

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
1741 SCOMM 69: HOUSE LIABILITY INSURANCE TASK FORCE, 1989-1990 309

APPENDIX F

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

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

U.S. TORT REFORM 1989

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

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

⁶ Constitutional challenge in 1988.

APPENDIX G

APPENDIX G

January 1989 through October 1989

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

U.S. TORT REFORM 1989

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

¹ Modifications to Texas Deceptive Trade Practices Act.

² Products liability legislation.

APPENDIX G

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Vermont	—	—	—	—	—	—	—	—
Virginia	—	—	—	—	—	—	—	—
Washington	—	—	—	—	—	—	—	—
West Virginia	—	—	—	—	—	—	—	—
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	—	—	—	—	—	—	—	—

APPENDIX H

January 1986 through October 1989

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

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

APPENDIX H

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

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

¹¹ Will expire in 1992.

¹² Constitutional challenge.

¹³ Excluding pain and suffering.

U.S. TORT REFORM 1989

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

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

¹⁵ Codifies existing practice of outlawing punitive damages.

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

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

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

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

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

FEDERAL REFORM ACTIVITY

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

1989

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

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

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

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

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

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

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

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

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

Preemption/Scope of Bill (Section 103).

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

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

Jurisdiction of Federal Courts (Section 104).

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

Effective Date (Section 105).

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

Expedited Products Liability Settlements (Section 201).

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

Alternative Dispute Resolution Procedures (Section 202).

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

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

Civil Actions (Section 301).

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

Uniform Standards of Product Seller Liability (Section 302).

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

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

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

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

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

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

Uniform Time Limitations on Liability (Section 304).

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

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

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

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

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

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

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

Defenses Involving Intoxicating Alcohol or Drugs (Section 307).

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

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

Preemption/Scope of Bill

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

Standards of Manufacturing Liability

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

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

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

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

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

Defenses

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

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

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

Standard of Product Seller Liability

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

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

Punitive Damages

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

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

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

Statute of Limitations

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

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

Workers' Compensation Offset

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

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

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

Frivolous Claims and Defenses

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

Secrecy Agreements

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

Mediation Proceedings

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

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

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

Data Collection

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

Scope of the Bill

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

McCARRAN-FERGUSON LEGISLATION

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

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

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

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

1989

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

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

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

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

A. Cause of Liability Insurance Availability and Affordability Problems

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

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

B. The McCarran-Ferguson Act

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

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

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

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

C. Insurance Data Collection and Recording

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

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

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

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

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

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

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

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

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

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

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

D. Flex Rating Plans

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

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

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

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

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

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

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

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

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

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

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

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

F. Assuring Availability of Essential Liability Insurance

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

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

G. Claims Made and Defense Cost Limits

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

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

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

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

H. Liability Insurance for "Mass Torts"

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

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

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

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

Appendix

APPENDIX A

A BRIEF SUMMARY OF FEDERAL REFORM INITIATIVES AND SELECTED PROPOSED LEGISLATION

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

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

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

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

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

SENATOR KASTEN'S S.666

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

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

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

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

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

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

APPENDIX A

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

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

DISCUSSION

Sec. 201: Expedited Products Liability Settlements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 301: Uniform Standards Of Product Seller Liability

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

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

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

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

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

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

Sec. 303: Uniform Standards For Award Of Punitive Damages

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

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

Sec. 304: Uniform Time Limitations On Liability

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 307: Several Liability For Noneconomic Damages

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

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

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

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

Amendment Number 34 to S.666 (Kasten)

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

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

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

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

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

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

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

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

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

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

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

Amendment Number 35 to S.666 (Kasten)

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

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

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

Representative Richardson's H.R. 1115¹⁸

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

¹⁷ See, 74 ALR 3rd 1001.

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

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

APPENDIX A

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

Federal Jurisdiction

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

Section 204: Uniform Standards Of Manufacturers' Liability

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

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

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

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

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

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

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

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

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

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

APPENDIX A

Section 205: Uniform Standards Of Product Seller Liability

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

Section 206: Defenses

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

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

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

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

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

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

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

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

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

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

Section 207: Liability Of Codefendant

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

Section 208: Punitive Damages

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

Section 209: Time Limitation On Liability

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

Section 210: Worker's Compensation Offset

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

APPENDIX B

THE McCARRAN-FERGUSON ACT

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

Background and Analysis

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

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

The State Action Doctrine

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

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

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

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

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

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

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

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

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

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

Federal Oversight

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

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

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

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

⁵ 471 U.S. 48 (1985).

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

⁷ *Id.*

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

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

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

Reform Initiatives

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

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

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

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

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

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

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

STATUTE OF LIMITATIONS

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

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

a) Specific medical liability statutes of limitations

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

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

b) Maximum statute of limitations period

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

* See section entitled Court Decisions: Statute of Limitations

INTRODUCTION

MAY BE DATED

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

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

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

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

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

SUMMARY

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

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

NCSL STATE LEGISLATIVE SUMMARY:
AUTOMOBILE INSURANCE/LIABILITY INSURANCE

**National Conference of
State Legislatures**



DRAFT

SUMMARY

AUTOMOBILE INSURANCE/LIABILITY INSURANCE

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

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

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June 30, 1989

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Robert D. Boerner

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

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DRAFT

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DRAFT

TORT REFORM

ALABAMA

Introduced

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

ALASKA

Introduced

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

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

ARIZONA

Introduced

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

CALIFORNIA

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

COLORADO

Introduced

HB 1137	Provides for personal liability of corporate officers and shareholders in corporations which fail to obtain insurance as required by the "Workmen's Compensation Act of Colorado."
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"Child Protection Bill" -- raises the state's cap on non-economic damages in cases alleging wrongful death of children to \$250,000 from \$45,000. Allows for recovery for grief, loss of companionship, pain and suffering, and emotional stress.

FLORIDA

Introduced

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

SB 117
SB 146
SB 720
SB 1017
SB 1300

Relates to Florida Birth-Related Neurological Injury Compensation Plan.

CS/HB 153

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

GEORGIA

Enacted

SB 239

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

HB 472

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

HB 525

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

HAWAII

Enacted

HB 231

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

Introduced

SB 1964
HB 1165

Childcare Tort Reform Act of 1989.

ILLINOIS

Introduced

SB 512

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

SB 875

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

INDIANA

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

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

IOWA

Introduced

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

KANSAS

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

LOUISIANA

Enacted

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

Introduced

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

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

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

MARYLAND

Enacted

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

MICHIGAN

Introduced

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

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

MISSISSIPPI

Enacted

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

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

Introduced

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

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

HB 1204

See HB 699.

MISSOURI

Enacted

HB 161

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

HB 774

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

MONTANA

Enacted

SB 157

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

HB 606

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

Introduced

SB 208

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

NEBRASKA

Introduced

LB 159

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

NEVADA

Enacted

AB 307

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

NEW JERSEY

Enacted

SB 2673

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

SB 3025

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

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

AB 2443

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

NEW MEXICO

Enacted

HB 514

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

Introduced

SB 128

Provides indemnification of trustees and amends the Uniform Trusts Act.

SB 279

Limits the liability for volunteers of non-profit organizations.

SB 457

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

SB 481

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

SB 529

Changes certain provisions of the Tort Claims Act.

SB 596

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

SB 655

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

HB 417

Makes changes in the Tort Claims Act. Adds definitions. Changes provisions regarding liability in connection with airports, highways, and streets. (Vetoed by Governor Garrey Carruthers)

HB 740

Changes the definition of "public employee" in the Tort Claims Act.

HB 743

Changes certain provisions of the Tort Claims Act.

HB 841

See SB 457.

HB 846

Changes limitations on the personal liability of corporate directors that may be included in the articles of incorporation.

NEW YORK

Enacted

SB 6265

Extends the provisions relating to the regulation of professional medical conduct. Chapter 55.

OKLAHOMA

Enacted

SB 161 Amends certain provisions of the Governmental Torts Claims Act. Chapter 25.

The Oklahoma Court of Appeals awarded \$1 million in punitive damages against the Sooner Life Insurance Co. for fraudulently inducing Louis John and Margaret E. Modica into buying a life insurance policy.

