SB

211

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/31/88

FURTHER REFERRALS: Judiciary
Finance

DATE: 5/3/88

The Labor & Commerce Committee has considered CSSB 211(Fin)am

"An Act relating to civil liability; and providing for an effective date."

RECOMMENDS:

[X] replace with HCS CSSB 211 (L&C) [X] the same title
[ ] attached amendment(s) [ ] a new title

- [ ] do pass
- [ ] do not pass
- [X] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [X] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

Dave Donley (as amended)

SIGNING OTHER RECOMMENDATIONS:

Jeff Ellis no rec
Niilo Koponen no rec
Rick Mystrom do not pass as amended

Dave Donley
Chairman's signature

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HCS CSSB 211 (L&C)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: 5/4/88
Title: An Act relating to civil liability
Sponsor: Labor and Commerce
Requester: Labor and Commerce

Agency Affected: Commerce & Econ. Dev.
BRU: Division of Insurance
Components: Public Protection

EXPENDITURES / REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	350.0	300.0	250.0	250.0	250.0	250.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	350.0	300.0	250.0	250.0	250.0	250.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of dollars)

GENERAL FUND	350.0	300.0	250.0	250.0	250.0	250.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

The analysis required in Section 5 for the Director's Annual Report involves a legal and actuarial review of court decisions and an analysis of rate changes resulting from those decisions. This requires a review that present

(CONTINUED - NEXT SHEET)

Prepared by: Donald P. Koch
Division: Insurance
Phone: 465-2571
Date: 5/5/88

Approved by Commissioner: J. Anthony Smith
Date: 5/5/88
Agency: Department of Commerce and Economic Development

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

1628D-1/050588a

ANALYSIS - (CONTINUED)

staff does not have the needed expertise to conduct. The scope of the analysis is not sufficiently clear to give great precision to the fiscal impact of this proposal. We estimate that a review could be done by an independent actuarial firm with legal assistance. The depth of review would be subject to negotiation and design. We have estimated $250,000 per year for this work. The remaining $100,000 in FY 88 and $50,000 in FY 89 is for participation in the effort required in Section 6. This section requires a report by the Department of Law, which will need the assistance of the Division of Insurance. This participation will require a substantial data collection and analysis effort by the division which it is not geared to accommodate. We expect also to contract for the necessary assistance to develop and implement methods to acquire the data and analyze same.

1628D-2/050588a

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU ALASKA 99811
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M May 4, 1988

SUBJECT: Civil liability - HCS CSSB 211(L&C)

TO: Representative Dave Donley

FROM: Michael F. Ford MF
Legislative Counsel

I wanted to bring two issues to your attention regarding HCS CSSB 211(L&C). First, AS 09.17.080(d)(2)(M) in section 4 of the bill appears to require certain environmental damages be awarded under a modified joint and several liability rule. In that same section, these damages appear to fall under a rule of pure joint and several liability under AS 09.17.-080(d)(1). It may be necessary to further amend (d)(1) to provide an exception for (d)(2)(M) if that is the intention of the committee. Second, the language in section 5 regarding insurance rate changes violates the single subject and title requirements of Article II, section 13 of the Alaska Constitution. The analysis of insurance rate changes resulting from changes in statutes is clearly not within the title of the bill. It includes subjects not necessarily related to civil liability, which creates a double subject problem.

Please contact me if you have further questions.

MFF:bb
b5/095

5-0554T

Original sponsors: Faiks, Abood,
Bennett, et al.

IN THE SENATE

BY THE LABOR AND
COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 211 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil liability; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.17.030 is amended to read:

Sec. 09.17.030. DAMAGES RESULTING FROM COMMISSION OF A CRIME. A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person was engaged in the commission of a crime [FELONY], the person has been convicted of the crime [FELONY], including conviction based on a guilty plea or plea of nolo contendere, and the crime [FELONY] substantially contributed to the injury or death. This subsection [SECTION] does not affect a right of action under 42 U.S.C. 1983.

* Sec. 2. AS 09.17.030 is amended by adding new subsections to read:

(b) The provisions of (a) of this section do not apply to a person who suffers personal injury or death if the person liable for the damages

(1) was engaged in the commission of a crime at the time the personal injury or death occurred; and

(2) has been convicted of the crime, including conviction based on a guilty plea or plea of nolo contendere.

(c) If a party recovers damages for personal injury or death and the person liable for the injuries or death was engaged in the commission of a crime at the time the personal injury or death occurred, has

been convicted of the crime, including conviction based on a guilty plea or plea of nolo contendere, and the acts constituting the crime substantially contributed to the injury or death, the court shall

(1) triple the damages awarded to the party; and

(2) award actual costs and attorney fees.

(d) In this section "crime" has the meaning given in AS 11.81.-900(b).

* Sec. 3. AS 09.17.050(a) is amended to read:

(a) Unless the act or omission constituted gross negligence, a person may not recover tort damages for personal injury, death, or damage to property for an act or omission to act in the course and scope of official duties, from [ONE OF] the following:

(1) a member of the board of directors or an officer of a nonprofit corporation;

(2) a member of the board of directors of a public or nonprofit hospital, or a member of a citizen's advisory board of any hospital;

(3) a member of a school board of a school district;

(4) a member of the governing body, a commission, or a citizen's advisory committee of a municipality of the state;

(5) a member of the board of directors or an officer of an electric or telephone cooperative organized under AS 10.25.

* Sec. 4. AS 09.17.080(d) is repealed and reenacted to read:

(d) The court shall enter judgment against each party liable on the basis of

(1) joint and several liability if the action involves an intentional tort, toxic or hazardous waste, environmental pollution or damage, a violation of state or federal antitrust statutes, a party who acted in concert or conspired with another party, or where the

plaintiff is fault-free;

(2) joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party, if (1) of this subsection does not apply and the damages result from

(A) breach of a contract;

(B) the manufacture and sale of a defective product;

(C) operation of an aircraft or a motor vehicle;

(D) a land sale practice;

(E) a transaction involving a security;

(F) medical malpractice;

(G) medical expenses;

(H) an injury for which the party is strictly liable;

(I) vicarious liability imposed on the party;

(J) an administrative hearing;

(K) a construction project;

(L) injury to an employee and the party is not the employer; or

(M) mitigation and clean-up of toxic or hazardous waste or environmental pollution by planning and design professionals;

(3) several liability, if the party is not jointly and severally liable under (1) or (2) of this subsection.

* Sec. 5. AS 21.06.110 is amended to read:

Sec. 21.06.110. DIRECTOR'S ANNUAL REPORT. As early in each calendar year as is reasonably possible the director shall prepare and deliver an annual report to the legislature and the commissioner, showing, with respect to the preceding calendar year,

(1) a list of the authorized insurers transacting insurance in Alaska, with such summary of their financial statement as the director considers appropriate;

(2) the name of each insurer whose business was closed during the year, the cause of the closing, and the amount of ascertainable assets and liabilities of each closed business;

(3) the name of each insurer against which delinquency or similar proceedings were instituted, and a concise statement of the facts with respect to each proceeding and its present status;

(4) a statement in regard to examination of rating organizations, advisory organizations, joint underwriters, and joint reinsurers as required by AS 21.39.120;

(5) the receipts and expenses of the division for the year;

(6) recommendations of the director as to amendments or supplementation of laws affecting insurance, or the office of director;

(7) other pertinent information and matters the director considers proper;

(8) an analysis of rate changes for commercial and professional liability and workers' compensation insurance occurring as a result of any recent changes in law, including court decisions in the state involving personal injury or death, and actions or suggested actions to mitigate such rates.

* Sec. 6. REPORT. The Department of Law, with the assistance of the Department of Commerce and Economic Development and with the cooperation of all state agencies, shall report to the legislature by the 30th day of the Second Session of the Sixteenth Alaska State Legislature on closed insurance claims and insurance company finances. The report must consist of

(1) a study of closed insurance claims to identify

(A) the extent to which the legal system has affected liability insurance and coverage in crisis lines in the state;

(B) if the implementation of this Act has resulted in a measurable effect on insurance rates in the state;

(2) a study of insurance company finances to determine the extent to which

(A) dramatic liability insurance rate increases and coverage limitations in the state are, or are not, cost-justified in relation to awards, settlements, and relevant court decisions in the state involving personal injury, death, or property damage based on fault; and

(B) legislative or regulatory actions affecting the tort system in the state are necessary to resolve the state's liability insurance rate increases;

(3) a status report on any pending civil cases filed by the state against liability insurers; and

(4) recommended changes to state occupational licensing laws that are intended to reduce civil litigation based on malpractice.

* Sec. 7. APPLICABILITY. Sections 1 - 5 of this Act apply to causes of action accruing on or after the effective date of this Act.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

IN THE SENATE

BY THE LABOR AND COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 211 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

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(1) was engaged in the commission of a crime at the time the personal injury or death occurred; and

(2) has been convicted of the crime, including conviction based on a guilty plea or plea of nolo contendere.

(c) If a party recovers damages for personal injury or death and the person liable for the injuries or death was engaged in the commission of a crime at the time the personal injury or death occurred, has

been convicted of the crime, including conviction based on a guilty plea or plea of nolo contendere, and the acts constituting the crime substantially contributed to the injury or death, the court shall

(1) triple the damages awarded to the party; and

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(d) In this section "crime" has the meaning given in AS 11.81.-900(b).

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(a) Unless the act or omission constituted gross negligence, a person may not recover tort damages for personal injury, death, or damage to property for an act or omission to act in the course and scope of official duties, from [ONE OF] the following:

(1) a member of the board of directors or an officer of a nonprofit corporation;

(2) a member of the board of directors of a public or nonprofit hospital, or a member of a citizen's advisory board of any hospital;

(3) a member of a school board of a school district;

(4) a member of the governing body, a commission, or a citizen's advisory committee of a municipality of the state;

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(1) joint and several liability if the action involves an intentional tort, toxic or hazardous waste, environmental pollution or damage, a violation of state or federal antitrust statutes, a party who acted in concert or conspired with another party, or where the

plaintiff is fault-free;

(2) joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party, if (1) of this subsection does not apply and the damages result from

(A) breach of a contract;

(B) the manufacture and sale of a defective product;

(C) operation of an aircraft or a motor vehicle;

(D) a land sale practice;

(E) a transaction involving a security;

(F) medical malpractice;

(G) medical expenses;

(H) an injury for which the party is strictly liable;

(I) vicarious liability imposed on the party;

(J) an administrative hearing;

(K) a construction project;

(L) injury to an employee and the party is not the employer;

(3) several liability, if the party is not jointly and severally liable under (1) or (2) of this subsection.

* Sec. 5. AS 21.06.110 is amended to read:

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(1) a list of the authorized insurers transacting insurance in Alaska, with such summary of their financial statement as the director considers appropriate;

(2) the name of each insurer whose business was closed during the year, the cause of the closing, and the amount of ascertainable assets and liabilities of each closed business;

(3) the name of each insurer against which delinquency or similar proceedings were instituted, and a concise statement of the facts with respect to each proceeding and its present status;

(4) a statement in regard to examination of rating organizations, advisory organizations, joint underwriters, and joint reinsurers as required by AS 21.39.120;

(5) the receipts and expenses of the division for the year;

(6) recommendations of the director as to amendments or supplementation of laws affecting insurance, or the office of director;

(7) other pertinent information and matters the director considers proper;

(8) an analysis of rate changes for commercial and professional liability and workers' compensation insurance occuring as a result of any recent changes in law, including court decisions in the state involving personal injury or death, and actions or suggested actions to mitigate such rates.

Department of Commerce and Economic Development and with the cooperation of all state agencies, shall report to the legislature by the 30th day of the Second Session of the Sixteenth Alaska State Legislature on closed insurance claims and insurance company finances. The report must consist of

(1) a study of closed insurance claims to identify

(A) the extent to which the legal system has affected liability insurance and coverage in crisis lines in the state;

(B) if the implementation of this Act has resulted in a measurable effect on insurance rates in the state;

(2) a study of insurance company finances to determine the extent to which

(A) dramatic liability insurance rate increases and coverage limitations in the state are, or are not, cost-justified in relation to awards, settlements, and relevant court decisions in the state involving personal injury, death, or property damage based on fault; and

(B) legislative or regulatory actions affecting the tort system in the state are necessary to resolve the state's liability insurance rate increases;

(3) a status report on any pending civil cases filed by the state against liability insurers; and

(4) recommended changes to state occupational licensing laws that are intended to reduce civil litigation based on malpractice.

* Sec. 7. APPLICABILITY. Sections 1 - 5 of this Act apply to causes of action accruing on or after the effective date of this Act.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811

Chairman-Representative Dave Donley (907) 465-3892

May 3, 1988

M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Explanation of proposed CS for SB 211

Before you today is a proposed House Labor and Commerce CS for SB 211, drafted in response to public testimony received during the last week of public hearings before our Committee and testimony received during the interim public hearing and statewide teleconference we hosted on November 13, 1988.

The changes in the proposed CS from the version of SB 211 that passed the Senate are:

1. Deletes Section 1. (lowered the cap on noneconomic damages from $500,000 under current law to $100,000).

2. Deletes Section 2. (limits the standards for award of punitive damages to only cases involving fraud, malice, gross negligence, or reckless disregard).

3. Leaves Section 3 unchanged - becomes Section 1 of the proposed CS. (plaintiff cannot receive damages if they were involved in a crime (FELONY) at the time they were injured and the crime (FELONY) substantially contributed to the injury or death).

4. Leaves Section 4 unchanged - becomes Section 2 of the proposed CS. (allows plaintiff to recover damages if person liable for their injuries was engaged in the commission of a crime or has been convicted of the crime).

5. Deletes Section 5. (allows either party to request periodic payments rather than only the plaintiff, as under current law).

6. Deletes Section 6. (amends section of law governing payment of damages by requiring judgement to include any increases in future payments for anticipated inflation).

7. Leaves Section 7 unchanged - becomes Section 3 of the proposed CS. (extends immunity from liability to members of the board of directors or an officer of an electric or telephone cooperative except for gross negligence).

8. Deletes Section 8. (repeals and reenacts collateral benefits language in existing statute).

9. Rewrites Section 9 (becomes Section 4 of the proposed CS) to establish three tiers of liability:

   (1) Strict joint and several liability if action involves an intentional tort, toxic or hazardous waste, environmental pollution or damage, violation of state or federal antitrust statutes, a party who acted in consort or conspired with another party, or where the plaintiff is fault free.

   (2) Modified joint and several liability if damages result from a breach of contract, manufacture and sale of a defective product, operation of an aircraft or motor vehicle, a land sale practice, a transaction involving a security, medical malpractice, medical expenses, an injury for which the party is strictly liable, vicarious liability imposed on the party, a construction project, an injury to an employee and the party is not the employer, and administrative hearings.

   (3) Strict several liability, if the party is not jointly and severally liable under (1) and (2).

10. Deletes Section 10. (definition of economic and noneconomic losses).

11. Deletes Section 11. (attorney fees may not be awarded to a party in a civil action (UNLESS THE CIVIL ACTION IS CONTESTED WITHOUT TRIAL, OR FULLY CONTESTED AS DETERMINED BY THE COURT)).

12. Rewrites Section 12. (becomes Section 5 of the proposed CS) relating to the Division of Insurance Directors annual report to the Legislature to include an analysis of rate changes for commercial and professional liability and workers' compensation insurance occuring as a result of any recent changes in law, including court decisions in the state involving personal injury or death, and actions or suggested actions to mitigate such rates.

13. Deletes Section 13. (repeals AS 09.17.010(c) - limits on noneconomic damages do not apply to disfigurement and severe physical impairment, and AS 09.17.040(c) - rules governing determining computation of future economic damages).

14. Rewrites Section 14. (becomes Section 6 of the proposed CS) relating to an annual report to the Legislature from the Department of law, with assistance of the Department of Commerce and Economic Development in cooperation of all state agencies, to delete ambiguous language and to include a report on the status of pending civil cases filed by the state against liability insurers and recommended changes to state occupational licensing laws that are intended to reduce civil litigation based on malpractice.

15. Leaves Section 15 unchanged - becomes Section 7 of the proposed CS. (applicability).

16. Deletes Section 16. (Severability clause).

17. Leaves Section 17 unchanged - becomes Section 8 of the proposed CS. (Effective date).

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 211 (Fin)
PUBLISH DATE: Senate 3/24/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to civil liability amending Civil Rule 82
Sponsor: Senate Judiciary
Requestor: Senate Finance

Agency Affected: Commerce & Econ. Dev.
BRU: Division of Insurance
Components: Public Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0	25.0	0	0	0	0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	25.0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	25.0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Rick Halford
Division: Senator Rick Halford, Co-chairman
Senate Finance Committee
Phone: 465-4958
Date: 3/23/88

Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: CSSB 211 (Fin)
Publish Date: Senate 3/24/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act Relating to Civil Liability
Sponsor: Faiks, Abood, Bennett, et al.
Requestor:

Agency Affected: Department of Administration
BRU: Division of Risk Management
Components: Risk Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	(306.0)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	(306.00)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	(306.00)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
TOTAL	0.0	(306.00)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

The final benefit is impossible to accurately project, given that it will only affect liability not yet incurred. Based on the State's past liability claims experience, we project a 20% reduction in estimated ultimate loss and loss expense per fiscal year. The attached projection details the calculations using the State of Alaska's actuarial experience.

Prepared By: Don Hitchcock
Division: Risk Management
Phone: 465-2180
Date: January 18, 1988

Approved by Commissioner: John M. Andrews
Agency: Department of Administration
Date: 1/23/88

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

RECEIVED
JAN 26 1988

FISCAL NOTE ANALYSIS
FOR SB 211

CASH FLOW SAVINGS ESTIMATED BY FISCAL YEAR

		YEAR OF OCCURRENCE						
		1988	1989	1990	1991	1992	1993	TOTAL
YEAR OF SAVING	FY 88	-0-						
	FY 89		306.0					306.0
	FY 90		274.0	384.0				658.0
	FY 91		360.0	342.0	480.0			1,182.0
	FY 92		336.0	448.0	428.0	600.0		1,812.0
	FY 93		252.0	420.0	558.0	534.0	750.0	2,514.0
	FY 94			316.0	526.0	698.0	668.0	
	FY 95				394.0	656.0	872.0	
	FY 96					492.0	820.0	
	FY 97						616.0	
	Future		874.0	1,092.0	1,366.0	1,706.0	2,132.0	
	TOTAL		2,400.0	3,000.0	3,750.0	4,686.0	5,858.0	

These represent estimated future payments pattern over a twelve year payout period, i.e., each year.

12 months	12.8%
24 months	11.4%
36 months	14.9%
48 months	14.0%
60 months	10.5%
Balance	36.4%

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CS SB 211(Fin)
Publish Date: Senate 3/24/88

Revision Date:
Title: An act relating to civil liability...
Sponsor: Faiks, Abood, et al
Requestor: Judiciary

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 03/05/88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 03/05/88
Agency: Alaska Court System

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Senate Secretary

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 211 (Fin)
PUBLISH DATE: Senate 3/24/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to civil liability and amending Civil Rule 82
Sponsor: Senate Judiciary
Requestor: Senate Finance

Agency Affected: Dept. of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Rick Halford
Division: Senator Rick Halford, Co-chairman
Senate Finance Committee
Phone: 465-4958
Date: 3/23/88

Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
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Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Wayne Anthony Ross
ATTORNEY AT LAW

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EDI. MINER
CHERI C. JACOBUS

OF COUNSEL
DONALD J. MILLER

March 31, 1988

Representative Dave Donley
P.O. Box V
Juneau, AK 99811

Dear Representative Donley:

On April 21, 1987, this office sent you a letter and memorandum reviewing Senate Bell 211 and HB 250. We urged your defeat of that unjust legislation.

On the last page of our letter we described "tort reform (as) a phony issue raised by the insurance companies to increase their already substantial profits."

We stated: "We hope you are not misled by the insurance companies and their well-financed lobbying efforts..."

It appears that our comments about the tort reform movement may be proven right shortly. On Wednesday, March 23, 1988, both Anchorage newspapers reported that eight states have sued the insurance industry for conspiring to create the insurance liability crisis. Those states' Attorneys General have alleged that the liability insurance crisis was artificially created by the insurance companies to drive up rates, change policies to provide less coverage for higher premiums, and restructure the civil justice system to obtain more protection from lawsuit judgments. The Texas Attorney General calls the insurance companies conduct "the most insidious consumer fraud that's taken place by American companies in modern times."

Clearly then, it would be irresponsible for you to pass tort reform legislation until this lawsuit is resolved lest it appear that, despite our warnings, the Alaskan Legislature was misled into reducing victims rights by this "most insidious consumer fraud."

LAW OFFICES OF
ROSS, GINGRAS, BAILEY & MINER
A PROFESSIONAL CORPORATION

We have enclosed some articles from Consumer Reports and Business Week, and a script from 60 Minutes further exposing this phony issue.

Thank you for your continued attention to this matter. We are,

Sincerely,

ROSS, GINGRAS, BAILEY & MINER
A Professional Corporation

WAYNE ANTHONY ROSS

THOMAS S. GINGRAS

ALLEN M. BAILEY

PATRICK G. ROSS

WAR:amf
Enclosures

legl/MARI

Alaska State Legislature

6

SENATE

Office of the President

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3755

April 1, 1988

MEMORANDUM

TO: Representative Dave Donley, Chairman
House Labor and Commerce Committee

FROM: Senator Jan Faiks
President of the Senate

SUBJECT: CSSB 211 (Fin) am "An Act relating to civil liability; and providing for an effective date."

CSSB 211 (Fin) am has been referred to the House Labor and Commerce Committee for consideration. The purpose of this bill is to improve the tort liability system in Alaska.

Specifically, the bill proposes the following:

Section 1. NONECONOMIC DAMAGES. Amends AS 09.17.010(b) by reducing the maximum amount of noneconomic damages which may be awarded for personal injury based on negligence.

The present statute has a limit of $500,000 for such damages; CSSB 211 (Fin) proposes a maximum of $100,000 for noneconomic damages, which are defined as subjective, nonpecuniary damages including pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, and all other nonpecuniary damages.

Section 2. PUNITIVE DAMAGES. Amends AS 09.17.020 by requiring clear and convincing evidence of specific conduct by the defendant before the court may award punitive damages.

The present statute has the same burden of proof (clear and convincing evidence), but does not specify the type of conduct which will trigger the award. CSSB 211 (Fin) provides that fraud, malice, gross negligence, or reckless disregard by the defendant may result in the award of punitive damages.

Section 3. DAMAGES RESULTING FROM COMMISSION OF A CRIME. Amends AS 09.17.030 by expanding the class of persons who may not recover damages for personal injury or death if the damages were incurred while the person was engaged in the commission of a crime.

The present statute provides that a person may not recover damages for injury or death if the damages were incurred while the person was engaged in the commission of a felony which substantially contributed to the injury or death.

CSSB 211 (Fin) replaces "felony" with "crime". This has the additional effect of precluding persons convicted of a misdemeanor from recovering damages for personal injury or death if that crime substantially contributed to the injury or death.

Section 4. LIABILITY OF CRIMINAL DEFENDANTS. Further amends AS 09.17.030, to provide that a person convicted of a crime that substantially contributed to the person's injury or death can recover damages from the wrongdoer if the wrongdoer has also been convicted of a crime in which he/she was engaged at the time of the injury or death.

Section 5. AWARD OF DAMAGES. Amends AS 09.17.040(d) by allowing any party, not just the injured party, to request the court to enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump sum payment.

The present statute allows only the injured party to make such a request.

Section 6. INCREASES IN PERIODIC PAYMENTS. Amends AS 09.17.040(f) to make it clear that if the payment of future damages is made periodically rather than in a lump sum, the court may order increases in future payments for anticipated inflation.

Section 7. LIMITED LIABILITY OF CERTAIN DIRECTORS AND OFFICERS. Amends AS 09.17.050 to include members of the board of directors or an officer of an electric or telephone cooperative organized under AS 10.25.

Section 8. COLLATERAL BENEFITS. Repeals and reenacts AS 09.17.070, replacing it with language similar to that found in present statute AS 09.55.548(b) relating to collateral sources in malpractice actions.

This section of CSSB 211 (Fin) provides that a person may only recover damages that exceed amounts that he/she has already

received from a collateral source, whether it be a private, group, or governmental source, either contributory or noncontributory. The only exceptions are where the collateral source by law or contract must seek subrogation, or from death benefits paid under life insurance.

This section further provides that the trier of fact shall be informed of the tax implications of an award of damages. The court may also take into account the value of the person's right to coverage which may have been exhausted or depleted by payment of these collateral benefits, and add a reasonable estimate of their probable value to the award.

Section 9. APPORTIONMENT OF DAMAGES. Amends AS 09.17.080(d) by modifying the theory of joint and several liability.

Under the present statute, a party can be held liable for all of the damages, even if that party has been allocated a certain percentage of the fault. The exception under the present statute is that where a party has been allocated less than 50% of the total fault allocated to all of the parties, that party may not be jointly liable for more than twice the percentage of fault allocated to that party.

