HLC

INSURANCE

CITY OF CRAIG ALASKA

December 4th, 1985

Governor Bill Sheffield
Capital Building
Juneau, Alaska

Dear Governor Sheffield:

The City of Craig has just received more bad news about it's insurance coverage. I know this issue is of concern to you and this information is passed along for your insurance task force, if it is stll active, and for you because we need your support for a tort liability limit law.

The latest horror story concerns the city's umbrella liability coverage. Current coverage is 5 million dollars above all of the city's underlying policies. The annual premium is $14,897.00 (up from $3200.00 the year before). The policy expires in January, 1986 and the only available coverage will cost $13,000.00 for the first six months and $20,000.00 per annum thereafter. The bad news is that the amount of coverage is reduced from 5 million dollars to $500,000 and the coverage will apply only to the auto and general liability policies. We can not purchase umbrella coverage for workers compensation, emergency medical, police professional or errors and omissions coverage.

Aside from the incredible premium costs (which account for almost one half of the property tax levy in Craig) the coverage is significantly reduced or unavailable.

Local governments are placed in the situation of trying to provide a multitude of varied services from emergency service to sewerage, daycare, recreation, harbors, transportation, construction, social services; you know the list. We operate with personnel who vary from professionally trained individuals to volunteers who are trying just to make the town a better place to live. We have continuous exposure to innumerable lawsuits. Most cities operate with limited resources and we can no longer insure ourselves sufficiently. We can not ask volunteers (or employees) to place personal homes or savings on the line because they maybe personally named in a civil rights, medical malpractice,or similar lawsuit.

Absent a state lottery, the next best game in town is "sue the city" (or state or school district or borough). We need a limit on the amount of money that can be awarded in a claim against a governmental entity. (I'd like to see it apply to everyone, but my concern now is for the city). Since we can't get umbrella coverage, we need a statue to protect us so governmental functions can continue. Otherwise, I believe, we face serious threats by the loss of services as insurance costs or uninsured exposure or uninsured awards increase.

I read that a recent Rand Corporation survey of lawsuit settlement claims in the asbestos industry showed that for every $1.00

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awarded to plaintiffs, 95 cents went to defense lawyers and 64 cents went to plaintiff's lawyers. About 2/3 of the settlements go to the lawyers. I know the Alaska Bar Association is organizing to oppose a tort liability law for obviaous reasons. The American Trial Lawyers Association is organizing for the same fight on the national level. These special interests selfishly ignore the whole problem.

Now the pitch for help: Will you introduce a tort liability bill to protect governments from exorbitant claims? Some states still have soverign immunity for governmental units, which is a possibility. Politics, I'm afraid, will dictate the particulars, but we need strong initiative to get the legislation rolling. I hope you find it consistent with your administration's policy to continue the initiative you have shown by appointing the task force and take the next step to introduce the legislation we need.

Sincerely,

David R. Palmer
City Administrator

cc: Elizabeth Cuadra
Scott Burgess, AML
Senator Dick Eliason
Representative Peter Goll
Mayor Sprague & Councilmembers

Midterm Cancellations, Premium Increases and Nonrenewals: 1985 State Insurance Department and Legislative Responses
October 17, 1985

STATE	FORM	APPLICABILITY	AUTHORITY	CONDUCT	COMMENTS & RATIONALE
Arizona	Circular Letter (8/15/85)	Commercial Lines	"Case and contract laws; unfair trade practices."	Midterm Cancellations	State's cancellation laws pertain only to auto. Contract of adhesion. Insurers "violate trust" by midterm cancellations. Threatens "administrative action."
Arkansas	Directive No. 1-85 (1/7/85)	Property/Casualty	Statute and Directive 20-67	Policy Cancellations & Nonrenewals	Comprehensive bulletin restates specific statutory restrictions and previous department position. Specifically prohibits wholesale cancellations.
California	Letter (7/26/85)	Commercial Lines	Unfair Trade Practices Act	Midterm Cancellations, Premium Increases & Nonrenewals	Threatens legislative action if abuses do not cease, as well as administrative action under the unfair trade practices act. Cancellations and price increases proper only upon "factors... not present at the inception of coverage."
Delaware	Bulletin No. 85-7 (9/18/85)	Commercial Lines	Unfair Trade Practices Act	Midterm Cancellations & Nonrenewals	"Indiscriminate cancellations and nonrenewals" will be reviewed as possible unfair trade practices. Bulletin threatens an ultimate legislative response.
Florida	(1)Informational Bulletin 85-103 (7/25/85)	Property/Casualty	Unfair Trade Practices Act	Inadequate Notice of Nonrenewals/ Premium Increases	Bulletin primarily directed at inadequate notice of nonrenewals and premium increases.
	(2)Informational Bulletin 85-279 (8/13/85)	Commercial Property/Casualty	Florida Insurance Laws	Midterm Cancellations & Nonrenewals	Letter issued "guidelines" providing that "cancellation, particularly midterm cancellation, ...is appropriate only...as a result of...factors ...not present at the inception."
Georgia	Bulletin (7/16/85)	Property/Casualty	Unfair Trade Practices Act	Midterm Cancellations & Premium Increases	Any action not justified by "sound underwriting or pricing considerations" will be scrutinized as a possible unfair trade practice. "Individual risk factors" are key.
Idaho	Bulletin No. 85-1 (3/26/85)	Commercial Property/Casualty	Unfair Trade Practices Act	Midterm Cancellations & Premium Increases	Action must be based on individual risk factors. Unjustified actions will be reviewed as possible unfair trade practice.
Kansas	Bulletin 1985-20 (8/15/85)	Property/Casualty	NAIC Resolution	Midterm Cancellations & Nonrenewals	Threatens legislative and administrative action if insurers continue to correct their errors at the expense of innocent policyholders.

Louisiana	Directive #58 (7/12/85)	Commercial Lines	"Insurance Rating Laws"	Midterm Cancellations & Nonrenewals	Bulletin contains guidelines regarding cancellations and nonrenewals. Unclear as to precise statutory authority.
Maryland	Bulletin to select companies	Commercial Lines	Unfair Trade Practices Act	Midterm Cancellations	Directive used unfair trade practice act as basis. Department is contemplating permanent rules.
Minnesota	(1) Proposed Rules 2700 2400 (8/19/85)	Commercial Lines	Minnesota Insurance Code §45.023; §72A.19	Midterm Cancellations	Proposed rules specify limited permissible bases for midterm cancellation of commercial policies. Notice of cancellation must be given sixty (60) days in advance and must specify basis.
	(2) Bulletin 85-5	Commercial Lines	Unfair Trade Practices Act	Midterm Cancellations, Premium Increases & Nonrenewals	Bulletin primarily directed toward failure to give adequate notice of nonrenewals, premium increases and nonrenewals. Notice should be provided "at the time such information becomes available and no later than sixty (60) days prior to the anniversary or expiration date of the coverage." The commissioner has issued a draft of compromise rules to be published formally in mid-October.
Montana	Emergency Rules (7/19/85)	Property/Casualty	Unfair Trade Practices Act	Midterm Cancellations, Premium Increases & Nonrenewals	Rules cited complaints from policyholders. Complex rules specify permissible bases for midterm premium increases and cancellation as well as nonrenewals. Violation of guidelines constitutes unfair trade practice.
Nevada	Amended Rules 687B. 510 (6/20/85)	All Property/ Casualty including Commercial	Insurance Code (N.R.S. 687B.310)	Midterm Cancellations & Nonrenewals	Amended rules repealed previous exemptions of commercial lines from statutory cancellation and nonrenewal instructions. Rules cited "unprecedented number" of midterm cancellations, often of entire lines.
New Jersey	Emergency Regulations N.J.A.C. 11:1-20.1	Property/Casualty	Unfair Trade Practices Act	Midterm Cancellations, Premium Increases, Nonrenewals	Emergency regulations prohibit midterm premium increases and/or reductions during policy term. Rules issued on emergency basis by commissioner in conjunction with governor and proposed to be adopted permanently. NAII had joined in a lawsuit challenging the regulations as unconstitutional.
North Dakota	House Concurrent Resolution No. 3082	Property/Casualty		Cancellations, Nonrenewals, Premium Increases	House-Senate concurrent resolution directed a study of current cancellation, nonrenewal, and premium increase problems. Current statutes in place do not handle these problems.
Oklahoma	Statute (H-1424; 36 O.S. 4807)	Commercial Lines		Midterm Cancellations	1985 statutory provision designed to curb midterm cancellation of commercial policies. Statute delineates permissible bases for such action.

Oregon	(1) Bulletin (3/7/85)	Property/Casualty	Unfair Trade Practices Act	Midterm Cancellations	Informal bulletin criticized insurers for midterm cancellation of entire lines of coverage. Insurers violate a trust, as well as the unfair trade practices act.
	(2) Rules (9/19/85)	Commercial Lines	Unfair Trade Practices Act	Midterm Cancellations, Premium Increases, Nonrenewals	Rules issued on emergency basis (5/30/85); adopted permanently (9/19/85). Rules require timely notice of nonrenewal, restrict midterm cancellation; prohibit midterm premium increases, and regulate nonrenewals. Final version contains a number of changes; most were favorable. Application only to commercial lines. Proposed thirty day nonrenewal notice cut to twenty days.
South Carolina	Emergency Rule (10/17/85)	Property/Casualty	Trade Practices Law; Case Law	Midterm Cancellation; Inadequate Notice of Nonrenewal	Regulations restrict midterm cancellations, specifying permissible bases therefore; require notice of cancellation ten days in advance; and require thirty day notice of nonrenewal. As in other states, it has been suggested these rules lack statutory authority.
Texas	Bulletin (6/25/85)	Commercial Lines	Existing Rules and Statutory Provisions	Midterm Cancellations	Bulletin reiterated necessity of adhering to existing rules governing midterm commercial lines cancellations.
Washington	Statutes 48.17.080, 48.18.2901	Property/Casualty	Statute	Cancellations & Nonrenewals	1985 law amended comprehensive statute already in place. Increases minimum notice of cancellation (20 to 45 days) and specified permissible reasons for nonrenewal.
Wisconsin	Bulletin (8/31/85)	Commercial Lines	"Insurance Rating Laws"	Midterm Cancellations & Premium Increases	Bulletin encourages insurers to curb midterm cancellations and rate increases.

RLZ:kh

Prepared by National Association of Independent Insurers.

David McGuire

CITIZENS COALITION ON TORT REFORM, INC.

One of the gravest problems facing individuals, governments and businesses in Alaska today is the dramatic rise in liability premiums. At the present time the problem is compounded by a variety of factors. While insurance premiums are being increased, many insurance companies are pulling back from servicing policies in Alaska. The risks, especially in the Bush, are too great. Legislative remedies are needed. Following is a summary of proposals from the CITIZENS COALITION ON TORT REFORM INC.

1. CAP NON-ECONOMIC AWARDS (public entities only? muni. govts; etc.)

significant immediate impact

Non-economic awards compensate a victim for pain and suffering, loss of consortium and other intangible losses. A cap will establish consistency and result in predictable insurance programs. We suggest a maximum award of $250,000.

A recent United States Supreme Court decision allowed California to impose a limit of $250,000.

2. MANDATE STRUCTURED SETTLEMENTS

Structured settlements provide future payments to the victim equal to the total award. The future payments are consistent with the victim's loss.

doctors f/m [illegible] determined by AK. figures

Impact - actuarial ~~impacts~~ figures for AK.

3. DISCLOSE COLLATERAL INCOME SOURCES

Juries currently are not allowed to know when a victim has insurance coverage and has already been compensated. Accordingly that coverage is ignored in jury awards.

4. SET A SLIDING SCALE OF ATTORNEY'S CONTINGENT FEES

40% 1st 50k
30% next "
20% next "
10% above

A sliding scale will increase the proportion to the victim as the amount of the award increases. Current practice allows an attorney a set percentage irrespective of the amount of the award.

The California sliding scale has been upheld as constitutional.

5. MODIFY JOINT AND SEVERAL LIABILITY

Several liability will apportion responsibility in accordance with degree of fault. Under current practice of Joint and Several liability, anyone at fault may be subject to the total liability.

6. REQUIRE ITEMIZATION OF ALL JURY AWARDS

The jury should make its award for damages with specific amounts. Damages will be itemized so as to reflect the monetary distribution among economic losses, non-economic loss, future losses, past expenses and other losses as applicable.

Similar legislation has been adopted by the State of Illinois in May of 1985.

7. ABOLISH RULE 82

This eliminates an additional expense. Current practice allows juries to make an award for damages which includes attorney's fees. Under Rule 82, the court can add up to 10% of the award for attorney's fees. (An attorney can claim and receive up to 10% of the settlement even if the case does not go to court.)

8. MODIFY PREJUDGEMENT INTEREST

Interest should accrue from the time of award or first offer of settlement. Current practice allows for interest to accrue from time of occurance. This will eliminate an unreasonable expense.

9. REVISE WRONGFUL DEATH STATUTE

A cap on wrongful death awards where there are no legal dependents will eliminate unreasonable expenses. The maximum benefit payable for wrongful death, in instances of no surviving dependents, should be limited to $25,000.

Similar legislation exists in Montana.

10. PUNITIVE DAMAGES - not covered under malpractice ins.
- used as a hammer to urge settlements

Awards for punitive damages should accrue to the benefit of society as a whole, ie., the State of Alaska.

11. Statute of Limitations

The current statutes of limitation should be modified to insure that they are applicable to a reasonable time certain. Recent interpretations open the individual to liability to an indefinite time future. The result is total unpredictability and unlimited exposure is an uninsurable risk.

12. REQUIRE AN AFFIDAVIT OF MERIT

As a condition of filing a complaint, the plantiff's attorney, must certify there is reasonable and meritorious cause of filing the action. The plantiff's attorney must certify that he has consulted and reviewed the facts with a competent authority and has determined there is reasonable and meritorious cause for filing the action.

Similar action has been adopted by the State of Illinois in May of 1985.

13. SPECIAL DAMAGES IN COUNTERCLAIMS

Eliminate the requirement to show special damages. This will require the plantiff's attorney to be held to the same standard of care principles required of other professionals.

14. EXPERT WITNESSES

Strict guidelines must be established for expert witness standards including current experience, substantial portion of his or her time currently involved in the practice and demonstration of a knowledge of the state of the art. Currently there are some expert witnesses whose sole practice is being an expert witness.

15. UNTRUE ALLEGATIONS

Legislation is needed to permit award of attorney's fees and payment of reasonable expenses from parties making untrue allegations without reasonable cause.

Currently there is no prohibition to plantiffs making allegations which are untrue. Similar legislation has been adopted by the State of Illinois in May of 1985.

16. MANDATORY ARBITRATION

Contracts shall provide for mandatory arbitration. The law should provide for judicial review of the arbitration hearings. In the event the mandatory arbitration is substantially upheld, the party requesting the judicial review shall assume all costs and fees related to the appeal.

OTHER SIGNIFICANT ISSUES

Provision for early dismissal of uninvolved parties by filing an Affidavit of Non-Involvement.

Require release of records prior to the institution of a suit.

Mandate advance notice of at least 60 days prior to the cancellation of insurance and provide for a timely return of unearned premiums.

Require disclosure of settlement information to licensing authority.

Provide reasonable immunity in anti-trust suits, except in the instance of malice and provide penalities for frivolous suits.

Make provision for review of professional activities by professional society.

Require all disciplinary actions by any professional group duly consistituted to be reported to licensing authority.

Limit application of strict liability.

REPRSENTATIVE MIKE NAVARRE
C/O SOLDATNA LEG. INFO. OFFICE
Legislative Affairs

from; Division of Insurance

Per your telephone request this date.

Please call me or John George at 465-2515 if we can further assist.

PAUL TROSH, DEPUTY DIRECTOR

Paul

ELEMENTS PASSED BY THE CALIFORNIA LEGISLATURE

1. <u>CONTINGENCY FEE AGREEMENTS</u> - A sliding scale for contingency fees

2. <u>COLLATERAL SOURCE</u>

3. <u>LIMITS ON LIABILITY</u> - $250,000 cap on non-economic losses (pain and suffering)

4. <u>STATUTE OF LIMITATION</u> - A tightened statute of limitations

5. <u>PERIODIC PAYMENTS</u> - Periodic payments & diversionary trusts

6. <u>ARBITRATION</u>

A G E N D A

October 5, 1985

I. History of the liability issue - given by Dr. David McGuire

II. Presentation from a representative of the following professions.

a. Day Care Center Operators - Margaret Wolfe

b. Alaska Air Carriers - Dave Zundell

c. Alaska Truckers Association - T.J. Thrasher

d. Alaska General Contractors - Dick Cattanaugh

e. C.H.A.R.R. (Caberet, Hotel and Restaurant Retailers) - Charles Selman

III. Overview of the Insurance aspect and how it affects society - given by Bill Gee.

IV. Wrap-up - given by Al Tamagni

EXECUTIVE SUMMARY OF THE PROBLEM

Perhaps one of the gravest problems facing businesses in Alaska today is the dramatic rise in liability premiums. These increases have been so dramatic, in fact, that many Alaskan businesses face the realistic possibility of closing their doors because the cost of insurance is so high that it is not in the best interest of prudent business management to continue to do business. Further, this is not a problem with any one sector of the economy, rather, it is a difficulty faced by day care center operators, tool and equipment rental companies, doctors, air carriers, nurse midwives, lawyers, municipalities, cities, architects, nonprofit organizations, as well as small and large businesses and small, single person proprietorships. Then there is the question of availability in addition to affordability of insurance. Many Alaskan businesses are finding that they cannot find insurance companies to take their account even if they are willing to pay the premiums.

At the present time the problem is compounded by a variety of factors. First, while insurance premiums are being increased, many insurance companies are pulling back from servicing policies in Alaska. The risks, especially in the Bush, are too great. Second, with no legislative remedies under consideration, it appears to many of these companies that Alaskans are content with the situation as it now exists. Third, without a concerted effort by all sectors of the Alaskan economy -- both public and private sectors -- more insurance companies will probably reconsider their coverage policies and the difficulties Alaskans face today will substantially worsen.

WHO IS AFFECTED BY THIS DRAMATIC INCREASE IN LIABILITY INSURANCE?

The cost of liability insurance is a cost of business and is passed along to the consumer as are other costs. ALL Alaskans are paying for this rise in liability insurance in the prices they pay for the goods and services they buy. As the premiums for liability insurance is 'rolled into' the cost of service for a day care center, for instance, that cost will be passed along to all of the parents who send their children to that day care center. Thus all Alaskans are paying for this cost -- if the businesses who are paying the higher liability cost stay in business. At one particular day care center in Anchorage, for instance, the operator must charge parents almost $200 per child per month just to cover the liability insurance premium -- and coverage for the day care center is only for $100,000.

WHAT IS THE SOLUTION?

The problem of astronomical liability insuance rates is not new in the United States. Many states have attempted to resolve this issue in a variety of ways. Some proposals are listed below for consideration

1) PLACE A CAP ON NON-ECONOMIC AWARDS

A noneconomic award is traditionally that sum of money which is given to the victim in compensation for 'pain and suffering.' This award is somewhat nebulous since there is no way to realistically equate the amount of pain and suffering with a dollar figure. The Citizen's Coalition for Tort Reform proposes a cap on noneconomic awards of between $100,000 and $250,000 which is in line with legislation passed by the Illinois and California legislatures, respectively.

2) ITEMIZATION OF LOSSES

In the event of an injury, the injured party is reasonably entitled to compensation for lost income. Under current practice, the injured party does have to state how he or she would have made that money. In other words, if a victim feels that he or she 'could have' made $80,000 in the year that the injury occured, the jury would be urged to accept that figure. The Citizen's Coalition for Tort Reform feels that the injured party is entitled to fair compensation but that the jury should be instructed to itemize the settlement as far as reasonably possible.

3) MANDATE STRUCTURED SETTLEMENTS

While it is truly unfortunate that anyone must suffer injury, the Citizen's Coalition for Tort Reform feels the victim should not be given a windfall profit but rather, should be compensated for his loss(es) in structured and less risky manner. Structured settlements are intended to compensate for further expenses incurred as a result of the injury and to protect the value of the award to the plantiff who might mismanage a lump sum award in a short period of time. This mechanism will allow the insurance company to spread its losses out over a period of time making its loses more predictable, thus making insurance and re-insurance more available. This type of settlement ensures that the victim does not become a burden on society if his or her investment is lost and, further, maintains the victim's dignity and pride. These two objectives can be achieved by the insurance company and the injury party to the best interest of both, the insurance company and the injured party receiving all benefits tax free.

4) REQUIRE DISCLOSURE OF COLLATERAL INCOME SOURCES

At the present time, in a law suit, the jury is not allowed to know other sources of the victim's insurance coverage until after a verdict has been reached. In other words, if a victim is suing for medical (economic) as well as 'pain and suffering' (noneconomic) damages, the jury is not allowed to know if the victim is actually covered under another policy. A victim could reasonably have all of his or her medical benefits already paid through one insurance policy and still be suing for that medical coverage. The plantiff should not be entitled to double indemnity.

5) TIGHTEN THE STATUTE OF LIMITATIONS

Under current statute, a victim may sue up to and including two years after the discovery of an injury. In the case of a broken leg, for instance, the injured party might have sustained the injury in 1978 and, after a number of difficulties, discovers in 1980 that one leg was shorter than the other. Once that discovery has been made, the injured party has two years to file a claim.

Unfortunately the statute of limitations is so loose that suits may be filed for injuries sustained decades earlier. There are cases where suits have been filed by victims who claim that injuries sustained when they were children affected their later life. While the Citizen's Coalition for Tort Reform feels that victims are certaily entitled to settlement of their claims, it is unreasonable to file suit decades after an action

6) REVERT TO 'SEVERAL' LIABILITY

In the process of filing a suit, often parties who have had little actual participation in the injury are saddled with payment for the entire cost. For instance, suppose a youngster is running along the roof of a school that is closed for the summer. He trips and falls through the skylight. The parents of the child sue the School District, the architect who designed the school, the General Contractor who built the school and the firm which made the skylight itself for damages. Suppose further that the architect has died, the General Contractor has left the state and cannot be found and the firm which made the skylight does not have product liability. The School District is thus the only defendant with insurance. Since the School District is the only party with insurance, it must absorb the entire cost of the legal action even though it minimally responsible for the accident. Under 'several liability' the court would assess a percentaage of responsibility and assess damages on that basis. If the School District was held to be 5% responsible for the injury, then the School District should only be responsible for 5% of the total costs incurred by the victim.

7) ESTABLISH A SLIDING SCALE OF ATTORNEY'S FEES

Under current practices, attorney's fees are a combination of expenses and contingency fees -- plus costs. In certain cases, the expenses of investigation are so high and the settlement so low, that the victim may end up with a minimal settlement. There is no guarantee that even if the victim wins a suit that he or she will be left with any remuneration; but the attorney will have his fee covered. A more reasonable mechanism to protect the fiscal rights of the victim is to legislate a sliding contingency fee scale which will ensure that as the victim gets less, the attorney must scale down his fee as well. This approach has been written into law in California and has been upheld as constitutional.

8) REVISE THE CONCEPT OF WRONGFUL DEATH

Wrongful Death is the term used to describe the denial of an estate financial gains because of the premature death of a person. If a breadwinner were to die prematurely, for instance, the dependents are entitled to compensation equivalent to the income that the breadwinner would have earned. This is reasonable. But the method in which this compensation is figured should be scrutinized.

9) ESTABLISHMENT OF A CRITERIA OF MERIT FOR LIABILITY CASES

At the present time there is no mechanism to ensure that when liability cases are initially filed that they are not frivolous. Since it is so easy to file a suit, attorneys can file a suit, knowing that it is frivolous, in the hopes of forcing a settlement from a company that is more interested in avoiding bad publicity that settling a just and reasonable claim. The intent of a liability suit is to compensate a victim for losses incurred. The Citizen's Coaltion for Tort Reform feels that an "Affidavit of Meritorious Cause of Action" should be required before a suit is filed as is currently done in Illinois. Only those cases with merit should be considered

10) REPEAL OF SPECIAL DAMAGES

Under current statute and practice, some professions are shielded from suit because of what is known as "Special Damages." Suppose, for instance, that an attorney files suit against an architect for designing a faulty home. At the trial it is discovered that the architect in question did not design the home in question. The suit is dropped but the architect still has legal fees to pay defending himself from a suit brought on by the error of the attorney. Under current statute, the architect would have to file a special damage suit against the attorney in question to recover his losses. But a special damage suit is difficult because the architect must prove loss of business, for instance, because of the bad publicity in the press. This makes his suit more difficult.

The repeal of the special damage statute will place the attorney in the same degree of jeopardy as other professionals with similar background and education.

11) TIGHTENING OF PRE-JUDGMENT INTEREST

Under current statute and practice, awards are made which have a compounded interest attached. Suppose a man is suing a tool company for $100,000 for an accident which occured five years earlier. Suppose further that it took another year for a settlement to be reached. While the jury believed it was granting the victim a $100,000 settlement, the actual cash involved is $100,000 <u>plus</u> compounded interest for six years. If this jury had known this fact, the final settlement might have been different.

12) REPEAL OF RULE 82

Under current practice under what is known as Rule 82, the victim is entitled to add 10% onto the settlement fee to pay for 'legal expenses.' Originally this was intended to assist the victim in covering his legal expenses. But by allowing the 10% as an additional expense, the victim is recovering 10% more than the jury [illegible]ded. There is no reasonable reason why this practice should be continued.

13) LIMIT RECOVERY OF PUNITIVE DAMAGES

The intent of a punitive damage suit is to compensate a victim for damage caused by poor quality goods or services which were intentionally portrayed as good quality goods and services. The Citizen's Coalition for Tort Reform feels that there would be a reasonable upward dollar limit placed on punitive damages. The point of punitive damages is to rectify the damage, not drive the company out of business.

Business, public face big insurance liability crisis

By RALPH NICHOLS
Special to AJC

Alaskans face major changes in the way they do business, and in virtually every other area of their lives.

These are not positive changes stemming from the oil wealth enjoyed by the state in recent years. Rather, they come from an unprecedented crisis in the liability insurance system, and threaten the financial security of all Alaska residents and businesses.

Just before Christmas, for example, low-income women expecting babies after July 1 were jolted with unseasonably bad news.

Sky-high insurance rates had forced the Anchorage Neighborhood Health Center to deny obstetrical services to these mothers.

The center's insurance premiums for those services alone had jumped by more than 400 percent--to $200,000--for the 1987 fiscal year.

Similar coverage for physicians working there was up by $30,000 for each doctor.

Officials said the non-profit agency just couldn't afford to provide obstetrical services at these prices.

This most recent example of a liability insurance system gone wild is just the tip of the iceberg.

The current crisis isn't limited to medical care, or even to government and non-profit agencies as well. It's hitting Alaskan businesses hard--and threatening to cripple some of the state's vital industries.

Commercial fishermen are feeling this crunch. For many, insurance is unaffordable or unavailable.

Only four of 30 American insurance companies that still offer marine coverage are willing to write policies on fishing vessels working Alaskan waters.

These policies reflect premium increases of at least 200 percent. Fishermen have been advised to buy them--and to consider themselves lucky for getting any coverage at all.

An Anchorage subcontractor was told recently the cost of insurance for his small crew was going to jump from less than $500 a year to more than $2,000.

Air carriers, architects, truckers and toy store owners are all affected by the current insurance crisis. So are virtually all other businesses, professions and trades.

Customers and clients must pay more in prices, fees for service and taxes to cover these astronomical costs for less liability coverage.

Who is to blame? How can the problem be solved?

Most business persons and professionals--along with America's insurance industry--say the current system through which personal injury claims are settled is flawed and must be reformed.

Trial lawyers--who, on the other hand, will see some of their fees limited in liability cases if reform efforts succeed --say nothing is wrong with the system.

The fault lies squarely with the insurance industry, which must be regulated more closely, they say.

But, says a pro-reform brochure, the primary cause of this crisis is a breakdown of "the fabric of laws intended to protect victims' rights and provide just compensation for injuries."

That brochure, published by the non-profit Citizens Coalition for Tort Reform, adds, "no one can avoid the costs of this unpredictable and inherently unfair system ... not even victims."

The coalition, composed of representatives from a broad cross-section of Alaska businesses and industries, is calling on the 1986 legislature to adopt a package of reforms.

Opposing this reform attempt is the Citizens for Consumers and Victims' Rights, which also speaks for trial lawyers who are against the proposals of the tort reform coalition.

This victims' rights organization wants the legislature to adopt a four-point program to regulate the business practices of insurance companies operating in Alaska.

Ames Luce, an Anchorage trial lawyer, said at a recent Anchorage Chamber of Commerce meeting that the crisis "is not caused by the tort system."

It is "caused by the way the casualty insurance business has conducted its business during the last seven to eight years...

"We are facing an insurance, not a tort, crisis," Luce said.

"Tort" is a legal term meaning a wrong. Tort law basically says if a negligent act by one person--either a committed or omitted act--causes injury to another, then the negligent party should pay for those damages.

This concept has been a cornerstone of common law for 300 years.

But, Dr. David McGuire, vice president of the citizens coalition, told chamber members, "the fact is, our tort laws have undergone a radical change in the last 25 years."

Defendants in liability cases once had to be found with "contributory negligence"--an act of negligence that actually con-

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AK Journal of Commerce

• Tort reform

Continued from Page 1

tributed to an injury--before they were required to pay damages.

Court rulings and jury verdicts since the early 1960s, however, have created "joint and several liability." This means that all defendants can be held equally responsible regardless of their comparative fault.

More people are also filing personal injury lawsuits than ever before.

The filing of private civil suits in federal courts was 50 percent higher in 1984 than in 1979; private civil suits filed in state courts were up 20 percent for the same period.

That's one civil lawsuit for every 15 Americans.

Almost 17 millioin private civil suits were tried in state courts in 1984; another 150,000 were tried in federal courts.

The average award for product liability in the United States was $1.07 million last year. In 1975 it was $345,000.

In medical malpractice cases the average award was $950,000.

In 1983, 360 personal-injury cases in the U.S. were settled with awards of $1 million or more. That's 13 times more than the number of million-dollar awards in 1975.

As a result, Alaskans as well as other Americans, have come to view personal injury lawsuits as a form of lottery.

The victims' rights organization, in a printed statement, claims, however, that "the size of verdicts and settlements from personal injury litigation has remained essentially unchanged from 1978 ... when inflation is taken into consideration."

This group also says "tort reform will have little or no impact in Alaska in making available reasonably priced insurance ...

"Alaska represents only a minute section of an insurance company's premium dollar and the present insurance crisis is nationwide."

Luce said any application of national malpractice statistics to Alaska begs the issue, since only one malpractice award has been handed down in South-central Alaska in the last 10 years.

But in one six-month period in 1984, a $3.75 million wrongful death award was made. This single case puts Alaska above the national average on a per capita basis for multi-million dollar liability awards for that year.

Advocates of tort reform counter the argument that changes in Alaska law won't change the insurance rates Alaskans pay by pointing to the case of

See TORT, Page 6

United Press International

Ralph Nader

Nader calls for insurance revolt

By THOMAS FERRARO
United Press International

WASHINGTON — Consumer advocate Ralph Nader spoke out on behalf of American business Monday and said he will call for a "business revolt" against the insurance industry, which he accused of price-gouging.

Nader and J. Robert Hunter, a former federal insurance administrator, charged that the property-casualty insurance industry has used misleading figures to claim it lost money the past two years.

They said at a news conference that the industry has squeezed customers and twisted figures to impose rate hikes of up to several hundred percent for commercial liability insurance in the past year.

Afterwards, Nader said in an interview he plans to hold a meeting soon with representatives of particularly hard-hit industries, such as day care centers, architects and truckers.

"We're going to call for a business revolt against the insurance industry," he said.

Nader said he will urge the businesses to push for legislation to lift the industry's partial immunity to federal anti-trust statutes and measures to make it easier for companies to form their own insurance pools.

Asked if it feels odd to suddenly be a business advocate, Nader said, "Businesses are consumers, too."

The Insurance Information Institute, a trade group, said it isn't worried by Nader's plans, saying it believes the evidence is on its side.

It reiterated the contention that the industry sustained record operating losses last year, but said it did make an after-tax profit of $1.7 billion.

Marc Rosenburg, an institute vice president, said the industry has been forced to boost the commercial liability rates of some customers and cancel the policies of others because it is in "poor economic health."

Last week, the institute estimated that the industry will show a "record operating loss of $5.5 billion in 1985," topping the previous record loss of $3.8 billion in 1984."

Hunter, insurance administrator in the Carter and Ford administrations, charged "the figures are fraudulent." He said counting tax breaks, capital gains and investment income, the industry actually made $1.7 billion in 1984 and $6.6 billion in 1985.

Sean Mooney, the institute's economic expert, stuck to the group's "operating loss" numbers and called some of Hunter's and Nader's figures "off the wall."

No mention of the industry's after-tax profit was included in last week's institute release, entitled, "Underwriting Loss for P-C (Property Casualty) Industry Hits New High."

In the past year, the industry has boosted liability premiums of many municipalities by 25 percent to more than 200 percent while reducing coverage.

At the same time, a number of businesses, including day care centers, mass transit lines, skating rinks, architect firms and bars have seen their liability premiums jump from 100 percent to more than 600 percent.

Some companies had to close because they couldn't afford coverage.

NATIONAL INSURANCE
CONSUMER ORGANIZATION

FOR IMMEDIATE RELEASE
December 9, 1985

CONTACT: Bob Hunter
(703)549-8050

NAIC "FIDDLES WHILE SMALL BUSINESS BURNS" NICO CHARGES

Reno, NV, December 9 - The National Association of Insurance Commissioners (NAIC) is "fiddling around" with issues like collision damage waivers on rental cars "while America's small business community is burned with excessive price increases and unwarranted cancellations of liability insurance," J. Robert Hunter, President of the National Insurance Consumer Organization (NICO) and former Federal Insurance Administrator, charged today.

Hunter pointed to the NAIC press release of November 21, 1985 regarding its annual meeting. The release, whic does not mention the liability insurance crisis, lists the "specific issues" that the NAIC will discuss as follows:

- Special Report on AIDS
- Rental Car Collision Damage Waivers
- Credit Life Insurance (on Student Loans)
- NAIC Elections
- State Telecommunication Network

The NICO executive suggested that the NAIC should be dedicating its entire meeting to the crisis. Hunter said the NAIC should be covering the cause of the crisis, which he described as a "crisis manufactured by insurers to bloat their profits and gouge small businesses." Hunter pointed to the fact that the property/casualty stocks have risen 44% as evidence of the gouging. "That's more than twice the rise of the general stock market," Hunter stated.

The fact that this is cyclical and caused by insurer price cuts is evident from the attached charts which display the cycle, the stock market performance and the fact that price cuts are the key cause of the current crisis.

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

Hunter said the NAIC should be looking for solutions to the crisis, such as:

1) The NAIC should encourage the federal government to seek a more pro-active role in the regulation of the insurance business. It is a sign of strength, not weakness, to ask for help when it is truly needed, and states surely need help in this area today. An example of the need is the woefully inadequate insolvency funds of the states, a Maryland S&L crisis waiting to happen.

2) The US General Accounting Office noted that the most critical deficiency in the regulation of insurance by the states was in the shortage of proper staff for adequate regulation. Only half the states have an actuary on staff, for instance. The GAO pointed out that this was a function of money and increased resources for targeted staff development for actuaries, accountants and lawyers will improve the quality and extent of state regulation of the insurance business. Regulators need to develop staff in the critical areas outlined and must be given sufficient resources to do so. The NAIC needs to to a better job of telling America of these gross inadequacies.

3) State law must require disclosure of loss data on a line-by-line basis which would give regulators much better ability to discern whether rates are excessive, inadequate or unfairly discriminatory. Line-by-line reporting will allow for adjustments between personal and commercial lines. The Blanks Committee of the NAIC should amend the Annual Statement to require detailed reporting of all general liability subline data, by subline.

4) To the maximum feasible extent, insurance rates must be made based upon experience. Admittedly some risks are hard to rate experentially, but over time the necessary data base can be developed to properly rate individuals and 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. No where is this more critically needed than in medical malpractice rates. The NAIC should lead in such developments.

5) Tough conflict-of-interest statutes must be enacted in the states to prevent continuation of the "revolving door" found by the USGAO where 50% of regulators came from the industry and 50% went to it after being a regulator. An "arms length" relationship between regulators and the regulated industry must be established. The NAIC should adopt a model bill to be on record as favoring such independence.

6) Insurance regulators need better data verification techniques either through conducting their own, more frequent audits or using outside auditors. Recent charges by NAIC President Foudree 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. The NAIC must move on this forthwith.

7) 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. The NAIC needs to be sure that this approach is pushed in each state now that it is official NAIC policy. It will save premiums for small businesses as well as for individuals.

8) State Commissioners must be empowered by the legislatures to meaningfully regulate excess, surplus lines carriers and reinsurers. Abuses, such as withholding coverage by these carriers, have contributed significantly to the current capacity crunch. The NAIC should adopt a model bill to implement this.

9) States need to establish their own reinsurance programs modeled after NICO's federal proposal (See attachment). 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.

10) States need to examine their anti-group and anti-rebate statutes to see if they serve any public purpose. Since these laws adversely impact upon availability and affordability of cover, they should be scrapped. The NAIC has lagged on calling for the elimination of these obviously anti-competitive and protectionist state laws.

11) 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. Some states have no examiners; this must be repaired.

12) Regulators must resist attempts by industry advocates to force proposed claims made forms, which include defense costs inside the limit of liability, upon consumers.

The proposed, and constantly modified, ISO claims made form means less coverage, more exclusions and less competition for insureds.

There is less coverage because of the timing of coverage involved in the policy and the proposed inclusion of defense costs inside the limit makes coverage illusory. If a buyer has a million dollar claim against it and a million dollars are spent by the insurer defending the suit from which the loss accrued, there is nothing to pay for the loss but the assets of the insured. That's not coverage, its an insurance defense lawyer income security plan! The proposed pollution exclusion is simply a refusal to write this risk until the tort law is changed to suit the industry. It is fascinating to note that ISO does not discount the claims made policy rate a whit for excluding "high cost" pollution coverage. ISO cannot have it both ways; either polluton cover costs a lot and the exlusion should cause a dramatic drop in price, or it costs little (nothing according to ISO) and the coverage should be contained within the policy. Consumers face captivity because of the exhorbitant levels of premium for extended tail coverage that can go as high as 200 percent of the last year's premium. The higher the tail coverage cost, the less likely you are to seek more competitive rates at another company.

