ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3426 HJUD SB 377/HB 532 (FILE 4: LETTERS AND ARTICLES FOR)

The Citizens Coalition was formed last year after people from many walks of Alaska life, professions, businesses and consumers found that insurance rates were high and availability was low. Putting together our Coalition would not have been possible if there was not widespread distress and the knowledge that other remedies have failed.

In addition to the list of Coalition member organizations, we have resolutions of support from the city councils of Wasilla, Cordova, Soldotna and Houston, from the Fairbanks North Star Borough Assembly, from the Chambers of Commerce in Fairbanks, Anchorage, Palmer, Sitka, Ketchikan and more. It is no light thing to organize a colition this broad, as I am sure you realize. Do not ignore our situation. Many of the Coalition members cannot wait another year for relief.

Sincerely,

Al Tamagni, Sr.
Chairman

P.S. Enclosed is a copy of the Federal Task Force Report and letter from our Board of Directors.

cc: Senator Jan Faiks
Senator John Sackett
Representative Mike Miller.

# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS' COALITION FOR T· , REFORM

SUBJECT: ENCLOSED DATA FO OUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.
Chairman

738 H Street, Suite 100 • Anchorage, Alaska 99501 • (907) 276-1135

# Court ruling targets costly trial delays

**Legal notes**

Dick McCann

While tort reform has captured its share of headlines lately, the court system has been working quietly and with little notice to deal with delays in moving cases to trial.

As anyone who has been involved with litigation knows all too well, delay in court proceedings is a persistent and frustrating problem. In a rapidly growing state like Alaska, the number of cases continues to increase faster than the number of judges and other court personnel assigned to deal with the cases.

In criminal cases, court rules require the courts to bring the cases to trial within a limited period of time. These rules are imposed by the state and federal constitutions, which guarantee accused persons a right to a speedy trial.

In civil cases, there is no similar constitutional requirement for a speedy trial. This means that it may take years before a civil case is tried. Often such a delay is necessary because of the complexity of the case. In other cases, the parties may not want to push the matter to a trial because they are trying to work out their differences without the high expense of a trial. In some cases, however, long delays have occurred simply because the courts are crowded.

The Alaska Supreme Court recently adopted a new court rule to address the problem of delay in Anchorage's Superior Court. The principal feature of this rule is establishment of a new "fast track" for certain kinds of civil cases. When new civil cases (other than divorces) are filed, the lawyers must describe the nature of the dispute and the likely length of a trial. If the case is not within certain categories of particularly complex cases, and if the trial is expected to take less than 10 days, the case will be assigned to the new "fast track." Three Superior Court judges are handling these fast track cases.

Once a case is on the fast track, the lawyers must ask for a trial date within nine months. If a trial date has not been requested in nine months, the judge may dismiss the case. When a trial date is requested, the judge will hold a conference to set the trial date. The new rule requires the judge to schedule the trial within four months of the conference.

One other new feature of this rule is a provision requiring both sides in a lawsuit to give their opponents copies of basic documents relevant to the case. Undere the previous rules, a party was only required to provide copies if the other side asked for them.

These new procedures have been adopted on an experimental basis after considerable study. Judges and court administrators will be watching closely to see the effects of these changes. One possible effect will be to clear many cases from the system.

Often the parties to a lawsuit do not make serious settlement efforts until they are faced with a trial with all of its commitments of time and money. By forcing the parties to either set the case for trial or have the case dismissed, the court will find out fairly quickly which cases involve real disputes that must go to trial. Cases that must be tried should go to trial sooner.

If this effort is successful, it should benefit anyone who needs to use the court system to obtain a decision within a reasonable amount of time. Even those who are not involved in lawsuits may be pleased if this system is effective.

In this year of shrinking state budgets, efficient use of the courts is a much more desirable alternative than the expense of hiring more judges and court personnel.

*Dick McCann has been a practicing attorney for 15 years and is managing partner of Perkins Coie's Anchorage office.*

DILLINGHAM CHAMBER OF COMMERCE

BOARD OF DIRECTORS

A RESOLUTION SUPPORTING THE
CITIZENS' COALITION FOR TORT REFORM REGARDING
INSURANCE PREMIUMS

WHEREAS, the members of the Dillingham Chamber of Commerce are seriously concerned about the increase in annual insurance premiums and lack of availability in rural areas, and

WHEREAS, other Alaska communities, businesses, school districts, and private citizens are similarly suffering because of the need for legislative redress of the problems peculiar to the Alaska insurance industry, and

WHEREAS, Alaska has a limited availability of liability insurance programs in Bush Alaska, and has experienced a dramatic rise in liability premiums, and

WHEREAS, legislative remedies are needed to restore predictability and affordibility to liability insurance programs, and

WHEREAS, THE Citizens' Coalition for Tort Reform has identified areas needing legislative remedy, and have proposed solutions

NOW, THEREFORE, BE IT RESOLVED by the Dillingham Chamber of Commerce that it supports the efforts of the Citizens' Coalition for Tort Reform to achieve legislative remedies, and urges the Alaska Legislature to make reforms a priority of the legislative session.

PASSED AND APPROVED THIS 22nd DAY OF April

Presiding Officer

Secretary

ATTEST:

# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS COALITION FOR TORT REFORM

SUBJECT: INFORMATION ON CONTIGENCY FEES

THE OTHER SIDE OF CONTIGENCY FEES BENEFIT TO ALL PARTIES

READ THE LOGIC

Sincerely,

Al Tamagni, Sr.
Chairman

738 H Street, Suite 100 • Anchorage, Alaska 99501 • (907) 276-1135

negligence. Insurance may not be available to cover all risks or may be too costly for many people.

Two of the four major MICRA provisions, if extended to all negligence actions, would help solve the current dilemma of rising insurance premium costs and shrinking insurance availability. The two provisions recommended for extension are limits on attorney contingency fees[61] and the provision for periodic payment of damages.[62] The actual relief that would result from an extension cannot be forecast precisely.[63] Industry analysts predicted, however, that medical malpractice payouts would decrease by twenty percent after the 1975 enactment of MICRA.[64] Empirical evidence from some states showed awards decreased as much as fifty percent from 1975 to 1977.[65]

After MICRA was enacted, insurers were able to halt increases in malpractice insurance rates because of lower payouts and settlements.[66] In fact, one appellate court acknowledged that medical malpractice premiums went down by twenty-five percent without adjusting for inflation after the enactment of MICRA.[67] Analogous provisions extended to all negligence cases may be expected to have a similar effect on liability insurance premiums in general. Steps toward reform, beginning with the extension of selected MICRA provisions, would improve the capability of the tort system to meet the needs for which

61. *See supra* note 40 and accompanying text.

62. *See* CAL. CIV. PROC. CODE §667.7(f).

63. The American Bar Association estimated that one of the MICRA provisions, abrogation of the collateral source rule, alone would reduce medical malpractice payouts by up to 20%. An empirical study following 1985 medical malpractice reforms nationwide showed that in states requiring reduction of awards by the amount of collateral source payments, payouts dropped 50% from 1975 to 1977. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 946 (1984).

64. *Id.* at 947. A smaller reduction in medical malpractice awards resulted from the cap on noneconomic damages. *Id.* States that enacted caps in 1975 had malpractice awards 19% lower in 1977. *Id.*

65. *Id.* at 948. In addition to this finding, economists who have studied states that enacted limitations on attorneys' contingent fees concluded that the limits have increased the number of cases dropped by five percent, decreased the size of settlements by nine percent, and reduced by eleven percent the number of cases tried. The MICRA provisions taken together resulted in a 25% decline in medical malpractice premiums for most hospitals in the state in the years following enactment of MICRA. American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc., 36 Cal. 3d 359, 382-83, 683 P.2d 670, 685, 204 Cal. Rptr. 671, 686 (Mosk, J., dissenting) (1984).

66. *American Bank & Trust*, 36 Cal. 3d. at 382-383, 683 P.2d at 685, 204 Cal. Rptr. at 686.

67. *Id.* at 382-383, 683 P.2d at 685, 204 Cal. Rptr. at 686 (1984); Brief of Amicus Curiae, Fred J. Hiestand at 7, American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc., Civil No. 24171 (Cal. Supreme Court filed Aug. 9, 1983) (on file at the Pacific Law Journal).





the system was established.[68] Each MICRA provision will be analyzed individually in the context of extension, beginning with the limitation on contingency fees and followed by the periodic payments provision. Policy considerations will be addressed first, followed by discussion of constitutional questions.

### A. *Extension of the Limitation on Contingency Fees*

The first MICRA provision proposed for extension to all negligence actions is the sliding scale limitation on contingent attorneys' fees. The United States is one of very few nations that permits plaintiffs' attorneys to set fees as a percentage of either court awards or settlements.[69] The medical malpractice insurance crisis provided the impetus for enactment of the MICRA limitation on contingency fees.[70] By enacting the contingency fee limitation, the California Legislature decreased the high cost of medical malpractice insurance premiums which threatened the availability of medical care.[71] In addition, the legislature sought to avoid potential recovery problems created by insufficient liability coverage for patients injured by medical malpractice.[72] The legislature determined that the limited sliding fee scale of MICRA would reduce costs to malpractice defendants and insurers, particularly in the large number of cases resolved through settlement.[73] Since the attorney fee limitation of MICRA[74] permits an attorney a smaller portion of the settlement, plaintiffs may be more likely to agree to a lower settlement.[75] In addition, the limit on attorneys' fees deters attorneys from litigating marginal cases or encouraging clients to hold out for unrealistically high settlements.[76]

Certain immutable characteristics of the contingency fee arrangement have made this method of compensation the subject of vigorous debate over the years.[77] The confluence of interest between attorney and client bound by a contingency fee agreement is marginal.[78] In

68. Report of the California Citizens' Commission on Tort Reform, Righting the Liability Balance, Sept. 1977, at 141.

69. *Id.* at 159. For example, Great Britain has banned the contingency fee. *Id.*

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71. *Id.*

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73. Roa v. Lodi Medical Group, 37 Cal. 3d 920, 930-32, 695 P.2d 164, 170-71, 211 Cal. Rptr. 77, 83-84 (1985).

74. CAL. BUS. & PROF. CODE §6146.

75. *Roa*, 37 Cal. 3d at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

76. *Id.* at 930-31, 695 P.2d at 170, 211 Cal. Rptr. at 83.

77. MacKinnon, *Contingent Fees for Legal Services* 39 (1964).

78. *Id.*

Application of the rational basis standard of review includes extreme deference to the legislature[96] and a presumption of constitutionality.[97] In addition, the burden of proving the statutory classification unconstitutional is on the party challenging the statute.[98] Historically, the rational basis test has been applied to economic and social welfare legislation.[99] Since MICRA relates to public health care, the statute is appropriately analyzed under the rational basis standard of review.[100]

In contrast to the rational basis test, the strict scrutiny standard of review requires that the challenged legislation be necessary to serve a compelling state interest.[101] The strict scrutiny test has been applied when legislative classifications impinge on suspect classes[102] or fundamental rights.[103] The legislative classifications in MICRA do not require application of the strict scrutiny standard of review[104] because neither a suspect class nor a fundamental right is affected by the Act. Therefore, the rational basis test has been chosen repeatedly by courts reviewing medical malpractice legislation[105] and was applied by the California Supreme Court in the four MICRA challenge cases.[106]

(1970), *accord*, McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) (presumption of constitutionality; statutory classifications deemed unconstitutional only if no circumstances reasonably may be conceived for justification); *see also* McGowan v. Maryland, 366 U.S. 420 (1961).

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100. *See, e.g.*, *Roa*, 37 Cal. 3d at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

101. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §16-4 at 1000-02 (1978).

102. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). Classifications are considered suspect when the class is subjected to a history of purposeful unequal treatment, or is relegated to a position of political powerlessness so as to need special protection from the majoritarian political process. *Id.* The U.S. Supreme Court has held that suspect classifications include those made on the basis of race. *Id.* Classifications based upon alienage are considered suspect. Truax v. Raich, 239 U.S. 33, 39-43 (1915). National origin classifications also are deemed suspect and may not be used to deny equal protection. Hernandez v. Texas, 347 U.S. 475, 478-80 (1954).

103. *San Antonio*, 411 U.S. at 33-34. Fundamental rights are those rights explicitly or implicitly guaranteed by the U.S. Constitution. *Id.*

104. D'Amico v. Board of Medical Examiners 11 Cal. 3d 1, 18, 520 P.2d 10, 22-31 Cal. Rptr. 786, 798-99 (1974) (right to practice medicine not fundamental); Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (limits on recovery for medical malpractice neither infringe a fundamental right nor affect a suspect class), cert. denied, 431 U.S. 914 (1977); Paro v. Longwood Hospital, 369 N.E. 2d 985, 987-88 (1977) (classifications made under malpractice act do not violate equal protection clause of the fourteenth amendment of the United States Constitution).

105. *See supra* note 104 and accompanying text.

106. *See supra* notes 91-92 and accompanying text.





Applying the rational basis standard, the court in *Roa* stated the legislature could reasonably have concluded MICRA's sliding scale limitation on attorneys' fees would be more equitable than a flat contingency fee.[107] The sliding scale ensures that an attorney does not receive a "windfall" simply because a client is seriously injured.[108] In order to relate an attorney's fee more closely to the amount of legal work and expense involved in a case and less to the plaintiff's economic status and degree of injury, a decreasing schedule of fees should be set by each state. The schedule should be generous with regard to smaller awards so potential plaintiffs are not deprived of representation.[109] The sliding scale guarantees that the most seriously injured plaintiffs will retain the largest share of any recovery secured on their behalf.[110]

The rationale in *Roa* for upholding the constitutionality of the MICRA contingency fee limitation can be applied to all negligence actions.[111] The limitation does not infringe on the right of negligence victims to retain counsel.[112] The provision merely places a limit on the compensation an attorney may receive when representing an injured plaintiff under a contingency fee arrangement.[113] The validity of legislative regulation of attorneys' fees is well established[114] and the constitutionality of this limiting regulation as an exercise of the police power has been settled.[115] Therefore, extension of the limitation on attorneys' contingency fees can be supported.

107. *Roa*, 37 Cal. 3d at 933, 695 P.2d at 172, 211 Cal. Rptr. at 85.

108. *Id.* at 929, 933, 695 P.2d at 169, 172, 211 Cal. Rptr. at 81-82, 85.

109. Report of Committee on Medical Professional Liability, 102 ABA Annual Rep. 786, 851 (1977).

110. *Roa*, 37 Cal. 3d at 929, 933, 695 P.2d at 169, 172, 211 Cal. Rptr. at 81-82, 85.

111. Statutory limitations on attorneys' fees are not uncommon, either in California or other states. *See, e.g.*, American Trial Lawyers v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Gair v. Peck, 6 N.Y. 2d 97, 188 N.Y.S. 2d 491, 160 N.E. 2d 43 (1958), *appeal dismissed*, 361 U.S. 374 (1960). In California, attorneys' fees have long been regulated both in workers' compensation proceedings (LAB. CODE §4906) and in probate proceedings (Prob. Code §§910, 911). Other states have already adopted maximum fee schedules that apply to all personal injury contingency fee arrangements. *Id.* In addition, the United States Congress has passed several laws limiting the amount of attorney fees chargeable in various types of cases. *See, e.g.*, 28 U.S.C. §2678 (1966) (limit on attorneys' fees in actions under the Federal Tort Claims Act); 42 U.S.C. §406 (b)(1) (1968) (limit on attorneys' fees in actions under the Social Security Act); 38 U.S.C. §3404 (1958) (limit on attorneys' fees for claims under the Veterans' Benefit Act).

112. *Roa*, 37 Cal. 3d at 929, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.

113. *Id.* at 929, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.

114. *See, e.g.*, Calhoun v. Massie, 253 U.S. 170 (1920).

115. *Roa*, 37 Cal. 3d at 926-927, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80. *See, e.g.*, Frisbie v. U.S., 157 U.S. 160, 165-66 (1895) (attorneys must accept limited fees for the processing of federal pension claims); Yeiser v. Dysart, 267 U.S. 540, 541 (1925) (state may place

# CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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Certain immutable characteristics of the contingency fee arrangement have made this method of compensation the subject of vigorous debate over the years.[77] The confluence of interest between attorney and client bound by a contingency fee agreement is marginal.[78] In

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77. MacKinnon, *Contingent Fees for Legal Services* 39 (1964).

78. *Id.*

fact, conflicts of interest are inherent in the contingency fee arrangement.[79] Since the fee is paid regardless of the amount of time spent on the case, early settlement may be advantageous to the attorney, especially when a small claim is involved. Extensive bargaining or a trial might yield a higher recovery for the plaintiff, but the additional amount of compensation to the attorney may be insignificant or wholly disproportionate to the amount of time necessary to pursue the claim.[80]

Those opposed to extending MICRA argue that giving a smaller percentage to the attorney representing a plaintiff with high damages in a negligence action actually harms the plaintiff.[81] The rationale is that attorneys will not vigorously prosecute or even undertake cases if compensation per unit of time expended is insufficient.[82] This argument is not supported by evidence obtained from jurisdictions in which fee limitations are applied. For example, New Jersey has adopted a sliding contingency fee scale for all tort actions.[83] Despite a fee scale that was even less generous to attorneys than the MICRA scale when it was adopted, no problems resulting from the fee limitation were reported in New Jersey.[84] In fact, commentators in New Jersey have indicated that New Jersey's limited contingency fee detractors were wrong in predicting that the poor would suffer impaired access to the courts.[85]

Contingency fee arrangements are not as risky for the attorney as the name suggests.[86] A noted authority states that plaintiffs recover, either by suit or settlement, in the vast majority of cases in which a lawyer is retained.[87] The argument for limitation of contingency

79. *Id.* Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation* 22 STAN. L. REV. 1125, 1136-39 (1970); Brief of Amicus Curiae, Fred J. Hiestand at 4, Roa v. Lodi Medical Group, Civil No. S.F. 24435 (Cal. Supreme Court filed Aug. 10, 1982) (on file at the Pacific Law Journal).

80. MacKinnon, *supra* note 77 at 198.

81. Brief of Amicus Curiae, Fred J. Hiestand at 17, Roa v. Lodi Medical Group, Civil No. S.F. 24435 (Cal. Supreme Court filed Aug. 10, 1982) (on file at the Pacific Law Journal).

82. *Id.*

83. The percentage of the recovery permitted for attorneys' contingency fees has been increased by the New Jersey Legislature since the original enactment of a sliding scale limiting contingency fees. NEW JERSEY RULES OF GENERAL APPLICATION, 1:21-7, 1984.

84. *Id.*

85. *New Jersey's Maximum Contingent Fee Schedules: The Validity of Rule 1:21-7*, 5 RUT.-CAM. 534 (1974). "The [New Jersey] rule's detractors may have overstated their objections by predicting impaired access of the poor to the courts." *Id.* at 549.

86. Connell, *The Lawsuit Lottery* 145 (1979). In other words, "there is very little that is contingent about the contingent fee." *Id.*

87. *Id.*, citing address by Professor Maurice Rosenberg, Columbia Law School, American Bar Association Convention (1976).





fees is strongest when recovery is almost certain.[88]

Since 1975 California legislators have repeatedly offered bills for consideration that would limit or regulate contingency fees.[89] The MICRA scale is the most reasonable quantitative proposal offered thus far, and should be extended to all negligence actions.[90] In addition, constitutional challenges to MICRA have been met successfully and similar constitutional challenges to a MICRA extension can be overcome.

The contingency fee limitation of MICRA was upheld as constitutional by the California Supreme Court in *Roa v. Lodi Medical Group*.[91] *Roa* was one of a recent series of cases involving the constitutionality of the various MICRA provisions.[92] The Court in *Roa* applied a rational basis standard of review to hold that the sliding scale for contingency fees was not a denial of due process or a violation of equal protection.[93] The rational basis standard of review is the lower tier of the traditional two-tier approach to judicial review of legislation on constitutional challenges.[94] In order to meet the rational basis standard of review, the statute being challenged must bear a rational relation to any conceivable legitimate state interest.[95]

88. *Id.*

89. The legislature considered at least nine bills seeking to limit or regulate contingent fees in 1975. They ranged from AB 7 (no maximum schedule but subject to court approval) to AB 14, 1672 (a flat 10% except that counsel and client may split the first $1,667 any way they wish). *See also* SB 407, SB 397, AB 1, AB 926 and AB 1941 (on file at Pacific Law Journal).

90. Report of the Committee on Medical Professional Liability, 102 ABA Annual Rep. 786, 851 (1977). *See also* Dept. of HEW Report of Secretary's Committee on Medical Malpractice 919730 pp. 34-35; Kohlman, *An Equitable Contingency Fee Contract* 50 STATE BAR J. 268, 295-98, n.42 (1975). A sliding scale approach has been recommended as the preferable form of regulation. Attorneys fees should be related to the amount of legal work and expense involved in handling a case and not to the fortuity of the plaintiff's economic status and degree of injury. A decreasing maximum schedule of attorney's fees, set on a state by state basis and reasonably generous in the lower recovery ranges, would prevent the denial of access to legal representation. *Id.*

91. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985). Upon a denial of petition for rehearing on the date of judgment, February 7, 1985, plaintiff/appellants petitioned the U.S. Supreme Court for certiorari on the ground that Business & Professions Code §6146 violates the first and fourteenth amendments of the US. Constitution. Docket A85216 U.S. filed July 12, 1985 (notes on file at the Pacific Law Journal).

92. Other cases included American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (upholding the MICRA provision authorizing periodic payment of future damages in medical malpractice actions); Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984) (upholding the MICRA provision that bars a collateral source from obtaining reimbursement from a medical malpractice defendant).

93. Roa, 37 Cal. 3d at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

94. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 657-897 (9th ed. 1975); Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 So. CAL. L.R. 689 (1977).

95. Westbrook v. Mihaly, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852

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99. G. Gunther, *supra* note 94, at 658; Larson, *Constitutional Law: Equal Protection—An Emerging Standard of Review*, 13 WASHBURN L.J. 106, 107 (1974).

100. *See, e.g., Roa*, 37 Cal. 3d at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

101. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §16-4 at 1000-02 (1978).

102. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). Classifications are considered suspect when the class is subjected to a history of purposeful unequal treatment, or is relegated to a position of political powerlessness so as to need special protection from the majoritarian political process. *Id.* The U.S. Supreme Court has held that suspect classifications include those made on the basis of race. *Id.* Classifications based upon alienage are considered suspect. Truax v. Raich, 239 U.S. 33, 39-43 (1915). National origin classifications also are deemed suspect and may not be used to deny equal protection. Hernandez v. Texas, 347 U.S. 475, 478-80 (1954).

103. *San Antonio*, 411 U.S. at 33-34. Fundamental rights are those rights explicitly or implicitly guaranteed by the U.S. Constitution. *Id.*

104. [illegible]o v. Board of Medical Examiners 11 Cal. 3d 1, 18, 520 P.2d 10, 22-31 Cal. Rptr. 78[illegible] 798-99 (1974) (right to practice medicine not fundamental); Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (limits on recovery for medical malpractice neither infringe a fundamental right nor affect a suspect class), cert. denied, 431 U.S. 914 (1977); Paro v. Longwood Hospital, 369 N.E. 2d 985, 987-88 (1977) (classifications made under malpractice act do not violate equal protection clause of the fourteenth amendment of the United States Constitution).

105. *See supra* note 104 and accompanying text.

106. *See supra* notes 91-92 and accompanying text.





Applying the rational basis standard, the court in *Roa* stated the legislature could reasonably have concluded MICRA's sliding scale limitation on attorneys' fees would be more equitable than a flat contingency fee.[107] The sliding scale ensures that an attorney does not receive a "windfall" simply because a client is seriously injured.[108] In order to relate an attorney's fee more closely to the amount of legal work and expense involved in a case and less to the plaintiff's economic status and degree of injury, a decreasing schedule of fees should be set by each state. The schedule should be generous with regard to smaller awards so potential plaintiffs are not deprived of representation.[109] The sliding scale guarantees that the most seriously injured plaintiffs will retain the largest share of any recovery secured on their behalf.[110]

The rationale in *Roa* for upholding the constitutionality of the MICRA contingency fee limitation can be applied to all negligence actions.[111] The limitation does not infringe on the right of negligence victims to retain counsel.[112] The provision merely places a limit on the compensation an attorney may receive when representing an injured plaintiff under a contingency fee arrangement.[113] The validity of legislative regulation of attorneys' fees is well established[114] and the constitutionality of this limiting regulation as an exercise of the police power has been settled.[115] Therefore, extension of the limitation on attorneys' contingency fees can be supported.