CSSB 211 (Fin) establishes full joint and several liability in cases involving hazardous waste, environmental pollution, or violation of state or federal antitrust laws.

In all other cases, CSSB 211 (Fin) has the effect of eliminating joint liability, and making each defendant liable only for the share of the damages for which he/she is personally responsible.

Section 10. DEFINITIONS. Amends AS 09.17.900 by adding new definitions for "economic losses" and "noneconomic losses".

Section 11. COSTS ALLOWED PREVAILING PARTY. Amends AS 09.60.010 by eliminating the language "unless the civil action is contested without trial, or fully contested as determined by the court."

This has the effect of allowing the supreme court to determine the costs which may be allowed a prevailing party in a civil action. However, unless attorneys fees are authorized by statute or by an agreement between the parties, they may not be awarded in actions for personal injury, death, or property damage relating to fault.

Section 12. DIRECTOR'S ANNUAL REPORT. AS 21.06.110 currently requires the director of the Division of Insurance

to submit an annual report to the legislature. CSSB 211 (Fin) requires this report to include an analysis of medical malpractice insurance rate changes occurring as a result of court decisions in the state.

Section 13. REPEALERS. 1) AS 09.17.010(c) would be repealed, to make the limit on noneconomic damages in section 1 applicable to all injuries. Currently, the limit on noneconomic damages does not apply to damages for disfigurement and severe physical impairment.

2) CSSB 211 (Fin) also repeals AS 09.17.040(c), which allows parties to agree to compute the award of future damages under the rule adopted in Beaulieu v. Elliott, 434 P. 2d 665 (Alaska 1967). That case held that income taxes should be deducted from the allowance for past lost wages, but not from the allowance for inflation or for future lost wages. It further made no allowance for inflation or for future normal wage increases and approved the use of a per diem formula in computing damages for pain and suffering.

Section 14. REPORT. CSSB 211 (Fin) requires the Department of Law, with the assistance of the Department of Commerce and Economic Development, to report annually to the legislature on closed insurance claims and insurance company finances.

Section 15. APPLICABILITY OF ACT. This Act applies to all causes of action which accrue after the effective date.

Section 16. SEVERABILITY. If any provision of this Act is held invalid, the remainder of the Act is not affected.

Section 17. EFFECTIVE DATE. This Act takes effect immediately.

Please contact my office if you have any questions or comments.

Thank you.

SB211

NATIONAL INSURANCE CONSUMER ORGANIZATION

Insurance Industry Profitability

Nationwide, property/casualty insurance industry profitability hit a record high in 1986, and another record high in 1987. In fact, in 1987 the industry set at least four all-time profitability records:

* Highest net profit, $13.7 billion (See Attachment I);
* Highest operating profit, $13.7 billion (See Chart I);
* Highest year-end surplus, $98 billion (See Chart II);
* Highest premiums written, $192 billion (See Chart III).

P-C Insurers Report Dramatic Income Gains

BY SUSAN NAROD

The property-casualty insurance industry recorded a dramatic improvement in operating income in 1987.

Insurers reported pre-tax operating income of $13.7 billion last year, according to preliminary data compiled by A.M. Best Co. This contrasted sharply with operating earnings of $5.4 billion in 1986 and operating losses of $4.0 billion and $5.6 billion in 1984 and 1985, respectively.

Pre-Tax Operating Income More Than Doubled In 1987

"The improvement in profitability reflected basic economics—revenues increased faster than claim costs," said Dr. Sean Mooney, economist and senior vice president of the Insurance Information Institute.

In 1987, revenues earned from premiums rose 13.3 percent, while claims costs increased at a slower rate of 8.6 percent. As a result, the underwriting loss declined from

Cont'd on Page 39

P-C Insurers Report Dramatic Income Gains

Cont'd from Page 1

$15.9 billion in 1986 to $9.8 billion in 1987.

In addition to underwriting results, investment income, interest and dividends earned from assets in 1987 increased 7.3 percent to $23.5 billion.

Net written premiums rose 8.7 percent in 1987—less than half the 22 percent increases reported for 1985 and 1986.

The stock market plunge on Oct. 19 didn't result in large realized losses for the p-c industry in 1987 because realized capital gains or losses are reported only when a stock is sold, according to Dr. Mooney.

"Most insurance companies hold stocks for a long time and probably didn't sell a large proportion of their portfolio in a weak market," said Dr. Mooney.

Sales can result in realized capital gains as long as the selling price is above the purchase price, he noted, adding that many stocks were purchased by insurance companies years ago.

Moreover, realized capital gains or losses also occur when bonds are sold. Bonds generally constitute the major portion of an insurance company's portfolio and have contributed to capital gains in the past few years.

Unrealized capital losses of $6.0 billion were reported for the industry in 1987. Since stocks on the balance sheet were reported at market value, the drop in the stock market is recorded as an unrealized capital loss.

Figures on capital values are preliminary estimates. No actual data have been reported for the fourth quarter of 1987, when the stock market plunged.

The unrealized loss was the major factor explaining the small growth in policyholder surplus for the industry in 1987.

Despite $13.7 billion reported for net income after taxes, policyholder surplus increased by only $3.9 billion, from $93.6 billion at the end of 1986 to $97.5 billion at the end of 1987.

Investment Income Grew 7.3 Percent To $23.5 Billion

There is nothing disastrous on the p-c financial horizon at the moment, although "there are some clouds," observed Dr. Mooney.

The negative signs, according to Dr. Mooney, include stock market weakness, pressure on claims from auto accidents, higher medical care costs and increased litigation, in addition to rising competition.

Dr. Mooney expects 1988 to culminate with claims growing faster than premium growth, with the result that net income will probably deteriorate.

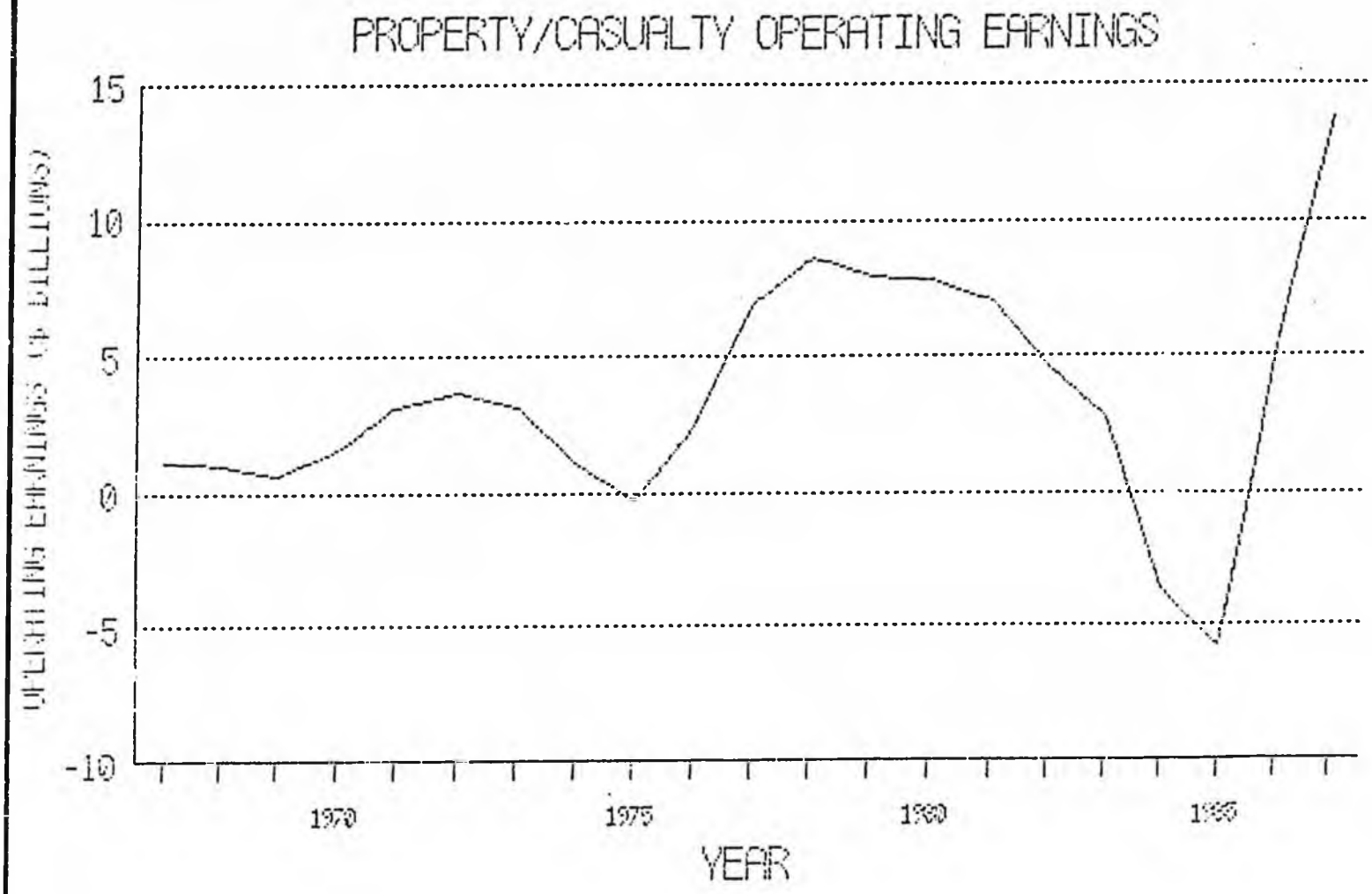
Nevertheless, Dr. Mooney said that, "it's a general feeling that the industry is going through a fairly stable period, so that 1989 will probably look the same as 1988." □

NATIONAL UNDERWRITER/

JANUARY 11, 1988

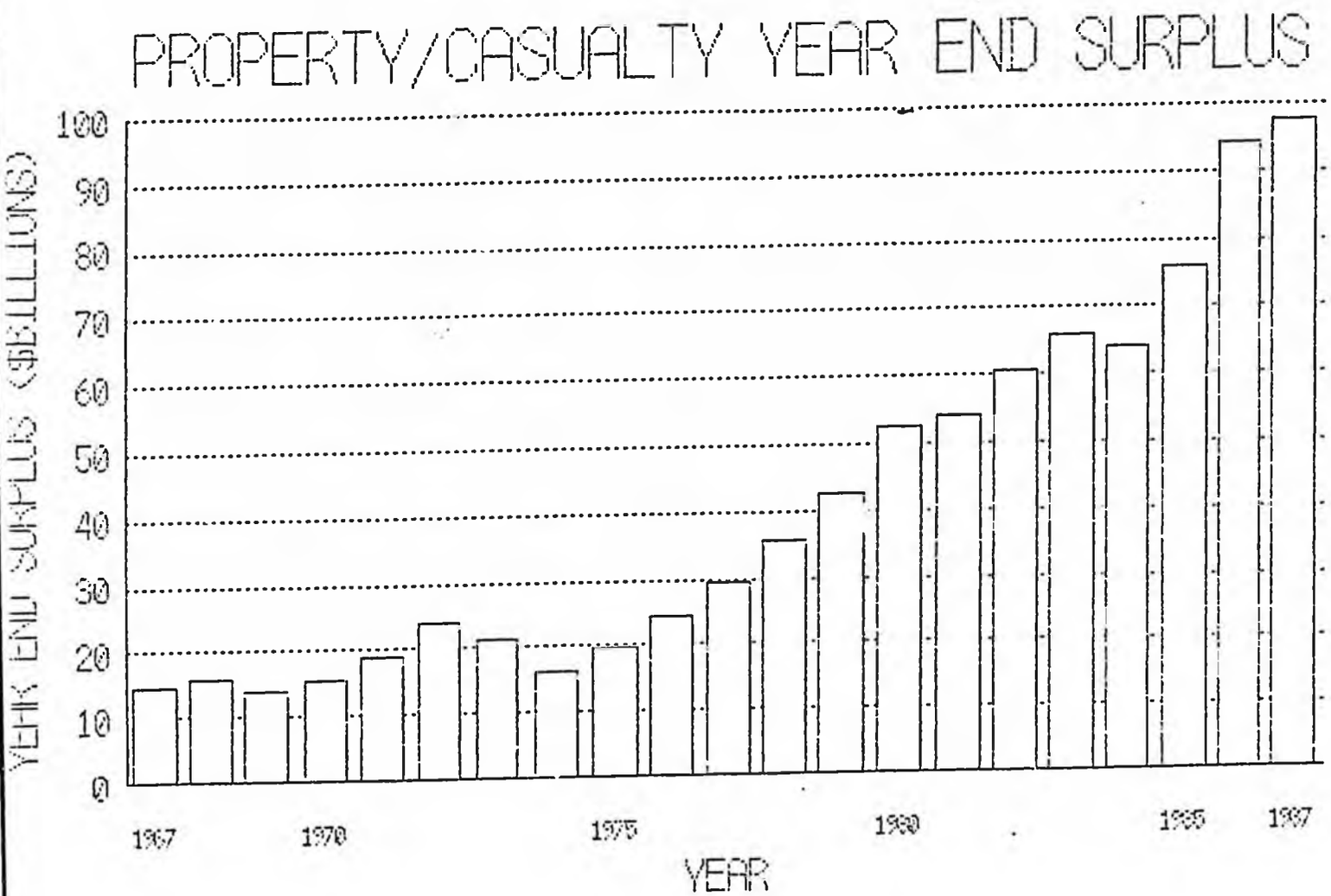
Attachment 7

CHART I



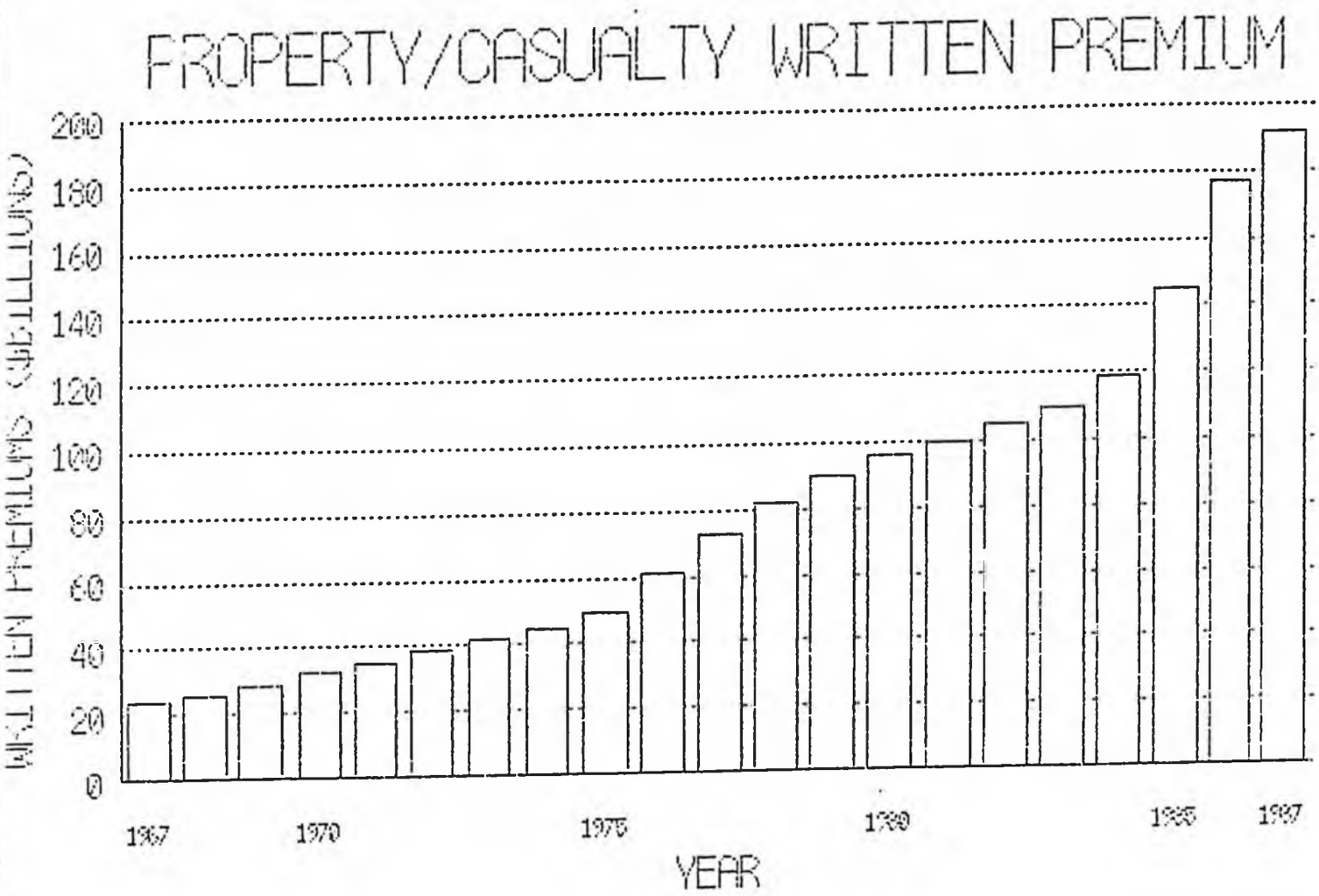
Source: Best's Insurance Management Reports; Insurance Information Institute, Insurance Services Office.

CHART II



Source: Best's Insurance Management Reports; Insurance Information Institute; Insurance Services Office.

CHART III



Source: Best's Insurance Management Reports; Insurance Information Institute; Insurance Services Office.

Note on the Property/Casualty Industry's Record $13.7 Billion Profit in 1987

The property/casualty insurance industry earned a record net profit of $13.7 billion in 1987, after having earned a then-record profit of $12.7 billion in 1986.

The industry has emphasized, however, that its $12.7 billion net profit in 1986 is really not as great as it appears, since only $5.4 billion of that profit, or 44%, is operating profit -- profit from its insurance operations. The bulk of its profit, the industry has stressed, came from realized gains -- sales of stock in an unusually inflated stock market. See Insurance Information Institute, The Executive Letter, "Earnings Improve, But Asset Sales Remain Primary Income Source," March 23, 1987. The industry pointed out that its capital gains were extraordinarily high in 1986, and that those high capital gains could not be expected to continue.

In 1987 those high capital gains did not continue, yet the industry made more money than it ever had before -- $13.7 billion. That $13.7 billion consisted entirely of operating profit -- profit from insurance operations -- up 154% from its $5.4 billion operating profit in 1986. If the stock market had not crashed in October, its net profit would have been even higher.

ICC INUIT CIRCUMPOLAR CONFERENCE

ALASKA OFFICE
429 'D' Street
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Anchorage, Alaska
99501
Tel (907) 338-6917
Telex 26-454

April 7, 1988

Dave Donely
Chairman
House Labor & Commerce Committee
P.O. Box V
Juneau, Alaska 99811

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Dear Mr. Chairman:

I enclose the ICC's position paper on tort reform for inclusion in the public record and for consideration by the members of the State House who will be reviewing this piece of legislation.

I will be out of the state and unable to present this position paper during the hearing scheduled for April 22, 1988.

If you or your staff have any questions regarding the enclosed document, please do not hesitate to contact me at the ICC Alaska Office, 258-6917, in Anchorage. I will be back from vacation beginning the week of April 25.

Thank you for your time and consideration of our views.

Sincerely,

Dalee Sambo

Dalee Sambo
Special Assistant

DS/ds

INUIT CIRCUMPOLAR CONFERENCE

POSITION PAPER ON PROPOSED TORT REFORM

One of the primary purposes of the Inuit Circumpolar Conference (ICC) is to promote the interests of the native people living in the world's Arctic region.

Legislation has been introduced in the Alaska Legislature, which would severely limit the rights of native people of Alaska, who are injured through the fault or negligence of someone else, to seek fair compensation for their injuries.

Some specific measures in the legislation which we feel will unfairly impact the native people of Alaska are:

Non-Economic Damages

SB 211 and HB 250 would place a limit on so-called non-economic damages available to an injury victim, which is much lower than the current limit which was passed by the legislature only two years ago. Under the current law, severely disabled and disfigured victims are exempted from this limit, however, the proposed legislation will limit non-economic damages for even the most severely injured victims.

Native people who live a subsistence lifestyle will be harmed by this limit, as will women, children and the elders in particular, since they have less measurable "economic value" (ie. lost wages

and future earnings) for which they can be compensated.

Some people who are in favor of these limits say they are fair because non-economic damages for pain and suffering are hard to measure, unlike the documented loss of a wage paying job due to an injury. They may be more difficult to add up on a balance sheet but they are very real nonetheless.

Good physical health is crucial to the ability to live a traditional subsistence way of life and a disability or serious injury can easily deprive a native person of their traditional way of life. Another aspect of the subsistence tradition is to provide not only for one's own family, but also for other members of the community as whole. An inability to participate with friends and neighbors, in providing for the group as a whole would create another hardship for the injury victim.

Obviously, the cultural values associated with a subsistence way of life, and the ability to pass on those values to future generations cannot be measured in strictly economic terms and limiting non-economic damages, therefore, discriminates against a large number of native people in Alaska.

Another unfair and arbitrary facet of the proposed limits on non-economic damages is that they mainly impact the injury victims who are the most severely disabled and disfigured. These are also the people who need compensation for their injuries the most, to pay medical bills and provide for their families.

Punitive Damages

These bills will make it more difficult for parties causing injuries to be assessed for punitive damages. The level of proof needed to punish a knowing wrongdoer would be made higher. The ICC opposes these changes proposed for punitive damages. Environmental pollution of water resources, subsistence habitats, and even school playgrounds is a grave problem in villages throughout Alaska. The threat of punitive damages must be preserved as an important economic incentive for hazardous waste producers to dispose of their wastes safely; and for manufacturers to produce safe products.

Periodic Payments

Instead of allowing the injury victim to decide on the method of payment, whether it be a lump sum payment or periodic payments made over decades, these bills would force the injury victim to accept periodic payments. This will deprive victims of receiving the full intended value of their compensation by allowing insurance companies to collect the interest on the bulk of the victim's money for years. The ICC opposes this blatantly unfair proposal and finds it particularly unfair to the elders who are victims.

Joint and Several Liability

With regard to joint and several liability, we support the exemption for hazardous waste and environmental pollutions.

However, we only, in general, support the concept of joint and several liability and don't believe it should be repealed or limited in other cases.

Who benefits from this legislation? Its proponents have argued that this legislation is a necessary answer to the problem of rising insurance premium rates and of lack of availability of insurance in some areas. Yet the fact is, other states which have already passed similar legislation have seen insurance rates continue to rise and availability has continued to be a problem.

##########

The ICC is very concerned about the effect of rising medical malpractice premiums on the continued availability of adequate medical care in rural Alaska. However, we do not believe that these anti-victim proposals are the answer to the problem.

We believe there are other measures which would much more effectively bring down medical malpractice rates without depriving victims of their rights. Some Proposals ICC would like to make are:

1. Require insurance companies to experience rate doctors. Drivers who have been involved in several serious accidents pay more, and drivers who have never had an accident pay less. Yet doctors found liable for malpractice several times pay the same as doctors who have never been sued. Good doctors should pay less, and doctors liable in malpractice cases should pay more.

2. Reduce the number of categories of doctors and increase the number of doctors in each category. This is better risk management than having doctors spread out through many categories.

3. Charge malpractice occuring in doctors' offices to doctors and charge malpractive occuring in hospitals to hospitals. This will maximize the incentive to hospitals to police doctors and will spread risk more evenly.

4. Require insurance companies to stop subsidizing doctors who have larger practices. Under the current system, the doctor who delivers a handful of babies in a small city like Nome pays as muchas a doctor in Anchorage who delivers hundreds of babies each year.

Three Men Got Lawsuit Rolling

By MARK MAGNIER
Journal of Commerce Staff

LAFAYETTE, Calif. — Richard Holmes, the mayor of Lafayette, Calif., in 1985 and 1986, says he smelled a rat early in his term when told that 80 insurance companies had turned down a request for municipal liability coverage.

"I got to thinking this simply can't be right," the former mayor and current city councilman says. "It can't be a coincidence. Five companies maybe. But if over 80 insurance companies are not offering insurance, what the hell are they going to offer — soap?"

His outrage prompted a fiery letter and several follow-up calls to California Attorney General John Van de Kamp. Those efforts reportedly catalyzed an investigation into possible insurance industry collusion spearheaded by the attorney general and Thomas Dove, the state's assistant attorney general.

"Dick (Holmes) is a very persistent guy," Mr. Dove explains.

Two weeks ago, seven states filed suit in California and one filed in Texas charging 31 U.S. and British insurance companies with conspiring to restrict the coverage available to cities and counties under their standard commercial liability policies.

Related Stories
On Page 9A

- A key player in an antitrust case reports a coincidence in his auto insurance since the suit was filed.
- The liability crisis has affected huge areas of American life.

Other states could follow the lead in what is being called the largest U.S. antitrust case in history. Some say more than 20 states in all might file within a matter of weeks.

Robert Vagley, president of the American Insurance Association, says the accusations contained in the suit are preposterous and motivated by attorneys general seeking political attention and personal injury lawyers fighting to preserve their fee structure.

What follows is a look at the role played by three men, Mr. Holmes, Mr. Van de Kamp and Mr. Dove, in the filing of this historic lawsuit.

