

ALASKA LEGISLATURE COMMITTEE FILES 1905-1900 00/2

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coverage. Traditionally, the general liability policy has included the business community's liability for damage caused by the "sudden and accidental" discharge of toxic substances. Environmental Impairment Liability ("EIL") policies are used to cover damages from gradual pollution incidents. In a number of highly controversial cases, courts have expanded the meaning of "sudden and accidental," causing insurers to be liable for EIL-type (gradual pollution) coverage when it was not intended under the policy.

As a result, insurers currently are reluctant to provide any pollution coverage, though Lloyd's of London has indicated a willingness to cover some liability at additional cost on a "named peril" basis only.

#### Defense Cost Inclusion

Ordinarily, the costs of defending against liability claims are not included within the aggregate limits of the commercial general liability policy. Insurers traditionally have controlled the defense of claims against their insureds by engaging defense counsel and by governing the vigor with which a claim is challenged. The insurers paid all costs, and the full amount of the policy limits were available to pay any settlement or judgment against the insured.

During the product liability crisis of the mid-1970's there were a number of allegations that insurers were, in fact, fueling the claims situation by settling too quickly in many cases that the insureds believed should have been more vigorously contested. As a result, many companies insisted that their insurance contracts include a right to at least partial, if not full, control of defense strategy.

In the mid-1980's, defense costs have escalated rapidly, mostly because of the cost of attorneys' fees, and possibly, in part because of the insureds' desires to contest claims to the fullest degree possible.

In order to control costs, the ISO had proposed to change the commercial general liability form to include defense costs within the aggregate limits of the policy. This practice already is incorporated in at least some other policy forms. 1/

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1/ Business Insurance, December 9, 1985, page 1.

The proposal brought a sharp response from insureds, the bar, and the Risk and Insurance Management Society, a trade association of risk managers and insurance buyers. They believe that there will be cases of defense costs exceeding the limits, leaving no money to pay a settlement or judgment. Some are concerned that defense counsel may urge settlement of unworthy claims in order to prevent defense costs from exhausting all available coverage. Others believe that there will be a spate of bad faith claims against insurers when the policy limit is used for legal costs and the insured is left liable for damages.

In response to the concerns of insurance customers, regulators and brokers, the ISO has revised its proposal so that up to 50% of the aggregate limits may be spent on defense costs before the policy limits will begin to be reduced by those expenses. An endorsement will be available so that up to 300% of the limit may be spent on defense costs before the policy limit is affected. A discount will be applied if the policyholder buys less than the 300% endorsement. Insurers apparently will have the option to apply an endorsement which will charge all defense costs to the policy limits. 2/

At its annual meeting in December, the National Association of Insurance Commissioners passed a resolution urging states not to approve the ISO proposal until the proposal can be studied by the Commissioners. The ISO, which had hoped to initiate the defense cost change in July of 1986, will postpone filing its request with the states until at least February 15, 1986. 3/

## II. ALTERNATIVE INSURANCE MECHANISMS

As liability insurance becomes unavailable or unaffordable, means of liability protection outside the conventional insurance markets increasingly are being sought and used.

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2/ Business Insurance, December 16, 1985, page 1.

3/ Business Insurance, December 23, 1985, page 1.

### Insurance Company Creation (Captive or Other)

One response available to large companies unable to buy the insurance coverage they need is to set up their own insurance company. Thirty-three major United States companies recently have established an offshore insurer, A.C.E. Insurance Company, which began operation in November, 1985, and provides up to \$150 million in liability coverage. Founding companies include IBM, GE, U.S. Steel and Chas. Manhattan, as well as other companies. While A.C.E. offers coverages not available elsewhere, its policies are available only to large companies since it only pays claims exceeding \$100 million.

In addition, it recently was announced that a group of fifteen chemical and petrochemical companies are creating a company called CASEX, which would provide excess limits coverage for products, directors and officers, and sudden and accidental pollution liability.

Another group of fifty United States banks are creating a mutual insurer, Bankers' Insurance Co., Ltd., to provide directors and officers liability coverage and bankers blanket bonds.

During the medical malpractice crisis in the early to mid-1970's, groups of medical professionals unable to obtain malpractice coverage formed their own companies, commonly known as bedpan mutuals, to handle their claims. Such insurance groups currently provide about half of the coverage in the malpractice liability market.

### Self-Insurance

Some industry groups and trade associations, as well as municipalities in several states, have joined together to self-insure as groups, and others have been able to set up a formal self-insurance program just to handle their own claims. <sup>4/</sup>

Self-insurance, either individual or group, also has been a useful vehicle for municipalities for which insurance has become either unavailable or unaffordable.

One major problem encountered by firms seeking to set up self-insurance programs is that reserves for self insurance are not

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<sup>4/</sup> A formal self-insurance program is different from "going bare" in that the former sets up reserves to cover claims and treats it similar to an insurance system whereas the latter simply hopes claims do not occur, which may cause financial difficulties if and when they do occur.

accorded the same tax treatment as insurance company reserves, in that self-insurance reserves are fully taxable. While this presents no problem for municipalities and other tax-exempt entities, it is a major hurdle for private entities.

Small firms are generally unable to establish a meaningful self-insurance program individually, but may benefit from group self-insurance if no other insurance is available.

#### Product Liability Risk Retention Act Groups

The Risk Retention Act ("RRA"), 15 U.S.C. § 3901 et seq., was intended as a mechanism to (1) create an alternative product liability insurance market, and (2) provide a means for smaller insurance buyers to purchase general liability insurance -- including product liability coverage -- as groups. The RRA evolved from an intensive interagency study of the product liability "crisis" in the mid-1970's. President Reagan signed the Act in September 1981, noting that it was a "marketplace solution" to provide product manufacturers, distributors and sellers with affordable product liability insurance.

A Risk Retention Group ("RRG") is formed by any number of product sellers as an insurance company licensed to operate under the laws of any state. The RRG may provide only product liability and completed operations coverage to its members. (Completed operations is work performed by a contractor or product manufacturer installing its product.) The RRG may sell insurance in any state without meeting the licensing or other regulatory requirements of any state other than its domicile. No state may discriminate against an RRG, but states may impose normal premium taxes and enforce compliance with unfair claims settlement practices statutes.

The Act is restrictive in that it limits a RRG to products and completed operations coverage, but permits the establishment of a domestic group captive that is able to do business countrywide.

A Purchasing Group ("PG") may be formed to negotiate for a group policy from any insurer to cover product liability completed operations, and commercial general liability when either of the first two coverages are included. The PG and any entity providing services to the PG are exempt from any state law which would prohibit the PG from purchasing this coverage on a group basis.

A group of companies purchasing together presents an attractive premium base with lower administrative costs to the insurer. In a tight market small companies are subject to cancellation or sharply higher prices because an insurer may prefer to use its

resources on a few large risks. The provisions for purchasing groups was necessary to overcome statutes and regulations in about forty-four states which prohibited so called "fictitious groups" set up for the purpose of buying property or casualty insurance on a group basis.

Very few companies have used the RRA to date, but the rapid change in market conditions likely will lead to a much greater interest in its provision.

One reason that the RRA has been little used is the fact that it is limited to products and completed operations coverages, although groups may include other coverages as long as products is the primary purpose. It is a useful means of expanding insurance capacity, and would provide additional capacity in the alternative market if the products limitation were removed.

### III. STATE REGULATORY DEVELOPMENTS

State legislators and insurance regulators have recognized the severity of the liability insurance crisis, and have responded in a variety of ways. One state has barred cancellation or non-renewal of policies and prohibited any increases in the cost of policies in effect. Several other states are considering similar actions. The National Association of Insurance Commissioners adopted a resolution opposing mid-term cancellations and short notices of non-renewal. Other states are implementing or considering the use of Market Assistance Programs, which are voluntary assigned risk pools designed to take risks such as day care centers on a rotating or shared basis. Yet other states are considering joint underwriting associations in which the state regulator mandates the sharing of certain risks

Half the states have "file and use" rate regulation in which the insurance department is notified of a rate increase which becomes effective without action by the regulator. Many of these states reportedly are rethinking their systems because of the sharp increases in the rates of some of the problem lines of coverage.

Regulators normally have viewed commercial insurance as transactions between knowledgeable buyers and sellers, and, accordingly, have refrained from interfering with the market's operation. The recent concerns expressed by the Insurance Commissioners is a measure of the depth of the availability/affordability crisis, and may foreshadow a heightening in the regulatory "oversight" of commercial insurance.

## CHAPTER 4

### TORT LAW REFORM

As discussed in Chapter 2, two primary areas have been the focus of the Working Group's examination into the crisis in liability insurance availability and affordability: the current economic difficulties of the insurance industry; and, the extraordinary growth in tort liability in recent years. For the reasons discussed in Chapter 2, while it seems likely that the insurance industry will be able to work its way out of its present economic straits, it is very unclear -- if not doubtful -- that this will significantly alleviate the crisis in insurance availability and affordability. Early indications are that insurers will continue to avoid areas that present a high risk of tort liability, or, where they do provide insurance, will demand high premiums. That is, while the more extreme aspects of the availability crisis may be resolved once the industry regains its desired level of profitability, it appears unlikely at this time that the high premiums that have led to serious affordability concerns will be reduced significantly.

For these reasons, as well as for the other reasons discussed in Chapter 2, there appears to be little that can or should be done by the federal or any other government to "remedy" the economic factors that underlie the current availability/affordability crisis. The excesses of the tort system, however, present a very real opportunity to address a major cause of the insurance crisis with sensible and appropriate reforms. And while some of the changes in the insurance market currently under contemplation (see Chapter 3) probably will relieve some availability/affordability problems, it seems unlikely that these changes will provide long-term, systemic relief without fundamental reforms of tort law.

The following is a list of eight tort reforms that would bring a greater degree of rationality and predictability to tort law, and thereby significantly assist in resolving the availability/affordability crisis. This is by no means an exhaustive list of possible tort reforms. Nor does the accompanying discussion of these reforms indicate how they necessarily should be implemented; that is, on the federal or state level, or through legislative or judicial modification of the law. Rather, this list identifies eight recommended tort reforms which if implemented should return tort law to a credible fault-based compensation system that provides a fair and reasonable level of compensation to deserving plaintiffs through a more predictable and affordable liability allocating mechanism. While these reforms undoubtedly will be resisted by some, they in fact are quite modest and should not dramatically alter the basic principles of tort law as those have existed for centuries.

Recommendation No. 1: Retain fault as the basis for liability.

For the reasons discussed in Chapter 2, fault should be retained as a basis for tort liability. As noted there, fault is the only mechanism in tort law for distinguishing desirable from undesirable conduct, and is an indispensable predicate to many other aspects of the tort liability system without which the system would generate arbitrary and unfair results.

For non-product liability cases, negligence should remain the applicable standard of liability. Strict product liability should under no circumstances be extended outside the traditional area of product injuries. Thus, theories which would apply strict product liability to landlords or to professionals providing services (e.g., pharmacists, architects, etc.) should be strongly resisted and expressly rejected. The trend in some states <sup>1/</sup> to extend strict liability doctrines outside the area of product injuries is a highly pernicious development which will significantly undermine the ability of those sectors of our economy to function properly.

Strict product liability in its traditional sense represents a sensible application of fault-based liability to the realities of modern industrial life. The Working Group, accordingly, does not recommend the abolition of strict product liability, provided the doctrine is kept within its traditional bounds. Unfortunately, strict product liability has been subject to extensive abuse that often has had the effect of transforming the doctrine in practice into absolute liability.

The following are the elements of a strict product liability standard which does not present an impossible or unfair burden to plaintiffs in demonstrating fault on the part of defendant-manufacturers, while at the same time not establishing a scheme of absolute liability which simply uses the manufacturer as an insurer for all risks of injury.

- ° Liability should be predicated on the existence of a defect which is found to make the product unreasonably dangerous.
- ° Defendants should only be held liable for uses of a product that are both reasonable and foreseeable. Liability should not be predicated upon unreasonable or unforeseeable alterations of a product that cause the injury, particularly where such alterations are prohibited or warned against. (Alterations, in this regard, can include the failure to provide required and reasonable safeguards, maintenance or inspections.)

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<sup>1/</sup> See in this regard the recent opinion of the California Supreme Court in Becker v. IRM Corp., 38 Cal.3d 454, 698 P.2d 116 (1985), extending strict product liability to landlords.

- ° Manufacturers should not be liable for defects which have been the subject of an adequate warning or which are readily apparent to the reasonable consumer. Manufacturers should only be required to warn with regard to uses of a product that are both reasonable and foreseeable.
- ° Manufacturers should only be held to the state of the art in existence at the time of manufacture of the product. Manufacturers should not be held liable for unknown or unknowable hazards.

The above elements, if applied in a principled manner, should ensure that strict product liability will serve to compensate persons injured as a result of a manufacturer's fault, while preventing that liability doctrine from simply being used as a risk spreading mechanism designed to operate as a product-based insurance scheme.

Recommendation No. 2: Base causation findings on credible scientific and medical evidence and opinions.

One of the most pernicious developments in tort law has been the extent to which causation findings are based on fringe scientific or medical opinions well outside the mainstream of accepted scientific or medical beliefs. Increasingly, juries are asked to make difficult decisions about highly complicated issues of science and medicine. Unfortunately, the personality and demeanor of expert witnesses often may be more critical in making such determinations than decades of evolving scientific and medical investigation and thought.

This problem has resulted in the growing perception that the tort system often is wholly arbitrary in allocating liability in cases involving difficult issues of science and medicine. This is a particularly problematic situation in toxic tort and drug liability cases. <sup>2/</sup>

There are a variety of reasons for this problem:

- ° Many judges do not have the training or inclination to understand complicated scientific and medical concepts, and are unwilling or unable to devote the time and energy needed to educate themselves in a complex body of knowledge.
- ° In order not to deprive plaintiffs of their opportunity for compensation, many courts allow plaintiffs to take

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<sup>2/</sup> For example, see the discussion of Johnson v. American Cyanamid Co., infra.

whatever scientific or medical views they may have -- however incredible -- to the jury.

- Many in the legal system do not appreciate how credible scientific and medical views develop, and the degree to which legal decisionmaking is a poor vehicle for developing such views.
- There often is an understandable frustration with the fact that science and medicine frequently cannot offer the kind of certainty that the legal decisionmaking mechanisms strive to obtain.

The inability of the tort system to deal credibly with complicated scientific and medical issues strikes at the very heart of the ability of tort law to deal with the growing number of cases involving highly complicated scientific and medical issues. While there are no easy answers, there are several remedial actions that the Working Group recommends:

- Greater deference must be paid to government agencies and certain private institutions that have devoted decades of attention and millions of dollars to researching and trying to assess the value of medical and scientific developments. Where such agencies and institutions have determined that particular products, services or techniques are safe or socially beneficial, courts should tread very carefully in overruling those judgments through the vehicle of tort law. Lay juries are a very poor mechanism for second-guessing the judgment of established mainstream scientific and medical views. Other legal mechanisms for determining those views, such as rulemaking and licensing proceedings, generally are far superior in making credible determinations involving complicated issues of science and medicine.
- Courts must be more aggressive in determining the credibility of scientific and medical evidence and opinions before trial, and not simply allow parties to present any theory to the jury. Appellate courts, in turn, should give trial courts greater latitude in making such decisions in early stages of litigation. Judges, where feasible, should receive training on basic methods of scientific, medical and statistical analysis so that they can make such determinations. If necessary, impartial masters with appropriate training should be used for this purpose.
- Studies and opinions that have not been subjected to the peer review process should be presumed invalid. Where peer review has taken place, judges (or masters, where appropriate) should acquaint themselves with the results of such review.

Courts must learn to accept the reality of uncertainty. They must understand that the fact that some degree of uncertainty always exists does not mean that every scientific or medical belief is as credible as the next. Judges and legislators must not try to "force" scientific certainty where such certainty simply is not possible. Attempts to do so through burden-shifting, presumptions or by requiring agencies to issue scientific "findings," simply create a misleading and deceptive gloss of scientific certainty that in fact does not exist. <sup>3/</sup> Ultimately, the legal system must accept the fact that some things are unknown, and, given existing methods and data, perhaps unknowable for the foreseeable future.

Recommendation No. 3: Eliminate joint and several liability.

One of the most troubling problems in tort law arises from injuries caused by multiple tortfeasors. Historically, such cases were handled by bringing separate actions against each defendant; joint and several liability only existed where concert-of-action was shown (see discussion in Chapter 2). Further, under the doctrine of contributory negligence, a negligent plaintiff could not recover damages from any defendant. Such an approach seemed harsh where plaintiffs were only minimally at fault for their own injuries. Eventually, and in part to remedy the harshness of the old rule, the doctrines of comparative fault and joint and several liability were developed to make it easier for plaintiffs to obtain compensation.

Comparative fault operates to assure that each party, including the plaintiff, is liable for its own fault. Joint and several liability, although originally applied to situations where concert-of-action was shown, is now in many cases applied to all defendants, regardless of their connection to the injury. Comparative fault, when coupled with the doctrine of joint and several liability, allows plaintiffs to recover the entire judgment from "deep pocket" defendants -- even if such defendants are only found to be minimally at fault. Joint and several liability thus frequently operates in a highly inequitable manner -- sometimes making defendants with only a small or even de minimis percentage of fault liable for 100% of plaintiff's damage. Accordingly, joint and several liability in the absence of concerted action has led to the inclusion of many "deep pocket" defendants such as governments, larger corporations, and insured entities whose involvement is only tangential and who probably would not be joined except for the existence of joint and several liability.

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<sup>3/</sup> As noted, the Working Group does not believe that scientific uncertainty can be handled simply by requiring government agencies to issue pronouncements of risk or causation for which there in fact is no credible basis.

Another problem area is the relationship of joint and several liability to "enterprise" or "market share" liability. See Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980). In theory, "market share" liability such as that established in the California Supreme Court's seminal opinion in Sindell attempts to allocate liability for a generic product (e.g., DES) among various producers on the basis of their share of the relevant market. Even assuming such an allocation is reasonable, 4/ some jurisdictions have devised variations of or alternative approaches to Sindell which apply joint and several liability among the producers of a generic product. 5/ See, e.g., Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, cert. denied, 105 S.Ct. 123 (1984); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984). 6/ The difficulties plaintiffs face in attempting to show which manufacturer of a generic product was responsible for plaintiff's injury in fact can be (but are not always) substantial. While the Working Group does not advocate one approach over another, it firmly believes that any allocation of liability on the basis of market share should limit a manufacturer's liability to its specific share, and that such liability should not, in the absence of actual concerted action, be joint and several in nature.

The Working Group thus recommends elimination of joint and several liability, except in the limited circumstances where the plaintiff can demonstrate that the defendants have actually acted in concert to cause plaintiff's injury. 7/

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4/ Because of a number of problems and inequities associated with Sindell, only a few states have embraced the position of the California Supreme Court. See Schwartz & Mahshigian, "Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution," 73 Calif. L. Rev. 941 (1985).

5/ It is unclear whether even Sindell is a true "market share" allocation decision, since under Sindell plaintiff must only sue manufacturers representing a substantial share of the market, and may allocate all liability among those defendants in proportion to their respective market shares.

6/ Particularly disturbing are decisions such as Abel which appear to distort the principles of concerted action to impute concerted action to manufacturers of a generic product.

7/ Joint and several liability as discussed in this report should not be confused with the legislatively enacted schemes for allocating financial responsibility for the cost of cleanup of hazardous waste sites and spills under the Nation's environmental laws, and, in particular, under the Superfund Act

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Recommendation No. 4: Limit non-economic damages to a fair and reasonable amount.

Non-economic damages such as pain and suffering, mental anguish and punitive damages are inherently open-ended. <sup>8/</sup> They are entirely subjective, and often defy quantification. For example, in many instances it simply is not possible, no matter how much money is awarded, to compensate someone fully for the pain and anguish of the loss of a loved one or from a serious injury. Moreover, because such damages are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results. Accordingly, such damages are particularly suitable for a specific limitation.

The open-ended nature of such damages makes them a particular problem from the standpoint of achieving predictability. Unlike economic damages (medical expenses, lost earnings, etc.), which can be reviewed objectively and thus can be predicted within a given range, non-economic damages are entirely subjective and unpredictable.

Non-economic damages also can serve as a significant obstacle in the settlement process. Plaintiffs and defendants often can

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7/ (FOOTNOTE CONTINUED)

(the Comprehensive, Environmental Response, Compensation and Liability Act of 1980) and the Resource Conservation and Recovery Act (RCRA). Unlike the tort system, which is intended to compensate injured persons and to deter wrongful conduct (see Chapter 2), Superfund and RCRA represent a legislative choice to allocate the cost of these programs among those who contributed to the problems the programs are designed to remedy. Thus, Superfund and RCRA liability, like the liability established under other environmental laws, are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up. Those whose specific contribution to the site can be identified and severed from the whole are not jointly liable under this scheme. Without some degree of joint and several liability under Superfund and RCRA, the effective enforcement of these programs could be seriously impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs.

