically provides for structured awards in 39-71-741, MCA (Chapter 471, L. 1985). No other statutory provisions, but method is commonly judicially applied in civil law cases.

NEW YORK
Only in medical and dental malpractice cases.

OHIO
No bill has been passed on the subject, but proposals are being considered. In Ohio's courts, structured settlements/awards have occurred without legislation on the books. See, however, the installment payments provisions in the recent political subdivision sovereign immunity act (R.C. 2744.06(B) and (C)).

SOUTH CAROLINA
Structured settlements are permitted by custom and practice, not by legislation.

SOUTH DAKOTA
Proposals for 1986 session similar to California statute regarding periodic payments for medical malpractice awards.

PENALTIES FOR FILING FRIVOLOUS SUITS

ALABAMA	--
ALASKA	A.S. 09.55.536 (medical malpractice only)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO *	13-17-101 through 106, C.R.S. (1973 and 1985 Supp.) (see comments)
CONNECTICUT	C.G.S.A. §§52-240a; 52-568
DELAWARE	--
FLORIDA *	§57.105 Fla. Stat.
GEORGIA	--
HAWAII	H.R. Stats., §§294-31; 607-14.5
IDAHO	I.R.C.P. Rule 54(e)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA	Ind. Code 34-4-16.5-19
IOWA	--
KANSAS	-- Statutory provisions are seldom used.
KENTUCKY	--
LOUISIANA *	Yes
MAINE	--
MARYLAND	--
MASSACHUSETTS	Mass. Gen. Laws Ch. 258, §11; Mass. Gen. Laws Ch. 231, §6F
MICHIGAN	--
MINNESOTA	Minn. Stat. 1984, §549.21
MISSISSIPPI *	-- See comments.
MISSOURI	§514.205, RSMo (S.B. 5, 1985)
MONTANA	--
NEBRASKA	--
NEVADA *	N.R.S. 18.010(2)
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK	Civil Practice Law & Rules 8303-a
NORTH CAROLINA	N.C. Gen. Stat. §6-21.5
NORTH DAKOTA	N.D.C.C. §28-26-01
OHIO *	-- See comments.
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA *	--
SOUTH DAKOTA	-- Proposed for 1986 session
TENNESSEE	Tenn. Code. Ann. §27-1-122 (1980) (frivolous appeals)
TEXAS	Chapter 105, Civil Practice & Remedies Code
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	§814.025 Stats.
WYOMING *	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

COLORADO
24-10-110(s), C.R.S. (1973), S.B. 182 (1984) - Penalties for filing frivolous suits. State Court Administrator's Office conducted a survey of use of frivolous lawsuits and found that judges do not invoke frivolous lawsuit legislation very often. A major weakness in such legislation lies in the stipulation that it cannot be used if the lawsuit involves a question of fact. In particular, whenever a party can bring in an expert witness, the issues which he testifies about become issues of fact, and as a result the frivolous lawsuit legislation cannot be used even if the action is frivolous.

FLORIDA
Awarding attorneys' fees to prevailing party where "complete absence of justiciable issue of either law or fact."

LOUISIANA
La.R.S. 3:3605; R.S. 42:11; R.S. 46:1820; R.S. 49:146
Louisiana Code of Civil Procedure Articles 863, 864 and 2164

MISSISSIPPI
See Rule 11q of Mississippi Rules of Civil Procedure.

NEVADA
Amended (1985), allows recovery of attorneys' fees when complaint "was brought with reasonable ground."

NORTH CAROLINA
Attorneys' fees awarded if court finds absence of justiciable issue.

OHIO
Under the Ohio Business Opportunity Plans Law and Consumer Sales Practices Law, the penalty of an attorney's fees award is available for groundless, bad faith actions (R.C. 1334.09 and 1345.09). In tort cases in general, there does not appear to be a general frivolous suit/penalty statute. Appellate Rule 23, however, permits courts of appeals to impose attorney's fees and court costs as penalties in the case of frivolous appeals. Additionally, in connection with frivolous tort civil actions, common law remedies (such as malicious prosecution actions) might be available against former plaintiffs who filed frivolous suits, but Ohio is strict relative to malicious prosecution recoveries. See Clermont Environmental Reclamation Co. v. Hancock, 16 Ohio App.3d (1984).

The frivolous suit issue has arisen in the past in Ohio relative to medical malpractice cases (see memo R-112-2782). The question has at times been whether attorneys as well as their clients should be pursued for frivolous suits. No legislative enactments have resulted, but several years ago legislation was discussed that would have imposed attorney's fees/court costs penalties for filing frivolous civil actions or appeals. Finally, see the memo R-115-1327 relative to attorney's fees awards in Ohio; also bear in mind that, in Ohio, prevailing parties in civil actions generally are awarded court costs under Civil Rule 54(D).

SOUTH CAROLINA
Rules of Procedure No. 54 allows costs to be allocated to prevailing party.

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

WISCONSIN

This section is of limited value because findings by a court that an action is frivolous requires the court report the attorney filing the action to the bar association, and judges are reluctant to do so.

WYOMING

Rules Committee of the Supreme Court is considering adoption of Fed. Rules Cuv. Proc. Rule 11.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS

ALABAMA	--
ALASKA	Yes
ARIZONA	A.R.S. 12-820 et seq. (modified 1984)
ARKANSAS	--
CALIFORNIA	--
COLORADO	24-10-118, C.R.S (1973 and 1985 Supp.)
CONNECTICUT	C.G.S.A. §§4-160; 4-165
DELAWARE	Del. Code Ann. Tit. 10 §4011
FLORIDA *	§768.28(9)(a), Fla. Stat.
GEORGIA	--
HAWAII	Haw. Rev. Stat. §26-35.5
IDAHO	I.C. §6-901 et seq.
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 85, Par. 101-1 et seq.
INDIANA	Ind. Code 34-4-16.5-3 (limited immunity)
IOWA	--
KANSAS	K.S.A. 75-6101 et seq. (Tort Claims Act)
KENTUCKY	-- Common law in effect.
LOUISIANA *	Yes
MAINE	14 M.R.S.A. §8101 et seq. (Tort Claims Act)
MARYLAND	Yes
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	H.B. 983 (1985) §11-46-1 et seq.
MISSOURI *	§537.035 (1985 H.B. 357); State Legal Expense Fund (see comments)
MONTANA	Chapter 530, L. 1983 (2-9-305, MCA)
NEBRASKA	--
NEVADA	N.R.S. 41.032; 41.033
NEW HAMPSHIRE	--
NEW JERSEY	N.J.S.A. 59:1-1 et seq.
NEW MEXICO	--
NEW YORK	--
NORTH CAROLINA	--
NORTH DAKOTA	N.D.C.C. §32-12.1-03
OHIO *	R.C. 9.85, 9.86, 2743.02; 2744.03(A)(6)
OKLAHOMA *	Yes - see comments.
OREGON	O.R.S. 30.265
PENNSYLVANIA	Case law: Pine v. Synkonis et al.
RHODE ISLAND	R.I. Gen. Laws §§91-127; 5-34-34; 45-16-5
SOUTH CAROLINA *	--
SOUTH DAKOTA	S.D.C.L. §§21-32-17 and 18
TENNESSEE	T.C.A. §9-8-307(h)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	1985 Wisconsin Act 47, Section 4 (125.035)
WYOMING	
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS - Comments

FLORIDA
Provides for immunity for acts in scope of employment, unless acting in bad faith, with malicious purpose, or in manner exhibiting wanton and willful disregard of human rights, safety, or property.

LOUISIANA
Louisiana Revised Statutes 9:2798.1, 13:5108.1 and 13:5108.2, 29:23.1, 40:1299.39, 42:1441.1-1441.4. This list does not include special statutes covering specific officers and functions.

MASSACHUSETTS
Massachusetts General Laws, Chapter 258 (public employees)
Massachusetts General Laws, Chapter 33 (national guard)
Massachusetts General Laws, Chapter 111C, Section 14 (medics rendering assistance in emergencies)
Massachusetts General Laws, Chapter 119, Section 51A (social workers and other mandated reporters immune from suit for filing report of suspected child abuse)

MISSOURI
(Cont'd) §§105.711 to 105.726 (S.B. 275, 1983)

OHIO
1) For state employees, see qualified immunity provisions of R.C. 9.85, 9.86, and 2743.02.
2) For political subdivision employees, see the recent political subdivision sovereign immunity act (R.C. 2744.03(A)(6).

OKLAHOMA
1) 19 O.S. 1981, §371
2) 63 O.S., §683.14
3) 57 O.S., §553
4) 11 O.S., §§29-108 and 37-121
5) 22 O.S., §371
6) 11 O.S., §23-104

SOUTH CAROLINA
McCall v. Batson, Supra, contains some language on the subject of immunity for government officials. H.B. 2266 (pending) contains provisions on this issue.

WISCONSIN
Statute was recently enacted in response to Appellate Court decisions holding liquor dispensers liable.

MODIFICATION OF DRAM SHOP LAWS

ALABAMA	--
ALASKA *	A.S. 04.21.020
ARIZONA	No statute; found in case law.
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	--
DELAWARE	--
FLORIDA *	768.125 Fla. Stat.
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 43, Par. 135
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE *	17 M.R.S.A. §2002
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA *	Laws of Minnesota 1985, Ch. 309, §12 and 13
MISSISSIPPI	--
MISSOURI	§537.053 (S.B. 345)
MONTANA *	--
NEBRASKA	--
NEVADA *	--
NEW HAMPSHIRE	--
NEW JERSEY *	--
NEW MEXICO	§41-11-1 N.M.S.A. (1978)
NEW YORK *	General obligations
NORTH CAROLINA	N.C. Gen. Stat. §18-B-305 (1983)
NORTH DAKOTA *	--
OHIO *	R.C. Chapter 4399
OKLAHOMA	--
OREGON	O.R.S. 30.950, 30.960
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA *	
SOUTH DAKOTA *	S.D.C.L. §§35-11-1 and 35-6-27; 35-4-78; 35-6-27; 35-11-2
TENNESSEE	Yes
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 12-8-301 (1985)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

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MODIFICATION OF DRAM SHOP LAWS - Comments

ALASKA
Liability of liquor licensee only for "criminal negligence" (1983)

FLORIDA
Limits liability to sale of alcohol to minors or knowingly to persons addicted to use of alcoholic beverages.

MAINE
Reduce liquor liability.

MINNESOTA
Compare: Minn. Stat. §340.95 (1984) and Minn. Stat. §340A.801 (Supp. 1985)

MONTANA
An unsuccessful attempt was made in 1985 (H.B. 395).

NEVADA
"Dram shop" laws are not recognized in Nevada.

NEW JERSEY
Proposed bill to limit liability of bars and retail liquor establishments for injuries to inebriated persons. Their liability to third parties injured by drunk persons would remain unchanged.

NEW YORK
No substantial modification of dram shop law in recent years; 1983 law cited above added coverage to persons under the legal drinking age.

NORTH DAKOTA
No change, but citation for dram shop laws: N.D.C.C. §5-01-06.

OHIO
See R.C. Chapter 4399; it is a limited law. A recently introduced bill, H.B. 733 of the 116th General Assembly, would increase civil liability (R.C. 4399.18); H.B. 488 also relates to the subject.

SOUTH CAROLINA
Christiansen v. Campbell, (1985), 328 S.E.2d 351, recognized civil liability of seller of alcoholic beverage who sells to intoxicated person in violation of penal statutes prohibiting such sales. H.B. 2802 (pending) pertains to this issue.

SOUTH DAKOTA
Abrogation of dram shop laws.

MODIFIED STATUTE OF LIMITATIONS

ALABAMA *	Yes
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	§§52-577a; 52-577b and 52-577c; P.A. 84-407; P.A. 84-287
DELAWARE	--
FLORIDA *	§95.11(4), F.S., providing 2 years from discovery (cont'd in comments)
GEORGIA	--
HAWAII	--
IDAHO	Limitations Tort Claims Act revised 1985, I.C. 6-901 et seq.
ILLINOIS *	--
INDIANA	Ind. Code 34-1-1-2
IOWA	--
KANSAS	K.S.A. 60-501 et seq.
KENTUCKY	--
LOUISIANA	--
MAINE *	14 M.R.S.A. §§752-A (design professionals), (cont'd in comments)
MARYLAND	Courts & Judicial Proceedings (CJ) §5-109 (actions against physicians)
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	H.B. 63 (1985)
MISSOURI *	§516.140 (H.B. 225, 1985); §516.030 (1983, S.B.44 & 45); (see comments)
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 41A.097 (regarding health care providers)
NEW HAMPSHIRE	
NEW JERSEY *	See comments.
NEW MEXICO	--
NEW YORK	C.P.L.R., §214-a; medical or dental malpractice
NORTH CAROLINA *	--
NORTH DAKOTA	N.D.C.C. Ch. 28-01
OHIO *	
OKLAHOMA	510.S.1984 §156(B)
OREGON *	O.R.S. 30.275
PENNSYLVANIA	Yes
RHODE ISLAND	--
SOUTH CAROLINA *	Section 15-3-545
SOUTH DAKOTA	Chapters 15-2 and 15-2a
TENNESSEE	T.C.A. §29-26-116 (1980) (medical malpractice)
TEXAS *	§16.008; Article 4590, §10.011
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 1-3-107 (1976)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

MODIFIED STATUTE OF LIMITATIONS - Comments

ALABAMA
Statute of limitations in certain civil lawsuits and workers' compensation were increased as part of a workers' compensation compromise.
ACT 85-39)
ACT 85-41) 1984 2nd Special Session

FLORIDA
(Cont'd) not to exceed four years for medical malpractice, two years for professional malpractice, two years for wrongful death. Generally, four years for torts (§95.11(3) F.S.).

ILLINOIS
See, generally, Ill. Rev. Stat. 1983, Ch. 110, Par. 13-101.

MAINE
(Cont'd) 752-B (ski areas); 752-C (sexual acts); 753 (doctors and lawyers).

MISSOURI
(Cont'd) §516.170 (S.B. 44 & 45, 1983); §516.350 (S.B. 468, 1982).

NEW JERSEY
No, except that a claimant against a public entity must file a notice of claim within 90 days of the accrual of his cause of action.

NORTH CAROLINA
See N.C. Gen. Stat. §1-15(c) (1983) (malpractice).

OHIO
See R.C. 2743.16 (two years generally against the state); R.C. 2744.04 (two years generally against political subdivisions); R.C. 2305.11 (medical malpractice actions precluded four years after act or omission occurred, despite general statute of limitations of one year after the cause of action arose (discovery rule)); and 2305.131 (a statute of repose relative to defective and unsafe real property improvements).

OREGON
Established a two-year limitation for filing claims against the state or state employees.

SOUTH CAROLINA
Medical malpractice only; S. 153 providing for architects' limitation on liability is pending.

TEXAS
Neagle v. Nelson, 678 S.W.2d 918 (Tex. 1984); Nelson v. Krusen, 685 S.W.2d 11.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES

ALABAMA	--
ALASKA	--
ARIZONA	Ariz. Rev. Stat. Ann. §12-568 (1982)
ARKANSAS	--
CALIFORNIA	Cal. Bus. & Prof. Code §6146 (West. Supp. 1984)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6865 (Supp. 1984)
FLORIDA *	Suits against state agencies §768.28(8) Fla. Stat.
GEORGIA	--
HAWAII *	Yes
IDAHO	Idaho Code §39-4213 (1976)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110
INDIANA	Ind. Code Ann. §16-9.5-5-1 Par. 2-611.1
IOWA	Iowa Code Ann. §147.138 (West. Supp. 1984-85)
KANSAS	Kan. Stat. Ann. §7-1216 (1982)
KENTUCKY	--
LOUISIANA	--
MAINE	--
MARYLAND *	Yes
MASSACHUSETTS *	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	Neb. Rev. Stat. §44-2834 (1978)
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	Regulated by Supreme Court R. 1:21-7
NEW MEXICO	--
NEW YORK	Judiciary Law 474-a
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA *	Yes
OREGON *	O.R.S. 752.150 (limited to medical, surgical, dental treatment,
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	-- Proposal for 1986 session
TENNESSEE	T.C.A. §29-26-120 (1980) (medical malpractice)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- (limitations by Wyoming Supreme Court, 1977)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES - Comments

FLORIDA
Also Section 768.575, F.S., provides guidelines for reasonable fees, including percentage of recovery.

HAWAII
Hawaii Revised Statutes, Section 671-2 (applies only to medical torts and limits contingent fees to a "reasonable amount as approved by a court of competent jurisdiction").

MARYLAND
Partial (for suits against state government).

MASSACHUSETTS
Except in cases of Industrial Accident Board (20%) and victims of violent crime (15%).

OHIO
There is no general statutory limitation on chargeable attorney contingency or hourly fees in tort cases; in some civil cases, attorney's fees may be subject to regulation (e.g., workers' compensation cases) or to court approval. However, attorney's fees generally are required to be reasonable under the Code of Professional Responsibility applicable to Ohio's attorneys.

A recently introduced bill, H.B. 694 of the 116th General Assembly, would limit recoverable or payable attorney's fees in civil actions against political subdivisions of Ohio.

OKLAHOMA
Oklahoma Bar Association Advisory Opinion #26 (fee limitation of 50% or less).

OREGON
(Cont'd) omission, operations.

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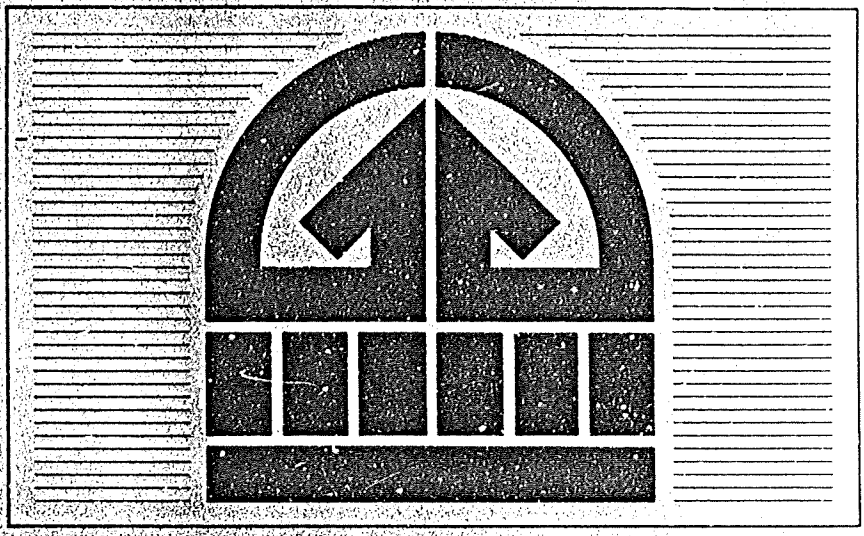
STATE LEGISLATIVE REPORT



CONTROLLING LIABILITY INSURANCE COSTS: STATE INITIATIVES IN THE AREA OF INSURANCE REGULATION

by

Brenda Trolin

Volume 11, No. 6 May, 1986

An Information Service of the National Conference of State Legislatures
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Attachment 6

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CONTROLLING LIABILITY INSURANCE COSTS: STATE INITIATIVES IN THE AREA OF INSURANCE REGULATION

INTRODUCTION

According to the Insurance Information Institute, Americans, who constitute approximately 5 percent of the world's population, purchase 43.7 percent of the total world insurance premiums. The Japanese are second with 13.6 percent, followed by West Germans, 7.1 percent, British, 7.1 percent, and French, 5.2 percent. Americans view insurance as a necessity, not a luxury, and have come to rely upon it in all facets of their lives. The current affordability/availability crisis has emphasized the importance of insurance to the economy of the country and the conduct of social activities. Consumers pay higher prices for products, and rising insurance premiums result in restricting social activities. Doctors are refusing to deliver babies because of costly medical malpractice insurance. The list of public and private sector entities and individuals affected is all-encompassing.(1, p. 22)

Everyone is aware of the problems, but arriving at solutions is an extremely controversial process. Because so many groups are affected, and each has its own perspective, reaching consensus is difficult. However, state legislatures have targeted three prime areas for easing the crisis: reform of the civil justice system; regulatory reform of the insurance industry; and establishment of risk management programs, including the establishment of alternative financing mechanisms such as pooling and self-insurance.

This State Legislative Report, the second in a series of three, addresses the issues surrounding regulation of the insurance industry.

OVERVIEW OF THE CURRENT CRISIS

Because the insurance industry has experienced capacity restrictions in previous years, many observers believe the current problems are part of the cyclical nature of the business. Data provided by Insurance Services Office, Inc. (ISO), show that the last two major cyclical "crises" were in 1969 and 1975. This particular cycle, however, appears to be much more serious, because it is longer than previous cycles and affects entire lines of insurance, where others did not.

The rise in insolvencies is indicative of the gravity of the situation. According to the National Association of Insurance Commissioners, the insurance industry experienced from 1969-1980 an average of three insolvencies per year in multistate companies. In 1984, the number increased to 14 and 1985 saw a record of 21. As of April, 1986, six were reported, with more expected.

A study by ISO, "The Coming Capacity Shortage," contends that the 1984 capacity shortage is different from the other downturns in a number of ways. The 1984 loss of $3.9 billion was 10 times greater than the shortage in 1975. Past year low points resulted from declines in the stock market, but 1984 losses were solely the result of operating losses. According to ISO, "1984 was the first time in decades that a surplus decline was not accompanied by an overall stock market slump." For the first time, commercial lines were more seriously affected than personal lines and would take "much

5 8 6 3

longer to recover." Finally and significantly, the situation caused reinsurers to withdraw from the market.

Most knowledgeable observers attribute the current crunch to cash flow underwriting--the underpricing of premium dollars for investments in the high interest rate period of the late 1970s and early 1980s. In effect, the insurance industry was relying on investment income to provide profits rather than charging adequate premiums to cover losses and guarantee profits.

A report issued by the South Carolina Department of Insurance, "The Insurance Capacity Crunch in South Carolina: An Overview of Causes, Impact, and Response" suggests insurance companies were able to underprice the premium through various underwriting techniques such as affording questionable discounts and placing insureds in inappropriate classes. The large increase in premiums in recent months is due to the fact that premiums paid in the early 1980s did not accurately reflect the real cost of insurance and insurance companies are now trying to make up for losses.

Other factors also influence legitimate cost increases of insurance premiums: increase in sales, increase in property values, expanding business activities and general economic growth. The practice of underpricing premiums, various combinations of factors such as those just cited, and the dramatic fall in interest rates set the scene for the insurance crisis of 1985 and 1986 (and possibly 1987 and 1988).

State legislatures have been studying the problem since 1985 to determine its underlying causes. So far the debate has focused on the civil justice system and the insurance industry. Legislative hearings on the subject have revealed that the causes are numerous, that they developed over an extended period of time, and that they will not be resolved easily or quickly. As legislators study the issue of insurance regulation, they are concerned with the dilemma of affordability and availability, with providing adequate protection for the public during the insurance market readjustment period, and with creating solutions which will mitigate the effects of the cyclical nature of the insurance industry in the future.

ROLE OF REINSURANCE IN UNDERWRITING

Reinsurance is the mechanism by which the original insurer transfers part or all of the liability to a second insurer (reinsurer). This practice is important for several reasons. The contract is between the original insurer and the secondary insurer. In case of insolvency, the policyholder only has recourse against the original insurer. In fact, the policyholder often is unaware of the transfer of liability.

The role of reinsurance in expanding the industry's capacity to write insurance is critical. Insurance regulators generally require a company to have a minimum surplus of three-to-one. "By law, an insurer is required to establish unearned premium, loss and claim reserves which appear as liabilities on the insurer's balance sheet. However, the insurer is permitted to reduce such reserve liabilities on its balance sheet where the business represented thereby is reinsured by acceptable reinsurers. To the extent that an insurer is able to reduce its stated liabilities through reinsurance, the margin by which its assets exceed liabilities is increased, and the capacity of the insurer to write business is enhanced."(2, p. 6) Reinsurance, therefore, plays an important role in increasing surplus and expanding the industry's capacity to underwrite.

REGULATION OF THE INSURANCE INDUSTRY

> "If you took all the men and women employed in the U.S. insurance industry and laid them head to toe, starting on New York's William or John Street--the little-talked-about insurance industry equivalents of neighboring Wall Street--they would stretch up the West Side Highway, head to toe, over the George Washington Bridge into New Jersey, down the New Jersey Turnpike to the Pennsylvania Turnpike, across Pennsylvania into Ohio, through Ohio past Chicago, past Des Moines, past Lincoln, Nebraska--still head to toe, one after another--past Cheyenne, Wyoming, to someplace just shy of Salt Lake City...one million eight hundred ninety-five thousand employees or very nearly as many people as constitute the Armed Forces."(1, pp. 11, 16)

Regulation of this enormous industry is the responsibility of the states. After the United States Supreme Court held that the insurance industry was subject to federal regulation (United States v. South-Eastern Underwriters Association, 322 U.S. 533, 1944), Congress enacted the McCarran Act of 1945 (59 Stat. 33, U.S.C. Sec. 1011 et seq.) supporting the continued regulation of the insurance industry by the states.

NEED FOR INSURANCE REGULATION

The vital role that insurance plays in American society, as well as certain characteristics of the industry, necessitates its regulation. According to Bob Hunter, president of the National Insurance Consumers Organization, "An insurance shortage is just as critical to our society as an oil shortage. Without insurance, the whole economy just grinds to a halt."

The insurance industry is regulated for the following reasons:

1) Its size.

2) The nature of the insurance contract. Because an insurance contract is a contract for future services, it is critical that consumers believe in the financial soundness of companies and that these companies will be able to pay future losses. Solvency is a primary goal of regulation.

3) The complexity of the industry and its financial system make it difficult for consumers to have sufficient knowledge of industry operations and terminology to purchase wisely.

4) The extent to which the public and private sector rely on insurance to conduct daily activities.

These reasons provide the basis for regulation and should provide the rationale for statutes, rules and regulations that are designed to effect that end. That is, regulatory responses to the current situation should be designed to protect the public by ensuring stability and solvency of insurance companies, and ensuring that rates are neither excessive or inadequate and that markets are available for reasonable risks.(3, pp. 9-14)

STRUCTURE OF STATE REGULATION

State insurance departments are administered by a commissioner, director or superintendent. The individuals are either appointed by the governor or elected (see Chart A). Elected commissioners have the longest tenure.(4)

While the administrator of the insurance department must ensure implementation of insurance law as enacted by state legislatures and interpreted by the courts, the administrator often has great discretionary powers. Most recently this discretionary power has been exercised in emergency regulations prohibiting mid-term cancellations and prescribing standards for non-renewals (see Chart B).

According to the National Association of Insurance Commissioners, the primary charge to state insurance departments is to ensure the solvency of insurance companies and to provide oversight so that rates are adequate, but not excessive or unfairly discriminatory. To carry out this function, state insurance departments engage in a number of activities related to financial examinations and trade practice regulation.

Trade practice regulation is accomplished primarily through market conduct examinations which review claim and underwriting activities of insurance companies.

An important function of the departments is to implement state rating laws. These laws provide the means by which insurance companies are allowed to change their rate schedules.

RATE REGULATION

Rate regulatory laws are enacted to ensure that rates are adequate, reasonable and not unfairly discriminatory. Current debate focuses on the inadequacy of rates for the last several years and the best type of rating law. The three types of rating laws are prior approval (a modified prior approval system also exists); file and use; and open competition (see Chart C).

Under prior approval statutes, the insurance commissioner must approve proposed changes before they can be implemented. A modification of this approach requires that fundamental changes must be first approved, but that less significant changes may be filed and implemented at once.

File and use statutes allow immediate implementation, but the continued use of the new rate is contingent upon approval by the commissioner. Most states provide from 60 to 90 days for the commissioner to reject the new rate. If this action occurs, then the prior rate becomes effective.

The final type of rating system is the open competition system, under which the company is free to use the rate it chooses. Critics of the system say that it may encourage collusion and may also encourage underpricing of the product in the face of rigorous competition.

In light of recent events, the fear that the competition system may result in rates which are too low may have some validity. However, states using other types of rating have experienced similar problems, indicating that other factors are contributing to the problem.

MAJOR ISSUES OF 1986

1) Charter Requirements. State laws regulate the entrance of new companies into the field through the issuance of charters which set minimum capital requirements, disclosure requirements and financial reporting requirements for the new companies. Critics maintain that one of the chief

causes of financial difficulties of some insurance companies is that they were undercapitalized when they entered the market in the early 1980s.

2) Adequate Staffing. In order to provide effective oversight of the insurance industry, staff actuaries are necessary. An actuary calculates insurance and annuity premiums, reserves and dividends. Their ability to analyze the cost of insurance coverage through assessment of the probability of loss occurrences enables them to establish prices which are fair to the consumer and also enables companies to make reasonable profits. One criticism of state insurance departments is that there are few, if any, actuaries on staff.

3) Data Reporting Requirements. A major concern in evaluating problems in the industry relates to the need for the collection of adequate data and its compilation in a form that is usable and understandable. Often insurance data is a collection of aggregate data that does not allow an analysis of individual lines of insurance.

Terminology and accounting methods used by the industry are often different from the general understanding of such concepts. For example, reports of industry losses for 1985 have been calculated at anywhere from a $5.5 billion loss to a $1.7 billion profit. The discrepancies are due, in part, to industry accounting methods on certain types of income, including returns on investments.

Critics also point to an Internal Revenue Service provision that permits insurers to estimate how much they will need to pay future losses and to include that amount in each year's underwriting losses. According to Robert Hunter, president of the National Insurance Consumers Organization, the insurance industry is guilty of overestimating its losses to get a better tax break. Companies contend that the practice exists because of the difficulty in predicting losses. This issue is an important consideration for state legislatures. Several states such as Connecticut (P.A. 86-98) and Georgia (Act No. 1518 OCGA Code Section 33-3-22.1) have recently enacted legislation requiring expanded financial reporting requirements.

Certain indicators broken down by lines could be useful in the monitoring of the industry. Such indicators include:

a) Premiums earned.
b) Premiums written.
c) Number of claims.
d) Number of new claims during the reporting period.
e) Number of claims closed during the reporting period, and actual payouts.
f) Number of claims outstanding at the end of the reporting period.
g) Total losses incurred.
h) Total losses incurred as a percentage of premiums earned.
i) Total number of policies in force on the last day of the reporting period.
j) Total number of policies cancelled.
k) Total number of policies nonrenewed.
l) Net underwriting gain or loss.
m) Separate allocations of expenses for commissions, other acquisition costs, general office expenses, taxes, licenses and fees, and other expenses.

4) Issuance of Claims-Made Policies. A claims-made policy only covers claims submitted during the term of the policy. Generally, insurance companies have issued occurrence policies which cover any incident occurring during the policy period. Often under the occurrence policy, claims are filed many years after the expiration of the policy. This creates difficulties in calculating the losses to be paid out. A major concern in shifting from the issuance of occurrence claims to claims-made policies is the gaps which may arise in coverage.

5) Restrictions on Mid-Term Cancellations. A major problem arising from the recent situation is the cancellation of insurance policies during the middle of the policy term, sometimes with little or no warning or explanation. Mass cancellation of entire lines of insurance with little respect for individual risk records has not been uncommon.

Mid-term cancellations create difficulties in normal times, but are especially serious in periods where markets are already tight. Of particular concern is the frequent lack of loss data justifying such actions.

Regulators and legislators are addressing the problem through extending notice requirements for such cancellations and prohibiting them unless specific causes are present. Legitimate reasons for cancellation may include failure to pay the premium or a substantial change in the risk involved. Statutory requirements of at least 45 (60 or 90 days) notice for cancellation, non-renewal and 100 percent plus increase/decrease in premiums are under consideration, as well as statutorily defining unfair trade practices to include mid-term cancellations, short notice cancellations, redlining and non-renewals without adequate reasons or other than under specified conditions.

6) Market Assistance Plans. Many states established market assistance plans to help specific lines obtain coverage. Generally, a market assistance plan involves a request from a state insurance department to insurance companies operating within the state to voluntarily write certain types or classes or risks. A hot line is then established which connects those in need of insurance with those who are willing to write such business. Currently, 22 states have market assistance plans operating generally, or for specific lines (Chart D).

7) Joint Underwriting Associations. A statutory plan which designates a limited number of insurance companies as servicing carriers for particular lines is now under consideration. Some states are considering stand-by authority for the insurance department to require mandatory participation in joint underwriting authority (JUA) in critically under-served areas (Chart E). In the mid-1970s a number of states established JUAs for medical malpractice.

8) Review of Standards to Address the Practice of Underpricing Premiums to Obtain a Larger Market Share. Responsibility for the current crunch is due in part to cash flow underwriting. Misclassification, misrating and an abuse of individual risk premium modification plans were possible due to broad regulatory and statutory language. Many states are reviewing language related to adequacy of rates as well as changing reporting requirements in order to avoid such occurrences in the future.

9) Tie Rate Schedules to Risk Management Efforts. In some cases, higher rates are justified by increases in negligent activities and a general disregard for safety practices. Many states are emphasizing improved risk

management through the adoption of risk management programs. Alaska has actively pursued this course and reports a significant measure of success.

Other issues under consideration by a number of states are

- o Increased professional staffing, particularly the addition of actuaries;
- o Creation of a state insurance fund to provide coverage for groups where coverage is deemed essential to the public welfare;
- o Establishment of reinsurance mechanisms (public and private); and statutory authority for banks and brokerage houses to enter the reinsurance portion of the insurance industry in several states (perhaps in under-served lines only);
- o Authorization of group commercial liability insurance for companies meeting minimum capitalization standards;
- o General review of capitalization requirements for all new companies;
- o Requirements related to excess profits;
- o Providing funding of an alternative insurance unit in the department of insurance to affirmatively assist groups looking to "self insure" or "bulk purchase"; and
- o Designation of "critically under-served lines" and statutory authority to allow premium tax offset for insurers willing to write these lines for a prescribed period of time (to be phased out as crisis abates).

CONCLUSION

As legislatures review the factors contributing to the liability insurance shortage, discussions will continue as to possible reforms of insurance regulation. Certain practices by the industry such as cash-flow underwriting have contributed to the magnitude of the problem. Excessive dependence upon profit from investment income based on high interest rates does not reflect sound business practices. The difficulty of obtaining usable statistics from the insurance industry is also a major concern. These problems are apparent and can be solved.

Legislators will have to reflect upon more nebulous areas of insurance in order to moderate the cyclical nature of the industry. The concept of insurance may require rethinking. Insurance is a pooling mechanism by which the risk of accidental loss is shared by a group of similar risks, the larger the pool the better. The success of insurance relies on the law of averages and depends upon a large volume of business to spread the risk efficiently and affordably.

In an effort to create a risk-free society, the public may have come to expect more from insurance than it can give. The realization that all activities are not insurable may be difficult to accept. The recognition that some risks are so great and/or the affected population so small as to prevent the calculation of a premium sufficient to make the insurance concept work is crucial to a fair consideration of the situation.

A small segment of society has been aware of insurance dynamics for some time. For example, individuals suffering from cystic fibrosis, even during the early 1980s, were faced with the question of affordability and availability of insurance for medical costs. The high risks as calculated by insurance companies made such insurance impossible to underwrite. Another area considered to be difficult to underwrite due to the high level

and unpredictability of future losses is the environmental (pollution) field.

While some types of liability insurance may be regarded as actuarially uninsurable by insurance companies, state legislatures must assess each line on its own merits. Endeavors which are uninsurable by industry standards may be important enough for social and economic reasons to warrant legislative action in order to provide alternative mechanisms for insurance.

Finally, the concept of risk management must be encouraged. Risk management attempts to prevent losses through the adoption of safety measures which discourage accidents. Liability insurance, prior to 1984, was relatively inexpensive. Entities and individuals were not rewarded for being cautious and adopting risk saving habits. There was little need to do so because insurance "would take care of the cost of accidents."

Not only have individuals suffered from this attitude, but society has as well. Capital destroyed through accidents caused by negligence is not replaced. Such loss is a drain on resources. The injured party receives restitution, but the net loss to society is not regained.

An example of disregard for established regulations to protect the public and prevent accidents is the recent case of the disposal of hazardous waste. Several companies complained of the inability to obtain liability insurance for hazardous waste disposal. Congress conducted hearings on the matter and determined that certain practices were in violation of federal rules and regulations. These practices could very well result in valid lawsuits which would result in awards payable by the insurance industry. Insurance companies had been unwilling to underwrite such activities and were justified in doing so.

Many factors have contributed to this insurance crisis. Most industry observers foresee problems continuing through the next few years. State legislatures are faced with the task of sorting through the layers of issues and interests and providing both short- and long-term solutions.

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2 "The Insurance Capacity Crunch in South Carolina: An Overview of Causes, Impact and Response", South Carolina Department of Insurance, January, 1986.

3 Report to the Congress of the United States, Issues and Needed Improvements in State Regulation of the Insurance Business, by the Comptroller General, October 9, 1979.

4 a) Fletcher Bell (Kansas, 16 years)
b) George Dale (Mississippi, 11 years)
c) Bill Gunter (Florida, 11 years)
d) Richard Marquardt (Washington, 11 years)

GLOSSARY

ACCIDENT FREQUENCY: Rate of occurrence of accidents; e.g., number of accidents per million man-hours worked.

ACCIDENT SEVERITY: A measurement of the seriousness of the results of accidents; i.e., days lost per one thousand man-hours worked.

CAPACITY: Relationship between the quantity of capital funds at risk in the industry and the quantity of funds legally and administratively required to furnish the amount of insurance likely to be demanded in the future.

CAPTIVE INSURERS: An insurance company owned by a single industrial company.

CASH-FLOW UNDERWRITING: The practice of charging inadequate premiums to generate dollars for investment, and then relying upon investment returns to offset underwriting deficits.

CASUALTY INSURANCE: A class of insurance made up of a variety of subclasses, principally concerned with insurance against loss due to legal liability to third persons, but comprising also several unrelated lines.

ERRORS-AND-OMISSIONS INSURANCE: Insurance against loss due to failure, through error or unintentional omission, to have insurance in force.

EXCESS INSURANCE: Insurance covering above a specified amount; insurance covering after the loss exceeds the coverage of other insurance.

EXPOSURE: The state of being exposed to the chance of loss. The extent of exposure to loss as measured by payroll, gate receipts, area, etc. The chance of fire being communicated to an insured risk from its surroundings.

LOSS RATIO: The percentage of losses to premiums. The proportion which losses incurred bear to the earned premiums.

LOSS OF USE INSURANCE: Insurance against loss due to the insured's inability to use property, such as a vehicle.

LOSS-PAYABLE CLAUSE: A clause in an insurance contract providing for payment of loss, for which the insurer is liable to the insured, to someone other than the insured.

LOSSES OUTSTANDING: The amount of loss for which the insurer is liable and which it expects to pay in the future, shown as a reserve.

LOSSES PAID: The amount of loss for which money has been disbursed by the insurer.

LOSS RESERVE: That portion of the assets of an insurance company kept in a readily available form to meet probable claims provided for the payment of losses which have been incurred but not yet due.

LOSSES INCURRED: Total losses, whether paid or unpaid, sustained by an insurance company under a policy or policies.

MARKET CONDUCT: Methods used by insurance companies to adjust to the markets in which they operate.

PREMIUM: Money given in consideration of an insurance contract.

PREMIUM, ESTIMATED: A provisional premium subject to final adjustment on ascertainment of the necessary facts.

PREMIUM, MINIMUM: The lowest consideration for which an insurer will insure a risk for a specified period.

PREMIUM, PURE: The portion of the premium rate calculated to enable the insurer to pay losses and, in some cases, allocated claim expenses.

PREMIUM, UNEARNED: The part of the premium applicable to the unexpired part of the policy period.

PREMIUM DISCOUNT PLAN: A plan providing for percentage reductions in premiums, the percentage increasing with the size of the risk.

PRO-RATA CLAUSE: A clause in an insurance contract providing that losses will be paid in the proportion that the amount of the contract bears to the entire amount of insurance covering the loss.

PROTECTION AND INDEMNITY INSURANCE: Insurance against loss due to claims for damages against vessel owners or operators not covered by the basic marine-insurance contract, often written by mutual associations called "clubs."

RATING, EXPERIENCE: Determination of the premium rate for an individual risk partially or wholly on the basis of that risk's own experience.

RATING, RETROSPECTIVE: A method of rating that adjusts the final premium of a risk in accordance with the experience of that risk during the term of the policy for which the premium is paid.

RATING, SCHEDULE: Making or modifying the premium rate for an individual risk on the basis of the physical conditions which affect the probability of loss.

RATING BUREAU: An organization that classifies risks and promulgates rates, usually on the basis of statistical data compiled by the bureau or of inspection of risks made by it.

RESERVE: Funds of an insurance company for the purpose of meeting obligations as they fall due. A liability set up by an insurer for a particular purpose.

RESERVE, UNEARNED PREMIUM: A reserve equal or approximately equal to the total of the unearned premiums on insurance in force with an insurer.

SUBROGATION: The acquiring by the insurer of the insured's rights against third parties for indemnification of loss or other payment to the extent that the insurer pays the loss.

THIRD-PARTY INSURANCE: Protection for the insured against liability arising out of bodily injury to others or damage to their property. Insurance other

than the life against loss due to liability to third parties or for the benefit of third parties.

UNDERWRITING: The selection process through which an insurer determines which of the risks offered to it should be accepted, and, if so, on what terms and for what amounts. Three purposes of underwriting: 1) to secure a safe distribution of risks; 2) to secure a profitable distribution of risks; and 3) to maintain equity among individual policyholders.

UNDERWRITING PROFIT: That portion of the earnings of an insurance company that comes from the function of underwriting. It excludes the earnings from investments either in the form of income from securities or sale of securities at a profit. The remainder is found by deducting incurred losses and expenses from earned premiums.

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INSURANCE COMMISSIONERS

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	METHOD OF SELECTION	LENGTH OF TERM
ALABAMA	Appointed by governor	Indefinite
ALASKA	Appointed by governor	Indefinite
ARIZONA	Appointed by governor	Indefinite
ARKANSAS	Appointed by governor	Indefinite
CALIFORNIA	Appointed by governor	Coextensive with governor
COLORADO	Appointed by governor	Indefinite
CONNECTICUT	Appointed by governor	4 years
DELAWARE	Elected	4 years
FLORIDA	Elected	4 years
GEORGIA	Elected	4 years
HAWAII	Appointed by Dir Commerce & Cons Affrs	Indefinite
IDAHO	Appointed by governor	Indefinite
ILLINOIS	Appointed by governor	Indefinite
INDIANA	Appointed by governor	Indefinite
IOWA	Appointed by governor	4 years
KANSAS	Elected	4 years
KENTUCKY	Appointed by governor	Indefinite
LOUISIANA	Elected	4 years
MAINE	Appointed by governor	5 years
MARYLAND	* over	Indefinite
MASSACHUSETTS	Appointed by governor	4 years
MICHIGAN	Appointed by governor	4 years
MINNESOTA	Appointed by governor	Indefinite
MISSISSIPPI	Elected	4 years
MISSOURI	Appointed by governor	Indefinite
MONTANA	Elected	4 years
NEBRASKA	Appointed by governor	Indefinite
NEVADA	Appointed by governor	Indefinite
NEW HAMPSHIRE	Appointed by governor	5 years
NEW JERSEY	Appointed by governor	Indefinite
NEW MEXICO	Appointed by State Corporation Commission	Indefinite
NEW YORK	Appointed by governor	4 years
NORTH CAROLINA	Elected	4 years
NORTH DAKOTA	Elected	4 years
OHIO	Appointed by governor	Indefinite
OKLAHOMA	Elected	4 years
OREGON	Appointed by Director of Commerce	Indefinite
PENNSYLVANIA	Appointed by governor	Indefinite
RHODE ISLAND	Appointed by governor	Indefinite
SOUTH CAROLINA	Appointed by Insurance Commission	Indefinite
SOUTH DAKOTA	Appointed by governor	Indefinite
TENNESSEE	Appointed by governor	4 years
TEXAS	Appointed by Board of Insurance	Indefinite
UTAH	Appointed by governor	4 years
VERMONT	Appointed by governor	2 years
VIRGINIA	Appointed by State Corporate Commission	Indefinite
WASHINGTON	Elected	4 years
WEST VIRGINIA	Appointed by governor	Indefinite
WISCONSIN	Appointed by governor	4 years
WYOMING	Appointed by governor	Indefinite

*See notes.

** Charts A, B, D, and E are a summation of state activities from June 1985 through May 1986 and are compiled from responses to a 50-state survey.

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NOTES - INSURANCE COMMISSIONERS

MARYLAND

Appointed by governor and Secretary of Licensing and Regulation.
Term is indefinite.

MODIFICATION OF MID-TERM CANCELLATION PROCEDURES - MAY 1, 1986

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STATE	IMPLEMENTATION	LINES AFFECTED
ALABAMA	Administrative Bulletin	Property/casualty
ALASKA	Legislation pending (H.B. 522)	Property/casualty
ARIZONA	Circular letter, 8/15/85 Legislative enactment (H.B. 2375)	Commercial lines
ARKANSAS	Administrative Directive No. 1-85, 1/7/85	Property/casualty
CALIFORNIA	Administrative Letter, 7/26/85	Commercial lines
COLORADO	Legislation pending (H.B. 1193)	Commercial lines
CONNECTICUT	Legislative enactment (H.B. 5400)	Commercial lines
DELAWARE	Administrative Bulletin No. 85-7, 9/18/85	Commercial lines
FLORIDA	Administrative Bulletin 85-279, 8/13/85 Legislation pending (H.B. 138)	Property/casualty
GEORGIA	Administrative Bulletin, 7/16/85	Property/casualty
HAWAII	Proposed legislation (H.B. 2525-86)	Property/casualty, commercial
IDAHO	Administrative Bulletin No. 85-1, 3/26/85	Property/casualty, commercial
ILLINOIS	Legislative enactment (S.B. 907)	Property/casualty
INDIANA	Bulletin 50, 8/21/85 Bulletin 51, 1/22/86	Property/casualty, commercial
IOWA	Legislative proposal	
KANSAS	Legislative enactment (S.B. 512)	Commercial lines
KENTUCKY	Legislative enactment (S.B. 339)	Commercial lines
LOUISIANA	Administrative Directive No. 58, 7/12/85	Commercial lines
MAINE	Legislative enactment (Public Law 671)	Commercial lines
MARYLAND	Administrative Bulletin	Commercial lines
MASSACHUSETTS	Administrative case-by-case basis, according to policy language	Property/casualty
MICHIGAN	Administrative - voluntary standards effective 1/1/86 through 12/31/86	Commercial lines
MINNESOTA	Legislative enactment (S.F. 2078)	All lines
MISSISSIPPI	Legislative proposal	
MISSOURI	Legislative proposal	
MONTANA	Administrative emergency rules, 7/19/85	Property/casualty
NEBRASKA	Legislative proposal	
NEVADA	Administrative Amendment to Rules 687B.510, 6/20/85	Commercial, all property/casualty
NEW HAMPSHIRE	Legislative proposal	
NEW JERSEY	Emergency Regulations N.J.A.C. 11:1-20.1; amended 11/16/85 (limited scope of regulation by deleting surplus lines, fidelity and surety bonds). Proposed regulation (3/3/86) would exempt personal lines.	Property/casualty
NEW MEXICO	Insurance Code (1984) Sec. 59A-18-29	Commercial lines
NEW YORK	Legislation pending (A.B. 8408B)	
NORTH CAROLINA	Administrative Bulletin, 12/85	Commercial lines
NORTH DAKOTA	House Concurrent Resolution No. 3082	Property/casualty
OHIO	Emergency Rule 10/23/85 became permanent 1/18/86	Property/casualty

STATE	IMPLEMENTATION	LINES AFFECTED
OKLAHOMA	Legislative enactment (H.B. 1424), 1985	Commercial lines
OREGON	Administrative Rules Chapter 836, Division 85 - Insurance Division, 9/19/85	Commercial lines
PENNSYLVANIA	Administrative Rules, 8/9/85	Property/casualty
RHODE ISLAND	Statutory	Property/casualty
SOUTH CAROLINA	Emergency Rule 10/17/85, expires 11/17/86; legislation pending, companion bills S. 797, H. 3234	Property/casualty
SOUTH DAKOTA	Enacted legislation (H.B. 1265) amends provisions of mid-term cancellation law enacted in 1985.	Property/casualty
TENNESSEE	Enacted legislation (H.B. 1582)	
TEXAS	Bulletin, 6/25/85	Commercial lines
UTAH	Legislation enacted	
VERMONT	--	
VIRGINIA	Legislation enacted (H.B. 140)	Commercial lines
WASHINGTON	Legislation enacted (S.B. 4541)	Commercial lines
WEST VIRGINIA *	Legislation enacted (S.B. 714).	Property/casualty
WISCONSIN	Administrative Bulletin, 8/31/85	Commercial lines
WYOMING	Legislation enacted (Enrolled Act No. 49)	Property/casualty

* The West Virginia Supreme Court unanimously granted a temporary injunction May 8, 1986, to prevent five insurance companies from cancelling medical malpractice coverage in the state (West Virginia v. St. Paul Fire & Marine Insurance Co.).

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TYPES OF RATE REGULATION *

See definition of terms on a following page.

If states have varied rules for different lines, they may be under more than one chart heading.

PRIOR APPROVAL

AK
CO - if non-competitive market
CT - personal lines, non-competitive market only
DE
DC - property
HI - except auto
IA
KS
MI - alternate method for fire and casualty
MS
NE
NH - auto only
NJ - personal lines and commercial non-competitive market
NY - effective 1-1-86
ND
OH - property, except auto
OK - except homeowners
OR - Administrative Rule adopted 4-21-86 requires prior approval for commercial casualty
PA - except auto
RI
SC
SD - except auto
TN - personal lines
TX - except some rates state set
VT - non-competitive personal lines only
WA - personal lines and professional liability
WV

MODIFIED PRIOR APPROVAL

AL
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FILE AND USE

AZ - non-competitive market
AR
CT - except personal lines, non-competitive market
DC - casualty
KY - non-competitive market
ME
MD - except medical malpractice
MA - except medical malpractice rates set by commissioner
MI
MN
MT
NV
NH - except auto
NC
OH - casualty, auto
OK - homeowners only
OR - except commercial casualty
SD - auto only
VA - except medical malpractice, uninsured motorists
WA - commercial lines

USE AND FILE

AZ - competitive market
FL
GA
HI - auto only
IL - by regulation
KY - competitive market
MO
NJ - commercial, unless non-competitive market
NM
TN - commercial lines
UT
VT - competitive market, personal lines only
WI
WY - by order of Commissioner dated 3-25-85

NO FILE

CA
CO - except when non-competitive market
ID
VT - commercial
WY - if competitive market (but see use and file list)

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RATE REGULATION BY STATE

Alabama - modified prior approval; need approval for change in expense ratio, otherwise file and use

Alaska - prior approval

Arizona - file and use, non-competitive market, use and file in competitive market

Arkansas - file and use

California - no file

Colorado - no file, except prior approval when non-competitive market

Connecticut - file and use, except prior approval for personal lines, non-competitive market

Delaware - prior approval

District of Columbia - prior approval, property; file and use, casualty

Florida - use and file

Georgia - use and file

Hawaii - prior approval except use and file for auto

Idaho - no file

Illinois - use and file - Reg. 754.20

Indiana - modified prior approval; file and use except need prior approval if change in relationship between rates and expenses

Iowa - prior approval

Kansas - prior approval

Kentucky - use and file in competitive market, file and use in non-competitive market

Louisiana - modified prior approval; file and use except when change in expense ratio

Maine - file and use

Maryland - file and use except medical malpractice needs prior approval

Massachusetts - file and use except medical malpractice set by Commissioner

Michigan - file and use; alternate method for filing is prior approval

Minnesota - file and use

Mississippi - prior approval

Missouri - use and file

Montana - file and use

Nebraska - prior approval

Nevada - file and use

New Hampshire - file and use except prior approval for auto

New Jersey - use and file for commercial unless no competition, prior approval for all else

New Mexico - use and file

New York - prior approval (as of January 1, 1986)

North Carolina - file and use, except for some non-commercial lines

North Dakota - prior approval

Ohio - file and use for casualty, motor vehicle and prior approval for other lines

Oklahoma - prior approval, except file and use for homeowners

Oregon - file and use, except administrative rule adopted 4-21-86 declares there is no competition in commercial casualty, so prior approval required

Pennsylvania - prior approval except special rule for auto

Rhode Island - prior approval

South Carolina - prior approval

South Dakota - prior approval, except file and use for auto

Tennessee - prior approval, personal lines; use and file for commercial lines

Texas - prior approval, Board sets rates for some lines

Utah - use and file

Vermont - use and file in competitive market, prior approval if non-competitive market in personal lines; no file for commercial lines

Virginia - file and use except medical malpractice, uninsured motorists require prior approval

Washington - prior approval except regulation allows file and use for commercial lines except professional liability (Reg. 284.060)

West Virginia - prior approval

Wisconsin - use and file

Wyoming - no file if competitive market; order of Insurance Commissioner dated March 25, 1985 requires use and file

DEFINITIONS OF RATING LAWS

PRIOR APPROVAL	Rates must be filed with and approved by the state insurance department before they can be used. Approval can be by means of a deemer provision, which indicates approval if rates are not denied within a specified number of days.
MODIFIED PRIOR APPROVAL	Rate revisions involving change in expense ratio or rate relativity require prior approval. Rate revisions based on experience only are subject to "file and use" laws.
FILE AND USE	Rates must be filed with the state insurance department prior to their use. Specific approval is not required but the department retains the right of subsequent disapproval.
USE AND FILE	Rates must be filed with the state insurance department within a specified period after they have been placed in use.
NO FILE	Rates are not required to be filed with or approved by the state insurance department. However, the company must maintain records of experience and other information used in developing the rates and make these available to the commissioner upon his request.

MARKET ASSISTANCE PLANS

Cha· ')

ALABAMA	--
ALASKA *	
ARIZONA	Administrative 1/15/86
ARKANSAS	Administrative 1/87
CALIFORNIA *	
COLORADO	Administrative 5/1/86
CONNECTICUT	Legislative enactment
DELAWARE	
FLORIDA	Administrative 2/1/86
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	Administrative 12/2/85
INDIANA	Administrative V-MAP 3/1/86
IOWA	Assistance provided on case-by-case basis
KANSAS	
KENTUCKY	Administrative proposal
LOUISIANA	
MAINE	
MARYLAND	
MASSACHUSETTS	
MICHIGAN	Administrative "open line" (1984)
MINNESOTA	
MISSISSIPPI	Administrative 10/85
MISSOURI	Administrative 3/86
MONTANA	Proposed
NEBRASKA	Proposed
NEVADA	--
NEW HAMPSHIRE	Administrative 8/1/85 (S.c. 407-C)
NEW JERSEY *	
NEW MEXICO	
NEW YORK *	
NORTH CAROLINA *	
NORTH DAKOTA	Administrative proposal
OHIO	Administrative 11/1/85
OKLAHOMA	
OREGON	
PENNSYLVANIA	Administrative 1/6/86
RHODE ISLAND	Administrative 1/7/86
SOUTH CAROLINA *	
SOUTH DAKOTA	
TENNESSEE	Administrative 6/85
TEXAS	Administrative 3/86
UTAH	Legislative enactment: S.B. 91
VERMONT	Administrative 1/20/86
VIRGINIA	Administrative 1/17/86
WASHINGTON	Legislative enactment: S.B. 4630)
WEST VIRGINIA	
WISCONSIN	
WYOMING	Administrative proposal
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See notes.

NOTES - MARKET ASSISTANCE PLANS

ALASKA

Implemented information plans enabling those with strong risk management programs to obtain insurance coverage. Program has been quite successful.

CALIFORNIA

Implemented for day care lines only.

NEW JERSEY

Regulations proposed 3/3/86 which would establish. A MAP is currently being discussed.

NEW YORK

Voluntary market assistance plan for municipal liability coverage is in place.

NORTH CAROLINA

Administration implementation began in 12/85; proposal to seek legislative authority.

SOUTH CAROLINA

Administrative implementation began in 9/85; created by South Carolina Department of Insurance and operated jointly with Independent Insurance Agents of South Carolina.

ALABAMA	
ALASKA	
ARIZONA	Legislative proposal
ARKANSAS	Legislative proposal
CALIFORNIA	
COLORADO	
CONNECTICUT	
DELAWARE	No
FLORIDA	Proposed; would become effective 10/1/86
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	No
INDIANA	
IOWA	
KANSAS	
KENTUCKY	No
LOUISIANA	
MAINE	
MARYLAND	Legislative enactment: H.B. 329
MASSACHUSETTS	
MICHIGAN	
MINNESOTA	
MISSISSIPPI	Proposed
MISSOURI	
MONTANA	Proposed
NEBRASKA	No
NEVADA	No
NEW HAMPSHIRE	
NEW JERSEY	
NEW MEXICO	
NEW YORK *	Yes; legislation effective 1/1/86, expires 5/15/86
NORTH CAROLINA	
NORTH DAKOTA	No
OHIO	Proposed legislation: H.B. 876
OKLAHOMA	
OREGON	Yes - legislation
PENNSYLVANIA	A prior approval state
RHODE ISLAND	No
SOUTH CAROLINA	No
SOUTH DAKOTA	
TENNESSEE	No
TEXAS	
UTAH	No
VERMONT *	Proposed legislation to trigger prior approval
VIRGINIA *	Proposed legislation
WASHINGTON	
WEST VIRGINIA	
WISCONSIN	No
WYOMING	Legislative proposal
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See notes.

NOTES - MODIFICATION OF "OPEN COMPETITION" REGULATORY SCHEME

NEW YORK
Current discussions include a return to a prior approval system.

VERMONT
Based on annual percentage increase of 25% or more (would become effective 7/1/86).

VIRGINIA
H.B. 849 carried over to 1987 session; amends competitive rating statutes to the effect that rate increases in excess of 25% would be subject to prior approval.

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CREATE JOINT UNDERWRITING ASSOCIATION

ALABAMA	
ALASKA	
ARIZONA	Legislative enactment: H.B. 2375
ARKANSAS	Legislative proposal
CALIFORNIA	
COLORADO	Legislative proposal
CONNECTICUT	Legislative enactment
DELAWARE	Legislative enactment 1968
FLORIDA	Legislative proposal: H.B. 138
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	No
INDIANA	
IOWA	
KANSAS	
KENTUCKY	Legislative enactment: 6-76/6-78
LOUISIANA	
MAINE	Legislative enactment: S.F. 2078
MARYLAND	
MASSACHUSETTS	
MICHIGAN	
MINNESOTA *	Yes: for dram shop coverage 6/1/85, for medical malpractice 9/1/85
MISSISSIPPI	
MISSOURI	
MONTANA	Legislative enactment for general coverage: H.B. 16
NEBRASKA	Legislative proposal: L.D. 2053
NEVADA	No
NEW HAMPSHIRE	
NEW JERSEY	
NEW MEXICO	
NEW YORK *	Proposed; would become effective 1/1/87
NORTH CAROLINA *	
NORTH DAKOTA	Not in session in 1986
OHIO	Legislative proposal: H.B. 874
OKLAHOMA	
OREGON	No
PENNSYLVANIA	Legislative proposal: H.B. 1391
RHODE ISLAND	Created JUA for medical malpractice (1976)
SOUTH CAROLINA *	
SOUTH DAKOTA	
TENNESSEE	
TEXAS	
UTAH	Enacted with trigger allowed if MAPs fail to assist: S.B. 91
VERMONT	Proposed legislation would become effective 7/1
VIRGINIA	--
WASHINGTON *	
WEST VIRGINIA	
WISCONSIN	No, but task force reviewing
WYOMING	No
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See notes.

NOTES - CREATE JOINT UNDERWRITING ASSOCIATION

MINNESOTA
Enactment for general purposes: S.F. 2078.

NEW YORK
Establishment of discretionary joint underwriting association is under consideration.

NORTH CAROLINA
1977 North Carolina Supreme Court decision struck down state's authority to mandate insurance company participation in JUAs, but legislature recently enacted legislation which authorizes, on a standby basis, the Insurance Commissioner to establish JUAs (S.B. 2).

SOUTH CAROLINA
South Carolina's Insurance Commissioner has been empowered to establish a JUA for any professional group unable to obtain coverage.

WASHINGTON
S.B. 4630 (enacted) establishes a task force to study the effectiveness of joint underwriting authorities throughout the United States to specifically determine:

1) The price as it relates to a filed Insurance Services Organization rate;
2) The solvency of such mechanisms
3) The effect it has on the admitted market;
4) The effect it has on the nonadmitted market;
5) The effect or availability on the voluntary market; and
6) What effect it has on lines or classes of insurance not designated.

INCREASE INSURANCE DEPARTMENT AUTHORITY TO REGULATE RATES

ALABAMA	
ALASKA	
ARIZONA	Legislative enactment: H.B. 2375
ARKANSAS	Legislative proposal
CALIFORNIA	Legislative proposal: A.B. 4406
COLORADO	Legislative proposal: H.B. 1204
CONNECTICUT	Legislative enactment: H.B. 5400
DELAWARE	No
FLORIDA	Legislative proposal: H.B. 138
GEORGIA	Legislative enactment: S.B. 384
HAWAII	
IDAHO	
ILLINOIS	No
INDIANA	
IOWA	
KANSAS	
KENTUCKY	No
LOUISIANA	
MAINE	Legislative enactment: S.F. 2078
MARYLAND	
MASSACHUSETTS	
MICHIGAN	
MINNESOTA	
MISSISSIPPI	Legislative proposal
MISSOURI	
MONTANA	Legislative proposal
NEBRASKA	No
NEVADA	No
NEW HAMPSHIRE	
NEW JERSEY	
NEW MEXICO	
NEW YORK	Proposed; would become effective 1/1/87
NORTH CAROLINA *	
NORTH DAKOTA	No
OHIO	Legislative proposal: H.B. 878
OKLAHOMA	
OREGON	No
PENNSYLVANIA	Administrative proposal
RHODE ISLAND	No
SOUTH CAROLINA	
SOUTH DAKOTA	
TENNESSEE	No
TEXAS	
UTAH	No
VERMONT	Yes
VIRGINIA	Yes
WASHINGTON	
WEST VIRGINIA *	Legislative enactment: S.B. 714
WISCONSIN	
WYOMING	
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See notes.

INCREASE INSURANCE DEPARTMENT AUTHORITY TO REGULATE RATES

GEORGIA

Requires insurance companies to expand the information related to reserves which they submit.

NORTH CAROLINA

Legislature considering increased authority beyond currently regulated lines.

WEST VIRGINIA

Requires expanded disclosure of claims, investments, judicial dispositions based on West Virginia claims experience. Also requires insurance commissioner whenever rates are expected to increase 10% or more or when verification of past loss experience is required.

PROVISIONS FOR AN EXCESS PROFITS LAW FOR COMMERCIAL RATES

ALABAMA	
ALASKA	
ARIZONA	
ARKANSAS	Considered, but not proposed
CALIFORNIA	
COLORADO	
CONNECTICUT	
DELAWARE	
FLORIDA	Legislation proposed: H.B. 138
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	
INDIANA	
IOWA	
KANSAS	
KENTUCKY	
LOUISLANA	
MAINE	
MARYLAND	
MASSACHUSETTS	
MICHIGAN	Legislative enactment
MINNESOTA *	Legislative enactment: S.F. 2078
MISSISSIPPI	
MISSOURI	
MONTANA	--
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	
NEW JERSEY	
NEW MEXICO	
NEW YORK	
NORTH CAROLINA *	
NORTH DAKOTA	--
OHIO	
OKLAHOMA	
OREGON	
PENNSYLVANIA	--
RHODE ISLAND	Administratively created in 1978
SOUTH CAROLINA	--
SOUTH DAKOTA	
TENNESSEE	--
TEXAS	
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	
WEST VIRGINIA	
WISCONSIN	
WYOMING	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See notes.

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NOTES - PROVISIONS FOR AN EXCESS PROFITS LAW FOR COMMERCIAL RATES

MINNESOTA

Provisions for remitting certain premiums

NORTH CAROLINA

Current language is believed to be effective enough in this area. Excess profit is not a concern. Concerns are capacity and solvency, which have contributed to creation of availability/affordability crisis.

ESTABLISH POOLS FOR STATE AND LOCAL GOVERNMENTAL ENTITIES

ALABAMA	
ALASKA	
ARIZONA	Legislative enactment: H.B. 2375
ARKANSAS	Yes
CALIFORNIA	
COLORADO	
CONNECTICUT	
DELAWARE	
FLORIDA	Yes; effective 7/79 for local governmental entities
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	--
INDIANA	Legislative enactment: H.B. 1255
IOWA	
KANSAS	
KENTUCKY	
LOUISIANA	
MAINE	
MARYLAND	
MASSACHUSETTS	
MICHIGAN	
MINNESOTA	
MISSISSIPPI	Legislative proposal
MISSOURI	
MONTANA	Yes
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	
NEW JERSEY	
NEW MEXICO	
NEW YORK	Yes; 1/1/87
NORTH CAROLINA	Legislative proposal to provide oversight of pools
NORTH DAKOTA	--
OHIO	Legislative proposal: H.B. 875
OKLAHOMA	
OREGON	
PENNSYLVANIA	Legislative and administrative proposals
RHODE ISLAND	--
SOUTH CAROLINA	No; see S.C. Code §§ 1-11-140 and 10-7-10 et seq. (1976)
SOUTH DAKOTA	--
TENNESSEE	Yes
TEXAS	
UTAH *	Legislation effective 7/86
VERMONT	Legislative proposal
VIRGINIA	Legislation passed both houses
WASHINGTON	
WEST VIRGINIA	
WISCONSIN	
WYOMING	Legislative and administrative proposal
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See notes.

NOTES - ESTABLISH POOLS FOR STATE AND LOCAL GOVERNMENTAL ENTITIES

UTAH

Legislation effective 7/86 which allows for the creation of public agency mutual insurance companies.

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ESTABLISH SELF-INSURANCE PLANS FOR STATE AND LOCAL GOVERNMENT

ALABAMA	
ALASKA	
ARIZONA	Legislative enactment: H.B. 2375
ARKANSAS	Yes
CALIFORNIA	Legislative proposal: A.B. 3554
COLORADO	Legislative enactment: H.B. 1001
CONNECTICUT	
DELAWARE	Administrative proposal 12/85
FLORIDA	Yes; effective dates: property 7/1917, casualty 7/1972, local 7/79
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	No
INDIANA	Legislative enactment
IOWA	
KANSAS	
KENTUCKY	Proposed
LOUISIANA	
MAINE	
MARYLAND	Legislative enactment: S.B. 1015
MASSACHUSETTS	
MICHIGAN	
MINNESOTA	
MISSISSIPPI	Legislative proposed; would become effective 7/1/86
MISSOURI	Legislative enactment
MONTANA	Legislative enactment
NEBRASKA	Legislative proposal
NEVADA	No
NEW HAMPSHIRE	
NEW JERSEY	
NEW MEXICO	
NEW YORK	Proposed legislation 1/1/87
NORTH CAROLINA *	Legisltaive proposal to provide oversight
NORTH DAKOTA	Not in session
OHIO	
OKLAHOMA	
OREGON	
PENNSYLVANIA	Legislative and administrative proposal
RHODE ISLAND	No
SOUTH CAROLINA *	No
SOUTH DAKOTA	Legislative enactment: H.B. 1381
TENNESSEE	No
TEXAS	Not in session
UTAH	Yes
VERMONT	Yes; effective date 7/1/86
VIRGINIA	Legislation passed both houses
WASHINGTON	Legislative enactment: H.B. 1972
WEST VIRGINIA	
WISCONSIN	Yes; property (1980) - self insurance unregulated
WYOMING	Legislative enactment: Enrolled Act No. 40 & 42
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

NOTES - ESTABLISH SELF-INSURANCE PLANS FOR STATE AND LOCAL GOVERNMENT

NORTH CAROLINA

Administrative rules and regulations adopted to assist local governments.

SOUTH CAROLINA

State Budget and Control Board operates insurance reserve fund to provide liability and property insurance for state and political subdivisions which provides an alternative for self-insurance programs (see S.C. Code §§ 1-11-40 and 10-7-10 et seq. (1976).

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National Conference of State Legislatures

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Summary

Selected Federal Legislation: Liability Insurance

The enclosed summary provides a brief identification of legislation pertaining to certain liability insurance issues introduced during the 99th Congress. This summary attempts to display legislation which has been introduced to address various issues related to affordability and availability of liability insurance, insurance regulation and the civil justice system. It does not include legislation related to maritime liability, RICO, deposit insurance and specialized federal insurance programs.

For additional information, contact Michael Bird (liability insurance generally), Bill Waren (product and municipal liability), Nancy New (Price-Anderson and Superfund) or Becki Brady (truckers' liability).

Michael Bird
May 30, 1986

(Updated: 6-12-86)

Attachment 7

Denver Office: 1050 17th Street • Suite 2100 • Denver, Colorado 80265 • 303/623-7800

Bill No. & Sponsor	Summary	Status
	A. McCarran-Ferguson Act	
S. 2458 (Simon - IL)	Makes the Federal Trade Commission Act applicable to the insurance industry to the extent the industry is not state regulated; Permits insurers to collectively gather loss data, prepare premium rate data, etc; Prohibits insurers from establishing guidelines including final rates and final rate must reflect each insurers own expense component; Allows insurers to act collectively when participating in j.u.a.'s, and pools.	No hearings or action.
S. 2497 (Simon - IL)	Requires property and casualty insurers to submit annual reports to the Secretary of Commerce including data on: premiums, claims paid, direct legal costs, administrative overhead, reserves units of exposure, classifications of business, investment income, etc. The Secretary would analyze the reports and share them with Congress and the states.	No hearings or action.
HR 4500 (LaFalce - NY)	Repeals the McCarran-Ferguson Act	No hearings or action.
HR 4501 (LaFalce - NY)	Applies various federal laws to the regulation of insurance if said industry is not effectively regulated at the state level.	No hearings or action.
HR 4502 (LaFalce - NY)	Removes the regulation of the insurance industry from present exemptions from certain federal laws.	No hearings or action.

HR 4503 (LaFalce - NY)	Repeals the McCarran-Ferguson Act and calls upon the Federal Trade Commission to affirm the legality of collective activities of the insurance industry.	No hearings or action.
HR 4504 (LaFalce - NY)	Amends McCarran-Ferguson and defines business of insurance (for state regulatory purposes) to be matters regarding solvency, reliability and underwriting.	No hearings or action.
HR 4877 (Schumer - NY)	Requires commercial insurers to annually report value of premiums written and earned; value of claims paid; value of administrative expenses, reserves, attorneys fees, actual economic loss and premium increases by class of business. An analysis would be made by the Secretary of Commerce and shared with Congress and the states.	No hearings or action.
	B. Civil Justice Reform	
HR 4385 (Gray - IL)	Requires periodic payments, collateral source reductions, $100,000 noneconomic damage cap, scheduled attorneys fees, transmittal of punitive damages to the U.S. Treasury in all civil actions unless otherwise governed by a state or federal law.	No hearings or action.
HR 4524 (Schulze - PA)	Creates 35-member Insurance Availability Crisis Commission, to provide Congress, within 6 months, a report on and recommendations for reforming our tort system and insurance industry practices.	No hearings or action.
HR 4406 (Hyde - IL)	Local government liability limited to proportionate negligence in actions brought before any courts; limits punitive damage; and attorneys fees.	No hearings or action.

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HR 4770 (Kindness - OH)	Amends Federal Tort Claims Act to modify joint and several liability, to reduce awards by sums received from collateral sources, to limit noneconomic damages to $100,000; to provide for periodic payments of judgments and schedule attorneys fees (Administration legislation).	
HR - 4874 (Ritter - PA)	Requires states, within 4 years, to comply with the following tort liability standards: pretrial screening panels; structured settlements; collateral source reductions; $250,000 noneconomic damage caps; scheduled attorneys fees; modified joint and several liability; state court administrative use of punitive damages and payment of frivolous suit expenses. Encourages establishment of risk management programs.	No hearings or action.
S. 436 (Hatch - UT)	Amends Section 1983 of Civil Rights Act to prohibit award of damages against any governmental entity if officials are found to have acted in good faith.	Mark-up in Senate Judiciary Subcommittee mid-June.
S. 1580 (Thurmond - SC)	Establishes a $75 hourly attorneys rate to be authorized in awards in judicial or administrative hearings to which any Federal fee-shifting statute applies. Applies to prevailing parties only awards against Federal, state or local governments.	Mark-up in Senate Judiciary Subcommittee mid-June.
S. 2038 (McConnell - KY)	Encourages the use of alternative dispute resolution techniques and establishes federal rules of procedure for the same.	Several previous hearings. Others expected.

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S. 2046 (McConnell - KY)	Requires periodic payments, collateral source reductions, $100,000 noneconomic damage cap, scheduled attorneys fees, transmittal of punitive damages to the U.S. Treasury in all civil actions unless otherwise governed by a state or federal law.	Several previous hearings. Others expected.
	C. Product Liability	
S. 100 (Original bill, (Kasten - WI)	Preempts all state laws inconsistent with the following federal product liability standards: (1) eliminates strict liability, (2) exempt most sellers from liability in construction defect cases, (3) expands manufacturers defenses for "misuse" of product, "contributory negligence: and "assumption of risky", (4) severely restricts joint and several liability, (5) provides for collateral source reductions of damage awards, (6) bars evidence of subsequent remedial measures, (7) largely eliminates punitive damages, and (8) imposes statute of response on suits involving capital goods.	Motion to report bill defeated in Senate Commerce Committee in May 1985.
S. 100 - Substitute (Kasten - WI)	Preempts all state laws inconsistent with the following product liability provisions: fault-based liability; modified joint and several liability; $100,000 limits on noneconomic damages; periodic payments of judgments; collateral source reductions; scheduled attorneys fees. U.S. Attorney General to implement alternative dispute resolution techniques. (Administration legislation.)	Heard in late May. One option for consideration in June mark-up.

S. 1999 (Danforth - MO)	Establishes an expedited claims procedure to resolve product liability disputes. Caps non-economic awards at $250,000 and limits punitive damages to two times the plaintiffs compensatory damages.	Mark-up commenced 6/12/86. The Commerce Committee has initially agreed to a limit on joint and several liability. Further mark-up scheduled for mid-June.
HR 2568 (Shumway - CA)	Preempts state product liability laws inconsistent with this bill. Sets basic standards of responsibility for manufacturers and sellers; requires injured parties to prove fault by preponderance of the evidence; imposes comparative responsibility; reduction of awards by workers' compensation benefits paid; establishes proof of "reckless disregard" as basis for punitive damages.	No hearings or action.
HR 4425 (Roth - WI)	Requires claimants to establish that manufacturers and sellers are negligent by a preponderance of the evidence and restricts award of punitive damages in product liability action. Preempts state law.	No hearings or action.
HR 4766 (Fish - NY)	Preempts all state laws inconsistent with the following product liability provisions: fault-based liability; modified joint and several liability; $100,000 limits on noneconomic damages; periodic payments of judgments; collateral source reductions; scheduled attorneys fees. U.S. Attorney General to implement alternative dispute resolution techniques. (Administration legislation.)	No hearings or action.

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HR 4832 (Dannemeyer - CA)	Preempts state law by providing for uniform federal standards of liability; sanctions comparative responsibility and several liability; caps punitive damages and provided for structured settlements.	No hearings or action.
	D. Medical Malpractice	
HJR 386 (Porter - IL)	Recommends noneconomic damage caps, periodic payments, enhanced risk management, state access to settlement data, alternative dispute resolution and other ways to address medical malpractice actions and quality control.	No hearings or action.
HR 2659 (Hansen - UT)	Appropriates $500 million to fund state medical malpractice programs which establish screening panels, limit noneconomic damages, provide for periodic payments, schedule attorneys fees, etc.	No hearings or action.
HR 3084 (Moore - LA)	Establishes an alternative liability system for malpractice - provides for out-of-court claims settlement. Recovery limited to net economic loss including lost wages and medical costs.	No hearings or action.
HR 3865 (Lent - NY)	Appropriates $12.5 million for FY 87 for payment development grants to states to accomplish the following malpractice-related state reforms: periodic payments of damages exceeding $100,000, reduction of awards by collateral source sums, $250,000 noneconomic damage caps, scheduled attorneys fees, risk management programs, and provision of judicial disposition data. An additional $3.1 is appropriated for FY 87 for related state incentive grants.	

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HR 4390 (Wyden - OR)	Provides for states committees to analyze good faith professional review committees of health care entities, require collection and dissemination of malpractice payments data and report sanctions against health care providers taken by state licensing boards.	No hearings or action.
S. 175 (Inouye - HA)	Encourages states to establish medical malpractice screening panels to hear claims, schedule attorneys fees and develop health care facility risk management programs. Authorizes annual payments of $250,000 to each state complying with this act.	No hearings or action.
S. 1372 (Heinz - PA)	Provides incentives for establishment of statewide insurance pools to provide health insurance to high-risk individuals.	No hearings or action.
S. 1804 (Hatch - UT)	Appropriates $12.5 million for FY 87 for payment of development grants to states to accomplish the following malpractice-related state reforms: periodic payments of damages exceeding $100,000, reduction of awards by collateral source sums, $250,000 noneconomic damage caps, scheduled attorneys fees, risk management programs, and provision of judicial disposition data. An additional $3.1 is appropriated for FY 87 for related state incentive grants.	Several past hearings. Future hearings likely.
S. 1960 (Durenberger - MN)	Establishes an alternative liability system for malpractice - provides for out-of-court claims settlement. Recovery limited to net economic loss including lost wages and medical costs.	No hearings or action.

E. Risk Retention Groups

S. 2129 (Kasten - WI)	Expands 1981 Risk Retention Act to permit similarly situated public and private sector entities to self-insure and/or collectively purchase most lines of liability coverage regardless of state prohibitions. State commissioners can examine a group's financial condition, various unfair trade practices. Policies must spell out that state insolvency guaranty funds are unavailable for these groups.	Reported from Senate Commerce Committee. Floor scheduling for June likely.
HR 4301 (Wyden - OR)	Permits private and public sector entities to self-insure and/or collectively purchase most types of liability insurance.	Risk retention grouping subject of a 6/24/86 hearing by House Subcommittee on Commerce, Transportation & Tourism.
HR 4442 (Lent - NY)	Permits private and public sector entities to self-insure or collectively purchase most types of liability insurance; permits state insurance commissioner financial examinations; requires notice of nonparticipation in insolvency guaranty funds.	Risk retention grouping subject of a 6/24/86 hearing by House Subcommittee on Commerce, Transportation & Tourism.

HR 4506 (LaFalce - NY)	Permits private and public sector entities to self-insure or collectively purchase most types of liability insurance; permits state insurance commissioner examinations; requires notice of non-participation in insolvency guaranty funds.	Risk retention grouping subject of a 6/24/86 hearing by House Subcommittee on Commerce, Transportation & Tourism.
HR 4796 (Schulze - PA)	Permits private and public sector entities to self-insure or collectively purchase most types of liability insurance; requires groups to be similarly situated and in compliance with state unfair trade practices laws; allows tax deductions for contributions to qualified liability trusts.	Risk retention is subject of a 6/24/86 hearing by House Subcommittee on Commerce, Transporation & Tourism.
	F. Superfund	
HR 2005	Addresses the funding mechanism for cleaning up hazardous waste sites. Also clarifies the definition of responsible parties and adjusts liability assigned. Deals with strict, several and joint liability.	In Conference Committee.
	G. Price-Anderson Act	
S. 1225 (McClure - ID)	Addresses the levels of liability insurance that must be carried by a nuclear facility as well as well as adjusting limits to total liability for the nuclear industry.	Voted out of Energy Committee. Has been referred, on a time limited basis, to the Environment Committee.

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HR 3653 (Udall - AZ)	Addresses the levels of liability insurance that must be carried by a nuclear facility as well as well as adjusting limits to total liability for the nuclear industry.	Voted out of Energy Committee. Has been referred, on a time limited basis, to the Environment Committee.
	H. Other	
HR 4142 (Glickman - KS)	Provides uniform rules of liability for damages arising from general aviation accidents; modifies joint and several liability - establishes comparative responsibility - tightens recovery of punitive damages; preempts state laws regarding recovery.	No hearings or action.
HR 4406 (Gekas - PA)	Provides immunity from liability for sponsors and operators of nonprofit sports programs.	No hearings or action.
HR 4499 (LaFalce - NY)	Creates a Federal Insurance Commission.	No hearings or action.
HR 4655 (Frank - MA)	Creates a National Commission on the Liability Crisis to investigate causes and to report in 6 months on its fundings and recommendations.	No hearings or action.
HR 4717 (Hammerschmidt - AR)	Provides uniform rules of liability for damages arising from general aviation accidents; modifies joint and several liability - establishes comparative responsibility - tightens recovery of punitive damages; preempts state laws regarding recovery.	No hearings or action.

HR 4765 (Fish - NY)	Places the following limits on federal government contractor liability: fault-based liability; modified joint and several liability; limits on noneconomic; damages periodic payments of judgments; collateral source reductions; scheduled attorneys fees. U.S. Attorney General to implement alternative dispute resolution techniques. (Administration legislation.)	No hearings or action.
S. 827 (Hawkins - FL)	Creates a National Vaccine Injury Compensation Program and Trust Fund and a federal insurance pool.	

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Summary

Selected State Legislative Action

Re: Affordability and Availability

of Liability Insurance

The attached summary represents various actions taken, under consideration or planned for the interim by selected state legislatures. This list highlights legislative activity and some regulatory initiatives. It is not a comprehensive survey of all enacted legislation.

We have attempted to summarize briefly action taken in legislatures which have already adjourned their 1986 sessions. Several additional states are featured.

To ensure accuracy and to expand the data base, all of the enclosed information continues to be scrutinized by legislative staff in the respective states.

Michael Bird/Brenda Trolin
March 10, 1986 (original report)

PORTIONS UPDATED: July 3, 1986
(Not every state included in this report has been updated)

Attachment 8

Washington Office: 444 North Capitol Street, N.W. • Suite 203 • Washington, D.C. 20001 • 202/624-5400

ALABAMA

1986 Session Completed

Enacted

SB 239 - Authorizes two or more counties to establish self-funded insurance funds for the purpose of providing liability protection for member counties and employees acting in the line and scope of their employment.

HB 202 - Requires insurance companies which sell medical liability insurance to report to the appropriate state licensing agencies any judgment or settlement resulting from a claim for personal injury caused by an error, omission or negligence in the performance of professional services.

HB 178 - Grants immunity from suit to the Board of Medical Examiners and the Medical Licensure Commission.

SB 369 - Grants immunity to Board of Dental Examiners, certain members, agents, employees, consultants and others in connection with hearing investigations.

Legislation Considered - Not Passed

- o House Bills 213-219 comprised a legislative package proposing an array of solutions, including:
  - o HB 213 - establish noneconomic damage caps at $250,000; modify the collateral source rule; limit attorneys' contingency fees; permit structured settlements; and alter the standard of proof.
  - o HB 215 - allows introduction into evidence the amount of reimbursed expenses related to a pending civil suit.
  - o HB 217 - amends the "scintilla" rule by increasing the minimum standards of proof needed to be met to bring about a tort liability action.
  - o HB 218 - would cap liability for punitive damages in civil actions at $250,000 or the amount of non-punitive damages, whichever was less. Would have changed burden of proof from preponderance of the evidence to beyond a reasonable doubt.

ALASKA

1986 Session Completed

Enacted

SB 377 - Places limits of $500,000 for noneconomic damages for each claim based on a separate injury or incident.

- o Bars a person who suffers personal injury or death from recovering damages if the injury or death occurs in the commission of a felony.
- o Provides for itemization of damages between economic and noneconomic losses.
- o Provides for periodic payment in certain circumstances.
- o Limits liability of members of board of directors of non profit corporations; public or nonprofit hospitals; school districts; citizens advisory committees of a municipality.
- o Modifies joint and several liability by making contributory fault (chargeable to the claimant) diminish the amount of damages proportionate to his fault.
- o Allows a defendant to introduce into evidence the amount of compensation from from collateral sources.
- o Establishes prejudgment interest accrual principle.

HB 506 - authorizes municipalities, school districts and regional educational areas to self-insure jointly or purchase coverage on a group basis.

SB 442 - authorizes the Department of Commerce to provide technical assistance to individuals intending to form recipiocal insurers for provision of marine liability insurance.

HB 2418 - authorizes the establishment of a joint underwriting association for provision of medical malpractice coverage.

ARIZONA

1986 Session Completed

Enacted

Seven tort reform bills were sent to the Governor. Five vetoed. The two which have been enacted into law include:

- o HB 2377 - establishes penalties for unjustified actions and raises limits for mandatory arbitration.

- HB 2170 - prescribes liability for liquor to a certain intoxicated person or minor; defines "obviously intoxicated" and prescribes certain liability limitations.

- HB 2375 - modifies insurance regulation and provides for alternative insurance options as follows:

  1. self-insurance for boards of directors of non-profit organizations;

  2. pooling for political subdivisions;

  3. self-insurance for schools;

  4. conditions for non cancellation of policies for commercial and industrial risks;

  5. a temporary joint underwriting association for all lines;

  6. the Department of I. urance to set rules and regulations for disclosure of loss experience.

  7. provides authority for profit and non-profit corporations to ensure directors and officers against certain liability.

  8. establishes a study commission on insurance.

- HB 2418 - authorizes the establishment of a joint underwriting association for provision of medical malpractice coverage for licensed midwives and registered nurses.

Among the legislation vetoed were bills calling for structured settlements (SB 1378), limitation of joint and several liability (HB 2013), collateral source rule modification (HB 2163) and scheduled contingent attorneys fees (HB 2376).

Interim

Petitions are currently being circulated to raise the issues vetoed by the Governor in the November, 1986 elections.

CALIFORNIA

Under Consideration

- No less than 40 bills have been introduced thus far, including legislation extending all provisions of the state's medical malpractice laws to general tort liability.

- AB 4406 would expand the annual information provided by insurers to the Insurance Commissioner to include total premiums paid (by individual lines of coverage), total reinsurance ceded and premiums paid, claims made or occurence base policy identification, trial and judgment

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incidence, lines of coverage provided, average settlements and judgments, etc.

- AB 4407 would compel all admitted insurers to offer, in California every category of direct commercial liability insurance or reinsurance for commercial liability insurance offered by the insurer anywhere in the U.S. Similar provisions are stipulated for surplus line providers.
- AB 3554 would establish a State fund for providing excess liability coverage for local governments and liability insurance for nonprofit organizations.
- AB 3875 would require 45 days notice of intent to renew a policy conditioned upon a premium increase.
- SB 1538 seeks to establish an assigned liability risk pool and SB 1581 would create a rate review board.

Previous Action

- Proposition 51, which passed by a margin of 62% - 38%, will eliminate joint and several liability in all suits seeking noneconomic damages.
- Restricted attorneys' contingency fees, an issue upheld by the U.S. Supreme Court in 1985.

COLORADO

1986 Session Completed

Enacted

- SB 67 will reduce awards by sums from specific collateral sources.
- SB 67 will limit damages for non-economic loss to $250,000 unless court funds "clear and convincing evidence," in which case up to $500,000 can be awarded. Eliminates awards for derivative non-economic loss except when court finds "clear and convincing evidence" and may award up to $250,000. Provides that an action against an architect, engineer or land surveyor must be certified by similar professionals.
- SB 69 will make uniform most statutes of limitations at three years. Time limits for bringing tort actions are either 1 or 2 years.
- SB 70 will eliminate the doctrine of joint and several liability. Limits liability of a defendant to his proportionate share of negligence or fault.
- SB 76 extends "good Samaritan" laws to limit the liability of individuals, businesses and corporations, directors of non-profit organizations and government entites when they volunteer their time without pay or enforce a policy or regulation to protect another person.

3136

- SB 86 limits the liability of vendors to $150,000 if liquor has been served to an intoxicated patron or a minor. (Became law without Governor's signature). Actions can be brought only by individuals other than the intoxicated person.

- SB 1167 permanently extends the division of risk management and its fund which were scheduled to expire 6/30/86. Requires purchase of property or liability insurance policies by state agencies to be approved by the division.

- HB 1185, 1186 and 1187 limit liability for employers, shareholders, officers and board members resulting from the flow of water from a reservoir. Establishes immunity for state engineers and employees when monitoring reservoirs.

- HB 1192 limits liability of manufacturers of firearms when products are operated properly.

- HB 1196 clarifies the immunity of public entities and their employees.

- HB 1197 ties punitive damages to actual damages in a one-to-one ratio with 2/3rd paid to injured parties and 1/3rd to the state general fund.

- HB 1201 limits liability for mental health professionals when they use an accepted standard of care but fail to anticipate a patient's violent behavior.

- HB 1204 permits exemptions to notice of intent to cancel, nonrenew, change benefits or increase rates. Authorizes the Insurance Commissioner to inspect any rate, underwriting rule, policy form or contract and prohibit those deemed hazardous to the public/policyholders. Also requires claims-made policy forms to be filed on or after 1-1-87 except for public entity self-insurance pools.

- HB 1206 changes the regulation of investments of assets by domestic insurers based upon model NAIC legislation.

- HB 1205 limits a homeowner's liability when property is entered illegally.

- 1193 lengthens notice provisions for midterm cancellations of commercial and medical malpractice policies from 45 or 60 days to 90 days. Requires 90 day notice of a unilateral premium increase or coverage reduction and an explanation for said action. Allows cancellations and coverage deductions only with cause.

- HB 1358 authorizes the Insurance Commissioner to promulgate rules requiring insurers to file supplemental reports or closed - claim files or both for any line, class or subclass, authorizes permissive public hearings to review rates and investigations of availability affordability problems. Sunsets 7-1-89.

CONNECTICUT

1986 Session Completed

Enacted

HB 5400 accomplishes the following:

- o increases from 30 days to 60 days notice of nonrenewal of commercial and personal liability insurance policies.
- o increases from 30 days to 60 days notice of rate or coverage changes for insured risks paying an annual premium of $50,000 or less.
- o establishes 8 grounds for cancellation of policies including nonpayment of premiums, substantial loss of reinsurance, material misrepresentations, etc. Cancellations are prohibited unless one or more of these grounds are substantiated.
- o requires insurers to submit data on multi peril, general liability and auto coverage lines which would include information comparing aggregate premiums charged and premiums established through rating mechanisms.

Substitute HB 6134 would accomplish the following civil justice changes:

- o modify joint and several liability.
- o reimpose modified sovereign immunity for municipal governments.
- o allow all judgments (currently limited to medical malpractice) to be reduced by sums awarded through collateral sources.
- o impose a penalty, which could include defense costs, for filing suits in absence of probable cause.
- o impose periodic payments on future economic and noneconomic damages exceeding $200,000.
- o schedule attorneys contingency fees.

Previous Action

Established a market assistance plan and statutorily authorized the creation of joint underwriting associations.

Interim Studies

HB 5400 instructs a legislative committee to analyze underwriting standards, classification systems and premium development techniques. It further instructs the committee to make recommendations re: the claims-made form and potential return to prior approval.

DELAWARE

To The Governor

- SB 533 - limits personal liability of directors of corporations in cases where directors are accused by shareholders of violating their "duty of care."

FLORIDA

1986 Session Completed

Enacted

The Tort Reform and Insurance Act of 1986 accomplishes the following:

- It freezes rates for all commercial property and liability coverages in Florida at their May 1, 1986 levels from July 1, 1986 until January 1, 1987;
- It requires a 40 percent roll-back of insurance premiums applicable to one-fourth of the policy-term premium of all commercial liability policies in Florida, pro-rated for the period that such policies are in effect from October 1, 1986 until January 1, 1987; and
- It requires that all commercial property and liability insurers file new rates with the department which are based upon the rates that were in effect on January 1, 1987.

  During the period from July 1, 1986 until January 1, 1987, the applicable insurers would be prohibited from cancelling or nonrenewing their insureds at a rate greater than 30 percent of their cancellation and nonrenewal rates for the previous 24 months during any 30 day period. Insurers would be permitted to escape the roll-back provisions to the extent that they could show that the resulting rates would be inadequate or would impair their solvency, and, lastly, the rates to be implemented on January 1, 1987 would be based on 1984 rates but would be adjusted upward (or downward) as justified by each insurer to comply with actuarial principles.

- authorizes financial institutions to participate in reinsurance and Florida insurance exchanges.
- authorizes commercial liability risks to be group insured;
- increases the department's rate review and enforcement authority;
- creates a property/casualty insurance excess profits law;
- authorizes creation of a commercial property/casualty joint underwriting association;

- o expands the types of health care providers that can self-insure and authorizes CPAs, architects, engineers, veterinarians, land surveyors, and insurance agents to self-insure;
- o establishes notice requirements for cancellation, nonrenewal, and renewal of premium of commercial liability policies;
- o authorizes the creation of commercial self-insurance funds.
- o modifies the application of the doctrine of joint and several liability.
- o limits when punitive damages may be pled, specifies to whom they are to be distributed, and caps the maximum amount of of such damages in certain cases.
- o caps noneconomic damages in civil actions at $450,000.
- o requires, under certain circumstances, periodic payment of future damages exceeding $250,000.
- o creates a five member Academic Task Force for Review of the Insurance and Tort Systems.
- o mandates a limited freeze and reduction, and a filing, of insurance rates for certain commercial lines of insurance.

GEORGIA

1986 Session Completed

Enacted

- o SB 369 and SB 440 - respectively authorize local governments and school boards to join together for purposes of securing liability insurance.
- o HB 1146 - (Act No. 1670) compels plaintiffs found to have filed frivolous suits to pay fees and costs incurred by defendants.
- o HB 1185 - (Act No. 1486) regards dismissal of actions for frivolous suits.
- o HB 1471 - (Act No. 1619) clarifies sovereign immunity of municipal corporations.
- o HB 1549 - (Act No. 1422) and HB 1526 (Act. No. 1621) establish immunity for governmental employees and officials.
- o HB 1503 - (Act No. 1456) places tighter restrictions on cancellation and renewal of policies by insurance companies.

3741

- SB 553 - (Act No. 1457) establishes assigned risk pools for certain property/casualty insurance risks and authorizes insurance commissioner to order a refund of portions of premiums.

- SB 384 - (Act No. 1518) requires insurers to file itemized annual reports.

HAWAII

1986 Session Completed

Enacted

- HB 1993-86 - provides for additional exceptions to the state's tort claims act.

- HB 2238-86 - provides a statutory mechanism for ensuring that child care providers will be able to secure liability insurance.

- HB 1695-86 - authorizes mass merchandising of motor vehicle, property casualty insurance to the employees of any employer or to the members of any association or organization under a mass merchandising plan audited by the insurance commissioner.

- HB 1694-86 - authorizes the licensure and operation of pure captive insurance companies and association captive insurance companies.

- HB 2549-86 - allows for the formation of workers' compensation self-insured groups.

IDAHO

1986 Session Completed

Enacted

- SB 1439 - limits dram shop and social host liability.

- HB 1469 - places limits on attorney contingency fees.

Legislation Considered - Not Passed

A major proposal (SB 1297) calling for establishment of a state insurance fund was among the bills not passing.

ILLINOIS

1986 Session Completed

To The Governor

Legislation passed on the final day of session accomplishes the following:

- o Joint and several liability. It retains joint liability in cases of medical malpractice, environmental concerns and medical costs. Defendants who are less than 25% at fault for an injury would not be jointly liable for other damages.

- o Collateral sources. Any judgment against a defendant would be reduced by any insurance reimbursements to the plaintiff above $25,000.

- o Comparative negligence. A plaintiff who is more than 50% responsible for his injury would not be permitted to collect damages in cases of negligence or product liability.

- o Municipal immunity: Grants broad immunity from liability suits to municipalities; exempts present or former public employees from punitive damages for actions arising from official duties; exempts public entity from liability for "hazardous recreational activities" when warning of the hazard is posted.

Other reforms:

- o Requires insurer to provide loss information with notification of cancellation or at request of insured.

- o Requires 90-day notice to state of termination of any line of insurance in the state.

- o Requires 60-day notice to insured of cancellation, nonrenewal or premium increase of 30% or more.

*- This is a brief initial synopsis. A more thorough summary is being developed.

Previous Action

- o In December 1985, the Insurance Department launched a market assistance plan.

- o Select Committees in both the House and Senate have examined the affordability/availability issue.

INDIANA

1986 Session Completed

Enacted

- SB 393 authorizes judges to determine what are frivolous suits and to assess fees for such suits.
- SB 394 modifies the states's collateral source rule. Juries are to be instructed not to take into account taxes to be paid on potential awards.
- SB 85, dealing with dram shop, asserts that licensed sellers are not liable for the actions of their customers unless they know customers making purchases are irtoxicated.
- HB 1255 allows the state to administer insurance pools for local governments.
- HB 1284 grants volunteers immunity from liability unless the entity which they assist has insurance.

IOWA

1986 Session Completed

Enacted

SF 2265 would accomplish the following:

- expand the use of alternative financing mechanisms to include bonding for purposes of establishing insurance pools for public sector entities.
- authorize the state risk manager to provide market assistance, combine various risk management techniques and permit grouping for purposes of establishing an insurable risk for local governments.
- provide risk management assistance to public/private sectors and permit establishment of market assistance plans for both sectors.
- authorize use of peer review committees for medical malpractice claims and authorize structured settlements for awards unless the awards are judged to be inequitable or if there is an insufficient guarantee of collectability.

Interim

A continuing legislative/public member study will focus on tort liability and insurance issues for which there is insufficient documentation of need and effectiveness. Items likely to receive attention are the collateral source rule, damage caps, attorney fees, premium rollbacks and innovative judicial mediation techniques.

KANSAS

1986 Session Completed

Enacted

- HB 2661 - caps damage awards against health care providers at $1 million. Noneconomic damage awards in these same medical malpractice judgments are capped at $250,000 (subject to cost of living adjustments). Juries must itemize noneconomic damage awards and all settlements are to be paid periodically.

  A "pinhole" provision permits claimants to petition courts to award supplemental benefits for medical related expenses up to maximum of $3 million.

- SB 512 - prohibits cancellation of business and professional liability insurance policies unless one of 5 causes for cancellation can be determined (as nonpayment of premiums, material misrepresentations, etc.).

  This legislation also requires insurers to give policyholders 60 day notice of a decision to nonrenew.

- SB 382 - allows deductible health care provider liability insurance.

Legislation Which Failed

- SB 540 would have established a $1 million liability cap for various professionals and SB 400 would have modified civil procedures regarding determination of frivolous suits.

Interim

A joint subcommittee on liability will likely recommend to the Joint Coordinating Council that an interim study on liability insurance be undertaken.

KENTUCKY

1986 Session Completed

Enacted

- SB 309 - will permit the Insurance Commissioner to establish a voluntary risk sharing association for hard-to-get lines of commercial liability coverage.

Legislation Considered - Not Passed

- Among dozens of introduced bills which did not pass was legislation capping awards, providing for structured settlements, modifying the collateral source rule and providing changes in the areas of medical malpractice.

Interim

A special session might occur.

Legislative leadership authorized the creation of a task force to review the entire issue which will include authority to investigate the State Insurance Department and the insurance industry.

LOUISIANA

Enacted

HB 2155 - limits liability of servers and sellers of liquor.

Under Consideration

Fourteen pieces of House legislation have been introduced including:

- HB 339-341 (structured settlements)
- HB 206 (political subdivision immunity)
- HB 1457 (collateral source doctrine)
- HB 1455 (prejudgment interest)
- HB 1465 ($150,000 cap on noneconomic damages)
- HB 1452 (comparative negligence)
- HB 1932 (professional and public liability trust)
- HB 1459 (scheduled contingent attorneys fees)

In the Senate, SB 719 proposes to establish a medical review panel to evaluate medical malpractice claims made against the state.

3748

MAINE

1986 Session Completed

Enacted

- Public Law 671 prohibits midterm cancellations unless cause (such as nonpayment of premiums, fraud, breach of contract, potential insurer insolvency, etc.) can be confirmed. Notice of cancellation must be made 10 days prior to the cancellation. Notice of a nonrenewal must be made 30 days prior to a policy's expiration date. Policyholders can request that the Superintendent of Insurance verify that the insurer has established cause for the nonrenewal.

- LD 2080 grants immunity to servers unless minors they serve can prove they were negligently served. Servers who are negligent or reckless in serving minors or visibly intoxicated adults could be sued. Per occurrence caps of $250,000 on awards against alcohol servers are established. These caps exclude medical care and treatment expenses.

- Public Law 713 authorizes political subdivisions to participate in public self-funded pools.

- Public Law 804 shortens statute of limitations for suits related to medical and legal professional liability

Legislation Considered - Not Passed

LD 2053 would have given the Insurance Commissioner authority to establish a joint underwriting association for provision of liability coverage for day care operators, public entities, liquor retailers and municipalities.

Interim

An interim commission comprised of legislators, legal and insurance representatives will explore tort liability.

MARYLAND

1986 Session Completed

Enacted

- Awards for noneconomic damages would be capped at $350,000 per SB 558.

- Prior approval of premium rates would not be required for three additional years per HB 329.

- SB 600 provides personal immunity for directors of charitable organizations provided the organization itself is insured.

- SB 899 will require that personal lines providers make coverage available to licensed operators of in-home day care facilities.

3746

- SB 1015 authorizes pooling and self-insuring for certain types of casualty risks, particularly local governments and nonprofit organizations.

MICHIGAN

Under Consideration

- HB 4550 - prescribes liability for retail liquor licensees under certain circumstances; to require security for that liability and to provide procedures, defenses and remedies.

- HB 4676 - health facilities with medical staff, including HMO's shall report to appropriate licensing board and to the department of health any disciplinary action taken against a member of the medical staff and relevant circumstances.

- HB 5163 - makes uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, when engaged in the exercise or discharge of a governmental function; defines and limits liability; authorizes the purchase of liability insurance; provides for defense of public officers, and their immunity in certain circumstances.

- HB 5154 - provides for a $225,000 limitation on non-economic damages in medical malpractice cases, unless one of the following circumstances exist: death, intentional tort, foreign object wrongfully left in body; injury involves reproductive system; discovery of claim was prevented by fraudulent conduct of health care provider; limb or organ was wrongfully removed; loss of bodily function.

  - trier of fact shall itemize damages into economic and non-economic.

  - provides a cost-of-living escalator in cap which is tied to the annual increase in the consumer price index.

  - permits a party named as one of multiple defendants in a medical malpractice case to file an affidavit of noninvolvement.

  - requires that plaintiffs and defendants in medical malpractice cases file an affidavit containing a written opinion from a licensed physician, dentists or other appropriate health care provider stating that the claim or defense has merit.

  - allows defendant to recover (contribution) from co-defendants any amount for which they may have been liable.

  - provides for implementation of pre-trial medication in all medical malpractice claims, regardless of dollar amount of claim.

  - addresses prejudgment and post judgment interest rates.

- provides that evidence that expense or loss was paid or is payable by collateral source is admissable after the verdict and before judgment is entered; court will be required to determine the amount of expense which has been paid by collateral source and then reduce that amount by an amount equal to the premiums paid for the benefit by the plaintiff, the plaintiff's family or employer.

- joint and several liability - the trier of fact shall determine the total amount of damages and the percentage of total fault of all parties regarding each claim as to each plaintiff, defendant and third party defendant. Then the amount shall be reduced by collateral source payments. If a party's share is uncollectible, then a reallocation of the uncollectible amount occurs (a party shall not be required to pay an amount which exceeds its percentage of fault).

- mandates structured payment provisions if judgment for future damages exceeds $250,000 gross present cash value, then court enters an order that defendant shall satisfy the entire judgment amount, less cost and attorneys fees, by purchase of an annuity contract; requires itemization of past economic and noneconomic damages, future damages.

MINNESOTA

1986 Session Completed

To the Governor

HF 1950 contains the following civil justice system modifications:

- imposition of a $400,000 cap on "intangible losses".

- provision for the automatic reduction from judgments of payments made from collateral sources.

- prohibition of victims seeking punitive damages in original complaints.

- allows the court to award costs in frivolous suits.

- exempts future damages from prejudgment interest.

SF 2078 accomplishes the following insurance regulation and provision modifications:

- creates a state risk management fund.

- requires P/C insurers to submit annual reports on liquor and product liability and medical malpractice and any other line designated by the commerce commissioner. These reports shall contain: written and earned premiums, investment income, incurred claims, operating and underwriting gains and losses.

8747

- o creates a state-run joint underwriting association (specifically for day care providers, foster homes, group homes and sheltered workshops).

- o In determining whether rates are or are not excessive, the commissioner will be authorized to utilize a definition of "less than 5 insurers writing more than 75% of the coverage" as non-competitive.

- o SF 1612 - authorizes the state's temporary j.u.a. to issue medical malpractice insurance to hospitals and nursing homes unable to get coverage.

MISSISSIPPI

1986 Session Completed

- o HB 755 - authorizes the Commissioner of Insurance to establish a plan for the availability of certain general liability insurance policies. In 1985, HB 983 established immunity for government employees and officials and modified sovereign immunity. HB 983 placed a statute of limitation on suits filed against the state.

MISSOURI

1986 Session Completed

Enacted

- o SB 663 - caps noneconomic damages awardable in medical malpractice suits at $350,000. This legislation also requires certain doctors to carry medical malpractice insurance and adds additional reporting requirements regarding disciplinary actions taken by hospitals against doctors. SB 663 requires submission to court of an affidavit from a licensed health care provider averring that a medical malpractice action is not frivolous.

- o HB 1435 and HB 1461 - create a Missouri Public Entity Risk Management Fund for local entities.

- o SB 647 - reestablishes sovereign immunity with several exceptions.

- o SB 701 - establishes a market assistance plan and authorizes establishment of joint underwriting associations for hard-to-get property insurance.

- o SB 739 - authorizes payment of prejudgment interest.

- o SB 742 - limits attorneys contingency fees and establishes a products liability act.

MONTANA

1986 Special Session Completed

Enacted

- SB 2 - authorizes bond issues for local government self-insurance funds.
- SJR 1 - authorizes an interim study commission to review public and private sector problems regarding liability insurance.
- HB 16 authorizes the Insurance Commissioner to establish a market assistance plan, and, if necessary, a joint underwriting association for provision of liability insurance coverage.

Legislation Introduced - Not Passed

- HB 21 would have created a state reinsurance program.

Interim

- In addition to interim study committee efforts, the June, 1986 special session on budgetary matters might overlap into liability insurance issues.

NEBRASKA

1986 Session Completed

- Established a major study commission to review the scope of the entire issue during the 1986 interim.

NEW HAMPSHIRE

1986 Session Completed

Enacted

HB 513 - will accomplish the following:

- place a $875,000 cap on pain and suffering awards;
- reduce the statute of limitations from six to three years;
- prohibit policy cancellations unless 60 days notice is given.
- permit judges to assess costs and attorneys fees from frivolous lawsuits and frivolous defenses.
- apply liability caps of $500,000 (per occurrence) and $150,000 (per person) to municipalities. When municipalities are found over 50% liable, joint and several liability will apply with only several liability applying when municipalities are 50% or less liable.

- o defines "good business practice" for purposes of defense in liquor liability lawsuits. Intoxicated drivers will need to show "gross" negligence in future suits against sellers and servers.

- o requires contingency fee agreements to be in writing with final costs set out at the end of litigation. Attorneys will be required statutorily to offer hourly rate and contingency fee options. Judges will be permitted to review contingency fee costs in all judgments exceeding $200,000.

- o outlaw punitive damages (existing practice).

- o set out the burden of proof in medical malpractice actions.

- o limit the liability of directors and officers of charitable organizations and societies.

HB 479 (Chapter 59) - relates to regulation of surplus lines insurance coverage.

HB 414 FN (Chapter 58) - provides for licensing of insurance consultants.

HB 360 - relates to credits for reinsurance.

Interim

HB 513 - also creates a Tort Reform Commission to evaluate the workability of the new law and to study issues, as the collateral source rule, not resolved in this session. The Commission will report in December, 1986 and December, 1987.

NEW JERSEY

Enacted

SB 1678 - grants immunity to volunteer unpaid athletic coaches' provided these individuals have participated in league-established safety and training programs.

Under Consideration

- o Legislation has been introduced in the Assembly proposing the following: structured settlements for awards exceeding $300,000; a $500 million per claimant or $1 million per occurrence cap on judgments entered against a public entity; immunity for volunteers and public officials; arbitration for all liability claims of $20,000 or less; rate filings based on New Jersey loss experience; and a graduated cap on "pain and suffering" awards in the private sector.

- o Assemblyman Bills 2357-2365 would apply various tort and regulatory reforms in the area of municipal liability. Besides establishing an excess insurance fund, the bills would modify joint and several liability and provide for structured settlements.

3751

- Senate legislation already introduced would create an excess insurance fund and require all public entities, except the state, to join. All public entities would be indemnified for claims exceeding $500,000.

- Other Senate legislation seeks to provide indemnification of hazardous waste contractors and modify stardards of negligence.

- The Assembly Insurance Committee is reviewing the feasibility of having premium increases justified through state claims experience in New Jersey.

- SB 346 - now in the Assembly would grant immunity to boards of trustees of nonprofit corporations carrying out their official duties.

Previous Actions

- Counties, municipalities and school boards may self-insure or join together in regional insurance pools.

- The Insurance Commissioner prohibited midterm cancellations and nonrenewals unless notice is given.

- A market assistance plan aimed at making liability insurance available for municipalities, day care centers, taverns and restaurants has been established.

NEW MEXICO

1986 Session Completed

Enacted

HB 178 - provides school districts with insurance coverage ATA cost savings and clarifies statutes related to the public school insurance authority.

SB 108 - creates District Court Arbitration Fund and provides for collection of an arbitration user fee.

HB 317 - extends the coverage which the risk management division is able to provide to school districts through the public school insurance authority.

SB 110 - caps attorneys fees for workers compensation cases at 20% of the first $5,000; 15% of next $5,000 and 10% of remaining benefits.

HB 244 - provides for certain limitations on liability for alcoholic liquor sales or service. Establishes caps of $20,000 for property damage, $50,000 for injury to or death of one person; $100,000 for injury to or death of two or more persons for each transaction or occurrence.

SB 105 - expands the applicability of the self-insurance and risk pooling provisions of the Municipal Code to include other political subdivisions and local public bodies.

Committee substitute for HB 226 - requires most insurers to submit quarterly financial reports to the superintendent of insurance. Based on these reports, the superintendent is required to compile an annual report for legislators.

HB 242 - creates a public child contractor liability fund.

SB 137 - creates Metropolitan Court Mediation Fund; provides for collection of certain costs to fund mediation programs for certain civil and criminal actions.

Study Groups

- o establishing a legislative liability insurance study committee.

NEW YORK

Enacted

Insurance and civil justice reforms are both included in omnibus legislation signed by the Governor in late June. SB 9351-A and A-10663 (Chapter 220, 1986 Session Laws) accomplish the following tort reforms:

- o compels courts to offset awards by amounts received from collateral sources (similar 1985 legislation regarding medical malpractice).
- o allows recovery of up to $10,000 in court costs and attorneys fees for frivolous suits and defenses in personal injury, property and wrongful death actions.
- o establishes "gross negligence as the determinant of liability of directors, trustees, officers of nonprofits".

The same legislation accomplishes the following insurance reforms:

- o creates a flex rating system to replace open, competitive ratemaking. Insurers must file rates to reflect enacted tort reforms within 90 days.
- o authorizes the Insurance Department to conduct a selected review of rates for the period 6/85 - 6/86. Mandates that every rate authorized since 6-1-86 be reviewed.
- o the flex rating system includes Commissioner - imposed "bands" on rate increases/decreases by line. If a proposed rate increase/decrease falls within the band, rates are filed and used. If the proposed rates are outside the band, rates are filed and subject to approval. Bands can be changed. Commercial, professional and public entity lines are included in flex-rating (not homeowners or automobile).
- o authorizes a discretionary joint underwriting association for troubled commercial, public entity and professional liability lines pursuant to Insurance Department determination of unavailability.

Requires establishment of a j.u.a. for public entities by 10-1-86 unless the Department determines that coverage is available.

- o prohibits unwarranted midterm cancellations.
- o requires P/C policies to extend a minimum of one year.
- o prohibits policy cancellations unless warranted (as when there is fraud - nonpayment - material charges, etc.). Lack of reinsurance is not in and of itself a reason to cancel unless solvency is threatened.
- o requires at least 60 days notice of notice to not renew or to affectuate a premium increase exceeding 10%.
- o enables policyholders to secure claims loss history.
- o permits municipalities, school districts and other public entities to form reciprocal insurers.
- o permits certain nonprofits and charitable/religious organizations to collectively purchase P/C coverage.
- o authorizes, through a "sunshine" provision, the Insurance Superintendent to report financial, and loss data and codefendants in suits regarding recreational, childcare, dram shop, municipalities owners, landlords and tenants, etc.
- o expedites access to provision of excess and surplus lines.

To The Governor

- o A. 10664 and S. 9391A, "toxic tort" legislation, includes the following proposals related to toxic torts and torts generally:
  - o extension of statute of limitations for filing toxic tort actions from 3 years after exposure to 3 years after discovering an injury.
  - o in personal injury actions, joint and several liability is inapplicable if the plaintiff is 51% or more liable (with some exceptions).
  - o authorization of structured settlements when awards exceed $250,000.
  - o A. 11584 and S. 9470 affect medical malpractice as follows:
    a) allow the Insurance Superintendent to establish medical malpractice rates.
    b) phase in issuance of claims - made policies.
    c) require certificates of merit and encourage arbitration in order to discourage frivolous suits.
    d) enhance examination processes regarding physician misconduct.

NORTH CAROLINA

1986 Special Session Completed

- Authorized, the Insurance Commissioner, on a standby basis, to establish joint underwriting associations.
- Authorized the Insurance Commissioner to extend the state's FAIR plan to all areas of the state.
- Called for a referendum on a state radioactive repository site act.

OHIO

Enacted

- HB 875 permits political subdivisions to participate in joint liability insurance pooling arrangements.

Under Consideration

- The House Select Committee on the Civil Justice System is investigating various aspects of the tort system, including legislation from both houses regarding the contractual inclusion/exclusion for punitive damages in policies.
- The House Insurance Committee is reviewing various insurance regulation matters.

HB 872 - permits state-chartered banks and state chartered savings and loan associations to own part or all of the stock of domestic life or property and casualty insurance companies.

HB 873 - creates the Ohio Insurance exchange as a means of permitting underwriters to exchange insurance contracts of reinsurance, direct insurance or risks located outside the U.S. and direct insurance of excess and surplus lines written in jurisdictions other than Ohio. Also establishes the Ohio Insurance Exchange Immediate Access Security Association for the purpose of taking prompt action for the settlement of claims in the event of the insolvency of a syndicate.

HB 874 - creates the Ohio Commercial Insurance Joint Underwriting Association.

HB 876 - establishes prior approval for insurance rates.

HB 877 - adopts NAIC Life and Health Insurance Guaranty Association Model Act.

HB 878 - requires the Superintendent of Insurance to request the Attorney General to take judicial action to remedy violations of insurance laws.

HB 895 - specifies that, unless coverage for punitive damages is expressly provided in an automobile or motor vehicle or other casualty or liability insurance policy, the policy does not include that coverage.

Sub. SB 332 - specifies that, unless coverage for punitive damages is expressly excluded in an insurance policy, it is covered.

HB 878 - requires the Superintendent of Insurance to request the Attorney General to take judicial action to remedy violations of insurance laws.

Am. SB 329 - permits defendant to introduce evidence of specified collateral benefits, permits plaintiff to introduce evidence of any monetary amount he paid or contributed to obtain the right to receive these benefits; requires judge or jury to consider such evidence presented in determining amount of compensatory damages recoverable by plaintiff.

Am. SB 331 - permits a court in a comparative negligence action to admit evidence relating to the negligence of persons who are not parties to the action, who have settled with the plaintiff, or who have entered into a release agreement with the plaintiff; and eliminates joint and several liability for entire judgments in comparative negligence cases.

Sub. SB 333 - requires the jury or court to specify future damages portions of awards of compensatory damages and permits a motion which orders periodic payment where future damages are in excess of both $100,000 and 25% of total compensation damage award; authorizes court to approve a variety of payment plans.

Sub. SB 334 - product liability action to allow recovery of damages against a product manufacturer or seller, prescribes the grounds for liability and defenses; establishes procedures for determination of comparative responsibility.

Sub. SB 338 - punitive damages prohibits recovery of punitive or exemplary damages in wrongful death cases; limits recovery to situations where the plaintiff recovers compensatory damages and is entitled under specific statute or common law; limits recovery to an amount equal to that of compensatory damages recovered; requires proof beyond a reasonable doubt; requires courts to determine amount while juries determine right of recovery.

SB 339 - establishes a maximum permissible contingent fee that may be agreed to, charged and collected for legal services.

SB 366 - makes a noncompensated trustee of a charitable organization immune from liability in civil damages for injury, death, or loss to persons or property.

HB 805 - prescribes limits on attorney contingent fees in medical malpractice cases, and raises from $200,000 to $1,000,000 the statutory ceiling on recoveries in medical malpractice cases.

HB 879 - permits courts in wrongful death and other tort cases to issue orders to the litigants to submit final offers of settlement to each other; specifies circumstances under which a case must proceed to trial; award of attorneys' fees;

HB 881 - permits introduction into evidence of specified collateral benefits.

HB 897 - enacts a modified version of the Model Periodic Payment of Judgments Act in which future damages may be paid in periodic installments and periodic adjustments would be made to reflect fluctuations in the value of the dollar.

HB 945 - places limitations on the fees of defense lawyers in medical claims cases.

OKLAHOMA

1986 Session Completed

Enacted

SB 488 accomplishes the following insurance regulation changes:

- o requires the 10 largest P/C insurers to annually submit reports on premiums, losses, settlements, judicial dispositions, etc. among 11 coverage categories.
- o requires the 50 largest P/C insurers to annually submit data on premiums, losses, judgments over $250,000, etc. on a less detailed, more restructed basis than for the 10 largest insurers.
- o implements unfair claims settlement practices statutory language and permits the Insurance Commissioner to require periodic reports from violators.

SB 488 accomplishes the following civil justice system changes:

- o limits punitive damages to actual damages and applies a stricter standard for justifying consideration of punitive damages.
- o allows judges to direct juries to itemize verdicts (constitutional prohibition on a mandate).
- o allows prevailing parties to recover up to an aggregate of $10,000 in attorneys fees and court costs in judicially-determined frivolous suits.
- o amends the interest payable on actual damages sought from 15% to the T-Bill rate plus 4%.

