HB

166

(FILE 2)

HOUSE JUDICIARY COMMITTEE

File #2

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SECTIONAL ANALYSIS OF HB 166
March 21, 1989

The following is an overview of House Bill 166, which seeks to remedy the high cost of insurance through gutting the civil justice system. For the most part, it is an attempt to modify the comprehensive changes made in 1986 to tort law. Where appropriate, examples have been given to clarify what rights are being taken away from victims.

S E C T I O N 1

This section attempts to justify these deprivations of victims rights. The stated purpose is to more equitably distribute the cost and risk of injury, but the actual effect would be to distribute the costs and risks only to the injured victims. A second stated purpose is to make insurance more available, but nothing in this bill will reduce insurance rates. When changes were made to the tort system in 1986, it was because proponents claimed that insurance rates would go down. Rates have not substantially decreased since that time. More changes should not even be considered unless the legislature gets a written guarantee from the insurance industry that rates will decrease as a result of this proposed legislation. The stated intent of the legislature, as written in this bill, is to reduce the costs associated with the tort system without affecting the rights of injured persons to seek redress through the courts. The true effect of this bill, however, is only to take away the rights of injured persons, without any benefit to them. Section 21 seeks to gather the facts that Section 1 claims the legislature already knows.

S E C T I O N 2

This imposes a six year statute of repose. This means that no claims may be brought six years after an injury-causing product was purchased or a building completed or an action took place.

Examples: A wing falls off of a Boeing 737 six years and one day after the airline bought it. Neither the passengers nor the airline could sue Boeing for their losses. The roof on the gymnasium in Aleknagak collapses shortly after the building is six years old. The school district and the injured children cannot recover their losses against the construction contractors or building designers.

You have surgery and the doctor leaves a sponge inside of you. It does not begin to cause you problems until more than six years later, when you discover this foreign object in your

body. You will not be able to sue the doctor for this negligent act. Similarly, you hire a lawyer to draw up a document for you. Ultimately, because of errors on the lawyer's part, you end up losing a great deal of money, but not until more than six years later. You would not be able to recover your losses from the attorney.

This six year limit applies even to minors or incompetents who were previously protected under AS 09.10.140. The statute of limitations remains two years. For lawsuits not eliminated by this section, see Section 4.

S E C T I O N S 3 & 4

Section 3 eliminates most torts from the current two year statute of limitations. Section 4 reenacts a similar two year statute of limitations for claims for personal injury, death or property damage. The new provision eliminates AS 09.10.140, which currently protects minors and incompetents.

Examples: A person is injured, resulting in a coma that lasts for 18 months. If AS 09.10.140 is eliminated, the person would then have only six months in which to file a lawsuit concerning the injury. Similarly, if a two-year old child were injured, the child would lose its right to sue this wrongdoer when the child was four years old even though a four-year old cannot understand claims for injury.

S E C T I O N 5

Makes it more difficult to obtain punitive damages award. Punitive damages represent the civil justice system's way of punishing defendants for gross, wanton, or willful misconduct. Punitive damages are infrequently awarded and when they are, it is because a jury felt very strongly about the misconduct and wanted to make an example of the defendant. Punitive damages serve as a deterrent so that businesses think twice before safety is sacrificed for profit. The 1986 statute restricted punitive damages to cases where there is clear and convincing evidence to support punitive damages. Under this section the standard would be even more restrictive. Not only would the plaintiff have to show malice, bad motive, or reckless indifference on the part of the defendant, but also would have to show conscious acts showing deliberate disregard. This is similar to a specific intent in criminal law. Wrongdoers would be insulated from punitive damages in spite of their conscious decision to ignore safety.

S E C T I O N 6

In the tort bill passed by the legislature in 1986, a victim who was injured while committing a felony lost the right to seek damages. This section now proposes to take this right from someone who is injured while engaged in any misdemeanor. A misdemeanor is defined as a crime punishable by a year or less in prison.

Examples: A person is hiking in Kachemak Bay State Park and wanders upon a private cabin that is an inholding within the park. The person decides to check out the cabin, opens the door, and a spring-loaded gun goes off, killing or injuring the person. Because the person was trespassing, they have no right to seek damages because they were engaged in a crime at the time that substantially contributed to the injury. Similarly, a citizen fearful of being robbed carries a concealed handgun. Because the gun has a manufacturing defect, it discharges. The injured person could not sue the manufacturer, despite the defect.

S E C T I O N 7

This section allows that if the person responsible for causing injury was also committing a crime, then Section 6 does not apply. In other words, if you were committing a crime and were injured, and the person who injured you was also committing a crime, then you still have recourse for damages through the courts. Two wrongs do appear to make a right in this case.

S E C T I O N 8

After a trial, a judgment is entered by the court. This provision would allow a defendant who lost a trial to prevent the plaintiff from obtaining his or her judgment. Instead, there would be a second mini-trial to set up a payment schedule over time. There are many problems with this.

Such periodic payments are called structured settlements. Structured settlements are very complicated. There is a vast difference between someone paying you $100,000 cash today, or paying you $10,000 per year over the next 10 years. In addition to the difference in value, there is a great difference in security. If payment is made today, you know the debt is satisfied; if all you have is someone's promise to pay, there is no guarantee you will ever receive the money. This problem does not disappear if the defendant buys an annuity from an insurance company that promises to make the payments. Undercapitalized or poorly managed insurance companies regularly fail. They also sell annuities cheaper

than strong companies. To buy a fair structure from a strong company will cost defendants the same amount as if the plaintiff were paid cash today. Why then do defendants and liability insurers want mandatory periodic payments? To cheat injured victims of the compensation the jury found due. Future payments are worth less than cash in hand. A law that said all jury awards will be reduced by 50 percent would clearly be unfair and unconstitutional. This proposal tries to do that in a backhanded manner.

The periodic payment statute sought to be changed by this section was enacted in 1986. Some of the primary proponents were brokers who make their money by selling annuity contracts. Their main pitch was that periodic payments were good for plaintiffs. The law they proposed then, however, allowed defendants to require plaintiffs to take periodic payments. When the bill was on the Senate floor, an amendment was passed that said if it was such a good idea for the injured party, then structured settlements should only be done at the request of the injured party. This legislation again proposes allowing either party to request a structured settlement. An injured party, who is no longer going to be able to continue in the line of work performed before the injury, may want a lump-sum payment to invest in a new business that is compatible with his or her capabilities. This section would allow the wrongdoer, rather than the injured person, to make the decision. The parties would then have a mini-trial about periodic payments. This would be a huge burden on the court system.

The impact of the second sentence of this section is unclear, since attorney fees are already a present value amount and contain no provision to adjust them for future value. Thus there is nothing to reduce to present value.

S E C T I O N 9

Adds a reference to existing law about increases in future payments for anticipated inflation. It does not require that such adjustments be made. What has been created here is a system in which a plaintiff can successfully try a claim, have a structured payout foisted upon him, and not even be compensated for inflation. Additionally, appropriate rates for inflation and discounting are not exact sciences. Mini-trials would be required on these issues with both sides bringing in economists to argue the case. Judges would be required to make decisions without the economic expertise to know what will be best for the claimant in the future. The court system will be controlling the entire future of injured people. By being injured, they will have sacrificed control of their destiny to the court system and insurance industry.

S E C T I O N 1 0

Creates immunity from liability for board members and officers of public corporations, electric cooperatives and telephone cooperatives, as long as they were acting within the scope of their official duties. Reviewing this amendment discloses a glaring error in the 1986 statute. The intent of the statute is to protect board members and officers for managerial decisions. As passed in 1986, it is much broader. It covers all acts within the scope of official duties. Thus, if driving an insured vehicle while dropping off a report to another board member, one of them runs a red light and kills or maims another person, there could be no recovery from the auto insurer for the injuries or death.

S E C T I O N 1 1

Opponents of victims' rights claim the collateral source rule is unfair because it gives a windfall to the victims. This is not true. The most common collateral source is health insurance bought by the victim or his employer. But health insurance policies almost always have subrogation clauses. This means that the health insurer gets paid back when damages are recovered from the wrongdoer. Thus there is no double recovery by the victim. It would be very unfair to have the victim's recovery reduced for such collateral payments because the victim would still be obligated by contract to pay back the health insurer. The collateral source rule ensures that the wrongdoer will properly bear the financial burden of his wrongdoing. It is not fair for a wrongdoer to profit because a plaintiff happens to be protected by insurance.

Example: A wrongdoer injures a person who spent his own money for a disability policy. The wrongdoer would thus receive a windfall. The same is true if the victim received gratuitous wage payments from an employer or help from family and friends.

This section replaces the collateral benefits statute enacted in 1986. Instead of being considered at a post-trial hearing, collateral benefits would now be considered by the jury and reduce the recovery. The 1986 statute served to reduce compensation to victims, but at least allowed the judge to consider countervailing costs to the claimant such as actual costs and fees incurred in the litigation.

This section also requires the jury to be instructed about any tax implications of damage awards. The IRS does not tax injury damages because they are compensation that simply replaces what the victim lost. If your house burns down, the insurance money you collect is not taxable. Damages are

replacement of capital, not new income. The judge or jury decides the amount of the loss. Taxability or non-taxability has nothing to do with that loss. This provision seeks to confuse juries with irrelevant information so they will impose their own "tax" on that which is not legally taxable, by reducing the damages they award.

S E C T I O N 1 2

Reduces the interest rate on judgments from 10.5 to 8 percent. The prime rate is now 11.5 percent. This 8% rate is well below the market rate and will encourage insurers not to settle. Insurers will be able to make money by setting it aside and collecting higher interest on it than they have to pay out, thus they lose any incentive to settle a case.

S E C T I O N 1 3

Under the 1986 statute, interest runs from the date of written notice of a claim. This section eliminates prejudgment interest on future damages, thus again providing a disincentive for insurers to settle cases.

S E C T I O N 1 4

Implements section 15.

S E C T I O N 1 5

Caps non-economic damages in a wrongful death case at $50,000. This is particularly discriminatory to those who operate in a non-cash based society, such as rural people and homemakers. The survivors of a successful orthoscopic surgeon in Anchorage who is killed by a wrongful act stand to receive a great deal of money for the future earning potential of the victim. The survivors of a native person living in the Bush and existing in a subsistence economy with very little actual cash value, will only receive $50,000 as the value of that life. Similarly, homemakers who do not have a W-2 to show for wages earned are only worth $50,000 under this bill. This limit applies regardless of the number of survivors, thus reducing the recovery of each one. If a housewife had a husband and four children, each would get only $10,000 in spite of their huge loss.

S E C T I O N 1 6

Alaska Civil Rule 82 awards partial attorneys' fees to the party who wins a lawsuit. This section would eliminate that partial reimbursement only in claims for injury or death. This is very unfair to injured people. Insurance companies use litigation to wear people down so they will settle for less money than is due them. But injured people typically have to pay their attorneys out of the damages recovered. So an injured person never pockets all her damages. Rule 82 helps ease the burden of using an attorney to protect your rights. This proposed legislation would allow big businesses and insurance companies to get partial fees from each other, but take that right away from an injured person suing an insurance company or an oil company. It is extremely unfair.

S E C T I O N 1 7

This overrules Jackson v. Power, which was a case in which a hospital was found liable for damages caused by a doctor working in its emergency room. The hospital was liable because of duties owed to emergency room patients under state regulations, national hospital accreditation standards, and its own bylaws. This section would give the hospitals immunity, even when the health care provider is the actual agent of the hospital, not just a contract physician. Enactment of this legislation would allow hospitals to avoid liability by merely posting a notice. This does not take into consideration severely injured persons who may be unconscious on the way into the emergency room and not able to read the notice. There is no requirement that the notice be seen or understood by the patient.

S E C T I O N 1 8

Requires that medical malpractice rate information be included in the annual report to the legislature presented by the director of the Division of Insurance under AS 21.06.110.

S E C T I O N 1 9

Current law gives immunity to peace officers or emergency service patrollers who handle intoxicated persons. The purpose of this amendment is unclear. It appears to be an attempt to preclude any legal action, such as an action against the governmental body employing the individual.

S E C T I O N 2 0

This section repeals three statutes. When the $500,000 cap was instituted in 1986, an exception was made for those victims who suffer disfigurement or severe physical impairment. Repeal of AS 09.17.101(c) removes that exception.

Example: A quadriplegic or triple amputee could receive no more than $500,000 general damages.

The second statute repealed here, AS 09.17.040(c), currently makes it possible for parties to stipulate to use the rules of Beaulieau v. Elliott to compute damages. This amendment would require the parties to use an inflation/discounting procedure that is more costly, more time consuming, and ultimately reaches the same result. It will impose an unnecessary burden on the limited resources of the court system. If the parties to litigation agree to follow the simpler procedure, the state has no legitimate reason to prevent them from doing so.

The final repealer in this section eliminates AS 09.55.548, the statute that specifically controls collateral source payments in medical malpractice cases.

S E C T I O N 2 1

Requires reports to the legislature of the effects of all these changes. To a large extent, this seeks the facts that are stated in the purpose section of the bill.

S E C T I O N S 2 2 & 2 3

Clarifies that certain sections of this bill amend the Alaska Rules of Civil Procedure.

S E C T I O N 2 4

Clarifies applicability of this act.

S E C T I O N 2 5

Provides an immediate effective date.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 30, 1990

SUBJECT: Limitation of certain civil actions
CSHB 166(L&C)

TO: Representative Peter Goll
Co-Chair
House Judiciary Committee

FROM: Michael F. Ford
Legislative Counsel

You have asked if AS 09.10.055(d), as amended in sec. 3 of CSHB 166(L&C) raises an equal protection problem. As explained in this memo, I believe that this section probably violates the constitutional right to equal protection of the law contained in Article I, section 1, of the Alaska Constitution.

In 1988 the Alaska Supreme Court struck down the existing version of AS 09.10.055(a). Turner Construction Company v. Scales, 752 P.2d 467 (Alaska 1988). The court found that the statute violated the state constitutional equal protection clause, because there was no substantial relationship between the protection given to design professionals, while leaving other defendants unprotected, and the goal of encouraging construction. Section 2 of CSHB 166(L&C) is an effort to repeal and reenact this same statute, AS 09.10.055(a), in a manner that avoids this unconstitutional distinction.

Section 3 of CSHB 166(L&C) would exempt certain actions relating to transportation or storage of hazardous materials, from the 15 year limit imposed under AS 09.10.055(a) as repealed and reenacted in sec. 2 of CSHB 166(L&C). This provision has the effect of shifting liability from some defendants, to those defendants who store or transport hazardous materials. Assuming the goal of sec. 2 is to encourage construction and improvement to real property, and to avoid stale claims, then to avoid an equal protection problem there must be a rational reason for not applying the same 15

year period of limitation to those individuals who store or transport hazardous materials. It does not seem that a rational reason exists that would support an exception for defendants who transport or store hazardous materials as provided in this bill. This is the type of distiction that was struck down in Turner Construction Company.

In conclusion, sec. 3 of CSHB 166(L&C) would most likely be struck down if challenged as being in violation of the equal protection clause of the Alaska Constitution. Please contact me if you have further questions.

MFF:pl
WKP3/112

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM March 22, 1989

SUBJECT: Civil Actions - HB 166

TO: Representative Dave Donley

FROM: Michael F. Ford
Legislative Counsel

The following is a sectional analysis of HB 166 that includes comparable provisions of law from the state of California:

Section 1 - Findings and purpose.

California - No comparable provision.

Section 2 - Requires that an action for personal injury, death, or property damage be brought within six years of the date of injury, if caused by a product or by construction, or within six years of the last act alleged to be the cause of the injury. Periods of disability, such as minority, incompetency, or imprisonment do not extend the six year period. This section does not apply if the personal injury, death, or property damage was caused intentionally, or if another shorter period of limitation applies.

California - The nearest comparable provision is enclosed as attachment A. This generally prohibits an action for damages resulting from a patent defect in the design, survey, or construction of real property from being brought more than four years after substantial completion of the improvement, or if the damages result from a latent defect, an action cannot be brought more than 10 years after substantial completion of the improvement.

Section 3 - Removes actions for personal injury, death, or property damage, from the existing two year statute of limitations.

California - The comparable provision is enclosed as attachment B. This generally requires an action for personal injury, wrongful death, or other listed wrongs to be brought within one year of the accrual of the action.

Section 4 - Requires that an action for personal injury, death, or property damage be brought within two years of the time the person had the right to bring the action. The two year period is not extended for any period of disability, such as minority, incompetency, or imprisonment. The section does not apply if a shorter period of limitation is imposed.

California - See section 3 above.

Section 5 - Requires that clear and convincing evidence of malice, bad motive, or reckless indifference to the interests of another exist before punitive damages may be awarded.

California - The comparable provision is enclosed as attachment C. This generally allows punitive damages to be awarded when "oppression, fraud, or malice" exists.

Section 6 - Prohibits a person from recovering damages for personal injury or death if the injury or death occurred while the person was committing a crime and the person has been convicted of the crime. Crime includes a felony or a misdemeanor.

California - No comparable provision.

Section 7 - Provides that a person who commits a crime that results in personal injuries to that person is not prevented from recovering damages for personal injury or death, if the person liable was also engaged in the commission of a crime and has been convicted of the crime. Also defines the term "crime", to include a felony or a misdemeanor.

California - No comparable provision.

Section 8 - Requires that if a portion of a judgment is owed to an attorney under a contingent fee agreement, that portion must be reduced to a present value and paid in a lump sum, rather than as a part of periodic payments ordered by the court.

California - The comparable is enclosed as attachment D. The comparable provision applies only in medical malpractice actions. It allows either party to request periodic payment of a judgment if the award equals or exceeds $50,000.

Section 9 - Requires that the court include an amount for inflation, when ordering that future damages be paid by periodic payments.

California - See section 8 above.

Section 10 - Prohibits recovery of damages for personal injury, death, or property damage caused by an act or omission within the official duties of a member of the board of directors or an officer of a public corporation, or electric or telephone cooperative, unless the act or omission constituted gross negligence.

California - No comparable provision.

Section 11 - Allows a person to only recover damages that are in excess of compensation received from other sources, such as private or government insurance. Also requires the court or jury to be informed of the tax implications of an award of damages.

California - The comparable provision is enclosed as attachment E. It applies only in medical malpractice actions.

Section 12 - Lowers the legal rate of interest that may be awarded on judgments from 10.5% to eight percent, unless otherwise agreed by contract.

California - The comparable provision is enclosed as attachment F. It sets the legal limit of interest on judgments at 10 percent.

Section 13 - Prohibits the award of prejudgment interest for future economic or noneconomic damages.

California - No comparable provision.

Section 14 - Technical amendment.

California - The comparable wrongful death provision is enclosed as attachment G. It provides for recovery of damages for wrongful death, by heirs of the estate.

Section 15 - Prohibits an award of nonmonetary damages in excess of $50,000, in a wrongful death action.

California - No comparable provision.

Section 16 - Prohibits the court from awarding attorney fees in a civil action for personal injury, death, or property damage, unless specifically authorized by statute or by agreement of the parties.

California - The comparable provision is enclosed as attachment H. It does not allow a court to award attorney fees, unless provided for in statute, or by agreement of the parties.

Section 17 - Limits the liability of a hospital for civil damages caused by a person who is not an employee. Requires the hospital to post notice that certain individuals are not employees. Provides that the limitation does not apply to liability based on the hospital's own negligence or intentional misconduct. Adds certain definitions.

California - The nearest comparable provision is enclosed as attachment I. It establishes immunity only for a physician who renders obstetrical services in a hospital emergency room.

Section 18 - Requires the director of the division of insurance to annually report to the legislature regarding medical malpractice insurance rate changes occurring as a result of certain court decisions.

California - No comparable provision.

Section 19 - Limits the right of a person to bring an action against a peace officer or member of the emergency service patrol when taking an intoxicated person into custody, unless the act or commission was grossly negligent, reckless or intentional.

California - No comparable provision.

Section 20 - Repeals (1) a limit on recovery of noneconomic damages contained in AS 09.17.010(c),(2) an exception to the award of future damages contained in AS 09.17.040(c), and (3) a section regarding consideration of collateral benefits in a medical malpractice action contained in AS 09.55.548.

California - No comparable provision.

Section 21 - Requires the Department of Commerce and Economic Development to report to the legislature regarding the effect of certain insurance claims on the civil justice system.

California - No comparable provision.

Section 22 - Notice of amendment to the civil rules of court.

California - No comparable provision.

Section 23 - Notice of amendment to the civil rules of court.

California - No comparable provision.

Section 24 - Applicability.

California - No comparable provision.

Section 25 - Effective date.

California - No comparable provision.

MFF:gc
WKG8/058

Attachments(9)

A

Added Stats 1959 ch 1010 § 1

Cross References:

Limitation of action to recover on bank account § 337

Collateral References:

Cal Jur 2d Limitation of Actions § 85
16 Cal Practice, Action on Account Between Merchants § 289.1
McKinney's Cal Dig Limitation of Actions §§ 11, 17
1 Am Jur 2d Accounts and Accounting § 3

Annotations

What constitutes open, current account 1 ALR 1086, 19 ALR 369, 57 ALR 201
Payment by one of two or more joint or joint and several debtors as suspending or tolling limitation 74 ALR2d 1287

NOTES OF DECISIONS

This section, though not retroactive in effect, codifies pre-existing case law of California on subject. Pacific States Steel Corp. v Isaacson Iron Works (1963) 320 F2d 645

Where the record of transactions between parties was kept on ledger sheets with supporting data attached which reflected debits and credits, the ledger sheets were kept in a single folder maintained as a unit for each year, and the folders were kept in a steel filing cabinet in the company office, such a record was within the ambit of Code Civ Proc, § 337a, defining a book account. Cotterman v DeLong (1967) 251 CA2d 768, 59 Cal Rptr 803

Where there is a question as to whether certain records qualify as a book account, it makes no difference whether the account is kept in one book or several so long as they are permanent records and constitute a system of bookkeeping as distinguished from mere private memoranda. Cotterman v DeLong (1967) 251 CA2d 768, 59 Cal Rptr 803

§ 337.1. [Patent deficiency in real property improvement design, survey, construction, etc., and resulting injury to property or person: Four years]

(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

(2) Injury to property, real or personal, arising out of any such patent deficiency; or

(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought

within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.

Added Stats 1967 ch 1326 § 1

Collateral References:

Within Procedure 2d p 1111.

Cal Jur 2d Limitation of Actions §§ 33, 67.

13 Am Jur 2d Building and Construction Contracts §§ 114, 132 et seq.

§ 337.15. [Latent deficiency in design, construction, survey of real property improvement, or property injury therefrom: Ten years]

(a) No action may be brought to recover damages from any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of such development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of his performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to Section 442 in an action which has been brought within the time period set forth in subdivision (a) of this section.

the premises of a family apartment house, the trial court did not err in granting summary judgment for the contractor, where, according to information properly before the court, the infant's fall into the pool occurred more than four years after the substantial completion of the pool and at the time of the fall the pool was unfenced. As a matter of [redacted] pool was an improvement to realty, and [redacted]ence of a fence constituted a patent deficiency. There was no unresolved issue of fact precluding the granting of the contractor's motion for summary judgment on the ground that the parents' complaint was barred by limitations under Code Civ. Proc., § 337.1. Mattingly v Anthony Industries, Inc. (1980) 109 CA3d 506, 167 Cal Rptr 292.

For purpose of determining the applicability to personal injury action of the four-year limitation period of Code Civ. Proc., § 337.1, the test to determine whether a deficiency is patent is not a subjective one, applied to each individual user, but it is an objective task based on the reasonable expectations of the average consumer. Mattingly v Anthony Industries, Inc. (1980) 109 CA3d 506, 167 Cal Rptr 292.

Code Civ. Proc., § 337.1, subd. (a), is an appropriate statute of limitations to be applied to actions based on negligence, strict liability, and inactive nuisance against a swimming pool contractor to recover damages resulting from personal injury to an infant in a fall into an outdoor, inground, unfenced, family apartment house swimming pool. That statute, which provides that a personal injury action against a party who constructed an improvement to realty for an injury arising out of a patently deficient design or construction in the improvement must be brought within four years after the substantial completion of the improvement, applies to a personal injury action against the contractor of such a swimming pool even should a complaint against him state a cause of action in strict products liability. Mattingly v Anthony Industries, Inc. (1980) 109 CA3d 506, 167 Cal Rptr 292.

In an action by a window washer against the owners of an apartment building for injuries sustained while cleaning the outside of the building's windows, which had no window cleaning safety devices, after another worker by mistake removed the weights from plaintiff's ladder, causing him to fall, in which the owners cross-complained against the building's architect, the trial court properly granted summary judgment to the architect due to the four-year statute of limitations in Code Civ. Proc., § 337.1 (limiting the time for actions against architects, contractors and the like). Such statute is a mere economic regulation touching upon neither a suspect class nor a fundamental right, and did not result in a denial of equal protection of the law and was constitutional, since it promoted a recognized legitimate state interest by protecting contractors from uncertain future liability, thereby encouraging construction, such that a rational basis existed for the classification. Salinero v Pon (1981, 1st Dist) 124 Cal App 3d 120, 177 Cal Rptr 204.

In an action by a window washer against the owners of an apartment building for injuries sus-

tained while cleaning the outside of the building's windows, which had no window cleaning safety devices, after another worker by mistake removed weights from plaintiff's ladder, causing him to fall, in which the trial court granted summary judgment in favor of the building's architect on the basis of Code Civ. Proc., § 337.1 (limiting the time for actions against architects, contractors and the like), the injured worker was entitled to argue the unconstitutionality of such statute on appeal, although the architect was made a party to the action not by the complaint, but by the owners' cross-complaint, since before such motion was granted the injured worker retained the option of substituting the architect for a Doe defendant by amendment of the complaint. Thus, the trial court's ruling adversely affected his right to pursue his cause of action against the architect, given the application of res judicata or collateral estoppel principles to bar any subsequent action by the injured worker against the architect. Salinero v Pon (1981, 1st Dist) 124 Cal App 3d 120, 177 Cal Rptr 204.

In a wrongful death action by a young man whose mother died of pneumonia directly and proximately caused by the faulty performance of heating and air conditioning units in a 10-year-old building in which she was employed against the architect who designed and supervised erection of the building, the general contractor, the heating and air conditioning subcontractor, and the manufacturers of the heating and air conditioning units, the trial court erred in granting the motions of the architect, the general contractor, and the subcontractor, for judgment on the pleadings on the ground the deficiency in the building was "patent" within the meaning of Code Civ. Proc., § 337.1, which provides a four-year-after-completion-of-construction limitation period with respect to patent deficiencies allegedly caused by improvers of real property. The statute defines "patent deficiency" as one "which is apparent by reasonable inspection," and none of the defendants had been able to pinpoint the cause of the heating and cooling malfunctions and therefore could not remedy the problem. Thus the decedent, who knew only that the building was always too hot or too cold and was subject to great temperature fluctuations, could not be expected to solve the enigma of the heating-cooling dilemma, and the defect fell within the commonly accepted definitions of "latent," i.e., not "open" or "exposed," or "evident." Baker v Walker & Walker (1982, 5th Dist) 133 Cal App 3d 746, 184 Cal Rptr 245.

In a proceeding brought by the owners of a winery to compel a construction company and a firm providing design, architectural, and engineering services to arbitrate alleged roofing defects in a winery such defendants designed and constructed, the trial court properly dismissed on the basis that both the design agreement and the construction agreement expressly prohibited a demand for arbitration being made after the date of the applicable statute of limitations. The court properly applied the four-year limitation period of Code Civ. Proc., § 337.1 (limitation period for patent defects in construction of improvements to real property), rather than the ten-year limitation period of Code Civ. Proc., § 337.15 (limitation period for latent defects in construction of improvements to real property), since substantial evidence supported the court's findings that the claimed defects should have been apparent to the owners, and were in fact known to them, by virtue of the role of the owners' full-time construction quality auditor, who was retained to monitor construction of the winery roof. Renown, Inc. v Hensel Phelps Construction Co. (1984, 1st Dist) 154 Cal App 3d 413, 201 Cal Rptr 242.

The provisions of Code Civ. Proc., § 337.15 (ten-year period of limitations for latent defects in construction of improvements to real property), read together with the provisions of Code Civ. Proc., § 337 (four-year period of limitations for written obligations), enacts a two-step limitation: actions founded upon a latent defect in the development of real property must be filed within four years of discovery, but in any case within ten years of the date of substantial completion of the improvement. Thus, the ten-year period set forth in § 337.15 is not absolute, but only sets the outer limit within which suit must be brought. Renown, Inc. v Hensel Phelps Construction Co. (1984, 1st Dist) 154 Cal App 3d 413, 201 Cal Rptr 242.

The two-year statute of limitations of Code Civ. Proc., § 339, subd. (1), rather than the four-year statute of limitations of Code Civ. Proc., § 337.1, subd. (a), was applicable to plaintiff developers' cause of action against a contractor and a subcontractor arising from delay in completion of public improvements in connection with a city redevelopment project caused by alleged patent deficiencies in the improvements. Code Civ. Proc., § 339, subd. (1), applies to actions upon a contract, obligation, or liability not founded upon an instrument in writing. Although Code Civ. Proc., § 337.1, applies to actions for patent deficiencies in the construction of improvements to real property, the intent of the Legislature in enacting Code Civ. Proc., § 337.1, was to provide a cause of action for patent deficiencies existing upon substantial completion of a project. The developers admitted that they sought damages solely for delay, not for patent deficiencies which still existed upon completion of the project. Kralow Co. v Sully-Miller Contracting Co. (1985, 4th Dist) 168 Cal App 3d 1029, 214 Cal Rptr 630.

§ 337.15. [Action for latent deficiency in construction or survey of real property or injury arising out of such deficiency: Ten years]

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observa-

tion of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.

(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.

(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.

(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:

(1) The date of final inspection by the applicable public agency.

(2) The date of recordation of a valid notice of completion.

(3) The date of use or occupation of the improvement.

(4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

Amended Stats 1979 ch 571 § 1; Stats 1980 ch 676 § 63; Stats 1981 ch 88 § 1.

Amendments:

1979 Amendment: Added ", or the surety of a person," near the beginning of subd (a).

1980 Amendment: Routine Code Maintenance.

1981 Amendment: (1) Substituted "the" for "such" before "development" in the introductory clause of subd (a); (2) substituted "that person's" for "his" in subd (c); (3) substituted "the" for "such" after "deficiency in" in subd (e); and (4) added subd (g).

Witkin Procedure (3d) Actions §§ 347, 356, 391, 392, 426, 427, 428, 429, 430, 431.

43 Cal Jur 3d Limitation of Actions §§ 28, 140.

Cal Condo Handbook 2d (Hanna) § 15.19.

Ten year limitations period of Code of Civil Procedure Section 337.15 applies to breach of contract actions. CEB Civ Litig Rep (1985) Vol 7 No. 7, p 216.

Ten year statute of limitation covers latent defect based on breach of contract. CEB Real Prop L Rep (1985) Vol 8 No. 8, p 191.

Timeliness of indemnity actions against builders—a review of new decisions under California Code of Civil Procedure Section 337.15. (1981) 19 Cal Trial Lawyers J No. 1, 103.

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was properly granted judgment in an nst a county sheriff and the county overy of funds received by the sheriff an attachment and paid over to the y through error in his office, where the brought within two years after judg- entered in the cause in which the issued, as provided by Code Civ. 9, subd. 2, for actions against sheriffs arising out of official acts. Plaintiff's tion, when the sheriff refused to satisfy for the funds, was either in equity or ot in tort, and the notice of claim of the Tort Claims Act were, under the of Gov. Code, § 814, inapplicable. Na- & Casualty Ins. Co. v Pitchess (1973) 2, 110 Cal Rptr 649.

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ion for an accounting and for declara- arising out of an alleged oral partner- ent, the trial court erred in sustaining to the complaint on the ground the barred by the two-year limitation pro- ode Civ. Proc., § 339, subd 1, for "an a contract, obligation or liability not an instrument in writing." The action arily based on the contract by which allegedly began but upon the al- of the parties, the carrying on of business, and the fiduciary duties law imposes upon such parties, one of e duty to account, as provided in Corp. 5021, 15022; thus the action is governed r-year catch-all limitation provided by Proc., § 343, for "an action for relief efore provided for." Manok v Fishman CA3d 208, 107 Cal Rptr 266.

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ction in which a limited partnership ud and professional negligence on the ountants and that such wrongdoing was red until after the running of the three- provided for bringing fraud actions by Proc., § 338, subd. (4), and the two-year Code Civ. Proc., § 339, subd. (1), for l negligence actions, the trial court did refusing the partnership's instructions acy, where its pleading alleged that the ct on the part of the accountants took than four years prior to the filing of g. The governing statutes of limitation set forth for fraud and professional , and the giving of instructions on civil would have been entirely meaningless have led only to confusion of the jury. Logan & Frazer (1975) 52 CA3d 118, tr 59.

§ 339.5. [Lessee's breach of unwritten lease: Four years]

Witkin Procedure (3d) Actions §§ 342, 367.

Cal Jur 3d Landlord and Tenant § 162. Limitation of Actions §§ 30, 53.

§ 340. [Personal injury; Wrongful death; Torts; Statutory penalties; Check payment by bank; Property seizure; Good faith improvements]

Within one year:

(1) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(2) An action upon a statute for a forfeiture or penalty to the people of this state.

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

(4) An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

(5) An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land upon which the improvements have been made.

Amended Stats 1973 ch 20 § 1; Stats 1982 ch 517 § 97.

Amendments:

1973 Amendment: (1) Deleted former subd 4 which read: "An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;"; and (2) renumbered former subds 5 and 6 to be subds 4 and 5.

1982 Amendment: In addition to making changes in punctuation, (1) deleted ", or upon an undertaking in a criminal action," after "a statute" in subd (2); and (2) substituted "the good faith improver" for "he" in subd (5).

Law Revision Commission Comment:

1973 Amendment—Section 340 is amended to reflect the fact that arrest and imprisonment in a civil action is no longer permitted. See Code Civ. Proc., § 478 and Comment thereto. See also former Govt. Code, §§ 26681 et seq. (liability of sheriff for escape of person held upon civil arrest). Cf. former Code Civ. Proc., § 501 (liability of officer for escape).

1982 Amendment—Section 340 is amended to delete the reference to an undertaking in a criminal action. Undertakings of bail are no longer governed by Section 340. See People v. Burton, 146 Cal. App.2d Supp. 878, 305 P.2d 302 (1956). Other undertakings in criminal actions are governed by the same rules that apply to undertakings generally. See Section 337 (four-year statute of limitations). The other changes in Section 340 are technical.

Application of this section to action by county, against tortfeasor, for care and treatment of injured or diseased person: Gov C § 23004.1.

Witkin Procedure (3d) Actions §§ 216, 325, 328, 330, 341, 348, 355, 396, 400 et seq., 439, 458; Plead § 43; Plead § 1042; Appeal § 506.

(1985, 2d Dist) 174 Cal App 3d 111, 219 Cal Rptr 805.

Pursuant to Civ Code, § 3291, a plaintiff is not entitled to prejudgment interest as a matter of course. Rather, prejudgment interest is authorized only if the defendant fails to accept an offer to settle made pursuant to Code Civ Proc, § 998, and the judgment exceeds the amount of the offer. Entitlement to prejudgment interest is determined by the amount of the judgment as entered rather than the gross verdict. Green v Franklin (1987, 2d Dist) 190 Cal App 3d 93, 235 Cal Rptr 312.

Civ Code, § 3291, providing for recovery of prejudgment interest on a personal injury damage award when plaintiff's settlement offer is refused and plaintiffs recovers a more favorable judgment (Code Civ Proc, § 998), imposes a mandatory obligation on the trial court to award prejudgment interest where the statutory conditions are met. The ordinary meaning of "shall" supports that interpretation, and nothing in the language of Civ Code, § 3291, suggests its word "shall" should be construed as other than mandatory. The Legislature should have used the word "may" if it intended trial courts to have discretion to deny prejudgment interest. Moreover, the available legislative history leads to the conclusion the statute's language is mandatory, since the purpose of § 3291 is to guarantee the plaintiff interest and to penalize the defendant in appropriate situations. Morin v ABA Recovery Service, Inc (1987, 4th Dist) 195 Cal App 3d 200, 240 Cal Rptr 509.

§ 3294 *and following sections—general references:*

Bancroft-Whitney Judicial Council Forms Manual, Form 982.1(13).

§ 3294. [When permitted]

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

"Rendition" of a judgment within the meaning of § 974 does not include the act of giving notice thereof. Wright v Superior Court (1922) 57 CA 749, 207 P 910

Notice of rendition of justice court judgment which after title of court and cause recited that in designated justice court "judgment rendered and entered denying plaintiff his claim, and assessing cost against plaintiff," and which was signed by justice, constituted substantial compliance with statute. Brown v Superior Court (1924) 65 CA 147, 223 P 426

The filing of a notice of appeal from a justice's judgment on the day it was entered was a waiver of the right to notice under former § 893. Nay v Superior Court (1925) 72 CA 443, 237 P 566

Judgments by default were not within former § 893. Colthurst v Justice's Court (1929) 100 CA 146, 279 P 812

A motion to quash execution and modify the judgment was a waiver of the notice required by former § 893. Morgan v Superior Court (1930) 210 C 28, 290 P 569

§ 667.7. [Medical negligence actions]

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars ($50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b) (1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original

judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(4) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at

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Added Stats 2nd Ex Sess 1975 ch 1 § 26; Amended Stats 2nd Ex Sess 1975 ch 2 § 1.194, effective September 26, 1975, operative December 12, 1975.

Collateral References:

Witkin Procedure 2d Attorneys § 86A, Judgment § 31.
Cal Jur 3d Healing Arts and Institutions § 195, Judgments § 191.
Cal Digest of Official Reports 3d Series, Healing Arts and Institutions § 53.

Forms:

Suggested form is set out below, following notes of decisions.

Annotations:

Cost of future cosmetic plastic surgery as element of damages. 88 ALR3d 117.
Sufficiency of evidence to prove future medical expenses as result of injury to head or brain. 89 ALR3d 87.

NOTES OF DECISIONS

After appeal from a postjudgment order in a medical malpractice action, following a judgment for plaintiff, that the judgment be payable in installments pursuant to Code Civ. Proc., § 667.7, the trial court had the power to make an order disallowing certain items of costs, as the order affected the final verdict, which was not appealed, rather than the postjudgment order. However, the trial court did not have the power to make orders on matters related to the appeal, as they were then within the jurisdiction of the Court of Appeal. Hollaway v Scripps Memorial Hospital (1980) 111 CA3d 719, 168 Cal Rprt 782.

Upon the taking of an appeal from an order, entered after judgment for plaintiff in a medical malpractice action, providing for installment payments of the judgment pursuant to Code Civ. Proc., § 667.7, all trial court litigation had ended except the manner of payment, it was the appellate court's province to insure competent representation for plaintiff, a brain-damaged minor, while the matter was pending there, and the trial court had no jurisdiction to make orders suspending plaintiff's guardians ad litem and attorney. Hollaway v Scripps Memorial Hospital (1980) 111 CA3d 719, 168 Cal Rptr 782.

SUGGESTED FORM

Judgment Authorizing Periodic Payments of Prospective Damages in Medical Malpractice Action

[Title of Court and Cause]

The above-entitled cause came on for hearing before this court on __1_____, 19__2__, __3_____ [with a jury]. __4_____ appeared as attorney for __5_____, and __6_____ appeared as attorney for __7_____. Oral and documentary evidence was duly presented and the jury was properly instructed following arguments by counsel.

The jury awarded judgment in favor of plaintiff and against defendant as hereinafter set forth:

__8_____ *[Specify damages to date of trial].*

__9_____ *[Specify prospective damages].*

A request was made by __10_____ [plaintiff *or* defendant] that the award of prospective damages be made in the form of periodic payments of $__11__ per __12_____ [month *or as the case may be]* until such judgment is satisfied.

It is therefore ordered that the judgment for prospective damages in the sum total of $__13__ be made to __14_____ in __15__ *[number]* installments of $__16__, on the __17__ of each __18_____ [month *or as the case may be],* __19_____ [beginning on __20_____, 19__21__, *or* within __22_____ (30) days after the judgment becomes final].

of her securities at the time she was advised by defendants to change her portfolio plus the amount such securities would have earned had she kept them, less the value of securities and cash returned to her by defendants, where defendants breached their fiduciary duty in advising plaintiff to switch into unsuitable investments and engage in excessive transactions, so that she was entitled to recover for all detriment suffered (Civ Code, § 3333), where the evidence supported an inference that plaintiff's losses were due to mismanagement rather than market fluctuation, and where defendants offered no evidence as to what the experience would have been with a theoretical properly-managed account. Twomey v Mitchum, Jones & Templeton, Inc. (1968) 262 CA2d 690, 69 Cal Rptr 222

Compensatory damages are designed to compensate plaintiff for harm resulting from defendant's wrongful conduct; and though it was error to instruct that compensatory damages are designed to compensate plaintiff for any wrong suffered by him as a result of defendant's wrongful conduct, the jury could not have been misled or confused by the inadvertent use of the word "wrong" for the word "harm." Fletcher v Western Nat. Life Ins. Co. (1970) 10 CA3d 376, 89 Cal Rptr 78

§ 3333.1. [Collateral benefits in medical malpractice actions]

(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

(c) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Sectio.. 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of

services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Added Stats 2nd Ex Sess 1975 ch 1 § 24.5; Amended Stats 2nd Ex Sess 1975 ch 2 § 1.19, effective December 12, 1975; Stats 1976 ch 1079 § 4.

Amendments:

1976 Amendment: The amendment made no change.

Collateral References:

Witkin Summary (8th ed) Torts § 516B.

39 Cal Jur 3d Insurance Contracts and Coverage § 510.

Cal Digest of Official Reports 3d Series, Damages § 13, Healing Arts and Institutions § 53, Public Aid and Welfare § 31.

Proof of Facts:

Medical malpractice—negligence in postoperative care of patient. 26 Am Jur Proof of Facts 2d 183.

Law Review Articles:

Psychiatric malpractice. 11 Bev Hills BJ 43.

Annotations:

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 ALR4th 589.

NOTES OF DECISIONS

In a medical malpractice action, the trial court erred in instructing the jury that, in determining the amount of any award it might make to plaintiff, it could take into consideration the extent to which payment for medical, hospital, and nursing care had already been made by insurance benefits. Though Civ. Code, § 3333.1, which abrogates the collateral source rule in actions against health care providers based on professional negligence, was in effect at the time of trial, it became effective after the alleged negligence took place and after the complaint was filed. The statute contains no explicit language making it retroactive, and its legislative history indicates that the Legislature intended that it should apply only prospectively. Bolen v Woo (1979) 96 CA3d 944, 158 Cal Rptr 454.

The trial court properly denied the motion of a health insurer to intervene in a personal injury action by one of its subscribers against doctors, a hospital, and manufacturers, suppliers and operators of respiratory equipment, even though the insurer's contract provided for a lien and reimbursement with respect to benefits provided for tort caused injuries, and the subscriber had separately agreed to make a good faith effort to recover the costs of benefits in the pending action. A cause of action in tort is not "property" within the meaning of CCP § 387, subd (b), which makes intervention a matter of right for persons claiming an interest relating to the property or transaction which is the subject of the action, when disposition of the action may impede or impair that interest, and the "transaction" that was the subject of the action was the alleged tortious injury to the subscriber, in which the insurer could have no interest. Since the insurer was not a party to the action, it was not bound by an order of the trial court purporting to foreclose its claim to proceeds of a settlement between the subscriber and one of the defendants, and could pursue its claim in a separate action. California Physicians' Service v Superior Court (1980) 102 CA3d 91, 162 Cal Rptr 266.

The imposition of a Medi-Cal lien (Welf. & Inst. Code, § 14124.70 et seq.) by the Department of Health Services in a medical malpractice action was not prohibited by Civ. Code, § 3333.1, providing that the defendant in an action for personal injury against a health care provider based upon professional negligence may elect to introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to certain specified acts, insurance, contracts or agreements, and that no source of such collateral benefits may recover any amount against the plaintiff nor be subrogated to the rights of the plaintiff against a defendant. Payments to a recipient under the Medi-Cal program are not encompassed in Civ. Code, § 3333.1, and particularly such payments are not included within the specified payments made "pursuant to the United States Social

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CHAPTER 5

Interest and Costs

Cross References:

Service of notice of entry of judgment based on sister state judgment, recovery of fee: § 1710.30.

Collateral References:

Witkin Procedure (2d) Enforcement of Judgment § 240A
Am Jur 2d Costs §§ 52 et seq., Interest and Usury §§ 34 et seq.

§ 685.010. [Rate of interest on judgment]

(a) Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied.

(b) The Legislature reserves the right to change the rate of interest provided in subdivision (a) at any time to a rate of less than 10 percent per annum, regardless of the date of entry of the judgment or the date any obligation upon which the judgment is based was incurred. A change in the rate of interest may be made applicable only to the interest that accrues after the operative date of the statute that changes the rate.

Added Stats 1982 ch 1364 § 2, operative July 1, 1983.

Legislative Committee Comment:

Section 685.010 supersedes former Section 685.010 (as enacted by 1982 Cal. Stats. ch. 150). Subdivision (a) continues subdivision (a) of former Section 685.010 which set the legal rate of interest on judgments at 10 percent as permitted by Section 1 of Article 15 of the California Constitution. Subdivision (b), which supersedes subdivision (b) of former Section 685.010, states the reserved power of

njury, the damages recoverable
robate Code.

rongful act or neglect may be
ongful death of any such child,
[redacted]solidated therewith for trial

paragraphs, (2) amended the fifth paragraph
her", (3) added "or her" wherever it appears

9, 552, Parties § 48, Wrongful Death § 3

l Practice Rev § 24.7

y for physical and emotional damages (1981)

Proof of Facts 2d 393

ory negligence of parents in action for injury

tort committed against child's mother before

ed by parent's negligence—modern cases 6

ALR4th 52

g action for his death. 26 ALR4th 1264

st yields on various bonds since 1920, and
published by the United States Savings and
Loans showing interest rates on savings
ce 1929, and where the expert took
account the need for reasonable security of
ment over the period of the boy's life. Niles
Rafael (1974) 42 CA3d 230, 116 Cal Rptr

sum of $1,299,637 in damages allocated for
lant care to an 11-year-old boy permanently
yzed from the neck down was not excessive
o an increase rate of 5½ percent being used
lculating the total cost; anticipated future
ases of medical costs may be presented to the
and expert testimony was substantial evi-
e supporting the award relating to the future
of attendant care, in the absence of any
ory evidence presented by defendants. Niles v
Rafael (1974) 42 CA3d 230, 116 Cal Rptr

neral damages in the sum of $1,604,371
ded to an 11-year-old boy permanently para-
from the neck down were not excessive
considering that the boy's mental and emo-
l capacities were intact while his body was
s, which situation was predicted by life ex-
ncy to continue for 59 years from the time of
and where the boy had suffered dire grief
nxiety—unhappy feelings that would perhaps
again and again. Niles v San Rafael (1974)
A3d 230, 116 Cal Rptr 733.

34. Appeal and Error

Defendants in a personal injury action did not have standing to contest the amount of attorney's fees awarded to a minor plaintiff's attorney, even if the amount of the attorney's fees were decreased, defendants would not have to pay less, and a party not aggrieved by an order or judgment has no standing to attack the order or judgment on appeal. Niles v San Rafael (1974) 42 CA3d 230, 116 Cal Rptr 733.

SUGGESTED FORM

Complaint by Parents for Injuries to Child

[Title of Court and Cause]

Plaintiffs allege:

1. Plaintiffs, [1], and [2], were and now are husband and wife, and the mother and father, respectively, of [3], a minor, aged [4] years, born on [5], 19[6].

2. Defendant, [7], is a resident of the County of [8], State of California.

3. On or about [9], 19[10], the defendant [11] *[insert appropriate facts]*, thereby causing serious injuries to [12], the minor child of plaintiffs.

4. As a direct and proximate result of the negligent acts of the defendant, [13], the minor child of the plaintiffs sustained serious injuries, consisting of [14] *[insert description]*.

5. As a direct and proximate result of the negligent acts of the defendant, the plaintiffs have been deprived of the care, society, companionship, maintenance and support of [15], the minor child of [16] and [17], plaintiffs herein.

Wherefore, plaintiffs pray:

1. For damages in the sum of $[18];

2. For costs of suit incurred herein; and

3. For such other and further relief as to the court seems proper.

[Signature]

Dated [19], 19[20].

[Verification]

§ 377. [Wrongful death]

(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

(b) For the purposes of subdivision (a), "heirs" [redacted]y the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code,

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid, and

(3) Minors, whether or not qualified under paragraphs (1) or (2), if, at the time of the decedent's death, they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for one-half or more of their support.

Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provision of law.

Amended Stats 1975 ch 334 § 1, ch 1241 § 5.5, Stats 1977 ch 792 § 1, Stats 1983 ch 842 § 12, operative January 1, 1985

Amendments:

1975 Amendment (Ch 334): (1) Designated the former section to be subd (a), (2) deleted (a) "not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother," after "person" the first time it appears, (b) ", and his dependent parents, if any, who are not heirs," after "heirs" the first time it appears, (c) "and dependent parents" after "heirs" in the fourth sentence; and (2) added subd (b).

1975 Amendment (Ch 1241): Added "or her" after "his" wherever it appears.

1977 Amendment: (1) Deleted "and" after "Probate Code," in subd (b)(1); (2) added ", and" after "valid" in subd (b)(2); and (3) added subd (b)(3).

