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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

COMPARISONS OF U.S. TORT SYSTEM CHANGES

NOTES ON TORT REFORMS ENACTED IN OTHER STATES

Arizona - State Constitution (in two separate areas) prohibits liability limits. Abolition of joint liability concept; medical review panels required prior to court action; collateral source information may be introduced but offset is not mandatory; standard of care defined in statutes.

California - \$250,000 cap on non-economic damages and other major tort reforms, including: Collateral sources of income admissible as evidence; periodic payment for future damages exceeding \$50,000; provisions for arbitration of claims; shortened statute of limitations; and a sliding schedule for attorneys' contingency fees starting at 40% of the first \$50,000, 33 1/3% of the next \$50,000, 25% of the next \$100,000-\$600,000 and 15% of any amount exceeding \$600,000. These measures were enacted in 1975, when premiums in California there were higher than in New York. California premiums are now sharply lower than premiums in New York State. Highest premium: \$92,800. Average: about \$8,000.

Colorado - Cap of \$1 million on total damages, including an absolute \$250,000 cap on non-economic damages; cap may be pierced for present value of future wage loss or health care cost; introduction into evidence of payments from collateral sources; elimination of joint and several liability; punitive damages limited to three times net pecuniary loss; mandatory periodic payment of all future damages exceeding \$150,000; mandatory liability insurance; voluntary binding arbitration; statute of limitation two years, statute of repose three years. Highest premium: \$57,000. Average: \$12,500.

Florida - Cap of \$450,000 on non-economic damages; regulation of insurers; periodic payment on awards greater than \$5,000 and sliding scale of contingency fees for plaintiff attorneys; offset collateral sources against damages; limitation on joint and several liability; penalties for frivolous suits and defense; certificate of merit; mandatory pre-suit investigation by the parties; voluntary binding arbitration; no-fault birth-related neurological injury compensation system; and good Samaritan immunity for emergency room medical treatment.

Georgia - Allows awarding of costs and fees in frivolous suits; contingency fees regulated and limited to plaintiffs attorneys. A minor shall have two years from his/her fifth birthday to file a medical malpractice suit or five years from the date of the negligent act or omission if the minor was age five or older when the act or omission occurred. Except for gross negligence or willful misconduct, health care providers shall not be liable for injuries arising out of voluntary charity work done at the request of a hospital, public school, non-profit organization or government agency. Highest premium: \$70,800. Average: \$17,500.

Illinois - Structured verdicts; contingency fee limitations; abolition of punitive damages; collateral sources reduce award; itemized verdicts; expert witness rules, early dismissal of uninvolved physicians.

Indiana - \$500,000 overall cap; physician liability limited to \$100,000; allows collateral payments to be introduced into evidence. The first \$100,000 comes from carrier and for additional \$400,000 an application is made to the patient compensation fund. Highest premium: \$11,500 for \$100,000 cover. \$11,500 plus 125% surcharge to finance the patient compensation fund.

Iowa - Limitations on joint and several liability; expert witness qualifications; damage awards may not include payment from collateral sources; sanctions for "groundless" suits; periodic payment of future damages. Highest premium: \$50,100. Average: \$19,500.

Kansas - Cap of \$250,000 on non-economic damages; Itemized verdicts; expert witness qualifications; court approval of attorneys' fees; mandatory liability insurance as a condition of licensure; pre-trial settlement conferences; costs and fees awarded in frivolous claims or defenses; collateral sources may be used to offset damages. Highest premium: \$68,000.

Kentucky - Modification of joint and several liability rule; Punitive damages guidelines; Introduction into evidence payments from collateral sources; Certificate of merit; Court review of adequacy of award; Penalties for frivolous lawsuits.

Louisiana - Cap of \$500,000, excluding hospital and medical care and lost wages.

Maine - Sliding scale for attorney's fees; periodic payment of future damages; pre-trial screening panels; shortened statute of limitations; regulation of contingency fees effective July 1, 1988.

Maryland - Cap of \$350,000 on non-economic damages in all personal injury actions; periodic payment of future damages; itemized verdicts; expert witness qualifications; certificate of merit; regulation of contingency fees.

Minnesota - Increased regulation of insurers; certificate of merit; shortened statute of limitations for minors; mandatory offset of collateral sources against damages; judicial hearing prior to claiming punitive damages; allows awarding of costs and fees where there is a frivolous claim or defense; itemized verdicts; cap of \$400,000 for intangible loss in all civil

actions - Intangible loss is defined as embarrassment, emotional distress, loss of consortium but does not include pain and suffering. Periodic payment of future damages; Modification of joint and several liability rule.

Mississippi - Award of costs and fees where there has been a frivolous claim or defense. Highest premium: \$110,900 (\$5 million/\$5 million coverage). Average: \$11,100.

Missouri - Cap of \$350,000 per defendant on non-economic damages; periodic payment of future damages; modification of joint and several liability; mandatory liability insurance of \$500,000 as a condition of hospital staff privileges - only applies in counties with a population in excess of 75,000; itemized verdict; certificate of merit.

Nebraska - Overall cap of \$1,000,000.

New Hampshire - Shortened statute of limitations; cap of \$875,000 on non-economic damages in all personal injury actions; court must approve attorney's fees when settlement or verdict exceeds \$200,000; prohibits punitive damages; penalty for frivolous suits.

New Jersey - Mandatory non-binding arbitration of claims below \$20,000; damage awards offset by collateral sources of income; modification of joint and several liability; assessment of costs and fees to party making a baseless pleading. Highest premium: \$42,000. Average: \$13,400.

New Mexico - Cap of \$500,000 but provides for all past and future medical needs related to the cause of action; caps on physician liability.

Ohio - Cap of \$200,000 on non-economic damages; collateral sources may be used to offset damages.

Oregon - \$500,000 cap on non-economic damages; significant modification of joint and several liability rule; higher standard of proof for punitive damages; immunity from punitive damages for health care professionals except where actions are willful or wanton; countersuits and penalties for frivolous lawsuits; some collateral source offsets.

Rhode Island - Awarding of costs and fees in frivolous suits; collateral sources admissible as evidence; periodic payment of future damages must be considered; medical liability insurance is required.

South Carolina - Shortened statute of limitations for minors; Punitive damages guidelines; Award of costs and fees where there has been a frivolous claim or defense; Limited liability for state-employed physicians.

South Dakota - Cap of \$1,000,000 on total damages; periodic payment of future damages; judicial hearing prior to submission of issue of punitive damages to jury; allows awarding of costs and fees to defendant in frivolous lawsuits; shortened statute of limitations for minors; punitive damages guidelines; limited liability for state-employed physicians.

Texas - Limitations on joint and several liability; punitive damage restrictions; sanctions for frivolous lawsuits; exemption from personal liability for physicians performing duties under contract to Texas Health or Corrections departments or Youth Commission; reduced liability for voluntary service to charitable organizations. Highest premium: above 50,000. Average: \$10,650.

Utah - Cap of \$250,000 on non-economic damages; periodic payment of future damages; elimination of joint and several liability; mandatory offset of awards for collateral sources of income; attorney contingency fee limitations; shortened statute of limitations for adults and minors; guidelines for establishment of a Joint Underwriting Association; pre-trial screening panels; elimination of "ad damnum" clause.

Virginia - Overall cap of \$1,000,000; pre-trial screening; shortened statute of limitation; No-fault compensation system for birth-related neurological injury cases.

Washington - Sliding scale cap for non-economic damages based on life expectancy (assumes minimum life expectancy of 15 years); Minimum/maximum awards of \$117,000 for those damaged later in life and \$573,000 for damages at birth; periodic payment of future damages; shortened statute of limitation; modification of joint and several liability rule.

West Virginia - Cap of \$1,000,000 on non-economic damages; increased regulation of insurers; shortened statute of limitations; elimination of "Ad damnum" clause(see glossary); expert witness qualifications; modification of joint and several liability effective at the 25% level.

Wisconsin - Cap of \$1,000,000 on non-economic damages; itemized verdicts; sliding scale for attorney's fees; mandatory non-binding mediation (replaces pre-trial hearing); reduction of all future losses to present value, with payment at the time of award; shortened statute of limitations.

Wyoming - Assessment of costs and fees to party making baseless pleading; affidavit of non-involvement (allows early dismissal of defendant); elimination of joint and several liability.

Eleven states have adopted statutes allowing voluntary and binding arbitration in malpractice cases. Patients who do not sign arbitration agreements may not be denied treatment or otherwise be discriminated against. The laws commonly allow a revocation period by the patient (usually 30 to 60 days) following treatment. The 1986 New York legislation provided for arbitration on a pilot basis in the HMO setting, and in certain cases where the defendant concedes finality.

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

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

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

AN OVERVIEW

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

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

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

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

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

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

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

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

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

PUBLIC POLICY ISSUES

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

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

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

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

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

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

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

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

ALTERNATIVES

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

AWARD OF DAMAGES

Establish Limits on Non-economic Damages

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

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

Abolition or Restriction of Punitive Damages

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

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

Itemized Jury Verdicts

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

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

Adoption of Structured Settlements

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

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

Abolition of Collateral Source Rule

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

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

Contingent Fees

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

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

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

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

Abolition of Joint and Several Liability Doctrine

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

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

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

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

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

PROCEDURAL REFORMS

Four major proposals include:

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

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

- 2) Allow Affidavits for Noninvolvement. To discourage the practice of joining every individual in a lawsuit who may have some remote connection, a defendant should be allowed to file an affidavit of noninvolvement denying connection to the negligent act. A hearing would then be held requiring the plaintiff to show reasonable cause for naming the individual as a defendant in the suit.
- 3) Permit a System of Binding, Voluntary Arbitration. Arbitration could be used in less complex cases as a faster, less costly means of resolving small claims. By diverting these cases to an alternative system, the traditional court system would be freed to more quickly expedite more complex cases, reducing costs to the courts and litigants. The Institute of Civil Justice is currently conducting a study to evaluate litigant reactions and litigant costs in court-annexed arbitration in federal courts.
- 4) Expedite Proceedings. Patricia A. Ebener of the Rand Institute conducted a national survey of state court procedures designed to reduce delays in civil court procedures. Her study found 25 procedures implemented in 47 states. These include:
 1. "Fast tracks" for certain types of cases;
 2. Dismissal of inactive cases;
 3. Penalties for last minute settlements made after courtroom assignment and jury selection;
 4. Procedures designed to simplify and limit filing of motions and pleadings; procedures limiting discovery;
 5. Procedures which set firm trial dates;
 6. Procedures which provide faster and less expensive means of resolving disputes.

Evaluation of Reforms

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

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

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

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

Effects of Changes in Tort Law

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

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

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

FEDERAL INITIATIVES ON TORT REFORM

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

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

Product Liability

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

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

Medical Malpractice

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

- 1) An alternative allowing health care providers, within 180 days of incident, to authorize payment of patient's economic loss;
- 2) Foreclosure of a patient's right to sue for medical malpractice once the provider's commitment to pay for economic loss is made, with two exceptions: a) cases where the provider intentionally caused the injury; b) wrongful death;
- 3) Offer of provider must by definition encompass all of patient's economic losses;
- 4) Provider may join all other responsible parties with disputes between joined parties being settled by arbitration;
- 5) Periodic payments.

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

FEDERAL COURTS AND LOCAL GOVERNMENT LIABILITY

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

SURVEY

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

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

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

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

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

The State of Tennessee reported that portions of the "Medical Malpractice Review Board and Claims Act of 1975," Tennessee Code Annotated, Sections 29-26-114, 29-26, i21, were repealed in 1985 due to ineffectiveness. Statistics for total tort or damage suits filed in Circuit and Chancery Courts in 1974 numbered 11,064; in 1984, 11,775 (Source: Executive Secretary, Supreme Court of Tennessee, Annual Report 1974 and 1984).

Recommendations

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

- 1) Cap on "non-economic damages," and
- 2) Modification of collateral source rule.

Various states made the following suggestions.

- 1) Limitation of punitive damages to a set amount or percentage of assets, whichever is greater.
- 2) Legislation that treats public entities and public employees identically for procedural requirements.
- 3) Legislation limiting public entities' contribution to any judgment to an amount not greater than its pro rata share of liability.
- 4) In assessing legislation, an important consideration is the ramifications of proposed legislation on practical as well as constitutional issues. Critical to the selection of appropriate legislation is the determination of the source from which the so-called problems originate--attorneys' actions, insurance industry actions or other causes.
- 5) Enactment of standards permitting waivers of rights to sue for damages for use by schools, churches, and non-profit organizations.
- 6) Enactment of market assistance plans.
- 7) Enactment of more limited standards of duty than are currently in use.
- 8) Abolition of jury trials in cases against public entities or trial to judge on damages issues;
- 9) Return to restricted form of sovereign immunity;
- 10) Creation of pretrial screening panels to determine validity of suit.
- 11) Legislation prohibiting a public entity's contributing to a judgment more than its pro rata share of liability.

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

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

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

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

CONCLUSION

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

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

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY

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

* See Comments.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

ALABAMA

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

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

ALASKA

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

COLORADO

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

CONNECTICUT

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

DELAWARE

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

FLORIDA

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

ILLINOIS

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

INDIANA

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

LOUISIANA

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

MASSACHUSETTS

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

MINNESOTA

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

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments**MONTANA**

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

NEW HAMPSHIRE

(Cont'd) §507-B:4.

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

NEW JERSEY

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

OHIO

- 1) In the case of the State of Ohio, sovereign immunity was abolished in Am. Sub. H.B. 800 of the 110th General Assembly (Effective 1/1/75). R.C. 2743.01-2743.20.
- 2) In the case of Ohio's political subdivisions, sovereign immunity was abrogated by the Supreme Court in a series of decisions, but recently reestablished subject to specified areas of liability (Am. Sub. H.B. 176 of the 116th General Assembly, effective 11/20/85). R.C. 2744.01-2744.09.

PENNSYLVANIA

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

RHODE ISLAND

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

SOUTH CAROLINA

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

SOUTH DAKOTA

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

VERMONT

No liability except to extent of insurance coverage.

WISCONSIN

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

WYOMING

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

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY

3

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

*See Comments.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

CONNECTICUT

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

DELAWARE

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

INDIANA

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

IOWA

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

LOUISIANA

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

MAINE

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

MINNESOTA

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

NEVADA

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

NEW HAMPSHIRE

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

NEW YORK

See Civil Practice Law and Rules (CPLR) 1404.

OHIO

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

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

OHIO, Cont'd

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

OKLAHOMA

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

PENNSYLVANIA

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

RHODE ISLAND

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

TEXAS

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

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE

4

ALABAMA	--
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	A.R.S. 12-565 (medical malpractice only)
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	P.A. 85-574
DELAWARE	--
FLORIDA	§672.7372 Fla. Stat. (automobile cases only)
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE	17-A MRSA §1322
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 42.020 (limited in scope)
NEW HAMPSHIRE	--
NEW JERSEY *	N.J.S.A. 59:9-2
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	N.C. Gen. Stat. §8C-1, Rule 411
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	§10.5 (1984), §153(D)
OREGON *	Yes
PENNSYLVANIA	42 Pa.C.S.A. §8553(d)
RHODE ISLAND	R.I. Gen. Laws §9-19-34 (medical malpractice only)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	--
AMERICAN SAMOA	--
PACIFIC TRUST	--
PUERTO RICO	--
VIETNAM ISLANDS	--

Comments.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE - Comments

MASSACHUSETTS

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

NEW JERSEY

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

NEW YORK

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

OHIO

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

OREGON

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

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE

5

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

Comments.

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE - Comments

ALASKA

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

HAWAII

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

NEW JERSEY

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

NEW YORK

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

NORTH DAKOTA

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

WISCONSIN

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

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES

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

* See Comments.

6a 7b

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES - Comments

LOUISIANA

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

MASSACHUSETTS

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

MONTANA

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

NEW JERSEY

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

NEW YORK

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

OHIO

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

PENNSYLVANIA

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

TEXAS

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

WISCONSIN

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

WYOMING

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

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS

7

ALABAMA	Ala. Code §6-5-486 (1975)
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	--
ARKANSAS	Ark. Stat. Ann. §34.2619 (Supp. 1983)
CALIFORNIA	Cal. Civ. Proc. Code §667.7 (West 1980)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6864 (Supp. 1984)
FLORIDA *	§768.57 Fla. Stat. (1985)
GEORGIA	--
HAWAII *	--
IDAHO	--
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA *	Yes
IOWA	--
KANSAS	Kan. Stat. Ann. §60-2609 (1983)
KENTUCKY	--
LOUISIANA	La. Rev. Stats. 13:5114 (Act No. 45) 450
MAINE	--
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	--
MISSOURI	--
MONTANA *	Yes
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 50-A
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	R.I. Gen. Laws §28-33-25 (workers' compensation only)
SOUTH CAROLINA *	--
SOUTH DAKOTA *	--
TENNESSEE *	Tenn. Code Ann. §7-51-202 (1985); §9-8-307 (1985 Supp.) (see comm.)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- Proposed legislation
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS - Comments

FLORIDA

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

HAWAII

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

INDIANA

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

MONTANA

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

NEW YORK

Only in medical and dental malpractice cases.

OHIO

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

SOUTH CAROLINA

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

SOUTH DAKOTA

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

PENALTIES FOR FILING FRIVOLOUS SUITS

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

* See Comments

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

COLORADO

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

FLORIDA

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

LOUISIANA

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

MISSISSIPPI

See Rule 11q of Mississippi Rules of Civil Procedure.

NEVADA

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

NORTH CAROLINA

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

OHIO

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

The frivolous suit issue has arisen in the past in Ohio relative to medical malpractice cases (see memo R-112-2782). The question has at times been whether attorneys as well as their clients should be pursued for frivolous suits. No legislative enactments have resulted, but several years ago legislation was discussed that would have imposed attorney's fees/court costs penalties for filing frivolous civil actions or appeals. Finally, see the memo R-116-1327 relative to attorney's fees awards in Ohio; also bear in mind that, in Ohio, prevailing parties in civil actions generally are awarded court costs under Civil Rule 54(D).

SOUTH CAROLINA

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

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

WISCONSIN

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

WYOMING

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

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS

9

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

* See Comments.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS - Comments

FLORIDA

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

LOUISIANA

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

MASSACHUSETTS

Massachusetts General Laws, Chapter 258 (public employees)

Massachusetts General Laws, Chapter 33 (national guard)

Massachusetts General Laws, Chapter 111C, Section 14 (medics rendering assistance in emergencies)

Massachusetts General Laws, Chapter 119, Section 51A (social workers and other mandated reporters immune from suit for filing report of suspected child abuse)

MISSOURI

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

OHIO

1) For state employees, see qualified immunity provisions of R.C. 9.85, 9.86, and 2743.02.

2) For political subdivision employees, see the recent political subdivision sovereign immunity act (R.C. 2744.03(A)(6)).

OKLAHOMA

1) 19 O.S. 1981, §371

2) 63 O.S., §683.14

3) 57 O.S., §553

4) 11 O.S., §§29-108 and 37-121

5) 22 O.S., §371

6) 11 O.S., §23-104

SOUTH CAROLINA

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

WISCONSIN

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

MODIFICATION OF DRAM SHOP LAWS

10

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

* See Comments.

MODIFICATION OF DRAM SHOP LAWS - Comments**ALASKA**

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

FLORIDA

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

MAINE

Reduce liquor liability.

MINNESOTA

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

MONTANA

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

NEVADA

"Dram shop" laws are not recognized in Nevada.

NEW JERSEY

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

NEW YORK

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

NORTH DAKOTA

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

OHIO

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

SOUTH CAROLINA

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

SOUTH DAKOTA

Abrogation of dram shop laws.

MODIFIED STATUTE OF LIMITATIONS

11

ALABAMA *	Yes
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	§§52-577a; 52-577b and 52-577c; P.A. 84-407; P.A. 84-287
DELAWARE	--
FLORIDA *	§95.11(4), F.S., providing 2 years from discovery (cont'd in comments)
GEORGIA	--
HAWAII	--
IDaho	Limitations Tort Claims Act revised 1985, I.C. 6-901 et seq.
ILLINOIS *	--
INDIANA	Ind. Code 34-1-1-2
IOWA	--
KANSAS	K.S.A. 60-501 et seq.
KENTUCKY	--
LOUISIANA	--
MAINE *	14 M.R.S.A. §5752-A (design professionals), (cont'd in comments)
MARYLAND	Courts & Judicial Proceedings (CJ) §5-109 (actions against physicians)
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	H.B. 63 (1985)
MISSOURI *	§516.140 (H.B. 225, 1985); §516.030 (1983, S.B.44 & 45); (see comment
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 41A.097 (regarding health care providers)
NEW HAMPSHIRE	--
NEW JERSEY *	See comments.
NEW MEXICO	--
NEW YORK	C.P.L.R., §214-a; medical or dental malpractice
NORTH CAROLINA *	--
NORTH DAKOTA	N.D.C.C. Ch. 28-01
OHIO *	--
OKLAHOMA	510.S.1984 §156(B)
OREGON *	O.R.S. 30.275
PENNSYLVANIA	Yes
RHODE ISLAND	--
SOUTH CAROLINA *	Section 15-3-545
SOUTH DAKOTA	Chapters 15-2 and 15-2a
TENNESSEE	T.C.A. §29-26-116 (1980) (medical malpractice)
TEXAS *	§16.008; Article 4590, §10.011
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 1-3-107 (1976)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

MODIFIED STATUTE OF LIMITATIONS - Comments**ALABAMA**

Statute of limitations in certain civil lawsuits and workers' compensation were increased as part of a workers' compensation compromise.

ACT 85-39)
ACT 85-41) 1984 2nd Special Session

FLORIDA

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

ILLINOIS

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

MAINE

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

MISSOURI

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

NEW JERSEY

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

NORTH CAROLINA

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

OHIO

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

OREGON

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

SOUTH CAROLINA

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

TEXAS

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

LIMITATIONS ON ATTORNEY CONTINGENCY FEES

12

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

* See Comments.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES - Comments**FLORIDA**

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

HAWAII

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

MARYLAND

Partial (for suits against state government).

MASSACHUSETTS

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

OHIO

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

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

OKLAHOMA

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

OREGON

(Cont'd) omission, operations.

TORT LIABILITY - INSURANCE

STATE	TORT LAW REVISION		INSURANCE REGULATION		SPECIAL PROBLEMS		NOTES									
	* Joint/Several Liability.	* Collateral Source	* Prejudgement Interest	* Caps on Damages	* Structured Awards	* F frivolous Suits	* Sovereign Immunity	* Insolvency - Guaranty Fund	Admin. Action to Promote Access	Medical Malpractice State/Local Gov'ts.	Day Care Centers	Envir. Impairment	Schools	Non Profit/Volunt'rs.	* Dram Shop	AIDS Epidemic
ALABAMA										x	x		x			May consider revision of Insurance Code
ALASKA	x	x	x	x	x	x	x			x					x	
ARIZONA	x	x		x	x			x		x	x	x	x	x	x	Special commission on property/casualty insurance set up
ARKANSAS																
CALIFORNIA	x	x	x	x	x	x	x	x		x	x	x	x			x
COLORADO	x	x	x	x	x	x	x	x		x		x		x		x
CONNECTICUT										*****						Unisex rates--abol. Coll. Source rule MedMal'85
DELAWARE																Unisex rates--has authority for joint underwriting
FLORIDA	x				x				x							
GEORGIA	*****															Uninsured motorists a priority
HAWAII				x	x			x		x	x	x				Insurance code scheduled for revision 1987
IDAHO	*****									x					x	
ILLINOIS	*****								x	x	x	x			x	May propose citizen advocate for Insurance Board
INDIANA										x						
IOWA	x	x	x	x	x	x	x				x					
KANSAS											x					Capped punitive damages in MedMal'85
KENTUCKY						x				x				x	x	Insurance for grain elevators major problem
LOUISIANA																Awaiting court test of cap on damage awards
MAINE				x						x	x	x			x	
MARYLAND										x						Medical Malpractice/Liability insurance task forces
MASSACHUSETTS				x						x	x	x	x		x	x
MICHIGAN	x	x	x			x				x	x		x		x	
MINNESOTA								x		x	x	x	x			x
MISSISSIPPI																
MISSOURI										x						

****Study in Progress

TORT LIABILITY - INSURANCE

STATE	TORT LAW REVISION	INSURANCE REGULATION	SPECIAL PROBLEMS	NOTES
	* Joint/Several Liability.	* Insolvency - Guaranty Fund	* Admin. Action to Promote Access	
	* Collateral Source			
	* Prejudgement Interest			
	* Caps on Damages			
	* Structured Awards			
	* F frivolous Suits			
	* Sovereign Immunity			
MONTANA				
NEBRASKA	*****	x		
NEVADA				Insurance insolvency statute enacted '85
NEW HAMPSHIRE				
NEW JERSEY	*****		x	Moratorium on insurance cancellations
NEW MEXICO				
NEW YORK	x			Special session on medical malpractice
NORTH CAROLINA	*****	x		
NORTH DAKOTA	x			
OHIO				Order signed prohibiting mid-term ins. cancellations
OKLAHOMA				
OREGON	x			May prohibit midterm cancellation or rate increase
PENNSYLVANIA				Reviewing insurance investment rules
RHODE ISLAND	x			
SOUTH CAROLINA	x			
SOUTH DAKOTA	x			
TENNESSEE				
TEXAS	*****			
UTAH				Major rewrite of Insurance Code in '85
VERMONT				
VIRGINIA	x			Insurance code may be recodified
WASHINGTON	x			
WEST VIRGINIA	x			Major problem with fire insurance claims
WISCONSIN				
WYOMING	*****			Legislation may give increased authority to Ins. Commr.

****Study in Progress

*See "Definitions" page 4

--NCSL State Legislative Report--6

TORT LIABILITY LITIGATION

In the past year, the tort liability problem and resultant high cost or unavailability of liability insurance have captured media and legislative attention. High visibility defendants such as cities, states, doctors, and hospitals have received wide media coverage. Less well publicized, but equally affected, are small businesses, long distance truckers, directors and officers of corporations, owners of gasoline stations and the operators of grain elevators to name but a few. Social services provided by private parties are also threatened by the high cost of insurance. Child care centers are finding it difficult to buy insurance in light of lurid claims of sexual abuse. Most waste dump sites cannot be licensed without insurance, and insurance is virtually unavailable. A large percentage of the dump sites are operated by municipalities.

ROOTS OF THE PROBLEM

The insurance companies lay primary blame for the problem upon the legal system. They say the system invites high damage awards. The doctrine of joint and several liability which allows a plaintiff to sue any or all of the possible defendants for the full amount of his damage is a frequent target of criticism. Although a plaintiff cannot collect more than his legally determined damages, he may collect it from the defendant with the most resources or the "deepest pocket," irrespective of that defendant's degree of fault. This rule sometimes works against government because it is always considered as a deep pocket defendant. A city which is found to be only 10 percent fault in an accident may have to pay all or most of the damages if the other defendants have no resources. Insurers also advocate caps on the amount of damages that can be recovered, particularly for non-economic or "pain and suffering" damages. They also criticize the collateral source doctrine which keeps out evidence of compensation already received by the plaintiff from a third party.

Trial lawyers argue that the rules of tort law evolved over time and operate with substantial fairness. Tampering with them might reduce the exposure of defendants, but would be unfair to injured plaintiffs. Why, they ask, should an injured party be denied full recovery just because most of the defendants cannot pay? In their view, it is better for a negligent defendant to pay more than his share than to deny an injured plaintiff full recompense. Similarly, they argue that a plaintiff who has suffered a \$200,000 loss should not be limited to recovering \$100,000.

The loss of sovereign immunity from suit has made governments a much more attractive target of law suits. In recent years, juries have shown a consistent willingness to impose large judgments against states and cities. Insurance actuaries have not had time to fully develop the kind of data needed to decide how big a risk a particular government might be. In the face of uncertainty, they take a conservative position and either deny coverage or charge very high premiums.

Uncertainty, even when unaccompanied by a claims history, can result in escalating premiums. In an NCSL survey, 15 states reported day care centers were having difficulty keeping or affording insurance. In large part, the increase is traceable to the charges of sexual abuse which have been brought against the operators of a few day care centers. The insurers may be correct that the criminal charges are the harbingers of civil suits, but that is speculation.

Insurers can rightly be concerned about technological hazards and environmental impairment. These claims may take years to appear and in our chemically complex world, the potential for harm is open ended. Of course insurers are reluctant to assume such uncertain risks.

Long term observers of the insurance business note that it is an industry characterized by cycles. In this case, the cycle was started with the competition in the late 1970s to write as much insurance as possible in order to invest the premiums. The return on investment was quite high in those inflationary days and "cash flow underwriting" was nearly irresistible. The competition for business drove down the price of insurance, but the claims keep coming in. As return on investment has dropped with the rate of inflation, losses in the insurance industry have mounted. In the past two years, insurance companies lost more than in the previous 25 years.

Even the strength of the dollar has worked against the insurers. Lloyds of London, which reinsured many of the policies written in the United States, has withdrawn from the business because of the unfavorable differential between the dollar and the pound sterling.

POTENTIAL SOLUTIONS

It is one thing to assess blame and quite another to resolve the problem, although a number of possibilities exist.

As described earlier, certain tort law doctrines, such as joint and several liability or collateral source, might be amended to assure that defendants are assessed no more than their fair share of a claim. Limits or caps may be placed on awards to reduce potential exposure.

Sovereign or governmental immunity might be wholly or partially reasserted and extended to local governments as well as the state.

No matter what else is done, business and government can do a better job of risk management. Risk management is simply a matter of learning from experience and trying to anticipate where claims may arise. If a city is plagued by claims based on inadequate road maintenance, some research, planning, resources and action may reduce the number of claims filed. In the long run, if done properly, risk management can save money.

Insurance savings is often possible through the use of risk pools where a number of individual companies or governments get together to seek insurance as a group. A group of small communities may be more attractive to

an insurer than any one of them alone. By acting collectively, they may be able to afford higher levels of deductibility, in effect, sharing the risk with the insurer.

In part, the present problem was caused by the entry into the insurance field of irresponsible and fiscally unsound companies whose pricing practices dragged the better companies along. When the conditions changed, many of the weaker companies went out of business and the more stable faced large losses. Better regulation of entry into the field and rate review by the state insurance commissions could help level out the cycles over the long run.

Traditional concepts of insurance may be inadequate to deal with technological hazards and environmental impairment. State governments and the federal government may have to get more involved in the resolution of such unpredictable and potentially catastrophic risks.

States are already taking steps to prohibit midterm cancellations of policies unless the risk has demonstrably increased, and companies are being directed to give policy holders more notice of intent to cancel.

Although there is some risk involved, state insurance commissions are considering allowing companies not otherwise licensed in the state to write certain kinds of policies. These surplus lines of insurance may help make insurance more available, but not necessarily at low cost. In addition, since the issuing companies are not licensed in the state, future disputes over the policies may be difficult to resolve.

Insurance companies are pressing for modification of the language of the policies they write. Coverage for "claims made" rather than "occurrence" is a frequent request. If a company insures against events occurring during the term of the policy, they must pay for claims made years after the expiration of the policy, as long as the events giving rise to the claim "occurred" during the time the policy was in force. A "claims made" policy covers only those claims made during the term of the policy. Insurers also urge the counting of attorneys' fees in determining the maximum that the company can be compelled to pay.

Assigned risk pools can be established, but while such pools offer coverage when none might have been available, the cost is inevitably high.

On the assumption that judges are likely to be less generous with taxpayer money, special courts of claims can be set up to hear tort claims against government defendants. States have also established review boards to conduct preliminary reviews of complex claims involving technical issues. This approach has been used in medical malpractice claims in 22 states.

Some insurance commissioners have reported success with "jawboning" the companies. The voluntary Market Assistance Programs (MAP) are often effective in convincing insurers to continue offering certain lines of insurance or to mitigate premium increases. This approach can be used effectively by businesses as well, particularly if it is accompanied by a well thought out risk management program.

Our survey suggests that states are taking a careful and responsible approach to this problem. Governments seem willing to work with the insurance industry to help it pull itself through the current difficulty. Wholesale revision of tort law is not likely. There may be selective amendments, but the system will remain intact. States are likely to employ a range of remedies including tort law revision, industry incentives and regulation, and improved risk management. State governments and the insurance industry have a long history of cooperation and both sides seem optimistic that the present difficulties will be overcome.

The purpose of the survey was to identify issues and approaches to the problem. Such a survey is necessarily subjective and may reflect the bias of the persons we contacted. Doubtless, it underestimates the attention being paid to insurance regulation, incentive, and administrative action. Insurance commissions in most states have not yet presented all their proposals to the legislatures. A similar survey in January or February would probably show a great deal more activity. Furthermore, the fact that a study has been undertaken, or a bill has been introduced, or an issue is getting a lot of attention does not mean that the inevitable result will be statutory. As careful observers of state legislatures know, events can move quickly. This survey was conducted in October. Conditions can change by spring or even January. If the survey has value, it is in giving the reader a brief overview of how the legislatures presently perceive the issue and the kinds of actions being proposed.

DEFINITIONS:

Joint and Several Liability: allows plaintiff to collect the whole of his damages from any or all of the defendants irrespective of their relative fault.

Collateral Source Doctrine: prohibits introduction of evidence that plaintiff has already received some payment for his injury from another source.

Prejudgment Interest: assessment of interest as of the date of the filing of the claim.

Structured Awards: allows defendant to pay a claim over a period of time.

Insolvency/Guaranty Funds: actions taken to protect claimants from insolvency failure of insurance companies.

Dram Shop: statutes holding vendors of alcohol responsible for acts of intoxicated purchasers.

LITIGATION

Kansas Malpractice Victims Coalition v. Fletcher Bell

In January, 1988, the Shawnee County Court ruled that Kansas' cap on medical malpractice awards is unconstitutional. The court found that the cap violated the due process provision and equal protection clause of the Kansas constitution. In addition to the caps, the court ruled that structured annuity provisions of the malpractice law were unconstitutional.

Evangelatos v. Superior Court of Los Angeles County

44 Cal 3d 1188

In April, 1988, the California Supreme Court ruled the 1986 "Deep Pockets" Proposition 51, which limits damages for pain and suffering, is constitutional but does not apply to cases pending when Proposition 51 passed.

LITIGATION

State Farm Mutual Insurance Company, et al. v. State of Florida. (Case Nos. 86-2262, 86-2272, 86-2363)

Four insurance companies challenged the Florida Tort Reform Act of 1986 charging that its broad language was violative of provisions in the Florida Constitution which prohibit legislation from addressing more than one issue in each bill. The plaintiffs also argue that the Act violates the due process and equal protection clauses of the United States and Florida Constitutions by denying access to the courts and discriminating against injured persons. A Florida Circuit Court upheld the Act in October of 1986.

On April 23, 1987, the Florida Supreme Court ruled as unconstitutional a \$450,000 cap on non-economic damages in a decision that, for the most part, upheld the state's controversial tort reform and insurance rate regulation law enacted last year. (Ch. 86-160, LOF) In affirming the Circuit Court's ruling made last October, the Court left intact a provision which limits joint and several liability and eliminated the retroactive payment of rebates to policyholders, making rebates mandatory only on policies written or renewed after July 1, 1986.

Crystle Miller v. Boone County Hospital (Iowa Supreme Court, 118/85 - 1275)

The Iowa Supreme Court struck down the state's statute requiring claimants to file suits against municipalities within six months of the occurrence for which damages are sought. Because victims of private sector torts were not bound by the same statute of limitations, the court found the statute to be violative of equal protection.

State of West Virginia, ex rel. Charles B. Brown, Attorney General v. St. Paul Fire and Marine Insurance Company, et al. (Circuit Court of Kanawha County, West Virginia.)

The Attorney General of West Virginia brought suit against six insurers alleging that "defendants and their co-conspirators have continuously engaged in an unlawful contract, combination, or conspiracy, or in a series of unlawful contracts, combinations, or conspiracies, in per se unreasonable restraint of trade" related to the provision of medical malpractice liability insurance in the State of West Virginia.

The suit is in the discovery phase of litigation. The Attorney General's Office issued a "White Paper" on insurance in mid-February. (see Bibliography).

Boyd, et al. v. Bulala (W.D. Virginia, United States District court) C.A. No. 83-0557-A-C)

Parents brought suit on behalf of themselves and their infant daughter seeking damages for the negligence of their obstetrician, Dr. Bulala, which allegedly resulted in perinatal injuries to the infant during delivery. The

case was tried before a seven member jury which returned six verdicts against the defendant physician in amounts totaling \$8,300,000 including punitive damages of \$1,000,000 for the mother and infant each. At the time the case was originally heard, the Virginia Code (Section 8.01-581.15) provided a cap of \$750,000 in all medical malpractice actions. The court found that although the legislature may pass measures which affect the way a jury determines factual issues, such as by promulgating rules of evidence and procedure, and make rules concerning the type of damages recoverable and the way in which damages are paid, the legislature may not preempt a jury's findings on a factual issue which has properly been submitted to it. "...the legislature may not mandate the amount of judgment to be entered in a trial." The court further explained that legislative action designed to ease "a crisis of the moment" cannot prevail over the constitutional right to a trial by jury.

The Commonwealth of Virginia has been permitted by the United States District Court (Western District of Virginia, Civil Action No. 83-0557-A-C) to intervene in the action which has been certified for appeal.

Lynn D. Straight and Clarice Straight v. Clear Water Constructors, Inc.
The Chart House, Inc., 87-CV-7241

Suit was filed in Denver District Court on April 15 challenging laws which limit monetary damages and prohibit suit against landowners for simple negligence. The action arose when a delivery man was injured while making a delivery to a privately-owned restaurant. Plaintiff argues that the Colorado Constitution guarantees a remedy for every wrong - not a partial remedy. This is the first court challenge to the state's year old tort reform laws.

INTRODUCTION

In 1989, the most significant activity relative to Civil Justice reform occurred in the Courts rather than the Legislatures. In stark contrast to 1986 when thirty-six (36) state legislatures passed tort reform,¹ albeit varying in degree and significance, this year only seven (7) states enacted reforms.

¹In 1986, thirty-six state legislatures passed tort reform measures, varying in degree and significance. Perhaps the most significant reform occurred in states with small populations such as Washington, Hawaii, Alaska, Colorado and New Hampshire. However, significant reform-related activity also occurred in such high population states as New York, California, Florida and Illinois.

By means of an overview, of the thirty-six states that enacted some form of tort reform, fourteen states abolished or modified the doctrine of joint and several liability, primarily for noneconomic damages only, but in a few states, namely Colorado, Utah and Wyoming, for economic damages as well. Modifications of the doctrine ranged from abolition only in the instance of a low fault defendant such as in the state of Illinois to New York's reform, which has numerous exceptions to the application of the abolition of joint and several liability.

Sixteen states capped noneconomic damages. Eight of those states limited the cap to medical malpractice cases. Where the cap applies to other tort actions, such as cases involving products liability, the caps ranged from \$250,000 cap in the absence of a showing of clear and convincing evidence of liability in Colorado to the cap set pursuant to formula in Washington which can cap the award of noneconomic damages as low as \$177,000 to the \$750,000 cap enacted in New Hampshire.

Seventeen states imposed new or stronger penalties on frivolous suits. Most of the penalties involve costs or attorney's fees. Connecticut enacted legislation which allows payments of double the amount of costs and attorneys' fees as sanction for frivolous suits. Hawaii enacted legislation which permits courts to assess up to 25% of the amount prayed for if a claim or defense is found to be frivolous.

Thirteen states passed legislation relative to structured settlements or periodic payments of large awards. Florida, Michigan, and New York passed legislation which mandated that future damage awards in excess of \$250,000 be paid periodically. Washington and South Dakota made periodic payment of awards in excess of \$100,000 mandatory if requested by a party.

Eleven states modified the collateral source rule. Alaska, Colorado, Connecticut, and Minnesota made collateral sources of payment admissible as evidence. Michigan enacted legislation which made collateral sources of payment admissible as evidence, but after the verdict and before judgment is entered. New York and Florida required mandatory offset of most collateral source payments.

State legislative and regulatory activity concerning the liability crisis remained strong in the 1987 legislative term.

Eleven states abolished or modified the doctrine of joint and several liability in 1987. Arizona, Idaho, and North Dakota, for example, eliminated the doctrine except where the defendants acted in concert or in other limited situations. Similar legislation was passed by the Nevada and Delaware legislature. New Mexico limited the doctrine to instances of intentional conduct, vicarious liability and strict liability.

Elsewhere, the doctrine was modified to varying degrees, and Connecticut repealed changes made to the doctrine in 1986. In Oregon, joint and several liability was abolished for noneconomic damages and for economic damages when the defendant is determined to be less than 15% at fault. In Missouri and Georgia, the doctrine was modified so that defendants can escape liability only in cases where a plaintiff also shares responsibility for his injury. In other states (e.g. Montana, South Dakota, and Texas), thresholds have been set to limits on liability. In Montana, defendants who are 50% or less responsible will pay no more than twice their share of a plaintiff's economic damages. The Texas threshold is lower; only defendants who are 20% or less responsible for injuries will escape liability unless the injury resulted from environmental pollution or hazardous waste.

Only three states imposed caps on noneconomic damages in 1987. The caps imposed are very limited in their application. Oregon passed a \$500,000 cap on noneconomic damages. A \$400,000 cap approved in Idaho will expire in 1992 and in Kansas a \$250,000 cap on noneconomic damages applies to pain and suffering but not to mental anguish or other similar types of damages. The Florida Supreme Court struck down the \$450,000 cap on noneconomic damages enacted in 1986 as unconstitutional.

Six states, Alabama, Georgia, North Dakota, Missouri, Montana and Oregon, approved modifications of the collateral source rule. North Dakota and Oregon were the only states to require automatic offset of collateral source payments from jury awards. The other four states merely allowed evidence of the payments to be admissible as evidence at trial.

Four states enacted provisions for periodic payments of awards to plaintiffs. Montana legislation gave judges the discretion to require such payments. In Alabama, judges may require payments to be spread out over a 15-year period if they deem it is in the best interest of the parties. In North Dakota, courts mandate periodic payments for future economic damages only if a plaintiff requires institutional or custodial care for more than two years. Idaho enacted legislation mandating periodic payments of future damage awards exceeding \$100,000.

Eight states, Oklahoma, Alabama, Idaho, Texas, Virginia, Arkansas, Nebraska and North Dakota, passed legislation imposing sanctions for the filing of frivolous suits. Oklahoma codified Rule 11 in its laws, and Alabama, Idaho, and Virginia permit, but don't require, courts to impose sanctions for the filing of frivolous suits. Qualifications to the Texas frivolous suit provision all but swallow the rule.

Iowa and Texas approved limits on prejudgment interest on awards. Iowa repealed prejudgment interest for future

Two states, Mississippi and New Hampshire, enacted modifications to the rule of joint and several liability. Mississippi modified the doctrine such that a defendant who is less than 50% at fault is ultimately responsible for no more than 50% of the plaintiff's recoverable damages. New Hampshire abolished joint and several liability below a 50% threshold.

Three states, Arizona, Nevada and Utah, enacted punitive damages reforms in 1989. Nevada capped punitive damages awards at (a) three times damages if the compensatory award is \$100,000 or more; or (b) \$300,000 if the compensatory award is less than \$100,000. Arizona and Utah established a government standards defense to punitive damages for FDA approved drugs. Nevada and Utah elevated the standard of evidence and proof for the award of punitive damages and mandated bifurcated trials in the instance of a punitive damages claim.

Two states enacted products liability related reforms. New Hampshire provided for a state of the art defense in products liability claims and also adopted a discovery based statute of limitations. Utah reenacted its products liability statute originally passed in 1977 without the statute of repose which was found to be unconstitutional. The new Law includes a government standards defense in products actions.

In other reform related legislative activity in 1989, Texas modified its Deceptive Trade Practices Act to, *inter alia* lengthen the time period from 30 to 60 days during which a seller can offer a settlement to avoid the unique consequences of a DTPA action, and Georgia provided for penalties for frivolous suits.

On the Federal level, as was the case in 1986, 1987, and 1988, products liability legislation was proposed but not enacted.

The civil justice reform issue that commanded the most national attention in 1989 was the constitutionality of punitive damages.

The constitutionality of punitive damages can, and has been, attacked on the following grounds: (1) a higher standard of proof should be required in determining punitive liability; (2) punitive damages awards are often excessive, i.e. disproportionately high in relation to the compensatory award; (3) the standards for determining punitive liability are often vague and indefinite; and (4) claims for punitive damages should be separated from compensatory claims in a bifurcated trial.

In 1989, the United States Supreme Court in *Browning-Ferris Industries of Vermont et al. v. Kelco Disposal, Inc. et al.*, severely restricted the availability of the "excessiveness" or "disproportionality" attack on punitive damages. The "disproportionality" argument is based largely on the Eighth Amendment to the U.S. Constitution. The Eighth Amendment provides:

damages, and Texas limited the period during which prejudgment interest may accrue if the defendant has offered to settle a case. Missouri limited prejudgment interest awards to instances where the judgment exceeds the claimant's settlement demand or offer.

State legislatures continued to review proposed legislation related to the general categories of civil justice reform, insurance regulation and risk management in 1988.

There was a perceptible shift in focus in a number of state legislatures away from an examination of a link between perceived excesses in the civil justice system and availability and affordability of insurance and toward the "competitiveness" issue. Concern has grown over the effect of state products liability laws on the ability of U.S. businesses to compete in the world marketplace. This concern manifested itself in an increased number of states taking up the issue of products liability. Louisiana, for example, enacted the Louisiana Products Liability Act. The Louisiana legislation, in many respects simply codifies existing Louisiana law relative to products liability. In one important respect, however, the legislation diverges from traditional Louisiana law in that it increases the burden of proof heretofore required of products liability plaintiffs. In this regard, New Hampshire enacted legislation which allows "state-of-the-art" as an absolute defense in products liability cases.

Significant reform of a more general nature was enacted in Kansas, Kentucky and South Carolina. Kansas enacted a cap on all noneconomic damages of \$250,000 and a cap on punitive damages. Kansas and Kentucky made collateral sources admissible as evidence. Kentucky abolished the doctrine of joint and several liability and Minnesota limited the application of the doctrine in cases where defendants are less than 15% at fault. Both Kentucky and South Carolina elevated the standard of proof for the award of punitive damages. South Carolina also provided that punitive damages may not be assessed where no actual damages are awarded. Moreover, South Carolina provided for a penalty of all or a portion of attorneys' fees and court costs for frivolous claims or defenses.

STATE LEVEL REFORM

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Browning-Ferris*, the Supreme Court held that the Eighth Amendment does not apply to punitive damages awards in cases between private parties. The Court reasoned that the Excessive Fines Clause does not prohibit such an award when the government neither has prosecuted the action nor has any right to recover a share of the damages awarded.

While *Browning-Ferris* severely restricted the availability of the excessive fines argument it did not extinguish it. In states such as Colorado, Florida, Iowa and Utah where recent reforms mandate that a percentage of a punitive damages award be paid to the state, and Illinois where a percentage of the punitive award may, at the discretion of the trial judge, be paid to the state, the Eighth Amendment may apply and the excessive fines argument may still be viable.

The *Browning-Ferris* Court declined to entertain the Fourteenth Amendment Due Process challenge to the punitive damages award in that case finding that *Browning-Ferris* had failed to properly raise this issue before the lower courts. In addition, following the *Browning-Ferris* decision, the Supreme Court denied certiorari in *Goodyear Tire & Rubber Company v. Dale L. Hedder* (no. 88-626), *Metromedia, Inc. et al. v. April Enterprises, Inc.* (no. 88-625), *Cudahy Company, General Host Corporation v. Cecil W. Muller et al.* (no. 88-1186), and *Combined Insurance Company of America v. Ainsworth* (no. 89-282).

Goodyear involved a \$4 million punitive damage award in Minnesota against Goodyear for inadequately warning consumers about the dangerous propensities of a tire rim of a particular brand. In *Metromedia*, plaintiff's were awarded \$14 million in punitive damages for loss of an irreplaceable video tape. In *Cudahy*, Kansas farmers were awarded \$10 million in punitive damages for the pollution of irrigation water. In *Ainsworth*, a \$6 million bad faith judgment was awarded against an insurance carrier. All four cases raised Due Process arguments.

The Supreme Court's decision not to entertain the Due Process arguments in *Browning-Ferris* and denial of certiorari in *Goodyear*, *Metromedia*, *Cudahy*, and *Ainsworth*, should not be regarded as a sign that they are not interested in the Due Process argument but rather that the Supreme Court is unlikely to take action on the issue until a lower court rules that the Due Process Clause has been violated. Indeed, Justices Brennan and Marshall in their concurring opinions and Justice O'Connor in her dissenting opinion in *Browning-Ferris* appear to have sent a clear signal to the lower courts to act on the Due Process issue.

One lower court that has focused on the Due Process issue relative to punitive damages is the Federal District Court in New Jersey. In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989) Judge Sarokin, a U.S. District Judge sitting in New Jersey, held that repeated punitive awards for a single course of conduct violates due process. In *Juzwin*, asbestos defendants attacked only the phenomenon of multiple awards in the context of "mass torts". They made three constitutional arguments in support of their contention that multiple awards of punitive damages are impermissible. They contended the concepts of double jeopardy and excessive fines in the Fifth and Eighth Amendments should be applied in the civil context to prohibit multiple awards of punitive damages for a single course of culpable conduct. They also argued that the Due Process Clause constitutionally limits the phenomenon of repeated awards of punitive damages.

The Federal District Court rejected the first two arguments but, at first, sustained the defendants' Due Process Clause argument on the ground that multiple awards violate the fundamental fairness requirement of that provision.

Following the issuance of the *Juzwin* opinion, a Federal District Court Judge also sitting in New Jersey in *Leonen v. Johns Manville*, 717 F.Supp. 272 (D.N.J. 1989), addressed the precise issue before the *Juzwin* Court but found that subjecting manufacturers to repeated assessments of punitive damages awards does not deprive them of the fundamental fairness required under the Due Process Clause. In so holding, the *Leonen* Court did not discount entirely the *Juzwin* Court's finding that due process requires that some limit be placed on the

amount of punitive damages which can be awarded against a manufacturer for the same culpable conduct. Nevertheless, the *Leonen* Court rejected what it characterized as "the easy solution of having the first litigant who reaches the courthouse door preclude all subsequent punitive damages awards to later plaintiff's as producing a harsh and inequitable result."

Following the decision in *Leonen*, Judge Sarokin, upon motion for rehearing, vacated his earlier order in *Juzwin* declaring that multiple awards of punitive damages violates the Due Process Clause of the U.S. Constitution. In his September 5, 1989 opinion, Judge Sarokin stated:

[t]he Court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause but concludes that equitable and practical concerns prevent it from fashioning a fair and effective remedy. If this Court's view of the law is correct, then the need for Uniform legislation is manifest.

Judge Sarokin outlined four requirements that must be met in order to bar a plaintiff from claiming punitive damages in the context of mass tort litigation:

1. A full and complete hearing must be held, after adequate time has elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence is presented regarding the conduct of the defendant against whom the claim is made.
2. Adequate representation is afforded to the plaintiff, with an opportunity for plaintiffs similarly situated and their counsel to cooperate and contribute towards the presentation of the punitive damage claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct.
3. An appropriate instruction to the jury that their award will be the one and only award of punitive damages to be rendered against the Company for its wrongful conduct.
4. Other conditions that will assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.

Judge Sarokin found, on rehearing, that he could not conclude that any of the criteria outlined above was met in the context of other asbestos trials. Moreover, Judge Sarokin noted that even if these criteria could be met, "... this Court does not have the power or authority to prohibit subsequent awards in other courts notwithstanding its opinion that such subsequent awards violate Due Process rights of the defendants."

The decision vacating the earlier *Juzwin* opinion was rendered without prejudice. The Court stated that it would entertain any remedy that would be appropriate to protect an individual defendant's due process interests after any motion by a defendant who has had punitive damages awarded against it.

Damage cap reforms continued to come under strong attack in the courts in 1989. In *Sofie v. Fibreboard*, 112 Wash.2d 636, 771 P.2d 711 (1989), the Washington Supreme Court overturned the 1986 variable limit on noneconomic damages in that State on the ground that the legislation represented an unconstitutional restriction on the right to trial by jury. The Court's analysis in *Sofie* began by noting that the Washington "right to trial by jury" is more extensive than that which was protected by the Federal Constitution when it was adopted in 1789. The Washington State Constitution provides, "the right to trial by Jury shall remain inviolate." The *Sofie* decision relied, in part, on reasoning of the Washington Supreme Court in *James v. Robeck*, 79 Wash.2d 864, 490 P.2d 878 (1971). In *James*, the Court stated:

[i]f the evidence supports the verdict and the trial has been conducted without error of sufficient gravity to warrant a reversal, the trial court cannot substitute its views of damages for those of the jury. To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts — and the amount of damages in a particular case is an ultimate fact.

STATE LEVEL REFORM

Thus, the *Sofie* court ultimately concluded that Washington's cap on noneconomic damages unconstitutionally deprived plaintiffs of their right to a trial by jury, and thus their right to have a jury determine their damages.

The constitutionality of Maryland's 1986 cap on noneconomic damages at \$350,000 is under attack in the Maryland Courts. A Maryland Circuit Court has found the cap unconstitutional as applied to common law causes of action and the intermediate appellate court in Maryland—the Court of Special Appeals upheld the cap in the context of a statutory, wrongful death cause of action. The issue has not yet reached the final arbiter of Maryland Law—the Maryland Court of Appeals.

The Court of Special Appeals upheld Maryland's \$350,000 cap on noneconomic damages in its June 8, 1989 decision in *Potomac Electric v. Smith* (No. 1395 Md. Special App. Ct.). In *Potomac*, plaintiff, a fifteen year-old girl, was electrocuted when she came into contact with a 7600 volt electric power line owned by defendant. The jury awarded, *inter alia*, \$500,000 in noneconomic damages. The trial court, pursuant to the 1986 reform, codified in § 11-108(b) of the Courts and Judicial Proceedings Article of the Maryland Code, reduced the award to \$350,000. Plaintiffs contended that: 1) the cap should not have been applied to a wrongful death case because the legislation did not expressly include wrongful death actions within the scope of the cap and 2) the cap, if applicable, violates several state and federal constitutional provisions.

The Maryland Court of Special Appeals rejected both of plaintiff's contentions. With regard to plaintiff's contention that the cap does not apply to wrongful death actions, the court stated:

The fact that the cap does not expressly enumerate the types of personal injury actions within its ambit is a function of its breadth, not a limitation of its application. Application of the cap to wrongful death actions would effectively alleviate the legislature's intent to alleviate the perceived insurance crisis by limiting noneconomic damages in a cause of action where such damages are usually the primary component.

With regard to plaintiff's contention that the cap is violative of the Federal and the Maryland State Constitutions, the Court held that, implicit in Maryland's powers to create a cause of action or abolish a statutory cause of action such as Maryland's wrongful death statute, is the power to modify such statutory actions. Hence, limitations of the jury's determination of damages in the statutorily created wrongful death cause of action is a proper modification of the remedy available in such actions and does not violate the provisions of the Maryland Constitution. The Court expressly did *not* rule on whether Maryland's \$350,000 cap on noneconomic damages would be unconstitutional as applied to common law actions for personal injuries. The Court, adopting a rational basis standard, also rejected plaintiff's arguments that the cap violated the Equal Protection and Due Process clauses of the Maryland Constitution.

The \$350,000 cap on noneconomic damages in Maryland was also upheld by the Federal Court for the District of Maryland, applying Maryland law, in *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D. Md. 1989). The *Franklin* court reasoned in part:

If the Legislature can act within its proper sphere of authority and completely eliminate a cause of action for negligence or repeal whole categories of recoverable damages under recognized torts, then it must follow that the Legislature has the power to define causes of action and limit categories of recoverable damages for reasonable policy considerations without offending the Seventh Amendment.

In a September 18, 1989 decision *Murphy v. Port East Transfer Co.*, (No. 88-CG 2152, Balt. Cir. Ct. Md.), however, a Maryland Circuit Court ruled that Maryland's \$350,000 cap on noneconomic damages is unconstitutional as applied to common law tort cases. Accordingly, the *Murphy* court let stand a \$510,000 award for pain, suffering, inconvenience, physical impair-

ment and disfigurement in a personal injury case rather than reducing the award to the \$350,000 called for by the Maryland cap. In so holding, the court distinguished the case from the holding in *Potomac Electric v. Smith* finding that that decision was limited to the context of a wrongful death action, an action created by statute. The *Murphy* court applied a "heightened scrutiny test" to the cap on noneconomic damages. The court found that application of this test compels the conclusion that the cap is unconstitutional.

The *Murphy* court also held, in *dicta*, that \$245,000 awarded to the plaintiff for "loss of consortium" i.e. loss of household services was an "economic loss" and hence, was not subject to reduction by the cap on noneconomic damages.

The validity of the 1987 and 1988 "\$250,000" cap on pain and suffering and noneconomic damages in Kansas remains in question. The rationale of *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987) and *Malpractice Victims Coalition v. Bell* 243 Kan. 333, 757 P.2d 251 (1988) which respectively declared unconstitutional the collateral source provisions in the 1985 Medical Malpractice Act and overruled the Legislature's attempt to cap noneconomic damages in medical malpractice actions, appeared to preordain the Kansas Supreme Court's ultimate rulings on the 1987 and 1988 caps on noneconomic damages applicable to all tort actions. On May 30, 1989, however, in *Samsel v. Wheeler Transport Services, Inc., et al.*, 244 Kan. 726, 771 P.2d 71 (1989) the Kansas Supreme Court in a brief memorandum decision, without explanation or rationale found that the 1987 cap on pain and suffering awards does not violate the Kansas Constitution. Following the issuance of the memorandum decision, however, and before a formal opinion was issued, the plaintiffs in *Samsel* settled with the defendants. The settlement in *Samsel* effectively mooted the question certified to the Kansas Supreme Court (whether the \$250,000 cap on pain and suffering awards is unconstitutional under Kansas law) as to that case. Accordingly, the Kansas Court will not be issuing a formal opinion in *Samsel* and the validity of the cap remains in question.

In other significant judicial activity, New York's Court of Appeals in *Hymowitz v. Eli Lilly*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989) upheld the revival of time barred DES claims pursuant to New York's 1986 Revival Legislation and adopted "market share" liability in DES cases in New York. California's Supreme Court in *Calfarm Insurance Company v. Deukmejian*, (No. 500 7838 (May 4, 1989)) upheld, in substantial part, the validity of Proposition 103, enacted in 1988, which made significant changes to the regulation of insurance in California. Virginia's Supreme Court in *Ethridge v. Medical Center Hospitals*, 1989 Virginia LEXIS 27, 1989 WESTLAW 2142 (1989), upheld the constitutionality of the \$750,000 cap on damages in medical malpractice actions in Virginia and the 1987 cap of \$250,000 on punitive damages in Alabama is under attack in *Trawick v. Michaels of Oregon*, (Z V-8E 5-413 N). In *Trawick*, the jury, after a three-day trial, returned a verdict which included a \$1 million punitive damages award. The punitive damages verdict was reduced to \$250,000 pursuant to the 1987 punitive damages reform. Plaintiffs contend that the reform is unconstitutional because the legislature was wrong in believing that its enactment would be socially useful. The attack is reminiscent of *Carter v. Fibreboard, et al.*, No. 87-203555-7 (King County Wa. 1988) where the Court noted "as a matter of fact I do not believe the statute (a cap on noneconomic damages) has a substantial relationship to the availability and affordability of insurance, and is most certainly not substantially related to the equitable distribution of the costs and risks of injury," and *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), where the Texas Supreme Court said it invalidated that State's cap on awards on medical malpractice awards in part because of independent research that indicated "[n]o relationship between a damage cap and increases in insurance rates." Aside from the troublesome separation of powers concerns raised by the arguments in *Trawick* and the decisions in *Carter* and *Lucas*, these cases work well to illustrate the power of the state judiciary to strike or interpret out of existence enacted reforms that offend their sensibilities. With this in mind, manufacturers and insurers are wise to hold in

STATE LEVEL REFORM

abeyance decisions based on the anticipated benefits of a reform, pending the development of case law interpreting these reforms.

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 those reforms for some time.

What follows is a state-by-state overview of liability and insurance reform enacted on the state level from 1986 through October of 1989, a review of the major products liability reform bills introduced in the Congress, and a brief overview of the McCarran-Ferguson Act and current legislative initiatives relative to it.

APPENDIX C

**TORT REFORM SUMMARY BY REFORM
(1986, 1987, 1988, 1989)**

**ABOLITION OR MODIFICATION OF JOINT AND
SEVERAL LIABILITY**

1986

California

Joint and several liability is abolished for noneconomic damages.

Colorado

Joint and several liability is totally abolished.

Connecticut

Modified to prohibit joint liability except where liable party's share of judgment is uncollectable (1987 legislation, however, limited this reform to noneconomic damages only).

Florida

Joint and several liability is abolished in cases of more than \$25,000. The abolition does not apply to:

- damages for pollution
- intentional torts
- actions governed by a specific statute providing for joint and several liability

Hawaii

Joint and several liability is abolished for defendants 25% at fault or less. The abolition applies for noneconomic loss only and does not apply to auto, product or environmental claims.

Illinois

Joint and several liability is abolished for low fault defendants (25% of fault or less). The abolition does not apply to:

- medical expenses
- medical malpractice or environmental cases

Michigan

Joint and several liability is completely abolished for municipalities. There is no abolition where plaintiff is fault-free and no abolition for products liability actions.

New York

Joint and several liability has been limited; a defendant who is 50% or less at fault is only severally liable for noneconomic damages. The limitation, however, does not apply to:

- actions in reckless disregard of rights of others
- motor vehicle cases
- actions involving the release of toxic substances into the environment
- intentional torts

U.S. TORT REFORM 1989

- contract cases
- products liability cases where the manufacturer cannot be sued
- construction cases
- other specific actions

Utah

Joint and several liability is totally abolished.

Washington

Joint and several liability is abolished except for cases in which:

- defendants acted in concert
- plaintiff is fault-free
- hazardous or solid waste disposal sites are involved
- business torts are involved
- manufacturing of generic products is involved

Wyoming

Joint and several liability is totally abolished.

* * * * *

1987

Arizona

Joint and several liability is abolished except in cases of:

- intentional torts
- hazardous waste

Georgia

Joint and several liability will not apply when plaintiff is found at fault also.

Idaho

Joint and several liability is abolished except in cases of:

- intentional torts
- hazardous wastes
- medical and pharmaceutical products

Louisiana

Joint and several liability applies only to the extent necessary to cover 50% of the plaintiff's damages.

Missouri

Joint and several liability will not apply when plaintiff is found at fault also.

Montana

Joint and several liability is abolished for those who are 50% or less responsible.

Nevada

Joint and several liability is abolished except in:

- products cases

APPENDIX C

- cases involving toxic wastes
- cases involving intentional torts
- cases where defendants acted in concert

New Mexico

Codified common law application of several liability except in:

- cases involving intentional torts;
- cases in which the relationship of defendants could make one defendant vicariously liable for the acts of others
- cases involving the manufacture or sale of a defective product. (In these cases the manufacturer and retailer can be held liable for their collective percentage of fault but not the fault of other defendants.)

North Dakota

Joint and several liability is abolished except for:

- intentional torts
- cases in which defendants acted in concert
- products liability cases

Ohio

Joint and several liability is abolished for noneconomic damages when the plaintiff is also at fault.

Oregon

Joint and several liability is abolished with regard to noneconomic damages when the defendant is less than 15% at fault. The abolition does not apply to some environmental torts.

South Dakota

Defendants who are 50% or less responsible pay no more than *twice* their apportioned share of damages.

Texas

Joint liability is abolished for those who are 20% or less responsible unless damages resulted from environmental pollution or hazardous waste.

* * * * *

1988

Alaska

Joint and several liability was abolished through a ballot initiative; Proposition 2 on November 8, 1988.

Kentucky

Joint and several liability is totally abolished.

Minnesota

Defendants who are less than 15% at fault can pay no more than four times their allocated share of liability.

1989

Mississippi

Modified joint and several liability. Liability for damages caused by two or more persons shall be joint only to the extent necessary for the person suffering injury to recover 50% of his recoverable damages.

New Hampshire

Abolishes joint and several liability below a 50% liability threshold.

CAP ON NONECONOMIC DAMAGES

1986

Alaska

\$500,000 cap (except for physical impairment or disfigurement).

Colorado

\$250,000 cap (unless court finds "clear and convincing evidence" in which case up to \$500,000 can be awarded).

Hawaii

\$375,000 cap, but cap applies only to actual physical pain and suffering; other noneconomic damages have no limit.

Maryland

\$350,000 cap.

Minnesota

- \$400,000 cap on all awards based on loss of consortium, emotional distress, or embarrassment
- No cap for pain and suffering
- Court may not inform the jury of existence of limitation

New Hampshire

\$875,000 cap.

Washington

\$177,000-\$493,000 (cap set by formula = approximately 1/2 the average annual wage in state multiplied by the life expectancy).

* * * * *

1987

Idaho

\$400,000 cap—adjusted for annual wage increase—sunsets on July 1, 1992.

Kansas

\$250,000 cap on pain and suffering (not other noneconomic losses).

Oregon

\$500,000 cap on noneconomic damages.

**REDUCTION OF COMPENSATORY AWARDS BY
COLLATERAL SOURCES**

1986

Alaska

Collateral sources admissible as evidence.

Colorado

Collateral sources admissible as evidence.