107. *Roa*, 37 Cal. 3d at 933, 695 P.2d at 172, 211 Cal. Rptr. at 85.

108. *Id.* at 929, 933, 695 P.2d at 169, 172, 211 Cal. Rptr. at 81-82, 85.

109. Report of Committee on Medical Professional Liability, 102 ABA Annual Rep. 786, 851 (1977).

110. *Roa*, 37 Cal. 3d at 929, 933, 695 P.2d at 169, 172, 211 Cal. Rptr. at 81-82, 85.

111. Statutory limitations on attorneys' fees are not uncommon, either in California or other states. *See, e.g.*, American Trial Lawyers v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Gair v. Peck, 6 N.Y. 2d 97, 188 N.Y.S. 2d 491, 160 N.E. 2d 43 (1958), *appeal dismissed*, 361 U.S. 374 (1960). In California, attorneys' fees have long been regulated both in workers' compensation proceedings (LAB. CODE §4906) and in probate proceedings (Prob. Code §§910, 911). Other states have already adopted maximum fee schedules that apply to all personal injury contingency fee arrangements. *Id.* In addition, the United States Congress has passed several laws limiting the amount of attorney fees chargeable in various types of cases. *See, e.g.*, 28 U.S.C. §2678 (1966) (limit on attorneys' fees in actions under the Federal Tort Claims Act); 42 U.S.C. §406 (b)(1) (1968) (limit on attorneys' fees in actions under the Social Security Act); 38 U.S.C. §3404 (1958) (limit on attorneys' fees for claims under the Veterans' Benefit Act).

112. *Roa*, 37 Cal. 3d at 929, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.

113. *Id.* at 929, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.

114. *See, e.g.*, Calhoun v. Massie, 253 U.S. 170 (1920).

115. *Roa*, 37 Cal. 3d at 926-927, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80. *See, e.g.*, Frisbie v. U.S., 157 U.S. 160, 165-66 (1895) (attorneys must accept limited fees for the processing of federal pension claims); Yeiser v. Dysart, 267 U.S. 540, 541 (1925) (state may place

# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR INFORMATION AND USE

ARE THESE THE FRIVILOUS INVESTMENTS INDICATED BY ROBERT HUNTER?

Sincerely,

Al Tamagni, Sr
Chairman

738 H Street, Suite 100 • Anchorage, Alaska 99501 • (907) 276-1135

## ALASKA INVESTMENTS OF INSURANCE COMPANIES IN ALASKA
## AS OF DECEMBER 31, 1984

| INSURANCE COMPANY INVESTMENTS | Total 1984 Investments (000) | Total 1984 Net Premiums (All Companies) (000) | Total 1983 Investments (000) | Total 1983 Net Premiums (All Companies) (000) |
|---|---|---|---|---|
| 1 Domestic Life Company | 3,331 | 663 | 2,459 | 594 |
| 4 Domestic and Foreign Title Insurance Companies | 5,233 | 19,116 | 4,278 | 19,343 |
| 9 Domestic Property and Casualty Companies | 18,179 | 119,463 | 36,049 | 83,050 |
| 201 Foreign Property and Casualty Companies | 1,357,719 | 324,493 | 1,270,907 | 331,434 |
| 138 Foreign Life Insurance Companies | 1,639,792 | 259,463 | 1,731,049 | 230,30[illegible] |
| 2 Hospital/Medical Service Corporations, F&D | 634 | 51,854 | 628 | 46,70[illegible] |
| 3 Fraternal Benefit Societies | 15,552 | 1,792 | 9,374 | 1,356 |
| Total | 3,039,140 | 776,844 | 3,054,744 | 712,778 |

### TYPE OF INVESTMENT

| | 1983 (000) | 1984 (000) | Percent Inc./Dec. |
|---|---|---|---|
| Alaska - State G. O. Bonds | 218,483 | 210,107 | (3.4) |
| Alaska - Political Subdivision Bonds | 238,094 | 216,709 | (8.9) |
| Alaska - Special Revenue Bonds | 1,111,376 | 1,187,034 | 6.8 |
| Alaska Industrial Bonds | 1,047,565 | 874,285 | (16.5) |
| Alaska Public Utilities | 48,000 | 63,103 | 31.4 |
| Alaska Real Estate | 9,198 | 23,131 | 151.4 |
| Alaska Mortgages | 212,416 | 235,077 | 10.6 |
| Common Stock and Bond Investments - % Allocated to Alaska Properties | 143,005 | 204,660 | 43[illegible] |
| U.S. Government Housing Authority Bonds | 2,671 | 132 | (95.0) |
| Alaska Policyholders Loan and Liens | 12,002 | 10,807 | (9.9) |
| Bank and Time Certificates | 11,934 | 14,095 | 18.1 |
| Total | 3,054,744 | 3,039,140 | (0.5) |

# CITIZENS COALITION FOR TORT REFORM, inc.

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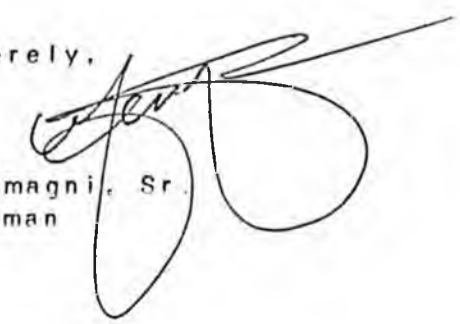
FROM: CITIZENS COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR INFORMATION AND USE

LET'S CONTROL THESE RESOURCES FOR ALL THE PEOPLE TO US AND HAVE AVAILABLE.

Sincerely,



A. Tamagni, Sr.
Chairman

# Extending MICRA Liability Limitations To All Negligence Actions: The Case For Tort Reform

"The tort syste[illegible] only element of American society that continues to function as though resources were unlimited."[1]

In 1975, the California Legislature enacted the Medical Injury Compensation Reform Act (MICRA)[2] in response to an apparent crisis in the health care field.[3] The perceived crisis was twofold.[4] First, many insurance companies issuing medical malpractice insurance policies in California determined that their costs were so high malpractice coverage

1. Address by Robert Willmore, Deputy Assistant Attorney General, National Association of Attorneys General Tort Liability Conference, San Francisco, (June 26, 1985).

2. 1975 Cal. Stat. c. 1, §1, at 3949. During the 1975 Second Extraordinary Session of the California Legislature called by Governor Edmund G. Brown, Jr., the legislature considered medical malpractice problems faced by the state. The session was labelled extraordinary because the legislature met in the interval between regular legislative sessions. *Id.*

3. *Id.* at 4007. Recognition by the California Legislature of a crisis is contained in the preamble to MICRA which states in pertinent part:

> The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police power, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health safety considerations permit now and into the foreseeable future.

*Id.* Governor Brown's proclamation to the California Legislature stated in pertinent part:

> The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals. The longer term consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens.
>
> In my judgment, no lasting solution is possible without sacrifice and fundamental reform. It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.

*Id.* at 3947.

4. KEENE, CALIFORNIA'S MEDICAL MALPRACTICE CRISIS, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 27 (1976); *see, e.g., When Doctors Went Out On Strike*, U.S. NEWS & WORLD REP., May 26, 19[illegible], at 4, col. 1 (strike by San Francisco anesthesiologists angered at rising malpractice insurance costs); *see also, When Doctors Rebel Against Higher Insurance Costs*, U.S. NEWS & WORLD REP., January 19, 1976, at 36, col. 2 (work slowdown by Los Angeles County doctors due to proposed insurance rate increase of 486 percent); *see*

## Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

| | *Contested* | *Without Trial* | *Non-Contested* |
|---|---|---|---|
| First $2,000 | 25% | 20% | 15% |
| Next $3,000 | 20% | 15% | 12.5% |
| Next $5,000 | 15% | 12.5% | 10% |
| Over $10,000 | 10% | 7.5% | 5% |

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

(4) Attorney's fees upon entry of judgment by default shall be determined by the clerk. In all other matters the court shall determine attorney's fees. Awards not pursuant to the schedule set forth in subparagraph (1) of this Rule shall be made only upon motion.

(b) Allowance in Mental Cases. In proceedings under the Mental Health Act, the attorney appointed to represent the patient shall be allowed and paid a fee of $25.00, unless the judge, in his discretion, orders otherwise. A lay advisor appointed in such proceedings shall be allowed and paid a fee of $10.00, unless the judge, in his discretion, orders otherwise. (Amended by Supreme Court Order 497 effective January 18, 1982)

I. In General

The common law did not permit allowance of attorney's fees as costs to the prevailing party, but in Alaska such allowance is of relatively ancient origin and prior to attainment of statehood the matter was regulated by statute. McDonough v. Lee, Op. No. 378, 420 P2d 459 (Alaska 1966).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. Miklautsch v. Dominick, Op. No. 538, 452 P2d 438 (Alaska 1969).

Where a mechanics' lienor files a four-count complaint against the beneficiary of a deed of trust to foreclose the mechanics' liens but prevails on only one count, the trial court may properly refuse to award either party costs or attorney's fees. Brand v. First Federal Savings & Loan Association of Fairbanks, Op. No. 658, 478 P2d 829 (Alaska 1970).

This rule does not apply where plaintiffs seeks an injunction and are awarded an injunction which is to be void if the defendant pays certain damages, since the rule in such case is not an accurate criterion for determining a fee. Stauber v. Granger, Op. No. 777, 495 P2d 67 (Alaska 1972).

The purpose of this rule is only to partially compensate a client for the productive work done by his attorney. It is irrelevant that actual attorney's fees are greater than the amount awarded. State v. Abbott, Op. No. 498 P2d 712 (Alaska 1972).

The determination of which party prevails and is entitled to costs is within the discretion of the trial judge. DeWitt v. Liberty Leasing Co. of Alaska, Op. No. 818, 499 P2d 599 (Alaska 1972).

A party is not barred from appealing from the disallowance of costs and attorney's fees by his acceptance of payment of the judgment and by signing a document entitled "Satisfaction of Judgment." DeWitt v. Liberty Leasing Co. of Alaska, Op. No. 818, 499 P2d 599 (Alaska 1972).

Under this rule, an award of prejudgment interest is to be included in the amount of the "money judgment." Era Helicopters, Inc. v. Digicon Alaska, Inc., Op. No. 999, 518 P2d 1057 (Alaska 1974).

Under this rule, a trial judge may award attorney fees without a formal motion and without a hearing, especially in a situation where the parties seeking to be heard did not file a formal request for fees. Urban Development Company v. Dekreon, Op. No. 1083, 526 P2d 325 (Alaska 1974).

This rule does not apply in a divorce action. Burrell v. Burrell, Op. No. 1169, 537 P2d 1 (Alaska 1975).

A trial judge may award attorney's fees without a formal motion and without a hearing. National Bank of Alaska v. J.B.L. & K. of Alaska, Inc., Op. No. 1239, 546 P2d 579 (Alaska 1976).

A "hold harmless" indemnity clause includes the cost of recovery in the clause itself. Manson-Osberg Co. v. State, Op. No. 1292, 552 P2d 654 (Alaska 1976).

Where parties' potential liability for payment of actual recovery greatly exceeded potential money for cost of defense, the main issue could not be said to be the cost of defense. Continental Ins. Co. v. U.S. Fid. & Guar. Co., Op. No. 1298, 552 P2d 1122 (Alaska 1976).

The cost of in-house counsel is not an attorney's fee within the meaning of this rule. Continental Ins. Co. v. U.S.

# CITIZENS COALITION FOR TORT REFORM, inc.

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TO: ALL LEGISLATORS

FROM: CITIZENS' COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.
Chairman

738 H Street, Suite 300 • Anchorage, Alaska 99501 • (907) 276-1135

On Saturday February 1, 1986, the Fort Richardson Flying Club's flight operations were suspended due to the inability of the Department of the Army to negotiate the renewal of the excess liability policy with the previous carrier. The suspension also affects the Fort Wainwright Flying Club. The remaining Army Flying Clubs are not affected.

The Alaska Flying Clubs do approximately 25% of the total flying of all Army flying clubs. There are currently 289 members of which 74 are Active Duty Military, 50 Reserves, and 57 Retired Military. Dues are assessed at $15.00/month.

The Army is requesting a maximum liability of $250,000 per seat and $5,000,000 per occurrence, with a $100,000 deductible. The deductible is self-insured by the Army's established rate for hull and liability to $100,000.

The majority of Anchorage area flight schools are currently carrying $100,000 per seat liability and $500,000 per occurrence. The Armys established limits may not be affordable for the flying club to continue operations.

The impact on the Fort Richardson Flying Club is wide ranging as outlined below:

1) Financial - The club's annual operating budget exceeds $500,000 per year. The eleven (11) member staff has an annual payroll of approximately $136,000. The maintenance on the airplanes is accomplished by a contracted mechanic at a cost of $25-30,000 per year.

2) Contracted personnel:

   a. Thirteen (13) Flight Instructors - per hour basis.
   b. Eighteen (18) lease back airplane owners - per hour basis.

3) Alaska State Student Loan (ASSL) Program - Currently approximately 35 students are utilizing the ASSL Program with approximately $85,000 on account at the flying club. ASSL funds are required to be placed on account at the flying club. The state requires 25 hours of instruction per three month period or 8.3 hours per month. An extended down time can put many students in non-compliance with state requirements for maintaining full-time status.

4) Veterans - The Flying Club is approved for the training of Veterans for flight training. There are currently twelve (12) members using veterans assistance for flight training.

# Is It Us?

The following is a condensed transcript of an interview conducted by the AIA with Victor O. Schinnerer & Company management, including J. Sprigg Duvall, president; Paul Genecki, senior vice president, and Thomas H. Porterfield, vice president.

AIA: Both DPIC and Victor O. Schinnerer (VOSCO) had agreed to meet with us today but we were advised yesterday that DPIC had decided that they could not make the meeting. And so we are with VOSCO people only. But in this current market, they provide coverage for at least half the insured architects.

Is there any good news for architects about insurance?

DUVALL: We did a study some time ago that indicated that the losses we paid in dollars represented only six one-hundredths of 1 percent of the construction values put in place by the architects and engineers against whom those claims were made. That's an incredibly high performance; a very low error rate. The problem is, in those rare instances—and six one-hundredths of 1 percent means a rare instance—it's very costly.

AIA: Looking at that small percentage, what can architects learn from those claims?

DUVALL: If you look at the period '80 to '84, the frequency of claims against architects did not increase all that much. It went from 43 per 100 insureds in 1980 to 44.4 in 1984. So it's not the frequency of claims; it's the severity of them that is the problem.

AIA: Of the claims that go to trial, do architects win more or lose more?

GENECKI: They win two-thirds of all the claims that go to court.

DUVALL: But I'm afraid in most of the cases we settled out of court, there really was a basis for a finding of fault against the [illegible]ered, in the minds of our defense lawyers and probably the [illegible]itects themselves, because they had to give their permission to settle the cases.

AIA: What kinds of people were the claimants?

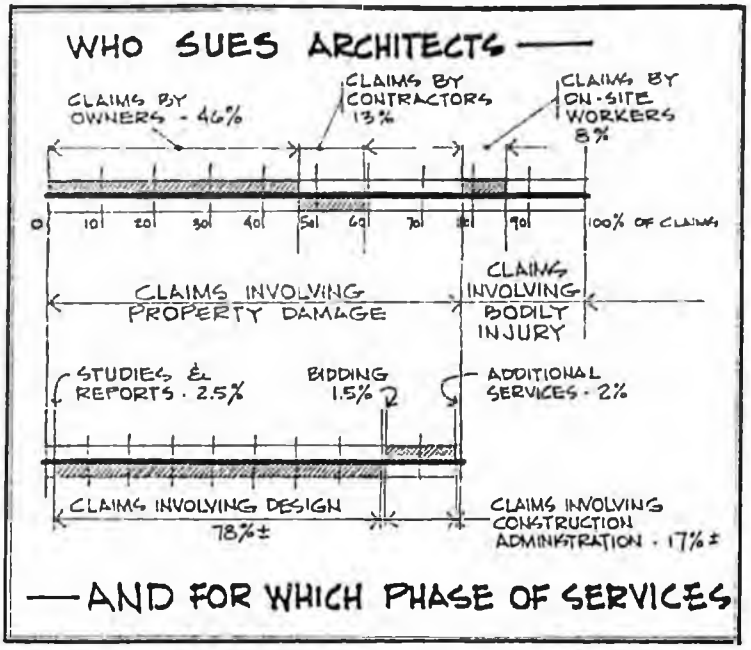
DUVALL: The most recent study we did involved 802 claims on architectural projects, and in 372 of those, the claimant was the owner.

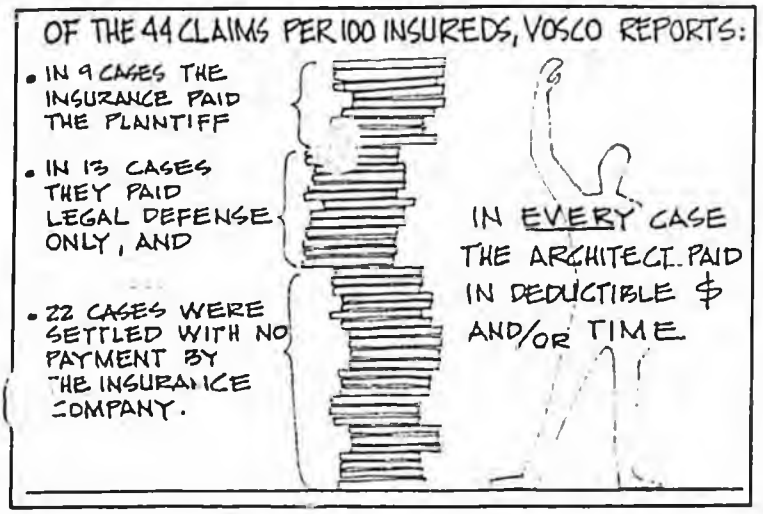
AIA: So these were claims that might have been prevented contractually?

DUVALL: Not in every case, because I suspect some number of these claims by owners were actually third-party actions when the owners had been sued by the contractors. The second largest category is bodily injury claims by the public.

AIA: Is there any way architects can use these data to protect themselves?

DUVALL: As a starting point, architects should use the standard AIA documents. Also, if I were an architect, I would be very




[illegible]pset about the financial integrity of my client. I'd be very careful about the degree to which he had been involved in previous construction and how that had turned out.

AIA: What else do the claims data say?

DUVALL: I think the claims data would disabuse a lot of architects about what they think the problems are. I know in the past, there was a feeling that bodily injury and death was a major element. The fact of the matter is, although 22 percent of the claims involve bodily injury and death, only 15 percent of the loss dollars are spent on those claims. If we could eliminate that 15 percent, we would avoid probably one year's rate increase.

AIA: Then pain and suffering would not be architects' issues?

DUVALL: Not major issues, no.

AIA: Is it true that half of the 22 percent of the bodily injury claims involve on-site workers?

GENECKI: Yes. They're the biggest single group we can identify.

AIA: So if we could convince state legislatures to include us under the workers' compensation umbrella, we could put an end to 50 percent of the bodily injury claims.

At the same time, architects feel that the judicial system is a lottery and that there's no predictable fairness to it all. Do the claims data bear out that sentiment?

DUVALL: Well, we've paid when we thought we would win; we've won when we thought we would lose. But I think, overall, we've probably paid when we should have and won when we should have.

PORTERFIELD: We don't believe the legal system is out to get design professionals.

DUVALL: I think it's more a case that buildings are very complicated. To me, a modern building is very much like a ship, and there are virtually no ships that are perfectly designed, and there are virtually no buildings that are perfectly designed. Buildings, like ships, need shakedown cruises. There's going to be a list of things that need correction. The problem is that where years ago owners looked to architects to pay only for the major corrections, now they're looking to them to pay for more and more.

AIA: What's an architect to do, then, given that mentality?

5) Current students - there are approximately 107 current students enrolled in the flying club - includes ASSL students. In CY1985 there were 91 students who obtained pilot ratings.

As a Veteran utilizing the flying club for flight training, I have been unable to train since 1 February 1986. In the event of a permanent closure, I would be forced to transfer schools and run the risk of losing my benefits for flight training as the maximum allowed break in training is six months.

I feel the Army should do the following:

1) That the Department Army (ACIF) Army Central Insurance Fund set obtainable and affordable liability limits.

2) That the Army Central Insurance Fund self-insure the flying clubs until an acceptable commercial policy is obtainable, and if that is not possible, then the ACIF establish a reasonable rate for the liability deemed necessary to maintain the airplanes.

SIGNED_____ DATE _____

CLUB MEMBER (FT. RICHARDSON FLYING CLUB)

ADDRESS:

_____

_____

PHONE # (H)_____ (W)_____

DUVALL: In the short term, if I were an architect, I would be collecting my insurance premium as a direct reimbursement. As a reimbursable expense, it would be provided in the contract that the owner is going to pay to the architect a percentage of each billing, which will be a line item for insurance. And if my insurance costs are $2.20 per $100 of billings and I've billed the client for $10,000, I'm going to charge him $220 and show it as an item.

Now, the argument is that'll encourage claims, but when you've reached the point where claims are running at 44-plus per hundred insureds, there's not much more claims encouragement you can give. That is a frightening frequency of claims.

AIA: What else could an architect do?

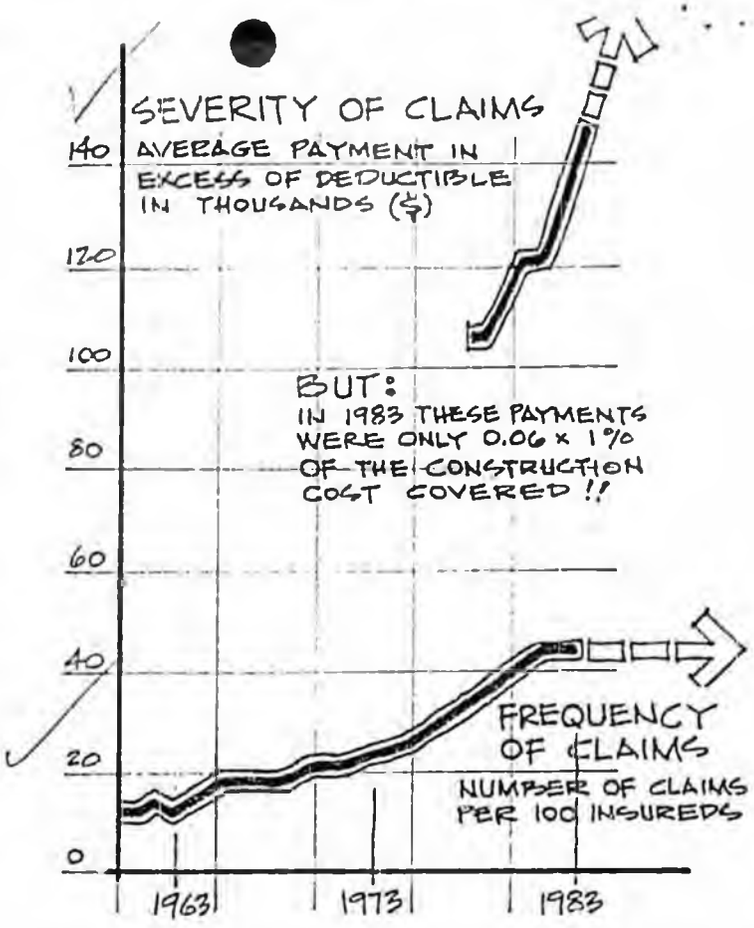
GENECKI: He could build into his contract that, after some period of operation of the structure, the owner will, on a fee basis, have the architect come back and make a detailed analysis, a walk-through of the structure, to see if maybe there are some maintenance items that the owner is not particularly aware of. Or the architect finds out that the building is being used a little differently from the way he was told originally and adjustments need to be made.