1983 Amendment: Substituted "Part 2 (commencing with Section 6400) of Division 6" for "Division 2 (commencing with Section 200)" in subd (b)(1).

Note—Stats 1975 ch 334 also provides: § 2. It is the intent of the Legislature that the amendments to Section 377 of the Code of Civil Procedure made by Section 1 of this act eliminate the additional requirements imposed by law, in the form of specified survivors, for the maintenance of a wrongful death action for the death of a minor and include the putative spouse, children of the putative spouse, stepchildren, and parents within the class of persons who may maintain an action for wrongful death if they were dependent on the decedent. It is the further intent of the Legislature that the amendment to Section 377 of the Code of Civil Procedure made by Section 1 of this act including dependent stepchildren within the class of persons who may maintain an action for wrongful death alter the rule of law enunciated in the decision of the California Supreme Court in Steed v Imperial Air Lines (1974) 12 Cal 3d 115.

Law Revision Commission Comment:

1983 Revision—Section 377 is amended to revise the reference to the intestate succession provisions of the Probate Code in view of the recodification of those provisions as Part 2 of Division 6 of the Probate Code.

Authority to recover exemplary damages: CC § 3294.

Witkin Evidence (3d) §§ 677, 1196.

Witkin Procedure (3d) Actions §§ 421, 490; Plead §§ 125, 174, 182, 299, 1164; PWT § 145; Trial § 324.

Witkin Summary (8th ed) pp 2314, 2315, 3083, 3084, 3085, 3180.

Cal Jur 3d Actions §§ 63, 135, 139, Aliens' Rights § 10, Boats and Boating § 39, Decedents Estates § 1004, Evidence §§ 239, 456, 462, 547, Limitation of Actions § 130, Parties § 48, Ships and Shipping §§ 97, 154, Statutes § 26, Wrongful Death §§ 2 et seq., 40, 50, 60, 62, 69, 70.

Modern Cal Discovery (4th ed) § 12.19.

Cal Family Law Service §§ 7:14, 40:6 et seq.

Calif Trial Handbook 2d (BW,1987) 25.36.

Bancroft-Whitney Judicial Council Forms Manual, Form 982.1(1).

13 Am Jur Proof of Facts 2d 45 (proof of economic damages resulting from death of person in labor force).

Loss of consortium in
8 Am Jur Trials p 30
20 Am Jur Trials pp
Choice of measure of
Stepchild's right to su
Nonstatutory wrongfu
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Mothers as plaintiffs i
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The wrongful death a
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57 ALR3d 1289.
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of Civil Procedure. 2

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guardian," in the first and second sentences of
(d)" in subd (c); (3) substituted "subdivision (c)"
uted "subdivision (d)" for "subsection (d) hereof"

ervator in subdivisions (a) and (b)
for prepaid rental listing service license. B & P C

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tats 1909 ch 640 § 1 and repealed by Stats 1969 ch

eferences:
his section: § 1293.2.

Within Procedure (3d) Judgm § 84, Appeal § 673.

Cal Jur 3d Family Law § 723.

Cal Digest of Official Reports 3d Series, Costs.

Bancroft-Whitney Judicial Council Forms Manual, Form EJ-130.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial. 29 ALR4th 160.

Pro se litigant as entitled to award of attorneys' fees for value of his own services rendered in lawsuit under Freedom of Information Act (5 USCS § 552). 56 ALR Fed 573.

When may federal court decline to award to prevailing party attorneys' fees authorized by contract. 56 ALR Fed 871.

Award of attorneys' fees in private action brought to enforce provisions of Interstate Commerce Act regulating motor carriers. 57 ALR Fed 552.

Right of claimant's attorney to fee award under § 28(a) of Longshoremen's and Harbor Workers' Compensation Act (33 USCS § 928(a)) for unsuccessful work before Benefits Review Board, where decision of Board is reversed on appeal. 57 ALR Fed 876.

§ 1021. [Compensation of attorneys; Costs to parties]

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Amended Stats 1986 ch 377 § 2.

Amendments:

1986 Amendment: Substituted "their costs" for "costs and disbursements" near the end of the section.

Attorney's fees in actions against nonadmitted foreign insurers: Ins C § 1619.

Within Procedure (3d) Attys § 129; Judgm §§ 107, 127, 128, 131.

Within Summary (8th ed) p 3168.

Cal Jur 3d Damages § 102, Mandamus and Prohibition § 52; Cal Jur 3d (Rev) Costs § 98.

Calif Trial Handbook 2d (BW,1987) 24:34.

Cal Practice Rev Ch 52 Costs and Attorneys' Fees.

Cal Forms—27A:23.

Fed Proc, L Ed, Judgments and Orders §§ 51:82 et seq.

Bancroft-Whitney Judicial Council Forms Manual, Forms MC-010, MC-011.

19 Am Jur Proof of Facts 2d p 335 (interference with attorney-client relationship).

Contingent fee compensation for attorney discharged without cause. 9 Cal Western LR 355.

Limiting the wrongfully discharged attorney's recovery to quantum meruit. 24 Hast LJ 771.

Mass contracts: Lawful fraud in California. 48 SCLR 1.

Enforcing the Coastal Act—Citizens' suits and attorneys' fees (1974). 49 St BJ 236.

Alexander, Consumers' rights in the legal market place: Problems of contingency fee clients who change attorneys. (1979) 54 St BJ 314.

Commercial bad faith in California: Attorney fees—Not tort liability—is the remedy for "stonewalling" (denial of liability without a reasonable basis for defense). (1987) 21 USF LR 419.

Attorney fees as recoverable costs. 63 ABAJ 510.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

Right of party who is attorney and appears for himself to award of attorney's fees against opposing party as element of costs. 78 ALR3d 1119.

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case. 88 ALR3d 246.

Allowance of counsel fees in taxpayer's action in state court. 89 ALR3d 690.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause. 92 ALR3d 690.

A staff physician of a hospital, who treats another doctor's patient at the hospital in response to a medical emergency, is protected by the Good Samaritan laws, Bus. & Prof. Code, § 2395 (providing that a physician who renders emergency care at the scene of an emergency is not liable for any damages as a result of any acts or omissions in rendering the emergency care), and Bus. & Prof. Code, § 2396 (providing that no physician who renders emergency care to a person for a medical complication arising from prior care by another person on the request of the other person is liable for any damages as a result of any acts or omissions in rendering such emergency medical care). The heart of the application of the Good Samaritan statutes is the inquiry whether a duty of professional care preexisted the emergency. Hence, a medical emergency arising from a child's birth occurring while a pediatrician was in the hospital, who then treated the child on the obstetrician's emergency request, created no duty to the child. Burciaga v St. John's Hospital (1986, 2d Dist) 187 Cal App 3d 710, 232 Cal Rptr 75.

Bus. & Prof. Code, §§ 2395, 2396, providing that a physician who renders emergency care at the scene of an emergency is not liable for any civil damages as a result of any acts or omissions in rendering the emergency care, and a physician who renders emergency medical care on the request of another person for medical complication arising from prior care by that person is not liable for any damages, apply to emergencies both within and without a hospital, and declare no restriction concerning the site of the emergency. Burciaga v St. John's Hospital (1986, 2d Dist) 187 Cal App 3d 710, 232 Cal Rptr 75.

Bus. & Prof. Code, §§ 2395, 2396, providing that no physician who renders emergency care at the scene of an emergency or upon the request of another for medical complication arising from prior care by another will be liable for any civil damages as a result of any acts or omissions in rendering such emergency medical care, do not limit immunity to only those physicians treating patients outside the physician's specialty. Burciaga v St. John's Hospital (1986, 2d Dist) 187 Cal App 3d 710, 232 Cal Rptr 75.

§ 2395.5. Immunity for "on-call" physicians for emergency obstetrical services

(a) A licensee who serves on an on-call basis to a hospital emergency room, who in good faith renders emergency obstetrical services to a person while serving on-call, shall not be liable for any civil damages as a result of any negligent act or omission by the licensee in rendering the emergency obstetrical services. The immunity granted by this section shall not apply to acts or omissions constituting gross negligence, recklessness, or willful misconduct.

(b) The protections of subdivision (a) shall not apply to the licensee in any of the following cases:

(1) Consideration in any form was provided to the licensee for serving, or the licensee was required to serve, on an on-call basis to the hospital emergency room. In either event, the protections of subdivision (a) shall not apply unless the hospital expressly, in writing, accepts liability for the licensee's negligent acts or omissions.

(2) The licensee had provided prior medical diagnosis or treatment to the same patient for a condition having a bearing on or relevance to the treatment of the obstetrical condition which required emergency services.

(3) Before rendering emergency obstetrical services, the licensee had a contractual obligation or agreement with the patient, another licensee, or a third-party payer on the patient's behalf to provide obstetrical care for the patient, or the licensee had a reasonable expectation of payment for the emergency services provided to the patient.

(c) Except as provided in subdivision (b), nothing in this section shall be construed to affect or modify the liability of the hospital for ordinary or gross negligence.

Added Stats 1988 ch 1306 sec 1.

Note—Stats 1988 ch 1306 sec 2 provides:

SEC. 2. The Legislature finds and declares that there is a crucial need for the people of this state to receive knowledgeable and experienced emergency medical care. The Legislature further finds that physicians who serve on an "on-call" basis to hospital emergency rooms are regularly required to provide

IMPACTS OF U.S. TORT SYSTEM CHANGES

1) Letter: 11/08/1989, To: David Rogers From: James Jordan

2) Report: Assessing the Effects of Tort Reform

3) Report: The Frequency and Severity of Medical Malpractice Claims

4) Letter: 08/05/1988 To: Mary Pierce From: Allan Kaufman, enclosure

5) Report: The Impact of Tort Changes on Insurance Rates

6) Report: State Responses to the Malpractice Insurance Crisis of the 1970s, Frank Sloan

ANTI-TRUST SUIT STATUS

1) Letter: 11/21/1989 To: Sam Cotten From: Richard Monkman

2) Letter: 10/16/1989 To: David Rogers From: Thomas Slagle, enclosure

3) Memo: Decision and Order

CLAIMS INFORMATION PROFESSIONAL

1) Liability Survey

2) Letter: 11/28/1989 From: Mary Pierce

3) Letter: 11/17/1989 to: Sam Cotten From: Janet Sloan Johnson

4) NICA Financial Database Sortfile

Claims Evaluations 3/28/1988

1) Evaluation Criteria and Report Format

2) Summary

3) Resume of Joyce Wainscott

4) Comments on Computer Database/Coding Addendum 1

5) Addendum 2

6) Addendum 3

7) Letter: 08/31/1989 To: Mary Pierce From: Jetta Whittaker

8) Letter: To: Jetta Whittaker From: Mary Pierce

9) Medical Indemnity Corporation of Alaska Reports and Studies

10) Letter: 04/19/1989 To: Mary Pierce From: Mary VandeCastle

11) Letter: 05/03/1989 To: MaryAnn VandeCastle From: Art Stanford

12) Letter: 04/27/1989 To: MaryAnn VandeCastle From: Janet Sloan Johnston

13) Letter: 11/21/1989 To: Mary Pierce From: Penne Chmielewski

14) Letter: 11/03/1989 To: Sam Cotten From: Douglas Smith

15) Liability Survey

16) Letter: 11/22/1989 To: David Rogers From: Ron Neupauer

17) Listing of Alaska Claims

18) Letter: 10/02/1989 To: Douglas Smith From: Ron Neupauer

19) Letter: 11/20/1989 To: David Rogers From: Patrick Hughes

20) Letter: 01/08/1989 To: David Rogers From: F. C. Ives

21) Alaska Professional Liability Loss and Premiums

22) Closed Professional Liability Claims for Alaska

23) Letter: 11/03/1989 To: David Rogers From: Bonnie Henkel

24) State of Alaska - Liability Survey

25) Letter: 11/02/1989 To: David Rogers From: Gary Bonham

26) Letter: 01/08/1990 To: Sam Cotten From: Thomas Porterfield, Jr.

27) Letter: 01/23/1986 From: Larry Laughman

American Institute of Architects

1) Survey

2) Letter: 07/29/1985 From: Larry Laughman

3) Questionnaire

4) Letter: 05/08/1985 To: Alaska Professional Design Council
From: Bernard Engals

5) Letter: 11/13/1989 To: David Rogers From: Lawrence Monin

Claims Information - Self Insured

1) Letter: 11/07/1989 To: David Rogers From: Brad Thompson

2) Letter: 12/28/1989 To: David Rogers From: Brad Thompson

3) Claims Made Analysis

4) Division of Risk Management

5) Letter: 10/30/1989 To: David Rogers From: Harry Sjoberg

6) Loss Experience Comparison

7) Letter: 10/30/1989 To. David Rogers From: H. P. Cutter

8) Letter: 11/01/1989 To: H. P. Cutter From: David Rogers

9) Letter: 11/17/1989 To: David Rogers From: Brian Rogers

10) Risk Management

11) State of Alaska Liability Survey

12) Letter: 11/17/1989 To: David Rogers From: Tom Bibeau

13) Liability Survey

14) Loss Summary

15) Letter: 11/28/1989 To: David Rogers From: Edward Zeine

16) Letter: 04/04/1989 From: Mr. Stanford

17) Resolution 89-24

18) Letter: 11/17/1989 To: David Rogers From: Gary Gandy

19) Ordinance #595

20) Letter: 11/19/1986 To: Judith Stevens From: Gary Gandy

21) MICA Meeting 01/15/1987

AVAILABILITY OF SERVICES

1) Memo: 10/17/1989 To: David Rogers From: Harlan Knudson

2) Letter: 01/11/1990 To: David Rogers From: Ward Hurlburt

3) Survey of Availability of Obstetric Care for Low-Income Women

4) Letter: 11/28/1989 To: David Rogers From: David Hoffman

5) Report: Our Greatest Natural Resource - 01/1988

6) Report: The Best of Care - 09/1988

7) Notes: Board of Nursing

8) Is There a Nurse in the House? - Christine Klein

9) Nursing Shortage - Barbara Bathony

10) Letter: 10/19/1989 To: David Rogers From: Debra Gravo

11) Letter: 01/08/1990 From: Seth Adams

12) Memo: 05/30/1989 From: Terrence Brooks, enclosures

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1) Letter: 11/08/1989 To: David Rogers From: James Jordan

2) Division of Insurance - Overview of Justification

3) Initiative #2 Survey

4) Market Availability Information

5) Example of Rate and Form Filing Activity

6) Rate Filing Compilation

7) Initiative Petition

8) Letter: 12/10/1989 To: David Rogers From: Gina McBride

9) Profile Alaska Market Medical Malpractice Insurance

10) Letter: 01/18/1990 To: David Rogers From: Harlan Knudson

11) Letter: 01/07/1990 To: David Rogers From: Ray Schalow, enclosures

12) Letter: 01/08/1990 To: David Rogers From: Keith Brown, enclosures

13) Letter: 01/09/1990 To: David Rogers From: Richard Ritter

14) Memo: 11/01/1989 To: David Rogers From: Richard Ritter

15) Letter: 01/20/1990 To: David Rogers From: Richard Ritter, enclosures

16) Fax: 11/14/1989 To: David Rogers From: Richard Ritter, enclosures

17) Letter: 01/12/1990 To: David Rogers From: Gail McGuill

18) Fax: 01/13/1990 To: David Rogers From: Frank Thomas-Mears

19) Letter: 01/13/1990 To: David Rogers From: Frank Thomas-Mears

PEER REVIEW PANEL RESULTS, ETC.

1) Letter: 10/24/1989 To: David Rogers From: William Cotton

2) Civil Rules 72-74

3) Alaska Rules of Court, Rules 7-9

4) Letter: 11/15/1989 To: David Rogers From: William Cotton

5) Letter: 11/17/1989 To: David Rogers From: William Cotton, enclosures

CHANGES IN INSURANCE SERVICES

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1) Suggested Legislative Agenda for 1987 by: National Insurance Consumer Organization

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1) Report: Trends in Tort Litigation, 1987

2) Report: Costs and Compensation; Paid in Tort 1986 Litigation

3) Report: Contingent Fees for Personal Injury Litigation - 1980

4) Report: Medical Malpractice Liability Study - 1989

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1) Establishment of Alternative to Traditional Litigation

2) Letter: 01/02/1989 To: Governor Cowper From: Mary Pierce

3) Comparison of Medical Liability Reforms By: AWA, AMA, and FIAA

4) Physician Insurer

Model Alternative Medical Liability Determination Act

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1) Board of Overseers

2) Reforming the Civil Litigation Process

3) Characteristics of State-Court Annexed Arbitration Programs

4) Comprehensive State ADR Program Database

5) State Programs by Case Type

6) Memo: 03/15/1989 To: Sam Cotten From: Patricia Young

7) Court Annexed Arbitration in Hawaii

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9) Executive Summary

10) Court-Annexed Arbitration Program - 01/1989

11) Court-Ordered Arbitration in North Carolina

12) Study Results

13) Summary

14) Memo: 11/07/1988 From: Patricia Young

15) Code of Virginia

16) Memo: 02/14/1989 From: Patricia Young

ROLES AND MECHANISMS OF STATE AGENCIES

1) Overview of Functions: Division of Insurance

2) Letter: 01/17/1989 To: John Andrews From: Donald Hitchcock

3) Functions of Division of Risk Management

4) Division of Occupational Licensing - FY 89 Performance Report

MISCELLANEOUS

1) Report: Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance - May 1986

2) Report: Tort Cost Trends

3) Report: Claim File Data Analysis

4) Report: Tort Reform: Past, Present, Future

5) Report: Medical Malpractice and Tort System - Peter Jacobson

6) Alaska Supreme Court System

7) Report: Their Rules, Effects and Costs to the General Public - A. L. Tamagni, Sr.

LEGISLATIVE RESEARCH AGENCY REPORTS

1) Memo: 06/17/1985 To: Senator Bennett From: Carol Berryhill, enclosures

2) Memo: 03/13/1989 To: Rep. Goll From: Hayden Kayden, enclosures

3) Memo: 04/18/1989 To: Rep. Goll From: Hayden Kayden

4) Memo: 03/13/1989 From: Karen Oakley, enclosures

5) Memo: 06/06/1988 To: Rep. Boyer From: Ed Flanagan, enclosures

6) Memo: 06/06/1988 To: Senator Jones From: Becky Penrose

7) Memo: 12/16/1987 To: Rep. Boyer From: Karen Oakley, enclosures

8) Colorado Chapter

9) Minnesota Chapter 604

10) North Dakota Judicial Remedies

11) South Dakota Non-Profit Corporation Members

12) State of New Jersey Assembly No. 2398

13) Memo: 05/28/1987 To: Rep. Swackhammer From: Gretchen Keiser, enclosures

14) Report: Workmen's Compensation Committee

15) Memo: 01/30/1987 To: Rep. Sund From: Penelope Weyrauch, enclosures

16) Memo: 11/06/1985 To: Rep. Koponen From: Mark Torgerson, enclosures

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1) Annual Report

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2) Memo: 09/17/1985 To: Sen. Bennett From: Carol Berryhill, enclosures

3) Memo: 04/24/1985 To: Sen. Zharoff From: Elizabeth Hickerson

4) Memo: 03/28/1985 From: Rob Nauheim, enclosure

5) Memo: 03/01/1985 To: Sen. Zharoff From: Rob Nauheim, enclosures

6) Memo: 04/03/1985 To: Rep. Szymanski From: Jonathan Sherwood, enclosures

SELF-REGULATION MATERIALS

1) Alaska Statutes

2) Professional Regulations

3) Letter: 12/22/1989 To: David Rogers From: Gary Dodson

4) FY 89 Stat. Information

5) Memo: 01/22/1990 To: David Rogers From: Linda Gohl

6) Annual Report Board of Registration

7) Procedures Manual

8) Circular of Information No. 189-90

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1) Alaska Statutes

2) Professional Regulations

3) Health and Safety

4) Letter: 10/16/1989 To: David Rogers From: Pam Ventgen, enclosures

5) Letter: 12/21/1989 To: David Rogers From: Pam Ventgen

6) Letter: 10/16/1989 To: David Rogers From: Pam Ventgen

7) Letter: 01/16/1990 To: David Rogers From: Pam Ventgen

8) Alaska State Medical Board Report

9) Addendum A

10) Addendum B

11) Addendum C

12) Avoiding Liabilities for In-Office Laboratories

13) Avoiding Medical Record Decencies

14) How to Report Possible Claim

15) Preventing Patient Injuries

16) Preventing Medication Related Malpractice Claims

17) Report: Risk Prevention

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1) Alaska Statutes

2) Letter: 10/29/1989 To: Sam Cotten From: Jerry Feldman, enclosures

3) Letter: 10/05/1989 To: Justice Matthews From: Stephen VanGoor, enclosures

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4) Fax: 01/16/1990 To: David Rogers From: Frank Thomas-Mears

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1) Memo 10/13/1989 To: James Jordan From: Don Koch

2) Memo 09/01/1989 To: Paul Roller From: Don Koch

3) Memo: 11/07/1989 To: James Jordan From: Stan Carlington

4) Letter: 11/06/1989 To: Sam Cotten From: Thomas Porterfield

5) Alaska Rate Structure for Design Professionals, Landscape Architects, and Land Surveyors

6) Letter: 01/19/1990 To: Julie Krafft From: Thomas Porterfield

7) How Your Professional Liability Insurance Premium is Determined - James Farber

8) Letter: 08/15/1988 To: Paul Roller From: Judith Ann Rudy

9) Filing Memo

10) Design Professionals Liability Continental Casualty Co.

11) Professional Liability Coverages and Premium Schedules

12) Fax: 01/17/1990 To: David Rogers From: Art Stanford

13) Proposed Gross Tail Premiums

14) Letter: 01/19/1987 To: Gary Gandy From: David Fraizer

15) Letter: 11/13/1989 To: David Rogers From: Art Stanford

16) Uninsured Hospital Staff Physician Deductible Endorsement

17) Hospital Rates

18) Letter: 12/21/1989 To: Rep. Donley From: Mary Pierce

19) Underwriting Practices and Procedures

20) Letter: 10/16/1989 To: David Rogers From: Ron Neupauer

21) 1989 Coverage Classification and Premium Schedule

22) Fax: 01/16/1990 To: David Rogers From: Ron Neupauer

23) Letter: 04/13/1989 To: Paul Roller From: Ron Neupauer

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1) Report April 1989

2) Letter: 05/10/1989 To: Stan Garlington From: Thomas Hermes

3) Letter: 04/07/1989 To: Ron Neupauer From: Thomas Hermes, enclosures

4) Letter: 04/1988 From: Paul Roller, enclosures

5) Letter: 04/01/1988 To: John George From: Judith Ann Rudy

6) Fax: 01/18/1990 To: David Rogers From: Ray Conger

7) Letter: 01/06/1989 To: Paul Roller From: Michael O'Mally

The North River Insurance Company

1) Flexible Rating Sheet

2) Letter: 08/17/1983 To: Kenneth Moore From: Judi h Ann Rudy, enclosure

3) Letter: 01/03/1986 To: John George From: Judith Ann Rudy

4) Filing Approval Procedures

5) Letter: 10/29/1987 To: John George From: Judith Ann Rudy

6) Letter: 08/18/1987 From: John George

COMPARISONS OF U. S. TORT SYSTEM CHANGES

1) Notes: Tort Reform Enacted in Other States

2) Controlling Liability Insurance Costs

3) Abolition of Modification of Collateral Source Doctrine

4) Establishment of Prejudgment Interest Accrual Principle

5) Penalties for Filing Frivolous Suits

6) Establishment of Immunity for Government Employees and Officials

7) Modification of Dram Shop Laws

8) Modified Statute of Limitations

9) Limitations on Attorney Contingency Fees

10) Tort Liability - Insurance

11) Tort Liability - Litigation

12) U.S. Tort Reform 1989

13) Statute of Limitations

14) Legislative Summary

15) Legislative Report for 101st Congress

16) Battle for Medical Malpractice Tort

17) Letter: 05/02/1989 To: Rep. Donley From: Elizabeth Kerttula, enclosure

Special Attachment - Pre-Judgment Interest

1) Report: Jury Awards and Prejudgment Interest in Tort Cases

CHANGES IN TIME IN LAW OF LIABILITY AND DAMAGES

1) Report: Liability Perspectives and Policy

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House Liability Task Force
March 2, 1990
By: David Rogers, Special Counsel

DRAFT

SUMMARY OF DATA HIGHLIGHTS

Discussion Draft

I. AVAILABILITY AND AFFORDABILITY OF INSURANCE.

A. Availability has improved. Based on information received by the Task Force to date from the Division of Insurance and various professional liability carriers, there appear to be no significant availability problems for most professionals with certain limited exceptions. According to the Alaska Independent Insurance Agents and Broker's Association, Inc. there are some availability problems for non-professional categories like day care centers, liquor liability, small specialty and general contractors, pollution and any small business that requires liability coverage only.

B. Generally, rates appear to have stabilized within the last year or so although costs are still perceived as prohibitive and/or unreasonable for some categories, most notably testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate developer combinations, computer programers and certain physician categories including but not limited to OB/GYN. Many experts tell us that this is a cyclical business and anticipate another round of availability/affordability problems in the future.

C. Affordability is relative; the greater percentage of income represented by insurance premiums, the greater the concern. It is interesting to note that nationwide medical malpractice premiums were 6.2% of physician's gross income in 1986; the national average for Architects and Engineers is 4.2% - it is estimated that in Alaska the average is 7%. We have no comparable information for lawyers.

II. PERCENTAGE OF UNINSURED.

A. Based on information provided by the Alaska State Medical Association the total percentage of uninsured physicians in Alaska is 24% in cities, 12% in towns and 56% in the Bush. The study further indicates that OB/GYN (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. A more recent survey by the Medical Association of Family Practice and OB/GYN practitioners

indicates that 15% are uninsured (based on a response rate of over 50%); a majority of these in urban areas. The differences between these numbers may be explained by the fact that the latter survey takes into account doctors who are insured by group programs although additional information and analysis is required.

B. Only four out of 21 hospitals surveyed by MICA are uninsured/self-insured.

C. Only 2% of Dentists are uninsured.

D. There are no current and reliable Alaska statistics for lawyers, nurses, architects and engineers; although nationally it is estimated that 49% of Architectural firms do not carry liability insurance; for engineers, 42% of 1-5 person firms, 17% of 6-10 person firms and 15% of 11-25 person firms are "bare".

E. We simply do not know the answer to the question of how many professionals are uninsured (or limiting their practices, getting out of the business altogether or significantly limiting coverage) because of the cost of insurance; or for strategic and/or philosophical reasons which have nothing to do with premium expenses. A survey conducted by the various professional organizations is the best way to clarify this issue along with the related question of how many other professionals are uninsured.

III. AVAILABILITY OF SERVICES.

A. There are a variety of service gaps that we have been able to identify including: significant doctor availability problems in several communities particularly relating to obstetrical and pre-natal care, day care service needs, certain legal services gaps (worker's compensation cases, medical malpractice, low and middle income legal services), nursing shortages, and the need for travel funds to transport rural residents to urban areas for diagnosis and treatment. It is interesting to note that according to the most recent Alaska State Medical Association survey, 32% of doctors who used to practice obstetrics don't anymore, primarily due to the cost of insurance. Also note that many feel there is a crying need for a comprehensive medical insurance program which covers those many unfortunate folks who "slip through the cracks" for a variety of reasons including lack of health insurance and inability to obtain relief through the civil justice system.

B. With the exception of physicians (and possibly Day Care providers), the cost or availability of liability insurance does not appear to be a major contributing factor to these service gaps.

IV. PEER REVIEW PANEL RESULTS AND RELATED STATISTICS.

A. There is little useful information readily available from the Court System regarding peer review panel results, the frequency and severity of liability actions, the length of time it takes to process an average case and/or the costs of litigation to the court system or the parties. However, we do know that between January 1, 1987 and July 1, 1989, 177 malpractice cases have been filed in Alaska State Courts: 90 Medical Mal.; 56 Legal Mal.; and 31 "Other". And information provided by the Alaska State Medical Association suggests that as of December 22, 1989 there have been 338 medical malpractice claims processed through the peer review panel program since the current system was established in the 1970's, an average of 26 claims per year with no particular upward trends indicated. Of approximately 178 claims reviewed, the expert advisory panel sided with the defendant 138 times and with the plaintiff 40 times.

B. This information gap appears to be common throughout the United States and consistently has been identified as a problem in attempting to understand and resolve issues relating to reform of the civil justice system.

V. RESULTS AND AMOUNT OF SELF-REGULATION.

A. Based on information provided to date, it is difficult to tell if a relatively small number of professionals (repeat offenders) cause a relatively large percentage of complaints and/or disciplinary actions. Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of the total number of professionals. Please note that only Physicians, Nurses and Dentists have mandatory continuing education requirements. Lawyers have an extensive optional program.

B. Comprehensive risk management programs (including peer review, quality assurance and education) by regulators, professional associations and insurance carriers appear to be the modern trend.

C. In response to a specific Task Force question, Alaska was ranked #2 per capita in the nation in Doctor Discipline for 1987 by the Public Citizen Health Research Group (a Ralph Nader organization); up from 19 in 1986.

VI. STATE AND FEDERAL LEGISLATIVE ACTIVITY.

A. Most states have adopted "tort reform" legislation in one form or another over the years including, for example, measures relating to limits on recovery (e.g. caps), statutes of limitation and repose, modification of joint and several liability, periodic payments of awards, reduction of compensation by collateral sources and limits on attorney

contingency fees. The constitutionality of many of these measures has been challenged in state and federal courts; some upheld, some not for a variety of reasons. The most comprehensive reforms have been enacted in Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, Florida, Illinois and California.

B. During the 1980's, legislative activity on these issues peaked in 1986 when 36 state legislatures passed tort reform laws. In 1989, only seven legislatures enacted such laws, altnough many measures were pending. The focus of state activity appears to have shifted to regulation of the insurance industry and auto insurance matters, including "Proposition 103" and "no fault" proposals.

C. At the Federal level, Congress is most concerned with products liability issues and changes to the McCarran-Fergusan Act which, among other things, provides limited anti-trust immunity to insurers.

VII. ALTERNATIVE PROPOSALS.

A. There are a variety of alternative systems in place or under consideration which may provide some relief; although most commentators agree that more analysis is required. These include: 1) court annexed mandatory arbitration programs (with "de novo" appeal rights) for cases which fall within certain limits and other administrative arbitration and/or adjudication proposals including pre-trial peer review screening panels and voluntary, binding arbitration mechanisms; 2) "No-fault" alternatives like the Virginia Birth-Related Neurological Injury Compensation Act which establishes a fund financed by voluntary payments from physicians and hospitals to cover actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees. A similar program is operated in Florida which also allows recovery of up to $100,000 in non-economic damages. Also note that Governor Cowper has proposed a general medical malpractice "no-fault" system and Alaska currently has arbitration and peer review systems applicable to medical malpractice, court ordered arbitration procedures for small claims (need more information on this) and recognizes certain contractual arbitration agreements; and 3) a variety of other proposals including use of direct "first party" insurance and state subsidization of certain insurance premiums for qualified applicants (see, for example, HB 449 and 450 by Donley and Gruenberg).

B. Reviewers of the Hawaii and other court annexed arbitration programs have found that they seem to achieve their goals of reducing litigation costs, increasing pace and maintaining the satisfaction of participants. A Rand

Study ("Reforming the Civil Justice System, How Court Arbitration May Help" by Deborah Hensler) indicates similar attitudes about the California and Pennsylvania programs.

VIII. THE RAND THREE-LEVEL STUDY.

A. This study, "Trends in Tort Litigation - The Story Behind the Statistics" by Deborah R. Hensler, Mary E. Viana, James Kakalik, and Mark A. Peterson, attempts to settle three highly controversial issues which dominate discussions about the need to reform our civil justice system: How much litigation is there? Are jury awards stable? How much does litigation cost and who gets the money?

B. The authors tell us that one of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics - 1) the world of routine personal injury torts, exemplified by auto suits. These occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world; 2) the world of high stakes personal injury suits such as products liability, malpractice and business torts. Here the litigation is newer, the law increasingly uncertain; and 3) the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases lead many to view them as problematic.

C. What is the story behind the statistics? The author's found that: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes -inflation adjusted - have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Please note that an article in the New York Times just brought to my attention suggests that these trends may be altering based on a recent study by two Cornell Law School professors which concludes that published opinions since the mid-1980's "have moved toward benefiting defendants over plaintiffs".

D. In response to a specific Task Force question about "who gets what" the authors tell us that: for auto cases 19% of

total litigation dollars go to the defendant's lawyers for legal fees and expenses, 26% are for plaintiffs legal fees and expenses, with 52% left for the plaintiff; Non-Auto- 30%, 24% and 43% respectively; Asbestos, etc.- 37%,, 26% and 37%. We have a few Alaska specific numbers on this question. For example, MICA tells us that on the average they spend approximately 18 cents on the dollar in defending claims; although this number varies depending on whether there is formal legal action, whether there is a plaintiff recovery and other factors.

IX. IMPACTS OF U.S TORT SYSTEM CHANGES- FREQUENCY, SEVERITY AND RATES.

A. While malpractice claim severity has risen roughly twice as fast as the Consumer Price Index, Patricia Danzon in a study prepared for the Rand Corporation ("Frequency and Severity of Malpractice Claims-New Evidence") tells us that certain tort reforms - particularly caps on awards, periodic payment of future damage provisions and shorter statutes of limitation/repose - appear to reduce the frequency and severity of medical malpractice claims as compared to what would have happened if the law had not been enacted. This conclusion is more or less confirmed in other studies contained in our information packet including the recent National Academy of Sciences Study (which acknowledges a "modest" reduction in medical malpractice claim frequency and severity), the 1988 Winston/Litan anthology by the Brookings Institution and the 1989 study done for the Maine Legislature by the Public Health Resource Group, Inc. (but there is disagreement over the significance of this impact).

B. However, there appears to be no definitive evidence that any reduction in claim frequency and severity effects the cost or availability of insurance; although the experience in California suggests that certain tort reform measures may at least contribute to stability (in the context of doctor owned insurance companies at any rate); and Danzon argues that certain reforms that reduce the uncertainty in estimating malpractice claim costs "may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses" (although she also mentions other factors such as litigation expenses and "changes in the timing of disbursement of loss reserves, and hence investment income").

C. The jury is still out on this one. More time may tell.

X. ALASKA CLAIMS EXPERIENCE- PRELIMINARY FINDINGS.

A) Professionals: Based on information obtained to date it appears that: 1) most medical malpractice claims/recoveries are under $150,000; 2) there are few "jumbo" recoveries (over $1 million), and none reported over $3 million

(through 1988) but payments on these claims typically represent a large percentage of total losses for a given year; 3) punitive damages are rarely, if ever, awarded; 4) most claims are settled before trial, many settled without formal legal action; 5) less than half of MICA claims resulted in a payment to the claimant; and 6) MICA's defense costs, on average, are about 18 cents for every dollar, but this number varies depending on a number of factors.

B) Self-Insured/Uninsured Entities: Based on the results of a survey of several major public and private entities obtained to date, it appears that: 1) the majority of claims/recoveries are between 0 and $50,000, claims against public entities tend to be larger; 2) most are settled prior to formal legal action; 3) there are occasional large payouts (mostly State claims) which typically represent a large percentage of total losses for a given year; and 4) defense costs do not appear to be significant but this observation requires additional information and analysis.

XI. WHAT SHOULD THE LEGISLATURE DO?

A. The four primary commentators relied on (Rand, Brookings, National Academy of Sciences and the Maine Legislative Study by the Public Health Resource Group, Inc.) agree that sweeping alternatives to the existing system are intriguing but require more study. It is less clear how they feel about partial alternatives like the Hawaii arbitration program.

B. In the meantime, Winston/Litan et al. support "fault based" rules of liability and argue that in terms of reducing uncertainty and eliminating inappropriate levels of compensation under a "fault based" system there is a strong case for limiting non-economic damages in tort cases but only in a way that takes into account the age of the injured party and the severity of the injury. In the same report, Patricia Danzon also argues for more restrictive statutes of limitation and provisions requiring periodic payment of future damages. The authors oppose stiffer regulation of insurance rates and support greater solvency regulation by state regulators.

C. On the other hand, the Maine group concludes that new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability pending more information that should be available within the next two years. If reforms are pursued they further suggest they be designed to expire after a period of time if the price of insurance and availability of essential medical services do not improve by some measure satisfactory to the legislature. In any event, the report cautions that you cannot just target one set of issues. Instead, Legislatures should develop a carefully balanced mix of changes to the tort, regulatory (for example, they

suggest requiring rate changes to be spread over time and requiring insurer's to demonstrate effective cost control programs) and medical care delivery systems (they suggest investigations of multi-claim physicians, greater efforts to diffuse potential complaints, information collection requirements and, possibly, adoption of "care standards") based on a considered understanding of what will be gained and what will be lost.

D. The National Academy of Sciences, which focuses on the issue of medical liability and obstetrical care, takes a different tack. On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking - the report concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to the traditional tort system for resolving medical malpractice claims and towards implementing these alternatives in certain circumstances.

E. Other commentators on the issues before us, like Robert Hunter, advocate various forms of insurance regulatory reform; risk management and disclosure requirements; certain tort reforms like limiting attorney's fees for both sides (although he focuses on defense fees), penalties for frivolous actions and settlement incentives; and increased use of alternative systems except in defective products and similar cases which Hunter feels should be subject to common law principles without damage limits as a necessary deterrence measure.

Finally, you may want to keep in mind the words of Gustave H. Shubert, Director of the Institute for Civil Justice of the Rand Corporation, who observed in 1986: "I think underlying all our problems with the civil justice system is the inability of this country to decide whether it wants to have a pure compensatory system or whether it wants to have a fault based liability system. We can't decide whether everybody should be compensated for every injury no matter what its cause, or whether we want compensation to be limited in a strict way, in a comparative way, or in a contributory way to those who have caused the injury. My personal assessment is that we are experiencing the disadvantages of trying to operate both systems in tandem, the worst of both worlds. We are attempting to compensate everyone with a fault-based system and we are incurring huge social overhead costs by attempting to do so. I believe it is time to focus on that overall choice and to be rational in doing so".

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MEMORANDUM

DRAFT

TO: Liability Task Force

FROM: David Rogers

DATE: February 22, 1990

RE: Summary of Data; Almost everything you ever wanted to know about liability issues (and were afraid to ask??)

Here is a general summary by category of the highlights contained in my last packet along with occasional editorial commentary as appropriate:

1. RATES: Still working on it.

2. AVAILABILITY/AFFORDABILITY OF INSURANCE: According to the information compiled by the Division of Insurance the market for professional liability insurance is "soft". Their specific findings based on a survey of major brokers placing professional liability are:

* The situation is improving which is to be expected in a soft market;

* Prices are coming down;

* Coverage is generally available but sometimes at high premium or with restrictive conditions. Non-availability appears to occur with home inspection services and any small unseasoned professional;

* Some insurers are now writing as part of a package policy;

* Policies are usually "claims made" with defense within limits and adjustment cost included in any applicable deductible;

* Pollution usually has a $25,000 deductible;

* Costs are perceived to be prohibitive for testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate/developer combinations and computer programers. They cited the following examples:

Lloyds- testing lab-$1/2 million coverage $50,000 premium last year; $1 million coverage $25,000 this year.

CNA- mechanical engineer doing some electrical and survey-$3 million in billings-$1 million coverage, $25,000 deductible, $129,000 premium.

* Only Allstate was identified during their survey as providing unlimited Civil Rule 82 coverage on its personal lines coverage. Demand is not there although markets could be found.

The Alaska Independent Insurance Agents and Brokers, Inc. also looked at availability/affordability of other lines of liability insurance based on a survey of members from all areas of the state. They concluded that the following categories have both availability and affordability problems: Day Care Centers, Liquor Liability, Small Specialty and General Contractors, Pollution, and any small business that requires liability coverage only (no supporting property or auto).

These findings are more or less confirmed by responses to our professional liability claims survey discussed below, informal conversations with representatives of insurance companies and in letters contained in this section from representatives of various professional organizations and regulators. Generally, there does not appear to be an availability problem for most professionals. Affordability, as Keith Brown points out, is relative. Note that Dan Rowley estimates that insurance premiums for Alaska Architectural and Engineering firms are approximately 7% of annual gross billings, as compared to the national average of 4.2%; according to the Medical Malpractice Liability Study prepared for the Maine Legislature (see discussion below) nationwide medical malpractice premiums were 6.2% of physicians gross practice income in 1986. I have no comparable statistics for Alaska. Also note that according to Mr. Rowley seven out of eleven carriers nationally have a maximum limit of $1 million; six of those carriers don't do business in Alaska. Finally, note that in addition to the groups identified by the Division of Insurance rates for certain physicians are very high as we will see in more detail below.

3. PERCENTAGE OF UNINSURED: a) Physicians: Based on information provided by the Alaska State Medical Association the total percentage of uninsured is 24% in cities, 12% in towns and 56% in the bush. According to my notes, the study further indicates that OB (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. The

results of a recent detailed questionnaire sent out to over 600 doctors gives us a different picture. Based on responses from over 50% of those surveyed, 15% of the Family Practice and OB/GYN physicians are uninsured in Alaska. Apparently, this figure takes into account a variety of group insurance programs not reflected in the other information provided by the State Medical Association. The results also suggest that a majority of uninsured Family Practice and OB/GYN's are located in Anchorage and other urban areas. Please note that MICA insures approximately 50% of Alaska insured physicians, MIEC approximately 30% and CNA approximately 10% through group practices that meet CNA criteria; b) Hospitals: Based on a recent survey of 23 hospitals by MICA four (Kodiak Island, Central Peninsula Hospital, Cordova Community and Petersburg General) are uninsured/self-insured. The others are either insured through MICA (most), affiliations with a national chain or the Federal government. MICA also insures twelve health related health care facilities, many of which are "rural" including a skilled nursing facility, clinics, intermediate care facilities and home health services; c)Lawyers: Information on lawyers is based on a survey conducted several years ago when availability was limited and prices had skyrocketed; although market circumstances have changed for the better since then according to Keith Brown, former Chairman of the Alaska Bas Association's Professional Liability Insurance Committee. If I am reading the results correctly, at that time, 275 firms were covered by liability insurance, 120 were not; d) Architects, Engineers, Land Surveyors: There is no statistical information available for Alaska, although nationally 49% of architectural firms do not carry professional liability insurance - 42% of 1-5 person, 17% of 6-10 person and 15 percent of 11-25 person engineering firms are "bare". Rich Ritter of the Alaska Chapter of the American Institute of Architects estimates that 70% of the architect and engineering firms he does business with in Alaska carry professional liability insurance; although he is aware of one major Anchorage firm recently going bare apparently due to the high cost of insurance. Nurses: No numbers are available. Note that Gail McGuill of Occupational Licensing tells us that while nurses typically are covered by their employers' policy increasing numbers are purchasing their own policies to protect themselves further; Dentists: According to Frank Thomas-Mears, writing on behalf of the Alaska Dental Society, approximately 2% of Alaska dentists are uninsured. We have no information for CPA's or other professionals at this time.

We don't have an answer to the question of how many professionals are going bare (or limiting their practices, reducing coverage or getting out of the business altogether) because they can't afford the premiums; or who do not carry insurance for philosophical or logistical reasons. A survey conducted by each professional organization is the best way

to clarify this issue along with the related question of how many professionals are in fact uninsured.

4. AVAILABILITY OF SERVICES: The information contained in this section is limited. What follows is a discussion of some of the service gaps in Alaska that I have been able to identify and comments on whether these gaps are attributable to the affordability or availability of liability insurance: a) Health Care: There are a number of communities in the state (mostly rural) that are having difficulties recruiting and retaining physicians. According to the Health Association of Alaska and the Alaska State Medical Association Haines, Tok, Ketchikan, Dillingham, Wrangell and Petersburg (and possibly Craig) are having doctor availability problems along with other communities with specialized care gaps. In addition, according to a 1988 survey of availability of obstetric care for low income women, fewer than half of the physicians surveyed (93% of the 196 family practice and OB/GYN physicians surveyed responded) are now providing obstetric care; "within two years only slightly more than a third of the surveyed physicians may be offering obstetric services in Alaska." In the more recent survey of Family Practice and OB/GYN physicians discussed above 32% of doctors formerly providing obstetrical services have stopped performing this service primarily due to the cost of liability insurance.

Many others also attribute this situation to the cost of liability insurance and other health care cost factors. For example the Report of the Governor's Interim Commission on Health Care (September 1988) states that rural providers, especially those providing obstetrical care, have been particularly hard hit by the increase in medical liability insurance: "The cost of medical liability insurance has created a particularly severe problem for pregnant women in rural areas. Non-Native residents of Glenallen, Dillingham, Bethel, and some other communities have lost access to local obstetrical and prenatal care because local providers are either unable or unwilling to pay for the expensive premiums" (at page 57). The report contends that medical liability insurance premiums had more than doubled between 1985 and 1988. See also the comments of Harlan Knudson of the Health Association of Alaska.

For native rural residents the problem, according to Dr. Ward Hurlburt of the Public Health Service, is particularly one of finding money to fund travel costs for diagnostic and treatment services in the larger cities :" As we discussed, as health professionals, we could point to many places in our program where, with added funding, we could do a better job. If I were to select one area, however, to point to where I could see a need related to medical services for rural Alaskans, I would identify the lack of funding for travel...At this time...we are basically paying only for

emergency travel. If the State were wanting to identify an area for potential positive impact on the provision of Native services for rural Alaskans, I would suggest consideration of the development of a mechanism for supporting travel costs." The Department of Community and Regional Affairs tells us that this position was echoed in a Resolution passed in November by the North and Northwest Alaska Mayors Conference which proposed an insurance progr m which will cover both transportation to Anchorage or Fairbanks and services provided by non-Indian Health service facilities in these towns.

There also appears to be a nursing shortage in Alaska. According to Gail McGuill of the state Division of Occupational Licensing : "It has recently been more severe than the cyclical shortage in rural communities and in certain specialty areas of practice. Almost all acute care and long term care facilities in the state have had to utilize "traveling nurses", nurses retained through agencies for short term periods of employment...Of the four main issues discussed in this letter, I view the nursing shortage and the problems it has caused for the health care industry in our state to be the most crucial one. Although, a concentrated effort of agencies in Alaska working together to remedy the shortage has not occurred, individual agencies and organizations have been attempting to alleviate the problem with the resources available to them." There are many cited reasons for this situation including poor pay and benefits, lack of hospital administration support, limited opportunities to further professional education, inadequate staffing, state laws that limit nursing practice, lack of access to child care facilities, insufficient in service education and lack of competent support personnel. The cost (or availability) of liability insurance does not appear to be a significant contributing factor.

b) Legal Services: We have no Alaska specific information. However, from my experience over the years and in talking to others in the profession I can identify several service gaps worth noting - representation of claimants in state and federal workmen's compensation matters; certain medical malpractice claims; low income legal services that cannot be provided by Alaska Legal Services and/or the Alaska Pro Bono program; and general legal services for middle income people who don't qualify for assistance but can't afford standard legal rates for a variety of basic legal services for personal and family matters; a problem I've seen in my own practice many times which may be growing due to the increasing need for some legal services in our society. These gaps do not appear to be due to high liability insurance premiums.

c) Engineering/Architectural/etc Services: We have no Alaska specific information on this but according to Rich Ritter

of the Alaska Chapter of the American Institute of Architects there is no apparent availability problem despite the fact that over 50% of Alaska Architects, Engineers and Land Surveyors have left the state in recent years. He feels that "there is still a core group of experienced professionals remaining in Alaska available to provide professional services". It is not clear how much of the attrition is due to the cost of liability insurance versus the dramatic recent economic slump.

d) Dentists: Frank Thomas-Mears tells us that Dental services in rural areas are not impacted by affordability and availability of insurance since a majority of dental practitioners are employed by the Public Health Service and protected under the Federal Tort Claims Act. Of those private practice dentists which either contract with the PHS or native corporations most are insured.

d) Day Care: The only other significant service gap that I have been able to identify to date (other than the need for a comprehensive health insurance program to take care of people who "slip through the cracks" under our current system, a subject which is being addressed elsewhere; and sewer and water system and similar service needs which are well beyond the scope of our duties) concerns Day Care Facilities. According to the report of the Governor's Interim Commission on Children and Youth parents "often have difficulty finding child care that meets their needs and matches their resources." This is particularly a problem for parents who work rotating shifts, nights or weekends, parents with infants and parents with school age kids who need before and after school supervision: "Too few programs offer flexible hours, overnight care and flexible staffing to ensure safe care for children. Not enough family child care homes exist to accommodate the needs of parents who work a non-traditional or normal schedule. The result is a near crisis in urban and rural Alaska." Recent changes to Federal welfare laws (the Federal Family Support Act of 1988) will exacerbate this problem. It is estimated that the welfare reform work and training requirements will result in the need for day care space for an additional 2400 children statewide.

And child care is expensive. According to the Governor's Interim Commission a recent survey of 600 American families indicates that 40% pf their respondents felt they cannot afford their current child care arrangement or the arrangement they would prefer. They add that evidence indicates Alaskans would agree. In March 1987 infant care ranged from $321 to $521 per month, pre-school care from $301 to $450 per month, school age child care from $132 to $215 per month and care for children with special needs from $600 to $1,200 per month. The report adds that high quality care may be even more expensive.