<sup>8/</sup> There are two types of non-economic damages: compensatory (pain and suffering, mental anguish, etc.) and punitive (sometimes called exemplary damages). The latter are designed purely to punish the defendant.

agree quickly on the amount of economic damages, but disagree sharply on non-economic damages. Plaintiffs frequently have unrealistic expectations of non-economic damages in the hundreds of thousands or millions of dollars to which defendants simply are unwilling to agree. Plaintiffs thus often reject settlement offers that from the standpoint of compensation for economic damages are quite reasonable. Plaintiffs' attorneys also often see high non-economic damage awards as necessary to justify high contingency fees, which may lead them to press for a high non-economic damage award when it may be in their clients' interest to obtain a quick and fair settlement.

Nevertheless, plaintiffs should be entitled to reasonable compensation for their pain and suffering and mental anguish. The key in this regard is to provide such compensation, but to ensure that it will be kept within reasonable bounds.

The Working Group believes that \$100,000 would be such a reasonable limitation. In this regard, it should be noted that only a handful of claims involve non-economic damages in excess of \$100,000. For example, it is estimated that only 2.7% of all medical malpractice claims (5.6% of all paid medical malpractice claims) receive non-economic compensation in excess of \$100,000. <sup>9/</sup> However, in those medical malpractice cases going to verdict where non-economic damages above \$100,000 are awarded, the non-economic damages award averages between \$428,000 and \$738,000 (the latter figure being the "best estimate"). <sup>10/</sup> For such awards including non-economic damages in excess of \$100,000, on the average 80% of the total award is for the non-economic damages component of the award. <sup>11/</sup> Since the non-economic damages in excess of \$100,000 awarded in these cases (including verdicts and settlements) account for between 28% and 50% of all paid out medical malpractice damages, the non-

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<sup>9/</sup> H. Manne, Medical Malpractice Policy Guidebook 132-48 (1985). In comparison, approximately half of all claims that end in a jury verdict in favor of plaintiff include a non-economic damages award in excess of \$100,000. Id. This suggests that non-economic damages are a major factor in forcing claims to trial.

As discussed in Chapter 2, the Guidebook was prepared for the Florida Medical Association. Henry Manne served as the general editor, and the analysis on the effect of a \$100,000 cap was prepared by Patricia Danzon -- "perhaps the most widely known and published economist in the country on the subject of medical malpractice." Id., at 10.

<sup>10/</sup> Id.

<sup>11/</sup> Id. In this regard, it is worth noting that non-economic damages as a percentage of overall damages increases substantially as the overall damages increase. Id., at 138-39. See discussion in Chapter 2.

economic damages payments in excess of \$100,000 alone account for up to half of all medical malpractice damages. 12/ Thus, a \$100,000 limitation on non-economic damage awards would affect only a relatively small percentage of all claims, but would introduce substantial predictability into the tort system. 13/

It also is necessary to deal with punitive damages. While some thought was given to an absolute ban on punitive damages, or perhaps a separate limitation, the Working Group concluded that the best approach would be to include punitive damages within the \$100,000 limitation on all non-economic damages. Nevertheless, punitive damages should only be awarded for willful conduct bordering on a criminal violation. Specifically, the Working Group recommends that an award of punitive damages be predicated on a demonstration of actual malice.

Even if these recommendations are adopted, punitive damages at best have a tenuous basis in tort law. Increasingly, there has been growing skepticism among legal scholars about the role of punitive damages, 14/ and numerous instances of extraordinary

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12/ Id. The best estimate of the Guidebook is that pain and suffering awards above \$100,000 account for nearly 39% of all medical malpractice damages.

13/ Some states have struck down such limitations on constitutional grounds, primarily on the basis of equal protection, on the theory that it is unfair to limit the recoveries of certain plaintiffs (e.g., medical malpractice claimants) while allowing other plaintiffs to receive unlimited recoveries. Recently, however, both the California Supreme Court and the Court of Appeals for the Ninth Circuit upheld such a limitation for medical malpractice verdicts awarded under California law. See Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665 (1985); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985). The Supreme Court refused to hear either case, finding with regard to the former that no substantial federal question was presented. Constitutional concerns such as this, however, can only be sensibly considered in the context of specific legal proposals.

14/ See, e.g., Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U. Chi. L. Rev. 1 (1982); Seltzer, "Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control," 52 Fordham L. Rev. 37 (1983); Sugarman, "Doing Away With Tort Law," 73 Calif. L. Rev. 555 (1985); Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment," 56 S. Cal. L. Rev. 133 (1982); Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1 (1982).

abuses. 15/ Punitive damages add considerable uncertainty, and frequently have very little real deterrent effect because they are awarded years after the offending conduct. In any event, the punishment of misconduct is primarily a function of the public law enforcement system, and should not be a common purpose of private litigation.

Nevertheless, the Working Group does not recommend prohibiting punitive damages in tort cases provided they are included within the limitation on non-economic damages. If this is infeasible, the Working Group recommends that punitive damages be abolished. 16/

Recommendation No. 5: Provide for periodic payments of future economic damages.

Traditionally, a losing defendant is required to pay all of plaintiff's future damages in one lump-sum payment. When damages were within reasonable limits, this generally was not a major problem. But as average damages have skyrocketed into the hundreds of thousands of dollars this has become an increasing burden on the defendant (or defendants' insurers). The Working Group, therefore, recommends that future economic damages be paid periodically. 17/

Allowing defendants to pay for plaintiff's damages periodically has several advantages. First, it gives defendants the ability in some cases to digest major adverse judgments by spacing

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15/ One of the most flagrant examples is the \$8 million dollar punitive damage award against the defendant in Johnson v. American Cyanamid Co., (District Court No. 81 C 2470), for its decision to produce the Sabin rather than the Salk polio vaccine. Despite the fact that the defendant had complied in this decision with the well established medical judgment of the United States government and virtually the entire medical community, the jury apparently decided to use punitive damages to overrule this judgment and to force the Sabin vaccine off the market. Ironically, the Sabin vaccine has proven far more effective than the Salk vaccine in combating polio. The case presently is on appeal to the Kansas Supreme Court, and the federal government has filed an amicus brief urging reversal.

16/ It frequently is noted that the deterrent effect of punitive damages could be achieved through a system of civil fines.

17/ Where there is legitimate concern that a particular defendant may not be able to make the periodic payments in future years the court should be empowered to require the defendant to ensure the periodic payment through the purchase of an annuity.

payments out over time, much in the same way that many consumers can afford major purchases by buying on installment. Second, society is benefited by the fact that plaintiffs have a guaranteed stream of income, and cannot deplete their awards within a few years. This sharply reduces the possibility that severely injured plaintiffs eventually will become wards of the state.

An important additional advantage of requiring courts to award damages in terms of periodic payments rather than lump-sum awards is that it uses the market's rather than a court's assessment of the applicable interest rate. Under the existing practice in most states, the trial court determines plaintiff's economic loss over plaintiff's lifetime, and then awards plaintiff the present value of those losses in a lump sum. The interest rate used to make that present value calculation is critical, and can significantly reduce or inflate the lump-sum payment. Frequently, courts in making that calculation use interest rates that bear no reasonable relationship to what in fact is available in the market.

A periodic payment requirement effectively avoids this problem by having the court determine the stream of future economic losses and require defendant to purchase an annuity providing a corresponding stream of compensation (where defendant is sufficiently large, an actual annuity probably would be unnecessary). Under such a procedure, the market determines the appropriate interest rate for calculating the present value of those payments (the present value would equal the cost of the annuity). Since the payments are guaranteed through the annuity, subsequent changes in the interest rate would have no effect on plaintiff's compensation. Defendant, on the other hand, would have the market rather than a judge or jury determine the correct interest rate for assessing the present value of future damages.

Periodic payments, as noted, are not unfair to plaintiffs because the payments would be scheduled to be made as the damages are in fact incurred (that is, as earnings are actually lost, or as certain expenses actually occur).

Because the benefits of such a provision would be relatively limited for smaller awards, the Working Group recommends that periodic payments only be required where the total economic damages award exceeds \$100,000.

Recommendation No. 6: Reduce awards by collateral sources of compensation for the same injury.

The collateral source rule prohibits the finder of fact from taking collateral sources of income related to the same injury into account in making an award of damages to the plaintiff. This effectively permits the plaintiff to obtain double recovery of certain components of his damages award.

In an era when collateral sources of income were financed largely by plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employers, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff.

As to publicly provided collateral sources of compensation, there is no justification for not taking such sources into account in determining plaintiff's ultimate damages. The collateral source rule in such circumstances has the effect of requiring citizens to pay compensation twice -- once as taxpayer, and once as the consumer of the product causing the injury. 18/

The situation is somewhat more complicated in dealing with private sources of collateral compensation, particularly where subrogation is involved. 19/ Where a third party (such as an insurer) is subrogated to plaintiff's claim, the collateral source rule may not in fact result in any double recovery. As a practical matter, however, subrogation often is not a significant consideration in many tort actions. In some areas, such as automobile accidents, subrogation is quite common. In other areas, however, such as medical malpractice, subrogation is far less common.

As to private sources, the best approach appears to be to require collateral sources of compensation related to the same injury to be taken into account as long as a third party is not subrogated to that portion of plaintiff's claim. Further analysis may suggest that elimination of subrogation (that is, simply offsetting all collateral sources against the award, and prohibiting subrogation arrangements) may have a limited effect and be justified on the basis of significant reductions in transaction costs.

While the correct approach to workers' compensation benefits must be considered very carefully, workers should be required to seek their workers' compensation benefits where appropriate. The Working Group takes no position on whether subrogation and indemnification actions between employers and manufacturers

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18/ Another reason to be concerned about such a windfall is that much of the windfall is in fact a windfall for attorneys in the form of attorneys' fees.

19/ In the context of insurance, subrogation allows the insurer to obtain from the tortfeasor-defendant all or part of its payments to the insured-plaintiff arising from the injury caused by the tortfeasor.

found liable as third party defendants should be eliminated, as has been proposed in some legislation. The Working Group will continue to review the merits of proposals dealing with such subrogation and indemnification actions.

Recommendation No. 7: Schedule contingency fees.

Currently, plaintiffs' attorneys receive a flat percentage of their clients' awards, usually between 30% and 40%, but sometimes as high as 50%. Where plaintiff's award is moderate, such a contingency fee may, in fact, be quite reasonable, since the attorney has significant costs and may face substantial risks that must be reimbursed. But as the average plaintiff's verdict has increased in recent years, such a high percentage becomes difficult to justify. Increasingly, there are indications of extraordinary abuses where attorneys receive fees in the hundreds of thousands of dollars for limited work. Particularly in mass liability cases where the groundwork for liability has been laid in previous cases by other attorneys, the fees often bear no relationship whatsoever to the work of or the risk to plaintiff's attorney. 20/

Nevertheless, the Working Group does not recommend, as some have suggested, the abolition of contingency fees. Often, such fees are the only means available to the poor to afford an attorney and obtain access to the legal system. The problem with contingency fees emerges when awards become very high, and a flat contingency rate becomes excessive. The Working Group, therefore, believes that contingency fees should be scheduled to decrease as awards increase.

Specifically, the Working Group recommends the following schedule: 25% for the first \$100,000, 20% for the next \$100,000, 15% for the next \$100,000, and 10% for the remainder. Thus, for an award of \$500,000, plaintiff's attorney would receive \$80,000 rather than \$166,666 (assuming a one-third contingency fee), and for an award of \$1,000,000, would receive \$130,000 rather than \$333,333.

There are a number of justifications for scheduling contingency fees:

- Verdicts often are inflated by judges and juries to compensate plaintiff for what is well understood to be high attorneys' fees. Defendants thus pay for such fees through higher insurance premiums or awards,

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20/ As discussed in Chapter 2, the prevailing plaintiff is not only liable to his attorney for the agreed to contingency fee, but also for litigation expenses. Such expenses often can amount to an additional five to eight percent of the underlying award.

which, in turn, are passed on to consumers through higher prices. It is difficult to justify placing such a burden on American consumers for the purpose of paying what often amounts to exorbitant attorneys' fees.

- ° Similarly, in order to compensate plaintiffs for very high contingency fees, settlements often are higher than otherwise would be the case. As with high awards, these payments ultimately are passed through to the consumer. More problematic; however, is that attorneys' fees often can become a major impediment to settlements since defendants may balk at paying a higher than justified award in order to compensate plaintiffs for exorbitant attorneys' fees. In such situations, attorneys' fees create an additional burden by causing cases not to be settled that otherwise would be settled.
- ° Contingency fees also distort the incentives of attorneys. Such fees may lead plaintiffs' attorneys to hold out for high non-economic damages (and, potentially, windfall profits for the attorney requiring only minimal additional work on the attorney's part), while the clients may be best served with obtaining economic damages and more limited non-economic damages as promptly as possible.
- ° Scheduling contingency fees also should substantially reduce the excessive transaction costs presently plaguing the tort system. This is particularly important in such areas as the asbestos litigations where there are only limited resources available to compensate a large pool of plaintiffs.

In this regard, it is worth noting that the Federal Tort Claims Act contains a 25% cap on attorneys' fees for lawsuits filed under the Act, and a 20% cap on attorneys' fees for settlements obtained under the Act's administrative claims process. 28 U.S.C. § 2678. Violations of these limitations are punishable by fine or imprisonment, or both. A similar 25% attorneys' fee cap (with similar sanctions) is found in the Social Security Act. 42 U.S.C. § 406. None of these caps appears to have had any significant effect on the ability of persons suing the government to obtain adequate legal representation. In fact, the number of lawsuits filed under both the Federal Tort Claims Act and the Social Security Act has increased substantially in recent years.

The Working Group has considered and recommends against the adoption of the English Rule on attorneys' fees, which would transfer attorneys' fees to the losing party. While such a rule might deter some frivolous litigation, it also would inhibit many lawsuits that may be merited but where some preliminary discovery may be necessary to determine the strength of plaintiff's claims. Moreover, because many plaintiffs essentially are judgment proof, the widely held belief that such

a rule would significantly deter frivolous litigation may be largely illusory.

A preferable (but still problematic) alternative approach to the English Rule would be to use a transfer of attorneys' fees as a means of motivating parties to settle their claims at an earlier point in litigation. Thus, a rule modeled on Rule 68 of the Federal Rules of Civil Procedure, 21/ but including attorneys' fees, might be useful. Perhaps the most promising approach would be to combine alternative dispute resolution with a transfer of attorneys' fees.

Recommendation No. 8: Develop alternative dispute resolution mechanisms.

The Working Group believes that alternative dispute resolution holds much promise. Experimentation and experience, however, is the only reliable vehicle for determining which systems will work. Alternative dispute resolution proposals range from binding arbitration to mediation, and include such procedural innovations as mini-trials and expedited discovery techniques. Many of these proposals are worthy of serious consideration, and states represent excellent laboratories in which to develop and explore these various alternative dispute resolution proposals.

The Working Group strongly supports alternative dispute resolution, and believes that the organized bars, legislatures, and jurists should be more receptive to alternative dispute resolution proposals. Where necessary, particularly in areas such as medical malpractice, states should be encouraged to consider seriously the necessary constitutional changes to permit the use of alternative dispute resolution.

The Working Group believes that the most promising use of alternative dispute resolution will be to encourage the early settlement of lawsuits. For example, requiring non-binding arbitration where part or all of attorneys' fees shift to the party which rejects an arbitration award and obtains a less favorable result in litigation, much as costs of litigation are shifted for rejected offers of settlement under Federal Rule of Civil Procedure 68 (see supra), might be an effective means

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21/ Rule 68 ("Offer of Judgment") provides that costs of litigation will shift to a plaintiff who has rejected an Offer of Settlement made under the rule and not obtained a judgment more favorable than the rejected offer. There currently is a proposal under consideration to include attorneys' fees in Rule 68, as well as to make other changes to the Rule. Inclusion of attorneys' fees in Rule 68, however, has a number of serious problems that must be considered very carefully. These and other problems have led the Department of Justice to caution against the proposed changes to Rule 68.

for using alternative dispute resolution to facilitate and expedite early settlements.

The Working Group does not believe, however, that alternative dispute resolution needs to or should involve major changes to the standards of liability or causation in tort law. The merits of alternative dispute resolution are largely unrelated to which standard of liability is used in resolving disputes. The value of alternative dispute resolution lies in procedural rather than substantive changes in the law.

## CHAPTER 5

### GOVERNMENT INSURANCE: A NON-SOLUTION

The growing liability insurance availability/affordability crisis has spawned calls for government insurance or indemnification for persons or companies unable to obtain adequate insurance coverage through the private sector. For the reasons discussed below, such government insurance or indemnification would be highly undesirable and would do nothing to remedy the problems underlying the availability/affordability crisis.

The most serious deficiency with the various schemes for government insurance or indemnification is, as noted, the fact that such proposals do not address the problems that have led to the availability/affordability crisis. Instead, these schemes simply would pass the costs of the crisis directly to the taxpayer. While it is difficult to estimate the potential cost of such a program to the American taxpayer, it should be noted that the insurance industry suffered an estimated \$25 billion underwriting loss in 1985 (see Chapter 2). This loss does not include self-insurance or captive insurer losses, which in all likelihood represent additional billions of dollars.

A government insurance or indemnification program would by definition certainly involve the riskiest activities; that is, those activities that even the insurance industry is unwilling to underwrite. To the extent that the government attempts to address affordability problems by offering coverage more cheaply than the industry, the government, of course, simply would be subsidizing certain purchasers of insurance. Again, the cost of such subsidization is difficult to estimate, but considering that the insurance industry paid out over \$126 billion in 1985, with related expenses of \$37 billion (see Chapter 2), such a subsidy easily could involve tens of billions of dollars annually. <sup>1/</sup> (Again, these figures do not include self-insurance or captive insurers).

Government insurance or indemnification would not only pass these costs to the taxpayer, but could exacerbate the current problems of the tort system. One of the few constraints left in tort law is the recognition that "deep pockets" are not after

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<sup>1/</sup> For example, over recent years the National Flood Insurance Fund has been subsidizing flood insurance by roughly \$150 million annually. The cumulative loss for the program to date is approximately \$1.4 billion. The President, in his latest budget submission, reiterated his intention to continue to phase out this costly subsidy. The riot insurance program, which existed from 1968 to 1984, was able to sustain itself through collected premiums. The relative success of the program, however, was largely due to the decline in urban riots after the program was instituted.

all bottomless -- that there is a finite amount of resources that can be reallocated through tort liability. Government indemnification or insurance would remove that last restraint, since the resources of the Federal Government are all too often viewed as without limit. Thus, courts and juries might be even more willing to skew liability and causation standards to ensure compensation, and to award the most generous compensation conceivable.

There are, however, a number of compelling reasons for rejecting the concept of government insurance or indemnification other than because of its potential cost and the failure to address the real problems underlying the crisis. Perhaps foremost among those reasons is that such a program would most likely jeopardize among the most effective and important mechanisms currently existing in the private sector to protect public health and safety. The insurance industry plays a vital role in promoting public health and safety by policing insureds to ensure that risks of injury are minimized. Insureds who fail to minimize such risks, or who experience higher than normal claim rates, may find the desired level of insurance coverage more difficult to obtain and more expensive. The insurance industry thus plays an important role in creating incentives that protect public health and safety, both in policing insureds, and in passing the benefits of safety back to the insureds through lower premiums.

While the role of insurance in promoting public health and safety is by no means perfect, and the above description admittedly is somewhat idealized, insurance creates important health and safety incentives which cannot be dismissed lightly. This critical function of insurance is undermined to the extent that the government supplants the private sector in providing insurance or indemnification, particularly for high risk activities. The government, even if and when it demonstrates the best of intentions, simply does not have the resources, experience, flexibility or incentives to replicate the activities of the private sector in policing insureds' practices and setting premiums to reflect claims experience. In addition, were the government to undertake such activities, the existing health and safety bureaucracies almost certainly would prove inadequate. Substantial additional funds, personnel and resources would need to be devoted to these activities, and in many areas new bureaucratic structures would need to be established. <sup>2/</sup> If, as seems likely, such additional investments of government resources are not made, government insurance or indemnification would operate as a clear disincentive to greater safety since insureds would receive

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<sup>2/</sup> The necessary collection and analysis of relevant information would of itself be a major undertaking requiring substantial investment of additional government resources.

the benefit of a risk transfer to the government (and, accordingly, would have less incentive to protect public health and safety) without any corresponding checks upon their conduct or activities. Both the consumer and the taxpayer would be the ultimate losers.