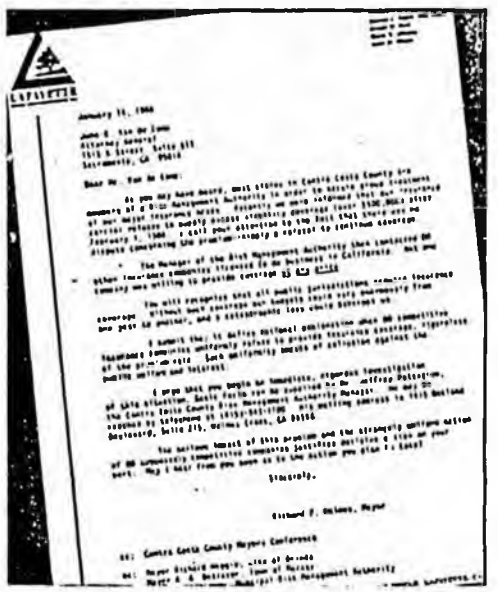
"They've called me the punk that set off the fireworks," Mr. Holmes says. "Apparently few

SEE THREE, PAGE 9A

HOLMES: Three decades in the oil business made him very sensitive to even the faintest suggestion of collusion.

VAN DE KAMP: He authorized the investigation after reading Mr. Holmes' letter and reviewing the evidence.

The Letter That Started It



States Assert Legitimacy Of Insurance Lawsuits

By PAULA L. GREEN
Journal of Commerce Staff

State law enforcers around the country say the antitrust lawsuits they have lodged against the insurance industry are not political vendettas, as insurers have claimed.

"Anyone would have to have their head examined to engage in this lengthy, extensive and expensive litigation without good reason," said James M. Shannon the Democratic attorney general of Massachusetts. "This is a suit filed by nine states, bipartisan, Republicans and Democrats, after a long investigation over the last two years."

The American Insurance Association has labeled the lawsuits a "coordinated, political, public relations exercise by a few attorneys general." Other industry-supported groups say the suits are the legal community's latest assault against insurers' attempts to reform the civil justice system.

But armed with 100,000 pages of documents and interviews with nearly 200 people on two continents, law enforcers say they are confident and ready to tackle the multibillion-dollar insurance industry.

"The case will be successful. The companies thought they were so well protected under the McCarran-Ferguson Act that they did most of what they did in the open," said Texas Attorney General Jim Mattox, also a Democrat. "But McCarran-Ferguson says you may not boycott, intimidate or coerce. And that's exactly what they (insurers) did as an industry."

Two weeks ago, officials in nine states took the first step in a nationwide offensive against the industry when they accused more than 30 major U.S. and British insurers and reinsurers with conspiracy, boycott and other violations of antitrust laws.

McCarran-Ferguson exempts the insurance industry from federal antitrust laws except in cases of boycott, coercion or intimidation. The federal act allows the national property/casualty, life and

SEE STATE, PAGE 10A

Where Plot May Have Been Hatched

By EDWIN UNSWORTH
Journal of Commerce Staff

LONDON — "All the World's a Stage" is the motto emblazoned on the architrave above most of the principal doorways of the Garrick Club, one of the handful of select gentlemen's clubs established in London.

It might well have been noticed by the group that met in the club on July 4, 1984, allegedly to hatch the plot involved in the antitrust suits launched two weeks ago by eight U.S. states against U.S. and British insurers.

The mid-19th century club building is the most impressive on the narrow street of the same name as the club. It was built on a palatial scale, with the Italianate facade leading to an entrance hall capped by a large domed fanlight. Around the hall a wide oak staircase whose walls are lined top-to-bottom with paintings of past theater personalities leads up to the club's smoking room, reading room, bar, billiard room and library.

The Garrick Club, like the other old and established London clubs, is a place for professional men to meet, to dine, to socialize, and to make contacts.

While the scale is grand, the interior of the club has the well-used and slightly downtrodden look to which so many of the English upper classes are accustomed in their own historic mansions.

It is unashamedly a masculine club, with the large proportions of the rooms accentuated rather than lightened by the dark walls — brown in the smoking room and burgundy in the dining room — and an abundance of over-stuffed leather armchairs. The atmosphere is often smoky, a place for men uninhibited by the presence of women.

Like the other old and established London clubs, it is a place for professional men to meet, to dine, to socialize, and to make contacts. Women, although allowed in as guests, are not accepted as members.

Even if this rule were to change it could be some years before a female were to join the ranks, because the club has an eight-year waiting list.

Unlike the other select gentlemen's clubs, the Garrick is not located in fashionable Mayfair or Belgravia but in Covent Garden, a location suitable to its role as a club whose first members came largely from the world of the nearby theaters.

The Duke of Sussex founded the Garrick in 1831 for actors, painters, writers and other artists, and members over the years have included the likes of Charles Dickens, William Thackery and Washington Irving.

Many of the club's near-1,000 members still do come from the performing and the creative arts. Among them are Sir John Gielgud and Sir Lawrence Olivier. Writers and journalists also favor the club.

If reinsurers from Lloyd's of London and the company market did meet Insurance Services Office staff at the club to discuss means of restricting insurance cover in the U.S. market, they may well have been in the proximity of some of Britain's top legal and political figures.

Chancellor of the Exchequer Nigel Lawson, Foreign Secretary Sir Geoffrey Howe, the country's top legal adviser, Attorney-General Lord Havers, and numerous other politicians, judges and lawyers are members. Even Prince Charles belongs to the Garrick, and his father, Prince Philip, is its patron.

The Journal of Commerce and Commercial

The Sparks That Lit the Antitrust Suit Fires

Three Men Got Lawsuit Rolling

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people did anything but wring their hands."

Lafayette is a typical, albeit prosperous, U.S. town 25 miles from San Francisco. The commercial center is clustered around the on- and off-ramps of the highway, and the town's 23,000 people live on tree-lined streets leading into the hills.

Mr. Holmes became a city councilman in 1981 shortly after retiring. The official says his three decades in the oil business, most recently with Chevron Corp., made him very sensitive to even the faintest suggestion of collusion, and with 60 companies acting in concert, "it clearly looked like antitrust."

The gray- and white-haired official says he wondered for several months after sending his letter whether the attorney general would take on the case, given all political disincentives. The insurance companies make up one of the largest and richest lobbying forces in California politics.

After several months of telephone calls, however, Mr. Holmes said he was told that a state investigation had begun. A few months later he was told that witnesses were being subpoenaed under a court order.

Mr. Holmes, who comes from a family with a long history of public service, says he is a strong believer in the system. When he heard that, he says, he knew things were working the way they were supposed to.

John Van de Kamp

John Van de Kamp, 52 years old and California's attorney general since 1983, says he authorized the investigation after reading Mr. Holmes' letter and reviewing the evidence.

Mr. Van de Kamp, a former district attorney for Los Angeles county, is known in California as an ethical, straight-shooting official with aspirations to the governor's office. A graduate of Dartmouth College and Stanford Law School, he was re-elected by a greater than 2-to-1 margin in 1986.

Mr. Van de Kamp, who comes from a wealthy family, is known as a serious and reserved person with a record as a moderate liberal.

> 'It was an amazing development. We went off to London as grade schoolers and came back as freshmen in college.'
>
> — Tom Dove, Assistant Attorney General, California

In 1986 he opposed a tort reform initiative supported by the insurance industry, which earned him a reputation as an insurance-basher. He says this is undeserved. He knew little about insurance or antitrust before becoming attorney general, he says, and became "tough" only after he understood the issues.

Mr. Van de Kamp says his office became involved in the insurance antitrust investigation in 1986 in part because the Reagan administration has done little in the area of trust busting and this left the responsibility with the states.

He is quick to point out that some of those most hurt by the insurance companies by the alleged collusion were the industry's own agents and brokers. "Companies within the industry were victimized," he said.

Thomas Dove

Where Mr. Van de Kamp appears reserved by nature, his assistant attorney general, Tom Dove, seems diametrically opposed. "This is an industry that was dumb enough to insure the Titanic after it sank," he says, walking down a hallway. He gives the impression he is comfortable at the center of a controversy.

Mr. Dove graduated from Berkeley Law School in 1971 and worked for the law firm of Paul Weiss, Rifkind, Wharton & Garrison in New York where he cut his teeth doing litigation and antitrust work. In 1973 he was drawn back to the West Coast where he joined the criminal division of the attorney general's office.

He handled civil rights cases and an anti-marijuana campaign before becoming head of the state's antitrust division in 1985. Mr. Dove says his investigation into the insurance industry started in early February of 1986, although it took until May to understand some of its complexity.

The early months were spent talking to voluntary witnesses, he says. He called up brokers and agents until one source told him curtly he'd just answered the same questions for the attorney general's office in Texas, tipping him off that other states were also interested.

He started working closely with Texas and was joined in the fall by New York and Massachusetts. "We discussed what angle works, compared how to phrase questions, corrected each other's misapprehensions," he says.

Mr. Dove said his real break came in October 1986 when Peter North Miller, the chairman of Lloyd's of London, came to San Francisco to give a speech on, of all things, the liability insurance crisis. Mr. Dove served him with a subpoena.

"He was somewhat surprised," Mr. Dove says. "No one had ever done that to the chairman of Lloyd's."

In exchange for delaying Mr. Miller's appearance, Mr. Dove was given permission to conduct voluntary interviews in London over a four-week period. He likens this agreement to swapping a whole tribe of Indians for a chief.

What followed was 170 hours of taped interviews with brokers, agents, reporters, book authors, accountants, former and disgruntled Lloyd's employees, and "anyone I could get my hands on," which produced a wealth of evidence.

"It was an amazing development," he says. "We went off to London as grade schoolers and came back as freshmen in college."

In the course of the investigation, Mr. Dove says, his attention kept returning to the reinsurance side of the business.

He says he soon came to the conclusion that Lloyd's and a few other reinsurers wielded tremendous influence well beyond the actual volume of business underwritten and that this influence was being used to control the market.

Although Lloyd's and North American Re, two parties named in the suit, may only underwrite a small portion of the overall business, their leverage is enormous because other companies won't act without their leadership, he says. "It's a little like saying you only sell 2% of the paint in the world but 'if you want red you'll have to come to me,'" he says.

The attorney, who sports a mustache and wears an ornate gold and diamond ring on one hand, says the case has left him 25 pounds overweight. He says he spent 117 days out of the state last year gathering evidence.

"It's been incredibly tough," he says. "I missed both my children's birthdays and missed my anniversary. At times I wondered, are you ever going to make this come together?"

Mr. Dove declined to elaborate on the evidence he has amassed but said he believes his office has a very solid case. "We'd like to push it to trial as fast as we can."

Although some point out that colluders don't refuse to sell their product at any price, as the insurance industry often did, Mr. Dove says the industry's strategy was to hold off selling until it could raise premiums substantially and bring about major reductions in the scope of their responsibilities.

"Then the cost is down, the risk is down, the handling is down and profits are up. What a wonderful way to go. Too bad it's illegal."

Mr. Dove said most of the cases were filed in California because of the amount of evidence collected in the state and the laws available in the 9th Circuit. "I can assure you if the law was superior in Charleston, West Va., we'd all be there," he says.

He says they have filed suit against the most provable cases. Others fall into gray areas, he said, and it remains to be seen how many additional defendants may be named.

Cover Inquiry Leads to Peculiar Incident

By MARK MAGNIER
Journal of Commerce Staff

LAFAYETTE, Calif. — Richard Holmes, the former Lafayette mayor whose letter may have prompted the largest antitrust case in history, says he doesn't know what the insurance companies feel about him.

But he says he may have received one small indication recently.

Mr. Holmes says his personal automobile insurance was due to expire and he faced a substantial increase from his insurance company, so he decided to look around for an alternative carrier.

Over the past several years he had received letters from the Hartford Fire Insurance Co. soliciting his business and offering lower premiums. Several weeks ago he called Hartford's toll-free number to get more information. A representative said the offer was still valid if the policy was completed by March 29.

Mr. Holmes also found that Hartford had a file on him from an accident several years earlier. At that time he had been hit broadside by another car whose driver was insured by Hartford, and as a result of paying the claim to Mr. Holmes, the company had extensive information on him.

On the telephone, the Hartford representative verified much of the information and promised to send him the necessary forms so Mr. Holmes could sign up before March 29.

Over the next few weeks, Mr. Holmes' role as a catalyst in the huge antitrust suit became better known, but he never received the promised forms. Finally on March 30, Mr. Holmes said, he called Hartford back.

In that second phone call a new Hartford representative told him the company had no record of Mr. Holmes at all and told him to look for coverage elsewhere.

"Isn't that an odd coincidence," he said. "Now they can't find me by name, by quotation number, by telephone number or by U.S. mail zip code. They didn't offer to send me a new (form), they didn't offer to check with the supervisor, they just told me to do my business elsewhere. It's pure coincidence, of course, and you'd never be able to prove anything, but isn't that interesting."

Mr. Holmes says he has since gone back to his old insurance company. A family member told him it is probably a better idea anyway.

A Hartford spokesperson said the incident did sound a little peculiar on the surface but that the company would look into the matter further.

Hartford could not provide comment by late Monday.

Although Mr. Holmes' role in the antitrust lawsuit may not have endeared him to the insurance industry, it has won praise among businessmen and other members of his community, he says.

"I would like to express my great thanks to you for being the catalyst that precipitated filing the class action suit against the insurance industry," wrote one businessman in Lafayette. "You should feel very satisfied that your time investment in sitting down to write to (California Attorney General) Van de Kamp achieved your interest. Your value to the city speaks for itself."

States Assert Legitimacy Of Insurance Lawsuits

CONTINUED FROM PAGE 1A

health insurance industries to operate under a system of state regulation.

Seven states, Alabama, California, Minnesota, Massachusetts, New York, West Virginia and Wisconsin, filed suit in U.S. District Court in San Francisco on March 22. Texas filed its own suit in State District Court in Travis County because state officials believe the state has tougher antitrust and consumer protection laws.

Arizona joined the federal suit a day later. Several other states, including Florida, New Jersey, Ohio, Maryland, Connecticut and Washington, are considering filing similar legal actions.

Mr. Mattox, whose second four-year term ends in 1990, said he expects about 10 other states to join the group of attorneys general that has closely followed the insurance industry's actions since the commercial liability crisis of the mid-1980s.

The civil complaint alleges that insurers used their market power and coercive and manipulative practices during the hard market to raise prices and restrict the limits of coverage available to insureds. The suit, which includes names, dates and places, outlines how officials from major insurance and reinsurance companies allegedly met during this period to manipulate the market.

The insurance industry has labeled the charges "meritless," "unfounded" and "preposterous."

During the insurance crisis, the industry launched a massive campaign to reform the civil justice system. State legislatures in more than 40 states approved tort reform measures, which restrict injured people's ability to recover damages in court. Most legal groups and attorneys adamantly opposed the industry campaign and the tort reform measures.

Insurers have said the skyrocketing awards that accident victims receive through the court system contributed to the unavailability and unaffordability of insurance during the liability crisis.

State law enforcers aren't surprised by the industry's attempt to dismiss the antitrust lawsuit as another round in the tort reform battle.

"There's a saying that when the law and the facts are against you, you attack the prosecutor," said a spokesman for California Attorney General John Van de Kamp, a Democrat. "They're (insurers) trying to explain away the allegations."

"It's very shallow to think that nine attorneys general in nine different states, most of whom are not up for re-election, would file suit for political reasons," said Darrell Daniels, a spokesman for the West Virginia attorney general. "That's like saying anything government does is political. You have to consider the context in which it (insurers' remarks) were given."

The group of nine attorneys general that filed suits include seven Democrats and two Republicans. Two officials, Charles "Charlie" G. Brown of West Virginia and Hubert H. Humphrey of Minnesota, are running for office. Mr. Brown, a Democrat who began his first four-year term in January 1985, is seeking re-election and Mr. Humphrey, who began his second four-year term in January 1987, is running for U.S. Senate this November.

Mr. Humphrey, a Democrat, said Minnesota's suit was not motivated by political interests but by the numerous complaints the state received from constituents who couldn't get insurance coverage between 1984 and 1986.

"Businesses and municipalities couldn't get insurance because it was up so high. They had to cut out activities or reorganize their way of doing business," Mr. Humphrey said.

He added that insurers forgot where the lines of McCarran-Ferguson ended.

"The industry narrowed their risk of coverage while sustaining prices at the same level, or higher, to preserve their profit structure," Mr. Humphrey said. "People forgot the clear lines of where the (McCarran-Ferguson) exemptions apply, that there are things they cannot do, and that the law will be aggressively enforced. They have to live like every other industry does in the marketplace."

Mr. Shannon, Massachusetts' attorney general, agreed that insurers thought they were shielded by the federal act.

"The arrogance of the industry is shown in that they left such a paper trail. They thought they were protected from any antitrust scrutiny. They made some arrogant and stupid mistakes," Mr. Shannon said.

The investigation jelled in November 1986 during a regular meeting of the antitrust committee of the National Association of Attorneys General, said Lloyd Constantine, chief of the antitrust bureau in the New York Department of Law. The department is run by New York Attorney General Robert Abrams, who will serve as association president this June.

During that meeting, the repeated liability horror stories that municipalities and businesses were reporting from around the country provided the spark for a focused investigation.

A core of states, including New York, California, Texas and Massachusetts, led the inquiry, which was patterned after previous investigations conducted under the aegis of the association of attorneys general. Staff members zero in on problem areas during the regular association meetings. Then a group of states that have the financial and staff resources devote the necessary time and money to lead an investigation.

"It's the magnitude of the case, not the process, that's remarkable," Mr. Constantine said.

After the initial states file a suit, other states become privy to the information and make their own decisions about joining the litigation, he added.

Officials believe the federal suits will be consolidated. Although a timetable is difficult to predict, most officials expect pretrial proceedings to take up to two years before jury selection begins.

"I'm sure there will be some industry heavyweights and some highly paid legal minds involved," said Mr. Brown, who was West Virginia's first antitrust director.

EDNESDAY, MARCH 23, 1988

WALL STREET JOURNAL

Four Big Insurers Charged With Scheme To Limit Commercial Liability Coverage

By Peter Waldman
And Beatrice E. Garcia
Staff Reporters of The Wall Street Journal

Seven state attorneys general, citing dozens of alleged secret meetings, dinner parties and behind-the-scenes threats, charged four of the nation's largest insurers with conspiring to manipulate the availability and cost of commercial liability coverage.

In separate antitrust lawsuits filed in federal court in San Francisco, the top prosecutors of Alabama, California, Massachusetts, Minnesota, New York, West Virginia and Wisconsin alleged that a conspiracy of giant insurance companies caused the so-called liability crisis earlier this decade by colluding to jack up prices and limit the scope of insurance coverage. The basic thrust of the accusations is that a few of the largest insurers jointly pressured the rest of the industry to go along with certain policy-writing changes that made it much tougher for public agencies, businesses and nonprofit organizations to buy liability insurance.

Named as defendants in the suits were Hartford Fire Insurance Co., Hartford Conn., a unit of ITT Corp.; Allstate Insurance Co., Northbrook, Ill., a unit of Sears, Roebuck & Co.; Aetna Life & Casualty Co., also in Hartford, and Cigna Corp., Philadelphia. Also named were the Insurance Services Office Inc., a New York-based trade group, and a number of major London-based reinsurance companies and their U.S. brokers.

In news conferences across the country, the seven attorneys general denounced the alleged conspirators, blaming them for afflicting day-care centers, recreational facilities and other public and private services with unnecessary anguish and in some cases, bankruptcy.

"International conspiracies resulted in policies so shrunken in scope, so reduced in value to the customer, that they can hardly be described as insurance at all," said New York Attorney General Robert Abrams.

California's attorney general, John Van de Kamp, said: "It was the public and the consumer who paid the price for this collusive exercise in corporate greed."

Companies Respond

A spokesman for Aetna Life called the action "another political move by political officeholders who have consistently opposed any and all efforts to address the real problems of the nation's liability system." The spokesman added that "any business decisions made by Aetna executives are made independently."

A spokesman for Allstate said the company hadn't seen the suit but stressed that "Allstate is not now, and never has been, involved in a conspiracy to fix prices or constrain the market."

A Cigna spokesman said the company doesn't comment on litigation, but pointed out that Cigna's policy is to conduct business "in conformity with all state, federal and foreign antitrust laws."

Stephen Martin, vice president for government relations at Hartford, said, "These charges are totally without substance."

In New York, a spokesman for the Insurance Services Office, the trade group that coordinates industrywide policy standards and that is alleged in the suits to have been a focal point of the conspiracy, called the accusations "unfounded and meritless." He added that the group has "conducted its operations properly and legally."

THE JOURNAL OF COMMERCE, Thursday, March 24, 1988

Those Named in Suit

Journal of Commerce Staff

The U.S. and British insurers, reinsurers, trade associations and insurance brokers named in the federal antitrust lawsuit include: **Hartford Fire Insurance Co., Hartford, Conn.; Allstate Insurance Co., Northbrook, Ill.; Aetna Casualty & Surety Co., Hartford, Conn.; and Cigna Corp., Philadelphia. The Texas suit also includes: Fireman's Fund Insurance Co., Novato, Calif; Liberty Mutual Insurance Co., Boston; St. Paul Fire and Marine Insurance Co., St. Paul, Minn.; Travelers Insurance Co., Hartford, Conn.; and USF&G Corp., Baltimore.**

The Insurance Services Office Inc., a New York-based rate-making and advisory trade association whose recommended policy forms are used by almost all U.S. insurers, and the Reinsurance Assocation of America, a Washington-based trade group for reinsurers, were named in the lawsuits.

Domestic reinsurers named in the complaint include: General Re Corp., Stamford, Conn.; Constitution Reinsurance Corp., New York; Mercantile and General Reinsurance Co. of America, Morristown, N.J.; Prudential Reinsurance Co., Newark, N.J.; North American Reinsurance Co., New York; and Winterthur Swiss Insurance Co., Winterthur, Switzerland.

Lloyd's of London syndicates named in the suit include: Robin A.G. Jackson; Merrett Underwriting Agencies Mgt. Ltd.; Three Quays Underwriting Management Ltd.; Janson, Green Ltd.; R.A. Edwards and Payne Ltd.; C.J. Warrilow-Hine & Butcher Ltd.; Harvey Bowring Ltd.-Murray Lawrence & Partners; K.F. Alder & Others Ltd.; D.P. Mann & Others Ltd.; and Peter N. Miller, who was chairman of Lloyd's at the time.

London market reinsurers named in the suit include: Unionamerica Insurance Co. Ltd.; CNA Re Ltd.; Terra Nova Insurance Co. Ltd.; Excess Insurance Group Ltd.; Kemper Reinsurance London Ltd.; and Continental Reinsurance Ltd.

Brokers named in the complaint include: Thomas A. Greene & Co., New York; Ballantyne, McKean & Sullivan Ltd., London; and R.K. Carvill & Co., London.

THE JOURNAL OF COMMERCE, Thursday, March 31, 1988

Fla. Considers Joining Antitrust Lawsuit

Journal of Commerce Staff

TALLAHASSEE, Fla. — Attorney General Bob Butterworth and Insurance Commissioner Bill Gunter are exploring Florida's options in light of the recent antitrust lawsuit filed against several insurance entities.

The lawsuit alleges that certain insurers and foreign reinsurers conspired to narrow the types of coverage that were available to businesses and local government by revising basic forms, altering coverage dates, excluding pollution liability coverage and including costs for defending claims in coverage limits.

"If there is any evidence that indicates that the liability insurance crisis of the mid-1980s was aggravated to benefit certain members of the insurance industry, the state of Florida deserves and demands redress," Mr. Gunter said.

Although the attorney general's office is prohibited from discussing antitrust investigations, Mr. Butterworth said he has assembled a team of lawyers to determine whether Florida should join the eight states that have filed suit against the insurers.

"We know that during the insurance crisis Commissioner Gunter, through the exercise of his regulatory powers and his lobbying efforts with the Florida legislature, made every effort to minimize the impact of the coverage changes that are alluded to in the lawsuits. To the extent that those efforts were successful, Florida consumers may have suffered limited, if any, damages alleged in this litigation. That is one of the areas we have been and will continue to examine," Mr. Butterworth said.

In addition, Mr. Gunter said the Insurance Department will be conducting an investigation to determine to what extent Florida businesses and public bodies may have been injured as a result of the alleged conspiracy.

4 More States Debate Joining Antitrust Suit

NEW YORK — Representatives of four states met with New York officials Tuesday to discuss the antitrust lawsuits that have been filed against major insurance companies.

The states are seriously considering whether to join the lawsuits and are seeking additional information.

The New York attorney general's office briefed antitrust lawyers from Connecticut, Ohio, Maryland and New Jersey on the investigations that led to the filing of the suits last week, according to Chris Braithwaite, a spokesman for New York State Attorney General Robert Abrams.

Nine states, including New York, filed suit last week alleging that insurers conspired to restrict coverage and boost prices, resulting in severe affordability and availability problems faced by businesses, towns and other public agencies during 1985 and 1986.