A variety of solutions are under discussion including a plan proposed by Virginia Johnson, Dean of the School of Education at the University of Alaska Anchorage, called the Middle School Day Care Center, which would locate day care centers at the six middle schools in the Anchorage area with the curriculum being developed by the Director of the Day Care Centers.

It is difficult to determine if the cost of liability insurance contributes to the day care service gap. It is my understanding based on several informal conversations with people familiar with these issues that affordability and availability is less of an issue at the present time, even for new facilities. It is interesting to note that current policies exclude liability for molestation/abuse related circumstances and, in some cases, require adult/child ratios that exceed state standards.

5. CLAIMS EXPERIENCE - Preliminary Findings:

a. Professionals: We requested claims experience data from all of the major admitted professional carriers. However, only information received from MICA and MIEC, the major medical liability carriers is useful. Generally, the information provided indicates that: 1) most medical malpractice claims/recoveries in Alaska fall within the 0-$150,000 category (MICA tells us that the average claim is $48,731; average claim where indemnity is paid is $124,353; 2) there are few "jumbo" recoveries (over $1 million), and none reported over $3 million (through 1988), but payments on these claims typically represent a large percentage of total payouts for a given year (MIEC tells us that nationally about 3% of claims account for over 70% of loss costs; these numbers appear to be consistent with their Alaska experience); 3) Punitive damages are rarely, if ever, awarded; 4) most claims are settled prior to trial; many are settled without legal action; 5) for MICA at least, less than one-half of claims filed result in a payment to the claimant; 6) on the average, MICA defense costs are approximately 18 cents per dollar; this number varies depending whether the claim was settled without litigation whether there was a payment to the claimant and other factors; and 5) it is hard to predict which doctor will cause the big claims, although MIEC tells us that the highly, trained well regarded physicians often get the "jumbo" cases.

b.Self-insured/Uninsured entities: We have surveyed a wide variety of public and private "self-insured" entities. Results received from the State of Alaska, the University of Alaska, the Municipality of Anchorage, the Anchorage School District, the City of Fairbanks, the North Star Borough, the North Star Borough School District, the City and Borough of

Juneau, NANA Regional Corporation, Inc., Nabors Alaska Petroleum Services, Phillips Petroleum Company, the Carr-Gottsten Corporation, Petersburg General Hospital and Cordova Community Hospital indicates that: 1) the majority of claims are between 0 and $50,000, public entities report more claim acitivity than private entities; 2) most are settled, often prior to formal legal action; 3) there are occasional large claim payouts (mostly the State of Alaska;) which typically represent a large percentage of total losses in a given year; 4) defense costs do not appear to be significant but this information requires further analysis. Please note that NANA has made two specific suggestions of issues that should be looked at by the Task Force which are contained in their letter to David Rogers dated January 31, 1990 attached.

6. ROLES AND MECHANISMS OF STATE AGENCIES: The information provided is self-explanatory. However, please note that the Division of Insurance has four primary functions: a) Market Conduct Surveillance (review and approve as appropriate all rate and form filings and perform market conduct examinations on insurance companies or producer licensees to ensure that the consumer is treated fairly in the marketplace);b) Licensing (to license qualified individuals and insurance companies to market insurance in Alaska); c)Financial Surveillance (primarily to ensure solvency - i.e. that the company has sufficient reserves to protect policy holders and pay their claims - and to determine if investments meet statutory requirements and if reinsurance agreements comply with Alaska law); and d) Consumer Complaint and Investigation (to investigate and resolve individual consumer complaints that are filed with the Division. Statistical data that is collected by this section is utilized by the market section as a means to identify licensees or trade practices that warrant further examination.

7. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: This lawsuit was filed by 19 states against four major American primary insurance companies and a variety of reinsurance companies alleging anti-trust violations in the form of a pattern of collusion. According to the Attorney General's Office, the allegations are that leading primary insurance companies and reinsurers conspired to withdraw casualty and pollution coverage from the United States market; and that defendants coerced others to take actions which prevented other potential competitors from offering these types of coverage resulting in consumers paying more premium for less coverage than ever before. Tom Slagle of the American Insurance Organization adds that the primary thrust of the lawsuit was that various entities conspired to eliminate the occurrence policy for a claims made policy. In October of 1989, Federal District Court Judge Schwarzer granted defendants' motions to dismiss and entered final judgment

against the states. The states have appealed this decision to the Ninth Circuit Court of Appeals; a decision is expected next fall. According to the Attorney General's Office, Alaska has actively participated in this case (against the advice of advice of industry representatives according to Slagle) and intends to continue.

8. PEER REVIEW PANEL RESULTS: With the exception of information concerning the number of professional malpractice cases filed in Alaska state courts between January 1, 1987 and July 1, 1989 (177: 90 medical mal.; 56 legal mal,; 31 other), there is no official information available from the court system on peer review panel matters or other issues relating to frequency and severity of claims/judgments; although within the last year or so the court system has started to keep track of how long a case takes from start to finish. The data contained on the last page of this section regarding peer review panel results since 1977 was developed by the Alaska State Medical Association. While incomplete, it does indicate that there is no apparent upward trend in cases processed through expert advisory panels (an average of 26 per year) and defendants are not always vindicated. Of 178 cases evaluated, the panels sided with the defendant 138 times and with the plaintiff 40 times. You may also want to refer to information prepared by Al Tamagni Sr. of Pension Services Ltd. regarding pending civil cases in Anchorage Superior Court.

9. RESULTS AND AMOUNT OF SELF-REGULATION: Given the large amount of information contained in this section, I will only attempt to set out several general observations about the subject:

a) With the exception of lawyers, all target professionals (doctors, architects, engineers, land surveyors, dentists and nurses) are regulated by the Division of Occupational Licensing within the Department of Commerce and Economic Development through various regulatory Boards. Lawyers are governed by the Alaska Bar Association (and its Board of Governors) created by statute as an "instrumentality of the State". All groups also have independent professional organizations (e.g. The Alaska Dental Society, the Alaska State Medical Association,The Alaska State Nurses Association, The Alaska Chapter of the American Institute of Architects, the Juneau Bar Association, etc.)

b) All target groups are subject to a variety of admission and licensing requirements, grievance procedures, and disciplinary sanctions for improper conduct; along with certain peer review procedures, sometimes required as a condition of membership in their respective professional associations. Note that lawyers are subject to rules promulgated by the Alaska Supreme Court.

c) Only Physicians, Nurses and Dentists have mandatory continuing education requirements. For example, physicians are required to complete at least 17 continuing medical education hours per year to retain a medical license provided through hospitals, the Alaska State Medical Association, local medical societies and physician specialty associations. Lawyers have an extensive optional continuing legal education program. Architects, Engineers and Land Surveyors apparently have no continuing legal education requirements or voluntary programs.

d) Based on information gathered to date, it is difficult to determine if, in fact, a relatively small number of professionals cause a relatively large percentage of complaints/disciplinary actions but some statistics included in this section suggest that is the case. The Alaska Bar Association tells us that since 1982 there were 1505 complaints against 710 attorneys. 57% of the attorneys had only one complaint against them which accounted for 27% of the complaint volume. 18% of the attorneys had two complaints against them which accounted for 17% of the complaint volume. The remaining 25% of the attorneys had three or more complaints against them and were responsible for 56% of the complaint volume. However, additional information provided on disciplinary actions taken against lawyers suggests that there are repeat offenders but they do not dominate the statistics except in the disbarment and probation categories.

Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of total professionals in several of the target groups. Please note that according to the Alaska Bar Association, there has been a marked increase in informal requests for ethics opinions from Bar Counsel which suggests that lawyers are attempting to practice preventative medicine, so to speak.

e) All target groups are subject to specific statutory or regulatory provisions regarding unprofessional conduct. In addition, Physicians apparently follow the American Medical Association "Principles of Medical Ethics", as a condition of membership in the Alaska State Medical Association; Nurses apparently follow the Code of Ethics of the American Nurses Association; Lawyers are subject to a Code of Professional Responsibility promulgated by the Alaska Supreme Court; Dentists who belong to the Alaska Dental Society (2/3 of all Alaska dentists) agree to adhere to a Dental Code of Ethics (along with agreeing to be subject to peer review and mediation procedures); same with Architects, Engineers and Land Surveyors who each have separate codes adherence to which is a condition of membership to their respective professional organizations.

f) As to a specific task force question concerning Alaska physician disciplinary actions compared to other states, the information provided by the Public Citizen Health Research Group ranks Alaska #2 (per capita) in Doctor discipline for 1987; up from 19 in 1986 (Pam Ventgen tells us that in 1981 there was 1 disciplinary action; 0 in 1982; 4 in 1983; 2 in 1984; 1 in 1985; 2 in 1986; 5 in 1987; 5 in 1988 and 7 in 1989. She also points out that HB 70, passed in 1987 provided for a full time investigator and an executive secretary for the medical board which may help explain these numbers) The recommendations contained in this report are also worth noting: Increase license fees to $500 per year and use all money to finance doctor disciplinary actions; Require periodic re-certification of doctors based on written exams and audits of doctor performance such as medical record review; Grant subpoena power to state licensing boards to go after evidence necessary to evaluate doctors; Grant state boards emergency powers to suspend a doctor's license to practice, pending investigation, when continued practice is considered to constitute a hazard to public safety; Require all hospitals to have a risk management program designed to prevent injury to patients (according to the American Hospital Association only 60 percent of hospitals have such programs and only half of these are excellent programs); Require all insurance companies to experience-rate doctors with sub-specialities, whereby doctors with the best records pay the lowest premiums, and multiple malpractice "loser" doctors pay the most; Require insurance companies to immediately disclose and forward to the state licensing board the filing of malpractice claims, as well as the results of all malpractice settlements and adjudications (see HB 146 now in House HESS); Require hospitals or other institutions taking disciplinary actions against doctors to publicly disclose and forward to the state licensing board the details of such actions; Provide immunity and confidentiality to all those reporting doctor malpractice, incompetence, substance abuse or fraud to state medical boards (see HB 146); Provide strong consumer representation on state medical boards; Do not allow the state medical society to control membership on the boards; Officials should make strong, public statements indicating a commitment to strong doctor discipline and protection of patient's safety. It is my understanding that several of these suggestions have already been adopted in Alaska.

10. MATRIX OF STATE SYSTEMS; FEDERAL ACTIVITY: It is difficult to briefly summarize this material but several general observations can be made:

a) Legislative responses to the increasing cost and availability of insurance and apparent claim trends can be broadly categorized to civil justice- or tort reform - measures, insurance regulatory reform measures and risk

management measures. According to Patricia Young formerly of the Legislative Research Agency from information provided by the National Conference of State Legislatures (NCSL), in 1986 the emphasis was on civil justice reform. The legislative focus in 1987 turned to immunities- from sovereign immunity extended to counties, cities and towns, to immunity from personal liability extended to groups of public employees and volunteers. More recently however legislative activity in civil justice reform has declined and the focus has shifted to regulation of the insurance industry, including the anti-trust suit discussed above. In 1989, the majority of legislative activity regarding liability dealt with regulation of the automobile insurance industry, including California's proposition 103 and similar measures introduced in other states.

b) The significant "tort reform" measures enacted over the years include laws relating to limits on recovery (caps) of damages; abolition or modification of Joint and Several Liability; reduction of compensatory awards by collateral sources, or at least notification to the jury of such sources; limits on attorney's contingency fees; limits on punitive damages; periodic payment of awards; penalties for frivolous suits; settlement incentives; limits on prejudgment interest; and establishment of statutes of limitation and repose. Proposals concerning alternative systems and similar issues will be discussed below. I have little "easy to read" summary information on the status of proposals regarding regulation of the insurance industry, professional competency laws and similar approaches to the problem.

c) According to the recent report by the New York law firm of Wilson, Elser, Moskowitz, Edelman and Dicker (Wilson) contained in this section, a majority of the states have considered or enacted "tort reform" laws as described above in various forms. The constitutionality of many of these measures has been challenged in state and federal courts with mixed results; some upheld, some not for a variety of reasons. See also the Alaska Attorney General's opinion for a discussion of some of these cases including the recent decision by the Washington Supreme Court on their cap mentioned below.

d) According to the Wilson Report, in 1989, the most significant activity concerning Civil Justice reform occurred in the courts rather than the Legislatures. In 1986 thirty-six state (36) legislatures passed tort reform laws (varying in degree and significance). In 1989 only seven (7) states enacted reforms; although many measures were pending (see NCSL 1989 pending legislation summary). NCSL tells us that four state courts rendered decisions in litigation questioning the constitutionality of damages caps. In Maryland, the cap on non-economic damages in all civil suits

was upheld; in Kansas, a $100,000 cap on such damages in wrongful death actions was upheld; the Virginia Court upheld a cap on total damages in medical malpractice cases; but in Washington, the cap on all non-economic damages was ruled unconstitutional(letter from Brenda Trolin dated December 23, 1989).

e) According to the Wilson Report, states which have enacted the most extensive reforms include Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, California, Florida and Illinois (See Wilson starting on page 1 of the Introduction for a detailed breakdown of how many states enacted various reform measures in 1986 and 1987; and for a discussion of 1989 tort reform enactments).

f) Alaska in 1986 enacted a series of civil justice changes including: Modified joint and several liability; caps on non-economic damages ($500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages sustained while that person was committing a felony; detailed provisions on damage award requirements; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgement, costs and attorneys, including pre-judgment interest, and the effects of a release. This legislation has been characterized by tort reform advocates as a "patch work quilt" of necessary compromises, and, in their view, did not go far enough toward making Alaska's civil justice system fair and predictable. As you know, Alaska also has a medical malpractice claims system created during the 1970's.

g) On the automobile insurance front, California's Proposition 103 is the biggest news. This reform measure narrowly adopted by California voters in November 1988 included a one year 20% roll back in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers", as defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after November 1989; and election, instead of appointment, of the State Insurance Commissioner starting in 1990. Prop 103 also requires the Insurance Commissioner publish for consumers a list of rate comparisons, and compels insurance companies to notify their customers of the right to join an "independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum." The California Supreme Court upheld all of 103's

long term restrictions on insurance rates and practices, but struck down the provision that would require insurers to be "substantially threatened with insolvency" before they could receive relief from rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

Many states are also considering "No-fault" automobile insurance proposals in response to escalating auto insurance costs. Note that according to NCSL at least 20 states already have no-fault legislation in many different forms particularly on issues relating to restrictions on the right to sue, conditions necessary to sue for pain and suffering and first party coverage.

h) The Wilson Report concludes as to state activity: "In general, although state legislatures have reviewed thousands of bills addressing the Civil Justice System and insurance regulation, disputes persist as to what precisely are the problem areas, and solutions to the perceived problem areas remain elusive. It is likely that state legislative activity will continue in the area of civil justice reform and the courts will be entertaining arguments relative to the interpretation and validity of these reforms for some time." See Wilson at page 7.

i) Federal activity in this area has confined itself primarily to products liability. For the past several years Congress has seriously considered proposals to federalize products liability law. Detailed discussions of current proposals are contained in the Wilson materials at pps. 77 and 93. In addition, Congress is considering a variety of proposals to modify the McCarren-Ferguson Act, a 1945 law that provides limited anti-trust immunity to insurers and continues the authority of the state to serve as the primary regulators of the insurance industry. A proposal to modify the doctrine of Joint and Several liability also is pending in the Senate according to my sources.

j) Two final notes. On the question of "pre-judgement interest", according to a 1983 Rand Note prepared by Stephan Carrol (which hasn't been updated according to Carrol) at least 26 states had pre-judgement interest laws on the books. The Note also suggests that juries implicitly provide pre-judgement interest at a rate equal to the underlying inflation rate plus 3.7 per cent per year in addition to any applicable statutory pre-judgement interest rate.

As to contingency fees, commentators argue that limiting those fees will potentially increase the amount of compensation paid to claimants, increase the likelihood that a case is dropped, decrease the likelihood of litigation to verdict and deter frivolous suits by placing the plaintiff's lawyer at financial risk; but will also preclude some

victims with legitimate claims from obtaining representation. It is not clear whether the presence of contingency fee arrangements increases the total number of claims (See Frank Sloan "State Responses to the Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment"- Vanderbilt University, 1985). One study also concludes that in modest cases contingent fee lawyers spend less time on a case than hourly fee lawyers; but there is no statistically significant evidence of a differential in effort for larger cases, although there is an indication that if there is an effect is in the opposite direction (see Rand, "The Impact of Fee Arrangement on Lawyer Effort" by Kritzner et. al.) For detailed discussions of these issues see "Rand Three Level Study and Other Reports" and various references to the subject contained in "Impact of U.S. Tort System Changes". Note that Danzon suggests that contingency fee limits reduced the amount of settlements by 9%, reduced the number of cases litigated to verdict by 1.5%, and the number of cases dropped by 5% (See Maine Malpractice Study at page 36).

11. ALTERNATIVE PROPOSALS: Here is a summary of some of the more significant alternatives I have been able to identify that are either in effect or under consideration today:

a) Arbitration and Screening Panels: According to the Rand article by Deborah Hensler entitled "Reforming the Civil Justice Process, How Court Arbitration May Help" arbitration programs may be established by state statute or by rule of a state supreme court or a local court. Typically, under these programs the Court is authorized to compel arbitration for cases that fall within certain limits (Rand says $25,000 is the typical cutoff); with certain exceptions. However, any of the parties to a suit may reject an arbitration award and request that the case be calendered "de novo" (without regard to the arbitration verdict). This appeal option is generally considered necessary to ensure that the litigants right to a trial is not abrogated. In 1984, Rand's Institute for Civil Justice estimated that arbitration programs are operating in more than 100 trial courts around the country and estimated that over 100,000 cases are arbitrated annually through this process. Apparently, there also are voluntary, binding program options.

Typically in court annexed arbitration programs cases are heard by private attorneys or retired judges who volunteer to serve as arbitrators and, according to Rand, receive only a small honorarium for their efforts. Arbitration hearings usually are private, informal and often brief. After giving the parties an opportunity to settle, the facts of the case are heard with the litigants often appearing as witnesses. If accepted, an arbitrator's award in entered as a judgement and is enforceable. As a disincentive for frivolous appeals, some programs require applicants who request a trial de novo

to reimburse the court for arbitrator's fees; in some programs court costs and attorneys fees may be levied on unsuccessful appellants, or applicants who do not improve their position (e.g. Hawaii-if the court does not alter the award by at least 15% in favor of the appealing party; see Patricia Young memo in this section). Note that such programs also are required by some carriers

Does it work? The reason for these programs is to reduce congestion, costs and delay. According to Rand preliminary information derived from two studies of a new program in California and an older program in Pennsylvania arbitration can and does contribute significantly to reducing congestion, costs and delay. These findings are confirmed by the Hawaii and North Carolina experiences discussed in this attachment. For example, reviewers from the University of Hawaii of the Hawaii program which covers all tort cases with a probable jury award of $150,000 or less concluded in January of 1989 that: "Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants..."To our knowledge no other arbitration program in the country claims to be reducing litigation costs; Hawaii leads the nation in this area." Similarly, a 1989 evaluation of the North Carolina program by the University of North Carolina concludes that the program: disposed of cases faster that standard procedures; reduced trials and out of court settlements replacing them with "promptly scheduled adversarial hearings in a courtroom before specially trained arbitrators"; and improved litigants satisfaction with the outcome and procedure used in their cases. The study also notes that attorneys were satisfied with the program and, in a survey, voted strongly in favor of continuing it.

However, the Rand study cautions that program design and implementation are critical factors in determining success. Some of the design issues that must be considered include: setting jurisdictional limits of the program, establishing procedures for determining case eligibility, adopting guidelines and procedures for selecting arbitrators and deciding how many arbitrators will hear each case, where the hearings will take place and whether there will be financial disincentives for appealing.

Please be advised that the American Medical Association, The American Hospital Association and the Physician Insurers Association of America each have proposed versions of alternative systems apparently involving arbitration or a form of administrative adjudication with various limitations on recovery. I do not have sufficient first hand information on these proposals at this time to go into specific differences but you may want to refer to the analysis prepared for MICA by Jerry Cogan. The State Alternative

version of the PIAA proposal is also included for your information. Also note that the AHA calls for a study of a Medical Indemnity Fund as a supplemental method for compensating medical malpractice victims financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

In Alaska, arbitration and peer review systems applicable to medical malpractice (AS 9.55.535 and 536) and court ordered small claims arbitration procedures (AS 9.43.190-220) are available. In addition, state law recognizes certain contractual arbitration agreements (AS 43.010-180; Uniform Arbitration Act). I have no other information on the latter two options.

b) The No-Fault Alternative to Tort Recovery: James Ludlam ("The Battle for Medical Malpractice Tort Reform: A Report From the Front Lines" prepared for the Annual Meeting of the American Academy of Hospital Attorney's, June 1989) tells us that in the 1970's and 1980's there was much discussion of possible no-fault alternatives to compensating plaintiffs for catastrophic injuries including "trip insurance" under which a patient bought his own coverage, or a system for which there would be payment without fault on the basis of a worker's compensation type schedule (similar to that proposed by Governor discussed in my introductory memo to the Task Force dated September 15, 1989). There was little or no action on these proposals. In fact, the California Medical Association and the California Hospital Association concluded that these systems would be more expensive than the existing tort system based on a study of over 25,000 charts and dropped the whole idea.

Then, in 1987 North Carolina and Virginia adopted no fault programs followed by Florida in 1988. The North Carolina program was restricted to vaccine related injuries which were compensated for out of a fund consisting of state appropriations with a limit of $300.000. Damages only can be awarded under this system to the person receiving the vaccine.

The Virginia Birth-Related Neurological Injury Compensation Act, mentioned at our first Task Force meeting, apparently was adopted to meet a crisis in the availability of insurance for physicians practicing obstetrics (according to Ludlam, it was expected that 25% of the OB/GYN's were going to lose coverage by the end of 1987). The Act applies only to patients of physicians and hospitals that have voluntarily participated in the program by payment of $50 per delivery with a $150,000 maximum by a hospital and a $5,000 fee for a physician doing obstetrics. These payments are voluntary. In addition, all other physicians are assessed a fee of $250 as a condition of licensing. If the fund falls short there is an annual premium tax on all

liability carriers in the state. The purpose of the fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery and resuscitation, and to be the sole and exclusive remedy for those who participate. The fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three physicians. Compensation is limited to actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees.

Following in the footsteps of Virginia, the Florida legislature passed a comprehensive malpractice reform package in 1988. Part of the package was a no-fault state run fund to provide for the care and treatment of babies born with permanent, severe disabilities due to mechanical failure or malpractice. The Fund, administered by the State Worker's Compensation Division, is to be financed by an annual payment of $5,000 per year by each participating physician. The parents may recover the cost of care and rehabilitation and up to $100,000 for non-economic damages. As an aside, the total Florida legislation (114 pages) also included caps for other cases, arbitration options, a new watchdog unit called the Medical Quality Assurance Division, hospital reporting requirements of malpractice cases involving doctors and other provisions designed to provide notice of certain events. It is interesting to note that there are no caps if both parties refuse arbitration.

One final note on alternative systems. Peter Huber ("Liability-The Legal Revolution and its Consequences") calls for a return to contract principles in the form of direct first party insurance.

Other miscellaneous procedures to provide faster and less expensive ways to resolve disputes include: "fast tracks" for certain types of cases; dismissal of inactive cases; penalties for last minute settlements made after the trial is underway; procedures designed to limit filing of motions and pleadings; procedures limiting discovery; and procedures which set firm trial dates.

12. THE RAND THREE LEVEL STUDY AND OTHER REPORTS: "Trends in Tort Litigation- The Story behind the Statistics" by Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson attempts to set the record straight on many of the underlying issues that we too are attempting to sort out. They start by reminding of us of how all this began:

"Over the past two years, manufacturers, physicians, consumer advocates and trial attorneys have vigorously debated the costs and benefits of the tort system as a mechanism for compensating and deterring injuries. The

debate began with a perceived "insurance crisis". Liability insurance premiums, particularly for medical malpractice and commercial lines, increased sharply and insurance for some kinds of activities became unavailable at any price. While there is broad consensus that obtaining and paying for insurance was a pressing problem, there was little agreement about the cause or its solution. On the one hand, insurers linked rising rates and unavailability to trends in tort litigation, thus focusing attention on the legal system. In many states and at the federal level, insurers, manufacturers, health care professionals and local government officials formed coalitions to support substantive changes in tort law. On the other hand, trial attorneys and consumer groups generally opposed these changes arguing that what needed reform was not the tort law but poor management practices in the insurance industry."

The authors go on to say that not only did these groups hold different positions on these issues they also held sharply different views of reality (and presented contradictory statistical data to support their claims):

"Proponents of change argued that there has been an explosion of liability lawsuits in the past five years, that recent verdicts demonstrate that civil juries are "out of control" and that the monetary benefits delivered by the tort system to injured parties are overshadowed by the enormous costs of administering the system. Tort reform was needed to counteract these trends. Opponents of tort reform argued that the litigation explosion is a myth, that jury awards have been basically stable for 25 years, and that the transactions costs of the system are acceptable, given the systems twin objectives of compensation and deterrence. Tort reform was not only unnecessary - it might be harmful to those whom the system is intended to serve."

In the author's words, "Where does the truth lie?" In an effort to resolve these apparent contradictions and put the issues in perspective for policy makers this report attempts to answer three questions - How much litigation is there? Are jury awards stable? How much does litigation cost, and who gets the money? A summary of their basic conclusions follows:

a) One of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics. The FIRST is the world of routine personal injury torts, exemplified by auto suits. They occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world. The SECOND is the world of high-stakes personal injury suits such as product liability, malpractice and

business torts. Here the litigation itself is newer, the law is still evolving, and the stakes per case are larger and increasingly uncertain. The THIRD is the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases leads many to view them as problematic.

b) How much tort litigation is there? Based on data compiled from the Administrative Office of the U.S. Courts, the National Center for State Courts and the Rand Institute for Civil Justice they have concluded that: accident cases are a steady or declining percentage of court action; non-auto personal injury cases such as malpractice and product liability are growing moderately in state courts and more dramatically in federal courts; and mass latent injury cases have the potential for explosive growth as new evidence of harms is developed.

c) Are jury awards stable or out of control? Based primarily on data complied by Rand from Cook County, Illinois and San Francisco, California between 1960 and 1984 (only data available in the U.S that can be used to discuss long term trends) they have concluded that: Plaintiffs in auto cases involving modest injuries and expense continue to obtain modest awards and, at least in recent years, these awards generally hold after trial; Plaintiffs in product liability and malpractice cases are winning more frequently and obtaining higher awards; Deep pocket defendants in product liability cases ultimately pay much, if not all the awards against them, even after post-trial adjustments; Jury behavior seems more unpredictable, but this may simply be because we do not have a very good sense of why juries make the decisions they do. The authors suggest that these trends may hold nationwide because of the similarities between the jurisdictions studied.

d) Litigation costs - How much, to whom? Based on Rand studies of litigation costs the authors state: "Our snapshot of litigation shows that the costs of litigation consumed about half of the $29 to $36 billion dollars that were spent on litigation. When we disaggregate these costs, we see that in more complex cases (non-auto torts) the costs of litigation were higher. In the case of asbestos claims, the only mass latent injury cases for which these data have been assembled, litigation costs constituted almost two-thirds of the total per-claim expenditure." Their specific breakdown in percentage of totals: Auto - 19% in Defendant legal fees and expenses, 26% in Plaintiff legal fees and expenses and 52% to Plaintiff; Non-auto- 30%, 24% and 43% respectively; Asbestos- 37%, 26% and 37%. See also pie charts contained on pages 27 and 28 of the report and the Tillinghast cost breakdown contained in Miscellaneous on page 15.

e) What is the story behind the statistics? Here is the authors' summary of their findings: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes-inflation adjusted- have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Unfortunately, this report does not resolve the nagging underlying question of why have we had significant affordability and availability problems that have lead to considerable debate of these issues. Is it industry practice, increased claims loss experiences, or both? I have found no study or analysis which settles this question in my mind.

Please note that a recent study by two Cornell Law School professors recently reported in the New York Times indicates that since the mid-1980's published opinions have moved toward benefitting defendants over plaintiffs suggesting a possible shift in overall trends.

The Medical Malpractice Liability Study by the Public Health Resource Group, Inc. for the Maine Legislature submitted in June 1989 is also worth noting in some detail. Here are their general findings:

a) Premium rates for Maine Physicians have been rising to "record proportions" over the last ten years.

b) Frequency, severity and losses as a percentage of income do not indicate that the liability insurance problem in Maine is out of control. It does suggest that more efficient methods of estimating reserves, reinsuring and obtaining legal services could reduce the price of premiums for policy holders while continuing to provide high quality coverage. These are areas where policy changes could achieve savings to the insurance industry and ultimately the rate payers.

c) Maine is experiencing a steady decline in physicians who provide obstetrical services; although the decline appears limited primarily to urban areas. The principal reasons reported by physicians for this decline are the price of medical malpractice insurance and fear of a malpractice suit.

d) It is not clear whether tort reforms actually have succeeded in reducing the price of insurance or the frequency or severity of claims, or whether they will succeed in reducing or stabilizing premiums or claims in the future; although it is far easier to estimate the effect of certain reforms on the frequency and severity of claims than on the price of insurance or the willingness of physicians to practice high risk specialties. For example, caps on awards have potential to reduce the dollar amount of high stakes claims and limits on attorneys fees may increase compensation to plaintiffs (while also leaving some victims with smaller claims without representation, they add). Nor is it known if these parameters would have increased more than they have in the absence of reforms. Moreover, many state reform statutes have not been in operation long enough to have a clearly measurable effect. For these and other reasons, new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability. Ongoing studies to be completed within the next two years may provide a clearer picture. If reforms are contemplated, the legislature might consider designing them to expire after a certain period of time if availability and affordability of insurance and medical services does not improve by some measure acceptable to policymakers.

e) Alternative systems are appealing because they may help reduce inefficiencies and costs of the current tort system. Unfortunately, no state has implemented an exclusive alternative and it will be years before any evidence is available on the impact of such approaches. Please note the report indicates that the Vermont Legislature is considering the AMA fault based administrative system discussed briefly above.

f) A principal goal of the government in a regulated industry like insurance is to get insurers to manage their business as efficiently as possible and provide a quality product to consumers at a reasonable price and at a fair return on investment. Accordingly, the Insurance Regulator should be directed to promulgate an investment income model and require insurers to demonstrate an effective cost control program. The report also suggests that the State could authorize insurance regulators to spread rate changes over three years and implement a merit rate system and/or system of deductibles which would have the effect of spreading the risk of claims payments and resulting rate increases to those policy holders responsible.

g) To keep professionals on their toes, the state could require investigations by the medical board of physicians who have three or more claims over a ten-year period which resulted in a payment; create an ombudsman within the board to defuse potential complaints before they are elevated to a

claim; and require the board to collect additional information on the voluntary or involuntary loss of hospital privileges in or outside the state. They also suggest that the Legislature take a look at "care standards" that have been proposed by a variety of entities.

h) They conclude: "There are many approaches to controlling the rising and unstable malpractice liability premiums in Maine and their effect on access to care. These include changes in the tort system, the insurance regulatory system and the medical care delivery system. To target one while ignoring the other will create disequilibrium and lead to policies likely to fall far short of the mark. Each has some merit and some drawbacks. Each needs to be addressed with a realistic understanding of what will be gained and what will be lost. It was no surprise to many experts that the St. Paul Companies decided to lower their premiums due in part to a reduction in expected reserve demand for outstanding claims. Considering past history, however, the medical malpractice issue is likely to revisit Maine in a very few years. The severity of the problem will depend on how comprehensive an approach the Legislature takes now."

13. IMPACTS OF U.S TORT SYSTEM CHANGES: (Frequency, Severity and Rates - this section does not attempt to discuss impacts of tort reform on victim rights and related issues, but see pros and cons discussions contained in your first information packet along with the James Ludlam article discussed above): While tort reform measures do appear to affect the frequency and severity of claims there is no solid proof to date that they also have a direct effect on the cost or availability of insurance.

Patricia Danzon of the University of Pennsylvania in a series of Rand articles (including in particular "Frequency and Severity of Malpractice Claims-New Evidence"- 1986) appears to have produced the most credible contemporary analysis of the relationship between certain tort reform provisions and the frequency and severity of medical malpractice claims. Although her study is restricted to medical malpractice claims her conclusions are worth examining in some detail:

a) Malpractice claim severity has risen roughly twice as fast as the Consumer Price Index. Nevertheless, the tort reforms enacted since the mid-1970's malpractice "crisis" affected the frequency and severity of malpractice claims over the decade from 1975-1984 in a manner broadly consistent with economic theory and previous evidence. Although claim frequency and severity have continued to rise despite reforms this trend does not indicate that the tort changes have had no effect.

b) For example, states that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than states with statutes more lenient to plaintiffs. On the average, cutting one year off the statute of limitations for adults reduces claim frequency by eight percent. The effect would presumably be greater for a reduction from, say, four to three years than from ten to nine years.

c) Statutes permitting or mandating the offset of collateral benefits have apparently reduced malpractice claim severity by eleven to eighteen percent and claim frequency by fourteen percent relative to comparable states without collateral source offset. One of the reasons for this is that collateral source offsets often reduce the potential for recovery for a large number of claims, thereby reducing incentives to file.

d) Caps on awards have reduced severity by twenty-three percent. This percentage represents the average impact of the various forms of cap, over the period of 1975 and 1984, during which time some statutes were still under challenge. If the dollar thresholds are not revised periodically to keep pace with inflation, the future effect will presumably be greater, unless juries find ways of implicitly circumventing the limits by increasing allowances for uncapped components of the award.

e) Arbitration statutes apparently increased claim frequency, but reduced overall average severity. Disaggregated data would be necessary to determine whether the reduction in observed average severity results from a reduction in awards per case or simply reflects the filing of more small claims. The net effect appears to be an increase in total claim costs, but compensation of more claimants.

f) None of the other reforms analyzed, including screening panels and limits on contingency fees, appears to have had any systematic impact on claim frequency or severity.

g) Urban areas have a particularly high frequency of non-meritorious claims (those closed without payment) and claims filed more than two years after the alleged injury. Per capita income, the unemployment rate, and the number of attorneys per capita have no statistically significant effects. The surgery rate in a state increases claim frequency, and the ratio of surgeons to medical specialists increases claims severity.

h) On average, severity of malpractice claims has increased at almost twice the rate of inflation of consumer prices over the last decade.

i) The above analysis on claim frequency and severity should not automatically be translated into an effect on premiums (a subject beyond the scope of this paper) for several reasons: First , the net potential impact on premiums also depends on litigation expenses and changes in the timing of disbursement of loss reserves, and hence investment income. Second, reforms that reduce the uncertainty in estimating malpractice claims costs- namely caps on awards, periodic payment of amounts for future damages and shorter statutes of limitation/repose- may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses. This result can be expected because of the reduction in the insurer's risk. Perhaps more importantly, she adds, by reducing uncertainty, such reforms should reduce the volatility in price and availability of malpractice insurance, which is a major inefficiency of the present malpractice system.

Please note that Danzon's claim severity conclusions are more or less confirmed by actuaries Milliman and Roberston, Inc. in their August 5, 1988 letter to MICA.

While this potential positive impact on insurance costs is theoretically possible and there is evidence that the experience in California (which has had time to test the theory) and perhaps other states bears this out (the informal opinion of Ray Bacon of the California Department of Insurance and Ron Neupauer of MIEC who feels strongly that California tort reform measures have had a significant impact on rates which currently are increasing less than inflation; although he agrees that other factors also come into play), as well as evidence to the contrary, I have found no study that definitively concludes this has been the case. And I suspect no such study exists. See "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," New York, 1986- "no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists." In fact, according to Franklin Nutter, president of the Alliance of American Insurers (quoted in the attached article from Public Citizen, "The Impact of Tort Changes on Insurance Rates"), "It is clearly impossible to say that if you adopt a certain tort reform, you will get 'X' reductions in premiums." Similarly, the Frank Sloan article entitled "State Responses to the Malpractice Insurance 'Crisis' of the 1970's: an Empirical Assessment" states: "The empirical results of the study presented here give no indication that individual state legislative actions, or actions taken collectively, had their intended effects on premiums." One last comment. When evaluating the significance of the California experience, it is useful to keep in mind that 90% of the insurance is provided by doctor owned companies which have a significant incentive to keep rates down.

Perhaps the most recent and detailed analysis of this issue in the context of medical liability and obstetrical care is contained in the 1989 report of the National Academy of Science Institute of Medicine's Committee to Study Medical Professional Liability and the Delivery of Obstetrical Care which has just been brought to my attention by a Task Force Member. While I have not had time to review this report in any detail, I have summarized their conclusions on the question of "tort reform". According to the study's Preface, the Institute of Medicine appointed a "distinguished interdisciplinary committee" (see attached list of participants) to evaluate the data relating to the effects of medical professional liability issues on access and delivery of obstetrical care. The preface continues that this study was a response to an inquiry of the American Academy of Pediatrics along with several other groups who believed that more attention to professional liability issues was "urgently" required. Here are there general findings on the basic question of legislative solutions to the problem:

a) Every state but West Virginia has enacted legislation modifying common-law tort doctrine that is intended to relieve the medical liability crisis; many are discussing additional reforms.

b) After evaluating these reforms (and reviewing the Danzon analyses, a 1987 Report of the General Accounting Office and others) the committee concluded that only a modest reduction in medical malpractice claim frequency and size of awards has been achieved. The committee also concluded that "the many deleterious side effects of the tort system for resolving obstetrical claims - resulting in distortions of health care delivery patterns - have not been reduced by those tort reforms." (See Attachment to follow, Volume I page 127).

c) The committee believes that the problems created by the medical professional liability issues in obstetrics represent a serious threat to the delivery of obstetrical care in this nation. However, although some of the tort reforms already in place have merit, they do not appear sufficient to stem the exodus of obstetrical providers from the profession or to solve the attendant problems caused by the current professional liability climate in obstetrics.

d) On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking- the committee concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to

the traditional tort system for resolving medical malpractice claims and toward implementing these alternatives in certain circumstances.

e) The committee recommends that states consider three proposals for additional research and implementation on a limited basis: the no-fault designated compensable events scheme (including those variants enacted in Virginia and Florida discussed above), the AMA-Specialty Society's fault based administrative system, and legislation authorizing the use of contractually determined legal relationships governing medical professional liability between providers and patients. The committee also recommends that the Federal Government provide grant funds to finance studies of proposed legislation and to begin pilot projects for limited implementation of various solutions.

Despite these findings, keep in mind that some commentators still feel that it may be too soon to draw any definite conclusions about the impacts of tort reform measures. According to Brenda Trolin of the NCSL a minimum of five years is needed before cases processed under previous systems clear the courts. Several additional years must pass before a sufficient number of cases have been processed through systems to determine whether changes have had the desired consequences.

And Patricia Young formerly of the Legislative Research Agency reminds us : "Because of the variations in state constitutions and laws regarding tort reform, identical reform measures may have dissimilar impacts in each state. Thus, even those reform measures which appear promising require careful consideration in the context of an individual states circumstances to determine potential ramifications. Opponents frequently argue that constitutional rights-including equal protection, access to courts, and trial by jury- are violated be certain reform measures. Also, reform measures can encourage or discourage lawsuits. Although some measures may facilitate and expedite resolution, they may also encourage claims which would not otherwise be made."

One of the keys to better understanding of this issue is more and better information. Most agree that this general lack of statistical data is a problem. According to Stephan Carroll ("Assessing the Effects of Tort Reforms, 1987 at viii): "The kinds of data needed to assess the effects of reform are generally not now available... Three types of new data collection systems need to be considered: 1) systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims; 2) special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify reform's winners and losers; and 3) systems for

collecting information both on the other factors that impinge on the behavior of participants in the tort system, and therefore have to controlled for, and on economic outcomes and injuries".

14. ROBERT HUNTER ("CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IN TREATED"): Given limits of time and space I will only summarize in "bullet" form Hunter's many recommendations contained in the publication called "How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient- A Suggested Legislative Agenda for 1987" by Robert Hunter and Jay Angoff. Hunter's central premise is that limiting the ability of severely injured people to sue and be compensated for their injuries does not bring down insurance rates (see above for additional discussion of this issue). He proposes many reforms including: Requiring disclosure by insurance companies of data on actual income and payouts on different types of insurance; permit group insurance/risk-retention group programs; allow banks to write liability insurance; establish joint underwriting associations which provide insurance to those who can't get insurance in the voluntary market; establish state reinsurance programs which would authorize self-insureds to pay the state a premium in return for which the state would agree to pay all claims above a certain specified amount; establish state run insurance companies; establish interstate compacts for interstate reinsurance programs; prohibit arbitrary cancellations of policies; require experience rating where good risks pay less than those who are bad risks; to allow the market to work competitively despite the McCarren-Ferguson Act, establish flex-rating which would allow insurance companies to raise or reduce rates without insurance commissioner approval within a "zone of reasonableness"; beef up enforcement by properly funding and staffing state insurance agencies; close the "revolving door" by discouraging or limiting the practice of hiring industry people to regulate the industry; establish an office of Insurance Consumer Advocate which would represent the consumer point of view at rate hearings and ensure that the insurance regulators do not rubber stamp insurance company rate requests; prohibit the pass through of lobbying expenses; require risk management by insurance purchasers and self-insureds which should reduce the frequency and severity of claims; allocate medical malpractice insurance costs more equitably. For example, doctors in high risk specialities pay for the risks that should be shared by others, doctors are broken down by insurance companies into to many categories with too few doctors in some categories, doctors pay for malpractice that could be more easily be borne by hospitals, and doctors are not experienced rated; insurance companies should disclose names of doctors involved in claims and the amount of those claims. This information should be made available to various organizations and the public in general; limit lawyers fees

on both sides. Hunter focuses on defense costs and contends that defense legal fees have doubled in ten years. States could limit defense fees by disapproving any rate that included within it more than a certain percentage (he suggests 25%) for defense costs which would force the insurer to keep an eye on fees insuring that a greater percentage of the money flowing through the system would end up in the hands of the injured person; penalize frivolous actions on both sides including frivolous motions and objections by defendants lawyers who charge by the hour; to encourage accountability to the public, prohibit secrecy agreements which prevent disclosure of the details of a settlement and other information about the case; encourage offensive collateral estoppel which prevents re-litigation of certain facts (i.e. once a fact is established it can be used in future cases); pass back collateral source benefits by requiring the defendant to pay the full amount of a verdict but excuse the source of collateral benefits from paying such benefits to the extent they are already included in the jury verdict and then require the source of the collateral benefits to reduce the cost of those benefits across the board based on these savings; create incentives to settle including penalizing defendants for refusing to make reasonable offers to settle, and penalizing plaintiffs for making unreasonable demands; and last but not least, establish alternatives to the tort system including no-fault systems (particularly for relatively minor injuries), arbitration, mediation, mini-trials, and other dispute resolutions systems. However, Hunter is careful to point out that cases involving defective products should be subject to common law principles without any limits on either compensatory or punitive damages: "The stories of A.H Robins and the Dalkon Shield, Ford and the Pinto gas tank, Richardson-Merrell and MER-29, and Johns-Manville and asbestos are just a few of the scandals unearthed as a result of tort litigation. And it was only the fear of more litigation, and of large awards for both compensatory and punitive damages, which finally forces these and other dangerous products off the market and encourages the development of less dangerous substitutes."

15. CHANGES IN TIME IN THE LAW OF LIABILITY AND DAMAGES: "Liability, Perspectives and Policy" edited by Robert E. Litan and Clifford Winston of the Brookings Institution in Washington, D.C. (1988) provides insight not only into the question of how tort law has evolved over the last thirty years but also presents an excellent overview and summary of the many issues we have attempted to review in this memorandum and related attachments. Here are the key findings:

a) Tort law is largely based not on statutes but on common law, a body of legal principles developed case by case by judges, primarily those in state courts. It is difficult to

generalize about the status of tort law in all jurisdictions but certain important changes in doctrines have occurred in the past several decades, all of which have expanded the system's function in spreading losses:

* Whether by applying the negligence test in a flexible fashion or by imposing liability on parties whose behavior is causally related to accidents but who are not necessarily negligent (so-called strict liability) the courts have increased manufacturer's liability for defective products. Certain courts have held that a product can be defective even if it conforms to prevailing regulatory standards and if the manufacturer had no knowledge at the time of design or production that it would entail the risks later attributed to it in litigation.

* The negligence standard itself has been extended through litigation to impose liability on a wide class of service providers not previously accustomed to being sued. Day care centers, ski lift, ice rink, and amusement park operators, tavern and restaurants, and not-for-profit organizations have all been taken to court for failures to warn of certain dangers and for the careless conduct of their employees. The exposure of these defendants to liability claims has been widened by the doctrine of joint and several liability, which allows prevailing plaintiffs to recover up to the full amount of a total damage award from any single defendant if the other defendants are unable to pay , and by the collateral source rule, which prohibited juries from reducing damages by subtracting insurance monies or other compensation plaintiffs receive from other sources.

* The concept of contributory negligence has been relaxed in many states so that negligent plaintiffs are no longer totally barred from recovery. Instead, they find their damages reduced by the proportion by which their negligence contributed to their injury. In addition, beginning with the Federal Tort Claims Act of 1946, which waived the federal government's sovereign immunity, courts have made state and local governments liable for tort suits.

* Courts have relaxed the standards the plaintiffs must satisfy in proving, under either the negligence or strict liability doctrine, that defendants have caused their injuries. This trend has been manifested primarily in product liability and so-called toxic tort cases, which have frequently required courts to decide whether plaintiffs' injuries have been caused by their exposure, often over long periods of their lives, to substances recently discovered to be associated with the development of cancer or other serious diseases. Courts have adopted a long range of rules to determine causation in such cases. Some have placed liability on the first or last source to which plaintiffs can establish they were exposed; others have made all

manufacturers of the substance jointly and severally liable. In one noted case involving the exposure of Vietnam veterans to the chemical Agent Orange, a federal court actively encouraged a $180 million settlement even though no hard scientific evidence had been uncovered that linked the chemical to the medical infirmities claimed by the plaintiffs.

* Finally, courts in certain jurisdictions have liberally interpreted statutes of limitation, which bar plaintiffs from recovering if they wait too long after suffering injury to file suit. In many toxic tort, product liability and medical malpractice cases it is difficult to determine when injury actually occurs. It could develop decades later when the symptoms of disease become observable. Although jurisdictions differ widely on this issue, the trend has been for courts not to invoke the statute of limitations to bar suits involving long-latent injuries.