HB 1983 authorizes the Insurance Commissioner to establish a market assistance plan.

Interim

SB 488 creates an 18-member (10 legislators - 8 public members) Select Committee on Insurance Rates and Tort Claims.

PENNSYLVANIA

Under Consideration

- Senate Bills 1391-95 have been introduced. Collectively, they propose to accomplish the following:

  1) authorize establishment of a joint underwriting association for all lines of unavailable liability coverage.
  2) require 60 days notice of insurance premium rate increases.
  3) require disclosure of insurance company loss experience within the state.
  4) establish a central risk management agency - provide advice to local governments.
  5) establish a joint self-insurance fund for municipalities and authorize cities to join.

- The House has completed a comprehensive hearing process, begun last September, which has looked at key problems, major causes and options to resolve the crisis. Reportedly, a comprehensive tort reform package could emerge from this effort.

SOUTH CAROLINA

1986 Session Completed

Enacted

- HB 2266 restores some of the state's sovereign immunity by reestablishing approximately 20 categorical, qualified immunities.

  It also places monetary liability limits on the state and its political subdivisions of $250,000 per incident and $500,000 per occurrence.

Legislation Considered - Not Passed

- SB 895, originally calling for numerous medical malpractice tort reforms, was revised to limit punitive damages to actual damages; establish preaction discovery and set up a certification process determining whether suits are frivolous. Final passage did not occur.

Previous Action

- South Carolina's Insurance Commissioner has been empowered to establish a joint underwriting association for any professional group unable to secure liability insurance coverage. This authority was previously restricted to j.u.a. formation for health care providers.

SOUTH DAKOTA

1986 Session Completed

Enacted

- SB 280 which will require pre-discovery, fact-finding hearings before a judge to prove that there was willful and malicious conduct in order to file for punitive damages.
- SB 281 authorizes structured settlements for awards exceeding $100,000.
- SB 282 will cap medical malpractice awards at $1 million. (Includes all recoverable damages).
- SB 216 permits establishment of self insurance pools for public entities for purposes of securing liability coverage. This can occur only if a master insurance contract is not purchased.
- HB 1106 revises provisions relating to property insurance policy nonrenewal notice. Increases notice time from 20 days to 30 days, effective 7-1-88 and from 20 days to 45 days for the period 7-1-86 to 6-30-88.
- Waiver of sovereign immunity for public entities, other than state, will occur only to the extent that said entities have purchased liability coverage (SB 233).

Legislation Considered - Not Passed

Bills which were introduced but were not passed included legislation abolishing the doctrine of joint and several liability (HB 1261), limiting punitive damages (SB 269), reforming the tort system as it pertains to public entities (HB 1278), mandating an offset for payment of special damages in certain circumstances (SB 279), creating a joint underwriting association for medical malpractice (HB 1269) and requiring insurers to file case reports with the Insurance Division (HB 1281).

Interim

1986 Summer Interim Judiciary Committee - A study of the entire area of liability insurance, including relative legislation considered by the Sixty-First Legislative Session; a review of what information is needed by the division of insurance to regulate insurance companies' rates; and a study of alternative ways to regulate costs of defending tort claims lawsuits. The committee has met once with a second scheduled for early July.

TENNESSEE

1986 Session Completed

Enacted

- HB 1582 (Public Chapter No. 656) will prohibit cancellation of or failure to nonrenew commercial risk insurance policies with some exceptions.
- Immunity from suit for directors of nonprofit organizations (exempt from federal taxation), of governing bodies of electrical cooperatives and electrical membership corporations is authorized in HB 1940.
- Regarding dram shop, HB 1199 prohibits any judge or jury from pronouncing any damages against an alcohol seller unless it is ascertained that the sale of intoxicating beverages was the proximate cause of subsequent injury or death.

SB 1702 (Public Chapter No. 726) - all members of boards, commissions, agencies, authorities, and other governing bodies of any governmental entity, created by public or private act, whether compensated or not, shall be immune from suit arising from activities of the entity unless conduct amounts to willful, wanton or gross negligence.

SB 1854 (Public Chapter No. 730) - provides immunity for local educaton agency employees, including board members, superintendents, teachers and nonprofessional staff members for suits arising from detection, management, or removal of asbestos.

HB 1199 (Public Chapter No. 519) - prohibits any judge or jury from pronouncing damages against an alcohol seller unless it is ascertained that the sale of intoxicating beverages was the proximae cause of subsequent injury or death.

SB 1458 - (Public Chapter No. 535) raises the capital and surplus requirements of insurance companies in Tennessee.

Interim

SR 43 directs a special committee to study liability insurance issues including (but not limited to) availability, coverage cost, liability limits and litigation.

TEXAS

Not In Session in 1986

Interim

- A market assistance plan for hard-to-get lines of liability coverage has been established.

3761

- o A joint legislative committee on Liability Insurance and Tort Law and Procedure Reform has been established and conducted five meetings to date. Four more meetings are currently scheduled with November 15, 1986 targetted as a final reporting date.

- o The State Board of Insurance has initiated a closed claims survey that will review about 73% of the liability coverage provided in the state for the years 1983-1985.

- o Examination of the state's ability to create a state insurance pool for governmental units is underway by the State Board of Insurance.

UTAH

1986 Session Completed

Enacted

- o Repealed joint and several liability (SB 64).

- o Established a $100,000/$300,000 cap on dram shop liability and set a 2-year statute of limitation (SB 182).

- o Authorized establishment of market assistance plans and joint underwriting associations (SB 91).

- o SB 111 limits noneconomic damages to $250,000 in medical malpractice judgments while SB 155 establishes structured settlements for medical malpractice judgments only.

- o Limited directors' and officers' liability through revamped standards of care (SB 214). Governor vetoed.

Legislation Considered - Not Passed

- o Modifications to statutes of limitation, mandatory arbitration and establishment of pretrial screening panels were introduced but failed to pass.

Interim

- o An interim committee tackled this subject in 1985 and another has been formed for 1986.

VERMONT

1986 Session Completed

Enacted

- o Pooling by municipal governments is authorized via HB 8641.

- o HB 8657 empowers the Insurance Commissioner to establish a joint underwriting association for a broad array of hard-to-get lines of liability insurance coverage.

Legislation Introduced - Not Passed

Unsuccessful attempts to cap attorneys' contingency fees and limit noneconomic damages were made.

Prior Action

A market assistance plan was established in January.

VIRGINIA

1986 Session Completed

- o No major action in 1986 session.
- o Will establish an interim study committee on the entire liability insurance issue.

WASHINGTON

1986 Session Completed

Sent To Governor

SB 4630 - accomplishes the following:

- o Caps, noneconomic damages per a statutory formula. The estimated cap range is $117,000 - $493,000. The formula is .43 x average annual wage (currently $18,029) x plaintiff's life expectancy (no less than 15 years; use Insurance Commissioner's mortality table).
- o Abolishes claims involving joint and several liability except for the following:
  - a) hazardous waste and solid waste disposal sites;
  - b) business torts; and
  - c) manufacturers of generic products.
- o Accelerates the statute of limitations for contractors.
- o Authorizes structured settlements for all judgments exceeding $100,000.
- o Establishes a voluntary market assistance plan requiring participation of 25 admitted or non-admitted companies.

HR 2080 and 2083 - respectively authorize the establishment of a joint underwriting association and self-insurance mechanism for provision of liability coverage for day care providers.

3941

SB 3636 - enables the Insurance Commissioner's office to be funded from dedicated rather than General Revenue sources.

HB 1972 - authorizes local governments to self-insure.

SB 4541 - requires prior notice to policyholders of cancellation and further requires 20 days prior notice of rate and form changes before policy renewal anniversary dates.

Legislation Considered - Not Passed

Among the bills failing to pass was legislation giving the Insurance Commissioner additional time to review rate applications, and to base rates on Washington State experience; authorizing establishment of joint underwriting associations for any hard-to-get line of coverage; memorializing Congress to modify the McCarran-Ferguson Act; and compelling all insurance companies to file all financial information with the National Association of Insurance Commissioners.

WEST VIRGINIA

1986 Session and Special Session Completed

To The Governor

- Regular session legislation (SB 714) caps noneconomic damages and pain and suffering awards in medical malpractice judgments at $1 million per incident. HB 149 (special session) permits a judge to instruct a jury regarding these caps.

- SB 714 prohibited insurers from cancelling or nonrenewing health care provider policies unless insurers could prove that the risk of loss had increased or that they could not back up their own risk with reinsurance. HB 149 removes most causal and durational restrictions on nonrenewals.

- SB 714 required expanded disclosure of claims, investments, judicial dispositions, etc. related to West Virginia. The legislation further required the Insurance Commissioner to conduct public hearings whenever rates were expected to increase 10% or more with verification of past loss experience in medical malpractice settlements and judgments required. HB 149 reduced reporting requirements to profit and loss, reserve and surplus data on an aggregate rather than company basis. Public hearings on rate increases exceeding 10% must be held within 60 days of the rate filing.

- HB 149 eliminates joint and several liability for individual defendants who are 25% or less responsible.

- Other special session legislation, SB 3, authorizes the following regarding the state's political subdivisions:

- o individual or collective self-insurance; and
- o purchase of liability insurance through the State Board of Insurance and Risk Management.

- o SB 3 also limits noneconomic damages in suits involving political subdivisions to $500,000, deploys the 25% rule (see HB 149 above) regarding joint and several liability and lays out standards for liability immunity of political subdivision employees.

Interim Studies

A legislator/citizen interim committee on liability insurance will be organized in late June.

WISCONSIN

1986 Session Completed

To The Governor

The legislature has approved medical malpractice legislation during its recent special session. Major ingredients of the medical malpractice legislation include:

- o $1 million cap on noneconomic damages;
- o sliding scale for attorney contingency fees (from 1/3 of first $1 million if proving negligence, to 25% of damages if defendant admits negligence, to 20% of damages exceeding $1 million).
- o elimination of pretrial screening panels to be replaced with a voluntary, non-binding mediation process.

Special session legislation (AB 8) also accomplishes the following:

- o authorizes the establishment of risk sharing pools for liability insurance coverage for public and private sector entities. Risk sharing pools cannot be authorized to produce coverage for risks the Insurance Commissioner determines to be "uninsurable".
- o increases minimum capital and surplus requirements.
- o increases from 30 days to 60 days, the notice period for mid-term cancellations.

Interim

A final report from an Insurance Commissioner's Task Force on Property/Casualty Insurance is due in July, 1986. The final report will include recommendations. Three subcommittees, on Civil Justice Reform, Pools and MAPs and Industry Actions, have already reported.

The Legislative Council is considering an interim study of the civil justice system.

WYOMING

1986 Session Completed

Sent To Governor

- HB 12 will modify the standards of care used to determine medical malpractice.
- HB 13 will remove individuals legally supplying alcoholic beverages from liability for resultant damages caused by an individuals consuming the alcoholic beverages.
- HB 14 will authorize courts to determine frivolous suits. Plaintiffs in frivolous suits could be made liable for payment of reasonable court expenses and attorneys fees.
- HB 15 provides for an affidavit of non-involvement as a summary means to obtain early dismissal of suits against defendants who are clearly not involved in the occurrence giving rise to the tort claim.
- HB 38 creates statutory definitions of unfair insurance claims practices.
- HB 39 grants any officers, commissioners or board members of government and nonprofit entities immunity from liability for any action, omission or inaction of the respective government or corporate body.
- HB 40 establishes pretrial screening panels for medical malpractice suits.
- HB 44 modifies the state's sovereign immunity and liability limits.
- HB 59 makes certain entities not liable for injuries incurred at amateur rodeos unless there is willful neglect.
- SF 17 repeals the doctrine of joint liability.
- SF 21 and SF 26 respectively create state and local government self-insurance programs and establish pools for state and local government entities.
- SF 73 places tighter restrictions on cancellation and renewal of policies.
- SF 69 prohibits midterm cancellations with some exceptions, such as nonpayment of premiums. Authorized cancellations must be preceded by a 10-45 day notice to policyholders. A 45-day notice with statement of reasons is required for nonrenewals.

Legislation Considered - Not Passed

Bills restricting punitive damages, capping awards, limiting noneconomic damages, restricting attorneys fees, placing moratoria on suits against the state and authorizing joint underwriting associations were introduced but did not pass.

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July 10, 1986

Testimony before the Special Com[illegible]n Tort Reform and Liability Insurance

Mr. Chairman and Members of [illegible]

My name is Dan Ramlow and I am Assistant Manager of the Kansas Contractors Association, representing more than [illegible] heavy, highway and utility contractors throughout Kansas.

Since tort reform is increasingly being examined as a possible solution to the liability insurance crisis, our national office determined it was desirable to examine the issue from the construction industry's perspective. Consequently, a special AGC Task Force on Tort Reform was established to examine the relationship between the civil justice system and the liability insurance crisis and evaluate the possible effects tort reform would have on the availability, affordability and adequacy of liability insurance for contractors.

While there is agreement that a liability insurance "crisis" exists, and partial agreement on some of the causes, there is no unanimity concerning the remedies. At one extreme, the insurance industry cites reform of the legal system as virtually the exclusive answer. At the other extreme, insurance industry critics contend that the civil justice system needs no reform, and call instead for greater regulation of, and reforms in, the insurance industry.

Attachment 9

After examining the problems relating to liability insurance and the civil justice system, the Task Force concludes that there is a relationship between problems in the nation's civil justice system and the problems of availability, affordability and adequacy of liability insurance.

The Task Force also concludes, however, that the insurance industry's response to tort reform may not be an immediate or significant reduction in premiums or increases in the availability and adequacy of liability coverage.

Nevertheless, the Task Force agrees that:

1. the civil justice system is in need of reform;
2. tort reform is a desirable goal and much broader than just as an instrument for abatement of the liability insurance crisis;
3. tort reform measures should have a beneficial effect on liability insurance over the long term;
4. tort reform will prove of benefit to the construction industry and be in the best interest of the nation.

The AGC Task Force on Tort Reform came up with thirteen tort reform measures with a recommendation for their adoption at the state level. In the interest of time, I will not detail each of these recommendations. I have given each member of the committee a synopsis of the Task Force's report, as well as a copy of the report itself.

I highly recommend the report's reading. Although some of the recommendations do not pertain specifically to Kansas, in that Kansas has already adopted some of them, we offer this report as one way to divert an ever-increasing crisis and thus benefit the state as a whole.

I thank you in advance for the opportunity to present our industry's unique viewpoint on tort reform. If there are any questions, I will attempt to provide answers from our industry's standpoint.

REPORT OF THE AGC TORT REFORM TASK FORCE

presented to the

Special Committee on

Tort Reform and Liability Insurance

of the

Kansas Legislature

by the

Kansas Contractors Association

July 10, 1986

Topeka, Kansas

Attachment 10

AGC TORT REFORM REPORT—SYNOPSIS

Since tort reform is increasingly being examined as a possible solution to the liability insurance crisis, AGC determined it was desirable to examine the issue from the construction industry's perspective. Consequently, a special AGC Task Force on Tort Reform was established to examine the relationship between the civil justice system and the liability insurance crisis and evaluate the possible effects tort reform would have on the availability, affordability and adequacy of liability insurance for contractors.

With the exception of a federal product liability statute the following tort reform measures are recommended for adoption at the state level.

- **Return to fault based system of liability** — Negligence should be re-established as the applicable standard of liability in non-product liability cases. Strict liability should not be extended to non-product cases, such as professionals providing services. In product cases, strict product liability should be limited to the traditional basis in which a product is found defective and the defect makes it unreasonably dangerous.

- **Restrict Joint and Several Liability Standard** — AGC recommends a return to a several liability standard in which each defendant is liable only for that portion of the injury he caused. Joint and several liability should be applied only where it can be shown that the defendants acted together, in concert, to cause the plaintiff's injuries.

- **Contributory vs. Comparative Negligence** — AGC opposes the contributory negligence standard and favors a comparative fault standard which allows a plaintiff to recover only to the extent of the defendant's negligence.

- **Limit on Non-Economic Damages** — A reasonable limit, in the form of a cap, should be placed on all non-economic damages. The cap should not become a "floor" and n conomic damages should not be automatically awarded as a matter of course in all cases.

- **Restrictions on Punitive Damages** — In lieu of punitive damages, criminal and regulatory sanctions should be strengthened to create adequate deterrents and punishment for willful and intentional misconduct. In the absence of such sanctions, restrictions should be placed on punitive damages. Such restrictions should limit the amount of such damages; define the standards of conduct and proof required to support an award; eliminate multiple punitive damage awards; and provide that awards for punitive damages not be payable to the plaintiff.

- **Periodic Payment of Future Economic Damages** — Awards for future economic loss should be paid on a periodic, scheduled basis. Defendants would be better able to absorb major adverse judgments and plaintiffs would be guaranteed a steady recompense for economic loss.

- **Reduction of Awards for Recoveries From Collateral Sources** — Collateral sources of compensation related to the same injury, where such sources are not largely financed by the plaintiff, should be considered by the court to reduce the amount of an award. Such consideration should be limited to collateral sources where the third party source is not subrogated to that portion of a plaintiff's claim.

- **Legal Fees** — Sanctions against frivolous suits would be a more effective means for eliminating the incentive to file suits without merit than restrictions on legal fees.

- **Create Sanctions Against Lawyers who Initiate Actions Without Reasonable Grounds for Recovery** — Attorneys who file actions in which no reasonable grounds for recovery exist should be subject to sanctions such as treble costs, including defendant's attorney's fees.

- **Promote Alternative Dispute Resolution Procedures** — Alternative dispute resolution procedures should be promoted and encouraged, and as they prove to be beneficial, made mandatory in certain cases.

- **Federal Product Liability Statute** — AGC recommends enactment of a federal product liability statute that would establish a uniformity to product liability laws throughout the nation. The Administration has proposed the Federal Product Liability Reform Act of 1986. The purpose of the legislation is to protect the free flow of products in commerce and includes many of the tort reform measures deemed favorable by the task force. AGC supports this legislation.

- **Establish Uniform Statutes of Limitations** — AGC recommends the establishment of a uniform statute of limitations for all states.

Report of AGC Tort Reform Task Force

Formation of Task Force

During the past eighteen months contractors have encountered increasing difficulty in obtaining adequate and affordable liability insurance. AGC's Insurance Industry-AGC Joint Committee and Insurance Information Committee have been examining what has become known as the "Liability Insurance Crisis."

In late 1985, the White House announced the formation of a Tort Policy Working Group at the Justice Department to analyze the nation's civil justice system and its effect on liability insurance rates and availability. The President asked the Working Group to recommend possible tort reform measures which could have a positive effect on insurance availability and affordability.

With tort reform being examined as a possible solution to the liability insurance crisis, AGC's Executive Committee agreed that this issue should be examined from the construction industry's perspective. Since the issue did not fall directly within the scope of activities of either of AGC's insurance committees, the Executive Committee established a Task Force to examine the relationship between the civil justice system and the liability insurance crisis and evaluate the possible effects tort reform would have on the availabilty, affordability and adequacy of liability insurance for contractors.

Liability Insurance Crisis - Task Force Analysis

"Availability", "Affordability", and "Adequacy" are the three principal ingredients of the liability insurance problem. Coverage limits have been drastically reduced, premiums drastically increased, and some forms of coverage are not available at any price. The recognition that the "crisis" exists is fairly universal. Agreement on its causes, effects and remedies is not.

One fact on which there is agreement is the increasing underwriting losses experienced by the property/casualty insurers during the past four years. As to the cause of this development, there is at least partial agreement. Insurance companies concede that during the past four years premiums charged were unrealistically low compared to the risks being incurred. The acknowledged reason was the industry's competitive price cutting due to the desire to maximize cash flow for investment purposes. With high interest rates, investment opportunities were exceptional. Insurance companies traditionally make far more of their profits on investments than on premiums received. Underwriting losses, (i.e. losses paid plus expenses minus premiums collected) are not unusual and a portion of investment income has often been used to offset such losses. With the decline in interest rates,

however, investment gains declined, and could not overcome the increased underwriting losses in 1984 and 1985.

The property/casualty insurance industry contends that in 1985 it experienced underwriting losses of $25.2 billion with investment income of $19.7 billion. The industry, however, has also acknowledged that it has estimated it will receive $1.9 billion in tax refunds and $5.3 billion in realized capital gains. Added together, all of these figures equal a $1.7 billion profit. Critics contend that when dividends paid to policy holders ($2.1 billion), which are largely voluntary payments, and unrealized capital gains are added, the profit figure increases to $ 5 billion. The insurance industry disputes the inclusion of these two items on the grounds it would violate generally accepted accounting principles. The insurers contend that operating profit/loss is the only reliable indicator of how the property/ casualty industry is doing.

In assessing the overall financial condition of the insurance industry, two additional factors are pertinent. While the Dow Industrial Average experienced a 25% gain in 1985, Best's Index on property/casualty companies jumped 50%. The annual rate of return (net income after taxes as a percent of net worth,) however, was 1.8% in 1985 for the property/casualty industry compared to the median for Fortune 500 companies of 13.6%. The comparable rate of return for the property/casualty industry from 1975 to 1984 was 10.9%.

Insurance industry critics contend that the financial plight of the insurance industry has been exaggerated and, to the extent it exists, is self made. The Federal Tort Policy Working Group concluded that the "crisis" is not a "crisis" for the insurance industry. While the property/casualty industry is suffering underwriting losses they do not constitute a major threat to the financial viability of the industry, according to the Federal Tort Policy Working Group. The "crisis" exists for the insureds who cannot obtain the insurance coverage they need at prices they can afford. To the extent they are forced to operate under-insured, or worse, uninsured, the "crisis" is for victims of tortious conduct who may find that the parties liable cannot pay their damages.

Insurers claim that the paramount factor impacting the liability insurance system today is the explosive growth in litigation in the U.S. and the associated problem of expanding concepts of liability. Insurers attribute the "crisis" in the liability system to this "crisis" in the civil justice system which they contend has seen the number of cases filed and the size of judgements awarded increase alarmingly.

The industry's critics contend that the cry for Tort Reform is little less than a smoke screen to justify exorbitant premium

increases to recoup past losses. In recent testimony before the House Ways and Means Committee, the General Accounting Office (GAO) reported that its analysis revealed that in 1984, the year when underwriting losses were the greatest, the property/casualty industry could have reached a break even point with only an approximate 30% increase in premiums. The insurance industry's response is that premium increases have not been implemented to recoup past losses, but rather represent a realistic projection of future exposures due to the unpredictable trends within the civil justice system. It is this lack of predictability that is most often cited in criticism of our courts and as justification for the substantial increase in premiums.

Some of the problem with respect to capacity of insurance coverages available is also attributable to reinsurers restricting the amount of risk they will absorb. Foreign reinsurers, where much of the reinsurance market exists, also cite as reasons for such restrictions an American legal system out of control with no element of predictability. It must also be noted, however, that other factors such as high losses world wide during the past two years due to natural disasters and civil strife, as well as the strength of the U.S. dollar in comparison to the British Pound Sterling may also be significant factors contributing to the reduction in available reinsurance capacity.

Task Force Conclusions

While there is agreement that a liability insurance "crisis" exists, and partial agreement on some of the causes, there is no unanimity concerning the remedies. At one extreme, the insurance industry cites reform of the legal system as virtually the exclusive answer. At the other extreme, insurance industry critics contend that the civil justice system needs no reform, and call instead for greater regulation of, and reforms in, the insurance industry.

After examining the problems relating to liability insurance and the civil justice system, the Task Force concludes that there is a relationship between problems in the nation's civil justice system and the problems of availability, affordability and adequacy of liability insurance.

The Task Force also concludes, however, that the insurance industry's response to tort reform may not be an immediate or significant reduction in premiums or increases in the availability and adequacy of liability coverage.

Nevertheless, the Task Force agrees that:

1. the civil justice system is in need of reform;

2. tort reform is a desirable goal and much broader than just as an instrument for abatement of the liability insurance

crisis;

3. tort reform measures should have a beneficial effect on liability insurance over the long term;

4. tort reform will prove of benefit to the construction industry and be in the best interest of the nation.

Tort Reform Recommendations - With the exception of a Federal Product Liability statute the following tort reform measures are recommended for adoption at the state level.

1. Return to fault based system of liability

The trend toward no-fault liability continues to accelerate. Tort law was originally based upon the premise that an individual should be compensated for all economic injuries caused by the fault of others. While "fault" has historically been based on a concept of "wrong doing", the current movement is toward finding "fault" wherever there has been an injury. This has been accomplished by courts defining new duties and responsibilities, after the fact, that create fault where no fault had previously existed. The element of causation has been further eroded by a drastic expansion of strict liability. The result is that liability is imposed on parties not because they have committed a "wrong", or because their actions have caused injury, but rather because an injury has occurred and they have been deemed capable of paying for them.

The Task Force recommends adherence to the principle that individuals should be responsible for their own actions and the injuries they cause. Consequently, the Task Force recommends that negligence be re-established as the applicable standard of liability in non-product liability cases. Strict liability should not be extended to non-product cases, such as professionals providing services. In product cases, strict product liability should be limited to the traditional basis in which a product is found defective and the defect makes it unreasonably dangerous. Manufacturers should only be liable for uses of their products that are both reasonable and forseeable and should not be liable for defects which have been the subject of adequate warnings.

2. Restrict Joint and Several Liability Standard

Historically, joint and several liability existed only where there was a "concert of action" between defendants, and they acted together to cause injury. The concept has been expanded, however, to impose liability upon each defendant, for the full amount of a judgment, regardless of their connection to the injury or the extent of their fault. A plaintiff can thus recover the full award from any of the defendants, no matter how minimally at fault. The result has been the inclusion of many parties

as defendants simply because they are perceived to possess the ability to pay. This "deep pockets" approach needs to be eliminated.

The Task Force recommends a return to a several liability standard in which each defendant is liable only for that portion of the injury he caused. Joint and several liability should be applied only where it can be shown that the defendants acted together, in concert, to cause the plaintiff's injuries.

3. Contributory vs. Comparative Negligence

Under the common law, a plaintiff who himself was negligent, however slight, and contributed to his own injury, could not recover anything. This approach was deemed to be unreasonably harsh and a new doctrine of comparative fault was developed. Comparative fault operates to assure that each party, including the plaintiff, is liable for its own fault. The comparative fault doctrine, however, along with the joint and several liability standard, has been expanded to allow plaintiffs to fully recover their losses regardless of the magnitude of their own misconduct.

Consistent with the basic principle that parties should be responsible for their own actions and injuries they cause, the Task Force opposes the contributory negligence standard and favors a comparative fault standard which allows a plaintiff to recover only to the extent of the defendant's negligence.

4. Limit on non-economic damages

The tort system was designed to compensate a victim for the damages he suffered. No limit should be placed on the amount of damages he can recover for economic loss. Non-economic damages, however, such as pain and suffering, mental anguish, and emotional distress, unlike economic damages, are subjective and defy accurate quantification. Great variations in the amounts awarded for similar injuries occur and contribute to the unpredictability of the liability system.

The Task Force's recommendation is that plaintiffs should be entitled to reasonable compensation, including compensation for non-economic damages. In view of the problems associated with such non-economic damages, however, the Task Force favors placing a reasonable limit in the form of a cap, on all non-economic damages. The cap should not become a "floor", and non-economic damages should not be automatically awarded as a matter of course in all cases.

5. Restrictions on Punitive Damages

Punitive Damages were originally intended as a deterrent to punish a party for willful and intentional misconduct and were not intended as additional compensation for the plaintiff. Over the years the criteria for awarding punitive damages has

become clouded. According to a study cited by the Federal Tort Policy Working Group, awards of punitive damages have increased in size and frequency in recent years. The result has been characterized by the American Insurance Association and the Alliance of American Insurers as "windfalls" for plaintiffs and attorneys. In class action suits, or where there are multiple plaintiffs in the same or separate actions against the same defendants, multiple awards of punitive damages further distort the original intent of punitive damages and serve to create another incentive to litigate.

In lieu of punitive damages, the Task Force recommends strengthening criminal and regulatory sanctions to create adequate deterrents and punishment for willful and intentional misconduct. In the absence of such sanctions, the Task Force recommends that restrictions be placed on punitive damages. Such restrictions should limit the amount of such damages; define the standards of conduct and proof required to support an award; eliminate multiple punitive damage awards; and provide that awards for punitive damages not be payable to the plaintiff.

6. Periodic payment of future economic damages

Traditionally, damage awards had to be paid lump sum. As awards have increased this has become a burden to defendants. The Task Force believes that awards for future economic loss, should be paid on a periodic, scheduled basis. Defendants would be better able to absorb major adverse judgments and plaintiffs would be guaranteed a steady recompense for economic loss.

7. Reduction of awards for recoveries from collateral sources.

In many jurisdictions courts are prohibited from considering other sources of recovery for the same injury, such as worker's compensation, medical insurance, social security or veteran's disability benefits. These collateral sources of recovery constitute a form of double recovery for plaintiffs. Where such collateral sources are not financed by the plaintiffs themselves, but by the government, employers, or other third parties, the basis for the collateral source rule is questionable.

The Task Force recommends that collateral sources of compensation related to the same injury, where such sources are not largely financed by the plaintiff, be considered by the court to reduce the amount of an award. Such consideration should be limited to collateral sources where the third party source is not subrogated to that portion of a plaintiff's claim.

8. Legal fees

The contingent fee arrangement allows access to the courts to persons who have been injured but could not otherwise pay for an attorney. The arrangement, however, also clearly serves as an incentive to file law suits without merit and name parties only on the basis of ability to pay in the hope of obtaining an out of court settlement.

The Task Force considered recommending the establishment of a sliding scale for attorneys fees so that as the amount of an award increases, the percentage of the contingency fee decreases. AGC policy, however, favors a free marketplace and the Task Force believes that contingent fee arrangements fall within, and are consistent with this policy. The Task Force believes that sanctions against frivolous suits would be a more effective means for eliminating the incentive to file suits without merit.

9. Create sanctions against lawyers who initiate actions without reasonable grounds for recovery.

The Task Force recognizes that many lawsuits are filed by plaintiffs and attorneys simply in the hope that defendants will settle to avoid the expense of litigation and the risk of an unpredictable jury award. The Task Force recommends that attorneys who file actions in which no reasonable grounds for recovery exist should be subject to sanctions such as treble costs, including defendant's attorney's fees. Such sanctions would not discourage legitimate claims, but would help to curb potential abuses spurred by a contingent fee system that often encourages law suits.

10. Promote alternative dispute resolution procedures.

Many cases can be resolved without court proceedings. Considering the high cost of litigation, alternative dispute resolution procedures, such as negotiation, mediation, arbitration and mini-trials offer promise as means to control costs. The Task Force recommends that such procedures be promoted and encouraged, and as they prove to be beneficial, made mandatory in certain cases.

11. Federal Product Liability Statute

Product Liability laws are different in the various states. A manufacturer whose products are sold in interstate commerce can be held liable for the same product in different ways in different states. The Department of Justice has concluded that excessive product liability risks currently exist which have an adverse impact on interstate commerce. To remedy this problem the Task Force recommends enactment of a Federal Product Liability

statute that would establish a uniformity to product liability laws throughout the nation.

Acting upon the Federal Tort Policy Working Group's recommendations the Administration has proposed the Federal Product Liability Reform Act of 1986. The purpose of the proposed legislation is to protect the free flow of products in commerce and includes many of the tort reform measures deemed favorable by the Task Force. The Task Force recommends that AGC support this legislation and evidence such support by letters to the White House and the appropriate Congressional committees.

12. State of the Art Defense

Negligence, as traditionally defined, is the failure to exercise such care as a reasonably prudent and careful person would use under similar circumstances. One of the adverse results of the expansion in the concept of liability has been the distortion of this definition to apply the knowledge and technology currently available, rather than the knowledge and technology available at the time the defendant's action occurred (such as the time a product was manufactured), to determine what the applicable standard of care should be. Consequently, defendants have been held liable based upon a standard of care predicated upon knowledge and technology which was not in existence at the time of the defendant's action. Defendants have been precluded from asserting a "state of the art" defense justifying their actions on the basis of available knowledge, practices and standards of care existing at the time the injury causing events occurred.

Consistent with its position on strict liability, and in conjunction with its support for product liability legislation, the Task Force recommends the allowance of a "state of the art" defense. Such defense would preclude a manufacturer from being liable unless at the time a product was manufactured, the manufacturer knew, had reason to know or suspect, or had the ability to discover, that the product was potentially defective and dangerous and had the ability to discover and eliminate such defect and danger according to engineering and manufacturing practices which were reasonably feasible in light of existing technology. A similar defense should also exist in other areas, such as professional malpractice, so that a person could not be liable unless he knew, had reason to know or suspect, or had the ability to discover, that his actions constituted a danger to himself or other persons, and that he failed to act in accordance with, or exercise the generally accepted standards of care and practice in existence at the time of his actions.

13. Establish Uniform Statutes of Limitations

Statutes of Limitations were established based upon the belief that after a designated passage of time the ability to establish

any degree of certainty regarding questions such as proximate cause was greatly diminished. Therefore, cases must be initiated within the statutory period after the cause of action "accrues." The question of when an action "accrues", however, has become clouded and, depending upon the jurisdiction, can be when the incident causing the injury occurs or when it is discovered. In the latter case, the discovery rule may significantly extend the limitations period. Consequently, lawsuits are being initiated long after the actions giving rise to the claim have occurred. This allows an opportunity for recovery for injuries that may be attributable to defendants with only the slightest degree of certainty and places defendants in the difficult position of trying to defend themselves for actions taken many years prior. Additionally, without uniformity among the states, plaintiffs are permitted to "shop" jurisdictions in many types of cases, such as product liability, to find the one with the most favorable statutory period for filing claims.

The Task Force recommends the establishment of a uniform statute of limitations for all states, and also recommends the establishment of an AGC Task Force to determine the most appropriate provisions of statute of limitations relating to commencement of actions and the commencement of the limitations period.

11

KANSAS CONSULTING ENGINEERS

GEORGE BARBEE, EXECUTIVE D JR
1100 MERCHANTS NATIONAL BANK
8TH & JACKSON
TOPEKA, KANSAS 66612
PHONE (913) 357-1824

STATEMENT

DATE: July 10, 1986

TO: SPECIAL COMMITTEE ON TORT REFORM

FROM: George Barbee, Executive Director

Mr. Chairman and members of the committee, my name is George Barbee and I am the Executive Director of Kansas Consulting Engineers (KCE), a state-wide association of consulting engineering firms. Many of these firms are multi-disciplined and offer architectural, land surveying and landscape architectural services as well as engineering services. KCE is also affiliated with the American Consulting Engineers Council (ACEC) and the National Society of Professional Engineers, Professional Engineers in Private Practice (NSPE/PEPP). The following comments are offered to highlight the severe professional liability problem with affordability and availability now being faced by consulting engineers.

In addition to being individually licensed as engineers to offer their services to the public, most firms also have professional liability insurance, either because the clients require it, the competition demands it, or out of pure fear of being sued in this litigous society we live in.

I was employed by KCE in 1972. By 1980, I had become quite familiar with the problems the members were experiencing with professional liability insurance and the consulting engineers allowed me to form an independent insurance agency to help them in obtaining adequate insurance coverage at affordable prices.

After about three years, through my independent agency, we were able to write policies for KCE members through Imperial Casualty and Indemnity, Republic Insurance Company, CIGNA and Continental Casualty Company (CNA). Through the early part of the '80s we were able to provide considerable savings for our members because we had created new competition by causing new companies to come in to Kansas. However, we began to see the market change to its present "hard" status beginning in 1984.

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The first sign was when Imperial notified us that they would no longer accept applications for new business, but would continue reviewing renewal applications. Their premiums went up dramatically. Presently Imperial is not renewing expiring policies.

Next, the source for most of our policies, CIGNA, began to notify us as each insured's policy expired, that they would not renew because of "new underwriting guidelines". CIGNA has refused, to this date, to make an announcement that they are getting out of the architect and engineer professional liability business. They simply do not renew.

Then, in 1985, Republic notified us that they would not accept applications from firms that have an annual gross billing of less than $100,000 per year, or more than $5 million per year. That figure was later reduced to less than $250,000 or more than $3 million per year. Republic will only offer a limit of liability of $500,000. As of August 1, 1986, Republic will begin withdrawing from the market and will not renew old policies or issue new policies. The trial lawyers contend that insurance companies are making huge profits. If so, why would the company withdraw from the market.

Availability of coverage is now so restricted that Continental Casualty is acknowledging receipt of applications by letter, stating that it may be several weeks before they can respond. We are down to one carrier offering broad coverage for architects and engineers, CNA.

I presently have thirty-one engineering or architectural firms insured through the KCE in-house agency. Recently I took the last five policies sold to calculate the percentage of increased premiums compared to the change in the firms' gross billings for the year. The results were as follows:

FIRM	'85 BILLINGS	'86 BILLINGS	%CHNG	'85 PREM	'86 PREM	%INCREASE
*A	$217,000	$200,000	-7.8%	$5,554	$12,161	118%
**B	$1,117,000	$1,000,000	-10.5%	$20,033	$41,725	108%
*C	$87,000	$78,750	-10.5%	$3,675	$4,375	19%
D	$302,800	$402,135	32%	$12,338	$16,840	35%
***E	$135,895	$160,000	17%	$7,426	$10,068	36%

* deductible increased from $5,000 to $10,000
** reduced coverage from $1,000,000 to $500,000
*** reduced coverage from $1,000,000 to $100,000

This illustration of the last five purchases of insurance from two difference companies shows an average gross billing change of 9.2% increase but an average premium increase of 63.20%. These increases are kept to a minimum by raising deductibles as high as possible.

It should also be recognized that the coverage for professional liability has been drastically reduced. Coverage is no longer available for asbestos work or pollution coverage. The state is wanting to let contracts to clean up pollution and enginering firms have their hands tied because they cannot accept the liability.

These problems are compounded when you realize that the figures I have referred to do not include the cost of other business insurance required by consulting firms such as workers' compensation, general liability, loss of business, automobile insurance, life insurance and health insurance, to name a few.

This brief summary does not touch upon all the insurance problems of consulting engineers but the opportunity to provide the information to a legislative forum is greatly appreciated. We are pleased that the Kansas Legislature recognizes that the doctors are not the only ones with insurance problems.

These problems are not limited to Kansas, of course. A White House task force reported this week "that developments in tort law are a major cause for sharp premium increases" of most businesses and professionals. "There is little to suggest," the panel said, "that increases are due solely to insurers' losses." Among reforms recommended by the task force:

- return to a fault-based standard
- eliminate joint and several liability
- limit non-economic damages
- mandate periodic payments
- limit attorneys' contingency fees

We can hope that the federal legislation is enacted but to aid us in the state courts we need you to enact legislation that is similar to the 1986 HB-2661 that provided tort reform for the medical profession. In addition to those measures, please consider the thirteen suggested items in the petition submitted to the leadership by the coaltion on tort reform when the request was made to form this special committee.

Thank you for the opportunity to appear today. It is assumed that there will be time made available at later meetings to discuss some of the issues in greater detail.

Kansas Association Of **Broadcasters**

818 Merchants National Bank, Topeka, Kansas 66612 (913) 235-1307

July 10, 1986

TO: Members of the Special Committee on Tort Reform and Liability Insurance

FROM: Hank Booth, KLWN/KLZR, Lawrence
KAB Legislative Chairman/President-Elect

We appreciate the opportunity to appear before you with information about how Kansas broadcasters have been affected by the current situation with availability and cost of liability insurance.

On July 1, we mailed a questionnaire to each radio and television station manager in the state. As of yesterday, we had received a response from 14 percent of those surveyed, which represents 17 percent of all the broadcast stations in Kansas. The purpose of the survey was to determine what Kansas broadcasters are experiencing in the way of cost and availability of liability insurance, and to seek input from them on possible solutions. The results of that survey are summarized on the attached.

Simply put, Kansas broadcasters are experiencing an increase in the cost of doing business because of the insurance premiums they are now forced to pay. We feel the problem is due primarily to the tremendous increase in the number of civil suits being filed and the amount of awards being granted. According to a recent article in "Association Management" magazine, 16.6 million civil suits (an average of one for every 15 Americans) were filed in state courts in 1984. We feel the solution ultimately will be found by restoring some sense fairness to the civil justice system.

We urge the Committee to consider those tort reform issues outlined on the petition to the Legislative Coordinating Council requesting an interim study on the subject.

Attachment 12

SUMMARY OF KAB SURVEY OF KANSAS BROADCASTERS
TORT REFORM/LIABILITY INSURANCE
July 9, 1986

RESPONSE RATE: 14 percent response on mailing / representing
17 percent of the state's broadcast licenses

QUESTIONS:

1. Have you been able to obtain or renew your liability insurance coverage?

100 percent responded yes

2. Have premiums increased over the last two years? 100 percent yes

41 percent have experienced an increase of 10-50%
41 percent " " " " " 50-100%
18 percent " " " " " 100-500%

3. Have you been forced to accept (during the last two years)

Lower policy limits - 24 percent said yes
Increased deductible amounts - 71 percent said yes

4. What kinds of liability coverage have posed the greatest problem in availability or cost?

82 percent - general liability
29 percent - libel/slander
18 percent - transportation vehicles
12 percent - officers/directors

Others listed included: aviation liability, outside events sponsorship, property and liability on other than radio properties, tower

5. What would be possible solutions? (check where appropriate)

100 % - Elimination of frivolous lawsuits
76 % - Limitations on attorney contingency fees
76 % - Limitations on non-economic damages
59 % - Elimination of punitive damage awards
53 % - Mandatory structuring of large awards and settlements
35 % - Enactment of a reasonable no-fault law
29 % - A system for alternative dispute resolution
29 % - Mandatory settlement conferences
29 % - Specific criteria for qualifying expert witnesses
24 % - Curtailment of venue shopping

Other suggestions:
-Claims paid over a period of time, not in one lump sum; plaintiff pays all costs if they lose; money has to be escrowed to bring suit, attorney put up money

-Better management in insurance industry

Other general comments submitted:
Several mentioned problems with getting tower insurance.

One wrote the following: "...I have had problems with companies on casualty insurance not wanting to cover tall radio towers. My problem started when I replaced a 180' tower with a 420' tower. Hartford, my carrier then, used that as a reason to cancel coverage. After locating an interim plan with a company not authorized to write business in Kansas, I joined the CNA Safety Group plan through the NAB, but I'm paying twice what I was in 1984, and am convinced that casualty rates have gone through the roof because insurance companies have been hit hard by liability litigation."

KANSAS SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS
July 10, 1986

Mr. Chairman and Members of the Special Committee. My name is T. C. Anderson. I am the Executive Director of the Kansas Society of Certified Public Accountants.

I understand that the purpose of these hearings is to examine liability insurance -- its expanding costs and shrinking availability to all segments of our society -- and to consider the impact of these conditions on various segments of the economy and how they might be aided by tort reform. I appreciate this opportunity to convey to this Special Committee the particular perspective on these issues of the more than 1,900 CPAs belonging to our profession. As my comments will illustrate, in many respects, the accounting profession shares the same liability and insurance problems experienced by other professional, trade and industry groups appearing before this Special Committee. In other respects, the CPA profession finds itself disproportionately burdened by expanding liability exposure at a time when adequate insurance is either too costly or too scarce to absorb the losses.

The market for CPA professional liability insurance is becoming increasingly unstable because of the inability to predict risk and potential losses; premiums are escalating, coverage is shrinking, and some carriers are refusing to offer such coverage altogether.

An example is the premiums paid and the amount of coverage received by the 273 Kansas firms covered by the American Institute of CPA's Professional

Attachment 13

Liability Insurance Plan. In 1984, a Kansas CPA firm with a staff of 25 employees could obtain $1,000,000 worth of coverage with a $3,500 deductible per claim for a premium of $1,559 or about $64 per person. In 1986, the same amount of coverage but with a $7,000 deductible per claim carries with it a premium of $28,725 or about $1,160 per employee. Since CPA insurance rates are based on employees (full or part-time) the number of part-time employees in Kansas CPA firms will decline. College accounting majors will be hard pressed to find summer intern work since firms will find it increasingly difficult to justify a nearly $1,200 insurance expense for a three-month employee.

The role of the independent auditor is not to guarantee the success of a particular business. Evaluation of the chance of success is the proper role of investors and creditors who will reap the rewards of their correct decisions and who should bear the risk of poor judgments in this respect.

The proper, long-standing role of the independent auditor is to provide the public with reasonable assurance that the representation of management reflected in the company's financial statements and related disclosures comply with generally accepted accounting principles. The independent audit should bring a trained, experienced, professional oversight to the financial reporting process and, thus, serve to deter the issuance of misleading financial statements by management.

At present, proprietors and partners of accounting firms in Kansas are finding it increasingly difficult to protect themselves against potentially ruinous losses. Audit fees, based on hourly rates, cannot be expected to keep

up with escalating liability exposure.

Moreover, since accountants traditionally practice in partnership form, each individual firm member faces personal liability for any partnership losses (including judgments, settlements or attorneys' fees), in excess of the partnership's assets. This threat was recently dramatized by an audit malpractice case decided in Australia, Cambridge Credit Corporation Ltd. v. Hutcheson, where a judgment equivalent to U. S. $100 million was rendered against an accounting firm with about twenty-eight partners. The judgment far exceeds the assets of the partnership and the court has taken control of the personal assets of the individual partners to ensure that they are available to pay the judgment. Kansas CPA firms could find themselves in the same position in view of the fact that in the past two years the limits of coverage available under the AICPA professional liability insurance program fell from $20 million to $1 million.

Given the specter of this magnitude of personal risk, there is serious concern that the accounting profession may not be able to attract or retain the most competent young people in the future, a development which must eventually affect the quality of service to business and the public.

Certain overriding trends have emerged out of our study of the legal liability experience of the accounting profession. First, the assumption that the accountant should be available to reimburse the losses suffered by unsuccessful investors too often proceeds without a fair analysis of the duty, if any, owed by the accountant to the party at loss, or an adequate examination of the shared responsibility of others for the loss. There is

also an "expectation gap" in the public's understanding of the nature and function of an audit. There is a persistent misconception that a "clean opinion" on financial statements somehow guarantees a company's future success as well as the competence and integrity of its management.

Simply because a business has failed does not mean an audit failure has occurred. Often the financial statements of a failed company fairly reflect its precarious financial position. Further, even where the financial statements are found wanting, the party most responsible for the misstated financials is often not the auditor, but the client company or its senior management, sometimes aided by the collusion of third parties. In this scenario, however, the client company is financially insolvent and the responsible officers and directors probably do not have sufficient individual assets to meet the often astronomical damage claims. Too often the accountant is the only remaining solvent party. Thus, once a business failure occurs, there is an automatic tendency to name the auditor as a defendant, irrespective of whether there is any evidence to suggest the auditor was at fault.

This is not to suggest that accountants' liability for direct fraud is overexpansive; active and knowing wrongdoing by accountants should be judged by the established and stern standards that have always been applied. However, accountants' liability for negligence -- for unintentional mistakes and oversights -- should not be extended to the extent that accountants may face liability for indeterminate losses incurred by a potentially unlimited class of unknown users of financial statements. The same danger of overexpansive liability exists with respect to claims against auditors for

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indirectly aiding and abetting another person's fraud, where the auditor can be held liable to the same indeterminate class even though he or she had no actual knowledge of the underlying fraud.

To deal with these issues, a Kansas Society Task Force on Professional Liability has targeted two major areas of particular concern for reform.

One of the most significant reforms we would propose is the replacement of the prevailing rule of "joint and several" liability with "several" liability alone, in actions predicated on negligence or aiding and abetting liability. Under the "joint and several" rule, a claimant can collect all or part of his damages from any defendant found liable, irrespective of that defendant's proportionate fault. For example, an auditor-defendant who is held to be only 5% responsible, may be required to pay 100% of the damages awarded and, in seeking contribution from other tortfeasors, bears the risk that they may be judgment proof. Although Kansas has adopted comparative negligence laws that provide for liability apportionment based on the parties' relative degrees of fault, we believe it only applies in cases of death, personal injury and property damage as stated in K.S.A.-60-258(a). A recent Kansas Supreme Court case would indicate not all types of negligent actions are covered by the comparative negligence law. A most recent case involving Comparative Negligence statutes is the Federal Savings & Loan Insurance Corporation v. Huff reported at 237 Kansas Reports beginning page 873 (1985 Kansas Supreme Court). This case involved a lawsuit by the receiver of a savings & loan association against the officers and directors of the saving & loan for mismanagement and breech of fiduciary duties which resulted in the financial collapse of the savings & loan institution. The defendants argued

that they were only guilty of negligence and the comparative negligence statute should apply which would limit their degree of negligence. The Kansas Supreme Court ruled that the Comparative Negligence statute didn't apply and it was proper to hold the officers and directors jointly and severally liable. The Court also addressed the economic loss resulting in this case and concluded it was not covered under K.S.A. 60-258(A). By making it clear negligent actions against CPAs and other professionals fall under our comparative negligence statute, a defendant CPA would not be compelled to pay more than his or her proportionate share of the claimant's loss relative to other responsible persons.

The joint and several liability rule lies at the heart of the "deep pocket" syndrome, which represents a threat to the very survival of the accounting profession. The rule is fundamentally unfair, in that it imposes disproportionate liability on whomever is the "deep pocket" defendant -- one who may have little actual responsibility for the loss and who may not be able to spread that cost to other tortfeasors.

The other area of particular concern to the KSCPA is a growing tendency by state courts to extend accountants' exposure to liability for negligence to an unlimited number of unknown third parties or non-clients with whom the accountant has no contractual or other relationship. In this respect, the KSCPA endorses the rule, first enunciated over fifty years ago by the New York Court of Appeals, in Ultramares v. Touche, 255 N. Y. 170 (193), that only persons in privity -- or having a direct contractual relationship --with an

accountant could sue that accountant for negligence.

This rule continues to be followed in a majority of states including Kansas (see Koch Industries v. Vosko, 494 F 2d 713, 10th Cir. 1974) and was recently reaffirmed by the New York Court of Appeals in Credit Alliance v. Arthur Andersen & Co. However, at about the same time a California Court abandoned the rule.

The privity rule we will ask you to consider will simply codify Kansas case law in to our statutes. The auditor's duty to render an audit opinion with due care runs by contract only to the audit client. The auditor may anticipate that others --such as investors and creditors -- might read and rely on the opinion, but typically has no ability to limit their numbers or to control or influence the magnitude to the risk they may take in reliance. While it may arguably be socially beneficial to compensate these third parties for their "innocent" reliance on an erroneous opinion, this benefit is vastly outweighed by the consequences of allowing a professional to be held liable for the negligent (as opposed to fraudulent) rendering of such an opinion to an unlimited number of unknown users of financial statements. As the New York Court stated over fifty years ago in the Ultramares case:

> "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to kindle doubt whether a flaw may not exist in the

implication of a duty that exposes to these consequences."

Mr. Chairman, I will be forwarding to you and the members of the Special Committee a suggested amendment to K.S.A. 60-258(a), the Comparative Negligence statute as well as a privity section for the accountancy statutes.

Thank you for providing me this opportunity to appear before you today. The Kansas Society believes the Legislature's favorable consideration on these two considerations will assist CPAs in protecting themselves for unjust ruinous loss in the future and bring better predictability to the liability insurance underwriting of our profession in this state.

I'll be happy to stand for questions.

THE KANSAS SOCIETY OF ARCHITECTS

612 614 Kansas Avenue Topeka, Kansas 66603 913-357-5308 A Chapter of the American Institute of Architects

Date: July 10, 1986

To: Interim Study Committee
From: Kansas Society of Architects

Subject: Tort Reform and Liability Insurance

We appreciate the opportunity to provide information to this Committee.

We support any legislation that potentially improves the insurance climate for our members without jeopardizing the legitimate interests of the public.

Our association at both the state and national levels is very concerned about the rising costs and the reduced availability of professional liability insurance. We're concerned by our perception that the general climate fosters litigation.

Although we do not yet have Kansas statistics, the national picture shows a dramatic increase in lawsuits; from 12/100 firms in 1960 to more than 45/100 firms in 1985. In 1982, fewer than 11/100 firms had to pay damages, but they had to defend themselves.

At an American Institute of Architects Liability Committee meeting in Washington DC, July, 1985; Mr. David T. Austern presented the issue of liability from the plaintiff's perspective. Mr. Austern is Director of Education at the Association of Trial Lawyers of America. When questioned by Committee about our concerns over thoughtless suits in which a minimal amount of fair and intelligent investigation would have shown that the architect rendered proper services, Mr. Austern agreed that indeed there were such things as frivolous suits and explained they were a function of 3 phenomenon:

1) greedy lawyers
2) sloppy lawyers that don't bother to investigate
3) good lawyers who for reason of law (statute expiration), tactic (let the defendants fight it out), and unavailable data (even after investigation, cause remains unknown); sue architects without knowing that the architect is negligent.

Information such as this leads us to discount the

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theory that our current problem is totally attributable to the insurance industry.

Some of you may remember Gus Shubert's visit to Kansas in February of this year to appear before a joint insurance study committee. As Director of the Institute for Civil Justice, Mr. Shubert has stated, and we subscribe to his theory, that "the current insurance situation is, in part, a high profile symptom of the maladies of our civil justice system." This symptom may produce a long-term benefit "if it enables us to produce constructive changes toward fairer, more efficient and more effective resolution of our civil disputes...."

Mr. Shubert's hope is our hope!

We're encouraged by recent White House endorsement of a report that called for a return to a fault-based standard for liability; limiting noneconmic damages to a fair and reasonable maximum dollar amount; limiting attorneys' contingency fees to reasonable amounts on a sliding scale; and encouraging use of alternative dispute resolution mechanisms to resolve cases out of court.

We're even more encouraged by the Kansas Legislature's attention to these issues. Consideration last session of SB 540 is a clear indication to us that these issues have been identified by the Legislature.

Future consideration and ultimate adoption of similar bills that incorporate parts of SB 540 and/or solutions such as those proposed by the Coalition for Tort Reform can only lead to a more equitable civil justice system for our clients, our members and the public at large.

Thank you!

Respectfully submitted,

Vance W. Liston, AIA
Chairperson - Public Policy Committee
Kansas Society of Architects,AIA

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KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

Testimony

before the

Special Committee on Tort Reform

and Liability and Insurance

by

Richard S. Funk, Assistant Executive Director
Kansas Association of School Boards

July 10, 1986

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you on behalf of our 303 member boards of education. One item that has been of concern to us is area of liability of board of education members under the "Tort Claims Act."

House Bill No. 3114 was introduced during the last session of the legislature by the House Committee on Federal and State affairs. It related to exemptions from liability under the "Tort Claims Act." Our Association offered an amendment that was accepted by both the House and Senate, however, H.B. 3114 was vetoed by the Governor.

Specifically, we wish to make it clear that individual board members not be held liable as individuals in an action resulting in damages while those members are performing within the scope of their governmental functions.

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KASB would like this Committee to consider our earlier amendment, as stated below, and consider the introduction of legislation that will meet the needs of our members and the members of other governmental subdivisions in Kansas.

Thank you for your consideration of our position.

"The members of the governing body of a municipality as defined in K.S.A. 75-6102(b) thereof acting within the scope of their employment shall not be liable for damages resulting from any act of the municipality. This shall not, however, affect the liability of the municipality."

KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

Testimony on Proposal No. 29 -- Tort Reform and Liability Insurance

before the

Special Committee on Tort Reform and Liability Insurance

by

Bill Curtis, Assistant Executive Director
Kansas Association of School Boards

July 10, 1986

Mr. Chairman and members of the committee, we appreciate the opportunity to present the concerns of the 303 member boards of education of the Kansas Association of School Boards. On June 7, 1986, the Board of Directors of KASB voted unanimously to proceed with the formation of a foundation which would provide insurance services for unified school districts in Kansas. It will take several years for the foundation to be operational in all lines of insurance. The initial offering will be in the area of workmen's compensation. However, the problem is statutory authority for the formation of such a foundation. Do we proceed under K.S.A. 44-581 et seq. or K.S.A. 72-8230?

Our request of this committee is to request an opinion from the Attorney General of Kansas answering the above question. In either case, our association has a problem with the statutory language. Depending upon the opinion, our association would then have further requests of this committee to amend the existing statutes.

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3-10-86

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Chairman Representative Joe Knopp and
Members of the Special Committee on Tort Reform and Liability Insurance

FROM: Jim Kaup, Attorney, League of Kansas Municipalities

RE: The Municipal Perspective on the "Liability Insurance Crisis" and how the Legislature should Respond

DATE: July 10, 1986

I. INTRODUCTION AND OVERVIEW

Like the other conferees appearing before you today, the League of Kansas Municipalities advises you that our membership has faced, and continues to face, a problem in the area of tort liability in Kansas. The dimensions of this problem are so severe as to threaten to erode the ability of Kansas cities to provide basic services to their citizens.

We recognize that the current liability insurance "crisis" not only affects cities, but also reaches out to wide cross-section of American society. Many groups -- from health care providers, small businesses and professionals, schools and others -- have felt the helplessness of expanding liability exposure and the shocking increase in insurance premiums. Often these two problems of liability exposure and insurance affordability or availability merge, creating a cause and effect scenario with drastic consequences. While cities may find some comfort in the fact that they are not alone in their struggle, local governments do not have the option open to many other parties suffering from the same ills. A city simply cannot pull up stakes and move out. Certain functions have to be carried out, certain services have to be provided regardless of the risk which insurance companies attribute to the performance of those activities.

We would ask you to recognize, as our city officials do, that inevitably the increases in local budgetary expenditures for insurance protection or for larger liability awards come from the local tax base. That level of government which is least able to raise revenues is forced to foot the final bill for a state-wide, and nation-wide, problem which touches upon all aspects of society.

The League is well aware of the continuing controversy and finger-pointing between the liability insurance industry and advocates of our current tort system. We realize that when two influences bear on the same subject at the same time, each can tend to obscure the existence of the other. While our cities are first and foremost preoccupied with the affordability and unavailability of municipal liability insurance, we fear the dangers of this legislature overlooking the fact that this is a "crisis" arising out of both insurance industry practices and the evolution of this nation's tort law system. In large part, the story of sharply escalating insurance costs reflects a system of injury compensation which has gone crazy. While the hands of the insurance industry are far from clean, a major cause of the problems we face involves tort liability awards that seem to accelerate daily in dollar terms and in terms of the nature of conduct for which cities can be held liable. Courts are awarding damages for actions that were not admissible in a court only a few years ago.

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3-18-86

Right versus wrong and the balancing of the needs of society versus the dangers to a few do not appear to be as important in today's tort system as is the public's expectation that someone, preferably a deep pocket such as a municipality, should pay for every injury suffered.

Common sense tells us it is too simplistic to blame the insurance industry solely for rising insurance premiums. Many factors which are unique to the insurance industry had a great deal to do with the rising premiums which cities are now faced with. During the 1970's cities benefited from insurance company practices which encouraged selling of premiums at rates below what actuarial and experience data would indicate. High interest rates which premium payments would receive upon investment was the incentive for doing this for many companies. Thus, to sell more insurance and collect as much cash as possible, insurance companies slashed rates. Low reinsurance rates were readily available to insurance companies, providing them with affordable protection for major claims. Cities had no reason to object to these bargain premiums, which were the result of cash flow underwriting.

Today, in a grand example of the cyclical nature of the insurance industry, the practices of the 1970's have come back to haunt our cities. Interest rates have dropped to the point where insurance companies no longer reap the insurance profits from investments which they once did. The foreign reinsurance market has abandoned this nation after having been hit with too many large liability claims. Insurance company reserves are depleted as companies must still pay out on policies which were sold at a discount years ago. To remedy their financial situation companies have abruptly and dramatically raised premiums to reflect the "true" cost of risk. Some companies are refusing to underwrite certain types of policies, such as environmental pollution, because they are just too risky. Others limit the amount of risky policies they do write. It is also a fact of life that, true to the principle of insurance to spread risk over a pool, even cities with relatively few claims have faced increased premiums.

The League recognizes that some parties challenge the assertion of the insurance industry that there has been a tort explosion in this country. Statistics on the number of cases filed and the average size of judgments awarded tort victims can be submitted to support that challenge. But whether the tort explosion is a myth, the insurance industry appears accurate in its claim that the types of liability for which cities can be sued has expanded. We recognize that the prospect of expanded liability and damages makes it almost impossible for insurers to predict losses with accuracy. Consequently, the mere threat of an increase in the types of lawsuits has made insurance companies avoid cities.

We also submit to you that the very existence of liability insurance over the years has hidden some of the abuses and excesses that have developed within our tort system. Insurance had shielded society from an accurate perception of the tremendous costs associated with tort law. We suggest to you that municipalities offer a sterling example of this societal-wide problem. As will be detailed later, the manifestations of these problems range from the annoying but relatively minor cancellation of fireworks displays clear to the other end of the continuum -- liability for the way in which basic governmental services, such as police and fire protection, are provided to individual members of the public. For example, just last month we read with alarm the Kansas Supreme Court decision of Fudge v. City of Kansas City, a decision which broke new ground for municipal tort liability -- cities can be held liable for what someone else did because the city failed to prevent something from happening.

Consistent with our recognition of the dual nature of the liability insurance "crisis," the League offers this Committee our perspectives on tort law problems and suggestions for remedies, followed by a similar look at the insurance industry.

As a final introductory note, we submit an excerpt from the League's 1985-86 convention adopted "Statement of Municipal Policy."

> L-2. **Governmental Immunity.** (a) **State-Local.** Cities are encouraged to adopt comprehensive risk management and tort liability policy statements. We generally oppose state legislative efforts to expand the liability of public agencies or employees. Immunity from liability should be extended to cover local emergency preparedness activities in the same manner as state declared emergencies. To discourage the filing and growth of baseless and harrassing lawsuits, cities are encouraged to file claims for reimbursement of costs and attorney fees in defense of such lawsuits under the provisions of K.S.A. 60-2007. This law should be amended to also provide for the recovery of costs and reasonable attorney fees in instances in which expenses are incurred prior to trial and the lawsuit is discontinued by the plaintiff.
>
> (b) **Federal-Local.** The U.S. Congress should restrict the application of the 1871 civil rights law (42 U.S.C. §1983) to claims involving constitutional or civil rights statutes violations and should also provide the same immunities to governmental units as are extended to officers and employees; the "good faith" defense in civil rights actions should be restored for municipalities.

II. TORT LIABILITY AND TORT REFORM

A detailed narrative of the journey in Kansas law from governmental immunity to the present-day tort claims law would serve no particular purpose at this point. Our municipalities operate under the provisions of the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.), and our suggestions for tort reform focus on that law. In passing the Kansas Tort Claims Act in 1979, the Kansas Legislature recognized that municipalities provide essential public services and functions, and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions. The Legislature also recognized that taxpayers ultimately bear the fiscal burdens of unlimited liability, and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against excessive fiscal burdens. The Legislature also recognized that public employees, whether elected or appointed, should be provided with protection from unlimited liability so that those employees are not discouraged from providing the services or functions required by the citizens or from exercising the powers authorized or required by law.

The League offers two basic approaches to amending the Kansas Tort Claims Act. While Option A is preferable to Option B, both options would be key elements in a coordinated legislative effort for tort and insurance reform. While these options are intended to lessen municipal liability burdens, the options can be legislatively enacted in a way to be fair to both taxpayers and to victims of inappropriate government conduct.

A. **A Tort Claims Act with Liability as the Exception.** The enactment of the Kansas Tort Claims Act initiated a new direction in the tort liability of governmental entities in Kansas by making "liability the rule and immunity the exception." In other words, the

Kansas Tort Claims Act has "open-ended" liability making municipalities "liable for damages caused by the negligent or wrongful act or omission of any of its employees. . . under circumstances where the governmental entity, if a private person, would be liable. . ." The League will request this Committee's consideration of a proposal to limit tort liability for Kansas cities by a rewriting of the Kansas Tort Claims Act to change its premise from open-ended liability to closed-end liability. In other words, we ask for immunity to be the rule and liability the exception for municipalities in Kansas. If the tort law, and public policy, of this state were to be that liability would be narrowly applied and immunity broadly applied, we would restore certainty and predictability to those who insure risks. Courts would find it much more difficult to carve out new areas of liability for municipalities, and decisions such as Fudge v. Kansas City would be much less likely. If the Committee so desires, testimony in support of this proposal will be offered at your upcoming hearings to show how such a change in the law would influence insurance availability.

B. **Amendments to Existing Kansas Tort Claims Act.** Should this Committee decline to sponsor legislation consistent with Option A, we submit the following amendments and clarifications to the Kansas Tort Claims Act. Again, greater supporting arguments for each proposal will be offered over the coming months. Our proposals fall into the following 10 categories:

1. Notice of Claims. Tort claims against cities should be barred when cities have not received early notice in writing of the claim. This requirement would serve as a jurisdictional prerequisite to bringing the action rather than merely serving as an affirmative defense. We suggest that an appropriate time period to provide written notice is six months, which is the amount under the new (1986) Colorado tort claims law. The purpose of this early notice of a claim is to give a defendant an opportunity to timely investigate the claim, thereby leading to pre-trial settlements of meritorious cases. We propose that the time period should run from the day the potential plaintiff discovered the injury, regardless of whether the plaintiff then knew all of the elements of the claim or of the cause of accident for the injury. We also suggest that the Act provide for a mandatory waiting period between the time of filing of notice of a claim and commencement of a lawsuit under the Tort Claims Act (e.g., 90 days), for the purpose of ensuring a meaningful opportunity for investigation and settlement of the claim. Finally, we would note that Kansas law prior to enactment of the Tort Claims Act in 1979 required a plaintiff to give notice of a claim within six months of the occurrence of the injury.

2. Shorten Statute of Limitations. The Tort Claims Act, at K.S.A. 75-6103 (citing K.S.A. 61-1603) establishes a two-year statute of limitations for the bringing of a tort claim. The League proposes a shortening of the statute of limitations to one year.

3. Mandatory Dispute Resolution. We propose the amendment of the Tort Claims Act to develop alternative dispute resolution mechanisms such as arbitration panels as a means of settling meritorious claims outside of the courtroom and discouraging the bringing of frivolous and baseless lawsuits.

4. New and Clarified Exceptions from Liability Relative Both to Employees and Functions Performed by Employees.

3-3-41

(a) We advocate the addition of certain new categories of "employees" of municipalities which should be provided blanket immunity from liability under the act: an exception for members of municipal governing bodies (similar to 1986 HB 3114) and an exception for persons engaged in community service work (also see 1986 HB 3114).

(b) Second, we propose the creation of a new functional exclusion from liability for the performance of "quasi-judicial" functions and the expansion of the present discretionary function exception (K.S.A. 75-6104(d)).

(c) Third, in response to the Kansas Supreme Court decision of Fudge v. City of Kansas City, we urge a clarification of the scope of the exclusion from liability available under the law enforcement exception to the Act (K.S.A. 75-6104(m)).

(d) Fourth, in response to the Schmeck v. City of Shawnee, Kansas Supreme Court decision (232 Kan. 11 (1982)), we urge legislation rejecting the application to cities of the Restatement (second) of Torts, Section 324A which establishes liability to a third person for negligent performance of service necessary for protection of a third person.

(e) Fifth, in further response to the Fudge decision, we support an amendment to K.S.A. 75-6104 to clarify that a municipality's adoption of a policy, regulation, guideline or other standard for the protection of any person's health, safety or welfare shall not result in the assumption of a duty of care where none otherwise existed. Further, the enforcement of or failure to enforce such a policy, regulation, guideline or other standard shall not give rise to a duty of care where none otherwise existed. In the alternative, we support an amendment to the Tort Claims Act which would make inadmissible in tort claims lawsuits the introduction of any municipal policy, regulation, guideline or other standard which was adopted and is utilized for the purposes of employee performance, appraisal, evaluation or discipline.

(f) Sixth, we support an amendment to K.S.A. 75-6104(c) to clarify the scope of the exception from liability for the enforcement of a statute, regulation or ordinance.

(g) Seventh, we support an amendment to K.S.A. 75-6104(g) to reassert the discretionary function aspect of traffic sign placement limited by the Schmeck v. City of Shawnee decision.

5. Remove the Automatic Waiver of $500,000 Liability Cap. We support the amendment of K.S.A. 75-6111(a) to remove the automatic waiver of the $500,000 tort liability limit in those instances where a municipality has procured insurance coverage in excess of that amount. Our amendment would provide for a waiver only where such is created by resolution of the governing body, and only to the extent such waiver is provided for in the resolution. This would allow a municipality, through its insurance coverage, to designate which functions or activities to which it will subject itself to greater dollar liability than the statutory cap on liability which would otherwise apply.

6. Limitations on Awards. We propose the following three amendments to K.S.A. 75-6105, that portion of the Tort Claims Act which puts $500,000 ceiling upon awards for damages for tort claims. First, a reduction in the liability ceiling from the present $500,000 to $250,000. At least 24 states currently have liability caps. Those caps range from $15,000 (South Carolina) to $5 million

(Indiana). Second, we urge the establishment of a special cap on non-economic damage awards. Compensatory damages for pain and suffering, mental anguish, and other non-economic damages are inherently subjective. A jury has little guidance in establishing an amount which adequately compensates the plaintiff. To provide greater certainty in awards, we propose a cap of $100,000 on all non-economic damages. Third, we propose an amendment to limit the awards of punitive damages against employees. Presently K.S.A. 75-6105(c) prohibits the awarding of punitive damages against a municipality, but does allow for such awards against employees. We propose that where there is a prevailing employee-defendant, or in other words, in those cases where the plaintiff does not substantially prevail in a claim of actual fraud or actual malice (as required by K.S.A. 75-6105(c)) against a public employee, a court shall award attorney's fees and costs in favor of the defendant.

7. Limitations on Attorney's Fees. We support the proposals submitted by the Reagan Administration's Tort Policy Working Group for a fee schedule for attorneys formatted as follows: 25% of $0 to $100,000; 20% of $101,000 to $200,000; 15% of $201,000 to $300,000; and 10% of the remainder.

8. Collateral Source Rule. We propose the abolishment of the collateral source rule in Kansas (Allman v. Holleman, 233 Kan. 781 (1983)). It is in the public interest to prevent double recovery of plaintiffs by taking into account collateral sources of compensation for the same injury.

9. Structured Settlements. The League proposes that damage awards for future economic harm amounting to over $100,000 be paid periodically rather than by lump-sum settlements.

10. Frivolous Lawsuits and Awarding of Fees and Costs. The League urges this Committee to consider legislation which would establish greater penalties upon attorneys who promote the bringing of frivolous lawsuits against municipalities. The League also urges consideration of new laws which would allow for recovery of costs and fees by a prevailing party in all civil cases. Presently at least four states allow for such recovery by prevailing parties (Alaska, Colorado, Ohio and Virginia). Kansas and at least six other states only allow recovery of costs and fees by prevailing parties in frivolous, malicious, harassment, etc. type cases (see K.S.A. 60-2007) (California, Florida, Maryland, North Dakota, Washington and Wisconsin).

[Note: Proposals 3, 6, 7, 8, and 9 are all proposals of the Reagan Administration's Tort Policy Working Group.]

III. Insurance Reforms

In January 1986 the League retained a risk management consultant to prepare an insurance market analysis to determine whether the private insurance market was capable of meeting Kansas municipal insurance needs. These consultants surveyed 500 of the 627 Kansas municipalities. 160 responded to the survey, with those cities having a population representing 40% of Kansas' municipal population. Following is a listing of the major findings of that survey:

1. Municipal insurance availability is not as severe a problem in Kansas as it is in many other states. Only 15% of the respondents indicated difficulty in obtaining insurance during the most recent renewal period.

2. There were no wholesale policy cancellations during the time period surveyed. Most of the cancellations that did occur were for general liability and public official's liability coverage.

3. Liability premiums increased dramatically from 1984-85 to 1985-86. The increase over this period was 115%. The increase from 1983-84 to 1984-85 was 50%. (As most policy years run from April 1 - April 1, 1984-85 to 1986-87 premium increases were not available at the time of the survey.)

4. The dramatic increases in premiums which did occur cannot be attributed to sharp increases in policy exposures.

5. 60% of the respondents have never had a claim filed against the city or its officers or employees since the time the Kansas Tort Claims Act took effect on July 1, 1979.

6. 72% of the respondents (118 of 165) had never had a claim paid under the lifetime of the Kansas Tort Claims Act. Only 9% of the respondents (14) have paid more than five claims since July 1, 1979.

7. **"Kansas municipalities have not experienced a frequency problem on tort liability claims. Therefore the very sharp increases in premiums charged by the insurers over the last two years is probably not caused by actual Kansas municipal loss experience, but rather by the overall poor loss ratios experienced by the insurance industry and perhaps by the poor loss experience experienced by public entities in other states."**

8. **". . .Conditions may improve for liability coverages sometime late in 1987. Even when conditions start to improve. . . conditions will probably never return to normal. Generally speaking public entities will be forced to take more aggressive risks retention postures to focus more on risk assessment and risk control. . . (T)he commercial insurance market will not be a principal source of risk financing for the most difficult risk exposures, including public official's liability, law enforcement liability and environmental impairment liability."**

The League notes with interest certain proposals recently made to the Illinois legislature by the Illinois Trial Lawyers Association. Among the Illinois Trial Lawyers Association proposals we would ask this Committee to consider are:

1. Provide for prior insurance-rate approval.

2. Require the State Insurance Department to hold hearings when an insurance company plans to raise its insurance rates more than 15%.

3. Establish a state-joint underwriting authority in which commercial liability insurers are required to participate.

4. Provide insurance for cities the voluntary market cannot handle.

5. Create a state re-insurance program.

In addition to these proposals, we urge this Committee's study of the following:

1. Regulation of the industry to guarantee consideration of Kansas cities' claims experience in the setting of Kansas rates.

2. Protection relative to the industry trend towards "claims-made" coverage and away from "occurrence" a trend which will leave serious gaps in municipal insurance coverage, especially for so-called "long-tail" risks.

SUMMARY

This is a confusing situation for our member cities. We recognize that the figures show that the insurance industry is making healthy profits again -- yet our premiums continue to skyrocket and the industry continues to press hard for civil justice reforms. We are exposed to more and more potential liability risks -- such as was recently created by the Fudge decision -- yet the claims record of Kansas cities remain exceptionally low. Because our obligation is to our citizens living in cities in Kansas -- and because those citizens are suffering as taxpayers and also as users (or former users) of municipal services and programs which are being curtailed or elimnated out of liability fears -- the League will take no chances and urges this Committee to enact legislation which both regulates insurance and reforms the tort system.

NOTE: This is a preliminary staff report. While prepared in consultation with city officials, the recommendations in this report have not been formally endorsed by the Governing Body, or any other policy-making board or committee of the League.

3907

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Chairman Representative Joe Knopp and
Members of the Special Committee on Tort Reform and Liability Insurance

FROM: Jim Kaup, Attorney, League of Kansas Municipalities

DATE: July 11, 1986

RE: Insurance Premium History for Surveyed Municipalities

During the course of my testimony before this Committee on July 10, I advised you of the fact that the League does not have, nor do we know of the existence of, any hard data which directly links together: (1) municipal insurance premium payment histories to (2) insured loss histories. While data linking premiums paid to losses incurred is not now available to the best of our information, I have attached for your information surveyed data pertaining to (1) municipal insurance premium payment histories. This data on 84 Kansas cities comes from a report prepared in April 1986 by risk management consultant firm retained by the League of Kansas Municipalities to prepare an insurance market analysis for Kansas cities.

Attached are the following documents:

(a) An excerpt from the consultant's market analysis report summarizing premium history survey results from responding municipalities, in both a narrative and table form.

(b) Appendix C from the consultant's market analysis report setting out, city-by-city, the premiuim histories for a four-year period of time, broken down by type of insurance.

In addition to providing you with this detailed information regarding premium payment histories, I will advise you that the League will be contracting this summer to gather data relevant to (2) insured loss histories for a selected number of Kansas municipalities. This survey will cover each of the preceding five years. The survey will be conducted in furtherance of the League's initiation of a municipal insurance pool. Loss histories must be developed for those cities which have expressed a desire to participate in the pool. Non-joining cities will not be surveyed. Consequently, the survey results will not match up, city-by-city with the attached survey results showing premium payment trends for 84 surveyed cities.

However, we anticipate that following the completion of this second survey, we will be able to match up premium histories to claims histories for all, or most, of the cities responding to this survey of claims paid. We cannot guarantee this Committee at this time rather the survey information will be compiled and available in time for your consideration prior to preparation of an Interim Committee report.

Attachment 18

0383

LEAGUE OF KANSAS MUNICIPALITIES

INSURANCE MARKET ANALYSIS

April, 1986

Prepared by:
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Lauren Cragg

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Premium Volume

Exhibit IV summarizes four years of premium information by line of coverage for those municipalities that submitted complete surveys (111). Please note that this exhibit includes information only from municipalities that provided premium information for three policy years. This was done so that conclusions can be drawn from trends in premium from one year to the next.

General liability premiums increased dramatically from 1984-85 to 1985-86. The increase over this period was 115%.* This followed on the heels of a 50% increase from the 1983-84 year to the 1984-85 year. The premium increase was much more modest (11%) for the earlier years. Thus, although we concluded in the previous section that there was not a severe insurance availability problem, Exhibit IV demonstrates that there is an affordability problem. Kansas municipalities are paying a high price for continued coverage.

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* The 1984-85 to 1985-86 growth rate is based on 112 respondents that provided premium data for at least those two years. The growth rates from earlier years are based on 86 respondents that provided premium data for at least three years.

EXHIBIT IV

PREMIUM HISTORY
RESPONDING MUNICIPALITIES

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$1,362,627	$596,917	$397,409	$354,537
2. Auto Liability	$1,090,144	$552,388	$340,408	$443,743
3. Public Officials Liability	$169,520	$120,445	$81,940	$71,839
4. Police Professional	$386,957	$209,588	$102,194	$125,419
5. Other Liability	$70,959	$47,132	$31,875	$33,427
6. Umbrella/Excess Liability	$314,412	$167,192	$126,443	$75,468
7. Property	$957,544	$700,575	$480,331	$424,803
8. Boiler Machinery	$99,997	$87,919	$78,863	$78,172
9. Contractors Equipment	$87,273	$61,422	$40,548	$28,839
10. EDP & Valuable Papers	$18,851	$11,977	$7,834	$7,197
11. Workers Compensation	$1,433,756	$1,076,698	$990,612	$1,014,772
TOTALS - General Liability	$1,747,998	$811,241	$555,727	$453,413
Auto Liability	$1,090,144	$552,388	$340,408	$443,743
Professional Liability	$556,477	$330,033	$184,134	$197,316
Property	$1,163,665	$861,893	$607,570	$538,975
Workers Compensation	$1,433,756	$1,076,698	$990,612	$1,014,772

LEAGUE OF KANSAS MUNICIPALITIES

INSURANCE MARKET ANALYSIS
APPENDICES

April, 1986

(Revised June 1986)

Prepared by:
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Appendix A. Survey Document (sample completed form with respondent attachments)

Appendix B. Survey Respondents

Appendix C. Premium Summaries of 84 Respondents

Appendix D. Exposure Summaries of 84 Respondents

Appendix E. List of Interviewees

APPENDIX C

PREMIUM SUMMARIES OF 84 RESPONDENTS

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF ALLEN

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$379	$367	$367	$0
2. Auto Liability	$40	$40	$40	$0
3. Public Officials Liability	$0	$407	$296	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$379	$367	$367	$0
Auto Liability	$40	$40	$40	$0
Professional Liability	$0	$407	$296	$0
Property	$0	$0	$0	$0
Workers' Compensation	$0	$0	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF ANTHONY

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$17,637	$8,361	$8,361	$5,652
2. Auto Liability	$112,665	$6,238	$6,767	$0
3. Public Officials Liability	$2,280	$2,338	$2,410	$0
4. Police Professional	$3,078	$0	$0	$0
5. Other Liability	$1,563	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$21,400	$10,198	$8,361	$13,128
8. Boiler Machinery	$4,405	$4,496	$4,496	$3,063
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$20,265	$14,803	$19,278	$0
TOTALS - General Liability	$19,200	$8,361	$8,361	$5,652
Auto Liability	$112,665	$6,238	$6,767	$0
Professional Liability	$5,358	$2,338	$2,410	$0
Property	$25,805	$14,694	$12,857	$16,211
Workers' Compensation	$20,265	$14,803	$19,278	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF ARLINGTON

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$605	$525	$510	$577
2. Auto Liability	$1,935	$1,459	$1,345	$1,935
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$639	$0	$0	$0
7. Property	$496	$414	$360	$519
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$431	$418	$396	$0
10. EDP & Valuable Papers	$100	$100	$0	$0
11. Workers Compensation	$1,084	$735	$610	$214
TOTALS - General Liability	$1,244	$525	$510	$577
Auto Liability	$1,935	$1,459	$1,345	$1,935
Professional Liability	$0	$0	$0	$0
Property	$1,027	$932	$756	$519
Workers Compensation	$1,084	$735	$610	$214

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF ATWOOD

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$1,486	$1,250	$1,100	$900
2. Auto Liability	$1,688	$1,400	$1,200	$1,100
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$700	$600	$500	$400
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$2,700	$2,600	$2,500	$2,200
TOTALS - General Liability	$1,486	$1,250	$1,100	$900
Auto Liability	$1,688	$1,400	$1,200	$1,100
Professional Liability	$0	$0	$0	$0
Property	$700	$600	$500	$400
Workers' Compensation	$2,700	$2,600	$2,500	$2,200

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF AXTELL

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$1,070	$1,000	$1,029	$798
2. Auto Liability	$840	$642	$468	$356
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,300	$1,230	$1,250	$1,219
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$506	$506	$506	$506
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,340	$1,191	$1,540	$1,521
TOTALS - General Liability	$1,070	$1,000	$1,029	$798
Auto Liability	$840	$642	$468	$356
Professional Liability	$0	$0	$0	$0
Property	$1,806	$1,736	$1,756	$1,725
Workers' Compensation	$1,340	$1,191	$1,540	$1,521

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF BISON

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$598	$435	$697	$412
2. Auto Liability	$83	$83	$57	$57
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$228	$228	$228	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$605	$401	$370	$370
TOTALS - General Liability	$598	$435	$697	$412
Auto Liability	$83	$83	$57	$57
Professional Liability	$0	$0	$0	$0
Property	$228	$228	$228	$0
Workers' Compensation	$605	$401	$370	$370

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF BLUE MOUND

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$484	$898	$484	$484
2. Auto Liability	$136	$127	$85	$85
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,226	$1,443	$1,376	$1,365
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$933	$898	$898	$908
TOTALS - General Liability	$484	$898	$484	$484
Auto Liability	$136	$127	$85	$85
Professional Liability	$0	$0	$0	$0
Property	$1,226	$1,443	$1,376	$1,365
Workers' Compensation	$933	$898	$898	$908

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF BOGUE

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$229	$229	$189	$189
2. Auto Liability	$119	$119	$95	$95
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$607	$597	$597	$506
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$229	$229	$189	$189
Auto Liability	$119	$119	$95	$95
Professional Liability	$0	$0	$0	$0
Property	$607	$597	$597	$506
Workers' Compensation	$0	$0	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF CAWKER City

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$1,998	$1,711	$1,652	$1,083
2. Auto Liability	$1,079	$777	$775	$724
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$1,000	$589	$668	$668
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$3,147	$2,732	$2,923	$2,348
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$2,150	$1,926	$1,771	$1,541
TOTALS - General Liability	$1,998	$1,711	$1,652	$1,083
Auto Liability	$1,079	$777	$775	$724
Professional Liability	$1,000	$589	$668	$668
Property	$3,147	$2,732	$2,923	$2,348
Workers' Compensation	$2,150	$1,926	$1,771	$1,541

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF CEDAR VALE

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$894	$639	$365	$848
2. Auto Liability	$1,613	$939	$1,707	$1,596
3. Public Officials Liability	$648	$495	$285	$846
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$100	$100	$100	$100
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$50	$50	$50	$0
11. Workers' Compensation	$1,614	$1,107	$642	$1,378
TOTALS - General Liability	$894	$639	$365	$848
Auto Liability	$1,613	$939	$1,707	$1,596
Professional Liability	$648	$495	$285	$846
Pr rty	$150	$150	$150	$100
Workers' Compensation	$1,614	$1,107	$642	$1,378

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF CHANUTE

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$0	$43,382	$23,906	$20,976
2. Auto Liability	$0	$8,472	$5,174	$5,350
3. Public Officials Liability	$0	$3,349	$0	$2,930
4. Police Professional	$0	$4,900	$0	$1,972
5. Other Liability	$4,200	$5,450	$3,380	$3,016
6. Umbrella/Excess Liability	$0	$13,500	$7,000	$4,400
7. Property	$27,373	$30,483	$19,035	$10,513
8. Boiler Machinery	$14,089	$11,271	$9,801	$9,651
9. Contractors Equipment	$5,876	$5,876	$4,760	$4,363
10. EDP & Valuable Papers	$744	$822	$622	$750
11. Workers' Compensation	$60,350	$68,541	$66,341	$45,593
TOTALS - General Liability	$4,200	$62,332	$34,286	$28,392
Auto Liability	$0	$8,472	$5,174	$5,350
Professional Liability	$0	$8,249	$0	$4,902
Property	$48,082	$48,452	$34,218	$25,277
Workers Compensation	$60,350	$68,541	$66,341	$45,593

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF CHASE

	Policy Year. 3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$1,675	$0	$0	$0
2. Auto Liability	$703	$0	$0	$0
3. Public Officials Liability	$13	$0	$0	$0
4. Police Professional	$349	$0	$0	$0
5. Other Liability	$679	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$0	$0	$0	$0
TOTALS - General Liability	$2,354	$0	$0	$0
Auto Liability	$703	$0	$0	$0
Professional Liability	$362	$0	$0	$0
Property	$0	$0	$0	$0
Workers Compensation	$0	$0	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF CLAY CENTER

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$4,502	$4,200	$3,900	$0
2. Auto Liability	$3,865	$2,136	$3,954	$0
3. Public Officials Liability	$0	$937	$748	$748
4. Police Professional	$2,257	$0	$0	$0
5. Other Liability	$600	$550	$500	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$9,872	$9,300	$9,300	$9,300
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$2,957	$2,244	$2,130	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$19,135	$15,591	$19,000	$10,644
TOTALS - General Liability	$5,102	$4,750	$4,400	$0
Auto Liability	$3,865	$2,136	$3,954	$0
Professional Liability	$2,257	$937	$748	$748
Property	$11,544	$11,544	$11,430	$9,300
Workers' Compensation	$19,135	$15,591	$19,000	$10,644

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF CLEARWATER

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$1,988	$1,658	$1,556	$1,556
2. Auto Liability	$2,711	$2,562	$2,438	$2,438
3. Public Officials Liability	$764	$674	$899	$899
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,676	$1,295	$1,211	$1,210
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$896	$896	$776	$767
10. EDP & Valuable Papers	$0	$35	$0	$0
11. Workers' Compensation	$3,468	$3,244	$3,552	$3,552
TOTALS - General Liability	$1,988	$1,658	$1,556	$1,556
Auto Liability	$2,711	$2,562	$2,438	$2,438
Professional Liability	$764	$674	$899	$899
Property	$2,572	$2,226	$1,987	$1,977
Workers' Compensation	$3,468	$3,244	$3,552	$3,552

Apr-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF COLBY

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/83 4/01/83
1. Primary General Liability	$13,497	$9,258	$7,014	$10,169
2. Auto Liability	$10,067	$8,584	$6,226	$4,561
3. Public Officials Liability	$3,237	$1,747	$1,165	$2
4. Police Professional	$0	$0	$0	$2
5. Other Liability	$0	$0	$0	$2
6. Umbrella/Excess Liability	$9,550	$4,500	$3,750	$0
7. Property	$4,754	$4,399	$4,125	$5,314
8. Boiler Machinery	$5,425	$4,889	$4,887	$14,300
9. Contractors Equipment	$834	$820	$820	$583
10. EDP & Valuable Papers	$0	$0	$0	$2
11. Workers' Compensation	$19,199	$15,587	$15,393	$21,202
TOTALS - General Liability	$23,047	$13,758	$10,764	$10,169
Auto Liability	$10,067	$8,584	$6,226	$4,561
Professional Liability	$3,237	$1,747	$1,165	$2
Property	$11,013	$10,108	$9,832	$20,198
Workers' Compensation	$19,199	$15,587	$15,393	$21,202

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF COPELAND

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$327	$0	$0	$0
2. Auto Liability	$657	$593	$593	$0
3. Public Officials Liability	$108	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$150	$0	$0	$0
6. Umbrella/Excess Liability	$1,150	$0	$0	$0
7. Property	$1,190	$1,190	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,027	$1,023	$1,004	$0
TOTALS - General Liability	$1,627	$0	$0	$0
Auto Liability	$657	$593	$593	$0
Professional Liability	$108	$0	$0	$0
Property	$1,190	$1,190	$0	$0
Workers' Compensation	$1,027	$1,023	$1,004	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF DERBY

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$30,176	$11,018	$8,914	$13,235
2. Auto Liability	$52,223	$14,394	$12,016	$10,352
3. Public Officialn Liability	$3,325	$1,376	$1,376	$0
4. Police Professional	$6,845	$0	$0	$0
5. Other Liability	$1,536	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$19,699	$3,478	$870	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$5,570	$2,163	$2,091	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$26,128	$22,574	$15,465	$12,484
TOTALS - General Liability	$31,712	$11,018	$8,914	$13,235
Auto Liability	$52,223	$14,394	$12,016	$10,352
Professional Liability	$10,170	$1,376	$1,376	$0
Property	$25,269	$5,641	$2,961	$0
Workers' Compensation	$26,128	$22,574	$15,465	$12,484

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF EASTBOROUGH

	Policy Year. 4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$4,577	$3,690	$2,778	$0
2. Auto Liability	$3,622	$1,394	$1,852	$0
3. Public Officials Liability	$2,675	$2,675	$2,675	$0
4. Police Professional	$4,225	$3,299	$3,834	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$33	$22	$18	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$3,878	$4,250	$3,592	$0
TOTALS - General Liability	$4,577	$3,690	$2,778	$0
Auto Liability	$3,622	$1,394	$1,852	$0
Professional Liability	$6,900	$5,974	$6,509	$0
Property	$33	$22	$18	$0
Workers' Compensation	$3,878	$4,250	$3,592	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums

Douglass

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$11,000	$9,500	$9,000	$8,500
2. Auto Liability	$0	$0	$0	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$2,500	$2,500	$2,190	$2,200
TOTALS - General Liability	$11,000	$9,500	$9,000	$8,500
Auto Liability	$0	$0	$0	$0
Professional Liability	$0	$0	$0	$0
Property	$0	$0	$0	$0
Workers' Compensation	$2,500	$2,500	$2,190	$2,200

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF Delphos

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$354	$363	$325	$295
2. Auto Liability	$246	$213	$203	$203
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,603	$1,558	$1,558	$1,558
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,344	$1,244	$1,018	$969
TOTALS - General Liability	$354	$363	$325	$295
Auto Liability	$246	$213	$203	$203
Professional Liability	$0	$0	$0	$0
Property	$1,603	$1,558	$1,558	$1,558
Workers' Compensation	$1,344	$1,244	$1,018	$969

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF DODGE CITY

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$78,063	$64,262	$47,549	$45,572
2. Auto Liability	$33,212	$26,666	$15,065	$18,205
3. Public Officials Liability	$5,832	$3,075	$2,800	$0
4. Police Professional	$6,284	$6,424	$5,936	$5,512
5. Other Liability	$9,525	$5,833	$5,833	$5,833
6. Umbrella/Excess Liability	$35,000	$19,500	$8,250	$7,000
7. Property	$39,453	$14,010	$11,478	$10,175
8. Boiler Machinery	$415	$509	$509	$419
9. Contractors Equipment	$3,033	$2,601	$1,817	$1,826
10. EDP & Valuable Papers	$1,593	$2,097	$921	$921
11. Workers' Compensation	$51,077	$54,094	$50,023	$46,888
TOTALS - General Liability	$122,588	$89,595	$61,632	$58,405
Auto Liability	$33,212	$26,666	$15,065	$18,205
Professional Liability	$12,116	$9,499	$8,736	$5,512
Property	$19,217	$19,217	$14,725	$13,341
Workers' Compensation	$51,077	$54,094	$50,023	$46,888

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF ELDORADO

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$34,280	$16,491	$8,941	$9,902
2. Auto Liability	$16,446	$11,126	$8,255	$19,278
3. Public Officials Liability	$4,815	$3,200	$1,789	$1,700
4. Police Professional	$6,890	$6,995	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$37,723	$23,170	$14,669	$5,814
8. Boiler Machinery	$817	$751	$526	$510
9. Contractors Equipment	$2,724	$699	$375	$365
10. EDP & Valuable Papers	$319	$319	$230	$230
11. Workers Compansation	$56,296	$57,846	$40,170	$38,649
TOTALS - General Liability	$34,280	$16,491	$8,941	$9,902
Auto Liability	$16,446	$11,126	$8,255	$19,278
Professional Liability	$11,705	$10,195	$1,789	$1,700
Property	$41,583	$24,939	$15,800	$6,919
Workers Compansation	$56,296	$57,846	$40,170	$38,649

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History

ELLIS

	Policy Year. 4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$15,179	$5,795	$4,431	$2,895
2. Auto Liability	$1,503	$918	$870	$941
3. Public Officials Liability	$781	$526	$526	$526
4. Police Professional	$2,430	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$4,349	$4,801	$4,701	$1,099
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$1,767	$1,753	$760	$760
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$8,244	$8,243	$7,819	$7,006
TOTALS - General Liability	$15,179	$5,795	$4,431	$2,895
Auto Liability	$1,503	$918	$870	$941
Professional Liability	$3,211	$526	$526	$526
Property	$6,116	$6,554	$5,461	$1,859
workers' compensation	$8,244	$8,243	$7,819	$7,006

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF ENSIGN

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$400	$580	$0
2. Auto Liability	$0	$400	$580	$580
3. Public Officials Liability	$589	$589	$589	$589
4. Police Professional	$500	$500	$500	$500
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,168	$1,168	$1,168	$1,168
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$321	$321	$321	$321
TOTALS - General Liability	$0	$400	$580	$0
Auto Liability	$0	$400	$580	$580
Professional Liability	$1,089	$1,089	$1,089	$1,089
Property	$1,168	$1,168	$1,168	$1,168
Workers' Compensation	$321	$321	$321	$321

Jun-86

LEAGUE OF KANSAS MUNICIPALITIES

Premium History

GARDEN PLAIN

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$826	$2,550	$1,211	$98[illegible]
2. Auto Liability	$1,705	$1,343	$1,365	$98[illegible]
3. Pub'ic Officials Liability	$685	$0	$367	$36[illegible]
4. Police Professional	$0	$0	$0	$[illegible]
5. Other Liability	$0	$0	$0	$[illegible]
6. Umbrella/Excess Liability	$0	$0	$0	$[illegible]
7. Property	$879	$0	$0	$[illegible]
8. Boiler Machinery	$0	$0	$0	$[illegible]
9. Contractors Equipment	$356	$363	$363	$36[illegible]
10. EDP & Valuable Papers	$0	$0	$0	$[illegible]
11. Workers Compensation	$578	$528	$467	$26[illegible]
TOTALS - General Liability	$826	$2,550	$1,211	$98[illegible]
Auto Liability	$1,705	$1,343	$1,365	$98[illegible]
Professional Liability	$685	$0	$367	$36[illegible]
Property	$1,235	$363	$363	$36[illegible]
Workers Compensation	$578	$528	$467	$26[illegible]

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF GIRARD

	Policy Year:			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$5,593	$4,479	$4,732
2. Auto Liability	$6,775	$4,869	$3,338	$4,232
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$3,751	$2,952	$2,624
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$949	$659	$587
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$8,476	$10,262	$9,047	$8,747
TOTALS - General Liability	$0	$5,593	$4,479	$4,732
Auto Liability	$6,775	$4,869	$3,338	$4,232
Professional Liability	$0	$0	$0	$0
Property	$0	$4,700	$3,611	$3,211
Workers' Compensation	$8,476	$10,262	$9,047	$8,747

Premiums
CITY OF GODDARD

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$2,300	$1,493	$1,422	$436
2. Auto Liability	$3,000	$2,611	$2,192	$416
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$764	$575	$658	$202
6. Umbrella/Excess Liability	$800	$600	$500	$154
7. Property	$4,564	$4,182	$4,040	$1,239
8. Boiler Machinery	$3,070	$2,611	$2,192	$416
9. Contractors Equipment	$152	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$25	$25	$25	$25
TOTALS - General Liability	$3,864	$2,668	$2,580	$792
Auto Liability	$3,000	$2,611	$2,192	$416
Professional Liability	$0	$0	$0	$0
Property	$7,786	$6,793	$6,232	$1,655
Workers' Compensation	$25	$25	$25	$25

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF GOFF

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$490	$475	$526	$473
2. Auto Liability	$863	$696	$666	$429
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$673	$538	$661	$889
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$100	$100	$100	$100
11. Workers' Compensation	$496	$400	$420	$309
TOTALS - General Liability	$490	$475	$526	$473
Auto Liability	$863	$696	$666	$429
Professional Liability	$0	$0	$0	$0
Property	$773	$638	$761	$989
Workers' Compensation	$496	$400	$420	$309

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF GOODLAND

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$14,964	$13,162	$9,331	$9,003
2. Auto Liability	$14,819	$9,761	$7,160	$6,970
3. Public Officials Liability	$3,399	$1,533	$1,164	$1,456
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$2,500	$2,250	$1,000	$1,000
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$22,430	$13,256	$10,520	$8,907
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$1,258	$1,258	$0	$869
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$21,539	$14,519	$13,829	$16,006
TOTALS - General Liability	$17,464	$15,412	$10,331	$10,002
Auto Liability	$14,819	$9,761	$7,160	$6,970
Professional Liability	$3,399	$1,533	$1,164	$1,456
Property	$23,688	$14,514	$10,520	$9,776
Workers' Compensation	$21,539	$14,519	$13,829	$16,006

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF GREAT BEND

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$39,880	$20,765	$13,882	$14,129
2. Auto Liability	$37,156	$11,815	$9,929	$9,583
3. Public Officials Liability	$6,640	$2,575	$2,656	$4,750
4. Police Professional	$88,734	$7,755	$8,108	$9,075
5. Other Liability	$4,425	$1,481	$2,100	$2,100
6. Umbrella/Excess Liability	$0	$6,000	$0	$0
7. Property	$12,855	$10,392	$6,212	$4,989
8. Boiler Machinery	$1,495	$1,338	$1,304	$1,304
9. Contractors Equipment	$3,382	$2,104	$2,526	$1,824
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$82,061	$76,707	$71,033	$80,984
TOTALS - General Liability	$44,305	$28,246	$15,982	$16,229
Auto Liability	$37,156	$11,815	$9,929	$9,583
Professional Liability	$95,374	$10,330	$10,764	$13,825
Property	$17,732	$13,834	$10,042	$8,117
Workers Compensation	$82,061	$76,707	$71,033	$80,984

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF Hardtner

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$0	$0	$0
2. Auto Liability	$1,292	$0	$0	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,180	$0	$0	$0
TOTALS - General Liability	$0	$0	$0	$0
Auto Liability	$1,292	$0	$0	$0
Professional Liability	$0	$0	$0	$0
Property	$0	$0	$0	$0
Workers' Compensation	$1,180	$0	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF HAYS

	Policy Years			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$23,106	$18,183	$13,689	$16,157
2. Auto Liability	$9,994	$9,850	$9,440	$8,643
3. Public Officials Liability	$0	$3,656	$0	$0
4. Police Professional	$4,743	$3,752	$3,606	$4,018
5. Other Liability	$1,276	$1,160	$1,111	$1,111
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$7,779	$8,051	$8,257	$8,155
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$34,073	$26,979	$34,539	$35,539
TOTALS - General Liability	$24,382	$19,342	$14,800	$17,268
Auto Liability	$9,994	$9,850	$9,440	$8,643
Professional Liability	$4,743	$7,408	$3,626	$4,018
Property	$7,779	$8,051	$8,257	$8,155
Workers' Compensation	$34,073	$26,979	$34,539	$35,539

Jun [illegible]

LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF HAYSVILLE

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$35,765	$13,753	$17,456	$16,342
2. Auto Liability	$9,813	$6,915	INCL PKG	INCL PKG
3. Public Officials Liability	$2,587	$1,553	$1,609	$1,609
. Police Professional	$8,515	$6,487	$4,285	$3,907
. Other Liability	$0	$0	$0	$0
Umbrella/Excess Liability	$0	$0	$0	$0
Property	INCL PKG	INCL PKG	INCL PKG	INCL PKG
Boiler Machinery	$0	$0	$0	$0
Contractors Equipment	INCL PKG	INCL PKG	INCL PKG	INCL PKG
EDP & Valuable Papers	$0	$0	$0	$0
Workers Compensation	$13,982	$14,503	$14,356	$15,479
LS - General Liability	$35,765	$13,753	$17,456	$16,342
Auto Liability	$9,813	$6,915	$0	$0
Professional Liability	$11,102	$8,040	$5,894	$5,516
Property	$0	$0	$0	$0
Workers Compensation	$13,982	$14,503	$14,356	$15,479

Jun-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF HERINGTON

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$5,518	$3,978	$3,271	$3,761
2. Auto Liability	$8,072	$5,416	$5,559	$5,674
3. Public Officials Liability	$984	$820	$3,195	$3,330
4. Police Professional	$0	$0	$2,359	$1,001
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$11,074	$7,603	$7,603	$1,784
8. Boiler Machinery	$8,464	$6,938	$6,938	$7,420
9. Contractors Equipment	$667	$667	$667	$667
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$15,815	$12,243	$11,165	$9,748
TOTALS - General Liability	$5,518	$3,978	$3,271	$3,761
Auto Liability	$8,072	$5,416	$5,559	$5,674
Professional Liability	$984	$820	$5,554	$4,331
Property	$20,205	$15,208	$15,208	$9,871
Workers Compensation	$15,815	$12,243	$11,165	$9,748

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF HESSTON

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$6,050	$3,864	$3,824	$4,124
2. Auto Liability	$10,916	$5,918	$5,010	$4,895
3. Public Officials Liability	$3,514	$632	$497	$565
4. Police Professional	$1,531	$0	$0	$0
5. Other Liability	$2,298	$6,590	$2,550	$2,500
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$11,301	$9,737	$10,296	$12,241
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$2,352	$1,553	$1,154	$2,100
10. EDP & Valuable Papers	$100	$100	$100	$100
11. Workers' Compensation	$8,500	$8,192	$9,928	$8,070
TOTALS - General Liability	$8,048	$10,454	$6,374	$6,624
Auto Liability	$10,916	$5,918	$5,010	$4,895
Professional Liability	$5,045	$632	$497	$565
Property	$13,753	$11,390	$11,550	$14,441
Workers' Compensation	$8,500	$8,192	$9,928	$8,070

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF HILLSBORO

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$5,639	$3,796	$3,005	$5,276
2. Auto Liability	$3,901	$3,796	$2,896	$2,816
3. Public Officials Liability	$1,470	$1,121	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$2,550	$2,250	$2,150	$1,980
7. Property	$8,516	$6,308	$5,496	$4,896
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$1,033	$783	$250	$250
10. EDP & Valuable Papers	$250	$227	$0	$0
11. Workers' Compensation	$10,462	$7,692	$8,783	$9,530
TOTALS - General Liability	$8,189	$6,046	$5,155	$7,256
Auto Liability	$3,901	$3,796	$2,896	$2,816
Professional Liability	$1,470	$1,121	$0	$0
Property	$9,799	$7,318	$5,746	$5,146
Workers' Compensation	$10,462	$7,692	$8,783	$9,530

Apr-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF HOLCOMB

	Policy Year 4/01/85 4/01/86	4/01/84 4/01/85	/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$1,106	$901	$690	$0
2. Auto Liability	$6,488	$2,353	$1,317	$0
3. Public Officials Liability	$806	$653	$540	$1,265
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$2,087	$1,739	$522	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$295	$295	$257	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$4,038	$2,546	$2,563	$0
TOTALS - General Liability	$1,106	$901	$690	$0
Auto Liability	$6,488	$2,353	$1,317	$0
Professional Liability	$806	$653	$540	$1,265
Property	$2,382	$2,034	$779	$0
Workers Compensation	$4,038	$2,546	$2,563	$0

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF Holyrood

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$2,240	$2,240	$1,439	$1,439
2. Auto Liability	$1,850	$1,435	$0	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$2,974	$2,974	$2,420	$2,420
8. Boiler Machinery	$150	$97	$82	$82
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,717	$1,737	$1,760	$1,690
TOTALS - General Liability	$2,240	$2,240	$1,439	$1,439
Auto Liability	$1,850	$1,435	$0	$0
Professional Liability	$0	$0	$0	$0
Property	$3,124	$3,071	$2,502	$2,502
Workers' Compensation	$1,717	$1,797	$1,760	$1,690

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF HUMBOLDT

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$26,572	$22,143	$13,876	$14,734
2. Auto Liability	$0	$0	$0	$0
3. Public Officials Liability	$1,395	$1,046	$1,046	$1,395
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$654	$659	$654	$659
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$26,572	$22,143	$13,876	$14,734
Auto Liability	$0	$0	$0	$0
Professional Liability	$1,395	$1,046	$1,046	$1,395
Property	$654	$659	$654	$659
Workers' Compensation	$0	$0	$0	$0

LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF HUTCHINSON

	Policy Year. 4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$240,797	$54,262	$40,203	$36,268
2. Auto Liability	$49,838	$54,879	$22,721	$24,537
3. Public Officials Liability	$0	$18,151	INCL	INCL
4. Police Professional	$0	$14,036	$7,290	$7,254
5. Other Liability	$0	$5,000	$4,000	$3,000
6. Umbrella/Excess Liability	N/A	N/A	$10,000	$10,000
7. Property	$67,365	$31,350	$20,319	$22,991
8. Boiler Machinery	$1,000	$1,000	$870	$870
9. Contractors Equipment	$8,908	$6,426	$4,328	$4,299
10. EDP & Valuable Papers	N/A	N/A	N/A	N/A
11. Workers Compensation	$240,796	$130,307	$134,078	$141,047
TOTALS - General Liability	$240,797	$59,262	$54,203	$49,268
Auto Liability	$49,838	$54,879	$22,721	$24,537
Professional Liability	$0	$32,187	$7,290	$7,254
Property	$77,273	$38,776	$25,517	$28,160
Workers Compensation	$240,796	$130,307	$134,078	$141,047

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF JOHNSON CITY

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$8,258	$7,586	$6,681	$0
2. Auto Liability	$4,384	$2,596	$0	$0
3. Public Officials Liability	$0	$1,165	$932	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$9,180	$7,586	$6,489	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$11,889	$8,726	$6,145	$0
TOTALS - General Liability	$8,258	$7,586	$6,681	$0
Auto Liability	$4,384	$2,596	$0	$0
Professional Liability	$0	$1,165	$932	$0
Property	$9,180	$7,586	$6,489	$0
Workers' Compensation	$11,889	$8,726	$6,145	$0

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF KANOPOLIS

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$0	$0	$0
2. Auto Liability	$737	$512	$440	$700
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,038	$1,042	$997	$996
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$252	$228	$220	$170
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,567	$1,416	$1,341	$973
TOTALS - General Liability	$0	$0	$0	$0
Auto Liability	$737	$512	$440	$700
Professional Liability	$0	$0	$0	$0
Property	$1,290	$1,270	$1,217	$1,166
Workers' Compensation	$1,567	$1,416	$1,341	$973

Apr-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF KIOWA

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$2,446	$2,445	$2,160	$997
2. Auto Liability	$2,270	$1,462	$1,386	$1,162
3. Public Officials Liability	$822	$461	$0	$0
4. Police Professional	$0	$0	$700	$765
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$2,967	$2,980	$2,807	$3,008
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$560	$693	$784	$693
10. EDP & Valuable Papers	$145	$0	$0	$0
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$2,446	$2,445	$2,160	$997
Auto Liability	$2,270	$1,462	$1,386	$1,162
Professional Liability	$822	$461	$700	$765
Property	$3,672	$3,673	$3,591	$3,701
Workers Compensation	$0	$0	$0	$0

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF LAKE QUIVIRA

	Policy Year. 3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$6,813	$5,000	$354
2. Auto Liability	$4,069	$4,269	$2,729	$3,069
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$1,000	$1,200	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$3,250	$1,300	$0
7. Property	$100	$100	$100	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$717	$250	$250	$350
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,299	$1,196	$2,387	$1,720
TOTALS - General Liability	$0	$10,063	$6,300	$354
Auto Liability	$4,069	$4,269	$2,729	$3,069
Professional Liability	$1,000	$1,200	$0	$0
Property	$817	$350	$350	$350
Workers' Compensation	$1,299	$1,196	$2,387	$1,720

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF LAWRENCE

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$0	$0	$0
2. Auto Liability	$64,000	$31,000	$27,000	$32,500
3. Public Officials Liability	$8,000	$6,500	$4,000	$5,000
4. Police Professional	$700	$5,100	$4,200	$3,800
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$22,000	$23,000	$19,500	$19,000
7. Property	$1,300	$1,097	$1,000	$1,200
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$14,000	$13,000	$9,500	$10,000
TOTALS - General Liability	$22,000	$23,000	$19,500	$19,000
Auto Liability	$64,000	$31,000	$27,000	$32,500
Professional Liability	$8,700	$11,600	$8,200	$8,800
Property	$1,300	$1,097	$1,000	$1,200
Workers Compensation	$14,000	$13,000	$9,500	$10,000

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF LEBANON

	Policy Year. 4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$687	$621	$695	$0
2. Auto Liability	$0	$0	$0	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,426	$665	$818	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$63	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$1,036	$936	$693	$0
TOTALS - General Liability	$687	$621	$695	$0
Auto Liability	$0	$0	$0	$0
Professional Liability	$0	$0	$0	$0
Property	$1,489	$665	$818	$0
Workers Compensation	$1,036	$936	$693	$0

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF LENEXA

	Policy Year.			
	3/15/85	3/15/84	3/15/83	3/15/82
	3/15/86	3/15/85	3/15/84	3/15/83
1. Primary General Liability	$116,000	$18,000	$14,500	$30,256
2. Auto Liability	$41,075	$20,138	$15,887	$42,040
3. Public Officials Liability	$7,400	$2,800	$4,527	$3,778
4. Police Professional	$10,900	$9,816	$0	$11,895
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$13,485	$8,000	$0
7. Property	$26,158	$9,600	$7,980	$5,448
8. Boiler Machinery	$2,774	$2,219	$1,663	$0
9. Contractors Equipment	$6,244	$2,555	$2,922	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$97,598	$89,182	$92,963	$68,740
TOTALS - General Liability	$116,000	$31,485	$22,500	$30,256
Auto Liability	$41,075	$20,138	$15,887	$42,040
Professional Liability	$18,300	$12,616	$4,527	$15,673
Property	$35,176	$14,374	$12,565	$5,448
Workers Compensation	$97,598	$89,182	$92,963	$68,740

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF LINWOOD

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$903	$0	$0
2. Auto Liability	$0	$0	$0	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$959	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$0	$475	$0	$0
TOTALS - General Liability	$0	$903	$0	$0
Auto Liability	$0	$0	$0	$0
Professional Liability	$0	$0	$0	$0
Property	$0	$959	$0	$0
Workers' Compensation	$0	$475	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF LORRAINE

	Policy Year,			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$502	$502	$502	$527
2. Auto Liability	$120	$0	$0	$0
3. Public Officials Liability	$663	$689	$584	$584
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$292	$292	$292	$320
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$506	$405	$377	$370
TOTALS - General Liability	$502	$502	$502	$527
Auto Liability	$120	$0	$0	$0
Professional Liability	$663	$689	$584	$584
Property	$292	$292	$292	$320
Workers' Compensation	$506	$405	$377	$370

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Apr-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF LYONS

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$9,383	$1,779	$1,596	$0
2. Auto Liability	$5,300	$3,327	$3,900	$4,700
3. Public Officials Liability	$1,500	$0	$0	$0
4. Police Professional	$1,500	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$4,200	$1,800	$1,600	$0
7. Property	$2,200	$18,500	$14,200	$13,700
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$14,400	$7,900	$7,600	$0
TOTALS - General Liability	$13,585	$3,579	$3,196	$0
Auto Liability	$5,300	$3,327	$3,900	$4,700
Professional Liability	$3,000	$0	$0	$0
Property	$2,200	$18,500	$14,200	$13,700
Workers Compensation	$14,400	$7,900	$7,600	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF MANHATTEN

	Policy Year.			
	5/4/85 5/4/86	5/4/84 5/4/85	5/4/83 5/4/84	5/4/82 5/4/83
1. Primary General Liability	$72,508	$16,266	$16,266	$0
2. Auto Liability	$28,323	$15,970	$15,970	$0
3. Public Officials Liability	$7,863	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$4,950	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$22,752	$19,981	$0	$0
8. Boiler Machinery	$908	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$85,655	$54,231	$0	$0
TOTALS - General Liability	$77,458	$16,266	$16,266	$0
Auto Liability	$28,323	$15,970	$15,970	$0
Professional Liability	$7,863	$0	$0	$0
Property	$23,660	$19,981	$0	$0
Workers Compensation	$85,655	$54,231	$50,773	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF MANTER

	Policy Year. 4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$677	$677	$677	$0
2. Auto Liability	$185	$141	$141	$0
3. Public Officials Liability	$900	$500	$450	$450
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$525	$525	$525	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$913	$725	$957	$367
TOTALS - General Liability	$677	$677	$677	$0
Auto Liability	$185	$141	$141	$0
Professional Liability	$900	$500	$450	$450
Property	$525	$525	$525	$0
Workers' Compensation	$913	$725	$957	$367

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF McCUNE

	Policy Year.			
	4/01/85	4/01/84	4/01/83	4/01/82
	4/01/86	4/01/85	4/01/84	4/01/83
1. Primary General Liability	$1,833	$1,863	$1,174	$1,000
2. Auto Liability	$608	$412	$285	$285
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$397	$439	$439	$431
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$295	$124	$124	$124
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$618	$654	$395	$655
TOTALS - General Liability	$1,833	$1,863	$1,174	$1,000
Auto Liability	$608	$412	$285	$285
Professional Liability	$0	$0	$0	$0
Property	$692	$563	$563	$555
Workers Compensation	$618	$654	$395	$655

M Jun-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF MILTONVALE

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$2,087	$9,619	$1,130	$1,768
2. Auto Liability	$2,307	$4,546	$2,118	$2,714
3. Public Officials Liability	$587	$587	$307	$307
4. Police Professional	$840	$600	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,765	$1,484	$0	$1,768
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$1,790	$1,376	$1,689	$2,040
TOTALS - General Liability	$2,087	$9,619	$1,130	$1,768
Auto Liability	$2,307	$4,546	$2,118	$2,714
Professional Liability	$1,427	$1,187	$307	$307
Property	$1,765	$1,484	$0	$1,768
Workers Compensation	$1,790	$1,376	$1,689	$2,040

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF MINNEAPOLIS

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$3,846	$2,729	$2,583	$0
2. Auto Liability	$3,541	$3,189	$2,868	$0
3. Public Officials Liability	$929	$656	$820	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$1,400	$1,193	$1,193	$0
6. Umbrella/Excess Liability	$2,450	$1,150	$1,150	$0
7. Property	$18,649	$14,357	$5,703	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$6,973	$5,784	$5,439	$0
TOTALS - General Liability	$7,696	$5,072	$4,926	$0
Auto Liability	$3,541	$3,189	$2,868	$0
Professional Liability	$929	$656	$820	$0
Property	$14,357	$14,357	$5,703	$0
Workers' Compensation	$6,973	$5,784	$5,439	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF MISSION

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$250	$0	$0	$0
2. Auto Liability	$14,000	$12,800	$10,800	$8,800
3. Public Officials Liability	$0	$0	$0	$750
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$7,800	$1,200	$807	$807
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$250	$250	$50	$50
11. Workers	$14,700	$14,200	$13,889	$13,500
TOTALS - General Liability	$250	$0	$0	$0
Auto Liability	$14,000	$12,800	$10,800	$8,800
Professional Liability	$0	$0	$0	$750
Property	$8,050	$1,450	$857	$857
Workers	$14,700	$14,200	$13,889	$13,500

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF MORROWVILLE

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$687	$723	$591	$0
2. Auto Liability	$89	$52	$59	$29
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$370	$378	$360	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$104	$104	$22	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$401	$401	$370	$290
TOTALS - General Liability	$687	$723	$591	$0
Auto Liability	$89	$52	$59	$29
Professional Liability	$0	$0	$0	$0
Property	$482	$482	$382	$0
Workers' Compensation	$401	$401	$370	$290

LEAGUE OF KANSAS MUNICIPALITIES

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Premiums
CITY OF MOUND CITY

	Policy Year. 3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
Primary General Liability	$843	$635	$808	$846
Auto Liability	$861	$550	$541	$564
Public Officials Liability	$0	$0	$0	$0
Police Professional	$0	$0	$0	$0
Other Liability	$0	$0	$0	$0
Umbrella/Excess Liability	$0	$0	$0	$0
Property	$597	$531	$512	$227
Boiler Machinery	$0	$0	$0	$0
Contractors Equipment	$0	$0	$0	$0
EDP & Valuable Papers	$0	$0	$0	$0
Workers' Compensation	$2,549	$2,202	$1,821	$1,434
TOTALS - General Liability	$843	$635	$808	$846
Auto Liability	$861	$550	$541	$564
Professional Liability	$0	$0	$0	$0
Property	$597	$531	$512	$227
Workers' Compensation	$2,549	$2,202	$1,821	$1,434

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF MULVANE

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$5,399	$3,313	$3,208	$0
2. Auto Liability	$6,421	$4,140	$4,045	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$1,949	$1,996	$1,210	$0
6. Umbrella/Excess Liability	$1,142	$806	$1,008	$0
7. Property	$9,598	$6,792	$4,837	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$1,881	$1,893	$581	$0
10. EDP & Valuable Papers	$117	$15	$57	$0
11. Workers' Compensation	$18,415	$12,477	$13,051	$0
TOTALS - General Liability	$8,490	$6,115	$5,426	$0
Auto Liability	$6,421	$4,140	$4,045	$0
Professional Liability	$0	$0	$0	$0
Property	$8,700	$8,700	$5,475	$0
Workers' Compensation	$18,415	$12,477	$13,051	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF NORTH NEWTON