Connecticut

Collateral sources admissible as evidence.

Florida

Mandatory offset of collateral source payments.

Hawaii

- Provides for payment of valid liens (arising out of claim for payment made from collateral sources for costs and expenses arising out of injury) from special damages recovered.
- The collateral source rule prevents double recoveries by allowing subrogation liens by insurance companies or other sources. Third parties are allowed to file a lien and collect the benefits paid to plaintiff from the plaintiff's award. The amount of damages paid by the defendant to the plaintiff is not affected.

Illinois

- Collateral sources for medical benefits over \$25,000 are offset.
- Judgment cannot be reduced by more than 50%.

Indiana

Court may reduce awards at its discretion. Jury may be instructed to disregard tax consequences of its verdict.

Michigan

Evidence that expense or loss was paid by collateral source is admissible after the verdict and before judgment is entered.

The court will reduce the amount paid by collateral source by an amount equal to premiums paid for this benefit by the plaintiff, the plaintiff's family or employer.

Minnesota

Collateral sources admissible as evidence.

New York

Compels courts to offset awards by amounts received from collateral sources.

* * * * *

1987

Georgia

Collateral sources are admissible as evidence toward reducing damages claimed.

Missouri

Collateral sources are allowed as evidence but defendant waives the right to credit for that amount if allowed as evidence.

Montana

Collateral Source Rule Abolished—Reimbursement from a collateral source is admissible in evidence and unless the source of reimbursement has a subrogation right under state or Federal law, judge is required to reduce personal injury judgments of \$50,000 or more.

North Dakota

Mandatory offset of collateral sources.

Ohio

Mandatory offset of any collateral source benefits which are not subrogated.

Oregon

Judge is allowed to reduce awards for collateral sources named in the bill. Awards will not be reduced by:

- life insurance and other death benefits;
- benefits for which plaintiff has paid premiums;
- retirement, disability, and pension plan benefits; and
- Federal social security benefits.

* * * * *

1988

Kansas

Collateral sources allowed as evidence.

Kentucky

Collateral sources, except life insurance, value of premiums paid and known subrogation rights, admissible as evidence.

LIMITS ON CONTINGENCY FEES

1986

Connecticut

Sliding scale percentage limits.

Hawaii

Party may request court review; limited to "reasonable" amount.

New Hampshire

Mandatory filing and court review where more than \$200,000 in damages awarded.

LIMITS ON PUNITIVE DAMAGES

1986

Alaska

Standard of proof has been elevated to clear and convincing evidence.

Colorado

Punitive award may not exceed compensatory award: one-third of the award goes to the state water conservation board's construction fund; the court may reduce the award if deterrence is achieved without it, but may also increase it to three times compensatory damages if misbehavior continues during trial.

Florida

Punitive award may not exceed three times compensatory damages unless evidence is "clear and convincing." Sixty percent of the award goes to State's General Fund.

Illinois

Plaintiffs are no longer able to plead punitive damages in original complaint. The subsequent motion to add punitive claim must show at hearing reasonable chance that the plaintiff will win punitive award and trial. The defendant must be shown to have acted willfully and wantonly; and the court has discretion to apportion a punitive award among plaintiff, plaintiff's attorney, and the State Department of Rehabilitation Services.

Iowa

Punitive damages may only be awarded where willful and wanton disregard for the rights and safety of another is proven. 75% or more of the award goes to the State.

Minnesota

Plaintiffs are no longer able to plead punitive damages in original complaints. The plaintiff must make a *prima facie* showing of liability before an amendment of pleadings is permitted by the court.

New Hampshire

Prohibits punitive damages.

Oklahoma

Award of punitive damages may not exceed compensatory award.

South Dakota

Clear and convincing evidence of willful, wanton, or malicious misconduct must be shown.

* * * * *

1987

Alabama

\$250,000 cap on punitive damages awards. Trial and appellate judges will review all punitive damage awards and reduce those that are excessive.

California

Standard of proof for punitive damages is elevated to "clear and convincing evidence."

Georgia

\$250,000 cap on punitive damages, products, however, are excluded from the cap. Only one punitive award is allowed against any given defendant for a given product.

Idaho

Punitive damages standard of proof is elevated to "a preponderance of evidence."

Iowa

Standard of proof for punitive damages is elevated to "preponderance of clear, convincing and satisfactory evidence that the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another."

Kansas

Punitive damages are capped at the lesser of defendant's highest annual gross income during the preceding five years or \$5 million dollars. If the defendant earned more profit from the objectionable conduct than either of these caps, the court may award a sum of up to 1 and 1/2 times that profit.

Missouri

Bifurcated trials are required for punitive damages.

New Jersey

The standard of proof for punitive damages is elevated to a preponderance of evidence of "actual malice" or "wanton and willful disregard" of the rights of others. Bifurcated trials for punitive damages are also required, with the judge setting the punitive damage award. An FDA government defense is available to defeat claims for punitive damages.

North Dakota

Plaintiffs are no longer able to plead punitive damages in original complaints and must show *prima facie* evidence and oppression, fraud or malice in order to make a claim for punitive damages.

Ohio

Standard of evidence for punitive damages is elevated to "clear and convincing evidence." The judge sets the amount of punitives awarded. Punitives cannot be awarded unless there are "actual damages" sustained by the plaintiff.

Oregon

Changes standard of proof for award of punitive damages to "clear and convincing evidence."

Texas

Caps punitive damage awards at four times the actual damages or \$200,000, whichever is greater. Plaintiff must show defendant's conduct was fraudulent, malicious or grossly negligent.

Virginia

Caps punitive damages at \$350,000.

* * * * *

APPENDIX C

1988

Kansas

Cap on punitive damages at lesser of defendant's annual gross income or \$5 million. If the court finds that the profit gained by the defendant's misconduct exceeds this limit, the limit shall be elevated to one and one-half times the profit that the defendant gained.

Kentucky

Standard of evidence for punitive damages is elevated to "clear and convincing evidence."

South Carolina

Standard of evidence for punitive damages is elevated to "clear and convincing evidence" of malice, fraud, etc. In most cases, punitive damages may not be assessed where no actual damages awarded.

1989

Arizona

Establishes a government standards defense to punitive damages for FDA approved drugs.

Nevada

Establishes a clear and convincing evidence standard and a higher standard of proof. Requires bifurcation of trials involving punitive claims. Limits punitive damage awards to (a) three times compensatory damages if compensatory damages are \$100,000 or more; or (b) \$300,000 if compensatory award is less than \$100,000.

Utah

Provides for a higher standard of proof, a government standards defense to FDA approved drugs, bifurcation of trials involving claims for punitive damages, a clear and convincing evidence standard and the payment of 50% of punitive damage awards over \$20,000 to the State fund.

PERIODIC PAYMENT OF AWARDS

1986

Alaska

Permission for courts to structure payments for future damages only.

Connecticut

Awards paid periodically when future economic damages exceed \$200,000.

Florida

Periodic payment of awards mandated, when requested by a party, if economic damages exceed \$250,000.

Iowa

Periodic payment of awards, at the discretion of the court, when requested by a party.

Michigan

Periodic payment of awards mandated where future damages exceed \$250,000.

New York

Periodic payment of awards mandated where future damages exceed \$250,000.

South Dakota

Periodic payment of awards mandatory, if requested by a party, where future damages exceed \$100,000.

Washington

Periodic payment of awards ordered by the court, at the request of a party, where future damages exceed \$100,000.

* * * * *

1987

Alabama

Award may be split into separate payments over a period of 15 years if it is in the best interest of both parties when damages exceed \$150,000.

Idaho

Periodic payment of awards for future damages over \$100,000.

Montana

Periodic payment of awards permitted when the judge feels they would be in plaintiff's best interest.

North Dakota

Court allows periodic payment of awards for future economic damages if institutional or custodial care involves more than two years.

Ohio

Judges may provide for periodic payments in cases where the *future* damages for economic losses exceeded \$200,000 and represent more than 25% of the total jury award.

Rhode Island

Periodic payment of awards for damages in excess of \$150,000.

PENALTIES FOR FRIVOLOUS SUITS

1986

Connecticut

Payment of double the amount of costs and attorney fees as sanction for frivolous suits.

Georgia

Costs and attorney fees for frivolous lawsuits or defenses.

APPENDIX C

Hawaii

Courts assess penalties if a claim or defense is found to be frivolous. The penalty may not exceed 25% of the amount prayed for.

Illinois

Court may assess fees for frivolous suits.

Indiana

Court may award prevailing party costs and fees if it finds allegation or defense unreasonable.

Iowa

Courts may assess penalties for frivolous lawsuits or deceptive tactics.

Michigan

Awards of attorney fees are available as sanctions for frivolous suits.

Minnesota

Court holds discretion to assess a penalty for a frivolous claim (costs and attorney fees).

New Hampshire

Court holds discretion to assess penalty for a frivolous suit.

New York

When finding frivolous claims and counterclaims, the court shall award to the successful party costs and attorney fees, not to exceed \$10,000.

Oklahoma

Awards of attorney fees available as sanctions for frivolous suits.

Washington

Awards of attorney fees are available as sanctions for frivolous suits.

Wyoming

Plaintiffs in frivolous suits are liable for payment of reasonable court expenses and attorney fees.

* * * * *

1987

Alabama

Allows court to assess court costs and attorney fees against parties bringing frivolous suits.

Idaho

Judge may assess attorney fees in frivolous suits.

Ohio

Allows court to assess attorney fees in frivolous suits.

Oklahoma

Codified Rule 11 of the Federal Rules of Civil Procedure on sanctions for frivolous suits.

Oregon

Requires court to provide sanctions for frivolous suits both attorney personally or their clients which include attorney fees, court costs, and other expenses.

Rhode Island

Allows court to assess penalties for frivolous suits.

Texas

Allows courts to impose sanctions on attorneys and parties who file frivolous suits.

Virginia

Authorizes courts to impose sanctions for frivolous suits.

* * * * *

1988

Louisiana

Allows courts to impose costs and attorneys' fees as costs for frivolous suits or defenses.

Mississippi

Allows courts to assess transaction costs and attorneys' fees for frivolous claims and defenses.

South Carolina

Penalty of all or a portion of attorneys' fees and court costs for frivolous claims or defense/abuse of process.

APPENDIX D

APPENDIX D

January 1986 through December 1986

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama ¹	HB 213 ² HB 215 HB 217 HB 218	—	—	—	—	—	—	—
Alaska	SB 377	\$500,000 ³	X	—	X	—	X	X
Arizona ⁴	HB 2377	—	—	—	—	X	—	—
Arkansas	—	—	—	—	—	—	—	—
California	Proposition 51	—	—	—	—	—	—	X
Colorado	SB 67 SB 69 SB 70 HB 1192 HB 1197	250,000 ⁵	X	—	X	X	—	X
Connecticut	HB 6134	—	X	X	—	X	X ⁶	X
Delaware	—	—	—	—	—	—	—	—
District of Columbia	—	—	—	—	—	—	—	—
Florida	Tort Reform Act of 1986	450,000	X	—	X	X	X	X
Georgia	HB 1146 (Act 1670) HB 1185 (Act 1486)	—	—	—	—	X	—	—
Hawaii	Special Session Legislation	375,000	X	X	X	X	—	X
Idaho	HB 1469	—	—	X	—	—	—	—

¹ Targeted by reform groups for concerted action next session.² Proposed—not passed or enacted.³ No damage cap for cases involving disfigurement.⁴ Ballot initiative to amend Arizona Constitution to allow legislators to limit noneconomic damages, punitive damages and contingency fees.⁵ Where "clear and convincing" evidence, \$500,000 can be awarded.⁶ Only for future economic and noneconomic exceeding \$200,000.

U.S. TORT REFORM 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Illinois	SB 1200 ⁷	—	X ⁷	—	X ⁷	X ⁴	—	X ⁷
Indiana	SB 393 } SB 304 }	—	X	—	—	X	—	—
Iowa	—	—	—	—	X	X	X	—
Kansas	—	—	—	—	—	—	—	—
Kentucky	—	—	—	—	—	—	—	—
Louisiana	HB 339-341 ⁸ } HB 1457 ⁸ } HB 1465 ⁸ } HB 1459 ⁸ }	—	—	—	—	—	—	—
Maine	—	—	—	—	—	—	—	—
Maryland	SB 558	\$350,000	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
Michigan	HB 5154	—	X	—	—	X	X	—
Minnesota	HF 1950	400,000 ⁹	X	—	X	X	—	—
Mississippi	—	—	—	—	—	—	—	—
Missouri	SB 742	—	—	X	—	—	—	—
Montana	—	—	—	—	—	—	—	—
Nebraska	—	—	—	—	—	—	—	—
Nevada	—	—	—	—	—	—	—	—
New Hampshire	HB 513	875,000	—	X	X ¹⁰	X	—	—
New Jersey	AB 2400 ¹¹ } SB 2312-2323 ¹¹ }	—	—	—	—	—	—	—

⁷ Passed—but not enacted. Active lobby by business and insurance industries for Governor to veto.

⁸ Not passed or enacted—under consideration.

⁹ Excluding pain and suffering.

¹⁰ Codifies existing practice of outlawing punitive damages.

¹¹ Not passed or enacted—under consideration.

APPENDIX D

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
New Mexico	—	—	—	—	—	—	—	—
New York	SB 9351-A A-10663 A-10664 S-9391-A	—	X	—	—	X	X	X
North Carolina	SB 873	—	—	—	—	X	—	—
North Dakota	—	—	—	—	—	—	—	—
Ohio	AM SB 329 ¹² AM SB 331 ¹² Sub. SB 333 ¹² Sub. SB 334 ¹² Sub. SB 338 ¹² SB 339 ¹² SB 336 ¹² HB 879 ¹² HB 881 ¹² HB 897 ¹²	—	—	—	—	—	—	—
Oklahoma	SB 488	—	—	—	X	X	—	—
Oregon ¹³	—	—	—	—	—	—	—	—
Pennsylvania	HB 2425 ¹⁴ HB 2426 ¹⁴	—	—	—	—	—	—	—
Rhode Island	—	—	—	—	—	—	—	—
South Carolina	—	—	—	—	—	—	—	—
South Dakota	SB 280 SB 281	—	—	—	X	—	X	—
Tennessee	—	—	—	—	—	—	—	—
Texas ¹⁵	—	—	—	—	—	—	—	—

¹² Not passed or enacted — under consideration.

¹³ Not in session in 1986.

¹⁴ Not passed or enacted — under consideration.

¹⁵ Not in session in 1986.

U.S. TORT REFORM 1989

<i>State</i>	<i>Relevant Products Liability Related Bill Identification Numbers</i>	<i>Cap on Noneconomic Damages</i>	<i>Collateral Source Rule</i>	<i>Limitation on Contingency Fees</i>	<i>Restrictions on Punitive Damages</i>	<i>Penalties for Frivolous Suits</i>	<i>Periodic Payment of Judgment</i>	<i>Modification of Joint and Several Liability</i>
Utah	SB 64	—	—	—	—	—	—	X
Vermont	—	—	—	—	—	—	—	—
Virginia	—	—	—	—	—	—	—	—
Washington	SB 4630	Range of \$117,000 to \$493,000	—	—	—	—	X	X
West Virginia	HB 149	—	—	—	—	—	—	X
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	HB 14 SF 17 }	—	—	—	—	—	X	X

APPENDIX E

APPENDIX E

January 1987 through December 1987

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for F frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama ¹	Act 87-185 87-187 87-186 87-183	—	X	—	X ¹	X	X	—
Alaska	—	—	—	—	—	—	—	—
Arizona	SB 1036	—	—	—	—	—	—	X
Arkansas	HB 1223	—	—	—	—	X	—	—
California	Proposition 51 ²	—	—	—	—	—	—	X
Colorado	SB 22 HB 1232	—	—	—	—	—	—	—
Connecticut	—	—	—	—	—	—	—	X
Delaware	SB 120 HB 281	—	X	—	X	—	—	X
District of Columbia	—	—	—	—	—	—	—	—
Florida	Sup. Ct. decision	Remove Cap	—	—	—	—	—	—
Georgia	SB 1	—	X	—	X ³	—	—	X
Hawaii	—	—	—	—	—	—	—	—
Idaho	SB 1223	\$400,000 ⁴	—	—	X	X	X	X
Illinois	—	—	—	—	—	—	—	—
Indiana	SB 2 HB 1273	X	—	—	—	—	—	—

¹Cap on punitive damages of \$250,000.

²Case law on the effective date of proposition 51 enacted in 1986.

³Cap on punitive damages of \$350,000.

⁴Will expire in 1992.

U.S. TORT REFORM 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Iowa	SF482	—	X	—	X	—	X	—
Kansas	HB 2021 HB 2024 HB 2025 HB 2472	\$250,000 ⁵	—	—	X	—	—	X
Kentucky	—	—	—	—	—	—	—	—
Louisiana	—	—	—	—	—	—	—	—
Maine	—	—	—	—	—	—	—	—
Maryland	—	—	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
Michigan	—	—	—	—	—	—	—	—
Minnesota	HF 392	—	—	—	—	—	—	—
Mississippi	HB 1000	—	—	—	—	—	—	—
Missouri	HB 700	—	X	—	X ⁶	—	—	X
Montana	SB 48 SB 51 SB 375 HB 567 SB 375 SB 380 SB 121 HB442	—	X	—	X	—	X	X
Nebraska	LB 71 LB 261	—	—	—	—	X	—	—
Nevada	SB 511	—	—	—	—	—	—	X
New Hampshire	—	—	—	—	—	—	—	—
New Jersey	N.J. Laws CH, 197	—	—	—	X	—	—	—
New Mexico	SB 164	—	—	—	—	—	—	X
New York	—	—	—	—	—	—	—	—

⁵ Applies to pain and suffering, but not mental anguish, etc.

⁶ Capped at the lesser of a defendant's highest annual gross income during preceeding five years or \$5 million.

APPENDIX E

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
North Carolina		—	—	—	—	X	—	—
North Dakota	HB 1571 SB 2058 HB 1084 }	—	X	—	X	X	X	—
Ohio	—	—	—	—	—	—	—	—
Oklahoma	—	—	—	—	—	—	—	—
Oregon	SB 323	\$500,000	X	—	X	—	—	X
Pennsylvania	—	—	—	—	—	—	—	—
Rhode Island	—	—	—	—	—	—	—	—
South Carolina	—	—	—	—	—	—	—	—
South Dakota	SB 263	—	—	—	—	—	—	X
Tennessee	SB 279	—	—	—	—	—	—	—
Texas	Special session Legislation	—	—	—	\$200,000 ⁷	X	—	X
Utah	—	—	—	—	—	—	—	—
Vermont	—	—	—	—	—	—	—	—
Virginia	HB 400 SB 402 }	X ⁸	—	—	—	—	—	—
Washington	—	—	—	—	—	—	—	—
West Virginia	—	—	—	—	—	—	—	—
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	SF 299	—	—	—	—	—	—	—

⁷ Punitive damages are capped at \$200,000 or four times the plaintiff's economic damages whichever is greater.

⁸ A Virginia circuit court judge ruled a 1983 measure limiting damages to \$1 million was unconstitutional.

APPENDIX F

January 1988 through August 1988

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for F frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama	—	—	—	—	—	—	—	—
Alaska	—	—	—	—	—	—	—	X ¹
Arizona	—	—	—	—	—	—	—	—
Arkansas	—	—	—	—	—	—	—	—
California	—	—	—	—	—	—	—	X ²
Colorado	—	—	—	—	—	—	—	—
Connecticut	—	—	—	—	—	—	—	—
Delaware	—	—	—	—	—	—	—	—
District of Columbia	—	—	—	—	—	—	—	—
Florida	—	—	—	—	—	—	—	—
Georgia	—	—	—	—	—	—	—	—
Hawaii	—	—	—	—	—	—	—	—
Idaho	—	—	—	—	—	—	—	—
Illinois	—	—	—	—	—	—	—	—
Indiana	—	—	—	—	—	—	—	—
Iowa	—	—	—	—	—	—	—	—
Kansas ³	HB 2692 HB 2731	\$250,000	X	—	X	—	—	—
Kentucky	HB 551							
Louisiana	Products Liability Act	—	—	—	—	—	—	—

¹ Voters initiative on ballot in November, 1988 seeks to completely abolish joint and several liability.² Proposition 51 abolishing joint and several liability for noneconomic loss held *not* retroactive.³ Constitutional challenge in 1988.

APPENDIX F

<i>State</i>	<i>Relevant Products Liability Related Bill Identification Numbers</i>	<i>Cap on Noneconomic Damages</i>	<i>Collateral Source Rule</i>	<i>Limitation on Contingency Fees</i>	<i>Restrictions on Punitive Damages</i>	<i>Penalties for Frivolous Suits</i>	<i>Periodic Payment of Judgment</i>	<i>Modification of Joint and Several Liability</i>
Maine	—	—	—	—	—	—	—	—
Maryland	—	—	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
Michigan	—	—	—	—	—	—	—	—
Minnesota	HF1493	—	—	—	—	—	—	X
Mississippi	HB 772	—	—	—	—	—	—	—
Missouri	—	—	—	—	—	—	—	—
Montana	—	—	—	—	—	—	—	—
Nebraska	—	—	—	—	—	—	—	—
Nevada	—	—	—	—	—	—	—	—
New Hampshire	HB 936	—	—	—	X	—	—	—
New Jersey	—	—	—	—	—	—	—	—
New Mexico	—	—	—	—	—	—	—	—
New York	—	—	—	—	—	—	—	—
North Carolina	—	—	—	—	—	—	—	—
North Dakota	—	—	—	—	—	—	—	—
Ohio	—	—	—	—	—	—	—	—
Oklahoma	—	—	—	—	—	—	—	—
Oregon	—	—	—	—	—	—	—	—
Pennsylvania ⁴	—	—	—	—	—	—	—	—
Rhode Island	HB 5885	—	—	—	—	X	X	—
South Carolina	HB 2610	—	—	—	X	X	—	—
South Dakota	—	—	—	—	—	—	—	—

⁴Significant legislation introduced but not yet enacted in 1988. Legislative session ends in January.

U.S. TORT REFORM 1989

<i>State</i>	<i>Relevant Products Liability Related Bill Identification Numbers</i>	<i>Cap on Noneconomic Damages</i>	<i>Collateral Source Rule</i>	<i>Limitation on Contingency Fees</i>	<i>Rescriptions on Punitive Damages</i>	<i>Penalties for F frivolous Suits</i>	<i>Periodic Payment of Judgment</i>	<i>Modification of Joint and Several Liability</i>
Tennessee	—	—	—	—	—	—	—	—
Texas ⁵	—	—	—	—	—	—	—	—
Utah	—	—	—	—	—	—	—	—
Vermont	—	—	—	—	—	—	—	—
Virginia	—	—	—	—	—	—	—	—
Washington ⁶	—	—	—	—	—	—	—	—
West Virginia	—	—	—	—	—	—	—	—
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	—	—	—	—	—	—	—	—

⁵ \$500,000 cap on medical malpractice damages enacted in 1977 held unconstitutional.

⁶ Constitutional challenge in 1988.

APPENDIX G

APPENDIX G

January 1989 through October 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frustrated Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama	-	-	-	-	-	-	-	-
Alaska	-	-	-	-	-	-	-	-
Arizona	SB1453	-	-	-	X	-	-	-
Arkansas	-	-	-	-	-	-	-	-
California	-	-	-	-	-	-	-	-
Colorado	-	-	-	-	-	-	-	-
Connecticut	-	-	-	-	-	-	-	-
Delaware	-	-	-	-	-	-	-	-
District of Columbia	-	-	-	-	-	-	-	-
Florida	-	-	-	-	-	-	-	-
Georgia	HB25 SB239	-	-	-	-	X	-	-
Hawaii	-	-	-	-	-	-	-	-
Idaho	-	-	-	-	-	-	-	-
Illinois	-	-	-	-	-	-	-	-
Indiana	-	-	-	-	-	-	-	-
Iowa	-	-	-	-	-	-	-	-
Kansas	-	-	-	-	-	-	-	-
Kentucky	-	-	-	-	-	-	-	-
Louisiana	-	-	-	-	-	-	-	-
Maine	-	-	-	-	-	-	-	-
Maryland	-	-	-	-	-	-	-	-
Massachusetts	-	-	-	-	-	-	-	-
Michigan	-	-	-	-	-	-	-	-

U.S. TORT REFORM 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages ¹	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Minnesota	—	—	—	—	—	—	—	—
Mississippi	HB1171	—	—	—	—	—	—	X
Missouri	—	—	—	—	—	—	—	—
Montana	—	—	—	—	—	—	—	—
Nebraska	—	—	—	—	—	—	—	—
Nevada	AB307	—	—	—	X	—	—	—
New Hampshire	SB110	—	—	—	—	—	—	X
New Jersey	—	—	—	—	—	—	—	—
New Mexico	—	—	—	—	—	—	—	—
New York	—	—	—	—	—	—	—	—
North Carolina	—	—	—	—	—	—	—	—
North Dakota	—	—	—	—	—	—	—	—
Ohio	—	—	—	—	—	—	—	—
Oklahoma	—	—	—	—	—	—	—	—
Oregon	—	—	—	—	—	—	—	—
Pennsylvania	—	—	—	—	—	—	—	—
Rhode Island	—	—	—	—	—	—	—	—
South Carolina	—	—	—	—	—	—	—	—
South Dakota	—	—	—	—	—	—	—	—
Tennessee	—	—	—	—	—	—	—	—
Texas	SB437 ¹	—	—	—	—	—	—	—
Utah ²	SB24 SB252	—	—	—	X	—	—	—

¹ Modifications to Texas Deceptive Trade Practices Act.

² Products liability legislation.

APPENDIX G

<i>State</i>	<i>Relevant Products Liability Related Bill Identification Numbers</i>	<i>Cap on Noneconomic Damages</i>	<i>Collateral Source Rule</i>	<i>Limitation on Contingency Fees</i>	<i>Restrictions on Punitive Damages</i>	<i>Penalties for F frivolous Suits</i>	<i>Periodic Payment of Judgment</i>	<i>Modification of Joint and Several Liability</i>
Vermont	—	—	—	—	—	—	—	—
Virginia	—	—	—	—	—	—	—	—
Washington	—	—	—	—	—	—	—	—
West Virginia	—	—	—	—	—	—	—	—
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	—	—	—	—	—	—	—	—

APPENDIX H

January 1986 through October 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama	Act 87-185 87-187 87-186 87-183	—	X	—	X ¹	X	X	—
Alaska	SB 377	\$500,000 ²	X	—	X	—	X	X ³
Arizona ⁴	HB 2377 SB 1036 SB1453	—	—	—	X	X	—	X
Arkansas	HB 1223	—	—	—	—	X	—	—
California	Proposition 51 ⁵	—	—	—	—	—	—	X
Colorado	SB 67 HB 1192 SB 69 SB 20 HB 1197 SB 22 HB 1232	250,000 ⁶	X	—	X	X	—	X
Connecticut	HB 6134	—	X	X	—	X	X ⁷	X ⁸
Delaware	SB 120 HB 281	—	X	—	X	—	—	X
District of Columbia	—	—	—	—	—	—	—	—
Florida	Tort Reform Act of 1986 Sup. Ct. decision	X ⁹	X	—	X	X	X	X

¹ Cap on punitive damages of \$250,000.² No damage cap for cases involving disfigurement.³ Ballot initiative abolished joint and several liability in 1988.⁴ Unsuccessful ballot initiative to amend Arizona constitution to allow legislators to limit noneconomic damages, punitive damages and contingency fees.⁵ Proposition 51 held *not* retroactive in 1988.⁶ Where "clear and convincing" evidence, \$500,000 can be awarded.⁷ Only for future economic and noneconomic damages exceeding \$200,000.⁸ Modification of joint and several liability for economic damages enacted in 1986 was repealed in 1987.⁹ \$450,000 cap on noneconomic damages enacted in 1986 found unconstitutional in 1987.

APPENDIX H

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Georgia	HB 1146 HB 1185 SB 1	—	X	—	X ¹⁰	X	—	X
Hawaii	Special Session Legislation	\$375,000	X	X	X	X	—	X
Idaho	HB 1469 SB 1223	400,000 ¹¹	—	X	X	X	X	X
Illinois	SB 1200	—	X	—	X	X	—	X
Indiana	SB 393 SB 394 SB 2 HB 1273	X	X	—	—	X	—	—
Iowa	SF482	—	X	—	X	—	X	—
Kansas ¹²	HB 2021 HB 2024 HB 2025 HB 2472	250,000	X	—	X	—	—	X
Kentucky	HB 551	—	X	—	X	—	—	X
Louisiana	HB 841 Products Liability Act	—	—	—	—	X	—	X
Maine	—	—	—	—	—	—	—	—
Maryland	SB 558	350,000	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
Michigan	HB 5154	—	X	—	—	X	X	—
Minnesota	HF 1950 HF 392 HF 1493	400,000 ¹³	X	—	X	X	—	X

¹⁰ Cap on punitive damages of \$350,000.

¹¹ Will expire in 1992.

¹² Constitutional challenge.

¹³ Excluding pain and suffering.

U.S. TORT REFORM 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Mississippi	HB 1000 HB 772 HB1171	-	-	-	-	X	-	X
Missouri	SB 742 HB 700	-	X	X	X ¹⁴	-	-	X
Montana	SB 48 SB 51 SB 375 HB 567 SB 380 SB 121 HB442	-	X	-	X	-	X	X
Nebraska	LB 71 LB 261	-	-	-	-	X	-	-
Nevada	SB 511 AB307	-	-	-	X	-	-	X
New Hampshire	HB 513 HB 936 SB110	\$875,000	-	X	X ¹⁵	X	-	X
New Jersey	N.J. Laws CH, 197	-	X	-	X	-	-	X
New Mexico	SB 164	-	-	-	-	-	-	X
New York	SB 9351-A A-10663 A-10664 S-9391-A	-	X	-	-	X	X	X
North Carolina	SB 873	-	-	-	-	X	-	-
North Dakota	HB 1571 SB 2058 HB 1084	-	X	-	X	X	X	-
Ohio	HB 1	-	X	-	X	X	X	X
Oklahoma	SB 488	-	-	-	X	X	-	-
Oregon	SB 323	500,000	X	-	X	-	-	X
Pennsylvania	-	-	-	-	-	-	-	-

¹⁴ Capped at the lesser of a defendant's highest annual gross income during preceding five years or \$5 million.

¹⁵ Codifies existing practice of outlawing punitive damages.

APPENDIX H

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Rhode Island	HB 5885	—	—	—	—	X	X	—
South Carolina	HB 2610	—	—	—	X	X	—	—
South Dakota	SB 280 SB 281 SB 263	—	—	—	X	—	X	X
Tennessee	SB 279	—	—	—	—	—	—	—
Texas ¹⁶	Special Session Legislation	—	—	—	\$200,000 ¹⁷	X	—	X
Utah	SB 64 SB24 SB25	—	—	—	X	—	—	X
Vermont	—	—	—	—	—	—	—	—
Virginia	HB 400 SB 402	X ¹⁸	—	—	—	—	—	—
Washington	SB 4630	X ¹⁹	—	—	—	—	X	X
West Virginia	HB 149	—	—	—	—	—	—	X
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	HB 14 SF 17 SF 299	—	—	—	—	—	X	X

¹⁶ \$500,000 cap on medical malpractice damages enacted in 1977 held unconstitutional.

¹⁷ Punitive damages are capped at \$200,000, or four times the plaintiff's economic damages, whichever is greater.

¹⁸ A Virginia circuit court judge ruled a 1983 measure limiting damages to \$1 million was unconstitutional.

¹⁹ Sliding cap on non-economic damages held unconstitutional in 1989.

FEDERAL REFORM ACTIVITY

Last year (1988), the House Energy and Commerce Committee approved by a vote of 30-20,¹ a federal products liability bill ("the Compromise Bill"). The legislation was the result of significant compromise since its original form as proposed by Representative Richardson.² The 1988 Compromise bill did not make it to the House floor for a vote, however, and accordingly its sponsors were required to start all over again in 1989.

1989

Proposed legislation providing for federal standards for products liability was again proposed in the House of Representatives and the Senate in June and July of 1989 respectively. The House Bill was sponsored by Rep. Thomas Luken (D-Ohio), Rep. Michael Synar (D-Okla.) and Rep. Dan Glickman (D-Kansas). In the Senate, the Bill was sponsored by Sen. Robert Kasten, (R-Wis.) Sen. Daniel Inouye (D-Hawaii), Sen. John C. Danforth (R-Mo.) and Sen. John D. Rockefeller IV (D-W.Va.). The delayed introduction of the Bills resulted from difficulties in finding sponsors. This difficulty, together with the logistic problems created by the Bills' late introduction, provide a clear indication that the legislation will fail to secure legislative approval this year.

Both the House and the Senate Bills include standards and certain defenses relative to the award of punitive damages, offset of workers' compensation benefits, and alternate dispute resolution proposals. The Bills differ in certain respects. The Senate Bill does not contain a standard of liability for manufacturers while the House Bill does. The Senate Bill includes provisions on joint and several liability while the House Bill does not. The House Bill contains a number of peripheral provisions, however, that the Senate Bill does not. Specifically, the House Bill provides for data collection and reports by the U.S. Commerce Department and circumscribed protection for firemen, which were part of the Bill introduced by Rep. Bill Richardson (D-N.M.) and passed in the House Energy and Commerce Committee last year.

The Senate Bill is similar, but not identical to Senator Kasten's S. 666 which passed the Senate Commerce Committee in 1987. A summary of that Bill appears in Appendix A. The present Senate Bill does, however, include a number of the modifications made to the House Bill last year in the course of its progress through the House Energy and Commerce Committee.

The workers compensation offset in the present Kasten Bill differs slightly from the reciprocal provision in Kasten's earlier Bill. (S. 666). S. 666 addressed the conflict between the tort and the workers' compensation systems by, *inter alia*, abrogating the employers' subrogation lien in all cases. (See S. 666 Sec. 306). The current Kasten Bill (S. 1400) abrogates the employers' subrogation lien *except* where the employer was not in any way at fault in causing the claimant's harm. In that instance, the employer will retain a right to recapture workers' compensation benefits.

The uniform time limitations on liability in S. 1400 also differs from the reciprocal provision in Senator Kasten's earlier Bill. Under S. 1400, the 25-year time limit on liability for capital good products *only* applies if the claimant is entitled to workers' compensation benefits. The 25-year outer limit of liability relative to capital goods contained in Kasten's prior Bill (S. 666) applies *irrespective* of whether or not the claimant was entitled to workers' compensation benefits.

A summary of the Senate Bill (S. 1400) and House Bill (H.R. 2700) follows.

¹ The Compromise Bill was supported by 17 of the Committee's Republicans and 13 of its 25 Democrats.

² See discussion of Representative Richardson's H.R. 1115, as well as a broad summary of federal reform proposals in Appendix A.

S. 1400
(Kasten, Inouye, Danforth, Rockefeller)

Preemption/Scope of Bill (Section 103).

The bill would preempt state law in civil actions against manufacturers or product sellers to recover for personal injury or property damage caused by a product only to the extent it supplies a rule of law on the topic. Thus:

- The bill addresses when a claim would be barred if a claimant is intoxicated or under the influence of illicit drugs, but does not address general principles of comparative negligence; existing state law would continue to apply on that broader topic.
- The bill does not cover actions involving contamination or pollution of the environment. These types of actions will continue to be governed by state environmental laws.
- The bill does not address actions to recover for "commercial loss" (i.e., damage to the product itself, loss of profits, and other economic losses); they are not covered by the bill and will continue to be covered by state commercial or contract law.

Jurisdiction of Federal Courts (Section 104).

The bill does not create any new jurisdiction in Federal courts. State courts will continue to have jurisdiction over products liability cases and will apply the Federal statute. Federal courts will only have the jurisdiction they have at present, for example, cases involving claimants and defendants from different states where the amount in dispute is over \$50,000.

Effective Date (Section 105).

The bill would apply to products liability actions filed on or after its date of enactment, including actions in which the harm or conduct occurred before that date. If any provision of the bill would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant is given one year after the bill's enactment to bring an action.

Expedited Products Liability Settlements (Section 201).

The bill establishes procedures and rules designed to expedite the settlement of products liability cases. They are based on Rule 68 of the Federal Rules of Civil Procedure. The procedures allow either the claimant or defendant to make an offer of settlement for a specific dollar amount. The court may allow time for discovery to be made. If the defendant does not accept the claimant's settlement offer and after a trial a verdict is entered against the defendant that is equal to or greater than the amount of the claimant's offer, the defendant must pay the claimant an additional sum for the claimant's reasonable attorney's fees and costs. If the claimant does not accept the defendant's settlement offer and after a trial a verdict is entered that is equal to or less than the amount of the defendant's offer, the court will reduce the amount of the verdict by an amount equal to the defendant's reasonable attorney's fees and costs, but no more than the amount of compensation the claimant will receive from other collateral sources. For purposes of this section, attorney's fees will be calculated on the basis of an hourly rate no greater than that which is considered acceptable in the community, considering the attorney's qualifications and experience and the complexity of the case.

Alternative Dispute Resolution Procedures (Section 202).

In lieu of or in addition to making a settlement offer, a claimant or defendant may offer to participate in any voluntary alternative dispute resolution procedures used in the state. If the other party refuses to participate in the procedures, and the court determines that the

refusal was unreasonable and not in good faith, the court may make that party pay the offeror's reasonable attorney's fees and costs. A refusal to participate in alternative dispute resolution procedures will be considered to be unreasonable or not in good faith if, after trial, the party who made the offer obtains a favorable verdict.

Civil Actions (Section 301).

Products liability actions may be brought pursuant to applicable State or Federal law, except to the extent that such law is superseded by this Act.

Uniform Standards of Product Seller Liability (Section 302).

Product sellers (i.e., retailers, wholesalers, distributors) will be liable only for harms caused by their own negligence or by a product's failure to conform to an express warranty made by the product seller. But, a product seller will be responsible for the manufacturer's errors if the manufacturer cannot be brought into court or the court determines that the manufacturers will be unable to pay the judgment. (A similar provision was included in the Uniform Products Liability Act and exists in the statutory law of many states.)

Uniform Standards for Award of Punitive Damages (Section 303).

The bill provides that, to the extent that a state permits punitive damages, they may be awarded only if the claimant establishes by "clear and convincing evidence" that his harm was caused by the manufacturer's or product seller's "conscious, flagrant indifference to the safety of those persons who might be harmed by a product." A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions, or warnings is not, by itself, conduct that may give rise to punitive damages. The bill does not preempt state law limitations on the amount of punitive damages.

A special provision is included for the few states that allow only punitive damages to be awarded in "wrongful death" cases. In those states, the claimant may obtain those damages under state law and still bring a claim for punitive damages under this bill.

The bill establishes defenses to punitive damages (in the absence of fraud by the manufacturer) for drugs and medical devices that receive pre-market approval by the FDA and for aircraft that receive pre-market certification by the FAA.

At the request of a manufacturer or product seller, the trial will be bifurcated so that the proceedings on punitive damages will be separate and subsequent to the proceedings on compensatory damages. Alternatively, a manufacturer or product seller may request that the issue of the amount of punitive damages be tried separately from the issue of liability for punitive damages. The bill sets out a number of factors that will be considered in determining the amount of punitive damages.

Uniform Time Limitations on Liability (Section 304).

The bill establishes a two-year statute of limitations which begins to run at the time the claimant discovered or reasonably should have discovered the harm and its cause. This is based on proposals to benefit injured persons that have been adopted in many states.

The bill adopts an outer time limit of 25 years (from time of product's first delivery) on liability for capital good products. It only applies to traumatic injuries involving capital goods (e.g., heavy industrial machinery). It does not cover or bar claims for "toxic harms." The 25-year time limit only applies if the claimant is entitled to workers' compensation benefits. This assures that claimants are not left without compensation from at least one source.

***Uniform Standards for Offset of Workers' Compensation Benefits
(Section 305).***

In actions involving workplace product injuries, the bill eliminates the employer's right to recapture workers' compensation benefits paid to an employee from the employee's products liability damage award. Instead, the products liability award will be reduced by the amount of workers' compensation benefits to which the employee is entitled. The employer will, however, have a right to recapture workers' compensation benefits (i.e., a right of "subrogation") if the employer shows that the employee's harm was not in any way caused by his fault or by the fault of a co-employee.

At the same time, the bill prohibits manufacturers from suing employers to make the employer contribute his share of the fault to the products liability award. A few states have allowed these types of actions. If, however, an employer attempts to recapture his workers' compensation benefits from the manufacturer in a products liability action, the employer loses this protection against lawsuits by the manufacturer. This provision was developed as a compromise between different groups in the business community who had opposing views on the approach to take in regard to the relationship between workers' compensation and products liability actions.

Several Liability for Non-Economic Damages (Section 306).

The bill modifies the rule of "joint and several liability" only with respect to its application to "non-economic damages" (e.g., damages for pain and suffering, emotional distress). Each defendant will be liable only for the amount of non-economic damages proportionate to his percentage or responsibility. This provision applies to all defendants in an action in which a manufacturer or product seller is liable (i.e., it includes doctors, municipalities, and other individual defendants involved in a products liability action).

Defenses Involving Intoxicating Alcohol or Drugs (Section 307).

The bill provides a complete defense to liability for manufacturers and product sellers if the claimant was under the influence of intoxicating alcohol or a drug and that condition was more than 50 percent responsible for the accident or event resulting in claimant's harm. This provision is derived from a statute in the State of Washington.

**H.R. 2700
(Luken, Glickman, Slattery, Synar)**

Preemption/Scope of Bill

The Bill would preempt state law in civil actions against manufacturers or product sellers to recover for personal injury or property damage only to the extent that it supplies a rule of law on the topic. The act expressly does *not* apply to asbestos and environmental actions.

Standards of Manufacturing Liability

H.R. 2700 establishes three theories on which a manufacturer may be sued: negligence, strict liability, and intentional wrongdoing.³ It establishes four ways in which a product may be considered defective under the strict liability theory:

³The legislation also contains a provision applicable only to liability of manufacturers of firefighting equipment and protective clothing.

1. It contained a construction flaw or specifically that the product deviated from the design specifications, formulations, or performance standards of the manufacturer;
2. It did not conform to the manufacturer's express warranty;
3. It failed to contain adequate standards or instructions; or
4. It was defective in design.

A product will not be considered defective if the claimant's harm was caused by an "inherent characteristic" of the product. An inherent characteristic is one that cannot be removed without seriously compromising the product's usefulness and desirability. Liability will not be precluded where harm was caused by an aspect of a product that was not an inherent characteristic. For example, the sharpness of a blade on a machine may be an inherent characteristic, but a claim could be brought on the basis that the machine failed to contain a safety guard because the lack of a safety guard is not an inherent characteristic.

H.R. 2700 also "recognizes" the principle of "unavoidably unsafe" products in the context of drugs and medical devices. The legislation, however, leaves the development of the details of this concept to state law.

Defenses

H.R. 2700 retains a "state-of-the-art" defense which provides that manufacturers and sellers will not be held liable if they show, by a preponderance of evidence, that injuries were caused by risks not scientifically identifiable when the product was manufactured.

The state of the art defense will not apply if the claimant establishes, by a preponderance of evidence, that the product is so unsafe, compared to its usefulness, that it should not have been marketed.

The legislation also provides a defense which reduces damages to the extent that a plaintiff or third party misuses or alters the product, and provides a complete defense where a claimant's use of drugs or alcohol is responsible for over 50% of the harm.

Standard of Product Seller Liability

A product seller other than a manufacturer would be held liable only if the plaintiff's harm was caused by the seller's lack of reasonable care or breach of the seller's own warranty.

A product seller will be held liable, as if it were the product manufacturer, if the product manufacturer is not subject to service of process under the laws of the state in which the claimant brings the action, or if the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

Punitive Damages

H.R. 2700 sets the standard of proof for punitive damages at "clear and convincing evidence." State law will control if, and under what circumstances, punitive damages will apply. The legislation does provide, however, that failure to exercise reasonable care in selecting among product designs, formulations, instructions or warnings does not, in and of itself, constitute conduct that may give rise to punitive damages.

H.R. 2700 provides for a separate proceeding on punitive damages at the option of the manufacturer or product seller. This measure is intended to keep evidence of a defendant's wealth or net worth out of the evidence in the basic liability case, because that evidence could prejudicially influence jurors as they focus on whether there is liability for compensatory damages.

The legislation also provides that punitive damages shall not be awarded against a manufacturer or product seller where the product is a drug or medical device that was approved by the Food and Drug Administration.

Statute of Limitations

H.R. 2700 provides a two-year statute of limitations for products liability claims. The statute begins to run from the time the plaintiff discovered, or should have discovered, the harm caused by a product and its cause.

Actions alleging that a capital good caused harm in the workplace will be barred if the complaint is not served and filed within twenty-five years of the time of the delivery of the product. This provision applies only where the claimant is eligible for workers' compensation and the harm caused is not chronic illness.⁴ This section does not establish a statute of repose for products other than capital goods and therefore state law in that area is not preempted.

Workers' Compensation Offset

H.R. 2700 provides rules allocating responsibility for products liability damages and workers' compensation benefits where a claimant is injured by a product in the workplace.

The legislation precludes workers' compensation subrogation liens except to the extent that the employer was not in any way at fault in causing the employee-claimant's harm. The provision also reduces damages awarded in products liability actions by the amount of the workers' compensation benefits paid plus the present value of the workers' compensation benefits to which the employee is or would be entitled. The damages are not reduced, however, where the employer is able to recapture workers' compensation benefits by asserting a lien against the products liability damage award because he was not in any way at fault.

Plaintiff's employer will be immune to third-party suits for implied indemnity or contribution except to the extent that plaintiff's employer attempts to recapture his workers' compensation payments. In that instance, the employer loses the protection provided by the Federal bill and applicable state law will apply.

Frivolous Claims and Defenses

H.R. 2700 allows courts to impose sanctions on attorneys who file frivolous pleadings. The provision is significant in that it calls for the imposition of sanctions on attorneys for filing frivolous pleadings while most state law reform and prior proposed federal legislation punish parties for frivolous litigation.

Secrecy Agreements

H.R. 2700 prohibits the use in products liability litigation of secrecy agreements or protective orders, which prevent information presented in a lawsuit from being turned over to other parties.

Mediation Proceedings

H.R. 2700 requires that every action which includes a claim against a manufacturer or product seller shall be mediated. The intent of the provision is to encourage settlements. An assigned mediation panel will hear the case and notify each party in the action being mediated of its evaluation of the claim. If a party has rejected an award and the action proceeds to trial,

⁴The statute of repose provided for in H.R. 2700 is longer than those that exist in the states that have retained the doctrine. Presently, 12 states have viable statutes of repose (Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kentucky, Nebraska, North Carolina, Oregon and Tennessee). Favorably, the statute of repose in H.R. 2700 does not, as is the case with some state statutes, require the litigation of "the useful safe life" of the product in order to apply the provision.

the party must pay the opposing party's costs unless the verdict is more favorable to the rejecting party than the mediation award.³

Data Collection

The legislation also directs the U.S. Commerce Department to provide a report to Congress and the public relative to what data and information must be accessed in order to gain real insight into 1) the effect of products liability reform on claimants and manufacturers and sellers; and 2) the relationship between products liability reform and insurance rates.

Scope of the Bill

H.R. 2700 covers any products liability action against a manufacturer or product seller. It does not cover civil actions brought against a manufacturer or product seller where the harm is actually commercial or economic loss.

H.R. 1115 does not cover actions involving contamination or pollution of the environment. Moreover, most of the provisions in H.R. 2700 do not apply to products liability actions for harm caused by asbestos products. Only the workers' compensation offset applies to these actions.⁴

JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT ("Pub. L. 100-702")

On November 19, 1988⁵ Congress passed the Judicial Improvements and Access to Justice Act "Pub. L. 100-702" (hereinafter referred to as the "Act"). The Act makes a number of changes in the procedural rules followed in the federal courts. The most dramatic effect of the Act is that it further limits the availability of a federal court forum for diversity of citizenship cases.

There are several provisions of the Act that limit federal diversity jurisdiction. The most prominent of these is that Congress has raised the monetary minimum needed to bring a case into Federal Court under diversity of citizenship from \$10,000 to \$50,000. Plaintiffs that commence an action in Federal Court after May 18, 1989, the effective date of this portion of the Act, will now be required to allege in good faith, only claims that in the aggregate exceed \$50,000 in order for their action to be heard.

The Act also places restrictions on the removal of state court cases to the federal court when based upon diversity jurisdiction. Presently the Federal Rules of Civil Procedure require that state court cases be removed within 30 days from the defendant's receipt of the initial pleading in the state court action. The 30-day rule recognizes that the case stated in the initial

³The provisions regarding mediation have been the subject of criticism. The provision requires the claimant and the defendant to proceed to ADR before going to court even if neither party wishes to. It specifically details every step of ADR that each state must use for products liability cases, even though those steps may not be consistent with the state's administration of tort cases. It also ignores the fact that many states have adopted some form of ADR. A more complete discussion of ADR in the context of a Federal reform bill can be found in Appendix A, page 73, at footnote 6 of WEMED's 1988 Tort reform report.

⁴One of the considerations for the general exclusion of asbestos from the legislation was to provide Congress with the opportunity to respond to the unique situation presented by the massive number of claims arising from exposure to asbestos products.

At the end of 1987, there were 50,000 asbestos-related lawsuits pending in the courts. Approximately 2,000 new cases are filed each month which exceeds the rate of disposition. It has been estimated that suits alleging injury from exposure to asbestos constitute about 38% of all products liability suits filed in Federal district courts. The Rand Institute has estimated that transaction costs in asbestos cases exceed 60%.

⁵Pub. L. 100-702 was passed after the issuance of WEMED's 1988 Tort Reform Report and, accordingly, was not addressed therein.

pleading may not make the case ripe for removal but that some later event may ripen it, and then from that date the parties would have 30 days to remove. Under the new provisions of the Act, if the case does not become ready for removal within one year of the initial pleading, and the federal jurisdiction is based upon diversity, the defendants will be unable to remove the case to the federal court system.

Another portion of the Act that became effective upon the Act's passage on November 19, 1989 eliminates the requirement of securing a bond to remove a case into the federal court. Congress instead has given the federal court judges the power to assess actual expenses including attorney fees if it is later determined that the case was not removable or was improperly removed. The Act specifically grants the federal court judge the discretion to award attorney fees to the plaintiffs if the defendants improperly remove the case. The Act's predecessor rule only provided that the defendants pay costs and disbursements. The new rule makes it less burdensome to remove a case to the federal court, however the sanctions for doing so improperly now may be much greater.

The Act provides that the citizenship of a fictitious defendant, such as "John Doe", (used when the plaintiffs do not know the names of parties that they are suing but know that an action exists against them) is now no longer considered for diversity jurisdiction. This portion of the Act, although pro-diversity, is not expected to have a major impact on the federal courts because if upon the Doe being named it is found the case is non-diverse, the federal court can remand the action down to the state level. In addition, the federal judge now has the discretion to award costs and attorney fees to the plaintiffs for improper removal.

The Act also does away with the requirement of a verified petition for removal. The Act now provides that the notice of removal must be signed pursuant to Federal Rule 11. This suggests that in addition to costs and disbursements being awarded to plaintiffs for improper removal, rule 11 sanctions (also at the judge's discretion) may also be imposed against defendants who remove cases improperly.

The Act also provides for a potentially significant change in the venue of actions against corporate defendants. The new law, which became effective February 17, 1989, defines residence as where the corporation is subject to personal jurisdiction at the time the action is commenced. In multi-district states, the corporation is deemed to reside in any district where its contacts within the district would be sufficient to subject it to personal jurisdiction. If no such district exists, then the corporation is deemed to reside in the district within which it has the most significant contacts.

The effect of this new rule (replacing the old rule that defined corporate residence as where the entity is incorporated, licensed to do business or is doing business) is that it reduces the federal district venue options within the state, while potentially increasing the number of states where a corporate defendant can be haled into federal court. Under the new law, venue is proper in any state where personal jurisdiction can be obtained over the corporation. This would include any state where the defendant corporation is subject to the state's long arm jurisdiction, thus expanding the Plaintiff's jurisdictional options.

Once personal jurisdiction is established within the state, the venue option becomes limited to the district where the corporation's contacts within the district would be sufficient to subject the corporation to personal jurisdiction. The full effect of this new venue provision will not be fully realized until after the courts have had the opportunity to interpret and develop the law through their case decisions.

Federal rule-making procedures have also been addressed by the Act. These new procedures, referred to as the Rules Enabling Act, require that individual court rules promulgated by district court judges must be made available for public comment before they take effect. The Rules Enabling Act further requires all new court rules to be reviewed upon their promulgation and periodically thereafter for conformity with the Federal Rules of Civil Procedure by the judicial council of each circuit.

The Act provides for similar treatment of the U.S. Supreme Court. Recommendations of rules by the Judicial Conference must be made public and committees formed by the Judicial Conference must conduct meetings open to the public. Further, the Supreme Court must submit all rules to Congress at least seven months in advance of the rule becoming law.

The Act also addresses other issues such as expanding the court-annexed experimental arbitration project and the establishment of a Federal Court Study Committee to examine the future of the federal judiciary.

McCARRAN-FERGUSON LEGISLATION

Last year (1988) the House Subcommittee on Monopolies and Commercial Law approved (by a strictly partisan vote of 8-6) legislation, the Fairness and Insurance Act (H.R. 2727) which would amend the McCarran-Ferguson Act. This marked the first time legislation attempting to modify the McCarran-Ferguson Act passed a subcommittee. The Legislation (H.R. 2727), however, failed to reach the full floor for consideration by the House of Representatives.

In 1989, Senator Metzenbaum (D-Ohio) introduced S.B. 719, a proposal to limit the insurance industry's antitrust exemption, and Rep. Jack Brooks (D-Texas) introduced H.R. 1663 in the House. Neither Senator Metzenbaum nor Representative Brooks' bills have a significant chance of success this year. This is true despite the recommendations made by the American Bar Association that the insurance industry's exemption to the antitrust laws be modified.

The American Bar Association's Recommendations To Repeal The McCarran-Ferguson Act And To "Improve" The Liability Insurance System

In 1987, the American Bar Association House of Delegates authorized the appointment of a broadly based commission to study and make recommendations regarding the liability insurance system. The Commission to Improve the Liability Insurance System ("the Commission") was formed to address what has been regarded as the insurance "crisis" of the mid-1980s. The Commission took as its principal charge to consider those features of the liability insurance system associated with availability and affordability of liability insurance coverage, and to make proposals designed to ameliorate availability and affordability concerns. Because of previous ABA studies, the most notable of which is the American Bar Association Report and Recommendations on Improving the Tort Liability System (discussed at page 55, et seq. in WEMED's 1987 U.S. Tort Reform Report), the Commission did not consider its charge to include proposals directed at the underlying tort liability system.

1989

In a report dated January of 1989, the Commission found that the liability insurance "crisis" of the mid-1980s was primarily a crisis of price and availability of commercial and professional liability insurance. The Commission found further, however, that problems of availability and affordability of liability insurance have been recurrent and have been felt in a variety of settings; the commercial liability insurance "crisis" of the mid-1980s was preceded by highly publicized availability and affordability problems in personal insurance lines such as automobile and homeowners insurance in the late 1960s, in medical malpractice insurance in the mid-1970s, and in products liability insurance in the late-1970s. While the Commission focused its primary attention on commercial and professional liability lines, it did not limit its investigations or recommendations to those lines.

The Commission began its analysis with the basic premise that competitive liability insurance markets are inherently unstable and prone to recurrent supply cycles. The Commission's

general conclusion is that restricting competition is not an appropriate way to respond to problems caused by competition-driven supply cycles. The Commission believes that competition can enhance the provision of liability insurance, even though the costs of competitive liability insurance markets will necessarily involve instabilities that periodically will produce availability and affordability problems. The Commission's recommendations are designed to enhance the operation of competitive markets; help reduce the uncertainties and instabilities in expectations that feed cyclical behavior; and ameliorate the impact of dislocations on those affected by them.

The Commission made the following specific findings and adopted the following recommendations:

A. Cause of Liability Insurance Availability and Affordability Problems

The Commission found that because of the high level of public concern, an investigation should be conducted by an appropriate agency or tribunal having full discovery and subpoena power to determine whether insurers participated in illegal collusive activity and, if so, the extent to which such activity may have contributed to problems of insurance availability and costs.

The Commission recommended that if the tort system is to be evaluated, it should be evaluated on the basis of a wide set of criteria of which effect on the private insurance industry is but one. Careful attention should be focused on whether dislocations in insurance markets are temporary responses to perceived uncertainties or more permanent market responses to liabilities that do not respond to the insurance principle.

B. The McCarran-Ferguson Act

The Commission found that the McCarran-Ferguson exemption to the antitrust laws should be repealed and replaced with legislation containing the following features:

1. Insurers should be made subject to general antitrust engage in specified cooperative activity that is shown to enhance the competitiveness of the industry.
2. Insurers should be authorized to cooperate in the collection and dissemination of past loss experience data so long as those activities actually enhance competition but should not be authorized to cooperate in the construction of advisory rates or the projection of loss experience into the future in such a manner as to interfere with competitive pricing.
3. Insurers should be authorized to cooperate to develop standardized policy forms in order to simplify consumer understanding, enhance price competition and support data collection efforts, but state regulators should be given authority to guard against the use of standardized forms to unreasonably limit choices available in the market.
4. Insurers should be authorized to participate in voluntary joint underwriting agreements and in connection with such agreements to cooperate with each other in making rates, policy forms, and other essential insurance functions so long as these activities do not restrain trade.
5. Insurers participating in residual market mechanisms should be authorized in connection with such activity to cooperate in making rates, policy forms, and other essential insurance functions so long as the residual mechanism is approved by and subject to the active supervision of a state regulatory agency.
6. Insurers should be authorized to engage in such other collective activities that Congress specifically finds enhance rather than restrict competition in insurance markets.
7. State regulation of insurance rates should not exempt insurers from the antitrust laws

under the state action doctrine, insurer should be provided with authorization to engage in specified cooperative activity that is shown to enhance the competitiveness of the industry. Other non-rate regulation by a state should not exempt insurers from the antitrust laws unless that regulation satisfies the requirements of the state action doctrine and the regulation is shown to reasonably enhance competition.

The Commission recommended that states should retain authority to regulate the business of insurance and that the federal government should defer to state regulation except in those unusual circumstances where the regulatory objective can only be effectively accomplished through federal involvement.

C. Insurance Data Collection and Recording

The Commission recommended that the states should enact uniform legislation to improve the collection and reporting of data designed to document the costs and benefits of the tort system, including its effects on the cost and availability of insurance, on loss reduction, and on the compensation of injured victims. The Commission found that the American Bar Association should request the Conference of Commissioners on Uniform State Laws to draft a Uniform Insurance Data and Tort Litigation Reporting Act for consideration by the states.

The Commission found that data collection and reporting requirements imposed on the insurer should be:

1. Reasonably uniform in content and scope throughout the states;
2. Limited to meaningful information related to clearly identified and significant objectives;
3. Applied, to the extent appropriate and feasible, to all segments of the insurance industry, including surplus lines risk retention groups and reinsurers; and
4. Applied prospectively only.

The Commission found that a data collection and reporting statute should require companies to collect, among other matters, the following:

1. Data which would permit reports on profitability by-line and by-state and where appropriate by class of coverage within a particular state. The Commission found that the definition of "lines" used for reporting data should be continually reviewed and disaggregated where appropriate;
2. Data and descriptive materials that would permit insurers to disclose their methodology and the factors they employ in establishing reserves; and
3. Loss and income data calculated on a policy year rather than on a calendar year basis.

The Commission found that data collection reporting statutes should require courts to collect, among other matters, the following information on a case by case basis:

1. The chronology of the dispute from the timing of the accident to the resolution of the dispute;
2. The disposition of each case;
3. A description of the subject matter of the dispute, the nature of the legal claims involved, and the nature of the injuries incurred;
4. The characteristics of the parties;
5. The manner and amount of compensation including recovery from collateral sources; and

¹The "State action doctrine" holds that the Federal Antitrust Laws do not prohibit anticompetitive conduct properly attributable to the States rather than to private parties. Recent State action cases have established a two-pronged test for determining whether private anticompetitive conduct that restrains trade is entitled to State action immunity. The restraint must be a product of a "clearly articulated and affirmatively expressed" state policy to displace competition, and the State must actively supervise any private anticompetitive conduct.

6. The expenses of the litigation including the amount of attorneys' fees incurred by each party.

In general, the Commission recommended that the uniform state legislation should:

1. Provide a mechanism, which assures participation by not only the industry and its regulators but also by insurance consumers and the public-at-large, to determine the type of data to be reported and the format of such reports; and
2. Specify the conditions under which data collected by insurance companies will be accessible to the public.

D. Flex Rating Plans

The Commission found that state regulators should closely monitor current experiments with "flex rating" plans in order to determine whether they can fulfill their promise to provide a measure of price stability without unduly restraining competition.

E. Formation and Modification of Insurance Contracts; Declinations, Non-renewals, Cancellations, and Price Adjustments

The Commission found that states should not impose substantive restrictions on the permissible grounds for cancellation, non-renewal, or initial declination of liability insurance as a means to maintain the general availability of liability insurance.

The Commission found that state law should permit an insurer to cancel a liability insurance policy in mid-term only when the insured has reached a policy condition under circumstances that would excuse the insurer from performing, the policy is voidable from inception, a mid-term change of circumstances within the control of the insured has materially increased the risk to the insurer, or the state insurance regulator has determined that cancellation is necessary in order to preserve the solvency of the insurer.

The Commission recommended that state law should require that any cancellation or non-renewal of liability insurance by the insurer be preceded by reasonable notice to the insured.

The Commission found that state law should require that any cancellation or non-renewal of liability insurance be accompanied by a statement of the insurer's reasons for the adverse underwriting decision, and that any initial declination be accompanied by a statement of the insurer's reasons for the adverse underwriting decision or notice that such a statement will be provided upon request. The statement of reasons should not only specify the grounds for the decision but also explain the particular reasons in the context of the particular situation.

The Commission found that state law should require each liability insurer doing business in the state to report periodically cancellation and non-renewal data for major lines and classes of coverage to insurance regulatory officials, and should require that regulatory officials publish data in a form reasonably accessible to prospective insureds.

The Commission recommended that state law should guarantee some form of efficient independent review of insurers' decisions to cancel or non-renew a contract of personal insurance in order to assure such decisions meet regulatory standards.

The Commission found that state law should prohibit insurers from asking applicants for personal insurance about prior non-renewals or cancellations.

The Commission recommended that state law require that any increase in rate of premium and any significant decrease in coverage, during or at the end of a term of liability insurance, be preceded by reasonable notice to the insured.

Finally, the Commission recommended that the American Bar Association request the Conference of Commissioners on Uniform State Laws to consider drafting a Uniform Insurance

Cancellation and Non-Renewal Act consistent with the foregoing recommendations, for consideration by the states.

F. Assuring Availability of Essential Liability Insurance

The Commission recommended that Congress should amend the Risk Retention Act of 1986 to clarify uncertainties that may be inhibiting development of risk retention groups and purchasing groups, and state regulatory officials should not unreasonably resist implementation of the policies underlying the acts.

The Commission further found that state legislation should give state insurance regulatory officials standby authority to create residual market mechanisms to provide essential liability insurance to eligible risks when the voluntary market does not.

G. Claims Made and Defense Cost Limits

The Commission recommended that states should require that, prior to the sale of any claims made liability insurance policy, the insurer disclose in writing in plain language to the prospective insured the significant features of the policy, including,

1. An explanation of the differences between claims made and occurrence formats;
2. A description of the principal aspects of the coverage being provided, including any exceptions, limitations or reductions in coverage;
3. An explanation of the particular retroactive date and extended reporting period under the policy.

The Commission recommended that where purchases of liability insurance have no practical choice between claims made and occurrence policies, states should require that claims made policies include terms that the retroactive date cannot be changed unilaterally and that effective tail coverage with limits at least equal to those in effect during the last year of regular coverage will be available at a price or pricing formula stated in the policy.

Finally, the Commission recommended that state law should prohibit liability insurance policy provisions that place financial limits on the obligation of the insurer to provide a defense, except where authorized by regulatory officials under conditions that assure that the provisions are the product of an informed decision by the insured to assume both some costs of defense and a role in control of the defense.

H. Liability Insurance for "Mass Torts"

The Commission recommended that in formulating liability rules for activities that have the potential to result in massive damage, policy makers should be particularly sensitive to the elements of the insurance principle that permit commercial insurers to provide insurance coverage.

The Commission recommended that for liabilities that appear to fit the insurance principle, authorization should be provided for alternative market mechanisms, in accordance with the recommendations to enhance insurance availability during periods of dislocations in private markets.

The Commission recommended that for liabilities that appear not likely to invoke insurance coverage from commercial insurers, a mixture of public and private programs to provide insurance coverage should be considered.

The ABA's Report of the Commission to Improve the Liability Insurance System was submitted in February to the ABA's House of Delegates which substantially approved the recommendations made.

Appendix

APPENDIX A

A BRIEF SUMMARY OF FEDERAL REFORM INITIATIVES AND SELECTED PROPOSED LEGISLATION

The significant proposed Federal tort reform legislation has confined itself to the products liability area.¹ The law of products liability has traditionally been developed by state legislatures and state courts, not by the Federal government. But for the past several years the Congress has seriously considered proposals to federalize products liability law.