These observations appear to be more or less consistent with the more detailed and critical analysis of these trends contained in Peter Huber's book "Liability, the Legal Revolution and Its Consequences" (1988).

b) The calls for reforming the civil justice system are less urgent now (1988) than they were in "recent months". As in previous insurance cycles, increases in premiums have moderated. In some instances, coverage that was withdrawn has reappeared. In 1986 the property and casualty industry earned 11.6 percent on its equity, a return lower than the manufacturing sector average of 13 percent during the past decade but still considerably better than the disappointing performance of the previous two years.

c) The issues raised by the most recent crisis will not disappear. If nothing else, the dramatic increases in premiums and curtailments of coverage have called greater attention to the nation's civil justice system - whether it is working satisfactorily, and if not why - then at any point in recent memory. Moreover, interest in these issues will intensify if and when the underwriting cycle reverses course and turns against the industry once again. Chances are that it will in five to ten years.

d) Injuries pose three different and potentially conflicting challenges for all societies. One is to efficiently deter behavior that cause injuries. A second and related objective is to exact retribution against those responsible (the criminal law is a key component of this function). The third challenge is to compensate victims for their injuries. Compensation may be supplied by the government or the private sector (through insurance), and may or may not be linked to specific injuries or types of accidents. Tort law-rules allowing accident victims to seek compensation through

the judicial system from the parties responsible - can be considered a mechanism for meeting all three of these challenges.

e) Of the millions of insurance claims filed each year, typically only 2% are resolved through litigation. Of cases brought to court, less than 5% are tried to verdict; the rest are settled.

f) The amounts actually received by successful plaintiffs are often much smaller than those originally awarded by juries due to trial judge and appellate overrides and/or the inability of some defendants to satisfy the judgement. In one study of 198 tort verdicts between 1984 and 1985 that resulted in awards of 1 million or more the final distributions to plaintiffs were on average 30% less than the original award. Successful plaintiffs received the jury award in only 51 cases.

g) As Rand noted average awards in tort cases in San Francisco and Cook County increased sharply, considerably faster that growth in real GNP and real prices of medical services.

h) Awards in medical malpractice cases and products liability cases were significantly higher and increased at a faster pace than those for personal injury cases generally.

i) Much of the Cook County and San Francisco increases are due to "explosive growth" in jury awards of $1 million or more (Cook County-Two verdicts between 1960 to 1964 accounting for 4% of all personal injury awards; 67 verdicts between 1980 to 1984 accounting for 85% of awards; San Francisco- only 3.8 % of all personal injury case produced $1 million plus awards which accounted for half of the total amounts awarded).

j) From the liability insurers point of view these statistics cause problems - Insurers can only remain profitable if they set their premiums to cover total expected claim costs, and large dollar claims increase uncertainty about the range of possible losses.

k) The greater frequency of large dollar awards can be partly explained by increases in non-economic damages - pain and suffering - as well as increases in punitive awards in certain cases. One commentator (George Priest, see page 10) finds that non-economic damages generally account for 30% to 40% of all tort damage awards and for even higher proportions of very large awards. Patricia Danzon draws similar conclusions according to Litan/Winston.

l) There are gaps in existing compensation programs and devices. For example, more than 30 million people in this

country remain uninsured for medical purposes at any given time, and perhaps more than 20 million are uninsured throughout a given calendar year. In addition, many of those with insurance have limited coverage, especially for the catastrophic medical expenses often associated with major tort litigation. Gaps also exist in programs designed to compensate for income losses, although such coverage (provided through public and private disability programs) probably has increased over time. There is little evidence that expanded tort liability has efficiently filled in the gaps left by public and private the network of compensation plans. In fact, it may be undermining the compensation objective by inducing private insurers to withdraw coverage and raise premiums at the expense of low income consumers.

m) While they have broadened the availability of compensation, more liberal liability doctrines and larger damage awards and settlement may have overdeterred, forcing socially worthwhile products, services and activities to be curtailed, withdrawn from the market or eliminated.(A classic example of this phenomenon is the loss of physicians willing to perform obstetrics, as discussed in this memorandum under "Availability of Services" above and in the Danzon article contained in chapter 4 of this book. Similar effects are observed by Peter Huber in chapter 5 regarding hazardous waste facilities.)

n) Delivering compensation through the tort system is very expensive. According to Rand the United States spent between $29 million and $36 million in 1985. Of that amount less than half the total ($14 billion to $16 billion) was paid to plaintiffs as damage awards; the rest went to lawyers and court administrators. Researchers at New York University, using a variety of methodologies, have arrived at similar estimates for administrative costs.

o) Because these costs are so high, interest has grown in supplementing or replacing the tort system with alternative means of compensation similar to the worker's compensation system. Most suggestions would place some sort of cap on total compensation - especially for pain and suffering - in return for automatic eligibility. More ambitious proposals envision separate funds, financed by taxes on employees or employers or both, to pay compensation awarded to victims of medical malpractice or exposure to toxic substances. But the limited experience with alternative compensation programs in the United States has not been encouraging. The federal black lung program, was established in 1969 to provide temporary compensation for an estimated 100,000 miners with pneumoconiosis. But due to broadened eligibility provisions by Congress, 542,000 miners, spouses and dependents have received benefits under the program by the end of 1981. Because of this experience, future proposals to establish compensation programs are unlikely to be given serious

consideration by Congress or state legislatures unless they are accompanied by convincing demonstrations that their costs can be contained. The New Zealand experience, which does not cover disease or sickness, has not been evaluated comprehensively; and is of probable limited value in the United States which is larger and has a more heterogeneous population. In short, we simply do not know whether society would be better off if the process of identifying risks and hazards were further centralized by replacing the tort system with more intensive regulation.

p) Nevertheless, the most effective way of avoiding much of the transaction cost would be to provide ways of compensating injured parties that do not require the high fact-finding expenses characteristic of tort litigation. This suggests a tradeoff: relaxed standards for eligibility but limits on compensation, especially for non-economic damages. The Product Liability Reform Act of 1986 (S. 2760) offers the tradeoff within the tort system itself by giving plaintiffs incentives to accept manufacturers settlement offers that limited non-economic damages components. This approach could be generalized to all types of tort cases; although it is not clear whether an expedited settlement process would result in net savings.

q) Stiffer regulation of liability insurance rates or policies will not solve the liability crisis and conceivably could be counterproductive. Tighter regulations by some states will only induce some carriers in those states to reduce coverage they offer or even withdraw entirely. The only way in which regulation of the property-casualty industry might be significantly improved is to strengthen solvency regulation by state insurance agencies. At the Federal level, it is unclear whether repeal of the McCarran-Ferguson Act would have a significant impact on insurers.

r) Virtually all tort reform measures would reduce compensation available through the system. In fact, there is evidence, at least for medical malpractice cases, that tort reforms have already reduced the frequency of claims and the growth rate of insurance premiums (he cites the 1987 update of the Tort Policy Working Group under the Reagen Administration contained in your first packet). But deterring injury is also an objective of tort law, and reducing compensation could weaken deterrence. The problem facing policymakers is that relatively little empirical information is available to indicate how tort compensation could be modified without compromising deterrence.

s) Judges should encourage juries to evaluate the costs and benefits of the behavior of both plaintiffs and defendants in tort cases in deciding which parties should bear the loss from the accident at issue.

t) The search for cost effective reforms should focus on modifications of the tort system to reduce uncertainty and eliminate inappropriate levels of compensation while retaining a fault-based rule of liability (which while costly and inefficient is probably less expensive than no-fault systems). Accordingly, there is a strong case for limiting non-economic damages in tort cases (as well as for more restrictive statutes of limitation and periodic payment of future damages, according to Danzon) but only in a way that takes into account the age of the injured party and the severity of the injury. By reducing non-diversifiable risk, such changes would also reduce the volatility of insurance premiums.

u) Finally, while some may be disappointed by the failure of Congress to enact comprehensive tort reform legislation, the experiments now being conducted by the states may prove more useful in the long run. Given the uncertainties about economic effects of different legal rules, we may one day be grateful that reform proceeded in the relatively uncoordinated fashion that it has in recent years. Today we simply know too little to be confident that any major overhaul of the U.S. tort system would produce more benefit than harm.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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REPLY TO:

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May 2, 1989

The Honorable Dave Donley
Chair
House Labor and Commerce Committee
P.O. Box V
Juneau, AK 99811

Re: Constitutional concerns raised by HB 166
Our file: 663-89-0459

Dear Representative Donley:

You have asked for our opinion on whether HB 166 or any part of HB 166 raises constitutional concerns. In addition you have requested a "report as to whether any courts have overturned any of the 'tort reform' measures addressed in HB 166, the reasons for the ruling and the ultimate outcome of the cases."

In general, any time the legislature acts there is a possibility that constitutional boundaries will be involved. When legislative action centers on individual rights within our justice system, concern about the constitutionality of the measure is heightened. General concerns about equal protection, due process, and the right to have a jury decide a claim are all presented by HB 166.

Specifically, there are two major areas of concern presented by HB 166. These are the sections dealing with the statute of repose (section 2) and the "cap" on noneconomic damages (section 15).

This memo will focus on the general state of the law concerning statutes of repose and caps on noneconomic damages.

STATUTE OF REPOSE

House Bill 166 proposes in section 2 to enact a six-year "statute of repose" that would limit a person's right to bring a cause of action for personal injury, death, or property damage to six years from the earliest of: the date of purchase

of a product; 1/ the date of substantial completion of construction; or the date of the last act alleged to have caused the injury, death, or property damage.

Statutes of repose are quite different than statutes of limitation. As one court defines the difference:

> A statute of limitation bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action, but will also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute . . . .
>
> A second distinction may be made with reference to the event from which time is measured. A statute of limitation runs from the date the cause of action arises; that is, the date on which the final element (ordinarily damages, but it may also be knowledge or notice) essential to the existence of a cause of action occurs. The period of time established by a statute of repose commences to run from the date of an event specified in the statute, such as delivery of goods, closing on a real estate sale or the performance of a surgical operation. At the end of the time period the cause of action ceases to exist.

Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4 Dist. Ct. App. 1987).

The Utah Supreme Court, in describing the difference between a statute of repose and a statute of limitations, noted:

> Statutes of repose . . . are different from statutes of limitations, although to some extent they serve the same ends. See McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am.U.L.Rev. 579, 582-87 (1981) (discussing the two types of

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1/ House Bill 166 does not clarify if the "date of purchase" is the "initial" date of purchase or some other date of purchase. Since products are often resold, this could become an issue if not clarified.

statutes and variations of statutes of repose). A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action. . . .

To be constitutional, a statute of limitations must allow a reasonable time for the filing of an action after a cause of action arises. Horn v. Shaffer, 151 P. 555 (1915); Saylor v. Hall, Ky., 497 S.W.2d 218 (1973). In Wilson v. Iseminger, 185 U.S. 55, 62, (1902), the United States Supreme Court stated:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Since a statute of repose begins to run from a date unrelated to the date of an injury, it is not designed to allow a reasonable time for the filing of an action once it arises. Therefore, a statute of repose may bar the filing of a lawsuit even though the cause of action did not even arise until after it was barred and even though the injured person was diligent in seeking a judicial remedy. . . . Indeed, a statute of repose may cut off a cause of action even though it is filed within the period allowed by the relevant statute of limitations.

Berry v. Beach Aircraft, 717 P.2d 670, 672 (Utah 1985) (some citations omitted). Thus, the major difference between a statute of repose and a statute of limitations is that a statute of repose can cut off a cause of action before a person even

recognizes he or she has one. A statute of limitations begins to "run" after the cause of action arises.

There has been one Alaska Supreme Court decision concerning a statute of repose. In Turner Construction Co. v. Scales, 752 P.2d 467 (Alaska 1988), the Alaska Supreme Court ruled that Alaska's six-year statute of repose on suits against design professionals was unconstitutional. In so doing, the supreme court followed an equal protection analysis. Although the court found that the "interest in redressing wrongs through the judicial process is a significant one" under Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983), the court held that no fundamental interest was at stake. 752 P.2d at 471.

Because no fundamental constitutional right was involved under State v. Erickson, 574 P.2d 1 (Alaska 1978) (see also Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984), for a helpful explanation of equal protection analysis in Alaska), 2/ all that was necessary to justify the statute was a fair and substantial relationship between the means and the ends of the statutory requirement. The court found that the goal of avoiding "state claims by shielding certain defendants from potential future liability" was a legitimate

---

2/ Under Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), the state supreme court outlined the following three-step analysis in equal protection cases. I include it as a guide to consider in analyzing equal protection issues.

1. First ask what the weight of the constitutional interest impaired is. Depending on the primacy of the interest involved the state will have a lesser or greater burden in justifying its legislation.

2. Next ask what purpose the statute serves. Depending upon the level of review, the state may be required to show purposes that at the low end of the scale are simply "legitimate objectives" all the way to a "compelling state interest" at the upper end.

3. Finally, question what the state's interest is in the particular means employed to further its goals. The state's burden differs in accordance with the determination of the level of scrutiny and goes from a "substantial relationship between the means and ends" to a much closer fit.

government purpose, but that there was no "substantial relationship" between the means and the ends of the statute, and that the statute was thus unconstitutional. 752 P.2d at 472.

The court noted in its decision that it was "not persuaded" by a number of rationales presented by other courts to justify a distinction between design professionals and others. The court rejected the reasoning that a distinction is valid because design professionals do not have continuing control over access to and maintenance of property while owners, tenants, and others in possession do. The court also rejected distinctions based upon who may sue design professionals (a large group) versus landlords and tenants (a smaller group). Finally, the court did not accept distinctions based on the theory that design professionals have special expertise and their work cannot be completely tested, unlike standard goods manufactured by "standard processes." 752 P.2d at 471.

After rejecting the above rationale the court found the six-year statute of repose unconstitutional. However, in its final statement, the court noted that the statute of repose eliminated the statutory right of contribution among tortfeasors. Therefore, under joint and several liability one defendant could end up liable for 100 percent of the damage. The court noted, "the statute of repose . . . does not entirely abrogate liability for defective design work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered." 752 P.2d at 472. The court further noted that because of this "shift" in responsibility there was no substantial or rational relationship between the means and the ends of the statute. The court found that there would even be a disincentive for owners not to finance construction projects which might "be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control," Id.

It is the mention of the joint tortfeasor act and the effect of joint and several liability on it that calls the Turner decision into some question. In the fall of 1988 Alaskan voters passed Ballot Proposition #2, which abolished joint and several liability in Alaska (except for environmental torts, see, e.g., 1988 Inf. Op. Att'y Gen. (Nov. 2; 661-89-0172) in Alaska. Because Alaska no longer has joint and several liability, there would no longer be the "shift" of responsibility found in Turner. What would exist, however, is a shift of liability from tortfeasors back onto the victim. What the court would decide given this situation is not certain, but the same analysis

applied in Turner disapproving the shift of liability onto other tortfeasors would most likely be applied to a shift onto a victim.

Turner dealt with design professionals, not products liability or medical malpractice, but the equal protection analysis applied would be the same. Thus, if HB 166 became law, the court would use the same equal protection analysis used in that case to determine the constitutionality of the statute of repose in section 2 of the bill.

Because there is no fundamental right involved (even though there is a "significant interest") the standard of review concerning the statute of repose in HB 166, should it become law, would still be whether or not there is a "fair and substantial relationship" between the means and the ends of the statute. Although this is a low standard of review, a court would also ask what the legislative goal was in enacting the statute. If the court found a legitimate goal, then the court would analyze whether or not the means utilized by the statute fit the ends, or the goal, of the statute. While it is not possible to be completely certain what the state supreme court would hold concerning the statute of repose suggested by HB 166, as mentioned above it is unlikely that the court would approve of such a drastic shift of liability back onto a victim.

OTHER STATES

Other states have split in their decisions on the constitutionality of statutes of repose. One commentator notes that

> vigorous legal challenges to such statutes have brought mixed results. Claims of the unconstitutionality of such statutes have failed, as some courts have been prepared to accept remarkable arguments that the challenged statutes of repose do not offend the equal protection clause because they are rationally related to some legitimate state purpose.

M. Madden, Products Liability 209 (2d ed. 1988). While, as Professor Madden notes, many courts find statutes of repose constitutional, many also find them unconstitutional. A denial of equal protection is often the main reason courts find statutes of repose unconstitutional, but due process and the "open courts" requirement (granting access to the courts and remedies for all

injuries) of some states are also major issues in determining constitutionality. 3/

One of the more comprehensive cases outlining issues concerning statutes of repose comes from North Dakota. In Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986), the North Dakota Supreme Court did an exhaustive study of its statute of repose and found it unconstitutional. Hanson involved a products liability statute of repose. In Hanson, a young man was killed when an earth mover "jumped backwards" upon start and ran over him. The earth mover had been purchased 19 years earlier, and North Dakota's statute of repose barred a cause of action unless brought within 10 years of purchase. Thus, the wrongful death action brought by the young man's mother was barred by the statute of repose. In analyzing its statute, the North Dakota Court used an equal protection analysis similar to the Alaska Supreme Court in Turner (although the court called their standard of review "intermediate" scrutiny, it was actually very similar to the Alaskan standard in Turner). It is important to note that one of the reasons the North Dakota Court found its statute unconstitutional was that the court found the purpose the statute of repose sought to achieve, i.e., controlling insurance rates, might not be achieved by the statute. This suggests that unless statutes of repose can actually be shown to control rates, they will be less likely to be found constitutional. Among the stated goals in HB 166 is the goal to "increase the availability and affordability of insurance" and "to reduce costs associated with the tort system." Hanson suggests that unless the statute of repose included in HB 166 can be shown to actually result in these goals the measure may be unconstitutional.

As noted in Hanson, many other courts have found their statutes of repose to be unconstitutional. Among states finding statutes of repose unconstitutional are Alabama, Lankford v. Sullivan, Long and Hagerty, 416 So. 2d 996 (Ala. 1982); Utah, Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); Rhode Island, Kennedy v. Cumberland Engineering Co., Inc., 471 A.2d 195

3/ "Open courts" provisions are contained in 37 state constitutions. These provisions allow access to courts and sometimes allow for a remedy for every injury. Alaska does not have an "open courts" provision in its constitution, but to a certain extent a combination of due process rights and the right to trial grant the same rights as an "open courts" provision. See, Lucas v. U.S., 757 S.W.2d 687, 690 (Tex. 1988).

(R.I. 1984); New Hampshire, Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983); Wyoming, Phillips v. ABC Builders Inc., 611 P.2d 821 (Wyo. 1980); Kentucky, Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); South Dakota, Daugaard v. Baltic Coop Bldg. Supply Assoc., 349 N.W.2d 419 (S.D. 1984); and Ohio, Gaines v. Preterm-Cleveland; 514 N.E.2d 709 (Ohio 1987). See Hanson, 389 N.W.2d at 321.

As Hanson notes:

> Courts which have declared statutes of repose unconstitutional have done so on the bases of different constitutional rights. Some courts have relied at least in part on "open courts" provisions in state constitutions. Berry; Daugaard; Lankford. Courts have also relied in part on the due process clauses of state constitutions. Berry. Statutes of repose have also been declared violative of equal protection provisions of Federal and State constitutions. Heath. Some courts have used a combination of these constitutional provisions along with state wrongful death constitutional provisions to invalidate statutes of repose. Berry, Kennedy, and Saylor.

389 N.W.2d at 321, 322 (citations omitted).

On the other side of the issue, Florida, North Carolina, Oregon, Massachusetts, Tennessee, Colorado, Indiana, Illinois, New Jersey, Wisconsin, and Nebraska have all upheld statutes of repose. Courts upholding statutes of repose have reasoned that there is a necessity to be able to predict an end to liability, thereby reducing the "tail" of liability actions; thus, it is hoped, reducing insurance rates. In Hanson, the court noted these cases and their reasonings:

> Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985) [statute of repose does not violate equal protection clause]; Tetterton v. Long Mfg. Co., Inc., 332 S.E.2d 67 (N.C. 1985) [statute of repose does not violate equal protection or State constitutional provision on open courts]; Davis v. Whiting Corp., 674 P.2d 1194 (Ore. App. 1984), cert. denied, 679 P.2d 1367 (Or. 1984) [statute of repose does not violate due process, equal protection, or access to court provisions of the constitution]; Stutts v. Ford Motor Co., 574 F.Supp. 100 (M.D.Tenn. 1983) [statute of repose does not

> violate open court provisions of State constitution]; Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1983) [statute of repose does not violate due process or equal protection]; Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1982) [statute of repose does not violate State open court provision]; Thornton v. Mono Mfg. Co., 54 Ill.Dec. 657, 425 N.E.2d 522 (Ill.App. 1981) [statute of repose does not violate due process]; Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972) [statute of repose does not violate equal protection clause of Federal Constitution].

389 N.W.2d at 322 n.7 (some citations omitted).

In one illustrative case, Gaines v. Preterm-Cleveland, 514 N.E.2d 709 (Ohio 1987), the issue was the constitutionality of a medical malpractice statute of repose. The facts involved a woman who brought suit against a health care organization. A doctor for the organization had told her that her IUD had successfully been removed when in actuality it had not. Three and one-half years later, the IUD had perforated her uterus and was embedded in her left ligament. Pain and permanent damage resulted. Relying on Ohio's four-year statute of repose, the lower court granted summary judgment against the plaintiff.

The Ohio court had previously held that a four-year statute of repose could not constitutionally bar claims of minors or plaintiffs who in exercise of reasonable diligence discovered their injury after the four-year period. Mominee v. Schebarth, 503 N.E.2d 717 (Ohio 1986); Hardy v. Ver Meulen, 512 N.E.2d 626 (Ohio 1987). In Gaines, the plaintiff was not outside the four-year period, but she had less than one year left in which to pursue her claim. The court held that the legislature had intended there to be at least one year allowed in which a person could bring a claim. 514 N.E.2d at 717.

The Ohio court in Gaines focused on the "reasonableness" of the period allowed in which to bring a claim. If less than a year was allowed, the court noted:

> This person is unique in the law of medical malpractice. [S]he has the misfortune of belonging to the only class of litigants who do not have a reasonable period for seeking legal recourse . . . . A person in this class of persons is not any less injured than other malpractice victims nor has he been less vigilant in monitoring the

> quality of his medical care. Yet his legal rights are abridged and even cut off completely for no other reason than the fortuity of timing. We fail to discern any rational basis for distinguishing such a person from other medical malpractice litigants. The injury suffered is no less real, nor is the claim necessarily less meritorious ....
>
> No reasonable grounds can be conceived which would justify denying a full year for filing a claim to a single class of litigants based solely on when they were able to discover the existence of a claim.

514 N.E.2d 709 at 715.

The court held that the statute of repose also denied due process, and said:

> Although it may be stated that this severance of rights might conceivably bear 'a real and substantial relation to the . . . general welfare of the public' by decreasing the sheer numbers of medical malpractice claims, thereby reducing malpractice insurance premiums and lessening the cost of health care, no evidence of such an effect has been brought forward. However, even assuming [the Ohio statute] has actually achieved this end, we find the means of achieving it are unreasonable and arbitrary, and violative of due process.
>
> . . . the severance of an individual's right to pursue a claim based on when he discovers the existence thereof is not justified by any distinguishing feature of such a person or of his claim. The fact that he did not discover his claim until after three years had passed does not necessarily indicate that he 'slept on his rights' since in many cases he will be unaware that he had any rights . . . Nor does the relative delay in his discovery suggest that the injury is trivial or the claim unfounded. In sum, we can envision no reason for cutting off the rights of such persons that is not unreasonable or arbitrary.

Id.

In Gaines, although Ohio (unlike Alaska) has an "open courts" provision, the Ohio court also clearly focused on the equal protection and due process problems presented by statutes of repose. As the Utah Supreme Court noted in Berry v. Beech Aircraft, 717 P.2d 670, 678 (Utah 1985), there are quite a few cases based solely on equal protection analysis that find statutes of repose unconstitutional:

> For cases holding statutes of repose unconstitutional on equal protection grounds, see, e.g., Shibuya v. Architects Hawaii Ltd., 647 P.2d 276 (Hawaii 1982) (architects and builders statute of repose); Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973) (architects and builders statute of repose); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (architects and builders statute of repose); Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978) (architects and builders statute of repose); Kallas Millwork Corp v. Square D Co., 225 N.W.2d 454 (Wis. 1975) (architects, engineers, and designers statute of repose).

CONCLUSION

This letter has outlined the issues involved and the general bases courts have used in analyzing the constitutionality of statutes of repose. As I have noted, the Alaska Supreme Court has found one statute of repose unconstitutional. In Turner Construction Co. v. Scales, the Alaska Supreme Court disapproved of the shift of liability caused by Alaska's statute of repose. Although Proposition #2 has removed joint and several liability from most torts, under HB 166 the shift of liability would still occur, but now it would be back onto the victim. While we cannot be certain of the outcome of a new Alaskan case concerning a statute of repose, the analysis used in Turner would be the same.

CAP ON NONECONOMIC DAMAGES

In 1986, the Alaska Legislature enacted a cap in all personal injury cases of $500,000 for noneconomic damages, except in cases of disfigurement or severe physical impairment. AS 09.17.010. In section 15, HB 166 seeks to limit noneconomic damages to $50,000 in wrongful death cases. In other personal injury cases, the $500,000 limit, with exceptions, stands.

Caps on economic damages in other states appear to apply across the board rather than just to wrongful death. I have been told that a committee substitute for HB 166 will

probably extend the limit on noneconomic damages to situations other than wrongful death.

A recent ABA journal article noted that among other states, Florida, Idaho, Illinois, New Hampshire, North Dakota, Ohio, Texas, and Virginia have struck statutory limits on noneconomic damages. The article also notes that "constitutional challenges to caps on noneconomic damages have been based on federal and state rights to equal protection, substantive due process, access to courts, and to a trial by jury." 74 A.B.A.J. 24 (1988).

I have attached an article concerning caps on noneconomic damages from the Washington Law Review. Silva, Washington's Noneconomic Damages Limit, 63 Wash. L. Rev. 658 (1988). This article contains a table of reported decisions on the constitutionality of medical malpractice and tort reform damage limits. As the table notes, (at least) 12 courts have found damage limits unconstitutional while seven have upheld them. Id. at 675.

In Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988), the Texas Supreme Court, in a case certified to it by the Fifth Circuit, found a $500,000 cap on medical malpractice damages unconstitutional. In so doing, the Texas court compiled an exhaustive description of other U.S. courts and their actions. As the Texas court noted:

> At least thirteen states other than Texas have enacted damage limitation provisions into their medical malpractice statutes. Each statute has different characteristics, and the state courts have divided on the constitutionality of the various caps. See, e.g., Smith v. Department of Insurance, 507 So.2d 1080, 1087-89 (Fla.1987) ($450,000 limit on noneconomic damages violated "open courts" provision of Florida Constitution); Wright v. Central Du Page Hospital Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 743 (1976) ($500,000 cap constituted "special law" in violation of Illinois Constitution); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 836-38 (1980) ($250,000 limit on noneconomic damages violated equal protection guaranteed by New Hampshire Constitution); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D.1978) ($300,000 ceiling violated equal protection clause of North Dakota Constitution); Duren v. Suburban Community Hospital, 24 Ohio Misc.2d 25, 482 N.E.2d

> 1358, 1361-63 (C.P.1985) ($200,000 limit on general damages violated Ohio and federal constitutions); Fein v. Permanente Medical Group, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, 679-84 (1985) ($250,000 ceiling on noneconomic damages held constitutional); Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585, 598-601 (1980) ($500,000 cap upheld); Sibley v. Board of Supervisors, 462 So.2d 149, 154-58 (La.1985) ($500,000 cap upheld) modified on reh'g, 477 So.2d 1094, 1109-10 (La.1985) (latter opinion ordering conditional remand on state equal protection challenge); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977) ($500,000 cap upheld in plurality opinion joined by only three judges, with three others dissenting as to constitutionality, and one judge declining to reach constitutional issues because opinion was merely advisory). Compare Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399, 410-16 (1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 233 (1977) (case remanded for fact findings pertinent to constitutional attacks on damage caps).

757 S.W.2d at 689.

Lucas involved a fourteen-month-old boy who was paralyzed for life due to the negligent administration of a penicillin shot. As you can see from Lucas's list, the reasons for finding caps unconstitutional parallel the reasons for finding statutes of repose unconstitutional. "Open courts" and equal protection are again called into question.

The cases noted concern caps on noneconomic damages in general, not just for wrongful death. The same concerns apply, but there is less argument in support of noneconomic damages when the victim is deceased. At least one court has upheld the constitutionality of a wrongful death statute that limited recovery for all damages to $45,000 for a decedent who left no dependents. Pollock v. City & County of Denver, 572 P.2d 828 (Colo. 1977).

The plaintiffs in Pollock lost their five-year-old child. They were not dependent on the child, and thus the $45,000 limit applied. The parents attacked the limit on equal protection grounds, arguing that it was illogical to allow dependants to recover unlimited damages, while parents could recover

only up to $45,000. The court held that since a dependent would have to show actual damages to recover more than $45,000, and since nondependents can survive without the money better than dependents, there was a legitimate societal interest in limiting recovery.

The same arguments could extend to HB 166's cap on non-economic damages in wrongful death cases. However, it is possible that the Alaska Supreme Court could consider the limit a violation of equal protection. If the cap is extended to all non-economic damages, the constitutionality will be even more questionable.

CONCLUSION

The cap on noneconomic damages in the current version of HB 166 would affect only wrongful death cases. I have been told that this cap may be extended to other noneconomic damages, so I have attached the Washington Law Review article cited herein for your information. This article covers the state of the law concerning caps on noneconomic damages in general, and as you can see, the courts split on the constitutionality of caps on noneconomic damages.

We hope that this memo is of use to you. There may be other constitutional issues raised by HB 166, and this memo is simply an outline of two major areas of concern. If you have further questions, please let us know.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Elizabeth J. Kerttula
Elizabeth J. Kerttula
Assistant Attorney General

EJK:prm

Attachments

cc: Robert Evans
Legislative Liaison

Art Peterson
Regulations Attorney

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August 5, 1988

Mary A. Pierce
Executive Director
Medical Indemnity Corporation of Alaska
4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503

Re: Effective Tort Reform Legislation

Dear Ms. Pierce:

You, like many other executive officers of medical societies and physician sponsored insurers, are likely involved in continuing efforts to obtain passage of effective tort reform.

At the May 1988 Physician Insurers' Association of America Annual Meeting I had the opportunity to discuss the importance of the "fine print" in tort reform legislation. So many people in the audience requested copies of my slides that I prepared the attached annotated version of those slides.

The information on pages two through four can be used as a checklist in reviewing tort reforms you may be considering. Actuarial techniques can be used to evaluate how much "fine print" in the tort reform language might affect the value of the reforms.

If you have any questions about this material, or if I can be of any other assistance to you, please feel free to call me or my associate, Spencer Gluck.

Very truly yours,

Allan Kaufman -SG.

Allan Kaufman, F.C.A.S.

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cc: D. Bickerstaff

How Effective is Tort Reform?

Read the Fine Print

Tort reform can work.

The largest "laboratory" to date has been the medical professioanl liability system in California. Here, a package of tort reforms including many of the currently popular elements was passed following the mid-seventies medical malpractice insurance crisis. At that time, California joined New York and Florida among the national leaders in medical liability costs. Today, California's medical liability costs are far closer to the national average.

Patricia Danzon, currently at University of Pennsylvania, compared medical liability costs from 1975 to 1984 in a number of states with and without tort reforms, calculating these average savings associated with various types of tort reforms:

Caps on non-economic loss	23%
Collateral sources offsets	11-18%
Contingency fees limitations	3%
Reduced statute of limitations	8% per year
Structured settlements	Not tested
Joint & Several Liability	Not tested

Of course, these estimates of savings are in comparison to what costs otherwise would have been, and represent average results for the states studied.

Remember, successful tort reform means that costs are lower than they otherwise would have been. It is unlikely that tort reform will produce costs below the starting point for an extended period.

Tort reform can also fail.

Or be relatively ineffective. Or be less effective than it might have been. For each of the types of reform listed above, there have been a number of variations in bills which have passed, and even more in bills which have been considered. Small differences in wording can have profound implications, some of which may be unintended. To evaluate an existing or proposed tort reform, be sure to read the "fine print".

We've worked on many variations of tort reforms in proposals, bills, and laws in a number of states. The following list illustrates some of the possible variations and important factors which affect the value of those reforms. The list begins with a ball-park estimate of the savings which the reforms might produce for medical professional liability.

Limitations on Non-Economic Loss

Estimated savings can range from zero to fifty percent, depending on:

1. Amount of Limitation. Proposals range from complete elimination to a $1,000,000 limitation.

2. Per Incident or Per Claimant. This distinction is significant, but without proper attention the wording of the law may not even be clear.

3. Flat or Graded. Flat limitations are more common. Graded limitations usually apply the maximum to only the most serious cases and then grade the limitation down for less serious cases (e.g. in proportion to "capacity to enjoy life").

4. Definition of Non-Economic Loss. For example, future wage loss in one jurisdiction is considered speculative and therefore non-economic.

5. Variation by Claimant Characteristic. For example, the limitation may vary by age of claimant and/or degree of injury.

6. Indexation of the Limitation for Inflation.

Collateral Source Offsets

We've estimated savings in this area from zero to fifteen percent.

1. Mandatory or Judgmental Offset. Possible wordings include: "evidence may be introduced"; "judge/jury may consider"; or "judge/jury shall reduce".

2. Offset by Judge or Jury. There's opinion (although no evidence) that offset by the judge produces greater savings.

3. Exceptions to Offset. Possibilities include medicare, life insurance, public insurance, insurance paid by claimant, insurance with subrogation provisions, insurance paid by employer.

4. Past Damages Only or Past and Future Damages. The language of a number of current laws appears to apply to past damages only, whether or not this was intended when the law was written.

5. Offset for Premium Paid by Claimant.

Contingency Fee Limitations

Estimated savings range from zero to ten percent.

1. Selected Schedule. Most limitations take the form of some kind of schedule. That schedule may include percentages higher than current prevailing fees.

2. Schedule Variations. Most schedules vary the percentage by size of award. Others may also vary the percentage by case disposition (i.e., claim, suit, trial, appeal).

3. Treatment of expenses. Are trial, court and expert fees counted as part of the schedule or in addition to the schedule fee? Alternatively, is the award/settlement reduced by expenses before the fee is applied?

Statute of Limitations

We've estimated savings ranging from zero to fifteen percent.

1. Cutoff Period. We've seen anywhere from two years to ten years.

2. Cutoff by Occurrence Date or Discovery Date. Another possibility is both, e.g. "four years from incident or two from discovery, whichever is later".

3. Definition of Discovery Date. "Did discover" or "could have discovered" or "should have discovered" etc.

4. Statute of Repose or Statute of Limitations. A statute of repose operates more restrictively. The courts may decide which it is; careful wording in the law can cause it to operate as a statute of repose.

5. Exceptions. The potential list includes infants, foreign objects, continuing treatment, drugs or radiation, and concealment or fraud.

Periodic or Structured Settlements

Estimated savings range from zero to ten percent.

1. Optional or Mandatory.

2. Size Requirements. For example, "awards over $250,000" or "awards with future damages over $100,000".

3. Applied to Economic Loss, Non-Economic Loss, or both.

4. Treatment of Inflation. Examples include inflation calculated at the jury's discretion, at a fixed rate specified by statute, or at a fixed relationship with a stated index.

5. Court Rules on Treatment of Inflation and Interest. This item refers to conditions before the change in law. Previous assumptions regarding inflation and interest may have been specified in statute or in case law. In other instance it may be difficult to determine prevailing assumptions.

6. Payment Periods. Possibilities include a specified payment period (e.g., 10 years), a specified maximum payment period, payment for life expectancy.

7. Payments May or May Not Terminate at Death. Frequently, some payments terminate (e.g., medical costs) while others may not (e.g., wage loss).

8. Financial Guarantees Required. For example, insurer with specified Best's rating.

9. Treatment of Attorney's Fees. In some instances, attorney's fees may be completely exempted from periodic payments. Other possibilities include lump-sum payments with required present value calculations or separate rules for scheduled payments.

Joint and Several Liability

We haven't estimated significant savings to doctors in this area.

1. Economic Versus Non-Economic Losses. A number of existing versions abolish joint and several liability for non-economic losses only.

2. Proportionate Liability in All Cases or Only Below A Threshhold. For example, some laws establish proportionate liability for those under 50% liable, but provide that all damages may be assessed against those over 50% liable.

3. Among Whom are Damages Apportioned. For example, in a case involving a work-related injury, may the employer be included?

* * * *

Summary and Conclusion

There is evidence that tort reform can be an effective means for reducing the growth in liability costs. Still, simply passing a tort reform bill by no means ensures that savings will be realized. It is no accident that we included zero in each possible range of results. Some versions of tort reform may even increase costs. The fine print of the law, the court instructions used to implement the law, and court interpretations of the law will all act to determine the effectiveness of a tort reform measure. An important first step is to read the fine print.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box V, State Capitol
Juneau, Alaska 99811-4100
Mail Stop 4100
(907) 465-3991

March 20, 1989

MEMORANDUM

TO: Representative Dave Donley

ATTN: Ginger Baim

FROM: Patricia Young
Legislative Analyst

RE: Tort Reform and the Cost and Availability of Liability Insurance
Research Request 89.311

You requested that we provide a review of tort reform measures adopted in other states during the last ten years. Specifically, you wished to know what effects such legislation has had on the cost and availability of liability insurance.

> One certainty exists regarding issues of tort reform and liability insurance: "this is not a race for the short-winded, and it is one which started only recently." ("Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," Volume II, New York, 1986, p. 62.)

A comprehensive review and condensation of the entire tort reform movement in the United States within the last ten years cannot be performed within the current legislative session. In addition to the major proposals--limits on non-economic damages, abolition or restriction of punitive damages, abolition of collateral source rules, restrictions on contingency fees, elimination of joint and several liability, reduction of statute of limitations, penalties for "frivolous" suits, and establishment of alternative resolution procedures--states have considered a variety of specific topics such as medical malpractice and sovereign immunity. Volumes describing and debating the merits of proposed and enacted legislation are published annually. Although relevant, much of this material would provide information of limited value.

Generally, it is too soon to accurately judge the effect of tort reform measures. According to Brenda Trolin, insurance specialist with the National Conference of State Legislatures (NCSL), a minimum of five years are needed

before cases processed under previous systems clear the courts. Several additional years must pass before a sufficient number of cases have been processed through new systems to determine whether changes have had the desired consequences. Ms. Irolin noted that the impacts of medical malpractice reform measures passed in the mid-1970s are only recently beginning to be meaningfully charted.

Because of the variations in state constitutions and laws regarding tort reform, identical reform measures may have dissimilar effects in each state. Thus, even those reform measures which appear promising require careful consideration in the context of our own circumstances to determine potential ramifications. In some states, opponents argue that constitutional rights--including equal rights to protection, access to courts, and trial by jury--are violated by reform measures. Also, reform measures can encourage or discourage lawsuits. Although some measures--such as Hawaii's Court Annexed Arbitration Program--may facilitate and expedite resolution, they may also encourage claims which would not otherwise have been made.[1]

Further complicating the tort reform issue, there is no direct relationship between laws regarding liability and cost and availability of insurance. According to "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," New York, 1986, "no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists." Proponents of tort reform argue that changes which restrict liability or limit damage awards will reduce insurance costs; however, a variety of factors--including changes in underwriting practices and costs, investment returns, market behavior, domestic interest rates, and the national economy--determine actual costs. According to Franklin Nutter, president of the Alliance of American Insurers, "It is clearly impossible to say that if you adopt a certain tort reform, you will get 'X' reductions in premiums."[2]

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[1]This alternative dispute resolution program is a mandatory, nonbinding program designed to handle all tort cases with a probable jury award value of $150,000 or less. Arbitration must be completed within nine months from the date of service to the last defendant. Litigants may select a private arbitrator, or an arbitration commission administrator will assign one to hear the case and deliver a judgment. A litigant who wishes to appeal a judgment must do so within 20 days of the arbitrator's award. If the court does not alter the award by at least 15 percent in favor of the appealing party, that party is required to pay reasonable costs and fees, costs of jurors, and attorney's fees up to $5,000.

[2]Quoted in Public Citizen, "The Impact of Tort Changes on Insurance Rates," attached.

The tort liability issue is one requiring careful consideration in all of its parts. While reform is championed by the insurance industry as the solution to the "insurance crisis," it is worth noting that there are other avenues to cost containment, such as the development of more effective risk management programs and regulation of the insurance industry.

I have attached the following items which you may find useful: "The Impact of Tort Changes on Insurance Rates," "The Need for .nsurance Reform," and "What People are Saying About Liability Insurance and Victims' Rights," Public Citizen, 1986-87; Brenda Trolin, "Controlling Liability Insurance Costs: State Actions and Future Initiatives in the Area of Civil Justice Reform," State Legislative Report, Vol. 11, No. 1, January 1986; a portion of "Insuring our Future: Report of the Governor's Advisory Commission on Liability Insurance," volume II, New York, 1986; Stephen J. Carroll and Nicholas Pace, Assessing the Effects of Tort Reforms, the Rand Institute for Civil Justice, 1987; "Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms," United States General Accounting Office, December 1986; "The Economic Impact of the Texas Liability Law System," a report submitted to the Texas Civil Justice League, January 1989; Insurance Services Office, "Claim File Data Analysis: Overview," December 1988; Brenda Trolin, "Controlling Liability Insurance Costs: State Initiatives in the Area of Insurance Regulation," Vol. 11, No. 6, May 1986; "Justice for All," The Association of Trial Lawyers of America; and information on the effects of tort reform on insurance rates, published by the National Insurance Consumer Organization.

I hope that this information is useful. If you have further questions, I recommend that you contact Brenda Trolin, NCSL, at (303) 623-7800, as an excellent source of information on this topic.

Attachments

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hen J Carroll with

Assessing the Effects of Tort Reforms

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The Institute for Civil Justice

The Institute for Civil Justice, established within The RAND Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.

RAND is a private, nonprofit institution, incorporated in 1948, which engages in nonpartisan research and analysis on problems of national security and the public welfare.

The Institute examines the policies that shape the civil justice system, the behavior of the people who participate in it, the operation of its institutions, and its effects on the nation's social and economic systems. Its work describes and assesses the current civil justice system, analyzes how this system has changed over time and may change in the future; evaluates recent and pending reforms in it; and carries out experiments and demonstrations. The Institute builds on a long tradition of RAND research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

The Institute is supported by pooled grants from corporations, private foundations, trade and professional associations and individuals. The Institute disseminates the results of its work widely to state and federal officials, legislators, and judges, to the business, consumer affairs, labor, legal, and research communities, and to the general public.

Contents

I. INTRODUCTION

Liability insurance availability and affordability problems became widespread in the early 1980s. These problems touched off extensive debate over the need for changes to the body of laws governing compensation for personal injury or property damage—the tort system. By 1986, most state legislatures were considering modifications to their tort systems. In at least 41 states, the debate over what has come to be known as tort reform led to changes in the law.[1]

The debates, and resulting changes in the law, have given rise to widespread concern about how we should go about measuring the effects of tort reforms. These concerns have been accompanied by confusing, and sometimes conflicting, claims for what it is we want or need to know in order to assess the effects of changes in a state's tort system, how we might go about developing that knowledge, and what data we need to perform the required research.

This report offers a framework for assessing the effects of tort reforms. It provides a coherent structure for systematically thinking about how research can contribute to the policy debate over tort reform. Specifically, the report has three purposes:

- To alert policymakers to the issues that need to be considered when assessing tort reform.
- To suggest the kinds of research that would illuminate the major policy issues.
- To offer some guidance to data collection efforts by identifying the generic kinds of data needed.

This report does not provide step-by-step instructions for assessing the effects of reforms. Nor does it provide a list of specific research projects to be performed. Research designs will be needed to translate the general guidance provided here into specific research projects.

We do not suggest that all the studies discussed here are worth undertaking. Research and data collection efforts can be extremely costly; it is possible that the value of the information obtained in any particular study will be less than the cost of obtaining the information. Both public officials and private interests concerned with tort reform

[1]Some proponents of reform argue that relatively few states have undertaken significant reform and that many of the so-called reform states made changes to their tort systems so minor as to be negligible. The Appendix summarizes the tort reforms enacted in 1986.

issues will have to evaluate the likely benefits of each project, relative to its costs, to decide if the effort is worthwhile.

LIMITATIONS OF THE TORT REFORM DEBATE

While the nature of the debate varies from place to place, depending upon a variety of local factors and circumstances, certain limitations characterize the debate almost everywhere.

The debate focuses almost exclusively on the questions of whether, and if so, how much, the tort system affects the increasing cost and declining availability of liability insurance. Reform proponents argue that liability insurance is increasingly costly and sometimes unavailable because the tort system is increasingly expensive. In their view, the only way to control insurance costs is to modify the tort system to make it less expensive.[2] Their opponents counter that malfunctions in the operation and regulation of the insurance system are the cause of the problems, and reform would disadvantage injured claimants while having little effect on insurance premiums or availability.[3] Other issues affecting the tort system and questions of how reform might affect it are raised from time to time, and seriously considered on occasion. But, by and large, concern over insurance costs overshadows other considerations.

In fact, however, effects on insurance costs and availability are no more than byproducts of the tort system's operations. The system serves fundamental social purposes: It provides basic forms of protection, encouraging or discouraging certain kinds of behavior; it establishes the rules for compensating those who have suffered losses through the actions of others; and it offers the context for resolving civil disputes arising out of injuries or property damage. Significant changes, for better or worse, to the system's ability to deter unduly risky behavior, to fairly compensate injured parties, or to encourage rapid and decisive dispute resolution are arguably as important as changes in insurance rates and, in any event, cannot be disregarded in any evaluation of reform.

Second, the debates tend to focus on the performance of some individual segment of the tort system, disregarding its relationship with the entire system. But a change in any one part of such a complex system can reverberate throughout the system. We cannot understand

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[2]See, for example, "The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations," Sidley & Austin, May 1986.

[3]See, for example, Thomas G. Goddard, "Testimony before the Liability Insurance Commission of the Iowa Legislature," Tucson, AZ, September 2, 1986.

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observations of any one part without considering how it affects and is affected by what is going on elsewhere in the system.

Reform proponents, for example, argue that the growing use of the legal system contributes to increasing costs.[4] Their opponents respond with a barrage of statistics indicating that the number of lawsuits is growing slowly, if at all. Throughout this debate, all sides tend to focus on the number of lawsuits, paying little attention to the behavior of parties in negotiating claims prior to the filing of a suit.[5] But any change in the general patterns of those pre-suit negotiations can have dramatic impact on the relationship between the frequency of lawsuits and the costs of the system.[6] Again, the interpretation of data on events in one part of the system (e.g., court filings) depends on events in other parts of the system (e.g., the resolution of claims before suits are filed).

Third, the debates are severely constrained by data limitations. Proponents of reform would insist that some particular change in the tort system is needed to bring about certain improvements, but they generally lack the data to estimate the amount of improvement if the change were made. Opponents, adamantly predicting that the change would result in disastrous consequences, are equally unable to provide estimates of the magnitude of the disaster.

Many public and private institutions collect data relevant to the tort and insurance systems. However, their data collection systems focus on information needed to inform and manage their own affairs; they rarely capture the kinds of data needed to address the debate issues. The extensive data collected by state insurance regulators, for example, are relevant to rate-making and solvency concerns[7] and do not include

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[4]See, for example, Robert D. Kilpatrick, "Solving the Lawsuit Crisis," address to the Rotary Club of Chicago, June 17, 1986. The "litigation explosion" thesis as initially put forth by commentators concerned with the long-term viability of the courts is reviewed in Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," *UCLA Law Review*, Vol. 31, No. 1, October 1983, pp. 4-71.

[5]See, for example, "Are Caseloads Really Increasing?, Yes . . . Thomas B. Marvell, Not Necessarily . . . Stephen Daniels," *The Judges Journal*, Summer 1986, p. 35.

[6]If defendants generally become less forthcoming in dealing with claimants, perhaps to discourage growth in claims or to ease cash flow pressures, there could be an increase in the frequency of lawsuits even though claims are neither more prevalent nor larger than in the past. Conversely, if defendants frequently make more attractive settlement offers, perhaps because the legal system seems increasingly sympathetic to the plaintiff, an increasing fraction of claims could be disposed before they reach suit; therefore, the rate at which suits are filed could be unchanged even if people are, in fact, increasingly likely to perceive themselves as having been injured and to seek compensation.

[7]Commissioner Fletcher Bell (Kansas), chair of the National Association of Insurance Commissioners' Legal Liability Insurance Task Force, NAIC News Release, Kansas City, MO, June 12, 1986.

the information needed to determine how any particular change to the tort law might affect the number and sizes of claims, the amounts paid to claimants, or any of the other concerns that lie at the heart of the reform debate. Similarly, few courts collect data in sufficient detail to identify particular types of civil cases. The caseload information they have generally lumps tort and other types of civil cases together and cannot be used to examine tort reform issues.[5]

Finally, the debate gives rise to widespread demands, particularly by various public authorities, for additional data. For the most part, these demands come from persons primarily concerned with their own state's tort or insurance system and focus on data for their state. Demands for data on tort and insurance affairs in one state are seldom coordinated with demands in other states. There is little recognition that comparing the outcomes of claims across states is critical to assessing the effects of tort reform. However, data for an individual state may prove to be of some value.

Moreover, the demands for data have not emerged from systematic research plans. Once collected, the data may prove to be useless to address the concerns of policymakers. Even worse, if the data collected omit elements essential to a critical analysis, the entire database will be unable to support the analyses policymakers require.

ASSESSING THE EFFECTS OF REFORMS

The tort reform debate is likely to continue. Proponents of reform express dissatisfaction with the extent of reform in many states, suggesting that the changes are inadequate. It is likely they will seek additional changes in subsequent legislative sessions. At the same time, opponents of reform are going to seek rollbacks of what they consider to be the more onerous changes in tort law.

Aside from the ongoing political debate on the need for tort reform, a dispassionate view of the system suggests another critical issue: In our ignorance of how these reforms will affect the system, we have almost certainly made some mistakes. Even when the reforms were adopted with general agreement, other parts of the system may be affected with undesirable consequences; and where the effects of reform were anticipated, their magnitude may be either greater or less than intended. The debate over how to fine-tune the system could prove to be as heated as the debate over whether reform was needed in the first place.

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[5]See National Center for State Courts, *State Court Caseload Statistics. Annual Report 1984*, Williamsburg, VA, 1986, for a discussion of the data maintained by state court systems.

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Future debates over tort reform will lead to demands for evaluations of the past reforms. States contemplating tort law changes will want to learn from the experiences of others.

Public officials and private parties have made it clear that they expect results to follow reform. States that enacted reforms will be pressured to examine the results of those reforms. ("Have we gotten what we thought we were going to get when we went along with reform in the first place?")[9]

Further complicating the situation, the demands for evaluation and data are sometimes maneuvers among political adversaries rather than serious requests for policy-relevant information. This contributes to the problem of identifying the research that would illuminate the policy debate and the data needed to conduct that research.

Thus, the debate continues, with many demands for information but little regard for the data and research needed to provide it. At the same time, new or enhanced data systems are in demand, and some are being put into place without much regard for the kinds of research they might support or the ways in which that research is linked to policy concerns. Conflicting demands have led to a system of data collection and research requirements that can fairly be described as chaotic.

More fundamentally, there is no coherent framework for evaluation. To our knowledge, no one has tried to make clear what we need to know: how information on one subject relates to information on another, what kinds of approaches are appropriate for trying to get which kinds of information, and so forth.

CLAIMANTS AND DEFENDANTS

We use the word "claimant" to refer to the person, organization, or institution pursuing a claim whether or not they have filed suit. Similarly, we use the word "defendant" in reference to the person, organization, or institution against whom a claim is brought, again without regard to the filing of a lawsuit. In general, we do not distinguish between the defendant and, if there is one, the insurer. In discussing the effects of reform on settlement negotiations, for example, we would refer to the "defendant's offer" rather than to the "offer made by the defendant or insurer."

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[9]See, for example, William D. Hager "The Commissioner Comments," in *Iowa Insurance Quarterly*, Vol. II, Fall 1986.