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$5,556	$1,666	$2,318	$0
2. Auto Liability	$1,081	$800	$875	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$1,000	$487	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$100	$0	$0	$0
10. EDP & Valuable Papers	$2,119	$1,899	$1,410	$0
11. Workers' Compensation				
TOTALS - General Liability	$6,556	$1,666	$2,318	$0
Auto Liability	$1,081	$800	$875	$0
Professional Liability	$1,000	$487	$0	$0
Property	$100	$0	$0	$0
Workers' Compensation	$2,119	$1,899	$1,410	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF OLPE

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$601	$560	$560	$0
2. Auto Liability	$2,253	$1,115	$1,115	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$518	$0	$0	$0
7. Property	$933	$820	$820	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$114	$50	$50	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$810	$586	$586	$0
TOTALS - General Liability	$1,119	$560	$560	$0
Auto Liability	$2,253	$1,115	$1,115	$0
Professional Liability	$0	$0	$0	$0
Property	$870	$870	$870	$0
Workers' Compensation	$810	$586	$586	$0

Jun-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF OTTAWA

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$[illegible],514	$9,561	$20,117	$16,366
2. Auto Liability	$17,620	$4,848	$4,735	$41,787
3. Public Officials Liability	$4,957	$1,487	$1,487	$5,674
4. Police Professional	$17,663	$5,828	$5,887	$5,887
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$3,600	$4,810	$4,452
7. Property	$28,294	$13,473	$16,028	$14,722
8. Boiler Machinery	$14,421	$8,933	$11,163	$11,095
9. Contractors Equipment	$0	$0	$557	$452
10. EDP & Valuable Papers	$313	$294	$902	$832
11. Workers Compensation	$71,986	$44,762	$45,637	$40,261
TOTALS - General Liability	$51,514	$13,161	$24,927	$20,818
Auto Liability	$17,620	$4,848	$4,735	$41,787
Professional Liability	$22,620	$7,315	$7,374	$11,561
Property	$43,028	$22,700	$28,650	$27,101
Workers Compensation	$71,986	$44,762	$45,637	$40,261

H Jun-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
OVERLAND PARK

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$0	$0	$0
2. Auto Liability	$116,700	$38,500	$22,300	$41,700
3. Public Officials Liability	$17,000	$10,000	$10,700	$10,400
4. Police Professional	$44,000	$20,170	$13,450	$24,400
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$114,400	$18,250	$14,600	$12,000
7. Property	$147,900	$100,937	$62,700	$60,500
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$4,410	$2,130	$1,800	$1,650
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$114,400	$18,250	$14,600	$12,000
Auto Liability	$116,700	$38,500	$22,300	$41,700
Professional Liability	$61,000	$30,170	$24,150	$34,800
Property	$152,310	$103,067	$64,500	$62,150
Workers Compensation	$0	$0	$0	$0

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF PALMER

	Policy Year:			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$578	$552	$552	$552
2. Auto Liability	$35	$35	$35	$35
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$1,180	$915	$915	$915
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$260	$260	$260	$260
8 Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$451	$312	$240	$240
TOTALS - General Liability	$1,758	$1,467	$1,467	$1,467
Auto Liability	$35	$35	$35	$35
Professional Liability	$0	$0	$0	$0
Property	$260	$260	$260	$260
Workers' Compensation	$451	$312	$240	$240

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF PAOLA

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$4,173	$3,089	$3,249	$2,913
2. Auto Liability	$6,418	$4,494	$4,577	$4,138
3. Public Officials Liability	$935	$935	$850	$830
4. Police Professional	$8,775	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$6,463	$6,573	$6,996	$6,935
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$1,085	$393	$380	$350
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$26,316	$23,952	$20,422	$160,711
TOTALS - General Liability	$4,173	$3,089	$3,249	$2,913
Auto Liability	$6,418	$4,494	$4,577	$4,138
Professional Liability	$9,710	$935	$850	$830
Property	$6,966	$6,966	$7,376	$7,285
Workers' Compensation	$26,316	$23,952	$20,422	$160,711

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF PARSONS

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$21,412	$15,460	$0	$0
2. Auto Liability	$29,481	$17,742	$0	$0
3. Public Officials Liability	$5,594	$4,663	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$1,785	$1,573	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$14,839	$11,945	$0	$0
8. Boiler Machinery	$677	$560	$0	$0
9. Contractors Equipment	$543	$543	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$43,846	$47,532	$0	$0
TOTALS - General Liability	$23,197	$17,033	$0	$0
Auto Liability	$29,481	$17,742	$0	$0
Professional Liability	$5,594	$4,663	$0	$0
Property	$16,059	$13,048	$0	$0
Workers' Compensation	$43,846	$47,532	$0	$0

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF PEABODY

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$1,960	$1,278	$1,134	$1,402
2. Auto Liability	$2,107	$1,720	$1,694	$1,300
3. Public Officials Liability	$740	$522	$653	$1,065
4. Police Professional	$1,960	$1,278	$1,134	$1,402
5. Other Liability	$2,107	$1,720	$1,694	$1,300
6. Umbrella/Excess Liability	$740	$522	$653	$1,065
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$3,391	$2,787	$2,715	$2,553
TOTALS - General Liability	$4,807	$3,520	$3,481	$3,767
Auto Liability	$2,107	$1,720	$1,694	$1,300
Professional Liability	$2,700	$1,800	$1,787	$2,467
Property	$0	$0	$0	$0
Workers' Compensation	$3,391	$2,787	$2,715	$2,553

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF PITTSBURG

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$56,530	$0	$0	$0
2. Auto Liability	$16,775	$16,976	$10,100	$8,418
3. Public Officials Liability	$4,413	$4,890	$4,781	$0
4. Police Professional	$11,757	$5,076	$3,580	$0
5. Other Liability	$5,500	$5,500	$5,181	$2,005
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$18,368	$33,976	$20,977	$18,831
8. Boiler Machinery	$1,141	$958	$798	$798
9. Contractors Equipment	$9,856	$2,742	$2,134	$2,994
10. EDP & Valuable Papers	$2,475	$306	$0	$0
11. Workers' Compensation	$51,505	$64,875	$44,530	$34,160
TOTALS - General Liability	$62,030	$5,500	$5,181	$2,005
Auto Liability	$16,775	$16,976	$10,100	$8,418
Professional Liability	$16,170	$9,966	$8,361	$0
Property	$31,820	$37,982	$23,909	$22,623
Workers' Compensation	$51,505	$64,875	$44,530	$34,160

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF PLAINVILLE

	Policy Year 6/1/85 6/1/86	6/1/84 6/1/85	6/1/83 6/1/84	6/1/82 6/1/83
1. Primary General Liability	$21	$21	$21	$21
2. Auto Liability	$2,395	$2,339	$2,463	$2,187
3. Public Officials Liability	$1,231	$1,231	$947	$947
4. Police Professional	$413	$311	$287	$255
5. Other Liability	$3,963	$2,938	$2,711	$2,711
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$2,263	$958	$958	$958
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$2,639	$2,581	$2,561	$2,382
TOTALS - General Liability	$3,984	$2,959	$2,732	$2,732
Auto Liability	$2,395	$2,339	$2,463	$2,187
Professional Liability	$1,644	$1,542	$1,234	$1,202
Property	$2,263	$958	$958	$958
Workers' Compensation	$2,639	$2,581	$2,561	$2,382

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF QUENEMO

	Policy Year.			
	4/1/85	4/1/87	4/1/83	4/1/82
	4/1/86	4/1/85	4/1/84	4/1/83
1. Primary General Liability	$457	$403	$159	$574
2. Auto Liability	$1,462	$1,255	$0	$848
3. Public Officials Liability	$605	$326	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$954	$689	$0	$561
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$218	$227	$0	$243
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$737	$653	$0	$692
TOTALS - General Liability	$457	$403	$159	$574
Auto Liability	$1,462	$1,255	$0	$848
Professional Liability	$605	$326	$0	$0
Property	$1,172	$916	$0	$804
Workers' Compensation	$737	$653	$0	$692

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Jun-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF RUSSELL

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$23,143	$8,387	$6,988	$5,334
2. Auto Liability	$15,893	$8,426	$4,656	$4,428
3. Public Officials Liability	$3,155	$2,998	$2,509	$2,509
4. Police Professional	$6,049	$2,998	$2,351	$2,351
5. Other Liability	$750	$550	$550	$425
6. Umbrella/Excess Liability	$0	$2,690	$1,477	$1,262
7. Property	$12,810	$9,725	$10,568	$12,690
8. Boiler Machinery	$27,790	$23,600	$18,477	$17,431
9. Contractors Equipment	$4,337	$2,977	$2,438	$1,576
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$54,714	$41,516	$37,529	$35,032
TOTALS - General Liability	$23,893	$11,627	$9,015	$7,021
Auto Liability	$15,893	$8,426	$4,656	$4,428
Professional Liability	$9,204	$5,996	$4,860	$4,860
Property	$44,937	$36,302	$31,483	$31,697
Workers Compensation	$54,714	$41,516	$37,529	$35,032

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LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF ST.GEORGE

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$3,955	$1,508	$0	$0
2. Auto Liability	$919	$1,508	$0	$0
3. Public Officials Liability	$608	$384	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$390	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$953	$953	$0	$0
TOTALS - General Liability	$3,955	$1,508	$0	$0
Auto Liability	$919	$1,508	$0	$0
Professional Liability	$608	$384	$0	$0
Property	$390	$0	$0	$0
Workers Compensation	$953	$953	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF SHARON SPRINGS

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$2,431	$1,959	$1,959	$1,959
2. Auto Liability	$2,649	$2,300	$1,787	$1,787
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$1,116	$1,116	$652	$652
7. Property	$9,380	$7,278	$8,644	$8,644
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$5,565	$4,566	$3,962	$3,669
TOTALS - General Liability	$3,547	$3,075	$2,611	$2,611
Auto Liability	$2,649	$2,300	$1,787	$1,787
Professional Liability	$0	$0	$0	$0
Property	$9,380	$7,278	$8,644	$8,644
Workers' Compensation	$5,565	$4,566	$3,962	$3,669

Jun-86

LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF SILVER LAKE

	Policy Year. 4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$1,597	$952	$725	$906
2. Auto Liability	$1,226	$796	$952	$685
3. Public Officials Liability	$1,696	$1,696	$1,272	$1,177
4. Police Professional	$1,650	$1,650	$1,650	$1,650
5. Other Liability	$1,138	$796	$0	$0
6. Umbrella/Excess Liability	$998	$500	$500	$500
7. Property	$2,100	$1,606	$1,981	$1,770
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$1,478	$1,143	$1,039	$1,238
TOTALS - General Liability	$3,727	$2,248	$1,225	$1,406
Auto Liability	$1,226	$796	$952	$685
Professional Liability	$3,346	$3,346	$2,922	$2,827
Property	$2,100	$1,606	$1,981	$1,770
Workers Compensation	$1,478	$1,143	$1,039	$1,238

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Jun-86 LEAGUE OF KANSAS MUNICIPALITIES

Premium History
CITY OF SUMMERFIELD

	Policy Year.			
	4/01/85 4/01/86	4/01/84 4/01/85	4/01/83 4/01/84	4/01/82 4/01/83
1. Primary General Liability	$697	$686	$839	$1,174
2. Auto Liability	$982	$1,594	$1,352	$1,140
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$1,488	$1,563	$1,511	$1,257
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$130	$199	$100	$100
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$506	$401	$370	$298
TOTALS - General Liability	$697	$686	$839	$1,174
Auto Liability	$982	$1,594	$1,352	$1,140
Professional Liability	$0	$0	$0	$0
Property	$1,618	$1,663	$1,611	$1,357
Workers Compensation	$506	$401	$370	$298

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF SALINA

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$132,274	$26,567	$27,703	$24,541
2. Auto Liability	$72,738	$35,381	$13,033	$13,055
3. Public Officials Liability	$15,266	$3,730	$3,991	$4,480
4. Police Professional	$16,037	$4,519	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$48,513	$43,148	$41,923	$43,148
8. Boiler Machinery	$655	$524	$504	$495
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$593	$547	$405	$113
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$0	$26,567	$27,703	$24,541
Auto Liability	$72,738	$35,381	$13,033	$13,055
Professional Liability	$31,303	$8,249	$3,991	$4,480
Property	$49,761	$44,219	$42,832	$43,756
Workers' Compensation	$0	$0	$0	$0

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF Shawnee

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$0	$0	$0
2. Auto Liability	$0	$0	$0	$0
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$15,000	$14,000	$12,198	$14,707
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equioment	$0	$0	$0	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers Compensation	$61,062	$41,740	$31,804	$38,455
TOTALS - General Liability	$0	$0	$0	$0
Auto Liability	$0	$0	$0	$0
Professional Liability	$15,000	$14,000	$12,198	$14,707
Property	$0	$0	$0	$0
Workers Compensation	$61,062	$41,740	$31,804	$38,455

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LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF STAFFORD

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$2,519	$3,116	$2,766	$2,856
2. Auto Liability	$4,958	$3,853	$3,461	$2,965
3. Public Officials Liability	$0	$0	$0	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$1,065	$1,003	$1,003	$1,003
7. Property	$5,113	$4,061	$3,996	$3,412
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$877	$845	$845	$863
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$8,195	$6,563	$5,808	$4,486
TOTALS - General Liability	$3,584	$4,119	$3,769	$3,859
Auto Liability	$4,958	$3,853	$3,461	$2,965
Professional Liability	$0	$0	$0	$0
Property	$5,990	$4,906	$3,841	$3,275
Workers' Compensation	$8,195	$6,563	$5,808	$4,486

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF TOPEKA

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$145,690	$54,595	$0	$0
2. Auto Liability	$71,048	$32,629	$0	$0
3. Public Officials Liability	$12,600	$6,247	$0	$0
4. Police Professional	$63,570	$58,905	$0	$0
5. Other Liability	$4,750	$4,000	$0	$0
6. Umbrella/Excess Liability	$0	$23,940	$23,940	$0
7. Property	$53,060	$47,449	$0	$0
8. Boiler Machinery	$2,599	$2,161	$0	$0
9. Contractors Equipment	$11,022	$9,312	$0	$0
10. EDP & Valuable Papers	$1,894	$1,627	$0	$0
11. Workers' Compensation	$0	$0	$0	$0
TOTALS - General Liability	$150,440	$82,535	$23,940	$0
Auto Liability	$71,048	$32,629	$0	$0
Professional Liability	$76,170	$65,152	$0	$0
Property	$68,575	$60,549	$0	$0
Workers' Compensation	$0	$0	$0	$0

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF TOWANDA

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$1,693	$1,071	$1,168	$2,114
2. Auto Liability	$1,632	$1,389	$1,368	$1,281
3. Public Officials Liability	$699	$493	$500	$0
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$3,193	$2,084	$3,033	$1,313
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$574	$559	$194	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$2,848	$2,162	$2,482	$1,957
TOTALS - General Liability	$1,693	$1,071	$1,168	$2,114
Auto Liability	$1,632	$1,389	$1,368	$1,281
Professional Liability	$699	$493	$500	$0
Property	$3,767	$2,643	$3,227	$1,313
Workers' Compensation	$2,848	$2,162	$2,482	$1,957

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF ULYSSES

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$18,300	$16,816	$14,546	$0
2. Auto Liability	$6,053	$5,453	$4,375	$3,745
3. Public Officials Liability	$1,835	$2,027	$1,731	$0
4. Police Professional	$2,762	$2,743	$1,783	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$0	$0	$0	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$1,275	$1,404	$1,404	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$10,201	$8,615	$11,496	$10,644
TOTALS - General Liability	$18,300	$16,816	$14,546	$0
Auto Liability	$6,053	$5,453	$4,375	$3,745
Professional Liability	$4,597	$4,770	$3,514	$0
Property	$1,404	$1,404	$1,404	$0
Workers' Compensation	$10,201	$8,615	$11,496	$10,644

Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF WHITEWATER

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$2,813	$1,258	$1,118	$0
2. Auto Liability	$881	$594	$482	$0
3. Public Officials Liability	$1,455	$370	$370	$370
4. Police Professional	$0	$0	$0	$0
5. Other Liability	$0	$0	$0	$0
6. Umbrella/Excess Liability	$0	$0	$0	$0
7. Property	$2,123	$1,597	$1,711	$0
8. Boiler Machinery	$0	$0	$0	$0
9. Contractors Equipment	$0	$0	$0	$0
10. EDP & Valuable Papers	$888	$828	$797	$771
11. Workers Compensation	$888	$888	$797	$771
TOTALS - General Liability	$2,813	$1,258	$1,118	$0
Auto Liability	$881	$594	$482	$0
Professional Liability	$1,455	$370	$370	$370
Property	$3,011	$2,425	$2,508	$771
Workers Compensation	$888	$888	$797	$771

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Apr-86

LEAGUE OF KANSAS MUNICIPALITIES

Premiums
CITY OF WINFIELD

	Policy Year.			
	3/15/85 3/15/86	3/15/84 3/15/85	3/15/83 3/15/84	3/15/82 3/15/83
1. Primary General Liability	$0	$26,376	$0	$0
2. Auto Liability	$0	$29,269	$23,862	$37,378
3. Public Officials Liability	$0	$0	$2,787	$0
4. Police Professional	$0	$0	$4,938	$0
5. Other Liability	$15,934	$0	$0	$0
6. Umbrella/Excess Liability	$0	$7,480	$0	$0
7. Property	$0	$33,701	$28,441	$24,237
8. Boiler Machinery	$0	$14,964	$14,553	$10,196
9. Contractors Equipment	$0	$2,770	$2,097	$0
10. EDP & Valuable Papers	$0	$0	$0	$0
11. Workers' Compensation	$68,522	$28,563	$47,866	$46,888
TOTALS - General Liability	$15,934	$33,856	$0	$0
Auto Liability	$0	$29,269	$23,862	$37,378
Professional Liability	$0	$0	$7,725	$0
Property	$0	$51,435	$45,091	$34,433
Workers' Compensation	$68,522	$28,563	$47,866	$46,888

Tribden

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE
TESTIMONY FOR PUBLIC HEARING
JULY 10, 1986

With the passage of the Tort Claims Act in 1979, the State of Kansas generated significant changes in the State's civil justice system. Major issues addressed by the act such as joint and several liability, punitive damages, interest paid prior to judgments, etc., are issues which now confront many states across the Country.

Despite legislation now in place, municipalities in the State of Kansas have suffered the impact of a system, across the nation, that is far out of balance and one that is expensive to consumers and taxpayers.

Just as in Proposition 51 passed June 3, 1986, by the State of California, we, too, are not looking for a "radical overhaul of the judicial system", but rather one of fairness---fairness to the taxpayer, fairness to the consumer and fairness to the potential defendants.

TORT SYSTEM

Problem: 1. Road Defects - A major portion of the lawsuits filed against the County since 1980 are road defect cases. Prior to the Tort Claims Act, there were fewer road defect cases. At that time, certain County Officials had to have actual notice prior to an action being filed or any claim of liability. Obviously, previous knowledge had a direct impact on allowing judgments. Currently, we are subject solely to the negligence test-- Legal Duty; Breach of Duty; Proximate Cause; and, Damages.

Suggestion: Repeal the system as it relates to Road Defect cases.

Problem: Civil Rights - The remaining lawsuits filed against the County are in the area of Civil Rights. While Civil Rights is based on Federal Statute, interpretation has surpassed equal rights and encompasses issues beyond those intended.

Suggestion: Johnson County would urge the Kansas legislature to continue to remind the U.S. Congress to confine it's interpretation of the Civil Rights Statute (42 USCA Section 1983) to those areas where equal protection has been denied rather than all issues dealing with proported takings without due process of law.

Attachment 19

INSURANCE REFORM

Problem: 1. There is a lack of availability and affordability of certain types of liability insurance for municipalities less that 150,000 population as well as those in excess of 150,000 population.

Suggestion: Inact legislation which will promote the individual consideration of risks and eradicate those underwriting procedures which are based entirely on population.

With legislation already or at least pending in some 37 out of 50 states, and, particularly with Proposition 51, the level of consciousness has been raised in terms of recognizing problems in the tort system. It is now time for insurance companies to come back to the marketplace and cooperate. Should legislation truly lower the cost of claims that insurers must pay, increased availability and lower premiums will ultimately result.

Carol N. Childers
Risk Manager
Johnson County, Kansas

CLAIMS AGAINST THE COUNTY S... 1980

NO	CASE TYPE	DATE FILED	NAME OF CLAIMANT	ALLE	STATUS	DATE CLOSED	AMOUNT OF SETTLEMENT
1	EEOC	01-Jul-83	Blackmon	EEOC	Settled	06-Sep-83	$13,708.00
2	EEOC	17-Aug-83	Laughlin	EEOC	Settled	01-Apr-86	$95,000.00
3	EEOC	16-Nov-84		EEOC	Closed	26-Oct-85	$0.00
4	EEOC	11-Jan-85		EEOC	Closed	30-Oct-85	$0.00
5	EEOC	25-Feb-85		EEOC	Pending	Pending	$0.00
6	EEOC	23-Sep-85		EEOC	Pending	Pending	$0.00
7	EEOC	26-Mar-86	Douglas	EEOC	Pending	Pending	$0.00
8	EEOC	07-May-86	Hoover	EEOC	Pending	Pending	$0.00
9	MISC	30-Apr-82		MISC	Dismissed	No Date	$0.00
10	MISC	09-Jul-82		MISC	Dismissed	30-Dec-83	$0.00
11	MISC	04-Aug-81		MISC	Closed	No Date	$0.00
12	MISC	25-Feb-82		MISC	Settled	15-Mar-83	$0.00
13	MISC	01-Jul-82	Allison	MISC	Closed	No Date	$4,400,000.00
14	MISC	01-Mar-83	Williams	MISC	Settled	No Date	$2,500.00
15	MISC	28-Oct-81	Fisher	MISC	Closed	25-Oct-82	$0.00
16	MISC	27-Sep-83		MISC	Default	No Date	$0.00
17	MISC	09-Feb-83		MISC	Dismissed	03-Jan-84	$0.00
18	MISC	27-Apr-84		MISC	Dismissed	05-Jun-84	$330.00
19	MISC	17-Jul-84	Wilson	MISC	Pending	Pending	$0.00
20	MISC	16-Aug-83	Hayne	MISC	Dismissed	No Date	$0.00
21	ROAD	25-Sep-80	Wilcox	ROAD	Closed	03-Jun-82	$0.00
22	ROAD	23-Jul-81	Medlock	ROAD	Dismissed	19-Apr-84	$0.00
23	ROAD	18-May-81	Bowen	ROAD	Closed	30-Aug-82	$9,800.00
24	ROAD	03-Dec-81	Parks	ROAD	Closed	15-May-84	$8,000.00
25	ROAD	16-Jun-81	Wheeles	ROAD	Dismissed	26-Apr-82	$0.00
26	ROAD	30-Aug-82	Poc	ROAD	Sum Judge	08-Nov-84	$0.00
27	ROAD	01-Nov-82	Sparks	ROAD	Dismissed	21-Jun-85	$125,000.00
28	ROAD	24-Jul-85	Spaedy	ROAD	Dismissed	19-Mar-86	$0.00
29	ROAD	14-Sep-85	Quigley	ROAD	Pending	Pending	$0.00
30	ROAD	20-Apr-84	Demiyt	ROAD	Dismissed	03-Jun-85	$0.00
31	ROAD	01-Oct-84	Powers	ROAD	Dismissed	02-Aug-85	$0.00

PRIMA Reviews:
State Actions On Insurance Crisis

Lawmakers across the country turned their attention to the liability insurance crisis this spring, with nearly every state legislature in regular session (as well as several which convened special sessions) expected to pass some type of relief measure, according to Michael Bird, senior staff director of the National Conference of State Legislatures (NCSL).

Following is a review of actions taken by each state (as of May 22, 1986) that pertain to public entities, including measures enacted, passed and awaiting signature of the governor, or defeated. (It should also be noted that several state legislatures were still in session and considering legislation as PRIMA-LETTER went to press.) Sources used in compiling this information were the NCSL, the Alliance of American Insurers, the Insurance Information Institute, the National League of Cities and PRIMA's biweekly bulletin, Riskwatch.

Note: *This paper is meant to provide an overview of state actions. For comprehensive information on the activity in your state legislature, contact your PRIMA chapter, state municipal league or county association. Readers are encouraged to keep us advised of any new legislative developments in their state with regard to the liability insurance crisis—ed.*

Alaska

Passed, and awaiting signature of governor: SB 377, modifying the doctrine of joint and several liability so defendants found to be less than 50 percent at fault cannot be forced to pay any more than twice the amount of their culpability. The bill also places a $500,000 cap on noneconomic damages except in cases of disfigurement or physical impairment.

Arizona

Seven tort reform bills were sent to the governor; five of those were vetoed, according to the NCSL. The one which pertains to public entities is HB 2377, which establishes penalties for frivolous suits.

Also passed: HB 2375 modifies insurance regulation and provides for alternative insurance options as follows: permits public entities to form pools; allows schools to self-insure; establishes a temporary joint underwriting association for all lines of insurance; and requires the Department of Insurance to set rules and regulations for disclosure of loss experience.

California

Approximately forty bills have been introduced in the legislature thus far, though none had been passed as PRIMA-LETTER went to press. Proposition 51, which will be voted upon by Californians on June 3, would eliminate joint and several liability in all suits seeking non-economic damages.

Previous action: Restricted attorneys' contingency fees, an action upheld by the U.S. Supreme Court in 1985.

Colorado

Passed, and awaiting signature of governor: SB 67, which will reduce awards by sums from specific collateral sources; limit damages for non-economic loss to $250,000 unless court finds "clear and convincing evidence," in which case $500,000 can be awarded; eliminates awards for *derivative* non-economic loss except when court finds "clear and convincing evidence" and may award $250,000.

Also passed: SB 69, making uniform most statutes of limitations at three years; SB 70, eliminating the doctrine of joint and several liability; SB 76, extending the "good Samaritan" laws to limit the liability of governmental entities (and others) when they volunteer their time without pay; HB 1185 and 1187, limiting liability for employers, shareholders, officers and board members resulting from the flow of water from a reservoir. Establishes immunity for state engineers and employees when monitoring reservoirs.

Additional legislation passed: HB 1193, lengthening the amount of time for prior notice of midterm cancellations; HB 1204 and HB 1358, expanding authority of the insurance commissioner to enforce the data reporting requirements of insurance companies, and expanding those requirements as well.

Connecticut

Enacted: HB 5400, establishing intergovernmental risk pools for liability and property coverage, and creating a municipal liability trust fund. Lawmakers also strengthened the state insurance commissioner's authority to reject midterm cancellations or rate increases.

Passed, and awaiting signature of governor: HB 6134, a broad tort reform bill that modifies joint and several liability to hold defendants more closely to their degree of fault; permits the use of structured settlements; sets up a sliding scale for plaintiff attorneys' contingency fees; imposes new limits on frivolous lawsuits; allows for consideration of collateral source information; establishes conditions under which public entities and their employees are immune from liability.

Previous action: Established a market assistance plan and authorized the creation of joint underwriting associations.

Georgia

Passed and awaiting signature of governor: SB 369 and SB 440, authorizing local governments and school boards to join together to secure liability insurance; SB 384, requiring insurance companies to provide more information on reserves; HB 1146, compelling plaintiffs found to have filed frivolous suits to pay fees and costs incurred by defendants; HB 1471, clarifying sovereign immunity of municipal corporations.

Hawaii

Passed, and awaiting signature of governor: HB 1694-86, authorizing the licensure and operation of pure captive insurance companies and association captive insurance companies; and HB 2549-86, allowing for the information of workers compensation self-insured groups.

Idaho

Defeated: a proposal (SB 1297) to establish a state insurance fund.

Illinois

The spring session of the legislature has just begun. The lawmakers are expected to address liability caps and restrictions on joint and several liability.

Previous action: In December 1985, established a market assistance plan.

Indiana

Passed, and awaiting signature of governor: SB 393, authorizing judges to determine whether a suit is frivolous, and to assess fees for such suits; SB 394, modifying the state's collateral source rule; HB 1255, allowing the state to administer insurance pools for local governments; HB 1284, granting volunteers immunity from liability unless the entity they serve has insurance.

Iowa

Passed, and awaiting signature of governor: SF 2265, expanding the use of alternative financing mechanisms such as bonding for purposes of establishing intergovernmental pools; permitting creation of market assistance plans.

Also passed: measures exempting localities from liability in connection with inspections, investigations and permitting functions unless actual malice or evil intent can be shown; and exempting officers and employees of political subdivisions from punitive damages.

Kansas

Passed and awaiting signature of governor: HB 2661, capping damage awards against health care providers at $1 million, with non-economic damages capped at $250,000 (although a "pinhole" provision allows claimants to petition courts to award supplemental benefits for medical expenses up to a maxium of $3 million); SB 512, which prohibits cancellation of business and professional liability insurance policies unless one of five causes for cancellation can be determined such as nonpayment of premiums, material misrepresentations, etc., and requires insurers to give policy holders 60 days notice of a decision not to renew.

Kentucky

Passed, and awaiting signature of governor: SB 309, allowing the insurance commissioner to establish a voluntary risk-sharing association for certain lines of commercial liability coverage.

Maine

Passed, and awaiting signature of governor: PL 671, prohibiting midterm cancellation unless cause (such as nonpayment of premiums, etc.) can be confirmed; in such cases, ten days' notice of cancellation must be given. Notice of a nonrenewal must be made 30 days prior to a policy's expiration date; policyholders can request that the superintendent of insurance verify that the insurer has established cause for the nonrenewal.

Maryland

Passed, and awaiting signature of governor: SB 558, capping awards for non-economic damages at $350,000 and enabling judges, regardless of litigants' wishes, to order that jury awards be paid in periodic installments; SB 1015, enabling local governments and nonprofit organizations to pool or self-insure.

Minnesota

Passed, and awaiting signature of governor: HF 1950, imposing a $400,000 cap on "intangible losses," exclusive of pain and suffering; automatically reducing the judgments of payments made from collateral sources; calculating interest on damages from a suit's filing date to the date of the award (awarding of interest on damages for future loss has been prohibited).

Also awaiting signature: SB 2078, creating a state risk management fund; authorizing the insurance commissioner to investigate whether rates for insurance are excessive in non-competitive situations, defined as when fewer than five insurers write more than 75% of the coverage.

Mississippi

While no major legislation was passed during the 1986 legislative session, HB 983, adopted in 1985, established immunity for government employees and officials and modified sovereign immunity. The measure also placed a statute of limitation on suits filed against the state.

Missouri

Passed and awaiting signature of governor: legislation establishing a public entity risk management fund, which will cover liability and property exposures for all participating public entities in the state. Under the bill, the state would lend "seed money" to the fund, and would be reimbursed by "contributions" from participating entities, according to Don LeMond, the state risk manager. Each entity's contribution would be set by a board of trustees, consisting of the state treasurer, state attorney general, commissioner of administration and four members, appointed by the governor, who represent participating public entities.

Montana

Passed, and awaiting signature of governor: HB 16, authorizing the insurance commissioner to establish a market assistance plan and, if necessary, a joint underwriting association to provide liability insurance coverage; SJR 1, authorizing an interim study commission to review the liability insurance crisis.

Nebraska

Established a study commission to review the scope of the issue during the 1986 interim.

New Hampshire

Passed, and awaiting signature of governor: HB 513, placing an $850,000 cap on pain and suffering awards; reducing the statute of limitations from six to three years; prohibiting policy cancellations unless 60 days notice is given; permitting judges to assess costs and attorneys' fees from frivolous lawsuits and frivolous defenses.

The measure also applies liability caps of $500,000 per occurrence and $150,000 per person to municipalities. Amends joint and several liability so that when a municipality's liability is 50% or less, only several liability applies; when its liability is over 50%, joint and several liability applies. Requires contingency fee agreements to be put in writing, with final costs established at the end of litigation. Attorneys will be required by statute to offer hourly rates and contingency fee options. Judges will be permitted to review contingency fee costs in all judgments exceeding $200,000. The measure also outlaws punitive damages.

An interim Tort Reform Commission will evaluate the workability of the new law and study related issues.

New Jersey

Several pieces of legislation are under consideration dealing with structured settlements, caps on judgments against public entities; immunity for volunteers and public officials, other tort reforms.

Previous action. Passed legislation enabling counties, municipalities and school boards to self-insure or form re

...al insurance pools. Insurance commissioner prohibited midterm cancellations and nonrenewals unless notice is given. Market assistance plan to aid municipalities, among others, established.

New Mexico

Enacted: legislation which expanded the state's risk management program to include provision of property/casualty liability coverage.

New York

Considering several pieces of legislation. The governor's Blue Ribbon Commission on the crisis, which made its report in April 1986, offered 18 recommendations designed to tighten insurance industry control, increase insurance availability and modify tort law.

North Carolina

Enacted: A temporary measure authorizing the insurance commissioner to establish joint underwriting associations.

Oklahoma

SB 488 is now in conference committee. In its current form, the measure would: expand the data to be submitted annually by insurers to include earned premiums, legal fees received, noneconomic damages paid, claims experience, etc. Measure would also permit recovery of costs and legal fees associated with frivolous claims and defenses, and limit punitive damages to 50% of actual damages.

Pennsylvania

Considering several bills which would establish a joint self-insurance fund for municipalities; authorize a joint underwriting association for all lines of unavailable liability coverage; and establish a central risk management agency to provide advice to local governments, among other provisions.

South Carolina

HB 2266, currently in conference committee, would restore some of the state's sovereign immunity by re-establishing approximately 20 qualified immunities. The legislation also contains proposals to limit the state's monetary liability to the range of $100,000–$500,000.

South Dakota

Passed, and awaiting signature of governor: SB 280, requiring pre-discovery, fact-finding hearings before a judge to prove that there was willful and malicious conduct in order to file for punitive damages; HB 1381, permitting public entities to form liability coverage pools, and requiring that $2 million used from the state's General Revenue Fund to start the pool be repaid by the pool in 1988.

Tennessee

Passed, and awaiting signature of governor: SB 1702, which provides immunity from suit for governmental agencies, boards, commissions and authorities and their members; HB 1582, prohibiting cancellation or nonrenewal of commercial risk insurance policies with some exceptions.

Utah

Enacted: legislation repealing joint and several liability (SB 64); authorizing marketing assistance plans and joint underwriting associations (SB 91).

Vermont

Passed, and awaiting signature of governor: Legislation allowing the banking and insurance commissioner to establish a joint underwriting association (JUA) to solve insurance availability problems for any commercial line except pollution insurance. The authority for the JUA expires July 1, 1987. However, before any JUA can be formed, the commissioner must determine that there is no voluntary market, and that the market assistance plan now in effect in the state is not working. Membership in the JUA will include all property and casualty insurers doing business in the state.

The legislation also requires a 45-day notice of cancellation or non-renewal in all commercial lines except workers compensation, instead of the current 30 days, and allows the commissioner to hold hearings on market competition when any commercial rates increase more than 25% in a year.

Also passed: HB 8641, allowing municipalities to form pools.

Virginia

While no major action was taken during the 1986 legislative session, an interim study committee was established to review the entire liability insurance problem.

Washington

Passed, and awaiting signature of governor: SB 4630, capping non-economic damages in the range of approximately $117,000–$493,000; abolishing joint and several liability, except in certain specified types of tort suits, including those involving hazardous waste and solid waste disposal sites; authorizing structured settlements for all judgments exceeding $100,000; establishing a voluntary market assistance plan requiring participation of 25 admitted or nonadmitted companies. Immunity granted for school board members and directors of hospitals.

Also passed: HB 1972, permitting local governments to self-insure; SB 4541, requiring prior notice to policyholders of cancellation and 20 days prior notice of rate and form changes before policy renewal date.

West Virginia

Convening in a recent special session, the legislature passed and sent to the governor SB 714, expanding the disclosure of claims, investments, judicial dispositions, etc. related to the state. (Other legislation passed pertained to medical malpractice awards and availability of insurance for health care providers.)

Wisconsin

Meeting in a recent special session, the legislature passed measures authorizing the establishment of liability pools for both public and private sector entities. The legislation also increases the notice period for mid-term cancellations from 30 days to 60 days.

Wyoming

Passed, and awaiting signature of governor: HB 14, authorizing courts to determine frivolous suits. Plaintiffs in such suits could be made liable for payment of reasonable court expenses and attorneys' fees; HB 38, creating statutory definitions of unfair insurance claims practices; HB 39, granting any officer, commissioner or board member of a governmental or non-profit entity immunity from liability for any action, omission or inaction of that government or corporate body.

Also passed: HB 44, modifying the state's sovereign immunity and liability limits; SF 21 and SF 26, which create state and local government self-insurance programs; SF 69, which prohibits mid-term cancellations with some exceptions, such as nonpayment of premiums. Authorized cancellations must be preceded by a 10–45 days notice to policyholders. A 45-day notice with statement of reasons is required for non-renewals

KANSAS ASSOCIATION of TOWNSHIPS

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TESTIMONY BEFORE SPECIAL COMMITTEE
ON
TORT REFORM AND LIABILITY AND INSURANCE

July 10, 1986

Mr. Chairman and members of the Committee, I appear before you today as the Executive Director for the Kansas Association of Townships (KAT). KAT is a relatively new organization, founded only three years ago with membership increasing as townships become aware of the organization. It exists to provide information and technical assistance to township government, while serving as a communications link with one another and other governmental units.

For your information, I formed the association after much frustration as a township official with many questions but no place to go for answers. In my search I learned that many township officials had never even seen statute books and they did not have the benefit of an association such as the League of Municipalities or Association of Counties. Thus, KAT was formed as part of the National Association of Towns and Townships (NATaT), on whose Board I serve, and exists primarily to share information and provide technical assistance to those smaller units of government across the state.

Though no longer a township official, I continue in this role today as a unpaid volunteer, primarily because there is no one to take my place, but more importantly because I am a strong advocate of grass-roots government. Township government, in my opinion, still has a role to play in many areas of our state. As long as Kansas faces an economic crisis, as long as we continue to value the contribution of our citizens through volunteer efforts, township goverment and township officials are important to our state.

It's this role of volunteerism that concerns me greatly as we face a liability crisis. Public servants should not fear litigation, or the loss of their homes or farms, while giving of their time and talents. Yet this is a real fear! Township officials are not only resigning, but it is becoming increasingly difficult to get people to accept the office. Who in their right mind wants to take a volunteer position, give of themselves, and then face the prospect of financial ruin?

As I have traveled across the state for the past three years, meeting with township officials, liability insurance is their number one concern. Township officers do not have the luxury of staff or legal counsel so they are often at the mercy of others to provide information or give advice. When their insurance rates tripled, when their policies were cancelled and they could not find other agencies to provide coverage, many township officials decided the job was just too much and the personal costs far exceeded the benefits.

When I first encountered this problem several years ago, I discussed it with anyone who would listen, including NATaT, other member states, the League of Municipalities, Association of Counties, insurance companies, the Kansas Department of Insurance, the White House, and others. Because the problem was not yet widespread, and the markets for the larger units of government, or those with association or state-wide policies had not yet been adversely affected, many questioned my concern.

 Attachment 20

Today it is appearing as the number one agenda item in most state and national associations and in legislatures throughout the land. While Kansas townships had felt the effects early for a variety of reasons, it took a broader crisis to bring it to the attention of others.

Recognizing and appreciating the efforts undertaken in the Kansas Legislature in the preceding sessions on medical malpractice, and knowing that tort reform would have to take a back seat until that area was resolved, you may recall I did introduce a bill in my role as a Kansas legislator that would have relieved some of the concerns expressed by townships. However, I was well aware that the problem would not be resolved through my bill, which was very similar to the one introduced by Representative Harper.

While neither bill was adopted, I do think the broader purpose of bringing the concerns to the forefront was accomplished. The efforts of the Insurance Committee last session to review tort reform, and now your efforts through this summer committee are most appreciated. After studying this issue for the past three years, I know your task is a difficult but important one and I am confident that you will bring some excellent recommendations forth to the 1987 legislative session.

Rather than go into all the problems, since you are already familiar with most of them, let me just share with you what KAT has done to date and also the impact this crisis has had on townships throughout Kansas.

Several years ago I met in Manhattan with officers of Farm Bureau Insurance since many of our townships were involved with this company. They assured me they were interested in working with townships and participated with KAT in a state-wide mailing. However, there was still much confusion and misunderstanding by both the township officials and insurance agents. Township officials were unfamiliar with state laws, did not understand insurance needs, and particularly did not understand errs and omissions insurance. The rumors of being sued personally and the possibility of losing their homes and property over litigation were becoming more prevalent.

The insurance agents were confused as well. As you are aware, townships throughout the state differ a great deal in their responsibilties. Some townships are only responsible for roads and bridges, others cemetaries, fire departments, sewage facilties, etc. With no state-wide data available identifying the responsibilities of townships no one knew what the township market potential would be. Consequently there was little incentive to insure townships since it was difficult for the insurance companies to assess the risks.

The problems were getting worse instead of better. Something had to be done.

I talked once again with Dick Brock of the Kansas Insurance Department, and we concured that there was much confusion but also a lack of information. We met with the Independent Insurance Agents of Kansas to obtain their help and they readily agreed. Jointly we mailed a survey to all townships (approximately 1,400). The returns were overwhelming for townships, approximately 34%.

Today through the survey we have a much clearer picture of the varied responsibilities of township government, the liabilities they face, the insurance needs they have, and the problems they are encountering The survey information which is rather extensive is available for your review and may be obtained through Dick Brock or myself. To familiarize you with the information obtained, enclosed is a copy of the survey, and a few responses. In addition, included is a copy of a much appreciated letter recently sent by the Independent Insurance Agents of Kansas to their company managers. (Anyone interested in the data referred to in the letter may contact me.)

Rather than inundate the committee with materials which I have gathered over the past three years, through meetings with NATaT, The White House and others, I have included some articles and reports that may be of interest. In addition, I also have copies of legislation passed by other township states available for your or the staff's review.

Not to be so presumptous to assume that I have answers to the liability crisis, I am not presenting any solutions other than to say that I definitely support some of the recommendations forwarded through NATaT and the White House Tort Policy Working group, and those enacted by other states. It is up to the wisdom of this committee to suggest legislation that best fits the needs and concerns of Kansas and I am confident that you will do so.

I stand ready to help in any way I can, and will be happy to respond to any questions.

INSURANCE AND NEEDS SURVEY

Township Name BUFFALO **Population** _____ **County** CLOUD

Township Official's Name, Address and Phone Number:

Trustee: RAYMOND A. HANSON

Clerk: DEAN PIXLEY

Treasurer: GLENN H. LARSEN

Does Your Township Operate Under: _____ Township Unit Road System ✓ County System

What Responsibilities/Activities Are Handled By Your Township?

_____ Road/Bridge Maintenance _____ Cemetery Maintenance _____ Fire Protection

_____ Prairie Dog Eradication _____ Sewer Plant _____ EMT Service

_____ Noxious Weed Control _____ Water Facilities _____ Zoning/Planning

Other (please describe): MAINTAIN TOWNSHIP COMMUNITY BUILDING

Property: Do you own or lease any of the following? If leased, please list payment.

Item	Own	Lease	Est. Value or	Lease Payment
Office/Township Building	✓			
Fire Station				
Vacant Land				
Cemetery				

If there is any other *stationary property* (tanks, water towers, plants, machinery), please list below and use additional sheet if more space is needed. Please list if owned or leased.

1- PROPANE TANK (NOT INSURED)?	✓			

Office/Computer Equipment (typewriter, copying machine, computer, etc.) Use additional sheet if needed.

				NONE

Mobile Equipment (Include number and value. Use additional sheet if more space is needed): NONE

$_____ Motor Grader ( ) $_____ Snow Plow ( ) $_____ Truck ( )

$_____ Tractor ( ) $_____ Mower ( ) $_____ Ambulance ( )

$_____ End Loader ( ) $_____ Two-Way Radios ( ) $_____ Fire Vehicle ( )

Automobiles (Include the following information for above mobile equipment as well): NONE

Make	Model	Year	Owned	Leased	Value or	Lease Payment

Workers Compensation (Describe duties, number of employees, estimated annual payroll):

Job Description	No. Employees	Annual Est. Payroll
	NONE	

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Insurance Information: (If more than one insurance company is involved, please list)

Type of Insurance (Annual Premium)		Insurance Company (Not Your Agent)	Expiration Date	Annual Premium
A. Liability	Out of 11 922	Farm Bureau Ins Co.	8-08-86	$87.00
1. Public Official D&O (E&O)	500,000 BI	None.		$
2. General Liability	50,000 PD.	OL & T		$ Incl
3. Other	$1000 Premises Med.			$ Incl
B. Property	$9000.00	Farmers Farm Bureau Ins Co	308-86	$124.5
1. Buildings/Other Real Property				$
2. Office/Computer/Equipment		None		$
3. Other				$
C. Vehicles				$
1. Automobiles				$
2. Other				$
D. Workers Compensation		None.		$
			TOTAL	$

Insurance Information: Please list any comments or concerns you have regarding your current insurance coverage and needs for the future. Use additional sheet if more space is needed.

None

Claim/Loss Information: Please list any pending claims, insured claims, and uninsured losses including payment information, for the last three years.

Date	Nature of Claim	Open	Settled	Dollar Amount
	NONE			

Miscellaneous: Please include any additional information you think may be helpful to us in helping you with your insurance needs.

Perhaps it would help to reduce our liability insurance if there could be a penalty applied to a person and/or their attorney where they sue for a huge amount and then they settle out of court or awarded just a small fraction they sued for damages.

WE WILL APPRECIATE ANY INFORMATION CONCERNING INSURA

Return To: Kansas Insurance Department, Attn: Dick Brock, 420 SW 9th, Topeka, Kansas 66612

THANK YOU FOR HELPING US HELP YOU!

Fletcher Bell
Commissioner of Insurance
(913) 296-3071

Kansas Association of Townships
(913) 897-3186

Independent Insurance Agents of Kansas
(913) 232-0561

INSURANCE AND NEEDS SURVEY

Township Name Junction Township Population _____ County Osage

Township Official's Name, Address and Phone Number:

Trustee: Allen Kettler Vassar, Kans 913-828-4819

Clerk: _____

Treasurer: _____

Does Your Township Operate Under: ✓ Township Unit Road System _____ County System

What Responsibilities/Activities Are Handled By Your Township?

✓ Road/Bridge Maintenance	_____ Cemetery Maintenance	_____ Fire Protection
_____ Prairie Dog Eradication	_____ Sewer Plant	_____ EMT Service
✓ Noxious Weed Control	_____ Water Facilities	_____ Zoning/Planning

Other (please describe): _____

Property: Do you own or lease any of the following? If leased, please list payment.

Item	Own	Lease	Est. Value or Lease Payment
Office/Township Building			
Fire Station			
Vacant Land			
Cemetery			

If there is any other *stationary property* (tanks, water towers, plants, machinery), please list below and use additional sheet if more space is needed. Please list if owned or leased.

Office/Computer Equipment (typewriter, copying machine, computer, etc.) Use additional sheet if needed.

Mobile Equipment (Include number and value. Use additional sheet if more space is needed):

$44,000 Motor Grader (/)	$_____ Snow Plow ( )	$_____ Truck (/)
$15,000 Tractor with backhoe and trailer (/)	$_____ Mower ( )	$_____ Ambulance ( )
$_____ End Loader ( )	$_____ Two-Way Radios ( )	$_____ Fire Vehicle ( )

Automobiles (Include the following information for above mobile equipment as well):

Make	Model	Year	Owned	Leased	Value or Lease Payment
1976	GMC Dump Truck	76	✓		

Workers Compensation (Describe duties, number of employees, estimated annual payroll):

Job Description	No. Employees	Annual Est. Payroll
grade roads for bridges, haul rock, operate road		
class truck, mow weed	1	$ 12,000

3 5 1 0

rance Information: (If more than one insurance company is involved, please list)

Type of Insurance (Annual Premium)	Insurance Company (Not Your Agent)	Expiration Date	Premium
A. Liability	United Fire	1-10-86	$ -
1. Public Official D&O (E&O)	Tudor Insurance Co	1-28-86	$ 75
2. General Liability	United Fire	1-10-86	$ 62
3. Other			$
B. Property			$
1. Buildings/Other Real Property			$
2. Office/Computer/Equipment			$
3. Other			$
C. Vehicles			$
1. Automobiles	United Fire		$ 134
2. Other Inland Marine	United Fire		$ 1150
D. Workers Compensation	United Fire		$ 791
		TOTAL	$ 3342

Insurance Information: Please list any comments or concerns you have regarding your current insurance coverage and needs for the future. Use additional sheet if more space is needed.

We need public offical insurance that is cheaper. If we don't get some relief we won't have anyone to run for public office.

Claim/Loss Information: Please list any pending claims, insured claims, and uninsured losses including payment information, for the last three years.

Date	Nature of Claim	Open	Settled	Dollar Amount
April 85	Hurt neck & shoulder		✓	$ 359
1-11-85	Thorn in his hand		✓	382

Miscellaneous: Please include any additional information you think may be helpful to us in helping you with your insurance needs.

Return To: Kansas Insurance Department, Attn: Dick Brock, 420 SW 9th, Topeka, Kansas 66612

THANK YOU FOR HELPING US HELP YOU!

Fletcher Bell
Commissioner of Insurance
(913) 296-3071

Kansas Association of Townships
(913) 897-3186

Independent Insurance Agents of Kansas
(913) 232-0561

Independent Insurance Agents of Kansas

June 13, 1986

Dear Company Managers:

Last fall our association, the Kansas Insurance Department and the Kansas Association of Townships began working together to seek solutions to both insurance availability and affordability problems for townships in Kansas.

One of the first steps taken was a survey sponsored by the Kansas Insurance Department of the 1,400 townships in the state to determine, among other things, the extent of their insurance needs, their insurance coverages now in force, the cost and their claims history. Enclosed is a summary of that survey, which produced 479 responses for a 34% response rate.

The survey reveals a substantial premium volume among townships of approximately $1,353,900 for all 1,400, a respectable pure loss ratio of 21.7% and a need for a stable, reasonably priced insurance program.

If this is a market your company would be willing to target, we would be interested in discussing the possibility of using the Agents Assistance Corporation to make your facility available to all members of IIAK. This would provide a much needed market to our members and to townships, it would provide your company with extremely positive publicity and, I am sure, earn the appreciation of the Kansas Insurance Department for helping to solve a serious problem.

If you are interested in pursuing this further, please contact either myself or the IIAK office for additional information. We would be happy to meet with you at your convenience to discuss it further.

Thank you for your consideration.

Sincerely,

Joseph C. Lukens, II, Chairman
Marketing Committee

akw

encl.

bcc: Marketing Committee
Dick Brock - Ks. Ins. Dept.
The Honorable Nancy Brown

YOUR Independent Insurance AGENT SERVES YOU FIRST

917 Topeka Avenue, Topeka, Kansas 66612 Tel. 913/232-0561

Attachment 22

DATE 4/21/86

INSURANCE AND NEEDS SURVEY
SUMMARY REPORT

TOTAL NUMBER OF TOWNSHIPS REPORTING - 479
TOTAL NUMBER OF COUNTIES REPRESENTED- 94

I. POPULATION SUMMARY: TOTAL POPULATION: 180,538 # OF TOWNSHIPS: 275 AVERAGE POPULATION: 657

II. ROAD SYSTEM SUMMARY: TOWNSHIP UNIT ROAD SYSTEM: 238 COUNTY SYSTEM: 187

III. RESPONSIBILITIES:

ROAD/BRIDGE MAINTENANCE -	254	CEMETERY MAINTENANCE-	183	FIRE PROTECTION -	124
PRAIRIE DOG ERADICATION -	69	SEWER PLANT -	1	EMT SERVICE -	5
NOXIOUS WEED CONTROL -	188	WATER FACILITIES -	3	ZONING/PLANNING -	9
				OTHER -	57

IV. PROPERTY:

	# REPORTED	VALUE
OFFICE/TOWNSHIP BUILDING	160	2,621,460
FIRE STATION	39	198,700
VACANT LAND	18	8,960
CEMETERY	120	86,462
OTHER PROPERTY	64	
OFFICE/COMPUTER EQUIPMENT	16	

V. MOBILE EQUIPMENT:

	TOTAL #	VALUE
MOTOR GRADER	240	11,954,260
TRACTOR	106	792,105
END LOADER	75	916,500
SNOW PLOW	208	390,800
MOWER	174	371,582
TWO-WAY RADIOS	102	44,404
TRUCK	106	802,130
AMBULANCE	3	24,500
FIRE VEHICLE	112	976,501

VI. AUTOMOBILES: NUMBER OF TOWNSHIPS REPORTING - 48

VII. WORKERS COMPENSATION TOTAL NUMBER OF EMPLOYEES - 595 TOTAL PAYROLL - 1,858,505

LIABILITY

The National Association of Towns and Townships urges the U.S. Congress to provide legislative remedies for the local government liability insurance crisis, directed specifically at:

The Civil Rights Act of 1871 (Sec. 42 U.S.C. Section 1983) by:

-- providing that Section 1983 actions be based solely on deprivation of rights secured by the Constitution and by laws which provide for equal rights, thus protecting the civil rights of individuals as Congress originally intended, while precluding the harassment of states and local governments;

-- by providing that municipalities and other political subdivisions of states have a "good faith defense" in Section 1983 actions. Thus, Section 1983 would continue to allow recovery when there had been an intentional or bad faith violation by the municipality (when officials "knew or should have known their conduct violated the constitutional norm") however, municipalities would be protected when they have acted in good faith;

-- by precluding litigation under 42 U.S.C. Section 1983 brought to assert rights for which there exists an adequate remedy at the state level and for which administrative consideration and determination of the federal rights asserted are provided; and

The Risk Retention Act of 1981 by enacting legislation to:

-- enable state and local governments to form collective purchasing groups across state lines which would be exempt from state prohibitions blocking their formation; and

Environmental statutes, by enacting legislation to:

-- establish federal standards of compliance in the environmental area and provide protection for municipalities meeting those standards;

-- modify liability provisions to award damages based on the percentage of fault and limiting damages to those actually caused by the party found to be at fault; and

-- remove any other strict liability provisions in environmental impairment liability statutes, returning liability thereunder to a concept based upon fault; and

Attachment 23

-- simplify the process of self-insurance by states and local governments.

Tort Reform, by supporting the principles embodied in the White House Domestic Policy Council's Tort Policy Working Group recommendations of 1985, specifically that:

-- fault be retained as the basis for liability;

-- joint and several liability be eliminated;

-- specific limits be placed on noneconomic damage awards;

-- periodic payments of economic damages over a set limit be provided for;

-- damage awards be reduced by sums received from collateral sources; and

-- attorney contingency fees be capped.

Conducted by:

The National Center for Small Communities
Department of Public Administration
University of Hartford
West Hartford, Connecticut 06117
(203) 243-4432

The National Municipal Liability Insurance Crisis: A Federal Perspective

January 14, 1986
Washington, D.C.

Attachment 24

The National Municipal Liability Crisis
A Federal Perspective

Introduction

The National Center for Small Communities recently took an important first step toward resolving the municipal liability insurance crisis—one of the most pressing problems facing local governments. Acting as convenor and facilitator, the center called the first meeting of representatives of local, state and federal government and the insurance industry to probe the federal issues in the crisis.

Participants in the day-long summit examined the availability and affordability of liability insurance, discussed how vulnerable local governments are to lawsuits under federal environmental and civil rights statutes, and suggested possible federal solutions to the problem.

The national crisis in the liability insurance market is threatening the survival of our country's towns, townships and other local governments. Communities are facing rate increases of up to 900 percent—and even total policy cancellations. Small towns are hit the hardest by the crisis, because they lack the financial capability to insure themselves and because they have a much harder time absorbing rate increases than large jurisdictions.

The center (which is a program of the National Association of Towns and Townships--NATaT) seeks to be an honest broker in finding solutions to such

national problems as the high cost and unavailability of local-government insurance. Coming into the summit, the center had no preconceived notions of what, if anything, should be done at the federal level to help ameliorate these problems.

This meeting was an important first step toward resolving one of the most pressing problems local governments face. It brought together people representing a variety of perspectives on the liability insurance crisis. And perhaps now that we better understand each other's positions, we can begin devising solutions.

Barton D. Russell
President
National Center for
Small Communities

March 1986

Jeffrey H. Schiff, Acting Executive Director, National Association of Towns and Townships

Ann Cole, Director of Federal Affairs

Paula N. Alford, Federal Affairs Consultant

Bruce G. Rosenthal, Director of Communications

David R. Jones, Author of Report

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The National Municipal Liability Crisis
A Federal Perspective

Synopsis: Causes of the
Liability Crisis and Solutions

Over the course of the day, the summit participants engaged in an in-depth, often lively, discussion of the causes of the municipal liability insurance crisis and possible solutions.

Insurance industry representatives criticized recent court decisions on liability, saying that insurers can no longer predict their exposure and therefore must hike premiums or cancel coverage altogether. Officials from local governments and local-government organizations questioned why policies were cancelled for localities that had never had legal problems, and whether insurance firms would ever re-enter the pollution liability market.

While the participants did not arrive at a single answer as the cause of the crisis, they did compile an extensive list of potential solutions that could be implemented at the federal and non-federal levels. Federal solutions include:

* Establishing a federal insurance program for localities;
* Capping attorney's fees;
* Surgically amending Section 1983 of the Civil Rights Act of 1871 to

prevent its use in resolving economic grievances, but leaving its civil rights protections intact;

* Encouraging dispute resolution in lieu of litigation;

* Indemnifying local governments for hazardous waste cleanup. The U.S. Environmental Protection Agency is supporting a measure in Congress to indemnify the firms it hires to clean up waste sites; in essence, the federal government would have the duty to pay any claims arising from cleanup activities. Some summit participants argued that indemnification should also be extended to localities; and

* Creating standards of compliance for local governments in managing waste facilities and cleaning up waste sites. These standards would give insurers a basis for evaluating localities' risk management practices.

Non-federal solutions include self-insurance and insurance pools; better risk management by insurance companies; and privatization of municipal environmental functions, such as landfill management, to permit others to absorb the liability costs.

An Overview of Municipal Liability

Natalie Wasserman, executive director of the Public Risk and Insurance Management Association (PRIMA), led the discussion with a paper on "The Federal Connection to the Liability Insurance Crisis: The Need to Focus on Environmental and Civil Rights Law." Wasserman, whose group represents risk managers in local government, explained how the notion of sovereign

immunity for local officials had been eroded, beginning in the 1970s, when the U.S. Supreme Court, in several decisions, reinterpreted Section 1983 of the Civil Rights Act of 1871.

The court said that governments could be sued as persons under the law, and these rulings "opened up a floodgate of liability against local governments," Wasserman said.

She also discussed developments over the past decade in environmental law and how local governments have become increasingly vulnerable to pollution liability suits. "Many local governments are not aware of all the problems they have with pollution liability," she warned. PRIMA is seeking solutions to the problem through its work on a task force, established by the National Association of Insurance Commissioners, to investigate problems with pollution liability insurance.

But the liability insurance crisis involves "perceived risk, to a great extent," Wasserman said. She cited an International City Management (ICMA) Association study of local governments in which only 28 percent of those responding reported liability claims against them from 1979 to 1984. Twenty percent of all claims sought no monetary damages, while 87 percent of reported claims involved settlements less than $20,000. And despite a litany of horror stories in the media detailing multi-million dollar judgments against localities, Wasserman said, the ICMA survey found that of

those reporting claims, less than 1 percent of claims payments exceeded $500,000.

Wasserman emphasized the need for a federal answer to the question of joint and several liability (whereby local governments can be held totally liable for damages even if they are found only partially to blame). Another issue that must be addressed, she said, is that of attorney contingency fees, which can be higher than monetary damages.

Whatever the solution, Wasserman said, something must be done about municipal liability: "Government can no longer continue as the 'deep pockets' for everyone who has a complaint. Ultimately, these costs revert to the taxpayer."

Civil Rights or Economic Gripes?

The second part of the summit focused on the liability of local governments under Section 1983 of the U.S. Civil Rights Act of 1871. The law was enacted during Reconstruction to protect blacks from civil rights violations by state and local governments. The act overrode state laws that curtailed the rights of citizens, and it provided federal remedies for civil rights violations where state and local laws were inadequate. Its scope, however, has since been interpreted to comprise virtually any case of perceived injustice committed by a local government, including planning and zoning decisions.

Lee Ruck, general counsel for the National Association of Counties (NACo), noted that 24,000 lawsuits, excluding prisoner suits, were filed in a single year under Section 1983. These included suits involving complaints about local-government zoning decisions--seemingly a far cry from the intent of the original statute.

J. Edgar Baily, a specialist in insurance law for the Roanoke, Va., firm of Gardner, Moss and Rocovich, presented a paper on civil rights issues as they affect local governments' liability. The recent flood of Section 1983 lawsuits, Baily said, stems in part from the unintentional or deliberate negligence of public officials in preserving civil rights. "It is not the lack of available legal remedies, but rather the failure of certain governments to enforce the law with an equal hand, that furnished the momentum for Section 1983" litigation, he said.

"There are no quick answers," Baily cautioned. "Municipal officials must realize that liability is a reality" that is here to stay. There is a wealth of case law interpreting Section 1983, he observed, and the notion of "municipal liability through civil rights violations is deeply entrenched in the judicial system."

"The hardest hit by the municipal insurance crisis is the small government entity," he said, noting that these governments cannot continually pay higher insurance premiums without having their whole budgets threatened.

Baily warned that attempts in Congress to amend Section 1983 or limit its scope are doomed to failure. Instead, he suggested, local governments should create their own self-insurance program in which policyholders would insure each other. Losses to each municipality would be limited to the amount of the individual investment. In this manner, Baily suggested, "they can collectively enjoy the advantages of a large municipal corporation."

In the discussion that followed, Edward Muhl, Maryland insurance commissioner, questioned whether this approach would solve the basic problems. "Any alternative insurance mechanism would be good for the short term, but unless you change the rules of the game, you're just shifting the burden of payment," he said. Muhl noted that Maryland officials are examining a number of municipal liability issues, including their laws that limit insurance pooling by municipalities. Maryland may further extend its local government immunity provisions and place caps on awards, he said.

Larry Jones, past president of the American Insurance Association, argued that the core of the problem is the way damages are determined, particularly in questions of punitive damages and economic loss. These questions must be addressed, he said, if the crisis in liability insurance is to be solved.

Ruck of NACo criticized a brief filed by the U.S. solicitor general in a recent Supreme Court case; the brief argued that monetary damages were

suitable for economic and land use cases brought under Section 1983. This goes against every previous federal position and against "virtually every treatise on the issue," Ruck maintained. Under this approach, every local-government decision that goes against a developer could be the subject of Section 1983 litigation for monetary damages.

The biggest problems that local governments face in economic and land use litigation, Ruck said, are attorney's fees and non-economic damages. He cited one case where a $1,500 injury settlement involved $400,000 in legal fees. "We have to find some reasonable way for courts to address these issues," Ruck said.

Participants also discussed whether courts were treating local governments like businesses. While businesses can raise prices, file for bankruptcy or discontinue services in the wake of a suit, several participants pointed out that local governments (especially those in small communities) have limited taxing powers and the legal obligation to provide services.

Local Governments and Insurance Companies:
What are the Rules?

Barton D. Russell, president of the summit's sponsor, the National Center for Small Communities, observed that the insurance industry has argued for changes in federal policy to make insurance coverage more

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predictable; will insurance companies offer affordable insurance to local governments, he asked, if these changes are made? Wasserman noted that 29 states have liability limits for local governments, yet they have had no more success than other states in obtaining coverage for their municipalities.

"What do you say to a local government," asked Deborah Lamm, assistant executive director of the U.S. Conference of Mayors, "that has had its insurance canceled or its premiums raised without ever having a lawsuit filed against it?"

Leslie Cheek III, vice president for federal affairs at the Crum & Forster Insurance Companies, responded that until the industry as a whole improves financially, the market is unlikely to get better. Any municipal insurance plan will involve higher premiums, and some local governments will be unable to obtain coverage, he said, because the insurance industry is likely to use far stricter underwriting practices in the future. "Part of this is our own fault," Cheek acknowledged. "We overextended coverage and ignored our own numbers."

"We've lost our ability to predict what will happen in the legal field," Cheek said, making risk management extremely difficult. He suggested that insurance companies might themselves pool their resources to form an even larger entity, thus spreading risk even more widely.

Jones of the insurance association added that no one can say what will happen if changes, such as limiting the amount of awards and types of suits that can be brought, are made in the law. Yet he was optimistic that agents would offer insurance to municipalities if there were some way of assessing risks.

Cy Gerde, attorney for the Indiana Township Association, said that all parties must acknowledge their share of the blame for the current situation. He offered several possible solutions, including self-insurance and dispute resolution outside of court, which can be a less costly way of settling claims.

John Harkavy, director of governmental affairs at the Risk and Insurance Management Society, asserted that insurance companies must be in the business of risk taking as well as risk management. Moreover, he emphasized, the need for tort reform--changing the laws governing liability suits--must not obscure the more pressing problem of lack of municipal liability insurance. "We must have the tools to help us help ourselves," he said.

"If we're going to change the rule of the game and come up with some fundamental reform of Section 1983, we're going to have to articulate what is unique about state and local governments," said Alex Dimitrief, a fellow at the White House Office of Intergovernmental Affairs. He said that states and localities had made this argument persuasively in the Garcia

Fair Labor Standards Act case before the U.S. Supreme Court. "If we can help each other articulate what is special about state and local governments, we've got a much better chance of achieving a long-term solution," he said.

No Coverage Available

Tom Dunne, a consultant to the U.S. Environmental Protection Agency (EPA), opened the afternoon session on pollution liability of local governments. He cited the problems that firms cleaning up hazardous waste sites confront in obtaining liability insurance.

"No one wants to replace the legitimate role of the insurance industry," Dunne said. Rather, EPA is looking at steps that government and the insurance industry can take together to get the industry back into the field of pollution liability coverage. "The debate must focus not on whether the insurance industry will come back--we're confident that if the right steps are taken, it will--but when it does come back, that coverage is available on a stable basis," he maintained.

Dunne also discussed several other approaches EPA is taking to improve the pollution liability situation, including supporting a congressional measure to permit contractors to self-insure and providing assistance to the insurance industry to develop sound underwriting practices.

"In the long run, localities must demonstrate that their pollution liability risks are manageable," Dunne said. He recommended that local governments conduct a "facility-specific environmental audit" of sites before approaching companies for insurance.

Several participants said that it was incongruent for EPA to indemnify its clean-up contractors, yet find that same action unnecessary or inappropriate for local governments operating waste sites.

"Pollution liability for municipalities is virtually non-existent. I've spent a lot of time with insurance industry representatives, and they say it will be a snowy day in hell before they get back into the pollution liability insurance market," said Russell. Insurance representatives were doubtful that any federal action to alleviate insurance risks would encourage them to re-enter the pollution liability market, at least in the next five to six years.

"Is it worth considering a federal program for insuring municipalities against pollution liability?" Russell asked. Dunne asserted that a federal program has no chance for creation, given the Gramm-Rudman law and the federal deficit.

"If you have federal insurance for everybody, you fail to achieve an important environmental goal: getting the bad facilities out of business," noted Bruce Parker, general counsel to the National Solid Waste Management

Association. He warned that municipal landfills are the next "ticking bomb" in waste liability and emphasized the importance of strong underwriting practices. He also suggested that localities consider privatization of pollution facilities, to pass on the liability risks to private companies that specialize in pollution control and abatement.

Cheek maintained that the key problem in pollution liability coverage is the re-insurance market overseas. Reinsurers are "getting clobbered" on these policies, he said. Cheek criticized the joint and several liability provisions of the federal Superfund law and asserted that these provisions must be changed before companies would re-enter the pollution liability market.

David Russell, first vice president of the National Association of Towns and Townships and first selectman of Granby, Conn., urged participants not to discourage short-term solutions, however limited, to the problem: "Right now we have nothing at all," he said.

Several participants noted that no matter what local governments do and no matter how much money they spend, they cannot limit their exposure to lawsuits over pollution measures. The federal government fails to give localities a standard of performance for pollution programs, and insurance companies cannot appraise the risks involved.

Until local governments are given some criteria for evaluating their pollution liability exposure, they will face the constant threat of litigation. Moreover, localities apparently can do nothing to meet insurance company concerns about risk: "I'm being told that no matter how much good risk management takes place, insurance companies are going to provide it," said Barton Russell.

He wrapped up the day's proceedings by summarizing the possible federal and non-federal solutions to the crisis and expressing optimism that the parties involved could work together to resolve the municipal liability insurance crisis.

The National Municipal Liability Crisis
A Federal Perspective

List of Participants

David Russell
First Selectman
Town of Granby, Connecticut

Barton D. Russell
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National Center for Small Communities

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Pennsylvania State Association
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Keith Hite
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Executive Director
Public Risk and Insurance
Management Association

Debbie Lamm
Assistant Executive Director
U.S. Conference of Mayors

Larry Jones
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American Insurance Association

William Suttle
Senior Vice President
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House Subcommittee on Commerce,
Transportation and Tourism

John Harkavy
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Insurance Coordinator
National Sheriffs Association

Edward Muhl
Insurance Commissioner
Maryland Insurance Division

Vic Rojas
Legislative Counsel
National League of Cities

The National Municipal Liability Crisis
A Federal Perspective

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National Association of
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NATaT publications list

Publications available to you from the National Association of Towns and Townships (NATaT) are practical and specific to meet your needs concerning many aspects of local-government operations and policy. These publications, developed and based on the day-to-day experiences of dozens of experts on small-town local government, will provide you with practical ideas and tools you can use to solve local problems and resolve issues.

NATaT's **National Community Reporter** is a wealth of practical information on hundreds of small-town and rural government policies, practices, operations, issues and opportunities. From useful tips to concise reviews of how you can take advantage of federal grant programs, the Reporter is assured to meet your needs for information on small governments. Issued monthly.

Harvesting Hometown Jobs is for elected leaders of towns, townships and other small communities who need to learn to organize and carry out effective job and revenue-generating activities. Step-by-step chapters introduce the reader to economic development and end with a sample of creative finance techniques. 36 pages.

The Revenue Sharing Handicap Workbook is your compliance guide for the important handicap regulations that apply to all recipients of federal General Revenue Sharing. It is authored by an expert on the topic, so you'll learn about no cost and low-cost ways to make your local government's programs and services accessible to handicapped people. Nearly 8,000 sold! 56 pages.

Keys to Successful Funding is a small-town guide to Community Development Block Grants and other federal programs. You'll read about all the details on how to develop competitive applications for federal funding programs...including the five keys that other towns have used to obtain funding. 43 pages.

Coping with Federal Requirements is NATaT's newest manual. The myth of federal red tape is so pervasive that many small governments do not even bother to apply for grants. Research and experience by NATaT indicate that communities such as yours will be more likely to submit a grant application if you understand what is involved in meeting federal requirements. This manual will give you the leading edge in coping with these requirements. 36 pages.

Financing Rural Development reveals techniques that rural governments are using to finance development projects. Small-town governments cannot rely simply on tradition and continue to conduct business as usual. They continuously must learn new ways to get what they need at the lowest possible cost. This manual meets that need. 24 pages.

Managing Rural Natural Resources provides ideas that you can use in dealing with your own natural resource management problems. To live in a rural area is to live in a place where the way of life is determined by natural resources. Farming, mining, timber harvesting, livestock grazing, etc., can be a key to your economy. Learn what you can do to manage your community's rural natural resources. 38 pages.

Sharing Local Costs will show you how simple agreements among neighboring communities are stretching tax dollars by sharing the costs of services. Cooperative agreements for road paving, police dispatch systems, data processing, purchasing and other governmental functions are prudent for all local governments and essential to the survival of some. 20 pages.

Making Management Improvements is just the manual for officials in small-town and rural governments who are not experts in public administration, but need information on managing their local government and spending limited dollars wisely. You'll learn techniques for sound management and good, old-fashioned common sense to help make management improvements. 32 pages.

Rural Governments in a Time of Change: Challenges and Opportunities identifies critical national issues facing rural local governments, and offers practical ideas for addressing these issues. Topics include: public finance, information needs, essential community facilities, training and technical assistance needs, regulatory reform and economic development. 25 pages.

NATaT's **public policy seminar reports** examine current problems and issues facing elected officials in small towns and rural communities. Reports compiled after each seminar are designed to both identify these problems and issues, and propose solutions. The seminars involve key experts from federal agencies, Capitol Hill, local government interest groups and foundations. (See titles on order form.)

NATaT and the National Center for Small Communities

The purpose of the National Association of Towns and Townships (NATaT) is to strengthen the effectiveness of towns, townships and small communities and promote their interests in the public and private sectors.

NATaT is a non-profit membership organization offering technical assistance, educational services and public policy support to local-government officials from more than 13,000 towns, townships and other small communities across the country.

developing effective federal policy

Through its National Center for Small Communities, the association conducts research and develops public policy recommendations which are scaled to the unique needs and nature of rural governments and small towns. By analyzing federal and state initiatives, and disseminating information about them, NATaT and the national center keep local officials abreast of decisions and actions of national import, so they can better manage change in their communities.

education and information

NATaT's educational conferences, training, workshops, and specialized publications help small-town officials cope with change in their communities—and improve the quality of life for rural people. The association's annual conference for small-town officials is the largest town meeting in the nation. It focuses on federal programs and policies affecting small communities. NATaT publishes a monthly news journal, the *National Community Reporter*, which is the only national source of intergovernmental policy news and "how-to" information written exclusively for small-town officials. The journal's topics range from community and economic development funding to tested small-town management and planning techniques.

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Attachment 25

TE 4/21/86

INSURANCE AND NEEDS SURVEY
INSURANCE INFORMATION SUMMARY

TYPE OF INSURANCE:	COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
A. LIABILITY			
1. PUBLIC OFFICIAL D&O (E&O)		3,393	3
	AETNA	0	1
	AID	1,154	3
	AID INSURANCE	1,471	2
	AID INSURANCE COMPANY	644	1
	AID INSURANCE SERVICES	903	1
	AID INSURNACE	538	1
	CIMARRON INSURANCE	258	2
	EMPLOYERS MUTUAL	4,940	13
	EMPLOYERS MUTUAL CASUALTY	1,841	4
	FARM BUREAU	4,417	11
	FARM BUREAU INS.	283	1
	FARM BUREAU MUTUAL	1,447	5
	FARMERS ALLIANCE	368	1
	FARMERS ALLIANCE MUTUAL	156	1
	GENERAL INSURANCE CO	181	1
	HARTFORD	126	1
	HARTFORD SPECIALTY	1,381	1
	ICI INSURANCE CENTER	674	1
	INSURANCE COMPANY OF AMERICA	1,981	1
	INSURANCE COMPANY OF N.A.	712	1
	INTERNATION INS	364	1
	INTERNATIONAL SURPLUS LINES	7,956	18
	JOE ROBBINS INSURANCE	282	1
	KANSAS FIRE & CASUALTY	2,708	3
	MAYERS INS CO	105	1
	METTLIN INSURANCE	600	1
	MUTUAL OF OMAHA	500	1
	NORTHWESTERN NATIONAL	7,249	4
	NORTHWESTERN NATIONAL CASUALTY	298	1
	PATRONS MUTUAL INSURANCE	438	1
	PENCO/HARTFORD	0	1
	ST PAUL	2,600	1
	ST. PAUL	321	1
	TRINITY UNIVERSAL	775	1
	TRUCK INSURANCE EXCHANGE	80	1
	TUDOR INSURANCE	1,546	2
	TWIN CITY FIRE	254	1
	WESTERN CAGUALTY & SURETY	447	2
	WESTERN INSURANCE	325	1
	WESTERN SURETY	50	1
	TOTAL -	53,796	100
2. GENERAL LIABILITY		4,980	7

INSURANCE AND NEEDS SURVEY
INSURANCE INFORMATION SUMMARY

TYPE OF INSURANCE:

COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
AID	84[illegible]	3
AID INSURANCE	11,457	22
AID INSURANCE COMPANY	2,792	6
AID INSURANCE MUTUAL	415	1
AID INSURANCE SERVICES	552	1
AID MUTUAL	325	1
ALLIANCE INSURANCE	299	1
AMERICAN STATES	3,445	9
AMERICAN STATES INS CO	384	1
BENSON INSURANCE AGENCY	420	1
BREMAN	430	1
CARLSON INSURANCE	222	1
CIMARRON	1,799	1
CIMARRON INSURANCE	1,312	7
CIMARRON INSURANCE AGENCY	308	1
COMMERCIAL UNION INS	155	1
EMCASCO	400	1
EMPLOYERS	374	1
EMPLOYERS MUTUAL	11,408	25
EMPLOYERS MUTUAL CASUALTY	4,295	11
FARM BUREAU	13,794	32
FARM BUREAU INS CO	271	1
FARM BUREAU MUTUAL	11,937	25
FARMERS ALLIANCE	4,515	14
FARMERS ALLIANCE INS CO	54	1
FARMERS ALLIANCE MUTUAL	2,036	9
FARMERS ALLIANCE MUTUAL INS	48	1
GENERAL CASUALTY	446	1
GENERAL INSURANCE CO	144	1
HARTFORD	111	1
HARTFORD A & I	171	1
HARTFORD ACCIDENT & INDEMNITY	230	1
HARTFORD INS GROUP	701	1
HOME STATE INSURANCE	418	1
INSURANCE COMPANY OF N.A.	2,037	1
INSURANCE STORE	345	1
INTERNATIONAL LIVED INSURANCE	0	1
INTERNATIONAL SURPLUS	0	1
KANSAS FARM BUREAU	0	1
KANSAS FARM BUREAU MUTUAL	307	1
KANSAS FIRE & CASUALTY	9,823	6
MARYLAND CASUALTY	312	1
MAYERS INS AGENCY	240	1
MAYERS INSURANCE	129	1
NATIONAL FARMERS UNION	2,534	3
NATIONAL FARMERS UNION INS	641	1
NATIONAL INSURANCE AGENCY	352	1
NORTHWESTERN NATIONAL	3,335	7
NORTHWESTERN NATIONAL CASUALTY	800	1
OHIO CASUALTY	1,882	1

TYPE OF INSURANCE:

COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
PATRONS MUTUAL	511	1
PENCO/HARTFORD	0	1
SHELTER	39	1
ST. PAUL	160	1
TRINITY	1,111	2
TRINITY UNIVERSAL	2,908	5
TRINITY UNIVERSAL INS CO	513	1
TRINITY UNIVERSAL INS CO OF KS	3,492	6
TRINITY UNIVERSAL INSURANCE	607	1
TRUCK INSURANCE EXCHANGE	750	1
TWIN CITY FIRE	0	1
UNION INSURANCE	86	1
UNITED FIRE	622	1
UNITED FIRE & CASUALTY	522	1
UNITED FIRST AGENCY	66	1
WESTERN	374	2
WESTERN CASUALTY	1,135	1
WESTERN CASUALTY & SURETY	1,852	5
WESTERN INSURANCE	1,094	2
ZURICH AMERICAN	375	1
TOTAL -	120,507	258

3. OTHER

	728	4
AETNA LIFE & CASUALTY	352	1
AID INSURANCE	907	2
AID INSURANCE SERVICE	562	1
AMERICAN STATEF	307	2
BREMEN FARMERS MUTUAL	215	1
CIMARRON INSURANCE	403	2
EMPLOYERS MUTUAL	1,293	3
EMPLOYERS MUTUAL CASUALTY	1,027	1
EVANS AGENCY	0	1
FARM BUREAU	104	1
FARM BUREAU MUTUAL	322	5
FARMERS ALLIANCE	493	2
FARMERS ALLIANCE MUTUAL	146	1
FIDELITY & DEPOSIT	84	1
INTERNATIONAL SURPLUS LINES	700	2
KANSAS FARM BUREAU	20	1
KANSAS FIRE & CASUALTY	4,556	3
KFB INSURANCE SERVICES	364	1
MARYSVILLE MUTUAL	200	1
NATIONWIDE INSURANCE	475	1
NATIONWIDE LIFE	450	1
OHIO CASUALTY	700	1
ROSHEN INSURANCE	19	1
ST PAUL	50	1
TRINITY UNIVERSAL	208	1

TYPE OF INSURANCE:	COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
	UNITED FIRE & CASUALTY	941	1
	WESTERN CASUALTY	321	1
	WESTERN CASUALTY & SURETY	464	4
	WESTERN SURETY	357	2
	WESTERN SURETY COMPANY	40	1
	TOTAL -	16,808	51
B. PROPERTY			
1. BUILDINGS/OTHER REAL PROPERTY		1,467	5
	AETNA	0	1
	AID	800	1
	AID INSURANCE	3,038	5
	AID INSURANCE COMPANY	222	1
	ALLIANCE	51	1
	ALLIANCE INSURANCE COMPANY	202	1
	AMERICAN STATES	182	1
	BREMEN FARMERS MUTUAL	317	2
	CIMARRON	416	1
	CIMARRON INS	0	1
	CIMARRON INS CO	495	1
	CIMARRON INSURANCE	1,066	3
	CONSOLIDATED FARMERS MUTUAL	190	2
	EMPLOYERS MUTUAL	1,271	3
	EMPLOYERS MUTUAL CASUALTY	1,219	2
	EVANS REAL ESTATE CO	506	1
	FARM BUREAU	1,653	9
	FARM BUREAU MUTUAL	1,866	9
	FARMERS ALLIANCE	491	4
	FARMERS ALLIANCE MUTUAL	396	3
	FARMERS MUTUAL	393	5
	FARMERS MUTUAL INS	90	1
	FARMERS MUTUAL INSURANCE	75	1
	GENERAL CASUALTY	0	1
	GENERAL INSURANCE CO.	74	1
	GREAT PLAINS MUTUAL	414	2
	HARTFORD	1,482	5
	HARTFORD A & I	237	1
	HARTFORD INS GROUP	1,442	1
	HARTFORD INSURANCE	214	1
	HINSHAW INSURANCE	450	1
	KANSAS FARM BUREAU	0	1
	KANSAS FARM BUREAU MUTUAL	150	1
	KANSAS FIRE & CASUALTY	4,623	3
	KANSAS MUTUAL	482	3
	LANNING RICE INSURANCE	99	1
	MARYSVILLE MUTUAL	593	2
	MARYSVILLE MUTUAL INS CO	173	1

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INSURANCE AND NEEDS SURVEY
INSURANCE INFORMATION SUMMARY

TYPE OF INSURANCE:	COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
	MEAD INSURANCE	207	1
	MM INSURANCE	485	1
	MURRAY INSURANCE INC	502	1
	NATIONAL FARMERS UNION	200	1
	NORTHWESTERN NATIONAL	651	3
	NORTHWESTERN NATIONAL CASUALTY	434	1
	OD 626-369	240	1
	OHIO CASUALTY	88	1
	PATRONS	118	1
	PATRONS MUTUAL	0	1
	POST INS CO	250	1
	REORDAN INS	60	1
	SHIELD OF SHELTER	202	1
	ST. PAUL	359	1
	TRINITY	0	1
	TRINITY UNIVERSAL INS CO OF KS	674	2
	TRINITY UNIVERSAL INSURANCE	82	1
	UNION INSURANCE	245	1
	UPLAND	126	1
	UPLAND INSURANCE	72	1
	UPLAND MUTUAL	201	1
	UPLAND MUTUAL INS	230	1
	VAN DYKE INSURANCE	624	1
	WESTERN	220	1
	WESTERN FIRE INSURANCE	588	1
	WESTERN INSURANCE	643	2
	WESTERN INSURANCE FIRE	130	1
	TOTAL -	34,470	120
2. OFFICE/COMPUTER/EQUIPMENT	AID INSURANCE	149	1
	AID INSURANCE COMPANY	1,028	1
	BREMAN FARMERS MUTUAL	300	1
	CIMARRON INSURANCE	31	1
	EMPLOYERS MUTUAL	840	1
	FARM BUREAU	584	2
	FARM BUREAU MUTUAL	1,088	1
	FARMERS ALLIANCE MUTUAL	157	1
	GENERAL CASUALTY	0	1
	HARTFORD A & I	46	1
	KANSAS FARM BUREAU	0	1
	KANSAS FIRE & CASUALTY	1,290	1
	NFU INS CO	232	1
	NORTHWESTERN NATIONAL CASUALTY	924	1
	TRINITY UNIVERSAL INSURANCE	8	1
	TRUCK INSURANCE EXCHANGE	0	1
	TOTAL -	6,677	17
3. OTHER			

TYPE OF INSURANCE:	COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
	AID INSURANCE	3,711	4
	AMERICAN STATES	510	1
	BREMEN FARMERS MUTUAL	389	2
	CONSOLIDATED FARMERS	95	1
	CONSOLIDATED FARMERS MUTUAL	230	1
	EMPLOYERS MUTUAL	2,576	3
	EMPLOYERS MUTUAL CASUALTY	288	1
	FARM BUREAU	1,180	4
	FARM BUREAU MUTUAL	2,980	5
	FARMERS ALLIANCE	811	2
	FARMERS ALLIANCE MUTUAL	340	1
	FARMERS MUTUAL	398	1
	FARMERS UNION	230	1
	GENERAL CASUALTY	869	1
	HARTFORD	571	2
	HARTFORD INS GROUP	404	1
	INLAND MARINE	298	1
	KANSAS FIRE & CASUALTY	1,643	2
	MARYSVILLE MUTUAL INS CO	71	1
	MENNONITE AID	350	1
	MENNONITE AID PLAN	280	1
	MENNONITE AID UNION OF KS	350	1
	NORTHWESTERN NATIONAL	1,744	2
	OHIO CASUALTY	259	1
	PATRONS MUTUAL	0	1
	TRINITY UNIVERSAL INS CO OF KS	2,196	3
	UPLAND MUTUAL	363	1
	WESTERN FIRE	799	2
	TOTAL -	23,935	48
C. VEHICLES			
1. AUTOMOBILES		3,707	4
	AETNA	0	1
	AID	218	1
	AID INSURANCE	7,155	7
	AID INSURANCE COMPANY	476	1
	ALLIANCE	394	1
	AMERICAN STATES INS CO	36	1
	CIMARRON	587	1
	CIMARRON INS CO	136	1
	CIMARRON INSURANCE	174	1
	EMPLOYERS MUTUAL	4,452	6
	EMPLOYERS MUTUAL CASUALTY	2,561	3
	FARM BUREAU	630	2
	FARM BUREAU MUTUAL	3,355	6
	FARMERS ALLIANCE	9,167	5
	FARMERS ALLIANCE MUTUAL	1,483	3

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INSURANCE AND NEEDS SURVEY
INSURANCE INFORMATION SUMMARY

TYPE OF INSURANCE:

-COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
FARMERS CASUALTY	757	1
GENERAL CASUALTY	0	1
HARTFORD	824	1
HINSHAW INSURANCE	193	1
INSURANCE COMPANY OF N.A.	7,289	1
INSURANCE STORE	223	1
KANSAS FARM BUREAU	324	2
KANSAS FIRE & CASUALTY	1,344	3
KFB INSURANCE	918	2
KFB INSURANCE COMPANY	1,111	1
MARYLAND CASUALTY	1,421	2
NATIONAL FARMERS UNION INS	731	1
NORTHWESTERN NATIONAL	1,182	2
NORTHWESTERN NATIONAL CASUALTY	387	1
REORDAN INS	227	1
ST. PAUL	952	1
STATE FARM	268	1
TRINITY UNIVERSAL INS CO	532	1
UNITED FIRE	134	1
UNITED FIRE & CASUALTY	262	1
WESTERN	209	1
WESTERN CASUALTY	1,262	2
WESTERN CASUALTY & SURETY	8,253	2
WESTERN INSURANCE	205	1
TOTAL -	63,539	76

2. OTHER

AETNA CASUALTY & SURETY	663	4
AID INSURANCE	399	1
AID INSURANCE COMPANY	7,573	8
AID INSURANCE SERVICES	473	3
AMERICAN STATES	510	1
BITUMINOUS	932	2
BREMEN	990	1
BREMEN FARMERS	276	1
BREMEN FARMERS MUTUAL	92	1
BREMENS	550	1
CIMARRON	105	1
CIMARRON INSURANCE	850	1
EMPLOYERS MUTUAL	1,416	2
EMPLOYERS MUTUAL CASUALTY	4,228	7
FARM BUREAU	0	1
FARM BUREAU MUTUAL	5,170	14
FARMERS ALLIANCE	3,305	10
FARMERS ALLIANCE MUTUAL	2,713	6
FARMERS MUTUAL	1,641	6
GENERAL INSURANCE CO	300	1
HARTFORD	337	1
	380	1

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INSURANCE AND NEEDS SURVEY
INSURANCE INFORMATION SUMMARY

TYPE OF INSURANCE:	COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
	HINSHAW INSURANCE	0	1
	HOME STATE INSURANCE	554	1
	INSURANCE STORE	250	1
	KANSAS FARM BUREAU	695	2
	KANSAS FARM BUREAU MUTUAL	1,071	1
	KANSAS FARMERS SERVICE	600	1
	KANSAS FIRE & CASUALTY	1,591	2
	KFB INSURANCE	961	2
	MARYSVILLE MUTUAL	346	1
	NORTHWESTERN NATIONAL	1,821	3
	OHIO CASUALTY	338	1
	SHIELD OF SHELTER	661	1
	SILVEY COMPANIES	187	1
	ST. PAUL	59	1
	STATE FARM	1,826	3
	STATE FARM INS	205	1
	TRINITY UNIVERSAL INSURANCE	1,229	1
	UNITED FIRE	1,150	1
	USF&G	704	1
	WESTERN CASUALTY	2,365	1
	WESTERN FIRE	1,104	1
	WESTERN INSURANCE	1,076	1
	WESTERN INSURANCE CO OF AM	1,138	1
	WESTERN INSURANCE FIRE	84	1
	TOTAL -	53,160	105
5. WORKERS COMPENSATION		5,480	9
	AETNA	2,548	3
	AETNA LIFE & CASUALTY	506	1
	AID	907	2
	AID INSURANCE	5,946	11
	AID INSURANCE COMPANY	2,237	4
	AID INSURANCE SERVICES	506	1
	ALLIANCE	448	1
	ALLIANCE INSURANCE	653	1
	AMERICAN MUTUAL LIABILITY	401	1
	AMERICAN STATES	1,966	4
	AMERICAN STATES INS CO	401	1
	ARGONAUT INSURANCE	422	1
	CIGNA	401	1
	CIMARRON INS	0	1
	CNA	1,257	2
	CNA INSURANCE COMPANY	332	1
	COMMERCIAL UNION	1,612	3
	COMMERCIAL UNION INS	401	1
	CONTINENTAL INSURANCE	268	1
	EDWARDS INSURANCE	174	1
	EMPLOYERS MUTUAL	7,873	11

INSURANCE AND NEEDS SURVEY
INSURANCE INFORMATION SUMMARY

TYPE OF INSURANCE:

COMPANY	TOTAL PREMIUMS	# OF TOWNSHIPS
EMPLOYERS MUTUAL CASUALTY	1,285	2
FARM BUREAU	3,742	10
FARM BUREAU INSURANCE	558	1
FARM BUREAU MUTUAL	9,766	20
FARMERS ALLIANCE	2,844	6
FARMERS ALLIANCE INS. CO	506	1
FARMERS ALLIANCE MUTUAL	1,700	4
FARMERS INSURANCE GROUP	435	1
FIDELITY & CASUALTY	988	2
GENERAL CASUALTY	775	2
HARTFORD	2,791	3
HARTFORD ACCIDENT & INDEMNITY	512	1
INA	398	1
INSURANCE COMPANY OF N.A.	3,286	1
KANSAS FARM BUREAU	2,800	1
KANSAS FARM BUREAU MUTUAL	799	1
KANSAS FIRE & CASUALTY	2,973	3
MARYLAND CASUALTY	401	1
NORTHWESTERN NATIONAL	2,260	7
NORTHWESTERN NATIONAL CASUALTY	741	1
OHIO CASUALTY	1,269	1
REORDAN INS	0	1
SILVEY COMPANIES	1,326	2
ST PAUL	274	1
ST PAUL FIRE & MARINE	506	1
ST. PAUL	332	1
STATE PLAN	506	1
TRINITY UNIVERSAL	401	1
TRINITY UNIVERSAL INSURANCE	976	1
UNITED FIRE	791	1
UNITED FIRE & CASUALTY	392	1
USF & G	2,814	2
WESTERN	870	2
WESTERN CASUALTY	401	1
WESTERN CASUALTY & SURETY	1,181	3
WESTERN INSURANCE	1,089	2
TOTAL -	87,427	153
GRAND TOTAL -	460,319	

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INSURANCE AND NEEDS SURVEY
CLAIM INFORMATION SUMMARY

TY	TOWNSHIP	DATE	NATURE OF CLAIM	OPEN	SETTLED	DOLLAR AMOUNT
ANDERSON	LINCOLN	0/00/00	HAIL STORM			0
BARBER	HAZELTON	0/00/85	WC		X	15,000
BARTON	WALNUT	6/17/82	WC		X	125
BARTON	WHEATLAND	11/00/85	WORKERS COMP.	X		0
BOURBON	MARION	5/00/85	THORN IN HAND		X	7,000
BROWN	HIAWATHA	9/21/83	ROAD GRADER BACKED INTO AUTO		X	7,021
BUTLER	CHELSEA	9/26/85	UNDERGROUND PROPERTY DAMAGE	X		1,100
BUTLER	GLENCO	9/16/82	BROKEN WINDSHIELD			128
COWLEY	HARVEY	2/08/84	HIT CHAIN SAW WITH GRADER		X	150
		7/24/84	HIT ROCK, BROKE GRADER BLADE		X	591
DOUGLAS	CLINTON	12/00/83	LIABILITY		X	377
		5/00/83	LIABILITY		X	250
		11/00/84	WC		X	40
EDWARDS	FRANKLIN	7/30/83	FIRE CLAIM		X	4,067
ELLSWORTH	BLACK WOLF	0/00/84	CATERPILLAR D-4 FIRE			2,400
ELLSWORTH	COLUMBIA	8/10/85	WIND & HAIL DAMAGE	X		378
FORD	BUCKLIN	3/14/85	PROPERTY DAMAGE - VEHICLE		X	296
		4/03/83	LEGAL FEES -SUIT FILED AG.TWP.		X	811
		4/03/83	LEGAL FEES -SUIT FILED AG.TWP.		X	227
FORD	SPEARVILLE	8/00/84	PICKUP STOLEN		X	300
		8/00/85	MOWER COLISION	X		2,200
HARVEY	LAKIN	9/00/85	WEED IN EYE		X	85
HARVEY	WALTON	0/00/80	ACCIDENT VICTIMS SUING TOWNS.		X	10,000
JEFFERSON	UNION	9/06/84	CHARLES WILLIAMS - INJURY		X	93
		9/02/84	DONALD NOWAK - INJURY		X	151
		3/22/84	IVAN THEROFF - HEART ATTACK			0
KINGMAN	BELMONT	10/30/00	NEW MOTOR ON GRADER		X	3,411
KINGMAN	EVAN	0/00/79	CAR ACCIDENT		X	0
LEAVENWORTH	KICKAPOO	8/00/85	WC VOLUNTEER INJURED		X	300

Attachment 26

DATE 4/21/86

INSURANCE AND NEEDS SURVEY
CLAIM INFORMATION SUMMARY

COUNTY	TOWNSHIP	DATE	NATURE OF CLAIM	OPEN	SETTLED	DOLLAR AMOUNT
MCPHERSON	EMPIRE	9/00/85	CAR HIT HOLE AT BRIDGE		X	200
MCPHERSON	MCPHERSON	6/29/84	BACKING ACCIDENT		X	619
MEADE	WEST PLAINS	9/10/84	WC		X	64
NEMAHA	CAPIOMA	0/00/00	MOSER VS. CAPIOMA INS	X		0
NEMAHA	GRANADA	2/02/83	ROAD GRADER CUT TRACTOR TIRE		X	382
OSAGE	JUNCTION	4/00/85	HURT NECK & SHOULDER		X	259
		1/16/85	THORN IN HIS HAND		X	39
OSBORNE	ROUND MOUND	7/01/85	WIND DAMAGE		X	— 2,200
RENO	LITTLE RIVER	10/05/84	HEDGE TRIMMED TOO CLOSE		X	775
RENO	VALLEY	1/05/84	W.C.			28
		12/15/85	LIABILITY			20
RILEY	BALA	7/10/85	LIABILITY			0
ROOKS	LOGAN & WALTON	5/05/84	HAIL DAMAGE	5/05/84	7/10/84	1,610
RUSSELL	PARADISE	7/08/84	DAMAGE TO DUMP TRUCK-COLLIGION		X	1,089
SEDGWICK	KECHI	6/13/85	COLLISION		X	250
SEDGWICK	MINNEHA	3/00/83	LIABILITY		X	1,862
		3/00/84	THIRD PARTY LIABILITY		X	2,795
		3/00/84	COLLISION		X	3,300
SEDGWICK	OHIO	4/13/84	LIABILITY		X	339
		4/14/84	AUTO LIABILITY		X	386
		4/14/84	AUTO LIABILITY		X	642
SEDGWICK	UNION	3/00/85	VANDELISM		X	1,150
SEDGWICK	VALLEY CENTER	12/00/83	PROPERTY DAMAGE		X	110
SEDGWICK	VIOLA	7/00/85	AUTO ACCIDENT		X	500
SHAWNEE	MENOKEN	0/00/81	THEFT OF TOOLS		X	2,500
SHAWNEE	TECUMSEH	5/00/85	AUTO PHY. DAM		X	497
		2/00/84	THEFT		X	3,625
		12/00/83	AUTO		X	912
		4/00/83	WC		X	152
		4/00/83	AUTO		X	8,575
		4/00/83	AUTO		X	160

DATE 4/21/86

INSURANCE AND NEEDS SURVEY
CLAIM INFORMATION SUMMARY

NTY	TOWNSHIP	DATE	NATURE OF CLAIM	OPEN	SETTLED	DOLLAR AMOUNT
SHAWNEE	TOPEKA	7/25/83	WC		X	152
		8/16/84	VEHICLE		X	428
		12/09/85	WC	X		0
SUMNER	LONDON	12/28/83	GRADER BACKED INTO VEHICLE		X	722
SUMNER	WALTON	8/07/84	THEFT		X	1,066
THOMAS	MORGAN	8/10/85	PICKUP ACCIDENT	X		0
WABAUNSEE	WILMINGTON	10/15/84	GRADER ROLLED INTO HOUSE CHIMN		X	5,209
WILSON	FALL RIVER	6/14/85	HAIL DAMAGE TO ROOF OF BLDG.		8/14/85	620

TOTAL CLAIMS - 68 99,818

TESTIMONY OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
1986 INTERIM COMMITTEE ON
TORT REFORM AND THE INSURANCE INDUSTRY

The Kansas Legislature has received a petition requesting the study of various aspects of the current legal system. From punitive damages to structured settlements the list contains most of the key features of the current tort system. The battle cry of groups is for "tort reform".

A fundamental question which must be asked by legislators to the groups seeking change is why? What do you want to accomplish?

If the answer is that tort reform will lead to stable and/or lower insurance rates, then the burden is on the industry representatives and legal critics to demonstrate some specific connection between the current Kansas laws and the liability insurance crisis.

If the reason for reform is because conferees believe the current legal system to be unfair or out of control, then it is crucial to examine the specific data from Kansas courts to determine where the problem lies in our state and what can be done to alter the system.

At the outset, the Kansas Trial Lawyers Association is available and eager to work with the Interim Committee. We welcome an in-depth look at these issues and hope that during the next several months all of us will learn a great deal about

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the interrelation between purchase of insurance, injury, claims payment and the court system in Kansas.

We recognize that there are problems with the legal system - it is very slow, very costly and compensates only a few of the people who receive injuries. There are dozens of anecdotes about litigation, but few statistics to pinpoint the problem.

In the insurance industry, it is even more difficult to sort through the complicated actuarial data. While there was a wealth of information on medical malpractice insurance from the Health Care Stabilization Fund, the Kansas doctors' insurance company, there was only limited data from primary carriers. During the 1986 debate on S.B. 540, it was apparent that no one knew the facts and figures about liability insurance in Kansas.

In order to formulate a meaningful solution it is vital to determine the nature and scope of the problem and to design specific legislation which will work in Kansas.

Today, we would like to present a brief overview of the current insurance situation and recommend some areas of investigation for the Interim Committee.

The nation is losing its liability insurance. Day care centers are being forced to close; nurse-midwives are losing their insurance so birthing centers are shutting down; doctors are marching on state capitals; cities, transit authorities, even whole states are losing their liability insurance. One of

the leading auto insurers in the District of Columbia has pulled out. The list goes on and on.

And prices have skyrocketed. In 1985, insurance premiums rose by almost $25 billion, more than $100 for every man, woman and child in the US. (Best's Insurance Management Reports, December 30, 1985.)

It's well-known in the business community -- if little known to the general public -- that the fortunes of the insurance industry rise and fall with the interest rate. That's because the industry's primary source of profits is not the premium it collects, but the interest it earns by investing those premiums in stocks and bonds -- many of which are tax free.

High interest rates made the late 1970's and early 1980's boom times indeed for the insurance industry. When interest hovered around 20%, there was breakneck competition for new business. Insurance companies "were nearly begging for new business to get premium dollars to invest," one industry leader told The New York Times.

When the interest rate plummeted in 1984, the insurance policy-writing merry-go-round ground to a halt. Companies eager to discount premiums just a few months before, during the book times, were now just as eager to raise them -- not because the insureds had suddenly become a bigger risk, but to cover the companies' decline in investment profits.

IS THE INSURANCE INDUSTRY GOING BROKE?

To hear industry spokesmen tell it, the wolf is at the door. During 1984, according to the industry-maintained Insurance Information Institute, the nation's property and casualty insurance companies reported a pre-tax deficit of $3.8 billion.

That sounds pretty grim. And it would be...if it were true. But it is not. It's just a product of the insurance industry's own peculiar -- and self-serving -- brand of accounting.

Here's how financial writer Andrew Tobias described that accounting system in his book, The Invisible Bankers:

> If an insurer pays out 60 cents of every premium dollar to settle claims, its "loss ratio" is 60 percent.
>
> If it spends another 30 cents of each dollar on such things as sales commissions, clerical salaries, postage stamps and overhead, its "expense ratio" is 30 percent....When the combined ratio exceeds 100 percent, as it not infrequently does, the insurer has an underwriting loss.

Notice that investment income is not included in this accounting. In fact, dividends paid to policyholders are routinely treated by insurance companies as "an expense".

Now let's look again at the insurance industry's balance sheet, this time through the eyes of A.M. Best Company's Aggre-

gates & Averages for 1,773 property/casualty companies in 1984: when actual losses paid and underwriting expenses are substracted from premiums written plus net investment income and tax credits, the bottom line is a profit of $8.6 billion.

That's the balance sheet for what industry analysts are calling the worst year in insurance since 1906, the year of the San Francisco earthquake.

Moreover, for the decade ending in 1983, the General Accounting Office of the United States Congress found that property and casualty insurance companies enjoyed net gains totaling $72 billion -- and, incidentally, received $63 million in federal tax credits.

The stock market is a good indicator of the insurance industry's true health. During the first six months of 1985 -- a time when insurance company officials were pleading poverty to their customers and to state regulators and legislators around the country -- the stocks of property and casualty companies outperformed the rest of the market by nearly 100 percent.

We need data; we need balance; when we get these things I will support tort reform because then it will be reform, not just an insurer profit guarantee.

WHAT IS TO BE DONE?

Insurance premiums represented 11.1% of the disposable income in this country in 1984, near 12% in 1985. (See

Appendix A.) Insurance is the fourth leading purchase Americans make (behind food, housing and federal income taxes, although it passed federal taxes this year). If we are to see any relief, specific steps will have to be taken at both the stae and federal level to end this insurance company misbehavior.

THE McCARRAN-FERGUSON ACT

In 1944, the U.S. Supreme Court found that insurance was interstate commerce and, thus, subject to anti-trust and other federal statutes. In 1945, Congress passed the McCarran-Ferguson Act which exempts insurance from the federal anti-trust laws (except should intimidation, coercion or boycott occur). Congress delegated the authority to regulate insurance to the states with no standards for regulatory excellence and no ongoing congressional oversight. Indeed, the Federal Trade Commission (FTC) cannot even study insurance under current law unless Congress specifically authorizes it in advance.

The immensely important McCarran-Ferguson Act was adopted by that earlier Congress without benefit of a hearing. The legislative history makes it clear that President Roosevelt wanted only a short, two or three-year moritorium after which anti-trust laws would fully apply. (Claude Pepper, Report before the Subcommittee on Monopolies & Commercial Law, April 11, 1984, page 5.) That is, in fact, what both houses of Congress adopted but their language was somewhat different,

requiring a conference. Mysteriously, the conference committee reported back a bill that continues in effect today; an infinite moritorium.

Every independent study of insurance concludes that the states have failed miserably in their attempts to regulate this giant industry. The states have allowed this crisis to happen. Had regulators had the political will and been properly equipped to keep prices to statutory standards (all states require that the rates be "not excessive, not inadequate, not unfairly discriminatory") we would not be in the mess we are in today with clearly excessive prices going into effect routinely around the nation and unfair mid-terim cancellations, coverage and price changes rampant.

The political pressure is very real. Businesses, professional groups and associations in Kansas, and throughout the country, are experiencing shocking rate increases. In some cases insurance at the needed levels is simply not available. The legislature is being prompted to take action, and must determine what action will affect the current insurance crisis.

Currently, the Kansas laws in many areas are far more restrictive than laws of recovery in other states. In fact, we have in place in Kansas significant "tort reforms" which are being promoted as the solutions to the insurance crisis across the country.

Since 1978, the Kansas Tort Claims Act established a $500,000 cap on awards from a governmental unit in Kansas (prior to that governments were immune from suit). Recently, Ernie Mosher, Director of the League of Municipalities, testified before the Bell Liability Committee. He cited enormous increases in insurance rates for cities in Kansas in spite of the following history of law suits:

> 60% of cities have had no claims since 1979; 22% have 5 claims or less. 75% of Kansas cities have never paid a claim in the last 6 years.

Why haven't these caps stabilized and lowered insurance rates for Kansas cities?

Another significant legal difference between Kansas and most other states is that we do not have "joint and several liability". Under the comparative negligence law in Kansas, no defendant will ever pay more than his or her specific share of the costs, even if all of the other guilty parties have no funds and the innocent victim is left with huge unpaid bills. Again, this theory is being promoted from coast to coast by tort reform advocates as a "key reform" which will lower insurance rates. Since Kansas plaintiffs have been denied full recovery under this theory for almost ten years, why aren't Kansas insurance rates significantly lower than other states?

If the answer is that the insurance crisis needs to be solved on a national level because states have little control

over rates, then we plead with this Committee to not further restrict the rights of Kansas citizens unless you are guaranteed some dramatic rate benefits.

Not only has the Reagan administration been investigating changes in the tort area, but there are major investigations underway of the insurance industry. Two of the most significant probes are from the GAO (General Accounting Office) which is the internal treasurer for the government. It is a major concern of administration officials that the huge insurance industry has successfully avoided paying federal income tax and yet profits are soaring.

Congressman Peter Rodino, Chairman of the House Judiciary Committee, has begun an inquiry into the liability insurance crisis.

Rodino Release: "This action is necessary", he stated, "because businesses and local governments across the country are being held hostage by the demands of liability insurance companies."

Rodino said, "The crisis boils down to one basic problem. Liability insurance companies have totally withdrawn from some markets and they have hiked rates beyond belief in others, making liability insurance unattainable for many."

"What's disturbing is that different companies have often taken these actions at the same time without warning and without explanation. This certainly raises the possibility that

anticompetitive practices by the companies have caused or contributed to the crisis," he explained.

"There is no federal oversight and the antitrust laws do not apply to insurance, which means that that industry may engage in anticompetitive practices without fear of punishment and that there is no federal agency we can count on to monitor the industry," Rodino continued. "Evidence submitted to the Subcommittee shows that shortly after the insurance industry determined to launch a massive campaign to curtail individual rights through tort reform, the liability crisis occurred. The coincidence is remarkable," he added.

Charts with national data gathered by the Committee are in your packets. (See Appendix B, C, D, E).

WHAT CAN BE DONE?

There are some solutions solely within the control of the U.S. Congress, and we would strongly urge that this Committee consider recommending that the legislature resolve to urge Congressional action in the following areas:

WHAT SHOULD CONGRESS DO?

First, it should subject the insurance industry to the anti-trust laws, thus preventing insurers from acting in concert to raise prices. Since 1944, the McCarran-Ferguson Act has allowed insurance companies to fix prices, while price-fixing in other industries is punishable by three years in jail. We specifically propose a two-year sunset provision

during which time the insurers, the states and the federal government can prepare for the change.

Second, it should create a federal office of insurance to monitor the industry and establish standards for state regulators to follow. Although insurance is a national, $310 billion business, accounting for 12% of our gross national product -- more than any other item except food and housing -- only the states regulate the insurance industry. Because state insurance commissions are often under-staffed (half the states have no actuaries to analyze rate filings) and have a "revolving door" relationship with the industry (state insurance commissioners typically come from and return to the industry), state regulation has not always protected the public.

Third, Congress should repeal the insurance industry's exemption from Federal Trade Commission jurisdiction. In 1979, after the FTC published a study critical of the life insurance industry, Congress prohibitied the FTC from ever again studying -- let alone prosecuting -- any sector of the industry. There is no principled justification for this exemption.

Fourth, it should expand the Risk Retention Act which currently allows manufacturers -- but not other businesses, such as day care centers and nurse-midwives -- to join together, self-insure or to buy insurance at a lower rate. This would pre-empt state laws prohibiting such group buying. Automobile owners, for example, who must now buy insurance individ-

ually, could reduce their premiums by 10% a year by buying it in groups.

Fifth, Congress should establish a national insurance industry-funded reinsurance program. Reinsurance is insurance for insurance companies: the insurer pays the reinsurer a premium, and the reinsurer agrees to share the risk with the insurer. Because the reinsurance market is dominated by Lloyds of London, which is not subject to federal regulation, U.S. insurers have no effective recourse when Lloyds raises its rates, as it did last year. A U.S. reinsurance program would compete with Lloyds and exert downward pressure on reinsurance rates, which in turn would enable insurers to reduce their rates.

Finally, we call upon you to require federal licensing of alien insurers that are not licensed and meaningfully regulated by any state in this nation but who insure or reinsure here. If Lloyd's of London will use its economic clout to dictate our nation's policy forms, (it is Lloyd's which is pushing the claims made form down the throats of the primary carriers; it is Lloyd's which is forcing the defense costs inside the limit of liability) premium charges and legal systems we think they should be subject to review by some authority.

WHAT SHOULD STATES DO?

1. State law should require disclosure of loss data on a line-by-line basis wchich would give regulators much better

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ability to discern whether rates are excessive, inadequate or unfairly discriminatory. Line-by-line reporting will allow for adjustments between personal and commercial lines. Companies' annual statements should be expanded to require detailed reporting of all general liability subline data, by subline.

2. To the maximum feasible extent, insurance rates must be made based upon experience. The failures of the regulators and the insurers to provide proper safety incentives lies chiefly in their unwillingness to rate commercial risks based upon individual experience. Admittedly some risks are hard to rate experentially, but over time the necessary data base can be developed to properly rate individuals nd unusual risks. Experience rating will allow proper market messages to be sent to unsafe risks and reduce the costs for good risks currently paying to allow the continued operations of bad risks.

3. Insurance regulators need better data verification techniques either through conducting their own, more frequent audits or using outside auditors. Recent charges by the NAIC (National Association of Insurance Commissioners) president that data has been falsified strikes at the core of state regulation of insurance. If we cannot trust the annual statements, then state regulation of insurance is a fraud and a sham.

4. Insurers must be required to fully disclose to regulators the total rates of return earned, including on investment income, so that full blown rate of return rate regulation can

be utilized. The NAIC endorsed this approach at its June 1984 meeting. (Texas, the first state to fully use the method in setting auto rates earlier this year, saw a 10 percent reduction in premiums required. This action saved Texas consumers $250 million over the proposed rates.)

5. State Commissioners should be empowered by the legislatures to meaningfully regulate excess, surplus lines carriers and reinsurers, at least to the extent that the federal government does not. Abuses, such as withholding cover by these carriers, have contributed significantly to the current capacity crunch.

6. States should establish their own reinsurance programs modeled after NICO's (National Insurance Consumer's Organization) federal proposal. A state reinsurance program with a risk management component requirement can bring meaningful safety considerations into insurance markets. Establishing models for risk management as a requirement for reinsurance through the state would provide a general market incentive and would ease availability and decrease risks faced by consumers and their primary carriers.

7. State regulators should conduct financial market conduct and trade practice examinations on a regular basis for all licensed insurers in states. Increased monitoring of insurer's practices and finances can only benefit consumers by curbing rating and other market abuses, as well as insolvencies.

8. State must allow greater consumer representation before the regulatory bodies. All too often the only parties to rate cases are the regulators and the insurer.

Most of the other conferees have urged tort reform, not insurance reform. We are eager to participate in a careful analysis of the Kansas legal system to determine what problems exist and what are the legislative solutions. Frankly, while the anecdotes are amazing, there is little hard data to support the cry for legislation reform.

IS THERE A LITIGATION EXPLOSION?

On April 21, 1986, the National Center for State Courts made the following release: "Careful examination of current available trial court data relating to tort, contract, real property rights and small claims cases, from a representative group of state courts, provides no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981-84 time period," according to Dr. Robert Roper, director of the Court Statistics and Information Management (CSIM) project of the National Center for State Courts.

"Twenty states, which include 29 limited and general jurisdiction statewide court systems, reported reliable and comparable tort, contract, and real property rights statistics on the number of lawsuits filed for the years 1978, 1981, and 1984. The data revealed a 14 percent increase in filings for 1978-81, and a 4 percent decrease in 1981-84."

"The often cited litigation thus appears to be exaggerated with respect to the total number of civil filings during the period of 1981-84. The source of the perception that there is a litigation explosion may be founded in a changing mix of civil cases, increased complexity of the cases being filed, and widespread media reports of enormous awards in relatively few civil cases."

Interestingly enough Kansas was one of the few states with complete state data. A state-by-state chart is in your packet and shows the following filings in tort, contract, and property cases: 54,005 cases in 1981 compared to 57,140 cases in 1984. During this period Kansas experienced a 2% growth in population, and the data shows a 6% growth in case filings, hardly an "explosion". (See Appendix F.)

As far as we can determine, there is no complete data on amounts of verdicts in civil cases, totals of punitive damages awarded, length of time to process cases thorugh the courts. We are going to attempt, through the assistance of trial lawyers in Kansas to gather some pertinent information in this area.

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QUESTIONS TO ASK THE INSURANCE INDUSTRY

Question:
The insurance industry claims it is in serious economic difficulty because of the rising number and size of claims. What it is the truth regarding the industry's profitability?

Answer:
The insurance industry earned a rate of return of almost 7% on net worth in 1985, after dividends to policy holders and after record losses from hurricanes (about $3 billion). Premium increases implemented in 1985, together with reductions in policy coverage, will bring the industry to an even more profitable rate of return in 1986. It is important to remember that the boom/bust cycle of the insurance industry is caused not by excessive litigation by consumers but by premium price-cutting by the industry, followed by the need to increase premiums during periods of lower investment income.

Question:
What about allegations that claims have increased sharply in number and size?

Answer:
The size of jury awards and the number of law suits filed have remained essentially level during the past 25 years, after inflation and the increase in population is taken into account. According to the Institute for Civil Justice, since 1959 the median jury verdict has remained at about $8,000 (constant 1979 dollars), the number of law suits filed per capita has remained constant, and jurors have found for the defendant about as often as for the plaintiff.

Question:
The stock market is a good barometer of an industry's health and profitability. What is the situation regarding stock prices of property casualty insurers?

Answer:
Best's Property/Casualty Stock Index indicates that insurance stocks have continuously outperformed the Dow Jones Index over the last five years. Between 1980 and 1985 property casualty stocks increased 194% versus 84% for all stocks on the Dow Jones Index. In 1985 property casualty stocks rose by 50%, almost double the rise of the stock market generally. Insurers' net worth increased $7.6 billion in 1985.

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Question:
One of the major arguments of those claiming there is an "insurance crisis" is that the cost of medical malpractice insurance premiums has increased sharply. Is this correct?

Answer:
The cost of malpractice insurance has actually been declining as a percentage of total health costs since 1976. Premiums have declined by 45% as a percentage of health care costs during that period. In 1984 malpractice premiums amounted to less than $2 billion, about 1/2 of 1% of the approximately $400 billion Americans spent on health care that year (A.M. Best's Casualty Loss Reserve Development 1985; "Nation Health Expenditures," 6 Health Care Financing Review).

Question:
Is the cost of medical malpractice insurance a significant factor for the average citizen?

Answer:
In 1983 the average American spent $1,500 on health care costs. Of that amount, only $6.08, or 11 cents a week, went to medical malpractice insurance. In addition, during the period 1975-1983, while medical malpractice premiums increased by 80%, the average increase in physician charges, a component of the medical consumer price index, was 108%.

Question:
Is the cost of medical malpractice insurance a burden on doctors?

Answer:
By and large, no. The average American physician spends only 2.9% of his or her gross income (currently estimated at about $200,000 per year) on medical malpractice insurance. This is slightly more than the 2.3% spent on "professional car upkeep." While there may be certain specialties which have received premium increases because of inadequate planning by the insurance industry, it is important to note that 57% of all doctors spend less than $5,000 on malpractice insurance. If doctors in certain specialties cannot obtain reasonably priced insurance, the problem lies in the under-pricing of premiums by the insurance industry over the past ten years, and with foreign reinsurance companies which have failed to make such coverage available.

Question:
Have insurance company practices played a significant role in the alleged medical malpractice crisis?

Answer:
Yes. According to Dr. James Posner of Marsh and McLellan, experts on the insurance industry:

> The insurance companies themselves have exacerbated the malpractice crisis. The high investment yields of the early 1980s, and the influx of new carriers, led to continued price-cutting. In late 1984 and 1985 the strong dollar reduced the amount of insurance and reinsurance capacity available from London, and emerging losses in the U.S. finally forced companies to raise premiums.

