ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

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Alaska House of Representatives

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To: Representative Don Clocksin January 8th, 1986

From: R.L. Cole RLC

Subject: Briefing Memo; National Conference of State Legislatures;Denver Meeting on Insurance Availability and Pricing, January 4th, 1986

Following is a summary transcript of the proceedings at the meeting in Denver on Liability Insurance. Well over three hundred people attended this meeting, including elected representatives from virtually every State and Territory. Both sides of the issue were eloquently represented. Most of the workshops were in a debate format between a representative from the "Tort Reform" school and a representative from either the Trial Lawyers, an Insurance Commission or Consumer group. I thought the Conference was well organized and substantive.

SUMMARY OF CONFERENCE PRESENTATIONS:

Presentor: David Childers, Commisioner of Insurance, Arizona

Main Points:

1. The Insurance Companies do in fact have a financial problem.
2. Insureds are being asked to solve that financial problem with premium rate increases that are often unreasonable.
3. The insurance companies see the problem as one of an "Oppressive" Court system.
4. Some Insureds are pressing State Legislatures for relief through restrictions on premium rate increases, Insurance companies ability to terminate coverage etc., and believe that Insurance Companies have fabricated the problem.
5. 1980-1984 Insurance Industry losses exceeded 5.5 Billion.
6. In 1985 Industry losses have already been 6.25 Billion thru the first three quarters.Looks like there will be a 24% increase in premiums during the 4th quarter alone.
7. Rapidly increasing stock prices for Insurance Companies will be a major factor in a turnaround.

8. The Insurance Regulatory Information System indicates that about one out of every six Insurance companies is experiencing severe financial problems.(I think he meant in the State of Arizona) He also expects more Insurance Company insolvencies.
9. This man made a point about watching out for the wellbeing of "State Guaranty Funds" that I didn't understand. Will try to clarify this point.
10. Between '79 and '84,the Insurance Industry practice of "Cash Flow Underwriting" was a form of gambling,that obviously did not pay off either for the Insurance Industry or consumers,in the longer run.
11. Insurance companies should not try to make their underwriting losses with premium increases in one year, which they are trying to do. (Witness the huge increases in premium costs.)
12. Insurance company stock prices are going up rapidly,which should help resolve the problem of shortage of Capital,bring new interests into the market,create more competition,and ultimately resolve the problem,except for prices,which will probably not experience sharp decreases any time soon.
13. Options for States to pursue include:
    a. Arizona; Market Assistance Programs in the State Insurance Office assist different types of businesses to find insurance. In Arizona they found that availability was not as broad a problem as they had originally thought. They were able to find insurance coverage for most classes of insureds, including Day Care Centers. The private agents fell down on the job in his opinion, by not working hard enough to find coverage for their clients. This program operates as if the State was it's own brokerage firm. They have a toll free number for people to use to reach the State office for information about the availability of coverage. Similar programs are in place in New York for Municipalities, and in California for Day Care Centers.
14. Other options include :

Premium Tax Credits

Cancellation Legislation (as in Arizona) Which would force companies to give 30 to 60 day notices before they could cancel any insurance.

Legislation to enact restrictive definitions of "Unfair Trade Practices"e.g.,Insurance Companies not being able to cut people off or raise premiums in the middle of the premium year or without ample prior notice,etc.

Joint State Underwriting Authorities (e.g.California and Arizona) requiring Insurance Companies to write certain coverages in one State if they want to do business in another.

Assigned Risk Plans

Pooling (e.g.California and Arizona pooling their coverage for Schools and Municipalities)
Expansion of Risk Management Functions for all Political Subdivisions to control exposure and losses.
Mediation and arbitration (I think he meant for the States to mediate and arbitrate between insureds and the Insurance Companies on premiums,availability,levels of coverage, etc.)

15. The Insurance companies see the current business downtown as a "Window of Opportunity" for "serious" Tort Reform. He is not sure this is the answer. Punitive Damages are not a serious economic problem for the Insurance Industry. The one area you might want to look at is "Joint and Several Liability". He also said something about "Courts of Claims", which I did not fully understand. (Will try to clarify).
16. Lastly,he said,..."DON'T OVERREACT!" Encourage your Insurance Division to FULLY ANALYZE the situation of your state before plunging ahead.

Presentor: James Cocoran; Superintendent of Insurance, State of New York

Main Points:

1. Holding Companies,who are short term thinkers,are running the Insurance Industry in the U.S.
2. If you enacted the entire "Tort Reform" package being demanded by the Insurance Industry,it wouldn't solve the problem!
3. Interest rates and "Cash Flow Underwriting" are the reasons for the problem.
4. Insurance companies have NOT been "Constructive Contributors" to the resolution of these problems.
5. Now we need new Capital in this business and State's need new powers to regulate the Industry.
6. Insurance companies should get back to being Insurance Companies. Holding Companies are milking off Insurance profits to use for other purposes,thereby exacerbating their Financial problems.
7. The States need expanded Data processing capability in their Insurance offices in order to be able to collect enough information to control Insurance Industry Unfair Trade Practices and control rates In past years premium rates often should have been raised,in order to forestall Industry cashflow problems and avert the cancellations and preciptious rate increases we are currently seeing. The Insurance Industry has NOT been helpful in suggesting new regulatory tools to avert these problems in the future.
8. "Tort Reform" should be looked at,but it is not a solution to the problem.

9. There needs to be expanded regulation of the Industry by the States.
10. "Claims Made" insurance forms are NOT a solution;they increase the frequency of lawsuits!
11. "Pooling" might be a partial solution to the problem.It will hurt the traditional Insurance Industry,because once people get out of the traditional Insurance market,they are not likely to return.Alternative markets WILL be created by this crisis and it will change the face of the American Insurance Industry.
12. If you establish Municipal Pools (Or Pools for any Government entity for that matter),You have to be sure that they are not subject to Political pressure and raked off for appropriations for another purpose.Insurance pool dollars are not a substitute for Tax Revenues!!
13. This is not just another cycle in the Insurance market in the U.S.,it is a "Sea change"
14. There are no quick solutions.
15. Use Assigned Risk Plans to solve your Availability problems and let prices float.
16. There is NO CRISIS IN DAYCARE!!!the Insurance companies are making money on Daycare coverage.
17. Coverage for Municipalities is also economically O.K.,the Insurance Companies are making on it..
18. There is NO JUSTIFICATION FOR CANCELLING whole lines of Insurance,based on actuarial data.Insurance Companies need to go back to being underwriters of risk and (sic) get out of the business of being "Money Managers" (As their first interest). Insurance companies are getting killed on the "Big Stuff" (Of losing billions on their investments,not on Tort Claims)..
19. States must expand their Insurance Division powers and capabilities.

Presentor: Thomas Chittenden: General Counsel and Vice President; American Insurance Association, New York

Main Points:

1. (See: the Industry's "White Paper" in your folder for the basic Industry view.)
2. Availability is a problem but "good beginnings"have been made in dealing with it.Please don't panic into "Draconian Measures".(Legislatively)."Panic Legislation is Bad Legislation."
3. The Insurance mechanism is only partly amenable to State Legislative and Regulatory control.Our system is "Worldwide".It is a "Free Market" system,involved in International Finance.States can only get hold of the "Front End" as States.
4. There is some truth to the charge that the Industry is partly to blame for the current "crisis" because of underpricing during the past few years.

5. "Tort Law" has become a "Social Insurance System",and one that is beginning to DETER desirable conduct.A thorough reexamination of the Tort Law system is desirable. Excesses must be addressed now !!
6. I do not believe that the Tort Law system was the sole cause of our current problem.(However) last year the Industry had a pre-tax operating loss of 4 Billion and the reinsurors losses were even higher.
7. These losses came about mainly because of cases like: Jackson Township, New Jersey, where the courts ignored the Pollution Exclusion in the Township's Insurance policy.
   Minnesota,1984;..A sweeping "Little Superfund" law set up presumptions (of Liability) regardless of causation.
8. American Society's expectations of Social Welfare and Expanding Rights have frightened the reinsurance Industry. A crisis would have occurred no matter what. There have been increased costs for all forms of Liability.
9. DO'S AND DON'TS:
   Make sure you know about availability, use the "MAPS" program.
   Do not enact "Mandatory Coverage".
   Take care that any mechanism you set up is temporary and that premiums are adequate.
   Do work with your Insurance Commissions on reasonable regulations.e.g..constraints on non-renewals and cancellations.
   Enact a package of Tort Reforms to cut costs and reestablish confidence;
   Several Liability
   Repeal Collateral Source
   Limit Punitive Damages
   Re-establish "Best Professional Practices" Defense
   Put a ceiling on non-economic damages (e.g.Michigan and Ohio)
10. Competition and Free markets will take care of the current down "Cycle".However,it may be that new tools can be found to handle "excesses"(e.g.Insurance regulations to control underpricing).
11. Broader Implications of Tort Reform.Tort Law has a role in shifting losses from the innocent to the negligent. However it has been stretched into an inefficient Social Welfare system.It doesn't give the money to the victims.It is neither fair nor efficient.Study the Tort System. Support basic research into how it actually works.

Presentor: William Titelman; Legislative Counsel;
Pennsylvania Trial Lawyers Association

Main Points:

1. "Tort Reform" will have no significant effect on Liability Insurance costs for at least five years,if at all.It will not affect cases already in the Courts.
2. Pennsylvania in 1978,passed the most restrictive Municipal Liability Law in the country,including a Cap on awards, and the elimination of pre-judgement interest.The passage of that law has had NO IMPACT ON COSTS in the State of Pennsylvania.
3. The proposed "Tort Reforms" are not even specific to the problems faced by the Industry. The Industry wants major, sweeping changes in the Tort Law system instead. Passage of the Industry's "Tort Law Reforms" will not bring about the changes in Insurance availability and affordability that your constituents want.
4. The negligence system depends on fault.Liability is defined narrowly.No one wants to go back to the old days on issues like product liability.
5. There has been no dramatic shift in Tort Law in recent years, nor has there been a massive increase in lawsuits. (See:Titelman's Paper)
6. Belanger, in the UCLA Law Review,did a study on the presumed increase in Litiginous behavior on the part of U.S. citizens and found that they sue on an average of 44/1000 (suits to citizens;don't know time period),about the same frequency as people in Australia and England(and other Western countries).
7. The American Bar Foundation did another study and found no long term pattern of increased litigation in the Federal Courts.
8. In Pennsylvania,the rate of increase in suits filed has been about 1% a year .For Personal Injury cases,there has been no difference in the rate of filing since the 1970's. Tort Law is an almost perfect mirror of the evolving values of a society.
9. You should also look at a Rand study published in the National Law Journal,November 11,1985,for evidence on the rate of cases filed.
10. STATES NEED DATA before they leap into any changes either in Tort Law or in Insurance Regulation.DEMAND THE DATA.
11. There are more Dram Shop Cases being filed because Social Values have changed.
12. The cost of paying Liability Claims has increased at about the same rate as inflation.
13. The Pennsylvania Medical Society and Hospital Association did a study on the cost of Medical Malpractice.They found a pattern of cost increases that reflected both inflation and "Pseudo-growth",that was reflective of the "tails" of Liability involving cases where negligence occured in prior years,but where the cases were being filed in court in later years.(This is a statistical phenomenon. Assume

for example that 100 cases of Medical Malpractice occur in a given year.It will take a number of years for those cases to be filed in court.If 100 additional cases occur in each subsequent year, the same pattern of filings occurs. With the passage of each successive year the number of filings increases because of the cumulative effect of occurrences.Titelman's paper includes a chart that displays this phenomenon graphically.)

14. Lawyers don't oppose Structured Settlements.The problem is in making them mandatory.Each settlement should be tailored to the particular circumstances of the individual case. The purpose of the "Tort Reform Advocates" version of "Structured Settlements"is to hurt clients by cutting costs.
15. (Read Titelman's paper on the Insurance Industry) The Insurance Industry has come to act more like Investment Bankers than Insurance Underwriters.Many Insurance Executives are isolated from concepts of Underwriting. They want to be Bankers, that is; Money managers.
16. Why is this particular cycle worse? Because the U.S. no longer controls the World Economy.Lloyd's of London reinsurance policy is affected by the international monetary exchange rate.Since the exchange rates have become more favorable (The Pound in relation to the Dollar), their Reinsurance capacity for U.S.Insurance is expected to rise by 40% this year alone.
17. States need to look at becoming reinsurors themselves; Self Insurance;Pooling;and strengthening State Law on Insurance Industry Accounting Practices and Reporting Requirements, for answers to the problems of Availability and Affordability.

Presentor: Gustave Shubert; Director; Institute for Civil Justice; The Rand Corporation

Main Points:

1. The American Civil Justice System is a broker for a multitude of needs.It determines how the "Free Market" works in this country and interprets Society's changing values of justice in a multitude of ways.The Civil Justice System has been ignored by researchers until very recently.
2. There is a real crisis in Insurance Availability and Affordability and we waited too long as a Society in seeking solution.We run the risk of using a large hammer, with little information,on a complicated problem.
3. The Civil Justice System has conflicting goals; Social Justice, Victim's rights, Good Business practices, etc., Everyone is affected by the Civil Justice System. There are no MAGIC BULLETS that will resolve our problems.

4. The Rand Corporation Study of the American Civil Justice System looked at three main areas:
   OUTCOMES: Trends and Patterns
   COSTS: What?Who?Distribution?
   PROCESSES: Were they Understood? Were they Optimal? Did they need Improvement?
5. Staff members from the Rand Corporation that worked on this study are available to testify before State Legislative Committees.
6. Since it was deemed impossible to evaluate the entire American Civil Justice system we had to look for Jurisdictions that were both willing to participate and that had a Data System that had enough information to allow evaluation to occur.No one had ever looked at the Courts before in any systematic way.In most jurisdictions there was no data on Juries (their composition,actions taken and size of awards for example).
7. Most of the data in our study is taken from the Cook County and San Fransisco County Courts from 1959 to 1979. We are still gathering and analyzing it.We also have data from the entire State of California Civil Court system from 1980 to 1985 and will be collecting that data on an ongiong basis.
8. There is no simple answer to the question of the impact of juries on the size of awards.The Cook County and San Fransisco County jury data was similar:MEDIAN AWARDS REMAINED FLAT OVER TWENTY YEARS.In Cook County the median award was $ 8,000 (Eight Thousand Dollars) and still hasn't changed.However, toward the middle of the period, some awards got bigger.In the top ten percent of cases, involving Medical Malpractice,Contracts and Suits against Governments, the ratio of Plaintiff Wins increased from 1/4th to 1/3rd and the Dollar amount of awards went up.The current ratio is about 50/50 Plaintiff/Defendant Wins.
9. Also: There was an increase in the ratio of the dollar amounts awarded as opposed to the dollar amounts claimed in the initial suits.(That is;Juries tended to award something closer to the amount requested than they had in previous years) apparently partly because of the application of "Pre-Judgement Interest".Rand has recently advised the Illinois Legislature on the impact of Pre-Judgement Interest in Illinois cases.
10. CIRCUMSTANCES affected the size of jury awards in the Cook County Courts.Awards for Workplace Injuries were,on the average,Three times as high as those for other accidents.
11. RACIAL CHARACTERISTICS were also a key determinant in the size of Jury awards.Minorities both win and/or pay less frequently than others.They also receive/are assessed less money than other cases.
12. There is little data yet available on the impact of Punitive Damages on the size of jury awards in the study.

13. We will soon be able to tell whether there was a difference in the size of Jury awards by the size of the Jury.(e.g. whether it was a six or twelve person jury)
14. We are also looking at the impact on Defendants,Insurors and Plaintiffs of "Joint and Several Liability",but that data is not ready yet.
15 We should focus our attention on the Tort Law on where the problems are:
    Medical Malpractice
    Contracts
    Product Liability
16. COSTS:
Public Costs: It is estimated that the annual Tax Costs of supporting the U.S. State and Federal (Civil ?) Courts is about 2.2 Billion Dollars.
Private Costs: An example of Private Costs is Asbestos Litigation.Assume that the typical case costs 95 Thousand dollars.Of that amount,35% goes to Defense Lawyers,Claims Adjusters and Managers.26% goes to the Plaintiff's Lawyers,and about 29% goes to the Plaintiff.(10% apparently goes elsewhere)
17. There is a real inadequacy of resources going to the Civil Justice system, especially in the area of Data gathering and Information Systems.
There is a real imbalance in the ratio of Public and private resources within the Legal Profession.Judges get paid the least.
18. PROCESS;We found the process of the Civil Justice System to be characterized by congestion and delay.In L.A. it takes 3-5 years to get to court.This drives up costs, especially because of the application of "Pre-Judgment Interest".
19. There has been no "EXPLOSION" of Litigation in the jurisdictions we studied.The only increase in the number of cases filed has been in proportion to the increase in the sheer size of the population.Otherwise,the number of cases filed is in the same proportion as during the era of WW11.
20. The number of Judges assigned to the Courts is probably less important than their Quality.
21. Organizational problems in the Courts may inhibit the Court's productivity.
22. The real cause of the delays in the Courts is that the COMPLEXITY of cases has radically increased,especially in the areas of Civil Liberties,Product Liability and First Amendment cases.The Courts haven't been able yet to adjust to the changes in complexity of cases.They should split out the routine from the non-routine cases.Changes in Docketing practices is one way to do this,which is being implemented in California.
23. Rand has a manual available for the asking on "Mandatory Judicial Arbitration",which is being tried in California, Illinois, and New Jersey. In those States,people are delighted with the system.

24. UNINTENDED CONSEQUENCES of the way our Courts now function, include; the average Jury trial in State Courts costs about $8000 . It takes up to five years to get to trial.As a consequence many cases are not being tried at all. An alternative is needed.
The System provides Compensation on an unfair,irrational and arbitrary basis. For example in the current Asbestos Litigation,there are Thousands of cases;Hundreds of Thousands of man-years; and Millions of Dollars of costs. In many cases, Plaintiffs have not even been injured; there is no attempt being made at individualized justice; the Rules are inconsistent; there is mass processing of cases and an average of 20 Defense Firms involved in each case. The System is not working very well in this instance.
25. We have also done a study on the impact of "Tort Reform" on Medical Malpractice cases. We have found that the impacts are: Fewer Filings; Cases are more likely to be dismissed; Cases are more likely to be settled out of Court; The probability of Victim Wins is lower; Awards to Victims are lower. (Copy of this study is on it's way)
26. The concepts of a simple civil justice system and a system that can compenstate for all injured parties are incompatible. There are no easy answers to our Insurance problems.
(Note: I have ordered copies of the Summaries of the Rand Studies for us to use.They are in the mail.)

LUNCHEON DISCUSSION:

Presentor: Mavis A.Walters; Senior Vice President; Insurance Services Office,Inc.; Washington,D.C.

Main Points:

1. Insurance Services Office Inc. is a technical services that serves the Industry nationwide.
2. During the past year,the Insurance Industry in the U.S. paid out $118 in Claims,for every $100 in premiums collected. 1985 losses will be even greater.
3. The "rate of return" for the Insurance Industry nationwide in 1984 was only 1.7%.50 out 0f 100 Insurance Companies in 1984 experienced a negative return on net worth.
4. There is an increase in investment Income to the Insurance Industry this year as premium growth is up 21% and stock prices are rising.However it is important to note that Stock Prices ANTICIPATE better future results rather than guarantee them!!

5. Inadequate past pricing was not the only cause (of Insurance company financial problems) Many companies were also wrong about their investment decisions and anticipated returns.
6. In 1985, we anticipate losses Industrywide to be close to 13.6 Billion dollars.
7. We think that much of our losses were due to Court interpretations of Policy Language to cover incidents that were never intended to be covered and Excessive Consumer expectations of Litigation.
8. The Industry is introducing new "Claims Made" policy forms designed to help solve the problem,by limiting Liability coverage to the actual time period paid for by the premium.
(Note:This eliminates the "tail" of Liability on the part of the Insurance company in years subsequent to the exact year for which the Insurance was purchased.There are those that think this is a very poor idea in that it will INCREASE the number of claims filed, and mean that people will have to buy liability insurance in subsequent years even though they may be out of their professional practices or their businesses. For the time being the concept has been rejected by the State of Alaska's Insurance Division.) The Industry hopes that the new forms will be approved for most jurisdictions soon.