Claims made poses a particular problem for the unsophisticated purchaser. Believing that they are getting the same coverage for less, many insureds will immediately purchase the new policy and suffer unanticipated losses. I think that if states adopt any form of the new claims made policy form that it should not be allowed to be sold to small business consumers at all. ISO admits that its "problems" are with only five percent of its larger accounts. It would be inappropriate for regulators to broadly restrict cover based upon scarce, potentially false, and small samples of data. In the alternative, if it can be shown that some small business consumers (again, as defined in 13 CFR 121) would be able to benefit from the new policy form, then that form should be made available to such consumers but only after a reasonable occurrence policy quote is given and a full and complete disclosure of the differences of cover is made by the seller. Disclosure forms could be promulgated by the regulators with input from consumers and the industry.

In any event, states should not approve this moving target, constantly amended form until the industry has had time enough to educate the agents and the consumer. Even if the latest amendments are the last, which I doubt, the form should not become effective before July 1, 1986 at the earliest.

13) States must allow greater consumer representation before the regulatory bodies. All too often the only parties to rate cases are the regulators and the insurer. States must give

greater funding to or create Offices of Public Advocate to statutorily intervene in insurance rate cases. The New Jersey experience can serve as a good model, there the costs of intervention are billed back to the filing party and this causes minimal growth in appropriations expenditures while maximizing consumer protection from abusive insurance rates. A related program could be authorized by the federal government or the states to allow consumers to organize their own Citizen's Insurance Board to intervene on their own behalf as a complement to the efforts of the Public Advocates. The NAIC should take the lead here.

14) The NAIC should unequivocally state that the crisis is caused by insurers and act responsibly to end the unwarrented insurer allegations that the crisis is caused by the tort law. At least, the NAIC should require proof of this charge to refute the clear evidence (see Charts) which I present here that the fault lies within the insurance industry. The least of those in our society, the victims of accidents, stand to lose a lot, for no reason, if the NAIC does not act to strip away the insurance contribution to this crisis.

15) Finally, and of utmost importance, the NAIC should call upon states that rely on competition to control excessive rates to review the market today to determine if competition is sufficient to do the job and, if not (as I expect), to regulate the rates small businesses must pay. States with rate regulation should move firmly to limit the out-of-control pricing practices currently being used by insurers which are excessive and will produce excessive profits in due course.

"This agenda I propose for the NAIC is urgent enough for them to cancel all other sessions and get to work on the real issue facing them. Their choice is of being Neros or heros, and I urge them to choose the latter," Hunter concluded.

- 30 -

CHART # 1

THE "CYCLE" AND CONSUMER ABUSE

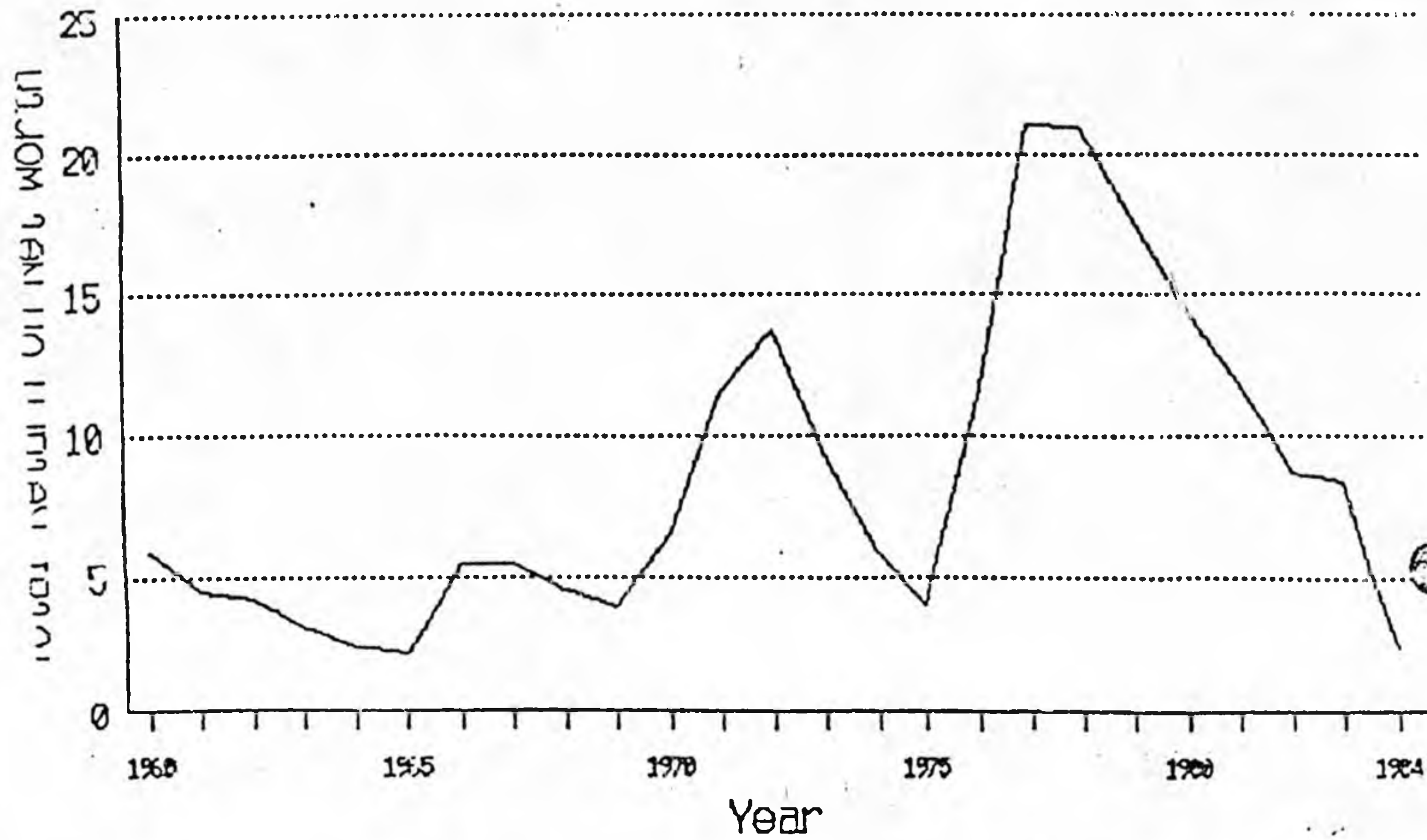


CHART #2

Best's Property/Casualty Stock Index

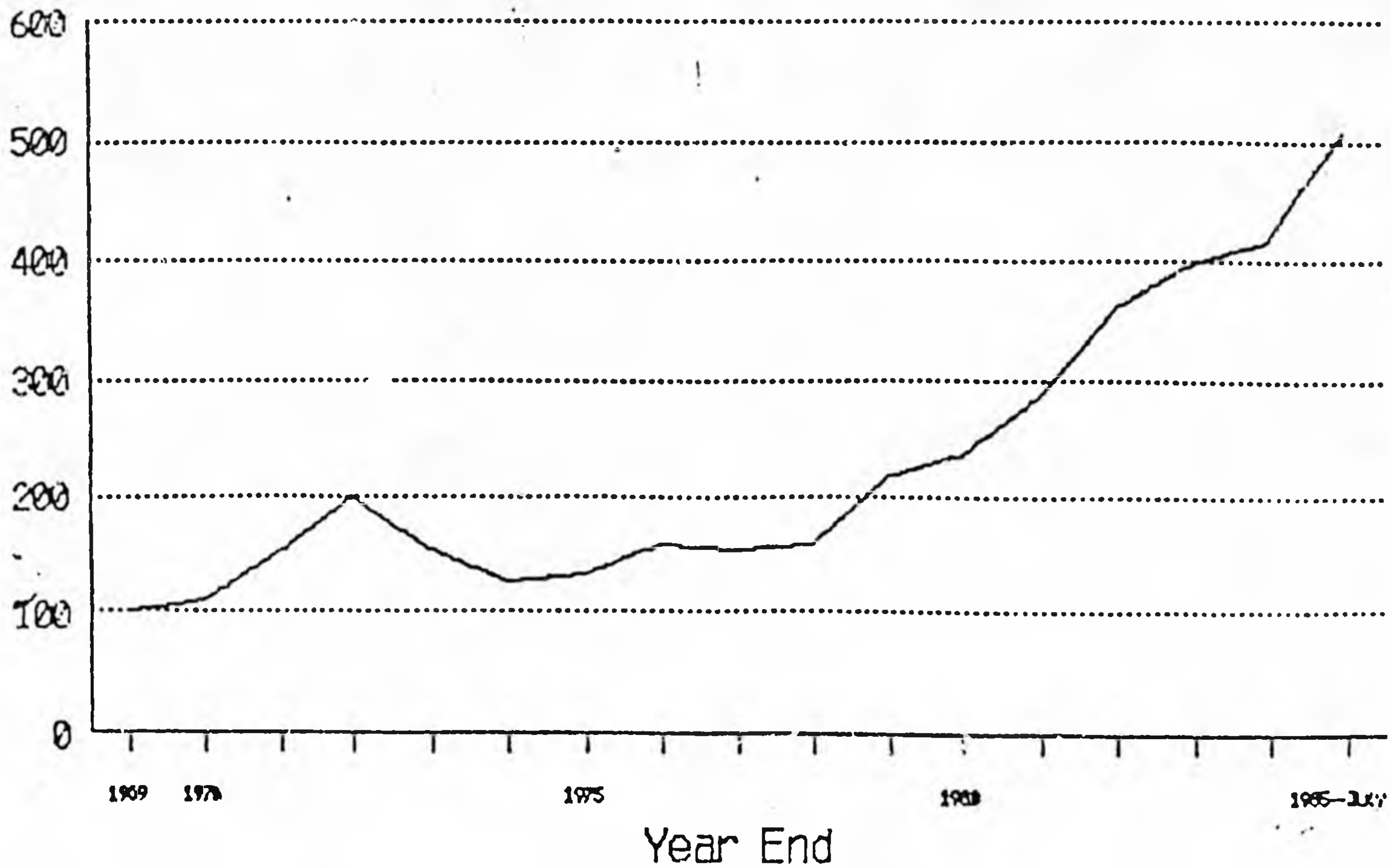


CHART 3

NATIONAL LIABILITY INSURANCE STRIKE

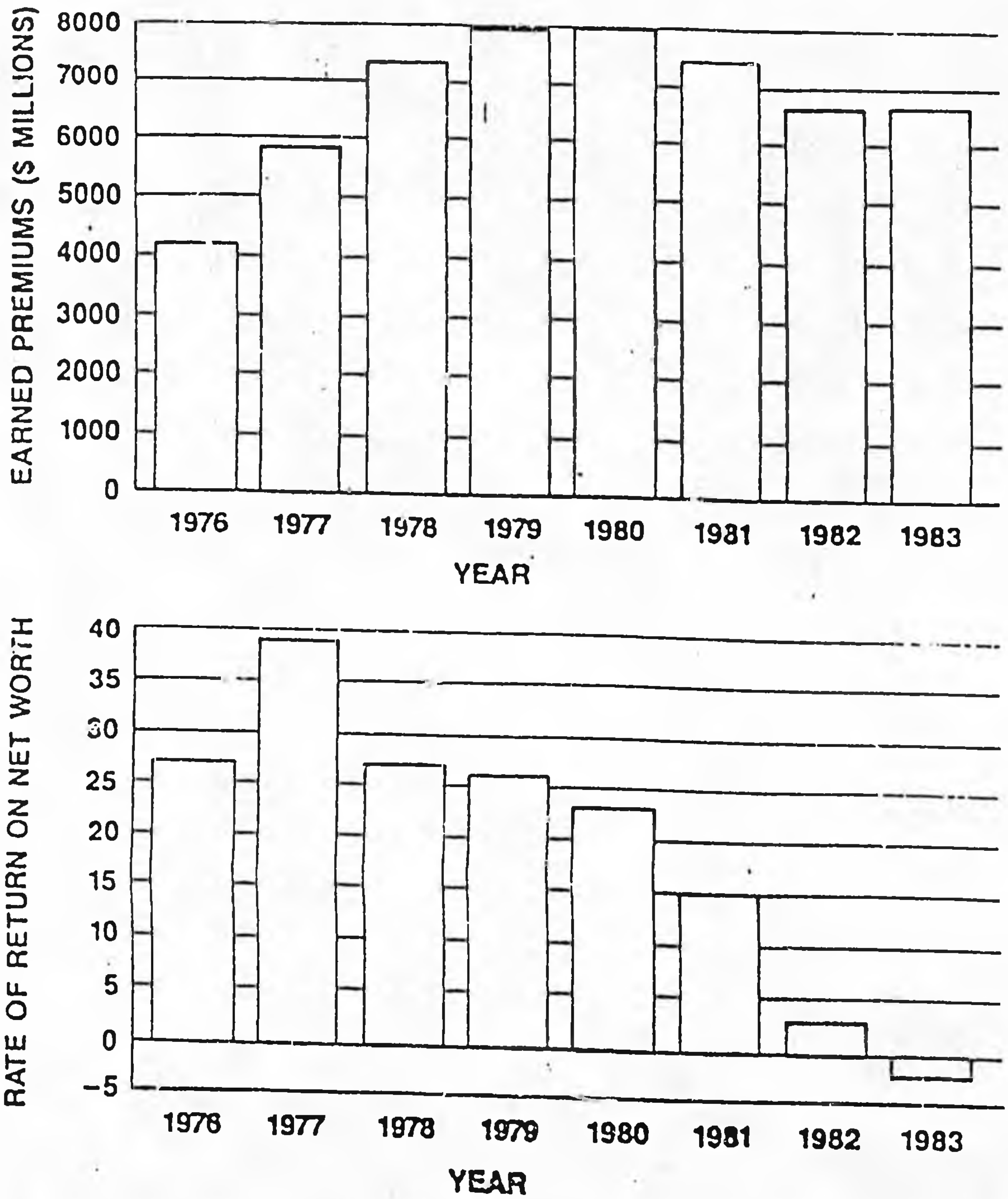
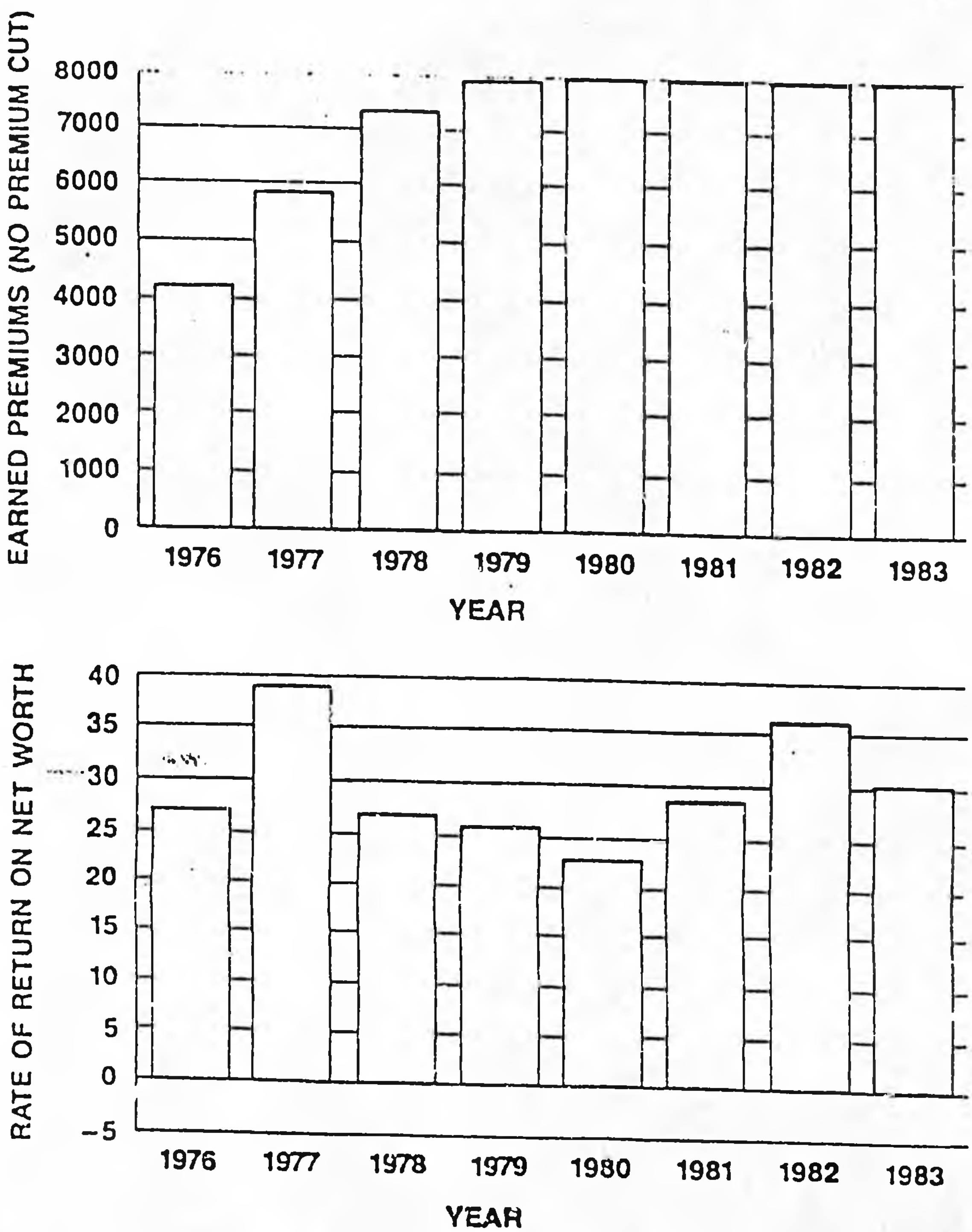


CHART 4

NATIONAL LIABILITY INSURANCE
STRIKE II



COMMERCIAL LIABILITY INSURANCE PROFITABILITY STATISTICS (1)
Rate of Return on Net Worth (2)

Year	Earned Premiums (Millions of $)	Actual ROR	All American Industry (3)
1976	$4160	27%	13.3%
1977	5865	39	13.5
1978	7334	27	14.3
1979	7943	26	15.9
1980	7969	23	14.4
1981	7416	15	14.0
1982	6627	3	11.0
1983	6671	-2	11.5
Average		19%	13.5%

(1) Source: National Association of Insurance Commissioners Report on Profitability, By Line, By State.

(2) Rate of Return on net worth estimated from the NAIC Reported Insurance Operating Profit on Earned Premiums by converting to net worth by multiplying by a 2:1 Premium/Net Worth Ratio. Investment Income on Surplus is added at an assumed after tax yield as follows: 1976, 5.0%; 1977, 5.5%; 1978, 6.0%; 1979, 6.5%; 1980, 7.0%; 1981, 7.5%; 1982, 8.0%; 1983, 8.5%.

(3) Fortune 500, 1976-1980; Business Week, 1981-1983.

NOTE: Had the insurers not cut premiums after 1980 but held them constant, the Rate of Return on Net Worth would have been:

1981	29%
1982	37%
1983	31%
8-year average	30%

The problem is clearly rate cutting, nothing else!

NICO believes that the approach enacted at a previous bottom, 1968/9 is worthy of consideration by Congress: The Urban Property Protection and Reinsurance Act of 1968 was a response to the unavailability of insurance in the inner cities in the wake of the riot situation of the late 60's.

To be sure, the predicate for the withdrawal of riot insurance was strong, given the very serious situation extant in the country at the time. But the finding of the President's Panel on the Insurance Crisis is just as valid for the day care provider community today and others losing coverage as it was for the inner city communities of the late 60's when the panel found that; "Communities without insurance are communities without hope."

In the riot insurance crisis, the federal government agreed to reinsure (insure the insurance transactons of the insurance companies -- a sort of lay-off bookie arrangement) the insurers against the specified peril of riot and civil commotion in return for a reinsurance premium and a commitment to participate in a pool to make sure insurance is available to all residents whose homes met reasonable standards of insurability.

The federal government made $125 million writing this reinsurance!

The cities were saved from the sure death that being uninsured brings in twentieth century America!

I think that a program of stand-by authority should be prepared to take care of the day care and nurse-midwives current problem (and, perhaps, some of the others). The authority should be granted to cover future crises as well, to stabilize the insurance profit cycle's harsh symptoms.

Insurers, the administrator of the program and representatives of the distressed industry would meet to set standards for insurability under which those who qualify are assured of an insurance market.

Studies would be undertaken to determine if other longer range actions (risk management, insurance reform, etc.) are also needed to resolve underlying problems.

Funding for this program would come from reinsurance premiums. I also envision a small surcharge, perhaps one-quarter of one percent of premiums written by all property/casualty insurers, to back up the program. This is in case premiums are insufficient over a short period or if it is determined by Congress that some short term subsidy is required to stabilize a distressed line sometime in the future.

The Tacoma News Tribune
The Pacific Northwest's Leading Independent Newspaper—Established 1883

NOV. 13, 1985

Insurance firms blamed for rate crisis

By RICK SEIFERT
The News Tribune

OLYMPIA — Insurance companies are largely to blame for rising liability insurance rates and widespread insurance policy cancellations, according to a state legislative report issued today.

"In far too many cases, people are being victimized by a giant industry facing a crisis of its own making," concluded the bipartisan Joint Study Committee on Insurance Availability and Affordability.

The five-member group was chaired by State Insurance Commissioner Dick Marquardt.

The report comes on the heels of a committee hearing late last month at which insurance company executives complained about mounting legal costs, multi-million dollar court judgments and unpredictable coverage risks.

In its report, the committee, which made several recommendations for legislation, called the problems within the insurance industry a crisis, one which was expected to last through 1986.

But the committee laid the bulk of the blame at the feet of the insurance companies.

At six public meetings held around the state this fall, the committee heard from hundreds of people, scores of whom "told of being hit by sharply increased insurance costs or of not having insurance available at any price," reported the committee.

Among those testifying were child care providers, doctors, nurses, restaurant owners, truckers, local public officials, installers of wood stoves and tow-truck operators.

Some are caught in a "catch-22" situation of being required by law to carry insurance but unable to buy it at any price, the committee reported.

And committee members learned that governments, which must stay in business regardless of insurance availability, "are forced to function with dangerously low amounts of protection or with no protection at all," the members said they discovered.

The root of the problem, the committee concluded, originated with insurance companies engaging in "cash-flow underwriting" in which they lowered rates to win premium dollars, which in turn were invested at the high interest rates of the early '80s.

"Sound underwriting and investment practices ... were either ignored or glossed over in favor of a quick return," concluded the committee. Insurance executives said they were forced to cut rates in order to remain competitive.

The report also cited the rising number and cost of court cases as contributing to the problem. One large company told the committee that in 1974, six doctors per 100 were being sued annually. By this year, the ratio had grown to 16 per 100.

The same company reported that legal costs for defending doctors has risen from $12 per $100 in claims in 1950 to $58 per $100 this year.

The committee made several recommendations for legislation, including:

- Expanding high-risk insurance pools to include liability insurance.
- Requiring companies to give 120 days' notice to agents and brokers prior

Continued on Page A-4

Insurance

Continued from Page One

to canceling agency contracts.

- Funding the insurance commissioners office in a way that would tie the amount of funding to the demands placed on the office. Presently the commissioner's office is underfunded, forcing it to rely too heavily on information provided by the companies, the committee concluded.
- Requiring insurance companies to tell commercial policy holders why policies are canceled or not renewed.

The committee also decided that some reform of the state's tort law "appears to be needed" but the group concluded the complex question needs further study.

A tort is wrongful act or damage which can be the subject of a civil court suit. A proposed change in the law might place a lid on the amount for which plaintiffs can sue for pain and suffering.

A REPORT TO THE LEGISLATURE

FROM THE

JOINT STUDY COMMITTEE

ON

INSURANCE AVAILABILITY AND AFFORDABILITY

November 13, 1985

Washington State

Dick Marquardt
Insurance Commissioner, Committee Chairman

Senator Ray Moore
Chairman, Senate Financial Institutions Committee

Representative Gene Lux
Chairman, House Financial Institutions and Insurance Committee

Senator Alex Deccio
Ranking Minority Member, Senate Financial Institutions Committee

Representative Shirley Winsley
Ranking Minority Member, House Financial Institutions and Insurance Committee

November 12, 1985

To the Honorable Members of the
49th Legislature

Ladies and Gentlemen:

After holding meetings around the state to hear from people affected by the current "insur crisis," the members of this committee agree the crisis is mostly a result of poor manage: practices by the companies, compounded by the unpredictability of rising costs for litigatior jury awards.

The reasons for the problems are many, but chief among them is the companies' practic several years of underpricing policies on the theory that volume builds investment cap Unable to predict losses from a weakened investment market and a lawsuit-prone society. companies ran headlong into trouble. The result has been that, in far too many cases, pe are being victimized by a giant industry facing a crisis of its own making.

Hundreds of people attended the meetings, and scores of them told of being hit by shar increased insurance costs or of not having insurance available at any price. Those testif included child-care providers, medical practitioners, restaurant owners, truckers, local offic wood stove installers, tow truck operators, other small business people and many more w livelihoods depend on adequate, affordable insurance coverage. For many of them, insuranc not an option, but a legal or practical necessity.

At the final meeting of the task force, the members heard representatives of major insur companies give their views on the reasons for the current problems in insurance cover nationally and here in Washington.

While recognizing the national, even international, scope of this complex problem the task fc also realizes that the insurance industry is regulated at the state level and that is where actions to address the problem must be taken.

Sincerely,

Dick Marquardt
Insurance Commissioner

Senator Ray Moore
Chairman, Senate Financial
Institutions Committee

Senator Alex Deccio
Ranking Minority Member, Senate
Financial Institutions Committee

Representative Gene Lux
Chairman, House Financial
Institutions and Insurance
Committee

Representative Shirley Winsley
Ranking Minority Member, House
Financial Institutions and
Insurance Committee

REPORT ON INSURANCE

AVAILABILITY AND AFFORDABILITY

November 13, 1985

INTRODUCTION

Six public meetings were held by the Joint Study Committee on Insurance Availability and Affordability to gather information on the current "insurance crisis" affecting Washington and the rest of the country. In the interests of readability, this report of the committee has been kept short. For readers wanting more detail, the appendices address various aspects of the problem in some depth. Copies of draft legislation, case histories and other reference materials are being prepared by the Insurance Commissioner's Office.

Five of the six meetings - held August 1 in Wenatchee, August 8 in Yakima, August 14 in Bellingham, August 21 in Spokane and September 11 in Seattle - were scheduled well in advance, to hear from people wanting to comment on any insurance problems. Testimony was sought specifically on day care liability, restaurant and liquor liability, insurance for long-haul trucking, insurance for local governments and insurance for non-profit agencies.

The sixth meeting, held October 21, was set after the insurance industry failed to offer substantive testimony at the first five sessions. Officials of 12 companies were invited to appear and give their views on the insurance crisis as well as on specific cases involving their firms. Eleven of the 12 companies invited sent representatives to the meeting. This report summarizes the committee's conclusions and recommendations.

REPORT OF THE SPECIAL COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY

The Insurance Crisis - An Overview

The fact that a crisis does exist in the insurance market is apparent to anyone willing to even briefly examine the problem. The number of people directly affected by the rising cost of insurance or the lack of availability of certain types of coverage seems to grow every day.

While it is difficult to determine just how serious the problem will become and how long it will last, most industry observers feel it will continue at least through 1986. How severe its effects will be on our society, on our economy, will depend a great deal on what actions are taken, by legislation or regulation, to ease it.

The inability to obtain adequate, affordable insurance coverage deeply concerns many people. It is an emotional issue, one often colored by subjective viewpoints and misinformation. Insurance underwriting may involve speculation as well as science, and many factors in the current crisis are not easily measured or verified.

The greatest problems of cost and availability exist in the commercial insurance lines, which refers to property and casualty coverage provided to business, professional people and governments. The commercial lines are distinct from the personal lines such as auto or homeowner's insurance, which are property and casualty coverages provided to rivate individuals.

The Insurance Code states that the business of insurance is "affected by the public interest, requiring that all persons be actuated by good faith..." The public interest is not being served by the commercial insurance underwriters. It is clear that the property and casualty companies are not meeting the needs of business and government. In fact, the ability of business and government to function normally is being severely curtailed, and in some cases their very existences are threatened. Many businesses and branches of local government are going without insurance coverage or are facing 200 to 300 percent increases in premiums for coverages with dangerously low liability limits.

How Did It Happen?

Property and casualty insurance goes through cycles, with competition during profitable times driving prices low and a tight market forcing prices high. The cycle often depends on outside factors, such as interest rates on investments or an unanticipated rise in the number or size of claims. The highs and lows are more extreme in the commercial insurance lines than in personal lines such as auto or homeowner's insurance.

During the past few years, insurance companies engaged in "cash flow underwriting" (see App. A), competing for every premium dollar. Lower premiums were used to get cash quickly and invest it at the high interest rates then available. Sound underwriting and investment practices, which are the bedrock on which the insurance industry was built, were either ignored or glossed over in favor of a quick return.

Price wars violate the Insurance Code (RCW 48.30.240), but policing the commercial underwriters to see that proper rates and forms are used is the job of the Examining Bureau. The Bureau, established by the Legislature (RCW 48.19.410) as a self-policing arm of the insurance companies, has been limited to property insurance. While rates must be filed with the commissioner's office before they are used, the "watchdog" role was assigned to the companies, acting through the Examining Bureau. From time to time, the commissioner's office has requested funding for field rate investigators so the commissioner could do his own rate examinations, but these requests have always been denied. The committee believes the commissioner's office should be authorized, and staffed with rate investigators, to be sure filed rates are actually being used.

During the height of the price war, so many filings came in that would have permitted even lower premiums than previously allowed, that the commissioner's rate analysts had to adopt a standard form letter of denial. For practical purposes, however, there is no policing mechanism to assure that only approved rates and forms are actually being used in the field.

The Capacity Crunch

The consumers are now paying the price for the insurers' drive for investment dollars. Today's comparatively low interest rates and new restrictions imposed by the "reinsurers," the international companies that in a sense "insure" the insurance companies, have forced a halt to cash flow underwriting. The commercial insurers now find their ability, or "capacity" to provide coverage, severely limited. The "capacity crunch" and the key role played by the reinsurers is described in Appendix B.

Growth of Court Claims

Compounding the current crisis is the long-term growth in the number and size of lawsuits companies must fight. One big insurance firm with long experience in liability coverage told the committee that in 1974, six doctors per 100 were being sued annually, but by 1985, the ratio was 16 per 100. Defense costs for that company rose from $12 per $100 in claims paid in 1950 to $58 per $100 in claims paid in 1985. Evidence given the committee pointed to court actions and legislation which increased the number of lawsuits and cases in which a defendant could be held liable. Significant growth in the size of jury awards during recent years was also shown.

The Need for Coverage

While the insurance market has been hit by such cyclical financial turmoil before, never has the "low point" been so low. The current crisis is the worst in the memory of those now in the insurance business. Unfortunately, the insurers seem determined to solve the problem, which they created, by sudden and drastic action that places often intolerable burdens on business and government.

For some businesses, insurance is an absolute necessity -- required by statute or regulation as with truckers, contractors and escrow companies. They are in a "Catch 22." The law requires insurance, but for some, insurance is not available at any price.

For most others, it is a practical necessity. Without insurance, or with inadequate protection against catastrophic loss, many businesses must severely cut back operations or simply close their doors. Governments, on the other hand, cannot "go out of business" but are forced to function with dangerously low amounts of protection or with no protection at all.

Resources of the Regulator's Office

While the insurance industry was going through the turmoil of cash flow underwriting from 1981 through 1985, more than one-fifth of the Insurance Commissioner's staff was cut. During the same period the number of authorized insurers increased by 132. More companies meant more premiums, more agents and brokers, more policy filings, more rate filings--a huge increase in paperwork. This required the commissioner to put proportionately more people onto the "paper pushing" end of the system (See App. C).

RECOMMENDATIONS

The committee unanimously adopted the following recommendations to enable the insurance commissioner to exercise more effective regulatory control of the insurance industry, to provide a means for guaranteeing insurance availability, and to prevent abusive marketing practices by insurers.

1. The Legislature should make sure insurance is available to those needing it by reauthorizing and expanding the FAIR plan. The FAIR plan, also known as the Washington Essential Property Insurance Inspection and Placement Program, would be expanded to provide liability insurance. The general idea behind the FAIR plan for fire insurance and the assigned risk pool for high-risk drivers auto insurance, both of which have been functioning for many years, is assuring that coverage is available for all.

2. The Legislature should adopt a new law requiring companies to give 120 days notice to agents and brokers prior to cancelling agency appointments. This would prevent insurers from arbitrarily and indiscriminatively cancelling contracts with agents and brokers, thereby eliminating coverage for large blocks of policyholders. This new law would give agents and brokers more latitude in getting cancelled policyholders new insurance (See App. D).

3. The Legislature should adopt a new method of funding the Insurance Commissioner's Office that would tie the amount of funding to the level of activity in the insurance industry. This would provide more stability for the regulatory staff, assuring staff cuts would not occur at the same time more industry control is needed. Funding should allow the hiring of six field rate investigators and two new rate analysts that are needed to enable better monitoring. With only three rate analysts and no field rate investigators, the commissioner now must rely on information supplied by the companies. Funding should also allow restoring six positions in the commissioner's consumer protection office lost during the budget cuts and provide supporting staff for the new personnel (See Appendices C and E).

4. The Legislature should require insurance companies to notify commercial policyholders of the reasons why their policies were cancelled or not renewed. Current law requires insurers to do this for policyholders in the personal insurance lines, and the law should be extended to cover all commercial policies.

5. The Legislature should amend existing law to improve the ability of insurance companies to comply with statutes on cancellation and nonrenewal of insurance contracts. This would involve limited changes to a bill adopted during the 1985 legislative session that required insurers to give policyholders more notice of cancellation or nonrenewal (See App. F).

In addition to the recommendations to the Legislature, the committee unanimously recommends or endorses the insurance commissioner's actions in the following areas:

1. The committee recommends that the commissioner return to "Prior Approval" on commercial rate filings. The committee recognizes that while the commissioner has the authority to do so, more staff is needed to implement it. This action would assure that the commercial insurance rates are fair and thoroughly "checked out" before they are used.

2. The committee endorses the current regulatory action by the commissioner to narrow from 40 percent to 25 percent the "judgmental" factor allowed companies in adjusting commercial insurance rates above and below the filed rate.

3. The committee endorses the commissioner's recent adoption of a regulation prohibiting insurance companies from cancelling, failing to renew or denying homeowner policies for the sole reason that day care facilities are being provided in the home.

- more -

In addition to the foregoing recommendations and endorsements, the committee is taking the following direct action.

The committee has begun setting up a Legal Action Task Force to review and collect data relevant to Washington's experience in tort law, and to recommend any changes needed to improve the availability and affordability of liability insurance. Based on testimony received by the committee, some reform of Washington's tort law appears to be needed. The committee, however, has neither the legal expertise to judge tort reform proposals, nor enough facts pertinent to Washington's experience to make informed recommendations of appropriate legislative action.

APPENDIX A

Cash Flow Underwriting

Cash flow underwriting had its roots in the runaway inflation that peaked in the late 1970s and early 1980s. Federal deficits, the oil embargo, "guns and butter" financing of the Vietnam War -- whatever the reasons for inflation, they can also be assigned blame as the root causes of the current dilemma. The excessive inflation led to excessive interest rates, which in turn led to the excesses of cash flow underwriting which resulted in the excessive measures being taken now by insurers against policyholders.

In the latter half of the 1970s, inflation pushed interest rates to unprecedented heights. Insurers began moving away from their traditionally conservative investment philosophy in favor of the short-term high yields that became available during those years. This practice picked up momentum and, by 1980, the insurance industry was engaging in a mad scramble to obtain premium income for the primary purpose of reinvesting it at the high interest rates. Sound underwriting considerations were glossed over or ignored in the rush to increase the cash flow.

The day of reckoning arrived when interest rates moved down to today's levels. About the same time, the disregard for sound underwriting started affecting the surpluses of insurance companies. An insurer's surplus is roughly equivalent to the net worth of a conventional business. It is the money available to pay claims if premiums are inadequate.

In the Spring of 1984, the reinsurers that had survived the rate cutting frenzy let it be known that, as their treaties (contracts with insurance companies) came up for renewal, sanity would have to return to the markets. By the Spring of 1985, most of the treaties that had not been cancelled had been renewed with strict requirements that the primary insurers increase their premiums -- particularly in the liability lines. The commercial underwriters had no choice but to comply. Appendix B, which follows, describes how the unregulated reinsurance market exercises ultimate control over commercial insurance underwriters.

APPENDIX B

The Capacity Crunch and the Reinsurers

The "capacity crunch" is industry jargon referring to the insurance companies' inability to write as many policies, measured by the amount of "premium" or money taken in each year from policyholders, as they did a few years ago. There are three reasons why the companies do not have the capacity to handle new policyholders or even some of their old policyholders.

The first is that the companies' surplus (money available to pay claims that exceed the total of premiums taken in) has diminished as interest rates have fallen and claim frequency increased.

Second, there are recognized industry guidelines limiting the amount of premium property and casualty insurers can write. The amount of premium, which translates into number of policies written, has a fixed relationship to the amount of surplus. Insurance companies can generally write up to three times as much premium as they have surplus. Historically, most insurers have written more policies -- more premium -- than three times their surplus, but have maintained their good ratings by passing the excess premium (policies or "risks") on to a reinsurance company. When the reinsurance carriers pulled out of the market, that practice was severely restricted or ended.

The third reason for the capacity crunch is that higher premiums on individual policies meant fewer policies could be supported by a relatively fixed or shrinking capacity. Some companies were forced to cancel policies to stay within their capacity level.

To illustrate, assume an insurer had $100 million of surplus and thus could write $300 million of premium based on its own resources. Such a company might have written as much as $400 million by passing excess premium (and risk) on to a reinsurer. The cash flow underwriting binge has not only depleted the $100 million surplus and thus the amount the company could write on its own resources, it has also caused the reinsurer to withdraw from the market. Thus, the insurance company is limited in its writings by its own resources. If, in this example, its surplus had been reduced from $100 million to $90 million, the company is now limited to $270 million of premium, instead of the $400 million it was writing when its surplus was $100 million and it had reinsurance treaties extending its writings to as much as $400 million. Capacity has been reduced by $130 million -- from $400 million to $270 million.