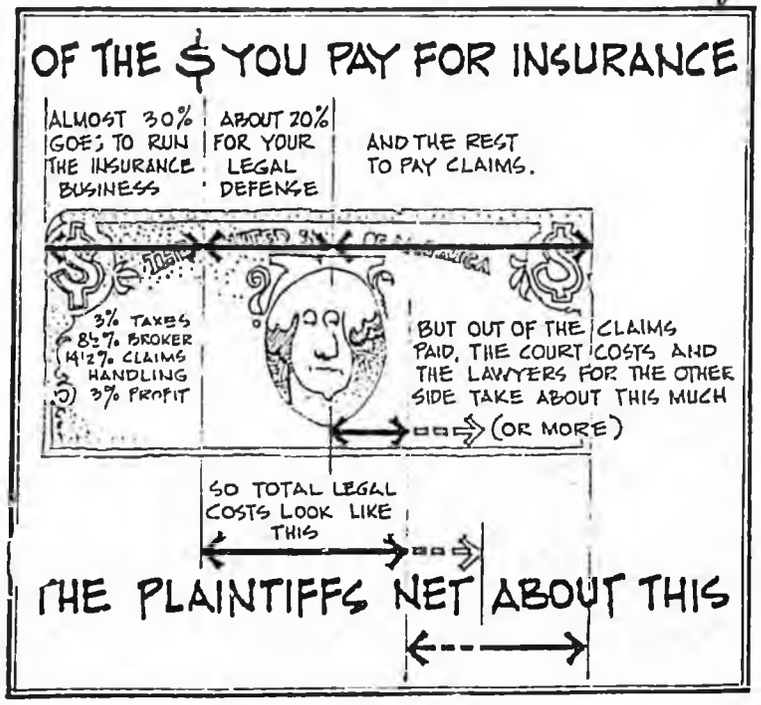
AIA: By the same token, could you say, given the fact that roofs are the primary cause of claims, that the architect should go back and watch the supervision of the placement of the roof on [illegible] building? On the one hand, architects could increase their [illegible]ntial liability because they would be physically on the roof observing the entire installation; on the other hand, they might decrease liability because finally roofs would be put on correctly. Do you have any feelings about that at all—which argument is the stronger of the two?

GENECKI: We'd rather see them out there.

DUVALL: The presence of a knowledgeable person has got to create some deterrent to the roofing subcontractor from cutting corners, if nothing else.

GENECKI: Surely if the roof does fail, then the courts, the owner and everybody else are going to expect the professional would have been more involved.




AIA: But they expect it anyway.

DUVALL: Yes, I'm not sympathetic to these theories of "let's not do that because by doing it there is more liability."

AIA: You'd probably say charge more and be present.

DUVALL: Charge more and do it. Be there—with knowledgeable people. Just a body there isn't going to do it.

Here we're touching on another subject that is near and dear to me, and that is, I don't think architects charge enough [illegible] and I don't think architects pay their consultants enough, and I think a lot of these things happen because there isn't sufficient talent, sufficient staff available, competent staff to get done what needs to be done to avoid having these problems. I think the fees are remarkably low.

GENECKI: Sticking with roofing, we don't have the empirical evidence yet, but it's my guess that 50 percent of all of the claims involving roofing also involved the substitution of material or a system different from that in the original drawings and specs.

AIA: That gets us back to the 78 percent of the cases that are property damage. You say 46 percent of those are initiated by the owner. Is it possible that those claims could be defeated, so to speak, by having better owner-architect relations or having better owner-architect contracts?

GENECKI: Yes, especially if you include relations.

DUVALL: It used to be that nobody wanted to talk to the owner about the possibility that disputes could arise. At 44 claims per 100 insured we're well past it. If at the outset of a project, an architect has frankly discussed with the owner the problem and the need for some form of contingency fund, I think it can be controlled much better than it is being now.

AIA: Are there any kinds of owners who need special handling, special education?

DUVALL: Well, you have the committee owners. And that generally involves churches, hospitals and schools.

GENECKI: And local government.

DUVALL: Churches have always bothered me because they represent a disproportionate amount of loss and they have all the elements that have got to lead to problems. They have a limited budget; they always want far more than they can afford; it's a committee of amateurs. Probably most serious of all, they have a

Continued on page six

CITY OF HOUSTON, ALASKA
INCORPORATED - JUNE 6 1966

Resolution 86-4

A RESOLUTION SUPPORTING THE CITIZEN'S COALITION FOR TORT REFORM REGARDING INSURANCE PREMIUMS.

---

WHEREAS, the City of Houston has had its budget reserve seriously dimished by the unanticipated increase of 16% in its annual insurance premium; and,

WHEREAS, other Alaska communities, businesses, school districts, and private citizens are similarly suffering because of the need for legislative redress of the problems peculiar to the Alaska insurance industry; and

WHEREAS, Alaska has a limited availability of liability insurance programs and has experienced a dramatic rise in liability premiums; and

WHEREAS, legislative remedies are needed to restore predictability and affordability to liability insurance programs; and

WHEREAS, the Citizens' Coalition for Tort Reform has identified those areas needing legislative remedy, and have proposed solutions;

NOW, THEREFORE, BE IT RESOLVED by the COUNCIL OF THE CITY OF HOUSTON, ALASKA, that it supports the efforts of the Citizens' Coalition for Tort Reform to achieve legislative remedies, and urges the Alaska Legislature to make these reforms a priority of the 2nd session of the 14th legislature.

PASSED AND APPROVED THIS 13th DAY OF FEBRUARY, 1986.

ROBERT J. LEMOINE, MAYOR

ATTEST:

ELSIE M. O'BRYAN, CITY CLERK

P.O. BOX 27 • HOUSTON, ALASKA 99694 • 892-6869

D.J.'s ALASKA RENTALS INC.
Formerly Andrews Alaska Rentals & Sales
405 BONIFACE PARKWAY • ANCHORAGE, ALASKA 99504-1099
(907) 337-2552
DON REDMOND, President

December 18, 1985

Citizens Coalition for Tort Reform
738 H Street
Anchorage AK 99501

To Whom It May Concern:

D.J.'s Alaska Rentals, Inc., a tool and equipment rental agency, submits the following information that reflects typical positions of many professionals and businesses in Alaska and nationwide concerning increases in liability insurance costs:

From December 31, 1984 through December 31, 1985 our General Liability costs for $1,500,00.00 in coverage was $23,76[illegible]00. Annual cost per $1000.00 was $15.84.

From December 31, 1985 through December 31, 1986 General Liability quoted cost for ONLY $300,000.00 in coverage is $30,737.20. Annual cost per $1000.00 is $102.44, which is 6.47 times the 1985 cost!

THERE HAVE BEEN NO CLAIMS FILED!

Sincerely

Don Redmond

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# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS' COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.
Chairman

738 H Street, Suite 300 • Anchorage, Alaska 99501 • (907) 276-1135

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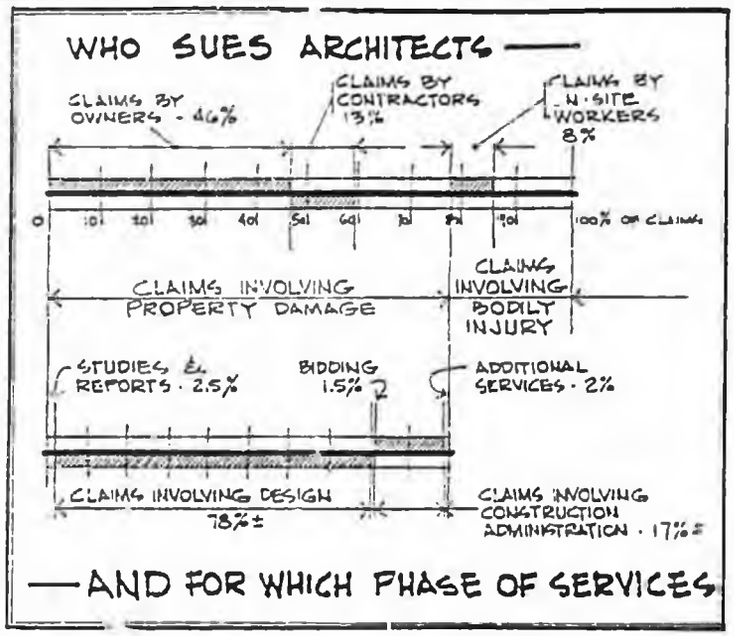


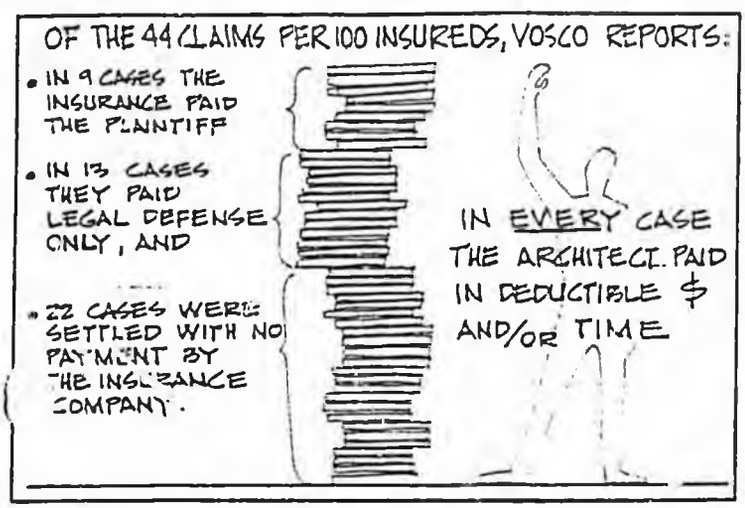


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ADDRESS:

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PHONE # (H)_____ (W)_____

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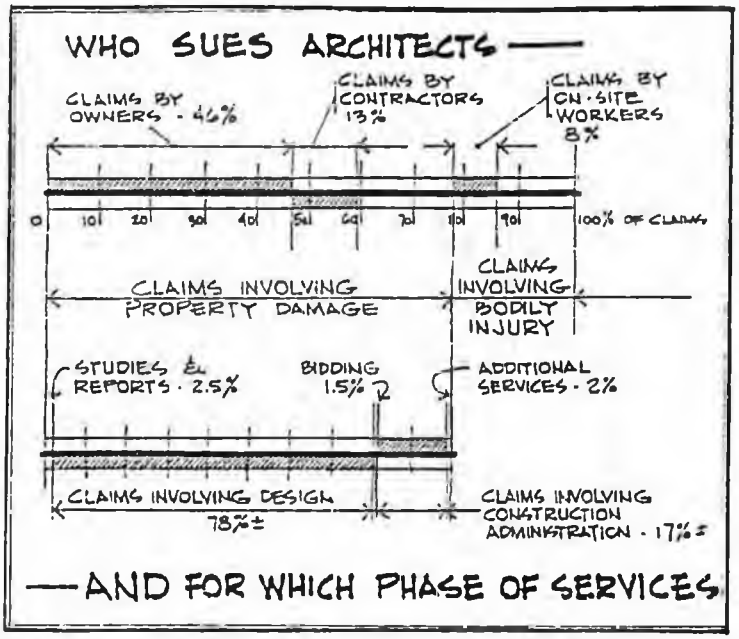


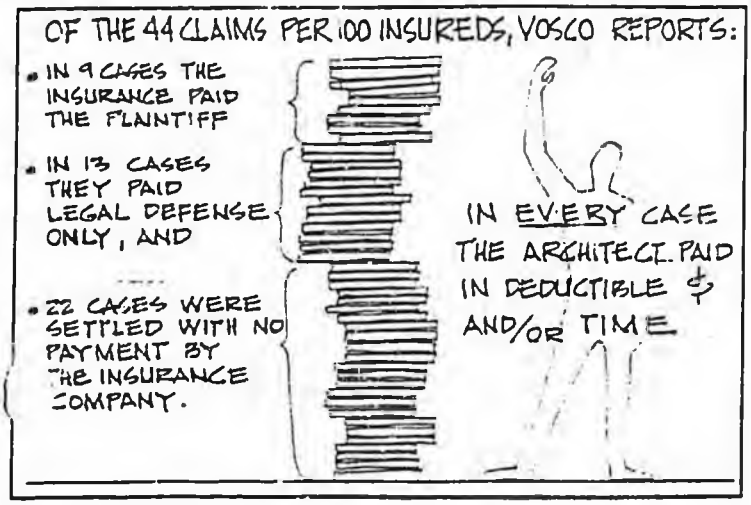


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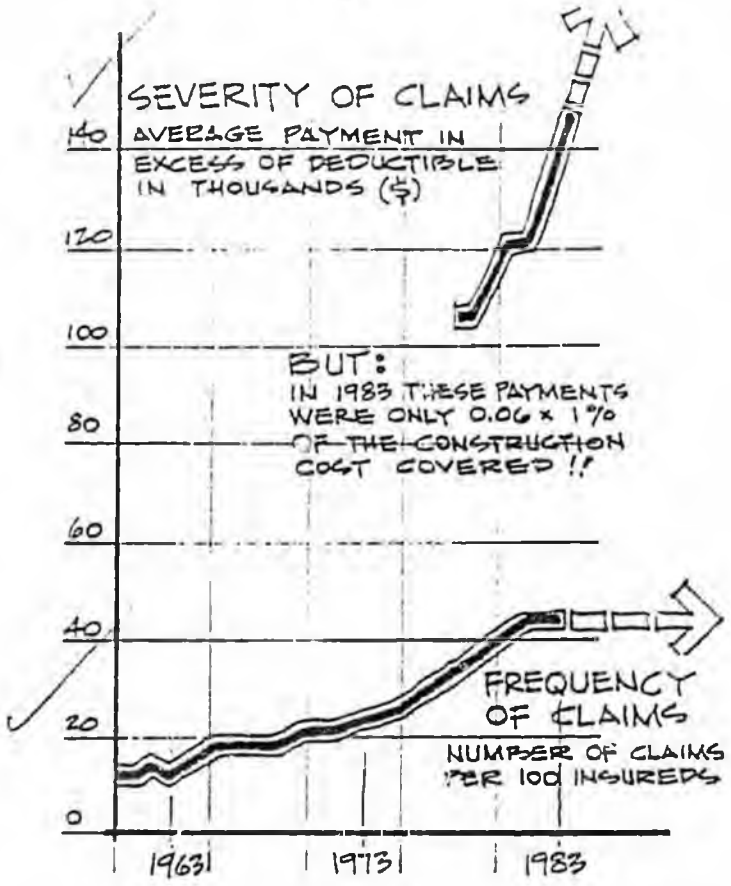


DUVALL: In the short term, if I were an architect, I would be collecting my insurance premium as a direct reimbursement. As a reimbursable expense, it would be provided in the contract that the owner is going to pay to the architect a percentage of each billing, which will be a line item for insurance. And if my insurance costs are $2.20 per $100 of billings and I've billed the client for $10,000, I'm going to charge him $220 and show it as an item.

Now, the argument is that'll encourage claims, but when you've reached the point where claims are running at 44-plus per hundred insureds, there's not much more claims encouragement you can give. That is a frightening frequency of claims.

AIA: What else could an architect do?

GENECKI: He could build into his contract that, after some period of operation of the structure, the owner will, on a fee basis, have the architect come back and make a detailed analysis, a walk-through of the structure, to see if maybe there are some maintenance items that the owner is not particularly aware of. Or the architect finds out that the building is being used a little differently from the way he was told originally and adjustments need to be made.

AIA: By the same token, could you say, given the fact that roofs are the primary cause of claims, that the architect should go [illegible] and watch the supervision of the placement of the roof on [illegible] building? On the one hand, architects could increase their [illegible]ntial liability because they would be physically on the roof observing the entire installation; on the other hand, they might decrease liability because finally roofs would be put on correctly. Do you have any feelings about that at all—which argument is the stronger of the two?

GENECKI: We'd rather see them out there

DUVALL: The presence of a knowledgeable person has got to create some deterrent to the roofing subcontractor from cutting corners, if nothing else.

GENECKI: Surely if the roof does fail, then the courts, the owner and everybody else are going to expect the professional would have been more involved.

AIA: But they expect it anyway.

DUVALL: Yes. I'm not sympathetic to these theories of "let's not do that because by doing it there is more liability."

AIA: You'd probably say charge more and be present.

DUVALL: Charge more and do it. Be there—with knowledgeable people. Just a body there isn't going to do it.

Here we're touching on another subject that is near and dear to me, and that is, I don't think architects charge enough [illegible] and I don't think architects pay their consultants enough, and I think a lot of these things happen because there isn't sufficient talent, sufficient staff available, competent staff to get done what needs to be done to avoid having these problems. I think the fees are remarkably low.

GENECKI: Sticking with roofing, we don't have the empirical evidence yet, but it's my guess that 50 percent of all of the claims involving roofing also involved the substitution of material or a system different from that in the original drawings and specs.

AIA: That gets us back to the 78 percent of the cases that are property damage. You say 46 percent of those are initiated by the owner. Is it possible that those claims could be defeated, so to speak, by having better owner-architect relations or having better owner-architect contracts?

GENECKI: Yes, especially if you include relations.

DUVALL: It used to be that nobody wanted to talk to the owner about the possibility that disputes could arise. At 44 claims per 100 insured we're well past it. If at the outset of a project, an architect has frankly discussed with the owner the problem and the need for some form of contingency fund, I think it can be controlled much better than it is being now.

AIA: Are there any kinds of owners who need special handling, special education?

DUVALL: Well, you have the committee owners. And that generally involves churches, hospitals and schools.

GENECKI: And local government.

DUVALL: Churches have always bothered me because they represent a disproportionate amount of loss and they have all the elements that have got to lead to problems. They have a limited budget; they always want far more than they can afford; it's a committee of amateurs. Probably most serious of all, they have a

Continued on page six

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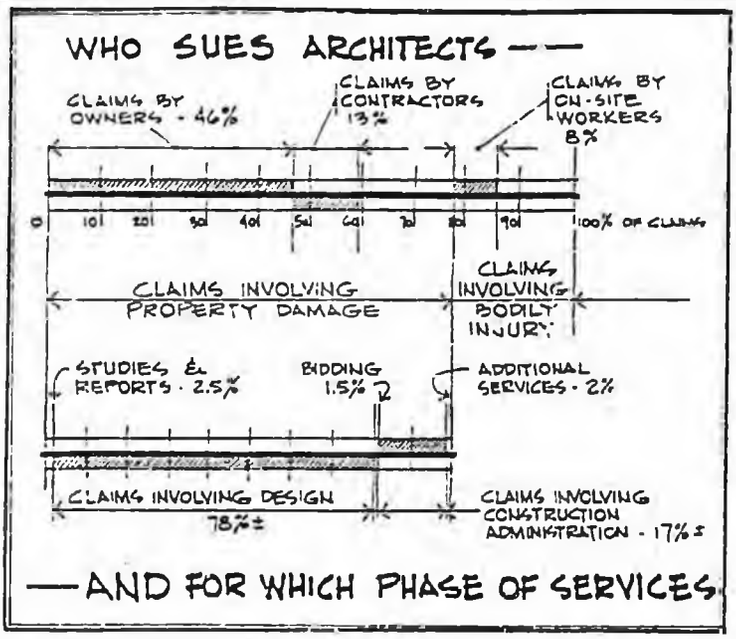


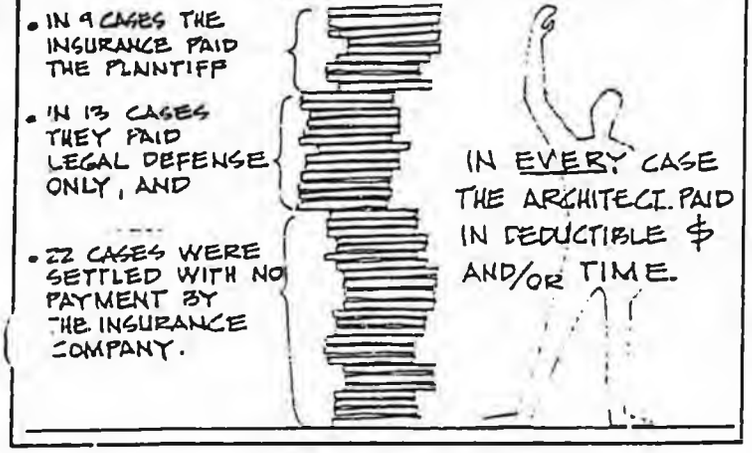


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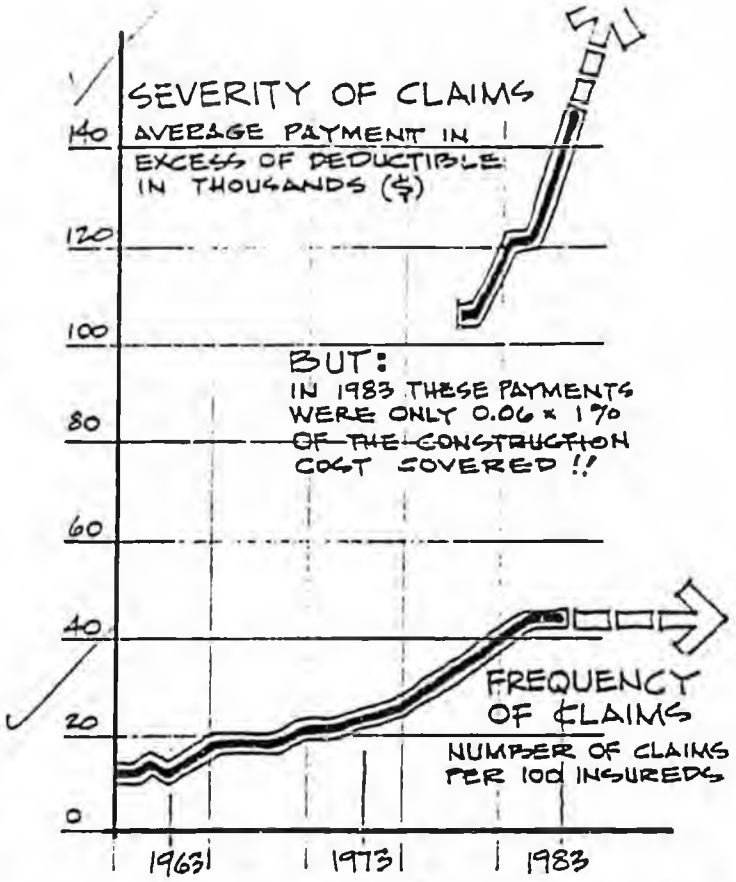
PORTERFIELD: We don't believe the legal system is out to get design professionals.

DUVALL: I think it's more a case that buildings are very complicated. To me, a modern building is very much like a ship, and there are virtually no ships that are perfectly designed, and there are virtually no buildings that are perfectly designed. Buildings, like ships, need shakedown cruises. There's going to be a list of things that need correction. The problem is that where years ago owners looked to architects to pay only for the major corrections, now they're looking to them to pay for more and more.

AIA: What's an architect to do, then, given that mentality?




DUVALL: In the short term, if I were an architect, I would be collecting my insurance premium as a direct reimbursement. As a reimbursable expense, it would be provided in the contract that the owner is going to pay to the architect a percentage of each billing, which will be a line item for insurance. And if my insurance costs are $2.20 per $100 of billings and I've billed the client for $10,000, I'm going to charge him $220 and show it as an item.

Now, the argument is that'll encourage claims, but when you've reached the point where claims are running at 44-plus per hundred insureds, there's not much more claims encouragement you can give. That is a frightening frequency of claims.

AIA: What else could an architect do?

GENECKI: He could build into his contract that, after some period of operation of the structure, the owner will, on a fee basis, have the architect come back and make a detailed analysis, a walk-through of the structure, to see if maybe there are some maintenance items that the owner is not particularly aware of. Or the architect finds out that the building is being used a little differently from the way he was told originally and adjustments need to be made.