Eight of the suits were filed in U.S. District Court in San Francisco. Texas filed in state district court in Austin.

"We can't speak for other states, but the door is certainly open to others who want to file," Mr. Braithwaite said.

"Most likely we will be filing" to join the other states in the antitrust challenge, said John R. Hagerty, spokesman for New Jersey Attorney General W. Cary Edwards. "It's just a matter of putting together the necessary information for that."

> 'Most likely we will be filing . . . It's just a matter of putting together the necessary information for that.'
>
> — John R. Hagerty
> Spokesman for W. Cary Edwards
> New Jersey Attorney General

Connecticut has requested and received investigation materials from Connecticut, said Robert Langer, Connecticut assistant attorney general in charge of antitrust and consumer protection.

Ohio wants to determine if its own state antitrust laws were broken by insurers, said Michael Webb, spokesman for Ohio Attorney General Anthony J. Celebrezze Jr.

Maryland also is asking its towns about their insurance problems in the mid-1980s, said Michael F. Brockmeyer, assistant attorney general and antitrust division chief. (AP)

Lawmakers weigh joining insurance suit

State must pay some fees to collect any damages

By Robert Laurie
Times Juneau Bureau

JUNEAU — Legislators looking into the possibility of the state joining in a multi-state lawsuit against several insurance companies will hear from the insurance industry Monday.

Eight states filed suit late last month against four major U.S. insurance companies, charging them with conspiring with members of Lloyd's of London to manipulate the availability of certain kinds of commercial liability insurance.

Gov. Steve Cowper and Attorney General Grace Schaible will decide later this month whether the state should join the lawsuit. The House Joint Committee on Economic Recovery is preparing a legislative resolution with its recommendations on the subject.

Craig Berrington, general counsel for the American Insurance Association, is scheduled to testify by phone before the panel.

Berrington, who appeared on PBS's "MacNeil/Lehrer NewsHour" following the filing of the lawsuit, is expected to tell the committee that the charges are without merit. He claims, in fact, that the insurance companies were required under state laws to get together to develop policies.

Berrington says insurance companies are required by some states, permitted by others, to work together to develop common policy forms in order to cut down the confusion of a plethora of varying policies.

Committee chairman Rep. Max Gruenberg, D-Anchorage, has drafted a resolution asking the governor and attorney general enter the lawsuit.

A decision whether to introduce the resolution will follow Berrington's testimony. The panel heard from Alaska Department of Law and Division of Insurance officials Thursday, along with California Assistant Attorney General Tom Dove.

Dove headed California's two-year investigation into the allegations. He claims the four insurance companies; Allstate, Aetna, Hartford, and CIGNA, caused reduced coverage and availability of insurance to municipalities, non-profit organizations and businesses through collusion, cooperation and conspiracy.

Dove says the charges were developed after investigators sifted through a half-million pages of documents and more than 250 interviews.

Because insurance companies are exempt from federal and state anti-trust laws, Dove said investigators had to drop about 25 charges any other industry would have faced.

Dove says 22 states, including Alaska, have requested information about the investigation and lawsuit. Alaska Department of Law attorneys are reviewing confidential information provided by California in order to make a decision on the state's participation.

Alaska Assistant Attorney General Richard Monkman said

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Suit: State must pay to play

Continued from page B-1

after a preliminary review of the information that the suit looks promising.

"(In) my personal opinion, this lawsuit has a very sound factual basis," Monkman told the committee. "I believe legal theories on which its based are very sound. It's a very complicated and . . . very expensive and time-consuming investigation."

California and New York investigators will brief western state attorneys general in greater detail April 19.

If Alaska joins the lawsuits, it would be expected to share in the costs of prosecuting the case. Dove estimates that would be less than $50,000.

Another $50,000 would be needed for staff and travel expenses next year.

Formally participating in the lawsuit is not the only option facing the state. Alaska could avoid most of the cost of the lawsuit simply by filing a friend of the court brief.

But if the court rules in favor of the states, Alaska would miss out on any damages that might be awarded.

Monkman says as a practical matter, the state could win money only for public entities like municipalities, school districts or state agenies that may have been harmed. But a successful suit could open the door for businesses.

"If the state of Alaska gets a judgment against these companies in federal court under our state act, then any private entity that's been damaged can come forward and say 'here's the judgement, that establishes liability' and have a case," Monkman explained.

"So, by establishing liability by participating in the first part of the lawsuit, we will open the doors for injured Alaska businesses to file their own actions," he continued.

Regulators: States Were Pressured On ISO Forms

By RUSS BANHAM
Journal of Commerce Staff

Some former and current state insurance regulators say the insurance industry used pressure tactics trying to get them to approve changes in the commercial general liability forms used by insurers.

The changes in the forms, the standard liability forms used by insurance companies, are at the center of a massive antitrust lawsuit filed nearly three weeks ago by nine state attorneys general against several U.S. and foreign insurers, reinsurers, brokers and trade associations.

The lawsuits accuse the companies of conspiring to restrict the coverage available under their standard commercial liability policies and using their market power to guarantee that no competitors could sell broader coverage.

Paul A. "Pete" Synnott Jr., former deputy insurance commissioner of Virginia from 1960 to 1987, said the Insurance Services Office Inc. told him in 1986 that if the state did not approve new ISO claims-made and occurrence forms, the insurance market in the state would dry up.

ISO is the industry's New York-based rate-making bureau that allegedly buckled under a threatened industry-led boycott to make changes in its forms.

"They told us, either you approve the forms, or there's no market (left in Virginia)," said Mr. Synnott, currently an executive vice president of the Society of Chartered Property Casualty Underwriters.

Mr. Synnott added that regulators were "up against the wall" to accept ISO's changes.

An occurrence form is a liability insurance form that covers losses that occur during the policy period. The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired.

A claims-made form is a liability insurance form under which the insurer is liable only for those claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy.

Some insurers on the ISO committee examining the forms wanted the occurrence form eliminated entirely and suggested changes in the claims-made form, including the addition of a retroactive date provision, a pollution liability exclusion and a legal defense cost exclusion.

ISO's board originally rejected the changes, but after a threatened boycott by U.S. and foreign reinsurers of the previous forms, ISO incorporated most of the insurers' changes.

> 'They told us, either you approve the forms, or there's no market (left in Virginia).'
>
> — Paul A. Synnott Jr.
> Deputy Insurance Commissioner
> For Virginia 1960 to 1987

Once ISO approved the new forms, staff members traveled to various states to inform regulators about the proposed changes. Some regulators say that ISO, and the industry itself, were doing more than educating regulators.

"There was tremendous pressure on my staff to accept the forms," said New York Insurance Superintendent James P. Corcoran. "We even had insureds writing us saying that they can't get insurance because we won't approve the forms . . . that writing us saying that they can't get insurance because we won't approve the forms . . . that we were hurting them."

New York is one of six states that did not approve the new claims-made form.

Mr. Corcoran added that while ISO did not threaten him into approving the forms, "it was said to my staff and innuendoed to me."

"They (ISO) took aim at this department, because of the huge market that exists in the state," Mr. Corcoran said. "But they wouldn't dare come into my office and threaten me. I'd tell them, 'If that's the way you want it, then we all sink together.' "

John G. Richards, South Carolina Director of Insurance, said that he received a "tremendous" amount of correspondence from the public about the proposed ISO form changes.

"We had many, many consumers saying to us that the reason for the unavailability and unaffordability of liability insurance coverage was because we did not approve the commercial general liability forms," Mr. Richards said. "I mean they used those words: commercial general liability forms. Where else would they get language like that than from someone in the insurance industry?"

June Bruce, an ISO spokeswoman, said, "We don't sell insurance, so we can't control insurance markets. We were bringing out a new product with more precise coverage descriptions that could be helpful in addressing availability problems."

"We weren't taking anything away, but were offering another new form — the claims-made," she said.

THE JOURNAL OF COMMERCE, Thursday, April 7, 1988

An Industry That's Far Too Cozy

By ROBERT HUNTER

The property/casualty insurance business is collusive and far from competitive. In "Invisible Bankers," Andrew Tobias says this industry "grew up as a massive exercise in price-fixing." Every truly independent study of insurance has found that insurers are too cozy with each other and with their state regulators.

Former President Gerald Ford's Justice Department and former President Jimmy Carter's Antitrust Commission both called for repeal of the insurer's antitrust exemption. The U.S. General Accounting Office found lack of an "arms-length relationship" between regulators and insurers. More often than not, GAO adds, state insurance commissioners come from, and return to, the insurance industry.

The last two presidents of the National Association of Insurance Commissioners returned to the industry as soon as their terms of office ended. Ed Muhl, the last association president, presided over the group's annual meeting last December after announcing he would go to work for the Royal Insurance Co. Not one of the other 49 commissioners spoke out against the implications of this behavior.

The commissioners do little to stop collusion. Price-fixing and other anti-competitive behavior, legal or illegal, is rampant.

Under the industry's exemption from the antitrust laws, insurers may meet and set prices. They can also resist entry from new competitors, split up markets, fix agents' commissions and otherwise keep prices above competitive levels. Their television ads look competitive, with slogans like "The Good Hands People" vs. "Glad I Met Ya." Behind the scenes, however, they collude.

The industry's protection from antitrust laws assures imperfect competition, producing higher consumer prices. The only chink in this armor is the legal exception allowing antitrust prosecution if insurers engage in boycott, intimidation or coercion.

Starting in late 1984, the insurers crossed even this line, according to a recent lawsuit brought by nine state attorneys general.

The National Insurance Consumer Organization was convinced insurers were engaged in unlawful action in mid-1985 when it wrote to the U.S. Justice Department:

"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.

"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 state legislatures' to change laws respecting . . . liability.

"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.

"Property/casualty insurance industry conduct, as explained by industry leaders themselves, may be but a prelude to a larger campaign to force major industries . . . to bend to the interests and will of insurers. If their means include non-exempt joint anti-competitive 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."

We got no response, so we wrote again on March 31, 1986, offering considerable evidence of collusion.

On April 22, 1986, Douglas Ginsburg, the unsuccessful Supreme Court nominee, responded to the consumer group's appeal on behalf of the Justice Department's Antitrust Division. He said the Federal Trade Commission had investigated the charges in our letters and was "unable to find any evidence of collusion."

We later discovered that FTC investigators did not interview a single witness or subpoena a single document. The FTC staff said the investigation was merely a literature search.

There is no argument collusion has taken place; even the insurers admit that. The only debate is whether it was legal under the antitrust exemption. The courts must decide that. But Congress should end the debate and make anti-competitive collusion illegal by ending the antitrust exemption.

In recent congressional hearings, the industry claimed that insurance companies are fully competitive and never, never engage in anti-competitive behavior. If it wants to prove it, all insurers have to do is waive their defense that their actions were legal under their exemption from the antitrust laws. Any takers?

Robert Hunter is president of the National Insurance Consumer Organization.

The States Fight Back

Eight sue to beat the liability crisis

JAMES D WILSON—NEWSWEEK

Leaving cops, firemen and other local employees uncovered: *Huron's police department*

Richard F. Holmes had a problem, and he wrote his state attorney general for help. Holmes, the former mayor of the northern California town of Lafayette, complained that 80 companies had denied his town liability insurance for claims over $500,000. "This strangely uniform action defied rational explanation," Holmes says. "It smacked of collusion." Another California town, Huron, also had insurance trouble. It had to shut down its police department for six months while working out a self-insurance plan. Crime rates jumped as crooks took advantage of the poky response time of the Fresno County sheriffs.

Lafayette and Huron were not alone: hundreds of other towns and cities were complaining about declining coverage. Last week the states took action. Eight attorneys general filed a massive antitrust suit against several of the biggest U.S. insurance companies, a trade association and even insurers with Lloyd's of London. The suit alleges "an international conspiracy to manipulate the insurance market," says California Attorney General John Van de Kamp. The states (Alabama, Arizona, California, Massachusetts, Minnesota, New York, West Virginia and Wisconsin) charge the insurance giants used illegal pressure to force the rest of the industry to curtail liability insurance to business and local governments. Insurance Services Office (ISO), the 1,400-member trade association, called the charges "meritless."

While the details of the suit are complex, the basic allegations are simple. The suit alleges that insurers used "boycotts, threats, intimidation" and other tactics to change industry practices. The companies allegedly pressured the ISO to sharply limit "long tail" claims—those that come to light long after the initial damage is done, as in toxic-waste cases. The states also charge that industry leaders, including Hartford Fire Insurance Co., Allstate, Aetna Casualty and Surety and Cigna, strong-armed other insurers to eliminate coverage for pollution liability and reduce other forms of coverage. The states allege conspirators threatened to cut off companies' "reinsurance"—protection for their own liability risks. Proving a case could be tough, since the government has allowed a degree of cooperation among insurers since 1945, when it exempted them from federal antitrust laws. But Van de Kamp says the industry's actions have gotten "way over the line."

The lawsuit is only the latest gust in the storm over liability insurance. Consumer advocates charge that the industry raised rates and canceled coverage to make up for losses that were largely self-inflicted. Through the 1970s, firms raked in profits from investments and used them to subsidize cutthroat price competition. When investment income drooped in the mid-1980s, the reduced premiums couldn't make up for the losses.

Insurers blame the liability crisis on a proliferation of lawsuits. They cite studies like a March 1987 Justice Department report that rejects collusion as a culprit. Says Blair Childs, executive director of the American Tort Reform Association, "It is ironic that the attorneys general's solution to the liability crisis is to file another lawsuit." With the industry digging in its heels, towns and cities across America may have to go partially uncovered for years as they await the outcome of the suit.

JOHN SCHWARTZ *with* JUDY HOWARD *in San Francisco*

The Boutique Banks Bag Another Big Star

On Wall Street, big doesn't seem so beautiful anymore. Battered by the market crash and bitter internal disputes, big investment banks are losing talented people—often to smaller, private investment boutiques. In early March former Federal Reserve chairman Paul Volcker snubbed major firms and joined Wolfensohn & Co. Now David Stockman, the wunderkind who went to the woodshed as Ronald Reagan's budget director, has left Salomon Brothers to join the Blackstone Group.

NANCY MORAN—OUTLINE

An 'intellect' hire: *Stockman*

Blackstone, headed by former commerce secretary Peter G. Peterson, invests in friendly takeovers and corporate restructurings. Peterson recruited Stockman, says one partner, for "his intellect." He also shares the firm's world view: that U.S. trade deficits will persist, driving the dollar down further and making U.S. assets even cheaper for Japanese investors. Blackstone hopes to capitalize on the buying binge, as it did by representing Firestone Tire & Rubber when Japan's Bridgestone bid for the U.S. firm's tire operations recently. Stockman says he will delve into "strategic issues that corporations now have to grapple with." For many U.S. firms, that means deciding when to sell out to Japan, and at what price.

The Surge in Self-Insurance

Soaring rates and cancellations made firms and cities change their coverage—and improve safety

A young man was playing in the deep end of a "wave pool" at a Florida water park. Suddenly his head dropped under water. He began gasping and desperately flailing his arms in the air. Several seconds later a lifeguard noticed him, jumped in and pulled him out. Back at poolside, the young man looked much better. In fact, he was fine. He was faking.

This was no teenage prank. It was an insurance audit. The young man was a local college student hired last summer to test the water park's lifeguards. What kind of insurance company would stage a drowning? One set up by the water parks themselves. Ten of them formed the company in 1986 because they had no choice: their insurance had become too expensive or been canceled.

Stung by the insurance crisis of the past decade, thousands of other companies, cities and professionals have followed a similar route, opting for what is often called self-insurance (chart). Some companies simply "go bare," paying claims straight out of their budget. Others have banded together to form new companies or "risk-retention groups"—insurance pools for firms or professionals that share similar risks. Between 10,000 and 20,000 local governmental entities are now self-insured, two-thirds of them having switched since 1985. Four years ago about 20 percent of U.S. insurance dollars went to "nontraditional" plans. Now analysts estimate that 35 percent do, and by 1990 half the market may be self-insured. "By jacking up rates so much, the insurance companies really shot themselves in the foot," says Jay Angoff of the National Insurance Consumer Organization, a group cofounded by Ralph Nader.

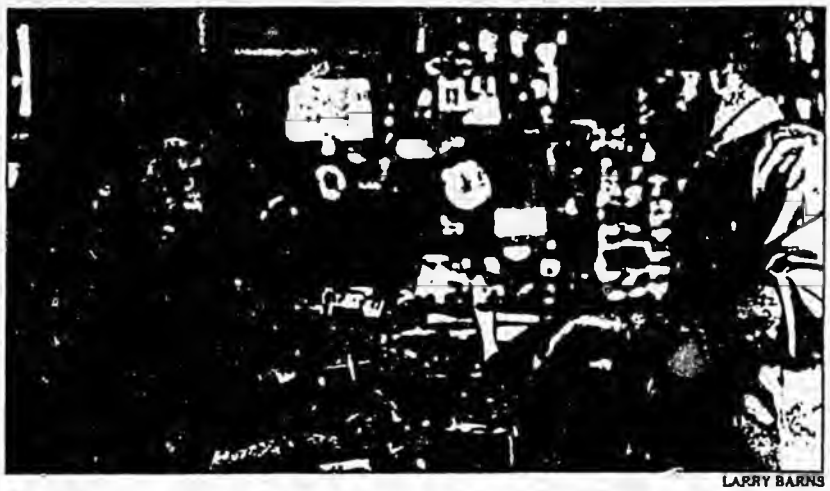
Traditional insurance companies say the rate hikes and cancellations were due not to unfairness or inefficiency but to a dramatic rise in lawsuits. While they concede that the business lost to nontraditional insurance may never be recaptured, they are hoping that a recent drop in rates may stem the slide. But the insurance crunch left large gaps in coverage, and alternative plans have been the only way to fill them. Consider the Olympics. Many who watched the freestyle skiers flipping and twisting in Calgary last week must have expected a few necks to get broken. Traditional insurance companies have had the same reaction, refusing to provide coverage for freestyle skiing even though the sport actually has a low accident rate. Until days before the 1986 world championship, the American team couldn't find insurance. "Day and night I was begging, scrambling, calling anyone out there," says Howard Peterson, secretary-general of the U.S. Ski Association. Peterson eventually got coverage, but other sports decided to avoid the hassles. In April 1986 the U.S. Olympic Committee brought together 35 athletic associations to form an insurance "captive." Instead of sending premiums to an insurance company, they pay the subsidiary, which provides them with coverage.

Once self-insured, companies often become safety zealots. The incentive: fear of lawsuits they will have to absorb directly. After United Medical Corp. opted for self-insurance, it installed a safety feature on its Trotter Treadmills to prevent elderly users from losing their footing when it accelerated. Last year the Seventh-day Adventist Church began making its West Coast facilities absorb the first $25,000 in any liability claim. It also introduced tough new safety standards. Church camps began forbidding small kids to ride large horses, and better-trained attendants were hired for day-care centers like the new facility in Loma Linda, Calif. The measures helped cut claims in half. After Dallas insured itself in May 1985, the city started checking the traffic records of all its 14,000 employees so they could keep drunk drivers from driving on city business. It removed high-diving boards from city pools, began monthly testing of fire sprinkler systems and repaired city buildings faster. "The key to being successfully self-insured is dedication to preventing loss," says Mark Ferraro, a former risk manager for Dallas. "If you're not dedicated to this, self-insur-

BILL GILLETTE

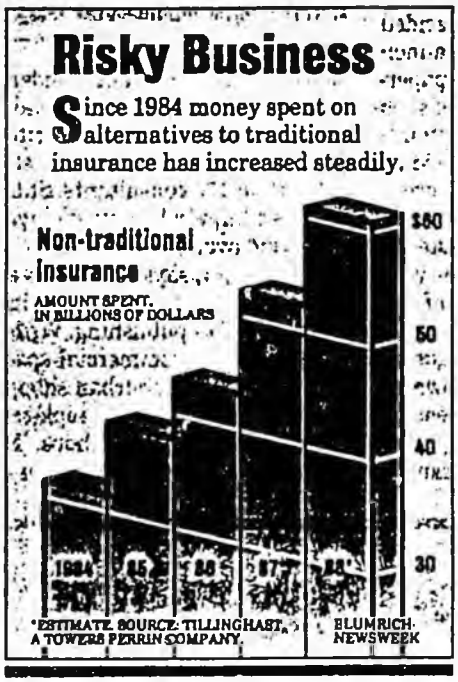
Safety incentives: *The Kemin plant in Iowa (above), the Loma Linda day-care center*

MICHAEL SALAS



LARRY BARNS

Pub precautions: *A N.J. bar*



ance will be the largest nightmare any city ever got itself into." Even minor changes add up. In Virginia Beach, Va., risk managers discovered that fairways at a proposed municipal golf course would make nearby houses vulnerable to aerial attack from the town's less gifted golfers. The city moved the holes.

When companies or cities join together to pool risks, peer pressure is a powerful goad to efficiency. After all, if one company in a pool gets hit with a big lawsuit, it drains the whole fund and everyone loses. Most of the groups hire consultants to assess the reliability of current and potential participants. A risk-retention group for liquid-propane-gas distributors and dealers sends inspectors to scour company parking lots for cigarette butts. "I started in the business in 1950 and I've never had as thorough an inspection as the people from the risk-retention group did," says Bill Jellison of Alliance, Ohio. Some police forces have been pressured to cut down on car crashes. "You won't see the Hollywood type of police chase anymore," says Richard Turnlund, the city manager of Newark, Calif., which has joined a San Francisco-area pool.

Why don't all traditional insurance companies go to similar lengths? In theory, they set rates strictly according to risk. In practice, during much of the 1980s many insurance companies succumbed to "cash-flow underwriting." Maintaining a steady stream of premium payments that could be invested at a high return took priority over precise, case-by-case measurement of risks. As a result, insurance rates skyrocketed even for companies or cities that had no increase in accidents or lawsuits. The insurance industry admits such cases existed, but claims that a nationwide "lawsuit crisis" was to blame. Whatever the cause, those that have switched to self-insurance believe they are now better protected against wild insurance cycles. Sometimes it also saves money. When hundreds of uninsured New Jersey bars joined together in February 1987, their premiums were cut in half. Self-insured companies say that because they know their businesses so well, they are likely to fight frivolous lawsuits. Traditional insurers would "bungle a $5,000 claim and make it a $50,000 [claim]," says David Bossman, president of a group set up by companies in the feed industry including Iowa's Kemin Industries, Inc.

Self-insurance can also mean self-destruction. Companies that go bare without tucking away money can be wiped out by a mammoth lawsuit. Government regulation of nontraditional plans is loose. To get tax breaks, most captives used to be established in the Cayman Islands or Bermuda, beyond the reach of U.S. laws. In 1986 Congress made forming risk-retention groups easier by allowing them to register in one state and practice nationally without adhering to other states' rules. Some state insurance commissioners warn that groups may be tempted to lower their premiums prematurely. Unlike many insurance companies, if they go belly up the state won't step in to pay injured plaintiffs. Municipal pools may also face problems. Investigations by Business Insurance magazine and a major accounting firm revealed that a huge Michigan insurance pool for 256 public entities is underfunded by as much as $21.5 million.

For all the uncertainties, most self-insured cities and firms say they'll stay that way. They like the freedom of calculating their own risks. "The insurance companies have cast us to the wolves more than once," says Robert Esenberg, risk manager for Virginia Beach. "We've got to get control over our own destiny." As long as those memories remain strong, the market for self-insurance will keep growing.