Presentor: Robert Hunter; President; National Insurance Consumer Organization; Virginia

Main Points:
1. The Insurance Availability and Affordability "Crisis" we are enduring now,is a standard, typical Insurance economic cycle. The real rates of return for the Industry for 1984 are more like 6% to 7%, rather than the 1.7% quoted by the Industry.
2. This year alone, the Industry has enjoyed a 25 Billion dollar premium increase cash infusion into their accounts. In addition, their stock prices are rising at a rate twice as high as the Dow-Jones for stocks in general. Wall street is not fooled by this short term cyclical downturn. If we wait for one more year, the problem will solve itself and we won't have to have another meeting like this until 1995, when the next cycle occurs.

3. (On the matter of the appropriateness of Insurance companies as we know them today being able to satisfy Society's need for protection from risk): "Competition" will not help the Day Care Centers or the Nurse mid-wives get Insurance at affordable rates. There have been 71% premium increases for far less coverage in the recent past for these and similar professions.

4. The 1984 number quoted by the Industry for their profitability is a phony number.It ignores Capital Gains and Income Tax Credits.
5. We may need Tort Reform,I don't know.But in the past when we had to deal with issues like this we had data.(e.g. on no-fault Auto Insurance).In this instance we have to rely on the Insurance Industry to provide the data to be analyzed. However, they control the data and won't turn loose of it. Without the data you can't know what's happening.
6. The Insurance companies are offering NOTHING in return for "Tort Reform".Further,you should ask them what would happen if you passed their entire "Tort Reform" package, would your costs be reduced?
7. States need to upgrade their Insurance Departments competence levels. There are a lot of unsubstantiated assumptions being made about the setting of rates. They are based in part on a lot of guesswork. We need an institutionalized presence to challenge the insurance industry. We need Public Advocates to participate in insurance rate setting cases. We need annual reports from the Industry that provide information in far more detail than they now do.
8. If you want to change laws, think about changing:
   Anti-group laws
   Anti-rebate laws
   Re-insurance laws

   Also: Move toward "Insurance Independence": That is; get out of depending on Lloyd's of London and other foreign exporters of re-insurance.

Presentor: NCSL Film on "What Legislators need to know about Medical Malpractice". There is also a handbook available on this topic. The film is available for loan for the asking.

Main Points:

1. The purpose of Medical Malpractice Insurance is to cover Negligence and to provide victims relief for the costs of Medical Care,Pain and Suffering and Impairment.
2. Between 1979 and 1983,there was a 31% increase in the premiums for ObGyn's and Surgeons.However,there is no uniformity in premium rates.A Policy that costs $1200 in Indiana costs $12500 in New York.
3. The criticisms of the System of Civil Law as it relates to Medical Malpractice are that:
   The Courts are slow, costly and unfair.
   Only 1/3rd of premiums paid end up in the pockets of injured parties.
   Awards for Non-Economic damages is highly unpredictable.
   Large settlements have often been overturned on appeal.

4. Have we "terrorized" Doctors and Hospitals? Is the legal system dictating medical judgement and practice? The Tort system forces the Medical profession to practice "Defensive Medicine" at an estimated cost of 15 Billion a year.
5. The rejoinder is that some of the increased service is exactly what the Courts had in mind and intentionally forced to occur with precedent setting awards and settlements.
6. Some of the alternatives that have been tried to resolve the Liability issues within the Medical Profession Include:

"Non-Binding Arbitration".....Inadequate Compensation?

"Binding Arbitration".....Inadequate Compensation?
Give up right to Jury Trial
Some State Courts have over turned.

"Caps on Pain and Suffering".....No limits on actual damages
Most cases already have moderate P/S awards?
Will hurt victims on exceptional cases?

"Collateral Source Rule"

"Structured Settlements".....Will cause higher admin. costs?
The Insurance Company gets the Interest ?

"Contingent Fees".....Makes Attys.work for hi awards? Drives up Costs?

7. The basic data on malpractice incidences and awards is in the hands of the Insurance companies.The States have limited Insurance Company Reporting requirements.Make them open up their data to you. YOU NEED THE DATA IN ORDER TO MAKE AN INFORMED DECISION ABOUT THESE ISSUES.
8. A small number of individuals create most of the Medical Malpractice claims. States should require that when claims are filed against Doctors,that information goes immediately to the Medical Examining Board, and that when the Courts make a negative ruling on a Doctor, that the Medical Examining Board review his/her license. States should expand immunity for Medical Examining Board members who review Licensure and for witnesses in Licensure re-examination cases.
9. Lots of States set up "Pre-Trial Screening" systems in the 1970's.A lot of those of same states have since abolished them. In some jurisdictions,they've been thrown out on Constitutional grounds.
10. The Organization of "Pre-Trial Screening" systems has usually been set by Statute;staffed by Doctors and Lawyers; Funded by the States thru the Court Systems; with Compensation levels set by Statute for different

kinds of occurences. (Look at the Indiana model for one that's still functioning.)

11. States might want to look into establishing penalties for Spurious Defenses! (No one's yet doing it,but it's an intriguing idea.)
12. The Rand Corporation says that based on it's study of the impact of the California Medical Malpractice "Tort Reforms" that the Reforms did in fact reduce the number of cases, the number of claims and the size and number of awards. It is unclear however,at what cost to victim accessibility to the Courts.

Presentor: Josephine Driscoll; Commissioner of Insurance; State of Oregon.

Main Points:

1. During the period of "Cash Flow" underwriting in the period from 1974 to 1979; premiums were too low and Investments were poorly managed by the Insurance Industry. Some of those companies have become insolvent as a consequence.
2. Insurance Companies must return to (a primary mission) of Underwriting Risk and raise their prices to cover actual costs.
3. State regulators were not responsible enough during the "Cash Flow" years. Regulators allowed prices for premiums to remain too low for too long and (When the downturn came) allowed consumers to get hurt with precipitate price increases.
4. (Made a statement about "Scheduled Credit Limitation" which I didn't understand.)
5. Most Insurance Commissions have the power to Hold Administrative Law hearings on rates but not the power to change rates retroactively.
6. Should States have prior approval on rates? There are those that believe that Competition is in the best interest of the Consumer.
7. Insurance Companies should return to rates based "Cost-based Pricing" and Risk Sharing.Rates should be based on projected losses and supported by actual loss experience of insureds. Regulators should be certain that excessive profits are not allowed.
8. Regulators need to be able to control "Questionable Business Practices" on the part of the Industry including; Mid-term Cancellations, Mid-term price Increases, Mid-term Cuts in Coverage, Excessive Renewal premiums and Unwarranted Withdrawal from various Markets. Day Care Centers in Oregon were cancelled but the actual claims did not support such an action by the Industry.

9. There is a "Market Conduct" analysis of Insurance Company behavior in the Western Zone of the U.S.,being Prepared by the National Association of Insurance Commissions. (We need a copy of this.)
10. There are companies that are trying to use the current crisis to build profitability at the expense of consumers. We should not allow Mid-term premium rate increases and we should demand "Just Cause" for non-renewals.
11. Liquor Liability Insurance is not available in Oregon.
12. Proposed Solutions:
    Have Companies voluntarily form "Joint Underwriting Associations" (I'm not clear what this would do.)
    There is a Program being established by the National Association of Insurance Commissions (NAIC)and the Insurance Service Organization (ISO) in Kansas City Missouri, Which will be a National Clearinghouse for information on unavailability of Insurance for all markets.
    The Trade Association Has agreed to assume the coverage for the short term.(Will check this to see if it means they have agreed to pick up all risks until solutions are forthcoming)
    The Trade Association realizes they must be a part of the short term solution.
    Regulators are determining whether there are other solutions.
    Many States are considering adoption of "Claims Made" Insurance forms and inclusion of Defense Costs (In the Premium rates?) Costs to Insurors for Defense is very high.
13. The Insurance Industry in the U.S. is at a crossroads. Recovery cannot be realized by having the consumer bear the entire cost. Insurance Department resources are available to help solve these problems.

Presentor: Steve Korta; President; State Risk and Insurance Managers Association

Main Points:
1. This presentation mainly has to do with how to handle the States own Liability Insurance problems through Risk Management.
2. In order to understand your States individualized Risk posture, you'll need to become a Risk Specialist to some degree in you own right. Look at the Budgets, Size, and Mission of your States Risk Management Division. Also examine the organizational structure of it and others in the other States.
3. DON'T BE FOOLED THAT YOU ARE SELF-INSURED IF YOU DON'T HAVE ADEQUATE RESERVE FUNDS! (Which Alaska does NOT have, they were taken for other purposes in past years.)

4. There is no uniformity to the solutions States may adopt to handle their own Risk Management problems. They will depend upon your individual circumstances. You should attempt to figure out the best mix of self insurance and commercial coverage to fit your own needs.
5. It is however important for you to structure your State's program so that agencies of State Government are handled by frequency of events within each agency. You should find out where the Control Points are within your particular Government.
6. In order to enhance your State's Risk Management posture you should examine the Powers and Duties of Your State Insurance Commission, the possibility of Interstate Compacts; Inter-state sharing of Risk,Interstate Self Insurance and inter-state Regulatory and Informational exchange.
7 This is a complicated issue and needs lots of study before you make substantive changes.With Interstate cooperation and Consultation, the National Conference of State Legislatures might be a good lead agency to help States resolve these problems.
8. This issue (of Insurance Availability and Affordability) has all the elements of a good Political issue. Powerful Interest groups are opposition to one another, Major voting blocks need relief and there is Lots of Money involved.

WRAP-UP SESSION:PANEL DISCUSSION: Representative Lee Daniels; Illinois: Senator William Golden; Massachusets: Senator Dick Posthumous; Michigan and Michael Bird, National Conference of State Legislatures; Washington, D.C.

Presentor: Representative Lee Daniels

Main Points:
1. In April,1984 at the demand of 4000 Doctors, the Illinois Legislature passed PA 84-0007, The "Medical Malpractice Act". More recently the Cook County Court has held it to be unconstitutional and it is now waiting on expedited appeal to the Illinois Supreme Court.
2. The Bill included:
   Pre-Trial Screening Panels (Non-mandatory)
   Sanctions against Losers who took cases to Court after the panels recommended that they not do so and then lost their case in court.
   Structured Verdicts
   Itemized Verdicts
   Collateral Source
   Non-Involvement Certification
   Allowance of some Countersuits
   Contingent Fee Limitations (Trial Lawyers agreed to this)

Banned Punitive Damages
Certification of Witnesses
A "Crackdown" on the regulation of Doctors (as a "Quid pro Quo".)

3. Some of our Tort Reform concerns were triggered by such things as:
A pending eight million verdict against the City of Chicago for an injury on a School Playground even tho the Mother was present with the child but had wandered off and was not properly supervising her child.
A California case in which a DWI offendor ran off the road, hitting a man who was in a telephone booth. The Man in the booth sued and even the designer of the Telephone Booth was held liable.
A case filed in Denver,in which a Son sued his Mother for 150K, for injuries received in an Auto accident when his mother was driving.
4. Higher Premiums have been put in place by the Insurance Companies to protect profits.
5. If you go to a "Claims Made" Insurance form,it means that you can never drop your Insurance,even if you leave your practice or your business.
6. In the Illinois Tort System,everybody wants to go to Court in Cook County Circuit Court,as the verdicts are generally far more generous to Plaintiffs in that court, compared to those in surrounding Counties. We need uniform rules for Jury Verdicts.
7. The Issues Are:
Reasonable Rate review
Risk Pooling
A decision on "Claims Made" vs "Occurence Made" Insurance forms.
The Number one public policy problem nationwide is the Insurance Crisis.The principal questions are:
When should public access to the Courts be limited?
How should we regulate the Insurance Industry?
8. The Trial Bar must understand that there will be Tort Reform.
The Insurance Industry must be more closely regulated.

Presentor: Sen. Wm. B. Golden; State of Massachusetts

Main Points:

1. We are dealing with two crises;one,that threatens to destroy the Private Insurance market.One,that threatens to destroy the Civil Justice System that protects society.
2. The "real" crisis is that the Voluntary Insurance market may not be able to continue to provide Insurance.
The "Unreal"crisis,is the series of unilateral decisions made the Insurance Industry to drop lines of Insurance and hurt Society. The Insurance Industry's attitude is one of arrogance, irresponsibility and intransigience.

3. The causes of the "real" crisis are:
Unreasonable Societal expectations for a "Risk Free" Environment. We are extremely Litiginous.It is fundamental to our value system. "Rights" do not always lead to "Remedies".
The Courts have become a Social Welfare System that run a Lottery for the Deep Pockets.
Our system (Of Torts) puts good businesses on a par with the real violators.
4. The solution is to re-examine our basic Tort assumptions, but that alone will not solve the problem. There is no single solution. It would help to bring basic Management Technology to our Courts,to make them more efficient and cut the costs of Litigation. Our Current Civil Litigation System is inefficient and too costly.
5. (We also need to) review the Rules of Civil Procedure (In order to curb inefficiencies and unecessary costs). For example in one Asbestos case 75 Attorneys sat in the courtroom for three days waiting to present five minutes of material to the judge. The Rules are now deliberately used for delay.
6. We need to Make maximum use of mediation in lieu of litigation.
7. (Our Tort System) has encouraged Businesses to be unproductive and inefficient. Avoidance of Liability has taken precedence over Profitability (as the motive for Management Decisions). These decisions rob society of it's Competitive Edge.
8. If businesses follow Good Management practices, they can avoid Strict Liability and Limit Damages. We need to provide (Legal) "Safe Havens" for Business so they can do this.
9. The Insurance Industry (On the other hand) has been poorly managed. The current crisis is due to Price Wars and the Ways insurance Companies are allowed to make a profit. There has been very limited effort by the Property and Casualty Insurance Industry to reduce losses by performing Risk Management Analyses of their Insureds. They don't want to be Risk managers; they want to be Money Managers! We need to have Insurance Companies to certify Insureds for compliance with basic safety standards and if the Insureds meet the Standards, they should get lower premiums.
10. Public Policy-makers are being manipulated by (Artificial) "Deadlines" established by the Insurance Companies. The Industry is putting a Gun at the head of the Legislatures of this country to Maximize, not just make, profits!
11. The answer may ultimately be to Self Insure and let the Industry walk away.
12. OR-perhaps we should not let them walk away, but withhold things they want, until they come around.

13. What is the value of keeping the (Existing) Insurance Industry? They have served Society well for hundreds of years.
14. The industry owes it to Society to "Stay in".
15. If they "walk away",they'll take the most profitable lines with them.OR-maybe we'll come to believe that we don't need them,we'll do it with Government Subsidized Insurance (and cut the Private Industry out of Property and Casualty altogether.)

Presentor: Sen.Dick Posthumous; Assistant Majority Floor Leader; State of Michigan.

Main Points:
1. In Michigan,the Senate Select Committee tried to look at this issue from the point of view of Consumers and Taxpayers.
2. (We found) that Michigan had the 48th.worst Insurance environment in the Country.We were losing essential services because of the Liability crisis,e.g.,Ob.Gyn's were unable to practice and 50% of our Family Practi e Physicians had to stop delivering babies. 50% of our Bars were going "Bare", and 38% of our State Highway funds were going to pay the costs of Liability Suits. Our Municipalities had suffered 200 to 400% rate increases.
3. We tried to deal with these problems rationally. We formed Subcommittees on: Malpractice; Government; and Dram Shop. We held eighteen hearings around the State. Those hearings were controversial and complicated.
4. We issued a Report, which we tried to make balanced. The Doctors were not very happy and the Trial Lawyers were not happy.
5. Despite the fact that the Insurance Industry created part of the problem (We concluded) that we really did have a Tort Reform problem. (Our evidence Included) that our self-insured cities had the same problems as professions and Businesses covered by private Property and Casualty Insurors. The State of Michigan had the same problems.
6. (One problem we had was that there was) LITTLE DETAILED DATA, thereby insuring that the debate was mostly Political.
7. (Some of the things we recommended included): For Municipalities; If Municipalities were less than 50% responsible for a Tort Claim, then there was no "Joint and Several Liability". If Municipalites were more than 50% liable for a Tort Claim, then there was "Joint and Several Liability". The Government liability issue was the easiest to resolve because there was bi-partisan support since every Government was affected, no matter the political complexion of their Leadership.
8. Dram Shop was more difficult. What we did was to Limit Non-Economic Losses and Require "Risk Reduction" programs of the Liquor Industry; including T.A.M.'s programs.

We also made the penalties higher for Illegally Serving Minors and Intoxicated persons.
We also made the penalties higher for Juveniles using false I.D.'s. (Indiana made similar changes 10 years ago. Check experience.)

9. Medical Malpractice was the most difficult.There was a perception on the part of the public that they were being ripped off by a lot of rich Doctors.But the rich Doctors were politically powerful and brought a lot of pressure to bear on the issue. We tried to reduce "Frivolous Suits" by implementing Pre-Trial Screening Panels. We established a 250K Cap for non-economic damages, because pain and Suffering awards were found to be arbitrary in our State between the different Court Jurisdictions.e.g. Wayne County Courts were found to have average awards 38% above the National average,while adjoining County Courts gave awards that averaged 7% below the national average. This was a very difficult area to resolve.Injured parties came before the Committees and presented their cases (in the most heart-rending ways) and it was difficult to change the Law.
10. State Legislators have got to realize that Tort Reform is a necessity. Self Insurance is not the answer because the Taxpayer will bear the costs.
11. This is a Very Controversial Issue. 10,000 Doctors demonstrated on the steps of the Statehouse, the largest demonstration we have had since the Vietnam War.

Presentor: Michael Bird; Staff Director for Government Operations, Banking and Regulation; National Conference of State Legislatures; Washington, D.C.

Main Points:

1. Are Congress and the Federal Administration concerned about this problem? Yes.
   Can you rest peacefully? No.
   Will Congress act in 1986? Yes.
   Will they act swiftly? Probably not.
2. There are eleven Congressional Subcommittees holding hearings on these problems around the country, including;
   Commerce Committee
   Small Business Committee
3. Congress is mostly concerned with:Long Haul Truckers; Hazardous Waste;Nuclear Accidents and Day Care.
4. The "President's Domestic Policy Council" has six Committees at work on these problems including the areas of Malpractice, Toxic Wastes, Vaccines, Product Liability and Government Contractors.
5. The U.S. Justice Department is working on the Tort problems of Municipalities and other Governments. (The Justice Department has said that "The Tort System is out of control").

6. Why is there Federal interest? Because they get the same horror stories as you do.
7. There is an increasing Federal desire to assess how well the States and the Insurance Industry are able to resolve these problems!The Federal Government is frustrated by (The State's and the Industry's inability to produce usable data).
8. The U.S,Senate is mainly interested in Tort Reform.
9. Federal Statutes contribute to the problem.
10. 75% of Congress says, "This is a State problem".25% of Congress thinks "Federal Intervention is Necessary". Those percentages could change at any time,depending on the pressure they feel.
11. The Congress is considering whether to act on:
    Federal reinsurance
    Revising the "McCarren-Ferguson Act" to establish minimal federal standards for how the States regulate the Insurance Industry.
    Establishing a Standby Federal program for some Insurance Lines.
    Nationalizing "Product Liability" (Insurance? or Responsibility?)
    Taking over State Guaranty Funds
    Taking over State Regulation of the Insurance Industry
12. Congress is particularly intersted in whether States are unable to resolve these problems. If Congress finds that States are unable to bring about longterm solutions to these problems (Look for) Congress to (at least) deal with "Special Problems" and "Comprehensive Tort Reform".
13. What might occur at the Federal level in the area of Pollution? A "Superfund" to afford ample Liability Insurance. (EPA is begining ?) to enforce pollution laws strictly.
14. Congress has thus far been unable to pass:SB 51 or HB 2817 which establish a "Superfund" and "Federal Reinsurance" (for some kinds of liability). They may act to expedite the establishment of Self-Insurance pools.
15. "Anything can happen,depending on the Political Pressures Congress is exposed to during the near future."