AIA: By the same token, could you say, given the fact that roofs are the primary cause of claims, that the architect should go back and watch the supervision of the placement of the roof on [illegible] building? On the one hand, architects could increase their [illegible]ntial liability because they would be physically on the roof observing the entire installation; on the other hand, they might decrease liability because finally roofs would be put on correctly. Do you have any feelings about that at all—which argument is the stronger of the two?

GENECKI: We'd rather see them out there.

DUVALL: The presence of a knowledgeable person has got to create some deterrent to the roofing subcontractor from cutting corners, if nothing else.

GENECKI: Surely if the roof does fail, then the courts, the owner and everybody else are going to expect the professional would have been more involved.

AIA: But they expect it anyway.

DUVALL: Yes. I'm not sympathetic to these theories of "let's not do that because by doing it there is more liability."

AIA: You'd probably say charge more and be present.

DUVALL: Charge more and do it. Be there—with knowledgeable people. Just a body there isn't going to do it.

Here we're touching on another subject that is near and dear to me, and that is, I don't think architects charge enough [illegible] and I don't think architects pay their consultants enough, and I think a lot of these things happen because there isn't sufficient talent, sufficient staff available, competent staff to get done what needs to be done to avoid having these problems. I think the fees are remarkably low.

GENECKI: Sticking with roofing, we don't have the empirical evidence yet, but it's my guess that 50 percent of all of the claims involving roofing also involved the substitution of material or a system different from that in the original drawings and specs.

AIA: That gets us back to the 78 percent of the cases that are property damage. You say 46 percent of those are initiated by the owner. Is it possible that those claims could be defeated, so to speak, by having better owner-architect relations or having better owner-architect contracts?

GENECKI: Yes, especially if you include relations.

DUVALL: It used to be that nobody wanted to talk to the owner about the possibility that disputes could arise. At 44 claims per 100 insured we're well past it. If at the outset of a project, an architect has frankly discussed with the owner the problem and the need for some form of contingency fund, I think it can be controlled much better than it is being now.

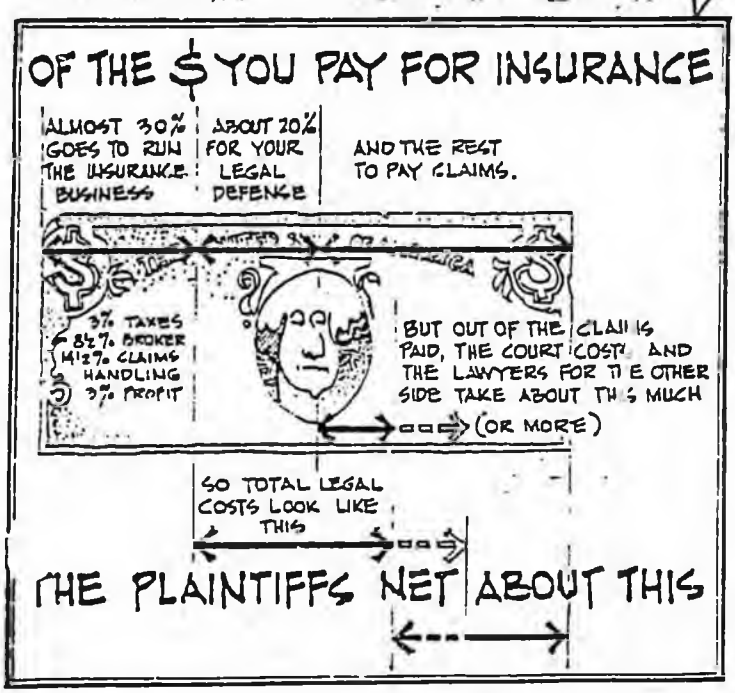
AIA: Are there any kinds of owners who need special handling, special education?

DUVALL: Well, you have the committee owners. And that generally involves churches, hospitals and schools.

GENECKI: And local government.

DUVALL: Churches have always bothered me because they represent a disproportionate amount of loss and they have all the elements that have got to lead to problems. They have a limited budget; they always want far more than they can afford; it's a committee of amateurs. Probably most serious of all, they have a

Continued on page six



Resolution 86-4

A RESOLUTION SUPPORTING THE CITIZEN'S COALITION FOR TORT REFORM REGARDING INSURANCE PREMIUMS.

---

WHEREAS, the City of Houston has had its budget reserve seriously dimished by the unanticipated increase of 16% in its annual insurance premium; and,

WHEREAS, other Alaska communities, businesses, school districts, and private citizens are similarly suffering because of the need for legislative redress of the problems peculiar to the Alaska insurance industry; and

WHEREAS, Alaska has a limited availability of liability insurance programs and has experienced a dramatic rise in liability premiums; and

WHEREAS, legislative remedies are needed to restore predictability and affordability to liability insurance programs; and

WHEREAS, the Citizens' Coalition for Tort Reform has identified those areas needing legislative remedy, and have proposed solutions;

NOW, THEREFORE, BE IT RESOLVED by the COUNCIL OF THE CITY OF HOUSTON, ALASKA, that it supports the efforts of the Citizens' Coalition for Tort Reform to achieve legislative remedies, and urges the Alaska Legislature to make these reforms a priority of the 2nd session of the 14th legislature.

PASSED AND APPROVED THIS 13th DAY OF FEBRUARY, 1986.

ROBERT J. LEMOINE, MAYOR

ATTEST:

ELSIE M. O'BRYAN, CITY CLERK

D.J.'s ALASKA RENTALS INC.
Formerly Andrews Alaska Rentals & Sales
405 BONIFACE PARKWAY • ANCHORAGE, ALASKA 99504-1099
(907) 337-2552
DON REDMOND, President

December 18, 1985

Citizens Coalition for Tort Reform
738 H Street
Anchorage AK 99501

To Whom It May Concern:

D.J.'s Alaska Rentals, Inc., a tool and equipment rental agency, submits the following information that reflects typical positions of many professionals and businesses in Alaska and nationwide concerning increases in liability insurance costs:

From December 31, 1984 through December 31, 1985 our General Liability costs for $1,500,00.00 in coverage was $23,763.00. Annual cost per $1000.00 was $15.84.

From December 31, 1985 through December 31, 1986 General Liability quoted cost for ONLY $300,000.00 in coverage is $30,737.20. Annual cost per $1000.00 is $102.44, which is 6.47 times the 1985 cost!

THERE HAVE BEEN NO CLAIMS FILED!

Sincerely

Don Redmond

Don Redmond, President

# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS' COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.
Chairman

738 H Street, Suite 300 • Anchorage, Alaska 99501 • (907) 276-1135

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

(Added by Supreme Court Order 128 effective May 6, 1971)

CPR 65.

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## CANON 8—A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM

### DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

CPR 63

# Insurance woes haunt city airport

By RICK FOLSTAD
Staff Writer

A resolution that would allow Soldotna to shut down its airport if insurance can't be obtained is scheduled to go before the City Council Wednesday.

The resolution also relaxes operator indemnification responsibilities at the Soldotna Airport and passes any additional airport insurance costs onto those operators.

The resolution was drawn up by City Manager Rich Underkofler at the request of the council. It calls for the city to pay its share of financial responsibility in any lawsuits according to its degree of fault or negligence. It replaces an earlier proposal that would have cleared the city of any and all lawsuits.

In addition, the resolution states that if the airport's annual premium for liability insurance exceeds the present $42,000, the difference in cost will be passed onto the airport users.

"In lieu of the commercial operators buying (more) insurance, the city will try to buy it and spread the cost among the users," said Underkofler.

Fifty percent of any additional cost will be assessed to the long-term lessees on a square footage basis and 50 percent will be

See SOLDOTNA, Page A-7

DEC 14 1986

# ...Soldotna airport proposal pending

Continued from Page 1

shouldered by the annual, monthly and transient aircraft tie-down users.

Required coverage for commercial operators would remain at its present rate.

According to the resolution, if the city can't purchase insurance coverage to the degree it deems necessary to "adequately protect its taxpayers ($10 million combined single limit as of 1986), the airport shall be closed, without any liability to the city, on 24 hours written notice to lessee."

The city's present insurance policy, which expires June 30, is underwritten by Lloyds of London through the Walters and Olson Inc. insurance company of Soldotna.

"Lloyds won't even quote us a price until two months before our premium is due," said Underkofler.

Kurt Olson of Walter and Olson said Lloyds is one of the few insurance companies still underwriting policies for airports.

Last year was a bad year for aviation, said Olson. "World wide, there were 2,200 fatalities. In the past, we've had years with fewer than 100 fatalities."

March 24, 1986

End-Year Data Confirms Industry's Figures:

End-year data released by ISO/NAII confirm what the industry has been asserting for months: that 1985 was one of the worst years ever for the property/casualty insurance industry. On an operating basis, the industry had a loss of $5.4 billion.

Full-Year Financial Results for 1985
(billions)

| | Industry estimates as of early Jan. | Nader/Hunter estimates | ISO/NAII financial results |
|---|---|---|---|
| Operating Loss | $5.5 | $5.5 | $5.4 |
| After-Tax Net Income | $1.7 | $6.6 | $2.0 |
| Rate of Return (Stat. basis) | 2.5% | 7% | 2.8% |

On an after-tax basis, net income was $2.0 billion, close to the early estimate of $1.7 billion and way below the Hunter/Nader estimates of $6.6 billion. The rate of return on a statutory basis was 2.8% in 1985, close to the earlier estimate of 2.5%.

Big rise in surplus:

Surplus increased by $12.5 billion in 1985 or 20 percent, from $63.8 billion at year-end 1984 to $76.3 billion at year-end 1985.

Changes in Surplus
(billions)

| | | |
|---|---|---|
| Surplus: End 1984 | | $63.8 |
| Changes in 1985: | | |
| Net Income After Tax | $ 2.0 | |
| Unrealized Capital Gains | 5.1 | |
| New Funds | 7.7 | |
| Less Stockholder Dividends and Other Minor Items | 2.3 | |
| Total | $12.5 | |
| Surplus: End 1985 | | $76.3 |

As the chart indicates, unrealized capital gains at $5.1 billion and new funds at $7.7 billion were the dominant factors behind the increase in surplus in 1985. The strong stock market led to the rise in the value of insurance companies' portfolios in stocks. Also, the strong market for p/c stocks provided an

added incentive for companies to raise capital. Also, parent companies of p/c subsidiaries infused cash into their companies to bolster their reserves and capital.

The following schematic illustrates the income flows in 1985:

1985 Profit (Loss) in P/C Industry
(billions)

| | | |
|---|---|---|
| Earned Premiums | $113.2 | Earned premiums |
| Incurred Losses (includes loss adjustment expense) | 118.1 | less claim losses, |
| Expenses | 37.6 | less expenses and |
| Policyholder Dividends | 2.2 | less policyholder dividends produce an |
| Underwriting Loss | (24.7) | Underwriting Loss. This loss was offset by income from |
| Investment Income | 19.5 | investments (interest and dividends) to produce an |
| Operating Loss* | (5.4) | operating loss. |
| Realized Capital Gains | 5.4 | However, capital gains primarily from the sale of stocks offset this loss, |
| Tax Credits | 2.0 | plus tax credits so that |
| Net After-Tax Income | 2.0 | net after-tax income was positive. |

*Includes minor items at a negative $200 million.

FINANCIAL RESULTS FOR 1985 AND 1984
(millions)

| | 1985 | 1984 | Improvement (Deterioration) 1985 vs. 1984 |
|---|---|---|---|
| Net Written Premium | $144,336 | $119,591 | 21.7% |
| Net Earned Premium | 133,246 | 115,010 | 15.9 |
| Incurred Loss & Loss Adjustment Expense | 118,127 | 101,446 | 16.4 |
| Expenses | 37,626 | 32,943 | 14.2 |
| Statutory Underwriting Gain (Loss) | (22,507) | (19,379) | (16.1) |
| Policyholder Dividends | 2,229 | 2,098 | 6.2 |
| Net Underwriting Gain (Loss) | (24,736) | (21,477) | 15.2 |
| Pretax Operating Income | (5,403) | (3,817) | (41.6) |
| Net Investment Income Earned | 19,465 | 17,660 | 10.2 |
| Net Realized Capital Gains (Losses) | 5,361 | 3,063 | (75.0) |
| Net Investment Gain | 24,826 | 20,723 | 19.8 |
| Net Income After-Tax | 1,957 | 828 | 136.4 |
| Policyholder Surplus (Consolidated) | 76,288 | 63,809 | 19.6 |
| Trade Ratio, Post-Dividends | 116.4 | 118.0 | 1.4 |

Sean Mooney, Ph.D., CPCU
I.I.I. Senior Vice President, Economist

*NAIB views*

## Current system of civil justice proving too costly

WASHINGTON, DC — Robert H. Moore, president of the National Association of Insurance Brokers, said February 19 that Americans will continue to suffer the penalties of a runaway civil justice system until they better understand the social and economic burdens that the system imposes.

Moore, senior vice president of Alexander & Alexander, testified before the senate commerce committee on the availability and affordability of insurance. He was accompanied by Alan Page of Johnson & Higgins who also presented a statement.

Moore warned against seeking scapegoats for the current liability insurance crisis. Moore cautioned that the search for a solution should not degenerate "into a mad scramble to find the bad guys."

**System too costly**

"When Americans ultimately come to recognize that the economic fallout from our present civil justice system may be too costly, then, and only then, will we have a serious effort at meaningful tort reform," said Moore. "And to be effective, such an effort will have to be led by a coalition representing labor, the legal profession, the business community, academia and others."

Moore told the committee, chaired by Senator Danforth (R), Missouri, that — while the insurance industry itself has contributed to the problem by roller coaster underwriting policies — "it must be candidly acknowledged that the insurance industry cannot, on its own, bring about the needed reforms."

Chief Justice Warren Burger has identified a significant flaw in the civil justice system, said Moore, by pointing out that "the total cost of the process is often equal to, or greater than what finally goes to the pockets of the litigant seeking relief." Tort reform is obviously needed when a very substantial portion of awards to victims is consumed by legal fees and transaction costs, Moore said.

Other costs to our society, Moore said, include:

- Higher prices for many goods and services sought by Americans.
- Reduced ability to produce new products and develop new technologies.
- Weakened economic efficiency in U.S industry.
- Eroded ability to compete in international markets.
- Consequent loss of employment opportunities in the U.S.

**Moore commends Danforth**

Moore commended Danforth for holding hearings that may lead to what the country needs — "a thoughtful analysis of the complex and interrelated dynamics of the business of insurance."

Page called for the expansion of the Risk Retention Act to cover other liability insurance lines in addition to product liability, arguing that this would increase insurance capacity.

Page also told the committee, "The insurance industry does not require federal capital or federal guarantees to solve the insurance crisis — rather, by allowing sophisticated buyers of insurance to meet their own insurance needs, we can preserve existing capacity for the public by providing new insurance protection for commercial buyers of liability insurance.

## WAIB luncheon seminar scheduled for March 5

SAN FRANCISCO — "What Do Companies Really Want" - A Guideline for Professional Submissions and Acceptances - is the topic of a luncheon seminar scheduled by the Northern California Chapter of the Western Association of Insurance Brokers for 11:30 a.m., March 5, at Gino's in San Francisco.

Speakers are Laura S. Danoff, CPCU, assistant vice president, casualty manager, Montgomery & Collins, Inc., San Francisco, and David C. Fisher, CPCU, underwriting manager, Aetna Life & Casualty, Walnut Creek.

The cost of lunch is $20 per person. Further information is available from the WAIB office, phone (415) 392-5383.

## Scott Holman advanced by Republic Indemnity

ENCINO, CA — Scott Holman, CPCU, has been elected vice president of Republic Indemnity Company of America and named southern California division manager, James J. Carolan, executive vice president, has announced. Holman, who has been assistant vice president and marketing manager for the past year, will have responsibility for marketing, underwriting, claims, loss control and field audit for the southern California region, Carolan said.

Scott Holman

A graduate of California State University at Northridge, Holman entered the insurance business as a multiple line producer with Employers of Wausau in Los Angeles in 1972. He later served with EBI in Santa Monica and San Jose. He also was with Bolton & Co. in South Pasadena, specializing in large line workers' compensation and captive products before joining Republic in 1983 as senior marketing representative in the San Fernando and San Gabriel Valleys.

### Fischer advanced at Seattle

SEATTLE — Addington, Baldwin & McDaniel, Inc., Seattle broker, has announced the promotion of Clista A. Fisher, CPCU, to administrative manager. She joined AB&M in August 1985 as a commercial customer service representative. Before joining the agency ranks, she spent eight years with Safeco.


*by Andrew L. Hanigan*

*Senate testimony*

## Bragg urges restraint in attempts to solve insurance problems

WASHINGTON, DC — Solution of the problems in insurance is of concern to the federal level of government, but the tools for the solution are at the state level, in cooperation with the insurance industry, Jeffrey S. Bragg, head of the Federal Insurance Administration advised members of the senate committee on commerce, science and transportation last week.

In testimony before the committee, Federal Insurance Administrator Jeffrey S. Bragg said, "If we are really to find a solution to today's insurance problems, insurers, insureds, insurance departments and state officials must resist the temptation to point fingers (of blame) and work together to identify the underlying problems."

**Fixing blame unrealistic**

Bragg told the committee, "Simply to blame anyone for taking advantage of high interest rates and giving the insureds a temporary bargain is somewhat unrealistic in terms of the real world in which we live," but he also remarked, "There is some basis for concern that the insurance industry did, in past years, let itself be diverted by the allure of higher investment return from what should be one of its most important principles: loss reduction and prevention."

Turning to the subject of tort reform, Bragg said, "One underlying problem which must be resolved is the growing belief that for every mishap a person suffers, there must be a financial remedy. We have moved more and more toward strict liability without a need to establish fault. And as the standards of liability have been stretched, there has been a tendency for more generous damage awards."

Bragg suggested, "The whole concept of reasonableness and fault needs to be revisited," and he declared, "Insurance companies have for too long been viewed by many as a source of unlimited funds which could be paid out without seeming to cost anything to the average person. Now there are some who see the resources of the federal government as temptingly available to provide the means of paying for a tort system that is becoming too expensive to fund through the premiums of insureds.

"If the federal government is brought into the picture before the hard choices are made as to how to conduct our tort and reparations systems, we will only be shifting burdens to taxpayers and postponing the day of decision," Bragg concluded.

INSURANCEWEEK
3-14-86

# EDITORIAL COMMENT

## A puzzlement . . .

For many years most of the insurance industry has pointed to contingency fee agreements in personal injury cases as a contributing factor to the growing costs of litigation and a pressure for rising liability insurance rates.

Most insurance observers agree that the high percentages of liability judgments that are taken through contingency fees have inflated demands, settlements and awards in personal injury cases.

In personal injury litigation that goes to trial the plaintiff counsel commonly gets from ⅓ to ½ of the award. Although there is some variation in the contingency percentage, we often have wondered why competition has not produced lower percentages in view of the rather large potential for return.

Over the years in the insurance field, for example, agents' commissions have declined substantially through the pressure of competition.

In the law there certainly is no shortage of attorneys to provide competitive pressure that, we have been told in economics class, tends to keep prices down. If true competition existed in the field of law it seems that contingency fee percentages should have come down over the past 20 years and current pressures for legislation to put caps on such arrangements would not be necessary.

USA TODAY ®

"USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."
—Allen H. Neuharth
Chairman and Founder
Sept. 15, 1982

John C. Quinn
Editor

John Seigenthaler
Editorial Director

# OPINION

## The Debate: INSURANCE CRISIS

Today's debate includes our opinion that reforms are needed to control the costs of liability lawsuits so insurance will be available and affordable, an opposing view from Louisiana, other views from California, Massachusetts, and the District of Columbia, and voices from across the USA.

# Limit fees, lawsuits; ensure justice for all

The insurance crisis is hitting us where it hurts.

In Chicago, the city is removing playground equipment it can't live with huge insurance premiums and lawsuits.

In California, ski resorts are raising the prices of lift tickets. Insurance costs are up, and someone — you know who — has to pay. Across the USA, doctors are not delivering babies — too many lawsuits, not enough insurance. Day-care centers are closing. Roller skating rinks are folding. Swimming pools are empty.

Who's to blame? There's plenty to go around.

Our legal system encourages litigation. Eye-popping awards whet the appetites of ambitious lawyers and a lottery-minded public hoping to strike it rich. Personal misfortune no longer is personal — someone has to pay.

The insurance industry is at fault, too. High premiums are strangling the golden goose. When interest rates soared and big bucks could be made on investments, insurance companies were happy to sign you up and take your money.

Now, pay-outs are up and investment income is down. Consumers are forced to make up the difference by paying high rates — if they can get insurance at all.

Some states are striking back with laws to limit such suits. Washington and Maryland acted last week, and 15 others are considering legislation.

States need to enact these reforms:

■ Put a lid on some payments. Allow reimbursement for medical expenses, lost wages, property damage, etc. But limit awards for punitive damages, physical pain, and emotional stress.

■ Limit lawyers' fees. Contingency fees can claim from a third to a half of a settlement. Set up a sliding scale for fees, with lower percentages for higher amounts.

■ Penalize lawyers who file frivolous lawsuits.

■ Pay large awards in installments instead of lump sums.

■ Eliminate the "deep pockets" doctrine, which requires defendants to pay not on the basis of how responsible they were, but on how much money they have. In 36 states, if you're just 1 percent at fault, you could pay all the damages if other responsible parties can't make up.

■ End double payments. In some states, judges and juries cannot be told a plaintiff may collect elsewhere.

Some people say that's unfair. Of course, the injured must retain the right to sue for damages. But abuses must end.

Legal reform is only the first step. Insurance companies must take the second step. If they gouge the public and don't make insurance available and affordable, they will invite — and deserve — strict government regulation.

And the third step? That's up to us. We must get over the notion that a lawsuit — any lawsuit, regardless of merit — is our ticket on the gravy train.

It's time we got rid of that misguided national motto: "See you in court."

# States snapping lid on 'pain' payments

By Cheryl Mattox Berry
USA TODAY

The push is on to limit soaring liability insurance awards.

Monday, Maryland became the second state in four days to place a cap on "pain and suffering" for all types of liability claims. Washington passed a similar law Friday.

"There is ... a crisis of major proportions," said Hugh Jones, chairman of New York's Liability Insurance Advisory Commission.

That commission Monday proposed limiting damage awards, and Gov. Mario Cuomo endorsed most proposals, except a $250,000 lid on payments made by public entities. He called the money limit too "drastic" right now.

President Reagan also plans to propose federal legislation to limit pain and suffering awards and lawyers' fees.

"I think it is unquestionably a trend," said Robert Frank Jr., a Boston trial lawyer.

Some lawyers already are attacking the legislation.

"I think it's terrible," Marianna S. Smith, executive director of the Association of Trial Lawyers of America. "It's bad because the people that get hurt the most and suffer the most are having their rights taken away from them."

Bills limiting liability are pending in 14 states: Maine, Massachusetts, New Hampshire, Delaware, South Carolina, Florida, Alabama, Illinois, Michigan, Iowa, Kansas, Nebraska, Oklahoma, Colorado.

Here's why:

- Costs of liability insurance are soaring — matching the rise in payouts.
- Communities and businesses have lost coverage — no matter the cost.

# REVIEW & OUTLOOK

## Tort Reform

President Reagan has asked the Justice Department to find some way to damp the litigation explosion. While there's only so much the federal government can do, this high-level attention to the problem is entirely appropriate. Abuses by lawyers and activist judges are raising liability-insurance rates at such a rapid rate that some goods and services are either no longer available or are costing consumers more and more money.

By now, collecting examples of tort-law outrages is almost a national sport. Our favorite from last week: A woman claimed that an X-ray test interfered with her "psychic" abilities and won a $1 million award against a Philadelphia hospital. The Coney Island roller coaster remains closed for lack of insurance, as are city playgrounds, day-care centers and even fire and police departments across the country.