To the extent that the government institutes an insurance or indemnification program, such a program also would increase significantly in two ways the involvement of the government in the private sector. First, while the government, as noted, cannot replicate the efforts of the insurance industry, it would have to become involved in the activities it has insured or indemnified to ensure that such insurance or indemnification does not lead to completely open-ended liability on the part of the government. This necessarily would involve new additional forms of government supervision and regulation of private sector activities.

A second undesirable but inevitable effect of such a program would be that the government frequently would be forced to manage, or at least actively oversee, the litigation of cases involving the liability of its insureds, since the insureds often would have only a limited incentive to contest aggressively claims, however meritless, against which they are fully insured or indemnified. Even putting aside the consideration of the massive investment of litigation resources that would be needed by both the insuring agencies and the Department of Justice, this could involve the government directly and actively in some of the most controversial and visible tort litigation in our society, much of which would involve litigation in state court under substantive, procedural and evidentiary rules of state law.

An additional consideration is that such a program necessarily would involve the federal government in state regulation of the insurance industry since such regulation could have a significant impact on the kind of insurance or indemnification the federal government would have to provide. For example, state regulators who might wish to avoid approving politically unpopular rate increases or policy provisions might be far more inclined to withhold such approvals if they perceived the federal government as ready and willing to provide an alternative source of insurance. The federal government, in turn, in order to avoid such wholesale transfers of the insurance burden, could very easily find itself compelled to regulate the insurance industry directly, or to regulate the state regulators. Either way, it would represent a substantial intrusion by the federal government into the regulation of the insurance industry.

Finally, a federal program of insurance or indemnification would interfere with and perhaps severely inhibit the ability of the market to devise new policies, insurance mechanisms, and specific contractual provisions to meet changing economic and

social conditions. Where the current services of the insurance industry prove inadequate or unacceptable, insurers and insureds have strong incentives to restructure those services so that the needs of the marketplace can be met (witness, for example, the current discussions over the introduction of claims-made policies and the inclusion of defense costs). Where government insurance or indemnification is available, however, insureds may be far more inclined to seek such insurance (particularly where it is subsidized, either intentionally or unintentionally) than to negotiate with insurers or invest considerable effort and resources shopping for better conditions. Insurers, in turn, who may feel themselves compelled to offer otherwise unattractive services to customers they wish to retain, may find a government insurance or indemnification program a convenient dumping grounds for the risks they would rather spin-off. <sup>3/</sup> The end result could very well be that the ability of the marketplace to respond to new conditions with innovative solutions could be severely chilled if the "safe harbor" of government insurance or indemnification were available to both the insureds and the insurers. <sup>4/</sup>

In sum, government insurance or indemnification would be a highly undesirable and counterproductive response to the current availability/affordability crisis. It effectively would amount to the nationalization of a potentially large portion of one of the Nation's leading financial industries. And, given the history of past government involvement in the private sector, it is all too apparent that removing the federal government from the insurance industry once the purported justification for its presence had passed would be an arduous if not ultimately futile endeavor.

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<sup>3/</sup> Such risks most likely would include the type of long-latency, catastrophic risks endemic to toxic torts. As is apparent from the asbestos litigations, such insurance would expose the taxpayer to potentially massive liability. The problem of insurers spinning off certain types of business very likely would generate pressure for some form of federal regulation of such practices.

<sup>4/</sup> It should be noted in this regard that the contractor indemnification provision which the Administration supports in the context of Superfund reauthorization is purely discretionary in nature, is limited to cleanups under the control of the Environmental Protection Agency, is linked to a critical limitation on liability (liability would be predicated only on negligence), and would be provided only because it will be extremely difficult, if not impossible, to keep this vital program in operation without such limited and closely regulated contractor indemnification (which presumably will include both limits and deductibles).

## CONCLUSION

This report contains within it a number of observations, conclusions and recommendations. The most important of these, however, for the purposes of the Tort Policy Working Group, are what this report implies as to the appropriate response of the federal government to the current crisis in insurance availability and affordability. In this regard, the pertinent conclusions are straightforward and relatively apparent.

First, tort law appears to be a major cause of the insurance availability/affordability crisis.

Second, there are a number of beneficial reforms of tort law that the federal government can support and promote in sensible and appropriate ways.

Third, to the extent that other factors -- such as the recent large underwriting losses of the insurance industry -- underlie this crisis, there is little the federal government can or should do to remedy these problems. While the contribution of these economic factors seems clear, it is likely that these problems will work themselves out in the short-term as the insurance industry restores its desired level of profitability, and as other insurance industry developments (see Chapter 3) are implemented. It seems highly unlikely, however, that these changes will substantially alleviate the crisis, particularly the affordability aspect of the crisis, without substantial reforms of tort law.

Fourth, the Working Group found nothing to support the suggestion that this crisis could be remedied through federal regulation of the insurance industry or of state insurance regulators.

Fifth, while a federal insurance or indemnification program obviously could provide subsidized insurance where insurance is unavailable or unaffordable, for many reasons (see Chapter 5) such a program would be highly undesirable and ultimately counterproductive.

In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways. But significant, long-term reform cannot and should not come solely from the federal government. Ultimately, state governments and courts must address the current excesses of tort law. Their active participation is essential to finding workable solutions to the increasingly debilitating problems of tort law.

**STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE**

Revision Date : \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : CSSB 377 (L&C)  
 Title : An Act Relating to Tort Reform  
 \_\_\_\_\_  
 Sponsor : \_\_\_\_\_  
 Requestor : \_\_\_\_\_  
 Date of Request : \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected : Alaska Court System  
 BRU : Trial Courts  
 \_\_\_\_\_  
 Components : \_\_\_\_\_  
 \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		80.7	80.7	80.7	80.7	80.7
TRAVEL		6.2	5.2	6.2	6.2	6.2
CONTRACTUAL		797.4	797.4	797.4	797.4	797.4
SUPPLIES		1.0	1.0	1.0	1.0	1.0
EQUIPMENT		6.7				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		<b>892.0</b>	<b>885.3</b>	<b>885.3</b>	<b>885.3</b>	<b>885.3</b>

CAPITAL						
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REVENUE						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND		892.0	885.3	885.3	885.3	885.3
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		<b>892.0</b>	<b>885.3</b>	<b>885.3</b>	<b>885.3</b>	<b>885.3</b>

**POSITIONS :**

FULL-TIME		2	2	2	2	2
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by : Karla Forsythe/Robert G. Fisher Phone : 264-8215  
 Division : Alaska Court System Date : 4/9/85

Approved by Commissioner : Arthur H. Snowden, IV Date : 4/9/85  
 Agency : Alaska Court System

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

## CSSB 377 (L & C) Fiscal Note Narrative

This legislation impacts the court system in two areas: expanded judicial workload and mandatory arbitration.

### Expanded Judicial Workload

The presiding judge for the third judicial district anticipates that new procedures incorporated in this bill (such as hearings to determine whether defendants who have defaulted on periodic payments should be held in contempt and the amount of related damages which should be assessed) will increase the court's workload by 20% for each trial. This estimate also includes judge time expended on additional litigation which will result from attempts to transfer proportional liability to persons who have signed releases before trial, and litigation to resolve interpretation questions with the legislation. Also, more cases will go to trial because of diminished incentives to settle resulting from restrictions on the award of Civil Rule 82 Attorneys Fees.

It is anticipated that the increased workload could be handled statewide by funding the equivalent of a pro tem judge. Pro tem funding is less costly than funding new judge positions because salary and benefits for retired pro tem judges are significantly lower. Additionally, since these judges are not permanently assigned to one court location, normal space and staffing requirements are avoided.

The provisions of this legislation which establish new procedures for the court come into play only when a case goes to trial. According to figures provided by the Anchorage trial court, approximately 5% of the cases filed go to trial, resulting in 105 personal injury trials statewide.

It is estimated that a personal injury trial averages two weeks. The total number of personal injury trials multiplied by two weeks of a judge's time total 210 judge weeks.

The estimated 20% additional judicial workload attributable to these expanded proceedings totals 42 judge weeks. Since a standard judicial work year averages 40 work weeks (excluding holidays, vacation and training), it is estimated that one judge would be required to process the additional statewide workload.

In order to avoid duplicative hearings, the court system favors binding arbitration rather than the option of de novo court trials. In the event that this legislation is not amended to provide for binding arbitration, the court system assumes for purposes of this fiscal note that the court would be required to bear the cost of arbitrators for those parties who are unable to afford this expense. It is estimated that 1341 personal injury cases statewide would be subject to the mandatory arbitration provision because they fall under \$100,000. It is assumed that a third of the parties will not be able to afford the expenses of arbitrators. Thus, the court system will be required to bear these expenses in 443 cases.

Assuming an arbitration lasting 12 hours and an estimated average hourly compensation rate for the arbitrator of \$150, the cost of an arbitration totals \$1,800. The estimated total cost of an arbitrator for all cases under \$100,000 is \$797,400. Additionally, the court system assumes that for parties in outlying rural areas who are unable to afford the costs of arbitrators, it will be less costly to fly these persons to central urban areas rather than to fly arbitrators to the outlying areas and pay for their room and board. The additional air fare and per diem costs total \$6,155. Based on these assumptions, the total costs of mandatory arbitration is \$803,555.

ALASKA COURT SYSTEM  
 CSSB 377 (L & C) - TORT REFORM  
 FISCAL IMPACT

Personnel:

	Salary	Benefits	Total
Pro Tem, Superior Court Judge (PFT, using fully-vested retired judge) (See Schedule #2)	\$19,332	\$26,779	\$46,111
In-Court Clerk (PFT, 12B)	25,740	8,863	34,603
			-----
Total Personnel			80,714
 Travel costs for indigent bush parties in manda- tory arbitration cases. (See Schedule #3)			 6,155
 Contractual cost of arbitrators for indigent parties in mandatory arbitration cases. (See Schedule #3)			 797,400
 Supplies			 1,000
 Equipment: (one-time items)			
New employee equipment - office furniture and reference materials			6,759
			-----
Total FY 87 Cost			\$892,028
			=====

## ALASKA COURT SYSTEM

ESTIMATION OF JUDICIAL RESOURCES  
NEEDED TO PROCESS INCREASED WORKLOAD

## CSSB 377 (L &amp; C) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases going to trial	5%	5%	5%
Estimated number of trials	73	32	105
Estimated length of trial in weeks	2	2	2
Estimated judicial time in weeks	146	64	210
Estimated workload increase from legislation	20%	20%	20%
Estimated additional judicial workload in weeks	29	13	42
Estimated average number of work-weeks in judicial year (b)	40	40	40
Estimated number of judges needed to process additional workload	0.73	0.33	1.05

## Notes:

- (a) Based on FY 85 case filings. All civil damage case filings assumed to be personal injury cases.
- (b) Estimated number of work-weeks, net of holidays, vacation and training.

ALASKA COURT SYSTEM  
 ESTIMATED FISCAL IMPACT OF MANDATORY ARBITRATION  
 HSSB 377 (L & C) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases under \$100,000	64%	64%	64%
Estimated number of cases under \$100,000	933	408	1,341
Estimated percentage of indigent parties	33*	33%	33%
Estimated number of cases involving indigent parties	308	135	443
Estimated average length of arbi- tration hearing in hours	12	12	12
Estimate average hourly rate of arbitrator	\$150	\$150	\$150
Estimated average cost of each case	\$1,800	\$1,800	\$1,800
Estimated total cost of arbitrators	\$554,400	\$243,000	\$797,400
Estimated travel cost for indigent parties living in bush areas. (See Schedule #4)	\$0	\$6,155	\$6,155
Estimated total cost of mandatory arbitration	\$554,400	\$249,155	\$803,555

## Notes:

- (a) Based on FY 85 case filings. All civil damage case filings assumed to be personal injury cases.

ALASKA COURT SYSTEM  
 ESTIMATED TRAVEL COSTS FOR INDIGENT BUSH PARTIES  
 CSSB 377 (L & C) - TORT REFORM

Bush Courts	Number of Case Filings	Percent Under \$100,000	Number of Cases Under \$100,000	Percent Indigent Defendants	Number of Indigent Cases	Air Fare to Nearest Urban Court (a)	Estimated Air Fare Cost	Estimated Per Diem Cost (b)	Estimated Total Travel Cost
Barrow	5	64%	3	33%	1	\$500	\$500	\$315	\$815
Bethel	30	64%	19	33%	6	302	1,812	1,680	3,492
Kotzebue	5	64%	3	33%	1	426	426	280	706
Nome	6	64%	4	33%	1	426	426	280	706
Valdez	6	64%	4	33%	1	156	156	280	436
								Total Cost	\$6,155

## Notes:

## (a) Bush courts served by urban courts:

Barrow served by Fairbanks  
 Bethel served by Anchorage  
 Kotzebue served by Anchorage  
 Nome served by Anchorage  
 Valdez served by Anchorage

## (b) Estimated to require three and one half days of per diem.

Martin Shaner, M.D., P.C.  
P.O. Box 74401  
Fairbanks, AK 99707  
907-451-7792

HB  
532  
file

March 12, 1986

Senator Patrick Rodey  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, AK 99811

Dear Senator Rodey:

I am writing you to urge you to lobby for the Coalition Bill for Tort Reform, HB 532.

As an anesthesiologist, my insurance premiums are already high. Without tort reform to limit malpractice settlements these premiums will only continue to escalate. The resultant increase in my operating costs will have to be reflected in an increase in billing costs to the patient. The patient is the one who ultimately loses.

I want to be able to continue to deliver good patient care at a reasonable cost to the patient. Whether or not HB 532 passes will have a great effect on the cost factor. I therefore, urge you to work to pass HB 532 during this session.

Sincerely,

*Martin Shaner M.D.*

Martin Shaner, M.D.

lk



**MedAlaska**

*SB 377 file*  
DIMOND • 5340 RAINY PLACE • ANCHORAGE, AK 99502 • (907) 349-9611  
RASPBERRY • 3901 RASPBERRY • ANCHORAGE, AK 99502 • (907) 248-0808

Sen Patrick Rodey  
Alaska State Legislation  
Box V.  
Juneau, Alaska 99801

Dr. Peter Powers  
2718 Lord Baranof  
Anch, Alaska 99517

Dear Sen Rodey:

I am writing in regards to legislation affecting Tort reform in Alaska. I am one of your concerned constituents.

I am a Medical Doctor and face tremendous increases in my medical malpractice insurance. The current projections are that my coverage will increase in cost in the range of 50% each year for the next 3-5 years, but nobody really knows. These very high insurance rates have prevented me from doing any Obstetrics work this past year, and threatens to make a lot of my colleagues stop doing Obstetrics also. I don't know how women in Anchorage are going to be able to find someone to deliver their babies.

I feel this issue is at a crisis stage and demands all of our attention.

I urge you to support H.B.532 and S.B.377. I strongly support these attempts at Tort reform and the Citizens Coalition for Tort reform.

Respectfully and Earnestly,

Peter Powers M.D.

ALASKA STATE LEGISLATURE  
SENATE JUDICIARY COMMITTEE

SENATOR PATRICK RODEY, CHAIRMAN  
SENATOR TIM KELLY, VICE-CHAIR  
SENATOR JAN FAIKS  
SENATOR RICK HALFORD  
SENATOR ROBERT ZIEGLER, SR.



POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-3717

March 2, 1986

Mr. Charles G. Estes  
C.G. Estes Co.  
4015 Borland Drive  
Anchorage, Alaska 99517

Dear Mr. Estes:

Thank you for your letter expressing your concern about the ever increasing cost of insurance. Tort reform has become one of the major issues facing this legislature. The Senate Judiciary Committee which I chair will be one of the more important committee referrals for the tort reform legislation which is now wending its way through the legislature.

In preparation for dealing with this issue, we have done a great deal of research, and listened to several nationally prominent experts on the subject. It is my hope that we can at least begin to find some satisfactory solutions to this dilemma by the end of this legislative session.

Thank you for your interest and your concern. I can appreciate that tort reform is an issue which effects all of our lives, and will do my best to alleviate some of the burden.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Patrick M. Rodey".

Patrick M. Rodey

**Tort Reform:**

**A Comprehensive Solution  
To The Crisis in  
Civil Justice and Insurance**

**The Citizens Coalition for Tort Reform  
738 H Street, Suite 100  
Anchorage, Alaska 99501**

## **Civil Justice: Unnecessarily Inefficient and Costly**

A tort is literally a wrong. Tort actions seek to redress wrongs in a court of law. A close look at how the tort reparations system works in 1986 reveals that it's not working. The system is mired in inefficiency, punctuated with greed and demonstrably unable to deal with the great bulk of its caseload in a timely and fair manner.

It often takes three to five years to settle a case. Only 30 to 40 per cent of the costs of reaching a settlement go to victims, and that does not include costs of the court system.

The economic costs to society are staggering and difficult to precisely quantify. It is clear that the hefty increases in insurance rates affect the price of nearly every product or service we purchase. *It is a tax—a tax imposed by default, without full political and social evaluation of its impact.*

A society that can send men to the moon ought to be able to settle liability claims in a more effective way. Most other western countries do.

## **The Comprehensive Solution**

The tort reparations system needs a thorough overhaul. Alaska can no longer afford the luxury of having its courts administer a giant lottery where a victim may win a fortune, but more likely will find the pot at the end of the rainbow empty.

*Alaska and other states have been dabbling in tort reform for ten or 15 years and there is adequate evidence major changes in the tort reparations system are essential. The fundamental goal of tort reform is to restore predictability to the tort system.*

All manner of solutions to the insurance crisis have been proposed including tighter regulation of insurance companies, state-backed insurance funds and reform of the tort system. More regulation may be useful and a state-supported fund may provide temporary relief to some. However, *without stopping the flagrant abuses of the tort system, liability will continue to be a serious problem for business, government and consumers.*

The following proposals address the major faults of the tort system. They are intended to restructure the process to allow more efficient and effective dispute resolution. These reforms would get a higher proportion of damage payments into the hands of plaintiffs while protecting the rights of defendants and the public which ultimately pays the bills.

## **Joint and Several Liability**

If more than one defendant is found partly responsible for an injury, each can be held "jointly and severally" liable for all damages. This means that if one defendant is unable to pay, the other defendants must pay the entire award. *Responsibility should be apportioned according to the degree of fault and each defendant's requirement to pay damages should reflect his share of responsibility for the injury.*

## **Noneconomic Awards**

Noneconomic awards compensate a victim for intangible losses— loss of consortium, pain and suffering, traumatic experiences and other things for which no established economic value exists. *A limit on this kind of arbitrary award will help establish consistency and fairness in this no-man's land. We suggest a maximum award of \$250,000 per incident. The U.S. Supreme Court has upheld such a law in another state.*

## **Structured Settlements**

Damages awarded for predicted future losses should be computed at their present economic value. The injured party would have an option to accept lump-sum payment at present value or accept structured payments running over a period of years and equal to the total award. *This guarantees financial support and care for a long time, often for life.*

## **Collateral Income Sources**

Insurance payments which have been made to an injured party should be disclosed to the jury and should be protected from recovery in the event the victim receives an award. *Under current rules, juries cannot be told about existing medical or other insurance coverage. If the injured party receives an award, the insurance companies which have fulfilled their obligations may sue for repayment from the victim.*

## **Sliding Contingency Fees**

Plaintiff attorneys today can take upwards of 40 percent of a total award verdict. A sliding scale will increase the proportion of the award which actually goes into the victim's pocket as the size of the award increases. *Where the sliding scale is now in effect, lawyers still work on contingency fees, but victims recover a greater share of awards. The U.S. Supreme Court has upheld this principle.*

## **Itemized Jury Awards**

Jury awards for damages should specify amounts for monetary losses, noneconomic losses, future losses, past expenses and other losses. *This will help to eliminate arbitrary awards based upon showmanship or prejudice and introduce an element of rationality in award construction.* An itemized award which is grossly unfair to either the victim or defendant can be more effectively appealed than a lump-sum award.

## **Rule 82**

Rule 82 is unique to Alaska. It is a device to increase attorneys' fees above the agreed level by order of the court. The rule was originally adopted to apply in certain public interest lawsuits, but it has been extended to cover most liability suits. *It simply adds up to 10 percent to the cost of awards without serving the originally intended public purpose.*

## **Arbitration**

Tort litigation is time consuming and expensive. Claims under \$50,000 should be required to go to arbitration before being heard in Superior Court. Either party would be free to appeal the arbitration decision to the courts, however the results of the arbitration could be admitted in evidence at any subsequent trial. *Experience indicates that the effect would be to reduce the number of cases going to court, lower the costs of resolution and ultimately get more money into the hands of victims without great delays.*

## **Notice of Policy Cancellation**

Individuals, businesses and professionals have been suddenly cut off from their insurance programs. *Companies should be required to give 60-day notice of changes in coverage.* This would avoid drastic disruptions in people's ability to earn a living.