In 1976, the Federal government established an interagency task force on products liability. The task force concluded that subjective insurance rate-making and uncertainty in products liability law tended to increase liability insurance costs. In 1978, the U.S. Department of Commerce formed a second task force on products liability which proposed the Risk Retention Act which was adopted by the 97th Congress. This statute provides for the formation of risk retention groups in which companies cooperate for self-insurance purposes. The 1978 task force also issued a model state law known as the Uniform Product Liability Act. No state, however, adopted the act, and by 1980 industry groups were calling for Federal legislation to preempt state products liability law.

The first Federal bill, H.R. 7921, was introduced in 1980 in the U.S. House of Representatives, but the House took no action. In March 1982, Senator Kasten introduced S.2631 to federalize products liability law. On October 1, 1982, the Senate Commerce Committee favorably reported S.2631, but the bill was never scheduled for a Senate floor vote. On January 29, 1983, Senator Kasten introduced S.44, essentially the same proposal. S.44 was approved by the Senate Commerce Committee on March 27, 1984, but the threats of a filibuster barred a Senate floor vote in the 98th Congress. A similar bill, H.R. 2729, sponsored in the 98th Congress by Representative Norman R. Shumway, also died. Senator Kasten's bill was reintroduced as S.100, but the Senate Commerce Committee defeated a motion to favorably report the bill in May 1985. In the 98th Congress a comprehensive product liability bill (a compromise of Senator Kasten's S.100, Senator Danforth's S.1999 and Amendment 1951 to S.1999) was approved by the Senate Commerce Committee but was pulled from consideration by the full Senate in late September 1986 after opponents of the measure, led by Senator Hollings, vowed to filibuster.

In 1987, the staunch opposition of Senate Commerce Committee Chairman Ernest Hollings (D-S.C.) to Federal products liability reform legislation served to shift the focus of Federal reform activity from the Senate to the House. The leading products liability reform bill introduced in the House in 1987 was Representative Richardson's (D-N.M.) H.R. 1115. H.R. 1115, with limited exceptions, was based on the compromise legislation that was approved by the Commerce Committee in 1986. The bill did not proceed past the committee stage.

A brief discussion of the two major bills introduced in the 100th Congress—Senator Kasten's S.666 and Representative Richardson's H.R.1115 follows.

SENATOR KASTEN'S S.666

The avowed purpose of Senator Kasten's S.666 is to regulate interstate commerce by providing a uniform products liability law. The bill is similar in many respects to the compromise

¹ Emphasis has been placed on this area because products liability issues, by their nature, involve goods and products shipped interstate. As such, the Federal government can avail itself of the broad powers of the Commerce Clause to regulate what is otherwise state-legislated activity.

legislation that was approved by the Commerce Committee last year.² The bill does not, however, include the controversial caps on noneconomic damage awards included in last year's legislation.

By way of summary, the Kasten products liability reform bill would:

1. Encourage plaintiffs and defendants in a products liability suit, to settle before the case is tried. Specifically, if a settlement offer is made by one side but rejected by the other and if the final judgment is equal to or less favorable to the rejecting party than the offer, then the party who rejected the offer would be liable for the other party's legal costs. (Sec. 201). Alternatively either plaintiff or defendant may opt to proceed pursuant to any voluntary alternative dispute resolution procedure established in the state or recognized by the court in which the products liability action is pending. If the offeree refuses to proceed pursuant to the alternative dispute resolution procedure and a verdict is ultimately rendered in favor of the offeror, attorney's fees and costs will be assessed against the offeree. (Sec. 202).
2. Establish a uniform fault-based standard for product sellers. Product sellers other than manufacturers would be liable only if the plaintiff's harm was caused by the seller's lack of reasonable care or breach of the seller's own warranty.
A product seller will be held liable as if it were the product manufacturer if the product manufacturer is not subject to personal jurisdiction in any state in which the action may have been brought or if the court determines that the claimant would be unable to enforce a judgment against the manufacturer. (Sec. 301).
3. Set the standard of proof for punitive damages at "clear and convincing evidence" and set the standard of liability for punitive damages at "conscious, flagrant indifference to the safety of persons." A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions or warnings does not, in and of itself, constitute conscious or flagrant disregard for the safety of persons. Punitive damages shall not be awarded against a manufacturer or product seller where the product is a drug or medical device that was approved by the Food and Drug Administration, or where the product was an aircraft and the aircraft was certified by the Federal Aviation Administration. (Sec. 303).
4. Require products liability lawsuits to be filed within two years from the time a plaintiff discovered—or should have discovered—the harm posed by a product and its cause.
Actions alleging that a capital good caused harm other than toxic harm will be barred if the complaint is not served and filed within twenty-five years of the time of delivery of the product.
With respect to goods other than capital goods, suit will be barred if it is proven by a preponderance of the evidence that the harm was caused after the product's useful sale life which will be presumed to be ten years after the time of the delivery of the product. (Sec.304).
5. Fine anyone found to have willfully destroyed or concealed material or evidence and provide a rebuttable presumption that the facts to which the material, or evidence relate are established in a manner adverse to the position of the party who committed the violation. (Sec. 305).
6. End worker's compensation subrogation liens as well as reduce damages awarded in products liability actions by the amount of the worker's compensation benefits paid plus the present value of all worker's compensation benefits to which the employee is or would be entitled.

²See discussion of compromise bill at pp. 43 to 59 in WEMED's "Brief Overview of the Liability 'Crisis' and Tort Reform" dated January, 1987.

APPENDIX A

No third-party tortfeasor may maintain any action for implied indemnity or contribution against the plaintiff's employer. (Sec. 306).

7. Limit the application of joint and several liability to economic damages only. (Sec. 307).
8. Bar recovery against manufacturers and product sellers where claimant was under the influence of drugs or alcohol and such condition was more than 50 per cent responsible for claimant's harm. (Sec. 308).
9. Collect from each insurer all data considered necessary by the Secretary of State to analyze the impact of S.666 on insurers. The Secretary of State shall issue a report in this regard to Congress on a yearly basis.

DISCUSSION

Sec. 201: Expedited Products Liability Settlements.

Section 201 is an attempt to attack the high transactions costs in litigating tort actions.³ Senator Danforth has addressed the perceived problem by means of an intricate set of incentives and penalties that would encourage both parties in an action to settle claims quickly. Senator Kasten on the other hand has taken a streamlined and simplified approach.⁴

The penalties and incentives in Senator Kasten's proposal are not as strong as those found in Senator Danforth's bills. Most notably, the proposal does not contain a limitation on recovery of noneconomic damages. Nonetheless, unlike the Danforth bills the Kasten proposal does not fall prey to problems of overcomplication, ill-defined terms and the prospect of an increase of frivolous claims.

Section 201 also provides the option of pursuing alternative dispute resolution procedures in lieu of an early settlement offer. [The section uses the spectre of attorney's fees and costs to encourage a litigant to make use of voluntary alternative dispute resolution ("ADR").]

There is a broad spectrum of ADR mechanisms presently in use. They include, *inter alia*, mediation, mini-trials;⁵ reference to special masters for settlement discussions; binding arbitration;⁶ final offer arbitration;⁷ court annexed arbitration;⁸ and trial by order of reference.⁹ As presently drafted, Section 201 permits a plaintiff or defendant to offer to proceed pursuant to "any" ADR procedure established or recognized under the law of the state in which the action is brought or under the rules of the court in which the action is maintained. The many forms

³ See WEMED's "Brief Overview of the Liability 'Crisis' and Tort Reform" dated January, 1987 ("Reform Report") at page 4 footnote 3.

⁴ See discussion of Senator Danforth's S.1999 and Amendment 1951 to S.1999 at page 32 of WEMED's Reform Report.

⁵ Mini-trials are basically a highly condensed version of a courtroom trial, presented by opposing counsel before a "jury" composed of senior executives from the opposing businesses who engage in settlement discussions at the end of the proceedings.

⁶ Arbitration is the most widely practiced form of ADR. It is a private adjudication in which the parties to a dispute agree, either by contract or at the time of disagreement to accept the judgment of a third party in resolution of their dispute. The proceedings may be either formal or informal and the determination is binding and usually enforceable in court.

⁷ In final offer arbitration, the arbitrator is compelled to select one or the other of the parties' final offers, which are made after negotiation to impasse. The technique is designed to exert maximum incentive on the parties to make the most realistic offer possible rather than to look to the arbitrator to split the difference between them.

⁸ Court annexed arbitration, discussed *infra* at page 8, is compulsory under court rules adopted in a number of states and federal jurisdictions. Unlike ordinary arbitration, the determination of the arbitrator is not binding.

⁹ In trial by order of reference, the parties to an action petition a court to permit adjudication by a neutral whom they agree on (often a retired judge) and whose judgment is then entered as that of the court. Such judgments are then subject to the same enforcement and appellate processes that would apply if the case had been decided by a sitting judge.

of ADR are not necessarily interchangeable with regard to a given set of facts. For example, the format and ramifications of binding final-offer arbitration, in which the arbitrator must select one or the other of the parties' final settlement offers, differs significantly from that of mini-trials. Mini-trials are a form of nonbinding adjudication in which the parties select a "judge" before whom they present an abbreviated trial. At the conclusion of the mini-trial, the adjudicator offers a recommended "judgment" which the parties use as a basis for settlement negotiations.

As presently drafted, Section 201 would give the initial offeror the power to choose whatever form of ADR would be most beneficial to his interest. In the face of such an offer, an offeree, amenable to the concept of ADR but opposed to the specific mechanism chosen by the offeror, would be relegated to accepting the form chosen by the offeror, or declining the offer and running the risk of losing at trial and being liable for attorney's fees and costs.

Moreover, sanctioning the refusal to submit to arbitration in every case can have consequences adverse to the intent of ADR. While the determination in some of the ADR procedures is binding and enforceable in court, under most forms of ADR any party can reject the determination and press the issue to trial *de novo*. When a case goes through both procedures, the public cost is higher than if arbitration had not been attempted.

One of the basic tenets and most attractive features of ADR is that these techniques increase the control of the disputants and their counsel in determining the type and timing of any proceeding through which their dispute is to be resolved. The spectre of liability for attorney fees and costs which loom over the decision to decline participation in ADR, and the apparent power of the initial offeror to dictate the form of ADR undertaken work to create havoc with this element of control.

A retention of an emphasis on the current array of completely voluntary ADR mechanisms, together with an expansion of "court-annexed arbitration," would provide a more effective and evenhanded approach to the problem of transaction costs.

Court annexed arbitration has been adopted in many states¹⁰ and several Federal District Courts. The objective is to deal with tort actions that arguably do not involve sums of money large enough to make it appropriate for litigants to go through the expensive procedures involved in ordinary litigation without first trying a less costly resolution technique. These programs vary in detail, but all of them provide that 1) arbitration is mandatory in all cases that fall below a legislated dollar ceiling¹¹ absent special circumstances as determined by the presiding court; 2) the decision of the arbitrator is not binding. Any party can reject the determination and proceed to trial, but usually at the risk of incurring some form of financial penalty if the trial result is less favorable to the rejecting party than the arbitration result.

Sec. 301: Uniform Standards Of Product Seller Liability

Section 301 addresses the problem of the "innocent" defendant. Most jurisdictions hold retailers and wholesalers strictly liable as sellers of defective products.¹² This can have the effect of keeping intermediate sellers in a lawsuit even if they bear no responsibility for the product defect.

Section 301 proposes to permit courts to release the nonmanufacturing seller from the

¹⁰ The states include Alaska, Arizona, California, Connecticut, Delaware, Illinois, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania and Washington. See, generally, Hensler, *What We Know and Don't Know about Court Administered Arbitration*, Institute for Civil Justice, the Rand Corporation, March 1986.

¹¹ Most states that have recently acted in this area have selected a case value limit at or about \$25,000, as assessed by a Judge.

¹² See Restatement (Second) of Torts § 402(a) (1965).

case unless 1) it cannot assert jurisdiction over the manufacturer; 2) the court determines that the claimant will be unable to collect a judgment against the manufacturer; or 3) the plaintiff alleges primary negligence against the nonmanufacturing seller. Under this section, an innocent plaintiff could be prejudiced if the court's determination as to the solvency of the manufacturer is wrong and insolvency materializes between pleading and judgment. Nevertheless, the alternative of keeping an "innocent" defendant in the case and therefore heaping nonproductive legal costs on a system that is clearly overburdened with them is intolerable.

Sec. 303: Uniform Standards For Award Of Punitive Damages

Section 303 imposes a high threshold for the nature of the conduct that justifies punitive damages and the "clear and convincing" evidentiary standard for proving that the defendant breached that standard. The high threshold and evidentiary standard provide the trial judge with a screening mechanism to exclude punitive damages from run-of-the mill products cases.¹³ This section also specifically states that choosing among alternative product designs or warnings does not constitute conduct that justifies the imposition of punitive damages. To date, courts have almost exclusively imposed punitive damages in design defect or failure-to-warn cases. The issues that support punitive damages in this area closely relate to the issues that support legitimate, or at worst, marginally erroneous risk-utility decision making. Section 303 recognizes the inherent unfairness of asking defendant manufacturers to balance safety, utility, aesthetics and cost, and then censure them with punitive damages merely because the jury disagrees with their assessment.

Section 303 steers clear of artificial limitations on punitive damages that either impose a cap or prohibit repetitive awards of punitive damages. Political realities dictate a more measured response. However, the section could have provided more definite standards for the jury to consider in rendering its verdict without flying in the face of these political realities. Factors for jury consideration such as 1) the total effect of other punishment or prior punitive damage awards imposed as a result of the misconduct, 2) the duration of the misconduct and whether it has been terminated, 3) the likelihood at the relevant time that serious harm would arise from the misconduct, 4) the profitability of the misconduct, and 5) the financial condition of the product seller, may be written directly into the statute as uniform guidelines for rendering a punitive damages verdict.

Sec. 304: Uniform Time Limitations On Liability

Section 304 limits a cause of action to no more than two years from the time the claimant discovered, or should have discovered the harm with due diligence. This provision is in line with many state statutes. The two year provision is shorter than some state provisions but is clearly reasonable. A discovery statute will aid consumers in those jurisdictions in which the statute of limitations begins running from the time the harm occurred. Shortening the statute of limitations is a small price to pay for a uniform discovery statute.

Section 304 also provides for a statute of repose of 25 years for capital goods and 10 years for consumer products. Statutes of repose have historically been a controversial provision in proposed tort reform legislation. Old products cases engender great resentment on the part of manufacturers. These cases are often accompanied by product misuse, abuse, lack of adequate

¹³ The threat of punitive damages can undermine settlement negotiations by thrusting a huge unknown into the negotiations. Plaintiff's counsel becomes intent on scoring big while defendant's counsel, who believes that the situation does not call for punitive damages, cannot factor their potential into the settlement negotiations for fear of adversely affecting settlements in related cases in litigation pending or yet to be brought. For discussion, see Owen, Problems in Assessing Punitive Damages Against Manufacturing Defective Products, 49 U. Chi. L. Rev. 1 (1982); Twerski, A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. Mich. Jnl. of Law Ref. 575 (1985); see also, Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, nn. 1-2 (1983).

maintenance and material alteration. In addition, these cases are often decided on the basis of changing societal standards with regard to safety. In contrast, statutes of repose have been met with consistent and strong opposition from consumer groups. This is especially true in the case of latent production defects where the product, albeit aging, was actually defective at the time it was sold.

The drafters of Section 304 attempted to strike a balance between the concerns of manufacturers and consumers by the imposition of a relatively long repose period for capital goods, the inclusion of exceptions where the statute would not apply, and the insertion of the discovery statute of limitations.

As presently drafted, Section 304 would provide some solace to manufacturers. However, the attempts to balance the statute to curry favor with consumer groups will not likely be successful and strong opposition can be expected.

A limited statute of repose applying only to those industries besieged by foreign imports, that are not shackled to a history of outdated capital equipment remaining in the marketplace, may engender more broad-based support justified on the basis of "competitiveness."

It should also be noted that Section 303, as presently drafted, appears to extend the statute of repose for express and implied warranty actions from 4 years under Section 2-725(1) of the U.C.C. to either 25 years for capital goods or 10 years for consumer goods. It is doubtful that this result was intended by the drafters.

Sec. 306: Uniform Standards For Offset Of Worker's Compensation Benefits

In most states an employer who pays worker's compensation benefits to an employee injured at the workplace while operating a piece of defective machinery has a subrogation lien against the plaintiff's ultimate net recovery from the product manufacturer. The employer retains this lien even if he was primarily responsible for the injury. This problem has substantial significance in light of the fact that employees implicate employer fault in over half of all employment-related products liability claims.¹⁴ Thus, under most state statutes, the product liability (tort) system bears the entire cost of the injury and the party bearing the biggest percentage of fault often escapes without paying anything toward the plaintiff's recovery.

Several states have permitted the product's manufacturer to join the employer in order to recover contribution based on proportional fault, thereby invading the immunity of the worker's compensation system. This effectively permits a manufacturer to accomplish via the contribution action, what a plaintiff cannot accomplish through direct action against the employer.

Section 306 addresses this conflict between the tort and the worker's compensation systems. The provision accomplishes this by 1) subtracting the worker's compensation recovery from the tort recovery, 2) abolishing the employer subrogation lien, and 3) precluding a manufacturer from bringing a contribution action against an employer. This approach provides the simplest and most effective means of resolving the conflict between the two reparation systems. The provision would not encroach on the benefits that the plaintiff currently enjoys. At the same time, it would shift part of the cost from the manufacturer to the employer where it rightfully belongs. The worker's compensation system, which was established to provide limited recovery for work-related injury, would, in fact, be paying for work-related injury.

Sec. 307: Several Liability For Noneconomic Damages

The limitation of joint and several liability to economic damages has been a staple in tort reform legislation. The rationale for this reform is that where the plaintiff has suffered an actual monetary loss he needs certain and speedy compensation and should not be forced to

¹⁴ Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results Report 10, 61-66 (1978).

APPENDIX A

seek payment from each individual defendant or bear the risk of uncollectibility. Where the damage involves noneconomic loss there is less of a need for certain and timely compensation, and pure several liability should apply.

An across-the-board abolition of joint and several liability where the defendants have not acted in concert would, of course, be preferred by manufacturers and insurers. This approach can be intellectually justified in light of the prevalence of comparative negligence systems and the desire for truly fault-based liability. Political realities dictate that adoption of pure several liability on the federal level is not a feasible solution. In recognition of this reality, Section 307 does not aim to fully meet the goal of liability based on fault. Nevertheless, the section's limitation of joint and several liability to economic damages offers some relief to deep pocket defendants, as noneconomic damages constitute a significant percentage of damage awards.

Amendment Number 34 to S.666 (Kasten)

Amendment 34 would add three sections to Senator Kasten's S.666. The first section would provide sanctions for lawyers, plaintiffs or defendants, who engage in conduct calculated to delay, and for lawyers or plaintiffs who file an action without a good faith belief that it has a reasonable basis in law and in fact. The sanctions in both cases would be "not less than the total amount of court costs, fees, and expenses (including reasonable attorneys' fees) reasonably attributable to the conduct."

The second section of the amendment would provide that a court *must* dismiss a suit if it "determines that the convenience of the parties and the interest of justice dictate that the action should proceed in another state or foreign jurisdiction or that the plaintiff has taken up residence in the state in which the court is located principally for the purpose of invoking the jurisdiction of such court." Although Federal courts already have this power, their use of it is discretionary, and the Supreme Court has indicated that they should use it sparingly: "the plaintiff's choice of forum should rarely be disturbed."¹⁵

The second section of the amendment also provides that, in the case of an "action maintained by a citizen of a foreign jurisdiction which arises out of a transaction which occurred in a foreign jurisdiction" (this apparently means a foreign country), there shall be a rebuttable presumption that the action should be dismissed as inconvenient as a matter of law. Although there currently is no presumption against a foreign plaintiff's choice of forum, the Supreme Court has held that it "deserves less deference" than a citizen's choice.¹⁶

The third section of the amendment provides, in relevant part:

all relevant evidence is admissible in any civil action brought pursuant to this act, except as otherwise provided by the Constitution of the United States, act of Congress, or any other rule prescribed by the Supreme Court of the United States pursuant to its statutory authority, or, with respect to any action based on section 1332 of title 28, United States Code, by the Federal rules of evidence. Evidence which is not relevant is not admissible in any such action.

This provision parallels Federal Rule of Evidence 402, 28 U.S.C. Under the provision, products liability suits will be treated as actions arising under state law; i.e. they could always be brought in state court, but could be brought in Federal court under 28 U.S.C. section 1332, where there is diversity of citizenship. The Federal Rules of Evidence already apply in diversity cases (*See*, 1 Wigmore, Evidence section 6.4 (Pillers rev. 1983)).

¹⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

¹⁶ *See Piper Air Craft Company v. Reyno*, 454 U.S. 235, 256 (1981).

The third section of the amendment appears to make the Federal Rules of Evidence applicable to products liability suits filed in state court. If so, the phrase "or any other rule prescribed by the Supreme Court of the United States pursuant to its statutory authority" would seem superfluous because rules prescribed by the Supreme Court do not apply in state courts except to the extent that a state adopts them.

The third section of the amendment also adopts Federal Rules of Evidence 401 and 403, which, respectively, define "relevant evidence" and permit its exclusion in specified circumstances. In addition, the third section of the amendment provides that relevant evidence may be excluded if it "is inadmissible hearsay under applicable state law," or if it may be excluded under a privilege provided by state law. This provision would not change the existing law in state courts; it would also not change the law in Federal court with respect to privileges because Federal Rule of Evidence 501 already incorporates state law in diversity cases with respect to privileges. It would appear to change the law in Federal courts with respect to hearsay, because the Federal Rules of Evidence do not incorporate state law in diversity cases with respect to hearsay (although to some extent the Federal rules may be substantially similar to state law). Accordingly, products liability cases brought in Federal courts would be treated differently from all other diversity cases with respect to hearsay.

Finally, the third section of the amendment adopts Federal Rule of Evidence 407, which limits the admissibility of evidence against a defendant of subsequent remedial measures such as improvements in the product made after an injury occurs. This is already the law in most states.¹⁷

Amendment Number 35 to S.666 (Kasten)

Amendment 35 would create uniform standards of liability for manufacturers (the main part of the bill does so only for sellers). It provides that manufacturers would not be liable for harm caused by one of four factors:

The first factor is "an unreasonable or unforeseeable use or alteration of a product." The second factor is "a defect or danger which would have been apparent to a reasonable person or that was an inherent characteristic of the product." The third factor is "Amendment 35: a product design, unless the claimant establishes that, at the time of manufacture, knowledge of the danger and a practicable means to eliminate it were reasonably available." The fourth factor is "failure to warn, unless the claimant establishes that at the time of manufacture, knowledge of the danger was reasonably available and the manufacturer failed to take reasonable steps to provide adequate warnings."

It is not clear, however, whether the presence of one of these factors would totally bar recovery or would reduce it to the extent the factor caused the harm.

Representative Richardson's H.R. 1115¹⁸

H.R. 1115 is a proposed amendment to the Consumer Product Safety Act which attempts to establish uniform safety and liability standards. With limited exceptions, the legislation is based on the compromise legislation that was approved by the Commerce Committee last year,¹⁹ the most notable of which is an adoption of a negligence standard for design defect and warnings cases.

¹⁷ See, 74 ALR 3rd 1001.

¹⁸ H.R. 1115 had the strongest support of any of the products liability bills introduced in the 100th Congress. Not surprisingly, however, support was strongest among Republicans. Of the measure's 72 cosponsors, 45 were Republicans and 27 were Democrats.

¹⁹ See discussion of compromise bill on pp. 43 to 59 in WEMED's "Brief Overview of the Liability 'Crisis' and Tort Reform" dated January, 1987.

APPENDIX A

By way of a summary, the Richardson products liability reform bill would:

1. Set uniform standards for manufacturer's liability including the adoption of a negligence standard for design defect and warnings cases [Sec. 204].
2. Establish a uniform fault-based standard for product sellers. Product sellers other than manufacturers would be liable only if the plaintiff's harm was caused by the seller's lack of reasonable care or breach of the seller's own warranty.

A product seller will be held liable as if it were the product manufacturer if the product manufacturer is not subject to personal jurisdiction in any state in which the action may have been brought or if the court determines that the claimant would be unable to enforce a judgment against the manufacturer. [Sec. 205].

3. Retain a state-of-the-art defense which provide, that manufacturers and sellers will not be held liable for injuries caused by risks which were not scientifically identifiable when the product was manufactured. [Sec. 206].
4. Create a statutory presumption of no liability where a product is in compliance with Federal regulations or standards. The presumption can be overcome by a showing that a person using reasonable care could and would have taken additional precautions. [Sec. 206].
5. Limit the application of joint and several liability to economic damages only. [Sec. 207].
6. Set the standard of proof for punitive damages at "clear and convincing evidence" and set the standard of liability for punitive damages at "conscious, flagrant indifference to the safety of persons."

A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions or warnings does not, in and of itself, constitute conscious or flagrant disregard for the safety of persons.

Punitive damages shall not be awarded against a manufacturer or product seller where the product is a drug or medical device that was approved by the Food and Drug Administration, or where the product was an aircraft and the aircraft was certified by the Federal Aviation Administration. [Sec. 208].

7. Require products liability lawsuits to be filed within two years from the time a plaintiff discovered — or should have discovered — the harm caused by a product and its cause.

Actions alleging that a capital good caused harm will be barred if the complaint is not served and filed within twenty-five years of the time of the delivery of the product. [Sec. 209].

8. End worker's compensation subrogation liens as well as reduce damages awarded in products liability actions by the amount of the worker's compensation benefits paid plus the present value of all workers' compensation benefits to which the employee is or would be entitled.

No third party tortfeasor may maintain any action for implied indemnity or contribution against the plaintiff's employer. [Sec. 306].

9. Establish a federal products liability study panel which would report on Federal and state expedited products liability claims procedures; federal and state workers' compensation systems and nonjudicial methods for resolving product liability claims at the Federal and state level.

DISCUSSION

Federal Jurisdiction

Under H.R. 1115, any products liability suit could be brought in Federal court; since the bill is silent on the issue, Federal courts would have Federal question jurisdiction under 28 U.S.C. 1331.

Section 204: Uniform Standards Of Manufacturers' Liability

The crux of Section 204 is the adoption of a simple negligence standard for design defect and failure to warn cases. The adoption of a negligence test would affect existing law in several ways. First, the defendant would not carry the burden of proving that its product was not defective. In this regard, Section 204 would preempt such case law as the decision in *Barker v. Lull Engineering Co.*,²⁰ where a California court shifted the burden of proof on risk utility in a design defect case to the defendant because he was in a better position than the plaintiff to prove that the alternatives suggested by the plaintiff were impractical or uneconomical. Such burden shifting has the practical effect of making it close to impossible for a defendant to obtain a directed verdict in a frivolous case.

Second, courts could no longer apply the highly subjective "consumer expectation test"²¹ as the sole liability standard in a design defect or failure to warn case, thus preempting such case law as the decision in *Campbell v. General Motors, Inc.*,²² which appears to allow the testimony of a plaintiff who, as an ordinary consumer, did not expect to be injured, to establish a *prima facie* case of design defect.

Third, the defendant would not be liable for information concerning dangers that it could not have reasonably foreseen at the time it distributed the product,²³ or for the implementation of design changes that were not economically or technologically feasible at the time of the distribution of the product. Rather, the plaintiff would have to establish the negligence of the defendant. A change to the negligence standard would not preclude the plaintiff from proving that at the time of trial, the defendant knew or should have known about the danger or design alternative that could have avoided the danger. Further, claims for postdistribution failure to warn or failure to recall would remain intact.

Finally, a plaintiff would be precluded from submitting evidence of postdistribution design modification in those jurisdictions that adhere to the subsequent repair rule in negligence cases. Since most jurisdictions adhere to the subsequent repair rule, this change would, for all practical purposes, be the controlling national rule in design defect and failure to warn cases.

Section 204 adheres to the prevailing view that strict liability correctly governs production defect cases and retains that standard for production defects.

²⁰ 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

See also *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Campbell v. General Motors Corp.*, 32 Cal. 2d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982); *Knitz v. Minster Mach. Co.*, 69 Ohio St. 2d 460, 436 N.E.2d 814 (1982).

²¹ The consumer expectation test essentially maintains that courts should hold liable a manufacturer who leads consumers to believe that a product will perform at a certain level and then disappoints those expectations. The drafters of the Model Uniform Product Liability Act, 44 Fed. Reg. 62, 714 (1979) noted that the consumer expectation test "... takes subjectivity to its most extreme end. Each trier of fact is likely to have a different understanding of abstract consumer expectations." The drafters further noted that "most consumers are not familiar with the details of the manufacturing process and cannot abstractly evaluate conscious design alternatives."

²² 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982). Professor Schwartz is similarly critical of the creation of an independent consumer expectations prong. See Schwartz, Foreword: Understanding Products Liability, 67 Calif. L. Rev. 435 (1979). Schwartz notes that in many cases a negligent failure to warn claim will subsume the consumer expectations test. In cases where an effective warning corrects misimpressions, or, in the alternative, where the fact finder is convinced that an appropriate warning would have served this function, no need exists for an independent consumer test.

²³ A majority of jurisdictions presently apply a negligence standard in the failure to warn case. Section 204 would preempt the decisions of the few courts that have applied strict liability in a failure to warn case or have approved of its application *in dicta*. See e.g. *Whitehead v. St. Joe Lead Co.*, 729 F.2d 238, 246-47 (3d Cir. 1984) (applying New Jersey Law); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974) (applying Montana law); *Beshada v. Johns Manville*, 90 N.J. 31, 204-5, 447 A.2d 539, 546-47 (1982); *Peqq v. General Motors Corp.*, 253 Pa. Super. 59, 78, 391 A.2d 1074, 1083 (1978).

APPENDIX A

Section 205: Uniform Standards Of Product Seller Liability

Section 205 is similar in all material respects to Section 301 in Senator Kasten's S.666 which is discussed in the section memo on S.666.

Section 206: Defenses

Section 206 retains a "state-of-the-art defense"²⁴ which has historically been used as a defense to strict liability design defect or warnings claims. Under a strict liability analysis a court could impose liability even though a reasonable manufacturer would not have had access to information that later became available. Thus, courts applying a strict liability standard would deem a product "unreasonably dangerous" even though the manufacturer had acted reasonably in designing and marketing the product.

The attribution to the manufacturer of knowledge that it could not have acquired using reasonable care created enormous apprehension in the business community. Courts and legislatures responded to this concern by creating state-of-the-art defenses to the strict liability rule.²⁵ The formulation of these "state-of-the-art rules" differs from jurisdiction to jurisdiction but the end result, for all practical purposes, is the reinstatement of negligence as the controlling standard in all cases where the rule applies.

As previously discussed, Section 204 adopts a simple negligence standard for design defect and failure to warn cases. This section should have obviated the necessity for retaining the state-of-the-art defense found in Section 206. At present, it is not clear what the intent of the drafters was in retaining a state-of-the-art defense in addition to an adoption of a negligence standard. It may be surmised, however, that their intent was to provide an additional safeguard to insure that the risk utility analysis²⁶ utilized in the negligence regime was not twisted by the courts to allow after-acquired knowledge or advances in technology to be the basis of liability.

The inclusion of Section 206 may be redundant in light of Section 204, nevertheless, in and of itself, it does not create significant problems for the legislation. The inartful drafting of the section, however, does create several problematic issues. The section provides a complete defense if "... at the time the product was made the manufacturer or seller did not have the ability to discover and to eliminate the defect or danger. . . ." A literal reading of this section indicates that where an advance in knowledge or technology occurs after manufacture of a specific run of products but before sale of those specific products, a manufacturer or seller can

²⁴ The "state-of-the-art defense" asserts that in light of the available scientific knowledge of the risks of a product, the company was acting reasonably in the design, manufacture, or sale of that product. Thus, manufacturers and sellers would not be held liable for injuries caused by risks which were not scientifically identifiable when the product was manufactured or sold. Those in favor of this limitation claim that it is unjust to apply a risk utility analysis with the benefit of hindsight. See *Stonehocker v. General Motors Corp.* 587 F.2d 151, 156-157 (4th Cir. 1978); *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1184-86 n.24 (5th Cir. 1971) on the other hand, the plaintiff's bar argues that it is virtually impossible to ascertain the exact state of a defendant's knowledge of technology at a given time and that state-of-the-art forces them to pinpoint knowledge with unfair exactitude. See generally O'Donnell, *Design Litigation and the State-of-the-Art: Terminology, Practice and Reform*, 11 Akron L. Rev. 627 (1978).

²⁵ See e.g. *Sturm Ruger & Co., Inc. v. Day* 594 P.2d 38, 45 (Alaska 1979); *Bell Bon Fil Memorial Blood Bank v. Hansen*, 665 P.2d 118, 126. (Colo. 1983); *O'Brien v. Muskin Corp.*, 94 N.Y.169, 183, 463 A.2d 298, 305 (1983). The following statutes have been enacted: *Ariz. Rev. Stat. Ann.* § 12-683(i) (supp. 1980); *Colo. Rev. Stat.* § 13-21-403(a) (Supp. 1984); *IND. Code* § 33-1-1.5 (6) (4) (1983); *Ky. Rev. Stat.* § 25-21, 182 (1979); *Tenn. Code* § 29-28-1-5(b) (1980); *Wash. Rev. Code* § 7.72.050(1) (Supp. 1985).

²⁶ Risk-utility analysis is also used to determine liability in design defect and warnings cases under a strict liability standard. The difference between risk-utility under negligence and strict liability regimes is the time when information became available to the manufacturer or seller. Negligence focuses on the conduct of the manufacturer and would impose liability where a reasonable manufacturer knew or should have known of certain information. Strict liability would impose liability even though a reasonable manufacturer would not have had access to information that later became available.

nevertheless market those completed products without fear of liability predicated on the advance in knowledge or technology. While such factors as the cost of redesigning a completed product may have some bearing in a risk-utility analysis and would conceivably lead to a finding of no liability under a negligence standard, it is difficult to justify granting an automatic and complete defense to a manufacturer or seller who had the knowledge, before sale, to rectify a defect in the product and opted not to do so. Assuming that the state-of-the-art defense is to be retained in the statute, this problem can be rectified by changing the controlling time from "... at the time the product was made ..." to "... at the time the product was sold. ..."

Finally, as noted previously, an adoption of the negligence standard for design defect and warnings cases would not interfere with a cause of action for postdistribution failure to warn or failure to recall. It appears, however, that the state-of-the-art provision may prohibit these causes of action. This is likely to engender considerable opposition to the Section.

Section 206 also provides a statutory presumption of no liability where a product is in compliance with Federal regulations or standards. The presumption can be overcome by a showing that a person exercising reasonable care could and would have taken additional precautions. Therefore, in addition to showing a defect in the product, plaintiff must satisfy the additional burden of showing that the defendant could and should have taken precautions beyond those called for by Federal regulations or standards. The practical effect of this Section is that it will be much easier for a defendant to prevail on a motion for summary judgment or a directed verdict.

Section 207: Liability Of Codefendant

Section 207 is similar in all material respects to Section 307 in Senator Kasten's S.666 which is discussed in the section memo on S.666.

Section 208: Punitive Damages

Section 208 is similar in most material respects to Section 303 in Senator Kasten's S.666 which is discussed in the section on S.666. It should be noted, however, that unlike Section 303 of Senator Kasten's S.666, Section 208 provides uniform guidelines for rendering a punitive damages verdict.

Section 209: Time Limitation On Liability

Section 209 is similar in most material respects to Section 304 in Senator Kasten's S.666 which is discussed in the Section memo on S.666. A material difference between the two statutes is that while Section 303 in S.666 provides a statute of repose for consumer products of 10 years, Section 209 in H.R. 1115 does not propose a statute of repose for consumer goods. In addition, while Section 304 in S.666 excludes the application of the 25-year statute of repose to capital products that cause "toxic harm," Section 209 of H.R. 1115 creates no such exclusion. The failure of the H.R. 1115 drafters to include this exclusion will likely serve to heighten the opposition to this Section.

Section 210: Worker's Compensation Offset

Section 210 is similar in all material respects to Section 306 in Senator Kasten's S.666 which is discussed in the Section memo on S.666.

APPENDIX B

THE McCARRAN-FERGUSON ACT

Extensive debate continues as to the causes of the "crisis" in property/casualty insurance. One such theory asserts that a principal cause of the "crisis" has been concerted anti-competitive actions by insurers to raise prices in certain lines of property/casualty insurance or even to refuse to write such insurance.¹ In this regard, frequent reference has been made to the McCarran-Ferguson Act of 1945, a law that provides limited antitrust immunity to insurers and continues the authority of the states to serve as the primary regulators of the insurance industry.

Background and Analysis

A major purpose of the antitrust law is to deter concerted pricing and marketing decisions among competitors. Certain types of collusive conduct, particularly agreements to raise price and restrict output, are illegal *per se* and expose the participants to both severe criminal sanctions and civil actions for treble damages by injured parties. In the insurance area, however, the McCarran-Ferguson Act provides a limited antitrust exemption for the "business of insurance," and provides that Federal fair trade and antitrust laws will apply to the business of insurance only to the extent that such business is not regulated by state law. All fifty states and the District of Columbia have codes of insurance law for supervising the insurance industry as well as regulatory departments, officials, and procedures for administering insurance laws.

The McCarran-Ferguson Act of 1945 was a response to a Supreme Court decision that held that the business of insurance was within the regulatory power of Congress under the commerce clause and, thus, was subject to the antitrust laws.² In effect, McCarran-Ferguson reaffirmed and continued the traditional power of the states to be the primary regulators of insurance and exempted the industry from those sections of the antitrust laws that prohibit price fixing. This has essentially given the business of insurance qualified exemption from antitrust laws, except for agreements which "boycott, coerce or intimidate"—areas which McCarran-Ferguson left subject to coverage under the Sherman Antitrust Act.

The State Action Doctrine

The McCarran-Ferguson exemption, to some extent, overlaps with another antitrust exemption, the "state action doctrine," which holds that the Federal antitrust laws do not

¹ See Discussion of State antitrust actions against four major U.S. insurers, the Insurance Services Office and numerous domestic and foreign reinsurers at p. 6 of this report. Note, however, that an economic analysis of the insurance industry prepared by the Antitrust Division of the Justice Department at the request of the Administration's Tort Policy Working Group found no evidence of collusion and found further that even if there was collusion, the recent crisis in affordability and availability of insurance can not be blamed on it.

The report found that low levels of market concentration in the insurance industry imply that successful collusion among property-casualty insurers is highly unlikely, even in the absence of any legal prohibitions.

The Antitrust Division report stated further that collusion, even if it did exist, is not a viable cause of the affordability and availability "crisis" in that: 1) Antitrust immunities have applied to all lines of insurance since at least 1945, with de facto immunity since the 1869 decision of the Supreme Court in *Paul v. Virginia*, 75 U.S. (8 Wash. 1.) 168 (1869), while the "crisis" is of relatively recent origin and is occurring in only a few lines; 2) collusion cannot explain unavailability: Insurers do not collusively raise prices above costs and then refuse to sell the product; 3) collusion as an explanation of large price increases is directly contradicted by the fall in ratio of premiums to underwriting costs and by indications of under-performance by property-casualty firms in the stock market. See Working Group Report dated March 1987, appendix at pp 1-22.

² *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944).

prohibit anticompetitive conduct properly attributable to the states rather than to private parties.³

Recent state action cases have established a two-pronged test for determining whether private anticompetitive conduct that restrains competition is entitled to state action immunity. The restraint must be a product of a "clearly articulated and affirmatively expressed" state policy to displace competition, and the state must actively supervise any private anti-competitive conduct.⁴

In its 1985 *Southern Motor Carriers* decision, the Supreme Court held that a state need not "compel" private anti-competitive conduct in order to satisfy this test.⁵ In that case, state regulation of collective rate-making by intrastate motor carriers was considered sufficient. Thus, *Southern Motor Carriers* suggests that at least some forms of state insurance regulation could protect concerted decisions among insurers from antitrust liability, even if the McCarran-Ferguson exemption did not exist.

Distinctions remain, however, between the McCarran-Ferguson act and the state action doctrine. States may regulate some insurer conduct in a manner that is sufficient to trigger the McCarran-Ferguson exemption, but not sufficient to provide state action immunity. For example, it has been held that states do not have to regulate the specific practices challenged under the antitrust laws, for the McCarran-Ferguson immunity to attach.⁶ Ostensibly, unless insurer's practices amount to a boycott, the states are free to regulate insurance or choose not to regulate it as they see fit. They do not have to *expressly* authorize or proscribe a specific activity. For the exemption to apply it is enough that a detailed overall scheme of regulation exists.⁷

Without a detailed, state by state analysis of regulation, it is difficult to assess the extent to which insurer decisions would enjoy state action immunity from the antitrust laws. Nevertheless, one example of a change in insurer regulation which would be brought about if solely the state action doctrine were in effect is that competitive rating systems may have to switch to prior approval systems in order to trigger the state action doctrine. In any event, a switch to reliance on the state action doctrine to protect certain cooperative action by insurers would subject the regulation and operation of the insurance industry to years of uncertainty and instability due to the potential for costly litigation and conflicting judicial interpretations relative to the scope and operation of the state action doctrine. These litigation costs may put smaller insurers at a great disadvantage and work to decrease competition.

Federal Oversight

Supporters of the repeal of the McCarran-Ferguson Act can be broken down into two general camps. There are those who sincerely believe that antitrust laws should apply to everyone and that repeal of the McCarran-Ferguson Act will enhance competition in the insurance industry. On the other hand, there are those who see repeal of McCarran-Ferguson as merely one step towards eventual Federal regulation.

Historically, both the authority and the capacity to regulate insurance have been vested

³ *Parker v. Brown*, 317 U.S. 341 (1943).

⁴ *California Retail Liquor Dealers Association v. Midcal Aluminium, Inc.*, 445 U.S. 97, 105 (1980).

⁵ 471 U.S. 48 (1985).

⁶ *Klamath-Lake Pharmacy v. Klamath Medical Services Bureau*, 701 S.2d 1276, 1287 N.10 (9th cir.) *Cert. denied* 464 U.S. 822 (1983). See also *Addisi v. Equitable Life Assurance Society*, 503 F.2d 725 (9th cir. 1974), *Cert. denied* 420 U.S. 929 (1975), *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419 (4th Cir. 1984); *Commander Leasing Co. v. Transamerica*, 447 F.2d 77 (10th Cir. 1973).

⁷ *Id.*

in the states. There is currently no Federal agency with the mandate or the requisite flow of information to perform any broad supervisory or oversight function.

The quality of state insurance regulation has been characterized as uneven, and the coordination of interstate regulatory activities has, at times, been problematic. Critics of state regulatory effectiveness emphasize the disadvantages of nonuniformity that results from a multiplicity of state insurance codes and the duplication and inefficiency this engenders.

Supporters of state regulation counter that the existing state regulatory system has several advantages. First, a local system is better able to respond to the needs of local insurance purchasers. Second, state regulators can respond to problems within the state's insurance market in a more timely manner than can the Federal regulators. Third, change is more moderate under state regulation and therefore, less disruptive to the insurance marketplace because it occurs state by state rather than throughout the entire country at one time. Finally, regulatory innovation is encouraged because individual states can experiment with new ideas and changes that do not affect the entire insurance marketplace.

Reform Initiatives

In 1979, President Carter's National Commission for the review of antitrust laws and procedures, concluded that McCarran-Ferguson should be repealed and replaced with a law limiting collective activities among insurers. The Commission also recommended a comprehensive study of the economic regulation of the insurance industry. In hearings before the commission, the Federal Trade Commission suggested that the Federal antitrust laws should be fully applied to the insurance industry, with specific narrowly-drawn exemptions for particularly necessary or highly desirable activities. The Justice Department at that time also took the position that antitrust immunity is not necessary for the survival of a healthy insurance industry.

In October 1979, the General Accounting Office issued a report, "Issues and Needed Improvements in State Regulation of the Insurance Business," which was critical of state handling of consumer education, classification rating and review, and consumer complaints. The Senate judiciary sub-committee on antitrust, monopoly and business rights held hearings on the report shortly after it was released, and a bill was subsequently introduced to amend the McCarran-Ferguson Act by imposing a series of minimum Federal Standards on state insurance regulation. There was no further action on this bill.

As in past sessions of Congress, a number of McCarran reform proposals were introduced in the 99th Congress. These proposals provided for repeal and a broad range of modification options. The McCarran "repeal" initiatives generally have been structured to repeal the act in its entirety, both antitrust exemption and state regulatory authority, or to repeal the antitrust exemption provision only, leaving intact the state regulatory authority. Repeal initiatives have been viewed as the most expedient way to resolve legal impediments to a more active Federal oversight or supervisory role in regulating the industry. Such proposals have also been viewed as a useful vehicle for exerting political pressure upon the industry. Proposed modification options include separate proposals that would: require "effective" state regulation for continued Federal antitrust immunity; remove the antitrust exemption but preserve state insurance taxation authority; limit immunity to identified certain "essential collective activities," to be determined by the Federal Trade Commission; limit the use of the damage remedy under the Clayton Act in legal actions related to insurance rates; and limit the antitrust exemption only to underwriting functions and activities and not to other activities such as advertising. The House judiciary subcommittee on monopolies held two days of general hearings on the McCarran-Ferguson Act (March 9th and July 24th, 1986) at which Chairman Rodino expressed considerable interest in oversight of the insurance industry. The statute was discussed in a number of other hearings, primarily those focusing on continuing commercial insurance market problems.

Early in the 100th Congress Senator Metzenbaum introduced S.80, a bill to repeal the

McCarran-Ferguson Act of 1945. A hearing was conducted before the full Senate judiciary committee on February 18, 1987. Following the hearing, Senator Metzenbaum abandoned efforts to win outright repeal of the McCarran-Ferguson Act and submitted a revised initiative that would modify only the antitrust component of the Act while providing some "safe harbors" of joint industry activity, with respect to the collection of historical data on claims or reserves, on the preparation of policy forms and in participation in joint underwriting pools. The new measure, S.1299, introduced May 29, 1987, superceded S.80 and specifically reaffirmed the continuation of state regulation of the business of insurance. S.1299 was also cosponsored by Senators Simon, Biden, and Kennedy. Senator Metzenbaum, Chairman of the Antitrust and Monopoly subcommittee, sought bipartisan support for the bill and reportedly had the backing of key members of the Senate Judiciary Committee. The Senate Judiciary Antitrust and Monopoly subcommittee conducted hearings June 2, 1987 on McCarran-Ferguson reforms specifically to "showcase" S.1299, the compromised modification measure that was introduced shortly before the hearing.

Senator Simon introduced S.804, a bill to modify only the antitrust exemption of McCarran-Ferguson. Some collective activities, as defined in the bill are allowed. Simon's proposal was based upon recommendations made in 1979 by the National Commission for the Provision of Anti-Trust Law and Procedure. The bill would allow collection and exchange of loss data and the joint underwriting of large risks, but would prohibit the exchange of data pertaining to insurers' costs of doing business. The bill also would give the Federal Trade Commission authority over insurance companies engaging in deceptive trade practices.

Representative Gibbons introduced H.R. 2277 in the House on May 5, 1987. The bill provided that the antitrust exemption applicable to the business of insurance shall apply only to the business of life, health and hospitalization insurance. This would repeal McCarran only for the property/casualty segment of the industry.

STATUTE OF LIMITATIONS

A statute of limitations is a law cutting off a cause of action, including medical liability actions, after the expiration of a specified time period. With respect to medical liability, the statute usually begins to run from either the date of occurrence or the date the alleged medical injury was or should have been discovered.

The primary purpose of a statute of limitations is to require that a claim be asserted within a specified time period while the pertinent evidence is available, and while witnesses are still available. Also, it is generally believed that the spectre of a lawsuit should not continue for an indefinite time. In the medical liability area, a shorter, more definite statute of limitations eliminates a "long tail" in claims, thereby making the writing of medical liability insurance more actuarially predictable.

a) Specific medical liability statutes of limitations

Every state has a statute of limitations applicable to medical liability actions. However, in some states the statute is a general one, applicable in all tort actions. States establishing a specific statute of limitations for medical liability cases are as follows:

- | | | |
|-----------------------------|--------------------|--------------------|
| 1. Alabama* | 16. Kentucky | 31. North Carolina |
| 2. Arizona (repealed 1985)* | 17. Louisiana | 32. North Dakota |
| 3. Arkansas | 18. Maine* | 33. Ohio* |
| 4. California | 19. Maryland | 34. Oklahoma* |
| 5. Colorado* | 20. Massachusetts | 35. Oregon |
| 6. Connecticut* | 21. Michigan | 36. Rhode Island |
| 7. Delaware | 22. Minnesota | 37. South Carolina |
| 8. Florida | 23. Mississippi | 38. South Dakota |
| 9. Georgia* | 24. Missouri | 39. Tennessee* |
| 10. Hawaii | 25. Montana | 40. Texas* |
| 11. Idaho | 26. Nebraska | 41. Utah* |
| 12. Illinois* | 27. Nevada | 42. Vermont |
| 13. Indiana* | 28. New Hampshire* | 43. Washington |
| 14. Iowa | 29. New Mexico | 44. Wisconsin |
| 15. Kansas* | 30. New York | 45. Wyoming |

b) Maximum statute of limitations period

In many states the statute of limitations for medical liability actions begins to run only upon discovery of the injury. Since such injuries may be discovered several years after the treatment was rendered, the time period for filing an action may be very uncertain under such statutes. This period of uncertainty is often referred to as the "long tail." The "long tail" is often cited by insurance companies as a major difficulty in establishing medical liability insurance premiums on an actuarially sound basis.

* See section entitled Court Decisions: Statute of Limitations

INTRODUCTION

MAY BE DATED

A statute of limitations is a law that requires a party who believes himself or herself to have been injured to bring an action against the responsible party within a certain time frame. Most states and the District of Columbia have enacted such statutes to protect architects, engineers and others in the construction industry from exposure to unlimited liability on individual projects.

These laws attempt to strike a reasonable balance between the interests of those who may be potentially "harmed" and the rights of defendants to be free of potential suits after a reasonable period of time. In states where no such legislation is in effect, design professionals face a lifetime of liability on each of their projects.

Most state laws relating to design professionals are actually "statutes of repose." These are laws that set time periods within which a suit may be filed regarding a cause of action regardless of when the cause occurred. The usual statute of limitations starts to run from the date of injury or other cause of action and actions brought after the end of the statutory time period are barred. The statute of repose establishes the beginning of the time period not the cause of action, such as an injury, but another event, such as the substantial completion of a building. When the specified time period has expired, suits for actions occurring after that period are barred.

State statutes of limitations for design professionals and the construction industry come under attack in the courts periodically, and may in fact be found to be unconstitutional. A review of the case law referred to in those situations will provide a complete understanding of the problems involved in an individual state. It is important that AIA state and local components, as well as individual architects, closely monitor activity relative to their state's statutes and that industry members now seeking new or amended laws carefully review related legislative and judicial activity to track a well-defined path through the legislative process.

AIA's "Compendium: State Statutes of Limitations" is timely and should be a useful working tool for those dealing with this issue.

SUMMARY

Alabama:	No statute of limitations at this time; previous law declared unconstitutional
Alaska:	Six years from substantial completion / <i>see also W.C. 1980</i>
Arizona:	Does not have a statute of limitations for design professionals
Arkansas:	Five years from substantial completion
California:	Ten years from substantial completion
Colorado:	Ten years from substantial completion
Connecticut:	Seven years from substantial completion
Delaware:	Six years from substantial completion
District of Columbia:	Ten years from substantial completion
Florida:	Four years from actual possession by owner
Georgia:	Ten years from substantial completion
Hawaii:	Ten years from substantial completion
Idaho:	Six years from substantial completion
Illinois:	Ten years from substantial completion plus four years from discovery of cause to take action
Indiana:	Ten years from substantial completion
Iowa:	Does not have a statute of limitations for design professionals
Kansas:	Ten years after performance of services
Kentucky:	Five years after performance of services
Louisiana:	Ten years after occupation by owner
Maine:	Ten years after substantial completion
Maryland:	Ten years after improvement becomes available
Massachusetts:	Six years after performance of design or construction
Michigan:	Six years after occupancy or acceptance of improvement
Minnesota:	Fifteen years after substantial completion
Mississippi:	Six years after written acceptance or use
Missouri:	Ten years after completion of construction

Montana:	Ten years after completion of construction, plus one year for action after cause
Nebraska:	Ten years after professional service is rendered
Nevada:	Eight years after substantial completion
New Hampshire:	No statute of limitations at this time; previous law declared unconstitutional
New Jersey:	Ten years after performance of services and construction
New Mexico:	Ten years after substantial completion
New York:	Three years after cause for action
North Carolina:	Six years after substantial completion
North Dakota:	Ten years after substantial completion
Ohio:	Ten years after performance of services and construction
Oklahoma:	Five years after substantial completion, plus two years for action after cause
Oregon:	Six years after substantial completion
Pennsylvania:	Twelve years after substantial completion
Rhode Island:	Ten years after substantial completion
South Carolina:	No statute of limitations at this time; previous law declared unconstitutional
South Dakota:	No statute of limitations at this time; previous law declared unconstitutional
Tennessee:	Four years after substantial completion
Texas:	Ten years after substantial completion
Utah:	Seven years after substantial completion
Vermont:	Six years after cause of action
Virginia:	Five years after performance of services
Washington:	Six years after substantial completion
Wisconsin:	Six years after substantial completion
Wyoming:	Ten years after substantial completion

NCSL STATE LEGISLATIVE SUMMARY:
AUTOMOBILE INSURANCE/LIABILITY INSURANCE

**National Conference of
State Legislatures**



DRAFT

SUMMARY

AUTOMOBILE INSURANCE/LIABILITY INSURANCE

The attached summary represents various actions taken or planned for interim study by state legislatures. The list highlights legislative activity and represents a compilation as of the summary date.

This information has been produced through the cooperation of state legislative staff personnel in each state.

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June 30, 1989

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Robert D. Boerner

State Legislative Summary for January 1, 1989 to June 30, 1989

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TABLE OF CONTENTS

1989 State Legislative Activity -- Automobile Insurance

1

Summaries of State Legislation (Automobile Insurance)

Alabama	3
Alaska	4
Arizona	4
Arkansas	5
California	5
Colorado	7
Connecticut	8
Delaware	8
Florida	8
Georgia	11
Hawaii	12
Idaho	13
Illinois	13
Indiana	16
Iowa	17
Kansas	18
Kentucky	18
Louisiana	18
Maine	20
Maryland	21
Massachusetts	22
Michigan	22
Minnesota	25
Mississippi	25
Missouri	27
Montana	27
Nebraska	28
Nevada	28
New Hampshire	28
New Jersey	29
New Mexico	29
New York	30
North Carolina	31
North Dakota	31
Ohio	33
Oklahoma	33
Oregon	34
Pennsylvania	36
Rhode Island	39
South Carolina	39
South Dakota	41
Tennessee	42
Texas	42
Utah	43
Vermont	44
Virgin Islands	44
Virginia	44
Washington	45

West Virginia	45
Wisconsin	46
Wyoming	47
Studies and Proposals (Automobile Insurance)	49
Proposition 103 Chart	51
Office of Consumer Advocate for Insurance Chart	52
Litigation	53
Index (Automobile Insurance)	54
Summaries of State Legislation (Property/Casualty Insurance)	61
Index (Property/Casualty Insurance)	68
Summaries of State Legislation (Tort Reform)	70
Index (Tort Reform)	84

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TORT REFORM

ALABAMA

Introduced

- SB 346** Provides for a statute of limitations in tort and contract actions against materialmen.
- SB 347** Provides for a statute of limitations in tort and contract actions against architects and engineers.
- SB 424** Includes officers appointed by mayors in the category of officers of non-profit corporations who are immune from civil liability.
- SB 507** Grants law enforcement officers and agencies civil immunity for certain arrests.
- HB 8** Requires the Commissioner of Insurance to annually report to the Legislature the effect of the enactment of "tort reform" statutes on insurance rates.
- HB 268** Limits the amount of judgments rendered against governmental entities' employees, officers, officials, and servants.

ALASKA

Introduced

- SB 94** Limits civil liability of the Alaska National Guard.
- SB 159** Limits liability relating to the release and supervision of persons in state custody.
- SB 228** Limits civil liability of certain volunteers.
HB 115
- SB 229** Limits liability for damages arising out of hazardous recreational activities.
- SB 323** Creates the Alaska Health Care Claims Board (medical malpractice).
HB 345
- HB 166** Declares a legislative intent and provides mechanisms to make civil justice in Alaska more equitable.
- HB 238** Extends the period in which civil actions are tolled for persons with mental disabilities and extends the statute of limitations for civil actions brought by victims of sexual abuse.
- HB 333** Relates to civil actions against insurers for unfair or deceptive acts.
- HB 334** Requires certain persons to obtain malpractice insurance.
- HB 336** Amends provisions related to medical malpractice advisory panels.

HB 337	Amends provisions related to health care provider liability insurance.
HB 349	Makes a special appropriation to the Alaska Medical Malpractice Matching Fund.
HB 350	Creates the Alaska Medical Malpractice Matching Fund.
Resolved	
SJL 41 HJR 40	Supports the status of the Medical Indemnity Corporation of Alaska.

ARIZONA

Introduced

HB 2307	Provides for periodic payments of damage awards in medical malpractice actions.
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CALIFORNIA

In Maria E. Thing v. James V. La Chusa, the California Supreme Court ruled that a mother cannot sue for negligent infliction of emotional distress involving an accident because she did not witness the actual accident involving her son.

COLORADO

Introduced

HB 1137	Provides for personal liability of corporate officers and shareholders in corporations which fail to obtain insurance as required by the "Workmen's Compensation Act of Colorado."
---------	--

"Child Protection Bill" -- raises the state's cap on non-economic damages in cases alleging wrongful death of children to \$250,000 from \$45,000. Allows for recovery for grief, loss of companionship, pain and suffering, and emotional stress.

FLORIDA

Introduced

SB 316	Relates to immunity from liability.
SB 389	Relates to offers of settlement.
SB 833	Relates to limitations of actions.
SB 908	Relates to arbitration.
SB 1024	Relates to damages.
SB 1131	Relates to collateral sources of indemnity.
SB 1197	Relates to immunity from civil liability.

SB 117
SB 146
SB 720
SB 1017
SB 1300

Relates to Florida Birth-Related Neurological Injury Compensation Plan.

CS/HB 153

Provides immunity from liability for law enforcement officers for conduct related to enforcement of the "combat automobile theft" program.

GEORGIA

Enacted

SB 239

Provides for tort action in cases where it is proven that a plaintiff has used civil proceedings with malice and without justification. Allows for complete defenses for a claim of abusive litigation: if the accused plaintiff withdraws his or her claim within 30 days of being notified that a countersuit has been filed; if the accused plaintiff can provide to have acted in good faith; or if the accused plaintiff was "substantially successful" in the suit that sparked the abusive litigation claim.

HB 472

Provides that any corporation shall have an insurable interest in the life or physical or mental ability of any of its directors, officers, or employees, and others whose death or disability might cause financial loss to the corporation. Act 579.

HB 525

Repeals code section 9-15-14 of the Official Code of Georgia Annotated regarding the assessment of litigation costs and attorney's fees in frivolous cases.

HAWAII

Enacted

HB 231

Amends provisions of Act 2, First Special Session Laws of 1986, by extending the repeal date of provisions requiring rate reductions on commercial liability insurance rates; rebates or credits for excessive rates; prohibition on cancellation of policies; notice requirements for nonrenewal of policies; abolition of joint and several liability for joint tortfeasors; and limitation on damages for pain and suffering in civil actions to October 1, 1991.

Introduced

SB 1964
HB 1165

Childcare Tort Reform Act of 1989.

ILLINOIS

Introduced

SB 512

Limits in personal injury cases the maximum recovery for non-economic loss to which a plaintiff might be entitled or for which judgment may be rendered to a plaintiff to \$250,000. Defines non-economic loss. Prohibits the jury from being instructed or informed of the limitation on awards for non-economic loss.

SB 875

Prohibits physician malpractice insurers from denying coverage to a physician because the physician is employed or has a contract with a governmental agency.

INDIANA

A law, which takes effect on January 1, 1990, requires that insurance companies give the state figures on direct premiums written, premiums earned, direct losses paid, losses incurred, losses paid, and allocated and unallocated loss adjustment expenses for the following coverages: lawyers' professional liability; recreational facility liability; products liability; uninsured and underinsured motorists; owner, landlord and tenant liability; and day care center liability.

Governor Evan Bayh signed a bill which raises the cap on total recoverable damages in medical malpractice cases from \$500,000 to \$650,000.

IOWA

Introduced

- SF 238** Relates to compensation of persons suffering loss as a result of medical malpractice, by establishing a limitation on non-economic damages, and requiring expert certification of claims by affidavit. Amends the statute of limitations for claims brought by minors and mentally ill persons. Provides for periodic payment of certain judgments for future injuries.
- SF 274** Permits the Commissioner of Insurance to require that medical malpractice insurance rates be based upon in-state experience when credible, regional experience if in-state experience is not credible, or national experience if both in-state and regional experience is not credible for ratemaking purposes.
- SF 332** Authorizes the Division of Insurance of the Department of Commerce to regulate the business of legal expense insurance.
- SF 390** Relates to the transfer of agricultural land by restricting the time land can be held by financial and insurance institutions.
- HF 170** Establishes a cap on non-economic damages of \$250,000 per defendant.

KANSAS

The Kansas Supreme Court, on May 30, 1989, upheld a law which caps awards for pain and suffering in personal injury cases to \$250,000.

LOUISIANA

Enacted

- SB 228** Limits liability of farm or forest landowners. Act No. 119.

Introduced

- SB 137** Provides civil liability immunity to certain physicians and hospitals.
- SB 170** Limits liability of restaurants or persons donating food to restaurants.

SB 196	Limits liability of non-profit poison control centers. (Sent to Governor Buddy Roemer)
SB 486	Limits liability of an owner of farm or forest land for injury, death, or loss.
SB 531	Limits liability of an owner of property not used primarily for commercial recreational purposes, an owner of recreational property, and Department of Wildlife and Fisheries property. (Sent to Governor Buddy Roemer)
SB 606	Provides immunity to health care providers who render emergency services.
SB 614	Extends exemption from liability under the Good Samaritan Law to a professional medical corporation.
SB 620	Extends the provisions of the Good Samaritan Law to public and private health care providers.
SB 761	Defines and provides for an award of exemplary damages for unfair claims settlement practices.
SB 780	Provides for the limitation of liability of a trustee of a self-insurance trust fund. (Sent to Governor Buddy Roemer)
SB 786	Limits liability for certain acts of a person under a contract.
HB 106	Limits liability of schoolteachers under certain circumstances.
HB 222	Limits liability for prepared food donated to a food bank. (Sent to Governor Buddy Roemer)
HB 228	Limits liability of private agricultural pesticide applicators.
HB 241	Extends Good Samaritan civil damage immunity to physicians and hospitals.
HB 288	Limits liability for perishable, salvageable, or prepared food donated to a food bank.
HB 333	See HB 288.
HB 682	Limits liability of property owners for damage or loss to certain trespassers.
HB 948	Extends the Good Samaritan Law to veterinarians. (Sent to Governor Buddy Roemer)
HB 964	Limits the civil liability of physicians, surgeons, hospitals, and their employees.
HB 990	Authorizes tort liability of a principal.
HB 997	Provides liability for gross, wanton, or willful misconduct by an employer.
HB 1016	See SB 780.
HB 1120	Limits the liability of a school board. (Sent to Governor Buddy Roemer)
HB 1340	See SB 531.

- HB 1341** Provides immunity to medical corporations.
- HB 1343** Provides immunity from civil damages for rendering emergency services.
- HB 1344** Provides civil immunity to certain health care providers.
- HB 1345** Provides civil immunity for refusing to render emergency medical services in certain cases.
- HB 1505** Limits the liability of volunteer athletic coaches.
- HB 1639** Limits the liability of owners of animals not in their custody.

MARYLAND

Enacted

- SB 56** Limits mental health care providers' liability.
- HB 50**
- SB 639** Exempts agents of a cooperative housing corporation from personal liability.
- HB 66** Provides immunity from civil liability for volunteers of charitable organizations.
- HB 162** Provides limited immunity from civil liability for retail establishments.
- HB 382** Provides limited immunity from civil liability for sanitary districts.
- HB 1410** Provides limited immunity from civil liability for non-profit community associations.

MICHIGAN

Introduced

- SB 2** Provides for notice of a provision requiring arbitration of malpractice claims to provider panel members and persons who have coverage.
- SB 3** Provides for notice of a provision requiring arbitration of malpractice claims to provider panel members and persons who have coverage.
- SB 4** Provides for notification of insureds a provision in health insurance policies a provision for arbitration of medical malpractice claims.
- SB 7** Includes physicians who provide medical care at state prison residences within the immunity statute.
- SB 12** Requires notification to subscribers of health care insurance the provision requiring arbitration of medical malpractice claims.
- SB 13** Amends the Michigan Health Care Arbitration Act.
- SB 22** Creates an exception to governmental immunity from tort liability for property damage by a law enforcement officer in executing a search warrant.

