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SB 377

March 24, 1986

Senator Pat Rodey
Senate Judiciary Committee
Room 504, Capitol Building
Juneau, Alaska 99811

Dear Senator Rodey:

Please do not be fooled by the insurance industry. Our tort laws protect innocent victims who do not have a lobby. These laws should not be tampered with.

Enclosed find an editorial from one of the most objective and well-respected magazines in the aviation community. It accepts no advertising and speaks only after thorough investigation. It found that the insurance industry is perpetrating a sham crisis; that their earnings are as high as ever; and that the lawyers, juries, and judges are being made into scapegoats.

Please read the enclosed editorial and vote against tort changes. Don't hurt our innocent accident victims who have no voice and no choice.

Very truly yours,

Raymond A. Nesbett

Raymond A. Nesbett

RAN:pm
Enclosure

Editor

The Aviation Consumer

Product Liability: Who's the real villain?

Seldom has a single issue aroused so much indignation as product liability. You've heard the figures—$70,000 an airplane, just so the builders can pay the insurance tab.

A proper villain has been identified for tar-and-feathering. It is our "litigious" society—the courts, the juries and their grossly large awards, and the greedy lawyers who thrive in the system. Every group and publication in aviation is screaming for legal reform. But wouldn't it be a surprise if some other villain were getting away scot-free in all the commotion?

Well, there is persuasive evidence that the insurance industry may be a bigger culprit than the legal system, but has erected a facade of innocence and neatly dodged all the responsibility. How indeed do they get away with huge hikes in premiums, and even refusing to provide coverage? Who holds them accountable? (No federal agency, certainly, and only weak state agencies, according to critics.)

Their reply is that they have been devastated by a spate of natural catastrophes (floods, hurricanes, etc.) and man-made ones (crashing jumbo jets) that has drained their coffers and made them church-mouse poor. The insurance industry at the end of last year claimed it suffered a record $5.5 billion loss in 1985. But according to an industry watchdog group, the National Insurance Consumer Organization, and Ralph Nader, the insurors conveniently omitted tallying in capital gains and federal tax credits to the tune of $8.4 billion. If you add $2.1 billion of dividends paid to stockholders labeled losses (according to a debatable accounting procedure) the overall insurance *earnings* amounted to $5 billion.

The insurance industry claims the high cost of litigation and awards are behind much of their recent losses, but have not, to our knowledge, come up with any plausible proof. Indeed, the Institute for Civil Justice reports jury verdicts have remained about the same over the last quarter century (accounting for inflation), the number of lawsuits filed *per capita* has stayed constant, and jurors have found for defendants about as often as for plaintiffs.

Add to all this a chronic industry habit of *underpricing* premiums during cyclical periods of high interest rates on investments, and *overpricing* them on the low swing, as now, and there's good reason to figure the insurance people have set themselves, and us, up for a lot of unwarranted grief. Maybe we ought to ask to see what's up the sleeves of these "good hands people" before we slap the tar and feathers on the wrong villain.

Richard B. Weeghman

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FEBRUARY 1986 $2.50

Small Firms And Social Security

Which Business Ads Are Best?

John Naisbitt On The Future Of Franchising

Nation's Business®

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

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

COVER STORY

Liability: Trying Times

By Harry Bacas

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

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

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

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

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

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

In discussing the overall liability cri-

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

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

PHOTO: MAX WINTER—PICTURE GROUP

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

PHOTO: LYNN JOHNSON—BLACK STAR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence from businesses across the country supports that statement:

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

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

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

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

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

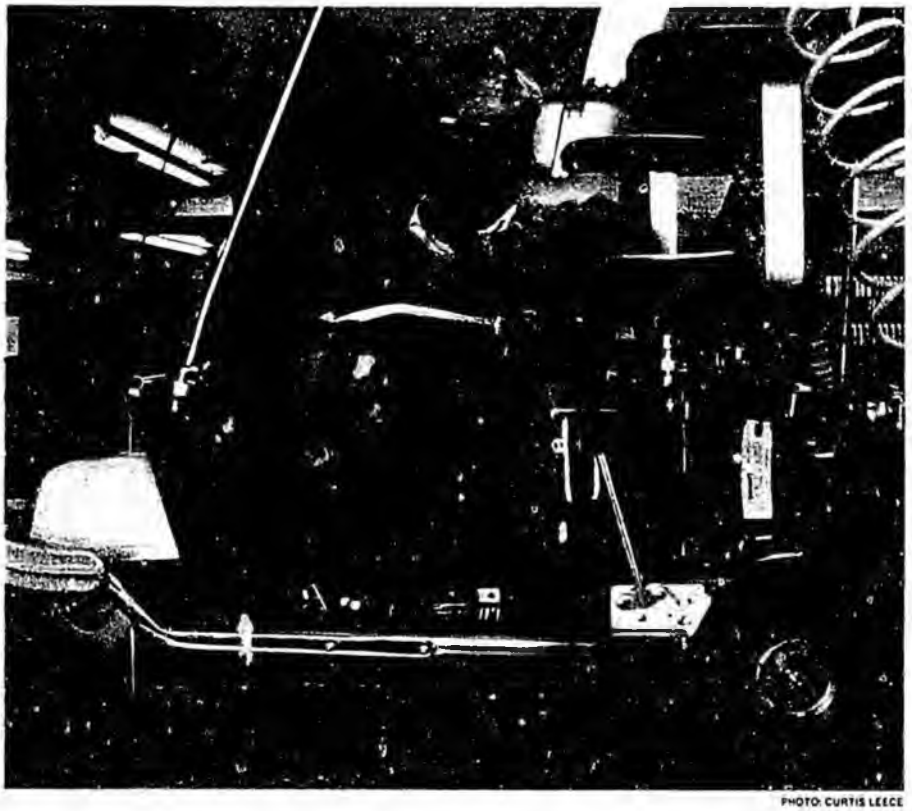

PHOTO: CURTIS LEECE

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

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

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

Dick Taylor, a Salt Lake City insur-

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

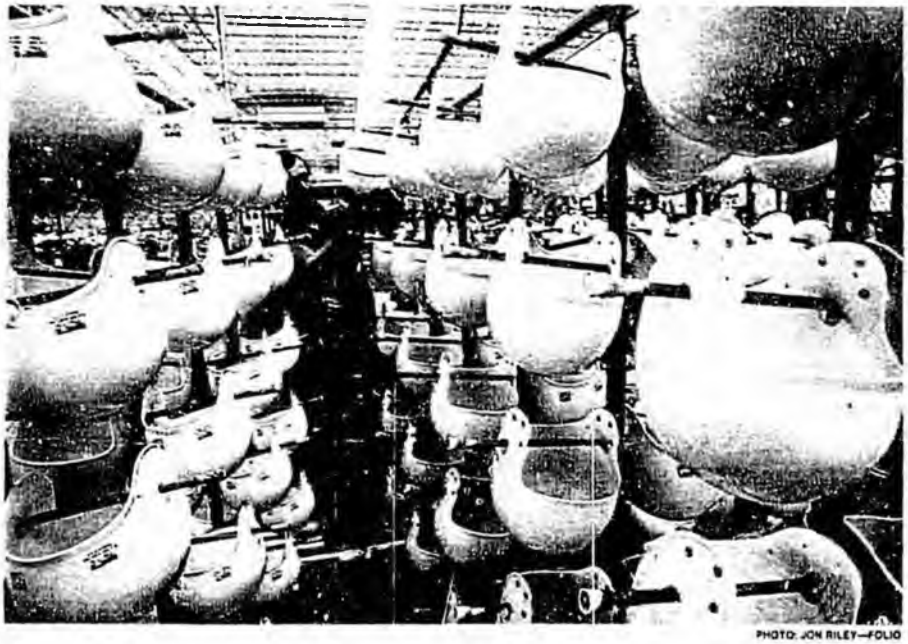

PHOTO: JON RILEY—FOLIO

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

PHOTO: C. THATCHER

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

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

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

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

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

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

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

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

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

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

These are among steps being taken on the business side:

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

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

PHOTO: MICHAEL PHILIP MANHEIM—FOLIO

liability areas like cleanup of hazardous waste and asbestos removal.

- Engineers and architects are writing contracts that require clients to share the risks or indemnify them against claims.
- Organizations are establishing special programs to help member companies and individuals curtail exposure to risk. The American Medical Association, for example, is showing physicians how to avoid or correct situations that might invite lawsuits. The National Restaurant Association is teaching members how to lower their vulnerability to lawsuits stemming from later conduct of customers who have been served drinks.

In addition to such specific steps, there is the drive by many business organizations for long-term reforms in the civil justice system and in basic laws on liability.

The National Association of Independent Insurers, American Insurance Association and Alliance of American Insurers have joined in supporting three tort system reforms they say will improve the affordability and availability of liability insurance:

1. Fair application of the "several liability" doctrine, which assigns damages based on the defendant's determined share of negligence, rather than on ability to pay.

2. Abolition of punitive damages in civil liability litigation on the ground that they excessively drive up settlements and awards.

3. Adoption of "state of the art" rules that will limit product, professional and municipal liability claims to standards prevailing at the time a damaging act takes place, rather than at the time of litigation.

In addition to the Steering Committee, the U.S. Chamber of Commerce is establishing a Blue Ribbon Civil Justice Action Group to recommend legal system changes that would reduce the extent and cost of litigation and would increase the availability and affordability of liability insurance.

One area of top concern to those seeking reform of the civil justice system is the practice of compensating lawyers through contingency fees, which are based on the amount of damage awards they win for their clients. Critics say that policy encourages lawyers to encourage clients to file lawsuits on a no-lose basis—the client incurs no costs if the lawyer does not win an award.

Tim Reath, chief executive of the eastern division of Jardin Insurance Brokers and past president of the National Association of Insurance Brokers, says, "Within a couple of years, we're going to see some serious reform activity in this area. We definitely need to get off the contingency system."

There is a division within the legal profession on the system. The American Bar Association published in its journal recently a debate on the contingency approach, with one lawyer terming it an "indispensable delivery device ... for the use of the civil law as a hammer in support of consumer interests." But another attorney asserted that "the pro-plaintiff trend of the last 25 to 30 years" has made the contingency fee a luxury that "must be controlled or modified in some way if the American system of justice is to be preserved."

Peter Perlman, president of the Association of Trial Lawyers of America, argues that the contingency fee system cannot be blamed for the surge in personal injury suits.

"Under the contingency fee system," he argues, "victims may have an incentive to bring weak claims, because they risk nothing. But, conversely, the contingent-fee lawyer has no such incentive, because the compensation for a weak claim is likely to be zero."

What about the argument that sharply increased advertising by lawyers seeking clients has been a factor in the litigation explosion? Joel Hyatt, whose 30-second television commercials have made him one of America's best-known lawyers and his law firm the nation's second largest, says advertising by lawyers has contributed little to increasing case loads of damage claims.

"The injury area of the law was already being served by the legal profession," he says. Hyatt, whose firm has 575 attorneys in 200 offices, says their work is mostly in divorce cases, bankruptcies and probate law. Less than 5 percent is in injury cases, he says.

But he does have a recommendation for the insurance industry. The current problem, he says, is not the large jury awards that receive much attention, but "the far greater number of small cases that should never have been brought to court."

Hyatt says some lawyers created "a whole frivolous lawsuit industry" after insurance companies made the "bad mistake" of deciding "that, if the cost of litigating a case was greater than the amount insurers could settle for, they would make the economic decision to buy those cases off—pay $5,000 to settle rather than $8,000 to fight the case." He says insurers should take the long view by fighting the bad cases regardless of the expenses involved.

Some insurance companies have begun to do that and to defend themselves in other ways. Increasingly, they are writing policies to cover only claims made during the life of the policy, excluding retroactive claims. Some are also limiting how much they will pay for legal defense of the insured company and for punitive damages.

Though the tort system and the cur-

Franklin W. Nutter, president of the Alliance of American Insurers, says the availability of affordable insurance depends on a climate of "legal and regulatory stability."

PHOTO: T. MICHAEL KEZA

rent, fragmented product liability laws are viewed as the principal pressures on insurance rates, insurance companies concede that part of the problem represents a delayed reaction to early 1980s pricing and investment policies. Interest rates were so high that the companies competed intensely for funds to invest. To attract premiums that could be used as investment capital, the entire industry engaged in what was termed "cash-flow underwriting." A former marketing vice president with one of the 10 largest property-casualty insurers says, "The theory was that, if you could sell a dollar's worth of risk protection for 50 cents and still end up with a dollar and 5 cents after investments, you'd be ahead of the game."

But, in 1984, as losses overtook investment returns, insurers became far more careful about what risks they would take at what price, and premium increases, limitations and even cancellation of coverage followed.

Another factor that put pressure on premium costs was the shrinkage of the reinsurance market, where underwriters spread risks they have insured. Andre Maisonpierre, president of the Reinsurance Association of America, told a congressional hearing recently: "Insurance policies and reinsurance contracts written in the 1950s and 1960s for relatively low premiums are now responding—pursuant to court decisions or retroactive legislation—to claims which were never anticipated under the contracts. The resulting impact on reinsurance has been traumatic."

Maisonpierre says the withdrawal of foreign reinsurance capital has reduced the property-casualty industry's capacity by about $5 billion, or approximately 7 percent. "We can foresee that 1986 will be much more difficult for U.S. reinsurers than 1985, simply because the funds are not going to be available," he adds.

Some critics accuse the industry of overreacting to its revenue problems. J. Robert Hunter, president of the National Insurance Consumer Organization and a former federal insurance administrator, joined with Ralph Nader at a recent press conference to argue that industry loss reports were "misleading and fraudulent." They held that the $5.5 billion loss cited for last year did not reflect tax credits and the increased value of investments and listed dividends as expenses.

Franklin W. Nutter, president of the Alliance of American Insurers, replied that the criticism was based on "voodoo accounting." He said the reports were based on requirements of state insurance regulators who, among other things, specify that dividends be carried as expenses. Hunter said insurance companies do not willingly withhold coverage: "We are not in the business of not selling insurance."

Resolution of the problem is not expected to come quickly. The insurance industry still faces difficulties. Final 1985 figures are expected to show a premium/cost ratio of 116 for the year, compared with 118 for 1984. (The ratio uses a base of 100, meaning that for every dollar of premiums in 1985, the industry paid $1.16 in costs and claims.)

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

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

"We'll go broke if we pay the premiums. If we go bare, we risk product liability suits shutting us down. We're just sitting here bleeding to death." NB

To order reprints of this and the following article, see page 77.

Insurance Industry Gains And Losses

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

There are 5,600 insurance companies, with nearly 2 million employees (a third of them agents and brokers) and assets of $985 billion.

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

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

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

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

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

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

New Directions In Liability Laws

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

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

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

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

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

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

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

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

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

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

PHOTO: T. MICHAEL KEZA

The limits on manufacturers' liability have been steadily expanded.

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

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

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

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

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

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

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

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

—Harry Bacas

ALASKA DEVELOPMENT CONSULTANTS, INC.

Engineers Surveyors Planners

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March 25, 1986

Senator Patrick Rodey
Alaska State Legislature
Box V
Juneau, Alaska 99801

Re: HB 532 and SB 377 - Tort Reform

Dear Legislator:

I am writing to you as a 28-year Alaskan resident who is entering my 18th year of professional practice as a civil engineer and the 9th year of business practice.

I urge your support and passage of legislation on tort reform, in particular House Bill 532 and Senate Bill 377. I support these bills as well as the Citizens Coalition for Tort Reform. I believe passage of these bills are vital to our business climate.

My company's professional liability insurance premium for $1 million coverage limit rose from $12,000 annual premium to $16,000, to $24,000 in three policy years. THEN, the 1985 "indicated" premium quote (an actual quote was never received; previous insurance company "left" Alaska) was $130,000 +. This was a fivefold increase on the same volume of claims-free business.

A single quote for $500,000 policy coverage limit was received for a $55,000 annual premium - still an effective increase of more than four times.

In view of apparent volatility of the insurance market, sky-rocketing premiums, and declining economy, all coupled with the fact that none of our existing or previous contracts have required professional liability insurance, we elected not to re-insure for "errors and ommissions". Our favorable claims experience aided in this decision.