## **Pre-judgment Interest**

Interest is often paid on awards. It should accrue from the date an action is filed. Currently, interest accrues in many cases from the date of the occurrence—even if no claim is filed for years. *A defendant should not be required to pay interest covering that period of time when he may have had no knowledge of his liability.*

## **Wrongful Death Statute**

Where there are no dependents, wrongful death monetary awards should be limited to \$25,000. *A wrongful death is always unfortunate, but it is questionable public policy which permits—even encourages—distant relatives and lawyers to reap a windfall at the expense of other policy holders and the public.*

## **Punitive Damages**

Punitive damages is the civil justice system's way of punishing defendants for conduct particularly offensive to society, therefore, punitive damages should be paid to the State of Alaska. *Society as a whole should share the benefits of punitive damages (which are rarely covered by insurance).*

## **Statute of Limitations**

The current statutes of limitation must be clarified to make sure that lawsuits are brought within a reasonable time. Recent court decisions make it possible to file suits in the distant future, making risks totally unpredictable. The alternatives to a functional statute of limitation are insurance devices which effectively establish these limits without benefit of public policy considerations. *These devices (claims-made policies) can cause severely reduced public protection and even reduced availability of some goods and services.*

## **Frivolous Suits/Untrue Allegations**

An Indiana woman purchased a box of Cracker Jacks. The usual prize was not in the box, so she filed suit against the manufacturer. Someone had to defend the suit, even if it was only to ask for dismissal. A responsible legal system should require that plaintiff attorneys certify that the facts have been reviewed and there is reasonable and meritorious cause for filing the action. This certification should be made in writing. *Rules have been adopted by the U.S. Supreme Court and ten states to curb these abuses of our court system.*

## **Full Disclosure**

Essential data should be made available to state regulatory authorities on a quarterly or semi-annual basis, to allow proper regulation of regulated companies regarding reserves, premium rates, loss ratio, investment and other data so as to properly protect people of Alaska.

## **Comparative Negligence v. Contributory Negligence**

When the claimant has contributed to the accident, his or her degree of fault should diminish the award proportionate to the degree. This would reduce damages where the claimant contributed to the mishap. As an example, in single car-auto accidents, cities have been successfully sued by the drivers for faulty road design or maintenance, even where the drivers have been proven to have been drinking or using drugs.

## **Who is the Citizens Coalition for Tort Reform?**

The Citizens Coalition for Tort Reform is an organization composed of representatives from a broad cross section of Alaskan businesses and professions.

They include these companies, associations and agencies:

Alaska Air Carriers	Alaska Visitors Association
Alaska Broadcasters Association	Anchorage Board of Realtors
Alaska Chapter, American Institute of Architects (AIA)	Anchorage Restaurant and Beverage Association (ARBA)
Alaska Dental Society	Cabaret Hotel and Restaurant Retailers (CHAR)
Alaska General Contractors	Childbirth Educators
Alaska Chapter, American Optometric Association	Daycare Operators Association
Alaska Movers Association	Fairbanks North Star Borough
Alaska Oil Marketers Association	Financial Managers
Alaska Rental Association	Hotel and Motel Association
Alaska Section, Fairbanks Branch, American Society of Civil Engineers	Insurance Brokers and Agents Association
Alaska Society of Professional Engineers	Nurse Midwives Association
Alaska State Health Association (Hospitals)	Pension Consultants
Alaska State Medical Association	Professional Physical Therapists Association
Alaska Support Industry Alliance	Risk Management Association
Alaska Truckers Association	Southern Alaska Association of Life Underwriters

**The Citizens Coalition for Tort Reform**  
**738 H Street, Suite 100**  
**Anchorage, Alaska**  
**(907) 276-1135**



C. G. ESTES CO.  
4015 Borland Drive  
Anchorage, Alaska 99517  
(907) 243-6656

February 14, 1986

Pat Rodey  
Alaska State Senator  
Pouch V  
Juneau, Alaska 99811

Dear Senator Rodey:

I am a small general construction contractor and have been in business in the Anchorage area for the past three years and have worked in construction in the State of Alaska for the past 20 years.

Insurance costs have been rising so rapidly that the required insurance is cost-prohibitive, if obtainable at all. My "umbrella" policy expired last month and when I tried to renew the insurance was told that my insurance company would no longer issue insurance in Alaska. I have contracts with the Municipality and federal government which require a million dollar "umbrella" policy and if I am unable to obtain this insurance I will be in violation of my contracts. These jobs were all bid in good faith as I had coverage at the time the jobs were bid and I did not anticipate any problem in renewing.

Apparently this problem has been brought about by the many liability lawsuits filed in Alaska and the skyrocketing amount of the awards. The Citizens Coalition for Tort Reform has come up with a comprehensive solution: legislation must address changes in the way liability issues are tried and decided, and inequities in the legal system's handling of liability lawsuits. Laws now undermine statistical probabilities which make insurance risks predictable and the present system of handling lawsuits is expensive and unfair.

This is an urgent matter. Unless there are drastic changes in the cost and availability of insurance, I will be unable to stay in business. Apparently many insurance companies have been forced out of business and those remaining are loaded and do not want to insure companies doing less than three million a year.

Anything you can do to effect legislation that will relieve this situation will be appreciated by all of us experiencing insurance problems in Alaska.

Sincerely,

G. G. ESTES CO.



Charles G. Estes

# Alaska Legislative Digest

*An Inside View of Alaska Policy*

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***Insurance Crisis a Reality, But . . .***

OFFICE COPY

## INSURANCE OR TORT REFORM?

After intense hearings last week, the insurance crisis became a clear reality to House lawmakers, but the solution to that crisis is still a question between tort reform, insurance reform, or a combination of both. The House Labor and Commerce Committee held three meetings last week to begin their review of the many insurance bills currently before them. The first bill under consideration was HB-532, by Cotten, which encompasses all proposals put forth by the Citizens Coalition for Tort Reform. Cotten said he introduced the bill because insurance costs are rising and general liability insurance is becoming unavailable. Cotten also admitted that he didn't know if legislative action would reduce insure costs, or if anyone could promise that.

Ames Luce, a trial lawyer from Anchorage, believes the insurance crisis is a result of "the way the insurance companies have been conducting their business over the last seven to eight years." Luce told lawmakers that tort verdicts and settlements have kept fairly consistent with inflation over the last several years, but insurance premiums have not. In 1984 when interest rates began to fall, insurance companies finally raised their premiums to prevent extreme losses. Luce believes that if the companies had kept their premiums up with inflation, there wouldn't be a crisis today. (Continued on page eight)

### ***Major FY '87 Budget Cuts?***

The announcement by SOHIO of a \$4.00 per barrel cut in the price of Prudhoe Bay oil, and continued drops in the spot market have convinced virtually everyone in Juneau that major cuts will be required in the budget proposed by Governor Sheffield in December. According to the Office of Management and Budget, the spot price for Alaska North Slope crude on the U.S. Gulf is now at \$13.35, down \$1.50 a barrel from a week ago. Analysts say every one dollar drop in the price cuts \$150 million from state revenues.

### ***Inside this week's Digest:***

**\*\*NEW SCHOOL FUNDING BILLS:** Last week five new school funding proposals were introduced. Most of the bills are a variation of the Governor's measure. (See story page 2)

**\*\*ALASKA MINERS SPEAK OUT:** Alaska miners told the Senate Resources Committee last week that state government shares responsibility in the "locking up" of vast tracts of Alaska lands from mineral exploration. (See story page 3)

**\*\*AHFC MOBILE HOME LOANS:** Lawmakers have introduced legislation in reaction to AHFC's decision to double the down payment requirement for mobile homes. (See story page six)

**\*\*SEVERANCE TAX CHANGES CONSIDERED:** Oil company analysts in Anchorage say the new ELF formula won't decrease taxes on new fields as much as claimed, and would increase taxes on two out of three marginal North Slope fields now producing. (See story page 7)

## ... Local Government ...

### School Funding Bills In

Last week, five new school funding proposals were introduced, but observers believe no final action will be taken on a school funding plan until the amount of funding available for school financing is determined. The Governor finally introduced the Dept. of Education bill, but surprised many by putting it in on the House side. Most of the bills introduced are a variation of the Governor's bill, HB-604, with the exception of the bills introduced by Sen. Ferguson (SB-408) and Rep. Taylor (HB-637).

SB-408, by Sen. Ferguson, would return school funding to an ADM (average daily membership) formula from 1978. Funding would be based on a weighted instructional unit as opposed to a weighted student in the DOE proposal. Taylor's bill is also based on the ADM formula, but differs from Ferguson's bill by counting PL 874 funds as local wealth in calculating a district's needed range of funding. HB-637 also sets up a special account for handicap assessment.

The Fahrenkamp, Koponen bills come from a proposal offered by the Fairbanks Borough and school district. The bills call for a 3.5 mill local contribution as opposed to the 2 mill in the DOE bill, and would take into consideration local communities that have a contribution larger than 3.5 mills in determining how much gain they could receive in FY 87 under the new formula.

HB-575, by Larson, also calls for a 3.5 mill local contribution. There is no "hold harmless" provision under this measure, meaning there are no caps set for maximum gains or losses. The DOE bill allows a maximum gain and loss of five percent. The bill also sets up an emergency account, to be funded by interest from the Public School Fund.

All the school funding measures, including SB-345 introduced earlier, have referrals to HESS and Finance. The House HESS committee hearings will begin hearings on the House bills March 4.

### Municipal and School Insurance "Pooling"

Municipalities, school districts, and REAA's would be able to form insurance pools under a bill before the House Labor and Commerce Committee last week. Sponsor substitute for HB-506 would also put the state in the reinsurance business by establishing an Alaska Reinsurance Fund to aid companies in Alaska who are unable now to obtain insurance due to availability or price. Many believe a bill such as this would solve the problems of insurance availability and price in Alaska, ending the need for tort changes. Labor and Commerce members heard an initial overview of the bill, however, no action was taken. Rep. Kay Wallis has introduced similar legislation, HB-585, which relates only to school districts. Both bills have been referred to the House Special Loans, Judiciary and Finance Committees.

### From The Backrooms . . .

ON THE CAMPAIGN TRAIL: Former Gov. Wally Hickel has reportedly been talking with California's campaign media whiz Clint Riley. Riley has been San Francisco Mayor Diane Feinstein's media expert. What's strange about the rumor is that Riley usually works only for Democrats.

IN OTHER DEVELOPMENTS: GOP candidate Arliss Sturgulewski has made a July 28th - August 7th TV time buy. What's unusual is that she didn't buy the last week before the primary. The buy, however, has attracted the immediate attention of GOP candidates Bob Richards and Joe Hayes, who are hurrying to match it. Apparently Sturgulewski is viewed as the candidate to watch by the rest of the GOP field. It seems that their strategy is not to let Sturgulewski have any unopposed media blitzes. Watch for intermittent media blitzes.

COWPER'S MEDIA ADVISOR: Former Alaskan and Egan press secretary Joe Rothstein, now a national media consultant, will be the media advisor for the Cowper campaign. Reportedly the Cowper media package, however, will be produced locally.

# Miners: State "Locking Up" Alaska Lands

Usually, federal agencies are blamed for "locking up" vast tracts of Alaska lands from mineral exploration. But according to Alaska miners, state government also shares responsibility. That was the message to Alaska miners gave Senate Resources Committee members in Anchorage last week during a mining "overview" session. The Alaska Miners' Association expressed particular concern, among other things, over "soft closures" of 11.1 million acres of upland terrain with potential mineralization, and another 908,500 acres where exploration has been explicitly closed by DNR mineral orders that may be in violation of the law. These figures do not include 3 million acres set aside in state parks and recreation areas and another 1.8 million acres in state game refuges, critical habitat areas and game sanctuaries, also closed to exploration. Without a land-base for exploration, mining can never grow from its current \$250 million annual economic contribution to a potential \$1 billion within the near-term the miners said.

Nine hundred thousand acres are affected by mineral closing orders may violate a statute requiring legislative approval of closures greater than 640 acres. "These closures are being made because of an interpretation of multiple-use which we believe is contrary to the intent of the Alaska constitution that that lands should be available for development," said Chuck Hawley of Hawley Resources, speaking for the Association on this point. "Instead of accepting this broad mandate and managing to allow potentially conflicting uses to sometimes occur, DNR is defining multiple-use as narrowly as possible in order to allow it to close lands without going back to the legislature for concurrence."

## ***State's Land Plans Result in "Soft Closure"***

A big block of lands - 11.1 million acres - are open to exploration in theory, but have primary uses designated as wildlife habitat or recreation, Hawley said. Most of this (9 million acres) is in the Bristol Bay Management Area, and another 2.1 million acres is in the Nelchina Public Use Area.

Much of this "soft closure" has been done as a part of state land planning efforts done under AS 38.04.065, but, "we seriously question whether the amount or direction of planning conforms to other guidelines of this section, which first of all advise the commissioner to 'use and observe the principles of multiple-use and sustained yield' and 'give priority to planning and classification in areas of potential settlement and potential environmental concern.' We believe the entire section does not suggest that the state have a massive planning staff and start to immediately plan and zone all the remaining parts of Alaska, but this is what has happened," Hawley said.

## ***Should Alaska Intervene in Sierra Club vs. BLM?***

Other points made by the association: (1) A plea for state intervention in the recently-filed Sierra Club vs. BLM, a case similar to that filed against the National Park Service last year that shut down mining in parks and wildlife refuges. By affecting BLM-managed lands, this suit could shut down most placer mining in the state; (2) State agency near-term effort should be applied toward development of mining practice and technology aimed at reaching environmental standards rather than on punitive enforcement of strict water-quality standards; (3) State government's problem is one of attitudes at lower to mid-level within agencies, rather than lack of supportive policy guidance from on top. In inter-agency planning, large manpower resources within ADF&G overwhelm more limited staff in other agencies. Result: An anti-development 'tilt' to state agency land management.

# . . . Status Of Bills . . .

## Key House Bills Introduced

--HCR-49, AHFC Reqs. Mobile Home Loans,  
(by Pourchot).....to HSL & FIN  
--HCR-65, Foreign Marketing Pink Salmon  
(by Herrmann).....to RES & L&C & FIN  
--HJR-66, Fed. Tax Imported Oil,  
(by Pignalberi).....to O&G & FIN  
--HB-575, State Support Education,  
(by Larson).....to HESS & FIN  
--HB-578, Fish/Game Res. Man. Regions,  
(by Wallis).....to RES & FIN  
--HB-579, Financing Fish Processors,  
(by Herrmann).....to HSL & RES & FIN  
--HB-581, Cooperative Corp. Act.,  
(by Koponen).....to L&C & JUD  
--HB-582, Mult. Convictions/Veh. Theft,  
(by Koponen).....to JUD  
--HB-584, State Contracts/Products/Serv  
(by Pignalberi).....to SA & FIN  
--HB-585, School Dist/Joint Insurance,  
(by Wallis).....to L&C & JUD & FIN  
--HB-587, Mun. Land Entitlements,  
(by Adams).....to CRA & FIN  
--HB-588, Grant North Slope Borough,  
(by Adams).....to CRA & FIN  
--HB-589, State Group Life/Health Ins.  
(by Sund).....to L&C & JUD & FIN  
--HB-591, Prostitution,  
(by Jenkins).....to JUD & FIN  
--HB-595, Gambling in Municipalities,  
(by Marrou).....to CRA & JUD & FIN  
--HB-596, Fishermen's Liens,  
(by Marrou).....to HSF & JUD  
--HB-604, School Funding Formula,  
(by Governor).....to HESS & FIN  
--HB-605, Shuyak State Game Refuge,  
(by Thompson).....to RES & FIN  
--HB-609, Increasing Alcohol Tax,  
(by Clocksin).....to SA & FIN  
--HB-610, Power Eminent Domain/Muni.  
(by Clocksin by Req).....to CRA & JUD  
--HB-611, Air Carriers,  
(by Cato).....to TRANS & FIN  
--HB-612, Leases Land Ak. Railroad Corp.  
(by Davis).....to L&C & TRANS & FIN  
--HB-613, Ak. Minerals Commission,  
(by Frank).....to RES & FIN  
--HB-616, Discrimination/Residency,  
(by Koponen).....to SA & FIN  
--HB-617, Business Trusts,  
(by Koponen).....to L&C & JUD & FIN  
--HB-618, Enforce. Comm. Mot. Veh. Laws  
(by Davis).....to L&C & SA & TRANS

## House Bills Introduced (Cont'd)

--HB-619, Scholarship Loan Program,  
(by Herrmann).....to HSL & HESS & FIN  
--HB-620, Reg. Certain Dealerships,  
(by Pignalberi).....to L&C & JUD & FIN  
--HB-622, Int. Rates/Delinquent Taxes,  
(by Pignalberi).....to JUD & FIN  
--HB-629, Geographic Pay Differentials,  
(by Governor).....to SA & JUD & FIN  
--HB-630, Suspended Imposition Sentence,  
(by Governor).....to JUD  
--HB-633, Ak. Export Dev. Authority,  
(by Martin).....to L&C & FIN  
--HB-635, Willow Creek State Rec. Area,  
(by Larson).....to RES & FIN  
--HB-637, State Support Education,  
(by Taylor).....to HESS & FIN  
--HB-638, Emerg. Water/Sewer Assess/Loan  
(by Boucher).....to HSL & FIN  
--HB-641, Generic Drugs/Bd. Pharmacy,  
(by Gruenberg).....to L&C & HESS & FIN  
--HB-643, Corporations,  
(by Gruenberg by Req).....to L&C & JUD  
--HB-644, Arrest/Surety/Remission Bail,  
(by Gruenberg).....to JUD & FIN  
--HB-645, Prevailing Wage/Pub. Const.  
(by Herrmann).....to SA & JUD & FIN  
--HB-647, Mun. Rep/Ins. Hazardous Waste  
(by Hurley).....to CRA & SA  
--HB-648, Leasing Limited Entry Permits,  
(by Herrmann).....to HSF & RES  
--HB-650, Ak. Transportation Comm,  
(by Pignalberi).....to TRANS & L&C & FIN  
--HB-652, Limited Entry Permit Brokers,  
(by Herrmann).....to RES & FIN  
--HB-653, Penalties Work-Safety Laws,  
(by Koponen).....to SA & JUD & FIN  
--HB-656, Amt. Bonded Indebt/Munis.  
(by Marrou by Req)....to CRA & HSL & FIN  
--HB-657, Worker's Compensation,  
(by Koponen).....to L&C & JUD & FIN  
--HB-659, Reg. Alcoholic Beverages,  
(by Binkley).....to SA & JUD & FIN  
--HB-662, Down Payment Reqs. Mobile Home  
(by Collins).....to HSL & FIN  
--HB-663, Foreclosures Liens Munis.,  
(by Furnace).....to CRA & JUD  
--HB-665, Reg. Cable Television Service,  
(by Taylor).....to L&C & FIN  
--HB-666, Coastal Management,  
(by Herrmann by Req)....to SA & RES & FIN  
--HB-668, Scholarship Loans,  
(by Koponen).....to HSL & HESS & FIN

# ... Status Of Bills ...

## House Bills Introduced (Cont'd)

--HB-669, State Support Education,  
(by Koponen).....to HESS & FIN  
--HB-670, Int. Airports/Anch. Fairbanks  
(by Hanley).....to HSL & TRANS & FIN  
--HB-671, Approp. Study Airport Man.,  
(by Hanley).....to HSL & TRANS & FIN  
--HB-672, Notice of Hazardous Waste,  
(by Koponen).....to SA & RES  
--HB-673, Transp. Haz. Sub. Munis,  
(by Koponen).....to SA & RES  
--HB-676, Classification Study,  
(by Governor).....to SA & FIN  
--HB-677, Seldovia Nat. Assoc. Land Exc.  
(by Marrou).....to RES & FIN  
--HB-678, General Relief Asst. Program,  
(by Governor).....to HESS & JUD & FIN  
--HB-679, Purchase Ak. Products,  
(by Governor).....to SA & JUD & FIN  
--HB-681, Unemployment Insurance,  
(by Governor).....to L&C & JUD & FIN  
--HB-683, Commercial Fishing Vessel Reg.  
(by Herrmann).....to HSF & RES & JUD  
--HB-685, Patronizing a Prostitution,  
(by Jenkins).....to JUD & FIN  
--HB-688, Tax Credits/Cont. Ed. Inst.,  
(by Gruenberg).....to HESS & FIN  
--HB-689, Motor Vehicles,  
(by Cotten).....to TRANS & JUD & FIN  
--HB-490, Commercial Fishing Viol. Fines  
(by Herrmann).....to HSF & RES & JUD

