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FINAL REPORT OF THE HOUSE LIABILITY TASK FORCE
(First Revised)

JUNEAU
MARCH 1990

"OUR TASK IS NOT TO FIX THE BLAME FOR THE PAST,
BUT TO FIX THE COURSE FOR THE FUTURE."

John F. Kennedy

HOUSE LIABILITY TASK FORCE

Legislative Members:

Representative Sam Cotten, Chair
Representative Red Boucher
Representative Virginia Collins
Representative Dave Donley
Representative Johnny Ellis
Representative Peter Goll
Representative Max Gruenberg
Representative Ron Larson
Representative Loren Leman
Representative Mike Navarre

Public Members:

Gary Fye
Vincent Haneman
Russ Huffman, M.D.
Jeffrey Jefferson, Esquire
Nancy Lord
Ames Luce, Esquire
David McGuire, M.D.
Al Parrish
Mary Pierce
Jim Witt

Alternates for Public Members:

William Brock for Mary Pierce
Dan Hensely for Ames Luce
Richard Ritter for Vincent Haneman

Special Counsel to Task Force:

David E. Rogers, Esquire

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FINAL REPORT OF THE HOUSE LIABILITY TASK FORCE

SUMMARY AND CONCLUSIONS

The Liability Insurance Task Force was established by the Alaska House of Representatives during the first session of the Sixteenth Alaska Legislature through House Resolution 10 (HR 10) in an effort to sort out the many controversies concerning "Tort Reform" and to "determine how the State may more effectively regulate insurance and provide civil justice"(see attached copy of HR 10). The task force consisted of the chairs of the House Judiciary, Labor and Commerce and Health, Education and Social Services Committees and other members appointed by the Speaker of the House including public members "who are involved in tort reform issues or who are involved in insurance or civil justice". A complete list of the Task Force membership is attached.

The resolution noted in particular the problems faced in the public and private sectors as a result of rising insurance costs. It concluded that a comprehensive review of "statutes, case law, practices of the insurance and legal fields and the relationship between insurance costs and civil justice" is warranted under the circumstances and instructed the task force to "recommend to the legislature any changes to the statutes appropriate and necessary for reducing insurance costs and improving civil justice".

PRIOR LEGISLATIVE EFFORTS

The issue of liability insurance availability first surfaced in Alaska in the early 1970's. By 1975, the medical community concluded that legislative relief was required. A bill creating a Joint Underwriting Association passed the legislature during the 1975 session, but was vetoed by Governor Hammond who instead created the Governor's Medical Malpractice Commission to study the problem and make recommendations to the Legislature. On the basis of this report and following extensive hearings on the matter, the Legislature enacted a comprehensive program which set up the basic medical malpractice claims system in operation today and which created the Medical Indemnity Corporation of Alaska as the primary medical malpractice insurer and required all Alaska doctors to participate as a condition of licensure. This latter provision was subsequently repealed and participation was made voluntary.

There were no significant additional developments until 1986 when the Legislature passed "Tort Reform" legislation largely in response to doctors and others who were concerned

about insurance availability and affordability (rates had climbed to record highs). Conference CS for Senate Bill 377 made a series of changes to our civil justice system including: Modified joint and several liability; Caps on non-economic damages ($500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages for personal injury incurred while that person was committing a felony; detailed provisions on requirements for damage awards; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgment, costs and attorney's fees, including pre-judgment interest, and the effects of a release. This legislation has been characterized as a "patch-work quilt" of necessary compromises, and, in the view of many tort reform advocates, did not go far enough toward making Alaska's civil justice system fair and predictable.

During the 1988 session, tort reform legislation intended to complete the 1986 effort was considered by the Legislature but significant differences between the House and Senate could not be resolved. However, the voters approved in November 1988 an initiative which eliminated joint liability for tort and other actions involving fault. A related provision limiting attorney contingency fees was disallowed by the Lieutenant Governor and is now the subject of litigation.

In 1989, another unsuccessful attempt to pass additional tort reform laws led to HR 10 and this Task Force. Most of the controversial issues remain unresolved following the final session of the Sixteenth Alaska Legislature. However, the Legislature did make several important changes to laws governing the regulation of professional conduct. particularly the medical profession (See the final version of HB 146).

SUMMARY AND RESULTS OF TASK FORCE EFFORTS

At its first meeting Task Force members, tired of relying on "anecdotal evidence", concluded there was a need to establish a common factual basis for their consideration of the issues. Accordingly, a list of threshold factual questions was prepared collectively by the Task Force with instructions to Task Force Special Counsel, David Rogers, to develop the appropriate information in response to those questions and report back to the Task Force as soon as

possible for further discussion. The result of this fact gathering effort is contained in a seventeen volume submittal incorporated herein by reference. These attachments contain the best information available at the time primarily from "non-partisan" sources. For a detailed discussion of how the information was developed and what each packet contains see attachment # 1. A "Highlight Summary" is included as Attachment #2. A detailed summary of the information is contained in Attachment #3.

At its second meeting this information was summarized and presented to the Task Force by David Rogers with participation by representatives of state agencies and others and considerable discussion by Task Force members. At its final meeting a problem/solution format suggested by Rep. Fran Ulmer was reviewed but no final action was taken due to an inability to obtain consensus on most of the issues.

Nevertheless, at the request of Chairman Cotten, several Task Force members did offer their written conclusions and observations which are included as Attachment #4. While attitudes about what the problem is and what you can do about it are divergent, it is important to note that based on these written comments and comments made during Task Force deliberations, there appears to be agreement on two critical points:

1) THERE IS A NEED TO FURTHER CONSIDER ALTERNATIVE DISPUTE RESOLUTION MECHANISMS WHICH MAY REPRESENT AT LEAST A PARTIAL SOLUTION TO MANY OF THE PROBLEMS IDENTIFIED BY CRITICS OF THE PRESENT SYSTEM INCLUDING: UNREASONABLE DELAY, EXCESSIVE COSTS OF LITIGATION, UNPREDICTABILITY AND FAIRNESS OF COMPENSATION AND LACK OF ACCESS TO THE COURTS; and

2) THERE IS A NEED FOR FURTHER INFORMATION AND ANALYSIS OF ISSUES CONCERNING THE INSURANCE INDUSTRY AND REGULATION OF PROFESSIONAL CONDUCT.

CONCLUSION

Despite the frustration expressed by several members of the Task Force about our inability to draw final conclusions, there is general agreement that the materials gathered and reviewed over the past year have brought us one important step closer to a collective understanding of the problems faced by and potential solutions available to policymakers and the public in the civil justice arena. And by establishing a common factual basis that frees us from the never ending battle of anecdotal claims, the work of the Task Force should help decisionmakers narrow the focus of future discussions.

Introduced: 5/6/89
Referred: Rules

IN THE HOUSE BY ULMER AND NAVARRE

HOUSE RESOLUTION NO. 10

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Relating to a Liability Insurance Task Force.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

WHEREAS the state and its political subdivisions, as well as many individuals in the private sector are faced with increasing insurance costs; and

WHEREAS tort reform involves civil procedure statutes, insurance statutes, case law developed by the courts over several centuries, many common-law doctrines, and practices of both the insurance industry and attorneys in the state; and

WHEREAS a comprehensive review of existing statutes, case law, insurance and legal practices, and the relationship between the cost of insurance and the civil justice system is needed in order to determine how the state may more effectively regulate insurance and provide civil justice;

BE IT RESOLVED by the House of Representatives that a Liability Insurance Task Force is established to study state statutes, case law, practices of the insurance and legal fields, and the relationship between insurance costs and civil justice; and be it

FURTHER RESOLVED that the task force shall recommend to the legislature any changes to the statutes appropriate and necessary for reducing insurance costs and improving civil justice; and be it

FURTHER RESOLVED that the chairs of the House Judiciary Committee, Labor and Commerce Committee, and Health, Education and Social Services Committee shall be members of the task force, and that the speaker of the house shall appoint as members of the task force an appropriate number of

members of the House majority and minority, and an appropriate number of persons who are involved in tort reform issues, or who are involved in insurance or civil justice; and be it

FURTHER RESOLVED that the terms of the task force members shall begin July 1, 1989, and that the task force shall terminate January 31, 1990; and be it

FURTHER RESOLVED that the task force shall submit a report of its findings and proposed legislation to the legislature by January 31, 1990; and be it

FURTHER RESOLVED that the administrative and legal services of the Legislative Affairs Agency shall be made available to the task force.