As we've said before, the root of this problem can be found with judges who insist on substituting their personal notions of "fairness" for traditional law. Since about 95% of the country's tort cases are brought in state courts, most of the reform will have to come from state legislatures, a process that already is well under way. But a recent Justice Department report, along with other studies, suggests these avenues for reform:

*Force judges to return to a fault standard for liability.* In the early 1960s, liberal judges began scuttling the rule that only defendants who acted negligently could be liable. Judges decided that "deep pockets," usually corporations, should pay whenever anyone suffered. For example, in the 1962 case of *Beshada vs. Johns-Manville*, the New Jersey Supreme Court mysteriously concluded that even if the manufacturer couldn't have known about possible dangers of a product it still somehow should have warned consumers. The judges thought an increase in insurance premiums made inevitable by their reasoning "not a bad result."

*End joint and several liability.* To guarantee access to deep enough pockets, judges have taken the limits of causation into the twilight zone. Now anyone with even a remote role can be liable for the full amount. This is a special problem for local governments, since taxpayers are the deepest pockets of all. In 1984, in Hayward, Calif., a speeding motorcyclist without a helmet collided with a car and suffered brain damage. He was found 80% responsible for the accident, but didn't have much insurance. The city was found 1% responsible (for deciding not to have a stop sign at the intersection) and had to pay the full $2.2 million award.

*Limit "non-economic" damages.* The idea of torts is to compensate a victim for identifiable harm, such as lost income. It's become a lottery to create instant millionaires. Medical malpractice awards now average $1 million, up from $200,000 a decade ago. Much of this is under vague headings like "pain and suffering." Likewise, punitive damages, once reserved for intentional injuries, are routinely tacked on. In the ridiculous Pennzoil case against Texaco, the jury tacked on a cool $3 billion in punitive damages on top of $8 billion in regular damages.

*Remove the litigation subsidy.* The widespread use of class-action contingency-fee financing has enriched some lawyers but hasn't helped plaintiffs much. Lawyers from both sides typically gobble up two-thirds of the judgments. Lawyers have an incentive to bring worthless cases: Chemical companies, wanting to end the litigation, settled the Agent Orange case for $180 million even though the judge later said that there was no persuasive evidence that the defoliant had hurt anyone.

Opposition to tort reform has come mostly from plaintiff lawyers and Nadertes, such as Joan Claybrook, late of the Carter regulatory apparatus. The true villain, we learn from these interested worthies, is the insurance industry. They say premiums are now rising because insurance companies were slow to raise their rates. You heard that right. These self-styled "consumerists" are complaining that insurers didn't charge higher premiums, which are of course usually passed along to consumers. They would be on much firmer ground if they argued that the insurance industry, which likes to see its investment income swelled by rising premium income, hasn't done enough to resist predatory lawyers. But you won't hear them saying that.

The Justice Department is working on a proposal to limit the liability of the federal government and its contractors by capping damage awards and contingency fees. It may also propose a uniform standard for the states, which would be a useful effort to encourage states to make their changes as consistent as possible.

More than half of the states already have proposed legislation to reform torts. Californians will vote in June on Proposition 51, which would curtail joint and several liability. Alaska and Colorado have the English rule on costs, which cuts down on frivolous cases by making the losing party pay the winner's lawyers.

In short, despite the loud protests of lawyers who have turned tort law into a gravy train at great cost to the public, reform is getting under way. It isn't coming a moment too soon.

# Enterprise Liability

The cable tram to Roosevelt Island in New York City stopped for two weeks recently because the insurance company refused to renew the policy. It looked like another victim of the litigation explosion set off by activist judges. But the residents of the island got the New York State Legislature to become the new insurer. The tram is running again. Now it's the taxpayers who are being taken for a ride.

So it goes in the world of American torts, or personal injury, law. There hasn't been a single accident in the 10 years of operating the tram, but insurance companies fear the possibility of multimillion-dollar verdicts even where there is no fault. Insurers are getting out of underwriting entire activities, like trams, day-care centers and midwifery. Consumers pay the bill, either through taxes as in the tram case, or through higher prices or through the unavailability of goods and services. Faced with this litigation explosion, about half the states are considering bills to get tort liability under control.

A Justice Department report on torts last week said that reinstituting the fault standard was the single most needed change. The current Journal of Legal Studies, published at the University of Chicago, describes how fault has been replaced by a notion called "enterprise liability." This scheme, devised by liberals in the early 1960s, says that business enterprises should be responsible for *any* injuries caused by products they introduce into commerce, no matter if the products were as safe as technology allowed or were misused. This is entirely different from the age-old view of the common law that with few exceptions there is no liability without fault.

George Priest, a Yale law professor, traced the history of enterprise liability to a desire on the part of some academics and judges for torts to become a system of national insurance, not just a forum for fairly resolving disputes. Mr. Priest says the impetus for holding defendants strictly liable was the New Deal notion of law as "social justice." Liberal judges embraced broader liability to pick the deep pockets of corporate defendants.

The judges appointed themselves as income redistributors. Canadian lawyer Ernest Weinrib points out that it's only in the U.S. that judicial fiat could create strict liability. Elsewhere, courts are supposed to resolve disputes between the opposing parties, not redistribute wealth according to their idea of social justice. Mr. Weinrib described how the Australian High Court refused to abandon the fault standard. Strict liability should be adopted "if at all, openly and after adequate public inquiry and parliamentary debate and not worked towards covertly, in the course of judicial decision, by the adoption of policy factors which assume its desirability as a goal."

Judges make lousy social engineers. Costs of goods rise with insurance premiums, hurting the poor and defeating the very purpose of the judicial activism. The result can be that only industries with wealthy consumers survive huge new premiums. A modest ski lodge in Tennessee may not be able to pay its premiums, but you can bet the slopes will still be full in Aspen. It may be hard to find an insured family doctor in Harlem, but richer Americans can still pay higher fees to cover higher premiums.

When judges start acting like politicians, it's time for the politicians to remind them of the separation of powers. State legislators can undo strict liability by passing statutes requiring that a party actually be at fault to be held liable for damages. This would not be revolutionary. It is the common law in the rest of the world, and was our law until the Great Society invaded the courts.

# Malpractice Liability: Can the Law Serve Both Doctors and Patients?

By MICHAEL WALDHOLZ
*Staff Reporter of* THE WALL STREET JOURNAL

*Malpractice liability has lately become one of the most divisive issues among doctors and lawyers.*

*"Physicians are leaving the profession in unheard-of droves because of a system they don't understand, they can't cope with and which is getting worse," says James Todd, a surgeon and a top official of the American Medical Association. At fault for the burgeoning lawsuits and staggeringly high premiums many doctors pay, he argues, are a legal system that encourages meritless litigation and trial lawyers who profit exorbitantly from malpractice cases.*

*"Malpractice lawsuits result from malpractice," counters Robert Habush, a partner with the Milwaukee law firm Habush, Habush & Davis and president-elect of the Association of Trial Lawyers of America. Mr. Habush says that present laws help protect patients' rights and ensure their access to the courts. He believes the situation calls for changes in the insurance industry and more careful monitoring by doctors of competence in the profession.*

*What follows is a debate organized by The Wall Street Journal between Dr. Todd and Mr. Habush.*

*Habush*

'WE THINK the problem of high premiums is eminently solvable...'

'ALL OF A sudden, the lawyers are insurance experts.'

*Todd*

Dr. Todd: We now have a mentality in this country that says court action is the only way to settle disputes. But in court, lawyers' theatrics often produce compensations that no one can consider reasonable. If the medical profession is guilty of anything, it is overselling its wares. Everyone now expects a perfect result, so when a defective child is born the response is to blame the doctor. Sure, there are doctors who perform negligently on occasion. But we are firmly convinced the number is not representative of the level of litigation that is going on.

Mr. Habush: Doctors are upset by malpractice litigation because they're under siege. They are under tremendous pressure from competition from health maintenance organizations, and from health insurers who are limiting coverage. The income pie is shrinking, and higher premiums exacerbate the situation. Doctors feel attacked from all sides, and malpractice is the thing they can lobby and complain about. Nobody likes being sued. But it bothers the hell out of doctors when lay people tell them how to practice.

*Dr. Todd: When you say we resent being "peer reviewed" by a jury, sure we do, because they're not peers. "Peer" means somebody in the same profession.*

Mr. Habush: Listen, the problem isn't juries or lawyers. An outstanding physician said, "There's just too much incompetence and negligence in the medical profession." That was Dr. Todd, in the Internal Medicine magazine in November 1984.

The U.S. government's own statistics say 20,000 to 45,000 of the nation's 400,000 doctors are likely candidates for some type of discipline due to incompetence or being impaired by alcohol, mental illness or criminal behavior. Yet in 1984, state medical licensing boards disciplined only 1,400 doctors. It's the incompetent doctors who are causing the insurance problem. In Pennsylvania, 1% of the doctors accounted for 25% of medical malpractice payments.

Dr. Todd: Unfortunately, the incompetent doctors are not the most likely ones to get sued. We wish they were, so we could get rid of them. I've said medicine can do a better job disciplining doctors. But you can't say more discipline means less suits. Florida is hailed for its number of disciplinary actions against doctors, but it continues to be a hotbed of malpractice agitation, debate and battle. The point is that two-thirds of all doctors have been sued at some time, but only 50% of all suits have any basis in merit.

Mr. Habush: The problem for doctors is simply that, for some of them—the high-risk surgeons and obstetricians, for example—insurance has become costly. Unlike some industries, which can't get any liability insurance these days, the problem in medicine is affordability, not availability. It's there, it's just gotten more expensive for some.

Dr. Todd: Wrong. I suggest you go to Virginia, where St. Paul (Fire & Marine Insurance Co.), the only company writing malpractice insurance, won't cover new *physicians. And in states where* rates are so high, new doctors are leaving. In three years, Massachusetts General Hospital hasn't kept one of the 13 anesthesiologists it trains each year.

Mr. Habush: I must tell you, where doctors are leaving the profession it's a good thing. Frankly, I am glad some aren't deli ering babies anymore, because son shouldn't be. The system is weeding o doctors who shouldn't be practicing. Still agree that a doctor sued for malpracti shouldn't be labeled incompetent.

Dr. Todd: That's what you're trying do.

Mr. Habush: No, no, you're wrong. M point is that there is an established patte among some doctors who get sued repea edly—successfully—which hasn't been a dressed by the medical establishment or i censing boards. In Wisconsin, there's plastic surgeon who had 13 malpractic settlements and judgments against hir and his ticket was never pulled.

Dr. Todd: It's not so easy. The phy clan-owned insurance companies som times do identify doctors deemed an inst able risk. But because of the rules of con dentiality, if the insurance company we to the licensing board saying, "We thi this guy is an ever-present danger," we be in court for breach of confidentiality

Mr. Habush: In any case, we think t problem of high premiums is eminent solvable. When two or three neurosurgeo in a state get hit for large judgments, has treme us impact on the rest of t neurosurgeons. That's because insure classify specialties together when they s rates. In Wisconsin, for instance, just neurosurgeons form one class. There's 3 obstetricians and gynecologists rated as class. No one in their right mind wou ever agree to have their automobile insu ance or homeowner's insurance rated in class that small. There's no way to spre the cost of claims.

In Wisconsin, for instance, if you com bine all surgeons in one class, the neur surgeons' 1985-86 premium drops from $1 545 to $9,500, and all the other surgical specialties get a premium increase of just 2 bucks. But the AMA and other medic groups aren't lobbying state governmen and Washington to change insurance pra tices, because nonspecialists—the majori of their members—would holler. The don't want to be lumped with the high-ri guys.

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In Wisconsin, for instance, if you combine all surgeons in one class, the neurosurgeons' 1985-86 premium drops from $19,545 to $9,500, and all the other surgical specialties get a premium increase of just 200 bucks. But the AMA and other medical groups aren't lobbying state governments and Washington to change insurance practices, because nonspecialists—the majority of their members—would holler. They don't want to be lumped with the high-risk guys.

Dr. Todd: All of a sudden, the lawyers are insurance experts. You know, you've got 35 doctor-owned insurance companies. If they could find a way to cut the cost, they would have done it. First of all, state legislatures don't change insurance practices; state commissioners do.

We have looked at rate differentials, and there is no question it does cause political problems for us with our members. It would be the easiest thing in the world if you don't want people responsible for their acts, if you just want to solve the dollars-and-cents issue.

But let's talk about what we are doing. We are educating the doctor; we've had meetings with the Justice Department and Federal Trade Commission to achieve immunity for peer-review activities. We are pressing for a bill in Congress to require reporting of malpractice claims to a central agency so those doctors can be tracked. We're looking to put a limit of $250,000 on awards for pain and suffering, beyond medical costs and lost wages. We want payments spread over a period of time instead of lump sums.

Mr. Habush: That's not tort (judicial-system) reform; it's tort deform, taking rights away from victims. When a jury makes a judgment, that's to compensate someone who's been victimized by physicians or hospitals.

Dr. Todd: I resent using inflammatory terms like "victimized." We're not asking to limit whatever it takes to maintain support, rehabilitate or treat. But pain-and-suffering awards can be limited, and where it's been done state courts have held it constitutional.

Mr. Habush: You also want to limit lawyers' contingency fees (the portion of a settlement, sometimes as high as 40%, paid to the attorney). But an article in a doctors' magazine says those states that limited fees have seen an upsurge in suits and award sizes.

Dr. Todd: We're saying (contingency fees) raise the costs (of insurance). In New York City, one law firm alone in a recent year made $11 million in contingency fees.

Mr. Habush: Well, they're not in the operating room, hurting people.

Dr. Todd: They're hurting all society, if you want my opinion.

Mr. Habush: It isn't the solution. Doctors must insist on a change in insurance practices. We have to help them get immunity for better peer review, and, yes, we have to help doctors explain to the public that not all bad results are malpractice. But these joint efforts can't be done as long as we're hollering at each other.

Dr. Todd: Sure, but it's an absolute one-way street. We're the ones who have to change, while the bar refuses to admit there might be a scintilla of something wrong within the judicial system. If something's not done there, I think the situation is going to roll out of control until the insurance mechanism crashes, and the federal government is going to step in and do something neither of us is going to be happy with.

# In Canada, Different Legal And Popular Views Prevail

By Peggy Berkowitz
*Staff Reporter of* The Wall Street Journal

When it comes to medical malpractice, Canada's common-law system has almost all the features the American Medical Association is urging in the U.S. as a way to ease doctors' legal and insurance woes.

Pain-and-suffering awards are limited by Canadian Supreme Court rulings to about $128,000. Contingency fees are banned in Ontario and restricted in several other provinces. Punitive damages are seldom awarded in personal-injury cases, and judges rarely permit jury trials of civil suits. And marginal and frivolous actions are discouraged by the possibility that the loser may have to pay up to two-thirds of the winner's court costs.

Largely because of such curbs, malpractice awards and out-of-court settlements are sharply lower in Canada, totaling only $10 million in 1984—less than some jury awards to individual plaintiffs in the U.S. Malpractice insurance, in turn, costs significantly less. Even high-risk specialists like obstetricians and neurosurgeons will generally pay only $3,500 for protection this year; many of their U.S. counterparts will pay $90,000 or more.

But Canadians also have a set of attitudes toward both medicine and law, and a form of malpractice protection for doctors, that would be difficult to transplant to another country. They are only about one-fifth as likely as Americans to sue their doctors. There is no significant patient-rights movement, no vigorous lobby to change the legal system and little public complaint even from plaintiffs' lawyers.

## Oversize Awards

Many Canadian lawyers, for instance, believe that settlements in the U.S. have grown unnecessarily large. "Awards for every type of personal injury are too high in the U.S. and aren't realistic," says Jacques Nols, a Montreal defense lawyer.

Moreover, while some feel that lawsuits can be a beneficial corrective in cases of negligence, many Canadian lawyers and doctors agree that limiting the size of settlements has no effect on the quality of medical care.

The "primary factor" controlling the medical practice, says Justice Allen M. Linden, who heads Canada's Law Reform Commission, "is the human desire to do a good job. Tort law is one factor, but I can't see whether the award is $100,000 or $200,000 or $300,000 that it makes a heck of a lot of difference."

Adds Mr. Nols: "I simply don't believe a doctor will be sloppier because he knows there's a cap on awards." A number of Canadian lawyers, though, like their U.S. colleagues, believe the cap is unfair to the patient. "It hurts the plaintiff, there's no question about it," says Gordon Kugler, a Montreal lawyer.

For their part, Canadian patients "are perhaps more trusting," says Marc Goldberg, a Florida ophthalmologist who has practiced in both countries. They also pay little or nothing for medical care because of government health insurance. Frances Miller, a Boston University law professor, says this makes them less vengeful when a treatment goes wrong. "One factor, when you decide whether to sue," she explains, "is how much you're out of pocket."

When malpractice suits do arise, many doctors benefit from the Canadian Medical Protective Association. About 85% of physicians belong to the group, which provides

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legal defense and pays malpractice claims and settlements, but technically isn't an insurance company.

The 85-year-old association widely publicizes its intention to defend any suit in which it believes a doctor wasn't negligent. "They'll spend $15,000 to fight a $15,000 action," says Alan Lenczner, an attorney with McCarthy & McCarthy, a Toronto law firm whose clients include CMPA.

## Lower Rates

Members will pay annual fees this year of $288 to $3,500, depending on their specialties. A large U.S. malpractice insurer, St. Paul Fire & Marine Insurance Co., says its typical premiums range from $1,365 for an Arkansas general practitioner to $106,508 for a Miami neurosurgeon.

Stuart Lee, CMPA's associate secretary treasurer, says it would be hard now for American doctors to contribute enough capital to form a similar group.

While conditions are still comparably favorable, some doctors and lawyers fear that Canadians are beginning to emulate their more litigious American neighbors. In 1984, the number of malpractice suits and the amount paid to claimants were both about twice as great as they were five years earlier. And CMPA's fees for some doctors have risen 1,000% in three years.

Ellen Picard, a professor of law and medicine at the University of Alberta, attributes this partly to the growing number of Canadian lawyers specializing in liability cases and partly to media reports of large awards in the U.S. She adds that, as a result, Canadian doctors have begun to react like American doctors, practicing more defensively.

However, she says, "I think Canada need not be headed the way of the U.S. (because of) the Canadian nature and the different practices of law and medicine."

# Scope of Nation's Liability Woes

By Gary Cohn
*Staff Reporter of* The Wall Street Journal

MIAMI—More than two years after he sold his fashionable Bay Harbor Islands restaurant, Denis Rety's case finally went to court. He claimed that a letter labeling him an anti-Semite, widely circulated by a local businessman in 1982, had angered the Jewish community and triggered a boycott of his restaurant, eventually forcing him to file for bankruptcy.

On Feb. 20, after a nine-day trial and just over an hour of deliberation, a Dade County Circuit Court jury agreed to award Mr. Rety a total of $22.5 million—more than even Mr. Rety's attorneys had been seeking. The presiding judge in the case, Jack Turner, subsequently reduced the award to slightly more than $3 million. "It was so excessive as to shock the conscience of the court," he says.

The Rety case made front-page news here because of the circumstances of the disputes and the exceptionally high preliminary award. But multimillion-dollar verdicts and settlements aren't unusual in Florida. Local juries have increasingly been handing down seven-figure awards in a wide variety of lawsuits, ranging from death and disability cases to one involving allegations of psychiatric malpractice.

Certainly Florida isn't the only place where multimillion-dollar verdicts are escalating. But a look at the situation here does give another perspective on the current national controversy over such awards and their impact on the insurance industry. While a lot of attention has been focused recently on extreme cases—for example, last month's award by a Philadelphia jury of $988,000 to a woman who said a CAT scan had caused her to lose her psychic powers—it is perhaps more significant that big awards have become almost routine in certain parts of the U.S.

Florida's first seven-figure jury award is believed to have been granted in 1967. From then through 1979 there were 55 such verdicts, an average of less than five a year. By contrast, there were 187 from 1980 through Dec. 3, 1985—an average of more than 30 a year. Florida now ranks third (behind much more populous New York and California) in the total number of multimillion-dollar awards, according to Jury Verdict Research Inc. in Solon, Ohio. South Florida's metropolitan areas account for a large percentage of these.

Why such a high concentration of large awards? Lawyers, judges and others familiar with the legal system say that South Florida has one of the nation's most aggressive plaintiff bars, and that the state's appellate courts have generally shown a predisposition to let high awards stand. Moreover, says Judge Turner, local juries have become so "notorious" for their awards that plaintiff attorneys across the country will often try to file or transfer their cases here. In Dade County, he notes, it's as if "multimillion-dollar verdicts are the norm rather than the exception."

Russell Moran, the editor of the New York Jury Verdict Reporter, says that the large numbers of minorities and transplanted retirees in South Florida may account in part for the size of the awards. "Anytime you have a population that is heavily underprivileged," he explains, "the awards tend to be a lot higher." He adds that people who used to live in major metropolitan areas where big awards have been common for some time may be more inclined to grant such awards themselves. As jurors, they don't "fall off their seats" when an attorney asks for more than $1 million in damages, he says.

The following is a selected list of seven-figure awards and settlements in Florida over the past six months. Many are on appeal and could be reduced or reversed.

> WHILE attention has been focused on extreme cases, it is perhaps more significant that big awards have become almost routine in some places.

Nov. 1: The family of a 37-year-old Jacksonville woman who was killed when a tractor-trailer jackknifed and crossed a highway median is awarded $2.5 million. The plaintiff's attorney says that he offered to settle the case for much less but that the insurance company rejected his offer, preferring to go to court.

Nov. 5: The Metro-Dade Commission, Dade County's governing body, unanimously approves a $1.9 million settlement with the 16-year-old son of a couple killed when their car was hit broadside by a police car going 70 miles per hour in a 45-mile-per-hour zone.

Nov. 18: In a medical-malpractice case, a Pensacola woman settles for $3.5 million. She had claimed that her child, now 3½, was born with profound brain damage because of obstetrical malpractice, poor training of residents and lack of supervision of residents at her hospital.

Dec. 4: A 24-year-old woman settles for $4.2 million after an accident in which her car was hit from behind at a red light, leaving her paralyzed below the waist.

Dec. 9: A former National Aeronautics and Space Administration engineer wins $5 million from a Dade County hospital after surgery to correct a congenital brain malformation that had begun to affect his walking. The 31-year-old engineer was in a coma for two weeks after the operation and was completely paralyzed when he came to. The jury forewoman tells the Miami Herald that her colleagues figured "that's what he's going to need to make l life comfortable." The award was subs quently reduced to $4 million.

Dec. 12: The wife and four children a 26-year-old construction worker who f 24 stories to his death on a worksite ac dent won $4.5 million. The jury agrees th the company that owned the apartme complex under construction had rushed t building subcontractor and otherwi caused unsafe conditions.

Dec. 17: A 36-year-old real estate sal woman wins $1.3 million in a medical-m practice case after an operation that l her breasts severely damaged.

Jan. 9: The family and estate of a m killed when the pistol of another man ac dentally went off during a struggle ov ownership of work tools are awarded million in a wrongful-death judgment.

Feb. 7: A 23-year-old welder wins $ million for permanent injuries suffer when hundreds of pounds of roofing sh gles fell on him at work. During a wee long trial, the welder had testified that t injuries would prevent him from returni to manual labor, thus causing significa loss of future earnings.

Feb. 21: An Orlando jury awards $ million to a woman who claimed malpra tice on the part of her psychiatrist af she attempted suicide by setting herself fire. The presiding judge subsequen says he might overturn the verdict becau of allegations of jury tampering.

March 14: A federal judge rules tha former Metro-Dade police officer shot pay $1.3 million to the family and estate a man he shot three years earlier. The d fendant is currently appealing a ma slaughter conviction stemming from t shooting.

March 17: A woman whose father w run over and killed while working at a te phone-company repair site wins a $4.6 m lion jury award. At the time of the ac dent, the driver had twice the legal st dard for drunkenness; he has pleac guilty to felony manslaughter charg stemming from the accident.

March 26: The family of a woman w died seven years ago after gynecologi surgery wins $4.3 million from a local h pital and anesthesiologist. In 1980, a ju had found the hospital and doctor liable ter a two-week trial. But the judge at t time ordered a new trial on the issue damages because he felt the jury was c fused over how to award them.