A company with its capacity limited is like a merchant who can sell more goods than he has on the shelf. The supply is constricted but the demand continues to grow. An insurance company in this situation will contrive to raise premiums, be very selective in its underwriting, cancel contracts with its producing agents, and generally conduct itself like any supplier in a seller's market.

APPENDIX C

Resources of the Regulator's Office

The committee recommends that the Insurance Commissioner be funded to hire six field rate investigators trained to examine insurance company underwriting and rating records to determine whether (a) insurance companies are using filed rates and (b) submitting accurate statistical and other information to the Insurance Department in support of rate filings. The committee believes that during the destructive "rate war" that occurred from about 1979 to 1984, many if not all property/casualty insurance companies used unfiled and often inadequate rates to obtain business and retain market share. With a small staff of three rate analysts and no field rate examiners the Insurance Department lacks the tools to monitor such conduct and to enforce the existing rate statutes.

In addition to the hiring of field rate investigators, the committee recommends that the Insurance Commissioner be funded to hire two rate analysts to assist the present staff of three with their review of insurance company rate and form filings. Due to an ever increasing workload in this area the Insurance Commissioner was compelled to go from a "prior approval" system of rate review for commercial rate filings to a "file and use" system which, while subject to the same statutory standards for disapproval of filings, results in insurance companies being able to use rates before those rates have been reviewed by the Insurance Department. The addition of these rate analysts will permit a return to the "prior approval" system of rate filing review and, in conjunction with field rate examinations, should result in more effective supervision of rate adequacy and enforcement of existing rate statutes and serve to lessen the severity of destructive underwriting cycles upon the citizens of Washington.

APPENDIX D

Draft Legislation on Agency Cancellations

CANCELLATION OF WRITTEN AGREEMENT WITH AGENT OR REFUSAL TO ACCEPT BUSINESS

(a) No insurer may cancel its agreement with an appointed agent with respect to insurance or refuse to accept insurance business from such agent unless it complies with the provisions of this section.

(b) If an insurer intends to cancel a written agreement with an agent, or intends to refuse any class of renewal business from the agent, the insurer shall give the agent not less than 120 days advance written notice of it. Notwithstanding any provision of the agreement to the contrary, the insurer shall continue, for not less than one year after notice of its intent to terminate the agency agreement, to permit insureds to process their renewals through the agent as to any of the policies which have not been replaced with other insurers as expirations occur. This subsection shall not apply to: (1) agents or policies of a company or group of companies represented by agents who by contractual agreement represent only that company or group of companies if the business is owned by the company or group of companies and the cancellation of any such contractual agreement does not result in the cancellation or nonrenewal of any policies of insurance; or (2) life, health, surety, ocean marine and foreign trade, and title insurance policies.

(c) No insurer shall cancel or refuse to renew the policy of the insured because of the termination of the agent's contract.

(d) In addition to the other provisions of this section, no insurer may cancel or amend a written agreement with an agent, or refuse to accept business from such agent if the cancellation or amendment is arbitrary, capricious, unfairly discriminatory as contemplated by RCW 48.30.300, or based in whole or part upon the sex, race, creed, color, religion, national origin, place of residency of the agent, his or her applicants or policyholders.

(e) Any insurer or agent that accepts brokerage business and rejects the business of a broker shall provide to the broker, upon request of the broker, the reasons in writing for the rejection.

APPENDIX E

Orderly Funding of the Insurance Regulatory System

The Insurance Commissioner's Office should be funded on a systematic basis that would reliably relate to the activity in the insurance business. Senate Bill 3657, now in Senate Rules 2, would do this. It assesses each insurer a small fraction of one percent of premium to fund the Commissioner's Office. To the best of the committee's knowledge, the Commissioner's Office is the only regulatory agency not now funded by the industry it regulates. Too often a budget crunch at the state level coincides with unusual activity in the insurance business.

Between 1981 and 1985, while the insurance industry was going through it's self-destructive cycle of cash flow underwriting, personnel in the Insurance Commissioner's Office was cut by more than 20 percent -- from 95 to 74 FTEs. During that time, general government employment rose by 10 percent. While staff cuts were being imposed, the number of authorized insurance companies in Washington grew by 132 to the present level of more than 1,400. During that time, the total annual premium taken in by the companies went from $3.8 billion to $5.5 billion. With more companies and more premiums, the number of licensed agents, brokers, and adjusters increased -- increasing the burden on the Commissioner's staff with respect to qualifications, continuing education, appointments, supervision and discipline of licensees. The number of licensees has increased to about 25,000, and new policy forms and thousands of rate adjustments have added to the workload. Contacts between the public and the commissioner's staff have increased from about 1,500 per week in 1983 to the present 3,000 contacts per week.

This rapid growth meant a huge increase in paper work. With decreasing personnel, the Commissioner was forced to shift more effort to pushing paper through the system and less to the examination of companies, policy and rate analysis, agent supervision and policyholder complaints.

Senate Bill 3657 would fund the regulatory system in an orderly manner that would relate directly to the activity in the insurance industry rather than subjecting it to the vagaries of the general government budgeting process. Too often the resources of the Commissioner's Offi zig when the activity in the insurance industry zags.

APPENDIX F

Cancellation and Nonrenewal Statutes With Proposed Amendments

Draft For Changes to RCWs

Sec. 17. Section .18.29. Chapter 79. Laws of 1947 as last amended by section 7, chapter 110, Laws of 1982 and RCW 48.18.290 are each amended to read as follows:

(1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy, may be effected as to any interest only upon compliance with either or both of the following:

(a) Written notice of such cancellation must be actually delivered or mailed to the insured or to his or her representative in charge of the subject of the insurance not less than forty-five days prior to the effective date of the cancellation except for cancellation of insurance policies for nonpayment of premiums, which notice shall not be less than ten days prior to such date and except for cancellation of fire insurance policies under chapter 48.53 RCW, which notice shall not be less than five days prior to such date: PROVIDED, That where cancellation is within the first 30 days after the contract has been in effect, at least ten days notice of cancellation is sufficient, and in case the contract is evidenced by a written binder which has been delivered to the insured, if such binder contains a clearly stated expiration date, no additional notice of cancellation or nonrenewal shall be required; PROVIDED FURTHER, that in all cases a loss payee shall receive no less than forty-five days notice of cancellation.

(b) Like notice of not less than forty-five days must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder.

(2) The mailing of any [illegible] notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office. The insurer shall retain in its records any such item so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.

(4) The portion of any premium paid to the insurer on account of the policy, unearned because of the cancellation and in amount as computed on the pro rata basis, must be actually paid to the insured or other person entitled thereto as shown by the policy or by any endorsement thereon, or be mailed to the insured or such person as soon as possible, and no later than <u>forty-five</u> days after the date of notice of cancellation to the insured for homeowners', dwelling fire, and private passenger auto. Any such payment may be made in cash, or by check, bank draft, or money order.

(5) This section shall not apply to contracts of life or disability insurance without provisions for cancellation of life or disability insurance without provision for cancellation prior to the date to which premiums have been paid.

<u>NEW SECTION</u> Sec. 20. A new section is added to chapter 48.18 RCW to be codified as RCW 48.18.2901, to read as follows:

(1) Each insurer shall be required to renew any contract of insurance subject to RCW 48.18.290 unless one of the following situations exists:

(a) The insurer gives the named insured at least forty-five days' notice in writing as provided for in RCW 48.18.290, that it proposes to refuse to renew the insurance contract upon its expiration date; and sets forth therein the actual reason for refusing to renew; or

(b) At least twenty days prior to its expiration date, the insurer has communicated its willingness to renew in writing to the named insured, and has included therein a statement of the amount of the premium or portion thereof required to be paid by the insured to renew the policy, ~~((including-the-amount-by-which-the-premium-or deductibles-have-changed-from-the-previous-policy-period,-and-the-date by-which-such-payment-must-be-made,))~~ and the insured fails to discharge when due his obligation in connection with the payment of such premium or portion thereof; or

(c) The insured's agent or broker has procured other coverage acceptable to the insured prior to the expiration of the policy period.

(2) A renewal shall be based on rates and forms applicable to the expiring policy and its term, except to the extent the insurer gives at least 20-days advance notice of changes in rates or contract provisions.

~~(2)~~ (3) Renewal of a policy shall not constitute a waiver or estoppel with respect to grounds for cancellation which existed before the effective date of such renewal, or with respect to cancellation of fire policies under chapter 48.53 RCW.

~~(3)~~ (4) "Renewal" or "to renew" means the issuance and delivery by an insurer of a contract of insurance replacing at the end of the contract period a contract of insurance and delivery of a certificate or notice extending the term of a contract beyond its policy period or term: PROVIDED, HOWEVER, That any contract of insurance with a policy period or term of six months or less whether or not made continuous for successive terms upon the payment of additional premiums shall for the purpose of RCW 48.18.290 and 48.18.293 through 48.18.295 be considered as if written for a policy period of terms of six months: PROVIDED, FURTHER, That any policy written for a term longer than one year or any policy with no fixed expiration date, shall, for the purpose of RCW 48.18.290 and 48.18.293 through 48.18.295, be considered as if written for successive policy periods or terms of one year.

REPRESENTATIVE DON CLOCKSIN
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To: Representative Don Clocksin January 8th, 1986

From: R.L. Cole RLC

Subject: Briefing Memo; National Conference of State Legislatures; Denver Meeting on Insurance Availability and Pricing, January 4th, 1986

Following is a summary transcript of the proceedings at the meeting in Denver on Liability Insurance. Well over three hundred people attended this meeting, including elected representatives from virtually every State and Territory. Both sides of the issue were eloquently represented. Most of the workshops were in a debate format between a representative from the "Tort Reform" school and a representative from either the Trial Lawyers, an Insurance Commission or Consumer group. I thought the Conference was well organized and substantive.

SUMMARY OF CONFERENCE PRESENTATIONS:

Presentor: David Childers, Commisioner of Insurance, Arizona

Main Points:

1. The Insurance Companies do in fact have a financial problem.
2. Insureds are being asked to solve that financial problem with premium rate increases that are often unreasonable.
3. The insurance companies see the problem as one of an "Oppressive" Court system.
4. Some Insureds are pressing State Legislatures for relief through restrictions on premium rate increases, Insurance companies ability to terminate coverage etc., and believe that Insurance Companies have fabricated the problem.
5. 1980-1984 Insurance Industry losses exceeded 5.5 Billion.
6. In 1985 Industry losses have already been 6.25 Billion thru the first three quarters. Looks like there will be a 24% increase in premiums during the 4th quarter alone.
7. Rapidly increasing stock prices for Insurance Companies will be a major factor in a turnaround.

8. The Insurance Regulatory Information System indicates that about one out of every six Insurance companies is experiencing severe financial problems.(I think he meant in the State of Arizona) He also expects more Insurance Company insolvencies.
9. This man made a point about watching out for the wellbeing of "State Guaranty Funds" that I didn't understand. Will try to clarify this point.
10. Between '79 and '84,the Insurance Ind' try practice of "Cash ow Underwriting" was a form of gambling,that obvio y did not pay off either for the Insurance Industry or consumers,in the longer run.
11 Insurance companies should not try to make their underwriting losses with premium increases in one year, which they are trying to do. (Witness the huge increases in premium costs.)
12. Insurance company stock prices are going up rapidly,which should help resolve the problem of shortage of Capital,bring new interests into the market,create more competition,and ultimately resolve the problem,except for prices,which will probably not experience sharp decreases any time soon.
13. Options for States to pursue include:
    a. Arizona; Market Assistance Programs in the State Insurance Office assist different types of businesses to find insurance. In Arizona they found that availability was not as broad a problem as they had originally thought. They were able to find insurance coverage for most classes of insureds, including Day Care Centers. The private agents fell down on the job in his opinion, by not working hard enough to find coverage for their clients. This program operates as if the State was it's own brokerage firm. They have a toll free number for people to use to reach the State office for information about the availability of coverage. Similar programs are in place in New York for Municipalities, and in California for Day Care Centers.
14. Other options include :
    Premium Tax Credits
    Cancellation Legislation (as in Arizona) Which would force companies to give 30 to 60 day notices before they could cancel any insurance.
    Legislation to enact restrictive definitions of "Unfair Trade Practices"e.g.,Insurance Companies not being able to cut people off or raise premiums in the middle of the premium year or without ample prior notice,etc.
    Joint State Underwriting Authorities (e.g.California and Arizona) requiring Insurance Companies to write certain coverages in one State if they want to do business in another.
    Assigned Risk Plans

Pooling (e.g.California and Arizona pooling their coverage for Schools and Municipalities)
Expansion of Risk Management Functions for all Political Subdivisions to control exposure and losses.
Mediation and arbitration (I think he meant for the States to mediate and arbitrate between insureds and the Insurance Companies on premiums,availability,levels of coverage, etc.)

15. The Insurance companies see the current business downtown as a "Window of Opportunity" for "serious" Tort Reform. He is not sure this is the answer. Punitive Damages are not a serious economic problem for the Insurance Industry. The one area you might want to look at is "Joint and Several Liability". He also said something about "Courts of Claims", which I did not fully understand. (Will try to clarify).
16. Lastly,he said,..."DON'T OVERREACT!" Encourage your Insurance Division to FULLY ANALYZE the situation of your state before plunging ahead.

Presentor: James Cocoran; Superintendent of Insurance, State of New York

Main Points:

1. Holding Companies,who are short term thinkers,are running the Insurance Industry in the U.S.
2. If you enacted the entire "Tort Reform" package being demanded by the Insurance Industry,it wouldn't solve the problem!
3. Interest rates and "Cash Flow Underwriting" are the reasons for the problem.
4. Insurance companies have NOT been "Constructive Contributors" to the resolution of these problems.
5. Now we need new Capital in this business and State's need new powers to regulate the Industry.
6. Insurance companies should get back to being Insurance Companies. Holding Companies are milking off Insurance profits to use for other purposes,thereby exacerbating their Financial problems.

7. The States need expanded Data processing capability in their Insurance offices in order to be able to collect enough information to control Insurance Industry Unfair Trade Practices and control rates In past years premium rates often should have been raised,in order to forestall Industry cashflow problems and avert the cancellations and preciptious rate increases we are currently seeing. The Insurance Industry has NOT been helpful in suggesting new regulatory tools to avert these problems in the future.
8. "Tort Reform" should be looked at,but it is not a solution to the problem.

9. There needs to be expanded regulation of the Industry by the States.
10. "Claims Made" insurance forms are NOT a solution;they increase the frequency of lawsuits!
11. "Pooling" might be a partial solution to the problem.It will hurt the traditional Insurance Industry,because once people get out of the traditional Insurance market,they are not likely to return.Alternative markets WILL be created by this crisis and it will change the face of the American Insurance Industry.
12. If you establish Municipal Pools (Or Pools for any Government entity for that matter),You have to be sure that they are not subject to Political pressure and raked off for appropriations for another purpose.Insurance pool dollars are not a substitute for Tax Revenues!!
13. This is not just another cycle in the Insurance market in the U.S.,it is a "Sea change"
14. There are no quick solutions.
15. Use Assigned Risk Plans to solve your Availability problems and let prices float.
16. There is NO CRISIS IN DAYCARE!!!the Insurance companies are making money on Daycare coverage.
17. Coverage for Municipalities is also economically O.K.,the Insurance Companies are making on it..
18. There is NO JUSTIFICATION FOR CANCELLING whole lines of Insurance,based on actuarial data.Insurance Companies need to go back to being underwriters of risk and (sic) get out of the business of being "Money Managers" (As their first interest). Insurance companies are getting killed on the "Big Stuff" (Of losing billions on their investments,not on Tort Claims)..
19. States must expand their Insurance Division powers and capabilities.

Presentor: Thomas Chittenden: General Counsel and Vice President; American Insurance Association, New York

Main Points:

1. (See: the Industry's "White Paper" in your folder for the basic Industry view.)
2. Availability is a problem but "good beginnings"have been made in dealing with it.Please don't panic into "Draconian Measures".(Legislatively)."Panic Legislation is Bad Legislation."
3. The Insurance mechanism is only partly amenable to State Legislative and Regulatory control.Our system is "Worldwide".It is a "Free Market" system,involved in International Finance.States can only get hold of the "Front End" as States.
4. There is some truth to the charge that the Industry is partly to blame for the current "crisis" because of underpricing during the past few years.

5. "Tort Law" has become a "Social Insurance System",and one that is beginning to DETER desirable conduct.A thorough reexamination of the Tort Law system is desirable. Excesses must be addressed now !!

6. I do not believe that the Tort Law system was the sole cause of our current problem.(However) last year the Industry had a pre-tax operating loss of 4 Billion and the reinsurors losses were even higher.

7. These losses came about mainly because of cases like: Jackson Township, New Jersey, where the courts ignored the Pollution Exclusion in the Township's Insurance policy.
   Minnesota,1984;..A sweeping "Little Superfund" law set up presumptions (of Liability) regardless of causation.

8. American Society's expectations of Social Welfare and Expanding Rights have frightened the reinsurance Industry. A crisis would have occurred no matter what. There have been increased costs for all forms of Liability.

9. DO'S AND DON'TS:
   Make sure you know about availability, use the "MAPS" program.
   Do not enact "Mandatory Coverage".
   Take care that any mechanism you set up is temporary and that premiums are adequate.
   Do work with your Insurance Commissions on reasonable regulations.e.g..constraints on non-renewals and cancellations.
   Enact a package of Tort Reforms to cut costs and reestablish confidence;
   Several Liability
   Repeal Collateral Source
   Limit Punitive Damages
   Re-establish "Best Professional Practices" Defense
   Put a ceiling on non-economic damages (e.g.Michigan and Ohio)

10. Competition and Free markets will take care of the current down "Cycle".However,it may be that new tools can be found to handle "excesses"(e.g.Insurance regulations to control underpricing).

11. Broader Implications of Tort Reform.Tort Law has a role in shifting losses from the innocent to the negligent. However it has been stretched into an inefficient Social Welfare system.It doesn't give the money to the victims.It is neither fair nor efficient.Study the Tort System. Support basic research into how it actually works.

Presentor: William Titelman; Legislative Counsel;
Pennsylvania Trial Lawyers Association

Main Points:

1. "Tort Reform" will have no significant effect on Liability Insurance costs for at least five years,if at all.It will not affect cases already in the Courts.
2. Pennsylvania in 1978,passed the most restrictive Municipal Liability Law in the country,including a Cap on awards, and the elimination of pre-judgement interest.The passage of that law has had NO IMPACT ON COSTS in the State of Pennsylvania.
3. The proposed "Tort Reforms" are not even specific to the problems faced by the Industry. The Industry wants major, sweeping changes in the Tort Law system instead. Passage of the Industry's "Tort Law Reforms" will not bring about the changes in Insurance availability and affordability that your constituents want.
4. The negligence system depends on fault.Liability is defined narrowly.No one wants to go back to the old days on issues like product liability.
5. There has been no dramatic shift in Tort Law in recent years, nor has there been a massive increase in lawsuits. (See:Titelman's Paper)
6. Belanger, in the UCLA Law Review,did a study on the presumed increase in Litiginous behavior on the part of U.S. citizens and found that they sue on an average of 44/1000 (suits to citizens;don't know time period),about the same frequency as people in Australia and England(and other Western countries).
7. The American Bar Foundation did another study and found no long term pattern of increased litigation in the Federal Courts.
8. In Pennsylvania,the rate of increase in suits filed has been about 1% a year .For Personal Injury cases,there has been no difference in the rate of filing since the 1970's. Tort Law is an almost perfect mirror of the evolving values of a society.
9. You should also look at a Rand study published in the National Law Journal,November 11,1985,for evidence on the rate of cases filed.
10. STATES NEED DATA before they leap into any changes either in Tort Law or in Insurance Regulation.DEMAND THE DATA.
11. There are more Dram Shop Cases being filed because Social Values have changed.
12. The cost of paying Liability Claims has increased at about the same rate as inflation.
13. The Pennsylvania Medical Society and Hospital Association did a study on the cost of Medical Malpractice.They found a pattern of cost increases that reflected both inflation and "Pseudo-growth",that was reflective of the "tails" of Liability involving cases where negligence occured in prior years,but where the cases were being filed in court in later years.(This is a statistical phenomenon. Assume

for example that 100 cases of Medical Malpractice occur in a given year.It will take a number of years for those cases to be filed in court.If 100 additional cases occur in each subsequent year, the same pattern of filings occurs. With the passage of each successive year the number of filings increases because of the cumulative effect of occurrences.Titelman's paper includes a chart that displays this phenomenon graphically.)

14. Lawyers don't oppose Structured Settlements.The problem is in making them mandatory.Each settlement should be tailored to the particular circumstances of the individual case. The purpose of the "Tort Reform Advocates" version of "Structured Settlements"is to hurt clients by cutting costs.
15. (Read Titelman's paper on the Insurance Industry) The Insurance Industry has come to act more like Investment Bankers than Insurance Underwriters.Many Insurance Executives are isolated from concepts of Underwriting. They want to be Bankers, that is; Money managers.
16. Why is this particular cycle worse? Because the U.S. no longer controls the World Economy.Lloyd's of London reinsurance policy is affected by the international monetary exchange rate.Since the exchange rates have become more favorable (The Pound in relation to the Dollar), their Reinsurance capacity for U.S.Insurance is expected to rise by 40% this year alone.
17. States need to look at becoming reinsurors themselves; Self Insurance;Pooling;and strengthening State Law on Insurance Industry Accounting Practices and Reporting Requirements, for answers to the problems of Availability and Affordability.

Presentor: Gustave Shubert; Director; Institute for Civil Justice; The Rand Corporation

Main Points:

1. The American Civil Justice System is a broker for a multitude of needs.It determines how the "Free Market" works in this country and interprets Society's changing values of justice in a multitude of ways.The Civil Justice System has been ignored by researchers until very recently.
2. There is a real crisis in Insurance Availability and Affordability and we waited too long as a Society in seeking solution.We run the risk of using a large hammer, with little information,on a complicated problem.
3. The Civil Justice System has conflicting goals; Social Justice, Victim's rights, Good Business practices, etc., Everyone is affected by the Civil Justice System. There are no MAGIC BULLETS that will resolve our problems.

4. The Rand Corporation Study of the American Civil Justice System looked at three main areas:
OUTCOMES: Trends and Patterns
COSTS: What?Who?Distribution?
PROCESSES: Were they Understood? Were they Optimal? Did they need Improvement?

5. Staff members from the Rand Corporation that worked on this study are available to testify before State Legislative Committees.

6. Since it was deemed impossible to evaluate the entire American Civil Justice system we had to look for Jurisdictions that were both willing to participate and that had a Data System that had enough information to allow evaluation to occur.No one had ever looked at the Courts before in any systematic way.In most jurisdictions there was no data on Juries (their composition,actions taken and size of awards for example).

7. Most of the data in our study is taken from the Cook County and San Fransisco County Courts from 1959 to 1979. We are still gathering and analyzing it.We also have data from the entire State of California Civil Court system from 1980 to 1985 and will be collecting that data on an ongiong basis.

8. There is no simple answer to the question of the impact of juries on the size of awards.The Cook County and San Fransisco County jury data was similar:MEDIAN AWARDS REMAINED FLAT OVER TWENTY YEARS.In Cook County the median award was $ 8,000 (Eight Thousand Dollars) and still hasn't changed.However, toward the middle of the period, some awards got bigger.In the top ten percent of cases, involving Medical Malpractice,Contracts and Suits against Governments, the ratio of Plaintiff Wins increased from 1/4th to 1/3rd and the Dollar amount of awards went up.The current ratio is about 50/50 Plaintiff/Defendant Wins.

9. Also: There was an increase in the ratio of the dollar amounts awarded as opposed to the dollar amounts claimed in the initial suits.(That is;Juries tended to award something closer to the amount requested than they had in previous years) apparently partly because of the application of "Pre-Judgement Interest".Rand has recently advised the Illinois Legislature on the impact of Pre-Judgement Interest in Illinois cases.

10. CIRCUMSTANCES affected the size of jury awards in the Cook County Courts.Awards for Workplace Injuries were,on the average,Three times as high as those for other accidents.

11. RACIAL CHARACTERISTICS were also a key determinant in the size of Jury awards.Minorities both win and/or pay less frequently than others.They also receive/are assessed less money than other cases.

12. There is little data yet available on the impact of Punitive Damages on the size of jury awards in the study.

13. We will soon be able to tell whether there was a difference in the size of Jury awards by the size of the Jury.(e.g. whether it was a six or twelve person jury)
14. We are also looking at the impact on Defendants,Insurors and Plaintiffs of "Joint and Several Liability",but that data is not ready yet.
15 We should focus our attention on the Tort Law on where the problems are:
    Medical Malpractice
    Contracts
    Product Liability
16. COSTS:
Public Costs: It is estimated that the annual Tax Costs of supporting the U.S. State and Federal (Civil ?) Courts is about 2.2 Billion Dollars.
Private Costs: An example of Private Costs is Asbestos Litigation.Assume that the typical case costs 95 Thousand dollars.Of that amount,35% goes to Defense Lawyers,Claims Adjusters and Managers.26% goes to the Plaintiff's Lawyers,and about 29% goes to the Plaintiff.(10% apparently goes elsewhere)
17. There is a real inadequacy of resources going to the Civil Justice system, especially in the area of Data gathering and Information Systems.
There is a real imbalance in the ratio of Public and private resources within the Legal Profession.Judges get paid the least.
18. PROCESS;We found the process of the Civil Justice System to be characterized by congestion and delay.In L.A. it takes 3-5 years to get to court.This drives up costs, especially because of the application of "Pre-Judgment Interest".
19. There has been no "EXPLOSION" of Litigation in the jurisdictions we studied.The only increase in the number of cases filed has been in proportion to the increase in the sheer size of the population.Otherwise,the number of cases filed is in the same proportion as during the era of WW11.
20. The number of Judges assigned to the Courts is probably less important than their Quality.
21. Organizational problems in the Courts may inhibit the Court's productivity.
22. The real cause of the delays in the Courts is that the COMPLEXITY of cases has radically increased,especially in the areas of Civil Liberties,Product Liability and First Amendment cases.The Courts haven't been able yet to adjust to the changes in complexity of cases.They should split out the routine from the non-routine cases.Changes in Docketing practices is one way to do this,which is being implemented in California.
23. Rand has a manual available for the asking on "Mandatory Judicial Arbitration",which is being tried in California, Illinois, and New Jersey. In those States,people are delighted with the system.

24. UNINTENDED CONSEQUENCES of the way our Courts now function, include; the average Jury trial in State Courts costs about $8000 . It takes up to five years to get to trial.As a consequence many cases are not being tried at all. An alternative is needed.
The System provides Compensation on an unfair,irrational and arbitrary basis. For example in the current Asbestos Litigation,there are Thousands of cases;Hundreds of Thousands of man-years; and Millions of Dollars of costs. In many cases, Plaintiffs have not even been injured; there is no attempt being made at individualized justice; the Rules are inconsistent; there is mass processing of cases and an average of 20 Defense Firms involved in each case. The System is not working very well in this instance.
25. We have also done a study on the impact of "Tort Reform" on Medical Malpractice cases. We have found that the impacts are: Fewer Filings; Cases are more likely to be dismissed; Cases are more likely to be settled out of Court; The probability of Victim Wins is lower; Awards to Victims are lower. (Copy of this study is on it's way)
26. The concepts of a simple civil justice system and a system that can compenstate for all injured parties are incompatible. There are no easy answers to our Insurance problems.
(Note: I have ordered copies of the Summaries of the Rand Studies for us to use.They are in the mail.)

LUNCHEON DISCUSSION:

Presentor: Mavis A.Walters; Senior Vice President; Insurance Services Office,Inc.; Washington,D.C.

Main Points:

1. Insurance Services Office Inc. is a technical services that serves the Industry nationwide.
2. During the past year,the Insurance Industry in the U.S. paid out $118 in Claims,for every $100 in premiums collected. 1985 losses will be even greater.
3. The "rate of return" for the Insurance Industry nationwide in 1984 was only 1.7%.50 out Of 100 Insurance Companies in 1984 experienced a negative return on net worth.
4. There is an increase in investment Income to the Insurance Industry this year as premium growth is up 21% and stock prices are rising.However it is important to note that Stock Prices ANTICIPATE better future results rather than guarantee them!!

5. Inadequate past pricing was not the only cause (of Insurance company financial problems) Many companies were also wrong about their investment decisions and anticipated returns.
6. In 1985, we anticipate losses Industrywide to be close to 13.6 Billion dollars.
7. We think that much of our losses were due to Court interpretations of Policy Language to cover incidents that were never intended to be covered and Excessive Consumer expectations of Litigation.
8. The Industry is introducing new "Claims Made" policy forms designed to help solve the problem,by limiting Liability coverage to the actual time period paid for by the premium.
   (Note:This eliminates the "tail" of Liability on the part of the Insurance company in years subsequent to the exact year for which the Insurance was purchased.There are those that think this is a very poor idea in that it will INCREASE the number of claims filed, and mean that people will have to buy liability insurance in subsequent years even though they may be out of their professional practices or their businesses. For the time being the concept has been rejected by the State of Alaska's Insurance Division.) The Industry hopes that the new forms will be approved for most jurisdictions soon.

Presentor: Robert Hunter; President; National Insurance Consumer Organization; Virginia

Main Points:
1. The Insurance Availability and Affordability "Crisis" we are enduring now,is a standard, typical Insurance economic cycle. The real rates of return for the Industry for 1984 are more like 6% to 7%, rather than the 1.7% quoted by the Industry.
2. This year alone, the Industry has enjoyed a 25 Billion dollar premium increase cash infusion into their accounts. In addition, their stock prices are rising at a rate twice as high as the Dow-Jones for stocks in general. Wall street is not fooled by this short term cyclical downturn. If we wait for one more year, the problem will solve itself and we won't have to have another meeting like this until 1995, when the next cycle occurs.

3. (On the matter of the appropriateness of Insurance companies as we know them today being able to satisfy Society's need for protection from risk): "Competition" will not help the Day Care Centers or the Nurse mid-wives get Insurance at affordable rates. There have been 71% premium increases for far less coverage in the recent past for these and similar professions.

4. The 1984 number quoted by the Industry for their profitability is a phony number.It ignores Capital Gains and Income Tax Credits.
5. We may need Tort Reform,I don't know.But in the past when we had to deal with issues like this we had data.(e.g. on no-fault Auto Insurance).In this instance we have to rely on the Insurance Industry to provide the data to be analyzed. However, they control the data and won't turn loose of it. Without the data you can't know what's happening.
6. The Insurance companies are offering NOTHING in return for "Tort Reform".Further,you should ask them what would happen if you passed their entire "Tort Reform" package, would your costs be reduced?
7. States need to upgrade their Insurance Departments competence levels. There are a lot of unsubstantiated assumptions being made about the setting of rates. They are based in part on a lot of guesswork. We need an institutionalized presence to challenge the insurance industry. We need Public Advocates to participate in insurance rate setting cases. We need annual reports from the Industry that provide information in far more detail than they now do.
8. If you want to change laws, think about changing:
   - Anti-group laws
   - Anti-rebate laws
   - Re-insurance laws

   Also: Move toward "Insurance Independence": That is; get out of depending on Lloyd's of London and other foreign exporters of re-insurance.

Presenter: NCSL Film on "What Legislators need to know about Medical Malpractice". There is also a handbook available on this topic. The film is available for loan for the asking.

Main Points:

1. The purpose of Medical Malpractice Insurance is to cover Negligence and to provide victims relief for the costs of Medical Care,Pain and Suffering and Impairment.
2. Between 1979 and 1983,there was a 31% increase in the premiums for ObGyn's and Surgeons.However,there is no uniformity in premium rates.A Policy that costs $1200 in Indiana costs $12500 in New York.
3. The criticisms of the System of Civil Law as it relates to Medical Malpractice are that:
   The Courts are slow, costly and unfair.
   Only 1/3rd of premiums paid end up in the pockets of injured parties.
   Awards for Non-Economic damages is highly unpredictable.
   Large settlements have often been overturned on appeal.

4. Have we "terrorized" Doctors and Hospitals? Is the legal system dictating medical judgement and practice? The Tort system forces the Medical profession to practice "Defensive Medicine" at an estimated cost of 15 Billion a year.

5. The rejoinder is that some of the increased service is exactly what the Courts had in mind and intentionally forced to occur with precedent setting awards and settlements.

6. Some of the alternatives that have been tried to resolve the Liability issues within the Medical Profession Include:

"Non-Binding Arbitration"........	Inadequate Compensation?
"Binding Arbitration"...........	Inadequate Compensation? Give up right to Jury Trial Some State Courts have over turned.
"Caps on Pain and Suffering".....	No limits on actual damages Most cases already have moderate P/S awards? Will hurt victims on exceptional cases?
"Collateral Source Rule"	
"Structured Settlements".........	Will cause higher admin. costs? The Insurance Company gets the Interest ?
"Contingent Fees"...............	Makes Attys.work for hi awards? Drives up Costs?

7. The basic data on malpractice incidences and awards is in the hands of the Insurance companies.The States have limited Insurance Company Reporting requirements.Make them open up their data to you. YOU NEED THE DATA IN ORDER TO MAKE AN INFORMED DECISION ABOUT THESE ISSUES.

8. A small number of individuals create most of the Medical Malpractice claims. States should require that when claims are filed against Doctors,that information goes immediately to the Medical Examining Board, and that when the Courts make a negative ruling on a Doctor, that the Medical Examining Board review his/her license. States should expand immunity for Medical Examining Board members who review Licensure and for witnesses in Licensure re-examination cases.

9. Lots of States set up "Pre-Trial Screening" systems in the 1970's.A lot of those of same states have since abolished them. In some jurisdictions,they've been thrown out on Constitutional grounds.

10. The Organization of "Pre-Trial Screening" systems has usually been set by Statute;staffed by Doctors and Lawyers; Funded by the States thru the Court Systems; with Compensation levels set by Statute for different

kinds of occurences. (Look at the Indiana model for one that's still functioning.)

11. States might want to look into establishing penalties for Spurious Defenses! (No one's yet doing it,but it's an intriguing idea.)
12. The Rand Corporation says that based on it's study of the impact of the California Medical Malpractice "Tort Reforms" that the Reforms did in fact reduce the number of cases, the number of claims and the size and number of awards. It is unclear however,at what cost to victim accessibility to the Courts.

Presentor: Josephine Driscoll; Commissioner of Insurance; State of Oregon.

Main Points:

1. During the period of "Cash Flow" underwriting in the period from 1974 to 1979; premiums were too low and Investments were poorly managed by the Insurance Industry. Some of those companies have become insolvent as a consequence.
2. Insurance Companies must return to (a primary mission) of Underwriting Risk and raise their prices to cover actual costs.
3. State regulators were not responsible enough during the "Cash Flow" years. Regulators allowed prices for premiums to remain too low for too long and (When the downturn came) allowed consumers to get hurt with precipitate price increases.
4. (Made a statement about "Scheduled Credit Limitation" which I didn't understand.)
5. Most Insurance Commissions have the power to Hold Administrative Law hearings on rates but not the power to change rates retroactively.
6. Should States have prior approval on rates? There are those that believe that Competition is in the best interest of the Consumer.
7. Insurance Companies should return to rates based "Cost-based Pricing" and Risk Sharing.Rates should be based on projected losses and supported by actual loss experience of insureds. Regulators should be certain that excessive profits are not allowed.
8. Regulators need to be able to control "Questionable Business Practices" on the part of the Industry including; Mid-term Cancellations, Mid-term price Increases, Mid-term Cuts in Coverage, Excessive Renewal premiums and Unwarranted Withdrawal from various Markets. Day Care Centers in Oregon were cancelled but the actual claims did not support such an action by the Industry.

9. There is a "Market Conduct" analysis of Insurance Company behavior in the Western Zone of the U.S.,being Prepared by the National Association of Insurance Commissions. (We need a copy of this.)
10. There are companies that are trying to use the current crisis to build profitability at the expense of consumers. We should not allow Mid-term premium rate increases and we should demand "Just Cause" for non-renewals.
11. Liquor Liability Insurance is not available in Oregon.
12. Proposed Solutions:
Have Companies voluntarily form "Joint Underwriting Associations" (I'm not clear what this would do.)
There is a Program being established by the National Association of Insurance Commissions (NAIC)and the Insurance Service Organization (ISO) in Kansas City Missouri, Which will be a National Clearinghouse for information on unavailability of Insurance for all markets.
The Trade Association Has agreed to assume the coverage for the short term.(Will check this to see if it means they have agreed to pick up all risks until solutions are forthcoming)
The Trade Association realizes they must be a part of the short term solution.
Regulators are determining whether there are other solutions.
Many States are considering adoption of "Claims Made" Insurance forms and inclusion of Defense Costs (In the Premium rates?) Costs to Insurors for Defense is very high.
13. The Insurance Industry in the U.S. is at a crossroads. Recovery cannot be realized by having the consumer bear the entire cost. Insurance Department resources are available to help solve these problems.

Presentor: Steve Korta; President; State Risk and Insurance Managers Association

Main Points:
1. This presentation mainly has to do with how to handle the States own Liability Insurance problems through Risk Management.
2. In order to understand your States individualized Risk posture, you'll need to become a Risk Specialist to some degree in you own right. Look at the Budgets, Size, and Mission of your States Risk Management Division. Also examine the organizational structure of it and others in the other States.
3. DON'T BE FOOLED THAT YOU ARE SELF-INSURED IF YOU DON'T HAVE ADEQUATE RESERVE FUNDS! (Which Alaska does NOT have, they were taken for other purposes in past years.)

4. There is no uniformity to the solutions States may adopt to handle their own Risk Management problems. They will depend upon your individual circumstances. You should attempt to figure out the best mix of self insurance and commercial coverage to fit your own needs.
5. It is however important for you to structure your State's program so that agencies of State Government are handled by frequency of events within each agency. You should find out where the Control Points are within your particular Government.
6. In order to enhance your State's Risk Management posture you should examine the Powers and Duties of Your State Insurance Commission, the possibility of Interstate Compacts; Inter-state sharing of Risk, Interstate Self Insurance and inter-state Regulatory and Informational exchange.
7 This is a complicated issue and needs lots of study before you make substantive changes. With Interstate cooperation and Consultation, the National Conference of State Legislatures might be a good lead agency to help States resolve these problems.
8. This issue (of Insurance Availability and Affordability) has all the elements of a good Political issue. Powerful Interest groups are opposition to one another, Major voting blocks need relief and there is Lots of Money involved.