- SB 54** Amends list of exceptions to limitations of non-economic damages and revises the medical malpractice statute of limitations for children under seven.
- SB 59** Exempts small wine makers from mandatory liability insurance coverage where consumption is off-premises.
- SB 130** Limits liability for medical malpractice and revises joint and several liability.
- SB 323** Establishes limited immunity for health professionals who render medical care or treatment in emergency rooms or trauma centers.
- SB 424** Provides for indemnification agreements between school districts and their employees supervising asbestos removal from public and school buildings.
- SB 431** Provides immunity from certain civil liability for transporters of mental health or handicapped persons.
- SB 432** Provides immunity from liability for transporters of special education or handicapped persons.
- SB 438** Provides for immunity from tort liability for certain vehicular negligence.
- HB 4101** See SB 59.
- HB 4116** Defines a lake board as a political subdivision for purposes of governmental immunity.
- HB 4118** Provides for limited immunity from liability for certain volunteers to sports teams.
- HB 4156** Establishes a medical malpractice liability trust.
- HB 4221** Provides for immunity for volunteers of non-profit corporations.
- HB 4532** Provides for damages for wrongful medical malpractice suits.
- HB 4544** Limits the civil liability of certain emergency food providers.
- HB 4552** Provides for general amendments to products liability law.
- HB 4563** Provides for civil and criminal immunity under certain circumstances for fire personnel.
- HB 4772** Allows tort action for recovery of loss of earning capacity.

MISSISSIPPI

Enacted

- HB 1171** Amends joint and several liability. Revises the statute of limitations applicable to a medical malpractice action. Provides that an out-of-state damage suit is prohibited from being filed in Mississippi if the time has expired for bringing suit in the state where the alleged wrong occurred. Provides that all judgments or decrees not based on contract shall bear interest at a per

annum rate set by the judge from a date determined by such judge to be fair.

Introduced

- SB 2132 Lowers the period of limitation for actions for which no other period of limitation is prescribed.
- SB 2133 Provides that an out-of-state action is prohibited from being filed in Mississippi if the time has expired in the foreign jurisdiction.
- SB 2134 Increases the rate of interest charged on all judgments or decrees other than those founded on contracts.
- SB 2332 Enacts the "Mississippi Medical Malpractice Reform Act of 1989."
- SB 2334 Provides that the trier of fact in actions alleging a breach of the standard of care shall categorize damages in a certain manner.
- HB 50 Enacts the Comparative Fault Act of 1989.
- HB 112 Enacts the "Non-Economic Damage Limitation Act of 1989."
- HB 163 Revises the standard of liability in product liability actions.
- HB 425 Enacts the "Collateral Source Deduction Act of 1989."
- HB 428 Abolishes joint and several liability in civil actions.
- HB 625 Enacts the "Punitive Damage Limitation Act of 1989."
- HB 699 Enacts the "Periodic Payment of Judgments Act of 1989."
- HB 955 Enacts the "1989 Medical Malpractice Law Reform Act."
- HB 1054 Establishes certain immunities for political subdivisions, limits non-economic damages in medical professional liability actions, and amends the Mississippi Code relating to contribution between joint tortfeasors.
- HB 1172 Establishes certain liability restrictions on injuries resulting from the application of certain farm pesticides.
- HB 1173 Codifies rules and standards applicable to product liability actions.
- HB 1175 Amends the statute of limitations for certain actions.
- HB 1181 Provides that joint tortfeasors shall share the obligation imposed by a judgment in an amount equal to their percentage of fault.
- HB 1184 Extends tort immunity to non-profit charitable organizations and their members.
- HB 1188 Enacts the "Equitable Attorney Contingent Fee Act of 1989."
- HB 1190 Requires the Supreme Court to render a judgment for damages against an appellant in cases appealed to such court in which the judgment of the court

below is affirmed or which the appellant fails to prosecute his appeal to effect.

HB 1204

See HB 699.

MISSOURI

Enacted

HB 161

Amends the State's sovereign immunity law and amends the law relating to exposure to tort liability by public entities purchasing liability insurance.

HB 774

Allows certain nonresident professions to be insured by Missouri malpractice insurance associations under certain conditions.

MONTANA

Enacted

SB 157

Creates a statute of limitations for civil actions to recover damages for injury suffered as a result of childhood sexual abuse. Chapter 158.

HB 606

Makes the provider of an intoxicating quantity of alcohol to a person under 21 years of age subject to civil liability for tortious acts committed by the person while intoxicated. Chapter 448.

Introduced

SB 208

Provides that in civil tort actions, suit may be brought in any county designated by the plaintiff if the defendant is not a resident of Montana.

NEBRASKA

Introduced

LB 159

Narrows the doctrine of joint and several liability to place restrictions on so-called "deep pocket" awards. Changes the State's doctrine of "slight versus gross" negligence to one of modified comparative negligence.

NEVADA

Enacted

AB 307

Changes the burden of proving punitive damages in certain actions and limits the amount of punitive damages recoverable in certain actions.

NEW JERSEY

Enacted

SB 2673

Makes permanent the authority to limit the liability of certain corporate officers under certain circumstances. Chapter 17.

SB 3025

Appropriates \$458,867.52 from the General Fund for the payment of judgments for attorneys' fees, costs and disbursements which have been awarded against the Legislature. Chapter 75. (Governor Thomas H. Kean used the

line item veto to delete the amount of \$458,867.52 and inserted the amount of \$1.00.)

AB 2443

Provides that qualified common interest communities, such as condominium communities, may amend their bylaws to provide that the owners' association is not liable in any civil action which is brought either by or on behalf of a unit owner or his spouse for bodily injuries sustained by the unit owner or his spouse. Provides an exception. Chapter 9.

NEW MEXICO

Enacted

HB 514

Grants immunity from liability to volunteers who assist athletic organizations. Laws 1989, Chapter 345.

Introduced

SB 128

Provides indemnification of trustees and amends the Uniform Trusts Act.

SB 279

Limits the liability for volunteers of non-profit organizations.

SB 457

Provides for civil liability in sales or service of alcoholic beverages.

SB 481

Makes certain changes in the Tort Claims Act providing for stays and appeals in certain circumstances.

SB 529

Changes certain provisions of the Tort Claims Act.

SB 596

Adds a definition of "occurrence" to the Tort Claims Act.

SB 655

Makes changes in the Tort Claims Act concerning past and future medical care and regulated expenses of a claimant.

HB 417

Makes changes in the Tort Claims Act. Adds definitions. Changes provisions regarding liability in connection with airports, highways, and streets. (Vetoed by Governor Garrey Carruthers)

HB 740

Changes the definition of "public employee" in the Tort Claims Act.

HB 743

Changes certain provisions of the Tort Claims Act.

HB 841

See SB 457.

HB 846

Changes limitations on the personal liability of corporate directors that may be included in the articles of incorporation.

NEW YORK

Enacted

SB 6265

Extends the provisions relating to the regulation of professional medical conduct. Chapter 55.

OKLAHOMA

Enacted

SB 161 Amends certain provisions of the Governmental Torts Claims Act. Chapter 25.

The Oklahoma Court of Appeals awarded \$1 million in punitive damages against the Sooner Life Insurance Co. for fraudulently inducing Louis John and Margaret E. Modica into buying a life insurance policy.

OREGON

Introduced

HB 2426 Requires the jury to compare any fault of a plaintiff with defendant's allegedly defective product to determine percentages of fault in product liability cases.

TENNESSEE

Enacted

SB 401 Exempts donors of food from certain tort liability. Public Chapter 476.
HB 119

SB 424 Removes liability from suit for certain members of non-profit corporations
HB 267 under certain circumstances. Public Chapter 479.

SB 530 Authorizes the waiver of landowner's liability in certain circumstances.
HB 867 Public Chapter 149.

SB 1332 Provides for written waivers of liability for certain uses of land.
HB 1069 Public Chapter 250.

Introduced

SB 194 Lengthens the statute of repose in products liability actions.
HB 1180

SB 432 Removes liability from certain persons for distribution of defectless
HB 909 products in certain circumstances.

SB 481 Prohibits pleading specific amount of damages in certain complaints.
HB 836

SB 528 Creates a cause of action against an employer for removing warning
HB 860 labels and safety devices from machinery in the workplace.

SB 602 Grants mental health professionals immunity from certain civil suits
HB 155 resulting from violent acts of patients.

SB 619 Makes providers of horse trails and related services liable only in cases
HB 713 of gross negligence or willful conduct.

**SB 701
HB 347**

Requires attorney contingency fees to be in writing and information on such arrangements to be provided to clients.

**SB 703
HB 345**

Prohibits punitive damage awards under certain circumstances.

**SB 704
HB 344**

Prohibits attorney percentage contingency fees.

**SB 738
HB 924**

Revises the itemization of damages recoverable in wrongful death actions.

**SB 798
HB 1102**

Revises items includable as damages in medical malpractice cases.

**SB 812
HB 1362**

Creates a presumption of reasonableness and necessity of medical expenses in certain civil actions and specifies a time limit.

**SB 889
HB 421**

Grants immunity to certain medical organizations which participate in peer review.

**SB 1150
HB 792**

Creates partial tort immunity for organizers of historical re-enactments.

**SB 1122
HB 1429**

Establishes liability of and standards for manufacturers and administrators of childhood vaccines.

TEXAS

Introduced

**SB 41
HB 15**

Establishes new standards of proof in product liability lawsuits. Allows judges to assess a portion of the responsibility for a product-related accident to the claimant. Installs a two-part trial system that would require juries to determine first whether a manufacturer was liable for damages and award compensatory damages and then separately decide the amount of any punitive award. Narrows the liability of manufacturers and sellers.

UTAH

Enacted

SB 24

Provides that punitive damages may be awarded if it is established by clear and convincing evidence that a tortfeasor's actions were willful and malicious or intentionally fraudulent, or that his conduct manifested a knowing and reckless indifference toward the rights of others. Provides that evidence of a party's wealth is not admissible until a finding of liability for punitive damages has been made. Also provides that 50% of a punitive damage award above \$20,000, after payment of attorneys' fees and costs, be remitted to the state. 1989 Utah Laws 237.

SB 25

Repeals the unconstitutional "statute of repose" provision of the Products Liability Act and establishes a statute of limitations of two years from the time both the harm and its cause is discovered. 1989 Utah Laws 119.

Introduced

- SB 21** Amends the Products Liability Act. Establishes a statute of limitations in bringing claims. Provides manufacturers' and sellers' liability.

VERMONT

Introduced

- SB 205** Creates a new administrative procedure for medical malpractice claims which eliminates jury trials and requires licensing boards to discipline negligent doctors.
- HB 461** Creates a dispute resolution procedure for medical negligence claims.

WASHINGTON

An April 27, 1989 Washington Supreme Court decision held as unconstitutional a portion of the 1986 Washington law that caps non-economic damage awards. The court ruled 6-3 that the cap on non-economic damages violated a plaintiff's right to trial by jury.

Washington's tort reform law, which included the non-economic damage cap and eliminated joint and several liability in specified cases, was a comprehensive tort reform measure.

WASHINGTON, D.C.

Introduced

- Bill 8-253** Limits recovery for non-economic loss in certain civil actions; modifies the doctrine of joint and several liability; provides for a comparative fault system; designates that portion of an award upon which a contingency fee may be computed; sets forth a standard of proof which must be met in order to award punitive damages; provides immunity from civil liability for volunteers of non-profit organizations, homeowners' associations, and the District government; allows for a limitation of the personal liability and indemnification of directors and officers of certain organizations; and provides for an assessment of the effectiveness of the Act by the Superintendent of Insurance.

WISCONSIN

Introduced

- SB 46** Specifies that the rule barring admission of subsequent remedial actions applies to product liability cases, whether based on negligence or the theory of strict liability in tort.
- SB 62** Modifies Wisconsin's comparative negligence system. Specifies that the changes do not apply to parties whose action results in damages or to damages resulting from environmental pollution, hazardous waste, or substances of waste disposal systems.
- SB 79** Limits the time a person may start a lawsuit for damages related to professional accounting services.

- SB 80** Provides under what circumstances a certified public accountant may be held civilly liable.
- SB 91** Includes provisions similar to SB 62. Reduces the maximum amount that a claimant may recover for non-economic damages caused by the negligence of a health care provider.
- SB 92** Reduces the maximum amount that a claimant may recover for non-economic damages caused by the negligence of a health care provider. Removes a January 1, 1991 ending date, permanently limiting recovery of non-economic damages caused by the negligence of a health care provider to a \$250,000 maximum.
- SB 110** Removes the present maximum limit of \$50,000 that may be awarded to the spouse, children, or parents of a deceased person for the loss of society and companionship.
- SB 153** Adds a representative of the Department of Agriculture, Trade and Consumer Protection to the membership of the State Emergency Response Commission.
- AB 150** Modifies the comparative negligence system. Reduces the maximum amount that a claimant may recover for non-economic damages caused by the negligence of a health care provider.
- AB 151** Revises a joint tort-feasor's liability if his or her percentage of negligence is less than 25%. Provides that in this situation, the joint tort-feasor's liability is limited according to his or her percentage of negligence.
- AB 152** Eliminates the current limitation on non-economic damages in medical malpractice cases. Amends other provisions of laws relating to medical malpractice.
- AB 154** See SB 79.
- AB 156** Establishes limits on attorney contingency fees. Amends laws on contingency fee arrangements.

DRAFT

INDEX (TORT REFORM LEGISLATION)

* = Enacted

A. Alternative Dispute Resolution

FL SB 389, 908
MI SB 2, 3, 4, 12, 13
VT SB 205; HB 461

B. Child Care

HI SB 1964*; HB 1165*

C.1 Damages

AK SB 229
AL HB 268
AZ HB 2307
FL SB 1024, 1131
GA HB 525*
HI HB 231*
IA SB 238; HF 170
IL SB 512
MI SB 54; HB 4532
MS SB 2334; HB 112, 425, 1054, 1190
NJ SB 3025*
NV AB 307*
TN SB 481, 738, 798, 812; HB 836, 924, 1102, 1362
WI SB 62, 91, 92, 110; AB 150, 152

C.2 Punitive Damages

DC B 8-253
LA SB 761
MS SB 625
TN SB 703; HB 345
TX SB 41; HB 15
UT SB 24*

D. Immunities

1. Non-Profit Corporations and Organizations

AL SB 424
DC B 8-253
LA SB 196
MI HB 4221
MS HB 1184
TN SB 424*; HB 267

2. Other

FL SB 316, 1197
MI SB 431, 432, 438; HB 4563
MO SB 639*; HB 162*, 382*, 1410*
NJ AB 2443*
TN SB 401*, 432, 619, 1150; HB 119*, 713, 792, 909

3. Physicians/Hospitals

LA SB 137, 606, 614, 620; HB 241, 1341, 1343, 1344, 1345
MI SB 7, 323
TN SB 602, 889; HB 155, 421

4. Sovereign

AK SB 94, 159
AL SB 507
FL CS/HB 153
MI SB 22; HB 4116
MS HB 1054
MO HB 161*

5. Volunteers

AK SB 228; HB 115
LA HB 1505
MD HB 66*
MI HB 4118, 4221
NM HB 514*

E. Joint and Several Liability

DC B 8-253
HI HB 231*
MI SB 130
MS HB 428, 1171*, 1181
NE LB 159
WI AB 151

F. Limits on Liability

LA SB 228*, 486, 531, 780, 786; HB 106, 222, 228, 288, 333, 682, 964, 1016, 1120, 1340, 1639
MD SB 56*; HB 50*
MI HB 4544
MS HB 1172
NJ SB 2673*
NM SB 279; HB 846
TN SB 530*, 1332*; HB 867*, 1069*

G. Medical Malpractice

AK SB 323; HB 345, 334, 336, 337, 349, 350; SJR 41; HJR 40
AZ HB 2307
FL SB 117, 146, 720, 1017, 1300

IA SF 238, 274
IL SB 875
MI SB 2, 3, 4, 12, 13, 54, 130; HB 4156, 4532
MO HB 774*
MS SB 2332; HB 955, 1054, 1171*
NY SB 6265*
VT SB 205; HB 461
WI SB 92; AB 150, 152

H. Miscellaneous

AK HB 166, 333
AL HB 8
CO HB 1137
FL SB 833
GA HB 472*; SB 239*
IA SF 332, 390
LA HB 948, 990, 997
MI SB 59, 424; HB 4101, 4772
MS SB 2134; HB 50, 699, 1188, 1204
MT SB 208; HB 606*
NM SB 128, 457, 481, 529, 596, 655; HB 417, 740, 743, 841
OK SB 161*
TN SB 528, 701, 704; HB 344, 347, 860, 1429
WI SB 80, 153; AB 156

I. Products Liability

MI HB 4552
MS HB 163, 1173
OR HB 2426
TN SB 194; HB 1180
TX SB 41; HB 15
UT SB 21, 25*
WI SB 46

J. Statute of Limitations

AK HB 238
AL SB 346, 347
IA SF 238
MS SB 2132, 2133; HB 1171*, 1175
MT SB 157*
TN SB 194; HB 1180
UT SB 21, 25*
WI SB 79; AB 154

**1989
STATE LEGISLATIVE ACTIVITY
AUTOMOBILE INSURANCE**

Since 1945, responsibility for regulation of the insurance industry has resided with the states. Dramatic price increases in recent years have resulted in increased scrutiny of automobile insurance costs and the impact of state regulation on those costs. In 1988 and 1989, virtually all state legislatures reviewed methods of rate regulation, cancellation, nonrenewals or refusals to issue policies, automobile claims, residual market mechanisms, proposals addressing automobile theft, uninsured motorists and no-fault. A number of states enacted comprehensive legislation on many of these subjects.

Proposition 103

On November 8, 1988, California voters went to the polls to choose from among four insurance reform measures. They narrowly adopted Proposition 103. Its provisions include a one-year 20% rollback in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers," defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after this November; and election, instead of appointment, of the state Insurance Commissioner, starting in 1990. Proposition 103 also requires the Insurance Commissioner to publish for consumers a list of rate comparisons, and it 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."

California's Supreme Court, on May 4, 1989, upheld all of Proposition 103's long-term restrictions on insurance rates and practices, but it struck down as unconstitutional the provision that would have required insurers to be "substantially threatened with insolvency" before they could receive relief from the rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

Within hours of the Court's ruling, consumer groups in 44 states contacted Voter Revolt, the organization that designed Proposition 103. Several states, including Illinois, Indiana, Ohio, and Pennsylvania, introduced legislation during 1989 with similar provisions to those contained in Proposition 103.

Concern about rising costs of automobile insurance has stimulated much legislative activity in 1989 and should continue into 1990. It is a reflection of the fact that in most parts of the country it is necessary to have an automobile in order to get to work, and driving uninsured is not an acceptable alternative to most workers. In some areas, annual premiums can exceed \$5,000. Therefore, it seems likely that the provisions of California's Proposition 103 will continue to be debated in those states where automobile insurance remains prohibitively expensive and, in some cases, unavailable.

No-Fault Automobile Insurance

Since the mid-1960s, states have reviewed no-fault automobile insurance as an alternative to the tort-based insurance system. At least 20 states have adopted no-fault legislation, but the components of the laws have significant differences. The common principle underlying each law is that the insured recovers financial losses from his/her own insurance company, regardless of who is at fault.

Variations in state law involve the restrictions placed on the right to sue, conditions necessary to sue for pain and suffering, and first party coverage.

Escalating automobile insurance costs have renewed the debate as to the pros and cons of the no-fault automobile insurance system. Many proposals were considered in 1989 and will be reviewed again in 1990.

ALABAMA
1989 Legislative Session
(February 7- May 22)

Enacted

- SB 259** Requires every person transporting a child under the age of six years in a motor vehicle to provide a child passenger restraint system meeting applicable federal standards. Act 89-781.
- SB 368**
HB 557 Requires that in all instances where non-original equipment manufacturer aftermarket crash parts are used in preparing an estimate for repairs, the written estimate prepared by the insurer and repair facility shall clearly identify each such part. Act 89-662.
- HB 311** Uniform Commercial Driver License Act
- Sets testing and licensing standards for operators and employers of commercial motor vehicles. Act 89-878.
- HB 569** Amends the Uniform Certificate of Title and Antitheft Act. Requires a salvage vehicle which has been restored in Alabama to be issued a certificate of title which shall contain the word "rebuilt." Act 89-863.

Introduced

- SB 299** Provides for mandatory liability insurance as a prerequisite to the licensing of an automobile.
- SB 303** Makes the Commissioner of Insurance an elected officer of the State. Revises the rate making procedures.
- SB 364** Requires certain front seat occupants of passenger cars to wear safety seat belts.
- HB 7** Provides that certain statistical information of insurance companies be made a public record.
- HB 9** Requires that public hearings be conducted by the Commissioner of Insurance in not less than 10% of insurance rate increase filings in each 12-month period.
- HB 11** Permits the Commissioner of Insurance to levy a civil penalty of not more than \$25,000.00 for violations of the Insurance Code following an administrative hearing.
- HB 398** Concerns automobile safety.
- HB 542** Concerns automobile safety.
- HB 570** Relates to uninsured motor vehicle liability insurance policies issued in Alabama.

- HB 580** Requires the reduction of the premium charges of motor vehicle insurance for insured persons 55 years of age or older upon completion of an accident prevention course.
- HB 940** Provides that certain information of insurance companies be made a public record.
- HB 968** Requires all motor vehicle operators to have certain liability insurance coverage or financial security and provides criminal sanctions.

ALASKA
1989 Legislative Session
(January 9 - May 8)

Introduced

- SB 4, SB 44
HB 44** Relates to motor vehicle liability insurance and vehicle registration.
- SB 137** Relates to commercial vehicle driver licensing.
- SB 309** Provides the circumstances under which a named driver may be excluded from a motor vehicle insurance policy.
- HB 2** Relates to motor vehicles equipped with ignition interlock devices.

Resolved

- HJR 43** Requests that the National Highway Traffic Safety Administration amend the existing federal school bus safety standards to require three point safety belts.

ARIZONA
1989 Legislative Session
(January 9 - Late April)

Introduced

- SB 1250** Regulates collision damage waivers on rented private passenger automobiles.
- SB 1264** Repeals mandatory or compulsory automobile insurance. (Not printed since bill was not assigned to committee)
- SB 1318** Prescribes notice requirements of the cancellation of motor vehicle insurance.
- HB 2059** Makes corrections relating to insurance fees.
- HB 2245** Prescribes contents of motor vehicle liability insurance policies and removes mandatory uninsurance coverage.
- HB 2321** Requires motor vehicle financial responsibility.
- HB 2489** Requires notice of cancellation, non-renewal or failure to renew a motor vehicle liability insurance policy.

HB 2496 Identical to HB 2245, not printed.

HB 2541 Prescribes pre-approval by the Department of Insurance of insurance rates.

ARKANSAS
1989 Legislative Session
(January 9 - March 17)

Enacted

SB 270 Provides that religious denominations in certain circumstances may qualify as self-insurers for motor vehicle liability insurance purposes. Act 189 of 1989.

SB 502 Requires insurers to notify policyholders and agents of certain premium increases on renewal of commercial property and casualty insurance policies. Act 797 of 1989.

HB 1069 Provides that anyone operating a motor vehicle in Arkansas without minimum liability coverage shall be fined not less than \$50.00 nor more than \$250.00 and the person's driving privileges shall be suspended for one year. Act 801 of 1989.

HB 1785 Prohibits the approval by the Insurance Commissioner of an automobile insurance policy or contract for personal automobile liability for a policy term of six months or less. Act 815 of 1989.

HB 1937 Amends coverage under motor vehicle liability insurance. Act 896 of 1989.

CALIFORNIA
1989 Legislative Session
(January 3 - Mid-September)

Introduced

AB 354 Requires each owner of a private passenger motor vehicle, other than a motorcycle, to provide insurance that would provide personal injury protection benefits. Requires owners of other motor vehicles and of motorcycles to provide insurance providing personal injury protection benefits to persons other than operators and occupants of the vehicles, and to provide liability coverage. Persons injured in a motor vehicle accident would generally be entitled to receive specified benefits regardless of fault.

Establishes procedures for claiming benefits, including requirements of arbitration of disputes.

Provides that a tort victim would have no right to recover any damages in tort for basic economic loss, and, except in the case of serious injury, would have no right to recover non-economic loss, except as specified.

Applies to accidents occurring on or after July 1, 1990.

Prohibits insurers from increasing premium rates for first-party benefits solely on account of prior payment of benefits or claims as specified.

Provides for the establishment of the California Basic Economic Loss Reinsurance Facility to assure the availability of basic economic loss coverage to all private passenger automobile insurance consumers who are entitled, but are otherwise unable to, obtain that coverage. Provides that prior to July 1, 1991, the rate for good drivers cannot exceed \$180.00.

AB 2315

Provides for numerous significant provisions including the following:

1. Eliminates liability for damage to a motor vehicle arising out of a motor vehicle accident, except as specified, and eliminates the requirement that proof of financial responsibility be maintained as to damage to property. Eliminates a requirement that insurers offer property damage uninsured motorist coverage, but requires that collision coverage be offered, as specified.
2. Provides that it is a felony to present or cause to be presented several related types of insurance claims which are fraudulent.
3. Provides that any person engaged in the business of insurance is required to act in good faith toward, and deal fairly with, policyholders and others. Provides that a policyholder or other person may bring an action for a violation of that requirement and other statutory provisions that prohibit unfair and deceptive practices, and may recover compensatory and exemplary damages. Provides with respect to claims arising out of motor vehicle personal injury or property damage liability claims that a carrier is not liable for unfair claims settlement practices to a claimant if certain procedures are complied with.
4. Requires motor vehicle insurers to report specified information to the Insurance Commissioner, and the Commissioner is required to make the information available to the public and local law enforcement officials.
5. Requires the Insurance Commissioner to approve or issue a reasonable plan, to be known as the California Auto Plan, for the equitable apportionment among insurers, of low-income applicants for private passenger automobile insurance. Requires the existing assigned-risk plan to use rates that are actuarially sound.
6. Requires each insurance company to pay an annual fee of \$1.30 for each vehicle insured under an insurance policy it issues. Provides for the percentage of distribution of this money to the Bureau of Fraudulent Claims of the Department of Insurance and District Attorneys.
7. Requires vehicles to have a certification of equipment safety every two years as a condition of renewal of registration.
8. Requires that evidence of financial responsibility be presented as a condition of original or renewal registration of a vehicle.
9. Provides that whenever the owner of a used vehicle other than a dealer transfers the ownership to a person who is not a dealer, the transferee's insurer shall make four photographs of the vehicle. Requires motor vehicle accident reports to insurers.
10. Prohibits the sale of certain types of vehicles with a model year after specified dates. Provides for exceptions.
11. Amends the duty of peace officers in the enforcement of mandatory seat belt law provisions.
Amends the law relating to child passenger seat restraint systems. Expands the category of those who are prohibited from selling or installing child passenger seat restraint systems not conforming to applicable federal standards.
Requires car rental agencies to inform customers of the law relating to child passenger seat restraint systems and to make those systems available and offer them for rental.

12. Requires the Director of the Department of Transportation to study the costs and benefits of the use of alternative median barriers.

COLORADO
1989 Legislative Session
(January 4 - May 30 and Special Session)

Enacted

- SB 90** Requires the availability of insurance for property damage caused by uninsured motorists. (Signed by Governor Roy Romer on April 7, 1989)
- SB 128** Provides for extended disability benefits and prohibitions against certain actions by insurers regarding insurance policies that are covered by the "Colorado Auto Accident Reparations Act." (Signed by Governor Roy Romer on June 1, 1989)
- HB 1155** Enacts the "Model Quality Replacement Parts Act." Concerns the use of non-original manufacturers' automobile crash parts. (Signed by Governor Roy Romer on April 7, 1989)
- HB 1195** Provides that no lessor of motor vehicles in Colorado may sell any collision damage waiver to a lessee without a written disclosure of the terms and provisions of the waiver. Specifies the required contents of any collision damage waiver and the terms and conditions to be disclosed in writing to any lessee. Provides that failure to comply with the provisions of the law shall constitute a deceptive trade practice under Colorado law. Prohibits a certain type of exclusion in any collision damage waiver and specifically permits other such exclusions. (Signed by Governor Roy Romer on April 12, 1989; effective January 1, 1990)
- HB 1244** Continues programs of automobile safety belt systems scheduled for repeal during 1989. (Signed by Governor Roy Romer on April 23, 1989)

Introduced

- SB 98** Establishes the State Automobile Insurance Authority. Authorizes the Authority to collect such fuel taxes, registration fees, and other taxes and user fees as the General Assembly authorizes. Provides that the Authority shall solicit proposals and select the least-cost proposal to provide minimum insurance coverage for persons injured as a result of operation of motor vehicles registered in Colorado. Eliminates the requirement that vehicle owners obtain mandatory motor vehicle insurance.
- SB 186** Provides that insurers shall offer an appropriate discount on automobile insurance policy premiums for operators of covered vehicles who successfully complete a motor vehicle accident prevention course offered by a commercial driving school licensed under Colorado law.
- SB 209** Requires owners of motorcycles to have in full force and effect a complying insurance policy that compensates for personal injuries in accordance with the "Colorado Auto Accident Reparations Act." Requires motorcycle or motor-driven cycle operators and passengers to wear safety helmets that meet standards which are required to be adopted by the Department of Revenue. Provides for penalties.

- HB 1138** Amends provisions of mandatory motor vehicle insurance laws.
- HB 1182** Requires the owner of a motor vehicle to sign an affirmation that such owner has in effect a complying policy of automobile insurance or certificate of self-insurance as a condition of obtaining and renewing a valid motor vehicle registration.
- HB 1260** Creates the office of Insurance Consumer Advocate as a division in the Department of Law and the position of Insurance Consumer Advocate to head said division.
- HB 1292** Establishes the Colorado Insurance Authority to insure drivers who are unable to obtain private automobile liability insurance.
- Resolved**
- HJR 1025** Establishes an interim study committee to study private passenger automobile liability and property damage insurance. (Postponed indefinitely on May 9, 1989)

CONNECTICUT
1989 Legislative Session
(January 4 - June 7)

As of April, 1989, no enacted legislation.

DELAWARE
1989 Legislative Session
(January 10 - June 30)

Introduced

- SB 212** Requires insurers of assigned risk businesses to notify the Department of Motor Vehicles of the cancellation of certain risk policies within 60 days of the cancellation.
- HB 58** Requires certain motorists to purchase automobile insurance.
- HB 206** Amends Delaware's automobile insurance no-fault laws.

FLORIDA
1989 Legislative Session
(April 4 - June 2)

Enacted

- CS/SB 817** Defines the term "motor vehicle" for purposes of the regulation of motor vehicle service agreement companies. Revises criteria for qualifications for licensure as a motor vehicle service agreement company to provide for the deposit of certain funds and the purchase of insurance. Provides an additional criterion for the Department of Insurance to consider prior to the suspension or revocation of a license or the refusal to renew a license. Laws of Florida 89-125.
- CS/HB 153** Authorizes counties and municipalities to enact ordinances to establish "combat automobile theft" programs whereby motor vehicle owners may

enroll their vehicles by signing consent in advance for a law enforcement officer to stop the vehicle. Provides program components. Authorizes a fee for administration of the program. Provides that the motor vehicle owner is responsible for removing the program's decal. Provides immunity from liability for law enforcement officers. Laws of Florida 89-34.

Introduced

- SB 80** Limits the amount of damages that a renter of a motor vehicle may be held liable for in certain circumstances. Restricts the manner in which certain motor vehicle rentals may be advertised and the rental rates that may be charged for such rentals.
- SB 161** Provides for the Department of Insurance to be administered by a secretary appointed by the Governor, subject to Senate confirmation. Provides that the powers, duties, and functions of the Treasurer exercised in his capacities as Insurance Commissioner and State Fire Marshal be assumed by the Secretary of Insurance.
- SB 276** Requires certain motor vehicle owners or operators to maintain proof of financial responsibility for bodily injuries. Provides for the suspension of registration and the operator's license of persons who fail to maintain the required security. Provides for proof of such financial responsibility when registering a motor vehicle.
- SB 740** Relates to the regulation of insurance rates. Provides procedures for filing rates for private passenger automobile insurance. Allows for full consideration by the Department of Insurance of investment income in reviewing rates.
- CS/SB 845** Provides that interest is payable on the cash surrender of an insurance policy. Requires certain insurers to annually submit rate filings to the Department of Insurance. Makes numerous other provisions including rate regulation. (Sent to Governor Bob Martinez)
- SB 878** Prohibits the offer of sale, the sale, or the exchange of a rebuilt vehicle until the Department of Highway Safety and Motor Vehicles notes on the certificate of title for the vehicle that it has been rebuilt, unless application for a certificate of title has been filed with the Department and the Department has physically examined the vehicle to assure its identity. Provides for the stamping of a vehicle's certificate of title with words stating that the vehicle has been rebuilt.
- CS/SB 1097** Revises guidelines upon when an insured's motor vehicle insurance premium may be increased or his policy not renewed as a result of the insured being involved in a motor vehicle accident. Prohibits an insurer from imposing an additional premium, canceling a policy, or issuing a non-renewal notice as a result of a traffic infraction in specified circumstances. Requires personal injury protection coverage to be in an amount of at least \$10,000. Requires insurers offering personal injury protection coverage to make available coverage in amounts equal to bodily injury liability limits up to a specified amount.
- CS/SB 1246**
CS/HB 331 Redefines the term "uninsured motor vehicle" for purposes of uninsured motor vehicle insurance coverage. Provides that an insurer may elect binding arbitration or trial. Prohibits certain insurer actions. Prescribes

- requirements for uninsured motorist coverage. Provides that personal injury protection coverage shall include death benefits in a specified amount. (Sent to Governor Bob Martinez)
- CS/SB 1251** Relates to motor vehicle insurance risk apportionment. Requires a poll of member insurers and additional filing requirements. Prohibits a renewal discount for plan insureds. Requires a disclosure on an application for coverage. (Sent to Governor Bob Martinez)
- CS/SB 1295** Authorizes the use of certain combined liability insurance policies. Provides for certain restrictions on motor vehicle liability insurance policies to apply only to those which provide bodily injury liability coverage. Creates the Motor Vehicle Insurance Task Force of 1989. (Sent to Governor Bob Martinez)
- CS/SB 1414** Creates the "Aftermarket Crash Parts Act." (Sent to Governor Bob Martinez)
- CS/HB 99** Prohibits charging excessive prices for fueling rental cars or charging for unused fuel.
- HB 229** Requires personal injury liability motor vehicle insurance in a certain amount.
- HB 285** Mandates bodily injury coverage for motor vehicle operators or owners. Prohibits insurers from non-renewing a policy for one accident, regardless of fault, and increases the time allowable for insurers to impose a surcharge when an accident does occur. Changes the method of rate filing for automobile insurers. Revises the excess profits formula. Creates the office of Insurance Public Counsel. Creates the insured's "Bill of Rights." Clarifies language regarding personal injury protection.
- HB 333** Relates to the legal liability of an uninsured motorist.
- CS/HB 536** Requires owners and operators of certain motor vehicles to maintain bodily injury liability insurance coverage. Clarifies language regarding the limits of coverage in the Financial Responsibility Law. Sets forth penalties.
- HB 666** Changes the private passenger automobile rating procedure to that currently being used by all other lines of property and casualty insurance. Provides exceptions. Requires the Department of Insurance to use a method of accounting that would fully consider investment income in private passenger automobile rating. Eliminates language from the automobile rating law which directs the Department of Insurance to order inadequate rates to be increased.
- CS/CS/HB 855** Directs the Legislative Auditing Committee to appoint a Public Counsel to represent the general public before the Department of Insurance and the Florida Public Service Commission. (Sent to Governor Bob Martinez)
- CS/HB 1231** Provides that if an insured is not at fault in an accident, the insurer may not non-renew or increase premiums. Provides that an insurer may not fail to renew a motor vehicle insurance policy if the insured has had only one accident in which he was at fault during the past three years. Provides an insurer may not surcharge or non-renew when adjudication has been withheld for a traffic infraction. Provides that personal injury protection

limits may be sold that are equal to bodily injury limits, but cannot exceed \$100,000.

HB 1334

Creates the "Florida Insurance Rate Reduction and Reform Act of 1989."

GEORGIA
1989 Legislative Session
(January 9 - Mid-March)

Enacted

SB 31

Requires the Commissioner of Insurance to compile and release annually for public dissemination a list of all written requests for assistance by citizens against insurers licensed in Georgia which are received by the Department of Insurance. Act 489.

SB 49

Provides that insurers shall make available appropriate reductions in premiums paid for certain motor vehicle insurance coverages for persons successfully completing defensive driving courses through driver improvement clinics. Act 687.

SB 50

Requires an insurer to accept by hand-delivery an affidavit of an insured affirming that such insured's motor vehicle has been stolen. Act 392.

SB 127

Amends a statute relating to the limitation of adverse underwriting decisions by insurers, so as to provide that, with respect to a personal or family-type policy of motor vehicle insurance, no insurance institution or agent may base an adverse underwriting decision solely on the fact that the applicant has never purchased a policy of motor vehicle insurance or has not owned or been covered by such a policy during any specified period immediately preceding the date of application. Act 491.

SB 199

Increases the period of incarceration from a maximum of 30 days to a maximum of 12 months for the offense of failure to keep proof of insurance coverage in a motor vehicle during the operation of the vehicle, the offense of knowingly operating or knowingly authorizing another to operate a motor vehicle without insurance coverage on such vehicle, and the offense of making a false statement or certification with reference to insurance coverage when registering a motor vehicle. Act 415.

SB 233

Amends a statute relating to the acquisition of control of a domestic insurer or merger with a domestic insurer. Act 34.

HB 57

Provides for the calculation of loss of income benefits under motor vehicle insurance policies in the event the insured is the sole shareholder of a professional corporation. Act 536.

HB 99

Clarifies the provision that a notice of cancellation of motor vehicle insurance coverage shall be sent by the insurer to the Department of Public Safety within 15 days after the effective date of such cancellation. Provides that the insurer shall indicate the reason for the cancellation on the notice sent to the Department. Act 455.

HB 175

Revises the grounds for the refusal, suspension, or revocation of the licenses of insurance agents, solicitors, brokers, counselors, and adjusters. Act 499.

- HB 183** Amends a statute relating to the duties of a broker in placing insurance with an unauthorized insurer. Act 500.
- HB 201** Changes the time period for insurers to apply for a salvage certificate of title and requires identification on non-original equipment manufacturer aftermarket crash parts. Act 637.
- HB 205** Provides that domestic insurers shall be examined at least once every three years instead of at least once every five years. Act 465.
- HB 216** Requires every insurer which provides liability or casualty insurance coverage and which is or may be liable to pay all or any part of a claim to provide, within 60 days of receiving a written request from the claimant, a sworn statement of a corporate officer or the claims manager stating with regard to each known policy of insurance issued by it, the name of the insurer, the name of each insured, and the limits of coverage. Act 503.
- HB 314** Empowers the Commissioner of Insurance to promulgate rules and regulations regarding certain vehicle service agreements or extended warranty agreements. Act 505.
- HB 510** Provides for the form of security deposits which shall be acceptable to the Commissioner of Insurance. Act 584.
- HB 566** Provides a method by which an insurer organized under the laws of another state and admitted to transact business in Georgia may become a domestic insurer and provides a method by which a domestic insurer may transfer its domicile to another state. Act 588.
- Introduced**
- SB 35** Amends Chapter 9 of Title 33 of the Official Code of Georgia Annotated relating to the regulation of insurance rates.
- HB 38** Increases certain coverages in motor vehicle liability policies within the definition of "proof of financial responsibility."
- HB 699** Relocates provisions relating to the selection of motor vehicle repair facilities.
- HB 904** Provides for the applicability of uninsured motor vehicle insurance coverage to certain vehicles.
- HB 1111** Adds a new chapter to be known as the Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Immunity Act.

HAWAII
1989 Legislative Session
(January 9 - April 23)

Introduced

- SB 48** Prohibits a person from driving a moped unless the moped is insured under a liability insurance policy. Establishes penalties. Requires persons engaged in the retail business of renting mopeds to ascertain from their renters if the

renter is knowledgeable of the current laws and rules relating to and governing the operation of a moped, the renter is skilled in driving a moped, and the renter promises to be fully responsible for any violations incurred while operating or in possession of a moped. Requires renters to be fully responsible for the payment of any violations received by their renters. Increases the moped liability insurance coverages for accidental harm and for property damage.

- SB 214 Provides for an optional rather than mandatory motor vehicle no-fault insurance system. Requires mandatory liability insurance coverage for bodily injury and property damage for all motor vehicle operators.
- SB 1056
HB 42 Establishes the Hawaii Insurance Service Corporation within the Department of Commerce and Consumer Affairs. The Corporation is to maintain a computer with information on no-fault insurance.
- HB 544 Repeals liability insurance coverage requirements for motorcycles and motor scooters, and includes motorcycles and motor scooters in the requirements of the motor vehicle insurance law.
- HB 1665 Requires no-fault motor vehicle insurance, and other insurance for accidental harm or property damage caused by motor vehicles, to provide that insurance covering the driver (as a named insured) shall be primary to the insurance covering the vehicle involved in the accident.
- Resolved
- SCR 67 Requests the Insurance Commissioner to investigate the nature of penalties assessed by motor vehicle insurers for moving violations and suggests reasonable modifications.

IDAHO
1989 Legislative Session
(January 9 - Late March)

Enacted

- HB 297 Requires insurers to provide automobile insurance premium reductions to drivers 65 years of age and older who successfully complete a driver education course.

ILLINOIS
1989 Legislative Session
(January 11 - June 30)
(Fall Session probable)

Enacted

- SB 293 Amends the Illinois Insurance Code. Provides that uninsured and underinsured motorist coverage may not contain a clause denying coverage until the limits of all other policies are used up. Provides that such a clause is against public policy and unenforceable.
- SB 790 Amends the Illinois Insurance Code in the uninsured motor vehicle coverage requirements to provide that vehicles not designed for highway use are not subject to the act.

- SB 1032** Provides additional regulation of automobile insurers concerning requirements for renewal or non-renewal of policies and the furnishing of loss information to insureds. Provides for written notice of premium dues and non-renewals to insureds.
- SB 1288** Authorizes the imposition of civil penalties for acts found to constitute an improper insurance claims practice.
- HB 308** Amends the Illinois Insurance Code. Requires that uninsured motor vehicle coverage in excess of the limits established in the Illinois Vehicle Code and underinsured motorist coverage be provided in a motor vehicle insurance policy unless the insured declines such coverage by written notice to the insurance company.
- HB 573** Prohibits the establishment of automobile insurance premium rates based solely on the zip code of the insured.
- HB 2217** Amends the Illinois Insurance Code. Raises the amount of forfeiture liability from \$50,000 to \$250,000 for persons who violate any provisions of the Code.
- Introduced**
- SB 170** Prohibits consideration of an applicant's zip code as a basis for establishing automobile insurance premiums. Requires consideration of the individual customer's driving record as the preponderant factor in establishing automobile insurance premium rates.
- SB 880** Amends the Illinois Insurance Code in relation to property and casualty insurance premium rates, cancellation notices, and private remedies. Requires cancellation notices to be sent by certified mail. Creates a civil cause of action against companies violating certain provisions of the Code. Authorizes the Department to review and approve or disapprove premium rates. Requires prior Department approval with respect to an increase or decrease of 10% or more. Specifies financial information to be reported to the Department.
- SB 881** Eliminates the exemption for insurance companies under the Illinois Anti-trust Act. Retains exemption for certain insurers. Provides for simplification of insurance policies and requires the Department of Insurance to prepare an annual consumer guide which compares the basic premiums and rates of insurers that issue automobile insurance and other types of insurance.
- SB 882** Provides for the election of the Director of the Department of Insurance at the general election in 1990 and every four years thereafter. Establishes qualifications for office and sets forth powers and duties. Abolishes the term of the appointed Director of Insurance in January, 1991. Requires insurers to roll back rates to a level of 15% less than the charges for the same coverage which were in effect on January 1, 1989.
- SB 932** Requires insurance companies to offer the option on automobile insurance policies of having only original manufacturer parts or the equivalent used when replacing parts covered under the policy. Requires the name of the manufacturer to appear on all replacement parts and prohibits the sale of such part unless the manufacturer is identified.

- HB 504** Amends the Illinois Insurance Code to create a civil cause of action for any violation of Provisions Applicable to All Companies, and Unfair and Deceptive Acts and Practices, of the Code. Provides for a minimum award of \$500 plus costs and attorney's fees in every case of recovery of damages. Provides for punitive damages for willful violations.
- HB 569** Provides that statistics reflecting the location of motor vehicle accidents, rather than the driver's residence, shall be utilized with respect to insurance rate setting.
- HB 821** Provides that adverse risk experience in a specific geographic location is not a business purpose sufficient to refuse to provide insurance.
- HB 855** Requires that certain insurance policies contain a provision setting forth how such a policy may be cancelled by the company and the insured.
- HB 1359** Creates an express warranty, as a matter of law, for rebuilt automobile parts. Provides that the warranty runs 90 days or 3,000 miles, whichever occurs first. Provides remedies and damages.
- HB 1753** Defines the terms "crash parts" and "Original Equipment Manufacturer (OEM)." Prohibits insurance companies from requiring the use of non-OEM or used crash parts in damaged vehicles. Requires persons repairing such vehicles to provide an estimate of repair which shall list any non-OEM or used part to be installed in the damaged vehicle, and to attach to such estimate a disclosure giving notice that the use of non-OEM crash parts may invalidate remaining motor vehicle warranties or compliance with federal safety standards.
- HB 1793** Provides for the Director of Insurance to establish by regulation limitations on rate increases and decreases. Prohibits increases exceeding 10% without prior approval. Provides that rates shall be equitable in their application, not unfairly discriminatory or destructive of competition or detrimental to the solvency of insurers. Defines terms.
- HB 1825** Requires any person who rents a motor vehicle to another to disclose the entire rental rate, terms of any mileage conditions relating to the rental rate in any print advertisement or telephonic, in-person or computer-transmitted quotation.
- HB 2140** Makes a grammatical change of the Illinois Insurance Code.
- HB 2144** See SB 882.
- HB 2147** See SB 881.
- HB 2638** See HB 1359.
- HB 2654** Prohibits the use of misleading advertising in the sale of insurance. Regulates the use of testimonials, endorsements, and commendations in insurance advertising. Makes violations a deceptive practice under the Unfair and Deceptive Acts and Practices article of the Insurance Code and a deceptive business practice under the Deceptive Business Practices Act.

INDIANA
1989 Legislative Session
(January 9 - Late April)

Enacted

- SB 159** Authorizes a car rental company to offer and sell, for a separate charge, a collision damage waiver which relieves an authorized driver of any liability for damages that the driver might otherwise incur. Stipulates what information must be disclosed in the rental agreement containing the collision damage waiver.
- SB 311** Requires a company which provides uninsured and underinsured motorist insurance, and other types of liability insurance, to file a financial statement with the Department of Insurance.
- SB 358** Provides for the examination of domestic insurance companies. Permits the Commissioner of Insurance to determine the nature, scope, and frequency of the examinations to be conducted under the Act.
- SB 360** Amends the Indiana Code concerning insurance coverage of private carriers.

Introduced

- SB 134** Raises minimum requirements for vehicle financial responsibility. Increases the amounts of bodily injury and property damage insurance motor vehicle owners must carry or the amounts of cash or securities motor vehicle owners must deposit to meet the requirements of the State's financial responsibility law. Applies these higher amounts to the registration and operation laws.
- SB 361** Allows the person insured by a motor vehicle liability policy to choose uninsured or underinsured motorist coverage in limits less than the statutory limits of liability coverage, if the insurer agrees to sell these limits.
- HB 1298** Makes numerous changes concerning insurance, including the following:
1. Requires a minimum 20% rate reduction from July 1, 1988 levels for automobile and property and casualty insurance.
 2. Freezes rates until July 1, 1990 unless an insurance company is substantially threatened with insolvency.
 3. Requires insurers to offer eligible persons a good driver policy with a 20% discount.
 4. Requires a public hearing and approval by the Insurance Commissioner for automobile and other property and casualty insurance rate changes.
 5. Requires automobile premiums to be determined primarily by driving record.
 6. Makes insurance companies subject to the state antitrust laws, and eliminates rating organizations and advisory organizations.
 7. Requires the Insurance Commissioner to be elected, rather than appointed.
 8. Requires the Insurance Commissioner to provide comparative pricing information to consumers.
 9. Permits insurance agents and brokers to give discounts on rebates to those who buy insurance from them.
- HB 1360** Increases the limitations on an insured's coverage for bodily injury uninsured or underinsured motorist coverage to the face value of the insured's

policy, rather than the value of the policy less the coverage of the wrongdoer. Provides that an insurer loses any right of subrogation if the insurer fails to advance payment to the insured within 30 days of notice of a settlement. Expands the definition of uninsured motor vehicle to include a hit-and-run motor vehicle where the owner or operator cannot be identified. Makes changes regarding insolvency of an insurer.

- HB 1363** Allows for a reduction in premium charges for motor vehicle insurance policyholders who are at least 55 years of age and who have successfully completed a motor vehicle accident prevention course.
- HB 1795** Makes insurance companies subject to the general state antitrust laws. Establishes the data collection agency and provides for a designated advisory organization.
- HB 1815** Requires an insurance company to notify a motor vehicle liability insurance policyholder before the company directs a repair shop to install a repair part in the policyholder's motor vehicle that is not at least equivalent to an original repair part supplied by the manufacturer.

IOWA
1989 Legislative Session
(January 9 - Late April)

Introduced

- SF 381** Establishes the office of Consumer Advocate of Insurance in the Department of Justice as a separate division.
- SF 458** Prohibits an insurance company from increasing an individual's rates, canceling or refusing to renew a person's automobile insurance because of that person's driving or ownership of a motor vehicle involved in an accidental collision with a wild deer.
- HF 169** Prohibits an insurance company from raising an insured's rates due to an accident caused by an uninsured or hit-and-run motorist or underinsured motorist.
- HF 290** Prohibits a person from driving a motor vehicle registered in Iowa on the highways of Iowa unless liability insurance coverage is in effect for the motor vehicle.
- HF 334** Requires motor vehicle liability insurance coverage; allows uninsured motorists' victims to receive moneys from the Victim Reparation Fund; and provides penalties.
- HF 495** Requires a motor vehicle insurer to extend a mandatory offer of insurance for property damage caused by an uninsured or underinsured driver when the insurer also provides uninsured and underinsured coverage to an insured.
- HF 629** Prohibits an insurance company from including as a term of a policy, or endorsement or rider on a policy, a provision restricting an insured's family member's use of the insured motor vehicle, if the restricted family member also maintains a separate policy of automobile liability insurance with the insurer.

KANSAS
1989 Legislative Session
(January 9 - Early May)

Enacted

- HB 2015** Requires a person who prepares an estimate of repair of a motor vehicle to disclose the use of aftermarket parts and the intended use of such parts to the owner.
- HB 2324** Amends penalty provisions of current law relating to the failure to maintain financial security.

Introduced

- SB 282** Amends certain antitrust statutes applicable to the insurance industry.
- SB 317** Prohibits any person in the business of renting motor vehicles to the public from including in the rental contract, liability for any damage done in excess of \$200. Provides exceptions.

KENTUCKY
No regular legislative session

LOUISIANA
1989 Legislative Session
(April 17 - July 10)

Enacted

- SB 126** Permits an automobile insurance rate or premium increase for insureds whose driving privileges have been suspended or revoked based on a court order when the offense involved directly relates to the operation of a motor vehicle. Act No. 42.

Introduced

- SB 136** Provides for exclusion of exemplary or punitive damages from certain policies of insurance.
- SB 510** Prohibits the recovery of exemplary damages under uninsured motorist coverage.
- SB 522** Provides for payment of claims by insurers and requires certain insurers to post security for payment of certain claims.
- SB 571** Sets forth the circumstances when a lessor may hold a lessee liable for damages or loss to a rented vehicle. (Withdrawn from Senate files)
- SB 608** Provides for the issuance of uninsured and underinsured motorist coverage.
- SB 695** Permits the Insurance Rating Commission to authorize rate reductions on bodily injury liability, property damage liability, and collision insurance under certain conditions.

- SB 850** **Modifies requirements for uninsured motorist coverage in automobile insurance policies.**
- SB 851** **Provides for issuance of uninsured or underinsured motorist liability policies.**
- HB 6** **Requires rate reductions for good drivers.**
- HB 40** **Requires an insurer to promptly pay the claim of a person who is not its insured, and sets a time limit and penalties.**
- HB 58** **Prohibits the Office of Motor Vehicles from reporting certain speeding tickets.**
- HB 98** **Provides that the Commissioner of Insurance shall be appointed by the Governor.**
- HB 125** **Provides for the contents of an individual driver's operating record and prohibits an increase in insurance premiums under certain circumstances.**
- HB 154** **Requires motor vehicle liability claims payment within 30 days, and requires interest on late payments.**
- HB 158** **Prohibits any insurer from increasing the rate or surcharge, cancelling, or failing to renew any policy of automobile insurance based on consideration of a "non-fault incident."**
- HB 330** **Requires insurers, except life and health insurers, to pay claimants within 60 days.**
- HB 346** **Requires a sticker affixed to a motor vehicle as proof of paid automobile liability insurance.**
- HB 395** **Prohibits an insurer from considering an incident which was not the fault of the insured in any rate increase or policy cancellation. (Sent to Governor Buddy Roemer)**
- HB 415** **Requires prompt payment of claims under minimum liability policies and provides for punitive damages.**
- HB 526** **Requires impoundment of a vehicle when the operator is driving while his/her license is suspended or without liability insurance.**
- HB 558** **Requires payment within 60 days after settlement or judgment for policies other than health or life.**
- HB 615** **Provides for car rental businesses' terms of rental agreements and limitations on charges and advertising.**
- HB 637** **Increases the fee for failure to notify the State when insurance is obtained.**
- HB 724** **Defines and provides penalties for "unfair claims settlement practices."**
- HB 750** **Provides for alternative liability insurance to insure individual licensed drivers.**

- HB 757** Specifies covered vehicles under uninsured motorist coverage.
- HB 912** Provides that no notice is required for transfer of coverage from one car to another.
- HB 918** Prohibits consideration of a non-fault incident in increasing rates or surcharges or in cancellation or non-renewal.
- HB 919** Prohibits an employee's violations from being charged against both the employee's policy and the employer's policy.
- HB 971** Provides that a compromise for an amount less than the amount available from primary coverage discharges the uninsured motorist carrier from liability.
- HB 1269** Requires prompt payment and loss adjustment of certain damage claims. (Sent to Governor Buddy Roemer)
- HB 1278** Requires an insurer to provide alternative transportation for certain property damage claims on personal vehicles.
- HB 1285** Regulates collision damage waivers for rented vehicles.
- HB 1287** Establishes limitations on the terms and conditions which may be used in short-term motor vehicle rental agreements, on the rates and charges which may be imposed by the lessor, and on the content of advertising used by the lessor. Prohibits a lessor from holding an authorized driver liable for more than \$200 in damages except under certain circumstances.
- HB 1420** Provides for vehicles and damages covered under uninsured and underinsured motorist coverage.
- HB 1423** Rolls back and freezes automobile insurance rates.
- HB 1438** Requires the revocation of a driver's license and vehicle registration for submitting false information.
- HB 1512** Requires rate reduction for good drivers.
- HB 1552** Limits the security providers who must provide information to the Secretary of the DPS and C.

MAINE
1989 Legislative Session
(January 2 - June 21)

Enacted

- SP 74** Clarifies the law authorizing the use of warning devices on Department of
LD 64 Corrections motor vehicles. Chapter 32.
- HP 220** Clarifies the Maine Used Car Information Laws. Chapter 61.
LD 300
- HP 258** Provides for color coded driver's licenses for minors. Chapter 64.
LD 370

HP 277
LD 389

Requires drivers, under certain circumstances, to turn off their motor vehicles' fog or auxiliary lights. Chapter 65.

HB 445
LD 610

Requires the use of flashing amber lights on motor vehicles during sanding and snow removal operations. Chapter 50.

MARYLAND
1989 Legislative Session
(January 11 - April 10)

Enacted

SB 170
HB 335

Permits an insured to waive certain medical, hospital, and disability benefits provided in motor vehicle liability insurance policies. Requires an insurer to provide certain medical, hospital, and disability benefits unless an insured makes an affirmative waiver of the coverage and benefits. Provides that the insured be notified of the nature of the benefits before waiving coverage. Repeals provision which provided that the benefits were considered to be required security. Specifies the requirements of the waiver form.

Introduced

SB 616
HB 853

Modifies the exemption for insurance activities under the state's antitrust law. Creates a Consumer Information Office and specifies the duties of the Office. Requires the Office to establish a consumer education outreach program. Requires insurers submit certain data with each rate filing and on an annual basis. Provides for a refund mechanism. Adds certain factors to be considered by the Insurance Commissioner in determining that competitiveness exists in certain markets.
(The Senate amended to repeal the antitrust option.)

HB 1243

Requires owners of motor vehicles in the state to obtain no-fault motor vehicle insurance benefits under the State Motor Vehicle Security Law. Limits the right to recover certain damages in a civil action in certain circumstances for certain persons covered under a no-fault policy. Specifies that no-fault insurance cover certain benefits. Limits the rates charged for motor vehicle liability insurance. Provides exceptions and a procedure for implementation of rate reduction. Authorizes an insurer to exclude no-fault coverages in certain circumstances. Limits an insurer's right of subrogation. Requires first party benefits be paid within a certain period and specifies a penalty. Requires coverage for accidental damage without regard to fault and requires insurers to issue a rider on certain policies.

HB 1434

Permits owners of motor vehicles in the state to elect no-fault motor vehicle insurance benefits in lieu of certain other coverages under the State Motor Vehicle Security Law. Limits, in certain circumstances, the right to recover damages in a civil action for persons covered under a no-fault policy. Requires no-fault insurance include certain benefits. Expands the scope of uninsured motor vehicle coverage to include a motor vehicle whose owner has elected no-fault benefits. Limits civil actions for damages by or on behalf of an insured against an owner of certain vehicles to the extent the

Introduced

**SB 616
HB 853**

Modifies the exemption for insurance activities under the state's antitrust law. Creates a Consumer Information Office and specifies the duties of the Office. Requires the Office to establish a consumer education outreach program. Requires insurers submit certain data with each rate filing and on an annual basis. Provides for a refund mechanism. Adds certain factors to be considered by the Insurance Commissioner in determining that competitiveness exists in certain markets.
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**MASSACHUSETTS
1989 Legislative Session
(January 4 - All year)**

The Commonwealth is unwilling to enact automobile legislation until the effects of Chapter 273, enacted on November 5, 1983, can be observed. Chapter 273, with 77 sections, regulates automobile insurance premiums and amends the Commonwealth's motor vehicle insurance laws.

**MICHIGAN
1989 Legislative Session
(January 11 - All year)**

Enacted

SB 173

Provides for the mandatory use of seat belts in motor vehicles and removes a sunset date.

Introduced

- SB 270** Makes certain insurers subject to the state antitrust act.
- SB 389** Allows a minimum premium charge upon cancellation of an insurance policy and permits certain options.
- HB 4152** Prohibits the Insurance Commissioner from accepting insurance-related employment in the private sector prior to six months after leaving office as Commissioner.
- HB 4158** Requires Commissioner approval of no-fault catastrophic claims association assessments.
- HB 4159** Excludes from secondary rating plans automobile no-fault comprehensive coverage.
- HB 4217** Allows inspection by the Secretary of State of the records of transactions concerning the buying or receiving of used motor vehicle parts by the state.
- HB 4220** Requires the use of seat belts by children ages four through 16.
- HB 4239** Amends no-fault insurance ratings based on civil infractions of 65 miles per hour in 55 mile per hour zones.
- HB 4289** Requires the revocation or denial of a mechanic's certificate and motor vehicle repair facility registration of a person convicted of theft of a motor vehicle or vehicle parts under certain circumstances.
- HB 4467** Requires the use of seat belts in school buses.
- HB 4468** Allows the installation of a front-mounted or rear-mounted audiovisual sensory warning device on school buses.
- HB 4490** See SB 270.
- HB 4553** Prohibits, in certain cases, rental automobile companies from holding customers liable for damage to rental vehicles.
- HB 4751** Requires insurance companies to offer uninsured and underinsured no-fault motorists coverage.
- HB 4771** Requires notice when there is an increase in a no-fault insurance premium.
- HB 4912** Provides for numerous significant provisions including the following:
1. Provides that an individual who serves as the State Insurance Commissioner cannot have worked for an insurer for 10 years prior to his or her appointment and cannot work for an insurer for 10 years after he or she leaves the appointment.
 2. Provides that an insurer or an insurer's agent which offers, solicits, pays or receives a kickback or bribe in connection with the process of resolving a claim for automotive repair is in violation of the unfair trade practices provisions of the Code. Specifies that such activities constitute a felony, punishable by one to five years in prison

and/or a fine of \$50,000, and makes the insurer subject to revocation of its license.

3. Creates the right to a private cause of action for citizens damaged by an insurer's unfair trade practices, violations of the Consumer Protection Act, or anti-trust activities.
4. Establishes group automobile insurers which are required to contract with automobile repair shops to obtain the best prices on automobile repair. Requires such an insurer to offer theft prevention devices, at cost, to its insureds.
5. Requires all automobile insurance rates to be approved by the Commissioner before insurers would be permitted to apply them to insurance policies sold in Michigan.
6. Requires all automobile insurers writing in Michigan to reduce rates to a level which is at least 20% less than the rate levels which were in existence on May 1, 1988. Requires the reduction to be in place by January 1, 1990. Prohibits automobile insurers from filing new rates more than once in a 12-month period.
7. Prohibits automobile insurers from engaging in anti-trust activities. Specifically prohibits insurers from using a rating organization or sharing information regarding rating systems, underwriting rules, actuarial projections, trending factors, profits or expenses.
8. Requires automobile insurers to employ Total Return Ratemaking.
9. Permits an automobile insurer to rebate any portion of the premium to its insureds.
10. Requires the Commissioner to approve rates based on data reflecting each insurer's cost and frequency of claims and litigation experience. Prohibits the approval of rates which are excessive, inadequate, or unfairly discriminatory. Requires all rates to be actuarially justified prior to their approval. Requires the Commissioner to assess the appropriateness of an insurer's administrative expenses as a factor in the rate approval process.
11. Requires each automobile insurer to offer a good driver discount plan based on actuarially supported criteria.
12. Prohibits automobile insurers from charging territorial base rates.
13. Requires the Commissioner to establish an annual hearing to determine the extent of competition in the automobile insurance industry. Requires a plan for increasing competition to be adopted and implemented if it is determined that a reasonable degree of competition does not exist.
14. Requires the Commissioner to establish an automated information system containing rates for each automobile insurer in Michigan. Creates a fund to finance this program and also permits that fees may be charged for the cost of filing each request of rate comparison information.
15. Prohibits an insurer from denying a claim against an insured for an automobile accident which occurs while a portion of a premium payment is overdue. Provides that insurers would be permitted to deny claims against policies for which premiums have been partially paid only in instances in which the policy has been cancelled for non-payment after the insured has been provided with written notice of the cancellation.

HB 4913

Provides that insureds over age 60 who are not receiving income from employment are not required to purchase wage-loss protection insurance coverage and, as a result, are to receive a reduction in premium.

- HB 4914** Provides that automobile insurers would have a fiduciary duty to deal fairly and in good faith with their insureds and are subject to a civil cause of action in instances in which this duty is breached.
- HB 4915** Requires automobile insurers to offer under-insurance and uninsured motorist coverage to insurance consumers.
- HB 4916** Clarifies the threshold requirements which an injured person must meet in order to pursue a claim for pain and suffering or for benefits beyond those which are provided under No-Fault coverage. Provides that the threshold would not apply if a person is injured in an automobile accident which results from a driver's consumption of alcohol or other drugs.
- HB 4917** Provides that automobile insurers would be made subject to the Michigan Consumer Protection Act.
- HB 4918** Provides that automobile insurers would be made subject to the Michigan Anti-Trust Reform Act.

MINNESOTA
1989 Legislative Session
(January 3 - May 22)

Enacted

- HB 956** Clarifies the calculation of underinsured motorist benefits. Chapter 213.
- HB 1194** Requires obligors to issue an insurance identification card. Requires a driver or owner of an automobile to produce proof of insurance. Provides for administrative review. Exempts certain vehicles. Provides for a limited license in certain circumstances. Defines terms and provides penalties. Chapter 321.

Introduced

- SF 784** Prohibits car rental companies from holding renters liable for damages except under certain circumstances.
- SF 801** Clarifies the applicability of the antitrust laws to the business of insurance. Enacts the Competition in Insurance Act of 1989.
- SF 1170** Regulates insurance rates, trade practices, and claims settlement practices.
- SF 1492** Regulates automobile rental companies, provides licensing and bonding requirements.

MISSISSIPPI
1989 Legislative Session
(January 3 - April 2)

Introduced

- SB 2422** Requires a licensee to notify the Department of Public Safety of a change of address. Allows the Department to rely on the address shown on a driver's license to serve notice of suspension. Increases the property

damage threshold for reporting an accident. Authorizes the Commissioner of Public Safety to impose a civil penalty on a law enforcement department for willful failure to submit accident reports. Increases the amount necessary to show proof of financial responsibility under the Motor Vehicle Safety Responsibility Law. Increases the amount deemed necessary to satisfy a judgment under the Motor Vehicle Safety Responsibility Law. Increases the minimum coverage required for motor vehicle liability insurance policies. Increases the time to suspend a license. Provides penalties and fines. Requires that driver's license reinstatement funds be deposited into the State General Fund. Requires that automobile liability insurance policies contain endorsements for uninsured motorist coverage for bodily injury or death, within limits no less than the insured's policy of property damage liability insurance.