Question:
Does most medical negligence become the subject of malpractice claims?

Answer:
No. All available evidence indicates that consumers seek compensation for negligent malpractice in only a small fraction of incidents. Yet the tort system, because of potential recoveries, remains the single most effective method of promoting safer health care practices. A study for the Secretary's Commission on Malpractice (Department of Health, Education and Welfare) revealed that only one in every 15 severe injuries resulting from medical negligence led to malpractice claims. A Rand Corporation study found that "at most one in ten incidents of malpractice result in a claim, and of these, less that half, or one in 25, receive payment." A relatively small group of doctors appears to be responsible for a disproportionate share of malpractice claims. Studies in Florida and Pennsylvania have indicated that less than 1% of the doctors studied were involved in about 25% of the malpractice claims. Individually based (experience-rated) insurance premiums and better quality control of medical practitioners would help resolve this problem.

Question:
To what extent is inadequate review and discipline of doctors a factor in malpractice?

Answer:
A major cause of malpractice is the failure of the medical profession to effectively discipline itself. Incompetent doctors are rarely sanctioned. Most states do not have any system

requiring insurance companies or courts to inform medical disciplinary boards regarding malpractice decisions. In 1983, 22 states reported fewer than one serious disciplinary action per 1,000 doctors. In a recent year, there were 1,500 paid malpractice claims in California, but only six disciplinary actions for quality of care violations (P.M. Danzon Testimony before U.S. Senate Committee on Labor and Human Resources, July 10, 1984). Utah disciplined five doctors per thousand for malpractice, a rate 36 times higher than Massachusetts.

Question:
The insurance industry is currently urging major changes in the common law tort system because of the claimed "insurance crisis." Would the result be decreased premiums and better coverage?

Answer:
Virtually every "tort reform" the insurance industry is seeking is currently the law in Ontario Canada. Yet in Ontario the industry is now raising premiums by as much as 400%, cancelling coverage in mid-term and refusing to provide coverage in certain areas at any price. Ontario's experience indicates the problem is not with injured consumers or the judicial system, but with the pricing and coverage decisions of the insurance industry.

Question:
The tort system has been a part of our American legal system since the adoption of the Constitution. It has often been the major force promoting safer consumer products and services, environmental protection and civil liberties. Does the alleged "insurance crisis" furnish a reason to modify the present system and limit the rights of injured citizens? Are there alternative methods of promoting consumer and environmental protection (such as increased government regulation) which the insurance industry would be willing to support?

Answer:
The insurance industry has rarely supported laws which would help prevent health, safety, and environmental violations through increased government regulation or other means. In most states malpractice cases are not reported to medical disciplinary boards. Often, evidence against wrongdoers is sealed at the request of industry lawyers. Proposed limitations on contingent fees, the amount juries may award victims, and joint and several liability are revolutionary changes in our system which will limit the rights of injured citizens. Those who are responsible for these injuries, and those who insure them, suggest no alternatives which would offer adequate protection to the public.

APPENDIX A

Amount of Disposable Income Spent on Insurance in the US

Item	1984 Amount Spent in Billions a/	Income in Percentages
Food	$444.3	17.2
Housing	$397.8	15.4
Personal Income Taxes	$302.6	11.7
INSURANCE b/	$287.1	11.1
TOTAL	$2578.1	55.4

Sources: a/ US DEPARTMENT OF COMMERCE, BUREAU OF ECON. ANALYSIS

b/ BEST'S MANAGEMENT REPORTS, December 31, 1984, pg.1
LIFE INSURANCE FACT BOOK, pg. 56.
BLUE CROSS ASSOCIATION

Attachment 29

APPENDIX B

TEN-YEAR REVENUES, EXPENDITURES
& PAY OUT RATIOS (1975-1984)
(REVENUES AND EXPENDITURES SHOWN IN THOUSANDS)

Line	Revenues*	Expenditures**	No. of Years for which pay outs exceed Revenues	Pay out Ratios***
Day Nurseries	21,335	10,395	1	.49
Owners, Landlords & Tenants Bodily Injury Liability	5,380,568	3,057,922	0	.57
Manufacturers & Contractors Bodily Injury Liability	4,220,972	1,796,602	0	.43
Manufacturers & Contractors Property Damage Liability	2,414,623	1,227,437	0	.51
All Products & Completed Operations Bodily Injury Liability	2,666,001	1,204,514	2	.45
All Products & Completed Operations Property Damage Liability	1,640,536	478,356	0	.29
Municipal Classes	5-year statistics only		--	--
Liquor Liability	115,225	46,346	1	.40
Governmental Subdivision	5-year statistics only		--	--

* Revenues = Earned premiums. It does not include investment income

** Expenditures = paid losses + loss adjustment expenses allocated to losses, both through 3/31/85. It does not include reserves or unallocated loss adjustment expenses.

*** Pay Out Ratio = Expenditures/revenues, rounded to nearest cent.

[Prepared by Subcommittee on Monopolies and Commercial Law staff from data supplied by the Insurance Services Office (ISO)]

Attachment 30

APPENDIX C

FIVE YEAR REVENUES, EXPENDITURES & PAY OUT RATIOS (1980-1984) (REVENUES & EXPENDITURES SHOWN IN THOUSANDS)

Line	Revenues*	Expenditures**	No. of Years for which pay outs exceed Revenues	Pay out Ratios***
Day Nurseries	16,633	7,906	0	.48
Owners, Landlords & Tenants Bodily Injury Liability	3,628,980	1,956,543	0	.54
Manufacturers & Contractors Bodily Injury Liability	2,706,699	918,466	0	.34
Manufacturers & Contractors Property Damage Liability	1,495,732	775,956	0	.52
All Products & Completed Operations Bodily Injury Liability	1,732,000	497,928	0	.29
All Products & Completed Operations Property Damage Liability	1,127,591	270,758	0	.24
Municipal Classes	308,321	204,015	1	.66
Liquor Liability	75,797	20,976	0	.28
Governmental Sudivision	95,756	39,852	1	.42

* Revenues = Earned premiums. It does not include investment income

** Expenditures = paid losses + loss adjustment expenses allocated to losses, both through 3/31/85. It does not include reserves or unallocated loss adjustment expenses.

*** Pay Out Ratio = Expenditures/revenues, rounded to nearest cent.

[Prepared by Subcommittee on Monopolies and Commercial Law staff from data supplied by the Insurance Services Office (ISO)]

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APPENDIX D

1984* REVENUES, EXPENDITURES & PAY OUT RATIOS
(REVENUES & EXPENDITURES SHOWN IN THOUSANDS)

Line	Revenues**	Expenditures***	Pay Out Ratios****
Day Nurseries	4,588	1,126	.25
Owners, Landlords & Tenants Bodily Injury Liability	764,850	210,581	.28
Manufacturers & Contractors Bodily Injury Liability	478,278	55,726	.12
Manufacturers & Contractors Property Damage Liability	270,646	143,695	.53
All Products & Completed Operations Bodily Injury Liability	311,540	21,938	.07
All Products & Completed Operations Property Damage Liability	214,569	32,816	.15
Municipal Classes	67,716	19,087	.28
Liquor Liability	10,798	504	.05
Governmental Sudivision	25,970	5,694	.22

* Because ISO data was on an accrual basis, expenditures are matched against the policy year in which the occurrence insured against happened.

** Revenues = Earned premiums. It does not include investment income

*** Expenditures = paid losses + loss adjustment expenses allocated to losses, both through 3/31/85. It does not include reserves or unallocated loss adjustment expenses.

**** Pay Out Ratio = Expenditures/revenues, rounded to nearest cent.

[Prepared by Subcommittee on Monopolies and Commercial Law staff from data supplied by the Insurance Services Office (ISO)]

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APPENDIX E

1978* REVENUES, EXPENDITURES & PAY OUT RATIOS
(REVENUES & EXPENDITURES SHOWN IN THOUSANDS)

Line	Revenues**	Expenditures***	Pay out Ratios****
Day Nurseries	1,115	571	.51
Owners, Landlords & Tenants Bodily Injury Liability	459,430	231,763	.50
Manufacturers & Contractors Bodily Injury Liability	381,654	192,283	.50
Manufacturers & Contractors Property Damage Liability	222,903	99,118	.44
All Products & Completed Operations Bodily Injury Liability	283,382	132,640	.47
All Products & Completed Operations Property Damage Liability	147,518	60,990	.41
Municipal Classes	1980 was first year for which statistics were suppli		
Liquor Liability	13,758	5,529	.40
Governmental Sudivision	1980 was first year for which statistics were suppli		

* Because ISO data was on an accrual basis, expenditures are matched against the policy year in which the occurrence insured against happened.

** Revenues = Earned premiums. It does not include investment income.

*** Expenditures = paid losses + loss adjustment expenses allocated to losses, both through 3/31/85. It does not include reserves or unallocated loss adjustment expenses.

**** Pay Out Ratio = Expenditures/revenues, rounded to nearest cent.

[Prepared by Subcommittee on Monopolies and Commercial Law staff from data supplied by the Insurance Services Office (ISO)]

E 32: Trend data for state courts that specifically reported tort, contract, and real property r case filings for 1978, 1981, and 1984.

Courts included in this table.

For inclusion in this table, a court must have reported an identifiable tort, contract, and real property rights caseload, separate from all other civil cases, in at least two of the three target years. Five states reported tort, contract, and real property rights cases for all the courts which had jurisdiction over tort, contract and real property rights cases in those states. A total of 37 statewide courts, in 25 states, reported data. Of the 37 courts, 12 were general jurisdiction courts.

Comparison of aggregated filings over time.

The following data are from the 29 courts in 20 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 32.

The increase in tort, contract, and real property rights filings between 1978-81 was 14%, while the population for the states reporting these data increased by 3%. Between 1981-84, the population continued to grow another 3%, but the new filings decreased by 4%. These aggregate figures provide preliminary evidence for the existence of the "up-down" pattern discussed earlier in this section.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose tort, contract, and real property rights filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	19	7
No significant difference between the change in population and filings:	6	3
Filings did not increase measureably during this period:	0	3
Filings increased at a rate slower than the population:	0	2
Filings decreased during this period:	5	22
Comparable data were not available for the period:	8	0

The "up-down" pattern described in the introduction to this section is illustrated in the above chart. Most of the courts reporting tort, contract, and real property rights cases during 1978-81 experienced significant increases in their filings. During the 1981-84 period, however, the pattern reversed itself--the majority of courts reported decreases in filings of these case types. Less than twenty-five percent of the courts reporting tort, contract, and real property rights cases during 1981-84 experienced increases in their filings at a rate significantly higher than increases in their populations. These patterns are more firmly established in the following chart.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 29 courts in 20 states that reported comparable data for all three years. The (G) or (L) after each court indicates whether it is a general or limited jurisdiction court:

1.	"Up-up" Pattern (no caveats):	Civil Court of NYC (L)
2.	"Down-up" Pattern (no caveats):	Alaska Superior Court (G) New Mexico Magistrate Court (L) Oregon Justice Court (L)
3.	"Up-up" Pattern (change in '81-'84 filings was less than '78-'81 increase in filings):	Nebraska County Court (L)
4.	"Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Hawaii Circuit Court (G) Hawaii District Court (L) Delaware Justice of the Peace (L)
5.	"Up-no significant change":	Delaware Court of Common Pleas (L)
6.	"No significant change - no significant change":	Delaware Superior Court (G)
7.	"Up-down" Pattern:	Alabama District Court (G) Arkansas Chancery and Probate Court (G) Colorado District Court (G) Colorado County Court (L) Indiana County Court (L) Indiana Municipal Court of Marion County (L) Kentucky District Court (L) Maine District Court (L) North Carolina Superior Court (G) North Carolina District Court (L)

Attachment 31

32: Trend data for state courts that specifically reported tort, contract, and real property rig case filings for 1978, 1981, and 1984.

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
District of Columbia:										
Superior Court	G	121,931	108,426	96,975	-6%	-11%	-1%	-11%	-7%	-20%
Kansas:										
District Court	G	NC	84,005	87,140	--	--	2%	6%	--	--
Not exclusive court jurisdiction:										
Colorado (STATE TOTAL)		79,480	105,028	99,205	7%	32%	7%	-6%	14%	25%
District Court	G	22,561	36,168	32,032	7%	60%	7%	-12%	14%	42%
Water Court	G	2,868	2,321	1,688	7%	-19%	7%	-23%	14%	-41%
County Court	L	54,051	66,539	65,485	7%	23%	7%	-2%	14%	21%
Hawaii (STATE TOTAL)		12,204[1]	17,379[1]	17,960[1]	6%	42%[1]	6%	3%[1]	12%	47%[1]
Circuit Court	G	2,786[1]	3,830[1]	3,992[1]	6%	37%[1]	6%	4%[1]	12%	43%[1]
District Court	L	9,418	13,549	13,968	6%	44%	6%	3%	12%	48%
North Carolina: (STATE TOTAL)		54,738	65,856	58,118	4%	20%	4%	-12%	7%	6%
Superior Court	G	11,541	13,756	12,482	4%	19%	4%	-9%	7%	8%
District Court	L	43,197	52,100	45,636	4%	21%	4%	-12%	7%	6%
INCOMPLETE STATE DATA:										
Alabama:										
District Court	L	40,130	55,818	51,805	2%	39%	2%	-7%	4%	29%
Alaska:										
Superior Court	G	2,683	2,312	3,107	3%	-14%	21%	34%	25%	16%
Arkansas:										
Chancery and Probate Court	G	6,642	7,545	5,151	2%	14%	2%	-32%	5%	-22%
Delaware:										
Superior Court	G	2,457	2,522	2,520	0%	3%	3%	0%	3%	3%
Court of Common Pleas	L	2,898	3,740	3,755	0%	29%	3%	0%	3%	30%
Justice of the Peace	L	15,844	20,028	20,806	0%	26%	3%	4%	3%	31%
Indiana:										
Municipal Court Marion County	L	8,901	14,364	10,131	0%	61%	1%	-29%	1%	14%
County Court	L	3,550[1]	5,573[1]	3,664[1]	0%	57%[1]	1%	-34%[1]	1%	3%[1]
Kentucky:										
District Court	L	48,808	57,627	56,359	1%	18%	2%	-2%	3%	15%
Maine:										
District Court	L	17,751[1]	20,072	16,146	2%	13%[1]	2%	-20%	4%	-9%[1]
Minnesota:										
County Court	L	NC	28,014	21,582	--	--	2%	-23%	--	--
Montana:										
District Court	G	NC	7,764	6,492	--	--	4%	-16%	--	--
Nebraska:										
County Court	L	9,236	11,128	13,027	1%	20%	2%	17%	3%	41%
Municipal Court	L	NC	17,781	17,712	--	--	2%	0%	--	--
New Hampshire:										
District Court	L	NC	10,382	9,815	--	--	4%	-5%	--	--
New Mexico:										
Magistrate Court	L	14,276	14,117	18,308	6%	-1%	7%	30%	14%	28%
Bernalillo County Metropolitan Court	L	NC	8,290	9,744	--	--	7%	18%	--	--
New York:										
Civil Court of New York City	L	130,131	151,159	195,163	-1%	16%	1%	29%	0%	50%
Court of Claims	L	NC	1,330	1,678	--	--	1%	26%	--	--
Ohio:										
Municipal Court	L	241,951[1]	260,068[1]	221,523[1]	0%	7%[1]	0%	-15%[1]	0%	-8%[1]
County Court	L	5,854[1]	11,302[1]	9,542[1]	0%	93%[1]	0%	-16%[1]	0%	63%[1]

COMMENTARY

BY WILLIAM B. GLABERSON AND CHRISTOPHER FARRELL

THE EXPLOSION IN LIABILITY LAWSUITS IS NOTHING BUT A MYTH

You know the story about the obese cardiac patient and the innocent lawn mower. News accounts say he cleared a bundle of money from Sears by slyly claiming he suffered a heart attack because it took too much energy to yank a starter cord. And what about the guy who collected $500,000 after he was injured using his mower as a hedge-trimmer? More examples of injury-case outrages. Right?

Not so fast. Such stories are part of a growing body of folklore about "out-of-control" courts. Critics of America's liability system use the tales to prove the necessity of radical changes in tort law, the rules that govern injury claims. Behind the anecdotes, however, the hard, undramatic data don't make the case. And startling new evidence suggests that the "lawsuit crisis" may not even exist.

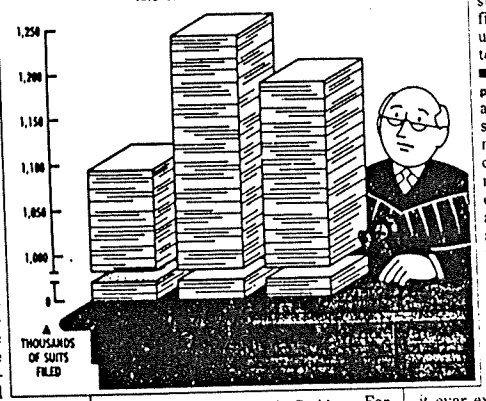
Consider the stories above. The foolish hedge-trimmer was a locker-room invention, concedes leading tort-reform lobbyist Victor E. Schwartz. And most versions of the Sears lawn-mower case don't tell you that the gardener, who did collect a substantial sum, was only 32. He wasn't fat. He wasn't a cardiac patient. And both Sears and the man's lawyer agree that the lawn mower's starter mechanism wasn't manufactured properly. Unfortunately, it took 15 pulls and a massive heart attack before he realized that.

MAJOR ALLY. Twisted tales like these, however, are repeated so often that they are seldom questioned. Of course, in a system that deals with hundreds of thousands of cases every year, you can find an anecdote to support any argument. But everyone seems convinced that "deep pockets" such as Sears, Roebuck & Co. have become helpless targets. The insurance industry has fostered those misperceptions with a phenomenally successful campaign that blames the "lawsuit crisis" for shocking premium increases and a paralyzing insurance shortage. The rate hikes, however, result largely from the insurance industry's own mismanagement (BW—Mar. 10). Even so, the drive for drastic change in the tort system has recently won its most important ally: President Reagan has endorsed federal tort reform.

With the debate moving to a new level, it's crucial to look at the facts. Fundamental to the case against the tort system are five key myths that, together, seem to argue for reform. When examined, like many of the outrageous stories, they don't hold up.

THE LITIGATION 'CRISIS' SEEMS TO HAVE PEAKED

PERSONAL-INJURY, REAL-ESTATE, AND CONTRACT SUITS IN 21 STATES



■ The Myth of the 758% Problem. For years, business and insurance groups have been complaining that the sheer number of product-liability suits is ballooning out of control. The evidence? Turn to page 46 of the just-issued report by the Justice Dept.'s Tort Policy Working Group, chaired by Assistant Attorney General Richard K. Willard. There, for the umpteenth time, is a graph showing a 758% explosion in product-liability cases over the past decade. The graph, however, shows filings only in federal courts. Partisans on all sides concede that only a tiny percentage of liability cases are litigated there. But the Willard report repeats the pervasive misconception that "there is no reason to believe that the state courts have not witnessed a similar dramatic increase in the number of product-liability claims."

That assumption is incorrect. Long before the Willard study, there was evidence that the increase in state liability cases is just a small fraction of that at the federal level. In fact, a soon-to-be-published study by the independent National Center for State Courts indicates that concern about state-court tort cases is vastly overstated. This most complete study reveals that tort filings were up only 10% in a six-year period ending in 1984—just two percentage points higher than the population growth rate in the 14 states that keep track of tort filings. The center's new data update a previous study often cited by tort reformers.

■ The Myth of the Litigation Explosion. It has become axiomatic that liability abuses are symptoms of a broader, mushrooming crisis. America, goes the refrain, is the most litigious society on earth, and court cases of all types are being filed at a frenzied rate. Instead, the new National Center study will reveal that civil cases stemming from business disputes have actually declined by more than 10% since 1981 (chart). The National Center's experts conclude that the crisis, if it ever existed, is over.

That surprising conclusion supports a revisionist thesis now being advanced by a few experts. University of Wisconsin Law Professor Marc S. Galanter, for example, argues that Americans are not uniquely driven to sue. The way he reads the existing data, Americans don't litigate any more than people in Canada's Ontario province, England, Australia, Denmark, or New Zealand—and they sue even less often than Yugoslavians.

■ The Myth of the Plaintiff Laughing All the Way to the Bank. Another notion suggests that all you have to do is stub your toe, sue, and you'll walk away with a million. It's true that there are

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more million-dollar awards than ever. But in a nation of 240 million people, there have been only 1,642 awards of $1 million or more in the last 14 years. And what about the gleeful winners? According to Jury Verdict Research Inc., the Ohio concern that tracks big awards, they were hardly in shape to enjoy the "spoils." In more than two-thirds of the cases, they suffered permanent paralysis, brain damage, amputations, or death.

■ The Myth of the Tip of the Iceberg. Would-be reformers argue that million-dollar awards are encouraging excessive awards throughout the tort system. But the big-verdict headlines are deceiving. Many are reversed by appeals courts. And the two most-cited surveys show that when mega-awards are left out, the rate of increase in damage awards is slow. Studies, moreover, show that plaintiffs win only about half of all cases. Galanter says

> The data just don't justify soaring insurance rates and court reform

society has come to expect that people who suffer catastrophic injuries should be fully compensated. But he says that shift, which has occurred over the past century, is having little effect on the bulk of the personal-injury system.

■ The Myth of the Good Old Days. Reformist gospel declares that increasingly liberal courts are developing "no-fault" rules that hit companies with unfair liabilities. The Willard group singles out this change as "one of the most disturbing aspects of the current tort system." In reality, there's very little reason for companies to be nostalgic. Rand Corp., whose data are lauded by the Willard group, concludes that corporate defendants probably have about as much chance of winning under "no-fault" rules as under the old negligence standard.

Despite these myths, however, the world business lives in is clearly changing. Today's technology creates products that are more widely distributed—and more potentially harmful—than ever. Toxic torts, such as asbestos and chemical exposure, are creating victims in unprecedented numbers. And society's changing expectations have pushed the courts to broaden their scope. All this, unfortunately, gives the trial lawyers, the new entrepreneurs of misery, windfall profits. It also means that facts—not folklore—are needed in searching for solutions.

TIN: HOW SHEARSON WAS LEFT HOLDING THE BAG

When the international tin cartel finally fell apart last month, everyone thought that London's old-time metals dealers would be hurt worst. As it's turning out, though, the biggest loser among brokers appears to be Shearson Lehman Brothers, one of Wall Street's biggest securities and commodities dealers. The American Express Co. unit isn't taking its tin losses lightly. Shearson is suing all the members of the London Metals Exchange and is seeking damages of more than $100 million from two LME brokers, including a subsidiary of Drexel Burnham Lambert Inc., a rival Wall Street powerhouse.

The tin market came crashing down last fall after the International Tin Council failed to make good on obligations to pay for 80,000 tons of tin that it had contracted to buy. The ITC, which represents 22 tin-producing nations, had been supporting the price of tin for years by buying large quantities from LME dealers. But after the ITC ran out of money to finance its purchases, tin trading on the LME was suspended, and the price of the metal plummeted from $13,080 to $5,880 per metric ton.

In an attempt to minimize the damage to its members by spreading the losses, the LME decided in early March to settle all open tin contracts at a fixed price of $9,188 per metric ton. Shearson was the only LME member that refused to accept the LME's settlement price and the method of settlement, by which dealers that contracted to buy tin are required to make a cash payment to sellers but not to take possession of the metal.

BIG LENDER. A few London metals brokers have announced write-offs amounting to tens of millions of dollars. Four companies have ceased trading on the LME. But Shearson, which did more trading with the ITC than other dealers, was left holding the most tin. London sources estimate Shearson's pretax losses at $50 million to $100 million. American Express says it is setting up a reserve to cover Shearson's tin losses, but it won't specify the amount.

Sources say that Shearson was probably the ITC's biggest supporter among tin dealers. It not only bought and sold tin on the council's behalf but also helped finance its price-support operation. For one thing, Shearson lent money directly to the ITC, accepting tin as collateral. Shearson also used its own money to finance metal purchases for the council and charged only interest and broker fees. "The system was marvelous, and we'd still be in business if we could pay the interest," says the ITC's head trader, Pieter deKoning.

A LONDON WAREHOUSE: THE SIZE OF THE TIN SURPLUS WAS HIDDEN FROM THE MARKET

The ITC also borrowed from other brokers and banks. Much of the tin the council obtained did not have to be registered as official LME stock because it was stored in non-LME warehouses and thus was not immediately available for sale on the exchange. In effect, it was "hidden" from the marketplace, obscuring the extent of the world oversupply. "The purpose of borrowing tin was to take away tin from the market," deKoning says. LME sources say deKoning was able to hide more than 40,000 metric tons—about 30% of annual consumption.

In a transaction cited in its suit, Shearson says that last summer, acting on the ITC's behalf, it bought on a cash basis more than 8,000 tons from Drexel subsidiary Maclaine, Watson & Co. and more than 2,000 tons from J. H. Rayner Ltd. Shearson then contracted to sell identical tonnages back to these same dealers in three months. But before the three months expired, the market collapsed. Says one broker: "Shearson was left holding the [tin] when it should have gone back to the ITC through Maclaine."

Shearson insists that the contracts be honored at the price agreed on before tin

The Seattle Times

TUESDAY
July 1 1986

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Tort-reform legislation: Did state get 'suckered'?

by Terry McDermott
Times business reporter

OLYMPIA — The highly touted tort-reform legislation enacted by the Legislature early this year is not lowering liability-insurance rates as promised, according to preliminary filings made with the state insurance commissioner.

Tort reform was hailed as the most significant accomplishment of the Legislature in its 60-day budget session this winter. It was jammed through the Legislature by a coalition of medical, local-government and insurance lobbyists who promoted reform of the civil-justice system as the way out of the "insurance crisis."

That crisis took the form of a succession of huge rate increases levied upon liability-insurance consumers, especially small businesses, governments and professionals. These consumers frequently had difficulty in obtaining insurance at any price.

The insurance industry repeatedly blamed the courts for liberalizing personal injury awards made in civil liability lawsuits. The industry alleged that skyrocketing jury-ordered settlements were the reason for the increasing premiums. They urged the court system be changed. Hence, tort reforms, which:

- Limits how much a person can collect on damages for "pain and suffering."
- Limits an individual's ability to collect the major share of an award from a minor party in a lawsuit; that is a limitation on going after the so-called deep pockets of local governments.
- Lengthens the period over which court-ordered damages must be paid.
- Cuts the statute of limitations for medical malpractice claims nearly in half.

The changes were sold as a way to obtain generally lower rates and wider availability. That hasn't occurred, and might not for a long time, said Allen Morrow, a rate analyst for the state.

Jay Angoff, counsel for the National Insurance Consumer Organization, said Washington was "suckered into tort reform."

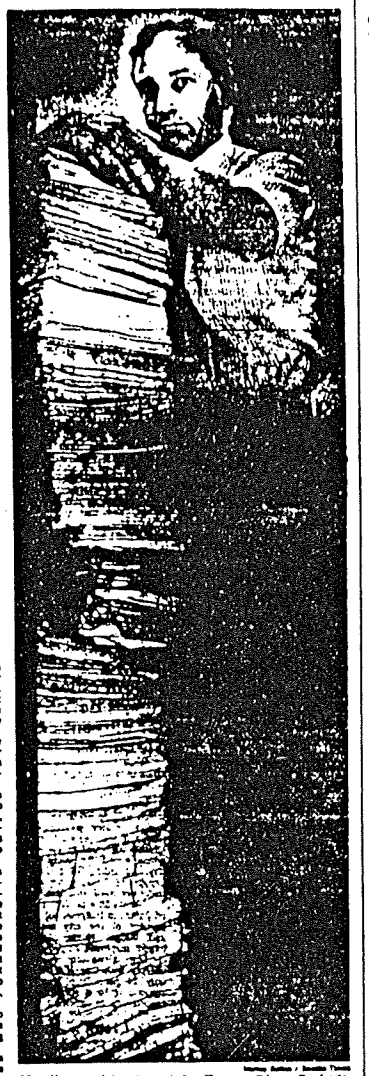
"You don't have to be a genius to know that if there's no requirement to roll back rates, they won't," he said. "Unfortunately for you, Washington was just about the last state to wishfully pass tort reform."

Brad Bradley, chief Olympia lobbyist for the insurance industry, said legislators and consumers were mistaken from the beginning if they thought tort reform was going to lessen personal liability insurance costs. The bill was not aimed at them, he said. It was aimed at business and local government liability and it is too early to judge the effect on those rates, he said.

"You're going to have to wait until toward the end of the year, but I really think it's going to have a good effect," he said.

However, Morrow issues his evaluation that rates will not be

Please see TORT on A 8



Allen Morrow, state rate analyst, with a month's worth of rate-change requests made by insurance companies since the tort-reform bill passed.

Lower rates not expected

TORT

continued from Page 1

lowered for some time on changes in rates requested by insurance companies since the new law was passed.

Although the law does not take full effect until Aug. 1, Insurance Commissioner Dick Marquardt in March began requiring all insurance companies asking for rate increases in the state to take the new law into account and explain how it would affect their rate requests.

A review of all filings that have gone into effect since the law was passed indicates the law has had minimal if any effect in reducing rates.

One insurer, Great American West of Orange, Calif., in correspondence with Marquardt said the new law might actually increase the rates it charges.

"It does not appear that the tort reform law will serve to decrease our losses, but instead it potentially could increase our liability," Kevin Kelley, an actuary for Great American, said in a letter to Marquardt.

None of the insurers said the reforms will decrease rates. Insurers asked for increases in almost every line they write. Some said the only foreseeable decrease would be in the amount of increase they seek.

Here, in a letter from General Accident Insurance of Philadelphia, is a typical response:

"Given that liability losses constitute such a low proportion of business owners' losses, GA feels it is prudent to continue with its original proposal of a 10 percent increase in base rates."

Great American said in its most recent [illegible] worth of Washington bu[illegible]ss, only 15 percent of its losses — that is, payments to clients — were from liability claims. Morrow said this is typical. Despite the publicity given to the occassionally huge liability claim, Morrow said most claims continue to be for property replacement due to fire or theft.

Allstate Insurance said "our proposed rate would not be measurably affected by the tort reform legislation." Allstate asked for a 22 percent increase.

Morrow said auto liability rates are going up on average from 7-12 percent; homeowner rates are up 5-10 percent, and commercial liability rates continue to climb 15-20 percent.

The insurance commissioner is charged by law with assuring that rates sought by the companies are equitable both for the company and for the consumer. Morrow said most rates now being sought are still below what the companies could justifiably propose if they expected to actually make money selling the insurance. Most do not.

In a practice called cash flow underwriting, which is common throughout the industry, companies expect earn less money in premiums than they pay out in losses and expenses. They recoup their losses, and they hope more, by investing the premiums.

This practice was fine during the high interest era of the late 1970s and early 1980s. Companies fought a series of rate-cutting wars with one another just to get business, charging less in premiums than they probably should have, as even they now admit. When investment income fell in 1984-85, they say they were faced with potentially huge losses. To avoid the losses and lift the companies out of their disastrous situations, they began hiking rates. In some cases, the increases were 100-fold. On average nationally, rates went up 25 percent and profits were up with them.

In the first quarter of this year, property casualty insurance companies nationally had an underwriting loss of $4.7 billion, according to industry trade groups. But the losses were more than covered by $5.2 billion in investment income and another $1.3 billion in capital gains. Net income rose to $2.38 billion, a 1,200 percent rise over the previous year. The crisis has passed, at least for the companies.

Badley, the insurance industry lobbyist, said some continued rate increases should be anticipated, however, because "rates were under-priced and have to be raised. When is enough enough?"

Gov. Booth Gardner and several legislators have suggested that if insurers do not cut rates voluntarily, enough will be enough fairly soon. They predict the Legislature will act next year to limit rates if the companies don't.

Morrow said that regardless of what happens to rates, he expects "the greatest impact will be on availability. It should encourage companies to write insurance here."

An increased willingness to issue policies would be a carrot insurance companies could dangle in front of other legislature bodies considering tort reform, he said.

At least one insurer, Fireman's Fund, has begun doing new business in Washington as a result, the company says, of the law changes. But Fireman's Fund has never been a major force in this market and will not likely become one. Morrow said the company's announced decision is largely symbolic, and in any event, the company has yet to file its proposed rates.

Meanwhile, the people at the other end of the "liability crisis," those who faced huge rate increases last year, continue to pay more and often for less insurance than they had before. Badley said people must understand that insurance costs are allocated not on an individual risk basis, but on an industry-wide basis.

"The fact that an individual has no claims doesn't mean his insurance won't go up," he said.

Attachment 33

mpia, WA
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(Cir. D. 27,923)
(Cir. [illegible])
JUN 22 1986

Allen's P.C.B. Est. 1888

Editorial

2241

Tort reform only helps companies

Tort reform — born in this state after months of public clamor and bitter legislative debate — is a legal fact, but it has yet to become a financial reality. If the situation doesn't change — and liability insurance rates start to reflect the controls the Legislature placed on damage suit awards — the insurance industry should be called to account.

A tort is a private or civil wrong or injury. Three elements of every tort action are: existence of legal duty from defendant to plaintiff; breac. of duty, and damage as a proximate result.

Insurance companies argued they are placed in an impossible position mainly because of unrealistic punitive damage awards handed down by juries. The cases range from medical malpractice to wrongful death or injury in a variety of accidents and circumstances. Insurers claimed these cash awards made it necessary to increase premium rates and to deny coverage to many individuals, businesses and government agencies.

Under considerable pressure from a lobby coalition that included medical associations, local governments and insurance groups, the Legislature put a cap on damage awards and took other steps to limit the insurance companies' legal responsibilities.

So, tort reform in this state did nothing to change or limit the filing of lawsuits when one party wronged another. It just limited the degree to which insurance companies could be held responsible after they had insured the defendant's performance.

The Legislature's action carried with it the implicit understanding insurance companies would respond by reducing rates. This has not happened, in spite of gentle prodding from Gov. Booth Gardner and others. In fact, St. Peter Hospital, and other hospitals, now say they might have to increase their charges in part to compensate for continued high liability insurance costs.

The Legislature Joint Study Committee on Insurance Availability and Affordability determined the liability crisis was as much a result of insurance companies' poor management practices as a weakened investment market and a lawsuit-prone society. In short, the companies ignored sound underwriting and investment practices and now are severely limiting coverage and increasing rates by as much as 300 percent to buy their way out of trouble.

The Legislature did provide more funding as of July 1 to allow the Insurance Commissioner to bolster his staff to more closely monitor rates and business practices. The commissioner also has tightened some regulations and is pushing for more financial information from the companies, information they have been reluctant to give.

This state, more than most others, has given the insurance industry what it wanted. Insurers have been too slow in responding with better coverage and lower rates.

The Joint Study Committee is monitoring the state's experience with tort reform and will recommend changes that may be necessary. At this point, it appears the insurance industry needs regulatory help to meet its public responsibilities.

3978

STATEMENT

By The

KANSAS MOTOR CARRIERS ASSOCIATION

Concerning the tort and insurance liability systems in Kansas and their impact on the motor carrier industry.

PRESENTED TO

The

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

Representative Joe Knopp, Chairman

Thursday, July 10, 1986

MR. CHAIRMAN AND MEMBERS OF THE SPECIAL COMMITTEE:

I am Tom Whitaker, Governmental Relations Director of the Kansas Motor Carriers Association with offices in Topeka. I appear here today representing our membership and the highway transportation industry.

The trucking industry in Kansas directly employs over 70,000 Kansans. Nationwide, this industry employs 7.4 million Americans and generates annual revenues in excess of $200 billion. Each year 5 million trucks log more than 138 million miles with an overall safety record twice as good as automobiles. These trucks, operated by more than 260,000 firms, haul 77 percent of the dollar value of all freight carried in this country.

Attachment 34

The trucking industry provides an essential transportation service to the largest economy in the world. The essentiality of our industry is illustrated by the fact that access to trucking is considered by business to be the second most important factor in deciding where to locate a new plant, ranking behind only cost of property. It is clear that practical business decisions are made in confidence that truck transportation will be available when needed.

One of our common objectives -- yours as makers of public policy and ours as providers of a publicly available service -- is to insure that businesses' expectations of an efficient, responsible transportation service are well founded. These hearings give us both an essential opportunity to address what is perhaps the most difficult problem facing the trucking industry: the availability of adequate insurance at a reasonable and relatively stable cost. It appears that corrections in our tort system, adjustments in the way we regulate the insurance industry, and the development of sound risk management practices all are critical components to alleviate our current insurance crisis.

Transportation, unlike so many other industries, is required by state and federal law to maintain minimum levels of liability insurance (see attachments). What does a business concern do when it must meet mandated minimum levels of coverage that it cannot purchase? It seems to us that those who impose such minimum levels of insurance have a responsibility to see to it that coverages for them are available at reasonable rates.

BACKGROUND OF THE PROBLEM

The historical 3-8 year financial cycles of the insurance industry, determined mostly by interest rates and international reinsurance marketplace dynamics, are perhaps beyond control of state and federal government.

High interest rates and easily obtainable reinsurance fueled to the most recent cycle, a "soft market" from the mid-1970's to early 1984.

In what is termed "cash flow underwriting," premium dollars from writing of often-times indiscriminate policy coverages by primary underwriters yielded returns from 18-20 percent interest-bearing investments for several years sufficient to offset claims and still realize profits. Sound underwriting practices and effective risk management were generally ignored. It was a buyers' market. A trucking company simply called an insurance broker and got the cheapest rate.

During 1984 several factors produced a dramatic turnaround: interest rates dropped to almost half; reinsurance became expensive; "long-tailed" claims for risks that had been indiscriminately written for in the earlier "soft market" came home to roost, after lengthy adjudication, in the form of large court awards. In short, cash flow underwriting no longer worked for the insurance industry.

A capacity crunch resulted, paced by a $60-plus billion shortfall in reserves. All insurance needs could not be met. The insurance companies had to recoup. Higher premium rates to increase capacity appeared to be the quick answer. Sound underwriting practices and effective risk management became the urgent order of the day.

Limited capacity was focused on the safer, known risks. Those with what were perceived as unquantifiable, unpredictable and/or unlimited risks were earlier dropped from coverage or targeted for arbitrary, skyrocketing premium rates. Hardest hit were the specialty lines of commercial insurance. Trucking found itself in the company of taxis and buses; liquor handlers; those dealing with bank surety bonds; directors and officers of municipalities and other organizations; lawyers, doctors and accountants; and day care centers, among others.

A company's safety record had little to do with premium rates and/or accessibility to underwriters.

SEVERITY OF THE PROBLEM IN TRUCKING

Because sound underwriting practices and risk management techniques were by and large not utilized during the "soft market," when the market turned in 1984 there was very little statistical data from which analysis of the devastation of the trucking industry could be drawn. Risks were not quantified during the "soft market."

Hence, we are at this hearing stage knowing only what our friends tell us and what we see in the papers. That, however, is substantial and more than enough to paint a picture of the monumental nature of the problem.

The following are some of the things we have learned about the severity of our problem:

* Premium rates for primary coverages for public liability and property damage for general commodity carriers have skyrocketed on the average from 250 to 500 percent with no apparent connection with the experience of the insured. We have had carriers tell us of claims-free records which have had no effect on the rates being quoted to them. Some have been unable to get coverage at any rate, especially the tank truck carriers hauling hazardous materials. Those in the latter category who have been lucky enough to get coverage have absorbed rates as high as 1,000 percent.
* Carriers who have turned to the assigned risk pools in their state to obtain coverages not otherwise available have done so despite the stigma associated with such a move that presents a bad connotation to prospective shipper customers. The demand has outstripped pool funds and capacity in many instances.

* While we do not know the percentage to which carriers are increasing their deductibles for self-insurance purposes, we do know that most are being doubled or tripled. Premium rates for excess coverages beyond the primary coverages are also increasing dramatically, with the level of coverage substantially decreased. Most insurance companies who will write primary coverage will not write excess. So, many trucking companies cannot get the required levels of insurance.

* Some insurance companies are arbitrarily cancelling policy coverages in mid-term, in spite of the fact that over 30 states prohibit such actions. Senate Bill No. 512 as adopted by the 1986 session of the Kansas Legislature addressed a portion of our concern in this area by requiring insurance companies to give 60 days notice in the event that the insurers cancels or non-renews a policy. However, our industry tells us that to develop an insurance package for a trucking firm can take as long as 90 days.

* On August 9, 1985, the Interstate Commerce Commission furnished the American Trucking Associations, Inc., with a list of about 700 underwriters which the ICC file indicated were writing truck insurance. Analysis of that list indicates, however, that about 90 percent of the companies listed are writing truck coverage only incidental to other insurance business they have with a manufacturer or shipper who has a private truck fleet. In other words, only about 10 percent, or 70, are in the for-hire trucking market. Unfortunately, about 15 percent of these underwriters are reported in dire financial straits. As a result, rather than 700, only about 60 insurance companies, as far as ATA can tell, are financially sound and writing for-hire truck insurance.

* Tank truck operators have been among the most severely hit by rising insurance costs. Their problems are exacerbated by the federal government's debate over environmental restoration, Superfund, and definitions of gradual pollution. As this Committee perhaps knows, several courts have interpreted the fine print on insurance policies regarding gradual/sudden and accidental pollution in ways other than what our industry believes Congress intended. Many tank carriers are experiencing rate increases close to 1,000 percent if coverage can be obtained at all.

* Some insurance companies are nonrenewing suddenly and arbitrarily, with inadequate notice to the insureds. Although Senate Bill No. 512 addressed this situation in Kansas, such actions became such a problem in New Jersey, for example, that the governor has declared an insurance emergency and has prohibited mid-term cancellations and nonrenewals for a six-month period.

* Numerous unusual exclusions are finding their way into the fine print of insurance policies submitted to trucking companies. Targeted, for example, are owner/operator usages, leased equipment, driveaway operations (motorized cargo that rolls on its own wheels under a bill of lading), and hazardous materials, as examples. The problems are particularly acute in the household goods moving industry which employs the services of over 21,000 interstate owner/operators, over 20 percent of the nation's entire owner/operator population. These small, independent owner/operators, attempting to negotiate for adequate, reasonably priced insurance, face a dilemma.

* Insurance companies are switching from occurrence-based to claims-made coverages for general liability. This means they will pay only if the claim is submitted during the policy period. The effort is to eliminate "long-tailed" claims. While there is no specific date when commercial auto (i.e., truck) insurance will be claims-made, it will happen in the near future.

In the meantime, there is the possibility that a motor carrier could have its primary coverage under an occurrence-based policy and its umbrella coverage under a claims-made policy. If that happens, everyone will be in court forever.

* Interstate Commerce Commission Chairman Reese Taylor reported to Congress in September 1985 that 3,393 carriers have had their operating authorities revoked in an 11-month period (October 1984 to August 1985) for failure to have insurance or evidence of other financial responsibility. He also reported that 15,000 others were under investigation for "insurance delinquencies" and that 482 consent agreements had been entered into whereby motor carriers agree not to engage in interstate commerce until they have adequate insurance. He said the agency had obtained 28 civil injunctions which prohibit motor carriers from operating in interstate commerce until they have adequate insurance. If carriers cannot find insurance, they have two options: cease operation until they can find insurance, or operate illegally.

* The General Accounting Office found that more than 12,000 motor carriers' insurance policies were cancelled in 1985. And, although most of the cancelled carriers found some kind of replacement coverage, according to the GAO study 1,300 carriers ceased doing business last year because of lack of adequate insurance.

* Trucking firms have petitioned the Federal Highway Administration for the right to provide self-insurance as a means of meeting their financial responsibility. The FHWA has approved the petition on a limited basis and now is requesting comments for a proposed rulemaking. Our industry feels that if those carriers who are able to self-insure do so, it will help relieve the capacity crunch in the insurance industry.

All of us are attempting to develop workable solutions to the problems of availability and the cost of insurance coverage. Insurance Commissioner Fletcher Bell created the Kansas Insurance Assistance Plan to help residents of this state locate available property and casualty coverages. If the KIAP is to help those in search of insurance, the Department of Insurance is gathering quantifiable information from insurance companies concerning the availability of coverages for various types of risks. This information will be important to those who must make the public policy regarding the insurance crisis.

TORT REFORM AND THE INSURANCE CRISIS

Tort reform is another piece of the complex insurance crisis puzzle. This industry believes it will take reforms in the way insurance companies do business to solve the insurance crisis. We also believe that reforms are necessary in our tort system to stop outrageous and unreasonable court awards.

Several principles of tort reform are being studied nationwide. KMCA respectfully requests that this special committee study the following proposals in an effort to find a solution to the tort system side of the insurance crisis:

-- Limitation of non-economic damages ("pain and suffering" as well as "punitive damages") to fair and reasonable amounts.

-- Limitation of attorney fees to reasonable levels and providing for recovery of costs and attorney fees for bringing or defending of frivolous lawsuits.

-- Reduction of awards by collateral sources to prevent "double dipping" in payments for the same injury.

It is our view that tort reform will bring back a measure of justice to our legal system. Further, to the extent that outrageous and unreasonable judgements and awards partially are responsible for the high cost and unavailability of insurance, we believe that tort reform will help alleviate the current insurance crisis.

CONCLUSION

The current insurance problem is going to get worse before it gets better. In fact, insurance experts tell us that reinsurance rates are likely to go up 600 percent to 1,500 percent in the near future. The impact will make today's insurance premium rate increases pale in comparison. The Minnesota Insurance Commissioner predicts that the current multi-billion dollar shortfall in insurance capacity that is leaving "roughly 9 percent of the commercial lines marketed this year without coverage" will grow "to approximately 26 percent by 1987."

The greatly increased premium rate dollars collected by the insurance companies apparently have had only minimal effect so far in reducing the industry's shortfall. The risk management expert under contract with the American Trucking Associations, Inc., reports that only about a $3 billion headway in decreasing the shortfall has been made in the past year. At that pace, the insurance crisis will last well beyond 1987, the year some experts are predicting the market will stabilize.

As stated earlier, all of this is bound to have a substantial negative impact upon the safety of our highways and the viability of the nation's essential transportation system. Public policy requires immediate effective action to reduce this problem.

The Kansas Motor Carriers Association appreciates the opportunity to present information concerning the problem this industry is suffering because of the insurance crisis. We will be happy to respond to any questions you may have.

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(3) Copies of all evidence intended to be relied on by the party submitting the motion

(b) Upon receipt of the motion the Associate Administrator may make a decision denying the petition or modifying the order in whole or in part. He may also, prior to making his decision order such other proceedings under these rules as he deems necessary and may request additional information from the party making the motion.

PART 387 — MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

Sec.
387.1 Purpose and scope.
387.3 Applicability.
387.5 Definitions.
387.7 Financial responsibility required.
387.9 Financial responsibility, minimum levels.
387.11 State authority and designation of agent.
387.13 Fiduciaries.
387.15 Forms.
387.17 Violation and penalty.
Illustration I — Form MCS 90
Illustration II — Form MCS 82

AUTHORITY: Sec. 30, Pub. L. 96-296, 94 Stat. 793; Sec. 108(b)(5), Pub. L. 96-510, 94 Stat. 2767; 23 U.S.C. 315; 49 CFR 1.48 and 301.60.

§387.1 Purpose and scope. This part prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

§387.3 Applicability. (a) This part applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce.

(b) This part applies to motor carriers operating motor vehicles transporting hazardous materials, hazardous substances, or hazardous wastes in interstate, foreign, or intrastate commerce.

(c) *Exception.* (1) The rules in this part do not apply to a motor vehicle that has a gross vehicle weight rating (GVWR) of less than 10,000 pounds. This exception does not apply if the vehicle is used to transport any quantity of Class A or Class B explosives, any quantity of poison gas, or large quantity of radioactive materials in interstate or foreign commerce.

(2) The rules in this part do not apply to the transportation of nonbulk oil, nonbulk hazardous materials, substances, or wastes in intrastate commerce except large quantity radioactive materials.

§387.5 Definitions. As used in this part -

Accident -includes continuous or repeated exposure to the same conditions resulting in public liability which the insured neither expected nor intended.

Bodily injury — means injury to the body, sickness, or disease including death resulting from any of these.

Cancellations of insurance — the withdrawal of insurance coverage by either the insurer or the insured.

Endorsement -- an amendment to an insurance policy.

Environmental restoration — restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage or potential for damage to human health, the natural environment, fish, shellfish, and wildlife.

Evidence of security — a surety bond or a policy of insurance with the appropriate endorsement attached.

Financial responsibility — the financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this part covering public liability.

For-hire carriage — transportation of property by motor vehicle except when —

(1) the property is transported by a person engaged in a business other than transportation, and

(2) the transportation is within the scope of, and furthers a primary business (other than transportation) of, the person.

In bulk — the transportation, as cargo, of property, except Class A and B explosives and poison gases, in containment systems with capacities in excess of 3,500 water gallons.

In bulk (Class A and B explosives) — the transportation, as cargo, of any Class A or B explosive(s) in any quantity.

In bulk (poison gas) — the transportation, as cargo, of any poison gas in any quantity.

Insured and principal — the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellations, and also the fiduciary of such motor carrier.

Insurance premium — the monetary sum an insured pays an insurer for acceptance of liability for public liability claims made against the insured.

Motor carrier — a common, contract, or private carrier of property by motor vehicle.

Property damage — damage to or loss of use of tangible property.

Public liability — liability for bodily injury or property damage and includes liability for environmental restoration.

§387.7 Financial responsibility required. (a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in §387.9 of this part.

(b)(1) Policies of insurance, surety bonds, and endorsements required under this section shall remain in effect continuously until terminated. Cancellations may be effected by the insurer or the insured motor carrier giving 35 days' notice in writing to the other. The 35 days' notice shall

...mmence to run from the date the notice is mailed. Proof of mailing shall be sufficient proof of notice.

(2) *Exception.* Policies of insurance and surety bonds may be obtained for a finite period of time to cover any lapse in continuous compliance.

(c) Policies of insurance and surety bonds required under this section may be replaced by other policies of insurance or surety bonds. The liability of the retiring insurer or surety, as to events after the termination date, shall be considered as having terminated on the effective date of the replacement policy of insurance or surety bond or at the end of the 35 day cancellation period required in paragraph (b) of this section, whichever is sooner.

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of —

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s); or

(2) A "Motor Carrier Surety Bond for Public Liability Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Forms MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

§387.9 Financial responsibility, minimum levels. The minimum levels of financial responsibility referred to in §387.7 of this part are hereby prescribed as follows:

SCHEDULE OF LIMITS
Public Liability

Type of carriage	Commodity transported	July 1, 1981	Jan. 1, 1985
(1) For-hire (In interstate or foreign commerce)	Property (nonhazardous)	$ 500,000	$ 750,000
(2) For-hire and private (In interstate, foreign, or intrastate commerce)	Hazardous substances, as defined in 49 CFR 171.8 transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons, or in bulk Class A or B explosives, poison gas (Poison A), liquefied compressed gas or compressed gas, or highway route controlled quantity radioactive materials as defined in 49 CFR 173.455	1,000,000	5,000,000
(3) For-hire and private (In interstate or foreign commerce in any quantity) or (In intrastate commerce in bulk only)	Oil listed in 49 CFR 172.101, hazardous waste, hazardous materials and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below	500,000	1,000,000
(4) For-hire and Private (In interstate or foreign commerce)	Any quantity of Class A or B explosives any quantity of poison gas (Poison A), or highway route controlled quantity radioactive materials as defined in 49 CFR 173.455	1,000,000	5,000,000

NOTE —The type of carriage listed under numbers (1), (2), and (3) apply to vehicles with a gross vehicle weight rating of 10,000 pounds or more. The type of carriage listed under number (4) applies to all vehicles with a gross vehicle weight rating of less than 10,000 pounds.

§387.11 State authority and designation of agent. A policy of insurance or surety bond does not satisfy the financial responsibility requirements of this part unless the insurer or surety furnishing the policy or bond is —

(a) Legally authorized to issue such policies or bonds in each State in which the motor carrier operates; or

(b) Legally authorized to issue such policies or bonds in the State in which the motor carrier has its principal place of business or domicile, and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates; or

(c) Legally authorized to issue such policies or bonds in any State of the United States and eligible as an excess or surplus lines insurer in any State in which business is written, and is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates.

§387.13 Fiduciaries. The coverage of fiduciaries shall attach at the moment of succession of such fiduciaries.

§387.16 Forms. Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the BMCS and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in §387.7 of this part. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

§387.17 Violation and penalty. Any person (except an employee who acts without knowledge) who knowingly violates the rules in this part shall be liable to the United States for civil penalty of no more than $10,000 for each violation, and if any such violation is a continuing one, each day of violation will constitute a separate offense. The amount of any such penalty shall be assessed by the Director, Bureau of Motor Carrier Safety, by written notice. In determining the amount of such penalty, the Director shall take into account the nature, circumstances, extent, the gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

books or records, shall be guilty of a misdemeanor and shall be punished as hereinafter provided.

History: L. 1931, ch. 236, § 19; July 1.

Source or prior law:
66-1,104

CASE ANNOTATIONS

1. Information charging various violations of act held sufficient. State v. Reed, 145 K. 459, 462, 65 P.2d 1083.

66-1,127.

History: L. 1931, ch. 236, § 20; L. 1933, ch. 286, § 16; L. 1937, ch. 329, § 7; L. 1955, ch. 296, § 1; Repealed, L. 1968, ch. 58, § 1; July 1.

66-1,128. Motor carrier liability insurance requirements; self-insurance, when. (a) Except as provided in subsection (b), no certificate, permit, or license shall be issued by the state corporation commission to any public motor carrier of property or passengers,contract motor carrier of property or passengers or private motor carrier of property, until the applicant has filed with the commission a liability insurance policy approved by the commission, in such reasonable amounts as the commission determines is necessary to adequately protect the interest of the public with due regard to the number of persons and amount of property involved. Such amounts shall not be less than $100,000 for personal injury or death to any one person in any one accident, $300,000 for injury or death to two or more persons in any one accident and $50,000 for loss to property of others in any one accident, which liability insurance shall bind the obligors to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. The liability insurance policy required to be filed by any resident applicant shall be in an insurance company or association authorized to transact business in this state. Such policy of any nonresident applicant may be afforded by an insurance company not authorized to do business in this state which has given the commissioner of insurance of this state a power of attorney authorizing such commissioner to accept service on its behalf of notice or process in any action upon such policy. Such company not authorized to do business in this state shall have on file with such commissioner a form as prescribed by subsection (b) of K.S.A. 40-3106. A certificate of any insurance company or association, in a form approved by the state corporation commission certifying that there is in effect the liability insurance required by this section, may be filed in lieu of the insurance policy itself. In the event such certificate is filed, such company shall furnish to the commission upon its request a duplicate original of the insurance policy and all endorsements thereon. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

(b) Any public motor carrier of property or passengers,contract motor carrier of property or passengers or private motor carrier of property in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance from the commissioner of insurance. Upon application of any such carrier, the commissioner of insurance may issue a certificate of self-insurance, if the commissioner is satisfied that such carrier is possessed and will continue to be possessed of ability to pay any judgment obtained against such carrier arising out of the ownership, operation, maintenance or use of any motor vehicle registered in such carrier's name.

Upon not less than five days' notice and a hearing pursuant to such notice, the commissioner of insurance may cancel a certificate of self-insurance upon reasonable grounds. Failure to pay any judgment against a self-insurer, arising out of the ownership, operation, maintenance or use of a motor vehicle registered in such self-insurer's name, within 30 days after such judgment shall have become final, shall constitute reasonable grounds for the cancellation of a certificate of self-insurance.

History: L. 1931, ch. 236, § 21; L. 1949, ch. 337, § 1; L. 1953, ch. 296, § 1; L. 1959, ch. 258, § 11; L. 1975, ch. 341, § 1; L. 1978, ch. 268, § 1; L. 1982, ch. 276, § 1; July 1.

Source or prior law:
66-1,102

Cross References to Related Sections:
Insurance where no permit is required, see 66-1314

Research and Practice Aids:
Automobiles 78

WICHITA INDEPENDENT BUSINESS ASSOCIATION
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STATEMENT TO THE SPECIAL COMMITTEE ON TORT REFORM
AND LIABILITY AND INSURANCE JULY 10, 1986

Thank you for the opportunity to speak today on behalf of the Wichita Independent Business Association. We are an association of over 1,200 locally owned and mostly small business in the Wichita trade area. Our membership is very diverse in nature. Mostly service oriented with some retail and manufacturing. Approximately 1,100 are businesses of 5 or less employees.

We are deeply concerned with the affordabilility and availability of liability insurance and the devistating effect it is having in many business being able to just stay in business let alone making a profit.

The following areas we believe should be delt with.

1. Call off the search for "deep pockets." Currently, a doctrine known as "joint and several liability allows injured people who bring suit against a number of defendents to collect the entire award from the defendent with the most money.

2. Cap cash bonuses on pain and suffering.

3. Limit punitive damages and divert the award to the state instead of the plaintiff with set attorney fees.

4. Revive the concepts of "fault" and "neglience." The plaintiff would need to prove negligence or fault on the part of the defendent.

5. Discourage "nuisance" suits. Reforms would discourage these suits by making the loser of a suit pay all legal and court fees for both sides or by allowing courts to fine attorneys and plaintiffs who bring suits deemed "frivalous, ground less or otherwise lacking in substancial justification."

6. Eliminate "double dipping." Inform juries about payments recieved from sources such as worker's compensation and and insurance.

Attachment 35

8. Allow losers of suits to pay over a period of time.

9. Limit the time a professional or a product manufacturer can be held liable for a product or service.

10. Lack of maintenance or product modification should release the manufacturer from liability.

We do believe there is a crisis in this area and trust many of these conserns will be addressed in the next legislative session. We stand ready as an organization to assist you in any way we can.

Thank you,

Roland E. Smith
Executive Director

PURITAN-BENNETT CORPORATION

GENERAL OFFICES
9401 INDIAN CREEK PARKWAY
P.O. BOX 25908
OVERLAND PARK, KANSAS 66225-5908
PHONE (913) 661-0444

STATEMENT BY PURITAN-BENNETT CORPORATION
BEFORE KANSAS SPECIAL COMMITTEE ON TORT REFORM
AND LIABILITY INSURANCE

JULY 10, 1986

My name is James F. Hughes and I'm representing Puritan-Bennett Corporation, a critical health care product research and manufacturing firm with its main offices in Overland Park, Kansas. Of our 1,600 employees worldwide, more than 500 are located in Overland Park and at our Puritan Division operation in Lenexa. Our Kansas annual payroll is approximately 13 & 3/4 million dollars.

While Puritan-Bennett is well known and respected in medical circles, we are not well known to the general public due to the nature of our products. We are attempting to rectify this situation in a variety of ways and have met with the Johnson County state legislative delegation and recently in Washington with the Kansas Congressional delegation. This was done primarily to acquaint them with the significant national and worldwide importance of a Kansas-based company in the critical health care arena.

Our medical care products are used in the diagnosis, monitoring and treatment of respiratory diseases in the hospital and the home. We build more than 50 percent of the ventilators used in the United States and more than 35,000 of our ventilators are in worldwide hospital use. More than 20,000 people are being kept alive this very moment on our ventilators -- life-support devices which control, or assist, a patient's breathing in the intensive care unit, recovery room or long-

Attachment 36

3-5-86

term therapy. We supply more than 80 percent of the North American requirements for nitrous oxide, a medical gas used as a muscle relaxant and anesthetic and an integral part of inhalation general anesthesia used in more than 20 million surgical procedures annually. Our home respiratory care products line is one of the broadest in this rapidly growing field. We also are focusing on a broad line of monitoring equipment for use primarily in hospital operating rooms and post-operative or intensive care units. We also are a major supplier of emergency aviation oxygen equipment to Boeing, the European Airbus and the other aircraft companies located in Wichita.

The critical nature of the life-support products just mentioned makes it clear as to our keen interest in tort reform and product liability. With only a relatively small number of claims against us and with no major pay-outs, our product liability insurance costs rose 656 percent from the 1984 to the 1985 policy year. And we have significantly less coverage with this higher premium cost. In addition, three of our primary insurance carriers have become insolvent.

Still another factor to consider is that in order to respond to these higher costs we have had to increase the price of our critical-care products. This action comes at a time when it has become a national priority to lower health care costs. Furthermore, as our engineers strive to develop new high technology products to help physicians and nurses improve their life-saving capabilities, an overriding consideration sadly has become whether these products will be subject to extravagant liability claims. This has the possibility of making these advances not viable economically or, worse yet, perilous to the ongoing viability of the company.

A matter of great concern to us is the fact that only two-thirds of the health care triangle was covered in the medical malpractice legislation passed in the last legislative session. Doctors and hospitals were covered but not the medical device manufacturer such as Puritan-Bennett. Manufacturers of medical devices provide the tools by which health care providers deliver their services. We freely admit it was our fault for not making our position known to the legislature in time for consideration to be given to including the health device manufacturer but we hope to have the matter taken up in the next legislative session. If only the doctor and the hospital are protected, the health care manufacturer remains in jeopardy and becomes a bigger target.

We applaud the intent of this committee, strongly support the need for product liability reform and pledge continued cooperation and suggestions as the study continues.

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KIOGA

KANSAS INDEPENDENT OIL & GAS ASSOCIATION

500 BROADWAY PLAZA • WICHITA, KANSAS 67202 • (316) 263-7297

TO: Special Committee on Tort Reform
and Liability Insurance

RE: Proposal 29 - Tort Reform
and Liability Insurance
Hearing July 10, 1986

KIOGA members share the common feelings normally expressed about the availibility, affordability and adequacy of liability insurance. Drilling for oil and gas and operating and producing in the oil fields is reported to be one of the more dangerous occupations. Liability insurance is considered a necessary cost of our doing business.

We polled our members recently with a Liability Insurance Survey. A copy of the summary of the survey is attached. The results are typical of what is being currently reported. The alarming trend is the number of Kansas operators who are going bare or self-insuring themselves.

A similar survey was conducted recently by the Independent Petroleum Association of America regarding the premiums related to the different types of coverage our industry normally requires. There were over 500 responses. A summary is attached. IPAA is considering sponsoring an industry captive offshore insurance company for its members.

KIOGA is currently participating in a Special Citizens' Committee relating to liability insurance set up by Kansas Insurance Commissioner Fletcher Bell. That Citizens' Committee has created six sub-committees to make detailed recommendations. One is related to oil, gas and natural resource companies, as distinguished from general industry or manufacturing because of the inability of oil and gas and natural resource producers to pass along the costs of insurance with their product.

We have been following the progress of the Tort Policy Working Group, established by the U.S. Attorney General, consisting of representatives of ten agencies and the White House. One of the tasks the Working Group was asked to undertake was to examine the rapidly expanding crisis in liability insurance availibility and affordability.

Attachment 37

3967/

This group has prepared a report on the causes, extent and policy implications of this crisis. We recommend your committee get this study and recommendations for your consideration.

The report concludes that developments in tort law are a major cause for the sharp premium increases. They predict that without tort reform, the insurance affordability problem will remain a long-term fixture of the American economy. Their report makes recommendations that should be implemented at the federal and state level. Interestingly, the report concludes there is little the government can or should do to address other factors underlying this insurance crisis, such as the insurance industry's recent large underwriting losses.

KIOGA is not really interested in participating in the debate of who or what is responsible for this insurance crisis. There seems to be a little guilt for everyone to share. The issue is what can be done so that liability insurance is again <u>available</u>, <u>affordable</u>, and that the policies provide <u>adequate coverage</u>. We will appreciate your committee addressing this issue and keeping our concerns in mind.

Thank you for allowing our association to appear here today.

Donald P. Schnacke

DPS:pp
Attachments

The Executive Committee received the report of the consultant and recommended further consideration. As a result, an ad hoc committee has been appointed which has been charged to investigate further the options open to the Association in order to provide assistance in the current insurance crisis. Jon Rex Jones, immediate past chief executive officer of the IPAA and partner in Jones Company of Albany, Texas, has agreed to serve as chairman of the committee. Other members of the committee are Jack Blomstrom, True Oil Company, Casper, Wyoming; Bill Brashier, Benito-Huntington Oil Company, Wilmington, California; Edwin H. Frank, III, Underwriters Indemnity in Houston, Texas; Kenner McConnell, Jr., Worthington, Ohio; Vance Orr, Jr., Michigan Petroleum Exploration, Mount Pleasant, Michigan and Lloyd Parks, AMAX Petroleum Corporation, Houston, Texas. Joseph W. Farmer, Secretary of IPAA, and Barry Russell, IPAA Counsel, will serve as staff representatives to the committee.

The committee has already scheduled a meeting in Dallas with Frank Eblen of International Risk Management Consultants, who will review for the committee members, our progress to date in our considerations and offer his recommendations for further action. That committee, then, will report its preliminary findings to the next meeting of the IPAA Executive Committee in late July. We will keep you advised of our progress.

Sincerely,

Raymond H. Hefner, Jr.

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3.8

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

July 9, 1986

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony before the

Special Committee on Tort Reform and Liability and Insurance

by

David S. Litwin

Mr. Chairman, members of the committee. I am David Litwin, representing the Kansas Chamber of Commerce and Industry (KCCI). We appreciate that this special committee has been created to study an area that is of enormous concern to the business and professional communities, and the opportunity to outline for the committee our thoughts.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

Attachment 38

As the liability insurance crisis exploded into view and worsened late last yea KCCI's Board of Directors created a new Liability Insurance and Tort Reform Committee. This committee in turn drafted a proposed policy calling for broad reforms of our tort adjudication system, and the policy was approved by the Board last February. A copy is attached to my testimony for the committee's information.

For about six months, there has been a widespread perception that we have a broad and deep liability insurance availability, affordability and adequacy problem, in Kansas and throughout the nation. However, empirical data are hard to come by. Thus we conducted a liability insurance survey of our members and the members of several local chambers of commerce. The results, based on 615 responses, are also attached to my testimony. We don't claim that our sample is statistically valid, but I do feel that it does add substantial support to the perception that the crisis is real and very serious.

My main purpose today is to outline the concerns of the business community in this whole matter, and list the specific reforms which we would like to receive serious consideration.

We have two crises today - one a crisis of unaffordable, unavailable, and inadequate liability insurance across a broad spectrum of lines. The other is a civil justice system which, in important ways, seems inefficient, unpredictable, and too costly in both the amounts of damages that are sometimes awarded or settled upon in anticipation of trial, and its own transaction costs, that is, the cost of litigation itself.

There is certainly a clear nexus between these crises. In our view, there is no doubt that the main cause of the insurance crisis is the overheated tort system. It is not the only cause, but is the primary and enduring one, and if not addressed, it will make many lines of insurance too costly and perpetuate present availability problems, long after purely insurance aspects of the crisis have been corrected.

Partly, this is a matter of common sense. What are the risks against which liability insurance is purchased? The risks of damage awards by courts and juries,

...d of the need to settle claims based on evaluation of their worth in light of suc.. awards. Yes, there seems to be widespread agreement that many carriers underpriced their products a few years ago for a variety of reasons, including vigorous competition and a failure to appreciate the extent of the brewing verdict explosion. But as you scrape away layers of causation, you ultimately have to come to the cost of the civil justice system itself. It, and it alone, determines liability, the amount of compensation that is appropriate, and its own internal transaction costs. These are the costs that ultimately determine the cost and availability of liability insurance.

Thus, if tort issues are not addressed, then some aspects of the current crisis will persist, and there won't be any assurance that future and perhaps worse crises won't explode in our faces.

I am not an insurance expert, and I'm not here to make arguments specifically on behalf of that industry. But I would like to share two brief observations. Some claim that much of the crisis is due to the industry's supposed efforts to make up for past underpricing. The presidential Tort Policy Working Group examined this contention in its February 1986 report, and found it wanting. Its members concluded that with over 900 competitors, plus the options of self-insurance and captives, the market was far too competitive to allow some carriers to overcharge for current policies to recoup past mistakes - they would be buried by lower price competition.

Second, another view is that the carriers have somehow conspired to bring on the crisis. Insurance companies earn revenue from premiums, and secondarily on investments. It would be an odd strategy to raise prices so high that many insureds cannot afford them, or to conspire to stop selling insurance altogether in some areas. Both trends reduce revenue.

It also seems implausible to suggest that while underpricing resulted from excessive competition, these same numerous, vigorous, competitors now conspire together to raise prices.

The following are possible areas of tort reform that we urge this committee to consider:

1. Limit damages for noneconomic loss. There is no question that pain and suffering and other kinds of mental distress can be very real, and should be compensated. However, being subjective, this element of damage really cannot be assigned a meaningful dollar value, so no meaningful constraints exist, resulting in many awards being extremely high, and in a lack of the predictability that is required for a stable insurance system.

A balance must be drawn, between the understandable drive to compensate for the essentially noncompensable, and the need to have a stable, adequate, and affordable insurance system, for the benefit of both insureds and the injured. Thus a cap must be drawn. The $250,000 cap on noneconomic loss recently legislated in the medical malpractice area seems equally reasonable and fair in other tort claims.

2. Restrict and rationalize the award of punitive damages. A wealth of authority and empirical data support the conclusion that under the present system, punitive damages are unpredictable and capricious, are often awarded against the same defendant for the same act in many separate suits, and provide windfalls of profit. We suggest that their amount be limited to a specific sum or according to a formula, that they be determined in a bifurcated proceeding as we now do in medical cases, and that future awards go to charities or to government rather than as windfalls to plaintiffs.

3. Limit attorney contingent fees. The presidential Tort Policy Working Group identified unregulated contingent fee arrangements as a major cause of the litigation explosion, and of the mushrooming size of average verdicts. Juries factor in an extra 30% or more to compensate the lawyer without diminishing compensation to the injured plaintiff. Sky-high fee schedules give some attorneys reason to bring unworthy cases, and sometimes such fees are all out of proportion to the time and effort put into a case or to the degree of risk involved.

4. Abrogate or restrict the collateral source rule. This concept had its origin in the abstract conviction that it wasn't fair for a defendant to benefit from the fortuitous circumstance that a plaintiff has insurance or other sources of compen-

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...ion. Mayby so - but today, with the bases for liability vastly expanded and an insurance system in disarray, this theoretical nicety becomes a luxury we can no longer afford. Let's compensate our injured persons, but let's do so on a basis that will assure fair and adequate compensation, not windfalls and double payments. Again, a critically important reform already enacted in the medical claim area.

5. Structured awards for future economic loss. If appropriate in the medical area, why not elsewhere? This maximizes the payout from dollars poured into the civil justice system, and assures injured parties that long-term support will be there.

6. Provide for alternative dispute resolution. No matter how much improved, our civil justice system will have to retain a considerable degree of formality, and will entail a good deal of expense as well as delay. For disputes that can be fairly disposed of through mediation, arbitration, or other less formal means, let's provide for and encourage the use of such faster and cheaper forums.

7. Settlements. We should have mandatory settlement conferences, with sanctions for failure to accept reasonable settlement offers. The sooner a case is settled, the less costly it is to everybody, including the taxpayers who pay for the court system.

8. Frivolous suits. Let's explore the improvement of summary disposition methods, and the imposition of sanctions such as costs and attorney's fees for the bringing of frivolous actions.

9. Discovery. Too often, discovery is needlessly extensive and burdensome, and it's sometimes used as a club to force settlements rather than a device to gain information. Let's look into possible ways to control the cost and duration of discovery, without impairing the legitimate needs of litigants.

10. Fault. Fault is the backbone of the entire tort system, the basis on which we separate desirable from undesirable actions and impose or do not impose liability. It is also a lynchpin for predictablity, which is necessary for a stable insurance system. To the extent that non-fault based liability has crept into Kansas jurisp-

dence (other than in areas such as workers' compensation where there have been carefully designed tradeoffs), let's consider returning to the fault-based system which served our society well for so long.

11. Itemized jury verdicts. A simple reform, already adopted in the medical area, that requires a reasonable amount of accountability from our juries.

In conclusion, I don't mean to suggest that we willy-nilly adopt each and every one of the above suggested reforms without careful consideration. I do suggest however that these proposals, and possibly others as well, deserve careful examination and should be adopted where the benefits outweigh any detriment that may be present.

Thank you again for this opportunity. If there are any questions. I'll be happy to address them.

Kansas Chamber of Commerce and Industry
Tort Reform Policy

February 1986

The Kansas Chamber of Commerce and Industry supports reforms which, in medical malpractice actions, would impose caps on damage awards with the exception of past and future medical expenses and other out-of-pocket costs, provide for structured awards of future economic loss, require itemization of jury awards, make decisions of pretrial screening panels admissible in evidence, require expert witnesses to be active in clinical practice, establish mandatory settlement conferences, link postjudgment interest rates to the yield of United States Treasury bills, require evidentiary hearings on the reasonableness of attorneys' fees, and reduce the exposure of the Health Care Stabilization Fund.

KCCI further supports, in principle, the enactment of provisions which would curtail the activities of impaired health care providers, accelerate and improve practitioner discipline, impose mandatory requirements concerning the reporting of malpractice incidents, immunize good faith reporting of such incidents, require the implementation of peer review and risk management programs, and impose civil fines for malpractice.

KCCI further believes that there is an equally serious crisis in the cost and availability of liability insurance in a wide range of industries and professions and for public entities, and in the cost of litigating tort claims. KCCI believes that reforms that are necessary and appropriate in the medical malpractice area should, on the whole, be adopted in these more general spheres as well, and urges the legislature to enact remedial legislation as soon as possible. Such legislation should include provisions that would eliminate or significantly restrict the award of punitive damages, place caps on awards for pain and suffering, authorize structured awards, limit attorney contingent fees, eliminate the collateral source rule, eliminate discovery abuse and control discovery costs, provide for alternate dispute resolution in appropriate cases, limit venue shopping in tort actions, and effect such other procedural and substantive reforms as may be necessary.

(615 RESPONSES)

LIABILITY INSURANCE SURVEY

1. Name of your organization (optional)_____

2. Number of employees_____

3. What is your principal business (manufacturer, wholesaler, retailer, professional services, utility, etc.)? _____

4. Have you been able to obtain or renew the liability insurance you need? Yes - 84% / No - 16%

5. Have your premiums risen during the last 2 years? Yes - 98% / No - 2% If so, how much?

10 - 50%	33%
51 - 100%	22%
101 - 500%	34%
Over 500%	11%

6. Have you been forced to accept, during the last 2 years:

39% Lower policy limits
50% Increased deductible amounts?

7. What kind(s) of liability coverage present the biggest availability or cost problems for your firm?

58% General liability
22% Transportation (automobile, truck, etc.)
26% Products
21% Officers and Directors
9% Environmental (including hazardous waste, etc.)
23% Professional malpractice
15% Other (please specify)_____

8. What alternatives, if any, are you pursuing? (check as many as apply to you)

14% Dropping products or services
4% Going out of business
20% Going bare (no liability insurance)
16% Self-insuring
11% Other (please specify) _____

9. Any additional comments you would like to make (optional):_____

_____

_____

THANK YOU FOR YOUR INPUT!

Please return to: KCCI
500 First National Bank Tower
Topeka, KS 66603-3460.

Attachment 39

INSURANCE SERVICES OFFICE, INC.

Report On
Insurance Liability Crisis
In Kansas

OVERVIEW

1984 was the worst year to date for the property/casualty insurance industry. While 1985 had only slightly improved returns on net worth, the industry actually experienced the largest operating loss in its history.

Figure 1 displays key industry results for 1984 and 1985. It includes operating income - the sum of underwriting income, investment income, and miscellaneous other income. This is the most important component of insurers' net income after taxes because it represents profit or loss from insurance operations. For only the second time in its history, the industry experienced operating losses in 1984 - a record $3.8 billion loss. In 1985, underwriting loss increased by more than $3 billion (despite substantial premium increases) while investment income increased by less than $2 billion. This created another record operating loss.

After the remaining components of net income after taxes are included - realized capital gains and federal income taxes - statuatory net income after tax increased from $0.8 billion in 1984 to $2.0 billion in 1985. GAAP-adjusted return on net worth rose from 1.7% in 1984 to 3.8% in 1985.

While this increase in net income after taxes is a positive occurence, we are concerned with its source. Contributing to the 1985 $2.0 billion increase in income, is $5.4 billion in realized capital gains, a record amount. This was due to unprecendented stock market increases. Tax credits and realized capital gains are not predictable or regularly recurring and therefore cannot be depended on in future years. Positive operating income is essential if insurers are to be able to meet the insurance needs of our growing economy.

Note that throughout this report all results quoted, other than return on net worth, are on a statutory basis. Returns on net worth are quoted on a GAAP basis in order to be comparable to returns calculated in other industries. Also, 1984 and prior statistics have been determined from A.M. Best compiled data. Since 1985 data from A.M. Best is currently unavailable, information on insurer operating results collected by ISO and NAII have been used. 1985 numbers broken down in detail by state and line of insurance are not available yet for several of the enclosed charts.

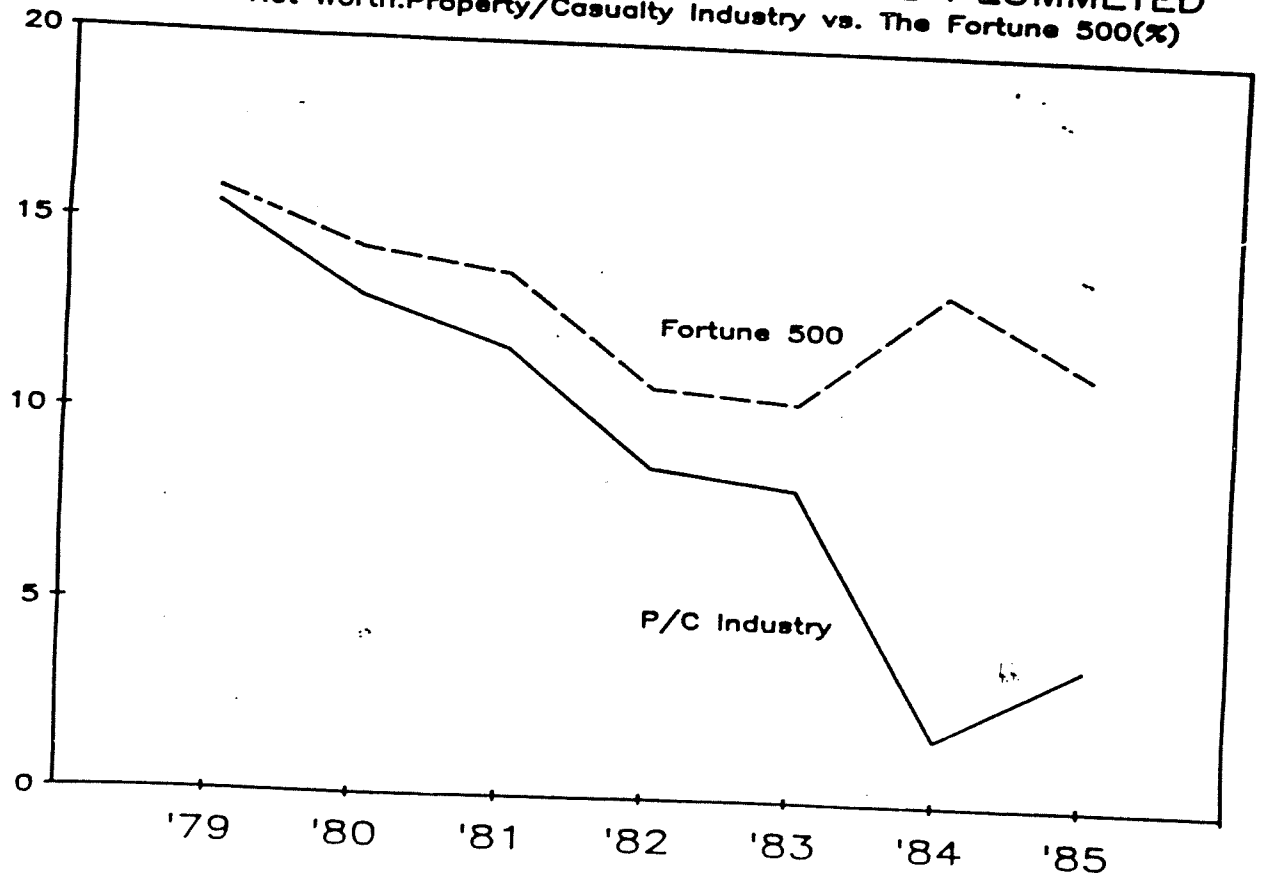
INDUSTRY RESULTS
($ BILLIONS)

	1984	1985
UNDERWRITING INCOME	- 21.5	- 24.7
INVESTMENT INCOME	17.7	19.5
OPERATING INCOME	- 3.8	- 5.4
REALIZED CAPITAL GAINS	3.1	5.4
FEDERAL INCOME TAXES	- 1.7	- 2.0
NET INCOME AFTER TAX	0.8	2.0
RETURN ON NET WORTH	1.7%	3.8%

RETURN ON NET WORTH

Figure 2 shows that, beginning in 1979, the industry returns on net worth have fallen increasingly below the returns for the Fortune 500 companies. In 1984, this gap in returns reached nearly 12 points - the industry rate of return was 1.7% while the Fortune 500 median return was 13.5%. In 1985, industry returns continued at a sub-par 3.8%, while the Fortune 500 median return dropped slightly to 11.5%. In fact, while the industry has now experienced two consecutive years of returns below 4%, the Fortune 500 median return has never fallen below 10% during the last 10 years.

PROPERTY/CASUALTY RETURNS HAVE PLUMMETED

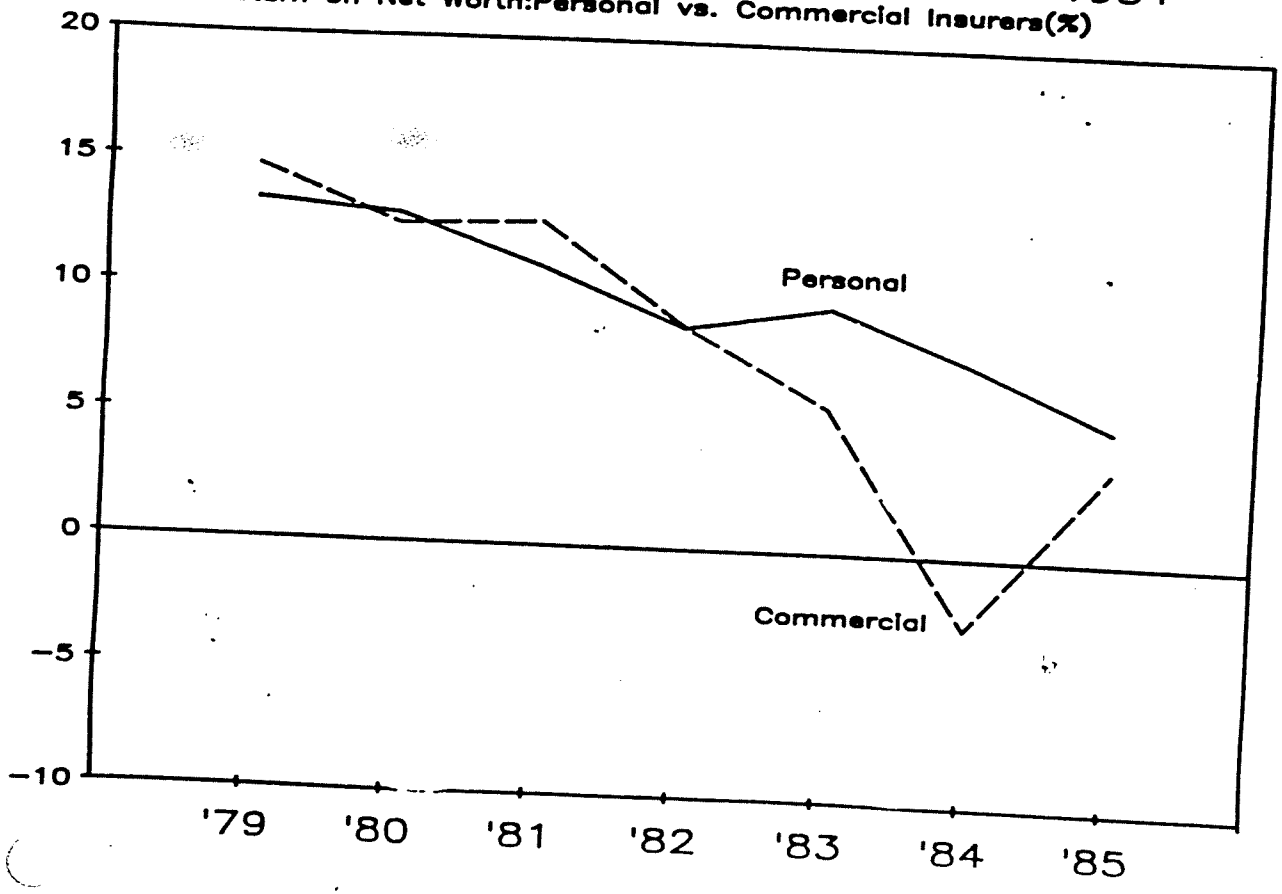


COMMERCIAL INSURERS

The deterioration in results has not been spread among all insurers evenly. The companies that insure our nation's businesses have been particularly hard hit.

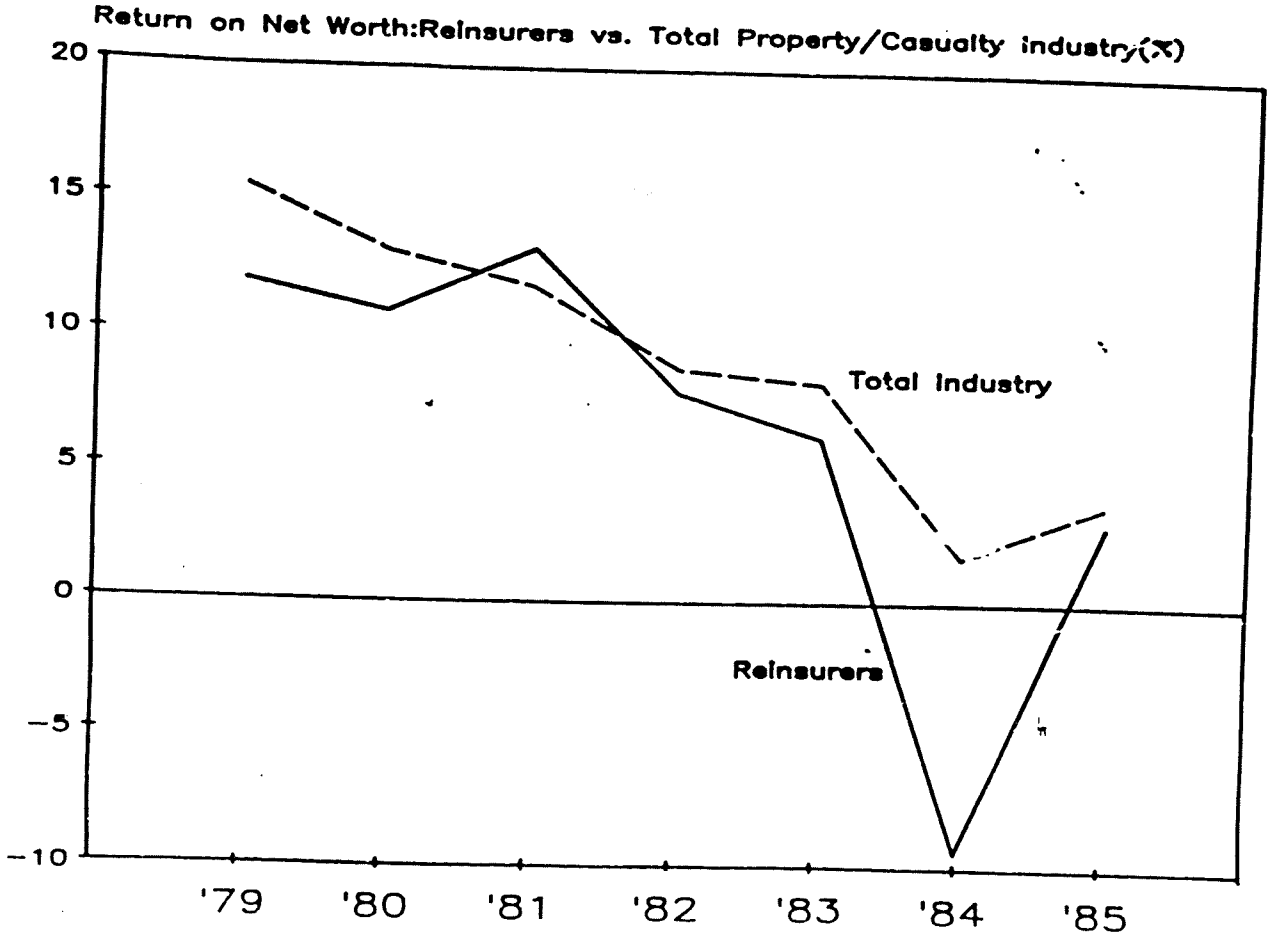
Figure 3 shows that returns on net worth for insurers that concentrate in commercial lines plummetted to negative 3% in 1984. Large premium increases have allowed their returns to rebound somewhat to 3.6%.

COMMERCIAL INSURERS LOST MONEY IN 1984



REINSURERS

As bad as the results have been for commercial insurers, the deterioration is magnified for reinsurers. This is caused by reinsurers' heavy involvement in the riskiest coverages, such as commercial liability. Figure 4 shows that reinsurers' returns on net worth, which were similar to the industry's until 1983, dropped to negative 10% in 1984 - 12 points below the industry average.


Return on Net Worth:Reinsurers vs. Total Property/Casualty industry(%)
20
15
10
5
0
-5
-10
'79
'80
'81
'82
'83
'84
'85
Total Industry
Reinsurers

INVESTMENT INCOME AND UNDERWRITING PROFIT OR LOSS

The most important component of insurers' net income is operating income - the sum of underwriting income and investment income. It represents profit or loss from insurance operations.

Underwriting income (the difference between premiums earned and losses and expenses incurred) has been underwriting loss since 1979. Prior to 1984, investment income (interest and dividends received on investments) was large enough to offset underwriting loss in every year except 1975.

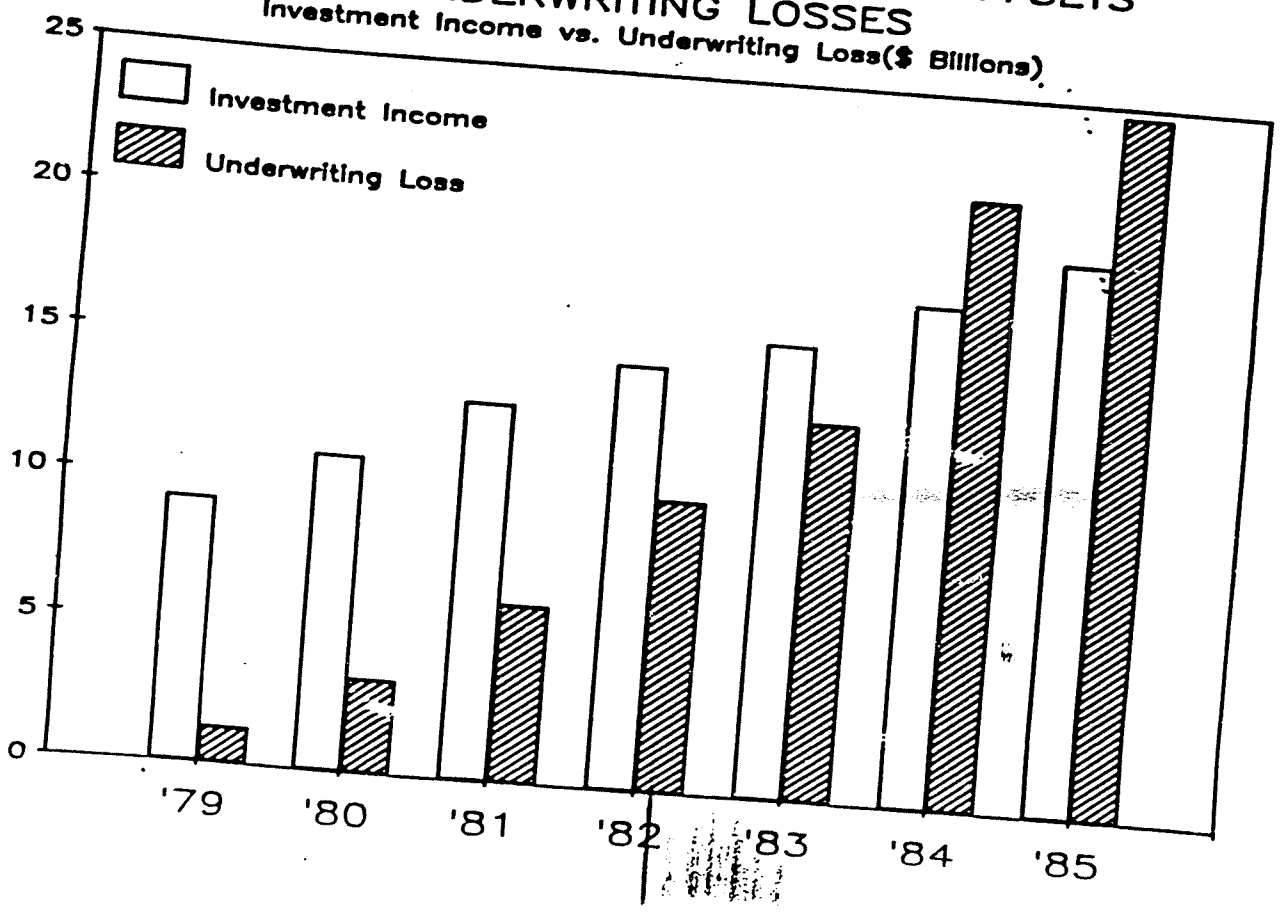
- In 1984, underwriting loss exceeded investment income by $3.8 billion (See Figure 5)
- In 1985, underwriting loss exceeded investment income by $5.4 billion.

From 1980 to 1984, investment income increased at a rate of less than $2 billion per year, while underwriting losses increased at an average annual rate of over $4 billion.

In 1985, investment income continued to increase at just under $2 billion per year. This shows that charges of insurers' mismanagement of their investment portfolio are unjustified. The annual growth in underwriting losses slowed to $3.2 billion in 1985.

However, the record operating loss reported in 1985 is caused by this increase in underwriting loss, which continues to outstrip the increase in investment income.

INVESTMENT INCOME NO LONGER OFFSETS UNDERWRITING LOSSES



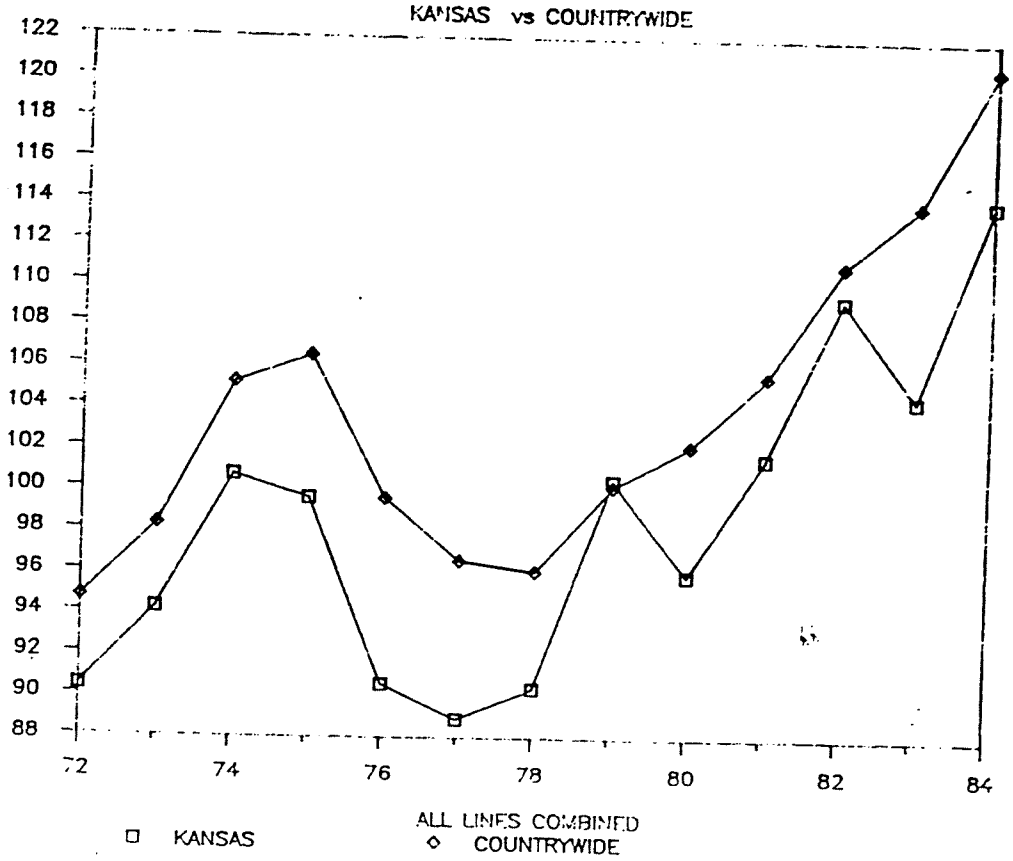
KANSAS UNDERWRITING EXPERIENCE

Insurer Financial Statements do not provide information on net income or net worth by line of insurance or state. However, it does provide information which can be used to track underwriting results.

FIGURES 6, 7 AND 8 COMPARE RATIOS IN KANSAS TO COUNTRYWIDE FOR ALL LINES, MAJOR COMMERCIAL LINES, AND GENERAL LIABILITY (INCLUDING MEDICAL PROFESSIONAL).

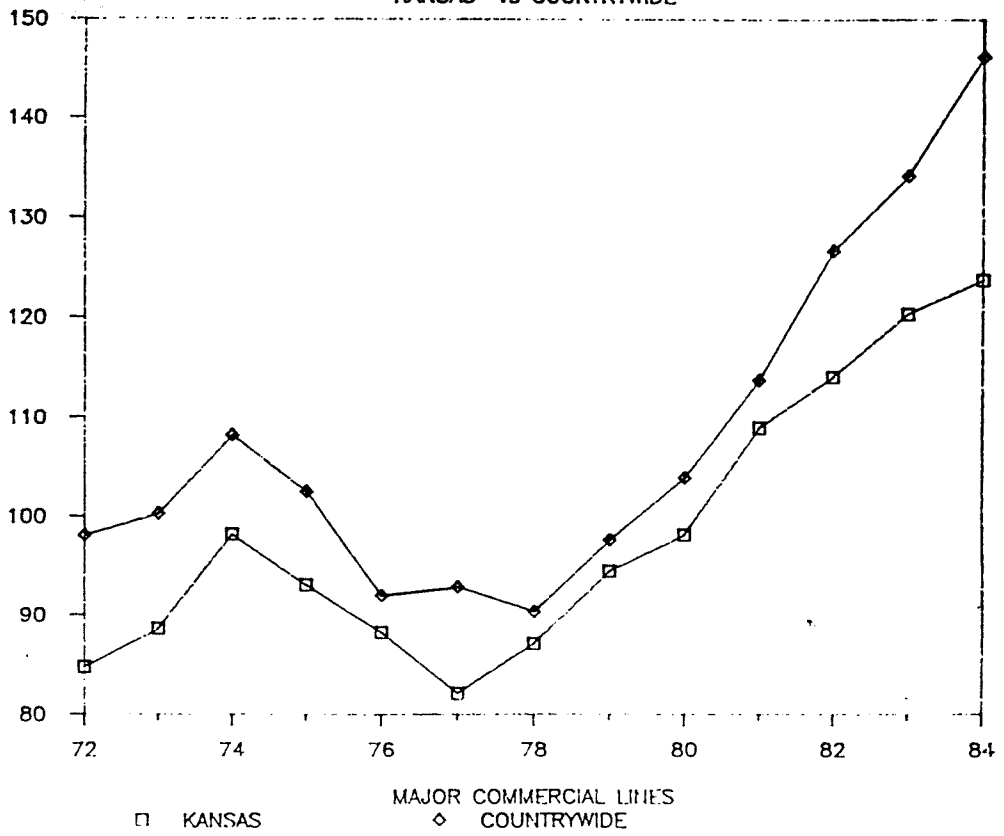
THESE EXHIBITS SHOW THAT KANSAS TRACKS THE COUNTRYWIDE TRENDS AND THEREFORE IS NOT IMUNE FROM THE GROWING LIABILITY PROBLEMS.

COMBINED RATIO AFTER DIVIDENDS

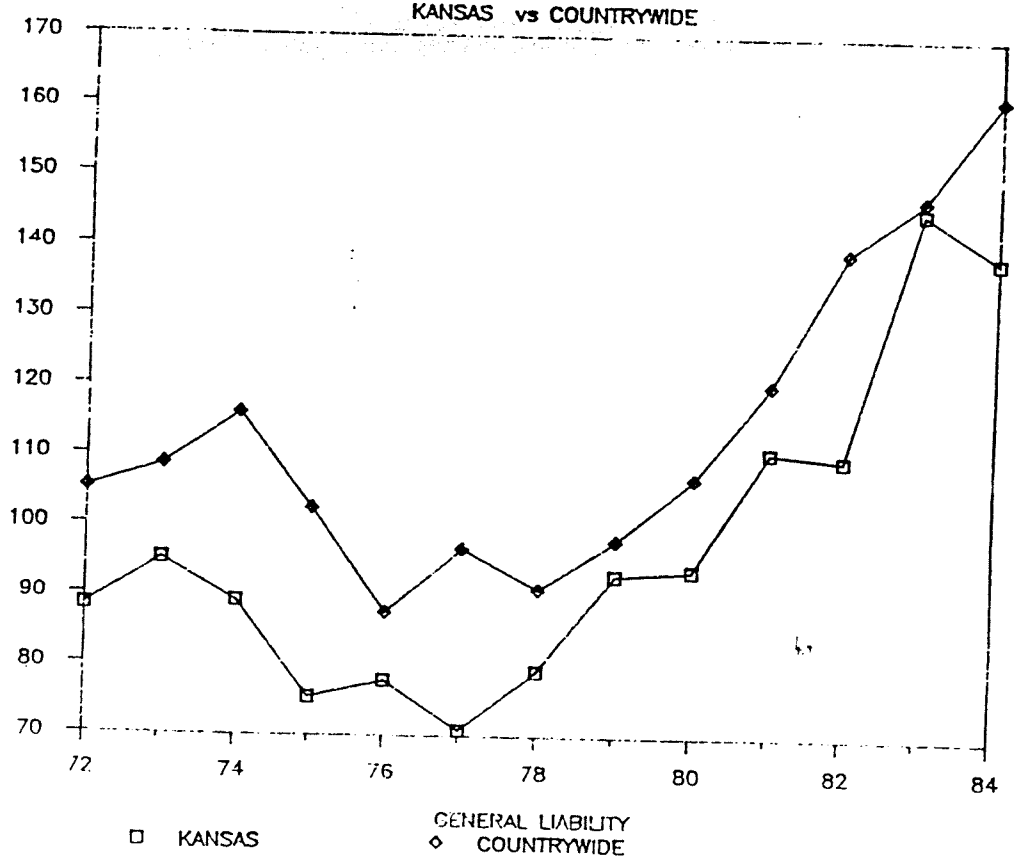


COMBINED RATIO AFTER DIVIDENDS

KANSAS vs COUNTRYWIDE



COMBINED RATIO AFTER DIVIDENDS



GROWTH IN LOSSES

Commercial lines insurers are seriously affected by "bottom line" results, caused by a deficiency in income due to escalating losses. The following exhibits focus on these loss patterns, particularly for commercial liability. These exhibits compare the growth in insurance premiums to the growth in insurance costs on a constant dollar basis (i.e. adjusted for inflation).

Figure 9 shows that the all lines premiums were generally in line with losses until 1979. Since 1979, premiums did not keep pace with costs and the gap WIDENED through the early '80's.

During this period, interest rates were at historic high levels. Insurers recognized that high interest rates created the potential for increases in investment income. In fact, as an earlier chart shows, investment income has grown at a rate of $2 billion per year. It was this growth in investment income that both allowed insurers to lower the premiums and created a desire to compete for additional premium dollars to invest. These low premium levels prevailed through 1984, to the benefit of insureds.

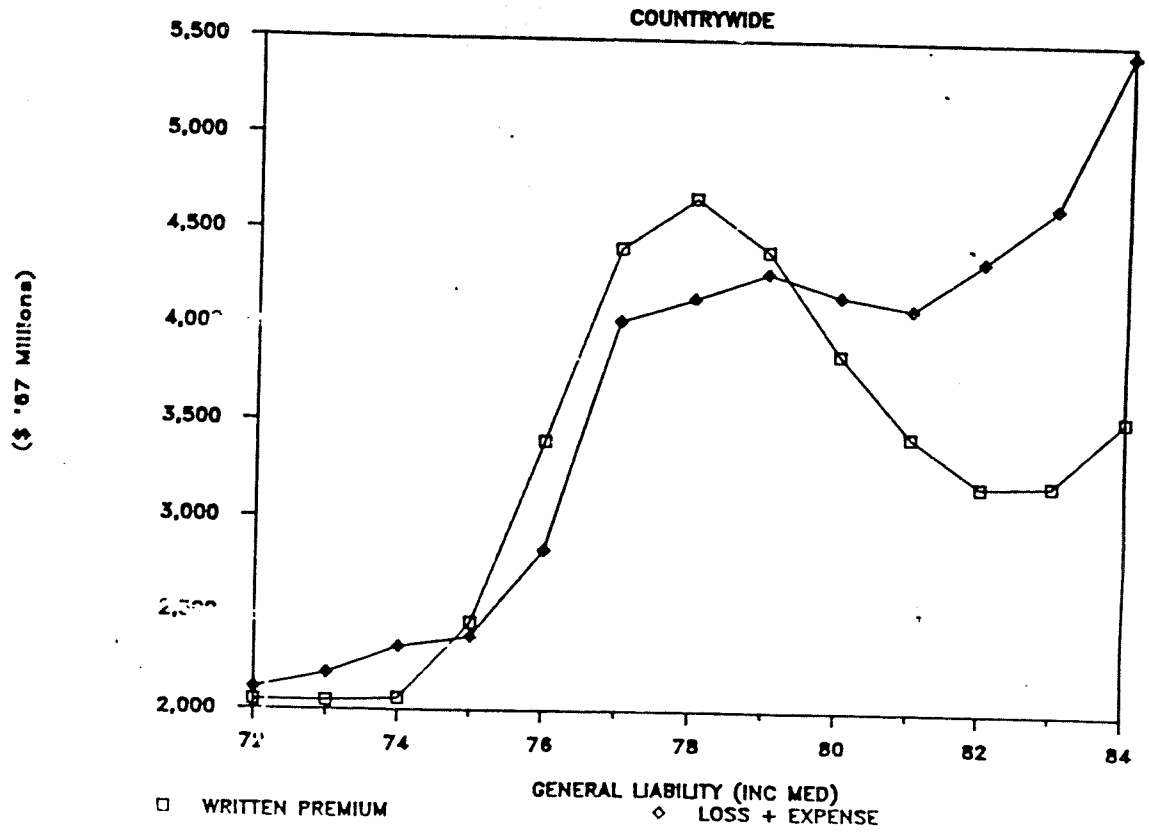
Thus, part of the reason for the premium shortfall is competitive pricing. However, a second and major cause of the problem is the losses, which have escalated to record highs. The rising loss line on Figure 9 demonstrates that today's financial problems are not simply the result of competitive pricing but are to a very significant extent "loss driven".

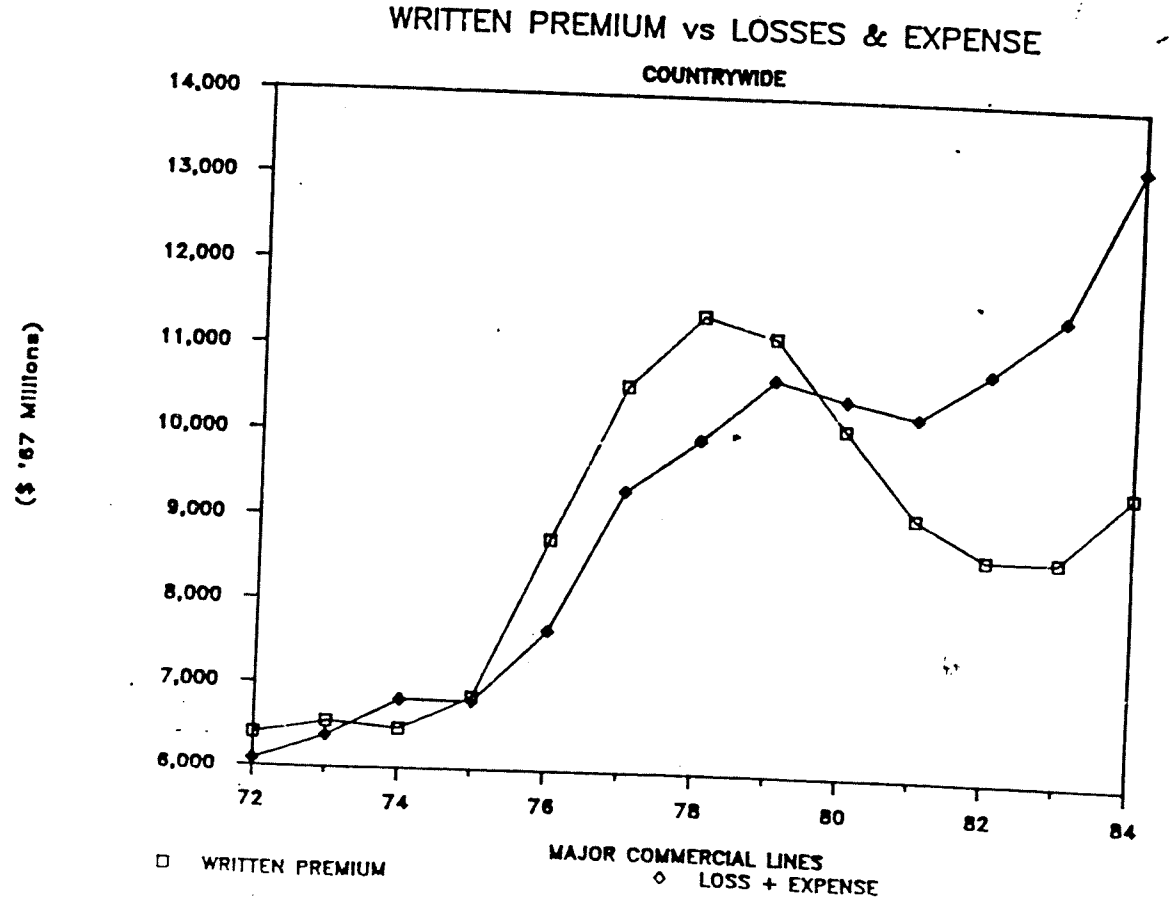
Figures 10 and 11 show that commercial lines, particularly general liability, are the major cause of the industry's current problems.

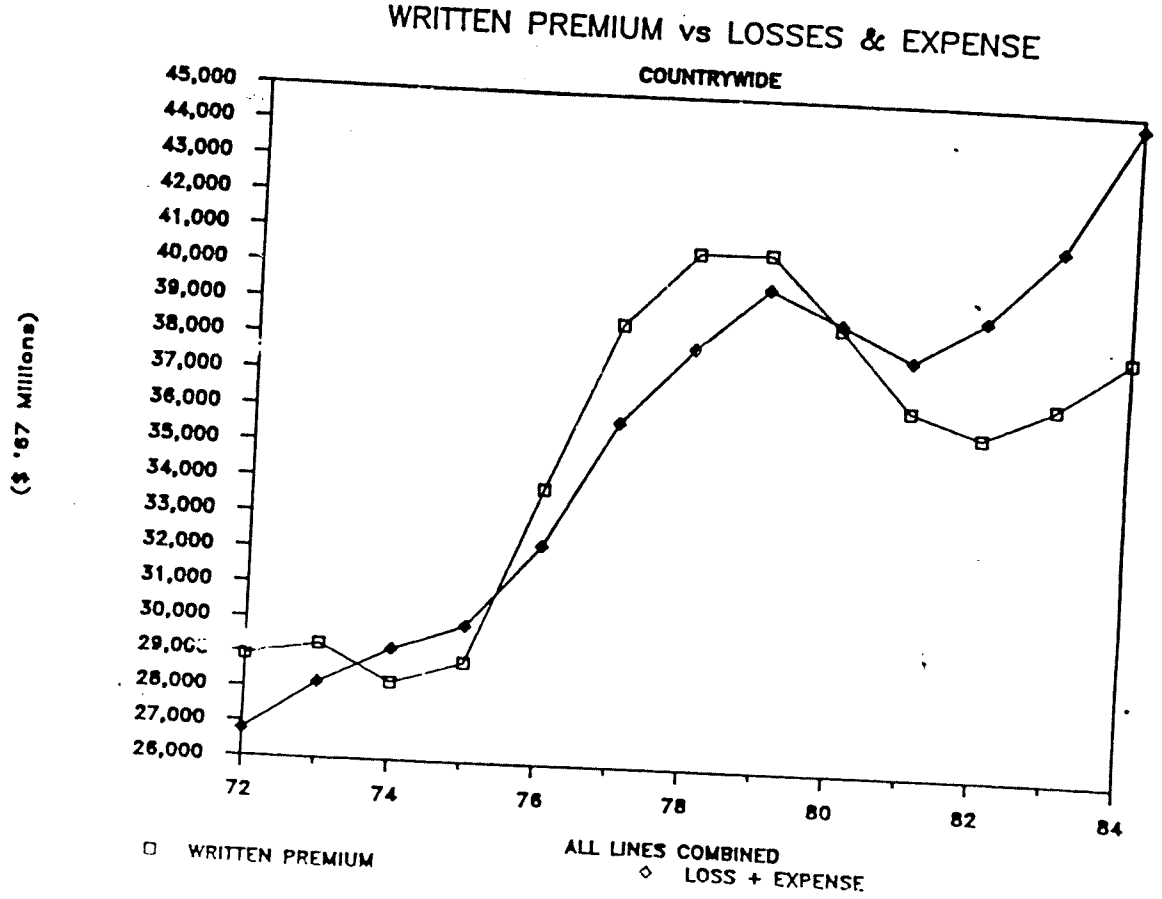
FIGURES 12, 13 AND 14 DEMONSTRATES THAT KANSAS EXPERIENCE FOLLOWS SIMILAR PATTERNS.