OREGON

Introduced

HB 2426 Requires the jury to compare any fault of a plaintiff with defendant's allegedly defective product to determine percentages of fault in product liability cases.

TENNESSEE

Enacted

SB 401 Exempts donors of food from certain tort liability. Public Chapter 476.
HB 119

SB 424 Removes liability from suit for certain members of non-profit corporations
HB 267 under certain circumstances. Public Chapter 479.

SB 530 Authorizes the waiver of landowner's liability in certain circumstances.
HB 867 Public Chapter 149.

SB 1332 Provides for written waivers of liability for certain uses of land.
HB 1069 Public Chapter 250.

Introduced

SB 194 Lengthens the statute of repose in products liability actions.
HB 1180

SB 432 Removes liability from certain persons for distribution of defectless
HB 909 products in certain circumstances.

SB 481 Prohibits pleading specific amount of damages in certain complaints.
HB 836

SB 528 Creates a cause of action against an employer for removing warning
HB 860 labels and safety devices from machinery in the workplace.

SB 602 Grants mental health professionals immunity from certain civil suits
HB 155 resulting from violent acts of patients.

SB 619 Makes providers of horse trails and related services liable only in cases
HB 713 of gross negligence or willful conduct.

**SB 701
HB 347**

Requires attorney contingency fees to be in writing and information on such arrangements to be provided to clients.

**SB 703
HB 345**

Prohibits punitive damage awards under certain circumstances.

**SB 704
HB 344**

Prohibits attorney percentage contingency fees.

**SB 738
HB 924**

Revises the itemization of damages recoverable in wrongful death actions.

**SB 798
HB 1102**

Revises items includable as damages in medical malpractice cases.

**SB 812
HB 1362**

Creates a presumption of reasonableness and necessity of medical expenses in certain civil actions and specifies a time limit.

**SB 889
HB 421**

Grants immunity to certain medical organizations which participate in peer review.

**SB 1150
HB 792**

Creates partial tort immunity for organizers of historical re-enactments.

**SB 1122
HB 1429**

Establishes liability of and standards for manufacturers and administrators of childhood vaccines.

TEXAS

Introduced

**SB 41
HB 15**

Establishes new standards of proof in product liability lawsuits. Allows judges to assess a portion of the responsibility for a product-related accident to the claimant. Installs a two-part trial system that would require juries to determine first whether a manufacturer was liable for damages and award compensatory damages and then separately decide the amount of any punitive award. Narrows the liability of manufacturers and sellers.

UTAH

Enacted

SB 24

Provides that punitive damages may be awarded if it is established by clear and convincing evidence that a tortfeasor's actions were willful and malicious or intentionally fraudulent, or that his conduct manifested a knowing and reckless indifference toward the rights of others. Provides that evidence of a party's wealth is not admissible until a finding of liability for punitive damages has been made. Also provides that 50% of a punitive damage award above \$20,000, after payment of attorneys' fees and costs, be remitted to the state. 1989 Utah Laws 237.

SB 25

Repeals the unconstitutional "statute of repose" provision of the Products Liability Act and establishes a statute of limitations of two years from the time both the harm and its cause is discovered. 1989 Utah Laws 119.

Introduced

- SB 21** Amends the Products Liability Act. Establishes a statute of limitations in bringing claims. Provides manufacturers' and sellers' liability.

VERMONT

Introduced

- SB 205** Creates a new administrative procedure for medical malpractice claims which eliminates jury trials and requires licensing boards to discipline negligent doctors.
- HB 461** Creates a dispute resolution procedure for medical negligence claims.

WASHINGTON

An April 27, 1989 Washington Supreme Court decision held as unconstitutional a portion of the 1986 Washington law that caps non-economic damage awards. The court ruled 6-3 that the cap on non-economic damages violated a plaintiff's right to trial by jury.

Washington's tort reform law, which included the non-economic damage cap and eliminated joint and several liability in specified cases, was a comprehensive tort reform measure.

WASHINGTON, D.C.

Introduced

- Bill 8-253** Limits recovery for non-economic loss in certain civil actions; modifies the doctrine of joint and several liability; provides for a comparative fault system; designates that portion of an award upon which a contingency fee may be computed; sets forth a standard of proof which must be met in order to award punitive damages; provides immunity from civil liability for volunteers of non-profit organizations, homeowners' associations, and the District government; allows for a limitation of the personal liability and indemnification of directors and officers of certain organizations; and provides for an assessment of the effectiveness of the Act by the Superintendent of Insurance.

WISCONSIN

Introduced

- SB 46** Specifies that the rule barring admission of subsequent remedial actions applies to product liability cases, whether based on negligence or the theory of strict liability in tort.
- SB 62** Modifies Wisconsin's comparative negligence system. Specifies that the changes do not apply to parties whose action results in damages or to damages resulting from environmental pollution, hazardous waste, or substances of waste disposal systems.
- SB 79** Limits the time a person may start a lawsuit for damages related to professional accounting services.

- SB 80** Provides under what circumstances a certified public accountant may be held civilly liable.
- SB 91** Includes provisions similar to SB 62. Reduces the maximum amount that a claimant may recover for non-economic damages caused by the negligence of a health care provider.
- SB 92** Reduces the maximum amount that a claimant may recover for non-economic damages caused by the negligence of a health care provider. Removes a January 1, 1991 ending date, permanently limiting recovery of non-economic damages caused by the negligence of a health care provider to a \$250,000 maximum.
- SB 110** Removes the present maximum limit of \$50,000 that may be awarded to the spouse, children, or parents of a deceased person for the loss of society and companionship.
- SB 153** Adds a representative of the Department of Agriculture, Trade and Consumer Protection to the membership of the State Emergency Response Commission.
- AB 150** Modifies the comparative negligence system. Reduces the maximum amount that a claimant may recover for non-economic damages caused by the negligence of a health care provider.
- AB 151** Revises a joint tort-feasor's liability if his or her percentage of negligence is less than 25%. Provides that in this situation, the joint tort-feasor's liability is limited according to his or her percentage of negligence.
- AB 152** Eliminates the current limitation on non-economic damages in medical malpractice cases. Amends other provisions of laws relating to medical malpractice.
- AB 154** See SB 79.
- AB 156** Establishes limits on attorney contingency fees. Amends laws on contingency fee arrangements.

DRAFT

INDEX (TORT REFORM LEGISLATION)

* = Enacted

A. Alternative Dispute Resolution

FL SB 389, 908
MI SB 2, 3, 4, 12, 13
VT SB 205; HB 461

B. Child Care

HI SB 1964*; HB 1165*

C.1 Damages

AK SB 229
AL HB 268
AZ HB 2307
FL SB 1024, 1131
GA HB 525*
HI HB 231*
IA SB 238; HF 170
IL SB 512
MI SB 54; HB 4532
MS SB 2334; HB 112, 425, 1054, 1190
NJ SB 3025*
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C.2 Punitive Damages

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MS SB 625
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TX SB 41; HB 15
UT SB 24*

D. Immunities

1. Non-Profit Corporations and Organizations

AL SB 424
DC B 8-253
LA SB 196
MI HB 4221
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TN SB 424*; HB 267

2. Other

FL SB 316, 1197
MI SB 431, 432, 438; HB 4563
MO SB 639*; HB 162*, 382*, 1410*
NJ AB 2443*
TN SB 401*, 432, 619, 1150; HB 119*, 713, 792, 909

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5. Volunteers

AK SB 228; HB 115
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NM HB 514*

E. Joint and Several Liability

DC B 8-253
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MS HB 428, 1171*, 1181
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F. Limits on Liability

LA SB 228*, 486, 531, 780, 786; HB 106, 222, 228, 288, 333, 682, 964, 1016, 1120, 1340, 1639
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MI HB 4544
MS HB 1172
NJ SB 2673*
NM SB 279; HB 846
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IA SF 332, 390
LA HB 948, 990, 997
MI SB 59, 424; HB 4101, 4772
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OK SB 161*
TN SB 528, 701, 704; HB 344, 347, 860, 1429
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MI HB 4552
MS HB 163, 1173
OR HB 2426
TN SB 194; HB 1180
TX SB 41; HB 15
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WI SB 46

J. Statute of Limitations

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AL SB 346, 347
IA SF 238
MS SB 2132, 2133; HB 1171*, 1175
MT SB 157*
TN SB 194; HB 1180
UT SB 21, 25*
WI SB 79; AB 154

1989
STATE LEGISLATIVE ACTIVITY
AUTOMOBILE INSURANCE

Since 1945, responsibility for regulation of the insurance industry has resided with the states. Dramatic price increases in recent years have resulted in increased scrutiny of automobile insurance costs and the impact of state regulation on those costs. In 1988 and 1989, virtually all state legislatures reviewed methods of rate regulation, cancellation, nonrenewals or refusals to issue policies, automobile claims, residual market mechanisms, proposals addressing automobile theft, uninsured motorists and no-fault. A number of states enacted comprehensive legislation on many of these subjects.