- HB 11 Provides that the definition of "uninsured motor vehicle" shall include insured motor vehicles when the liability insurer of the vehicle has provided limits of bodily injury liability which are less than the legal liability of the injuring party.
- HB 160 See HB 420.
- HB 268 Creates the Mississippi Collision Damage Waiver Act. Defines terms. Provides for licenses, renewals, and fees associated with such licenses. Provides for the content of collision damage waivers. Provides for the filing of rates and guidelines for setting rates. Addresses unfair trade practices and provides for penalties.
- HB 320 See HB 328.
- HB 324 See HB 420.
- HB 328 Provides that uninsured motorist coverage limits shall be automatically equal to the limits of bodily injury liability coverage unless the insured specifically selects uninsured motorist coverage or elects lesser limits. Requires minimum limits of uninsured motorist coverage in all policies.
- HB 420 Amends the Mississippi Motor Vehicle Safety Responsibility Law. Provides for compulsory motor vehicle liability insurance. Provides that certain vehicles shall be exempt from the requirement of maintaining motor vehicle liability insurance. Provides that the persons insured under liability insurance shall be responsible for affixing an emblem on each insured motor vehicle as evidence of coverage. Provides for the design of such emblem by the Department of Public Safety and for the furnishing of such emblem by the insurance company. Prescribes penalties for violations of the provisions. Increases financial responsibility requirements.
- HB 563 Strengthens the Mississippi Motor Vehicle Safety Responsibility Law by increasing the minimum amounts of proof of financial responsibility. Requires certain law enforcement officers to assist in the enforcement of this Act and to provide for random sampling of persons cited for traffic violations. Requires proof of financial responsibility prior to receiving vehicle license tags. Requires tax collectors to issue certificates regarding proof of financial responsibility. Revises the accident threshold reporting amount. Requires the Commissioner of Insurance to prescribe certificates

of financial responsibility and provide for the distribution of such certificates. Increases the minimum amounts of proof of financial responsibility. Increases the minimum amount of money or securities used as proof of financial responsibility.

HB 688

Excludes the necessity of actual physical contact from the definition of uninsured motor vehicle.

MISSOURI
1989 Legislative Session
(January 4- June 30)

Enacted

SB 228

Exempts Missouri mutual and extended Missouri mutual insurance companies organized under Chapter 380, RSMo, from corporate income tax.

SB 250

Makes a number of changes to laws relating to insurance regulation. Sets a flat fee for the filing of policies with the Division of Insurance. Eliminates outdated language, brings investment requirements up to date, and corrects inconsistencies in capitalization requirements. Requires 15 days' prior written notice to policyholders of any proposed increase in automobile insurance premiums. Allows a supplemental assessment or certification of additional tax liability or delinquency for the purpose of collecting insurance premium taxes. Amends laws relating to regulation of sales or surplus lines insurance. Requires that surplus lines tax returns be due annually.

HB 615
HB 563

Changes the state's insurance laws and adds a provision which retaliates against the insurance agents of another state in instances where the other state requires any coverage solicited in that state by a Missouri agent to be co-signed by an agent of that state.

HB 726

Requires that aftermarket crash parts for motor vehicles display the logo or name of the manufacturer of the part when the part is supplied by a non-original equipment manufacturer. Requires insurers to make disclosures on estimates with regard to the use of non-original parts to repair an insured's vehicle. Provides penalties.

MONTANA
1989 Legislative Session
(January 2 - Late April)

Enacted

HB 206

Provides for the mandatory suspension of a driver's license for failure to appear or pay a fine for a violation of the Motor Vehicle Financial Responsibility Laws. Chapter 263.

HB 295

Clarifies that a person involved in a motor vehicle accident may examine information concerning the accident that is prepared and filed by the Department of Justice. Chapter 486.

Introduced

- SB 102** Prohibits rental car companies from holding renters liable for damages to rental cars.
- HB 322** Increases the premium reduction and eligibility periods from two to three years for drivers 55 years of age or older who successfully complete traffic safety programs.
- HB 673** Provides for a direct cause of action against the insurer in automobile accident liability cases.

NEBRASKA
1989 Legislative Session
(January 4 - May 24)

Introduced

- LB 59** Adopts the Collision Damage Waiver Act and provides a penalty.
- LB 222** Changes provisions relating to the maximum liability for underinsured motorist coverage.
- LB 347** Changes provisions of current law relating to the proof of financial responsibility and provides penalties.
- LB 495** Changes and eliminates provisions of current law relating to financial responsibility and provides penalties.

NEVADA
1989 Legislative Session
(January 16 - Mid-June)

Enacted

- SB 220** Requires that for any coverage for a policy of motor vehicle liability insurance issued or renewed on or after October 1, 1989, every insurer shall reduce its charges for insurance to levels which are at least 15% less than the charges for the same coverage which were in effect on July 1, 1988. Requires that for those persons who apply for a policy of motor vehicle liability insurance for the first time on or after October 1, 1988, the rate must be 15% less than the rate which was in effect on July 1, 1988, for similarly situated risks. Provides that rates and premiums reduced pursuant to this law may only be increased if the Commissioner of Insurance finds, after a hearing, that an insurer is substantially threatened with insolvency.

NEW HAMPSHIRE
1989 Legislative Session
(January 4 - Late May)

Enacted

- HB 270** Establishes the Motorcycle Safety Fund. Grants the Insurance Commissioner the authority to provide motorcyclists a discount upon a showing of the successful completion of a safety course.

HB 370

Relates to uninsured motorists who are at fault and are positively identified following an automobile accident.

**NEW JERSEY
1989 Legislative Session
(January 10 - All year)**

The state introduced 113 bills which relate to automobile insurance. An index of the bills will be provided on request. Below is a list of a few of the significant bills which were enacted.

Enacted

SB 3122

Requires insurers transacting automobile insurance in New Jersey to report the theft or salvage of a motor vehicle to the National Automobile Theft Bureau in accordance with the constitution and operating procedures of the NATB. Requires reimbursement of the NATB's costs. Chapter 65.

SB 3124

Requires public agencies to notify the National Automobile Theft Bureau whenever they take possession of an abandoned motor vehicle. Chapter 66.

AB 130

Adds licensed ophthalmic dispensers to the list of persons authorized to certify the vision screenings required of every licensed driver at least once every 10 years as a condition for the renewal of his driver's license and of any endorsement thereon. Chapter 15.

**NEW MEXICO
1989 Legislative Session
(January 17 - March 17)**

Enacted

SB 318

Increases the penalty for violations of the Mandatory Financial Responsibility Act. Laws 1989, Chapter 235.

SB 461

Provides procedures for the enforcement of the Mandatory Financial Responsibility Act. Laws 1989, Chapter 214.

Introduced

SB 176

Provides for enforcement of the Mandatory Financial Responsibility Act. Prescribes powers and duties. Provides penalties.

SB 207

Removes deductible limits for uninsured motorist property coverage.

SB 257

Increases the fine for non-compliance with the Mandatory Financial Responsibility Act.

SB 310

Rolls back charges of insurance and freezes rates and premiums on certain types of insurance. Establishes rating criteria for private passenger automobile insurance. Establishes factors for issuance of good driver discount policies. Restricts non-renewal and cancellation of private passenger automobile insurance policies.

- SB 649** Eliminates collision damage waivers for rental car companies.
- HB 36** Provides for enhanced enforcement of the Mandatory Financial Responsibility Act. Provides penalties.
- HB 287** Eliminates the antitrust exemption for insurance carriers. (Vetoed by Governor Garrey Carruthers)
- HB 398** Provides for enforcement of the Mandatory Financial Responsibility Act. Prescribes powers and duties. Provides penalties.
- HB 640** Provides for a reduction in motor vehicle insurance premium rates. (Vetoed by Governor Garrey Carruthers)
- HB 685** Increases the amounts of mandatory automobile insurance.

NEW YORK
1989 Legislative Session
(January 4 - July)

Enacted

- SB 688** Provides for the waiver of a fine for failure to provide a child safety
AB 1266 seat in a car. Chapter 28.
- SB 1006** Permits the use of closed-circuit television on certain trucks and school
buses for safety and maneuvering purposes. Chapter 39.
- SB 1146** Provides that insurance coverage shall not apply to an impounded
automobile which will not be moved under its own power under certain
conditions. Chapter 11.
- SB 1245A** Provides for the licensing of historical motorcycles upon a showing of
AB 1857A evidence of financial security. Chapter 30.
- SB 2132** Amends the Vehicle and Traffic Law in relation to child safety seats.
AB 3173 Chapter 41.
- SB 4554A** Amends the Insurance Law and the General Business Law, in relation to
insurance property damage coverage for rental cars. Chapter 66.
- AB 473A** Amends the Vehicle and Traffic Law, in relation to registration of repair
shops for motor vehicles. Chapter 63.
- AB 7315A** Refines Chapter 220 of the Laws of 1986 (Omnibus Liability Act);
permits the Insurance Department to act when a company overextends
itself; requires 45 days' notice prior to when a company terminates a
"line" of insurance; adds additional reporting requirements on the solvency
of companies; and enacts a portion of the N.C.O.I.L./N.A.I.C. bill
requiring independent certification of loss reserves in certain
circumstances. Chapter 235

Introduced

- AB 469** Provides that every private passenger automobile insurer doing business in
New York which utilizes surcharges on its premium rates shall express

such surcharges in a dollar amount and disclose this to each of its affected insureds at least once a year in writing with a regular communication.

- AB 2169A** Increases the minimum limits of liability required under motor vehicle insurance coverages.
- AB 2770A** Amends the Insurance Law, in relation to unfair claims settlement practices.
- AB 3555** Amends the Insurance Law, in relation to private rights of action for unfair claim settlement practices.
- AB 5067** Amends the Insurance Law, in relation to standards for rates.
- AB 5180** Creates the New York Motor Vehicle Joint Underwriting Association Act.
- AB 5794A** Amends the Insurance Law, in relation to uninsured motorist coverage.
- AB 5893** Requires automobile insurers to provide insureds with lists of discounts or surcharges on automobile insurance rates.
- AB 7312** Provides higher levels of benefits to injured persons under the Comprehensive Motor Vehicle Insurance Reparations Act.
- AB 7396** Provides motor vehicle insurance rate reductions for participation in certain anti-theft programs.

NORTH CAROLINA
1989 Legislative Session
(January 11 - July)

Enacted

- HB 324** Authorizes automobile liability insurers to offer coverage for damage to rental vehicles driven by their insureds. Prohibits certain advertising and sales practices of rental car companies. Clarifies the law regarding sales of insurance by rental car company employees. Chapter 631.

Introduced

- HB 1081** Authorizes the Legislative Research Commission to study automobile insurance issues and town or county mutual insurance companies. (The General Assembly did not authorize this study.)

NORTH DAKOTA
1989 Legislative Session
(January 4 - April 20)

Enacted

- SB 2098** Requires motor vehicle liability insurance policies for private passenger automobiles to include coverage for damage due to use of rented automobiles.

- SB 2271** Specifies who is entitled to premium reductions for accident prevention course completion.
- HB 1107** Provides the unsatisfied judgment fund with authority to pay legal costs associated with collections.
- HB 1155** Replaces sections of the North Dakota Century Code relating to uninsured and underinsured motorist coverage under motor vehicle liability insurance policies.
- HB 1176** Relates to bankruptcy, allowing a judgment debtor relief from motor vehicle financial requirements.
- HB 1242** Imposes a mandatory fine for driving without liability insurance.
- HB 1331** Establishes the financial responsibility requirements for liquified petroleum gas transporters.
- HB 1351** Requires persons who request a driver's record abstract to identify the reason for the request.
- HB 1408** Amends rate-making procedures of insurance companies.
- HB 1409** Requires optional excess no-fault benefits to be made available for injury in non-covered vehicles.
- HB 1467** Extends the time for filing claims for no-fault benefits.
- Resolved**
- SCR 4028** Directs the Legislative Council to study the feasibility and desirability of regulating salvage pool operations and the activities of insurance companies disposing of vehicles through such operations.
(The Legislative Council decided not to conduct this study.)
- SCR 4039** Directs the Legislative Council to study the operation and effect of North Dakota's no-fault insurance law in comparison with no-fault insurance laws in other states.
(The Legislative Council decided not to conduct this study.)
- SCR 4052** Directs the Legislative Council to study methods of ensuring that all operators of motor vehicles maintain automobile liability insurance.
(The Legislative Council decided not to conduct this study.)
- SCR 4057** Directs the Legislative Council to study the appropriateness of allowing the use of advisory insurance rates to be filed for insurance companies by licensed rating organizations.
(The Legislative Council decided not to conduct this study.)

OHIO
1989 Legislative Session
(January - All year)

Introduced

- SB 163** Revises automobile insurance laws relating to eligibility for coverage, standards for rating and underwriting, standards for mandatory premium discounts, return of excess rates, restrictions on rating organizations, intrafamilial exclusions and recovery of damages under uninsured and underinsured motorist coverage, rights of insureds regarding the non-renewal of policies, authority for group coverage, allowance of rebates, prohibition of tie-in sales, termination of authority of agents, and application of the Ohio Antitrust Law to the business of insurance. Permits banks to engage in the business of insurance.
- HB 76** Requires insurers, for a one-year period, to reduce rates by 10% for automobile and certain other forms of casualty insurance. Requires insurers to offer good driver discount policies. Requires that the Superintendent of Insurance be elected in non-partisan elections. Establishes the Office of Insurance Consumer Advocate. Requires the Superintendent to give approval prior to the use of rates for motor vehicle and certain other forms of casualty insurance. Provides that the Ohio Antitrust Law applies to the business of insurance. Provides for the availability of automobile insurance rate comparison data.
- HB 91** Requires automobile insurers to provide appropriate reductions in premiums for insureds who are 60 years of age or older, have completed a motor vehicle accident prevention course, and meet certain conditions regarding their driving records.
- HB 250** Includes political subdivisions and their employees under uninsured and underinsured motorist coverages.
- HB 264** Prohibits the non-renewal of an automobile insurance policy for the reason that the insured was involved in an accident in which he was not substantially at fault and makes it an unfair insurance practice to change a rate or increase the cost of an automobile insurance policy based on a consideration of that reason.
- HB 430** Establishes the offense of driving without proof of financial responsibility. Provides civil and criminal penalties. Eliminates the requirements of the Financial Responsibility Law that a suspension of operating privileges be for a period of at least 90 days and not be subject to occupational or other limited driving privileges.
- HB 465** See SB 163.

OKLAHOMA
1989 Legislative Session
(January 3 - Early July)

Introduced

- SB 13** Requires motor vehicle insurance claim settlement payments to be on instruments payable on demand.

- SB 182** Relates to tentative agreements to settle with insured tortfeasors. Requires certain documentation and authorization. Allows insurers to substitute payment. Requires notice. Limits the rights of insurers if payment is not made in 60 days.
- HB 434** Requires motor vehicle insurance premium reductions for wearing seat belts.
- HB 1303** Provides penalties for violating provisions of compulsory liability insurance laws.
- HB 1418** Provides penalties for motor vehicle owners who allow excluded persons from insurance coverage to operate their vehicle.
- HB 1471** Relates to motor vehicle insurance coverage of T-top automobiles.
- HB 1545** Relates to uninsured motorist coverage. Limits coverage. Modifies limitations and procedures.
- HB 1550** Requires owners of motor vehicles to notify state agencies of cancellation of compulsory liability insurance and to furnish new security verification. Requires insurers to notify state agencies of cancellation of compulsory liability insurance. Requires security verification to be returned to the carrier upon cancellation of compulsory liability insurance.
- HB 1581** Allows the impoundment and forfeiture of a motor vehicle for driving without compulsory liability insurance.
- HB 1584** Provides that the security verification form is to be approved by the Insurance Commissioner.

OREGON
1989 Legislative Session
(January 9 - Late June)

Enacted

- SB 128** Concerns collision damage waiver provisions for rented motor vehicles.
- SB 684** Provides for "good driver" automobile insurance discounts.
- HB 2429** Prohibits insurance forms that include the cost of defending claims within stated limits of liability.

Introduced

- SB 18** Concerns uninsured motorists.
- SB 558** Requires prior approval of rate changes of 5% or more.
- SB 683** Concerns automobile body craftsmen.
- SB 858**
HB 2889 Removes provisions requiring continuous titling and registration of campers and travel trailers. Prohibits the Motor Vehicles Division from refusing to renew registration or transfer title solely on grounds that the owner owes registration fees.

SB 696
SB 859

Concerns seat belt laws.

HB 2419

Requires insurers to inform insureds and providers of denial of personal injury protection benefits. Allocates cost of arbitration proceedings and authorizes the award of attorney fees. Changes certain notice requirement provisions. Requires a penalty against insurers for unreasonably delaying benefits.

HB 2539

Extends required personal injury protection benefits to motorcycle and moped insurance policies. Requires all costs of arbitration regarding disputes between insurers and beneficiaries about the amount of personal injury protection benefits to be borne by the insurer. Expands the definition of "costs." Puts the burden of proof of denied benefits on the insurer.

HB 2540

Provides that underinsurance benefits are excess over amounts recovered from other motor vehicle liability insurance.

HB 2541

Increases the minimum amount a person must be able to pay or be insured for to be in compliance with the Motor Vehicle Financial Responsibility Law.

HB 2546

Increases the amount of personal injury protection benefits required under motor vehicle insurance. Provides that the amount of personal injury protection benefits may not be applied in reduction of the amount of damages if the person receives policy limits.

HB 2627

Requires comprehensive motor vehicle insurance policies to cover the replacement of glass, with maximum deductible of \$50 or less. (Vetoed by Governor Neil Goldschmidt)

HB 2701

Adds to insurance trade practices regulations certain categories in which distinctions are discriminatory.

HB 2829

Prohibits an insurer from recommending a vehicle body shop to an insured unless requested to do so. Provides that a written estimate from a shop is rebuttable proof of an amount of loss and procedure of repair. Requires an insurer to settle a claim within 15 days of receipt of an estimate. Establishes a private right of action for an unfair claim settlement practice. Authorizes treble damages for specified conduct.

HB 3098

Limits insurance coverage through an insurance policy binder to 15 days after receipt of an insurance policy by an insured.

HB 3132

Establishes the Abandoned Vehicle Account in the General Fund.

HB 3160

Establishes the Motor Vehicle Insurance Account in the Insurance and Finance Fund. Creates the Motor Vehicle Insurance Pool to provide coverage for damages arising out of motor vehicle accidents. Repeals mandatory financial responsibility laws. (Becomes effective only if the constitutional amendment proposed by HJR 40 (1989) is approved by the electors at the 1990 primary election.)

HB 3391

Prohibits a motor vehicle insurer from assigning a person to a higher risk category solely on grounds that the person has let prior insurance lapse unless such person drove without insurance.

**PENNSYLVANIA
1989 Legislative Session
(January - All year)**

Enacted

SB 109

(Catastrophic Loss Trust Fund) Requires certain insurers to provide for extraordinary medical benefits; provides for limits, for transition of catastrophic loss benefits and for funding of benefits.

Introduced

SB 12

Establishes the Pennsylvania Insurance Commission Act.

SB 32

Provides for the establishment of an Index Bureau and requires insurers to submit monthly reports to the Bureau.

SB 100

Extends the powers and duties of the Office of Consumer Advocate to matters relating to insurance.

SB 146

Provides for competitive rating relating to certain insurance policies, confers powers and duties upon the Insurance Commissioner, and provides penalties.

SB 204

Amends the Casualty and Surety Rate Regulatory Act (P.L. 538, No. 546) by adding a section on factors to consider for the establishment of rates.

SB 205

Requires certain insurance companies to record and report their losses, expenses, and other data with respect to liability insurance.

SB 210

Prohibits the cancellation of insurance policies in certain cases.

SB 223

Regulates the writing of policies of automobile insurance.

SB 436

Provides for rate administration.

SB 457

Requires insurers to notify the Department of Transportation when insurance is cancelled.

SB 538

Provides for an administrative procedure for insureds to file complaints against insurers for actions relating to certain insurance policies.

SB 843

Requires insurance companies to disclose certain data, provides for the review of rate filings and for compliance with requests for data and information, and provides for a liability underwriting services plan.

SB 902

Establishes the Rental Vehicle Collision Damage Waiver Act.

HB 212

Regulates the rights of insurers with respect to underinsured motorist benefits.

- HB 292** Prohibits the raising of automobile insurance rates because of an accident where the insured is not at fault.
- HB 324** Provides for certain insurance rates for motor vehicles equipped with a passive restraint system.
- HB 426** Provides for proof of financial responsibility and imposes penalties. Allows sheriffs, constables and their deputies to confiscate suspended driver's licenses and registration plates and cards. Requires current proof of insurance or financial responsibility when automobiles are inspected.
- HB 427** Requires insurers to file their underwriting standards with the Insurance Commissioner.
- HB 429** Provides that persons convicted of insurance fraud may receive maximum fines of \$15,000 and up to seven years in prison. Increases penalties for fraud between insurance companies and for fraud against the state Insurance Department or other state agencies.
- HB 431** Provides for financial responsibility verification and for an insurance data bank for detection of fraud and abuse. Requires insurers to report cancellation or termination of insurance. Provides for review of insurer profits for private passenger automobile insurance. Requires automobile insurance providers to reduce their rates by 25% across the board. Gives drivers further premium reductions if they agree not to sue except in the most serious accident cases. Requires insurers to offer collision and comprehensive coverage with a \$500 deductible, requires proof of insurance coverage or financial responsibility to register a vehicle, limits medical claims to 110% of Medicare reimbursement rates, and permits the review of medical claims by Peer Review Organizations. Prohibits redlining.
- HB 431 Amendments** Requires all insurance companies to file for new rates within 30 days of the date the entire automobile insurance reform legislation takes effect. Provides that the new rates, which would apply to all policies issued and renewed on and after October 1, 1989, would have to be 25% less than all rates in effect on July 1, 1989. Requires two estimates for automobile repair claims and mandates that the insurer's adjuster inspect a damaged vehicle within three days after a claim is made.
- HB 510** Regulates automobile insurance surcharge rates.
- HB 564** Amends the act of July 22, 1974 (P.L. 589, No. 205) relating to unfair insurance practices and provides for notices of cancellation of insurance policies.
- HB 567** Establishes the Antitheft Automobile Insurance Premium Reduction Act.
- HB 589** Relates to rate reduction.
- HB 608** Provides enforcement procedures with respect to providing financial responsibility and penalties for failure to provide financial responsibility.
- HB 609** Relates to rate regulation.
- HB 648** Establishes the Automobile Insurance Availability Study Act.

- HB 685** Imposes a 180-day restriction on increases in motor vehicle insurance premiums.
- HB 1110** Establishes a Title known as the Insurance Code. Amends Title 40 (Insurance) of the Pennsylvania Consolidated Statutes and adds provisions relating to insurance.
- HB 1150** Creates the Office of Public Insurance Advocate and prescribes its powers and duties.
- HB 1151** Provides that certain motor vehicle liability insurance benefits may be waived by an insured.
- HB 1152** Provides for proof of financial responsibility upon registration or renewal and for reports of insurance cancellations to the Department of Transportation, the Pennsylvania State Police and local police.
- HB 1154** Regulates the writing of policies of automobile insurance.
- HB 1165** Provides for the surrender of drivers' licenses, registration plates, and registration cards upon suspension. Provides for financial responsibility verification.
- HB 1172** Provides for motor vehicle stickers evidencing financial responsibility and provides penalties for altered, forged or counterfeit documents.
- HB 1334** Prohibits the cancellation or refusal to renew policies by reason of operating privileges of an underage person being suspended for an offense relating to alcoholic beverages.
- HB 1523**
HB 1524 Allows the Insurance Commissioner to modify insurance company requests for rate increases rather than simply approve or deny them. Gives the Commissioner more time to review rate filings, and requires insurance companies to provide more information with their rate filings.
- HB 1669** Expands the definition of "unfair methods of competition" and "unfair or deceptive acts or practices" to prohibit the assessment of fees other than commissions in exchange for any insurance-related transaction, including placement services. Provides an exemption for licensed brokers. Makes it an unfair practice to require drivers purchasing automobile insurance to buy other coverage as well.
- HB 1671** Delegates responsibility to insurers for the prevention, detection, and investigation of insurance fraudulent activities. Insurers must devise anti-fraud plans by December 31, 1989. Requires insurers to supply written reports of any suspected fraud to law enforcement officials and mandates that insurers join a proposed Fraud Information Exchange in order to operate in Pennsylvania.
- HB 1672** Grants the Insurance Department the power to investigate insurers and provides penalties for unlicensed brokers.

RHODE ISLAND
1989 Legislative Session
(January 3 - Late May)

Introduced

- SB 19** Creates the Fair Claim Settlement Practices Act and provides for suits against the insurer for acts of bad faith by the insurer.
- SB 20** Requires that motor vehicle insurance policies have arbitration provisions that may be utilized at the election of the injured party whenever a claim is for \$25,000 or less. Preserves the right to a jury trial.
- SB 110** Requires an insurance company to reveal its policy limit upon request.
- SB 207** Removes any requirements relating to uninsured motorist property damage coverage from the uninsured motorist coverage required under RIGL 27-7-2.1.
- SB 259** Requires that before a motor vehicle can be registered, the vehicle must be covered by liability insurance or proof of financial security.
- SB 671** Clearly defines vehicles affected by the law, states that this coverage pays only compensatory damages, clarifies language concerning rejection of uninsured property damages coverage and selection of limits on renewal and replacement of policies, makes technical amendments to recognize that many policies have more than one named insured and that any named insured can agree to terms of the contract, and eliminates the current stacking requirements. Clarifies and defines that uninsured motorist coverage may be applied only to damages resulting from bodily injury and does not include property damage, provides that the coverage for property damage applies as excess over other available property insurance, and introduces a definition of "hit-and-run" motor vehicle which would require physical contact.
- HB 5591** Requires that before a motor vehicle can be registered, the vehicle must be covered by liability insurance or proof of financial security.
- HB 5755** Requires liability insurance or proof of financial responsibility on all motor vehicles in the State, and provides procedures to insure compliance and penalties, including fines, jail terms and revocation of license and registration privileges for noncompliance.
- HB 6030** Creates within the Department of Business Regulation a Motor Vehicle Insurance Commissioner.

SOUTH CAROLINA
1989 Legislative Session
(January 10 - June 1)

Enacted

- HB 3695** Enacts the "Automobile Insurance Reform Act of 1989." Makes various significant amendments, including the following provisions:

1. Reduces the cost of motor vehicle reports.
2. Allows policies with credits and discounts to be ceded to the Reinsurance Facility.
3. Allows notification of the Highway Department by electronic and magnetic media of cancellation and reinstatement of automobile registrations.
4. States that uninsured and underinsured motorist coverages need not be provided in any excess or umbrella policy.
5. Increases the safe driver discount to 20% for all companies.
6. Reconstitutes the board members of the Reinsurance Facility.
7. Allows intervention by the Consumer Advocate in federal regulatory agencies to represent consumers' interest.
8. Allows intervention by the Consumer Advocate in the rate making process before the Department of Insurance.
9. Limits the mandate to write 250/500/50 or 500 single limit liability. States that insurers may not refuse to write optional coverages on the basis of unfair discrimination.
10. Makes it a violation of the Unfair Trade Practices statute to overcharge in insurance cases.
11. Provides for a minimum policy term of 60 days with no cancellation. Makes exceptions.
12. Establishes a procedure for handling underinsured motorist claims.
13. Sets up a procedure for offering optional coverages.
14. Makes it a felony for insurance fraud.
15. Requires insurers to notify the Chief Insurance Commissioner when a claim is denied due to fraud, arson, false swearing, etc.
16. Requires a person applying for a driver's license for the first time to complete a proof of insurance form or an affidavit that neither he nor any resident relative owns a motor vehicle and return it to the Department of Motor Vehicles within 30 days. Provides that failure to do so will result in the suspension of the newly acquired license. Provides that proof must also be given on each renewal.
17. Requires the Chief Insurance Commissioner to prepare and make available to the public a price shopper's guide for automobile insurance.
18. Gives the Chief Insurance Commissioner the power to order rate reductions as a result of legislative action.
19. Prohibits an insurer from including excess and bad faith judgments in the loss or expense component of their rate filings.
20. Makes it a felony for an insurer to include non-automobile insurance expenses in its automobile insurance rate filings unless such expenses are properly allocated.
21. Removes the mandate to write personal injury protection coverage.
22. Restricts the allowable expense figures to no more than the average expense figure for the top 10 most efficient companies. Separates companies into appropriate categories for the purpose of calculating the figures. Allows the Chief Insurance Commissioner to extend these provisions to other lines of insurance after a public hearing if it is in the best interest of the public.
23. Requires the Highway Department to identify lapses in insurance coverage when a person provides proof of insurance in response to a registration cancellation notice. Provides exceptions.
24. Requires the Highway Department to issue a receipt when the registration on a motor vehicle is surrendered.
25. Requires insurance companies to report investment income to the Insurance Department by means of a standard investment income exhibit.
26. Prevents an increase in automobile insurance premiums for the first

offenses of having a defective taillight or driving too fast for conditions.

27. Prohibits the increase of a recoupment fee of an insured motorist where he is not at fault for an accident.
28. Makes property/casualty rate filings subject to the Administrative Procedures Act.
29. Requires that all designated carriers pass audits in order to continue to hold a designated carrier contract.
30. Reduces the cession limitation from 40% to 35% and requires all insurance companies to inform any policyholder whether he or any person insured under the policy is in the Reinsurance Facility if requested to do so in writing by the policyholder.
31. Changes the formula for the recoupment fee.
32. Mandates a rate reduction of 5% for all insureds after September 30, 1989.
33. Requires persons in a motor vehicle to wear a safety belt, but in the back seat only if it has shoulder harness. Requires the School Bus Transportation Study Committee to study the installation of safety belts in school buses.
34. Allows the confiscation of license plates of uninsured automobiles by local law enforcement agencies.
35. Requires all policies that are ceded to the Reinsurance Facility have a \$250.00 deductible on comprehensive and collision coverage. Excludes safety glass from deductible.
36. Allows an insurer to cede coverages it is mandated to write; cannot cede coverages under a policy it is not mandated to write.
37. Changes the definition of an underinsured motor vehicle.
38. Adds a requirement to the Uninsured Motorist Statute that the witness required for a non-contact claim must sign a sworn affidavit and be informed of a penalty for false swearing.
39. Requires that a motor vehicle report be obtained at the point of sale for any policy that is to be ceded to the Reinsurance Facility.
40. Repeals the \$1.00 fee (of the premium for uninsured motorist coverage) that goes to the Highway Department for the enforcement of insurance requirements relating to motor vehicle registration, effective March 1, 1991.

Act 148. (Passed without Governor Carroll Campbell's signature)

SOUTH DAKOTA
1989 Legislative Session
(January 10 - Early March)

Introduced

HB 1065

Regulates rental car companies and provides under what circumstances a lessee of a rented motor vehicle may be liable for damages to the lessor.

TENNESSEE
1989 Legislative Session
(January 10 - May)
(organizational session followed by regular session)

Enacted

- SB 757** Clarifies the requirement of reducing motor vehicle insurance premiums for
HB 811 the completion of a motorcycle training course. Public Chapter 131.
- SB 1170** Extends the time of notice of intention not to renew private passenger
HB 635 automobile insurance. Public Chapter 110.
- SB 1136** Prohibits automobile insurance companies from increasing premiums under
HB 871 certain circumstances. Public Chapter 378.
- SB 1219** Authorizes recovery under uninsured motorist coverage in certain
HB 1015 circumstances. Public Chapter 313.

Introduced

- SB 10** Requires liability insurance on automobiles.
HB 76
- SB 841** Enacts the Mandatory Insurance Act of 1989.
HB 976
- SB 874** Prohibits the non-renewal of an automobile insurance policy solely because
HB 870 of the old age of the insured.
- SB 939** Requires the written approval by the Commissioner of certain liability
HB 1014 insurance rate increases and decreases.
- SB 1005** Requires an automobile liability insurer to offer coverage for interspousal
HB 536 protection.
- SB 1259** Deletes the licensure requirement that motor freight agents must obtain and
HB 1424 maintain liability and cargo insurance.
- SB 1394** Prevents subrogation of certain parties to payments under uninsured
HB 1327 motorist coverage and removes certain exemptions from such coverage.

TEXAS
1989 Legislative Session
(January 10 - May 29)

Enacted

- SB 41** Requires persons operating a motorcycle on a public street or highway to
wear protective headgear which meets standards adopted by the Department
of Public Safety. Requires passengers to wear protective headgear. Provides
an exception for those who are 18 years of age or older and have been is-
sued a medical exemption. Chapter 15.

Introduced

- SB 191** Prohibits rental companies from imposing certain liabilities on persons who rent automobiles, subject to exceptions, in connection with private passenger automobile rental agreements.
- SB 255** Requires new Texas insurers to maintain at least \$700,000 in capital and \$700,000 in surplus. Stipulates that companies already operating can continue to meet the current minimums of \$200,000 in capital and \$400,000 in surplus unless more than 50% of the insurer is sold. Requires that if more than 50% of the company is sold, the insurer is still able to maintain the \$400,000 minimum in surplus, but must increase capital to \$700,000.
- Removes the confidentiality of information related to insurers unless the Insurance Commissioner can prove there is sufficient reason not to make the information public. Stipulates that the confidentiality can last only 60 days.
- Requires the state's attorney general to notify the Insurance Commissioner of intent to file a lawsuit against an insurer for violations of the Texas Deceptive Trade Practices Act.
- Requires large insurers annually to submit a financial statement prepared by an independent auditor. Insurers with less than \$750,000 of direct written premiums or fewer than 1,000 policyholders are exempt from the audit requirements.
- Calls for the establishment of new regulations for the purchase of reinsurance by Texas insurance companies. Allows Texas insurers to show reinsurance as an asset or deduction from liability only if the coverage is ceded to companies licensed or accredited in the state or ones that establish sufficient assets in U.S. banks to pay claims.
- SB 410** Relates to certain insurance coverage for spouses and dependents in the event of the severance of the family relationship.
- HB 163** Designs and supplies a uniform certificate of course completion for successful completion of a driver safety course.
- HB 1094** Repeals a fee section of the Texas Motor Vehicle Safety-Responsibility Act.
- HB 1822** Relates to financial responsibility for a motor vehicle.
- HB 1827** Relates to recovery of motor vehicle insurance benefits for a motor vehicle impounded for the insured's drug violations.

UTAH
1989 Legislative Session
(January 9 - February 22)

Enacted

- SB 112** Prohibits automobile rental companies from holding renters liable for vehicle collision damage unless the company discloses all costs incident to the rental of a vehicle, and displays notice that a renter's own motor vehicle insurance or credit card agreement may cover damage to the rental vehicle. 1989 Utah Laws 251

Introduced

- SB 258** Requires insurance companies to offer optional property damage protection against uninsured motorists. Provides that this is only a secondary coverage. Specifies limits on the coverage offered.
- HB 61** Requires the disclosure of rate making data in addition to an insurance company's required annual statement.
- HB 268** Reduces the no-fault threshold in motor vehicle insurance and increases coverage provisions.

VERMONT
1989 Legislative Session
(January 4 - Late April)

Introduced

- HB 149** Prohibits car rental companies from imposing liability upon renters subject to exceptions and the sale of collision damage waivers in private passenger automobile rental agreements of 30 days or less.
- HB 176** Changes the method of regulation of rates by returning to a system of prior approval.
- HB 253** Increases the capital requirements of surplus lines insurers.
- HB 370** Establishes a comprehensive revision of laws relating to insolvency of insurers.
- HB 421** Establishes new standards for notice of cancellation or nonrenewal of casualty or automobile insurance.
- HB 476** Requires daily pro rata refund of premiums on cancellation or non-renewal of commercial and personal automobile insurance policies.

VIRGIN ISLANDS

As of May 1989, the Legislature was considering compulsory automobile insurance legislation.

VIRGINIA
1989 Legislative Session
(January 11 - Late February)

Enacted

- HB 73** Raises the minimum limits of insurance coverage for motor vehicle insurance from \$10,000 to \$20,000. Chapter 621.
- HB 1733** Permits the stacking of uninsured motorist insurance coverage.
- HB 1901** Prohibits Department of Motor Vehicles disclosure to insurance carriers of any information of a person's involvement in any accident unless the person was convicted of a violation of a statute or ordinance in connection with the accident.

HB 1955

Amends notice requirements of acts of cancellation and refusal to renew certain liability insurance policies issued to business entities. Prohibits an insurer from cancelling or refusing to renew a policy of motor vehicle insurance against legal liability of the insured solely because of lack of supporting business or lack of the potential for acquiring such business. Chapter 728.

Introduced

SJR 223

Establishes a joint subcommittee to study the availability and affordability of motor vehicle insurance in the Commonwealth.

HJR 382

Continues the joint subcommittee studying the practices by which insurance companies reinsure all or parts of the risks they insure, the advisability of repealing the exemption from the Commonwealth's antitrust laws, and means of assuring the continued availability and affordability of liability insurance coverage.

WASHINGTON
1989 Legislative Session
(January 9 - April 23)

Enacted

SB 5152

Amends insurance form filing requirements. Amends the rate making process.

SB 5499

Requires the driver and registered owner of a motor vehicle to maintain liability insurance. Provides for penalties and exemptions.

Introduced

SB 5148

Requires a rental car company to provide a separate disclosure concerning a collision damage waiver to an individual renting a motor vehicle.

HB 1068

Provides the circumstances under which a motor vehicle lessee may be liable for damages to the lessor.

WEST VIRGINIA
1989 Legislative Session
(February 8 - April 8)

Enacted

SB 264

Provides a mechanism to regulate the declination (i.e., the refusal of an insurer to issue an automobile liability insurance policy upon receipt of a written non-binding application or written request for coverage from its agent or an applicant) of automobile liability policies.

Introduced

SB 277

Defines fraudulent insurance acts and prescribes limits on liability for such acts.

- SB 286** Removes motor vehicle insurance coverage under any policy's omnibus clause if consent is given to use a motor vehicle to a person who does not have a valid operator's or chauffeur's license.
- SB 379** Lowers the fine for driving without insurance to \$10.00.
- SB 406** Allows persons whose driving privileges have been suspended for failure to have insurance coverage for the first time within a 10-year period and upon a showing that they have reinstated their insurance, to drive to and from work.
- SB 462** Requires insurance companies to supply an explanation for cancellation of policies or coverages to the insured, and provides penalties for violations.
- SB 595** Mandates that reductions in premium charges for persons 55 years of age and over shall be separate from and in addition to reductions which may have been given routinely to persons in this age group without respect to improved skills resulting from an approved driving course.
- SB 623**
SB 469 Ensures that the body shops of the state receive their money for work done based on insurance payments, when there is a lien placed on the motor vehicle.
- HB 2058** Limits the coverage of uninsured or underinsured motorists' insurance by imposing ceilings and compensatory damage and maximum amounts.
- HB 2225** Creates the Insurance Consumers' Selection and Advisory Committee and the Office of Insurance Consumer's Advocate.
- HB 2228** Provides that uninsured motorist coverage be optional rather than mandatory for any persons required to purchase automobile insurance pursuant to state law.
- HB 2769** Provides that owners of motor vehicle insurance policies may, upon notice of non-renewal of such policies due to other covered driver's driving violations, prevent such non-renewal by restrictive endorsement specifically excluding such other covered driver from coverage.
- HB 2833** Permits a specific exclusion of any person, by restrictive endorsement, from the mandatory liability insurance requirements set out in Section 170-4-2.

WISCONSIN
1989 Legislative Session
(Convenes January 10)

Enacted

- SB 11** Makes various changes to the administrative suspension law relating to driving while under the influence. Requires that any period of time that a license is suspended or revoked is credited against any suspension or revocation reimposed by a court for violations that arose out of the same incident. 1989 Wisconsin Act 7.

Introduced

- SB 10** Prohibits a renter or authorized driver from being held liable to the person who provided the vehicle for rent (rental company) for damage to the rented vehicle. Provides exceptions. Prohibits a rental company from attempting to hold a renter or authorized driver liable in cases where liability has been eliminated. Prohibits rental companies from attempting to sell to renters a waiver of liability or to require the the renter to make a security deposit. Provides penalties.
- SB 24** Requires each motor vehicle liability insurance policy to include underinsured motor vehicle liability coverage. Provides that the amounts of underinsurance coverage must be provided in addition to any coverage applicable to the owner or operator of the underinsured motor vehicle. Prohibits the insurer from being subrogated to the rights of insureds.
- AB 22** Requires a person who operates a motor vehicle that is registered or required to be registered in Wisconsin to have in effect liability insurance or a bond that assures financial responsibility for the operation of the vehicle. Provides exceptions. Prescribes penalties.
- AB 47** See SB 24.
- AB 51** Specifies factors that an insurer may consider to determine the rates and premiums for certain motor vehicle insurance policies. Limits an insurer's consideration of the location of the insured motor vehicle in determining rates and premiums.
- AB 84** Increases to \$60,000 the amount of cash or value of securities that may be deposited with the Secretary of Transportation in lieu of providing insurance or a bond as proof of financial responsibility for the future.
- AB 288** Requires the Department of Transportation to indicate in the files it maintains for licensed drivers whether the accidents in which each driver was involved occurred during the driver's employment as a law enforcement officer, firefighter, or emergency medical technician (advanced paramedic).

WYOMING
1989 Legislative Session
(January 10 - March 4)

Enacted

- SF 129** Amends sections of the current law related to motor vehicle financial responsibility. Chapter No. 173
- HB 165** Provides that any person who successfully completes an accident prevention course shall receive a reduction in rates for automobile insurance. Chapter No. 258

Introduced

- SF 226** Creates an antitrust act for insurance companies and provides for penalties.
- HB 61** Prohibits automobile insurance companies from raising premiums based upon certain speeding violations.
- HB 908** Provides for an Uninsured and Underinsured Motorist Act.

- HB 173** Requires the certification of financial responsibility in order to register a motor vehicle.
- HB 227** Requires the filing of rates in competitive markets.
- HB 242** Relates to surplus lines insurers.
- HB 302** Expands the rating authority of the Insurance Commissioner.

AUTOMOBILE INSURANCE - Studies and Proposals

COLORADO

See HJR 1025 in Legislation Section.

FLORIDA

- CS/SB 1295 Motor Vehicle Insurance Task Force studies the availability and affordability of motor vehicle insurance. (Report due April 1, 1990)
- CS/CS/CS/HB 336 Reviews premium tax laws in Florida and other states. (Report due December 1, 1990)

HAWAII

See SCR 67 in Legislation Section.

IOWA

Study of non-gender based insurance.

MARYLAND

1. House of Delegates will study the costs and benefits of establishing a Fraud Unit in the Insurance Division or the Attorney General's office.
2. Administration will study the organization of the Insurance Division.
3. Senate will study the antitrust issue.

MISSISSIPPI

"Automobile Insurance in Mississippi," A Report of the House Study Committee on Automobile Insurance, December, 1988.

NORTH CAROLINA

See HB 1081 in the Legislation Section.

NORTH DAKOTA

See SCR 4028, 4039, 4052, and 4057 in Legislation Section.

Note: The Legislative Council decided not to conduct the above studies.

OHIO

Ohio House Insurance Subcommittee proposal to move to prior approval of automobile insurance rates and unisex rating.

TEXAS

Legislators have requested a study to determine what effects the removal of insurers' antitrust exemption in the state would have on the insurance industry in Texas and the nation. Results of the study will not be released until the opening of the 1991 Legislative Session.

VERMONT

SB 193 requires the Department of Banking and Insurance to conduct a study of gender-based insurance practices.

VIRGINIA

- 1. "Annual Report of the Department of Motor Vehicles on Uninsured Motorists to the Governor and the General Assembly of Virginia," House Document Number 4, December 1988.**
- 2. "Report of the State Corporation Commission's Bureau of Insurance on Insurance Premium Increases Resulting From Not-At-Fault and Partially-At-Fault Motor Vehicle Accidents to the Governor and the General Assembly of Virginia," House Document Number 14, November 1988.**
- 3. "Report of the Joint Subcommittee Studying the Availability and Affordability of Liability Insurance, the Antitrust Exemption Afforded Insurers and the Reinsurance Costs Associated with Liability Insurance to the Governor and the General Assembly of Virginia," House Document Number 63, February 1989.**

**1989 STATE LEGISLATION WITH PROVISIONS SIMILAR TO
CALIFORNIA'S PROPOSITION 103****

1. Insurance Rate Reduction

FL HB 1334
IL HB 337
IN HB 1298
LA HB 6, 1423, 1512
NM SB 310
NV SB 220*
OH HB 76
PA HB 431
SC HB 3695*

2. Discount for "Good Drivers"

IN HB 1298*
LA HB 6, 1512
OH HB 76
OR SB 684*

3. Election of Insurance Commissioner

AL SB 303
IL SB 882; HB 2144
IN HB 1298
OH HB 76

4. Consumer Advocate for Insurance

AZ Considering Creating Consumer Fraud Division
CO HB 1260
FL HB 285, CS/CS/HB 855
MD SB 616; HB 853
OH HB 76
PA SB 100; HB 1150
WV HB 2225

* - Enacted

** - Provisions not highlighted are: the requirement of advance state approval of insurance rate increases and the requirement of the publication of insurance rate comparisons.

CONSUMER ADVOCATES FOR INSURANCE LEGISLATION

1989

Introduced

AZ	Considering creating Consumer Fraud Division
CA	Proposition 103
CO	HB 1260
FL	CS/CS/HB 855 (Public Counsel) HB 285 (Insured's Bill of Rights)
IA	SF 381
MD	SB 616, HB 853
OH	HB 76
PA	SB 100, HB 1150
WV	HB 2225

1988

Enacted

KY	HB 552
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Introduced

CA	SB 2301
NJ	AB 1620
PA	HB 471

AL
GA
LA
MA
MD
MN
OH
RI
SC

1987

Enacted

AK	SB 509
AZ	HB 2034
CT	SB 116
MI	SB 67
MN	HF 392
OR	SB 323
TX	SB 2X

AUTOMOBILE INSURANCE - Litigation

Aetna Casualty and Surety Company v. Souras 552A.2d 908 (Md. App. 1989)

A passenger who was injured in a collision brought suit against the insurer providing uninsured motorist coverage for the vehicle in which the passenger was riding.

The Court held that in determining the uninsured motorist benefits an injured passenger is to receive from the insurer providing coverage for the vehicle in which the passenger was riding, the \$25,000 the passenger received from the alleged tortfeasor's insurer is to be subtracted from the uninsured motorist coverage limits of \$50,000 rather than from the judgment of almost \$67,000 awarded the injured passenger.

Horace Mann Insurance v. Hampton 767 P.2d 343 (Mont. 1989)

An insurer brought a declaratory judgment action seeking to avoid coverage under an automobile policy.

The Court held that where the driver of a motor vehicle initially obtains control and operates a vehicle with permission of the owner, the Montana Mandatory Liability Protection Act requires the liability insurance to continue to cover the vehicle even though the permittee may have exceeded the scope of the owner's permission or consent.

Presnell v. Allstate Insurance Company 434 N.W.2d 267 (Minn. App. 1989)

The Court held that in a claim for both underinsured and uninsured motorist benefits, the insured who communicates the settlement offer of the underinsured tortfeasor's insurer may recover the difference between the tortfeasor's underinsured liability limit and settlement proceeds from the underinsured insurer.

INDEX (AUTOMOBILE INSURANCE LEGISLATION)

* = Enacted

A. Access to motor vehicle reports

CA AB 2315
LA HB 58
MI HB 4217
MT HB 295*
ND HB 1351*
TX SB 255
VA HB 1901*

B. State antitrust laws

IL SB 881; HB 2147
IN HB 1795
KS SB 282
MD SB 616; HB 853
MI SB 270; HB 4490, 4912, 4918
MN SF 801
NM HB 287
OH SB 163; HB 76, 465
VA HJR 382
WY SF 226

C. Automobile claims

1. Claims

CA AB 2315
FL CS/SB 817*
GA SB 50*; HB 216*, 699
IN HB 1815
MI HB 4912
MN SF 1170
NY AB 2770A, 3555
OK SB 13
PA HB 431
RI SB 19, 20
WV SB 469, 623

2. Aftermarket parts

AL SB 368*; HB 557*
CO HB 1155*
FL SB 878, CS/SB 1414
GA HB 201*
IL SB 932; HB 1359, 1753, 2638
KS HB 2015*
MO HB 726*

3. Automobile Safety

AL SB 259*, 364; HB 398, 542
AK HJR 43
CA AB 2315
CO HB 1244*
GA HB 699
ME SP 74*; HP 277*, 445*; LD 64*, 389*, 610*
MI SB 173* HB 4220, 4467, 4468
NY SB 688*, 1006*, 2132*; AB 473A*, 1266*, 3173*
OK SB 434
OR SB 696, 859
PA HB 324
TX HB 1094

4. Automobile theft

AL HB 569*
AK HB 2
FL CS/HB 153*
GA HB 1111
MI HB 4289, 4912
NJ SB 3122*, 3124*
NY AB 7396
OR HB 3132
PA HB 567

D. Collision damage waivers/car rentals

AZ SB 1250
CO HB 1195*
FL SB 80; CS/HB 99
IL HB 1825
IN SB 159*
KS SB 317
LA SB 571; HB 615, 1285, 1287
MI HB 4553
MS HB 268
MT SB 102
ND SB 2098*
NE LB 59
NM SB 649
NY SB 4554A*; AB 6711A*
OR SB 128*
PA SB 902
SD HB 1065
TX SB 191
UT SB 112*
VT HB 149
WA SB 5148; HB 1068
WI SB 10

E. Commercial automobiles

AL HB 311*
AK SB 137
ND HB 1331*
TN SB 1259; HB 1424

F. Compulsory security

LA HB 1552

G. Financial responsibility

AZ HB 2321
CA AB 2315
CO HB 1182
FL SB 276; CS/HB 536
GA HB 38
IN SB 134
KS HB 2324*
LA HB 750
MS SB 2422; HB 563
MT HB 206*
ND HB 1176*, 1331*
NE LB 347, 495
NM SB 176, 257, 318*, 461*; HB 36, 398
OH HB 430
OR HB 2541
PA HB 426, 431, 608, 1152, 1165, 1172
TX HB 1822
WI AB 22, 84
WV SB 379
WY SF 129*, HB 173

H. Insurance commissioner

1. Duties

AL HB 9, 11
AR HB 1785*
CA AB 2315
FL SB 161
GA SB 31*, HB 314*, HB 510*
IL SB 880, 881; HB 1793, 2147
IN SB 358*; HB 1298
MI HB 4158, 4912
NV SB 220*
OH HB 76
OK HB 1584
PA HB 1523, 1524
TN SB 939; HB 1014
WY HB 302

2. Appointment or election

AL SB 303
IL SB 882; HB 2144
IN HB 1298
LA HB 98
OH HB 76

3. Other categories

MI HB 4152, 4912
PA SB 12
RI HB 6030

I. No-fault

DE HB 206
HI SB 214; HB 1665
LA HB 158, 395, 918
MD HB 1243, 1434
MI HB 4158, 4159, 4239, 4751, 4916
ND HB 1409*, 1467*, SCR 4039

J. Rate regulation

AL SB 303
AZ HB 2541
CA AB 354
FL SB 740, CS/SB 845, CS/SB 1097; HB 666
GA SB 35, 49*
IA SF 458; HF 169
IL SB 170, 880; HB 337, 569, 573, 1793, 2144
LA SB 126, 695; HB 125
MI HB 4912
MN SF 1170
MO SB 250*
ND HB 1408*, SCR 4057
NY AB 469, 5067, 5893 or SB 558
OH SB 163; HB 264, 465
PA SB 146, 204, 436, 843; HB 292, 324, 510, 609, 685, 1523, 1524
UT HB 61
VT HB 176, 476
WA SB 5152*
WI AB 51
WY HB 61, 227

K. Rate Reduction

AL HB 580
CO SB 186
FL HB 1334
GA SB 49*
ID HB 297*
IL SB 882
IN HB 1298, 1363
LA HB 6, 1423, 1512

MI HB 4912
MT HB 322
ND SB 2271°
NM SB 310; HB 640
NV SB 220°
NY AB 7396
OR SB 684°
PA HB 431, 567, 589
TN SB 757°; HB 811°
WV SB 595
WY HB 165°

L. Residual risk

FL CS/SB 1251
IL HB 821
NY AB 5180
OR HB 3160

M. Uninsured motorists

AL HB 570
AR HB 1069°
AZ HB 2245, 2496
CA AB 2315
CO SB 90°; HB 1292
FL HB 285, CS/CS/HB 855
GA SB 199°; HB 904
IN HB 1360
LA SB 510, 608, 850, 851; HB 526, 757, 971, 1420
MI HB 4751, 4915
MS HB 320, 328, 688
ND HB 1155°, 1242°
NH HB 370°
NM SB 207
NY AB 5794A
OH HB 250
OK HB 1545
OR SB 18
PA HB 648
RI SB 207, 671
TN SB 1219°, 1394; HB 1015°, 1327
UT SB 258
VA HB 1733°; SJR 223; HJR 382
WV SB 406; HB 2058, 2228
WY HB 908

N. Mandatory or compulsory auto insurance

AL SB 299; HB 968
AK SB 4, 44; HB 44
AZ SB 1264; HB 2245, 2496
CA AB 354
CO SB 98, 209; HB 1138, 1182
DE HB 58
IA HF 290, 334

LA HB 346, 637
MD HB 1243
MN HB 1194*
MS HB 160, 324, 420
NC HB 1081
ND SCR 4052
NM HB 685
OK HB 1303, 1581
TN SB 10, 841; HB 76, 976
WA SB 5499*
WV HB 2833

O. Consumer advocate office

CO HB 1260
FL HB 285, CS/CS/HB 855
IA SF 381
MD SB 616; HB 853
OH HB 76
PA SB 100; HB 1150
WV HB 2225

P. Notice requirements

AR SB 502*
AZ SB 1318; HB 2489
DE SB 212
GA HB 99*
IL SB 880, 1032
IN HB 1815
LA HB 912
MD SB 170; HB 335
MI HB 4771
MS SB 2422
NY AB 7315A*
OK SB 182; HB 1550
OR HB 2419
PA SB 457; HB 564
TN SB 1170*; HB 635*
VT HB 421
VA HB 1955*
WV SB 462; HB 2769

Q. Miscellaneous

AK SB 309
AL HB 7, 940
AR SB 270*; HB 1937*
AZ HB 2059
CO SB 128*; HJR 1025
FL CS/SB 1295; HB 229, 285, CS/HB 1231
GA SB 127*, 233*; HB 57*, 175*, 181*, 205*, 566*
HI SB 48, 1056; HB 42, 544; SCR 67
IA HF 495, 629
IL SB 1288; HB 504, 855, 2140, 2217, 2654
IN SB 311*, 360*, 361

LA SB 136, 522; HB 40, 154, 330, 415, 558, 724, 919, 1269, 1278, 1438
ME HP 220, 258*; LD 300*, 370*
MI SB 389; HB 4913, 4914, 4917
MN HB 956*
MO SB 228*; HB 563*, 615*
MS HB 11
MT HB 673
ND HB 1107*, SCR 4028
NE LB 222
NH HB 270*
NJ AB 130*
NY SB 1146*, 1245A*; AB 1857A*, 2169A, 7312, 7315A*
OK HB 1418, 1471
OR SB 858; HB 2429*, 2539, 2540, 2546, 2701, 2889, 3098, 3391
PA SB 32, 109*, 205, 210, 223, 538; HB 212, 1110, 1151, 1154, 1334
RI SB 110
TN SB 874, 1005, 1136*; HB 870, 536, 871*
TX SB 41*, 255, 410; HB 163, 1827
VA HB 73*
VT HB 253, 370
WI SB 11*, 24; AB 47, 288
WV SB 264*, 277, 286
WY HB 242

PROPERTY/CASUALTY INSURANCE

ALABAMA

Introduced

- HB 10 Provides that those who are subject to the Insurance Code are also subject to the Deceptive Trade Practices Act.
- HB 1022 Relates to the conversion of property and casualty mutual insurance companies.

ALASKA

Introduced

- SB 100 Requires school districts to purchase adequate property insurance.
HB 37
- SB 212 Relates to insurer insolvency.
- SB 257 Requires an insurance company to pay a judgment or settlement of a claim
HB 265 with a negotiable bank check.
- SB 258 Relates to the state exemption from certain insurance premium taxes.
- SB 273 Relates to the licensing of insurance agents, brokers, solicitors, adjusters, and firms.
- HB 135 Relates to insurance policy binders.
- HB 335 Imposes a uniform insurance premium tax.
- HB 343 Creates the Environmental Indemnity Corporation of Alaska to provide a means of furnishing insurance to owners of underground storage tanks.

ARKANSAS

Enacted

- SB 451 Amends the notice requirements of cancellation of insurance policies. Act 675 of 1989.
- SB 502 Requires insurers to notify policyholders and agents of certain premium increases on renewal of commercial and casualty insurance policies. Act 797 of 1989.
- HB 1099 Requires notice of insurance cancellation to motor carrier lessees. Act 646 of 1989.

COLORADO

Enacted

- SB 61** Concerns the authority of the Commissioner of Insurance to use outside examiners to conduct examinations of insurance companies.
- SB 107** Amends the laws regulating captive insurance companies.
- HB 1058** Concerns the change of domicile of insurance companies.
- HB 1258** Concerns exclusions from coverage under the "Colorado Guaranty Association Act."
- HB 1264** Concerns the power of the Commissioner of Insurance to regulate insurance companies, and makes an appropriation.

Introduced

- HB 1157** Concerns the establishment of education requirements as a condition of licensure for certain insurance licensees.
- HB 1160** Requires that an applicant complete a specified number of hours of training prior to becoming a licensed life or accident and health insurance agent or broker.
- HB 1189** Concerns an insurer's actions with respect to an agent based on the loss ratio experience of the policies the agent has written.

GEORGIA

Enacted

- HB 178** Requires the Commissioner of Insurance, as a supplemental report to the annual report, to compile and distribute to the members of the General Assembly a report containing specified information on property and casualty insurance. Act 548.
- HB 182** Requires property and casualty insurers to engage a qualified independent loss reserve specialist under certain circumstances. Requires the specialist to file a report with the Commissioner. Act 501.
- HB 205** Allows the Insurance Commissioner to examine insurers every three years instead of every five years.
- HB 484** Increases from \$25,000 to \$30,000 the amount of funds which must be deposited by a farmers' mutual fire insurance company which writes insurance coverage of \$7 million or more as a surplus of its assets over its liabilities. Act 510.
- HB 566** Allows insurers based in other states to move their operations to Georgia by complying with all requirements regarding organization and licensing of a domestic insurer.

Introduced

HB 1130

Regulates property-casualty insurance.

HAWAII

Enacted

**SB 1813
HB 1883**

Allows the Insurance Examiners Revolving Fund to be used to reimburse Insurance Division staff examiners for expenses incurred on account of an examination and the examiners' education and training.

Introduced

SB 203

Requires insurers of fire insurance to state in the policy that in the event of a total loss of the insured real and personal property, the insurer will pay the maximum dollar amount of coverage reflected in the policy for the insured property.

**SB 329
HB 1284**

Establishes the Basic Property Insurance Inspection and Placement Plan. Provides that within 30 days after effective date of act, with approval of the Insurance Commissioner, all insurers licensed to write basic property insurance in multiperil policies shall establish the Hawaii FAIR (Fair Access Insurance Requirements) Plan Association to formulate and administer a program for the equitable apportionment among insurers of basic property insurance for persons who are unable to procure such insurance through normal channels from a licensed insurer or broker. Provides criteria. Allows for equitable distribution of risks among insurers.

SB 584

Requires all casualty, surety, property, marine and transportation insurers to provide a reduction of rates normally assessed for each new and renewal policy, where the prospective insured is an employer who has provided risk management training for all the employer's employees. Requires the Insurance Commissioner to establish minimum standards for such training.

SB 855

Repeals preferential tax rates given to Hawaii insurance companies. Imposes a tax on certain insurers. Establishes special preferential rates for other insurers. Establishes other requirements.

SB 907

Repeals preferential tax rates given to Hawaii insurance companies. Imposes a tax on certain insurers. Allows certain insurers tax credits. Establishes requirements.

SB 1232

Allows trust companies to engage in the business of a general insurance agent or an insurance subagent if licensed by the Insurance Commissioner.

**SB 1242
HB 761**

See SB 329, HB 1234.

SB 1581

Requires each insurer offering property insurance to homeowners or renters, to offer insurance against loss by fire, theft, or casualty which shall include reimbursement for reasonable rental expenses for temporary housing. Provides that coverage shall be offered for risks not exceeding \$25,000, with a deductible not to exceed \$50. Requires rates to be substantially the same as those charged in 1986 after adjustment for inflation.

- SB 2005** Changes discrimination covenants in provisions relating to insurance and other topics.
- HB 940** See SB 855.
- HB 1112** See SB 1232.
- HB 1113** See SB 907.
- HB 1747** Amends regulations of risk retention groups. Among other provisions, provides that where insurance is obtained covering members' risk from an insurer authorized in Hawaii, claims shall be covered by the Property and Liability Insurance Guaranty Association. (Received by Governor John D. Wai Hee III on April 19, 1989)

ILLINOIS

Introduced

- HB 181** Provides a maximum of \$100,000 rather than \$25,000 as punitive damages when an insurance company has been unreasonable and vexatious in refusing to pay a claim. Authorizes the Department of Insurance to review and approve premium rates. Requires prior Department approval with respect to an increase or decrease of 10% or more. Specifies financial information to be reported to the Department.
- HB 337** Requires insurers to roll back rates to a level of 15% less than the charges for the same coverage which were in effect on January 1, 1989. Applies to policies issued or renewed on or after January 1, 1990.
- HB 1340** Provides that all insurance policies disclose their provisions in a clear and explicit manner.
- HB 2146** Amends the Illinois Insurance Code in relation to property and casualty insurance premium rates, cancellation notices and private remedies. Requires cancellation notices to be sent by certified mail. Creates a civil cause of action against companies violating certain provisions of the Code. Authorizes the Department to review and approve or disapprove premium rates. Requires prior Department approval with respect to an increase or decrease of 10% or more. Specifies financial information to be reported to the Department.
- HB 2148** Abolishes authority for rating organizations. Requires companies to file their own rates with the Department of Insurance. Prohibits rate changes exceeding 15% without adequate justification. Establishes criteria. Expands the scope of rate regulation to include all property and casualty insurance.
- HB 2766** Requires that the form and content of all insurance policies and related documents must be filed with and approved by the Director of Insurance. Establishes minimum language and format standards for policy readability.

IOWA

Introduced

HF 446 Prohibits discrimination on the basis of sex or marital status in the issuance or operation of an insurance policy contract or plan.

KANSAS

Enacted

SB 110 Requires insurers which fail or refuse to pay any amount due under any contract of insurance within a prescribed time to pay interest on the amount due.

Introduced

SB 282 Amends certain antitrust statutes applicable to the insurance industry.

LOUISIANA

Introduced

HB 1264 Revises surplus requirements for new domestic mutual insurers. (Sent to Governor Buddy Roemer)

HB 1265 Revises capital requirements for domestic stock insurers. (Sent to Governor Buddy Roemer)

MAINE

Enacted

SP 53 Relates to the licensing of insurance agents, brokers, and adjusters.
LD 28 Chapter 168.

HP 217 Requires insurance agents, brokers, and consultants to participate
LD 297 in continuing professional education. Chapter 31.

MARYLAND

Introduced

SB 616 Modifies exemption for insurance activities under the state's antitrust
HB 853 law and maintains open competition.

MISSOURI

Enacted

SB 333 Clarifies the law pertaining to the Missouri Insurance Guaranty Association.
Changes provisions dealing with the regulation of insurance.

NEW YORK

Enacted

SB 2178A

Amends the Insurance Law, in relation to continuation of provisions relating to advances from the property/casualty insurance security fund. Chapter 14.

AB 6101

Authorizes the formation of financial guaranty insurance corporations and provides exclusions from coverage by the property/casualty insurance security fund. Chapter 48.

NORTH DAKOTA

Enacted

HB 1540

Allows the use of property and casualty insurance binders.

PENNSYLVANIA

Introduced

HB 1669

Requires insurers to provide written notification of intent to cancel homeowners policies.

RHODE ISLAND

Enacted

SB 61

Prohibits insurance companies from issuing policies which exclude any members of the insured's family from making any claim under such policy.

UTAH

Introduced

SB 121

Provides for the gathering of property and casualty insurance rate information.

HB 61

Requires the disclosure of rate making data in addition to an insurance company's required annual statement.

VERMONT

Introduced

HB 229

Authorizes the Commissioner of Banking and Insurance to specify insurance records that must be preserved.

HB 286

Requires prior approval of rates which increase 25% over a 12-month period, requires a hearing to determine if the market has become noncompetitive when rates increase 15% over a 12-month period, requires statistical agencies to provide only the loss cost portion of rates to insurance companies, requires prior approval of all "claims made" rates.

HB 374

Extends from 45 to 90 days the required notice period for cancellation or nonrenewal of property and casualty insurance policies.

WISCONSIN

Introduced

SB 102

Extends the time limit for bringing an action on a fire, windstorm, or hail insurance policy from 12 months to three years after the inception of the loss. Applies to riders or endorsements attached to a fire insurance policy covering a loss from any cause.