LIABILITY INSURANCE TASK FORCE MEMBERS

Legislative Members:

Representative Sam Cotten, Chair
Representative Red Boucher
Representative Virginia Collins
Representative Dave Donley
Representative Johnny Ellis
Representative Peter Goll
Representative Max Gruenberg
Representative Ron Larson
Representative Loren Leman
Representative Mike Navarre

Non-legislative Members:

Gary Fye, Gary Fye Company, PO Box 92971, Anchorage 99509, 272-1502
Insurance Investigator

Vince Haneman, University of Alaska, Dean of Engineer, 539 Duckering,
Fairbanks 99775, 474-7330, Educator/Engineer

Russ Huffman, M.D., Past President, Alaska State Medical Association,
701 Stearns Place, Paynesville, MN 56362, (612) 2443-3666,
Physician

Jeff Jefferson, Esq., 215 Fidalgo Street, Kenai 99611, 283-9187,
Attorney

Nancy Lord, PO Box 558, Homer 99603, 235-8252, Consumer

Ames Luce, Esq., Luce & Hensley, 1015 West Seventh Avenue, Anchorage 99501,
272-9403, Attorney

David McGuire, M.D., 4040 Laurel, Anchorage 99508, 562-4142, Physician

Al Parrish, Westmark Hotel, 880 H Street, Anchorage, AK 99501, 272-9403,
Businessman

Mary Pierce, MICA, Aleut Plaza, 4000 Old Seward #203, Anchorage 99503,
563-3414, MICA

Jim Witt, Teamsters, 4300 Boniface #449, Anchorage 99510, 269-4258,
Attorney

Alternates at March 2-3, 1990 Meeting

Bill Brock for Mary Pierce, PO Box 20709, Juneau 99802, 586-3656, Financial Management Consultant and Chair of MICA

Dan Hensley for Ames Luce, Luce & Hensley, 1015 West Seventh Avenue, Anchorage 99501, 272-9430, Attorney

Richard Ritter for Vince Haneman, Minch Ritter Voelckers Architects, 800 Glacier Avenue, Juneau 99801, 586-1371, architect

Special Counsel to Task Force

David Rogers, PO Box 33932, Juneau 99803, 586-2366, Lawyer

ATTACHMENT NUMBER ONE

Memorandum from David E. Rogers describing fact finding process and contents of multi-volume fact submittal

DAVID E. ROGERS

LAWYER

P.O. Box 33932
JUNEAU, AK 99803

907-586-2366
FAX 907-586-6959

ATTACHMENT #1

MEMORANDUM

TO: Liability Task Force

FROM: David Rogers DW

RE: Fact finding efforts

DATE: January 19, 1990

Our next meeting is set for March 2 (starting at 1:30 p.m.) and March 3 (if necessary; starting at 9:00 a.m.) in Juneau. Attached are materials compiled by my office to date which deal with the various factual matters identified by the Task Force at its first meeting in September. They provide a fairly comprehensive overview of the subjects under discussion although some materials may be dated and/or incomplete. I did not attempt to cover every conceivable angle given limits of time and space, although I did arbitrarily expand the scope of our inquiry into professional liability issues to include Nurses and Dentists.

Additional information will be forwarded upon receipt.

If I have missed an issue that you are concerned about or failed to address a question raised at the last meeting please let me know as soon as possible and I will try to respond before our next show. Please note there are some overlaps since several folks responded to my questions in one letter/submittal which cannot be easily divided (note, for example, information regarding dentists and nurses in "Availability/Affordability;Insured Percentage"); certain reports and studies fall into more than one category. There may also be missing or out of order pages, etc. although I have gone through everything pretty carefully to avoid this problem. Each section was stapled if it could be stapled, bound if not, or "rubberbanded" if it couldn't be stapled or bound. All sections have holes for a three ring notebook if you prefer that method of keeping things organized.

I have not attempted to "stack the deck" one way or the other. Generally, I have tried to give you the best available information from "non-partisan" sources

(particularly those identified in the Group #1 and #2 game plans). However, I have also taken the liberty of including what some may consider "partisan" materials (from both sides of the fence) where I felt the information was relevant or helpful in defining a point of view on the many interrelated issues before us. I anticipate that some of the materials contained in this second packet will be rejected by the Task Force for one reason or another when it draws its final conclusions.

You may also want to take a second look at your first packet for other views on the issues.

Additional suggestions are encouraged. If I have left something out which has been recommended by one party or another I am happy to reconsider. It is also quite possible that constructive information in my possession has been lost in the shuffle.

This should not be considered a final product as there are gaps and other problems (some yet to be discovered) which will hopefully be resolved as the process continues. I apologize for the long delay between meetings, but I had to start from scratch and things have arrived in bits and pieces often requiring additional analysis and follow-up; further complicated by last minute realizations that I had missed a piece of the puzzle, endless problems with scheduling our second meeting (Christmas, Session, and busy Task Force members) and other logistical difficulties. After you (and I) have had a chance to start digesting all this and prior to our next meeting, I'll send out a memorandum with my thoughts and observations along with additional materials.

I know there is a lot to review in a fairly short period of time but the subjects addressed are complex and I thought it best to give you as much original data as possible for starters rather than to simply offer a summary of my impressions and conclusions. Fortunately, some of these materials can be skimmed easily.

Just pretend you are a student studying for a mid-term exam.

My thanks and compliments to the many people and organizations who bent over backwards to assist me in this effort without complaint; and a special thanks to Julie Kraft who was always there when I needed her advice and assistance.

Here is a brief discussion of major attachments by topic as set out in the Task Force Group 1 and Group 2 "to do" lists:

1. INSURANCE RATES: You will find attached rate information (current to this date), including "tail" coverage quotes,

received from the major admitted carriers who have responded to informational requests similar to that contained in the "Claims Survey" section. These surveys were sent to as many admitted carriers as we could identify at the time for each of the target professional groups (Lawyers, Physicians, Hospitals, Architects, Engineers and Land Surveyors). In an effort to broaden the scope of our inquiries, I am also including current rate filings provided by the Division of Insurance for Nurses, Nurse mid-wives, Dentists, and Accountants. No other rates have been included but I am told that the Division of Insurance is developing a comparative analysis of auto and home owner's rates which I will pass along.

Finally, I've attached the MIEC rate filing documents provided by the Division of Insurance for your information. Rates filings for other liability policies of admitted carriers (including MICA, which was to thick to include) are available in my office for anyone who is interested. Please let me know. I am also attempting to nail down rates for those non-professional categories listed as problem areas by the Division of Insurance and/or the Alaska Independent Insurance Agents and Brokers Association; and determine general rate trends for the major professional categories over the last several years. I have not focused on "surplus lines" ,"purchasing groups" and similar issues because you have to draw a line somewhere but we may want to take a closer look in the future. More on this topic in the analysis memorandum. Stay tuned.

2. AVAILABILITY OF INSURANCE: Information developed by the Division of Insurance, the Alaska Independent Insurance Agents and Brokers Association, various professional organizations and the Division of Occupational Licensing, along with responses from several of the major admitted carriers (included in the claims survey section) are attached. This is pretty good stuff. Please read these materials carefully. I am told that relevant additional data developed by the Division of Insurance in December concerning surplus lines (which apparently can only be used when there is an admitted carrier availability problem) will be provided in the near future. Information regarding CPA's (and hopefully Day Care facilities) will follow.

3. PERCENTAGE OF UNINSURED: All available information is included for Doctors, Lawyers, Engineers, Architects, Land Surveyors, Dentists and Nurses. Information regarding CPA's and Day Care Facilities will be forwarded as soon as possible. You will note that with the exception of Doctors, most of the data on this topic is dated, speculative or non-existent. A current survey would be necessary to adequately answer this inquiry. I suspect that most, if not all , of the professional organizations would to be willing to conduct such a survey if necessary; but given the effort

required I have not asked them to pending Task Force discussion. However, I have prepared a draft questionnaire which I can share with you upon request. A survey conducted by the Alaska State Medical Association which apparently addresses this issue and perhaps related questions is currently underway with results available by mid-February if all goes according to plan.

4. AVAILABILITY OF SERVICES: This has been hard to pin down since the Task Force provided little guidance on the "other services" category. I have surveyed with a broad brush state and federal agencies, professional and other organizations and individuals who might have something to add to the discussion. All available information received to date is included for target professionals (expanded list). Additional information regarding CPA's is in progress. I'm still working on the "other services" category and waiting for a response from the Department of Health and Social Services; information compiled to date is attached. In addition, I just received word from the Alaska State Medical Association that there are doctor availability problems in the following communities: Haines, Tok, Ketchikan and Dillingham as well as a variety of specialized service gaps (eg. no Ob/Gyn) in other communities. I've also heard that Craig currently has no doctors but this hasn't been confirmed.

Finally and for your information, I am told that it is very difficult for people to find lawyers to represent them in Worker's compensation and certain medical malpractice cases.

5. WHO RECEIVES WHAT FROM SETTLEMENT: See attached "pie chart" from the Rand Corporation contained in the so-called "three-level" study discussed below. Similar information is contained in "Costs and Compensation Paid in Tort Litigation" by Kakalik and Pace also included in that section. Based on my discussions with various interested parties, it appears that no such breakdown has been developed for Alaska, but I suspect that the results would be comparable.