9

WRITTEN PREMIUM vs LOSSES & EXPENSE

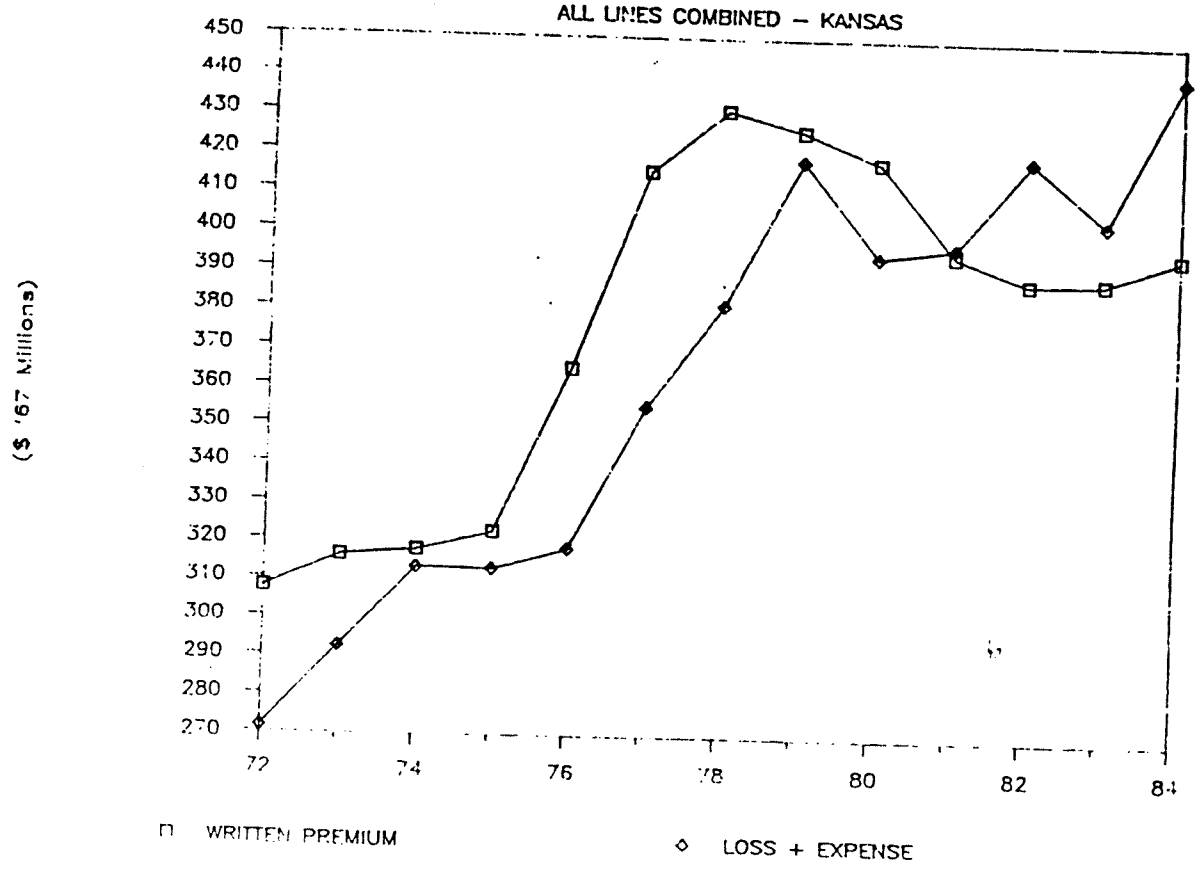


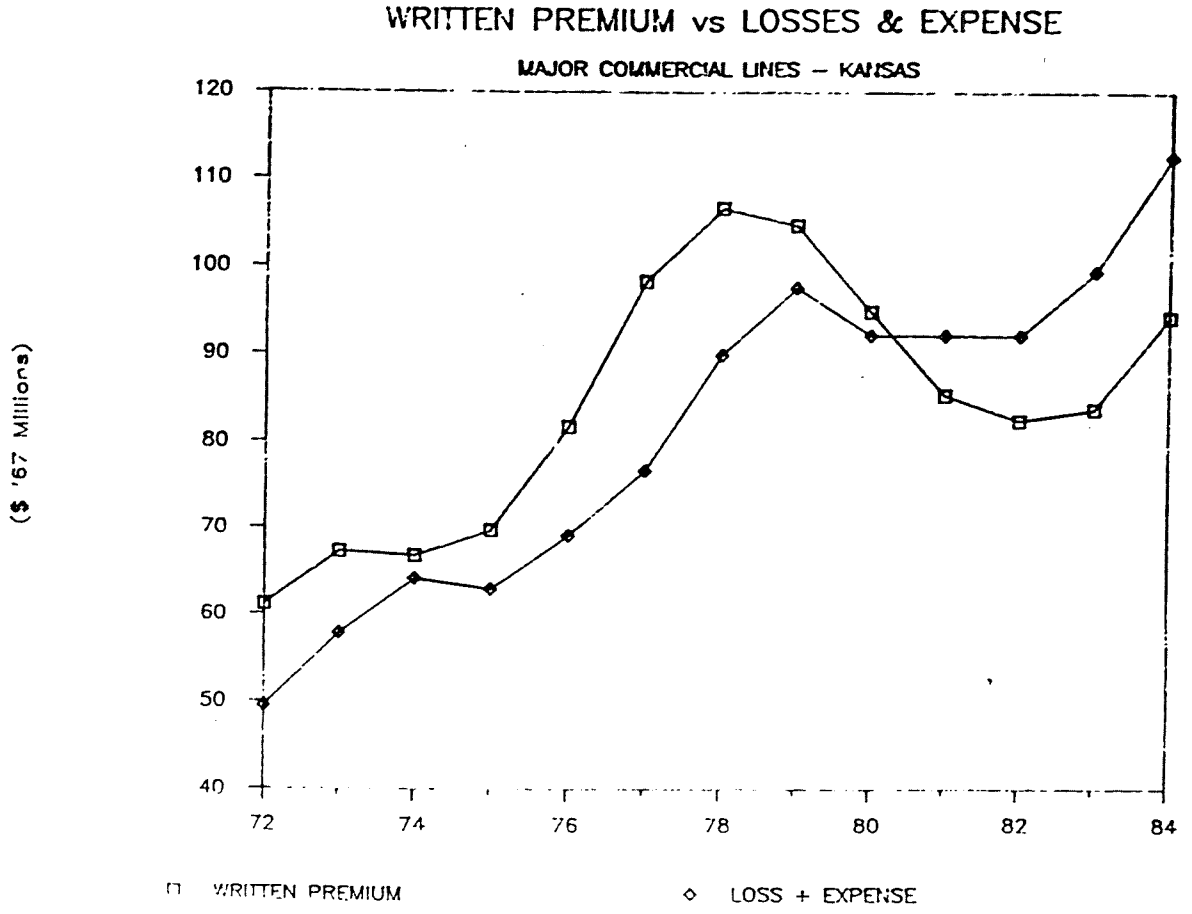

WRITTEN PREMIUM vs LOSSES & EXPENSE
COUNTRYWIDE
($ '67 Millions)
14,000
13,000
12,000
11,000
10,000
9,000
8,000
7,000
6,000
72
74
76
78
80
82
84
MAJOR COMMERCIAL LINES
□ WRITTEN PREMIUM
◇ LOSS + EXPENSE


WRITTEN PREMIUM vs LOSSES & EXPENSE
COUNTRYWIDE
($ '87 Millions)
45,000
44,000
43,000
42,000
41,000
40,000
39,000
38,000
37,000
36,000
35,000
34,000
33,000
32,000
31,000
30,000
29,000
28,000
27,000
26,000
72
74
76
78
80
82
84
WRITTEN PREMIUM
ALL LINES COMBINED
LOSS + EXPENSE

WRITTEN PREMIUM vs LOSSES & EXPENSE

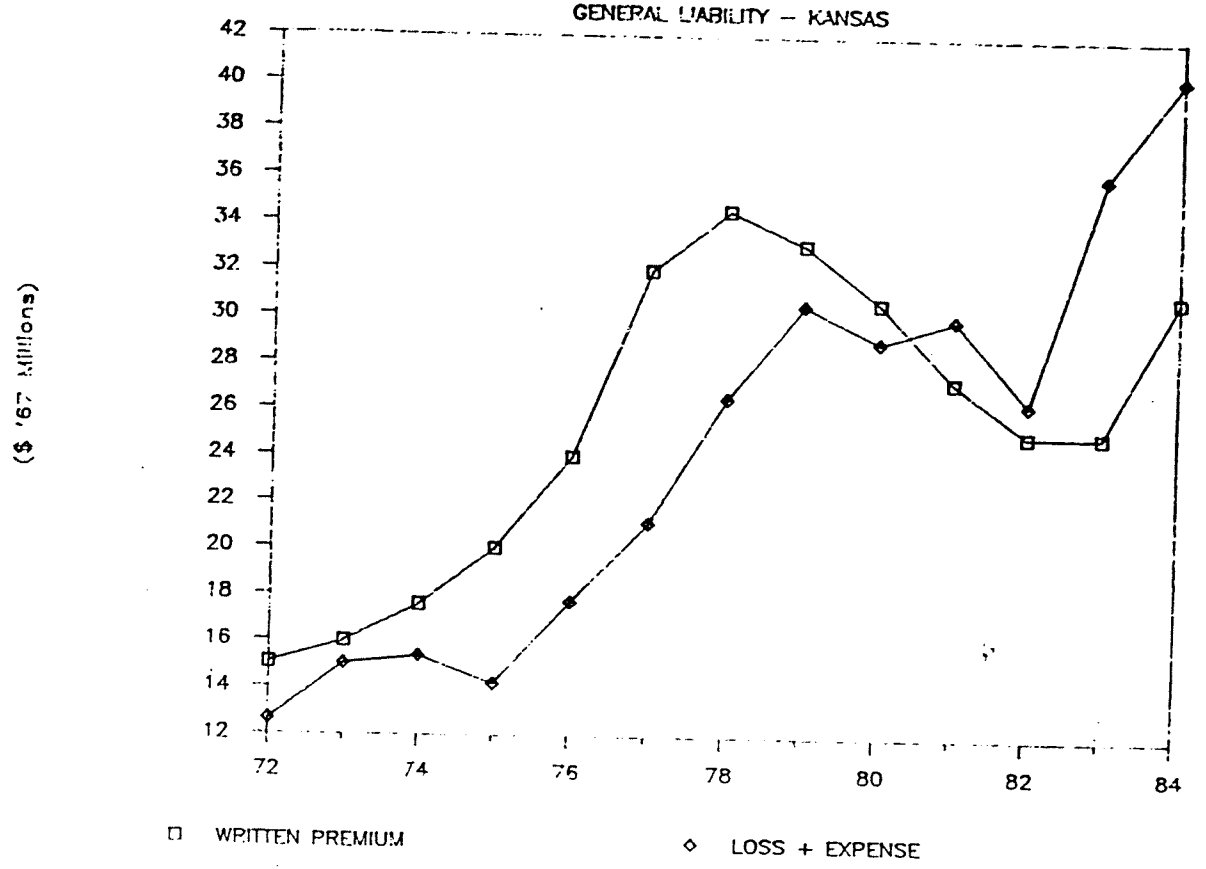
ALL LINES COMBINED – KANSAS




WRITTEN PREMIUM vs LOSSES & EXPENSE
MAJOR COMMERCIAL LINES – KANSAS
($ '67 Millions)
120
110
100
90
80
70
60
50
40
72
74
76
78
80
82
84
WRITTEN PREMIUM
LOSS + EXPENSE

WRITTEN PREMIUM vs LOSSES & EXPENSE

GENERAL LIABILITY – KANSAS



LOSS RESERVES

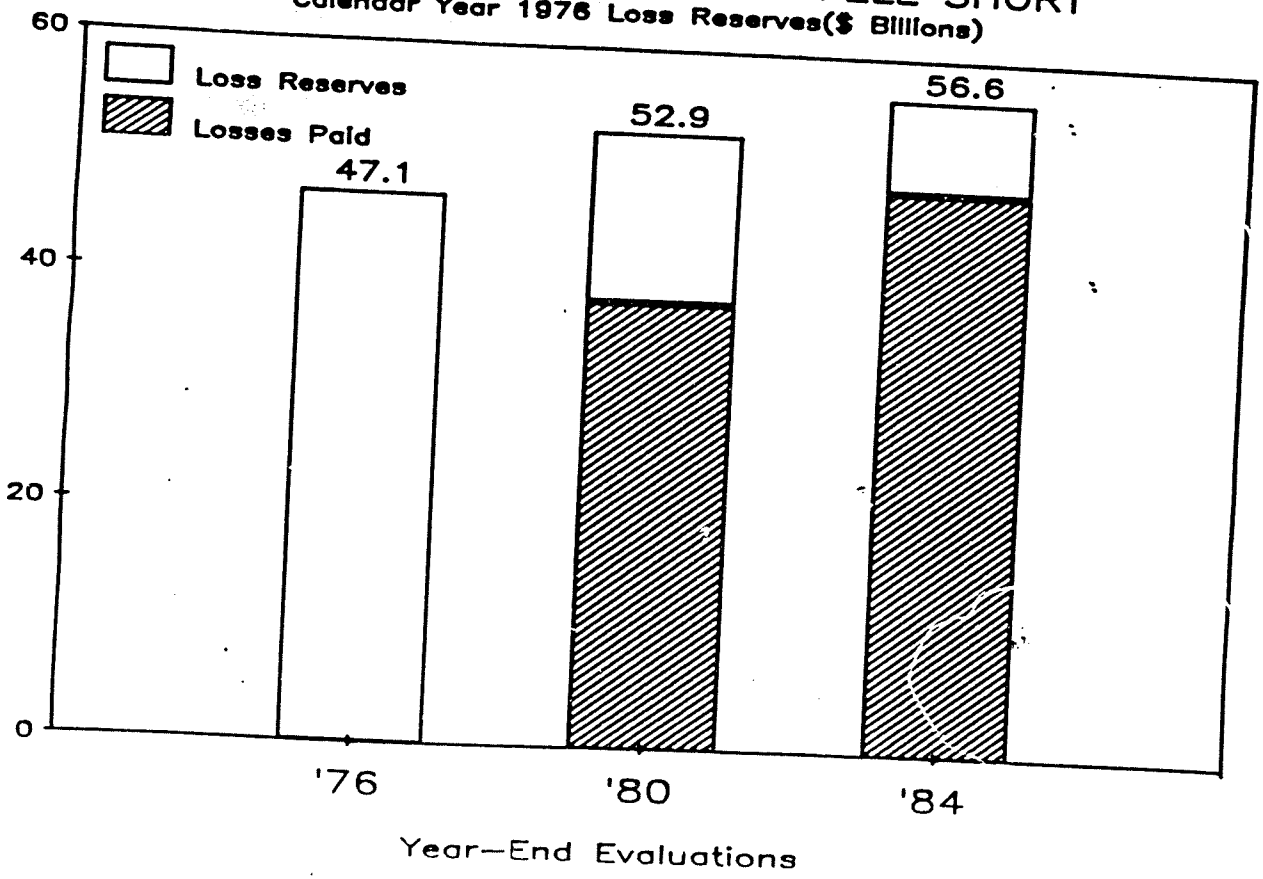
Our analysis of industry profitability is based on incurred losses, which considers both losses paid during a given period of time as well as estimates of loss payments that will need to be made on claims which have not reached final judgement or settlement. Critics have charged that these loss reserves are "ARTIFICALLY" inflated by the industry to make the situation look worse that it is.

In fact experience has shown that industry loss reserves have been understated. At year-end 1976, industry loss reserves were $47.1 billion. However, as of year-end 1984, $48.6 billion had been paid out on these same claims and an additional $8 billion was still held in reserve. The conclusion is that the initial 1976 reserves were deficient by nearly $10 billion, or 20%. (See Figure 15.)

Furthermore, 1976 was not unique. Figure 16 shows a similar pattern for the 1979 reserves. That is, the initial reserve of $65.3 billion set at year-end 1979 proved to be deficient by at least $4 billion , or 6%. As of year-end 1984, $53.8 billion had been paid out on these same claims, while an additonal $15.7 billion was still held in reserve - for a total of $69.5 billion, or $4 billion more then initially reserved.

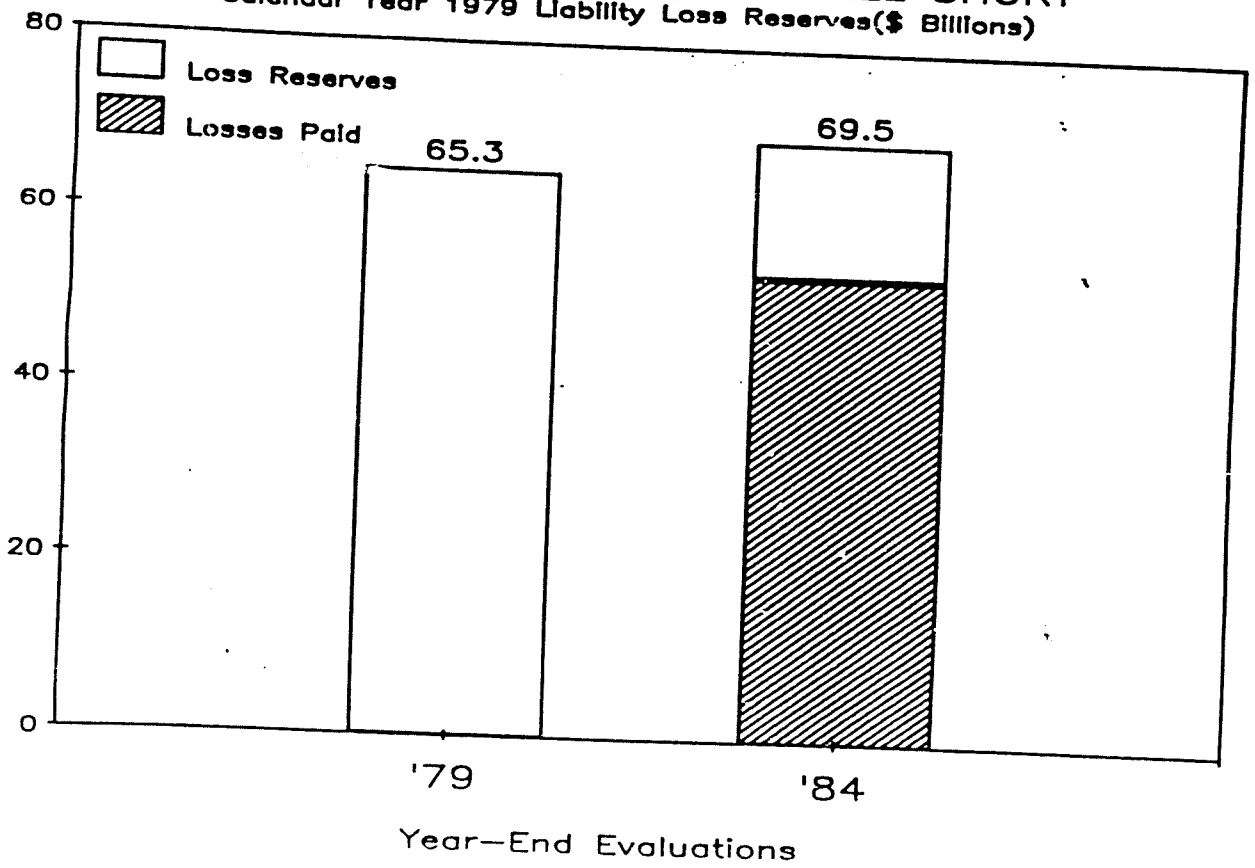
15

1976 INDUSTRY RESERVES FELL SHORT



1979 INDUSTRY RESERVES FELL SHORT

Calendar Year 1979 Liability Loss Reserves($ Billions)



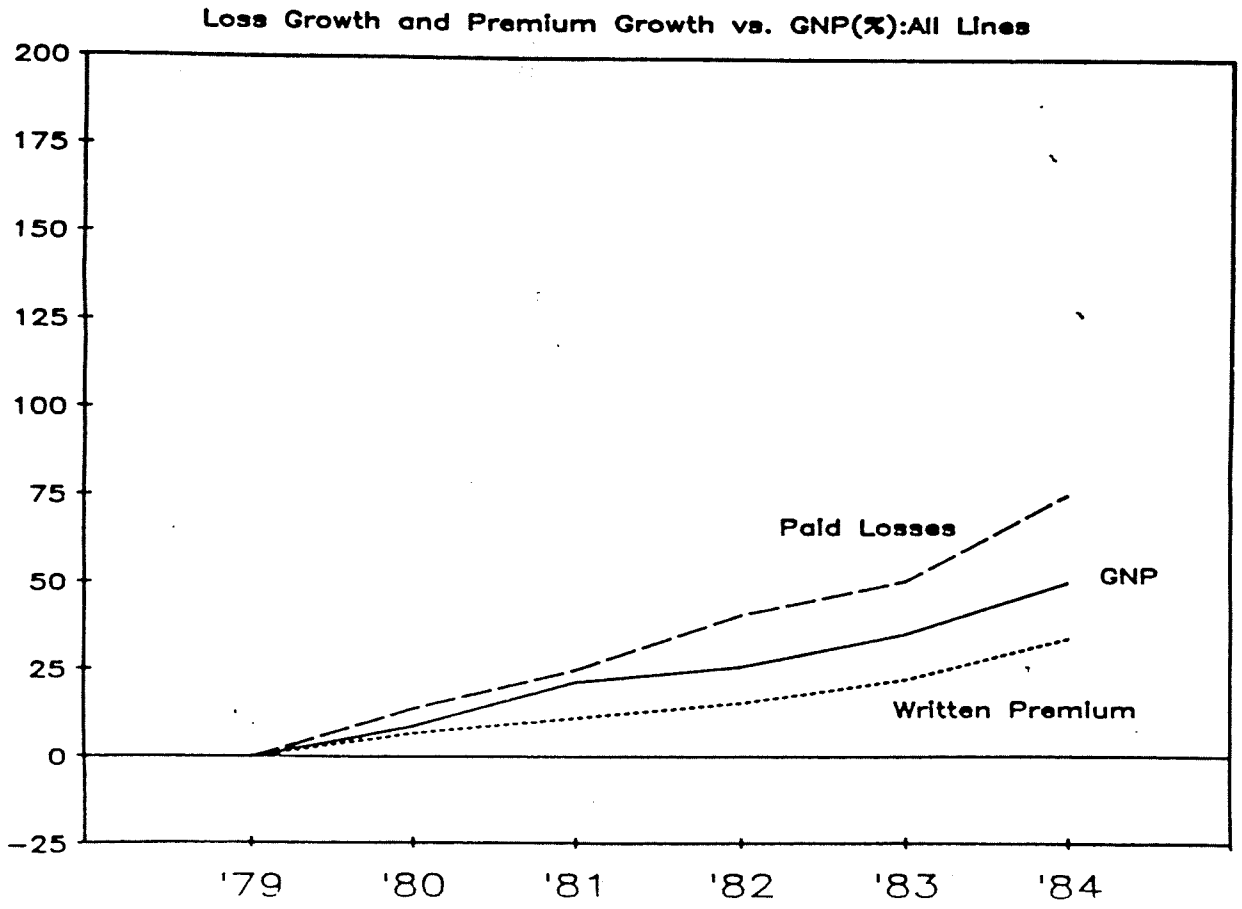
PAID LOSSES

In order to put aside debate about possible manipulation of loss reserves, trends in paid losses can be analyzed.

In the past five years, growth in paid property/casualty losses has far exceeded the country's economic growth as measured by GNP.

From 1979 to 1984, the GNP grew 50%. During the same period, total property/casualty written premium increased only 34%, not quite keeping up with the nations's economic growth. However, paid loss growth exceeded the nation's overall growth, increasing 76%. (See Figure 17)

17

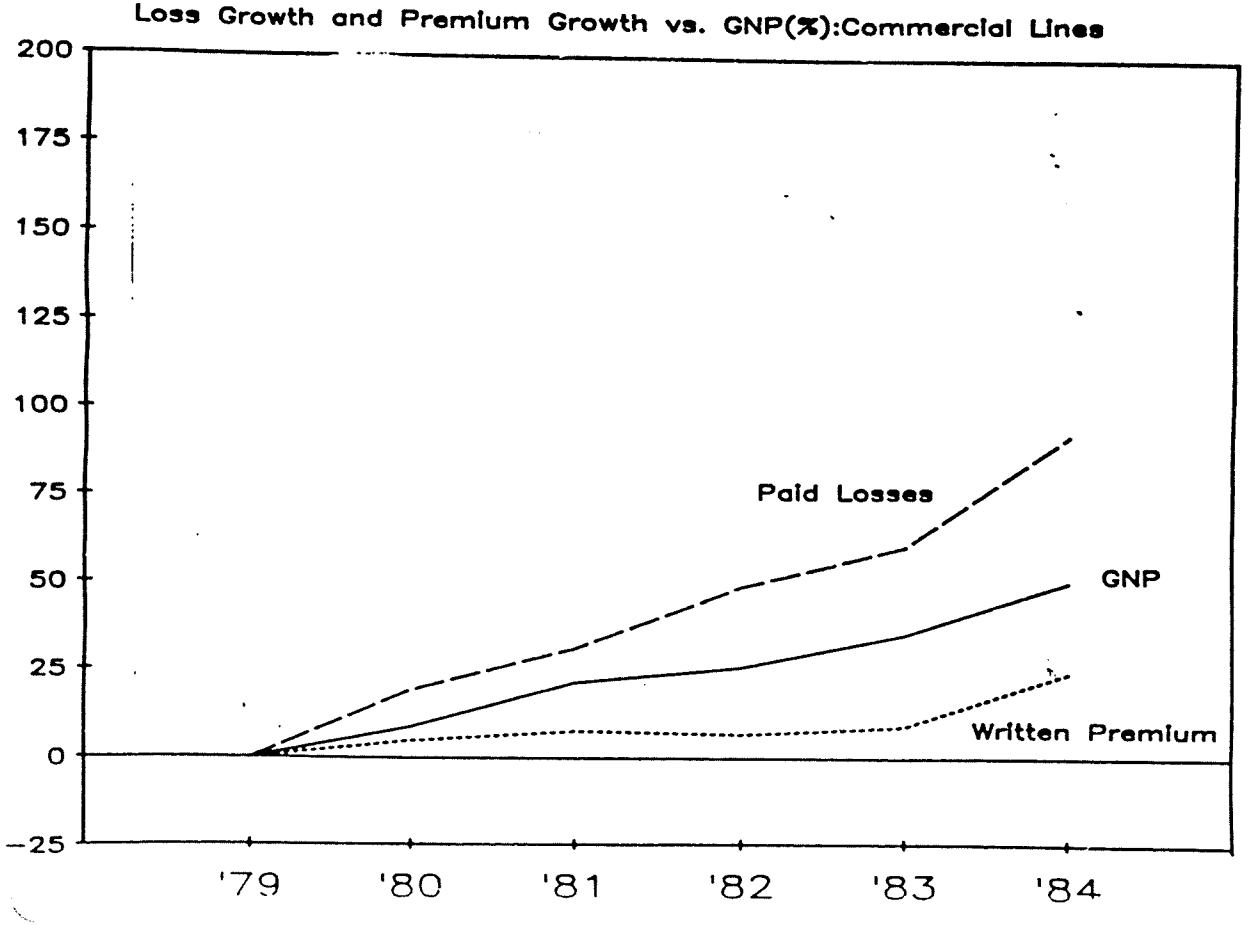

Loss Growth and Premium Growth vs. GNP(%):All Lines
200
175
150
125
100
75
50
25
0
-25
'79
'80
'81
'82
'83
'84
Paid Losses
GNP
Written Premium

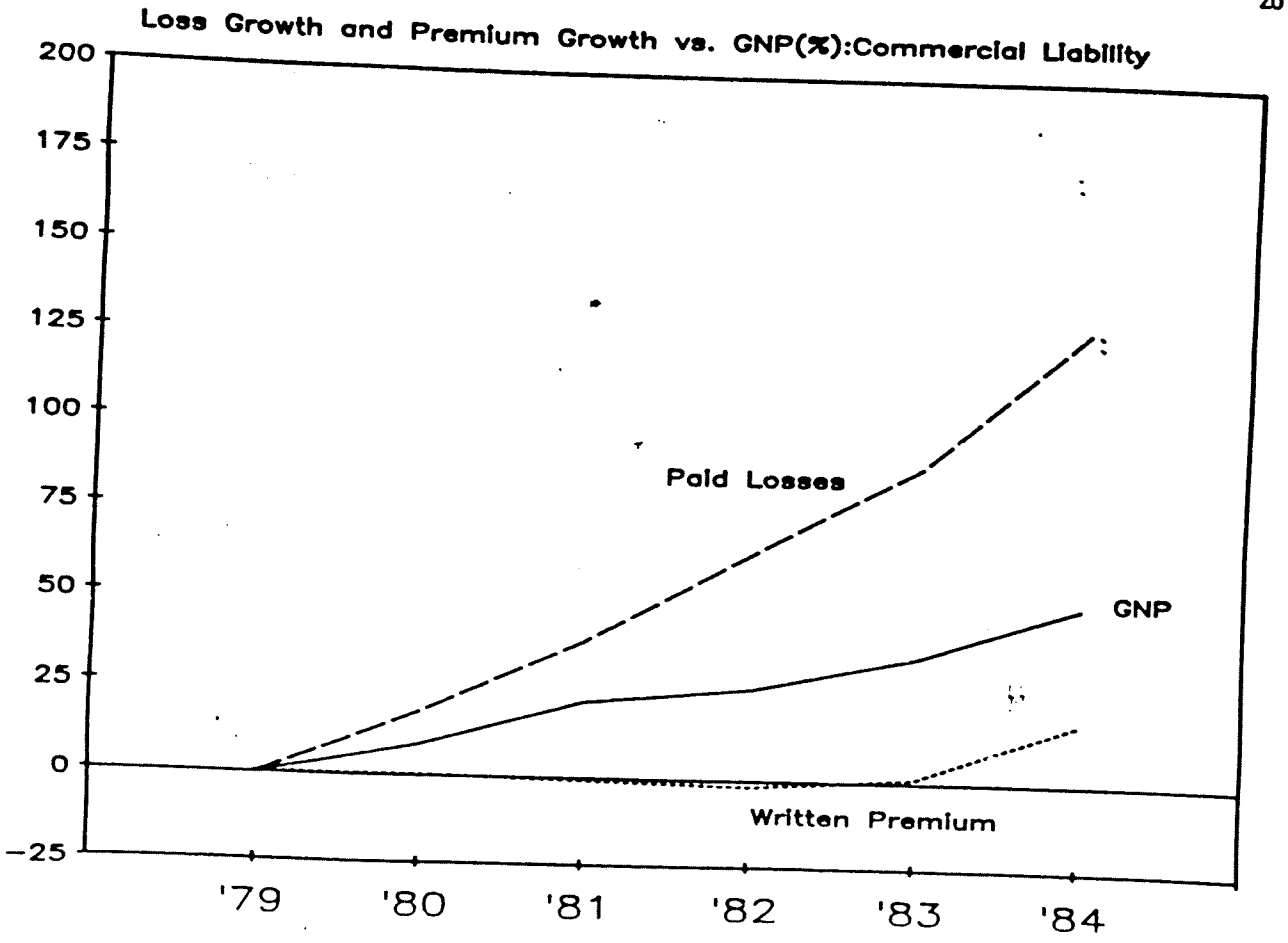
MORE ABOUT PAID LOSSES

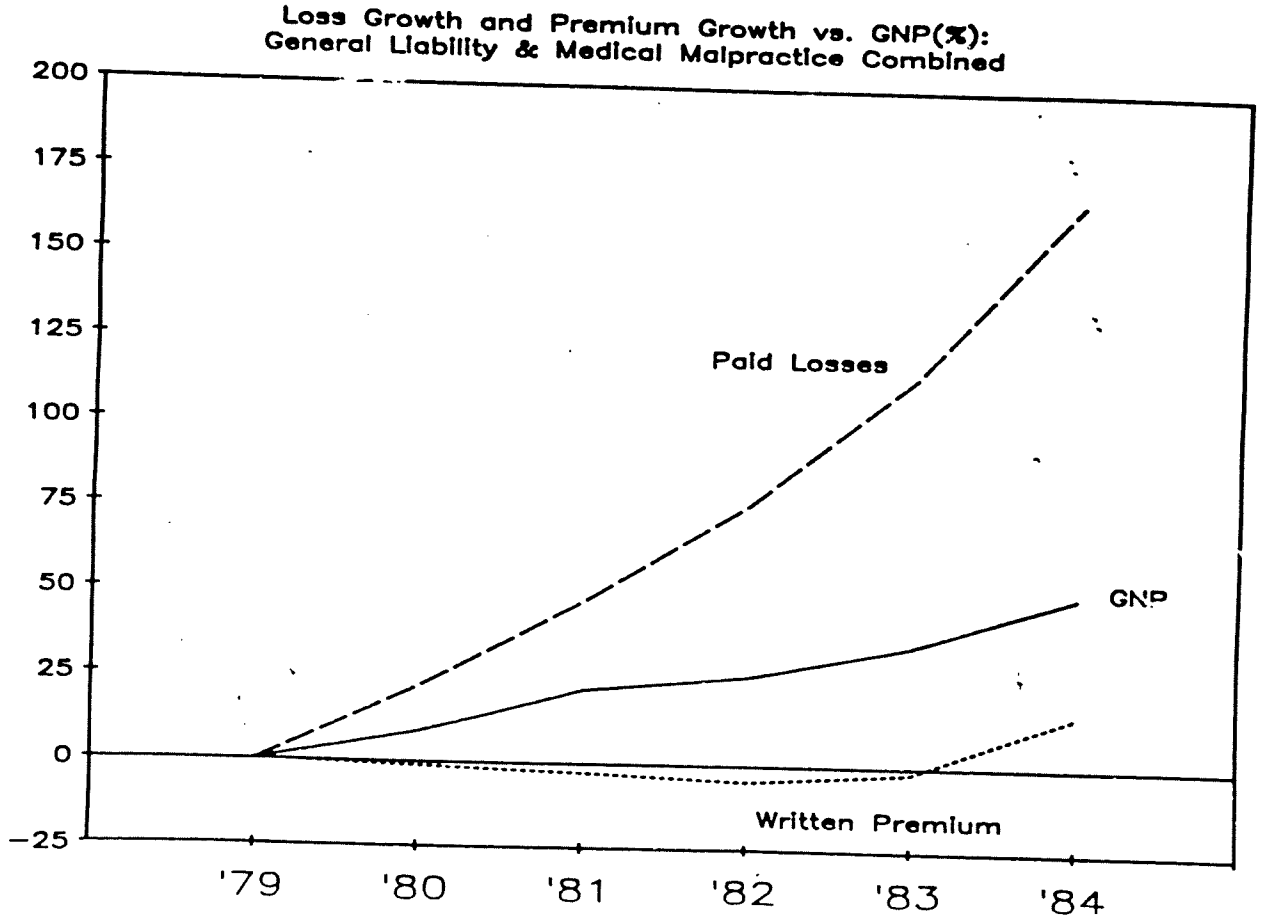
Figure 19 shows that the difference between loss growth and the nation's GNP growth was concentrated in commercial lines where losses grew 92% in five years.

Figures 20 and 21 show that the problem is further concentrated in commercial liability and particularly general liability (including medical professional) where losses grew 130% and 167%, respectively.

For general liability and medical professional, paid losses grew at an annual rate of 22% while GNP grew at a 9% rate, for a 13 point annual gap. (See Figure 22)

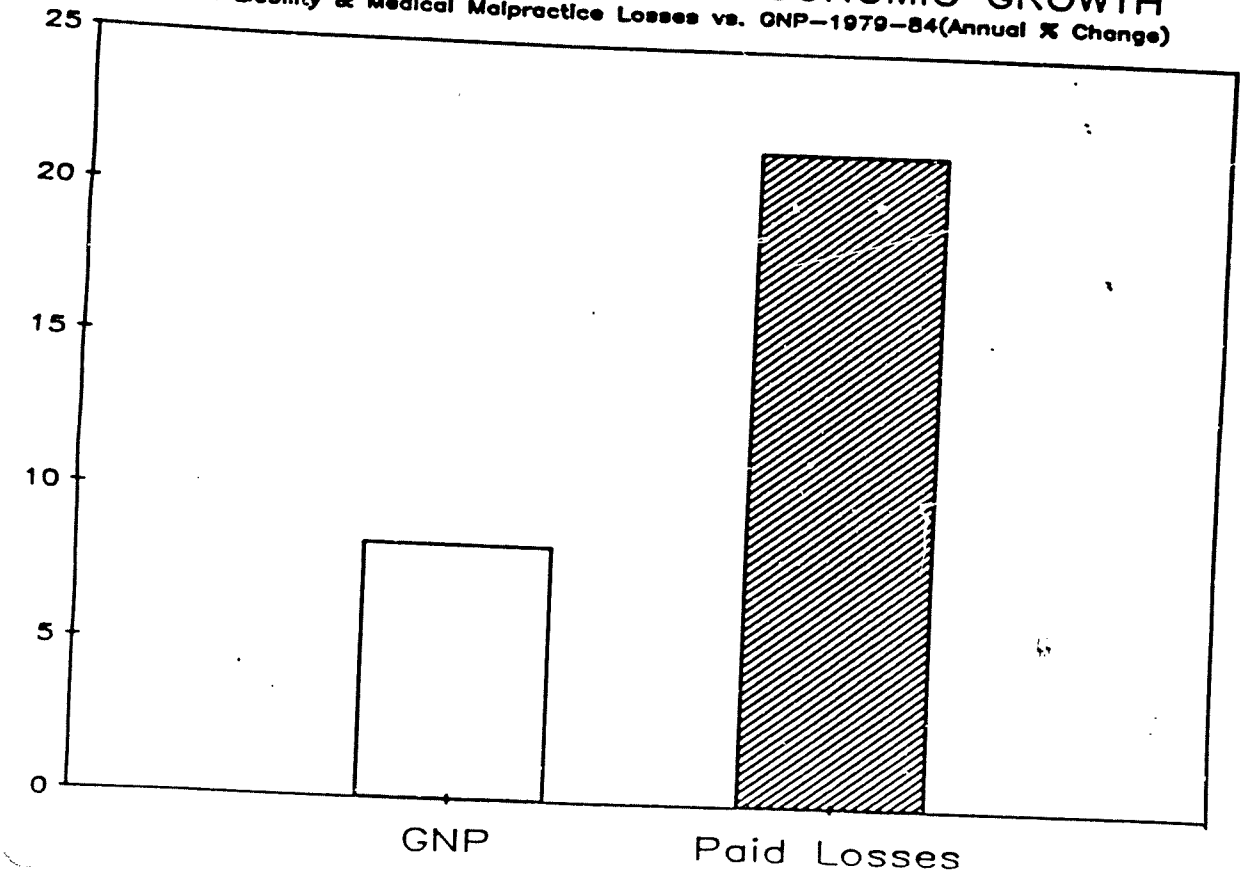

Loss Growth and Premium Growth vs. GNP(%):Commercial Lines
200
175
150
125
100
75
50
25
0
-25
'79
'80
'81
'82
'83
'84
Paid Losses
GNP
Written Premium


Loss Growth and Premium Growth vs. GNP(%):Commercial Liability
200
175
150
125
100
75
50
25
0
-25
Paid Losses
GNP
Written Premium
'79
'80
'81
'82
'83
'84


Loss Growth and Premium Growth vs. GNP(%):
General Liability & Medical Malpractice Combined
200
175
150
125
100
75
50
25
0
-25
Paid Losses
GNP
Written Premium
'79
'80
'81
'82
'83
'84

LOSS GROWTH OUTPACES ECONOMIC GROWTH

General Liability & Medical Malpractice Losses vs. GNP—1979—84(Annual % Change)



KANSAS PAID LOSSES

THE KANSAS LOSS TRENDS ARE SHOWN IN FIGURES 23 THROUGH 26 AND ARE COMPARED TO COUNTRYWIDE BELOW. KANSAS PAID LOSS GROWTH MIRRORS THE COUNTRYWIDE PATTERN AND SHOWS HIGHER LOSS GROWTH FOR THE LIABILITY LINES.

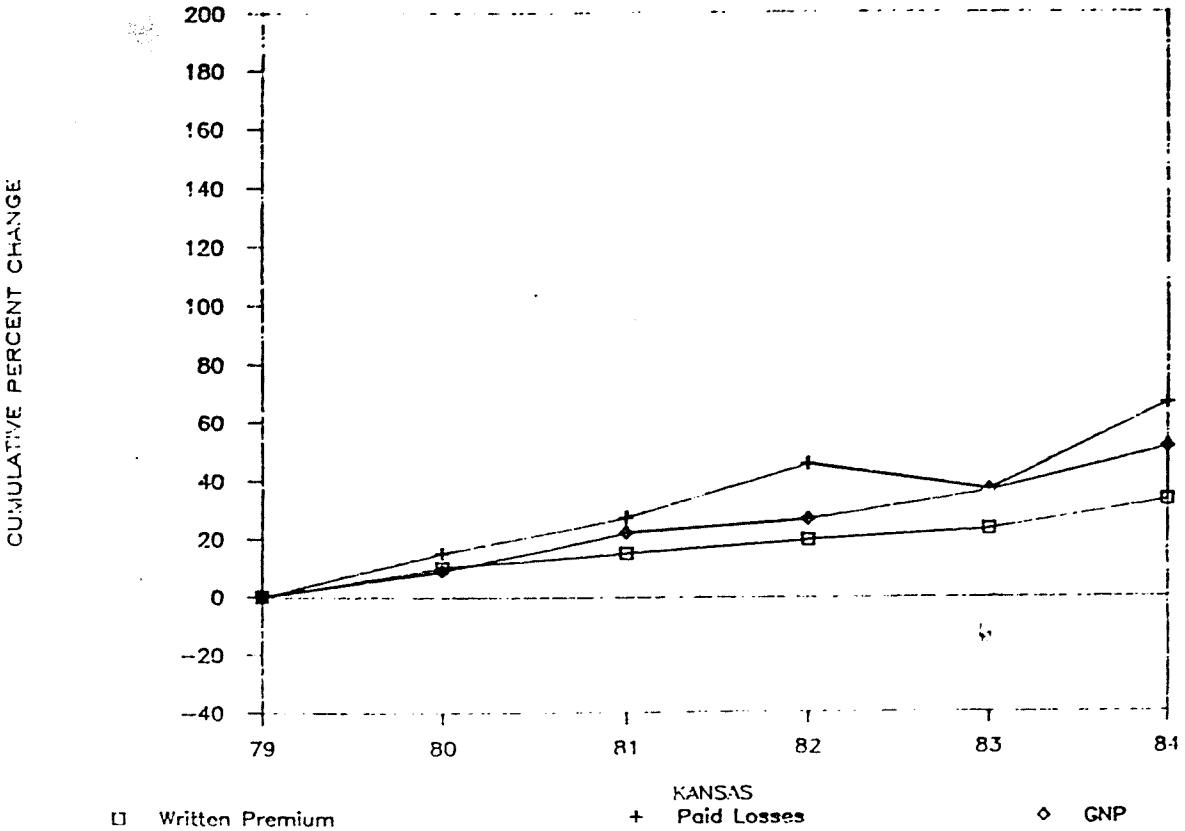
FIVE YEAR GROWTH

	GNP	COUNTRYWIDE Paid Losses	KANSAS Paid Losses
All Lines	50%	76%	66%
Commercial	50	92	89
Commercial Liability	50	130	131
G.L. & Medical	50	167	241

23

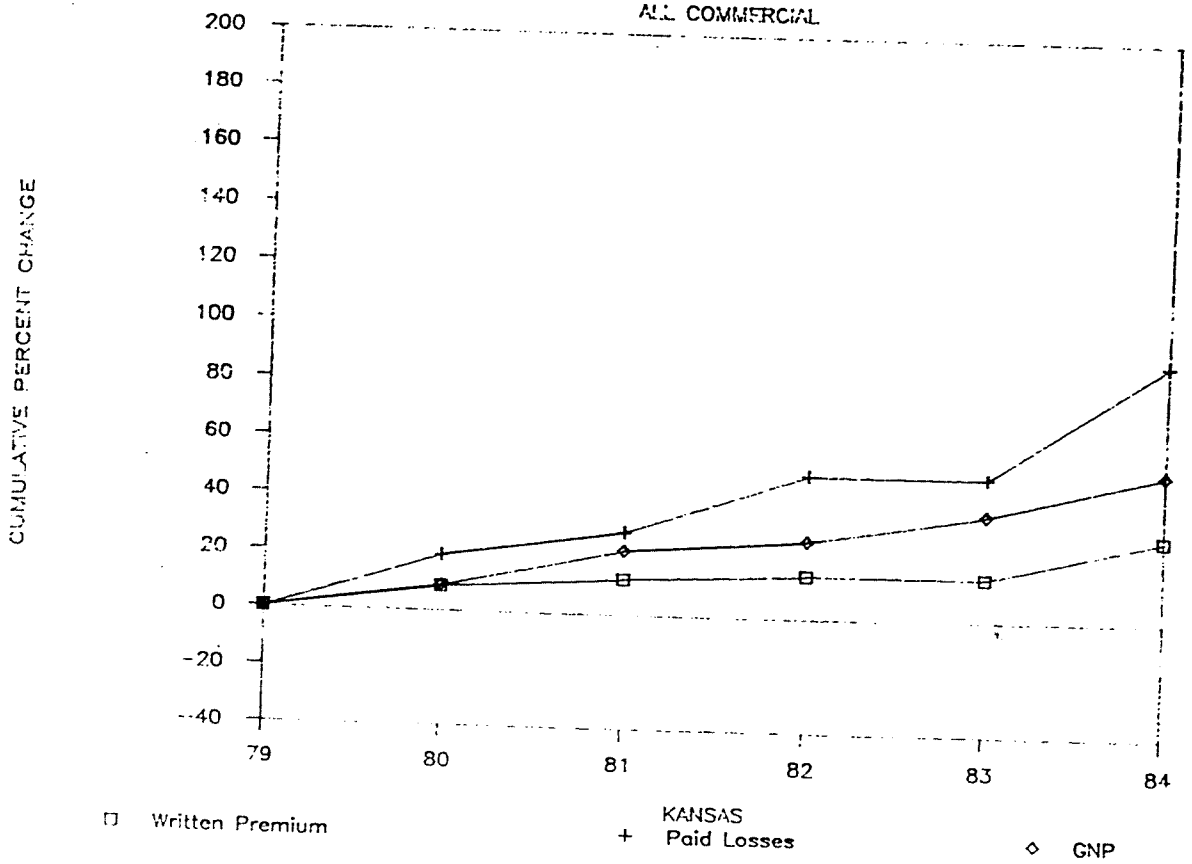
PREMIUM vs LOSSES vs GNP

ALL LINES



PREMIUM vs LOSSES vs GNP

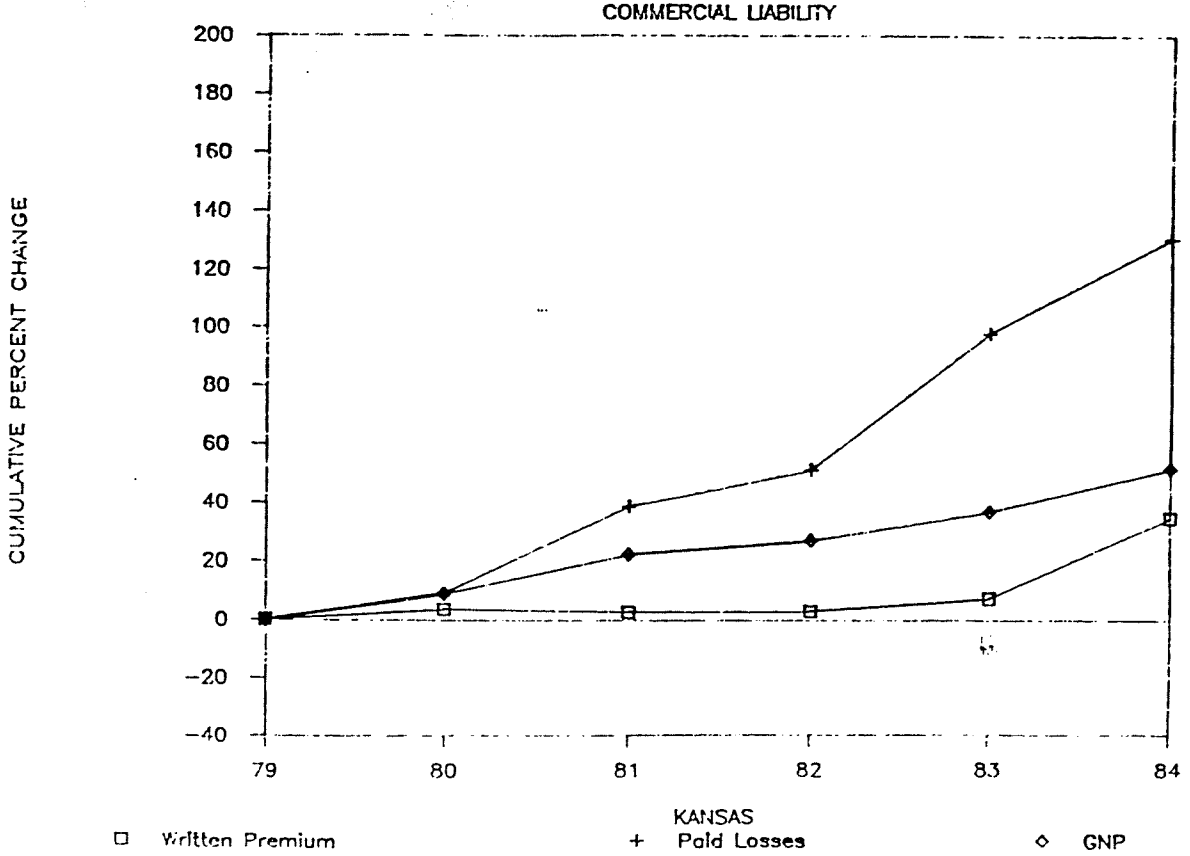
ALL COMMERCIAL



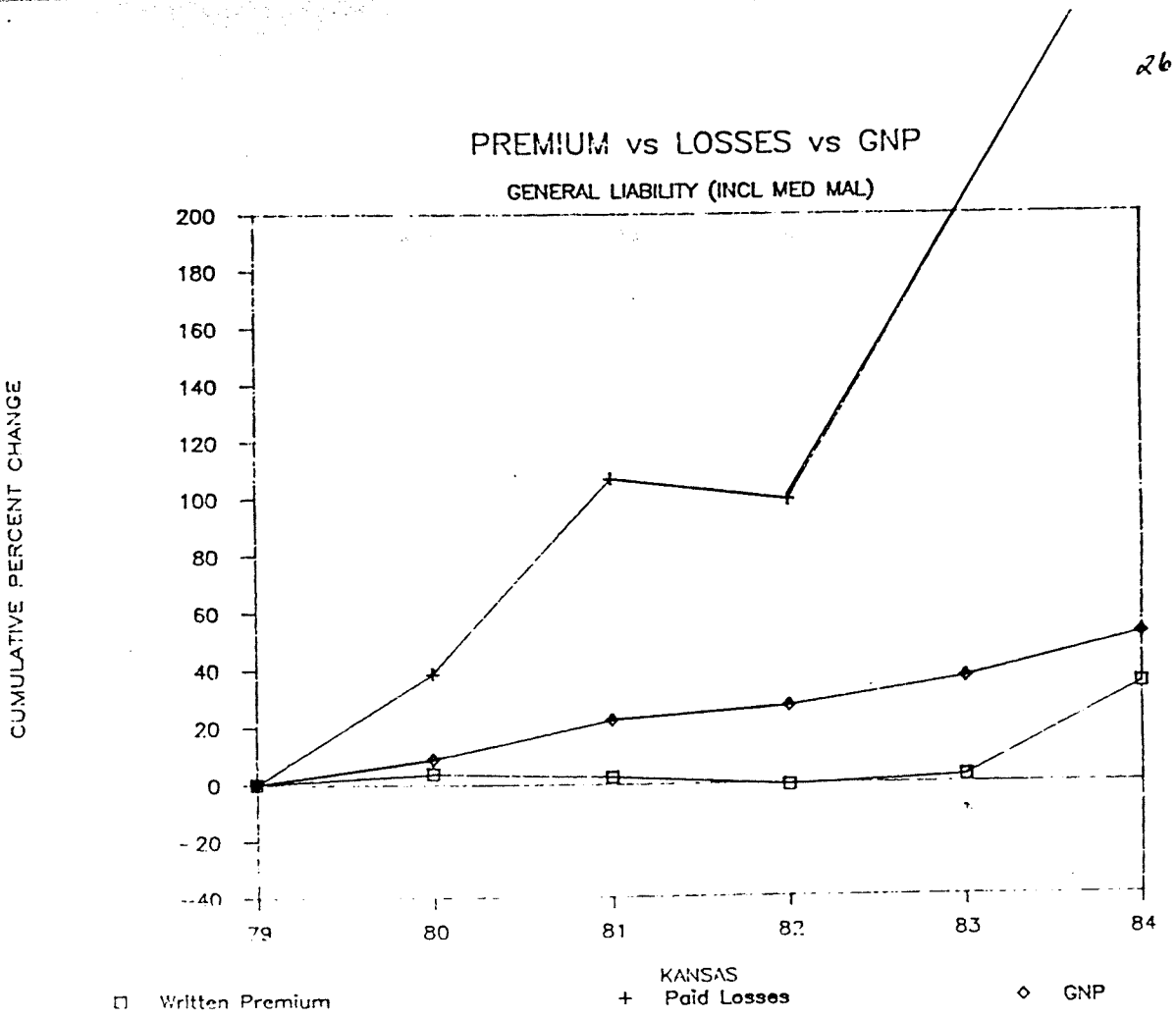
25

PREMIUM vs LOSSES vs GNP

COMMERCIAL LIABILITY



26

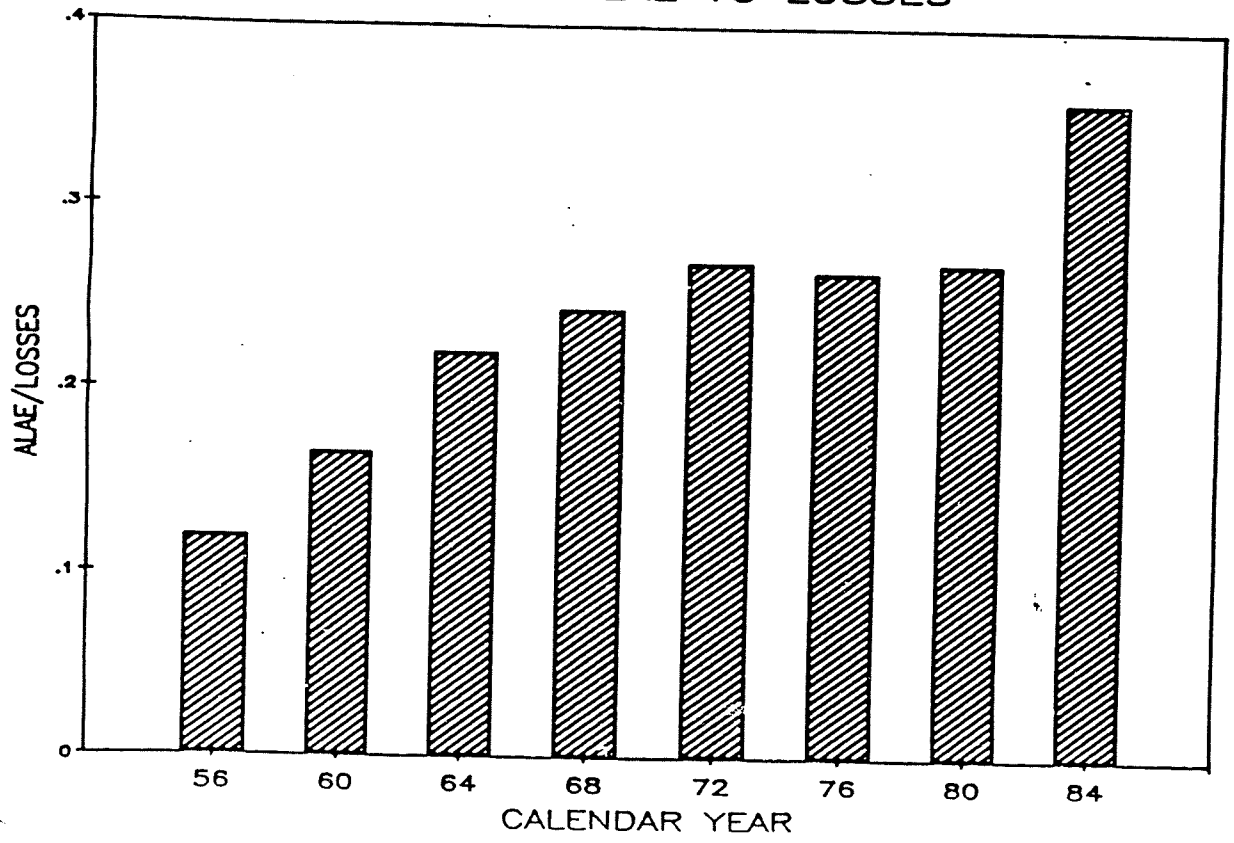

PREMIUM vs LOSSES vs GNP
GENERAL LIABILITY (INCL MED MAL)
CUMULATIVE PERCENT CHANGE
200
180
160
140
120
100
80
60
40
20
0
- 20
-40
79
80
81
82
83
84
KANSAS
Written Premium
Paid Losses
GNP

GENERAL LIABILITY DEFENSE COSTS

The previous exhibits show that general liability losses have been a particular problem, growing much faster than the nation's economic growth. However, the legal defense expense incurred by insurers to defend those general liability claims has grown even faster than losses, and is now a significant portion of the total insured payout.

Insurers call these legal defense expenditures "allocated loss adjustment expense" (ALAE) and the historical data show that ALAE is at unprecedented levels. In the late 1950's it averaged between 10% and 15% of insurers' general liability incurred losses. (See Figure 26A) IN THE LATE 1960's and 1970's, when general liability losses grew rapidly, defense expense rose even faster. By 1970, these expenses accounted for almost 25% of incurred losses, and, by 1984, had jumped to 36% of incurred losses. For every dollar insurers paid or set aside to reimburse an injured party, they've had to allocate an additional 36¢ for defense

GENERAL LIABILITY
RATIO OF ALAE TO LOSSES



GENERAL LIABILITY PREMIUM GROWTH

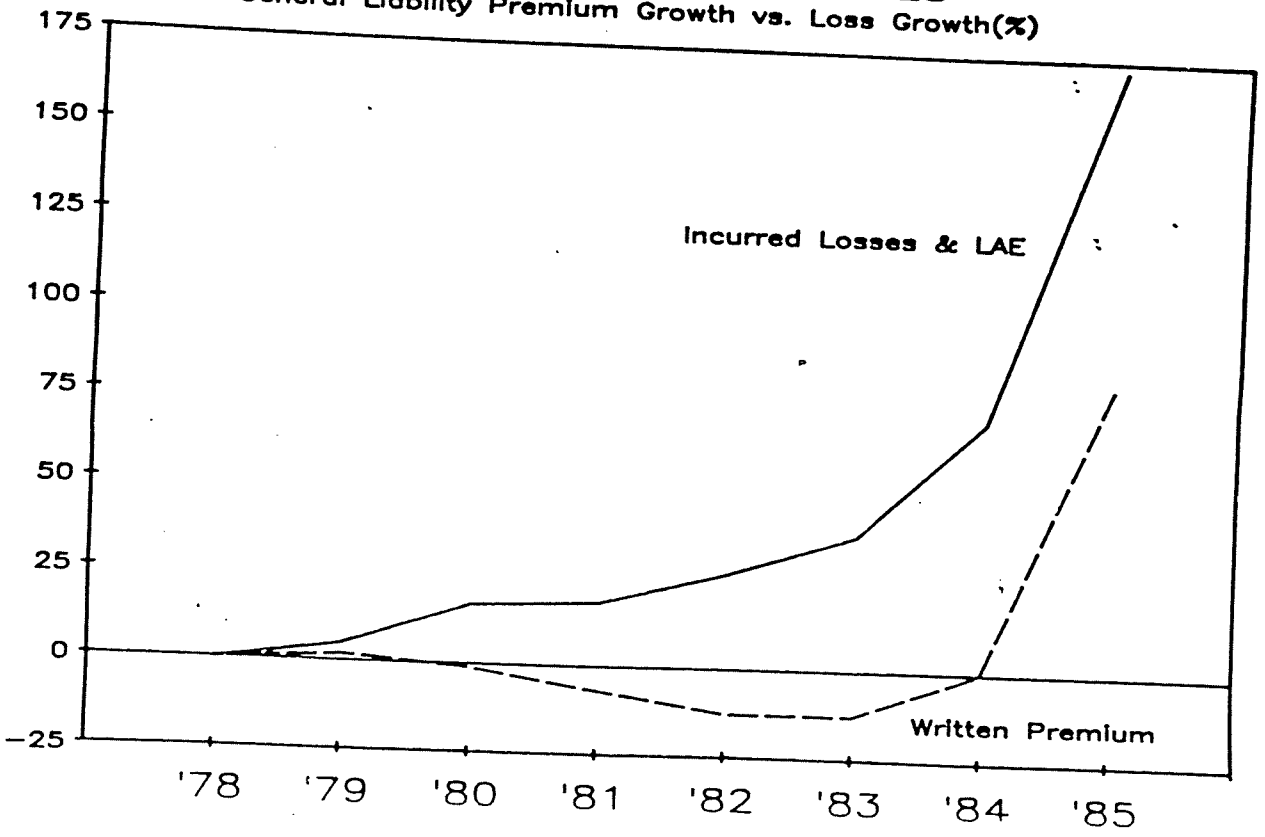
From 1978 to 1984, general liability losses and loss adjustment expense increased 74% while written premium did not increase. Therefore, it is not suprising that insurers needed to raise their premium levels to catch up to the growth in losses.

General Liability written premium increased 82% in 1985. HOWEVER, this growth should not be considered excessive since total loss growth since 1978 still exceeds premium growth.

Figure 27 shows that, since 1978, incurred loss and loss adjustment expense increased 172.5%. During this period, written premium increased only 82.2%. From 1978 to 1985, the rate of growth in losses was nearly double that of premiums.

The large increase in premium does <u>not</u> recoup past losses. In fact, this rise in premium is just an attempt to get premiums in line with dramatically rising losses.

1985 GENERAL LIABILITY PREMIUM GROWTH NOT ENOUGH TO CATCH LOSSES



UNIQUENESS OF THIS CYCLE

The current profitability cycle is not a typical one. A look at today's problem vs. previous records show several ominous new records have been set.

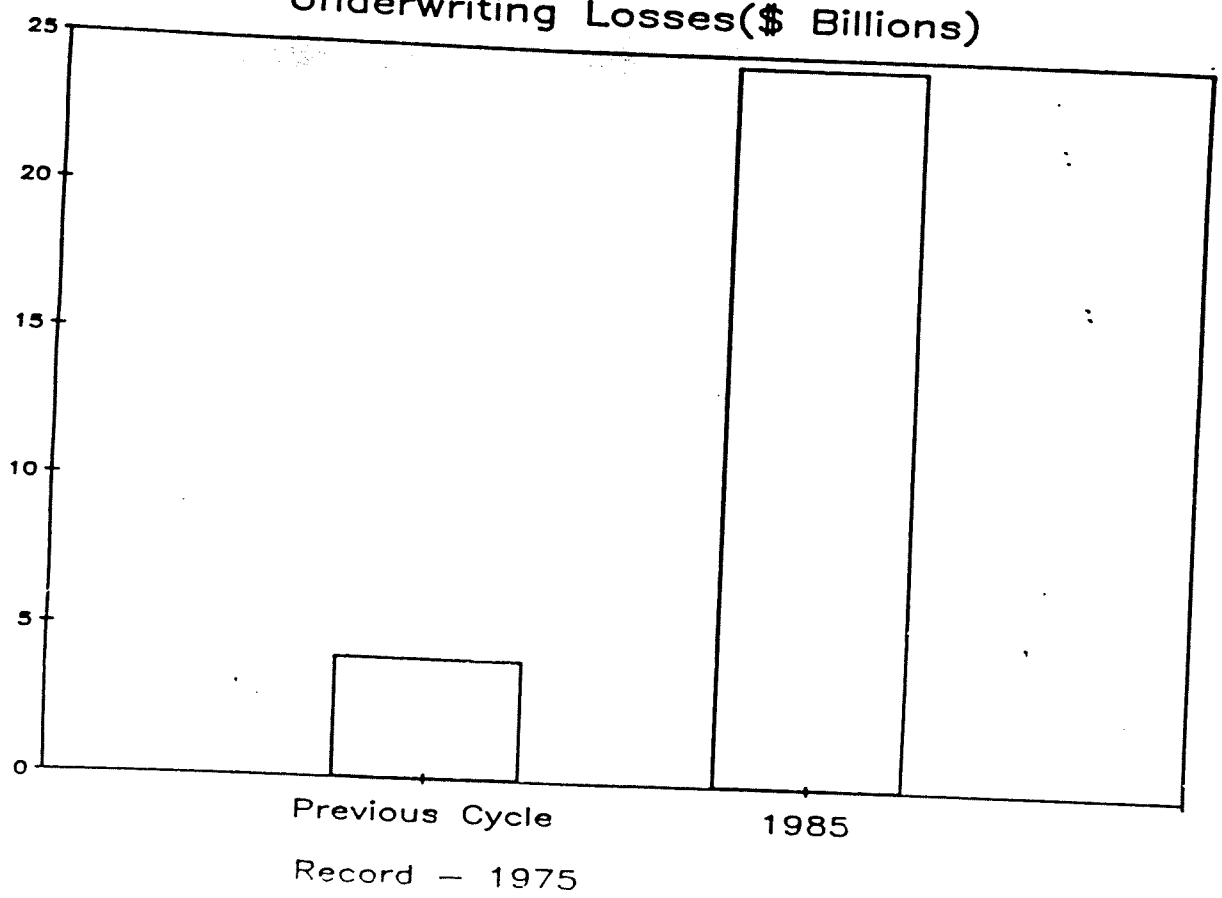
The following figures compare 1984 results to the records set prior to the current cyclic downturn. However, some of these new records were broken again in 1985.

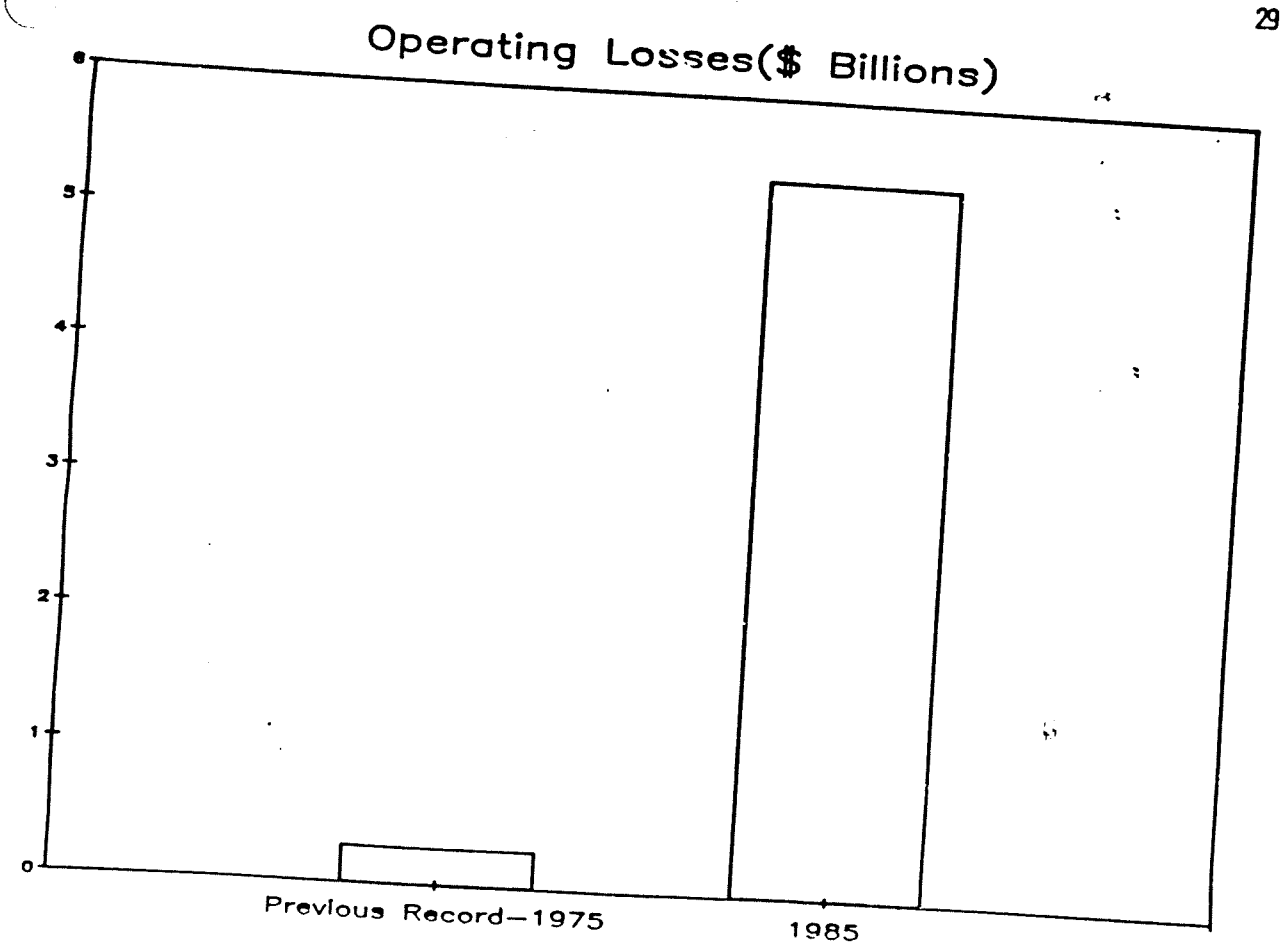
Figure 28 shows that the record 1984 underwriting loss of $21.5 billion far surpassed the previous record of $4.2 billion set in 1975. The 1985 underwriting loss of $24.7 billion was even worse.

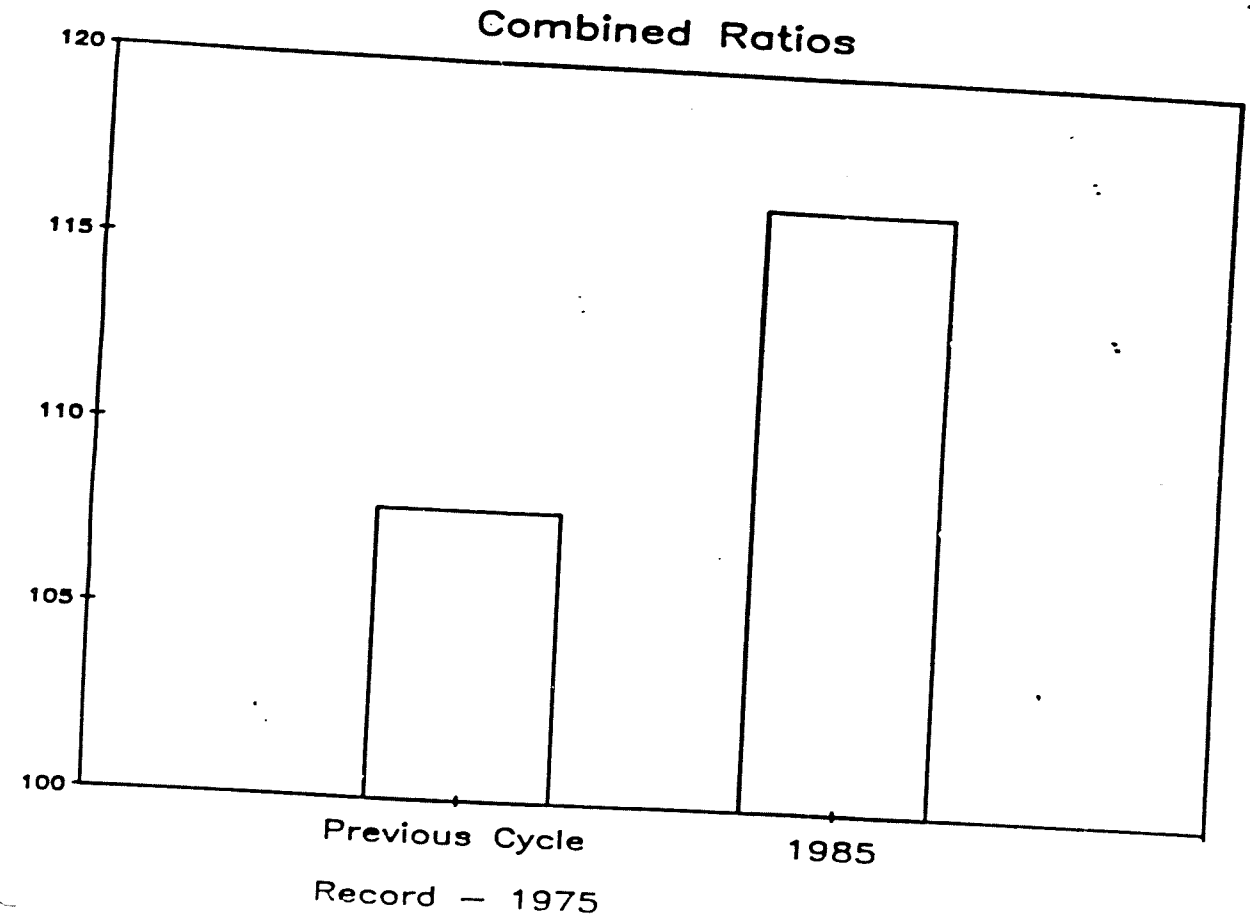
While investment income in 1984 also hit a record $17.7 billion, Figure 29 shows that the combined impact of underwriting and investment results was a record 1984 operating loss of $3.8 billion which exceeds the previous record of $300 million set in 1975. The 1985 operating loss of $5.4 billion was even worse, despite a $2 billion increase in investment income.

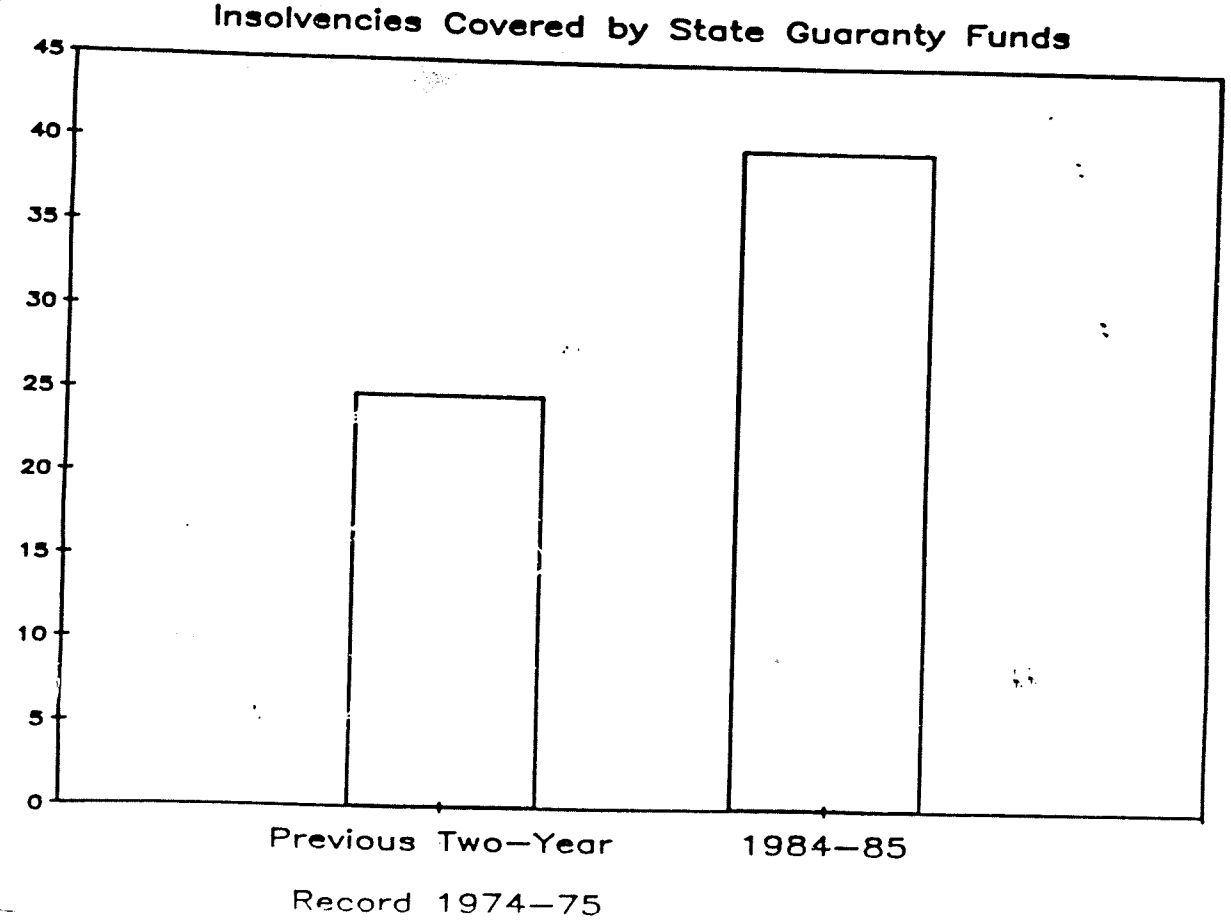
Figure 30 shows that the 1984 record combined ratio of 118.0 far surpassed the previous record of 107.9 set in 1975. The 1985 combined ratio showed a small improvement to 116.4.

Figure 31 shows that the record of 40 insolvencies covered by state guaranty funds for the two years 1984-85 exceeded the previous two-year record of 25 set in 1974-75.


Underwriting Losses($ Billions)
25
20
15
10
5
0
Previous Cycle
1985
Record — 1975


Operating Losses($ Billions)
6
5
4
3
2
1
0
Previous Record—1975
1985


Combined Ratios
120
115
110
105
100
Previous Cycle
1985
Record – 1975


Insolvencies Covered by State Guaranty Funds
45
40
35
30
25
20
15
10
5
0
Previous Two-Year Record 1974-75
1984-85

40

4060

Countrywide Results for Selected Commercial Liability Classes

Insurance Services Office, Inc.
April 1986

Attachment 40

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COUNTRYWIDE RESULTS FOR SELECTED COMMERCIAL LIABILITY CLASSES

BACKGROUND

Many regulatory and legisative bodies have conducted inquiries over the past several months into some affordability and availability issues for certain commercial liability classes of insurance. These inquiries have usually focused on municipalities, other governmental subdivisions, liquor liability and day care centers. The purpose of this document is to provide the most recent countrywide premium and loss information for these and other commercial liability classes.

ISO ACTION

ISO has provided countrywide and/or state statistical plan data from all our reporting carriers to various state commissions including, most recently, commissions in Illinois, New Jersey and New York. Tables and summary graphs of the type of countrywide experience presented are in Sections Two and Three of this document.

ISO will continue to respond to similar requests for such data, as may be appropriate. Furthermore, individual state summary exhibits will be prepared and provided to regulators and other interests as requested and appropriate. The countrywide information is provided herein so that any insurer responding to inquiries for its own data will be aware of the contents, specifications and format of the material ISO has provided.

SPECIAL NOTICE

Much of this business is written by markets not reporting to ISO or under programs that do not capture detailed information.

PERSON TO CONTACT

Any questions or comments, including the availability of specific state information, may be directed to:

Michael Fusco
Senior Vice President & Actuary
Insurance Services Office, Inc.
175 Water Street
New York, New York 10038
(212) 487-5020

CONTENTS

SECTION ONE — Description of the Statistical Results

SECTION TWO — Statistical Experience of:

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- Sheet 2 - All Municipal Classes (including the experience shown in Sheet 2A)
- Sheet 2A - Streets and Roads
  Public Schools
  Governmental Subdivisions
- Sheet 3 - Municipal Related Classes
- Sheet 4 - Recreational Classes
- Sheet 5 - Day Nurseries
- Sheet 6 - Liquor Liability

SECTION THREE — Graphs of Changes in Premiums and Losses for:

- Sheet 1 - All Owners, Landlords and Tenants Classes
- Sheet 2 - All Municipal Classes
- Sheet 3 - Streets and Roads
- Sheet 4 - Public Schools
- Sheet 5 - Governmental Subdivisions
- Sheet 6 - Municipal Related Classes
- Sheet 7 - Recreational Classes
- Sheet 8 - Day Nurseries
- Sheet 9 - Liquor Liability

DESCRIPTION OF THE STATISTICAL RESULTS

DATA INCLUDED

Each exhibit presents the countrywide statistical data of one group of risks. The experience of both monoline and multiline policies written under ISO programs or essentially similar programs is included. These exhibits separately compile the five most recent policy years (years ending December 31, 1980 through 1984), and show five-year totals.

Only Owners, Landlords and Tenants (OL&T) Bodily Injury Liability or Liquor Liability experience reported to ISO under the ISO Commercial Statistical Plan (CSP) and the intermediate level of the Commercial Minimum Statistical Plan (CMSP) is included. This includes the experience of all ISO reporting companies except for the very smallest, which may elect to report under the mini level of CMSP. The specific ISO class codes used are listed on each exhibit.

DEFINITIONS

Total Limits Earned Premium is the actual premiums collected for policies in the indicated policy years. These premiums are not adjusted either for ratemaking considerations such as subsequent rate changes, or to eliminate the effect of package or other rating modifications.

Incurred Losses are the actual losses paid for the policies plus the reserves for unpaid losses as of March 31, 1985. The losses have been adjusted to ultimate settlement level using the countrywide loss development factors for OL&T manual ratemaking classes. These factors adjust primarily for the later emergence of claims that had not been reported by March 31, 1985. The losses were also adjusted to include unallocated loss adjustment expenses, based on the standard factor developed from all General Liability experience. Any deviations from these average values will result in inaccuracies in the estimated ultimate values of losses and loss adjustment expenses. Losses have not been adjusted for subsequent changes in cost levels.

Basic Limits Incurred Losses include the first $25,000 of each loss and all loss adjustment expenses. Excess Limits Incurred Losses are that part of each loss in excess of $25,000, but do not include loss adjustment expense.

The Number of Incurred Claims is reported claims adjusted to ultimate settlement levels based on development factors derived from the countrywide experience of OL&T manual ratemaking classes.

DEFINITIONS

The Loss and Loss Adjustment Expense Ratio compares the total limits incurred losses and loss adjustment expenses with the total limits collected earned premiums. This ratio calculates the dollars of losses and loss adjustment expenses incurred per dollar of premium collected. The ratio has not been adjusted to include company operating expenses.

DATA LIMITATIONS

Any analysis that uses the data shown in these exhibits must consider the limitations of the data. The reported experience for these classes is often quite limited, so the credibility of the results must be carefully examined.

Data for these classes are also available on a state basis. The state data are directly comparable to the countrywide. Because of the smaller volume, credibility is a more important consideration when examining data from a single state than when the data are considered on a countrywide basis. Distortions in the state data may also occur because of the absence from the ISO database of the state's major writers of that class. Furthermore, an individual state's data may not yet reflect national trends which will transcend state boundaries, such as landmark court decisions in other jurisdictions.

The experience reported to ISO for these classes does not include the entire market for these types of risks (for example, an insurer that has developed an independent program using a different exposure base or coverage provisions). Similarly, excess or deductible liability insurance cannot be included. Also, some carriers, such as the excess and surplus lines carriers that have written much of the liquor liability market, do not report statistics to ISO. Because of these exclusions, the experience reported here may not be representative of the entire market.

GENERAL LIABILITY INSURANCE
ALL OWNERS, LANDLORDS AND TENANTS CLASSES
MONOLINE AND MULTILINE COMBINED

Owners, Landlords and Tenants includes coverage arising from liability claims for bodily injury and medical payments arising out of the ownership, maintenance or use of the covered premises and incidental operations. The remaining exhibits in this report, except for Liquor Liability, detail specific classifications of OL&T.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 502,589,481	$ 318,541,483	$ 138,366,733	57,680	90.9%
12/31/81	652,083,610	450,110,341	218,620,521	76,396	102.6%
12/31/82	719,568,955	600,871,615	271,239,890	99,611	121.2%
12/31/83	774,480,450	683,155,842	352,750,271	104,405	133.8%
12/31/84	762,267,289	742,975,287	436,313,901	106,307	154.8%
TOTAL	$3,410,989,785	$2,795,654,568	$1,417,291,316	444,399	123.5%

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GENERAL LIABILITY INSURANCE
MUNICIPAL CLASSES*
MONOLINE AND MULTILINE COMBINED

This exhibit includes all OL&T classes that are strictly municipal in nature. Sheet 2A summarizes particular groups of municipal classes. Their experience is also included here. Certain exposures, such as housing projects, bus stations and bridges are excluded from these classes, and are shown in a separate exhibit on Sheet 3.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 35,296,627	$ 31,251,906	$ 15,719,085	4,390	133.1%
12/31/81	57,007,556	48,984,959	30,810,927	6,460	140.0%
12/31/82	66,407,102	67,818,339	39,395,319	8,527	161.4%
12/31/83	78,059,122	96,319,947	69,406,579	11,630	212.3%
12/31/84	67,692,458	100,679,876	73,688,299	12,125	257.7%
TOTAL	$304,462,865	$345,055,027	$229,020,209	43,132	188.6%

*Classes Included

82113	Public High Schools or Junior Colleges
82116	Schools - Not otherwise classified
91250 - 91263	Governmental Subdivisions
92151, 92153, 93151	Streets and Roads
93050	Governmental Composite Rated Risks
93111	Government Employees
93155	Play Streets
93164	Municipal Permits
93221	Elementary, Kindergarten or Junior High Schools - Public

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GENERAL LIABILITY INSURANCE

STREETS AND ROADS (CLASSES 92151, 92153 AND 93151)
MONOLINE AND MULTILINE COMBINED

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 6,874,941	$10,080,648	$ 5,124,326	1,307	221.2%
12/31/81	7,538,187	14,461,824	8,575,478	1,654	305.6%
12/31/82	7,328,564	17,623,471	13,505,009	1,818	424.8%
12/31/83	6,660,170	17,677,843	16,507,406	1,921	513.3%
12/31/84	5,652,493	17,050,818	13,603,390	1,868	542.5%
TOTAL	$34,054,355	$76,894,604	$57,315,609	8,568	394.1%

PUBLIC SCHOOLS (CLASSES 82113, 82116, AND 93221)
MONOLINE AND MULTILINE COMBINED

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$12,336,307	$ 10,440,549	$ 3,600,852	1,807	113.8%
12/31/81	17,130,091	15,196,239	7,081,218	2,595	130.0%
12/31/82	19,234,384	19,856,327	7,124,042	3,106	140.3%
12/31/83	26,392,414	36,820,657	22,929,399	4,844	226.4%
12/31/84	24,262,371	39,878,934	23,557,466	5,100	261.6%
TOTAL	$99,355,567	$122,192,706	$64,292,977	17,452	187.7%

GOVERNMENTAL SUBDIVISIONS (CLASSES 91250 - 91263)
MONOLINE AND MULTILINE COMBINED

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/81	$13,966,938	$ 8,076,986	$ 6,877,043	886	107.1%
12/31/82	26,561,019	18,588,450	10,916,487	2,236	111.1%
12/31/83	29,064,201	25,595,258	16,304,092	3,079	144.2%
12/31/84	25,970,257	31,422,775	24,746,253	3,627	216.4%
TOTAL	$95,562,415	$83,683,469	$58,843,875	9,828	149.2%

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GENERAL LIABILITY INSURANCE
MUNICIPAL RELATED CLASSES*
MONOLINE AND MULTILINE COMBINED

These classes are for exposures not included in the Governmental Subdivisions classes, but that may involve municipal functions. Any private facilities rated under these classes are also included here.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 2,713,060	$ 2,047,952	$ 2,138,636	308	154.3%
12/31/81	3,152,971	2,038,694	2,120,460	389	131.9%
12/31/82	3,634,554	2,946,540	612,034	545	97.9%
12/31/83	3,689,628	3,371,102	2,559,962	535	160.7%
12/31/84	3,732,128	3,958,355	2,089,123	619	162.1%
TOTAL	$16,922,341	$14,362,643	$ 9,520,215	2,396	141.1%

*Classes Included

41711	Bus Stations or Terminals
44631 44632 44633 44639	Wharf or Waterfront Property
45836	Airports
47841	Toll Bridges
47850	Drawbridges
92154	Highways or Roads or Dept. of Public Works
93131	Firehouses
91188 91231 92181 92182 92184 - 92187 93181 93182 93184 93185	Housing Projects

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GENERAL LIABILITY INSURANCE
RECREATIONAL CLASSES
MONOLINE AND MULTILINE COMBINED

These classes are for recreational facilities and events such as amusement parks, grandstands, ski-lifts and fireworks demonstrations. They may be municipal or private. The 88 actual class codes are too numerous to list here.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 39,270,579	$ 25,350,520	$10,003,986	5,367	90.0%
12/31/81	49,376,922	31,904,007	13,858,365	5,931	92.7%
12/31/82	56,875,885	42,194,290	16,164,611	8,448	102.6%
12/31/83	58,921,287	50,406,642	25,203,624	8,687	128.3%
12/31/84	60,226,085	55,164,373	34,009,622	8,284	148.1%
TOTAL	$264,670,758	$205,019,832	$99,240,208	36,717	115.0%

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GENERAL LIABILITY INSURANCE
DAY NURSERIES (CLASS 82115)
MONOLINE AND MULTILINE COMBINED

This exhibit includes experience under the OL&T Day Nurseries classification. This class is institutional day care operations, i.e., when day care is the primary function of the business. This experience does not include day care which is provided out of an individual's home and has been deemed by the underwriter to be an "incidental business exposure" according to the rules of the Homeowners Policy and is covered there.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 1,785,529	$ 1,013,414	$ 268,671	254	71.8%
12/31/81	2,581,645	1,199,095	1,139,122	336	90.6%
12/31/82	3,321,139	2,026,196	1,597,703	462	109.1%
12/31/83	4,016,915	3,073,908	2,430,769	612	137.0%
12/31/84	4,586,601	4,452,400	3,331,254	840	169.8%
TOTAL	$16,291,829	$11,765,013	$8,767,519	2,504	126.0%

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GENERAL LIABILITY INSURANCE
LIQUOR LIABILITY*
MONOLINE AND MULTILINE COMBINED

For states where liquor liability is imposed by statute or under common law principles, these classes include: clubs, package stores selling alcoholic beverages for off-premises consumption, manufacturers, wholesalers and distributors, restaurants, taverns, hotels and motels, temporary licensees, and owners or lessors of premises used by others in the business of manufacturing, distributing, selling or serving alcoholic beverages. Data from states that do not impose liquor liability by statute or under common law is also included.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 8,946,430	$ 1,917,279	$ 1,942,659	127	43.1%
12/31/81	11,595,663	3,172,391	2,690,031	195	50.6%
12/31/82	18,159,662	5,878,950	6,497,060	396	68.2%
12/31/83	14,169,075	3,526,863	4,412,736	273	56.0%
12/31/84	10,797,671	3,726,068	5,182,816	302	82.5%
TOTAL	$63,668,501	$18,221,551	$20,725,302	1,293	61.2%

* Classes Included: 50881, 50882, 58151, 58161, 58168, 58169, 58191, 58198, 58199, 50911 ,59211, 59212, 70113, 70114, 70411, 70412, 70413, 70414, 70415, 70416

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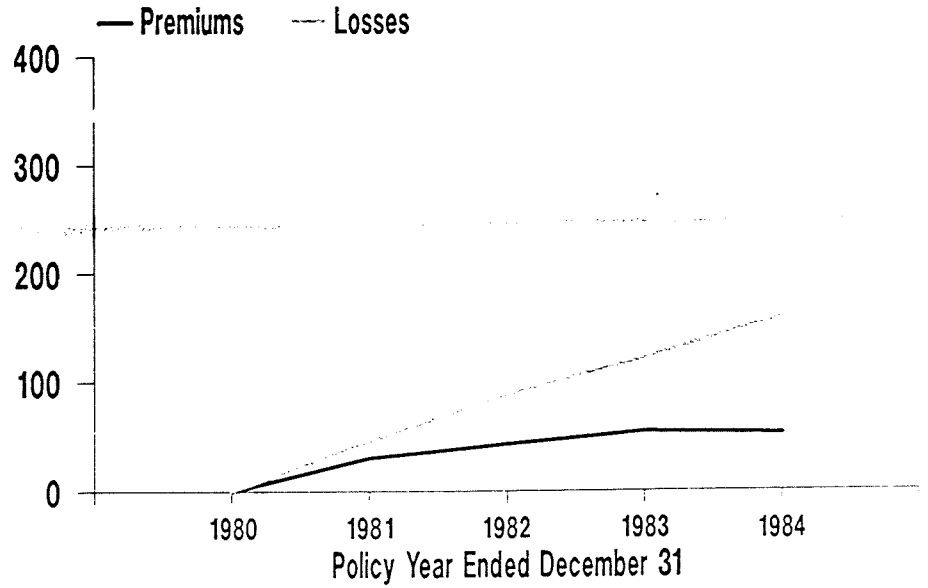
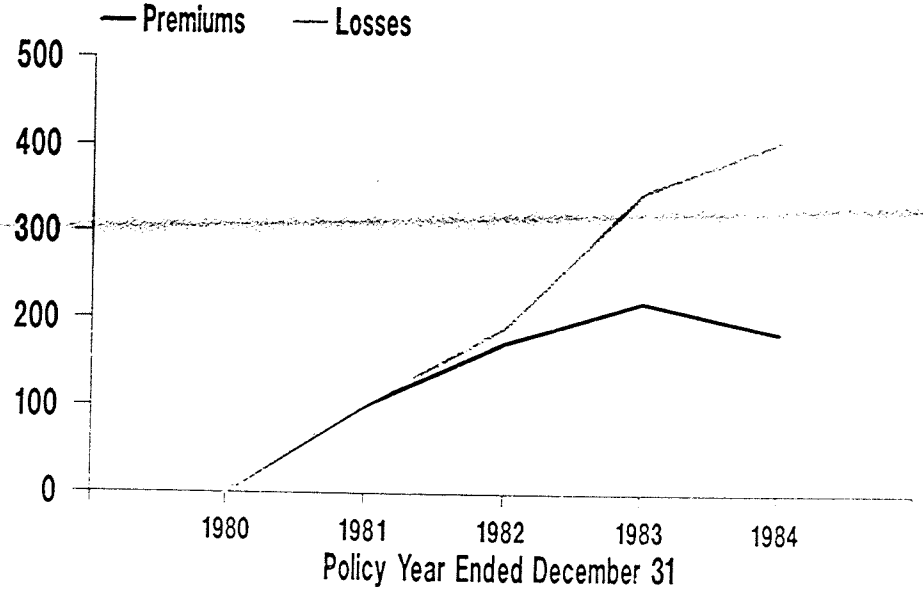
All Owners, Landlords and Tenants Classes

Growth in Premiums and Losses (%) as Reported to ISO



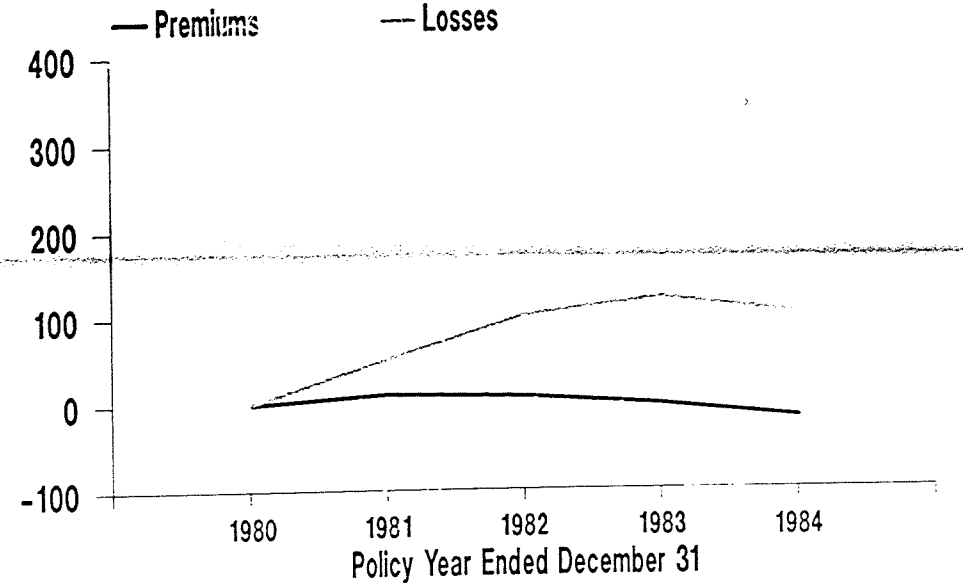
All Municipal Classes

Growth in Premiums and Losses (%) as Reported to ISO



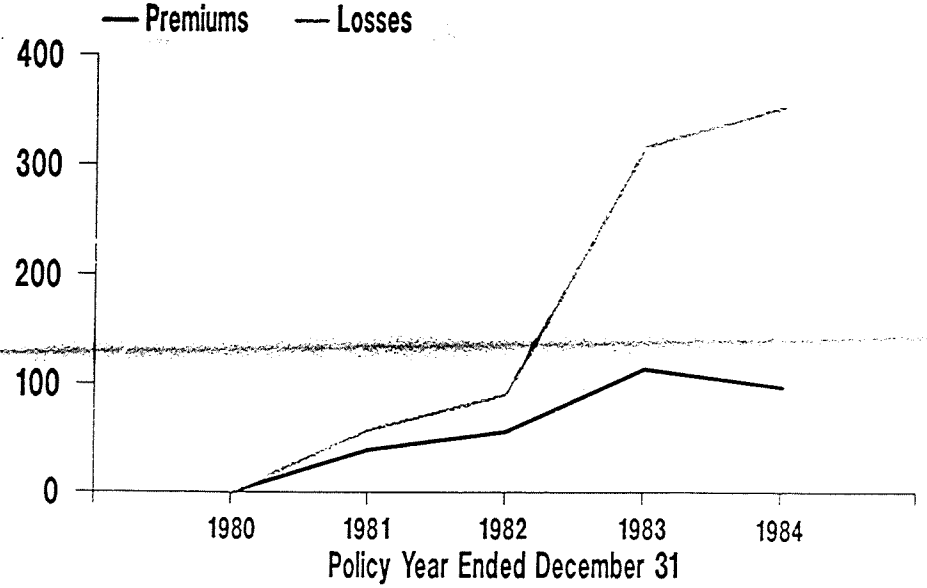
Streets and Roads

Growth in Premiums and Losses (%) as Reported to ISO



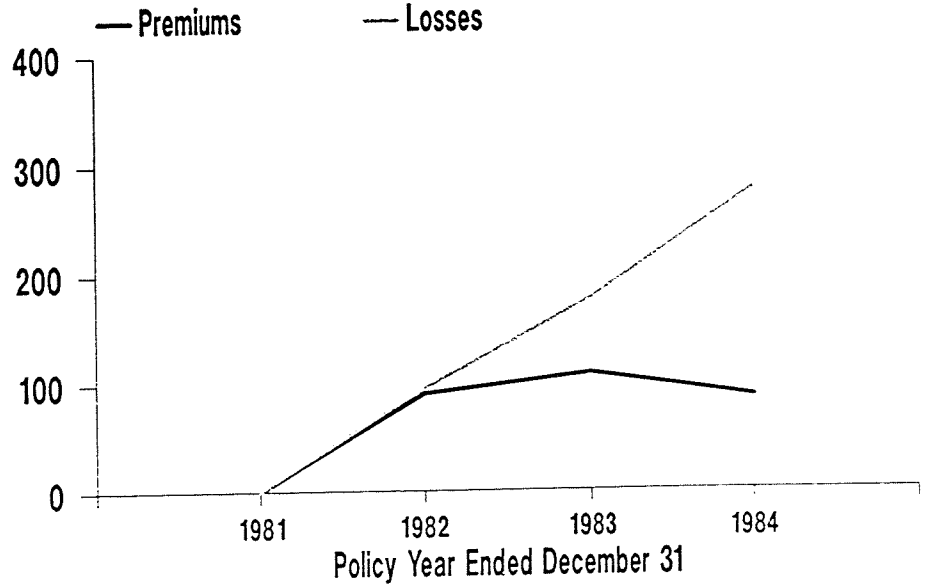
Public Schools

Growth in Premiums and Losses (%) as Reported to ISO



Governmental Subdivisions

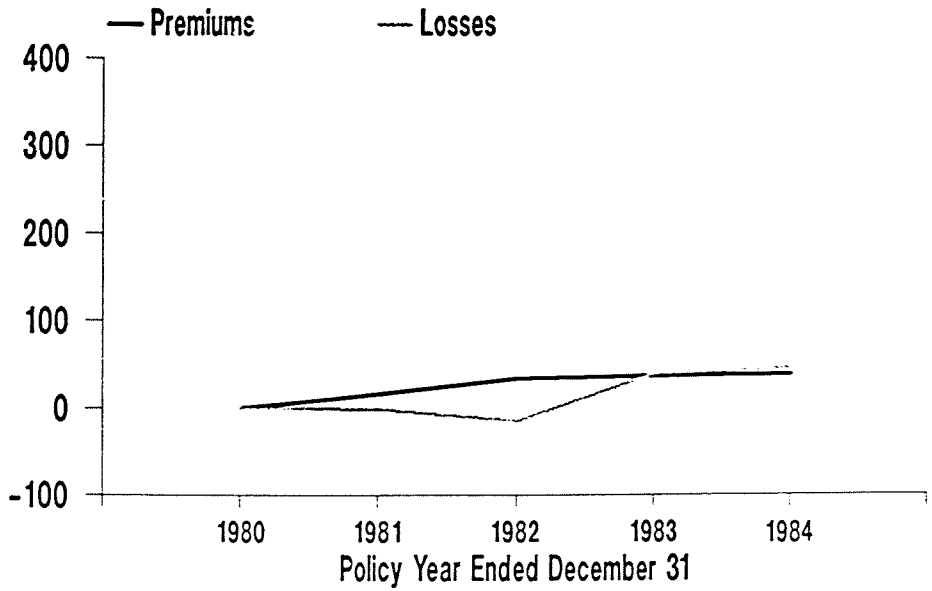
Growth in Premiums and Losses (%) as Reported to ISO



Insufficient data for policy year ended December 31, 1980.

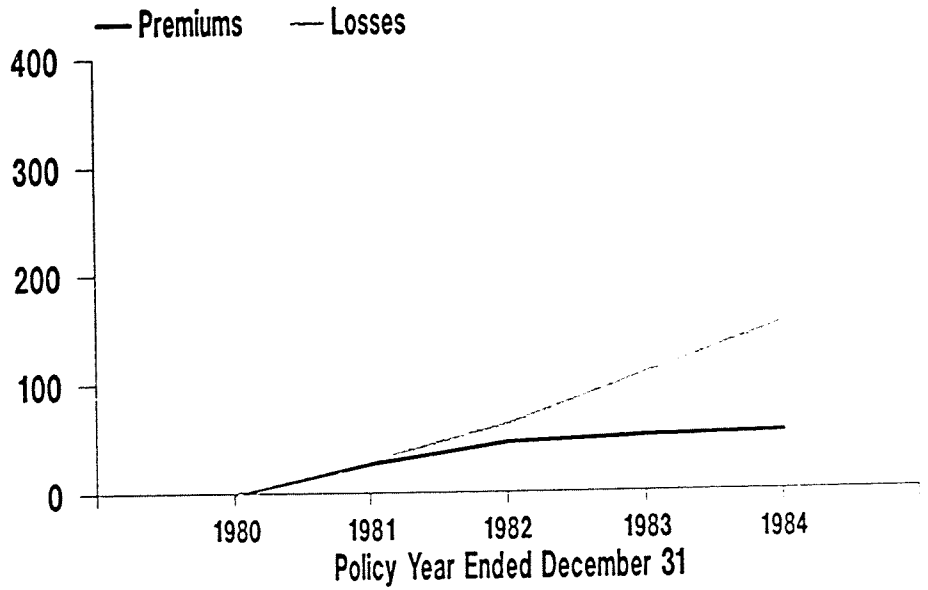
Municipal Related Classes

Growth in Premiums and Losses (%) as Reported to ISO



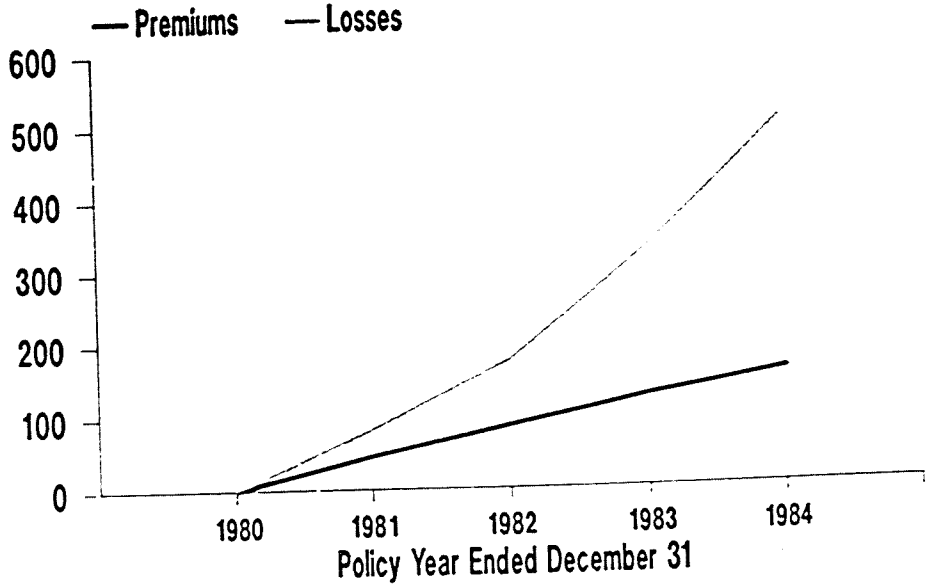
Recreational Classes

Growth in Premiums and Losses (%) as Reported to ISO



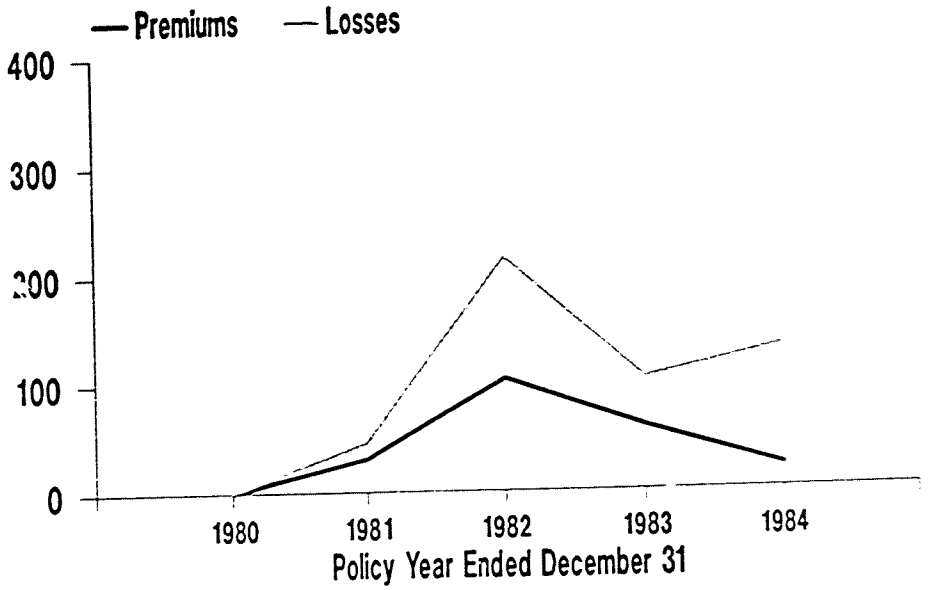
Day Nurseries

Growth in Premiums and Losses (%) as Reported to ISO



Liquor Liability

Growth in Premiums and Losses (%) as Reported to ISO



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GENERAL LIABILITY INSURANCE
OWNERS, LANDLORDS, AND TENANTS BODILY INJURY
MONOLINE AND PACKAGE BUSINESS

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-80	3,471,719	1,829,381	371,489	360	0.634
31-Dec-81	4,472,499	2,352,321	989,875	449	0.747
31-Dec-82	5,389,378	2,963,894	1,363,880	630	0.803
31-Dec-83	6,049,295	3,630,454	1,880,030	681	0.911
31-Dec-84	5,748,464	3,839,157	2,431,142	699	1.091
TOTAL	25,131,355	14,615,207	7,036,416	2,819	0.862
COUNTRYWIDE					
31-Dec-80	502,589,481	318,541,483	138,366,733	57,680	0.909
31-Dec-81	652,083,610	450,110,341	218,620,521	76,396	1.026
31-Dec-82	719,568,955	600,871,615	271,239,890	99,611	1.212
31-Dec-83	774,480,450	683,155,842	352,750,271	104,405	1.338
31-Dec-84	762,267,289	742,975,287	436,313,901	106,307	1.547
TOTAL	3,410,989,785	2,795,654,568	1,417,291,316	444,399	1.235

Attachment 41

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GENERAL LIABILITY INSURANCE
MUNICIPAL CLASSES
MONOLINE AND PACKAGE BUSINESS

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-80	242,670	310,459	36,912	42	1.431
31-Dec-81	678,334	350,281	1,224	41	0.518
31-Dec-82	1,076,702	552,127	20,671	77	0.532
31-Dec-83	1,154,845	946,811	1,322,932	115	1.965
31-Dec-84	907,077	639,396	1,294,812	73	2.132
TOTAL	4,059,628	2,799,074	2,676,551	348	1.349
COUNTRYWIDE					
31-Dec-80	35,296,627	31,251,906	15,719,085	4,390	1.331
31-Dec-81	57,007,556	48,984,959	30,810,927	6,460	1.400
31-Dec-82	66,407,102	67,818,339	39,395,319	8,527	1.614
31-Dec-83	78,059,122	96,319,947	69,406,579	11,630	2.123
31-Dec-84	67,692,458	100,679,876	73,688,299	12,125	2.576
TOTAL	304,462,865	345,055,027	229,020,209	43,132	1.886

GENERAL LIABILITY INSURANCE
GOVERNMENTAL SUBDIVISIONS
MONOLINE AND PACKAGE BUSINESS

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-81	310,228	68,340	0	10	0.220
31-Dec-82	544,017	192,447	0	30	0.354
31-Dec-83	583,771	341,925	136,858	50	0.820
31-Dec-84	374,913	196,136	0	22	0.523
TOTAL	1,812,929	798,848	136,858	112	0.516
COUNTRYWIDE					
31-Dec-81	13,966,938	8,076,986	6,877,043	886	1.071
31-Dec-82	26,561,019	18,588,450	10,916,487	2,236	1.111
31-Dec-83	29,064,201	25,595,258	16,304,092	3,079	1.442
31-Dec-84	25,970,257	31,422,775	24,746,253	3,627	2.163
TOTAL	95,562,415	83,683,469	58,843,875	9,828	1.491

GENERAL LIABILITY INSURANCE
PUBLIC SCHOOLS (CLASSES 82113, 82116 AND 93221)
MONOLINE AND PACKAGE BUSINESS

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-80	89,928	235,543	36,912	27	3.030
31-Dec-81	115,265	189,868	1,224	21	1.658
31-Dec-82	118,821	254,563	20,671	32	2.316
31-Dec-83	183,754	306,992	874,724	41	6.431
31-Dec-84	219,638	103,882	0	36	0.473
TOTAL	727,406	1,090,848	933,531	157	2.783
COUNTRYWIDE					
31-Dec-80	12,336,307	10,440,549	3,600,852	1,807	1.138
31-Dec-81	17,130,091	15,196,239	7,081,218	2,595	1.300
31-Dec-82	19,234,384	19,856,327	7,124,042	3,106	1.403
31-Dec-83	26,392,414	36,820,657	22,929,399	4,844	2.264
31-Dec-84	24,262,371	39,878,934	23,557,466	5,100	2.615
TOTAL	99,355,567	122,192,706	64,292,977	17,452	1.877

GENERAL LIABILITY INSURANCE
STREETS AND ROADS
MONOLINE AND PACKAGE BUSINESS

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-80	128,060	74,530	0	10	0.582
31-Dec-81	164,875	83,292	0	6	0.505
31-Dec-82	157,905	101,937	0	12	0.646
31-Dec-83	138,895	263,937	311,351	20	4.142
31-Dec-84	94,268	289,947	1,294,812	9	16.811
TOTAL	684,003	813,643	1,606,163	57	3.538
COUNTRYWIDE					
31-Dec-80	6,874,941	10,080,648	5,124,326	1,307	2.212
31-Dec-81	7,538,187	14,461,824	8,575,478	1,654	3.056
31-Dec-82	7,328,564	17,623,471	13,505,009	1,818	4.248
31-Dec-83	6,660,170	17,677,843	16,507,406	1,921	5.133
31-Dec-84	5,652,493	17,050,818	13,603,390	1,868	5.423
TOTAL	34,054,355	76,894,604	57,315,609	8,568	3.941

GENERAL LIABILITY INSURANCE
RELATED MUNICIPAL CLASSES
MONOLINE AND PACKAGE BUSINESS

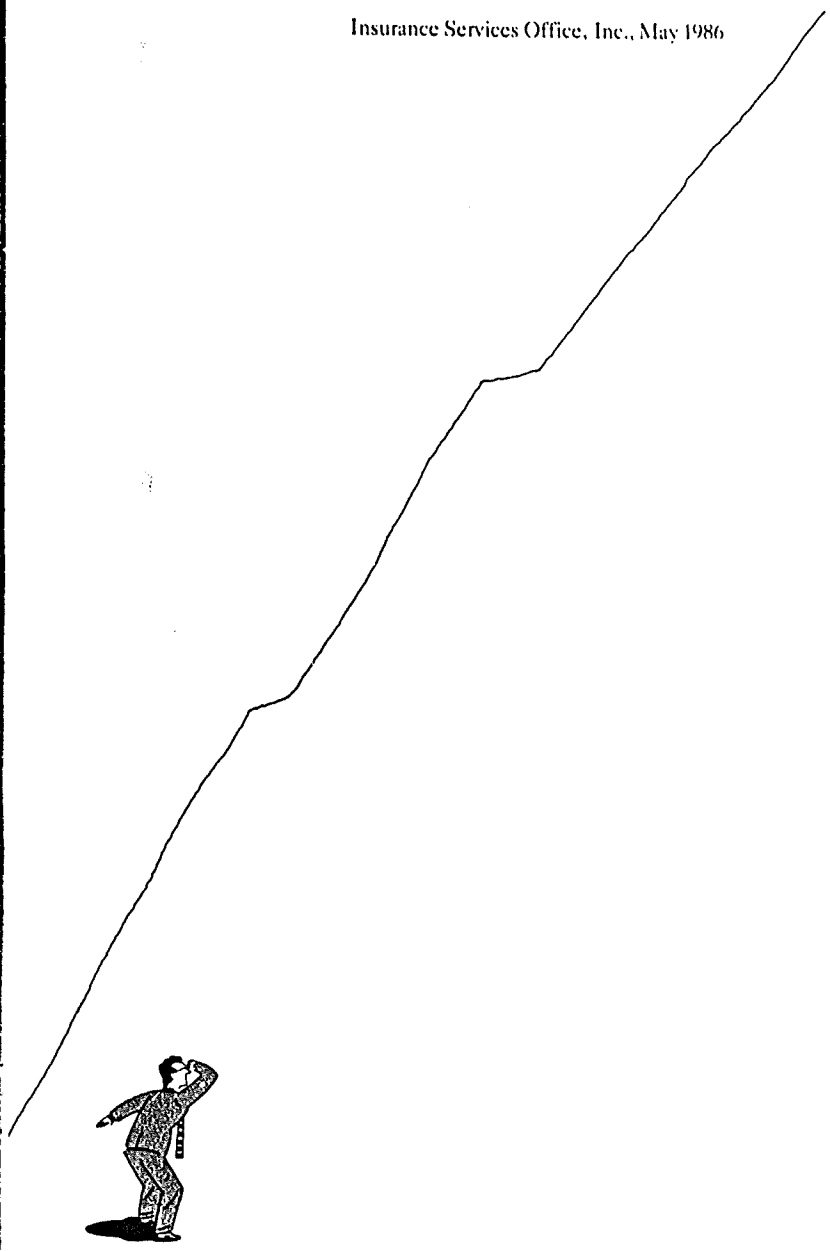
POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-80	6,338	0	0	0	0.000
31-Dec-81	13,594	138	0	0	0.010
31-Dec-82	26,081	6	0	0	0.000
31-Dec-83	32,658	854	0	1	0.026
31-Dec-84	28,719	17,990	0	3	0.626
TOTAL	107,390	18,988	0	4	0.177
COUNTRYWIDE					
31-Dec-80	2,713,060	2,047,952	2,138,636	308	1.543
31-Dec-81	3,152,971	2,038,694	2,120,460	389	1.319
31-Dec-82	3,634,554	2,946,540	612,034	545	0.979
31-Dec-83	3,689,628	3,371,102	2,559,962	535	1.607
31-Dec-84	3,732,128	3,958,355	2,089,123	619	1.620
TOTAL	16,922,341	14,362,643	9,520,215	2,396	1.411

GENERAL LIABILITY INSURANCE
RECREATIONAL CLASSES
MONOLINE AND PACKAGE BUSINESS

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED BASIC LIMITS INC. LOSSES	DEVELOPED EXCESS LIMITS INC. LOSSES	NUMBER OF CLAIMS	T/L LOSS RATIO
KANSAS					
31-Dec-80	346,319	238,797	64,449	46	0.876
31-Dec-81	410,942	428,146	298,568	66	1.768
31-Dec-82	538,717	258,210	38,586	83	0.551
31-Dec-83	602,731	232,881	25,661	78	0.429
31-Dec-84	603,902	264,844	95,407	100	0.597
TOTAL	2,502,611	1,422,878	522,671	373	0.777
COUNTRYWIDE					
31-Dec-80	39,270,579	25,350,520	10,003,986	5,367	0.900
31-Dec-81	49,376,922	31,904,007	13,858,365	5,931	0.927
31-Dec-82	56,875,885	42,194,290	16,164,611	8,448	1.026
31-Dec-83	58,921,287	50,406,642	25,203,624	8,687	1.283
31-Dec-84	60,226,085	55,164,373	34,009,622	8,284	1.481
TOTAL	264,670,758	205,019,832	99,240,208	36,717	1.150

The Rising Costs of General Liability Legal Defense

Insurance Services Office, Inc., May 1986



Attachment 42

About ISO

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Introduction

Fact: The total legal defense expenses incurred by insurers on behalf of policyholders in 1984 was $5.1 billion, almost double the 1979 total. For general liability insurance (including general liability coverage in package policies), defense expenses reached $2.7 billion in 1984.

Fact: The proportion of general liability costs incurred by insurers (losses and all expenses) that are consumed by legal defense costs has nearly *tripled* over the 25-year period 1960 through 1984.

Fact: The industry's 1984 general liability reserves for loss adjustment expense—78 percent of which are legal defense costs—are *deficient by approximately 50%*.

Civil justice crisis. Tort reform. Affordability and availability problems for some commercial liability insurance classes. While the debate continues over the causes of and solutions to the excesses of our U.S. civil justice system, there is an emerging consensus on one point: the total insurer outgo devoted to funding the legal defense of general liability third-party claims is growing. From viewpoints as disparate as those of consumer organizations, government, corporate America and the legal profession, as well as the property/casualty insurance industry and its marketing forces, the need to take steps to curtail these legal defense costs is clear.

The purpose of this booklet is to provide a solid base of statistical evidence that documents the scope and magnitude of rising general liability legal defense costs. General liability insurance is the focus of this booklet because defense costs now consume such a large percentage of the premium dollars in this line.

1. Legal Defense Costs— The Data

Over time, most insurers have been able to proportionally decrease their expenses— with one major exception: legal defense costs. Insurance Services Office analyzed the relationship of general liability defense costs to total insurer outgo for that line of business (losses *and* all expenses) and found that loss adjustment expense has increased from 15.5% of total outgo in 1960 to 25.2% in 1984. (See Table 1.) Loss adjustment expense has two major components: unallocated loss adjustment expense, which is decreasing as a share of total outgo, and allocated loss adjustment expense (legal defense costs), which is increasing. Unallocated loss adjustment expense, the cost of claims handling and costs other than legal defense, decreased from 8.2% to 5.5%—a one-third reduction. Over the same 25-year period, legal defense costs increased from 7.3% to 19.7%, almost tripling as a percentage of total general liability loss and expense dollars incurred.

Defense expense is at unprecedented levels. In 1956, it averaged 12% of insurers' general liability incurred losses. (See Figure 1.) In the late 1960's and 1970's, when general liability losses grew rapidly, defense expense rose even faster. By 1970, these expenses accounted for almost 25% of incurred losses and, by 1984, had jumped to 36% of incurred losses. Stated another way, for every dollar insurers paid or set aside to reimburse an injured party in 1984 (the latest year for which data are available), they've had to allocate 36¢ for legal defense.

Table 1. General Liability Percentage of Total Costs Incurred by Insurers

	1960	1970	1980	1984
Unallocated Loss Adjustment Expense	8.2%	6.9%	5.8%	5.5%
Allocated Loss Adjustment Expense (Legal Defense Costs)	7.3	12.3	14.4	19.7
Total Loss Adjustment Expense	15.5%	19.2%	20.2%	25.2%

A recent ISO study reveals that, for a sample of companies writing one-fifth of U.S general liability premiums, the calendar year statistics quoted above, which include changes in expected loss and expense amounts of claims *incurred* prior to the listed year, obscure the rapid growth in defense expense for recent cases. Our analysis concludes that, based on historic patterns, for every indemnity dollar paid on claims *reported* in 1982 through 1984, these companies will spend approximately 46¢ in defense costs in order to pay out $1 to claimants. This is *double* the defense costs per loss dollar for claims reported to these companies during 1973–75.