AB 77

See SB 102.

WYOMING

Introduced

HB 227

Requires the Insurance Commissioner to establish standards for rating plans in property/casualty and professional liability insurance markets.

INDEX (PROPERTY/CASUALTY INSURANCE LEGISLATION)

• = Enacted

A. Company Regulations

AK SB 257; HB 265
IL HB 1340, 2766
KS SB 110*
LA HB 1264, 1265
ME SP 53*, HP 217*; LD 28*, 297*
RI SB 61*
UT HB 61

B. Discrimination

HI SB 2005
IA HF 446

C. Fire Insurance

HI SB 203, 1581
WI SB 102, AB 77

D. Insolvency

AK SB 212
MO SB 333*
NY SB 2178A*; AB 6101*

E. Insurance Binders

AK HB 135
ND HB 1540*

F. Licensing

AK SB 273

G. Miscellaneous

AK SB 100; HB 37, 343
AL HB 10, 1022
GA HB 178*, 182*, 484*, 1130, 205*, 566*
HI SB 1232, 1813*; HB 1112, 1883*
IL HB 181
KS SB 282
MD SB 616; HB 853
UT SB 121
VT HB 229, 286
WY HB 227

H. Notice Requirements

AR SB 451*, 502*; HB 1099*
IL HB 2146
PA HB 1669
VT HB 374

I. Rate Reduction

IL HB 337

J. Rating Organizations

IL HB 2148

K. Risk Retention

HI SB 329, 584, 1242; HB 761, 1284, 1747

L. Taxes

AK SB 258; HB 335
HI SB 855, 907; HB 940, 1113

CALIFORNIA DOES IT AGAIN!



BY FREDERICK W. KILBOURNE

Frederick W. Kilbourne is a consulting actuary in Newport Beach, California.

A decade ago, California enacted Proposition 13, thereby slashing property taxes and generally shaking up the state and local government systems. Perhaps most shaken were the state legislators, for enactment occurred by means of the initiative process, whereby the legislature is bypassed and law is made more or less directly by the electorate. One can imagine the impact on the perceived value of legislators if the initiative process were to catch on and spread to other areas or other states.

Well, Prop 13 did catch on, and its influence has been felt well beyond property taxes and well beyond California. Some say that Prop 13 laid the groundwork for the anti-tax mood of the 1980s, while others say it was merely an early manifestation of that mood. All agree, however, that it burst onto the national scene, and into the national consciousness, to an extent that most human ballot choices can only aspire.

And now, it appears, California voters have done it again! Last year, they enacted Proposition 103, which promises to slash automobile and other insurance premiums, and generally shake up the property and casualty insurance systems. Will these ideas spread to other states? Are they but a part of a general revolt by policyholders? Can the multitudes be fed with two loaves and five fish? Time will tell. . . .

The People Speak—or Was That a Shout?

We, the people, speak in various ways—usually indirectly. We hire a prosecutor to speak for us in the case of the people versus the accused. We hire a legislature to enact laws, ostensibly in our interest. We hire a judge to interpret those laws, and occasionally get a bonus of sorts when that judge decides he is also a legislator.

We hire an administration to enforce the law, again, as always, in our interest. Examples of our speaking directly, however, are harder to find. Arguably, we do so when we take to the streets, but the voice of the mob rarely (outside China) is the voice of the people as a whole. The closest we come to direct and representative speech may well be by means of the initiative process, for better or worse.

Only California and Switzerland, plus a relatively few other jurisdictions, have an alive and healthy initiative mechanism. It's admittedly an exaggeration to call a ballot proposition the voice of the people, for it takes an interest group at best to draft, promote, and place the proposition on the ballot. The California ballot last fall, for example, had competing and contradictory propositions concerning automobile insurance put forth by the insurance industry, the trial lawyers, a consumer advocate, and a renegade insurance company.

The voice of the people can be harmony rather than a single note, but it surely isn't one voice if the song is cacophony. Yet it's hard to argue with the proposition that winning more than half the votes in an election means that the people have spoken, while winning less than half the votes means that the people have been, at best, silent. Most Dukakis supporters don't care for the term "President Bush," but they accept it nonetheless.

So Proposition 103, by garnering 51% of the vote, can be said to have earned a force of law greater than that which can be conferred by the state senate or the governor. Yet one question does remain: Did the people speak, or did they shout? Did the voters really mean to mandate profound changes in the insurance system, or were they just giving vent to pain and outrage at the level of their auto insurance premiums? Perhaps it was both, perhaps not. . . .

California Has a Radically New Insurance Law

Debate about its true motivation notwithstanding, Proposition

103 has changed the property/casualty insurance landscape dramatically. The change does not directly affect the life/health insurance system, but the indirect impact will be profound. Similarly, other states are not directly affected by this change in California laws, but the extraterritorial impact of Prop 103 may rival that of Prop 13 when the final results are in. Consider, first, the initiative's provisions.

The initiative process in California provides that the Attorney General prepare an official title and summary for the ballot. Here's the result as presented to California voters last fall in the case of Prop 103 (it should be noted that there were substantially fewer than 103 propositions on the ballot; the numbering system defies understanding or explanation):

Insurance rates, regulation, commissioner, initiative statute—Requires minimum 20-percent rate reduction from November 8, 1987, levels, for automobile and other property/casualty insurance. Freezes rates until November 8, 1989, unless insurance company is substantially threatened with insolvency. Thereafter requires every insurer offer any eligible person a good driver policy with a 20-percent differential. Requires public hearing and approval by elected insurance commissioner for automobile, other property/casualty insurance rate change. Requires automobile premiums be determined primarily by driving record. Prohibits discrimination, price-fixing, unfair practices by insurance companies. Requires commissioner provide comparative pricing information. Authorizes insurance activities by banks.

The ballot summary goes on to include the state's Legislative Analyst's cost impact estimates, in terms of costs or savings to state and local government. The voter also received, well before the election date, a thorough analysis of the initiative measure by the Legislative Analyst, as well as a full statement of the new law and changes to existing law. The process clearly anticipates a literate electorate, with the time and inclination to become educated in the particulars of individual issues.

Actuarial analysis (that is, analysis by an actuary) of the initiative summary leads to the conclusion that Prop 103 is largely actuarial in nature, with the balance political. This follows from even a narrow definition of actuarial work as concerning itself with the level and distribution of insurance costs and rates. This may explain why actuarial eyes, usually focused on New York, have been fixed on California in recent months.

Prop 103 promised to roll back auto insurance rates to 20% below the election day level, and hold them there for at least a year. Friends and foes alike acknowledge that this was the key provision, in terms of gaining voter support. Arguably, the margin of victory would have been greater if the initiative had contained no other provisions. Surely, the initiative would have lost without the rate rollback provision.

Auto insurance is generally considered too expensive, whatever the reason for its high price—and particularly so for some modest-income drivers. Worse, the auto insurance inflation rate has been much higher than general inflation recently, so there's no end to the problem in sight. The public invariably attacks any commodity or service with an out-of-line inflation rate, whether that be medical care costs in the 1980s, or oil prices in the 70s, or housing costs in the 40s. Legislation usually follows, whether by the legislators themselves or otherwise.

Prop 103 also provides for an additional 20% discount for "good drivers," defined as those with no more than one moving violation over a three-year period. The backers of the initiative estimate that more than 80% of all drivers will qualify for this discount, which means, all other things being equal, that "bad drivers" will have to pay more than double the rate paid by their good-driving neighbors.

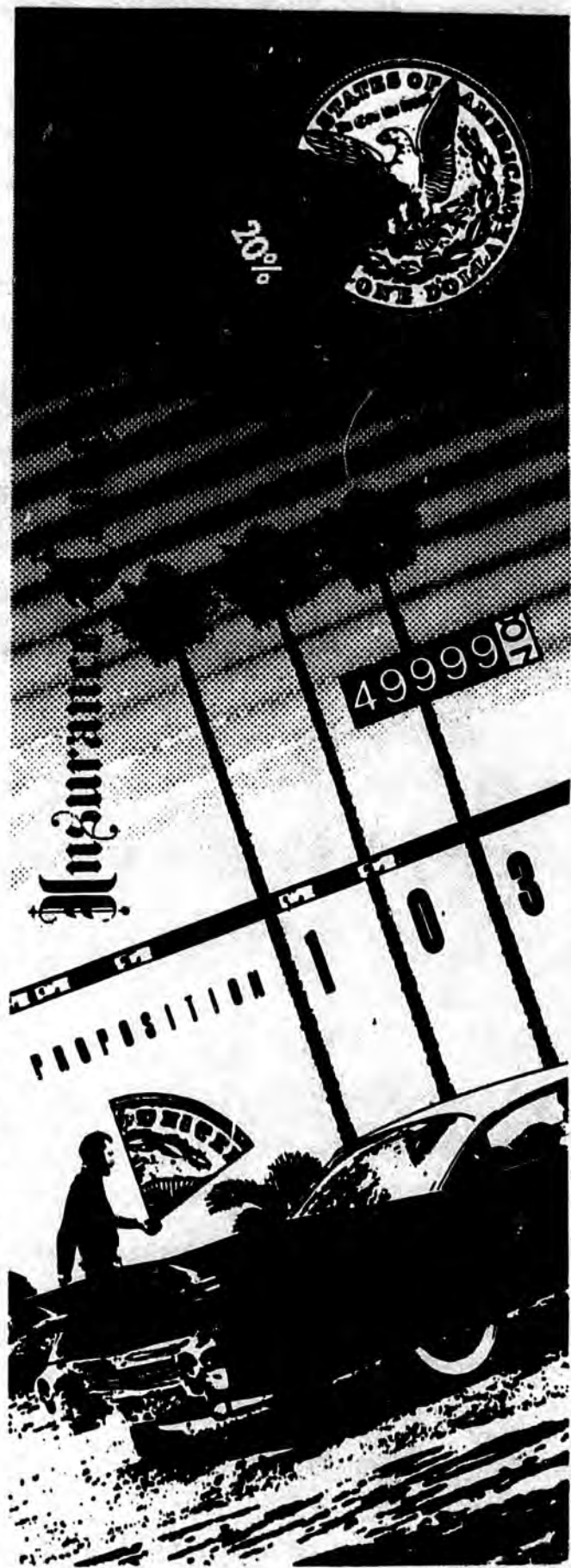


Illustration by John Pack

The proposition goes on to require that rates be distributed according to mileage and experience, in addition to driving record, before other classification parameters, such as territory and age, may be considered. The net effect of this new order will be, in California, an annual shift of billions of dollars of auto insurance premiums from drivers formerly considered (i.e., actually) high-risk to those considered high-risk under the new system. The proposition as written also provided, of course, for the annual shift of more billions from insureds to risk-takers (in the financial sense)—assuming there will continue to be those who will take that risk.

Prop 103 also provides for an elected insurance commissioner, who must review and approve property and casualty insurance rates before they become effective, and who in many cases must hold a public hearing on the subject. The first insurance commissioner election will be next year, but the campaigning has already begun.

Someday it's a no-win job, for several reasons. If an insurance company fails, the commissioner gets some of the blame; if it prospers, he gets none of the credit. If rates are too high, the hearing officer gets some of the blame; if inadequate rates cause failures or availability problems after insurers flee the state, he gets more of the blame. The position will carry a good deal of public visibility, but it concerns an expensive commodity that the consumer is compelled to buy, yet yields no pleasure. Commissioner of the State Lottery would seem a much preferable political plum. Yet the public visibility of the insurance czar post seems to ensure an adequate supply of applicants, most of whom will undoubtedly have their sights set on a higher position down the road.

*The people have triumphed
over the insurance industry's
\$70 million campaign of
false advertising and phony
mailings. [Prop 103] reforms
the insurance industry and
guarantees lower
insurance prices.*

The costs of running the state insurance department, the proposition notes, will be increased substantially in order to cover such provisions as rate review and hearings. These additional costs are covered by increases in the fees and assessments paid by insurers. There is also provision for, effectively, a premium tax rate increase to cover the shortfall caused by the mandated rate decrease. The Legislative Analyst's review reassured taxpayers concerning these two provisions, but went on to refer to governmental savings resulting from reductions in property and liability premiums paid by government entities.

This is valid only to the limited extent that the mandated reductions would have come out of insurers' profits. It is invalid

beyond that extent, and is reflective either of ignorance about insurance pricing or a deliberate attempt to mislead the electorate. This question extends as well, of course, to the whole public understanding of Prop 103.

The initiative stipulates numerous other changes to California insurance law, not all of which are covered in the summary. The law also:

- precludes setting up of an affiliated insurer so as to evade the rate provisions of the law;
- prohibits discrimination against new drivers, or others who were previously uninsured;
- removes state antitrust exemptions, but allows joint data collections and joint underwriting authority participation;
- permits cancellation or nonrenewal of coverage only for fraud, hazard increase, or nonpayment of premium;
- requires the commissioner to provide, for a user fee, personal lines rate comparison for all admitted insurers;
- provides for a hearing whenever a personal lines rate increase exceeds 7%, or whenever any consumer requests the hearing;
- permits intervenors in rate hearings, with costs generally borne by the insurance industry;
- provides for the commissioner to establish a joint underwriting authority if coverage availability becomes a problem;
- repeals provisions of existing law that prevent premium rebates and group property and casualty insurance.

One burning question remains: Is Prop 103 truly wonderful, or simply terrible, for the people of the state?

Prop 103 Is Truly Wonderful, for the People

Prop 103 is an "historic citizen campaign for insurance justice and lower rates" (Ralph Nader). The people have triumphed over the insurance industry's \$70 million campaign of false advertising and phony mailings. It reforms that insurance industry and guarantees lower insurance prices for automobiles, homes, businesses, and municipalities. Know the truth about Prop 103 by observing who's against it, and who's for it. Its detractors include the insurance industry, the actuarial profession, and others whose primary interest is hardly the public good. Conversely, a short list of supporters includes the AFL/CIO, the American Civil Liberties Union, the California Democratic Council, the California State Employees Association, Common Cause, the Gray Panthers, the National Organization for Women, and many others whose interest is the public good.

You will hear that Prop 103 creates subsidies in insurance pricing. The truth is quite the opposite. Prop 103 requires that the driving record be the first variable in setting auto insurance rates, thereby putting an end to the current subsidization of bad drivers by the 80% of us with good driving records. It requires that annual mileage be the second variable, thereby putting an end to the current subsidization of long-distance drivers by those of us who use our cars as an adjunct to our daily lives rather than as its focus. It requires that driver experience be the third variable, thereby putting an end to the current subsidization of novice drivers by those of us with the experience gained by years of driving under our (seat) belts. It permits other pricing variables that can be proven significant, such as geography, but requires that they be of lesser importance to the rate than the three variables already itemized.

You will hear that Prop 103 destroys competition, will drive insurance companies out of the state, and was designed primarily to put the government into the business of writing insurance. The truth is quite the opposite. Prop 103 repeals several barriers to true competition in the insurance marketplace, permitting banks to place insurance, letting brokers give discounts, author-

izing group casualty insurance, and subjecting insurers to the state antitrust and consumer protection laws that are applicable to other businesses in the state. Prop 103 will give insurers an incentive to contribute to the solution of rising accident costs, further incentive to hold down their own operating costs and profits, and an opportunity to justify their resulting premium rates in public. Few insurers are likely to find these provisions so onerous that they will abandon the largest insurance market in the country. Finally, there is absolutely no authority, under Prop 103, for the government to sell insurance. The joint underwriting authority provision merely triggers a state law already on the books requiring insurers to join with others in a pool to solve any availability problem that may develop.

Proposition 103 isn't the answer to all of California's problems, not even to all its insurance problems. It may even create some problems, though fewer than it will solve, particularly during the early transition years. All Prop 103 is, and promises to be, is a major reform in the insurance law designed to yield an insurance system that is fair, competitive, and in the best interests of the people of California.

Prop 103 Is Simply Awful, for the People

Prop 103 represents "the kind of mindless, populist hostility toward capitalism that one would expect to find in some banana republic preparing to nationalize its businesses" (*The Intellectual Activist*). The motive behind the initiative measure is something other than the desire to make insurance less expensive and more available to the people. The California electorate voted, marginally, for cheaper auto insurance; what they have bought is a blueprint for socialism and all its attendant "benefits" that are evident from Albania to Zambia—not to mention higher insurance premiums, in the long run.

Prop 103, as sold to the voters, would have driven auto and other casualty insurance rates down 20% below the rates

effective at the end of 1987, which were more than 10% below rates generally effective on election day in 1988, and then proposed to freeze those rates through the end of 1989. Since insurer profits on 1988 rates were far below 30% of premiums, this amounted to a requirement that California drivers be subsidized by insurer stockholders. The California Supreme Court found this a bit strong for its taste (i.e., unconstitutional), but upheld most other provisions of the initiative.

Casualty insurance rates in California will henceforth be subjected to a political, rather than a market, process that will rank with the worst in the country, and that is likely to lead to inadequate rates, hidden and shifted and deferred costs, a swollen compulsory insurance pool and, perhaps, a state auto insurance fund (as the insurer of "last resort").

In time, Prop 103 will increase rates, because it subsidizes high-risk driving (leading to more of it), and because it adds to the costs of doing business in the state. Prop 103 pays scant heed to underlying insurance costs, much less the underlying reasons for those costs. It represents a decision to treat the symptom, rather than the disease, with medicine that, at best, will provide temporary relief (via pressure to cut rates), to be followed by more severe symptoms (rates eventually must catch up with costs), and which will add a new malady (rates set by politics, rather than by market forces), to increase the patient's discomfort.

Prop 103 also compels low-risk drivers to subsidize high-risk drivers; this is manifestly unfair, and will likely increase the number and cost of accidents on the highways. Insurers already provide good-driver discounts, to the extent warranted by their statistics. If a greater discount were justified, one or more of those predatory competitors would go after that overpriced segment of the market.

Prop 103 forces insurers to burn their books of statistics and provide instead an arbitrary 20% discount to 80% of the drivers (read: "electorate") who qualify arbitrarily as "good." No men-

The Market Response: Prop 103 Mutual and AIDS

Some mainstream insurance companies may well pull out of California, or restrict their auto insurance book dramatically. This does not necessarily mean an exclusive state fund, or a joint underwriting authority with all the business. California has no shortage of entrepreneurs, and a few of them may be able to put together insurance companies to meet the new challenge. Consider, for example, Prop 103 Mutual.

Prop 103 Mutual is actually a reciprocal exchange, but public relations is the key to its success, and "mutual" sounds better than "exchange." Underwriting is done, in the main, by the agent, who is sacrificed if he is unlucky enough to have unfavorable publicity develop over coverage availability in his area. Similarly, claim problems are handled promptly and liberally—once the Company learns that the claimant has support in the media or from the regulator. Rate increases are granted readily, for the Company enjoys "good press" and "good relations with the regulator." Expenses are relatively high, but are largely paid to a separate attorney-in-fact, who runs most of the Company's affairs and whose records are not entirely open to public scrutiny. This vehicle, set up by the original contributors to Prop 103 Mutual's capitalization, does indeed have a heavy expense load. In addition to its investors and officers, who are handsomely rewarded for their funds and

efforts, there's that public relations budget. In addition to the previously mentioned demands on that budget, there's the cost of the monthly lottery, whereby one driver *does* get something back from his insurer, and the cost of the monthly helping-hand program, whereby one "good work" is done and amply publicized, in order to set a better example for corporate California.

Even actuaries are capable of responding to a glaring market need or opportunity. Consider, for example, that new consumer advocacy consulting firm, Actuarial Intervenor for Drivers of the State, or AIDS.

AIDS offers actuarial services and intervention at rate hearings to insurance consumer group clients. Marketing consists of identifying the group and intervening on its behalf, for the fee, if the effort is successful, will be paid by the insurance industry. One group client might be allegedly "good" drivers misclassified as "bad" because of inequities in the patterns of arrests for traffic violations. Another, larger group client might be Northern California, in its contention that dollars, as well as water, are flowing south to subsidize the excesses of Southern California. AIDS, like Prop 103 Mutual, speaks for the consumer—so long as the regulator and the media are listening.

tioned in this campaign was the inescapable derivative fact that 20% of California drivers (nearly 5 million in number) will thereby have to pay a 125% surcharge, relative to those with fewer than two tickets in three years, for their auto insurance.

Downgrading or elimination of other important rating variables, such as age and territory, will also cause low-risk drivers to subsidize high-risk drivers. Consider two groups of California drivers, roughly of equal populations: urban teenagers and middle-aged rural drivers. Each group is now paying its own way (actually, there is already a modest subsidy of the first group because of political pressures). If this were not so, competition would rear its ugly head, as above (California has over 300 auto insurers).

The question raised by Prop 103, to be repeated at future rate hearings, is the extent to which those middle-aged rural drivers should be required to pay a surcharge, beyond their own auto insurance costs, so that funds can be available to cover urban teenagers at a discount. Perhaps the hearings should be held in Fresno rather than in Los Angeles.

*In time, Prop 103 will
increase rates, because
it subsidizes high-risk
driving (leading to more
of it), and because it adds to
the costs of doing business
in the state.*

Prop 103 isn't the answer to any of California's insurance problems. The overriding, compelling problem is the cost of auto accidents, caused in turn by street congestion, medical costs, and the speed with which California drivers are becoming indistinguishable from their counterparts in New York and Tokyo. Subsidization of those costs is no answer, whether by insurance company stockholders, drivers of other states, or middle-aged rural drivers in California. Prop 103 was misrepresented to the people of California, and it should be replaced.

What's to Be Done?

First, the insurance industry and the insured public must accept the fact that Prop 103, as amended by the California Supreme Court, is now the law of the state, if not the land. Second, the insurance industry must seek an accommodation with its constructive critics, in legislatures and elsewhere. Third, this new team must undertake to educate the public, in terms of basic actuarial principles (for example, in order to give to Paul, you must take from Peter) and the underlying causes of high insurance costs (such as judicial and regulatory tolerance of drunk driving). Only then will the stage be set for reversing the unsound and antisocial provisions of Prop 103. And the others must be worked on, worked around, worked with, and eventually accepted. For the people have spoken. □



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Report for S.132 Joint and Several Liability Reform Act of 1989
As introduced in the Senate
Complete Text of this version

II

101st CONGRESS
1st Session

S. 132

To reform the tort law doctrine of joint and several liability.

IN THE SENATE OF THE UNITED STATES

January 25 (legislative day, January 3), 1989

Mr. Pressler introduced the following bill; which was read twice and referred
to the Committee on the Judiciary

A BILL

To reform the tort law doctrine of joint and several liability.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Joint and Several Liability Reform Act of 1989".

Severable Liability for Damages

Sec. 2. (a)(1) Except as provided in paragraph (2) of this subsection, in any civil action alleging injury to a person, damage to property, or death of a person, the liability of each defendant for damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(2) In any case where the parties are found to have engaged in concerted action, the liability of each defendant shall be joint and several.

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c)(1) If a claimant has released any defendant or potential defendant from liability for the claimant's harm, or if a defendant is unable (despite exercising all practicable means) to join any other person as a defendant in such action the trier of fact shall, in determining the proportion of

responsibility under subsection (b) of this section, consider the liability of any person not a party to the action if the defendant is able to prove that any such person caused the claimant's harm.

(2) If a claimant has released any defendant or potential defendant from liability for the claimant's harm, the total amount of responsibility for the claimant's harm shall be reduced by the proportion of responsibility of any such released defendant or potential defendant.

(d) As used in this section, the term "concerted action" means any action consciously and intentionally taken by two or more defendants which resulted in the harm alleged in such civil action. Such term does not mean consciously parallel action.

**THE BATTLE FOR MEDICAL MALPRACTICE TORT
REFORM, A REPORT FROM THE FRONT LINES**

**Prepared for the Annual Meeting of
AMERICAN ACADEMY OF HOSPITAL ATTORNEYS
Williamsburg, Virginia
June 25-28, 1989**

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**The Battle For Medical Malpractice Tort
Reform. A Report From The Front Lines**

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Table of Contents

	<u>Page</u>
Introduction	1
Pre-legislative Preparation and Decision-making	6
The Legislative Action Phase	14
The Battle Over Constitutionality	15
The Implementation Phase	17
Cap on Damages	19
The Collateral Source Rule	26
Statutes of Limitations	31
Periodic Payments	35
Limits on Contingency Fees	41
Joint and Several Liability	47
Punitive Damages	52
Ad Damnum Clause	60
Notice of Intent to Sue	63
The No-Fault Alternative to Tort Recovery	66
Arbitration and Screening Panels	72
The AMA Proposal	74
Miscellaneous	75
Conclusion	85

**The Battle For Medical Malpractice Tort
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Introduction

In preparing this outline of the discussion of the various tort reforms emphasis will be placed upon a few of the leading cases coupled with reference to what I believe are the most informative articles on the particular subject and which include extensive review of the statutes and cases in the various states.

As a starting point and for basic background I would recommend a careful study of the 1988 Georgetown Law Journal, vol. 76, No. 4, starting at page 1495, entitled: "The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances." This article was written by four of the multidisciplinary staff of the Academic Task Force For Review of the Insurance and Tort Systems established by the Florida Legislature. The Task Force report itself provides excellent source material but this article expresses the viewpoint of the authors without some of the restraint of the Task Force report itself. Most importantly it clearly defines the role of insurance in both solving and contributing to the malpractice tort crisis pattern. This type of information has not been available and is critical in approaching any proposed short term or long term solutions.

The next article to read is "The Frequency and Severity of Medical Malpractice Claims: New Evidence," by Patricia M. Danzon in Law and Contemporary Problems, vol. 49, page 56, Spring 1986. There are other articles in this same issue that are of interest.

The third publications to review are the three reports of the AMA Special Task Force on Professional Liability and Insurance, 1984-1985, available from the AMA as a single publication. Although written from a physician viewpoint, it includes a wealth of data that will assist in understanding the cycle that is a major contributor to the problem.

For a comprehensive review of the constitutional issues up to the date of its publication see, "The Constitutionality of Medical Malpractice Legislative Reform: A National Survey," Loyola University Law Journal, vol. 18, p. 1053 (1987).

A series of recently published federal studies are of use as background information.

For a broad overview with recommendations as to specific state legislative proposals the study entitled, "An Update on the Liability Crisis," by the Tort Policy Working Group, dated March 1987, is useful because it not only brings together a broad sweep of data and materials but also makes eight positive recommendations for tort reform. The weakness is that the specific legislative proposals do not appear to have been researched in depth and from a legislative draftsmanship standard do not meet problems that have risen in recent litigation. This

report can be obtained by communicating with the Tort Policy Working Group in the Department of Justice.

A series of reports of the U. S. General Accounting Office are useful for the data included but do not include specific reforms except the final report entitled, "A Framework For Action." These are:

"Medical Malpractice - No Agreement on the Problems or Solutions." GAO HRD 86-50.

"Medical Malpractice - Insurance Costs Increased But varied Among Physicians and Hospitals," GAO/HRD 86-112.

"Medical Malpractice - Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reform," GAO/HRD 87-21. Separate studies on each of the six states (Arkansas, California, Florida, Indiana, New York, and North Carolina) can also be requested as 87-2151-6.

"Medical Malpractice - Characteristics of Claims Closed in 1984," GAO/HRD 87-55.

"Insurance: Profitability of the Medical Malpractice and General Liability Lines," GAO/GGO 87-67.

"Medical Malpractice - A Framework For Action."

On a continuing basis the AMA Professional Liability Update, published monthly by the Professional Liability Clearinghouse, American Medical Association, Center For Health Policy Research, 535 North Dearborn Street, Chicago, Illinois 60610, (312) 645-5380, not only summarizes current legislation and litigation but includes a periodic detailed master bibliography of the current literature and media reports.

Any approach to tort reform should start from a basic philosophical concept of what should be the fundamental criteria

for a medical professional liability compensation system. The following criteria was suggested by the ABA Commission on Medical Professional Liability in its Interim Report of September 27, 1976, p. 12.

1. Encourage the prompt availability of remedial medical services to injured persons;
2. Compensate all persons deemed compensable under the mechanism;
3. Pay a victim of a compensable medical incident at least the net economic loss occasioned by that incident;
4. Provide for the prompt resolution of claims;
5. Charge a minimum of administrative costs (including attorneys' fees) and make a maximum amount available for the injured person;
6. Insure maximum predictability of outcome as an aid to planning by health care providers and insurers;
7. Discourage the bringing of baseless or contrived claims and provide for their prompt elimination if brought;
8. Contribute to the prevention of malpractice incidents by introducing incentives for improving health care and for improving the supervision and discipline of health care personnel;
9. Distribute losses, through insurance or otherwise, in a way which does not leave an unfair burden on any one segment of the health care system; and
10. Disrupt to the least possible degree the relationships of trust and confidence between health care providers and patients.

Each proposed reform can be separately evaluated as to how it contributes to or violates the above criteria.

What is needed, and for some strange reason not available from either the AMA or AHA, is a set of model state tort reform statutes, annotated with current cases, pointing out the

various legislative options and the pitfalls that are being uncovered through current litigation. As a result there is no uniform attack or evaluation of the results on the various proposals. Each state must reinvent the wheel and repeat the mistakes of the past.

What will follow will be a personal evaluation of the various malpractice tort reforms adopted in California in 1975 with a critique of the strengths and weaknesses that have been exposed with thirteen years experience. There will also be included references and discussion as to cases and developments in other states to complete the picture.

The purpose of this session is to deal with the real world of medical malpractice tort reform. The discussion will combine practical legislative strategies with an analysis of the results, including successes and failures. Historically and for the immediate future substantially all tort reform action has been approached on a state by state basis with no uniform approach and a wide disparity of results. The AMA, jointly with the specialty societies, has chosen to devote extensive resources to the design of a comprehensive substitute for the existing tort system which, although innovative, has serious problems including the diversion of effort from the study and design of incremental changes in the existing tort systems which could result in immediate relief in certain critical states.

What is needed is a well staffed analysis of the 13 years of experience of the tort reforms that have been made

since the crisis of 1975 with positive recommendations of the value and effectiveness of the various approaches that have been successful or failed. The ability of each individual state health care provider to achieve relief generally comes as a very limited window of opportunity to achieve relief and unless there is available a well documented analysis of the various options with supporting information the opportunity may be lost or fumbled. This session proposes to highlight these issues.

The discussion will break down into the four essential components of an effective action program:

1. The pre-legislative preparation,
2. Legislative action
3. Constitutional challenge,
4. Effective implementation.

followed by a critical discussion of the pros and cons of the major tort reforms.

Pre-legislative Preparation and Decision-making

The opportunity to achieve effective legislative action is often a limited opportunity which will be lost for many years unless effectively seized. The window may open as a result of an insurance crisis resulting from escalating costs or even the unavailability of primary or excess insurance. It may be as a result of a series of dramatic incidents, such as a series of bad baby cases, withdrawal of obstetric services, the closing of emergency rooms, dramatic jury verdicts, or the like, which motivate a legislature to act on an emotional impulse that overcomes the power of the plaintiffs' bar to effectively bottle up any reform. A number of steps must be taken to prepare for

this opportunity and so that whatever action is taken is ultimately sustainable on constitutional grounds to a challenge that the crisis was a phony or just a conspiracy by the insurance industry to rip off the public.

1. The first decision that must be made is whether the reforms proposed will be limited to medical malpractice or will they be generic to the tort system. This decision establishes the nature of the coalition and fund raising effort that is necessary for a successful effort. The successful actions of the 1970s were malpractice specific and then often foundered on the constitutional challenge of equal protection. In the 1980s there was a broadening of the base and more interest in generic tort reform. Unfortunately, the business coalitions tend to give more lip service than real support to generic tort reform and the real support must come from hospitals and organized medicine.

2. The second step is to analyze the prospects and potential results of the various proposed reforms. Although there is a laundry list of potential reforms, a careful selection of a limited list is essential to avoid dispersion of effort and division of support in establishing priorities. The specific discussion of the various proposals will highlight these issues.

3. The third step is in drafting of the exact language to be proposed. This is far more difficult than is first perceived as it may require serious negotiation between the members of the coalition created to support the effort. For example, any change in the collateral source rule will surface a

major split in the insurance industry. Unfortunately there has been too little organized effort to develop model language with appropriate alternatives. Recent attacks on existing legislation has highlighted the importance of reviewing actual experience and pitfalls. Do not assume that there will be an early opportunity to rectify mistakes.

4. Build a legislative record on the need for action. This must be done well in advance before the "crisis" develops. Encourage legislative hearings with well documented evidence of the developing problem and the impact on the cost of quality of health care. Initiate studies by affected state agencies so as to document the need. Create a statewide independent body to make studies and recommendations. The Academic Task Force in Florida is a good example. Other studies by the Insurance Commissioner or other state agencies may be helpful. Be sure that the support for the legislation is identified with the purchasers, not the providers, or the insurers and that knowledgeable consumer support is encouraged well in advance.

5. Identify legislative leadership that will carry the ball and assure the Governor's support to avoid the veto. Nothing is more discouraging than to fight a bill through the legislature and then have it vetoed on the last day. This ball can most effectively be carried by hospital trustees.

6. Create an effective coalition of support which includes universities, state and local government, major purchasers of health insurance, hospital and physician employees,

hospital support groups, church organizations that sponsor hospitals.

7. Don't be discouraged if you lose the first effort. It may take several years.

8. In designing a tort reform legislative package it is important to consider the matter of balance to meet the very telling argument by our opponents as to why we chose as our only solution to the "so called" malpractice crisis the rip-off of the rights of tragically injured plaintiffs. Why did we not clean up the evils of the hospitals and physicians so that there would be no problem? How about the insurance companies and their secretive procedures?

In our California approach we met this issue straight on and recognized that it was a complex problem and that all parties had to contribute to the solution.

We therefore substantially strengthened the Medical Practice Act and greatly increased the authority of the disciplinary body to creatively deal with the matters relating to physician conduct. We require extensive reporting of hospital disciplinary actions as well as the adverse results of medical or hospital malpractice actions, with the authority of the licensure boards to explore them. We required additional reporting by the malpractice insurance companies and put limits on their right to unilaterally increase medical malpractice premiums. The California Bar Association was directed to come up with a plan to

control excessive fees by defense counsel as a counter to our proposed limit on plaintiff's contingent fees.

The United States Supreme Court and various state courts have given lip service to the concept that there is no requirement of a quid pro quo for any legislation which takes away or limits a property right. However, one cannot read the cases without becoming convinced that the existence of a quid pro quo can be an important factor in leading to a favorable court action. In the briefing of our cases we emphasize that the legislation was a balance of the equities of all of the parties--a quid pro quo in another name.

Other states have used a patient's compensation fund or mandated certain types of insurance coverage, or, more recently, the no-fault legislation in Virginia and Florida has had a similar purpose with generally a favorable result.

9. One of the most challenging problems in drafting tort reform legislation involves the issue of the effective date of the legislation and the degree of retroactivity, if any.

If there is an immediate crisis in the cost or the availability of medical practice insurance, a legislation package that has no retroactivity may not result in any real relief for several years. This is based on the fact that with the long tail on malpractice claims there is always a substantial volume of potential claims in the pipeline that must run off before there can be any realistic relief. The introduction of the claims-made form of insurance as a substitute for occurrence coverage has

only partially helped as the courts are continuously whittling down the right of insurance carriers to effectively enforce the right of an insurance company to deny a claim that is made after the time limit set in the insurance policy.

The opposition to malpractice tort reform has made a big issue of the fact that even when tort reforms have been passed there is no immediate result through the reduction of malpractice insurance premiums or a reduction in health care costs. As a counter attack they propose amendments to the proposed legislation which would mandate immediate rate decreases to call the bluff of the insurance companies on the need and effect of any reform. Such tactics can have the effect of splitting the support for the legislation.

On the other hand, to aggressively propose a retroactive effect on the legislation will increase the potential risk of a successful challenge to the constitutionality of the legislation on the grounds of taking of a property right with due process. For example, if it is proposed to reduce the statute of limitations, an amendment which would have the result of immediately barring existing causes of action, or even actions that have been brought but not brought to trial, are extremely risky. However, if some reasonable time limit is proposed on an interim basis to protect the rights of existing causes of action, it may be sufficient to meet the constitutional challenge even though there is some retroactive effect.

Also, a distinction can be made as to those matters which are procedural rather than those that deal with an existing cause of action. For example, reforms that deal with evidentiary matters or the like may be acceptable, such as a new requirement of qualifications for witnesses. On the other hand, in dealing with the issue of whether to change the collateral source rule by making the existence of collateral sources a matter of evidence rather than as a direct offset against the plaintiff's recovery may permit retroactivity.

The courts are reluctant to imply the retroactive application of any statute that limits the rights of the plaintiff. In drafting the legislation there are at least two alternatives. One is to face the issue directly by spelling out in detail as to the retroactive application including any exceptions or saving clauses to make the approach more acceptable. The other alternative is the one we followed in California. This is to rely on the use of strong public policy statements and findings without directly dealing with the issue of retroactivity. As a result we have been able to argue aggressively that some degree of retroactivity is necessary to implement legislative policy. At the same time, if the courts refuse to retroactively apply certain key sections, then that is an answer as to why there have not been immediate results. Very frankly, with the then constituency of the California Supreme Court we were not prepared to risk the additional constitutional issue. Fortunately, with the change in the constituency of the Court and even

the recognition by a majority of the former Court of the validity of our public policy argument we have achieved retroactivity to the procedural and evidentiary sections, as well as including the statute of limitations, the periodic payment, and the collateral source provisions. As we expected, we failed to achieve retroactivity on the \$250,000 limit on noneconomic damages.

In addition to building a legislative record on the need and justification for the legislation, it is critically important to incorporate specific findings in the legislation itself to justify the action taken. The more specific, the better to make it more difficult for the courts to engage in judicial legislation. It must be remembered that the courts by their own fiat have created most of the liberal legal doctrines that we are attempting to eliminate or at least modify, and the courts are extremely reluctant to give up this prerogative. Many courts, such as in New Jersey and California, have taken great pride in their creative expansion of liability doctrines and other state courts have been most willing to follow their leadership.

In every brief that we have filed we have continued to pound home the public policy statements built into our legislation. At the federal legislative level it is possible to build legislative intent into the committee reports that precede or follow critical legislative action. At the state legislative level this resource is less available or nonexistent.

The Legislative Action Phase

There is such a wide variation in the basic relationships between physicians and hospitals, on the one hand, and each state legislature, on the other, that it is hard to generalize on procedures other than to indicate that it is an all out campaign that is fought in both the media and in the legislative halls.

Hopefully the recommended steps of preparation have been accomplished with the members of the support coalition clearly identified and motivated. Necessary funding for any media or public relations program should be in hand. The appropriate legislation needs to be carefully drafted, including any fallback position necessary to make compromises as the opposition develops. Favorable advance legislative commitments should be obtained as soon as possible.

Information kits must be available to supporters and be used for structured meetings with the editorial boards of all newspapers, radio and television outlets.

Our experience has been that although it is important to get the support of hospital trustees the willingness of any large number to get effectively involved can be disappointing. So it is better to identify a small group that are willing to participate. Our experience would indicate that many business men trustees have other priorities related to their own businesses and the legislature and they are reluctant to expend their clout on this issue. By and large, organized medicine is the strongest source of support. Every legislator has a family

physician and the auxiliaries to the state and county medical associations can be highly motivated.

Of equal importance is the planning to meet the increasingly sophisticated tactics of the trial lawyers. In this connection you must be prepared to meet their selective use of statistics to argue that there is no real crisis or need for the legislation, that the problem is the quality of medical and hospital care and the greed of the insurance industry. The new material discussed in the introduction to this paper is helpful in meeting their arguments and if the insurance coverage is provided by doctor and hospital captives this point should be exploited.

Above all else there must be a solid working relationship between organized medicine and hospitals that cannot be split by diversionary tactics.

The Battle Over Constitutionality

As soon as any effective legislation is adopted there will be the challenge to its constitutionality. This involves a new type of coalition led by organized medicine and hospitals with support by their insurers.

1. Prepare a master legal analysis on all anticipated legal challenges.
2. Prepare model pleadings to initiate the appropriate defenses and avoid anticipated technical challenges.
3. Develop a monitoring system so that any test case is identified at the earliest possible time.

4. Educate all claims managers and defense counsel to the potential issues and the importance of early reporting.

5. Develop and fund a coordinated approach to every important case, including advice as to which cases should be pressed and which should be settled. The bad case that makes bad law is an absolute truism.

6. Organize an effective brief strategy. All too often each interested group puts in its own brief that is largely repetitive of the others. The briefing strategy should include a master in depth brief but be supported by separate briefs zeroed in on special problems. For example, in the massive effort in California we not only had separate briefs from the medical society and the hospital association but additional briefs from the teaching hospitals, the county hospitals, the urban hospitals, the rural hospitals, the support groups such as United Way, and a very effective brief from a group of legislators who had supported the legislation. Briefs from religious groups that sponsor hospitals can be most effective. It is not the number of briefs but their punch that is important.

7. In states with multiple appellate courts consideration should be given to filing in each court's library a copy of the master brief to be in the court's reference library.

8. To the extent possible all briefs should be critically reviewed by independent counsel in advance of filing to avoid conflict in approach.

9. Do not overreach in the claims that are made for the legislation or exaggerate the impact that it may have. We have had such claims thrown back at us when we could not document the feared result. Establishment of the credibility of the proponents over the long run is essential. You can expect puffery from the opposition and be prepared to capitalize on it.

10. Except in rare instances, such as in Louisiana and Idaho where cases were sent back by the appellate court for special hearing, there is rarely an evidentiary hearing at the trial court on the issue of constitutionality. This gap must be filled by the Brandeis brief approach of including extensive documentation and referenced to materials that will be accepted by the court. It is at this point that the preparatory approach of documentation at the legislative hearings becomes critical as being not only the basis for the legislative action but as a clear signal to the appellate courts of the fact the legislature properly performed its function and that the separation of powers should be respected.

The Implementation Phase

We have found that the implementation phase may be equally if not more important than the other three phases as it is possible to see the entire effort go down the drain. It is at this point that the plaintiffs' bar, through a coordinated effort, attempts to whittle down and emasculate any successful legislative effort. Unfortunately, often they will be fully aided and abetted by the trial and lower courts who are inher-

ently opposed to any narrowing of the tort system which they have so effectively created and expanded.

Once the constitutional battle has been won there is a tendency by health care providers and their legal counsel to let down their guard and to permit the statutes to be whittled down. All of the steps taken on the constitutional phase must be followed. In addition, there needs to be a continued process of model briefs on every developing issue and assurance that this material is furnished to all defense counsel. The ability to rectify an error at the appellate level is much more difficult on an interpretation decision than it is on a constitutional issue.

The appellate courts are all too inclined to treat the matter as a combination evidence and interpretation issue and let a bad result stand or just modify the amount of the award. The courts must be made keenly conscious of the fact that the organized health care providers are going to monitor every case and pounce on every sloppy or irrational decision. For example, we have a monthly conference call with some 15 participants to review every developing case to determine what action the group should take. We jointly employ a highly qualified appellate specialist to represent the combined interest of doctors and hospitals and to appear and present our combined position on every case that has important consequences either to challenge the result or support the court if its decision is challenged.

On any issue we determine which interest will be most effective in presenting key arguments. For example, on hospital

quality of care problems or matters of discipline it may be more effective for organized medicine to carry the laboring oar. On the other hand, issues of confidentiality and interference with medical judgment may be best argued by the hospital. Also, if the issue is one that affects the cost or availability of insurance, the issue is best argued by the purchasers of insurance rather than the providers of insurance. Similarly, doctor or hospital captive insurers can be more effective than commercial insurers.

Cap on Damages

No proposed malpractice tort reform has generated as many complex solutions or as much litigation as the variety of caps put on damages. On an overall basis the results have been almost equally divided between successes and failures. Drafting such legislation requires careful research into both the political and judicial environment of the particular state. The stakes are high because Patricia Danzon in her most recent study has opined that the statutory limits on noneconomic damages have reduced the size of average paid claims by 23 percent.*/ Obviously, the amount of the limit will affect this result.

The general arguments for the cap approach are as follows:

1. Many experts believe that the limitation, if properly drafted, can be the most effective single

*/ P. Danzon, "New Evidence on the Frequency and Severity of Medical Malpractice Claims," 26 Institute For Civil Justice, Rand, 1986; Law and Contemporary Problems, Vol. 49, No. 2, p. 76 (1986).

legislative reform of tort law even though its impact is almost entirely on the severity of the claims losses and little impact upon frequency.

2. Makes the cost of insurance more predictable. The need for predictability is particularly critical for assuring the availability of both primary and excess insurance for the long term tail on medical malpractice. The surge in the recoveries for infant damage is a dramatic example of such result.

3. Predictability of recovery assures the availability of funds to pay future losses to injured patients by reducing the number of uninsured health care providers.

4. Encourages settlements because plaintiff knows there is a limit on recovery.

5. Assuring recovery of economic loss should be first priority to injured plaintiff.

6. The limits that are set are realistic and not speculative. Awards are rationally related to the damages.

7. Reduces windfall contingent fee incentive for plaintiffs' attorneys.

8. Noneconomic damages are not subject to objective judgment either at trial or on appeal and may be based upon emotion and the desire to punish and are thus a substitute or addition to punitive damages.

9. The courts have consistently failed to control or effectively modify runaway judgments.

10. Judgments for comparable injuries for malpractice plaintiffs generally run twice as much as against other tort defendants.

On the other hand, the arguments against such a limit are:

1. There is no rational basis to discriminate against the health care plaintiff and other plaintiffs equal protection and due process issues.

2. The limits that have been placed are arbitrary and have no relation to the injuries of the plaintiff and thus penalize the most severely injured

plaintiff with the greatest need. Often they are not indexed to reflect inflation.

3. The health care system, because of government intervention and support, is well able to bear this social burden. The burden is ultimately shared through the health insurance system rather than by the health care providers.

4. The threat of large damage awards is a strong incentive to improve quality of care and thus reduce health care costs.

5. Defensive medicine is good medicine and in the best interest of quality patient care.

6. There is no legally rational distinction between economic and noneconomic damages.

7. The cap is a denial of the right to trial by jury.

8. Some states have specific constitutional provisions protecting the right to recover full damages.

To meet these challenges a number of creative approaches have been used:

1. Probably the most effective has been the creation of Patient Compensation Funds. Such a fund is essentially created by providing a layer of insurance coverage in addition to a primary layer of insurance purchased by the health care provider. The insurance may be mandatory or elective with the health care provider seeking the protection. A major problem with these funds is that they are often underfunded so that the excess insurance costs creep up and up. For example, the cost of the excess insurance under the Indiana Plan is now five times the initial premium. Also, the health care insureds have no right to shop the excess to get competitive rates or to change management. The Patient Fund in concept provides an answer to the constitutional argument that there must be a quid pro quo for any denial of a plaintiff's property right. Although most state courts deny the need for a quid pro quo it is obvious from reading the cases that it plays an important part in influencing a favorable response.

2. Although a few states, such as Indiana and Virginia, have attempted to apply the cap to the total damage award including both economic and noneconomic damages, most have limited the cap to noneconomic damages and even in those states the results have been mixed.

3. The State of Washington, effective for cases filed after August 1, 1986, adopted a cap on a complex sliding scale which may in part meet the argument that a single limit is too arbitrary. Texas included a cost of living index adjustment to its cap but failed to get favorable approval of its Supreme Court. For a comprehensive discussion of the legal and constitutional issues related to the Washington statute see Washington Law Review, July 1988 issue, at pages 633-675. As this paper is going to print a news report indicates that the Washington Supreme Court has declared the statute unconstitutional under the constitutional requirement that "the right of trial by jury shall remain inviolate," and thus the jury must retain the right to set damages. This leaves the count of six states overturning the cap and five states sustaining it.

4. In Boyd v. Bulala, 647 F.Supp. 781 (1986), the Virginia statute that placed a \$750,000 cap in 1973, increased to \$1,000,000 on total damages, was held to be constitutional on equal protection grounds but unconstitutional under the Virginia constitutional requirement relating to trial by jury. However, the more recent Virginia Supreme Court case of Ethridge v. Medical Center Hospitals, Jan. 13, 1989 Docket No. 860194, upheld as constitutional the very same statute. For the future the State Supreme Court decision should prevail.

5. The limit under the Louisiana law was upheld in Williams v. Kushouer, 524 So.2d 181 (1988), with a \$400,000 cap on top of a \$100,000 primary. In this case the constitutional issues were returned to the trial court for a 5-week hearing leading to a finding of constitutionality on issues of the state clause protecting individual dignity as well as the due process right of access to the courts.

6. Many of the State Funds have separate procedures for access to the State Fund portion including the use of mandatory arbitration.

7. In 1988 the Florida Legislature adopted a \$250,000 limit on pain and suffering if the health care

provider admits to liability and the case goes to arbitration on the issue of damages. If the patient refuses to arbitrate then the limit on recovery is \$350,000, but if the health care provider refuses to arbitrate then there is no limit on recovery. In 1988 the Florida Medical Society attempted to pass an initiative with a straight \$100,000 limit on pain and suffering across all torts but the initiative failed badly.

8. In 1987 the Kansas Supreme Court declared the Kansas statute limiting total recovery to \$1,000,000 and limiting recovery of noneconomic damages to \$250,000 unconstitutional on grounds that there was not sufficient quid pro quo as a substitute remedy. Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, (June 3, 1988). However, on March 30, 1989, the Kansas Supreme Court affirmed the constitutionality of the 1988 Kansas legislation which placed a \$250,000 limit on noneconomic damages in any personal injury lawsuit.

9. The Texas Supreme Court held the Texas statute limiting malpractice damage recovery unconstitutional in a bitter split decision in Lucas v. U.S., 757 S.W.2d 687 (1988). Since that time a major portion of that majority have lost reelection. What will happen now remains to be seen.

10. The Maryland \$250,000 limit on noneconomic damages is before the Fourth U.S. Circuit Court of Appeals on appeal from a favorable ruling at the trial court in Franklin v. Mazda Motor Corp.

11. The Louisiana case of Williams v. Kusher, 524 So.2d 191 (La.App. April 12, 1988), upheld the constitutionality of a challenge to the 1975 Louisiana Medical Malpractice Act which limited total liability of health care providers to \$100,000, with a potential excess recovery of up to \$400,000 from a provider-supported State-operated compensation fund. In 1984 the act was amended to provide that the fund limits did not apply to medical expenses and so that medical expenses in addition to \$500,000 could be recovered from the fund. What is unique about this case is that the appellate court referred the constitutional challenge back to the trial court for a full evidentiary hearing on the constitutional issue. The trial court found that a true crisis existed in 1975 that would have jeopardized the State's interest in guaranteeing continued health care services at a reasonable cost. The constitutional issues related to the individual dignity (really equal protection) and

access to courts requirements in the State Constitution. The court applied the rational basis test.

So far the California statute is the only one that has reached the United States Supreme Court, which refused a petition for hearing on the California Supreme Court's decision sustaining the constitutionality of the California provision. The United States Supreme Court held that there were not sufficient federal grounds for a further review.

The California statute provides:

Civil Code. 3333.2. Medical malpractice actions: Limitation on amount recoverable for noneconomic losses.] (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

(c) For the purposes of this section:

(1) "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;

(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.

Now that the statute has been declared constitutional various issues have been raised by the plaintiffs' bar to find loopholes in the statute, particularly to increase the number of \$250,000 limits recoverable in any single occurrence, such as:

1. Multiple recovery for multiple heirs in a wrongful death case.
2. Additional recovery for the loss of consortium of the spouse.
3. Additional recovery against each defendant rather than a single recovery against all.
4. Multiple recovery for additional causes of action for a series of events.
5. Unlimited recovery for a nonmalpractice tort when combined with a malpractice tort.
6. No limit on recovery for an intentional tort.
7. Statute not retroactive in application.
8. No limit on recovery against a joint non-healthcare defendant.
9. Does the limit include recovery for punitive or exemplary damages?

Although the current trend of the California courts since the 1986 election which removed three Justices has been mostly favorable, the cost of litigation to resolve these issues has been very expensive and time consuming. Since the limit is the one set in 1975 there is increasing pressure to raise the limit and eventually there will be some adjustment.

There is no question but that the \$250,000 limit on pain and suffering has been a major factor in stabilizing insurance rates in California.

For a comprehensive law review article criticizing the utilizing of a cap on damages but supporting a modification of the joint and several liability rule see "1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability," Cornell Law Review, vol. 73 at p. 628.

The Collateral Source Rule

Historically, all states through common law evolution have implemented what is known as the collateral source rule. Under this rule of damages the plaintiff is entitled to recover all damages, both economic and noneconomic, against the liable defendant or defendants without offset for any reimbursement or compensation that the plaintiff may have received for the same injury from such collateral sources as health insurance, disability insurance, workers compensation coverage, Social Security, and the like. As a result the plaintiff may enjoy multiple recovery for the same damages. The underlying rationale of the rule is that the guilty defendant should not be able to benefit from the prudence of the plaintiff. This fundamentally places the emphasis on the punishment component of the tort system as contrasted with the compensation component.

This contrasts with the social policy relating to fire insurance under which the owner cannot enjoy multiple recovery. Furthermore, other forms of injury coverage, such as health insurance, workers compensation, and the like, are much more

efficient patient reimbursement mechanisms than is malpractice insurance.

In designing a modification of the collateral source rule several basic decisions must be made:

1. Will the change be made to the entire tort spectrum or be limited to medical malpractice?

By limiting the change to medical malpractice you may lose the active support of business and industry and may increase the risk of potential constitutional challenge on equal protection grounds. On the other hand, by limiting the reform to medical malpractice this may split the plaintiff's bar as most attorneys do not feel qualified to handle medical malpractice cases.

2. Will the rule change require a mandatory offset of the collateral sources or be limited to permitting introduction of evidence of the collateral sources to the jury and rely on the jury's discretion in handling it?

The trial court experts disagree very strongly on the issue and the arguments are:

- a. If the approach is evidentiary, then the constitutional challenge based upon trial by jury or the right to recovery of complete damages is minimized. However, there is always the opportunity for the jury to ignore or minimize the impact of the evidence. Some defense attorneys have found that by following the evidence approach, particularly in infant birth cases where there may be overwhelming collateral sources, the ability of the attorney to present evidence of comprehensive collateral sources that are available in many catastrophic cases

may lead to a defense verdict when the plaintiff's liability case is so weak as to need all of the economic sympathy component to sway the jury. Until the recent Kansas case^{**/} we believed the evidentiary approach to be a safe harbor for constitutional challenge.

b. If it is a direct offset, it may be done by the court rather than the jury or simply by jury instruction.

c. The matter of subrogation is an important issue to resolve. If the plaintiff is to be denied multiple recovery, then the plaintiff must be protected against subrogation by a third party payor who may have paid for the plaintiff's medical or economic costs. Some health insurance carriers have become quite aggressive in attempting such subrogation. The answer to this is that health care insurance is an efficient social mechanism and can absorb this additional cost and as a matter of underwriting does not contemplate equitable indemnity recovery in its underwriting. As a practical matter, the right of subrogation has been of minimal value.

d. Certain types of government programs by their very terms are not subject to state action by way of modification of the collateral source rule coupled with a prohibition against subrogation.

e. Our California experience would indicate that there are far more collateral sources available to the plaintiff than

^{**/} Wenting v. Medical Anaesthesia Service, 237 Kansas 503, 701 P.2d 939 (1985).

even an experienced litigator can anticipate and that it is important to develop model discovery documents related to this issue and insist that they be implemented. This has a major impact on settlements as well as actually discouraging the pursuing of a particular case or future cases. We have fewer problems in implementing the collateral source reform than any of the others.

Changes in the collateral source rule have the potential impact of reducing both the severity and frequency of judgments and settlements.

Danzon, at pages 72-77, projects a 14% reduction in claims frequency. For severity she projects an 11 to 18 percent reduction in recoveries. Our own anecdotal experience in California would indicate that her projections may be conservative.

For additional material see:

"Collateral Source Rule," St. Mary's Law Journal, vol. 18, at 584 (1967).

"The Collateral Source Rule - The American Medical Association and Tort Reform, Washburn Law Review, vol. 24 at 207 (1983).

For key cases see:

Fein v. Permanente Medical Group, 211 Cal.Rptr. 368, 30 Cal.3d 177 (1985), and Barme v. Wood, 207 Cal.Rptr. 816, upholding constitutionality.

Carson v. Maurer, 120 NH 925, 424 A.2d 825 (1980) and Wenting v. Medical Anaesthesia Service, 237 Kan. 503, 701 P.2d 939 (1985), both holding statute unconstitutional.

The California Statute, Section 3333.1 of the California Civil Code:

3333.1. [Medical malpractice actions: Insurance and disability benefit payable to plaintiff.] (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 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;

(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. Cal Jur 3d Insurance Contracts and Coverage sec. 510; Witkin Summary (8th ed) Torts sec. 516B.

Statutes of Limitations

Over the years the courts have been very creative in gutting the impact of various attempts to create some limitation on the time when a complaint for medical malpractice must be filed. Not surprising, the courts have been much more protective of the fate of practicing attorneys where the statute of limitations on legal malpractice has been effectively enforced.

We must recognize that there are special problems facing the courts in dealing with medical malpractice that may not exist in other types of litigation. For example, the matter of discovery of the injury or the fact that the injury may have been caused by negligence, the possibility of a cover-up, and the matter of the continued physician/patient relationship may be present. The problems relating to foreign bodies as well as the fact that in recent years the injuries to newborn infants has been an increasing area of liability exposure for health care providers. Any statute must deal with the issue as to when the time element commences to run, such as, for example, from the time of the negligence, the time of the injury, or the time of death.

The finality of the implementation of the statute of limitation and the fact that any date is essentially arbitrary give the courts great concern in tragic cases. On the other hand, the openendedness of the statute creates major problems for any medical malpractice insurers. The creation of a premium

structure that will anticipate the workout of claims maturing or settling many years later makes underwriting such a risk speculative at best. Probably this factor has as much impact on the shortage of insurance carriers willing to write the risk as any other factor. By the time of the 1975 crisis in California it was generally recognized that the statute of limitations for medical malpractice cases was almost nonexistent. As a result great effort was made to design a statute that would achieve a degree of balance acceptable to the legislature and one that would withstand the challenge of the appellate courts. The statute which was adopted attempted to meet all these factors and handle retroactivity by strong policy statements.

Most states have enacted legislation strengthening the statute of limitations and shortening the statute as to infants. The most recent action is a 1989 amendment in Mississippi that reduces the statutory time as to minors who are six years or younger to two years after the sixth birthday.

The California statute, essentially as adopted in 1975, in Section 340.5 of the California Code of Civil Procedure provides:

340.5. [Professional negligence of health care provider.] In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or

diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

(1) "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;

(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.

Except for some confusion as to how the specific statute, as related to medical malpractice, relates to the broad generic tort statute of limitations, the 1975 language has been effective. In Kite v. Campbell, 191 Cal.Rptr. 367 (1987), the California statute as applied to infants was held to be constitutional. The application of the statute to infants or incompetents is obviously the most controversial. Sax v. Yotteler, 648 S.W.2d 661 (Texas 1983), and Schwinn v. Riverside Methodist Hospital, 45 N.E.2d 737 (Ohio 1983), both held the

statute as applied to infants unconstitutional. As noted, California adopted the eight year period as applied to newborns. This figure was arrived at by considerable consultation with pediatricians and neonatal specialists as to what was an outside period in which infant brain damages would manifest themselves.

The importance of the limitation on the statute is pointed out in the Patrician Danzon study entitled: "The Frequency and Severity of Medical Malpractice Claims: New Evidence," Law and Contemporary Problems, vol. 17, No. 2, p. 71 (Spring 1986), in which she found that "reducing the statute of limitations for adults by one year reduces total claim frequency by eight per cent and frequency of paid claims by six to seven per cent."

The State of Oklahoma designed an innovative approach in providing that the discovery exceptions as applied to medical malpractice cases applied only to those damages constituting medical and surgical expenses. However, the Oklahoma Supreme Court in Reynolds v. Porter, 760 P.2d 816 (July 19, 1988), held even this modification was unconstitutional under special provisions of the Oklahoma constitution. The court makes an interesting distinction between a statute that penalizes those who sleep on their rights and a statute which acts as an absolute bar. Strahlen v. St. Luke's Hospital, 706 S.W.2d 7 (Missouri 1986) held the Missouri statute unconstitutional on grounds of denial of access to the courts.

Periodic Payments

One of the most difficult tort reform statutes to draft and implement is the one designed to convert lump sum judgments into periodic payments. As a practical matter, the most beneficial effect of the legislation has been to force both plaintiff and defendant attorneys to work with the concept in the settlement process either pre-judgment or post-judgment. Our California experience has been that the results have been most effective from the point of view of both the injured plaintiff and the plaintiff's dependant as well as the insurers for the defendants.

The basic purpose is to design an award that meets the needs of the plaintiff and at the same time avoids a windfall to the plaintiff's heirs and thus more effectively utilize the resources available.

The arguments in favor of the approach are:

1. The jury award may overestimate or underestimate the true needs of the injured party. For example, the plaintiff may live longer or shorter than expected. The needs of the plaintiff as he or she advance from infant to a minor child and then to an adult status will change. An annuity can be designed to anticipate these needs whereas a jury has no discretion or expertise in which to act. On the other hand, the market place through specialized annuities can design an effective package which in most instances is far less expensive. When we started this program in California in the 1970s there was little or no expertise available. Now it is a very competitive and sophisticated market.

2. It is usually less costly to finance a judgment by debt paid on an installment basis than by lump sum.

3. The potential windfall is eliminated both ways as the cost of the annuity is paid up front and is set by the market.

4. Experience has indicated that the receipt of a lump sum all too often leads to a loss of the resources through unnecessary expenditures or poor investment, with the result that the permanently injured party becomes a public charge.

5. The total payments under a period payment award is treated as tax-exempt under Rev. Rul. 79-220, 1979 CB 74. On the other hand, investment income from a lump sum award may be fully taxable. A word of warning is appropriate as the application of the IRS ruling together with technical amendments in the 1986 Tax Reform Act must be followed. Drawing such an arrangement is no role for amateurs.

The arguments against the concept are:

1. There is no rational reason to treat medical malpractice plaintiffs any differently than other plaintiffs. This is the classic due process or equal protection argument. Also, the constitutional issue of trial by jury can be raised on the charge that the jury has been deprived of its full right to establish the damages.

2. There is no rational reason to deprive the plaintiff of the right to protection from run away inflation or to have sole discretion as to the administration of the fund.

3. There may be no provision for unforeseen circumstances or needs.

4. Future annuity payments are at risk because of possible problems of the annuity carrier, or the insurance carrier if the award is not funded by an annuity.

5. There is no justification for denying the plaintiff the right to assign future payments as is provided in some statutes.

The Uniform Laws Commission, through a committee, came up with such an administrative monster of a proposed statute that most interested parties opposed its adoption as being unworkable

and it has not been supported. I understand that the Commission is going to take another crack at it starting this fall.

The earliest appellate decision upholding the concept was State ex rel Strykowski v. Wilkie, 261 N.W.2d 474 (Wisconsin 1978).

In a comprehensive opinion thoroughly ventilating both sides of the argument the California Supreme Court, by a 4-3 vote, upheld the California statute in American Bank & Trust Co. v. Community Hospital, 687 P.2d 670 (1984). For an excellent discussion of this case see: "Medical Malpractice Statutes: A Retrospective Analysis," Annual Survey of American Law 1984, 700-704. For a contrary decision see: Carson v. Maurer, 424 A.2d 82 (N.H. 1980).

The California statute provides:

Section 667.7, Code of Civil Procedure:

667.7. [Medical malpractice 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 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)k 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 hearing 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 modifications at some future time which might alter the specifications of the original judgment.

The trial courts as well as appellate courts have found considerable difficulty in implementing the statute. Included in the problems is the matter of pleading the section and at what point in the proceedings the defendant or plaintiff must elect to implement the section. We recommend that the defendant not only plead this section as well as all other tort reform sections in the answer and renew the request prior to the final entry of judgment. Also, necessary requests for special verdicts must be made to establish the distinction between past and future damages. The basis on which the jury establishes its

damage award as to the number of years it would anticipate the plaintiff would survive may be important. The defendant must be sure to provide adequate economic testimony to establish the economic basis for converting the award to periodic payments. This would include evidence as to differing needs for the individual initially as well as in the future.

Another problem that is currently being litigated on appeal, with the intermediate courts in California going both ways, is whether the periodic payments start to bear interest from the date of judgment or from the time each individual payment becomes due. The jury instructions become critical and the results can be well worth the effort.

Although plaintiff attorneys originally fought the concept, some are now seeing its merits and some are even deferring their own legal fees on a periodic basis as they get to the end of their tax year.

Because of the complexity of implementing the section the hospital malpractice program has arranged for special counsel to work with local trial counsel on all phases of implementation and has developed a special trial manual that is made available to both legal counsel and the judiciary.

The Kansas Supreme Court, in Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (June 3, 1988), as a part of its sweeping overturning of the Kansas tort reform statute, held the statutory requirement of an annuity payment of future malpractice

damages was unconstitutional as denying the injured plaintiff the right of full recovery.

Limits on Contingency Fees

Nothing raises the fury of the trial bar more than any attempt to limit the right to exact contingency fees from their clients. The first limits on contingency fees were applied by the rule of court by New York and New Jersey. These limits were applied to all tort personal injury cases. It was not until the crisis of 1975 that there was a concentrated move to bring malpractice contingency fees under controls or limits. Although some of the approaches were to increase the authority of the court, most were directed at specified statutory limits on a descending scale.