April 1: A 30-year-old woman paraly when the Jeep she was riding in rol over after crashing with another vehi wins $19.5 million—$10 million of it in pu tive damages from American Mot Corp., the Jeep's manufacturer. The ju blamed AMC for failing to warn the pul of an alleged defective design. After trial, the jury's forewoman was quoted saying: "The only way you can tell a co pany you don't like what they are doing through high awards."

# Tort reform's better than nothing

## Letters to the editor

Dear Editor:

May I respond to L. Ames Luce's April 4 opinion on tort reform? This is not an apologia for the foibles of the insurance industry; it is just that Luce befogs the issue.

Why do trial attorneys invest so much time in developing profiles of favorable and unfavorable prospective jurors? Why do I read in this very newspaper an article about some acting school back East that specializes in teaching trial attorneys to be better actors? All this seems to be in aid of their doing the best possible job for their client.

But when examined in sober perspective, doesn't this smack of something that at this moment I cannot put a name to? What does this have to do with the hallowed concepts of a "fair" trial and "blind justice?" Why does even the Chief Justice of the United States Supreme Court criticize the legal excesses that have developed in the past decade?

Many outside of the insurance industry have come to realize the tort system of justice is out of control. Many citizens, business and public entities have already lost or are in serious danger of losing their rights. Luce's rhetoric about the "systematic and devastating assault upon the rights of the citizens of this state" is, I suspect, a camouflaged concern about the possible loss of rights of Alaskan trial lawyers.

I believe the so-called tort reform proposals to be bandages applied to an already sick and dying body. I have long maintained the only lasting and effective solution to be the radical step of removing the insurance function entirely from the tort system; replacement being a system of binding arbitration. But, dear public out there, tort reform is better than nothing and I strongly recommend you express your thoughts to your legislators.

Peter C. Huycke
508 W. Sixth Ave.

*Editorial Opinion and Comment of*

FAIRBANKS
**Daily News-Miner**

"Independent in All Things . . . Neutral in None"

Other opinions expressed on this page do not necessarily reflect those of the Daily News-Miner.

## *Tort reform needed*

The House Judiciary Committee is expected to complete work this week on a measure that should be adopted this session: a comprehensive package of reforms to liability issues. The Senate Judiciary Committee passed its version of the legislation on to the Finance Committee last week.

As Alaskans have seen our insurance premiums skyrocket, we've joined the interest nationwide in accomplishing reforms that will change the way liability issues are tried and decided, addressing the inequities in the way liability lawsuits are handled. The issue has come to be known as tort reform, after the legal term tort, meaning a wrongful act.

The Citizens Coalition for Tort Reform explains that skyrocketing jury awards in liability lawsuits is a critical factor in the cost of insurance. For example, the coalition says, about 20 percent of the price of a ladder represents insurance costs.

The coalition is backing a comprehensive approach to tort reform. Among the provisions it supports:

- Limit noneconomic awards to $250,000.
- Structure periodic payments in cases where the award exceeds $50,000.
- Set a sliding scale for contingent fees that encourage early resolution of claims while providing fair compensation for attorneys.
- Require those filing personal injury complaints to swear under oath that they believe all claims are true.
- Require courts to direct damage payments proportionate to a defendant's degree of fault.
- Instruct juries to itemize award verdicts.
- Require that punitive damages—which punish defendants for negligence beyond their liability for actual damages—are paid to the state of Alaska, that is, the whole society.
- In instances of wrongful death, allow for death benefits only to spouses, children or other current economic dependents.
- Require that a lawsuit be filed within two years of the date of the act or omission on which the complaint is based.
- Encourage settlements that avoid costly trials through arbitration of claims up to $50,000 before turning to the court.

Backers of the comprehensive approach warn that it won't bring down insurance premiums—that scenario is too complex for a direct cause-and-effect impact. However, they believe it will stabilize costs and make it possible for many businesses and governmental units to obtain insurance they've been forced to do without. They point out that in the 10 years since California adopted tort reform legislation and even in the presence of concerted legal challenges, medical malpractice insurance costs in that state rose at half the rate of the rest of the nation. In California, the average increase was 150 percent; nationwide it was 300 percent.

In Alaska, they believe adoption of a comprehensive tort reform package will have positive effects. The House is now considering HB532 and the Senate is considering SB377. Depending on what changes each house made, a conference committee may be necessary before a final measure is adopted.

It's rare to see legislation with the diverse backing that this package has. It's supported by groups and individuals ranging from day care providers to engineers to truckers to dentists and doctors. The widespread support is a reflection of the importance tort reform has to Alaskans. Its passage should remain a top priority of legislators.

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# The Executive Letter

March 3, 1986 Vol. 18 No. 42

## ADMINISTRATION GIVES A PREVIEW OF ITS TORT REFORM VIEWS

Assistant Attorney General Richard Willard last week gave the Federal Bar Association a preview of the Reagan administration's review of tort law problems. Willard heads the interagency task force which is producing a series of reports, the first of which is due in mid-March.

He said the current liability insurance crisis is due to two factors: insurers' cash-flow underwriting in the past and the "explosion of civil liability." The latter is due to the combined effects of three changes in the law: the trend to no-fault liability; the erosion of the doctrine of causation, including the rise of joint liability; and sharp increases in the size of damage awards. He warned that "tort liability cannot be a constantly expanding concept" and indicated that the Justice Department will recommend efforts to change overall public attitudes rather than pursue specific tort reform proposals.

The task force is not likely to recommend indemnification of federal contractors, because that would merely transfer the cost rather than solve the tort law problem, Willard said. It is looking at the liability problems of federal government employees and also the impact of federal civil rights laws on local government liability. While endorsing federal product liability law in concept, the administration is not embracing any specific legislation at this point.

## PRODUCT LIABILITY LEGISLATION DEBATED

Insurers, consumer groups, manufacturers and attorneys last week presented to the Senate Commerce Committee their views on new product liability legislation. The bill (S.1999), introduced by Committee Chairman Sen. John C. Danforth (R-MO), will establish a uniform federal liability standard which would incorporate a no-fault victim compensation system. Danforth admitted that his bill is "not perfect and leaves room for improvement." Consumer advocates said they would favor an incentive system which would award those manufacturers who work out a prompt settlement with victims and punish those who carry on with unreasonable litigation.

# CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

# Tort reform's better than nothing

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But when examined in sober perspective, doesn't this smack of something that at this moment I cannot put a name to? What does this have to do with the hallowed concepts of a "fair" trial and "blind justice?" Why does even the Chief Justice of the United States Supreme Court criticize the legal excesses that have developed in the past decade?

Many outside of the insurance industry have come to realize the tort system of justice is out of control. Many citizens, business and public entities have already lost or are in serious danger of losing their rights. Luce's rhetoric about the "systematic and devastating assault upon the rights of the citizens of this state" is, I suspect, a camouflaged concern about the possible loss of rights of Alaskan trial lawyers.

I believe the so-called tort reform proposals to be bandages applied to an already sick and dying body. I have long maintained the only lasting and effective solution to be the radical step of removing the insurance function entirely from the tort system; replacement being a system of binding arbitration. But, dear public out there, tort reform is better than nothing and I strongly recommend you express your thoughts to your legislators.

Peter C. Huycke
508 W. Sixth Ave.



*Editorial Opinion and Comment of*

FAIRBANKS
**Daily News-Miner**
"Independent in All Things Neutral in None"

Other opinions expressed on this page do not necessarily reflect those of the Daily News-Miner.

## *Tort reform needed*

The House Judiciary Committee is expected to complete work this week on a measure that should be adopted this session: a comprehensive package of reforms to liability issues. The Senate Judiciary Committee passed its version of the legislation on to the Finance Committee last week.

As Alaskans have seen our insurance premiums skyrocket, we've joined the interest nationwide in accomplishing reforms that will change the way liability issues are tried and decided, addressing the inequities in the way liability lawsuits are handled. The issue has come to be known as tort reform, after the legal term tort, meaning a wrongful act.

The Citizens Coalition for Tort Reform explains that skyrocketing jury awards in liability lawsuits is a critical factor in the cost of insurance. For example, the coalition says, about 20 percent of the price of a ladder represents insurance costs.

The coalition is backing a comprehensive approach to tort reform. Among the provisions it supports:

- Limit noneconomic awards to $250,000.
- Structure periodic payments in cases where the award exceeds $50,000.
- Set a sliding scale for contingent fees that encourage early resolution of claims while providing fair compensation for attorneys.
- Require those filing personal injury complaints to swear under oath that they believe all claims are true.
- Require courts to direct damage payments proportionate to a defendant's degree of fault.
- Instruct juries to itemize award verdicts.
- Require that punitive damages—which punish defendants for negligence beyond their liability for actual damages—are paid to the state of Alaska, that is, the whole society.
- In instances of wrongful death, allow for death benefits only to spouses, children or other current economic dependents.
- Require that a lawsuit be filed within two years of the date of the act or omission on which the complaint is based.
- Encourage settlements that avoid costly trials through arbitration of claims up to $50,000 before turning to the court.

Backers of the comprehensive approach warn that it won t bring down insurance premiums—that scenario is too complex for a direct cause-and-effect impact. However, they believe it will stabilize costs and make it possible for many businesses and governmental units to obtain insurance they've been forced to do without. They point out that in the 10 years since California adopted tort reform legislation and even in the presence of concerted legal challenges, medical malpractice insurance costs in that state rose at half the rate of the rest of the nation. In California, the average increase was 150 percent; nationwide it was 300 percent.

In Alaska, they believe adoption of a comprehensive tort reform package will have positive effects. The House is now considering HB532 and the Senate is considering SB377. Depending on what changes each house made, a conference committee may be necessary before a final measure is adopted.

It's rare to see legislation with the diverse backing that this package has. It's supported by groups and individuals ranging from day care providers to engineers to truckers to dentists and doctors. The widespread support is a reflection of the importance tort reform has to Alaskans. Its passage should remain a top priority of legislators.

*Filings affected*

# Marquardt requests insurers to adjust rates to new law

OLYMPIA — Washington Insurance Commissioner Dick Marquardt is telling insurance companies writing liability insurance in Washington that new rate filings must take into consideration newly-adopted changes in the state's tort laws. Marquardt said that since the governor signed the tort reform bill, "It's a new ball game, and the ball is in the companies' court."

All rate changes asked for so far by the companies have been based on their expected losses under the old law, Marquardt said. "The changes in the law will affect the companies' predictions of future losses. And if the outlook for losses is different, the rates should be re-figured. They just don't fit," he contended.

After the legislature passed the bill, the companies were notified that if the governor signed it, pending or future rate increases would have to be recalculated. "We've been denying rates change requests because if we simply delayed action on them, they could take effect automatically under present law." Marquardt said.

Marquardt warned there may be additional delays in rate approvals because of changes required by the new laws. "The tort law changes create considerable extra work for this office," Marquardt said, "and we don't have a casualty actuary -- a specialist in figuring what the companies should be charging or laying away for future claims." Marquardt said that due to the complex nature of the work, securing the services of a qualified actuary and getting the necessary information in hand could take some time.

"The new law applies to all lawsuits filed on or after August 1 of this year," Marquardt said. "The companies are now writing insurance to protect policyholders against lawsuits which will be decided in court on the basis of the new law."

Marquardt said he recognizes the difficulties some companies will face in meeting the new requirements, but he emphasized that if lower costs are going to result from the recent tort law changes, then consumers should be given the benefits of those changes.

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# The Executive Letter

March 3, 1986 Vol. 18 No. 42

## ADMINISTRATION GIVES A PREVIEW OF ITS TORT REFORM VIEWS

Assistant Attorney General Richard Willard last week gave the Federal Bar Association a preview of the Reagan administration's review of tort law problems. Willard heads the interagency task force which is producing a series of reports, the first of which is due in mid-March.

He said the current liability insurance crisis is due to two factors: insurers' cash-flow underwriting in the past and the "explosion of civil liability." The latter is due to the combined effects of three changes in the law: the trend to no-fault liability; the erosion of the doctrine of causation, including the rise of joint liability; and sharp increases in the size of damage awards. He warned that "tort liability cannot be a constantly expanding concept" and indicated that the Justice Department will recommend efforts to change overall public attitudes rather than pursue specific tort reform proposals.

The task force is not likely to recommend indemnification of federal contractors, because that would merely transfer the cost rather than solve the tort law problem, Willard said. It is looking at the liability problems of federal government employees and also the impact of federal civil rights laws on local government liability. While endorsing federal product liability law in concept, the administration is not embracing any specific legislation at this point.

## PRODUCT LIABILITY LEGISLATION DEBATED

Insurers, consumer groups, manufacturers and attorneys last week presented to the Senate Commerce Committee their views on new product liability legislation. The bill (S.1999), introduced by Committee Chairman Sen. John C. Danforth (R-MO), will establish a uniform federal liability standard which would incorporate a no-fault victim compensation system. Danforth admitted that his bill is "not perfect and leaves room for improvement." Consumer advocates said they would favor an incentive system which would award those manufacturers who work out a prompt settlement with victims and punish those who carry on with unreasonable litigation.

Attorneys, who have been at odds with Congress over federal product liability legislation, remained firmly opposed to any changes in the current system. Manufacturers, while acknowledging their reservations about the bill, generally favor the idea of a uniform law in the hopes it would improve the affordability and availability of liability insurance. Les Cheek of Crum & Forster offered specific suggestions for changes in the legislation, indicating that the standard of liability in the alternative claims mechanism was unworkable.

## HIGH COURT LETS CITIES OFF THE ANTITRUST HOOK

The Supreme Court last week eased the threat of antitrust lawsuits against local governments that regulate economic activities. In an 8-to-1 decision, the Court said municipal rent control laws do not violate federal antitrust statutes. By extension, the ruling also validates local zoning laws, taxicab regulation, cable TV franchises and other rules that were under legal challenge. The decision clarifies a 1978 case in which the Court ruled that local governments could be held liable under antitrust law for economic regulation that exceeded authority granted to them by the state. The latest decision came in Fisher vs. City of Berkeley (Docket No. 84-1538).

## HAZARDOUS WASTE OPERATORS DEBATE INSURANCE DEADLINE CHANGE

Representatives of the hazardous waste management industry last week presented opposing views on legislation (HR.3917) which would extend the period allowed for compliance with federal financial responsibility requirements. Testifying before the Senate Environmental Pollution Subcommittee, small hazardous waste management companies said the unavailability of adequate liability insurance made it impossible to meet the Nov. 1, 1985, deadline. Extending the deadline, they added, would allow them to develop alternatives to commercial insurance. Technically, those not in compliance are operating illegally.

Representatives of larger companies noted, however, that the insurance problem will not disappear in a year and that granting an extension will not help resolve the problems of those who are unable to comply with financial responsibility requirements. They said an extension of the deadline would be unfair to those companies which did meet the compliance deadline. The bill was passed by the House of Representatives last December and awaits action by the Senate.

## PENNSYLVANIA GOVERNOR VETOES BILL TO RETAIN GENDER-BASED RATING

Insurers are considering their options following Pennsylvania Gov. Dick Thornburgh's veto of a bill (HB.452) which would have retained gender-based rating for auto insurance (see ExL 2/18/86). The governor said he could not support legislation "which affords less protection against unfair sexual classifications than is (legally) afforded against unfair classifications

based upon race, religion or national origin." He said what should be identified are underlying rating factors which better reflect actual variations in driving and safety records of many males and females. "While such factors might coinc. e with the sex of the insured, rates should be based on those underlying factors and not per se on sex."

Since the bill was passed by more than a two-thirds margin in both houses and a veto can be overturned by such a majority, insurers may lobby for that to be done. Another possibility is lobbying for Senate concurrence with the House-passed bill (SB.1037), which would, among other things, postpone implementation of unisex rating for 18 months while the State Government Commission -- a legislative body -- develops a plan for implementation. Some insurers believe the commission might find that the problems of unisex outweigh the supposed benefits, resulting in a commission recommendation for a modification of the unisex directive. The governor said he could support legislation to delay unisex implementation while a "legislative-executive inquiry" seeks alternative methods for determining auto insurance rates, but his veto message seems to flatly rule out use of sex as a rating classification.

## COOK COUNTY SUIT AGAINST ASBESTOS MANUFACTURERS DISMISSED

A Cook County Circuit Court (Chicago) judge has dismissed lawsuits filed by 34 school districts in Illinois against dozens of asbestos manufacturers seeking to force the companies to pay the cost of removing the substance from school buildings. Judge Richard Curry rejected the suits (Cook County Circuit Court 85-CH-811, 812 and 3905) ruling the school districts, including the Chicago school system, failed to prove the companies knew of the dangers of the substance when they sold it to the schools. The cost of removing the asbestos, he ruled, should be paid by the school districts or the state under the Illinois Asbestos Abatement Act. Only about $3 million has been appropriated for the act, however, significantly less than the $55 million expected cost for removal of the asbestos from the schools. The suits were filed last year against 78 firms that mine, manufacture, sell and install the material. An appeal is expected.

## INSURERS AND INDUSTRY CRITICS CLASH AT ICAN MEETING

Industry critics such as Ralph Nader, Robert Hunter and several trial lawyers clashed with insurance industry representatives in Los Angeles Feb. 21 and 22 at a meeting of the Insurance Consumer Action Network (ICAN). Most of the approximately 100 persons attending were plaintiff attorneys, with representatives from government and insurance companies and some consumers also present. Insurance Information Institute spokespersons represented the industry on two panels: one dealing with insurance company profits, and another dealing with auto insurance questions including territorial rating and compulsory insurance. ICAN, which bills itself as "a network of consumer insurance

advocates ... dedicated to defining and protecting insurance consumers' rights," received its start-up funds from a past president of the California Trial Lawyers Association.

## TRIAL LAWYER TOURING COUNTRY TO PROMOTE BOOK

William M. Shernoff, a past president of the California Trial Lawyers Association and a force behind the Insurance Consumer Action Network (see item above), is on a 15-day tour promoting through television appearances his new book, "Payment Refused." Published by Richardson & Steirman of New York, the book reviews in detail "bad faith" claims brought by Shernoff involving all lines of insurance. The Insurance Information Institute and the American Council of Life Insurance are arranging for industry representatives to appear with Shernoff, as was the case last week in New York City where he kicked off his tour with appearances on two stations.

## MICHIGAN'S AUTO LAWS GET MODIFIED

Efforts to modify the auto insurance provisions of Michigan's Essential Insurance Act (EIA) appear headed for success. Unlike last year's package, the 1986 version apparently has Gov. James Blanchard's support. The major thrust of the reform measure is to relieve the onerous rating provisions of the old law, allowing rates outside of Detroit to be set competitively while retaining some restrictions on Detroit rates.

The law also mandates a 20% discount for personal injury protection rates after Feb. 1, 1987, to reflect the state's seat belt usage law. Other sections of the proposed law deal with auto theft, including the establishment of an auto theft authority.

## R.I. GOVERNOR NAMES INDUSTRY PANEL ON AVAILABILITY

Rhode Island Gov. Edward D. DePrete has established a 25-member Governor's Insurance Council, made up of insurance industry executives, to address problems of availability and affordability in the current insurance market. The governor, a former insurance agent, has targeted three main purposes for the Council: to ensure that the needs of the insurance consumer are being met; to establish communications between the insurance industry and state government; and to retain existing jobs as well as to create new employment.

## VERMONT BANKING AND INSURANCE COMMISSIONER NAMED

Vermont Gov. Madeleine Kunin has named Thomas P. Menson, former executive vice president and chief operating officer of the Bank of Vermont, as the new banking and insurance commissioner. He succeeds David Bard, who resigned to become president of the New England IBM Credit Union.

Carl C.A. Lee, Editor

UNITED STATES
CHAMBER OF COMMERCE

# BUSINESS LIABILITY SURVEY

Your response to this survey will help THE UNITED STATES CHAMBER OF COMMERCE—the world's largest federation of businesses, chambers of commerce, and trade and professional associations—in its comprehensive LIABILITY CRISIS PROJECT. The Chamber has launched the Project to study and help resolve the liability crisis to help thousands of businesses like your own that are confronted by soaring liability costs.

1. **What is your business or profession?** RETAIL AND WHOLESALE PETROLEUM SALES

2. **How many people do you employ?** 65

3. **Have you been able to renew or obtain the liability insurance you need?**
   - ✓ Yes.
   - ___ No.

4. **Have your premiums risen?**
   - ✓ Yes.
   - ___ No.

   **If yes, how much?** (Check only one.)
   - ___ 10-50%
   - ✓ 51-100%
   - ___ 101-500%
   - ___ More than 500%

5. **What effect has this increase had on your firm?** DRASTIC - MAJOR IMPACT ON EARNINGS

6. **What kind(s) of liability coverage present the greatest problem for you?** (Check all that apply.)
   - ✓ General (Casualty).
   - ✓ Transportation.
   - ✓ Environmental (including Hazardous Waste).
   - ___ Officers and Directors.
   - ___ Professional (Architects, Engineers, CPAs, etc.).
   - ___ Product.
   - ___ Medical Malpractice.
   - ✓ OTHER (Please specify.) UMBRELLA

7. **What alternatives are you pursuing?** (Check all that apply.)
   - ___ Dropping products or services.
   - ✓ Self-insurance. TO A DEGREE
   - ___ Going out of business.
   - ___ Going bare (operating without liability insurance).
   - ✓ LOOKING FOR NEW CARRIER

8. **Have you contacted your state insurance commissioner?**
   - ___ Yes.
   - ✓ No.

9. **In your opinion, why are the number of liability suits and damage awards increasing?** (Check all that apply.)
   - ___ The professional and business community is less competent.
   - ✓ The civil justice system encourages frivolous claims. ATTORNEYS & COURTS
   - ✓ Liability is based on the ability to pay, not wrongdoing. DEEP POCKETS
   - ✓ Consumers have unrealistic expectations.
   - ✓ OTHER (Please specify.) INSURANCE COMPANIES RAISED RATES UNREALISTICALLY

10. **Which of the following approaches to this problem should the U.S. Chamber pursue?** (Check all that apply.)
    - ✓ Civil justice reform. CONTINGENCY FEE BASIS CONTROLLED - MAXIMUMS
    - ___ Federal product liability reform.
    - ✓ Tort reform.
    - ___ Changes in insurance industry law.
    - ___ All of the above.
    - ___ OTHER (Please specify.)
    - ___ No action.

11. **In relation to economic costs arising from injury, the size of awards is:** (Check only one.)
    - ___ Too low.
    - ___ About right.
    - ✓ Excessive.

12. **Do you see the problem getting better or worse for you?** (Check only one.)
    - ___ Better.
    - ✓ Worse.

13. **The number and outcome of liability claims against your firm are:** (Check only one.)
    - ___ Predictable.
    - ✓ Unpredictable. NONE IN RECENT YEARS

**OPTIONAL:** (If the results of this survey are published, they will be published in the aggregate. Your response will not be made public.)

Name: R.G. BIRKINSHAW

Title: GENERAL MANAGER MARKETING

Company: TOPPERS OIL CORPORATION, INC.

Address: P.O. BOX 10-1619
ANCHORAGE, AK 99510

Telephone: (907) 279-8553

Thank you for completing the survey. Please return it to the: LIABILITY CRISIS PROJECT, U.S. Chamber of Commerce—Business Government Policy Department, 1615 H Street, N.W., Washington, D.C. 20062.

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FEBRUARY 1986 $2.50

**Small Firms And Social Security**

**Which Business Ads Are Best?**

**John Naisbitt On The Future Of Franchising**

# Nation's Business®

## The liability insurance crisis is the most serious threat to business today.

Companies risk bankruptcy by paying soaring premiums or going without insurance. The results include lost jobs and higher prices. Experts blame a litigation explosion in which there is a private civil lawsuit for every 15 Americans. Many of those suing count on a trend of fat awards that assume wrongdoing by business. Page 22.

COVER STORY

# Liability: Trying Times

*By Harry Bacas*

An overweight man with a history of coronary disease has a heart attack while trying to start a lawn mower. In a suit against the manufacturer, he argues that pulling the starter rope required excessive effort. A jury awards him $1 million in damages—plus interest.