STEVEN WALDMAN *with* DANIEL SHAPIRO *in Houston and* TOM SCHMITZ *in San Francisco*

The Product Liability Dilemma

By William T. Waren

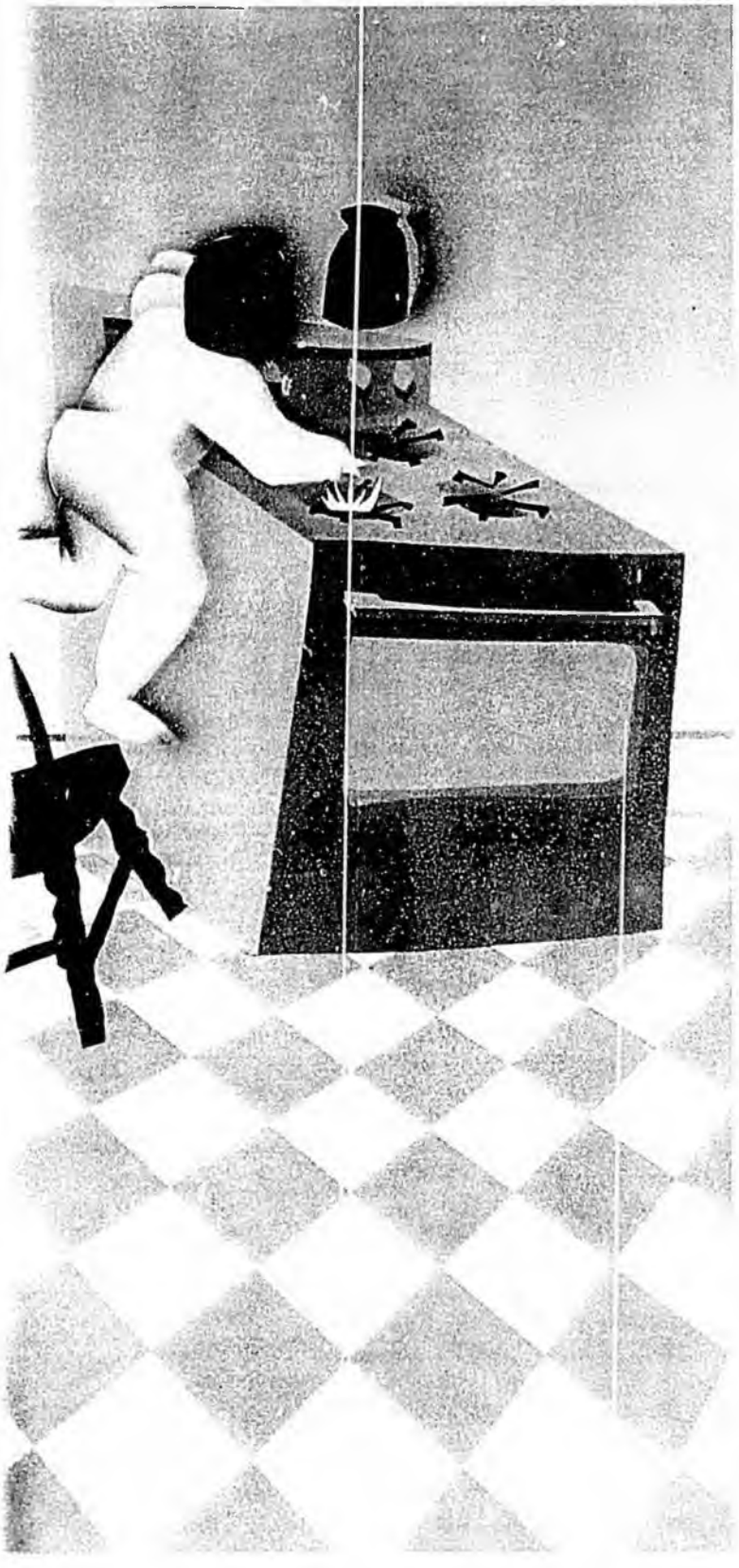
Unhappy with the headline-making results of state court decisions in product liability cases over the past 25 years, many state legislators, members of Congress and businessmen are attempting to reform the legal rules that define the liability of manufacturers and merchants for product-related injuries.

Famous product liability cases of the past 25 years include the suits against the manufacturer of the Dalkon Shield, an intrauterine contraceptive device, alleged to have caused infections and spontaneous abortions resulting in thousands of injuries and many deaths. Another famous product liability case involved the alleged "exploding gas tank" of the Ford Pinto. A jury in the Pinto case levied a multimillion dollar judgment against Ford when it found a design defect responsible for the death of a woman and severe burns suffered by a child. Other well-publicized cases involved flammable baby pajamas, toxic shock syndrome resulting from an alleged design defect in tampons, and injuries resulting from alleged design defects in Japanese-manufactured, all-terrain vehicles.

Perhaps the most significant claims for deaths and injuries were raised by persons exposed to asbestos. Juries since the early 1970s have awarded large judgments to shipyard workers, asbestos workers and others exposed to the substance who subsequently developed cancer and lung diseases.

According to product liability reformers, these well-publicized cases are only part of a widespread problem. They assert that the state courts over the past 25 years have deviated from a standard of liability based on the defendant's negligence. The results are said to be unfair and excessive judgments against corporations--judgments that push small

William T. Waren is a senior program director in NCSL's Washington, D.C. office. Brenda Trolin, senior staff associate, NCSL, Denver, contributed research for this article.



Are product liability judgments excessive? Are victims' rights endangered? Is there middle ground?

firms to bankruptcy, reduce the capacity of large firms to compete internationally, and drive up the cost of property and casualty insurance for everyone.

In response to this outcry, in 1987 several state legislatures enacted statutes to protect manufacturers and sellers from what are perceived as excessively harsh common law standards of product liability. For example, the California Legislature acted to prohibit recovery based on "strict liability" as opposed to the manufacturer's negligence for injuries associated with inherently unsafe products including tobacco, alcohol, sugar and butter. The Missouri General Assembly adopted a comparative negligence standard for use in product cases and established a "state-of-the-art" defense for manufacturers and sellers. New Jersey enacted a comprehensive product liability reform bill that strengthens manufacturers' defenses and limits punitive damages, among other provisions. Ohio also enacted a comprehensive bill, limiting joint and several liability and reducing awards by the amount of benefits received by plaintiffs from collateral sources. Georgia, Montana, Nevada, North Dakota, Oregon and Texas were also among the states adopting product liability legislation in 1987. Not all of this legislation effected sweeping changes in product law, and many legislatures defeated or declined to take action on product liability bills. But, according to Diane Swensen, legislative director of the American Tort Reform Association, "In 1988 there will be at least 10 states working on product liability and I think there will be more as the battle gets going."

Congress was also busy in 1987, seriously considering legislation that would pre-empt state product liability laws. A subcommittee of the U.S. House Energy and Commerce Committee reported out a bill, H.R. 1115, in December 1987 that would set limits on the liability of manufacturers under state law. The support of the powerful chairman of the House Commerce Committee, John Dingell of Michigan,

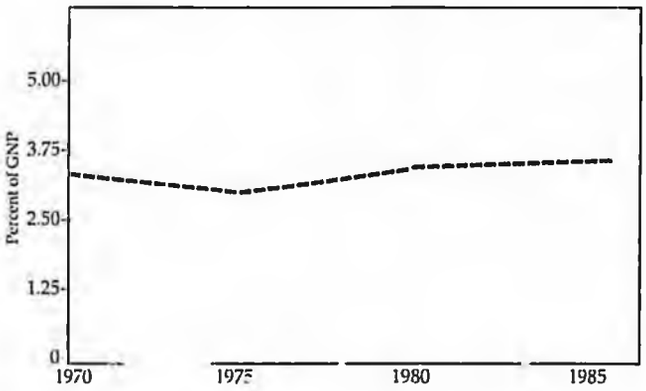
ensures that the bill will receive serious attention in Congress in 1988.

One important reason for continued legislative activity on product liability reform is the persuasive testimony presented in state legislative and congressional hearing rooms by businessmen who have been sued. What follows is the story of Robert D. Rogers, senior vice president of Lubbock Manufacturing, as told to the U.S. Senate Commerce Committee and to *State Legislatures* magazine.

In 1977 a Texas jury returned a verdict against the Lubbock Manufacturing Company, a truck-trailer manufacturer, in a product liability action. The case arose when in 1975 the driver of a tractor-trailer carrying propane gas swerved to avoid a car. The trailer turned onto its side, smashing into a bridge abutment. When the point of the bridge pierced the tank, the propane gas exploded, killing or injuring several people.

The injured persons and the families of the deceased sued

PROPERTY AND LIABILITY PREMIUMS
As a Percent of Gross National Product



Source: Consumer Federation of Amer...

Lubbock alleging that its transport trailer was defectively designed. According to the plaintiffs, the trailer's center of gravity was too high. These charges were denied by Rogers who says, "Lubbock trailers have the lowest center of gravity of any in the industry."

Nonetheless, Rogers testified that Lubbock Manufacturing faced a $20 million judgment—the limit in its liability insurance policy. The cost of liability insurance and lawyers' fees after the accident, he said, ultimately drove Lubbock out of business.

"My family and I," Rogers said, "had nothing but the deepest heartfelt sympathy for the victims of this terrible tragedy. Yet the consequences to my family and our business only compounded the tragedy. The demise of Lubbock Manufacturing Co. did not benefit anyone. In my mind, it was the lawyers and our current legal system that must be held responsible for the bankruptcy of the business my family struggled to maintain for over 50 years."

Robert Rogers' story is not isolated, according to the National Association of Manufacturers. NAM says the machine tool industry has shrunk by one quarter over the past decade, in part because of product liability lawsuits. The general aviation industry has reduced employment by 66 percent, and NAM claims product liability suits are an important reason for the industry's decline. Today, there are two manufacturers of football helmets in the United States, down from 18 just a few years ago. According to NAM, product liability suits are to blame.

The Chamber of Commerce of the United States contends that product liability suits are a major cause of the liability insurance crisis. Representatives of the Chamber have testified that the affordability and availability of product liability insurance are "the result of problems that businesses face with our current tort system." While liability insurance rates have stabilized, Thomas A. O'Day, vice president of the Alliance of American Insurers, reports that commercial liability losses grew 621 percent from 1967 to 1984.

The appropriate response by state legislatures and Congress, according to associations representing manufacturers, small businesses and insurers, is general tort reform and specific reforms aimed at the product liability system.

The recommendations for general tort reform are familiar to most state legislators: caps on damage awards, limits on punitive damages, limits on joint and several liability, reduction of judgments by the amount of compensation received by plaintiffs from collateral sources and shorter statutes of limitation.

Some proposed reforms, however, are aimed very specifically at product liability actions. For example, shorter statutes of repose, which are based on the life of the product rather than the date of injury, would limit suits where a product has reached a certain age. This reform is supported by the rationale that a manufacturer ought not to be responsible for the failure of a 15- or 30-year-old product. Similarly, reforms aimed at bolstering the potential legal defenses against suits may be particularly relevant in product cases. Defenses of "contributory negligence" and "misuse or abuse of the product" may effectively limit the manufacturer's liability in many cases even where a prima facie case has been made by the plaintiff. Barring evidence of manufacturers' "subsequent remedial measures" is said to be particularly appropriate in product cases because allowing introduction of such evidence may tend to penalize firms making good faith attempts to improve the safety design of their products.

The most significant tort reform specifically aimed at product cases is a rollback of strict liability. Although product liability actions may be brought under a negligence or a warranty theory, the wave of successful product liability actions in asbestos, automobile design and toxics cases coincided with the development by state courts of a third theory of product liability, so-called strict liability for manufacturing or selling a defective product that is unreasonably dangerous.

Strict liability had its modern origins in a 1963 California case, *Greenman vs. Yuba Power Products.* The plaintiff in that case was injured severely when using a power lathe. He clamped a piece of wood into the lathe, and when he began using the machine the wood flew out and struck him on the head. The defendant failed to give notice within the time specified by California law for suit under a warranty theory. But Chief Justice Roger Traynor wrote for the

California Supreme Court that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being." The rule in *Yuba Products* was codified in Section 402A of the Second Restatement of Torts, a highly influential legal research and reference publication of the American Law Institute, and subsequently was widely adopted by state courts.

Strict liability is not supposed to be absolute liability, but the scope of liability is broader than under a negligence theory. Negligence requires some showing that the defendant knew or should have known about the danger. Strict liability avoids this difficult inquiry. It focuses on the product itself rather than the conduct or state of mind of the defendant. In most jurisdictions, the plaintiff need only establish that the product is both defective and unreasonably dangerous.

Critics of strict liability allege that as applied by judges and juries it often amounts to no-fault or absolute liability. Alabama state Representative Perry O. Hooper Jr. says that "the courts have attempted to make manufacturers, in effect, the insurers of product-related injuries. This results in an entitlement mentality. Individuals should be more self-reliant." Liability, Hooper says, should be found only where there is fault as defined by traditional concepts of negligence including the traditional concept that requires, as an element of culpability, proof that the defendant made a conscious choice resulting in the plaintiff's injury.

Frustrated by their perception that the pace of state product liability reform—on strict liability and other major reforms in particular—has been too slow, and concerned that uniform standards of product liability will never be adopted state-by-state, Hooper and many others in the tort reform movement support proposed federal product liability legislation "so long as tough tort reform laws in the states are protected."

The National Association of Manufacturers reported to Congress that "the impact of the current 50 state product liability laws has been devastating—product prices have increased, products have been discontinued, innovation has been slowed, plants have closed, and thousands of Americans have lost their jobs."

Consumer groups disagree with such criticism of state law. They assert that "state product liability law is the backbone of consumer protection in our market economy. Product liability disciplines the marketplace by forcing those who make defective products to pay for the injuries their products cause." According to Pamela Gilbert, a consumer advocate, the reforms proposed "would unfairly and cruelly deny victims...their rightful compensation, and it would create a more dangerous society for everybody because of reduced incentives to fix or recall defective products." These views are shared by other opponents of product liability reform often including members of the plaintiffs' bar, labor unions and victims' groups.

Just as the case for product liability reform is often presented in the form of case histories of individual businessmen who have suffered in product litigation, so the case against product liability reform is often presented in the form of case histories of individual plaintiffs.

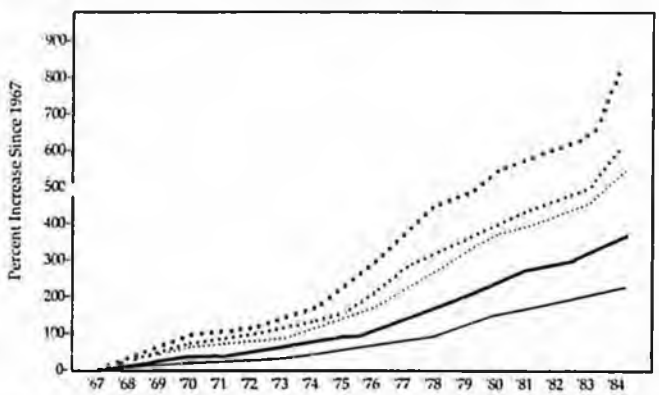
Take for example *Gryc vs. Dayton Hudson*, the case of the 4-year-old girl who suffered second and third degree burns that, according to the Minnesota Supreme Court, permanently scarred her "arms, chest, breasts, stomach, back, neck and chin." She was wearing pajamas made of a cotton material called "flannelette." As the court reported the facts, when the little girl reached over an electric stove burner to turn off a ringing timer, her flannelette pajama top burst into flames.

The little girl's parents brought a product liability action against the manufacturer, claiming that because the pajama top was made with flammable cotton that had not been treated with fire retardant, it was an unreasonably dangerous, defective product. The manufacturer, they said, should therefore be strictly liable for compensatory and punitive damages.

The trial court entered a judgment on a jury verdict of $750,000 compensatory damages and $1 million in punitive

LOSSES AND LOSS ADJUSTMENT EXPENSES

Consumer Price Index and Gross National Product vs. Commercial Lines



CPI ___. GNP ___ All Commercial Lines..... Commercial Liability.... General Liability . .

Source: Insurance Services Office; Alliance of American Insurers

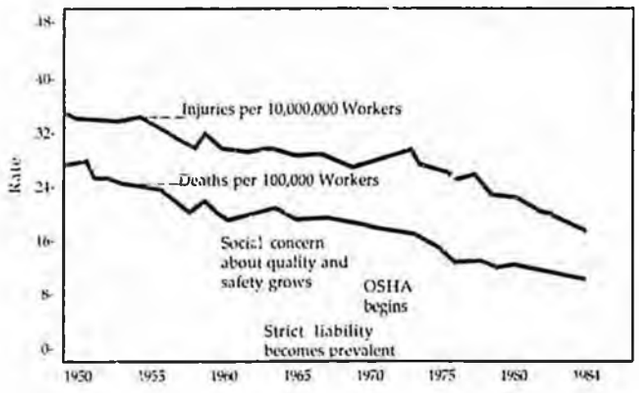
damages. In 1980, the Minnesota Supreme Court upheld the judgment. Consumer groups hailed it as a landmark decision. According to Public Citizen, a consumer group founded by Ralph Nader: "Subsequent to *Gryc* and similar cases, flannelette was taken off the market and federal law was amended to provide stronger flammability standards for children's sleepwear." State court cases like *Gryc*, according to consumer advocates, have been a major factor in the reduction of accidental deaths and injuries in the United States in recent years.

Opponents of product liability reform dispute the allegation that judgments and settlements in product liability cases have contributed significantly to the liability insurance crisis. Bob Hunter, president of the National Insurance Consumer Organization, claims that the crisis in the availability and affordability of liability insurance that struck in 1984 was "a manufactured crisis intended to bloat insurer profits and reduce victims' rights." Hunter blames the 1984-86 insurance crisis on the fluctuations in the insurance cycle, aggravated, he says, by reckless premium cuts and overreliance on investment income at the top of the cycle in 1981-82. He also believes that the industry's monopoly practices push up property and casualty insurance costs, particularly at the bottom of the cycle, and he calls for Congress to repeal the

industry's exemption from federal antitrust laws that prohibit price-fixing, market allocations and similar collusive practices. To Hunter's mind, "The crisis is within the insurance industry, not the courts."

Many product liability reform proposals are alleged to arbitrarily cut off the rights of victims. State Representative Jeffrey J. Teitz, chairman of the Rhode Island House Judiciary Committee, maintains that "of all the proposed tort reforms, caps on recovery are the most invidious because they take compensation away from the most severely injured persons who have already gone through the legal process and proven their case." Opponents say limits on punitive damages would strip the courts of an important tool for deterring corporate wrongdoing. As for limits on pain and suffering awards, a Dalkon Shield victim replies that "unless you have actually been in the situation of losing your most valuable possession as a woman, your fertility, you cannot understand that there is a great deal of pain and

INJURIES AND DEATHS ON-THE-JOB



Source: Consumer Federation of America

suffering in addition to the physical injury. The psychological effect is quite severe and it warrants attention." According to Teitz, "tort reform should be aimed at reducing transaction costs within the legal process, not reducing compensation to victims."

Jo Ann Doroshow, an associate of Ralph Nader at the Center for the Study of Responsive Law, explains that consumer groups oppose limits on joint and several liability. She says that "where you can't locate all the defendants, it is fairer for a defendant who is culpable to bear the cost of the tort than to place the burden on the victim."

According to Bob Lembo, who represents the Association of Trial Lawyers of America, additional manufacturer defenses based on misuse of the product or conformity with government safety standards would be excessively restrictive. Lembo says the current test in state law for misuse, whether it is "foreseeable" by the manufacturer, works well. It may be misuse of a product for a child, or an adult for that matter, to stick his hand in a window fan, but manufacturers can foresee the probability that people might do it unless a protective cage covers the fan. And, they say, manufacturers should be strictly liable if they fail to install such a safety device. Lembo says that "judges usually recognize misuse and deal with it by giving the jury appropriate instructions." Similarly, Lembo maintains that government safety standards, such as Food and Drug Administration approval, should not determine the issue of product safety. "Right now, evidence that a product met government safety standards is admissible. It is a tough burden for the plaintiff's attorney to get over. You have to prove that the standards were inadequate or that the hazard was outside the scope of the government regulatory process." The flannelette baby pajamas in the *Gryc* case, consumer groups point out, met government standards.

According to Doroshow, shorter statutes of limitation or statutes of repose cut off victims' rights, even where a product such as an elevator is designed or warranted to operate safely for long periods of time, or where the latency period of the harm is long, for example, where workers have been exposed to asbestos, radioactive material, or some other toxic or carcinogenic substance.

In particular, consumer groups and trial lawyers object to a rollback of strict liability. In defense of strict liability, consumer groups assert that "because the victim must prove that the product was dangerously defective in order to prevail, the product itself stands as a surrogate for the dangerous or wrongful conduct that led to the product's design, manufacture and marketing." Says Senator Ernest F. Hollings of South Carolina, "Strict liability is not absolute liability. The injured product user must prove that the product was defective in such a manner as to be unreasonably dangerous." Consumer groups maintain that a traditional negligence standard would be inadequate in product cases because of the difficulties involved in producing evidence about the manufacturer's conduct and state of mind.

Opposition to federal pre-emption of state product liability laws comes from a different quarter. Some opponents of federal pre-emption favor tort reform at the state level or may have no view on its merits. Their concern is about the effect on our federal system if the national government assumes from the states major responsibility for the law of torts. Chief Justice Harry L. Carrico of the Supreme Court of Virginia testified before the U.S. House Energy and Commerce Committee, "State courts and legislatures are well-situated to determine the social and economic impact of present law on their own communities, and many legislatures already are immersed in product liability issues."

Regardless of what happens in Washington, D.C., states will continue through 1988 to consider tort reform and product liability reform legislation. Carefully weighing the arguments of proponents and opponents of product liability reform, legislatures generally have taken an experimental approach, cautiously enacting tort reforms in the hope of helping the competitiveness of manufacturers and reducing insurance costs, while attempting to preserve the essential rights of plaintiffs. It is reasonable to expect legislatures to continue in the same mode of careful, step-by-step consideration of the issue.

Senator Robert G. Frey of Kansas perhaps spoke for many of his colleagues across the country when he noted, "The issue is not one that offers easy solutions. Responding to various constituencies through thoughtful experimentation and then waiting to observe the results of our efforts are all part of our legislative process."

Boyko, Davis, Dennis, Baldwin & Breeze

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March 11, 1988

Alaska State Legislature
P.O. Box V

Juneau, AK 99811

RE: CS For Senate Bill 211 (Judiciary)

Dear Legislator:

I have just had a chance to review the conference substitute for Senate Bill 211 passed out of the Senate Judiciary Committee and referred to the Senate Finance Committee. Though the Senate Judiciary made some changes the conference substitute is still an extremely poor piece of legislation which will have devastating effects upon any seriously injured victims of accidents in Alaska. It also adversely effects the efficient operation of the civil justice system and reduces the amount of money victims receive while increasing the amount of money spent administering liability claims.

I will attempt to give you a quick run down point by point of what the conference substitute does. Unfortunately, most of the comments that I previously made to you in my letter of February 17, 1988 sent to all legislators, are equally applicable to this conference substitute.

AS 09.17.010(b) of the proposed amendment lowers the cap of $500,000 to $250,000 on pain and suffering, inconvenience, loss of enjoyment of life and other non-pecuniary damages. The cap does not apply to damage awards for physical disfigurement or severe physical damages. The basic idea of placing a cap on a personal injury damage award is extremely repugnant and artificial. Why not place a cap on the amount of money a negligent person can be forced to repay if he destroys personal property. Any limitation, even the $500,000 limitation in place under the existing law, sends a message from the Legislature to each individual Alaskan that their personal damages are not important, or at least not as important as damages to pay their doctor bills and bank mortgage payments. Who is the Legislature protecting; the individual or the economic forces in our society.

Placing caps on individual damage awards is simply wrong. This wrongness is further exemplified by the total absence of evidence such caps are necessary to reduce insurance rates or that any insurance rates have been reduced by such caps. Passage of this legislation would send a clear message that you believe our society must make a few innocent victims who were horribly injured suffer further by limiting the compensation they may receive, in order to benefit the profit centers within the insurance industry. I strongly believe all caps on damages should be abolished, but if that does not occur, at the very least, no change in the law should be permitted.

AS 09.17.020. This effort to amend the punitive damage statute does not concern me because in reality neither the original punitive damage statute nor the proposed amendments change the law in any significant way from what it was before the statute was enacted. This is simply much adieu about nothing. However, it is baffling to me why the Legislature would wish to "seemingly" make it more difficult to obtain punitive damages where it was already very difficult to obtain punitive damages before 1986. Punitive damages are only appropriate to punish evil or malicious wrongdoers. This should be promoted by the Legislature, not made more difficult. It is the fear of punitive damage awards that forces responsibility on certain individuals, and organizations who, but for this threat, would act with reckless disregard for the rights of members of our society. Furthermore, since punitive damages are excluded from insurance coverage routinely, the award of punitive damages does not effect insurance rates.

AS 09.17.030 makes no substantive changes between SB 211 and the conference substitute; that any person who was injured while technically committing a crime, versus a felony, will be unable to recover damages for personal injury or death. It simply makes no sense to me that a person who may be violating the law in a very minor way cannot recover any damages when he suffers injuries at the hands of a wrongdoer who is much more culpable. Obviously I am not sympathetic to a thief who breaks his leg on a landowners premises while he is breaking into the landowners home. On the other hand I can't imagine a jury awarding such an individual very much money for his injuries either. He would have a difficult time finding any attorney willing to handle the case because of the unlikelihood of recovery. In looking at this proposed amendment, one must question why is it necessary. Is there really a problem which requires the substitution of crime in place of a felony that is in the current law?

AS 09.17.040(d). I see the conference substitute still follows the language in SB 211 which provides that any party, as opposed to only the injured party, may request that future damages be paid on a periodic payment plan rather than as a lump sum payment. This provision is silly. A victim who has fought his way through the courts to the conclusion of a trial to obtain compensation for his damages should not be subjected to the arbitrary requests of the wrongdoer that he only be paid his judgment for future damages on a piece-meal periodic payment basis. This provision will tend to draw out litigation into the future, will result in continual administration expenses and will result in further involvement of the attorneys in a case. It will simply make more money for insurance defense attorneys because of the time they have to expend supervising and/or arguing about payment of future benefits. Of course, the plaintiffs' attorneys will also have to figure out some way to obtain payment.

I imagine this legislation would work like divorce judgments which require payment of child support or alimony into the future. The parties are always battling about late payments or simply non-payment. Simplification of the tort system should be one of the goals of any legislation. This defeats that goal.

AS 09.17.050(a). This provision is the same as was set out in SB 211. I have no objection to this provision.