Also, nowhere in our wildest expectations did we budget for a fivefold increase in E & O premiums. Predictability! Affordability!

A recent survey of Alaskan architect-[illegible]neer firms, which an A/E ad hoc committee on professional li[illegible] insurance commissioned through the accounting firm of Peat, Marwick, Mitchell & Co., indicates an average 2 times increase in 1985 premiums for A/E firms with more than $5 million in annual revenues. This rate of increase rose to more than 4 times the 1984 premium. for small A/E firms in the range of $100 to $200 thousand annual revenues! Bear in mind that these are averages. A copy of this survey, in which 43 Alaskan firms responded, is attached for your information.

I know of several design firms who did not or could not renew their professional liability insurance policies for the same reasons. Several of these firms also have a favorable claims experience. We are one of those firms.

We are now faced with the situation where clients who did not previously require professional liability insurance are now requiring such coverage. One notable example is the Municipality of Anchorage who are themselves un-insured due to unavailability or unaffordability of liability insurance!

The Municipality has been without liability insurance since the first of the year, and now have a firm requirement for professional liability insurance for all professional design services where they have not previously required such in the past.

Meetings with Jack Coyne, Assistant Municipal Attorney, and Dave Berry, Director of Property and Facility Management, June 1985 and March 1986, respectively, indicate the Municipality of Anchorage has not experienced any claims or otherwise had a loss history on its civil projects (i.e., streets and roads, drainage, water and sanitary sewer line improvements).

A January 23, 1986 memorandum from the Municipality's Risk Management Division to all Municipal departments requires $500,000 E & O coverage for professional services for ALL projects with construction values up to $1 million, and $1 million E & O coverage for projects exceeding this construction value.

A recent Municipal request for proposal for civil design services lists several projects in the range of $50,000 to $65,000 construction value. Based on our single quote received last spring, our professional liability insurance premium will equal or exceed the construction value of these projects which might have a design fee of 6% to 10% of the construction value!

This recent request for proposals, which were due to Municipality yesterday, covered a list of twelve water and sewer projects, of which only two had estimated construction values in excess of $1 million. None of these projects are "Eklutna Water" or "Bradley or Susitna Hydroelectric" projects, either. I wonder if there are twelve "local Alaskan" engineering firms in Anchorage who still have professional liability insurance in force.

I have several real concerns regarding this problem. The first, obviously enough, concerns my own ability to be able to continue working. The second concern is that more and more of this design work will be awarded to "outside" engineering firms who have "branch" offices in Alaska. I feel strongly that profits, as well as payroll, made on Alaskan projects should stay in Alaska and continue to be spent in Alaska! I wonder how many of these "outside" firms, like the insurance companies, are also going to "pull-out of Alaska" when the economic climate is no longer beneficial to them.

Another concern, though perhaps less direct, is the State subsidy of the student loan and other programs. Why bother!

Alaska's student loan program helped me through my undergraduate and graduate studies at the University of Alaska in Fairbanks (money spent in Alaska!). The purpose of the student loan program is purportedly to train and educate Alaskans to live and work in Alaska. Why bother when the Alaskan work cannot be awarded to Alaskan firms who cannot obtain/afford liability insurance, and the work "goes outside" anyway.

On the short-term, the architect-engineer community is attempting to work with the Municipality of Anchorage to resolve some of these insurance requirements, but in the long-term I believe tort reform is required to provide some predictability in the courts for the insurance companies and predictability and affordability for us Alaskans attempting to do business in Alaska.

I'm not trying to paint the insurance industry as being lily white, I doubt that any of us are that, but I do believe that they, and we, need help in modifying the climate of extremely liberal awards that presently seems to be prevalent in our courts.

I attended a professional liability seminar in Texas in early 1984, and was told by the speaker, an attorney for a major underwriter of professional liability insurance - one of two companies still writing in Alaska, that the courts in Alaska are so consumer-oriented that "you guys don't have a chance up there".

Where there were more than twelve insurance companies writing professional liability insurance in Alaska two years ago, we are told there are now two, possibly three underwriters now.

I sat as a juror on a personal injury/product liability case in 1983. I have seen the attitude that not only do we need to make someone well, we have to "make it up to them", and "somebody" has to pay. Unfortunately, no amount of money is ever going to replace a limb or a loved one.

I support every one of the elements in these two bills and the Citizen's Coalition for Tort Reform. I am not trying to limit victims rights and no one that I know is. Just as victims should be compensated in an appropriate and JUST manner, neither should they profit by their unfortunate experience.

I understand that the 13-point HB 532 is one of the more comprehensive tort reform bills in the nation. Many of these reforms have already been passed by other states "in South America" and many of these have been upheld as constitutional in the respective state supreme courts.

Again, I urge you to pass HB 532 and SB 377, and support other companion legislation.

I would suggest to you that if these bills are not passed, at the rate insurance companies are leaving Alaska, victims may lose rights due to the unavailability of insurance. After all, if there is no insurance in force, there may be no "deep pocket" to compensate victims with valid claims.

This started out to be a 50-word Public Opinion Message, but since I've exceeded the limit slightly, I guess a letter will have to do. While these are my opinions, discussions with others, both within and without the design community, indicate that many share these opinions.

If I can be of any assistance to you or provide any information, please do not hesitate to contact me.

Very truly yours,

Stephen D. Shrader
House District 11
Senate District G

Encl: E & O Survey, dtd 2/27/86

SDS/cs

PEAT MARWICK

RMS ✓
SD ✓
MC ✓

Peat, Marwick, Mitchell & Co.
Certified Public Accountants
Alaska Mutual Bank Building
601 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501
907-276-7401

January 23, 1986

Dear Participant:

Attached are the results of the November, 1985 Errors and Omissions Insurance Survey conducted by the American Institute of Architects, Alaska Chapter, and the Alaskan Society of Professional Engineers. Fifty-five companies responded to the survey; however, only 43 companies provided information that could be utilized to compare changes from 1984 to 1985.

Exhibit I lists the individual responses of the 43 companies used in the survey. In addition, companies were categorized into six groups, based upon their 1984 revenue, and averages have been provided for each group. No significant changes in classification would have occurred if the companies had been categorized based upon their 1985 revenues.

Exhibit II provides a summary of comments made by respondents.

Several companies did not indicate whether their 1985 data was actual or quoted amounts; as such, the data for 1985 may not be the actual coverage, deductible and premium selected by a company.

If you have any questions please feel free to call me.

Very truly yours,

PEAT, MARWICK, MITCHELL & CO.

Larry L. Laughman

Larry L. Laughman
Senior Manager

LLL:BM
Enclosure

AMERICAN INSTITUTE OF ARCHITECTS, ALASKA CHAPTER
and the
ALASKA SOCIETY OF PROFESSIONAL ENGINEERS

Errors and Omissions Insurance Survey

November 1985

Exhibit 1

AMERICAN INSTITUTE OF ARCHITECTS, ALASKA CHAPTER
and the
ALASKA SOCIETY OF PROFESSIONAL ENGINEERS

Errors and Omissions Insurance Survey

November 1985

1984 Revenues	Company	Coverage 1984	Coverage 1985**	Deductible 1984	Deductible 1985**	Premium 1984	Premium 1985**	Multiplier
Less than $200,000	1	$ 1,000,000	1,000,000	5,000	5,000	3,000	13,104	4.37
	2	100,000	100,000	5,000	5,000	2,500	7,172	2.87
	3	100,000	250,000*	5,000	5,000	1,500	8,500	5.67
	4	500,000	500,000	5,000	5,000	4,800	13,700	2.85
	5	1,000,000	1,000,000	2,500	10,000*	3,000	36,500	12.17
	6	250,000	150,000*	5,000	5,000	4,000	21,000	5.25
	7	500,000	500,000	5,000	5,000	3,973	17,272	4.35
	8	500,000	500,000	5,000	5,000	6,868	10,387	1.51
Average		$ 493,750	500,000	4,687	5,625	3,705	15,954	4.31
$200,001 to $499,999	9	$ 1,000,000	1,000,000	5,000	5,000	7,696	21,898	2.85
	10	1,000,000	1,000,000	5,000	10,000	7,902	33,154	4.20
	11	---"Not Provided"---		5,000	5,000	6,500	31,000	4.77
	12	1,000,000	500,000*	10,000	15,000*	8,425	30,000	3.56
	13	1,000,000	1,000,000	10,000	10,000	26,000	130,000	5.00
	14	500,000	500,000	5,000	5,000	5,000	17,000	3.40
	15	---"Not Provided"---		5,000	5,000	7,785	19,995	2.57
	16	1,000,000	1,000,000	5,000	10,000*	11,058	37,844	3.42
	17	500,000	500,000*	40,000	40,000	17,952	11,560	.64
	18	100,000	100,000	10,000	10,000	8,714	66,750	7.66
Average		$ 762,500	700,000	10,000	11,500	10,703	39,920	3.73
$500,000 to $999,999	19	$ 1,000,000	1,000,000	25,000	25,000	18,000	54,000	3.00
	20	1,000,000	1,000,000	10,000	10,000	19,000	29,000	1.53
	21	500,000	1,000,000*	10,000	10,000	23,602	40,000	1.69
	22	1,000,000	1,000,000	7,500	10,000*	6,500	96,000	14.77
	23	1,000,000	1,000,000	15,000	15,000	26,180	28,756	1.10
	24	1,000,000	1,000,000	15,000	15,000	7,800	22,500	2.88
	25	100,000	100,000	10,000	10,000	12,000	16,000	1.33
	26	1,000,000	250,000*	15,000	15,000	39,062	63,147	1.62
	27	1,000,000	1,000,000	20,000	20,000	21,446	74,491	3.47
Average		$ 844,444	816,666	14,167	14,444	19,289	47,099	2.44
$1,000,000 to $1,999,999	28	$ 500,000	500,000	10,000	20,000*	15,500	44,500	2.87
	29	1,000,000	1,000,000	25,000	25,000	24,000	130,000	5.42
	30	---"Not Provided"---		10,000	20,000*	17,000	44,000	2.59
	31	500,000	500,000	5,000	10,000*	11,892	46,972	3.95
	32	---"Not Provided"---		10,000	20,000*	34,931	79,374	2.28
Average		$ 666,666	666,666	12,000	19,000	20,665	68,969	3.34
$2,000,000 to $5,000,000	33	$ 1,000,000	1,000,000	40,000	50,000*	30,000	130,000	4.33
	34	1,000,000	1,000,000	50,000	50,000	44,937	127,000	2.83
	35	1,000,000	1,000,000	25,000	50,000*	27,934	110,012	3.94
	36	2,000,000	2,000,000	50,000	50,000	70,000	114,000	1.63
	37	2,000,000	2,000,000	100,000	100,000	45,392	66,952	1.47
	38	1,000,000	1,000,000	10,000	25,000*	65,809	147,475	2.24
	39	2,000,000	2,000,000	50,000	75,000*	133,528	119,544	.90
Average		$ 1,428,571	1,428,571	46,429	57,143	54,657	116,426	1.95
Over $5,000,000	40	$ 1,500,000	1,500,000	100,000	100,000	55,000	220,000	4.00
	41	2,000,000	2,000,000	50,000	75,000*	190,000	365,000	1.92
	42	---"Not Provided"---		25,000	25,000	30,000	35,000	1.17
	43	---"Not Provided"---		50,000	250,000*	50,000	150,000	3.00
Average		$ 1,750,000	1,750,000	56,250	112,500	81,250	192,500	2.37

* Quote at 1984 level not provided.
** Actual or quotes.

Exhibit 2

AMERICAN INSTITUTE OF ARCHITECTS, ALASKA CHAPTER
and the
ALASKA SOCIETY OF PROFESSIONAL ENGINEERS

Errors and Omissions Insurance Survey

November 1985

The following is a summary of comments by respondents:

- The triple cost of premiums made it unfeasible for a small firm, such as ours, to continue to carry this coverage.

- New policy with new carrier - they would not cover prior acts, so the retroactive date became the date of the new policy. I am still trying to find insurance for my prior acts.

- Coverage was not renewed for 1985 due to an increase in premiums of over 400%.

- We are doing without errors and omissions insurance. In ten years of practice, we have never litigated a claim. In view of our reduced practice and low-risk projects, the premium increase is unconscionable. The insurance industry has a problem, not us, but they want us to pay for it.

- Applications were submitted to five firms. So far, two have declined, one pulled out of Alaska, one said its gross income was too small and still no response from the fifth. Did offer suggestions of a higher deductible and instead of the $500,000 limit, suggested even $250,000, but so far no response.

- The firm is now, in essence, uninsurable as the project insurance contract was canceled. The current practice of the insurance industry is an apparent deliberate method of putting the small businesses in this country either out of business entirely or at an uncompetitive disadvantage for lack of ability to obtain required insurance coverage.

- My old insurance broker sold the company to another broker who in turn sold to an Eastern company this year. At the same time, our insurance was due for renewal and the old insurance underwriter would not renew A&E liability insurance in Alaska. We had to find a new broker who filed applications with three companies but was having trouble getting quotations. In the meantime, the State DOT&PF terminated a contract we were working on for some time due to the fact that we did not have insurance coverage for a short period of time.

AMERICAN INSTITUTE OF ARCHITECTS, ALASKA CHAPTER
and the
ALASKA SOCIETY OF PROFESSIONAL ENGINEERS

Errors and Omissions Insurance Survey

- Errors and omissions insurance may not be affordable for us next year.

- Did not renew because of the cost. One of my clients is requiring $500,000 in errors and omissions insurance. I am trying to get a new quote without prior acts coverage.

- Half the coverage for almost four times the premium -- that is an 800% increase. The carrier already told us we can expect a 20% to 30% increase for next year. This may tap us to the limit, that is, fold our doors. It is about time the federal government and the Alaska State legislature did something positive to keep small business firms in business. It is getting extremely difficult to compete with the big boys, especially with these dramatic insurance increases!

- In 1985, dropped coverage from $1,000,000 with $7,500 deductible to $500,000 with $10,000 deductible and the premium paid was $34,000. Don't remember the May 24, 1985 questionnaire. Since my coverage runs from August 31 to August 31, it was easier to give you the actual amounts as they appear on my application for errors and omissions insurance. Basically, when considering we are paying five times the premiums for half the coverage, that represents a 1000% increase!

March 21, 1986

Senator Patrick Rodey
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Rodey:

I am writing to you regarding House Bill 532. First off, I am not in favor of House Bill 532, in that I feel it is taking away rights of future-injured individuals, and they have absolutely no in-put into the loss of their rights to be compensated when they are injured through no fault of their own. The problem of "tort reform" is that it is minimizing or totally eliminating the responsibility of the physician, manufacturer, company, etc., and penalizing the injured person for getting up that morning and doing whatever he was doing when he became injured.

In Alaska, the medical profession, specifically, is working very hard to pass this legislation to totally eliminate their responsibility. Many doctors in our state go bare, and many more will go bare that now are carrying insurance if "tort reform" is passed. The doctors put their assets in trust or in other individual's names, so they are not subject to judgments. Doctors are pushing particularly to do away with joint and several liability because everytime an uninsured doctor injures or kills someone, the hospital which gave him privileges to practice is also named in the suit, and it ends up paying the settlement or judgment because the doctor has hidden his assets. I feel both the hospital and the doctor are responsible, and it doesn't hurt my feelings a bit if the hospital ends up paying because the physician is hiding his assets and refusing to carry medical negligence insurance.

The hospital can put a stop to this in a flash, like they do in other parts of the country, by requiring every

physician practicing at their institution to show proof of insurance prior to getting hospital privileges. In Alaska, we have a good old boy medical association that allows this pathetic situation to exist. Where does the Governor go to have medical treatment? Well, it sure isn't to Anchorage, Alaska, because he knows as well as other individuals if you can afford it, you go outside and get competent help by competent physicians, at competent hospitals that have insurance to cover accidents or mistakes. That's why you and I buy automobile insurance. It's to protect people as a result of an accident or negligence.

In passing this legislation, you are guaranteeing that there will be more doctors going bare in Alaska because they will know now that the hospital will not be tapped but for a very small percentage, and they have essentially eliminated their financial responsibility to those that are injured at their hands.