6. CLAIMS EXPERIENCE OF SELF-INSURED ENTITIES: I also sent a claims survey to target self-insurers in Alaska (all major public entities that we could identify at the time and a couple of private entities); results received to date are included (State of Alaska, Municipality of Anchorage, Anchorage School District and the University of Alaska) along with a couple of letters from hospitals in Cordova and Petersburg. A second, less complicated request went out recently to a wider cross section of self-insured's in an effort to pick up more information since several entities were either unable or unwilling to respond to my naively comprehensive original request. In addition, as I mentioned

above, most of the major players in the Alaska admitted professional liability market have responded as best they could with the exception of National Union (lawyers liability) which has apparently declined to respond.

Please note that this section begins with the heading "Claims Information-Professionals".

7. ROLES AND MECHANISMS OF STATE AGENCIES: The attached materials summarize the duties of three state agencies which have primary roles in this arena - The Division of Insurance in the Department of Commerce and Economic Development, which regulates insurance activities in the state; the Division of Risk Management in the Department of Administration which is responsible for handling claims against the State of Alaska, a "self-insured" public entity; and the Division of Occupational Licensing within the Department of Commerce and Economic Development which regulates several of the professional groups discussed in the attachments including Doctors, Dentists, Nurses, Architects, Engineers, Land Surveyors, and Certified Public Accountants. I am still waiting for information on State agencies involved in licensing/certification of hospitals, day care facilities, etc. but I should have more on this soon.

8. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: See attached memo from Attorney General's office which tells us what has happened to date along with comments from industry representative Tom Slagle.

9. PEER REVIEW PANEL RESULTS; TOTAL NUMBER OF MEDICAL MALPRACTICE CASES: As you will see from reading the attached letter from the Alaska Court System much of this information is not readily available. The last document in this section does contain potentially useful information but, ironically, I've lost track of the source. Hopefully, someone out there can help me fill in the blanks. I'm also trying to determine annual costs to the State Court system relating to tort litigation and how long it takes to resolve a typical negligence case from the filing of a complaint to final disposition.

10. OTHER SOLUTIONS TRIED ELSEWHERE; MATRIX OF STATE SYSTEMS; FEDERAL ACTIONS: I have included information developed by the National Conference of State Legislatures, a New York law firm which tracks these issues and miscellaneous other sources including the Rand Corporation. There is also a separate attachment on "pre-judgement interest" in response to a specific Task Force inquiry. The James Ludlam article ("Battle for Medical Malpractice Reform") while partisan was included because it contains useful information on legislative strategy issues and "tort reform" pros and cons among other things. I've also attached

an NCSL summary of pending 1989 legislation around the country to give you a sense of current thinking on the subject and a copy of an Alaska Attorney General's opinion on the constitutionality of several proposals contained in HB 166; but please note my unsolicited opinion that the conclusions contained in this memorandum are speculative and debatable.

There is duplication in this section but I wanted to give you a choice of formats. Some information may be dated (e.g. Statute of Repose/Limitations) due primarily to the ever present possibility of judicial decisions overturning these laws on constitutional grounds.

At a minimum, I recommend that you read the NCSL narrative and the Wilson, Elser report and take a quick look at what was going on around the country in 1989. An interesting overall view of Federal and State activities is also contained in Chapter 8 of the Winston/Litan book discussed below.

11. ALTERNATIVE CLAIMS RESOLUTION MECHANISMS: I've included a sampling of information on this topic which should give you a pretty good sense of some of the more significant alternatives which are in operation or under consideration. This section includes a 1984 Rand study on state court arbitration, a comparison of three medical liability reform proposals, and discussions of the Hawaii arbitration system and the Virginia Birth Related Neurological Injury Compensation Act. I also direct your attention to Huber who argues direct "first party" insurance (apparently similar to the policies some people purchase before they get on airplanes) and comments contained in the Litan et. al. piece discussed below. Finally, you may want to refer to my original information package for a review of Governor Cowper's "No Fault" medical malpractice proposal.

12. IMPACTS OF U.S. TORT SYSTEM CHANGES: This information is hard to come by. I have tried to provide several reasonably credible perspectives on the question, although at first glance the evidence appears to be somewhat contradictory. This section includes information from Rand ("Assessing the Effects of Tort Reform"; "Frequency and Severity of Malpractice Claims"), and actuaries Milliman and Robertson along with several other articles on the subject. Please note that the Danzon report on Frequency and Severity of Claims is often referred to by other civil justice commentators. The Maine report discussed below also addresses these issues.

13. LEGISLATIVE RESEARCH REPORTS. All reports prepared to date on liability issues are attached.

14. RAND STUDY-THREE LEVELS: It took awhile to find this study but I am pleased to introduce "Trends in Tort Litigation, The Story Behind the Statistics" by Hensler et. al. I have also included a recent Maine medical malpractice study which you may find interesting along with several other reports (mostly from Rand) which address a number of questions raised by the Task Force; and will be happy to order additional materials in your discretion (see attached Rand Bibliography).

15. RESULTS AND AMOUNT OF SELF-REGULATION: Attached are applicable statutes, regulations, current annual reports, national standards, disciplinary statistics, state by state comparisons and observations supplied by various professional organizations and regulators, along with information regarding educational programs and requirements. More will follow as soon as it arrives in my office including the Alaska Bar Association's latest annual report and a general discussion of trends over the last few years.

16. CHANGES IN TIME IN LAW OF LIABILITY AND DAMAGES: The Huber and Brodeur books (five copies each) just arrived and are available upon request. Call if you want one. I have also included an excellent overall discussion of the issues (including a summary of the kinds of changes which have occurred over the last 30 years) edited by Stephan Litan and Clifford Winston of the Brookings Institution which I urge you to review, particularly the Forward and Chapters 1 and 8. I have talked to Mr. Litan and concluded that he does not appear to have any axes to grind.

17. CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IS TREATED: While it is not exactly responsive to this specific question, I have included a report prepared by well known consumer advocate Robert Hunter which hits on a number of topics before us. This also can be considered a partisan effort (which may require a rebuttal from the insurance industry and others), but I feel we have an obligation under the terms of our mandate to review Mr. Hunter's many findings and conclusions since he is considered by many to have a steady and enlightened handle on the issues before us. As I mentioned before, Gary Fye is also willing to discuss the service issue at our next meeting if there is no objection from the group. Otherwise, I am open to additional suggestions on how to further explore this topic and related questions.

18. INSURANCE DEPARTMENT REPORT: Jim Jordan, formerly of the Division of Insurance, says there is no such report.

19. MISCELLANEOUS: I have also included several additional attachments which may fall into the "bias" category but are still worth reviewing in my opinion. These include excerpts

from a Tillinghast study on U.S. and World trends, a claim data overview by ISO, Inc., information prepared by Al Tamagni, Senior regarding Alaska Court Rules and related matters, a 1986 report prepared by several state Attorney's General on the causes of the liability insurance situation, A Louis Harris study and others.

Have fun and feel free to call with questions, etc.

Remember, "no pain, no gain".

ATTACHMENT NUMBER TWO

Highlight Summary (as of March 1990)

ATTACHMENT # 2

SUMMARY OF DATA HIGHLIGHTS
(as of March, 1990)

I. AVAILABILITY AND AFFORDABILITY OF INSURANCE.

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

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

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

II. PERCENTAGE OF UNINSURED.

A. Based on information provided by the Alaska State Medical Association the total percentage of uninsured physicians in Alaska is 24% in cities, 12% in towns and 56% in the Bush. The study further indicates that OB/GYN (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. A more recent survey by the Medical Association of Family Practice and OB/GYN practitioners indicates that 15% are uninsured (based on a response rate of over 50%); a majority of these in urban areas. The differences between these numbers possibly are explained by the fact that the latter survey takes into account doctors who are insured by group programs although additional information and analysis is required.

B. Only four out of 23 hospitals surveyed by MICA are uninsured/self-insured.

C. Only 2% of Dentists are uninsured.

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

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

III. AVAILABILITY OF SERVICES.

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

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

IV. PEER REVIEW PANEL RESULTS AND RELATED STATISTICS.

A. There is little useful information readily available from the Court System regarding peer review panel results, the frequency and severity of liability actions, the length of time it takes to process an average case and/or the costs of

litigation to the court system or the parties. However, we do know that between January 1, 1987 and July 1, 1989, 177 malpractice cases have been filed in Alaska State Courts: 90 Medical Mal.; 56 Legal Mal.; and 31 "Other". Information provided by the Alaska State Medical Association suggests that as of December 22, 1989 there have been 338 medical malpractice claims processed through the peer review panel program since the current system was established in the 1970's, an average of 26 claims per year with no particular upward trends indicated. Of approximately 178 claims reviewed, the expert advisory panel sided with the defendant 138 times and with the plaintiff 40 times. Finally, MICA has carefully reviewed 90 cases (out of a total of 244 cases since inception) which contain sufficient information for meaningful evaluation and has found that there were fifteen reports adverse to Health care providers, eleven reports that were mixed or equivocal as to the health care provided and Sixty Five reports that were favorable to the health care providers.