WRAP-UP SESSION:PANEL DISCUSSION: Representative Lee Daniels; Illinois: Senator William Golden; Massachusets: Senator Dick Posthumous; Michigan and Michael Bird, National Conference of State Legislatures; Washington, D.C.

Presentor: Representative Lee Daniels

Main Points:

1. In April, 1984 at the demand of 4000 Doctors, the Illinois Legislature passed PA 84-0007, The "Medical Malpractice Act". More recently the Cook County Court has held it to be unconstitutional and it is now waiting on expedited appeal to the Illinois Supreme Court.
2. The Bill included:
   Pre-Trial Screening Panels (Non-mandatory)
   Sanctions against Losers who took cases to Court after the panels recommended that they not do so and then lost their case in court.
      Structured Verdicts
      Itemized Verdicts
      Collateral Source
      Non-Involvement Certification
      Allowance of some Countersuits
      Contingent Fee Limitations (Trial Lawyers agreed to this)

Banned Punitive Damages
Certification of Witnesses
A "Crackdown" on the regulation of Doctors (as a "Quid pro Quo".)

3. Some of our Tort Reform concerns were triggered by such things as:
A pending eight million verdict against the City of Chicago for an injury on a School Playground even tho the Mother was present with the child but had wandered off and was not properly supervising her child.
A California case in which a DWI offendor ran off the road, hitting a man who was in a telephone booth. The Man in the booth sued and even the designer of the Telephone Booth was held liable.
A case filed in Denver,in which a Son sued his Mother for 150K, for injuries received in an Auto accident when his mother was driving.
4. Higher Premiums have been put in place by the Insurance Companies to protect profits.
5. If you go to a "Claims Made" Insurance form,it means that you can never drop your Insurance,even if you leave your practice or your business.
6. In the Illinois Tort System,everybody wants to go to Court in Cook County Circuit Court,as the verdicts are generally far more generous to Plaintiffs in that court, compared to those in surrounding Counties. We need uniform rules for Jury Verdicts.
7. The Issues Are:
Reasonable Rate review
Risk Pooling
A decision on "Claims Made" vs "Occurence Made" Insurance forms.
The Number one public policy problem nationwide is the Insurance Crisis.The principal questions are:
When should public access to the Courts be limited?
How should we regulate the Insurance Industry?
8. The Trial Bar must understand that there will be Tort Reform.
The Insurance Industry must be more closely regulated.

Presentor: Sen. Wm. B. Golden; State of Massachusetts

Main Points:
1. We are dealing with two crises;one,that threatens to destroy the Private Insurance market.One,that threatens to destroy the Civil Justice System that protects society.
2. The "real" crisis is that the Voluntary Insurance market may not be able to continue to provide Insurance.
The "Unreal"crisis,is the series of unilateral decisions made the Insurance Industry to drop lines of Insurance and hurt Society. The Insurance Industry's attitude is one of arrogance, irresponsibility and intransigience.

3. The causes of the "real" crisis are:
Unreasonable Societal expectations for a "Risk Free" Environment. We are extremely Litiginous.It is fundamental to our value system. "Rights" do not always lead to "Remedies".
The Courts have become a Social Welfare System that run a Lottery for the Deep Pockets.
Our system (Of Torts) puts good businesses on a par with the real violators.

4. The solution is to re-examine our basic Tort assumptions, but that alone will not solve the problem. There is no single solution. It would help to bring basic Management Technology to our Courts,to make them more efficient and cut the costs of Litigation. Our Current Civil Litigation System is inefficient and too costly.

5. (We also need to) review the Rules of Civil Procedure (In order to curb inefficiencies and unecessary costs). For example in one Asbestos case 75 Attorneys sat in the courtroom for three days waiting to present five minutes of material to the judge. The Rules are now deliberately used for delay.

6. We need to Make maximum use of mediation in lieu of litigation.

7. (Our Tort System) has encouraged Businesses to be unproductive and inefficient. Avoidance of Liability has taken precedence over Profitability (as the motive for Management Decisions). These decisions rob society of it's Competitive Edge.

8. If businesses follow Good Management practices, they can avoid Strict Liability and Limit Damages. We need to provide (Legal) "Safe Havens" for Business so they can do this.

9. The Insurance Industry (On the other hand) has been poorly managed. The current crisis is due to Price Wars and the Ways insurance Companies are allowed to make a profit. There has been very limited effort by the Property and Casualty Insurance Industry to reduce losses by performing Risk Management Analyses of their Insureds. They don't want to be Risk managers; they want to be Money Managers! We need to have Insurance Companies to certify Insureds for compliance with basic safety standards and if the Insureds meet the Standards, they should get lower premiums.

10. Public Policy-makers are being manipulated by (Artificial) "Deadlines" established by the Insurance Companies. The Industry is putting a Gun at the head of the Legislatures of this country to Maximize, not just make, profits!

11. The answer may ultimately be to Self Insure and let the Industry walk away.

12. OR-perhaps we should not let them walk away, but withhold things they want, until they come around.

13. What is the value of keeping the (Existing) Insurance Industry? They have served Society well for hundreds of years.
14. The industry owes it to Society to "Stay in".
15. If they "walk away",they'll take the most profitable lines with them.OR-maybe we'll come to believe that we don't need them,we'll do it with Government Subsidized Insurance (and cut the Private Industry out of Property and Casualty altogether.)

Presentor: Sen.Dick Posthumous; Assistant Majority Floor Leader; State of Michigan.

Main Points:
1. In Michigan,the Senate Select Committee tried to look at this issue from the point of view of Consumers and Taxpayers.
2. (We found) that Michigan had the 48th.worst Insurance environment in the Country.We were losing essential services because of the Liability crisis,e.g.,Ob.Gyn's were unable to practice and 50% of our Family Practi e Physicians had to stop delivering babies. 50% of our Bars were going "Bare", and 38% of our State Highway funds were going to pay the costs of Liability Suits. Our Municipalities had suffered 200 to 400% rate increases.
3. We tried to deal with these problems rationally. We formed Subcommittees on: Malpractice; Government; and Dram Shop. We held eighteen hearings around the State. Those hearings were controversial and complicated.
4. We issued a Report, which we tried to make balanced. The Doctors were not very happy and the Trial Lawyers were not happy.
5. Despite the fact that the Insurance Industry created part of the problem (We concluded) that we really did have a Tort Reform problem. (Our evidence Included) that our self-insured cities had the same problems as professions and Businesses covered by private Property and Casualty Insurors. The State of Michigan had the same problems.
6. (One problem we had was that there was) LITTLE DETAILED DATA, thereby insuring that the debate was mostly Political.
7. (Some of the things we recommended included): For Municipalities; If Municipalities were less than 50% responsible for a Tort Claim, then there was no "Joint and Several Liability". If Municipalites were more than 50% liable for a Tort Claim, then there was "Joint and Several Liability". The Government liability issue was the easiest to resolve because there was bi-partisan support since every Government was affected, no matter the political complexion of their Leadership.
8. Dram Shop was more difficult. What we did was to Limit Non-Economic Losses and Require "Risk Reduction" programs of the Liquor Industry; including T.A.M.'s programs.

We also made the penalties higher for Illegally Serving Minors and Intoxicated persons.
We also made the penalties higher for Juveniles using false I.D.'s. (Indiana made similar changes 10 years ago. Check experience.)

9. Medical Malpractice was the most difficult.There was a perception on the part of the public that they were being ripped off by a lot of rich Doctors.But the rich Doctors were politically powerful and brought a lot of pressure to bear on the issue. We tried to reduce "Frivolous Suits" by implementing Pre-Trial Screening Panels. We established a 250K Cap for non-economic damages, because pain and Suffering awards were found to be arbitrary in our State between the different Court Jurisdictions.e.g. Wayne County Courts were found to have average awards 38% above the National average,while adjoining County Courts gave awards that averaged 7% below the national average. This was a very difficult area to resolve.Injured parties came before the Committees and presented their cases (in the most heart-rending ways) and it was difficult to change the Law.
10. State Legislators have got to realize that Tort Reform is a necessity. Self Insurance is not the answer because the Taxpayer will bear the costs.
11. This is a Very Controversial Issue. 10,000 Doctors demonstrated on the steps of the Statehouse, the largest demonstration we have had since the Vietnam War.

Presentor: Michael Bird; Staff Director for Government Operations, Banking and Regulation; National Conference of State Legislatures; Washington, D.C.

Main Points:

1. Are Congress and the Federal Administration concerned about this problem? Yes.
   Can you rest peacefully? No.
   Will Congress act in 1986? Yes.
   Will they act swiftly? Probably not.
2. There are eleven Congressional Subcommittees holding hearings on these problems around the country, including;
   - Commerce Committee
   - Small Business Committee
3. Congress is mostly concerned with:Long Haul Truckers; Hazardous Waste;Nuclear Accidents and Day Care.
4. The "President's Domestic Policy Council" has six Committees at work on these problems including the areas of Malpractice, Toxic Wastes, Vaccines, Product Liability and Government Contractors.
5. The U.S. Justice Department is working on the Tort problems of Municipalities and other Governments. (The Justice Department has said that "The Tort System is out of control").

6. Why is there Federal interest? Because they get the same horror stories as you do.
7. There is an increasing Federal desire to assess how well the States and the Insurance Industry are able to resolve these problems!The Federal Government is frustrated by (The State's and the Industry's inability to produce usable data).
8. The U.S,Senate is mainly interested in Tort Reform.
9. Federal Statutes contribute to the problem.
10. 75% of Congress says, "This is a State problem".25% of Congress thinks "Federal Intervention is Necessary". Those percentages could change at any time,depending on the pressure they feel.
11. The Congress is considering whether to act on:
    Federal reinsurance
    Revising the "McCarren-Ferguson Act" to establish minimal federal standards for how the States regulate the Insurance Industry.
    Establishing a Standby Federal program for some Insurance Lines.
    Nationalizing "Product Liability" (Insurance? or Responsibility?)
    Taking over State Guaranty Funds
    Taking over State Regulation of the Insurance Industry
12. Congress is particularly intersted in whether States are unable to resolve these problems. If Congress finds that States are unable to bring about longterm solutions to these problems (Look for) Congress to (at least) deal with "Special Problems" and "Comprehensive Tort Reform".
13. What might occur at the Federal level in the area of Pollution? A "Superfund" to afford ample Liability Insurance. (EPA is begining ?) to enforce pollution laws strictly.
14. Congress has thus far been unable to pass:SB 51 or HB 2817 which establish a "Superfund" and "Federal Reinsurance" (for some kinds of liability). They may act to expedite the establishment of Self-Insurance pools.
15. "Anything can happen,depending on the Political Pressures Congress is exposed to during the near future."

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THE REVOLUTION IN THE MUNICIPAL LIABILITY INSURANCE MARKET:

Report of Municipal and Public Official Liability Insurance Committee of the National Institute of Municipal Law Officers

1985-86

David J. LaBrec, Committee Chairman
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City of Dallas, Texas

October 19, 1985

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THE REVOLUTION IN THE MUNICIPAL LIABILITY INSURANCE MARKET:

Report of Municipal and Public Official Liability
Insurance Committee of the National Institute of
Municipal Law Officers
1985-86

1. HISTORICAL BACKGROUND:

The liability insurance industry, including the worldwide reinsurance market which underwrites a major portion of the liability coverage provided to both public and private insureds, is experiencing unprecedented losses, characterized by some experts as the worst financial crisis in the property/casualty industry in history. Insurance experts suggest a myriad of causes, many of which contributed directly to the present crisis and many of which are better explained as insurance industry excuses. The purpose of this report is to provide city attorneys with a better understanding of how the problem developed, the factors which contributed, the insurance industry's response and, most importantly, where cities should look for a solution.

A few statistics will put the problem in real perspective:

-- The insurance industry has lost more than $34 billion in the past two years; more than the total lost in the previous twenty-five years.

-- According to A. M. Best Company, in 1984 the liability insurance industry lost $3.8 billion compared with earnings of $2.5 billion in 1983. (This is the first annual loss for the liability insurance industry since 1906.)

-- As of April 3, 1985, the casualty facultative reinsurance capacity in the United States decreased $100.5 million.

-- Wausau Insurance Company lost $102 million in the first nine months of 1984 and its surplus reserves decreased by $163 million.

-- Century Insurance Company lost $11.2 million in the first six months of 1984.

-- ARMCO Insurance Group lost $44 million in the first four months of 1984.

-- In December 1983, American Express (owner of Firemen's Fund Insurance Company) announced it would drop earnings by 10 percent from 1982 because of a $230 million shortfall in reserves.

-- The industry experienced underwriting losses of $785.5 million in 1982, compared to $468.9 million in 1981, while the combined loss and expense ratio reached 105.5% of earned premium.[1]

2. <u>FACTORS CONTRIBUTING TO THE CRISES</u>

Among some of the more significant factors that contributed, at least in part, to the present liability insurance crisis are the following:

-- A continuation of the traditional relationship between primary and excess reinsurers

-- A significant increase in the number of competitors in the reinsurance market and a corresponding decrease in its sophistication

-- Increased competition in the primary insurance market due to a corresponding increase in inflation and a resulting development of cash flow underwriting

-- A developing deficiency in the compilation of sound actuarial data accompanied by a corresponding increase in volume and complexity of claims and litigation

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THE REVOLUTION IN THE MUNICIPAL LIABILITY INSURANCE MARKET:

Report of Municipal and Public Official Liability
Insurance Committee of the National Institute of
Municipal Law Officers
1985-86

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-- Unsound underwriting practices

-- Increases litigation and attendant expenses

In short, the crisis developed as follows. In the past few years, because of high interest rates, insurance companies have invested their premiums and recovered handsome profits, thereby subsidizing the ever-increasing claim losses that were being experienced. While interest rates hovered near 20% a few years ago, the insurance industry began to engage in what is known as "cash flow underwriting" -- the practice of selling insurance coverages at cut-rate prices with the intent of making up on reinvestments. This phenomenon brought unknowledgeable (and in many instances unscrupulous) participants into both the primary insurance market (the portion of the industry that actually writes insurance policies), and into the reinsurance market (the portion of the industry that underwrites primary carriers through reinsurance treaties). When a company writes a large liability policy, particularly to an insured perceived as high-risk, the carrier turns to larger companies for reinsurance underwriting assistance.

When the recent fall in interest rates occurred, companies were left without the anticipated investment income to subsidize claim loses. They were then in a position of having inadequate premiums and high-risk policies. At the same time, the reinsurance market (led by influencial companies such as Lloyd's of London) curtailed their reinsurance treaties. The net result: The insurance industry simply lost the capacity to underwrite high-risk policies. Once the reinsurance capacity was lost and interest rates had fallen, the industry had placed itself in the intenable position of holding anticipated incurred losses which far exceeded foreseeable income.

3. THE INDUSTRY'S RESPONSE.

Not unexpectedly, the insurance industry has taken numerous steps to reduce its losses; losses that are a direct result of negative cash flow underwriting and unsound investment practices of the industry itself. The major changes which are taking place are:

(A) Cancellation of major exposure clients

(B) Restriction of new business

(C) Reduction of coverages

(D) Increase in premiums

(E) Curtailment of underwriting of High-Risk Business

(F) Selective underwriting criteria;

all of which are indicative of the industry's tradition of no-risk to its stockholders philosophy. Each of these responses is analyzed separately below.

A. CANCELLATION OF MAJOR EXPOSURES.

A number of insurers have stopped underwriting municipal liability coverage completely. Some of the major ones are:

Aetna Casualty & Surety	Home Indemnity
American General	Ideal Mutual
Cherokee	INA/CIGNA
Canadian Indemnity	St. Paul

Compass	Transit Casualty
Great Southwest Fire	United National
Guaranty National	

Others have temporarily discontinued writing municipal liability insurance. For example, Colonial Penn has cancelled scores of municipal policies and only temporarily extended policies for the states of Colorado, New Mexico and Wyoming. Utica National Insurance Group has announced that it is cancelling all local government policies, leaving 229 New York cities seeking new coverage. Forum Insurance, one of the major underwriters of public official and police professional liability coverages, has resumed underwriting after a three-month layoff, but with the maximum limits for new business reduced to $2 million and a maximum of $5 million on renewals (Note: Forum will not write coverage for cities with budgets over $50 million or cities with populations of 200,000 or more). Contra, Calvert Insurance Company has now resumed underwriting municipal liability after a six-month layoff, but it limits police professional liability to $1 million.

Municipalities are not the only entities that the industry has targeted for cancellation. Others include the airline industry, professionals, including doctors and accountants, and industries which are likely targets of products liability lawsuits. Day-care centers have become a high risk business because of sexual abuse cases. Liquor stores have been denied liability coverages because they now may be liable for death and injury caused by drunken customers.

Because of the rapid and continuing rise in cancellations, the National Association of Insurance Commissioners received outcries of "unfair and deceptive trade practices" by insurers. The Commission has established new guidelines relating to midterm cancellations of coverage, providing that insurers wishing to cancel should do so only at the expiration of the policy itself, or alternatively, should provide for other reinsurance. The new guidelines also provide that at least thirty days advance notice be given for non-renewals of policies in order to allow the insured to seek alternate coverages.

B. RESTRICTION OF NEW BUSINESS

A second response by the industry has been to simply refuse to underwrite new business. This, coupled with the withdrawal of the major municipal liability carriers from the market, has posed further unforeseen and uncontrollable difficulties for municipalities seeking liability coverage. At the same time that primary carriers are withdrawing rapidly from this and other markets, the reinsurers who have rapidly proliferated the market in recent years are "renegotiating" their treaties with the few primary carriers still in the business of providing municipal liability coverage. As a result, the companies which are willing to write municipal liability coverage often are unable to do so because of inadequate reserves and unavailable reinsurance capacity.

C. REDUCTION OF COVERAGES.

A third by-product of the present insurance crisis is that the Insurance Services Office (ISO), the entity which provides form policies for the commercial insurance industry, has developed a new comprehensive general liability (C.G.L.) policy which significantly diminishes protection to the insured in a number of respects. For example, the revised form deletes pollution coverage, which historically was included but with a "sudden and accidental" limitation. However, due to recent developments in case law,[2] the industry has chosen to completely withdraw from writing pollution coverage of any sort.

The new ISO form further modifies existing comprehensive general liability forms by including defense costs within aggregate limits. Due to the ever increasing costs of litigation, including defense costs within the aggregate limits will significantly diminish indemnification afforded under primary coverages.[4] As a consequence, umbrella coverages will likely become even more expensive. ISO is also considering an optional endorsement to provide for the sharing of legal costs by the insured.

The new ISO form will also change "occurrence" coverage to "claims made" coverage because of the industry's experience with litigation arising out of coverages for asbestos, DES, radiation, agent orange, and other "long tail" risks. Much of the burden is being passed to those perceived as high risk insured, such as municipalities. If coverages change from occurrence to claims-made format, incidents that were previously insured (because they occurred during the policy period), will oftentimes be uninsured unless a claim has actually been made against the insured during the coverage period.

The new ISO CGL form will also contain an extended reporting period restriction whereby claims made more than sixty days after the policy expiration will not be covered unless the insured purchases an "unlimited extended reporting period," for which the premium will approximate 200% of the premium for the prior policy year. Thus, unless the buyer renews his coverage with carrier X, he will be compelled to purchase the extended reporting period coverage at up to 200% additional cost. If, on the other hand, carrier X chooses to cancel or non-renew or if the buyer seeks coverage from carrier Y, a 200% premium will be required to keep the extended coverage.

D. INCREASE IN PREMIUMS.

One predictable response of the industry has been to pass on the cost of the industry's underwriting mistakes through increased premiums to those perceived as high-risk insureds. No direct link need exist between actual losses and high premiums: a mere perception by the industry that the particular insured falls into a high-risk category provides the industry with sufficient basis for escalating premiums, regardless of actual experience.[4]

At the same time as they increase premiums, insurers are also demanding higher deductibles, higher self-insured retentions and stricter reporting requirements.

E. CURTAIL UNDERWRITING OF HIGH-RISK COVERAGES.

Since the beginning of 1985, a number of insurers have totally curtailed underwriting liability coverages for public entities and others continue to withdraw from the market. As of August, 1985, twelve major carriers have stopped writing coverage: all within the last two years. The stated reasons for the growing reluctance to insure political entities: fear of growing losses resulting from the erosion of governmental immunity by the courts. Insurers also express an aversion to competitive bidding, arguing that they are unable to win renewals if another insurer underprices them. Third, reinsurers are refusing public entity risks, thereby forcing the primary insurers to underwrite more of the exposure themselves, if they have the financial capacity, or to refuse to write the coverage if they do not.

F. SELECTIVE UNDERWRITING CRITERIA.

Another industry response has been to develop underwriting criteria by: limiting the scope, amount and duration of coverages; establishing overlapping population and budgetary restrictions on the entities that they will insure; demanding higher deductibles and self-insured retentions; adding new "standard" exclusions; and rewriting coverages to conform with the new ISO "claims made" C.G.L.

forms (discussed above).

4. LONG-TERM SOLUTIONS.

In light of the revolution occurring in the municipal liability insurance market, cities must immediately look to other options, such as self-insurance, pooling, or purchase of commercial coverage with higher deductibles. If the third option (purchase of commercial coverage with higher deductibles) is chosen, the insured must establish sound budgetary restrictions to provide revenue necessary to counteract the reduction of coverages because of the new ISO exclusions.

It is suggested that larger cities may be able to survive the crisis in the insurance industry by solely self-insuring (which is in effect, "uninsuring"), but small municipalities can ill afford the inherent risks of doing so. A large judgment can place a small city in such financial straits that it is forced to either increase taxes, issue bonds, or file a petition for bankruptcy. The recent experiences of cities such as South Tucson, Arizona, Pawpaw, West Virginia, Grays Lake, Illinois, Bay St. Louis and Mound Bayou, Mississippi, Jackson Township, New Jersey, Troy, Michigan, and Wapanucka, Oklahoma, to name only a few, are illustrative of the significant risk that small cities now face.

However, for those small cities, self-insurance pooling is becoming an increasingly attractive alternative. The cost of coverages is often significantly less than is coverage on the traditional insurance market and the coverage itself is much broader and much better adapted in most instances to the risks which a small municipality is attempting to insure. However, a caveat is in order. Self-insurance pools can easily fall into the same trap where the insurance industry presently finds itself. Most self-insurance pools buy reinsurance through the same market that has recently retrenched. They are often involved in similar investment practice that has brought the insurance industry to its knees. Third, they are becoming increasingly aware of the need to restrict their coverages the same as the industry has done via its ISO form revisions. Another alternative is the purchase of commercial insurance coverage with significantly higher deductibies than in the past.

By proposing a higher deductible, a municipality sends a message to potential underwriters that it is both aware of the increasing exposures and willing to underwrite a larger portion itself. A comprehensive risk management program which identifies significant risks, establishes methods for their reduction and explores alternatives by which those that are likely to occur are financed will make a municipality a much more attractive insured.

Regardless of which alternative is chosen, long-range risk management and litigation cost control practices must become standard procedure. With the continued proliferation of litigation of all sorts, municipalities will continue to be target defendants, and thus perceived as "high-risk" insureds. Therefore, it is safe to assume that even after the insurance industry has stablized it will continue to respond to municipalities in the same manner as it has to the present crisis.

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[1] Best Management Insurance Reports (March, 1983)

[2] For example, see Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Company, et al., 186 N.J. Super. 156 (Superior Court, New Jersey 1982).

[3] In 1984, one quarter of earned insurance premiums in general liability coverages (approximately $1.5 billion) were spent on attorney's fees, a 500 percent increase over the past thirty years. National Underwriter (May 3, 1985)

[4] For example, the City of Dallas, Texas has seen an increase in liability insurance premiums from $94,183 in 1983 to $221,518 in 1984. In 1985, the City has gone self-insured because it obtained only two premium quotes: one from Cal-Union (the City's 1984 carrier) for approximately $1.5 million, and one from Arthur J. Gallager & Co. in the amount of $2.8 million. The Cal-Union bid, (in addition to being 1,590% of the 1983 premium) excluded significant areas of coverage: motor vehicle insurance for the City's 4,000 vehicle fleet, employment discrimination, interruption of utility service, athletic events sponsored by the City and pollution. The Gallager bid, on the other hand, purported to cover those categories, but contained a $1 million per claim limit (the City bid specification called for coverage of at least $50 million per claim). The 1985 bid proposals apparently ignored the City's prior claims and litigation experience: In no previous year have the total amount of paid claims even approached the amount of the 1985 premium quotes.

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2. Temporary restraining order

Temporary restraining order preventing defendant in obscenity case from removing or in any manner interfering with alleged obscene material was properly dissolved where order was defective in not specifying what conduct was prohibited. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

§ 12-816. Content of judgment and order

Notes of Decisions

In general 2
Validity 1

1. Validity

Unconstitutional portion of this section permitting destruction of promotional materials without providing for judicial review of materials to determine whether they are also obscene was severable from remainder of section. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

Provision of this section providing for destruction of items directly related to obscene materials including promotional material and printing presses was unconstitutional prior restraint in absence of any provision for judicial review of materials to determine whether they were also obscene. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

2. In general

Items of neutral equipment which may be used in future for legitimate forms of expression may not be destroyed because of past transgressions of obscenity laws. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

This section providing that, upon finding existence of nuisance, court shall enjoin defendant from further maintaining nuisance of exhibiting or selling obscene materials did not require as a remedy the closure of entire business or place in which obscene items had been sold or distributed but merely established remedy of abating nuisance by prohibiting further sales or exhibition of obscene materials. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

§ 12-817. Civil penalty; forfeiture; accounting

Notes of Decisions

1. Validity

Provision of this section classifying obscene materials as contraband was not unconstitutional since, because obscenity was not within scope of U.S.C.A. Const. Amend. 1, legislature could declare it contraband. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

ARTICLE 2. ACTIONS AGAINST PUBLIC ENTITIES OR PUBLIC EMPLOYEES

Laws 1984, Ch. 285, § 2 substituted "Actions against Public Entities or Public Employees" for "Actions against the State on Contract or for Negligence" as the heading for this article.

Cross References

Procurement Code, exclusive procedure for asserting claim against state or state agency under code, see § 41-2615.

§ 12-820. Definitions

In this article, unless the context otherwise requires:

1. "Employee" includes an officer, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does not include an independent contractor. Employee includes noncompensated members of advisory boards appointed as provided by law.

2. "Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person.

3. "Maintenance" means the establishment or continuation in existence of facilities, highways, roads, streets, bridges or rights-of-way by a public entity and does not mean or refer to ordinary repair or upkeep.

4. "Prisoner" means a person incarcerated while awaiting sentence or while serving a sentence imposed by a court of law.

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§ 12-820.02. Qual

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5. "Public employee" means an employee of a public entity.

6. "Public entity" includes this state and any political subdivision of this state.

7. "State" means this state and any state agency, board, commission or department.

Added by Laws 1984, Ch. 285, § 3.

Laws 1984, Ch. 285, § 1 provides:

"**Section 1. Legislative purpose and intent**

"A. The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the legislature recognizes that, while a private entrepreneur may readily be held liable for negligence within the chosen scope of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state. All of the provisions of this act should be construed with a view to carry out the above legislative purpose.

"B. The legislature intends that the provisions of this act which modify existing law apply to causes of action which arise after the effective date of this act. The provisions of this act which confirm existing law apply to causes of action arising before the effective date of this act."

§ 12-820.01. Absolute immunity

A. A public entity shall not be liable for acts and omissions of its employees constituting:

1. The exercise of a judicial or legislative function; or

2. The exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for:

(a) The purchase of equipment,

(b) The construction or maintenance of facilities,

(c) The hiring of personnel, or

(d) The provision of governmental services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

3. The licensing and regulation of any profession or occupation.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

Cross References

Issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization, see § 12-820.02.

Library References

States ⇐191(1).
C.J.S. States §§ 297, 298.

§ 12-820.02. Qualified immunity

Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for:

1. The failure to make an arrest or the failure to retain an arrested person in custody.

2. An injury caused by an escaping or escaped prisoner.

3. An injury resulting from the probation, parole, furlough or release from confinement of a prisoner or from the terms and conditions of his probation, parole, furlough or

release from confinement or from the revocation of his probation, parole, furlough or release from confinement.

4. An injury caused by a prisoner to any other prisoner.

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to § 12-820.01.

6. The failure to discover violations of any provision of law requiring inspections of property other than property owned by the public entity in question.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

Library References

Officers and Public Employees ⟹116.

States ⟹191(1).

C.J.S. Officers and Public Employees §§ 206 to 208.

C.J.S. States §§ 297, 298.

§ 12-820.03. Affirmative defenses

Neither a public entity nor a public employee is liable for an injury:

1. Arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions.

2. Which is attributable to the fault of a person, other than a public employee, driving a motor vehicle while the person was under the influence of intoxicating liquor. This paragraph does not apply to persons who are not passengers or to minors who are passengers riding in or upon the motor vehicle.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

1984 Reviser's Note:

Pursuant to authority of § 41-1304.02, the subsection designation of "A." was omitted as a correction of a manifest clerical error.

§ 12-820.04. Punitive and exemplary damages; immunity

Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

§ 12-820.05. Other immunities

A. Except as specifically provided in this article, this article shall not be construed to affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state.

B. A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee's propensity for that action. This subsection does not apply to acts or omissions arising out of the operation or use of a motor vehicle.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

§ 12–821. Authorization of claim against public entity or public employee; definition

A. Persons who have claims against a public entity or public employee shall file such claims in the same manner as that prescribed in the Arizona Rules of Civil Procedure, Rule 4(D) within twelve months after the cause of action accrues. Any claim which is not filed within twelve months after the cause of action accrues is barred and no action may be maintained except upon a showing of excusable neglect if the action is brought within the otherwise applicable period of limitations, provided that if there is no excusable neglect, and if the absence of excusable neglect is because of the conduct of the claimant's attorney, then the action shall proceed, and the public entity and public employee shall have a right of indemnity against the claimant's attorney for any liability assessed in the action.

B. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within twelve months after the disability ceases.

C. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

D. A claim for medical malpractice under chapter 5.1, article 1 of this title [1] is excluded from the provisions of this section as no claim is necessary to bring a medical malpractice action.

E. For the purposes of this section "excusable neglect" means reasonable and foreseeable neglect or inadvertence.

Added by Laws 1984, Ch. 285, § 5.

[1] Section 12–561 et seq.

Source:

Laws 1912, Ch. 59, §§ 1, 2.
Civ.Code 1913, §§ 1791, 1792.
Rev.Code 1928, §§ 4379, 4380.
Code 1939, §§ 27–101, 27–102.
A.R.S. former §§ 12–821, 12–822.

Former § 12–821, relating to the same subject matter as this section, was repealed by Laws 1984, Ch. 285, § 4.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

1984 Reviser's Note:

Pursuant to authority of § 41–1304.02, in the heading of this section "; definition" was added following "employee".

Notes of Decisions

Constructive notice 6.5
Class actions 16.5
Jurisdiction 4.5

2. Construction and application

Notice of claims statute requires presentation of a claim and disallowance before suit may be brought against state. Mammo v. State (App. 1983) 138 Ariz. 528, 675 P.2d 1347.

Employees' claims against state for past overtime work were based upon statutorily implied provisions of their employment contracts with the state, were subject to statutory claim and filing requirements, and thus were not susceptible to review in special action proceedings and any relief which might be sought by employees under special action procedures for other claims would be limited to individual claims asserted by employees themselves, since class action relief was not available under special action rules. Clark v. State Livestock Sanitary Bd. (App.1932) 131 Ariz. 551, 642 P.2d 896.

4. Purpose of law

Purpose behind this section requiring presentation of a claim and disallowance before suit may be brought against state is to afford agency opportunity to investigate claim and assess its liability, to afford agency opportunity to attain a settlement and avoid costly litigation, and to advise legislature where settlement could not be achieved. Mammo v. State (App.1983) 138 Ariz. 528, 675 P.2d 1347.

4.5. Jurisdiction

Although state defendants in wrongful death action did not raise contention that plaintiff had failed to comply with this section at trial, issue was properly before court of appeals since subject matter jurisdiction may be raised at any time and is never waived. Mammo v. State (App.1983) 138 Ariz. 528, 675 P.2d 1347.

6.5. Constructive notice

State defendants' answer to merits of wrongful death action amounted to a constructive disallowance of plaintiff's claim, satisfying requirement of this section that a claim be first presented and disallowed before suit may be brought against state. Mammo v. State (App.1983) 138 Ariz. 528, 675 P.2d 1347.

16.5. Class actions

Provisions of § 12–821 et seq. authorizing tort or contract claims against the state must be satisfied by each individual or entity having a contract or negligence claim against the state before an action may be brought in court and is not satisfied by a claim filed on behalf of a class where the claim does not meet the requirements for an individual claim established by § 12–821 et seq.; declining to following *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701; and *Santa Barbara Optical Co., Inc. v. State Board of Equalization*, 47 Cal.App.3d 244, 120 Cal. Rptr. 609. Evans by Beemer v. Arizona Dept. of Corrections (App.1983) 139 Ariz. 321, 678 P.2d 506.

§ 12–822. Service of summons; change of venue

A. Service of summons in an action authorized in § 12–821 shall be made pursuant to Arizona Rules of Civil Procedure, Rule 4(D).

B. In an action against this state upon written demand of the attorney general, made at or before the time of answering, served upon the opposing party and filed with the court where the action is pending, the place of trial of any such action shall be changed to Maricopa county.

Formerly § 12–824. Renumbered as § 12–822 and amended by Laws 1984, Ch. 285, § 7.

Former § 12–822, derived from Laws 1912, Ch. 59, § 2; Civ.Code 1913, § 1792; Rev.Code 1928, § 4380; and Code 1939, § 27–102, was repealed by Laws 1984, Ch. 285, § 6. See, now, § 12–821.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

§ 12–823. Judgment for plaintiff; amount; interest and costs

If judgment is rendered for the plaintiff, it shall be for the amount actually due from the public entity to the plaintiff, with legal interest thereon from the time the obligation accrued and with court costs.

Formerly § 12–825. Renumbered as § 12–823 and amended by Laws 1984, Ch. 285, § 8.

Former § 12–823, was repealed by Laws 1984, Ch. 285, § 6.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

§§ 12–824, 12–825. Renumbered as §§ 12–822 and 12–823

§ 12–826. Report of judgments to legislature by governor; payment

A. The governor shall report to the legislature at each session judgments rendered against the state, and not theretofore reported.

B. The director of the department of administration shall draw his warrant upon the state treasury for payment of the judgment upon presentation to him of an authenticated copy of the judgment together with the approval of the judgment by the attorney general.

C. The director of the department of administration shall not draw the warrant until an appropriation therefor is made by the legislature.

Amended by Laws 1983, Ch. 98, § 13.

ARTICLE 8. MATERNITY AND PATERNITY PROCEEDINGS

§ 12–843. Persons who may originate proceedings

Proceedings to establish the maternity or paternity of a child or children and to compel support under this article may be commenced by any of the following:

1. The mother.

1984 Reviser's Note:

This section contains the amendments made by Laws 1984, chapter 189, section 49 and chapter 200, section 1 which were blended together as shown above pursuant to authority of section 41-1304.03.

§ 41-621. Purchase of insurance; coverage; limitations; exclusions

Text of section effective January 1, 1985.

A. The department of administration shall obtain insurance against loss, to the extent it is determined necessary and in the best interests of the state as provided in subsection C of this section, on the following:

1. All state owned buildings, including those of the universities, but excluding buildings of community colleges, whether financed in whole or in part by state monies and in which the state has an insurable interest as determined by the department of administration.

2. Contents in any buildings owned, leased or rented, in whole or in part, by or to the state and reported to the department of administration.

3. The state and its departments, agencies, boards and commissions and all officers, agents and employees thereof against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization except as prescribed by this chapter.

4. All personal property reported to the department of administration, including vehicles and aircraft owned by the state and its departments, agencies, boards and commissions and all non-owned personal property which is under the clear responsibility of this state because of written leases or other written agreements.

5. The state and its departments, agencies, boards and commissions against casualty, use and occupancy and liability losses of every nature except as prescribed by this chapter.

6. Workers' compensation and employers' liability insurance.

7. Other exposures to loss where insurance may be required to protect this state and its departments, agencies, boards and commissions and all officers, agents and employees.

B. The department of administration may determine, in the best interests of the state, that state self-insurance is necessary or desirable and, if that decision is made, shall provide for state self-insurance for losses arising out of state property or liability claims prescribed by subsection A of this section. If the department of administration provides state self-insurance, such coverage shall be excess over any other valid and collectible insurance.

C. In carrying out the provisions of this chapter, the department of administration shall establish and provide the state with some or all of the necessary risk management services, or shall contract for risk management services and shall purchase such insurance coverage, pursuant to chapter 23 of this title,[1] as the director of the department of administration deems necessary in the best interest of the state[2] and may, in addition to other specifications of such coverage as deemed necessary, determine self-insurance to be established. The provisions of chapter 23 of this title shall not apply to the department of administration's procurement of excess loss insurance from the state compensation fund for the state's workers' compensation liability for individual or aggregate claims, or both, in such amounts and at such primary retention levels as the department of administration deems in the best interest of the state. In purchasing insurance to cover losses arising out of state property or liability claims prescribed by subsection A of this section, the department of administration is not subject to the provisions of title 20, chapter 2, article 5.[3]

D. No successful bidder for risk management services pursuant to this section shall be entitled to receive directly or indirectly any sales commission, contingent commission, excess profit commission, or other commissions, or anything of value, as payment for the risk management services except those amounts received directly from this state as payment for the risk management services.

E. The department of administration shall pay for purchased risk management services and premiums for insurance on state property and state liability pursuant to provisions of this chapter and subject to legislative appropriations.

F. A state officer, agent or employee acting in good faith, without wanton disregard of his statutory duties and under the authority of an enactment that is subsequently declared to be unconstitutional, invalid or inapplicable, is not personally liable for an injury or damage caused thereby except to the extent that he would have been personally liable had the enactment been constitutional, valid and applicable.

G. A state officer, agent or employee, except as otherwise provided by statute, is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duties.

H. The state and its departments, agencies, boards and commissions are immune from liability for losses arising out of a judgment for willful and wanton conduct resulting in punitive or exemplary damages.