OVERVIEW OF THIS REPORT

Section II begins with an overview of the connections between tort reform and the societal outcomes of policy interest. The overview suggests four basic kinds of policy questions in assessing the effects of tort reform. Subsequent sections focus on each of these questions in turn, discussing the kinds of research needed to illuminate the question, the strategies that might be used to do the work, and the kinds of data needed to conduct the research. Section VII presents our suggestions for what can be done now.

Analyses of the effects of tort reforms ultimately involve comparisons of states that have enacted the reforms of interest to states that have not. The Appendix lists the reforms that were enacted in each state in 1986.

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II. WHAT DO WE NEED TO KNOW?

Much of the reform debate focuses on the relationship between the tort system and the costs and availability of insurance. Most demands for tort reform evaluations and the data needed to conduct them concentrate on information presumed relevant to the connection, if any, between the tort and insurance systems. But analyses concerned exclusively with this relationship would be grossly inadequate and could be misleading. This section discusses the information policymakers need to assess the effects of reforms.

AN OVERVIEW OF THE TORT SYSTEM

The objectives of the tort system are numerous and conflicting, and not all are explicit. The balance among them is subject to continual change as social perceptions and preferences change. Nevertheless, the objectives can be defined in terms of the system's effects on three major areas of social concern:

- The economic and social well-being of the society at large.
- The injuries and grievances suffered by individuals and groups within the society.
- The prompt, efficient, and just resolution of disputes.

The tort system can affect these areas indirectly through legal rules. The rules influence the behavior of people and institutions and, to the extent that they modify behavior, influence our economic and social well-being, the injuries we suffer, and the outcomes of resulting disputes. Figure 1 depicts one view of the connections among legal rules and the social purposes served by the tort system.

Productive behavior refers to the everyday activities of businesses, organizations, and individuals producing the goods and services we all enjoy: for example, the activities of manufacturers producing goods, the actions of health professionals providing medical services, the behavior of drivers providing private or public transportation, and the activities of insurers providing insurance. But as Fig. 1 indicates, productive behavior sometimes results in injuries or grievances, which, if not informally resolved by the parties, become disputes.

Disputes are resolved through interactions among people—claimants and defendants, their legal representatives, judges, jurors, mediators,

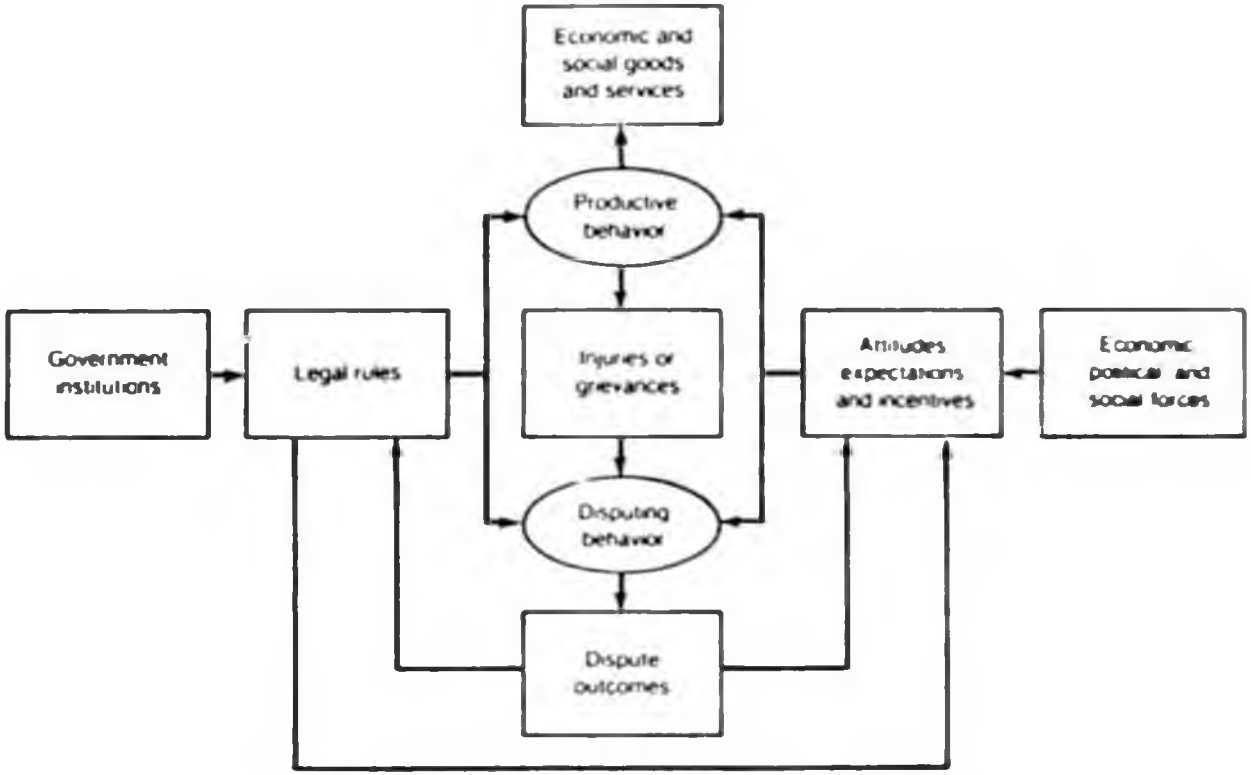

Fig. 1—A conceptual view of the tort system

arbitrators, and so forth. The behavior of those involved in dispute resolution are affected by legal rules, but they are also affected by the parties' attitudes, expectations, and incentives, which, in turn, are shaped by numerous economic, political, and social forces.

Parties' disputing behaviors determine the outcomes of disputes. Dispute outcomes, in turn, influence attitudes, expectations, and incentives of individuals and institutions. Finally, productive behavior is affected by both legal rules and individuals' and institutions' attitudes, expectations, and incentives.

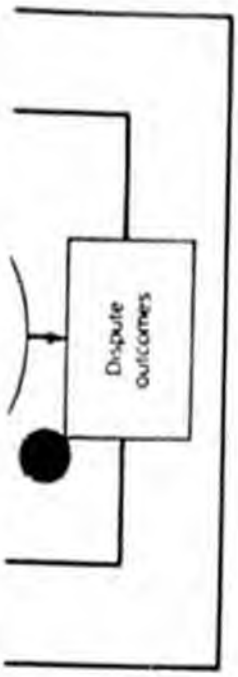

FIG. 1—A conceptual view of the tort system

Consider the relationship between tort reform and insurance costs. Assume some change in legal rules. For that change to have any effect, it must stimulate a change in someone's disputing behavior. If those involved in resolving disputes are unaware of the change in the law, or simply choose to disregard the change, dispute outcomes will remain the same. Unless there is some change in dispute outcomes, the losses insurers expect to incur are unaffected and insurers have no incentive to modify underwriting practices or premiums.

Suppose, on the other hand, that the change in the law induces some change in the disputing behavior of those resolving claims. A cap on awards for pain and suffering, for example, might lead defendants confronted with substantial claims to offer less in settlement than they would if the potential trial award were unlimited. Similarly, plaintiff attorneys might scale down their demands in cases where potential verdicts are constrained by the cap. The changes in disputing behavior may, in turn, result in different dispute outcomes. Large claims, for example, might settle for less when awards for pain and suffering are capped than if there been no cap. Underwriters and others forecasting the outcomes of future disputes may observe that some types of disputes are now being resolved at lower cost than used to be the case and revise their expectations of future costs accordingly. To the extent that premiums reflect expected future costs, they will then decrease.

Thus, dispute outcomes are the signals sent by the system to those engaged in productive activities (e.g., insurers). To bring about changes in those activities (e.g., lower insurance premiums), dispute outcomes must be changed. But, outcomes will change only when dispute resolution behavior is modified.

BASIC POLICY QUESTIONS

The view of the system offered above suggests four basic policy questions needed to assess the effects of reforms.

How Soon Can We Expect to See the Effects of Reforms?

Reforms will not affect dispute outcomes until dispute resolution behavior changes. Behavioral changes will not occur overnight; some reforms may never affect anyone's behavior. Time must pass before a new law takes full or even measurable effect because it takes time for participants in the disputing process to adjust their behavior.

The implementation of laws has received surprisingly little study. Therefore, we need to study the ways laws are implemented, the amount of time necessary for behavioral changes, if any, to occur, and the ways disputes are resolved during these transition periods as behavior responds to changes in the law.

Have Reforms Affected the Outcomes of Disputes?

The effects of reform on the costs of the system are clearly a major policy concern. But a number of other outcomes are also worthy of study. Filing patterns can be affected by changes in the law: Reform can affect litigants' perceptions of the rate of return to litigation, and thus, the incentive to litigate. Reform can also affect whether litigants perceive the law in a jurisdiction as sympathetic to their position and thus, their interest in pursuing the dispute there rather than some other forum.

Reforms that affect either the costs of litigation or litigants' perceptions of the rate of return can affect disposition patterns. More or fewer cases might be settled rather than pursued to trial; cases might be encouraged to settle earlier or later.

Reforms can directly affect litigation costs. Additionally, changes in either disposition patterns or in filing patterns or both are likely to affect the public and private costs of litigation.

We need analyses of the effects of reform on costs, including the amounts paid injured parties in compensation and the transactions costs incurred. To place those results in their proper context, we need analyses of the effects of reforms on filing and disposition patterns.

Who Won? Who Lost? How Much?

If reform affects the outcomes of any dispute, someone must pay, and someone else be paid more or less than would have been paid without reform. The winners in reform are those who pay less, or are paid more; the losers are those who pay more, or are paid less.

Regardless of the concerns that motivated any particular reform, effects on the equity of the system cannot be neglected. Who won? Who lost? How much? Who paid the price of reform?

Did Reform Affect Economic Outcomes or Injuries?

Finally, while the debate has focused on the costs of the system, the indemnification of injured parties is only one of the tort system's purposes. The system also shapes our basic obligations to each other and influences the structure and policies of our social and economic institutions. Modifications to the tort system, whether or not they have cost or equity effects, may affect producers' and service providers' decisions regarding the kinds, characteristics, and prices of the goods and services they make available to society. Changes in these decisions can result in changes in the constellation of goods and services consumed by society and, consequently, in society's well-being.

At the same time, changes in the kinds and characteristics of available goods and services can generate changes in the frequency and severity of the injuries incurred by the use of goods or services.

More generally, tort reforms can affect pressures on manufacturers and service providers to keep goods and services associated with liability claims off the market or to make them safer. Whether society gains or loses when products or services are withdrawn from markets or are modified depends on value judgments regarding the usefulness of the product or service, the costs of modification, the costs of injuries, and related issues. Whatever those judgments might be, policymakers need to assess the effects of reforms on the deterrence function of the system.

III. HOW SOON CAN WE EXPECT TO SEE THE EFFECTS OF REFORM?

IMPLEMENTATION PROBLEMS

Validity and Interpretation

Changes in the law are rarely implemented immediately, and, in fact, may never be fully implemented. Whether, and to what extent, a law of uncertain validity affects the outcomes of disputes is an open question. It is possible that a reform will not be fully effective so long as its status is uncertain.

California's medical malpractice tort reform package, enacted in 1975, is an example of implementation delay due to sequential constitutional challenges to each of its provisions. It took more than a decade of litigation to finally determine the legitimacy of the law. The degree to which the outcomes of medical malpractice cases resolved during the transitional period were affected by the reform package is unknown. If the law did not become fully effective until the mid-1980s, analyses of its effects based on earlier data may be misleading.

The implementation of a reform can also be delayed by questions of interpretation and application. Consider, for example, a cap on damages for pain and suffering. The wording of the statute may not be clear as to whether the cap applies to the award assessed against each defendant in a multiple-defendant case or to the aggregate award provided to the plaintiff. It may not be clear whether the cap applies to cases in the system at the time the law was passed or only to cases filed after its effective date. Independent of the intentions of those who framed the law, there may be disputes as to the legitimacy of those intentions.

Operational Procedures

Even when the meaning of a reform is clear, its effect remains problematic until it is put into operation. A law becomes more than words on paper when it causes someone to do something. It must specify who must do what, what measures are to be used to discover whether they have done it, and what should be done if they haven't.

Consider, again, the example of a cap on awards. Assuming constitutional and interpretative issues have been resolved, the cap must still

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be enforced. One possibility is to instruct the jury not to award more than the specified amount for pain and suffering. Appropriate jury instructions, possibly requiring itemization of the components of the award, must be developed.

What if the judge believes that the jury has disregarded the cap, returning an award that includes an excessive amount for pain and suffering? Rules are needed to establish the judge's responsibility and the factors he must consider.

Alternatively, enforcement of the cap might be left to the judge, leaving the jury free to return any award it deems appropriate. Here, too, rules establishing the judge's responsibility and authority in enforcing the cap are needed.

California's medical malpractice reform package illustrates the problem of operational procedures. The package includes a limitation on contingent fees in the form of a fee schedule. In California, however, contingent fees are not reported. There is no reason to suppose that plaintiff attorneys are charging fees other than those specified by the reform,[1] but there is no way to systematically examine how that provision of the law operates nor is there a way to systematically enforce the law.

Recognizing the Effects of the Law

The vast majority of civil cases are resolved in settlement negotiations. Because parties are free to settle a dispute on any mutually acceptable terms, settlement negotiations are affected by changes in the law that alter parties' bargaining positions and strategies. These strategies, in turn, reflect expectations of the likely outcome of the claim if pursued to verdict and the costs of litigation.

But expectations of verdicts and litigation costs may not change the instant a reform is enacted. Attorneys, claims adjusters, and others involved in the negotiating process may require time to learn what difference a change will make. Will the first verdict returned under the new legal regime change expectations? Or will it take two verdicts, or ten verdicts, or ten years of verdicts before the settlement negotiation process is changed? The effects of reform will be realized only after people become aware of the change in bargaining strength brought about by the change in the law.

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[1]The California State Bar Association is investigating an allegation that an attorney collected an excessive fee in a medical malpractice suit. See John Kendall, "Trial Lawyer Chief's Fee Dispute Will Go to Bar," *Los Angeles Times*, October 7, 1987, p. 21.

RESEARCH REQUIREMENTS

To learn more about the nature and effect of implementation problems, three kinds of analyses are needed to focus on the timing of reform activities, the behavior of participants in disputes pending complete implementation of a reform, and the differential effects of alternative implementation strategies.

The Timing of Reform Activities

Conducting studies before fundamental questions are resolved may misconstrue the effects the law will have once it is fully in place. Policymakers and researchers need to know the timing of activities that influence the implementation process. When were constitutional challenges resolved? When were questions regarding the interpretation of key terms and phrases finally answered? More generally, when did the law become certain? The answers to these questions govern both the timing of future research and the interpretation of research results.

Behavior Pending Implementation

Policymakers and researchers need to know how parties involved in dispute resolution—judges, jurors, attorneys, claims adjusters, and so forth—behave during the implementation process when the status of a reform is uncertain. Do they conduct themselves as though the reform had not been enacted, as though its validity or interpretation was unquestioned, or somewhere in between? How long does it take to learn the practical consequences of a new law? How do people behave when the status of a new law is certain but its practical consequences are still unknown because cases to which it applies have not yet gone to trial? The answers to these questions determine how much we can rely on analyses of reforms conducted before reforms are fully implemented; they also provide guidance on interpreting analysis results to anticipate the likely effects of the reforms once fully implemented.

Alternative Implementation Strategies

Depending on the nature of the reform, there may be several ways of going about implementation, each with its own implications for the speed and magnitude of the reform's effects. Policymakers need to know the differential effects of alternative implementation strategies.

For example, a reform requiring compensation from collateral sources to be offset could be implemented by instructing the jury to adjust for such sources in arriving at its award. Alternatively, the jury

might award whatever it deems appropriate, and the judge would deduct collateral source compensation. The method used may affect both the speed of implementation and the effects of the reform itself. Developing jury instructions may take more or less time than developing rules for judges. Having juries account for collateral source payments may result in awards that differ from adjustments made by judges.

STRATEGIES FOR STUDYING IMPLEMENTATION

General Approach

Case studies of the behavior of people involved in dispute resolution are an appropriate strategy for studying tort reform implementation. We need to examine their actions when the law is uncertain, and after the law is certain but its effects are still unknown. In either case, research needs to probe the expectations and perceptions of the parties and their reasons for acting as they did.

We can initiate studies now to examine how people today are negotiating in the new environments created by the reforms enacted last year. Consider for example, California's Proposition 51, modifying the doctrine of joint and several liability. Researchers can investigate the settlement policies of presumably affected institutions, such as government agencies, to identify how they are responding to the change in the law. By studying other states that have similarly modified their tort systems, researchers can identify the common themes that run through different implementation experiences.

Retrospective studies of implementation are also possible. During the mid-1970s, a number of states modified their laws relevant to medical malpractice. Researchers can examine the experiences of those involved in medical malpractice disputes to develop an understanding of how people behaved during the transition period.

An Example: Implementing California's Judicial Arbitration Program

In 1978, the California State Legislature enacted mandatory judicial arbitration to alleviate increasing civil caseloads, stabilize court costs, and reduce time to disposition and other burdens on litigants. An analysis of implementation by the local courts demonstrates both the

methods of implementation analysis and the kinds of results that can be obtained.[2]

The analysis was primarily based on interviews with court officials and practicing attorneys in courts representing different-sized jurisdictions and different sections of the state. In each court, the researchers interviewed the judge responsible for directing the arbitration program, the court executive officer or the deputy or both, the arbitration administrator, and attorneys who were familiar with the program.

The study found that local courts made very different implementation decisions in adopting a series of rules or policies to establish their program's operating procedures. In doing so, some of the courts consciously deviated from statutory provisions and Judicial Council rules. And where local discretion was permitted, local courts opted for different approaches. For example, although Judicial Council rules set forth a detailed timetable for the sequence of steps in the arbitration process, some courts deviated from those rules: Some adopted special practices to accelerate the process; others deliberately pursued a "no-monitoring" policy once an arbitrator was assigned to a case.

It may be that each court's implementation decisions resulted in the arbitration program best suited to its needs, given the resources available to it and the demands on it. Nonetheless, these decisions profoundly affected the degree to which each court's program achieved the stated goals. Failing to take account of local courts' implementation decisions would result in very misleading conclusions. For example, some courts required that all litigants whose cases were assigned to arbitration appear at a settlement conference prior to arbitration. In these courts, the arbitration program actually increased pressures on court resources, not because arbitration programs necessarily burden courts, but rather because these courts chose to expend judicial resources to ease burdens on the arbitration program.[3]

Data Requirements

The most basic data requirement is information on the timing of implementation activities: when reforms were enacted, what their

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[2]Deborah R. Hensler, Albert J. Lipson, and Elizabeth S. Rolph, *Judicial Arbitration in California: The First Year*, The RAND Corporation, R-2733-ICJ, 1981.

[3]These courts offer an intriguing example of the ways in which means and ends can become inverted in the implementation process: They were expending approximately 30 minutes of judicial time per case to avoid overburdening a program that was meant to relieve pressure on the judicial system.

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To study the implementation process, we need data on the experiences, activities, and perceptions of attorneys and claims managers. Researchers need to interview and observe people involved in dispute resolution to understand what they are doing and why; their objectives and goals; and how changes in the law have affected their objectives, perceptions, and disputing strategies.

Consider, again, the study of California's judicial arbitration program. The researchers interviewed executive, legislative, and judicial personnel involved in the design of the program. They interviewed local court officials who decided how the program would be implemented at the local level or were responsible for its subsequent operation, or both. They interviewed attorneys who served as arbitrators and attorneys whose cases had gone before arbitrators. The interviews included representatives of all those involved, except litigants, in the resolution of disputes applicable to the program.

In addition to interviewing representatives of different perspectives, the researchers purposely selected study sites that span the range of the jurisdictions involved in the program. This allowed them to examine whether the formal rules and statutory provisions were being implemented in a uniform manner and, if not, how differences in implementation decisions were linked to differences among the sites. They could thus identify the factors affecting implementation and the features of the law that, if changed, might induce the originally desired behavior.

Studies of the implementation of reforms can be conducted while the implementation process is under way. In fact, implementation studies would probably yield more accurate results if undertaken while those involved are still engaged in the process. Studies deferred to some future date will suffer the problems of recall and rationalization that often plague retrospective studies.

Initiating studies now of how those involved in dispute resolution are behaving and how their behavior changes in response to reform could inform the current policy debate. Policymakers are pressed to make judgments on the need for further reforms, or on the need to undo past reforms, on the basis of what seem to be the effects of reforms, whether or not the reforms have had sufficient time to influence behavior. Implementation studies can suggest how much we can base policy on what is happening in the tort system now. For example, implementation studies may find that important players in the system

[4]The Appendix is a step toward the creation of this database.

have not yet adapted to the reforms, and we cannot base policy on the assumption that their current behavior will continue.

Implementation studies will also guide the timing of studies of the effects of reforms. We need to know the degree to which reforms have been implemented before we can decide when to study their effects.

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IV. HAVE REFORMS AFFECTED THE OUTCOMES OF DISPUTES?

The policy debate centers on the effects of reform on "costs," meaning defendants' and insurers' aggregate outlays—the sum of indemnity payments to injured parties and legal defense costs. But there are several other types of dispute outcomes that could be affected by reform. While these are less directly related to insurance costs—they are nonetheless important and need to be considered.

DISPUTE OUTCOMES

Aggregate Outlays

The basic question is: How have defendants' and insurers' aggregate outlays been affected by reform? In considering how research can help answer this question, it is important to recognize that aggregate outlays include several different components. Outlays comprise indemnity plus defense costs. Indemnity, in turn, is the product of the frequency of claims, the percentage of claims closed with payment, and the average size of paid claims.

Reforms can impinge on different components of outlays in different ways, affecting one but not another, or affecting two or more components in the same or in different directions. To fully appreciate effects of reforms, we need to identify effects on outlays and on components of outlays. We want to know whether changes in aggregate outlays came about because of changes in the amount of indemnity paid or because of changes in defense costs or both. To the extent that indemnity was affected by reform, we also want to know whether those effects resulted from changes in claim frequency, or in the fraction of claims closed with payment, or in the size of payments, or in a combination of the three.

Patricia Danzon's study of the effects of medical malpractice reforms on the frequency and magnitude of claims illustrates the importance of analyzing separately the components of outlays.[1] She found that the introduction of arbitration of medical malpractice cases increased outlays. Does this imply that arbitration resulted in larger

[1]Patricia M. Danzon, *New Evidence on the Frequency and Severity of Medical Malpractice Claims*, The RAND Corporation, R-3410-ICJ, 1986.

indemnity payments? No: She also found that arbitration contributed to increased claim frequency. (Presumably arbitration offered a less expensive means for resolving disputes, encouraging parties to make claims otherwise too small to warrant pursuing when only the more expensive, traditional means were available.) Because the frequency of smaller claims grew, the size of the average paid claim declined. But because there were more claims overall, total outlays increased.

Disposition Patterns

Changes in the law can affect the point at which a dispute is resolved (before suit was filed, filing, just before trial, etc.). Litigants' decisions about whether to make an offer, how much, or whether to accept an offer made by the other side partially depend on their expectations of the financial consequences of pursuing the matter. Legal changes that affect either the expected recovery or the costs of litigation can influence negotiating strategies on both sides. And if either side's negotiating strategy changes, the dispute may settle earlier (or later) in the process.

Reforms that reduce either the odds that the plaintiff will prevail at trial or the likely size of the award will reduce both sides' expectations of the expected recovery. A settlement offer that would have appeared inadequate to the claimant prior to the reform may be acceptable after the reform. On the other hand, the defendant might be more willing to risk trial after the reform and, consequently, be less forthcoming in settlement negotiations. The net effect on disposition patterns will depend on how much claimants' expectations change relative to the changes in defendants' expectations.[2]

Reforms that affect the uncertainty of dispute outcomes can also affect disposition patterns. Reforms that reduce the uncertainty of dispute outcomes will encourage settlement and reduce the need for protracted litigation. Caps on awards, for example, can reduce the difference between plaintiff's and defendant's expectations as to the value of a case and lead to more rapid resolution. Conversely, reforms

[2]Suppose a reform generally reduces claimants' expectations more than defendants' expectations. While defendants may now make lower settlement offers (because they are a little *more optimistic* about their chances at trial should the offer be declined), claimants will be relatively more willing to accept defendants' offers (because they are, comparatively, a lot *more pessimistic* about their trial prospects). Both the fraction of claims resolved before a suit was filed and the fraction of suits resolved before trial will likely increase. Conversely, if defendants generally believe the reform had a comparatively large effect on trial prospects while claimants see the effect as being much smaller, defendants may substantially reduce their settlement offers while claimants' settlement demands decline only a little. If so, fewer claims will be resolved before suit and fewer lawsuits settled before trial than without reform.

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that increase the uncertainty of dispute outcomes can widen the gap between claimants' and defendants' expectations, reducing the prospects for settlement and, where settlement is still feasible, increasing the amount of time and effort to reach settlement.

Changes in disposition patterns are important in themselves; the time to disposition is obviously of interest to the parties. Disposition patterns are also a key factor in interpreting changes in the frequency of lawsuits and signal the effects of reforms on parties' negotiating strategies. Disposition patterns can be a significant factor in the costs of litigation: Reforms that lead to disposition at an earlier stage in the process can reduce the amounts of public and private resources expended to resolve the dispute.

Filing Patterns

In many cases, claimants have some flexibility as to when and where a suit is filed. Attorneys might rush to the courthouse prior to the effective date of a reform they consider unfavorable to their position, or they might delay filing until after the effective date of one they deem favorable to their position.[3]

Similarly, tort reforms can affect the desirability of pursuing a claim in one jurisdiction compared to another (e.g., in federal rather than state court or in one state rather than another).

These choices are of concern on their own merits: Does it serve society's interest to shift the location of disputes from this jurisdiction to that? Does the creation of incentives to file lawsuits early or late generate unnecessary litigation?

Moreover, these choices affect the interpretation of information on the effects of reform. A surge in litigation following on the heels of reform could result from significantly enhanced plaintiffs' expectations of recovery, inducing claims by parties who, before reform, found the rate of return to litigation so low that they did not bother pursuing their claim. Alternatively, the surge could result from a rush to the courthouse as claimants who deemed the reform prejudicial to their position sought to pursue their claim before the reform took effect. These are very different interpretations of the same observation; to sort out the real effects, policymakers need information on how reform affected filing patterns. Similarly, policymakers need to distinguish a

[3]An extreme example of the reform effects on the timing of litigation is the commentator who argues that Florida plaintiffs should delay filing suit for three years in the hope that a reform law favorable to the defense with a three-year sunset provision would not affect their case. George L. Priest, "Tort Reform Legislation . . . Is Only Smart," *The Wall Street Journal*, February 11, 1987, p. 26.

change in a jurisdiction's litigation rate due to a change in the law from a *shift* in litigation from one jurisdiction to another.

Transactions Costs

The transactions costs of litigation are the sum of plaintiffs' costs, defense costs, and public costs. They are the "overhead" costs of the system in the sense that the services purchased are not desired for themselves. Rather, they are means to ends: the deterrence of injurious behavior, the compensation of injured parties, and the resolution of disputes. To the extent that reform increases (decreases) transactions costs, society must expend more (fewer) resources to achieve those ends.

Reform can affect the transactions costs of litigation in a number of ways. On the plaintiffs' side, any reform that reduces the plaintiff's recovery will reduce the amount (but not the share) paid the plaintiff attorney on a contingent fee basis. Limits on contingent fees can reduce both the amount of plaintiff's costs and the share of recovery paid in legal fees. To the extent that defendants are represented on an hourly fee basis, any reform that reduces (increases) the amount of litigation activity will reduce (increase) defendants' costs. Because the public costs of litigation are related to the stage at which a case is disposed, any reform that affects disposition patterns can affect public costs.

STRATEGIES FOR STUDYING THE OUTCOMES OF DISPUTES

General Approach

In studying the effects of reforms on dispute outcomes, policymakers can concentrate on aggregate outcomes and need not be concerned with individual claims. The question at hand is not how John Doe's claim was affected by reform, but rather, how reform influenced all claims.

Because all the claims resolved in a state at about the same time were resolved in the same legal environment, differences among their outcomes cannot cast light on how reform affected the outcomes of claims. This suggests a research approach based on comparing aggregate outcomes across states to see if a dispute outcome—say, aggregate outlays—systematically differs from one legal environment to another. Alternatively, we could compare aggregate outcomes in a state in years

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before and after reform. An even more powerful approach would be to combine both approaches in an analysis across states over time.[4]

Because outcomes can be affected by a variety of factors other than the legal environment, other factors need to be taken into account. Suppose, for example, that the population of State 1 tends to be more sympathetic toward the plaintiffs' perspective than the population of State 2. If these states had identical systems of tort law, we would expect the average size of paid claims (magnitude) in State 1 to exceed the average size of paid claims in State 2. If State 1 enacted a reform that tended to reduce magnitude, the average size of paid claims thereafter would be less than if the reform had not been introduced. But the magnitude of paid claims in State 1 might still exceed the magnitude in the State 2, despite this reform, if the effect of the population differences was greater than the effect of the reform. And even if the reform had an effect sufficient to outweigh the effect of the population differences, the effect of the reform would be greater than the observed difference in magnitude between the two states.

Multivariate statistical analyses are an effective method for controlling the effects of other factors in comparing the aggregate outcomes of claims across states, over time, or both. Figure 2 suggests the nature of the statistical analysis. Suppose the solid lines indicate the claim frequency in each of six hypothetical states over the 1974–1984 period. Neglect the dashed lines for the present. Assume the following:

- States A, B, C, and D are highly urbanized while states E and F are generally rural;
- States A, B, D, and E had adopted pro-plaintiff common law doctrines prior to 1974, while States C and F had not adopted these doctrines by 1984;
- States A and D adopted mandatory collateral source offset in 1975, effective as of 1976; and
- States B, C, E, and F made no changes to their tort rules over the 1974–1984 period.

The data presented in Fig. 2 show that claim frequency is generally higher in States A through D than in States E and F, suggesting that highly urbanized states have greater claim frequencies than do less urbanized states. The slopes of the lines for States B and E and, before enactment of collateral source offset in 1976, in States A and D are generally steeper than are the slopes of the lines for States C and F. This pattern suggests that the growth rate of claim frequency is

[4]Research on the effects of any particular type of reform is limited by the opportunities to observe that type of reform. The Appendix lists the reforms enacted in 1986.

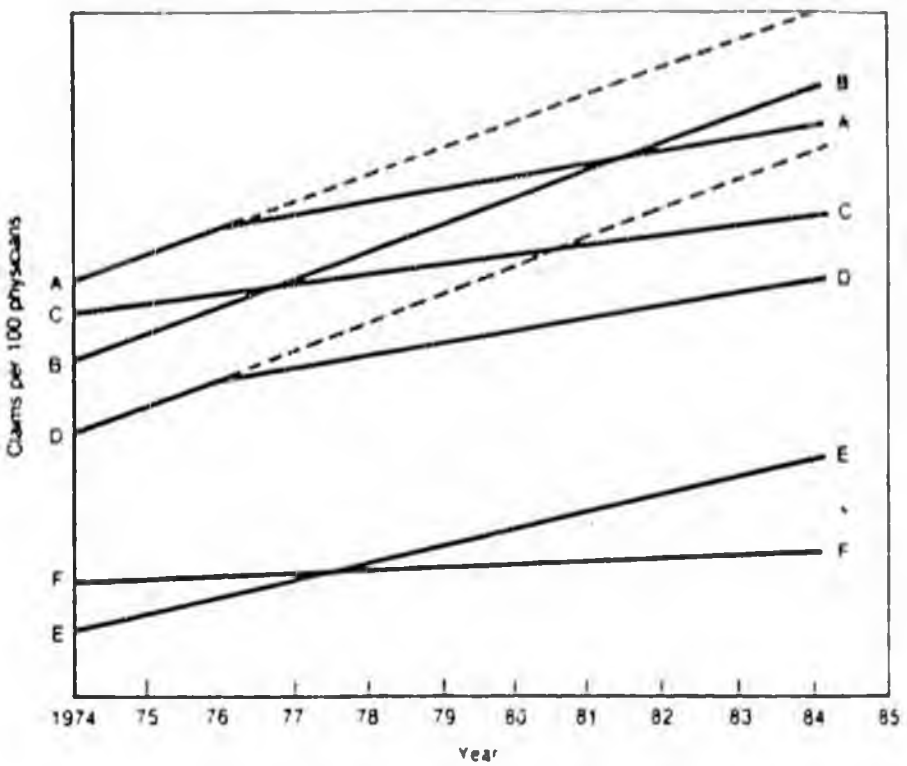
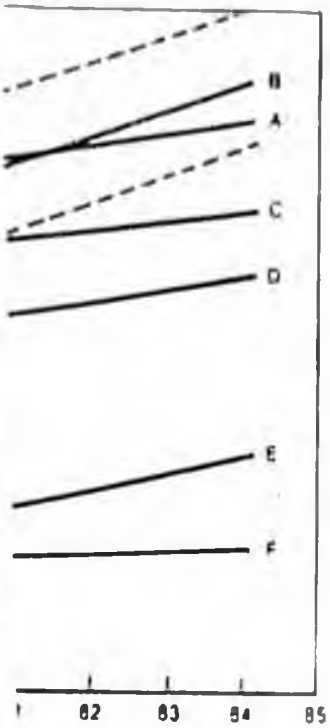


Fig. 2—Hypothetical comparisons of aggregate outcomes of claims

generally greater in states that had adopted pro-plaintiff common law doctrines. Finally, the slopes of the lines for States A and D are less steep after 1976 than before. The adoption of mandatory collateral source offset slowed the growth in claim frequency in the two states that enacted that reform.

Note that the lines for the states that did not enact reforms—States B, C, E, and F—are straight over the entire period. Because there are no "kinks" in those lines, we conclude that the growth rate of claim frequency was constant over the entire period in all four states. The dashed lines indicate what claim frequencies would have been in States A and D if each state's claim frequency had grown over the 1976-1984 period at the same rate as the 1974-1975 period. The vertical distance between the dashed line and the solid line for State A and for State D shows the effect of reform on claim frequency in each state.



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This stylized example neglects the complexities encountered in analyzing real data. Growth rates, for example, are rarely constant and so do not result in straight lines like those shown in Fig. 2. Year-to-year fluctuations in growth rates generate zig-zag lines over time that are far more difficult to interpret. The analyst, on the other hand, is not dependent on visual inspection of graphs but can employ powerful statistical methods to search out the patterns and relationships in the data.

An Example: Assessing the Effects of Reforms on the Frequency and Magnitude of Medical Malpractice Claims

Patricia Danzon used multivariate statistical methods to assess the effects of tort reforms on the frequency and average size of medical malpractice claims closed in 1970 and 1975–1978.[5] She subsequently updated her results using data on claim frequency and size for 1974–1984.[6] The units of observation were not individual claims, but individual states in each year. Each study attempted to explain claim frequency per 100 physicians and the average size of paid claims, by state and year.

The first study examined the effects of legal rules present in a state, such as the number of pro-plaintiff common law doctrines the state had adopted by 1970, and whether the state had adopted a cap on total awards or on pain and suffering awards. To control for other influential factors, the analysis controlled for aspects of each state's medical environment and demographic composition such as the percentage of the population over age 65, the percentage of physicians belonging to a state or local medical society, and the number of lawyers per 100,000 population. The second study employed basically the same kinds of variables.

Danzon was able to estimate the effects of caps on awards (a 19 percent reduction in the average size of paid claims according to the initial study, a 23 percent reduction according to the follow-up study). Similarly, she showed that statutes permitting or mandating the offset of collateral benefits reduced both the frequency of claims (by 14 percent) and the average size of paid claims (by 11–18 percent) relative to comparable states without collateral source offset. Among the other factors

[5]Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims*, The RAND Corporation, R-2870-ICJ/HCFA, 1982. Danzon uses the word "severity" in reference to the average size of paid claims.

[6]Patricia M. Danzon, *New Evidence on the Frequency and Severity of Medical Malpractice Claims*, The RAND Corporation, R-3410-ICJ, 1986.

affecting claims, Danzon found urbanization a highly significant factor that explains much of the observed difference among states in claim frequency and magnitude. Per capita income, the unemployment rate, and the number of attorneys per capita had no statistically significant effect after controlling for urbanization.

Data Requirements

The research approach suggested above requires information, by state and year, on the outcomes of disputes, the legal environments, and the other factors that might have affected outcomes. The outcomes of interest include the following: claim frequency; the percentage of claims closed with payment; the average size of paid claims; disposition patterns or the fraction of claims closed before suit, after suit but before trial, and after trial; filing patterns; plaintiffs' and defendants' costs of litigation; and public costs of litigation. Note that data on individual claims are not required to address these issues; statewide aggregate measures of dispute outcomes will suffice.

Construction of the legal variables poses few conceptual problems. However, the number of variables that can be included depends on the number of states that have adopted the laws of interest. If only one state enacts some reform, there is no way to distinguish that reform's effects from those of any other factor unique to that state. Even if several states enact the same type of reform, but opt for different variants of the reform (e.g., a cap on awards for pain and suffering at $500,000 in one state, at $250,000 in another state), it may be impossible to estimate the differential effect of each variant. In such cases, it is necessary to define a legal variable for the type of reform and use the same variable for every state that adopted a reform of that type, regardless of differences among the variants. This approach essentially estimates the average effect for each type of change in the law.

The identification of the "other factors" that might influence dispute outcomes can be difficult. Theory, the experiences of practitioners, and the results of previous research are the major guides to identifying factors that need to be controlled to separate out the effects of legal variables. For example, Danzon observes that hospital admission rates for the elderly are roughly twice as high as those for persons under 65 and that a previous study had found a higher rate of negligent injury per admission for the elderly. Her theory suggests that claims will be more frequent when injuries are more frequent. This combination of theory, observation, and the results of research led her to control for the fraction of a state's population over 65. However, there is no simple formula or certain guide to the selection process and no list of all

the "right" factors to include in the analysis; different analyses require that different factors be controlled. "Other" factors expected to influence one dispute outcome will not necessarily be the same as "other" factors expected to influence another dispute outcome.

The measurement of "other factors" can also present difficulties. For example, Danzon argues that the number of malpractice incidents in any period depends on the frequency, types, and quality of medical treatment among other factors, but these data are not readily available. Accordingly, she used "proxy" variables such as the number of nonfederal physicians in patient care per 100,000 population and the percentage of physicians belonging to a state or local medical society.

The interpretation of the results for other factors can be problematic. For example, Danzon's first study found that urbanization had a significant effect on claim frequency. Why? We can speculate, but the fact is that we do not know.

To provide variance in the legal environment (which differs from state to state but not within states), the analyses must include states with and without reform. And because of the need to control for other factors, a number of states must be included. This, in turn, requires the collection of data for most, if not all, states. Data for a single state or even a small number of states is not sufficient to accurately assess the effects of reform. In addition, data for each state are needed for a number of years before and after reform. Studying the years before reform means researchers can control better for whatever trends existed beforehand.

Finally, to make meaningful statements about the effects of reform, policymakers must be able to apply specific research results to disputes in general. That means data must pertain to the universe of claims or to a representative sample of claims.

V. WHO WON? WHO LOST? HOW MUCH?

Regardless of the concerns that motivated any particular reform, effects on the equity of the system cannot be neglected. Who won? Who lost? How much? Who paid the price of reform?

THE EFFECTS OF REFORM ON INDIVIDUAL CLAIMS

Recovery

Any change in the outcomes of claims resulting from reform raises questions regarding the adequacy and equity of compensation. To address these questions policymakers need to know how patterns of recovery among various types of claimants and against various types of defendants are affected by reform. More specifically, policymakers need information on how changes in the law affect the probability of recovery, the amount successful claimants recover, and claimants' net recoveries, by type of claimant and type of defendant.

Consistency/Predictability

We have few value-free standards as to what anyone ought to be awarded for an injury, but we do have some basic standards of equity: Similarly situated people ought to be treated alike; dissimilarly situated people ought to be treated differently in ways consistent with the dissimilarity. Translated into the concerns of the tort system, similarly injured people ought to recover about the same amount and more seriously injured people ought to recover more than less seriously injured people.

Consistency, a fundamental equity issue, is intimately related to another issue of some concern in this area: predictability. The legal system is more consistent as the amount recovered is more closely related to the seriousness of a claimant's injuries; that is, when the variance of outcomes, given the characteristics of claims, is smaller. A reduction in the variance of recovery, other things equal, increases the predictability of outcomes. Insurers have argued that a growing lack of predictability is a major contributing factor to the availability and affordability problem. They maintain that they are unable to offer insurance when the likely outcomes of future claims are so unpredictable that they cannot "price" their product. Reforms that increase the

predictability of outcomes reduce the difficulty of determining the appropriate premium for insurance.

Disposition Patterns, Filing Patterns, and Transactions Costs

The issues of the effects of reform on aggregate disposition patterns, filing patterns, and transactions costs also arise with respect to individual claims. For example, both claimants and defendants have an interest in the effects of reform on disposition patterns. Both care when the defendant must pay, and the claimant must be paid, whatever compensation is agreed to or awarded by the court. And the stage of disposition and, possibly, the time to disposition might affect the parties' legal costs. But there is no reason to believe that reform will affect all claims in exactly the same way; equity considerations thus make the question of which kinds of claims are affected in what ways an important policy concern.

STRATEGIES FOR STUDYING THE OUTCOMES OF INDIVIDUAL CLAIMS

General Approach

Statistical analyses of the relationship between legal rules and the outcomes of individual claims, controlling for the claims' characteristics and for other influential factors, are needed. The approach is similar to that taken to analyze reform effects on aggregate claims. Here, however, the focus is how reforms have affected the outcomes of particular kinds of claims: How did reform affect small claims? Or large claims? Or claims against some type of defendant? Or claims brought by some type of claimant? And so forth.

Here, too, differences among the outcomes of disputes resolved in a single state at about the same time cannot result from differences in legal environments and, so, cannot cast light on the issue of how reform affected the outcomes of claims. The analysis must, therefore, compare the outcomes of individual claims across states, over time, or preferably both.[1]

The analysis must take account of claims' characteristics: the severity of the claimant's injury, the medical costs and lost income, whether the claimant was disabled and, if so, how much and for how long. The

[1]The Appendix lists the reforms enacted in 1986, implying the states in which analyses of various types of reforms can be conducted.

characteristics of the parties to the dispute might also affect the claim's outcomes. For example, juries might return larger awards to plaintiffs when the defendant is an institution than when the defendant is an individual. Institutional defendants might offer more in their settlement than individual defendants, other things equal, because the potential consequences of failing to settle are relatively greater for them. The net effect of these patterns is consistently greater recovery by claimants against institutional defendants compared to individual defendants.

Again, characteristics of the social and economic environment within which a claim is pursued can affect its outcomes. These factors must be considered.

An Example: Assessing the Effects of Parties' and Claims' Characteristics on Jury Verdicts

Audrey Chin and Mark Peterson examined how parties' and claims' characteristics affect jury verdicts, using data for all civil jury trials reaching verdict in cases for money damages in Cook County (Chicago), Illinois, between 1960 and 1979.[2] Because the data pertain to a single legal environment, they do not address the effects of the law on the outcomes of trials.

Chin and Peterson examine four sets of factors affecting jury awards: (1) case type (e.g., automobile accident, malpractice, intentional tort); (2) the type of plaintiff—individual, corporation, government and, if the plaintiff was an individual, his or her characteristics, (3) the defendant's type and characteristics; and (4) the type, number, and severity of the plaintiff's injuries and losses.

Parties' characteristics explained some of the differences in awards. For example, after accounting for the type of lawsuit and the plaintiffs' injuries and losses, black plaintiffs received, on average, 25 percent less than whites with the same injury, and corporate defendants paid more than individual defendants, with the premium increasing from 23 percent in the 1960s to 40 percent in the 1970s.

If similar data were available for several other jurisdictions that had enacted reforms, the analysis could be replicated for each jurisdiction and the results compared to determine whether the results were systematically related to the presence or absence of particular laws. We could see, for example, if the premium paid by institutional defendants is affected by the presence of caps on awards.

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[2]Audrey Chin and Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials*, The RAND Corporation, R-3249-ICJ, 1985.

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An Example: Assessing the Effects of Reforms on the Outcomes of Medical Malpractice Claims

Patricia Danzon and Lee Lillard used a cross-sectional, time-series approach to estimate the effects of reforms on the outcomes of individual medical malpractice claims.[3] Their objective was to estimate the total effect of reform; they did not attempt to understand who won or lost as a result of reform. Nonetheless, their study used data on individual claims and, thus, provides an example of the approach suggested above.

Danzon and Lillard drew on individual claims' data from two surveys of insurance companies' claim files closed in 1974 and 1976. Both surveys were broadly representative of claims against physicians and hospitals. They also used data from other sources on the legal environment of a state (e.g., whether the state had limited contingent fees or modified the collateral source rule) to examine two claim outcomes: the stage of disposition and the amount of payment, if any. The researchers introduced variables to control for the severity of the injury, the claimant's characteristics and economic loss, the defendants' characteristics, and the ease of proving negligence.

Danzon and Lillard used multivariate statistical techniques to estimate the effects of tort reforms. For example, they found that imposing limits on contingent fees reduced settlement amounts (by 9 percent), the proportion of cases dropped (by 5 percent), and the share of cases going to trial (from 6.1 percent to 4.6 percent).

If Danzon and Lillard had performed a separate analysis of, say, severe injury claims, the results would have shown how those claimants were affected by reform. Similarly, they could have performed separate studies of the effects of reform on claimants with a specific income or separate analyses of claims brought against physicians. The data and general approach used in their study could have been used to study reform's winners and losers.

Data Requirements

To analyze the effects of reform on the outcomes of individual claims, researchers will need detailed data on individual claims of the sort generally obtained through "closed-claim" studies. The data must identify the outcomes and other characteristics of individual claims.

[3]Patricia M. Danzon and Lee A. Lillard, *The Resolution of Medical Malpractice Claims: Modeling the Bargaining Process*, The RAND Corporation, R-2792-ICJ, 1982, and Patricia M. Danzon and Lee A. Lillard, *The Resolution of Medical Malpractice Claims: Research Results and Policy Implications*, The RAND Corporation, R-2793-ICJ, 1982.

Researchers will also require indicators of the legal rules that applied to each claim. While the data for this type of study are reasonably straightforward, they tend to be very expensive and difficult to obtain.

Studies of the effects of reform on the outcomes of individual claims can be conducted with data on particular types of claims. The data need not describe the universe of claims or even a representative sample of all claims. For example, if policymakers are concerned with the impact of reform on severely injured claimants, research requires samples of severe-injury claims in states with and without reforms, for years before and after reforms. These data would suffice for an analysis that indicates whether reform has resulted in severely injured people receiving X percent more or Y percent less, recovering Z percent more frequently or Q percent less frequently, and so on. If we do not know how the number of severe-injury claims compares to the number of less-severe injury claims, we cannot then inflate the findings to a statewide aggregate; but that is not the primary concern of this type of study.

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VI. DID REFORM AFFECT ECONOMIC BEHAVIOR?

Producers of goods and providers of services run the risk that someone will claim to have been injured by their goods or services. The costs of defending against such claims and compensating claimants, either directly (self-insurance) or through insurance, presumably enter into decisions as to the types and prices of products and services that will be offered. Reforms that affect the frequency and severity of claims can change these decisions and, consequently, the kinds and prices of the goods and services available to society. These changes, in turn, could result in changes in the frequency and severity of injuries.

ECONOMIC OUTCOMES

The Availability of Goods and Services

Producers and service providers must decide what products or services they will offer, on what terms, and in which markets. They may choose not to enter, or to withdraw from, markets in which the potential liability costs added to the other costs of doing business exceed the perceived benefits of entering, or remaining in, the market. Asbestos is an example of a product once used widely but now withdrawn because of mounting liability costs. Potential liability costs are claimed to threaten the availability of both existing and promising new vaccines,[1] severely constrain birth-control options in the United States,[2] have virtually ended the production of light piston-engined aircraft,[3] and have caused manufacturers of child car safety seats to refuse to place new products on the market.[4]

Insurance is the most apparent example of a service withdrawn from some of its markets in response to concerns over liability-related costs.

Reforms that reduce potential liability costs, reduce pressures on producers of "risky" goods and services to cease production. Reform

[1]Edmund W. Kitch, "Vaccines and Product Liability: A Case of Contagious Litigation," *Regulation*, May/June 1985, pp. 11-18.

[2]Michele Galen, "Birth-Control Options Limited by Litigation," *The National Law Journal*, October 20, 1986.

[3]Jack Cox, "The Christen Husky," *Sport Aviation*, August 16, 1986.

[4]Malcolm Baldrige, "Product Liability Woes Hurting U.S. Industries," *Journal of Commerce*, April 28, 1987.

may result in the continued availability of a product or service that otherwise would have been withdrawn from the market.

Whether or not it is in the social interest to "save" a product from being withdrawn depends on the value of the product relative to its risks. It has been argued that the value of vaccines to society so greatly exceeds their risks that the current system for compensating for vaccine-related injury needs to be changed to reduce deterrent effects.[5] Similarly, much of the current tort reform debate is concerned for the social consequences of insurance withdrawals. On the other hand, despite the many disputes over who was responsible for what in the asbestos arena, there seems to be general agreement that our society is better off for asbestos being withdrawn from some of its past applications.

Whether or not society is better off when a product or service is withdrawn from a market depends on a combination of facts and value judgments. The factual questions, in principle amenable to research, address the product's uses and dangers: Who uses the product for what purposes? What substitutes are available? What would those who use the product do if it were not available? What injuries are likely to occur from its use or the use of substitutes if the product is not available?