As a public representative, and an individual who has been entrusted with their constituents' best interest, I cannot see how you could support H.B. 532 that is so devastating to the general public. This is victimizing the victim a second time, and you and yours may be the next victims.

What can be done? (1) Make the insurance industry, through legislation, set up risk management departments that oversee the medical profession which have the expertise and the power to take away an Alaskan physician's license if it has been shown that he is incompetent. (2) Have the risk management department or state licensing department have the powers to reduce a doctor's privileges to areas that will keep him out of trouble. (3) Require that all hospitals doing business in the State of Alaska and certified by the State of Alaska require each and every physician to show proof of medical negligence insurance before they obtain privileges. (4) Require the Commissioner of Insurance to be an actuary or to have an actuary on his staff. (5) Require the insurance industry be estopped from wholesale price increases that are illegal in the State of Alaska, since each price increase has to be submitted to the Insurance Commissioner and justified (and all of the tremendous increases from 100 to 1,000 percent that have happened in the State of Alaska this year have happened without the formal proceeding set up to protect the public). (6) Set up reinsurance pools or insurance pools for industries that have been singled out by the insurance industry. (7) To disallow insurance companies to arbitrarily cancel an individual's insurance, but to give them adequate notice and adequate reason. In Alaska, as in other parts of the United

States, there are companies that have had absolutely perfect records and their insurance has been either cancelled or increased to such an amount that it is prohibitive. Insurance premiums should be on the basis of claims made history, so that if you have a company which is historically bad, it should pay a higher premium than the company that is concerned and has a good safety record. (8) Make it so that the Commissioner of Insurance cannot get into the insurance business until five years after he terminates with the State of Alaska.

The insurance industry in 1975 did a dry run for the 1985 "insurance crisis." If you will remember, throughout the United States, they targeted the physicians who in our country have a lot of political clout and money; and they have again targeted them, as well as other professions and companies such as day cares, bars, and recreational providers. By doing this, the insurance industry knew they would directly impact millions of individuals through either higher costs or the loss of a service--recreation.

I am sure you have heard that the insurance industry goes in a 10 year cycle, and as I noted previously in 1975 we had a dry run for the industry falling flat on its face again in 1985 and blaming that strictly on the tort system in America and not on their bad business practices and corporate greed. Just in case you have not kept up with this aspect of the "crisis," the insurance industry during the time of high interest rates put all of their moneys in large interest-bearing funds, gaining interest at 20 percent, cut prices ridiculously so to undercut their competition to get a larger share of the market, and then failed to put the appropriate amounts of money in reserves to cover losses that were forecast by their own actuaries. When the interest started going down, they started earning less money; and with the failure of adequate reserves, they had to start paying out large losses from natural disasters, airplane crashes, hotel fires, and the like; and they went flat on their faces as an industry. This is when they started yelling, "tort reform," "tort reform," and blaming the whole problem on the judicial system.

"Tort reform" is happening nationwide, and the insurance industry has orchestrated this "insurance crisis" and the Insurance Information Institute of New York is sending out packets called "The Civil Justice Crisis" which tells the recipient of the packet how to get tort reform legislation passed, and it is a step-by-step instructional book with examples and fliers, etc. On first blush, you may raise your eyebrow at a conspiracy theory, but once you look at this

packet, it is quite clear what they are doing, and that it is not something they have just casually set out to do.

I want to thank you for your time. I want to again strongly urge you to oppose House Bill 532 and any other bill that is going to penalize the individual who has already been injured by taking their rights to recovery away for the injury caused by a third party.

Sincerely yours,

Leonard J. Hackett

Leonard J. Hackett

LJH:amm

2468A

P.S. Please also oppose S.B. 377. Please support Insurance Reform & Fooling legislation!

Alaska State Legislature

Senate

Committee on Labor & Commerce

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

March 24, 1986

TO: Senator Rodey, Chair
Senate Judiciary Committee

FROM: Senator Zharoff
Chair, Senate Labor and Commerce Committeee

RE: Tort Reform legislation

By request, I am forwarding to you a proposal related to tort reform legislation, sent by a Kodiak constituent. We were not able to accomodate every request regarding the tort reform bill while it was in the Labor and Commerce Committee, but I promised I would bring this to the attention of the Senate Judiciary Committee. Thank you.

Kermit D. Reppond
1616 Selief Lane
Kodiak, AK 99615

Senator Fred Zharoff
Box V
Juneau, AK 99811

March 5,1986

Dear Senator Zharoff:

I have enclosed a copy of a bill passed last year in Idaho which prohibits so-called "wrongful life" suits. In such suits, parents of a handicapped child claim a doctor was at fault for not preforming prenatal tests that would reveal the handicap so they could have the child aborted. The idea being that death is preferable than living with a handicap. Other enclosed material gives additional data on such legislation. It is obvious why pro-life people favor the bill but it should have support among all physicians as it is really for their protection. This would be especially true of pro-life doctors who are ethically opposed to abortion. This bill could be part of any tort reform legislation. Nothing in the bill hinders prenatal testing for birth defects or abortion. I would appreciate it if you would look over this idea.

Thank you for your recent letter concerning state program for prenatal services. It is my hope that the legislature will soon see the hypocricsy of claiming to be "pro-choice" while funding only one choice in the abortion question.

Sincerely,

Kermit D. Reppond

Kermit D. Reppond

STATEMENT OF PURPOSE

RS 11142

Rs 11142 precludes a cause ~~to~~ of action based on the claim that, but for the negligence of another, a woman would have had an abortion. It only precludes an award of damages; it does not prevent a woman from having diagnostic tests performed to detect a handicap, nor does it prevent any woman from obtaing an abortion.

The bill represents a public policy choice favoring childbirth and refusing to encourage or facilitate abortion, infanticide, bad medical practice and unequal treatment of the handicapped.

FISCAL IMPACT

There is no fiscal impact to state agencies.

RS11142

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO PROCEEDINGS IN CIVIL ACTIONS; AMENDING CHAPTER 3, TITLE 5, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 5-334, IDAHO CODE, TO PROVIDE THAT A CAUSE OF ACTION SHALL NOT ARISE, AND DAMAGES SHALL NOT BE AWARDED, ON BEHALF OF ANY PERSON, BASED ON THE CLAIM THAT BUT FOR THE ACT OR OMISSION OF ANOTHER, A PERSON WOULD NOT HAVE BEEN PERMITTED TO HAVE BEEN BORN ALIVE BUT WOULD HAVE BEEN ABORTED, AND TO PROVIDE CAUSES OF ACTION THIS ACT SHALL NOT PRECLUDE; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 3, Title 5, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 5-334, Idaho Code, and to read as follows:

5-334. ACT OR OMISSION PREVENTING ABORTION NOT ACTIONABLE. (1) A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

(2) The provisions of this section shall not preclude causes of action based on claims that, but for a wrongful act or omission, fertilization would not have occurred, maternal death would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Sunday 2-3-80 Front Page The Spokesman-Review

ill to shield doctors from wrongful-birth suits u

By DAVID NEWMAN
staff writer

BOISE — Idaho's anti-abortion ivists are urging lawmaker sup- t this year for a bill that would ld doctors from "wrongful h" malpractice lawsuits.

'ear of such lawsuits coerces doctors into performing risky and expensive prenatal tests on their patients to diagnose potential handicaps, pro-life advocates contend.

When tests show a birth defect is certain or likely, prospective parents choose to abort the pregnancy in more than 60 percent of such cases, according to a Chicago doctor aiding the lobbying efforts of Right to Life of Idaho.

"It makes physicians a hit squad for those people who morally favor abortion as an alternative for society's obligation to care for the handicapped," said Sandpoint Democrat Rep. Steve Herndon, a devout supporter of the pro-life agenda.

The test in question is amniocentesis, in which a long needle is used to penetrate the draw a sample of The fluid is culture mined to reveal th makeup.

"It's used as a stroy [illegible]," said R the legislative direc Life of Idaho. "It's

(Continued on

Doctors

(Continued from page 1)

Down's Syndrome or spina bifida, neither of which can be completely cured."

Wrongful-birth lawsuits typically are filed by the parents of a handicapped child. They contend a physician was negligent because he failed to perform diagnostic tests that would have revealed the handicap and perhaps convinced the parents to terminate the pregnancy rather than care for the child.

"With that as a cause of action, you place the medical community in a position where they have to test for every birth defect imaginable," said Herndon, who is a lawyer. "You're exposing the phy- cians to liability for damages th did not cause."

Such lawsuits are becoming increasingly common as legal precedents are set in more and more states, according to pro-life advocates, medical experts and malpractice insurance carriers.

A September 1984 decision by the Idaho Supreme Court in Blake vs. Cruz appears to have opened the door to wrongful-birth actions in this state, according to Uhlenkott.

In that case, Dr. Amado J. Cruz failed to diagnose or order a test for a case of German measles in a Kamiah woman who subsequently gave birth to a severely handicapped daughter.

"A physician whose negligence has deprived a woman of the opportunity to make an informed decision whether her fetus should be aborted should be required to compensate her for the damage he has . . . caused," the court said.

It's not clear how common such lawsuits are in Idaho. No reliable information on wrongful-birth actions is available from the Idaho Medical Association, the state Board of Medicine or the state Insurance Department.

"They're on the rise," said Barbara Reynolds, a spokeswoman for St. Paul Fire & Marine. The Minneapolis-based insurance company is the nation's largest malpracuce insurance carrier, with 14.6 percent of the U.S. market.

Legislation aimed at stopping the rise emerged here Thursday. House Bill 120 provides that there shall be no cause for legal action, and no damages awarded, for a doctor's failure to perform tests, reveal a handicap and provide information that leads parents to select abortion rather than a live birth.

"It only affects tests that would be used only to end the life of the child," said Dr. Steven Zielinski of Chicago, who is lobbying Idaho lawmakers and is affiliated with the Americans United for Life Legal Defense Fund.

"They (doctors) will never get off the hook if their actions are truly negligent," Zielinski said.

The bill would not prohibit prenatal diagnostic tests; a pregnant woman still could elect to have them performed.

But the decision to administer tests would be made on clinical grounds, rather than upon economic grounds, Zielinski said. Fear of wrongful-birth lawsuits forces doctors to administer the tests to nearly all their obstetric patients — whether or not they have high-risk pregnancies — as they build evidence to combat potential malpractice suits.

Pro-life interests believe such blanket testing not only encourages abortions of handicapped children, but carries other health hazards and economic consequences.

Amniocentesis carries an 8 to 10 percent risk of injury to the fetus, according to Zielinski.

"You may wind up creating handicaps which would not have existed otherwise," he said.

Uhlenkott noted the test also carries a 2 percent risk of spontaneous miscarriage, while mothers age 40 have only a 1 percent risk of bearing a child who suffers from Down's Syndrome. The risk of Down's Syndrome is lower for younger mothers.

Uhlenkott was citing statistics from a 1983 article by Dr. Hymie Gordon, a Mayo Clinic genetic researcher, that appeared in a newsletter published by the American Life Lobby.

Uhlenkott further noted that abortions performed because of information revealed in the test occur late during the pregnancy — at the 24th or 25th week — when risk of injury to the mother is high.

As for economics, spokeswoman Reynolds of St. Paul Fire & Marine cautiously said wrongful-birth actions contribute to increases in the cost of malpractice insurance.

Her company Friday imposed a 25 percent boost in the cost of such insurance for obstetricians and other doctors who administer prenatal care and deliver children.

In Idaho, St. Paul's new annual premium is $26,846 for an obstetrical malpractice policy affording $1 million protection. The company's rates for similar coverage range from $6,316 per year in Arkansas to $45,722 in Dade County, Fla., Reynolds said.

The December 1983 average nationwide for her company's obstetrical policy was $33,400, she said, and is higher now.

Idaho Medical Association Executive Director Don Sower said costs for malpractice insurance cover a wide range. He cited another obstetric policy that costs $12,000 per year, but noted that carrier has notified Idaho doctors to expect a rate boost of not loss than 30 percent in June.

Rep. Dean Sorensen, R-Po se, is a surgeon and past president of t IMA, and also sits on th [illegible] tee considering HB120.

Sorensen estimates at malpractice insurance add $500 to $1,000 to the patient's c st for a typical delivery.

"The pro-life people look at this a little differently than physicians," said Sorensen, who said he's heard of obstetrical malpractice rates rising as high as $80,000 per year in some states.

The effect of high insurance rates is not limited to increased health-care costs Sorensen said it also is forcing some doctors out of the baby business. That is particularly true for general practitioners and rural doctors, he said, who can buy cheaper insurance if they omit obstetrical care from their services.

"Of all the medical specialties, this is the one that's having the real problem," he said.

If the bill becomes law, Sorensen said, "I think most responsible obgyn people will still go through the motions of advising patients. I don't think it will change the methods of practice."

IMA director Sower said his group has taken no position on the bill, but it is before the board of directors for consideration.

"The abortion issue aside, most of them (doctors) support reducing doctors' liability," said Sorensen, who predicted the medical community will remain neutral or support the bill.

HB120 rests now with the House Judiciary, Rules and Administration Committee. Chairman Rep. Larry Harris, R-Boise, said the bill probably will come up for committee debate during the week of Feb. 11.

TORT

CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS' COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR USE AND REVIEW

Thanks,

Al Tamagni, Sr.
Chairman

738 H Street, Suite 300 • Anchorage, Alaska 99501 • (907) 276-7135

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 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
Fairbanks North Star Borough
Financial Managers
Hotel and Motel Association
Insurance Brokers and Agents Association
Nurse Midwives Association
Pension Consultants
Professional Physical Therapists Association
Risk Management Association
Southern Association of Life Underwriters

The Citizens Coalition for Tort Reform, Inc.

738 H Street, Suite 100
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TORT REFORM -- A COMPREHENSIVE SOLUTION TO THE INSURANCE CRISIS

Introduction

THE TAX THAT SKIRTS THE TAX COLLECTOR

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 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 reparation 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 tinkering with the tort system for ten or 15 years and there is adequate evidence major changes in the tort reparations system is essential. *The fundamental goal of tort reform is to restore predictability to the tort system.*

All manner of solutions to 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 should 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.

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JANUARY 1986a

ITEMIZED JURY AWARDS

Juries awards for damages should specify amounts for monetary losses, non-economic 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.*

A COMPREHENSIVE LEGISLATIVE SOLUTION TO THE INSURANCE CRISIS

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.*

NON-ECONOMIC AWARDS

Non-economic awards compensate a victim for intangible loses -- 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 loses 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.**

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 plaintiffs 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.

by MORTIMER B. ZUCKERMAN
Chairman and Editor-in-Chief of *U.S.News & World Report*

THE NATIONAL LOTTERY

An epidemic of costly litigation is sweeping the country, and the time to halt it is now.

Witness the efforts of lawyers after any disaster, such as an airplane crash or the tragedy at Bhopal, India. They rush to the scene and descend upon the distraught survivors and relatives. They rent movie houses and auditoriums to make their pitch for clients. In law offices all over the country, lawyers are hard at work finding and convincing people to file suit. It used to be that lawyers tried to persuade their clients to settle disputes. No longer.

The pot of gold for lawyers is a huge fee or a participation of up to 50 percent in court awards. Staggering court awards in cases whose results seem to violate common sense have made it worthwhile for the lawyers. Recently, a man attempted suicide by jumping in front of a New York subway train. He sued the Transit Authority because the train stopped in time to save his life but not quite soon enough to avoid some physical damage to him. He collected more than $600,000.

And what about the tenant, celebrating his birthday on a Sunday afternoon, who drowned when he drunkenly tried to walk along the bottom of his apartment-house swimming pool in the full view of his wife and 15 close friends? His wife successfully sued the landlord's insurance company.

The result? Soaring premiums for liability insurance to cover this increased and indeterminate financial exposure. Legal costs and insurance have become an increasing component of the price of goods and services. Even the availability of some consumer services is being curtailed.

Personal-injury awards, especially jury awards, are out of touch with reality. They are often based on estimates of how much money the defendants have rather than whether they are at fault. The awards have become a means to redistribute wealth rather than a measure of fault or a deterrence to undesirable conduct. It may appear to a jury that an insurance company, individual, corporation or government with "deep pockets" is paying the claim. The truth is that millions of "little pockets" are actually paying the cost either through higher prices for products and services or through higher insurance bills.