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

V. RESULTS AND AMOUNT OF SELF-REGULATION.

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

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

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

VI. STATE AND FEDERAL LEGISLATIVE ACTIVITY.

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

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

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

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

VII. ALTERNATIVE PROPOSALS.

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

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

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

VIII. THE RAND THREE-LEVEL STUDY.

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

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

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

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

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

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

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

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

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

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

X. ALASKA CLAIMS EXPERIENCE- PRELIMINARY FINDINGS.

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

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

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

XI. WHAT SHOULD THE LEGISLATURE DO?

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

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

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

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

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

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

F. A very recent study completed by Harvard University was available to late in the process to be included in this report but should be carefully reviewed before any final conclusions are drawn.

Finally, it may be helpful to keep in mind the words of Gustave H. Shubert, Director of the Institute for Civil Justice of the Rand Corporation, who observed in 1986: "I think underlying all our problems with the civil justice system is the inability of this country to decide whether it wants to have a pure compensatory system or whether it wants to have a fault based liability system. We can't decide whether everybody should be compensated for every injury no matter what its cause, or whether we want compensation to be limited in a strict way, in a comparative way, or in a contributory way to those who have caused the injury. My personal assessment is that we are experiencing the disadvantages of trying to operate both systems in tandem,

the worst of both worlds. We are attempting to compensate everyone with a fault-based system and we are incurring huge social overhead costs by attempting to do so. I believe it is time to focus on that overall choice and to be rational in doing so".

ATTACHMENT NUMBER THREE

Information Summary and Index - "Almost Everything You Ever Wanted to Know About Liability Issues (and were afraid to ask???)

CONTENTS

ATTACHMENT #3

ALMOST EVERYTHING YOU EVER WANTED TO KNOW ABOUT LIABILITY ISSUES (and were afraid to ask???)

Here is a general summary by category of the information contained in the multi-volume factual submittals along with occasional editorial commentary as appropriate:

1. RATES: See Attached rate information including rate filings for selected entities.

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

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

* Prices are coming down;

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

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

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

* Pollution usually has a $25,000 deductible;

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

> Lloyds- testing lab-$1/2 million coverage $50,000 premium last year; $1 million coverage $25,000 this year.
>
> CNA- mechanical engineer doing some electrical and survey-$3 million in billings-$1 million coverage, $25,000 deductible, $129,000 premium.

* Only Allstate was identified during their survey as providing unlimited Civil Rule 82 coverage on its personal

lines coverage. Demand is not there although markets could be found.

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

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

3. PERCENTAGE OF UNINSURED: a) Physicians: Based on information provided by the Alaska State Medical Association the total percentage of uninsured is 24% in cities, 12% in towns and 56% in the bush. According to my notes, the study further indicates that OB (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. The results of a recent detailed questionnaire sent out to over 600 doctors gives us a different picture. Based on responses from over 50% of those surveyed, 15% of the Family Practice and OB/GYN physicians are uninsured in Alaska. Apparently, this figure takes into account a variety of group insurance programs not reflected in the other information provided by the State Medical Association. The results also suggest that a majority of uninsured Family Practice and OB/GYN's are located in Anchorage and other urban areas. Please note that MICA insures approximately 50% of Alaska insured physicians, MIEC approximately 30% and CNA approximately 10% through

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

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

4. AVAILABILITY OF SERVICES: The information contained in this section is limited. What follows is a discussion of some of the service gaps in Alaska that I have been able to identify and comments on whether these gaps are attributable to the affordability or availability of liability insurance: a) Health Care: There are a number of communities in the state (mostly rural) that are having difficulties recruiting and retaining physicians. According to the Health

Association of Alaska and the Alaska State Medical Association Haines, Tok, Ketchikan, Dillingham, Wrangell and Petersburg (and possibly Craig) are having doctor availability problems along with other communities with specialized care gaps. In addition, according to a 1988 survey of availability of obstetric care for low income women, fewer than half of the physicians surveyed (93% of the 196 family practice and OB/GYN physicians surveyed responded) are now providing obstetric care; "within two years only slightly more than a third of the surveyed physicians may be offering obstetric services in Alaska." However, recent uncorroborated information suggests that this trend not be true for Anchorage and perhaps other larger urban communities. This source contends that six new obstetricians have begun practicing in Anchorage in the last two or three years and two additional obstetricians will begin practicing there in the near future.

In the more recent survey of Family Practice and OB/GYN physicians discussed above, 32% of doctors formerly providing obstetrical services have stopped performing this service primarily due to the cost of liability insurance.

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

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

supporting travel costs." The Department of Community and Regional Affairs tells us that this position was echoed in a Resolution passed in November by the North and Northwest Alaska Mayors Conference which proposed an insurance program which will cover both transportation to Anchorage or Fairbanks and services provided by non-Indian Health service facilities in these towns.

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

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

c) Engineering/Architectural/etc Services: We have no Alaska specific information on this but according to Rich Ritter of the Alaska Chapter of the American Institute of Architects there is no apparent availability problem despite the fact that over 50% of Alaska Architects, Engineers and Land Surveyors have left the state in recent years. He feels that "there is still a core group of experienced

professionals remaining in Alaska available to provide professional services". It is not clear how much of the attrition is due to the cost of liability insurance versus the dramatic recent economic slump.

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

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

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

A variety of solutions are under discussion including a plan proposed by Virginia Johnson, Dean of the School of Education at the University of Alaska Anchorage, called the Middle School Day Care Center, which would locate day care

centers at the six middle schools in the Anchorage area with the curriculum being developed by the Director of the Day Care Centers.

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

5. CLAIMS EXPERIENCE - Preliminary Findings:

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

b.Self-insured/Uninsured entities: We have surveyed a wide variety of public and private "self-insured" entities. Results received from the State of Alaska, the University of Alaska, the Municipality of Anchorage, the Anchorage School District, the City of Fairbanks, the North Star Borough, the North Star Borough School District, the City and Borough of Juneau, NANA Regional Corporation, Inc., Nabors Alaska Petroleum Services, Phillips Petroleum Company, the Carr-Gottsten Corporation, Petersburg General Hospital and Cordova Community Hospital indicates that: 1) the majority of claims are between 0 and $50,000, public entities report

more claim activity than private entities; 2) most are settled, often prior to formal legal action; 3) there are occasional large claim payouts (mostly the State of Alaska;) which typically represent a large percentage of total losses in a given year; 4) defense costs do not appear to be significant but this information requires further analysis. Please note that NANA has made two specific suggestions of issues that should be looked at by the Task Force which are contained in their letter to David Rogers dated January 31, 1990 attached.

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

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

(against the advice of advice of industry representatives according to Slagle) and intends to continue.

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

Information provided by MICA during Task Force deliberations involving 90 cases where panels had been appointed (only definitive information available; MICA has dealt with a total of 244 lawsuits from its inception to March 1990) tells us that: 1) There were 15 reports adverse to health care provides with payment resulting in all instances by MICA and/or co-defendants; 2) Eleven reports were either mixed or equivocal as to the health care provided. In one instance, that case is still pending (as of March 5, 1990) with no resolution. Five cases resulted in settlement by MICA. Two cases were dismissed by the plaintiff. Another case was dismissed by the plaintiff but it was unclear whether the basis for the dismissal was voluntary or successful defense motion for summary judgement. Two of the cases resulted in payment by other co-defendants but no contribution from MICA; 3) Sixty-five reports were favorable to the health care providers. Five are still pending without resolution. One was tried to a plaintiff verdict with a substantial recovery. Three were tried to a defense verdict with no recovery of costs and fees by MICA. Twenty-eight cases were dismissed by one mechanism or another. Twelve were dismissed by plaintiff in return for a waiver of costs and fees. Seven were dismissed on successful motions for summary judgement with virtually no recovery of costs and fees by defense. Nine were dismissed but the basis for dismissal was unclear. Finally, in one case, the MICA defendant was dismissed by the plaintiff who proceeded to try the case against a co-defendant and recover a

substantial sum through a plaintiff verdict and large judgement.

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

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

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

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

d) Based on information gathered to date, it is difficult to determine if, in fact, a relatively small number of professionals cause a relatively large percentage of complaints/disciplinary actions but some statistics included in this section suggest that is the case. The Alaska Bar Association tells us that since 1982 there were 1505 complaints against 710 attorneys. 57% of the attorneys had only one complaint against them which accounted for 27% of the complaint volume. 18% of the attorneys had two complaints against them which accounted for 17% of the complaint volume. The remaining 25% of the attorneys had three or more complaints against them and were responsible for 56% of the complaint volume. However, additional information provided on disciplinary actions taken against

lawyers suggests that there are repeat offenders but they do not dominate the statistics except in the disbarment and probation categories.