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THE REVOLUTION IN THE MUNICIPAL LIABILITY INSURANCE MARKET:

Report of Municipal and Public Official Liability Insurance Committee of the National Institute of Municipal Law Officers

1985-86

David J. LaBrec, Committee Chairman
First Assistant City Attorney
City of Dallas, Texas

October 19, 1985

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THE REVOLUTION IN THE MUNICIPAL LIABILITY INSURANCE MARKET:

Report of Municipal and Public Official Liability
Insurance Committee of the National Institute of
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1985-86

1. HISTORICAL BACKGROUND:

The liability insurance industry, including the worldwide reinsurance market which underwrites a major portion of the liability coverage provided to both public and private insureds, is experiencing unprecedented losses, characterized by some experts as the worst financial crisis in the property/casualty industry in history. Insurance experts suggest a myriad of causes, many of which contributed directly to the present crisis and many of which are better explained as insurance industry excuses. The purpose of this report is to provide city attorneys with a better understanding of how the problem developed, the factors which contributed, the insurance industry's response and, most importantly, where cities should look for a solution.

A few statistics will put the problem in real perspective:

-- The insurance industry has lost more than $34 billion in the past two years; more than the total lost in the previous twenty-five years.

-- According to A. M. Best Company, in 1984 the liability insurance industry lost $3.8 billion compared with

earnings of $2.5 billion in 1983. (This is the first annual loss for the liability insurance industry since 1906.)

-- As of April 3, 1985, the casualty facultative reinsurance capacity in the United States decreased $100.5 million.

-- Wausau Insurance Company lost $102 million in the first nine months of 1984 and its surplus reserves decreased by $163 million.

-- Century Insurance Company lost $11.2 million in the first six months of 1984.

-- ARMCO Insurance Group lost $44 million in the first four months of 1984.

-- In December 1983, American Express (owner of Firemen's Fund Insurance Company) announced it would drop earnings by 10 percent from 1982 because of a $230 million shortfall in reserves.

-- The industry experienced underwriting losses of $785.5 million in 1982, compared to $468.9 million in 1981, while the combined loss and expense ratio reached 105.5% of earned premium.[1]

2. FACTORS CONTRIBUTING TO THE CRISES

Among some of the more significant factors that contributed, at least in part, to the present liability insurance crisis are the following:

-- A continuation of the traditional relationship between primary and excess reinsurers

-- A significant increase in the number of competitors in the reinsurance market and a corresponding decrease in its sophistication

-- Increased competition in the primary insurance market due to a corresponding increase in inflation and a resulting development of cash flow underwriting

-- A developing deficiency in the compilation of sound actuarial data accompanied by a corresponding increase in volume and complexity of claims and litigation

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Acknowledgment

My thanks to B. M. Murgo, City Attorney of Pendleton, Oregon and Mark Ferraro, Risk Manager, City of Dallas, for furnishing much of the research materials used in the preparation of this report.

-- Unsound underwriting practices

-- Increases litigation and attendant expenses

In short, the crisis developed as follows. In the past few years, because of high interest rates, insurance companies have invested their premiums and recovered handsome profits, thereby subsidizing the ever-increasing claim losses that were being experienced. While interest rates hovered near 20% a few years ago, the insurance industry began to engage in what is known as "cash flow underwriting" -- the practice of selling insurance coverages at cut-rate prices with the intent of making up on reinvestments. This phenomenon brought unknowledgeable (and in many instances unscrupulous) participants into both the primary insurance market (the portion of the industry that actually writes insurance policies), and into the reinsurance market (the portion of the industry that underwrites primary carriers through reinsurance treaties). When a company writes a large liability policy, particularly to an insured perceived as high-risk, the carrier turns to larger companies for reinsurance underwriting assistance.

When the recent fall in interest rates occurred, companies were left without the anticipated investment income to subsidize claim loses. They were then in a position of having inadequate premiums and high-risk policies. At the same time, the reinsurance market (led by influencial companies such as Lloyd's of London) curtailed their reinsurance treaties. The net result: The insurance industry simply lost the capacity to underwrite high-risk policies. Once the

reinsurance capacity was lost and interest rates had fallen, the industry had placed itself in the intenable position of holding anticipated incurred losses which far exceeded foreseeable income.

3. THE INDUSTRY'S RESPONSE.

Not unexpectedly, the insurance industry has taken numerous steps to reduce its losses; losses that are a direct result of negative cash flow underwriting and unsound investment practices of the industry itself. The major changes which are taking place are:

(A) Cancellation of major exposure clients

(B) Restriction of new business

(C) Reduction of coverages

(D) Increase in premiums

(E) Curtailment of underwriting of High-Risk Business

(F) Selective underwriting criteria;

all of which are indicative of the industry's tradition of no-risk to its stockholders philosophy. Each of these responses is analyzed separately below.

A. CANCELLATION OF MAJOR EXPOSURES.

A number of insurers have stopped underwriting municipal liability coverage completely. Some of the major ones are:

Aetna Casualty & Surety	Home Indemnity
American General	Ideal Mutual
Cherokee	INA/CIGNA
Canadian Indemnity	St. Paul

Compass
Great Southwest Fire
Guaranty National
Transit Casualty
United National

Others have temporarily discontinued writing municipal liability insurance. For example, Colonial Penn has cancelled scores of municipal policies and only temporarily extended policies for the states of Colorado, New Mexico and Wyoming. Utica National Insurance Group has announced that it is cancelling all local government policies, leaving 229 New York cities seeking new coverage. Forum Insurance, one of the major underwriters of public official and police professional liability coverages, has resumed underwriting after a three-month layoff, but with the maximum limits for new business reduced to $2 million and a maximum of $5 million on renewals (Note: Forum will not write coverage for cities with budgets over $50 million or cities with populations of 200,000 or more). Contra, Calvert Insurance Company has now resumed underwriting municipal liability after a six-month layoff, but it limits police professional liability to $1 million.

Municipalities are not the only entities that the industry has targeted for cancellation. Others include the airline industry, professionals, including doctors and accountants, and industries which are likely targets of products liability lawsuits. Day-care centers have become a high risk business because of sexual abuse cases. Liquor stores have been denied liability coverages because they now may be liable for death and injury caused by drunken customers.

Because of the rapid and continuing rise in cancellations, the National Association of Insurance Commissioners received outcries of "unfair and deceptive trade practices" by insurers. The Commission has established new guidelines relating to midterm cancellations of coverage, providing that insurers wishing to cancel should do so only at the expiration of the policy itself, or alternatively, should provide for other reinsurance. The new guidelines also provide that at least thirty days advance notice be given for non-renewals of policies in order to allow the insured to seek alternate coverages.

B. RESTRICTION OF NEW BUSINESS

A second response by the industry has been to simply refuse to underwrite new business. This, coupled with the withdrawal of the major municipal liability carriers from the market, has posed further unforeseen and uncontrollable difficulties for municipalities seeking liability coverage. At the same time that primary carriers are withdrawing rapidly from this and other markets, the reinsurers who have rapidly proliferated the market in recent years are "renegotiating" their treaties with the few primary carriers still in the business of providing municipal liability coverage. As a result, the companies which are willing to write municipal liability coverage often are unable to do so because of inadequate reserves and unavailable reinsurance capacity.

C. REDUCTION OF COVERAGES.

A third by-product of the present insurance crisis is that the Insurance Services Office (ISO), the entity which provides form policies for the commercial insurance industry, has developed a new comprehensive general liability (C.G.L.) policy which significantly diminishes protection to the insured in a number of respects. For example, the revised form deletes pollution coverage, which historically was included but with a "sudden and accidental" limitation. However, due to recent developments in case law,[2] the industry has chosen to completely withdraw from writing pollution coverage of any sort.

The new ISO form further modifies existing comprehensive general liability forms by including defense costs within aggregate limits. Due to the ever increasing costs of litigation, including defense costs within the aggregate limits will significantly diminish indemnification afforded under primary coverages.[4] As a consequence, umbrella coverages will likely become even more expensive. ISO is also considering an optional endorsement to provide for the sharing of legal costs by the insured.

The new ISO form will also change "occurrence" coverage to "claims made" coverage because of the industry's experience with litigation arising out of coverages for asbestos, DES, radiation, agent orange, and other "long tail" risks. Much of the burden is being passed to those perceived as high risk insured, such as municipalities. If coverages change from occurrence to claims-made

format, incidents that were previously insured (because they occurred during the policy period), will oftentimes be uninsured unless a claim has actually been made against the insured during the coverage period.

The new ISO CGL form will also contain an extended reporting period restriction whereby claims made more than sixty days after the policy expiration will not be covered unless the insured purchases an "unlimited extended reporting period," for which the premium will approximate 200% of the premium for the prior policy year. Thus, unless the buyer renews his coverage with carrier X, he will be compelled to purchase the extended reporting period coverage at up to 200% additional cost. If, on the other hand, carrier X chooses to cancel or non-renew or if the buyer seeks coverage from carrier Y, a 200% premium will be required to keep the extended coverage.

D. INCREASE IN PREMIUMS.

One predictable response of the industry has been to pass on the cost of the industry's underwriting mistakes through increased premiums to those perceived as high-risk insureds. No direct link need exist between actual losses and high premiums: a mere perception by the industry that the particular insured falls into a high-risk category provides the industry with sufficient basis for escalating premiums, regardless of actual experience.[4]

At the same time as they increase premiums, insurers are also

demanding higher deductibles, higher self-insured retentions and stricter reporting requirements.

E. CURTAIL UNDERWRITING OF HIGH-RISK COVERAGES.

Since the beginning of 1985, a number of insurers have totally curtailed underwriting liability coverages for public entities and others continue to withdraw from the market. As of August, 1985, twelve major carriers have stopped writing coverage: all within the last two years. The stated reasons for the growing reluctance to insure political entities: fear of growing losses resulting from the erosion of governmental immunity by the courts. Insurers also express an aversion to competitive bidding, arguing that they are unable to win renewals if another insurer underprices them. Third, reinsurers are refusing public entity risks, thereby forcing the primary insurers to underwrite more of the exposure themselves, if they have the financial capacity, or to refuse to write the coverage if they do not.

F. SELECTIVE UNDERWRITING CRITERIA.

Another industry response has been to develop underwriting criteria by: limiting the scope, amount and duration of coverages; establishing overlapping population and budgetary restrictions on the entities that they will insure; demanding higher deductibles and self-insured retentions; adding new "standard" exclusions; and rewriting coverages to conform with the new ISO "claims made" C.G.L.

forms (discussed above).

4. LONG-TERM SOLUTIONS.

In light of the revolution occurring in the municipal liability insurance market, cities must immediately look to other options, such as self-insurance, pooling, or purchase of commercial coverage with higher deductibles. If the third option (purchase of commercial coverage with higher deductibles) is chosen, the insured must establish sound budgetary restrictions to provide revenue necessary to counteract the reduction of coverages because of the new ISO exclusions.

It is suggested that larger cities may be able to survive the crisis in the insurance industry by solely self-insuring (which is in effect, "uninsuring"), but small municipalities can ill afford the inherent risks of doing so. A large judgment can place a small city in such financial straits that it is forced to either increase taxes, issue bonds, or file a petition for bankruptcy. The recent experiences of cities such as South Tucson, Arizona, Pawpaw, West Virginia, Grays Lake, Illinois, Bay St. Louis and Mound Bayou, Mississippi, Jackson Township, New Jersey, Troy, Michigan, and Wapanucka, Oklahoma, to name only a few, are illustrative of the significant risk that small cities now face.

However, for those small cities, self-insurance pooling is becoming an increasingly attractive alternative. The cost of coverages is often significantly less than is coverage on the

traditional insurance market and the coverage itself is much broader and much better adapted in most instances to the risks which a small municipality is attempting to insure. However, a caveat is in order. Self-insurance pools can easily fall into the same trap where the insurance industry presently finds itself. Most self-insurance pools buy reinsurance through the same market that has recently retrenched. They are often involved in similar investment practice that has brought the insurance industry to its knees. Third, they are becoming increasingly aware of the need to restrict their coverages the same as the industry has done via its ISO form revisions. Another alternative is the purchase of commercial insurance coverage with significantly higher deductibles than in the past.

By proposing a higher deductible, a municipality sends a message to potential underwriters that it is both aware of the increasing exposures and willing to underwrite a larger portion itself. A comprehensive risk management program which identifies significant risks, establishes methods for their reduction and explores alternatives by which those that are likely to occur are financed will make a municipality a much more attractive insured.

Regardless of which alternative is chosen, long-range risk management and litigation cost control practices must become standard procedure. With the continued proliferation of litigation of all sorts, municipalities will continue to be target defendants, and thus perceived as "high-risk" insureds. Therefore, it is safe

to assume that even after the insurance industry has stablized it will continue to respond to municipalities in the same manner as it has to the present crisis.

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[1] Best Management Insurance Reports (March, 1983)

[2] For example, see Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Company, et al., 186 N.J. Super. 156 (Superior Court, New Jersey 1982).

[3] In 1984, one quarter of earned insurance premiums in general liability coverages (approximately $1.5 billion) were spent on attorney's fees, a 500 percent increase over the past thirty years. National Underwriter (May 3, 1985)

[4] For example, the City of Dallas, Texas has seen an increase in liability insurance premiums from $94,183 in 1983 to $221,518 in 1984. In 1985, the City has gone self-insured because it obtained only two premium quotes: one from Cal-Union (the City's 1984 carrier) for approximately $1.5 million, and one from Arthur J. Gallager & Co. in the amount of $2.8 million. The Cal-Union bid, (in addition to being 1,590% of the 1983 premium) excluded significant areas of coverage: motor vehicle insurance for the City's 4,000 vehicle fleet, employment discrimination, interruption of utility service, athletic events sponsored by the City and pollution. The Gallager bid, on the other hand, purported to cover those categories, but contained a $1 million per claim limit (the City bid specification called for coverage of at least $50 million per claim). The 1985 bid proposals apparently ignored the City's prior claims and litigation experience: In no previous year have the total amount of paid claims even approached the amount of the 1985 premium quotes.

1250H

Note 2

2. Temporary restraining order

Temporary restraining order preventing defendant in obscenity case from removing or in any manner interfering with alleged obscene material was properly dissolved where order was defective in not specifying what conduct was prohibited. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

§ 12–816. Content of judgment and order

Notes of Decisions

In general 2
Validity 1

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1. Validity

Unconstitutional portion of this section permitting destruction of promotional materials without providing for judicial review of materials to determine whether they are also obscene was severable from remainder of section. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

Provision of this section providing for destruction of items directly related to obscene materials including promotional material and printing presses was unconstitutional prior restraint in absence of any provision for judicial review of materials to determine whether they were also obscene. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

2. In general

Items of neutral equipment which may be used in future for legitimate forms of expression may not be destroyed because of past transgressions of obscenity laws. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

This section providing that, upon finding existence of nuisance, court shall enjoin defendant from further maintaining nuisance of exhibiting or selling obscene materials did not require as a remedy the closure of entire business or place in which obscene items had been sold or distributed but merely established remedy of abating nuisance by prohibiting further sales or exhibition of obscene materials. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

§ 12–817. Civil penalty; forfeiture; accounting

Notes of Decisions

1. Validity

Provision of this section classifying obscene materials as contraband was not unconstitutional since, because obscenity was not within scope of U.S.C.A. Const. Amend. 1, legislature could declare it contraband. State v. Book-Cellar, Inc. (App.1984) 139 Ariz. 525, 679 P.2d 548.

ARTICLE 2. ACTIONS AGAINST PUBLIC ENTITIES OR PUBLIC EMPLOYEES

Laws 1984, Ch. 285, § 2 substituted "Actions against Public Entities or Public Employees" for "Actions against the State on Contract or for Negligence" as the heading for this article.

Cross References

Procurement Code, exclusive procedure for asserting claim against state or state agency under code, see § 41–2615.

§ 12–820. Definitions

In this article, unless the context otherwise requires:

1. "Employee" includes an officer, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does not include an independent contractor. Employee includes noncompensated members of advisory boards appointed as provided by law.

2. "Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person.

3. "Maintenance" means the establishment or continuation in existence of facilities, highways, roads, streets, bridges or rights-of-way by a public entity and does not mean or refer to ordinary repair or upkeep.

4. "Prisoner" means a person incarcerated while awaiting sentence or while serving a sentence imposed by a court of law.

5. "Public en

6. "Public e

7. "State" m

Added by Laws 19

Laws 1984, Ch.

"Section 1. Le

"A. The legisla unfair and inequita strict application sovereign immunit legislature recogni preneur may readil within the chosen within which gover for the public good therefore governm to do everything quently, it is here

§ 12–820.01. Ab

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3. The licensing

Added by Laws 1984.

For legislative pur 1984, Ch. 285, see § 12–820.

Cross References

Issuance of or fail any permit, license, or similar authorizatic

§ 12–820.02. Qual

Unless a public e injury or was grossl

1. The failure to

2. An injury cau

3. An injury res ment of a prisoner c

5. "Public employee" means an employee of a public entity.

6. "Public entity" includes this state and any political subdivision of this state.

7. "State" means this state and any state agency, board, commission or department.

Added by Laws 1984, Ch. 285, § 3.

Laws 1984, Ch. 285, § 1 provides:

"Section 1. Legislative purpose and intent

"A. The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the legislature recognizes that, while a private entrepreneur may readily be held liable for negligence within the chosen scope of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state. All of the provisions of this act should be construed with a view to carry out the above legislative purpose.

"B. The legislature intends that the provisions of this act which modify existing law apply to causes of action which arise after the effective date of this act. The provisions of this act which confirm existing law apply to causes of action arising before the effective date of this act."

§ 12–820.01. Absolute immunity

A. A public entity shall not be liable for acts and omissions of its employees constituting:

1. The exercise of a judicial or legislative function; or

2. The exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for:

(a) The purchase of equipment,

(b) The construction or maintenance of facilities,

(c) The hiring of personnel, or

(d) The provision of governmental services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

3. The licensing and regulation of any profession or occupation.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

Library References

States ⇐191(1).
C.J.S. States §§ 297, 298.

Cross References

Issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization, see § 12–820.02.

§ 12–820.02. Qualified immunity

Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for:

1. The failure to make an arrest or the failure to retain an arrested person in custody.

2. An injury caused by an escaping or escaped prisoner.

3. An injury resulting from the probation, parole, furlough or release from confinement of a prisoner or from the terms and conditions of his probation, parole, furlough or

release from confinement or from the revocation of his probation, parole, furlough or release from confinement.

4. An injury caused by a prisoner to any other prisoner.

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to § 12-820.01.

6. The failure to discover violations of any provision of law requiring inspections of property other than property owned by the public entity in question.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

Library References

Officers and Public Employees ⇐116.

States ⇐191(1).

C.J.S. Officers and Public Employees §§ 206 to 208.

C.J.S. States §§ 297, 298.

§ 12–820.03. Affirmative defenses

Neither a public entity nor a public employee is liable for an injury:

1. Arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions.

2. Which is attributable to the fault of a person, other than a public employee, driving a motor vehicle while the person was under the influence of intoxicating liquor. This paragraph does not apply to persons who are not passengers or to minors who are passengers riding in or upon the motor vehicle.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

1984 Reviser's Note:

Pursuant to authority of § 41-1304.02, the subsection designation of "A." was omitted as a correction of a manifest clerical error.

§ 12–820.04. Punitive and exemplary damages; immunity

Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

§ 12–820.05. Other immunities

A. Except as specifically provided in this article, this article shall not be construed to affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state.

B. A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee's propensity for that action. This subsection does not apply to acts or omissions arising out of the operation or use of a motor vehicle.

Added by Laws 1984, Ch. 285, § 3.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12-820.

§ 12–821. Authorization of claim against public entity or public employee; definition

A. Persons who have claims against a public entity or public employee shall file such claims in the same manner as that prescribed in the Arizona Rules of Civil Procedure, Rule 4(D) within twelve months after the cause of action accrues. Any claim which is not filed within twelve months after the cause of action accrues is barred and no action may be maintained except upon a showing of excusable neglect if the action is brought within the otherwise applicable period of limitations, provided that if there is no excusable neglect, and if the absence of excusable neglect is because of the conduct of the claimant's attorney, then the action shall proceed, and the public entity and public employee shall have a right of indemnity against the claimant's attorney for any liability assessed in the action.

B. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within twelve months after the disability ceases.

C. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

D. A claim for medical malpractice under chapter 5.1, article 1 of this title [1] is excluded from the provisions of this section as no claim is necessary to bring a medical malpractice action.

E. For the purposes of this section "excusable neglect" means reasonable and foreseeable neglect or inadvertence.

Added by Laws 1984, Ch. 285, § 5.

[1] Section 12–561 et seq.

Source:
Laws 1912, Ch. 59, §§ 1, 2.
Civ.Code 1913, §§ 1791, 1792.
Rev.Code 1928, §§ 4379, 4380.
Code 1939, §§ 27–101, 27–102.
A.R.S. former §§ 12–821, 12–822.

Former § 12–821, relating to the same subject matter as this section, was repealed by Laws 1984, Ch. 285, § 4.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

1984 Reviser's Note:

Pursuant to authority of § 41–1304.02, in the heading of this section "; definition" was added following "employee".

Notes of Decisions

Constructive notice 6.5
Class actions 16.5
Jurisdiction 4.5

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2. Construction and application

Notice of claims statute requires presentation of a claim and disallowance before suit may be brought against state. Mammo v. State (App. 1983) 138 Ariz. 528, 675 P.2d 1347.

Employees' claims against state for past overtime work were based upon statutorily implied provisions of their employment contracts with the state, were subject to statutory claim and filing requirements, and thus were not susceptible to review in special action proceedings and any relief which might be sought by employees under special action procedures for other claims would be limited to individual claims asserted by employees themselves, since class action relief was not available under special action rules. Clark v. State Livestock Sanitary Bd. (App.1932) 131 Ariz. 551, 642 P.2d 896.

4. Purpose of law

Purpose behind this section requiring presentation of a claim and disallowance before suit may be brought against state is to afford agency opportunity to investigate claim and assess its liability, to afford agency opportunity to attain a settlement and avoid costly litigation, and to advise legislature where settlement could not be achieved. Mammo v. State (App.1983) 138 Ariz. 528, 675 P.2d 1347.

4.5. Jurisdiction

Although state defendants in wrongful death action did not raise contention that plaintiff had failed to comply with this section at trial, issue was properly before court of appeals since subject matter jurisdiction may be raised at any time and is never waived. Mammo v. State (App.1983) 138 Ariz. 528, 675 P.2d 1347.

6.5. Constructive notice

State defendants' answer to merits of wrongful death action amounted to a constructive disallowance of plaintiff's claim, satisfying requirement of this section that a claim be first presented and disallowed before suit may be brought against state. Mammo v. State (App.1983) 138 Ariz. 523, 675 P.2d 1347.

16.5. Class actions

Provisions of § 12–821 et seq. authorizing tort or contract claims against the state must be satisfied by each individual or entity having a contract or negligence claim against the state before an action may be brought in court and is not satisfied by a claim filed on behalf of a class where the claim does not meet the requirements for an individual claim established by § 12–821 et seq.; declining to following *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701; and *Santa Barbara Optical Co., Inc. v. State Board of Equalization*, 47 Cal.App.3d 241, 120 Cal. Rptr. 609. Evans by Beemer v. Arizona Dept. of Corrections (App.1983) 139 Ariz. 321, 678 P.2d 506.

§ 12–822. Service of summons; change of venue

A. Service of summons in an action authorized in § 12–821 shall be made pursuant to Arizona Rules of Civil Procedure, Rule 4(D).

B. In an action against this state upon written demand of the attorney general, made at or before the time of answering, served upon the opposing party and filed with the court where the action is pending, the place of trial of any such action shall be changed to Maricopa county.

Formerly § 12–824. Renumbered as § 12–822 and amended by Laws 1984, Ch. 285, § 7.

Former § 12–822, derived from Laws 1912, Ch. 59, § 2; Civ.Code 1913, § 1792; Rev.Code 1928, § 4380; and Code 1939, § 27–102, was repealed by Laws 1984, Ch. 285, § 6. See, now, § 12–821.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

§ 12–823. Judgment for plaintiff; amount; interest and costs

If judgment is rendered for the plaintiff, it shall be for the amount actually due from the public entity to the plaintiff, with legal interest thereon from the time the obligation accrued and with court costs.

Formerly § 12–825. Renumbered as § 12–823 and amended by Laws 1984, Ch. 285, § 8.

Former § 12–823, was repealed by Laws 1984, Ch. 285, § 6.

For legislative purpose and intent of Laws 1984, Ch. 285, see Historical Note following § 12–820.

§§ 12–824, 12–825. Renumbered as §§ 12–822 and 12–823

§ 12–826. Report of judgments to legislature by governor; payment

A. The governor shall report to the legislature at each session judgments rendered against the state, and not theretofore reported.

B. The director of the department of administration shall draw his warrant upon the state treasury for payment of the judgment upon presentation to him of an authenticated copy of the judgment together with the approval of the judgment by the attorney general.

C. The director of the department of administration shall not draw the warrant until an appropriation therefor is made by the legislature.

Amended by Laws 1983, Ch. 98, § 13.

ARTICLE 8. MATERNITY AND PATERNITY PROCEEDINGS

§ 12–843. Persons who may originate proceedings

Proceedings to establish the maternity or paternity of a child or children and to compel support under this article may be commenced by any of the following:

1. The mother.

1984 Reviser's Note:
This section contains the amendments made by Laws 1984, chapter 158, section 49 and chapter 200, section 1 which were blended together as shown above pursuant to authority of section 41-1301.03.

§ 41-621. Purchase of insurance; coverage; limitations; exclusions

Text of section effective January 1, 1985.

A. The department of administration shall obtain insurance against loss, to the extent it is determined necessary and in the best interests of the state as provided in subsection C of this section, on the following:

1. All state owned buildings, including those of the universities, but excluding buildings of community colleges, whether financed in whole or in part by state monies and in which the state has an insurable interest as determined by the department of administration.

2. Contents in any buildings owned, leased or rented, in whole or in part, by or to the state and reported to the department of administration.

3. The state and its departments, agencies, boards and commissions and all officers, agents and employees thereof against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization except as prescribed by this chapter.

4. All personal property reported to the department of administration, including vehicles and aircraft owned by the state and its departments, agencies, boards and commissions and all non-owned personal property which is under the clear responsibility of this state because of written leases or other written agreements.

5. The state and its departments, agencies, boards and commissions against casualty, use and occupancy and liability losses of every nature except as prescribed by this chapter.

6. Workers' compensation and employers' liability insurance.

7. Other exposures to loss where insurance may be required to protect this state and its departments, agencies, boards and commissions and all officers, agents and employees.

B. The department of administration may determine, in the best interests of the state, that state self-insurance is necessary or desirable and, if that decision is made, shall provide for state self-insurance for losses arising out of state property or liability claims prescribed by subsection A of this section. If the department of administration provides state self-insurance, such coverage shall be excess over any other valid and collectible insurance.

C. In carrying out the provisions of this chapter, the department of administration shall establish and provide the state with some or all of the necessary risk management services, or shall contract for risk management services and shall purchase such insurance coverage, pursuant to chapter 23 of this title,[1] as the director of the department of administration deems necessary in the best interest of the state[2] and may, in addition to other specifications of such coverage as deemed necessary, determine self insurance to be established. The provisions of chapter 23 of this title shall not apply to the department of administration's procurement of excess loss insurance from the state compensation fund for the state's workers' compensation liability for individual or aggregate claims, or both, in such amounts and at such primary retention levels as the department of administration deems in the best interest of the state. In purchasing insurance to cover losses arising out of state property or liability claims prescribed by subsection A of this section, the department of administration is not subject to the provisions of title 20, chapter 2, article 5.[3]

D. No successful bidder for risk management services pursuant to this section shall be entitled to receive directly or indirectly any sales commission, contingent commission, excess profit commission, or other commissions, or anything of value, as payment for the risk management services except those amounts received directly from this state as payment for the risk management services.

E. The department of administration shall pay for purchased risk management services and premiums for insurance on state property and state liability pursuant to provisions of this chapter and subject to legislative appropriations.

F. A state officer, agent or employee acting in good faith, without wanton disregard of his statutory duties and under the authority of an enactment that is subsequently declared to be unconstitutional, invalid or inapplicable, is not personally liable for an injury or damage caused thereby except to the extent that he would have been personally liable had the enactment been constitutional, valid and applicable.

G. A state officer, agent or employee, except as otherwise provided by statute, is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duties.

H. The state and its departments, agencies, boards and commissions are immune from liability for losses arising out of a judgment for willful and wanton conduct resulting in punitive or exemplary damages.

I. The following exclusions shall apply to subsections A and B of this section:

1. Losses that arise out of and are directly attributable to an act or omission determined by a court to be a felony by a state officer, agent or employee unless the state knew of the person's propensity for that action, except those acts arising out of the operation or use of a motor vehicle.

2. Losses arising out of contractual breaches.

3. Employment discrimination actions.

J. If self-insurance coverage is determined to exist, the attorney general, with funds provided by the department of administration, in accordance with subsection B of this section, shall provide for the defense, either through his office or by appointment of outside legal counsel, of the state and its departments, agencies, boards and commissions and all officers, agents and employees thereof for or on account of their acts or omissions covered pursuant to this chapter. All state departments, agencies, boards and commissions and all officers, agents and employees thereof shall cooperate fully with the attorney general and department of administration in the defense of claims arising pursuant to this chapter.

K. A claim for liability damages made pursuant to this chapter may be settled and payment made up to the amount of twenty-five thousand dollars or such higher limit as may be established by the joint legislative budget committee with the approval of the director of the department of administration. A claim over the amount of twenty-five thousand dollars up to fifty thousand dollars or such higher limit as may be established by the joint legislative budget committee may be settled and payment made with the approval of the director of the department of administration and the attorney general. Any claim over the amount of fifty thousand dollars or such higher limit as may be established by the joint legislative budget committee may be settled and payment made with the approval of the director of the department of administration, the attorney general and the joint legislative budget committee. If it is in the best interests of this state, the joint legislative budget committee may establish higher settlement authorities. Any settlements involving amounts in excess of fifty thousand dollars or such higher limit as may be established by the joint legislative budget committee shall be vested with the department of administration, the attorney general and the joint legislative budget committee pursuant to the authority granted.

L. Neither the authority provided by this section to insure, nor the exercise of such authority, shall:

1. Impose any liability on this state or the departments, agencies, boards and commissions or any officers, agents and employees of this state unless such liability otherwise exists.

2. Impair any defense this state or the departments, agencies, boards and commissions or any officers, agents and employees of this state otherwise may have.

M. The department of administration shall promulgate such rules and regulations as are deemed necessary to carry out and implement the provisions of this chapter.

Amended by Laws 1975, Ch. 12, § 1, eff. April 24, 1975; Laws 1975, Ch. 102, § 17; Laws 1976, Ch. 72, § 1; Laws 1976, Ch. 117, § 2; Laws 1976, Ch. 136, § 2, eff. June 27, 1976; Laws 1977, Ch. 121, § 1; Laws 1979, Ch. 176, § 1; Laws 1980, Ch. 246, § 37; Laws 1982, Ch. 262, § 15, eff. July 24, 1982, effective retroactively to July 1, 1982;[4] Laws 1984, Ch. 87, § 4, eff. April 12, 1983; Laws 1983, Ch. 98, § 121; Laws 1984, Ch. 188, § 49; Laws 1984, Ch. 200, § 1; Laws 1984, Ch. 251, § 25, eff. Jan. 1, 1985.

[1] Section 41-2501 et seq.
[2] So in original. Probably should read "state,".
[3] Section 20-401 et seq.
[4] See note following § 41-2962.

For text of section effective until January 1, 1985 see § 41-621, ante.

Source:

Laws 1956, Ch. 153, § 1
A.R.S. former § 35-647

For legislative intent regarding termination of provisions added or amended by Laws 1980, Ch. 246, see note following § 23-108.02.

For legislative intent of Laws 1982, Ch. 262, see note following § 35-151.

For purpose and effective date provision of Laws 1984, Ch. 251, see Historical Note following § 41-2501.

Reviser's Notes:

1975 Note. As it existed prior to the 1976 amendments, this section contained the amendments made by Laws 1975, chapter 12, section 1 and chapter 102, section 17 which were blended together pursuant to authority of section 41-1304.03.

1976 Note. As it existed prior to the 1977 amendment, this section contained the amendments made by Laws 1976, chapter 117, section 2 which amended section 41-621 as amended by Laws 1976, chapter 72, section 1 and by Laws 1976, chapter 136, section 2 which were blended together pursuant to authority of section 41-1304.03.

1983 Note. This section contains the amendments made by Laws 1983, chapter 87, section 4 and chapter 98, section 121 which were blended together pursuant to authority of section 41-1304.03.

1984 Note. This section contains the amendments made by Laws 1984, chapter 188, section 49, chapter 200, section 1 and chapter 251, section 25 which were blended together as shown above pursuant to authority of section 41-1304.03.

Cross References

Authority to procure liability insurance covering officers, agents and employees, see §§ 9-497 and 11-261.

Cities and towns, liability insurance, see § 9-497.

Counties, errors and omissions and liability insurance, see § 11-261.

Liability loss revolving fund, payment of self-insured liability losses, see § 41-622.

Risk management administration fund, payment of service costs, see § 41-622.

Rules, administrative procedure, see § 41-1001 et seq.

Workmen's compensation liability laws revolving fund, see § 41-622.

Administrative Code References

Establishment of self-insurance, see A.C.R.R. R2-10-01.

Reporting procedures, accidents and incidents, see A.C.R.R. R2-10-02.

Specifications, agency and company selection for insurance to cover insured risks, see A.C.R.R. R2-10-100 et seq.

Law Review Commentaries

Governmental immunity in Arizona—The Stone case, 6 Ariz.L.Rev. 102 (1964).

Governmental tort immunity revisited, 25 Ariz.L.Rev. 1081 (1983).

Library References

States ⇐90.
C.J.S. States §§ 154, 155, 160.

United States Supreme Court

Immunity of state. State as not constitutionally immune from suit in the courts of another state, see Nevada v. Hall, 1979, 99 S.Ct. 1182, 440 U.S. 410, 59 L.Ed.2d 416.

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1. Construction and application

Provision of this section making state immune from liability for willful and wanton misconduct cannot be applied retroactively to impair a vested right. State v. Sanchez (App.1978) 119 Ariz. 64, 579 P.2d 568.

Supreme Court would take judicial notice of this section and §§ 9-497, 11-263, permitting the insuring of governmental agents and agencies. Patterson v. City of Phoenix (1968) 103 Ariz. 64, 436 P.2d 613.

State of Arizona and its departments are authorized to expend public funds to provide a form of insurance to employees of the state who may be injured by an uninsured motorist. Maryland Cas. Co. v. Wilson (1967) 6 Ariz.App. 470, 433 P.2d 650.

If members of the private industry council were acting in good faith within the scope of statutory authority, including regulations promulgated pursuant to that authority, they would not be held liable for injuries or damage resulting from such acts or omissions. Op.Atty.Gen. No. 179-311.

Non-paid human and legal rights committee members are not personally liable for actions taken in good faith pursuant to their authority; office of attorney general would defend such committee members in suits ... ing to discharge of their duties. Op.Atty.Gen. No. 179-234.

State retirement system board and investment advisory council members acting in their official capacity will be accorded the same treatment as other state officials; the attorney general will defend an action brought against a state official or in which he has an interest, and board and council members, acting in their statutory capacities have state insurance protection to cover their actions while carrying out their duties. Op.Atty.Gen. No. 179-161.

Under § 41-622 relating to revolving funds for uninsured losses and the risk management administrative fund, as amended by Laws 1977, Ch. 121, the department of administration is to request an appropriation from the Legislature for the following fiscal year, 1978-1979, for each of the three separate funds which have been set up by Ch. 121, and then the department of administration, risk management services division is responsible to provide liability and property damage protection to the agency either by the purchase of insurance or through a self-insurance program from moneys appropriated directly to the various funds. Op.Atty.Gen. No. 77-161.

State department of health may, in its discretion, purchase liability insurance for its officers, agents, or employees. Op.Atty.Gen. No. 57-11.

1.4. Volunteers

Department of administration risk management services lacks authority to purchase disability insurance for listed state service volunteers. Op.Atty.Gen. No. 179-112.

State agencies are not prohibited from using volunteers, but coverage of volunteers under state insurance policy is questionable, and therefore, volunteer should be informed that there is no coverage for them and should sign a written acknowledgement that their work is being done on a voluntary basis, free of any charge to the state. Op.Atty.Gen. No. 79-208.

Volunteers used by department of economic security are neither covered by state's compensation nor liability insurance, but the state is protected by whatever insurance is in force at the time of the act or occurrence. Op.Atty.Gen. No. 75-85.

1.5. Aircraft

Department of economic security as a state agency, could utilize services of a volunteer aircraft pilot for various department staff personnel, but it would be advisable that volunteer have personal liability insurance coverage for services he or she was to carry out on behalf of state, and such policy should be continued for protection of state's fledgling self-insurance program. Op.Atty.Gen. No. 77-236.

State self-insurance program provides coverage only for state-owned property, not for rental or leased property losses and, therefore, independent insurance would have to be purchased for full protection against loss of aircraft which department of economic security rented from an aviation vendor for purpose of flying department staff personnel throughout the state. Id.

Since inception of state's self-insurance program, authorized volunteers who are acting within course and scope of their authorization are covered under state's self-insurance program. Id.

2. Motor vehicles—In general

Where incompetence to operate a motor vehicle is demonstrated, department of transportation may be authorized to suspend the driver's license immediately and require re-examination or not issue a new license, but recovery in an action against the state or its officers or employees for failure to suspend a license would be highly unlikely. Op.Atty.Gen. No. 78-203.

State real estate department could purchase liability insurance covering department's motor vehicles and could include coverage of its employees while operating the vehicles in furtherance of the department's business and coverage of employees while operating their own private motor vehicles but carrying out duties assigned by department. Op.Atty.Gen. No. 63-22.

3. —— Uninsured motorist coverage, motor vehicles

Arizona game and fish department's rejection, subsequent to accident in which automobile operated by uninsured motorist collided with game and fish department vehicle and fatally injured employee of the department, of department policy which, by operation of law, contained uninsured motorist coverage unless and until the department rejected such coverage did not abrogate vested right of deceased employee and representative of her estate to coverage under the policy for the accident. Maryland Cas. Co. v. Wilson (1967) 6 Ariz.App. 470, 433 P.2d 650.

3.5. —— Leased motor vehicles

Practice of renting or leasing state vehicles to private parties is not authorized; state self-insurance fund would cover damage to state vehicle but risk management services would have right subrogate against any part negligently causing damage to the vehicle; state self-insurance fund would not cover damage to non-state owned vehicles caused by an off duty department of public safety officer or by a third party. Op.Atty.Gen. No. 78-227.

4. Negligence

Under this section, department of public welfare could expend funds to purchase liability insurance covering volunteers acting for department and negligently causing injury or damage to another. Op.Atty.Gen. No. 63-30.

Immunity of the state for negligence is not waived by this section. Op.Atty.Gen. No. 56-9.

5. Occupational diseases

To extent that insurance for defense of lawsuits and payment of judgments or settlements constituted liability insurance contemplated by this section covering state officers, agents, and employees while employed in governmental or proprietary capacities, cost would be a proper expenditure from compensation or occupational disease fund in regard to industrial commission's members and employees. Op.Atty.Gen. No. 66-11.

6. Community colleges

Personalty of community college does not come within provision of this section for insurance coverage against loss, and, therefore, Pima college could not be reimbursed out of state permanent uninsured loss coverage revolving fund for its loss of books, damaged materials in storage, and other personalty damaged as a result of a fire in the college book store area. Op.Atty.Gen. No. R75-731, p. 57, 1976-77.