AS 09.17.070 - Collateral Benefits. The drafters of this statute should be asked what they were attempting to accomplish. Attorneys and the courts would find this bill extremely difficult to implement. For instance the bill states: "the triers of fact shall be informed of the tax implications of an award of damages." The tax implications to whom? By whom are the triers of fact to be informed of this information? Must every plaintiff that goes to trial be required to employ the assistance of an expert witness to testify before the jury as to what he thinks the tax implications of a damage award are?

The statute goes on to say that the: "The court may take into account the value of a persons' right to coverage exhausted or depleted by payments of these collateral benefits by adding back a 'reasonable estimate of their probable value'...". Once again presumably an expert witness would be required to testify as to what the "reasonable estimate of their probable value" is. This is simply more expense and more confusion.

It would appear that the underlying principal behind introduction of this collateral benefit before the jury is to allow the jury to see what other benefits an individual has received by

virtue of his injuries. Traditionally jurors have not been allowed to know whether a defendant was insured or not because their determination of what damages the plaintiff has suffered as a result of the defendants conduct should be based solely upon the evidence as to those damages. To disclose information regarding the defendants insurance could taint the jury's determination as to what the plaintiff should receive. This same argument applies whether a plaintiff is rich or poor, has health insurance or not. This evidence should not be considered by the jury in determining the extent of damages suffered by that plaintiff at the hands of the wrongdoer.

If collateral sources such as health insurance are going to be introduced, then why not introduce evidence of all sources of wealth available to all parties to the litigation. The law has not been based upon the concept of "from the defendant according to his ability to pay to the plaintiff according to his need". It has been based upon the goal of compensating the victim for the damages which he proves that he suffered at the hands of the wrongdoer. Nothing more should be awarded because of ability to pay and nothing less should be awarded according to the plaintiff's needs.

The 1986 amendment allows the court, after the juries decision, to take into consideration collateral benefits available to the plaintiff in making adjustments to the jury's award. Though I vehemently object to that statute, it certainly has more even-handedness and fairness to it than the proposed amendment.

AS 09.17.080(d). This provision is a significant improvement over the language in SB 211, which attempts to impose several liability in all cases. However, this statute needs additional improvement or significant additional exemptions for the public to be adequately protected. For instance, joint and several liability should exist in such situations where damages arise out of hazardous waste, intentional torts, where defendants have acted in concert, where defendants conspired to commit a wrongful act, where one defendants' share of the judgment is uncollectable, where the plaintiffs are fault free, where the damages arise out of land sale practices, in strict liability cases, product liability cases or where the defendants are more than 25% at fault. Notwithstanding the frailties of this statute as drafted, it is significantly better than what was originally introduced.

AS 09.17.900. I have no objections to the amendment to the definition section which appears to be the same or extremely similar to SB 211.

AS 09.60.010. This proposed legislation seeks to amend an already ambiguous piece of legislation. The proposed amendment would abolish the award of attorney's fees in the State of Alaska. However, the drafters do not seem to have nerve enough to just write the bill up that way.

The state of Alaska is one of the few jurisdictions which requires the losing party to pay the prevailing party's attorney's fees. This provision is a great deterrent to pursuit of marginal lawsuits; after all, if the loser will have to pay for pursuing litigation is he more or less likely to take the risk of being unsuccessful? The Alaska court system is already clogged with civil litigation. The abolition of attorney's fees awards against the losing party will only increase the amount of litigation since there will be no adverse consequences to going to trial other than losing. Insurance companies will force plaintiffs to try legitimate cases that are currently being settled, and plaintiffs with marginal cases will go to trial on matters which they would have dropped in order to avoid the significant sanctions of an award of attorney's fees.

The SB 211 amendment to this statute is written as gobbledygook and for the sake of clear and concise thinking on this subject, should be scratched. The statute should be amended to clearly state that attorney's fees may be awarded to the prevailing party in civil litigation, based upon Civil Rule 82. This has been the law in the State and Territory of Alaska since the turn of the century.

The additional proposed amendments set out in the conference substitute to SB 211 are not objectionable in substance. It would appear to be appropriate that the Insurance Directors annual report not only include an analysis of medical malpractice insurance rate changes and their reasons, but also an analysis of the rate changes of all liability insurance in Alaska and the profits generated by the insurance carriers issuing the coverage. After all, if there truly is an insurance crisis, the Legislature and the public should be able to know what type of profit is being earned by the insurance industry.

I hope my observations with reference to the changes to SB 211 are of benefit to you, and if I can be of any assistance to you in the future, please feel free to contact me.

Yours very truly,

BOYKO, DAVIS & DENNIS,
BALDWIN & BREEZE

Elliott T. Dennis

ETD:jo

SB211

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ANCHORAGE, ALASKA 99501-2040
(907) 276-3188

BERNARD P. KELLY
PAUL COSSMAN
STEVEN PRADELL

April 15, 1988

Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

Re: Tort Reform Legislation/Insurance Anti-Trust Suit

Dear Mr. Donley:

I am writing to solicit your support in defeating any further tort reform legislation and supporting Alaska's involvement in the insurance anti-trust litigation, which Governor Cowper and Attorney General Schaible are reviewing. I would also urge you to support any insurance reform legislation. Enclosed, for your information, is an editorial from the April 13, 1988, Anchorage Daily News.

For the last three years we have been attempting to educate the public and inform our legislators that the "liability crisis" was a fraud perpetuated by the insurance industry to line its own pockets and victimize the victims from being adequately compensated when they are injured, through no fault of their own. It is very refreshing to see that someone out there has been listening, and it is not just an issue between the doctors and the attorneys which our local medical community along with the local tort reform committee has tried to perpetuate. We are all victims of the insurance industry, including the doctors, and it is time we put a stop to the blood letting by the insurance industry at the expense of our tort system.

Insurance bad faith litigation is on the rise, and it is no mystery why it is when you have insurance companies categorically refusing to cover claims that are specifically included within their policies and therefore forcing companies or individuals to litigate for years to right their arbitrary and capricious ruling not to defend, indemnify, etc.

Whatever you can do to assist the people of Alaska in this matter will be greatly appreciated.

Sincerely yours,

BERNARD P. KELLY & ASSOCIATES

BERNARD P. KELLY

ko
0036o

Anchorage Daily News

Winner, 1976 Pulitzer Prize Gold Medal for Public Service

Gerald E. Grilly
Publisher

Howard Weaver
Managing Editor

Michael Carey
Editorial Page Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971

Founded in 1946 by Norman C. Brown

The liability crisis: Is it fact or fraud?

Remember the liability insurance crisis? Not so long ago, many businesses and cities couldn't buy coverage at any price. Those that could paid a small fortune. The subsequent uproar provoked widespread calls to overhaul state liability laws. Alaska lawmakers yielded to the clamor last year; a statewide tort reform coalition demands still more changes.

But now it turns out that liability laws may not be the culprit after all. The real cause may be an antitrust conspiracy.

At least eight states have filed antitrust suits against several of the country's largest liability reinsurance companies. (These are the firms that provide back-up coverage to smaller insurance companies.) The suits allege the reinsurance firms conspired to force smaller insurers to restrict or eliminate coverage — all while rates were going up.

Gov. Steve Cowper has asked his attorneys to study whether Alaska should join the suits. From what they've seen so far, the lawyers think the states have a strong case. There's only one drawback: it could be costly for Alaska to battle the well-heeled titans of the insurance industry. The case will cost at least $50,000 a year, plus staff and travel; it could cost much more.

If further research bears out the state's preliminary legal findings, the suit will be worth the price. A state victory would yield large awards for Alaska cities victimized by vanishing coverage and high rates. It would also make it easier for private firms that had liability insurance problems to win damage awards.

Pursuing the suit will cost the state money, but that's part of the price it will have to pay for failing to regulate the insurance industry. If the state's insurance watchdogs had been awake, they might have howled. Given that they didn't, joining the suit is a way Alaska can start to dig out the facts about the liability insurance mess.

SB211

CITIZENS COALITION FOR TORT REFORM

907-561-6250

April 15, 1988

RECEIVED
APR 2[illegible] 1987

Representative Dave Donley
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Donley:

Please find enclosed a breakdown of the cost of a recent verdict in favor of the plaintiff and against Humana Hospital and MICA, The Medical Indemnity Corporation of Alaska.

This case is an example of what really happens in our civil courts. Many plaintiff's lawyers have told you that there are not judgements in the State of Alaska in excess of one million dollars. Here, before you, is an example of one. I am certain that many of you have heard Mr. Roller, from the Division of Insurance, testify that jury verdicts are only the tip of the civil litigation iceberg. Below the water level on this iceberg, where we cannot see or measure, are the settled cases. Nevertheless, jury verdicts serve as bench marks, or "shadow verdicts", if you will, and it is against these verdicts that insurance companies attempt to settle claims. There are some interesting facts which can be read between the lines in an evaluation of this judgement.

For the record, the Los Angeles County settlement was $650,000.00 with the provision that the plaintiff would have to return $300,000.00 to California if successful in his Alaska lawsuit. The plaintiff was clearly far more successful in Alaska than he was in California. Please note the difference between the Alaska award of $1,859,518.90 and the California award of 650,000.00. This seems "clear and convincing evidence" of the value of tort reform in California vs. the lack thereof in Alaska.

What is of further interest is that the California settlement was reduced to present value - by the Alaska Court - when it subtracted the amount from the verdict awarded in Alaska. At the same time the Alaska court computed the costs for economic and non-ecomonic costs on the basis of future economic value - as opposed to again using present economic value - when it came to making the award. It seems to me this is a clear inconsistency on the part of Judge Gonzales. Either we should calculate everything as present value or at future value, but not be selective in calculating the deductions at present value and awards at future value.

P.O. Box 201668 • Anchorage, Alaska 99520

Please note the cost of pre-judgement interest of $683,534.00. The Alaska tort reform action in 1986 mandates pre-judgement interest be calculated from the date of filing. Had the 1986 law been in effect in 1982, there certainly would have been substantially less prejudgement interest added to the award in this case. It is also very important to note there was no action taken on the Alaska case for a period of one year while the litigation was pursued in California. The one year lack of action in Alaska forced the pre-judgement interest award to increase $117,446.

Finally I would like to draw your attention to Rule 82 attorney's fees. Please note in the Alaska case alone, the cost was $171,319.90. In its history, MICA has paid out nearly half a million dollars in Rule 82 fees. To its certain knowledge, MICA has never been successful in recovering a single dime for Rule 82 fees when it prevailed. I think this illustrates clearly our contention that Rule 82 is a one-way street. It is awarded when there is a pocket to pick; when there is not a pocket, there is no award. The net effect is to increase the cost of awards by 10% or so in the State of Alaska. Further testament is the fact that we, the consumers, pay a premium rider for Rule 82 fees for every policy written in the State of Alaska.

Obviously the present liability crises is not over. The tort system is a clear and major part of the problem. I would urge your action on the Senate Bill 211, which is presently in Representative Donley's House Labor and Commerce Committee.

Sincerely,

David A. McGuire, M.D.
Chairman, Citizens' Coalition for Tort Reform

MKD03003/vv

Dr. McGuire
4

MICA Medical Indemnity Corporation of Alaska

ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 203
ANCHORAGE, ALASKA 99503

TO: MICA Executive Committee
MICA Claims Committee

FROM: Janet Johnston,
Claims Manager

DATE: March 17, 1988

RE: Judgement in Justice Case

At 2:00 p.m. this afternoon I was informed by Jim Delaney's office that Judge Gonzales had entered judgement in the Justice case in the amount of $1,859,518.90. That figure is inclusive of prejudgement interest and Rule 82 attorney fees but does not include plaintiff's costs which have yet to be determined at a cost hearing. I do not expect that those will exceed $100,000.

The judgement of was broken down as follows:

$ 1,449,160.00	Amount of the verdict
- 144,916.00	10% plaintiff contributory negligence
$ 1,304,244.00	Subtotal
- 210,201.00	Present value of L.A. County settlement as of July 1985
$ 1,094,043.00	Subtotal
- 89,378.00	Collateral medical benefits
$ 1,004,665.00	Subtotal
+ 683,534.00	Prejudgement interest at 10 1/2% from May 30, 1982 - March 16, 1988
$ 1,688,199.00	Subtotal
+ 171,319.90	Rule 82 attorney fees
$ 1,859,518.90	Final Judgement

To this final judgement figure will be added plaintiff attorney costs as they will be determined by the judge at a cost hearing to be held in the future.

ALASKA CHAPTER
THE AMERICAN INSTITUTE OF ARCHITECTS
P.O. BOX 10-3503 • ANCHORAGE, ALASKA 99510

April 27, 1988

Reference: SB 211 - Public Hearing/Teleconference

To: State of Alaska, House of Representatives, Labor and Commerce Committee Members:
Rep. Dave Donley
Rep. Niilo Koponen
Rep. Red Boucher
Rep. Cliff Davidson
Rep. Johnny Ellis
Rep. Walt Furnace
Rep. Curt Menard

I waited for an hour and a half yesterday, Tuesday, to testify in favor of SB 211. I will be unable to attend the continuation of the teleconference this evening, so I an sending this letter to you today.

I am a Registered Architect in the State of Alaska and have my own business located in Anchorage. I represent the Alaska Chapter of the American Institute of Architects which has 140 members in Alaska.
As a body, the architects in the AIA have supported tort reform legislation for some time. Our members have suffered greatly in this crisis of insurance rate increases. Because of the high costs for errors and omissions (E & O) insurance, many architects are forced to go without this insurance. This situation has also been exacerbated by the recent court ruling on the Statute of Limitations in the State of Alaska. These architects are unable to compete for State and local, publically funded, projects which require the architects and engineers to have E & O insurance. This limits the design expertice available to the State and local governments.
We feel this legislation (SB 211) is a step in the right direction to help remedy this situation.
The Alaska Chapter, AIA, Executive Board met on April 19, 1888, and unanimously passed the following resolution:

> The Alaska Chapter, American Institute of Architects, supports SB 211 and urges the Alaska House of Representatives to pass this bill in order to achieve meaningfull tort reform measures during the current (rifteenth) legislative session.

For more details, Rich Ritter AIA of Minch, Ritter, Forrest in Juneau (586 1371) is available to this committee.

Sincerely,

John F. Ross AIA
President
Alaska Chapter, American Institute of Architects

Alaska State Legislature

Please enter into the record my testimony to the HOUSE LABOR & COMMERCE COMMITT
committee name

committee on CSSB-211 - CIVIL LIABILITY dated APRIL 26, 1988.
bill/subject

I AM CHRIS BIRCH, A PROFESSIONAL ENGINEER AND PRESIDENT OF THE FAIRBANKS CHAPTER OF THE ALASKA SOCIETY OF PROFESSIONAL ENGINEERS AND A CO-SPONSOR ON THE RECENT SUCCESSFUL INITIATIVE DRIVE BY THE CITIZENS COALITION FOR TORT REFORM.

WE IN ALASKA ARE AT A CRITICAL CROSS-ROADS - WE HEAR TIME AND AGAIN OF THE NEED FOR ALASKA BUSINESS TO BE ABLE TO COMPETE IN NATIONAL AND INTERNATIONAL MARKETS, YET WE HAVE BEEN DELINQUENT IN ADDRESSING THE LEGITIMATE CONCERNS OF ALASKA CITIZENS AND BUSINESS. WE MUST ADDRESS TORT REFORM NEEDS, WORKMAN'S COMPENSATION LEGISLATION ~~[illegible]~~ AND RELATED ISSUES NOT ONLY TO ALLOW OUR BUSINESS TO COMPETE OUTSIDE ALASKA BUT TO ENABLE THEM TO FAIRLY COMPETE IN DIMINISHED ALASKAN MARKETS.

PLEASE PASS THIS WIDELY SUPPORTED AND ~~[illegible]~~ IMMEDIATELY NEEDED LEGISLATION.

Signed: Chris Birch, CHRIS BIRCH - PRESIDENT - FAIRBANKS CHAPTER ALASKA SOCIETY OF PROFESSIONAL ENGINEERS
Testifier

Representing (Optional)

1300 VIEWPOINTE DRIVE, FAIRBANKS, AK 99709
Address

(907) 479-3706
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the LABOR + COMMERCE committee name

committee on SB 211 bill/subject, dated 4/26/88.

The issue of liability insurance in medicine represents crisis proportions. Affordability, availability, and accessibility are increasingly slipping beyond our grasp. Colleagues in Fairbanks are being forced out of the full spectrum of practice and needs of our communities go unserved. Nationwide 73% of doctors in my specialty have been sued, 40% more than three times. My premium in 84 was $15,000, in 86 - $24,000, '87 - $40,272, '88 - $51,000, and 1990 - $71,575, all of which is passed to our patients as the cost of doing business. "Tail" coverage to move or discontinue practice is $143,000 this year vs $225,000 in 1990! The U.S. (including Alaska) is 20th in the world in perinatal morbidity and mortality, the main issue in this country being access to care. The increasing cost of liability insurance fosters an increasing distance between a patient and his/her physician.

Signed: NIGEL G. WAPPETT, M.D.
Testifier

FAIRBANKS MEDICAL ASSOCIATION, TANANA VALLEY CLINIC
Representing (Optional)

1001 NOBLE ST, FAIRBANKS, ALASKA 99712
Address

(907) 452-1611
Phone No.

Fairbanks Legislative Information Office
119 N. Cushman St., Rm 101
Fairbanks, Alaska 99701
907-452-4448

PUBLIC OPINION MESSAGE

SENATE

___ LEGISLATIVE COMMITTEE
Indicate House(H) and/or Senate(S)
___ COMMUNITY & REGIONAL AFFAIRS
___ FINANCE
___ HEALTH, EDUCATION and SOCIAL SERVICES
___ JUDICIARY
_X_ LABOR & COMMERCE
___ RESOURCES
___ RULES
___ STATE AFFAIRS
___ TRANSPORTATION

___ OTHER _____

___ FANNING
___ FAHRENKAMP
___ COGHILL

RESPONSE REQUESTED
___ YES
___ NO

HOUSE OF REPRESENTATIVES

___ MILLER
___ KOPONEN
___ DAVIS
___ BOYER
___ FRANK

**Only those single messages delivered by the signing individual, by phone, hand delivered, or written at the Legislative Information Office will be accepted as a public opinion message. (Legislative Council Policy 6/81)

FROM: _____ (H)PHONE: _____

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CITY/STATE _____ ZIP: _____

SUBJECT: _____

MESSAGE: (50 Words or Less)

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SIGNED: _____ DATE: _____

R & M ENGINEERING CONSULTANTS • 4TH STREET & EAGLE, GRAEHL • BOX 2630 • FAIRBANKS, ALASKA 99707-2630 • PH. 907-452-1655
ENGINEERS
GEOLOGISTS
SURVEYORS

Testimony of James H. Wellman

Senate Bill No. 211 (Finance) Amended

I am president of R & M Engineering Consultants, an engineering firm that has done business in the Fairbanks area for nearly 20 years. As such, I have some concerns with regard to the proposed bill as it relates to the needs of design professionals.

Professional liability insurance constitutes the single largest individual cost for doing business of our firm, exclusive of payroll. This is the case, despite the fact that in nearly 20 years I have never filed a claim with our insurance company.

Insurance companies have the image of Alaska as being a high risk state. At the present time, I am aware of eleven licensed insurance carriers writing liability insurance policies for design professionals in the United States. Of these eleven, only five will write insurance in Alaska. Of these five, four exclude coverage for work involving geotechnical engineering (evaluation of soils conditions and requirements for structure foundations). Since our firm provides geotechnical services, only one licensed insurer remains who is willing to provide coverage. Is it no wonder that the cost for this insurance is astronomical?

I believe that the proposed bill, if suitably modified, could effectively erase the adverse impression that the insurance companies have of Alaska. Although I support the proposed bill, I recommend that deficiencies in the following two areas be addressed by amendment.

1) <u>The bill should go further in discouraging frivolous lawsuits.</u> Typically, over 50 percent of the lawsuits filed against architects and engineers are dismissed, with only about 3 percent ending with a court or jury verdict. I recommend that the proposed bill be amended to discourage suits that are totally without merit including:

    a) Putting the plantiff's attorney at risk when he files a case without first establishing that there is reasonable cause for filing the suit, as is provided in the Federal courts.

b) Providing for a review board or for review by an impartial design professional or university professor, licensed in the same discipline as the defendent, to review all cases against architects and engineers, prior to the filing of the case, to determine if there is reasonable and justifiable cause for filing the action. California, Colorado, Hawaii, and Kansas have such laws, and according to my understanding, they have been effective in these states in reducing overall litigation and the number of jury trials.

2) The bill should protect design professionals from third party claims resulting from the death or injury of construction workers. The needed protection should apply where the architect or engineer has no responsibility for safety or control over the portion of the premises where the accident occurred and where the injury did not result from the negligent preparation of plans and specifications. Nationally, over one-fourth of all claims against architects and engineers are the results of such suits. The requested amendment would allow Alaska to join at least seven other states that prohibit such suits.

In summary, I support the bill but would like to see it strengthened to reduce frivolous lawsuits and third party suits against architects and engineers by injured construction workers. I believe that these two changes would eventually result in a significantly lower cost of doing business in Alaska.

26 April 1988

To the House Labor and Commerce Committee
Chairman Donley, Members

I am Vincent S Haneman, Jr. a Professional Engineer and past president of the Alaska Society of Professional Engineers.

The profession of Engineering recognizes the primary rights of the individual for redress and compensation for wrongs committed by other parties, but the use of this concept to unfairly attach the assets of another is a miscarriage of justice. The systems which have evolved have provided a gross over support for those members of our society that have found a new method of obtaining financial security.

Primary among the problems is the question of joint and several. This has led to the "deep pocket" concept and the consideration of tying all causes to a source of funding far beyond that which either the individual defendant or the provable economic loss can sustain. The newspapers are full of the reports of this application of the law. A cap on the noneconomic awards is necessary to provide a FAIR and JUST compensation for both parties.

The rights of the criminal have been promulgated at the expense of the average citizen, not involved in crime. The situation has developed that "crime does pay". If the Criminal can not succeed one way he/she can by going to court, claiming the over use of force or restraint caused a hardship that must be redressed.

Punitive damages are an indication that an illegal act was committed, that there was intent to do harm. This falls from the tort area into the criminal area and therefore should be handled in that section of the law. The use of civil justice to deal with these crimes is another miscarriage of justice.

The practice of engineering requires the professional to provide services that push the frontiers of knowledge to bring the best possible product to the client at the least cost with the requisite safety and public protection. For this country and for Alaska to be competitive, FAIR and JUST application of the laws to the designer-builder as well as the client as well as the lay public must occur. This does not happen and therefore, the cost is increased to cover the potential excessive awards being delivered. Outside firms, and outside countries are not faced with the problem. The net result is that either our firms are going bare or they are loosing to outside competition. This loss is a further drain on our economy. The second alternative is just as bad, don't use any new concepts, use only time honored methods at increased cost to the client and reduced performance. Alaska must provide its citizens with the best, with the dollars and safety desired.

Please consider the bill under consideration as a must piece of

legislation for the citizens of Alaska.

Fairbanks
Memorial Hospital

1650 Cowles Street
Fairbanks, Alaska 99701
907-452-8181

STATEMENT TO BE READ BY RUSS COX AT THE
SENATE BILL 211 HEARING BEFORE THE HOUSE, LABOR
COMMERCE COMMITTEE
CHAIRED BY DAVE DONLEY
2:00 PM - APRIL 26, 1988

STATEMENT:

It is clearly the position of Fairbanks Memorial Hospital that we support the tort reform bill that is before the House, Labor and Commerce Committee. Senate Bill 211 is of paramount importance to this community hospital as we face the issues for years to come.

Fairbanks Memorial Hospital is and always has been in favor of several liability where we pay for any fault that is, in fact, our fault. We take the position where we are willing to pay for what we have caused and no more.

We, representing the hospital and nursing home industry, support this type of tort reform and feel it is of paramount importance that liability issues offer fair and reasonable cost to the consuming public. In order to keep insurance premiums at reasonable costs, it is simply imperative that we eliminate the "double-dip" recovery system currently in place. This occurs when a plaintiff receives money from multiple sources for the same damages. This has happened and is in the process of recurring in court cases related to medical malpractice issues at Fairbanks Memorial Hospital.

In all good conscience it is very clearly the position of the Fairbanks medical community and the Fairbanks Memorial Hospital that Senate Bill 211 be supported as step number 1 in addressing tort reform. We urge your serious consideration of this bill.

Key Bank of Alaska
A KeyCorp Bank

Post Office Box 1230
Fairbanks, Alaska 99707-1230
(907) 452-2146

KEY BANK

April 26, 1988

House Labor and Commerce Committee
Representative Dave Donley, Chairperson
P.O. Box V
Juneau, AK 99811

RE: CS for Senate Bill No. 211 (Finance)
Legislature of the State of Alaska
Fifteenth Legislature - Second Session

Dear Representative Donley:

Key Bank of Alaska, Interior Region, wishes to express its support for the above referenced bill relating to tort reform.

The bank represents many customers and business persons in the Fairbanks area. Likewise, we are aware of previous cases involving exaggerated civil penalties which have been very harmful to businesses.