It is time to re-examine the manner in which the nation's judicial system deals with injured parties.

First, a method must be developed to tilt the judicial system against increased litigation. One approach would be to compensate a successful defendant for the cost of the defense against an unsuccessful plaintiff. The obvious benefits would be a more serious and thoughtful analysis of a claim prior to bringing a lawsuit and a reduction in the number of frivolous claims. It would also bring pressure to bear on achieving a reasonable settlement of the matter prior to running up large legal fees.

Second, the states should follow the example of California in limiting contingent fees to lawyers. These fees theoretically balance economic power for those who cannot afford the cost of bringing a case on an hourly basis. In practice, however, contingent fees have fostered an atmosphere of a no-cost lottery for clients. The California bill caps the contingency fees at 40 percent of the first $50,000 of the settlement, ranging downward to 10 percent of any award above $200,000.

Third, damages awarded for "pain and suffering" and other noneconomic losses should be capped. California has set a limit of $250,000, controlling the awards in medical-malpractice suits for such vague matters as grief, mental distress, etc.

One of the great principles of American jurisprudence has been access to justice through the court system. But the right to swing your arm stops at the point of another man's chin. The right to access to the courts must not be permitted to bury our society under a mountain of legal pleadings that raise insurance bills for all. To permit this abuse is to turn the courts into a national lottery in which the winning names are the lawyers and certain plaintiffs who are picked by judges and juries, while each of us, every day, is the loser. ■

MALPRACTICE BATTLES
Surgeon Donald Stewart has fought off six suits

BARTENDER RISKS
High premiums forced Washington, D.C., bar owner Jim Stiegman to go without insurance

HOMEOWNER WOES
Helene Harris's pet nearly cost her insurance coverage

Sky-high damage suits

The impact on consumers, business and professions

A seriously injured California gymnast wins $14.7 million in a suit against an exercise-mat manufacturer.

Half of the 10 doctors doing obstetrics work in Montrose, Colo., stop delivering babies when insurance rates soar.

A New Jersey couple must pay $72,500 to a woman hurt when a man who had been drinking at the couple's home smashes his truck into her car.

In Minnesota, a farmer cancels a live Nativity scene when an insurer asks a $540 premium in case someone is injured by a donkey and horses carrying Mary and the Wise Men.

It seems that everyone is liable these days. Juries return costly verdicts against homeowners, million-dollar awards against professionals and huge assessments against manufacturers. A new national study by Ohio-based Jury Verdict Research, Inc., reports the dollar amount of awards in personal-injury cases up 15 percent in 1984. Courts issued 401 verdicts exceeding $1 million that year, the latest for which statistics are available. A sampling shows liability suits filed in state courts jumping by 20 percent or more over seven years, according to the National Center for State Courts.

"We are in the midst of an unprecedented liability crisis," says Barry Bauman of the U.S. Chamber of Commerce. To cope, insurance firms have been raising premiums sharply since 1984—sometimes by 1,000 percent or more at a clip—drastically reducing coverage and sometimes pulling out altogether. Companies in turn are abandoning lines of business, operating without insurance or hiking prices of products to cover premium costs. "Companies don't pay the cost of product-liability suits—consumers do," says Martin Connor, Washington, D.C., attorney for General Electric Company. Manufacturers say 20 percent of the cost of a $25 stepladder goes to insurance. A similar proportion in the airplane industry was one reason Beech Aircraft Corporation quit making a small training aircraft.

Meanwhile, obstetricians and surgeons are walking away from their practices rather than paying insurance premiums of up to $50,000 or more a year. States, cities and school districts spend large sums to satisfy judgments and drop risk-laden services such as recreation programs.

The turmoil springs from changes in the law and society. No longer is the decisive question whether the party sued—the defendant—negligently harmed someone. The question now centers on how much the plaintiff ought to be compensated for injuries. Judges constantly expand "common law" to create new grounds for suits, and citizens in a more impersonal world look to courts to solve problems. They are aided by a corps of 700,000 lawyers—roughly 1 for every 350 Americans—who collect some $55 billion a year in fees. The spread of liability insurance also has led to a mind-set that no one really gets hurt by the barrage of suits since insurers will pick up the bill.

Critics contend that the system has gone out of control. Richard Willard, chief of the Justice Department's civil division, charges that some judges and lawyers are utilizing the courts in such a way as "to restructure

◄ Dr. Daniel O'Keeffe, far left, no longer delivers babies and complains about "practicing with a gun at your head"

◄ Consumer advocate Ralph Nader says rate hikes for liability insurance amount to a "ripoff"

► Doctors, trying to avoid litigious patients, can check computer file of malpractice claims

society and administer a massive scheme for the redistribution of wealth."

Trial lawyers and consumer spokesmen such as Ralph Nader argue that the problems spawned by expanded liability have been exaggerated. The real villains, they say, are property and casualty insurers who are trying to use an attack on the courts to line their own pockets. "What we are witnessing is a manufactured crisis, intended to bloat insurer profits and reduce victim rights," contends J. Robert Hunter, president of the National Insurance Consumer Organization.

Some consumers argue, too, that the spurt of damage claims serves as a warning that providers of goods and services must maintain high standards—or suffer the consequences. "The liability system ought to hurt. It ought to encourage people to modify their behavior," says Gary Schwartz, a law professor at the University of California at Los Angeles.

Whichever side is correct, liability will be a major issue this year in Congress and many state legislatures.

Liability's lengthening shadow

Anyone from Uncle Sam to Uncle Harry is open to suit, now that the mood of society is to seek a cure for all of life's mishaps.

A New Jersey court said merchants could be held liable if a customer's dog bit another patron, and a Philadelphia insurer, fearing legal action over an allegedly vicious dog, threatened cancellation of Helene Harris's homeowner's policy. A Maryland court held that handgun makers could be forced to pay damages resulting from a shooting. A California policeman agreed to pay damages when the woman who bought his house complained he hadn't disclosed five murders committed there 12 years earlier. After a man flying on a charter flight made a mock announcement that the plane would crash, a passenger won damages in Minnesota for emotional distress.

Employes injured on the job, no longer satisfied with workers' compensation, now often sue not only their employers but also the makers of the equipment involved in the accident. Companies complain that they are caught in a bind when faced with a claim over machinery made years ago that may have been altered or poorly maintained. "How do you design something to last forever?" asks Gary Bell, product-safety administrator of Toledo-based DeVilbiss Company.

Lawsuits over industrial machinery are just a tiny part of a vast arena of litigation. The number of product-liability suits filed in federal courts has jumped from 1,600 in 1974 to 13,554 last year. A major source of product-liability cases is chemicals and drugs said to cause harm that may not be detected until years after exposure. More than 30,000 damage claims for lung ailments and cancer allegedly caused by asbestos have piled up around the country. Millions of dollars in damages already have been paid out, and the threat of other pending cases has sent the huge Manville Corporation into a bankruptcy reorganization.

Filing a similar bankruptcy claim was Virginia-based A. H. Robins Company, which has set aside $1 billion to satisfy claims by 15,000 women over damage caused by the intrauterine contraceptive device called the Dalkon Shield.

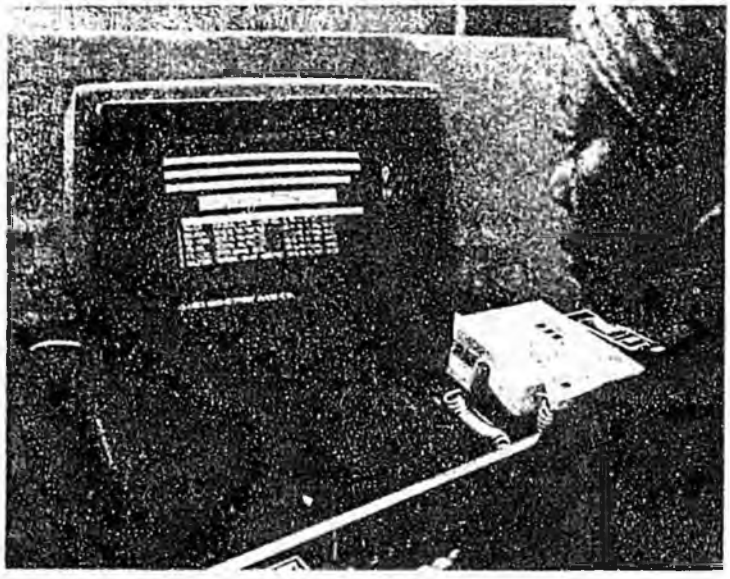
For professionals: A malpractice meat grinder

Major corporations usually have vast resources to draw upon in combatting the litigation wave, but few doctors, lawyers, accountants or other professionals dragged into court have that cushion. Malpractice claims against physicians have more than doubled in a decade, reports the American Medical Association. Although more than half are dismissed, there have been 367 verdicts of a million dollars or more against doctors over the years, and the average settlement costs defendants $330,000. Malpractice-insurance premiums exceed $2 billion annually.

The irony is that improvements in the quality of care can encourage lawsuits. Defense lawyer James Ludlam of Los Angeles notes that "infants with severe brain damage who would have died three years ago now live, but the parents—or society—are faced with lifelong care. I can't think of anything more expensive."

Obstetricians in New York State saw their malpractice premiums increase by an average of $21,635 last year, amounting to 16 percent of their gross income. Some have decided to quit. After four suits were filed against him, obstetrician Daniel O'Keeffe of Glens Falls, N.Y., said enough was enough. He hasn't lost a case, but, O'Keeffe says, "I decided that at age 64 I did not wish to expose my personal assets and life savings to a mishap that would wipe me out. There is also the emotional factor: Practicing with a gun at your head."

Syracuse neurosurgeon Donald Stewart has successfully defended six suits in 15 years. He is dismayed by the expectations of today's patients, recalling one 16-year-old boy who remarked to his father during an examination, "Think how much money you'd get if he screws up."



To sniff out proclivities toward suing, some doctors are attempting to screen their patients. In Los Angeles, some now use a computerized service called Physicians' Alert to identify patients who have filed malpractice claims. Tit for tat, lawyers are setting up a hot line warning patients about the lawsuit records of doctors.

Trial lawyers argue that malpractice litigation reflects rising medical negligence. But a recent study by a Pennsylvania committee comprising doctors and lawyers laid the problem to a combination of things, including an inability by the medical profession to discipline repeat offenders and excessive damages awarded in a few cases.

When lawyers aren't suing other professionals for malpractice, they may be defending themselves against it. In October, a court affirmed a $26 million judgment for actress Doris Day in a suit accusing her former attorney, Jerome Rosenthal, of an investment and legal-fee swindle. More-typical suits allege foul-ups such as failing to pursue worthy cases and missing deadlines for filing court papers.

No profession seems immune, from accountants and architects to teachers, therapists and even clergymen. The Big Eight accounting firms paid nearly $200 million in the past five years in malpractice suits and face $2 billion more in claims. A San Jose, Calif., minister faces a $5 million suit by a woman who charges that he violated her privacy by disclosing her confession that she had embezzled church funds. Last year, the Vermont Supreme Court held a therapist liable for the burning of a barn by a patient who had told her he wanted to get back at his father. The court said she had a duty to protect third persons.

Legal theory opens the floodgates

The big verdicts stem almost in equal measure from a loosening of standards for proving liability and the ever growing resourcefulness of lawyers in finding new places to collect damages. Rules that shielded defendants from liability have eroded as judges have given persons filing suits the benefit of the doubt. At the same time, the growth of insurance has encouraged juries to award huge sums in the belief that someone else will end up paying the bill.

Plaintiffs now win damages by linking products to health problems even when there is no proof that the products caused harm. Thousands of Vietnam War veterans charged

NEIGHBOR VS. NEIGHBOR

From playmate to plaintiff

Staten Island, N.Y. What started as a pleasant summer day of child's play in 1972 at Morris and Rosalyn Friedman's house turned into a nightmare of lawsuits that lasted a decade.

Neighborhood children had a standing invitation to play with the Friedmans' five children in the back yard of their modest, ranch-style home. One of the visitors—9-year-old Sylvia Ashwal—was being pushed on a swing by playmates Deborah and Lisa Rosenberg when somehow she broke her leg. Rosalyn Friedman took her to a hospital and thought the episode would be forgotten.

But three years later, the Friedmans were surprised to be cited in a lawsuit. "We were shocked," remembers Morris Friedman. "We had thought things were over and done with."

The Friedmans weren't the only ones sued. The Rosenberg children also were named, as were Sears, Roebuck, which sold the swing, and Turco Manufacturing Company of Illinois.

From the vantage point of Joseph and Eva Ashwal, seeking recompense for their daughter's injury became the logical option when the fractured leg stopped growing. Even an operation on her good leg couldn't prevent a limp and back problems.

"I was in pain all the time," Sylvia says. "I still can't sit or stand very long. I get fidgety and have a lot of back pain."

The pretrial maneuvering dragged on. Sylvia's legal team—led by New York trial lawyer Fred Queller—contended that the swing was so poorly designed that Sylvia's leg easily became caught between the seat and a platform below.

Turco and Sears both countered that the accident was Sylvia's fault: She was standing up when she shouldn't have been and fell down. The Friedmans and the Rosenberg children maintained that they didn't cause the mishap.

In the end, an accident that occurred in seconds took three weeks to sort out before a jury in November, 1984. The verdict: $2.5 million for Sylvia, mostly to cover medical care. Turco was ordered to pay 80 percent, Sears 20 percent. The neighbors were cleared. To avoid a long and costly appeal process, the companies chose to settle the matter last summer by paying the Ashwals $1.35 million—a third going to attorney Queller.

Suit over backyard injury shocked the Friedmans

The defendants regard the ordeal as Exhibit A of modern-day litigation run amok. Friedman, who worried about losing his home if a verdict exceeded his $100,000 insurance policy, says, "I now carry a $10 million policy. I don't take chances any more."

James Lysaught, attorney for the Rosenbergs, says they had to endure "the horror of the incident and the horror of being sued."

Harold Berel, Turco's lawyer, believes the many years it took to bring the case to trial made jurors sympathetic to the injured plaintiff. As for Sears: "It was an outrageous verdict," says attorney Suzanne Hyer.

by Dan Collins

that the defoliant Agent Orange had caused birth defects in their children. Chemical firms agreed to pay $180 million even though the judge noted that there was no conclusive evidence that the chemical was responsible.

Others are found at fault, in effect, just for being in a particular line of business. In Michigan, for example, 16 drug firms have agreed to share in payments to 240 women who suffered abnormalities because their mothers took a drug called DES years earlier. Too much time had elapsed to determine which firm made the DES taken by any individual, so all the companies were dragged in. "The plaintiff can sue the bunch, and it's up to them to prove they weren't involved," says Detroit lawyer Charles Nichols.

Workers in chemical plants are winning claims based solely on the fact that the risk of becoming ill has increased. Employes of firms where asbestos was prevalent have won cases alleging that their chances of contracting serious lung ailments are much greater, even if they do not suffer now. Some lawsuits charge that the fear of becoming ill is so terrifying that recompense is warranted.

A statute aimed at organized crime—called the Racketeer Influenced and Corrupt Organization Act, or RICO—provided litigation fodder when lawyers discovered its language is so broad that suits can be filed against just about any corporation if they claim a pattern of illegal activity such as fraud. Triple damages are authorized—a payoff that has encouraged thousands of claimants to march into court. Few judgments have yet been awarded, but suits are pending against such firms as Shearson Lehman Brothers and Price Waterhouse.

Personal-injury lawyers also are adept at finding "deep pockets" with resources to pay big judgments. With a campaign against drunk driving gathering steam, the number of cases being pursued against bars and restaurants over damage caused by intoxicated patrons has gone up 300 percent in the last year, reports Massachusetts lawyer Ronald Beitman. Laws in 35 states hold liquor purveyors liable for such injuries. Last year, insurers of a Clarkston, Mich., café agreed on a $1 million settlement to families of three teenagers killed in an auto accident with a café patron. Noting that insurance costs have tripled in the last year, café owner Don Hayes says he now cites the case when refusing drinks to tipsy customers.