A drug dosage administered by hospital personnel to a child who then suffers brain damage exceeds the manufacturer's specifications. The child's parents nevertheless sue the manufacturer—and are awarded $22 million.

A motorcyclist, injured when he runs off the road into a parked truck, sues the truck's owner. A mediation board, citing the motorcyclist's own role in the accident, limits a damage award to $20,000. The case goes to a jury, which increases the award to $4.2 million.

Those examples of recent damage awards are not isolated instances but are part of a cycle that is pulling more and more businesses, particularly smaller and medium-size ones, into what has become one of the most serious problems facing business today—the liability-insurance crisis.

The crisis begins with damage awards in cases that are frequently based on thin legal grounds. It moves to the insurance companies that raise premiums—or limit or deny coverage—to stem losses caused by the swollen awards. It ends up with the businesses that face massive cost increases or are unable to obtain coverage at any price.

For that reason, reform of the civil justice system is a key goal of business organizations that want to ease the liability crisis. A second goal is adoption of a federal product-liability law to replace the present patchwork of individual state laws that require manufacturers and retailers to comply with many different and often conflicting statutes or face lawsuits.

In discussing the overall liability cri-

*Jack Hayes, a free-lance writer based in Roswell, Ga., also contributed to this article.*

*"We are reaching the point where we can no longer afford product liability insurance," says Maynard B. Weaver, president of an Omaha company that makes man-lift cranes. He saw his insurance payments rise 500 percent in one year and his coverage limits go down.*


PHOTO: MAX WINTER—PICTURE GROUP

# *Huge jury awards and a patchwork of laws are principal reasons for a scary insurance crisis into which business has been plunged.*

sis at a recent congressional hearing, the U.S. Chamber of Commerce declared:

"A preliminary survey . . . indicates that businesses in every region of the country have experienced extreme hardship. In fact, there have been business closures due to the dramatic increase in premium payments. Each day, we learn firsthand of another segment of our economy which has been affected by this crisis. There seem to be no boundaries."

Testifying for the business organization, William C. Wyer, president of the Delaware State Chamber of Commerce, added: "Small businesses are bearing the brunt of the present crisis."

Evidence from businesses across the country supports that statement:

Maynard B. Weaver, president of Elliott Equipment Corporation, an Omaha manufacturer of man-lift cranes, reports that his liability insurance payments are $18,000 a month, up 500 percent from 1984, though his coverage has been reduced. "We are reaching the point where we can no longer afford product liability insurance," he says.

The Amigo Company, a family-owned manufacturer of motorized wheelchairs, has never had a successful insurance claim brought against it. But General Manager Alden Thieme says that, because of the insurance crisis, he does not know whether the company can stay in business.

Amigo, which has offices in Albuquerque, N.M., and a factory in Bridgeport, Mich., was told last year that its insurance premiums were being raised from $30,000 to $150,000.

Though Thieme obtained coverage from a Bahamas broker for $45,000, Amigo expects its 1986 liability insurance costs to be $100,000 to $120,000. "The liability crisis is getting completely out of hand," he says. His company experienced the problem firsthand when it had to face a type of lawsuit becoming increasingly common—those in which the defendant is chosen on the basis not of fault, but ability to pay.

*Alden Thieme manages a company that manufactures motorized wheelchairs in Bridgeport, Mich. Although it has never lost a liability suit, its insurance premiums are skyrocketing. Thieme blames a legal system that encourages litigation and allows huge jury awards.*

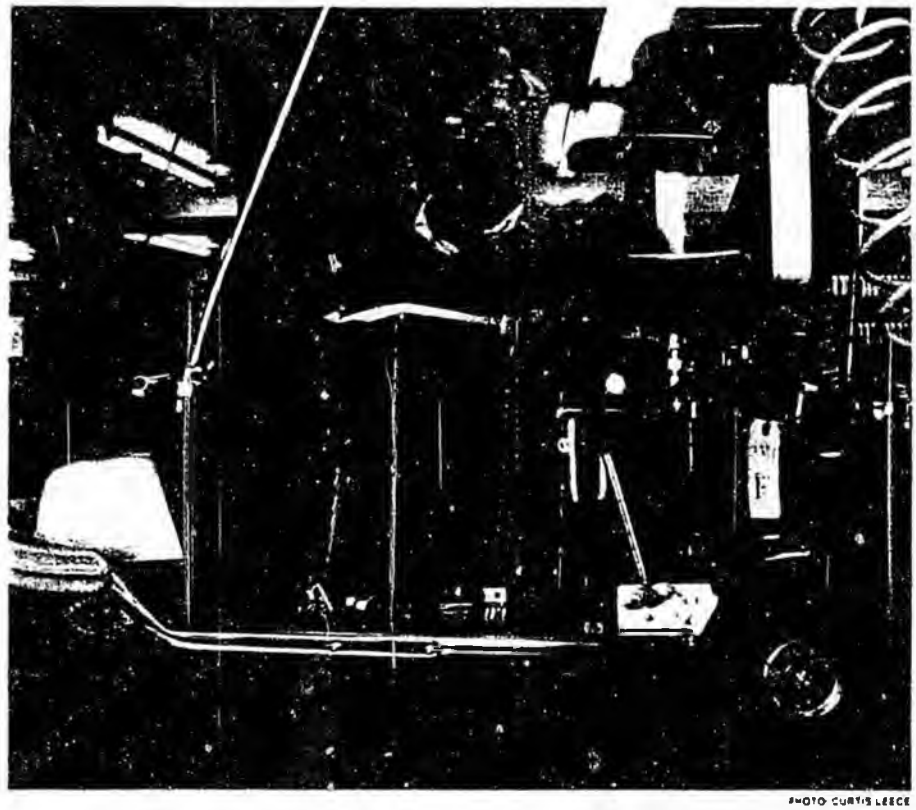

PHOTO CURTIS LEECE

Thieme recalls that a woman in a wheelchair, accompanied by her husband, was killed when struck by a car that had run a red light on a California street. "The driver had no insurance, so the husband sued us," Thieme says. "The case dragged on for two years before we won. But it cost us $170,000 to defend ourselves."

The company, founded by Thieme's brother, Allen, has 120 employees, does $10 million a year in sales and is the leader in its field. Allen Thieme was named national Small Business Person of the Year in 1981 for successfully launching the firm. His brother and general manager now says that if insurance premiums continue to soar, "it will wipe us out. If we keep adding to our costs, we will price ourselves out of the market."

Vernon Hayes, president of Hayes and Stolz, which makes grain-processing machinery in Fort Worth, Tex., operated without insurance for several weeks last year after his primary policy was canceled. "What do you do?" he asks. "Everybody in America can't shut down. And it's hard to put 70 people out of work." By paying an 800 percent premium increase, he finally obtained a new policy, but it did not provide as much coverage as the canceled policy.

Dick Taylor, a Salt Lake City insur-

**Liability: Trying Times**

*David and Ruth Hampe—paying bills for their Somerset, Pa., auto salvage yard—needed a bank loan after their liability insurance premium nearly doubled.*

PHOTO: LYNN JOHNSON—BLACK STAR

ance agent who is also current president of the Independent Insurance Agents of America, says, "My customers think I'm nuts suggesting they are lucky to renew at double last year's premiums."

It is becoming more and more apparent, he says, that "price is no longer the issue. It's a question of availability, of just finding the coverage."

Joseph Prendergast, American Ski Federation president, says ski resort operators are facing premium increases ranging to 500 percent. He adds that companies that sell roller skis—which have wheels and are used on nonsnow surfaces—are unable to obtain any coverage.

David Hampe had filed no claims under the liability insurance on the wrecker and dump truck he uses in his auto salvage business in Somerset, Pa., but recently received notice his premiums had nearly doubled. He did not have the cash needed to pay the bill and took out a bank loan so he could.

Edward Cone, chief executive officer of Graco Children's Products, Elverson, Pa., says the deductible on his basic-coverage policy went from $25,000 to $150,000 in 1985, and he had to canvass five sources to get the $500,000 coverage he needed before anyone would sell him an excess risk policy. And that provided one fourth the coverage at a cost five times greater than his previous policy. "We have not had any large claims," he says. "Our claims experience does not nearly justify those rates. But, because of the cost, we will have to evaluate our product lines, and we may get out of some." One of those lines is children's car seats.

All 50 states require use of special car seats for tots, Cone notes. "They have to meet federal standards," he says. "It is not a product that is likely to be used for any other purpose than the one it's designed for. Yet, in our court system, that won't mean a thing to a jury. They see an injured child, and they say, 'Somebody has to pay.' "

He cites a $10 million claim against another car-seat manufacturer resulting from an accident in which a passenger not wearing a seat belt was thrown against a baby strapped into a car seat.

Long-range trends, as well as awards in specific cases, spotlight the connection between the litigation explosion in the nation's courts and the insurance crisis.

In 1984 there was one private, civil lawsuit for every 15 Americans. The number of personal injury cases with awards of $1 million or more is now more than 13 times the 1975 total. A record 12 million lawsuits were filed in state courts between 1978 and 1983. The average product liability award has increased from $345,000 to more than $1 million in 10 years, and the number of product liability suits filed in federal courts alone has tripled since 1960.

There are three times as many lawyers practicing now as there were in the 1950s, and it costs 37 times more to run the tort system than it did then.

Chief Justice Warren Burger says the American public "has an almost irrational focus—virtually a mania—on litigation as the way to solve all problems."

Richard K. Willard, an assistant U.S. attorney general, asks of the fast-growing insurance crisis that is affecting more and more businesses: "How did we get into this mess?" He continues: "I believe the answer lies in recent legal movements by activist judges and tort lawyers who see no bounds to the ever increasing expansion of tort liability."

The traditional basis of tort liability is fault—one individual's actions have caused harm to another individual, who seeks recompense. But under the current trend, Willard says, tort law is increasingly invoked to punish those who have done nothing wrong but have resources to pay damages.

Rick Berman, executive vice president of Dallas' S&A Restaurant Corporation and chairman of the Liability Crisis Steering Committee recently created by the U.S. Chamber of Commerce to coordinate lobbying and other efforts in behalf of reform, says that curbing tort system abuses "is the main road to solution of this problem."

The Chamber committee, he explains, was established as a catalyst to bring together the many interested groups seeking a solution to the insurance crisis. Among other activities, he points out, the committee operates a clearinghouse "to share information and to inform the public of the dimensions of the liability problem."

And the impact of the problem on the general public is much greater than is generally realized.

*Of the 13 U.S. firms making football helmets a few years ago, only three are still in production. The others dropped out because of insurance costs.*

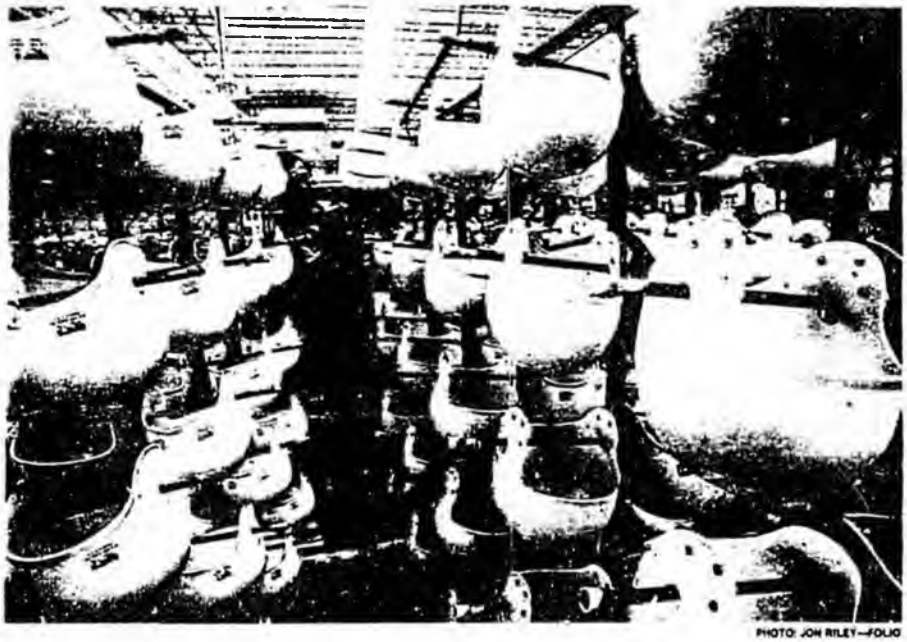

PHOTO: JON RILEY—FOLIO

*Rick Berman, of Dallas' S&A Restaurant Corporation, heads a business group seeking state changes in the legal tort system and uniform product liability standards.*

PHOTO: C. THATCHER

Malpractice awards against physicians reached an average $950,000 in 1984, and the costs of liability insurance for medical practitioners generally are changing the way many of them approach their patients. The trend to defensive medicine involves additional—and often costly—tests and procedures by physicians concerned that failure to go those extra lengths could lead to allegations of negligence.

But the combination of higher insurance costs and defensive medicine is raising the nation's medical bills an estimated $2 billion to $4 billion a year, an expense being felt mainly by employers who provide health insurance to workers.

Consumers can no longer purchase the drug Bendectin, which had been the only safe and effective treatment for persistent nausea in pregnant women. The manufacturer took it off the market when liability insurance reached $10 million a year, more than 80 percent of annual sales. A nationwide shortage of vaccine to protect children from diphtheria and whooping cough developed when all but one of several companies manufacturing it halted production in the face of mounting liability insurance costs.

Insurance rate boosts are showing up in the price of goods. Twenty percent of the cost of a stepladder now represents the manufacturer's expenses for liability insurance. There is also an effect on employment. Of the 13 U.S. firms making football helmets a few years ago, only three still are. The others dropped out because of insurance costs.

Owners and managers of smaller businesses could face problems beyond the immediate question of insurance coverage, says Jan E. Smith, president of a Bradenton, Fla., business-investment firm. "If banks find a company has lost its liability insurance, they may start asking, 'What about those operating loans we made to that company?' And they may not renew those notes. Banks may require liability insurance before they will make a loan."

*Each day, we learn firsthand of another segment of our economy which has been affected. Small businesses are bearing the brunt of this [liability] crisis.*

*—William C. Wyer, president, Delaware State Chamber of Commerce*

In his testimony to Congress for the U.S. Chamber, William Wyer said: "Perhaps this crisis will reserve ultimately its harshest consequences for American consumers. When obstetricians withdraw from their profession, it is the quality of health care for all of us which suffers. When sporting goods manufacturers go overseas, it is the American worker who becomes unemployed.

"And when . . . firms announce price increases primarily to cover rising insurance costs, it is all of us who will pay more through higher prices."

The actual and threatened problems of the liability crisis have spurred a wide range of reactions by those most affected—individual business and professional people, their trade organizations, the insurance industry and the legal profession.

These are among steps being taken on the business side:

- Business people in all fields are shopping more aggressively for coverage by obtaining quotes from several brokers. They are also accepting higher deductibles and are self-insuring when they can afford to.
- Many businesses are hiring consultants to conduct risk audits and help them analyze their insurance needs more carefully. Consultants are also showing companies how to minimize exposure to large damage awards by keeping detailed records on product-safety management programs with an eye toward impressing juries if they ever face them.
- Some companies unable to meet massive premium increases or even to obtain coverage are, like Vernon Hayes of the Fort Worth machinery-manufacturing company, taking the ultimate step of "going bare"—operating without liability insurance and hoping for the best.
- Contractors are setting up subsidiaries without assets to work

*Ski resort operators have more than weather to worry about. They are paying liability insurance premiums that have increased up to 500 percent in a year.*

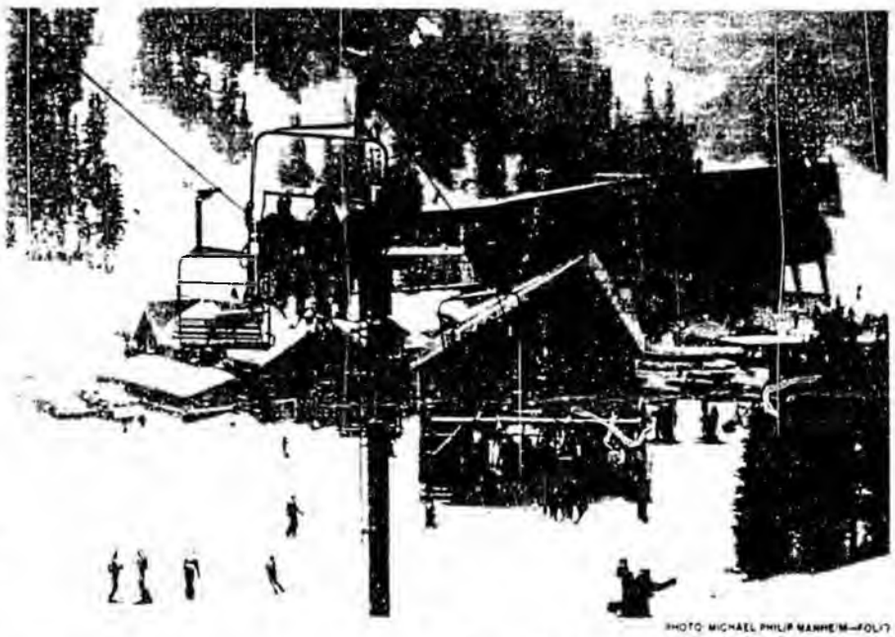

PHOTO: MICHAEL PHILIP MANHEIM—POLIT

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PHOTO: F. MICHAEL KEZA

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At the same time, the dimension of the problem and business demands for action are getting attention. Mary Jane Fisher, Washington-based correspondent for the insurance industry publication, *National Underwriter*, says, "The members of Congress are getting heat from their constituents who want something done about availability and pricing of liability insurance."

Though the campaigns for civil justice reform and a uniform product liability law continue to be pressed, and the insurance industry is working its way out of its financial problems related to investment policies of recent years, many individual businesses worry that they will sooner or later face the dilemma of Maynard Weaver of Omaha's Elliott Equipment Corporation:

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# Insurance Industry Gains And Losses

The U.S. insurance industry collects $249 billion a year in premiums. That is 6.9 percent of the gross national product and an average of $972 for every man, woman and child in the country.

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The Insurance Information Institute says that 48 percent of the world's premiums are collected in the United States, followed by Japan, 13 percent, and West Germany, 8 percent.

Property-casualty insurance in this country, most of it written by 900 companies, takes in $118 billion in premiums, about half of it in personal auto and homeowner policies and half in business lines.

For two years, property-casualty insurers have had net operating losses. In 1984 the total loss was $3.8 billion; in 1985, $5.5 billion. Critics charge that those losses are overstated, but the industry denies that accusation, stating that 1985 was the worst year for insurance since the San Francisco earthquake of 1906.

The companies have been paying out $1.18 in claims settlements and expenses for every $1 they collected in premiums.

Of the payout, 88 cents goes for claims and adjustment expenses, 25 cents for sales and administrative expenses, 2 cents for dividends to policyholders and 3 cents for taxes.

Losses in some lines were much larger than the overall loss. General liability policies cost the companies $1.51 for every $1 they got in premiums. Commercial auto liability cost $1.42. Medical malpractice cost $1.61.

# Liability: Trying Times

*By Harry Bacas*

*"We are reaching the point where we can no longer afford product liability insurance," says Maynard B. Weaver, president of an Omaha company that makes man-lift cranes. He saw his insurance payments rise 500 percent in one year and his coverage limits go down.*

An overweight man with a history of coronary disease has a heart attack while trying to start a lawn mower. In a suit against the manufacturer, he argues that pulling the starter rope required excessive effort. A jury awards him $1 million in damages—plus interest.

A drug dosage administered by hospital personnel to a child who then suffers brain damage exceeds the manufacturer's specifications. The child's parents nevertheless sue the manufacturer—and are awarded $22 million.

A motorcyclist, injured when he runs off the road into a parked truck, sues the truck's owner. A mediation board, citing the motorcyclist's own role in the accident, limits a damage award to $20,000. The case goes to a jury, which increases the award to $4.2 million.

Those examples of recent damage awards are not isolated instances but are part of a cycle that is pulling more and more businesses, particularly smaller and medium-size ones, into what has become one of the most serious problems facing business today—the liability-insurance crisis.

The crisis begins with damage awards in cases that are frequently based on thin legal grounds. It moves to the insurance companies that raise premiums—or limit or deny coverage—to stem losses caused by the swollen awards. It ends up with the businesses that face massive cost increases or are unable to obtain coverage at any price.

For that reason, reform of the civil justice system is a key goal of business organizations that want to ease the liability crisis. A second goal is adoption of a federal product-liability law to replace the present patchwork of individual state laws that require manufacturers and retailers to comply with many different and often conflicting statutes or face lawsuits.

In discussing the overall liability cri-


PHOTO: MAX WINTER—PICTURE GROUP

*Jack Hayes, a free-lance writer based in Roswell, Ga., also contributed to this article.*

# *Huge jury awards and a patchwork of laws are principal reasons for a scary insurance crisis into which business has been plunged.*

sis at a recent congressional hearing, the U.S. Chamber of Commerce declared:

"A preliminary survey ... indicates that businesses in every region of the country have experienced extreme hardship. In fact, there have been business closures due to the dramatic increase in premium payments. Each day, we learn firsthand of another segment of our economy which has been affected by this crisis. There seem to be no boundaries."

Testifying for the business organization, William C. Wyer, president of the Delaware State Chamber of Commerce, added: "Small businesses are bearing the brunt of the present crisis."

Evidence from businesses across the country supports that statement:

Maynard B. Weaver, president of Elliott Equipment Corporation, an Omaha manufacturer of man-lift cranes, reports that his liability insurance payments are $18,000 a month, up 500 percent from 1984, though his coverage has been reduced. "We are reaching the point where we can no longer afford product liability insurance," he says.

The Amigo Company, a family-owned manufacturer of motorized wheelchairs, has never had a successful insurance claim brought against it. But General Manager Alden Thieme says that, because of the insurance crisis, he does not know whether the company can stay in business.

Amigo, which has offices in Albuquerque, N.M., and a factory in Bridgeport, Mich., was told last year that its insurance premiums were being raised from $30,000 to $150,000.

Though Thieme obtained coverage from a Bahamas broker for $45,000, Amigo expects its 1986 liability insurance costs to be $100,000 to $120,000. "The liability crisis is getting completely out of hand," he says. His company experienced the problem firsthand when it had to face a type of lawsuit becoming increasingly common—those in which the defendant is chosen on the basis not of fault, but ability to pay.

*Alden Thieme manages a company that manufactures motorized wheelchairs in Bridgeport, Mich. Although it has never lost a liability suit, its insurance premiums are skyrocketing. Thieme blames a legal system that encourages litigation and allows huge jury awards.*

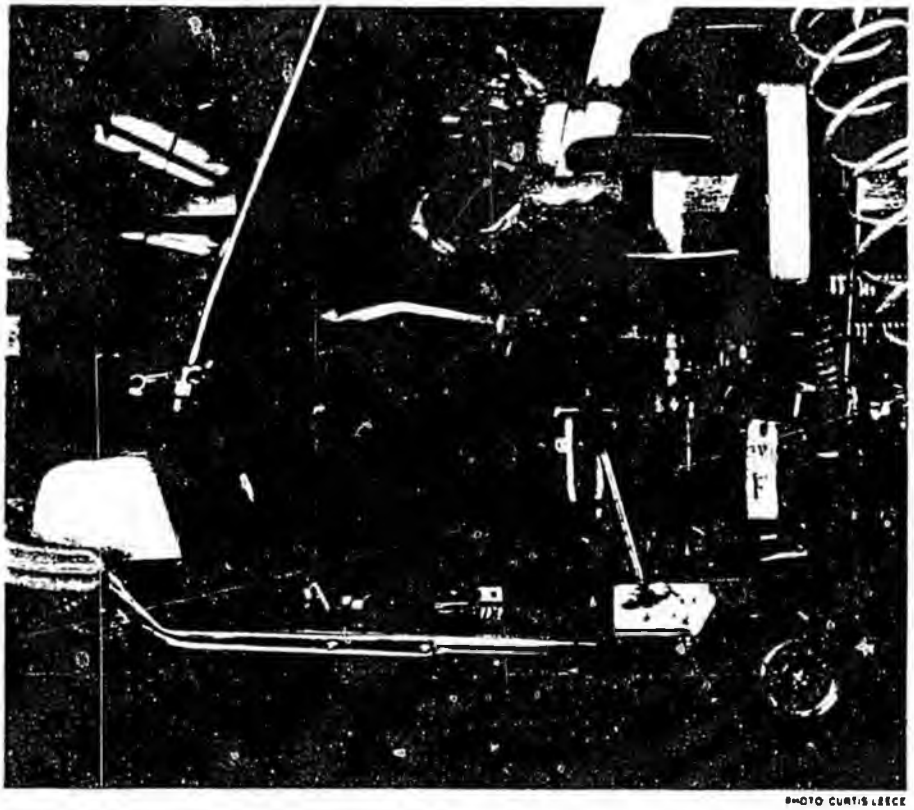

PHOTO CURTIS LEECE

Thieme recalls that a woman in a wheelchair, accompanied by her husband, was killed when struck by a car that had run a red light on a California street. "The driver had no insurance, so the husband sued us," Thieme says. "The case dragged on for two years before we won. But it cost us $170,000 to defend ourselves."