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

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

f) As to a specific task force question concerning Alaska physician disciplinary actions compared to other states, the information provided by the Public Citizen Health Research Group ranks Alaska #2 (per capita) in Doctor discipline for 1987; up from 19 in 1986 (Pam Ventgen tells us that in 1981 there was 1 disciplinary action; 0 in 1982; 4 in 1983; 2 in 1984; 1 in 1985; 2 in 1986; 5 in 1987; 5 in 1988 and 7 in 1989. She also points out that HB 70, passed in 1987 provided for a full time investigator and an executive secretary for the medical board which may help explain these numbers) The recommendations contained in this report are also worth noting: Increase license fees to $500 per year and use all money to finance doctor disciplinary actions; Require periodic re-certification of doctors based on written exams and audits of doctor performance such as medical record review; Grant subpoena power to state licensing boards to go after evidence necessary to evaluate doctors; Grant state boards emergency powers to suspend a doctor's license to practice, pending investigation, when continued practice is considered to constitute a hazard to public safety; Require all hospitals to have a risk management program designed to prevent injury to patients (according to the American Hospital Association only 60 percent of hospitals have such programs and only half of these are excellent programs); Require all insurance companies to experience-rate doctors with sub-specialities,

whereby doctors with the best records pay the lowest premiums, and multiple malpractice "loser" doctors pay the most; Require insurance companies to immediately disclose and forward to the state licensing board the filing of malpractice claims, as well as the results of all malpractice settlements and adjudications (see HB 146 now in House HESS); Require hospitals or other institutions taking disciplinary actions against doctors to publicly disclose and forward to the state licensing board the details of such actions; Provide immunity and confidentiality to all those reporting doctor malpractice, incompetence, substance abuse or fraud to state medical boards (see HB 146); Provide strong consumer representation on state medical boards; Do not allow the state medical society to control membership on the boards; Officials should make strong, public statements indicating a commitment to strong doctor discipline and protection of patient's safety. It is my understanding that several of these suggestions have already been adopted in Alaska.

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

a) Legislative responses to the increasing cost and availability of insurance and apparent claim trends can be broadly categorized into civil justice- or tort reform - measures, insurance regulatory reform measures and risk management measures. According to Patricia Young formerly of the Legislative Research Agency from information provided by the National Conference of State Legislatures (NCSL), in 1986 the emphasis was on civil justice reform. The legislative focus in 1987 turned to immunities- from sovereign immunity extended to counties, cities and towns, to immunity from personal liability extended to groups of public employees and volunteers. However, more recently legislative activity in civil justice reform has declined and the focus has shifted to regulation of the insurance industry, including the anti-trust suit discussed above. In 1989, the majority of legislative activity regarding liability dealt with regulation of the automobile insurance industry, including California's proposition 103 and similar measures introduced in other states.

b) The significant "tort reform" measures enacted over the years include laws relating to limits on recovery (caps) of damages; abolition or modification of Joint and Several Liability; reduction of compensatory awards by collateral sources, or at least notification to the jury of such sources; limits on attorney's contingency fees; limits on punitive damages; periodic payment of awards; penalties for frivolous suits; settlement incentives; limits on prejudgment interest; and establishment of statutes of limitation and repose. Proposals concerning alternative

systems and similar issues will be discussed below. I have little "easy to read" summary information on the status of proposals regarding regulation of the insurance industry, professional competency laws and similar approaches to the problem.

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

d) According to the Wilson Report, in 1989, the most significant activity concerning Civil Justice reform occurred in the courts rather than the Legislatures. In 1986 thirty-six state (36) legislatures passed tort reform laws (varying in degree and significance). In 1989 only seven (7) states enacted reforms; although many measures were pending (see NCSL 1989 pending legislation summary). NCSL tells us that four state courts rendered decisions in litigation questioning the constitutionality of damages caps. In Maryland, the cap on non-economic damages in all civil suits was upheld; in Kansas, a $100,000 cap on such damages in wrongful death actions was upheld; the Virginia Court upheld a cap on total damages in medical malpractice cases; but in Washington, the cap on all non-economic damages was ruled unconstitutional(letter from Brenda Trolin dated December 23, 1989).

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

f) Alaska, in 1986, enacted a series of civil justice changes including: Modified joint and several liability; caps on non-economic damages ($500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages sustained while that person was committing a felony; detailed provisions on damage award requirements; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and

school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgement, costs and attorney's fees (including pre-judgment interest), and the effects of a release. This legislation has been characterized by tort reform advocates as a "patch work quilt" of necessary compromises, and, in their view, did not go far enough toward making Alaska's civil justice system fair and predictable. As you know, Alaska also has a medical malpractice claims system created during the 1970's.

g) On the automobile insurance front, California's Proposition 103 is the biggest news. This reform measure narrowly adopted by California voters in November 1988 included a one year 20% roll back in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers", as defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after November 1989; and election, instead of appointment, of the State Insurance Commissioner starting in 1990. Prop 103 also requires the Insurance Commissioner publish for consumers a list of rate comparisons, and compels insurance companies to notify their customers of the right to join an "independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum." The California Supreme Court upheld all of 103's long term restrictions on insurance rates and practices, but struck down the provision that would require insurers to be "substantially threatened with insolvency" before they could receive relief from rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

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

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

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

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

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

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

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

Typically in court annexed arbitration programs cases are heard by private attorneys or retired judges who volunteer to serve as arbitrators and, according to Rand, receive only a small honorarium for their efforts. Arbitration hearings usually are private, informal and often brief. After giving the parties an opportunity to settle, the facts of the case are heard with the litigants often appearing as witnesses. If accepted, an arbitrator's award in entered as a judgement and is enforceable. As a disincentive for frivolous appeals, some programs require applicants who request a trial de novo to reimburse the court for arbitrator's fees; in some programs court costs and attorneys fees may be levied on unsuccessful appellants, or applicants who do not improve their position (e.g. Hawaii-if the court does not alter the award by at least 15% in favor of the appealing party; see Patricia Young memo in this section). Note that such programs also are required by some carriers.

Does it work? The reason for these programs is to reduce congestion, costs and delay. According to Rand preliminary information derived from two studies of a new program in California and an older program in Pennsylvania arbitration can and does contribute significantly to reducing congestion, costs and delay. These findings are confirmed by the Hawaii and North Carolina experiences discussed in this attachment. For example, reviewers from the University of Hawaii of the Hawaii program which covers all tort cases with a probable jury award of $150,000 or less concluded in January of 1989 that: "Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants....To our knowledge no other arbitration program in the country claims to be reducing litigation costs; Hawaii leads the nation in this area." Similarly, a 1989 evaluation of the North Carolina program by the

University of North Carolina concludes that the program: disposed of cases faster that standard procedures; reduced trials and out of court settlements replacing them with "promptly scheduled adversarial hearings in a courtroom before specially trained arbitrators"; and improved litigants satisfaction with the outcome and procedure used in their cases. The study also notes that attorneys were satisfied with the program and, in a survey, voted strongly in favor of continuing it.

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

Please be advised that the American Medical Association, The American Hospital Association and the Physician Insurers Association of America each have proposed versions of alternative systems apparently involving arbitration or a form of administrative adjudication with various limitations on recovery. I do not have sufficient first hand information on these proposals at this time to go into specific differences but you may want to refer to the analysis prepared for MICA by Jerry Cogan. The State Alternative version of the PIAA proposal is also included for your information. Also note that the AHA calls for a study of a Medical Indemnity Fund as a supplemental method for compensating medical malpractice victims financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

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

b) The No-Fault Alternative to Tort Recovery: James Ludlam ("The Battle for Medical Malpractice Tort Reform: A Report From the Front Lines" prepared for the Annual Meeting of the American Academy of Hospital Attorney's, June 1989) tells us that in the 1970's and 1980's there was much discussion of possible no-fault alternatives to compensating plaintiffs for catastrophic injuries including "trip insurance" under which a patient bought his own coverage, or a system for which there would be payment without fault on the basis of a worker's compensation type schedule (similar to that

proposed by Governor discussed in my introductory memo to the Task Force dated September 15, 1989). There was little or no action on these proposals. In fact, the California Medical Association and the California Hospital Association concluded that these systems would be more expensive than the existing tort system based on a study of over 25,000 charts and dropped the whole idea.

Then, in 1987 North Carolina and Virginia adopted no fault programs followed by Florida in 1988. The North Carolina program was restricted to vaccine related injuries which were compensated for out of a fund consisting of state appropriations with a limit of $300,000. Damages only can be awarded under this system to the person receiving the vaccine.

The Virginia Birth-Related Neurological Injury Compensation Act, mentioned at our first Task Force meeting, apparently was adopted to meet a crisis in the availability of insurance for physicians practicing obstetrics (according to Ludlam, it was expected that 25% of the OB/GYN's were going to lose coverage by the end of 1987). The Act applies only to patients of physicians and hospitals that have voluntarily participated in the program by payment of $50 per delivery with a $150,000 maximum by a hospital and a $5,000 fee for a physician doing obstetrics. These payments are voluntary. In addition, all other physicians are assessed a fee of $250 as a condition of licensing. If the fund falls short there is an annual premium tax on all liability carriers in the state. The purpose of the fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery and resuscitation, and to be the sole and exclusive remedy for those who participate. The fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three physicians. Compensation is limited to actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees.

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

hospital reporting requirements of malpractice cases involving doctors and other provisions designed to provide notice of certain events. It is interesting to note that there are no caps if both parties refuse arbitration.