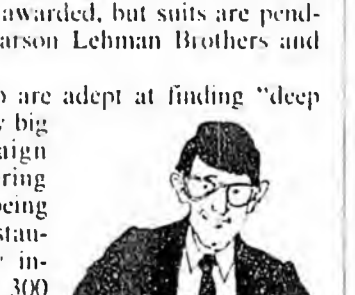
Supreme courts in Iowa and New Jersey have gone a step further by holding private hosts liable for injuries caused by guests, and the Michigan Supreme Court held a bar responsible for a patron's death in a car crash.

High crime rates have spawned suits by victims against hotels, apartment landlords and stores blamed for providing inadequate security. Spurred by the $1.5 million award that singer nie Francis won from a motel where she was raped, sec cases are so widespread that they produced more than million in damages in the last three years, reports Vir lawyer Frank Carrington.

Whenever new concerns develop in society, they us end up in court. The latest example is AIDS. An al lover of the late actor Rock Hudson has sued his esta the ground that Hudson failed to disclose that he ha deadly disease. Suits also have been brought against pe for spreading herpes and other infectious ailments.

Another rapidly expanding tactic is to go beyond pensation for actual harm—such as payment for me bills and missed work—and to demand damages for tional distress. States for years have allowed money aw

Agent Orang



Before you file suit . . .

Another motorist hits your car, sending your child against the windshield. The bill for medical care: $6,500. Your lawyer promises a hefty recovery, but discussions with the other party's insurance representative go nowhere. You're tempted to go to court, but your child may be in college before you recover a penny. Then, too, because of legal costs involved, it often does not pay to pursue in court a claim of less than $10,000. Just what are the alternatives?

In 22 states, no-fault auto insurance eliminates most auto-injury litigation and provides more compensation faster. In 16 states, your case, as well as other civil disputes in which damages are under $15,000-$25,000, probably would go to an arbitration proceeding with your right to trial preserved if you didn't accept the award.

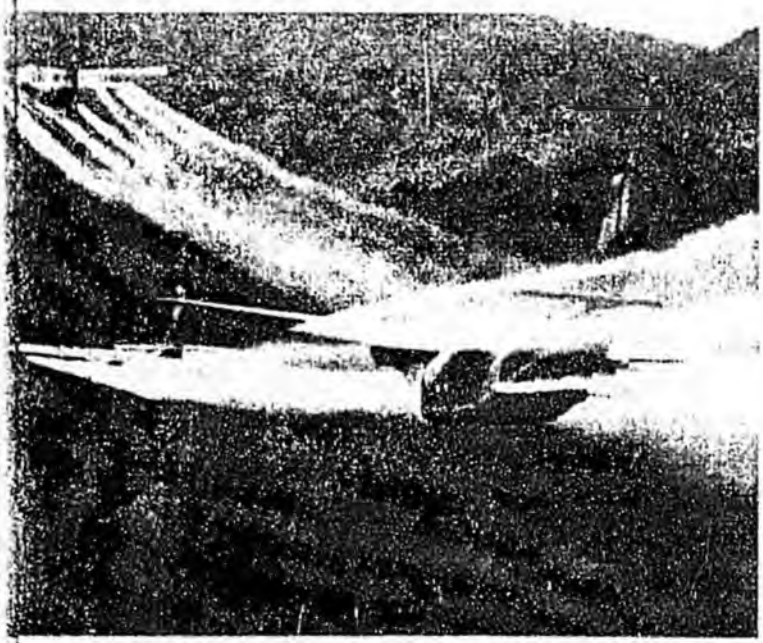
If the other driver were uninsured, your policy might call for a hearing by the American Arbitration Association. The group also promotes mediation of auto-injury disputes and reports settlements in 90 percent of such cases. In other states, such as Illinois, court-appointed mediators steer both sides toward a settlement.

Private firms, such as EnDispute of Washington, D.C., offer another option. For a $200-to-$425 fee per party, the company will help arrange a private, voluntary settlement conference before a neutral adjudicator, usually a retired judge. Federal District Court Judge Thomas Lambros of Cleveland has designed the "short jury trial"—copied elsewhere—featuring a half-day trial before six jurors, who hear arguments from both sides with no live testimony by witnesses. Most parties settle on the basis of the jury's advice.

If you get sued . . .

As often as not, people are caught by surprise when a liability suit hits. Some guidelines for action:

- Call your insurance agent immediately, since your auto or home coverage is your first line of defense.
- Don't talk to the plaintiff's lawyer. You could make a mission damaging to your Report any contacts by th er side to your insurer.
- Keep any notes or p that you may have taken time of the incident leadi the suit. If it was an auto dent, get as much inform as you can about the d and cars.
- If you have no insuran your insurance does not the matter for which you a ing sued, you need to find own lawyer. Ask friends a sociates for their recomm tions and interview your spective lawyer, discu



Vietnam and prompted lawsuits against chemical makers

for "pain and suffering," a term encompassing a victim's anguish that is not reflected in a doctor's bill.

Now, it is common for lawsuits to make claims for mental harm resulting from a mishap even if the plaintiff was not injured. Family members are suing over the trauma of witnessing an accident in which a loved one was killed or injured. The Ohio Supreme Court ruled that a claimant need not even be at the scene. Suffering distress over a family member's fate may be enough to sue those responsible.

A change of attitudes in society

Why do new theories win such support? One reason is that Americans have become more insistent on finding remedies whenever anything goes wrong. "People want to get back at whoever they perceive is the cause of injustice," says Bruce Wackowski of the Research Institute of America.

In years past, people tended to resolve disputes informally, whether the argument was with the corner dry cleaner or the family doctor. In today's more complex and more mobile society, there are more demands that the law settle disputes in all facets of life. Big damage awards and new remedies create fresh demands. "At the end of the process, what people come to expect is a higher level of justice—social justice, life justice," says Prof. Lawrence Friedman of Stanford University Law School in a new book, *Total Justice.*

In situations where many used to accept adversity, the first move now is to call a lawyer. Legal help is easier to get these days than ever. With an explosion of the lawyer population has come a scramble for business that often includes newspaper and broadcast advertisements or mail solicitations. Also, notes Professor Schwartz of UCLA, "the ability of plaintiffs' lawyers to prove their cases has greatly improved, and in mass injury cases they have learned how to collaborate."

Leading the campaign for expanded liability concepts is the Association of Trial Lawyers of America, a Washington-based organization of 60,000 attorneys for plaintiffs. The group helps lawyers exchange tips on promising subjects of lawsuits and techniques to win them. A convention the group is holding in late January features such programs as "the expanding responsibility of hospitals" and "enforcing landlord's duty to protect tenants from crime."

The largest legal group, the American Bar Association, also supports the way courts handle personal-injury suits. An ABA committee last year praised the "resilience" of the law in responding to social change, a development credited in part to "imaginative lawyering."

To critics, some of this innovation is reaching absurd proportions. They cite a suit by a California tree trimmer who charged that eating Hostess cupcakes and similar products had given him "toxic-junk syndrome." A Pennsylvania mother whose baby choked on peanut butter alleged that the makers should have warned of the danger to infants.

Legal scholars note that what may seem farfetched now may be routinely accepted later. "A black's

your case and the fees. Lawyers typically charge $50 to $150 an hour to defend personal-injury cases. If the case goes to trial, expect to pay upward of $10,000.

An ounce of prevention, however, can save you a fortune. For example:

- Consider buying "umbrella" liability insurance that would kick in after your auto or homeowner's policy limits have been reached. Such coverage is relatively inexpensive—$80-$120 annually for a million-dollar policy—and covers both home and auto-related incidents.
- Use vigilance and common sense. Inspect your property for hazards. If your child invites friends over, you're responsible for their safety. If you serve cocktails to guests, you could be liable if they drive drunk and have an accident. And keep your animals under control. The "one free bite" allowed by law in many states is fading fast.

Take a bureaucrat to court

Gloomy reports of government red ink haven't stopped many people from viewing the bureaucracy as a rich target. Here are three recent cases.

- A disabled weather buoy off Massachusetts failed to send a storm warning. A judge ordered the U.S. to pay $1.2 million to families of fishermen lost in the maelstrom.
- Police in Torrington, Conn., didn't step in to prevent an estranged husband from beating his wife. She sued the city and won nearly 2 million dollars.
- A speeder in Antioch, Calif., hit a light polo. An injured rider argued that the pole should have broken on impact and won a $400,000 settlement.

A key reason for the trend is a series of court rulings and laws reducing immunity from suits that government long has enjoyed. As a result, states and cities face huge insurance-premium increases. Oak Park, Ill., schools now pay $24,303 annually, four times the price two years ago. Plymouth, Calif., closed its swimming pool and fired its two-person police force for fear of lawsuits.

In the face of premium hikes as high as 1,100 percent, 32 California cities now insure themselves. Cities in nine states have organized insurance pools to share the risk.

At the federal level, claims against agencies total $277 billion, including thousands of cases of World War II shipyard workers exposed to asbestos.

Liability insurance bills

Typical annual premiums—

- Big Eight accounting firm in New York, $5 million
- Wisconsin dairy, $1.5 million
- Illinois bank, $1 million
- California law firm, $700,000
- Georgia engineer, $24,000
- Maryland surgeon, $17,000
- Pennsylvania auto-body shop, $13,000

charge in 1950 that segregated schools were unconstitutional would have been considered frivolous," remarks Prof. Ronald Allen of Northwestern University Law School. Others point to the asbestos cases, regarded as questionable when they were first filed two decades ago. Now, they are threatening the financial health of major corporations.

Lawyer Melvin Belli has earned fame in injury cases

In the jaws of a money machine?

Defendants are quick to scoff at any notion that a higher justice is being served by the liability crunch. They see themselves as victims of a system geared more to encourage giant verdicts than to weigh fault. The public seems to agree. A new Roper survey found that nearly half of Americans believe that courts tilt toward injured persons. About one third believe the system is fair to both sides. Only 5 percent say defendants have the edge.

Most businesses and professionals insist they will compensate persons they harm. But they assail unpredictable behavior of judges and juries, and a costly and time-consuming legal system that may force them to settle cases even when blameless—driving up insurance rates.

At dozens of White House conferences around the nation on small business, liability has emerged as "just about the biggest issue," reports coordinator Robert Leitao. In Willard, Ohio, Glen Ward was forced to run his Thundering Wheels Skating Arena "bare" after his insurance expired in December. Although Ward has never been sued, the lowest rate he could obtain was for $17,000, more than seven times his old price. In Des Moines, Iowa, Dwayne Van Oort reports that profits in his Northwest Erection Services construction business have been "wiped out" by a $250,000 increase in insurance premiums. Van Oort is tacking 5 percent onto current bids to cover the added costs. "Liability insurance is not a luxury item but a necessary expense," says Frank Swain of the Small Business Administration, who predicts that some firms will reduce payrolls or limit expansion to pay the bill.

Are these big bills warranted? Many consumer advocates contend that they are not. "It's a staggering ripoff," says consumer activist Nader, who insists that when items such as capital gains and tax credits are factored in, the industry made a $5 billion profit in 1985, a year in which insurance stocks rose by more than 50 percent.

Insurers declare that the increases are justified, pointing out that property and casualty firms reported record pretax operating losses of $5.5 billion last year. The industry is in "rather fragile financial condition," contends Mavis Walters of the Insurance Services Office.

To keep big verdicts from driving rates still higher, defendants are fighting lawsuits with a variety of tactics, chief among them an aggressive stance in court. For example, a Tennessee judge and a California jury were convinced that cigarette makers were not to be held accountable for smokers' illnesses.

Losers often appeal and get big verdicts tossed out. A Yale University study found that U.S. appeals judges void lower-court judgments in nearly half the cases. Over all, reversals do away with 51 percent of verdicts favoring plaintiffs but only 20 percent of defendants' verdicts.

Another tactic is to sue insurers for "bad faith" in jacking up premiums or refusing to pay claims. In one such case, insurers wouldn't pay off after a fire at the MGM Grand in Las Vegas killed 87 and injured hundreds. The hotel and victims recovered $76 million in a settlement.

More businesses and professionals are forming their own "captive" insurance companies. Nurse-midwives, whose underwriters abandoned them, will open one such firm in April. A consortium of 33 corporations, including IBM, General Electric and Shell Oil, is doing likewise. But success is not guaranteed. Some "bedpan mutuals" created by doctors in a malpractice crisis a decade ago are now close to insolvency.

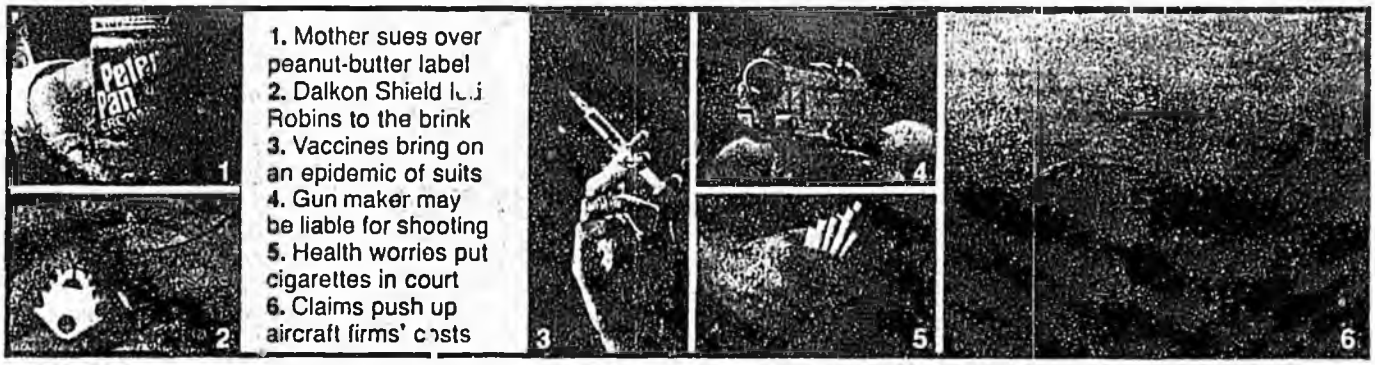
The search for solutions

When insurers, businesses and professionals aren't litigating, they are lobbying. They have massed to storm Congress and statehouses, seeking an array of changes in the law.

Capitol Hill debate centers on a plan to set national rules for product suits. A Senate panel deadlocked over the bill last year after trial lawyers opposed it. A new version stands a better chance. It gives victims the option of collecting damages out of court without proving a firm at fault and is backed by consumer groups who say the first bill favored business.

Most of the furor is erupting in the states. Says Colorado

Targets of legal opportunity



1. Mother sues over peanut-butter label
2. Dalkon Shield led Robins to the brink
3. Vaccines bring on an epidemic of suits
4. Gun maker may be liable for shooting
5. Health worries put cigarettes in court
6. Claims push up aircraft firms' costs

Senate President Ted Strickland. "It affects every walk of life."

Among remedies being considered by states are ceilings on jury awards and fees of plaintiffs' lawyers. The U.S. Supreme Court upheld California laws dating from the 1970s. The Court affirmed a limit of $250,000 on damages in malpractice cases for anything beyond out-of-pocket expenses, as well as limits on legal fees. Montana limited "punitive" damages—assessments by juries to punish defendants for wrongful acts and to serve as deterrents. Other reforms under study:

- Calculating interest on damages from the day a case is filed to discourage defendants from stalling.
- Forcing losers of cases that judges consider weak to pay the winner's legal fees and court costs.
- Fining those who pursue frivolous cases. The Supreme Court ordered an Indiana lawyer to pay a $500 penalty for backing a worker's challenge of salary withholding for taxes.
- Stopping payments for medical care when a victim dies. A Virginia doctor is appealing a $2.5 million award for the care of a brain-damaged girl who died a month after the verdict.

Insurance practices may also be overhauled. Some states will regulate insurers more carefully to keep rates sound.

Interest groups are increasing their activities. Insurers have helped set up "civil-justice reform" drives in a dozen states to build support for new laws, and a coalition of groups hardest hit by lawsuits announced a national campaign on January 16. Defendants are expecting help from the Reagan administration, where Atty. Gen. Edwin Meese has named a panel that is likely to offer proposals this year that coincide with many being circulated by business owners.