Local community college district board which controlled community college's personalty was an independent political entity, not a department, agency, board, or commission of the state within provision of § 41-622 creating the state uninsured loss fund and limiting disbursements from fund to compensate for uninsured property losses to "departments, agencies, boards or commissions of the state", and, therefore, claim for reimbursement from fund based upon loss of an aircraft would be denied. Op.Atty.Gen. No. R75-294, p. 61, 1976-77.

7. —— Punitive damages

This section which makes state immune from liability for losses arising out of judgments for wilful and wanton conduct resulting in punitive and exemplary damages could not be applied retroactively in wrongful death action brought by mother of motorist killed in collision with vehicle driven by intoxicated state employee, since this section contained no provision for retroactivity, and since motorist's mother had vested right to judgment. State v. Sanchez (App.1978) 119 Ariz. 64, 579 P.2d 568.

General rule is that municipal corporation cannot be held liable for punitive or exemplary damages in absence of specific statute authorizing them. Id.

8. Non-lapsing self-insurance fund

Subsection (C) of § 11-261 permitting a county to self insure should not be construed as granting authority to create a non-lapsing self-insurance fund until the legislature specifically grants such authority. Op.Atty.Gen. No. 78-15.

9. School districts

Language of § 15-442 requiring the school district board of trustees to discipline the students for disorderly conduct on way to and from the school requires the board to exercise disciplinary control over a student's disorderly conduct while the student is enroute from home to school and back, but the school district is not liable merely because a student, while going to and from school, commits a tortious act upon a third person. Op.Atty.Gen. No. 78-200.

10. Dental examiners

Arizona state dental board members who act in good faith, within scope of their authority, will not be held liable for injuries or damages resulting from such acts or omissions. Op.Atty.Gen. No. 179-235.

11. Immunity

Governmental immunity is a defense only when necessary to avoid a severe hampering of a governmental function or a thwarting of established policy and in other respects the state and its agencies are subject to the same tort liability as private citizens, although certain areas of immunity remain, namely, legislative immunity, judicial immunity and high-level executive immunity; overruling Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376. Ryan v. State (1982) 134 Ariz. 308, 656 P.2d 597.

Ad hoc approach is the most appropriate for further development of exceptions to state liability for negligent acts. Id.

or administration of the risk management division, without approval of the joint legislative budget committee.

Added by Laws 1977, Ch. 121, § 3. Amended by Laws 1979, Ch. 176, § 2; Laws 1980, Ch. 108, § 9, eff. April 22, 1980; Laws 1982, Ch. 262, § 16, eff. July 21, 1982, effective retroactively to July 1, 1982;[1] Laws 1983, Ch. 87, § 5, eff. April 12, 1983; Laws 1985, Ch. 98, § 122; Laws 1984, Ch. 188, § 50; Laws 1984, Ch. 200, § 2.

[1] See note following § 41-2562.

For text of section effective January 1, 1985, see § 41-622, post.

1984 Reviser's Note:

This section contains the amendments made by Laws 1984, Ch. 188, § 50 and Ch. 200, § 2 which were blended together as shown above pursuant to authority of § 41-1304.03.

§ 41-622. Revolving funds for self-insured losses and administrative costs: budget requests

Text of section effective January 1, 1985

A. There is established a permanent risk management revolving fund and a permanent workers' compensation liability loss revolving fund in the department of administration for the purchase of insurance, risk management services including loss control services, payment of self-insured losses pursuant to § 41-621 subsections A and B and administrative costs necessary to carry out risk management services prescribed by § 41-621. The department of administration shall pay for claims processing costs, including adjusting costs, legal defense costs and attorney fees, for any portion of claims falling within state self-insurance coverage pursuant to the provisions of this chapter.

B. The permanent risk management revolving fund in the department of administration shall exclude any property loss arising from obsolescence, nonserviceability, mysterious disappearance or inventory shortage. Mysterious disappearance shall not be construed to include a loss if there is a reasonable presumption of theft. The department of administration, subject to chapter 23 of this title,[1] may advance or disburse monies to contractors who rebuild state property as a result of self-insured losses or to persons who supply goods or services in replacing self-insured losses. The department of administration shall pay for claims processing costs, including adjusting costs, legal defense costs and attorney fees, for any portion of claims falling within state self-insurance coverage pursuant to the provisions of this chapter.

C. To qualify for payment for loss by theft or burglary of state-owned personal property, an agency, department, board or commission must show evidence of forcible entry or that threat of violence was used in the taking of the property or there must be a reasonable presumption of theft.

D. The department of administration shall present to the legislature at the beginning of each session a budget request based on the actuarial needs for liability losses, workers' compensation liability losses, property losses and risk management administrative costs. The budget request shall be broken down to reflect the amount of monies to be charged to each of the state departments, agencies, boards and commissions. Any state department, agency, board or commission that has an amount for insurance included in its appropriation, whether specifically stated or not, and any state department, agency, board or commission that receives funds other than those appropriated shall be billed for the proportionate share of the charges for insurance by the department of administration. All monies received from such billings shall be deposited to the funds as identified in subsection A of this section as directed by the chairman and vice-chairman of the joint legislative budget committee.

E. All monies recovered by the state pursuant to litigation, recovery, salvage value of damaged property, proportionate share monies from any other existing state funds, or otherwise, for damages relating to either a liability or property loss for which monies from the risk management or workers' compensation liability loss funds have been or will be paid shall be deposited in the respective revolving fund.

F. The monies in the revolving funds may be invested pursuant to § 35-324. Interest earnings on the revolving funds shall be credited to the respective funds.

G. If a revolving fund is projected to be exhausted while the legislature is in session, a special appropriation may be requested by the department of administration for monies to meet the needs of the funds. If the funds are exhausted at a time when the legislature is not in session, any final judgment shall accrue interest at the legal rate and shall be payable upon appropriation in the next succeeding regular session of the legislature.

H. All monies deposited in the funds identified in subsection A of this section are appropriated to the department of administration for use pursuant to this section and are exempt from the provisions of 35-190, relating to lapsing of appropriations.

I. Monies in the funds established pursuant to subsection A of this section shall not be used for administrative costs, other than costs directly related to liability, property loss claims, workmen's compensation liability, loss control services, risk management services or administration of the risk management division, without approval of the joint legislative budget committee.

Added by Laws 1977, Ch. 121, § 3. Amended by Laws 1979, Ch. 176, § 2; Laws 1980, Ch. 108, § 9, eff. April 22, 1980; Laws 1982, Ch. 262, § 16, eff. July 24, 1982, effective retroactively to July 1, 1982;[2] Laws 1983, Ch. 87, § 5, eff. April 12, 1983; Laws 1983, Ch. 98, § 122; Laws 1984, Ch. 188, § 50; Laws 1984, Ch. 200, § 2; Laws 1984, Ch. 251, § 26, eff. Jan. 1, 1985.

[1] Section 41-2501 et seq.
[2] See note following § 41-2362.

For text of section effective until January 1, 1985, see § 41-622, ante.

Former § 41-622, derived from Laws 1973, Ch. 136, § 2; Laws 1974, Ch. 205, § 4; Laws 1975, Ch. 12, § 2, eff. April 24, 1975; and Laws 1976, Ch. 72, § 2, and relating to an uninsured losses revolving fund, self-insurance expenses, and a liability self-insurance account, was repealed by Laws 1977, Ch. 121, § 2, eff. Aug. 27, 1977.

Laws 1977, Ch. 121, § 5, eff. Aug. 27, 1977 provides:

"The director of the department of administration may authorize the transfer of the unexpended the unencumbered monies held immediately prior to the effective date of this act in the department of administration division of finance special revolving fund and the permanent uninsured loss coverage revolving fund for the purposes described in this act into the funds created by this act in such amounts as necessary to accomplish the purposes of this act."

For legislative intent of Laws 1980, Ch. 108, see note following § 35-321.

For legislative intent of Laws 1982, Ch. 262, see note following § 35-151.

For purpose and effective date provision of Laws 1984, Ch. 251, see Historical Note following § 41-2501.

Reviser's Notes:

1979 Note. In the first sentence of subsection B, the word "obsolescence", the comma after "disappearance" and the words "nonserviceability" and "or" were transposed in that order to follow the word "from" pursuant to authority of § 41-1304.02.

1983 Note. This section contains the amendments made by Laws 1983, Ch. 87, § 5 and Ch. 98, § 122 which were blended together pursuant to authority of § 41-1304.03.

1984 Note. This section contains the amendments made by Laws 1984, Ch. 188, § 50, Ch. 200, § 2 and Ch. 251, § 26 which were blended together as shown above pursuant to authority of § 41-1304.03.

Cross References

State compensation fund reserves, credit to workmen's compensation liability laws revolving fund, see § 23-962.

Administrative Code References

Establishment of self-insurance, see A.C.R.R. R2-10-01.

Reporting procedures, accidents and incidents, see A.C.R.R. R2-10-02.

Library References

States ⇐127.
C.J.S. States § 228.

Notes of Decisions

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1. In general

Risk management services could release monies from the property loss fund to pay legal fees or other court expenses incurred under § 12-348 relating to the award of fees and other expenses against the state, that section would prevail over the general provisions of this section relating to revolving funds for uninsured losses and the risk management administrative fund. Op.Atty.Gen. No 182-018.

Under this section relating to revolving funds for uninsured losses and the risk management administrative fund, as amended by Laws 1977, Ch. 121, the department of administration is to request an appropriation from the Legislature for the following fiscal year, 1978-1979, for each of the three separate funds which have been set up by Ch. 121, and then the department of administration, risk management services division is responsible to provide liability and property damage protection to the agency either by the purchase of insurance or through a self-insurance program from moneys appropriated directly to the various funds. Op.Atty.Gen. No. 77-161.

On August 27, 1977, director of department of administration was authorized to transfer unexpended and unencumbered monies from the liability self insurance account into the separate funds setup by Laws 1977, Ch. 121, which amends this section relating to revolving fund for uninsured losses and risk management administrative fund, for the purpose of implementing the self-insurance/insurance program. Id.

Community colleges are public subdivisions of the state, not "departments, agencies, boards or commissions" of the state which would entitle them to be reimbursed from the state uninsured loss coverage revolving fund. Op.Atty.Gen. No. 175-731, p. 57, 1976-77.

2. Community colleges

Local community college district board which controlled community college's personality was an independent political entity, not a department, agency, board, or commission of the state within provision of this section creating the state uninsured loss fund and limiting disbursements from fund to compensate for uninsured property losses to "departments, agencies, boards or commissions of the state", and, therefore, claim for reimbursement from fund based upon loss of an aircraft would be denied. Op.Atty.Gen. No. 175-291, p. 67, 1976-77.

3. Volunteers

Department of administration risk management services lacks authority to purchase disability insurance for listed state service volunteers. Op.Atty.Gen. No. 179-112.

§ 41-623. Risk management and loss control

A. The department of administration shall promulgate rules and regulations to initiate and implement a risk management and loss control program for all state departments, agencies, boards and commissions for the purpose of reducing risks, accidents and property and liability losses.

B. The department of administration shall annually provide each state department, agency, board and commission with a report of property and liability claims filed and an analysis of the cause of loss. State departments, agencies, boards and commissions shall submit a reply to the department of administration outlining plans to correct property and liability exposures to loss.

C. The department of administration shall annually issue to the governor and legislature a summary report of property and liability losses incurred by state departments, agencies, boards and commissions. The report shall include loss control plans and recommendations for corrective action.

D. All state departments, agencies, boards and commissions shall cooperate with, assist and provide requested information to the department of administration in the initiation, implementation and operation of the risk management and loss control program.

E. Concurrent with the commencement of planning for the construction, alteration or additions to state-owned or leased buildings, and the purchase of specialized personal property, the department of administration shall be consulted for the purpose of implementing the risk management and loss control program and to assure compliance with generally accepted loss control practices.

Amended by Laws 1982, Ch. 262, § 17, eff. July 21, 1982, effective retroactively to July 1, 1982[1]; Laws 1983, Ch. 98, § 123.

[1] See note following § 41-2362.

For legislative intent of Laws 1982, Ch. 262, see note following § 35-151.

Administrative Code References

Coverage and limitations, see A.C.R.R. R2-10-05.

Liability claim procedure, see A.C.R.R. R2-10-03.

Loss prevention, building plans, hazard control, see A.C.R.R. R2-10-50 et seq.

Reporting procedures, accidents and incidents, see A.C.R.R. R2-10-02.

§ 41-624. Commissions on sales of insurance to the state; violations; classification

Text of section effective until January 1, 1985.

A. In this section, unless the context otherwise requires:

1. "Bid" means a bid for the sale of insurance to the state.

2. "Bidder" means one who bids for the sale of insurance to the state under § 41-730.

3. "Commissions" means any contingent commission, excess profits commission, other commission that may be based upon losses or experience or other compensation which a successful bidder for the sale of insurance to the state may be eligible to receive from insurance carriers or underwriters.

B. Only a successful bidder or persons who have performed actual services for a successful bidder in connection with a bid shall be eligible to receive directly or indirectly any commissions.

C. A successful bidder may pay commissions directly or indirectly only to persons who have performed actual services for the successful bidder in connection with the bid.

D. Any successful bidder who pays commissions in violation of subsection C of this section or any person who receives commissions in violation of subsection B of this section shall be subject to the following penalties:

1. The successful bidder or the person who receives commissions or both shall be guilty of a class 2 misdemeanor.

2. The successful bidder or the person who receives the commissions or both shall be liable under § 20-316 for suspension, revocation or denial of renewal of any licenses issued under title 20, chapter 2, article 3.[1]

3. The successful bidder and the person who receives commissions shall be jointly and severally liable to the state for the amount of the commissions paid in violation of subsection B or C of this section.

4. The successful bidder and the person who receives the commissions shall be jointly and severally liable to competing bidders under the same invitation for bids for the amount of the commissions paid in violation of subsection B or C of this section as well as for reasonable attorney's fees of the competing bidders in recovering the penalty. Where there is more than one competing bidder, the successful bidder and the person who receives commissions shall be subject only to one liability under this subsection and the competitors who have joined in or intervened before judgment in the first action under this subsection to proceed to final judgment shall be entitled to equal shares in the penalty recovered.

Added by Laws 1975, Ch. 102, § 18. Amended by Laws 1978, Ch. 201, § 719, eff. Oct. 1, 1978.

[1] Section 20-281 et seq.

For text of section effective January 1, 1985, see § 41-624, post.

§ 41-624. Definitions; commissions on sales of insurance to the state; violation; classification

Text of section effective January 1, 1985.

A. In this section, unless the context otherwise requires:

1. "Bidder" or "offeror" means a person who has submitted a bid or proposal for the sale of insurance to the state under chapter 23 of this title.[1]

2. "Commissions" means any contingent commission, excess profits commission, or other commission that may be based upon losses or experience or other compensation which a successful contractor for the sale of insurance to the state may be eligible to receive from insurance carriers or underwriters.

3. "Solicitation" means all documents whether attached or incorporated by reference which are utilized for soliciting bids or proposals.

B. Only a contractor or persons who have performed actual services for a contractor in connection with a bid shall be eligible to receive directly or indirectly any commissions.

C. A contractor may pay commissions directly or indirectly only to persons who have performed actual services for the contractor in connection with the solicitation.

D. Any contractor who pays commissions in violation of subsection C of this section or any person who receives commissions in violation of subsection B of this section shall be subject to the following penalties:

1. The contractor or the person who receives commissions, or both, shall be guilty of a class 2 misdemeanor.

2. The contractor or the person who receives the commissions, or both, shall be liable under § 20-316 for suspension, revocation or denial of renewal of any licenses issued under title 20, chapter 2, article 3.[2]

3. The contractor and the person who receives commissions shall be jointly and severally liable to the state for the amount of the commissions paid in violation of subsection B or C of this section.

4. The contractor and the person who receives the commissions shall be jointly and severally liable to competing bidders or offerors under the same solicitation for the amount of the commissions paid in violation of subsection B or C of this section as well as for reasonable attorney's fees of the competing bidders or offerors in recovering the penalty. Where there is more than one competing bidder or offeror, the contractor and the person who receives commissions shall be subject only to one liability under this subsection and the competitors who have joined in or intervened before judgment in the first action under this subsection to proceed to final judgment shall be entitled to equal shares in the penalty recovered.

Added by Laws 1975, Ch. 102, § 18. Amended by Laws 1978, Ch. 201, § 719, eff. Oct. 1, 1978; Laws 1984, Ch. 251, § 27, eff. Jan. 1, 1985.

[1] Section 41-2501 et seq.
[2] Section 20-281 et seq.

For text of section effective until January 1, 1985, see § 41-624, ante.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.

For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

For purpose and effective date provision of Laws 1984, Ch. 251, see Historical Note following § 41-2501.

Cross References

Classification of offenses, see § 13-601 et seq.
Fines, see § 13-801 et seq.
Insurance, commissions on sales to state, see § 41-624.
Sentences of imprisonment, see § 13-701 et seq.
Violation as ground for suspension, revocation, or refusal to renew insurance agent's, broker's, or solicitor's license, see § 20-316.

Library References

Insurance ⇐84(2).
C.J.S. Insurance § 162.

Notes of Decisions

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Splitting commissions 1

1. Splitting commissions

Where school board purchased insurance through services of an advisory committee composed of insurance agents who each received a portion of the insurance commission, such commission splitting arrangement would be in violation of provision of § 20-446 prohibiting the entry into any agreement to commit, or by any concerted action commit, any act of boycott, coercion, or intimidation resulting in or tending to result in an unreasonable restraint of, or monopoly in, the business of insurance and a violation of provision of this section making it a misdemeanor for a successful bidder for the sale of insurance to the state to directly or indirectly split commissions with one who has not performed services. Op.Atty.Gen. No. 77-4, p. 63, 1976-77.

2. Purchases of insurance

Advisory guidelines for purchase of insurance by school districts and other political subdivisions provided following Op.Atty.Gen. No. 77-4, p. 67, 1976-77.

TESTIMONY OF

J. ROBERT HUNTER
PRESIDENT
NATIONAL INSURANCE CONSUMER ORGANIZATION

BEFORE THE
ALASKA LEGISLATIVE CONFERENCE

THE LIABILITY CRISIS IN INSURANCE

ANCHORAGE, ALASKA
DECEMBER 6, 1985

121 N. Payne Street
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OVERVIEW

We are here today to discuss a mounting crisis among small businesses and across America, a crisis which involves every man, woman and child: the nation is losing its liability insurance. Day care centers are losing their insurance and are being forced to close, perhaps driving second breadwinners out of work or creating new latchkey children. Nurse-midwives are losing their insurance and the lower cost birthing centers are shutting down. Doctors are marching on state capitals because insurance is unavailable or costs have skyrocketed. Cities, transit authorities, even whole states are losing their liability insurance. One of the leading auto insurers in the District of Columbia has pulled out. The list goes on and on.

And prices have skyrocketed. For example, the cost of insuring an automobile in America has gone up at a 9.1% rate for the first 6 months of 1985, exceeding the rate of change for all of 1984. 1/ The annualized rate of change is 18.2%, a record dollar change.

What is going on here? Are these practices of insurers justified?

The answer is "NO!" What we are witnessing is a manufactured crisis intended to bloat insurer profits and reduce victims' rights.

Property-Casualty insurance has a cyclical profitability, as Chart Number 1 shows. 2/ In 1984, if you accept the insurer's whopping reserve increases as valid (quite a large leap of faith), they earned about a 3% rate of return on net worth (equity). That is too low. 3/ It would indicate that their premiums were about 5% short. If their premiums had been 5% higher, they would have earned a rate of return on net worth of about 13%, more than enough for an industry of the low to average riskiness of Property/Casualty insurance. 4/

A five percent premium shortfall is not a crisis. Yet we see all of the cancellations and mammoth price increases such as:

- A 70% increase for OB/GYNs in Maryland (totally unjustified -- per analysis, attached as Exhibit I).
- 300% to 900% increases in lawyer and architect malpractice insurance premiums around the country.
- Increases of 200% to 500% for the day care centers who can get insurance. Many can't.

- o 300% to 1000% increases for public transit authorities.

- o One Northeastern state's liability insurance was $100,000 for $100 million of coverage last year. This year it's $400,000 for $3 million in coverage. Last year, it cost $1.00 per $1000 of coverage; this year it is $1.00 for $7.50 of cover.