ISO also examined whether there was a specific geographical area, or type or size of insured risk that could be identified as the source of these rising defense costs. The results are striking: Large defense expense is common *throughout* general liability insurance.

General liability insureds in *all* states share the defense cost burden.

Large defense costs are *not* attributable to a small number of problem classes, and it is virtually impossible to *predict* which general liability classes will incur large defense costs.

Large defense expense is *not* restricted to large general liability risks.

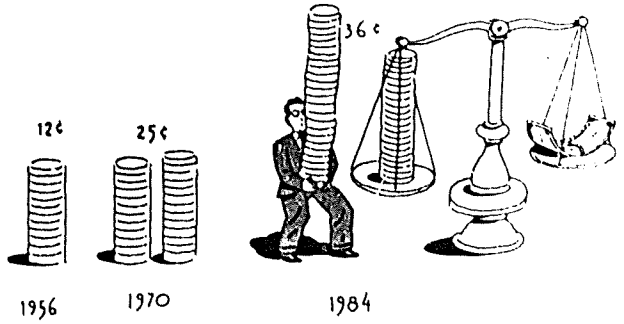


Figure 1. General Liability Defense Costs per Dollar of Loss
By 1984, defense costs stood at 36¢ per dollar of incurred loss—triple the 12¢ per incurred loss dollar figure of 1956.

States

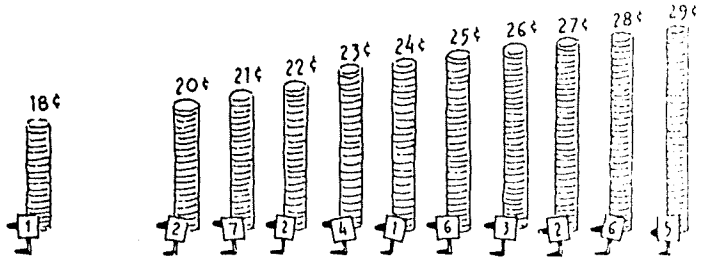
General liability insureds in all states share the defense cost burden. ISO examined each state's ratio of defense expense to indemnity for four policy years combined (1979–82). Most states clustered around the median ratio of 26%. Only two states' ratios varied more than 9 percentage points from the median, and both fell way above it. (See Figure 2.)

Classes

Large defense costs are not attributable to a small number of problem classes. More than 200 general liability classifications incurred defense costs of more than 50 cents per indemnity dollar on all policies written from 1979 to 1982. These included such diverse classes as:

Products/Completed Operations Liability:
- —Bookbinding
- —Burglar Alarms
- —Plumbing
- —Shoes, Boots and Slippers
- —Television Sets—household

Premises/Operations Liability:
- —Escalators—in office or bank buildings
- —Governmental Subdivisions—Personal Injury Coverage
- —Laboratories—research, development or testing
- —Mattress Manufacturing
- —Physiotherapists' Offices (excludes Professional Liability)
- —Railroad Construction
- —Sanitariums or Health Institutions — not



Number of States

hospitals or mental-psychopathic institutions (excludes Professional Liability)
—Toy or Game Manufacturing—except Bicycles
—Wharf and Waterfront Property—Ferry Docks

It is virtually impossible to predict which general liability classes will incur large defense costs. An attempt was made to predict which classes would incur unusually high defense costs in policy years 1981–82 by examining whether they had incurred similar costs in policy years 1979–80. A class was considered to have unusually high defense costs if its ratio of defense cost to indemnity was more than twice the industry average for the subline. The data consistently show that you can't predict which classes will have unusually high defense costs in one period based on their experience in preceding periods.

For example, 27 out of 406 products classes had unusually high defense costs in 1981–82. However, only 6 of these had unusually high defense costs in 1979–80. Furthermore, an additional 26 classes would erroneously have been labelled as classes with high defense expense based on their 1979–80 experience. In 1981–82, 19 of these 26 classes incurred

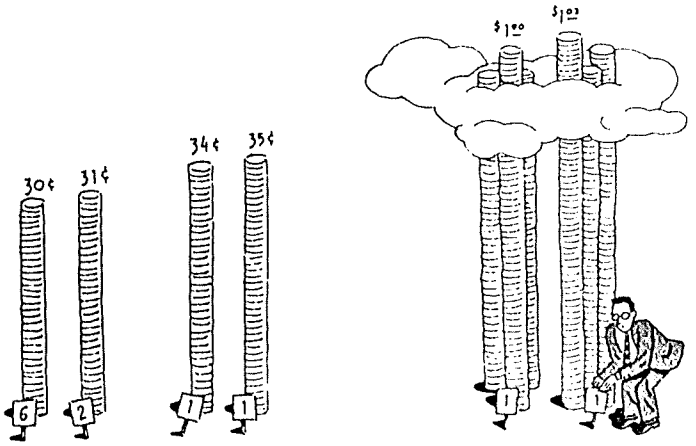


Figure 2. Distribution of States—General Liability Defense Costs per Indemnity Dollar
Of the 51 jurisdictions studied (50 states plus Washington, D.C.), 49 had average defense costs that clustered around the countrywide median of 26¢ per indemnity dollar. *Data are 1979-82 policy year figures for premises/operations and products combined.*

average defense expenses, leaving 7 of these 26 that actually incurred *low* defense-expense-to-indemnity ratios (less than half of the industry average).

Similar to products/completed operations, data for manufacturers and contractors, and for owners, landlords and tenants classes show the following:

M&C—Of 44 classes with unusually high ratios of defense expense to indemnity in 1981–82, only 11 would have been identified in advance based on 1979–80 data—along with 50 other classes that ended up having only low or average defense costs in 1981–82.

OL&T—Of 35 classes with unusually high ratios of defense expense to indemnity in 1981–82, only 9 would have been identified in advance based on 1979–80 data. An additional 49 classes with high defense costs in 1979–80 had low or average defense costs in 1981–82.

Based on ISO data, only one-sixth of the classes with large relative defense costs in 1979–80 still had high defense costs in 1981–82. A much larger portion of the classes with unusually high defense costs in 1979–80 had average or lower-than-average defense costs in 1981–82. Given the extreme variability of results and the ever-shifting effects of social trends, technological trends and case law on various general liability classes, it appears virtually impossible to select with reasonable certainty a large subset of classes which do not have a *potential* large defense exposure.

Table 2. General Liability Paid Defense Cost—Variation by Policy Size (Policy Year 1980)

Premium Size Group	Number of Policies	ALAE Paid per Dollar of Loss
up to $1,000	359,500	60¢
1,001 to 2,500	37,100	17
2,501–10,000	23,700	24
10,001–25,000	5,600	15
25,001–50,000	1,900	15
50,001–100,000	900	16
100,001–250,000	500	14
Over $250,000	300	21
Total	429,500	22¢

Source: ISO Special Study (See page 17.)

Size of Risk

Large defense expense is not restricted to large general liability risks. Experience for policy year 1980 from a sample of companies writing general liability insurance shows that, while somewhat variable, the ratio of paid defense cost to incurred indemnity for different premium size intervals exhibits no discernable pattern. (See Table 2.)

Relatively large defense expense is also not restricted to policies with high limits. Table 3 displays the incurred defense costs per dollar of indemnity for all premises/operations and products/completed operations policies written in 1979 (as of April 1, 1984). Ignoring random fluctuations at limits with sparse data, these ratios are fairly constant.

Based on the ISO findings, it is clear that high defense costs cannot be isolated to certain commercial general liability risks—whether grouped by classification, size, or geography.

Table 3. General Liability Incurred Defense Costs per Dollar of Loss—by Occurrence Limit (Policy Year 1979)

Occurrence Limit	Number of Occurrences	ALAE Incurred per Dollar of Loss
$25,000	5,223	18¢
50,000	11,355	19
100,000	40,264	21
200,000	1,562	30
250,000	7,967	19
300,000	36,187	20
500,000	56,711	20
1,000,000	27,590	20
1,500,000	384	21
2,000,000	707	30
Over $2,000,000	1,928	20
Total	189,878	20¢

2. Why the Explosive Growth in Defense Costs?

Two factors explain the explosive growth in the costs of defending and settling third-party claims, and to reduce such costs, these two factors must be addressed.

—*The way general liability contracts have traditionally been written.* The general liability contracts guarantee that, so long as dollars remain to pay claims against the insured, the insurer has an unlimited obligation to defend (and pay for) third-party claims against its insured. These provisions have unwittingly created a host of financial *dis*incentives to control defense expenses.

—*The lawsuit crisis itself.* Fueled by expansive theories of liability, litigation has become longer, more complicated, and inevitably, more costly.

Unlimited Duties, Unlimited Costs

Under today's standard general liability contracts, the insurer has the duty to defend its insured against claims by third parties—and to pay the costs of defending those claims—until the policy's dollar indemnity limits have been exhausted by payments of judgments or settlements. But there's no dollar limitation on the money spent for litigation and other defense expense.

In many instances, more resources are devoted to funding the civil justice system's transaction costs (primarily the fees of plaintiff and defense attorneys) than to compensating injured victims. Latent injury cases stemming from substances such as DES, Agent Orange, and asbestos produce complex lawsuits involving multiple parties, difficult issues of law and fact, and thorny public policy issues.

Insurance companies can be viewed as ultimately accountable for the legal expenses incurred in defending claims against their insureds. Of course, legal defense costs would be minimized if all claims —covered and uncovered, meritorious and specious —were settled for some amount immediately upon receipt by the insurer. However, insurance companies must balance their clear incentive to curtail legal defense costs with other factors, including their evaluation of the liability of their insured and the adverse precedential value of certain settlements. This balance of objectives does not extend to other parties to litigation; indeed, the current "no limits on defense"

system throws roadblocks in the path of managing defense costs effectively.

—Plaintiffs' attorneys are generally paid a percentage of the amount recovered by their clients. These attorneys are, of course, interested in getting their clients the largest settlement possible, consistent with their clients' needs for timely compensation.

—Plaintiffs have little or no interest in curtailing legal costs, since they don't have to tap their own resources to pay their attorneys. If plaintiffs win, they pay lawyers' fees exclusively out of their recoveries from the defendants and the defendants' insurers.

—Policyholder/defendants often have an economic incentive that works to actually *increase* the cost of legal defense. There is no direct cost to the insured involved in defending a lawsuit. Since general liability policies don't put monetary limits on legal defense, the policyholder's own funds aren't at risk until policy limits to pay claims have been used

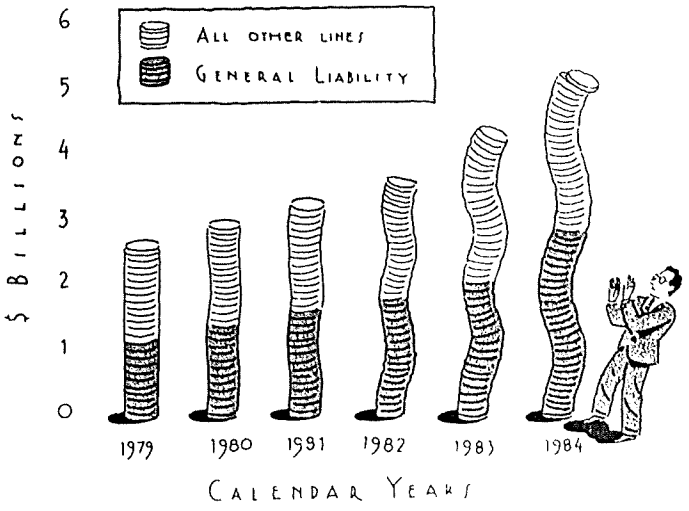


Figure 3. Incurred Defense Costs
By 1984, the property/casualty insurance industry's incurred defense costs had risen to $5.1 billion, with general liability growing to more than half of that figure.

up. Thus, with the present system, it can often be in the insured's best interest to demand prolonged defense strategies, even if those efforts will be excessive and ultimately counterproductive. Moreover, there's no risk to the insured in an all-out defense effort, even if it fails. The money spent on defense doesn't decrease the amount available to pay claims.

—Finally, the defense attorney also has little direct financial incentive to manage litigation costs economically. Though paid by the insurer, the defense attorney has an ethical obligation to the client, the policyholder. Also, defense lawyers' economic self-interest—they are typically paid by the hour—may also provide little, if any, motivation to minimize the time spent in defending a lawsuit, other than as means of attracting future business.

Defense costs are a substantial element of the total transaction costs associated with the U.S. tort system. As shown in Figure 3, the total defense expenses incurred by insurers on behalf of their policyholders was a staggering $5.1 billion in 1984, having almost doubled since 1979. Insurers' 1984 defense expenses for general liability (including the general liability portion of package policies) accounted for $2.7 billion. Of course, insurer costs

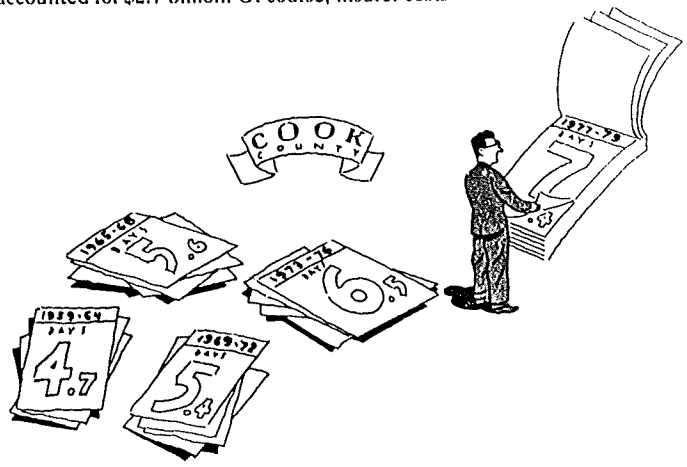


Figure 4. Average Length of Trial—Cook County
The length of trials involving premises/operations and products coverages increased nearly 3 days in Cook County, Illinois from 1959-64 to 1977-79.
Source: Institute for Civil Justice

represent only a fraction of the total costs of litigation. This system results in higher taxes, higher insurance premiums, and higher costs of goods and services.

A recent U.S. government study on the liability insurance situation[1] commented on legal defense costs as follows:

It is difficult to justify such extraordinary transaction costs. But it is particularly difficult to justify such costs when the costs are borne largely by the seriously injured and by consumers who ultimately must pay for these costs through higher prices for goods and services. The only clear beneficiaries of this system appear to be the lawyers.

How Today's Civil Justice System Affects Legal Defense Costs

To a large extent, the upward spiral in legal defense costs reflects factors underlying today's civil justice system. New and expanded legal theories broaden the scope of liability itself. Though only a fraction of all civil cases culminate in trials, those trials are

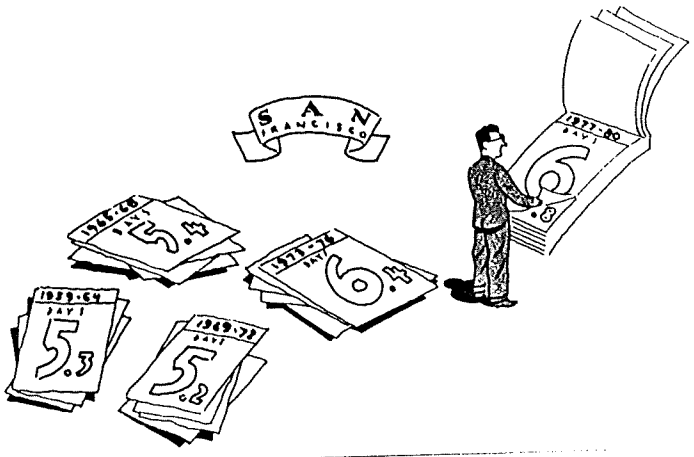


Figure 5. Average Length of Trial—San Francisco
In San Francisco, the average length of trials involving premises/operations and products coverages rose 1½ days over a 21-year period.
Source: Institute for Civil Justice

[1]Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, February, 1986, p. 45. Note: This group was appointed by the U.S. Attorney General.

becoming longer, more complex and, as a result, more costly.

ISO analyzed data collected by the Institute for Civil Justice on civil cases tried in San Francisco, California, and Cook County, Illinois, over more than 20 years, through 1980. These data demonstrate that the average length of trials involving products and premises/operation coverages increased more than 56% in Cook County (Figure 4) and 29% in San Francisco (Figure 5), while the proportion of cases lasting longer than two weeks quadrupled in Cook County and doubled in San Francisco. (See Figures 6 and 7.) This study also indicates that the proportion of cases involving three or more witnesses more than doubled during this period. Clearly, trials are becoming both longer and more complicated. Unquestionably, we live in a far more complicated world than we did in 1959. But that increased complexity accentuates the need to seek a system that provides prompt, fair compensation to injured parties.

A clear tradeoff—between the costs of litigation and the benefits of achieving social goals—is well illustrated with Superfund litigation, where this typically multi-party litigation is extraordinarily complicated and lengthy. Estimates presented to the U.S. Congress[2] in 1985 held that litigation costs account for 24 to 44 percent of the cost of cleaning up hazardous waste sites. Expert testimony indicated that if two-thirds to three-fourths of the current litigation costs could be eliminated, an additional 400 to 450 dump sites could be cleaned up each year at no additional cost to society.

Everyone—businesses, government, consumers—has a stake in today's lawsuit crisis. The escalating cost of defending third-party claims is both measurable and well-documented. Slowing down that escalation calls for attention—followed by action—focused on commercial liability insurance contracts and our country's legal system.

[2]Testimony of John C. Butler, III, Putnam, Hayes & Bartlett, Inc., on behalf of the American Insurance Association before the U.S. Senate Committee on Environment & Public Works, April 3, 1985.

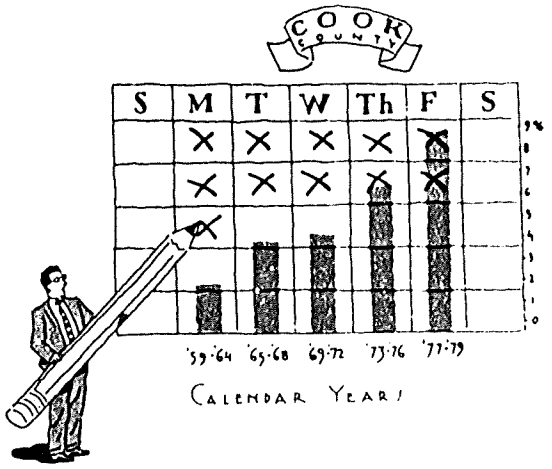


Figure 6. Percentage of Trials Lasting 2 Weeks or More—Cook County
In Cook County, Illinois, the percentage of trials involving premises/operations and products coverages that lasted at least two weeks more than quadrupled from 1959-64 to 1977-79.

Source: Institute for Civil Justice

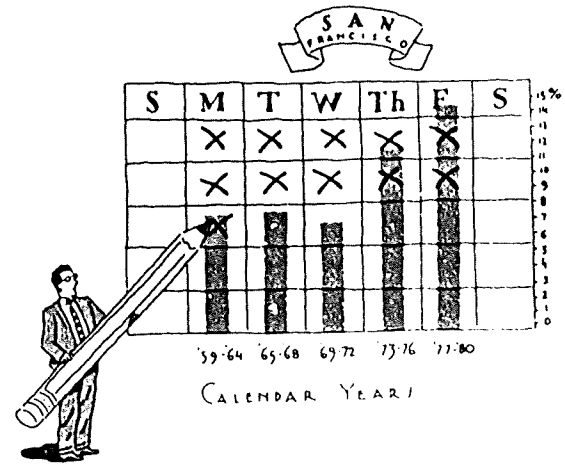


Figure 7. Percentage of Trials Lasting 2 Weeks or More—San Francisco
In San Francisco, the percentage of trials involving premises/operations and products coverages that lasted at least two weeks doubled over a 21-year period.

Source: Institute for Civil Justice

A Consensus Develops

What might some of the planks be in our platform of reform? Let me suggest, as a starting point... to cut down on the defense costs so that more dollars are available to pay claimants.

Robert J. Clark, President
Commercial Insurance Division
Aetna Life & Casualty
January 14, 1986
New York, New York

I.I.A.A. acknowledges and understands the need for cost containment. We cannot therefore oppose the effort of companies to bring under control these rapidly escalating costs that threaten the viability of the General Liability contract.

Statement of Policy on Defense Cost Containment
Adopted by the National Board of State Directors
Independent Insurance Agents of America, Inc.
September 8, 1985
Honolulu, Hawaii

Of importance is a need to control the escalating defense cost spending and to provide more certainty for the insurers in evaluating their exposures.

Resolution, Board of Directors
Professional Insurance Agents
October 26, 1985
Reno, Nevada

I think plaintiffs' attorney fees should be limited. I think defense attorneys' fees should be limited. The reason I say we need to do both is if I get a $100,000 award and I pay my lawyer $50,000 or I pay my lawyer $10,000, it doesn't affect insurance rates one penny. But defense fees, which ISO has now claimed are going up three times faster than losses since 1960, those impact you. Every dollar they pay a defense attorney is a dollar in your rates.

J. Robert Hunter, President
National Insurance Consumer Organization
March 24, 1986
Washington, D.C.

In litigating scores of civil cases, I have seen the problems created by the protracted delays and the high transactional costs that all too often characterize the current system. I have seen how the current system imposes unfair burdens on those who find themselves caught up in civil litigation. And the frustration is felt by all participants in the system... Long delays and high costs of administering the system are causing people to lose confidence in it.

Benjamin Civiletti
Former U.S. Attorney General (1979-1981)
April 30, 1986
New York, New York

There's a problem in the tort system and we've reached the point where we need to talk about what we're going to do to solve the problem...We should seize the opportunity to make reforms in the public interest. It's doubtful that Americans will continue to support such an inefficient payments system.

Griffin B. Bell
Former U.S. Attorney General (1977-1979)
April 30, 1986
New York, New York

The insurance industry by itself cannot bring reform to the inefficiencies of our civil justice system. But we can lead the way by curbing the excessive legal costs associated with our business... As long as there is no disincentive to incurred defense costs, they will be incurred long after the rule of reason would prevail.

Daniel J. McNamara, President
Insurance Services Office, Inc.
May 14, 1985
San Francisco, California

About the Data

Several different types of data were analyzed for this report. In each case, the particular data were selected for an appropriate reason. For example, they may be the most recent available or the broadest based data and, therefore, the most stable, or simply the only data available. The various types of data and their characteristics are described below.

ISO Expense Call (through calendar year 1984)

Along with other detail, this annual call to insurers for expense data provides calendar year incurred losses and defense expenses for about 50% of the general liability business. Calendar year incurred data includes amounts paid in the given year plus the change in reserves during the year. The latest year available is 1984. These data are the only source of historical defense cost experience back to the 1950's. Expense call information is used in an analysis of the long-term growth in defense costs on page 2.

ISO Statistical Plan Experience (through policy year 1982)

These data are from companies writing about 80% of the U.S. general liability premium, arranged in policy year format. Each year's experience includes all claims on policies written in that year. The claims experience changes as claims are reported to the insurer and settled in the ensuing years. Most years are projected to an ultimate settlement basis assuming that historical development patterns will repeat. The latest available experience is on policies *written* in 1982 and expiring as late as December 31, 1983. This experience was evaluated as of March 31, 1984. These data represent a larger sample than the expense call experience. More significantly, this sample is the *only* source regarding defense expense data by state, classification and policy limit. It is used in the state, classification and policy limit analyses on pages 4-7.

ISO Special Study

The data needed for some of the analyses contained in this report were not available from any standard source. Therefore, in early 1985, ISO issued a special call for data to a sample of companies writing one-fifth of the general liability business. Each company submitted experience in several formats, although not all companies were able to submit data in each format requested. The following formats are discussed in this report:

A. Sample Report Year Data (through 1984)

Each year's experience includes all claims reported in that year. The claims experience changes as claims are settled over a period of several years. Recent years, whose claims are not completely settled, are projected to an ultimate settlement basis assuming that historical development patterns will repeat. The latest experience in the study is for claims reported during 1984, evaluated as of December 31, 1984. These data

are a smaller sample than either the ISO statistical plan data or the expense call. However, they include more recent experience than either of those, since report year 1984 includes claims reported during 1984, evaluated as of December 31, 1984. These data are used to analyze the latest increases in defense expense on page 3.

B. Size of Risk Data (for policy year 1980)
Experience from companies writing 14% of general liability premiums was collected in premium size group detail. That is, each policy was assigned to a premium size group. The claims on each policy were assigned to that same group. Experience collected is on all policies written in 1980, with claims evaluated as of December 31, 1984. These are the only data available that classify claims by their associated policies' premium size. They are used to analyze whether large insureds (i.e., policies with large premiums) are the cause of the defense cost problem on page 7.

The Institute for Civil Justice (ICJ) Data

The ICJ, a part of the Rand Corporation, performs independent, objective policy analysis and research on the American civil justice system. The data studied in this report includes information about each civil case in Cook County, Illinois and San Francisco, California that went to verdict from 1959 through 1980 (through 1979 for Cook County). This is the most comprehensive long-term data base available which includes detail such as the length of, and the number of expert witnesses involved in, each trial. The data analyzed in this report are a subset of these data, restricted to the types of cases that involve premises/operations and products liability coverages. These data are used to analyze trends in trial length and complexity on pages 11-12.

43

THE REINSURANCE MARKET

PAST - PRESENT - FUTURE

Special Committee on Tort Reform
and Liability Insurance

Statement of the
REINSURANCE ASSOCIATION OF AMERICA

Topeka, Kansas
July 11, 1986

Attachment 43

My name is Daniel J. Conway, General Counsel of the Reinsurance Association of America, a trade association of professional reinsurers. Our member companies are professional reinsurers principally engaged in the business of assuming property and casualty (p/c) reinsurance and are either domestic U.S. companies or U.S. branches of foreign reinsurers entered through and licensed by a state. All the companies are subject to the regulatory jurisdiction of the various states in which they are domiciled or licensed.

We appreciate the opportunity to address the dual issue of availability and affordability of reinsurance.

Reinsurance is essentially an insurance transaction whereby the reinsurer, for a premium, agrees to indemnify the ceding insurer or reinsured against all or part of the loss which the latter may sustain under its policies of insurance. It provides reimbursement to the ceding insurers for losses which they sustain. Thus, it is a transaction which does not involve the policyholder who looks only to his insurer for defense and indemnity against loss. It is often described as the insurance of insurance companies because it provides reimbursement for the insurer's losses under policies covered by the reinsurance contract. Reinsurance is purchased by the primary or excess ceding insurer for its own benefit so that it can spread its risks and limit its own liability from large or catastrophic losses.

Reinsurance was developed to provide capacity essential to the continued growth of the direct insurance industry.

Reinsurance contracts are shaped to meet the specific needs of the ceding insurer. Despite the fact that there are no standard reinsurance contracts, there are two basic types which are used and adapted to accommodate the buyer's business. A reinsurance treaty is a broad and often automatic agreement that covers some portion of a particular class or classes of business, i.e., the ceding insurer's entire workers' compensation or property book of business. In contrast, a facultative agreement covers a specific risk of the ceding insurer and requires the insurer and reinsurer to agree on terms and conditions on a contract-by-contract basis. Both treaties and facultative agreements may be based on a pro-rata distribution where the two parties share proportionately in premiums and losses. The agreements may also be written on an excess basis, where only the losses of the insurer in excess of a predetermined amount, known as the "retention," are reinsured. It must also be noted that many reinsurers also provide direct excess insurance to policyholders, although this direct business generally represents a small portion of a professional reinsurer's entire book of business.

The 1984 U.S. property and casualty reinsurance market received approximately $11.3 billion in gross premium. Of this amount, $10.9 billion was for reinsurance assumed and $445 million for direct excess insurance. This represented less than 10% of the total premium written by all property and casualty companies.

Further, many U.S. insurers purchase their reinsurance directly abroad and U.S. reinsurers also rely on the foreign market for a substantial portion of its reinsurance needs -- called retrocession.. The U.S. Department of Commerce estimates that in 1984, in excess of $3 billion in net premium was paid to unlicensed foreign reinsurers. Although data recording these transactions are not collected systematically, indications are that foreign reinsurers assume a significantly larger portion of U.S. risks and, indeed, U.S. insurers paid $1.3 billion more in reinsurance abroad in 1984 than were received by U.S. reinsurers from ceding foreign companies.

The domestic reinsurance market has undergone rapid growth over the past 15 years. Since 1969, there has been better than a 6.6 fold increase in the net premium assumed by U.S. reinsurers. The dependence on foreign companies also has grown but their penetration of the U.S. market has been reduced from 34.3% in 1969 to 27.7% in 1984.

It should be observed that the extent of utilization of reinsurance varies considerably from primary company to primary company. A study* published by Conning and Co., an investment firm which conducts extensive financial analyses of the insurance industry, notes that among 26 primary underwriters studied, utilization varied in 1984 from a high of 46% of gross premium to a low of less than 1%. The average utlization rate for the 26 companies

* Reinsurance Use and Cost of Reinsurance versus Benefit -- A Comparison of Primary Property and Casualty Insurers, Conning & Co. (December 1985)

was 16.9% in 1984, an increase from 10.7% in 1975 for these same companies. Further, it is clear that those companies which tend to underwrite large or hazardous commercial risks are more dependent on reinsurance despite their higher retention levels.

For reasons I will describe in a moment the reinsurance industry today absorbs a disproportionate percentage of total insurance losses. The Conning Report observes that "for all the companies and during the ten years in this study, 116.4% of the cost of reinsurance was returned to the primary companies in the form of paid losses reimbursed or reinsured losses still collectible. 1984 was a disaster for reinsurers, with the above ratio deteriorating from 121% in 1983 to 173% in 1984." (Emphasis added.)*

Since reinsurers indemnify primary and excess insurers for losses paid under their direct policies, they are impacted by the same legal and legislative developments affecting property and casualty insurers. Any factors increasing the frequency or the amount of losses will increase the reinsurer's liability, although the effect on reinsurers can be even more dramatic than on direct writers.

* A ratio above 100% indicates that reinsurers reimbursed primary companies for losses in excess of premium collected. Note that the study ignores the effect of investment income which, though important, could never offset the losses incurred by reinsurers, in 1983 and 1984.

The insurance industry's enormous and still expanding liability in the casualty area under general liability policies issued in the past has had and will continue to have a major influence on the present and future ability and inclination of reinsurers to continue to expose their capital and surplus in these same lines of insurance, until and unless major reforms in both the policy forms and the civil justice system take place. Experience on current and past policies is creating current and future liabilities of such unanticipated magnitude and unpredictable nature that the reinsurance industry finds it almost impossible to assess its present total responsibility.

Insurance policies and reinsurance contracts written in the 1950's and 1960's for relatively low premiums are now responding pursuant to court decisions or retroactive legislation to claims which were never anticipated under the contracts. The resulting impact on reinsurance has been traumatic.

First, these unexpected liabilities as well as other losses are draining the industry's policyholders' surplus and hence its ability to provide the capacity needed in all lines of reinsurance. Second, these losses have highlighted the totally unpredictable nature of casualty risks and the liabilities which they create and how these, in turn, can be enlarged by the courts and by legislators. Taken together, these forces are likely to discourage the reinsurance industry from writing risks it cannot understand, rate or limit with any certainty. Instead, it will likely commit most of

its available capacity to product lines providing some profit potential. As a matter of fact, a reinsurer will need to adopt this behavior if it wants to remain solvent. It must do so for the benefit of all of its client companies and its shareholders.

As previously mentioned, the reinsurance industry is today absorbing losses from primary insurers disproportionate to the amount of premiums received. This is a relatively recent development. The ratios of loss and loss adjustment expenses to premiums for reinsurers and insurers were quite similar from 1980 to 1982. However, in 1983 the reinsurers' ratio exceeded primary insurers by 4% and 1984 by 15%:

	Reinsurers	Insurers
1980	75%	75%
1981	76%	77%
1982	80%	80%
1983	85%	81%
1984	103%	88%

This, as well as the Conning Report, supports the contention that changes in the civil justice environment and the interpretation by the courts of insurance contracts in ways never anticipated by the insurance industry have had considerably worse impact on reinsurers than on the primary companies. Note, for instance, that in the early 1960's, it was common for a reinsured company to offer $5 million or $10 million coverage limits to a policyholder but retain only $50,000 or $100,000, respectively. All

losses in excess of those retentions were then intended to be absorbed by reinsurers. However, since it was expected that the reinsureds retention would suffice to cover the majority of losses, the reinsurance premium paid was relatively small.

What has, in fact, happened is that the retention limits on those contracts are today being reached and pierced with unexpected frequency in just about all lines of business as a direct consequence of the unexpected changes in the civil justice system. The result is that reinsurers' past and future liabilities on these contracts far exceed the premium received, plus all the investment income earned on the premium.

You may wonder why these ancient contracts are responding to claims being filed currently. The reason is that the traditional general liability insurance contract leaves the insurer exposed to claims filed many years after the insurance policy has expired since the contract provides for coverage of any loss occurring during the policy period irrespective of when the loss is reported. Certain exposures,, particularly in the toxic tort area, are particularly susceptible to this latency factor which is generally referred to as the "long tail."

Although this delay in reporting creates serious problems for all insurers, there is a marked difference in loss development patterns between reinsurers and primary insurers. The major reason for these differences lies in the retention feature of excess of loss reinsurance. Since many claims are not valued at ultimate cost

initially, the primary insurer may not report such claims to his reinsurer until considerable time has passed because the initial reserve is within the primary insurer's retention. The relative development is much larger for the reinsurer than the primary insurer since the primary insurer's net loss on any particular claim is limited for annual statement purposes to its retention. In addition, the primary company claim department has more direct control over the administration and adjudication of each claim. For instance, in workers' compensation, a primary insurer is aware of 75% of the losses it will incur at the end of the first year of the insurance policy. The reinsurer only knows of 15% of its losses by that time. After the fourth year, the primary company knows of all but 5% of the losses it will incur; the reinsurer, still does not know 60% of its liability.

	PERCENTAGE OF ULTIMATE LOSSES			
	1st Year		4th Year	
	Reinsurer	Primary	Reinsurer	Primary
Automobile Liability	35%	80%	80%	100%
General Liability (incl. asbestos)	3%	50%	20%	85%
Medical Malpractice	2%	45%	20%	90%
Workers' Compensation	15%	75%	40%	95%

Source: 1984 Best's Casualty Loss Reserve Development (for Primary only).

This delay creates major problems for reinsurers in the anticipation of losses, and the consequent rating of future business on the basis of accurate loss information. For the past several years, we have

been conducting studies in reinsurance loss development trends. In recent years, loss development factors have become larger. With few exceptions, each year's additional information has proved previous loss development patterns to have been optimistic.

It is no accident that the lines of insurance which are the slowest to develop -- the long tail lines -- are the ones creating the worst problems for reinsurers. For instance, in the general liability area -- even excluding identifiable asbestos losses -- by the end of the first year we know little more than 5% of ultimate losses, 30% by the end of the third year and by the eighth year only 60%. It is not until the thirteenth year that we know of 75% of the losses that will arise and we slowly hear of the remainder of the losses over the next two decades.

Assuming no change in the future loss development pattern, only a bare majority of losses on reinsurance contracts covering general liability exposures issued in 1986 will be known to the reinsurers by 1994; and, by the end of the century, there will still be large amounts of losses not known by the companies. Note that these losses will be adjudicated in the social, judicial and economic environment which will then prevail, but the premiums to pay those losses must nevertheless all be collected in 1986.

Is it any wonder then, that the reinsurance industry's underwriting experience over the past several years, has gone from bad to atrocious? The industry's combined ratio has shown a worsening in each of the past five years, culminating in an

unbelievable 133% in 1984. In other words, reinsurers paid out 133% for every $100 in premium collected on losses, losses incurred, adjustment expenses, administration and commissions. No investment income, no matter what the interest rates may have been, could ever offset such losses.

Year	U.S. Reinsurance Combined Ratio
1984	133
1983	119
1982	114
1981	108
1980	107

A.M. Best - 1984 Reinsurance Results.

This is particularly disturbing since, as a direct consequence, the reinsurance industry sustained a 7% decline in policyholder's surplus in 1984 despite a large infusion of new capital in the industry. A.M. Best notes that "the reinsurers posted a negative 14% return on surplus" in 1984, as compared to a 3% negative return for the total property/casualty industry. Best further notes that today, the ratio of Net Liabilities to Surplus for the reinsurance industry exceeds that of the industry average.

What this all means, of course, is that the U.S. reinsurance industry's capacity has diminished substantially at a time when the need for our growing economy for insurance has increased. This capacity is lagging woefully behind the expending needs for reinsurance. To reflect the level of solidity and

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solvency evidenced in 1982, reinsurers' surplus should have increased by 20%, not decreased by $30 million over the two year span ending December 1984. It should be noted that the decrease in capacity of the U.S. reinsurance industry coincides with a review of the continued participation in the U.S. insurance and reinsurance markets by Lloyd's and other alien companies.

It has been claimed by some observers that the current insurance-reinsurance market crisis is of the industry's own making. The inadequate rates charged in the past several years, as reflected by worsening underwriting ratios, are said to be indicators of "cut throat" or excessive competition.

No doubt, there was some excess, primarily led by new entrants into the insurance business who did not have sufficient knowledge to judge the consequences of excessively relying on investment income. But, what is often overlooked, is that insurance premiums had to reflect the extraordinary returns the industry was earning on its investments when interest rates were running 15% or 20% or even higher. Consider, for instance, what the reaction of legislators or regulators had been if insurers had not reduced premium in recognition of their investment returns and had reported unconscionably high profits.

The property and casualty insurance business is one of the most competitive of any business its size. No single company has enough penetration of any market to act as a price leader contrary to almost any other large commercial or industrial sector of the economy. It is probably this competitive environment which accounts

for the industry's failure to have reacted promptly enough to the developing changes which took place recently in the civil justice system. As a result, the underwriting loss expectations have turned out much worse than anticipated.

I am sure you have already received many papers which address the reasons for the increases in frequency and severity; the increased propensity of juries to award benefits; the changes in our tort or common laws, brought about through contract interpretations, retroactive legislations or just courts seeking deep pockets. All these activities have directly impacted insurance policies or reinsurance contracts sold many years in the past. Since insurers and reinsurers must project future costs to determine current premiums, they need to depend on reliable trend factors to estimate losses and expenses from the historical time of the experience period to the future time when claims will be presented. As trend factors really measure anticipated changes in the economic, legal and social environments, the greater the instability in any one of these factors, the less they can be depended upon to generate adequate premiums.

What about the future?

The good news is that the combined ratio for 1985 has materially improved. A recent survey which we recently completed of 55 U.S. professional reinsurers indicates a combined ratio of 118.5%. The expectations are that for 1985, the U.S. reinsurance industry will have developed a combined ratio somewhat in excess of this number -- certainly, a major improvement over 1984. Still the

second worse in recorded history. First quarter 1986 results, helped by fewer weather disturbances, have continued to show improvement, although casualty results are still unacceptable.

In 1985, the 15 largest U.S. reinsurers increased their premium writing in excess of 40% and also were able to increase their surplus close to 30%. Again, first quarter 1986 indications are that both premium and surplus are increasing.

Still, the combined ratio remains at a level which is unacceptable and the increase in surplus is inadequate to maintain the reinsurance industry's solidity basis. In other words, the premium to surplus relationship continues to weaken. It should be noted that most of the increased surplus is not generated through operation, but rather by infusion of new capital in those companies.

Further, not all U.S. reinsurers have been successful in attracting new capital and, in fact, a number of them have withdrawn from the market, some voluntarily, others through insolvency. For 1984 and 1985, 13 U.S. reinsurers have been placed in receivership, 27 have voluntarily withdrawn and 9 have withdrawn either partially or completely from writing facultative reinsurance.

The increase in surplus in 1985 continuing into 1986 certainly is an indication of the continued viability of the U.S. reinsurance market, and since much of that surplus growth has come from non-operating sources, it demonstrates faith by investors in the potentials of the industry. There are continued indications that the domestic reinsurance industry's share of the reinsurance need of the U.S. market will increase, particularly, in light of the

concern which the U.S. civil justice system has raised both in England and on the Continent.

In the long run, availability of an adequate reinsurance market rests on two factors:

1. The ability of the U.S. reinsurance industry to build up an adequate policyholder surplus base to sustain growth.
2. A change in the civil justice environment in which reinsurers must operate which will allow a return to profitability.

Surplus growth comes from two sources. One, is the funneling of outside capital into the reinsurance industry. As previously mentioned, the well established companies have been successful in the past several months in attracting new capital either through an infusion of capital funds from a parent or through the floating of stock issues. This certainly demonstrates faith in the ability of the reinsurance industry to come out of its slump and return to a profitable state.

The other source of growth is operating profits. This avenue will improve if and when the tort system is revamped since those reinsurers with adequate capacity will funnel their resources in those lines which provide a certain degree of predictability. A degree of predictability is essential to insurance pricing and it should be noted it will be substantially enhanced once the new CGL contract forms developed by the Insurance Services Office are adopted. The RAA has supported the introduction of the new form since it will create, at least temporarily, some stability in the insurance market.

Ultimately, the availability of reinsurance in critical product lines, at affordable rates, will depend on the restructuring of our civil justice sytem. We are heartened by the level of interest shown by both state and federal governments on the issue. However, we are not encouraged by the action which the various legislatures have taken to date to reform the tort system. The issue has become overly politicized. It is, nevertheless, essential that the tort system be revamped. We believe that a fair balance can be accomplished whereby adequate benefits are provided and manufacturers are fairly treated. Until such a balance is restored, the insurance and reinsurance problems which you have identified are bound to persist.

One thing for sure! Forcing insurers and reinsurers to absorb losses rather than spread losses may, for the short term, prove to be politically expedient, but sooner or later, such a policy must result in mass insolvencies or market withdrawals or both. Reinsurers will be the first to go in view of their relatively small capital basis and the disproportionate impact of the systems imbalance on their operations.

The sooner our elected officials come to terms with tort reform, the sooner they and their constituents will be able to rely once again on the dependability and availability of insurance and reinsurance.

REMARKS BY

RON TODD

ASSISTANT COMMISSIONER

BEFORE THE

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

TOPEKA, KANSAS

JULY 11, 1986

Attachment 44

A PART OF THE REASON YOU ARE HERE IS BECAUSE OF A QUESTION ABOUT THE AFFORDABILITY OF LIABILITY INSURANCE. AND, WHEN SUCH A QUESTION ARISES, IT IS ONLY NATURAL AND PROPER THAT THE REGULATORY SYSTEM AND THE PERFORMANCE OF THAT SYSTEM BE EXAMINED.

THIS IS ESPECIALLY TRUE IN KANSAS BECAUSE, BY SOME INSURANCE INDUSTRY STANDARDS, WE ARE CONSIDERED TO BE OLD FASHIONED. WE STILL EMPLOY A PRIOR APPROVAL SYSTEM OF RATE REGULATION FOR MOST KINDS OF FIRE AND CASUALTY INSURANCE INCLUDING LIABILITY COVERAGE. THIS, OF COURSE, MEANS THAT THE RULES, RATES AND RATING PLANS USED BY INSURERS TO CALCULATE THE PREMIUM ON A KANSAS RISK MUST BE FILED WITH AND APPROVED BY THE COMMISSIONER OF INSURANCE PRIOR TO THEIR USE. HOWEVER, IT IS IMPORTANT TO NOTE THAT THE PRIOR APPROVAL SYSTEM WE EMPLOY HAS BEEN EXAMINED BY THE LEGISLATURE ON SEVERAL OCCASIONS -- THE LATEST BEING A 1979 STUDY BY AN INTERIM COMMITTEE -- AND THE CONCLUSION THUS FAR HAS BEEN TO RETAIN PRIOR APPROVAL. IN SOME RESPECTS THESE NOW SEEM TO HAVE BEEN PROPHETIC DECISIONS BECAUSE A NUMBER OF STATES THAT WERE OPERATING UNDER A COMPETITIVE

RATE REGULATORY SYSTEM ARE NOW RETURNING TO SOME VERSION OF PRIOR APPROVAL AS A PART OF THEIR RESPONSE TO THE LIABILITY INSURANCE SITUATION. ON THE OTHER HAND, IT IS INTERESTING TO NOTE THAT THE SYSTEM OF RATE REGULATION IN PLACE IN A GIVEN STATE SEEMS TO BEAR LITTLE RELATIONSHIP TO THE LIABILITY INSURANCE SITUATION. STATES WITH ONE OF THE SEVERAL VARIATIONS OF OPEN COMPETITION RATE REGULATION HAVE FACED AND ARE FACING THE SAME PROBLEMS WE ARE -- ILLINOIS WHICH HAS NO RATING LAW AT ALL HAS THE SAME PROBLEMS -- TEXAS WHICH PROMULGATES ITS OWN RATES HAS THE SAME PROBLEMS -- AND OTHER STATES WITH PRIOR APPROVAL LAWS HAVE THE SAME PROBLEMS. THEREFORE, WHILE IT MIGHT BE CONVENIENT TO ATTEMPT TO ADDRESS THE AVAILABILITY/AFFORDABILITY SITUATION BY CHANGING THE METHOD BY WHICH RATES ARE REGULATED, THE LABORATORY OF STATE EXPERIENCE SUGGESTS RATHER STRONGLY THAT RATE REGULATION IS NEITHER THE CAUSE OR THE SOLUTION.

BY THE SAME TOKEN, IT IS EQUALLY OBVIOUS THAT INSURANCE PREMIUMS FOR SOME RISKS HAVE CHANGED DRAMATICALLY FROM THE LATE 70'S TO THE

PRESENT TIME. WHEN INTEREST RATES WERE HIGH, INSURANCE COMPANIES REDUCED THEIR PREMIUMS AND -- BECAUSE THE REDUCED PREMIUMS EXPANDED THEIR CAPACITY IN TERMS OF PREMIUMS TO SURPLUS -- THEY COMPETED FEVERISHLY FOR BUSINESS. WHEN INTEREST RATES FELL THE OPPOSITE OCCURRED -- PREMIUMS ROSE -- CAPACITY DECREASED -- AND INSURERS TOOK ACTIONS DESIGNED TO OFFSET THE REDUCTION IN INVESTMENT INCOME. THIS IS WHAT IS COMMONLY CALLED THE UNDERWRITING CYCLE -- THE PHENOMENON TO WHICH SOME ATTRIBUTE OUR CURRENT DIFFICULTIES. LIKE ANY BUSINESS WHERE EASE OF ENTRY, EXIT AND NUMBER OF PLAYERS CREATES A TRULY COMPETITIVE ENVIRONMENT, A CYCLICAL MOVEMENT IS A NORMAL MARKET CONDITION. IN THE DAYS BEFORE ANTITRUST LAWS AND CONCERNS, THE INSURANCE BUSINESS WAS NOT OF A CYCLICAL NATURE BECAUSE 8 OR 10 CEO'S FROM THE LARGEST FIRE AND CASUALTY WRITERS WOULD MEET AND AGREE UPON THE PRICES THEY WERE GOING TO CHARGE DURING THE COMING YEAR -- AN EXAMPLE OF A PURE CARTEL -- BUT CYCLES AFFECTING THE PRICE AND AVAILABILITY OF INSURANCE DID NOT EXIST OR WERE RIGIDLY CONTROLLED BY THE BIG COMPANIES.

UTILITY TYPE REGULATION IS ANOTHER POSSIBILITY THAT IS SOMETIMES MENTIONED AS A WAY OF SMOOTHING OUT THE CYCLICAL NATURE OF THE INSURANCE BUSINESS. FRANKLY, I DON'T KNOW THAT MUCH ABOUT UTILITY RATE REGULATION BUT I SUPPOSE IT PRODUCES A MORE CONSISTENT PRICE STRUCTURE. AT LEAST I DIDN'T NOTICE ANY REDUCTION IN MY UTILITY BILLS DURING THE PERIOD OF HIGH INTEREST RATES. YET, I ASSUME UTILITIES INVESTED THEIR FUNDS AND I ASSUME THEY EARNED A RATHER GOOD INVESTMENT RETURN FOR SEVERAL YEARS. THIS FACT ASIDE, HOWEVER, IT SEEMS TO ME UTILITY REGULATION IS DESIGNED TO PROTECT THE PUBLIC WELFARE WHEN A NECESSARY SERVICE IS AVAILABLE FROM A VERY LIMITED NUMBER OF SOURCES. HOW WELL IT WOULD WORK IN A HIGHLY COMPETITIVE ENVIRONMENT IS A QUESTION I CAN'T REALLY ANSWER. NEVERTHELESS, IT DOES SEEM RATHER OBVIOUS THAT ANY REGULATORY SCHEME ALMOST HAS TO LET BUYERS AND SELLERS ADJUST TO GENERAL ECONOMIC INFLUENCES. THE ENERGY CRISIS OF THE MID SEVENTIES HAD A VISIBLE AND SUBSTANTIAL IMPACT ON RELATED UTILITIES. THUS, IT DOES NOT APPEAR THAT THE SYSTEM USED TO REGULATE UTILITY RATES IMMUNIZES THEM FROM SHARP

INCREASES ALTHOUGH - ADMITTEDLY I CANNOT GIVE A SIMILAR EXAMPLE OF AN ECONOMIC CONDITION WHICH CAUSED UTILITY RATES TO DROP RAPIDLY.

NONE OF THIS MEANS THE CYCLICAL NATURE OF INSURANCE PRICES AND MARKETS HAS NOT CONTRIBUTED TO OUR CURRENT PROBLEMS. BUT THIS COMMITTEE WOULD BE MAKING A SERIOUS MISTAKE IF IT ATTEMPTS TO CONCLUDE THAT THE CURRENT LIABILITY INSURANCE SITUATION IS SIMPLY THE RESULT OF A BUSINESS CYCLE AND WE CAN ELIMINATE THE CURRENT AS WELL AS FUTURE PROBLEMS OF COST AND AVAILABILITY SIMPLY BY SOME LEGISLATIVE MANDATE THAT WOULD SMOOTH OUT THE CYCLE.

IN THE FIRST PLACE, IF WE SMOOTH OUT THE INSURANCE CYCLE WITHOUT SMOOTHING OUT THE EXTERNAL ECONOMIC INFLUENCES SUCH AS INTEREST RATES WE ARE GOING TO DENY INSURANCE BUYERS THE OPPORTUNITY FOR PREMIUM REDUCTIONS THAT ACCOMPANY PERIODS OF INCREASED INVESTMENT EARNING. WE DON'T HEAR TOO MUCH ABOUT THE REDUCED PREMIUMS MANY RISKS ENJOYED AT THE BOTTOM END OF THE CYCLE. -- IN TODAY'S CLIMATE WE DON'T THINK ABOUT THE PROFITS INSURERS WOULD HAVE REALIZED HAD

THEY NOT REDUCED THEIR PREMIUMS DURING THE PERIOD OF HIGH INTEREST RATES -- AND WE SOMETIMES FORGET THE MATHEMATICAL FACT THAT A 50% REDUCTION IN THE GOOD TIMES IS A 100% INCREASE IF PREMIUMS ARE RETURNED TO THEIR PREVIOUS LEVEL. IT IS ALSO IMPORTANT TO CONSIDER THAT COMMERCIAL RISKS OFTEN MOVE FROM COMPANY TO COMPANY IN ORDER TO SAVE MONEY -- THAT LIMITS OF LIABILITY OR OTHER COVERAGE PROVISIONS ARE FREQUENTLY ADJUSTED -- AND THAT COMMERCIAL RISKS CONDUCT VARYING AMOUNTS OF BUSINESS FROM YEAR TO YEAR AND AS A RESULT PAYROLL, GROSS RECEIPTS OR OTHER RATING CRITERIA CAN FLUCTUATE SUBSTANTIALLY. BECAUSE OF THESE VARIATIONS IT IS NOT POSSIBLE TO SEPARATE THE AFFECTS OF INSURANCE COSTS AND UNDERWRITING CYCLES FROM INDIVIDUAL BUSINESS TRENDS WITH ANY DEGREE OF PRECISION. WE CAN OBVIOUSLY TELL PRETTY WELL WHAT STAGE OF THE INSURANCE COST AND UNDERWRITING CYCLE WE ARE IN AT A GIVEN TIME BUT WE ALSO KNOW THAT PREMIUMS RISE AND MARKETS SHRINK AS A RESULT OF OTHER FACTORS AS WELL. CONSEQUENTLY, WE SHOULD REMEMBER TWO THINGS. FIRST, EVERY CYCLE HAS A GOOD PHASE AS WELL AS A BAD PHASE. AND TWO, WE SHOULD NOT ASSUME THAT EVERY

PREMIUM INCREASE, EVERY CANCELLATION AND EVERY NON-RENEWAL ARE A RESULT OF THE CYCLE.

IN THE SECOND PLACE, IF THE AFFORDABILITY/AVAILABILITY PROBLEMS WE FACE WERE ONLY AN AFTERMATH OF THE SOFT MARKET PART OF THE CYCLE, IT SEEMS LOGICAL TO ASSUME THE DIFFICULTIES WOULD BE SPREAD ACROSS ALL LINES. YET COMMERCIAL LIABILITY INSURANCE IS FAR AND AWAY THE AREA OF GREATEST CONCERN. IN ADDITION, A PURELY CYCLICAL INFLUENCE WOULD HAVE PERMITTED ALL RISKS TO ENJOY THE PREMIUM REDUCTIONS AND COMPETITIVE MARKETS THAT FLOWED FROM THE HIGH INVESTMENT EARNINGS. HOWEVER, OFFICERS AND DIRECTORS LIABILITY, MANY PROFESSIONAL CLASSES, POLLUTION HAZARDS AND MUNICIPALITIES ARE AMONG THOSE RISKS THAT -- AS A CLASS -- WERE NOT A PART OF THE BUYERS MARKET THAT PREVAILED DURING THE FAVORABLE PART OF THE CYCLE. WE BELIEVE THIS LACK OF CONSISTENCY IS A RATHER STRONG INDICATION THAT THERE ARE SOME PROBLEMS IN THE LIABILITY INSURANCE ARENA THAT WILL NOT RESOLVE THEMSELVES. FOR WHATEVER REASON MANY INSURERS ARE AND HAVE FOR SOME TIME BECOME INCREASINGLY RELUCTANT TO WRITE CERTAIN LEGAL LIABILITY

EXPOSURES. OTHERS WHO MAY BE A LITTLE BIT LESS SELECTIVE WILL NOT INSURE CERTAIN LIABILITY EXPOSURES UNLESS THEY RECEIVE WHAT THEY BELIEVE IS AN ADEQUATE PREMIUM FOR THE COVERAGE. I REALIZE SOME OF YOU MIGHT CONTEND THAT RATE REGULATION SHOULD TAKE CARE OF THE PRICE PROBLEM BUT IF YOU DO I MUST REMIND YOU THAT OUR DILEMMA HAS TWO EDGES -- AFFORDABILITY IS ONE -- AVAILABILITY IS THE OTHER. SO -- BY DISAPPROVING A PARTICULAR RATE, THE INSURANCE DEPARTMENT MIGHT HOLD COSTS DOWN FOR CONSUMERS BUT WE WON'T HAVE HELPED THEM IF THE INSURANCE COMPANY REFUSES TO SELL THE NEEDED PRODUCT AT WHAT IT PERCEIVES TO BE AN INADEQUATE RATE.

THE ACTIONS OF FLORIDA OR WEST VIRGINIA ARE EXAMPLES OF LEGISLATIVE EFFORTS THAT WERE OR ARE DESIGNED TO SIMPLY OVER-POWER THE PROBLEM BY THE FORCE OF STATUTORY LAW. IN FLORIDA A PACKAGE OF INSURANCE AND TORT REFORM LEGISLATION WAS ENACTED IN AN EFFORT TO CONFRONT THE LIABILITY INSURANCE CRISIS IN THAT STATE. THE FLORIDA LAW IS A COMPREHENSIVE APPROACH TO THE LIABILITY INSURANCE SITUATION WHICH CONTAINS MANY PROVISIONS THAT WOULD SEEM TO BE BOTH A

RESPONSIVE AND RESPONSIBLE APPROACH TO CHANGES IN TORT LAW AND INSURANCE LAW THAT ARE NECESSARY IF LIABILITY INSURANCE IS TO CONTINUE TO BE A PRIMARY MEANS OF FINANCING THE COMPENSATION OF PERSONS WHO ARE INJURED. UNFORTUNATELY, IN ITS ZEAL TO PRODUCE IMMEDIATE RESULTS DESPITE THE CONSTITUTIONAL IMPEDIMENTS TO MAKING LAWS EFFECTIVE ON A RETROACTIVE BASIS, THE FLORIDA LEGISLATURE INCLUDED SOME RATE FREEZE AND ROLLBACK PROVISIONS WHICH MAY WELL LEAVE FLORIDA INSURANCE BUYERS IN A WORSE SITUATION THAN WAS THE CASE PRIOR TO ENACTMENT OF THE LEGISLATION. SPECIFICALLY ON OCTOBER 1 THE LAW REQUIRES A 40% REDUCTION IN THE PREMIUMS THAT WERE IN EFFECT AS OF MAY 1, 1986 AND PROHIBITS INSURERS FROM CANCELLING OR NON-RENEWING MORE COMMERCIAL LIABILITY POLICIES THAN 130% OF THE MONTHLY AVERAGE OF CANCELLATIONS AND NON-RENEWALS OVER THE LAST 24 MONTHS. THIS RATE ROLL BACK COUPLED WITH THE PROHIBITIONS ON CANCELLATION AND NON-RENEWAL HAS LED AT LEAST 7 MAJOR INSURERS TO ANNOUNCE PLANS TO CEASE WRITING NEW POLICIES IN FLORIDA AND A MAJOR INVESTMENT ANALYST HAS WARNED THAT IF STATES LIKE CALIFORNIA, NEW YORK, ILLINOIS, AND PENNSYLVANIA ADOPT SIMILAR LEGISLATION THE

EMERGING ECONOMIC RECOVERY OF THE INSURANCE INDUSTRY WOULD BE THREATENED. ON THE OTHER HAND FLORIDA IS A LARGE AND GROWING INSURANCE MARKET. AS A RESULT, OBSERVING THE ULTIMATE INDUSTRY REACTION IN FLORIDA WILL TELL US WHETHER OR NOT THE IMPACT OF THE FLORIDA ACTION IS REALLY SO UNACCEPTABLE THAT INSURERS WILL BE WILLING TO SACRIFICE THEIR SHARE OF THE MARKET. IF THEY DO CARRY OUT THEIR THREAT, THE LEGISLATION WILL HAVE BACKFIRED BY WORSENING THE AVAILABILITY PROBLEM. IF THEY DON'T CEASE THE WRITING OF NEW BUSINESS WE CAN PROBABLY ASSUME THAT AT LEAST THOSE STATES WITH A LARGE MARKET CAN TAKE SOME RATHER HARSH AND DRAMATIC STEPS TO ADDRESS AVAILABILITY AND AFFORDABILITY AND BE MORE COMFORTABLE THAT SUCH ACTIONS WON'T MAKE A BAD SITUATION WORSE.

EARLIER THIS YEAR, WEST VIRGINIA WENT THROUGH A SIMILAR EXPERIENCE WITH REGARD TO MEDICAL MALPRACTICE. IN RESPONSE TO SOME VERY AGGRESSIVE - PERHAPS REPRESSIVE - LEGISLATION THE FEW MEDICAL MALPRACTICE INSURERS THAT WERE WRITING MEASURABLE NUMBERS OF RISKS PULLED OUT AND - TO MAKE A LONG STORY SHORT - A SPECIAL SESSION OF

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THE LEGISLATURE WAS NECESSARY TO RESOLVE WHAT HAD BECOME A VERY SERIOUS SITUATION.

I MENTION THE FLORIDA AND WEST VIRGINIA EXPERIENCES SIMPLY AS A REMINDER THAT INSURANCE COMPANIES DO OPERATE WITHIN THE COMMUNITY OF FREE ENTERPRISE. BY LAW WE CAN PLACE REQUIREMENTS ON THE INDUSTRY AND INSIST UPON THEIR COMPLIANCE WITH CERTAIN PERFORMANCE STANDARDS. HOWEVER, TO THE EXTENT THESE REQUIREMENTS OR THESE STANDARDS ARE OR BECOME INTOLERABLE TO INDIVIDUAL INSURERS THEY WILL RESPOND BY AVOIDING THE PROBLEM LINES, RISKS OR EVEN STATES IN WHICH THEY DO BUSINESS. AND THIS IS TRUE EVEN IF THEIR FEARS, CONCERNS OR IRRITATIONS ARE UNFOUNDED. A PARTICULAR ACTION MIGHT SEEM QUITE REASONABLE AND EQUITABLE TO YOU AND I BUT IF THE CEO OR DIRECTORS OF AN INSURER DO NOT AGREE - WHETHER THEY ARE RIGHT OR WRONG - THE RESOURCES OF THAT INSURER WILL BE ALLOCATED AWAY FROM AREAS THEY PERCEIVE TO BE TROUBLESOME AND TOWARD AREAS OF MORE PREDICTABLE PROFITABILITY. THEREFORE,THE MOST REASONABLE APPROACH TO YOUR ASSIGNMENT WOULD SEEM TO BE TO TRY TO IDENTIFY THE ROOT CAUSES OF

THE LIABILITY INSURANCE SITUATION AND DEAL WITH THEM IN SOME RATIONAL FASHION. CERTAINLY, THIS WILL INCLUDE CHANGES IN THE LAWS RELATING TO INSURANCE COMPANIES AND COMMISSIONER BELL HAS SUBMITTED SOME INSURANCE RELATED RECOMMENDATIONS TO THE KANSAS CITIZENS COMMITTEE ON LEGAL LIABILITY. THE CITIZENS COMMITTEE HAS NOT REACTED TO THE COMMISSIONER'S SUGGESTIONS YET BUT THEY CONSIST OF:

1. A RECOMMENDATION THAT SENATE BILLS 528 AND 729 WHICH WERE CONSIDERED BUT NOT ENACTED BY THE 1986 SESSION OF THE KANSAS LEGISLATURE BE PROPOSED AGAIN FOR FURTHER CONSIDERATION. SENATE BILL NO. 528 IS THE BILL THAT WOULD PREVENT INSURERS FROM INCREASING PREMIUMS ON RENEWAL POLICIES UNTIL THE INSURED HAS BEEN INFORMED OF THE INCREASE. (WE REFER TO THIS AS A "COMMON DECENCY" BILL). SENATE BILL NO. 729 WOULD PERMIT THE COMMISSIONER TO OBTAIN ADDITIONAL DATA FROM THE INSURANCE INDUSTRY. WE RECEIVE SUFFICIENT DATA TO SUPPORT RATES FILED BY COMPANIES; HOWEVER, THIS DATA IS GENERALLY NOT SUFFICIENTLY DETAILED TO PERMIT CLOSE EXAMINATION OF EXPERIENCE IN INDIVIDUAL

LINES OR CLASSES OF BUSINESSES. IN OTHER WORDS, WE HAVE SUFFICIENT DATA TO JUDGE THAT AN INDIVIDUAL COMPANY HAS NOT FILED EXCESSIVE RATES OR RATES THAT ARE UNFAIRLY DISCRIMINATORY, BUT WE MAY NOT HAVE ENOUGH DATA ON A PARTICULAR RISK TO ADEQUATELY ADDRESS PUBLIC CONCERN IN INDIVIDUAL AREAS SUCH AS DAY CARE CENTERS. THE DATA FURNISHED IN INDIVIDUAL COMPANY RATE FILINGS IS ALSO NOT REPORTED ON A UNIFORM BASIS. WE DO RECEIVE UNIFORM DATA FROM STATISTICAL PLANS BUT THIS IS ONLY A PORTION OF THE DATA NEEDED BY THIS DEPARTMENT. FOR EXAMPLE, WE DO NOT RECEIVE DATA ON RISKS WRITTEN BY NONADMITTED INSURANCE COMPANIES OR A SIGNIFICANT AMOUNT OF DATA FROM REINSURERS. THIS MAKES IT EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE, TO COMPILE UNIFORM DATA FROM RATE FILINGS BY NUMEROUS COMPANIES AS TO INDIVIDUAL LINES AND CLASSES OF BUSINESS IN KANSAS.

2. THE COMMISSIONER HAS ALSO SUGGESTED CONSIDERATION OF THE POSSIBLE CREATION OF A MANDATORY ASSIGNED RISK POOL OR SOME OTHER TYPE OF MANDATORY RESIDUAL MARKET MECHANISM WHICH

INCORPORATES SOME KIND OF RATE SUBSIDIZATION. THIS POOL WOULD, OF COURSE, BE PARTICULARLY DESIGNED TO ASSIST THOSE RISKS SUCH AS DAY CARE CENTERS THAT HAVE DIFFICULTY OBTAINING COVERAGE OR HAVE NO WAY OF INCREASING THEIR REVENUES TO MEET INCREASED INSURANCE PREMIUMS.

3. THE DEPARTMENT IS IN THE PROCESS OF INITIATING A VERY EXTENSIVE CLOSED CLAIMS SURVEY OF THOSE LIABILITY CLASSES THAT ARE PRESENTING A SERIOUS AVAILABILITY/AFFORDABILITY PROBLEM IN KANSAS. WHILE IT IS NOT POSSIBLE TO DO AT THIS TIME, IT SHOULD NEVERTHELESS BE NOTED THAT THE VALUE OF CLOSED CLAIM REPORTS IS SOMEWHAT DIMINISHED BY OUR INABILITY TO OBTAIN DATA ON ALL THE TRANSACTION COSTS INCURRED ON A GIVEN CLAIM. PLAINTIFF ATTORNEY FEES AND EXPENSES IS A NOTABLE EXAMPLE OF INFORMATION THAT IS NOW VERY ELUSIVE IF NOT IMPOSSIBLE TO OBTAIN FROM INSURERS AND INSURERS ARE THE ONLY ONES THE INSURANCE DEPARTMENT CAN TARGET FOR THE SUBMISSION OF RELEVANT DATA.

4. FINALLY AND OF MOST IMPORTANCE THE COMMISSIONER HAS ASKED THE CITIZENS COMMITTEE TO LOOK AT AN "EXCESS PROFITS" LAW. THERE HAS BEEN SOME CONCERN AND EVEN SOME INSURERS HAVE INDICATED THAT THE LACK OF PREDICTABILITY OF LIABILITY INSURANCE LOSSES CAN LEAD TO RATES WHICH RANGE FROM BEING GROSSLY INADEQUATE TO GREATLY EXCESSIVE PREMIUMS DESPITE EFFORTS TO ESTABLISH PREMIUMS THAT PRODUCE A REASONABLE UNDERWRITING PROFIT. AN "EXCESS PROFITS" LAW WOULD ALLEVIATE MUCH OF THIS CONCERN WITH REGARD TO EXCESSIVE PREMIUMS OR WINDFALL PROFITS BY PROVIDING FOR A RETROSPECTIVE REVIEW OF THE EXPERIENCE AND A RETURN OF ANY EXCESS PROFITS TO INSUREDS. THIS PROPOSAL IS CURRENTLY BEING DRAFTED.

WITH THAT I BELIEVE I HAVE COVERED THE POINTS WE WERE ASKED TO DISCUSS. I WILL BE HAPPY TO TRY TO RESPOND TO ANY QUESTIONS.

Koch

45

JULY 11, 1986

SPEECH BEFORE THE KANSAS SPECIAL COMMITTEE
ON TORT REFORM AND LIABILITY INSURANCE
FRIDAY, JULY 11, 1986, 1:30 P.M.
STATEHOUSE, ROOM 514-S, TOPEKA, KANSAS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I AM KARL KOCH, EXECUTIVE VICE PRESIDENT OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC). I THANK YOU FOR THE OPPORTUNITY TO MEET WITH YOU ON BEHALF OF THE NAIC TO DISCUSS NAIC ACTIVITIES REGARDING LIABILITY INSURANCE AVAILABILITY. I JOINED THE NAIC ONLY EIGHT MONTHS AGO AFTER SIXTEEN YEARS IN THE PROPERTY CASUALTY INDUSTRY. I MOVED TO THE REGULATORY SIDE AFTER SIX YEARS AS THE PRESIDENT OF TWO REGIONAL CALIFORNIA PROPERTY-CASUALTY CARRIERS. THIS RECENT EXPERIENCE ON BOTH THE INDUSTRY SIDE AND THE REGULATOR SIDE HAS GIVEN ME A PERSPECTIVE OF THE AVAILABILITY CRISIS FROM BOTH SIDES.

I MUST CONFESS THAT THE LIABILITY CRISIS WAS MUCH MORE ENJOYABLE WHEN I WAS ON THE UNDERWRITING SIDE OF THE ISSUE, ENJOYING RENEWING RISKS FOR GREATLY INCREASED PREMIUMS AND BEING ABLE TO DECLINE ANY RISK THAT LOOKED TOO TOUGH WITHOUT CONCERN THAT WE WOULDN'T MEET PRODUCTION GOALS. THE RESULTANT PREMIUM GROWTH AND PROFITABILITY WAS QUITE SATISFYING TO OUR BOARD OF DIRECTORS.

NOW THAT I HAVE JOINED THE SIDE OF THE REGULATORS AND THEIR RESPONSIBILITIES TO GUARD INSURANCE CONSUMER INTERESTS, I FIND THE LIABILITY CRISIS NOT NEARLY AS ENJOYABLE, BUT I HAVE GAINED AN APPRECIATION OF ITS IMPORTANCE TO THE INSURANCE BUYING PUBLIC.

THE NAIC IS AN ORGANIZATION OF THE CHIEF INSURANCE REGULATORY OFFICIALS OF THE FIFTY STATES, THE DISTRICT OF COLUMBIA, AND THE FOUR UNITED STATES TERRITORIES. THE OBJECTIVES OF THE NAIC ARE (1) MAINTENANCE AND IMPROVEMENT OF STATE REGULATION OF INSURANCE IN A RESPONSIVE AND EFFICIENT MANNER; (2) MAINTENANCE OF THE RELIABILITY OF THE INSURANCE INSTITUTION AS TO FINANCIAL SOLIDITY AND GUARANTY AGAINST LOSS; AND (3) FAIR, JUST AND EQUITABLE TREATMENT OF POLICYHOLDERS AND CLAIMANTS.

MEMBERS OF THE NAIC SHARE THIS COMMITTEE'S CONCERN REGARDING INSURANCE AVAILABILITY AND AFFORDABILITY, PARTICULARLY WITH RESPECT TO COMMERCIAL LIABILITY INSURANCE COVERAGES. I BELIEVE IT IS SAFE TO SAY THAT THE IMPACT OF THE AVAILABILITY CRISIS ON CONSUMERS, REGULATORS, CARRIERS, LEGISLATORS, ETC. IS THE NUMBER ONE CONCERN OF STATE REGULATORS TODAY. MUCH OF THE NAIC ACTIVITY OF THE LAST YEAR HAS FOCUSED ON THE CAUSES AND CURES OF THE AVAILABILITY PROBLEM.

Attachment 45

4740

IN THE SUMMER OF 1985, AT ITS SUMMER NATIONAL MEETING IN KANSAS CITY, THE NAIC PRESENTED A FORUM WHICH GAVE REPRESENTATIVES OF CONSUMER GROUPS AND THE INSURANCE INDUSTRY AN OPPORTUNITY TO PRESENT THEIR VIEWS ON AVAILABILITY. CONSUMERS REPRESENTING GENERAL CONTRACTORS, LICENSED BEVERAGE DEALERS AND THE MEDICAL PROFESSION DISCUSSED THE IMPACT ON THEIR CONSTITUENCIES OF THE INABILITY TO FIND AFFORDABLE COMMERCIAL LIABILITY COVERAGES. THE INSURERS PRESENT DISCUSSED THE IMPACT OF THE UNITED STATES CIVIL JUSTICE SYSTEM ON UNDERWRITING, PRICING, AND RESERVING.

IN LATE 1985, THE EXECUTIVE COMMITTEE OF THE NAIC MET WITH CHIEF EXECUTIVE OFFICERS OF LEADING PROPERTY AND CASUALTY INSURERS AS WELL AS THE PRESIDENTS OF THE PROPERTY AND CASUALTY TRADE ASSOCIATIONS TO DISCUSS CAPACITY, UNINSURABILITY, SOLVENCY, AND PROFITABILITY.

FROM THESE MEETINGS CERTAIN CONCLUSIONS EMERGED. ONE WAS THAT THE AVAILABILITY CRISIS WAS CAUSED BY MULTIPLE FACTORS. THREE BASIC FORCES WERE (1) A TREND IN THE CIVIL JUSTICE SYSTEM WHICH INCREASED THE CLAIMS COSTS AND FREQUENCY INCURRED BY INSURERS AND REDUCED THEIR DEFENSES AGAINST CLAIMS AND WHICH CREATED AN "ENTITLEMENT" MIND SET THAT CAUSED INJURED PARTIES TO VIGOROUSLY PURSUE LEGAL REMEDIES FOR PHYSICAL OR EMOTIONAL HARM; (2) CASH FLOW UNDERWRITING BY INSURANCE CARRIERS IN RECOGNITION OF RECORD SETTING INTEREST RATES THAT OFFSET LARGE UNDERWRITING LOSSES, PARTICULARLY IN THE LONG-TAILED (SLOW PAYOUT OF CLAIM RESERVE DOLLARS) LIABILITY LINES AND (3) A "MARKET SHARE" MENTALITY ON THE PART OF CARRIERS THAT RECOGNIZED SUCCESS NOT BY THE TRADITIONAL VIEW OF UNDERWRITING PROFIT BUT BY GAINS IN MARKET SHARE AND PREMIUM GROWTH.

A RECENT STUDY BY THE CONSULTING FIRM TILLINGHAST, NELSON, AND WARREN PROVIDES SOME INTERESTING INFORMATION CONCERNING THE TORT SYSTEM. THE STUDY, ENTITLED "THE COST OF THE U.S. TORT SYSTEM," REVIEWS TORT COSTS AGAINST OTHER ECONOMIC CHANGES IN THE U.S. DURING THE PERIOD 1950 TO 1984, TORT SYSTEM COSTS AFTER ADJUSTMENT FOR INFLATION INCREASED 700 PCT. WHILE THE POPULATION GREW 60 PCT. THE STUDY ALSO POINTS OUT THAT DURING THE PERIOD 1933 TO 1950 TORT COSTS GREW PROPORTIONATELY WITH THE GROSS NATIONAL PRODUCT. AFTER 1950 TORT COSTS RAPIDLY ACCELERATED AND BY 1984 TORT SYSTEM COSTS HAD INCREASED BY 37 TIMES FROM 1933 WHILE THE GROSS NATIONAL PRODUCT HAD INCREASED BY A FACTOR OF 12.

TORT COSTS USED IN THE STUDY WERE EXPENSES AND BENEFITS PAID BY INSURANCE COMPANIES (80 PCT OF THE TOTAL), AND SELF INSURED COSTS (18 PCT OF THE TOTAL), PLUS COSTS OF COURT ADMINISTRATION AND CORPORATE RISK MANAGEMENT.

THE STUDY ALSO REVIEWS INCREASES IN TORT COSTS WITHIN THE FRAMEWORK OF OTHER SOCIAL COSTS AND ILLUSTRATES THE TREND IN THE LAST 30 YEARS TO AN "ENTITLEMENT" ATTITUDE. DURING THIS 1950 TO 1984 PERIOD WHILE THE POPULATION GREW 60 PCT AND TORT COSTS 700 PCT., PUBLIC AID INCREASED 800 PCT., GOVERNMENT HEALTH CARE 1000 PCT., AND WORKER'S COMPENSATION COSTS 600 PCT. ALL DOLLAR GROWTH IS ADJUSTED FOR INFLATION, WHICH WAS 4.3 TIMES OVER THE SAME PERIOD.

CERTAINLY CASH FLOW UNDERWRITING AND MARKET SHARE AS A DRIVING FORCE WERE EVIDENT IN 1980 TO 1984 WHEN THE GENERAL LIABILITY LOSS RATIOS ALONE ROSE TO AND SURPASSED 100 PCT, YET CARRIERS CONTINUED TO WRITE LIABILITY LINES AT PRICES HEAVILY DISCOUNTED FROM ACTUARIALLY INDICATED RATES.

PURSUANT TO THESE CONCERNS, IN DECEMBER 1985 THE NAIC CREATED THE NATIONAL ADVISORY COMMITTEE ON AVAILABILITY TO ACT AS A FORUM TO (1) IDENTIFY INSURANCE AVAILABILITY PROBLEMS OF EACH STATE TO THE INDUSTRY, (2) TO DETERMINE THE CAUSE OR CAUSES OF SUCH PROBLEMS FOR A GIVEN LINE OF BUSINESS, AND (3) IDENTIFY INSURANCE CARRIERS WILLING TO WRITE THE LINE OF BUSINESS.

MEMBERS OF THIS COMMITTEE ARE THE THREE PROPERTY-CASUALTY TRADE ASSOCIATIONS, THE FIVE MAJOR PRODUCER ASSOCIATIONS, TWO INTERNATIONAL REINSURANCE ORGANIZATIONS, AND TWO NATIONAL CARRIER "AT LARGE" MEMBERS.

THE NAIC SERVICE AND SUPPORT OFFICE IN KANSAS CITY HAS BEEN WORKING WITH THE STATE INSURANCE DEPARTMENTS TO IDENTIFY LINES OF BUSINESS WITH AVAILABILITY PROBLEMS FOR REVIEW BY THE COMMITTEE. I THOUGHT YOU MIGHT BE INTERESTED IN THE RESULTS OF THAT SURVEY.

I THINK AN IMPORTANT IMPLICATION OF THE SURVEY IS THAT THE AVAILABILITY CRISIS KNOWS NO STATE BOUNDARIES. ALL STATES HAVE BEEN AFFECTED. RELATED TO THAT IMPLICATION IS THAT PRIOR APPROVAL STATES WERE NOT SPARED THE DIFFICULTY, BUT SUFFERED NON-AVAILABILITY EQUALLY WITH COMPETITIVE RATING STATES.

IN ADDITION TO AVAILABILITY CONCERNS, THE REGULATORS ARE GREATLY CONCERNED WITH THE RELATIONSHIP BETWEEN CIVIL JUSTICE TRENDS AND THE AVAILABILITY AND AFFORDABILITY OF LIABILITY INSURANCE. THE REGULATORS SEEK TO BALANCE THE DEMAND OF THE CONSUMER FOR AVAILABLE AND AFFORDABLE LIABILITY INSURANCE WITH THE EQUAL CONCERN THAT THE INSURERS WILL BE SUFFICIENTLY SOLVENT TO PROVIDE THAT INSURANCE AND TO PAY THE CLAIMS WHEN THEY ARE DUE.

DATA ON THE AVAILABILITY CRISIS IS OF TREMENDOUS QUANTITY, BUT EQUALLY GREAT IS THE CONFLICT IN THE DATA AND THE CONCLUSIONS FROM IT. THOSE WHO PROFIT FROM THE CURRENT TORT SYSTEM OFTEN REACH OPPOSITE CONCLUSION FROM THOSE WHO SUFFER LOSSES FROM IT. NOTABLY LACKING HAS BEEN AN IN DEPTH RETROSPECTIVE AND PROSPECTIVE LOOK AT THE RELATIONSHIP BETWEEN TORT SYSTEM CHANGES AND LIABILITY INSURANCE AVAILABILITY AND PRICING BY AN INDEPENDENT EXPERT WITH NO VESTED INTEREST IN THE CONCLUSION.

TO MEET THAT NEED,THE NAIC CREATED A NEW TASK FORCE IN DECEMBER 1985. THAT TASK FORCE, THE LEGAL LIABILITY INSURANCE TASK FORCE, HAS A MEMBERSHIP OF ELEVEN OF THE MOST EXPERIENCED REGULATORS OF THE NAIC, INCLUDING THE NAIC PRESIDENT AND VICE PRESIDENT. THE TASK FORCE IS CHAIRED BY YOUR OWN COMMISSIONER, FLETCHER BELL.

THIS TASK FORCE IS CHARGED WITH CONDUCTING A COMPREHENSIVE STUDY OF LEGAL LIABILITY AS IT AFFECTS THE INSURANCE MECHANISM. IT WILL INCLUDE EVALUATING THE IMPACT OF THE TRENDS IN LEGAL LIABILITY ON THE PREDICTABILITY OF LOSS RESERVES AND THE AVAILABILITY OF REINSURANCE AND THE INSURANCE COST TO THE CONSUMER.

AT THE JUNE 1986 NAIC NATIONAL MEETING IN BOSTON, THE REGULATORS DISCUSSED THEIR CONCERNS THAT THE STATISTICAL REPORTING SYSTEMS OF THE INDUSTRY PROPERLY ADDRESS MEASURING THE EFFECT OF TORT LIABILITY CHANGES ON INSURANCE COSTS.

CONSEQUENTLY, AN ADDITIONAL CRITICAL CHARGE WAS ADDED TO COMMISSIONER BELL'S TASK FORCE: TO DEVELOP A PROGRAM TO OBTAIN NECESSARY STATISTICAL DATA TO MEASURE THE IMPACT OF TORT SYSTEM COSTS ON INSURANCE. TO UNDERSCORE THEIR CONCERNS ABOUT THE NEED FOR PROPER INFORMATION, THE NAIC PASSED A RESOLUTION AT THE JUNE 1986 BOSTON MEETING CALLING FOR IMPROVED LIABILITY INSURANCE DATA. I THOUGHT YOU WOULD BE INTERESTED IN A COPY OF THAT RESOLUTION:

IN CONCLUSION, THE NAIC HAS MADE THE AVAILABILITY CRISIS ITS PRIMARY FOCUS. THE CONSUMERS NEED FOR AVAILABLE AND AFFORDABLE LIABILITY INSURANCE AND THE CORRESPONDING NEED FOR INSURER STABILITY AND SAFETY IS PARAMOUNT IN THE ACTIVITY OF EACH INSURANCE DEPARTMENT. WE ARE AT A CROSSROADS IN DETERMINING THE NATURE OF THE INSURANCE MECHANISM IN THE UNITED STATES AND THE NAIC WILL PLAY A KEY ROLE IN THAT DETERMINATION. THANK YOU FOR THE OPPORTUNITY TO SPEAK HERE TODAY. I WILL BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

MAY 23, 1986

NAIC CLEARING HOUSE SURVEY FOR PROPERTY & CASUALTY COVERAGE AVAILABILITY
LINES EXPERIENCING AVAILABILITY PROBLEMS
(UNVERIFIED--FOR INTERNAL USE ONLY.NOT FOR PUBLICATION)

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR	TOTAL
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GENERAL LIABILITY																																																						
OVERALL PROBLEM	I								I					I	I															I	I																	I		I	I		9
BUSINESSOWNERS RISKS							I			I											I																														I		5
FOSTER CHILDREN PROVIDERS		I				I								I							I								I																						6
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NONPROFIT ORG.									I	I											I									I																					I		8
DAY CARE	I	I	I	I					I		I	I	I		I	I					I									I																					I		29
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WELL SERVICING															I	I					I																															I		2
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PETROLEUM DEALERS(WHLSL)											I										I									I																					I		6
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OIL FIELD RELATED BUSINESS																					I																																3
PROPANE GAS FACILITIES										I	I										I						I	I																								7
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ELEVATOR MAINTENANCE										I											I																															2
EXPLOSIVES MFG																					I																																4
CUSTOM HARVESTING																																																				1
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PROD.LIAB. GENERAL							I								I	I	I					I		I																												8
CHEMICAL MFG														I	I	I				I					I		I	I																								9
MED. EQUIP/SUPPLIES								I								I																																				2
FISHERMEN												I								I																																3
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PESTICIDE APPLICATION					I							I		I		I	I					I																																12

MAY 23, 1986

NAIC CLEARING HOUSE SURVEY FOR PROPERTY & CASUALTY COVERAGE AVAILABILITY
LINES EXPERIENCING AVAILABILITY PROBLEMS
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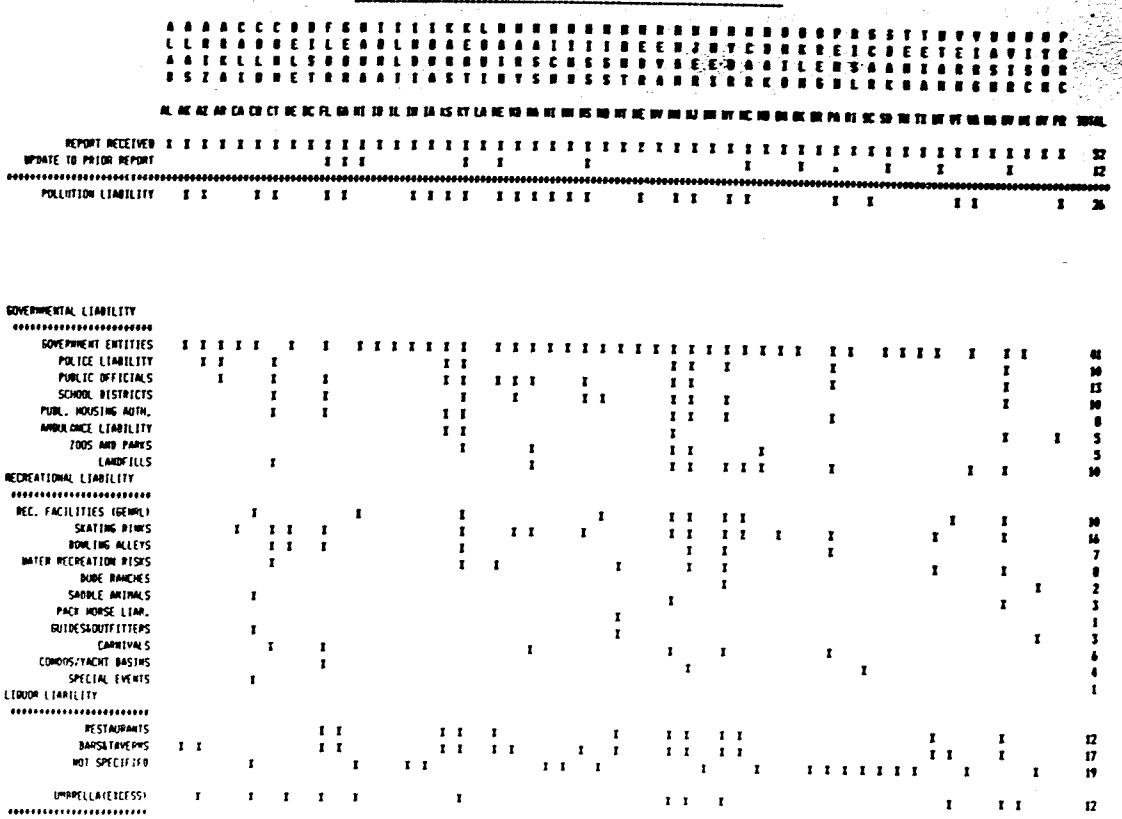

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	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR	TOTAL
REPORT RECEIVED	X	X	X	A	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	2	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	52
UPDATE TO PRIOR REPORT											X	X				X		X							X							X											X			X							X		12
PROF. LIAB. (GENRL)	X					X	X			X																																													13
MEDICAL MAL.(GENRL)	X		X							X		X		X		X																																					13
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NURSE MIDWIVES																																																						1
DENTISTS										X																																											20
ATTORNIES				X						X																																												4
ARCHITECTS	X			X						X		X																																										11
ENGINEERS				X																																																		12
ACCOUNTANTS				X						X		X																																									1
TEACHERS												X																																									8
REAL ESTATE DEVELOPERS				X								X																																								3
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COLLEGE FAC.LIABILITY																																																					1
E & O (GENERAL)	X																																																				1
DIRECTORS&OFFICERS						X		X		X		X																																								8
INS. AGENTS E&O										X																																											26
NURSING HOME LIAB				X																																																	0
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COMM AUTO LIABILITY																																																					
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SAND&GRAVEL HAULERS	X										X																																									34
GASOLINE HAULERS	X																																																				2
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TOUR BUSES																																																				10
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TAXIS																																																					5
PUBLIC VEHICLES																																																					5
AMBULANCE LIABILITY																																																					7
SCHOOL BUSES																																																					3
OTHER VEH. FOR HIRE																																																					10
RENTAL CARS																																																					2
NEW CAR DEALERS																																																					2
USED CAR DEALERS																																																					2
GARAGE LIABILITY																																																					4
SPECIAL USE TRANSPORT																																																					3
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MAY 23, 1986

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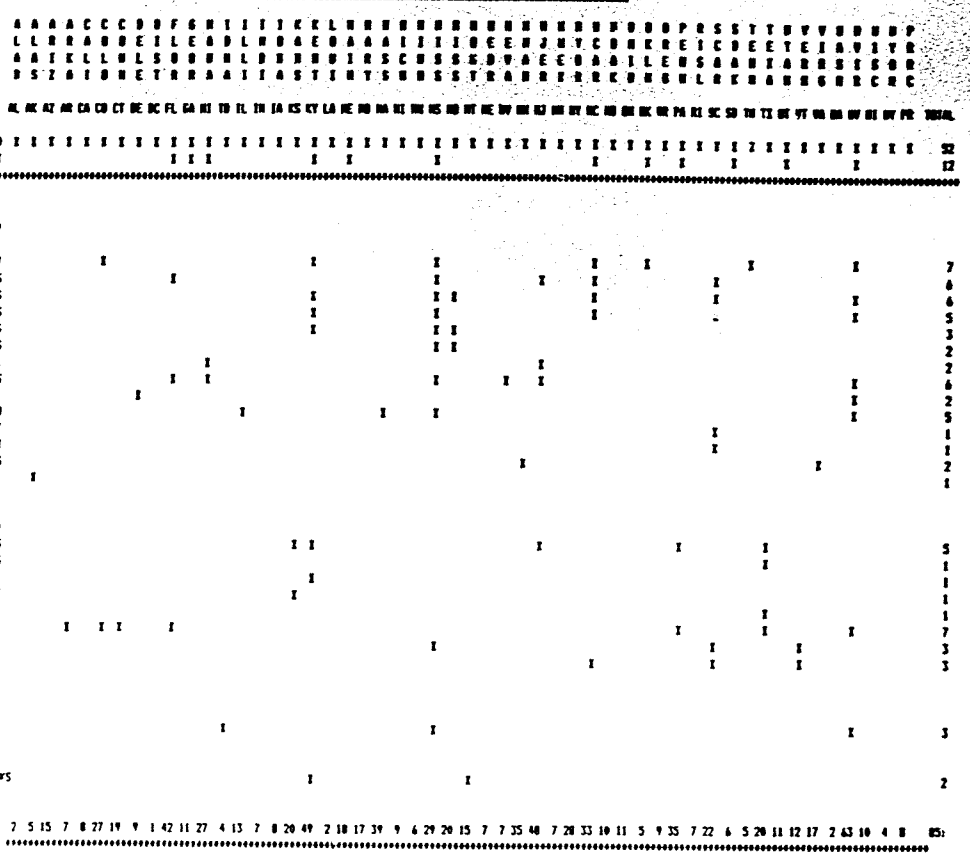
LINES EXPERIENCING AVAILABILITY PROBLEMS
UNVERIFIED—FOR INTERNAL USE ONLY…NOT FOR PUBLICATION



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LINES EXPERIENCING AVAILABILITY PROBLEMS
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	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR	TOTAL
REPORT RECEIVED	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	52
UPDATE TO PRIOR REPORT													I	I	I			I		I					I																																17

SUMMARY OF NUMBER OF STATES INDICATING AVAILABILITY PROBLEM WITHIN MAJOR PRODUCT LINE CATEGORIES

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR	TOTAL NO. OF STATES
GENERAL LIABILITY	1	0	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0	1	48
PRODUCT LIABILITY	0	0	0	0	0	1	0	1	0	0	0	1	0	0	0	1	1	1	1	0	1	0	0	0	1	1	0	1	0	0	1	0	1	1	0	1	0	1	0	0	1	0	1	0	0	0	1	0	0	0	1	0	0	18
ENVIRONMENTAL LIABILITY	1	1	1	0	1	1	1	1	0	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	37
GOVERNMENTAL LIABILITY	0	1	1	1	1	1	1	1	0	1	0	1	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	43
RECREATIONAL LIABILITY	0	0	0	0	1	1	1	1	0	1	0	1	0	0	0	0	1	1	0	1	1	0	0	1	1	1	0	1	0	1	1	0	1	1	0	1	0	1	0	0	1	0	1	0	0	0	1	0	1	0	1	0	1	25
LIQUOR LIABILITY	0	1	1	0	0	1	0	0	0	1	1	0	0	1	1	1	0	1	1	0	1	1	1	1	1	0	0	1	1	1	1	0	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	0	1	0	1	0	1	35
UMBRELLA(EXCESS)	0	0	1	0	0	1	0	1	0	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	12
PROFESSIONAL LIABILITY	0	1	1	0	1	1	1	1	0	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	42
COMM AUTO LIABILITY	0	0	1	1	1	1	0	0	0	1	1	1	1	0	1	1	0	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	40
PROPERTY	0	1	0	0	0	1	0	1	0	1	0	1	0	0	0	1	0	0	1	0	0	1	0	0	1	0	1	1	0	0	1	0	1	1	0	1	0	1	0	0	1	0	1	0	0	0	1	0	1	0	1	0	0	19
BONDS	0	0	0	1	0	1	1	0	0	1	0	0	0	0	0	1	1	0	0	0	0	1	0	0	0	0	1	0	0	0	1	0	0	1	0	1	0	1	0	0	1	0	1	0	1	0	1	0	0	0	1	0	0	14
WORKER'S COMPENSATION	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
HEALTH CARE-DIFFICULT RISK	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2

NOTE: 1 INDICATES STATE CHECKED ONE OR MORE SUBLINES WITHIN THE MAJOR PRODUCT LINE CATEGORY
0 INDICATES STATE DID NOT CHECK ANY SUBLINE WITHIN THE MAJOR PRODUCT LINE CATEGORY

Resolution

STATISTICAL REPORTING REQUIREMENTS

WHEREAS, one of the objectives of the NAIC is to implement statistical reporting requirements to assist the several states in achieving fair, just and equitable treatment of policyholders;

WHEREAS, the market place behavior of the property and casualty insurance industry the past several years has culminated in extraordinary premium fluctuations and market constrictions;

WHEREAS, a significant volume of statistical data is accumulated by the insurance industry and reported to insurance regulators;

WHEREAS, the recent enactment of various tort reform measures will require the development and implementation of a standardized procedure to monitor the impact on the insurance industry's underwriting and pricing behavior;

WHEREAS, the information to justify recent insurer market practices requires improved and expanded information;

NOW THEREFORE BE IT RESOLVED, that the NAIC establish a program to coordinate the reporting of statistical data that will more clearly reveal the actual costs of individual insurance transactions;

BE IT FURTHER RESOLVED, that such program will not necessarily be confined to obtaining information from insurers specifically authorized to do business in the several states but shall also address information from the non-admitted and reinsurance

sectors. Information such as legal expenses incurred, comparison of case reserves to settlement or award amounts, refinement of the classes established for statistical purposes, loss reserve adjustments, and other relevant information is to be considered;

BE IT FINALLY RESOLVED, that the Legal Liability Insurance (D) Task Force shall be charged with the responsibility of developing a program for coordination of the reporting of statistical data at the earliest possible date for distribution to and comment by all members of the NAIC.

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AARP

TESTIMONY BEFORE THE SPECIAL COMMITTEE ON TORT
REFORM AND LIABILITY INSURANCE

Mr. Chairman, Ladies and Gentlemen of the Committee:

You are to be commended on your decision to review all statutes regulating tort reform and liability insurance. Our State Legislative Committee of the American Association of Retired Persons is in total agreement. In the light of the 1986 legislative experience, we believe that the study you are undertaking is timely and completely justified and we would like to cooperate with the Special Committee in providing whatever assistance we can.

It is evident that there is more than one aspect of the "liability crisis". The question is "What is the true situation?". To determine this, SLCs could ask the following questions: how effectively does the state regulate insurers?; how fast have premiums increased?; have the liability suits and awards increased rapidly in the state?; and what kind of tort reforms are already in place? (eg., if the state already has caps on awards what have the effects on premiums been?). The idea is to get as complete a picture about the situation as possible. Once the SLC has determined the state's situation it will be in a better position to decide upon legislative solution to the "liability crisis".

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700
Vita R. Ostrander *President* Cyril F. Brickfield *Executive Director*

Attachment 46

INSURANCE INDUSTRY ASSERTIONS

The industry claims that soft-hearted juries, suit-happy consumers, and greedy lawyers have dramatically increased the numbers and amount of liability suits. The resulting unpredictability of and upward pressure on payments for suits has forced insurers to raise their rates and stop writing certain kinds of liability insurance

Insurers and many of their customers, such as businesses, local governments, and physicians have accepted the above ideas and propose restrictions consumers' access to the court system and limiting awards. This approach, they say, will help solve the liability crisis by slowing the rate of increase in the insurance premiums.

Two factors have been ignored in the arguments above. One is that there is little informations to support the insurers' assertions that tort reforms such as capping awards or limiting attorneys' fees will reduce premium increases. for example, in Ontario, Canada there are limits on non-economic damages, no contingency fees for attorneys, and the plaintiff must pay the defendants' attorneys fees if the defendant wins his or her case. Despite these tort reforms Ontario has the same problem with sky-rocketing premiums that many states in the U.S. have. In addition two states with similar reforms, Iowa and Louisiana, are still experiencing premium increaes.

The other part of the debate that most parties are ignoring is the part the insurance industry itself may have played in the current "liability crisis". In addition many insurers are not requlated closely because many states are lax and the federal government has little regulatory authority over the industry.

CONCLUSION

There are things that can be done to affect the "liability crisis" without overhauling the civil justice system. These include:

1. requiring insurers to experience rate their premiums;
2. mandating disclosure of data on premiums paid to insurers, investment income, and claims paid by class of coverage;
3. hiring an insurance consumer counsel to intervene in rate issues and individual cases; and
4. requiring prior approval of rate increases.

There are legal reforms that SLCs (State Legislative Committees) might consider supporting. A review of the administration of justice system in the state should be undertaken to see how the justice system can be streamlined in terms of access, speed, and cost savings. For example, pre-screening panels may facilitate case handling. More specific tort reforms can also be considered, such as:

1. Limits on plaintiffs' and defendants' attorney fees. If defendants could spend an unlimited amount of money and plaintiffs attorney fees were sharply reduced, plaintiffs would be at a great disadvantage in proving their cases;
2. Pre-trial arbitration systems that are carefully constructed to avoid constitutional challenges;
3. Structured settlements that are financially sound and protect against the erosion of awards due to inflation; and
4. Penalties for defendants' delaying actions and plaintiffs frivolous suits.

The Kansas State Legislative Committee of The American Association of Retired Persons thanks the Special Committee for this opportunity to testify.

Testimony at Special Committee on Tort Reform and Liability Insurance

Ralph W. Wright, AARP, SEK-AAA

July 10, 1986

AARP Position

1. All premiums should be experience rated. Rates increased only after approval of the Commissioner of Insurance.

2. Approval of rate changes must be cleared with Commissioner of Insurance before charges to client are changed.

3. Mandate disclosure of data used in arriving at premium to be paid by client. This data should include (1) investment income of the company, (2) claims paid by insurer to class of coverage involved.

4. Recommend counsel be available to consumers when rate increase cases are heard. Persons of moderate means unlikely to afford counsel and not able to argue case adequately. This recommendation resembles need for an office of consumer affairs to monitor utility cases.

AARP believes there are legal reforms that it could support which are short of major changes in tort system. It is felt that the public must always have access to the courts in instances where they have sustained damages.

AARP research indicates the major culprit in the liability crisis is the insurance industry.

RW/mh

AARP

American Association of Retired Persons

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Pittsburg, KS 66762

Ralph W. Wright
State Legislative Committee

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Attachment 47

Information presented at Kansas Citizens Committee on Legal Liability

Ralph W. Wright

July 10, 1986

I. Stephan Carroll - Rand Corporation

Reports on research 1960-1985 Median settlement has been relatively stable for 25 years. Mean settlement has increased dramatically. Difference is caused by relatively few extremely high (million +) awards.

The number of cases heard has increased dramatically. One half of all cases fail. Cost of filings (nationally) approximately equals awards. Time spent by litigants is extra.

High awards paid by corporations, government agencies, insurance companies. Deep pocket attitude.

II. Mavis Walters - Insurance Services Office

The burden of this presentation notes the high cost of liability insurance to insurers. This in turn is occasion for high premiums. Certain classes of insurance cannot be economically feasible to write and so are discontinued. Companies have had to draw from investments to meet obligations.

Costs of liability insurance will continue upward. Some types will not be offered.

Evidence discounts the impact of competitive pricing of the 1970s on liability crisis of the 1980s.

RW/mh

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CURRENT ISSUES
CIVIL JUSTICE

Alliance
of American Insurers

Attachment 48

CURRENT ISSUES: CIVIL JUSTICE

Second Edition

Alliance of American Insurers
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I. INTRODUCTION

The Alliance of American Insurers maintains a keen interest in general reform of the tort and the civil justice systems. The Alliance has addressed legislation dealing with almost every civil negligence issue from the collateral source rule to ad damnum clauses. Past initiatives, however, were usually in response to ad hoc problems or broad recommendations from outside groups.

As the need for tort reform has become more evident and fees, costs, abuses and delay continue to impact civil justice adversely, a cohesive policy bringing a wide range of reforms together in one package is necessary. Such an effort is also supported by empirical evidence from research organizations like The Institute for Civil Justice.

Because of the importance that Alliance member companies place on reforming the current system, the Alliance has reviewed existing tort reform policies and current legal and related legislative developments. This work product identifies those tort and civil justice issues that are of immediate concern to the Alliance. Thus, alternative dispute resolution, comparative negligence (including joint and several liability issues), class actions, contingent fees, discovery abuse, jury instructions, prejudgment interest, pain and suffering awards and punitive damages are discussed. While these issues are priorities for the Alliance, they are not the only civil justice issues deserving attention. Frivolous lawsuits, medical malpractice, structured settlements, municipal liability, collateral sources and the complexities of mass tort litigation are just a few of the numerous other important issues.

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II. EXECUTIVE SUMMARY

For greater impact, a cohesive policy bringing a wide range of tort and civil justice reforms together in one package is desirable. The empirical research available from research organizations, such as The Institute for Civil Justice, supports such an effort.

Alternative dispute resolution, class actions, comparative negligence (including joint and several liability issues), contingent fees, discovery abuse, jury instructions, prejudgment interest, pain and suffering awards, product liability and punitive damages are all topics of immediate concern to the Alliance of American Insurers.

A. **Alternative Dispute Resolution.** The complexity and time-consuming aspects of litigation encourage consideration of alternative dispute resolution (ADR) mechanisms. The Alliance supports the use of mandatory and binding arbitration for "small claims" insofar as constitutionally permissible. The experience of member companies with ADR further enables positive reaction to ADR proposals resulting from the courts, legislatures and private contracts.

B. **Class Actions.** While class actions can be a positive tool in litigation, abuses stemming from the certification costs, frivolous cases, the question of proper parties, "fishing expeditions" and unduly high fees must be addressed along with new approaches. During the development of such policy considerations, the states are encouraged to address abuses created by class action litigation and seek reform along the lines followed by the federal courts.

C. **Comparative Negligence and Joint and Several Liability.** Even after many states have replaced contributory negligence with a comparative negligence standard, joint and several liability continues to be used by courts to balance an "all or nothing" contributory negligence rule that no longer exists. The Alliance supports enacting modified comparative negligence and replacing joint and several liability with a system of several liability only.

D. **Contingent Fees.** The contingent fee system has developed in the United States on the theory that it enables everyone to get a lawyer. Because of the potential for abuse, several states regulate contingent fees. While the Alliance does not recommend abolishing contingent fees, it does object to lawyers charging contingent fees that have no relation to the time, effort, skill or value to the client of the legal services provided. Mandatory sliding fee schedules and contingent fee reporting laws are positive remedies for such abuses. The Alliance also supports disclosure of the contingent fee contract and related information to the client, the judiciary or both.

E. **Discovery Abuse.** The Alliance supports procedures aimed at limiting discovery abuse and seeks reforms along the lines followed by the federal courts. The Alliance draws from the experience of its member companies in pinpointing discovery abuses and is following the effects of amendments to the *Federal Rules of Civil Procedure* seeking to end such abuses. The Alliance also supports judicial action to implement more efficient discovery management procedures.

F. **Jury Instructions.** The Alliance supports close monitoring of jury instructions to ensure fairness so that particular instructions do not prejudice the defense of a case. Although drafting jury instructions on a national basis is impractical, uniformity of jury instructions is encouraged for litigation with national scope.

G. **Pain and Suffering Awards.** Pain and suffering relates not only to physical discomfort and distress but to mental and emotional trauma as well. The Alliance supports limitation on pain and suffering damages in those jurisdictions where caps or standards or both would be appropriate. Legislation applying limitation of damages equally to all tort litigants where bodily injury or death has occurred is also suggested.

H. **Prejudgment Interest.** Research conducted in Illinois by The Institute for Civil Justice has shown juries already implicitly include interest with their awards. The Alliance opposes legislation imposing interest on a judgment from the date of injury or the date the lawsuit was filed and has drafted a proposal relating to offer of settlement.

I. **Product Liability.** The Alliance supports the business community's efforts to obtain federal product liability tort reform as long as the legislation contains no provisions implementing federal regulation of insurance. The Alliance also supports continued product liability reform at the state level.

J. **Punitive Damages.** Punitive or exemplary damages are money damages awarded in tort cases to punish defendants for malicious acts. Punitive damages are distinct from compensatory damages which compensate the claimant for actual losses. Punitive damages have become increasingly greater "windfalls" for plaintiffs and their attorneys as such judgments have grown. The Alliance supports abolishing punitive damages, and where that is not possible, the Alliance affirmatively seeks restrictions to eliminate the abuses of punitive damages.

The Alliance's continuing focus on tort and civil justice reform issues includes supporting and developing coalitions as circumstances and the realities of tort and civil justice initiatives require.

III. CURRENT CIVIL JUSTICE REFORM ISSUES

A. Alternative Dispute Resolution

Definitions

Many tort actions involve sums of money which, while significant to the parties, are otherwise modest enough to raise serious questions about the social utility of engaging the most expensive institutions and procedures of the civil justice system to resolve them. The complex and time-consuming legal process often drowns even simple issues raised by a sma'l tort case in a flood of paper. Whether settled or tried, most lawsuits take too long and cost too much to resolve.

The interests of all parties and society generally can be better served by less costly alternatives which maintain the injured person's capacity to use the legal system. Alternative dispute resolution (ADR) mechanisms can generate cost-effective solutions which still allow dissatisfied parties to proceed to the formal legal process.

No single mechanism is best suited for all dispute resolution. The secret of cost-effectiveness is tailoring the process to fit particular issues while protecting the rights of those involved in disputes. The objective is reducing the cost of engaging in civil disputes to the lowest feasible level.

Alternative dispute resolution mechanisms can be used to:

(1) Facilitate voluntary settlements on a faster, less expensive basis. These include mediation, the mini-trial, the summary jury trial, and in-court innovations such as the use of advisory panels; and

(2) Obtain a third party decision. Two examples are private trials and court mandated arbitration.

The most prominent alternative dispute resolution mechanisms available to relieve civil justice burdens are:

(1) **Mediation.** In mediation, a neutral (disinterested third party) assists the parties in reaching a settlement but cannot force the parties to accept a binding decision. The neutral asks questions about the case and encourages settlement but rarely expresses an opinion about the case.

Mediation puts those involved in a dispute more in control of the outcome.

(2) **Arbitration.** Besides mediation, parties may choose voluntary arbitration to settle a dispute. In non-binding, voluntary arbitration, a neutral, chosen by both parties, listens to the respective cases and offers a decision. In binding, voluntary arbitration, each side presents its case to the neutral at a hearing for a final and binding decision.

As in mediation, the parties can find their own neutral or utilize an outside source, such as the American Arbitration Association (AAA). Most appointed neutrals are attorneys.

(3) **Mini-Trial.** The mini-trial is a fairly new mechanism used for inter-corporate dispute settlement. The goal of the mini-trial is to expedite rather than replace litigation, and it is best suited to complex disputes such as patent infringement and product liability.

Companies involved in a mini-trial mutually agree upon a neutral adviser who presides over pre-trial investigation. The parties' attorneys use traditional briefs and discovery to present abbreviated cases to the adviser, whose role is decided beforehand by the parties. For example, the adviser may merely rule on the validity of evi

dence without making a decision. The objective is to shorten the pretrial period by discussing the dispute's merits. Negotiations between each party's respective counsel and senior management are encouraged, and acceptable settlement offers can be made without going to trial.

(4) **Court Mandated (or Annexed) Arbitration.** Arbitration successes have influenced public sector initiatives toward arbitration. Many states have introduced some sort of court mandated arbitration effort where court rules require pending cases to be arbitrated before a trial or trial de novo can be held. The oldest continuing program began in 1952, in Pennsylvania, where defendants and plaintiffs in 53 counties (including Philadelphia and Pittsburgh) are subject to arbitration. In the early 1970's, five states adopted similar systems.

New York instituted an arbitration system for 27 counties (including New York City) as did Nevada (statewide) for motor vehicle damage only. Arbitration was also established for three counties in Arizona (including Tucson and Phoenix) and for three counties in Ohio (including Cleveland and Cincinnati).

More recently, in 1978, California established arbitration in eleven counties where ten or more judges sit. New Hampshire implemented arbitration systems in two counties in 1978, and Washington began using the process in King County (Seattle) in 1979.

In selected federal courts, the rules for an arbitration system for cases under $150,000 are also being proposed.

According to The Institute for Civil Justice, there are now court-annexed arbitration programs in federal court districts in California, Connecticut, Florida, Michigan, Missouri, New Jersey, North Carolina, Oklahoma, Pennsylvania and Texas. The fifteen state courts with programs are Alaska, Arizona, California, Connecticut, Delaware, Illinois, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania and Washington.

Background

No country in the world utilizes the jury system as does the United States. England rarely uses juries in civil cases. Lawsuits have become as common as family arguments and a lot more expensive. In an effort to contain rampant litigation, many insurers, along with other business interests and the judiciary, have joined forces to encourage the use of alternative dispute resolution mechanisms. Excessive litigation costs borne by insurers, industry and the government have been a prime motivator in this movement.

Research by The Institute for Civil Justice (ICJ) found that only seven to 20 percent of the total cases filed in U.S. courts went to trial, but those trials consumed half of all government expenditures for processing cases and required the lion's share of case-related judge time.

A civil case that required one hearing, two conferences and a jury trial, the ICJ noted, cost $3,500 in Florida, $2,800 in Washington, and nearly $11,000 in Los Angeles. On the other hand, ICJ reports that state courts spent an average of $2,000 to $3,000 for a non-jury trial and about $50 for a case settled after filing without a trial.

These figures represent the court system costs paid by taxpayers. They do not even begin to account for the dollars that are used to pay attorneys' fees, witnesses' expenses and resulting awards, the latter of which can be extravagantly high when decided by a jury.

Litigation conducted via the court system also wastes time. Some cases drag on for years while incurring unnecessary court operating expenses and placing untold strain on the individuals involved. Throughout that period attorneys must be paid and administrative costs mount.

With that kind of time and money spent, the ICJ indicates the cost of conducting some smaller civil cases often exceeds the amount of the final award to the litigants. Court proceedings for smaller civil cases can cost thousands of dollars, even though justice can be dispensed just as fairly through alternative methods.

One large, national insurance company estimates that a routine suit takes an average of 17.2 months from filing to closing. That insurer has now reduced settlement time for many cases to 100 days by using a new insurance ADR program. Administered by the American Arbitration Association and, in some states, EnDispute, the program expedites personal injury and property damage claims through mediation or arbitration.

Launched as a pilot program in New Jersey during the summer of 1983, the insurer's ADR system had concluded approximately 35 percent of the 114 cases submitted to it by December. Most of these cases would otherwise have remained open, incurring additional legal expenses with no benefit to the parties involved. In addition, the company estimates that it lowered the average cost of settling a case from $2,154 to $275.

Though it needed some refinement, this pilot ADR program continues. It is representative of the insurance industry's long-standing goal to control litigation costs.

Increased attention paid to alternative dispute resolution mechanisms reinforces the accuracy of Chief Justice Warren E. Burger's statement to the American Bar Association. He said, "The notion that most people want black-robed judges, well-dressed lawyers and fine paneled courtrooms as a setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."

Throughout the country there are more ADR mechanisms available to consumers and business than ever before. ADR mechanisms are proving to be acceptable solutions to problems of epidemic proportions. The problems, however, took time to develop and ADR systems will need time to resolve them.

Alliance Policy

Since most tort actions involve small sums of money, the Alliance questions the social value of using the most expensive institutions and procedures to resolve such civil disputes. Thus, the Alliance supports mandatory and binding arbitration within the limits of due process for small claims.

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Exhibit A-1

Alliance Model Legislation - Court Annexed Arbitration

Sec. 1. Authorization. The _____ court of a county by majority vote of the judges thereof may authorize mandatory arbitration of civil actions under this chapter.

Sec. 2. Actions subject to mandatory arbitration. All civil actions, except for appeals from _____ courts, which are at issue in the _____ court in counties which have authorized arbitration where the sole relief sought is a money judgment and where there does not exist a claim in excess of _____ thousand dollars or if approved by the _____ court of a county by majority vote of the judges thereof _____ thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration.

Sec. 3. Implementation by supreme court rules. The supreme court shall by rule adopt procedures to implement mandatory arbitration of civil actions under this chapter.

Sec. 4. Qualifications, appointment and compensation of arbitrators. The qualifications and appointment of arbitrators shall be prescribed by rules adopted by the supreme court. Arbitrators may be compensated in the same amount and manner as _____ of the _____ court.

Sec. 5. Decision and award - Appeals - Trial - Judgment. Following a hearing as prescribed by court rule, the arbitrator(s) shall file his (their) decision and award with the clerk of the _____ court, together with proof of service thereof on the parties. Within _____ days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the court on all issues of law and fact. Such trial de novo shall thereupon be held including a right to trial by jury.

If no appeal has been filed at the expiration of_____ days following filing of the arbitrator's decision and award, a judgment shall be entered and may be presented to the court by any party, on notice, which judgment when entered shall have the same force and effect as judgments in civil actions.

Sec. 6. Costs and attorney's fees. The supreme court may by rule provide for costs and reasonable attorney's fees that may be assessed against a party appealing from the award who fails to improve his position on the trial de novo.

Sec. 7. Right to trial by jury. No provision of this chapter may be construed to abridge the right to trial by jury.

Sec. 8. Severability. If any provision of the act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Sec. 9. Effective date. This act shall take effect _____

B. Class Actions

Definitions

The class action is a judicial procedure that, in certain circumstances, allows a number of individual claims and the rights of a large number of persons to be decided in one lawsuit. The class action involves joining a number of parties and a number of related claims, plus representing the interests of persons not before the court.

The key feature of the class representative suit is that not all class members have to become parties to a lawsuit in order to have their rights adjudicated. Instead the great majority of the group may participate only as class members while a smaller number represents them in court as parties to the litigation.

Background

The class action evolved some 250 years ago in the English Chancery courts. The Chancery courts were separate tribunals through which the English Crown dispensed justice when the common law courts did not work and the "remedy at law was inadequate." As part of the equity concepts involved in the Chancery courts, it appeared just to combine common issues in order to resolve them expeditiously. Thus, the class action was used of necessity when many parties were involved to prevent the inconvenience of a multiplicity of lawsuits. An early but important principle applied to class actions was that the judgment would apply to absentee class members who were not parties in the court.

Because both law and equity were retained in American courts, the class action was fully incorporated into jurisprudence in the United States. Indeed, beyond the circumstances of necessity and of convenience, courts in the United States have used class actions to avoid a failure of justice where no other adequate procedural remedy exists. Due to large and unprecedented problems created by the growth of private corporations, the class action procedure has also grown in usefulness.

The class action concept was fully incorporated into the *Federal Rules of Civil Procedure* in 1938, when implemented by virtue of Rule 23.

Federal Court Rules. In the federal courts, class actions are still governed by Rule 23 of the *Federal Rules of Civil Procedure*. Rule 23 sets out four conditions that must be satisfied before a case can proceed as a class action:

(1) The class must be so numerous that identification and joinder of every member as a party to the suit would be impractical;
(2) Questions of fact or law exist that are common to that class;
(3) Claims and defenses of the representative parties are typical of those of the class; and
(4) The representative will fairly and adequately protect the interests of the class.

In addition to these four conditions, one of three detailed sets of requirements must be met to maintain a class action. In general these are:

(1) Separate suits would subject the opposing party to the risk of incompatible court orders or that separate suits would prevent interested parties from protecting their rights;
(2) The opposing party had already acted as though the class exists; or
(3) The court finds that questions of law and fact common to the class predominate over individual questions and that the class action is the superior method for adjudicating the controversy.

Of course, the amount in controversy must also exceed $10,000 before federal courts will have jurisdiction.

State Court Rules. State laws vary, but many require that class claims arise from the same transaction or occurrence. Consumer class actions normally arise from a series of separate transactions or occurrences, and, therefore, many state courts do not provide an appropriate forum for such activity. Certainly this situation does not prevail in all jurisdictions, and some states, such as California and Arizona, have legislation supporting such class actions.

The class action concept is quite appealing in theory. It permits the ordinary citizen to invoke the power of the law against wealthy and organized special interest groups. However, class actions have developed abuses which are raising product costs and drastically diminishing the litigants, as opposed to their attorneys', recovery.

Class actions have taken on a tone of coerciveness. They are often filed as a threat or pressure tactic. Defendants can be forced into an unwanted settlement or face the extraordinary costs of defending class actions. Such are truly frivolous lawsuits founded in harassment and intimidation.

Plaintiffs taking a shotgun approach in class actions is of concern. Such plaintiffs frivolously include defendants without investigating whether they are proper parties to the lawsuit. Courts support this shotgun approach when they assist such plaintiffs in identifying defendants rather than requiring those plaintiffs to identify the defendants. The shotgun approach further abuses the class action by permitting discovery and fishing expeditions merely to support filing subsequent class actions after dismissal.