I. The following exclusions shall apply to subsections A and B of this section:

1. Losses that arise out of and are directly attributable to an act or omission determined by a court to be a felony by a state officer, agent or employee unless the state knew of the person's propensity for that action, except those acts arising out of the operation or use of a motor vehicle.

2. Losses arising out of contractual breaches.

3. Employment discrimination actions.

J. If self-insurance coverage is determined to exist, the attorney general, with funds provided by the department of administration, in accordance with subsection B of this section, shall provide for the defense, either through his office or by appointment of outside legal counsel, of the state and its departments, agencies, boards and commissions and all officers, agents and employees thereof for or on account of their acts or omissions covered pursuant to this chapter. All state departments, agencies, boards and commissions and all officers, agents and employees thereof shall cooperate fully with the attorney general and department of administration in the defense of claims arising pursuant to this chapter.

K. A claim for liability damages made pursuant to this chapter may be settled and payment made up to the amount of twenty-five thousand dollars or such higher limit as may be established by the joint legislative budget committee with the approval of the director of the department of administration. A claim over the amount of twenty-five thousand dollars up to fifty thousand dollars or such higher limit as may be established by the joint legislative budget committee may be settled and payment made with the approval of the director of the department of administration and the attorney general. Any claim over the amount of fifty thousand dollars or such higher limit as may be established by the joint legislative budget committee may be settled and payment made with the approval of the director of the department of administration, the attorney general and the joint legislative budget committee. If it is in the best interest of this state, the joint legislative budget committee may establish higher settlement authorities. Any settlements involving amounts in excess of fifty thousand dollars or such higher limit as may be established by the joint legislative budget committee shall be vested with the department of administration, the attorney general and the joint legislative budget committee pursuant to the authority granted.

L. Neither the authority provided by this section to insure, nor the exercise of such authority, shall:

1. Impose any liability on this state or the departments, agencies, boards and commissions or any officers, agents and employees of this state unless such liability otherwise exists.

2. Impair any defense this state or the departments, agencies, boards and commissions or any officers, agents and employees of this state otherwise may have.

M. The department of administration shall promulgate such rules and regulations as are deemed necessary to carry out and implement the provisions of this chapter.

Amended by Laws 1975, Ch. 12, § 1, eff. April 21, 1975; Laws 1975, Ch. 102, § 17; Laws 1976, Ch. 72, § 1; Laws 1976, Ch. 117, § 2; Laws 1976, Ch. 136, § 2, eff June 27, 1976; Laws 1977, Ch. 121, § 1; Laws 1979, Ch. 176, § 1; Laws 1980, Ch. 246, § 37, Laws 1982, Ch. 262, § 15, eff. July 24, 1982, effective retroactively to July 1, 1982;[4] Laws 1983, Ch. 87, § 4, eff. April 12, 1983; Laws 1983, Ch. 98, § 121; Laws 1984, Ch. 188, § 49; Laws 1984, Ch. 200, § 1; Laws 1984, Ch. 251, § 25, eff. Jan. 1, 1985.

[1] Section 41-2501 et seq.
[2] So in original. Probably should read "state,".
[3] Section 20-401 et seq.
[4] See note following § 41-2362.

For text of section effective until January 1, 1985 see § 41-621, ante.

Source:

Laws 1956, Ch. 153, § 1.
A.R.S. former § 35-641.

For legislative intent regarding termination of provisions added or amended by Laws 1980, Ch. 246, see note following § 23-108.02.

For legislative intent of Laws 1982, Ch. 262, see note following § 35-151.

For purpose and effective date provision of Laws 1984, Ch. 251, see Historical Note following § 41-2501.

Reviser's Notes:

1975 Note. As it existed prior to the 1976 amendments, this section contained the amendments made by Laws 1975, chapter 12, section 1 and chapter 102, section 17 which were blended together pursuant to authority of section 41-1304.03.

1976 Note. As it existed prior to the 1977 amendment, this section contained the amendments made by Laws 1976, chapter 117, section 2 which amended section 41-621 as amended by Laws 1976, chapter 72, section 1 and by Laws 1976, chapter 136, section 2 which were blended together pursuant to authority of section 41-1304.03.

1983 Note. This section contains the amendments made by Laws 1983, chapter 87, section 4 and chapter 98, section 121 which were blended together pursuant to authority of section 41-1304.03.

1984 Note. This section contains the amendments made by Laws 1984, chapter 188, section 49, chapter 200, section 1 and chapter 251, section 25 which were blended together as shown above pursuant to authority of section 41-1304.03.

Cross References

Authority to procure liability insurance covering officers, agents and employees, see §§ 9-497 and 11-261.

Cities and towns, liability insurance, see § 9-497.

Counties, errors and omissions and liability insurance, see § 11-261.

Liability loss revolving fund, payment of self-insured liability losses, see § 41-622.

Risk management administration fund, payment of service costs, see § 41-622.

Rules, administrative procedure, see § 41-1001 et seq.

Workmen's compensation liability laws revolving fund, see § 41-622.

Administrative Code References

Establishment of self-insurance, see A.C.R.R. R2-10-01.

Reporting procedures, accidents and incidents, see A.C.R.R. R2-10-02.

Specifications, agency and company selection for insurance to cover insured risks, see A.C.R.R. R2-10-100 et seq.

Law Review Commentaries

Governmental immunity in Arizona—The Stone case. 6 Ariz.L.Rev. 102 (1964).

Governmental tort immunity revisited. 25 Ariz.L.Rev. 1081 (1983).

Library References

States ⇐90.
C.J.S. States §§ 154, 155, 160.

United States Supreme Court

Immunity of state. State as not constitutionally immune from suit in the courts of another state, see Nevada v. Hall, 1979, 99 S.Ct. 1182, 440 U.S. 410, 59 L.Ed.2d 416.

Notes of Decisions

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1. Construction and application

Provision of this section making state immune from liability for willful and wanton misconduct cannot be applied retroactively to impair a vested right. State v. Sanchez (App.1978) 119 Ariz. 64, 579 P.2d 568.

Supreme Court would take judicial notice of this section and §§ 9-497, 11-261, permitting the insuring of governmental agents and agencies. Patterson v. City of Phoenix (1968) 103 Ariz. 64, 436 P.2d 613.

State of Arizona and its departments are authorized to expend public funds to provide a form of insurance to employees of the state who may be injured by an uninsured motorist. Maryland Cas. Co. v. Wilson (1967) 6 Ariz.App. 470, 433 P.2d 650.

If members of the private industry council were acting in good faith within the scope of statutory authority, including regulations promulgated pursuant to that authority, they would not be held liable for injuries or damage resulting from such acts or omissions. Op.Atty.Gen. No. I79-311.

Non-paid human and legal rights committee members are not personally liable for actions taken in good faith pursuant to their authority; office of attorney general would defend such committee members in suits relating to discharge of their duties. Op.Atty.Gen. No. I79-234.

State retirement system board and investment advisory council members acting in their official capacity will be accorded the same treatment as other state officials; the attorney general will defend an action brought against a state official or in which he has an interest, and board and council members, acting in their statutory capacities have state insurance protection to cover their actions while carrying out their duties. Op.Atty.Gen. No. I79-161.

Under § 41-622 relating to revolving funds for uninsured losses and the risk management administrative fund, as amended by Laws 1977, Ch. 121, the department of administration is to request an appropriation from the Legislature for the following fiscal year, 1978-1979, for each of the three separate funds which have been set up by Ch. 121, and then the department of administration, risk management services division is responsible to provide liability and property damage protection to the agency either by the purchase of insurance or through a self-insurance program from moneys appropriated directly to the various funds. Op.Atty.Gen. No. 77-161.

State department of health may, in its discretion, purchase liability insurance for its officers, agents, or employees. Op.Atty.Gen. No. 57-11.

1.4. Volunteers

Department of administration risk management services lacks authority to purchase disability insurance for listed state service volunteers. Op.Atty.Gen. No. I79-112.

State agencies are not prohibited from using volunteers, but coverage of volunteers under state insurance policy is questionable, and therefore, volunteer should be informed that there is no coverage for them and should sign a written acknowledgement that their work is being done on a voluntary basis, free of any charge to the state. Op.Atty.Gen. No. 78-208.

Volunteers used by department of economic security are neither covered by state's compensation nor liability insurance, but the state is protected by whatever insurance is in force at the time of the act or occurrence. Op.Atty.Gen. No. 75-85.

1.5. Aircraft

Department of economic security as a state agency, could utilize services of a volunteer aircraft pilot for various department staff personnel, but it would be advisable that volunteer have personal liability insurance coverage for services he or she was to carry out on behalf of state, and such policy should be continued for protection of state's fledgling self-insurance program. Op.Atty.Gen. No. 77-236.

State self-insurance program provides coverage only for state-owned property, not for rental or leased property losses and, therefore, independent insurance would have to be purchased for full protection against loss of aircraft which department of economic security rented from an aviation vendor for purpose of flying department staff personnel throughout the state. Id.

Since inception of state's self-insurance program, authorized volunteers who are acting within course and scope of their authorization are covered under state's self-insurance program. Id.

2. Motor vehicles—In general

Where incompetence to operate a motor vehicle is demonstrated, department of transportation may be authorized to suspend the driver's license immediately and require re-examination or not issue a new license, but recovery in an action against the state or its officers or employees for failure to suspend a license would be highly unlikely. Op.Atty.Gen. No. 78-203.

State real estate department could purchase liability insurance covering department's motor vehicles and could include coverage of its employees while operating the vehicles in furtherance of the department's business and coverage of employees while operating their own private motor vehicles but carrying out duties assigned by department. Op.Atty.Gen. No. 63-22.

3. —— Uninsured motorist coverage, motor vehicles

Arizona game and fish department's rejection, subsequent to accident in which automobile operated by uninsured motorist collided with game and fish department vehicle and fatally injured employee of the department, of department policy which, by operation of law, contained uninsured motorist coverage unless and until the department rejected such coverage did not abrogate vested right of deceased employee and representative of her estate to coverage under the policy for the accident. Maryland Cas. Co. v. Wilson (1967) 6 Ariz.App. 470, 433 P.2d 650.

3.5. —— Leased motor vehicles

Practice of renting or leasing state vehicles to private parties is not authorized; state self-insurance fund would cover damage to state vehicle but risk management services would have right subrogate against any part negligently causing damage to the vehicle; state self-insurance fund would not cover damage to non-state owned vehicles caused by an off duty department of public safety officer or by a third party. Op.Atty.Gen. No. 78–227.

4. Negligence

Under this section, department of public welfare could expend funds to purchase liability insurance covering volunteers acting for department and negligently causing injury or damage to another. Op.Atty.Gen. No. 63–30.

Immunity of the state for negligence is not waived by this section. Op.Atty.Gen. No. 59–9.

5. Occupational diseases

To extent that insurance for defense of lawsuits and payment of judgments or settlements constituted liability insurance contemplated by this section covering state officers, agents, and employees while employed in governmental or proprietary capacities, cost would be a proper expenditure from compensation or occupational disease fund in regard to industrial commission's members and employees. Op.Atty.Gen. No. 66-11.

6. Community colleges

Personalty of community college does not come within provision of this section for insurance coverage against loss, and, therefore, Pima college could not be reimbursed out of state permanent uninsured loss coverage revolving fund for its loss of books, damaged materials in storage, and other personalty damaged as a result of a fire in the college book store area. Op.Atty.Gen. No. R75–731, p. 57, 1976–77.

Local community college district board which controlled community college's personalty was an independent political entity, not a department, agency, board, or commission of the state within provision of a § 41–622 creating the state uninsured loss fund and limiting disbursements from fund to compensate for uninsured property losses to "departments, agencies, boards or commissions of the state", and, therefore, claim for reimbursement from fund based upon loss of an aircraft would be denied. Op.Atty.Gen. No. R75–291, p. 61, 1976–77.

7. —— Punitive damages

This section which makes state immune from liability for losses arising out of judgments for wilful and wanton conduct resulting in punitive and exemplary damages could not be applied retroactively in wrongful death action brought by mother of motorist killed in collision with vehicle driven by intoxicated state employee, since this section contained no provision for retroactivity, and since motorist's mother had vested right to judgment. State v. Sanchez (App.1973) 119 Ariz. 64, 579 P.2d 568.

General rule is that municipal corporation cannot be held liable for punitive or exemplary damages in absence of specific statute authorizing them. Id.

8. Non-lapsing self-insurance fund

Subsection (C) of § 11–261 permitting a county to self insure should not be construed as granting authority to create a non-lapsing self-insurance fund until the legislature specifically grants such authority. Op.Atty.Gen. No. 78–15.

9. School districts

Language of § 15–442 requiring the school district board of trustees to discipline the students for disorderly conduct on way to and from the school requires the board to exercise disciplinary control over a student's disorderly conduct while the student is enroute from home to school and back, but the school district is not liable merely because a student, while going to and from school, commits a tortious act upon a third person. Op.Atty.Gen. No. 78–200.

10. Dental examiners

Arizona state dental board members who act in good faith, within scope of their authority, will not be held liable for injuries or damages resulting from such acts or omissions. Op.Atty.Gen. No. I79-235.

11. Immunity

Governmental immunity is a defense only when necessary to avoid a severe hampering of a governmental function or a thwarting of established policy and in other respects the state and its agencies are subject to the same tort liability as private citizens, although certain areas of immunity remain, namely, legislative immunity, judicial immunity and high-level executive immunity; overruling Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376. Ryan v. State (1982) 134 Ariz. 308, 656 P.2d 597.

Ad hoc approach is the most appropriate for further development of exceptions to state liability for negligent acts. Id.

or administration of the risk management division, without approval of the joint legislative budget committee.

Added by Laws 1977, Ch. 121, § 3. Amended by Laws 1979, Ch. 176, § 2; Laws 1980, Ch. 108, § 9, eff. April 22, 1980; Laws 1982, Ch. 262, § 16, eff. July 24, 1982, effective retroactively to July 1, 1982;[1] Laws 1983, Ch. 87, § 5, eff. April 12, 1983; Laws 1983, Ch. 98, § 122; Laws 1984, Ch. 188, § 50; Laws 1984, Ch. 200, § 2.

[1] See note following § 41-2562.

For text of section effective January 1, 1985, see § 41-622, post.

1984 Reviser's Note:

This section contains the amendments made by Laws 1984, Ch. 188, § 50 and Ch. 200, § 2 which were blended together as shown above pursuant to authority of § 41-1304.03.

§ 41–622. Revolving funds for self-insured losses and administrative costs; budget requests

Text of section effective January 1, 1985

A. There is established a permanent risk management revolving fund and a permanent workers' compensation liability loss revolving fund in the department of administration for the purchase of insurance, risk management services including loss control services, payment of self-insured losses pursuant to § 41-621, subsections A and B and administrative costs necessary to carry out risk management services prescribed by § 41-621. The department of administration shall pay for claims processing costs, including adjusting costs, legal defense costs and attorney fees, for any portion of claims falling within state self-insurance coverage pursuant to the provisions of this chapter.

B. The permanent risk management revolving fund in the department of administration shall exclude any property loss arising from obsolescence, nonserviceability, mysterious disappearance or inventory shortage. Mysterious disappearance shall not be construed to include a loss if there is a reasonable presumption of theft. The department of administration, subject to chapter 23 of this title,[1] may advance or disburse monies to contractors who rebuild state property as a result of self-insured losses or to persons who supply goods or services in replacing self-insured losses. The department of administration shall pay for claims processing costs, including adjusting costs, legal defense costs and attorney fees, for any portion of claims falling within state self-insurance coverage pursuant to the provisions of this chapter.

C. To qualify for payment for loss by theft or burglary of state-owned personal property, an agency, department, board or commission must show evidence of forcible entry or that threat of violence was used in the taking of the property or there must be a reasonable presumption of theft.

D. The department of administration shall present to the legislature at the beginning of each session a budget request based on the actuarial needs for liability losses, workers' compensation liability losses, property losses and risk management administrative costs. The budget request shall be broken down to reflect the amount of monies to be charged to each of the state departments, agencies, boards and commissions. Any state department, agency, board or commission that has an amount for insurance included in its appropriation, whether specifically stated or not, and any state department, agency, board or commission that receives funds other than those appropriated shall be billed for the proportionate share of the charges for insurance by the department of administration. All monies received from such billings shall be deposited to the funds as identified in subsection A of this section as directed by the chairman and vice-chairman of the joint legislative budget committee.

E. All monies recovered by the state pursuant to litigation, recovery, salvage value of damaged property, proportionate share monies from any other existing state funds, or otherwise, for damages relating to either a liability or property loss for which monies from the risk management or workers' compensation liability loss funds have been or will be paid shall be deposited in the respective revolving fund.

F. The monies in the revolving funds may be invested pursuant to § 35-324. Interest earnings on the revolving funds shall be credited to the respective funds.

G. If a revolving fund is projected to be exhausted while the legislature is in session, a special appropriation may be requested by the department of administration for monies to meet the needs of the funds. If the funds are exhausted at a time when the legislature is not in session, any final judgment shall accrue interest at the legal rate and shall be payable upon appropriation in the next succeeding regular session of the legislature.

H. All monies deposited in the funds identified in subsection A of this section are appropriated to the department of administration for use pursuant to this section and are exempt from the provisions of 35-190, relating to lapsing of appropriations.

I. Monies in the funds established pursuant to subsection A of this section shall not be used for administrative costs, other than costs directly related to liability, property loss claims, workmen's compensation liability, loss control services, risk management services or administration of the risk management division, without approval of the joint legislative budget committee.

Added by Laws 1977, Ch. 121, § 3. Amended by Laws 1979, Ch. 176, § 2; Laws 1980, Ch. 108, § 9, eff. April 22, 1980; Laws 1982, Ch. 262, § 16, eff. July 24, 1982, effective retroactively to July 1, 1982;[2] Laws 1983, Ch. 87, § 5, eff. April 12, 1983; Laws 1983, Ch. 98, § 122; Laws 1984, Ch. 188, § 50; Laws 1984, Ch. 200, § 2; Laws 1984, Ch. 251, § 26, eff. Jan. 1, 1985.

[1] Section 41-2501 et seq.

[2] See note following § 41-2362.

For text of section effective until January 1, 1985, see § 41-622, ante.

Former § 41-622, derived from Laws 1973, Ch. 156, § 2; Laws 1974, Ch. 205, § 4; Laws 1975, Ch. 12, § 2, eff. April 24, 1975; and Laws 1976, Ch. 72, § 2, and relating to an uninsured losses revolving fund, self-insurance expenses, and a liability self-insurance account, was repealed by Laws 1977, Ch. 121, § 2, eff. Aug. 27, 1977.

Laws 1977, Ch. 121, § 5, eff. Aug. 27, 1977 provides:

"The director of the department of administration may authorize the transfer of the unexpended the unencumbered monies held immediately prior to the effective date of this act in the department of administration division of finance special revolving fund and the permanent uninsured loss coverage revolving fund for the purposes described in this act into the funds created by this act in such amounts as necessary to accomplish the purposes of this act."

For legislative intent of Laws 1980, Ch. 108, see note following § 35-321.

For legislative intent of Laws 1982, Ch. 262, see note following § 35-151.

For purpose and effective date provision of Laws 1984, Ch. 251, see Historical Note following § 41-2501.

Reviser's Notes:

1979 Note. In the first sentence of subsection B, the word "obsolescence", the comma after "disappearance" and the words "nonserviceability" and "or" were transposed in that order to follow the word "from" pursuant to authority of § 41-1304.02.

1983 Note. This section contains the amendments made by Laws 1983, Ch. 87, § 5 and Ch. 98, § 122 which were blended together pursuant to authority of § 41-1304.03.

1984 Note. This section contains the amendments made by Laws 1984, Ch. 188, § 50, Ch. 200, § 2 and Ch. 251, § 26 which were blended together as shown above pursuant to authority of § 41-1304.03.

Cross References

State compensation fund reserves, credit to workmen's compensation liability laws revolving fund, see § 23-962.

Administrative Code References

Establishment of self-insurance, see A.C.R.R. R2-10-01.

Reporting procedures, accidents and incidents, see A.C.R.R. R2-10-02.

Library References

States ⇐127.
C.J.S. States § 228.

Notes of Decisions

In general 1
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1. In general

Risk management services could release monies from the property loss fund to pay legal fees or other court expenses incurred under § 12-348 relating to the award of fees and other expenses against the state, that section would prevail over the general provisions of this section relating to revolving funds for uninsured losses and the risk management administrative fund. Op.Atty.Gen. No I82-018.

Under this section relating to revolving funds for uninsured losses and the risk management administrative fund, as amended by Laws 1977, Ch. 121, the department of administration is to request an appropriation from the Legislature for the following fiscal year, 1978-1979, for each of the three separate funds which have been set up by Ch. 121, and then the department of administration, risk management services division is responsible to provide liability and property damage protection to the agency either by the purchase of insurance or through a self-insurance program from moneys appropriated directly to the various funds. Op.Atty.Gen. No. 77-161.

On August 27, 1977, director of department of administration was authorized to transfer unexpended and unencumbered monies from the liability self-insurance account into the separate funds setup by Laws 1977, Ch. 121, which amends this section relating to revolving fund for uninsured losses and risk management administrative fund, for the purpose of implementing the self-insurance/insurance program. Id.

Community colleges are public subdivisions of the state, not "departments, agencies, boards or commissions" of the state which would entitle them to be reimbursed from the state uninsured loss coverage revolving fund. Op.Atty.Gen. No. R75-731, p. 57, 1976-77.

2. Community colleges

Local community college district board which controlled community college's personalty was an independent political entity, not a department, agency, board, or commission of the state within provision of this section creating the state uninsured loss fund and limiting disbursements from fund to compensate for uninsured property losses to "departments, agencies, boards or commissions of the state", and, therefore, claim for reimbursement from fund based upon loss of an aircraft would be denied. Op.Atty.Gen. No. R75-294, p. 64, 1976-77.

3. Volunteers

Department of administration risk management services lacks authority to purchase disability insurance for listed state service volunteers. Op.Atty.Gen. No. I79-112.

§ 41-623. Risk management and loss control

A. The department of administration shall promulgate rules and regulations to initiate and implement a risk management and loss control program for all state departments, agencies, boards and commissions for the purpose of reducing risks, accidents and property and liability losses.

B. The department of administration shall annually provide each state department, agency, board and commission with a report of property and liability claims filed and an analysis of the cause of loss. State departments, agencies, boards and commissions shall submit a reply to the department of administration outlining plans to correct property and liability exposures to loss.

C. The department of administration shall annually issue to the governor and legislature a summary report of property and liability losses incurred by state departments, agencies, boards and commissions. The report shall include loss control plans and recommendations for corrective action.

D. All state departments, agencies, boards and commissions shall cooperate with, assist and provide requested information to the department of administration in the initiation, implementation and operation of the risk management and loss control program.

E. Concurrent with the commencement of planning for the construction, alteration or additions to state-owned or leased buildings, and the purchase of specialized personal property, the department of administration shall be consulted for the purpose of implementing the risk management and loss control program and to assure compliance with generally accepted loss control practices.

Amended by Laws 1982, Ch. 262, § 17, eff. July 24, 1982, effective retroactively to July 1, 1982[1]; Laws 1983, Ch. 98, § 123.

[1] See note following § 41-2362.

For legislative intent of Laws 1982, Ch. 262, see note following § 35-151.

Administrative Code References

Coverage and limitations, see A.C.R.R. R2-10-05.

Liability claim procedure, see A.C.R.R. R2-10-03.

Loss prevention, building plans, hazard control, see A.C.R.R. R2-10-50 et seq.

Reporting procedures, accidents and incidents, see A.C.R.R. R2-10-02.

§ 41-624. Commissions on sales of insurance to the state; violations; classification

Text of section effective until January 1, 1985.

A. In this section, unless the context otherwise requires:

1. "Bid" means a bid for the sale of insurance to the state.

2. "Bidder" means one who bids for the sale of insurance to the state under § 41-730.

3. "Commissions" means any contingent commission, excess profits commission, other commission that may be based upon losses or experience or other compensation which a successful bidder for the sale of insurance to the state may be eligible to receive from insurance carriers or underwriters.

B. Only a successful bidder or persons who have performed actual services for a successful bidder in connection with a bid shall be eligible to receive directly or indirectly any commissions.

C. A successful bidder may pay [illegible]mmissions directly or indirectly only to persons who have performed actual services for the successful bidder in connection with the bid.

D. Any successful bidder who pays commissions in violation of subsection C of this section or any person who receives co[illegible]missions in violation of subsection B of this section shall be subject to the following penalties:

1. The successful bidder or the person who receives commissions or both shall be guilty of a class 2 misdemeanor.

2. The successful bidder or the person who receives the [illegible] or both shall be liable under § 20-316 for suspension, revocation or denia[illegible]al of any licenses issued under title 20, chapter 2, article 3.[1]

3. The successful bidder and the person who receives comn[illegible]all be jointly and severally liable to the state for the amount of the commissions pa[illegible] in violation of subsection B or C of this section.

4. The successful bidder and the person who receives the commissions shall be jointly and severally liable to competing bidders under the same invitation for bids for the amount of the commissions paid in violation of subsection B or C of this section as well as for reasonable attorney's fees of the competing bidders in recovering the penalty. Where there is more than one competing bidder, the successful bidder and the person who receives commissions shall be subject only to one liability under this subsection and the competitors who have joined in or intervened before judgment in the first action under this subsection to proceed to final judgment shall be entitled to equal shares in the penalty recovered.

Added by Laws 1975, Ch. 102, § 18. Amended by Laws 1978, Ch. 201, § 719, eff. Oct. 1, 1978.

[1] Section 20-281 et seq.

For text of section effective January 1, 1985, see § 41-624, post.

§ 41-624. Definitions; commissions on sales of insurance to the state; violation; classification

Text of section effective January 1, 1985.

A. In this section, unless the context otherwise requires:

1. "Bidder" or "offeror" means a person who has submitted a bid or proposal for the sale of insurance to the state under chapter 23 of this title.[1]

2. "Commissions" means any contingent commission, excess profits commission, or other commission that may be based upon losses or experience or other compensation which a successful contractor for the sale of insurance to the state may be eligible to receive from insurance carriers or underwriters.

3. "Solicitation" means all documents whether attached or incorporated by reference which are utilized for soliciting bids or proposals.

B. Only a contractor or persons who have performed actual services for a contractor in connection with a bid shall be eligible to receive directly or indirectly any commissions.

C. A contractor may pay commissions directly or indirectly only to persons who have performed actual services for the contractor in connection with the solicitation.

D. Any contractor who pays commissions in violation of subsection C of this section or any person who receives commissions in violation of subsection B of this section shall be subject to the following penalties:

1. The contractor or the person who receives commissions, or both, shall be guilty of a class 2 misdemeanor.

2. The contractor or the person who receives the commissions, or both, shall be liable under § 20-316 for suspension, revocation or denial of renewal of any licenses issued under title 20, chapter 2, article 3.[2]

3. The contractor and the person who receives commissions shall be jointly and severally liable to the state for the amount of the commissions paid in violation of subsection B or C of this section.

4. The contractor and the person who receives the commissions shall be jointly and severally liable to competing bidders or offerors under the same solicitation for the amount of the commissions paid in violation of subsection B or C of this section as well as for reasonable attorney's fees of the competing bidders or offerors in recovering the penalty. Where there is more than one competing bidder or offeror, the contractor and the person who receives commissions shall be subject only to one liability under this subsection and the competitors who have joined in or intervened before judgment in the first action under this subsection to proceed to final judgment shall be entitled to equal shares in the penalty recovered.

Added by Laws 1975, Ch. 102, § 18. Amended by Laws 1978, Ch. 201, § 719, eff. Oct. 1, 1978; Laws 1984, Ch. 251, § 27, eff. Jan. 1, 1985.

[1] Section 41-2501 et seq.
[2] Section 20-281 et seq.

For text of section effective until January 1, 1985, see § 41-624, ante.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.

For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

For purpose and effective date provision of Laws 1984, Ch. 251, see Historical Note following § 41-2501.

Cross References

Classification of offenses, see § 13-601 et seq.
Fines, see § 13-801 et seq.
Insurance, commissions on sales to state, see § 41-624.
Sentences of imprisonment, see § 13-701 et seq.
Violation as ground for suspension, revocation, or refusal to renew insurance agent's, broker's, or solicitor's license, see § 20-316.

Library References

Insurance ⇐84(2).
C.J.S. Insurance § 162.

Notes of Decisions

Purchases of insurance 2
Splitting commissions 1

1. Splitting commissions

Where school board purchased insurance through services of an advisory committee composed of insurance agents who each received a portion of the insurance commission, such commission splitting arrangement would be in violation of provision of § 20-446 prohibiting the entry into any agreement to commit, or by any concerted action commit, any act of boycott, coercion, or intimidation resulting in or tending to result in an unreasonable restraint of, or monopoly in, the business of insurance and a violation of provision of this section making it a misdemeanor for a successful bidder for the sale of insurance to the state to directly or indirectly split commissions with one who has not performed services. Op.Atty.Gen. No. 77-4, p. 63, 1976-77.

2. Purchases of insurance

Advisory guidelines for purchase of insurance by school districts and other political subdivisions provided following Op.Atty.Gen. No. 77-4, p. 67, 1976-77.

NATIONAL INSURANCE
CONSUMER ORGANIZATION

TESTIMONY OF

J. ROBERT HUNTER
PRESIDENT
NATIONAL INSURANCE CONSUMER ORGANIZATION

BEFORE THE
ALASKA LEGISLATIVE CONFERENCE

THE LIABILITY CRISIS IN INSURANCE

ANCHORAGE, ALASKA
DECEMBER 6, 1985

121 N. Payne Street
Alexandria, Virginia 22314
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OVERVIEW

We are here today to discuss a mounting crisis among small businesses and across America, a crisis which involves every man, woman and child: the nation is losing its liability insurance. Day care centers are losing their insurance and are being forced to close, perhaps driving second breadwinners out of work or creating new latchkey children. Nurse-midwives are losing their insurance and the lower cost birthing centers are shutting down. Doctors are marching on state capitals because insurance is unavailable or costs have skyrocketed. 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. For example, the cost of insuring an automobile in America has gone up at a 9.1% rate for the first 6 months of 1985, exceeding the rate of change for all of 1984. 1/ The annualized rate of change is 18.2%, a record dollar change.

What is going on here? Are these practices of insurers justified?

The answer is "NO!" What we are witnessing is a manufactured crisis intended to bloat insurer profits and reduce victims' rights.

Property-Casualty insurance has a cyclical profitability, as Chart Number 1 shows. 2/ In 1984, if you accept the insurer's whopping reserve increases as valid (quite a large leap of faith), they earned about a 3% rate of return on net worth (equity). That is too low. 3/ It would indicate that their premiums were about 5% short. If their premiums had been 5% higher, they would have earned a rate of return on net worth of about 13%, more than enough for an industry of the low to average riskiness of Property/Casualty insurance. 4/

A five percent premium shortfall is not a crisis. Yet we see all of the cancellations and mammoth price increases such as:

- A 70% increase for OB/GYNs in Maryland (totally unjustified -- per analysis, attached as Exhibit I).

- 300% to 900% increases in lawyer and architect malpractice insurance premiums around the country.

- Increases of 200% to 500% for the day care centers who can get insurance. Many can't.

- 300% to 1000% increases for public transit authorities.

- One Northeastern state's liability insurance was $100,000 for $100 million of coverage last year. This year it's $400,000 for $3 million in coverage. Last year, it cost $1.00 per $1000 of coverage; this year it is $1.00 for $7.50 of cover.

The list goes on and on, but the statistics don't justify any of this!

What is going on?

THE LAST CYCLE BOTTOM - 1974/5

If you look again at the first chart you will see that 1984 was a typical "bottom-of-the-cycle" year. The last time it happened was in the mid-1970's when I served as Federal Insurance Administrator in the Ford Administration. At that time, the country observed the precise phenomena we see today. As a Washington Post editorial of November 3, 1976 put it:

> It is becoming increasingly apparent that liability insurance -- or the lack of it -- is becoming a national problem. . . . The rates charged those in professions other than medicine, most notably architects, are rising rapidly. Local governments are finding that it is increasingly difficult or expensive to buy insurance covering their police departments. And because of the price now placed on it, many small companies are dropping the product liability insurance they th ought they needed. . . .
>
> It is no doubt true that the increasing number and size of judgments against police departments for false arrest or mistreatment of prisoners have had some salutory effects on police behavior. Similarly, malpractice suits have provided an incentive for more careful medical care, and product liability suits have forced manufacturers to produce better and safer products. But there must be some limit to all this, and we suspect it has been passed. The real beneficiaries of this litigation explosion have been the lawyers. . . . There has to be a better way of compensating those to whom reparations are due than the clumsy and expensive mechanisms that exist today. The legal ingenuity that created the present problem is going to have to be used to solve it. Otherwise, the whole system of liability insurance and of personal liability for wrongdoing is going to collapse of its own weight.

After insurers abandoned the medical and product manufacturer lines, the federal government reviewed the situation. I was fortunate to be part of the interagency working groups that found that there were no justifications for the insurer actions. 5/ We concluded that the insurers had just panicked from lack of data.

But look at what happened; their profits skyrocketed to all time record levels. Insurers learned that the state regulators would, during the panic, give away the store in rate increases. Insurers also learned that state legislators would act to reduce victims' rights in the wake of the panic (over half the states did so 6/). The fact that insurers achieved much of their 1975 legislative agenda and now are back for a bigger bite from the apple is very significant. Now, medical professionals want caps on overall and non-economic damages and municipal governments (and especially insurers!) are seeking elimination of joint and severable libility and punitive damage awards. Where will this raid on victims' rights end?

They are applying the lessons they learned in the mid-1970's very well today -- to day care centers, to nurse-midwives, to doctors, to product manufacturers, and so on. They are petitioning Congress for product liability and medical malpractice tort law changes and the states for changes in other tort systems.

THE HEAT IS ON

Some property/casualty officials have made statements on the public record that; "It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures." 7/ Reinsurance, a critical aspect of maintaining available and affordable insurance rates may not be available from overseas because syndicates would "simply not write reinsurance for the American casualty industry" in 1986. A representative of that overseas market (Lloyd's of London) was recently reported to have said that if a new policy form is not adopted by state regulators, reinsurance wouldn't be provided to American liability underwriters. When I recently testified before the Maryland Governor's Special Medical Malpractice Committee, a medical malpractice insurance company executive told the committee that higher rates for ob/gyns in Maryland were put into their filing because the reinsurer required it, not because the rates were actuarily justifiable (which they weren't).

Wall Street knows what is going on. Chart Number 2 shows that the property/casualty stocks have soared to record highs more than doubling the Dow Jones Industrial Average rise for 1985. Through November 20, 1985, the Best's Property/Casualty Stock Index was up by 44% compared with a 20% Dow Jones increase.8/ Wall Street expects state regulators to allow excessive rate increases; Wall Street is right! At the end of the first six months of 1985, the surplus of insurers has skyrocketed by $8 billion, over the year earlier figure, a growth of 13.4%. 9/

Insurers blame this crisis on the courts and the tort law and say the only way to fix it is to take away as many victims' rights as possible. They can point to such statistics as these:

> Of 28 insurers writing liability insurance for day care centers in Maryland last year, 15 have left the market. Of the remaining 13, six will not write any new business. The last 7, those who will write new business, all have excluded child abuse from their policies. The Maryland Commissioner of Insurance has termed the pull out "hysteria" since no data supports it. 10/

Insurers will say this points to the need for tort reform, 11/ while admitting that data don't justify the pull out. 12/ In New Jersey, at a hearing where ISO requested the new claims made form, the ISO could not say how many million dollar CGL type claims there were in recent years, nor what percentage of claims paid were in suit last year. Iowa Insurance Commissioner and NAIC president, Bruce Foudree says that "regulators cannot trust annual statements and quarterly financial data. We [regulators] will therefore need to get tougher and spend more time looking over companies' shoulders. We cannot tolerate falsification or deception on annual statements." 13/

I do not believe that there is a tort crisis across the nation, I believe we are witnessing joint action by insurers intended to create an atmosphere where rates can be put too high and legislators will be intimidated into action designed to take away victims' rights and to allow wrongdoers to go unpunished. It was no accident that A.H. Robbins tried to piggyback onto federal tort "reform" to be excused from its misdeeds.

At the top of the cycle a few years ago, the now-dreaded liability insurance policy rates were being slashed wildly and even being sold after the insured event happened, such as in the case of the MGM Grand Hotel fire where liability coverage was written months after the fire. 14/ Chart #3, labeled the "National Insurance Strike," shows the effect of rate cutting during 1981 and 1982 upon the profit levels of insurers. As you can see, the insurers cut about $1.5 billion in premiums over this interval and the resulting impact upon insurers profits was vastly significant---they plummeted. Chart #4 shows the profit levels insurers would have enjoyed had insurers not cut their premiums, but only maintained them at 1981 levels. Chart #4 shows great disparity between actual profits and those able to have been realized had insurers simply held the line on premiums. Obviously, if premiums were increased at the same level as, say, the Consumer Price Index, insurer profits could have been even higher than the levels indicated in Chart #4. The national problem of insurer profits is clearly and convincingly self-inflicted.

If tort reform was so desperately needed in 1974 and 1975, why not in 1981? Why again today? The crisis is within the insurance industry, not in the courts.

When insurance trade association representatives talk to legislators, they point their fingers at the tort system for all their financial ills. But, amongst themselves, insurance association representatives and insurance company executives are more honest and admit their culpability for the current capacity crunch. A recent report put out by the Insurance Services Office (ISO) and the National Association of Independent Insurers (NAII) concluded that:

> The property/casualty industry must accept the major responsibility for its current financial condition. But, the brutal price war of the last six years is over. The industry has finally realized that a business cannot indefinitely price its product below cost and expect to survive. 15/

Now, we are asked to take the insurance industry's word that there is a tort problem and that limits on pain and suffering or on overall damages must be imposed so that rates will go down. All the evidence so far indicates that such caps have no effect on rates whatsoever.

Virginia has had limits on medical malpratice damages for years, but I was still called to testify before the legislature this year about insurance problems. Pennsylvania enacted one of the most restrictive immunity acts on record for its political subdivisions in 1978. 16/ Yet, despite those limits, Pennsylvania has another "crisis" in municipal liability insurance. A recent national study of the impact of "reforms" after the last crisis showed that caps on pain and suffering in medical malpractice cases have had no statistically measurable impact upon premium increases. 17/

I have done a lot of work in North and South Carolina as a consultant to the state governments. I am convinced that the degree of litigeousness in the Carolinas is low, significantly below that of other states where I work, for example. Such actuarial calculations as the loss development and the ratio paid to incurred losses, which I use for investment income purposes, make it crystal clear that, if there is a tort problem in this nation, it has not manifested itself in these states.