The Costs and Characteristics of Goods and Services

Producers and service providers may respond to increases in their liability (or liability insurance) costs by increasing the prices of their products and services, passing a part of the increase on to their customers. Some will continue to purchase the product while others find the product no longer attractive. Consumers thus bear part of the costs of the liability system. Reforms that reduce, or limit increases in, producers' and service providers' liability costs can reduce the costs borne by consumers.

The price of liability insurance is a prominent example of a service whose price reflects the costs of the liability system. In fact, the primary argument put forth in support of tort reform is that reducing the costs of the tort system will result in lower insurance prices.

Producers and service providers may attempt to reduce their liability exposure and, hence, liability costs by modifying their products and services. Modifications might involve changes that reduce the risk of a product-related injury or the severity of injuries that may occur. Or

[5]Committee on Public-Private Sector Relations in Vaccine Innovation, Institute of Medicine, National Academy of Sciences, "Vaccine Supply and Innovation," National Academy Press, Washington, D.C., 1985.

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they might involve changes primarily designed to enhance their defense in the event of a liability claim, such as doctors ordering unnecessary tests as a hedge against malpractice claims.[6]

Modifications that affect the safety of a product or service may also affect its ease of use or its suitability for certain tasks. Safety devices on power tools reduce both the risk of injury and the ease with which they can be used. Modifications can also change the cost of producing the product or providing the service. Some consumers may consider the modifications unnecessary or unwarranted; increased costs resulting from what consumers consider to be unnecessary changes are losses.

If reform reduces producers' and service providers' liability exposure, they will be less inclined to engage in liability-driven modifications to their products. Whether or not this is socially desirable depends upon the same kinds of evaluations that arise in considering the availability of products and services. How much does the modification reduce the danger of the product? Does it limit the usefulness of the product? What does the modification cost and who pays the bill?

Development of Innovative Products and Services

Research and development is inherently risky because there is no assurance that something of value will result. Potential liability must be included in the cost side of the equation for a new product or service to justify the R&D effort. For example, researchers are slowing efforts to test and market computers with artificial intelligence because they fear potential lawsuits.[7] Reforms that reduce the potential liability costs of products or services might stimulate research efforts and the rate of technical innovation.

Macroeconomic Outcomes

If tort reforms bring products to market that otherwise would have been withheld, or change the characteristics or prices of the products, the economy as a whole is influenced. Some say that the high costs of our liability system have impaired U.S. competitiveness.[8] Reducing those costs would improve U.S. firms' ability to compete with foreign firms, increasing their sales both here and abroad. If these claims are

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[6]Roger A. Reynolds et al., "The Cost of Medical Professional Liability," *Journal of the American Medical Association*, Vol. 257, January 1987, pp. 2776-2781.

[7]William J. Broad, "Does the Fear of Litigation Dampen the Drive to Innovate?" *The New York Times*, May 12, 1987, p. 17.

[8]Malcolm Baldrige, "Product Liability Woes Hurting US Industries," 1976.

valid, tort reforms that reduce liability costs could result in improvements in the U.S. trade balance, increased employment, and a higher rate of overall economic growth.

THE FREQUENCY AND SEVERITY OF INJURIES

Liability concerns can lead producers and service providers to withdraw "risky" products and services from the market or to modify them to reduce their risks. Reforms that reduce liability concerns may ease these pressures, resulting in more, and more serious, injuries.

STRATEGIES FOR STUDYING ECONOMIC OUTCOMES AND THE FREQUENCY AND SEVERITY OF INJURIES

General Approach

In principle, the statistical approaches described in previous sections could be used to analyze the effects of reform on economic outcomes and the frequency and severity of injuries. In practice, however, these approaches are frequently, though not invariably, infeasible.

The statistical approach can be used to study the reform effects on the availability, characteristics, and prices of products or services sold only on local markets. Suppose that we wanted to study the effects of reform on the frequency of a medical test. We might assume that most doctors are sensitive to their state's legal environment, but not to other states' legal environments. If so, doctors in states that undertook reforms might be under less pressure to "build a file" in anticipation of a possible claim and, therefore, less frequently administer tests they consider unnecessary. Assuming sufficient data on test frequency and other variables could be obtained, we could see whether there was a systematic relationship between the enactment of a reform and the rate at which some tests were given.

However, products and services are frequently sold on national markets. If producers do not develop and distribute different versions of their products in states with different liability standards, the availability, characteristics, and prices of products will not vary across states with different tort laws. If some states introduce reforms, producers will either modify their products or they will not. If they do, the changes will affect the products sold in all states. Thus, the effects of reform cannot be estimated by relating economic outcomes in different states to their legal environments.

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An Example: Assessing the Effects of Reforms on Medical Malpractice Insurance Premiums

Frank Sloan used the multivariate statistical approach to assess the effects of tort reforms on medical malpractice insurance premiums.[9] The analysis was based on premium data for a standardized policy paid annually by physicians in three fields in each state between 1974 and 1978.

Sloan characterized a state's legal environment by variables such as whether there was a cap on recovery. To control for other factors that might influence premiums, he used real per capita income and the numbers of surgical operations, lawyers, and patient-care physicians, respectively, per capita. These variables were selected on the basis of theory (the number of surgeries per capita, because injury is more likely when a surgical procedure is performed) and the results of previous research (per capita income, because an earlier study found it related to malpractice premiums).

The empirical results gave no indication that the reforms considered had any significant effect on premiums. Sloan suggests that insurers probably base premiums on expected outlays which, in turn, reflect the frequency and severity of claims. Because state-specific data on claim frequency and severity are not available for 1974 and thereafter, he could not control for these important factors. This result demonstrates the importance of adequately controlling for influential factors other than legal rules.

An Example: Assessing the Effects of Product Liability Standards on Product Safety

George Eads and Peter Reuter wanted to analyze the effects of product liability laws and other factors on the safety of consumer products.[10] Because there was no reason to believe that firms respond in different ways to the differences among states in their product liability laws, they could not statistically relate measures of product safety to legal environments. In any event, there were no comprehensive data on the frequency of injuries arising from defective products. Even if there were, their interpretation would be problematic. The mix of products and users changes over time in ways that affect the injury

[9]Frank A. Sloan, "State Responses to the Malpractice Insurance 'Crisis' of the 1970s: An Empirical Assessment," *Journal of Health Politics, Policy and Law*, Vol. 9, No. 4, Winter 1985, pp. 629-646.

[10]George Eads and Peter Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation*, The RAND Corporation, R-3022-ICJ, 1983.

rate, even when firms act with equal care at all times. Hence, the efficacy of changes aimed at increasing product safety could not be judged by analyzing accident data. These problems are typical difficulties encountered in assessing the effects of reforms on economic behavior.

Because statistical approaches were not feasible and direct measurement of outcomes (product safety) was impossible, Eads and Reuter conducted a series of case studies of how firms organized their efforts to ensure that the design of products was not unsafe. They interviewed officials of nine large manufacturing firms, one large retailer, and several other organizations with an interest in product safety.

Of all the various external social and economic pressures, product liability had the greatest influence on product design decisions. But because the linkage between good design and a firm's liability exposure remains tenuous, product liability sends an extremely vague signal: It tells the firm that it must be careful or it will be sued, but it does not say how to be careful or how careful to be. Eads and Reuter felt that the connection between the law and product design is weak and even major changes in the law would have little effect on consumer product safety except when significant changes occurred in the overall costs of product claims.

Data Requirements

Data requirements are uncertain because, at this point, we cannot identify clear research strategies; but the requirements will surely be highly specialized. We cannot simply invent a single data collection system to conduct research on all of these issues; rather, we will have to tailor data collection systems on a case-by-case basis.

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VII. WHERE DO WE GO FROM HERE?

The available data are generally not sufficient to assess the effects of tort reforms. We do not systematically collect information on the behavior of participants in the system, on the outcomes of claims—either aggregate or individual—on economic outcomes, or on injuries. Nor do we systematically collect information on the factors that influence behavior or outcomes. Improved data systems are needed to assess the effects of tort reforms.

While the need for better data is clear, data collection efforts are expensive in terms of the direct costs of collecting the data and the indirect costs of diverting the attention and energies of those from whom the data are collected. Data collection efforts are warranted only when their benefits, measured by the value of the research they make possible, outweigh their costs. Both the benefits and costs of a data collection effort depend on which data are collected, in what amounts, from whom, and how. The next step toward assessing the effects of tort reform is to develop detailed designs for data collection efforts. These designs can then be evaluated to determine whether their benefits outweigh their costs.

We sketch out the conceptual issues that must be addressed in designing the data collection efforts needed for research on tort reform; the design of data collection systems is beyond the scope of this report.[1]

WHAT DATA SHOULD BE COLLECTED?

A data collection effort that is not focused on specific questions may overlook elements essential to the analysis. At the extreme, a database missing critical data elements can turn out to be largely worthless in terms of its ability to support the analyses policymakers require. At the same time, data collection undertaken without regard to the eventual use of the data may waste resources on efforts that eventually prove useless.

Analyses of the implementation of tort reforms will require data on the behaviors, expectations, and perceptions of participants in the

[1]The design of a data collection effort also involves a number of operational issues—developing a sampling frame, designing and testing instruments and procedures, and so forth—that cannot be addressed until detailed research specifications have been developed.

resolution of claims. Precisely what information will be needed from which participants depends on the reforms being studied.

The data needed to assess the effects of reforms on dispute outcomes include:

- the aggregate outcomes of disputes, by state and year,
- relevant characteristics of each state's legal environment, by year, and
- the other factors that influence the outcomes of disputes, by state and year.

We discussed several specific aggregate outcomes of policy concern: claim frequency, the percentage of claims closed with payment, the average size of paid claims, disposition patterns, filing patterns, plaintiffs' and defendants' costs of litigation, and public costs of litigation. Data collection and analysis efforts can focus on one, a few, or all of them, depending on policymakers' concerns relative to the costs of collecting and analyzing the data.

Detailed data on the characteristics of individual claims are needed to assess reform's winners and losers, or, alternatively, the effects of reform on various kinds of claims. Specifically, we need data on:

- the outcomes and characteristics of individual claims, for claims resolved in reform versus nonreform states or differences in states before and after reform, or both;
- relevant characteristics of each state's legal environment; and
- other factors that can affect the claims' outcomes.

Several outcomes of individual claims are relevant to the policy debate: the probability of recovery, the amount of recovery, net recovery, the consistency/predictability of outcomes, disposition patterns, filing patterns, and transactions costs. Here, too, data collection and analysis efforts can focus on one, a few, or all of them, depending on policymakers' concerns relative to the costs of collecting and analyzing the data.

Analysis of economic outcomes and injuries will require information on the availability, characteristics, and costs of goods and services of particular policy interest and on the frequency and severity of injuries.

Theory, the experiences of practitioners, and the results of previous research will help identify the other factors that need to be controlled to separate out the effects of the legal variables. There is no simple formula for the selection process and no list of all the "right" factors to include in the analysis. For that matter, different analyses require control of different factors. The factors expected to influence one dispute

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outcome will generally not be the same as those expected to influence another.

IN WHAT AMOUNTS?

The degree to which research can provide useful information is limited by the quantity and quality of the available data. More elaborate data collection systems can provide more accurate, more detailed data that enhance the accuracy of research and its relevance to policymakers' needs. But the cost of data collection efforts increases with their scope. Those involved in the design process must weigh the costs of an expanded effort against the benefits of more accurate results.

Analysis of reform requires data on outcomes and the factors that affect them, by state and year. Analysis of who won or lost from reform requires data on the outcomes and other characteristics of individual claims. The numbers of states and years or the number of claims for which data are required depend on the tradeoff between the costs of collecting and analyzing data and the need for accuracy in the results. At a minimum, research will need data for several states that have implemented each type of reform of interest. As the number of states and years or claims for which data are collected increase, analysis can more accurately estimate reform effects, but at greater cost.

Similarly, policy debates sometimes focus on particular types of claims and hinge on the issue of how reform affects those types of claims. For example, the problems child care centers or municipalities encounter in obtaining insurance are the focus of particular concern in the tort reform debate. Participants in the debate might find assessments of the effects of reform on those institutions particularly relevant; estimates of the effects of reform on all institutions or on the availability of insurance in general would be inadequate.

If existing data systems happen to maintain data in a form that permits identification of particular claims, it may be possible to collect the data needed to perform separate analyses of the effects of reform on them. If not, new data systems will have to be developed and put into operation before separate analyses can be conducted. The development and implementation of new data systems can dramatically increase the costs of the data collection effort. Here, too, design efforts must address the tradeoffs between the increased value of data collection systems that obtain a high level of detail and their higher price tags.

The availability of "baseline data" is an important factor in the design of data collection efforts: To estimate the effects of any reform,

it is necessary to compare "what is" after reform with "what would have been" had the reform not occurred. Data on the value of some outcome after reform are not sufficient in themselves to assess the effects of reform. At a minimum, data on the values of an outcome prior to reform will be needed to compare to that outcome's postreform values.[2]

Baseline data sufficient to estimate how outcomes would have changed over time without reform will be needed to accurately assess the effects of reforms. These data will generally include information on the outcomes of interest and on the other relevant variables before reform. Data collection efforts that capture detailed data "from now on" are not going to provide data from the past; baseline data on past performance will have to be collected.

The need for appropriate baseline data, in turn, implies that the feasibility and costs of collecting retrospective information must be considered in deciding on the level of detail.

FROM WHOM?

The insurance industry is the obvious source of data on the aggregate outcomes of claims. Aside from claims against self-insured individuals and organizations, the insurance industry is the one place where all claims eventually appear. The kinds of information insurance companies record for management purposes include much of the data needed to assess the aggregate performance of the tort system; a variety of reporting systems that capture data from insurers exists. In principle, data on the outcomes of closed claims (e.g., indemnity paid, mode of and time to disposition, and the jurisdiction in which the claim was brought or a lawsuit filed) could be routinely compiled to generate an ongoing database that would suffice for studies of aggregate outcomes.

The insurance industry may seem like an obvious source of data on the outcomes and characteristics of individual claims. However, the information it collects may not include some of the data needed to assess the effects of reforms on various kinds of claims or claimants. For that matter, some relevant information may not even be known to

[2]However, most of the issues of the current policy debate have dynamic patterns of their own: They are changing over time and would have changed from the prereform year even without reform. Research cannot simply attribute all differences between the value of an outcome this year and some earlier year to reform. Rather, research must somehow account for the dynamics of the process—estimating where the system would have been this year in the absence of reform—and compare that estimate to where the system is given the presence of reform.

insurers. Insurance companies, for example, may not routinely obtain information on claimants' wealth; their data, therefore, would not suffice for a study of the effects of reform on relatively poor claimants.

Claimants and defendants tend to be "one-time" participants in the system and the involvement of any particular claimant or defendant is generally unanticipated. We have no means of predicting in advance who will be claimants or defendants, and there are no centralized systems to which claimants or defendants must report. But if the policy debate raises questions regarding the effects of reforms on particular types of parties or claims, and if insurance companies do not routinely obtain the information needed to distinguish them, then special surveys of claimants or defendants or both will be needed.

In principle, all the information required to assess the effects of reforms on aggregate outcomes and on the outcomes of individual claims (winners and losers) could be obtained from lawyers. However, there are no data systems that routinely collect information from lawyers; obtaining such data would require the creation of entirely new systems and the development of monitoring techniques to ensure that the proper data are provided in a timely manner for all cases. Because of the large number of lawyers from whom information would be needed, these systems would be extremely cumbersome and expensive. Attorney-client privilege issues might also limit the data that could be obtained through attorneys. Nonetheless, there may be particular policy questions that hinge on data available only from attorneys. Special surveys of attorneys might be needed to obtain these data.[3]

The courts routinely collect significant amounts of information. But they generally collect data for their own administrative needs, and the data tend not to be useful for assessing the effects of tort reforms. It may be possible for the courts to provide more useful information on an ongoing basis. In particular, data on the aggregate numbers of cases filed and disposed and on the means of and time to disposition, by case type, could be very helpful.

The courts obtain information on such matters as the type of suit and the alleged injuries indirectly in a variety of documents—complaints, answers, motions, and so forth—designed for purposes other than data collection. Using court personnel to review these documents and extract information would undoubtedly strain court resources; but it may be possible to devise forms that plaintiffs and defendants, or their representatives, could fill out and submit to the court.

[3]Because claims can be resolved before a lawyer is involved, the litigants known to the bar are self-selected samples of all litigants. And because the basis for self-selection is likely to be related to outcomes of interest, the sample would be inappropriate for many kinds of analyses.

Although the insurance industry seems an appropriate source for much of the requisite data, several problems must be addressed. Insurance companies may not have access to important information such as collateral source payments. Differences occur among companies in the kinds of information they obtain for a claim, the definitions of various characteristics of a claim, and the coding systems they use. Data on claims against self-insureds would have to be collected separately. "Double counting" is a problem in claims against two or more defendants because, except by chance, the defendants will have different insurers and there would be duplicate reports of the same claim.

The Insurance Services Office (ISO), a nonprofit corporation that makes available advisory rating and other services to the insurance industry, is now collecting information on at least 12,000 individual claims in 27 states that have modified their tort systems.[4] These will include a sample of large claims (over $25,000) arising out of policy year 1983 and closed after July 1, 1985, or still open, a sample of all claims closed during the month of May 1987, and a sample of all governmental claims from policy year 1983. These data will provide a first step toward the development of a database sufficient to assess the effects of reform.

Because almost all the claims in the database will have closed soon after reforms were enacted, their outcomes may not reflect the full impact of reform.[5] However, these data should suffice to establish a baseline with which the outcomes of future claims can be compared.

In collecting these data, ISO will presumably have worked through the problems of obtaining compatible information from different insurance companies. Their procedures should provide guidelines to such issues as consistent definitions of data elements.

NEXT STEPS

The next step in assessing the effects of reform is to design and evaluate data collection systems that could be used in the future to capture data on the performance of the tort system. We suggest

[4]Insurance Services Office, *Insurance Data: A Close Look*, 1987.

[5]ISO intends to have experienced claims managers estimate the values of each claim in its new legal environment. This approach is the only way to obtain an early estimate of the impact of reform. Nonetheless, because the claims managers will have had relatively little experience with the new legal environments, their estimates may not fully reflect the impact of tort reforms. Pending analyses of the implementation process, there is no way to determine the degree to which they, or anyone else, are able to anticipate the eventual effect of reform on claims' outcomes.

consideration of three types of new data collection systems. One comprises systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims. Ideally, these efforts would result in systems for collecting these data on an ongoing basis to support continuing analyses and monitoring of the overall effects of reform. The second type of system would involve the design of special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify reform's winners and losers. Finally, we need to explore the feasibility of systems for collecting information on the other factors that influence participants in the tort system and must, therefore, be included in analyses, and on economic outcomes and injuries.

Once feasible designs are constructed, they need to be evaluated to determine whether the research they will support is sufficiently important to warrant the costs of the data collection and analysis efforts.

Appendix

STATE TORT REFORM ENACTMENTS, 1986

Table A.1 summarizes the principal tort reforms enacted during 1986. The remainder of this appendix describes the provisions of those reforms.

A. COMPARATIVE/CONTRIBUTORY NEGLIGENCE (CN)

CONNECTICUT	HB 6134—Damages will be diminished by the plaintiff's percentage of fault.
ILLINOIS	SB 1200—Plaintiffs who are more thar 50 percent at fault are barred from recovery, and the jury would be instructed as to 15 possible barring effects. The law applies to negligence actions and product liability actions brought under a strict liability theory.

B. JOINT AND SEVERAL LIABILITY (JSL)

1. All Tort Suits

ALASKA	SB 377—The application of joint and several liability is now limited for low fault defendents (less than 50 percent at fault) as they cannot be held jointly liable for more than two times the apportioned percentage of damages.
CALIFORNIA	Prop 51—Joint and several liability has been abolished for all noneconomic damages.
COLORADO	SB 70—Outright abolition of joint and several liability nas been approved.
CONNECTICUT	HB 6134—A measure abolishing joint and several liability has been enacted; each defendant is liable only for their attributed share of damages; Orphan Share Clause: Defendants are liable for that portion of an uncollectible sum that is proportionate to their share of the entire judgment but may not be forced to pay the entire uncollectible amount.

Table A.1

STATE TORT REFORM ENACTMENTS, 1986

STATE	CN	JSL	DAM	PUNI	AFMS	CSR	PPJ	INTX	DRAM	GOV	MMPL	MISC
Alabama										2		
Alaska		1	1	1		1	1	1			2	1
Arizona					1				2			1
California		1										
Colorado		1	3	1		1			2	2	2	3
Connecticut	1	1			1	1	1		2	2	2	
Delaware											2	
Florida		1	1	1		1	1					
Georgia					1					2		
Hawaii		1	1	1	1	1	2			2	2	1
Idaho					1				2			
Indiana					1	1		1	2		2	2
Illinois	1	1		1	1	1				2	2	
Iowa				3	1		1		2	2	2	3
Kansas			2		3		2				2	2
Louisiana									2			2
Maine					2		2		2	2	2	
Maryland			1				1				2	
Massachusetts			2		2	2					2	
Michigan		1	2		1	3	1	1	2	2	2	1
Minnesota			1	1	1	1		1				
Mississippi										2		
Missouri			2							2	2	
Montana			2							2		
Nebraska					1			1				
New Hampshire		3	3	1	1				2	2	2	1

.....				[redacted]		2		2	2	2		
Maryland		1				1				2		
Massachusetts		2			2					2		
Michigan	1	2		1	3	1	1	2	2	2	1	
Minnesota		1	1	1	1		1					
Mississippi									2			
Missouri		2							2	2		
Montana		2							2			
Nebraska				1			1					
New Hampshire	1	1	1	1				2	2	2	1	

Table A.1 – continued

STATE	CN	JSL	DAM	PUNI	AFMS	CSR	PPJ	INTX	DRAM	GOV	MMPL	MISC
New Mexico			2		2				2			
New York		1			1	1	1				2	1
New Jersey												2
Ohio											2	2
Oklahoma				1	1			1				
Rhode Island					2	2					2	
South Carolina			2							2		
South Dakota		2	2	1			1			2	2	
Tennessee									2	2	2	2
Utah		1	2				2		2		2	
Virginia			2	2				2		2		
Washington		1	1		1		1			2	2	1
West Virginia		3	2		2					2	2	
Wisconsin			2		3						2	
Wyoming		1			1				2	2	2	2

NOTE: 1 = Applicable to most tort suits, 2 = applicable only to particular case types or parties, 3 = applicable to most tort suits and specifically to particular case types or parties

ABBREVIATIONS:

CN = Comparative/Contributory Negligence
JSL = Joint and Several Liability
DAM = Limits on Damage Awards
PUNI = Punitive Damages
AFMS = Attorney's Fees/ Miscellaneous Sanctions
CSR = Collateral Source Rule Changes
PPJ = Periodic Payment of Judgments
INTX = Interest and Taxes on Judgments
DRAM = Dram Shop Liability Reform Legislation
GOV = Government Liability
MMPL = Medical Malpractice and Professional & Director's/ Officer's Liability
MISC = Miscellaneous Provisions

FLORIDA	SB 465—Joint and several liability has been severely restricted in cases involving over $25,000 in damages. No joint and several liability for noneconomic damages in negligence actions and likewise for economic damages for those defendants less at fault than the plaintiff. Itemization of damage awards is also required. No modification of the rule for: (a) action seeking economic damages for pollution incidents (b) intentional torts (c) actions governed by a specific statute providing for joint and several liability
HAWAII	SB S1(SS)—Joint and several has been eliminated for low fault defendants (less than 25 percent); this limit on joint and several does not apply to (1) economic damages, (2) automobile accident cases, (3) product liability cases, (4) property damage cases, or (5) environmental pollution cases.
ILLINOIS	SB 1200—Joint and several liability has been eliminated in negligence and strict liability product liability actions for low fault defendants (less than 25 percent). This does not apply to (1) medical malpractice cases, (2) environmental liability cases, and (3) medical expenses specifically awarded as damages in any action.
MICHIGAN	HB 5154—Joint and several liability is now limited, except in (1) product liability actions, (2) actions involving a blame-free plaintiff. Defendants are only severally liable for damages, but Michigan has the Orphan Share Clause, (i.e., any uncollectible shares of a judgment can be proportionately reallocated between solvent codefendants). Joint and several liability is now abolished for municipalities.

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NEW HAMPSHIRE	HB 513—Apportionment of damages between codefendants is now allowed.
NEW YORK	SB 9391—Joint and several liability is now eliminated for noneconomic damages for low fault defendants (50 percent or less at fault). The limitation does not apply for: (a) contract cases (b) indemnification by public employee claims (c) administrative proceedings (d) workers' compensation claims (e) intentional torts on actions alleging reckless disregard for rights of others (f) motor vehicles or motorcycle accident cases (g) actions involving absolute liability resulting from construction (h) toxic tort cases (i) product liability actions where the manufacturer could not be joined (j) and certain other actions The law also requires the itemization of verdicts for personal injury, property damages, and wrongful death.
UTAH	SB 64—Outright abolition of joint and several liability has been approved.
WASHINGTON	SB 4630—Except as follows, joint and several liability has been abolished. The exceptions include: (a) where defendants act in concert or a servant acts for a master (b) where a plaintiff is entirely fault-free (c) where toxic substances or solid waste disposal is involved (d) tortious interference with contract or business relations (e) where specified types of fungible products are involved
WEST VIRGINIA	HB 149—Joint and several liability has been abolished for defendants less than 25 percent at fault.

WYOMING	SB 17—The doctrine of joint and several liability is abolished; a party may request or a court may require apportionment of damages, and a defendant's liability is then limited to that share apportioned to him, her, or it.

2. Particular Suits or Parties

NEW HAMPSHIRE	HB 513—Just and several liability only applies to municipality when they are over 50 percent at fault.
SOUTH DAKOTA	SB 216—Joint and several liability is now modified in respect to actions against local governments.
WEST VIRGINIA	SB 714, HB 149X—Joint and several liability has been eliminated in medical malpractice actions for low fault defendants (less than 25 percent negligent).

C. LIMITS ON DAMAGE AWARDS (DAM)

1. All Tort Suits

ALASKA	SB 377—A cap on noneconomic damages of $500,000 is now provided. However, the cap does not apply to damages resulting from severe physical impairment or disfigurement. Also provided for the itemization of damages between economic and noneconomic losses.
COLORADO	SB 67—$250,000 cap on noneconomic damages, unless a court finds clear and convincing evidence that the damages exceed the cap raising the ceiling to $500,000. Eliminates awards for derivative noneconomic loss except when the court finds "clear and convincing evidence."
FLORIDA	SB 465—A cap of $450,000 on noneconomic damages in all personal injury, wrongful death, and property damage actions.
HAWAII	SB S1(SS)—A $375,000 cap has been provided on damages awarded for pain and suffering (but not other types of noneconomic losses such as loss of consortium or emotional distress) in certain tort actions. Additionally, awards for mental anguish

are unavailable in actions seeking recovery for property damage only; provides standard for determination of loss or impairment of earning capacity.

MARYLAND — SB 558—A cap of $350,000 on all noneconomic damage.

MINNESOTA — SB 2078—A cap has been enacted on "intangible losses," (embarrassment, emotional distress, and loss of consortium) exclusive of pain and suffering and disfigurement; the cap is set at $400,000.

NEW HAMPSHIRE — HB 513—A cap on noneconomic damages has been set at $875,000.

WASHINGTON — SB 4630—All noneconomic damages are capped based upon a measure of economic damages and the Washington average annual wage; a portion of this amount (.43) is used as a base figure and is adjusted to reflect life expectancy of a plaintiff (estimated to be somewhere between $177,000 and $493,000).

2. Particular Suits or Parties

COLORADO — SB 86—A $50,000 cap on damages in dram shop actions has been passed.

KANSAS — HB 2661—Noneconomic damages have been capped at $250,000 and all damages at $1,000,000 in medical malpractice actions; the cap on noneconomic damages will be annually adjusted to reflect the consumer price index. Mandatory itemization of noneconomic damage awards has been instated in such cases. "Pinhole" provision to allow courts to award supplementary medical benefits up to $3 million also instated.

MASSACHUSETTS — HB 5700—Unless special circumstances are demonstrated indicating a plaintiff will not be justly compensated, noneconomic damages in medical malpractice actions are now capped at $500,000.

MICHIGAN — HB 5154—A cap of $225,000 on noneconomic damages in medical malpractice actions that

	will be adjusted to reflect the C.P.I. has been enacted. (This cap does not apply in wrongful death actions, actions involving reproductive system injuries, and actions for loss of a vital bodily function.)
MISSOURI	SB 663—Noneconomic loss in medical malpractice actions has been capped at $350,000; the cap amount is the limit that may be awarded against each individual health care provider.
MONTANA	SB 22XX—The liability of the state and its political subdivisions has been capped at $750,000 per claimant and $1,500,000 per incident.
NEW HAMPSHIRE	HB 513—The liability of governmental subdivisions is now limited to a cap on all civil damages that has been set at $150,000/$500,000.
NEW MEXICO	NM HB 244—A $50,000/person, $100,000/incident, cap on personal injury/death damages in dram shop actions has been passed, $20,000 for property damage.
SOUTH CAROLINA	HB 2266—Limits liability of state and its subdivisions to $250,000/incident and $500,000/occurrence.
SOUTH DAKOTA	SB 282—The existing cap on noneconomic damages in medical malpractice actions has been changed to a cap of $1,000,000 covering all damages. Additionally, the cap was broadened to include actions against all health care providers.
UTAH	SB 111—Noneconomic damages in medical malpractice actions are capped at $250,000, but specifically included are damages for pain and suffering and inconvenience; punitive damages are specifically excluded.
UTAH	SB 182—A cap on damages in dram shop actions has been enacted; liability is limited to $100,000/$300,000.
VIRGINIA	HB 624—A cap of $25,000 or the amount of insurance coverage carried is provided in actions against transportation districts.

WEST VIRGINIA	SB 714, HB 149X—A $1,000,000 cap on noneconomic damages has been enacted on medical malpractice damages.
WEST VIRGINIA	SB 3—Noneconomic damages are limited to $500,000 when involving political subdivisions.
WISCONSIN	AB 4—Damages in medical malpractice actions have been capped at $1,000,000.

D. PUNITIVE DAMAGES (PUNI)

1. All Tort Suits

ALASKA	SB 377—Clear and convincing evidence is required before punitive damages can be awarded.
COLORADO	HB 1197—Punitive awards may not exceed the amount of compensatory damage award; one-third of a punitive damage award goes to the State General Fund; proof of malice, fraud, or willful and wanton conduct is required; court has ability to reduce punitive awards if deterrent effect is accomplished, or to increase them up to three times the amount of actual damages if misbehavior continues during trial.
FLORIDA	SB 465—Punitives cannot exceed three times the compensatory damage award unless clear and convincing evidence is shown; 60 percent of any punitive damage award goes to the Public Medical Assistance Trust Fund or the State's General Fund.
HAWAII	SB S1(SS)—Punitive damages are now uninsurable unless an inclusion is specifically provided by an insurer.
ILLINOIS	SB 1200—Plaintiffs would no longer be able to plead for punitive damages in their original complaint; subsequent motion to amend is granted only following a hearing where the plaintiff stands a chance to win the punitive award at trial. Defendant must be shown to have acted in a willful and wanton manner. Court has discretion to distribute punitive award among the plaintiff, his or her attorney, and the State's Department of Rehabilitation Services; applies to negligence actions and product liability actions based on a strict liability theory.

IOWA	SB 2265—Willful and wanton disregard for the rights and safety of another must be proven prior to an award of punitive damages. 75 percent or more of a punitive award must be paid to the State's Civil Reparations Trust Fund, except where the action resulted from a tort specifically directed at the particular plaintiff; no discovery of a defendant's wealth is permitted prior to establishment of a prima facie case.
MINNESOTA	SB 2078, HF 1950—Pleas for punitive damages are no longer permitted in their complaint; a prima facie showing of defendant's liability is required before an amendment of pleadings.
NEW HAMPSHIRE	HB 513--Punitive damage awards are now prohibited.
OKLAHOMA	SB 488—Punitive damage awards have been capped; no punitive award may exceed the amount of actual damages awarded; the level of proof required raised also.
SOUTH DAKOTA	SB 280—Punitive damages must be proved by clear and convincing evidence of willful, wanton, or malicious conduct on the part of the defendants.

2. Particular Suits or Parties

IOWA	SB 2265—Limits liability of municipal officers and employees for punitive damages.
VIRGINIA	HB 624—Punitive damage awards are prohibited in actions against transportation districts.

E. ATTORNEY'S FEES/MISCELLANEOUS SANCTIONS (AFMS)

1. All Tort Suits

ARIZONA	HB 2377—Establishes penalties for unjustified actions.
CONNECTICUT	HB 6134—A contingent fee scale limiting attorney's fees is now required (1/3 of 1st $300K, 1/4 of next $300K, 20 percent of next $300k, 15 percent of next $300K, and 10 percent of rest). Also creates sanctions (which could include defense costs) for frivolous behavior for filing in absence of probable cause.

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GEORGIA	HB 1146 HB 1185—Parties filing frivolous suits to pay defendants fees and cost; dismissals of action for frivolous suits.
HAWAII	SB S1(SS)—Any party may request court review or their attorney's fees; compensation is limited to a "reasonable amount"; attorneys' fees are now available as a sanction for frivolous defenses as well as frivolous actions (not to exceed 25 percent of prayer).
IDAHO	HB 1469—Places limits on attorney contingent fees.
ILLINOIS	SB 1200—Sanctions may be assessed against parties, attorneys, and insurers for frivolous pleadings, defenses, and motions; attorneys' fees would be available as a sanction.
INDIANA	SB 393—Courts may impose attorneys' fees as a sanction against parties who bring frivolous actions or defenses.
IOWA	HB 2265—Authorizes the court to stay actions if past actions by the party have been frivolous. Requires certification of pleadings and motions and provides sanctions for violation.
KANSAS	HB 266—Modification of civil procedures for determination of frivolous suits.
MICHIGAN	HB 5154—Awards of attorneys' fees are now available as sanctions for frivolous suits and defenses.
MINNESOTA	HF 1950—Allows the award of costs in frivolous suits.
NEBRASKA	LB 298—Allows the award of prejudgment interest as a sanction for unreasonable failure to settle (offers of settlement are compared to the judgment to determine reasonableness).
NEW HAMPSHIRE	HB 513—All contingent fee arrangements must be filed with the court and those in actions where the damage award is over $200,000 are subject to court review. Allows the court to assess costs and attorneys' fees from frivolous suits and defenses.

NEW YORK	SB 9351—Attorneys' fees and costs are now available as sanctions for frivolous suits and defenses.
OKLAHOMA	SB 488—Attorneys' fees are now available as sanctions for frivolous suits and defenses up to an aggregate of $10,000.
WASHINGTON	SB 4630—New law provides for the discretionary review of contingent fee contracts by courts; also, attorneys' fees are now available as sanctions for frivolous suits and defenses.
WYOMING	HB 14, HB 15—Courts authorized to determine frivolous suits and make plaintiffs liable for sanctions.

2. Particular Suits or Parties

HAWAII	SS S1—All fees in medical malpractice cases are subject to court approval.
KANSAS	HB 2661—Courts are now able to review attorneys' fee arrangements in medical malpractice cases.
MAINE	SB 958—Establishes an attorneys' contingent fee scale in medical malpractice actions.
MASSACHUSETTS	HB 5700—Establishes fee limits in medical malpractice cases.
NEW MEXICO	SB 1110—Caps fees for workers' compensation cases according to a sliding scale.
RHODE ISLAND	SB 2891—Attorneys' fees and costs are now available as sanctions in frivolous medical malpractice actions.
WEST VIRGINIA	SB 714—Frivolous suit sanctions are provided in medical malpractice actions.
WISCONSIN	AB 4—Attorney's fees have been regulated in malpractice actions.

F. COLLATERAL SOURCE RULE CHANGES (CSR)

1. All Tort Suits

ALASKA	SB 377—Introduction and limited offset are now provided for collateral sources that do not have statutory or contractual rights of subrogation.

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COLORADO	SB 67—Admissibility and offset with broad exclusions or sources with subrogation rights.
CONNECTICUT	HB 6134—Expansion of application of the collateral source rule modifications for malpractice actions to all civil actions; admission and offset are provided, but sources having rights of subrogation are excepted from offset.
FLORIDA	SB 465—The traditional collateral source rule to allow admission of evidence of collateral source benefits; offset is provided, but benefits having a right of subrogation are not offset; those seeking subrogation are required to share the attorneys' fees and costs incurred by the plaintiff.
HAWAII	SB S1(SS)—Court is required to determine the validity of liens and rights of subrogation; such valid liens are to be paid from special damages recovered.
ILLINOIS	SB 1200—The collateral source rule is modified in that only benefits in excess of $25,000 can be offset and no more than 50 percent of a tort judgment can be reduced by offset of duplicative sources, but sources having rights of subrogation cannot be offset.
INDIANA	SB 394—The traditional collateral source rule has been abolished; evidence of collateral sources of payment is now admissible; a court may reduce excessive awards to reflect collateral sources at its discretion as well as reducing subrogation liens under certain circumstances.
MICHIGAN	HB 5154—The traditional collateral source rule has been abolished; the court may consider evidence of collateral benefits; offset of collateral sources is provided, but such offset cannot reduce a plaintiff's damages by more than the amount awarded for economic losses, and the offset is first reduced by the sum of any premiums paid for their benefit by either plaintiff, his or her family or employer. Sources having statutory liens cannot be offset; sources with contractual liens are required to act to assert the lien or lose it.

MINNESOTA	SB 2078, HR 1950—The traditional collateral source rule has been abolished; while evidence of collateral source payments is now admissible, only the court may review such evidence; offset is provided for, but all collateral sources having rights of subrogation are excluded.
NEW YORK	SB 9351—Abolition or traditional collateral source rule; admission of evidence and offset of collateral benefits are now provided; offsets are reduced by last two years premiums and future premiums necessary to secure collateral payments; sources with mandatory liens and workers' compensation, life insurance, and certain social security benefits may not be offset.

2. Particular Suits or Parties

MASSACHUSETTS	HB 5700—Rule on collateral source modified in medical malpractice cases.
MICHIGAN	HB 5154—Admission of collateral sources and offsets by court in medical malpractice cases.
RHODE ISLAND	SB 2891—In malpractice cases, collateral source rule has been modified to provide for introduction of evidence of additional sources of a recovery and an offset of such sources.

G. PERIODIC PAYMENT OF JUDGMENTS (PPJ)

1. All Tort Suits

ALASKA	SB 377—Periodic payment of judgments for future damages is now permitted in certain circumstances.
CONNECTICUT	HB 6134—Mandatory provisions for periodic payment of judgments have been enacted when noneconomic damages exceed $200,000, unless the parties agree otherwise.
FLORIDA	SB 465—Periodic payments are now mandated where a party requests such a plan and where future damages for economic losses exceed $250,000.

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IOWA	SB 2265—Periodic payment of awards is permitted at the court's discretion following petition of a party.
MARYLAND	SB 558—Periodic payments of awards are permitted at the discretion of the court.
MICHIGAN	HB 5154—Periodic payment of judgments for future damages over $250,000 is now mandated.
NEW YORK	SB 9391—Periodic payment of future damages over $250,000 is mandated if a party requests them.
SOUTH DAKOTA	SB 281—Periodic payment of future damages in bodily injury actions is permitted where a good faith claim for such damages of $100,000 or more is shown; provisions for election and objection have been enacted.
WASHINGTON	SB 4630—The court is required to order the payment of judgments by means of a periodic payment plan upon a party's request.

2. Particular Suits or Parties

HAWAII	SB S1(SS)—The state and its subdivisions now have the option of paying judgments against them in excess of $1,000,000 by means of periodic payments.
KANSAS	HB 2661—All medical malpractice settlements are to be paid periodically.
MAINE	SB 958—Mandates periodic payments of future medical malpractice awards in excess of $250,000.
UTAH	SB 155—Periodic payment of damages in medical malpractice actions is now mandated where either party so requests.

H. INTEREST AND TAXES ON JUDGMENTS (INTX)

1. All Tort Suits

ALASKA	SB 377—Establishes prejudgment interest accrual principle.
INDIANA	SB 39[illegible]-Upon the request of any party, an instruction to jury that it may not consider tax consequences of its verdict is available.

MICHIGAN	HB 5154—Prejudgment interest on awards for future damages is now prohibited; the rate of interest on judgments has been changed to 1 percent above the yield on five-year U.S. Treasury bills.
MINNESOTA	SB 2078—Any award of interest on damages for future loss is prohibited.
NEBRASKA	LB 298—The rate of interest on judgments is now tied to the rate of return on 52-week U.S. Treasury obligations plus 1 percent; the award of prejudgment interest as a sanction for unreasonable failure to settle is now available (offers of settlement made are compared to the judgment to determine reasonableness).
OKLAHOMA	OK SB 488—Prejudgment interest on awards for punitive damages is now prohibited, the rate of interest on judgments has been changed to 4 percent above the U.S. Treasury bill rate.

2. Particular Suits or Parties

VIRGINIA	HB 624—Awards of prejudgment interest damages are prohibited in actions against transportation districts.

I. DRAM SHOP LIABILITY REFORM LEGISLATION (DRAM)

ARIZONA	HB 2170—Liability may be imposed only where the liquor licensee serves an obviously intoxicated person; liability of servers is several only.
COLORADO	SB 86—Dram shop actions are now capped at $150,000; liability for servers is limited to circumstances where a licensee or social host serves a visibly intoxicated person or minor.
CONNECTICUT	HB 6134—Sellers to intoxicated persons are liable up to $20,000/party, $50,000/incident. Rebuttable presumption of such sole liability is established.
IDAHO	SD 1439—Limits dram shop and social host liability.

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INDIANA	SB 85—Dram shop liability is now abolished except where a defendant furnishes alcohol to a visibly intoxicated person or where a plaintiff can show that service was a proximate cause of injury.
IOWA	SB 2265—Liability of servers has been limited to only those licensees who knew or should have known that a person consuming alcohol was already intoxicated; servers other than licensees or permittees may not be held liable for injuries resulting from a person's intoxication; consumption rather than service is legislatively declared the proximate cause of injury.
LOUISIANA	ACT 18—Those who sell, serve, or furnish alcoholic beverages generally not liable.
MAINE	LD 2080—Immunity to servers unless minors can prove negligent service. Does not apply when adult was visibly intoxicated. $250,000 cap exclusive of medical expenses.
MICHIGAN	HB 455—The liability of retail servers of alcohol has been limited to injuries resulting from service to a minor or visibly intoxicated person.
NEW HAMPSHIRE	HB 513—Limitations on dram shop liability have been enacted. Intoxicated drivers need to show gross negligence in future suits; defines "good business practices" for defense purposes.
NEW MEXICO	HB 244—Personal injury/death damages in dram shop actions is capped at $50,000/person, $100,000/incident, $20,000 for property damage. Establishes certain limitations of such liability.
TENNESSEE	HB 1199—Dram shop liability has been abolished except where a defendant serves an intoxicated person or a minor or where injury was caused by such service.
UTAH	SB 182—Liability in dram shop actions is limited to $100,000/$300,000 and is subject to one-year statute of limitations.
WYOMING	HB 13—Dram shop suits now may be brought only in circumstances where a licensee or other person sells or provides alcohol in violation of law.

J. GOVERNMENT LIABILITY (GOV)

ALABAMA	HB 178, SB 369—Grants immunity to certain members and associated 178 parties of various staff boards and commissions.
COLORADO	HB 1185-1187, HB 1196—Various limits on municipal liability including that arising out of water flow; clarifies immunity of public entities and employees.
CONNECTICUT	HB 6134—A measure limiting liability for acts of municipal employees has been enacted.
GEORGIA	HB 1471, HB 1549, HB 1526—Clarifies sovereign immunity of municipal corporations and establishes immunity for government employees and officials.
HAWAII	SB S1(SS)—The state and its subdivisions now have the option of paying judgments against them in excess of $1,000,000 by means of periodic payments.
HAWAII	HB 1993-86—Provides for additional exemptions to the state's tort claim act.
ILLINOIS	SB 1200—Public officials and employees are free from punitive damages claims when they arise from conduct of their official activities; the statute of limitations period in actions brought against public entities is shortened from two years to one year; local government liability is limited in actions arising from provision of traffic control devices and certain police, fire, and emergency services; local government liability is limited where a person is injured as the result of a hazardous recreational activity or on waterways adjacent to public property; local governments would no longer waive immunities by the purchase of insurance.
IOWA	SB 2265—Actual malice or a criminal offense must be proved for liability to be imposed upon officers and employees or municipalities and limits their liability for punitive damages; liability is limited regarding licensing decisions, the granting of permits, inspections, and financial regulatory activities.

MAINE	SB 700—Immunity is now provided to mediators under contract with the state judicial department.
MICHIGAN	HB 5154, HB 5163—Joint as several liability is completely eliminated for municipalities; limits liability of the state and its subdivisions when engaged in the exercise of its governmental functions.
MISSISSIPPI	SB 2166—Sovereign immunity has been totally reinstated.
MISSOURI	SB 647—Reestablishes sovereign immunity with several exceptions.
MONTANA	SB 22XX—The liability of the state and its political subdivisions is capped at $750,000 per claimant and $1,500,000 per incident.
NEW HAMPSHIRE	HB 513—All civil damages against governmental subdivisions are limited to $150,000/$500,000. Joint and several immunity only applies against municipalities when over 50 percent at fault. Acts of a government unit or employee that result in a pollutant incident are conclusively presumed to be reasonable; this presumption applies where the unit acted in accordance with state-of-the-art technology; strict and absolute liability is not available in such actions.
SOUTH CAROLINA	HB 2266—Restores some of the state's sovereign immunity by reestablishing about 20 categories of qualified immunities and limited liability of the state and its subdivisions to $250,000/incident and $500,000/occurrence.
SOUTH DAKOTA	SB 216—Joint and several liability was modified in actions against local governments; sovereign immunity for public entities applies only to the extent of their liability insurance coverage.
TENNESSEE	SB 1701—Except where conduct amounts to willful, wanton, or gross negligence, members of boards of governmental entities are now immune from civil suit.
VIRGINIA	HB 624—A cap of $25,000 or the amount of insurance coverage carried is provided and awards

	of prejudgment interest and punitive damages are prohibited in actions against transportation districts.
WASHINGTON	SB 4630—Immunity has been provided for school board members and directors of hospitals.
WEST VIRGINIA	SB 3—Limits noneconomic damages in suits involving political subdivisions to $500,000, deploys 25 percent rule regarding joint and several liability, lays out standards for liability immunity or political subdivisions employees.
WYOMING	WY 39—Grants officers and board members of governmental entities immunity.

K. MEDICAL MALPRACTICE AND PROFESSIONAL & DIRECTORS/OFFICERS LIABILITY (MMPL)

ALASKA	AK SB 377—Civil liability has been limited for members of boards of not-for-profit organizations, hospitals, school boards, and municipalities.
COLORADO	SB 1201—Limits liability for mental health professionals when they use an accepted standard of care but fail to anticipate a patient's violent behavior.
CONNECTICUT	HB 6134—Plaintiffs in malpractice action are required to file a certificate of merit with their complaints indicating that another provider believes their claims have merit. Also limits liability of directors and officers of nonprofit organizations.
DELAWARE	SB 533—Except for breaches of loyalty, bad faith acts, intentional misconduct, and wrongful transactions from which a director derives personal benefit, shareholders of a corporation may now limit the liability of directors.
HAWAII	SS S1—All attorneys' fees in medical malpractice cases are subject to cost approval; also provides for a statute of limitations of two years after discovery or six years after act (except for minors).

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ILLINOIS	SB 1200—Immunity would be provided for officers and directors of certain not-for-profit corporations.
INDIANA	HB 1284—Directors of not-for-profit corporations have been given immunity for acts and omissions not covered by liability insurance coverage.
IOWA	SB 2265—Expert witnesses in medical and dental malpractice actions must have qualifications directly related to problems or treatments at issue; new requirements for disclosure of expert witnesses in professional liability actions; restricts the discovery and use of medical malpractice peer review and disciplinary proceedings; expands use of voluntary agreements.
KANSAS	HB 2661—Noneconomic damages are capped at $250,000 and all damages at $1,000,000 in medical malpractice actions; the noneconomic damage cap will be annually adjusted to reflect the consumer price index; new expert witness requirements; pretrial settlement conferences are now required; courts are now able to review attorneys' fee arrangements in malpractice actions. Mandatory itemization of noneconomic damage awards and period payment of all settlements; "pinhole" provisions for court award of supplemental medical expenses up to $3 million.
MAINE	SB 958—Mandatory prelitigation screening by mediation panels in malpractice actions; three-year statute of limitations for actions for professional negligence; prohibits wrongful birth and wrongful life actions; mandatory periodic payments of future awards in excess of $250,000; establishes an attorneys' contingent fee scale in malpractice actions.
MARYLAND	SB 600—Personal immunity for directors of charitable organizations if the organization is insured.
MASSACHUSETTS	HB 5700—Noneconomic damages in medical malpractice actions are now capped at $500,000 unless special circumstances are demonstrated indicating a plaintiff will not be justly compen-

	sated. Collateral source rule modified. Attorney fees limited in medical malpractice cases.
MICHIGAN	HB 5154—Noneconomic damages in medical malpractice actions are capped at $225,000 and the cap will be adjusted to reflect the C.P.I. (this cap does not apply in wrongful death actions, intentional torts, foreign objects left inside, actions involving reproductive system injuries, and actions for loss of a vital bodily function and a few other exemptions); stricter standards for expert witnesses, and a prohibition contingent fee on compensation of expert witnesses; option for defendants to file an affidavit of noninvolvement rather than an answer; itemized damages; collateral source rule modifications; a new mediation system for medical malpractice actions; a statute of limitations is now six years regardless of when injury was discovered, and other miscellaneous provisions.
MISSOURI	SB 663—A cap of $350,000 has been enacted on damages for noneconomic loss in medical malpractice actions; the cap amount is the limit that may be awarded against each individual provider. Requires submission of an affidavit that the action is not frivolous.
NEW HAMPSHIRE	HB 513—Directors' and officers' liability is now limited; the burden of proof in medical malpractice actions has been revised.
NEW YORK	SB 9740—Medical malpractice plaintiffs are now required to file a certificate of merit with their pleadings and a new arbitration procedure is available in medical malpractice actions when defendants concede liability; new provisions for monitoring professional competence and investigating misconduct are provided.
	SB 9351—The liability of directors, officers, and trustees of not-for-profit corporations is limited to cases of "gross negligence."
OHIO	SB 366—Immunity has been extended to uncompensated members of boards of directors of charitable organizations.