A typical statute is the one adopted by California in 1975 which provided:

Business and Professions Code, Section 6146:

6146. Limitations in amount

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered. (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered. (3) Twenty-five percent of the next one hundred thousand dollars (\$100,000) recovered. (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars (\$200,000).

Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorneys' fees are calculated under this section.

(c) The Board of Governors of the State Bar of California shall report and make recommendations to the Legislature by July 1, 1976, on an equitable method for regulating compensation of defense counsel consistent with the policies embodied in this article regarding regulation of plaintiff's attorney's fees.

(d) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges shall not be deductible disbursements or costs for such purpose;

(2) "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;

(3) "Professional negligence" is 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.

The only substantive change in the statute occurred in 1987 when the schedule was modified to provide:

40% of the first \$50,000
33-1/3% of the next \$50,000 25% of the next \$50,000
15% of all over \$600,000

Our experience would indicate that attorneys are screening cases more carefully but even for the risky cases

there has been no dearth of competent attorneys willing to take the risks.

The principal arguments challenging the contingent fee limitation are:

1. Deprivation of right to select legal counsel. The argument is based on the fact that medical malpractice cases are costly to prepare and try and that a low fee schedule will drive the most qualified attorneys from the market. Also, Harvard Law Professor Lawrence Tribe, the itinerant peddler of constitutional nostrums, has opined that there is a similar infringement on the First Amendment rights of freedom of speech.

2. The usual arguments on due process and equal protection as well as the question whether such a provision is subject to strict scrutiny.

3. The additional constitutional argument of separation of powers on the theory that regulation of attorneys is a matter for the courts and not the legislature.

4. The limit denies the right of both the attorney and client to bargain as to the amount of the fee, thus interfering with the right of contract. This argument is made by persons who have never dealt with a plaintiff attorney on fee matters.

5. The sliding scale creates a potential conflict of interest between attorney and client because it discourages the attorney from taking the additional risk of going for the larger judgment.

6. The most appealing argument is that the contingency fee system is the key to the court house for a class of plaintiffs who are particularly handicapped in their ability to finance their own litigation.

7. Because of the high loss ratio in medical malpractice cases the contingent fees must cover both the winners and the losers.

The principal contra arguments are:

1. That the equal protection argument is overridden by the legislative goals and social policy

to assure the availability of liability insurance as being critical to the availability of health care. Basically is there or is there not a crisis?

2. The contingent fee recovery is more reflective of the extent of injuries to the injured plaintiff than it is to the skill of the attorney and thus justifies the sliding scale to avoid a windfall to the attorney.

3. The limit will encourage settlements by discouraging attorneys from trying the speculative cases in hoping to reap newsworthy recoveries.

4. The contingent fee limit offsets the reduction of recovery by the injured plaintiff by other tort reforms such as a cap on pain and suffering or collateral sources. This can be dramatically diagrammed for box car recoveries in excess of \$1,000,000.

5. The contingent fee is negotiated without independent legal representation for the injured party and also encourages excessive referral fees at the client's expense.

6. The recoveries in medical malpractice cases for comparable injuries are two to three or four times as great as other tort recoveries for auto accidents and the like. A dramatic study on this has been published by the Rand Institute For Civil Justice, R-3466-ICJ, by M. Peterson, entitled, "Compensation of Injuries: Civil Justice verdicts in Cook County" (1984).

7. There is a pattern of legislative control over attorney fees in such areas as probate, workers compensation, veterans cases, etc.

As usual, the court results have been mixed. For an extended review of the cases see: "Medical Malpractice Statutes, a Retrospective Analysis," Annual Survey of American Law 1984, p. 707; "Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient?", Loyola of Los Angeles Law Review, vol. 19: 623 (1985). The only case to reach the United States Supreme Court,

with hearing denied, was Roa v. Lodi Medical Group, 695 P.2d 164, 37 Cal.3d 920 (1985). In Roa the California Supreme Court by a 4 to 3 decision upheld the California statute in an extraordinarily acrimonious decision. It is interesting to note that in the Roa case the appeals all the way up to the United States Supreme Court to upset the imposition of the fee limit were by the father of the injured minor in his capacity of guardian ad litem. In effect he was seeking to reduce the net award to his ward for the benefit of the attorney whose sole service was in negotiating a policy limit \$500,000 settlement and without trial.

In Heller v. Frankston, 464 A.2d 581 (1983) the Commonwealth Court of Pennsylvania refused to implement the Pennsylvania statutory limit on contingent fees on the ground that it violated the Pennsylvania constitutional separation of powers. In Carson v. Maurer, 424 A.2d 825 (1980), the New Hampshire Supreme Court as a part of a decision upsetting all statutory tort reforms, dumped the New Hampshire statute on the grounds that this specific limit denied access to the courts.

Now that the statute has been declared constitutional in California under Roa the plaintiff attorneys are seeking to avoid the statute by several different ploys that are now being litigated. One approach with some success at the lower court level is to claim that the statute does not apply to intentional torts, but only to negligence. By including a count on intentional tort the attorney then claims that in the event of a

settlement of the entire action that he can avoid the fee limits. Other attorneys are claiming that their fee agreements are not true contingent fee agreements, and others are claiming that the injured plaintiff can waive or consent to the additional fees. Although these approaches appear to be in clear conflict with both the language and the intent of the statute, one can never underestimate the sympathy that the judiciary has for legal fees. We also find that there is not only reluctance but outright opposition by our own defense counsel to aiding in the enforcement of the provision, claiming that it is not a proper matter for discovery, etc. As a result, the enforcement is rising through actions by former plaintiffs to recover the excessive fees they have paid. Within the past year the State Bar, some thirteen years after the statute was adopted, has initiated two disciplinary proceedings against attorneys who have flaunted the provision.

In anticipation of the claim by plaintiff attorneys that there was violation of the equal protection provisions of the Constitution, the fee provision of the California tort reform statute included the following language as to defense attorney fees:

6146(c) of the Business and Professions Code:

The Board of Governors of the State Bar of California shall report and make recommendations to the Legislature by July 1, 1976, on an equitable method for regulating compensation of defense counsel consistent with the policies embodied in this article regarding regulation of plaintiffs attorneys fees.

The Bar Association has taken the position that the Legislature has no constitutional right to direct such action and has summarily refused to consider the matter.

Joint and Several Liability

The development of the common law concept of joint and several liability has very special significance to health care providers. Not only the largest medical malpractice cases but also the most serious ones arise out of physician practice in the hospital. Most of these cases not only involve a joint action against both the hospital and the attending physician but also multiple physician as well as other health care practitioners, such as nurses, equipment suppliers, and now including HMOs, and other alternative delivery systems. The seriousness of the problem became apparent with the shift by the courts to both the elimination of the defense of contributory negligence and the application of joint and several liability, with the deep pocket defendant potentially subject to paying the total loss regardless of the share of liability.

In the health care field the hospital is usually the deep pocket defendant with high limits of insurance coverage and the physicians with much lower limits or sometimes uninsured. In those states where there was a true cap on either total recovery or at least a cap on pain and suffering the problem is not as acute. In the health care field a new problem is evolving as the result of the adoption of state and now federal requirement for reporting malpractice losses paid by physicians,

hospitals and other health care providers. Particularly when there is a dollar threshold for the reporting requirement the matter of allocating the loss becomes a major friction point. This will be a new issue for allocating paid losses between the hospital and an employed or contract physician when they are insured under the same insurance policy. When the reporting requirements under the Health Quality Improvement Act become effective there will be major problems over this issue of allocation of settlements in particular.

This is one area of tort reform in which other defendant groups, such as auto insurance carriers, products liability and the like, have taken a direct interest and even leadership in fighting for generic tort reform. As a result this is the one reform where the health care providers have not necessarily taken the lead, even though their support may be critical in making the case known to the public.

There has been no uniformity of action by the various state legislatures with the result determined by the makeup of the coalition and the compromises acceptable to the legislature. Some of the alternatives adopted are:

1. A modification of the joint and several liability to provide that each defendant's liability is limited to its percentage of liability. The plaintiff's contributing liability may or may not be included and the defense may or may not apply to the insurance carriers for certain classes of defendants.

2. Not including certain classes of cases in the tort reform proposal, such as products liability or environmental tort actions.

3. Elimination of joint and several liability only for losses below a certain maximum.

4. Elimination of joint and several liability only for defendants below a certain threshold of loss.

5. Elimination of joint and several liability only when the plaintiff is at fault, or is more at fault than the defendants.

The basic argument against these reforms is that the innocent injured party should be entitled to a full recovery for all losses regardless of the economic status of some of the defendants and that the defendants should be required to adjust their relative liability amongst themselves.

In 1986 the State of Washington legislature, in modifying the joint and several liability rule, pointed out that such a response was necessary to preserve the availability of liability insurance (1986 Wash.Legis.Serv. Ch. 305, par. 106, West).

In California, when the legislature failed to act a strong coalition was developed to pressure a generic reform by a voters initiative. It was agreed that the limit should apply only to noneconomic damages with the emphasis on the fact that the injured plaintiff would be assured of a full recovery for economic losses, but the deep pocket abuses of noneconomic losses should be limited. The matter was placed on the ballot as Proposition 51 and received an overwhelming favorable vote of over 60%. The changes in the law were incorporated in Sections 1431-1432 of the California Civil Code.

1431. Joint Liability. An obligation imposed upon several persons, or a right created in favor of

several persons, is presumed to be joint, and not several, except as provided in Section 1431.2, and except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

1431.1. Findings and Declaration of Purpose. The People of the State of California find and declare as follows:

a) The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People--taxpayers and consumers alike--ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums. Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

1431.2. Several Liability for Non-economic Damages.

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's

percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

1431.3. [Immunity] Nothing contained in this measure is intended, in any way, to alter the law of immunity.

1431.4. Amendment or Repeal of Measure.

This measure may be amended or repealed by either of the procedures set forth in this section. If any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.

(a) This measure may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.

(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.

1431.5. Severability.

If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this measure are severable.

1432. Contribution between joint parties. Except as provided in Section 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

During 1987 and 1988 more than half of the states enacted legislation to either limit or abolish the joint and several liability rule. An excellent discussion of these legislative developments appears in "Recent Legislative Response To the Rule of Joint and Several Liability," Tort and Insurance Law Journal, p. 486 (1988).

Punitive Damages

Although the matter of punitive damages was not considered a major medical malpractice problem prior to the crisis of 1975 and was given little attention in the two major national reports in the early 1970s, it has become an increasing economic problem as well as a highly charged emotional problem for health care providers as it manifests itself in new areas of liability. For example, hospitals in some states such as California are finding themselves subject to astronomical claims for punitive damages in employee wrongful termination cases. Also, the malpractice insurance carriers are being charged with unfair practices in their handling of third party claims which is creating conflict with their insureds. In approximately half of the states punitive damages are not insurable by law. There is a potential conflict between the health care insurer and each hospital or physician whenever punitive damages are alleged in a malpractice complaint.

Interestingly enough, the assessment of punitive or exemplary damages is one of our oldest legal doctrines going back to the Code of Hammurabi in 2000 B.C. and the Old Testament

of the Bible. In common law the doctrine appeared in the 1700s and in the United States in New Jersey in the case of Corvett v. Colbaugh, 1 N.J.L. 77 (1791).

Allegations of punitive damages have serious emotional impact upon health care providers for a variety of reasons, such as:

1. Operationally for physicians or nurses an allegation of punitive damages with the necessary legalese to support the allegation is a traumatic affront to their professional integrity accompanied by the astronomical claims alleged.

2. Such a complaint may result in a cold letter of reservation of rights by the insurance company that further aggravates the situation.

3. The claim may or may not be insurable and the defendant may be subject to extensive discovery as to assets and sources of income as well as inquiry as to other tort actions needed to show a course of conduct.

4. If the claim is not insurable, there is the problem of a real or perceived conflict between the insured and the insurer's carriers on the matter of trial tactics or settlements including the need to segregate the punitive damages from other damages in the judgment or the settlement. If the case is settled the punitive damages may be buried in the total settlement.

5. The health care providers are unsettled by the vagueness of the standards by which they are judged and the general lack of court effective monitoring of potential jury action.

6. From the viewpoint of the health care provider there is the potential of double jeopardy by the granting of punitive damages coupled with the potential challenge to licensure.

7. Punitive damages are a potential windfall to the plaintiff and plaintiff's attorney as they may bear no relationship to the true damages suffered by the plaintiff.

On the other hand, the plaintiffs' bar argues:

1. In fact punitive damages are rarely allowed and when they are it is in the grievous case.
2. To protect himself/herself from a legal malpractice claim the plaintiff's attorney must make the necessary allegations in the complaint and pursue discovery.
3. Damages are an inadequate punishment for the health care provider to assure a high standard of conduct.
4. Judges exercise appropriate supervision of the jury.
5. Punitive damages permit the plaintiff to fully recover his losses including attorney's fees.

Only recently has the American Bar Association taken any action on the matter of punitive damages. In the 1987 Report of the ABA Action Commission To Improve the Tort Liability System, the following recommendations were made:

"5. The scope of punitive damages in cases involving damage to person or property should be narrowed through the following measures:

- The standard of conduct. Punitive damages should be allowed only in cases where the defendant's conduct indicates substantially greater indifference to the safety of others than ordinary negligence, such as intentional action or conduct in conscious disregard of the rights or safety of others.

- The standard of proof. The standard of proof in awarding punitive damages should be higher than in awarding compensatory damages. The standard should be proof by 'clear and convincing evidence.'

- The process of decision. (1) Appropriate pretrial procedures should be routinely utilized to weed out frivolous claims for punitive damages prior to trial, with a savings mechanism available for late discovery of misconduct meeting the standard of liability. (2)

Evidence of net worth and any other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.

- Multiple judgment torts. While the total amount of any punitive damages awarded should be adequate to accomplish the purposes of punitive damages, appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.

- To whom award should be paid. After deducting costs and expenses, the court should determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes."

The Tort Policy Working Group, in its 1987 Update, made several recommendations, including:

1. Include any punitive damages within the overall limit on noneconomic damages with a single limit for both.
2. Limit the application to intentional torts.
3. Tie the limit to a multiple of the economic damages and use a substantial portion of the recovery for public purposes.
4. Limit the attorney fee contingency to 5% so that the attorney will not jeopardize the client's recovery in order to achieve a box car recovery.
5. Recognize that in actual practice 90% of the cases are settled so that the limit would be directly effective only in the litigated cases. However, it must be recognized that settlements are directly reflective of what is happening in the trial courts so, in fact, there is a direct correlation. Although as new litigations evolve there may be an incentive for the attorney to settle to avoid the impact of these limitations.

6. The Working Group pointed out that based upon its study the Group was skeptical of the value of changing the standard of proof. The report pointed out that even though there has been no doctrinal change in the law the courts have found ways of broadening the application in a geometric fashion. If the standard of proof is to be tightened then the change should provide that the plaintiff can only recover if there is clear and convincing evidence that the defendant acted with actual malice.

If punitive damages are to be continued, there can also be procedural changes which will somewhat alleviate the unnecessary burden of frivolous allegations. For example, there can be a requirement that the allegation be made only after certain discovery and be based upon an affidavit of probable recovery with the trial of the issue separate from and deferred until after the trial of the principal action, with no evidence of the economic status of the respective defendants until there has been a determination that such defendants are liable.

The plaintiffs' bar has claimed that there are relatively few punitive damage awards even though more than 70% of our malpractice complaints in California have included a claim for punitive damages. The Working Group quoted from a study of the Institute of Civil Justice that stated that the recovery of punitive damage awards in Cook County increased from three in 1960-64 to 75 in 1980-84 and in San Francisco from 14 in 1960-64 to 51 in 1980-84, with a punitive damage award in nearly one out of every seven plaintiffs' verdicts. Even more critical is the increasing size of the award. The Institute's data reported that in Cook County the average personal injury punitive damage award

grew from \$28,000 in 1970-74 to \$1,934,000 in 1980-84, an increase of some 6,900%.

A critical side effect of punitive damage awards is the impact on the availability of high risk drugs or procedures involving preventive measures such as the experience with the Salk vaccine.

Punitive damages was not a high priority issue when we negotiated our tort reform package in California in 1975. But by the mid-1980s it was at the top of our agenda as the next tort reform to be adopted. Although our efforts were unavailing for several years, continued preparation was made to organize a broad based coalition to support generic tort reform in this area. At the same time the California Trial Lawyers Association was raising funds to support an initiative that would repeal the malpractice tort reforms adopted in 1975. The legislative leaders were concerned that this continued battle would syphon off funds that they would otherwise enjoy for their reelection campaigns and forced a compromise which was literally negotiated and passed in a matter of hours at the end of the 1987 legislative session. The quid pro quo for the trial lawyers was an adjustment increasing their allowable contingent fee percentage. The trial lawyers got nothing for their clients as their prime concern was for their own fees. Included were changes in the law relating to exemplary damages applicable to all torts, not just those relating to medical malpractice. As a

result extensively amended Sections 3294 and 3295 were adopted to the Civil Code as follows:

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 contain 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.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

3295. [Protective order requiring plaintiff to produce evidence; Discovery] (a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:

(1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.

(2) The financial condition of the defendant.

(b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294.

(c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.

(d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and

found one or more defendants guilty of malice, oppression, or fraud.

(e) No claim for exemplary damages shall state an amount or amounts.

(f) The amendments to this section made by Senate Bill No. 241 of the 1987-88 Regular Session apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

So far these sections appear to have been beneficial.

For a series of articles expounding on this controversial issue see:

"Punitive Damages: Toward a Principled Approach," 31 Hastings Law Journal 639 (1980).

"Exemplary Damages As An Instrument of Social Policy: Is Tort Reform in the Public Interest." St. Mary's Law Journal, Vol. 18:797 (1987).

"Punitive Damages and The Tort System," University of Richmond Law Review, vol. 22:1 (1987).

"Awarding Punitive Damages in Medical Malpractice Arbitration," California Western Law Review, vol. 20:312 (1984).

Ultimately the issue of the extent of the constitutionality of the various proposed reforms of the right to punitive damages will be decided by the United States Supreme Court, perhaps at the current session. However, so far the Supreme Court has been very adept at ducking this controversial issue. My best guess is that the Court will affirm the principle of exemplary damages but require some objective standards both as to the application and the amount.

Ad Damnum Clause

A procedural tort reform that I promoted in the early 1970s was the elimination of the ad damnum clause in all medical malpractice actions. I had made an informal study of a

comparison of the ad damnum demands in a series of medical malpractice claims with the actual results by way of judgment or settlement. The study indicated that the claims versus the recovery were about 30 to 1. From the viewpoint of the health care providers, and particularly physicians, the fact that XYZ Hospital and Doctor A were sued for a million dollars was headline news but the fact that the ultimate recovery was a nominal amount was not news. This type of publicity obviously contributed to the public perception as well as influenced juries in their deliberations.

Plaintiffs' attorneys claim that they must ask the limit to protect themselves from a claim of legal malpractice. There is no penalty for asking too much. There is no question but that the outlandish demands have materially contributed to the antipathy of the medical profession for the legal profession.

The legislature found this one an easy one to grant and it has not been challenged. There is no way to quantify the result. Both the ABA Commission and the Secretary's Commission in the early 1970s included this concept as a favorable recommendation.

There are a few problems but these are relatively minor and can be resolved:

1. The question of establishing jurisdiction when there is a dollar threshold between trial courts.

2. The need for the defendant and the defendant's insurance company to know the amount of the claim for the purpose of deductibles, whether the claim exceeds

the amount of the primary coverage or the total coverage, etc.

3. Two Kentucky cases split on the constitutionality of the issue on whether the law violated the rule making power of the courts. The most recent case, Lewis v. Smathers, 663 S.W.2d 228 (Ky.App. 1984), upheld it.

The California statute provides:

Sections 425.10 and 425.11 of the California Code of Civil Procedure:

425.10. [Contents of complaint or cross-complaint.] A complaint or cross-complaint shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the pleader claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual or punitive damages for personal injury or wrongful death, in which case the amount thereof shall not be stated.

425.11. [Demand for damages statement] When a complaint or cross-complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the party against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff or cross-complainant, who shall serve a responsive statement as to the damages within 15 days thereafter. In the event that a response is not served, the party, on notice to the plaintiff or cross-complainant, may petition the court in which the action is pending to order the plaintiff or cross-complainant to serve a responsive statement.

If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1) before a default may be taken; or (2) in the event an answer is filed, at least 60 days prior to date set for the trial.

Notice of Intent to Sue

One of the most unsuccessful tort reform proposals that has been developed is the requirement of a notice of intent to sue. As one of the principal proponents of this concept back in the 1970s, I have been most disappointed in not only its failure but the fact that it has often been counterproductive. I must confess that I was one of the early proponents of this concept and it was included as a recommendation in both the Secretary's Commission and the ABA Commission reports.

The social purpose behind the approach was an attempt to create a period of time between which the plaintiff determined to press a claim against a physician and the time a lawsuit was actually filed in order that there could be some dialogue between the prospective plaintiff and the physician which could either lead to a determination by the plaintiff that there was a satisfactory explanation of what had occurred or, in the alternative, a possibility of an immediate settlement for the benefit of all concerned.

This is more of a doctor problem than it is a hospital problem because a claim against a hospital does not have the emotional content as does a claim against a doctor. Our experience would indicate that prior to the 1975 statutory requirement in over 50 per cent of the cases against the doctor the first knowledge that the doctor had of the claim was the service of the summons and complaint upon him. In working with doctors my experience is that this is a devastating experience,

particularly as he reads the complaint and sees the amount of the demand if one is stated. Also, from the viewpoint of the plaintiff the execution of the complaint in itself raises the plaintiff's hopes and expectations, making it more difficult to settle the case if justified.

To understand the problems that developed the California statute is set forth as follows:

Sections 364 and 365 of the California Code of Civil Procedure:

364. [Notice required as condition precedent to bringing action] (a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.

(b) No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.

(c) The notice may be served in the manner prescribed in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.

(e) The provisions of this section shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name, as provided in Section 474.

(f) For the purposes of this section:

(1) "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;

(2) "Professional negligence" means 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.

365. [Failure to comply] Failure to comply with this chapter shall not invalidate any proceedings of any court of this state, nor shall it affect the jurisdiction of the court to render a judgment therein. However, failure to comply with such provisions by any attorney at law shall be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such cases brought to its attention.

Our first problem was that plaintiffs' attorneys chose to ignore the statute so we instructed our trial counsel to notify the California State Bar Association as to each violation. For a while we got no response at all from the Association. Then we were notified that it took the position that the statute violated the separation of powers between the judiciary and the legislative branch and therefore it chose to take no action.

However, as time went on the plaintiffs' attorneys began to use the statute for psychological purposes and filed the letter in a majority of the cases. It then appeared that the insurance claims representatives chose to ignore the notice and claimed that they needed more time for discovery and the usual bureaucratic folderol. So it had little impact on expediting settlements. Interestingly enough, we have seen recently greater interest by the claims people to use the time more effectively. This takes client pressure.

However, the unanticipated result was that the plaintiffs' attorneys were able to use the provision to extend the statute of limitations by another 90 days and sometimes by 180 days. Part of the problem arises from draftsmanship. There was no window created between the time of the required filing of the complaint and the expiration of the mandated deferral for filing the complaint. See Braham v. Severson, 119 Cal.App.3d 367 (1981); also, Lesko v. Superior Court, 127 Cal.App.3d 476 (1982), holding the statute was constitutional.

At this point if we had our druthers we would prefer to see the whole statute repealed.

Only a few states have adopted the concept and in New Hampshire in Carson v. Maurer, 424 A.2d 825 (1980), the Supreme Court held the law unconstitutional as having no substantial relationship to "any legitimate legislative objective." Perhaps on this one the New Hampshire Court was right--they can't be wrong all of the time.

The No-Fault Alternative to Tort Recovery

During the 1970s and 1980s there was much discussion of possible no-fault alternatives to the tort system of compensating plaintiff suffering for catastrophic injuries. These included such proposals as the availability of "trip insurance" under which the patient bought his own coverage, or a form of identified compensable events for which there would be payment without fault on the basis of a workers compensation type of schedule, and the like. Except for the action by the United

States Congress in dealing with the swine flu problem, there was little or no action on these proposals. The California Medical Association and the California Hospital Association in an indepth study of over 25,000 charts concluded that a no-fault approach across the board would be far more costly than the existing tort system and quietly dropped the concept. See "Medical Insurance Feasibility Study," published in 1977 by the California Medical Association, with Don Harper Mills, M.D., J.D., the principal editor and investigator.

However, in 1987 the State of North Carolina legislature adopted as Chapter 130A Public Health, of the General Statutes of North Carolina, a carefully drafted program to provide for compensation to parties suffering from specified vaccine related injuries. Under this program the fund created by general appropriations of state funds constitutes the sole source of compensation for such injuries, with the program being administered by the existing North Carolina Industrial Commission. The claim for damages may include, among other matters, actual and anticipated expenses of medical care, vocational and rehabilitation therapy, custodial care, and the like, that cannot be provided by the Department of Human Resources; also, loss of earnings and noneconomic damages from pain and suffering together with reasonable attorney's fees. However, there was a limit of \$300,000 or its present value on the total award and no damages were allowable to any person other than the one to which the designated vaccine was

administered. The Commission has the right to the extent of the award to recover back against any health care provider or manufacturer who had been negligent in the manufacture or administration of the vaccine. There were additional refinements in the statute made in 1987. This enactment has received little treatment in the literature.

However, when Virginia, in 1987, and Florida, in 1988, adopted no-fault legislation for compensation for neurologically impaired infants, there has been widespread discussion of the pros and cons of these two programs.

The Virginia Birth-Related Neurological Injury Compensation Act, Va. Code §38.2-5000, et seq., was adopted to meet the crisis in the availability of insurance for physicians practicing obstetrics, with it being anticipated that by the end of 1987 25% of the State's obstetricians/gynecologists expected to lose their coverage with no other source available. The act applied 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 annual fee by a physician whether an obstetrician or a general practitioner doing obstetrics. Although these payments are voluntary, all other physicians, as a condition of licensure, are assessed a \$250 fee. The bill nearly foundered when it was amended to include a \$1,000 annual assessment against all attorneys--a provision that was quickly deleted. If the Fund

falls short, there is an annual premium tax on all liability carriers in the State.

The Fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery, and resuscitation, and is to be the sole and exclusive remedy against those electing to participate.

In addition, both hospitals and physicians electing to participate also participate in a program to assist the State in developing a health program for low-income pregnant women and the participating physicians must agree in advance to submit to a review of their obstetrics practices in the event of a finding of substandard care.

The Fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three impartial physicians with the duty of the State's medical schools to develop guidelines.

Immediately on passage of the bill the Virginia Insurance Reciprocal lifted its moratorium on new o.b. insureds and agreed to freeze its rates and grant a 10% reduction to physicians who participated in the Fund. The medical protective entered the market with the theretofore unavailable \$1,000,000 limits. Forty of the sixty Virginia hospital providers having obstetrical services have indicated their intent to participate.

For an excellent discussion of the Virginia legislation see Professor Nathan Hershey's "Hospital Law Newsletter," Volume 5, Number 5, March 1988, and The American

College of Obstetricians and Gynecologists Legisletter, Special Issue, Vol. 6, No. 2, May 1987.

Immediately following the Virginia action the Florida legislature passed a comprehensive malpractice reform package in 1988. Included in the package was a special 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 will be financed by an annual payment of \$5000 per year by each participating physician. In addition to the cost of care and rehabilitation the parents may recover up to \$100,000 for noneconomic damages. The Fund will be administered by the State Workers' Compensation Division.

For other cases the law sets \$250,000 and \$350,000 caps on noneconomic damages under certain circumstances. Either the doctor defendant or the injured plaintiff can request that an arbitration panel settle the case and limit the noneconomic damages. If arbitrated, the limit is \$250,000. If the physician refuses arbitration and the case goes to a jury trial, the limit is \$350,000, and if both parties refuse arbitration, there is no limit. Subsequently the Florida Medical Society attempted to reduce the cap on an overall basis for noneconomic damages to \$100,000 by a proposed constitutional amendment which was soundly defeated by the voters.

The total Florida legislation was some 114 pages in length and included many provisions that hospitals and physicians will find burdensome. For example, although the good

samaritan law of immunity for ordinary negligence was extended to hospital emergency rooms, now hospitals must get State permission before cutting back on emergency rooms and if groups of doctors withhold emergency room services they may be subject to penalties, including possible loss of licensure.

A new watchdog unit called the Medical Quality Assurance Division to Florida's Department of Professional Regulation is created with 89 positions and a \$3,300,000 budget. As a part of hospital peer review a hospital must report to the agency of any malpractice case which includes a doctor and also notify the agency as to the outcome. The Medical Quality Assurance Division can contract with hospital peer review panels or local professional groups to make disciplinary recommendations, including the limitation or revocation of hospital privileges. Since these panels will be a part of State action there should be antitrust immunity when acting with State agency authority. In addition, hospitals must notify Medical Quality Assurance of incidents that could trigger a malpractice lawsuit. Also, a patient or his attorney must include Medical Quality Assurance in its notice of intent to sue and a doctor must report to Medical Quality Assurance of any settlement in or out of court. Insurers must notify the Medical Quality Assurance if they drop a doctor's insurance or if the doctor does not renew. For gross and repeated malpractice the Medical Quality Assurance must investigate serious payouts and for three

judgments in excess of \$10,000 each in a five year period there is mandatory revocation of licensure.

There are additional provisions as to patient dumping and a provision requiring and protecting whistle blowing. As might be expected the American Medical Association has described these steps as "doctor bashing." On the other hand, hospital and physician leaders in Florida are quoted as being cautiously optimistic.

Arbitration and Screening Panels

Both arbitration and screening panels can perform an important role as alternative dispute resolution mechanisms in medical malpractice claims or suits. However, to properly analyze and discuss the wide variety of approaches and their results would require a paper almost as extensive as this total paper. The allotted time does not permit doing justice to the subject so only a few comments will be made.

The California Medical Association and the California Hospital Association jointly initiated a program of voluntary arbitration of patient claims about 1970 which was described in my article in Hospitals, Vol. 44, October 1, 1970. Although the program was initiated in over 100 hospitals, it gradually fell in substantial disarray by the continued attack upon it by the courts which gave lip service to the public policy favoring arbitration but seemed to always find good reason not to enforce it. Wheeler v. St. Joseph Hospital, 63 Cal.App.3d 345 (1977), is a good example of this attitude.

However, interestingly enough, the Supreme Court took a different attitude if the arbitration agreement was contained in the health insurance agreement provided by an HMO negotiated by the employer even without the knowledge of the plaintiff patient. Such agreements continue to be enforceable in California. See seminal Supreme Court case, Malden v. Kaiser Foundation Hospitals, 131 Cal.Rptr. 1178 (1976).

More recently we find that all of the major HMOs in California have put medical malpractice arbitration clauses in their health coverage contracts and those that are national, such as CIGNA and Kaiser, are putting them in their agreements in other states. Unfortunately, we do not have access to their actual experience but their conduct speaks for itself. The CMA and CAHHS have just completed a revision of the basic physician arbitration agreement and rules of arbitration. These will be published shortly. This is in response to a recent upsurge in interest in contract arbitration by at least one of the major physician carriers that is mandating physician participation.

The other major statewide experience is that of Michigan where a State Medical Society arbitration program implemented by State legislation is developing a public bank of data, which is most encouraging.

For an excellent review of the history and progress of the Michigan program see "Medical Malpractice Crisis The Second Time Around," Journal of Legal Medicine, Volume 8, Number 2, 1987. Also, the case of Morris v. Metrivakoul, 418 Mich. 423,

344 N.W.2d 736 (1984), in which the Michigan Supreme Court upheld the constitutionality of the Michigan act.

For a general discussion of alternative dispute resolution concepts see, "Alternative Dispute Resolution: Panacea or Anathema?" Harvard Law Review, Vol. 97:668.

The AMA Proposal

What is generally referred to as the AMA Specialty Society Medical Liability Project is primarily, if not specifically, directed as a mandatory alternative approach to the removal of all physician malpractice cases to a commission approach, with limitations on recovery but substantial legal support for the claimant in receiving justice. In its initial form, from a hospital point of view, it would create a serious problem as the physician would be handled in one forum and other joint defendants in another. Personally, I have great concern about the combination of the disciplinary function with that of victim compensation which is contemplated by the proposal. Although there is a threshold requirement of a finding of fault, it would be my anticipation that under any commission operation it would drift more and more into a no-fault threshold. In any event, the proponents are to be congratulated for doing a very thorough and innovative job. I just hope they keep it out of California until it is well tested elsewhere.

The New York Medical Association has come up with a somewhat comparable proposal and the Vermont Medical Association caused a prototype of the AMA proposal to be introduced into the

Vermont legislature in February. At this point it is too early to determine its fate.

Miscellaneous

It will not be the purpose of this section to discuss in detail all of the various approaches to special problems that cumulatively can have an important impact upon the cost of medical malpractice insurance. Many of these are directed toward solving particular problems of providing health care in addition to the liability problem.

One of the earliest was to provide for immunity of physicians and other health care providers who respond to an emergency under what are now described as Good Samaritan Laws. California pioneered this approach with a simple immunity statute applying to just the scene of the emergency. Since then the statute has been expanded to a series of sections in the Medical Practice Act, including Sections 2395, 2396, 2397, and 2398 of the California Business and Professions Code:

§2395. Care at scene of emergency

No licensee, who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care.

"The scene of an emergency" as used in this section shall include, but not be limited to, the emergency rooms of hospitals in the event of a medical disaster. "Medical disaster" means a duly proclaimed state of emergency or local emergency declared pursuant to the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code).

Acts or omissions exempted from liability pursuant to this section shall include those acts or omissions

which occur after the declaration of a medical disaster and those which occurred prior to such declaration but after the commencement of such medical disaster. The immunity granted in this section shall not apply in the event of a willful act or omission.

§2396. Emergency care for complications after prior care by another

No licensee, who in good faith upon the request of another person so licensed, renders emergency medical care to a person for medical complication arising from prior care by another person so licensed, shall be liable for any civil damages as a result of any acts or omissions by such licensed person in rendering such emergency medical care.

§2397. Duty to inform patient of possible consequences

(a) A licensee shall not be liable for civil damages for injury or death caused in an emergency situation occurring in the licensee's office or in a hospital on account of a failure to inform a patient of the possible consequences of a medical procedure where the failure to inform is caused by any of the following:

- (1) The patient was unconscious.
- (2) The medical procedure was undertaken without the consent of the patient because the licensee reasonably believed that a medical procedure should be undertaken immediately and that there was insufficient time to fully inform the patient.
- (3) A medical procedure was performed on a person legally incapable of giving consent, and the licensee reasonably believed that a medical procedure should be undertaken immediately and that there was insufficient time to obtain the informed consent of a person authorized to give such consent for the patient.

(b) This section is applicable only to actions for damages for injuries or death arising because of a licensee's failure to inform, and not to actions for damages arising because of a licensee's negligence in rendering or failing to render treatment.

(c) As used in this section:

- (1) "Hospital" means a licensed general acute care hospital as defined in subdivision (a) of Section 1250 of the Health and Safety Code.
- (2) "Emergency situation occurring in the licensee's office" means a situation occurring in an office, other than a hospital, used by a licensee for the examination or treatment of patients, requiring

immediate services for alleviation of severe pain, or immediate diagnosis and treatment of unforeseeable medical conditions, which, if not immediately diagnosed and treated, would lead to serious disability or death.

(3) "Emergency situation occurring in a hospital" means a situation occurring in a hospital, whether or not it occurs in an emergency room, requiring immediate services for alleviation of severe pain, or immediate diagnosis and treatment of unforeseeable medical conditions, which, if not immediately diagnosed and treated, would lead to serious disability or death.

(d) Nothing in this article shall be construed to authorize practice by a podiatrist beyond that set forth in Section 2473.

§2398. Aid to participant in athletic event or contest
No licensee, who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event or contest, at the site of the event or contest, or during transportation to a health care facility, for an injury suffered in the course of such event or contest, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering such voluntary medical assistance. The immunity granted by this section shall not apply to acts or omissions constituting gross negligence.

These sections have been well understood by our courts and applied in accordance with their provisions. In Burciaga v. St. John's Hospital, 232 Cal.Rptr. 75 (1986), the court applied the exemption to a pediatrician who was in the hospital and responded to an emergency request of an obstetrician. In the most recent case, Kearns v. Superior Court, 204 Cal.App.3d 1325 (1988), a physician was called in on an emergency basis to assist a surgeon who was faced with critical unexpected emergency in a cancer case. The defendant assistant was not a

consultant nor had any prior relationship to the patient and was granted a summary judgment by way of dismissal.

As a part of the increasing concern for the availability of obstetrical services the 1988 California legislature enacted Business and Professions Code Section 2395.5 intended to provide "incentive and protection" for physicians rendering on-call emergency obstetrical care. The immunity applies to liability for negligent acts provided that they did not constitute gross negligence and the service was without compensation nor a part of continued physician/patient relationship. If the physician was required by the hospital to serve on call and if the hospital agreed to accept liability for the physician's negligence, then the limitation on immunity does not apply even though the physician was not compensated.

For a similar result see:

Johnson v. Matuiune, 531 N.E.2d 970 (Ill.App.Ct.),
November 28, 1988.

Clayton v. Kelley, 357 S.E.2d 865 (Ga. 1987).

Henry v. Barfield, 367 S.E.2d 289 (Ga. 1988).

A requirement of a certificate of merit as a condition of filing a medical malpractice action is becoming increasingly popular. The purpose of requirements is to apply some discipline on the attorney to do at least some preliminary investigation of the matter and not simply rely on the request of his client that a suit be filed. These take several approaches from the minimal requirement that the attorney certify with no requirement that he

be made to substantiate the affidavit to actual requirement that an outside expert make the affidavit. Depending on the strength of the requirement, the plaintiff attorney may be subject to sanctions. As a matter of fact, the use of sanctions by either court rule or legislative action is a rapidly developing phenomena of applying sanctions for frivolous pleadings or conduct by either plaintiff or defense counsel. Such discipline has been long overdue. Similar application of pre- and post-judgment interest has been a part of the same process to expedite the resolution of cases.

For a case discussing the Illinois requirement of a certificate of merit see Harford v. O'Connor, 519 N.E.2d 66 (1988), holding the certificate adequate in that particular case.

During the crisis of the 1970s the doctors were strongly advocating a requirement that the prevailing party in a medical malpractice action should be entitled to reasonable attorney fees and costs. They thought that this would be a strong deterrent because obviously the doctors are always right and will win substantially all of the cases. What they did not realize is that although the defense may win a majority of the cases, when the plaintiff wins the win is a big one and then if the contingent fee is added to the judgment, it can be an even worse disaster. Furthermore, if the defendant wins, the ability to actually collect any substantial amount from the plaintiff is speculative at best because the attorney for the plaintiff is

not liable--only his client. It is my understanding that Florida actually adopted such a statute but after disastrous results it was repealed. In 1987 Colorado adopted a statute that would permit judges to allow attorneys' fees to defendants in wrongful death cases dismissed before trial.

As the locality rule has gradually disappeared there has been increasing concern by defense counsel for the threat of the itinerant witness who can be made available through the several major witness service organizations. The need to provide some discipline over the actual qualifications of these witnesses and to protect the defendants from the itinerant expert who has an impressive paper background, often with strong academic qualifications, has become apparent. The thrust has been to attempt to require that these individuals have current experience in actual patient care and in the specialty involved in the case.

Although the courts have been extremely reluctant to utilize judicial legislation for the benefit of the tort defendant, there is one glimmer of hope in a late Georgia Supreme Court case, Yost v. Torok, 256 Ga. 92, in which the Court created a new tort for asserting a frivolous claim or defense that is "substantially frivolous, substantially groundless or substantially vexatious." This decision was in part based upon the Georgia statute providing for the award of attorney's fees and court costs for specified abusive conduct by parties to litigation (Ga. Code Ann. Par. 9-15-14).

The Arizona legislature initiated a statute which prohibited medical malpractice litigants from presenting evidence that a witness was covered by the same professional liability insurance carrier as the defendant. In Barseman v. Sussong, 751 P.2d 969 (Ariz. 1988), the Arizona Supreme Court held that the statute was unconstitutional under the doctrine of separation of powers.

In Henning v. Thomas, 366 S.E.2d 109 (Va. 1988), the Virginia Supreme Court ruled that a party could cross-examine an expert witness concerning his relationship with a professional medical witness company. Also, as to extent of income as an expert witness, see Trower v. Jones, 520 N.E.2d 297 (Ill. 1988).

Under California Health & Safety Code, §§1797.5 and 1799.10, in cases against emergency care department physicians expert medical testimony may be admitted only if by physicians and surgeons with substantive professional experience within the last five years while assigned to provide such emergency medical coverage. This statute was upheld in Jutzi v. County of Los Angeles, 242 Cal.Rptr. 74 (1987). The Court relied on statement of policy in the statute of encouraging emergency medical services.

In 1987 Alabama adopted a statute establishing an expert witness qualification law in medical malpractice cases with the following requirements:

- a. Be licensed by the appropriate regulatory board of Alabama or another state.

b. Be trained and experienced in the same specialty as the defendant.

c. Have practiced the same discipline as the defendant during the year preceding the alleged act of malpractice.

d. Be certified by an appropriate American Board in the same specialty as the defendant.

Other states that have passed similar statutes include Colorado, Kansas, Maryland, Michigan, Rhode Island and West Virginia.

Included in the 1987 tort reform package adopted by North Carolina was a requirement that attorneys in medical malpractice cases agree to set a deadline for designating expert witnesses at a pretrial conference or be subject to dismissal or sanction. In California a similar result is achieved by a rule of court.

Although not a true tort reform in itself, an increasing number of states have mandated that hospitals and physicians institute peer review activities or including hospital risk management programs with a variety of requirements for reports to various state agencies dealing with physician or hospital licensure. Such requirements can be a part of a quid pro quo for other tort reforms. From the hospital point of view these requirements can be a mixed blessing. On the one hand, they validate the activities initiated by many hospitals and hopefully encourage physician cooperation. On the other hand,

they can be another bureaucratic intrusion into management that results in a blizzard of paper work and in some instances may jeopardize patient confidentiality. The most comprehensive program in this regard was included in the Massachusetts "Act Relative to Medical Malpractice Chapter 351 of the Laws of 1986." More important are the comprehensive regulations developed to clarify the ambiguities in the Act, entitled "Care Assessment Regulations, 243 Code of Massachusetts Regulations Starting at 3.00." For an excellent discussion of the Massachusetts and five other state enactments and an analysis of the pros and cons see "State Malpractice/Risk Management Statutes Raise Important Concerns" in the Spring 1988 issue of Perspectives in Healthcare Risk Management and "State Statutes Take Aim at Malpractice Insurance Crises" in the Summer 1987 issue of the same publication.

It is beyond the scope of this paper to discuss in detail the role of Joint Underwriting Associations. These are entities created by state law mandating that existing liability carriers join together in making available designated lines of insurance that may not be available. This is a mixed private and governmental effort to meet a crisis situation, and has been used for other lines of insurance, particularly auto insurance. Especially during the malpractice insurance crisis of the 1970s many states created special Joint Underwriting Associations as a stopgap measure and as a part of the quid pro quo burden placed on the insurers as a part of a tort reform package. Unfor-

Unfortunately, this device created for the crisis becomes addictive and becomes involved in politics and, as a result, is often seriously underfunded, thus only delaying the evil day of reckoning. For a discussion of the critical status of a number of JUAs see the March 13, 1989 issue of National Underwriter, at page 6.

A somewhat similar result is developing in the experience of the Catastrophic Loss Funds provided by many states as a part of the solution to the medical malpractice crisis. Such a fund is really a layer of insurance over a basic policy limit provided the individual physician or hospital and is triggered when the amount of the judgment or settlement exceeds the basic policy limit. The Fund is usually created by an assessment against the individual policy and starts out at a relatively low amount. However, as claims develop against the Fund, the Fund starts to fall short and as a result the annual assessment against the physicians and hospitals rapidly increase to the dismay of all concerned. Often applicants to the State Fund must agree to arbitrate their claim. For example, the Indiana Plan started with a 25% assessment and is now at 125% with no end in sight. There are many questions of the financial viability of the New York Fund as well as others. For a provocative discussion of this approach Medical Economics, in its November 21, 1988 issue, at page 101, suggests that "for some, the protection is worse than the risk." Again, this is an

example of a short term patchwork solution that appeals to a legislature seeking to avoid the need for true tort reform.

North Carolina in 1988 faced the problem of the availability of obstetrical services when the cost of liability insurance for obstetricians went from \$6,000 in 1935 to \$29,000 in 1988 and the available physicians providing obstetrical care dropped from 500 to 150. The State will provide \$6,500 or the added cost of insurance coverage, whichever is the higher, for service in non-urban areas. The M.D. must agree to accept all obstetrical patients regardless of income.

Although there have been sporadic efforts by the trial attorneys to repeal some of the tort reforms put into place in the mid-seventies and mid-eighties, the only major success occurred in 1937 in Connecticut when the legislature restored joint and several liability, eliminated the requirement for periodic payment, and increased the amount of allowable attorneys' fees. Unconfirmed rumor indicates that this unusual action was a part of a package deal with the Governor to obtain hospital and doctor relief under the State medicaid law.

Some states have passed laws providing for immunity from liability for free health care services. These states include Arizona, Georgia, Illinois, Maine, South Carolina and Virginia.

Conclusion

Perhaps the only conclusion we can reach is that there is no conclusion to this ongoing struggle to establish a fair

compensation system. Until there can be an effective integration of our duplicative and conflicting social programs such as workers compensation, health insurance in all of its manifestations, disability insurance, Social Security, and the like, the tort system will continue as an overlapping expensive anomaly.

If we are to assume that the justification for the tort system is based upon two separate components, to wit: punishment and compensation, then these should be analyzed separately as to their continued justification. For example, the punishment and deterrent component is rapidly being covered by other mechanisms, such as intensive peer review, strengthened licensure, PROs and PSROs, and intensive review of medical records for quality assurance purposes.* On the other hand, to an increasing extent the tort system as a compensation mechanism duplicates social insurance mechanisms which are funded and operated on a much fairer and universal basis. A system based on fault is of necessity arbitrary and capricious in its result.

As time passes the continued need by a relatively small component of the legal profession relying on medical malpractice cases for their financial sustenance remains as the main deterrent to a more effective solution in the public interest.

In the meantime the battle for true tort reform continues.

* See "Payment Systems, Cost Management, and Malpractice," Ludlam, Hospitals, November 1, 1984.

Table A.1

STATE TORT REFORM ENACTMENTS, 1986

STATE	CN	JSI	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	3	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

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

**Test Reforms Enacted in 1987
(As of September 1987)**

Alabama	- Itemized verdicts - Mandatory periodic payment of future damages - Cap on noneconomic damages, defined as including punitive damages, of \$400,000 - Introduction into evidence of payments from collateral sources - Burden of proof/standard of care guidelines - Expert witness qualifications - Establishment of cause of action for malicious prosecution - Cap of \$1 million on total award in actions for wrongful death	Nevada	Award of attorney fees where there has been a frivolous claim or defense
Arizona	Modification of joint and several liability rule	Nevada	Modification of joint and several liability rule
Arkansas	Award of attorney fees where there has been a frivolous claim or defense	New Mexico	Modification of joint and several liability rule
Colorado	- Certificate of merit - Pretrial screening panels for small claims	North Dakota	- Punitive damages guidelines - Modification of joint and several liability rule - Mandatory offset of payments from collateral sources - Periodic payment of future economic damages - Post-trial review of reasonableness of damages
Georgia	- Limited liability for medical students, physicians providing free services, and officers of nonprofit hospitals and associations - Introduction into evidence of payments from collateral sources - Punitive damages guidelines - Cap on punitive damages of \$250,000 - Special hearings as to inadequate or excessive damages - Modification of joint and several liability rule - Shortened statute of limitations for minors - Certificate of merit	Ohio	- Shortened statute of limitations - Certificate of merit - Ad damnum clause eliminated - Award of attorney fees where there has been a frivolous claim or defense - Itemized verdicts - Periodic payment of future damages
Hawaii	Ad damnum clause eliminated	Oklahoma	- Ad damnum clause eliminated - Award of costs and fees where there has been a frivolous claim or defense - Shortened statute of limitations for minors
Idaho	- Discretionary periodic payment of future damages - Cap of \$400,000 on noneconomic damages (all personal injury actions) - Modification of joint and several liability rule - Judicial discretion to increase or decrease awards - Award of attorney fees where there has been a frivolous claim or defense - Ad damnum clause eliminated	Oregon	- Punitive damages guidelines - Cap of \$500,000 on noneconomic damages (all personal injury actions) - Modification of joint and several liability rule - Guidelines for contingent fee agreements - Discretionary offset of benefits from collateral sources - Elimination of special injury requirement in actions for wrongful use of civil proceedings - Ad damnum clause eliminated - Certificate of merit
Illinois	Shortened statute of limitations for minors	South Carolina	Limited liability for physicians providing free services
Iowa	- Itemized verdicts - Punitive damages guidelines	South Dakota	Modification of joint and several liability rule
Maryland	- Shortened statute of limitations for minors - Court authority to grant new trial on damages to consider collateral sources	Texas	- Award of costs and fees where there has been a frivolous claim or defense - Punitive damages guidelines - Cap on punitive damages of \$200,000 or four times amount of actual damages
Montana	- Modification of joint and several liability rule - Discretionary periodic payment of future damages - Shortened statute of limitations for minors - Mandatory offset of payments from collateral sources - Punitive damages guidelines	Virginia	- Shortened statute of limitations for minors - Birth-related neurological injury compensation program - Cap on punitive damages of \$350,000 - Limited liability for physicians rendering emergency obstetrical care - Certificate of merit

Legislative information provided by the
AMA Department of Federal Legislation
and Department of State Legislation

**AMERICAN RE-INSURANCE COMPANY
1987 REPORT ON TORT REFORM**

The following is a series of quotes from the above Report:

Joint and Several Liability - "Some states currently retain this doctrine. Through 1987, however, 32 states have taken action to either abolish or modify it. Colorado, Utah and Wyoming have abolished it for all classes of damages as to all defendants. Proposition 51 in California eliminated it for all noneconomic damages. Twenty-eight other states have enacted partial modifications.

"Modification or elimination of this rule will reduce both awards and settlements, particularly in cases where liability is tenuous but the injury substantial. Insurers envision reduced losses resulting from this legislation."

Damage Award Caps - "In 1986, 23 states passed legislation capping damages in some form, and 1987, 10 additional states passed such bills. Although the majority limit 'caps' to specific tort areas such as medical malpractice, dram shop/liquor liability, and governmental liability, eight states now have noneconomic damage 'caps' applicable to all tort actions.

"These limitations on recoverable damages, particularly noneconomic damages, will make settlement values and damage awards more predictable. This enhanced predictability can eventually be translated into more accurate calculation of risk and permit companies to offer coverage in all lines of business."

Collateral Source Rule - "Modification of this rule is gaining popularity. Supporters of change argue that if one of the purposes of our tort system is to compensate injured plaintiffs, then it is reasonable to consider contributions to such compensation from sources other than the defendant.

"In 1986 and 1987, 24 states modified their rule. The most common approach has been to provide an offset or reduction of a jury award for compensation from other sources. Such offsets or reductions should favorably impact settlements or jury awards."

Punitive Damages - "Twelve states enacted some reform in this area in 1986 and 14 additional states took action in 1987. Some approaches taken by the states were to place caps on such awards, to raise the standard of conduct a plaintiff must prove in order to obtain an award, to limit the type of case in which punitive damages are available, or to require that punitive awards bear some reasonable relationship to the compensatory award.

"This legislation will reduce catastrophic awards. In those states where punitive damages are insurable it will allow insurers to reserve and settle claims and rate risks for premium purposes with more accuracy."

Periodic Payment of Judgments - "The mid-1970s saw an increase in large jury awards and resulting insurance premium increases for certain types of coverages. These increases, coupled with a perceived need to protect plaintiffs from squandering such awards, induced several state legislatures to create statutory exceptions, initially for medical malpractice cases, to the time honored principle that a single recovery of money was the only permissible mode of distribution of a Judgment. Thereafter, other states began to allow for periodic payment of Judgments in other types of cases.

"In 1986 and 1987, 20 states enacted some type of reform in this area. Generally, these statutes allow for the spreading of all or a portion of plaintiff's Judgment over a period of time. Some require that the parties elect to have the case tried so as to result in a periodic payment Judgment. Others allow periodic payments at the Court's discretion where the Judgment is in excess of a threshold dollar amount.

"These statutes affect both small and large cases. They will reduce total claim payments by allowing insurers the benefit of interest accrued on payments due in the future while still providing the plaintiff with his/her total award and guaranteeing the plaintiff's future financial security."

June 1, 1988

TORT REFORMS ENACTED IN 1988

Colorado

- Cap of \$1 million on total damages
- Mandatory periodic payment of future damages exceeding \$150,000
- Voluntary binding arbitration
- Introduction into evidence payments from collateral sources
- Mandatory liability insurance
- Statute of repose

Florida

- Certificate of merit
- Mandatory presuit investigation by the parties
- Voluntary binding arbitration
- No-fault birth-related neurological injury compensation system
- Good Samaritan immunity for emergency room medical treatment

Kansas

- Cap of \$250,000 on noneconomic damages [all personal injury actions]
- Introduction into evidence payments from collateral sources [all personal injury actions]
- Punitive damages guidelines [all personal injury actions]

Kentucky

- Modification of joint and several liability rule
- Punitive damages guidelines
- Introduction into evidence payments from collateral sources
- Certificate of merit
- Court review of adequacy of award
- Penalties for frivolous lawsuits

Minnesota

- Periodic payment of future damages
- Modification of joint and several liability rule

Mississippi

- Award of costs and fees where there has been a frivolous claim or defense

South Carolina

- Shortened statute of limitations for minors
- Punitive damages guidelines
- Award of costs and fees where there has been a frivolous claim or defense
- Limited liability for state-employed physicians

- American Medical Association -
Department of State Legislation, Division of Legislative Activities

Tort Reform Provision	Total States Enacting	Held Constitutional by State Supreme Court	Held Unconstitutional by State Supreme Court
Ad Damnum Clause	38	IN, LA	NH*, WY
Arbitration	15	MI	—
Attorney Fee Regulation	26	CA, IL, IN, NE	NH*
Awarding Costs	27	MA	NH*
Collateral Source Rule	30	AZ, CA, FL, IA, IL, NE	KS*, NH, ND*
Joint & Several Liability Rule	26	—	—
Limits on Recovery	29	CA, IN, NE	FL, IL, KS*, NH*, ND, TX
Periodic Payments	30	CA, FL, IL	KS, NH
Pretrial Screening Panels	29	AK, AZ, IN, LA, MA, MT, NE, NJ, NY, OH	FL*, IL, MO, PA, WY
Punitive Damages Guidelines	24	—	—

Note: Chart does not include statutes that have been repealed or that have sunset. Chart is current as of June 15, 1998.

*State has enacted a new tort reform provision since court decision.

*Legislative Information provided by the
AMA Department of State Legislation,
Division of Legislative Activities*

STATE OF ALASKA

DEPARTMENT OF LAW

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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

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 unbounded. 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

Honorable Dave Donley, Chair
663-89-0459

May 2, 1989
Page 14

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 noneconomic 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 noneconomic 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
Assistant Attorney General

EJK:prm

Attachments

cc: Robert Evans
Legislative Liaison

Art Peterson
Regulations Attorney

Caps

IEW

CONSTITUTIONAL CHALLENGES TO WASHINGTON'S LIMIT ON NONECONOMIC DAMAGES IN CASES OF PERSONAL INJURY AND DEATH

In 1986 the Washington legislature passed a tort reform act¹ to ameliorate a perceived crisis in the availability and cost of liability insurance.² One of the act's provisions limits the amount of noneconomic damages recoverable in personal injury and wrongful death actions.³ Cases to which this damages limit applies began coming to trial only in the past few months. In October 1987, one judge applied the limit to reduce a jury verdict by over one million dollars.⁴

TOPS
ATT LYBECK
MARSHALL

Department—

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1. Tort Law Revisions (Tort Reform Act), ch. 305, 1986 Wash. Laws 1354 (codified as amended in scattered titles of WASH. REV. CODE (1987)).

2. *Id.* § 100.

3. *Id.* § 301 (codified at WASH. REV. CODE § 4.56.250 (1987)). The section provides in relevant part as follows:

[(1)] (b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

4. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). In *Sofie* the jury awarded the plaintiff \$1,345,833, of which the jury allocated \$1,154,592 to noneconomic damages. Special Verdict Form at 2, *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). The court reduced noneconomic damages to \$125,136 and granted the plaintiff a judgment of \$316,377, in conformity with the statutory cap. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2-3 (Wash. Super. Ct. Oct. 30, 1987).

Some trial courts have held the Washington limit unconstitutional. *E.g.*, *Carter v. Fibreboard Corp.*, No. 87-2-03555-7 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (defense of Section 4.56.250 damages limit struck down as violative of equal protection and jury trial guarantees of Washington constitution); *Foster v. Fibreboard Corp.*, No. 87-2-05629-5 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (defense of Section 4.56.250 struck down on equal protection and jury trial grounds).

Similar damages limits have been challenged in other states on numerous federal and state constitutional grounds, including substantive due process,⁵ equal protection,⁶ a right of trial by jury,⁷ special legislation,⁸ special privilege,⁹ and a right of access to the courts.¹⁰ By a slight majority, courts have declared the limits unconstitutional.¹¹

This Comment considers the constitutionality of the Washington cap on noneconomic damages. The Comment briefly reviews the recent legislation of medical malpractice and tort reform damages ceilings and judicial decisions on the constitutionality of such ceilings. The Comment then analyzes the constitutionality of the Washington limit under the substantive due process and equal protection guarantees of the federal and state constitutions.¹² Because under the federal constitution a court should give the statute only minimal scrutiny, the statute probably does not offend fourteenth amendment protections. Under the Washington Constitution, however, a court should give the statute intermediate scrutiny. Under intermediate scrutiny a court probably will hold that the limit violates the state equal protection guarantee, but a court probably will not hold the limit violative of substantive due process. Under the right of trial by jury guarantee of the state constitution, the statute also is unconstitutional.¹³

5. *E.g.*, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 157, 695 P.2d 665, 679, 211 Cal. Rptr. 368, 382, *appeal dismissed*, 474 U.S. 892 (1985).

6. *E.g.*, *Arneson v. Olson*, 270 N.W.2d 125, 129 (N.D. 1978).

7. *E.g.*, *Boyd v. Bulala*, 647 F. Supp. 781, 788 (W.D. Va. 1986).

8. *See, e.g.*, *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (citing ILL. CONST. art. IV, § 13 prohibition of special legislation).

9. *E.g.*, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977).

10. *E.g.*, *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987). For an annotated list of many of the recent decisions in this area, see Table: Reported Decisions on the Constitutionality of Medical Malpractice and Tort Reform Damages Limits [hereinafter Table], *infra* p. 675. For citations to these decisions, see *infra* notes 38-49.

11. *See infra* Table p. 675.

12. Federal and Washington constitutional challenges are considered separately here because the proper standard of review in substantive due process and equal protection challenges of the damages limit should be higher under the Washington Constitution than under the federal constitution. *See infra* notes 106-28 and accompanying text.

13. For additional commentary on the constitutionality of the Washington noneconomic damages limit, see Wiggins, Harnitiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1986/87); Development in the Law, *The 1986 Washington Tort Reform Act: Noneconomic Damages Cap* (RCW 4.56.250), 23 WILLAMETTE L. REV. 215 (1987).

I. BACKGROUND

A. Insurance Crises and Damages Limits

Many damages limits now in effect are part of state medical malpractice legislation of the mid-1970's.¹⁴ During that period, state legislatures perceived that medical malpractice insurance had become widely unavailable and increasingly expensive.¹⁵ Virtually all legislatures responded to this insurance crisis by enacting laws to control medical malpractice litigation.¹⁶ In at least one-fifth of the states, these laws included provisions to limit recoverable damages.¹⁷ The provisions limit either the liability of each defendant,¹⁸ the recovery of each plaintiff,¹⁹ or both.²⁰ Nearly all the limits are flat figures²¹ that apply either to noneconomic damages only,²² nonmedical damages only,²³ or all damages.²⁴

A different insurance crisis arose in the mid-1980's. During that period, the cost of liability insurance increased not only health care providers²⁵ but also for day care centers, architects, commercial fishermen, and other businesses and professions.²⁶ Many businesses and local governments found liability insurance difficult to obtain.²⁷ In

14. See, e.g., statutes cited *infra* notes 18-24.

15. See Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 759-60 (1977); Note, *Fein v. Permanent Medical Group: Future Trends in Damage Limitation Adjudication*, 80 NW. U.L. REV. 1643, 1649 n.49 (1986).

16. See, e.g., Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH. L. REV. 419, 419 (1979).

17. See Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 945 (1984).

18. E.g., TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

19. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981).

20. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

21. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981) (\$200,000 limit on general damages); W. VA. CODE ANN. § 55-7B-8 (Michie Supp. 1987) (\$1,000,000 limit on noneconomic damages).

22. E.g., CAL. CIV. CODE § 3333.2 (West Supp. 1988).

23. E.g., LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

24. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

25. Bell, *supra* note 17, at 939; Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 195 n.1 (1985), reprinted in 35 DEF. L.J. 359 (1986).

26. *Newsday*, Oct. 29, 1985, at 11, col. 3.

27. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 333-34 n.19 (1987) (citing U.S. ATTY'S GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6-14 (1986)).

Washington State, a legislative committee formed to study the crisis found that it had been caused by a combination of poor management practices in the insurance industry and rising litigation costs and awards.²⁸

Washington was one of a number of states to respond to the crisis by enacting tort reform legislation²⁹ that included a limit on the recovery of noneconomic damages.³⁰ Under the Washington statute, the limit varies with the plaintiff's life expectancy and the average annual state wage.³¹ The limit at present ranges from \$125,136 for a male aged sixty-four or older to \$632,606 for a newborn female.³²

Washington imposes no other statutory ceiling on damages recoverable in personal injury and wrongful death actions. Other states have limited recovery of damages in common-law causes of action by such legislation as automobile accident victim compensation acts³³ and in statutory causes of action by such legislation as dram-shop acts,³⁴ governmental tort claims acts,³⁵ and wrongful death

28. JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY, REPORT TO THE LEGISLATURE (Nov. 13, 1985) (copy on file with the *Washington Law Review*).

29. Sugarman, *supra* note 27, at 347. Among other things, Washington's act limits noneconomic damages, provides for review of plaintiffs attorneys fees, modifies joint and several liability, modifies the statute of limitations for malpractice cases, and permits structured awards or periodic payments of future economic damages over \$100,000. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 233 n.3 (1987).

30. Sugarman, *supra* note 27, at 348 & n.115 (citing a \$500,000 limit in Alaska that does not apply to "disfigurement or severe physical impairment," a \$450,000 limit in Florida, a \$350,000 limit in Maryland, a \$400,000 limit in Minnesota that does not apply to "pain, disability or disfigurement," and an \$875,000 limit in New Hampshire); Reistrup, *The Final Frontier*, NAT'L L.J., Dec. 7, 1987 at 13, col. 1 (citing a \$400,000 limit in Idaho, a \$250,000 limit in Kansas, a review of the reasonableness of awards over \$250,000 in North Dakota, and a \$500,000 limit in Oregon).

31. WASH. REV. CODE § 4.56.250(2) (1987).

32. See *id.*; 6 WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, WASH. PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS, App. B ("Life Expectancy Table [Revised]") (2d ed. Supp. 1984) (based on WASH. STATE INS. COMM'R, COMMISSIONERS STANDARD ORDINARY TABLE OF MORTALITY (1980)); WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, AVERAGE ANNUAL STATE WAGE (1986). The limit for a 64-year-old or older male is calculated by multiplying 0.43 (the statutory factor) by a life expectancy of 15 years (the statutory minimum life expectancy) by \$19,401 (the average annual state wage).

33. See, e.g., the Illinois statute cited in *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (recovery for certain noneconomic loss tied to amount of medical expenses).

34. E.g., ILL. ANN. STAT. ch. 43, para. 135 (Smith-Hurd Supp. 1987) (\$15,000 to \$40,000 limits on recovery from liquor supplier for injuries inflicted by intoxicated person).

35. E.g., MD. CTS. & JUD. PROC. CODE ANN. § 5-403 (Supp. 1987) (liability of local government may not exceed \$200,000 per individual claim and \$500,000 per total claims arising from same tortious occurrence); N.H. REV. STAT. ANN. § 507-B:4 (Supp. 1987) (limits of \$150,000 per claimant and \$500,000 per occurrence on amount recoverable in personal injury action against governmental subdivision).