Proposition 103

On November 8, 1988, California voters went to the polls to choose from among four insurance reform measures. They narrowly adopted Proposition 103. Its provisions include a one-year 20% rollback in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers," defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after this November; and election, instead of appointment, of the state Insurance Commissioner, starting in 1990. Proposition 103 also requires the Insurance Commissioner to publish for consumers a list of rate comparisons, and it compels insurance companies to notify their customers of the right to join an "independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum."

California's Supreme Court, on May 4, 1989, upheld all of Proposition 103's long-term restrictions on insurance rates and practices, but it struck down as unconstitutional the provision that would have required insurers to be "substantially threatened with insolvency" before they could receive relief from the rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

Within hours of the Court's ruling, consumer groups in 44 states contacted Voter Revolt, the organization that designed Proposition 103. Several states, including Illinois, Indiana, Ohio, and Pennsylvania, introduced legislation during 1989 with similar provisions to those contained in Proposition 103.

Concern about rising costs of automobile insurance has stimulated much legislative activity in 1989 and should continue into 1990. It is a reflection of the fact that in most parts of the country it is necessary to have an automobile in order to get to work, and driving uninsured is not an acceptable alternative to most workers. In some areas, annual premiums can exceed \$5,000. Therefore, it seems likely that the provisions of California's Proposition 103 will continue to be debated in those states where automobile insurance remains prohibitively expensive and, in some cases, unavailable.

No-Fault Automobile Insurance

Since the mid-1960s, states have reviewed no-fault automobile insurance as an alternative to the tort-based insurance system. At least 20 states have adopted no-fault legislation, but the components of the laws have significant differences. The common principle underlying each law is that the insured recovers financial losses from his/her own insurance company, regardless of who is at fault.

Variations in state law involve the restrictions placed on the right to sue, conditions necessary to sue for pain and suffering, and first party coverage.

Escalating automobile insurance costs have renewed the debate as to the pros and cons of the no-fault automobile insurance system. Many proposals were considered in 1989 and will be reviewed again in 1990.

ALABAMA
1989 Legislative Session
(February 7- May 22)

Enacted

- SB 259** Requires every person transporting a child under the age of six years in a motor vehicle to provide a child passenger restraint system meeting applicable federal standards. Act 89-781.
- SB 368** Requires that in all instances where non-original equipment manufacturer
HB 557 aftermarket crash parts are used in preparing an estimate for repairs, the written estimate prepared by the insurer and repair facility shall clearly identify each such part. Act 89-662.
- HB 311** Uniform Commercial Driver License Act
- Sets testing and licensing standards for operators and employers of commercial motor vehicles. Act 89-878.
- HB 569** Amends the Uniform Certificate of Title and Antitheft Act. Requires a salvage vehicle which has been restored in Alabama to be issued a certificate of title which shall contain the word "rebuilt." Act 89-863.

Introduced

- SB 299** Provides for mandatory liability insurance as a prerequisite to the licensing of an automobile.
- SB 303** Makes the Commissioner of Insurance an elected officer of the State. Revises the rate making procedures.
- SB 364** Requires certain front seat occupants of passenger cars to wear safety seat belts.
- HB 7** Provides that certain statistical information of insurance companies be made a public record.
- HB 9** Requires that public hearings be conducted by the Commissioner of Insurance in not less than 10% of insurance rate increase filings in each 12-month period.
- HB 11** Permits the Commissioner of Insurance to levy a civil penalty of not more than \$25,000.00 for violations of the Insurance Code following an administrative hearing.
- HB 398** Concerns automobile safety.
- HB 542** Concerns automobile safety.
- HB 570** Relates to uninsured motor vehicle liability insurance policies issued in Alabama.

- HB 580** Requires the reduction of the premium charges of motor vehicle insurance for insured persons 55 years of age or older upon completion of an accident prevention course.
- HB 940** Provides that certain information of insurance companies be made a public record.
- HB 968** Requires all motor vehicle operators to have certain liability insurance coverage or financial security and provides criminal sanctions.

ALASKA
1989 Legislative Session
(January 9 - May 8)

Introduced

- SB 4, SB 44
HB 44** Relates to motor vehicle liability insurance and vehicle registration.
- SB 137** Relates to commercial vehicle driver licensing.
- SB 309** Provides the circumstances under which a named driver may be excluded from a motor vehicle insurance policy.
- HB 2** Relates to motor vehicles equipped with ignition interlock devices.

Resolved

- HJR 43** Requests that the National Highway Traffic Safety Administration amend the existing federal school bus safety standards to require three point safety belts.

ARIZONA
1989 Legislative Session
(January 9 - Late April)

Introduced

- SB 1250** Regulates collision damage waivers on rented private passenger automobiles.
- SB 1264** Repeals mandatory or compulsory automobile insurance. (Not printed since bill was not assigned to committee)
- SB 1318** Prescribes notice requirements of the cancellation of motor vehicle insurance.
- HB 2059** Makes corrections relating to insurance fees.
- HB 2245** Prescribes contents of motor vehicle liability insurance policies and removes mandatory uninsurance coverage.
- HB 2321** Requires motor vehicle financial responsibility.
- HB 2489** Requires notice of cancellation, non-renewal or failure to renew a motor vehicle liability insurance policy.

HB 2496 Identical to HB 2245, not printed.

HB 2541 Prescribes pre-approval by the Department of Insurance of insurance rates.

ARKANSAS
1989 Legislative Session
(January 9 - March 17)

Enacted

SB 270 Provides that religious denominations in certain circumstances may qualify as self-insurers for motor vehicle liability insurance purposes. Act 189 of 1989.

SB 502 Requires insurers to notify policyholders and agents of certain premium increases on renewal of commercial property and casualty insurance policies. Act 797 of 1989.

HB 1069 Provides that anyone operating a motor vehicle in Arkansas without minimum liability coverage shall be fined not less than \$50.00 nor more than \$250.00 and the person's driving privileges shall be suspended for one year. Act 801 of 1989.

HB 1785 Prohibits the approval by the Insurance Commissioner of an automobile insurance policy or contract for personal automobile liability for a policy term of six months or less. Act 815 of 1989.

HB 1937 Amends coverage under motor vehicle liability insurance. Act 896 of 1989.

CALIFORNIA
1989 Legislative Session
(January 3 - Mid-September)

Introduced

AB 354 Requires each owner of a private passenger motor vehicle, other than a motorcycle, to provide insurance that would provide personal injury protection benefits. Requires owners of other motor vehicles and of motorcycles to provide insurance providing personal injury protection benefits to persons other than operators and occupants of the vehicles, and to provide liability coverage. Persons injured in a motor vehicle accident would generally be entitled to receive specified benefits regardless of fault.

Establishes procedures for claiming benefits, including requirements of arbitration of disputes.

Provides that a tort victim would have no right to recover any damages in tort for basic economic loss, and, except in the case of serious injury, would have no right to recover non-economic loss, except as specified.

Applies to accidents occurring on or after July 1, 1990.

Prohibits insurers from increasing premium rates for first-party benefits solely on account of prior payment of benefits or claims as specified.

Provides for the establishment of the California Basic Economic Loss Reinsurance Facility to assure the availability of basic economic loss coverage to all private passenger automobile insurance consumers who are entitled, but are otherwise unable to, obtain that coverage. Provides that prior to July 1, 1991, the rate for good drivers cannot exceed \$180.00.

AB 2315

Provides for numerous significant provisions including the following:

1. Eliminates liability for damage to a motor vehicle arising out of a motor vehicle accident, except as specified, and eliminates the requirement that proof of financial responsibility be maintained as to damage to property. Eliminates a requirement that insurers offer property damage uninsured motorist coverage, but requires that collision coverage be offered, as specified.
2. Provides that it is a felony to present or cause to be presented several related types of insurance claims which are fraudulent.
3. Provides that any person engaged in the business of insurance is required to act in good faith toward, and deal fairly with, policyholders and others. Provides that a policyholder or other person may bring an action for a violation of that requirement and other statutory provisions that prohibit unfair and deceptive practices, and may recover compensatory and exemplary damages. Provides with respect to claims arising out of motor vehicle personal injury or property damage liability claims that a carrier is not liable for unfair claims settlement practices to a claimant if certain procedures are complied with.
4. Requires motor vehicle insurers to report specified information to the Insurance Commissioner, and the Commissioner is required to make the information available to the public and local law enforcement officials.
5. Requires the Insurance Commissioner to approve or issue a reasonable plan, to be known as the California Auto Plan, for the equitable apportionment among insurers, of low-income applicants for private passenger automobile insurance. Requires the existing assigned-risk plan to use rates that are actuarially sound.
6. Requires each insurance company to pay an annual fee of \$1.30 for each vehicle insured under an insurance policy it issues. Provides for the percentage of distribution of this money to the Bureau of Fraudulent Claims of the Department of Insurance and District Attorneys.
7. Requires vehicles to have a certification of equipment safety every two years as a condition of renewal of registration.
8. Requires that evidence of financial responsibility be presented as a condition of original or renewal registration of a vehicle.
9. Provides that whenever the owner of a used vehicle other than a dealer transfers the ownership to a person who is not a dealer, the transferee's insurer shall make four photographs of the vehicle. Requires motor vehicle accident reports to insurers.
10. Prohibits the sale of certain types of vehicles with a model year after specified dates. Provides for exceptions.
11. Amends the duty of peace officers in the enforcement of mandatory seat belt law provisions.
Amends the law relating to child passenger seat restraint systems. Expands the category of those who are prohibited from selling or installing child passenger seat restraint systems not conforming to applicable federal standards.
Requires car rental agencies to inform customers of the law relating to child passenger seat restraint systems and to make those systems available and offer them for rental.

12. Requires the Director of the Department of Transportation to study the costs and benefits of the use of alternative median barriers.

COLORADO
1989 Legislative Session
(January 4 - May 30 and Special Session)

Enacted

- SB 90** Requires the availability of insurance for property damage caused by uninsured motorists. (Signed by Governor Roy Romer on April 7, 1989)
- SB 128** Provides for extended disability benefits and prohibitions against certain actions by insurers regarding insurance policies that are covered by the "Colorado Auto Accident Reparations Act." (Signed by Governor Roy Romer on June 1, 1989)
- HB 1155** Enacts the "Model Quality Replacement Parts Act." Concerns the use of non-original manufacturers' automobile crash parts. (Signed by Governor Roy Romer on April 7, 1989)
- HB 1195** Provides that no lessor of motor vehicles in Colorado may sell any collision damage waiver to a lessee without a written disclosure of the terms and provisions of the waiver. Specifies the required contents of any collision damage waiver and the terms and conditions to be disclosed in writing to any lessee. Provides that failure to comply with the provisions of the law shall constitute a deceptive trade practice under Colorado law. Prohibits a certain type of exclusion in any collision damage waiver and specifically permits other such exclusions. (Signed by Governor Roy Romer on April 12, 1989; effective January 1, 1990)
- HB 1244** Continues programs of automobile safety belt systems scheduled for repeal during 1989. (Signed by Governor Roy Romer on April 23, 1989)

Introduced

- SB 98** Establishes the State Automobile Insurance Authority. Authorizes the Authority to collect such fuel taxes, registration fees, and other taxes and user fees as the General Assembly authorizes. Provides that the Authority shall solicit proposals and select the least-cost proposal to provide minimum insurance coverage for persons injured as a result of operation of motor vehicles registered in Colorado. Eliminates the requirement that vehicle owners obtain mandatory motor vehicle insurance.
- SB 186** Provides that insurers shall offer an appropriate discount on automobile insurance policy premiums for operators of covered vehicles who successfully complete a motor vehicle accident prevention course offered by a commercial driving school licensed under Colorado law.
- SB 209** Requires owners of motorcycles to have in full force and effect a complying insurance policy that compensates for personal injuries in accordance with the "Colorado Auto Accident Reparations Act." Requires motorcycle or motor-driven cycle operators and passengers to wear safety helmets that meet standards which are required to be adopted by the Department of Revenue. Provides for penalties.

- HB 1138** Amends provisions of mandatory motor vehicle insurance laws.
- HB 1182** Requires the owner of a motor vehicle to sign an affirmation that such owner has in effect a complying policy of automobile insurance or certificate of self-insurance as a condition of obtaining and renewing a valid motor vehicle registration.
- HB 1260** Creates the office of Insurance Consumer Advocate as a division in the Department of Law and the position of Insurance Consumer Advocate to head said division.
- HB 1292** Establishes the Colorado Insurance Authority to insure drivers who are unable to obtain private automobile liability insurance.
- Resolved**
- HJR 1025** Establishes an interim study committee to study private passenger automobile liability and property damage insurance. (Postponed indefinitely on May 9, 1989)

CONNECTICUT
1989 Legislative Session
(January 4 - June 7)

As of April, 1989, no enacted legislation.

DELAWARE
1989 Legislative Session
(January 10 - June 30)

Introduced

- SB 212** Requires insurers of assigned risk businesses to notify the Department of Motor Vehicles of the cancellation of certain risk policies within 60 days of the cancellation.
- HB 58** Requires certain motorists to purchase automobile insurance.
- HB 206** Amends Delaware's automobile insurance no-fault laws.

FLORIDA
1989 Legislative Session
(April 4 - June 2)

Enacted

- CS/SB 817** Defines the term "motor vehicle" for purposes of the regulation of motor vehicle service agreement companies. Revises criteria for qualifications for licensure as a motor vehicle service agreement company to provide for the deposit of certain funds and the purchase of insurance. Provides an additional criterion for the Department of Insurance to consider prior to the suspension or revocation of a license or the refusal to renew a license. Laws of Florida 89-125.
- CS/HB 153** Authorizes counties and municipalities to enact ordinances to establish "combat automobile theft" programs whereby motor vehicle owners may

enroll their vehicles by signing consent in advance for a law enforcement officer to stop the vehicle. Provides program components. Authorizes a fee for administration of the program. Provides that the motor vehicle owner is responsible for removing the program's decal. Provides immunity from liability for law enforcement officers. Laws of Florida 89-34.

Introduced

- SB 80** Limits the amount of damages that a renter of a motor vehicle may be held liable for in certain circumstances. Restricts the manner in which certain motor vehicle rentals may be advertised and the rental rates that may be charged for such rentals.
- SB 161** Provides for the Department of Insurance to be administered by a secretary appointed by the Governor, subject to Senate confirmation. Provides that the powers, duties, and functions of the Treasurer exercised in his capacities as Insurance Commissioner and State Fire Marshal be assumed by the Secretary of Insurance.
- SB 276** Requires certain motor vehicle owners or operators to maintain proof of financial responsibility for bodily injuries. Provides for the suspension of registration and the operator's license of persons who fail to maintain the required security. Provides for proof of such financial responsibility when registering a motor vehicle.
- SB 740** Relates to the regulation of insurance rates. Provides procedures for filing rates for private passenger automobile insurance. Allows for full consideration by the Department of Insurance of investment income in reviewing rates.
- CS/SB 845** Provides that interest is payable on the cash surrender of an insurance policy. Requires certain insurers to annually submit rate filings to the Department of Insurance. Makes numerous other provisions including rate regulation. (Sent to Governor Bob Martinez)
- SB 878** Prohibits the offer of sale, the sale, or the exchange of a rebuilt vehicle until the Department of Highway Safety and Motor Vehicles notes on the certificate of title for the vehicle that it has been rebuilt, unless application for a certificate of title has been filed with the Department and the Department has physically examined the vehicle to assure its identity. Provides for the stamping of a vehicle's certificate of title with words stating that the vehicle has been rebuilt.
- CS/SB 1097** Revises guidelines upon when an insured's motor vehicle insurance premium may be increased or his policy not renewed as a result of the insured being involved in a motor vehicle accident. Prohibits an insurer from imposing an additional premium, canceling a policy, or issuing a non-renewal notice as a result of a traffic infraction in specified circumstances. Requires personal injury protection coverage to be in an amount of at least \$10,000. Requires insurers offering personal injury protection coverage to make available coverage in amounts equal to bodily injury liability limits up to a specified amount.
- CS/SB 1246**
CS/HB 331 Redefines the term "uninsured motor vehicle" for purposes of uninsured motor vehicle insurance coverage. Provides that an insurer may elect binding arbitration or trial. Prohibits certain insurer actions. Prescribes

- requirements for uninsured motorist coverage. Provides that personal injury protection coverage shall include death benefits in a specified amount. (Sent to Governor Bob Martinez)
- CS/SB 1251** Relates to motor vehicle insurance risk apportionment. Requires a poll of member insurers and additional filing requirements. Prohibits a renewal discount for plan insureds. Requires a disclosure on an application for coverage. (Sent to Governor Bob Martinez)
- CS/SB 1295** Authorizes the use of certain combined liability insurance policies. Provides for certain restrictions on motor vehicle liability insurance policies to apply only to those which provide bodily injury liability coverage. Creates the Motor Vehicle Insurance Task Force of 1989. (Sent to Governor Bob Martinez)
- CS/SB 1414** Creates the "Aftermarket Crash Parts Act." (Sent to Governor Bob Martinez)
- CS/HB 99** Prohibits charging excessive prices for fueling rental cars or charging for unused fuel.
- HB 229** Requires personal injury liability motor vehicle insurance in a certain amount.
- HB 285** Mandates bodily injury coverage for motor vehicle operators or owners. Prohibits insurers from non-renewing a policy for one accident, regardless of fault, and increases the time allowable for insurers to impose a surcharge when an accident does occur. Changes the method of rate filing for automobile insurers. Revises the excess profits formula. Creates the office of Insurance Public Counsel. Creates the insured's "Bill of Rights." Clarifies language regarding personal injury protection.
- HB 333** Relates to the legal liability of an uninsured motorist.
- CS/HB 536** Requires owners and operators of certain motor vehicles to maintain bodily injury liability insurance coverage. Clarifies language regarding the limits of coverage in the Financial Responsibility Law. Sets forth penalties.
- HB 666** Changes the private passenger automobile rating procedure to that currently being used by all other lines of property and casualty insurance. Provides exceptions. Requires the Department of Insurance to use a method of accounting that would fully consider investment income in private passenger automobile rating. Eliminates language from the automobile rating law which directs the Department of Insurance to order inadequate rates to be increased.
- CS/CS/HB 855** Directs the Legislative Auditing Committee to appoint a Public Counsel to represent the general public before the Department of Insurance and the Florida Public Service Commission. (Sent to Governor Bob Martinez)
- CS/HB 1231** Provides that if an insured is not at fault in an accident, the insurer may not non-renew or increase premiums. Provides that an insurer may not fail to renew a motor vehicle insurance policy if the insured has had only one accident in which he was at fault during the past three years. Provides an insurer may not surcharge or non-renew when adjudication has been withheld for a traffic infraction. Provides that personal injury protection

limits may be sold that are equal to bodily injury limits, but cannot exceed \$100,000.

HB 1334

Creates the "Florida Insurance Rate Reduction and Reform Act of 1989."

GEORGIA
1989 Legislative Session
(January 9 - Mid-March)

Enacted

SB 31

Requires the Commissioner of Insurance to compile and release annually for public dissemination a list of all written requests for assistance by citizens against insurers licensed in Georgia which are received by the Department of Insurance. Act 489.

SB 49

Provides that insurers shall make available appropriate reductions in premiums paid for certain motor vehicle insurance coverages for persons successfully completing defensive driving courses through driver improvement clinics. Act 687.

SB 50

Requires an insurer to accept by hand-delivery an affidavit of an insured affirming that such insured's motor vehicle has been stolen. Act 392.

SB 127

Amends a statute relating to the limitation of adverse underwriting decisions by insurers, so as to provide that, with respect to a personal or family-type policy of motor vehicle insurance, no insurance institution or agent may base an adverse underwriting decision solely on the fact that the applicant has never purchased a policy of motor vehicle insurance or has not owned or been covered by such a policy during any specified period immediately preceding the date of application. Act 491.

SB 199

Increases the period of incarceration from a maximum of 30 days to a maximum of 12 months for the offense of failure to keep proof of insurance coverage in a motor vehicle during the operation of the vehicle, the offense of knowingly operating or knowingly authorizing another to operate a motor vehicle without insurance coverage on such vehicle, and the offense of making a false statement or certification with reference to insurance coverage when registering a motor vehicle. Act 415.

SB 233

Amends a statute relating to the acquisition of control of a domestic insurer or merger with a domestic insurer. Act 34.

HB 57

Provides for the calculation of loss of income benefits under motor vehicle insurance policies in the event the insured is the sole shareholder of a professional corporation. Act 536.

HB 99

Clarifies the provision that a notice of cancellation of motor vehicle insurance coverage shall be sent by the insurer to the Department of Public Safety within 15 days after the effective date of such cancellation. Provides that the insurer shall indicate the reason for the cancellation on the notice sent to the Department. Act 455.

HB 175

Revises the grounds for the refusal, suspension, or revocation of the licenses of insurance agents, solicitors, brokers, counselors, and adjusters. Act 499.

- HB 183** Amends a statute relating to the duties of a broker in placing insurance with an unauthorized insurer. Act 500.
- HB 201** Changes the time period for insurers to apply for a salvage certificate of title and requires identification on non-original equipment manufacturer aftermarket crash parts. Act 637.
- HB 205** Provides that domestic insurers shall be examined at least once every three years instead of at least once every five years. Act 465.
- HB 216** Requires every insurer which provides liability or casualty insurance coverage and which is or may be liable to pay all or any part of a claim to provide, within 60 days of receiving a written request from the claimant, a sworn statement of a corporate officer or the claims manager stating with regard to each known policy of insurance issued by it, the name of the insurer, the name of each insured, and the limits of coverage. Act 503.
- HB 314** Empowers the Commissioner of Insurance to promulgate rules and regulations regarding certain vehicle service agreements or extended warranty agreements. Act 505.
- HB 510** Provides for the form of security deposits which shall be acceptable to the Commissioner of Insurance. Act 584.
- HB 566** Provides a method by which an insurer organized under the laws of another state and admitted to transact business in Georgia may become a domestic insurer and provides a method by which a domestic insurer may transfer its domicile to another state. Act 588.
- Introduced**
- SB 35** Amends Chapter 9 of Title 33 of the Official Code of Georgia Annotated relating to the regulation of insurance rates.
- HB 38** Increases certain coverages in motor vehicle liability policies within the definition of "proof of financial responsibility."
- HB 699** Relocates provisions relating to the selection of motor vehicle repair facilities.
- HB 904** Provides for the applicability of uninsured motor vehicle insurance coverage to certain vehicles.
- HB 1111** Adds a new chapter to be known as the Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Immunity Act.

HAWAII
1989 Legislative Session
(January 9 - April 23)

Introduced

- SB 48** Prohibits a person from driving a moped unless the moped is insured under a liability insurance policy. Establishes penalties. Requires persons engaged in the retail business of renting mopeds to ascertain from their renters if the

renter is knowledgeable of the current laws and rules relating to and governing the operation of a moped, the renter is skilled in driving a moped, and the renter promises to be fully responsible for any violations incurred while operating or in possession of a moped. Requires renters to be fully responsible for the payment of any violations received by their renters. Increases the moped liability insurance coverages for accidental harm and for property damage.

- SB 214 Provides for an optional rather than mandatory motor vehicle no-fault insurance system. Requires mandatory liability insurance coverage for bodily injury and property damage for all motor vehicle operators.
- SB 1056
HB 42 Establishes the Hawaii Insurance Service Corporation within the Department of Commerce and Consumer Affairs. The Corporation is to maintain a computer with information on no-fault insurance.
- HB 544 Repeals liability insurance coverage requirements for motorcycles and motor scooters, and includes motorcycles and motor scooters in the requirements of the motor vehicle insurance law.
- HB 1665 Requires no-fault motor vehicle insurance, and other insurance for accidental harm or property damage caused by motor vehicles, to provide that insurance covering the driver (as a named insured) shall be primary to the insurance covering the vehicle involved in the accident.
- Resolved
- SCR 67 Requests the Insurance Commissioner to investigate the nature of penalties assessed by motor vehicle insurers for moving violations and suggests reasonable modifications.

IDAHO
1989 Legislative Session
(January 9 - Late March)

Enacted

- HB 297 Requires insurers to provide automobile insurance premium reductions to drivers 65 years of age and older who successfully complete a driver education course.

ILLINOIS
1989 Legislative Session
(January 11 - June 30)
(Fall Session probable)

Enacted

- SB 293 Amends the Illinois Insurance Code. Provides that uninsured and underinsured motorist coverage may not contain a clause denying coverage until the limits of all other policies are used up. Provides that such a clause is against public policy and unenforceable.
- SB 790 Amends the Illinois Insurance Code in the uninsured motor vehicle coverage requirements to provide that vehicles not designed for highway use are not subject to the act.

- SB 1032** Provides additional regulation of automobile insurers concerning requirements for renewal or non-renewal of policies and the furnishing of loss information to insureds. Provides for written notice of premium dues and non-renewals to insureds.
- SB 1288** Authorizes the imposition of civil penalties for acts found to constitute an improper insurance claims practice.
- HB 308** Amends the Illinois Insurance Code. Requires that uninsured motor vehicle coverage in excess of the limits established in the Illinois Vehicle Code and underinsured motorist coverage be provided in a motor vehicle insurance policy unless the insured declines such coverage by written notice to the insurance company.
- HB 573** Prohibits the establishment of automobile insurance premium rates based solely on the zip code of the insured.
- HB 2217** Amends the Illinois Insurance Code. Raises the amount of forfeiture liability from \$50,000 to \$250,000 for persons who violate any provisions of the Code.
- Introduced**
- SB 170** Prohibits consideration of an applicant's zip code as a basis for establishing automobile insurance premiums. Requires consideration of the individual customer's driving record as the preponderant factor in establishing automobile insurance premium rates.
- SB 880** Amends the Illinois Insurance Code in relation to property and casualty insurance premium rates, cancellation notices, and private remedies. Requires cancellation notices to be sent by certified mail. Creates a civil cause of action against companies violating certain provisions of the Code. Authorizes the Department to review and approve or disapprove premium rates. Requires prior Department approval with respect to an increase or decrease of 10% or more. Specifies financial information to be reported to the Department.
- SB 881** Eliminates the exemption for insurance companies under the Illinois Anti-trust Act. Retains exemption for certain insurers. Provides for simplification of insurance policies and requires the Department of Insurance to prepare an annual consumer guide which compares the basic premiums and rates of insurers that issue automobile insurance and other types of insurance.
- SB 882** Provides for the election of the Director of the Department of Insurance at the general election in 1990 and every four years thereafter. Establishes qualifications for office and sets forth powers and duties. Abolishes the term of the appointed Director of Insurance in January, 1991. Requires insurers to roll back rates to a level of 15% less than the charges for the same coverage which were in effect on January 1, 1989.
- SB 932** Requires insurance companies to offer the option on automobile insurance policies of having only original manufacturer parts or the equivalent used when replacing parts covered under the policy. Requires the name of the manufacturer to appear on all replacement parts and prohibits the sale of such part unless the manufacturer is identified.

- HB 504** Amends the Illinois Insurance Code to create a civil cause of action for any violation of Provisions Applicable to All Companies, and Unfair and Deceptive Acts and Practices, of the Code. Provides for a minimum award of \$500 plus costs and attorney's fees in every case of recovery of damages. Provides for punitive damages for willful violations.
- HB 569** Provides that statistics reflecting the location of motor vehicle accidents, rather than the driver's residence, shall be utilized with respect to insurance rate setting.
- HB 821** Provides that adverse risk experience in a specific geographic location is not a business purpose sufficient to refuse to provide insurance.
- HB 855** Requires that certain insurance policies contain a provision setting forth how such a policy may be cancelled by the company and the insured.
- HB 1359** Creates an express warranty, as a matter of law, for rebuilt automobile parts. Provides that the warranty runs 90 days or 3,000 miles, whichever occurs first. Provides remedies and damages.
- HB 1753** Defines the terms "crash parts" and "Original Equipment Manufacturer (OEM)." Prohibits insurance companies from requiring the use of non-OEM or used crash parts in damaged vehicles. Requires persons repairing such vehicles to provide an estimate of repair which shall list any non-OEM or used part to be installed in the damaged vehicle, and to attach to such estimate a disclosure giving notice that the use of non-OEM crash parts may invalidate remaining motor vehicle warranties or compliance with federal safety standards.
- HB 1793** Provides for the Director of Insurance to establish by regulation limitations on rate increases and decreases. Prohibits increases exceeding 10% without prior approval. Provides that rates shall be equitable in their application, not unfairly discriminatory or destructive of competition or detrimental to the solvency of insurers. Defines terms.
- HB 1825** Requires any person who rents a motor vehicle to another to disclose the entire rental rate, terms of any mileage conditions relating to the rental rate in any print advertisement or telephonic, in-person or computer-transmitted quotation.
- HB 2140** Makes a grammatical change of the Illinois Insurance Code.
- HB 2144** See SB 882.
- HB 2147** See SB 881.
- HB 2638** See HB 1359.
- HB 2654** Prohibits the use of misleading advertising in the sale of insurance. Regulates the use of testimonials, endorsements, and commendations in insurance advertising. Makes violations a deceptive practice under the Unfair and Deceptive Acts and Practices article of the Insurance Code and a deceptive business practice under the Deceptive Business Practices Act.

INDIANA
1989 Legislative Session
(January 9 - Late April)

Enacted

- SB 159** Authorizes a car rental company to offer and sell, for a separate charge, a collision damage waiver which relieves an authorized driver of any liability for damages that the driver might otherwise incur. Stipulates what information must be disclosed in the rental agreement containing the collision damage waiver.
- SB 311** Requires a company which provides uninsured and underinsured motorist insurance, and other types of liability insurance, to file a financial statement with the Department of Insurance.
- SB 358** Provides for the examination of domestic insurance companies. Permits the Commissioner of Insurance to determine the nature, scope, and frequency of the examinations to be conducted under the Act.
- SB 360** Amends the Indiana Code concerning insurance coverage of private carriers.

Introduced

- SB 134** Raises minimum requirements for vehicle financial responsibility. Increases the amounts of bodily injury and property damage insurance motor vehicle owners must carry or the amounts of cash or securities motor vehicle owners must deposit to meet the requirements of the State's financial responsibility law. Applies these higher amounts to the registration and operation laws.
- SB 361** Allows the person insured by a motor vehicle liability policy to choose uninsured or underinsured motorist coverage in limits less than the statutory limits of liability coverage, if the insurer agrees to sell these limits.
- HB 1298** Makes numerous changes concerning insurance, including the following:
1. Requires a minimum 20% rate reduction from July 1, 1988 levels for automobile and property and casualty insurance.
 2. Freezes rates until July 1, 1990 unless an insurance company is substantially threatened with insolvency.
 3. Requires insurers to offer eligible persons a good driver policy with a 20% discount.
 4. Requires a public hearing and approval by the Insurance Commissioner for automobile and other property and casualty insurance rate changes.
 5. Requires automobile premiums to be determined primarily by driving record.
 6. Makes insurance companies subject to the state antitrust laws, and eliminates rating organizations and advisory organizations.
 7. Requires the Insurance Commissioner to be elected, rather than appointed.
 8. Requires the Insurance Commissioner to provide comparative pricing information to consumers.
 9. Permits insurance agents and brokers to give discounts on rebates to those who buy insurance from them.
- HB 1360** Increases the limitations on an insured's coverage for bodily injury uninsured or underinsured motorist coverage to the face value of the insured's

policy, rather than the value of the policy less the coverage of the wrongdoer. Provides that an insurer loses any right of subrogation if the insurer fails to advance payment to the insured within 30 days of notice of a settlement. Expands the definition of uninsured motor vehicle to include a hit-and-run motor vehicle where the owner or operator cannot be identified. Makes changes regarding insolvency of an insurer.

- HB 1363** Allows for a reduction in premium charges for motor vehicle insurance policyholders who are at least 55 years of age and who have successfully completed a motor vehicle accident prevention course.
- HB 1795** Makes insurance companies subject to the general state antitrust laws. Establishes the data collection agency and provides for a designated advisory organization.
- HB 1815** Requires an insurance company to notify a motor vehicle liability insurance policyholder before the company directs a repair shop to install a repair part in the policyholder's motor vehicle that is not at least equivalent to an original repair part supplied by the manufacturer.

IOWA
1989 Legislative Session
(January 9 - Late April)

Introduced

- SF 381** Establishes the office of Consumer Advocate of Insurance in the Department of Justice as a separate division.
- SF 458** Prohibits an insurance company from increasing an individual's rates, canceling or refusing to renew a person's automobile insurance because of that person's driving or ownership of a motor vehicle involved in an accidental collision with a wild deer.
- HF 169** Prohibits an insurance company from raising an insured's rates due to an accident caused by an uninsured or hit-and-run motorist or underinsured motorist.
- HF 290** Prohibits a person from driving a motor vehicle registered in Iowa on the highways of Iowa unless liability insurance coverage is in effect for the motor vehicle.
- HF 334** Requires motor vehicle liability insurance coverage; allows uninsured motorists' victims to receive moneys from the Victim Reparation Fund; and provides penalties.
- HF 495** Requires a motor vehicle insurer to extend a mandatory offer of insurance for property damage caused by an uninsured or underinsured driver when the insurer also provides uninsured and underinsured coverage to an insured.
- HF 629** Prohibits an insurance company from including as a term of a policy, or endorsement or rider on a policy, a provision restricting an insured's family member's use of the insured motor vehicle, if the restricted family member also maintains a separate policy of automobile liability insurance with the insurer.

KANSAS
1989 Legislative Session
(January 9 - Early May)

Enacted

- HB 2015** Requires a person who prepares an estimate of repair of a motor vehicle to disclose the use of aftermarket parts and the intended use of such parts to the owner.
- HB 2324** Amends penalty provisions of current law relating to the failure to maintain financial security.

Introduced

- SB 282** Amends certain antitrust statutes applicable to the insurance industry.
- SB 317** Prohibits any person in the business of renting motor vehicles to the public from including in the rental contract, liability for any damage done in excess of \$200. Provides exceptions.

KENTUCKY
No regular legislative session

LOUISIANA
1989 Legislative Session
(April 17 - July 10)

Enacted

- SB 126** Permits an automobile insurance rate or premium increase for insureds whose driving privileges have been suspended or revoked based on a court order when the offense involved directly relates to the operation of a motor vehicle. Act No. 42.

Introduced

- SB 136** Provides for exclusion of exemplary or punitive damages from certain policies of insurance.
- SB 510** Prohibits the recovery of exemplary damages under uninsured motorist coverage.
- SB 522** Provides for payment of claims by insurers and requires certain insurers to post security for payment of certain claims.
- SB 571** Sets forth the circumstances when a lessor may hold a lessee liable for damages or loss to a rented vehicle. (Withdrawn from Senate files)
- SB 608** Provides for the issuance of uninsured and underinsured motorist coverage.
- SB 695** Permits the Insurance Rating Commission to authorize rate reductions on bodily injury liability, property damage liability, and collision insurance under certain conditions.

- SB 850** **Modifies requirements for uninsured motorist coverage in automobile insurance policies.**
- SB 851** **Provides for issuance of uninsured or underinsured motorist liability policies.**
- HB 6** **Requires rate reductions for good drivers.**
- HB 40** **Requires an insurer to promptly pay the claim of a person who is not its insured, and sets a time limit and penalties.**
- HB 58** **Prohibits the Office of Motor Vehicles from reporting certain speeding tickets.**
- HB 98** **Provides that the Commissioner of Insurance shall be appointed by the Governor.**
- HB 125** **Provides for the contents of an individual driver's operating record and prohibits an increase in insurance premiums under certain circumstances.**
- HB 154** **Requires motor vehicle liability claims payment within 30 days, and requires interest on late payments.**
- HB 158** **Prohibits any insurer from increasing the rate or surcharge, cancelling, or failing to renew any policy of automobile insurance based on consideration of a "non-fault incident."**
- HB 330** **Requires insurers, except life and health insurers, to pay claimants within 60 days.**
- HB 346** **Requires a sticker affixed to a motor vehicle as proof of paid automobile liability insurance.**
- HB 395** **Prohibits an insurer from considering an incident which was not the fault of the insured in any rate increase or policy cancellation. (Sent to Governor Buddy Roemer)**
- HB 415** **Requires prompt payment of claims under minimum liability policies and provides for punitive damages.**
- HB 526** **Requires impoundment of a vehicle when the operator is driving while his/her license is suspended or without liability insurance.**
- HB 558** **Requires payment within 60 days after settlement or judgment for policies other than health or life.**
- HB 615** **Provides for car rental businesses' terms of rental agreements and limitations on charges and advertising.**
- HB 637** **Increases the fee for failure to notify the State when insurance is obtained.**
- HB 724** **Defines and provides penalties for "unfair claims settlement practices."**
- HB 750** **Provides for alternative liability insurance to insure individual licensed drivers.**

- HB 757** Specifies covered vehicles under uninsured motorist coverage.
- HB 912** Provides that no notice is required for transfer of coverage from one car to another.
- HB 918** Prohibits consideration of a non-fault incident in increasing rates or surcharges or in cancellation or non-renewal.
- HB 919** Prohibits an employee's violations from being charged against both the employee's policy and the employer's policy.
- HB 971** Provides that a compromise for an amount less than the amount available from primary coverage discharges the uninsured motorist carrier from liability.
- HB 1269** Requires prompt payment and loss adjustment of certain damage claims. (Sent to Governor Buddy Roemer)
- HB 1278** Requires an insurer to provide alternative transportation for certain property damage claims on personal vehicles.
- HB 1285** Regulates collision damage waivers for rented vehicles.
- HB 1287** Establishes limitations on the terms and conditions which may be used in short-term motor vehicle rental agreements, on the rates and charges which may be imposed by the lessor, and on the content of advertising used by the lessor. Prohibits a lessor from holding an authorized driver liable for more than \$200 in damages except under certain circumstances.
- HB 1420** Provides for vehicles and damages covered under uninsured and underinsured motorist coverage.
- HB 1423** Rolls back and freezes automobile insurance rates.
- HB 1438** Requires the revocation of a driver's license and vehicle registration for submitting false information.
- HB 1512** Requires rate reduction for good drivers.
- HB 1552** Limits the security providers who must provide information to the Secretary of the DPS and C.

MAINE
1989 Legislative Session
(January 2 - June 21)

Enacted

- SP 74** Clarifies the law authorizing the use of warning devices on Department of
LD 64 Corrections motor vehicles. Chapter 32.
- HP 220** Clarifies the Maine Used Car Information Laws. Chapter 61.
LD 300
- HP 258** Provides for color coded driver's licenses for minors. Chapter 64.
LD 370

HP 277
LD 389

Requires drivers, under certain circumstances, to turn off their motor vehicles' fog or auxiliary lights. Chapter 65.

HB 445
LD 610

Requires the use of flashing amber lights on motor vehicles during sanding and snow removal operations. Chapter 50.

MARYLAND
1989 Legislative Session
(January 11 - April 10)

Enacted

SB 170
HB 335

Permits an insured to waive certain medical, hospital, and disability benefits provided in motor vehicle liability insurance policies. Requires an insurer to provide certain medical, hospital, and disability benefits unless an insured makes an affirmative waiver of the coverage and benefits. Provides that the insured be notified of the nature of the benefits before waiving coverage. Repeals provision which provided that the benefits were considered to be required security. Specifies the requirements of the waiver form.

Introduced

SB 616
HB 853

Modifies the exemption for insurance activities under the state's antitrust law. Creates a Consumer Information Office and specifies the duties of the Office. Requires the Office to establish a consumer education outreach program. Requires insurers submit certain data with each rate filing and on an annual basis. Provides for a refund mechanism. Adds certain factors to be considered by the Insurance Commissioner in determining that competitiveness exists in certain markets.
(The Senate amended to repeal the antitrust option.)

HB 1243

Requires owners of motor vehicles in the state to obtain no-fault motor vehicle insurance benefits under the State Motor Vehicle Security Law. Limits the right to recover certain damages in a civil action in certain circumstances for certain persons covered under a no-fault policy. Specifies that no-fault insurance cover certain benefits. Limits the rates charged for motor vehicle liability insurance. Provides exceptions and a procedure for implementation of rate reduction. Authorizes an insurer to exclude no-fault coverages in certain circumstances. Limits an insurer's right of subrogation. Requires first party benefits be paid within a certain period and specifies a penalty. Requires coverage for accidental damage without regard to fault and requires insurers to issue a rider on certain policies.

HB 1434

Permits owners of motor vehicles in the state to elect no-fault motor vehicle insurance benefits in lieu of certain other coverages under the State Motor Vehicle Security Law. Limits, in certain circumstances, the right to recover damages in a civil action for persons covered under a no-fault policy. Requires no-fault insurance include certain benefits. Expands the scope of uninsured motor vehicle coverage to include a motor vehicle whose owner has elected no-fault benefits. Limits civil actions for damages by or on behalf of an insured against an owner of certain vehicles to the extent the

Introduced

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**MASSACHUSETTS
1989 Legislative Session
(January 4 - All year)**

The Commonwealth is unwilling to enact automobile legislation until the effects of Chapter 273, enacted on November 5, 1983, can be observed. Chapter 273, with 77 sections, regulates automobile insurance premiums and amends the Commonwealth's motor vehicle insurance laws.

**MICHIGAN
1989 Legislative Session
(January 11 - All year)**

Enacted

SB 173

Provides for the mandatory use of seat belts in motor vehicles and removes a sunset date.

Introduced

- SB 270** Makes certain insurers subject to the state antitrust act.
- SB 389** Allows a minimum premium charge upon cancellation of an insurance policy and permits certain options.
- HB 4152** Prohibits the Insurance Commissioner from accepting insurance-related employment in the private sector prior to six months after leaving office as Commissioner.
- HB 4158** Requires Commissioner approval of no-fault catastrophic claims association assessments.
- HB 4159** Excludes from secondary rating plans automobile no-fault comprehensive coverage.
- HB 4217** Allows inspection by the Secretary of State of the records of transactions concerning the buying or receiving of used motor vehicle parts by the state.
- HB 4220** Requires the use of seat belts by children ages four through 16.
- HB 4239** Amends no-fault insurance ratings based on civil infractions of 65 miles per hour in 55 mile per hour zones.
- HB 4289** Requires the revocation or denial of a mechanic's certificate and motor vehicle repair facility registration of a person convicted of theft of a motor vehicle or vehicle parts under certain circumstances.
- HB 4467** Requires the use of seat belts in school buses.
- HB 4468** Allows the installation of a front-mounted or rear-mounted audiovisual sensory warning device on school buses.
- HB 4490** See SB 270.
- HB 4553** Prohibits, in certain cases, rental automobile companies from holding customers liable for damage to rental vehicles.
- HB 4751** Requires insurance companies to offer uninsured and underinsured no-fault motorists coverage.
- HB 4771** Requires notice when there is an increase in a no-fault insurance premium.
- HB 4912** Provides for numerous significant provisions including the following:
1. Provides that an individual who serves as the State Insurance Commissioner cannot have worked for an insurer for 10 years prior to his or her appointment and cannot work for an insurer for 10 years after he or she leaves the appointment.
 2. Provides that an insurer or an insurer's agent which offers, solicits, pays or receives a kickback or bribe in connection with the process of resolving a claim for automotive repair is in violation of the unfair trade practices provisions of the Code. Specifies that such activities constitute a felony, punishable by one to five years in prison

and/or a fine of \$50,000, and makes the insurer subject to revocation of its license.

3. Creates the right to a private cause of action for citizens damaged by an insurer's unfair trade practices, violations of the Consumer Protection Act, or anti-trust activities.
4. Establishes group automobile insurers which are required to contract with automobile repair shops to obtain the best prices on automobile repair. Requires such an insurer to offer theft prevention devices, at cost, to its insureds.
5. Requires all automobile insurance rates to be approved by the Commissioner before insurers would be permitted to apply them to insurance policies sold in Michigan.
6. Requires all automobile insurers writing in Michigan to reduce rates to a level which is at least 20% less than the rate levels which were in existence on May 1, 1988. Requires the reduction to be in place by January 1, 1990. Prohibits automobile insurers from filing new rates more than once in a 12-month period.
7. Prohibits automobile insurers from engaging in anti-trust activities. Specifically prohibits insurers from using a rating organization or sharing information regarding rating systems, underwriting rules, actuarial projections, trending factors, profits or expenses.
8. Requires automobile insurers to employ Total Return Ratemaking.
9. Permits an automobile insurer to rebate any portion of the premium to its insureds.
10. Requires the Commissioner to approve rates based on data reflecting each insurer's cost and frequency of claims and litigation experience. Prohibits the approval of rates which are excessive, inadequate, or unfairly discriminatory. Requires all rates to be actuarially justified prior to their approval. Requires the Commissioner to assess the appropriateness of an insurer's administrative expenses as a factor in the rate approval process.
11. Requires each automobile insurer to offer a good driver discount plan based on actuarially supported criteria.
12. Prohibits automobile insurers from charging territorial base rates.
13. Requires the Commissioner to establish an annual hearing to determine the extent of competition in the automobile insurance industry. Requires a plan for increasing competition to be adopted and implemented if it is determined that a reasonable degree of competition does not exist.
14. Requires the Commissioner to establish an automated information system containing rates for each automobile insurer in Michigan. Creates a fund to finance this program and also permits that fees may be charged for the cost of filing each request of rate comparison information.
15. Prohibits an insurer from denying a claim against an insured for an automobile accident which occurs while a portion of a premium payment is overdue. Provides that insurers would be permitted to deny claims against policies for which premiums have been partially paid only in instances in which the policy has been cancelled for non-payment after the insured has been provided with written notice of the cancellation.

HB 4913

Provides that insureds over age 60 who are not receiving income from employment are not required to purchase wage-loss protection insurance coverage and, as a result, are to receive a reduction in premium.

- HB 4914** Provides that automobile insurers would have a fiduciary duty to deal fairly and in good faith with their insureds and are subject to a civil cause of action in instances in which this duty is breached.
- HB 4915** Requires automobile insurers to offer under-insurance and uninsured motorist coverage to insurance consumers.
- HB 4916** Clarifies the threshold requirements which an injured person must meet in order to pursue a claim for pain and suffering or for benefits beyond those which are provided under No-Fault coverage. Provides that the threshold would not apply if a person is injured in an automobile accident which results from a driver's consumption of alcohol or other drugs.
- HB 4917** Provides that automobile insurers would be made subject to the Michigan Consumer Protection Act.
- HB 4918** Provides that automobile insurers would be made subject to the Michigan Anti-Trust Reform Act.

MINNESOTA
1989 Legislative Session
(January 3 - May 22)

Enacted

- HB 956** Clarifies the calculation of underinsured motorist benefits. Chapter 213.
- HB 1194** Requires obligors to issue an insurance identification card. Requires a driver or owner of an automobile to produce proof of insurance. Provides for administrative review. Exempts certain vehicles. Provides for a limited license in certain circumstances. Defines terms and provides penalties. Chapter 321.

Introduced

- SF 784** Prohibits car rental companies from holding renters liable for damages except under certain circumstances.
- SF 801** Clarifies the applicability of the antitrust laws to the business of insurance. Enacts the Competition in Insurance Act of 1989.
- SF 1170** Regulates insurance rates, trade practices, and claims settlement practices.
- SF 1492** Regulates automobile rental companies, provides licensing and bonding requirements.

MISSISSIPPI
1989 Legislative Session
(January 3 - April 2)

Introduced

- SB 2422** Requires a licensee to notify the Department of Public Safety of a change of address. Allows the Department to rely on the address shown on a driver's license to serve notice of suspension. Increases the property