The list goes on and on, but the statistics don't justify any of this!

What is going on?

THE LAST CYCLE BOTTOM - 1974/5

If you look again at the first chart you will see that 1984 was a typical "bottom-of-the-cycle" year. The last time it happened was in the mid-1970's when I served as Federal Insurance Administrator in the Ford Administration. At that time, the country observed the precise phenomena we see today. As a Washington Post editorial of November 3, 1976 put it:

> It is becoming increasingly apparent that liability insurance -- or the lack of it -- is becoming a national problem. . . . The rates charged those in professions other than medicine, most notably architects, are rising rapidly. Local governments are finding that it is increasingly difficult or expensive to buy insurance covering their police departments. And because of the price now placed on it, many small companies are dropping the product liability insurance they th ought they needed. . . .
>
> It is no doubt true that the increasing number and size of judgments against police departments for false arrest or mistreatment of prisoners have had some salutory effects on police behavior. Similarly, malpractice suits have provided an incentive for more careful medical care, and product liability suits have forced manufacturers to produce better and safer products. But there must be some limit to all this, and we suspect it has been passed. The real beneficiaries of this litigation explosion have been the lawyers. . . . There has to be a better way of compensating those to whom reparations are due than the clumsy and expensive mechanisms that exist today. The legal ingenuity that created the present problem is going to have to be used to solve it. Otherwise, the whole system of liability insurance and of personal liability for wrongdoing is going to collapse of its own weight.

After insurers abandoned the medical and product manufacturer lines, the federal government reviewed the situation. I was fortunate to be part of the interagency working groups that found that there were no justifications for the insurer actions. 5/ We concluded that the insurers had just panicked from lack of data.

But look at what happened; their profits skyrocketed to all time record levels. Insurers learned that the state regulators would, during the panic, give away the store in rate increases. Insurers also learned that state legislators would act to reduce victims' rights in the wake of the panic (over half the states did so 6/). The fact that insurers achieved much of their 1975 legislative agenda and now are back for a bigger bite from the apple is very significant. Now, medical professionals want caps on overal. and non-economic damages and municipal governments (and especially insurers!) are seeking elimination of joint and severable libility and punitive damage awards. Where will this raid on victims' rights end?

They are applying the lessons they learned in the mid-1970's very well today -- to day care centers, to nurse-midwives, to doctors, to product manufacturers, and so on. They are petitioning Congress for product liability and medical malpractice tort law changes and the states for changes in other tort systems.

THE HEAT IS ON

Some property/casualty officials have made statements on the public record that; "It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures." 7/ Reinsurance, a critical aspect of maintaining available and affordable insurance rates may not be available from overseas because syndicates would "simply not write reinsurance for the American casualty industry" in 1986. A representative of that overseas market (Lloyd's of London) was recently reported to have said that if a new policy form is not adopted by state regulators, reinsurance wouldn't be provided to American liability underwriters. When I recently testified before the Maryland Governor's Special Medical Malpractice Committee, a medical malpractice insurance company executive told the committee that higher rates for ob/gyns in Maryland were put into their filing because the reinsurer required it, not because the rates were actuarily justifiable (which they weren't).

Wall Street knows what is going on. Chart Number 2 shows that the property/casualty stocks have soared to record highs more than doubling the Dow Jones Industrial Average rise for 1985. Through November 20, 1985, the Best's Property/Casualty Stock Index was up by 44% compared with a 20% Dow Jones increase.8/ Wall Street expects state

regulators to allow excessive rate increases; Wall Street is right! At the end of the first six months of 1985, the surplus of insurers has skyrocketed by $8 billion, over the year earlier figure, a growth of 13.4%. 9/

Insurers blame this crisis on the courts and the tort law and say the only way to fix it is to take away as many victims' rights as possible. They can point to such statistics as these:

> Of 28 insurers writing liability insurance for day care centers in Maryland last year, 15 have left the market. Of the remaining 13, six will not write any new business. The last 7, those who will write new business, all have excluded child abuse from their policies. The Maryland Commissioner of Insurance has termed the pull out "hysteria" since no data supports it. 10/

Insurers will say this points to the need for tort reform, 11/ while admitting that data don't justify the pull out. 12/ In New Jersey, at a hearing where ISO requested the new claims made form, the ISO could not say how many million dollar CGL type claims there were in recent years, nor what percentage of claims paid were in suit last year. Iowa Insurance Commissioner and NAIC president, Bruce Foudree says that "regulators cannot trust annual statements and quarterly financial data. We [regulators] will therefore need to get tougher and spend more time looking over companies' shoulders. We cannot tolerate falsification or deception on annual statements." 13/

I do not believe that there is a tort crisis across the nation, I believe we are witnessing joint action by insurers intended to create an atmosphere where rates can be put too high and legislators will be intimidated into action designed to take away victims' rights and to allow wrongdoers to go unpunished. It was no accident that A.H. Robbins tried to piggyback onto federal tort 'reform" to be excused from its misdeeds.

At the top of the cycle a few years ago, the now-dreaded liability insurance policy rates were being slashed wildly and even being sold after the insured event happened, such as in the case of the MGM Grand Hotel fire where liability coverage was written months after the fire. 14/ Chart #3, labeled the "National Insurance Strike," shows the effect of rate cutting during 1981 and 1982 upon the profit levels of insurers. As you can see, the insurers cut about $1.5 billion in premiums over this interval and the resulting impact upon insurers profits was vastly significant---they plummeted. Chart #4 shows the profit levels insurers would have enjoyed had insurers not cut their premiums, but only maintained them at 1981 levels. Chart #4 shows great disparity between actual profits and those able to have been

realized had insurers simply held the line on premiums. Obviously, if premiums were increased at the same level as, say, the Consumer Price Index, insurer profits could have been even higher than the levels indicated in Chart #4. The national problem of insurer profits is clearly and convincingly self-inflicted.

If tort reform was so desperately needed in 1974 and 1975, why not in 1981? Why again today? The crisis is within the insurance industry, not in the courts.

When insurance trade association representatives talk to legislators, they point their fingers at the tort system for all their financial ills. But, amongst themselves, insurance association representatives and insurance company executives are more honest and admit their culpability for the current capacity crunch. A recent report put out by the Insurance Services Office (ISO) and the National Association of Independent Insurers (NAII) concluded that:

> The property/casualty industry must accept the major responsibility for its current financial condition. But, the brutal price war of the last six years is over. The industry has finally realized that a business cannot indefinitely price its product below cost and expect to survive. 15/

Now, we are asked to take the insurance industry's word that there is a tort problem and that limits on pain and suffering or on overall damages must be imposed so that rates will go down. All the evidence so far indicates that such caps have no effect on rates whatsoever.

Virginia has had limits on medical malpratice damages for years, but I was still called to testify before the legislature this year about insurance problems. Pennsylvania enacted one of the most restrictive immunity acts on record for its political subdivisions in 1978. 16/ Yet, despite those limits, Pennsylvania has another "crisis" in municipal liability insurance. A recent national study of the impact of "reforms" after the last crisis showed that caps on pain and suffering in medical malpractice cases have had no statistically measurable impact upon premium increases. 17/

I have done a lot of work in North and South Carolina as a consultant to the state governments. I am convinced that the degree of litigeousness in the Carolinas is low, significantly below that of other states where I work, for example. Such actuarial calculations as the loss development and the ratio paid to incurred losses, which I use for investment income purposes, make it crystal clear that, if there is a tort problem in this nation, it has not manifested itself in these states.

Yet, South Carolina has had to issue emergency regulations requiring no mid-term cancellations and 30-day notice of non-renewal price increases. If the crisis were truly tort based, South Carolina would not have to undertake such action. The fact that South Carolina insureds are feeling the same "hit" as the other states is stong evidence that the law is not causing the crisis, but rather that it is a creation of insurers.

In plain English, what the insurers propose in so-called "tort reform" hasn't worked and won't work. The evidence points overwhelmingly to a substantial insurance problem, both in the regulation and management of the property/casualty industry.

Insurance premiums represent 11.1% of the disposable income in this country. 18/ Insurance is the fourth leading purchase Americans make (behind food, housing and federal income taxes, although we expect it to pass federal taxes this year). Insurance rates have grown at an 18% rate for the first six months of 1985. If we are to see any relief, specific steps will have to be taken at both the state and federal level to end this insurance company misbehavior.

ALASKA'S EXPERIENCE

As great as things have been over the last cycle for the property/casualty insurers nationally, it is greater in Alaska. Over the last cycle, the operating income of insurers in Alaska was more than double that of the nation as a whole. Think of it, the profits in the nation were excessive, leading to a stock market performance of about four times the Dow Jones, yet Alaska's profit was twice the nation's; three times in private passenger auto insurance.

Perhaps you should look into your Insurance Division instead of into the tort law. In the 1981 Private Passenger Auto and Homeowner's Insurance, A Statistical Analysis published by the Division of Insurance, there was a discussion of the fact that Alaska had the lowest loss ratio in the country, indicating the highest profits for insurers, the least competition and the least efficiency. The Analysis said:

> The fact that Alaska ***enjoyed*** this position ***for the past three years*** is indicative of ***a healthy trend, one we hope to see continue*** . . . ." (Emphasis added.)

How's that for consumer protection?

THE MCCARRAN-FERGUSON ACT

In 1944, the Supreme Court of the United States found that insurance was interstate commerce and, thus, subject to anti-trust and other federal statutes. In 1945, under heavy insurer pressure, Congress passed the McCarran-Ferguson Act which uniquely exempts insurance from the federal anti-trust laws (except should intimidation, coercion or boycott occur). Congress delegated the authority to regulate insurance to the states with no standards for regulatory excellence and no ongoing congressional oversight. Indeed, the Federal Trade Commission (FTC) cannot even study insurance under current law 19/ unless Congress specifically authorizes it in advance. (FTC's power was revoked because they had the audacity to point out that whole life insurance was not a wise purchase for most Americans. The fact that the FTC was right did not alter their fate.)

The immensely important McCarran-Ferguson Act was adopted by that earlier Congress without benefit of a hearing. The legislative history makes it clear that President Roosevelt wanted only a short, two or three-year moritorium after which anti-trust laws would fully apply. 20/ That is, in fact, what both houses of Congress adopted but their language was somewhat different, requiring a conference. Mysteriously, the conference committee reported back a bill that continues in effect today; an infinite moritorium.

Every independent study of insurance concludes that the states have failed miserably in their attempts to regulate this giant industry. 21/ The states have allowed this crisis to happen. Had regulators had the political will and been properly equipped to keep prices to statutory standards (all states require that the rates be "not excessive, not inadequate, not unfairly discriminatory") we would not be in the mess we are in today with clearly excessive prices going into effect routinely around the nation and unfair mid-term cancellations, coverage and price changes rampant.

WHAT SHOULD CONGRESS DO?

(1) NICO has called upon the Judiciary Committees of the US Senate and House to review the McCarran-Ferguson Act to determine if it is working to protect America. The quality of state regulation is documented to be inadequate; the insolvency funds are a "Maryland S&L Crisis Waiting to Happen." I do not call for the elimination of state regulation here as some insurers recently have. I believe that federal standards for state regulation, coupled with federal oversight on a continuing basis, are needed. Further, the federal government should take over the insolvency funds, making them an FDIC-type operation.

(2) NICO also believes that the approach enacted at a previous bottom, 1968/9 is worthy of consideration by Congress: The Urban Property Protection and Reinsurance Act of 1968 was a response to the unavailability of insurance in the inner cities in the wake of the riot situation of the late 60's.22/

To be sure, the predicate for the withdrawal of riot insurance was strong, given the very serious situation extant in the country at the time. But the finding of the President's Panel on the Insurance Crisis is just as valid for the day care provider community today and others losing coverage as it was for the inner city communities of the late 60's when the panel found that; "Communities without insurance are communities without hope." 23/

In the riot insurance crisis, the federal government agreed to reinsure (insure the insurance transactons of the insurance companies -- a sort of lay-off bookie arrangement) the insurers against the specified peril of riot and civil commotion in return for a reinsurance premium and a commitment to participate in a pool to make sure insurance is available to all residents whose homes met reasonable standards of insurability.

The federal government made $125 million writing this reinsurance!

The cities were saved from the sure death that being uninsured brings in twentieth century America!

I think that a program of stand-by authority should be prepared to take care of the day care and nurse-midwives current problem (and, perhaps, some of the others). The authority should be granted to cover future crises as well, to stabilize the insurance profit cycle's harsh symptoms. I have provided a copy of a draft bill to establish such a program to your staff.

Insurers, the administrator of the program and representatives of the distressed industry would meet to set standards for insurability under which those who qualify are assured of an insurance market.

Studies will be undertaken to determine if other longer range actions (risk management, insurance reform, etc.) are also needed to resolve underlying problems.

Funding for this program would come from reinsurance premiums. I also envision a small surcharge, perhaps one-quarter of one percent of premiums written by all property/casualty insurers, to back up the program. This is in case premiums are insufficient over a short period or it it is determined by Congress that some short term subsidy is

required to stabilize a distressed line sometime in the future.

(3) NICO has asked the Department of Justice to review the evidence to see if a conspiracy to boycott insureds has occurred in day care insurance and other lines, the intent of which is to intimidate state regulation into granting excessive rate increases and to intimidate state and federal legislators into passing unjustified tort law modifications which will maximize insurer profit levels. 24/ Such boycotts and intimidations are not exempt from federal review under the provisions of the McCarran-Ferguson Act. NICO has called upon the Congress to monitor activity upon this important request, which has prompted a preliminary investigation by the FTC.

(4) NICO has called upon the Congress to require federal licensing of alien insurers that are not licensed and meaningfully regulated by any state in this nation but who insure or reinsure here. If Lloyd's of London will use its economic clout to dictate our nation's policy forms, (it is Lloyd's which is pushing the claims made form down the throats of the primary carriers; it is Lloyd's which is forcing the defense costs inside the limit of liability) we think they should be subject to review by some authority here.

5) NICO proposes that the Congress modify the Product Liability Risk Retention Act of 1981 25/ to allow small businesses as defined by the Small Business Administration at 13 CFR 121 to form risk retention groups along the lines already authorized under the statute. Targeted assistance through the proposed reinsurance program can assist those small business insureds who are too few to form risk retention groups in a given state.

WHAT SHOULD STATES DO?

States must concentrate their major efforts on insurance reform and not tort "reforms."

1) States should encourage the federal government to seek a more pro-active role in the regulation of the insurance business. It is a sign of strength, not weakness, to ask for help when it is truly needed, and states surely need help in this area today.

2) The US General Accounting Office noted that the most critical deficiency in the regulation of insurance by the states was in the shortage of proper staff for adequate regulation. 26/ The GAO pointed out that this was a function of money and increased resources for targeted staff development for actuaries, accountants and lawyers will improve the quality and extent of state regulation of the

insurance business. Regulators need to develop staff in the critical areas outlined and must be given sufficient resources to do so.

3) State law must require disclosure of loss data on a line-by-line basis which would give regulators much better ability to discern whether rates are excessive, inadequate or unfairly discriminatory. Line-by-line reporting will allow for adjustments between personal and commercial lines. Companies' annual statements should be expanded to require detailed reporting of all general liability subline data, by subline.

4) To the maximum feasible extent, insurance rates must be made based upon experience. The failures of the regulators and the insurers to provide proper safety incentives lies chiefly in their unwillingness to rate commercial risks based upon individual experience. Admittedly some risks are hard to rate experentially, but over time the necessary data base can be developed to properly rate individuals and unusual risks. Experience rating will allow proper market messages to be sent to unsafe risks and reduce the costs for good risks currently paying to allow the continued operations of bad risks. No where is this more critically needed than in medical malpractice rates.

5) Tough conflict-of-interest statutes must be enacted in the states to prevent continuation of the "revolving door" found by the USGAO where 50% of regulators came from the industry and 50% went to it after being a regulator. 27/ An "arms length" relationship between regulators and the regulated industry must be established.

6) Insurance regulators need better data verification techniques either through conducting their own, more frequent audits or using outside auditors. Recent charges by the NAIC president that data has been falsified strikes at the core of state regulation of insurance. If we cannot trust the annual statements, then state regulation of insurance is a fraud and a sham.

7) Insurers must be required to fully disclose to regulators the total rates of return earned, including on investment income, so that full blown rate of return rate regulation can be utilized. The NAIC endorsed this approach at its June 1984 meeting. Texas, the first state to fully use the method in setting auto rates earlier this year, saw a 10 percent reduction in premiums required. This action saved Texas consumers $250 million over the proposed rates.

8) State Commissioners must be empowered by the legislatures to meaningfully regulate excess, surplus lines carriers and reinsurers, at least to the extent that the federal goverment does not. Abuses, such as withholding cover by these

carriers, have contributed significantly to the current capacity crunch.

9) States need to establish their own reinsurance programs modeled after NICO's federal proposal. A state reinsurance program with a risk management component requirement can bring meaningful safety considerations into insurance markets. Establishing models for risk management as a requirement for reinsurance through the state would provide a general market incentive and would ease availability and decrease risks faced by consumers and their primary carriers.

10) States need to examine their anti-group and anti-rebate statutes to see if they serve any public purpose. If these laws adversely impact upon availability and affordability of cover, then they should be scrapped.

11) State regulators should conduct financial, market conduct and trade practice examinations on a regular basis for all licensed insurers in states. Increased monitoring of insurer's practices and finances can only benefit consumers by curbing rating and other market abuses, as well as insolvencies.

12) Regulators must resist attempts by industry advocates to force proposed claims made forms, which include defense costs inside the limit of liability, upon consumers.

The proposed, and constantly modified, ISO claims made form means less coverage, more exclusions and less competition for insureds.

There is less coverage because of the timing of coverage involved in the policy and the proposed inclusion of defense costs inside the limit makes coverage illusory. If a buyer has a million dollar claim against it and a million dollars are spent by the insurer defending the suit from which the loss accrued, there is nothing to pay for the loss but the assets of the insured. That's not coverage, its an insurance defense lawyer income security plan! The proposed pollution exclusion is simply a refusal to write this risk until the tort law is changed to suit the industry. It is fascinating to note that ISO does not discount the claims made policy rate a whit for excluding "high cost" pollution coverage. ISO cannot have it both ways; either polluton cover costs a lot and the exlusion should cause a dramatic drc in price, or it costs little (nothing according to ISO) and the coverage should be contained within the policy. Consumers face captivity because of the exhorbitant levels of premium for extended tail coverage that can go as high as 200 percent of the last year's premium. The higher the tail coverage cost, the less likely you are to seek more competitive rates at another company.

Claims made poses a particular problem for the unsophisticated purchaser. Believing that they are getting the same coverage for less, many insureds will immediately purchase the new policy and suffer unanticipated losses. I think that if states adopt any form of the new claims made policy form that it should not be allowed to be sold to small business consumers at all. ISO admits that its "problems" are with only five percent of its larger accounts. It would be inappropriate for regulators to broadly restrict cover based upon scarce, potentially false, and small samples of data. In the alternative, if it can be shown that some small business consumers (again, as defined in 13 CFR 121) would be able to benefit from the new policy form, then that form should be made available to such consumers but only after a reasonable occurrence policy quote is given and a full and complete disclosure of the differences of cover is made by the seller. Disclosure forms could be promulgated by the regulators with input from consumers and the industry.

In any event, states should not approve this moving target, constantly amend d form until the industry has had time enough to educate the agents and the consumer. Even if the latest amendments are the last, which I doubt, the form should not become effective before July 1, 1986 at the earliest.

13) States must allow greater consumer representation before the regulatory bodies. All too often the only parties to rate cases are the regulators and the insurer. States must give greater funding to or create Offices of Public Advocate to statutorily intervene in insurance rate cases. The New Jersey experience can serve as a good model, there the costs of intervention are billed back to the filing party and this causes minimal growth in appropriations expenditures while maximizing consumer protection from abusive insurance rates. A related program could be authorized by the federal government or the states to allow consumers to organize their own Citizen's Insurance Board to intervene on their own behalf as a complement to the efforts of the Public Advocates.