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

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

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

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

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

"Proponents of change argued that there has been an explosion of liability lawsuits in the past five years, that recent verdicts demonstrate that civil juries are "out of

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

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

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

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

c) Are jury awards stable or out of control? Based primarily on data complied by Rand from Cook County, Illinois and San Francisco, California between 1960 and 1984 (only data available in the U.S that can be used to discuss long term trends) they have concluded that: Plaintiffs in auto cases

involving modest injuries and expense continue to obtain modest awards and, at least in recent years, these awards generally hold after trial; Plaintiffs in product liability and malpractice cases are winning more frequently and obtaining higher awards; Deep pocket defendants in product liability cases ultimately pay much, if not all the awards against them, even after post-trial adjustments; Jury behavior seems more unpredictable, but this may simply be because we do not have a very good sense of why juries make the decisions they do. The authors suggest that these trends may hold nationwide because of the similarities between the jurisdictions studied.

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

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

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

Please note that a recent study by two Cornell Law School professors recently reported in the New York Times indicates

that since the mid-1980's published opinions have moved toward benefitting defendants over plaintiffs suggesting a possible shift in overall trends.

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

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

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

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

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

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

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

g) To keep professionals on their toes, the state could require investigations by the medical board of physicians who have three or more claims over a ten-year period which resulted in a payment; create an ombudsman within the board to defuse potential complaints before they are elevated to a claim; and require the board to collect additional information on the voluntary or involuntary loss of hospital privileges in or outside the state. They also suggest that the Legislature take a look at "care standards" that have been proposed by a variety of entities.

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

13. IMPACTS OF U.S TORT SYSTEM CHANGES: (Frequency, Severity and Rates - this section does not attempt to discuss impacts of tort reform on victim rights and related issues, but see

pros and cons discussions contained in your first information packet along with the James Ludlam article discussed above): While tort reform measures do appear to affect the frequency and severity of claims there is no solid proof to date that they also have a direct effect on the cost or availability of insurance.

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

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

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

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

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

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

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

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

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

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

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

While this potential positive impact on insurance costs is theoretically possible and there is evidence that the experience in California (which has had time to test the theory) and perhaps other states bears this out (the informal opinion of Ray Bacon of the California Department

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

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

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

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

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

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

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

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

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

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

14. ROBERT HUNTER ("CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IN TREATED"): Given limits of time and space I will only summarize in "bullet" form Hunter's many recommendations contained in the publication called "How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient- A Suggested Legislative Agenda for 1987" by Robert Hunter and Jay Angoff. Hunter's central premise is that limiting the ability of severely injured people to sue and be compensated for their injuries does not bring down insurance rates (see above for additional discussion of this issue). He proposes many reforms including: Requiring disclosure by insurance companies of data on actual income and payouts on different types of insurance; permit group insurance/risk-retention group programs; allow banks to write liability insurance; establish joint underwriting associations which provide insurance to those who can't get insurance in the voluntary market; establish state reinsurance programs which would authorize self-insureds to pay the state a premium in return for which the state would agree to pay all claims above a certain specified amount; establish state run insurance companies; establish

interstate compacts for interstate reinsurance programs; prohibit arbitrary cancellations of policies; require experience rating where good risks pay less than those who are bad risks; to allow the market to work competitively despite the McCarren-Ferguson Act, establish flex-rating which would allow insurance companies to raise or reduce rates without insurance commissioner approval within a "zone of reasonableness"; beef up enforcement by properly funding and staffing state insurance agencies; close the "revolving door" by discouraging or limiting the practice of hiring industry people to regulate the industry; establish an office of Insurance Consumer Advocate which would represent the consumer point of view at rate hearings and ensure that the insurance regulators do not rubber stamp insurance company rate requests; prohibit the pass through of lobbying expenses; require risk management by insurance purchasers and self-insureds which should reduce the frequency and severity of claims; allocate medical malpractice insurance costs more equitably. For example, doctors in high risk specialities pay for the risks that should be shared by others, doctors are broken down by insurance companies into to many categories with too few doctors in some categories, doctors pay for malpractice that could be more easily be borne by hospitals, and doctors are not experienced rated; insurance companies should disclose names of doctors involved in claims and the amount of those claims. This information should be made available to various organizations and the public in general; limit lawyers fees on both sides. Hunter focuses on defense costs and contends that defense legal fees have doubled in ten years. States could limit defense fees by disapproving any rate that included within it more than a certain percentage (he suggests 25%) for defense costs which would force the insurer to keep an eye on fees insuring that a greater percentage of the money flowing through the system would end up in the hands of the injured person; penalize frivolous actions on both sides including frivolous motions and objections by defendants lawyers who charge by the hour; to encourage accountability to the public, prohibit secrecy agreements which prevent disclosure of the details of a settlement and other information about the case; encourage offensive collateral estoppel which prevents re-litigation of certain facts (i.e. once a fact is established it can be used in future cases); pass back collateral source benefits by requiring the defendant to pay the full amount of a verdict but excuse the source of collateral benefits from paying such benefits to the extent they are already included in the jury verdict and then require the source of the collateral benefits to reduce the cost of those benefits across the board based on these savings; create incentives to settle including penalizing defendants for refusing to make reasonable offers to settle, and penalizing plaintiffs for making unreasonable demands; and last but not least, establish alternatives to the tort system including no-fault

systems (particularly for relatively minor injuries), arbitration, mediation, mini-trials, and other dispute resolutions systems. However, Hunter is careful to point out that cases involving defective products should be subject to common law principles without any limits on either compensatory or punitive damages: "The stories of A.H Robins and the Dalkon Shield, Ford and the Pinto gas tank, Richardson-Merrell and MER-29, and Johns-Manville and asbestos are just a few of the scandals unearthed as a result of tort litigation. And it was only the fear of more litigation, and of large awards for both compensatory and punitive damages, which finally forces these and other dangerous products off the market and encourages the development of less dangerous substitutes."

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

a) Tort law is largely based not on statutes but on common law, a body of legal principles developed case by case by judges, primarily those in state courts. It is difficult to generalize about the status of tort law in all jurisdictions but certain important changes in doctrines have occurred in the past several decades, all of which have expanded the system's function in spreading losses:

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

* The negligence standard itself has been extended through litigation to impose liability on a wide class of service providers not previously accustomed to being sued. Day care centers, ski lift, ice rink, and amusement park operators, taverns and restaurants, and not-for-profit organizations have all been taken to court for failures to warn of certain dangers and for the careless conduct of their employees. The exposure of these defendants to liability claims has been widened by the doctrine of joint and several liability, which allows prevailing plaintiffs to recover up to the full

amount of a total damage award from any single defendant if the other defendants are unable to pay, and by the collateral source rule, which prohibited juries from reducing damages by subtracting insurance monies or other compensation plaintiffs receive from other sources.

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

* Courts have relaxed the standards the plaintiffs must satisfy in proving, under either the negligence or strict liability doctrine, that defendants have caused their injuries. This trend has been manifested primarily in product liability and so-called toxic tort cases, which have frequently required courts to decide whether plaintiffs' injuries have been caused by their exposure, often over long periods of their lives, to substances recently discovered to be associated with the development of cancer or other serious diseases. Courts have adopted a long range of rules to determine causation in such cases. Some have placed liability on the first or last source to which plaintiffs can establish they were exposed; others have made all manufacturers of the substance jointly and severally liable. In one noted case involving the exposure of Vietnam veterans to the chemical Agent Orange, a federal court actively encouraged a $180 million settlement even though no hard scientific evidence had been uncovered that linked the chemical to the medical infirmities claimed by the plaintiffs.

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

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

b) The calls for reforming the civil justice system are less urgent now (1988) than they were in "recent months". As in

previous insurance cycles, increases in premiums have moderated. In some instances, coverage that was withdrawn has reappeared. In 1986 the property and casualty industry earned 11.6 percent on its equity, a return lower than the manufacturing sector average of 13 percent during the past decade but still considerably better than the disappointing performance of the previous two years.

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

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

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

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

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

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

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

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

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

l) There are gaps in existing compensation programs and devices. For example, more than 30 million people in this country remain uninsured for medical purposes at any given time, and perhaps more than 20 million are uninsured throughout a given calendar year. In addition, many of those with insurance have limited coverage, especially for the catastrophic medical expenses often associated with major tort litigation. Gaps also exist in programs designed to compensate for income losses, although such coverage (provided through public and private disability programs) probably has increased over time. There is little evidence that expanded tort liability has efficiently filled in the gaps left by the public and private network of compensation plans. In fact, it may be undermining the compensation objective by inducing private insurers to withdraw coverage and raise premiums at the expense of low income consumers.

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

effects are observed by Peter Huber in chapter 5 regarding hazardous waste facilities.)