Lawyers, who have the most to lose from changes in the legal system, are becoming more involved, too. They fear that the increasing number of "horror stories" about big verdicts and canceled insurance may turn the tide against them. To counter anecdotes suggesting never ending liability, lawyers cite a new study for the American Insurance Association showing that overall costs in personal-injury cases over the last 50 years have risen at about the same rate as workers'-compensation payments and health-care costs and less than half as fast as Social Security.

Despite such moves, no one expects quick solutions to a crisis that took decades to build. In the meantime, juries will continue issuing verdicts that make millionaires of some Americans while sending others into bankruptcy. ■

by Ted Gest and Clemens P. Work with the magazine's domestic bureaus

Should lawyers' contingency fees be limited?

PRO

Interview with Grant DuBois, chairman, National Coalition for Litigation Cost Containment

Q Mr. DuBois, why limit the contingency fees that lawyers receive in liability suits?

Contingency fees, which can amount to 40 percent or more of the money awarded to plaintiffs, are principally responsible for the explosion of huge verdicts and the logjam in our courts. The principle of strict liability allows lawyers to collect hundreds of thousands of dollars for what often amounts to very little work.

We run the risk of creating an insuranceless society because the threat of liability suits has caused insurers either to drop coverage or charge sky-high rates.

Q What reforms is your group proposing?

One example is a California law on medical malpractice, recently upheld by the U.S. Supreme Court. The statute provides a scale of maximum fees a lawyer can collect—40 percent of the first $50,000, 33 percent of the next $50,000, and so on.

Q Would lawyers refuse to take cases if fees were limited?

Some would, but the oversupply of lawyers assures that someone would take the case. If there is a reluctance, it might be a sign to the plaintiff that the case does not have sufficient merit.

Q Aren't chances for limiting lawyer fees rather slim?

Reform won't be easy, but the public has finally awakened—thanks to the publicity surrounding such developments as U.S. lawyers traveling to India in search of big fees in the Bhopal case.

CON

Interview with Peter Perlman, president, the Association of Trial Lawyers of America

Q Mr. Perlman, why do you oppose limiting the amount of fees that lawyers can earn in damage suits?

The contingency fee is the victim's key to the courthouse. It allows the person suffering from a tragedy to get a lawyer with the same abilities as the well-paid attorneys who represent the wrongdoer—often a rich and powerful corporation or special-interest group. Some cases require much expense and preparation. When you consider the chance of losing, in which case the lawyer gets nothing, the one-third contingency fee is most reasonable.

Q Why not go to a system, as in California, where the lawyer's percentage of the money awarded a victim decreases as the amount gets larger?

It denies severely injured people the right to the most effective counsel. It is not the victim who complains about contingency fees; it's the wrongdoer and insurance companies. Victims see the system as fair.

Q Haven't aggressive trial lawyers forced insurers to cancel coverage and raise rates tremendously?

That's absolutely incorrect. The so-called insurance crisis can be traced primarily to the drop in interest rates, which limits the investment income of insurance firms. There was no claim of a crisis in the late 1970s, when interest rates were high. Insurers were reducing their premiums to get a bigger market share. Rather than basing premiums on expected losses, they based them on expected investment return, and now that's come back to haunt them.

The open season on insurance companies in courtrooms all over the country has gone on so long that the insurers can no longer afford to play. Are you ready for . . .

A world without insurance?

By Jill Andresky with Mary Kuntz and Barbara Kallen

A 41-YEAR-OLD bodybuilder entered a footrace with a refrigerator strapped to his back to prove his prowess. During the race, he alleged, one of the straps came loose and the man was hurt. He sued everyone in sight, including the maker of the strap. Jury award: $1 million.

Two Maryland men decided to dry their hot-air balloon in a commercial laundry dryer. The dryer exploded, injuring them. They won $885,000 in damages from American Laundry Machinery, which manufactured the dryer.

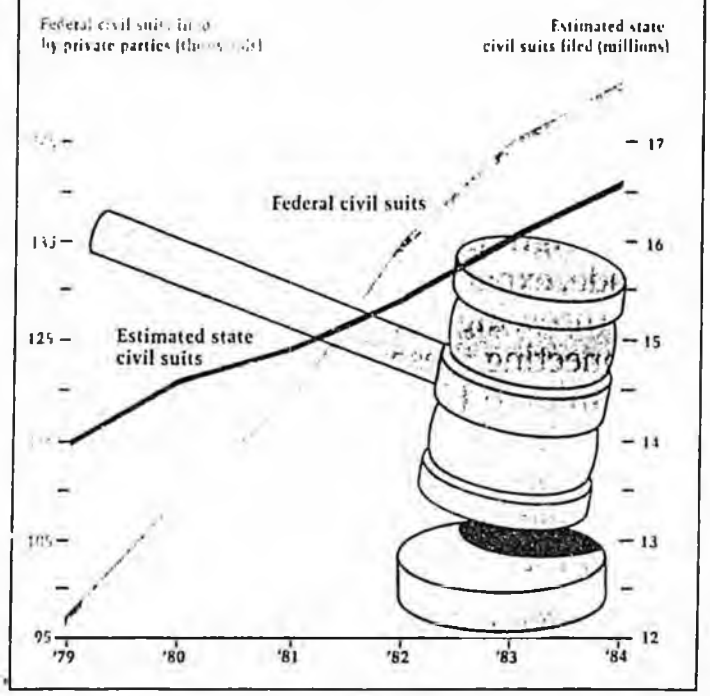
An overweight man with a history of coronary disease suffered a heart attack while trying to start a Sears lawnmower. He sued Sears, charging that too much force was required to yank the mower's pull rope. A jury in Pennsylvania awarded him $1.2 million, plus damages of $550,000 for delays in settling the claim. (Sears appealed but eventually settled out of court.)

Isolated cases of absurdly generous awards? Far from it. Last year the average product liability award in the U.S. was $1.07 million—up from $345,000 ten years earlier—and the average medical malpractice award was $950,000. In 1983 alone 360 personal-injury cases were settled with million-dollar awards or more, an incredible 13 times the number in 1975.

Americans now seem to look on a civil suit against a corporation or municipality as a kind of lottery—a lottery to be played whenever they can. Last year there was 1 private civil lawsuit filed for every 15 Americans. An estimated 16.6 million private civil suits were tried in state courts last year. Another 150,000 private civil suits were tried in federal courts, which is nearly twice the number ten years ago.

The litigation burden

There was 1 private civil lawsuit last year for every 15 Americans. And the beat goes on: Federal civil filings by private parties are up 50% since 1979, while state filings are up 20%.



Just handling the paperwork probably cost taxpayers over $360 million on all these actions last year. It cost insurance companies far more. In 1984 the property and casualty insurance industry as a whole paid out $116.10 for every $100 received in premiums—the worst numbers since the San Francisco earthquake and fire. Reinsurers, who take the brunt of the unpredictable risks, paid out nearly $141 for every $100 in premium income.

No industry can keep that up for long. "It's impossible for insurance companies to price liability products when they have no idea what the settlements and risks are going to be," says David O'Leary, a Hartford-based insurance analyst with the London brokerage firm of Fox-Pitt, Kelton. "Courts have expanded the definitions of liabilities for accountants and other industries to such an extent that insurers have started saying, we don't need the business."

For example, obstetricians can now be sued for "wrongful birth" if, for instance, a sterilized woman conceives. Accountants can be sued under "third party liability" by anyone who might reasonably have relied upon numbers they audited. The list goes on and on, and why not? Insurers have been picking up the tab and covering costs in part through their investment income for so long

that the system has taken on the look of natural law.

But insurers are not in the business of losing money. Their losses have become so appalling that at this point they are either raising their rates out of sight or getting out of the business. In April, Utica Mutual Insurance informed some 229 New York State municipalities that it would not renew their policies. Transit Casualty, a large carrier for restaurants in Connecticut, canceled most of that group's liability coverage. Mutual Fire, Marine & Inland Insurance announced it would not renew the malpractice policies of about 1,300 midwives as of July 3.

"I can't get any kind of coverage for sand-and-gravel and cement companies," says David Brennan, president of the Insurance Management Center, a Manchester, Conn. agency. "I've got one client who is a distributor of frozen chickens. Last year he paid $25,000 for coverage. This year I can't get anyone to even give me a quote. It's the same thing with an insulated-wire manufacturer, a fish distributor and even a group of nuns who own real estate as investment properties."

If they are willing to pound pavements, most business people can still find insurance. But they are paying vastly more for much lower coverage. One supermarket chain, for example, saw its average rates go from $8,000 per store a year and a half ago to $40,000 per store. Florida Power & Light's premiums for general liability coverage doubled in 1984 over 1983. The coverage provided was halved, $200 million instead of $400 million.

Pricey, but at least it got protection. For industries that have been especially hard hit by lawsuits, prospects have gotten much worse. Consider Acmat Corp., a $50 million (sales) asbestos-removal firm based in East Hartford. According to the firm, Cigna notified Acmat last December that all its coverage was being canceled because of its asbestos exposure. When Acmat protested, Cigna agreed to renew—so long as Acmat pulled out of the asbestos-removal business entirely. Acmat agreed, even though it meant "cutting our revenues in half overnight," says Henry Nozko Jr., executive vice president. But even that drastic measure failed to satisfy Cigna, which canceled the company's account on Apr. 1.

Nozko approached over 30 carriers, including Lloyd's of London. All turned him down. Finally, he convinced Great American Surplus Lines and three other firms to give him coverage. The price, assuming last year's volume of business: $6 million to buy $6 million of general liability coverage, including only $1 million of asbestos protection. That compares with $300,000 last year for $10 million of coverage. Why didn't he just bank that $6 million instead? "The policy gives us a worthless amount of protection, but we couldn't bid on public jobs without it," says Nozko.

A note on retributive justice: Now that legal-malpractice suits are becoming trendy, even lawyers are having a tough time finding coverage. Reuben & Proctor, an 80-member Chicago law firm, lost its coverage on July 1 from Crum & Forster's International Insurance.

The flight of insurers and reinsurers is most visible where the risks of winding up in a courtroom are great—both gradual and sudden-and-accidental pollution, directors' liability, municipal liability, medical malpractice and accountants' malpractice. "Our agent notified us a couple of months ago that everybody in our business was being canceled," says Irwin Singer, president of Atlas Oil Co., a fuel distributor. "They didn't care how good our safety record was. In fact, the very company that canceled our coverage complimented us on it."

In some cases, the retreat can be gradual. "Our normal general liability policy used to exclude all pollution, unless it was sudden and accidental," says Chuck Henry, a second vice president at Travelers. "Then the courts started saying in some cases that if the insured did not intend to cause damage, it was 'sudden and accidental'—even if it took years for the stuff to seep out." Now Travelers completely excludes pollution coverage on its general liability policy and will underwrite environmental hazard coverage only at restricted levels and only for customers who also buy Travelers' general liability policy.

Even such restrictions aren't enough for some insurers. Since the beginning of the year frightened insurers have been pulling out of property and casualty lines like the British army at Dunkirk.

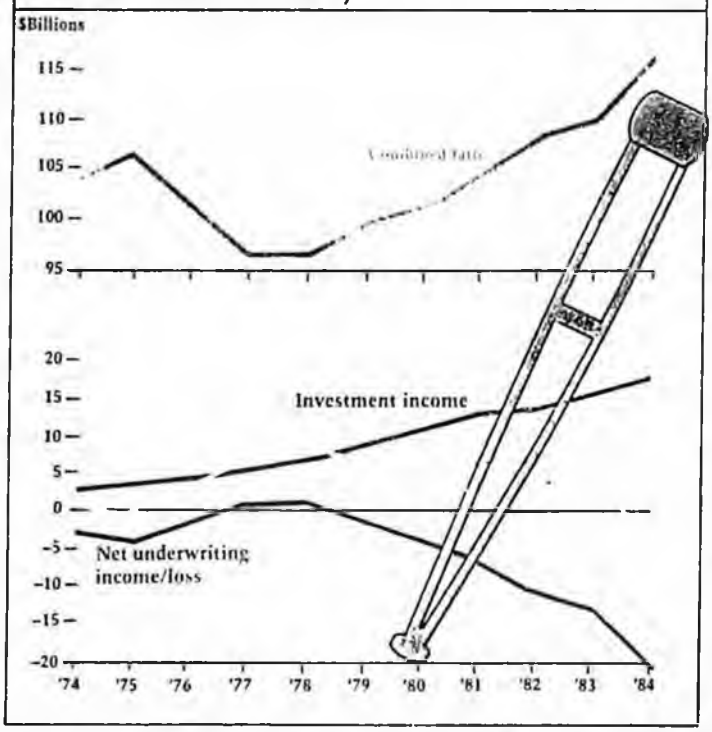
Property and casualty insurance has always been a boom and bust business, but the bust has never been this bad. Blame part of it on greed. After five years of cash-flow underwriting—that is, pricing products at a loss in underwriting terms in order to bring in extra dollars to invest at once-tempting interest rates—the industry has hit rock bottom. Last year it recorded a pretax loss of $3.8 billion.

Face it: There's no way that the insurance industry can fully recover from its current downswing until Congress—or state legislatures—step in and impose order on our self-destructive legal system. Pennsylvania has already made a start with legislation that curbs pain and suffering awards from municipalities. But it's only a start. Remedies in law will not become effective overnight.

In the meantime, property and casualty insurance is going to become much tougher to get, at any price. For example, insurance agent David Brennan expects that by September none of

A road to disaster?

For 8 of the last 11 years, property and casualty insurers have paid out more than they have gotten in premium income. Investment income had offset that worsening combined ratio until last year.



13 insurers he does business with will be willing to write new commercial policies for anyone.

Companies will have to scramble for any type of coverage they can find. By far the most common strategy is to accept limits on coverage—higher deductibles lower protection levels and, increasingly, exclusions for items such as legal defense costs and pollution liability. "We're paying more than double what we used to pay and we still haven't been able to replace all the coverage we lost," says Singer of Atlas Oil Co.

Insurers have also started pushing "claims-made" policies, which pay off only those claims filed during the policy term. Supporters of these insurance straitjackets argue that they will help insurers define their legal risks better and thus enable them to keep selling their products. But many are dubious. "Claims-made policies just postpone the problem," says Jon Harkavy, director of governmental affairs at the Risk and Insurance Management Society.

The last resort, of course, is self-insurance, either setting up a reserve fund to cover uninsured costs or, more commonly, paying them out of operating expenses. "Corporations of our size can afford to self-insure up to certain levels," says General Foods' risk manager Peter McDonough. "But that's not going to solve any of the major problems with the system."

Some companies are again setting up insurance captives, as they did in the mid-1970s. But captives are not very attractive from a tax standpoint (FORBES, *Nov. 19, 1984*), and they are risky to boot. Says O'Leary of Fox-Pitt, Kelton: "Many companies that set up captives ended up losing so much money that they have for the most part withdrawn."

But some see self-insurance as a curb on litigation. "I hope we're moving to the age of self-insurance," says Irving S. Shapiro, former chairman of E.I. Du Pont and now a partner at Skadden, Arps. "Once lawyers realize they're suing a defendant who doesn't have an insurance firm with deep pockets beyond them, they'll sue somebody else." Unless, perhaps, the company is as big as Du Pont.

For companies that aren't as big as Du Pont—and even for some that are—self-insurance today carries the risk of being pushed into Chapter 11 tomorrow. Shapiro's solution: a federal disaster-insurance fund for corporations, similar to the federal flood-insurance program. But wouldn't such a pot of gold be even juicier bait for plaintiffs' lawyers?

Marsh & McLennan is testing its own version of disaster relief—a stock insurance company for big firms known as ACE, for American Casualty Excess Insurance. ACE will provide the final $100 million in coverage—excess of at least $100 million in self-insurance or policies. Eleven firms have jumped at the opportunity to join up—but that's out of the reach of many companies.