CONCLUSION

America deserves a better deal on its insurance. The federal and state governments cannot sit idly by and let the insurance industry hold day care providers, nurse-midwives, and others, hostage in a large game beyond the providers' control. The terrorist tactics of insurers every 10 years at cycle bottom must be dealt with in a systematic way that adds the stability to our economy that insurance is meant to deliver. Periodic price gouging must be stopped. It is time for the states, as well as the federal government, to act responsibly in the area of insurance regulation and take appropriate remedial action now.

FOOTNOTES

1/ CPI data on "auto insurance", Bureau of Labor Statistics.

2/ Source of data: Citibank Economics and Insurance Services Office.

3/ The ISO admits that the p/c industry had a positive return on net worth last year, conceding the point that the industry did not lose money last year. But, ISO's Mavis Walters disputes the level of that return, saying it was only two percent on net worth. Even at that level, the premium shortfall for last year was only 5.5 percent or so. (See, Statement of Mavis Walters, Senior Vice President, Insurance Services Office,Inc., before the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism hearings on the Liability Insurance Crisis of 1985, p.16 (Sept. 19, 1985)).

4/ For a discussion of risk in the property/casualty insurance business, see Investment Income and Profitability in Property/Casualty Insurance Ratemaking, J.R. Hunter and J.W. Wilson, 1983, Chapter 5.

5/ Hearing on December 3, 1975, Subcommittee on Health of the Committee on Labor and Public Welfare, US Senate. Among the interesting data supplied by ISO at that hearing were exhibits that showed that the average claim cost ISO used for ratemaking significantly exceeded the limit of liability, clearly ratemaking that had run amok. That led to this exchange:

> Sen. Laxalt: Is malpractice always a loser as far as carriers are concerned?
>
> Mr. Hunter: If they charge these rates, they could not help but win. (Page 141.)

In John Guinther's book, The Malpractitioners (Anchor Press, 1978), Guinther cites this exchange at page 169 in a chapter entitled "They Could Not Help But Win." In the following chapter, called "They Won," Guinther reviewed the later experience.

Final Report, Product Liability Task Force. Report on Product Liability Ratemaking, Product Liability and Accident Compensation Task Force, US Department of Commerce, 1980. At page ix the Report states that "overly subjective ratemaking practices were one of the principal causes of the product liability insurance problem."

6/ St. Louis Post Dispatch, Section B, P.3, 4/14/84. (See also, Sloan, infra, at note 17).

7/ Journal of Commerce, "Insurers Told: Exit Some Lines," p.8A, (June 18, 1985).

8/ Source of data: Best's Property/Casualty Stock Index, A.M. Best and Company, Oldwick, NJ. December 31, 1984 index = 416.30; November 20, 1985 index = 600.06. Dow Jones Industrial Average December 31, 1984 = 1211.57; November 20, 1985 = 1441.37.

9/ According to the Insurance Information Institute's Executive Letter of August 26, 1985, Policyholder surplus grew from $58.2 billion as of 6/30/84 to $66.0 billion as of 6/30/85.

10/ "The day care facilities have been caught up in this availability crunch and are being deemed higher risk, not necessarily based on a claims experience but due more to an insurance hysteria . . ." Testimony of Edward J. Muhl, Insurance Commissioner of the State of Maryland, before the House Select Committee on Children, Youth and Families, July 30, 1985.

11/ "Any permanent solution (of the day care insurance crisis) will require significant changes in the tort system." Testimony of Frank Neuhauser, Vice-President and Actuary for AIG (a leading insurer of day care centers) before the House Select Committee on Children, Youth and Families, July 30, 1985.

12/ "The countrywide experience for those companies reporting premium and loss data to the Insurance Services Office . . . appears to conform with the current loss experience for the majority of commercial insurance lines . . (these data) do not suggest that insurers should abandon the market." Testimony of James L. Kimble, Senior Counsel, American Insurance Association, before the House Select Committee on Children, Youth and Families, July 30, 1985. The testimony was also endorsed by the Alliance of American Insurers.

13/ Journal of Commerce, "Tougher Insurance Rules Loom," p.1A, (Oct. 10, 1985).

14/ See, for instance, the National Underwriter, 11/20/81, page 1, where it says:

> A large commercial umbrella (liability) risk came up for renewal and was rated at $105,000, about the same as the previous year. But the insured was not satisfied. Aware of the aggressive rate competition in the commercial lines market today, he decided to shop around. He approached a second agent, who submitted the very same risk to a different company, which offered to write it for just $20,000.

But the insured was still not happy. He continued shopping and eventually the original company, which originally wanted $105,000 came back and took the business for $5,000. That's right, $5,000. (Emphasis added.)

15/ NAII and ISO, "1985: A Critical Year," p.30 (Spring 1985). This quote has been curiously lacking in any reference made to this document by insurers in previous testimonies. (See, Walters, supra.)

16/ Pennsylvania Political Subdivision Tort Claims Act, (42 Pa. CSA 8541 et. seq.)

17/ Sloan, Frank A., "State Responses to the Malpractice Insurance 'Crisis' of the 1970s: An Empirical Analysis," 9 Journal of Health Politics, Policy and Law, 629 (Winter 1985).

18/

Item	1984 Amount Spent in Billions a/	Column (1) - 1984 Disposable Income of $2,578.1 Billion a/
Food	444.3	17.2%
Housing	397.8	15.4
Personal Income Taxes	302.6	11.7
INSURANCE b/	287.1	11.1

a/ Source: US Department of Commerce, Bureau of Economic Analysis.
b/ Source: Bests Management Reports, December 31, 1984, page 1.
Life Insurance Fact Book, page 56.
Blue Cross Association, Telephone call of 1/25/85.

19/ The law was euphemistically entitled the "FTC Improvements Act of 1979."

20/ See Statement of the Honorable Claude Pepper before the Subcommittee on Monopolies and Commercial Law on the Insurance Industry's Antitrust Exemption, April 11, 1984; found at page 5 of the Subcommittee's report, Competition in the Insurance Industry (Serial No. 127).

21/ See, for instance, Issues and Needed Improvements in State Regulation of the Insurance Business, General Accounting Office (Oct. 9, 1979) (hereinafter, GAO Issues); The Invisible Bankers, Andrew Tobias (Linden Press, 1982); The Life Insurance Game, Ronald Kessler (Holt, Rinehart and Winston, 1985);"Protection for Sale: The Insurance Industry," NBC-TV News (1981); Risk, Reality and Reason, the Conference of Insurance Legislators (September 1983).
One of the tests of state preparedness to deal with a crisis in availability and pricing of liability insurance is actuarial staff. Of the 52 states (including DC and Puerto

Rico) NICO surveyed, we find that 26 have actuaries. So one-half of the states have no actuaries at all.
There are 62 actuaries employed by the states, of the 7,682 actuaries in the nation. It is well known in the industry that those best suited to deal with matters pertaining to liability insurance are those who have passed the examinations enabeling them to be "Fellows" in the Casualty Actuarial Society. State regulation has only 8 such persons. They are employed by only 5 states [Connecticut (1), Massachusetts (1), Michigan (1), New Jersey (1) and New York (4).]
Aetna Life and Casualty Insurance Company alone employs 126 actuaries. Travelers has 100.

Source of Data: American Academy of Actuaries 1985 Yearbook and Directory of Members by Business Affiliation.

22/ Public Law 90-448, 82 Stat. 476; 12 U.S.C. 1749bbb, 42 U.S.C. 4011.

23/ Meeting the Insurance Crisis of Our Cities, A report of the President's National Advisory Panel on Insurance in Riot-Affected Areas, January, 1968, p. 1.

24/ See Exhibit II for a copy of the letter to the Justice Department.

25/ 15 USC 3901 et. seq. and 1983 amendments.

26/ GAO Issues, p.35.

27/ Ibid., p.176

CHART #1

THE "CYCLE" AND CONSUMER ABUSE

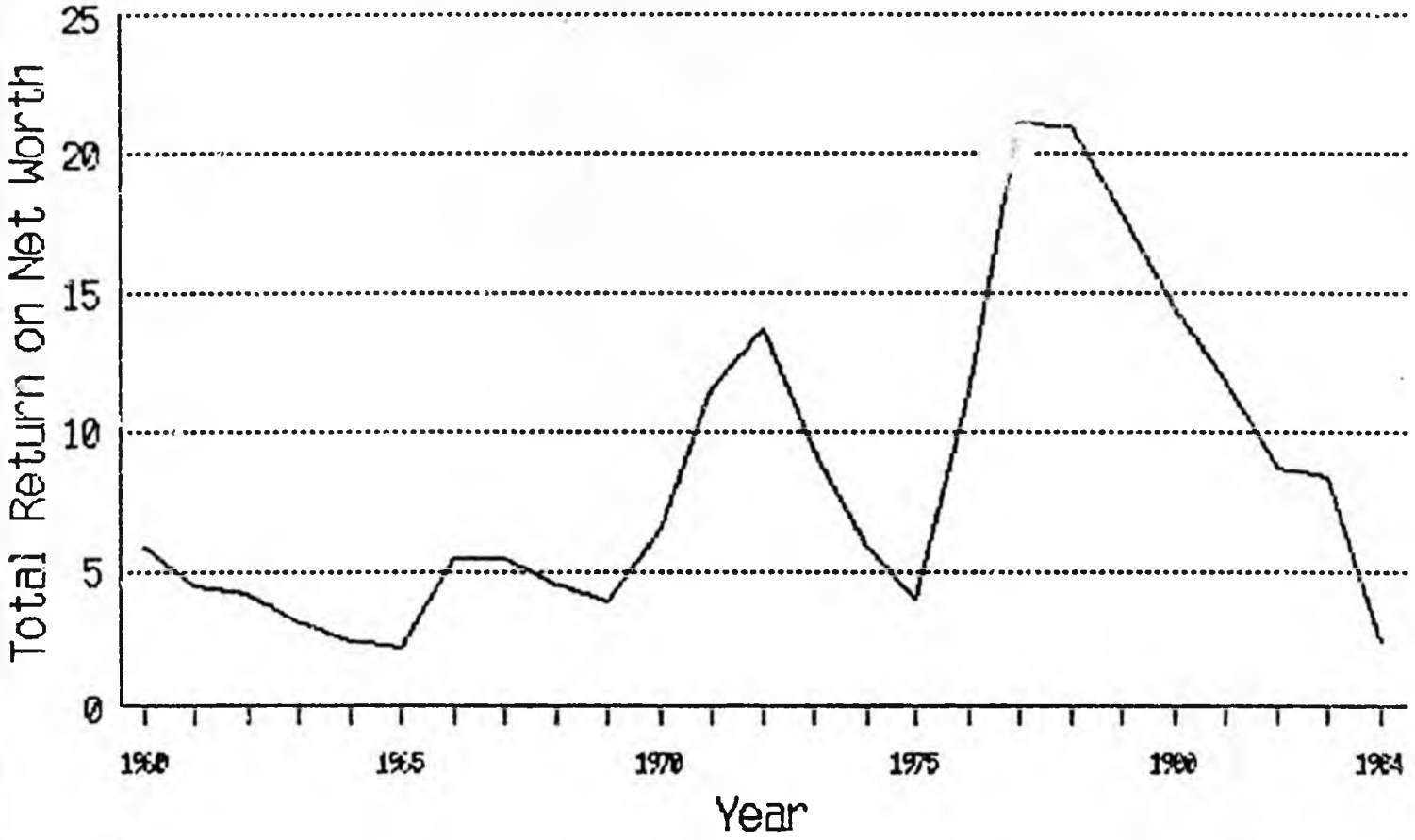


CHART #2

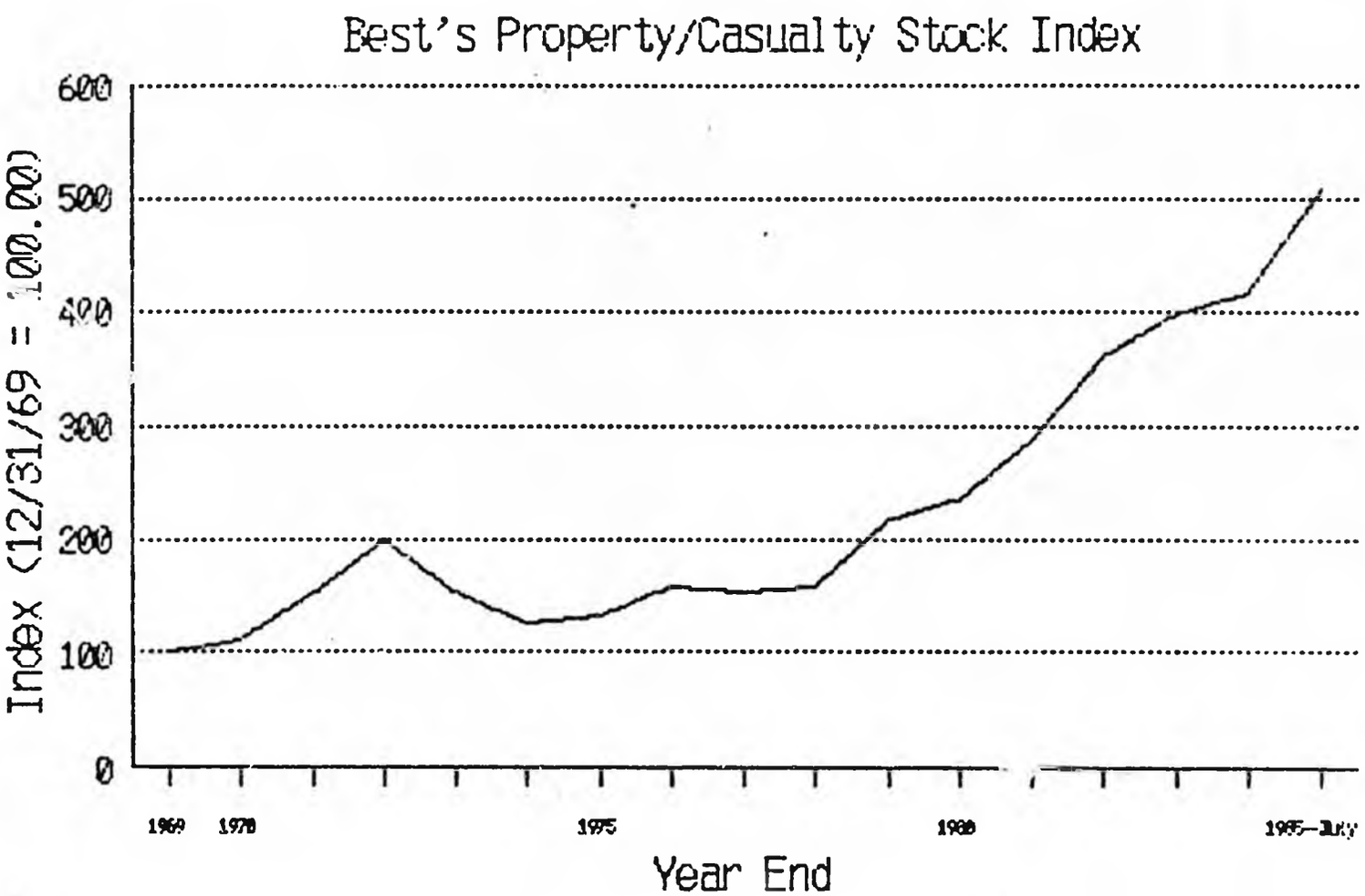
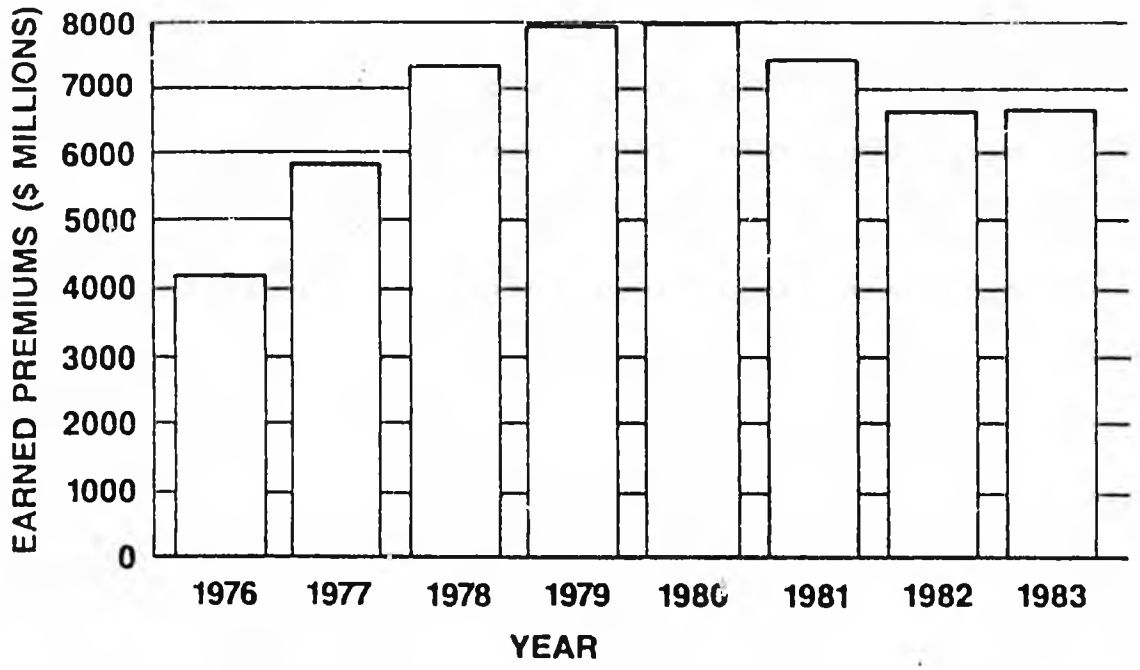

Best's Property/Casualty Stock Index
Index (12/31/69 = 100.00)
600
500
400
300
200
100
0
1969
1970
1975
1980
1985-July
Year End