Yet, South Carolina has had to issue emergency regulations requiring no mid-term cancellations and 30-day notice of non-renewal price increases. If the crisis were truly tort based, South Carolina would <u>not</u> have to undertake such action. The fact that South Carolina insureds are feeling the same "hit" as the other states is stong evidence that the law is not causing the crisis, but rather that it is a creation of insurers.

In plain English, what the insurers propose in so-called "tort reform" hasn't worked and won't work. The evidence points overwhelmingly to a substantial insurance problem, both in the regulation and management of the property/casualty industry.

Insurance premiums represent 11.1% of the disposable income in this country. 18/ Insurance is the fourth leading purchase Americans make (behind food, housing and federal income taxes, although we expect it to pass federal taxes this year). Insurance rates have grown at an 18% rate for the first six months of 1985. If we are to see any relief, specific steps will have to be taken at both the state and federal level to end this insurance company misbehavior.

ALASKA'S EXPERIENCE

As great as things have been over the last cycle for the property/casualty insurers nationally, it is greater in Alaska. Over the last cycle, the operating income of insurers in Alaska was more than double that of the nation as a whole. Think of it, the profits in the nation were excessive, leading to a stock market performance of about four times the Dow Jones, yet Alaska's profit was twice the nation's; three times in private passenger auto insurance.

Perhaps you should look into your Insurance Division instead of into the tort law. In the 1981 <u>Private Passenger Auto and Homeowner's Insurance, A Statistical Analysis</u> published by the Division of Insurance, there was a discussion of the fact that Alaska had the lowest loss ratio in the country, indicating the highest profits for insurers, the least competition and the least efficiency. The <u>Analysis</u> said:

> The fact that Alaska ***enjoyed*** this position ***for the past three years*** is indicative of ***a healthy trend, one we hope to see continue . . . .***" (Emphasis added.)

How's that for consumer protection?

THE MCCARRAN-FERGUSON ACT

In 1944, the Supreme Court of the United States found that insurance was interstate commerce and, thus, subject to anti-trust and other federal statutes. In 1945, under heavy insurer pressure, Congress passed the McCarran-Ferguson Act which uniquely 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 19/ unless Congress specifically authorizes it in advance. (FTC's power was revoked because they had the audacity to point out that whole life insurance was not a wise purchase for most Americans. The fact that the FTC was right did not alter their fate.)

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. 20/ 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. 21/ 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-term cancellations, coverage and price changes rampant.

WHAT SHOULD CONGRESS DO?

(1) NICO has called upon the Judiciary Committees of the US Senate and House to review the McCarran-Ferguson Act to determine if it is working to protect America. The quality of state regulation is documented to be inadequate; the insolvency funds are a "Maryland S&L Crisis Waiting to Happen." I do not call for the elimination of state regulation here as some insurers recently have. I believe that federal standards for state regulation, coupled with federal oversight on a continuing basis, are needed. Further, the federal government should take over the insolvency funds, making them an FDIC-type operation.

(2) NICO also believes that the approach enacted at a previous bottom, 1968/9 is worthy of consideration by Congress: The Urban Property Protection and Reinsurance Act of 1968 was a response to the unavailability of insurance in the inner cities in the wake of the riot situation of the late 60's.22/

To be sure, the predicate for the withdrawal of riot insurance was strong, given the very serious situation extant in the country at the time. But the finding of the President's Panel on the Insurance Crisis is just as valid for the day care provider community today and others losing coverage as it was for the inner city communities of the late 60's when the panel found that; "Communities without insurance are communities without hope." 23/

In the riot insurance crisis, the federal government agreed to reinsure (insure the insurance transactons of the insurance companies -- a sort of lay-off bookie arrangement) the insurers against the specified peril of riot and civil commotion in return for a reinsurance premium and a commitment to participate in a pool to make sure insurance is available to all residents whose homes met reasonable standards of insurability.

The federal government made $125 million writing this reinsurance!

The cities were saved from the sure death that being uninsured brings in twentieth century America!

I think that a program of stand-by authority should be prepared to take care of the day care and nurse-midwives current problem (and, perhaps, some of the others). The authority should be granted to cover future crises as well, to stabilize the insurance profit cycle's harsh symptoms. I have provided a copy of a draft bill to establish such a program to your staff.

Insurers, the administrator of the program and representatives of the distressed industry would meet to set standards for insurability under which those who qualify are assured of an insurance market.

Studies will be undertaken to determine if other longer range actions (risk management, insurance reform, etc.) are also needed to resolve underlying problems.

Funding for this program would come from reinsurance premiums. I also envision a small surcharge, perhaps one-quarter of one percent of premiums written by all property/casualty insurers, to back up the program. This is in case premiums are insufficient over a short period or if it is determined by Congress that some short term subsidy is required to stabilize a distressed line sometime in the future.

(3) NICO has asked the Department of Justice to review the evidence to see if a conspiracy to boycott insureds has occurred in day care insurance and other lines, the intent of which is to intimidate state regulation into granting excessive rate increases and to intimidate state and federal legislators into passing unjustified tort law modifications which will maximize insurer profit levels. 24/ Such boycotts and intimidations are not exempt from federal review under the provisions of the McCarran-Ferguson Act. NICO has called upon the Congress to monitor activity upon this important request, which has prompted a preliminary investigation by the FTC.

(4) NICO has called upon the Congress 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) we think they should be subject to review by some authority here.

5) NICO proposes that the Congress modify the Product Liability Risk Retention Act of 1981 25/ to allow small businesses as defined by the Small Business Administration at 13 CFR 121 to form risk retention groups along the lines already authorized under the statute. Targeted assistance through the proposed reinsurance program can assist those small business insureds who are too few to form risk retention groups in a given state.

WHAT SHOULD STATES DO?

States must concentrate their major efforts on insurance reform and not tort "reforms."

1) States should encourage the federal government to seek a more pro-active role in the regulation of the insurance business. It is a sign of strength, not weakness, to ask for help when it is truly needed, and states surely need help in this area today.

2) The US General Accounting Office noted that the most critical deficiency in the regulation of insurance by the states was in the shortage of proper staff for adequate regulation. 26/ The GAO pointed out that this was a function of money and increased resources for targeted staff development for actuaries, accountants and lawyers will improve the quality and extent of state regulation of the

insurance business. Regulators need to develop staff in the critical areas outlined and must be given sufficient resources to do so.

3) State law must require disclosure of loss data on a line-by-line basis which would give regulators much better 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.

4) 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 and 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. No where is this more critically needed than in medical malpractice rates.

5) Tough conflict-of-interest statutes must be enacted in the states to prevent continuation of the "revolving door" found by the USGAO where 50% of regulators came from the industry and 50% went to it after being a regulator. 27/ An "arms length" relationship between regulators and the regulated industry must be established.

6) Insurance regulators need better data verification techniques either through conducting their own, more frequent audits or using outside auditors. Recent charges by the NAIC 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.

7) 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.

8) State Commissioners must be empowered by the legislatures to meaningfully regulate excess, surplus lines carriers and reinsurers, at least to the extent that the federal goverment does not. Abuses, such as withholding cover by these

carriers, have contributed significantly to the current capacity crunch.

9) States need to establish their own reinsurance programs modeled after NICO's 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.

10) States need to examine their anti-group and anti-rebate statutes to see if they serve any public purpose. If these laws adversely impact upon availability and affordability of cover, then they should be scrapped.

11) 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.

12) Regulators must resist attempts by industry advocates to force proposed claims made forms, which include defense costs inside the limit of liability, upon consumers.

The proposed, and constantly modified, ISO claims made form means less coverage, more exclusions and less competition for insureds.

There is less coverage because of the timing of coverage involved in the policy and the proposed inclusion of defense costs inside the limit makes coverage illusory. If a buyer has a million dollar claim against it and a million dollars are spent by the insurer defending the suit from which the loss accrued, there is nothing to pay for the loss but the assets of the insured. That's not coverage, its an insurance defense lawyer income security plan! The proposed pollution exclusion is simply a refusal to write this risk until the tort law is changed to suit the industry. It is fascinating to note that ISO does not discount the claims made policy rate a whit for excluding "high cost" pollution coverage. ISO cannot have it both ways; either polluton cover costs a lot and the exlusion should cause a dramatic drc in price, or it costs little (nothing according to ISO) and the coverage should be contained within the policy. Consumers face captivity because of the exhorbitant levels of premium for extended tail coverage that can go as high as 200 percent of the last year's premium. The higher the tail coverage cost, the less likely you are to seek more competitive rates at another company.

Claims made poses a particular problem for the unsophisticated purchaser. Believing that they are getting the same coverage for less, many insureds will immediately purchase the new policy and suffer unanticipated losses. I think that if states adopt any form of the new claims made policy form that it should not be allowed to be sold to small business consumers at all. ISO admits that its "problems" are with only five percent of its larger accounts. It would be inappropriate for regulators to broadly restrict cover based upon scarce, potentially false, and small samples of data. In the alternative, if it can be shown that some small business consumers (again, as defined in 13 CFR 121) would be able to benefit from the new policy form, then that form should be made available to such consumers but only after a reasonable occurrence policy quote is given and a full and complete disclosure of the differences of cover is made by the seller. Disclosure forms could be promulgated by the regulators with input from consumers and the industry.

In any event, states should not approve this moving target, constantly amend d form until the industry has had time enough to educate the agents and the consumer. Even if the latest amendments are the last, which I doubt, the form should not become effective before July 1, 1986 at the earliest.

13) States must allow greater consumer representation before the regulatory bodies. All too often the only parties to rate cases are the regulators and the insurer. States must give greater funding to or create Offices of Public Advocate to statutorily intervene in insurance rate cases. The New Jersey experience can serve as a good model, there the costs of intervention are billed back to the filing party and this causes minimal growth in appropriations expenditures while maximizing consumer protection from abusive insurance rates. A related program could be authorized by the federal government or the states to allow consumers to organize their own Citizen's Insurance Board to intervene on their own behalf as a complement to the efforts of the Public Advocates.

CONCLUSION

America deserves a better deal on its insurance. The federal and state governments cannot sit idly by and let the insurance industry hold day care providers, nurse-midwives, and others, hostage in a large game beyond the providers' control. The terrorist tactics of insurers every 10 years at cycle bottom must be dealt with in a systematic way that adds the stability to our economy that insurance is meant to deliver. Periodic price gouging must be stopped. It is time for the states, as well as the federal government, to act responsibly in the area of insurance regulation and take appropriate remedial action now.

FOOTNOTES

1/ CPI data on "auto insurance", Bureau of Labor Statistics.

2/ Source of data: Citibank Economics and Insurance Services Office.

3/ The ISO admits that the p/c industry had a positive return on net worth last year, conceding the point that the industry did not lose money last year. But, ISO's Mavis Walters disputes the level of that return, saying it was only two percent on net worth. Even at that level, the premium shortfall for last year was only 5.5 percent or so. (See, Statement of Mavis Walters, Senior Vice President, Insurance Services Office,Inc., before the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism hearings on the Liability Insurance Crisis of 1985, p.16 (Sept. 19, 1985)).

4/ For a discussion of risk in the property/casualty insurance business, see Investment Income and Profitability in Property/Casualty Insurance Ratemaking, J.R. Hunter and J.W. Wilson, 1983, Chapter 5.

5/ Hearing on December 3, 1975, Subcommittee on Health of the Committee on Labor and Public Welfare, US Senate. Among the interesting data supplied by ISO at that hearing were exhibits that showed that the average claim cost ISO used for ratemaking significantly exceeded the limit of liability, clearly ratemaking that had run amok. That led to this exchange:

Sen. Laxalt: Is malpractice always a loser as far as carriers are concerned?

Mr. Hunter: If they charge these rates, they could not help but win. (Page 141.)

In John Guinther's book, The Malpractitioners (Anchor Press, 1978), Guinther cites this exchange at page 169 in a chapter entitled "They Could Not Help But Win." In the following chapter, called "They Won," Guinther reviewed the later experience.

Final Report, Product Liability Task Force. Report on Product Liability Ratemaking, Product Liability and Accident Compensation Task Force, US Department of Commerce, 1980. At page ix the Report states that "overly subjective ratemaking practices were one of the principal causes of the product liability insurance problem."

6/ St. Louis Post Dispatch, Section B, P.3, 4/14/84. (See also, Sloan, infra, at note 17).

7/ Journal of Commerce, "Insurers Told: Exit Some Lines," p.8A, (June 18, 1985).

8/ Source of data: Best's Property/Casualty Stock Index, A.M. Best and Company, Oldwick, NJ. December 31, 1984 index = 416.30; November 20, 1985 index = 600.06. Dow Jones Industrial Average December 31, 1984 = 1211.57; November 20, 1985 = 1441.37.

9/ According to the Insurance Information Institute's Executive Letter of August 26, 1985, Policyholder surplus grew from $58.2 billion as of 6/30/84 to $66.0 billion as of 6/30/85.

10/ "The day care facilities have been caught up in this availability crunch and are being deemed higher risk, not necessarily based on a claims experience but due more to an insurance hysteria . . ." Testimony of Edward J. Muhl, Insurance Commissioner of the State of Maryland, before the House Select Committee on Children, Youth and Families, July 30, 1985.

11/ "Any permanent solution (of the day care insurance crisis) will require significant changes in the tort system." Testimony of Frank Neuhauser, Vice-President and Actuary for AIG (a leading insurer of day care centers) before the House Select Committee on Children, Youth and Families, July 30, 1985.

12/ "The countrywide experience for those companies reporting premium and loss data to the Insurance Services Office . . . . appears to conform with the current loss experience for the majority of commercial insurance lines . . (these data) do not suggest that insurers should abandon the market." Testimony of James L. Kimble, Senior Counsel, American Insurance Association, before the House Select Committee on Children, Youth and Families, July 30, 1985. The testimony was also endorsed by the Alliance of American Insurers.

13/ Journal of Commerce, "Tougher Insurance Rules Loom," p.1A, (Oct. 10, 1985).

14/ See, for instance, the National Underwriter, 11/20/81, page 1, where it says:

> A large commercial umbrella (liability) risk came up for renewal and was rated at $105,000, about the same as the previous year. But the insured was not satisfied. Aware of the aggressive rate competition in the commercial lines market today, he decided to shop around. He approached a second agent, who submitted the very same risk to a different company, which offered to write it for just $20,000.

But the insured was still not happy. He continued shopping and eventually the original company, which originally wanted $105,000 came back and took the business for $5,000. That's right, $5,000. (Emphasis added.)

15/ NAII and ISO, "1985: A Critical Year," p.30 (Spring 1985). This quote has been curiously lacking in any reference made to this document by insurers in previous testimonies. (See, Walters, supra.)

16/ Pennsylvania Political Subdivision Tort Claims Act, (42 Pa. CSA 8541 et. seq.)

17/ Sloan, Frank A., "State Responses to the Malpractice Insurance 'Crisis' of the 1970s: An Empirical Analysis," 9 Journal of Health Politics, Policy and Law, 629 (Winter 1985).

18/

Item	1984 Amount Spent in Billions a/	Column (1) - 1984 Disposable Income of $2,578.1 Billion a/
Food	444.3	17.2%
Housing	397.8	15.4
Personal Income Taxes	302.6	11.7
INSURANCE b/	287.1	11.1

a/ Source: US Department of Commerce, Bureau of Economic Analysis.
b/ Source: Bests Management Reports, December 31, 1984, page 1.
Life Insurance Fact Book, page 56.
Blue Cross Association, Telephone call of 1/25/85.

19/ The law was euphemistically entitled the "FTC Improvements Act of 1979."

20/ See Statement of the Honorable Claude Pepper before the Subcommittee on Monopolies and Commercial Law on the Insurance Industry's Antitrust Exemption, April 11, 1984; found at page 5 of the Subcommittee's report, Competition in the Insurance Industry (Serial No. 127).

21/ See, for instance, Issues and Needed Improvements in State Regulation of the Insurance Business, General Accounting Office (Oct. 9, 1979) (hereinafter, GAO Issues); The Invisible Bankers, Andrew Tobias (Linden Press, 1982); The Life Insurance Game, Ronald Kessler (Holt, Rinehart and Winston, 1985); "Protection for Sale: The Insurance Industry," NBC-TV News (1981); Risk, Reality and Reason, the Conference of Insurance Legislators (September 1983).
One of the tests of state preparedness to deal with a crisis in availability and pricing of liability insurance is actuarial staff. Of the 52 states (including DC and Puerto

Rico) NICO surveyed, we find that 26 have actuaries. So one-half of the states have no actuaries at all.
There are 62 actuaries employed by the states, of the 7,682 actuaries in the nation. It is well known in the industry that those best suited to deal with matters pertaining to liability insurance are those who have passed the examinations enabeling them to be "Fellows" in the Casualty Actuarial Society. State regulation has only 8 such persons. They are employed by only 5 states [Connecticut (1), Massachusetts (1), Michigan (1), New Jersey (1) and New York (4).]
Aetna Life and Casualty Insurance Company alone employs 126 actuaries. Travelers has 100.

Source of Data: American Academy of Actuaries 1985 Yearbook and Directory of Members by Business Affiliation.

22/ Public Law 90-448, 82 Stat. 476; 12 U.S.C. 1749bbb, 42 U.S.C. 4011.

23/ Meeting the Insurance Crisis of Our Cities, A report of the President's National Advisory Panel on Insurance in Riot-Affected Areas, January, 1968, p. 1.

24/ See Exhibit II for a copy of the letter to the Justice Department.

25/ 15 USC 3901 et. seq. and 1983 amendments.

26/ GAO Issues, p.35.

27/ Ibid., p.176

CHART # 1

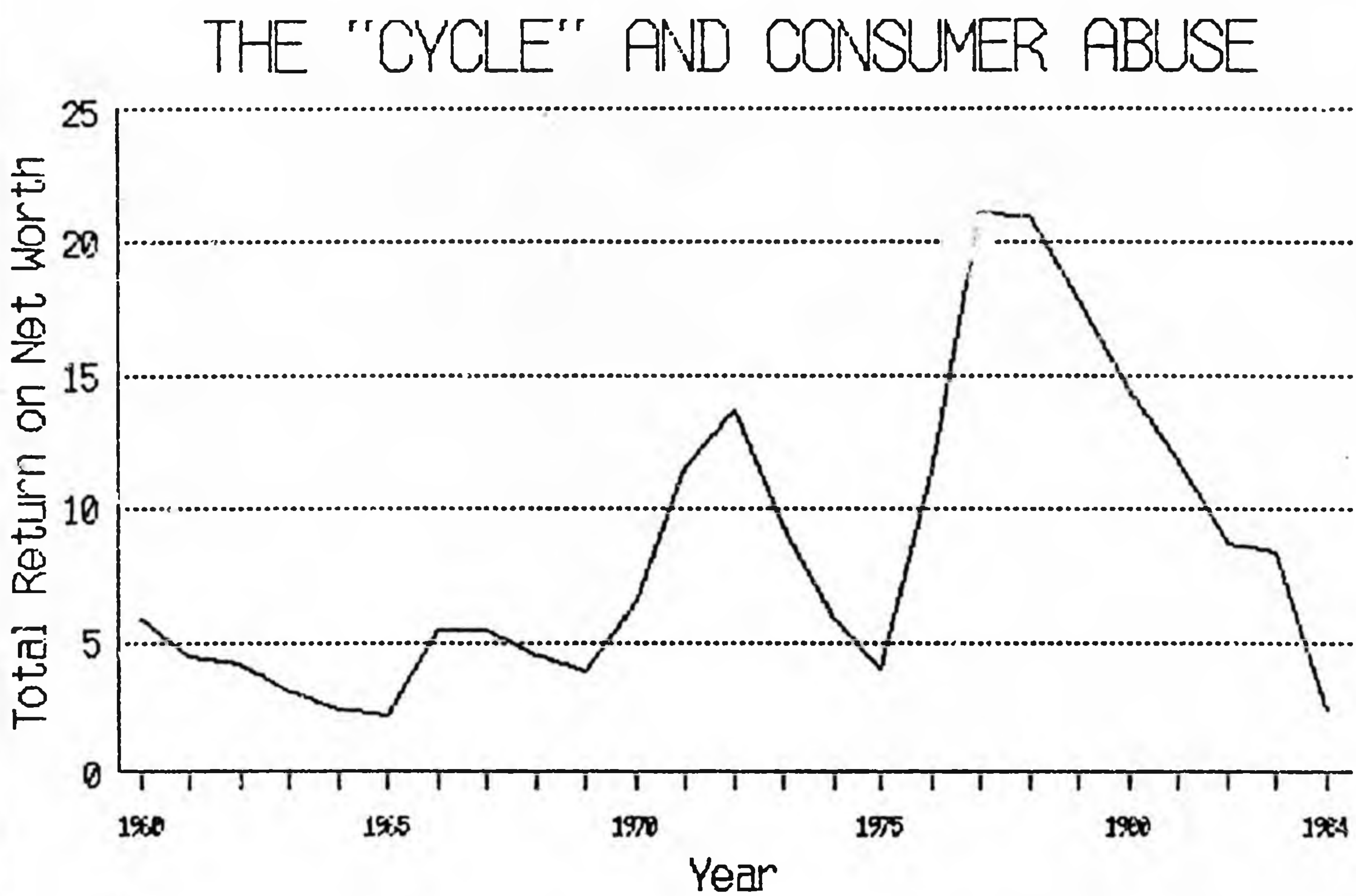

THE "CYCLE" AND CONSUMER ABUSE
Total Return on Net Worth
25
20
15
10
5
0
1960
1965
1970
1975
1980
1984
Year

CHART #2

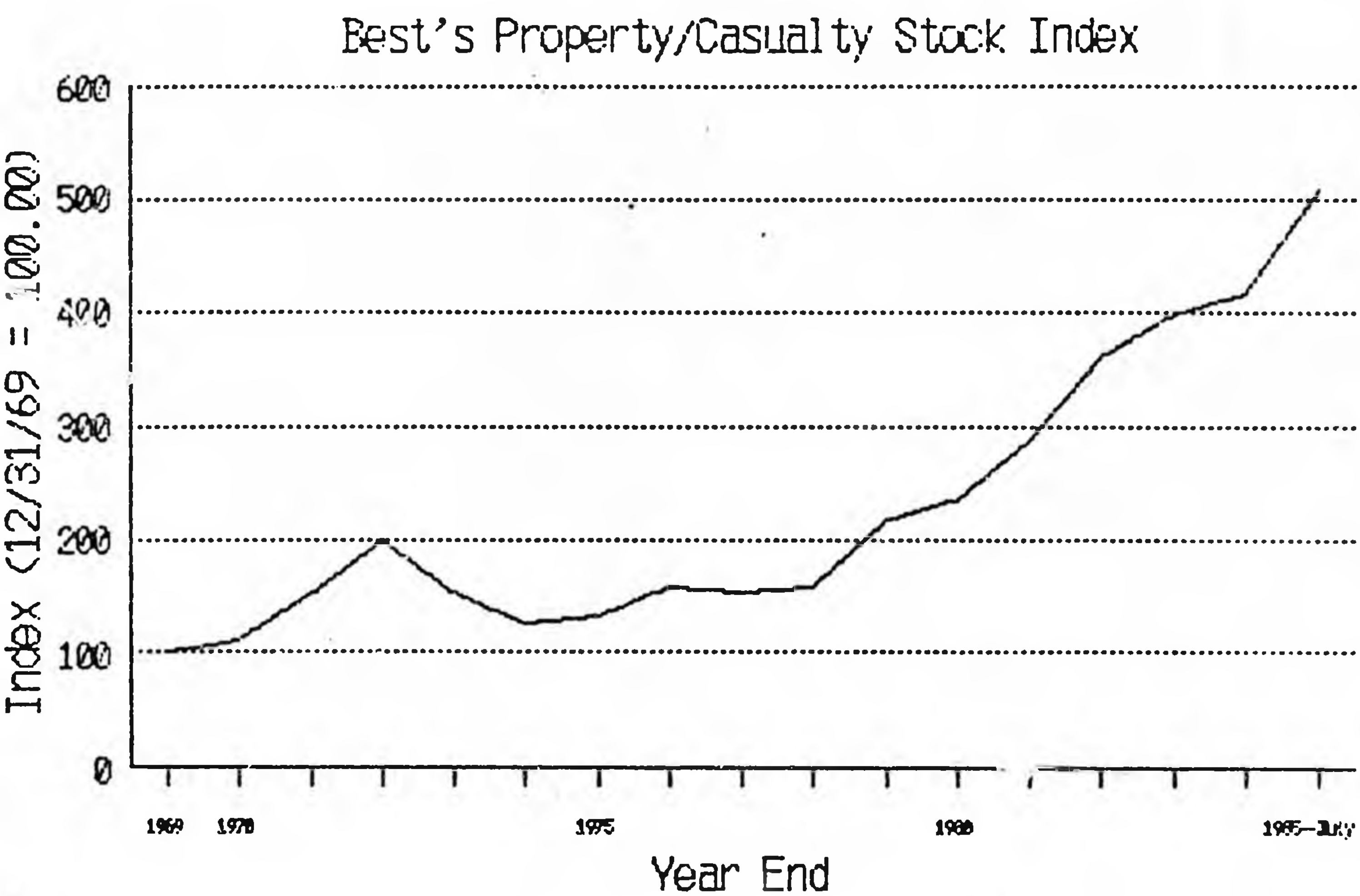
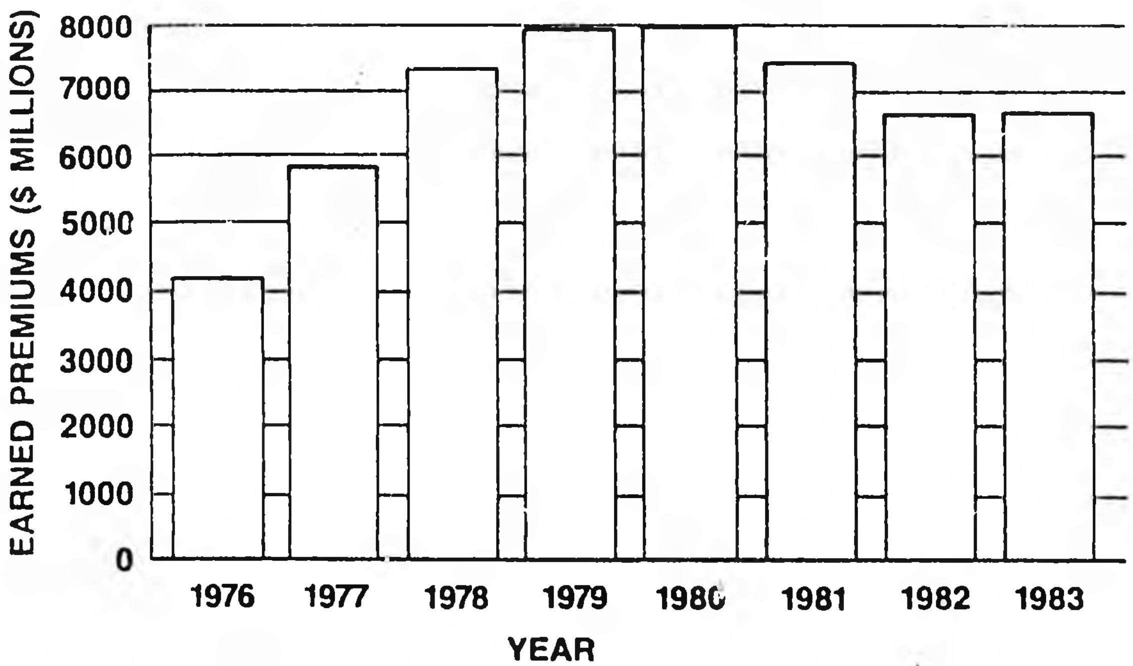

Best's Property/Casualty Stock Index
Index (12/31/69 = 100.00)
600
500
400
300
200
100
0
1969
1970
1975
1980
1985-July
Year End

CHART 3

NATIONAL LIABILITY INSURANCE STRIKE



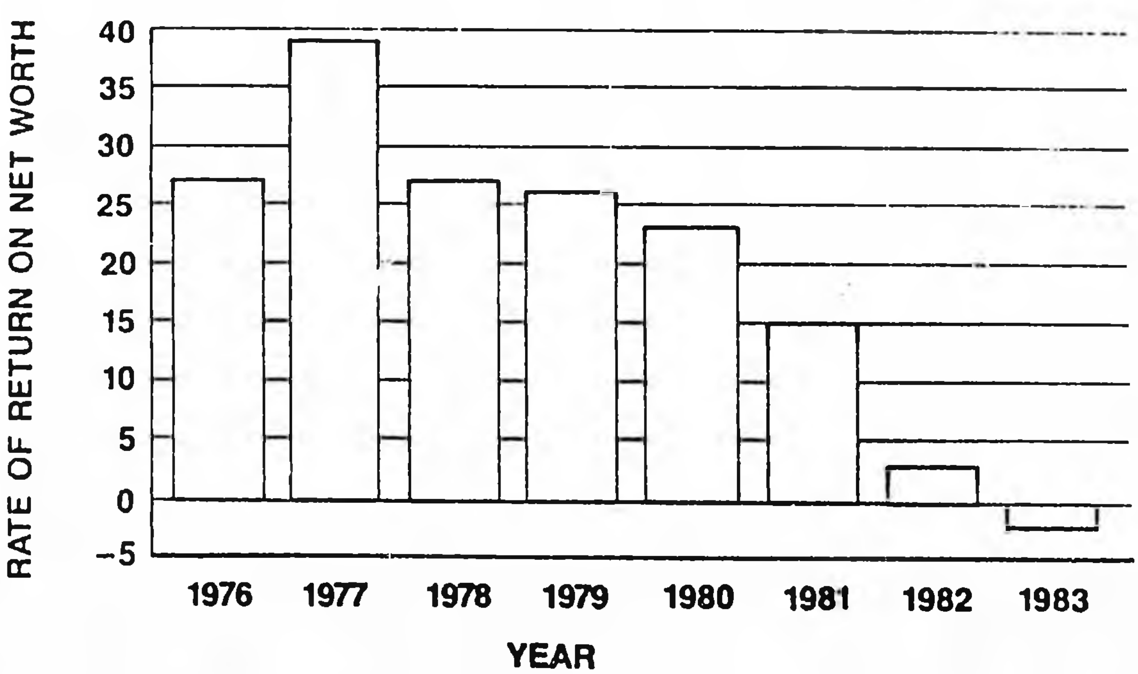
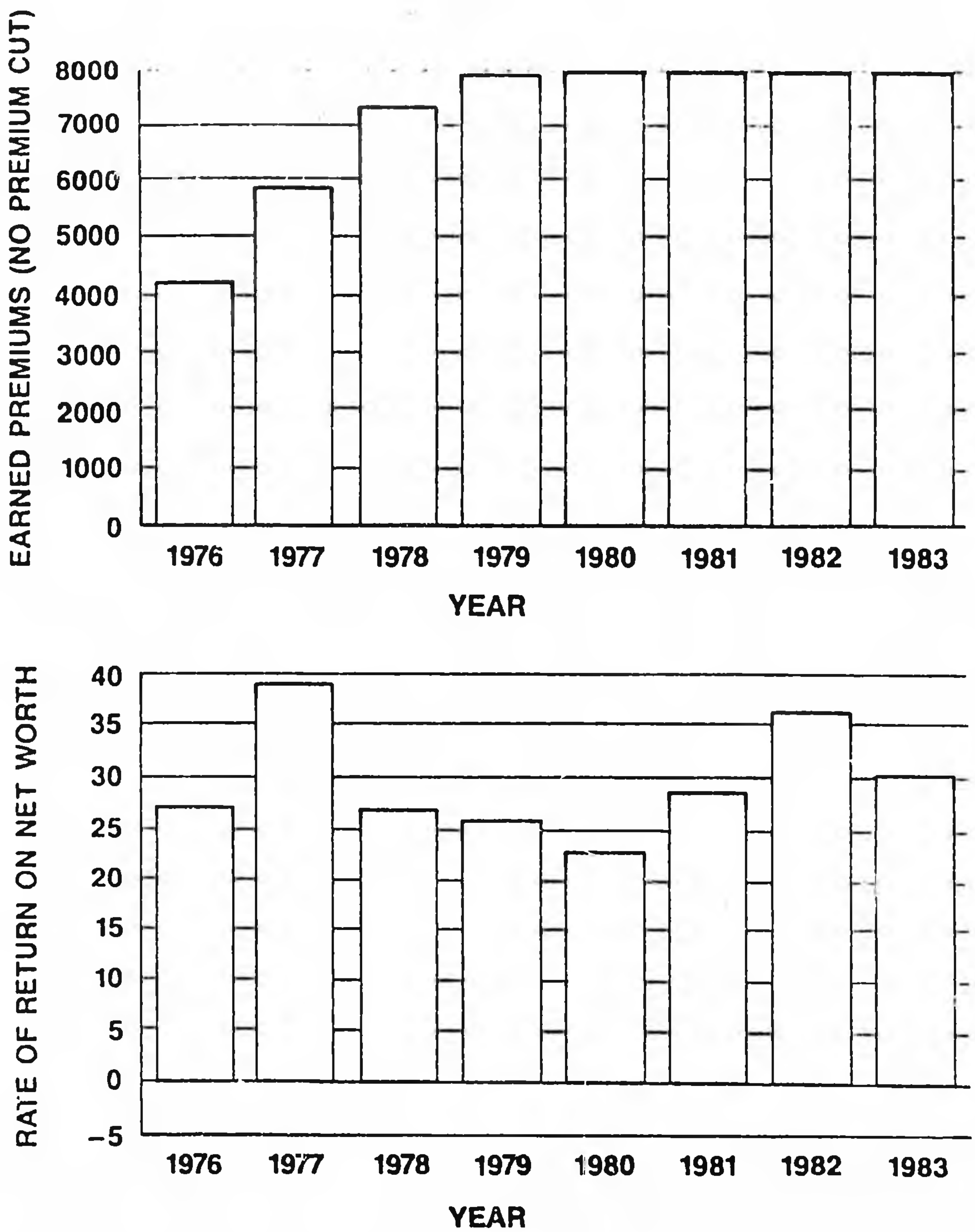


CHART 4

NATIONAL LIABILITY INSURANCE
STRIKE II



COMMERCIAL LIABILITY INSURANCE PROFITABILITY STATISTICS (1)
Rate of Return on Net Worth (2)

Year	Earned Premiums (Millions of $)	Actual ROR	All American Industry (3)
1976	$4160	27%	13.3%
1977	5865	39	13.5
1978	7334	27	14.3
1979	7943	26	15.9
1980	7969	23	14.4
1981	7416	15	14.0
1982	6627	3	11.0
1983	6671	-2	11.5
Average		19%	13.5%

(1) Source: National Association of Insurance Commissioners Report on Profitability, By Line, By State.

(2) Rate of Return on net worth estimated from the NAIC Reported Insurance Operating Profit on Earned Premiums by converting to net worth by multiplying by a 2:1 Premium/Net Worth Ratio. Investment Income on Surplus is added at an assumed after tax yield as follows: 1976, 5.0%; 1977, 5.5%; 1978, 6.0%; 1979, 6.5%; 1980, 7.0%; 1981, 7.5%; 1982, 8.0%; 1983, 8.5%.

(3) Fortune 500, 1976-1980; Business Week, 1981-1983.

NOTE: Had the insurers not cut premiums after 1980 but held them constant, the Rate of Return on Net Worth would have been:

1981	29%
1982	37%
1983	31%
8-year average	30%

The problem is clearly rate cutting, nothing else!

Analysis of Rate Filing of

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

Filing Date: May 16, 1985   Effective: July 1, 1985

J. ROBERT HUNTER

Fellow, Casualty Actuarial Society
Member, American Academy of Actuaries
President, National Insurance Consumer Organization
Former Federal Insurance Administrator

BACKGROUND

On May 16, 1985, the Medical Mutual Liability Insurance Society of Maryland (MMLIS) filed for an increase in malpractice premiums of +29%. The filing also requested changes in the relativities between classes, the most notable of which was a one-third increase in Class 8 (OB/GYN Surgery). The total impact of the overall rate change of +29% and the class relativity change of +33.3% on OB/GYN surgeons was to increase their rates by 66.7%. For the highest rated territory, these doctors had their rates raised from $25,429 to $42,393. This did not please the OB/ GYN community.

WAS THE OVERALL 29% RATE INCREASE JUSTIFIED?

In my opinion, there was no justification for an overall rate increase of 29%. Indeed, I believe that the filing supports a reduction in premiums rather than an increase. Here's why:

- The filing incorrectly assumes that the yield on investments that the MMLIS will earn is 5%, an unrealistically low assumption, and

- The filing incorrectly assumes that inflation in the future will be at double-digit levels.

When proper assumptions are made on just these two items, even accepting other major assumptions (such as their reserves are accurate), a rate reduction of 10.5% is indicated.

HOW SHOULD INVESTMENT INCOME BE FACTORED IN?

To do the job properly, a full blown total return analysis should be undertaken. The National Association of Insurance Commissioners adopted the total return approach at their June, 1984 meeting, and issued a report detailing several approaches. Under a total return approach, all income is analyzed to determine what overall profit the company will make under a given set of rates and a comparison of that potential earning power to the needed margin to attract risk capital is undertaken. It is a sophisticated, highly desirable approach that should be used in Maryland, as the NAIC recommended for all regulated lines.

In that the filing was woefully short of the data needed to undertake total return analysis, I decided to accept, for review purposes, the MMLIS approach to discounting the cash flows (their Exhibit 5, my Exhibit "A", attached). On my exhibit, you will see the MMLIS approach as typed and mine in handwriting. MMLIS discounted the losses based on a distribution of losses paid by time. Presumably this is based on their Maryland experience, the filing does not identify that.

The average claim takes a bit over 7 years to pay. This means that MMLIS holds the money in reserve for that long before they pay the average claim. Obviously this means that the reserves, which are fully funded today under statuatory accounting rules, will produce a significant amount of investment income.