RHODE ISLAND	SB 2891—Attorneys' fees and costs are now available as sanctions in frivolous malpractice actions; additionally, the collateral source rule has been modified to provide for introduction of evidence of additional sources of a malpractice plaintiff's recovery and an offset of such sources.
SOUTH DAKOTA	SB 282—The previous cap on noneconomic damages in medical malpractice actions has been changed to a cap of $1,000,000 covering all damages; the cap was broadened to include actions against all health care providers.
TENNESSEE	SB 1701—Except for willful, wanton, or gross negligence, directors and members of boards of not-for-profit entities are immune from suit.
UTAH	SB 111—Noneconomic damages in medical malpractice actions are capped at $250,000 (specifically included are damages for pain and suffering and inconvenience; punitive damages are specifically excluded from the cap). SB 155—Periodic payment of damages in medical malpractice actions is now mandated upon request of either party.
WASHINGTON	SB 4630—Immunity has been provided for school board members, directors of hospitals, and officers and directors of nonprofit organizations.
WEST VIRGINIA	SB 714—A $1,000,000 cap on noneconomic damages has been enacted on medical malpractice damages; the use of ad danmum clauses is now prohibited in medical malpractice pleadings; a two-year malpractice statute of limitations includes a discovery standard for accrual; all medical malpractice actions must be brought within 10 years of the injury; the period for which minor causes of actions are preserved has been shortened; medical malpractice actions accruing for a minor under 10 years of age must be brought within two years or by the child's twelfth birthday, whichever is later; greater peer review powers have been granted to the Board of Medicine; mandatory pretrial conferences are now required;

frivolous suit sanctions are provided; expert witness standards are specified; joint and several liability has been modified in medical malpractice actions; joint and several liability applies to defendants who are 25 percent or more negligent; several liability applies to defendants who are less than 25 percent negligent.

WISCONSIN — AB 4—Damages in medical malpractice actions have been capped at $1,000,000; attorney's fees have been regulated in malpractice actions; tougher medical disciplinary standards have been enacted.

WYOMING — HB 12, HB 40—Modifies the standard of care used to determine medical malpractice; pretrial screening panels.

HB 39—Grants nonprofit officers and board members of nonprofit entities immunity.

L. MISCELLANEOUS PROVISIONS (MISC)

ALASKA — SB 377—The definition of fault used in the state's comparative fault language has been expanded to include reckless actions, strict liability, and product liability. Bars a party from recovering losses for personal injury or death if it occurs during his or her commission of a felony.

ARIZONA — HB 2377—Raises limits for mandatory arbitration.

COLORADO — SB 69—A measure has been enacted shortening the statute of limitations period for the bringing of civil actions from four years to two years (intentional torts are one year).

SB 76—A Good Samaritan provision has been enacted.

SB 1192—Limits liability for the manufacturing of firearms.

SB 1205—Limits a homeowner's liability when the property is entered illegally.

HAWAII	SB 1(SS)—An arbitration provision has been enacted applicable to actions seeking damages up to $150,000. Punitive damages are now uninsurable unless specifically provided. Also abolishes cause of action for serious emotional distress arising from damage to property or material objects.
INDIANA	HB 1284—Good Samaritan Rule applies to volunteers unless entity assisted has insurance.
IOWA	SB 2265—Plaintiffs found to have prosecuted three or more frivolous actions within five years may be required to post security. Ad damnum clauses have been prohibited in personal injury and wrongful death actions. The liability of non-manufacturers for product liability injuries has been limited. Creates state-of-the-art defense in P.L. suits. No discovery of a defendant's liability permitting prior establishment of a prima facie case.
KANSAS	SB 668—Evidence of product improvements may not be introduced in product liability actions; design feasibility evidence may be used only to impeach a witness who has denied feasibility.
LOUISIANA	ACT 952—Provides for limited civil liability connected with hazardous waste and asbestos abatement and cleanup.
MICHIGAN	HB 5154—A new mediation system for civil actions other than medical malpractice actions is now provided (this system is parallel to, but separate from, the medical malpractice mediation system described in Section II C).
	HB 5154—Reforms have been enacted in rules determining proper venue.
NEW YORK	A 10664, S 9391A—Statute of limitations extends from three years after exposure to three years after discovering an injury with a one-year revival of claims.
NEW HAMPSHIRE	HB 513—The statute of limitations period for personal injury actions has been shortened from six years to three years.

NEW JERSEY	SB 1678—Provides immunity to volunteer unpaid athletic coaches under certain circumstances.
OHIO	SB 366—Immunity to volunteers of nonprofit or charitable associations (some exemptions).
TENNESSEE	SB 1854—Asbestos removal immunity for local education agency employees.
WASHINGTON	SB 4630—Voluntary intoxication of a plaintiff by means of alcohol or drugs that is responsible for more than 50 percent of an injury is now a complete defense in wrongful death actions; defendants are protected from liability if the injured party was engaged in the commission of a felony.
WYOMING	HB 59—Makes certain entities not liable for injuries at amateur rodeos absent willful neglect.

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Trends in California Tort Liability Litigation
D. R. Hensler
1987

A special bibliography (SB 1064) provides a list of other RAND publications in the civil justice area. To request the bibliography or to obtain more information about The Institute for Civil Justice, please write the Institute at this address: The Institute for Civil Justice, The RAND Corporation, 1700 Main Street, P.O. Box 2138, Santa Monica, California 90406-2138, (213) 393-0411.

NATIONAL INSURANCE
CONSUMER ORGANIZATION

Statement of

J. ROBERT HUNTER, PRESIDENT
NATIONAL INSURANCE CONSUMER ORGANIZATION

Before: The Joint Hearing
of the
House Labor and Commerce Committee
and the
House Judiciary Committee
of the
Alaska State Legislature

April 25, 1989

Mr. Chairman and members of the Committee, it is a great pleasure to be back in Alaska.

I have a question: Why are you still considering so-called "tort reform" when everywhere else the issue is now insurance reform and "tort reform" is a dead issue? There is a good reason for the change. Consider these facts:

*20 States, including Alaska, have sued insurers alleging collusion to create the liability insurance crisis of the mid-1980's --- the predicate for "tort reform."

*California citizens adopted Option 103, wisely recognizing the need to tame the monumental (and uncontrolled) insurance industry.

*We now know that tort reform doesn't lower insurance rates but insurance reform does!

*Key insurance reform proposals have gained widespread support (for example, the effort to repeat the anti-trust exception insurer enjoy in the McCarran-Fergusen Act is supported by both ABA's (Bar and Banker), small businesses, the American Nurses' Association, the National Association

121 N. Henry Street
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of Attorneys General), AARP, all consumer groups, environmental groups, civil rights groups, the FTC and the Ford, Carter and Reagan Justice Departments).

I. FROM A CONSUMER VIEWPOINT, WHAT'S WRONG WITH TORT REFORM?

A. "Tort Reform" doesn't lower prices

Given this history, any adoption of Tort Reform without mandatory lower insurance rates is surely buying 'a pig in a poke.'

1. The Aetna and St. Paul Filings. Aetna Casualty and Surety Co. and St. Paul Fire and Marine Co. have undertaken closed claim studies purposing to demonstrate that the savings resulting form five major tort reforms enacted in Florida -- eliminating the collateral source rule, capping non-economic damages, restricting joint and several liability, limiting punitive damages, and requiring periodic payment of future economic damages -- would be negligible. See attachments 1A and 1B.

2. The State Farm letter. State far has corroborated the Aetna and St. Paul results. In a letter to the Kansas Insurance Department State Farm concludes, on the basis of "a sampling of commercial liability claims," that the following tort reforms would bring about the following savings:
   a. eliminating the collateral source rule -- "about 1%";
   b. non-economic cap -- "will not exceed 1%";
   c. restricting joint and several liability -- "in our sample of liability claims, no claim was found that would have been affected by the joint and several restriction";
   d. limiting punitive damages -- "in our sample, no punitive damage awards were found";
   e. alternative payment of future economic losses - savings "would be negligible."

State Farm also emphasized that "it will probably be several

years before any effect from tort reform legislation can be expected to influence our experience." See Attachment 2.

3. The Florida Insurance Department data. 277 rate filings purporting to calculate the effect of the Florida tort reforms are on file with the Florida Insurance Department. 175, or 63%, showed no effect from the Florida tort changes, and the average reduction in all 277 filings was 1.2%. See Attachment 3. By way of contrast, insurance companies increased premiums in Florida by 62% in 1985, according to NAIC data, and by a similar amount in 1986.

4. The Great American West letter. In Washington state, which enacted perhaps the most comprehensive tort reform package in the nation in 1986, Great American West, Inc. calculated that the new law would, if anything, raise insurance rates. Great American West concluded:

"It does not appear that the 'tort reform' law will serve to decrease our losses, but instead it potentially could increase our liability. We elect at this point, however, not to make an upward adjustment in the indications to reflect the impact of the 'tort reform law." See Attachment 4.

5. The ISO Chief Executive Circular. Perhaps most disturbing, the Insurance Services Office has announced that it is issuing "advisory" rates that show no reduction resulting from tort reform, and has emphasized to its member companies that "any beneficial effects of tort reform cannot be quantified with any degree of accuracy" (emphasis ISO's). See Attachment 5. Yet when in 1975 New York enacted tort reform that would expand liability by replacing contributory negligence with comparative negligence, with comparative negligence, and would through raise insurance costs, ISO immediately raised its advisory rates by 5%,

and provided full actuarial justification for the increase. See Attachment 6. It is not readily apparent why ISO can tell us how much rates should rise when tort law expands, but can't tell us how much rates should fall when tort law is limited.

Whether it is good public policy to reduce insurance rates by limiting compensation to seriously injured people is a question on which reasonable minds can differ. But it is clearly not good policy to limit compensation to injury victims and get nothing in return.

B. "Tort Reform" lowers consumer rights and gives them nothing in return.

"Tort reform" takes away from the victim of negligence. It grants nothing in return for this reduction in rights. There should be a quid-pro-quo if Alaska's citizens are to be denied their rights.

C. "Tort Reform" is not based on careful analysis of need.

There have been few careful studies of how victims are treated under the current liability system to determine if there is a problem that needs fixing.

For Texas, where a closed claim study was undertaken, it showed no need for changes in the legal system

To try to find something without understanding what, if anything, is wrong with it, makes no sense.

D. "Tort Reform" lowers the deterrance effect of the legal system.

How could copying the liability of Exxon's oil transport strike you? Or Ford in building Pintos? Or A.F. Robbins in building Dalcom Shields?

America's consumers need the protection of the legal system to deter inappropriate behavior; to stop "crime in the suites."

E. The need for flexibility

People are not chattle. They are not fenders bumped or houses burned. When a drunk driver runs over a bread-winner, or a little girl, or a underwater reef, the penalty must fit the circumstances, both in terms of the victim and the wrongdoers act.

II. WHY DO CONSUMERS WANT INSURANCE REFORM?

A. Insurers are grossly inefficient

"Republican or Democrat, liberal or conservative, there is one thing we can agree on --- waste is bad, inefficiency robs us all."

Andrew Tobias
The Invisible Bankers

"Tobias says we are inefficient and he's right. We spend too much on distribution, overhead and just plain waste."

John Cox, President
Insurance Agency of North America

One of the best service auto liability insurers, USAA, delivers the product at a total overhead cost of twenty cents on the premium dollar. The average insurer requires over thirty-five cents. Prices could fall by 19% if the average insurer becomes as efficient as USAA.

B. Insurers are not well regulated.

Alaska's insurance regulation has historically been, to put it in its most favorable light, non-existant. Often bragging about the highest profits in the nation in its annual report, the Department has not historically protected consumers in this state.

When last I appeared here, I challenged then Director George by saying I doubted that the Department had ever

disapproved a rate. He responded by pointing out that he had too disapproved a rate -- an automobile rate for State Farm -- a decrease!! He said he was afraid State Farm would attract too much business if their rates went down.

How's that for consumer protection?

I don't mean to pick on Alaska, particularly State regulation generally is awful. I am encouraged by the neew Director Roller. The U.S. General Accounting Office found "a lack of arms-length relationship between the regulators and the regulated" and that consumers were, generally, not protected by the state insurance departments of the nation.

C. Insurers are not fully competitive

In most states, insurers are structured comparatively. In auto insurance, for instance, 29 states have low concentration (Herfindahl-Hirschman Index below 1000), 21 are moderately concentrated (HHI between 1000 and 2000) and one, Alaska is heavily concentrated (HHI greater than 1000).

So, you have a problem with relying on competition, even in the best of competitive worlds.

But insurance is hardly "the best of competitive worlds," viz:

*it is largely exempt from anti-trust laws (Alaska exempts it from state anti-trust law and the McCarran-Fergusen Act exempts it from federal anti-trust law).

*it is the last bastion of fair trade laws (the Alaska anti-rebate law makes it unlawful for agents to offer discounts).

*there are prohibitions on group sales

*insurance price and service information is hard to understand, if you can find it at all.

Combining these comparative impediments with weak regulation guarantees two things:

- inefficiency and/or
- excessive profits

D. Alaska's profits are excessive

We know insurers are inefficient so profits can be hidden. But profits are too high in Alaska. According to the National Association of Insurance commissioners, Alaska's property/casualty insurance profits are among the highest in the country.

Here are the overall profits for the last decade:

	Premium Earned	Operating Profit	Total Return on Equity Ø	Premium Earned*	Operating Profit	Total Return on Equity
1978	$285 Million	6.3%	17%	$80 Billion	5.9'1	16'1.
1979	258	9.1	23	89	4.7	14
1980	257	6.8	19	95	4.6	15
1981	264	3.5	13	97	3.3	13
1982	332	18.0	43	103	0.7	8
1983	412	4.8	17	111	-0.2	7
1984	443	3.1	14	121	-3.2	1
1985	537	-1.9	4	140	-4.1	-
1986	642	3.4	15	176	2.0	13
1987	636	7.1	23	197	3.1	15
Total	$4,066 Million	5.4%	18%	$1,209 Billion	1.4%	10'1.

*Source: National Association of Insurance Commissioners, Profitability by line, by state, ten most recent editions.

Ø Estimated by assuming equity to premium rates of 2:1; investment income on equity of 9% latest year decreasing by 0.5'1. by year.

And this national 10% return understates the real economics vitality of their industry. during the same 10 years, the property/casualty industry's common stock have risen by 308'1. vs. 163'1. for the NYSE Composite Index (Source: Bests' Insurance Management Regents, January 1988.

Profitability in 1987 in Alaska for Medical Malpractice was over 50'1. return on equity and for other liability was over 40%r e-turn. But this was a high profit compared to other recent years. Medical malpractice profits in Alaska mirror the national aver-ages over a ten-year review. When the General Accounting Office discounted reserve method of measuring profits is used, the return is about 30% over 10 years. The other liability return in Alaska was lower than the national average of GAO, 26% It was about 12% a good, not excessive return (if you ignore expense inefficiencies).

In 1987, Alaska's leading writers did well, viz:

Leading Medical Malpractice Writers:

		Loss Rates*
1.	Medical Indem. Alaska	50.8%
2.	Medicine/N.S. Exch.	34.0
3.	CNA	66.5
4.	Health Care Indem.	56.6
5.	Amer. International	53.0

A profitable loss ratio would be about 90%. This shows remarka-ble profits in 1987.

*Source: Best's Executive Data Service

Alaska's Leading Other Liability Writers

		Incurred/Earned Less Ratio
1.	American International	62.9%
2.	Alaska National Insurance	33.8
3.	Crum & Forster	64.8
4.	Nationwide	50.3
5.	CNA	50.6

A loss ratio of the order of 85% should be profitable. Again, 1987 was a remarkably good year for insurers in Alaska.

1988 was better, nationally. I do not have 1988 Alaska data as yet.

III. THE SPECIFIC PROBLEM - MEDICAL MALPRACTICE FOR DOCTORS DELIVERING BABIES IN RURAL AREAS

A. A real problem

No one should minimize the serious nature of unaffordability of malpractice insurance in rural areas for doctors delivering babies. Alaska is not alone in having this problem.

B. The Medical Malpractice "Crisis" in Alaska is NOT Due to an Expensive Aggregate System Cost.

If you look at the total costs of the Medical Malpractice system in Alaska it is an inexpensive system. For example, the latest data from the National Association of Insurance Commissioners (NAIC) shows total premiums in Alaska of $13.6 million during 1987. That's $28.00 per person (The statistical Abstract of the United States shows 481 Thousand people in Alaska in 1984).

For perspective, the average American spends $133f per year on tobacco products.

Another way to look at system cost is vis-a-vis total medical costs in the state. According to the Alaska Department of Health, Alaska spent $2,763 per capita health care costs by 1.0% ($28.00 divided by $2,763). I dare say that if you had no system to compensate the victims of malpractice and someone offered to do it for you for a percentage this small, you'd probably grab it.

C. Allocation is the Problem.

The problem is cost allocation, not total system costs. There are only about 550 doctors in Alaska (Statistical Abstract, 1986). This drives the cost very high, to about $25,000 per doctor on average, some of which may

be positive (because of deterrence effects), but some of which is likely inappropriate.

If you think of the medical profession as a pyramid, with the relatively many G.P.'s at the bottom and the relatively few specialists at the top, I think the problem becomes easier to visualize.

If I wake up in the morning with a bad back and go to my G.P., the likelihood of a major malpractice suit arising is negligible. But if my back is a serious medical problem, I will be referred up the specialty ladder until I get to the neurosurgeon.

At the top of the pyramid, where the number of insureds is least, the risk is greatest. Bad outcomes become more likely. The chance of lawsuit rises, and the cases are much more complex.

I believe it violates insurance spread-of-risk principles to force so much through such a narrow base. (Even though neurosurgeons net income, after med mal premiums, is excellent according to medical economics).

For one thing, why should the defense costs for the complex suits neurosurgeons win be forced to be spread through only the neurosurgeons? Why shouldn't the referring physician and the hospital granting privileges bear some of the cost of successful suits (as incentives for safer referrals/privilege granting)?

The overall system cost is reasonable in your state. Your focus should be on the allocation process, in my estimation.

IV. REINSURANCE PROBLEMS

A. Lloyds of London, the dominant reinsurance company with approximately 25% of the world-wide market, has been wracked by scandals in recent years.

For example:

o Between 1973 and 1982, two Lloyd's underwriters, Peter Cameron-Webb and Peter Dixon, siphoned off for their own use $55 million belonging to 1,500 Lloyd's members. Investigators say they used the money for yachts, corporate aircraft, a French orange juice company and a pornographic movie entitled "Let's Do It." see Chicago Tribune, Oct. 20, 1985, at 5; Business Week, Aug. 5, at 57.

o Many of the 1,500 swindled by Cameron-Webb and Dixon are suing Lloyds (although Parliament immunized Lloyds from lawsuits in 1982, the 1.500 are claiming that the immunity doesn't apply to events occurring before 1982). Lloyds, on the other hand, is claiming that the 1.500 owe Lloyds another $180 million. 100 members face bankruptcy and 200 have been suspended for failing to meet Lloyds' solvency test. See Chicago Tribune, Oct. 20, 1985; Business Week, Aug. 5, 1985.

o Lloyds has grown too fast. In the last decade the number of Lloyds' members has more than tripled to 26,000. Chicago Tribune, Oct. 20, 1985. Since 1981 alone, Lloyds has added 7,000 new members, including "newly rich doctors, lawyers, accountants and rock musicians . . . lured by the hope of annual returns to members that topped 100% some years." Business Week,. Aug. 5, 1985. Its total premium writing capacity rose from $3.4 billion to $9.4 billion. Id.

B. In 1982, Lloyds was granted immunity from lawsuits by the British Parliament. Business Week, Aug. 5, 1985, at 58.

C. Lloyds has threatened, coerced and intimidated both insurers and insureds -- such as states -- in order to keep insurance rates high, as the following statements indicate:

o You may recall this statement:

> "If you change your tort laws in Alaska, you will have a market here when the rest of the United States will not. Lloyds is pulling out of the United States as a reinsurer -- they have already pulled out of Connecticut, New York and New Jersey
>
> -- and they're continuing to pull out of more states."
>
> Statement of Jeff Johnson, Partner, LeBoeuf, Lamb, Lieby and McCrae (U.S. counsel for Lloyds), at the Casualty Insurance Colloquium, Anchorage, Alaska, Sept. 17, 1985.

Alaska is not alone:

o ". . . in order to keep [Lloyds] participation on cover we had to accede to some strong suggestions from the reinsurers to beef up the rate charged to the OB's."

> Statement of John Spinella, President, Medical Mutual Liability Insurance Society of Maryland, before the Governor's Task Force on Medical Malpractice, Oct. 22, 1985.

o "[reinsurance brokerage head Thomas A.] Green said that beginning in 1986, Lloyd's syndicate would 'simply not write reinsurance for the American casualty industry.'"

> Journal of commerce, June 18, 1985.

o "Mr. Wakefield conceded that Lloyds cannot dictate to American regulators on Policy approval, but he wryly

said that if the new form is not approved, Lloyds will not reinsure American liability underwriters."

Journal of Commerce, July 26, 1985, citing C.T. Bowing & Co. Chief Executive Gerald Wakefield, presenting Lloyds' views to 17 insurance commissioners.

- "A Lloyd's of London delegate who flew over expressly for the [insurance commissioner's] meeting added that unless the U.S. industry was permitted to adopt the new form, the lloyds reinsurance market would discontinue backing American underwriters forthwith."

Journal of Commerce, July 27, 1985.

D. Neither the U.S. government, the states, or the British Parliament regulate Lloyds.

E. The British pound, which was worth $2.80 in the mid-1960's has been worth less than half that for most of the last two years and fell to $1.05 in February 1985. Thus, whereas Lloyds would need to pay only 10,000 pounds to satisfy a $28,000 claim in 1963, today it must pay 20,000 pounds to satisfy the same claim and in February 1985 -- when the pressure first started to build for tort reform -- it had to pay 26,600 pounds.

V. SOLUTIONS

A. How to Solve the Insurance Crisis -- What Alaska Should Do

1. Repeal Alaska's Anti-trust Exemption
2. Repeal statutes that prohibit businesses and consumers from joining together to buy insurance in groups. Today, in most states, group health and life insurance is available, but group liability insurance is illegal. If laws prohibiting such group insurance were repealed, the price of liability insurance would fall.

3. Prohibit rate increased from taking effect until such increases are approved by the insurance commission. Today, in most states, increases automatically take effect unless disapproved within a certain number of days; because the burden is on the insurance commission to disapprove a rate, and because insurance commissions do not have the staff to analyze even a fraction of rate filings, most increases automatically take effect. Shifting the burden of proof to the insurance company to demonstrate that a rate increase is justified would limit such increases.

4. Allow greater consumer representation before regulatory bodies. Typically, only regulators and insurance companies participate in rate cases. to increase citizen participation in the ratemaking process, states should authorize Citizens' Insurance Boards, groups of insurance consumers who would intervene on their own behalf. In the alternative, states could establish Offices of Public Advocates to intervene in rate cases, as new Jersey and some other states have. In New Jersey when the Public Advocate intervenes in a rate case the cost of that intervention is billed back to the insurance company seeking the rate increase, thus discouraging insurers from seeking exorbitant increases.

5. Require that insurance rates be based on experience. Because insurance companies today often lump all insureds in a category together, regardless of how often any individual insured has been sued, good risks currently subsidize bad risks. Experience rating would go along way toward bringing down premiums for medical malpractice insurance, in which experience rating is now virtually non-existent.

6. Enact tough conflict-of-interest statutes to close the "revolving door." As the U.S. General Accounting Office has found, 50% of state regulators come from and return to the industry; the relationship between the industry and the regulators is not an arms-length relationship.

7. Require that insurance companies disclose their loss data on a line-by-line basis. Such disclosure would enable regulators to better discern whether rates are excessive, inadequate or unfairly discriminatory.

8. Establish state reinsurance programs.

9. Beef up the Insurance Department both authoritatively and with resources.

10. Repeal the state anti-rebate law.

11. Publish buyers guides with price and service information.

B. Medical Malpractice

Render the above:

1. Lessen the number of classes.

2. Let hospitals bear part of the cost for adverse procedures in the hospital. Consider channeling doctors malpractice costs through hospitals.

3. Consider a specific subsidy in rural areas for physicians consider additn a malpractice charge on all health insurance premium as a subsidy dollar base.

4. Attract more physicians to Alaska to normalize the patient/doctor ratio.

VI. WHY CONSUMERS OPPOSE HOUSE BILL NO. 166

Generally:

1. We lose rights.
2. We get nothing in return (such as a victim's reparations regime).
3. It treats us like a fender, not a person.
4. It won't work to lower rates and make insurance more available.
5. It lowers deterrance.
6. There is no study showing need for change.

It specifically has these problems, among others.:

1. Lets faulty product manufacturers or bad surgeons off the hook if six years go by before the product blows up or the sponge works its way into someone's heart.

2. Fixes the possibly real problem of collateral source in exactly the opposite (and wrong) way. While no one should collect twice for the same injury, the wrong doer should pay, not our policies. Our rate should go down, not drunk drivers.

   mandate subrogation and order lower health insurance rates.

3. Creates inter-family problems by limiting a baby's right to sue to two years ending special treatment for minors.

4. It limits our freedom to choose the sort of settlement we want, lump sum or structured.

5. It creates a disincentive for insurers to pay (as if they needed any more) by charging them below market interest if they delay.

6. It caps non-economic damages in wrongful death cases at a pitiful $50,000.

VI. CONCLUSION

Alaska needs reform that works -- Alaska needs insurance reform. Like other smaller population states, large multi-national insurers can hold you hostage. You may well need consider working for interstate compacts with larger states to avoid the kind of under pressure Lloyds and others have brought to bear here. And other states are moving. Almost every state has insurance reform bills before the legislature. Little New Mexico voted to repeal that state's anti-trust exemption, but the governor vetoed it under intense pressure from the insurers. Arizona has many reform bills before it. South Carolina is moving a bill. Maryland returned to prior approval. The Texas Senate late last week voted to repeal that state's anti-trust exemption. The Chairs of the U.S. Senate and House Judiciary Committees have introduced bills to end McCarran's broad anti-trust immunity.

Now is the time for insurance reform. I pledge NICO's assistance to you in achieving such real reform.

Thank you. I would be happy to answer your questions when that is appropriate.

Attachment 1A
FCC 86-2172

Commercial Insurance Division
151 Farmington Avenue
Hartford, CT 06156
(203) 273-0123

August 8, 1986

Honorable Bill Gunter
INSURANCE COMMISSIONER
Florida Department of Insurance
Tallahassee, FL 32301

ATTN: Mr. Charlie Gray, Chief
Bureau of Policy and Contract Review

Dear Mr. Gray:

RATE REVISION
CONTRACTORS LIABILITY POLICY PROGRAM
THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

In accordance with your Insurance Laws, our Companies file a revised liability rate level which results in an overall selected premium increase of 17.2% with an annual premium effect of $622,250.

Our Companies' decision to revise rates results only after a thorough and comprehensive analysis. We evaluated our experience, market conditions, tort reform, and other relevant factors as they affect the establishment of adequate rate levels. The enclosed exhibits prepared by actuarial unit are submitted in support of our rate filing decision, and demonstrate that the resultant rates are neither excessive, inadequate, nor unfairly discriminatory.

We propose to implement this filing with respect to all policies written on or after January 1, 1987. So as to not delay the filing of our rate level decision, revised rate pages will be forwarded under separate cover when available.

A stamped, self-addressed envelope is enclosed for your convenience in responding.

Sincerely,

Thomas L. Rudd

Thomas L. Rudd, Superintendent
Insurance Department Affairs - Commercial Lines

BODILY INJURY CLAIM COST IMPACT OF FLORIDA TORT LAW CHANGE

Summary

The following table summarizes the expected impact of the new Florida law on bodily injury claims costs (including Allocated Loss Adjustment Expenses). The impacts shown were developed from data gathered via a special claim study conducted by the AEtna. The claim study and the analysis are detailed in the succeeding sections of this memorandum.

Impact of Tort Law Changes

Impact of Tort Law Changes

Tort Law Change	Line of Business: Products Bodily Injury	Line of Business: All Other General Liability
Collateral Source Offset	0	(0.4%)
Joint & Several	0	0
Limitation of Noneconomic Damages to $450,000	0	0
Punitive Damages	0	0
Future Economic Damages over $250,000 Paid at Present Value	0	0

All Other General Liability includes the bodily injury liability portion of package policies, SMP Section II, and monoline General Liability policies. The analysis as shown is based solely on AEtna data and, therefore, is applicable only to AEtna's book of business.

Claim Study

The attached special claim analysis form, designed to gather data on the impact of the tort reforms, was completed by experienced Branch Office claim personnel. Claims eligible for analysis were selected according to the following criteria:

1. Commercial Casualty claims (excluding National Accounts business) for policy years 1981 through 1985
   a. reported prior to January 1, 1986
   b. open as of May, 1986
   c. closed during the last six months

2. All claims in category (1) with indemnity payments or reserves over $25,000 were analyzed (total of 55 claims).

3. Fifty closed claims with indemnity of less that $25,000 were randomly selected.

The completed forms were reviewed for internal consistency prior to coding and analysis.

Collateral Source Analysis

Exhibits I and II detail the analysis of the revision in the collateral source rules. Exhibit I is for claims over $25,000 indemnity. Exhibit II is for claims under $25,000 indemnity.

Exhibit I shows that since the right of subrogation exists for many collateral sources available to the plaintiff, the economic losses incurred are not expected to be substantially reduced due to the law change. Furthermore, current AEtna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff.

Exhibit II shows that for claims under $25,000, no additional savings are expected due to the change in Florida law.

Joint and Several Analysis

Exhibit III details the analysis of joint and several additional payments made by AEtna. Total joint and several payments were 4.5% of indemnity payments over $25,000. A review of each claim generating additional payments due to joint and several liability indicated no reduction in those payment due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to AEtna's insured, and the policy limits purchased.

Analysis of Limitation of Noneconomic Damages to $450,000

Nine claims had the potential for coming under the new limitation for noneconomic losses. The nine cases were identified on the basis of full liability value—not our insured's share of the liability. Data in the above format allowed for a review of whether total claim value could be reduced and whether such a reduction would impact on AEtna's incurred claim cost.

The review of the actual data submitted on these cases indicated no reduction of cost. This result is due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff; all seemed to reduce the expected noneconomic component of damages to less than $450,000.

Analysis of Punitive Damages

Only two cases were found where punitive damages had an impact on the claim settlement value. The total impact was estimated at less than $15,000 or less than 0.1% of total indemnity payments. Consequently, it appears that there will be no impact on AEtna's claim values due to changes in the allocation of the punitive damages awarded.

Analysis of Installment Payment of Future Economic Damages Over $250,000

Ten claims had the potential for coming under this section of the law. The review of individual cases indicated no net savings to AEtna for the following reasons:

1. interaction of policy limits, past economic losses, and future economic losses

2. settlement value of the case

3. apparent implicit recognition of the periodic nature of future damages

Overall Summary

The expected net reduction in claim costs is based on an analysis of AEtna claims. As such, the analysis is applicable only to AEtna's book of business.

Due to the level of detail of the historical claim data, informed claim judgement was required in some instances to ascertain some of the detail required for the analysis. The judgement, if any, was exercised by experienced claim adjustors and is implicit in the analysis.

The analysis shown represents the best estimate of future cost reductions if the law as currently structured remains in effect. However, the sunset provision of the law takes effect in four years. Furthermore, the law applies only to cases filed under the law, and the Florida statute of limitations is four years. Consequently, it is possible that any plaintiff who might be severely impacted by the provisions of the law would delay filing until after the law expires. If this situation arises, then the expected reductions will be lower than those indicated in this memorandum.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Medical Professional Liability
State of Florida

ADDENDUM

In 1986, Florida passed a number of changes to the tort system. We have reviewed the tort changes and their potential effect on our medical professional liability experience. Our review is based on a study of over 300 Florida closed claims. The total effect of the bill based on this evaluation was very small.

Evaluation:

Of the 313 closed claims that were studied, only four claims would have been effected by the law for a total effect of about 1% savings. (Exhibit A) Furthermore, all of these savings would have been eliminated if the courts had assigned only 10% more of the blame on our insureds than our claim department had estimated. It's highly likely that there would have been no savings on these claims had the bill been in effect. (Exhibit B)

Our study covered all of our Florida physicians, surgeons and hospital claims that closed in 1983 and 1984. Economic loss was determined based on the plaintiff's medical loss, weekly wage, and time lost from work. These losses were reduced for the time value of money.

We added the noneconomic loss cap to the total economic losses. The cap is $450,000 times the portion of negligence assigned to our insured. We compared this maximum award under the new law to the amount that the St. Paul actually paid on behalf of our insured.

The conclusion of the study is that the noneconomic cap of $450,000, joint and several liability on the noneconomic damages, and mandatory structured settlements on losses above $250,000 will produce little or no savings to the tort system as it pertains to medical malpractice.

Comments on other provisions of the bill:

a. Collateral source offset

The medical malpractice provisions prior to this act provided for subrogation against collateral providers. The effect of this subrogation would be similar to the effect of the collateral source rule. Therefore, the net effect of eliminating the subrogation and allowing collateral sources is negligible.

b. Itemization of Damages

Damages were itemized in our evaluation of this tort reform and no savings were shown. They are probably already implicitly itemized by either juries or our claim department when settling claims. We expect no savings from this provision.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Medical Professional Liability
State of Florida

ADDENDUM
(Continued)

c. Frivolous Suit Protection

This provision can either work for or against us depending on who wins the case. No savings are expected from it.

d. Additur/Remittitur

This provision can also work for or against us. No savings are expected.

e. Punitive Damages

The legislation reduces the monetary incentive for punitive damage cases, but not total award amounts. Since these cases often have a retaliatory incentive, no savings are expected.

f. Timing of Effects

The tort changes made in Florida apply to losses occurring on or after July 1, 1986. On a claims-made policy, they will effect only the portion of our expected losses with accident date after July 1, 1986. This will impact the equivalent of our first year losses.

g. Conclusion

The tort law changes effective July 1, 1986 in Florida will, hopefully, have a positive impact on loss costs for occurrences after that date. However, to forecast the effect is highly speculative. Our evaluation of prior losses showed little or no savings under key provisions of the law and our analysis of other provisions show no expected savings. Our best estimate is no effect from the tort changes.

It can be hoped that the adoption of these tort changes will have an intangible effect on society, and further work to mitigate future loss trends. However, the trends in medical malpractice have been very high. The effect of the reform needs to be very strong to stem such trends.

Attachment 2

State Farm Fire and Casualty Company

State Farm General Insurance Company

112 E. WASHINGTON ST.
BLOOMINGTON ILLINOIS 61701

October 21, 1986

Mr. Ray Rathert
Kansas Insurance Department
420 S. W. 9th Street
Topeka, Kansas 66612

Ray:

Before any discussion of State Farm and tort reform, it must first be clearly understood that most of the problems in the liability field are in lines which State Farm does not write. Because of this, the impact of tort reform on our book of business is going to be considerably different from that of a major liability writer.

We have been requested by several insurance departments to come up with some estimate of the effect of newly passed tort reform legislation on our rates in their states. We know of no way this can be done actuarially. Consequently, we resorted to judgement.

The few enacted tort reform statutes usually include items such as:

1) Collateral source of indemnity

2) A non-economic cap

3) Joint and several restriction

4) Punitive damage limitation

5) Alternate methods of payment.

A sampling of commercial liability claims provided the following:

1) Collateral source of indemnity. The sample indicated that approximately 7% of our total indemnity losses were potentially subject to a collateral source. Only about a quarter of these reflected a known collateral source. In our judgement, 50% would be a very liberal estimate of the success in reducing damages due to the existance of a collateral source. The net savings from the collateral source change is thus about 1% (7% X 25% X 50%).

2) Non-economic cap. Non-economic caps are established at such a level that our sample indicated only very few claims would exceed the cap. It is our judgement that the loss savings resulting from the non-economic cap will not exceed 1% of our total indemnity losses.

3) Joint and several restriction. In our sample of liability claims, no claim was found that would have been affected by the joint and several restriction.

4) Punitive damage limitation. Again, in our sample, no punitive damage awards were found.

5) Alternative methods of payment. On our book of business, the savings due to alternative payment methods on future economic losses would be negligible in relation to our total indemnity losses.

Although we believe the effect of tort reform on our book of business would be small, we do believe that effective tort reform legislation can have a positive impact on not only pricing but also availability. It is important to keep in mind that tort reform, or absence thereof, is only one of many factors which influence pricing and availability. Any of these other factors can produce an opposite effect which could equal or outweigh any positive effect of tort reform.

Attached are liability rate comparisons for Kansas and surrounding states. As you know, we use ISO rates for monoline policies. Even in our package policies, the original liability loadings were also derived from ISO rates.

Again, as you know, we do review our rate levels at least annually. It will probably be several years before any effect from tort reform legislation can be expected to influence our experience. Anyway, hope these brief comments will be of some use to you in your discussions of this subject.

Best regards,

Bob

Robert J. Nagel
Assistant Vice President
State Filings Division

RJN:kc/1021

Attachment 3

NATIONAL INSURANCE
CONSUMER ORGANIZATION

Effect on Insurance Rates of Florida Tort Reforms -

for all companies filing as of 11/01/86

% Reduction	Number of Filings				
	Commercial General Liability	Commercial Package	Auto	Other	Total
0	72	28	31	44	175
0-2.5%	12	25	5	3	45
2.5-5%	18	14	6	0	38
5-7.5%	7	1	7	1	16
7.5-10%	2	1	0	0	3
Over 10%	0	0	0	0	0
Total number of filings	111	69	49	48	277
Average Reduction	-1.3%	-1.5%	-1.5%	-0.2%	-1.2%

Average calculated by assuming all filings are of equal premium weight. Companies that filed rates and did not calculate the effect of the new tort reforms are not included.

Source: Florida Department of Insurance

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

Attachment 4

GREAT AMERICAN · WEST, INC.

100 S. MANCHESTER AVENUE
ORANGE, CA 92668
714/634-4600

April 23, 1986

Mr. Norman Figon
Rate Analyst
Washington Insurance Department
Insurance Building
Olympia, WA 98504

Re: American National Fire Insurance Company
Select Driver I Program
Select Driver II Program
Private Passenger Automobile
Rate and Rule Revision

Dear Mr. Figon:

In your letter of March 25, 1986, you indicated that we need to place a provision in our ratemaking to reflect the impact of the "tort reform" law. As an attempt to quantify, we reviewed twenty-four claim files, which represented all of our Private Passenger Automobile claims over $50,000 in the state of Washington since 1983. Of these twenty-four claims, we believe that the new law could have an impact on three claims. One claim involved a driver that was intoxicated. We estimate that we would not have paid $20,000 of the claim. On the other hand, there were two claims in which American National Fire would see an increase in its loss liability. These are contributory negligence cases in which our percent of the entire loss liability would increase. The impact of the law on these two is at least $100,000 on each of them.

From the above study, it does not appear that the "tort reform" law will serve to decrease our losses, but instead it potentially could increase our liability. We elect at this point, however, not to make an upward adjustment in the indications to reflect the impact of the "tort reform" law.

We request, therefore, that you reconsider the original filing of January 19, 1986, with an amended effective date rule of:

"For all policies written on or after June 2, 1986".

In our telephone conversation you mentioned a concern that we are selecting an increase less than our indications. Our plan of action is to take this increase, which we estimate to be slightly more than 14%, and to review the rates in the near future, such that we can effect a rate change six months after the effective date of this revision. We believe that this method will prove to be less disruptive on our book of business than other courses that we might have chosen.

We hope the above includes all the information that you need to expedite an approval of the filing.

Sincerely,

Kevin J. Kelley
Director of Actuarial

KK/nk

CHIEF EXECUTIVE
circular

Attachment 5

October 3, 1986

ISO POLICY DECISION ON TORT REFORM ANNOUNCED

Chief Executive CE-86-31

BACKGROUND

Various tort reform measures have been enacted or are still under active consideration in many states. It is clear that meaningful tort reform will have a favorable, prospective impact on loss severity and/or frequency, variable by state and line of insurance which, ultimately, will be reflected in state loss experience.

However, in some jurisdictions, an immediate rate reflection in response to tort reform is being demanded. Statutes in Florida, New York and Hawaii mandate that insurers reflect tort reform legislation in their filings. The New York Insurance Department has already advised companies of its estimates of the cost reductive effects of tort reform. Florida has mandated a 1987 rollback to adjusted 1984 rates, unless companies file 1987 rates reflecting the impact of tort reform by October 15, 1986. Hawaii has mandated a 10% decrease in rates on October 1st to reflect tort reform, with further reductions required in future years. The Washington Insurance Department is requiring that future rate filings reflect enacted tort reform even without a specific statutory requirement.

Insurance Services Office, Inc. 160 Water Street, New York, New York 10038 (212) 487-5000

ISO POSITION

ISO is unable to quantify, and to reflect in its filings with a reasonable degree of certainty, any immediate cost effects of tort reform. ISO believes that the reflection of any beneficial effect of tort reform on insurance pricing, where mandated, is a matter of individual insurer judgment and not a precise actuarial exercise. Such judgment is consequently more properly applied by individual insurers, rather than by ISO in its role of acting on behalf of those affiliated insurers which elect to use ISO's services.

Therefore, the ISO Board of Directors has established — as ISO policy — that, inasmuch as ISO cannot immediately reflect any cost effects of tort reform in its filings, any such effects are best determined by the judgment of each insurer, taking into account the distribution by coverage, class, and limits on its own book of business.

ISO ACTION

Consistent with this policy, ISO advisory rates will not reflect tort reform and each company must make its own assessment as to the immediate effect, if any, of tort reform on its book of business.

In New York, in order to assist companies in complying with the refiling requirements of the new law, ISO released Commercial Lines Circular CL-86-29 which contained revised manual rules utilizing the cost reductive effects promulgated by the Superintendent of Insurance, without commenting on their appropriateness.

In Florida, ISO has developed a filing procedure -- which has been approved by the Insurance Department -- whereby individual companies must supplement the ISO filing with their own individual estimates of the impact of tort reform. At the direction of the Insurance Department, ISO will collect these individual estimates and file them on behalf of each insurer. Refer to ISO Commercial Lines Circular CL-86-33 for specific details.

ADDITIONAL INFORMATION

ISO plans to shortly provide insurers with information which could be considered by each company in reflecting any effect of tort reform, including an analysis of the tort reform measures enacted in individual states.

Within the next several days, ISO will release such information to insurers via Commercial Lines and Technical Services Circulars. In anticipating receipt of this material, each insurer should note ISO's strong belief that any beneficial effects of tort reform cannot be quantified with any degree of accuracy. Accordingly, providing any quantitative information does not imply that any actuarial precision can be applied to what is -- in effect -- an imprecise subject. However, the information may aid individual insurers in supplementing their judgment which, ultimately, will be the major factor in determining any beneficial pricing effect of tort reform.

CAUTION

In Circular CL-86-33 we detailed the Florida filing procedures which must be completed by October 15th. Since -- to avoid the rollback -- Florida rate filings require individual insurer estimates of the cost effects of tort reform and, since the judgment of each insurer will be the major component in arriving at these estimates, we urge individual insurers to promptly begin developing their own estimates, without waiting for the ISO material on tort reform which, as heretofore mentioned, will not produce precise results.

Daniel J. McNamara
President

cc: ISO Board of Directors
Actuarial Committee
Commercial Lines Committee
Personal Lines Committee

Attachment 6

INSURANCE SERVICES OFFICE

160 WATER STREET NEW YORK, N. Y. 10038

TELEPHONE: (212) 487-5000

COMMERCIAL CASUALTY ACTUARIAL DIVISION
RICHARD B. BIONDI, ASSOCIATE ACTUARY & MANAGER

October 15, 1975

Mr. Stanley A. Dorf, Chief Actuary
New York Insurance Department
2 World Trade Center
New York, New York 10038

Re: Comparative/Contributory Negligence -
Automobile Liability Rate Change Proposal

Dear Mr. Dorf:

Because of the change in the New York law from contributory negligence to comparative negligence, I.S.O. proposes to increase Automobile Liability (including Uninsured Motorists) rates by 5%. This proposed increase is based on a study of closed Automobile Liability claims in California, comparing the actual settlement under the comparative negligence law with the estimate of what it would have been under the earlier contributory negligence law. Enclosed is Exhibit 1 displaying the indicated rate changes by line and coverage based on the survey, and also the proposed changes of 5% for the liability coverages and "no change" for Personal Injury Protection. Exhibit 2 details the results of the claim study survey, showing number of claims, losses under both negligence laws, and comparative/contributory ratios, by line and coverage.

We have also enclosed a copy of the "Call" letter used for this survey; in it can be found a sample copy of the questionnaire form and the general instructions for completing the form. The companies participating in the study write approximately 75% of the Automobile Liability premiums written by Insurance Services Office affiliated companies. All claims reported to us were settled very shortly after the changeover in negligence laws in California; thus, claims personnel completing these forms were in a good position to compare comparative vs. contributory settlements for their claims.

Very truly yours,

George Burger

George Burger
Actuarial Assistant

GB:cm
Enc.

New York

Automobile Liability Insurance

I.S.O. Proposed Rate Increases to Reflect the Change from Contributory to Comparative Negligence*

Coverage	Indicated Rate Change	Proposed Rate Change
Private Passenger		
Residual Bodily Injury	+ 4.1%	+ 5.0%
Personal Injury Protection	-	0.0
Property Damage	+ 4.6	+ 5.0
Uninsured Motorists	+13.0	+ 5.0
Total	+ 4.8	+ 4.4
Commercial		
Residual Bodily Injury	+ 6.8%	+ 5.0%
Personal Injury Protection	-	0.0
Property Damage	+ 6.9	+ 5.0
Uninsured Motorists	+ 0.1	+ 5.0
Total	+ 6.5	+ 4.7
Grand Total	+ 5.4%	+ 4.4%

*Note that all percent changes are weighted on New York's premium distribution.