## Key House Committee Action

--HB-277, Fish Processor/Buyers,  
RES "DO PASS".....to FIN  
--HB-345, Dram Shop,  
SA "MIX REC".....to JUD  
--HB-503, Games of Chance,  
L&C "DO PASS".....to JUD  
--HB-534, Violent Crimes Compensation,  
SA "DO PASS".....to JUD

## Key House Floor Action

--HB-63, Plumbing Code,  
HOUSE PASSED.....to SENATE  
--HB-530, Special Mortg. Loan Program,  
HOUSE PASSED.....to SENATE

## Key Senate Bills Introduced

--SJR-39, Rt. Citizen Bear Arms,  
(by Rodey).....to JUD

## Senate Bills Introduced (Cont'd)

--SJR-41, Am. Const. Approp. Limit,  
(by Faiks).....to JUP & FIN  
--SB-403, Adv. Vote State Income Tax,  
(by Zharoff).....to JUD & FIN  
--SB-405, Loans/Ak. Grain Res. Program,  
(by Coghill).....to RES & FIN  
--SB-407, Approp. North Slope Borough,  
(by Ferguson).....to CRA & FIN  
--SB-403, State Aid Education,  
(by Ferguson).....to HESS & FIN  
--SB-410, Fin. Shore-based Fish. Proc.,  
(by Zharoff).....to RES & FIN  
--SB-412, Claims Against the State,  
(by Faiks).....to SA & JUD  
--SB-413, Illegally Controlled Ent.  
(by Rodey).....to JUD & FIN  
--SB-414, Municipal Land Entitlements,  
(by Ferguson).....to CRA & FIN  
--SB-415, School Board Composition,  
(by Ferguson).....to HESS  
--SB-416, Warranties Used Motor Vehs.,  
(by Josephson).....to TRANS & JUD  
--SB-417, Approp. Payoff GO Bonds,  
(by Fahrenkamp).....to FIN  
--SB-418, Ak. Minerals Commission,  
(by Bennett).....to RES & FIN  
--SB-421, Attach. Permanent Fund Div.,  
(by P. Fischer).....to JUD & FIN  
--SB-422, Prospecting for Coal,  
(by Bennett by Req).....to RES  
--SB-423, Missing Persons Info.,  
(by Faiks).....to SA & JUD  
--SB-426, Tele/Elect. Utilities/APUC,  
(by Coghill).....to L&C  
--SB-427, Homesite/Ag. Land,  
(by Coghill).....to RES & FIN  
--SB-429, Regs/Small Bus/Organ/Gov.,  
(by Fahrenkamp).....to L&C & JUD  
--SB-430, Reduce Royalty/Coop. Unit Plan  
(by Fahrenkamp).....to RES & FIN  
--SB-431, Preference State Residents,  
(by Bennett).....to L&C & JUD & FIN  
--SB-433, State Support Education,  
(by Fahrenkamp).....to HESS & JUD

## Key Senate Committee Action

--SB-344, Number of Sup. Court Judges,  
JUD "MIX REC".....to FIN  
--SB-350, Ad. Vote Perm. Fund Dividend,  
SA "MIX REC".....to FIN  
--SB-374, State Toll Facilities,  
TRANS "DO PASS".....to FIN

# ... Business ...

## Subcontractor, Supplier Payment

Overbuilding in the Anchorage area coupled with a general slowdown in Alaska's construction industry has led to payment problems for construction suppliers and subcontractors. HB-494, by Rep. Cotten, would require bankers to pay suppliers and subcontractors for their services when foreclosing on a builder or contractor. The measure is not popular in the banking community because it increases their lending risks and may lead to decreased loan availability for small construction firms. Subcontractors and suppliers claim that the proposal is necessary to guarantee that they receive payment for their services. The bill has L&C and JUD referrals.

## \$1 Billion into the Permanent Fund?

Many were accusing the Senate of playing politics last week when they voted to deposit the Undistributed Income Account (UDI), almost one billion dollars, into the corpus of the Permanent Fund. The Senate made that move when they passed HB-28 and SB-346. The bills deposit the entire billion dollar UIA into the Fund and also delete the current five year averaging used to determine monies available for distribution. The House majority doesn't appear favorable to the change in averaging, and many believe it will increase dividends in the short run but decrease contributions to the Fund over the long haul. Some question whether the Senate made this move to justify expenditure of all the recent 'windfall' monies.

## Tax Increase on Alcohol

State taxes on alcoholic beverages would be increased under HB-609, by Rep. Clocksin. Increased revenues would be used for alcohol abuse programs and to provide assistance for victims of alcohol abusers. The bill would raise the tax on beer from 35 cents/gal. to 64 cents/gal.; on wine from 85 cents/gal. to \$1.56/gal.; and on beverages containing 21 percent or more alcohol from \$5.60/gal. to \$6.00/gal.

## AHFC Bill Moving in Senate

\*\*The Alaska Housing Finance Corp. (AHFC) refinancing bill, HB-530 by Rep. Duncan, was sent to the Senate last week. A hearing is scheduled for the bill in Senate Finance this Tuesday, February 25. Looks like the bill will move quickly to the Senate floor.

\*\*Two measures were introduced last week in reaction to AHFC's decision to double the down payment requirement for mobile homes purchased with AHFC financing. AHFC believes that the increase is necessary to help curb the increasing default rate in mobile home loans. Some lawmakers, however, worry that the down payment hike will limit the home ownership opportunities for low and moderate income persons.

HCR-49, by Rep. Pourchot, would request that AHFC reconsider its decision to single out mobile homes for down payment increases. It is noted in the resolution that the default problem is not exclusive to mobile home owners and that any action taken should apply to all types of residences handled by the AHFC. The resolution has been referred to House Loans and Finance.

Similarly, a bill introduced by Rep. Collins would force the AHFC to reverse its decision to increase mobile home down payments. Under HB-662, down payments for AHFC financed mobile home purchases could be no higher than those required for other types of residences. The measure goes to House Loans, chaired by Rep. John Sund, and to the Finance Committee.

\*\*Approval for \$600 million in state guaranteed AHFC revenue bonds to purchase veteran's mortgages would be sought on the November ballot under HB-532. The measure, which was introduced by the Governor, passed out of House Loans last week and has also been referred to the Finance Committee.

\*\*AHFC would be allowed to purchase refinancing loans through their Special Mortgage Loan Purchase Program under SB-438, by Sen. Rodey. The bill has a single Senate referral, to Finance.

## . . . Resources . . .

### Oil Tax Hearings in House

Several oil companies testified last week to House Finance regarding changes in the Economic Limit Factor (ELF) provision in the state's severance tax proposed in HB-545. According to Dept. of Revenue economist Chuck Logsdon, the proposed ELF change would raise the state an additional \$156 million in revenue over the next two years. Taxes at Prudhoe Bay would rise under the proposed formula and oil company representatives say that will jeopardize investments aimed at increasing oil recovery. Logsdon said that the loss of recovery at Prudhoe between now and the year 2000 will be 22 million barrels, or the equivalent of about 15 days output at current production levels.

Sponsors hope that HB-545 will lower taxes on North Slope "marginal" fields while increasing tax on the larger Prudhoe Bay and Kuparuk fields. But oil company analysts in Anchorage, after studying the impact of the new ELF formula, say the bill wouldn't decrease taxes on new fields as much as claimed, and would slightly increase taxes on two out of the three marginal North Slope fields now producing. Company analyses show slight increases in overall taxes on Endicott and Lisburne, but a decrease for Milne Point, Conoco's new small field now producing 20,000 bpd. (Conoco has so far not expressed an opinion on the bill.) Taxes on Seal Island, a new discovery, would also increase under the bill, analyses indicates.

Industry findings are at variance with the analysis by the Office of Management and Budget which shows decreasing taxes on these fields. One reason for the variation industry people speculate, might be that OMB used lower assumptions for field production levels and higher estimates for the number of wells than will actually be the case. For example, OMB apparently assumed Endicott would produce 65,000 bpd, instead of the 100,000 bpd planned by the operator, Sohio. Assumptions for the number of wells at Endicott might also differ.

### State, Chugach Make a Deal

After several months of negotiations, Commissioner of Natural Resources Esther Wunnicke and Chugach Electric Board Chair Dr. Joyce Murphy announced they had reached agreement on their Cook Inlet royalty gas valuation dispute, dependent upon passage of CSSB-309. The announcement was made at a Senate Resources Committee meeting last week. The legislation authorizes the Commissioner to value the state's royalty share of natural gas sold by the state's oil and gas lessees to instate nonprofit or government-owned utilities or cooperatives based upon the arms-length gas sales contract price.

Wunnicke told members that she was comfortable that the new language in the CS would give her the authority to recognize consumer concerns when determining value. Dr. Murphy urged quick action by the legislature because of ongoing litigation and their need to begin negotiations on future gas contracts. The bill was moved onto Finance.

### Royalty Oil Contract Moving?

The Petro Star/Chevron royalty oil contract (HB-559) was well received by members of the House Oil and Gas Committee last week and should move from that Committee on Wednesday. Members questioned Petro Star President Steve Louis how he can offer a cheaper product than MAPCO Refining when the proposed Petro Star royalty contract is more expensive than the state's contract with MAPCO. Louis replied that his company markets products to end-users mostly in rural Alaska, rather than distributors, trying to eliminate the middle man. Committee members asked the Division of Oil and Gas to supply them with a comparison of the major features of the state's royalty oil contracts including the proposed Petro Star/Chevron contract.

\*\*HB-470, creating an Oil and Hazardous Waste Response Fund has been sent to a Subcommittee of Finance chaired by Rep. Pourchot. A committee substitute will be worked on this week.

## ***Insurance or Tort Reform (Continued)***

(Continued from page one) Ames Luce called for insurance reform rather than tort reform, which would include: full financial disclosure by insurance companies; a state emergency insurance pool; a law precluding arbitrary cancellation without giving the policy holder adequate time to find a replacement policy; and establishment of a consumer advocate within the Division of Insurance.

Placing restrictions on the contingency fees of attorneys, another feature of the Cotten bill, was addressed by both the tort reform advocates and the trial attorney's, who say they are there on behalf of the victims. "The contingency fee is the key to the court house for those who are not wealthy," stated Bernard Kelly, an Anchorage attorney. Al Tamagni, Chair of the Coalition, told lawmakers that the Coalition believes larger percentages of awards should go to injured parties. Tort reform advocates also believe that lower attorney's fees will mean lower settlements and thus lower insurance costs. Luce told committee members that contingency fees have nothing to do with insurance premium costs, that attorney's fees from an economic award are not an "add on." Rep. Mike Navarre believes that if a cap is placed on contingency fees, "there will be no way for plaintiffs' attorneys to recover costs, and defense costs are built into insurance premiums." Luce called the bill a "massive takeaway of victim's rights," but Tamagni later countered that all parties are victims in this crisis.

All those involved appear to agree that current law relating to comparative negligence should be changed to apportion the damages between the responsible parties. The House Judiciary Committee heard HB-368 last week calling for adoption of the Uniform Comparative Fault Act. Many see this bill as the start of a compromise on the insurance issue. Juneau attorney Av Gross, representing the trial attorneys, told members his group does not support this bill now, but is willing to work to resolve their problems with the Committee. Another bill seen as a compromise is HB-506, by Taylor, aimed at increasing the availability of insurance by allowing municipalities and school districts to pool insurance and creating a state Reinsurance Fund, to provide insurance to those companies that cannot obtain it due to price or availability. The House Labor and Commerce Committee will continue hearings this week in Anchorage on February 24th and February 25th in Juneau.

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# CITIZENS COALITION FOR TORT REFORM, inc.

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FROM: CITIZENS' COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.  
Chairman

## JACOBS GOES DEEPER INTO THE OIL PATCH

Despite the threat posed by plummeting oil and gas prices, Irwin L. Jacobs is pouring more money into two big and seemingly ill-timed plays in the oil patch. The Minneapolis investor, impatient with efforts by Pioneer Corp. President C. David Culver to restructure the Amarillo natural gas producer, says he will launch a tender offer for the 86% of Pioneer he does not yet control. Jacobs is offering \$28 a share, or \$655 million—well below the roughly \$26 a share he paid for his initial stake in late 1984 but at least 10% above the current market for Pioneer's gas reserves. Those reserves are being reappraised, and Jacobs may be betting on a big upward revision. He also has boosted, to 15.4%, his stake in Tidewater Inc., which services offshore oil rigs. Jacobs paid \$26 a share for his initial 5% stake in early 1984; Tidewater stock is trading now at below 10. Jacobs also holds 9% of HNG-InterNorth Inc., a gas pipeline.

## CHEWING TOBACCO FACES AN AD BAN

The House of Representatives passed a bill that would bar radio and TV advertising for snuff and chewing tobacco. The measure, which the Senate is expected to approve, also would require makers of the products to place on packages such warning labels as "This product may cause mouth cancer." The measure also calls for the Health & Human Services Dept. to set up programs to educate the public about the dangers of smokeless tobacco.

## 'REAL MOMENTUM' FOR NORFOLK'S BID

The Senate approved, 54 to 39, Norfolk Southern Corp.'s proposal to buy the government's 85% stake in Consoli-

dated Rail Corp. for \$1.2 billion. The vote gives Transportation Secretary Elizabeth H. Dole, who favors the sale to Norfolk Southern, an expected victory in the battle over Conrail's fate. The Senate support, she said, will "send this to the House with some real momentum." But the sale faces greater opposition there. House Energy & Commerce Committee Chairman John D. Dingell (D-Mich.) promises to resolve the issue this year, but first he wants to examine documents from the Justice Dept.'s review of the deal and from all bidders for Conrail. Another key representative, James J. Florio (D-N.J.), said that all the bids for Conrail are "woefully deficient" and must be improved.

## BEATRICE APPROVES A REVISED BUYOUT

Directors of Beatrice Cos. approved a modified buyout offer from Kohlberg Kravis Roberts & Co. The offer facilitates out-of-court settlements of more than a dozen shareholder suits challenging the compensation plans for Beatrice executives and the proposed takeover of the Chicago-based conglomerate. Kohlberg Kravis still will pay \$40 in cash and \$10 in preferred stock for each Beatrice common share under the new agreement, but the preferred's dividend will jump to 15.25% annually from the 14% announced in January. Golden parachutes for Beatrice's six top executives will be reduced from \$23.5 million to \$20.1 million. Beatrice also agreed to consider terminating the deal should the board receive a better offer.

## MICROSOFT: CAPPING A SUCCESS STORY

William H. Gates III dropped out of Harvard in 1975 and started a company to write software programs for then-new microcomputers. Now his company, Microsoft Corp., in Bellevue, Wash., is going public. Chairman Gates, 30, the



GATES: HOLDING A STAKE OF \$200 MILLION IN MICROSOFT

son of a prominent Seattle lawyer, will sell 80,000 shares, worth from \$1.3 million to \$1.5 million at the proposed offering price of \$16 to \$19 a share. That will leave him the owner of 44.9% of Microsoft shares with a worth of about \$200 million. Co-founder Paul G. Allen, 33, will own 25.2% of Microsoft; it earned \$17 million on revenues of \$85 million in the first half, ended Dec. 31. Microsoft is trying to overtake Lotus Development Corp., which had \$225 million in revenues last year, as the largest personal computer software company.

## UNDOING STEEL'S WAGE UNIFORMITY

The United Steelworkers opened negotiations on separate contracts with three of the nation's six major steel-makers. In exchange for early bargaining, LTV Steel, Bethlehem Steel, and National Steel agreed to join with the union in a campaign to persuade Washington to give major relief to the industry. The union also gave a special exemption to ailing LTV by allowing it to defer a wage and cost-of-living increase due on Feb. 1. Inland Steel and Arco are expected to join the union campaign, but U.S. Steel, the nation's largest and healthiest producer, has yet to set a date for early talks. The six producers are seeking conces-

sionary pacts to replace contracts that expire on Aug. 1 and cover 145,000 workers. The negotiations are expected to result in the end of wage uniformity in the industry.

## IBM WILL REBUILD UNITED AIR'S SYSTEM

United Airlines Inc. said the bulk of the \$1 billion rebuilding of its Apollo reservations system will be spent on a computer network to be developed by International Business Machines Corp. The new system will improve the ability of travel agents to service large corporate accounts. It will also handle the internal business tasks of travel agencies, in effect providing an automated office for each. The system will use IBM hardware, communication networks, and software.

## THREE INSURERS BOLSTER RESERVES

Three insurance companies admitted they underestimated future claims on property and casualty policies issued before 1985. Philadelphia-based Cigna Corp. charged \$1.2 billion against fourth-quarter earnings to boost its property and casualty reserves by 28%. The charge, by far the largest taken by an insurer, will result in a 1985 operating loss of \$853 million. After Wall Street reacted favorably—Cigna stock fell less than \$1—Continental Corp., in New York, unveiled a \$220 million charge against fourth-quarter earnings to bolster reserves. USF&G Corp., in Baltimore, followed with a \$100 million charge against fourth-quarter earnings to prop up its reserves 23% to \$3.2 billion. The charges reflect higher jury awards in liability suits, broader legal interpretations of policy coverage, and industry-wide failure to set aside sufficient loss reserves. The industry is just now recovering from years of price competition and lower underwriting standards that also punished earnings. □

# BOTTOM-FISHING IN CARL LINDNER'S SWAMP

**T**o most of its hapless creditors, customers, and equity holders, Mission Insurance Group Inc. is one big swamp. Its largest unit, Mission Insurance Co., is insolvent, under the conservatorship of California since Oct. 31, with no easy solution to its problems. Yet a couple of adventurous bottom-fishers have plunged into the muck—and hope to find a fortune there.

Martin J. Whitman, a specialist in securities of bankrupt companies who manages more than \$200 million, is leading the expedition. He's drawn in Carl Marks & Co., a New York investment house that has dabbled in everything from venture capital to czarist bonds. Between them, the partners have acquired Mission notes and debentures worth only about \$2 million—but enough, they believe, to get them in on a revival of Mission.

**SIMPLE LOGIC.** Whitman has also rallied some angry long-standing Mission bondholders with much more at stake. The biggest is Retirement Systems of Alabama, a \$5 billion pension fund that holds \$24 million worth of Mission bonds. Mission skipped two interest payments "without contacting anybody," complains David G. Bronner, the fund's chief executive.

The bondholders argue that as creditors they would be first in line in a Chapter 11 reorganization—something that everyone wants to avoid. But so far they aren't making much headway with Cincinnati financier Carl H. Lindner, whose American Financial Corp. owns 49.9% of Mission. Lindner's preliminary agreement with the California regulators provides for a restructuring of the debt that would reduce the bondholders' stake. Dozens of large and small reinsurance clients are also waiting in line with claims on Mission's assets.

For Whitman, a part-time finance teacher at Yale University who eschews suits for work, dressing "only well enough to get into the Yale Club for lunch," the logic is simple. He claims

that he and the bondholder group, along with unidentified potential backers, are ready to inject millions of dollars in new equity into Mission and maybe even take the reins. In return, they want a chance to profit from the turnaround they say can be engineered. This is substantially what Lindner would like to work out—but to AFC's benefit instead.

A turnaround won't be easy. Mission,



FINANCIER WHITMAN BELIEVES MISSION "COULD BE ANOTHER GEICO"

traditionally a well-regarded vendor of workers' compensation insurance, expanded pell-mell into reinsurance in the late 1970s and has since seen claims run three times as high as premiums. The company lost \$198 million in 1984 and \$65 million more in 1985's first nine months. But Whitman has high hopes for the workers' compensation business and firming rates in property-casualty lines. "This could be another Geico," he predicts in his gravelly voice. "If there's one chance in ten of that, it would be well worth our while." Geico, threatened with insolvency in the mid-1970s, made a splendid turnaround under new management. Since then, the insurer's stock has blossomed 40-fold.

Whitman's group may face deeper problems in Mission, however. There are all those reinsurers waiting to be paid. "I'd be very surprised if after all the claims emerge there's anything left for

the bondholders," says David J. O'Leary, an analyst at Fox-Pitt Kelton Inc. At Mutual Shares Corp., an investment firm similar to Whitman's, partner Michael F. Price says he "wouldn't touch it with a 10-foot pole."