Industry insurance pools are popular with utilities, lawyers, accountants, fuel distributors and others. Of course, the exposure for any insurer of a single high-risk industry is enormous, even when only claims-made policies are sold. So some companies, instead, try to spread their risk by setting up multi-industry insurance pools. Result: High-risk companies, again, are out of luck.

The fact is, the problem cannot be dealt with solely from the insurance side of the equation. It must be approached from the legal side. So long as judges keep expanding the definition of liability and juries keep handing out astronomically high awards, the chilling prospect of a world without insurance draws ever closer.

One simple but unpopular solution would be to prohibit—or at least severely limit—the contingency fee system that encourages lawyers to seek the highest possible damages. "You don't see any other country having the kind of insurance problems that we have, because none of them have the kind of jury awards or contingency system we've got," says James Corcoran, New York State's superintendent for insurance.

But there are problems with such a move. "We may be the only country that really has a contingency fee system," says F. Lee Bailey, a member of the three-lawyer consortium representing the Bhopal victims. "On the other hand, in most of the world, poor people go without any relief."

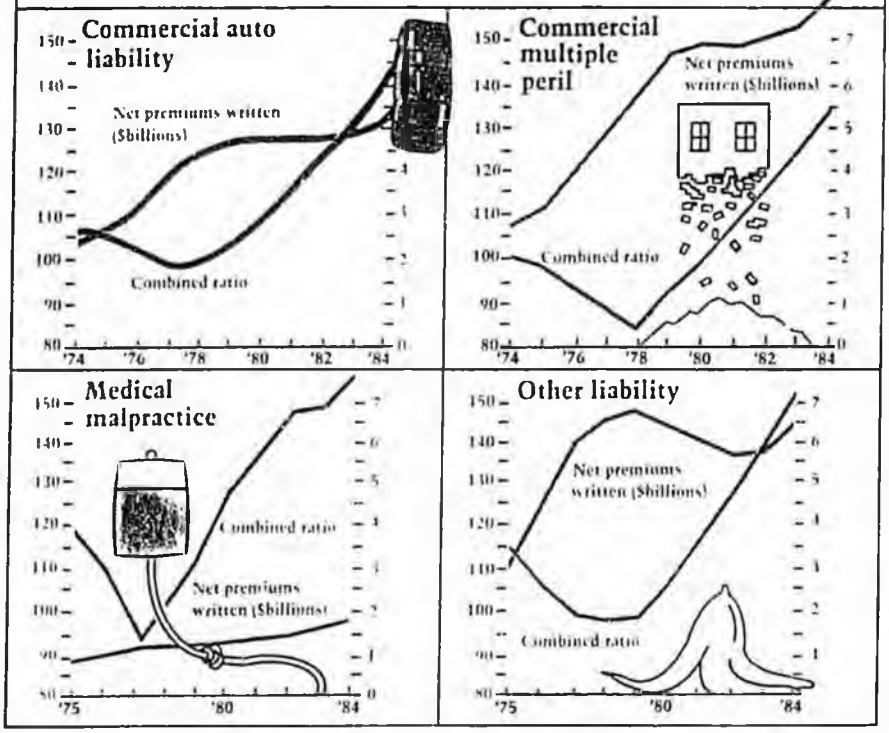
In the long run, maybe the only practical solution is legislative action to define liabilities and cap them at a fair and reasonable level. In New York, where obstetricians and neurosurgeons are turning away patients because of high malpractice insurance rates and where municipalities are scrambling for coverage, legislators have debated bills that attempt to cap liabilities for doctors and municipalities. Congress has contemplated a proposal by Senator Robert Kasten (R–Wis.) that would put a limit on corporate liabilities.

No longer do we have the luxury of pretending that the monster we have created will just go away.

It won't. ■

Losing propositions

In four big commercial liability lines, insurers paid out from $135 to $160 for every $100 of premium income taken in last year—a trend that has worsened steadily since 1978.



TRB

FROM WASHINGTON

THE TORT EXPLOSION

A court in Kansas has awarded ten million dollars, including eight million dollars in punitive damages, to a man who got polio after his daughter took the Sabin oral polio vaccine. A jury ruled that it is "outrageous" to sell the Sabin vaccine when the Salk vaccine is safer. The Salk vaccine *is* safer, in that the Sabin is a live virus that causes about four polio cases a year out of 24 million doses. On the other hand, the Sabin is more effective. Ten or 20 Americans a year get polio now, compared to several thousand a year during the Salk era. That, among other reasons, is why it is official U.S. policy to prefer the Sabin vaccine. But if this case becomes a precedent, no one will make the Sabin vaccine and that policy will be overruled.

When people fret about unelected judges making important social policy, they usually have in mind the Supreme Court's rulings about the Constitution. But another kind of judicial activism is coming to have an equal or greater effect on life in America. That is the explosion in tort law, set off primarily by state courts. Fear of lawsuits and inability to get insurance are affecting drug companies, municipalities, corporate directors, doctors, rock concert promoters, and others as surely as if the government had issued new laws or regulations. Many of these new judge-made regulations are ones no sane government would ever consider.

A Supreme Court ruling can take effect almost overnight. Tort law, by contrast, operates on a long fuse. A new development can take a couple of decades to percolate through the legal system, drive up insurance rates, and begin to affect everyday life. Little-remarked decisions of the past two decades are only now coming back to haunt us.

In one sense, the coming tort crisis is just another example of the paradigmatic problem of modern American government: our inability to take action for the general public good if it harms identifiable individuals. Trade protectionism, tax loopholes, and overgenerous entitlements are all part of the same dilemma. But courts add their own special madness. They blithely set policy on complex subjects about which they have no expertise. They are insititutionally inclined to focus on the costs of whatever behavior they have under scrutiny, without regard to the benefits.

Under our federal system, the same policy issue can be litigated again and again across the land, with similar or opposite results. However, since the plaintiffs tend to be local and the defendants from out-of-state, there is an inevitable tendency to follow the lead of whatever state has been most aggressive in finding liability.

The idea of tort law is that if my misbehavior causes you harm, I should pay you money to make up for it. Trial lawyers have worked wonders to overcome all these tiresome limitations—fault, causation, harm, damages—in recent years. Punitive damages—payments beyond all compensation for actual loss—used to be reserved for virtually criminal conduct. Now they are almost routine, and can be assessed again and again when a product or incident leads to multiple lawsuits. Courts have become far more imaginative in their definitions of actual harm as well, awarding large sums for emotional distress, fear of getting cancer (as opposed to actually getting cancer), and so on. Where it's impossible to know whether the defendant's activity actually caused the plaintiff's harm—did the victim get cancer from living downwind of a nuclear testing site, or just from living?—courts have held that the defendant must prove it *isn't* responsible, which is impossible.

But the biggest advances have been made in dispensing with the notion that you must have done something wrong in order to be held liable. No human endeavor is risk-free. If you can't plausibly be accused of failing to eliminate all risk, you can be accused of "failure to warn" of the risk that remains.

The first successful suit against the Sabin vaccine, in 1968, turned on the manufacturer's failure to warn recipients of the infinitesimal chance of catch-

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TRB, *from page 4*

ing polio from it—as if this would lead any rational person to expose his children to the far greater risk of catching polio from *not* taking it.

More and more, though, any pretense of finding fault is abandoned and manufacturers of inevitably risky products are held "strictly liable" for any harm that comes from them. The theory is that they will absorb the cost and spread it around to all users. Whatever the theory, it is no defense that your product or activity is approved by the government agency that supervises such things. A chemical company recently was held liable for "mislabeling" a can of paraquat poison, even though the wording was not merely permitted but actually required by the Environmental Protection Agency.

In real life, any theory will do as long as it gets the case to the jury, whose natural sympathies will usually produce a large judgment without much concern for the legal technicalities. Fear of juries leads defendants to settle suits, whatever their merits. High settlements lead to skyrocketing insurance rates. And soon so much cost is being absorbed that the activity in question, be it practicing gynecology or manufacturing a vaccine or being on the city council, is no longer economically practicable.

Members of the Reagan administration who are alarmed about this trend regard it resentfully as backdoor government activism. In an era when new regulatory agencies and new social welfare programs don't have a prayer through normal democratic channels, they see liberal judges and greedy lawyers conjuring up vast schemes for income redistribution and controls on business through the courts. The "tax" that pays for these new programs is huge, but hidden ($12 for a dose of diphtheria vaccine that cost 15 cents a few years ago), so there is little political resistance. But they fear that the government often will end up footing the bill anyway, by interposing itself between some vital activity and a tort system gone wild. In 1976, for example, the government indemnified all manufacturers of swine flu vaccine. Otherwise, no one was willing to make it.

The irony is that the Reaganites are trapped here by their own dogmatism. The obvious solution to the problem of state courts competing against one another with ever-wackier theories of tort liability is national legislation setting sensible rules and exempting activities that meet federal standards from the risk of lawsuits. But overruling state law in this way would violate the axiomatic Reaganite belief in "federalism," while enhancing the power of national regulatory agencies would violate a related taboo. So the Reagan administration supports tort reform, so long as it *doesn't* mandate a uniform national standard.

Meanwhile, the fact that conservatives are alarmed by the tort explosion is no reason that liberals shouldn't be. As it now operates, tort law is more like a lottery than a rational and humane system of justice. Yes, some sufferers receive the balm of money. But people with the identical grievance collect radically different amounts, ranging from nothing if they don't sue (as many don't) to millions if they hit the jackpot with punitive damages. What you can collect depends on all sorts of arbitrary factors such as where you live, the size of the defendant, what judge you get, how much publicity there's been, and so on. It also depends a lot on factors like the amount of your lost earnings and the size of your medical bills. This means that affluent people—who are more likely to sue in the first place—collect more than poor people for the same grievance. Above all, collecting from the tort system depends on having someone to sue. If you just get cancer for no apparent reason, you're out of luck.

Anyway, most of the redistribution in tort law is from everyone else to the lawyers. In all the current litigation over asbestos, for example, the average cost per claim has been $101,000. Of that, $37,000 has gone to the defendant's lawyers, $25,000 to the plaintiff's lawyers, and $39,000 is left for the plaintiff. These numbers are typical. Studies of different aspects of the tort system always show that lawyers get over half the money.

Worst of all, from the liberal point of view, the tort system teaches a cramped lesson about justice and injustice. Most of the suffering in our society—dreadful diseases, loss of employment, simple poverty, whatever—is part of everyday life, not the result of specific actions that disrupt everyday life. Relief of suffering needn't depend on finding someone to blame. The instinct that says it's wrong for people to suffer unnecessarily should be directed into politics, not into lawsuits.

Lucrative contingent fees for attorneys and increasingly expansive court rulings on legal liability have combined to harm not only insurance companies, but all who purchase and depend on liability insurance.

A Lawyer Looks at Liability Law

BY JAMES G. FRIERSON

Consider the following. A restaurant's $25,000 liability insurance premium jumps to $80,000 in one year. A neurosurgeon in New York pays $101,000 in annual malpractice premiums. Twice as many liability lawsuits are filed in 1984 as were in 1978. Small child care centers go out of business due to their inability to obtain liability insurance. Huge underwriting deficits cause liability insurance companies to lose $3.8 billion dollars in 1984, their first operating loss in 78 years. American lawyers appear on TV from India within hours of the Union Carbide disaster. A U.S. Senate committee finds that product liability claims produce 77 cents in legal costs for every 66 cents that successful claimants receive.

The City of Sykesville, Md. receives a liability insurance premium increase of 700% in one year. More than 500 Ohio schools have their liability insurance canceled in 1985. The A.H. Robins Co., facing 3500 separate punitive damage claims, files for bankruptcy. Attorneys fly halfway across America to solicit the victims of a hotel collapse in Kansas City. Relatives of those killed in an airplane crash in Dallas endure the solicitation of attorneys as they attempt to identify the bodies of their loved ones.

These are but a few of the numerous examples that illustrate the legal liability disaster in America. Lucrative contingent fees for attorneys and increasingly expansive court rulings on legal liability have combined to harm not only insurance companies, but all who purchase and depend on liability insurance. Attempts to reform the system have been unsuccessful, primarily because of the political power of trial attorneys, the only group that consistently benefits from the present system.

Drastic problems call for drastic solutions. Three major changes in our legal system of liability lawsuits would go far in curing the present mess, while retaining fairness to deserving claimants. These changes would require substantial revision of the way we treat pain and suffering judgments, punitive damage awards and the payment of attorneys' fees.

Judgments for pain and suffering and for punitive damages are a major cause behind the huge increase in court judgments, as well as the extreme contradictions in the amount of money awarded in similar cases. The large amounts that may be paid under these categories cause some lawsuits to go to trial that otherwise might have been settled voluntarily. They are a major reason why attorneys' fees are so lucrative in personal injury cases.

VARIATIONS IN AWARDS

Pain and suffering awards and punitive damages often cause differences in lawsuits that make little or no sense. Recently Merrell Dow Pharmaceutical was sued in New York and California because of problems caused by an anti-cholesterol drug they distributed. The court in New York ordered punitive damages of $250,000 to be paid to the plaintiff, while the California court found that no punitive damages were justified. The facts were identical; only the courts were different.

A personal injury claim in Michigan might bring a $1 million pain and suffering award, while an identical case in Tennessee might result in a $50,000 pain and suffering award. Some plaintiffs win huge amounts based upon

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these nebulous categories, while similar plaintiffs receive absolutely nothing for pain and suffering or punitive damages. The result appears to depend upon which attorney was used, which court heard the case, which jury was selected—and pure luck.

While there have been heavily publicized cases of huge judgments, which sometimes make the plaintiff and his lawyer rich, many more unpublicized cases result in such small compensation that the plaintiff receives less than the financial losses incurred, after paying the attorney the typical one-third of the judgment, plus costs.

Most lawyers know the real reason for seeking pain and suffering and punitive damages in the typical cases: the award of these nonfinancial losses may be enough to pay the attorney's fee and costs, leaving the plaintiff full reimbursement for his real losses, including lost salary, medical expenses and property damage. However, this is a hit-or-miss method that rarely works perfectly. Plaintiffs normally win too much, or too little, for an exact reimbursement of their economic losses, after attorneys' fees and costs are paid. The examples shown in the accompanying chart are based upon actual lawsuits (attorneys' fees are assumed to be a one-third contingent fee and costs are estimated).

The last two cases shown in the chart involved almost identical fact situations, although one caused the plaintiff a net loss of $50,000, while the other produced a net gain of $182,000. It seems obvious that awarding the plaintiff all the economic losses caused by the defendant's actions, including attorney's fee and costs, would be a reasonable trade-off for no longer awarding pain and suffering and punitive damages.

AWARDS RECEIVED BY PLAINTIFFS

A Libel Case:

$6,700,000	Compensatory Damages (loss of business)
2,500,000	Punitive Damages
$9,200,000	Total
-3,066,666	Attorney's Fee
- 50,000	Costs
$6,083,334	Net Recovery; $616,666 less than the actual loss to the plaintiff

A Medical Malpractice Case:

$1,000,000	Compensatory Damages
1,000,000	Punitive Damages
$2,000,000	Total
-666,666	Attorney's Fee
- 10,000	Costs
$1,323,334	Net Recovery; $323,334 more than the actual loss to the plaintiff

A Products Liability Case:

$247,000	Lost Salary, Medical Expenses, Money Loss
50,000	Pain and Suffering Judgment
$297,000	Total
-99,000	Attorney's Fee
- 1,000	Costs
$197,000	Net Recovery; $50,000 less than the actual loss to the plaintiff

Another Products Liability Case:

$45,000	Actual Financial Loss
50,000	Pain & Suffering Judgment
250,000	Punitive Damages
$345,000	Total
-115,000	Attorney's Fee
- 3,000	Costs
$277,000	Net Recovery; $182,000 more than the actual loss to the plaintiff

ARBITRARY AWARDS

Awards for pain and suffering, by definition, are arbitrary and unreasonable. Since it is impossible to place a correct dollar figure on a specified amount of physical pain and mental suffering, it is unreasonable to do so. The law should provide for full restitution to a wronged plaintiff by full payment of all economic losses caused by the defendant, but it should not attempt the impossible, and it is impossible to decrease one's pain by the payment of money. The payment of pain and suffering damages will, at most, give the plaintiff (and his lawyer) some mental satisfaction, but this seems to be a minor benefit for such a major expenditure.