High fees to plaintiffs' attorneys in class actions leave little dollar return for class members. Only the attorneys seem to profit from such windfalls. Also attorneys can file class suits to tag along on other cases in the same class just to get fees at the conclusion of the full litigation. Class actions can promote ethical abuses when champerty and maintenance result from an attorney's desire either to share in the profits or to provide funds for the client's support and maintenance in such lawsuits.

The time and expense of defending a class action is enormous. Initially, the cost of class certification must be borne by the defendants. Class certification can include investigation into thousands of individual situations and defenses as well as the resultant notification costs. Defense costs also increase when the plaintiff makes extensive use of boilerplate discovery to "out paper" the defendant and to produce a bulk of documents of questionable usefulness. A business entity's lack of access to its documents during discovery can be as costly as the identification and location of the documents.

Class actions are unwieldy and by many courts' own admissions threaten to overburden their case load. Coupled with the reluctance of courts to dismiss class actions, court management of class actions is a significant, unresolved problem.

If the class action remedy is to remain viable and fair for litigants, specific abuses must be addressed:

(a) The litigants who do not prevail should bear the significant costs of identifying and notifying parties.
(b) Unfounded class actions should be dismissed before expensive discovery and class certification takes place.
(c) The problem of standing and who are the proper parties to bring a class action should be viewed restrictively to end the filing of frivolous class actions.
(d) Strong sanctions should be applied against attorneys using class actions merely as vehicles for fishing expeditions in search of a basis for other class actions.
(e) Questionably high attorneys fees associated with class actions should be brought in line with time expended and results achieved. Such stricter court scrutiny would protect the recovery of all class members, many of whom are unknown to the attorney representing the class. Perhaps one counsel should be designated by the court at the beginning of a class action to represent all plaintiffs.

Also new approaches may be needed, such as requiring an injunction or a cease and desist order before a class action might proceed, restricting certain types of class actions only to

government action for an injunction and requiring a bond for costs from corporate plaintiffs in class actions.

Alliance Policy

The class action can be a useful procedural tool in many areas of litigation and for a wide range of potential plaintiffs and defendants. The Alliance believes, however, both the states and the federal courts should address the abuses created by class action litigation and seek reform of such abuses along the lines followed by the federal courts. The difficulty with class actions does not come from their availability, but results from specific abuses that have been permitted to continue.

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Exhibit B-1

Federal Rules of Civil Procedure, Title 28, United States Code, Judiciary and Judicial Procedure, Rule 23, Class Actions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice

shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, Eff. July 1, 1966.)

C. Comparative Negligence and Joint and Several Liability

Definitions

When allocating responsibility for injury or damages, a court will apply one of the following rules:

- **Contributory Negligence** - The injured person may not recover if he or she is partially responsible for the injury. Under this system, if the plaintiff contributes at all to his or her own injury or damages, the plaintiff is completely barred from recovering, regardless of the degree of the plaintiff's negligence.
- **Pure Comparative Negligence** - This rule permits a court to determine the responsibility of each party in the action and to allocate damages according to their percentages of fault. Under pure comparative negligence, even though the plaintiff may be primarily responsible for his or her own injuries, the plaintiff may recover from defendants who are less at fault. Thus, a plaintiff may recover regardless of whether his or her own negligence in causing the resulting harm was less than, the same or greater than any of the defendants.
- **Modified Comparative Negligence** - A plaintiff may recover damages from a defendant only if the negligence of the defendant is greater than that of the plaintiff. If a plaintiff and defendant are equally negligent or the plaintiff is more negligent than the defendant, then the plaintiff is not allowed to recover damages.
- **Joint and Several Liability** - Liability which is imposed upon more than one wrongdoer. Under this doctrine, an injured person can sue and recover from any one or more of the wrongdoers at his or her option, regardless of that wrongdoer's degree of responsibility. The injured person cannot receive double compensation, but he or she can choose to recover 100 percent of a damages award from any defendant who is found liable to any extent.
- **Several Liability** - Under this doctrine, a defendant is liable only to the extent that he or she is responsible for the plaintiff's injury. Each defendant is responsible only for that portion of an award corresponding to the percentage of responsibility assigned to that defendant by a court or jury.

Background

Contributory negligence was developed through the English common law. The doctrine was abandoned in Great Britain over 100 years ago. Forty-two states have replaced contributory negligence with a comparative negligence system. Fourteen states have adopted the pure comparative negligence version, including: Alaska, Arizona, California, Florida, Illinois, Louisiana, Kentucky, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island and Washington. Although the insurance industry, various business groups and defense bar organizations have united in efforts to replace pure comparative negligence with the modified version, they have only been successful in Iowa.

To balance the harsh "all or nothing" rule of contributory negligence, many state courts adopted joint and several liability. This concept enables a plaintiff to collect full damages from any one of a group of defendants, regardless of any defendant's individual degree of responsibility. Joint and several liability is subject to abuse, since a plaintiff may recover full damages from the defendant with the most resources, even if that defendant had little actual responsibility for the damages. Although the "deep pocket" defendant may seek fair compensation from codefendants, this right to reimbursement is of little use if codefendants are insolvent or judgment proof. Even so, the system still breeds unnecessary lawsuits, thus increasing legal expenses.

When joint and several liability was developed, it was commonly believed that juries were unable to determine the relative degree of responsibility among defendants and plaintiffs. At

that time, juries could only determine whether a party contributed to the injury, not how much of the damage each individual caused. Accordingly, if the plaintiff was found even partially responsible, he or she was denied recovery. If the plaintiff was fault-free, the defendants were deemed jointly liable, since juries could not allocate "degree of fault" under the contributory negligence/joint and several liability system.

Although it is logical that the adoption of a comparative negligence system should lead to the repeal of joint and several liability, most states have not abandoned the theory of joint and several liability. Because legislation and court decisions adopting comparative negligence are generally silent on the issue of joint and several liability, the theory remains in effect in most jurisdictions.

There have been recent efforts in a few states to repeal or modify the impact of joint and several liability. Two states have suggested novel approaches to modify the concept

- **Iowa** - Adopted a modified comparative fault system and enacted provisions which limit the application of joint and several liability to defendants who are found to be more than 50 percent at fault for the damages. Defendants who are less than 50 per cent responsible will be liable only for the damages they caused.
- **California** - A coalition proposed an initiative statute that would limit a defendant's liability for non-economic damages to the defendant's proportionate share of the damages based on degree of fault. Enough signatures were gathered to place the proposal on a June 1986 ballot.

In addition to Iowa's action, Kansas, New Mexico, Utah and Wyoming have abolished joint and several liability. At least 11 other states have limited the concept.

The *Uniform Contribution Among Tortfeasors Act* establishes a system for joint tortfeasors to recover against each other for payments made in excess of their individual responsibility. However, the act does not provide for determination of a share of the damages based upon the percent of responsibility.

Alliance Policy

The Alliance supports enactment of modified comparative negligence and supports the replacement of joint and several liability with a system of several liability only. The Alliance supports enactment of the *Uniform Contribution Among Tortfeasors Act* with amendments to provide for several liability. The Alliance opposes the *Uniform Comparative Fault Act*, which imposes a system of pure comparative fault. The Alliance, likewise, supports model legislation (as set forth in Exhibit C-2) on comparative fault.

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Exhibit C-1

Alliance Model Legislation - Uniform Contribution Among Tortfeasors Act (1955 Revised Act - National Conference of Commissioners on Uniform State Laws)*

An Act Concerning Contribution Among Tortfeasors, Release of Tortfeasors, Procedure Enabling Recovery of Contribution and Making Uniform the Law with Reference Thereto.

Sec. 1. Right to Contribution.

(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Act shall not apply to breaches of trust or of other fiduciary obligation.

Sec. 2. Pro Rata Shares.

In determining the pro rata shares of tortfeasors in the entire liability: (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

Sec. 3. Enforcement.

(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either: (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment; or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

Sec. 4. Release or Covenant Not to Sue.

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Sec. 5. Uniformity of Interpretation.

This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

Sec. 6. Short Title.

This Act may be cited as the Uniform Contribution Among Tortfeasors Act.

Sec. 7. Severability.

If any provision of this Act or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

Sec. 8. Repeal.

All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Sec. 9. Time of Taking Effect.

This Act shall take effect_____.

* Reprinted with permission of the National Conference of Commissioners on Uniform State Laws, Chicago, Illinois. Copies of the Act may be obtained from the Headquarters Office, National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue, Suite 510, Chicago, Illinois 60611.

Exhibit C-2

Alliance Model Legislation - Comparative Fault (1984 Joint Draft)

Sec. 1. Effect of Contributory Fault.

(a) Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for death or injury to person or property if such contributory fault was not as great as the fault of the person against whom recovery is sought, but any damages shall be diminished in proportion to the amount of fault attributable to the person recovering or for whose injury, damage or death recovery is made.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Sec. 2. Judgments.

The plaintiff shall be awarded judgments only in that percentage of his damages equal to the percentages found against each defendant. The judgments shall be entered severally and not jointly, against each defendant in an amount equal only to the percentage of damages causally attributable to that defendant.

Sec. 3. Joinder.

Subject to rules of procedure and to lawful defenses, any party may cause joinder as a party defendant of any entity claimed to be causally responsible for some percentage of plaintiff's damages.

Sec. 4. Third Party Action Prohibited.

Except where a contractual relationship otherwise permits, no defendant shall have a right to recover any portion of the percentage of his cause of plaintiff's damages from any other defendant or entity.

Sec. 5. Application of Act.

This Act shall apply to all causes of action accruing on or after the effective date.

Exhibit C-3

An Act Relating to Negligence Actions, Florida House Bill No. 172, Prefiled for the 73rd General Assembly, To Convene April 8, 1986

A bill to be entitled

An act relating to negligence actions; providing for liability for damages based upon the degree of fault; providing for the elimination of joint and several liability in negligence actions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. In actions based on negligence, the amount of damages awarded a party shall be apportioned according to the degree of fault of each of the parties to the occurrence that gave rise to the action. Joint and several liability shall not exist among parties to an action when negligence is apportioned among parties to an occurrence, and each party found responsible for a proportionate amount shall be severally liable for that amount only. When the negligence of more than one party to an occurrence is an issue, the proportionate fault of all the parties shall be determined in a single action.

Section 2. This act shall take effect upon becoming a law and shall apply to all causes of action pending at the time of its passage in which the proportionate fault of the parties is an issue and to all cases filed thereafter.

Exhibit C-4

Fair Responsibility Act of 1986, Proposed Amendments to the California Civil Code Relating to Joint and Several Liability, Petition to California Secretary of State to Submit to the Voters of California for Adoption or Rejection, Petitions Filed December 17, 1985, Petitions Qualified January 17, 1986

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

MULTIPLE DEFENDANTS LIABILITY FOR TORT DAMAGES. INITIATIVE STATUTE. Under existing law, tort damages awarded a plaintiff in court against multiple defendants may all be collected from one defendant. A defendant paying all the damages may seek equitable reimbursement from other defendants. Under this amendment, this rule continues to apply to "economic damages," defined as objectively verifiable monetary losses, including medical expenses, earnings loss, and others specified; however, for "non-economic damages," defined as subjective, non-monetary losses, including pain, suffering, and others specified, each defendant's responsibility to pay plaintiff's damages would be limited in direct proportion to that defendant's percentage of fault. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Enactment of this measure would eliminate the responsibility of the state and local governments to pay for non-economic damages attributable to the actions of others. Preliminary data indicate that savings to state and local governments could be several millions of dollars annually, but may fluctuate significantly annually, depending on size of claims paid.

TO THE HONORABLE SECRETARY OF STATE OF CALIFORNIA:

We the undersigned, registered, qualified voters of California, residents of the below mentioned County (or City and County) hereby propose amendments to the Civil Code relating to joint and several liability and petition the Secretary of State to submit the same to the voters of California for their adoption or rejection at the next succeeding general election or at any special statewide election held prior to that general election or otherwise provided by the law. The purposed statutory amendments read as follows:

SECTION 1: This shall be known as the "Fair Responsibility Act of 1986."

SECTION 2: Section 1431 of the Civil Code is amended to read:

§1431 Joint Liability

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint and not several, except as provided in Section 1431.2, and exception in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

SECTION 3: Section 1431.1 is added to the Civil Code to read:

§1431.1 Findings and Declaration of Purpose

The people of the State of California find and declare as follows:

(a) The legal doctrine of joint and several liability, also known as "the deep pocket rule" has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault under joint and several liability. If they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The people — taxpayers and consumers alike — ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault to treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

SECTION 4: Section 1431.2 is added to the Civil Code to read:

§1431.2 Several Liability for Non-economic Damages

(a) In any action for personal injury, property damage or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

SECTION 5: 1431.3 is added to the Civil Code to read:

§1431.3 Nothing contained in this measure is intended in any way to alter the law of immunity.

SECTION 6: Section 1431.4 is added to the Civil Code to read:

§1431.4 Amendment or Repeal Measure

This measure may be amended or repealed by either of the procedures set forth in this section if any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.

(a) This measure may be amended to further its purposes by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring and signed by the Governor if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.

(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.

SECTION 7: Section 1431.5 is added to the Civil Code to read:

§1431.5 Severability

If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of the measure are severable.

D. Contingent Fees

Definitions

A contingent fee is a contractual arrangement between a lawyer and a client for legal services for which the lawyer is to be paid if, and only if, some recovery is achieved through the lawyer's efforts. The distinguishing characteristic of contingent fees is the negative: if the plaintiff loses, the lawyer does not get paid. Contingent fee contracts are used in many areas of law practice, particularly in personal injury and workers compensation claims, corporate business litigation, tax practice and class action suits. In each of these situations, the lawyer's fees are a percentage of the recovery, whether it be the injured client's recovery for an accident or the savings or refund to a taxpayer.

Background

Court costs, other litigation expenses and lawyers' fees are the principal out-of-pocket expenses paid by those who use the courts to resolve controversies. A recent study by the American Bar Association's Action Commission to Reduce Court Costs and Delay (ABA Commission) concluded that while courts can implement measures to eliminate delay, those efforts do not lower legal fees for clients retaining attorneys on a contingency basis.

By contrast, for clients paying lawyers on an hourly basis, time-saving efforts by the courts mean less lawyer time and lower legal bills. The ABA Commission cited Kentucky's reduction of the average time to dispose of cases from 16 months to five months. A subsequent survey revealed that 83 percent of the lawyers retained on an hourly basis realized time savings that were passed on to the client. The average saving was $650 or almost one-fourth of the average total fee. However, 39 percent of lawyers paid by contingent fees reported time savings but no reduction of fees since the fee was a percentage of the client's recovery.

Thus, lawyers' fees are very important in the administration of civil justice. To the extent lawyers use a fee contract which results in unfairness or inhibits the effectiveness of court reforms, their clients are denied the full and fair administration of justice.

Contingent fees are not the only way that lawyers are paid. In fact, the United States is the only major industrial nation which uses contingent fees. In virtually every other country, the contingent fee system is considered illegal and/or unethical and is prohibited or heavily regulated. Even in the U.S. there are types of cases where contingent fees are prohibited. Most states prohibit contingent fee arrangements in criminal and domestic relations cases.

Many lawyers are paid for their services regardless of the outcome. Typically, a lawyer will charge a client by the hour for work on a legal matter. Lawyers also will arrange monthly or yearly retainers from clients providing a continuing flow of routine legal work. Other lawyers charge set fees, regardless of the client, for a particular service, such as drafting wills or obtaining non-contested divorces. Finally, legal services are performed by lawyers who are salaried employees of law firms, governmental bodies, corporations or other organizations.

Despite these other fee arrangements, the contingent fee system developed on the theory that with contingent fees anyone could afford and choose even the best lawyer. The client need not be able to pay, but must only have a good case. The contingent fee appears to be a blessing for the average citizen who pays no fee unless a money judgment is obtained. A close examination, however, shows the system is, at best, a mixed blessing:

- **The percentage nature of the contingent fee is a poor measure of the cost of legal services.** Taking a percentage of the recovery as a legal fee in some cases leads to exorbitant profits for the lawyer. For example, in personal injury cases, where the defendant's liability is clear, the lawyer may obtain a big settlement for the client after working only a few hours. In such cases, taking 25 to 33 percent and up to 50 percent of the injured claimant's recovery represents an excessive profit for the lawyer. Lawyer's fees in personal injury cases arising out of auto accidents are par-

ticularly shocking because the majority involve rear-end collisions, stop light violations or other oversights in operation where the defendant's liability is clear. The only issue in these cases is the jury's monetary evaluation of obviously serious injuries. For example, if a claimant's injuries are valued at $300,000, the claimant's lawyer collects $100,000 under most contingent fee contracts and the claimant receives $200,000. The lawyer may have worked only a few hours but still collects the entire $100,000.

- **The contingent fee does not assure lawyers will be available to everyone with a good case.** Contingent fees actually discourage the bringing of smaller, but meritorious, claims. The percentage of a small recovery will not compensate the lawyer for the time and work needed to pursue the case. Most lawyers will refuse small cases, regardless of merit.
- **Contingent fees create a potential conflict of interests between the lawyer and client.** Under the contingent fee system, lawyers have an economic interest in the case because they do not get paid unless there is a recovery. However, this interest may differ from the client's. For example, the client, facing mounting medical bills and loss of income, may desperately want to settle the case instead of risking no recovery at trial. The lawyer, having other sources of income, may be much more willing to wait for a bigger settlement at trial and, hence, a bigger contingent fee. Since the question of whether to settle or go to trial for a larger recovery arises in every case, this potential for conflict of interests is always present. When this conflict arises, the lawyer will usually prevail since the client often relies on the lawyer's advice.
- **The contingent fee encourages groundless litigation.** Supposedly the lawyer working on a contingent fee basis will have no economic incentive to bring groundless lawsuits. If there is no chance of recovery or fees, the lawyer should not bring the case. However, when the probability of winning is small, but the potential recovery would be large, some lawyers will take this risk and file the lawsuit. Since clients incur no legal fees unless their lawyers obtain a recovery, clients too will be likely to encourage lawyers to bring such cases. Even if contingent fees may not encourage groundless litigation, they do not discourage lawyers from filing nuisance suits and inflating the amount of damages sought.
- **The contingent fee permits over-reaching by lawyers.** Because the fee is set in advance and is contingent upon recovery, eager and inexperienced claimants may promise to pay a large percentage of their recovery as the lawyer's fee. The claimant is negotiating in unfamiliar territory. The lawyer can better evaluate the merits of the case and the work involved. Thus, a lawyer might demand an unduly high percentage of the eventual recovery without the client knowing a lesser fee might be bargained for. Moreover, there will always be the temptation to surcharge a victorious client with a high percentage to make up for the other losses.
- **Contingent fees may encourage unethical conduct on the part of lawyers.** The contingent fee system may encourage solicitation of business, commonly called "ambulance chasing." Since the lawyer's fee depends upon the claimant's recovery, lawyers will want the most lucrative cases. Solicitation may only lead to employing the most aggressive lawyer and does not necessarily result in retention of the most competent lawyer. Conversely it encourages the most aggressive, and possibly the unethical, to seek out the most seriously injured persons.

Because of potential abuses, a number of states regulate contingent fees. Some states require the lawyer to disclose information to the client about the contingent fee rate, how disbursements and costs will affect the fee and the client's recovery, and the fact that the lawyer's fee is not set by law but is negotiable. Other states require lawyers to file copies of their contingent fee contracts and other information with the courts or appropriate judicial bodies. Thus,

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rather than making disclosures to the client, lawyers report to the courts who supervise them and can intervene and review contracts calling for excessively large fees.

Furthermore, some states set a maximum schedule for contingent fees, which is generally a sliding scale of percentages based on the amount of recovery. For example, a lawyer might be allowed to take 33 percent of the first $50,000 of recovery, 25 percent for the next $100,000, 15 percent for the next $' 0,000 and 5 percent of any portion over $500,000. Finally, some states have introduced legislation which would require lawyers to charge by the hour in areas such as probate.

Alliance Policy

The Alliance, while not advocating the abolition of contingent fees, objects to abuses of the contingent fee system. Lawyers should not be permitted to collect fees which bear no relationship to the time, effort, skill or value to the client of the legal services rendered. Such excessive fees reduce money given to injured claimants, who generally need every dollar available, and reduce the fairness and equity in the civil justice system.

Thus, the Alliance believes that the contingent fee system should be regulated and restricted to eliminate possible abuses while preserving its benefits. Fees calculated on a graduated percentage scale guarantee a greater share of the recovery for the injured party, while providing the attorney with reasonable payment for services. Therefore, the Alliance supports mandatory sliding scale fee schedules (an example is set forth in Exhibit D-1). The exact percentages permitted can be tailored to the nature of the judgments in any state.

The Alliance also supports enacting contingent fee reporting laws to require attorneys to present copies of their contingent fee contracts and related information to their clients or the appropriate judicial body. At a minimum, the clients bound by these contracts should receive a copy and be informed of their effect. With this information, clients may negotiate better and counteract potential over-reaching by the lawyer. Depending on the available judicial resources, some states may require such disclosures to a judicial body. This would assure compliance with graduated percentage schedules and put the information into the hands of those with authority to discipline lawyers (examples of reporting legislation are set forth in Exhibits D-2, D-3 and D-4).

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Appendix D
CONTINGENT FEES

Exhibit D-1

Alliance Model Legislation - Maximum Limits on Contingent Fee Contracts

Sec. 1. As used in this Act, the term "contingent fee" means an agreement for legal services of an attorney or attorneys, including any associated or forwarding counsel, under which compensation is contingent, in whole or in part, upon the successful accomplishment or disposition of the subject matter of the agreement, and is to be in an amount which either is fixed or is to be determined under a formula.

Sec. 2. In any claim or action based on tort, contract law or otherwise to recover damages for personal injury, death or property damage, no attorney representing any party to such claim or action shall contract for, charge or collect, on a contingent fee basis, any fee for his or her services in excess of the following limits:

(1) 33 1/3% on the first $50,000 recovered;
(2) 25% of the next $100,000 recovered;
(3) 15% of the next $350,000 recovered, and
(4) 5% of an amount on which the recovery exceeds $500,000.

Sec. 3. The permissible fee provided for in Section 2 shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, regardless of who advances the disbursements, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal and any interest included in a judgmen but no deduction need be made for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal. Where representation is undertaken on behalf of both a husband and wife or parent or guardian and child in a derivative action, or where a claim for wrongful death is joined with a claim on behalf of a decedent, the contingent fee shall be calculated on the aggregate sum of the recovery.

Sec. 4. When the payment of any settlement or judgment between the parties contains terms which provide for the payment of the funds to be received by the plaintiff on an installment or periodic basis, the basis for calculation of a contingent fee shall be the value of the structured settlement. Value shall consist of any cash payment made upon consummation of the settlement plus the actual cost to the party making the settlement of the deferred payment aspects thereof. In the event that the party paying the settlement does not purchase the deferred payment component, the actual cost thereof shall be the actual cost assigned by that party to the component. For further purposes of this Act the party making the settlement shall disclose to the party receiving the settlement its actual cost and, if it does not purchase the deferred payment aspect of the settlement, the factors and assumptions used by it in assigning actual cost.

Sec. 5. When representation is undertaken on behalf of several persons whose respective claims, whether or not joined in one action, arise out of the same transaction or set of facts or involve substantially identical liability issues, the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries, whether by judgment, settlement or both, and shall be charged to the clients in proportion to the recovery of each.

Sec. 6. Section 2 of this Act is intended to fix maximum permissible fees and does not preclude an attorney from entering into a contingent fee arrangement providing for, or from charging or collecting a contingent fee below such limits.

Sec. 7. If at the conclusion of a matter, an attorney considers the fee permitted by Section 2 to be inadequate, an application, on written notice to the client, may be made to the court in the manner prescribed by its general rules. The court may grant an increase in the maximum contingent fee permitted under Section 2 only upon the presentation of clear and convincing evidence of unusual, specific facts or circumstances which warrant compensation in excess of that provided in this Act. This section shall be supplementary to and shall not repeal or otherwise affect the exercise of any right a client may have to a court review of the reasonableness of an attorney's fee.

Sec. 8. A contingent fee arrangement made in violation of this Act shall be void and shall not be enforced. A person affected by a violation of this Act shall have the substantive right to bring an action on his or her own behalf for damages by reason of such conduct or violation, together with costs including reasonable attorney fees, and such other relief to which the person may be entitled under law. When the Attorney General has reason to believe that a person has violated this Act, he or she shall have standing to bring a civil action for injunctive relief and such other relief as may be appropriate to secure compliance with this Act. This remedy shall be supplementary to and shall not repeal or otherwise affect any remedy or penalty provided by statute or rules of the Supreme Court of this state.

Sec. 9. This Act applies to contingent fee contracts entered into after the effective date of this Act.

Exhibit D-2

Alliance Model Legislation - Disclosure of Contingent Fee Contracts to the Judiciary

Sec. 1. Attorney Contingent Fee Retainer Statement. In order to provide information for study purposes as to the subject of contingent fees and the operation of any proposed rules, every attorney who, in connection with any action or claim for damages for personal injuries, accepts a retainer whereby his or her compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of entering into any such retainer or agreement of compensation, sign personally and file with the appropriate judicial body a written statement of such retainer or agreement of compensation. Such statement must include the date and terms of the compensation agreement, the name and address of the client and the name and address of the retaining attorney. If claim is for personal injury, wrongful death or property damage, the statement shall also disclose the date and place of occurrence, and the name, address, occupation and relationship of any person referring the client to the retaining attorney.

Exhibit D-3

Alliance Model Legislation - Disclosure of Fees Under Contingency Contracts to the Judiciary

Sec. 1. Contingent Fee Closing Statement. Every attorney receiving, retaining or sharing any sum as contingent compensation in any claim or action for personal injury, death or property damage shall, within 15 days after such receipt, retention or sharing, file a closing statement with the clerk of the court in which the action was brought, or if no action was brought, then with the clerk of a court of competent jurisdiction in this state. Such a statement must include the gross amount of the recovery, the costs and disbursements, the amount of compensation actually received or retained by the attorney, and the net amount of the recovery actually received by the client.

Exhibit D-4

Alliance Model Legislation - Disclosure of Contingent Fee Contracts to the Client

Sec. 1. An attorney who contracts to represent a plaintiff on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the plaintiff, or his guardian or representative, to the plaintiff, or to the plaintiff's guardian or representative. The contract shall include, but is not limited to, the following:

(a) A statement of the contingency fee rate which the client and attorney have agreed upon.
(b) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.
(c) A statement as to what extent, if any, the plaintiff could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.
(d) A statement that the fee is not set by law but is negotiable between attorney and client.

Sec. 2. Failure to comply with any provision of this section shall render the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

E. Discovery Abuse

Definitions

Discovery is the process by which the parties in a legal dispute can find information and evidence pertinent to their case from another party. The general objective of discovery is to promote justice by allowing each party to obtain a fair understanding of all relevant evidence before a trial begins, thereby avoiding "trial by ambush."

Federal rules of procedure apply to discovery in cases brought before federal courts; similarly, state courts have rules pertaining to state filings.

Background

Since the late 1960's discovery has been called the most costly and time-consuming part of litigation. Discovery can be abused by over-using permissible procedures and unreasonably avoiding requests. Although Federal Judicial Center studies indicate that discovery is not a problem in all cases, there is widespread concern about discovery abuse. Also, in a study of Chicago litigators, 79 percent had negative or mixed feelings about the discovery process, and 40 percent of this same group believed excessive discovery and use of the process for harassment were problems.

There is no doubt that the discovery process is time consuming. A recent study noted that nearly 17 percent of the average litigator's time was devoted to discovery. This percentage was higher than any other activity, such as legal research, settlement discussions or even activity related to trials and hearings.

Detailed evidence is difficult to accumulate, but there is a genuine basis for concern, particularly in complex litigation. In an extreme, but not unique, antitrust case involving SCM Corp. and Xerox Corp., the two sides took a total of 233 depositions. Recently an insurance company was required to produce 2.3 million documents in a three-month period to be available for review in its home office, eight regional offices, and 150 branch offices. The company reported that the discovery order cost more than $800,000, including establishing a document production facility occupying 3,600 square feet. As of January 1985, the company estimated its external costs for this litigation (including legal fees) were over $3 million — almost all of these discovery-related.

One authority estimates that it costs $300,000 for a lawyer to review the documents discovered in a modest-sized civil case. Such a case involves 10,000 documents averaging 10 pages each and 5,000 transcript pages from depositions and interrogatories. At the extreme, litigants are now being asked to construct or refurbish courtrooms big enough to contain their documents. In one such case, litigants paid $450,000 for the courtroom and another $200,000 for the computer system to store the 150,000 exhibits and 250,000 objections involved in the case.

Studies of the federal court system caseload indicate that litigation costs and duration are increasing. The number of cases filed in 1975 increased 120 percent from 1960, and the percentage of cases pending for more than three years increased by 24 percent. As litigation increases in amount and duration, problems with the discovery process will be exacerbated.

Why Has Discovery Become a Problem? Current literature indicates that abuses result from ineffective rules, judicial inaction and lawyer misconduct. By far, most commentators have focused on improving discovery rules. Even those seeking to correct discovery problems caused by the legal profession or judiciary recommend amending discovery rules.

Discovery Abuse Resulting from Existing Rules. Rules 26-37 of the *Federal Rules of Civil Procedure (FRCP)* contain provisions for basic discovery devices: depositions, written interrogatories, production of documents or things, permission to enter upon land or other property, physical or mental examinations, and requests for admissions. The *FRCP* apply to all cases brought in federal courts. Based on the notion that justice is best served when all parties are thoroughly informed, the discovery rules were well received in 1938 by the bench and bar

and have been interpreted liberally ever since.

FRCP's two underlying philosophies are:

(a) to promote swift and fair administration of justice by permitting the maximum exchange of information between parties prior to trial so each will know the facts and issues involved and there will be no "trial by surprise;" and

(b) to minimize court intervention in this exchange.

The United States Supreme Court, with the consent of Congress, recently adopted amendments suggested by the Judicial Conference and the American Bar Association to correct discovery problems.

Rules 16 and 26 as amended would provide for a pretrial conference early in the litigation and formulation of a discovery schedule and plan to control discovery. Rule 16 also allows the court actively to define issues, weed out frivolous claims and defenses, and impose sanctions to enforce the pretrial orders and schedules.

Rule 11 makes the signature of an attorney on a pleading constitute a certificate, subject to sanctions from the court, that the attorney has read the pleading, it is well grounded and warranted, and it is not interposed to harass or cause unnecessary delay.

Several of the rules continue to be focal points for discussion:

- **Rule 26 - General Provisions on Discovery.** The scope of discovery under Rule 26 includes any information "relevant to the subject matter involved in the pending action." This broad definition makes nearly any discovery request proper, no matter how abusive. It can also prevent judges from keeping discovery within reasonable bounds regardless of their authority to intervene.

  The ABA has, thus, recommended limiting the scope of discovery only to information "relative to any claim or defense of any party in the case." Other proposals suggest an overall time limit for discovery, such as 60 or 90 days.

- **Rule 33 - Interrogatories.** Interrogatories are written questions served on the other party to obtain written answers. But the interrogatory process is abused through the use of standardized or "canned" interrogatories. Such questions are often not tailored to the particular case and turn the process into a burdensome, wasteful proceeding. Defense attorneys argue that opponents are not trying to get information through endless interrogatories, but are imposing the burden to get a better negotiating position for settlement. Plaintiffs attorneys also complain of evasive answers and unjustified objections to questions.

  Commentators suggest interrogatories should be limited to 30 with a specific certification requirement where the party answering or objecting certifies that the answers or objections were made in good faith and each question has been carefully read or answered separately and fully.

- **Rule 34 - Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.** Under Rule 34, a party can require another party to produce documents. As the volume and complexity of records grows, this can require screening and collating vast quantities of paper and computer data. Parties may demand costly production of documents to coerce the opponent into a settlement. Rule 34 also permits a party to respond by dumping cartons of documents onto the discovering party and deliberately mixing crucial documents with others to obscure their significance.

  A suggested Rule 34 amendment would provide that if the same time and expense would be involved for either the discovering or discovered party to obtain the information then the discovering party should pay the expense.

- **Rule 37 - Sanctions.** Rule 37 provides sanctions for discovery abuse. Penalties include awarding costs and attorneys' fees for an inadequate response to a discovery request or dismissal for violating a court order regarding discovery.

Rule 37 is criticized, however, for only allowing sanctions for those refusing without justification to respond to discovery requests but does not penalize those making unreasonable or unnecessary discovery demands. Also the sanctions are meaningless because attorneys can simply pass the fines on to their clients. It has been suggested that Rule 37 be amended to prohibit an attorney from directly or indirectly charging any portion of such a sanction to the client.

Commentators agree that additional sanctions should be monetary and that the court should conduct a post-judgment review procedure upon its own motion or motion of counsel to determine if there has been any over-use or avoidance of the discovery process.

Discovery Abuse Resulting from Lawyers' Conduct. A number of commentators state that attorneys, not discovery rules, are the cause of abuses. Such discovery abuse can be caused by lawyer inexperience, ineptitude and fear of malpractice lawsuits.

Other abuse may result from organizational changes in large law firms. Law firms now have developed "litigation departments" where associates' time, billed on an hourly basis, are major "profit centers." Also litigation is handled in a decentralized way. Rarely does the lawyer who handles discovery actually litigate the case. These lawyers can spend hours on a discovery request to produce information never used by the attorneys at trial.

Another criticism is the adversary system itself. Some believe the contingency fee strongly motivates plaintiffs' lawyers to try all kinds of discovery techniques just to be a "winner." Defense lawyers, paid on an hourly basis, may similarly have no incentive to limit discovery.

Suggestions to end discovery abuses include: regulation of lawyers' fees, awarding costs for abuse of discovery, increasing trial lawyers' qualifications, more control of defense counsel by house counsel and greater judicial supervision.

Discovery Abuse as the Result of Judicial Inaction. Commentators emphasize the need for greater judicial control over the discovery process. A common complaint is that judges are unwilling to manage the pretrial process. Despite well-intentioned efforts to resolve them, disputed matters necessitate additional motion practice and trips to court. Once in court, lawyers note difficulty in getting judicial decisions on discovery issues and in persuading judges to limit or schedule the discovery process. Another common complaint is that judges are reluctant to impose sanctions for abuses.

Judges offer many reasons for inaction. Many argue that judicial inactivity complies with the letter and spirit of the *FRCP* requiring little judicial involvement. Other reasons include fear that sanctions or intervention will be counterproductive, will affect the case on its merits or that parties will resent court-initiated intervention. Judges say mounting caseloads force assigning low priority to discovery disputes which parties should resolve themselves. In fact, some judges argue significant involvement in discovery requires additional judicial time and resources. Finally, intervention is viewed as useless when the lawyers who abuse the process will not be deterred because such abuse is in their economic interest.

Many state judges argue that the discovery process can be managed effectively by direct calendaring, as used at the federal level, giving a judge total control of a case. Also, the federal rules provide for discovery conferences which create a forum for dialogue. Since many state judges do not get cases assigned to them "for all matters," they believe reorganization of their state courts' case handling is necessary to control the discovery process effectively.

Alliance Policy

Based on information and experience from member companies' claims departments as to the extent and type of discovery abuse problems, the Alliance supports state and federal adoption of court procedures to limit these abuses. The Alliance believes discovery problems are complex and that there is no single, all-encompassing solution. Rather, the discovery process must be reviewed on a state-by-state basis as some states have problems with rules while

others have problems in judicial or court administration. The Alliance encourages appropriate entities to review their discovery process (specific policy considerations for use during review are set forth as Exhibit E-1).

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Exhibit E-1

Alliance Policy Considerations for Improving Discovery Management

I. **Changes in Court Rules or Laws.** For states which have a problem with existing discovery laws or court rules, the following changes should be considered:

1. **Existing Rules or Laws.** For states considering amendments to their laws or court rules, the *Federal Rules of Civil Procedure* should be used as a starting point for changes in the management of the discovery process.

2. **Experimentation and Improvement.** Recognizing that even the federal rules can be improved, some states may wish to experiment with new procedures or rules designed to improve the discovery process, which may include:

(a) Eliminating discovery in any civil case where the anticipated award would reasonably not exceed $50,000, based on the pleadings;

(b) Where discovery is permitted, and the claim or estimated discovery costs would exceed a stated amount, require a pre-discovery hearing for presenting direct evidence on discovery request costs. If the court allows discovery to proceed, the court may order the requesting party to pay all or a reasonable percentage (never less than 50 percent) of the costs that will satisfy the request, as established at the hearing. The court may require that the requesting party post a bond with the court to insure payment.

If the requesting party is successful in the underlying cause of action, the court may shift these discovery costs back against the defendant in addition to the damages awarded. However, to assure consistency, there must be a close coordination in shifting these discovery costs back to the defendant with any existing judgment rule regarding the fair shifting of costs between parties.

(c) Require that a party making a claim without a formal demand that invokes the court by way of a motion for a bill of particulars must disclose to the other party the basis of the claim.

(d) Implementing other limitations on the discovery process, or one of its devices, particularly if another jurisdiction has effectively used such a procedure. This might include limits on the number of interrogatories, expert witness fees, or time limits on the overall process.

3. **Arbitration.** Establish mandatory, and if possible binding, arbitration with limited and expedited discovery proceedings for all small claims (less than $50,000). Encourage alternate dispute resolution procedures in all other cases.

4. **Special Masters.** Provide special masters, appoint representatives of the court, for discovery of complex cases. Federal rules permit this procedure.

5. **Monetary Sanctions.** Strengthen existing sanctions against those parties or attor-

neys who abuse the process by unnecessary avoidance, overuse of procedures and violation of court orders. Encourage judges and lawyers to report unethical and abusive discovery conduct to the appropriate authority while giving them immunity from liability for such reports.

II. **Changes in Court or Judicial Administration.** For states having a problem with their court or judicial administration, the Alliance encourages improvement through, but not limited to, the following:

1. Assign one judge to a case where discovery masters may be used. Make this judge responsible for all decisions in that case from beginning to end, including the motions and orders pertaining to discovery management.

   Avoid the alternative, motion dockets, in which judges only hear discovery or other types of motions for cases not even assigned to them.

2. Require pre-discovery conferences to determine whether discovery should proceed as well as to determine its scope. Encourage telephone conferencing for such hearings.

3. Encourage judges to establish detailed schedules with cutoff dates for and limitations on the number of depositions, interrogatories, and other discovery activities.

4. Encourage judges to sanction a lawyer or party who does not comply with discovery rules and orders, or otherwise abuses the process. The lawyer should pay the sanction immediately without passing it on to the client.

5. Strongly encourage the use of special masters for discovery in complex litigation, usually characterized by multiple plaintiffs in a class action, multiple defendants pleading against each other, and large dollar claims (over $50,000). The masters' authority should have as wide a jurisdiction as possible.

III. **Voluntary Efforts.** House and outside defense counsel can take a number of voluntary steps to eliminate discovery problems:

1. Discuss the necessary discovery in any case, setting timetables and cost estimates for discovery procedures and related motions.

2. Together make timely decisions on whether a case will be tried or settled.

3. Attempt to obtain mutual limitations on discovery with opposing counsel, such as limiting the expert witnesses.

4. Continually search for ways to cut costs, such as using paralegals and telephone conferences, and eliminating needless photocopying.

F. Jury Instructions

Definitions

Jury instructions guide and aid a jury in reaching a proper verdict. Before or upon completing the presentation of the evidence and closing statements, the judge presents a final address to the jury. During this charge to the jury, the judge sums-up the case and instructs the jury as to the rules of law which apply to various issues.

The charge can be either a general charge or a special charge. The general charge or instruction is upon the case as a whole or upon the general features or characteristics of the case. The special charge or instruction is upon some particular point or question involved in the case and usually is given in response to counsel's request for such instruction.

Thus, jury instructions are a direction or statement made by the judge to inform the jury of the law applicable to the case in general or in some aspect. The jury is bound to accept and apply such instruction.

The attorneys for both sides normally furnish the judge with suggested instructions. Also many states have model or pattern jury instructions which trial judges must use or substantially follow.

If during its deliberations the jury is unclear about a particular point of law or aspect of the evidence, it may request the court for additional or supplementary instructions.

Mandatory instructions set up a factual situation and direct the jury to a certain result. The judge unequivocably charges the jury that if from the weight of the evidence a certain set of facts exists, then the jurors must find for one party and against the other.

When the court gives a peremptory instruction to a jury, the jury must obey it implicitly, such as when instructed to return a verdict for the defense or the plaintiff.

Background

Jury instructions guide a jury by explaining the law of the case and pointing out what must be proved by the litigants. The instructions help the jury reach a proper verdict. Obviously, since jury instructions come directly from the court, they are of importance to jurors. When providing jury instructions, the court should clearly and concisely define the issues as presented by the pleadings and the proof, and state the correct principles of applicable law. Although the attorneys may request and provide instructions they would like the court to give to the jury, it is the court that must provide the charge to the jury. Giving or refusing to give a particular set of instructions to the jury is within the discretion of the trial court. Whether the instructions are given before or after the final argument and summation, they are clearly from the court and not from the contesting litigants or their counsel.

Jury instructions usually must be read in court, although sometimes by statute they are provided in writing. Generally, no distinction is made between what portion of the instructions originate with counsel or with the court. Several jurisdictions now have official or standardized pattern jury instructions intended for mandatory use when applicable.

Jury instructions should be fair and without prejudicial character or errors so that correct results are reached by a jury. Unfairly emphasizing or minimizing the importance of a fact or item of evidence can greatly influence the jury's decision making process; a case may turn upon a particular instruction given to the jurors. As such, pattern or uniform jury instructions and jury instructions specific to a case should be formulated fairly.

Frequently, counsel do not give the attention to jury instructions that might be expected. This lack of attention is not limited to the trial level. Appeals, articles delineating potential jury instructions, concern for jury instructions prepared for use throughout the state, and judicial review of instructions that do not comply with the existing law are all significant matters.

Alliance Policy

Although jury instructions raise more procedural than substantive questions, the Alliance encourages company counsel and retained defense counsel, on a jurisdiction-by-jurisdiction basis, to monitor closely the development of jury instructions and work to ensure fairness so that particular instructions do not prejudice the defense of a case.

In regard to litigation with national scope, whether from the defense or the plaintiff's standpoint, the Alliance supports uniformity among jury instructions to the extent particular case law within a jurisdiction does not mitigate against uniformity. Even though drafting suggested jury instructions may not be possible on a wide jurisdictional basis, the Alliance encourages corporate counsel and defense counsel to work together so that proper and fair jury instructions evolve.

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Appendix F
JURY INSTRUCTIONS

Exhibit F-1

Jury Instructions in Personal Injury Cases and Collateral Source Evidence, Indiana Senate Bill No. 394, As Amended January 16, 1986, 104th General Assembly*

A BILL FOR AN ACT to amend the Indiana Code concerning civil actions.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 34-4-35 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 35. Jury Instructions in Personal Injury Cases.

Sec. 1. If a tort action for the recovery of damages for a personal injury is tried by a jury, the jury instructions given by the court must include an instruction that explains the federal and state income tax consequences of the potential award.

SECTION 2. IC 34-4-35 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 36. Collateral Source Evidence.

Sec. 1. In a tort action, regardless of the theory of liability under which it is brought, the court shall allow the admission into evidence of proof of collateral source payments that are substantially certain to be made to a plaintiff as compensation for the loss or injury for which the action is brought. Proof of such payments shall be considered by the trier of fact in arriving at the amount of any award and shall be considered by the court in reviewing awards that are alleged to be excessive.

*This bill, with amendments, was signed into law on March 11, 1986.

G. Pain and Suffering Awards

Definitions

Pain and suffering is used to describe not only physical discomfort and distress but also mental and emotional trauma which are recoverable as elements of damages in tort law. Lawyers and judges use unofficial ways to calculate damages for pain and suffering, because there are few or no legislative standards determining whether such damages should be awarded or their amount.

Background

The *Restatement of The Law, Second, Torts* states that there are several goals of tort recovery: namely, compensation, determination of rights, punishment of wrongdoers, deterrence of wrongful conduct, vindication of the parties and retaliation.

The standards used to judge how much compensation is proper to achieve these goals have been the focus of much discussion. Juries have commonly been instructed to award damages based on past, present and so much of future suffering as is "reasonably probable," given the plaintiff's life expectancy and taking into account the intensity and duration of the pain. Most jurisdictions allow a per diem argument to be made to the jury. Thus, the plaintiff's attorney suggests an appropriate figure based on the "worth" of suffering for a short period (an hour, a day, a week) multiplied by the life expectancy. Absence of a more definite standard has made appellate review of excessive awards difficult with uneven results. Motions to set aside an excessive verdict come within the discretion of the trial judge; however, the discretion of the jury is usually allowed to govern.

Critics of the present system argue that allowing the jury unlimited discretion in awarding damages for pain and suffering guarantees uneven and unpredictable recoveries. This forces insurers to counter the uncertainty of awards by charging higher premiums. Lawyers for both claimants and insurers say that disagreement over the amount of pain and suffering damages is a major obstacle to out-of-court settlements. This prolongs the plaintiff's uncompensated suffering and makes an adequate recovery less likely, particularly in cases involving large economic losses.

Additionally, the spectre of a disproportionate jury award causes insurers to overpay settlements of smaller claims. The net result may skew the pattern of compensation with windfall gains for smaller claimants while significantly undercompensating larger claims. A further complication occurs when juries inflate pain and suffering recoveries to cover some or all of the plaintiff's fee for attorneys.

To these criticisms, the California Citizen's Commission on Tort Reform recommended, in 1977:

> The Legislature should establish a permanent State Commission on Pain and Suffering Standards. This commission should be similar to the body that rules on Workers Compensation matters, and should be charged to develop sample standards or reasonable pain and suffering awards fitted to typical factual situations. The statute should require the Courts to acquaint juries with the standards, and to use them as general (but not absolute) guidelines when reviewing jury verdicts for possible action in additur or remittitur.

The Defense Research Institute, Inc. (DRI), located in Chicago, has also studied various state laws to determine whether such standards or limitations could be placed on pain and suffering awards.

The DRI examined whether limitations on pain and suffering would violate any state constitutional right to a jury, the "due process" clause of the Constitution of the United States or an "equal protection" clause. DRI concluded that nine state constitutional provisions create a reasonable possibility that any legislation limiting pain and suffering would be declared unconstitutional. However, in some of those nine states, some kinds of modified limitations

might be held constitutional. As to the other 41 states where there is no specific objection in the constitution, such an act may be constitutional. No one model piece of legislation really meets each state's unique constitutional and statutory problems. Consequently, any legislation limiting pain and suffering must be drafted to reflect the best approach in each state.

The most recent legislative activity capping pain and suffering awards impacts medical malpractice cases. A 1975 California statute prevents medical malpractice victims from recovering more than $250,000 for pain and suffering in the California or federal courts. Both the California Supreme Court and the United States Court of Appeals for the 9th Circuit upheld the California limitation, and the United States Supreme Court has let the California Supreme Court decision stand by refusing to hear an appeal of that decision. As a result, a $500,000 pain and suffering medical malpractice award was reduced to the California state limit of $250,000.

Alliance Policy

Recognizing the difficulty in quantifying general damages, the Alliance supports reasonable limitations upon pain and suffering awards, either by a total cap on the award or the establishment of standards for measuring damages or both, whatever is appropriate in a state. Any such restriction must allow for providing rehabilitation benefits. The Alliance believes implementing this recommendation will introduce a much needed element of predictablility into the system.

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Appendix G
PAIN AND SUFFERING AWARDS

Exhibit G -1

Alliance Model Legislation - Limit on Liability for Non-Economic Loss

Sec. 1. In any civil action brought for the recovery of damages for personal injury or death, the maximum amount recoverable as damages for non-economic loss shall not exceed $_____.

H. Prejudgment Interest

Definitions

A prejudgment interest law requires a defendant in a tort action to pay interest on a judgment calculated from a point in time before the judgment was awarded.

Background

Twenty-seven states now have some form of prejudgment interest, and such legislation is frequently introduced in other states. Variations in state laws include: whether interest dates from the filing of the case, or from the date of accident or other occurrence giving rise to a claim for action; whether there is a fixed or floating interest rate; the types of cases in which interest would be assessed; and if interest can be applied when damages are "liquidated."

Proponents claim prejudgment interest is the only effective way to make the plaintiff whole. The plaintiff, they allege, can only be placed in the same position as prior to the loss if an award were made at the time of the loss. This being impossible, proponents insist that the nearest to an immediate award of damages is an award of interest on the damages.

This argument ignores that a judgment is not limited to compensating past loss but also includes an estimate of future losses. For example, personal injury damages are awarded in part for the loss of earnings, loss of consortium, and pain and suffering not only for the past but also in the future. If interest is charged for losses occurring before the judgment, it would seem logical to credit the judgment for future losses before calculating prejudgment interest.

A recent study of auto accident cases by The Institute for Civil Justice (ICJ) has also shown that juries already implicitly include interest with their awards in Illinois. According to ICJ econometric models, there is no level of interest which will always be a simultaneous deterrent for delay on both sides of a dispute; depending upon financial circumstances of an individual or company, the interest cost may be too high or too low.

Litigation exists because bona fide disagreements exist regarding the amount of loss or even the legitimacy of claims. The amount of damages in a personal injury claim is, likewise, often highly speculative. Prejudgment interest penalizes defendants for not settling claims when the amount of damages cannot be agreed upon. Defendants are also penalized for exercising the legal right to bring a case to trial, even when the plaintiff refuses a reasonable settlement offer. Such measures coerce innocent defendants to settle rather than face a possible award plus high interest.

According to proponents, prejudgment interest deters defendants from delay and promotes timely settlements. The defendant, it is alleged, will come to terms with the plaintiff sooner if interest is attached to the damages. This assumes any failure to settle before trial is the fault of the defendant. Presuming that delays are caused exclusively by defendants ignores that delays are just as often caused by continuances requested by plaintiffs.

Prejudgment interest is counterproductive. Prejudgment interest statutes provide no incentive for the plaintiff to end the dispute. Rather than reduce court congestion, prejudgment interest laws may actually create more lengthy lawsuits since delay brings in higher awards.

Even when prejudgment interest is awarded, logic dictates that its adverse impact and the windfall benefits to plaintiffs must be minimized. Thus, interest rates should be as low as possible. The award of prejudgment interest should be contingent upon a showing that the judgment is disproportionate to the defendant's final offer of settlement. Interest should be limited to covering out of pocket expenses and damages to personal property. Prejudgment interest should not be applied to attorney fees, future damages, court costs, punitive damages and nonpecuniary damages, such as pain and suffering, loss of consortium, and emotional distress. Awards of prejudgment interest should be within the discretion of the court rather than mandatory.

Alliance Policy

The Alliance opposes the enactment of legislation which imposes interest on a judgment running from the date of injury or the date the lawsuit is filed and has drafted a proposal relating to offer of settlement (as set forth in Exhibit H-1). The Alliance also opposes legislation to increase the interest rates in enacted prejudgment interest statutes. Where prejudgment interest laws exist, the Alliance favors repeal or will work to lessen their severity.

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Appendix H
PREJUDGMENT INTEREST

Exhibit H-1

Alliance Model Rule or Legislation - Offer of Judgment; Settlement; Sanctions*

(a) Offer of Judgment; Stipulation; Offer Not Admissible.

(1) At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the adverse party and shall file with the court a written offer, denoted as an offer of judgment under this rule, to settle a claim for money or property or relief as specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly.

(A) An offer shall remain open for 60 days unless sooner withdrawn by the offeror in a written instrument served on the offeree prior to acceptance by the offeree.

(B) An offer that remains open may be accepted or rejected in writing by the offeree.

(C) An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected.

(D) An offer that is accepted shall be filed with proof of service thereof and notice of acceptance with the clerk of the court who must thereupon enter judgment accordingly, provided the summons and complaint have been filed.

(E) The fact that an offer was made but not accepted does not preclude a subsequent offer.

(2) Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

(b) Entitlement to Recover Costs.

(1) If an offer of judgment is not accepted and the plaintiff recovers a judgment more favorable than the last rejected offer made pursuant to this rule, then the plaintiff will be entitled to recover costs as hereinafter defined.

(2) If an offer of judgment is not accepted and the plaintiff does not recover a judgment more favorable than the last rejected offer made pursuant to this rule, then the defendant will be entitled to recover costs as hereinafter defined.

(c) Maximum Costs Recoverable. The maximum costs recoverable under this rule shall include:

(1) Court costs; and

(2) Any reasonable charges for necessary legal costs, including but not limited to attorneys fees, incurred after an offer was rejected. The court shall resolve any dispute as to whether legal costs were reasonable and necessary.

(d) **Determination of Costs by Court.** In determining the amount of the costs to be awarded, the court shall consider:

(1) Whether the state of the law was not clearly defined as to questions of law or fact which were at issue, such that there were conflicting precedents as to these issues;

(2) Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer;

(3) Whether the suit was in the nature of a "test case" presenting questions of far reaching importance affecting the parties or non-parties; and

(4) The time and labor involved.

(e) **Award of Costs; Sanctions.**

(1) To recover costs under this rule, the entitled party must move the court to have the costs awarded. Such an action for sanctions under this rule shall constitute the exclusive remedy available for costs for any unreasonable refusal to settle.

(2) A defending party may deduct the amount of the costs awarded under this rule from the amount of judgment recoverable by the offeree as a sanction based upon unreasonable rejection of a settlement offer. A defending party shall be entitled to a judgment against an offeree to the extent that any costs assessed against the offeree under this rule exceed the offeree's judgment against the defending party.

(3) Any final order of the court regarding sanctions under this rule shall be considered an appealable order.

(4) The liability for costs awarded as a sanction under this rule shall apply against a party individually and shall not be assessed jointly with any other party.

(f) **Application of Rule.** This rule shall not apply to class or derivative actions under Rules

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*Drafting Note: If the text of this rule is to be adopted as a statute then some references or provisions may need to be modified.

I. Product Liability

Definitions

Product liability tort law governs the liability of product manufacturers for injuries caused by defective products. Because the law has developed differently in the various state-level jurisdictions, manufacturers are sometimes subject to conflicting standards for one product.

Among the many issues raised by product liabil. ', the following cross section represents those receiving recent attention:

- **Statute of repose** - A time period within which a claimant must file a product liability claim. State laws have been adopted in 21 states which require that a claim be filed within a certain number of years, usually between eight and ten, from the date a product was made or delivered to a buyer.
- **State of the art** - The level of pertinent scientific and technical knowledge existing at the time of manufacture of a product.
- **Ad d' mnum clause** - The section of a plaintiff's pleading which states the dollar amount of damages that the plaintiff desires.
- **Governmental standards** - Minimum standards established by state or federal agencies for products.

Background

Product liability law has evolved on a jurisdictional basis. State judges have developed product liability laws case by case, judicially establishing laws which vary from state to state. This crazy quilt of product liability laws is constantly subject to change and is thus unpredictable for product manufacturers and sellers, as well as their insurers.

Product liability tort reform proposals have been promoted on a state-by-state basis for a number of years. A uniform product liability law has been developed for use at the state level but has not been enacted in any state. The proposed tort reforms include, but are not limited to, the establishment of a state of the art defense, a statute of repose, elimination of the ad damnum clause, limitations on a manufacturer or seller's duty to warn for obvious dangers, inadmissibility of post-accident improvements, alteration or modification defenses, incorporation of the *Restatement of the Law, Second, Torts* definition of strict liability, a government standards defense and limitations on punitive damages and attorney contingent fees.

The business community has responded to the lack of uniform product liability laws by supporting federal legislation to adopt a uniform product liability law to be implemented by state courts.

The federal bill was passed by the Senate Commerce Committee in 1982 and 1984. Reintroduced in 1985, the bill failed in committee by an 8-8 vote. At the direction of Commerce Committee Chairman Senator Danforth, the staff has prepared a draft proposal incorporating an "alternative claims mechanism" into the tort reform bill so a binding election could be made by the claimant to recover net economic loss, rather than pursue litigation for full tort recovery.

Alliance Policy

The Alliance supports, in principle, the efforts of the general business community to obtain federal product liability tort reform and continues to support product liability reform at the state level, as long as the legislation includes no provisions implementing federal regulation of insurance. The Alliance is reviewing the proposal to establish an alternative claims mechanism.

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Exhibit I-1

Alliance Model Legislation - Alteration or Modification of Product by Plaintiff or Third Party

Sec. 1. In any civil action brought against the manufacturer or seller of a product, for recovery of damages for personal injury, death or property damage, it shall be a defense to the action that the damages arose from the alteration or modification of the product by the plaintiff or a third party:

(a) if the alteration or modification had the effect of altering or modifying the purpose, the use or the manner of use of the product as originally intended by the manufacturer or for which the product was originally manufactured; and

(b) if the injury would not have occurred but for the alteration or modification.

Sec. 2. In any civil action brought against the manufacturer or seller of a product, for recovery of damages for personal injury, death or property damage, it shall be a defense to the action that the damages arose from alteration, modification or deterioration of the product by reason of the failure of the product owner or user to properly maintain, service or repair the product:

(a) if the alteration, modification or deterioration had the effect of altering or modifying the purpose, the use or the manner of use of the product as originally intended by the manufacturer or for which the product was originally manufactured; and

(b) if the injury would not have occurred but for the alteration, modification or deterioration.

Exhibit I-2

Alliance Model Legislation - Strict Liability For Product Sellers

Sec. 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property shall be liable for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product; and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Sec. 2. The rule stated in Subsection (1) applies although:

(a) the seller has exercised all possible care in the preparation and sale of his product; and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Sec. 3. The rule stated in this section shall not be applied to actions in which it is alleged that the manner in which the product was designed caused that product to be in a defective condition unreasonably dangerous to the user or consumer or to his property.

Sec. 4. The rule stated in this section shall not be applied to actions in which it is alleged that the failure to warn of dangers associated with product use or the failure to instruct as to proper product use caused that product to be in a defective condition unreasonably dangerous to the user or consumer.

Sec. 5. The rule of this section shall not be applied in actions involving drugs, vaccines and like products which, in the state of human knowledge existing at the time of manufacture or processing, are incapable of being made completely safe for their intended use, but as to which use is deemed medically justified in light of dangers which might result from nonuse.

Sec. 6. As used in this section:

(a) **Sale.** The terms "one who sells" and "seller" shall mean only one who is actually engaged in the business of selling the product in question. They shall not be construed to mean one who bails or leases a product. One is not engaged in the business of selling a product if he occasionally sells a product but is not engaged in that activity as part of his business.

(b) **Defective Condition Unreasonably Dangerous.** A product is in a "defective condition unreasonably dangerous" to the user or consumer only when it is in a condition not contemplated by the ultimate consumer which will be dangerous to him. A product is not in a defective condition unreasonably dangerous to the user or consumer when the seller delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is used by the consumer or when injury results from abnormal handling or consumption.

Exhibit I-3

Alliance Model Legislation - Maximum Limits on Contingent Fee Contracts

Sec. 1. As used in this Act, the term "contingent fee" means an agreement for legal services of an attorney or attorneys, including any associated or forwarding counsel, under which compensation is contingent, in whole or in part, upon the successful accomplishment or disposition of the subject matter of the agreement, and is to be in an amount which either is fixed or is to be determined under a formula.

Sec. 2. In any claim or action based on tort, contract law or otherwise to recover damages for personal injury, death or property damage, no attorney representing any party to such claim or action shall contract for, charge or collect, on a contingent fee basis, any fee for his or her services in excess of the following limits:

(1) 33 1/3% on the first $50,000 recovered;
(2) 25% of the next $100,000 recovered;
(3) 15% of the next $350,000 recovered, and
(4) 5% of an amount on which the recovery exceeds $500,000.

Sec. 3. The permissible fee provided for in Section 2 shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, regardless of who advances the disbursements, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal and any interest included in a judgment, but no deduction need be made for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal. Where representation is undertaken on behalf of both a husband and wife or parent or guardian and child in a derivative action, or where a claim for wrongful death is joined with a claim on behalf of a decedent, the contingent fee shall be calculated on the aggregate sum of the recovery.

Sec. 4. When the payment of any settlement or judgment between the parties contains terms which provide for the payment of the funds to be received by the plaintiff on an installment or periodic basis, the basis for calculation of a contingent fee shall be the value of the structured settlement. Value shall consist of any cash payment made upon consummation of the settlement plus the actual cost to the party making the settlement of the deferred payment aspects thereof. In the event that the party paying the settlement does not purchase the deferred payment component, the actual cost thereof shall be the actual cost assigned by that party to the component. For further purposes of this Act, the party making the settlement shall disclose to the party receiving the settlement its actual cost and, if it does not purchase the deferred payment aspect of the settlement, the factors and assumptions used by it in assigning actual cost.

Sec. 5. When representation is undertaken on behalf of several persons whose respective claims, whether or not joined in one action, arise out of the same transaction or set of facts or involve substantially identical liability issues, the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries, whether by judgment, settlement or both, and shall be charged to the clients in proportion to the recovery of each.

Sec. 6. Section 2 of this Act is intended to fix maximum permissible fees and does not preclude an attorney from entering into a contingent fee arrangement providing for, or from charging or collecting a contingent fee below such limits.

Sec. 7. If at the conclusion of a matter, an attorney considers the fee permitted by Section 2 to be inadequate, an application, on written notice to the client, may be made to the court in the manner prescribed by its general rules. The court may grant an increase in the maximum contingent fee permitted under Section 2 only upon the presentation of clear and convincing evidence of unusual, specific facts or circumstances which warrant compensation in excess of that provided in this Act. This section shall be supplementary to and shall not repeal or otherwise affect the exercise of any right a client may have to a court review of the reasonableness of an attorney's fee.

Sec. 8. A contingent fee arrangement made in violation of this Act shall be void and shall not be enforced. A person affected by a violation of this Act shall have the substantive right to bring an action on his or her own behalf for damages by reason of such conduct or violation, together with costs including reasonable attorney fees, and such other relief to which the person may be entitled under law. When the Attorney General has reason to believe that a person has violated this Act, he or she shall have standing to bring a civil action for injunctive relief and such other relief as may be appropriate to secure compliance with this Act. This remedy shall be supplementary to and shall not repeal or otherwise affect any remedy or penalty provided by statute or rules of the Supreme Court of this state.

Sec. 9. This Act applies to contingent fee contracts entered into after the effective date of this Act.

Exhibit I-4

Alliance Model Legislation - Prohibition of Punitive Damages in Product Liability Cases

Sec. 1. In any action based on tort, contract law or otherwise, to recover damages for injury, death or property damage arising out of a defective condition in a product, no pleading shall contain a demand for punitive damages nor shall there be any award for such damages.

Exhibit I-5

Alliance Model Legislation - Limitation on Attorneys' Fees With Respect to Punitive Damages

Sec. 1. Any claim or action based on tort, contract law or otherwise, to recover damages for injury, death or property damage arising from an alleged defective condition in a product in which punitive damages are awarded, and in which the fee of the attorney representing any party to such claim or action, is on a contingent basis, no part of such contingent legal fees shall be computed based on the amount awarded as punitive damages.

Exhibit I-6

Alliance Model Legislation - Compliance With Standards

Sec. 1. The manufacturer of a product for which there are federal or state statutes or administrative regulations prescribing standards for the design, testing, labeling or manufacture of such product, shall not be liable for personal injury or death or property damage allegedly caused by a defect in the design, testing, labeling or manufacture of such product, unless the design, testing, labeling or manufacture of such product was in violation of such standards.

Alliance Model Legislation - Compliance with Standards - Alternate Proposal

Sec. 1. In any action for personal injury, death or property damage, no manufacturer or seller of a product shall be liable for such injury, death or damage caused by a defect in the design, manufacturing, testing or labeling of such product, if such defect was occasioned by compliance with any Federal or State statute or regulation prescribing standards for the design, manufacturing, testing or labeling of such product.

Exhibit I-7

Alliance Model Legislation - Inadmissibility of Post-Accident Improvements

Sec. 1. In any action to recover for personal injury, death or property damage allegedly caused by or resulting from a defective product, evidence of any modification or change made in the design, testing or manufacture of such product or of any safety improvements made after the date of the injury, death or damage shall not be admissible for any purpose whether the change or improvement is by the defendant or any other third party.

Exhibit I-8

Alliance Model Legislation - Patent Hazards and Duty to Warn

Sec. 1. Any duty on the part of a manufacturer or seller of a product to warn of a hazard which may arise in the use of the product shall not extend:

(a) to warning of hazards which are patent or open and obvious;

(b) to warning of safeguards or precautions which a person reasonably should take for the safety of himself and others considering his activity at the time, his training, experience, education or special knowledge;

(c) to situations where such safeguards and precautions would or should have been taken by a person similarly situated exercising reasonable care.

Exhibit I-9

Alliance Model Legislation - Ad Damnum

Sec. 1. In any action brought for the recovery of damages for personal injury or death, no pleading shall be submitted to the jury which sets forth a claim for relief, whether an original claim, counter-claim, cross claim or third party claim, demanding damages in a specific dollar amount, except with respect to statements as to dollar amounts that are required by law to establish that such action comes within the jurisdiction of a particular court.

Sec. 2. The party against whom the complaint or cross complaint is made may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the complainant or cross complainant who shall serve a responsive statement as to the damages within 15 days thereafter. In the event a response is not served, the party, on notice to the complainant or cross complainant, as the case may be, may petition the court in which the action is pending to order the complainant or cross complainant to serve a responsive statement.

Sec. 3. If no request is made for a statement setting forth the nature and amount of damages being sought, the complainant or cross complainant, as the case may be, shall give notice to the other of the amount of special and general damages sought to be recovered: (1) before a default may be taken, or (2) in the event an answer is filed, at least 60 days prior to the date set for trial.

Exhibit I-10

Alliance Model Legislation - State of the Art - Post-Accident Modification

Sec. 1. No manufacturer or seller of a product shall be liable to any person for damages for personal injury, death or property damage caused by the design or method of manufacturing or testing of the product where the design or the methods of manufacture and testing conformed with the generally recognized and prevailing standards or state of the art in existence at the time the design was prepared or the product was manufactured or tested.

Sec. 2. In any such civil action the following evidence shall not be admissible for any purpose:

(a) evidence of advancements or changes in technical knowledge or techniques, in design theory or philosophy, or in manufacturing or testing techniques which have been made, learned or placed into common use subsequent to the time of the design, testing and manufacturing of the product allegedly causing such injury, death or damage; or

(b) evidence of any change made in the design or methods of manufacturing or testing the product in issue or any similar product subsequent to the time the product in issue was designed, manufactured and tested.

Exhibit I-11

Alliance Model Legislation - Statute of Limitations

Sec. 1. No action in tort or contract against a seller of a product for the recovery of damages for personal injury, death or property damage based upon the theory of strict liability or breach of warranty may be commenced more than _____ years after the product was first sold to any person not engaged in the business of selling the product.

Nothing contained herein shall, however, bar an action against a product seller brought on a theory of negligence if such action is timely commenced within the limitation prescribed by [reference to statute of limitations for negligence action].

Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.

Exhibit I-12

Summary of Major Provisions of Federal Product Liability Tort Reform Bills

The following summary was originally taken from the report of the Senate Committee on Commerce, Science and Transportation on S.44. It has been modified to cover the provisions in S.100, which was introduced in 1985, and subsequent proposals in the Danforth Staff Working Draft.

Responsibility of Manufacturers

- A manufacturer is liable if the claimant establishes by a preponderance of the evidence that:(1) the product is unreasonably dangerous in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product did not conform to an express warranty and (2) the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant.

- A product is unreasonably dangerous in construction or manufacture if it deviated from the manufacturer's design specifications, formula or performance standards or from otherwise identical units manufactured to the same manufacturing specification or formula. A manufacturer is, then, strictly liable for mismanufactured products if the deviations in the product caused the claimant's harm.

- A product is unreasonably dangerous in design or formulation if: (1) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which caused the claimant's harm and (2) a reasonably prudent person would have not made the product or used the design that the manufacturer used. A product is not unreasonably dangerous in design if: (1) a means to eliminate the danger was not within practical technological feasibility and the benefits and usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm; (2) the harm was caused by an unavoidably dangerous aspect of a product; or (3) the harm was caused by an unsafe aspect of a product that was inherent in the product.

- A product is unreasonably dangerous because of a failure to provide adequate warnings and instructions if: (1) the manufacturer knew or, through the exercise of reasonable prudence, should have known of the existence of the danger which caused the claimant's harm; (2) the manufacturer failed to provide warnings that a reasonably prudent person would have provided; and (3) the warnings or instructions would have prevented harm to a product user in the course of reasonably anticipated conduct. In addition, the manufacturer may be responsible for a failure to warn if, after the product was made, the manufacturer discovered or should have discovered the danger which caused the claimant's harm and failed to provide postmanufacture warnings to the claimant as a reasonably prudent person would have done.

- Warnings or instructions must be given to a product user unless they were provided to certain classes of persons who could be expected to pass the warning on to the users. A manufacturer is not liable for failure to warn about obvious dangers, conse-

quences of misuse, alteration or modification.

- A manufacturer is strictly liable for breach of express product warranties where the breach of warranty caused the claimant's harm.

Responsibility of Product Sellers

- A product seller is liable if the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of the claimant's harm. Where, however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer.

Determination of Responsibility in a Product Liability Action and Effect on Workers Compensation

- The claimant's own conduct, contributory negligence or assumption of risk does not bar recovery, but reduces compensatory damages awarded to the claimant by an amount proportionate to the claimant's responsibility. In addition to determining the amount of harm attributable to the claimants, the trier of fact will determine the percentages attributable to each defendant and to any other cause or person not a party to the action.

- In apportioning responsibility among those who caused the harm, evidence that a misuse or alteration of a product caused the claimant's harm is relevant. Product misuse or alteration by another will not reduce the manufacturer's or seller's responsibility if it was reasonably anticipated conduct.

- Damages in a product liability action would be reduced by the amount paid to the claimant under any state or federal worker compensation law. This reduction does not affect the amount the claimant receives, but takes the place of the employer's subrogation lien, unless the manufacturer or product seller had expressly agreed to indemnify an employer.

Time Limitation on Liability

- **Statute of Repose.** If a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling or leasing the product. Capital good is defined as a product used in trade or business or held for the production of income.

- The statute of repose does not apply if: (1) the manufacturer or product seller intentionally misrepresented or fraudulently concealed information about the product; (2) the claimant's harm was caused by the cumulative effect of prolonged exposure to the product; or (3) the harm did not manifest itself until after the time limitation. Thus, claims for certain harms, such as harms from drugs, which do not manifest themselves until many years after product use, would not be barred by this section.

- A two-year statute of limitations for all product liability actions is provided. The period does not begin to run until the claimant discovers or should have discovered both his harm and its cause.

Punitive Damages

- Punitive damages may be assessed if the claimant proves liability for compensatory damages and establishes with clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users.

- Following a determination by the trier of fact that punitive damages should be assessed, the judge would determine the amount of damages. The damages would be distributed to the claimant.

Subsequent Remedial Measures

- Evidence of corrective measures taken by a manufacturer or product seller after a harm has occurred would not be admissible in court to prove liability.

Judicial Review Panel

- The Judicial Conference would be authorized to appoint a three-member panel of legal experts to conduct a continuous study of the tort system and to suggest changes to the Congress, including ways to compensate persons who are injured by defective products but who are unable to prove negligence or to identify the manufacturer.

Alternative Mechanism

- Any claimant sustaining a product-related injury can make a binding election to recover net economic loss instead of pursuing litigation for full tort recovery.

Toxic Health Effects Panel

- A panel would be established to make determinations of the health effects of toxic substances to be applied in toxic injury cases.

J. Punitive Damages

Definitions

Punitive or exemplary damages are money awards in tort cases to punish or deter defendants from wrongful acts. Most punitive damage laws require a plaintiff to prove that a defendant acted with fraud, malice, or with intent to oppress in order to recover punitive damages. Punitive damages are distinct from compensatory damages which indemnify a claimant for actual losses.

Where punitive damage awards are permitted, there generally is no limitation on either the amounts awarded or the number of times a defendant may be assessed punitive damages. Thus, the manufacturer of a defective product may be repeatedly "punished" for manufacturing the product by every jury or judge in every jurisdiction which hears a liability case on the product.

Background

All states except Louisiana, Massachusetts, Nebraska and Washington recognize common law actions for punitive damages. Four states - Connecticut, Georgia, Michigan and New Hampshire - allow punitive damage awards not to punish, but to provide additional compensation where there are aggravating circumstances; these states are exceptional.

A trend is arising, however, toward the limitation of punitive damage awards, notably in the area of medical malpractice legislation.

Punitive damages were originally intended to punish a defendant for outrageous acts, but now lawyers routinely request them to intimidate defendants and to increase awards. An Institute for Civil Justice (ICJ) study released in August 1985, shows a significant increase in the number of punitive damage awards. The total amount of punitive damages in Cook County, Illinois, rose from $20,000 in the 1960-64 period to $44 million during the 1980-84 period. Similarly, punitive damages in San Francisco, California, rose from $700,000 in the 1960-64 period to $17.5 million during the 1980-84 period. In Cook County, the number of awards increased from five during the 1960-64 period to 90 during the 1980-84 period. In San Francisco, the number of awards increased from 13 during the 1960-64 period to 45 during the 1980-84 period.

Though punitive damages are said to serve the dual purpose of punishment and deterrence, these are the functions of criminal not civil law. Compensatory damages now allow recovery for the full spectrum of actual damages. This alone imposes a significant financial burden on defendants and works as an effective deterrent without large punitive assessments. While an insurance company bears the compensatory damages burden, defendants also suffer inconvenience in defending claims and face probable increases in insurance rates as well as the possible loss of future insurance coverage. Opponents of punitive damages believe that further deterrents are unnecessary.

In California in a five-month period during 1985, four juries in the San Francisco Bay Area and one jury in the Los Angeles Area returned a total of over $253 million in punitive damages in just five cases.

Also in a compilation of 211 California trial court punitive damage awards, rendered between January 1, 1983, and July 19, 1985, it was shown that: (1) during 1983 a total of 73 juries awarded $69,466,504 in punitive damage awards; (2) in 1984, 112 juries awarded total punitive damages of $105,682,027; and (3) in the first half of 1985, 26 juries returned punitive damage verdicts totalling $274,101,205.

When businesses, professionals and municipalities pay large punitive damage awards, the cost ultimately is passed on to consumers by higher priced products and reductions in services provided by government. Thus, society pays for windfalls to a few plaintiffs and their attorneys.

Punitive damages have become a windfall for plaintiffs and their attorneys who claim that the award actually serves society's best interest. Also punitive damage awards may encourage attorneys to accept cases where little actual damage was sustained or where the merits may be tenuous because of an increased chance for a large fee. Punitive damages provide an incentive for filing questionable and nonmeritorious suits.

The states of Louisiana and Massachusetts have a general rule against punitive damages, except where they are expressly authorized by statute. A number of state jurisdictions are showing increased interest in restricting punitive damage awards. In 1985, Montana enacted legislation establishing a clear and convincing standard of proof and a cap of $25,000 or 1 percent of the defendant's net worth, whichever is higher. Also during 1985, Florida, Illinois and Kansas enacted limitations on punitive damages in medical malpractice actions. Minnesota enacted a punitive damages reform measure in 1979, imposing a clear and convincing evidence standard under which the defendant must have acted with willful indifference to the plaintiff's safety.

State courts in Maine and Kentucky have also tightened their rules on punitive damages. The Kentucky Court of Appeals ruled that cities may not be sued for punitive damages. The Maine Supreme Judicial Court raised the standard of proof to clear and convincing evidence of actual malice toward the plaintiff.

The punitive damages issue often surfaces in the product liability forum. Federal product liability reform proposals specifically address punitive damages. The proposals establish the standard of proof required to award punitive damages and restrict the circumstances under which they can be awarded.

Thus, punitive damages are creating a great deal of controversy. The question remains whether society can afford to provide full compensation plus a great deal more as a windfall to plaintiffs and their attorneys.

Alliance Policy

The Alliance strongly supports the abolition of punitive damages. Where abolition is not feasible, the Alliance seeks to limit punitive damage awards. Appropriate reforms include adequate caps on awards, raising the standards of conduct and proof required to support an award, and eliminating multiple punitive damage awards. The Alliance supports prohibiting punitive damage awards when conduct exposes a defendant to criminal sanctions. The Alliance also advocates prohibiting the payment of attorneys' fees out of any portion of a punitive damage award.

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Exhibit J-1

Alliance Model Legislation - Punitive Damages - Model Bill *

Sec. 1. As used in this paragraph, "punitive damages" includes exemplary damages.

Sec. 2. In any civil action where counts for punitive damages are included or in any separate action for punitive damages, the plaintiff shall have the burden of proving each element of defendant's liability for punitive damages beyond a reasonable doubt.

Sec. 3. In order to sustain a claim for punitive damages, a plaintiff must prove that the defendant acted toward the plaintiff with oppression, fraud or actual malice.

(a) To prove actual malice, the plaintiff must prove that the defendant specifically intended to cause tangible or intangible injury to the plaintiff.

(b) To prove oppression the plaintiff must prove that the defendant acted with a specific intent to subject the plaintiff to cruel and unjust hardship.

(c) To prove fraud, the plaintiff must prove intentional misrepresentation, deceit, or concealment of a material fact known to the defendant for the intended purpose of depriving a person of property or legal rights or otherwise causing injury and on which the plaintiff has relied to his detriment.

Sec. 4. There shall be no punitive damages recoverable in the absence of an award for compensatory damages or a finding of actual damages. Nor shall punitive damages be recoverable if only nominal damages have been awarded. This section does not apply to those torts in which a showing of actual damages is not necessary to establish a cause of action.

Sec. 5. There shall be no punitive damages recoverable if the defendant has been criminally punished by a governmental body or unit, either by fine or imprisonment; nor shall punitive damages be recovered if the defendant is charged with a criminal act and the outcome of any state criminal proceeding is not yet determined.

Sec. 6. Punitive damages can be awarded against a master or other principal because of an act by an agent only if the principal expressly ratified or approved the act.

Sec. 7. Punitive damages shall not be recoverable in any action arising from contract, including extra contractual breach of duty or other tortious breach of any expressed or implied terms of the contract.

Sec. 8.

Alternative a: In any civil action the amount of punitive damages shall be an amount not to exceed any one of the following amounts:

(a) _____% of the actual or compensatory damage which the court or jury finds that the plaintiff is entitled to recover exclusive of all costs; or

(b) $5,000, whichever is less.

Alternative b: _____ times the compensatory damages awarded in the case of action forming the basis for an award of punitive damages.

Sec. 9.

(a) In any civil action where punitive damages have been requested, a separate trial from the trial for compensatory damages may be granted for determining the liability for punitive damages. If the trier of fact in the action for punitive damage is a jury, the verdict must be unanimous.

(b) Evidence of defendant's social and economic policy shall not be admitted in the trial determining liability for punitive damages; nor shall evidence of defendant's wealth or financial condition. No discovery of defendant's financial condition shall occur unless liability for punitive damages has been already determined.

(c) In any action where the defendant has been determined to be liable for punitive damages, the judge shall determine the amount of such damages regardless of whether the issue of liability therefor has been determined by the judge or a jury. The jury shall not participate in the fixing of such amount either in an advisory capacity or otherwise.

Sec. 10 (Optional).

Alternative a: No punitive damages shall be recoverable if punitive damages have previously been levied against the tortfeasor in this state for the same act or offense, regardless of the duration of the tort or number of claimants.

Alternative b: In assessing the amount of punitive damages, the judge shall take into account the amount of similar awards, if any, in all previous cases where the defendant has been held liable for the same course of conduct in this state.

Sec. 11.

Alternative a: No attorney may collect a contingency fee based on an award for punitive damages.

Alternative b: Contingency fees based on an award for punitive damages shall be limited to _____ amount of the award.

Sec. 12. There shall be no punitive damages recoverable when there is evidence that the defendant's actions were based upon the advice of defendant's attorney, or where such actions were in compliance with a statute or judicial decision.

Sec. 13. The communication between defendant and attorney shall be privileged communication and immune from discovery by the plaintiff. This privilege shall include the work product of defense counsel as well as the thoughts, impressions and strategies written in preparation for trial. A sole exception shall be when the communication is made with the purpose of furthering a crime or perpetrating a fraud.

Sec. 14. Punitive damages shall not be recoverable by someone other than the person against whom the defendant's intent to cause injury was specifically directed. Actions for punitive damages may not be maintained by heirs, survivors, legal representatives, or any other person whose claim derives from the person against whom the injury was directed.

Sec. 15. No discovery relative to a request for punitive damages shall be granted unless the plaintiff establishes a prima facie case for the imposition of punitive damages.

Sec. 16.

Alternative a: There shall be no prejudgment interest on punitive damage awards.

Alternative b (Where state has a prejudgment interest statute): (Code section) shall not be applicable to awards for punitive damages.

Sec. 17.

Alternative a: This act supersedes all prior and existing statutes or judicial law in full or in part to the extent that such law is inconsistent with this legislation.

Alternative b: No common law right to recover punitive damages other than as herein provided is available in any civil action.

Sec. 18. This act is applicable to any pending litigation or cases which have not yet gone to trial.

Sec. 19. The invalidity of any part of this act shall not affect the validity of the remaining provision.

Sec. 20. This act shall take effect upon its becoming law.

* The appropriate provisions of this model bill are intended to be adapted to the specific needs of a given state before introduction into a legislature. It is not intended to be introduced in its entirety.

Exhibit J-2

Alliance Model Legislation - Punitive Damages - Abolished

Sec. 1. As used in this Act, "punitive damages" includes exemplary damages.

Sec. 2. Punitive damages shall not be recovered in any civil action, and no common law or statutory right to recover punitive damages exists in civil actions.

IV. CONCLUSION

By directing its efforts at a few priority issues, the Alliance hopes to achieve significant and necessary reform immediately. The Alliance continues to study civil justice issues to identify additional concerns of its member companies and to draft legislation correcting the problems identified here and any which arise in the future.

The problems in the civil justice system, of course, vary from region to region and from state to state. Not every proposal is necessarily applicable in every area. The Alliance will work with local coalitions to develop appropriate reforms based on the existing law in that state.

We invite you to contact the Alliance regional office responsible for your state for further information. The individual states and the respective office to contact are listed at the end of this booklet. We also welcome your inquiries to the Alliance home office.

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V. APPENDICES

Appendix 1

RECOMMENDATIONS FOR REFORM, REPORT OF THE CALIFORNIA CITIZENS' COMMISSION ON TORT REFORM: RIGHTING THE LIABILITY BALANCE, SEPTEMBER 1977*

Recommendations Applicable to All Areas of Liability

1. The Need for Conscious Policy

2. Using Arbitration for Small Cases

3. Improving the Legal Process

   A. Notifying Defendants That They Have Been Sued
   B. Permitting Defendants to Join Other Parties to a Suit
   C. Providing for an Early Judicial Review to Cull Out Frivolous or Delaying Actions and Other Clearly Unmeritorious Cases
   D. Bifurcating Tort Trials
   E. Making Real the Court's Capacity to Appoint Experts
   F. Making Large Awards for Future Losses Payable in Periodic Payments
   G. Establishing Standards for Pain and Suffering Awards
   H. Making the Trial Judge Directly Responsible for Setting the Amount of Punitive Damages
   I. Providing for a Post-Trial Motion Shifting the Cost Burden to an Irresponsible Party

4. Stabilizing and Tightening Definitions of Key Concepts of Rules of Law

   A. Defining the Conditions Creating a Duty of Care and the Definition of "Foreseeability"
   B. Codifying the Doctrine of Comparative Responsibility
   C. Making Judgments of Comparative Responsibility in All Cases Involving Multiple Defendants and/or Contributory Negligence
   D. Making Each Liable Party Responsible to the Extent of His Responsibility for the Injury

5. Assuring Reasonable Costs of Legal Counsel

   A. Limiting Contingency Fees Paid by Plaintiffs
   B. Determining the Factors That Inflate the Costs of Defense Litigation

6. Reforming the Court System

Recommendations Applicable to Specialized Areas of Liability

1. Auto-Related Liability

   A. Preparing to Move to a "Pure" System of No-Fault Auto Liability
   B. Increasing the Legal Limit on Uninsured Motorist Coverage

2. Product Related Liability

   A. Removing Disincentives to Product Improvement
   B. Limiting the Length of the Product Liability "Tail"
   C. Restricting Design Liabilities to Those That Are Unreasonably Dangerous
   D. Rationalizing the Allocation of Liability Between Manufacturers and Modifiers of Products

3. Professional Liability

   A. Establishing Criteria for Those Professional Associations That Wish to Have Their Standards of Practice Recognized in the Law
   B. Exploring Optional Automatic Payment Requirements for Some Varieties of Medical Injury
   C. Requiring Regular State Review of the Self-Disciplinary Processes Used by the Principal Professions
   D. Limiting the Third-Party Liability of Professionals to Persons Who Can Be Identified in Terms of General Classes
   E. Discouraging Concealment of Malpractice

4. Government Liability

   A. Making Clear Why Public Entities Receive Special Treatment
   B. Clarifying the Immunity of Public Entities From Suit for Misrepresentation
   C. Providing Public Entities With Discretion to Reimburse an Employee for Punitive Damages
   D. Limiting the Liability of Police Officers Who Believe in Good Faith That Their Actions Are Lawful
   E. Elimination of the Special Statute of Limitations

5. Workers' Compensation

   A. Undertaking Immediate Analysis of the Economic Effects of Upgrading the Schedule of Benefits
   B. Providing Special Penalties for Employers Whose Modifications of Equipment Are the Causes of Injuries

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Appendix 2

ADMINISTRATION OF CIVIL JUSTICE POSITION PAPER, THE DEFENSE RESEARCH INSTITUTE, INC., 1981*

Statement of Specific Proposals

Following the overview of "The Nature of the Civil Justice System" (pages 11-20), various specific proposals for improvement of the system are presented (pages 21-71).

The bulk of this Position Paper consists of statements and discussions of these proposals.

The specific proposals themselves are set forth below for the reader's convenience.

Court Organization and Management

1. The judiciary has primary responsibility for the effective, efficient operation of the system of justice.
2. To achieve maximum productivity, without sacrificing individual justice, court systems should be unified.
3. Without sacrificing the principle of judicial responsibility and control, professional court administrators, capable of complex systems management, should be employed to assist the judiciary in improving court productivity.
4. To the maximum extent possible, judges' time should be devoted to discretely judicial functions. Where feasible, the processing of routine and non-dispositive judicial matters should be handled by auxiliary judicial personnel, such as magistrates, court commissioners and the like.
5. There should be regularly scheduled meetings of judges within each unified court system, and, where appropriate, within subsystems, to address systemic problems in the administration of justice.

Judicial Selection, Retention and Removal

1. Judges ought to be selected on the basis of legal knowledge, moral character and sound judgment.
2. Judicial compensation, including fringe benefits, should be adequate to attract and retain highly qualified members of the bar. In determining the adequacy of judicial compensation, due consideration should be given to the income available to highly qualified practitioners in the private bar, as well as lawyer compensation in other branches of government.
3. Each jurisdiction should provide procedures for the removal of judges unable to fulfill their responsibilities because of disability, or unfit to sit as judges because of improper conduct. While such procedures cannot be so summary as to threaten the independence of the judiciary, or to render judicial tenure vulnerable to political pressure or popular whim, they must be less cumbersome and more flexible than traditional impeachment procedures.

Caseflow Management

1. Through appropriate legislative action, a means should be established to provide a sufficient number of judges, court personnel and facilities to keep abreast of the in-

crease in judicial work occasioned by population and litigation growth.

2. The courts share with individual attorneys responsibility for caseflow. Administrative practices and rules of procedure which leave entirely in the hands of the attorneys of record the responsibility for ease of scheduling should be changed, as necessary, to provide for judicial supervision of case movement.
3. Continuances are the bane of effective judicial scheduling. Continuances ought to be granted only for good cause shown and on the record, and subject to reasonable terms.
4. Courts should be more forceful in enforcing statutes and rules providing sanctions, including but not limited to dismissal and entry of default judgments, for unexcused delay.
5. Courts should be less restrictive in the granting of summary judgment in cases in which the claim or defense is spurious, sham or unsupported by applicable legal doctrine.
6. Courts should enforce rules or statutes providing for the recovery of costs, including reasonable attorneys' fees, for the maintenance of spurious claims and defenses.
7. Good pretrial conferences not only enhance the quality of justice in the individual cases in which they occur, but also can improve the general administration of justice in the courts where such conferences are regularly employed. The conducting of such conferences is generally encouraged. Judges who lack proficiency in pretrial conference skills should strive to attain such proficiency. Continuing judicial education programs should have pretrial conference skill development as a principal goal.

Jury Selection and Service

1. Master jury lists should be as comprehensive and representative of the community as possible. Excuses from jury service should be given only in cases of demonstrable hardship. "Categorical" excuses should be avoided to the maximum extent possible.
2. Jury service should not normally exceed ten working days.
3. The number of jurors required to be physically present in court should be based on the actual experience of the court respecting how many potential jurors are necessary to take care of "jury business."
4. Although jury service is a civic duty and privilege, and not intended as a remunerative activity, nonetheless jurors ought to receive reasonable stipends and reasonable expense reimbursements for their service to the public.
5. Jurors should always be treated as vitally important participants in the dispensation of justice. To this end, they must be treated courteously and respectfully, and they should be provided suitable surroundings during their period of service.

Lawyer Competence and Performance

1. Mere licensure to practice law provides no assurance of competence to engage in litigation. Each jurisdiction should seriously study methods of assuring that all lawyers who handle litigation possess the necessary qualifications to do so competently and efficiently.
2. Law schools have significant responsibilities in preparing lawyers to function competently in their offices and in our courts. Law schools should provide adequate curriculum offerings emphasizing skills development, professional responsibility, and problems in the administration of justice. Interaction between the bench, the bar and the law schools should be encouraged, especially with respect to the use of adjunct law faculties and participation by law professors in continuing legal education programs for the practicing bar and the judiciary.
3. Participation in continuing legal education programs should be mandatory for practicing lawyers and judges. Continuing legal education programs must be de-

signed not only to increase professional competence but also to increase professional responsibility and to heighten the awareness of bench and bar to problems in the administration of justice.

Lawyer Conduct Respecting Litigation

1. Each lawyer must become and remain sensitive to his affirmative ethical obligation to represent his client competently, zealously and attentively and his duty to refrain from practices which are inimical to the administration of justice. Disciplinary authorities are encouraged to impose appropriate discipline as readily in the case of one who prejudices the administration of justice as in the case of who one prejudices his client's cause.
2. Early settlement of disputes in litigation benefits not only the individual disputants but the court system itself. Attorneys accordingly must endeavor earnestly to arrive at settlements as soon as reasonably possible and to avoid postponing settlements to the eve or day of trial.
3. The broad availability of discovery in modern litigation has proved an instrument of abuse in the hands of some attorneys. While the abuse is not so widespread as to require radical changes in discovery rules or practices, where abuse is found, sanctions should be imposed by judges empowered to do so and, where the abuse is egregious, by disciplinary authorities.
4. Attorneys should encourage the voluntary use of arbitration in lieu of litigation whenever arbitration appears to be a reasonably adequate method of resolving the matter in dispute. Those jurisdictions which have serious delay problems in the courts ought to adopt compulsory arbitration for claims of less than ($5,000), preserving the right to trial for dissatisfied parties.

Legal Doctrines

1. The Collateral Source Rule should be modified so that evidence of the nature and extent of all benefits and services received or to be received by the claimant as a result of the alleged injuries and damages he sustained would be admissible. In a wrongful death, evidence of the remarriage of a surviving spouse should likewise be admissible.
2. The punitive damages doctrine imposes an inappropriate burden on the civil justice system.

Client and Public Relations

1. Attorneys representing clients in litigation must keep their clients informed not only of the progress of their cases, but also of the nature of benefits and requirements of adversary procedure. Serious efforts must be made to keep the costs of litigation, including attorney's fees, as reasonable as possible, consistent with adequate preparation of the case. Contingent fees ought never to be an unearned windfall for an attorney but must be reasonable and subject to court supervision.
2. The bar should support public educational programs designed to inform the public of the benefits of the adversary system and of the role of courts and juries in our system of justice. Special efforts should be made to encourage and support expanded non-professional educational programs about law and the legal process in general education.

Bar Support of Court Improvement

1. The bar must actively support efforts to improve the administration of justice including, but not limited to, efforts aimed at court modernization, improvements in judicial selection and removal methods, improvements in judicial compensation, and improvements respecting jurors' fees, terms and facilities.

Legislation and Public Support of the Courts

1. Legislatures must provide adequate support for the administration of justice. Poorly organized court systems should be modernized. Adequate funding should be provided for a sufficient number of courts, reasonably compensated judges, attractive positions for auxiliary court personnel, and reasonable jurors' fees and facilities.
2. Before enacting legislation which may impact on the administration of justice, legislatures should require studies of the probable judicial impact of the legislation and provide appropriate augmentation of judicial resources when necessary.
3. Chronic deficiencies in the administration of justice demonstrate public indifference or ignorance. Public support is essential to bring about court modernization, competence and responsibility on the bench and in the bar, legislative attention to the needs of the courts, and preservation of the right of trial by jury. Educators and the news media must devote greater attention to the operations of our courts.
4. Citizens should exercise restraint in resorting to the courts for relief.

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Appendix 3

SUMMARY OF THE REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY, FEBRUARY 1986*

In October 1985, the Attorney General of the United States established the Tort Policy Working Group, an inter-agency task force of federal agency and White House representatives. The Working Group examined the increasing problems of liability insurance availability and affordability, and considered the merits of various tort law and insurance system options for solution.

Financial Condition of the Insurance Industry

The Working Group's review of the causes of availability and affordability problems includes a consideration of the industry's financial and general economic health. The report indicates that current problems are not an insurance industry crisis. Recent significant underwriting losses which have been suffered by the industry are stated as limiting the industry's ability to offer desired coverage and making it reluctant to insure high risk activities. The report states that the losses incurred appear to have resulted from inadequate rates of the late 1970s and early 1980s. It concludes, however, that recent premium increases are not the direct result of these losses. Rather, the report says that premiums have been increased because of tort law developments which have expanded liability and increased unpredictability.

Rejection of Government Intervention in Insurance

The Group labels proposals to abolish the McCarran-Ferguson Act in response to alleged industry mismanagement as "patently absurd" and rejects claims that "excessive competition" can be cured by removing the industry's antitrust immunity.

The Group's analysis indicates that government regulation would be neither effective nor appropriate in correcting current financial and economic problems related to insurance availability problems. The report states that tort law, unlike insurance regulation, is an area which the government can address in a variety of constructive ways.

The report summarizes some responses to availability problems advocated by the insurance industry, consumers and state regulators. Among the approaches mentioned are the use of claims-made policies, the inclusion of defense costs within policy limits, self-insurance and captive insurers, as well as several types of cancellation and non-renewal provisions, market assistance plans and joint underwriting associations. The Working Group expressed doubt about the ability of insurance system changes alone to alleviate availability problems. While proposed regulatory changes might influence availability in the short run, the Group concludes there cannot be long-term systemic relief without fundamental tort law reforms.

The report states that government insurance and indemnification would do nothing to remedy problems underlying the availability crisis and calls the use of government resources for insurance a "non-solution." Federal insurance would be extremely expensive, the report concludes, and would make the "deep-pocket" of the taxpayers the ultimate financial resource.

Tort System Problems and Proposed Solutions

The Working Group's report identifies four key problems contributing to the "veritable explosion" of tort liability in the United States. The following problems were seen as part of the recent trend toward transforming the tort system into a compensation system financed by the entire public sector and most notably by insurers:

- The movement toward no-fault liability;
- The undermining of causation requirements and the shifting of liability to deep-pocket defendants;
- The explosive growth in damages awarded in tort lawsuits, particularly non-economic awards, such as pain and suffering, and punitive damages; and
- The excessive transaction costs of the tort system.

Eight specific civil justice reforms were recommended by the Working Group as means to return to a credible fault-based tort system:

- Return to a fault-based standard for liability;
- Base causation findings on credible scientific and medical evidence and opinions;
- Abolish joint and several liability;
- Limit non-economic damages, such as pain and suffering and punitive damages, to a fair and reasonable maximum dollar amount;
- Provide for periodic payments of damages for future medical care or lost income;
- Reduce awards in cases where a plaintiff can be compensated by certain collateral sources to prevent a windfall double recovery;
- Limit attorneys' contingency fees to reasonable amounts on a "sliding scale"; and
- Encourage use of alternative dispute resolution mechanisms to resolve cases out of court.

*The report is available from the U.S. Government Printing Office at a cost of $3.25 per copy. The report may be ordered by writing the United States Government Printing Office, Attention: Superintendent of Documents, Washington, D.C. 20402, or by calling USGPO Customer Service at (202) 783-3238. Specify Document Number 027-000-01251-5.

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Alliance
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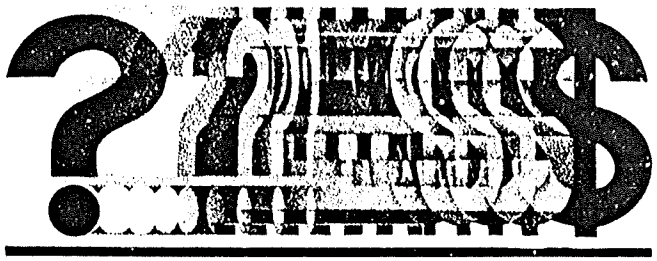

QUESTIONS AND ANSWERS ON AVAILABILITY

Alliance
of American Insurers

Attachment 49

QUESTIONS AND ANSWERS ON AVAILABILITY

Availability Problem?

1. More and more we read that insurers are unable or unwilling to provide some lines of insurance coverage. Why?

The Alliance of American Insurers shares the concerns of state and federal public officials, businesses, and the general public regarding restricted insurance coverage and the increasing price of insurance protection. Insurers need certainty, however, in all social, legal and business relationships so they can assess the risk exposure in commercial insurance. Insurance is closely integrated in these relationships and is affected by any destabilizing factors in the legal or commercial environment. Availability problems for some coverages reflect today's greater underlying uncertainty in the business environment and legal climate in which it operates.

Another element in the availability problem is the insurance industry's own financial plight — collectively and individually. The industry is expected to complete 1985 as the seventh consecutive year of staggering underwriting losses. While the financial condition of the industry is improving, insurance coverages for some troubled lines have generally proven unprofitable. In this environment, an insurer must decide where to commit its resources to assure its own financial stability and to provide for insurance needs of the greatest number of its policyholders.

2. Is this really a nationwide "availability crisis?"

Availability and affordability problems do *not* exist in all lines of commercial insurance, nor do they exist in all states, nor to the same degree in each affected commercial activity. Solutions vary with each problem and in each area of the country. The property and casualty insurance industry is not monolithic. Each company evaluates its own financial capacity to provide coverage to its policyholders, present or prospective. In recent months, the actions of some individual companies to improve their financial stability have created availability and affordability problems in certain lines of insurance.

The situation is compounded by insurance rates that have increased in certain lines to reflect anticipated losses. For the first half of 1985, general liability insurance — the type of insurance most frequently mentioned in the media — had a combined ratio of 145 percent, meaning that insurers were incurring losses and expenses of $145 of every $100 of premium collected. Prices were increased significantly to reflect those losses. For certain insurance lines — such as coverage for municipalities, bus companies, tavern owners, restaurants, day care centers, and commercial fishing boats — the combined ratio was even worse.

In addition to competition among insurers, losses in commercial insurance lines during the last four to five years have soared for a variety of reasons, including court reinterpretation of policy language, greatly expanding coverage, the vast increase in litigation, and the extension of strict joint and several liability. Insurance in these lines will not be readily available until these underlying civil justice problems are addressed.

3. What part does reinsurance play in selected availability problems?

Reinsurance is integral to the quality and quantity of an insurance company's capacity to underwrite risk. It is a form of insurance for insurance companies. The reinsurance mechanism enables one insurance company (the reinsurer) to assume part of the risk initially assumed by another insurance company (the primary insurer). This allows primary insurers to spread risk widely. Without a healthy reinsurance market, primary insurers are significantly handicapped in their ability to assume new business and continue present business.

Today, reinsurance coverage is significantly more expensive than a few years ago. Reinsurance coverage is also taking far longer to obtain and, in certain cases, is unavailable.

These problems are the result of two factors: first, the reinsurance industry has incurred severe financial losses; second, reinsurers are averse to continued exposure to the U.S. civil justice system. Reinsurers feel they can't provide their product in a completely unpredictable civil justice environment with explosive growth in litigation and awards.

The solution lies in better pricing and comprehensive tort reform. The pricing problem is improving dramatically. Tort reform still awaits action.

Tort reform is imperative because more than 25 percent of all U.S. reinsurance capacity is accounted for by overseas sources. It would be very easy for this capacity to seek more profitable markets elsewhere. For example, one major foreign reinsurer reports incurring virtually 100 percent of its losses from general liability coverage in the U.S., a market that comprises only 12 percent of

its total business. This is an equation this reinsurer says it can't be expected to tolerate. As long as the present civil justice system remains unchanged, foreign sources of reinsurance will continue to reduce their U.S. capacity. If this situation persists, problems in the primary market will continue.

4. *Weren't these problems actually brought on by the insurers themselves through cut-throat price competition in the late 70s and early 80s?*

The late 1970s and early 1980s were certainly a period of tremendous competition in the property-casualty insurance industry, both in types of coverages offered and in premiums charged. For nearly a decade, buyers benefited as insurance companies introduced new products and coverages, and provided more coverage at lower prices. Most insurance companies handled this period of competition responsibly. They were able to offer greatly-increased coverage at lower prices, but still keep a realistic eye on their own liabilities and bottom line.

However, insurance companies operate in a highly competitive market which requires them to respond to the actions of other insurers if they are to remain in business. In retrospect, many insurers did cut prices lower than they should have in the late 1970s and early 1980s in the face of competition. This became evident in 1984 when a industrywide increase of 10 percent in investment income over 1983 ($1.6 billion) was much less than the 60 percent increase in underwriting losses ($8 billion). The result was a $3.8 billion pretax net operating loss for the industry as a whole in 1984.

Because of this, even prudent insurers now find themselves needing to increase prices and seek new sources of capital to provide coverage in today's market. Other insurers which did not fare as well in the competition now find themselves in financially distressed circumstances, forced either to cut back on the risks they can assume or raise premiums substantially in order to continue writing insurance.

But current availability and affordability problems were not caused solely be price competition among insurers. Besides being faced with competitive pressures, insurers have also had to confront a number of changes in the civil justice system which require them to raise prices *now* in anticipation of future liabilities. Over the past decade the nature of the judicial system has changed, forcing insurers to operate in a much more uncertain legal climate. Judicial interpretations of insurance contract language have been broadened and new theories of liability are being accepted. This fact has become painfully clear to insurers in the aftermath of such cases as the recent *Jackson Township* pollution liability case in New Jersey. In that case, limits on the insurer's total liability, clearly stated in the policy language, were reinterpreted and expanded by the court far beyond what the insurer intended or was willing to accept when it initially insured the risk.

Costs of defending and adjusting claims have risen as well, directly increasing the cost of doing business. Although the insurance industry at large many have believed it could predict these changes accurately during a more competitive period, it was proven wrong as, first, underwriting losses and, then, overall operating losses occurred. Because of these losses, the industry has concluded that many of the new judicial/legal risks it has been absorbing should not be accepted, or should only be accepted at much higher prices. These conclusions about the future are at the heart of the current availability and affordability problems and they are also the reason for the industry's insistence on the need for meaningful tort reform.

5. *Aren't insurers actually trying to recoup in one year the losses it took several years to build?*

When insurers raise rates, they are not trying to recoup past losses. Rates are set to cover claims and expenses an insurer will incur during subsequent coverage periods. If, in retrospect, insurers discover the losses are substantially higher than expected, they must incorporate that information into determining future rates.

For instance, if insurers discover that rates were 10 percent deficient in the past and they need additional 10 percent to cover future losses, rates need to be increased 20 percent over what they were. This may look as if the insurers are trying to recoup the 10 percent loss from the past, but in reality they are trying to establish rates commensurate with expected future losses.

6. *What caused the insolvency problems facing the insurance industry and what does this have to do with availability problems?*

The rate increases insurers have recently begun collecting for various commercial coverages may come too late for a significant segment of the insurance industry. For these companies, these claims cannot be totally met either with cash currently available or cash resulting from projected future earnings. In this event, insurance regulators will have no option other than to shut these insurance companies down and place them into liquidation.

Insolvencies have been occurring at an alarming rate. Nearly 40 property/casualty insurers have been determined insolvent in court proceedings over the last two years. The National Association of Insurance Commissioners (NAIC) determined in the spring of 1985 that an additional 180 property and casualty insurers needed "immediate" attention by state regulators. In addition, 50 of the top 100 insurers in the nation will probably not realize a profit in 1985.

An underlying reason for the current solvency difficulties is that many companies, remembering the limited duration of the insurance industry's last two major downturns, believed the commercial insurance "price war" which began in 1979 could not last more than three years. Companies found themselves accepting underpriced business for six long years, until even high investment income could not cover their underwriting losses. At the same time, changes in the law and in society's expectations of recovery for loss or injury -- which insurers call "social inflation" -- escalated at an unprecedented rate, pushing losses even higher. Finally, the rate war centered on commercial coverages many of which have "long tails," where claimants may be heard from decades into the future. As a result, the affects of severely under priced business will continue to haunt insurers' finances for years to come.

The plight of the reinsurance industry has exacerbated the solvency situation. Reinsurance companies – the ones that actually insure insurance companies – have fallen victim to the same price-competitive market which weakened the primary insurers. The loss of reinsurance capacity takes away an important safety net for primary insurers.

The solvency difficulties faced by many insurers affect the availability of insurance coverages in a number of commercial lines because the majority of companies recently placed into liquidation were commercial carriers which provided hard-to-place coverages. The loss of these companies naturally decreases the industry's insuring capacity. Other companies are understandably reluctant to write those commercial lines which involve the worst cumulative uncertainties. Finally, the high underwriting losses (both actual and anticipated) resulting from commercial coverages written in the past, have severely restricted the surplus, or excess capital, of even large insurers engaging in commercial business. As a result, these companies must reluctantly turn away even adequately priced commercial business.

7. Some have alleged that insurers are "over-reserved" while others say that insurers are "under-reserved." What's the difference, and who is right?

The property/casualty insurance companies create loss reserves to pay unsettled claims. Loss reserve accounts are only set up for accidents which have occurred; for example, if a home is destroyed by fire, the insurance company with a policy covering this event will set up a reserve until the claim is paid.

Loss reserve accounts are closely regulated and watched by state regulatory agencies in order to guarantee that policyholders and claimants will be paid by the company for their claims.

Companies are required by state regulators to have on hand certain levels of "capital and surplus;" i.e., amounts originally paid in by the owners and amounts accumulated from prior profitable years. If it is determined that there is not enough in loss reserve accounts, the company is required to transfer amounts from its own capital and surplus to these accounts.

Far from being over-reserved, property/casualty insurers have been under-reserved in the recent past. The Insurance Services Office, a nonprofit corporation providing rating, statistical, actuarial, policy form and related services to U.S. property/casualty insurers, has estimated that the property/casualty industry on the whole may be *under*-reserved by 10 to 20 percent. Some lines, it has said, could be under-reserved by as much as 75 percent. Other industry financial observers, such as the independent A.M. Best Company, Inc., have made similar estimates.

Recently many substantial insurance companies have added significant amounts to their loss reserves.

8. Insurers claim they are paying out too much in claims. Aren't insurers supposed to pay claims?

Insurers do pay claims – that's their business. In 1984, for example, the property/casualty insurance industry incurred losses and loss adjustment expenses of $101 billion, equal to 88.2 percent of its earned premiums.

Insurance, however, is based on the principle of risk sharing. For every 1,000 cars, houses, or businesses insured, the "law of averages" says an insurance company should be able to expect a given number of losses within a certain period of time. The insurance company invests the premiums paid by the 1,000 car owners, homeowners, or businesses, and that invested money and the income from it is used to pay the losses occurring to any policyholders during the policy term.

Recently, problems have arisen because insurers have lost the certainty they need to predict the losses they will incur and what those losses will cost the company and other policyholders. With liquor liability insurance, for example, the demand by society that drunk drivers pay for the injuries and property damage they cause has resulted in more frequent and ever higher awards against tavern owners and restaurants. In municipal liability insurance, court decisions have expanded the theories under which cities and towns can be sued, and again, larger jury verdicts are the order of the day.

There are many reasons for this loss of certainty. One reason is fraudulent claims. Recent research shows that some policyholders have adopted the attitude now prevalent in our society that paying insurance premiums entitles them to collect from the insurance company. They may "fudge" on a needed home repair and claim the damage was caused by a storm. On a larger scale, industry sources cite car theft rings and workers compensation fraud schemes that bilk insurance companies out of millions of dollars annually. As a result, insurers must spend large sums of money to investigate the authenticity of claims.

Additionally, insurers are facing uncertainty about claims because of the increasingly litigious nature of our society. Losses and loss adjustment expenses have increased because of a corresponding increase in lawsuits, some of them frivolous and some based on new theories of law developed by plaintiffs lawyers. Costs to insurers of defending lawsuits is also increasing, as are the amount juries are awarding on insurance claims.

Civil Justice Reform?

9. The civil justice system in this country has worked well for over 200 years. Why is it such a problem now?

The civil justice system evolved gradually throughout this country's history, reflecting changes and advances in society and science. Over the most recent ten years, however, the system has undergone revolutionary change through both the judicial and legislative processes. This unprecedented expansion of liability was unpredictable and cataclysmic to the insurance mechanism.

Dramatic changes include, for example, the adoption of "market share liability" under California's *Sindell* decision which permits the plaintiff to recover from a defendant even though it cannot be shown that the defendant's product caused the plaintiff's injury, and New

Jersey's *Beshada* decision, which established that a defendant could be held liable for damages caused by a product defect which was unknown and impossible to discover at the time of manufacture. These erosions of traditional tort doctrine are not evolving tort theory. They are radical attempts to find a source of compensation for claimants who have come to expect recoveries for every injury. They have been accompanied by court interpretations of insurance policy language which "read out" provisions intended to place limits on the amounts of coverage provided under a policy and make payouts predictable.

Thus, today's legal system incorporates many procedural liberalizations which favor claimants, as well as statutory tort remedies not traditionally available under the common law. While some of these changes have benefited society in insuring that meritorious claims will be compensated, a "lottery mentality" has embraced the tort system in recent years and added a significant and increasing financial burden on society and its resources.

The proper goal of our civil justice system is to insure that the injured parties are compensated fairly for actual damages. This goal has been profoundly perverted as the legal system becomes an increasingly costly means to resolve disputes, as well as a money machine for plaintiffs attorneys. Laws are being stretched far beyond their original intent and courts have gone out of their way to find ways of funding all of society's losses, regardless of fault. Courts have, in some cases, invaded the province of the legislatures in determining social and economic policy. Our society is reaching a time when choices must be made as to how much litigation and how much recovery we can finance.

Today, the court system in many jurisdictions is also experiencing significant congestion, with time before trial usually stretching for several years. A study of the Los Angeles court system showed that there is an average delay of 54 months before trial. Awards in excess of $1,000,000 are no longer uncommon, and awards for subjective damages such as pain and suffering often bear no relation to the degree of injury actually suffered. Punitive damage awards have become common, despite the fact that they do not compensate a plaintiff for injury and often are windfalls. Awards for the same injury or loss are uneven, with judgments against doctors, municipalities and corporations, for example, running much higher than judgments against individual defendants with lesser resources. Plaintiffs often do not receive an equitable share of the money awarded from their judgments. A recent study showed that for asbestos litigation some two-thirds of an average judgment goes for the cost of litigation and for attorneys' fees.

Research by the Institute for Civil Justice (ICJ) shows that the taxpayers' annual price tag for processing all civil cases is around $2 billion, with $1.7 billion being spent just to operate the state courts. The private costs to defend these cases is not included in the total, nor does the total cover plaintiff's judgments.

Dramatic increases in awards have also occurred. A recent study of Cook County (Chicago area), Illinois jury verdicts showed that the average civil verdict increased from around $30,000 in the 1960s to around $70,000 in the late 1970s. Such figures were very low in comparison with average awards for products liability and malpractice injuries, which, according to *Forbes* magazine averaged $1.07 million and $950 thousand respectively in 1984.

The rapid-paced development of novel tort theories and the apparent goal of the courts to find methods of providing insurance coverage, regardless of policy language, have combined to make today's civil justice system impossible to predict for many types of liability. We support stabilization and restoration of balance to the civil justice system.

10. What changes need to be made in the civil justice system?

Broad-based tort reform should be enacted throughout the various states as a means of stabilizing our civil justice system and make its costs manageable for society. Such reforms should ideally apply to all areas of tort law, although reforms confined to certain specific areas (e.g., medical malpractice) can also prove useful.

A major reform is replacement of "pure comparative negligence" with "modified comparative negligence." Comparative negligence systems are a method of determining the defendants' liability for a plaintiff's damages. Under modified comparative negligence, now in place in over 20 jurisdictions, a plaintiff can only recover if the plaintiff's negligence is not greater than the negligence of the defendant. This provides an incentive for care on the part of all persons, since those chiefly responsible for their own injury can't recover. Under pure comparative negligence, however, a plaintiff can recover from a defendant even if the plaintiff is much more at fault than the defendant.

A related reform is replacement of "joint and several liability" with "several liability." Joint and several liability permits the plaintiff to recover the whole award from any single defendant, regardless of whether that defendant was one percent or 100 percent responsible for the plaintiff's damages. Under this line of reasoning, the defendant bears the burden of allocating costs among other negligent parties. Such allocation breeds more litigation and often results in the award being born largely by the defendant with the most resources but not the greatest negligence.

Product liability, municipal liability, and medical liability exposures would be stabilized through the adoption of meaningful "state-of-the-art standards." Under state-of-the-art standards, a defendant would be liable if the defendant's actions (for example, when manufacturing a product or performing an operation) were not in compliance with the up-to-date state of technology at the time of the actions. Defendants should not be held to a standard developed after a product was manufactured or an operation was performed.

Another high priority for reform is punitive damages. Punitive damages serve to punish and deter. These are functions of criminal law that have no place in civil litigation. Punitive damages are awarded in addition to the plaintiff's actual damages, and provide windfalls to plaintiffs and their attorneys. The prospect of recovering punitive damages has turned the civil liability system into a lottery for plaintiffs attorneys.

Priorities for civil process reform include the establishment of alternative dispute resolution systems, such as arbitration, which can help reduce the costs of the litigation process. Arbitration provides a more informal mechanism to solve disputes and can be required as a prerequisite to filing suit. States may also adopt restrictions or caps on the amounts recoverable for noneconomic damages, such as pain and suffering. These noneconomic awards are highly subjective and are often inflated by juries on the basis of sympathy alone or to compensate for attorneys' fees. Abolition of prejudgment interest, lowering of judgment interest rates and regulation of attorney contingent fees can all be useful measures to bring the costs of the tort system under control.

Several changes in the ways the courts themselves operate could contribute much to greater manageability and fairness in the civil justice system. States should adopt provisions for class actions similar to the approach of the Federal Rules of Civil Procedure; for example, controls should be incorporated which will discourage "fishing expeditions" to expand the class for the benefit of the attorneys involved. The discovery process of obtaining evidence should be better managed by courts by requiring a direct relevance to an issue in the case, and should protect defendants from bearing the heavy expences of dubious discovery requests by plaintiffs, many of which may be designed merely to harass. Jury instructions should be made more uniform from jurisdiction to jurisdiction, and should protect plaintiffs' rights while not putting unfair burdens on defendants.

These reform measures will be the foundation for stabilizing the civil justice system.

11. The United States already has the highest number of lawyers per capita of any nation in the world. How have lawyers contributed to the problems with the civil justice system?

While the sheer number of lawyers may not be the direct cause of civil justice system problems, dramatic increases in their numbers in recent years has apparently had an impact on both the number of cases introduced and the costs of resolving those cases. An increase in frivolous cases can be observed. It should be noted that even a frivolous action will result in defense costs for defendants and their insurers — costs that must be built into future insurance rates. It is an unfortunate statement on the system that insurers realize it is sometimes less expensive to pay a settlement than to incur the cost of defense, even when it is fairly certain the defendant would prevail.

In 1984, there was one new case filed for every 15 U.S. citizens; a large share of the expense of this litigation was borne by insurers and ultimately their policyholders.

Lawyers can be part of the solution to the civil justice problem, however. The bar and other legal associations are evaluating reforms such as arbitration and mediation. These associations are also reviewing problems in the tort system and are attempting to find alternative ways to compensate persons who are injured.

12. Some observers of the civil justice system say that the dollar amounts juries are awarding are no greater after adjusting for inflation than they were twenty years ago. If so, why are insurers saying there is a "civil justice crisis?"

The civil justice crisis is made up of many factors, not just the size of awards. These factors have combined to produce a crisis that is very real. In a study of Cook County, Illinois, the Institute for Civil Justice (ICJ) found that the median size of awards for all civil cases, that is, the "middle size," remained fairly constant from the 1960s through the 1970s. However, the average award on all cases rose from $30,000 in the 60s to $69,000 in the 70s, indicating that more very large awards were being obtained. Moreover, the average annual number of product liability, malpractice, and business tort/contract cases more than doubled over this period.

Among some of the cases most likely to involve businesses, average awards rose sharply. In product liability cases, the average award in the late 1970s was $377,000, 2.6 times larger than the average award for these cases in the early 1960s. In worker injury and business tort/contract cases, average awards rose by more than 250 percent from the early 1960s to the late 1970s. The situation was even worse for those cases usually involving government defendants such as slip-and-fall, road construction, and street hazard cases. For these, the average award rose 830 percent from the 1960s to the 1970s. Additional research by the ICJ found that business and government defendants typically paid over four times more than individual defendants for nearly identical cases. The significance of some of these detailed findings from Cook County has been corroborated by similar findings in San Francisco.

The civil justice crisis is also evident in rising defense costs. Comprehensive data on defense costs are not yet available, but testimony in a current legal challenge to medical malpractice reform in Illinois indicated an average medical negligence case in 1983-1984 cost about $55,000 to defend — before it ever reached trial. The range of pretrial defense costs ran from under $12,000 to $300,000. These costs are usually borne by the defendant's insurers long before questions of fault or negligence are ever decided. Commercial lines defense costs which consumed five percent of premium in the 1950s, now absorb 25 percent of premium income.