Broad implications of these civil penalties have been rising insurance rates. In some cases rising premiums have been extremely detrimental to Alaskan businesses. The cost of doing business in the state of Alaska is already generally higher than in many other places. Therefore, high and rising insurance rates may not be tolerable, contribute to a higher rate of business failures, and may prevent new businesses from forming or entering the state.

Key Bank of Alaska believes that passage of this Act will result in a measurable decrease in insurance rates in the state.

Sincerely,

Alan W. Fulp
Assistant Vice President

cc: Niilo Koponen, Vice Chairperson

ALN2/33/1

Alaska State Legislature

Please enter into the record my testimony to the Labor & Commerce
committee name

committee on SB 211, dated [illegible].
bill/subject

Signed: [illegible] MD
Testifier

Fairbanks [illegible] Clinic, Inc.
Representing (Optional)

[illegible] St, Fbks, AK 99701
Address

456-5711
Phone No.

9/86 Legislative Information Office

FEAR. Many people react to discussions of Tort Reform with expressions of fear. Fear that reform will block legitimate cases. Fear that lack of reform will allow liability fees to escalate and businesses to close.

The current system is not working. Businesses and government entities find it harder to find insurance and then to pay for it. The American Bar Association appointed a commission of various lawyers, judges and law professors to investigate the matter. They presented 22 recommendations at the national meeting February 1987. 17 of those 22 items comprised the original tort bill introduced in 1986 to the Alaska Legislature. Less than 70¢ of every dollar won in a Malpractice suit goes to the victim. Our current system is inefficient and ineffective in getting a greater share of the money to the victim. We also need to understand that there is only a FINITE amount of money. Some insurance companies have been bankrupted by several large awards--What of the other legitimate victims who filed suits but will never receive their fair share????

Americans have lost goods and services as a result of problems with access or affordability of insurance. Women in Fairbanks have lost the CU-7 IUD and services of an Obstetrician. Physicians in the Bush can not afford insurance , so they no longer deliver babies. Fairbanks has suffered the loss of goods and services. One Obstetrician in Fairbanks has quit OB. Two Family Practicioners in town raised rates 42% in order to continue to do OB--yet Lutheran Hospitals say they need a greater level of Insurance. Women in Fairbanks buy CU 7 IUDs in Canada.

How much more do we need to lose???? How many more phone Calls and letters do you need to receive from us ?? Over 28,000 people signed a petition for a referendum ballot to cover one aspect of Tort Reform. When do we get help — for all of us?? The issue is here to stay.

Mary C. Wing, MD
Vice-President
Fairbanks Medical Association

Fairbanks Legislative Information Office
119 N. Cushman St., Rm 101
Fairbanks, Alaska 99701
907-452-4448

PUBLIC OPINION MESSAGE

SENATE — HOUSE OF REPRESENTATIVES

LEGISLATIVE COMMITTEE
Indicate House(H) and/or Senate(S)

___ COMMUNITY & REGIONAL AFFAIRS
___ FINANCE
___ HEALTH, EDUCATION and SOCIAL SERVICES
___ JUDICIARY
H X LABOR & COMMERCE
___ RESOURCES
___ RULES
___ STATE AFFAIRS
___ TRANSPORTATION

___ OTHER _____

___ FANNING
___ FAHRENKAMP
___ COGHILL

RESPONSE REQUESTED
___ YES
___ NO

___ MILLER
___ KOPONEN
___ DAVIS
___ BOYER
___ FRANK

**Only those single messages delivered by the signing individual, by phone, hand delivered, or written at the Legislative Information Office will be accepted as a public opinion message. (Legislative Council Policy 6/81)

FROM: Patty Merritt c/o Play N Learn (H)PHONE: 479-6487

MAILING ADDRESS 655 Chena Pump Rd. (W)PHONE: 479-0900

CITY/STATE Fairbanks, AK ZIP: 99709

SUBJECT: TORT REFORM

MESSAGE: (50 Words or Less)

Please (1)	Support (2)	CSSB 211. (3)	Child (4)
Care (5)	Centers (6)	cannot (7)	afford (8)
any (9)	more (10)	increases (11)	in (12)
insurance (13)	costs. (14)	Many (15)	family (16)
home (17)	providers (18)	are (19)	already (20)
"going (21)	bare". (22)	Reasonable (23)	limits (24)
need (25)	to (26)	be (27)	put (28)
on (29)	Claims (30)	in (31)	order (32)
to (33)	Keep (34)	Costs (35)	down (36)
(37)	(38)	(39)	(40)
(41)	(42)	(43)	(44)
(45)	(46)	(47)	(48)
(49)	(50)		

SIGNED: Patty Merritt DATE: 4/26/88

NFIB® National Federation of Independent Business

The Guardian of Small Business

April 27, 1988

TO: HOUSE LABOR & COMMERCE COMMITTEE

FROM: GARY L. JENKINS, DIRECTOR, GOVERNMENTAL RELATIONS

SUBJECT: POSITION ON CSSB 211 (Finance) am

This legislation deals with an issue which is of grave concern to small business across Alaska. The issue is the unavailability or extremely high cost of liability insurance for routine business operations. In response to the question on this issue on our 1988 ballot, NFIB/Alaska members voted 89% in favor, 4% opposed and 7% no opinion.

NFIB recognizes the difficulty you have making a reasoned decision on the various tort reform issues included in because of the widely diverse testimony which you have and will receive on the issue. One conclusion, however, can be reached solely on logic alone. That is if there are reasonable limits placed on the potential liability of the company writing the insurance, the market will stabilize and rates will eventually be reduced. It may require a suit against the insurance industry to bring rates down, however, that is a separate issue. The limits on liability must be in place first.

NFIB members across Alaska are confronted with the problems arising from the high cost or unavailability of liability insurance on a daily basis. In many cases businesses have been forced to close because they could not obtain necessary liability insurance. Since small business creates the majority of new jobs created in Alaska, this problem adds to the existing serious economic conditions across the State of Alaska. The NFIB members in your district urge you to pass out SB 211 retaining the existing provisions.

If any members of the committee have questions regarding our position on SB 211, feel free to contact me at 586-4100.

NFIB/ALASKA
Legislative Office
P.O. Box 210194
Auke Bay, AK 99821
907/586-4100

PEPP

PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE

- Alaska Chapter -

27 April, 1988

Legislative Information Office

To: Representative Donley, Chairman-Labor & Commerce Committee

Re: SB 211

Dear Mr. Donley and committee members:

My name is Willem Van Hemert and I represent the Alaska section of Professional Engineers in Private Practice (ASPE/PEPP) as past chairman and state delegate to the national PEPP Board of Governors. ASPE/PEPP includes over 100 engineers statewide, practicing in all engineering disciplines. As an organization we have maintained involvement in important state-wide issues. SB 211 is very important to us and we strongly urge your support. Tort reform is not an issue of who is at fault but rather one of common sense. As professionals we are all responsible for our actions as engineers, however, we do not believe we must pay the cost of mistakes caused by others. For this reason we urge your support of SB 211.

Willem Van Hemert

A Practice Section of the Alaska Society of Professional Engineers
3900 Arctic Blvd. Suite 203 Anchorage, Alaska 99503

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

Ketchikan General Hospital
3100 TONGASS AVE.
KETCHIKAN, ALASKA 99901
907-225-5171

April 27, 1988

Representative David Donley, Chairman
Labor & Commerce Committee
Box V
Juneau, AK 99811

RE: Committee Substitute for Senate Bill 211

Representative Donley & Members of the Committee:

Thank you for the opportunity to testify. I urge passage of Committee Substitute for Senate Bill 211:

Section I
The cap limit is important on non-economic damages at the $100,000 level. I understand that this does not limit economic or punitive damages.

Section II
Clarification in this section is very important in that punitive damages should be paid for "clear and convincing evidence of "fraud, malice, gross negligence or reckless misconduct by the defendant.

Section V
It makes sense to allow either the plaintiff or the defendant to choose periodic payments rather than one huge payment. For many of our smaller businesses this amendment could be vital. It does not concern me that the trial attorneys may have a complicated payment schedule rather than one huge contingency fee. I think this amendment is in the public's interest.

Section VII
This section seems to be the heart of the Bill. One should be liable for damages to the extent of one's negligence. To allow the "deep pocket theory of justice" to continue to exist is costing millions. It seems logical that the defendant pay for his or her degree of fault and not 200% of their fault if it is less than 50% as the law now requires.

Section XII
I urge that by the elimination of Rule 82 you allow the market to set the hourly and contingency fee, without the influence of a State civil rule agreed to by attorneys. It is my understanding that no other State in the Union has anything like Rule 82.

KGH

In conclusion, I know the trial lawyers have spent a great deal of money to defeat this Bill and others like it. Most of us do not have that kind of money. I believe this Bill protects the rights and interests of the victim while providing some relief for the business community as well as local governments, school districts and the State of Alaska.

Passage of this bill would be in the public's interest. I urge your passage of it and support for passage on the floor of the House. Thank you again for the opportunity to testify.

Sister Barbara Haase

Sister Barbara Haase
Administrator

Ketchikan General Hospital
3100 TONGASS AVE.
KETCHIKAN, ALASKA 99901
907--225-5171

April 27, 198

Representative David Donley, Chairperson
Labor & Commerce Committee
Box V
Juneau, Alaska 99811

RE: Committee Substitute for Senate Bill 461

Representative Donley & Members of the Committee:

You have heard much testimony regarding emergency services in hospitals and the effect of the Supreme Court's recent decision on Jackson vs. Powers which "legislates" deep pocket responsibilities to hospitals. I found their decision now being applied to obstetrics as well. The hospital is held liable for all of the actions and medical judgments of members of its medical staff without requiring the plaintiff to prove negligence on the part of the hospital or to prove the hospital has violated any specific regulatory requirement.

In cases already heard in this state, the effect has been that the plaintiffs dropped the suit against the physician and held only the hospital responsible (See Justice vs. Humana Hospital). The affect is that the hospital would be forced to sue the physicians involved to recover at least some damages. I find this position untenable for any kind of continued team effort to care for patients - and good patient care is what we all want. However, not every patient outcome will be perfect, nor can every procedure produce a miracle.

SB 461 corrects the Supreme Court ruling by clarifying that hospitals are not liable for acts or omissions of non-employed physicians or other health professionals soley for the reason that they must provide those services under Alaska Statute and Regulations. The Bill returns the law to where it was prior to the Court's decision, with the hospital liable for its own negligence or intentional misconduct. We also understand that we still have the responsibility of properly credentialing, referencing and reviewing the actions of the members of the medical staff. We also must see that peer review is properly conducted within the medical staff of each hospital. Therefore, we feel we are not allowing negligent physicians to operate within our hospitals. Rather, we are trying to make certain that they are human beings and that we can help one another as much as possible to see that high quality medical care is available to all Alaskans.

I urge your committee to pass Committee Substitute for Senate Bill 461 and also to support it on the floor of the House. The State of Alaska's health facilities need this legislation.

Sister Barbara Haase

KGH

Sister Barbara Haase
Administrator

DAVID A. McGUIRE, M.D.
Orthopedic Surgery

DIPLOMAT OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

4048 LAUREL STREET
SUITE 202
ANCHORAGE, ALASKA 99508

PHONE 907-562-4142

April 15, 1988

RECEIVED
APR 22 1987

Dave Donley, Representative
House Labor & Commerce Committee
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Donley:

I am enclosing a recent memorandum from the staff at Providence Hospital. As you may know, the Supreme Court recently, in its Jackson vs Powers decision, allocated to the Hospital a non-delegable duty relative to care provided within the Emergency Room. This, in the view of the Sisters of Providence, has substantially increased their liability relative to malpractice actions against the Hospital. In their opinion, they already have an unacceptably high exposure, and the Supreme Court decision makes their continued operations untenable without enjoining physicians in the lawsuits provided.

Please note the second motion enacted by the Executive Committee of the staff of Providence Hospital, April 13, 1988. The unhappy fact of the matter is that continued escalation of liability exposure has brought the staff of Providence Hospital and the Administration of Providence Hospital, to very bitter loggerheads. There is more than a possibility that medical services are going to be curtailed as a result of this Supreme Court interpretation and as a result of the attendant liability.

Clearly there are at least two factors operating in this arena. The first is the magnitude of the liability, and the second is the distribution of the liability. Many may not quarrel that the distribution of the liability is appropriate relative to the Supreme Court's decision in Jackson vs Powers. Nevertheless, if that's the case, then the magnitude of the liability must be reduced or simply not tenable for the hospital to continue with the kind of loss exposure that it's had.

I am also enclosing correspondence between our Clinic, Anchorage Orthopedic Associates, and the other large orthopedic clinic in Anchorage, namely the Anchorage Fracture & Orthopedic Clinic. Again, I think the correspondence is self-explanatory. Nevertheless it's worth pointing out that from our point of view, (that is Anchorage Orthopedic Association), we cannot take the risk of interpreting films that are copies because they may miss some important detail. Anchorage Fracture & Orthopedic Clinic does not feel

they can release the films because they've had instances in which the films have been stolen, misplace, lost, etc. If litigation ensues and the films are not available, it's the physician's word against the patient and the plaintiff attorney. Clearly an untenable situation for "risk management". The immediate consequence to the citizens of the State of Alaska is that when I see a patient for a second opinion, I'm compelled to order new X-rays. These X-rays are an approximate cost of $150.00. Given that I see an average of five to ten patients in any given week for second opinions, the arithmetic becomes important.

Representative Donley, this is an important problem, and we cannot afford to continue to ignore it. I understand that the Attorney General is contemplating action against the insurance companies for anti-trust, etc. To the extent that such activities are responsible for the present state of affairs, we support that investigation. To say that that alone is sufficient is clearly short-sighted if not self-serving. I'm certain that you are well aware that the Medical Mutual Insurance Companies in the State of Alaska have nothing whatever to do with Aetna, SIGNA, or any of the other major insurance companies that are being part of this action. To say that the action on the part of those insurance companies has anything whatever to do with the current state of affairs so far as medical liability insurance is concerned is to obscure the issue.

In 1976 and '76, the liability crisis became acute within the State of Alaska. There was a period of time in which medical care was provided only on an emergency basis. There were patients who were denied care because of their affiliation with identifiable subsets of the community. This is an unhappy state of affairs and should not be allowed to occur again. I do not feel that we can afford to ignore any longer that 20 to 40% of the physicians in the State of Alaska are uninsured, and not by choice. The insurance is available, it's simply not affordable. Recent verdicts and settlements in malpractice actions illustrate the point. It's not clear to me that we can afford a system that allocates one individual $1.8 million dollars when he's already received $650 thousand from a settlement in California. The parents of a baby born in Ketchikan recently received $2.2 million dollars and the lawsuit continues. It doesn't take a genius to do the arithmetic to divide these kind of costs amongst the citizens of a state of 500,000 people. I urge your expeditious action to hold a hearing on Senate Bill 211 and the related issue of defining hospital liability.

Sincerely,

David A. McGuire, M. D.

DAM:li

Thank you Chairman Donnelly:

My name is Thurl Flynn. I am a professional engineer and past-President of the Anchorage Branch of the American Society of Civil Engineers. Our organization represents some 600 civil engineers in Southcentral Alaska and some 900 statewide.

ASCE would like to express its strong support for SB 211. We passed a resolution in support of the bill last week and copies of this resolution have been sent to the appropriate legislative committee chairmen.

Thank you for the opportunity to testify in support of SB 211.

Sincerely,

Thurl Flynn

4-27-88

PUBLIC OPINION MESSAGE
(LIMITED TO 50 WORDS OR LESS)

LEGISLATIVE INFORMATION OFF
3111 C Street, Suite 150, Anchorage, AK 99
561-7

Your message may be directed to any individual or combination of the following members o the Alaska Legislature.

*__ ANCHORAGE DELEGATION
Indicate House (H) and/or Senate (S)

__ LEGISLATIVE COMMITTEE
Indicate House (H) and/or Senate (S)
__ Community & Regional Affairs
__ Finance
__ Health, Education and Social Services
__ Judiciary
__ Labor & Commerce
__ Resources
__ Rules
__ State Affairs
__ Transportation
__ Other: _____

SENATE

*__ Abood
__ Binkley
__ Coghill
__ Duncan
__ Eliason
__ Fahrenkamp
*__ Faiks
__ Fanning
__ Fischer
*__ Halford
__ Hensley
__ Jones
*__ Josephson
*__ Kelly
*__ Kerttula
*__ Rodey
*__ Sturgulewski
*__ Szymanski
*__ Uehling
__ Zharoff

HOUSE OF REPRESENTATIVES

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__ Frank
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__ Grussendorf
*__ Hanley
__ Herrmann
__ Hoffman
__ Hudson
__ Koponen
__ Larson
*__ Martin
__ Menard
__ Miller
__ Navarre
*__ Pearce
*__ Pettyjoh
*__ Phillips
*__ Pourchot
*__ Rieger
__ Shultz
__ Springer
__ Sund
__ Swackhamm
__ Taylor
__ Ulmer
__ Wallis
*__ Zawacki

FROM: Dorothy V. REHE (H) Phone: 694 6477

HOME ADDRESS: 12129 Curtis Circle (W) Phone: 562 2211 Ex 3150

MAILING ADDRESS: EAGLE RIVER ALASKA ZIP: _____

MESSAGE: (50 Words or Less)

PLEASE NOTE: Only those single messages delivered by the signing individual to the Legislative Information Office by telephone, hand-delivered, or written at the Legislative Information Office will be accepted for transmission via electronic mail as a Public Opinion Message. (Legislative Council Policy 6/81)

SUBJECT: Medical Malpractice Issues

I 1	support 2	the 3	enactment 4
of 5	Senate 6	bill 7	and 8 461
I 9	look 10	forward 11	to 12
the 13	enactment 14	will 15	lessen 16
our 17	do 18	reform 19	in 20
medical 21	cost 22	I 23	would 24
like 25	much 26	efforts 27	put 28
into 29	accountability 30	on 31	a 32
non 33	economic 34	manner 35	36
37	38	39	40
41	42	43	44
45	46	47	48
49	50		

Time: 820 PM Operator: Dorothy V Rehe Date: 4/27/1988

4/26/88

GOOD AFTERNOON, MY NAME IS ART JACOBS, AND I HAVE RECENTLY RETIRED FROM A POSITION AS A PRINCIPAL IN AN ENGINEERING FIRM HERE IN ANCHORAGE. I WILL ADDRESS THREE OF THE ITEMS CONTAINED IN CSSB 211.

THE FIRST ITEM IS THE PROPOSED CAP ON NON-ECONOMIC DAMAGES. THESE ARE DAMAGES WHICH CANNOT RATIONALLY BE ASSESSED IN TERMS OF DOLLARS, AND WHICH ARE TYPICALLY DETERMINED BY JURIES AS A RESULT OF THE EMOTIONAL PLEAS OF THE ATTORNEY REPRESENTING THE PLAINTIFF. THE TRUE MOTIVATOR WHICH DETERMINES THE AMOUNT CLAIMED IN MOST OF THESE CASES IS THE RESULTANT INCREASE IN THE FEE COLLECTED BY THE PLAINTIFF'S ATTORNEY, RATHER THAN HIS CONCERN FOR THE WELFARE OF HIS CLIENT. WE NEED NOT ONLY A CAP ON AWARDS IN THIS CATEGORY OF DAMAGES, BUT ALSO A REASONABLE SCHEDULE OF ATTORNEY'S FEES.

THE SECOND ITEM I WISH TO ADDRESS IS THE PUNITIVE DAMAGES SECTION. THESE DAMAGES ARE SUPPOSEDLY IMPOSED BECAUSE OF ILLEGAL ACTIONS BY THE DEFENDANT WHICH RESULTED IN THE CLAIMED INJURIES. IF THAT IS THEIR TRUE BASIS, ANY PENALTY, OR FINE, WHICH IS WHAT IT WOULD AMOUNT TO SHOULD BE IMPOSED, AND COLLECTED, BY THE STATE, WITHOUT ALLOWING A PERCENTAGE OF THE AMOUNT TO FURTHER ENRICH THE PLAINTIFF'S ATTORNEY.

THE LAST ITEM IS PURE SEVERAL LIABILITY. I BELIEVE THIS SHOULD BE APPLIED IN ALL CASES, WITHOUT THE EXCEPTIONS WRITTEN INTO THE SENATE BILL. EACH DEFENDANT SHOULD BE MADE RESPONSIBLE FOR ONLY HIS OWN ACTIONS, NOT FOR THE ACTIONS OF OTHERS WHO MAY NOT BE ABLE TO PAY, OR WHO MAY BE MORE SUCCESSFUL THAN HE IN HIDING OR DISGUISING ASSETS.

IN CLOSING, I WOULD LIKE TO SAY THIS BILL, WHICH IS A WELCOME ADDITION TO EXISTING LAW, STILL FALLS SHORT OF COVERING THE AIMS OF THE TORT REFORM MOVEMENT.

MEMORANDUM

TO: ALL MEMBERS OF THE PROVIDENCE HOSPITAL MEDICAL STAFF

FROM: GEORGE RHYNEER, M.D., PRESIDENT, MEDICAL STAFF GR.

SUBJECT: ACTIONS OF THE EXECUTIVE COMMITTEE MEETING OF APRIL 12, 1988

DATE: APRIL 13, 1988

The following motion was passed at the Executive Committee meeting on April 12, 1988.

MOTION AS AMENDED

Thomas Vasileff, M.D. moved that the Executive Committee representing Providence Hospital Medical Staff, believes that a major error in policy and/or judgment has occurred (perhaps secondary to poor legal advice), reflected by recent actual and threatened legal actions by the Sisters of Providence resulting in the unwilling embroilment of staff physicians in malpractice suits.

We believe such actions, taken without the acquiescence of the Medical Staff, are harmful, both to the affected physicians and to the staff in general. These actions are furthermore harmful to Providence Hospital and to the Mission of the Sisters of Providence.

We are aware of the potential grave consequences faced by all hospitals in Alaska because of the Jackson/Powers Supreme Court Decision. It is our firm belief that solutions are best achieved through meaningful dialogue between physicians and hospitals and are willing to participate in dialogue among all affected parties, including hospital administrators and representatives of the legal and insurance industries.

Additionally, we request reasoned investigation of the above actions which have been taken by the Sisters' employees and representatives, and request participation of the Executive Committee in this analysis and in subsequent corrective actions by the Sisters. We further request Mr. Camosso to commit tonight that there will be no further legal actions against physicians.

Finally, we ask that all completed legal actions such as outlined in paragraph one be immediately dropped.

The motion was seconded by James Lanier, M.D. and the motion carried with 2 voting against and one abstention.

A second motion was also passed which is as follows:

MOTION

Mohammed Sarwar, M.D. moved that if the action is turned down by the Governing Board, it is recommended that a meeting of the General Staff be called within ten days. The motion was seconded by Thomas Vasileff, M.D. and approved by the Executive Committee.

1137m

ANCHORAGE BRANCH

AMERICAN SOCIETY OF CIVIL ENGINEER

A RESOLUTION

SUPPORTING ALASKAN TORT REFORM LEGISLATION

WHEREAS: Alaskan communities, businesses, school districts and private citizens continue to suffer undue economic hardships due to the problems of limited availability and premium escalation of insurance coverage, and

WHEREAS: A fundamental cause of Alaska's continuing liability crisis is the increasing and unpredictable size of damage awards and settlements, and

WHEREAS: Backlogged courts, windfall verdicts, high transaction costs of our legal system and escalating liability insurance prices are symptoms of the need for clear and decisive reforms, and

WHEREAS: There exists a widespread awareness of the need for change and some legislative reforms have been enacted, the need for comprehensive, fair and reasonable reforms has not been satisfied.

NOW, THEREFORE BE IT RESOLVED THAT:

The Anchorage Branch of the American Society of Civil Engineers supports HB250 and CSSB211 (Finance) and urges the Alaska House of Representatives to act on these Bills in order to achieve meaningful reform measures during the current (fifteenth) legislative sessions.

Signed: Lynda L. Barber
Lynda Barber, President

Dated: April 19, 1988

SB211

CITIZENS COALITION FOR TORT REFORM

907-561-6250

April 15, 1988

Senator Jalmar (Jay) M. Kerttula
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Senator Kerttula:

Please find enclosed a breakdown of the cost of a recent verdict in favor of the plaintiff and against Humana Hospital and MICA, The Medical Indemnity Corporation of Alaska.

This case is an example of what really happens in our civil courts. Many plaintiff's lawyers have told you that there are not judgements in the State of Alaska in excess of one million dollars. Here, before you, is an example of one. I am certain that many of you have heard Mr. Roller, from the Division of Insurance, testify that jury verdicts are only the tip of the civil litigation iceberg. Below the water level on this iceberg, where we cannot see or measure, are the settled cases. Nevertheless, jury verdicts serve as bench marks, or "shadow verdicts", if you will, and it is against these verdicts that insurance companies attempt to settle claims. There are some interesting facts which can be read between the lines in an evaluation of this judgement.

For the record, the Los Angeles County settlement was $650,000.00 with the provision that the plaintiff would have to return $300,000.00 to California if successful in his Alaska lawsuit. The plaintiff was clearly far more successful in Alaska than he was in California. Please note the difference between the Alaska award of $1,859,518.90 and the California award of 650,000.00. This seems "clear and convincing evidence" of the value of tort reform in California vs. the lack thereof in Alaska.