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FROM FIGURES

BEST'S EXECUTIVE DATA SERVICE

1987
ALASKA

EXPERIENCE BY STATE
OTHER LIABILITY

AS-OL-17

COMPANY	MKT SHR	DIRECT PREMIUMS WRITTEN a	DIRECT PREMIUMS EARNED b	DIVIDENDS TO POLICYHOLDERS DIRECT d	DIRECT LOSSES PAID e	DIRECT LOSSES INCURRED f	Δ%	LOSS RATIOS g	LOSS RATIOS Adj	Group Rank Prem	Group Rank Ratio	Overall Rank Prem	Overall Rank Ratio
AETNA LIFE & CAS GRP	1.4	1 168	1 166		67	864	7.5	61.1	63.1	8	9	15	30
AMER FINANCIAL GROUP	1.2	793	896		211	312	26.6	34.8	34.8	10	9	20	13
AMER GENERAL GROUP		4	8			3		32.0	32.0	23		71	
AMER INTERN GROUP	23.2	15 139	13 187		5 750	8 294	38.0	62.9	62.9	1	8	1	29
ATLANTIC MUTUAL COS								-99.9	-99.9	28		91	
CHUBB GRP OF INS COS	1.7	1 255	1 144			222		14.1	18.1		3	14	
CIGNA GROUP	6.9	4 509	4 282		-1 325	-3 209	-29.4	-74.9	-74.9	2		3	
CNA INS COMPANIES	4.4	2 878	3 111	7	481	1 571	16.7	50.5	50.5	4	6	6	22
COMM UNION INS COS		2	2			-14		-99.9	-99.9	26		86	
CONTINENTAL INS COS	1.5	997	960		1 515	-1 265	156.7	-99.9	-99.9	9		38	
CRUM & FORSTER COS	6.2	4 047	4 175		2 427	2 704	60.0	64.8	64.8	3	10	4	32
FIREMAN'S FUND COS	3.8	2 457	2 491	1	457	1 805	18.4	72.5	72.5	5	11	7	33
GENERAL ACC GROUP		1	11		1 865	1 155	999.9	999.9	999.9	27		89	
HANOVER INS COS		4	4					7.6	7.6	25		82	
HARTFORD INS GROUP	.9	565	618		2 581	3 880	510.3	628.2	628.2	12	16	24	42
HOME INS GROUP	1.1	739	566		4 359	1 789	569.5	316.2	316.2	11	15	22	41
KEMPER GROUP	.2	156	144			21		14.0	14.0	17	1	43	3
LINCOLN NAT GROUP		1								29		92	
NORTHWESTERN NAT GRP					-95	-100	999.9	999.9	999.9				
ORION GROUP	2.3	1 479	1 418			-54		-3.8	-3.8	6		11	
RELIANCE INS COS	.1	72	73		31	10	43.5	14.1	14.1	21	2	53	*
ROYAL INS GROUP	.5	348	297		1	-152	.3	-51.2	-51.2	14		27	
SAFECO INS COMPANIES	.3	170	134		27	75	15.9	56.0	56.0	15	7	40	21
ST PAUL GROUP	.1	74	106			34		31.8	31.8	19	6	51	10
TRANSAMERICA INS GRP	.2	133	105		12	78	9.3	74.3	74.3	18	12	44	34
TRAVELERS INS GROUP	.3	184	159		1 215	-523	738.8	-99.9	-99.9	16		41	
UNIGARD INS GROUP		5	24							24		80	
UNITED STATES F&G GR	.6	418	643		122	782	29.1	121.6	121.6	13	14	25	38
UTICA NATIONAL GROUP		11	6			2		32.7	32.7	22		68	
ZURICH INS GROUP-U S	.1	72	149			124		82.9	82.9	20	13	52	35
MAIL.AGENCY COS 30	57.6	37 635	36 106	8	20 021	18 394	53.2	51.0	51.0				
ALASKA NATIONAL INS	11.8	7 706	7 917		1 736	2 672	22.5	33.8	33.8	1	6	2	11
AMER MODERN HOME GRP	.1	63	63			9	7.0	13.9	13.9	27	2	55	2
AMERICAS INS CO	.3	215	266			604		227.0	227.0	14	18	32	40
W R BERKLEY CP GROUP	1.3	1 288	1 897		751	328	59.2	17.3	17.3	5	3	13	6
BERKSHIRE HATHAWAY	.5	345	543		7	75	2.0	13.8	13.8	11	1	28	1
CLARENDON INS GROUP	.1	42	42			52		123.4	123.4	28		56	
ELITE INS CO USB	.1	40	34			-1		-2.2	-2.2	29		58	
EMPLOYERS CAS GRP IX		14	24							34		66	
EMPLOYERS RE GROUP	.5	319	323		121	115	38.0	35.5	35.5	12	8	29	14
EVANSTON GROUP	1.5	1 009	1 231		282	481	28.0	39.1	39.1	7	9	17	15
FOREMOST CORP GROUP		32	45		32	14	98.5	30.3	30.3	30		60	
FREMONT INS GROUP		17	31		321	1 444	999.9	999.9	999.9	33		65	
GENERAL AGENTS GROUP	.3	177	187		4	-113	2.4	-60.5	-60.5	19		37	
GUARANTY NAT CORP GR	.3	175	96			33		34.8	34.8	10	7	39	28
HIGHLANDS INS GROUP	1.7	1 088	1 105		-157	-130	-14.4	-11.7	-11.7	6		16	
ILL. EXCH. COMPOSITE	.3	193	227			-190		-83.6	-83.6	18		36	
IMPERIAL CAS & INDEM		23	4		-5	-3	-20.6	-77.1	-77.1	32		63	
INTEGON CORP GROUP		14	1				1.0	32.1	32.1	35		67	
NORTH ATLANTIC C & S	.1	69	43			10		24.0	24.0	26		54	
NORTHLAND GROUP	2.3	1 522	1 200		7	737	.4	61.4	61.4	3	14	10	27
OLD REPUBLIC GROUP	1.2	775	1 329		567	1 401	73.1	105.4	105.4	8	16	21	36
PACIFIC MARINE GROUP	.9	582	979		294	-364	50.5	-37.2	-37.2	9		23	
PENN-AMERICA INS CO	.1	82	99		25	-6	30.3	-3.9	-3.9	25		50	
PROGRESSIVE GROUP	.2	103	76			44		58.1	58.1	22	12	47	24
PROVIDENCE WASH GRP	2.1	1 399	1 380		2 346	254	167.7	18.4	18.4	4	4	12	8
RLI GROUP	.1	96	59			66		111.6	111.6	23	17	48	37
ROCKWOOD GROUP	.6	377	443		25	203	6.5	45.9	45.9	10	11	26	17
SAFETY MUTUAL CAS CP	2.6	1 687	1 679		91	1 031	5.4	61.4	61.4	2	13	8	26
TOKIO MAR & FIRE GRP	.3	205	182		4	117	2.1	64.0	64.0	16	15	34	31
TOPA INS CO		11	40		14	65	122.1	160.9	160.9	36		69	
UMIALIK INS CO	.3	203	188		681	54	335.8	28.7	28.7	17	5	35	9
UNITED CAPITOL INS	.4	267	200			90		44.7	44.7	13	10	31	16
UNITED NATIONAL GRP	.2	110	85		600	761	454.3	895.9	895.9	21	20	46	44
WESTCO INS GROUP	.3	212	304		3 135	2 610	999.9	858.3	858.3	15	19	33	43
WILLIS FABER GROUP		25	39			4		11.4	11.4	31		62	
YASUDA FIRE & MARINE	.1	92	21			9	.1	41.6	41.6	24		49	
OTHER COS 33	-.1	-76	-231		6 473	-1 745	-99.9	526.9	526.9				
STATE AGENCY CO 69	31.3	20 479	22 052		17 258	10 733	84.3	48.7	48.7				
ALLSTATE INS GROUP	.5	298	275		50	168	16.9	61.1	61.1	6	6	30	25
COLONIAL PENN GRP		11	28		11	487	102.2	999.9	999.9	12		70	
CUNA MUT INS GROUP		32	32			3		3.7	8.7	10		61	
GEICO CORP GROUP		2	3					-8.1	-6.1	20		85	
GENERAL RE GROUP	2.6	1 671	1 616			1 006		62.2	62.2	2	7	9	28
JOHN DEERE GROUP	.3	174	144		13	83	7.3	57.6	57.6	5	5	38	23
LIBERTY MUTUAL GROUP	.3	164	170		61	27	37.2	15.9	15.9	6	1	42	5
MOTORS INS GROUP		21	23			29		125.7	125.7	11		64	
NATIONWIDE GROUP	5.9	3 826	3 774		2 115	1 898	55.3	50.3	50.3	1	3	5	19
NAVIGATORS INS CO	.1	41	19			13		65.0	65.0	8		57	
PRUDENTIAL OF AM GRP	.1	34	4		2	-93	7.1	-99.9	-99.9	9		59	
SENTRY INS GROUP		8	7					4.3	4.3	13		72	
STATE FARM GROUP	1.3	864	759		468	435	54.2	57.3	57.3	3	4	19	22
USAA GROUP	.2	115	123	8	4	56	3.3	45.8	49.2	7	2	45	18
OTHER COS 14		-14	483		586	-335	-99.9	-99.2	-99.2				
DIRECT WRITERS 28	11.1	7 247	7 440	9	3 310	3 776	45.7	50.6	50.7				
TOTAL 127	100.0	65 361	65 618	17	40 589	32 904	62.1	50.1	50.2				

000 OMITTED
FROM FIGURES

BESTS EXECUTIVE DATA SERVICE

1987 ALASKA

EXPERIENCE BY STATE
- MEDICAL MALPRACTICE

A2-02-40

COMPANY	MKT SHR	DIRECT PREMIUMS WRITTEN a	DIRECT PREMIUMS EARNED a	DIVIDENDS TO POLICYHOLDERS DIRECT d	DIRECT LOSSES PAID p	DIRECT LOSSES INCURRED i	LOSS RATIOS D/W	LOSS RATIOS D/E	LOSS RATIOS Adj	Group Rank Prem	Group Rank Ratio	Overall Rank Prem	Overall Rank Adj
AETNA LIFE & CAS GRP	.8	130	130		500	-279	383.4	-99.9	-99.9	4		8	
AMER INTERN GROUP	2.9	447	298			158		53.0	53.0	2	2	5	5
CHUBB GRP OF INS COS					116	25							
CIGNA GROUP	.1	10	8		33	-379	345.2	-99.9	-99.9	8		15	
CNA INS COMPANIES	10.7	1 670	1 670		590	1 129	35.3	66.5	66.5	1	3	3	7
CONTINENTAL INS COS	.4	66	65			16		36.1	36.1	5		10	
CRUM & FORSTER COS		-2				-183		-99.9	-99.9				
FIREMAN'S FUND COS	.4	66	59			-21		-36.3	-36.3	6		11	
HARTFORD INS GROUP		2	6					.1	.1	9		19	
HOME INS GROUP													
ST PAUL GROUP	1.0	162	96			3		3.6	3.6	3	1	7	1
TRAVELERS INS GROUP	.4	59	59		-1	51	-1.7	86.3	86.3	7	4	12	9
MAFL.AGENCY COS 12a	16.7	2 608	2 398		1 238	521	47.5	21.7	21.7				
W R BERKLEY GP GROUP	.2	34	31			25		82.3	82.3	2		13	
DOCTORS CO INTER EX		2	2							7		20	
EVANSTON GROUP	1.1	174	668			521		78.0	78.0	1	1	6	8
ILL. EXCH. COMPOSITE		6	11							6		18	
JEFFERSON INS GROUP		2	2			1		48.1	48.1	8		21	
MMI COMPANIES GROUP		5	2			1		68.0	68.0	5		17	
RLI GROUP	.1	9	8			8		96.1	96.1	4		16	
WESTCO INS GROUP	.1	13	18			-13		-72.9	-72.9	3		14	
OTHER COS 2a													
STATE AGENCY CO 10a	1.6	242	731			542		74.1	74.1				
ALLSTATE INS GROUP						773							
HEALTH CARE INDEMN	5.9	920	964		152	545	16.5	56.6	56.6	3	4	4	6
MEDICAL INDEMN ALASK	44.6	6 937	6 937		5 928	3 524	85.5	50.8	50.8	1	3	1	4
MEDICAL INS EXCH CAL	30.7	4 777	3 724		1 281	1 265	26.8	34.0	34.0	2	1	2	2
NAT CHIROPRACTIC MUT	.5	55	77			31		41.0	41.0	4	2	9	3
OTHER COS 1a						-1							
DIRECT WRITERS 6a	81.7	12 719	11 701		7 362	6 130	57.9	52.5	52.5				
TOTAL • 28a	100.0	15 569	14 831		8 599	7 201	55.2	48.6	48.6				

Wall Street/Diana B. Henriques

Those Newly Cash-Rich Insurers

A FEW months ago, two law professors started a stir in the insurance industry with a study that showed that defendants have been faring better in product liability cases. The widely reported findings, by James A. Henderson Jr. and Theodore Eisenberg, both of the Cornell Law School, suggested to some analysts that big liability insurers might soon be able to move unneeded reserves back into profits.

Indeed, the St. Paul Group, one of the nation's leading liability insurance carriers, had already boosted its 1988 profits by moving $14.5 million from reserves set aside to cover past claims. Richard Paulsen, president of Paulsen Securities in Boston, was predicting that the company's results for last year would show a similar, perhaps stronger trend.

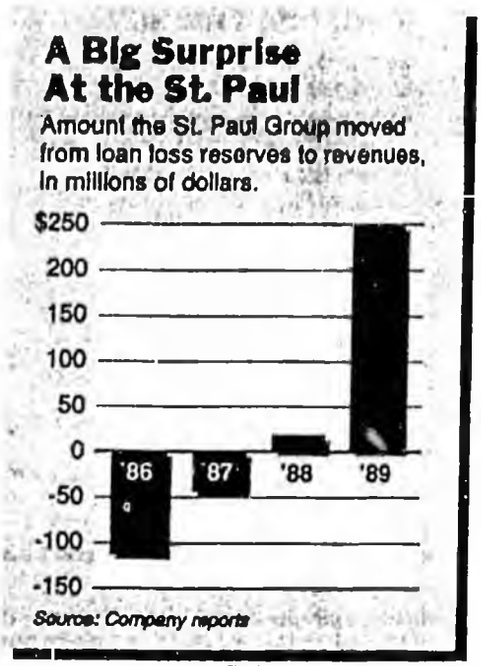
Trend? More like a tidal wave. A whopping $250 million was released from reserves for old claims and moved to revenues.

Wall Street doesn't like surprises, of course, and even apparently positive ones can be unsettling. Analysts began to fret that such profit-boosting moves were unsustainable and would lead to disappointment in the future. St. Paul's share price shuddered a bit, then steadied. The current philosophy seems to be "wait and see."

But for Mr. Paulsen, the movement — while far beyond his expectations — lends additional support to his thesis that liability insurance carriers will benefit from fundamental changes in the legal environment.

"The only surprise is that the level of release is surprisingly high," he said. "Because we feel that a fundamental change is taking place that favors defendants, earnings power going forward will be enhanced by lower reserve additions." He added: "Clearly, the St. Paul must have found that cases are settling out at much less than originally anticipated. Otherwise they would not have released $250 million."

Mr. Paulsen doesn't expect to see movements of this magnitude become routine. But he said he does believe the company will continue to find that its reserve levels are overly generous, and that it will be able to reduce them in the future.



THE ECONOMIC PULSE

TRENDS

Remember the Crisis In Liability Insurance?

It dissolved in a flood of profits from premiums

By Nancy L. Ross
Washington Post Staff Writer

Whatever happened to the liability insurance crisis? A year ago, it was being compared to the Arab oil embargo that devastated the world economy. A lack of insurance for municipalities threatened services such as police and fire protection. Unable to afford coverage for malpractice, some obstetricians stopped delivering babies.

News pages overflowed with stories of day-care centers and bars, midwives and manufacturers, accountants and truckers who were unable either to afford a doubling or tripling of their insurance premiums or to obtain coverage at any price. Some businesses were forced to close; others stayed open without insurance, hoping they wouldn't be sued.

Blame for the crisis, in the insurance industry's version, was laid on juries and judges who made multimillion-dollar awards to plaintiffs suing everyone in sight. Economists, on the other hand, faulted the carriers for engaging in cut-throat rate competition during the early 1980s until mounting losses forced them to raise premiums.

The industry lobbied state legislatures vigorously to restrict the scope of liability to cut the companies' losses. Consumer advocates demanded that tort reform be accompanied by a rollback in rates. Dozens of bills were introduced in Congress to deal with tort reform and product liability. Yet, by fall, the great liability insurance crisis had vanished from the headlines.

The emergency, it seems, has dissolved in a flood of insurance company profits.

According to the Insurance Services Office (ISO), which advises carriers on rates, operating profits tripled during the first nine months of this year, compared with the same period last year. Earnings rose from $1.2 billion in 1985 to $3.6 billion. Underwriting losses will be cut back by almost a third to $12.2 billion this year.

A major factor in the renewed profitability has been huge rate increases. Premium income for all types of property-casualty insurance rose 24.5 percent in the first three quarters to $131.5 billion, according to A.M. Best Co., the authoritative source on industry data. Premiums for commercial liability insurance—which had accounted for 25 percent of the losses but only 12 percent of the revenue—rose an average of 79 percent in 1985, after only nominal increases in the early 1980s. Best projects that this year's premium increases will amount to 72.5 percent.

While the shock of premium increases that averaged 100 percent in 1985 has made 40 percent to 50 percent increases of 1986 seem mild by comparison, rates still appear to be going up briskly.

A benefit of returning profitability has been increased availability. A report issued at a recent meeting of the National Association of Insurance Commissioners stated, "Problems of insurance availability may have eased since 1985 and early 1986 in certain lines or coverages, yet problems continue in several lines." Last May, 43 of the 50 states, the District of Columbia and Puerto Rico reported that municipalities were having trouble obtaining insurance and 42 reported difficulty with professional insurance for physicians.

By December, 55 percent of reporting states indicated slight improvement, while 43 percent saw no significant change in availability for day-care, nurse-midwives, liquor shops, governmental entities and truckers. Three found the situation greatly improved, while one judged it worse.

However, availability is sometimes a tradeoff for affordability. The Northern Virginia Regional Juvenile Detention Center, for example, which had been paying $1,400 annually for $1 million in general liability coverage, contacted 50 companies to replace its canceled policy before finding one that was willing to write $500,000 in coverage—at a $12,268 annual premium, an increase of 1,500 percent.

Besides higher premiums for lower coverage, companies are tightening underwriting requirements by setting higher deductibles, limiting legal defense costs and loading policies with exclusions. As a result of widespread publicity about physical abuse, the average annual premium per child at day-care centers has risen from $7 in 1984 to between $8 (in Wyoming) and $153 (in New York City), according to James Strickland of Austin, Tex., chairman of the Day Care Liability Task Force. By excluding abuse as an insurable event, one company has "reduced" the average cost per child to $50 annually, he says.

The industry hopes that future profitability will be enhanced as the result of limits on the breadth and depth of legal liability. Although Congress failed to pass insurance legislation this year, many states took action. The American Tort Reform Association says 20 states made "significant" changes in 1986, while the Insurance Information Institute lists 32.

Of those states that acted, just seven—Colorado, Connecticut, Florida, Michigan, New York, Washington and West Virginia—went the whole way and limited joint and several liability, sewing up the "deep pockets" of corporations and municipalities into which plaintiffs were thrusting their hands, or limited the amount they could recover in damages.

"The industry pressed hard, but got only bits and pieces of what it wanted," says Richard M. Page, chairman of the insurance brokerage Fred S. James & Co. in New York. The Florida experience has dampened the cry for more tort reform in other states.

There the industry's efforts misfired. The legislature in Tallahassee voted to limit joint and several liability and to cap awards. At the same time, it mandated a rollback to 1984 rates unless companies could prove hardship. The industry sued the state, claiming the law was unconstitutional. The case will soon be decided by the Florida Supreme Court.

Tort reform has made a difference for nurse midwives in states that have set limits on recovery, says Karen Bodenhorn, acting director of the American College of Nurse-Midwives. While their colleagues in other parts of the country must pay $3,500 annually for $1 million in coverage—compared with premiums of $800 to $1,000 three years ago—a few midwives will need only $500,000 worth of coverage.

Tort reform advocates had expressed hope that it would reduce rates. In general, however, it is too early to assess its impact; some laws haven't taken effect yet, and insurance rates are calculated on experience, not projections.

"I am not sure that tort reform will have an impact on insurance pricing for some time to come," says Page. "Underwriters tell us they don't know if it will reduce claims."

Jay Angoff, general counsel of the National Insurance Consumer Organization, reports that interviews with insurance commissioners in 15 states revealed no difference in availability or rates because of tort reform.

The Washington Post contacted insurance commissions in 10 states, half of which had passed some version of tort reform. New York and Florida reported smaller increases in premiums than would have occurred had there been no legislation in their states. For example, Florida's general liability rates will go up 5 percent in January, instead of 10 to 12 percent. Officials in Michigan, which made significant changes in its liability laws, indicated rates had stabilized, as did officials in Nevada, which made no changes.

Officials in Wyoming, a tort reform state, said companies were still hesitant to write policies there, while officials in the District of Columbia, where there was no legislation, reported scattered problems, but no crisis. In Vermont—a nonreform state—liability premiums are still rising by between 50 percent and 60 percent, faster than other lines. Yet, most state commissions saw a moderating trend. "If we see an increase of 10 to 20 percent, that's stability," says Harold Hendrick, a Michigan analyst.

The liability insurance crisis may be resolving itself, but the turmoil has taken its toll.

Some of the insured have rebelled. Last April, the tiny community of Norwood, Ohio, took on giant Home Insurance Co. in the courts and forced it to roll back a $205,000 premium to its 1984 level of $30,000. "We were able to buy time, but now we're in the same situation as before—shopping for insurance," says Frances Lah, the town's assistant law director. Eight other Ohio municipalities also sued Home for reductions.

Increasingly companies, professionals and localities are seeking alternatives to commercial insurance in the form of self-insurance and insurance pools. Arlington, Tex., facing annual liability premiums more than triple the $209,000 it paid three years ago, established a nonprofit corporation to insure itself and proceeded to raise $9 million in bonds for a loss reserve.

Risk manager Peter Potemkin estimates the annual cost of insurance will be $550,000 to $600,000 for $3 million in coverage, substantially less than the $760,000 demanded by its commercial insurers.

National Small Business United, a trade group that is concerned about the growing number of businesses going "bare"—without insurance—recently announced a legal referral program for those that are sued.

Self-insurance is an option for about a fifth of the largest trucking companies. But an estimated 16,000 small trucking firms—about a third of the industry—instead have leased their rigs to larger companies that have insurance, according to Kenneth Pierson, director of the Transportation Department's office of motor carrier standards. In the meantime, the industry is still waiting for the Interstate Commerce Commission to approve pool coverage.

Although there are scant data on self-insurance, Page estimates that it now amounts to $34 billion annually. If the current trend continues, he says he expects that figure to climb to $77 billion annually by 1989. That would mean 35 percent of the business community is self-insured, up from about 20 percent in 1980.

"And these clients are not eager to go back to that marketplace," he adds, noting that self-insurance provides protection against availability crises. So, warns Angoff of the insurance consumer group, while the insurance industry is enjoying prosperity again, it may end up a loser as its market share shrinks. ■

Wall Street/Diana B. Henriques

Friendlier Legal Climate for Insurers

WHAT happens if you have been saving for a string of rainy days only to see the climate get steadily drier? When the hard times don't materialize, you obviously will find yourself with an unexpected surplus of cash.

An intriguing new academic study of judicial trends in product liability cases suggests that this is just what is in store for some of America's largest insurance carriers. That could mean that, despite the adverse effects of last fall's spate of natural disasters, the insurance industry's future profits may be stronger than a wary Wall Street anticipates.

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The study, published in the February issue of the University of California in Los Angeles Law Review, was written by two professors at the Cornell Law School, James A. Henderson Jr. and Theodore Eisenberg. After examining hundreds of product liability cases decided since 1976, the two professors conclude that sometime around the midpoint of the past decade, the judicial tide began to turn in favor of defendants.

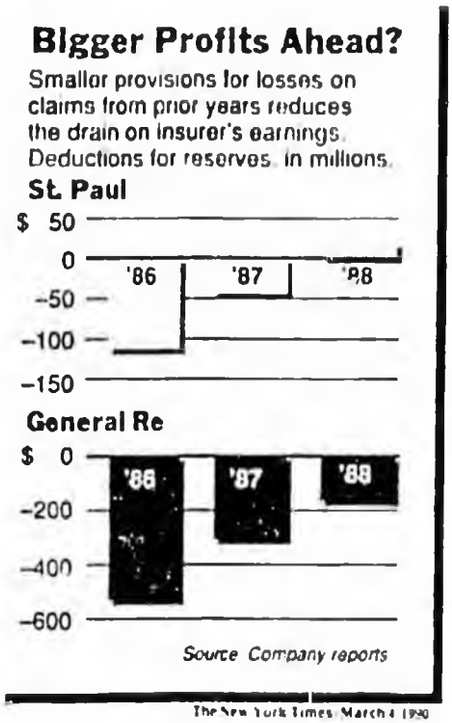
"At least since the mid-1980's," the authors reported, "published opinions have moved toward benefiting defendants over plaintiffs, have increasingly demanded dismissal of plaintiffs' claims as a matter of law, and have tended increasingly to break new legal ground for defendants."

While the study included only cases decided by the end of 1988, Professor Henderson said last week that the 1989 cases he has started to examine confirm the trend. "The results are all, quite remarkably, in the direction we have already identified," he said.

Aside from its fascination for judicial scholars and defense lawyers, the Cornell study also has important implications for those defendants' insurance carriers, which set money aside as a matter of course to pay claims that are working their way through the court system.

"If I were an insurer, all else being equal, I would expect a better-than-expected earnings performance, because I would have a reserve based on judicial experience that has now changed," said Professor Henderson.

Given that happy prospect, why aren't insurers broadcasting these findings from the rooftops? Politics, apparently. Insurers are among those campaigning at the state and Federal level for sweeping legislative and judicial changes that would reduce their exposure to huge punitive damage awards in liability cases. Moreover, insurers may find it harder to raise rates if customers and regulators suspect that higher premiums are contributing to overly generous reserve accounts whose chief beneficiaries may turn out to be the insurers' shareholders.



The New York Times: March 4, 1990

But while the insurance executives' current political agenda may require that they pooh-pooh the Cornell results in public, they are poring over the study in private. "We've even gotten calls from Europe," Professor Henderson said. "Lloyd's of London called asking for 100 reprints. It's a novel phenomenon for those of us whose work is usually of interest primarily to other academics."

It is also Professor Henderson's impression that major insurers are unlikely to alter their current reserve patterns until there is more evidence to support the Cornell thesis.

So much the better for investors, said Richard Paulsen, president of Paulsen Securities, a small institutional research firm in Boston. The longer that insurers continue to set aside loss reserves based on what may be an overly pessimistic reading of the judicial climate, the bigger the pool of "redundant" cash that will be available to boost future earnings. Even when insurers do adjust, Mr. Paulsen added, they are likely to do so by reducing the amount they deduct from profits for contributing to their reserves. Either way, their bottom lines will benefit.

Last year Mr. Paulsen was one of the first insurance industry analysts to recognize that the trend in medical malpractice cases, an important subset of liability law, had begun to shift in favor of malpractice insurers. "But this is even more significant than the medical malpractice data," he said. "This cuts across all lines of insurance. Product liability is both one of the most complex and expensive to deal with, and insurers have traditionally set aside large reserves in anticipation of difficult decisions."

The Federal form 10-K filings by the St. Paul Group and General Re Corporation, two of the major liability carriers likely to benefit from this trend, suggest that the Cornell professors' thesis is already apparent to the bean-counters in the back office.

Both firms are scheduled to release details of their 1989 results in the next few weeks. At first glance, the 1988 reports show that the St. Paul Group's additions to its total loss reserves — made up of funds earmarked for claims arising in both current and past years — varied only slightly between 1986 and 1988. The amount set aside by General Re remained constant between 1986 and 1987, although the figure did fall by 21 percent in 1988.

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On closer inspection, however, both reports show that the portion the companies have set aside for past claims alone have plummeted. In fact, in 1988 St. Paul's profits included more than $15 million that had been transferred from its reserves. Similarly, General Re set aside $529.5 million for estimated losses on past claims in 1986. That amount declined to $305.5 million in 1987 and to just $164.4 million in 1988.

These figures suggest to Mr. Paulsen that the reported 1987 and 1988 profits for those two companies already reflect the "salutary effect" of the judicial changes cited in the Cornell report.

Professor Henderson said he is not surprised at those corporate developments, although he had not anticipated them. "It's the academic's curse," he joked. "When we had this data on our computer screens, we should have run out and taken positions in these stocks. We didn't, of course. But it would be a hoot if all this has taken the Street by surprise, too."

#12 B

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TELEPHONE 272-1538
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January 10, 1990

Representative Peter Goll
Room 122, Capitol
P. O. Box V
Juneau, AK 99811

Dear Representative Goll:

In view of the continuing effort to limit victims' rights in the state of Alaska, I thought you would be interested by the attached item which was in the January 8 issue of Business Week. This article is informative for several reasons.

First, the article notes that three incidents that occurred in 1989, Hurrican Hugo, the San Francisco earthquake, and the Phillips Petroleum plant explosion, will cost United States casualty insurers about $4,300,000,000. This figure is about two times the annual budget for the state of Alaska. The figure is also the equivalent of 4,300 million-dollar verdicts. In short, only three catastrophic events during one year will cost the insurance industry a lot more than all of the verdicts and settlements paid to Alaskans since statehood. This observation simply confirms what I have said before: Insurance rates are not really affected by claims resulting from our citizens' personal injuries. Accordingly, even serious limitations on victims' rights will have little, if any, effect on insurance rates in this state.

Second, the article succinctly describes the insurance industry's recent history:

(1) In the early 1980s, the insurers slashed their premiums to gain market shares;

(2) When losses mounted, they reversed course by negotiating higher prices and eliminating coverage for everything from day-care centers to county jails;

only
Hayden
+ committee files

(3) That touched off a public outcry and led to the defection of many customers, from corporations and municipalities to merchants' associations;

(4) The defectors switched to self-insurance siphoning off one-third of all property/casualty premiums;

(5) In a desperate attempt to recoup, insurers slashed rates again in 1988, though this failed to woo back many customers.

We should not be surprised to see another "insurance crisis" in the 1990s. And we should not be surprised to hear that the "crisis" can be solved by limiting victims' rights to recover for their injuries. Because you and many other legislators in this state have taken the time to examine the insurance industry and the tort system, I trust that the next "crisis" will be better understood by the legislature.

Please keep up the good work in Juneau; your efforts are appreciated.

Very truly yours,

YOUNG & SANDERS, INC.

By
Eric T. Sanders

ETS:sg
Enclosure

INSURANCE

A CEASEFIRE MAY HELP INSURERS RECOVER

As the price war ends, revenues should rise

A hurricane, a major industrial mishap, or an earthquake is never good news for U.S. property and casualty insurers. In 1989, they had to pay big for all three—$1.9 billion for Hurricane Hugo, $1.3 billion for the Phillips Petroleum Co. plant explosion in Pasadena, Tex., and $1.1 billion for the San Francisco quake. But the disasters may set the stage for rate hikes in 1990 that will beef up sagging premium income. The insurers, whose counterparts in life insurance also are limping, expect an 8% revenue upturn—ending the property/casualty price war that has lasted for three years.

If property/casualty premiums do move up in 1990, policyholders may feel a sense of deja vu. In the early 1980s, the insurers slashed their premiums to gain market share. When losses mounted, they reversed course by negotiating higher prices and eliminating coverage for everything from day-care centers to county jails. That touched off a public outcry and led to the defection of many customers, from corporations and municipalities to merchants' associations. The defectors switched to self-insurance, paying all but the largest claims out of their own pockets—in the process siphoning off one-third of all property/casualty premiums. In a desperate attempt to recoup, insurers slashed rates again in 1988, though this failed to woo back many customers. "Insurers are like lemmings running together in a pack," says H. Felix Kloman of the Tillinghast Div. of Towers Perrin Forster & Crosby, a New York-based consultant.

A PLAGUE? So property/casualty insurers are hurting again. Last year's trio of catastrophes is expected to use up only a small fraction of their $125 billion in reserves. But that tab, combined with low premiums, cut profits in the $143 billion industry to about $5 billion in 1989, down from $15.6 billion a year earlier. As 1989 drew to a close, David A. Kocher, president of commercial insurance for Aetna Life & Casualty, was still wondering if there was "time for a plague to hit us" before yearend. Aetna's $130 million expense for catastrophes in 1989 was three times its 1988 payout.

Large hits like this may force insurers to rethink their strategies. But no one expects them to react as violently as they did in the mid-1980s. Instead, most are telling their branch offices to try to nudge up rates when client contracts expire. Hartford Fire Insurance Co.'s goal, for example, is to raise prices in 1990 by 15%. Whether it will get that much is iffy, however, because of competitive pressures. Ladenburg, Thalmann & Co., a Wall Street investment house, looks for a slower rebound. It sees the return on equity in the property/casualty insurance field edging down to 4.5% in 1990, from 5.3% in 1989, because premium boosts take a while to turn around weak balance sheets. Then, the firm says, premiums will climb back to a healthier 16.5% in 1993.

Lacking more pricing power, insurance companies also may look for better ways to shield themselves from disasters. For instance, they may assign more risk to reinsurance providers—syndicates that share insurers' liabilities. That's a reversal of the industry's recent tendency to contain costs by shouldering more risk itself. Insurers also are asking states for large rate increases for workers' compensation—policies that pay employees for on-the-job injuries. Insurers' losses on workers' comp coverage reached $7 billion in 1989 and are headed even higher in 1990. The primary battleground: Texas, where damage awards by juries led to $1 billion in losses on workers' comp coverage last year.

The Texas legislature did vote recently to limit claimants' rights to a jury trial, a victory for insurers. But that hardly counters the bad news in California, the site of 1988's Proposition 103. Its aim was to lower auto insurance rates by at least 20%. The law has been blunted somewhat by the California Supreme Court, which has ruled that insurers are entitled to a "fair and reasonable rate of return." Yet California Insurance Commissioner Roxani M. Gillespie interprets that to mean that rate increases should be limited to the rise in inflation—a cap insurers call too low.

LOOPHOLE. They continue to blame high rates on increased medical and vehicle repair costs. But while most are losing money on auto insurance, they're staying in the state. The reason: The California market for lines of business such as annuities and life insurance is too valuable to surrender. "We'd consider pulling out, but so far, the downside is worse than the upside," says Donald R. Frahm, chief executive of Hartford Insurance.

Insurers also are wary of New Jersey, whose new governor, Democrat James J. Florio, has pledged to bring down stratospheric auto rates. New Jersey's no-fault law, under which insurers pay most accident claims no matter who is responsible, was weakened by a loophole that lets drivers sue for pain and suffering if their medical costs exceed $200. Trying to contain an explosion of suits, the state now has drivers choose between an unlimited right to sue—which means a higher premium—or agreeing to sue only for fatal or disabling accidents.

Life insurers face big challenges, too. Spreads between the insurers' premium income and the return they're getting on their investments are painfully thin. Thus, many life insurers lack the capital to invest in new ventures. Experiments with selling policies through banks, stockbrokers, and by direct mail are fizzling. So insurers are using an old tactic: trying to improve their agents' selling skills. "It's back to basics," says Michael Tine, senior vice-president at Travelers Insurance Co. For the industry in general, that may be the tone for 1990.

By Larry Light in New York, with Lisa Driscoll in Hartford

INSURERS SEE A TURNAROUND

Alaska Action Trust
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Office: 540 L Street, Suite 102 • Anchorage
(907) 258-4040

Acknowledged

February 22, 1990

Rep. Peter Goll
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

Dear Rep. Goll,

In the ongoing process of keeping you informed as to current developments relating to the perceived insurance "crisis," the Alaska Action Trust has prepared this informational packet for your review.

A. MINNESOTA INJURY COMPENSATION STUDY

Commissioned by the Minnesota Legislature, this study focused on the tort system in general, including common and statutory law. The six-member study commission, appointed in 1988, held ten public hearings, beginning in January, 1989, and ending in October, 1989. The Commission made a number of recommendations for legislative change in the law governing tort claims.

Among the topics studied by the Commission:

1. Comparative Fault and Joint and Several Liability
2. Statutes of Limitation and Repose
3. Punitive Damages
4. Deductions under the No-Fault and Collateral Source Statutes
5. State and Municipal Tort Liability
6. Mandatory Automobile Insurance
7. Contingent Attorney Fees

A complete copy of the Minnesota Injury Compensation Study has been enclosed for your review.

Hayes

B. NEW YORK MEDICAL MALPRACTICE STUDY

A long-awaited study of malpractice in New York hospitals concludes that thousands of hospital deaths and tens of thousands of injuries are tied to negligence every year, though relatively few victims seek redress in courts, according to a published report.

Preliminary estimates by a research team indicate that in 1984, the year analyzed in the study, negligence by doctors or hospital workers may have contributed to about 7,000 hospital deaths and an additional 29,000 injuries, according to The New York Times.

Researchers from Harvard University concluded that 306 of the 30,195 patients studied, or just over 1%, were treated negligently; yet only 47 patients filed lawsuits, the Times said.

Dr. David Axelrod, the state health commissioner, cited the study when he called for a system of no-fault medical malpractice insurance, which would drastically change the existing legal liability system. Dr. Axelrod now says that his boss, Gov. Mario Cuomo will not propose a system of no-fault insurance this year because it needs more than a few months of study by the Legislature.

Dr. Axelrod, who has said he won't release full details of the study until next month, said the figures contained in it appear to be accurate projections. He said the longer a New Yorker is in a hospital, the greater the chance something will go wrong in their treatment. "It stands to reason that the longer you're there, the longer you're exposed to all of the risks and all of the services that are available in a hospital, the greater the likelihood that something will go wrong," he said.

Dr. Axelrod also said that fear of getting dragged into a malpractice lawsuit makes many doctors afraid to report colleagues who may be doing wrong things.

"Physicians are so concerned about what they might say about his or her colleagues that they don't participate effectively in peer review," the health commissioner said.

* The Alaska Action Trust has requested copies of the New York study and will be forwarding a copy to your office.

C. FLORIDA MEDICAL MALPRACTICE REPORT

According to a report published in the Journal of the American Medical Association (JAMA) and conducted by Frank Sloan and others of the Vanderbilt University Health Policy Center on physician claims experience in Florida, "[a]lmost all payments for compensation and associated costs went to cover losses incurred by a handful of physicians." In recent years, Florida has been the major battle ground for medical malpractice legislation, and malpractice premiums have traditionally been among the highest in the country and doctor outcry one of the loudest.

The report, "Medical Malpractice Experience of Physicians, Predictable or Haphazard?", looked at all closed claims against physicians in Florida from 1975 to the first quarter of 1985.

Among the major findings of the JAMA article:

1. Claims Experience. A small percentage of doctors were responsible for a high percentage of paid claims. Closed malpractice claims with compensation exceeding $300,000 accounted for roughly 68 percent of the total indemnity payments, but only 11 percent of the total closed claims. Among obstetricians-anesthesiologists, more than 85 percent of the closed claim payments against them were incurred by approximately 6 percent of the physicians. For surgical specialists, 75 percent of the total malpractice claims were incurred by just ".8 percent of practicing Florida surgeons.

2. Physician Characteristics. There was no conclusive link between the quality of a physician's credentials and his or her claims experience. In most cases, physicians with prestigious credentials had no better claims experience than did physicians with less credentials. In fact, board certified physicians often had a higher claims experience than did non-certified doctors. Foreign medical school graduates had about the same claims experience as other U.S.-trained physicians. Older physicians were less likely to have claims filed against them. Women physicians were more likely to have fewer claimed filed against them than their male counterparts.

3. Physicians Changing Specialties. Doctors with fewer claims against them were more likely to change specialties than physicians with more adverse claims experiences. Good doctors were also found to be more likely to retire or to change from patient to non-patient care than bad doctors.

4. Doctor Discipline. None of the doctors with adverse claims experience had their licenses suspended or revoked in Florida, and more than 90 percent of these physicians were never disciplined in any manner.

* The Alaska Action Trust has requested copies of the Florida report and will be forwarding a copy to your office.

If you or your staff should have any questions about any part of this informational packet, please contact the Alaska Action Trust office at 258-4040.

Sincerely,

Debra Gravo

Debra Gravo
Executive Director
dch/encl.

Citizens' Coalition For Tort Reform

Rep. Sam Cotten, Speaker
Members of the Alaska House
P. O. Box V
Juneau, Alaska 99811

May 4, 1989

Dear Mr. Speaker,

The oil spill in Prince William Sound has raised significant questions as to legal liability for the pollutions accident. The tort reform bill, HB166, is pending in the House. There have been allegations made that tort reform would adversely impact the ability of the residents of Alaska, and the State itself, to be compensated for the pollution incident. Opponents have raised the Prince William Sound disaster as a reason not to adopt meaningful tort law changes. The reality is tort law changes proposed in HB166 would have little if any effect on the compensation being paid by Exxon.

The issue must be viewed with historical perspective. In the 1988 session of the Alaska Legislature, Representative Mike Davis, with Representatives Koponen, Navarre, Swackhammer, Goll, Sund, Ulmer, Davidson, Brown and Donley, introduced compelling legislation (HB459) defining the responsibility for pollution and environmental damage. It passed the House. It's death in the Senate seemed certain until a Senate substitute (CSHB85) was forged which allowed passage of meaningful tort reform and strict environmental legislation. This bill passed 15 to 5. It imposed a standard of strict liability for pollution incidents.

Governor Cowper reviewed the bill and indicated he would sign the bill into law, were it to pass the House.

As a result of the plaintiff trial attorney opposition to tort reform, the environmental bill, CSHB85, was allowed to die in the House. Had that bill been passed in 1988, there would be no question as to how the liability, which stems from the pollution accident, would be settled. Simply put, under of strict liability, if the accident happens, you are responsible for it.

The irony is that the questions being raised now on HB166 are by the very people who had it within their

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power to pass environmental damage legislation in 1988. There is a self interest in the opposition to tort reform. That self interest was so compelling that they were willing to forego the opportunity to pass excellent environmental legislation. There should never be any confusion between environmental legislation delineating responsibility for pollution accidents and tort reform.

CSHB85 was reported in the House Journal, May 9, 1988. Brief excerpts from that bill are as follows:

a. The following persons are strictly liable, jointly and severally, for damages to persons or property, public or private, including damage to the natural resources of the State, and the cost of response, containment, removal or remedial action incurred by the state or a municipality, resulting from a release of a hazardous substance or with respect to the response costs, the substantial threat of the release of a hazardous substance:

    1. The owner and the person having control over the hazardous substance at the time of the release or threatened release;

    2. The owner and the operator of the facility or vessel from which the release occurred....;

    3. A person who owned or operated the facility or vessel from which the release occurred....at the time the hazardous substance was received by the facility or vessel;

    4. A person who owned the hazardous substance and who arranged for disposal or treatment....;

    5. A person who transported or accepted the hazardous substance for transport to the facility, vessel or site....;

Had the House of Representatives chosen to pass CSHB85, we would have had meaningful tort reform and we would have had amongst the strictest standards in the nation for environmental pollution, as of 1988. Self interests precluded Alaska from having this legislation. We urge self interest be set aside now.

Sincerely,

David A. McGuire, M.D.

The House reverted to:

MESSAGES FROM THE SENATE

CCS SB 432

A message dated May 9, 1988, was read stating the Senate has adopted the Conference Committee with limited powers of free conference report on CSSB 432(Fin) and HCS CSSB 432(Fin), thus adopting:

CONFERENCE CS FOR SENATE BILL NO. 432
"An Act making appropriations for the operating expenses of state government; and providing for an effective date."

The House has adopted CCS SB 432 (page 3698).

CSHB 538(Fin)

A message dated May 9, 1988, was read stating the President has granted limited powers of free conference to the Senate members of the Conference Committee considering:

CS FOR HOUSE BILL NO. 538 (Finance)
"An Act relating to the Alaska Municipal Bond Bank Authority, municipal debt for development and redevelopment projects; and providing for an effective date."

The specific points for which limited powers were granted appear on page 3697.

The Speaker had previously granted limited powers of free conference as requested (page 3697).

CSHB 85(Jud)

A message dated May 9, 1988, was read stating the Senate has passed CSHB 85(Jud) with the following amendment and it is transmitted for consideration:

SENATE CS FOR CS FOR HOUSE BILL NO. 85 (Rules)
amended Senate
"An Act relating to civil liability; and providing for an effective date."

The message further stated that under Rule 43(b) of the Uniform Rules engrossment had been waived and the following certified amendment was attached:

CSHB 85(Jud)

Certified Amendment No. 1

Offered by Senator Faiks:

Page 1, line 1 through page 12, line 8:

Delete all material, and insert:

"IN THE HOUSE BY THE RULES COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 85(Rules) am S

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 09.17.020 is amended to read:

Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence of fraud, malice, gross negligence, or reckless disregard by the defendant.

Sec. 2. 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. 3. AS 09.17.030 is amended by adding new subsections to read:

(b) This section does 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.

CSHB 85(Jud)

(b) A zoo operator shall post signs at prominent places within a zoo and at each zoo entrance. Each sign shall include a statement warning that the zoo is not liable for injuries to person or property occurring as a result of dangers or conditions inherent in attending the zoo.

(c) In this section

(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public that is

(A) owned by the state or a municipality; or

(B) owned and operated by a nonprofit organization.

Sec. 10. AS 09.60.010 is amended to read:

Sec. 09.60.010. COSTS ALLOWED PREVAILING PARTY. The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900 [, UNLESS THE CIVIL ACTION IS CONTESTED WITHOUT TRIAL, OR FULLY CONTESTED AS DETERMINED BY THE COURT].

Sec. 11. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES. (a) A hospital that is required to provide services by AS 18.20 or regulations implementing that chapter, or that is subject to regulation with respect to the provision of services, is not, solely for that reason, liable for civil damages as a result of an act or omission in administering those services by a health care provider who is not an employee of the hospital.

(b) Compliance with the standards of a public or private licensing or accreditation agency with respect to provision of services or adoption of bylaws or regulations by the hospital governing provision of services, may not be construed as an assumption of civil liability by the hospital for the acts or omissions of a physician or other health care provider who is not an employee of the hospital.

CSHB 85(Jud)

(c) This section does not preclude liability for civil damages that are the proximate result of the hospital's own negligence or intentional misconduct, including negligence in contracting with a specific health care provider.

(d) In this section, "health care provider" has the meaning given in AS 18.23.070, except that it does not include a hospital or an employee of the hospital.

Sec. 12. 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 medical malpractice insurance rate changes occurring as a result of court decisions in the state involving personal injury or death.

Sec. 13. AS 46.03.822 is repealed and reenacted to read:

CSHB 85(Jud)

knowledge or experience the person has; the relationship of the purchase price to the value of the property if uncontaminated; commonly known or reasonably ascertainable information about the property; the obviousness of the presence or likely presence of contamination at the property; and the ability to detect contamination by appropriate inspection.

(e) This section does not diminish the liability of a person who previously owned or operated a facility and who would otherwise be liable; however, if the person obtained actual knowledge of the release or threatened release of a hazardous substance at the facility and subsequently transferred ownership to another without disclosing that knowledge, the person is liable under (a)(2) of this section, and a defense under (b)(1)(B) of this section is not available to the person.

(f) This section does not affect the liability of a person who, by an act or omission, caused or contributed to the release or threatened release of a hazardous substance that is the subject of the action relating to the facility.

(g) An indemnification, hold harmless, or similar agreement or conveyance is not effective to transfer liability under this section from the owner or operator of a vessel or facility or from a person who may be liable for a release or substantial threat of a release under this section. This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section. This subsection does not bar a cause of action that an owner or operator or other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against a person.

Sec. 14. AS 46.03.826 is amended by adding a new paragraph to read:

(8) "facility" includes a

(A) building; structure; installation; equipment; pipe or pipeline, including a pipe into a sewer or publicly owned treatment works; well; pit; pond; lagoon; impoundment; ditch; landfill; storage container; motor vehicle; rolling stock; or aircraft; or

(B) site or area at which a hazardous substance has been deposited, stored, disposed of, placed, or otherwise located.

Sec. 15. AS 47.37.170(g) is repealed and reenacted to read:

CSHB 85(Jud)

(g) A person may not bring a civil action based on the decision of a peace officer or member of the emergency service patrol to take or not to take an intoxicated or incapacitated person into protective custody or to release a person from protective custody as provided in this section, unless the decision is made maliciously.

Sec. 16. AS 09.17.010(c) and 09.17.040(c) are repealed.

Sec. 17. 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 or has not been the cause of dramatic liability insurance increases or decreases and coverage reduction in crisis lines in the state;

(B) how victims are faring under the present system;

(C) what the various specific tort reform proposals have actually accomplished; and

(D) if the passage of this Act has resulted in a measurable decrease in 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.

Sec. 18. APPLICABILITY. This Act applies to all causes of action accruing on or after the effective date of this Act.

Sec. 19. SEVERABILITY. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act

SCS CSSSHB 198(Rea)

The Chief Clerk was instructed to so notify the Senate.

SCS CSSSHB 198(Rea) was referred to the Chief Clerk for enrollment.

CSHB 85(Jud)

Representative Pettyjohn moved and asked unanimous consent that the House take up the Senate message (page 3700) on the following at this time:

CS FOR HOUSE BILL NO. 85 (Judiciary)
"An Act relating to reporting of unclaimed property; and providing for an effective date."

and

SENATE CS FOR CS FOR HOUSE BILL NO. 85 (Rules)
amended Senate
"An Act relating to civil liability; and providing for an effective date."

Representative Navarre objected.

Representative Gruenberg placed a call of the House.

Representative Goll rose to a point of order.

The Speaker ruled that members should confine debate to the motion.

Representative Furnace rose to a point of order regarding impugning the motives of other members.

The Speaker stated the point was well taken.

The call was satisfied.

The question being: "Shall CSHB 85(Jud) be taken up at this time?" The roll was taken with the following result:

CSHB 85(Jud)

SCS CSHB 85(RULES)AMS MOTION

Yeas:	16	Barnes, Collins, Frank, Furnace, Hanley, Hudson, Martin, Menard, Miller, Pearce, Pettyjohn, Phillips, Rieger, Shultz, Taylor, Zawacki
Nays:	24	Adams, Boucher, Boyer, Brown, Cato, Cotten, Davidson, Davis, Donley, Ellis, Goll, Gruenberg, Grusendorf, Herrmann, Hoffman, Koponen, Larson, Navarre, Pourchot, Springer, Sund, Swackhammer, Ulmer, Wallis
Excused:	0	
Absent:	0	

And so, the motion failed, and CSHB 85(Jud) remains under Unfinished Business.

The House reverted to:

MESSAGES FROM THE SENATE

CSHB 203(Fin)

The Senate message on CSHB 203(Fin) and SCS CSHB 203(Jud) (page 3769) was before the House.

Representative Gruenberg moved that the House concur in the Senate amendment to CSHB 203(Fin), thus adopting SCS CSHB 203(Jud), and recommended that the members vote yes.

The question being: "Shall the House concur in the Senate amendment to CSHB 203(Fin)?" The roll was taken with the following result: