

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
1742 SCOMM 69: HOUSE LIABILITY INSURANCE TASK FORCE, 1989-1990₃₁₀

damage threshold for reporting an accident. Authorizes the Commissioner of Public Safety to impose a civil penalty on a law enforcement department for willful failure to submit accident reports. Increases the amount necessary to show proof of financial responsibility under the Motor Vehicle Safety Responsibility Law. Increases the amount deemed necessary to satisfy a judgment under the Motor Vehicle Safety Responsibility Law. Increases the minimum coverage required for motor vehicle liability insurance policies. Increases the time to suspend a license. Provides penalties and fines. Requires that driver's license reinstatement funds be deposited into the State General Fund. Requires that automobile liability insurance policies contain endorsements for uninsured motorist coverage for bodily injury or death, within limits no less than the insured's policy of property damage liability insurance.

- HB 11 Provides that the definition of "uninsured motor vehicle" shall include insured motor vehicles when the liability insurer of the vehicle has provided limits of bodily injury liability which are less than the legal liability of the injuring party.
- HB 160 See HB 420.
- HB 268 Creates the Mississippi Collision Damage Waiver Act. Defines terms. Provides for licenses, renewals, and fees associated with such licenses. Provides for the content of collision damage waivers. Provides for the filing of rates and guidelines for setting rates. Addresses unfair trade practices and provides for penalties.
- HB 320 See HB 328.
- HB 324 See HB 420.
- HB 328 Provides that uninsured motorist coverage limits shall be automatically equal to the limits of bodily injury liability coverage unless the insured specifically selects uninsured motorist coverage or elects lesser limits. Requires minimum limits of uninsured motorist coverage in all policies.
- HB 420 Amends the Mississippi Motor Vehicle Safety Responsibility Law. Provides for compulsory motor vehicle liability insurance. Provides that certain vehicles shall be exempt from the requirement of maintaining motor vehicle liability insurance. Provides that the persons insured under liability insurance shall be responsible for affixing an emblem on each insured motor vehicle as evidence of coverage. Provides for the design of such emblem by the Department of Public Safety and for the furnishing of such emblem by the insurance company. Prescribes penalties for violations of the provisions. Increases financial responsibility requirements.
- HB 563 Strengthens the Mississippi Motor Vehicle Safety Responsibility Law by increasing the minimum amounts of proof of financial responsibility. Requires certain law enforcement officers to assist in the enforcement of this Act and to provide for random sampling of persons cited for traffic violations. Requires proof of financial responsibility prior to receiving vehicle license tags. Requires tax collectors to issue certificates regarding proof of financial responsibility. Revises the accident threshold reporting amount. Requires the Commissioner of Insurance to prescribe certificates

of financial responsibility and provide for the distribution of such certificates. Increases the minimum amounts of proof of financial responsibility. Increases the minimum amount of money or securities used as proof of financial responsibility.

HB 688

Excludes the necessity of actual physical contact from the definition of uninsured motor vehicle.

MISSOURI
1989 Legislative Session
(January 4- June 30)

Enacted

SB 228

Exempts Missouri mutual and extended Missouri mutual insurance companies organized under Chapter 380, RSMo, from corporate income tax.

SB 250

Makes a number of changes to laws relating to insurance regulation. Sets a flat fee for the filing of policies with the Division of Insurance. Eliminates outdated language, brings investment requirements up to date, and corrects inconsistencies in capitalization requirements. Requires 15 days' prior written notice to policyholders of any proposed increase in automobile insurance premiums. Allows a supplemental assessment or certification of additional tax liability or delinquency for the purpose of collecting insurance premium taxes. Amends laws relating to regulation of sales or surplus lines insurance. Requires that surplus lines tax returns be due annually.

HB 615
HB 563

Changes the state's insurance laws and adds a provision which retaliates against the insurance agents of another state in instances where the other state requires any coverage solicited in that state by a Missouri agent to be co-signed by an agent of that state.

HB 726

Requires that aftermarket crash parts for motor vehicles display the logo or name of the manufacturer of the part when the part is supplied by a non-original equipment manufacturer. Requires insurers to make disclosures on estimates with regard to the use of non-original parts to repair an insured's vehicle. Provides penalties.

MONTANA
1989 Legislative Session
(January 2 - Late April)

Enacted

HB 206

Provides for the mandatory suspension of a driver's license for failure to appear or pay a fine for a violation of the Motor Vehicle Financial Responsibility Laws. Chapter 263.

HB 295

Clarifies that a person involved in a motor vehicle accident may examine information concerning the accident that is prepared and filed by the Department of Justice. Chapter 486.

Introduced

- SB 102** Prohibits rental car companies from holding renters liable for damages to rental cars.
- HB 322** Increases the premium reduction and eligibility periods from two to three years for drivers 55 years of age or older who successfully complete traffic safety programs.
- HB 673** Provides for a direct cause of action against the insurer in automobile accident liability cases.

NEBRASKA
1989 Legislative Session
(January 4 - May 24)

Introduced

- LB 59** Adopts the Collision Damage Waiver Act and provides a penalty.
- LB 222** Changes provisions relating to the maximum liability for underinsured motorist coverage.
- LB 347** Changes provisions of current law relating to the proof of financial responsibility and provides penalties.
- LB 495** Changes and eliminates provisions of current law relating to financial responsibility and provides penalties.

NEVADA
1989 Legislative Session
(January 16 - Mid-June)

Enacted

- SB 220** Requires that for any coverage for a policy of motor vehicle liability insurance issued or renewed on or after October 1, 1989, every insurer shall reduce its charges for insurance to levels which are at least 15% less than the charges for the same coverage which were in effect on July 1, 1988. Requires that for those persons who apply for a policy of motor vehicle liability insurance for the first time on or after October 1, 1988, the rate must be 15% less than the rate which was in effect on July 1, 1988, for similarly situated risks. Provides that rates and premiums reduced pursuant to this law may only be increased if the Commissioner of Insurance finds, after a hearing, that an insurer is substantially threatened with insolvency.

NEW HAMPSHIRE
1989 Legislative Session
(January 4 - Late May)

Enacted

- HB 270** Establishes the Motorcycle Safety Fund. Grants the Insurance Commissioner the authority to provide motorcyclists a discount upon a showing of the successful completion of a safety course.

HB 370

Relates to uninsured motorists who are at fault and are positively identified following an automobile accident.

**NEW JERSEY
1989 Legislative Session
(January 10 - All year)**

The state introduced 113 bills which relate to automobile insurance. An index of the bills will be provided on request. Below is a list of a few of the significant bills which were enacted.

Enacted

SB 3122

Requires insurers transacting automobile insurance in New Jersey to report the theft or salvage of a motor vehicle to the National Automobile Theft Bureau in accordance with the constitution and operating procedures of the NATB. Requires reimbursement of the NATB's costs. Chapter 65.

SB 3124

Requires public agencies to notify the National Automobile Theft Bureau whenever they take possession of an abandoned motor vehicle. Chapter 66.

AB 130

Adds licensed ophthalmic dispensers to the list of persons authorized to certify the vision screenings required of every licensed driver at least once every 10 years as a condition for the renewal of his driver's license and of any endorsement thereon. Chapter 15.

**NEW MEXICO
1989 Legislative Session
(January 17 - March 17)**

Enacted

SB 318

Increases the penalty for violations of the Mandatory Financial Responsibility Act. Laws 1989, Chapter 235.

SB 461

Provides procedures for the enforcement of the Mandatory Financial Responsibility Act. Laws 1989, Chapter 214.

Introduced

SB 176

Provides for enforcement of the Mandatory Financial Responsibility Act. Prescribes powers and duties. Provides penalties.

SB 207

Removes deductible limits for uninsured motorist property coverage.

SB 257

Increases the fine for non-compliance with the Mandatory Financial Responsibility Act.

SB 310

Rolls back charges of insurance and freezes rates and premiums on certain types of insurance. Establishes rating criteria for private passenger automobile insurance. Establishes factors for issuance of good driver discount policies. Restricts non-renewal and cancellation of private passenger automobile insurance policies.

- SB 649** Eliminates collision damage waivers for rental car companies.
- HB 36** Provides for enhanced enforcement of the Mandatory Financial Responsibility Act. Provides penalties.
- HB 287** Eliminates the antitrust exemption for insurance carriers. (Vetoed by Governor Garrey Carruthers)
- HB 398** Provides for enforcement of the Mandatory Financial Responsibility Act. Prescribes powers and duties. Provides penalties.
- HB 640** Provides for a reduction in motor vehicle insurance premium rates. (Vetoed by Governor Garrey Carruthers)
- HB 685** Increases the amounts of mandatory automobile insurance.

NEW YORK
1989 Legislative Session
(January 4 - July)

Enacted

- SB 688** Provides for the waiver of a fine for failure to provide a child safety
AB 1266 seat in a car. Chapter 28.
- SB 1006** Permits the use of closed-circuit television on certain trucks and school
buses for safety and maneuvering purposes. Chapter 39.
- SB 1146** Provides that insurance coverage shall not apply to an impounded
automobile which will not be moved under its own power under certain
conditions. Chapter 11.
- SB 1245A** Provides for the licensing of historical motorcycles upon a showing of
AB 1857A evidence of financial security. Chapter 30.
- SB 2132** Amends the Vehicle and Traffic Law in relation to child safety seats.
AB 3173 Chapter 41.
- SB 4554A** Amends the Insurance Law and the General Business Law, in relation to
insurance property damage coverage for rental cars. Chapter 66.
- AB 473A** Amends the Vehicle and Traffic Law, in relation to registration of repair
shops for motor vehicles. Chapter 63.
- AB 7315A** Refines Chapter 220 of the Laws of 1986 (Omnibus Liability Act);
permits the Insurance Department to act when a company overextends
itself; requires 45 days' notice prior to when a company terminates a
"line" of insurance; adds additional reporting requirements on the solvency
of companies; and enacts a portion of the N.C.O.I.L./N.A.I.C. bill
requiring independent certification of loss reserves in certain
circumstances. Chapter 235

Introduced

- AB 469** Provides that every private passenger automobile insurer doing business in
New York which utilizes surcharges on its premium rates shall express

such surcharges in a dollar amount and disclose this to each of its affected insureds at least once a year in writing with a regular communication.

- AB 2169A** Increases the minimum limits of liability required under motor vehicle insurance coverages.
- AB 2770A** Amends the Insurance Law, in relation to unfair claims settlement practices.
- AB 3555** Amends the Insurance Law, in relation to private rights of action for unfair claim settlement practices.
- AB 5067** Amends the Insurance Law, in relation to standards for rates.
- AB 5180** Creates the New York Motor Vehicle Joint Underwriting Association Act.
- AB 5794A** Amends the Insurance Law, in relation to uninsured motorist coverage.
- AB 5893** Requires automobile insurers to provide insureds with lists of discounts or surcharges on automobile insurance rates.
- AB 7312** Provides higher levels of benefits to injured persons under the Comprehensive Motor Vehicle Insurance Reparations Act.
- AB 7396** Provides motor vehicle insurance rate reductions for participation in certain anti-theft programs.

NORTH CAROLINA
1989 Legislative Session
(January 11 - July)

Enacted

- HB 324** Authorizes automobile liability insurers to offer coverage for damage to rental vehicles driven by their insureds. Prohibits certain advertising and sales practices of rental car companies. Clarifies the law regarding sales of insurance by rental car company employees. Chapter 631.

Introduced

- HB 1081** Authorizes the Legislative Research Commission to study automobile insurance issues and town or county mutual insurance companies. (The General Assembly did not authorize this study.)

NORTH DAKOTA
1989 Legislative Session
(January 4 - April 20)

Enacted

- SB 2098** Requires motor vehicle liability insurance policies for private passenger automobiles to include coverage for damage due to use of rented automobiles.

- SB 2271** Specifies who is entitled to premium reductions for accident prevention course completion.
- HB 1107** Provides the unsatisfied judgment fund with authority to pay legal costs associated with collections.
- HB 1155** Replaces sections of the North Dakota Century Code relating to uninsured and underinsured motorist coverage under motor vehicle liability insurance policies.
- HB 1176** Relates to bankruptcy, allowing a judgment debtor relief from motor vehicle financial requirements.
- HB 1242** Imposes a mandatory fine for driving without liability insurance.
- HB 1331** Establishes the financial responsibility requirements for liquified petroleum gas transporters.
- HB 1351** Requires persons who request a driver's record abstract to identify the reason for the request.
- HB 1408** Amends rate-making procedures of insurance companies.
- HB 1409** Requires optional excess no-fault benefits to be made available for injury in non-covered vehicles.
- HB 1467** Extends the time for filing claims for no-fault benefits.
- Resolved**
- SCR 4028** Directs the Legislative Council to study the feasibility and desirability of regulating salvage pool operations and the activities of insurance companies disposing of vehicles through such operations.
(The Legislative Council decided not to conduct this study.)
- SCR 4039** Directs the Legislative Council to study the operation and effect of North Dakota's no-fault insurance law in comparison with no-fault insurance laws in other states.
(The Legislative Council decided not to conduct this study.)
- SCR 4052** Directs the Legislative Council to study methods of ensuring that all operators of motor vehicles maintain automobile liability insurance.
(The Legislative Council decided not to conduct this study.)
- SCR 4057** Directs the Legislative Council to study the appropriateness of allowing the use of advisory insurance rates to be filed for insurance companies by licensed rating organizations.
(The Legislative Council decided not to conduct this study.)

OHIO
1989 Legislative Session
(January - All year)

Introduced

- SB 163** Revises automobile insurance laws relating to eligibility for coverage, standards for rating and underwriting, standards for mandatory premium discounts, return of excess rates, restrictions on rating organizations, intrafamilial exclusions and recovery of damages under uninsured and underinsured motorist coverage, rights of insureds regarding the non-renewal of policies, authority for group coverage, allowance of rebates, prohibition of tie-in sales, termination of authority of agents, and application of the Ohio Antitrust Law to the business of insurance. Permits banks to engage in the business of insurance.
- HB 76** Requires insurers, for a one-year period, to reduce rates by 10% for automobile and certain other forms of casualty insurance. Requires insurers to offer good driver discount policies. Requires that the Superintendent of Insurance be elected in non-partisan elections. Establishes the Office of Insurance Consumer Advocate. Requires the Superintendent to give approval prior to the use of rates for motor vehicle and certain other forms of casualty insurance. Provides that the Ohio Antitrust Law applies to the business of insurance. Provides for the availability of automobile insurance rate comparison data.
- HB 91** Requires automobile insurers to provide appropriate reductions in premiums for insureds who are 60 years of age or older, have completed a motor vehicle accident prevention course, and meet certain conditions regarding their driving records.
- HB 250** Includes political subdivisions and their employees under uninsured and underinsured motorist coverages.
- HB 264** Prohibits the non-renewal of an automobile insurance policy for the reason that the insured was involved in an accident in which he was not substantially at fault and makes it an unfair insurance practice to change a rate or increase the cost of an automobile insurance policy based on a consideration of that reason.
- HB 430** Establishes the offense of driving without proof of financial responsibility. Provides civil and criminal penalties. Eliminates the requirements of the Financial Responsibility Law that a suspension of operating privileges be for a period of at least 90 days and not be subject to occupational or other limited driving privileges.
- HB 465** See SB 163.

OKLAHOMA
1989 Legislative Session
(January 3 - Early July)

Introduced

- SB 13** Requires motor vehicle insurance claim settlement payments to be on instruments payable on demand.

- SB 182** Relates to tentative agreements to settle with insured tortfeasors. Requires certain documentation and authorization. Allows insurers to substitute payment. Requires notice. Limits the rights of insurers if payment is not made in 60 days.
- HB 434** Requires motor vehicle insurance premium reductions for wearing seat belts.
- HB 1303** Provides penalties for violating provisions of compulsory liability insurance laws.
- HB 1418** Provides penalties for motor vehicle owners who allow excluded persons from insurance coverage to operate their vehicle.
- HB 1471** Relates to motor vehicle insurance coverage of T-top automobiles.
- HB 1545** Relates to uninsured motorist coverage. Limits coverage. Modifies limitations and procedures.
- HB 1550** Requires owners of motor vehicles to notify state agencies of cancellation of compulsory liability insurance and to furnish new security verification. Requires insurers to notify state agencies of cancellation of compulsory liability insurance. Requires security verification to be returned to the carrier upon cancellation of compulsory liability insurance.
- HB 1581** Allows the impoundment and forfeiture of a motor vehicle for driving without compulsory liability insurance.
- HB 1584** Provides that the security verification form is to be approved by the Insurance Commissioner.

OREGON
1989 Legislative Session
(January 9 - Late June)

Enacted

- SB 128** Concerns collision damage waiver provisions for rented motor vehicles.
- SB 684** Provides for "good driver" automobile insurance discounts.
- HB 2429** Prohibits insurance forms that include the cost of defending claims within stated limits of liability.

Introduced

- SB 18** Concerns uninsured motorists.
- SB 558** Requires prior approval of rate changes of 5% or more.
- SB 683** Concerns automobile body craftsmen.
- SB 858** Removes provisions requiring continuous titling and registration of
HB 2889 campers and travel trailers. Prohibits the Motor Vehicles Division from refusing to renew registration or transfer title solely on grounds that the owner owes registration fees.

SB 696
SB 859

Concerns seat belt laws.

- HB 2419** Requires insurers to inform insureds and providers of denial of personal injury protection benefits. Allocates cost of arbitration proceedings and authorizes the award of attorney fees. Changes certain notice requirement provisions. Requires a penalty against insurers for unreasonably delaying benefits.
- HB 2539** Extends required personal injury protection benefits to motorcycle and moped insurance policies. Requires all costs of arbitration regarding disputes between insurers and beneficiaries about the amount of personal injury protection benefits to be borne by the insurer. Expands the definition of "costs." Puts the burden of proof of denied benefits on the insurer.
- HB 2540** Provides that underinsurance benefits are excess over amounts recovered from other motor vehicle liability insurance.
- HB 2541** Increases the minimum amount a person must be able to pay or be insured for to be in compliance with the Motor Vehicle Financial Responsibility Law.
- HB 2546** Increases the amount of personal injury protection benefits required under motor vehicle insurance. Provides that the amount of personal injury protection benefits may not be applied in reduction of the amount of damages if the person receives policy limits.
- HB 2627** Requires comprehensive motor vehicle insurance policies to cover the replacement of glass, with maximum deductible of \$50 or less. (Vetoed by Governor Neil Goldschmidt)
- HB 2701** Adds to insurance trade practices regulations certain categories in which distinctions are discriminatory.
- HB 2829** Prohibits an insurer from recommending a vehicle body shop to an insured unless requested to do so. Provides that a written estimate from a shop is rebuttable proof of an amount of loss and procedure of repair. Requires an insurer to settle a claim within 15 days of receipt of an estimate. Establishes a private right of action for an unfair claim settlement practice. Authorizes treble damages for specified conduct.
- HB 3098** Limits insurance coverage through an insurance policy binder to 15 days after receipt of an insurance policy by an insured.
- HB 3132** Establishes the Abandoned Vehicle Account in the General Fund.
- HB 3160** Establishes the Motor Vehicle Insurance Account in the Insurance and Finance Fund. Creates the Motor Vehicle Insurance Pool to provide coverage for damages arising out of motor vehicle accidents. Repeals mandatory financial responsibility laws. (Becomes effective only if the constitutional amendment proposed by HJR 40 (1989) is approved by the electors at the 1990 primary election.)

HB 3391

Prohibits a motor vehicle insurer from assigning a person to a higher risk category solely on grounds that the person has let prior insurance lapse unless such person drove without insurance.

**PENNSYLVANIA
1989 Legislative Session
(January - All year)**

Enacted

SB 109

(Catastrophic Loss Trust Fund) Requires certain insurers to provide for extraordinary medical benefits; provides for limits, for transition of catastrophic loss benefits and for funding of benefits.

Introduced

SB 12

Establishes the Pennsylvania Insurance Commission Act.

SB 32

Provides for the establishment of an Index Bureau and requires insurers to submit monthly reports to the Bureau.

SB 100

Extends the powers and duties of the Office of Consumer Advocate to matters relating to insurance.

SB 146

Provides for competitive rating relating to certain insurance policies, confers powers and duties upon the Insurance Commissioner, and provides penalties.

SB 204

Amends the Casualty and Surety Rate Regulatory Act (P.L. 538, No. 546) by adding a section on factors to consider for the establishment of rates.

SB 205

Requires certain insurance companies to record and report their losses, expenses, and other data with respect to liability insurance.

SB 210

Prohibits the cancellation of insurance policies in certain cases.

SB 223

Regulates the writing of policies of automobile insurance.

SB 436

Provides for rate administration.

SB 457

Requires insurers to notify the Department of Transportation when insurance is cancelled.

SB 538

Provides for an administrative procedure for insureds to file complaints against insurers for actions relating to certain insurance policies.

SB 843

Requires insurance companies to disclose certain data, provides for the review of rate filings and for compliance with requests for data and information, and provides for a liability underwriting services plan.

SB 902

Establishes the Rental Vehicle Collision Damage Waiver Act.

HB 212

Regulates the rights of insurers with respect to underinsured motorist benefits.

- HB 292** Prohibits the raising of automobile insurance rates because of an accident where the insured is not at fault.
- HB 324** Provides for certain insurance rates for motor vehicles equipped with a passive restraint system.
- HB 426** Provides for proof of financial responsibility and imposes penalties. Allows sheriffs, constables and their deputies to confiscate suspended driver's licenses and registration plates and cards. Requires current proof of insurance or financial responsibility when automobiles are inspected.
- HB 427** Requires insurers to file their underwriting standards with the Insurance Commissioner.
- HB 429** Provides that persons convicted of insurance fraud may receive maximum fines of \$15,000 and up to seven years in prison. Increases penalties for fraud between insurance companies and for fraud against the state Insurance Department or other state agencies.
- HB 431** Provides for financial responsibility verification and for an insurance data bank for detection of fraud and abuse. Requires insurers to report cancellation or termination of insurance. Provides for review of insurer profits for private passenger automobile insurance. Requires automobile insurance providers to reduce their rates by 25% across the board. Gives drivers further premium reductions if they agree not to sue except in the most serious accident cases. Requires insurers to offer collision and comprehensive coverage with a \$500 deductible, requires proof of insurance coverage or financial responsibility to register a vehicle, limits medical claims to 110% of Medicare reimbursement rates, and permits the review of medical claims by Peer Review Organizations. Prohibits redlining.
- HB 431 Amendments** Requires all insurance companies to file for new rates within 30 days of the date the entire automobile insurance reform legislation takes effect. Provides that the new rates, which would apply to all policies issued and renewed on and after October 1, 1989, would have to be 25% less than all rates in effect on July 1, 1989. Requires two estimates for automobile repair claims and mandates that the insurer's adjuster inspect a damaged vehicle within three days after a claim is made.
- HB 510** Regulates automobile insurance surcharge rates.
- HB 564** Amends the act of July 22, 1974 (P.L. 589, No. 205) relating to unfair insurance practices and provides for notices of cancellation of insurance policies.
- HB 567** Establishes the Antitheft Automobile Insurance Premium Reduction Act.
- HB 589** Relates to rate reduction.
- HB 608** Provides enforcement procedures with respect to providing financial responsibility and penalties for failure to provide financial responsibility.
- HB 609** Relates to rate regulation.
- HB 648** Establishes the Automobile Insurance Availability Study Act.

- HB 685** Imposes a 180-day restriction on increases in motor vehicle insurance premiums.
- HB 1110** Establishes a Title known as the Insurance Code. Amends Title 40 (Insurance) of the Pennsylvania Consolidated Statutes and adds provisions relating to insurance.
- HB 1150** Creates the Office of Public Insurance Advocate and prescribes its powers and duties.
- HB 1151** Provides that certain motor vehicle liability insurance benefits may be waived by an insured.
- HB 1152** Provides for proof of financial responsibility upon registration or renewal and for reports of insurance cancellations to the Department of Transportation, the Pennsylvania State Police and local police.
- HB 1154** Regulates the writing of policies of automobile insurance.
- HB 1165** Provides for the surrender of drivers' licenses, registration plates, and registration cards upon suspension. Provides for financial responsibility verification.
- HB 1172** Provides for motor vehicle stickers evidencing financial responsibility and provides penalties for altered, forged or counterfeit documents.
- HB 1334** Prohibits the cancellation or refusal to renew policies by reason of operating privileges of an underage person being suspended for an offense relating to alcoholic beverages.
- HB 1523**
HB 1524 Allows the Insurance Commissioner to modify insurance company requests for rate increases rather than simply approve or deny them. Gives the Commissioner more time to review rate filings, and requires insurance companies to provide more information with their rate filings.
- HB 1669** Expands the definition of "unfair methods of competition" and "unfair or deceptive acts or practices" to prohibit the assessment of fees other than commissions in exchange for any insurance-related transaction, including placement services. Provides an exemption for licensed brokers. Makes it an unfair practice to require drivers purchasing automobile insurance to buy other coverage as well.
- HB 1671** Delegates responsibility to insurers for the prevention, detection, and investigation of insurance fraudulent activities. Insurers must devise anti-fraud plans by December 31, 1989. Requires insurers to supply written reports of any suspected fraud to law enforcement officials and mandates that insurers join a proposed Fraud Information Exchange in order to operate in Pennsylvania.
- HB 1672** Grants the Insurance Department the power to investigate insurers and provides penalties for unlicensed brokers.

RHODE ISLAND
1989 Legislative Session
(January 3 - Late May)

Introduced

- SB 19** Creates the Fair Claim Settlement Practices Act and provides for suits against the insurer for acts of bad faith by the insurer.
- SB 20** Requires that motor vehicle insurance policies have arbitration provisions that may be utilized at the election of the injured party whenever a claim is for \$25,000 or less. Preserves the right to a jury trial.
- SB 110** Requires an insurance company to reveal its policy limit upon request.
- SB 207** Removes any requirements relating to uninsured motorist property damage coverage from the uninsured motorist coverage required under RIGL 27-7-2.1.
- SB 259** Requires that before a motor vehicle can be registered, the vehicle must be covered by liability insurance or proof of financial security.
- SB 671** Clearly defines vehicles affected by the law, states that this coverage pays only compensatory damages, clarifies language concerning rejection of uninsured property damages coverage and selection of limits on renewal and replacement of policies, makes technical amendments to recognize that many policies have more than one named insured and that any named insured can agree to terms of the contract, and eliminates the current stacking requirements. Clarifies and defines that uninsured motorist coverage may be applied only to damages resulting from bodily injury and does not include property damage, provides that the coverage for property damage applies as excess over other available property insurance, and introduces a definition of "hit-and-run" motor vehicle which would require physical contact.
- HB 5591** Requires that before a motor vehicle can be registered, the vehicle must be covered by liability insurance or proof of financial security.
- HB 5755** Requires liability insurance or proof of financial responsibility on all motor vehicles in the State, and provides procedures to insure compliance and penalties, including fines, jail terms and revocation of license and registration privileges for noncompliance.
- HB 6030** Creates within the Department of Business Regulation a Motor Vehicle Insurance Commissioner.

SOUTH CAROLINA
1989 Legislative Session
(January 10 - June 1)

Enacted

- HB 3695** Enacts the "Automobile Insurance Reform Act of 1989." Makes various significant amendments, including the following provisions:

1. Reduces the cost of motor vehicle reports.
2. Allows policies with credits and discounts to be ceded to the Reinsurance Facility.
3. Allows notification of the Highway Department by electronic and magnetic media of cancellation and reinstatement of automobile registrations.
4. States that uninsured and underinsured motorist coverages need not be provided in any excess or umbrella policy.
5. Increases the safe driver discount to 20% for all companies.
6. Reconstitutes the board members of the Reinsurance Facility.
7. Allows intervention by the Consumer Advocate in federal regulatory agencies to represent consumers' interest.
8. Allows intervention by the Consumer Advocate in the rate making process before the Department of Insurance.
9. Limits the mandate to write 250/500/50 or 500 single limit liability. States that insurers may not refuse to write optional coverages on the basis of unfair discrimination.
10. Makes it a violation of the Unfair Trade Practices statute to overcharge in insurance cases.
11. Provides for a minimum policy term of 60 days with no cancellation. Makes exceptions.
12. Establishes a procedure for handling underinsured motorist claims.
13. Sets up a procedure for offering optional coverages.
14. Makes it a felony for insurance fraud.
15. Requires insurers to notify the Chief Insurance Commissioner when a claim is denied due to fraud, arson, false swearing, etc.
16. Requires a person applying for a driver's license for the first time to complete a proof of insurance form or an affidavit that neither he nor any resident relative owns a motor vehicle and return it to the Department of Motor Vehicles within 30 days. Provides that failure to do so will result in the suspension of the newly acquired license. Provides that proof must also be given on each renewal.
17. Requires the Chief Insurance Commissioner to prepare and make available to the public a price shopper's guide for automobile insurance.
18. Gives the Chief Insurance Commissioner the power to order rate reductions as a result of legislative action.
19. Prohibits an insurer from including excess and bad faith judgments in the loss or expense component of their rate filings.
20. Makes it a felony for an insurer to include non-automobile insurance expenses in its automobile insurance rate filings unless such expenses are properly allocated.
21. Removes the mandate to write personal injury protection coverage.
22. Restricts the allowable expense figures to no more than the average expense figure for the top 10 most efficient companies. Separates companies into appropriate categories for the purpose of calculating the figures. Allows the Chief Insurance Commissioner to extend these provisions to other lines of insurance after a public hearing if it is in the best interest of the public.
23. Requires the Highway Department to identify lapses in insurance coverage when a person provides proof of insurance in response to a registration cancellation notice. Provides exceptions.
24. Requires the Highway Department to issue a receipt when the registration on a motor vehicle is surrendered.
25. Requires insurance companies to report investment income to the Insurance Department by means of a standard investment income exhibit.
26. Prevents an increase in automobile insurance premiums for the first

offenses of having a defective taillight or driving too fast for conditions.

27. Prohibits the increase of a recoupment fee of an insured motorist where he is not at fault for an accident.
28. Makes property/casualty rate filings subject to the Administrative Procedures Act.
29. Requires that all designated carriers pass audits in order to continue to hold a designated carrier contract.
30. Reduces the cession limitation from 40% to 35% and requires all insurance companies to inform any policyholder whether he or any person insured under the policy is in the Reinsurance Facility if requested to do so in writing by the policyholder.
31. Changes the formula for the recoupment fee.
32. Mandates a rate reduction of 5% for all insureds after September 30, 1989.
33. Requires persons in a motor vehicle to wear a safety belt, but in the back seat only if it has shoulder harness. Requires the School Bus Transportation Study Committee to study the installation of safety belts in school buses.
34. Allows the confiscation of license plates of uninsured automobiles by local law enforcement agencies.
35. Requires all policies that are ceded to the Reinsurance Facility have a \$250.00 deductible on comprehensive and collision coverage. Excludes safety glass from deductible.
36. Allows an insurer to cede coverages it is mandated to write; cannot cede coverages under a policy it is not mandated to write.
37. Changes the definition of an underinsured motor vehicle.
38. Adds a requirement to the Uninsured Motorist Statute that the witness required for a non-contact claim must sign a sworn affidavit and be informed of a penalty for false swearing.
39. Requires that a motor vehicle report be obtained at the point of sale for any policy that is to be ceded to the Reinsurance Facility.
40. Repeals the \$1.00 fee (of the premium for uninsured motorist coverage) that goes to the Highway Department for the enforcement of insurance requirements relating to motor vehicle registration, effective March 1, 1991.

Act 148. (Passed without Governor Carroll Campbell's signature)

SOUTH DAKOTA
1989 Legislative Session
(January 10 - Early March)

Introduced

HB 1065

Regulates rental car companies and provides under what circumstances a lessee of a rented motor vehicle may be liable for damages to the lessor.

TENNESSEE
1989 Legislative Session
(January 10 - May)
(organizational session followed by regular session)

Enacted

- SB 757** Clarifies the requirement of reducing motor vehicle insurance premiums for
HB 811 the completion of a motorcycle training course. Public Chapter 131.
- SB 1170** Extends the time of notice of intention not to renew private passenger
HB 635 automobile insurance. Public Chapter 110.
- SB 1136** Prohibits automobile insurance companies from increasing premiums under
HB 871 certain circumstances. Public Chapter 378.
- SB 1219** Authorizes recovery under uninsured motorist coverage in certain
HB 1015 circumstances. Public Chapter 313.

Introduced

- SB 10** Requires liability insurance on automobiles.
HB 76
- SB 841** Enacts the Mandatory Insurance Act of 1989.
HB 976
- SB 874** Prohibits the non-renewal of an automobile insurance policy solely because
HB 870 of the old age of the insured.
- SB 939** Requires the written approval by the Commissioner of certain liability
HB 1014 insurance rate increases and decreases.
- SB 1005** Requires an automobile liability insurer to offer coverage for interspousal
HB 536 protection.
- SB 1259** Deletes the licensure requirement that motor freight agents must obtain and
HB 1424 maintain liability and cargo insurance.
- SB 1394** Prevents subrogation of certain parties to payments under uninsured
HB 1327 motorist coverage and removes certain exemptions from such coverage.

TEXAS
1989 Legislative Session
(January 10 - May 29)

Enacted

- SB 41** Requires persons operating a motorcycle on a public street or highway to
wear protective headgear which meets standards adopted by the Department
of Public Safety. Requires passengers to wear protective headgear. Provides
an exception for those who are 18 years of age or older and have been is-
sued a medical exemption. Chapter 15.

Introduced

- SB 191** Prohibits rental companies from imposing certain liabilities on persons who rent automobiles, subject to exceptions, in connection with private passenger automobile rental agreements.
- SB 255** Requires new Texas insurers to maintain at least \$700,000 in capital and \$700,000 in surplus. Stipulates that companies already operating can continue to meet the current minimums of \$200,000 in capital and \$400,000 in surplus unless more than 50% of the insurer is sold. Requires that if more than 50% of the company is sold, the insurer is still able to maintain the \$400,000 minimum in surplus, but must increase capital to \$700,000.
- Removes the confidentiality of information related to insurers unless the Insurance Commissioner can prove there is sufficient reason not to make the information public. Stipulates that the confidentiality can last only 60 days.
- Requires the state's attorney general to notify the Insurance Commissioner of intent to file a lawsuit against an insurer for violations of the Texas Deceptive Trade Practices Act.
- Requires large insurers annually to submit a financial statement prepared by an independent auditor. Insurers with less than \$750,000 of direct written premiums or fewer than 1,000 policyholders are exempt from the audit requirements.
- Calls for the establishment of new regulations for the purchase of reinsurance by Texas insurance companies. Allows Texas insurers to show reinsurance as an asset or deduction from liability only if the coverage is ceded to companies licensed or accredited in the state or ones that establish sufficient assets in U.S. banks to pay claims.
- SB 410** Relates to certain insurance coverage for spouses and dependents in the event of the severance of the family relationship.
- HB 163** Designs and supplies a uniform certificate of course completion for successful completion of a driver safety course.
- HB 1094** Repeals a fee section of the Texas Motor Vehicle Safety-Responsibility Act.
- HB 1822** Relates to financial responsibility for a motor vehicle.
- HB 1827** Relates to recovery of motor vehicle insurance benefits for a motor vehicle impounded for the insured's drug violations.

UTAH
1989 Legislative Session
(January 9 - February 22)

Enacted

- SB 112** Prohibits automobile rental companies from holding renters liable for vehicle collision damage unless the company discloses all costs incident to the rental of a vehicle, and displays notice that a renter's own motor vehicle insurance or credit card agreement may cover damage to the rental vehicle. 1989 Utah Laws 251

Introduced

- SB 258** Requires insurance companies to offer optional property damage protection against uninsured motorists. Provides that this is only a secondary coverage. Specifies limits on the coverage offered.
- HB 61** Requires the disclosure of rate making data in addition to an insurance company's required annual statement.
- HB 268** Reduces the no-fault threshold in motor vehicle insurance and increases coverage provisions.

VERMONT
1989 Legislative Session
(January 4 - Late April)

Introduced

- HB 149** Prohibits car rental companies from imposing liability upon renters subject to exceptions and the sale of collision damage waivers in private passenger automobile rental agreements of 30 days or less.
- HB 176** Changes the method of regulation of rates by returning to a system of prior approval.
- HB 253** Increases the capital requirements of surplus lines insurers.
- HB 370** Establishes a comprehensive revision of laws relating to insolvency of insurers.
- HB 421** Establishes new standards for notice of cancellation or nonrenewal of casualty or automobile insurance.
- HB 476** Requires daily pro rata refund of premiums on cancellation or non-renewal of commercial and personal automobile insurance policies.

VIRGIN ISLANDS

As of May 1989, the Legislature was considering compulsory automobile insurance legislation.

VIRGINIA
1989 Legislative Session
(January 11 - Late February)

Enacted

- HB 73** Raises the minimum limits of insurance coverage for motor vehicle insurance from \$10,000 to \$20,000. Chapter 621.
- HB 1733** Permits the stacking of uninsured motorist insurance coverage.
- HB 1901** Prohibits Department of Motor Vehicles disclosure to insurance carriers of any information of a person's involvement in any accident unless the person was convicted of a violation of a statute or ordinance in connection with the accident.

HB 1955

Amends notice requirements of acts of cancellation and refusal to renew certain liability insurance policies issued to business entities. Prohibits an insurer from cancelling or refusing to renew a policy of motor vehicle insurance against legal liability of the insured solely because of lack of supporting business or lack of the potential for acquiring such business. Chapter 728.

Introduced

SJR 223

Establishes a joint subcommittee to study the availability and affordability of motor vehicle insurance in the Commonwealth.

HJR 382

Continues the joint subcommittee studying the practices by which insurance companies reinsure all or parts of the risks they insure, the advisability of repealing the exemption from the Commonwealth's antitrust laws, and means of assuring the continued availability and affordability of liability insurance coverage.

WASHINGTON
1989 Legislative Session
(January 9 - April 23)

Enacted

SB 5152

Amends insurance form filing requirements. Amends the rate making process.

SB 5499

Requires the driver and registered owner of a motor vehicle to maintain liability insurance. Provides for penalties and exemptions.

Introduced

SB 5148

Requires a rental car company to provide a separate disclosure concerning a collision damage waiver to an individual renting a motor vehicle.

HB 1068

Provides the circumstances under which a motor vehicle lessee may be liable for damages to the lessor.

WEST VIRGINIA
1989 Legislative Session
(February 8 - April 8)

Enacted

SB 264

Provides a mechanism to regulate the declination (i.e., the refusal of an insurer to issue an automobile liability insurance policy upon receipt of a written non-binding application or written request for coverage from its agent or an applicant) of automobile liability policies.

Introduced

SB 277

Defines fraudulent insurance acts and prescribes limits on liability for such acts.

- SB 286** Removes motor vehicle insurance coverage under any policy's omnibus clause if consent is given to use a motor vehicle to a person who does not have a valid operator's or chauffeur's license.
- SB 379** Lowers the fine for driving without insurance to \$10.00.
- SB 406** Allows persons whose driving privileges have been suspended for failure to have insurance coverage for the first time within a 10-year period and upon a showing that they have reinstated their insurance, to drive to and from work.
- SB 462** Requires insurance companies to supply an explanation for cancellation of policies or coverages to the insured, and provides penalties for violations.
- SB 595** Mandates that reductions in premium charges for persons 55 years of age and over shall be separate from and in addition to reductions which may have been given routinely to persons in this age group without respect to improved skills resulting from an approved driving course.
- SB 623**
SB 469 Ensures that the body shops of the state receive their money for work done based on insurance payments, when there is a lien placed on the motor vehicle.
- HB 2058** Limits the coverage of uninsured or underinsured motorists' insurance by imposing ceilings and compensatory damage and maximum amounts.
- HB 2225** Creates the Insurance Consumers' Selection and Advisory Committee and the Office of Insurance Consumer's Advocate.
- HB 2228** Provides that uninsured motorist coverage be optional rather than mandatory for any persons required to purchase automobile insurance pursuant to state law.
- HB 2769** Provides that owners of motor vehicle insurance policies may, upon notice of non-renewal of such policies due to other covered driver's driving violations, prevent such non-renewal by restrictive endorsement specifically excluding such other covered driver from coverage.
- HB 2833** Permits a specific exclusion of any person, by restrictive endorsement, from the mandatory liability insurance requirements set out in Section 170-4-2.

WISCONSIN
1989 Legislative Session
(Convenes January 10)

Enacted

- SB 11** Makes various changes to the administrative suspension law relating to driving while under the influence. Requires that any period of time that a license is suspended or revoked is credited against any suspension or revocation reimposed by a court for violations that arose out of the same incident. 1989 Wisconsin Act 7.

Introduced

- SB 10** Prohibits a renter or authorized driver from being held liable to the person who provided the vehicle for rent (rental company) for damage to the rented vehicle. Provides exceptions. Prohibits a rental company from attempting to hold a renter or authorized driver liable in cases where liability has been eliminated. Prohibits rental companies from attempting to sell to renters a waiver of liability or to require the the renter to make a security deposit. Provides penalties.
- SB 24** Requires each motor vehicle liability insurance policy to include underinsured motor vehicle liability coverage. Provides that the amounts of underinsurance coverage must be provided in addition to any coverage applicable to the owner or operator of the underinsured motor vehicle. Prohibits the insurer from being subrogated to the rights of insureds.
- AB 22** Requires a person who operates a motor vehicle that is registered or required to be registered in Wisconsin to have in effect liability insurance or a bond that assures financial responsibility for the operation of the vehicle. Provides exceptions. Prescribes penalties.
- AB 47** See SB 24.
- AB 51** Specifies factors that an insurer may consider to determine the rates and premiums for certain motor vehicle insurance policies. Limits an insurer's consideration of the location of the insured motor vehicle in determining rates and premiums.
- AB 84** Increases to \$60,000 the amount of cash or value of securities that may be deposited with the Secretary of Transportation in lieu of providing insurance or a bond as proof of financial responsibility for the future.
- AB 288** Requires the Department of Transportation to indicate in the files it maintains for licensed drivers whether the accidents in which each driver was involved occurred during the driver's employment as a law enforcement officer, firefighter, or emergency medical technician (advanced paramedic).

WYOMING
1989 Legislative Session
(January 10 - March 4)

Enacted

- SF 129** Amends sections of the current law related to motor vehicle financial responsibility. Chapter No. 173
- HB 165** Provides that any person who successfully completes an accident prevention course shall receive a reduction in rates for automobile insurance. Chapter No. 258

Introduced

- SF 226** Creates an antitrust act for insurance companies and provides for penalties.
- HB 61** Prohibits automobile insurance companies from raising premiums based upon certain speeding violations.
- HB 908** Provides for an Uninsured and Underinsured Motorist Act.

- HB 173** **Requires the certification of financial responsibility in order to register a motor vehicle.**
- HB 227** **Requires the filing of rates in competitive markets.**
- HB 242** **Relates to surplus lines insurers.**
- HB 302** **Expands the rating authority of the Insurance Commissioner.**

AUTOMOBILE INSURANCE - Studies and Proposals

COLORADO

See HJR 1025 in Legislation Section.

FLORIDA

- CS/SB 1295 Motor Vehicle Insurance Task Force studies the availability and affordability of motor vehicle insurance. (Report due April 1, 1990)
- CS/CS/CS/HB 336 Reviews premium tax laws in Florida and other states. (Report due December 1, 1990)

HAWAII

See SCR 67 in Legislation Section.

IOWA

Study of non-gender based insurance.

MARYLAND

1. House of Delegates will study the costs and benefits of establishing a Fraud Unit in the Insurance Division or the Attorney General's office.
2. Administration will study the organization of the Insurance Division.
3. Senate will study the antitrust issue.

MISSISSIPPI

"Automobile Insurance in Mississippi," A Report of the House Study Committee on Automobile Insurance, December, 1988.

NORTH CAROLINA

See HB 1081 in the Legislation Section.

NORTH DAKOTA

See SCR 4028, 4039, 4052, and 4057 in Legislation Section.

Note: The Legislative Council decided not to conduct the above studies.

OHIO

Ohio House Insurance Subcommittee proposal to move to prior approval of automobile insurance rates and unisex rating.

TEXAS

Legislators have requested a study to determine what effects the removal of insurers' antitrust exemption in the state would have on the insurance industry in Texas and the nation. Results of the study will not be released until the opening of the 1991 Legislative Session.

VERMONT

SB 193 requires the Department of Banking and Insurance to conduct a study of gender-based insurance practices.

VIRGINIA

- 1. "Annual Report of the Department of Motor Vehicles on Uninsured Motorists to the Governor and the General Assembly of Virginia," House Document Number 4, December 1988.**
- 2. "Report of the State Corporation Commission's Bureau of Insurance on Insurance Premium Increases Resulting From Not-At-Fault and Partially-At-Fault Motor Vehicle Accidents to the Governor and the General Assembly of Virginia," House Document Number 14, November 1988.**
- 3. "Report of the Joint Subcommittee Studying the Availability and Affordability of Liability Insurance, the Antitrust Exemption Afforded Insurers and the Reinsurance Costs Associated with Liability Insurance to the Governor and the General Assembly of Virginia," House Document Number 63, February 1989.**

**1989 STATE LEGISLATION WITH PROVISIONS SIMILAR TO
CALIFORNIA'S PROPOSITION 103****

1. Insurance Rate Reduction

FL HB 1334
IL HB 337
IN HB 1298
LA HB 6, 1423, 1512
NM SB 310
NV SB 220*
OH HB 76
PA HB 431
SC HB 3695*

2. Discount for "Good Drivers"

IN HB 1298*
LA HB 6, 1512
OH HB 76
OR SB 684*

3. Election of Insurance Commissioner

AL SB 303
IL SB 882; HB 2144
IN HB 1298
OH HB 76

4. Consumer Advocate for Insurance

AZ Considering Creating Consumer Fraud Division
CO HB 1260
FL HB 285, CS/CS/HB 855
MD SB 616; HB 853
OH HB 76
PA SB 100; HB 1150
WV HB 2225

* - Enacted

** - Provisions not highlighted are: the requirement of advance state approval of insurance rate increases and the requirement of the publication of insurance rate comparisons.

CONSUMER ADVOCATES FOR INSURANCE LEGISLATION

1989

Introduced

AZ	Considering creating Consumer Fraud Division
CA	Proposition 103
CO	HB 1260
FL	CS/CS/HB 855 (Public Counsel) HB 285 (Insured's Bill of Rights)
IA	SF 381
MD	SB 616, HB 853
OH	HB 76
PA	SB 100, HB 1150
WV	HB 2225

1988

Enacted

KY	HB 552
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Introduced

CA	SB 2301
NJ	AB 1620
PA	HB 471

AL
GA
LA
MA
MD
MN
OH
RI
SC

1987

Enacted

AK	SB 509
AZ	HB 2034
CT	SB 116
MI	SB 67
MN	HF 392
OR	SB 323
TX	SB 2X

AUTOMOBILE INSURANCE - Litigation

Aetna Casualty and Surety Company v. Souras 552A.2d 908 (Md. App. 1989)

A passenger who was injured in a collision brought suit against the insurer providing uninsured motorist coverage for the vehicle in which the passenger was riding.

The Court held that in determining the uninsured motorist benefits an injured passenger is to receive from the insurer providing coverage for the vehicle in which the passenger was riding, the \$25,000 the passenger received from the alleged tortfeasor's insurer is to be subtracted from the uninsured motorist coverage limits of \$50,000 rather than from the judgment of almost \$67,000 awarded the injured passenger.

Horace Mann Insurance v. Hampton 767 P.2d 343 (Mont. 1989)

An insurer brought a declaratory judgment action seeking to avoid coverage under an automobile policy.

The Court held that where the driver of a motor vehicle initially obtains control and operates a vehicle with permission of the owner, the Montana Mandatory Liability Protection Act requires the liability insurance to continue to cover the vehicle even though the permittee may have exceeded the scope of the owner's permission or consent.

Presnell v. Allstate Insurance Company 434 N.W.2d 267 (Minn. App. 1989)

The Court held that in a claim for both underinsured and uninsured motorist benefits, the insured who communicates the settlement offer of the underinsured tortfeasor's insurer may recover the difference between the tortfeasor's underinsured liability limit and settlement proceeds from the underinsured insurer.

INDEX (AUTOMOBILE INSURANCE LEGISLATION)

* = Enacted

A. Access to motor vehicle reports

CA AB 2315
LA HB 58
MI HB 4217
MT HB 295*
ND HB 1351*
TX SB 255
VA HB 1901*

B. State antitrust laws

IL SB 881; HB 2147
IN HB 1795
KS SB 282
MD SB 616; HB 853
MI SB 270; HB 4490, 4912, 4918
MN SF 801
NM HB 287
OH SB 163; HB 76, 465
VA HJR 382
WY SF 226

C. Automobile claims

1. Claims

CA AB 2315
FL CS/SB 817*
GA SB 50*; HB 216*, 699
IN HB 1815
MI HB 4912
MN SF 1170
NY AB 2770A, 3555
OK SB 13
PA HB 431
RI SB 19, 20
WV SB 469, 623

2. Aftermarket parts

AL SB 368*; HB 557*
CO HB 1155*
FL SB 878, CS/SB 1414
GA HB 201*
IL SB 932; HB 1359, 1753, 2638
KS HB 2015*
MO HB 726*

3. Automobile Safety

AL SB 259*, 364; HB 398, 542
AK HJR 43
CA AB 2315
CO HB 1244*
GA HB 699
ME SP 74*; HP 277*, 445*; LD 64*, 389*, 610*
MI SB 173* HB 4220, 4467, 4468
NY SB 688*, 1006*, 2132*; AB 473A*, 1266*, 3173*
OK SB 434
OR SB 696, 859
PA HB 324
TX HB 1094

4. Automobile theft

AL HB 569*
AK HB 2
FL CS/HB 153*
GA HB 1111
MI HB 4289, 4912
NJ SB 3122*, 3124*
NY AB 7396
OR HB 3132
PA HB 567

D. Collision damage waivers/car rentals

AZ SB 1250
CO HB 1195*
FL SB 80; CS/HB 99
IL HB 1825
IN SB 159*
KS SB 317
LA SB 571; HB 615, 1285, 1287
MI HB 4553
MS HB 268
MT SB 102
ND SB 2098*
NE LB 59
NM SB 649
NY SB 4554A*; AB 6711A*
OR SB 128*
PA SB 902
SD HB 1065
TX SB 191
UT SB 112*
VT HB 149
WA SB 5148; HB 1068
WI SB 10

E. Commercial automobiles

AL HB 311*
AK SB 137
ND HB 1331*
TN SB 1259; HB 1424

F. Compulsory security

LA HB 1552

G. Financial responsibility

AZ HB 2321
CA AB 2315
CO HB 1182
FL SB 276; CS/HB 536
GA HB 38
IN SB 134
KS HB 2324*
LA HB 750
MS SB 2422; HB 563
MT HB 206*
ND HB 1176*, 1331*
NE LB 347, 495
NM SB 176, 257, 318*, 461*; HB 36, 398
OH HB 430
OR HB 2541
PA HB 426, 431, 608, 1152, 1165, 1172
TX HB 1822
WI AB 22, 84
WV SB 379
WY SF 129*, HB 173

H. Insurance commissioner

1. Duties

AL HB 9, 11
AR HB 1785*
CA AB 2315
FL SB 161
GA SB 31*, HB 314*, HB 510*
IL SB 880, 881; HB 1793, 2147
IN SB 358*; HB 1298
MI HB 4158, 4912
NV SB 220*
OH HB 76
OK HB 1584
PA HB 1523, 1524
TN SB 939; HB 1014
WY HB 302

2. Appointment or election

AL SB 303
IL SB 882; HB 2144
IN HB 1298
LA HB 98
OH HB 76

3. Other categories

MI HB 4152, 4912
PA SB 12
RI HB 6030

I. No-fault

DE HB 206
HI SB 214; HB 1665
LA HB 158, 395, 918
MD HB 1243, 1434
MI HB 4158, 4159, 4239, 4751, 4916
ND HB 1409*, 1467*, SCR 4039

J. Rate regulation

AL SB 303
AZ HB 2541
CA AB 354
FL SB 740, CS/SB 845, CS/SB 1097; HB 666
GA SB 35, 49*
IA SF 458; HF 169
IL SB 170, 880; HB 337, 569, 573, 1793, 2144
LA SB 126, 695; HB 125
MI HB 4912
MN SF 1170
MO SB 250*
ND HB 1408*, SCR 4057
NY AB 469, 5067, 5893 or SB 558
OH SB 163; HB 264, 465
PA SB 146, 204, 436, 843; HB 292, 324, 510, 609, 685, 1523, 1524
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K. Rate Reduction

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FL HB 1334
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ID HB 297*
IL SB 882
IN HB 1298, 1363
LA HB 6, 1423, 1512

MI HB 4912
 MT HB 322
 ND SB 2271*
 NM SB 310; HB 640
 NV SB 220*
 NY AB 7396
 OR SB 684*
 PA HB 431, 567, 589
 TN SB 757*; HB 811*
 WV SB 595
 WY HB 165*

L. Residual risk

FL CS/SB 1251
 IL HB 821
 NY AB 5180
 OR HB 3160

M. Uninsured motorists

AL HB 570
 AR HB 1069*
 AZ HB 2245, 2496
 CA AB 2315
 CO SB 90*; HB 1292
 FL HB 285, CS/CS/HB 855
 GA SB 199*; HB 904
 IN HB 1360
 LA SB 510, 608, 850, 851; HB 526, 757, 971, 1420
 MI HB 4751, 4915
 MS HB 320, 328, 688
 ND HB 1155*, 1242*
 NH HB 370*
 NM SB 207
 NY AB 5794A
 OH HB 250
 OK HB 1545
 OR SB 18
 PA HB 648
 RI SB 207, 671
 TN SB 1219*, 1394; HB 1015*, 1327
 UT SB 258
 VA HB 1733*; SJR 223; HJR 382
 WV SB 406; HB 2058, 2228
 WY HB 908

N. Mandatory or compulsory auto insurance

AL SB 299; HB 968
 AK SB 4, 44; HB 44
 AZ SB 1264; HB 2245, 2496
 CA AB 354
 CO SB 98, 209; HB 1138, 1182
 DE HB 58
 IA HF 290, 334

LA HB 346, 637
MD HB 1243
MN HB 1194*
MS HB 160, 324, 420
NC HB 1081
ND SCR 4052
NM HB 685
OK HB 1303, 1581
TN SB 10, 841; HB 76, 976
WA SB 5499*
WV HB 2833

O. Consumer advocate office

CO HB 1260
FL HB 285, CS/CS/HB 855
IA SF 381
MD SB 616; HB 853
OH HB 76
PA SB 100; HB 1150
WV HB 2225

P. Notice requirements

AR SB 502*
AZ SB 1318; HB 2489
DE SB 212
GA HB 99*
IL SB 880, 1032
IN HB 1815
LA HB 912
MD SB 170; HB 335
MI HB 4771
MS SB 2422
NY AB 7315A*
OK SB 182; HB 1550
OR HB 2419
PA SB 457; HB 564
TN SB 1170*; HB 635*
VT HB 421
VA HB 1955*
WV SB 462; HB 2769

Q. Miscellaneous

AK SB 309
AL HB 7, 940
AR SB 270*; HB 1937*
AZ HB 2059
CO SB 128*; HJR 1025
FL CS/SB 1295; HB 229, 285, CS/HB 1231
GA SB 127*, 233*; HB 57*, 175*, 181*, 205*, 566*
HI SB 48, 1056; HB 42, 544; SCR 67
IA HF 495, 629
IL SB 1288; HB 504, 855, 2140, 2217, 2654
IN SB 311*, 360*, 361

LA SB 136, 522; HB 40, 154, 330, 415, 558, 724, 919, 1269, 1278, 1438
ME HP 220, 258*; LD 300*, 370*
MI SB 389; HB 4913, 4914, 4917
MN HB 956*
MO SB 228*; HB 563*, 615*
MS HB 11
MT HB 673
ND HB 1107*, SCR 4028
NE LB 222
NH HB 270*
NJ AB 130*
NY SB 1146*, 1245A*; AB 1857A*, 2169A, 7312, 7315A*
OK HB 1418, 1471
OR SB 858; HB 2429*, 2539, 2540, 2546, 2701, 2889, 3098, 3391
PA SB 32, 109*, 205, 210, 223, 538; HB 212, 1110, 1151, 1154, 1334
RI SB 110
TN SB 874, 1005, 1136*; HB 870, 536, 871*
TX SB 41*, 255, 410; HB 163, 1827
VA HB 73*
VT HB 253, 370
WI SB 11*, 24; AB 47, 288
WV SB 264*, 277, 286
WY HB 242

PROPERTY/CASUALTY INSURANCE

ALABAMA

Introduced

- HB 10 Provides that those who are subject to the Insurance Code are also subject to the Deceptive Trade Practices Act.
- HB 1022 Relates to the conversion of property and casualty mutual insurance companies.

ALASKA

Introduced

- SB 100 Requires school districts to purchase adequate property insurance.
HB 37
- SB 212 Relates to insurer insolvency.
- SB 257 Requires an insurance company to pay a judgment or settlement of a claim
HB 265 with a negotiable bank check.
- SB 258 Relates to the state exemption from certain insurance premium taxes.
- SB 273 Relates to the licensing of insurance agents, brokers, solicitors, adjusters, and firms.
- HB 135 Relates to insurance policy binders.
- HB 335 Imposes a uniform insurance premium tax.
- HB 343 Creates the Environmental Indemnity Corporation of Alaska to provide a means of furnishing insurance to owners of underground storage tanks.

ARKANSAS

Enacted

- SB 451 Amends the notice requirements of cancellation of insurance policies. Act 675 of 1989.
- SB 502 Requires insurers to notify policyholders and agents of certain premium increases on renewal of commercial and casualty insurance policies. Act 797 of 1989.
- HB 1099 Requires notice of insurance cancellation to motor carrier lessees. Act 646 of 1989.

COLORADO

Enacted

- SB 61** Concerns the authority of the Commissioner of Insurance to use outside examiners to conduct examinations of insurance companies.
- SB 107** Amends the laws regulating captive insurance companies.
- HB 1058** Concerns the change of domicile of insurance companies.
- HB 1258** Concerns exclusions from coverage under the "Colorado Guaranty Association Act."
- HB 1264** Concerns the power of the Commissioner of Insurance to regulate insurance companies, and makes an appropriation.

Introduced

- HB 1157** Concerns the establishment of education requirements as a condition of licensure for certain insurance licensees.
- HB 1160** Requires that an applicant complete a specified number of hours of training prior to becoming a licensed life or accident and health insurance agent or broker.
- HB 1189** Concerns an insurer's actions with respect to an agent based on the loss ratio experience of the policies the agent has written.

GEORGIA

Enacted

- HB 178** Requires the Commissioner of Insurance, as a supplemental report to the annual report, to compile and distribute to the members of the General Assembly a report containing specified information on property and casualty insurance. Act 548.
- HB 182** Requires property and casualty insurers to engage a qualified independent loss reserve specialist under certain circumstances. Requires the specialist to file a report with the Commissioner. Act 501.
- HB 205** Allows the Insurance Commissioner to examine insurers every three years instead of every five years.
- HB 484** Increases from \$25,000 to \$30,000 the amount of funds which must be deposited by a farmers' mutual fire insurance company which writes insurance coverage of \$7 million or more as a surplus of its assets over its liabilities. Act 510.
- HB 566** Allows insurers based in other states to move their operations to Georgia by complying with all requirements regarding organization and licensing of a domestic insurer.

Introduced

HB 1130

Regulates property-casualty insurance.

HAWAII

Enacted

**SB 1813
HB 1883**

Allows the Insurance Examiners Revolving Fund to be used to reimburse Insurance Division staff examiners for expenses incurred on account of an examination and the examiners' education and training.

Introduced

SB 203

Requires insurers of fire insurance to state in the policy that in the event of a total loss of the insured real and personal property, the insurer will pay the maximum dollar amount of coverage reflected in the policy for the insured property.

**SB 329
HB 1284**

Establishes the Basic Property Insurance Inspection and Placement Plan. Provides that within 30 days after effective date of act, with approval of the Insurance Commissioner, all insurers licensed to write basic property insurance in multiperil policies shall establish the Hawaii FAIR (Fair Access Insurance Requirements) Plan Association to formulate and administer a program for the equitable apportionment among insurers of basic property insurance for persons who are unable to procure such insurance through normal channels from a licensed insurer or broker. Provides criteria. Allows for equitable distribution of risks among insurers.

SB 584

Requires all casualty, surety, property, marine and transportation insurers to provide a reduction of rates normally assessed for each new and renewal policy, where the prospective insured is an employer who has provided risk management training for all the employer's employees. Requires the Insurance Commissioner to establish minimum standards for such training.

SB 855

Repeals preferential tax rates given to Hawaii insurance companies. Imposes a tax on certain insurers. Establishes special preferential rates for other insurers. Establishes other requirements.

SB 907

Repeals preferential tax rates given to Hawaii insurance companies. Imposes a tax on certain insurers. Allows certain insurers tax credits. Establishes requirements.

SB 1232

Allows trust companies to engage in the business of a general insurance agent or an insurance subagent if licensed by the Insurance Commissioner.

**SB 1242
HB 761**

See SB 329, HB 1234.

SB 1581

Requires each insurer offering property insurance to homeowners or renters, to offer insurance against loss by fire, theft, or casualty which shall include reimbursement for reasonable rental expenses for temporary housing. Provides that coverage shall be offered for risks not exceeding \$25,000, with a deductible not to exceed \$50. Requires rates to be substantially the same as those charged in 1986 after adjustment for inflation.

- SB 2005** Changes discrimination covenants in provisions relating to insurance and other topics.
- HB 940** See SB 855.
- HB 1112** See SB 1232.
- HB 1113** See SB 907.
- HB 1747** Amends regulations of risk retention groups. Among other provisions, provides that where insurance is obtained covering members' risk from an insurer authorized in Hawaii, claims shall be covered by the Property and Liability Insurance Guaranty Association. (Received by Governor John D. Wai Hee III on April 19, 1989)

ILLINOIS

Introduced

- HB 181** Provides a maximum of \$100,000 rather than \$25,000 as punitive damages when an insurance company has been unreasonable and vexatious in refusing to pay a claim. Authorizes the Department of Insurance to review and approve premium rates. Requires prior Department approval with respect to an increase or decrease of 10% or more. Specifies financial information to be reported to the Department.
- HB 337** Requires insurers to roll back rates to a level of 15% less than the charges for the same coverage which were in effect on January 1, 1989. Applies to policies issued or renewed on or after January 1, 1990.
- HB 1340** Provides that all insurance policies disclose their provisions in a clear and explicit manner.
- HB 2146** Amends the Illinois Insurance Code in relation to property and casualty insurance premium rates, cancellation notices and private remedies. Requires cancellation notices to be sent by certified mail. Creates a civil cause of action against companies violating certain provisions of the Code. Authorizes the Department to review and approve or disapprove premium rates. Requires prior Department approval with respect to an increase or decrease of 10% or more. Specifies financial information to be reported to the Department.
- HB 2148** Abolishes authority for rating organizations. Requires companies to file their own rates with the Department of Insurance. Prohibits rate changes exceeding 15% without adequate justification. Establishes criteria. Expands the scope of rate regulation to include all property and casualty insurance.
- HB 2766** Requires that the form and content of all insurance policies and related documents must be filed with and approved by the Director of Insurance. Establishes minimum language and format standards for policy readability.

IOWA

Introduced

HF 446 Prohibits discrimination on the basis of sex or marital status in the issuance or operation of an insurance policy contract or plan.

KANSAS

Enacted

SB 110 Requires insurers which fail or refuse to pay any amount due under any contract of insurance within a prescribed time to pay interest on the amount due.

Introduced

SB 282 Amends certain antitrust statutes applicable to the insurance industry.

LOUISIANA

Introduced

HB 1264 Revises surplus requirements for new domestic mutual insurers. (Sent to Governor Buddy Roemer)

HB 1265 Revises capital requirements for domestic stock insurers. (Sent to Governor Buddy Roemer)

MAINE

Enacted

SP 53 Relates to the licensing of insurance agents, brokers, and adjusters.
LD 28 Chapter 168.

HP 217 Requires insurance agents, brokers, and consultants to participate
LD 297 in continuing professional education. Chapter 31.

MARYLAND

Introduced

SB 616 Modifies exemption for insurance activities under the state's antitrust
HB 853 law and maintains open competition.

MISSOURI

Enacted

SB 333 Clarifies the law pertaining to the Missouri Insurance Guaranty Association.
Changes provisions dealing with the regulation of insurance.

NEW YORK

Enacted

SB 2178A

Amends the Insurance Law, in relation to continuation of provisions relating to advances from the property/casualty insurance security fund. Chapter 14.

AB 6101

Authorizes the formation of financial guaranty insurance corporations and provides exclusions from coverage by the property/casualty insurance security fund. Chapter 48.

NORTH DAKOTA

Enacted

HB 1540

Allows the use of property and casualty insurance binders.

PENNSYLVANIA

Introduced

HB 1669

Requires insurers to provide written notification of intent to cancel homeowners policies.

RHODE ISLAND

Enacted

SB 61

Prohibits insurance companies from issuing policies which exclude any members of the insured's family from making any claim under such policy.

UTAH

Introduced

SB 121

Provides for the gathering of property and casualty insurance rate information.

HB 61

Requires the disclosure of rate making data in addition to an insurance company's required annual statement.

VERMONT

Introduced

HB 229

Authorizes the Commissioner of Banking and Insurance to specify insurance records that must be preserved.

HB 286

Requires prior approval of rates which increase 25% over a 12-month period, requires a hearing to determine if the market has become noncompetitive when rates increase 15% over a 12-month period, requires statistical agencies to provide only the loss cost portion of rates to insurance companies, requires prior approval of all "claims made" rates.

HB 374

Extends from 45 to 90 days the required notice period for cancellation or nonrenewal of property and casualty insurance policies.

WISCONSIN

Introduced

SB 102

Extends the time limit for bringing an action on a fire, windstorm, or hail insurance policy from 12 months to three years after the inception of the loss. Applies to riders or endorsements attached to a fire insurance policy covering a loss from any cause.

AB 77

See SB 102.

WYOMING

Introduced

HB 227

Requires the Insurance Commissioner to establish standards for rating plans in property/casualty and professional liability insurance markets.

INDEX (PROPERTY/CASUALTY INSURANCE LEGISLATION)

• - Enacted

A. Company Regulations

AK SB 257; HB 265
IL HB 1340, 2766
KS SB 110*
LA HB 1264, 1265
ME SP 53*, HP 217*; LD 28*, 297*
RI SB 61*
UT HB 61

B. Discrimination

HI SB 2005
IA HF 446

C. Fire Insurance

HI SB 203, 1581
WI SB 102, AB 77

D. Insolvency

AK SB 212
MO SB 333*
NY SB 2178A*; AB 6101*

E. Insurance Binders

AK HB 135
ND HB 1540*

F. Licensing

AK SB 273

G. Miscellaneous

AK SB 100; HB 37, 343
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HI SB 1232, 1813*; HB 1112, 1883*
IL HB 181
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H. Notice Requirements

AR SB 451*, 502*; HB 1099*
IL HB 2146
PA HB 1669
VT HB 374

I. Rate Reduction

IL HB 337

J. Rating Organizations

IL HB 2148

K. Risk Retention

HI SB 329, 584, 1242; HB 761, 1284, 1747

L. Taxes

AK SB 258; HB 335
HI SB 855, 907; HB 940, 1113

CALIFORNIA DOES IT AGAIN!



BY FREDERICK W. KILBOURNE

Frederick W. Kilbourne is a consulting actuary in Newport Beach, California.

A decade ago, California enacted Proposition 13, thereby slashing property taxes and generally shaking up the state and local government systems. Perhaps most shaken were the state legislators, for enactment occurred by means of the initiative process, whereby the legislature is bypassed and law is made more or less directly by the electorate. One can imagine the impact on the perceived value of legislators if the initiative process were to catch on and spread to other areas or other states.

Well, Prop 13 did catch on, and its influence has been felt well beyond property taxes and well beyond California. Some say that Prop 13 laid the groundwork for the anti-tax mood of the 1980s, while others say it was merely an early manifestation of that mood. All agree, however, that it burst onto the national scene, and into the national consciousness, to an extent that most human ballot choices can only aspire.

And now, it appears, California voters have done it again! Last year, they enacted Proposition 103, which promises to slash automobile and other insurance premiums, and generally shake up the property and casualty insurance systems. Will these ideas spread to other states? Are they but a part of a general revolt by policyholders? Can the multitudes be fed with two loaves and five fish? Time will tell. . . .

The People Speak—or Was That a Shout?

We, the people, speak in various ways—usually indirectly. We hire a prosecutor to speak for us in the case of the people versus the accused. We hire a legislature to enact laws, ostensibly in our interest. We hire a judge to interpret those laws, and occasionally get a bonus of sorts when that judge decides he is also a legislator.

We hire an administration to enforce the law, again, as always, in our interest. Examples of our speaking directly, however, are harder to find. Arguably, we do so when we take to the streets, but the voice of the mob rarely (outside China) is the voice of the people as a whole. The closest we come to direct and representative speech may well be by means of the initiative process, for better or worse.

Only California and Switzerland, plus a relatively few other jurisdictions, have an alive and healthy initiative mechanism. It's admittedly an exaggeration to call a ballot proposition the voice of the people, for it takes an interest group at best to draft, promote, and place the proposition on the ballot. The California ballot last fall, for example, had competing and contradictory propositions concerning automobile insurance put forth by the insurance industry, the trial lawyers, a consumer advocate, and a renegade insurance company.

The voice of the people can be harmony rather than a single note, but it surely isn't one voice if the song is cacophony. Yet it's hard to argue with the proposition that winning more than half the votes in an election means that the people have spoken, while winning less than half the votes means that the people have been, at best, silent. Most Dukakis supporters don't care for the term "President Bush," but they accept it nonetheless.

So Proposition 103, by garnering 51% of the vote, can be said to have earned a force of law greater than that which can be conferred by the state senate or the governor. Yet one question does remain: Did the people speak, or did they shout? Did the voters really mean to mandate profound changes in the insurance system, or were they just giving vent to pain and outrage at the level of their auto insurance premiums? Perhaps it was both, perhaps not. . . .

California Has a Radically New Insurance Law

Debate about its true motivation notwithstanding, Proposition

103 has changed the property/casualty insurance landscape dramatically. The change does not directly affect the life/health insurance system, but the indirect impact will be profound. Similarly, other states are not directly affected by this change in California laws, but the extraterritorial impact of Prop 103 may rival that of Prop 13 when the final results are in. Consider, first, the initiative's provisions.

The initiative process in California provides that the Attorney General prepare an official title and summary for the ballot. Here's the result as presented to California voters last fall in the case of Prop 103 (it should be noted that there were substantially fewer than 103 propositions on the ballot; the numbering system defies understanding or explanation):

Insurance rates, regulation, commissioner, initiative statute—Requires minimum 20-percent rate reduction from November 8, 1987, levels, for automobile and other property/casualty insurance. Freezes rates until November 8, 1989, unless insurance company is substantially threatened with insolvency. Thereafter requires every insurer offer any eligible person a good driver policy with a 20-percent differential. Requires public hearing and approval by elected insurance commissioner for automobile, other property/casualty insurance rate change. Requires automobile premiums be determined primarily by driving record. Prohibits discrimination, price-fixing, unfair practices by insurance companies. Requires commissioner provide comparative pricing information. Authorizes insurance activities by banks.

The ballot summary goes on to include the state's Legislative Analyst's cost impact estimates, in terms of costs or savings to state and local government. The voter also received, well before the election date, a thorough analysis of the initiative measure by the Legislative Analyst, as well as a full statement of the new law and changes to existing law. The process clearly anticipates a literate electorate, with the time and inclination to become educated in the particulars of individual issues.

Actuarial analysis (that is, analysis by an actuary) of the initiative summary leads to the conclusion that Prop 103 is largely actuarial in nature, with the balance political. This follows from even a narrow definition of actuarial work as concerning itself with the level and distribution of insurance costs and rates. This may explain why actuarial eyes, usually focused on New York, have been fixed on California in recent months.

Prop 103 promised to roll back auto insurance rates to 20% below the election day level, and hold them there for at least a year. Friends and foes alike acknowledge that this was the key provision, in terms of gaining voter support. Arguably, the margin of victory would have been greater if the initiative had contained no other provisions. Surely, the initiative would have lost without the rate rollback provision.

Auto insurance is generally considered too expensive, whatever the reason for its high price—and particularly so for some modest-income drivers. Worse, the auto insurance inflation rate has been much higher than general inflation recently, so there's no end to the problem in sight. The public invariably attacks any commodity or service with an out-of-line inflation rate, whether that be medical care costs in the 1980s, or oil prices in the 70s, or housing costs in the 40s. Legislation usually follows, whether by the legislators themselves or otherwise.

Prop 103 also provides for an additional 20% discount for "good drivers," defined as those with no more than one moving violation over a three-year period. The backers of the initiative estimate that more than 80% of all drivers will qualify for this discount, which means, all other things being equal, that "bad drivers" will have to pay more than double the rate paid by their good-driving neighbors.



Illustration by John Pack

The proposition goes on to require that rates be distributed according to mileage and experience, in addition to driving record, before other classification parameters, such as territory and age, may be considered. The net effect of this new order will be, in California, an annual shift of billions of dollars of auto insurance premiums from drivers formerly considered (i.e., actually) high-risk to those considered high-risk under the new system. The proposition as written also provided, of course, for the annual shift of more billions from insureds to risk-takers (in the financial sense)—assuming there will continue to be those who will take that risk.

Prop 103 also provides for an elected insurance commissioner, who must review and approve property and casualty insurance rates before they become effective, and who in many cases must hold a public hearing on the subject. The first insurance commissioner election will be next year, but the campaigning has already begun.

Someday it's a no-win job, for several reasons. If an insurance company fails, the commissioner gets some of the blame; if it prospers, he gets none of the credit. If rates are too high, the hearing officer gets some of the blame; if inadequate rates cause failures or availability problems after insurers flee the state, he gets more of the blame. The position will carry a good deal of public visibility, but it concerns an expensive commodity that the consumer is compelled to buy, yet yields no pleasure. Commissioner of the State Lottery would seem a much preferable political plum. Yet the public visibility of the insurance czar post seems to ensure an adequate supply of applicants, most of whom will undoubtedly have their sights set on a higher position down the road.

*The people have triumphed
over the insurance industry's
\$70 million campaign of
false advertising and phony
mailings. [Prop 103] reforms
the insurance industry and
guarantees lower
insurance prices.*

The costs of running the state insurance department, the proposition notes, will be increased substantially in order to cover such provisions as rate review and hearings. These additional costs are covered by increases in the fees and assessments paid by insurers. There is also provision for, effectively, a premium tax rate increase to cover the shortfall caused by the mandated rate decrease. The Legislative Analyst's review reassured taxpayers concerning these two provisions, but went on to refer to governmental savings resulting from reductions in property and liability premiums paid by government entities.

This is valid only to the limited extent that the mandated reductions would have come out of insurers' profits. It is invalid

beyond that extent, and is reflective either of ignorance about insurance pricing or a deliberate attempt to mislead the electorate. This question extends as well, of course, to the whole public understanding of Prop 103.

The initiative stipulates numerous other changes to California insurance law, not all of which are covered in the summary. The law also:

- precludes setting up of an affiliated insurer so as to evade the rate provisions of the law;
- prohibits discrimination against new drivers, or others who were previously uninsured;
- removes state antitrust exemptions, but allows joint data collections and joint underwriting authority participation;
- permits cancellation or nonrenewal of coverage only for fraud, hazard increase, or nonpayment of premium;
- requires the commissioner to provide, for a user fee, personal lines rate comparison for all admitted insurers;
- provides for a hearing whenever a personal lines rate increase exceeds 7%, or whenever any consumer requests the hearing;
- permits intervenors in rate hearings, with costs generally borne by the insurance industry;
- provides for the commissioner to establish a joint underwriting authority if coverage availability becomes a problem;
- repeals provisions of existing law that prevent premium rebates and group property and casualty insurance.

One burning question remains: Is Prop 103 truly wonderful, or simply terrible, for the people of the state?

Prop 103 Is Truly Wonderful, for the People

Prop 103 is an "historic citizen campaign for insurance justice and lower rates" (Ralph Nader). The people have triumphed over the insurance industry's \$70 million campaign of false advertising and phony mailings. It reforms that insurance industry and guarantees lower insurance prices for automobiles, homes, businesses, and municipalities. Know the truth about Prop 103 by observing who's against it, and who's for it. Its detractors include the insurance industry, the actuarial profession, and others whose primary interest is hardly the public good. Conversely, a short list of supporters includes the AFL/CIO, the American Civil Liberties Union, the California Democratic Council, the California State Employees Association, Common Cause, the Gray Panthers, the National Organization for Women, and many others whose interest is the public good.

You will hear that Prop 103 creates subsidies in insurance pricing. The truth is quite the opposite. Prop 103 requires that the driving record be the first variable in setting auto insurance rates, thereby putting an end to the current subsidization of bad drivers by the 80% of us with good driving records. It requires that annual mileage be the second variable, thereby putting an end to the current subsidization of long-distance drivers by those of us who use our cars as an adjunct to our daily lives rather than as its focus. It requires that driver experience be the third variable, thereby putting an end to the current subsidization of novice drivers by those of us with the experience gained by years of driving under our (seat) belts. It permits other pricing variables that can be proven significant, such as geography, but requires that they be of lesser importance to the rate than the three variables already itemized.

You will hear that Prop 103 destroys competition, will drive insurance companies out of the state, and was designed primarily to put the government into the business of writing insurance. The truth is quite the opposite. Prop 103 repeals several barriers to true competition in the insurance marketplace, permitting banks to place insurance, letting brokers give discounts, author-

izing group casualty insurance, and subjecting insurers to the state antitrust and consumer protection laws that are applicable to other businesses in the state. Prop 103 will give insurers an incentive to contribute to the solution of rising accident costs, further incentive to hold down their own operating costs and profits, and an opportunity to justify their resulting premium rates in public. Few insurers are likely to find these provisions so onerous that they will abandon the largest insurance market in the country. Finally, there is absolutely no authority, under Prop 103, for the government to sell insurance. The joint underwriting authority provision merely triggers a state law already on the books requiring insurers to join with others in a pool to solve any availability problem that may develop.

Proposition 103 isn't the answer to all of California's problems, not even to all its insurance problems. It may even create some problems, though fewer than it will solve, particularly during the early transition years. All Prop 103 is, and promises to be, is a major reform in the insurance law designed to yield an insurance system that is fair, competitive, and in the best interests of the people of California.

Prop 103 Is Simply Awful, for the People

Prop 103 represents "the kind of mindless, populist hostility toward capitalism that one would expect to find in some banana republic preparing to nationalize its businesses" (*The Intellectual Activist*). The motive behind the initiative measure is something other than the desire to make insurance less expensive and more available to the people. The California electorate voted, marginally, for cheaper auto insurance; what they have bought is a blueprint for socialism and all its attendant "benefits" that are evident from Albania to Zambia—not to mention higher insurance premiums, in the long run.

Prop 103, as sold to the voters, would have driven auto and other casualty insurance rates down 20% below the rates

effective at the end of 1987, which were more than 10% below rates generally effective on election day in 1988, and then proposed to freeze those rates through the end of 1989. Since insurer profits on 1988 rates were far below 30% of premiums, this amounted to a requirement that California drivers be subsidized by insurer stockholders. The California Supreme Court found this a bit strong for its taste (i.e., unconstitutional), but upheld most other provisions of the initiative.

Casualty insurance rates in California will henceforth be subjected to a political, rather than a market, process that will rank with the worst in the country, and that is likely to lead to inadequate rates, hidden and shifted and deferred costs, a swollen compulsory insurance pool and, perhaps, a state auto insurance fund (as the insurer of "last resort").

In time, Prop 103 will increase rates, because it subsidizes high-risk driving (leading to more of it), and because it adds to the costs of doing business in the state. Prop 103 pays scant heed to underlying insurance costs, much less the underlying reasons for those costs. It represents a decision to treat the symptom, rather than the disease, with medicine that, at best, will provide temporary relief (via pressure to cut rates), to be followed by more severe symptoms (rates eventually must catch up with costs), and which will add a new malady (rates set by politics, rather than by market forces), to increase the patient's discomfort.

Prop 103 also compels low-risk drivers to subsidize high-risk drivers; this is manifestly unfair, and will likely increase the number and cost of accidents on the highways. Insurers already provide good-driver discounts, to the extent warranted by their statistics. If a greater discount were justified, one or more of those predatory competitors would go after that overpriced segment of the market.

Prop 103 forces insurers to burn their books of statistics and provide instead an arbitrary 20% discount to 80% of the drivers (read: "electorate") who qualify arbitrarily as "good." No men-

The Market Response: Prop 103 Mutual and AIDS

Some mainstream insurance companies may well pull out of California, or restrict their auto insurance book dramatically. This does not necessarily mean an exclusive state fund, or a joint underwriting authority with all the business. California has no shortage of entrepreneurs, and a few of them may be able to put together insurance companies to meet the new challenge. Consider, for example, Prop 103 Mutual.

Prop 103 Mutual is actually a reciprocal exchange, but public relations is the key to its success, and "mutual" sounds better than "exchange." Underwriting is done, in the main, by the agent, who is sacrificed if he is unlucky enough to have unfavorable publicity develop over coverage availability in his area. Similarly, claim problems are handled promptly and liberally—once the Company learns that the claimant has support in the media or from the regulator. Rate increases are granted readily, for the Company enjoys "good press" and "good relations with the regulator." Expenses are relatively high, but are largely paid to a separate attorney-in-fact, who runs most of the Company's affairs and whose records are not entirely open to public scrutiny. This vehicle, set up by the original contributors to Prop 103 Mutual's capitalization, does indeed have a heavy expense load. In addition to its investors and officers, who are handsomely rewarded for their funds and

efforts, there's that public relations budget. In addition to the previously mentioned demands on that budget, there's the cost of the monthly lottery, whereby one driver *does* get something back from his insurer, and the cost of the monthly helping-hand program, whereby one "good work" is done and amply publicized, in order to set a better example for corporate California.

Even actuaries are capable of responding to a glaring market need or opportunity. Consider, for example, that new consumer advocacy consulting firm, Actuarial Intervenor for Drivers of the State, or AIDS.

AIDS offers actuarial services and intervention at rate hearings to insurance consumer group clients. Marketing consists of identifying the group and intervening on its behalf, for the fee, if the effort is successful, will be paid by the insurance industry. One group client might be allegedly "good" drivers misclassified as "bad" because of inequities in the patterns of arrests for traffic violations. Another, larger group client might be Northern California, in its contention that dollars, as well as water, are flowing south to subsidize the excesses of Southern California. AIDS, like Prop 103 Mutual, speaks for the consumer—so long as the regulator and the media are listening.

tioned in this campaign was the inescapable derivative fact that 20% of California drivers (nearly 5 million in number) will thereby have to pay a 125% surcharge, relative to those with fewer than two tickets in three years, for their auto insurance.

Downgrading or elimination of other important rating variables, such as age and territory, will also cause low-risk drivers to subsidize high-risk drivers. Consider two groups of California drivers, roughly of equal populations: urban teenagers and middle-aged rural drivers. Each group is now paying its own way (actually, there is already a modest subsidy of the first group because of political pressures). If this were not so, competition would rear its ugly head, as above (California has over 300 auto insurers).

The question raised by Prop 103, to be repeated at future rate hearings, is the extent to which those middle-aged rural drivers should be required to pay a surcharge, beyond their own auto insurance costs, so that funds can be available to cover urban teenagers at a discount. Perhaps the hearings should be held in Fresno rather than in Los Angeles.

*In time, Prop 103 will
increase rates, because
it subsidizes high-risk
driving (leading to more
of it), and because it adds to
the costs of doing business
in the state.*

Prop 103 isn't the answer to any of California's insurance problems. The overriding, compelling problem is the cost of auto accidents, caused in turn by street congestion, medical costs, and the speed with which California drivers are becoming indistinguishable from their counterparts in New York and Tokyo. Subsidization of those costs is no answer, whether by insurance company stockholders, drivers of other states, or middle-aged rural drivers in California. Prop 103 was misrepresented to the people of California, and it should be replaced.

What's to Be Done?

First, the insurance industry and the insured public must accept the fact that Prop 103, as amended by the California Supreme Court, is now the law of the state, if not the land. Second, the insurance industry must seek an accommodation with its constructive critics, in legislatures and elsewhere. Third, this new team must undertake to educate the public, in terms of basic actuarial principles (for example, in order to give to Paul, you must take from Peter) and the underlying causes of high insurance costs (such as judicial and regulatory tolerance of drunk driving). Only then will the stage be set for reversing the unsound and antisocial provisions of Prop 103. And the others must be worked on, worked around, worked with, and eventually accepted. For the people have spoken. □



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Report for S.132 Joint and Several Liability Reform Act of 1989
As introduced in the Senate
Complete Text of this version

II

101st CONGRESS
1st Session

S. 132

To reform the tort law doctrine of joint and several liability.

IN THE SENATE OF THE UNITED STATES

January 25 (legislative day, January 3), 1989

Mr. Pressler introduced the following bill; which was read twice and referred
to the Committee on the Judiciary

A BILL

To reform the tort law doctrine of joint and several liability.

=====

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Joint and Several Liability Reform Act of 1989".

Severable Liability for Damages

Sec. 2. (a)(1) Except as provided in paragraph (2) of this subsection, in any civil action alleging injury to a person, damage to property, or death of a person, the liability of each defendant for damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(2) In any case where the parties are found to have engaged in concerted action, the liability of each defendant shall be joint and several.

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c)(1) If a claimant has released any defendant or potential defendant from liability for the claimant's harm, or if a defendant is unable (despite exercising all practicable means) to join any other person as a defendant in such action the trier of fact shall, in determining the proportion of

responsibility under subsection (b) of this section, consider the liability of any person not a party to the action if the defendant is able to prove that any such person caused the claimant's harm.

(2) If a claimant has released any defendant or potential defendant from liability for the claimant's harm, the total amount of responsibility for the claimant's harm shall be reduced by the proportion of responsibility of any such released defendant or potential defendant.

(d) As used in this section, the term "concerted action" means any action consciously and intentionally taken by two or more defendants which resulted in the harm alleged in such civil action. Such term does not mean consciously parallel action.

**THE BATTLE FOR MEDICAL MALPRACTICE TORT
REFORM, A REPORT FROM THE FRONT LINES**

**Prepared for the Annual Meeting of
AMERICAN ACADEMY OF HOSPITAL ATTORNEYS
Williamsburg, Virginia
June 25-28, 1989**

**James E. Ludlam, Esq.
Musick, Peeler & Garrett
Los Angeles, California**

**The Battle For Medical Malpractice Tort
Reform. A Report From The Front Lines**

**James E. Ludlam, Esq.
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Los Angeles, California**

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**The Battle For Medical Malpractice Tort
Reform. A Report From The Front Lines**

**James E. Ludlam, Esq.
Musick, Peeler & Garrett
Los Angeles, California**

Introduction

In preparing this outline of the discussion of the various tort reforms emphasis will be placed upon a few of the leading cases coupled with reference to what I believe are the most informative articles on the particular subject and which include extensive review of the statutes and cases in the various states.

As a starting point and for basic background I would recommend a careful study of the 1988 Georgetown Law Journal, vol. 76, No. 4, starting at page 1495, entitled: "The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances." This article was written by four of the multidisciplinary staff of the Academic Task Force For Review of the Insurance and Tort Systems established by the Florida Legislature. The Task Force report itself provides excellent source material but this article expresses the viewpoint of the authors without some of the restraint of the Task Force report itself. Most importantly it clearly defines the role of insurance in both solving and contributing to the malpractice tort crisis pattern. This type of information has not been available and is critical in approaching any proposed short term or long term solutions.

The next article to read is "The Frequency and Severity of Medical Malpractice Claims: New Evidence," by Patricia M. Danzon in Law and Contemporary Problems, vol. 49, page 56, Spring 1986. There are other articles in this same issue that are of interest.

The third publications to review are the three reports of the AMA Special Task Force on Professional Liability and Insurance, 1984-1985, available from the AMA as a single publication. Although written from a physician viewpoint, it includes a wealth of data that will assist in understanding the cycle that is a major contributor to the problem.

For a comprehensive review of the constitutional issues up to the date of its publication see, "The Constitutionality of Medical Malpractice Legislative Reform: A National Survey," Loyola University Law Journal, vol. 18, p. 1053 (1987).

A series of recently published federal studies are of use as background information.

For a broad overview with recommendations as to specific state legislative proposals the study entitled, "An Update on the Liability Crisis," by the Tort Policy Working Group, dated March 1987, is useful because it not only brings together a broad sweep of data and materials but also makes eight positive recommendations for tort reform. The weakness is that the specific legislative proposals do not appear to have been researched in depth and from a legislative draftsmanship standard do not meet problems that have risen in recent litigation. This

report can be obtained by communicating with the Tort Policy Working Group in the Department of Justice.

A series of reports of the U. S. General Accounting Office are useful for the data included but do not include specific reforms except the final report entitled, "A Framework For Action." These are:

"Medical Malpractice - No Agreement on the Problems or Solutions." GAO HRD 86-50.

"Medical Malpractice - Insurance Costs Increased But varied Among Physicians and Hospitals," GAO/HRD 86-112.

"Medical Malpractice - Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reform," GAO/HRD 87-21. Separate studies on each of the six states (Arkansas, California, Florida, Indiana, New York, and North Carolina) can also be requested as 87-2151-6.

"Medical Malpractice - Characteristics of Claims Closed in 1984," GAO/HRD 87-55.

"Insurance: Profitability of the Medical Malpractice and General Liability Lines," GAO/GGO 87-67.

"Medical Malpractice - A Framework For Action."

On a continuing basis the AMA Professional Liability Update, published monthly by the Professional Liability Clearinghouse, American Medical Association, Center For Health Policy Research, 535 North Dearborn Street, Chicago, Illinois 60610, (312) 645-5380, not only summarizes current legislation and litigation but includes a periodic detailed master bibliography of the current literature and media reports.

Any approach to tort reform should start from a basic philosophical concept of what should be the fundamental criteria

for a medical professional liability compensation system. The following criteria was suggested by the ABA Commission on Medical Professional Liability in its Interim Report of September 27, 1976, p. 12.

1. Encourage the prompt availability of remedial medical services to injured persons;
2. Compensate all persons deemed compensable under the mechanism;
3. Pay a victim of a compensable medical incident at least the net economic loss occasioned by that incident;
4. Provide for the prompt resolution of claims;
5. Charge a minimum of administrative costs (including attorneys' fees) and make a maximum amount available for the injured person;
6. Insure maximum predictability of outcome as an aid to planning by health care providers and insurers;
7. Discourage the bringing of baseless or contrived claims and provide for their prompt elimination if brought;
8. Contribute to the prevention of malpractice incidents by introducing incentives for improving health care and for improving the supervision and discipline of health care personnel;
9. Distribute losses, through insurance or otherwise, in a way which does not leave an unfair burden on any one segment of the health care system; and
10. Disrupt to the least possible degree the relationships of trust and confidence between health care providers and patients.

Each proposed reform can be separately evaluated as to how it contributes to or violates the above criteria.

What is needed, and for some strange reason not available from either the AMA or AHA, is a set of model state tort reform statutes, annotated with current cases, pointing out the

various legislative options and the pitfalls that are being uncovered through current litigation. As a result there is no uniform attack or evaluation of the results on the various proposals. Each state must reinvent the wheel and repeat the mistakes of the past.

What will follow will be a personal evaluation of the various malpractice tort reforms adopted in California in 1975 with a critique of the strengths and weaknesses that have been exposed with thirteen years experience. There will also be included references and discussion as to cases and developments in other states to complete the picture.

The purpose of this session is to deal with the real world of medical malpractice tort reform. The discussion will combine practical legislative strategies with an analysis of the results, including successes and failures. Historically and for the immediate future substantially all tort reform action has been approached on a state by state basis with no uniform approach and a wide disparity of results. The AMA, jointly with the specialty societies, has chosen to devote extensive resources to the design of a comprehensive substitute for the existing tort system which, although innovative, has serious problems including the diversion of effort from the study and design of incremental changes in the existing tort systems which could result in immediate relief in certain critical states.

What is needed is a well staffed analysis of the 13 years of experience of the tort reforms that have been made

since the crisis of 1975 with positive recommendations of the value and effectiveness of the various approaches that have been successful or failed. The ability of each individual state health care provider to achieve relief generally comes as a very limited window of opportunity to achieve relief and unless there is available a well documented analysis of the various options with supporting information the opportunity may be lost or fumbled. This session proposes to highlight these issues.

The discussion will break down into the four essential components of an effective action program:

1. The pre-legislative preparation,
2. Legislative action
3. Constitutional challenge,
4. Effective implementation.

followed by a critical discussion of the pros and cons of the major tort reforms.

Pre-legislative Preparation and Decision-making

The opportunity to achieve effective legislative action is often a limited opportunity which will be lost for many years unless effectively seized. The window may open as a result of an insurance crisis resulting from escalating costs or even the unavailability of primary or excess insurance. It may be as a result of a series of dramatic incidents, such as a series of bad baby cases, withdrawal of obstetric services, the closing of emergency rooms, dramatic jury verdicts, or the like, which motivate a legislature to act on an emotional impulse that overcomes the power of the plaintiffs' bar to effectively bottle up any reform. A number of steps must be taken to prepare for

this opportunity and so that whatever action is taken is ultimately sustainable on constitutional grounds to a challenge that the crisis was a phony or just a conspiracy by the insurance industry to rip off the public.

1. The first decision that must be made is whether the reforms proposed will be limited to medical malpractice or will they be generic to the tort system. This decision establishes the nature of the coalition and fund raising effort that is necessary for a successful effort. The successful actions of the 1970s were malpractice specific and then often foundered on the constitutional challenge of equal protection. In the 1980s there was a broadening of the base and more interest in generic tort reform. Unfortunately, the business coalitions tend to give more lip service than real support to generic tort reform and the real support must come from hospitals and organized medicine.

2. The second step is to analyze the prospects and potential results of the various proposed reforms. Although there is a laundry list of potential reforms, a careful selection of a limited list is essential to avoid dispersion of effort and division of support in establishing priorities. The specific discussion of the various proposals will highlight these issues.

3. The third step is in drafting of the exact language to be proposed. This is far more difficult than is first perceived as it may require serious negotiation between the members of the coalition created to support the effort. For example, any change in the collateral source rule will surface a

major split in the insurance industry. Unfortunately there has been too little organized effort to develop model language with appropriate alternatives. Recent attacks on existing legislation has highlighted the importance of reviewing actual experience and pitfalls. Do not assume that there will be an early opportunity to rectify mistakes.

4. Build a legislative record on the need for action. This must be done well in advance before the "crisis" develops. Encourage legislative hearings with well documented evidence of the developing problem and the impact on the cost of quality of health care. Initiate studies by affected state agencies so as to document the need. Create a statewide independent body to make studies and recommendations. The Academic Task Force in Florida is a good example. Other studies by the Insurance Commissioner or other state agencies may be helpful. Be sure that the support for the legislation is identified with the purchasers, not the providers, or the insurers and that knowledgeable consumer support is encouraged well in advance.

5. Identify legislative leadership that will carry the ball and assure the Governor's support to avoid the veto. Nothing is more discouraging than to fight a bill through the legislature and then have it vetoed on the last day. This ball can most effectively be carried by hospital trustees.

6. Create an effective coalition of support which includes universities, state and local government, major purchasers of health insurance, hospital and physician employees,

hospital support groups, church organizations that sponsor hospitals.

7. Don't be discouraged if you lose the first effort. It may take several years.

8. In designing a tort reform legislative package it is important to consider the matter of balance to meet the very telling argument by our opponents as to why we chose as our only solution to the "so called" malpractice crisis the rip-off of the rights of tragically injured plaintiffs. Why did we not clean up the evils of the hospitals and physicians so that there would be no problem? How about the insurance companies and their secretive procedures?

In our California approach we met this issue straight on and recognized that it was a complex problem and that all parties had to contribute to the solution.

We therefore substantially strengthened the Medical Practice Act and greatly increased the authority of the disciplinary body to creatively deal with the matters relating to physician conduct. We require extensive reporting of hospital disciplinary actions as well as the adverse results of medical or hospital malpractice actions, with the authority of the licensure boards to explore them. We required additional reporting by the malpractice insurance companies and put limits on their right to unilaterally increase medical malpractice premiums. The California Bar Association was directed to come up with a plan to

control excessive fees by defense counsel as a counter to our proposed limit on plaintiff's contingent fees.

The United States Supreme Court and various state courts have given lip service to the concept that there is no requirement of a quid pro quo for any legislation which takes away or limits a property right. However, one cannot read the cases without becoming convinced that the existence of a quid pro quo can be an important factor in leading to a favorable court action. In the briefing of our cases we emphasize that the legislation was a balance of the equities of all of the parties--a quid pro quo in another name.

Other states have used a patient's compensation fund or mandated certain types of insurance coverage, or, more recently, the no-fault legislation in Virginia and Florida has had a similar purpose with generally a favorable result.

9. One of the most challenging problems in drafting tort reform legislation involves the issue of the effective date of the legislation and the degree of retroactivity, if any.

If there is an immediate crisis in the cost or the availability of medical practice insurance, a legislation package that has no retroactivity may not result in any real relief for several years. This is based on the fact that with the long tail on malpractice claims there is always a substantial volume of potential claims in the pipeline that must run off before there can be any realistic relief. The introduction of the claims-made form of insurance as a substitute for occurrence coverage has

only partially helped as the courts are continuously whittling down the right of insurance carriers to effectively enforce the right of an insurance company to deny a claim that is made after the time limit set in the insurance policy.

The opposition to malpractice tort reform has made a big issue of the fact that even when tort reforms have been passed there is no immediate result through the reduction of malpractice insurance premiums or a reduction in health care costs. As a counter attack they propose amendments to the proposed legislation which would mandate immediate rate decreases to call the bluff of the insurance companies on the need and effect of any reform. Such tactics can have the effect of splitting the support for the legislation.

On the other hand, to aggressively propose a retroactive effect on the legislation will increase the potential risk of a successful challenge to the constitutionality of the legislation on the grounds of taking of a property right with due process. For example, if it is proposed to reduce the statute of limitations, an amendment which would have the result of immediately barring existing causes of action, or even actions that have been brought but not brought to trial, are extremely risky. However, if some reasonable time limit is proposed on an interim basis to protect the rights of existing causes of action, it may be sufficient to meet the constitutional challenge even though there is some retroactive effect.

Also, a distinction can be made as to those matters which are procedural rather than those that deal with an existing cause of action. For example, reforms that deal with evidentiary matters or the like may be acceptable, such as a new requirement of qualifications for witnesses. On the other hand, in dealing with the issue of whether to change the collateral source rule by making the existence of collateral sources a matter of evidence rather than as a direct offset against the plaintiff's recovery may permit retroactivity.

The courts are reluctant to imply the retroactive application of any statute that limits the rights of the plaintiff. In drafting the legislation there are at least two alternatives. One is to face the issue directly by spelling out in detail as to the retroactive application including any exceptions or saving clauses to make the approach more acceptable. The other alternative is the one we followed in California. This is to rely on the use of strong public policy statements and findings without directly dealing with the issue of retroactivity. As a result we have been able to argue aggressively that some degree of retroactivity is necessary to implement legislative policy. At the same time, if the courts refuse to retroactively apply certain key sections, then that is an answer as to why there have not been immediate results. Very frankly, with the then constituency of the California Supreme Court we were not prepared to risk the additional constitutional issue. Fortunately, with the change in the constituency of the Court and even

the recognition by a majority of the former Court of the validity of our public policy argument we have achieved retroactivity to the procedural and evidentiary sections, as well as including the statute of limitations, the periodic payment, and the collateral source provisions. As we expected, we failed to achieve retroactivity on the \$250,000 limit on noneconomic damages.

In addition to building a legislative record on the need and justification for the legislation, it is critically important to incorporate specific findings in the legislation itself to justify the action taken. The more specific, the better to make it more difficult for the courts to engage in judicial legislation. It must be remembered that the courts by their own fiat have created most of the liberal legal doctrines that we are attempting to eliminate or at least modify, and the courts are extremely reluctant to give up this prerogative. Many courts, such as in New Jersey and California, have taken great pride in their creative expansion of liability doctrines and other state courts have been most willing to follow their leadership.

In every brief that we have filed we have continued to pound home the public policy statements built into our legislation. At the federal legislative level it is possible to build legislative intent into the committee reports that precede or follow critical legislative action. At the state legislative level this resource is less available or nonexistent.

The Legislative Action Phase

There is such a wide variation in the basic relationships between physicians and hospitals, on the one hand, and each state legislature, on the other, that it is hard to generalize on procedures other than to indicate that it is an all out campaign that is fought in both the media and in the legislative halls.

Hopefully the recommended steps of preparation have been accomplished with the members of the support coalition clearly identified and motivated. Necessary funding for any media or public relations program should be in hand. The appropriate legislation needs to be carefully drafted, including any fallback position necessary to make compromises as the opposition develops. Favorable advance legislative commitments should be obtained as soon as possible.

Information kits must be available to supporters and be used for structured meetings with the editorial boards of all newspapers, radio and television outlets.

Our experience has been that although it is important to get the support of hospital trustees the willingness of any large number to get effectively involved can be disappointing. So it is better to identify a small group that are willing to participate. Our experience would indicate that many business men trustees have other priorities related to their own businesses and the legislature and they are reluctant to expend their clout on this issue. By and large, organized medicine is the strongest source of support. Every legislator has a family

physician and the auxiliaries to the state and county medical associations can be highly motivated.

Of equal importance is the planning to meet the increasingly sophisticated tactics of the trial lawyers. In this connection you must be prepared to meet their selective use of statistics to argue that there is no real crisis or need for the legislation, that the problem is the quality of medical and hospital care and the greed of the insurance industry. The new material discussed in the introduction to this paper is helpful in meeting their arguments and if the insurance coverage is provided by doctor and hospital captives this point should be exploited.

Above all else there must be a solid working relationship between organized medicine and hospitals that cannot be split by diversionary tactics.

The Battle Over Constitutionality

As soon as any effective legislation is adopted there will be the challenge to its constitutionality. This involves a new type of coalition led by organized medicine and hospitals with support by their insurers.

1. Prepare a master legal analysis on all anticipated legal challenges.
2. Prepare model pleadings to initiate the appropriate defenses and avoid anticipated technical challenges.
3. Develop a monitoring system so that any test case is identified at the earliest possible time.

4. Educate all claims managers and defense counsel to the potential issues and the importance of early reporting.

5. Develop and fund a coordinated approach to every important case, including advice as to which cases should be pressed and which should be settled. The bad case that makes bad law is an absolute truism.

6. Organize an effective brief strategy. All too often each interested group puts in its own brief that is largely repetitive of the others. The briefing strategy should include a master in depth brief but be supported by separate briefs zeroed in on special problems. For example, in the massive effort in California we not only had separate briefs from the medical society and the hospital association but additional briefs from the teaching hospitals, the county hospitals, the urban hospitals, the rural hospitals, the support groups such as United Way, and a very effective brief from a group of legislators who had supported the legislation. Briefs from religious groups that sponsor hospitals can be most effective. It is not the number of briefs but their punch that is important.

7. In states with multiple appellate courts consideration should be given to filing in each court's library a copy of the master brief to be in the court's reference library.

8. To the extent possible all briefs should be critically reviewed by independent counsel in advance of filing to avoid conflict in approach.

9. Do not overreach in the claims that are made for the legislation or exaggerate the impact that it may have. We have had such claims thrown back at us when we could not document the feared result. Establishment of the credibility of the proponents over the long run is essential. You can expect puffery from the opposition and be prepared to capitalize on it.

10. Except in rare instances, such as in Louisiana and Idaho where cases were sent back by the appellate court for special hearing, there is rarely an evidentiary hearing at the trial court on the issue of constitutionality. This gap must be filled by the Brandeis brief approach of including extensive documentation and referenced to materials that will be accepted by the court. It is at this point that the preparatory approach of documentation at the legislative hearings becomes critical as being not only the basis for the legislative action but as a clear signal to the appellate courts of the fact the legislature properly performed its function and that the separation of powers should be respected.

The Implementation Phase

We have found that the implementation phase may be equally if not more important than the other three phases as it is possible to see the entire effort go down the drain. It is at this point that the plaintiffs' bar, through a coordinated effort, attempts to whittle down and emasculate any successful legislative effort. Unfortunately, often they will be fully aided and abetted by the trial and lower courts who are inher-

ently opposed to any narrowing of the tort system which they have so effectively created and expanded.

Once the constitutional battle has been won there is a tendency by health care providers and their legal counsel to let down their guard and to permit the statutes to be whittled down. All of the steps taken on the constitutional phase must be followed. In addition, there needs to be a continued process of model briefs on every developing issue and assurance that this material is furnished to all defense counsel. The ability to rectify an error at the appellate level is much more difficult on an interpretation decision than it is on a constitutional issue.

The appellate courts are all too inclined to treat the matter as a combination evidence and interpretation issue and let a bad result stand or just modify the amount of the award. The courts must be made keenly conscious of the fact that the organized health care providers are going to monitor every case and pounce on every sloppy or irrational decision. For example, we have a monthly conference call with some 15 participants to review every developing case to determine what action the group should take. We jointly employ a highly qualified appellate specialist to represent the combined interest of doctors and hospitals and to appear and present our combined position on every case that has important consequences either to challenge the result or support the court if its decision is challenged.

On any issue we determine which interest will be most effective in presenting key arguments. For example, on hospital

quality of care problems or matters of discipline it may be more effective for organized medicine to carry the laboring oar. On the other hand, issues of confidentiality and interference with medical judgment may be best argued by the hospital. Also, if the issue is one that affects the cost or availability of insurance, the issue is best argued by the purchasers of insurance rather than the providers of insurance. Similarly, doctor or hospital captive insurers can be more effective than commercial insurers.

Cap on Damages

No proposed malpractice tort reform has generated as many complex solutions or as much litigation as the variety of caps put on damages. On an overall basis the results have been almost equally divided between successes and failures. Drafting such legislation requires careful research into both the political and judicial environment of the particular state. The stakes are high because Patricia Danzon in her most recent study has opined that the statutory limits on noneconomic damages have reduced the size of average paid claims by 23 percent.*/ Obviously, the amount of the limit will affect this result.

The general arguments for the cap approach are as follows:

1. Many experts believe that the limitation, if properly drafted, can be the most effective single

*/ P. Danzon, "New Evidence on the Frequency and Severity of Medical Malpractice Claims," 26 Institute For Civil Justice, Rand, 1986; Law and Contemporary Problems, Vol. 49, No. 2, p. 76 (1986).

legislative reform of tort law even though its impact is almost entirely on the severity of the claims losses and little impact upon frequency.

2. Makes the cost of insurance more predictable. The need for predictability is particularly critical for assuring the availability of both primary and excess insurance for the long term tail on medical malpractice. The surge in the recoveries for infant damage is a dramatic example of such result.

3. Predictability of recovery assures the availability of funds to pay future losses to injured patients by reducing the number of uninsured health care providers.

4. Encourages settlements because plaintiff knows there is a limit on recovery.

5. Assuring recovery of economic loss should be first priority to injured plaintiff.

6. The limits that are set are realistic and not speculative. Awards are rationally related to the damages.

7. Reduces windfall contingent fee incentive for plaintiffs' attorneys.

8. Noneconomic damages are not subject to objective judgment either at trial or on appeal and may be based upon emotion and the desire to punish and are thus a substitute or addition to punitive damages.

9. The courts have consistently failed to control or effectively modify runaway judgments.

10. Judgments for comparable injuries for malpractice plaintiffs generally run twice as much as against other tort defendants.

On the other hand, the arguments against such a limit are:

1. There is no rational basis to discriminate against the health care plaintiff and other plaintiffs equal protection and due process issues.

2. The limits that have been placed are arbitrary and have no relation to the injuries of the plaintiff and thus penalize the most severely injured

plaintiff with the greatest need. Often they are not indexed to reflect inflation.

3. The health care system, because of government intervention and support, is well able to bear this social burden. The burden is ultimately shared through the health insurance system rather than by the health care providers.

4. The threat of large damage awards is a strong incentive to improve quality of care and thus reduce health care costs.

5. Defensive medicine is good medicine and in the best interest of quality patient care.

6. There is no legally rational distinction between economic and noneconomic damages.

7. The cap is a denial of the right to trial by jury.

8. Some states have specific constitutional provisions protecting the right to recover full damages.

To meet these challenges a number of creative approaches have been used:

1. Probably the most effective has been the creation of Patient Compensation Funds. Such a fund is essentially created by providing a layer of insurance coverage in addition to a primary layer of insurance purchased by the health care provider. The insurance may be mandatory or elective with the health care provider seeking the protection. A major problem with these funds is that they are often underfunded so that the excess insurance costs creep up and up. For example, the cost of the excess insurance under the Indiana Plan is now five times the initial premium. Also, the health care insureds have no right to shop the excess to get competitive rates or to change management. The Patient Fund in concept provides an answer to the constitutional argument that there must be a quid pro quo for any denial of a plaintiff's property right. Although most state courts deny the need for a quid pro quo it is obvious from reading the cases that it plays an important part in influencing a favorable response.

2. Although a few states, such as Indiana and Virginia, have attempted to apply the cap to the total damage award including both economic and noneconomic damages, most have limited the cap to noneconomic damages and even in those states the results have been mixed.

3. The State of Washington, effective for cases filed after August 1, 1986, adopted a cap on a complex sliding scale which may in part meet the argument that a single limit is too arbitrary. Texas included a cost of living index adjustment to its cap but failed to get favorable approval of its Supreme Court. For a comprehensive discussion of the legal and constitutional issues related to the Washington statute see Washington Law Review, July 1988 issue, at pages 633-675. As this paper is going to print a news report indicates that the Washington Supreme Court has declared the statute unconstitutional under the constitutional requirement that "the right of trial by jury shall remain inviolate," and thus the jury must retain the right to set damages. This leaves the count of six states overturning the cap and five states sustaining it.

4. In Boyd v. Bulala, 647 F.Supp. 781 (1986), the Virginia statute that placed a \$750,000 cap in 1973, increased to \$1,000,000 on total damages, was held to be constitutional on equal protection grounds but unconstitutional under the Virginia constitutional requirement relating to trial by jury. However, the more recent Virginia Supreme Court case of Ethridge v. Medical Center Hospitals, Jan. 13, 1989 Docket No. 860194, upheld as constitutional the very same statute. For the future the State Supreme Court decision should prevail.

5. The limit under the Louisiana law was upheld in Williams v. Kushouer, 524 So.2d 181 (1988), with a \$400,000 cap on top of a \$100,000 primary. In this case the constitutional issues were returned to the trial court for a 5-week hearing leading to a finding of constitutionality on issues of the state clause protecting individual dignity as well as the due process right of access to the courts.

6. Many of the State Funds have separate procedures for access to the State Fund portion including the use of mandatory arbitration.

7. In 1988 the Florida Legislature adopted a \$250,000 limit on pain and suffering if the health care

provider admits to liability and the case goes to arbitration on the issue of damages. If the patient refuses to arbitrate then the limit on recovery is \$350,000, but if the health care provider refuses to arbitrate then there is no limit on recovery. In 1988 the Florida Medical Society attempted to pass an initiative with a straight \$100,000 limit on pain and suffering across all torts but the initiative failed badly.

8. In 1987 the Kansas Supreme Court declared the Kansas statute limiting total recovery to \$1,000,000 and limiting recovery of noneconomic damages to \$250,000 unconstitutional on grounds that there was not sufficient quid pro quo as a substitute remedy. Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, (June 3, 1988). However, on March 30, 1989, the Kansas Supreme Court affirmed the constitutionality of the 1988 Kansas legislation which placed a \$250,000 limit on noneconomic damages in any personal injury lawsuit.

9. The Texas Supreme Court held the Texas statute limiting malpractice damage recovery unconstitutional in a bitter split decision in Lucas v. U.S., 757 S.W.2d 687 (1988). Since that time a major portion of that majority have lost reelection. What will happen now remains to be seen.

10. The Maryland \$250,000 limit on noneconomic damages is before the Fourth U.S. Circuit Court of Appeals on appeal from a favorable ruling at the trial court in Franklin v. Mazda Motor Corp.

11. The Louisiana case of Williams v. Kusher, 524 So.2d 191 (La.App. April 12, 1988), upheld the constitutionality of a challenge to the 1975 Louisiana Medical Malpractice Act which limited total liability of health care providers to \$100,000, with a potential excess recovery of up to \$400,000 from a provider-supported State-operated compensation fund. In 1984 the act was amended to provide that the fund limits did not apply to medical expenses and so that medical expenses in addition to \$500,000 could be recovered from the fund. What is unique about this case is that the appellate court referred the constitutional challenge back to the trial court for a full evidentiary hearing on the constitutional issue. The trial court found that a true crisis existed in 1975 that would have jeopardized the State's interest in guaranteeing continued health care services at a reasonable cost. The constitutional issues related to the individual dignity (really equal protection) and

access to courts requirements in the State Constitution. The court applied the rational basis test.

So far the California statute is the only one that has reached the United States Supreme Court, which refused a petition for hearing on the California Supreme Court's decision sustaining the constitutionality of the California provision. The United States Supreme Court held that there were not sufficient federal grounds for a further review.

The California statute provides:

Civil Code. 3333.2. Medical malpractice actions: Limitation on amount recoverable for noneconomic losses.] (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

(c) For the purposes of this section:

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

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

Now that the statute has been declared constitutional various issues have been raised by the plaintiffs' bar to find loopholes in the statute, particularly to increase the number of \$250,000 limits recoverable in any single occurrence, such as:

1. Multiple recovery for multiple heirs in a wrongful death case.
2. Additional recovery for the loss of consortium of the spouse.
3. Additional recovery against each defendant rather than a single recovery against all.
4. Multiple recovery for additional causes of action for a series of events.
5. Unlimited recovery for a nonmalpractice tort when combined with a malpractice tort.
6. No limit on recovery for an intentional tort.
7. Statute not retroactive in application.
8. No limit on recovery against a joint non-healthcare defendant.
9. Does the limit include recovery for punitive or exemplary damages?

Although the current trend of the California courts since the 1986 election which removed three Justices has been mostly favorable, the cost of litigation to resolve these issues has been very expensive and time consuming. Since the limit is the one set in 1975 there is increasing pressure to raise the limit and eventually there will be some adjustment.

There is no question but that the \$250,000 limit on pain and suffering has been a major factor in stabilizing insurance rates in California.

For a comprehensive law review article criticizing the utilizing of a cap on damages but supporting a modification of the joint and several liability rule see "1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability," Cornell Law Review, vol. 73 at p. 628.

The Collateral Source Rule

Historically, all states through common law evolution have implemented what is known as the collateral source rule. Under this rule of damages the plaintiff is entitled to recover all damages, both economic and noneconomic, against the liable defendant or defendants without offset for any reimbursement or compensation that the plaintiff may have received for the same injury from such collateral sources as health insurance, disability insurance, workers compensation coverage, Social Security, and the like. As a result the plaintiff may enjoy multiple recovery for the same damages. The underlying rationale of the rule is that the guilty defendant should not be able to benefit from the prudence of the plaintiff. This fundamentally places the emphasis on the punishment component of the tort system as contrasted with the compensation component.

This contrasts with the social policy relating to fire insurance under which the owner cannot enjoy multiple recovery. Furthermore, other forms of injury coverage, such as health insurance, workers compensation, and the like, are much more

efficient patient reimbursement mechanisms than is malpractice insurance.

In designing a modification of the collateral source rule several basic decisions must be made:

1. Will the change be made to the entire tort spectrum or be limited to medical malpractice?

By limiting the change to medical malpractice you may lose the active support of business and industry and may increase the risk of potential constitutional challenge on equal protection grounds. On the other hand, by limiting the reform to medical malpractice this may split the plaintiff's bar as most attorneys do not feel qualified to handle medical malpractice cases.

2. Will the rule change require a mandatory offset of the collateral sources or be limited to permitting introduction of evidence of the collateral sources to the jury and rely on the jury's discretion in handling it?

The trial court experts disagree very strongly on the issue and the arguments are:

- a. If the approach is evidentiary, then the constitutional challenge based upon trial by jury or the right to recovery of complete damages is minimized. However, there is always the opportunity for the jury to ignore or minimize the impact of the evidence. Some defense attorneys have found that by following the evidence approach, particularly in infant birth cases where there may be overwhelming collateral sources, the ability of the attorney to present evidence of comprehensive collateral sources that are available in many catastrophic cases

may lead to a defense verdict when the plaintiff's liability case is so weak as to need all of the economic sympathy component to sway the jury. Until the recent Kansas case^{**/} we believed the evidentiary approach to be a safe harbor for constitutional challenge.

b. If it is a direct offset, it may be done by the court rather than the jury or simply by jury instruction.

c. The matter of subrogation is an important issue to resolve. If the plaintiff is to be denied multiple recovery, then the plaintiff must be protected against subrogation by a third party payor who may have paid for the plaintiff's medical or economic costs. Some health insurance carriers have become quite aggressive in attempting such subrogation. The answer to this is that health care insurance is an efficient social mechanism and can absorb this additional cost and as a matter of underwriting does not contemplate equitable indemnity recovery in its underwriting. As a practical matter, the right of subrogation has been of minimal value.

d. Certain types of government programs by their very terms are not subject to state action by way of modification of the collateral source rule coupled with a prohibition against subrogation.

e. Our California experience would indicate that there are far more collateral sources available to the plaintiff than

^{**/} Wenting v. Medical Anaesthesia Service, 237 Kansas 503, 701 P.2d 939 (1985).

even an experienced litigator can anticipate and that it is important to develop model discovery documents related to this issue and insist that they be implemented. This has a major impact on settlements as well as actually discouraging the pursuing of a particular case or future cases. We have fewer problems in implementing the collateral source reform than any of the others.

Changes in the collateral source rule have the potential impact of reducing both the severity and frequency of judgments and settlements.

Danzon, at pages 72-77, projects a 14% reduction in claims frequency. For severity she projects an 11 to 18 percent reduction in recoveries. Our own anecdotal experience in California would indicate that her projections may be conservative.

For additional material see:

"Collateral Source Rule," St. Mary's Law Journal, vol. 18, at 584 (1967).

"The Collateral Source Rule - The American Medical Association and Tort Reform, Washburn Law Review, vol. 24 at 207 (1983).

For key cases see:

Rein v. Permanente Medical Group, 211 Cal.Rptr. 368, 30 Cal.3d 177 (1985), and Barme v. Wood, 207 Cal.Rptr. 816, upholding constitutionality.

Carson v. Maurer, 120 NH 925, 424 A.2d 825 (1980) and Wenting v. Medical Anaesthesia Service, 237 Kan. 503, 701 P.2d 939 (1985), both holding statute unconstitutional.

The California Statute, Section 3333.1 of the California Civil Code:

3333.1. [Medical malpractice actions: Insurance and disability benefit payable to plaintiff.] (a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

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

(c) For the purposes of this section:

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

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital. Cal Jur 3d Insurance Contracts and Coverage sec. 510; Witkin Summary (8th ed) Torts sec. 516B.

Statutes of Limitations

Over the years the courts have been very creative in gutting the impact of various attempts to create some limitation on the time when a complaint for medical malpractice must be filed. Not surprising, the courts have been much more protective of the fate of practicing attorneys where the statute of limitations on legal malpractice has been effectively enforced.

We must recognize that there are special problems facing the courts in dealing with medical malpractice that may not exist in other types of litigation. For example, the matter of discovery of the injury or the fact that the injury may have been caused by negligence, the possibility of a cover-up, and the matter of the continued physician/patient relationship may be present. The problems relating to foreign bodies as well as the fact that in recent years the injuries to newborn infants has been an increasing area of liability exposure for health care providers. Any statute must deal with the issue as to when the time element commences to run, such as, for example, from the time of the negligence, the time of the injury, or the time of death.

The finality of the implementation of the statute of limitation and the fact that any date is essentially arbitrary give the courts great concern in tragic cases. On the other hand, the openendedness of the statute creates major problems for any medical malpractice insurers. The creation of a premium

structure that will anticipate the workout of claims maturing or settling many years later makes underwriting such a risk speculative at best. Probably this factor has as much impact on the shortage of insurance carriers willing to write the risk as any other factor. By the time of the 1975 crisis in California it was generally recognized that the statute of limitations for medical malpractice cases was almost nonexistent. As a result great effort was made to design a statute that would achieve a degree of balance acceptable to the legislature and one that would withstand the challenge of the appellate courts. The statute which was adopted attempted to meet all these factors and handle retroactivity by strong policy statements.

Most states have enacted legislation strengthening the statute of limitations and shortening the statute as to infants. The most recent action is a 1989 amendment in Mississippi that reduces the statutory time as to minors who are six years or younger to two years after the sixth birthday.

The California statute, essentially as adopted in 1975, in Section 340.5 of the California Code of Civil Procedure provides:

340.5. [Professional negligence of health care provider.] In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or

diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

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

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

Except for some confusion as to how the specific statute, as related to medical malpractice, relates to the broad generic tort statute of limitations, the 1975 language has been effective. In Kite v. Campbell, 191 Cal.Rptr. 367 (1987), the California statute as applied to infants was held to be constitutional. The application of the statute to infants or incompetents is obviously the most controversial. Sax v. Yotteler, 648 S.W.2d 661 (Texas 1983), and Schwinn v. Riverside Methodist Hospital, 45 N.E.2d 737 (Ohio 1983), both held the

statute as applied to infants unconstitutional. As noted, California adopted the eight year period as applied to newborns. This figure was arrived at by considerable consultation with pediatricians and neonatal specialists as to what was an outside period in which infant brain damages would manifest themselves.

The importance of the limitation on the statute is pointed out in the Patrician Danzon study entitled: "The Frequency and Severity of Medical Malpractice Claims: New Evidence," Law and Contemporary Problems, vol. 17, No. 2, p. 71 (Spring 1986), in which she found that "reducing the statute of limitations for adults by one year reduces total claim frequency by eight per cent and frequency of paid claims by six to seven per cent."

The State of Oklahoma designed an innovative approach in providing that the discovery exceptions as applied to medical malpractice cases applied only to those damages constituting medical and surgical expenses. However, the Oklahoma Supreme Court in Reynolds v. Porter, 760 P.2d 816 (July 19, 1988), held even this modification was unconstitutional under special provisions of the Oklahoma constitution. The court makes an interesting distinction between a statute that penalizes those who sleep on their rights and a statute which acts as an absolute bar. Strahlen v. St. Luke's Hospital, 706 S.W.2d 7 (Missouri 1986) held the Missouri statute unconstitutional on grounds of denial of access to the courts.