CHART 3

NATIONAL LIABILITY INSURANCE STRIKE



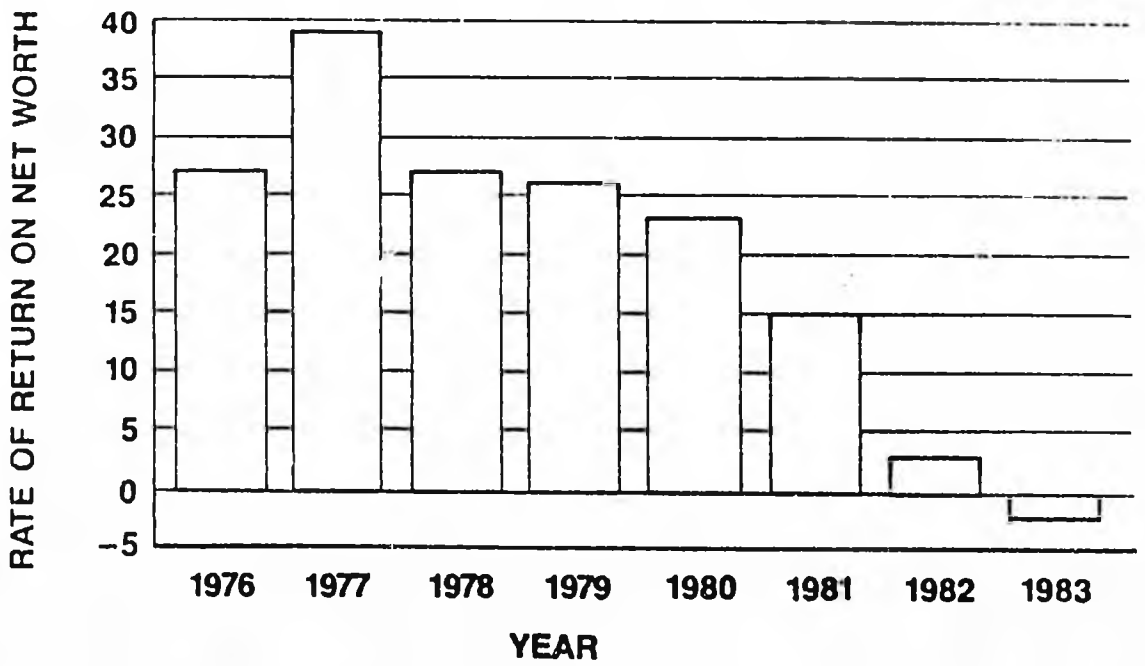
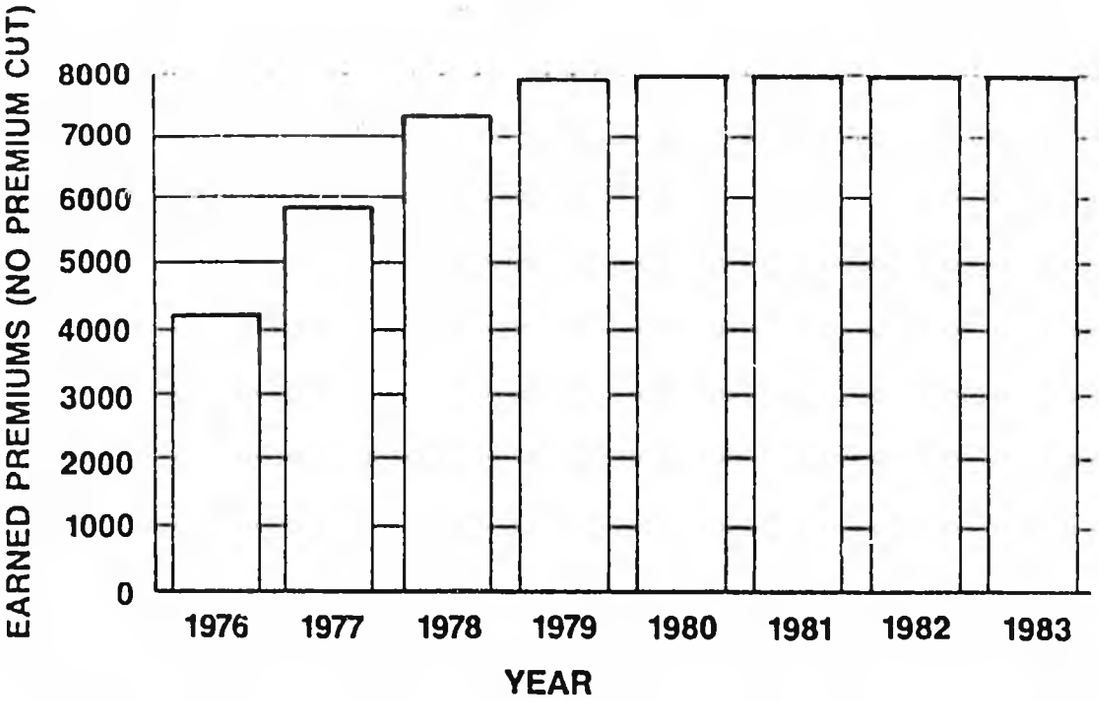
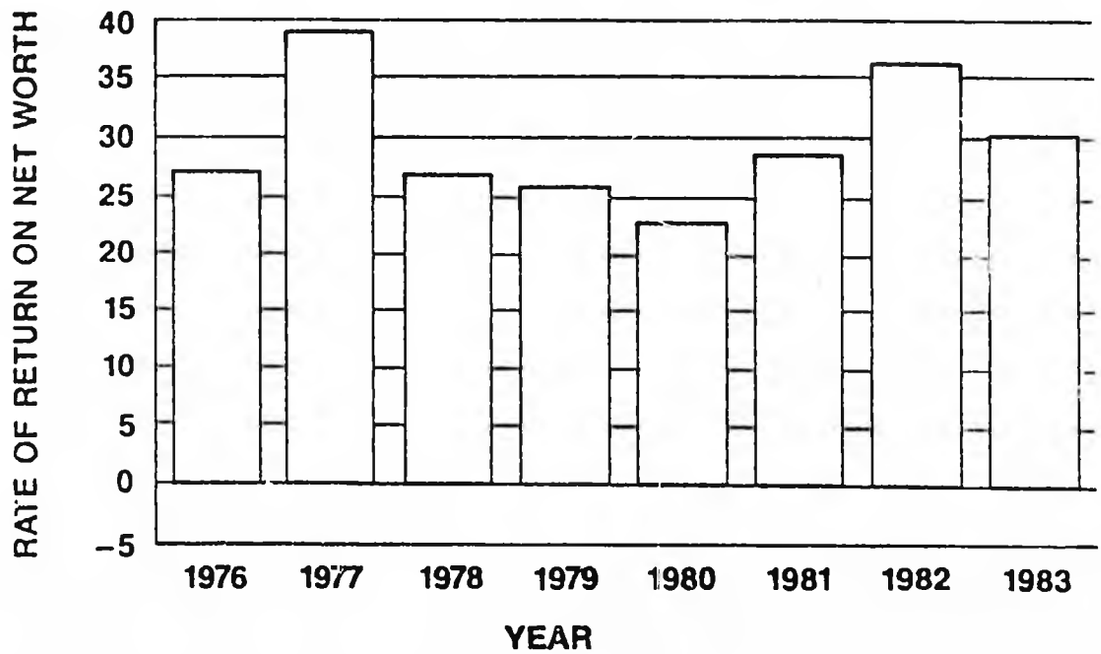


CHART 4

NATIONAL LIABILITY INSURANCE
STRIKE II





DATA UNDERLYING CHARTS 3 & 4

COMMERCIAL LIABILITY INSURANCE PROFITABILITY STATISTICS (1)
Rate of Return on Net Worth (2)

Year	Earned Premiums (Millions of $)	Actual ROR	All American Industry (3)
1976	$4160	27%	13.3%
1977	5865	39	13.5
1978	7334	27	14.3
1979	7943	26	15.9
1980	7969	23	14.4
1981	7416	15	14.0
1982	6627	3	11.0
1983	6671	-2	11.5
Average		19%	13.3%

(1) Source: National Association of Insurance Commissioners Report on Profitability, By Line, By State.

(2) Rate of Return on net worth estimated from the NAIC Reported Insurance Operating Profit on Earned Premiums by converting to net worth by multiplying by a 2:1 Premium/Net Worth Ratio. Investment Income on Surplus is added at an assumed after tax yield as follows: 1976, 5.0%; 1977, 5.5%; 1978, 6.0%; 1979, 6.5%; 1980, 7.0%; 1981, 7.5%; 1982, 8.0%; 1983, 8.5%.

(3) Fortune 500, 1976-1980; Business Week, 1981-1983.

NOTE: Had the insurers not cut premiums after 1980 but held them constant, the Rate of Return on Net Worth would have been:

1981	29%
1982	37%
1983	31%
8-year average	30%

The problem is clearly rate cutting, nothing else!

Analysis of Rate Filing of

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

Filing Date: May 16, 1985 Effective: July 1, 1985

J. ROBERT HUNTER

Fellow, Casualty Actuarial Society
Member, American Academy of Actuaries
President, National Insurance Consumer Organization
Former Federal Insurance Administrator

BACKGROUND

On May 16, 1985, the Medical Mutual Liability Insurance Society of Maryland (MMLIS) filed for an increase in malpractice premiums of +29%. The filing also requested changes in the relativities between classes, the most notable of which was a one-third increase in Class B (OB/GYN Surgery). The total impact of the overall rate change of +29% and the class relativity change of +33.3% on OB/GYN surgeons was to increase their rates by 66.7%. For the highest rated territory, these doctors had their rates raised from $25,429 to $42,393. This did not please the OB/ GYN community.

WAS THE OVERALL 29% RATE INCREASE JUSTIFIED?

In my opinion, there was no justification for an overall rate increase of 29%. Indeed, I believe that the filing supports a reduction in premiums rather than an increase. Here's why:

- The filing incorrectly assumes that the yield on investments that the MMLIS will earn is 5%, an unrealistically low assumption, and

- The filing incorrectly assumes that inflation in the future will be at double-digit levels.

When proper assumptions are made on just these two items, even accepting other major assumptions (such as their reserves are accurate), a rate reduction of 10.5% is indicated.

HOW SHOULD INVESTMENT INCOME BE FACTORED IN?

To do the job properly, a full blown total return analysis should be undertaken. The National Association of Insurance Commissioners adopted the total return approach at their June, 1984 meeting, and issued a report detailing several approaches. Under a total return approach, all income is analyzed to determine what overall profit the company will make under a given set of rates and a comparison of that potential earning power to the needed margin to attract risk capital is undertaken. It is a sophisticated, highly desirable approach that should be used in Maryland, as the NAIC recommended for all regulated lines.

In that the filing was woefully short of the data needed to undertake total return analysis, I decided to accept, for review purposes, the MMLIS approach to discounting the cash flows (their Exhibit 5, my Exhibit "A", attached). On my exhibit, you will see the MMLIS approach as typed and mine in

handwriting. MMLIS discounted the losses based on a distribution of losses paid by time. Presumably this is based on their Maryland experience, the filing does not identify that.

The average claim takes a bit over 7 years to pay. This means that MMLIS holds the money in reserve for that long before they pay the average claim. Obviously this means that the reserves, which are fully funded today under statuatory accounting rules, will produce a significant amount of investment income.

The MMLIS approach assumes that they will earn 5% on their invested reserves. This is obviously too low. MMLIS has earned, according to their 1984 Annual Statement, the following yields on their total assets (including assets not invested or used for business--such as properties) the following:

1982	9.1%
1983	8.9%
1984	9.3%

Other filers recognize that the yield is not so absurdly low. For example, on May 17, 1985 the leading writer of medical malpractice insurance in the country, St. Paul submitted a filing in South Carolina in which it used a 10.5% yield to discount that state's cash flow. (see my Exhibit "B")

I have chosen to use a 10% discount rate, which is reasonable for fully invested assets of MMLIS. That change is shown on Exhibit "A". It results in a discount for investment income of 43% rather than 26% based on the unjustified 5% yield assumption. If that change is carried through to the rate level itself, the rate filing would have been for a <u>reduction</u> in rates of 1.4% rather than an increase of 29%. The calculation of the reduction is found on Exhibit "C", attached.

TREND

MMLIS displayed its own Maryland data for trend on its Exhibit 4, my Exhibit "D". It carefully analyzed the data and concluded that the range of results were between an annual trend of +7.8% based on straight line projection, and +9.3% based on exponential line projection. The data are company specific and Maryland specific andthrough the most recent year, 1983.

For some reason, the filer then displays data for other insurers, for other states, that is old data. (See Exhibit

"E"). This experience is from a period of high inflation and is not relevant, in my opinion to the case at hand. For one thing, the federal government has reported that medical inflation rates in the nation are below 10%, certainly no where near the 16% figure that the irrelevant data produce. These data should not be given weight, in my estimation.

I selected a trend of 9% for the purposes of this review. It gives weight to the fact that the exponential line has a slightly better "fit" to the data and is within the range as calculated by MMLIS, but near the exponential side. I also chose to apply the trend exponentially (this gives a higher answer than using a straight line).

Looking again at Exhibit "C", the use of the amended trend, coupled with the 10% yield assumption produces an indicated rate level reduction of 10.5%

SENSITIVITY ANALYSIS

If we used a yield of only 9% (less than MMLIS earns, even on all assets including cash) and use a trend of 10% (which is more than that realized by MMLIS and more than that in the nation today) the indicated rate would be a reduction of 0.9%.

ANALYSIS OF CLASSIFICATION CHANGES

Incredibly, there is absoultely no justification for the changes in the classification differentials employed by MMLIS contained in the filing. The entire "justification" for the change is found on Exhibit "F", attached.

There are other, more minor changes made without a shread of evidence, such as the territorial relativity changes, and the increased limits changes.

BALANCE SHEET

MMLIS is as solid an insurer as there can be. Their 1984 balance sheet shows that the company enjoys a premium/surplus ratio of 1.2 to 1. This company appears to be over-capitalized. If the ratemaking has followed the current filing approach, it is no wonder.

Exhibit "A"

MEDICAL MUTUAL LIABLITY INSURANCE SOCIETY OF MARYLAND

1985 PROFESSIONAL LIABILITY RATE LEVEL REVIEW - OCCURRENCE COVERAGE

PRESENT VALUE OF PAID MEDICAL MALPRACTICE CLAIMS

(OCCURRENCE BASIS)

Time Interval	Cum. Paid	% Paid Losses By Interval	Years of Discount (n)	Vn (5%)	10%	Present Value	
Up to 12 mos.	0.0%	0.0	0.5	.976	.954	-	
24	2.0	2.0	1.5	.929	.867	1.858	1.73
36	7.0	5.0	2.5	.885	.788	4.425	3.94
48	19.0	12.0	3.5	.843	.716	10.116	8.59
60	35.0	16.0	4.5	.803	.651	12.848	10.42
72	53.0	18.0	5.5	.765	.592	13.770	10.65
84	68.0	15.0	6.5	.728	.538	10.920	8.07
96	79.0	11.0	7.5	.694	.489	7.634	5.38
108	87.0	8.0	8.5	.661	.445	5.288	3.55
120	92.0	5.0	9.5	.629	.404	3.145	2.02
132	95.0	3.0	10.5	.599	.368	1.797	1.10
144	97.0	2.0	11.5	.571	.334	1.142	.669
156	99.0	2.0	12.5	.543	.304	1.086	.609
168	100.0	1.0	13.5	.518	.276	.518	.27
						74.547%	

AVR 7.1 yrs

57.1

CONCLUSION

This filing is not justified. An overall rate level decrease of 10.5% is needed, not a 29% increase. The class changes which so sharply impact the OB/GYN surgeon group is not justified in the filing, although their may be experience somewhere that supports that change. The filing should have been disapproved. It is particularly abusive to observe a 66.7% increase for OB/GYN surgeons with no justification. On the basis of the filing, the OB/GYN rate should have been decreased by 10.5%. This means that the OB/GYN surgeons in Maryland may be paying about 85% too much.

Exhibit "B"

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Physicians and Surgeons Professional Liability

Exhibit C
Loss and Loss Expense
Payout Patterns

Year	Cumulative Annual Payout	Incremental Annual Payout	Present Value*
1	.061	.061	.059
2	.275	.214	.187
3	.496	.221	.175
4	.668	.172	.124
5	.786	.118	.076
6	.869	.083	.049
7	.910	.041	.022
8	.952	.042	.020
9	.976	.024	.011
10	1.000	.024	.009
		1.000	.738

* Discounted claims payments at 10.5% pre-tax.

EXHIBIT "C"

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

1985 Professional Liability Rate Level Review - Occurrence Coverage

Total Limits Rate Level Indication -- $000's

(1) Calendar/ Accident Year	(2) E. P. at Current Rate Level (Exh. 3)	(3) Ultimate Incurred Loss & ALAE (Exh. 2)	(4) Trend Factor to 7/1/86 at 11% 9%	(5) Losses Trended to 7/1/86 (3)x(4)	(6) Loss Ratio at Current Rate Level (5)/(2)
1979	33,395	24,688	1.826 2.076	51,255 45130	1.535 1.351
1980	35,732	25,235	1.677 1.870	47,200 42319	1.321 1.184
1981	33,872	25,904	1.539 1.685	43,649 39,866	1.289 1.177
1982	28,984	25,414	1.412 1.518	38,580 35,885	1.331 1.238
1983	18,203	18,854	1.245 1.368	25,785 24,416	1.417 1.341
	150,185			206,470	1.375
				187,816	1.249

Annual Trend Factor: 11.0%
(Exhibit 4)

a)	Five year loss ratio at current rate level:	1.249	1.375	
b)	Discount for investment income at 5.0%: (10%) (Exhibit 5)	.570	0.745	.570
c)	Discounted loss and ALAE ratio (a) x (b):	.712	1.024	.784
d)	Provision for Unallocated LAE (Exhibit 6)	1.05	1.050	
e)	Discounted loss and LAE ratio (c) x (d):	.748	1.075	.823
f)	Permissible discounted loss and LAE ratio: (Exhibit 6)	.835	0.835	
g)	Indicated rate level increase (e) / (f):	-10.5	1.288	-1.4%
h)	Selected rate level increase		1.290	

INVESTMENT INCOME AND TREND CHANGE

ONLY INVESTMENT INCOME CHANGE.

Exhibit "D"

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

1985 RATE LEVEL REVIEW - PROFESSIONAL LIABILITY - OCCURRENCE COVERAGE

TREND IN TOTAL LIMITS LOSS RATIOS AT CURRENT RATES

($000'S)

(1) Calendar/ Accident Year	(2) Earned Premium at Current Rate Level	(3) Ultimate Incurred Loss and ALAE	(4) Loss Ratio at Current Rates	(5) Linear Fit	(6) Exponential Fit
1979	33,395	24,688	.739	.672	.683
1980	35,732	25,235	.706	.748	.747
1981	33,872	25,904	.765	.825	.816
1982	28,984	25,414	.877	.901	.893
1983	18,203	18,854	1.036	.978	.976
			Average Annual Trend:	+ 7.8%	+ 9.3%
			r :	.899	.906

(2) Exhibit 3

(3) Exhibit 2

(4) (3) / (2)

irrelevant

ISO COUNTRYWIDE TREND (Exh. 4A): 16%

Selected Trend Factor: 11%

I'd use 9.0%

EXHIBIT "C"

INSURANCE SERVICES OFFICE

EXHIBIT 4A

COUNTRYWIDE#

Professional Liability Insurance
Calculation of Annual Trend Factor
Based on Basic Limits Loss Ratios at Present Rates

PHYSICIANS, SURGEONS AND DENTISTS

Basic Limits

(1) Policy Year Ending	(2) $100,000 Basic Limits Incurred Losses*	(3) Premium At Present Rates	(4) (2)÷(3) Actual	Average Loss Ratio at Present Rates (5) Exponential Curve of Best Fit
12/31/75	$167,810,058	$615,020,250	.273	.232
12/31/76	139,176,608	524,225,850	.265	.271
12/31/77♦	181,630,098	638,830,853	.284	.316
12/31/78♦	251,848,210	700,894,098	.359	.369
12/31/79♦	280,590,219	717,382,127	.391	.430
12/31/80♦	332,612,672	705,726,416	.474	.502
12/31/81♦	426,038,352	684,461,050	.622	.585
12/31/82♦	497,532,513	666,499,516	.746	.683

Average Annual Loss Ratio at Present Rates Trend.....16.6%

Excluding Texas and Massachusetts

* Losses include allocated loss adjustment expense and are developed to an ultimate settlement basis.

♦ Includes Claims Made Data.

Selected Annual Trend 16.0%

TS-PR-84-11
12/20/84

Exhibit "F"

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

1985 PROFESSIONAL LIABILITY RATE LEVEL REVIEW

Effect of Proposed Classification Changes

Specialty	Description	Distribution Of Total Limits Premium	Present Relativity	Proposed Relativity
80240	Forensic Medicine	0.0 %	.75	.65
80232	Hypnosis	0.0	.75	.65
80248	Nutrition	0.0	.75	.65
80263	Ophthalmology-No Surgery	0.2	.75	.65
80235	Physiatry and Physical Medicine	0.2	.75	.65
80249	Psychiatry	0.3	1.00	.65
80250	Psychoanalysis	0.0	1.00	.65
80251	Psychosomatic Medicine	0.0	1.00	.65
80266	Pathology-No Surgery	0.5	1.00	.65
80261	Neurology-No Surgery	0.8	1.00	1.20
80253	Radiology-Diagnostic-No Surgery	0.5	1.20	1.80
80280	Radiology-Diagnostic-Minor Surgery	0.1	2.10	2.80
80145	Surgery-Urology	3.0	3.00	3.60
80155	Surgery-Plastic-Otorhinolaryngology	1.5	6.00	5.00
80156	Surgery-Plastic-N.O.C.	2.5	6.00	5.00
80141	Surgery-Cardiac	0.0	5.00	6.50
80150	Surgery-Cardiovascular	0.0	6.00	6.50
80153	Surgery-Obstetrics/Gynecology	8.0	9.00	12.00
80168	Surgery-Obstetrics	0.1	9.00	12.00
	All Other	82.3		
		100.0%		

Effect: +2.8%

Current Average Relativity: 2.15

Projected Average Relativity: 2.21