But Whitman's team has a different view. Since Mission's shareholder equity has evaporated—the shares were delisted last December by the New York Stock Exchange—the bondholders figure that they already "own" the company. That, they argue, should give them clout in structuring a reorganization. They've proposed a solution in which they'd put up cash and receive new equity and Lindner's group would continue running the company. But they say Lindner turned them down.

In January the Whitman group filed

to push Mission's holding company into Chapter 11 proceedings. That would open the whole company for reorganization, although the fate of insurance assets would remain up to state regulators. Mission has not yet responded. But California Insurance Commissioner Bruce A. Bunner was shocked: "I thought the bondholders would be the least of our problems, but they could destroy everything."

**LAST RESORT.** After all, Bunner and American Financial had been hammering out their own restructuring agreement. Lindner, who injected \$75 million in new capital into Mission last year, would contribute at least \$125 million more to back up part of its policy-writing business. But Bunner

says there's at least a \$169 million gap between assets and liabilities.

The tangle of payments Mission owes dozens of reinsurance clients may put it even deeper in the hole. For weeks, executives at these companies have been meeting with Mission officials and Bunner to settle their claims, which run into the hundreds of millions. If a settlement isn't reached, Bunner will move to liquidate the unit under his conservatorship.

Whitman depicts Chapter 11 as a last resort. Lindner's AFC won't comment. In the meantime, Mission is said to be suffering defections by customers and brokers. "I don't think Mission as an entity is viable," says analyst O'Leary. He wonders if the bottom-fishers will come away with anything but debris.

*By Elizabeth Ehrlich in New York, Zachary Schiller in Cleveland, and Teresa Carson in Los Angeles*

PHOTO BY KENNETH

ALASKA STATE LEGISLATURE  
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JUNEAU, ALASKA 99811  
(907) 465-3717

March 2, 1986

Ms. Renee Murray  
605 W. 42nd  
Anchorage, Alaska 99503

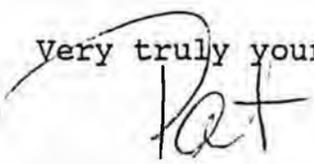
Dear Ms. Murray: <sup>Renee</sup>

Thank you for your note and the article on the increasing cost of insurance. Tort reform has become one of the major issues facing this legislature. The Senate Judiciary Committee which I chair will be one of the more important committee referrals for the tort reform legislation which is now wending its way through the legislature.

In preparation for dealing with this issue, we have done a great deal of research, and listened to several nationally prominent experts on the subject. It is my hope that we can at least begin to find some satisfactory solutions to this dilemma by the end of this legislative session.

Thank you for your interest and your concern. I can appreciate that tort reform is an issue which effects all of our lives, and will do my best to alleviate some of the burden.

Very truly yours,

  
Patrick M. Rodey

## SEARLE: STARING AT SOME LONG DAYS IN COURT

**W**hen G. D. Searle & Co. withdrew the Copper 7 and Tatum-T intrauterine contraceptive devices from sale in the U.S., it said the products were safe. The move, it said, was meant to curtail mounting litigation costs. But lawyers for plaintiffs who are suing Searle, claiming that the devices caused pelvic infection and infertility, see the company's Jan. 3 action as an acknowledgment that it is in for a long, tough series of legal battles.

Searle, a subsidiary of Monsanto Co., has been fighting 775 lawsuits, 305 of which it says are still pending. The company says it spent \$1.5 million to defend itself in just four of these suits. Searle says it has won 8 of 10 trials and that more than 150 other cases have been dismissed. "The financial burden is not created by payments to the plaintiffs but by payments to lawyers," says Tod Hulin, a Searle vice-president.

And there are sure to be more suits filed. Plaintiffs' lawyers say they are reviewing hundreds of new claims. And Ira J. Bornstein, a lawyer who represents Monsanto shareholders who have filed suit charging that Searle failed to inform them of the suits, believes that by taking the IUDs off the market, Searle is "acknowledging that there is tremendous potential liability out there." **BARELY A RIPPLE.** All sides are closely watching a similar but unrelated situation involving A. H. Robins Co.'s Dalkon Shield. Robins filed under Chapter 11 last August after it had won 27 cases and lost 33. A court-ordered advertising campaign aimed at potential plaintiffs has resulted in an avalanche of new claims—11 years after the Dalkon Shield was withdrawn from the market. Searle's withdrawal of its product from the U.S. (it is still sold overseas) means "we are on the Dalkon Shield track," says Patricia Jo Stone, one of the plaintiffs' trial lawyers.

Searle maintains there are important differences. Unlike the Dalkon Shield, Searle's Copper 7 and its labeling were approved by the Food & Drug Administration. Moreover, the FDA has recently investigated allegations that Searle suppressed adverse findings and deflated the incidence of pelvic inflammatory disease in its test results. The agency continues to stand behind the products. "We found that Searle had reported adverse findings in a timely fashion. In our judg-

ment, Searle did not mislead FDA," says Susan M. Cruzan, an FDA spokeswoman.

Discontinuance of the products will hardly cause a ripple on Monsanto's income statement. Last year its IUD sales in the U.S. were \$11 million, a tiny part of Monsanto's \$6.75 billion in sales. Searle's move, however, practically extinguishes the nation's IUD industry. Since Robins took the Dalkon Shield off the market in 1974, others have followed, and Alza Corp. of Palo Alto, Calif., is the only U.S. company that still produces an IUD. But the decision to stop selling the devices has not put a stop to the controversy about them.

*By Ellyn E. Spragins in Chicago and William B. Glaberson in New York*

### EXECUTIVE SUITE

## GM'S SHUFFLE: THE CALM BEFORE A SLAUGHTER?

**A** predictable shift in top management? That's how General Motors Corp. characterized the raft of promotions it announced on Feb. 3. But insiders believe the appointments mean much more: a new phase in the broad reorganization GM began two years ago. Its ultimate goal is to trim white-collar employment in auto operations by at least 25% within 10 years.

Staff cuts are a logical result of the new structure GM outlined two years ago (BW—Jan. 23, 1984). That plan aimed to reduce the auto giant's reaction time to market changes by arranging its five car divisions—Chevrolet, Pontiac, Buick, Oldsmobile, and Cadillac—under two groups. Each group now performs most of the staff functions once spread out through the company.

But critics say GM has been slow to reduce its executive ranks even after

streamlining operations. That, they figure, contributes significantly to GM's production costs, which analysts agree are higher than any other domestic auto maker. "There's no question you could slash the fat in the middle of GM," confides one executive. Another insider predicts the company will begin to attack its manpower glut within six months in a "massive restructuring" of executive jobs. "The change is going to bring pain, but it has to come," he says.

GM's goal is to match the management efficiency of Toyota Motor Corp., the industry leader in that category, by eventually eliminating at least 25% of the salaried jobs in its carmaking business. The changes announced this month do not reduce the number of top GM executives. But they do restructure responsibilities so the chairman and president can concentrate on policy decisions. The shuffle was triggered by the decision of Alexander A. Cunningham, 60, to retire for health reasons. The affable Cunningham had been a board member and executive vice-president in charge of North American passenger-car operations. He has resigned both positions.

**'NEW DAY.'** GM sources describe Cunningham's departure as a tremendous loss for the company. But it has also prompted GM to unleash a younger management team. "It's a new day, as far as I'm concerned," declares pleased board member H. Ross Perot. "These guys are so competitive, they can't live with themselves until they beat anybody in sight."

Cunningham's duties will be split between two new executive vice-presidents. Lloyd E. Reuss, 49, will manage all U.S. auto operations. Robert C. Stempel, 52, will run the company's truck and overseas operations. Reuss formerly headed GM's "small-car" unit, the Chevrolet-Pontiac-GM of Canada Group, while Stempel ran the "big-car" unit, the Buick-Oldsmobile-Cadillac Group. Both men also become directors.

Reuss and Stempel are regarded as leading contenders to replace F. James



REUSS AND STEMPEL: WITH A NEW TOP-LEVEL TEAM IN PLACE, PINK SLIPS MAY FLY

PHOTOGRAPHS BY PETER YATES

ALASKA STATE LEGISLATURE  
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Thank you for your interest and your concern. I can appreciate that tort reform is an issue which effects all of our lives, and will do my best to alleviate some of the burden.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Pat".

Patrick M. Rodey

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## "Preferential treatment"

### AAMGA president attacks agreement to "rescue" Mission

WASHINGTON, DC—The "rescue" of the Mission Insurance Company may well seal the fate of state regulation, according to Avrohm I. Wisenberg, president, American Association of Managing General Agents, in his monthly letter to the membership.

Commenting on the December 6 letter of agreement from Mission American Insurance Company to California Insurance Commissioner Bruce Bunner which sets forth the terms and conditions for the rehabilitation of the Mission Insurance Company, Wisenberg said the intricate maneuvers and switching of assets and liabilities contained in that agreement will only accomplish the transfer of loss to the Mission's reinsurance customers who are largely located outside of California. "The Mission did tremendous reinsurance business all over the United States," said Wisenberg, "based on a healthy rating, and the continued blessing of the California insurance department under which the company operated.

(Continued on page 4)

## The WEEK in A MINUTE

JANUARY 24, 1986

- ✓ LITIGATION SOARS IN WASH. STATE ..... 2
- ✓ CALIF. REDUCES SURPLUS FEE ..... 3
- ✓ NADER, HUNTER RAP INSURERS ..... 3
- ✓ LLOYD'S CLARIFIES U.S. OPERATIONS ..... 5
- ✓ I.I.I. OUTLINES 1986 PRIORITIES ..... 8
- ✓ NEVADA STUDIES EXPORT COVERAGE .. 8
- ✓ DALKON SHIELD CLAIMS GROWING .... 9
- ✓ GUARDIOLA NAMED AIM PRESIDENT ..... 9
- ✓ HOPE VOICED FOR TORT REFORM ... 10
- ✓ SCHEEL ELECTED ISO CHAIRMAN ..... 13

## California initiative

### Deep pocket issue approved for vote in June election

SACRAMENTO—California Secretary of State March Fong Eu has qualified the "deep pocket" initiative for the June 3 primary election ballot.

Insurance and other organizations circulated petitions to put the controversial joint and several liability doctrine issue to a public vote after the assembly refused to approve a senate-passed bill providing some relief from huge judgments against only partially at fault defendants in tort cases.

According to the secretary of state valid signatures of voters were estimated at 462,071 from the more than 681,000 signatures turned in. The initiative needed 393,835 valid signatures of registered voters to qualify.

The "deep pocket" issue will be the only initiative proposal on the ballot in June, although there will be at least five proposed constitutional amendments submitted by the legislature.

Businesses, public agencies and professional associations are expected to join the insurance industry in the campaign to get the initiative proposal.

(Continued on page 4)

INSURANCEWEEK COVERS THE WEST



# ACCESS



Sweet & Crawford Group

Appleton & Cox  
J.H. Crowther, Inc.  
West Insurance Managers  
Montgomery General Agency  
Dana Roehrig & Associates  
Sweet & Crawford

## Policy change info asked of insurers

NEW YORK — A resolution urging companies to provide insurance buyers with information explaining major changes in liability policies has been adopted by the Independent Insurance Agents of America.

The resolution, passed by the IIAA National Board of State Directors during their recent winter meeting in San Antonio, follows:

"Because of major changes in liability policies, the Independent Insurance Agents of America strongly encourages insurance companies to provide a written explanation outlining significant policy changes. These clarifications should be included with their policies for presentation to insurance buyers. While IIAA recognizes that changes in liability policies may vary by company, the Association nevertheless believes that certain basic changes to the liability forms should be included in any written explanation, particularly as they relate to claims-made forms. Insurance companies, producers, and consumers will all benefit from such an effort to clarify these key coverage differences between expiring and renewed policies."

## Fund names Davis to top claim post

NOVATO, CA — Fireman's Fund Insurance Companies has announced that Morgan Davis will become executive vice president, claims, starting February 3. Davis was senior vice president, claims management, at CIGNA Corporation, Philadelphia, with responsibility for worldwide claims operations.

Davis, 35, joined INA in 1975 after graduating from Harvard's Graduate School of Business. He served in claims management positions in Georgia and St. Louis, and was branch manager in eastern Missouri, Seattle and Atlanta.

## AAMGA president attacks agreement to "rescue" Mission

*(Continued from page 1)*

"Those who have long defended the state regulation of insurance are appalled at this obvious preferential treatment of certain creditors at the expense of others," said Wisenberg. The repercussion of the California department's action may well have a "domino effect" on other companies who have a substantial amount of reinsurance recoverable from Mission at year end.

The primary function of the state regulation of insurance is to prevent insolvency, according to Wisenberg. The Mission failure, therefore, represents a failure of one state's regulators, he charged. It appears that the purpose of these maneuvers in California is to avoid further embarrassment to the insurance department from yet another assessment to their guaranty fund which already leads the nation with record assessments in excess of \$55 million, Wisenberg said. Moreover, the bailout comes at the expense of other companies throughout the country who will have to bear the cost of this failure of state regulation, he contended.

Those who are inclined toward a federal solution to problems of this kind will see the "Mission Rescue" as clear evidence that states are unwilling, or incapable, of containing their regulatory failures within state boundaries, Wisenberg said. The California department has given a creditable argument to those who have long advocated federal regulation as a necessary and prudent successor to the efforts of the states, he concluded.

## Calif. labor to push comp benefits hike

SACRAMENTO — The California Labor Federation, AFL-CIO, has notified the state lawmakers of its priorities for the 1986 session of the legislature and the list includes "equitable" workers' compensation benefits among the top items.

The federation's executive council voted to sponsor legislation to take the place of a workers' compensation bill vetoed last year by Gov. George Deukmejian.

It will take the form of the vetoed bill or a new approach if warranted by findings in the report of a study begun in 1983 by a joint study committee and expected to be completed soon by the senate industrial relations committee.

The federation's position, it was announced, "served clear notice that labor will make an election year issue of the veto by the governor and will vigorously resist an employer-backed bill introduced in the waning days of the last session as a workers' compensation 'reform' but denounced by trade unionists and their legislative allies as a major ripoff of injured workers."

Deukmejian vetoed Senate Bill 1273 by Sen. Bill Lockyer (D), Hayward, which would have increased the maximum temporary weekly benefit from \$224 to \$273 for a worker injured on the job and raised the death benefits from \$70,000 to \$85,000 where there was one survivor and from \$95,000 to \$115,000 where more than one dependent survived a worker killed on the job.

## Deep pocket issue approved for vote in June election

*(Continued from page 1)*

approved by the voters.

Reports indicate the California Trial Lawyers Association, the major opponent, is preparing to spend millions of dollars to try to defeat the measure.

The initiative is designed to change the "deep pocket" rule to allow defendants in tort cases to pay for non-economic losses according to the degree of fault. Under existing law a defendant may have to pay 100% of the damages in a lawsuit even if the defendant is as little as 1% at fault.

"The court doctrine that requires firms or individuals to be liable for all of a damage award even if they are only marginally to blame for an injury is clearly unfair," said Kirk West, president, California Chamber of Commerce.

## Riding elected surplus line chairman

SAN FRANCISCO — The annual meetings of the Surplus Line Association of California were held January 14 in San Francisco, and January 16 in Los Angeles and new officers and a new executive committee for 1986 were elected.

D. F. Riding of Brown & Riding Insurance Services was named chairman. W. N. Richards of Swett & Crawford was elected secretary-treasurer.

The new executive committee will be: I. H. Anderson of Marsh & McLennan, Inc.; P. E. Beauchamp of Alexander & Alexander, Inc.; E. F. Casey of Stewart, Smith West, Inc.; D. W. Grant of Western Reinsurance Brokers, Inc.; J. J. Grigg of Southern Marine & Aviation Underwriters; R. P. Keul of Montgomery & Collins, Inc.; G. O'Gorman of Johnson & Higgins of California; W. B. Rosenfeld of Canon Insurance Service; G. J. Sullivan of Gerald J. Sullivan & Associates, Inc.; R. P. Welch of Welch & Company and J. C. Widgren of INC Insurance Services.

# CITIZENS COALITION FOR TORT REFORM, inc.

Vol. 1, No. 1 February 8, 1986

"voices raised in unison..."

## COALITION PROPOSALS ON THE TABLE IN THE LEGISLATURE

Tort reform legislation is fast becoming a major focus of this legislative session. Measures reflecting the position of the Citizen's Coalition were introduced in both houses on Friday, Jan. 31.

Eagle River Democrat Sam Cotten led the charge in the House of Representatives as the prime sponsor of the Coalition's bill (HB 532). He was joined by Reps. John Binkley, Virginia Collins, Marco Pignalberi and Dave Thompson, all Republicans.

In the Senate, Rules Committee Chairman Tim Kelly put in most of the Coalition bill (SB 377) and pulled along nine co-sponsors. They are Republicans Mitch Abood, Jack Coghill, Edna DeVries, Jan Faiks, Paul Fischer and Arlis Sturgulewski. Democrats Jalmar Kerttula and Fred Zharoff also joined on as co-sponsors. Sen. Kerttula also put in the the essence of the Coalition proposal as SB 382.

The Coalition's bill was put into form for introduction through the assistance of Sen. Kelly and his staff.

In placing the full Coalition proposal before the House, Cotten said, "There are some controversial aspects of this bill, but insurance has become a major concern of many people throughout the state and every idea should be laid on the table."

## IS TORT REFORM POSSIBLE? -- THE COSMETIC SOLUTION

Both Houses of the Legislature recognize that the unavailability of some kinds of liability insurance and the high cost when offered is a critical problem for many Alaskans. Only a few legislators seem to make the solid connection between the evolution in the way the courts treat liability suits and the so-called "insurance problem." The Alaska Legislature has faced this problem before, in 1975 and in 1979, but their actions failed to adequately address the problems.

The Coalition's best intelligence is that the feeling among many key legislators, particularly in the House, is to simply offer some kind of "cosmetic" legislation to take the heat off and have something to point to during the up-coming election campaign.

Therefore, in order to get an effective solution to the liability insurance issue, it is essential that legislators become thoroughly informed on both the causes and effects of the evolution in the civil justice system's approach to resolving liability disputes.

## HOUSE LABOR AND COMMERCE COMMITTEE SETS HEARINGS

Pending last minute revisions, the House Labor and Commerce Committee headed by Kenai Rep. Mike Navarre has set a series of hearing dates for mid-February on insurance-related bills, including tort reform. As this newsletter goes to press, it appears the Senate Labor and Commerce Committee chaired by Sen. Fred Zharoff will join with the House to make these joint hearings.

**Feb. 17, 19 and 20:** Hearings in Juneau and possibly on the teleconference network. These hearings will be on specific legislation, however the details had not been released at press time for this newsletter.

**Feb. 24:** A panel of experts on insurance issues, including tort reform, will appear before the Committee in Anchorage. A morning session will focus on Alaska experts with authorities from outside of Alaska joining local professionals in the afternoon.

**Feb. 25:** A continuation of the panel of experts in Juneau.

## HELP ENACT EFFECTIVE TORT REFORM -- TELL YOUR STORY

Plan to tell your story to the House Labor and Commerce Committee... In person in Juneau or by teleconference from elsewhere in Alaska. Call your nearest Legislative Information office or the CITIZENS COALITION FOR TORT REFORM office for details.

## JOIN THE FIGHT FOR THE PRINCIPLES IN HB 532, SB 377 AND SB 382

# DOES TORT REFORM WORK? A LOOK AT CALIFORNIA

Ten years ago California enacted some major elements of the Coalition's tort reform proposal. A recent Rand Corporation (think tank) study reports:

"...when a state moved to cap verdicts or eliminate specific dollar requests by plaintiffs or permit payment of awards for future losses in periodic installments, the net effect was to reduce trial awards by 30%, cut the average out-of-court settlement by 25%, raise the portion of cases dropped from 43% to 48% and reduce the share of cases going to actual verdict from 5.1 to 4.6%."

## SUPPORT THE COALITION'S EFFORTS -- YOUR TIME WILL COUNT

What's happened to your liability insurance this year? Tell your legislator. Call or write. A personal letter gets the idea across in the best possible way. That way your representative or senator knows you mean business. And when you mean business, they'll listen; it's their job. The address is:

Your representative or senator  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

## NEED MORE INFORMATION? WRITE OR CALL THE COALITION

### The Citizens Coalition for Tort Reform

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



Hon. Patrick Rodey  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

#### Officers:

Al Tamagni, chairperson  
Gene Roguzka, vice chairperson  
Dr. Dave McGuire, vice chairperson  
Bill Gee, treasurer  
Dave Zundel, secretary

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Mail address: \_\_\_\_\_  
City: \_\_\_\_\_  
State: \_\_\_\_\_  
Zip: \_\_\_\_\_  
Phone: \_\_\_\_\_

Contribute to the campaign to restore common sense to the tort system.