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

o) Because these costs are so high, interest has grown in supplementing or replacing the tort system with alternative means of compensation similar to the worker's compensation system. Most suggestions would place some sort of cap on total compensation - especially for pain and suffering - in return for automatic eligibility. More ambitious proposals envision separate funds, financed by taxes on employees or employers or both, to pay compensation awarded to victims of medical malpractice or exposure to toxic substances. But the limited experience with alternative compensation programs in the United States has not been encouraging. The federal black lung program, was established in 1969 to provide temporary compensation for an estimated 100,000 miners with pneumoconiosis. But due to broadened eligibility provisions by Congress, 542,000 miners, spouses and dependents have received benefits under the program by the end of 1981. Because of this experience, future proposals to establish compensation programs are unlikely to be given serious consideration by Congress or state legislatures unless they are accompanied by convincing demonstrations that their costs can be contained. The New Zealand experience, which does not cover disease or sickness, has not been evaluated comprehensively; and is of probable limited value in the United States which is larger and has a more heterogeneous population. In short, we simply do not know whether society would be better off if the process of identifying risks and hazards were further centralized by replacing the tort system with more intensive regulation.

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

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

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

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

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

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

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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

ALTERNATIVE CLAIM RESOLUTION MECHANISMS

1) Establishment of Alternative to Traditional Litigation
2) Letter: 01/02/1989 To: Governor Cowper From: Mary Pierce
3) Comparison of Medical Liability Reforms By: AWA, AMA, and FIAA
4) Physician Insurer

Model Alternative Medical Liability Determination Act

Reforming the Civil Litigation Process - 8/1984

1) Board of Overseers
2) Reforming the Civil Litigation Process
3) Characteristics of State-Court Annexed Arbitration Programs
4) Comprehensive State ADR Program Database
5) State Programs by Case Type
6) Memo: 03/15/1989 To: Sam Cotten From: Patricia Young
7) Court Annexed Arbitration in Hawaii
8) Hawaii Arbitration Rules
9) Executive Summary
10) Court-Annexed Arbitration Program - 01/1989
11) Court-Ordered Arbitration in North Carolina
12) Study Results
13) Summary
14) Memo: 11/07/1988 From: Patricia Young
15) Code of Virginia
16) Memo: 02/14/1989 From: Patricia Young

RAND "THREE LEVEL" STUDY AND OTHER REPORTS

1) Report: Trends in Tort Litigation, 1987

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

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

4) Report: Medical Malpractice Liability Study - 1989

IMPACTS OF U.S. TORT SYSTEM CHANGES

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

2) Report: Assessing the Effects of Tort Reform

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

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

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

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

CHANGES IN INSURANCE SERVICES

HOW THE PUBLIC IS TREATED

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

LEGISLATIVE RESEARCH AGENCY REPORTS

1) Memo: 06/17/1985 To: Senator Bennett From: Carol Berryhill, enclosures
2) Memo: 03/15/1989 To: Rep. Goll From: Hayden Kayden, enclosures
3) Memo: 04/18/1989 To: Rep. Goll From: Hayden Kayden
4) Memo: 03/13/1989 From: Karen Oakley, enclosures
5) Memo: 06/06/1988 To: Rep. Boyer From: Ed Flanagan, enclosures
6) Memo: 06/06/1988 To: Senator Jones From: Becky Penrose
7) Memo: 12/16/1987 To: Rep. Boyer From: Karen Oakley, enclosures
8) Colorado Chapter
9) Minnesota Chapter 604
10) North Dakota Judicial Remedies
11) South Dakota Non-Profit Corporation Members
12) State of New Jersey Assembly No. 2398
13) Memo: 05/28/1987 To: Rep. Swackhammer From: Gretchen Keiser, enclosures
14) Report: Workmen's Compensation Committee
15) Memo: 01/30/1987 To: Rep. Sund From: Penelope Weyrauch, enclosures
16) Memo: 11/06/1985 To: Rep. Koponen From: Mark Torgerson, enclosures

American Bar Association Journal

American Insurance Association Studies

1) Annual Report

Insurance Services Office, Inc.

1) Report: Coming Capacity Shortage

Liabilities of Municipalities 1983

1) Report: NIMLO 1983

Information From the National Insurance Consumer Organization

1) Letter: 08/14/1985 To: Rick Rule From: Ron Landsman, enclosures

United States General Accounting Office Report - 1985

California Draft Legislation - 1985

Colorado - 1985 Self-Insurance for State

Connecticut - 1895 Discussion of Sovereign Immunity Doctrine

Illinois Governmental Tort Immunity - 1985

Louisiana - 1985 Legislation on Self-Insurance Liability of Public Entities

Maine Study - 1980

Maryland 1985 Tort Claims Act Amendments

New York Draft Legislation

New York Tort Reform Article

New York Tort Reform Article

North Dakota 84 Collateral Source Rule

Ohio Legislative Alternatives 1983

Ohio Municipal Liability 1979

Oregon 1980 Self-Insurance for State Tort Liability

South Carolina 1985 Amendments to Tort Claims Act

1) Memo: 06/17/1985 To: Sen. Bennett From: Carol Berryhill

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

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

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

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

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

MISCELLANEOUS

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

2) Report: Tort Cost Trends

3) Report: Claim File Data Analysis

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

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

6) Alaska Supreme Court System

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

ATTACHMENT NUMBER FOUR

Comments From Task Force Members

Alaska State Legislature

P.O. Box V
Juneau, Alaska 99811
(907) 465-2828

3111 C Street, Suite 412
Anchorage, Alaska 99503
(907) 561-2040

Anchorage • District 10

Member
Alaska Legislative Council
Labor & Commerce Committee
Special Committee on Foreign Trade
Finance Sub-Committee for Labor

Representative Virginia Collins

M E M O R A N D U M

To: Representative Sam Cotten, Chairman
Liability Task Force

From: Representative Virginia Collins

Date: March 23, 1990

Subject: Statement-Liability Task Force

Several members of the task force expressed their concerns that the task force had been a failure. Given the time frames and the climate, I think that the task force really did the best it could.

The real failure, as I see it, is everybody's inability or refusal to address the real problem and that, I believe, is that the original purpose of the civil justice system, i.e., compensating innocent victims who have been injured or suffered a loss by another through no fault of their own, has been lost.

It seems that the civil justice system has become a means to redistribute the wealth. The only people who have to worry about being sued are those who have assets. The only victims who are compensated are those whose injury occurred at the hands of a wealthy individual or entity. This leaves us with an expensive, unworkable and unbalanced system, that in the end hurts us all.

Until we focus our efforts on returning the civil justice system to the purpose for which it was originally intended, we will continue to fail in our efforts to appropriately address these issues.

LAW OFFICES
Luce & Hensley
A PROFESSIONAL CORPORATION
1015 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501

L. AMES LUCE
DAN A. HENSLEY

TELEPHONE (907) 276-1191
FAX:(907) 277-4864

March 27, 1989

Via Fax

David E. Rogers, Esq.
Box 33932
Juneau, Alaska 99803

Re: Liability Task Force Report

Dear David:

I have very serious objections to the Task Force issuing a report in the problem/solution form you have suggested. The reasons for my objections are:

(1) The "problem" portion of the report suggests a widespread insurance problem when, in fact, the data gathered by the Task Force indicates that insurance problems only affect a limited segment of Alaska's businesses;

(2) The "solution" portion of the report suggests that there are a number of viable solutions to insurance problems when, in fact, the data gathered by the Task Force indicates just the opposite; and

(3) The report fails to mention that the Task Force has investigated only the tip of the iceberg of the insurance issue and that a substantial number of the Task Force members recommended that the investigation continue before the Task Force issues any reports or makes any recommendations.

Now let me move to the most important issue. The issue isn't what kind of report we do, but what kind of accountability we have to the legislature and to the public.

We were charged with investigating issues relating to insurance problems. We looked at issues of interest to some members of the committee -- legislative restrictions on victims' rights. We completely failed to consider issues such as insurance regulation, reinsurance, and similar questions. We haven't completed our job but we have been disbanded.

Some persons, more cynical than I, might suggest that the reason we were disbanded is that the information we gathered concerning the impact of restrictions of victims' rights on insurance rates did not support further legislative activity in that area. Regardless of the reason for discontinuation of the Task Force, the fact remains that there is much work to be done before we can even begin to understand how best to reduce insurance rates (assuming reduction of rates is necessary). We will have wasted the public's money if we don't complete that work.

I realize that issuing any report from the Task Force may be problematic because there exist disagreements among the members as to the impact of the data gathered. As you know, I believe that the data gathered by the Task Force strongly supports the view that further legislative restrictions on victims' rights won't have any appreciable impact on insurance rates and certainly won't solve those insurance problems that presently exist in this state. However, I am sure that there will be no Task Force consensus on that view. Therefore, I don't expect you to issue a report taking that position.

I don't have any objection to a report which attempts to summarize the data gathered by the Task Force in an objective manner. You did just that in your February 22, 1990, draft. I would have no objection to the Task Force issuing a report in this form (as opposed to the March 2 edited form) <u>if</u> the report is prefaced with appropriate disclaimers, and <u>if</u> the report makes clear that there still is much work to be done to understand how insurance rates are made and how those rates can be impacted by legislation.

Thanks for the opportunity to participate and make these comments.