The MMLIS approach assumes that they will earn 5% on their invested reserves. This is obviously too low. MMLIS has earned, according to their 1984 Annual Statement, the following yields on their total assets (including assets not invested or used for business--such as properties) the following:

1982	9.1%
1983	8.9%
1984	9.3%

Other filers recognize that the yield is not so absurdly low. For example, on May 17, 1985 the leading writer of medical malpractice insurance in the country, St. Paul submitted a filing in South Carolina in which it used a 10.5% yield to discount that state's cash flow. (see my Exhibit "B")

I have chosen to use a 10% discount rate, which is reasonable for fully invested assets of MMLIS. That change is shown on Exhibit "A". It results in a discount for investment income of 43% rather than 26% based on the unjustified 5% yield assumption. If that change is carried through to the rate level itself, the rate filing would have been for a <u>reduction</u> in rates of 1.4% rather than an increase of 29%. The calculation of the reduction is found on Exhibit "C", attached.

TREND

MMLIS displayed its own Maryland data for trend on its Exhibit 4, my Exhibit "D". It carefully analyzed the data and concluded that the range of results were between an annual trend of +7.8% based on straight line projection, and +9.3% based on exponential line projection. The data are company specific and Maryland specific andthrough the most recent year, 1983.

For some reason, the filer then displays data for other insurers, for other states, that is old data. (See Exhibit

"E"). This experience is from a period of high inflation and is not relevant, in my opinion to the case at hand. For one thing, the federal government has reported that medical inflation rates in the nation are below 10%, certainly no where near the 16% figure that the irrelevant data produce. These data should not be given weight, in my estimation.

I selected a trend of 9% for the purposes of this review. It gives weight to the fact that the exponential line has a slightly better "fit" to the data and is within the range as calculated by MMLIS, but near the exponential side. I also chose to apply the trend exponentially (this gives a higher answer than using a straight line).

Looking again at Exhibit "C", the use of the amended trend, coupled with the 10% yield assumption produces an indicated rate level reduction of 10.5%

SENSITIVITY ANALYSIS

If we used a yield of only 9% (less than MMLIS earns, even on all assets including cash) and use a trend of 10% (ehich is more than that realized by MMLIS and more than that in the nation today) the indicated rate would be a reduction of 0.9%.

ANALYSIS OF CLASSIFICATION CHANGES

Incredibly, there is absoultely no justification for the changes in the classification differentials employed by MMLIS contained in the filing. The entire "justification" for the change is found on Exhibit "F", attached.

There are other, more minor changes made without a shread of evidence, such as the territorial relativity changes, and the increased limits changes.

BALANCE SHEET

MMLIS is as solid an insurer as there can be. Their 1984 balance sheet shows that the company enjoys a premium/surplus ratio of 1.2 to 1. This company appears to be over-capitalized. If the ratemaking has followed the current filing approach, it is no wonder.

Exhibit "A"

MEDICAL MUTUAL LIABLITY INSURANCE SOCIETY OF MARYLAND

1985 PROFESSIONAL LIABILITY RATE LEVEL REVIEW - OCCURRENCE COVERAGE

PRESENT VALUE OF PAID MEDICAL MALPRACTICE CLAIMS

(OCCURRENCE BASIS)

Time Interval	Cum. Paid	% Paid Losses By Interval	Years of Discount (n)	Vn (5%)	10%	Present Value	
Up to 12 mos.	0.0%	0.0	0.5	.976	.954	-	
24	2.0	2.0	1.5	.929	.867	1.858	1.73
36	7.0	5.0	2.5	.885	.788	4.425	3.94
48	19.0	12.0	3.5	.843	.716	10.116	8.59
60	35.0	16.0	4.5	.803	.651	12.848	10.47
72	53.0	18.0	5.5	.765	.592	13.770	10.65
84	68.0	15.0	6.5	.728	.538	10.920	8.07
96	79.0	11.0	7.5	.694	.489	7.634	5.38
108	87.0	8.0	8.5	.661	.445	5.288	3.55
120	92.0	5.0	9.5	.629	.404	3.145	2.02
132	95.0	3.0	10.5	.599	.368	1.797	1.10
144	97.0	2.0	11.5	.571	.334	1.142	.669
156	99.0	2.0	12.5	.543	.304	1.086	.609
168	100.0	1.0	13.5	.518	.276	.518	.27
			Ave 7.1 yrs			74.547%	57.1

CONCLUSION

This filing is not justified. An overall rate level decrease of 10.5% is needed, not a 29% increase. The class changes which so sharply impact the OB/GYN surgeon group is not justified in the filing, although their may be experience somewhere that supports that change. The filing should have been disapproved. It is particularly abusive to observe a 66.7% increase for OB/GYN surgeons with no justification. On the basis of the filing, the OB/GYN rate should have been decreased by 10.5%. This means that the OB/GYN surgeons in Maryland may be paying about 85% too much.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Physicians and Surgeons Professional Liability

Exhibit "B"

Exhibit C
Loss and Loss Expense
Payout Patterns

Year	Cumulative Annual Payout	Incremental Annual Payout	Present Value*
1	.061	.061	.059
2	.275	.214	.187
3	.496	.221	.175
4	.668	.172	.124
5	.786	.118	.076
6	.869	.083	.049
7	.910	.041	.022
8	.952	.042	.020
9	.976	.024	.011
10	1.000	.024	.009
		1.000	.732

* Discounted claims payments at 10.5% pre-tax.

Exhibit "C"

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

1985 Professional Liability Rate Level Review - Occurrence Coverage

Total Limits Rate Level Indication -- $000's

(1) Calendar/ Accident Year	(2) E. P. at Current Rate Level (Exh. 3)	(3) Ultimate Incurred Loss & ALAE (Exh. 2)		(4) Trend Factor to 7/1/86 at 11% 9%	(5) Losses Trended to 7/1/86 (3)x(4)		(6) Loss Ratio at Current Rate Level (5)/(2)	
1979	33,395	24,688	1.826	2.076	51,255	45130	1.535	1.351
1980	35,732	25,235	1.677	1.870	47,200	42319	1.321	1.184
1981	33,872	25,904	1.539	1.685	43,649	39,866	1.289	1.177
1982	28,984	25,414	1.412	1.518	38,580	35,885	1.331	1.238
1983	18,203	18,854	1.295	1.368	25,785	24,416	1.417	1.341
	150,185				206,470		1.375	
					187,816		1.249	

Annual Trend Factor: 11.0%
(Exhibit 4)

a)	Five year loss ratio at current rate level:	1.249	1.375	
b)	Discount for investment income at 5.0%: (10%) (Exhibit 5)	.570	0.745	.570
c)	Discounted loss and ALAE ratio (a) x (b):	.712	1.024	.784
d)	Provision for Unallocated LAE (Exhibit 6)	1.05	1.050	
e)	Discounted loss and LAE ratio (c) x (d):	.748	1.075	.823
f)	Permissible discounted loss and LAE ratio: (Exhibit 6)	.835	0.835	
g)	Indicated rate level increase (e) / (f):	-10.5	1.288	-1.4%
h)	Selected rate level increase	—	1.290	

INVESTMENT INCOME AND TREND CHANGE

ONLY INVESTMENT INCOME CHANGE.

Exhibit "D"

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

1985 RATE LEVEL REVIEW - PROFESSIONAL LIABILITY - OCCURRENCE COVERAGE

TREND IN TOTAL LIMITS LOSS RATIOS AT CURRENT RATES

($000'S)

(1) Calendar/ Accident Year	(2) Earned Premium at Current Rate Level	(3) Ultimate Incurred Loss and ALAE	(4) Loss Ratio at Current Rates	(5) Linear Fit	(6) Exponential Fit
1979	33,395	24,688	.739	.672	.683
1980	35,732	25,235	.706	.748	.747
1981	33,872	25,904	.765	.825	.816
1982	28,984	25,414	.877	.901	.893
1983	18,203	18,854	1.036	.978	.976
			Average Annual Trend:	+ 7.8%	+ 9.3%
			r :	.899	.906

(2) Exhibit 3

(3) Exhibit 2

(4) (3) / (2)

ISO COUNTRYWIDE TREND (Exh. 4A): 16% Irrelevant

Selected Trend Factor: 11%

I'd use 9.0%

EXHIBIT "C"

INSURANCE SERVICES OFFICE EXHIBIT 4A

COUNTRYWIDE#

Professional Liability Insurance
Calculation of Annual Trend Factor
Based on Basic Limits Loss Ratios at Present Rates

PHYSICIANS, SURGEONS AND DENTISTS

Basic Limits

(1) Policy Year Ending	(2) $100,000 Basic Limits Incurred Losses*	(3) Premium At Present Rates	Average Loss Ratio at Present Rates (4) (2)÷(3) Actual	(5) Exponential Curve of Best Fit
12/31/75	$167,810,058	$615,020,250	.273	.232
12/31/76	139,176,608	524,225,850	.265	.271
12/31/77+	181,630,098	638,830,853	.284	.316
12/31/78+	251,848,210	700,894,098	.359	.369
12/31/79+	280,590,219	717,382,127	.391	.430
12/31/80+	332,612,672	705,726,416	.474	.502
12/31/81+	426,038,352	684,461,050	.622	.585
12/31/82+	497,532,513	666,499,516	.746	.683

Average Annual Loss Ratio at Present Rates Trend..............16.6%

Excluding Texas and Massachusetts

* Losses include allocated loss adjustment expense and are developed to an ultimate settlement basis.

+ Includes Claims Made Data.

Selected Annual Trend 16.0%

TS-PL-84-11
12/20/84

Exhibit "F"

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

1985 PROFESSIONAL LIABILITY RATE LEVEL REVIEW

Effect of Proposed Classification Changes

Specialty	Description	Distribution Of Total Limits Premium	Present Relativity	Proposed Relativity
80240	Forensic Medicine	0.0 %	.75	.65
80232	Hypnosis	0.0	.75	.65
80248	Nutrition	0.0	.75	.65
80263	Ophthalmology-No Surgery	0.2	.75	.65
80235	Physiatry and Physical Medicine	0.2	.75	.65
80249	Psychiatry	0.3	1.00	.65
80250	Psychoanalysis	0.0	1.00	.65
80251	Psychosomatic Medicine	0.0	1.00	.65
80266	Pathology-No Surgery	0.5	1.00	.65
80261	Neurology-No Surgery	0.8	1.00	1.20
80253	Radiology-Diagnostic-No Surgery	0.5	1.20	1.80
80280	Radiology-Diagnostic-Minor Surgery	0.1	2.10	2.80
80145	Surgery-Urology	3.0	3.00	3.60
80155	Surgery-Plastic-Otorhinolaryngology	1.5	6.00	5.00
80156	Surgery-Plastic-N.O.C.	2.5	6.00	5.00
80141	Surgery-Cardiac	0.0	5.00	6.50
80150	Surgery-Cardiovascular	0.0	6.00	6.50
80153	Surgery-Obstetrics/Gynecology	8.0	9.00	12.00
80168	Surgery-Obstetrics	0.1	9.00	12.00
	All Other	82.3		
		100.0%		

Effect: +2.8%

Current Average Relativity: 2.15

Projected Average Relativity: 2.21

LANDSMAN & LASTER

1503 21ST STREET, N.W.
WASHINGTON, D.C. 20036

(202) 331-0800

JOHN L. LASTER
RON M. LANDSMAN

August 14, 1985

Hon. Rick Rule
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
Tenth and Constitution Avenues, N.W.
Washington, D.C. 20530

Dear Mr. Rule:

I am writing on behalf of the National Insurance Consumer Organization to bring to your attention evidence of concerted anticompetitive conduct within the property casualty insurance industry that is not exempt under the McCarran-Ferguson Act.

The industry is now going through one of its periodic capacity scares. As in previous incidents, the public suffers severe and economically debilitating dislocations. After a period of glut, when premiums drop to a fraction of their prior fixed-price levels, underwriting tightens like a vise and important major manufacturing and service industries find themselves unable to purchase insurance protection at any price from any company.

To be sure, much of this pattern may reflect nothing more than the operation of the business cycle in an industry not under reasonable and effective regulatory oversight at the national level. The extremely aggressive price competition in commercial property/casualty lines in the late 1970s, and perhaps the subsequent price increases as well, appears to reflect such market forces. Some of the industry's responses may also reflect the mindless herd instinct which so distinctively marks the insurance industry. This is perhaps to be expected in an industry with a long history of price-fixing and other cooperative anticompetitive arrangements under state regulation that from the consumers' perspective ranges from lax to impotent, but so be it.

But the response of the industry to recent developments in their customer industries -- and the statements of industry leaders explaining their conduct -- suggest that something more is occurring.

Spokesmen for the reinsurance industry have told state regulators that they plan to withdraw en masse if they -- the regulators -- do not approve new insurance policy forms jointly developed by the reinsurers and the industry price-fixing agency (Insurance Services Office, Inc.). These new policy forms severely narrow the protection provided to the insurers' commercial customers, changes about which they are, to say the least, extremely unhappy. See Attachment A. Along the same lines, a well-known insurance company executive has justified the mass departure of insurers from medical, toxic waste, and directors' and officers' liability lines by "the social good" in "let[ting] the pressures build in the courts and the state legislatures" to change laws respecting their customers' -- and the insurers' -- liability. See Attachment B.

There is, finally, irrational market conduct that goes beyond even this industry's herd instinct. They have withdrawn from lines for risks with experience ranging from good to excellent and which even the insurers admit could and should be written. See Attachment C.

Boycotts to force action by state and federal officials, be they judges, legislators, or regulators, are illegal. The McCarran-Ferguson Act specifically does not exempt boycotts from federal antitrust enforcement. In _St. Paul Fire and Marine Insurance Co._ v. _Barry_, 438 U.S. 531 (1978), the Supreme Court held that the term boycott was broadly applicable to joint action to deny coverage to customers. Nor is there protection to be had under any of the familiar non-statutory exemptions. The _Noerr-Pennington_ doctrine does not exempt "an express or implied agreement ... that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through ... boycotts ... ." _Eastern Railroad Presidents Conference_ v. _Noerr Motor Freight, Inc._, 365 U.S. 127, 136 (1961). And _Parker_ v. _Brown_, 317 U.S. 341 (1943), does not exempt joint product-fixing absent state statutes authorizing such joint action. The debates on the McCarran-Ferguson Act reflect absolutely no consideration of agreements respecting products, and the state laws enacted in response to it by and large do not adopt such joint action as state policy. _Southern Motor Carriers Rate Conference_ v. _United States_, --- U.S. ---, 53 U.S.L.W. 4422 (March 27, 1985).

Property/casualty insurance industry conduct, as explained by industry leaders themselves, may be but a prelude to a larger campaign to force major industries, from the chemical and drug manufacturers to physicians and others, to bend to the interests and will of insurers. If their means include non-exempt joint anticompetitive action, however, then you may hold the key to important public protection. I urge you to investigate to ascertain whether the federal antitrust laws are being violated.

Yours truly,

Ron M. Landsman

Ron M. Landsman
Counsel, National Insurance
Consumer Organization

RML/kd

Appendix A

JOC 6/18/85

Insurers Told: Exit Some Lines

By JAMES NOLAN
Journal of Commerce Staff

WOODBRIDGE, N.J. — The insurance industry should quit covering doctors, chemical manufacturers and corporate officers and directors. And the sooner the industry quits such lines of business, the sooner it will free itself from its bondage to a court system "that has run amok."

This was the message delivered to a meeting of actuaries here Monday by John J. Byrne, chairman and chief executive officer of Geico Corp., the Washington-based personal lines insurance company.

Mr. Byrne said that the single thread running through such lines of business for underwriters was that they have fallen under the sway of the courts.

"There will be no problem with insuring homeowners or autos in the coming years," he said. "But anyone who puts his private capital behind lines such as malpractice is putting himself in the hands of a zany judge or jury out in California. To my mind, he is absolutely stupid."

Mr. Byrne's comments came in the midst of a discussion at a meeting of the Casualty Actuaries of New York about what kinds of insurance products might be available in the future.

The touchstone for the discussion was a presentation by the Insurance Services Office Inc., an industry-rating and data-gathering service. The ISO estimates that in the next few years the insurance industry will suffer a $62 billion shortfall in capacity. This means that corporate America will not be able to buy all the insurance it needs because insurers ability to cover them will fall short by that amount.

'Anyone who puts his private capital behind lines such as malpractice is putting himself in the hands of a zany judge or jury out in California.'

Mr. Byrne said the industry was responding to these issues in precisely the right way by refusing to cover lines of business that are hostage to court interpretations. "It will be best for the social good to let society know that the problem is not one for the insurance industry but for society as a whole. It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures," Mr. Byrne said.

He said he saw little hope for reform in such things as the federal program for Superfund, a toxic waste cleanup measure. He said the vast amount of money thus far spent by Superfund was to "educate lawyers on how to refine their suits brought on the part of plaintiffs against industry."

"Anybody who leaves his private capital where the courts can grab it has not done the right thing for his owners," Mr. Byrne said.

On a related score, Thomas A. Greene, president of his reinsurance brokerage firm in New York, said that still more pressure would be brought to bear on the American property and casualty industry by underwriters at Lloyd's of London. Mr. Greene said that beginning in 1986, Lloyd's syndicates would "simply not write reinsurance for the American casualty industry, especially in the lines mentioned by Mr. Byrne." He said further that reinsurance underwriters would virtually dictate to the ISO about a proposed commercial general liability form. He said the domestic reinsurance industry will not write treaties unless the industry adopts the new CGL form.

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Aetna studied the financial data of companies that had actually failed and the resultant ratios were absolutely realistic, Mr. Ryan said.

(1)

EPA Chief Deems It Necessary
To Keep Toxic Liability Powers

JOC 7/12/85

By LEAH R. YOUNG
Journal of Commerce Staff

WASHINGTON — The Environmental Protection Agency must keep the authority allowing it a wide choice of whom to sue for cleaning up toxic waste sites, Administrator Lee M. Thomas said.

While acknowledging that the market for all kinds of environmental insurance is drying up, Mr. Thomas insisted in an interview that the EPA cannot give up the "strict, joint and several liability" powers that courts have given it.

The insurance industry has been arguing that it cannot insure and collect premiums from individual companies when a court can require one or a few companies to pay all the costs of cleaning up a site.

That is especially true, insurers add, when many of the policies being interpreted by state courts never were intended to pay for hazardous waste cleanup.

But Mr. Thomas pointed out that he is responsible for getting such sites cleaned up while ensuring to the extent possible that the polluter, not the federal government, bears the costs.

The insurance industry would like to divide liability so that its clients are held responsible only for their share of damage, but the EPA finds that in most Superfund waste cleanup sites substances are mixed and records are poor.

When the EPA tried to apportion responsibility — an approach that is surfacing again among some congressmen at the behest of the insurance industry — it became "just as controversial among the private parties as utilization of joint and several" liability, Mr. Thomas said.

The EPA tried to base responsibility on the volume of waste, he said, but the companies fell into long debates over whose waste was more toxic.

However, as adamant as he is that strict, joint and several liability must be part of any Superfund program, Mr. Thomas opposes attempts by House Energy and Commerce Subcommittee Chairman James Florio, D-N.J., to write it into the pending Superfund bill.

"We don't think it should be specifically mandated," Mr. Thomas said. "Trying to get language in the statute has the potential of opening up the whole issue again to litigation."

But Rep. Florio argues that while he is "heartened" by the district court rulings to date, "this principle could be gutted by a specific district court or by the Justice Department."

He wants to make sure that industry cannot convince the administration to abandon this unwritten interpretation.

Rep. Florio lost a battle in his subcommittee on the issue to a group headed by Energy and Commerce Committee Chairman John Dingell, D-Mich.

In spite of the setback, Rep. Florio has vowed to continue his fight on the issue, and for other provisions the subcommittee rejected, in the full committee and on the House floor.

His rejection in subcommittee is no reason for rejoicing by the insurance industry. Many who opposed Rep. Florio support the views of Mr. Thomas.

Rep. Jim Slattery, D-Kan., explained that injecting joint and several liability into the legislation could lead to a situation in which the provision was either stricken or filibustered in the Senate.

That would create legislative history that might convince state courts that such liability is not part of Superfund.

While Mr. Thomas is determined to keep joint and several liability in spite of evidence of growing insurance problems, Mr. Thomas does not have any recommendations to alleviate the burden on the insurance industry.

He pointed out that a lot of the problems are not related just to Superfund, but rather to the general economic situation in the property-casualty insurance industry.

He noted that the European reinsurance market is drying up for environmental policies. There has been poor experience with asbestos, and a general desire to "establish a less risky base of insurance."

Under such circumstances, he said, he has been unable to win from the insurance industry any assurances that particular steps taken on the federal level will result in a return to the environment market.

Instead, insurance industry spokesmen will only say that if some steps are not taken "there is a chance we won't get back in the market," Mr. Thomas said.

It is possible that there is a need for federal involvement in the environmental liability field, but the debate has not reached the point where he thinks he can draw any conclusions.

In the meantime, EPA recognizes that many hazardous waste sites being licensed under the Resource Conservation and Recovery Act may not prove financial responsibility on Nov. 8 as required.

Without insurance, some facilities may use their own net worth, Mr. Thomas said, but others may just be forced out of business.

Fewer facilities will require companies that are generating wastes to modify their procedures to incinerate or otherwise minimize waste that until now was cheaper to send to land disposal facilities.

It is too soon to analyze the impact of this scenario, he said, in light of the congressional decision to encourage companies to move away from land disposal.

The only thing he is at all sure of now is that solving the problems of insuring hazardous waste facilities would not solve the entire insurance dilemma.

The House subcommittee did vote against one provision that disturbed the insurance industry. Congressmen rejected an amendment to permit citizens to sue private parties if they perceived a dangerous situation being ignored by the Environmental Protection Agency.

Only one Florio amendment was attached to the Superfund bill that goes to the full Commerce Committee.

That provision requests that the House Ways and Means Committee devise as part of the taxing scheme an import fee to reduce the share of general federal revenues envisioned in the bill from $250 million to $110 million.

The idea is to tax imported feedstock derivatives equally with domestic feedstock components in order not to give an advantage to foreign derivatives.

Mr. Thomas said the administration still opposes new Superfund taxes.

In Day-Care Crisis Cited

Official Criticizes Insurance Firms

By Sandra Sugawara
Washington Post Staff Writer

Maryland Insurance Commissioner Edward J. Muhl said yesterday that "hysteria" had caused insurance companies to discontinue coverage of day-care centers and that Maryland officials had blocked an attempt by one California firm to cancel 242 day-care policies.

Muhl also said that state officials were studying a wide variety of options, including the creation of a mutual liability insurance fund in Maryland similar to the one created in 1974 by the General Assembly to help physicians hit by an insurance malpractice crisis.

Muhl testified yesterday before the House Select Committee on Children, Youth and Families, which is holding hearings on the nationwide insurance crisis in the day-care industry. Muhl, who appeared on behalf of the National Association of Insurance Commissioners, critized insurance companies for wholesale cancellation of day-care policies, saying the insurance industry was overreacting to news accounts of sexual abuse and court suits involving some day-care centers.

Muhl said a California insurance carrier canceled policies at 242 Maryland day-care centers before they were to expire. He said he recently ordered that firm to revoke the midterm cancellations, although he said the company does not have to renew the policies.

Muhl said he was sympathetic to the plight of the insurance industry, which had its worst year ever in 1984. He said the Association of Insurance Commissioners expects the industry to sell $67 billion less in insurance this year than last year.

Muhl said he has signed 20 notices of insolvency for Maryland insurance firms this year. Those firms have gone out of business or must stop writing policies because of financial problems.

Insurance industry executives testified yesterday that the industry was in a slump and urged Congress to allow the industry to voluntarily [illegible] the problem. But Rep. [illegible]

EDWARD J. MUHL
. . . testifies before House committee

gress would be forced to get involved if the insurance industry failed to take immediate action to prevent the closing of thousands of day-care centers.

Insurance industry representatives have said the financial slump was caused by excessively low rates that companies charged during the late 1970s, when they were trying to increase business. They tried to make up the losses through investments, but were hurt by falling interest rates, according to Marvis A. Walter, senior vice president of Insurance Services Offices Inc., which compiles statistics and rate information for the industry.

Because of the financial problems, insurance firms began dropping high-risk industries, and they place the blame on the high awards given in liability cases.

"The potential for multimillion-dollar judgments exists" even though no such award has yet been paid in a child-abuse case, said Frank Neuhauser Jr., vice president of AIG Risk Management Inc., an insurance group based in New York. "Many of us believe we are living under a tort system that is completely out of control."

But J. Robert Hunter, former head of the Federal Insurance Administration during the Ford and Carter administrations, said that the insurance industry is using the courts "as a scapegoat."

"It's a self-inflicted problem, and to take it out on day-care centers is wrong," said Hunter.

Mike Causey is on vacation. The Federal Diary will resume when he returns.

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Appendix B

JOC 6/18/85

Insurers Told: Exit Some Lines

By JAMES NOLAN
Journal of Commerce Staff

WOODBRIDGE, N.J. — The insurance industry should quit covering doctors, chemical manufacturers and corporate officers and directors. And the sooner the industry quits such lines of business, the sooner it will free itself from its bondage to a court system "that has run amok."

This was the message delivered to a meeting of actuaries here Monday by John J. Byrne, chairman and chief executive officer of Geico Corp., the Washington-based personal lines insurance company.

Mr. Byrne said that the single thread running through such lines of business for underwriters was that they have fallen under the sway of the courts.

"There will be no problem with insuring homeowners or autos in the coming years," he said. "But anyone who puts his private capital behind lines such as malpractice is putting himself in the hands of a zany judge or jury out in California. To my mind, he is absolutely stupid."

Mr. Byrne's comments came in the midst of a discussion at a meeting of the Casualty Actuaries of New York about what kinds of insurance products might be available in the future.

The touchstone for the discussion was a presentation by the Insurance Services Office Inc., an industry-rating and data-gathering service. The ISO estimates that in the next few years the insurance industry will suffer a $92 billion shortfall in capacity. This means that corporate America will not be able to buy all the insurance it needs because insurers ability to cover them will fall short by that amount.

> *'Anyone who puts his private capital behind lines such as malpractice is putting himself in the hands of a zany judge or jury out in California.'*

Mr. Byrne said the industry was responding to these issues in precisely the right way by refusing to cover lines of business that are hostage to court interpretations. "It will be best for the social good to let society know that the problem is not one for the insurance industry but for society as a whole. It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures," Mr. Byrne said.

He said he saw little hope for reform in such things as the federal program for Superfund, a toxic waste cleanup measure. He said the vast amount of money thus far spent by Superfund was to "educate lawyers on how to refine their suits brought on the part of plaintiffs against industry."

"Anybody who leaves his private capital where the courts can grab it has not done the right thing for his owners," Mr. Byrne said.

On a related score, Thomas A. Greene, president of his reinsurance brokerage firm in New York, said that still more pressure would be brought to bear on the American property and casualty industry by underwriters at Lloyd's of London. Mr. Greene said that beginning in 1986, Lloyd's syndicates would "simply not write reinsurance for the American casualty industry, especially in the lines mentioned by Mr. Byrne." He said further that reinsurance underwriters would virtually dictate to the ISO about a proposed commercial general liability form. He said the domestic reinsurance industry will not write treaties unless the industry adopts the new CGL form.

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Insurers Urge Adoption Of New Policy

By JAMES NOLAN
Journal of Commerce Staff

CHICAGO — The very fate of the American liability insurance industry hangs on state regulatory approval of new liability insurance forms.

An array of insurance industry spokesmen argued this position in public hearings Thursday before a panel of insurance regulators from 8 states.

The industry representatives predicted further that American business and industry in all likelihood would go unprotected by insurance against liability claims on their assets unless the regulators approve a proposed uniform commercial general liability form for use by Jan. 1, 1986.

The hearings were organized by Illinois, New York and Texas insurance commissioners after a meeting of the National Association of Insurance Commissioners in Kansas City in June.

The commissioners at that time said they felt they wanted to hear from the industry in a single presentation, rather than taking testimony on a state-by-state basis as is usually the case when insurers seek approval for a new policy form.

Illinois Insurance Director John E. Washburn, chairman of the regulator panel, grouped supporters of the new policy in the morning and afternoon session.

Opponents, such as the Risk and Insurance Management Society, the voice of corporate insurance buyers, were to present their case later in the day and continue this morning.

Speaking in support of the new policy John C. Morrison, a senior vice president at Cigna Corp., said the use of the new commercial general liability policy drafted by the Insurance Services Office, an industry policy-making group, "will help to forestall a very serious threat to the financial solvency of some members of our industry.

"Without approval of the new ISO program, there will likely be an unacceptable number of insurer insolvencies — and this problem could have disastrous consequences for the general public."

The ISO in a statement said the industry's existing "occurrence" policy would be replaced by a "claims-made" version.

An occurence policy covers the insured for injury and property damage that happen during the policy contract year.

The claims-made policy covers the insured only if a claim is made for the damage during the year the policy is in force.

Christopher C. Mansfield, vice president and general counsel, Liberty Mutual Insurance Co. said that "unless we act positively, our industry may not be able to provide the risk shifting and loss distribution capacity which our customers require and society demands."

Fred R. Marcon, ISO executive vice president and chief operating officer, said, "There has been a complete breakdown in confidence on the part of risk takers: confidence in the predictability of loss, the efficacy of the underwriting process and the ability of insurers to control their own financial destinies."

Supporters of the new policy were united in placing the major share of the blame for the crisis on the judiciary system.

Industry officials say almost with one voice that it is the courts redefinition of policy contract language that has led to awards in pollution liability, product liability and medical malpractice that are bankrupting liability underwriters.

Gerald Wakefield, chief executive, North American reinsurance division of C.T. Bowring & Co., presented the views of Lloyd's of London reinsurers, vigorous supporters of the new policy.

Mr. Wakefield conceded that Lloyd's cannot dictate to American regulators on policy approval, but he wryly said that if the new form is not approved, Lloyd's will not reinsure American liability underwriters.

"Worldwide reinsurance capacity at this juncture is so short that further erosion could cause a fundamental change in the fabric of the U.S. insurance industry's mode of operation." He concluded: "ISO's proposed new claims-made form certainly goes a long way toward the retention of such reinsurance market support which currently looks so tenuous."

The industry spokesmen returned to the hearing table later in the day for questioning by the insurance commissioners.

Vs. Occurrence

Journal of Commerce Staff

CHICAGO — The casualty insurance industry and its biggest customers, corporate America, are having problems with words.

Three words in particular.

The words occurrence and claims made refer to that most important facet of the insurance business, the payment of claims and the question of who will make the payment.

To put it as simply as is possible, no small thing in a sea of policy language complexity, when you buy an occurrence insurance policy, your claim is good for damages you sustained in the period for which you paid the premium, usually one year.

You may not discover the damage until years later, but still your claim is valid and the underwriter who sold you that occurrence policy must pay the claim.

If you bought a claims made policy, your claim is good only if you file the claim during the [illegible] in which the policy contract [illegible]

So if you are a doctor or make your living by making anything from cookie tins to insect spray, you most assuredly want that occurrence coverage. Who knows what you did 10 years ago to lay yourself open to a claim?

Now we get to the sticky part.

It is the occurrence policy and the way law courts are defining the words therein that is bleeding the casualty industry white, industry leaders say.

The insurance industry, therefore, wants to sell only claims made coverage beginning in January 1986.

In the process, the coverage afforded by the occurrence policy as it is understood by the corporations who buy it would be no more.

Understandly, then, the Risk and Insurance Management Society, the voice of insurance buyers for America's corporations, is, to a

ew Liability

By JAMES NOLAN.
Journal of Commerce Staff

HICAGO — Major state insur-
regulators were openly skepti-
ast week about the proper-
sualty industry's plans to use a
commercial general liability
ard policy form.

hearings convened by the Illi-
nsurance Department, regula-
rom New York, Texas, Con-
ut and Illinois said time and
that the insurance industry
intent on reducing the amount
bility coverage corporations
buy beginning in January.

ther, the regulators argued
dustry representatives during
hours of intense questioning
e proposed policy was much
mplex for corporate insurance
to understand.

e than a dozen industry repre-
ves countered with arguments
e new policy form was an
e necessity for the survival of
ustry.

burden of the industry's case
rried by delegates from the
ce Services Office, an indus-
ded policy-making body,
as fashioned the new policy

f the industry arguments ran
ad that casualty underwrit-
been suffering catastrophic
recent years.

yd's of London delegate who
r expressly for the meeting
at unless the U.S. industry
mitted to adopt the new
e Lloyd's reinsurance mar-
ld discontinue backing Amer-
derwriters forthwith. Such
would severely limit the U.S.
's ability to buy reinsurance,
eading risks on major disas-
h as a supertanker sinking,
ore oil well disaster and the
g claims associated with the
India, gas leak catastrophe
led more than 2,000 and in-
ns of thousands more less
ear ago.

Lloyd's has had a substantial position for generations in supporting American primary underwriters with reinsurance for product liability, pollution and environmental impairment coverages, directors and officers liability and medical and other professional malpractice coverages.

The industry forum was organized by commissioners from Illinois, Texas and New York. They were joined by commissioners and staff regulators from 14 other states after they found they were reacting in a piecemeal fashion to pleas from the industry, state by state, for permission to adopt the new system.

Although the commissioners protested that they were open minded about the issues, their questioning showed mounting skepticism.

For example, Peter Gillies, Connecticut commissioner, said that traditionally the industry position on a new policy filing has been that policy contract language is virtually cast in bronze and should not be changed.

"The purpose of this whole exercise is to avoid litigation. But aren't we going to just march lock step into court on this issue?" Mr. Gilles said.

"When the industry does not want us to approve something in a policy form the argument is made that if you change it, we will have to go and litigate. And you know what this means in the courts, so for God's sake, don't do that to us.

"Now you are asking us to approve a form which is going to make some very dramatic changes in a whole host of areas. How do you avoid the courts?" Mr. Gilles said.

Richard Savage of the ISO said that the danger of litigation was lessened because the new contracts were worded most carefully.

To put the kindest face possible on the matter, the response drew laughter from the regulator's table.

Later, Fred R. Marcon, ISO executive vice president, conceded that the possibility of new litigation had been much on the mind of those who shaped the new form. But, he added, the property/casualty industry has no other course if it is to survive.

At another point, Gerald H.C. Wakefield, chief executive, North American reinsurance division of C.T. Bowring at Lloyd's of London, employed an extended anecdote to explain the genesis of a legal liability principal.

He said that a British court had ruled in the days of Queen Victoria that if a householder was fool enough to keep a tiger in the back garden, the householder was liable for damages the tiger did when he got out.

At a later moment in the proceedings, Mr. Wakefield sought permission to address the panel on a point.

"Fine," said James P. Corcoran, New York insurance superintendent, "but, please, no lions and tigers."

Outright hostility to the new policy forms was repeated at the meeting by a delegation from the Risk and Insurance Management Society, an organization of some 3,800 corporate insurance buyers.

William Blick Jr. of the Allen Group, a New York auto parts maker, and spokesmen for the society, said the group stood fast on the position it took in public hearings before the New York Insurance Department in May.

The society then accused the ISO of "an abuse of the antitrust exemption granted to insurers by the McCarran Ferguson Act," and that the new policy had been fashioned "with little or no concern as to the impact these changes will have on the insured or potential claimants."

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APPENDIX C

STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION

BEFORE THE

HOUSE SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

CONCERNING

CHILD CARE AND INSURANCE

JULY 30, 1985

American Insurance Association

The American Insurance Association is a national trade organization of casualty insurers.

The American Insurance Association (AIA) is a trade association which represents 172 property and casualty insurance companies. The member companies of the Association provide a majority of the commercial line insurance coverages written throughout the United States. Some of AIA's members provide general liability coverage to professional day care centers. Liability insurance is provided to some family day care homes through the application of the "business pursuits" endorsement which removes the business exclusion from the homeowner's policy.

Professional day care centers and family day care homes are currently experiencing a liability insurance availability and affordability problem. To the extent that state law mandates the acquisition of general liability insurance coverage as a prerequisite for doing business, the availability/affordability situation is exacerbated. Current insurance market conditions for professional day care centers suggest a market in transition rather than chaos. The countrywide experience for those companies reporting premium and loss data to the Insurance Services Office, Inc. (ISO) for advisory ratemaking purposes for day nurseries appears to conform with the current loss experience for the majority of commercial insurance lines. If expense factors are built into the loss and loss adjustment data for day care nurseries provided by ISO, the combined ratio approaches the aggregate general liability combined ratio of 152. Although these losses clearly indicate the need for increased rates, they do not suggest that insurers should abandon the market.

Insurance availability and affordability problems are not confined to the day care industry. Societal litigiousness and our legal system's movement

STATEMENT OF

RALPH NADER

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM

OF THE

COMMITTEE ON ENERGY AND COMMERCE
US HOUSE OF REPRESENTATIVES

THE GREAT INSURANCE INDUSTRY BOYCOTT OF 1985

SEPTEMBER 19, 1985

Good morning. Mr. Chairman, members of the subcommittee, thank you for the opportunity to testify on the sharp increases in insurance premiums and widespread cancellations.

Consumers of insurance products in America are facing a crisis. The crisis is not one of availability nor one of affordability, but one of confidence. This crisis in confidence lies in whether this Congress will take necessary steps at the federal level to give consumers relief from abusive practices of the insurance industry.

By massively canceling policies or refusing to sell coverage without 300 to 1000 percent increases for day-care centers, nurse-midwives, transit authorities, physicians, municipalities, fishing fleets--to name a few sectors of the economy--the industry is betting that the resultant pressure will lead the states to grant (excessive) rate increases and changes in policy forms, and the state legislatures and the Congress to enact restrictions on injured people's right to sue. The insurance industry is gambling for high stakes, if successful the bet will pay off in billions.

The insurance industry has won on this bet once before. There seems to be an underwriters' 10-year itch of greed operating here. Ten years ago, the companies bellowed about the "medical malpractice and product liability crises" and got higher premiums from state authorities and favorable changes in the laws in many states. Subsequent studies, including one by the U.S. Department of Commerce, revealed no such crises but the damage was done to consumers' rights and their pocketbooks. 1/ Insurer profits soared.

Now, 10 years later, we are witnessing what actuary Robert Hunter calls "a manufactured crisis intended to bloat insurer profits and reduce victims' rights." Already, in the first six months of 1985, auto insurance premiums have risen 9.1 percent, more than the rate of increase for all of 1984. 2/ At this rate, auto rates will rise 18.2 percent this year, far in excess of increases in claims or inflation. All the elements for a repeat of the 1975 "crises" are in place. Even the Congress has fallen into line. Bills are pending or will be introduced before the House and Senate that would restrict victims' rights in product liability, medical malpractice and admiralty related suits.