Individual:                    \$10 [ ]    \$100 [ ]    \$500 [ ]  
Company:                    \$100 [ ]    \$500 [ ]    \$2,500 [ ]    \$5,000 [ ]  
Association:                \$500 [ ]    \$2,500 [ ]    \$5,000 [ ]    \$10,000 [ ]

Signature: \_\_\_\_\_

Mail or deliver to

THE CITIZENS COALITION FOR TORT REFORM

#### Participating Organizations:

- Alaska Air Carriers
- Alaska Broadcasters Association
- Alaska Chapter, American Institute of Architects (AIA)
- Alaska Dental Society
- Alaska General Contractors
- Alaska Chapter, American Optometric Association
- Alaska Movers Association
- Alaska Oil Marketers Association
- Alaska Rental Association
- Alaska Section, Fairbanks Branch, American Society of Civil Engineers
- Alaska Society of Professional Engineers
- Alaska State Health Association (Hospitals)
- Alaska State Medical Association
- Alaska Support Industry Alliance
- Alaska Truckers Association
- Alaska Visitors Association
- Anchorage Board of Realtors
- Anchorage Restaurant and Beverage Association (ARBA)
- Cabaret Hotel and Restaurant Retailers (CHAR)
- Childbirth Educators
- Daycare Operators Association
- Financial Managers
- Hotel and Motel Association
- Insurance Brokers and Agents Association
- Nurse Midwives Association
- Pension Consultants
- Professional Physical Therapists Association
- Risk Management Association
- Southern Alaska Association of Life Underwriters

Pat Rodey  
Alaska State Legislature  
Box V (MS 3100)  
Juneau, Alaska 99811

February 24, 1986

Dear Mr. Rodey:

The attached correspondence is furnished to you as information since Alaska and the Nation appears to be on a collision course on liability, tort, insurance costs, and Professional integrity of a few Participants in our legal system.

The case in enclosure seems to have several ramifications.

What is being done to protect citizens against attorney malpractice since they seem reluctant to confront each other and exuberant to sue any other Profession.

Why are Unions paying attorney fees for services not related to employment. The Plaintiff in the attached case is an employee of the State of Alaska so I have to assume that State revenues, directly or indirectly, supported a frivolous case against me that cost me nearly \$2,000.00 in direct cost plus some indirect costs.

America has had the strongest free enterprise system known to mankind and it is now being eroded by the best judicial system ever known to mankind. I wonder who is setting on their hands. While medical costs go off the end of the chart, young mothers in Massachusetts wonder if they can get a doctor to deliver their baby, because liability risks become more important than the new infant.

As a 49 year old American, 28 year Alaskan, and father of a budding member of Valley free enterprise; it concerns me that we may be turning our future over to the whims of a sue happy society nurtured by greedy attorneys. What is even more terrifying is HBA's recent announcement that TURI is good for the country and needs no change.

Recently, Chief Justice Warren Berger stated on national radio that we have to get a handle on frivolous suits.

As you are surly aware, in the near future a computer access data bank will be established to identify sue happy members of our society for the purpose of the medical profession obtaining information to govern the decision to accept patients. With no imagination one can see how the ramifications of such a system could spread as the pendulum swings. For example, attorneys who take liability cases and their family members unable to get medical care except on the Black Market. The same for judges and jury members who award high settlements for frivolous cases. Who will repair their automobile, fight insurance, issue airplane tickets, sell a new car or airplane, repair a leak in the roof, let your imagination run wild!

Our grandmothers said "a stitch in time saves nine", and our grandfathers said "fish or cut bait". I hope we don't cut bait until it takes nine stitches.

Farris E. McIver  
dba McIver Construction  
SR Box 5219  
Wasilla, Alaska 99687

Chief Justice  
Alaska Supreme Court  
303 K Street  
Anchorage, Alaska 99501

February 20, 1986

Dear Sir:

This is to request whatever action feasible to protect the Alaska Public from malicious abuse of Process displayed by attorney (attorney) of (law firm)

In 1955 I was sued (BULDUC VS. MCIVER) regarding repairs I had accomplished to a septic system 2 1/2 years prior. Plaintiff was represented by (attorney).

(Attorney)'s case fell apart at the first deposition; however he continued to grasp at smaller and smaller straws, deposition after deposition, until arriving in court with nothing left but one innuendo that obviously didn't impress Judge Cutler and Plaintiff quickly lost.

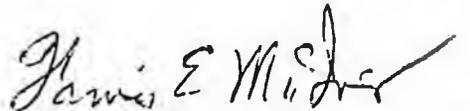
Justice was served except for the financial aspect. The work performed on the septic system cost \$227.00. My attorney fees were \$3,591.00, Plaintiff's attorney fees were paid by a union. Plaintiff declined three offers of settlement and the court awarded reimbursement of my attorney fees of \$1,600.00 which was paid personally by the Plaintiff.

This appears to be a case of greed motivated malpractice on the part of (attorney) and something needs to be done to protect unsuspecting Alaskan's from such a financial burden.

Court records at Palmer, Alaska contain all details.

I ask your assistance since I share many Alaskan's distrust for the Bar Associations cronism.

Copies of this correspondence with the attorney's name removed is being furnished Ted Stevens, Frank Murkowski, Don Young, Jay Kerttula, Edna DeVries, Katie Hurley, Ron Larson, and all members of Alaska Judiciary Committee.

  
Farris E. McIver  
dba McIver Construction  
SR Box 5219  
Wasilla, Alaska 99687

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

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

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

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

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

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

Certain immutable characteristics of the contingency fee arrangement have made this method of compensation the subject of vigorous debate over the years.<sup>75</sup> The confluence of interest between attorney and client bound by a contingency fee agreement is marginal.<sup>76</sup> In

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

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

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

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

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

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

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

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

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

70. See *supra* note 3 and accompanying text.

71. *Id.*

72. *Id.*

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

74. CAL. BUS. & PROF. CODE §6146.

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

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

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

78. *Id.*

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

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

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

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

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

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

82. *Id.*

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

84. *Id.*

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

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

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

fees is strongest when recovery is almost certain.<sup>88</sup>

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

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

88. *Id.*

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

90. Report of the Committee on Medical Professional Liability, 102 ABA Annual Rep. 786, 831 (1977). See also Dept. of HEW Report of Secretary's Committee on Medical Malpractice 919730 pp. 34-35; Kohlman, *An Equitable Contingency Fee Contract* 50 STATE BAR J. 268, 295-98, n.42 (1975). A sliding scale approach has been recommended as the preferable form of regulation. Attorneys fees should be related to the amount of legal work and expense involved in handling a case and not to the fortuity of the plaintiff's economic status and degree of injury. A decreasing maximum schedule of attorney's fees, set on a state by state basis and reasonably generous in the lower recovery ranges, would prevent the denial of access to legal representation. *Id.*

91. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985). Upon a denial of petition for rehearing on the date of judgment, February 7, 1985, plaintiffs/appellants petitioned the U.S. Supreme Court for certiorari on the ground that Business & Professions Code §6146 violates the first and fourteenth amendments of the U.S. Constitution. Docket AB5216 U.S. filed July 12, 1985 (notes on file at the Pacific Law Journal).

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

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

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

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

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

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

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

96. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

97. See, e.g., *McGowan*, 366 U.S. at 420.

98. See, e.g., *Lindsley*, 220 U.S. at 78-79.

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

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

101. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §16-4 at 1090-02 (1978).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

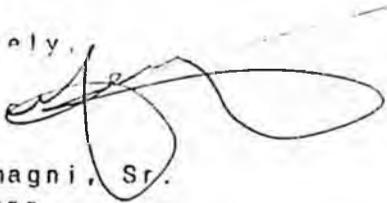
FROM: CITIZENS COALITION FOR TORT REFORM

SUBJECT: INFORMATION ON CONTINGENCY FEES

THE OTHER SIDE OF CONTINGENCY FEES BENEFIT TO ALL PARTIES

READ THE LOGIC

Sincerely,

A handwritten signature in black ink, appearing to read 'Al Tamagni, Sr.', written over a horizontal line.

Al Tamagni, Sr.  
Chairman

# CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS' COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.  
Chairman

# The Honolulu Advertiser

Established July 2, 1856

Thurston Twigg-Smith    *President & Publisher*  
George Chaplin        *Editor-in-Chief*  
Buck Buchwach        *Executive Editor*  
John Griffin           *Editorial Page Editor*  
Mike Middlesworth    *Managing Editor*  
Gerry Keir             *City Editor*

THE HONOLULU  
M.I.E.C.

Friday, January 31, 1986

UNDERWRITING

## Liability insurance

### *Time to reform it*

Among the state Legislature's top priorities this year should be reform of our outmoded liability insurance system.

Legislators have a special opportunity to come to terms with some of the inequities and excesses of rules that often penalize taxpayers and subvert the laws' intent.

**A GROWING** number of lawsuits and higher liability awards have led to skyrocketing insurance premiums. What's worse, some "high-risk" individuals, firms and governments — from doctors, bars and child care centers to municipal agencies — can't find insurance. That situation is clearly intolerable.

A number of areas deserve special and immediate attention. First, the state should change the "deep pocket" rule whereby a government or company that is found marginally at fault can be required to pay an entire judgment simply because other defendants can't pay.

A fairer system would be to make defendants pay only that percentage of damages for which they have been found at fault.

Second, there should be a cap on the amount of damages awarded. In California, there's a \$250,000 limit for non-economic damages (such as pain and suffering) over and above what an injured party needs for out-of-pocket expenses, future medical care and wage losses.

**RELATED TO** this should be

a cap on attorneys' fees. One good suggestion calls for a maximum 35 percent for recovered damages up to \$100,000, 25 percent between \$100,000 and \$200,000 and 10 percent of damages over \$200,000.

Such a sliding scale may help curb some of the demeaning "ambulance chasing" by plaintiff attorneys, whose advocacy of victim's rights often appears overshadowed by financial gain.

Third, legislators should look hard at limiting "punitive" damages, which are often awarded to punish a defendant and to deter similar future behavior.

Complementing these proposed changes will be a worthwhile program, announced this week by Hawaii Chief Justice Herman Lum, requiring most personal injury lawsuits to be handled through arbitration. In theory, the program should reduce costs for plaintiffs and defendants and reduce the caseload of the overburdened court system.

**THE UNITED** States is the most litigious society in the world. To be sure, victims deserve prompt and just compensation. But too often suits are filed merely to try to squeeze — either in court or through out-of-court settlements — astronomical damages out of companies, individuals and municipalities.

Directly or indirectly, Hawaii residents pay for these suits. It's time for legislators to restore fairness and balance to our liability insurance system.

TUESDAY 2/4/86

## Torts Control

G.D. Searle announced Friday that it is taking its intrauterine birth-control devices off the market because the cost of defending the products in personal-injury cases has become prohibitive. Its Copper-7 was the most commonly used device among the 2.3 million women who use IUDs. The weight of medical evidence, including a recent report by the FDA, says that the devices are safe. Claims that the devices have injured women have been tried in 10 courts, with eight victories for Searle.

After settling more than 450 cases—for what the company says was less than the cost “to keep a file warm in some lawyer’s office”—Searle is faced with the prospect of defending some 300 more suits claiming that the IUD causes pelvic inflammatory diseases, including sterility. In the latest trial, no damages were awarded, but the defense cost Searle more than \$1 million. Annual sales of the IUD bring in \$11 million; Searle says this simply doesn’t warrant the legal expenses, so it is discontinuing the product.

The decision leaves only one IUD available in the U.S., a hormone-releasing device that has a small market share. A recent study by Planned Parenthood recommended the Copper-7 devices for most women; a group spokesman expressed “dismay” that the Searle IUDs will not be available.

Plaintiffs’ lawyers and activist judges can claim another victory in the tort wars. The rest of us can view this as still more evidence that the torts system was gone berserk.

The problem is that enough class-action, contingency-fee lawyers have tried enough cases in enough jurisdictions to get some judges to revoke the common law. The traditional rule was that there would be no liability if the product was made using state-of-the-art knowledge; it was unreasonable to expect anything more. Activist judges, however, have expanded the notion of liability to reach into the “deep pockets” of defendants, often corporations, even when there is no fault. For example, a court in Maryland held a gun manufacturer liable because one of its guns was used to shoot the plaintiff.

Plaintiff lawyers get rich practicing a form of greenmail on defendants—they threaten that if there’s no settlement, the defendant will spend millions on lawyers. If there is a trial,

to award damages even if there was no fault. Rand Corp.’s Institute for Civil Justice estimates that when contingency-fee cases are won, two-thirds of the damage award goes to lawyers and only one-third goes to the plaintiffs. The large class-action suits give nickels and dimes to the injured, but make millionaires of the lawyers. So the incentive for the plaintiff’s bar is to pick the most widely used products and most sympathetic injured clients.

What could be better than mothers and prospective mothers? The class-action lawyers were encouraged, of course, by the way their colleagues cashed in on the unhappy history of the Dalkon Shield, which A.H. Robins took off the market in 1974 when medical opinion concluded it was dangerous. So they took on Copper-7 as well, despite the weight of medical opinion.

Nor is this the first time a safe drug has been forced out of the market. Merrill Dow felt forced to drop Bendectin, a remedy for morning sickness used by 33 million women from the time it was developed in 1956 until 1983. The FDA approved its use and Merrill Dow lost no cases in court, but the company removed the product and created a \$120 million settlement fund rather than face some 700 cases claiming that the anti-nausea drug caused birth defects.

This is becoming a major problem for society. One result is such legal uncertainty that liability insurance is no longer even available in scores of industries, from midwifery to day-care centers. Lloyds has pulled out of the litigious U.S. market. This judicial activism also discourages risky ventures by entrepreneurs, creating a huge hidden cost to the technological society. Who will bother to develop the next generation of birth-control methods if new devices cannot be sold profitably under today’s tort laws?

The situation also is bringing dispute on the legal system. Somehow the incentives in the system have to be changed. Our favorite proposals include limiting contingency fees and damages, as California has already done, having the loser pay both sides’ legal and court costs, charging user fees for courts and strictly limiting class actions. But even more than these procedural reforms, what’s needed is for judges and the bar to return to the ancient wisdom of the common law on torts: There shall be

# Medical Insurance Exchange of California

Medical Underwriters of California Attorney-in-Fact

*D. Nick*

February 4, 1986

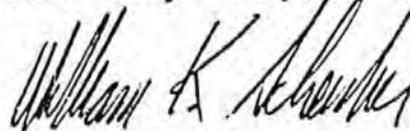
The Honolulu Advertiser  
ATTN: John Griffin  
Editorial Page Editor  
P.O. Box 3110  
Honolulu, HI 96802

Dear Sir:

Your editorial of January 31, entitled "Liability Insurance - Time to Reform It", is as clear and succinct a statement of the problem as we've seen.

This kind of public understanding and legislative action will improve the situation. We are sending copies of your editorial to the other states where we insure doctors, where reform efforts are being made, and to our reinsurers in London. They will welcome it.

Yours very truly,



William K. Scheuber  
President  
Medical Underwriters of California

WKS/ka/04FEB01/cor11

points, to 159, due to a slight improvement in the loss adjustment expense ratio and a more than two-point improvement in the underwriting expense ratio. Ratios aside, the underwriting loss increased 30%, from \$1.1 billion to \$1.4 billion.

Medical malpractice gained 43% in net premiums written in 1985 and 34% in premiums earned. Written 61% by stock companies, 21% by mutuals and 18% by reciprocals, medical malpractice had results in terms of combined ratios that were comparable for the three sectors, but stock companies had markedly higher underwriting expense ratios and lower loss ratios than the others.

In only one year since its critical nature earned it a separate line in the

els to be followed by other lines. Claims-made policies, limits on pain and suffering awards, and arbitration of claims all have potential for broader application.

### Medical Malpractice

Year	Net Premiums Written \$000	Loss & LAE Ratio %	Und. Expense Ratio %	Combined Ratio Before Divs. %	Combined Ratio After Divs. %	Statutory Und. Gain or Loss After Divs. \$000
<b>Stock Companies</b>						
1981	723,032	119.23	20.15	139.39	139.66	-284,781
1982	814,368	122.79	20.58	143.37	143.52	-346,589
1983	893,529	121.03	20.63	141.66	141.73	-364,141
1984	1,084,151	137.04	19.68	156.72	156.67	-583,552
1985*	1,550,000	141.20	17.20	158.40	158.40	-829,010
5 Yrs	5,065,080	130.29	19.30	149.60	149.66	-2,408,073
<b>Mutual Companies</b>						
1981	319,164	128.70	7.14	135.84	138.78	-118,123
1982	350,279	155.52	7.74	163.26	167.07	-224,351
1983	352,866	153.34	8.55	161.89	165.15	-232,388
1984	350,569	167.08	10.13	177.20	180.03	-269,628
1985*	540,000	151.00	7.20	158.20	160.90	-291,270
5 Yrs	1,912,878	151.26	8.07	159.63	162.72	-1,135,760
<b>Reciprocals</b>						
1981	294,085	114.84	10.25	125.10	130.42	-80,512
1982	323,702	139.57	11.21	150.78	154.13	-140,814
1983	317,849	139.62	12.21	151.83	155.68	-167,224
1984	353,830	145.41	11.17	156.58	159.16	-223,420
1985*	465,000	147.20	10.00	157.20	159.70	-282,580
5 Yrs	1,754,466	139.39	10.90	150.29	153.60	-894,550
<b>Total Industry</b>						
1981	1,336,281	120.62	14.87	135.49	137.39	-483,416
1982	1,488,349	133.82	15.52	149.35	150.97	-711,754
1983	1,564,244	132.35	16.19	148.55	150.11	-763,753
1984	1,788,550	144.76	16.12	160.88	161.98	-1,076,600
1985*	2,555,000	144.43	13.78	158.20	159.27	-1,402,860
5 Yrs	8,732,424	136.82	15.15	151.97	153.36	-4,438,383

\*Estimated

### MEDICAL MALPRACTICE

At the top of the list of high committed ratios is the line of medical malpractice. This line's pure loss ratio stayed at 112 for 1985, but the committed ratio was down almost three

annual statement in 1975 has medical malpractice turned in an underwriting profit. That was 1977. Since then, total underwriting losses have mounted annually. Although medical malpractice represents only 1.8% of property/casualty premiums written (and 5.6% of underwriting losses), the attention that has turned to the line because of public interest has made it a focal point of attention by regulators and legislators. Resultant experiments in search of a solution to the medical malpractice problem may or may not produce mod-

Medical Insurance Exchange of California  
Medical Underwriters of California Attorney-in-Fact

FEB 3 1986

January 28, 1986

TO: MIEC Board of Governors  
MUC Board of Directors

FROM: Ron Neupauer *RN*

RE: Insurance Industry Results - Medical Malpractice

The enclosed article and five year chart from the January, 1986 issue of Best's Review tells the story of what lies behind the recent rate increases and market restrictions for primary, excess and reinsurance coverages in medical malpractice.

Malpractice insurance represents only 1.8% of property/casualty premiums but is responsible for 5.6% of the underwriting losses. Although premiums increased by 43% (\$700 million) between 1984 and 1985, the malpractice line still produced a combined ratio of 158.2% in 1985, an improvement of just 2%. The five year ratio is also terrible: 152%. No wonder the management of most commercial carriers has again decided it is just not worth bothering with malpractice insurance, given its relatively small overall premium volume and its very unpredictable but historically adverse underwriting results. Even counting the substantial investment income generated because of lengthy delays between the occurrence of losses and their eventual payment, ultimate payouts are so large and increasing so rapidly that high investment income no longer helps.

A compounded average annual investment return of 9% over four years would yield about \$1.20 on 85% of original written premiums. This would then produce operating losses of \$.38 for every dollar of malpractice premium written industrywide during 1985. Losses of this magnitude cannot be tolerated for very long.

While the rest of the property/casualty insurance industry may very well recover from the recent down cycle within the next 24 months, medical malpractice seems likely to remain a problem for a longer period of time.

We think the problem can best be solved through careful professional management by well-funded and well-operated doctor-owned carriers which have a permanent stake in the business and have both the incentive and the resources to handle its unique problems better than the commercial insurance industry. Evidence of this is apparent in the operating ratios of some doctor-owned companies, including MIEC, which were 20-50 percentage lower than the industry totals. Even with the best management and utilization of funds, the professional liability insurance industry needs tort reform if it is to survive.