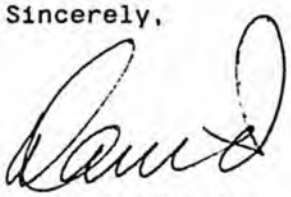
What is of further interest is that the California settlement was reduced to present value - by the Alaska Court - when it subtracted the amount from the verdict awarded in Alaska. At the same time the Alaska court computed the costs for economic and non-ecomonic costs on the basis of future economic value - as opposed to again using present economic value - when it came to making the award. It seems to me this is a clear inconsistency on the part of Judge Gonzales. Either we should calculate everything as present value or at future value, but not be selective in calculating the deductions at present value and awards at future value.

Please note the cost of pre-judgement interest of $683,534.00. The Alaska tort reform action in 1986 mandates pre-judgement interest be calculated from the date of filing. Had the 1986 law been in effect in 1982, there certainly would have been substantially less prejudgement interest added to the award in this case. It is also very important to note there was no action taken on the Alaska case for a period of one year while the litigation was pursued in California. The one year lack of action in Alaska forced the pre-judgement interest award to increase $117,446.

Finally I would like to draw your attention to Rule 82 attorney's fees. Please note in the Alaska case alone, the cost was $171,319.90. In its history, MICA has paid out nearly half a million dollars in Rule 82 fees. To its certain knowledge, MICA has never been successful in recovering a single dime for Rule 82 fees when it prevailed. I think this illustrates clearly our contention that Rule 82 is a one-way street. It is awarded when there is a pocket to pick; when there is not a pocket, there is no award. The net effect is to increase the cost of awards by 10% or so in the State of Alaska. Further testament is the fact that we, the consumers, pay a premium rider for Rule 82 fees for every policy written in the State of Alaska.

Obviously the present liability crisis is not over. The tort system is a clear and major part of the problem. I would urge your action on the Senate Bill 211, which is presently in Representative Donley's House Labor and Commerce Committee.

Sincerely,



David A. McGuire, M.D.
Chairman, Citizens' Coalition for Tort Reform

MKD03003/vv

Dr. McGuire
4

MICA Medical Indemnity Corporation of Alaska

ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 203
ANCHORAGE, ALASKA 99503

TO: MICA Executive Committee
MICA Claims Committee

FROM: Janet Johnston,
Claims Manager

DATE: March 17, 1988

RE: Judgement in Justice Case

At 2:00 p.m. this afternoon I was informed by Jim Delaney's office that Judge Gonzales had entered judgement in the Justice case in the amount of $1,859,518.90. That figure is inclusive of prejudgement interest and Rule 82 attorney fees but does not include plaintiff's costs which have yet to be determined at a cost hearing. I do not expect that those will exceed $100,000.

The judgement of was broken down as follows:

$ 1,449,160.00	Amount of the verdict
- 144,916.00	10% plaintiff contributory negligence
$ 1,304,244.00	Subtotal
- 210,201.00	Present value of L.A. County settlement as of July 1985
$ 1,094,043.00	Subtotal
- 89,378.00	Collateral medical benefits
$ 1,004,665.00	Subtotal
+ 683,534.00	Prejudgement interest at 10 1/2% from May 30, 1982 - March 16, 1988
$ 1,688,199.00	Subtotal
+ 171,319.90	Rule 82 attorney fees
$ 1,859,518.90	Final Judgement

To this final judgement figure will be added plaintiff attorney costs as they will be determined by the judge at a cost hearing to be held in the future.

SB21

Mr. Chairman, and members of the Committee;

Thank you for the opportunity to testify. I am Dr. Annette Thorn, a board certified specialist in internal medicine. I am also a specialist in public health, occupational medicine, and toxicology. I do work for the state, but today I am not testifying as a representative of the state, but instead as a private citizen. The administration has not taken a position on this legislation so it is very important that you understand that none of my views reflect the position of the administration.

However, as a member of the public health community, I am very concerned about the public health policy implications of the bill before you, Senate Bill 211. I am also concerned about the bill as a physician who needs malpractice in order to be able to practice. I may never be able to make my occupational health skills available in private practice in Alaska due to the cost of malpractice. I am very concerned about both implications of the bill.

Currently the torte system is the only effective deterrent against irresponsible disregard for the

health and safety of individuals exposed to toxic chemicals in their homes, in the process of production, or while enjoying hobbies.

The torte system acts as the only real sanction which is effectively making producers warn potential users of the true health hazards of a chemical product.

Since the toxic torte case law has developed (in such instances as the Johns Mansville Asbestos case), I have noted a progressive improvement in the quality of the instructions, information and the warnings made available to the public and the users of products.

However, there are many producers who still refuse to appropriately warn consumers of the potential dangers of products for fear of loosing sales. Only when the monetary consequences of concealing information outweigh potential profits, will producers take note and act responsibly either by removing defective or dangerous products from the market or by appropriate effective warnings.

IUDs provide an example of this. When I was a medical student in 1974, the literature was

replete with studies showing that IUDs could cause infertility, septic shock and death. Yet producers did not provide warnings or guidelines for use in young women who might want to have children. In fact they continued to reassure physicians of their safety. Physicians, continued to insert IUDs in young women despite the findings in their literature. Finally multiple suits brought by injured women has resulted in better information provided to physicians about the risks by the producers and the removal of the Dalcon Shield from the market. I personally presented the data to the department of Obstetrics and Gynecology but could get no change in the practice of inserting IUDs in young women by members of the department.

When you limit the punitive damages by requiring such a high burden of proof, limit noneconomic damages due to pain and suffering to $100,000 and allow the escape from joint and several responsibility in such circumstances, you detooth the only effective public health sanctions society has against the poisoning or injury of consumers in the community, in the workplace or at home.

I have seen this time and time again in Alaska with employees injured by a chemical which the employer and the employee had no idea was harmful. I have called the producer who claims that such well documented damage is impossible. Only after citing article after article about an effect that is well known to occur as a consequence of the chemical, does the manufacturer acknowledge the problem, and promise that they will put warnings on the product. However in follow up of such products the improvement in warning did not occur. In my experience this has occurred for example with foam-in-place isocyanate products which are known to cause sudden death from anaphylaxis, and solvents in paints containing methylene chloride acts like carbon monoxide in the blood, and can cause death from a heart attack.

It would be cheaper for these producers to pay $100,000 in noneconomic damages, and pay economic damages for several cases, than suffer the consequences of loss of profit due to appropriate warnings to unsuspecting consumers.

In the workplace, the right to know law does not

have the teeth necessary to ensure adequate warnings in material safety data sheets used to warn employees and employers of dangers unless the torte system backs the law up. The potential of a sizeable award from a toxic torte action is the only real guarantee that the MSDS contains appropriate warnings of serious hazards. Alone,the Right to Know Law provides for only a maximum fine of $10,000 for a grievous misrepresentation of a danger on a material safety data sheet, but most probably would cost the manufacturer $1,000 for an omission if caught by OSHA. The proposed changes to the torte system will have unanticipated repercussions on preventive mechanisms upon which the society has come to rely. I believe that many members of the public will be dismayed by the loss of protections which they now take for granted, and upon which they rely, when they actually experience the consequences of this kind of change to the torte system.

When employees are harmed by toxic chemicals, they often have to turn to the torte system because the worker's compensation system is entirely inadequate to compensate the employee's health problems. By making these kinds of changes to the torte law you may be creating the same problems with the torte

system that you now have with the worker's compensation system.

The worker's compensation system, in fact acts as a disincentive to effective preventive of health and safety in the workplace because the costs of injuring an employee is not really borne by the perpetrating employer. It is amortized out over many employers and can be calculated in as a cost of doing business. This is probably why effective prevention of illness and injury in the workplace is the last frontier of public health in why it is so difficult to eliminate unnecessary injury and illness in the workplace. We are doing abysmally on a state and national level. Alaska has the highest rate of years of potential life lost in the country and the second highest injury and illness rate in the country. There is no effective deterrent to taking significant risks with employee health when profit due to production is compared with the cost of an injury or illness which now can be predicted and figured into the cost of doing business. There is a significant risk that you will create the same type of situation with this torte reform bill. It is a very bad public health policy change.

There is also a significant risk that compensation will be inadequate. By placing caps on noneconomic awards and relying on the replacement of economic loss, you create a system with the same types of inherent flaws that you have in the worker's compensation system. The worker's compensation system is expeditious in compensating injuries due to physical trauma such as loss of a finger or a hand or an eye or something which is obvious. However the awards are often totally inadequate to compensate the individual for the pain and suffering and the impact of that injury on the persons life. As an example, an employee who looses an arm due to negligence will at a maximum be compensated $59,000. An employee made totally deaf will be compensated at a maximum $37,800. By changing the torte system you are likely to create these kinds of inequities.

However the greatest problem is that many of the cases are never compensated. The insurance company automatically controverts most occupational disease claims and employs well trained lawyers to fight the claim. Proof of illness due to a chemical exposure or repetitive motion exposure is often very difficult, complex, and requires an immense amount of research. Very few plaintiffs attorneys have the

expertise and resources to fight the insurance company resources, especially when you consider the limitations placed on compensation of the plaintiff's attorneys by the worker's compensation system. I have found very few attorneys willing to take the time and resources necessary to win the employees rightful compensation in occupational disease cases given their level of compensation. The awards are too small. You run the risk of similar results in civil litigation if you make these kind of changes. In fact, given the complexity of the proof in occupational disease cases, the employees would be much more fairly served and compensated by being removed entirely from the Workman's Compensation system and allowed to take action in civil court. By making the anticipated changes proposed in this bill, you will be removing much of the alternative that the torte system offers to employees injured by toxic exposure.

The only real remedy many individual employees or consumers have at this point is civil litigation. For most employees damaged by a chemical, or toxic agent such as asbestos, torte litigation is the only remedy which can truly compensate their loss.

Is $100,000 an adequate compensation for a person with the degree of pain and suffering suffered for 12 years while dying a slow and laborious death due to asbestosis? Is $100,000 adequate to compensate an individual who was knowingly exposed to a lung carcinogen, and who spends two years in severe pain due to lung cancer; suffocating to death with recurrent infections, and lack of oxygen ? Will it be enough of a disincentive for a producer who is making millions off of the product world wide to not conceal information? I would ask you to seriously consider not taking away this most important deterrent, which is protecting the health and safety of employees, consumers, and the community.

Though this bill exempts hazardous waste, environmental pollution and violations of state or federal antitrust statutes from several liability in accordance with that party's percentage of fault, it does not exempt those harmed by defective products, chemicals or toxic agents, or employees intentionally harmed by employers. These should be exempted. What is more important is the fact that $100,000 in noneconomic damages is far too little to act as a deterrent in this day and age where potential profits far outweigh these kind of

consequences.

I am sympathetic to those who must spend years in court defending themselves against a spurious charge. I am also just as concerned as the next physician as to what I am going to have to spend in the future in malpractice payments. However this bill does nothing to remedy these situations and removes the sanctions which are vital to protection of the health of those who I went into medicine to help. This Bill does nothing to require the lowering of premiums or to remedy the lack of availability of insurance for entities that can not get insurance. A study of the link between insurance rates and the amount and frequency of awards in this state is a good idea; but if done, would probably embarrass those physicians and others (except for the insurance companies) who have been convinced that this bill is a good idea.

I am however concerned about the lack of availability of affordable insurance in Alaska. I believe that formulas used by insurance companies to project the probability of future claims can be used to falsely elevate projected claim costs. Legislation should be considered which would create

two insurance categories for professionals. Legislation should require lower insurance rates based on actual awards for a group of competent physicians and design professionals who receive good ratings from their peers. The State needs competent professionals who can provide services to all areas of the state. I believe if legislation created a mechanism of mandatory confidential peer review as a condition of licence renewal, insurance companies are likely to be more than willing to offer insurance to the group with adequate ratings, even with a cap on the insurance. It is about time we start talking about mandatory caps on insurance rates rather than award rates. Then the insurance companies and the professionals are likely to have the needed motivation to cooperate in realistic ratings. Only the negligent and incompetent physicians, and design professionals should have to pay the higher rates based upon their peer's opinions of them and their own litigation history.

I believe the majority of Alaska's physicians and design professionals are competent and will not experience the liability which is being projected by insurance formulas. There does not appear to be a real crisis in increasing rates of litigation filed,

or awards based on available numbers quoted during these meetings. The crisis appears to be due to internal financial problems in the insurance industry.

Perhaps the rate of rise of insurance can be curtailed by a thorough investigation of insurance practices used to project future awards.

In order to assure relief in medical malpractice rates, I would suggest the following measures;

1. Remove any cap on awards for noneconomic damages for product liability, toxic torte, community pollution and hazardous waste.

2. Pass legislation which addresses the medical and hospital malpractice crisis specifically; as well as design professional specifically, while leaving the rest of the torte system intact so that it may function to protect the health and safety of the public, the community and employees.

3. In order to specifically remedy the medical malpractice crisis I would suggest the

following:

a. allow exemption for joint and several liability only for physicians and hospitals.

b. change the law to remove all deterrents and interferences in sanctioning and the potential removal from practice of incompetent physicians, or physicians using medically dangerous, useless, or otherwise unacceptable therapy. The current legal protections of physicians in this state makes it very unlikely that unacceptable practices or incompetent practitioners can be stopped through the licensure process.

c. make it necessary that a medical malpractice plaintiff prior to filing a claim, show that sufficient evidence exists to pursue a claim against an individual as is required for claims requesting punitive damages. This will cut down on the unnecessary defense costs in legal fees as well as unnecessary time

expenditure and stress for physicians .

d. ban medical malpractice insurance which requires a tail, and instead require that all malpractice insurance be claims made.

e. change the way future litigation liabilities are projected. If the number of physicians is too small to make reliable projections of risk for Alaska, do not use formulas based on a litigation environment which is entirely different than our own. Choose more realistic projections based on the actual state experience even if the statistical reliability is inadequate rather than relying on outside numbers and formulas. Every action feasible needs to be taken to assure that physicians in the State of Alaska are not subsidizing British rates.

f. In exchange, require that the physicians in the state develop a set of objective criteria of competent and incompetent action and use this criteria to have physicians audit peers. A mechanism of

peer review should result in warnings to the physicians found to be deficient. A sufficient period of time should be given to deficient physicians to give them an opportunity to demonstrate that the deficiencies have been remedied and they have come in line with the criteria of performance. This should precede the audit result being used to influence that individual's malpractice rates. If the individual refuses to change harmful practices or deficiencies, only then would the individual loose the right to buy malpractice at a lower rate.

As much as I would like, for my own purposes to never have to face a malpractice claim, I believe the people of the state should continue to have access to fair compensation for objectively verifiable pain and suffering such as that which we know occurs with certain diagnoses such as cancer. Economic losses do not include the increased income and higher quality of life the individual may have obtained had the individual not been harmed.

Changes need to be made, but I would recommend you

consider changing the law to guarantee that medical and design professionals can get affordable insurance and not gut the effectiveness of the entire torte system.

Ketchikan General Hospital
3100 TONGASS AVE.
KETCHIKAN, ALASKA 99901
907-225-5171

April 27, 1988

Representative David Donley, Chairman
Labor & Commerce Committee
Box V
Juneau, AK 99811

RE: Committee Substitute for Senate Bill 211

Representative Donley & Members of the Committee:

Thank you for the opportunity to testify. I urge passage of Committee Substitute for Senate Bill 211:

Section I
The cap limit is important on non-economic damages at the $100,000 level. I understand that this does not limit economic or punitive damages.

Section II
Clarification in this section is very important in that punitive damages should be paid for "clear and convincing evidence of "fraud, malice, gross negligence or reckless misconduct by the defendant.

Section V
It makes sense to allow either the plaintiff or the defendant to choose periodic payments rather than one huge payment. For many of our smaller businesses this amendment could be vital. It does not concern me that the trial attorneys may have a complicated payment schedule rather than one huge contingency fee. I think this amendment is in the public's interest.

Section VII
This section seems to be the heart of the Bill. One should be liable for damages to the extent of one's negligence. To allow the "deep pocket theory of justice" to continue to exist is costing millions. It seems logical that the defendant pay for his or her degree of fault and not 200% of their fault if it is less than 50% as the law now requires.

Section XII
I urge that by the elimination of Rule 82 you allow the market to set the hourly and contingency fee, without the influence of a State civil rule agreed to by attorneys. It is my understanding that no other State in the Union has anything like Rule 82.

KGH

In conclusion, I know the trial lawyers have spent a great deal of money to defeat this Bill and others like it. Most of us do not have that kind of money. I believe this Bill protects the rights and interests of the victim while providing some relief for the business community as well as local governments, school districts and the State of Alaska.

Passage of this bill would be in the public's interest. I urge your passage of it and support for passage on the floor of the House. Thank you again for the opportunity to testify.

Sister Barbara Haase

Sister Barbara Haase
Administrator

(2)

Ketchikan General Hospital
3100 TONGASS AVE.
KETCHIKAN, ALASKA 99901
907-225-5171

April 27, 1988

Representative David Donley, Chairperson
Labor & Commerce Committee
Box V
Juneau, Alaska 99811

RE: Committee Substitute for Senate Bill 461

Representative Donley & Members of the Committee:

You have heard much testimony regarding emergency services in hospitals and the effect of the Supreme Court's recent decision on Jackson vs. Powers which "legislates" deep pocket responsibilities to hospitals. I found their decision now being applied to obstetrics as well. The hospital is held liable for all of the actions and medical judgments of members of its medical staff without requiring the plaintiff to prove negligence on the part of the hospital or to prove the hospital has violated any specific regulatory requirement.

In cases already heard in this state, the effect has been that the plaintiffs dropped the suit against the physicians and held only the hospital responsible (See Justice vs. Humana Hospital). The affect is that the hospital would be forced to sue the physicians involved to recover at least some damages. I find this position untenable for any kind of continued team effort to care for patients - and good patient care is what we all want. However, not every patient outcome will be perfect, nor can every procedure produce a miracle.

SB 461 corrects the Supreme Court ruling by clarifying that hospitals are not liable for acts or omissions of non-employed physicians or other health professionals soley for the reason that they must provide those services under Alaska Statute and Regulations. The Bill returns the law to where it was prior to the Court's decision, with the hospital liable for its own negligence or intentional misconduct. We also understand that we still have the responsibility of properly credentialing, referencing and reviewing the actions of the members of the medical staff. We also must see that peer review is properly conducted within the medical staff of each hospital. Therefore, we feel we are not allowing negligent physicians to operate within our hospitals. Rather, we are trying to make certain that they are human beings and that we can help one another as much as possible to see that high quality medical care is available to all Alaskans.

I urge your committee to pass Committee Substitute for Senate Bill 461 and also to support it on the floor of the House. The State of Alaska's health facilities need this legislation.

Sister Barbara Haase

KGH Sister Barbara Haase
Administrator

(2)

PROFESSIONAL LIABILITY UPDATE

March 1988

Accompanying this month's newsletter is an updated bibliography listing recent publications on professional liability that are of particular interest. Individual copies of articles are available for a duplication charge of $.30 per page plus a $3.00 per order handling and mailing charge.

NEW RESEARCH

The average medical professional liability insurance premium for obstetricians has increased almost 240% in the last five years, from $10,946 in 1982 to $37,015 in 1987. These results are contained in a recently released study by the American College of Obstetricians and Gynecologists (ACOG). The study, a survey of almost 2,000 obstetricians and gynecologists, is the third in a series of biennial reports examining the impact of medical professional liability.

Concurrent with increasing premiums, an increasing number of obstetricians and gynecologists report making changes in the way they practice medicine. As the table below indicates, the percentage of physicians limiting their care of high risk pregnancies has increased sharply. In 1983, that percentage was 17.7%. By 1985, it had risen to 23.0%; in 1987, it was 27.1%. Similarly, the percentage of physicians limiting gynecological surgical procedures has increased significantly. In 1983, that percentage was 5.7%; in succeeding surveys, it was 6.9% and 9.0%. The other categories of physician response -- decreased number of deliveries, no longer practice obstetrics, and no longer do major gynecological surgery -- experienced no significant growth or declined slightly over the past two years. Still, the percentages in all three categories for 1987 are up over the figures reported in the original 1983 survey.

Changes in Practices of Obstetricians and Gynecologists as a Result of Professional Liability Risks, 1983-1987

Physician Response	Percent of Physicians 1983	1985	1987
Decreased Level of High Risk OB Care	17.7%	23.0%	27.1%
Decreased Number of Deliveries	10.1	13.7	12.9
No Longer Practice Obstetrics	9.1	12.3	12.4
Decreased Gynecological Surgical Procedures	5.7	6.9	9.0
No Longer Do Major Gynecological Surgery	2.5	3.3	3.3

Source: American College of Obstetricians and Gynecologists.

Professional Liability Clearinghouse, American Medical Association, Center for Health Policy Research, 535 N. Dearborn Street, Chicago, Illinois 60610. (312) 645-5380.

While the percentage of physicians who no longer practice obstetrics has leveled off over the past two years, the current data suggest that such physicians are making this decision at an earlier age. In the 1985 survey, 54.2% of those not practicing obstetrics reported that they stopped prior to age 55; in 1987, that percentage was 66.8%. In 1985, 25.3% reported that they stopped prior to age 45; in 1987, that percentage was 29.3%. In 1985, 2.8% reported that they stopped before age 35; in 1987, that figure was 6.1%.

The current study indicates that obstetricians and gynecologists remain targets of medical professional liability claims. Over 70% of those surveyed reported that they had at least one claim filed against them in their careers. Respondents listed a total of 3,011 claims. Approximately 52% involved obstetrical issues and 48% involved gynecological concerns. Respondents reported that an average of 3.5 years passed between the time of the injury's occurrence and the closing of the claim.

The full report provides a detailed explanation of the results presented above, as well as sections dealing with survey design, physician demographics, costs of insurance, and tables comparing national data with those grouped by geographical areas. Copies of the full report, entitled "Professional Liability and its Effects: Report of a 1987 Survey of ACOG's Membership," may be obtained from the Department of Professional Liability, The American College of Obstetricians and Gynecologists, 600 Maryland Avenue S.W., Washington, DC, 20024. Report summaries are also available through the same address.

FEDERAL DEVELOPMENTS

The Department of Health and Human Services has issued proposed regulations for the national data bank of physician information created by the Health Care Quality Improvement Act, PL 99—660, Title IV. The data bank will serve as a source of information on adverse licensure actions taken by state boards, payments on malpractice claims, and adverse actions on clinical privileges. The primary purpose of the data bank is to make information available to hospitals and state licensing boards for their credentialing and licensing activities.

The proposed regulations appear in the March 21, 1988 Federal Register. Comments may be filed with HHS by May 20, 1988. Because no money was appropriated for the data bank in FY88, this activity is not expected to be operational before next year.

STATE LEGISLATIVE HIGHLIGHTS

The AMA Department of State Legislation reports that the Oregon Attorney General has issued an opinion negating a provision of Oregon's 1987 tort reform legislation. The provision would have made it illegal for the Oregon Medical Association to require OMA membership before a physician could purchase OMA group medical liability insurance. The attorney general ruled that the provision was unenforceable as long as OMA was considered a "purchasing group" under the provisions of the federal liability Risk Retention Act of 1986.

* * *

REP. DONLEY

BOX 837 SOLDOTNA, ALASKA 99669 CONSULTING ENGINEERS (907) 262-4024

Mike Tauriainen, P.E.

April 26, 1988

Rep. Dave Donley, Chair
House Labor & Commerce Committee
Pouch V
Juneau, AK 99669

Subject: SB 211 - Tort Reform

Representative Donley:
Committee Members:

I am a licensed professional engineer and have been in business for over 10 years. Tort reform is essential to the economic well-being of our state. I am testifying in favor of SB 211. This legislation is a good start on correcting our tort system, and I urge you to move it out of committee (with minor modification as noted below) and pass it into law this session.

I circulated the petition on elimination of joint liability and obtained nearly 200 signatures in about a month. The response was overwhelmingly favorable.

The liability situation has become significantly more difficult since I began in business. I have watched my professional liability insurance virtually double every year, and then become unavailable when my underwriter pulled out of the Alaska market, leaving me "bare" for quite a while.

I strongly recommend an amendment to Section 9 (pg 4, line 7) AS 09.17.080(d) to delete joint liability for hazardous waste and environmental pollution. This will penalize firms working on pollution cleanup that had no part in the original pollution.

For example, an engineer involved in the abatement of an existing pollution problem, using current technology and accepted practice, could be held liable for a mess created by someone else. No professional liability insurance is currently available for hazardous waste or pollution work. Therefore joint liability really leaves us hanging out and discourages engineers from involvement in proper environmental cleanup.

I respectfully encourage passage of SB 211 with Section 9 amended to delete joint liability for hazardous waste and environmental pollution.

Sincerely,

Mike Tauriainen

Mike Tauriainen

c: Rep. Mike Navarre
Rep. John Sund

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H L+C 5-3-88 6:30p.m.