Sincerely,

LAW OFFICES OF LUCE & HENSLEY

Dan A. Hensley

DAH:fs
:udd:case:off.let.rog.tor.ref
cc: Representative Sam Cotten

March 21, 1990

TO: Speaker Sam Cotten
Chair, Liability Insurance Task Force

FROM: Nancy Lord NL

RE: Liability Insurance -- Conclusions and Recommendations

At the end of the task force's final, teleconferenced meeting last week, task force members agreed to submit their thoughts on the subject, to be compiled into a report. It is understood that the task force did not fulfill its charge to complete a comprehensive review of the issue and make recommendations to the legislature. The primary reason for this, in my opinion, was that the task force did not meet enough times to reach a common basis of fact and consider with any seriousness any of the options identified.

CONCLUSIONS

After participating in the two task force meetings and reading the enormous amount of material that was gathered, my personal conclusions are these:

The problem in Alaska concerning the availability and affordability of professional liability insurance is a complex one with no easy solutions. Following national trends, Alaska addressed the problem in 1986 by passing a "tort reform" package that was, among the states, one of the most substantial; this was followed in 1988 by passage of a ballot measure that eliminated joint liability for tort actions involving fault. There is no data suggesting that these changes in tort law, which restricted the rights of victims, have had any effect on making liability insurance more available or less costly. Nationally, the focus has now moved on to court challenges of "tort reform" and to efforts to reform the insurance industry, ensure better self-regulation by the professions, and provide alternative dispute resolution mechanisms.

In my opinion, the liability insurance problem in Alaska needs to be

further defined and addressed, not through more changes to our civil justice system but through Alaska-specific investigations into the insurance industry, the regulation of professionals, and alternative dispute resolution systems. An understanding of each of these subjects--how they operate and what possibilities they offer for reducing insurance costs while maintaining services--may provide the basis for recommending statutory changes.

RECOMMENDATIONS

1. If the legislature is interested in continuing a fact-finding effort, establish a continuing or new task force. To be more workable, such a task force might be either smaller or divided into committees; it might also be given a more narrow focus, such as to address specifically the medical malpractice issue. It might also be given the resources to contract for specific research. (Of all the reports we reviewed, the one I believe serves as the best model for an Alaskan effort is Maine's 1989 "Medical Malpractice Liability Study," which was prepared by a study team of public health experts, under the oversight of a special legislative committee.)

2. Review "tort reform" changes of 1986 and 1988 and determine what impact they have had on the rights of victims, insurance rates, insurance availability, etc.

3. Provide the Division of Insurance with a budget adequate to regulate the insurance industry, including having on-staff actuaries. Request or require (with sufficient funds) the division to do its own review of insurance regulation and identify areas it believes need attention or hold promise for meaningful reform.

4. A data-base is absolutely necessary to understand what is happening with insurance claims and profits. Require all insurance companies doing business in Alaska to report to the Division of Insurance such information as claims, settlements, premiums, investment income, reserves, and estimates of incurred claims. (Washington law may provide a good example.) Once this data is available, it should be possible to see if, among other things, the insurance companies are operating efficiently. (Generally, they do not, since they can pass along expenses to policy holders). Alaska could mandate that all insurers that do business in the state demonstrate

an effective cost control program.

5. Investigate further the issue of reinsurance. From what I know about this, there's a definite potential of holding down premiums by having the State of Alaska, by itself or in a compact with other states, offer reinsurance as an alternative to the main reinsurers, particularly Lloyd's of London. Reinsurers are currently beyond the regulatory control of states, yet a large portion of premium costs (40% of medical malpractice premiums in Maine) go to cover reinsurance costs. Reinsurers hold major economic power over primary insurers, including in many cases dictating their terms and coverages. Alaska as reinsurer could assert its own influence on rates and coverage and, importantly, the efficiencies of primary insurers; it could also offer reinsurance to groups that self-insure; properly run, it could expect to make a profit.

6. Continue to investigate alternative dispute resolution mechanisms. While none of the systems we looked at were clearly working so well that we would want to adopt them, the general concept certainly holds much promise for providing more complete and timely compensation to victims while keeping costs down.

7. Encourage the adoption of risk management programs. Consider mandating that health care facilities develop and implement risk management programs.

8. Review the panel system currently used for peer review in the medical profession. There seemed to be concensus that this was not working well and could be improved. (HB 336, which changes the panel system, does not seem to be responsive to the problems we heard about.)

I appreciated being able to serve on the task force and hope that our efforts have helped advance the legislative discussion. Thank you for the opportunity to participate.

MICA Medical Indemnity Corporation of Alaska

ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 203
ANCHORAGE, ALASKA 99503
(907)563-3414

March 29, 1990

Representative Sam Cotten, Speaker
House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Speaker Cotten:

You offered members of the Legislative Liability Task Force the opportunity to review and draw some individual conclusions. This was an opportunity I did not want to miss. Although the Legislative Liability Task Force only had the opportunity to meet twice, I was impressed by the membership's ability to communicate and forward their own thoughts on some very complicated issues. At the final meeting on Friday, March 16, 1990, we still had not been able to reach conclusions as a group. I, however, would like to draw my own and am forwarding those to you in this letter.

Let me start by saying that the time spent, both interfacing with other members, and reading the data gathered by David Rogers from various sources, convinced me that this task was extremely complex. Experience has taught me that nothing this complex has a single, simple, easy solution. Although I do admit to that fact that the group didn't seem to agree upon exactly what the problems were, the fact that there were problems didn't allude anyone. In other words, I believe that everyone was convinced that the system was "broken". To what extent there was damage to the system, and what kinds of repairs needed to be made, seemed to be the questions that the group needed to tackle.

It seems to me that a three-pronged approach is necessary in solving the complex liability issue placed before us. These three remedies are as interwoven and complex as the problems they are attempting to solve. I have come to believe that, singly, they will not fix any of the problems but, taken in concert, will work towards attacking the issue from several fronts. I believe that these three remedies are: a thoughtful reform to the tort system, an organized approach to civil justice reform and, finally, increased regulation both of the insurance industry and of professional organizations.

Investigation of our own claims experience and discussions with our actuary have led us to conclude that there are some specific changes to the tort system which would, in the long run, reduce premiums. Certainly, limiting prejudgement interest, establishing a statute of repose, clarifying the statute of limitations, reducing contingencies fees to present value, and reducing the prejudgement interest rate are known changes that would reduce the cost to

the system. Information and testimony given to the Legislative Liability Task Force seems to point to the fact that no one can exactly quantify what the reduction would be. However, the fact that there would be a reduction seems to be, in my mind, a meaningful reason to make these changes.

I'm a firm believer and supporter of our current civil justice system. My question about the current system revolves around the word "justice". Is, in fact, justice being done under the current system? I feel that the task force was presented with evidence to the contrary. First of all, plaintiff attorney members of the task force testified that they would not pursue medical malpractice cases against a health care provider who was uninsured. They also said that they turned away all but the most compelling cases. This leads me to believe that there are citizens of the state of Alaska who have been legitimately injured and who have no recourse for recovery under the current system. We also had information presented to us that clearly proved the opposite exists: some victims are overcompensated. My feeling is that this is not the American concept of true justice. We were also presented with evidence that the court system is overburdened. Court cases are calendared by judges without any internal control over deadlines. Also, the judge is in charge of giving the jury instructions regarding what they can consider in a court case. The jury does not seem to be allowed the privilege of hearing all information and making their own decisions. That leads me to conclude that the current civil justice system has a variety of flaws. We, at MICA, at least, are interested in looking at an alternative to the current adjudication system.

Gathering information for the task force proved difficult in some respects. Insufficient information regarding data from insurance companies on claims losses and risk management was certainly a problem. We also had difficulty in gathering data about the current court system. It is certainly difficult to draw conclusions when you have insufficient information. I believe that we need to take a good look at the requirements for both the insurance industry and the court system, then allow funding to give state government the mechanisms through the Division of Insurance, etc., to do their regulatory job. There also seems to be a variety of certification, licensing, and sanctions on the various professions. My feeling is that there should be some uniformity among the various professions as to sanctions for misconduct, disclosure requirements, education, recertification requirements, peer review and immunity for those peer reviewers.

These three approaches that I have presented here may, on review, seem complicated and overwhelming, but the problem is complicated and overwhelming. It seems when we were discussing these issues, I was reminded of a push button radio in a car where, when you push the button in to fix one problem, the remaining buttons all pop out. I'm afraid that if we don't look at all the issues, much like the buttons on the radio, and attempt to attack them comprehensively, we will end up with a partial fix that soon topples over without the support of other important component parts.

Let me conclude with saying that I do believe the task force performed a great service in providing a common data bank of information that the legislature can use in making further decisions about the problems. I would like to again thank the other members for the time that I know they committed to this effort. I'd also like to thank David Rogers for the wonderful job that he did, and you, Representative Cotten, for putting such a well balanced group together and allowing us the opportunity to share information and experiences.

Sincerely,

Mary A. Pierce

Mary A. Pierce
Executive Director

MAP/blb

CC: William Brock
David Rogers