RN/ka/27JAN06/cor11

cc: Dave Willett  
Jim King  
Tom Hermes  
John Griffiths



Insurance  
Information  
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New York, N.Y. 10038  
(212) 669-9200

# The Executive Letter

FEB 18 1986

February 18, 1986

DEPARTMENT OF COMMERCE  
& ECONOMIC DEVELOPMENT

Vol. 18 No. 40

## HEARINGS SCHEDULED ON McCARRAN-FERGUSON ACT

Rep. Peter Rodino (D-NJ) has announced that the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law will hold a hearing March 19 on the McCarran-Ferguson Act and current liability insurance problems of price and availability. Recalling 1983 hearings on the McCarran-Ferguson Act, which gives the states responsibility for regulating insurance, Rodino questioned the effectiveness of state regulation. He said the "lack of federal information and antitrust safeguards" may have contributed to the liability insurance crisis and added, "It is clearly time to determine whether McCarran-Ferguson should be modified or repealed."

## JURY AWARDS \$2.5 MILLION TO FIRED UNIVERSITY PROFESSOR

A federal court jury in Atlanta has awarded a fired University of Georgia (UGA) English professor more than \$2.5 million -- \$2.3 million for punitive damages. Dr. Jan Kemp brought suit against UGA administrators charging that she was unfairly dismissed from her teaching position in 1982 after she protested preferential academic treatment for student athletes (U. S. District Court, Northern Dist. of Ga.-Atlanta Div. Case No. 83-330A, Jan Kemp vs. Leroy Ervin and Virginia Trotter).

After deliberating for about 10 hours over a three-day period, the six-member jury found that UGA administrators "maliciously violated Dr. Kemp's constitutional right to free speech by demoting her and then dismissing her." The award, which also contained almost \$80,000 in lost wages and \$200,000 in compensatory damages, has set off reactions of shock and disbelief among state officials in Georgia and around the country. Since it was a federal court case, the judge has the discretion to review the award and reduce it if he finds it to be excessive. Additionally, State Attorney General Michael Bowers said he will review the order to decide if he will appeal the verdict or the size of the award.

Georgia had liability insurance with the now insolvent Transit Casualty Co. of Missouri. Since the state's Insolvency Pool will only provide the state \$100,000 in liability coverage, the General Assembly could have to appropriate the remainder of the

money to pay the large award and legal costs. Ironically, the day after the huge award was handed down, Robert Hunter, president of the National Insurance Consumer Organization, held a press conference in Atlanta attacking the insurance industry and said that there is no crisis in the nation's civil justice system and no need for major tort reform efforts.

#### DOCTORS, LAWYERS BATTLE OVER TORT REFORM

The American Bar Association last week rejected all tort reform proposals that have been put forward by physicians. The ABA's House of Delegates, in Baltimore for its annual meeting, specifically opposed collateral source rules, restrictions on attorney's contingency fees, caps on pain and suffering, and prohibitions on punitive damage awards. However, the group called for further study and endorsed working with physician groups and insurers to develop a consensus on the compensation of injured persons.

James H. Sammons, executive director of the American Medical Association, said tort reform is needed "to create a climate in which doctors can practice, can render care, without looking at each patient who walks in the door as a potential lawsuit." He called the ABA's blanket rejection of tort reform proposals "absolutely incredible" and noted that many of the physician's proposals were included in a 1977 ABA report.

Sammons said insurers are not the problem, noting that many doctors are insured by physician-run, non-profit mutuals. The AMA owns a reinsurer that covers over 90,000 doctors, he said, and added that it is losing money. He estimated that only 5 or 6 out of nearly three dozen physician-run mutuals are in good financial condition today.

#### PENNSYLVANIA LEGISLATURE VOTES TO RETAIN GENDER-BASED RATING

Pennsylvania Gov. Dick Thornburgh has 10 days to act on a bill (HB452) that would retain gender-based rating for auto insurance and other property/casualty lines. His signature or no action makes the bill the law. A veto can be overturned by a two-thirds vote of both houses; the bill was passed by both chambers by more than a two-thirds majority. Unisex rating had been mandated in the state by court decisions and insurance department regulations, and was due to take effect on March 1. Meanwhile, the National Organization for Women, a strong supporter of unisex rating, said it would file a court challenge if gender-based rating is retained.

#### CONSUMER ADVOCATES DISPUTE CASE FOR TORT REFORM

Consumer advocate Ralph Nader and Robert Hunter, president of the National Insurance Consumer Organization, said last week that the current crisis in the liability insurance market is not, as insurers claim, related to the U.S. tort law system. They

pointed to the recent experience of Ontario, Canada, where many of the changes in tort system proposed by the insurance industry are in effect. NICO said that despite the changes made in Ontario, municipalities, day care centers and various other groups are having serious difficulties obtaining affordable liability insurance. (See Special Report for comment on the Nader/Hunter charges.)

#### VERMONT COMMISSIONER BARD RESIGNS AFTER 13 MONTHS IN OFFICE

Vermont Banking and Insurance Commissioner David Bard will resign March 10 after serving 13 months in the administration of Gov. Madeleine Kunin. Bard had been in the spotlight recently as his department took actions to meet public concerns over affordability and availability problems in commercial liability insurance. Bard had worked with the industry to organize a MAP for day-care and municipal liability, and now is pushing for legislative approval to give his office the authority to activate a Joint Underwriting Association for any problem area of liability insurance. That legislation is pending, and Bard said he believes his leaving will not affect chances of passage for any legislation proposed by his department.

#### WASHINGTON COALITION'S REFORMS GAIN SENATE COMMITTEE APPROVAL

A bill comprising the lion's share of the Liability Reform Coalition's efforts to reform Washington's tort system won Senate committee approval. The measure would impose a \$250,000 cap on non-economic damages in all tort cases, modify joint and several liability rules in cases where the plaintiff was partially responsible to comparative negligence liability, require structured settlements when awards exceed \$100,000 and require plaintiff attorney fees to be reviewed and approved by the court. Senate approval is considered fairly certain since almost two-thirds of the Senate are co-authors of the bill. The action by the committee came just a few days following testimony in opposition to the bill by consumer activist Ralph Nader.

#### "COMPROMISE" BILL TO LEVEL PREMIUM TAX PASSES WASHINGTON SENATE

A bill to level the foreign and domestic insurance company premium tax in Washington at 2% plus an assessment for operations of the Washington Department of Insurance passed the State Senate 38-10 and awaits House Ways and Means Committee action. Under the measure, the assessment could be no more than .125%, making the maximum premium tax rate 2.125%. Several domestic insurance companies which had opposed other attempts to level the foreign and domestic premium tax rates and attempts to set up a special fund for the insurance department removed objections to this proposal (Senate Bill 3636). Currently, the premium taxes are 1.21% for domestic companies and 2.25% for foreign companies. There is no assessment for operations of the department currently.

## MASS. LIQUOR JUA, IN FIRST MONTH, WRITES NEARLY 500 POLICIES

The Massachusetts Liquor Liability Joint Underwriting Association, established in 1985 by the state legislature, has bound applications for 485 policies since starting up Jan. 6. Coverage written to date will produce \$3.2 million in annual premiums. A spokesman for the plan says the amount of opening business shows how many liquor providers were "going bare, waiting for some sort of relief." Policies are being written on an occurrence basis, with limits of \$100,000/\$200,000, \$250,000/\$500,000 and \$500,000/\$1 million. A claims-made policy also will be used following regulatory approval. The JUA must accept all applications and cannot cancel or non-renew except for loss of license or non-payment of premium, although loss experience will be accumulated as future underwriting criteria. The plan is being serviced by The Commerce Insurance Company of Webster, Mass.

## ILLINOIS GOV. THOMPSON CITES NEED FOR TORT REFORM

Legislation to counteract the growing insurance availability and civil justice crisis needs to be passed in the upcoming General Assembly, said Illinois Gov. James R. Thompson in his annual State of the State address. Thompson said he endorses a legislative package that would stem what he termed the "insurance crisis" that has driven up premiums and has threatened availability of coverage for businesses, municipalities and other tax-supported agencies. In his address, Thompson said jury awards should be capped but he added that insurers should be required to provide detailed claims information on request and provide 60 days notice before cancellation of a commercial policy.

## COMMERCIAL AUTO RISKS DRIVE UP SHARED MARKET ASSIGNMENTS IN 1985

New applications to the nation's automobile assigned risk plans increased significantly in 1985, due in part to a major influx of commercial risks, according to the Automobile Insurance Plans Service Office (AIPSO). Total applications rose 26.8%. Applications for commercial risks jumped 37.8%, and private passenger applications were up 25.9%.

All but four states showed increases in applications for commercial auto liability insurance in 1985. States showing the highest percentage increases include Pennsylvania (124.3%), Florida (92.3%), California (91.1%) and New York (42.6%).

In the private passenger liability insurance shared market in 1985, nearly as many states had decreases as had increases in applications. The most significant increases occurred in California (133.5%), Kentucky (93.1%), Virginia (38%) and Connecticut (23%). New Jersey had the most significant decrease in both private passenger and commercial auto applications, 50.2% and 11.9% respectively.

Carl C.A. Lee, Editor



February 18, 1986

NADER'S CHARGE ABOUT ONTARIO TERMED INACCURATE AND MISLEADING

At a press conference in Washington, D.C., on Feb. 10, Ralph Nader told reporters that Ontario, Canada, is experiencing high premiums and a shortage of insurance coverage despite having laws which have many of the tort reform measures being proposed in the United States. Representatives for the National Insurance Consumer Organization said that Ontario already has a cap on compensation for pain and suffering, restrictions on punitive damages, prohibitions on injured parties specifying the amount of the award they are seeking, restrictions on attorneys' contingency fees, few jury trials, and penalties for frivolous suits.

This represents another misleading charge from Nader/Hunter. Here are the facts:

\* On a per capita basis, commercial liability insurance premiums are much lower in Canada than in the U.S. In 1985, liability premiums (excluding auto) averaged \$18 (C\$25) per capita in Canada, compared with \$60 per capita in the U.S. The different legal system in Canada is the most likely factor explaining this wide divergence in the cost of insurance.

\* There are problems in commercial liability insurance in Canada, but they are not as severe as in the U.S.

\* The problems in commercial liability insurance in Ontario, Canada reflect:

1. The ir recent statutes, which increase the incentives to litig
2. An erosion of traditional common law disincentives to sue.
3. The impact of the worldwide contraction in liability insurance capacity.

Commercial liability premiums in Canada are expected to show an increase of 15% for 1985, contrasted with a 72% increase in the U.S.

There are, however, some problems of availability of commercial liability insurance in Ontario. This province is known to be litigious. Specific statutory provisions have increased the number and size of claims in Ontario Province:

- a. The Family Law Reform Act of Ontario Province (1978). This law extended the number of persons who could sue. For example, under this law a person with only passing acquaintance with another relative (say a cousin or nephew) can sue for loss of companionship.

- b. The province of Ontario passed a prejudgment interest act, which adds interest to awards from the date of filing.

Also, judicial procedures in Ontario have tended to increase awards beyond expectations. For example, courts in Ontario have tended to add to the award enough money to cover the taxes on interest earned from the award in future years.

In addition, Canada is affected by the worldwide shortage of liability insurance, caused mainly by severe losses by reinsurers in the U.S. market.

The Province of Ontario did not enact a series of tort reforms as might be inferred from the Nader charges. The reforms mentioned are features of the common law system and are not statutory law. Since they are part of common law, they are subject to change by judicial decision and, in fact, there has been erosion in these areas in recent years.

The following reviews the elements of the legal system in Ontario, Canada, that are highlighted in the Nader charge:

1. Cap on compensation for pain and suffering. In the early 1970s, Canadian courts established through case law a cap of C\$100,000 on pain and suffering awards. The cap has since been eroded and the figure now is C\$180,000. (Since the cap is set by case law, it can be changed by case law.)
2. Restrictions on punitive damages. These restrictions also are set by case law and have been in place for many years. The restrictions in Canada are in general tougher than those used by U.S. courts.
3. Prohibition on injured parties specifying the amount they are seeking. This prohibition holds that a jury cannot be directly informed or led by evidence to know the amount of damages sought by a plaintiff. This rule is a common law rule and has been in place for decades.
4. Restriction on attorneys' contingency fees. In Ontario, attorneys' fees are set by the Law Society. Contingency fees are prohibited. This system has been in place for decades.
5. Few jury trials. Traditionally, Canada uses juries infrequently in civil cases.
6. Penalties for frivolous suits. Defendants who win suits can collect legal fees and other costs from plaintiffs. This system has been in place for decades.

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



**McCool-McDonald**  
OF ALASKA INC. ARCHITECTS

March 25, 1986

The Honorable Pat Rodey  
Pouch V  
Juneau, Alaska 99811

Re: Liability Insurance  
Tort Reform

Dear Senator Rodey:

Please look carefully into tort reform legislation which could equitably reduce the unpredictable costs of litigation. I believe this, in part, has caused dramatically increased cost of professional liability insurance for Architects and Engineers.

As you are probably aware, State contracts with Architects and Engineers require professional liability insurance. This makes availability and affordability of insurance critical to the State design process.

I have been practicing architecture in Alaska for over twenty years. The past nine months I have been a member of the Alaska American Institute of Architects-Consulting Engineers Council Committee on Professional Liability Insurance. My insurance has risen 290 percent from 1981 to 1985. Some Architects and Engineers have been unable to renew their insurance at any price.

As I see it, improvement is needed on several fronts to make insurance affordable:

1. Architects need to more diligently pursue quality control over their services.
2. Insurance companies need to more carefully manage their investments.
3. Courts need fair, but not unreasonable, high settlements for cost of pain and suffering (tort reform).

I assure you, the Architects of Alaska are improving the quality of their services. Please see that fair tort reform laws are enacted to combat the attitude that, "Oh well, you're insured ..." doesn't inflate court settlements and ultimately raise insurance premiums.

Sincerely,

McCool-McDonald of Alaska, Inc.

John E. McCool, Architect  
Alaska Registration No. A-3534

JEM/igh  
A

COMMITTEE REPORT  
SENATE

FURTHER: FINANC.

3/20/86

Date 4/17/86

Mr. President

The Committee on JUDICIARY considered SB 377

relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, 68 and 82; efd.

and (a majority of the committee) (The committee) reports it back with the following recommendations:

- do pass
- do pass with attached amendment(s)
- replace with/or adopt CS for SB 377 (JUDICIARY)
- new title
- same title and recommends \_\_\_\_\_
- and attached a "LETTER OF INTENT"  NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

\_\_\_\_\_

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\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS

Rich Akland DO NOT PASS  
UNLESS AMENDED

3 equal - N/R

Jan Fair - N/R

Tim Kelly - Do Pass if  
amended.

Kathleen Rydberg  
Chairman  
DO PASS  
Chairman recommendation

# Valley Medical Center, Inc.

P.O. BOX 879, 425 E. DAHLIA, SUITE M, PALMER, ALASKA 99645 — Telephone (907) 745-4268

Family Practice  
James F. Juey, M.D., F.A.A.F.P.  
David P. Werner, M.D., F.A.A.F.P.

April 9, 1986

Senator Pat Rodey  
Chairman, Senate Judiciary Committee  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Dear Senator Rodey,

I am writing to ask you and your committee to support SB 377, which was discussed on the teleconference of April 10, which I could not attend for lack of time. I send my thoughts and observations.

I am a family physician and have been practicing in Palmer, Alaska since the summer of 1974. I endured the "malpractice crisis" of 1975 and even practiced "bare" for a short period before insurance again became available. Practicing "bare" does not give a feeling of security. I have purchased coverage with MICA (Medical Indemnity Corporation of Alaska) since its inception in 1975 and in the last 3 years my annual premium has gone from \$8,000 to \$12,000 to \$21,000 (claims made only), rising largely because I deliver 40 to 50 babies a year. My coverage is now one fourth the amount I used to buy at \$8,000 a year. In effect, my coverage is about ten times as costly. Malpractice insurance used to be a minor part of my overhead and now it is 10% of my gross charges. If I were neither assisting at major surgery nor practicing obstetrics, my premium would today be down in the \$6,000 range. In addition, my \$21,000 annual premium doesn't take into account the "tail" coverage I will have to pay should I discontinue practice or change companies. The tail will amount to 1 1/2 to 2 times the present annual premium. This extra cost adds \$300 to \$400 to my fee for pregnant patients and in the present economy families who are self-pay are not in the position to easily pay that amount. If the differential for obstetrics is ignored, \$3 of each \$30 office call goes right off the top to pay MICA.

MICA was created in the mid 70's as an answer to the "malpractice insurance crisis". MICA is not a "commercial insurance company" but has had the same premium increases and coverage cuts as has any of the companies guilty of cash flow underwriting, predatory pricing practices or poor investment results. This would lead me to doubt that state sponsored liability insurance for other forms of liability would be successful. I seriously doubt that the state should make itself the "deep pocket" either. It might find itself liable for financial obligations far greater than any expectations.

Many family doctors are seriously considering discontinuing obstetrics depending on what next year brings with regard to premium increases. The bottom line is: women soon may not find a family doctor who will deliver a baby in a small town or in the bush. If she can find such a doctor, his fees may be more that she can afford. This is a pro-consumer issue, after all.

Premium costs aside, you undoubtedly are aware that many qualified physicians have given up the practice of obstetrics because of undue "risk". I speak of risk to the physician of being sued, which continues for 21 years after a baby is born. Despite our advances in medicine, we often have little knowledge or control over the things that can affect the development of a fetus and less than optimal ways of diagnosing intrauterine defects. There are still

unpleasant surprises during labor and delivery, many of which can be detected and remedied, but many which cannot. People today take safe childbirth for granted (to the point of doing it at home), and expect a flawless process and infant every time. When it isn't flawless some people are quick to sue their doctors and hospitals even when "fault" or "negligence" as many would define it has not occurred. I will not defend careless and negligent medical care by any means, but a "poor outcome," without negligent care, should not automatically guarantee a lawsuit and an award. That's why many qualified physicians are leaving this field; because the interpretation of "fault" is so liberally applied plus the awards for an accident of childbirth can run easily into the millions of dollars. One such award came to \$12,000,000. Even half of that tax-free sum invested at 8% tax-free comes to \$1315 a day. The people who indirectly but do actually pay for that (our patients) cannot afford that generosity. The present statute of limitations allows that a baby born today has until the age of majority (19) plus 2 years to file a suit against the doctor who delivered him. I am now 42 years old and if I continue to practice obstetrics as long as I would like I could be dead and either my widow or estate could have to deal with a suit in which I could not account for my performance. I do believe in the rights of minors, but I think you can understand why some obstetricians are opting for early retirement or are changing to gynecology only. I feel it's a shame to waste good physicians' skill and experience because of that prolonged period of liability plus the extended scope of liability as interpreted by our courts. When a doctor doesn't dare deliver a less than perfect baby without fearing a lawsuit for something for which there might not have been any knowledge or control I see very real problems for availability and affordability of health care. I also see real problems in the future of neonatal intensive care units where tiny infants born 3 months early are taken care of with great skill and caring but may not achieve a totally "normal" life. The people who have given of themselves to provide such care are sued because the child will not be able to enjoy a "normal" life, but without that care would simply have been dead if born five or ten years ago. You will not find doctors or nurses who will continue to give of themselves to this extent only to be come targets of a lawsuit and suffer the mental anguish that a suit itself gives. Life-saving vaccines may become either too expensive or even unavailable due to recent product liability suits. Imagine, polio and whooping cough epidemics again! I have never seen those diseases, thanks to the vaccinations. Any IUD will soon be impossible to obtain, regardless of whether or not one is willing to accept the risks that can accompany it's use.

I want to continue my practice of obstetrics as long as I'm able to perform with continued good judgement, state of the art methods, and with consultation when appropriate. However, when the time comes that I feel that the medical-legal atmosphere and emotional and monetary costs outweigh the satisfaction of being a part of one of the most gratifying events of life, then I'm going to stop. I think my patients will be disappointed. I feel that it will take solid tort reform to bring about a stable and predictable medical-legal atmosphere. I'm sure that there are several other physicians in the Valley who are of the same mind, but I cannot speak to their plans.

Any human being feels great sympathy toward a crippled or retarded child who cannot enjoy a normal life. Trial lawyers have found that "birth damaged infant" lawsuits can generate huge awards, and they have zeroed in on "birth damage" as a lucrative field, knowing full well that the sympathy of a well-meaning jury can mean large awards. Sympathy should not be the basis for an award; fault should be the basis for that.

Meaningful tort reform is essential soon but health care is only one small part of the whole picture. I would ask you, yourself, to imagine yourself on either side of a personal injury lawsuit, both as the injury victim and as the defendant, which any of you could easily become. See if SB 377 seems fair from both positions. See if your rights are still intact if you have a valid claim for a real injury. See if it weeds out the litigious