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Washington's Noneconomic Damages Limit

acts.³⁶ Under the federal Price-Anderson Act, Congress imposes a limit of \$560,000,000 on the liability of a federally-licensed nuclear power plant for damages arising from a nuclear accident.³⁷

B. Judicial Response to Damages Limits

Several reported decisions address the constitutionality of medical malpractice and tort reform damages limits. The medical malpractice limits of California,³⁸ Indiana,³⁹ and Nebraska⁴⁰ have been upheld. The tort reform limit of Florida⁴¹ and the medical malpractice limits of Illinois,⁴² New Hampshire,⁴³ North Dakota,⁴⁴ Ohio,⁴⁵ and Virginia⁴⁶ have been invalidated. Courts had split as to the constitutionality of the Texas medical malpractice damages cap, but the Texas Supreme Court recently held the limit invalid.⁴⁷ The constitutionality of the medical malpractice limits of Idaho⁴⁸ and Louisiana⁴⁹ have been considered but not fully decided in reported decisions; those courts remanded the issue to the trial level. Damages limits in state automo-

36. E.g. ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959) (recovery for wrongful death limited in some instances to from \$20,000 to \$30,000).

37. Price-Anderson Act, 42 U.S.C. § 2210 (1983 & Supp. 1986).

38. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

39. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

40. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

41. *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987).

42. *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

43. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

44. *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

45. *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ohio C.P. 1985); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976) (dictum).

46. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986).

47. *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (constitutional under federal constitution; court certified to Texas Supreme Court whether cap was valid under Texas constitution); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (unconstitutional); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987) (constitutional), *overruled*, *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database); *Detar Hosp. v. Estrada*, 694 S.W.2d 359 (Tex. Ct. App. 1985) (unconstitutional); *Malone & Hyde, Inc. v. Hobrecht*, 685 S.W.2d 739 (Tex. Ct. App. 1985) (unconstitutional); *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. Ct. App. 1984) (unconstitutional).

In *Lucas* the certified question of whether the cap was constitutional under the Texas Constitution was answered in the negative by the Texas Supreme Court in May 1988. The Texas court held that the damages limit violated the open courts provision of the Texas Constitution. *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database).

48. *Jones v. State Bd. of Medicine*, 97 Idaho 839, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). On remand, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

49. *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985).

bile accident victim compensation acts,⁵⁰ dramshop acts,⁵¹ governmental tort claims acts,⁵² and wrongful death acts⁵³ also have been challenged on constitutional grounds.

The United States Supreme Court validated two damages ceilings under the federal constitution. In *Duke Power Co. v. Carolina Environmental Study Group*⁵⁴ the Court upheld the federal Price-Anderson Act limit on nuclear power plant liability.⁵⁵ In *Fein v. Permanente Medical Group*⁵⁶ the Court dismissed the appeal from the California Supreme Court's ruling that California's medical malpractice noneconomic damages limit was constitutional. The Court dismissed the appeal for want of a substantial federal question.⁵⁷

50. *E.g.*, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (Illinois auto accident victim recovery limit unconstitutional).

51. *E.g.*, *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961) (Illinois dramshop act damages cap constitutional); *McGuire v. C & L Restaurant*, 346 N.W.2d 605 (Minn. 1984) (Minnesota dramshop act damages cap unconstitutional).

52. *E.g.*, *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983) (holding unconstitutional a statute that denied recovery of noneconomic damages and limited recovery of economic damages from state and its subdivisions, but upholding a statute that denied recovery of punitive damages); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979) (statutory limit of \$50,000 per claimant in recovery against governmental subdivisions for bodily injury constitutional), *appeal dismissed*, 445 U.S. 921 (1980).

53. *E.g.*, *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (wrongful death act recovery limit of \$25,000 constitutional).

54. 438 U.S. 59 (1978).

55. The Court held that the limit did not deny fifth amendment due process because the limit was supported by the need to encourage private industry to participate in the development of nuclear energy resources and by the federal government's commitment to protect the public from the consequences of a nuclear disaster. *Id.* at 84-87. The limit did not deny equal protection because the differing treatment of those injured in nuclear accidents and those injured in other types of accidents was justified by the "general rationality" of the Act. *Id.* at 93-94.

56. 474 U.S. 892 (1985).

57. *Id.* at 892. Justice White dissented to the dismissal on the grounds that the appeal raised the unresolved issue of whether due process requires a statutory compensation scheme to be a quid pro quo for the common-law or statutory remedy it replaces. *Id.* at 894-95 (White, J., dissenting).

Because *Fein* was a summary disposition, its precedential value is unclear. See *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.' " (brackets original) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973))). Indeed, subsequent decisions by federal courts on the federal constitutionality of state medical malpractice damages limits have not recognized the *Fein* dismissal as precedential or persuasive. See, e.g., *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (Texas medical malpractice damages cap unconstitutional under federal and state equal protection guarantees); *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia cap unconstitutional under jury trial right of state and federal constitutions).

II. CONSTITUTIONALITY OF THE WASHINGTON LIMIT

A. *United States Constitution: Due Process and Equal Protection*

The fourteenth amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁵⁸ Under these clauses, Washington's damages cap is subject to attack on the grounds that it denies substantive due process by depriving personal injury plaintiffs of property without providing an adequate benefit in return⁵⁹ and denies the equal protection of the laws by discriminating against or among injured plaintiffs. These challenges are considered, first, by determining the appropriate standard of review, and second, by applying the appropriate standard to the statute. Because the federal constitution requires only minimal scrutiny of the statute, the statute probably does not offend either due process or equal protection.

1. *Standard of Review*

The United States Supreme Court currently subjects legislation challenged on substantive due process and equal protection grounds to three standards of review.⁶⁰ The Court applies the same standard whether the legislation is challenged on substantive due process or equal protection grounds.⁶¹ Strict scrutiny is applied where the effect of legislation is either to create a suspect classification⁶² or to infringe

58. U.S. CONST. amend. XIV, § 1.

59. Since the 1930's the United States Supreme Court has more often applied equal protection than substantive due process analysis to legislation challenged on fourteenth amendment grounds, and has rarely declared state legislation unconstitutional on substantive due process grounds. *Johnson v. Hassett*, 217 N.W.2d 771, 775 (N.D. 1974); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 352 (3d ed. 1986). The Washington Supreme Court has become similarly disenchanted with substantive due process. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting) ("the now dormant specter of substantive due process"). Nevertheless, the United States and Washington Supreme Courts still recognize a substantive due process barrier to unreasonable state regulation. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (state criminal abortion statute violates due process); *State v. Santos*, 104 Wash. 2d 142, 148, 702 P.2d 1179, 1183 (1985) (substantive due process requires accuracy in establishing paternity).

Although a number of courts have considered substantive due process challenges of statutory damages caps, no reported decisions have invalidated medical malpractice or tort reform damages ceilings on substantive due process grounds. See *infra* Table p. 675.

60. See 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 323-26 (1986).

61. *Id.* at 323.

62. E.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (classification based on race).

on a fundamental right.⁶³ Legislation is unconstitutional under strict scrutiny if it is not necessary to the promotion of a compelling state interest. The Court recently has applied intermediate scrutiny to review legislation that creates classifications based on gender, alienage, or legitimacy.⁶⁴ Under the intermediate standard, legislation is unconstitutional if it does not both serve important governmental objectives and bear a substantial relationship to the accomplishment of those objectives.⁶⁵ Rational basis, or minimal, scrutiny is applied to most economic and social welfare legislation. Under the rational basis test there is a strong presumption of constitutionality,⁶⁶ and legislation is invalid only if the classification created by the legislation is not rationally related to any conceivable legitimate legislative purpose.⁶⁷

The federal constitution requires only minimal scrutiny of the Washington damages ceiling. Strict scrutiny is inappropriate because the ceiling neither creates suspect classifications nor affects fundamental rights. The limit creates only economic⁶⁸ and age⁶⁹ classifications. The Court has not held such classifications suspect.⁷⁰ Further, the right to compensation for personal injuries is not fundamental under

63. E.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy).

64. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 326-27 (1986). The intermediate standard is known also as "means-focus," "means scrutiny," and the "substantial relationship" test. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), *cert. denied*, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980). The Court does not appear to have applied intermediate scrutiny to legislation challenged on substantive due process grounds under the federal constitution, nor has any other court in a reported decision applied intermediate scrutiny to a federal substantive due process challenge of a medical malpractice or tort reform damages cap.

65. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

66. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

67. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). At least one commentator suggests that the Court should give the rational basis test "teeth" such that a court would consider whether a basis exists in reality rather than merely in the court's imagination. G. GUNTHER, *CONSTITUTIONAL LAW* 604-05 (11th ed. 1985).

68. Washington's limit creates the following economic classifications: First, it classifies according to whether damages are economic or noneconomic and discriminates in the case of the latter, and second it classifies according to whether damages are above or below the limit and discriminates in the case of the former.

69. Washington's limit classifies according to age by permitting plaintiffs with shorter life expectancies less recovery than plaintiffs with longer life expectancies. For example, Plaintiff A, a newborn male, has a life expectancy of 70.83 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. *Id.* The average annual state wage is \$19,401. WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. The statute limits Plaintiff B's noneconomic damages to \$128,307. However, Plaintiff A's limit is \$590,894.

70. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82 (1978) (economic classification not suspect); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (age classification not suspect); 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON*

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the federal constitution.⁷¹ A fundamental right is one explicitly or implicitly guaranteed by the constitution.⁷² The right to recover in tort is not so guaranteed.⁷³

Intermediate scrutiny also is inappropriate under the federal constitution. The United States Supreme Court has applied the intermediate standard only to classifications based on gender,⁷⁴ alienage,⁷⁵ and legitimacy.⁷⁶ The Court recently gave minimal rather than intermediate scrutiny to classifications based on age⁷⁷ and on the type and degree of personal injury where the affected right was the right to collect full damages.⁷⁸ The statute's age-based classification does incidentally create a gender-based classification, because women generally have longer life expectancies than men.⁷⁹ The gender-based classification, however, is only incidental to the age-based classification and does not reflect invidious gender-based discrimination. It therefore should not trigger intermediate scrutiny.⁸⁰ The apparent purpose of the age-based classification is to increase the potential recovery as the potential life span increases.⁸¹ It is consistent with this purpose that if women live longer, they suffer greater noneconomic loss and should be allowed greater recovery.

Minimal scrutiny also is proper under the 1978 decision of the United States Supreme Court to apply minimal scrutiny to a damages

CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 335 (1986) (age classification not suspect).

71. *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985); see *Duke Power Co.*, 438 U.S. at 83-84.

72. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

73. *Boyd v. Bulala*, 647 F. Supp. 781, 787 (W.D. Va. 1986).

74. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

75. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

76. *E.g.*, *Lalli v. Lalli*, 439 U.S. 259, 268, 275-76 (1978).

77. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

78. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-84 (1978).

79. Between birth and age 98, women have greater life expectancies than men. For example, Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. However, Plaintiff C, a 63-year-old female, has a life expectancy of 18.86 years. *Id.* Assuming an average annual state wage of \$19,401, Plaintiff B's noneconomic damages are limited to \$128,307, while Plaintiff C might recover noneconomic damages of up to \$157,338.

80. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

81. The legislature's reasoning might have been that pain and suffering damages should be greater for a plaintiff who will have to endure pain and suffering longer. This "assumes that in all cases the injured victim will have ongoing injuries and ongoing future suffering, which is clearly not the case. . . . [Not] all injured victims will continue to suffer for the future." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (granting motion to strike defense of noneconomic damages cap on equal protection and right to jury trial grounds).

limit similar to the Washington cap. In *Duke Power Co. v. Carolina Environmental Study Group*⁸² the Court found that the Price-Anderson Act's \$560,000,000 nuclear power plant liability limit was "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"⁸³ In the Price-Anderson Act, Congress encouraged the availability of nuclear power by reducing the liability of nuclear power plants.⁸⁴

Washington's noneconomic damages limit seems to have arisen out of a similar legislative effort. The Washington legislature sought to encourage the availability and affordability of liability insurance for governmental, professional, and other entities by reducing the awards of some personal injury plaintiffs. Particularly because the Court in *Duke Power Co.* considered a damages limit, *Duke Power Co.* is strong authority that a damages cap should not be given more than minimal scrutiny under the federal constitution.⁸⁵

2. Application of Review

Under a rational basis standard of review, Washington's noneconomic damages limit probably does not violate the federal constitutional guarantee of substantive due process. The test is whether the challenged law is rationally related⁸⁶ to a valid state objective.⁸⁷ This suggests two inquiries: First, whether there is a valid state objective, and second, whether the statute has a rational relation to that objective.

Any conceivable legitimate state objective satisfies the first requirement. The stated purpose of the Washington Tort Reform Act was to "create a more equitable distribution of the cost and risk of injury and

82. 438 U.S. 59 (1978).

83. *Id.* at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

84. *Id.* at 84.

85. A majority of recent decisions supports this conclusion. See *infra* Table p. 000. In *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), the New Hampshire Supreme Court concluded that heightened scrutiny of New Hampshire's recovery limit was not required under the federal constitution, since the United States Supreme Court had applied heightened scrutiny only in "cases involving classifications based upon gender and illegitimacy." *Id.* at 831. Instead, the *Carson* court went on to apply heightened scrutiny—the substantial relationship test—under the state constitution. *Id.*

86. The dictionary definitions of the key components of this test might be useful references, since courts sometimes have little guidance in applying the test other than the plain meaning of these words. "Rationally" means reasonably or sensibly. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1885 (1981). "Related" means "connected by reason of an established or discoverable relation." *Id.* at 1916. Compare the key component of the substantial relationship test: "Substantial" means materially, importantly, or essentially. See *id.* at 2280.

87. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

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Washington's Noneconomic Damages Limit

increase the availability and affordability of insurance."⁸⁸ The legislature determined that a serious liability insurance problem existed within the state. Insurance unavailability and unaffordability had caused some entities either to cease operating, for want of insurance, or to operate without insurance. Without insurance, many entities might be unable to pay tort judgments due injured plaintiffs. Under these facts, making liability insurance more available and affordable seems a valid legislative objective.

Moreover, the damages limit appears rationally related to the legislature's purpose. The limit is arbitrary to the extent that it relies on the product of an individual's age, the average annual state wage, and the figure 0.43.⁸⁹ However, the Court in *Duke Power Co.* did not find this kind of arbitrariness fatal to the constitutionality of the statute.⁹⁰ Limiting recoverable noneconomic damages could rationally be related to a reduction in insurer uncertainties and liabilities. This reduction could rationally be related to an increase in insurance availability and a reduction in insurance rates. Because there appears to be a rational relation between the damages limit and a valid state objective, the limit probably is not unconstitutional on federal substantive due process grounds.

Under rational basis review, Washington's limit similarly does not appear to violate the federal equal protection guarantee.⁹¹ The proper test is whether the challenged classification is rationally related to a conceivable legitimate governmental purpose.⁹² This test is virtually identical to the substantive due process test and is equally deferential to the legislature. The legislature's desire to make liability insurance available and affordable to governmental, professional, and other entities is a legitimate governmental purpose.⁹³ The economic⁹⁴ and age⁹⁵ classifications created by the damages cap seem rationally related to that purpose, because it is rational to believe that these classifications

88. 1986 Wash. Laws ch. 305, § 100.

89. See WASH. REV. CODE § 4.56.250(2) (1987).

90. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 86 (1978).

91. *Contra Foster v. Fibreboard Corp.*, No. 87-10529-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion (Sept. 18, 1987) (Washington, noneconomic damages cap denies equal protection under rational basis test).

92. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (pertinent inquiry is whether classification advances legitimate legislative goals in a rational fashion); *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (legislative classification valid if based upon a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy).

93. See *supra* text accompanying note 88.

94. See *supra* note 68.

95. See *supra* note 69.

will reduce tort judgments, insurer liability, and insurance rates.⁹⁶ The age classification, for example, is rationally related to the legitimate objective of allowing relatively greater compensation for noneconomic loss to plaintiffs who will endure their intangible losses over a longer period of time.⁹⁷ Because these classifications are rationally related to a legitimate governmental purpose, they do not unconstitutionally deny equal protection under the federal constitution.

B. Washington Constitution: Due Process and Equal Protection

A court should apply a higher standard of review to substantive due process and equal protection challenges to the statute under the Washington Constitution than under the federal constitution. The United States Supreme Court acknowledges the authority of state courts to interpret state constitutional guarantees to be more protective of individual rights than the federal counterparts.⁹⁸ Washington courts in a number of cases have exercised this authority.⁹⁹

The Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."¹⁰⁰ Although this adopts verbatim the federal due process guarantee,¹⁰¹ Washington courts have held that federal case law interpreting the federal due process clause does not bind judicial interpretation of the state due process clause.¹⁰² The Washington Constitution provides further that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."¹⁰³ While the Washington Supreme Court has held that this provision and the federal equal protection provision are substan-

96. It is irrelevant that the cap is not the most direct or complete means by which the legislature could achieve its objective, because the legislature is free to attack perceived problems one step at a time. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

97. *Contra Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) ("There is no rational relationship for distinguishing between two individual victims otherwise similarly situated with respect to injury simply because of age.").

98. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

99. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493 (1984).

100. WASH. CONST. art. I, § 3.

101. Compare *id.* with U.S. CONST. amend. XIV, § 1, cl. 3.

102. *Petstel, Inc. v. County of King*, 77 Wash. 2d 144, 153, 459 P.2d 937, 942 (1969). However, federal case law is given great weight and prevails to the extent it affords greater protection. *Id.*; *Olympic Forest Products v. Chaussee Corp.*, 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973) (procedural due process challenge).

103. WASH. CONST. art. I, § 12. This section is entitled, "Special Privileges and Immunities Prohibited."

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tially identical despite their differing language.¹⁰⁴ Washington courts also consistently have held that the Washington equal protection provision may be interpreted to provide greater individual rights than the federal guarantee.¹⁰⁵

1. Standard of Review

Washington courts reviewing legislation under the state constitution use the same three standards of review currently applied by the United States Supreme Court under the federal constitution.¹⁰⁶ However, Washington courts do not apply these standards in the same manner as the United States Supreme Court. Instead, Washington courts sometimes subject challenged legislation to higher standards of review than are applicable under the federal constitution.

For example, in *State v. Wood*¹⁰⁷ the Washington Supreme Court noted that the United States Supreme Court had not yet found gender-based classifications suspect and thus subject to strict scrutiny.¹⁰⁸ The Washington court held, however, that under the Washington equal protection guarantee gender was a suspect classification "requiring strict scrutiny to determine whether the State has demonstrated a compelling state interest to uphold such classification."¹⁰⁹ Again, in *Darrin v. Gould*¹¹⁰ the Washington Supreme Court acknowledged that the United States Supreme Court had found neither that gender-based classifications were suspect, nor that education was a fundamental right.¹¹¹ Nevertheless, the Washington court held that an education free from sexual discrimination was a fundamental right under the Washington Constitution.¹¹² *Wood*, *Darrin*, and other Washington

104. *State v. Perrigoue*, 81 Wash. 2d 640, 503 P.2d 1063 (1972). The federal provision requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

105. See, e.g., *Darrin v. Gould*, 85 Wash. 2d 859, 868, 540 P.2d 882, 888 (1975); *State v. Alfonso*, 41 Wash. App. 121, 126, 702 P.2d 1218, 1221 (1985).

106. See, e.g., *State v. Rice*, 98 Wash. 2d 384, 655 P.2d 1145 (1982) (strict scrutiny); *Griffin v. Department of Social & Health Servs.*, 91 Wash. 2d 616, 590 P.2d 816 (1979) (minimal scrutiny); *State v. Wood*, 89 Wash. 2d 97, 569 P.2d 1148 (1977) (strict scrutiny); *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975) (intermediate scrutiny); *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wash. App. 225, 660 P.2d 1124 (1983) (minimal scrutiny).

107. 89 Wash. 2d 97, 569 P.2d 1148 (1977).

108. *Id.* at 100, 569 P.2d at 1150.

109. *Id.* The United States Supreme Court has held that gender-based classifications deserve intermediate, but not strict, scrutiny. E.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

110. 85 Wash. 2d 859, 540 P.2d 882 (1975).

111. *Id.* at 865-66, 540 P.2d at 886-87.

112. *Id.* at 870, 540 P.2d at 888. The right to an education free from sexual discrimination is provided by the Washington Constitution. WASH. CONST. art. IX, § 1.

decisions, as well as case law in other states and considerations of public policy, strongly suggest that Washington courts should apply a higher standard of review to Washington's noneconomic damages cap.

a. *Washington Case Law*

Under Washington case law the right to be compensated for personal injuries is important enough that statutes burdening the right trigger intermediate scrutiny.¹¹³ In 1975 the Washington Supreme Court held in *Hunter v. North Mason School District*¹¹⁴ that

[t]he right to be indemnified¹¹⁵ for personal injuries is a substantial property right Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."¹¹⁶

Application of this intermediate standard should be extended to the right to the full recovery of noneconomic damages. A damages cap significantly affects the right to be indemnified. Indemnification is the restoration of the victim of a loss,¹¹⁷ and in Washington such restoration includes compensation for noneconomic loss.¹¹⁸ Washington's

113. See *Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 20 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). No reported Washington decisions have characterized the right to recover in tort as "fundamental" so as to trigger strict scrutiny in substantive due process or equal protection analysis.

114. 85 Wash. 2d 810, 539 P.2d 845 (1975).

115. The *Hunter* court seems to have meant "indemnified" to include the proper elements of negligence damages, which at the time of *Hunter* included noneconomic damages such as pain and suffering.

116. *Hunter*, 85 Wash. 2d at 814, 539 P.2d at 848 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (additional citations omitted). The standard applied in *Hunter* is more intense than the rational basis test. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), cert. denied, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 830-31 (1980); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244, 249 (Tex. Ct. App. 1987). But see *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585, 600 (1980). The *Johnson* court applied "the fair and substantial relationship test" to Indiana's damages cap in the apparent belief that it was invoking only minimal scrutiny. See 404 N.E.2d at 600-01.

The United States Supreme Court's decision in *Duke Power Co. v. Carolina Envtl. Study Group* three years after *Hunter* suggests that the *Hunter* court was incorrect to apply intermediate scrutiny under the federal constitution. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). The *Hunter* court instead might safely have relied solely on the state equal protection clause. See *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1104-07 (La. 1985); *Carson*, 424 A.2d at 831.

117. See BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

118. See *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984). The court in *Shaw* noted that Washington law permitted recovery of damages for pain and suffering and other noneconomic damages, and that under Washington law such damages were compensatory. *Id.* at 1208.

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Washington's Noneconomic Damages Limit

limit in one case reduced the aggregate damages award by eighty-six percent.¹¹⁹ This is as significant an infringement on the right to indemnification as was the statute challenged in *Hunter*, which statute effectively eliminated the plaintiff's cause of action.¹²⁰

b. Case Law in Other States

In some cases, courts in other states have applied intermediate scrutiny to state due process and equal protection challenges of damages caps. While the rational basis test has been applied more often, the decisions to invoke intermediate scrutiny show greater sensitivity to the discriminatory effect of damages ceilings and the nature of the interests at stake. In one case, a court invoked intermediate scrutiny partly in reliance on the Washington Supreme Court's decision in *Hunter v. North Mason School District*.¹²¹

In *Carson v. Maurer*¹²² the New Hampshire court cited the Washington court's holding in *Hunter* that the right to recover for personal injuries is a substantial property right.¹²³ The *Carson* court found that characterization compelling, concluding that "the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."¹²⁴ The court acknowledged that the United States Supreme Court had restricted application of intermediate scrutiny to cases involving classifications based on gender and illegitimacy, but announced that it was free to grant individuals greater protections under the state constitution.¹²⁵

119. See *Sofle v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2 (Wash. Super. Ct. Oct. 30, 1987).

120. The *Hunter* court invalidated a Washington statute that required persons with claims against certain governmental bodies to either file their claims with those bodies within 120 days of the date the claim arose or forfeit those claims. 85 Wash. 2d at 811 n.1, 539 P.2d at 846 n.1.

121. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (citing *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975)).

122. 120 N.H. 925, 424 A.2d 825 (1980).

123. 424 A.2d at 830.

124. *Id.* Some courts have relied on other grounds to review medical malpractice damages ceilings under intermediate scrutiny. In *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978), the North Dakota court relied on its earlier use of intermediate scrutiny of a statute that limited tort recoveries in *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). The *Hassett* court had found that the United States Supreme Court's then-recent introduction of a new intermediate analysis closely approximated the test historically used by the North Dakota court. 217 N.W.2d at 775. In *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1107-08 (La. 1985), the Louisiana court found that a damages limit classified people based on their physical condition, a classification prohibited under the Louisiana Constitution.

125. 424 A.2d at 831.

In *Jones v. State Board of Medicine*¹²⁶ the Idaho Supreme Court held that intermediate scrutiny was applicable where "the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute."¹²⁷ The discriminatory character of the Washington limit is apparent on its face. The limit facially discriminates against aged and noneconomically injured plaintiffs. While there may be a rational relationship between the classification and the declared purpose of the statute, the lack of a substantial relationship is indicated by the fact that a reduction in awards of noneconomic damages cannot force insurers to offer coverage at reasonable rates.

c. Public Policy Considerations

Public policy considerations also compel the use of an intermediate standard of review. First, courts should carefully scrutinize legislation that supports a special interest at the expense of a disadvantaged class. Second, severely injured victims whose noneconomic damages are limited might as a result receive less than full compensation even for their economic damages. Noneconomic damages often are that part of the plaintiff's award that pays the attorney's fee. A reduction in noneconomic damages may mean that the attorney's share of the total judgment must be paid from monies that were allocated by the court to economic damages, such as past and future medical expenses.

2. Application of Review

The discriminatory classifications that Washington's damages limit creates, rather than the statute's aggregate effect on those it regulates, render the statute unconstitutional under intermediate scrutiny. In other words, a court should hold that the statute violates the Washington Constitution's equal protection guarantee but not the substantive due process guarantee.

A statute satisfies the substantive due process requirement when it is substantially related¹²⁸ to the promotion of a legitimate governmental

126. 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977).

127. 555 P.2d at 411. The court invoked an intermediate standard of review in weighing an equal protection challenge to Idaho's damages limit, but seemed to invoke only a rational basis standard to consider a substantive due process challenge to the limit. See *id.* at 409-10. This comports with the United States Supreme Court's omission to apply intermediate scrutiny in the context of substantive due process.

128. "Substantially" means materially, importantly, or essentially. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1981).

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interest.¹²⁹ The stated object of the Tort Reform Act was to create a more equitable tort compensation system and increase the availability and affordability of liability insurance.¹³⁰ This appears to be a legitimate governmental interest.¹³¹

The statute probably is not substantially related to that interest. Although there is evidence that damages ceilings reduce damages awards,¹³² and while it may be rational to believe that a reduction in damages will lead to an eventual reduction in rates,¹³³ there is no apparent substantial relationship between a reduction in damages judgments and an increase in insurance availability and affordability. The mid-1980's insurance crisis was caused in part by bad insurance company management practices.¹³⁴ Further, insurance companies are not obliged to increase availability and decrease rates as their uncertainties and liabilities decrease. In view of these other influences on insurance availability and rates, the relationship between the statute's means and end seems rational but not substantial.

Yet even if there is not a substantial relationship between the statute and the legislature's purpose, courts are likely to discredit a substantive due process challenge for three reasons. First, courts may refuse to apply intermediate scrutiny to the challenge, even while applying such scrutiny to an equal protection challenge.¹³⁵ Second, courts may avoid substantive due process challenges if they can dispose of a case on equal protection grounds. Washington courts rarely in recent years have invalidated legislation on substantive due process grounds.¹³⁶ Third, Washington courts may defer to the decisions of courts in other

129. Recent Washington decisions appear not to have applied the substantial relationship test to a substantive due process challenge. The stated test is based on the test applied in *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

130. 1986 Wash. Laws ch. 305, § 100.

131. See *supra* text accompanying note 88.

132. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987). Professor Danzon found that "[t]he average impact of statutes to limit all or part of the plaintiff's recovery has been to reduce average severity by twenty-three percent." *Id.*

133. See *supra* text accompanying notes 89-90.

134. See *supra* note 28 and accompanying text.

135. E.g., *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). But see *supra* notes 60-61 and accompanying text. There appear to be no recent Washington decisions in which a court applied intermediate scrutiny to a statute challenged on substantive due process grounds.

136. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting).

states, which courts have consistently rejected substantive due process challenges to medical malpractice damages limits.¹³⁷

These considerations probably will influence a court not to find a substantive due process violation but will not interfere with the determination of the equal protection challenge. Under the equal protection guarantee of the state constitution, the statute should be stricken. The state equal protection test is whether the statute's classifications have a fair and substantial relation to the object of the legislation.¹³⁸ This test differs slightly from due process intermediate scrutiny. It examines whether the statute's discriminatory effect, rather than the statute's aggregate effect, bears a substantial relationship to the statute's purpose.

Courts that have used intermediate scrutiny to review medical malpractice damages limits either have found that the limits failed the substantial relationship test¹³⁹ or have remanded the cases to the trial courts for further factual determinations.¹⁴⁰ The North Dakota court in *Arneson v. Olson*¹⁴¹ applied intermediate scrutiny to that state's medical malpractice damages ceiling and found the ceiling violative of the state equal protection guarantee. The court found that the limit benefited physicians but denied adequate compensation to plaintiffs with proven meritorious claims and did nothing toward the elimination of nonmeritorious claims.¹⁴²

The New Hampshire Supreme Court in *Carson v. Maurer*,¹⁴³ in applying intermediate scrutiny to a medical malpractice damages cap challenged under the New Hampshire equal protection guarantee, also found no substantial relationship between the cap and the legislative purpose. The court rather found that "[i]t is simply unfair and unrea-

137. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987). The courts in *Fein* and *Rose* applied minimal, rather than intermediate, scrutiny.

138. See *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975).

139. See *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). *Contra Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (purported to invoke substantial relationship test but in fact decided equal protection challenge under rational basis test).

140. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977); *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985). On at least one of these remands, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

141. 270 N.W.2d 125, 135 (N.D. 1978).

142. *Id.* at 135-36.

143. 120 N.H. 925, 424 A.2d 825, 837 (1980).

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Washington's Noneconomic Damages Limit

sonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."¹⁴⁴

Washington's cap denies equal protection for similar reasons. The cap denies adequate compensation to the most seriously injured plaintiffs, plaintiffs with proven meritorious claims, and imposes on them the burden of supporting the insurance industry. The legislative object of preserving insurance availability and affordability is not substantially related to the classifications of plaintiffs according to whether their damages are economic or noneconomic, whether their noneconomic damages are above or below an arbitrary limit, or whether they are young or old.¹⁴⁵ The difference between economic loss and noneconomic loss is that economic loss is quantified by doctors, hospitals, and employers, who establish the monetary value of past and future medical care and lost wages, whereas noneconomic loss is quantified by laypersons who sit on juries. There is no substantial relationship between the distinction and the legislative purpose. The distinction merely enforces a suspicion of claims for noneconomic loss.

The statute's classifications may not even have a substantial relationship to a reduction in insurer uncertainty and liability. Although the statute forbids the instruction of juries as to the existence of a limit, it seems likely that citizens eventually will learn that the limit exists.¹⁴⁶ Such knowledge might encourage juries that wish to avoid the statute to categorize their awards as economic damages, which are unlimited under the statute.

Additionally, the legislature cannot guarantee that a reduction in insurer uncertainty and liability will be passed along to the entities

144. 424 A.2d at 837. There are many analogies between automobile guest statutes—and the reasons for abolishing such statutes—and contemporary tort reform legislation. Consider the discussion of guest statutes in W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 215-17 (5th ed. 1984). Washington repealed its guest statute in 1974. *Id.* at 216 n.84.

145. A 55-year-old male who has suffered severe and permanent injuries is limited to \$177,610 in noneconomic damages, whereas a 25-year-old male who has suffered severe injuries from which he will completely recover within a year can recover as much as \$399,102 in noneconomic damages. See WASH. REV. CODE § 4.56.250 (1987); WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32; WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. "There is no substantial relationship or rational basis asserted which the court could accept for that difference in classification." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

146. For example, a front-page newspaper story in the Seattle Times recently announced that a trial court judge had ruled the Washington limit unconstitutional. *Judge Rules Lid on Injury Awards Unconstitutional*, Seattle Times, Feb. 20, 1988, at 1, col. 4.

that must buy liability insurance. Aggregate awards may have dropped after medical malpractice damages caps were imposed in the mid-1970's, but there might be no relationship between the drop in awards and the promise of available and affordable liability insurance.

The classifications are not substantially related to the legislative end. While a rational relationship might exist between the classifications and the end, this relationship does not rise to the level of substantiality. The damages limit therefore denies the equal protection of the laws guaranteed by the Washington Constitution.¹⁴⁷

C. Washington Constitution: Right of Trial by Jury

Washington's limit on damages requires the trial court to reduce the jury's determination of noneconomic damages when the jury's award exceeds the statute's ceiling. This interference with the jury function raises another constitutional challenge. The Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate."¹⁴⁸ The word "inviolable" in the provision means "freedom from substantial impairment" but does not prohibit modification of administrative details that do not affect the enjoyment of the right to a jury trial.¹⁴⁹

Washington's noneconomic damages limit abridges the jury trial guarantee.¹⁵⁰ The guarantee limits the authority of the legislature to take away the right to a jury trial.¹⁵¹ The damages limit does more than modify administrative details; it substantially impairs the jury trial right.

More than one court already has invalidated a damages limit on right to jury trial grounds. In *Boyd v. Bulala*¹⁵² a federal district court judge held that both the federal and Virginia constitutional guarantees of the right to a jury trial were violated by Virginia's \$750,000 limit on

147. Because Washington's equal protection guarantee does not prohibit the grant of special privileges or immunities to municipal corporations, the damages limit probably is not unconstitutional on state equal protection grounds when applied to a municipality. See WASH. CONST. art I, § 12.

148. *Id.* art. I, § 21.

149. *State v. Furth*, 5 Wash. 2d 1, 18-19, 104 P.2d 925, 933 (1940).

150. *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); accord *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia damages ceiling violates federal and Virginia guarantees of right to jury trial). *Contra Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (Indiana damages cap does not violate jury trial provision of Indiana constitution).

151. *State v. Ellis*, 22 Wash. 129, 131, 60 P. 136, 137 (1900), overruled on other grounds, *State v. Lane*, 40 Wash. 2d 734, 246 P.2d 474 (1952).

152. 647 F. Supp. 781 (W.D. Va. 1986).

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damages recoverable in medical malpractice actions.¹⁵³ The court found that the federal jury trial guarantee provided the right to have the jury determine not only liability but damages.¹⁵⁴ According to the court, the statutory limit, which required "entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury," had no permissible basis.¹⁵⁵ At least two Washington trial courts, on pre-trial motions, have rejected the defense of the damages limit partly on right of trial by jury grounds.¹⁵⁶

The determination of the plaintiff's damages, including noneconomic damages,¹⁵⁷ is a question of fact for the jury.¹⁵⁸ The statutory cap, in effect, permits the legislature to reexamine and modify the findings of the jury. This interference is especially inappropriate in view of the authority of a judge to set aside an excessive verdict and order a new trial, enter judgment notwithstanding the verdict, or order remittitur where the evidence does not support the verdict. This authority is well-established both at common law and in modern court rules.¹⁵⁹ Unlike a statutory damages cap, these judicial interventions are exercised neither arbitrarily nor in disregard of the facts proved at trial.

Washington's damages cap ignores facts proved at trial. It takes into account only the plaintiff's age and the average annual state wage and not the seriousness of either the injury or the loss. The statute

153. *Id.* at 789; see also *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (Florida tort reform damages cap invalidated partly because it denies plaintiff constitutional benefit of jury trial). The *Boyd* court later refused to reconsider its holding. *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987).

154. 647 F. Supp. at 788 ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935))).

155. *Id.* at 789.

156. *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); *Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 30 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). In *Foster*, King County Superior Court Judge Ellington declared that the limit "renders the right to a jury trial not substantive, not fully extended." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

157. *Power v. Union Pac. R.R.*, 655 F.2d 1380, 1388 (9th Cir. 1981) (under Washington law, amount of damages for loss of companionship is left to trier of fact); *Farman v. Farman*, 25 Wash. App. 896, 611 P.2d 1314 (1980) (amount of damages for intentional infliction of emotional distress is question for trier of fact).

158. *Shea v. City of Spokane*, 17 Wash. App. 236, 562 P.2d 264 (1977) (proof of damages is question of fact for jury); *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888) (where amount of damages is not fixed, agreed upon, or liquidated, jury must be called unless waived).

159. Some such common-law rules have become court rules. *E.g.*, WASH. SUPER. CT. CIV. R. 59(a)(5) (judge may set aside excessive verdict and order new trial).

"invades the province of the jury and restricts the jury's ability to assess damages."¹⁶⁰ It is therefore unconstitutional under the Washington Constitution.¹⁶¹

III. CONCLUSION

Washington's damages limit violates the state equal protection and right of trial by jury guarantees. Under the state equal protection provision, courts should give the statute intermediate scrutiny. This standard of review is supported by Washington case law, case law in other states, and public policy considerations. Because the statute's classifications are not substantially related to a legitimate legislative interest, the statute denies tort plaintiffs the equal protection of the laws. The statute denies the right of trial by jury because it materially invades the province of the jury to find facts.

State constitutional guarantees of due process and equal protection should not be understood by courts merely to restate the fourteenth amendment. Washington courts can and do grant greater protections of individual rights under the state constitution. Such protection is warranted in the review of legislation that classifies and affects the rights of tort victims.

Marco de Sa e Silva

160. *Boyd v. Bulala*, 647 F. Supp. 781, 789 (W.D. Va. 1986).

161. The limit by its terms applies to all "action[s] seeking damages for personal injury or death." WASH. REV. CODE § 4.56.250(2) (1987). Nevertheless, the limit is not unconstitutional on jury trial grounds as to all such actions, but rather only to actions for personal injury. Whether a person is entitled to a jury trial under the Washington Constitution depends on whether the right existed in 1889, when the Washington Constitution was adopted. *Firchau v. Gaskill*, 88 Wash. 2d 109, 558 P.2d 194 (1977). The right to a jury trial in a civil action existed in Washington in 1889. See *Baker v. Prewitt*, 3 Wash. Terr. 395, 19 P. 149 (1888) (breach of warranty action); *Northern Pac. R.R. v. Holmes*, 3 Wash. Terr. 543, 18 P. 76 (1888) (negligence action). The state constitution therefore preserves the right. On the other hand, the cause of action for wrongful death did not exist until created by the legislature in 1917. 1917 Wash. Laws ch. 123, § 1. Although parties to a claim for wrongful death have a right to a jury trial, that right is statutory and not constitutional.

The distinction may cause a court to sever the application of the damages limit as to personal injury actions but leave intact the limit as to wrongful death. *Contra Carter v. Fibreboard Corp.*, No. 87-2-03555-7, slip op. at 31 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (jury trial right exists regardless of "whether the right was created by statute or existed at common law"). Severance would, in effect, amend Washington's wrongful death act to provide for a limit on noneconomic damages. Such a limit is probably constitutional under the Washington jury trial guarantee. See *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958). But see *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983).

Washington's Noneconomic Damages Limit

TABLE: REPORTED DECISIONS ON THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE AND TORT REFORM DAMAGES LIMITS. This Table gathers in chronological order recent decisions on the constitutionality of medical malpractice and tort reform damages limits. The Table does not include cases that have been overruled or that merely follow binding precedent. Where both a state and federal court have decided the constitutionality of the same statute, the Table reports both decisions. For citations to the following cases, see footnotes 38-49.

CASE	LIMIT	STANDARD OF REVIEW	HELD	GROUND
Wright v. Central DuPage Hosp. (Ill. 1976)	\$500,000 ^A	Q	UC	SL ¹
Jones v. State Bd. of Medicine (Idaho 1976)	Variable ^A	NA	C	AC ²
Simon v. St. Eliz'th Med. Cntr. (Ohio C.P. 1976)	\$200,000 ^D	RB/I	R	DP, ³ EP ⁴
Prendergast v. Nelson (Neb. 1977)	\$500,000 ^A	Q	UC ⁵	EP ⁶
Arneson v. Olson (N.D. 1978)	\$300,000 ^A	RB	C	SP ⁷
Johnson v. St. Vincent Hosp. (Ind. 1980)	\$500,000 ^A	I	UC	EP ⁸
Carson v. Maurer (N.H. 1980)	\$250,000 ^{NE}	Q	C	DP, ⁹ EP, ¹⁰ JT ¹¹
Baptist Hosp. v. Baber (Tex. App. 1984)	\$500,000 ^{NM}	RB	UC	EP ¹²
Malone & Hydz, Inc. v. Hobrecht (Tex. App. 1985)	\$500,000 ^{NM}	I	UC	EP ¹³
Fein v. Permanente Medical Group (Calif. 1985)	\$250,000 ^{NE}	NA	UC	Baptist Hosp.
Detar Hosp. v. Estrada (Tex. App. 1985)	\$500,000 ^{NM}	RB	C	DP, ¹⁴ EP ¹⁵
Hoffman v. United States (9th Cir. 1985)	\$250,000 ^{NE}	RB	UC	EP, ¹⁶ AC ¹⁷
Duren v. Suburban Comm'y Hosp. (Ohio C.P. 1985)	\$200,000 ^D	RB	C	EP ¹⁸
Sibley v. Board of Supervisors (La. 1985)	\$500,000 ^{NM}	Q	UC	Q ¹⁹
Waggoner v. Gibson (N.D. Tex. 1986)	\$500,000 ^{NM}	Q	R	EP ²⁰
Boyd v. Bulala (W.D. Va. 1986)	\$750,000 ^A	RB	UC	DP, ²¹ EP, ²² AC ²³
Lucas v. United States (5th Cir. 1986)	\$500,000 ^{NM}	RB	C	DP, ²⁴ EP ²⁵
Smith v. Dep't of Ins. (Fla. 1987)	\$450,000 ^{NE}	NA	UC	AC, ²⁶ JT ²⁷
Lucas v. United States (Tex. 1988)	\$500,000 ^{NM} \$150,000 ^{NE}	RB	UC	AC ²⁸

Explanation of symbols:

Type of damages limited: A = All damages; G = General damages; NE = Noneconomic damages; NM = Nonmedical damages

Standard of review: I = Intermediate; RB = Rational basis; NA = Not applicable; Q = Unclear

Holding: C = Constitutional or not unconstitutional; UC = Unconstitutional; D = Dictum; R = Not decided in reported case, remanded to trial court for decision as to constitutionality

Grounds for court's decision: AC = Right of access to courts; DP = Due process; EP = Equal protection; JT = Right of trial by jury; SL = Special legislation; SP = Special privilege; Q = Unclear

Constitution relied on by court: B = Both federal and state constitutions; F = Federal constitution only; S = State constitution only; Q = Unclear

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Preserving tort reform gains

By J. Anthony Manger, Esq., Norris, McLaughlin & Marcus, General Counsel to PIAA

While the pace of legislative reform of medical professional liability has often been frustrating to those of us in the PIAA community, significant achievements have been realized in several states. Unfortunately, conclusion of the legislative battle does not end the war. In addition to on-going legislative assaults, we have learned that we can expect court challenges to any significant tort reform.

Unfortunately, supporters of tort reform, to date, have suffered about as many losses as victories in facing these court challenges. It is sometimes difficult to discern a pattern to the decisions of various courts in addressing tort reform. With a significant number of such cases now behind us, it is important that we assess, as best we can, the reasons differentiating our successes from our failures.

Naturally, the first and most important distinguishing characteristic among the court decisions involves the differences among the statutes in question. Sometimes, to the casual observer, these differences may not be obvious. Many of the most important court decisions in this field have, for example, passed upon statutes imposing damage caps. Some of the statutes have sought to limit all damages, while other statutes have attempted to restrict only non-economic damages. Total damage caps have been upheld in some instances (such as Indiana), while non-economic damage caps have been struck down in some cases. Nevertheless, it is clear that caps which apply only to non-economic damages have a far better chance of withstanding challenge.

Second, in many cases, the reviewing court will look for a "quid pro quo" in the legislation. The classic cases of this type are those from the early part of this century upholding worker's compensation acts of the various states. There, the quid pro quo was obvious: replacement of the tort system with a no-fault mechanism. While the Virginia birth-related injury statute offers such a quid pro quo, most malpractice reform statutes do not. Nevertheless, other types of quid pro quo may be afforded. The PIAA and AMA/GMSS proposals, for example, offer the speed and reduced expense of an administrative system.

Virtually all legal challenges to tort reform statutes are based, at least in part, on arguments that the legislation violates the due process and equal protection clauses of the federal constitution (and often of similar state constitutional provisions). Thus, a reviewing court will require a showing with regard to the situa-

tion which the legislature sought to address in adopting the statute. It is certainly helpful, and perhaps essential, that a legislative record be established showing that the legislature considered such factors as (i) increasing numbers and severity of claims, (ii) rising costs of insurance, (iii) estimated social costs of "defensive medicine", and (iv) withdrawal of physicians from practice or limitations of practice, and the resulting impact on access to medical care. A review of court decisions indicates that some legislatures did a better job than others in establishing such a record. A review of those same decisions also emphasizes the importance of presenting that argument persuasively and effectively to the court.

In addition, we must recognize that differences among the constitutional provisions of the various states, along with different judicial philosophies and political climates, will also yield varying results even in similar cases.

Finally, courts in these cases have applied inconsistent legal standards of review of the equal protection argument. In general, courts have applied three standards of review in equal protection cases. The most stringent, "strict scrutiny," is applied in such instances as those involving claims of racial discrimination. In other types of cases, the courts will uphold the statute as long as it bears a reasonable relationship to a valid legislative purpose. In recent years, however, the courts have applied an "intermediate standard" of review in some equal protection cases.

In reviewing tort reform legislation, the selection of the appropriate standard of review for the equal protection claim may determine the result. In two recent cases, for example, the validity of Virginia's cap on damages was upheld. The state's Supreme Court and a federal appeals court both agreed that the limited "rational basis" review was the appropriate standard. In a recent lower court decision in New Mexico, however, the court applied the more stringent intermediate standard of review and, as a result, struck down New Mexico's cap.

PIAA is monitoring the New Mexico case and, in all likelihood, will file an *amicus curiae* brief when it reaches the state's Supreme Court. The struggle to preserve tort reform, even after a legislative victory, is a difficult one requiring vigilance and perseverance. PIAA expects to be an active participant in that struggle.

**SPECIAL ATTACHMENT
PRE-JUDGEMENT INTEREST**

A RAND NOTE

JURY AWARDS AND PREJUDGMENT INTEREST
IN TORT CASES

Stephen J. Carroll

May 1983

N-1994-ICJ

Prepared for

The Institute for Civil Justice

35th
Year

Rand
SANTA MONICA, CA 90406

THE
INSTITUTE FOR
CIVIL JUSTICE

PREFACE

This Note is based on a briefing presented to the Board of Overseers of The Institute for Civil Justice on February 17, 1983. It reports preliminary results from an ongoing Institute study of the effects of inflation on jury awards and the implications of those effects for the policy debate about prejudgment interest. A full report of the completed study will be published in the near future.

SUMMARY

This Note reports the preliminary results of research now under way at The Institute for Civil Justice which empirically examines issues central to the prejudgment interest policy debate. Our work thus far establishes that juries are implicitly awarding prejudgment interest.

At least 26 state legislatures have enacted laws that provide such interest on awards to victorious plaintiffs in tort cases. These laws are ostensibly designed to compensate prevailing plaintiffs for the decline in the real value of their recovery caused by delay between the time of their injury and the time when they go to trial, and to eliminate the defendants' incentive to delay in order to benefit from the use of the money.

There are plausible arguments both for and against prejudgment interest, but the empirical crux of these arguments is how delay actually affects awards and legal costs. Our current study focuses on the question of whether juries provide larger awards to longer delayed cases; the effects of delay on legal costs will be the subject of future research.

Our analysis is based on data on all awards returned in civil jury trials in the federal, state, and municipal courts in Cook County, Illinois, from 1960 to 1979 relating to injuries arising from automobile accidents (1,349 cases). Controlling for the severity of injury, we find that, on average, juries increased awards over and above inflation as measured by the Consumer Price Index at a rate of 3.7 percent per year for the time between injury and trial. Overall, juries implicitly provide prejudgment interest at a rate equal to the underlying inflation rate plus 3.7 percent per year.

This result raises questions that policymakers must consider: Who should set the prejudgment rate--legislatures, judges, or juries (as juries appear to be doing informally in Cook County)? How can discretionary decisions be coordinated?

The "true" prejudgment interest rate equals whatever the jury awards by way of implicit interest plus the statutory prejudgment interest rate if the state has one. If a state enacted a prejudgment interest statute and juries continue to mark up awards by the rate of inflation plus 3.7 percent per year, the true prejudgment interest rate will be much different from that intended by either the legislature or the jury.

The analysis also raises the question: What is the appropriate rate? The policy debate has ignored the differences between plaintiff's and defendant's positions. The prejudgment interest rate (implicit plus statutory) that fully compensates the plaintiff may not eliminate the defendant's incentive to delay, while the rate that eliminates the defendant's incentive to delay may create an incentive for the plaintiff to delay. There may be prejudgment interest rates (including the jury's markup) at which both plaintiff and defendant have an incentive to delay. Moreover, differences among plaintiffs, among defendants, and over time make it difficult to establish any one rate that will serve policy objectives.

In future research, we will replicate our analysis using different measures of inflation. We will also analyze data from San Francisco County, thus enlarging the data base and enabling comparisons with Cook County. And we will review the economics literature on the opportunity cost of money to plaintiffs and to defendants so that we can include this information in our final report for the benefit of concerned policymakers.

Finally, the question of increased litigation costs due to delay for both plaintiffs and defendants is obviously important to this whole issue and merits a thorough separate study. We plan to undertake that study as resources become available.

Appendix A

PREJUDGMENT INTEREST STATUTES

INTRODUCTION

Between 1980 and 1982 twenty state legislatures enacted or amended prejudgment interest statutes applicable to damages in tort cases, while many others denied passage of similar bills.¹ In 1983, legislative sessions around the country are debating the merits of prejudgment interest, with new or expanded legislation proposed in at least 20 states.² Where no statutes exist to clarify legislative intent, or statutes are unclear on what constitutes "full and just compensation," the award of prejudgment interest is left to the discretion of the adjudicator. Courts and juries around the country differ in their application of prejudgment interest to awards, and appeals tribunals are asked in many cases for rulings on trial court decisions awarding or withholding prejudgment interest.³

This appendix provides comparative data on current statutes and rules, pattern of their adoption, and their key characteristics.

METHODOLOGY

We reviewed the statutes of all 50 states for evidence of prejudgment interest laws. In most states the code sections dealing with interest and judgments contain reference to the legal rate of interest, the accrual of interest and types of cases eligible for interest. In addition we looked at tort and personal injury sections of the codes and at wrongful death statutes. We did not review court rules

¹In this Appendix we discuss only the regulations that include tort actions within their scope. Numerous other states have legislation that authorizes prejudgment interest for contract disputes and other civil cases claiming only liquidated damages.

²As of April 1983.

³*In re Air Crash Disaster near Chicago, Ill.*, on May 25, 1979, D.C.Ill.1979, 480 F.Supp. 1280, affirmed 644 F.2d 633; *Statler Hotels v. Herbert Rosenthal Jewelry Corp.*, 351 SW2d 579 (Texas Civ App 1961); *Hewitt v. Hutter*, 432 F.Supp. 795 (W.D.Va. 1977), aff'd, 574 F.2d 182 (4th Cir. 1978).

in all 50 states because very few states have enacted regulation of prejudgment interest by rule rather than statute. Nor did we review the 1982 session laws from all 50 states. We did refer to the session laws when changes had been so recent that they had not yet been incorporated into the code. We used the *State Legislative Report*, published by the Alliance of American Insurers, for information about legislation pending in 1983.

PATTERN OF ADOPTION

Twenty-six states currently authorize prejudgment interest for one or more types of tort litigation. Table A-1 shows that 20 of the 26 have mandatory provisions for prejudgment interest. In the other six states prejudgment interest, although provided for by statute, is left to the discretion of the court or jury to award.

Many bills providing for prejudgment interest have been introduced in 1983 state legislative sessions. At least 12 states, where no statute already exists, will consider prejudgment interest proposals this year. In five other states, 1983 proposals have already been defeated, and in 1982, when more than 50 bills were considered around the country, two states voted to add prejudgment interest to tort awards. A number of bills are also before 1983 legislatures to expand or amend prejudgment interest legislation already in place. Table A-1 shows the 20 states where bills were introduced during the first quarter of 1983, and were still pending as of April. Finally, as shown in Table A-1, there are 12 states where no statutes have been passed and none are currently under consideration by the legislatures.

No clear distinction exists between states that have prejudgment interest laws and those that do not. For example, some states with large populations, such as New York and California, have prejudgment interest laws while others like Illinois and Florida do not. In contrast, Alaska, with a small population, has had prejudgment interest for tort cases for many years, while Alabama and Kansas, also with small populations, have never passed such legislation.

Although the last five years have seen laws passed for the first time in seven states, during the five years from 1973-1978 only one state enacted prejudgment interest legislation. Five states--Colorado,

Table A-1

**STATUS OF STATE LAWS OR COURT RULES
REGULATING PREJUDGMENT INTEREST FOR TORT CASES**

STATE	MANDATORY STATUTE/RULE	DISCRETIONARY STATUTE/RULE	LEGISLATION ¹ PROPOSED	NONE PENDING NOR ENACTED	STATE	MANDATORY STATUTE/RULE	DISCRETIONARY STATUTE/RULE	LEGISLATION ¹ PROPOSED	NONE PENDING NOR ENACTED
Alabama	—	—	—	•	Montana	—	—	•	—
Alaska	•	—	—	—	Nebraska	—	—	•	—
Arizona	—	—	—	•	Nevada	•	—	—	—
Arkansas	—	—	—	•	New Hampshire	•	—	•	—
California	•	—	—	—	New Jersey	•	—	—	—
Colorado	•	—	—	—	New Mexico	—	—	•	—
Connecticut	•	—	—	—	New York	•	—	•	—
Delaware	—	—	—	•	North Carolina	—	—	—	—
Florida	—	—	—	•	North Dakota	—	—	—	•
Georgia	•	—	—	—	Ohio	—	•	—	—
Hawaii	—	•	•	—	Oklahoma	•	—	—	—
Idaho	—	—	•	—	Oregon	—	—	•	—
Illinois	—	—	•	—	Pennsylvania	•	—	—	—
Indiana	—	—	—	•	Rhode Island	•	—	•	—
Iowa	•	—	—	—	South Carolina	—	—	—	•
Kansas	—	—	—	•	South Dakota	—	—	—	•
Kentucky	—	—	—	•	Tennessee	—	•	—	—
Louisiana	•	—	—	—	Texas	—	—	•	—
Maine	•	—	—	—	Utah	•	—	—	—
Maryland	—	•	—	—	Vermont	—	—	—	•
Massachusetts	•	—	—	—	Virginia	—	•	—	—
Michigan	•	—	—	—	Washington	—	—	•	—
Minnesota	—	—	•	—	West Virginia	—	•	•	—
Mississippi	—	—	•	—	Wisconsin	•	—	—	—
Missouri	—	—	•	—	Wyoming	—	—	•	—

¹Introduced and still pending as of April, 1983.

Louisiana, Massachusetts, New Hampshire, and Rhode Island--have had laws on the books for more than 20 years that mandate prejudgment interest in tort cases. Table A-2 shows the date of first enactment and the date of most recent amendment of mandatory prejudgment interest statutes. Table A-3 shows the date of most recent action on discretionary prejudgment interest laws.

New Jersey and Pennsylvania are the only states where prejudgment interest was authorized by court rule rather than by statute. The supreme courts of both states upheld the constitutionality of the rules. The New Jersey rule includes a provision that it can be suspended upon exceptional circumstances, an example of which has been interpreted to be delay of the litigation by the plaintiff. In Pennsylvania the court included a provision that suspends prejudgment interest after the time of an offer by the defendant if the judgment does not exceed 125 percent of the offer. Several of the statutes authorizing prejudgment interest are less explicit in their intent, and leave more uncertainty as to the purpose of the provision, and when it is to be applied.⁴

FEATURES OF PREJUDGMENT INTEREST REGULATIONS

The key features of the statutes and rules regulating the award of prejudgment interest include:

- the types of actions included within the scope of the provision;
- the rate of interest and how it is calculated;
- the date that interest commences to accrue; and
- the contingencies upon the application of the provision.

⁴Ha.Rev.Stat. Sec. 636-16; Tn. Code Ann. Sec. 47-14-123; Code of Va.Rem.& Proc. Sec. 8.01-382.

Table A-2

STATES WITH MANDATORY PREJUDGMENT INTEREST STATUTES

<u>STATE</u>	<u>AUTHORIZATION</u>	<u>FIRST ENACTED</u>	<u>MOST RECENT AMENDMENT</u>	<u>TYPES OF ACTIONS</u>	<u>RATE OF INTEREST</u>	<u>DATE OF ACCRUAL</u>	<u>APPLICATION CONTINGENT ON:</u>
Alaska	Al. Statutes CCP 09.50.270; Trade & Commerce 45.45.010	1965	1982	Tort, excluding Alaska government as defendant	8.5% ¹ , 12.5%	Date cause of action accrued.	
California	CA Civ. Code §3291	1982	-- ²	Personal injury excluding CA government as defendant	10%	Date of offer.	Award greater than plaintiff offer.
Colorado	C.R.S. 13-21-101	1935	1982	Personal injury	9% ^{3,4}	Date cause of action accrued.	
Connecticut	Conn. Gen. Stat. §37-3a	1981	-- ²	Civil	12%	Date complaint filed, or date of offer, if offer is made more than 18 months after filing.	Award greater than plaintiff offer.
Georgia	Code of GA 51-12-14	1968	1981	Tort	12%	Date of offer.	Award equal to or greater than offer.
Iowa	Iowa Code Ann. §535.3	1980	-- ²	Civil	10%	Commencement of action.	
Louisiana	LA Revised Stat. §13:4203	1916	1981	Tort	12%	Date complaint filed.	
Maine	MRSA Title 14 §1602	1969	1979	Civil	8%	Date complaint filed.	If prevailing party has a continuance of greater than 30 days, interest is suspended for that time.
Massachusetts	Ann. Laws of Mass. C.231 §6B Supp. §11	1946	1982	Personal injury/ property damage	12%	Date complaint filed.	
Michigan	MSA 27A.6013 Mich. Comp. Laws 600.6013	1965	1980	Civil	12% ³	Date complaint filed.	If an offer was equal to or greater than the award, the court may suspend interest after date of offer.

Table A-2 (continued)

<u>STATE</u>	<u>AUTHORIZATION</u>	<u>FIRST ENACTED</u>	<u>MOST RECENT AMENDMENT</u>	<u>TYPES OF ACTIONS</u>	<u>RATE OF INTEREST</u>	<u>DATE OF ACCRUAL</u>	<u>APPLICATION CONTINGENT ON:</u>
Nevada	NRSA §1(b) 1974	1979	1981	Civil	12%	Date complaint filed.	
New Hampshire	NH Rev. Stat. Ann. 524:1-b	1957	1981	Civil law & equity	6%	Date of writ.	
New Jersey	Civ. Prac. Rules Governing Courts of the State of NJ Rule 4:42-11(b)	1971	1981	Tort, excluding NJ government as defendant	12%	Date complaint filed, or 6 months after cause of action accrued.	"Court may suspend in exceptional cases."
New York	NY Estates Power & Trust Law §5-4.3	1967	1980	Wrongful death	9%	Date of death.	
North Carolina	Gen. Stat. of NC §24-5	1981	-- ²	Civil claims covered by liability insurance	8%	Date complaint filed.	
Oklahoma	12 OK Stat. §727(2)	1971	1982	Personal injury	15% ⁵	Date complaint filed.	
Pennsylvania	PA Rules of Civil Procedure §231 Rule 238	1979	-- ²	Personal injury, death, or property damage	10%	Date filed, or 1 yr. after date cause accrued, whichever is later.	Award must be greater than 125% of offer. If not, interest accrues only to date of offer.
Rhode Island	RI Gen. Law 9.21-10	1958	1981	Civil	12%	Date cause of action accrued.	
Utah	Utah Code Ann. §15-1-4; 78-27-44	1975	1981	Personal injury	12%	Date cause of action accrued.	
Wisconsin	Wis. Ann. Code §807.01	1980	-- ²	Civil	12%	Date of offer of settlement.	Award greater than offer.

¹ Higher interest rate applies if plaintiff offer is refused, lower rate of interest applies if defendant offer is refused.

² None known.

³ Compounded annually.

⁴ Rate on appealed cases to be certified each Dec. 31st at 2 percentage points above current discount rate.

⁵ Rate limited to 10% against Oklahoma government entities.

Table A-3

STATES WITH DISCRETIONARY PREJUDGMENT INTEREST STATUTES

<u>STATE</u>	<u>AUTHORIZATION</u>	<u>DATE ENACTED/ AMENDED</u>	<u>TYPE OF CASES</u>	<u>RATE OF INTEREST</u>	<u>DATE OF ACCRUAL</u>	<u>UPON DISCRETION OF:</u>
Hawaii	Hawaii Rev. Stat. §636-16	1979	Tort	10%	Earliest possible is date of injury.	Judge
Maryland	MD Cts. & Jud. Proc. Code Ann. §11-301	1980	Personal inj. motor veh. only	10% max.	Earliest possible is date of complaint.	Court finding of un- necessary delay by defendant.
Ohio	Ohio Rev. Code §1343.03	1982	Tort	10%	Date action accrued.	Court finding of lack of good faith effort to settle.
Tennessee	Tenn. Code Ann. §47-14-123	1979	Civil Actions for monetary damages.	10% max.	Determined by court or jury.	Court or jury.
Virginia	Code of VA Civil Rem. & Proc. §8.01-382	1979	Civil law & equity.	10%	Determined by court or jury.	Court or jury.
West Virginia	W. VA Code §56-3-31	1981	Civil ¹	10%	Date cause accrued as determined by the court.	Court.

¹For special damages only.

Types of Actions Included in Scope

Most of the statutes authorizing prejudgment interest at the discretion of the adjudicator are applicable to the majority of civil tort actions for monetary damages. In some cases the interest is limited to the special damages, while in others future damages are explicitly excluded. In the 20 states where the statutes are mandatory, most refer broadly to civil actions as within their scope. Typically, the language reads "money judgment recovered in a civil action," "in all civil actions," or more broadly "money judgments." Several, though not excluding other types of actions, specifically cite tort actions as eligible for prejudgment interest. Seven others are even more narrow and indicate personal injury, wrongful death, property damage, or a combination of these three as within the scope of the provision. North Carolina's statute is specifically limited to claims covered by liability insurance. In a number of states, cases in which the state government or any public entity is a defendant are not eligible for prejudgment interest under the provisions of the statute. Table A-2 and Table A-3 show the types of cases included within the scope of the prejudgment interest statutes and rules.

Rate of Interest

In all six states where the statutes are discretionary, the rate of interest is fixed at 10 percent. In the 20 states with mandatory provisions, ten specify 12 percent as the current prejudgment interest rate. Oklahoma has the highest rate, increased in 1982 to 15 percent. The lowest current rate is 6 percent in New Hampshire. Alaska has two different rates. There, 8.5 percent is applied to judgments where the refused offer was made by the defendant, and 12.5 percent is applied when the plaintiff made the offer and was refused by the defendant. Only the Colorado and Michigan statutes provide that prejudgment interest be compounded annually. Others either do not specify or provide for simple interest.

Fifteen of the twenty statutes referred to in Table A-2 specify the rate as part of the prejudgment interest statute. One specifies that the rate is to be the legal rate in effect at the time of judgment and

three others make no mention of the rate, which is therefore assumed to be the legal rate in each state. When the Michigan statute was amended in 1980 it provided that the rate would vary according to the date of filing. The rate is 12 percent per year on all suits filed after June 1, 1980, but those filed before that date had interest calculated at six percent per year through June 1980 and at 12 percent per year thereafter through the satisfaction of the judgment. No other statutes contain such a provision.

All but one of the prejudgment interest rates are fixed. Only Colorado provides for annual adjustment of the legal rate in accordance with the discount interest rate prevailing during the time of the litigation. The annual adjustment of the rate provided for in Colorado applies only to cases that are appealed and affirmed. On all other cases the rate is 9 percent per year compounded annually.

Accrual of Interest

Most of the states that have discretionary statutes provide that the determination of the date when interest commences should be left to the adjudicator. The most liberal date is the date when the action accrued, or the date of injury. In five of the 20 states shown on Table A-3, interest accrues from the date the action accrued. Eight states trigger the running of interest from the date the case was filed, while in three other states the interest is calculated from the date of an offer of settlement.

Contingencies

Six of the 20 states in Table A-2 include provisions in their statutes that make the award of prejudgment interest contingent on obtaining an award that is equal to or greater than previous offers to settle. In California and Connecticut, the offer is to be made by the plaintiff. In the other four states with similar provisions the offer can be made by either party. If it is refused and the judgment is greater than the offer, the prevailing party is awarded prejudgment interest. If the award is not 125 percent greater in Pennsylvania, prejudgment interest accrues only to the date of the offer. In Michigan, if an offer was equal to or greater than the award, the court

may suspend the accrual of interest after the date of the offer. In Maine, if the prevailing party has had a court continuance of the case for more than thirty days, interest is suspended throughout the length of the continuance. Twelve of the mandatory statutes place no contingencies on the award of prejudgment interest.

Other states with contingencies on the award of prejudgment interest are Maryland and Ohio. These statutes are shown in Table A-3, because unlike the mandatory statutes, interest is awarded to prevailing parties in these states only if the court determines that the defendant has caused unnecessary delay or has failed to make a good-faith effort to settle. The statutes in these two states are the most narrowly designed to reduce delay and promote settlement of cases.