It is to be hoped that this "strike 'em or gouge 'em" gamble will backfire. Americans do not like companies which refuse to sell to them, or which refuse to sell to them unless they get three or five or ten times the previous price. The insurance industry is brazenly unique in these quantum price jumps or arbitrary refusals to deal. This kind of abuse turns people off. If the insurance industry is selectively going on strike, or abandoning certain markets or imposing wildly extortionate prices, then federal or even state government pools of insurance can be established to provide coverage for people who lose coverage through no fault of their own. The Congress could articulate standards by which the states must regulate insurance. The Department of Justice could investigate and take steps to protect consumers.

Insurance is a necessity and affected businesses cannot be required to close down. Products which are safe and beneficial might be kept from markets. Physicians and surgeons may quit practice because of unavailable or unaffordable insurance. Society cannot function properly when its commerce is so disrupted. When those same insurers refused to offer insurance to properties in the center cities during the disruptions of the '60s, the federal governmment offered the FAIR plans that kept insurance available in the cities. The government made money in this business, contrary to insurance industry predictions.

The government has offered insurance in the past when private insurers have balked ---crop insurance for farmers, bank deposit insurance for savings accounts, crime insurance in the less affluent areas of the country and for some years flood insurance for properties on flood plains. Federal law has facilitated self-insurance pools for companies which want to get together for coverage in the product liability area. So the insurance industry is gambling also with the risk of inviting Uncle Sam's intervention and self-insurance by syndicates of their former customers.

Leaders in the industry think they will win. They've won before. John J. Byrne formerly head of GEICO Insurance and new CEO of the Fireman's Fund has said; "It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures." 3/ Thomas A. Greene, president of his own reinsurance brokerage firm, has said Lloyd's would "simply not write reinsurance for the American casualty industry." 4/ Gerald Wakefield , a Lloyd's representative was reported as having wryly said that if new policy forms limiting insureds' rights were not approved, Lloyd's would not reinsure American liability underwriters. 5/ Lloyd's chair Peter Miller said later that: "This is not a threat." 6/ The Subcommittee would advance the purpose of its inquiry were it to examine the lobbying and pressures on domestic insurers and state regulators and lawmakers by this British giant, Lloyds of London -- a major initiator of the domestic insurers' over-reaching.

Instead of this massive industry using its economic leverage for claims prevention by advancing pollution control and clean-up, safer consumer products and workplaces; instead of using its leverage to help stabilize the economy, it is, with few exceptions, behaving like a spoiled brat. The insurance industry should be more than a cash cow; it should be a safety bull to reduce the basis for claims. This spoiled brat must be weaned of the fruits of its manufactured "crises" and not allowed to increase prices while restricting cover for insureds and the legal rights of victims.

For example, Engineering Times reports that the main underwriters for the 11,000 architectural/engineering firms will include a "pollution exclusion" in all future policies. This means that firms working on municipal treatment plants or projects involving emissions or recycling, reconditioning or reclaiming waste products won't have insurance for these activities. Other policy changes would include the cost of defending suits within the limit of liability in a policy. This means that if a buyer has a million dollars of coverage and the insurer defense lawyers spend a million dollars defending the suit, nothing remains for any victim recovery.

The insurance companies are using judges and juries as their favorite whipping boys, blaming verdicts and settlements for their troubles. Their favorite figure to bandy about is "$3.8 billion in losses last year." A U.S. General Accounting Office (GAO) report on insurer profitability shows a $300 million profit over underwriting losses last year for the property/casualty insurance industry. 7/ If insurers are losing so much money, why are their stocks selling at record prices on the stock exchange? A.M. Best's Insurance Index shows an increase of 30% for property/casualty stocks in the first six months of 1985. The S&P Industrials languished at a mere 14% and the Dow Jones Industrials at a paltry 10% for the first six months of 1985. 8/ If insurers are losing so much money, why are stockbrokers recommending that these companies are such great buys? The brokers know that the industry will continue to be as profitable as it has been over the last 10 years where, according to the GAO, investment income has exceeded underwriting losses by $72.1 Billion (and they got a $63 million tax refund)! 9/

It will take an informed citizenry and an informed media to stop the great insurance industry boycott of 1985. This hearing is an important first step toward providing that essential information. The insurance industry must be required to support its assertions of losses with data unencumbered by accounting flimflam. During the phony product liability crisis in the mid-seventies, this industry would not even produce data as to how much was paid out in verdicts and settlements compared to what it took in in product liability premiums. I hope this is only the first of a series of hearings on the insurance "crisis" and that perhaps regional hearings might be held to give all of America the opportunity to see that the crisis need not be manufactured, but rather that they see a renewed dedication by the Congress to the protection of all consumers.

I would like to include for the record some detailed letters by small businesses who have been abandoned or gouged by insurance companies.

Thank you.

Rec'd SKB 1/13/86

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

POUCH D
JUNEAU, ALASKA 99811
PHONE: 465-2500

December 17, 1985

Honorable Bill Sheffield
Governor
Juneau, AK 99811

Dear Governor Sheffield:

As chairman of your Task Force on Insurance Availability and Pricing, it is my pleasure to submit the report of the task force. I believe we have fulfilled our clearly delineated responsibility. The report summarizes the testimony and documentation presented to the task force without making specific recommendations.

The issue of insurance availability and pricing is expansive. The task force accumulated a huge amount of documentation on the subject. The documents appended to the report are only a fraction of the available data. We included in the report only the minimal documentation necessary to adequately explain the issues.

The task force believes that insurance issues will continue to be at the forefront for at least another year. We also believe that an ongoing review of insurance issues would be beneficial.

Throughout the work of the task force, the issue of tort reform was suggested as one of several probable causes of the insurance crisis.

It is apparent that tort reform will be a major issue in the next Legislature and will receive prominent attention. You may, therefore, wish to consider appointing a task force or advisory group to further study this specific issue.

The task force is pleased to report to you that State agencies universally expressed their desire to work with licensees, vendors and contractors to resolve insurance problems stemming from State mandated insurance requirements. We believe this reflects positively on your Administration.

Thank you for giving us this opportunity to assist.

Sincerely,

Loren H. Lounsbury

Loren H. Lounsbury
Commissioner

LHL/JG/ss3326W
08-H2LH 121885b
cc: Task Force Members

TASK FORCE ON INSURANCE AVAILABILITY AND PRICING

REPORT TO GOVERNOR BILL SHEFFIELD

STATE OF ALASKA
OFFICE OF THE GOVERNOR
DECEMBER, 1985

9/26/85

GOVERNOR'S TASK FORCE ON INSURANCE AVAILABILITY AND PRICING

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INSURANCE TASK FORCE REPORT

EXHIBITS

SCOPE

The Task Force has been charged with determining the scope and seriousness of problems of insurance availability and pricing.

Prior to appointment of the Task Force, it was recognized that a crisis existed in insurance. No one had compiled sufficient information on the various groups affected or the extent of the problem to delineate clearly what the real crisis is. Although many solutions were being proposed (from all sides), the basis for rational examination of the entire problem had not been collected.

The intent of this Task Force Report is to delineate clearly the problem, examine the reasons for the problem, define the persons or groups affected by the problem, capsulize pertinent testimony, and to present the documents and evidence collected by the Task Force.

It is not within the scope of the Task Force to make recommendations or to endorse recommendations made by others.

SUMMARY

The Task Force has found that the problems associated with insurance availability and cost are not unique to Alaska. They impact directly or indirectly every citizen in the entire country.

Many underlying causes contribute to the numerous separate problems which have been referred to as the insurance crisis. We have verified to our satisfaction that the majority of major insurers definitely have lost substantial amounts of policyholder surplus during the past year. This impairs their ability to offer as much insurance to consumers, because of diminished financial capacity. Many insurers have been put into liquidation or rehabilitation by State regulators due to severely impaired financial condition.

Insurers acted foolishly in overcompeting for business in prior years in order to reap investment income. When investment yield fell at the same time that insurers were experiencing higher than anticipated claims awards, premiums were forced to adjust dramatically upward and underwriting criteria tightened.

The Insurance Report for 1985 prepared by the Division of Insurance compiles premium and loss figures for admitted insurers for calendar year 1984. It indicates that the experience of insurers in Alaska was uneven. Some insurers had profitable years while others were not so fortunate.

However, overall insurers had better pure loss ratios (claims vs. premiums) in Alaska than the national average. Although comparisons of premium and losses do not account for the expenses of operation, these are similar comparisons to other types of comparisons included in the appendix for national experience. Despite a better than average performance, the small volume of business and high cost of operation still makes Alaska a less than attractive place to insure risks. A significant factor to consider when reviewing the report is that the accumulation of coverages for premium and loss comparisons, tends to hide bad losses by a particular subcoverage by combining them with profitable subcoverages to show an average loss or gain. Thus, day care experience is comingled with many other lines making it impossible to examine it separately.

It appears that insurers are selecting out subgroups of coverages to improve profitability, to mesh with reinsurance coverage, or to concentrate their efforts in areas they feel more competent to underwrite.

The Task Force finds that in Alaska most coverages are available at some price either from the regulated or unregulated insurance market, for those insureds that have good claims experience and are high quality risks. However, excess policy limits are sometimes unavailable, and insurers who have been largely unprofitable have limited capacity to issue insurance policies even at adequate rates.

FINDINGS

A. THE TASK FORCE CONCLUDES THAT EVERY ALASKAN IS DIRECTLY OR INDIRECTLY AFFECTED BY THE HIGHER COST OF INSURANCE WHICH IS BEING DEMANDED IN TODAY'S MARKETPLACE.

B. THE TASK FORCE FOUND THAT THE BEST RISKS OF MOST CLASSES OF BUSINESS WERE INSURABLE AT LEAST FOR PRIMARY LIMITS IN VIRTUALLY ALL CASES IF THE INSURED WAS WILLING TO PAY THE HIGH COST. MUCH, BUT NOT ALL, OF THIS INSURANCE WAS OFFERED IN THE UNREGULATED SURPLUS LINES MARKET.

C. WE FURTHER FOUND THAT HIGHER POLICY LIMITS WERE NOT READILY AVAILABLE IN MANY CASES.

D. THE TASK FORCE FINDS THAT TORT REFORM WAS RAISED AS A SIGNIFICANT ISSUE BY MANY WITNESSES. TORT REFORM IS A BROAD CONCEPT WHICH HAS MANY SPECIFIC PARTS EACH OF WHICH REQUIRE EXHAUSTIVE STUDY AND IS FAR BEYOND THE SCOPE OF THE TASK FORCE TO COMMENT KNOWLEDGEABLY ABOUT. THE TASK FORCE ACKNOWLEDGES TWO PREVIOUS REPORTS, THE REPORT OF THE GOVERNOR'S MEDICAL MALPRACTICE INSURANCE COMMISSION (1975) AND THE BODILY INJURY REPARATIONS ADVISORY COMMITTEE (1979) BOTH OF WHICH ARE INCLUDED IN THE APPENDIX. THESE REPORTS BOTH CONTAIN COMMENTS ON TORT REFORMS.

E. THE TASK FORCE FINDS THAT THE INSURANCE CRISIS IS NATIONAL OR INTERNATIONAL IN SCOPE. THE PROBLEMS EXPERIENCED IN ALASKA ARE NO DIFFERENT THAN EXPERIENCED IN OTHER STATES.

THE TASK FORCE FINDS THAT MANY THINGS ARE CURRENTLY BEING DONE TO EASE THE INSURANCE CRISIS. THE FOLLOWING ARE AREAS WHERE THE STATE IS ACTIVELY WORKING TO RESOLVE THE PROBLEMS.

1. THE DIVISION OF RISK MANAGEMENT HAS BEEN WORKING WITH STATE AGENCIES ON REVISION OF STATE CONTRACT INSURANCE REQUIREMENTS.

2. THE DIVISION OF INSURANCE HAS ESTABLISHED A MARKET ACCESS PROGRAM TO ASSIST INDIVIDUALS IN LOCATING INSURANCE COVERAGE.

3. THE DIVISION OF INSURANCE HAS ESTABLISHED THE CADIS (COORDINATION OF ALASKA DAY CARE INSURANCE SEARCH) PROGRAM TO IDENTIFY POTENTIAL MARKETS AND SHARE INFORMATION WITH BOTH INSURANCE PRODUCERS AND DAY CARE OPERATORS.

THE TASK FORCE RECOMMENDS THAT THE DOCUMENTS COLLECTED DURING THE TASK FORCE RESEARCH BE READ BY ANYONE WHO INTENDS TO PROPOSE A SOLUTION TO THE COMPLEX PROBLEM WE ADDRESS AS THE INSURANCE CRISIS.

not really

HOW INSURANCE IS REGULATED

INSURANCE IS A HIGHLY REGULATED INDUSTRY IN WHICH THE INDIVIDUAL STATES, NOT THE FEDERAL GOVERNMENT, HAVE COMPLETE JURISDICTION. IN ORDER TO REGULATE INSURANCE MORE UNIFORMLY AMONG THE STATES AND TO AVOID SERIOUS DUPLICATION OF EFFORTS, THE STATE REGULATORS CREATED THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS.

THROUGH THE NAIC, ACCOUNTING AND FINANCIAL REPORTING BY INSURERS HAS BEEN STANDARDIZED AMONG THE STATES. EVERY ADMITTED INSURER DOING BUSINESS IN ALASKA MUST FILE THE STANDARD NAIC FINANCIAL REPORTING STATEMENT WITH THE DIRECTOR OF INSURANCE. THE ANNUAL STATEMENT IS COMPREHENSIVE AND IS SPECIFICALLY DESIGNED TO REFLECT THE INFORMATION REQUIRED TO DETERMINE THE FINANCIAL HEALTH OF THE INSURER. THE DIRECTOR HAS THE AUTHORITY TO CONDUCT EXAMINATIONS OF INSURERS IN ORDER TO VERIFY THE TRUTHFULNESS OF THE FINANCIAL STATEMENTS. EACH COMPANY IS PERIODICALLY EXAMINED TO DETERMINE ITS SOLVENCY, BY NAIC EXAMINER TEAMS, MADE UP OF EXAMINERS FROM VARIOUS STATE INSURANCE DEPARTMENTS. ALASKA CONDUCTS SOME OF ITS EXAMINATIONS THROUGH NAIC EXAMINATION TEAMS.

THE NAIC ENTERS INFORMATION FROM INSURER FINANCIAL STATEMENTS INTO ITS COMPUTER WHICH IS DESIGNED TO COMPUTE SIGNIFICANT RATIOS AND COMPARISONS. COMPANIES WHOSE RATIOS ARE FOUND OUTSIDE THE NORMAL PARAMETERS ARE TARGETED FOR IMMEDIATE EXAMINATION. IN 1985, OVER 200 INSURERS FAILED SEVEN OR MORE OF THE ELEVEN RATIO TESTS.

THE NEED FOR IMMEDIATE EXAMINATION OF THESE COMPANIES HAS SEVERELY TAXED THE ABILITIES OF THE STATES' EXAMINER TEAMS TO CONDUCT TIMELY EXAMINATIONS OF THE MOST SERIOUSLY TROUBLED COMPANIES.

ALASKA ALSO DEPENDS HEAVILY ON SURPLUS LINES INSURERS WHO OPERATE IN A TOTALLY UNREGULATED SYSTEM. ALASKA STATUTES REQUIRE INSURANCE PRODUCERS TO ATTEMPT TO PLACE INSURANCE IN ADMITTED OR REGULATED INSURERS FIRST. IF COVERAGE IS UNAVAILABLE IN THE ADMITTED MARKETS, THEY MAY PLACE COVERAGE THROUGH A SURPLUS LINES BROKER IN THE UNREGULATED MARKET. ALASKA RELIES HEAVILY ON THE SURPLUS LINES MARKET FOR MARINE, AVIATION, PROFESSIONAL LIABILITY, EXCESS LIMITS AND OTHER NONSTANDARD CLASSIFICATIONS. NO RATE OR POLICY FORM RESTRAINTS APPLY TO SURPLUS LINES INSURERS.

ALL ADMITTED INSURERS DOING BUSINESS IN ALASKA ARE REQUIRED TO SUBMIT INSURANCE RATES AND POLICY FORMS TO THE DIRECTOR OF INSURANCE FOR APPROVAL PRIOR TO USE. ONLY A FEW EXCEPTIONS TO THESE FILING REQUIREMENTS EXIST. STAFF LIMITATIONS PRECLUDE THE DIVISION FROM CLOSELY SCRUTINIZING EVERY RATE AND FORM FILING PRESENTED; HOWEVER, THE DIVISION DOES A CURSORY REVIEW OF EACH FILING TO SELECT A LIMITED NUMBER FOR DETAILED EXAMINATION. RATES ARE REVIEWED TO DETERMINE THAT THEY ARE ADEQUATE BUT NOT EXCESSIVE BASED ON PROBABILITIES OF FUTURE EXPECTED LOSSES ACCORDING TO THE BEST ACTUARIAL INFORMATION AND ASSUMPTIONS AVAILABLE.

PUBLIC TESTIMONY

The Task Force heard testimony from a broad spectrum of Alaska's entrepreneurs. Represented in this group were day care facilities, architects, engineers, aircraft operators, commercial vehicle operators, bar owners, fuel oil distributers, commercial fishermen, school districts, municipalities, security services, nonprofits, Native corporations, school bus contractors, and State agencies. It is safe to speculate that, with the possible exception of private passenger automobile insurance and homeowners insurance, all property and liability insurance has been affected to some degree by the current insurance market situation.

Anyone who needs to purchase property and liability insurance will be affected by higher insurance cost this year. Additionally, the Task Force learned that some businesses faced higher rate increases than others. Liability insurance rates increased more than property rates and some types of liability coverages increased more than others.

THE TASK FORCE CONCLUDES THAT EVERY ALASKAN IS DIRECTLY OR INDIRECTLY AFFECTED BY THE HIGHER COST OF INSURANCE WHICH IS BEING DEMANDED IN TODAY'S MARKETPLACE.

Several witnesses testified that they were unable to obtain any insurance coverage whatsoever. Further examination by Task Force staff reveals that several different reasons for the I can't get insurance" statements.

Some have been offered insurance at a price which is deemed to be so high as to preclude purchase. Others have been told by one or more agents that it isn't available. Task Force staff has successfully found markets for the majority of these people after canvassing the marketplace. Coverage was not always inexpensive but was available in most cases if enough time and effort were expended. In the few cases where insurance was not found, the particular risk was not insurable even though others in its same class of risk were insurable. Examples were individual claims history, condition of a particular fishing boat and inability or unwillingness to institute loss control measures. In only a very few cases was no coverage found for a class of risk. <u>Pollution coverage</u> and <u>sexual abuse coverage for day care operations were not offered at any price</u>.

Division of Insurance staff were successful in finding limited markets at some price for wooden fishing vessels, fuel distributors, day care operators, fireworks display operators, liquor liability and others when the particular policyholder did not have poor loss history or an unseaworthy vessel.

A related problem was nonavailability of required excess limits coverages. Although liquor liability is available for primary limits of $300,000 per occurrence, higher limits were not always found. The same is true in other classes of insurance such as fuel delivery, day care, and professional liability. If entrepreneurs require high policy limits, they may not always be able to procure them.

One reason given for lack of higher limits was the inability to generate enough premium in the excess layers where losses are less frequent but more severe. Another reason was primary insurers lacked the internal capacity to retain the exposure and were unable to find reinsurers to share the risk.

THE TASK FORCE FOUND THAT THE BEST RISKS OF MOST CLASSES OF BUSINESS WERE INSURABLE AT LEAST FOR PRIMARY LIMITS IN VIRTUALLY ALL CASES IF THE INSURED WAS WILLING TO PAY THE HIGH COST. MUCH, BUT NOT ALL, OF THIS INSURANCE WAS OFFERED IN THE UNREGULATED SURPLUS LINES MARKET.

WE FURTHER FOUND THAT HIGHER POLICY LIMITS WERE NOT READILY AVAILABLE IN MANY CASES.

Many persons testified about what they felt was the underlying cause of the insurance crisis and their own personal crisis if insurance coverage was unavailable. Summary of the testimony of the vast majority of the witnesses leaves the Task Force with the impression that the witnesses were frustrated with the liability imposed upon them by the courts or by their insurers settling cases in which they did not feel they were liable.

Although witnesses expressed willingness to accept responsibility for what they interpret as their own negligence, almost everyone expressed resentment of the actual or potential negligence and related high awards assessed against them by the legal system. In short, they believe the theories of negligence and compensation imposed by the civil justice system are out of synch with their own. The proposals of the Citizens Coalition for Tort Reform included in the appendix summarize the various specific suggestions made by the pro tort reform witnesses.

Two witnesses gave testimony in opposition to tort reform. The disparity in numbers of persons for and against tort reform relates to the nebulous make up of persons who would benefit from the no tort reform option. — potential These are in most cases persons who have not yet been injured but who will in the future seek recovery through the civil justice system. Since they are presently unidentified, they did not testify. Clearly aligned with this group of future benefactors of the present system are the attorneys who have represented injured parties in the past and who presumably will be asked to obtain recovery for persons injured in the future. In essence, they testified on behalf of their future clients.

Paul Cossman's letter to the Task Force summarizes the testimony in opposition to tort reform and is included in the appendix.

THE TASK FORCE FINDS THAT TORT REFORM WAS RAISED AS A SIGNIFICANT ISSUE BY MANY WITNESSES. TORT REFORM IS A BROAD CONCEPT WHICH HAS MANY SPECIFIC PARTS EACH OF WHICH REQUIRE EXHAUSTIVE STUDY. IT IS FAR BEYOND THE SCOPE OF THE TASK FORCE TO COMMENT ON TORT REFORM AT THIS TIME. THE TASK FORCE ACKNOWLEDGES TWO PREVIOUS REPORTS, THE REPORT OF THE GOVERNOR'S MEDICAL MALPRACTICE INSURANCE COMMISSION (1975) AND THE BODILY INJURY REPARATIONS ADVISORY COMMITTEE (1979) BOTH OF WHICH ARE INCLUDED IN THE APPENDIX. THESE REPORTS BOTH CONTAIN COMMENTS ON TORT REFORMS.

DOT INSURANCE REQUIREMENTS

During one of the Task Force meetings, Department of Transportation requirements for contractor bonding and insurance were discussed. Although the department has the ability to waive bonding requirements, they seldom, if ever, do so. Apparently, the decision has been made that contractors who are unable to obtain bonding do not necessarily have the financial capability of financing the job and successfully performing the contract performance. If DOT waives the bond requirement, the State could end up with no recourse in the case of contractor default. DOT did express some interest in bidding certain contracts for architects and engineers with and without professional liability insurance in order to better define the insurance cost of the job. Cost benefit comparisons could be made for the specific job to determine the merit of insurance. They also are considering waiving professional liability insurance on contracts where in-house expertise is available to monitor and approve the contract work for quality.

Although DOT could eliminate insurance and bonding problems for contractors dealing with the State by simply not requiring insurance, they must also consider the increased liability and exposure to the State which is assumed by the process.

LOSS CONTROL

Although the Task Force heard from numerous individuals and groups on the availability and price of insurance and some commented on the high cost of resolving loss through the legal system, little testimony centered on elimination of or reduction in loss frequency. Any resolution of the crisis involving transfer of risk to insurers would be incomplete without fully exploring cost containment through loss prevention.

Loss control is an individual, industry and government function. One concern expressed to the Task Force in written testimony was that any resolution of the crisis must include continued and possibly increased State effort in policing labor standards, law enforcement and license qualifications. Insureds also have an obligation to control their own loss expense through prevention.

Documents submitted to the Task Force and testimony support the national and international scope of the insurance crisis. A report prepared by the State of New Jersey summarizes the problems reported by the majority of states. Other documents support the contention that European insurance markets have withdrawn or are about to withdraw from the U.S. market due to severe losses. Only a small portion of their book of business is concentrated in the U.S. but the majority of their losses have been sustained here.

THE TASK FORCE FINDS THAT THE INSURANCE CRISIS IS NATIONAL OR INTERNATIONAL IN SCOPE. THE PROBLEMS EXPERIENCED IN ALASKA ARE NO DIFFERENT THAN EXPERIENCED IN OTHER STATES.

The general consensus of the information sources surveyed by the Task Force was that nationally insurers began competing aggressively for premium dollars for investment purposes in 1979. High interest rates could provide profit to the extent that some underwriting loss could be offset. New insurers were formed to take advantage of high profits generated by small underwriting losses and high investment yield. As competition increased the law of supply and demand caused rates to drop further. As the competitive spiral decreased premium rates, inflation slowed and interest rates fell. Insurers found that they could not increase premiums in order to make up for lost interest income. To do so meant almost instant loss of new business to lower priced competitors.

At the same time that rates were at a seriously inadequate level, insurers began to experience increased losses.

Had rates remained at the 1979 level they would not have generated profits in many lines of insurance. Increased social pressure and liberal interpretation of policy language by the courts caused coverage for claims which insurers had intended to exclude. It caused average awards to increase and promoted the rare but often quoted multi-million dollar awards for seemingly minor or questionable negligence.

Reinsurers were the first to put the brakes on the cycle. Reinsurers typically receive a percentage of the premium and take a percentage of the risk of the primary insurer. Figures show that reinsurers were hardest hit in the loss ratio column. When they gave primary insurers the ultimatum across the board of more premium or no reinsurance, premiums increased.

Year-end 1984 insurance company results showed severe losses. More importantly the losses decreased policyholder's surplus, the ultimate measure of an insurers ability to write new insurance policies. With the substantial decrease in surplus, insurers were unable to write as much insurance in 1985 as they had in the previous year. Other insurers closed their doors because of insolvency or to pursue other more profitable ventures.

As a result of the insurers' folly in pursuit of investment profits and their unwillingness to increase rates in the face of aggressive competition during the past few years, we are experiencing two distinct problems today: (1) insurance industry capacity falls short of the national demand for insurance, and (2) insurance rates which have been depressed for six years are taking a quantum leap in 1985 in order to be adequate for current year losses. Profit, if any, will go to rebuilding surplus which has the effect of increasing insurance capacity.

HOW ALASKA FITS INTO THE NATIONAL SITUATION

Despite its geographic size, Alaska accounts for an almost insignificant portion of insurance premium in the U.S. marketplace. Even in the period of excess capacity and cut rate premiums, the Division of Insurance devoted substantial efforts toward attracting insurers to do business in Alaska. High costs relative to the small volume, lack of local servicing and the perception of Alaska in the lower 48 are constant obstacles to attracting new markets. Alaska is the last state market many insurers enter and the first to feel the company's consolidation of business efforts. <u>Generally, insurers faired better in Alaska, on a pure loss ratio basis, than the national average</u>.

The Division of Insurance believes its long-term efforts to encourage insurers to operate profitably has lessened the present insurance crisis to a large degree. Since Alaska business is largely insignificant to many insurers, any move to pressure them into areas they perceive to be unprofitable or potentially volatile may cause them to shift their underwriting to another part of the country. To the extent Alaska cultivates insurers and encourages their participation, capacity may be attracted here from other states. At least for the present time total insurance capacity does not exist in sufficient amount to satisfy the national need. The particular efforts and conditions in each state, therefore, affect the amount of insurance capacity dedicated by insurers to that state.

INSURANCE INDUSTRY RESPONSES

Insurers interviewed by the Task Force staff made recommendations that they considered would improve the availability of insurance in Alaska. The highest priority was related to reforms in the civil justice system that would give stability and predictability to liability claim settlements and judgments. Joint and several liability, caps on awards for wrongful death and pain and suffering, disclosure of collateral source recoveries and prejudgment interest, were high on the insurers' list. The industry was severely impacted by the recent announcement by the chairman of Lloyds of London that Lloyds would not insure casualty risks in the U.S. after this year because of their frustration with the U.S. legal system. Insurers have responded by asking for tort reform and by switching to a "claims made" form of liability policy. "Claims made" policies respond to losses reported during the policy period only as opposed to covering claims which occur during the policy period but are reported years later. The full impact of the new form will only be known after policies have been in effect for several years.

Insurers did not hesitate to point out the seriousness of their efforts to turn massive losses into profit in the short-term. Further losses would put insurers out of business. Participation in guarantee association programs for insolvent insurer bailout would exacerbate the problems for currently marginal insurers.

Insurers stated that they would devote their limited capacity to the best risks and coverages. Any line they felt had potential for unexpected claims or catastrophic loss would be avoided or priced to guarantee profitability. Being forced to unwillingly write coverage for classes of insured that have an unpredictable risk and/or the potential for catastrophic loss or to subsidize the rate, would be cause for the insurer to reevaluate their overall profit potential in that state and to readjust overall company strategy. Insurers are also holding back until they determine the cost and availability of their reinsurance and the exclusions it contains for certain types of risks.

DIVISION OF RISK MANAGEMENT RESPONSE

State insurance programs have also been adversely affected by the present insurance market situation. Public entities, including states and municipalities of all sizes, have been singled out by the insurance industry as difficult risks due to type and variety of exposures and deteriorating claims experience. Risk Management is well aware of the current market problems, and they have empathy for others caught in the same problem.

They see risk management or "management of risk" as a program requiring three elements of attention: (1) insurance, including various levels of self-insurance; (2) claims control to fairly and quickly adjust or adjudicate claims against the State; and (3) loss prevention or loss control programs designed to reduce the number and severity of claims. As we are forced to higher levels of self-insurance, loss prevention programs become paramount in control of costs. Risk Management is now providing agencies with useful claims reports and analysis on a quarterly basis. This should help locate and identify problem areas that can be corrected. Another important segment of loss control involves State contract insurance requirements. These are necessary to prevent the State from having to pay or defend claims caused by negligent acts of independent contractors unless the State by its own negligent acts is also responsible.

The Division of Risk Management is in complete agreement with Task Force recommendations concerning reassessment and possible revision of State contract insurance requirements.

Risk Management has been working with State agencies on revisions of insurance requirements for a number of months. They have addressed these issues both on an individual contract basis, and, where applicable, on a specific program basis. They are also in the process of revising several elements of Appendix B ("boiler plate" insurance requirements for many agency contracts) to help alleviate the problem where these insurance requirements are in general use.

Due to the great variety of State contracts, it is very difficult to adopt one program or even a series of programs that fit the needs of all contract agreements. They, therefore, look upon "boiler plate" requirements as "guides" and Risk Management will work with any of the State agencies to consider revisions when necessary.

Risk Management services should be looked upon as a resource available to all State agencies or contractors. They are willing and anxious to meet with agency contract officers or other personnel at any time to explain the State program and to understand or assist with agency insurance problems.

They believe it is in the agencies' best interests to remain involved in insurance decisions or deviations because the agencies attest better to the type of work involved,.inherent exposures, possible statutory requirements, and the importance of the program or contract "to the best interests of the State."

To reiterate, they cannot emphasize too strongly that "boiler plate" insurance requirements are considered by Risk Management as "guides." While in many cases these requirements have been set for good and sufficient reasons, there are also may types of contracts depending on supervision, type of work, and other reasons that, as a practical matter, call for modification of such requirements. When these cases are called to Risk Management's attention, they have been recommending accordingly.

The present insurance crisis will probably remain with us for another two or three years, especially in the areas of professional or hazardous liability and property exposures. Recognizing this market situation, Risk

Management will continue to respond to the difficulties the private sector has in meeting State insurance requirements. So far, in most instances they have been able to agree on alternatives acceptable to both parties.

MARKET ACCESS PROGRAM

After the first Task Force meeting, many individuals have called the Division of Insurance for assistance in finding insurance coverage.

The division undertook on an experimental basis a market availability program to these displaced persons. In the majority of cases, diligent market search turned up coverage for these people. Although very time consuming and insufficient on a per policy basis, this experiment proved that few reasonable risks are unable to be insured by someone at some price. The division is working on several ideas which may increase the efficiency of this program in order to make it relatively cost effective.

CADIS
(Coordination of Alaska Day Care Insurance Search)

EVOLUTION AND CONCEPT

During February and March 1985, the division became aware of a growing problem for day care operators attempting to purchase or renew day care liability insurance. Numerous articles have been written on the subject in a variety of publications.

Since the time that the division became aware of the problem, we have attempted to identify potential markets and share the information with both insurance producers (insurance agents and brokers) and day care operators. We have also advised operators how to approach the market.

We understood from the beginning that this challenge could not be met with empty rhetoric. It has to be met with a program of active cooperation by all involved parties. We have used this opportunity to create and test a pilot program wherein we attempt to identify markets, identify their needs, and bring the buyer, intermediary and seller together. This approach is also useful in attracting new markets. It has, in fact, already attracted a market that was not generally available prior to the development of CADIS.

Division personnel have spent many hours talking to individual operators, speaking before groups, meeting with other State agencies and discussing the situation with insurers. From this has come an understanding of the problem and the seeds of how the challenge might be approached.

It became clear in talking with operators that, at the very least, underwriters must be suffering from a severe information deficiency. It was also discovered that much information was available from the permitting and licensing agencies. CADIS attempts to get the information flowing to those needing it to make decisions. It also helps the operator to understand the insurers concerns and needs, and shows how the information gap can be bridged.

MECHANICS OF CADIS

The approach developed in cooperation with the Department of Health and Social Services and the Department of Education starts with the day care operator. Each licensed day care operator has been informed by the appropriate regulatory agency of the existence and availability of CADIS. The operators have been advised how they might participate in CADIS.

If a licensed operator wishes to participate in CADIS, the operator has been told that his or her insurance producer should be supplied with the following documents:

> If the licensed day care operator is regulated by the Department of Health and Social Services, a copy of the evaluation report completed by the licensing worker of the Department of Health and Social Services.
>
> If the licensed day care operator is regulated by the Department of Education, a copy of the application for pre-elementary certification, the pre-elementary certificate, and the written on-site review inspection evaluation of the preschool facility, if available (some preschools do not have this report).

In addition, the following must be included in all cases:

A copy of the fire and sanitation inspection report.

Pictures of the facility showing pertinent underwriting features:

1. The front of the facility with fence and fire hydrant, if available
2. General exterior layout
3. Inside of the building showing general layout
4. Kitchen area
5. Playground equipment
6. Any barriers or features designed to prevent children from reaching items that are hazardous to their health or safety
7. Stairs, if any

After the insurance producer receives this packet, the producer can contact this office and request identification of those companies currently accepting the particular kind of insurance under CADIS. The producer can then submit the packet to the companies with the appropriate application. We are asking the producers to advise us of the results as a means to monitor the success of the program.

There is no guarantee that coverage will be granted by the insurer, but such a package will be more attractive than that generally provided before this program was designed. We have already received favorable comments from one insurer concerning the quality of submissions. It should be clearly understood that this is a purely voluntary program. It is not an assigned risk plan and should not be characterized as one. At this stage, we believe that the program can be endangered by misconception, so we are treading very cautiously. We believe that the program is working, even at this early stage.

EFFECT ON PARTIES

The effect of this effort of the various parties is, in itself, of value.

The licensed day care providers can receive assistance in locating coverage needed to maintain, license and operate their business. Initially, the program will put them in touch with admitted companies through their agent or broker. This has the advantage of having the protection afforded by the Alaska Guaranty Association Act. These will be companies subject to rate and form review, which should reduce the potential for outlandish pricing.

The insurance producer has the advantage of being provided the most desirable of situations, an informed buyer with a complete submission package and the markets to approach with that package. This should result in substantial reductions of the time required to put together the materials needed when approaching an underwriter. The producer also has the attraction of using an admitted market with its known protections. That represents one less exposure to the producers surplus lines brokers bond.

The insurance company will receive submissions that will be unusual in quality resulting in less effort in putting together the information needed to underwrite properly this class of business. This approach will make the resulting portfolio of risk more attractive to the insurers/reinsurers. Hopefully this should stabilize the market somewhat. It will give them insureds that have a better understanding of the risk the insurer is taking and one who is willing to reduce the hazards that could result in loss. This will certainly be attractive to an insurer willing to look at this line of insurance.

WHAT NEXT

At this time, the program is limited to licensed day care operations. To some degree it can help preschools regulated by the Department of Education. We are exploring expansion of the program to operators not subject to licensure. We are also looking to the surplus lines market for a broader base of coverage availability. The program will undoubtedly be subject to fine tuning for some time.

LEGISLATION

Legislation has been submitted which will require insurers to give longer notice of cancellation to insureds and return unearned premium prior to the effective date of cancellation. This will allow additional time to find replacement coverage and provide funds to the insured to apply to the new policy.

ALTERNATIVES FOR INSURANCE

Within staff time and personnel limitations, the Division of Insurance has provided assistance to entities seeking alternatives to commercial insurance such as self-insurance, formation of captive insurers or pools and risk avoidance through loss control.

The Task Force believes that continuation of these ongoing responses is appropriate.

LICENSE AND CONTRACT REQUIREMENTS

We encourage all State agencies to review insurance criteria they impose on others as license requirements or contract requirements, to determine that they are reasonable and appropriate.

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Liability awards have increased at a much greater rate than the cost of living or inflation rate and at a greater rate than anticipated by insurers. The civil justice system has gradually expanded theories of liability so that more acts or failure to act are found to be negligent conduct. As insurers are asked to accept this transfer of negligence from individuals, they must anticipate the probable future expansion of legal theories in order to properly charge for the insurance product.

Insurers are also responding to expansion of legal theories with new policies and language which limit coverage for some exposures, in some cases limiting the time in which claims may be covered, and limiting the cost of defense and attorney fees. <u>In effect, they are refusing to accept the transfer of certain types of risk that they feel are unpredictable or unreasonable at this time</u>.

Individuals find that they are less able to transfer the cost of their own negligence to insurers. The punishment afforded by punitive damages is more likely to be assumed by the negligent person than by an insurer in the future.

Insurers having hit their financial low in 1985 have adjusted their practices and anticipate some profits in the future. This has caused insurance stocks to increase in value over prior year lows. As insurers build up their surplus through profitable underwriting, insurance capacity will increase.

THE TASK FORCE RECOMMENDS THAT THE DOCUMENTS COLLECTED DURING THE TASK FORCE RESEARCH BE READ BY ANYONE WHO INTENDS TO PROPOSE A SOLUTION TO THE COMPLEX PROBLEM WE ADDRESS AS THE INSURANCE CRISIS.

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RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

9/5/89
Date