Finally, the Institute for Civil Justice has highlighted an additional aspect of the current civil justice system. In their "First Five Years" report, the ICJ noted, "...an increasing proportion of the monetary stakes (in civil trials) involved complex issues that were rarely raised in the 1960s placing new burdens on jurors." These problems have been manifested in significant delays in trials and the consequent costs to all parties from delaying the resolution of disputes. In summary, it is clear from the research which has been done, from trial testimony, and from the experience of participants in the process, that the civil justice system is in crisis.

13. Defense costs have traditionally been paid by most insurance policies. Are these costs part of the current problem?

Without doubt! The cost of defense can be quite sub-

stantial, even exceeding the value of the judgment itself. As previously noted, testimony in a recent Illinois case revealed that the average cost of defending a medical negligence case in 1983-1984 was $55,000 and ranged from below $12,000 to as high as $200,000 or $300,000 before the case even reached trial. A 1984 closed claims study of medical malpractice cases in Illinois found that for cases worth less than about $7,000 in awards, average expenses on the claim exceeded the award, usually by more than two to one.

The insurance industry is considering a number of solutions to the problem of rising defense costs. Among its tort reform proposals, the creation of non-judicial means to settle disputes such as arbitration and mediation figure prominently. Insurers believe such methods offer hope of reducing the costs of obtaining justice both for plaintiffs and defendants. In addition, many insurers are considering including defense costs within the limits of policy coverage. By taking this action, both policyholders and insurers will be encouraged to make certain that the defense of every case is cost effective and that litigation will not be unnecessarily prolonged or expensive. Finally, this inclusion should also give insurers more predictability in the costs they must incur, helping to stabilize their prices and reduce the number of costly "surprises."

14. Will individual state civil justice reform make any difference?

Yes. *Significant* civil justice reform in an individual state will be closely reviewed and evaluated by insurance underwriters. Stabilizing broad-based tort reforms, such as replacement of joint and several liability with several liability, replacement of pure comparative negligence with modified comparative negligence, and adoption of firm state-of-the-art standards, while not limiting plaintiffs' recoveries of actual damages, will clearly make an individual risk's potential liability more predictable.

In addition, state regulation and tort reforms directed at individual types of risks, such as dram shops, day care centers, amusement parks, and medical liability also contribute to the insurability of individual types of risks. Insignificant or token reform in a state may not make a significant difference because the entire system remains unstable. Comprehensive stabilizing reform is necessary to restore predictability and to insure the system. For example, if a state works on one issue, such as limiting the application of several liability to municipalities, while allowing other destabilizing factors to continue, such as prejudgment interest, pure comparative negligence, and the erosion of defenses, the system will remain difficult to predict and the impact of the single reform, while helpful, will be limited as far as providing more insurance coverage. While the limited reform may not in itself restore the insurance market for a risk, it will limit potential liability.

For product liability insurance, however, individual state reform may have a small impact. As much as 70 percent of products manufactured in the states are sold outside of the state of manufacture, and a product liability claim is likely to be filed in the state where the product is purchased or where the claimant resides. In this case it may be more effective to adopt uniform product liability laws among the states or federal product liability tort reform to assure stability.

Product liability embodies a unique set of circumstances. Significant tort and civil process reforms in a state clearly will encourage insurance underwriters to offer coverage in the state.

15. If tort reform legislation is enacted will insurance be more available?

The adoption of meaningful stabilizing tort reform will assist insurers in predicting the extent of the insureds' exposure. This should make insurance more available. However, insurance is a cost-based product and it is difficult to predict in advance the precise influence adoption of tort reform will have on availability of a specific type of insurance.

As a cost-based product, insurance rates are set today based upon historical data which is then projected into future costs. Where historical data does not reflect future exposures and conditions, or cannot take the rapid evolution of the law into account, today's price becomes increasingly subjective.

Unfortunately, this is the current state of property/casualty underwriting in many lines of insurance. Insurers collect data for rating and claims purposes but not for evaluating specific legislative or regulatory reforms. Thus, it is difficult, even in a perfect world, to evaluate the impact of reforms on the availability of insurance. The world, of course, is not static and therefore we cannot hold constant the social, economic, and legal environment in which insurers operate in order to empirically evaluate any specific package of reforms.

The insurance industry operates in an open market and price-competitive economy. Thus, premiums reflect competition for business as much as historical claim patterns. A company determines the capital it is willing to commit to property/casualty underwriting by the potential profitability of a line of insurance, the overall financial integrity of the insurer, and service to the broadest spectrum of its policyholders. We believe that an environment will exist in which property/casualty insurers could make more insurance available if the following develop, as its occur:

- a stable legal environment exists;
- regulatory or marketplace self-regulatory standards are applied to some of the businesses now affected by availability and affordability problems;
- insurers return to a position of financial integrity and capital is replenished; and
- the transactional costs of resolving disputes under our liability system becomes more manageable.

16. What effect will tort reform have on insurance prices?

The effects of reforms on insurance prices are uncertain. Although estimates of the effects of specific reforms occasionally appear, these are usually highly speculative due to the great differences in judicial and

legal environments from state to state, the final shape of reform legislation, and the current insurance climate in different states. Estimates of the future behavior of insurance prices based on these unknown factors must always be used with extreme caution.

It should be remembered, however, that insurance is a cost-based product. In a highly competitive market, such as the insurance market, firms constantly seek to outdo their competitors in price and quality of the products they offer. In a competitive market, the benefits of greater stability and lower costs should reach the consumer either in the form of lower prices or increased product quality. When this will happen or how significant it will be from one insurer to another is uncertain.

17. How do you know these tort reforms will work?

Although the experience with tort reform is not broad, the experience we have had does give hope that there are solutions to the current crisis. Significant reforms dealing with medical malpractice insurance were adopted in many states during 1974-1975. Among the reforms were: "caps" or limits on awards, offsets of collateral sources of payments, limits on attorney contingent fees, elimination of the plaintiff's *ad damnum* (statement of damages sought), changes in statutes of limitations, pretrial screening panels, arbitration, restrictions on informed consent, and periodic payments of future damages.

Research by Professor Patricia Danzon of the University of Pennsylvania has found that capping awards and mandating collateral source offsets were significant in reducing the average size of awards. Elimination of *ad damnum* appears to have reduced total claim costs. Limits on contingent fees appear to have reduced the average size of awards and the total cost of awards, but this result is ambiguous statistically. Danzon was not able to find measurable effects from the other reforms but this does not necessarily mean that they had no effect. Danzon has cautioned that her results are "rough estimates of short effects." Much of her data may have been too undeveloped to reflect fully the changes which took place from the reforms. Before the full effects of the 1974-1975 reforms are known more research using more recent data will have to be completed.

Besides looking at significant research on the effectiveness of medical malpractice tort reforms, the value of a stable judicial and legal climate must not be ignored. One cannot easily estimate the monetary impact from broad-based reform, but this should not delay moving to stabilize a system in which there are serious problems.

Cancellation & Nonrenewal?

18. My claims experience has been good. I've never made a claim. Why is my business insurance being cancelled?

In most cases, insurers are continuing policies to the end of the term. However, in some areas, a company may be notifying you that it will not be able to renew your coverage when the policy expires. Similar to a lease for an apartment, the contract between you and the company simply runs out on a given date, and may or may not be continued by agreement of the parties. Even if you've never made a claim, there are other reasons why your insurance company might be unable to continue your insurance beyond its current obligation.

Basically, insurance works on the principle of risk sharing. Each member of a large group (or classification) of policyholders is exposed to the same kind of possible loss. Each member contributes a certain but lesser amount, the premium, than he or she might lose if the unforeseen mishap occurs. The insurer pays the much larger actual claims for those mishaps that some of the group will have from the total amount accumulated.

When the total number or amount of the whole group's claims increases unexpectedly, the claims dollars paid can quickly exceed the premiums collected by a substantial amount. The reasons for a deteriorating loss experience for a group or class of insureds can be varied, and may include court decisions generously interpreting coverage; a trend of increasingly high jury awards; recognition of new target areas for lawsuits by claimant's attorneys; new obligations imposed by law or regulation; or errors in pricing the risk because of competitive pressure. Under such circumstances, the insurer may not choose to continue to provide the same kind of coverage for the same premium, and must take some action.

Because of increases in claims and overall losses experienced by an insurance company, or uncertainty over future claims experience, the insurer may have no other recourse than to discontinue providing that kind of insurance for the group as a whole. This means that even if you've had no claims, your insurer may not be able to provide you with coverage.

19. Can insurance companies cancel business insurance policies before they expire?

Business insurance policies may be cancelled by either the policyholder or the insurance company, but this right is seldom exercised. When an insurance company does cancel an insurance policy, it does so under restricted circumstances. These circumstances are controlled by the provisions of the insurance contract and general contract law.

There are many situations where an insurance company may be compelled to cancel an insurance policy. The very laws designed to protect automobile and homeowner policyholders recognize this fact. An insurance company should not be forced to honor a contractual agreement when the policyholder has in one way or another failed to comply with the terms of the contract. This is as true for insurance as it is for any other contractual agreement. An insured who fails to pay premiums, withholds material information about the extent of risk, or violates terms and conditions of the policy cannot be given continued coverage under the policy. Forcing an insurance company to carry risks under these circumstances is a recipe for financial disaster and an injustice to the great majority of policyholders who comply with the terms of their contracts.

20. Why can't my insurer give me more notice before cancelling my business coverage or raising my rates?

For the cancellation of a contract a reasonable degree

of prior notice should be given the policyholder. The amount of time that elapses between the notice of cancellation and the actual date of cancellation should vary with the reason for cancellation. In the case of nonpayment of premium, insurance companies should be free to get off the risk quickly. An insurer cannot be expected to cover a risk when the insured has not paid for the coverage. Other reasons for cancellation such as changes in a risk which substantially increases the hazard insured against, are usually accompanied by longer prior notice.

The important point to remember is that the prior notice should be reasonable in relation to the reason. An insurance company would not be acting in the best interests of its policyholders if it delayed too long before cancelling in the event of fraud or nonpayment. While a fraudulent policyholder may benefit by being given a long period to defraud the insurance company, the company's other policyholders will ultimately bear the cost of an unjust claim.

In the case of rate increases upon renewal of an insurance policy, insurance companies have difficulty providing any established prior notice due to a number of underwriting constraints. The first constraint, and probably the most important, relates to communication between the insured and the insurance company. The policyholder needs to communicate to the insurance company exactly what sort of coverage is needed well in advance of the anniversary date of the policy. This is important because insurance companies have to take a hard look at the risk to see how it has changed since the coverage was originally offered. This process takes some time and will often include loss control recommendations by the insurance company. Loss control recommendations then have to be implemented by the policyholder which, again, takes some time. Until these recommendations are implemented and the reanalysis of the risk is finished, the insurance company does not know what it will cost to provide the coverage requested by the policyholder. A second underwriting problem relates to reliability of reinsurance to cover the insureds underwriting.

One way to reduce the likelihood of abrupt cancellation or unexpected premium increase is improved communication between the policyholder and the insurance company. If policyholders keep their insurance company informed of any changes that take place relating to an insured risk the likelihood of cancellation will be greatly reduced. Moreover, if the policyholder desires a renewal quote before the anniversary date of a policy, the policyholder should communicate the coverage request at least three months before the end of the policy. If this is done, the insurance company will have adequate time to reanalyze the risk and ensure implementation of loss recommendation proposals. Improved communication will eliminate a great deal of misunderstanding in this area.

Increasing Rates?

21. My claims experience has been good. I've never made a claim. Why are my rates suddenly skyrocketing?

Except for the the very largest risks, the premium for each individual policyholder is based on the losses of all the policyholders in his particular class. Only a few class members are expected to have losses while most are expected to be loss free or only have small losses. If the number of claims and/or the size of the claims is larger than expected and the higher level of losses is expected to continue in the future, premiums must go up to cover these higher losses. As the consequence, premiums will increase even for policyholders who have never made a claim.

Dramatic rate increases are only occurring in certain problem areas. Although there have been well publicized cases where premiums have doubled or tripled or even more, this is the exception. During the first half of 1985, written premiums for the entire property/casualty insurance industry increased by 18 percent over the same period in 1984. This is a substantial increase but nowhere near a doubling or tripling of premiums. It is important to note that these first half increases came nowhere near covering losses. For the first half of 1985, the property/casualty insurance industry was incurring losses and expenses of $1.16 for every dollar in premiums collected.

For certain commercial insurance lines, especially general liability, premium increases in 1985 have been substantial. During the first six months of 1985, according to A.M. Best Company, Inc., premium volume for general liability increased 58 percent compared to the first six months of 1984. Although this is a substantial increase, losses also kept track with the premium. The loss ratio for the first six months of 1985 was in fact higher than for the first six months in 1984. Also important to consider, is that in 1984 insurers collected a total of $6.5 billion in general liability premium while in 1979, or five years earlier, they collected more premium, $6.6 billion. If one removes the effects of inflation of the five year period, premiums actually declined more than 30 percent. The substantial increases today are needed in order to return profitability to this line of business.

22. How is my individual claims experience figured in the rates I pay?

Individual claim experience for the very smallest policyholders, even over a several year period, is not large enough to reasonably estimate what those individual policyholders' experience will be in the future. As a result, their individual claim experience does not affect their premiums. They pay based on the average loss experience for all similar small policyholders. For the very largest policyholders, individual claim experience may be large enough to reasonably estimate what future losses will be. In this case, the individual policyholder's premium may be determined totally on its past loss experience.

For the large number of policyholders who are not large enough to have their premiums based on their experience but are larger than the very small policyholders, individual claims experience is often considered in their premiums. The amount of influence the past experience has on determining future premiums depends upon the number and size of claims.

The methods by which the experience is used to determine rates varies with different lines of insurance. If an

individual policyholder's experience is better than expected, the policyholder's premium will be reduced from the manual premium. Similarly, if the policyholder's experience is worse than expected, the premium will be increased from the manual premium.

23. Why is my business lumped in with broad categories for ratemaking purposes?

The basic premise behind insurance is for similar risks to share their losses. The principal goes back to the earliest times when shippers sent their goods out on several different ships. If one ship went down, all their goods would not be lost. Benjamin Franklin got the idea that if homeowners agreed to pool their money, they could pay for rebuilding any house of a pool member destroyed by fire and thus started the first fire insurance company.

This is the same principal used today. There are literally thousands of different classifications of risks into which a policyholder can be placed depending upon the coverage needed and the characteristics of the risk. In some cases the classifications are broad and others are quite narrow. Rating organizations constantly review classes of business to determine if the similarities of the risk are maintained within the class. If recognizable dissimilarities appear, new classes are made. Insurers assume that only similar risks show in each class' losses. But remember even for similar risks only a very few are expected to have losses and most are expected to be loss free.

24. How are commercial insurance rates made?

Although ratemaking is a very complex process, the principles are quite simple. Rates must be adequate but not excessive, and they should not be unfairly discriminatory. The last point is extremely important and is why classifications exist. Insurance by its very nature must discriminate among policyholders so that each pays an equitable rate based on its loss expectations.

Although ratemaking methodologies vary by lines of business and sublines of business, certain general procedures and processes are common throughout. For almost all lines of business, premium and claim information is collected by state for various lines and sublines of business and by class within the lines and sublines of business. The raw data can not be used directly to determine rates for several reasons. These reasons include:

- the experience is for past periods of time;
- benefits and coverages may have changed since the period of time the experience is for;
- The experience does not include losses which have already happened during the period of time the experience is for, but which have not yet been reported to the insurance carrier.
- The volume of experience may be too small to be reliable.

Actuaries apply statistical methodologies and analysis to the raw data for the purpose of projecting what future losses will be. The projections are usually done at two levels, at the gross level and at the class level. Adjusting the gross data for a line or subline of business, they determine the overall rate increase that is needed in order to cover future losses and expenses for the lines or sublines of business. Individual class data is also projected to adequate rate levels using only the statistical data in most cases. Sometimes when the state experience volume is too small, national data for the same class may be added to obtain an adequate level of experience. Usually limits were placed upon how much a class rate is allowed to increase above the average increase. This amount will vary by line of business.

The premium increase generated by the classes is then compared to the gross increase determined earlier. If the total class increase is greater than the overall increase indicated, then a downward adjustment is made to each of the classes. In this way, rates will be adequate and not excessive nor will be they unfairly discriminatory.

25. Definitive loss data on particular lines of insurance experiencing availability problems is necessary. Why can't the industry produce it?

Premium and claim experience is collected by state, by line or subline of business, and by class within line or subline of business. Examples of lines of business include fire, workers compensation, and general liability. Examples of sublines of business include within the general liability line for example coverage for owners, landlords and tenants; manufacturers and contractors; and completed operations. Within each of these sublines are the classes.

The types of claims the policy covers depend upon the insuring agreement in the policy. The insuring agreements for almost all liability policies are very similar and generally state, "the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury or (b) property damage to which this insurance applies, caused by an occurrence." The insuring clause does not specifically state which types of occurrences will be covered, but rather is very broad. Limits to the types of occurrences that are covered are contained in the exclusion section. Due to the multitude of the different types of occurrences that may happen, and as long as the occurrence is not one that is excluded, the insurance industry has never attempted to categorize the different types of actions which might lead to a claim under a general liability policy. The purpose of the policy is to cover the liability of the insured almost regardless of how it arises.

Recently, insurers have noted that certain types of occurrences are beginning to arise more frequently and be the source of actions against the insured. The types of occurrences noted include suits for pollution liability, as well as suits against directors and officers of certain corporations, liquor servers, daycare centers, and, of course, physicians. Although the specific cause of action resulting in the suit is not recorded, the claim payments are recorded in the class the insured has been assigned. In some instances it has been possible to isolate specific classes which are having problems such as daycare centers and tavern owners. This information, however, is only available through the statistical

plans recorded with the statistical agents. Further compounding the problem is the fact that many of the more difficult to insure lines such as liquor liability and pollution coverage are written by excess and surplus writers which do not generally report their statistics to any statistical agency. As a result no single source of data exists for the total insurance industry.

Designing a coding system which would capture the cause or source of the suits would be extremely difficult. One of the most difficult problems to overcome is determining which of the several different actions on the part of insured brings rise to the suit or is even the most important to the ultimate outcome. Even if this information could be captured, it would not be particularly useful in terms of ratemaking since as long as the cause of action is covered, the losses are going to be paid and rates will be based on those losses.

26. Why is it that insurers collect so much money in premiums and actually pay out so little?

Some point to insurance facilities in the medical malpractice field which have high premium income and low paid claims as evidence that the crisis is in the insurance industry alone.

The examples cited are simple, often persuasive, but misleading. For insurance coverages where claims develop slowly and the full costs are known only over an extended period, one cannot look at this year's income and costs but must look at this year's income compared to the statistically proven costs which will develop on these policies. In 1984, medical malpractice insurers expect to ultimately pay $161 in claims and costs for each $100 collected in premiums. General liability coverage costs are expected ultimately to be $151 for each $100 of premium.

27. How is investment income figured into ratemaking?

Only a few states require that investment income be explicitly incorporated into the ratemaking process. This does not mean, however, that policyholders do not benefit from the investment income earned by insurers. To understand this, distinction must be made between ratemaking and pricing. Ratemaking is the process whereby experience is turned into manual rates. Pricing is the process of starting with the manual rates and determining the premium charged to the policyholder. Competition in the insurance marketplace will affect prices but not actuarial rates.

It is in the pricing of the product that many policyholders over the past several years have benefited considerably from the investment income earned by the insurers. Between 1979 and 1984, commercial lines premiums increased from $52 billion to $61.6 billion or 18.5 percent. If the impact of inflation is removed from the 1984 premium volume, 1984 premium volume would have been only $43.6 billion or more than 16 percent below the 1979 premium volume of $52 million. The reason insurers were able to sustain this premium loss was due to investment income. If the insurers had not benefited from high returns on their investments they would not have been able to pass on the premium decreases, in constant dollars, to their policyholders.

28. Aren't insurers still reaping billions of dollars from their investment income?

Due to prudent and conservative investment policies, insurers earned more than $16.7 billion in investment income in 1984. Despite these record high earnings, the investment income was not sufficient to cover the more than $22 billion underwriting loss after dividends to policyholders. Insurers obviously cannot go on losing money even after investment income and still be expected to provide the insurance needs of their policyholders. Without an adequate return from their business operations, insurers will not be able to attract funds from potential investors or increase surplus in order to meet the ever expanding need for insurance in our society. To meet this need, substantial rate increases are needed.

Coverage Required?

29. Don't insurers have an obligation to provide coverage to American businesses?

The insurance industry is attempting to meet the needs of American businesses for liability coverage. This responsibility does not, however, fall entirely upon insurers. There are some risks which are uninsurable because of the magnitude and certainty of loss. Recent court decisions reinterpreting policy language and broadening insurers' liability even after contracts have been written have made increasing numbers of risks uninsurable. Fearful of future court decisions changing the intent of the policies they write, insurers have refused to provide some types of coverage.

But not all risks are uninsurable and for those the industry is providing coverage. In these cases, insurers and their customers have become successful partners in risk sharing, working to reduce or control insurance premiums and loss exposure through loss control techniques, variations in insurance deductibles, introduction of revised policy forms.

It should be clear, however, that these successful efforts at risk-sharing can only proceed in a commercial insurance market free of impediments to underwriting. The insurance market is a competitive market in which numerous players must interact freely to place risks with those willing to accept them. Not only is the industry competitive within itself but also with other forms of enterprise. If the insurance industry is to remain healthy and dynamic it must retain the ability to attract new capital and retain old sources of capital. Reducing the profitability of any industry and/or artificially lowering its prices will almost always produce its failure as capital flees the industry and supply falls. As supply falls and demand for the product remains, there is very little that can be done to prevent prices from rising.

30. The government says I've got to have insurance coverage. Why can't the industry provide it?

Unfortunately, insurance requirements mandated by the federal and state governments are typically established on the basis of what is believed to be in the public interest, but do not necessarily take into account the limitations of the insurance industry as a whole. In some

cases, the insurance industry cannot fully provide for the coverage needed to meet the imposed insurance requirements because it would find itself not only endangering its own financial stability, but would also be in violation of other governmentally established requirements.

For example, two federal laws, the Motor Carrier Act of 1980 and the Bus Regulatory Reform Act of 1982, required high liability insurance limits of $5 million per vehicle for motor carriers of hazardous substances and passengers. Following enactment of this federal legislation, a number of individual states followed suit for other motor carriers operating within their state. Many more states are also following this lead.

Because of the sheer number of vehicles to which these high limits apply, the overall liability insurance limits required for the motor carrier industry and bus industry runs into the billions of dollars. This demand far outstrips the capacity of the insurance industry to provide coverage, as an insurer is limited by state regulatory standards which inhibit it from assuming liabilities in excess of a given percentage of its surplus in order to protect its solvency. This capacity problem is further complicated by demands for higher liability limits in other lines of insurance, many of which are also imposed by governmental edict.

By prescribing certain kinds and amounts of insurance, government is shifting responsibility for regulating certain industries from itself to insurers, who have finite capacity and no regulatory ability. Because insurers must be selective or face solvency problems, they are forced to both limit their writings and attempt to improve the quality of the risks written by introduction of safety and cost control programs. For those risks that cannot qualify for insurance coverage, the insurer becomes the unwilling regulator.

In spite of the fact that there currently are some serious problem areas, it should be remembered that the insurance industry is continuing to provide insurance coverage for most commercial and personal lines policyholders. The industry is at the same time seeking solutions to the question of providing the needed coverage in these problem areas. Insurers must, however, survive the short term difficulties in order to be able to provide coverage in the future.

31. *Why can't an insurer just pick up the coverage another company can't write?*

An insurer may not be able to pick up the coverage another company can't write because of lack of capital. Every insurance company must maintain a reserve of uncommitted funds as the necessary security which keeps it solvent and which stands behind every policy. This capital protects the insurer's policyholders and cannot be compromised for the sake of writing additional insurance coverage. An insurer may also be limited by the availability of reinsurance for the coverage sought.

Lastly, an insurer may not have the expertise or experience necessary to evaluate the coverage another company is unable to write. Many lines of insurance, especially in the commercial area, are highly specialized and complex and require extensive knowledge to assist the policyholder with such matters as coverage decisions and loss control. In many lines of insurance, the processing of claims is also highly specialized. Insurance companies are reluctant to take on a responsibility they may be unable to discharge well.

32. *What do insurers mean when they claim they don't have the "capacity" to write coverage?*

Insurers mean that they cannot jeopardize the surplus which is the security that stands behind every policy by taking on additional business or by continuing some of their existing business. This "policyholders surplus" is the difference between the insurer's assets it must maintain to write business in the future and its liabilities, and represents the insurer's uncommitted funds. The surplus provides the necessary cushion to keep an insurer solvent should the insurer suffer a major catastrophe such as a major hurricane or earthquake, face a severe reversal in the investment market, or find its loss reserves inadequate.

If an insurer's written premiums exceed its surplus by more than three to one, it is generally agreed that the company's surplus may not be adequate to support the particular business it is writing. In this case, the insurer may not have the capacity to safely write new business or to continue the existing business which is causing the negative ratio.

According to the Insurance Services Office, industry surplus in 1984 fell three percent to $63.6 billion. In constant dollars, 1984 surplus was three percent below the 1980 level, which indicates that capacity may not be sufficient to meet the insurance needs of an expanding U.S. economy.

33. *Why shouldn't government just force the insurance industry to provide these coverages?*

The decline in availability of certain insurance coverages is a reflection of the unpredictable liability system. Forcing insurers to provide some lines of insurance rather than solving the problems which caused the lack of insurance will force carriers to underwrite coverages they have never written before and do not possess the expertise to underwrite. Where such proposals impose insurance pricing restrictions which result in inadequate rates, insurers will be forced to make up for losses and inadequate rates by charging higher prices for other lines of insurance.

The result is that some policyholders will be required to subsidize other policyholders, which is unfair. Insurers owe their policyholders an obligation to remain solvent to provide other necessary coverages. Insurers also have a fiduciary obligation to their owners and policyholders which is compromised by such government-imposed requirements. Government laws requiring insurers to provide coverage at inadequate rates do not solve the real problem, the unstable and unpredictable liability system.

Mandatory medical malpractice insurance pools were instituted in a number of states since the mid-1970s. The experience of these efforts, specifically of the Medical Malpractice Joint Underwriting Associations (JUA),

indicate the true cost of these solutions. New York's Medical Malpractice JUA, which has had regular difficulties getting adequate rate increases, is estimated to have a deficit of over $250 million. Massachusetts' JUA is estimated to be over $400 million in deficit. Texas' JUA has been forced to assess medical practitioners and insurance companies to fund deficits that resulted from inadequate premiums and reserves.

The state malpractice facilities have been unsuccessful in large part because no attempt has been made to address the problems underlying the growth of liability in the malpractice area. Such problems relate to the operation of the tort litigation system, a problem relevant to other high-risk exposures like medical malpractice. Generally, no way has been provided under these schemes to effectively limit the size of awards, nor have means been put in place to insure that adequate premiums will be allowed. Moreover, JUAs have not always been given adequate underwriting powers.

34. If insurers can't write these coverages, is government insurance the answer?

Government insurance programs are a dangerous and expensive alternative. Such mechanisms do not address the underlying problem of the rapid growth in size and number of liability claims, but merely shift liability to society as a whole or to members of society believed able to "fund" the system. Problems are postponed, but not avoided under such systems.

States are in no better position than insurers to write problem lines. Those lines in which insurance is difficult to obtain, such as medical malpractice, municipal liability, dram shop, pollution liability, have become problems because there is little predictability of risk to allow insurers to price their product appropriately. This problem of predictability comes about because new theories of liability, new duties owed, and new interpretations of insurance contract language can fundamentally change the nature and extent of liability. Moreover, lines such as medical malpractice have very long "tails" of liability, meaning that the total extent of claims resulting from an occurrence may not be known for many years, until an injury is discovered or manifests itself. The regulatory climates of states have often interfered with insurers' ability to write high-risk lines. That resistance to granting adequate rates for lines which have significant loss ratios means that the state will have to subsidize the losses in any government operated program.

Establishing a state fund only shifts liability from one place to another, rather than reducing or controlling the total liability exposure or the plaintiffs' expectations for recovery. State funds can exacerbate already serious problems by delaying real action on underlying problems. This is certainly the case in states operating workers compensation funds. The pattern can be expected to be repeated in other problem lines. We must remember that there is often heavy political pressure to keep premiums unrealistically low This only contributes to this problem. Tort reforms to contain costs while still preserving fairness represent a much preferable option to state funds or reinsurance facilities.

Solutions?

35. Insurers seem to blame everyone else. What are they doing to make insurance more available?

Getting the civil justice system back on track is one of the major keys to solving the insurance availability problem. Insurers are actively working with coalitions around the country restore balance to the liability system, but we need the assistance of all those affected by the expansion and instability of the tort system.

In addition, insurers are changing their policy coverages in order to make insurance more available. Insurers plan to provide commercial general liability policies on what is called a "claims-made" basis. Under this form only those claims which are filed against the policyholders during the policy period are covered. Where a claims-made policy is first issued it covers only incidents which occurred during the initial term of the policy. When the policy is renewed with the same insurer, coverage for prior acts is provided back to the date the policy was first issued. This change in policy addresses the problems due to the long term loss development of claims under the traditional occurrence policy. For example, a sponge left in a patient's body after surgery may not be discovered for 10 or 12 years. This "long tail" makes it difficult or impossible for insurers to measure the extent of risk.

The industry is also attempting to restore its own solvency and to create a climate in which insurers can operate soundly. To do that, it must set prices at levels that cover losses. Operating income for the first half of 1985 was a negative $2.3 billion. Further, the industry has sustained operating losses for seven quarters in a row, for a total of more than $6 billion.

Insurers are actively working to attract capital to their business which will increase their capacity. In the meantime, insurers are concentrating on the markets which provide for insurance needs for the greatest number of its policyholders.

Many insurers are modifying their operating policies on cancellation and nonrenewal in response to this tight market to strike a reasonable balance between its own needs and the buyers' needs for stability and time to react if changes are necessary. Insurers' and insureds' need flexibility to respond to changes in individual risks or impairment in the financial status of an insurer or its reinsurers.

Many in the industry have worked actively with regulators and producers to secure coverage for such difficult risks as day care and liquor liability through open lines programs and market assistance plans, but such assistance plans are not a panacea for all problems and will not work in lines where risks are truly uninsurable. Only long term reforms which restore balance to the system will return the market for these coverages.

36. How can I find out which companies are still writing the difficult coverages?

Although some consumers report difficulty in finding certain kinds of insurance coverage, insurance industry surveys have found most types of policies continue to

be offered by at least a few companies. Consumers therefore should explore all availabk markets when looking for difficult to place risks. The consumers of commercial coverage, should check with their company or independent agents, brokers, or state insurance department for information and assistance with insurance needs. Consumers seeking coverage should start to look for coverage 90 days prior to renewal. Many insurers are willing to provide coverage, but it takes time for them to develop detailed plans for making coverage available.

In several states where availability problems have been addressed, companies agents and the insurance department joined together to set up open lines programs. These insurance "hot lines" have surveyed the marketplace in certain areas and provide information to customers or agents seeking coverage. The hotline staff can assist customers in locating coverage. Michigan and Connecticut have such open lines programs which have been in effect for a number of years.

The Alliance of American Insurers has published a brochure, *Availability Checklist for Insurance Consumers*, which provides suggestions for insurance buyers looking for alternative sources of coverage. Single copies are available free from the Alliance headquarters, 1501 Woodfield Road, Suite 400 West, Schaumburg, IL 60195-4980 and from any of its nine regional offices.

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PATRICK R HUBBELL
SPECIAL REPRESENTATIVE-PUBLIC AFFAIRS

MICHAEL C GERMANN, J D
LEGISLATIVE REPRESENTATIVE

Statement of the
Kansas Railroad Association

Presented to the Special Committee
on Tort Reform and Liability Insurance,
The Honorable Joe Knopp, Chairman

Statehouse
Topeka, Kansas
July 10, 1986

* * * * * *

Mr. Chairman and Members of the Special Committee:

My name is Mike Germann. I am a representative of the Kansas Railroad Association. I want to thank the Chairman and the Members of this Special Committee for permitting me to appear today and express some of my industry's concerns with certain trends occurring in the civil justice system.

These trends have been emerging for a number of years but received little attention until the insurance crisis developed. Studies of the insurance crisis have been undertaken recently by a number of legislatures, by special governmental task forces, by insurance regulatory agencies, and by independent groups. Almost universally, these studies have found that one of the underlying causes of the insurance crisis is the increasingly unpredictable nature of the civil justice system.

Attachment 50

These studies have found that the number of lawsuits and the size of jury awards are increasing at an alarming rate. The findings of these studies are supported by statistics from the railroad industry. Personal injury claims of railroad employees decreased 47% during the period from 1979 to 1985. However, during this period of declining claims the number of employee personal injury lawsuits increased more than 69%, and the total dollars paid out in judgments increased 292%.

These statistics reflect the concerns of the railroad industry with the civil justice system. We are principally a self-insured industry. We believe there is in fact a crisis, but for our industry it is not an insurance crisis. From our vantage point the civil justice system has gotten out of kilter.

Some of the problems with the civil justice system were addressed in an article recently published in the Wichita Business Journal. James Frierson, a lawyer, a professor of management at East Tennessee State University, and the author of the article, wrote: "Judgments for pain and suffering and punitive damages are a major cause of the huge increase in the number of lawsuits, the size of judgments and the extreme variations in the amounts awarded in different lawsuits. They are a major reason why attorneys' fees are so lucrative in personal injury cases."

The civil justice system should be fair, and it should be predictable. Frierson touched on the fairness and the predictability of the system when he wrote: "A personal

injury claim in Ohio might bring a $1 million pain and suffering award, while an identical case in Alabama might result in only a $25,000 judgment . . . . The result appears to depend upon which attorney was used, which court heard the case, the jury that was selected and pure luck."

A blameless person, injured by the tortious conduct of another, should have complete restitution of all economic losses, including attorneys' fees to prosecute the claim, but the law should not attempt to do the impossible. It is impossible to place a correct dollar amount on physical pain and mental suffering. It is therefore reasonable and fair that money awards for pain and suffering be limited by statute.

Addressing punitive damages, Frierson wrote: "[P]unitive damage judgments are a major cause of the inconsistency of court judgments." The awarding of punitive damages in a private lawsuit is an attempt to impose a penalty for a defendant's "outrageous conduct" or "reckless action" against society.

The imposition of punitive damages in the infancy of the civil justice system was a reasoned approach to dealing with the "outrageous conduct" or the "reckless action" of a defendant. However, as the criminal law has developed and as the civil justice system has evolved, particularly the area of administrative law, the awarding of punitive damages in private civil proceedings no longer appears appropriate.

We believe a number of areas of the civil justice system warrant careful study and serious consideration. We urge

this Special Committee to devote a portion of the interim to the following issues: non-economic damages; punitive damages; venue and transfers; structured settlements; collateral sources; and alternative dispute resolution.

Thank you for the opportunity to present our statement. I will try to answer any questions which you may have.

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REMARKS BY

TED FAY

ATTORNEY

KANSAS INSURANCE DEPARTMENT

BEFORE THE

LEGISLATIVE INTERIM COMMITTEE

ON TORT REFORM AND LIABILITY INSURANCE

JULY 11, 1986

Attachment 51

On February 26, 1986, Fletcher Bell, State Commissioner of Insurance, appointed a Citizens Committee to review the liability insurance environment in Kansas and render an opinion as to whether such environment should be cause for public and legislative concern because of its impact on legal liability insurance or other mechanisms used to finance the civil justice system. The charge to the committee is found as attachment A.

The Citizens Committee is chaired by Sajjard Hashmi, Dean of Business, Emporia State University. The committee members represent a broad cross section of insurance consumers having contacts in Kansas. Included on the committee are representatives of major businesses such as Farmland Industries, Inc., Beech Aircraft, Hallmark Cards, FMC Corporation, Coleman Co., Inc., Puritan-Bennett Corporation, and McNally Pittsburg, Inc. The committee also includes representatives of business groups such as the National Cooperative Refinery Association, Kansas Bankers Association, and Kansas Independent Oil and Gas Association, and representatives of professional groups such as

Kansas Society of Certified Public Accountants, Kansas Engineering Society, and the Kansas National Education Association. Municipalities and school boards are also included on the committee as is a representative for day care centers in Kansas.

Chief Justice Harold R. Fatzer, Ret. and Justice Robert H. Kaul, Ret. serve as ex officio advisory members to the committee. Gerald Goodell, an attorney and past president of the Kansas Bar Association, is acting as an advisor to the committee on legal matters. Mark L. Bennett, Sr. also an attorney, is serving as an advisor to the committee for insurance information. A current list of Citizen Committee members is attached as attachment B.

The Citizens Committee has held four meetings to date. During the first two meetings the committee heard testimony from numerous businesses, professions and individuals who have experienced liability insurance problems. The third and fourth meetings were devoted to leading national and state insurance spokesmen. The meeting on July 1,

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also included Stephen Carroll, Chief Economist, Institute for Civil Justice, Rand Corporation, who testified regarding extensive studies conducted by the Rand Corporation of the civil justice system. The fifth meeting, which will be held on August 5 will be devoted to testimony from the judiciary and legal profession. Mr. Goodell has made arrangements for the speakers to address this meeting.

Following the information gathering segment of committee work, the committee will divide into subcommittees to develop recommendations, if any, needed in specific areas of concern. The six subcommittees will be:

1. Products liability and pharmaceuticals.

2. Professional liability to consider insurance problems with lawyers, nurses and other non-health care providers within the health care system, certified public accountants, architects and engineers, and teachers.

3. Municipalities and other governmental units.

4. Directors and officers insurance, financial institutions, and charitable organizations (including day care centers).

5. General manufacturing.

6. Oil, gas and natural resource companies.

Should it be determined later that additional areas of concern should also be included, these areas will be added to the appropriate subcommittee for study.

Each session of the full committee has been recorded. Upon completion of the information gathering segment, these transcripts will be provided to this committee. If this committee prefers to receive the prepared transcripts immediately and future ones as prepared we will certainly comply with this request.

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The chairman and members of the Citizens Committee have specifically asked me to inform this interim committee of the existence and work of the Citizens Committee, and to respectfully request that this committee delay its final recommendations until the Citizens Committee has completed its final report. The committee intends to complete a final report prior to November of this year. If recommendations are available prior to the completion of the final written report these will be provided to this interim committee as soon as possible.

Charge to Legal Liability Citizens Committee

The charge to the Committee is simple. The Committee is to review the legal liability environment in Kansas and render an opinion as to whether such environment is, in fact, a situation which should be cause for public and legislative concern because of its impact on legal liability insurance or other mechanisms used to finance the civil justice system.

If so, the Committee is to identify, to the extent possible, the causative factors that seem to be responsible and develop, at least in conceptual terms, such recommendations as may be necessary to alleviate the direct and indirect adverse influences.

On the other hand, if the Committee concludes that few, if any, liability awards and settlements are excessive; that injured persons are treated fairly; and that the process used in determining whether negligent acts were committed and the manner in which the damages are calculated is effective, efficient, and meets society's needs, the Committee should so state and its recommendations should reflect such a finding.

The Committee shall have complete freedom to pursue its charge as the Committee, itself, shall determine.

Attachment A

7/7/86

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Mary Lou Marlitt, Dir. of Membership/Insurance/Special Services
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Attachment B

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4217

Associated General Contractors of Kansas, Inc.
200 WEST 33rd • TOPEKA, KANSAS 66611 • TELEPHONE 913-266-4015

July 7, 1986

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Representative Joe Knopp, Chairman
Special Committee on Tort Reform
State Capitol
300 SW 10th
Topeka, Ks. 66612

Dear Representative Knopp:

The Associated General Contractors of Kansas is exteremly interested in the special committee's review of Tort Reform and Liability Insurance. We intend to be represented at the Thursday, July 10th meeting and subsequent meetings of the committee, however, we will not be presenting testimony at this time.

I have reviewed the testimony that will be presented by Dan Ramlow of the Kansas Contractors Association. At this time we would have nothing to add to Mr. Ramlow's comments other than we strongly support the conclusions and recommendations of the national AGC task force on tort reform. I understand Mr. Ramlow will present a copy of this report to the committee.

As we continue to research the specific problems contractors in Kansas face in this regard we will be asking to make our findings known to the committee.

If AGC of Kansas can be of any assistance to you please just give me a call.

Sincerely,

Tom Slattery

Thomas E. Slattery
Executive Vice President

TES/jm

cc: Michael Heim
Committee Members
Dan Ramlow

DIRECTORS
DONALD W. BALDWIN
STAN BARNETT
CHRIS BOLTON
BUD CARNEY
DEAN FERRELL
EARL A. JOHNSON
JOHN SCANLAN
JACK FOSTER
JOHN NEUNER

Attachment 52

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TESTIMONY FOR

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

JULY 10, 1986

BY

JANET STUBBS, EXECUTIVE DIRECTOR

HOME BUILDERS ASSOCIATION OF KANSAS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS JANET STUBBS, EXECUTIVE DIRECTOR OF THE HOME BUILDERS ASSOCIATION OF KANSAS. I REPRESENT SOME 1800 KANSAS MEMBERS, WHO ARE ALSO MEMBERS OF THE NATIONAL ASSOCIATION OF HOME BUILDERS WHICH IS COMPRISED OF OVER 140,000 MEMBERS.

ALTHOUGH THE HOME BUILDERS ASSOCIATION OF KANSAS DOES NOT HAVE STATE SURVEY RESULTS TO RELEASE TO YOU AT THIS TIME, WE DO HAVE SUBSTANTIATED REPORTS OF INSURANCE PREMIUM INCREASES OF 3 TO 8 TIMES, WITHOUT CLAIMS, AND INSTANCES OF LAWSUITS.

THE NATIONAL ASSOCIATION OF HOME BUILDERS HAS JUST RELEASED RESULTS OF A SURVEY THEY CONDUCTED ON LIABILITY INSURANCE, IN WHICH THEY RANDOMLY SELECTED 3,750 BUILDER MEMBERS.

NINETY SIX PERCENT (96%) OF THOSE RESPONDING INDICATED THEY DO CARRY INSURANCE WITH 2.4% OF THOSE NOT CURRENTLY COVERED PLANNING TO OBTAIN INSURANCE.

FURTHER STATISTICS OBTAINED FROM THE NATIONAL ASSOCIATION OF HOME BUILDERS SURVEY ARE AS FOLLOWS:

Attachment 53

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Stephen R. Thompson, P.E.
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Marcia Turner, P.E.
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Consulting Engineers
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El Dorado
William M. Henry
Executive Vice President

Testimony to the Special Committee
on Tort Reform and Liability Insurance
July 10, 1986

Mr. Chairman, and members of the committee, I am Bill Henry, the Executive Vice President of the Kansas Engineering Society. I appear today before you on behalf of the more than 1400 members of the engineering society who work in construction, industry, education, government and private practice. Today there are more than 10,000 licensed professional engineers in the state of Kansas. These engineers are licensed by the Kansas State Board of Technical Professions which also provides the regulation and licensure for architects, landscape architects and land surveyors.

We have been informed that you do not wish to hear the so-called "horror" stories about the cost of liability insurance for the members of our society but rather you are more interested in hearing about definite proposals in the way of tort reform that would affect availability and affordability of liability insurance.

The major problem of the professional licensed engineer or any other design professional in Kansas today is the cost of defending a malpractice suit or claim. I emphasis that point again, it is the cost of defending, i.e. cost of discovery, expert witnesses and attorney fees.

The average cost of insurance historically nationwide for a private consulting firm has amounted to 2 to 3 percent of the gross billings of the consulting firm. However, in the past two years that cost has nearly doubled and for smaller firms the increase is even more significant.

How then do we address these burdensome costs of defense? Again, we emphasize we are talking about cost of defense not actual awards. To be frank however a study conducted by the National Society of Professional Engineers, has found that the amount of claims is increasing significantly. In 1978 the average indemnity payment awarded or settled was reported at $104,000. In 1984 that average indemnity payment had increased to $148,000, approximately $40,000 per claim. The same study conducted nationwide showed that during the same time frame average claims expenses have more than doubled on a per claim basis for the design professional.

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Those members of the panel who have dealt in detail with the medical malpractice legislation last session and who also reviewed S.B. 540 know that there are some practical procedural ways that we believe can reduce these costs.

1. The screening panel concept, which was incorporated in H.B. 2661 and S.B. 540, is one solution. If we can get our claims to be routed to panels composed of legal professionals, both in the legal field and in the area involving the litigation, we could speed up the process considerably. The key feature of utilizing such a panel however, we believe, is to insure that the results of the panel, and all of its findings, would be made admissible in any subsequent legal action.

2. Those of you who have tried a variety of cases involving expert witnesses, realize how the proliferation of witnesses can both confuse and in some case entirely mislead the lay person on the issues of the case. One of the problems is how do we rate the credibility of the individual witness. We believe one good method, which was present in S.B. 540, would restrict an expert witness to only that person who has devoted at least 50 percent of his/her time in the past two years to practice in the same profession and speciality as the defendant.

3. While mandatory conferences appear to be a good idea, and indeed some judges in our courts in Kansas today are utilizing these already, there must be some form of leverage to affect the parties who reject a settlement offer--and then do not better their position by further trial of the matter. There should be some type of reasonable attorney fee and court costs--penalty. This was a good provision that was included in S.B. 540.

4. Another key provision of S.B. 540 which we feel is necessary for informational purposes was the requirement that made insurers report to the appropriate licensing agency and the Kansas Insurance Department all information on all claims or actions for damages brought against the professions. We believe this is important because the insurance industry simply cannot or in some cases will not provide this data to us today.

There are a number of other improvements in the tort reform area that we would propose which we feel would decrease the cost of defenses and therefore improve the availability and the cost of liability insurance to members of our profession. We hope you will allow us at another point to discuss the above suggestions and others that we would have in further detail.

Respectfully submitted

William M. Henry
Executive Vice President
Kansas Engineering Society

WHH/mg

a National Society of Professional Engineers

WHITE PAPER

THE LIABILITY CRISIS

published by the
Professional Engineers
and the
Legislative and Government

Attachment 55

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This report was prepared by Milton F. Lunch, NSPE General Counsel, and reviewed for concept by the NSPE Liability Task Force and the NSPE/PEPP Professional Liability Committee. It is published for NSPE by the Professional Engineers in Private Practice, a semi-autonomous Practice Division of NSPE, and the NSPE Legislative and Government Affairs Committee.

Appreciation is expressed to Paul L. Geneckl, Senior Vice President, Victor O. Schinnerer & Company, Inc., administrators of the NSPE/PEPP-endorsed liability insurance program, for reviewing the text and providing the insurance data.

It is intended that this report will serve as a basis for further cooperative programs with other professional societies and trade associations through the work of the Committee on the Liability Crisis of the Interprofessional Council on Environmental Design composed of The American Institute of Architects, American Society of Landscape Architects, American Society of Consulting Planners, American Society of Civil Engineers, American Institute of Certified Planners, American Consulting Engineers Council, and the National Society of Professional Engineers.

[illegible]

THE LIABILITY CRISIS

INTRODUCTION

At midnight on September 11, 1985 the town of Sykesville, Maryland (population 2200) went out of business.

At that hour the town's liability insurance expired and the town had been unable to find any replacement policy. The elected and appointed town officials resigned their positions and terminated all town services to the town's citizens. Their stated reason was the fear that they might be held individually liable for claims arising from the activities of the town or the services rendered by the town, ranging from street repair, water supply maintenance, enforcement of police laws, traffic control, and the host of other day-to-day functions which residents of towns and citizens routinely expect and hardly think about.

The Sykesville case is not unique or even special any longer. The loss of liability insurance, because it is no longer available, or because the premiums are out of reach, has now extended to all elements of society. Child care centers are closing, school boards must close down schools with asbestos installed years ago, midwives are leaving the field, hospitals increasingly raise patient charges to cover ever-increasing premiums.

These concerns are not new to the professions. Engineers, architects, medical doctors, accountants, and now even lawyers (who are often blamed for the crisis) are feeling the pinch in terms of loss of coverage or substantial premium increases.

The purpose of this special report is not to assess blame, or to present solutions, as such. Rather, it is intended that it will be beneficial to members of NSPE, and others, to understand the background of how this all came about, what is the current situation in particular aspects of the problem, and what actions are underway or contemplated to deal with the many and varied issues which form the total crisis.

The emphasis of this report will naturally be on the implications of the problem for engineers, but not confined to those in private practice or any other single segment of the profession. Likewise, it discusses the relationship of the concerns of engineers with those of the other professions, but recognizing that there are major differences between the professions in light of their different forms of practice and liability exposure.

The liability crisis is not confined to the professions. It sweeps across virtually all elements of society. For some ten years the manufacturing industry has attempted to enact a federal law establishing a uniform standard for product liability. Despite extensive efforts and substantial financing the effort has not been successful. In addition to the arguments about the substance of the proposal which is intended to lessen the liability exposure for product cases, there has been strong opposition to the idea of "federalizing" what has always been a state function. Currently, a revised proposal to establish a voluntary "no fault" system for product liability has emerged, but there is no indication that Congress will move in that direction at this time. The justification for a national standard in product cases is that products are often produced in several states and are sold nationally in interstate commerce. That is not the case, however, with professional design and related services, which are almost always located within a particular state.

Engineering employees are sometimes concerned with the possibility of being named as defendants on an individual basis. While this is a rare occurrence, it is possible, particularly for those employed in industry, government, contracting or education, among others. Even those in consulting firms which do not carry professional liability insurance may be vulnerable. Employees in firms with such insurance policies are covered under the policy along with the firm, but there may be liability exposure for employees who leave the firm and go into non-consulting employment.

NSPE has attempted to provide for this potential exposure by a separate insurance program (jointly with ASCE) for individual employees. However, this undertaking did not generate enough support to justify its continuation from an insurance viewpoint. An effort to develop a new program for individual employees is continuing, but in the present state of the insurance industry there is no immediate prospect of success.

It is hoped that by this exploration of the problem, faced realistically from practical, economic, legal and ethical viewpoints, the engineering profession, working in concert with the other professions, may be able to play a constructive role in seeking remedies to a familiar, but now worsening situation; one which is heavily invested with an overriding public concern of health, safety and economic well-being of all citizens.

This report is presented in two basic parts. Part I is intended to deal with the current or immediate problems and to outline pending proposals to deal with practical approaches. These aspects of the problem reflect mainly the concerns of engineers in private practice and the efforts of the Professional Liability Committee of the Professional Engineers in Private Practice Section of NSPE. The Professional Liability Committee has worked extensively in recent months to monitor these fast-breaking developments, in

cluding meetings with the insurance administrators and underwriters to press for the best possible language to limit the new policy exclusions discussed under the section on policy coverage.

Part II relates more to the long-term problems which are at the heart of the crisis, but which will require a much more detailed exploration of causes and possible remedies. This aspect, which in general is referred to as "tort reform", will require many years of effort if fundamental changes in our legal system are to be achieved. Of equal, if not more, importance will be a better public understanding of the nature of a legal system which in many respects has gone berserk in evaluating and balancing the rights of plaintiffs and defendants in injury cases

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THE LIABILITY CRISIS

PART I—The Immediate Crisis

The most evident change in the worsening liability picture has been the very high increases in premiums charged to practicing engineers in recent years.

For twenty-eight years NSPE and the American Institute of Architects have endorsed a professional liability insurance program underwritten by Continental Casualty Company, and administered by Victor O. Schinnerer & Co., Inc. It has been a fully collaborative program during all of those years, with regular review of development since its inception by committees of the two societies, and with full disclosure of all pertinent statistics as the basis for premium development.

In recent years the premium rate increases resulting from increased claims have averaged:

1981	12%
1982	9%
1983	9%
1984	15%
1985	35%

Historically, average premiums have been approximately 2-3 percent of gross billings of consulting firms. With the projected increases for the current policy period it is expected that they will average approximately 4-5 percent.

It should be emphasized that average rate increases or percentage of billings do not mean that each policyholder received or will receive the same increase. Premiums reflect a host of factors—size of the firm in terms of billings, type of practice, geographical location and loss experience. Thus, a firm with a substantial growth in billings may well have an increase above the average. Because firms which specialize in structural engineering have experienced the worst loss records in recent years their premium currently is in the highest range. Those firms which practice entirely, or mainly, in the field of structural engineering, and which have not heretofore been insured under the CNA program are finding it most difficult to find any source of liability insurance.

Another significant development in the worsening liability insurance picture is a trend toward higher deductibles required of the insured firms. This obviously means that in the event of a loss covered by insurance the firm will have to dig deeper into its own pocket to cover the first element of the loss.

All of this, compounded by the withdrawal or reduction in the availability of reinsurance, has resulted in a substantial lessening of insurance underwriters for A/E professional liability insurance. Only a few years ago there were some ten or a dozen insurance companies offering A/E liability insurance. Today there are only a handful or fewer insurance companies willing to offer such policies.

It would be erroneous, however, to conclude that the crisis is an insurance crisis. The state of the insurance market is basically a reflection and result of the liability crisis.

The reasons for insurance underwriters dropping out of the market are complex, but clear. The main reason, of course, is the heavy losses sustained by these companies in recent years. According to recent reports, the casualty insurance industry, overall, has lost $3.7 billion in the past year. In the A/E program alone, CNA, the largest of the remaining underwriters, reported an underwriting loss of $113,000,000 on the first $1,000,000 limit of liability between 1978-1983 with an accelerating loss trend. It has been observed by insurance authorities that insurance companies are not mainly interested in premium income; they look for their profit from cash flow—from investment of the premium income. This formula worked well during the years when interest rates were in the 20 percent, or better, range. The underwriters were then content to absorb the underwriting loss and make up for it from the investment income. In this regard it is worth noting that invested premium income generates income for a long period of time before claims are resolved and indemnity payments made. Now, however, with interest rates at a much reduced level the cash flow-investment formula fails to produce a sufficient return to compensate for the increased costs of claims handling, indemnity payments and overhead.

As an indication of the deteriorating A/E liability picture from the insurance underwriter's standpoint, in 1983 (the latest available complete statistics) claims frequency remained fairly steady at 44 claims per 100 firms per year. Paid claims frequency (claims in which there was an indemnity payment) was 9.5 per 100 firms. But, severity measured in terms of average indemnity payment was reported at $148,000, representing an increase since 1978 of approximately $40,000 per claim. Also, during the same time frame, average claims expenses have more than doubled on a per claim basis.

Policy Coverage

As serious as the premium increases have been, in some respects it is not the most serious concern. The firms required to pay these higher insurance costs must of course, pass them along to clients as part of the firm's overhead. It has been suggested in that connection that in billing a client the A/E may choose to add a line item to the bill to represent the liability insurance part of the bill. Thus, if a firm is paying 3 percent of its billings for liability insurance it would add 3 percent of the basic bill to the client. This is a dubious tactic, however, on several grounds. First, the line item for insurance would represent double billing if the same 3 percent were in the overhead part of the firm's charge to the client. Second, it may well be questioned whether it is wise in any event to spell out to clients the extent of the A/E's insurance, thereby perhaps giving the client the false idea that it may as well file a claim for some imagined deficiency in the plans and specifications "because the insurance company will pay it."

From its inception, the A/E insurance policy has included certain exclusions, such as certain types of more hazardous projects, guarantees by the A/E, nuclear facilities, etc. In the face of the emergence of pollution-related claims and enormous claims related to asbestos, the insurance industry as a whole has opted to now exclude those two categories from liability insurance coverage. Those two exclusions, to be written into every new policy and renewal policies read as follows:

Pollution

We will not defend or pay under this policy for "claim" and "claim expense" resulting from "professional services" performed by you and arising out of:

1. The actual, alleged or threatened discharge, dispersal, release or escape of "pollutants"; or
2. Any governmental or regulatory directive or request that "you" or anyone acting under your direction or control test for, monitor, clean up, remove contain, treat, detoxify or neutralize "pollutants".

This exclusion does not apply to "claim" or "claim expense" resulting from "professional services" performed by you in the design and construction of treatment facilities for:

a. domestic sewage including those receiving industrial waste but only if such industrial waste is pretreated in accordance with applicable governmental or regulatory standards,

b. potable water and

c. "storm water".

ADDITIONAL DEFINITIONS

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

"Storm water" means from rain, hail, snow or sleet.

It is noted that the exceptions to the basic exclusion were initially developed by extensive discussions between the NSPE/PEPP Professional Liability Committee and representatives of CNA and the Schinnerer firm. That initial language, later revised for a clearer understanding that the exclusions would not apply to "traditional" engineering activities, such as water supply facilities, drainage, wastewater facilities, street, roads and highways, municipal incinerators, power plants and domestic and non-manufacturing facilities, was not accepted by CNA, which had meanwhile filed the language quoted above with the state insurance authorities.

As the language now stands it does not meet the concerns of engineers in private practice, but there is an indication that the more extensive and explicit language will be considered for subsequent policies. The present language is, hopefully, only a first step in better defining the extent of the exclusion, but it will take more time to learn how the exclusion will be applied through a case-by-case experience. As explained by the CNA comment in transmitting the exclusion language to policyholders, the intent is to remove from coverage claims which rest upon damage from pollution, as defined, but to continue to cover the remedial costs in the project when it is deemed that the A/E had been negligent in the design of the particular part of the facility which failed.

Asbestos

To "claim" or "claim expense" alleged to or actually arising out of:

1. specification of a product, material or process containing asbestos
2. failure to detect the existence or proportion of asbestos in a product, material or process
3. the performance or failure to perform "professional services" in the abatement, replacement or removal of a product, material or process containing asbestos

whether by you or on your behalf.

Indemnification

Faced with a choice of taking on a project which may entail pollution or asbestos exposures, or declining the project because of the uninsurable risks, the engineer has little choice but to seek protection through an indemnification clause. For that purpose the PEPP committee has developed two indemnification clauses as follows:

Hazardous Waste—For services involving or relating to hazardous waste elements of this agreement, it is further agreed that the OWNER shall indemnify and hold harmless ENGINEER and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct and indirect, or consequential damages, including but not limited to fees and charges of attorneys and court and arbitration costs, arising out of or resulting from the performance of the work by ENGINEER, or claims against ENGINEER arising from the work of others, related to hazardous waste.

The above indemnification provision extends to claims against ENGINEER which arise out of, are related to, or are based upon, the dispersal, discharge, escape, release or saturation of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, gases or any other material, irritant, contaminant or pollutant in or into the atmosphere, or on, onto, upon, in or into the surface or subsurface (a) soil, (b) water or water-courses, (c) objects, or (d) any tangible or intangible matter, whether sudden or not.

Asbestos—For services involving or relating to the removal or encapsulation of asbestos as part of this agreement, it is further agreed that the OWNER shall indemnify and hold harmless ENGINEER and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct and indirect, or consequential damages, including but not limited to fees and charges of attorneys and court and arbitration costs, arising out of or resulting from the performance of the work by ENGINEER, or claims against ENGINEER arising from the work of others, related to asbestos activities.

Already the question has been raised as to what action the engineer should take if a particular project does not indicate the likelihood of either a pollution or asbestos concern, but during the course of the work such a potential problem develops. It would be impractical in such an instance for the engineer to unilaterally terminate services. To do so, in fact, might well generate a claim for breach of contract. One suggestion to deal with this kind of potential problem is to add a clause in the owner-engineer agreement and in supplementary general conditions to the effect that when and if such conditions are observed the engineer or the contractor, as the case may be, shall cease all work related to the pollution or asbestos conditions and notify the owner of the circumstances. The owner will then be obligated to determine what course of action is to be taken, such as bringing in experts for advice on how to deal with the condition.

Toxic and Hazardous Waste--As this report was being prepared Congress was in the midst of deliberations on an extension and expansion of the federal Superfund program. This federal program designed to bring about the cleanup of toxic and hazardous waste sites around the country is expected to involve the expenditure of somewhere between $5 and $10 billion over the next five years. The key players in this national program will obviously be engineers and contractors. Yet neither will be able to play their role in such an undertaking without any protection from claims alleging damage as a result of cleanup operations in a highly sensitive area, and particularly as such claims may entail class action suits of enormous magnitude.

Fortunately, Congress appears to be receptive to the problem and is moving toward an indemnification program whereby the federal government will "hold harmless" engineers and contractors (referred to as "response action contractors") in the pending legislation.

The Senate has already passed its Superfund bill, which authorizes EPA to hold harmless and indemnify response action contractors "... against such claims to the extent not covered by available insurance and to the extent that any such damages awarded do not arise out of the gross negligence, recklessness, or intentional misconduct of the contracting or subcontracting party, so long as such indemnification is in the public interest."

Likewise, three House committees have adopted similar language in their bills, which are now being merged into one bill for House action. As explained by the report of the House Judiciary Committee:

> "At present, insurance availability for response action contractors is diminishing, limits of coverage are being reduced, and premium rates are increasing by more than 50-200 percent. Insurance industry sources estimate that only 10 percent of contractors' market needs are currently being met by insurers, and that by January, 1986, no insurance will be available. The present lack of insurance is already causing a reduction in the number of qualified contractors willing to participate in Superfund cleanups. As insurance becomes increasingly unobtainable over the next year, the availability of qualified contractors could diminish to the point of being acute, and the Superfund cleanup program could come to an abrupt halt."

Assuming final congressional approval of the Superfund bill, a remaining question will be the extent to which the EPA indemnification will apply. The House Judiciary Committee report recognizes that EPA may provide "appropriate limits", to represent amounts equivalent to, but not in excess of, adequate insurance coverage, and to include deductibles. The report also refers to payment by response action contractors of a premium for the ideminification coverage and to offer it only as a supplement to available insurance, if available insurance is not adequate. Thus, following enactment of the indemnification provision it will be necessary for engineers and contractors to engage in detailed discussions with EPA to define the basis upon which indemnification will be provided.

Final congressional action of an indemnification approach will open the way for similar legislative action at the state level to cover projects which are state-financed outside of the federal program. Some efforts have been initiated at the state level along similar lines, but it will take concerted action by the state societies to press for more vigorous action during the 1986 legislative sessions. The federal approach should serve as a model to spur state action.

Private cleanup operations will likewise call for an insistence upon indemnification provisions in the engineer-owner contract.

Other Approaches

Various other ideas have been advanced as possible means of dealing with the liability conditions which confront the design professions.

These include, for example, a firm establishing a separate corporation to handle the pollution and asbestos kinds of projects. The idea would be for the separate company to be alone liable for claims in those areas. This entails several important considerations. First, from a legal standpoint, for this approach to work it must be clearly established that the separate firm is truly independent of the parent company. This means separate stockholders, separate officers and personnel, and separate financial arrangements. Otherwise it may well be argued that the separate company is no more than a "shield" to avoid liability, much as the cases in which a husband-owner transfers his assets to his wife to protect himself from liability. The courts will most likely, in such cases, apply the legal doctrine of "piercing the corporate veil."

A second important consideration is whether, even if a company is created as a truly separate entity, prospective clients will be willing to enter into contracts with a firm which presumably would have limited assets and no liability insurance.

From time to time, some engineers have chosen to "go bare" on the theory that in the absence of liability insurance they may be less likely targets for liability suits. There is some theoretical basis for this philosophy in today's climate of plaintiffs' attorneys looking for the "deep pocket". Again, it is a question of the extent to which the engineer is a gambler and is willing to take the chance that his personal assets will be subject to claim. It may be contended that this approach might work if the assets of the firm alone are at risk, and not those of the individual officer or shareholder. However, in the case of professional services it is more likely than not that those who are in responsible charge of plans and specifications which are found to be negligent will be held personally liable. For that reason the present professional liability policy covers the individuals in the firm, as well as the firm itself.

This idea is closely akin to what is called "self- insurance" a term which actually means no insurance. True, a firm may set aside part of its revenue each year into a separate fund for liability claims only, but under present tax law such set-aside funds are after tax dollars. If a firm is lucky enough to not have serious liability claims for enough years to build the self-insurance fund to a substantial amount it may be a workable scheme, but how much is enough to pay potential losses is purely speculative.

Part II of this report will deal with the broader aspects of the liability crisis, including protective legislation against injured construction worker claims, joint and several liability laws, punitive damages, restrictions on contingent fees, frivolous suit claims, pre-trial panel requirements, statutes of limitation, a new "unified risk" insurance concept, and the need for long-range tort reform.

THE LIABILITY CRISIS

PART II—Remedial Actions

The commonly used phrase in discussion of what actions might be taken to help resolve the liability crisis is "tort reform". That refers broadly to the idea that much of the problem arises from laws and judicial procedures which tend to impose ever-higher responsibilities and costs upon defendants in liability cases. Another common reference to this situation is the use of the "deep pocket" in determining who should be held liable for damages in a given situation. It is said that whereas the lawyer representing a plaintiff traditionally would first ask, "who is at fault", now will first ask "who has the money?"

An equally important perception is the attitude of the general public in being excessively lenient in dealing with the claims of persons claiming the right of recovery for damages sustained in a given situation, with much less concern for whether a particular defendant was at fault. This is a reflection of the same "deep pocket" philosophy alluded to above, but here it is even more significant because it is the members of the general public who make up the juries. Since 1970 there have been approximately 220 verdicts of more than $1 million in injury cases. Even though many of these were later reduced by the courts as excessive, those kinds of numbers attract headlines and further implant the idea of tremendous awards in cases in which the sympathy of the jury is with the injured plaintiff.

The more difficult problem in trying to cope with these kinds of developments is that remedial action may be taken to bring about a fairer and more equitable system designed to protect the rights of those with a proper claim, while at the same time limiting the current atmosphere which drives juries to grant ever-higher awards on responsible defendants, and, even worse, drives a finding of liability when not justified.

This Part of the paper, therefore, deals with various and sundry current proposals and developments designed to achieve some degree of reform in the justice system. It should be emphasized that many of these items as discussed below flow from medical malpractice cases, and to a substantial degree are less relevant to cases involving design professionals. The reason for the distinction is that in medical malpractice situations there is virtually always a claim involving death or injury. In the design professions, however, approximately 80 percent of the cases involve property damage, broadly defined. Only about 20 percent of design professions cases relate to personal injury or death, and most of those occur in connection with accidents during the construction process.

Worker Compensation Laws

Turning, then, to the construction accident situations, a move has started in two states (Oklahoma and Kansas) which gives promise of alleviating a problem in which the design professional is unfairly a victim of claims for accidents completely outside the responsibility of the engineer. In a typical case, an unshored trench (in violation of safety laws) collapses and a construction workman is killed. The widow is entitled to the benefits provided under the state workers compensation law, which are generally relatively low. This exonerates the contractor-employer from any further liability. The widow in this case then files suit against the design engineer, alleging that in some fashion the collapse was caused by the negligence of the design firm in failing to properly monitor the construction as part of its services during the construction phase. Even if the defendant engineering firm is ultimately found to not be responsible, substantial legal costs are involved and to a large extent, if not totally, are paid by the firm out of its deductible under the liability insurance policy.

To deal with this kind of "no-win" problem, Oklahoma first enacted an amendment to its workers compensation law which provides that in such instances the design professional stands in the same shoes as those of the contractor; the firm is equally not subject to suit for damages over and above the amount paid under the worker compensation law system. The only exception is if it is determined that the collapse was due to the negligence of the engineer. While this exception may open the door to the filing of a suit in the kind of example stated above it should be relatively simple to quickly prove that the engineer under his contract had nothing to do with the trench. In that connection, it is exceedingly important that the engineer's contract with the owner, plus provisions in the general conditions, make it clear that the engineer during the construction phase is not responsible for contractor's means, methods and techniques.

A copy of the Oklahoma law is reproduced in Appendix A.

Frivolous Suits

Probably every engineer who has been sued has reacted that the suit was unjustified, groundless and without merit—a frivolous suit. While it is often true that the engineer is brought into a dispute between other parties on a "shotgun" basis, it does not follow that the engineer is a vic-

tim of a truly frivolous suit. A frivolous suit does not result because a party wins the case on the merits, or is dismissed prior to trial. While there are various definitions of what constitutes a frivolous suit, the most common characteristics are that the party alleging the suit was frivolous must first be dismissed from the case or win on the merits. But that is not enough. It must also be shown that the allegations were totally without merit, a showing of bad faith or other improper motives on the part of the plaintiff.

The leading case to illustrate the difficulty if maintaining a frivolous suit (sometimes called a counter suit) involving design professionals is Bird v. Rothman, 627 P.2d 1097 (Ariz. 1981). In that case an architect had designed a race track in 1963. In 1976 he was sued by a woman who was injured at the track when the grandstand glass was shattered by a rock. In 1977 the architects were dismissed from the case. In 1978 he sued the woman's attorney on the ground the attorney had been negligent in failing to investigate the facts and the law before bringing the case. In finding against the architect, the court noted that a balance must be struck between freedom of access to the court and discouraging unmeritorious litigation; that the courts must be open to litigating parties without fear of subsequent prosecution for calling upon the court to decide a contested issue; that an ulterior purpose alone cannot constitute abuse of legal process, concluding:

> "In summary, despite appellant's arguments that negligence suits, such as the underlying suit in this action, against architects and engineers have a significant impact on malpractice liability insurance rates and serve to impugn the reputation of conscientious professionals, we are persuaded that in the absence of proof of malicious prosecution on the part of the injured party or his attorney, the interest of freedom of access to the courts compels the conclusions we have reached."

A number of the state societies have tried over the years to enact frivolous suit statutes to define the circumstances in which a successful defendant might recover his legal costs in defending an unmeritorious case. In fact, however, most states have such provisions by law or by court rules, even though the wording varies considerably. For those still pursuing this type of legislation attention is called to the wording in Rule 11 of the federal rules of civil procedure, as amended in 1983, requiring that all pleadings and motions on behalf of a party shall be signed by the attorney of record, and further providing that:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."
> (As amended Apr. 28, 1983, eff. Aug. 1, 1983).

While a rule of this type, or a statute along similar lines, is proper and desirable, based upon a review of the cases over the years it is not likely that a design professional who was involved to any degree in either the design or construction phase of the project will be held entitled to the benefits of a countersuit through a frivolous suit action except upon a showing of a malicious purpose on the part of the plaintiff, or a reckless failure of the plaintiff's attorney to make even a minimal investigation of the facts before naming the design professional as a defendant.

Pre-Trial Panels

A development of potential significance in recent years has been the enactment of laws to require that in malpractice cases the party bringing the action first submit it to a panel of those with ostensible experience in the area of practice involved for a hearing and subsequent rendering of an opinion on the merits of the case.

These kinds of statutes vary considerably in detail, ranging from the composition of the panel members, procedural hearing requirements, compensation for the panel members, and, most importantly, the extent to which the panel opinion is admissible in any subsequent court proceedings.

The theory behind this kind of procedure is that if the pros and cons of the case are presented to an unbiased but knowledgeable panel of persons with some degree of expertise in the subject matter the resulting opinion may bring about a result which is acceptable to either or both parties, and thus avoid full-scale litigation. In every such instance, however, the panel opinion is not binding on either party and either may then take the case to court in the normal manner.

Most of the experience in this type of operation has been in the medical field. A number of pertinent questions have resulted from that experience. First, in several states the courts have ruled that a requirement that the case be first submitted to the panel is unconstitutional because it has a "chilling" effect on the plaintiff. That is, the plaintiff is required to go through what may amount to two full-scale proceedings, involving repetition of witnesses, attorney fees and time spent in prosecuting the case. This objection is compounded when the statute allows the panel finding to be submitted to a jury in a subsequent trial because it may unduly influence the jury's judgment of the case. In other states, however, the courts have upheld the mandatory panel procedure in medical malpractice cases on the ground that such a procedure is designed to deal with the "medical crisis" in the state.

To what extent the constitutional issue will be resolved when the concept is applied to non-medical cases remains to be seen. To date only one state—Hawaii—has enacted a similar requirement for design professionals. The first Hawaii statute was enacted in 1981 and was subsequently determined to be lacking in several major respects, following which it was amended in 1985. The full statute is included as Appendix B.

The essential features of the Hawaii law are:

1. The panel is composed of a chairperson who is familiar with tort claims settlement processes, one attorney experienced in trial practice and one design professional appointed from a list submitted by the registration board.

2. The claimant and the design professional defendant must each deposit $450 with the director of regulatory agencies.

3. The panel is required to hear the case within 30 days after the date for filing a response, and no persons other than the parties, witnesses, consultants and attorneys may be present except with the permission of the chairperson.

4. The panel hearing is informal, but witnesses and consultants may be questioned by the panel members and legal counsel. The panel may subpoena witnesses and documents.

5. Following completion of the hearing, the panel shall file a written advisory opinion with the director of regulatory agencies, who shall mail copies to all parties in the case and the professional liability insurance carrier. The panel opinion is to decide the issue of liability and the amount of damages, if any, stipulating which part of the damages are for economic loss and non-economic loss, but the panel may not recommend punitive damages.

6. The claimant may institute litigation based upon the claim only after a party to the panel hearing rejects the decision of the panel. The opinion of the panel on the issue of liability or damages may not be admitted in evidence in any subsequent trial.

7. The section requiring cooperation on the part of all parties to the case also provides that the costs of the action may be assessed against a professional liability insurance carrier or a party for failure to cooperate, even though the insurance company is not a party to the proceeding.

8. The 1985 amendment added a section permitting a judge to avoid the panel procedure if the judge determines that the subject matter in dispute is unsuitable for the panel procedure.

9. The 1985 amendment also added a section calling upon the attorney for the claimant to obtain a qualified person's opinion that there is merit to the claim, but this requirement may be avoided if the attorney is not able to obtain such consultation from qualified persons.

It is too early since the 1985 amendments to determine to what degree the Hawaii procedure may be helpful in resolving disputes. Design professionals in Hawaii have reported a lack of success under the 1981 law, and more recent reports indicate divided opinion as to whether the amended law has been useful to date.

Dispute Resolution

The federal and state courts are literally drowning in the volume of civil cases filed each year. As reported in a recent special study of the Defense Research Institute, there were approximately 240,000 cases filed in 1984 in the federal courts alone, and there are now 10 million civil cases filed in all courts annually. That number suggests the reason for the lengthy delay in bringing a case to trial and judgment, often running into many years. It is only because a vast majority of these cases are ultimately dropped or settled that the judicial system works at all.

Meanwhile, there is renewed interest in finding means to resolve disputes short of formal trials, both in the interest of time and cost. In Hamlet's famous soliloquy he noted, among other of life's problems, "the law's delay", and as far back as 1759 Edmund Burke observed that, "The contending parties find themselves more effectively ruined by the delay than they could have been by the injustice of any decision." Warren Burger, Chief Justice of the United States, has led the way in calling for alternative dispute resolution techniques, observing:

> "We must remember that when a dispute arises there are options. I was trained with that generation of lawyers taught that the best service a lawyer could render a client was to keep the client out of court. The adversary litigation process is expensive and time-consuming; and it often leaves a trail of stress and frustration. Other alternatives represent a way to avoid litigation, yet they largely go unused."

Arbitration

The best known system of alternative dispute resolution is arbitration; a procedure which is particularly pertinent to disputes involving design professional and construction cases.

Arbitration of disputes has existed since time immemorial, going back to the story of King Solomon's resolution of a dispute between two women who claimed parentage of a baby. And it has long been used in commercial cases. But in 1966 the design professions undertook to establish a special set of rules and procedure for construction disputes under the aegis of the American Arbitration Association. NSPE and some dozen other societies now support and participate in the oversight of a special set of Construction Industry Arbitration Rules, administered by AAA through its 26 regional offices. The Rules and explanatory material about the program may be obtained from AAA, 140 West 51st Street, New York, NY 10020.

While there is little doubt that arbitration is faster and less expensive than full-blown litigation, there are some in the design professions and among their lawyers who find it unacceptable for a variety of reasons. There has been some confusion about the nature of arbitration by reference to it as "mandatory" arbitration. It is mandatory in the sense that if the parties agree by contract to arbitrate disputes which may arise either party may invoke the arbitration provisions. The resulting decision of the arbitrators is then binding and enforceable in the court. But the parties may likewise agree to not include an arbitration provision in their agreement, and in that case it is simply not an option for dispute settlement. Some critics favor a clause which says that the parties may agree to arbitrate when a dispute arises, but realistically the chances of the parties at that point agreeing to anything are almost nil, such as the procedure to select the arbitrators, the rules to be observed, payment of costs, and a host of other details spelled out in the AAA Rules.

Among the objections offered by opponents of arbitration are that it is an informal procedure; the rules of evidence do not apply, the decision is not subject to appeal to the courts on the merits of the dispute, there is no provision for discovery of information by the parties prior to the hearing, and that, according to some, arbitrators tend to "split the difference" in the decision. The other side of the coin, of course, in response to these arguments is that the lack of legal formalities is one of the factors that makes arbitration more expeditious and less expensive, that without the arbitration decision being final and binding the procedure would be fruitless if a party could retry the case in court at double expense. One of the advantages of arbitration is that it is private, whereas a court trial is public.

One of the strongest arguments for arbitration rather than a jury trial is that the arbitrators are selected on the basis of their technical expertise in dealing with often-complex cases in a construction setting. Under the AAA procedures, the parties have the choice of reviewing a list of suggested arbitrators and striking those not desired to the point that the arbitrators are then named from the lists acceptable to both parties. It is vitally important in cases involving technical issues that the arbitrators have an adequate technical background to fully understand the issues. Members of juries, on the other hand, and judges, for that matter, are most unlikely to have that kind of knowledge and expertise.

To deal as objectively as possible with these arguments and counter-arguments, NSPE and the other participating societies in the Engineers' Joint Contract Documents Committee have included an arbitration clause in the owner-engineer agreement and in the general conditions on a separate page which may be removed without affecting the rest of the document, thus leaving it to the parties to decide in advance which way they prefer to go in handling potential disputes. Also, the arbitration clause in the owner-engineer agreement is limited to claims and counterclaims not in excess of $200,000. This figure, however, based on AAA statistics, represents some 80 percent of all claims involving design professionals. Another important aspect of the arbitration clause is a stipulation that it may not be used to join the design professional not a party to the agreement; that is, in a dispute between an owner and contractor, or contractor and subcontractor, the engineer may not be required to participate in or be bound by the arbitration result without prior consent.

Mediation

An emerging form of alternative dispute resolution is the use of mediation. This is a process, sometimes confused with arbitration, which attempts to have the parties agree to bring in a neutral third party to act as a "go between", to try to encourage and induce the parties to reach a voluntary settlement. A mediator has no authority to render a binding decision. It has been suggested that in advance of the start of a project the parties agree to name a mediator in the event disputes arise. While this has not been tried to any degree in the construction area, it is somewhat questionable whether the formal anticipation of disputes might not, in fact, generate disputes which otherwise might be settled by the parties themselves.

Another aspect of this development has been the suggestion that two functions be combined; that is, an arrangement in which the mediator first attempts to induce the parties to reach a voluntary settlement, and if that effort fails to convert his status to that of an arbitrator, with authority to render a binding decision. That concept is flawed by the fact that because the two functions are so different in concept and procedure the same person cannot serve both purposes. A primary function of a mediator is to solicit from both

parties separately and confidentially their "bottom line" positions on each aspect of the dispute. If the parties know that such confidential information may be used against their interests if the mediator becomes an arbitrator the system itself will obviously fail.

The AAA has adopted "Construction Industry Mediation Rules" under the auspices of the Construction Industry Advisory Committee, including a contract clause for mediation. But this clause is not enforceable if either party refuses to mediate in good faith, in which case the clause becomes inoperative and the procedure turns to arbitration if the parties have also inserted the arbitration clause in their agreement.

Limitation of Liability

Another controversial idea in trying to deal with liability costs has been to write into the owner-engineer agreement a provision to the effect that the liability of the engineer will be limited to a stipulated amount or the amount of the engineer's fee, whichever is more. Although some engineers have indicated the acceptance of this idea by owners, it raises several difficult problems.

As noted in the Commentary accompanying the standard documents prepared by the Engineers' Joint Contract Documents Committee:

> "The Committee also feels strongly that it is undesirable and quite unprofessional to try by standard society-endorsed contract forms to relieve Engineers from liability for improperly performing those duties and responsibilities which their expertise and professional training qualifies them to perform and which, because of their being licensed to practice, they have a duty to the public to perform. In fact, such contractual endeavors may well provide no more than illusory legal protection since courts and juries are not likely to accept wholesale efforts to avoid professional responsibilities."

To date there have not been definitive court decisions applying to specific limitation of liability clauses for design services, but in several cases involving professional services the courts have held such clauses to be in violation of public policy. In some instances the courts have upheld limitation of liability clauses for commercial transactions, provided that the parties were of relatively equal bargaining strength. But in other instances where it has been determined that the contract was a "contract of adhesion", meaning it was prepared on a "take it or leave it" basis, the courts have ruled such a provision invalid.

Another facet for consideration is the reaction of clients when presented with a provision which, in effect, asks the client to share in paying the damages resulting from the negligence of the engineer. Some engineers have reported an adverse reaction to the point of endangering their retention for the job.

Unified Risk Insurance

Approximately one-third of professional liability insurance dollars go to the payment of litigation, including investigations, expert witnesses and appeals.

Suppose it were possible to find a way to eliminate most of the litigation cost? A novel and intriguing idea to accomplish that goal has been advanced and is under study by a joint committee of the professional societies. The idea, which has a long way to go before it will be known if it is feasible, is called "unified risk insurance". In brief, it contemplates that there would be one insurance policy covering the entire risk of the parties involved in the project—owner, design professional, prime contractor, subcontractors, and perhaps material suppliers. The owner would pay the entire premium on the justification that in the long run the owner pays all the costs through fees and construction bids which must reflect the cost of insurance.

Under this approach as a liability issue arose there would not be an attempt, as now, to decide which party was at fault. The single insurance fund would pay the cost of remedial action. It has been compared to home fire insurance. If there is a fire it does not matter from an insurance standpoint whether it was caused by smoking in bed, bad electrical wiring, lightning, or any other cause. The insurance pays the cost of restoring the property to its original state. In a word, it is a form of "no fault" insurance.

There are some obvious questions and limitations. It could not cover non-property claims between the parties, such as a contractor claim for an extra because another party had delayed his performance. That kind of claim would have to be resolved by arbitration or litigation. It could conceivably cover claims by injured third persons, but those kinds of claims could involve litigation to determine if the injury was caused by any of the covered parties, and, if so, the amount of damages.

The idea basically is to have three related insurance policies—one for property damage in the project (the walls crack, there is roof leakage, the HVAC system does not work, and a host of other typical property claims). A second policy would cover third-party claims of the type noted above. And a third policy would extend the coverage to an undefined period of years following completion of the project. One of the many unresolved issues at this point is whether and to what extent there would be deductibles for the various parties, and how they would be allocated.

The insurance consultant retained by the societies to develop the idea has noted that in today's insurance market it would be most difficult to launch such a revolutionary

approach, and it is likely that the insurance industry would require, at best, some form of "stop loss" fund to protect the insurance underwriters; an in-house or captive insurance fund raised by the participating societies.

The current status is that the idea is being explored in depth with representatives of the insurance industry, owners, contractors, subcontractors, and others. Realistically, it will be several years before there is any definitive conclusion as to the merits and feasibility of such an approach to reduction of liability insurance costs.

Statute of Limitations

A more immediate remedial provision is the enactment of statutes of limitation, more correctly identified as statutes of repose. These kinds of state laws, which exist in more than half of the states today, provide that after a stated period of time following substantial completion of the project (usually 6-8 years) a person claiming injury as a result of faulty design or related services is barred from maintaining an action against the design professional. Appendix C lists the states with such statutes and the applicable time period.

In some states, as noted, the courts have held these statutes to be unconstitutional in that they deprive an injured party of his "day in court", although in each such state law it is provided that the bar to suit does not apply to the owner or person in possession of the property. That party is more justifiably accountable for a failure which occurred long after the project was designed and built by virtue of inadequate maintenance of the facility.

The existing statutes of repose vary in detail and should be read in entirety to determine the starting period for the time cut-off, the parties covered by the law and the interpretation of the law by the courts.

Contingent Fees

An area of tort reform drawing considerable attention as the overall liability situation has worsened is the use (or abuse) of contingent fees by lawyers. It is alleged that this system of allowing lawyers to collect substantial fees as a percentage of awards to injured persons generates claims, and there is little doubt that this is true. As a result, several states have now moved to put a limit on contingent fees on a reduced sliding scale. A recent New York law, for example, stipulates that contingent fees will be limited to 30 percent of the first $250,000 recovered, 25 percent of the next $250,000, 20 percent of the next $500,000, 15 percent of the next $250,000, and 10 percent of any amount over $1,250,000.

The contingent fee system relates almost exclusively to injury or death claims, and is therefore of less importance to design professionals than to those in the medical field. However, as previously noted, a limitation schedule of the New York type will be helpful to some extent to engineers in the 20 percent of cases involving bodily injury or death.

A related aspect of this point is the suggestion that one of the major deterrents to unjustified suits would be to adopt the so-called "English Rule" in which the losing party is required to pay the legal costs of the prevailing party. The "American System", to the contrary, has always called upon the parties to pay their own legal costs no matter the outcome. The American Rule has been eroded to a considerable extent in recent years in special types of litigation, such as violation of civil rights, environmental cases, and others in which the legislature has determined that there are special considerations justifying a form of "penalty" on those who violate basic rights of others. But in the design field, and in commercial cases generally, the American Rule still holds.

The "other side of the coin" in considering a change to the English Rule, however, is that it cuts both ways. If the design professional is held to have been negligent he would have to pay the legal costs of the plaintiff.

Punitive Damages

Engineers and other design professionals have rarely been subjected to punitive damages, i.e., sometimes called "smart damages", meaning that the offending party has acted in such a grievous manner that he should feel the sting of his dereliction by having to pay a penalty on top of actual damages. This has become a major concern in injury and death cases, often resulting in enormous awards far exceeding actual economic loss, i.e. loss of wages, medical costs, loss of use of property, etc. The Defense Trial Lawyers' Task Force on Litigation Cost Containment has proposed that punitive damages be eliminated entirely, or at least severely restricted in light of its abuse in recent years.

Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice, has observed:

> "Another remarkable development in tort actions between private parties is that awards of punitive damages have increased dramatically. Punitive damages were originally intended to punish particularly egregious or malicious conduct. Such damages may have a place in a system bottomed on fault. One would therefore expect that as the tort system moved away from fault, punitive damage awards would become rarer. Instead, the incidence and size of punitive awards seem to be increasing.
>
> If this trend toward massive increases in punitive and noneconomic damages continues, its impact on the economy of this nation is likely to be devastating."

Pain and Suffering

A closely related aspect of the drive for tort reform is huge awards for pain and suffering. This has reached the point of bringing about corrective legislative action in some states. The most notable action along this line was the enactment in California of a flat $250,000 maximum limitation in medical malpractice actions for "non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary damage."

The statute was promptly challenged on constitutional grounds, but was upheld by the California Supreme Court. Fein v. Permanente Medical Group, 695 P. 2d 665 (1985). An appeal was taken to the U.S. Supreme Court, which dismissed the appeal "for want of a substantial federal question," without written opinion. That type of rejection by the Supreme Court is a decision on the merits, suggesting that a number of other states may well follow the California precedent now that the Supreme Court has found no constitutional objection at the federal level. However, the issue is far from being finally resolved. Justice Byron White, the lone dissenting member of the Supreme Court, opined that the Court should have taken the case for full review because other state courts have rejected similar limits. Justice White predicted, in effect, that the issue will eventually be back before the Supreme Court as more states enact similar limitations.

The issue more directly impacts the medical profession, but is nevertheless significant for the design professions if the trend for a larger share of design cases to involve bodily injury or death continues.

Joint and Several Liability

If a case involves several defendants, which is not unusual in construction industry operations, and if judgment is rendered against all the defendants the state law may make each defendant fully liable for the total judgment, even if a particular defendant was only negligent to a small degree. Thus, the doctrine of joint and several liability, poses serious dangers to design professionals caught up in a multi-defendant case. Suppose that the engineer was only 5 percent negligent, and the contractor, subcontractor, owner, or other liable parties are no longer in business, or have been adjudged bankrupt, or have inadequate assets to pay their share. The engineer in that situation is liable for the entire award.

Various tort reform groups are now pushing for a change in the state laws to eliminate the joint and several doctrine and require that each defendant pay its fair share to the degree it contributed to the damage. The alternative to joint and several, or course, is the doctrine of comparative negligence. This means, of course, that in a particular situation the plaintiff may not collect the full award if one or more of the co-defendants is "judgment proof", but that is a risk that the plaintiff should share in bringing the action in the first place. The obverse argument to the effect that no matter the plaintiff must be "made whole" at the expense of another, even if unfairly, reflects what is perhaps the most basic cause of all of the liability crisis—that we want to live in a risk free society. But the real issue is not whether we can achieve the impossible of a "risk-free" society, rather how to most fairly allocate these risks.

Structured Settlements

Another area of tort reform much to be desired is a requirement for structured settlements in the case of very large awards. Again, this pertains mainly to injury and death awards. If the award is required to be paid in one lump sum it amounts to much more than the amount of the award in that the large amount is invested and over a period of years may amount to twice or more the original amount. This kind of case arises mainly when an injured person needs a substantial sum each year for an indefinite period to pay for housing, food, nursing care, special equipment, etc. Under a structured settlement arrangement the amount of the award is not changed, but is payable over the years, which means that the liable defendant may put a considerably lesser sum in some form of trust or escrow account to provide the required amount each year, probably adjusted for inflation.

The arrangement is much like the case in which the winner of a state lottery wins a million dollars. In fact, the winner does not receive a lump sum of one million dollars. Rather, he more likely receives $50,000 a year for 20 years, and the state deposits whatever lesser amount is required in a special account to provide that amount out of principal and interest.

Collateral Source Rules

When a judgment is made in favor of an injured plaintiff the jury is required to then ascertain the amount of damages and the amount to be awarded. But the jury is not advised of the amounts which may be received by the plaintiff from other sources, such as worker compensation benefits, private insurance, employer payments, and the like. Thus, the jury is left in the dark in calculating the amount of damages to be awarded in terms of offsetting benefits related to the injury. This so-called "collateral source rule" which prohibits the defendant from offering evidence of other benefits, serves to give the plaintiff additional benefits over and above those determined by the jury.

The basic concept of money damages for one injured by the negligence of another is to reach a result which is said to "make the plaintiff whole"—that is, to compensate the in-

jured party for "out-of-pocket" losses (leaving aside here the issue of punitive damages, discussed above).

Several of the state liability reform studies have accordingly recommended that the collateral source rule should be repealed so that a more equitable result will occur for both parties, thereby reducing the impact of liability awards and related insurance costs without penalizing the plaintiff.

In-House Controls

Although it has been said and written ad nauseam, the single best thing an engineer can do to limit, if not avoid, liability claims is to exercise tight control over in-house operations, use legally and technically sound documents, monitor on-site functions of assigned personnel during the construction phase, and, in general, approach every project with one eye on the liability potential.

Among the tools available for general guidance and assistance are the NSPE/PEPP "Architect-Engineer Quality Control Manual", (NSPE Pub. No. 1957), the NSPE/PEPP "Office Policy Handbook", (NSPE Pub. No. 1967), and a 60-minute video seminar entitled "Professional Liability".

Also, as previously mentioned, the Engineers' Joint Contract Documents Committee has over the years developed a set of documents which attempt to provide contract terms which are fair to the engineer, the owner and the contractor. (Appendix D).

There are numerous other sources of information from other societies, private publishers and public agencies which may be helpful. It is recognized that an engineer cannot spend all his time on a project with the only emphasis on liability exposure, but to a reasonable degree the extent to which the liability possibilities are kept in mind and in balance with technical and managerial functions the engineer will be well served.

The Coalition Approach

Part of this special report deals with action items engineering and related societies can tackle on their own, but hopefully with the support of other interested groups. A larger part of the problem areas, particularly those identified as tort reform, will require involvement in broader coalitions of other professions and public groups, such as organizations of municipalities and private concerns hard hit by the liability crisis.

A number and variety of tort reform coalitions are developing around the country. Some of these have been authorized by state legislation, others by action of the governor. The private groups range from manufacturers concerned with product liability, to state chambers of commerce, and to attorney groups, both from the standpoint of defense attorneys and trial lawyers who are the natural opponents of tort reform. NSPE has organized a liability task force to monitor developments at the national level and to cooperate with state groups. It behooves each state society to ascertain the status of these developments in the state, and to participate to the extent possible with such coalitions or separate reform groups in order that the views of the engineering profession are expressed as the campaign for tort reform progresses. It is particularly important that the state societies make early contact with state-sponsored liability study groups and seek appointment of at least one engineer in such bodies.

In the final analysis, every group involved in the reform movement has agreed that the greatest success can be achieved only if the general public is made aware of the issues and the need for corrective action. This is happening already to a considerable extent as child care clinics close, municipalities "go out of business", for lack of insurance or face enormous tax increases to pay the higher premiums, as obstetricians cease practice, as hospital rates soar, and so on down the line. As the general public is made award of the problem, and particularly comes to understand that the ultimate losers are those who pay the taxes and the increased cost of products and services, the opportunity for improvement in the legal justice system will emerge.

In this connection, a potentially significant development has occurred at the federal level with the announcement by Attorney General Edwin Meese of the appointment of an Interagency Tort Policy Working Group. This federal group, under the direction of Assistant Attorney General Richard K. Willard, head of the Civil Division, who has spoken out strongly on the need for tort reform, will consider a broad range of policy issues that relate to the current crisis of the tort system.

The federal interagency group is intended to recommend legislative, regulatory and litigative proposals at the federal level. Although the major scene of action in tort reform must occur at the state level, the eventual report of the federal group will not only serve to present specific proposals, but, more importantly, will be a key factor in bringing to the attention of the public the need for action.

AN ACT RELATING TO WORKERS' COMPENSATION; AMENDING 85 O.S. 1981, SECTION 12, AS AMENDED BY SECTION 1, CHAPTER 37, O.S.L. 1982 (85 O.S. SUPP. 1983, SECTION 12); PROVIDING PROCEDURES RELATING TO EXCLUSIVE LIABILITY, EXCEPTIONS, COURT ACTIONS, AND IMMUNITY INCLUDING PERSONS TO WHICH LIMITED LIABILITY APPLIES TO.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 85 O.S. 1981, Section 12, as amended by Section 1, Chap. 37, O.S.L. 1982 (85 O.S. Supp. 1983, Section 12), is amended to read as follows:

Section 12. The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person. If an employer has failed to secure the payment of compensation for his injured employee, as provided for in this title, an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided:

(i) The immunity created by the provisions of this section shall not extend to action by an employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person against another employer, or its employees, on the same job as the injured or deceased worker where such other employer does not stand in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker;

(ii) The immunity created by the provisions of this section shall not extend to action against another employer, or its employees, on the same job as the injured or deceased worker even though such other employer may be considered as standing in the position of a special master of a loaned servant where such special master neither is the immediate employer of the injured or deceased worker nor stands in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker; and

(iii) This provision shall not be construed to abrogate the loaned servant doctrine in any respect other than that described in paragraph (ii) of this section. This section shall not be construed to relieve the employer from any other penalty provided for in this title for failure to secure the payment of compensation provided for in this title.

(iv) For the purpose of extending the immunity of this section, any architect, professional engineer, or land surveyor shall be deemed an intermediate or principal employer for services performed at or on the site of a construction project, but this immunity shall not extend to the negligent preparation of design plans and specifications.

RELATING TO DESIGN PROFESSIONAL CONCILIATION PANEL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 672, Hawaii Revised Statutes, is amended by adding two new sections to read as follows:

"§-672 Determination of unsuitability. Any party or any person served with notice of a claim may file a motion with circuit court in the judicial circuit in which the claim arose for a determination that the subject matter of the dispute is unsuitable for review by a panel under this chapter; provided that no such application may be filed within ten days of the date on which the claim is scheduled to be heard by a panel or after such a hearing has taken place.

In determining whether the subject matter of a dispute is unsuitable for disposition pursuant to this chapter, a court may consider:

(1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;

(2) Problems referred to the court where court regulated discovery is necessary;

(3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;

(4) The fact that the design professional's involvement in the matter is distinctly secondary in importance to the involvement of parties not covered by this chapter;

(5) The potential for unreasonable delays in reaching any resolution of the matter by its referral to a panel pursuant to this chapter; or

(6) The fact that there are too many parties or issues involved to be effectively handled by the informal processes of this chapter.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions.

§672- Certificate of consultation. (a) any claim filed under this chapter shall be accompanied by a certificate which declares one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one design professional who is licensed to practice and practices in this State or any other state, or who teaches at an accredited college or university and is licensed to practice in this State or any other state, in the same discipline as the design professional against whom the claim is made and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable and meritorious cause for the filing of the claim. The persons consulted may not be a party to the case;

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within thirty days after filing the claim; or

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney has made three separate good faith attempts with three separate design professionals to obtain such consultation and none of those contacted would agree to such a consultation.

(b) Where an attorney intends to rely solely on a failure to inform of the consequences of a procedure, this section shall be inapplicable. The attorney shall certify upon filing of the claim that the attorney is relying solely on the failure to inform of the consequences of a procedure and for that reason is not filing a certificate as required by this section.

(c) For the purposes of this section, the attorney shall not be required to disclose the names of design professionals consulted to fulfill the requirements of subsection (a).

(d) Unless a certificate is filed pursuant to subsection (a) or (b), the claim shall not be received for filing by the department."

SECTION 2. Section 672-1, Hawaii Revised Statutes, is amended to read as follows:

"§672-1 Definitions. For the purposes of this chapter:

"Design professional" means a professional engineer, architect, surveyor or landscape architect.

"Entities employing design professionals" means professional corporations or other business structures under which design professionals may practice and does not include non-design professional entities."

SECTION 3. Section 672-2, Hawaii Revised Statutes, is amended to read as follows:

"§672-2 Actions against architects, professional engineers, surveyors, and landscape architects. In any action for damages arising out of the alleged professional negligence of actions performed in the professional practice of a person holding a license as a professional engineer, architect, surveyor, or landscape architect under chapter 464, before the time of filing the complaint, the aggrieved person shall file a claim with the design professional conciliation panel.

SECTION 4. Section 672-3, Hawaii Revised Statutes, is amended to read as follows:

"§672-3 Design professional conciliation panel; composition, selection, compensation. (a) There are established conciliation panels which shall review and render findings and advisory opinions on the issues of liability and damages in tort claims against professional architects, engineers, surveyors, and landscape architects.

(b) A design professional conciliation panel, hereafter called "the panel", shall be formed for each claim filed pursuant to section 672-4 and after each panel renders its decision or the claim is otherwise disposed of it shall be disbanded. Each design professional conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the tort claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one architect, engineer, surveyor, or landscape architect licensed to practice under chapter 464. The chairperson shall be appointed by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys experienced in trial practice submitted annually by the supreme court. The architect, engineer, surveyor, or landscape architect shall be appointed by the chairperson from a list of not less than thirty-five design professionals submitted annually by the board of registration of professional engineers, architects, surveyors, and landscape architects.

The chairperson shall preside at the meetings of the panel. The chairperson and all panel members shall be compensated at the rate of $300 per claim handled which will become payable when the decision of the panel is submitted and shall be paid allowances for travel and living expense which may be incurred as a result of the performance of their duties and they shall be paid by the department of commerce and consumer affairs from funds collected from the claimant and defendant, to be shared equally. The claimant shall deposit $450 with the department upon the filing of the claim and the failure to do so shall result in the claim being rejected for filing. The design professional shall deposit $450 with the department within twenty days of being served with the claim and the failure to do so shall result in termination of proceedings under this chapter allowing the claimant to proceed in accordance with section 672-8. If the claim is withdrawn, determined to be unsuitable for proceedings under this chapter, or otherwise terminated without participation by a panel, the department shall return all moneys collected to the respective parties.

The office and meeting space, secretarial and clerical assistance, office equipment and office supplies for the board shall be furnished by the department of commerce and consumer affairs.

The board of registration shall prepare a list of architects, engineers, surveyors, and landscape architects along with their respective specialties who shall then be considered consultants to the panel in their respective fields. Panel members may consult with other legal, technical, and insurance specialists. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs shall be paid by the department of commerce and consumer affairs."

SECTION 5. Section 672-4, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Any person or his representative claiming that a tort has been committed by the design professional or entities employing such design professionals shall file a claim with the department of commerce and consumer affairs before a suit based on the claim may be commenced in any court of the State. All claims shall be submitted to the department of commerce and consumer affairs in writing on forms provided by the department. If the claim is presented orally, the department of commerce and consumer affairs shall reduce the claim to writing. The claimant shall set forth facts upon which the claim is or may be based and shall include the names of all parties against whom the claim is or may be made who are known to the claimant. Within five business days thereafter, the panel shall give notice of the claim, by certified mail, to all architects, engineers, surveyors, or landscape architects and others who are or may be parties to the claim and shall furnish copies of written claims to such persons. Such notice shall set forth a date, not more than twen-

ty days after mailing the notice, within which any design professional against whom a claim is made may file a written response to the claim, and a date and time, not less than five days following the date for filing a response, for a hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the hearing. The times originally set forth in the notice may be changed by the chairman, on due notice to all parties, for good cause; provided that a party requesting the rescheduling of the hearing within seven days of the scheduled date shall be required in the sole discretion of the panel chairperson to additionally compensate the panel in an amount equal to the fee panel members receive pursuant to section 672-3."

SECTION 6. Section 672-5, Hawaii Revised Statutes, is amended to read as follows:

"§672-5 Design professional conciliation panel hearing; fact-finding; evidence; voluntary settlement. Every claim of a tort shall be heard by the design professional conciliation panel within thirty days after the date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed in section 672-6 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

The hearing shall be informal. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such record shall not be made available to the parties. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with respect to such issues as it may consider, and unless otherwise designated by the panel, when the design professional's records have been provided to the claimant for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When such subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the state, which may issue an order requiring compliance with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. Any member of the panel may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

At the hearing of the panel and in arriving at its opinion the panel shall consider, but not be limited to, statements or testimony of witnesses, construction documents, inspection reports, calculations, and other records kept in the usual course of the practice of the design professional without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified architect, engineer, surveyor, or landscape architect or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant of relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such expenses shall be paid by the department of commerce and consumer affairs to be paid as provided in Section 672-3. Discovery by the parties shall not be allowed.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section 672-7, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily."

SECTION 7. Section 672-10, Hawaii Revised Statutes, is amended to read as follows:

"§672-10 Statute of limitations tolled. The filing of the claim with the design professional conciliation panel shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date

the decision of the panel is mailed or delivered to the parties; provided that in no case shall the applicable statute of limitations be tolled for more than twelve months. If a decision by the design professional conciliation panel is not reached within twelve months, the statute of limitations shall resume running and the party filing the claim may commence a suit based on the claim in any appropriate court of this State. The panel shall notify in writing all parties of this provision."

SECTION 8. Section 672-11, Hawaii Revised Statutes, is amended to read as follows:

"§672-11 Duty to cooperate; assessment of costs and fees. It shall be the duty of every person who files a claim with the design professional conciliation panel, every architect, engineer, surveyor, or landscape architect against whom such claim is made, to cooperate with the design professional conciliation panel for the purpose of achieving a prompt, fair, and just disposition or settlement of such claim, provided that such cooperation shall not prejudice the substantive rights of said persons.

After trial of such claim or after settlement of such claim after suit has been filed, any party may apply to the court in which the suit was brought to have the costs of the action assessed against any party or any insurance carrier or any other person providing professional liability insurance to a party design professional or both, for failure to cooperate with the design professional conciliation panel. The court may award such costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, costs of discovery and transcribing depositions, and court costs to the party applying therefor.

On application of the director of commerce and consumer affairs, the court may award as a civil penalty against any party or any insurance carrier or other person providing professional liability insurance to a party design professional, or all or any combination of such persons, all or a portion of the costs and expenses of the design professional conciliation panel attributable to a claim involving such persons, if the court finds that such person or persons failed to cooperate with the design professional conciliation panel. Such penalty shall be payable to the general fund.

In determining whether any person has failed to cooperate in good faith, the court shall consider, but is not limited to, the following:

(1) The attendance of the persons at the hearing of the design professional conciliation panel;
(2) The extent to which representatives of the parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the claim;
(3) The testimony of members of the panel as to the facts of the person's participation in the panel hearing;
(4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel; and
(5) The reasons advanced by the person so charged for not fully cooperating or negotiating."

SECTION 9. Section 672-14, Hawaii Revised Statutes, is amended to read as follows:

"§672-14 Retroactive application. This chapter shall apply to any claim arising prior to June 22, 1981 if a suit based on the claim has not been filed in a court of competent jurisdiction prior to that date."

S.B. 434

Appendix C

Statutes of Limitation for the Design Professionals
(Note—**boldface** indicates a statute subsequently held unconstitutional)

STATE	DATE ADOPTED	NUMBER OF YEARS AFTER SUBSTANTIAL COMPLETION OR OCCUPANCY
Alabama	**1969**	**Seven (Latent Defects)** **Four (Patent Defects)**
Alaska	1967	Six
Arizona	—	No statute
Arkansas	1967	Five (Property Damage) Four (Personal Injury)
California	1971	Ten (Latent Defects) Four (Patent Defects)
Colorado	1979	Ten
Connecticut	1969	Seven
Delaware	1974	Six
District of Columbia	1972	Ten
Florida	1980	Fifteen (Latent Defects) Four (Patent Defects)
Georgia	1968	Eight
Hawaii	**1974**	Six
Idaho	1965	Six
Illinois	**1982**	**Twelve**
Indiana	1967	Ten
Iowa	—	No Statute
Kansas	1963	Ten (Latent Defects) Two (Patent Defects)
Kentucky	**1966**	**Five**
Louisiana	1964	Ten
Maine	1975	Ten
Maryland	1979	Ten
Massachusetts	1968	Six
Michigan	1967	Six
Minnesota	1980	Fifteen
Mississippi	1966	Ten
Missouri	1976	Ten
Montana	1971	Ten

Nebraska	1972	Ten
Nevada	1965	Six
New Hampshire	**1968**	**Six**
New Jersey	1967	Ten
New Mexico	1967	Ten
New York	1963	Three
North Carolina	1963	Six
North Dakota	1967	Ten
Ohio	1963	Ten
Oklahoma	1978	Ten
Oregon	1971	Ten
Pennsylvania	1965	Twelve
Rhode Island	1975	Ten
South Carolina	**1970**	**Ten**
South Dakota	**1966**	**Ten**
Tennessee	1965	Four
Texas	1975	Ten
Utah	1967	Seven
Vermont	1959	Six
Virginia	1964	Five
Washington	1967	Six
West Virginia	1983	Ten
Wisconsin	1976	Six
Wyoming	**1973**	**Ten**

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1910-2	Standard Form of Letter Agreement between Owner and Engineer for Professional Services (1986 ed.)	_____	$1.00 10 or more 50¢ ea.
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1910-8-B	Change Order (1983 ed.) — Pads of 35	_____	$2.00 per pad
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1910-8-E	Application for Payment (1983 ed.) — Pads of 25	_____	$2.00 per pad
1910-8-F	Work Directive Change (1983 ed.) — Pads of 25	_____	$2.00 per pad
1910-9	Commentary on Agreements for Engineering Services and Contract Documents by John R. Clark, Esq. (1981 ed.)	_____	$10.00 No bulk rate
1910-9-A	Commentary on 1983 Editions of Construction Related Documents by John R. Clark, Esq. (1983 ed.)	_____	$6.00 No bulk rate
1910-9-B	An Update to Indicate Important Changes in EJCDC Standard Agreements for Engineering Services (1984 ed.)	_____	$5.00 No bulk rate
1910-9-C	Focus on Shop Drawings by John R. Clark, Esq. (1986 ed.)	_____	$15.00 No bulk rate
1910-10	Standard Form of Agreement between Engineer and Architect for Professional Services (1986 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-11	Cross Reference between EJCDC Standard General Conditions of the Construction Contract (1910-8, 1983 ed.) and AIA General Conditions of the Contract for Construction (No. A201, Aug. 1976 ed.) (1984 ed.)	_____	$1.00 No bulk rate
1910-12	Guide to the Preparation of Instructions to Bidders (1983 ed.)	_____	$1.00 10 or more 50¢ ea.
1910-13	Standard Form of Agreement between Engineer and Associate Engineer for Professional Services (1985 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-14	Standard Form of Agreement between Engineer and Consultant for Professional Services (1986 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-15	Standard Form of Agreement between Owner and Project Manager for Professional Services (1977 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-16	Uniform Location of Subject Matter (1981 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-17	Guide to the Preparation of Supplementary Conditions (1983 ed.)	_____	$5.00 No bulk rate
1910-18	Suggested Bid Form and Commentary for Use (1983 ed.)	_____	$1.00 10 or more 50¢ ea.
1910-19	Standard Form of Agreement between Owner and Engineer for Study and Report Professional Services (1986 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-20	Engineer's Letter to Owner Requesting Instructions re Bonds and Insurance During Construction (1986 ed.)	_____	$1.00 10 or more 50¢ ea.
1910-21	Owner's Instructions to Engineer re Bonds and Insurance During Construction (1983 ed.)	_____	$1.00 10 or more 50¢ ea.
1910-22	Notice of Award (1983 ed.) — Pads of 25	_____	$2.00 per pad
1910-23	Notice to Proceed (1983 ed.) — Pads of 25	_____	$2.00 per pad
1910-24	Contract Documents Bibliography (1984 ed.)	_____	$1.00 No bulk rate
1910-35	Commentary on AIA C141 Standard Form of Agreement between Architect and Engineer, June 1979 (1981 ed.)	_____	$3.00 No bulk rate
1910-36-A	Standard Form of Procurement Agreement between Owner and Contractor (1981 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-36-B	Procurement General Conditions (1981 ed.)	_____	$3.00 10 or more $1.50 ea.
1910-36-C	Guide to the Preparation of Procurement Supplementary Conditions (1981 ed.)	_____	$3.00 10 or more $1.50 ea.
1910-36-D	Instructions to Bidders for Procurement Contracts (1981 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-36-E	Commentary on Procurement Documents by John R. Clark, Esq. (1981 ed.)	_____	$2.00 10 or more $1.00 ea.
1910-28-A	Construction Performance Bond (1984 ed.) -- Pads of 25	_____	$2.00 per pad
1910-28-B	Construction Payment Bond (1984 ed.) — Pads of 25	_____	$2.00 per pad
	Complete set of documents (does not include full pads, single document copies only)	_____	$80.00
	Binder, 3-ring	_____	$10.00
	Complete set of documents with binder	_____	$90.00

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THERE IS NO SIMPLE ANSWER

Everyone in business or in a profession in America today has been hit hard by increases in liability insurance premiums. Doctors, municipal governments, small and large manufacturers, merchants on main street U.S.A., are all faced with rising insurance costs, and some cannot obtain liability insurance at any price.

If there is nothing absolute in the legality of an insurance contract, then society becomes absolute and each loss situation is interpreted to meet a person's need, without questioning whether that person is clearly entitled to compensation.

Every American is impacted because the increased costs are passed along and become a part of what each person, business or corporation, pay for goods and services.

ROOTS OF THE PROBLEM

The property and casualty insurance industry must accept some of the responsibility, but the major root of the problem lies within our American Civil Justice System.

The answer to the availability and affordability of liability insurance question is two-fold.

First, for the past several years, many insurance companies have provided commercial liability insurance at prices below market value. This intense competition, although good for insurance consumers, has turned out to be very costly for the insurance companies. During the last decade alone, the frequency and cost of claims paid by insurance companies has significantly increased and has exceeded the amount of premium dollars collected for insurance coverages.

(S. 7-10-86)

Attachment 56

THE CIVIL JUSTICE SYSTEM

The second and most important answer to the availability and affordability of liability insurance questions lie deep in a civil justice system.

The number of lawsuits in the U.S. has grown at a rapid rate.

The courtroom today is being used increasingly as a forum for deciding who, if anyone, will pay and usually it is the person or insurance company perceived to have the "deepest pocket" ends up paying the courtroom bills. Also, who is at fault, often plays a much lesser role in determining who pays.

According to a study by the Institute of Civil Justice, an organization sponsored by the Rand Corpuration, million dollar awards today account for nearly two-thirds of all the money delivered in plaintiff verdicts.

WITHOUT LIABILITY INSURANCE

* Factories cannot expand or continue to operate.
* Research and Development projects by many companies are cancelled or delayed, because of fear of lawsuits. New projects are not considered, therefore research and development dollars are diverted.
* Entrepreneurs seeking to launch new enterprises -- don't!
* Young businessman cannot set up shop.
* Competition in pricing is ruined.
* Doctors raise fees, or quit practice altogether.
* Parks, playgrounds and other entertainment sources -- close.
* Business markets dry up.
* High insurance costs have hit the farm too. Today's farmers must produce as efficiently as possible. But, when the cost of machinery, herbicides, pesticides, and fertilizers includes the increased cost of the manufacturer's liability insurance, it adds to the already burdened farmers' expense that many cannot afford.

(S. 7-10-86)

* Construction contractors, toy manufacturers, day care operators, automobile repair shop owners, grocers, architects and engineers, publishers, sporting goods manufacturers, people in banking, hospital administration, natural gas transportation, the management of oil and gas drilling operations and municipalities, have one thing in common: their livelihoods are being threatened by a lack of ability to obtain liability insurance or being able to afford insurance protection.

Insurance companies could normally count on a reasonably consistent application of the law and interpretations of contracts by the courts; that's no longer the case. Not only can they not rely on predictability of the frequency or severity of losses over time, they cannot rely on court decisions which change and expand insurance contracts in ways neither the insured nor the insurer had foreseen or originally agreed upon. In most cases, insurance companies pay huge court awards when policies are redefined and coverage is extended.

INSURANCE IS NOT TORT REFORM

Insurance in the simplest terms, is a device whereby a number of persons, each subject to the same risk or chance of loss, contributes to a common fund and the fund is then used to compensate the few who actually suffer a loss.

Because the numbers of similar persons are large, events or accidental losses, when they occur, become predictable over a period of time. Insurance rates are then based on the ability of the insurance company to estimate the likelihood of claims and the size of losses. When losses are predictable, the insurance mechanism is activated, and an insured is reimbursed financially when he suffers an accidental loss.

Insurance alleviates or eliminates a financial loss to an insured when the loss incurred is specifically covered in the insurance contract.

Insurance companies could normally count on a reasonably consistent application of the law and on reasonably consistent interpretations of contracts by the courts; that's no longer the case. Not only can they not rely on predictability of the frequency or severity of losses over time, but often policies are redefined and coverage is extended.

(S. 7-10-86)

What happens next? Higher costs are generated to compensate for the unpredictability. The result is what is happening today; companies are realizing that they can no longer write certain lines of liability insurance or, they are being forced to raise rates in order to remain solvent.

EDUCATION: KEY TO TORT REFORM

The Alliance Insurance Companies support an American Civil Justice system. We want injured parties to recover their losses fairly and reasonably. However we feel that the abuses within the system today must be stopped and a balance must be obtained to ensure that injured parties are compensated fairly for actual damages.

This cannot be done when legislatures and courts are adopting looser standards of comparative negligence, and ruling strict liability, which makes possible an award of damages, without any proof of negligence.

For example, businesses conducting abnormally dangerous activities were held strictly liable in the past. Today, strict liability has been interpreted to mean that an injured person does not have to prove the manufacturer of a product was negligent, only that the plaintiff was injured while using the product in the manner intended.

Perhaps the most damaging "concept" is called "joint and several liability." This concept, used in many states today, basically allows a plaintiff to sue anyone in an accident who might have contributed insignificantly to the accident. A person 1% at fault could be the major payer if other more at-fault persons have no financial resources.

Another example of windfall awards lies in the area of punitive damages. These are dollars awarded to plaintiffs despite the fact that they do not compensate for injury. However, in many instances the awarding of punitive damages far exceeds reasonableness when it comes to punishing someone for causing injury to a plaintiff.

Society can no longer afford the exorbitant costs of the current Civil Justice system, whether assessed through private insurance, self-insurance or governmental forms of insurance.

(S. 7-10-86)

SOLUTIONS

The Alliance Insurance Companies feel that a Civil Justice reform platform must be considered, including:

1. ALTERNATIVE DISPUTE RESOLUTION (ADR). We support the use of mandatory and binding arbitration for "small claims" insofar as constitutionally permissible.

Arbitration is becoming an increasingly attractive alternative for citizens and organizations trapped in the glut of litigation. It saves everyone time and money.

2. COMPARATIVE NEGLIGENCE. We support enactment of modified comparative negligence and replacement of joint and several liability with a system of several liability only.

Many states have abandoned contributory negligence rules (a plaintiff who is in any way responsible for his injury recovers nothing) in favor of pure comparative negligence (damages are allocated purely by percentage of responsibility). Under modified comparative negligence, the plaintiff recovers damages only if the defendant's negligence is greater. In "several liability" (without joint and several), defendants are liable for damages only within the limits of their responsibility.

3. CONTINGENT FEES. The purpose of contingent fees is to make sure that anyone who really needs a lawyer can obtain the services of one. The Alliance Insurance Companies object to the abuses conducted within the contingency fee mechanism. Fees are collected that have absolutely no relation to the time or effort expended on behalf of a client.

Mandatory sliding fee schedules and contingent fee reporting laws are positive remedies for such abuses. We support the disclosure of the contingent fee contract and related information to all parties.

4. PAIN AND SUFFERING AWARDS. Pain and suffering relates to physical discomfort and distress as well as mental and emotional trauma. The Alliance Insurance Companies supports limitation on pain and suffering damages in those jurisdictions where caps or standards or both would be appropriate.

5. PUNITIVE DAMAGES. Again, these awards are made in court cases to punish defendants for malicious acts.

(S. 7-10-86)

Punitive damages bear no relation to actual losses suffered by a plaintiff; therefore these damages have become increasingly greater windfalls for plaintiffs and their attorneys as amounts of judgments have grown. The Alliance Insurance Companies supports the restrictions to eliminate the abuses of punitive damages. Restriction include caps on awards, defining the standard of conduct and proof required to support an award, and elimination of multiple punitive damage awards. These awards occur when the manufacturer of a product is "punished" through punitive damage awards every time and at every court level a case is heard.

The Alliance Insurance Companies are working hard to solve the availability of insurance problems. We shall continue to place emphasis on quality service and products to meet the needs of our policyholders. We invite our policyholders and agents to join us in the effort to find reasonable solutions to the extremely difficult problems that exist in our Civil Justice System today.

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(316) 241-2200

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(S. 7-10-86)