The company, founded by Thieme's brother, Allen, has 120 employees, does $10 million a year in sales and is the leader in its field. Allen Thieme was named national Small Business Person of the Year in 1981 for successfully launching the firm. His brother and general manager now says that if insurance premiums continue to soar, "it will wipe us out. If we keep adding to our costs, we will price ourselves out of the market."

Vernon Hayes, president of Hayes and Stolz, which makes grain-processing machinery in Fort Worth, Tex., operated without insurance for several weeks last year after his primary policy was canceled. "What do you do?" he asks. "Everybody in America can't shut down. And it's hard to put 70 people out of work." By paying an 800 percent premium increase, he finally obtained a new policy, but it did not provide as much coverage as the canceled policy.

Dick Taylor, a Salt Lake City insur-

*David and Ruth Hampe—paying bills for their Somerset, Pa., auto salvage yard—needed a bank loan after their liability insurance premium nearly doubled.*

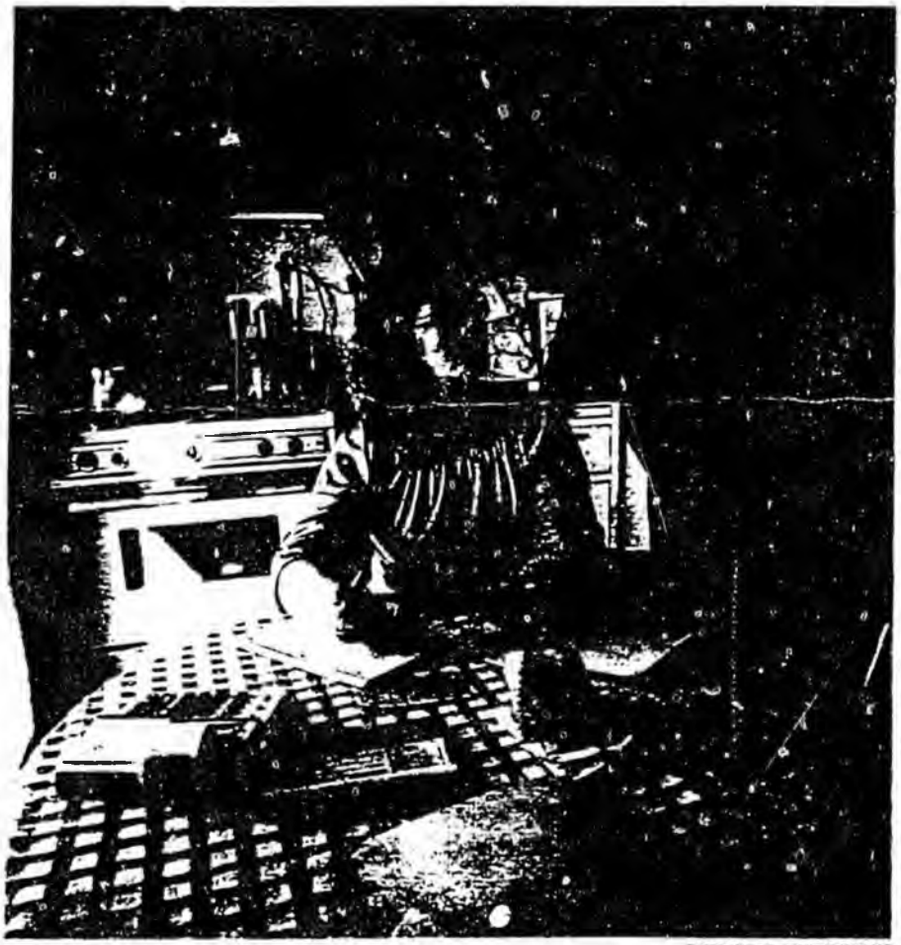

PHOTO: LYNN JOHNSON—BLACK STAR

ance agent who is also current president of the Independent Insurance Agents of America, says, "My customers think I'm nuts suggesting they are lucky to renew at double last year's premiums."

It is becoming more and more apparent, he says, that "price is no longer the issue. It's a question of availability, of just finding the coverage."

Joseph Prendergast, American Ski Federation president, says ski resort operators are facing premium increases ranging to 500 percent. He adds that companies that sell roller skis—which have wheels and are used on nonsnow surfaces—are unable to obtain any coverage.

David Hampe had filed no claims under the liability insurance on the wrecker and dump truck he uses in his auto salvage business in Somerset, Pa., but recently received notice his premiums had nearly doubled. He did not have the cash needed to pay the bill and took out a bank loan so he could.

Edward Cone, chief executive officer of Graco Children's Products, Elverson, Pa., says the deductible on his basic-coverage policy went from $25,000 to $150,000 in 1985, and he had to canvass five sources to get the $500,000 coverage he needed before anyone would sell him an excess risk policy. And that provided one fourth the coverage at a cost five times greater than his previous policy. "We have not had any large claims," he says. "Our claims experience does not nearly justify those rates. But, because of the cost, we will have to evaluate our product lines, and we may get out of some." One of those lines is children's car seats.

All 50 states require use of special car seats for tots, Cone notes. "They have to meet federal standards," he says. "It is not a product that is likely to be used for any other purpose than the one it's designed for. Yet, in our court system, that won't mean a thing to a jury. They see an injured child, and they say, 'Somebody has to pay.' "

He cites a $10 million claim against another car-seat manufacturer resulting from an accident in which a passenger not wearing a seat belt was thrown against a baby strapped into a car seat.

Long-range trends, as well as awards in specific cases, spotlight the connection between the litigation explosion in the nation's courts and the insurance crisis.

In 1984 there was one private, civil lawsuit for every 15 Americans. The number of personal injury cases with awards of $1 million or more is now more than 13 times the 1975 total. A record 12 million lawsuits were filed in state courts between 1978 and 1983. The average product liability award has increased from $345,000 to more than $1 million in 10 years, and the number of product liability suits filed in federal courts alone has tripled since 1960.

There are three times as many lawyers practicing now as there were in the 1950s, and it costs 37 times more to run the tort system than it did then.

Chief Justice Warren Burger says the American public "has an almost irrational focus—virtually a mania—on litigation as the way to solve all problems."

Richard K. Willard, an assistant U.S. attorney general, asks of the fast-growing insurance crisis that is affecting more and more businesses: "How did we get into this mess?" He continues: "I believe the answer lies in recent legal movements by activist judges and tort lawyers who see no bounds to the ever increasing expansion of tort liability."

The traditional basis of tort liability is fault—one individual's actions have caused harm to another individual, who seeks recompense. But under the current trend, Willard says, tort law is increasingly invoked to punish those who have done nothing wrong but have resources to pay damages.

Rick Berman, executive vice president of Dallas' S&A Restaurant Corporation and chairman of the Liability Crisis Steering Committee recently created by the U.S. Chamber of Commerce to coordinate lobbying and other efforts in behalf of reform, says that curbing tort system abuses "is the main road to solution of this problem."

The Chamber committee, he explains, was established as a catalyst to bring together the many interested groups seeking a solution to the insurance crisis. Among other activities, he points out, the committee operates a clearinghouse "to share information and to inform the public of the dimensions of the liability problem."

And the impact of the problem on the general public is much greater than is generally realized.

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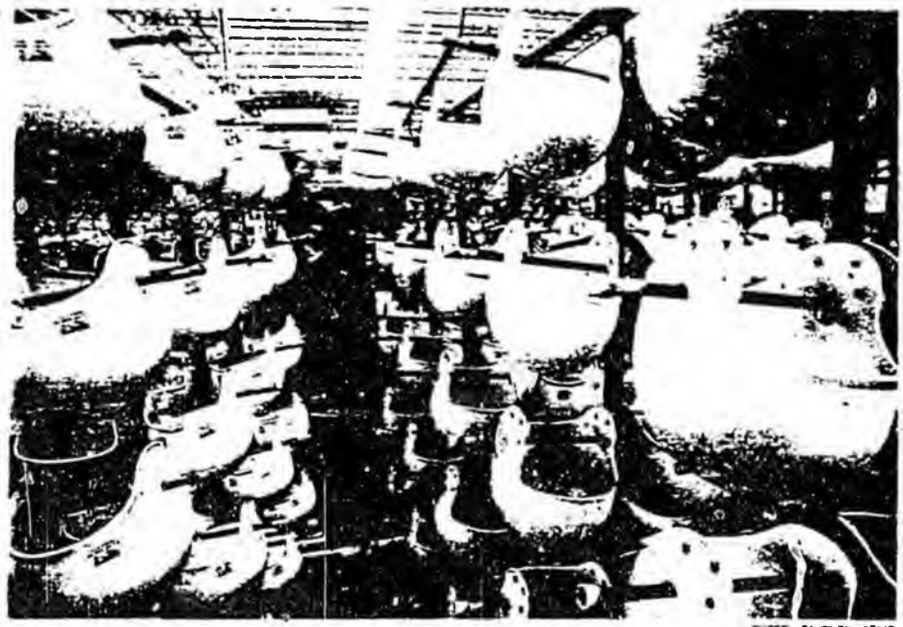

PHOTO: JIM RILEY—FOLIO

*Rick Berman, of Dallas' S&A Restaurant Corporation, heads a business group seeking state changes in the legal tort system and uniform product liability standards.*

PHOTO: C. THATCHER

Malpractice awards against physicians reached an average $950,000 in 1984, and the costs of liability insurance for medical practitioners generally are changing the way many of them approach their patients. The trend to defensive medicine involves additional—and often costly—tests and procedures by physicians concerned that failure to go those extra lengths could lead to allegations of negligence.

But the combination of higher insurance costs and defensive medicine is raising the nation's medical bills an estimated $2 billion to $4 billion a year, an expense being felt mainly by employers who provide health insurance to workers.

Consumers can no longer purchase the drug Bendectin, which had been the only safe and effective treatment for persistent nausea in pregnant women. The manufacturer took it off the market when liability insurance reached $10 million a year, more than 80 percent of annual sales. A nationwide shortage of vaccine to protect children from diphtheria and whooping cough developed when all but one of several companies manufacturing it halted production in the face of mounting liability insurance costs.

Insurance rate boosts are showing up in the price of goods. Twenty percent of the cost of a stepladder now represents the manufacturer's expenses for liability insurance. There is also an effect on employment. Of the 13 U.S. firms making football helmets a few years ago, only three still are. The others dropped out because of insurance costs.

Owners and managers of smaller businesses could face problems beyond the immediate question of insurance coverage, says Jan E. Smith, president of a Bradenton, Fla., business-investment firm. "If banks find a company has lost its liability insurance, they may start asking, 'What about those operating loans we made to that company?' And they may not renew those notes. Banks may require liability insurance before they will make a loan."

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In his testimony to Congress for the U.S. Chamber, William Wyer said: "Perhaps this crisis will reserve ultimately its harshest consequences for American consumers. When obstetricians withdraw from their profession, it is the quality of health care for all of us which suffers. When sporting goods manufacturers go overseas, it is the American worker who becomes unemployed.

"And when . . . firms announce price increases primarily to cover rising insurance costs, it is all of us who will pay more through higher prices."

The actual and threatened problems of the liability crisis have spurred a wide range of reactions by those most affected—individual business and professional people, their trade organizations, the insurance industry and the legal profession.

These are among steps being taken on the business side:

- Business people in all fields are shopping more aggressively for coverage by obtaining quotes from several brokers. They are also accepting higher deductibles and are self-insuring when they can afford to.
- Many businesses are hiring consultants to conduct risk audits and help them analyze their insurance needs more carefully. Consultants are also showing companies how to minimize exposure to large damage awards by keeping detailed records on product-safety management programs with an eye toward impressing juries if they ever face them.
- Some companies unable to meet massive premium increases or even to obtain coverage are, like Vernon Hayes of the Fort Worth machinery-manufacturing company, taking the ultimate step of "going bare"—operating without liability insurance and hoping for the best.
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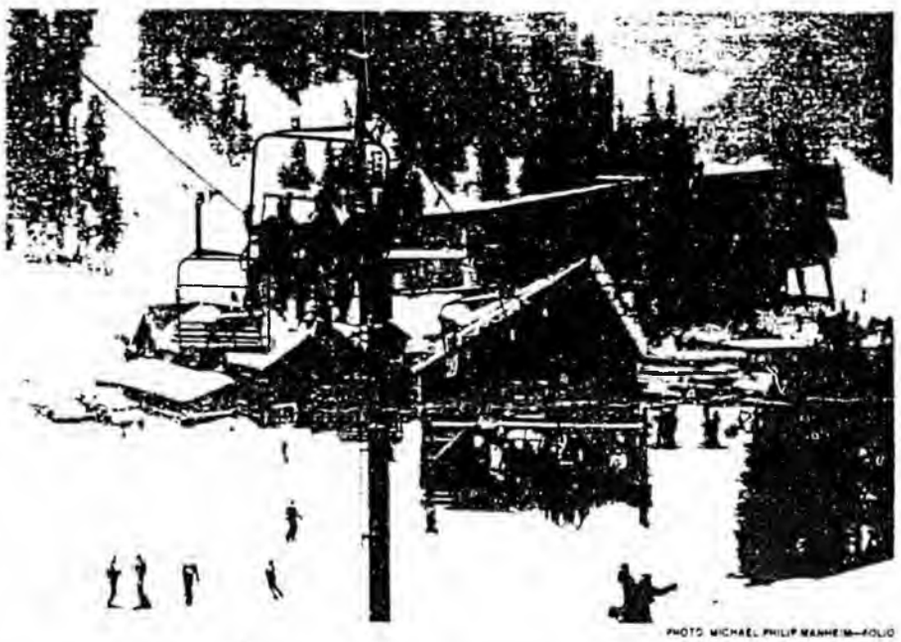

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The Insurance Information Institute says that 48 percent of the world's premiums are collected in the United States, followed by Japan, 13 percent, and West Germany, 8 percent.

Property-casualty insurance in this country, most of it written by 900 companies, takes in $118 billion in premiums, about half of it in personal auto and homeowner policies and half in business lines.

For two years, property-casualty insurers have had net operating losses. In 1984 the total loss was $3.8 billion; in 1985, $5.5 billion. Critics charge that those losses are overstated, but the industry denies that accusation, stating that 1985 was the worst year for insurance since the San Francisco earthquake of 1906.

The companies have been paying out $1.18 in claims settlements and expenses for every $1 they collected in premiums.

Of the payout, 88 cents goes for claims and adjustment expenses, 25 cents for sales and administrative expenses, 2 cents for dividends to policyholders and 3 cents for taxes.

Losses in some lines were much larger than the overall loss. General liability policies cost the companies $1.51 for every $1 they got in premiums. Commercial auto liability cost $1.42. Medical malpractice cost $1.61.

COVER STORY

# New Directions In Liability Laws

*Safeguards for business that are uniform nationwide—those are reformers' goals*

Product liability law in this country is a confusing patchwork. Only 31 states have statutes, and no two are the same. Congressional bills establishing uniform nationwide standards have been stymied repeatedly, with trial lawyers leading the lobbying.

The result is confusion for businesses, insurers and injury victims alike. A case that would be won in one state would be lost in another.

With lawsuits increasing more than 500 percent in a decade, courts have become clogged. Decisions are delayed.

Litigation takes years to run its course before victims are compensated, and then legal costs often take more than half the money paid in claims. A Rand Corporation study of asbestos liability cases showed that lawyers' fees consumed 63 percent of all damage awards. Since the 1950s the population has grown 60 percent, the number of lawyers 200 percent and the cost of the tort system, adjusted for inflation, 700 percent.

Although liability law arises from the tort system—a person who wrongs another must compensate him for the wrong—in recent practice it has been moving in new directions.

Questions of negligence and fault ("Did someone do wrong, and did it cause this injury?") have grown nearly irrelevant. Instead, courts have moved toward a concept of entitlement to injury compensation: "A person has been hurt, and somebody has to pay. Who involved has the deepest pockets?"

The judge in the celebrated Agent Orange case pressured the seven chemical company defendants to pay $180 million to Vietnam veterans and their families even though, he said later, he did not believe there was any medical evidence to support their claims.

In this effort to find compensation for victims, judges have created a doctrine of "strict liability." This means that manufacturers are responsible for more than doing their best to produce products without defects. They are also responsible for creating product designs whose usefulness outweighs all possible hazards, and they must foresee ways in which a product might be misused and warn against them.

*U.S. Asst. Atty. Gen. Richard K. Willard (left) blames lawyers and judges who have tried to compensate all plaintiffs at the expense of anyone with deep pockets.*

PHOTO: F. MICHAEL KEZA

The limits on manufacturers' liability have been steadily expanded.

Biro Manufacturing Company in Marblehead, Ohio, is being sued for a hand injury caused by a hamburger grinder the company sold 27 years ago. Originally sold to the Air Force, the grinder was privately owned and in commercial use when the accident took place. Its safety guard had been removed.

H.B. Rouse & Company in Chicago is being sued for injuries on a bench milling machine it sold in 1947. The machine, still owned by the original purchaser, was being used by a new operator in an obviously unsafe manner.

Business people generally want laws that assure a reasonable balance between rights of plaintiffs and defendants.

Some have proposed that product liability be removed from the area of tort and a new no-fault compensation system be created that would operate like workers' compensation. The system, supported by business taxes, would use administrative shortcuts to avoid courts, guarantee victims speedy relief from economic losses and protect manufacturers from suits.

Other business people, and the Reagan administration, see the answer in reforming present liability laws. A coalition of business groups has advanced the following as goals of such reform:

- A fault-based standard for judging the adequacy of product design and the appropriateness of safety warnings.
- A statute of limitations on the time period during which manufacturers can be held liable for a defective product.
- A standard limiting the number and size of punitive damage awards for injuries from a particular product defect.
- A standard requiring that damages reflect the extent to which plaintiffs contributed to their injuries.
- A clear presumption that government contractors are not liable for injuries resulting from equipment or systems that they have built to government specifications.

Sen. Robert W. Kasten (R-Wis.), author of the best-known reform bill, says enactment would "put money for injuries back into the hands of the victims rather than in the pockets of lawyers."

He says uniform nationwide liability standards, "by placing clear responsibility on people who make unsafe products, will bring about the manufacture of safer products . . . and do so without one cent spent for additional regulation."

*—Harry Bacas*

ROBERT J. SAMUELSON

# The Lawyering of America

We are now seeing the glimmers of a new legal crisis in America. It arises from the clamor over liability insurance and a vague unease that lawyers are exercising too much influence. The United States now has more lawyers (an estimated 625,000 of them in 1985) per capita than any other major nation. Since 1950, their numbers have grown twice as fast as the population. But our sense that lawyers are meddling too much sits awkwardly with the great American faith in law as a remedy for almost any ill. Or, as one book a few years ago put it, "Sue the B*st*rds."

The key to understanding this confusion—if not entirely dispelling it—is to grasp a basic truth. Lawyers and law firms are businesses, and their business is conflict. Creative lawyering often means exploiting or creating conflicts. Just as companies develop new products, so lawyers search for new legal theories on which to sue. Rights of action are lawyers' markets. But their economic self-interest—their legal innovations—may subvert their social usefulness. The civil-justice system's essential purpose is to resolve conflict, not to excite it.

**The big danger is becoming an overly cautious, rigid society**

It's often a pretense that lawyers represent other people's grievances rather than their own economic interests. There are thousands of cases where lawyers, not their supposed clients, are the main aggressors. In the early 1980s, for example, many new "high technology" companies sold stock to the public. Many of these admittedly speculative stocks subsequently collapsed. Now there are dozens of suits against these companies, their officers, accountants and insurance companies alleging that investors were misled. But the suits have been brought by a few law firms on a contingency-fee basis. The lawyers—who typically take 30 percent or more of a settlement or damages—stand to win the most.

Of course, a rising tide of lawsuits is not the only reason for more lawyers. Greater government regulation, complicated tax rules and expanding international business have all contributed. But the growth of lawsuits also has a big multiplier effect. It requires defense lawyers and lawyers to advise people and companies how to avoid being sued. Consider the evidence of more litigation:

- Since 1970, membership of the Association of Trial Lawyers of America has nearly tripled, to 60,000. (In the same period, all lawyers rose 90 percent.) To belong, half a lawyer's work must be representing people in personal-injury cases.
- The number of product-liability cases filed in federal courts has risen from 1,579 in 1975 to 10,745 in 1984. Although most cases are settled before trial, the volume of jury awards in product-liability and medical-malpractice suits roughly tripled between 1975 and 1984, says Jury Verdict Research Inc.
- Since the mid-1970s, suits against officers and directors of public corporations—from shareholders, employees, customers and others—have more than doubled, according to The Wyatt Co., a Chicago actuarial firm. Many of these cases are contingency-fee cases.

To be fair, the liability-insurance mess—complaints from doctors, cities, consulting engineers, day-care centers and others that insurance is too costly or unavailable—is not entirely the doing of lawyers. The insurance industry bears much of the blame. A few years ago companies lowered premiums to compete for business. They expected to earn lush profits by investing premium income at high interest rates. Declining interest rates wrecked that gamble and, combined with steep insurance losses, triggered premium increases and coverage cutbacks. But the insurers' blunder only mitigates the role of lawyers.

**Side effects:** If courts adopt expansive liability doctrines, then the costs—not just insurance—will be huge. The gravest danger is becoming a precautionary society. Unintended side effects are already emerging. The threat of suits has driven some drug companies from manufacturing vaccines; consulting engineers now refuse to work on hazardous sites for fear of suits. Companies are losing outside directors for lack of liability coverage. As attorney Peter Huber argues, courts deal poorly with the full social effects of products, like vaccines, whose public benefits overwhelm the risks. Courts see only mistakes. "Beneficiaries of risk-reducing products . . . do not litigate," he writes.

Stating the problem is easier than solving it. Lawsuits are an important discipline on corporate and individual irresponsibility. They do compensate victims. There is no neat dividing line between too much or too little liability. But we can impose self-restraint on the legal system by treating lawyers for what they are—businesses. We need legal rules with proper economic incentives. In damage suits, the losing side should always pay the other side's legal fees. This would deter weak suits by reducing the pressure for expedient settlements that are less than the cost of litigation. And a losing defense would ultimately pay if its delays ran up the other side's costs.

These common-sense ideas strike many lawyers as radical. They aren't. One inevitable complaint is that having losers pay would make it tougher for people of modest means to bring legitimate cases to court. This is nonsense. The reality is that the contingency-fee lawyer is already financing these cases. Strong cases would be more attractive under this system, because—aside from the contingency fee—the lawyer would also recover costs. But weak cases would be less attractive (the losing contingency-fee lawyer would pay the other side's legal fees), and they should be. The system exists to settle conflicts, not to generate lawyer caseloads. In a subtle way, commercial interests of lawyers now corrupt the law.

So let the lawyers grumble. If the current insurance mess leads to any good, it will be renewed political interest in our legal system. And that is as it should be. To paraphrase an old cliché: law is sometimes too important to be left to lawyers.