As citizens of a modern, technological society, we must all endure some pain and suffering at some time. It is simply a risk we all face. Money does not solve, or even affect, the problem. Many other countries recognize this fact, and as a result, they do not award money for pain and suffering. There is little valid reason to support America's policy of pain and suffering awards.

An even stronger argument can be made against punitive damage claims. A. with pain and suffering awards, punitive damage judgments are a major cause of the inconsistency of court judgments. They are a misguided attempt to impose society's penalty for wrongdoing in an inappropriate forum. The entire theory of assessing punitive damages in a personal, individual lawsuit is a contradiction in terms.

Punitive damages are assessed for a defendant's "outrageous conduct" or "reckless action" against society. The private plaintiff, under this concept, acts for society in claiming a penalty for the defendant's wrong. But why should a private person bring an action based upon a wrong to society? And why should this private person (and his attorney) benefit personally when a penalty is imposed?

If a person or company does an outrageous or reckless act that is a

wrong against society, the representative of society, the government, should be the one to prosecute the case, and the government should be the one to benefit financially when penalties are imposed. The penalties should not result in a windfall profit to a private plaintiff and the lawyer.

Private lawsuits allowing punitive damages also can cause the defendant to be punished many times over for the same wrongful act. After paying hundreds of claims, the A.H. Robins Co., as mentioned earlier, still faced 3500 different lawsuits claiming punitive damages. Is it really fair for a company to be punished thousands of times for the same act, such as in the Robins case where all the lawsuits involve the same defective birth control device?

European countries and four American states prohibit punitive damages. There is little or no evidence that companies and other potential defendants act any more recklessly in those jurisdictions than they do in the rest of the United States, where punitive damages are allowed.

TOWARD A JUST SOLUTION

Since pain and suffering awards and punitive damages have been used, indirectly, to pay attorneys, it would be unfair to eliminate such judgments without providing deserving plaintiffs with an alternative method to pay legal costs. The law should provide for the payment of all economic losses caused to a deserving plaintiff. The attorney's fee and legal costs are just as much economic losses caused by the defendant as are the losses of medical bills, lost salary and property damages. A successful plaintiff deserves to win and keep the amount of money necessary to pay all economic losses.

Radical changes, as long as they are fair, are the only method through which the problems can be solved.

Experience in other countries, almost all of which allow the collection of attorneys' fees, as well as experience in the United States where attorneys' fees are paid, such as in consumer law and antitrust law cases, proves that the payment of legal fees can be imposed fairly upon the defendant. If the parties cannot agree upon a fair attorney fee, the judge can serve as a referee and make the final decision. Alternatively, the law could provide that the lawyer for the winning plaintiff be entitled to a predetermined amount, such as $9 per hour. The exact amount can be based upon average time charges of attorneys, adjusted periodically for inflation.

At this point many lawyers will argue that they should be paid more than a standard fee per hour since they will collect only if they win the case as they do now with contingent fees. They will argue that contingent fees are necessary to allow people of limited financial means to afford to use an attorney in bringing a lawsuit. And they will argue that large fees, even one-third of a million-dollar judgment, are justified since the attorney takes a chance of receiving nothing if the case is lost.

These arguments have some validity. However, it is hard to justify fees as high as $333,334 or more in a single liability lawsuit. The payment of legal fees by the defendant can be arranged so that the lawyer is compensated for the risk of losing the case. We can provide that, upon successful completion of a liability lawsuit, the lawyer will be paid 150% of the normal hourly rate. A 50% premium over a lawyer's standard charges should compensate him fully for the risk of losing. After all, an

attorney usually will not accept a case unless he feels he has a reasonably good chance of winning.

Another method, often used in antitrust cases, is to allow the judge to add a multiplier based upon the difficulty of the case. For example, in a simple, obvious case the attorney might receive 120% of the standard hourly rate, while in a landmark case that created new law, the rate might be set at 200% of the hourly rate. Such a scale should provide sufficient incentive for lawyers.

Eliminating pain and suffering awards and punitive damage judgments, while adding a requirement for the payment of attorneys' fees, would have several definite advantages. First, plaintiffs would collect what they deserve in all cases. No longer would they have to hope to collect enough in pain and suffering awards or punitive damages to pay their attorneys. Second, attorneys would be compensated fairly.

Third, the opportunity to make a profit on a lawsuit by receiving huge pain and suffering or punitive damage awards would be eliminated. This would not only reduce many of the huge liability judgments, but it would also encourage plaintiffs to settle without a trial whenever insurance companies offer a fair settlement covering the plaintiff's economic losses. And finally, the reduction of huge judgments, while still treating fairly all concerned, would lead to the reduction of liability insurance premiums, thus benefiting all segments of society.

These changes, however, can be accomplished only by overcoming the opposition of trial lawyers, who have a vested interest in the present system of liability lawsuits. Changing these concepts state-by-state is an impractical goal. In addition to the problem of dealing with 50 different legislative bodies, lawyers often have great power in the state legislatures. The only practical course of action is a federal law.

Those who are familiar with the lack of success in reforming product liability law, which was to be accomplished by the so-called Kasten proposal, might doubt the ability of Congress to change the law in this area. However, the original Kasten proposal had several provisions that were validly opposed by consumer groups as well as trial lawyers. That bill would have changed the basic standard for finding liability from one of strict liability to one of negligence, resulting in many valid claims not being paid. Other provisions of that proposal would have seriously limited the period of time in which a lawsuit could be filed. Reported revisions of the Kasten bill will not attempt to change the method of handling attorneys' fees, punitive damages and pain and suffering awards.

However, the elimination of pain and suffering awards and punitive damages, while requiring payment of attorneys' fees, is necessary if we are to assure that successful plaintiffs win exactly what they deserve. These ideas are so reasonable, in fact, that only those with vested interests to protect should oppose them. A movement not only of insurance companies and trade associations, as is now under way, but also of city governments, day care center operators and all the millions of others faced with unreasonably high liability insurance premiums could be successful in creating one large lobbying effort to create a national law that would improve the system for everyone's benefit.

Those in favor of change in the manner in which we award damages in liability lawsuits should not be content with minor changes that might do little to solve the basic problems that have caused the liability mess we now face. Radical changes, as long as they are fair, are the only method through which the problems can be solved. In dealing with the reform of liability claims and lawsuits we should remember the advice of Henry George, who said, "There is danger in reckless change, but greater danger in blind conservatism." □

CITIZENS COALITION FOR TORT REFORM, inc.

"Voices raised in unison..."

TO: ALL LEGISLATORS

FROM: CITIZENS COALITION FOR TORT REFORM

SUBJECT: ENCLOSED DATA FOR YOUR INFORMATION AND USE

ARE THESE THE FRIVILOUS INVESTMENTS INDICATED BY ROBERT HUNTER?

Sincerely,

Al Tamagni, Sr.
Chairman

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

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

INSURANCE COMPANY INVESTMENTS	Total 1984 Investments (000)	Total 1984 Net Premiums (All Companies) (000)	Total 1983 Investments (000)	Total 1983 Net Premiums (All Companies) (000)
1 Domestic Life Company	1,931	663	2,459	594
4 Domestic and Foreign Title Insurance Companies	5,333	19,116	4,278	19,343
9 Domestic Property and Casualty Companies	18,179	119,463	36,049	83,050
201 Foreign Property and Casualty Companies	1,357,719	324,493	1,270,907	331,434
138 Foreign Life Insurance Companies	1,639,792	259,463	1,731,049	230,301
2 Hospital/Medical Service Corporations, F&D	634	51,854	628	46,700
3 Fraternal Benefit Societies	15,552	1,792	9,374	1,356
Total	3,039,140	776,844	3,054,744	712,778

TYPE OF INVESTMENT

	1983 (000)	1984 (000)	Percent Inc./Dec.
Alaska - State G. O. Bonds	218,483	210,107	(3.4)
Alaska - Political Subdivision Bonds	238,094	216,709	(8.9)
Alaska - Special Revenue Bonds	1,111,376	1,187,034	6.8
Alaska Industrial Bonds	1,047,565	874,285	(16.5)
Alaska Public Utilities	48,000	63,103	31.4
Alaska Real Estate	9,198	23,131	151.4
Alaska Mortgages	212,416	235,077	10.6
Common Stock and Bond Investments - % Allocated to Alaska Properties	143,005	204,660	43.1
U.S. Government Housing Authority Bonds	2,671	132	(95.0)
Alaska Policyholders Loan and Liens	12,002	10,807	(9.9)
Bank and Time Certificates	11,934	14,095	18.1
Total	3,054,744	3,039,140	(0.5)

CITY OF SOLDOTNA
RESOLUTION 86-9

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

WHEREAS, the City of Soldotna has had its budget reserve seriously diminished by the unanticipated increase of $173,000 or 283% in its annual insurance premium; and

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

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

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

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

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SOLDOTNA:

That it supports the efforts of the Citizens' Coalition for Tort Reform to achieve legislative remedies, and urges the Alaska Legislature to make these reforms a priority of the second session of the 14th legislature.

ADOPTED this 19th day of February, 1986.

Mayor

ATTEST:

City Clerk

RESOLUTION 86-8

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CORDOVA, ALASKA, SUPPORTING THE CITIZENS COALITION FOR TORT REFORM REGARDING INSURANCE PREMIUMS

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

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

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

NOW THEREFORE BE IT RESOLVED that the Cordova City Council supports the efforts of the Citizens' Coalition for Tort Reform to achieve legislative remedies, and urges the Alaska Legislature to make these reforms a priority of the 2nd session of the 14th legislature.

PASSED AND APPROVED THIS 18 DAY OF February, 1986.

Mayor Erling T. Johansen

Acting City Clerk

LIABILITY SETTLEMENT CURRENT PROCESS

COMPARED TO

CITIZENS' COALITION FOR TORT REFORM PROPOSAL

The following example case is that of a case settled in Anchorage. The name being used is that of John Doe. The purpose is to demonstrate by actual figures, the mechanics of how a case is settled under current rule and statute and to compare how the same case would be settled under the proposals by the Citizens' Coalition for Tort Reform using the following portions of our tort reform bill.

1. Periodic payments
2. Sliding scale of attorney fees
3. A cap on non-economic awards
4. Elimination of Rule 82

NAME - JOHN DOE
AGE - 30
SEX - MALE
ADDITIONAL LIFE EXPECTANCY - 43.5 years
WORK LIFE EXPECTANCY - 31.5 years
ANNUAL BEFORE TAX INCOME - $40,000.00
ATTORNEY OVERHEAD - $30,000.
PLAINTIFF ATTORNEY COSTS - 40% of Gross Settlement

CURRENT METHOD OF CALCULATION

Loss of income $40,000 x 43.5 years	=$ 1,740,000
Pain, Suffering, Misc	750,000
Future cost of living etc.	500,000
TOTAL SETTLEMENT AMOUNT	=$ 2,990,000

COST ANAYLSIS

MONEY FOR ATTORNEY FEES	=$ 1,196,000
MONEY FOR ATTORNEY COSTS	=$ 30,000
NET MONEY TO INJURED PARTY TO CLIENT	=$ 1,764,000

PERCENT OF MONEY TO CLIENT = 58.9%
PERCENT OF MONEY TO ATTORNEY = 41.1%

DEFENDENDANT COSTS AT 30% = 987,000

TOTAL COSTS OF CASE TO INSURED = $3,887,000

PERCENT OF AWARD BASED ON TOTAL COSTS TO INJURED PARTY = 45.38%

THE AMOUNTS ABOVE ARE TAX FREE

C.

The remaining balance will be structured in the following manner.

1. Cash up front = $10,000.00
2. Deferred lumps of cash tax free
   - 10 years = $ 92,000
   - 15 years = $ 154,000
   - 30 years = $ 583,000

Total lump amount = $[illegible]9,000 TAX FREE

TOTAL GUARANTEED VALUE TO INJURED PARTY TAX FREE BASED ON:
1. GUARANTEED PERIOD = $3,250,101
2. NORMAL LIFE EXPECTANCY = $4,428,573

COST ANALYSIS

PRESENT VALUE COSTS	= $	658,332
ATTORNEY OVERHEAD COSTS	=	30,000
ATTORNEY FEES	=	107,498
NET PRESENT VALUE TO CLIENT	=	520,834
PERCENT OF AWARD TO INJURED PARTY	=	79%
PERCENT OF AWARD TO ATTORNEY	=	21%
DEFENDANT COSTS (denotes estimate of maximum fluctuation, up or down)	= $	75,000

TOTAL COST OF CASE TO INSURED = $733,332

PERCENT OF TOTAL AWARD TO INJURED PARTY = 71%

1. Please note the reduced costs to defendant
   $3,887,000 vs $733,332
   Reduction Amount = $3,153,668

2. Please note the continued and guaranteed income to the injured party on the basis of pay as claimed under periodic payments.

3. Note reduction in plaintiff attorney fees and costs -
   $1,226,000 vs $137,498
   Reduction Amount = $1,088,502

4. Please note increased percentage of money awarded going to injured party - 79% vs 58.9% - Amount of percentage increase = 20.1%

5. Please note the increased percentage of the overall costs going to the injured party - 71.0% vs 45.38% - Amount of percentage increase = 25.62%

QUESTIONS: WHO BENEFITS?
WHO LOSES?
WHO IS REALLY GETTING LESS MONEY?
WHO SAVES?

EXHIBIT A

STRUCTURED METHOD OF SETTLEMENT USING
COALITION REFORM PROPOSAL

A

To pay injured party $40,000 per year and compounding at 3% annually guaranteed 35 years and life. Tax free.

AGE	ANNUAL INCOME	AGE	ANNUAL INCOME
31	$41,200.	53	$ 76,625.
32	42,436.	54	81,290.
33	43,709.	55	83,728.
34	45,020.	56	86,239.
35	46,370.	57	88,826.
36	47,761.	58	91,490.
37	49,193.	59	94,234.
38	50,669.	60	97,153.
39	52,188.	61	100,067.
40	53,753.	62	103,069.
41	55,365.	63	106,161.
42	57,025.	64	109,345.
43	58,735.	65	112,625.
44	60,492.	66	116,003.
45	62,306.	67	119,483.
46	64,175.	68	123,067.
47	66,100.	69	126,759.
48	68,083.	70	130,561.
49	70,125.	71	134,477.
50	72,228.	72	138,511.
51	74,394.	73	142,666.
52	76,625.	74	146,945.

This will continue to compound as long as plaintiff shall live.

Total guaranteed income amount - 35 years = $2,421,101
Total income normal life expectancy = $3,599,573

NOTE: The above amounts are TAX FREE

B.

A lump amount of $250,000. is additional for non-economic award, after payment of attorney fees, in the amount of 107,498,00 and attorney overhead costs of $30,000.

CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

SYNOPSIS OF THE ISSUE

Tort reform is an issue in many states, but Alaska's situation is unique and requires a solution this year by the Alaska legislature. The laws of Alaska are exceptionally liberal and allow virtually unlimited jury awards, often without regard to the actual economic value of the loss. This makes actual risk extremely difficult for insurers to predict. Some insurers and reinsurers have withdrawn from or refused to enter the Alaska marketplace. Those that have stayed are increasing their rates for liability insurance to astronomic levels. As a consequence many Alaska businesses and individual service providers, many of them critical to the public, are reducing their services, going out of business or operating without insurance. The danger is clear and present. The damage that will result from deferred action demands a legislative resolution of the issue this year. It has been the subject of two previous comprehensive studies.

The issue is non-partisan. The problems caused by the present tort reparation system cut across party lines. There are essentially three interest groups, each with a somewhat different stake in the issue:

1. The Business Community and Consumers
2. Insurance Companies
3. Trial Attorneys

The Citizens Coalition for Tort Reform represents the first group, the business community and consumers. The coalition, through HB532 and SB377 seek changes in the laws governing both tort reparations and insurance regulations to resolve the crisis. It affects everyone. At present our system is virtually wide open and we are all paying the bill for it. Allowing the issue to be referred to yet another study committee or allowing passage of a cosmetic reform bill will unnecessarily prolong a crisis which is costing consumers more every day.

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

Doug This is an excellent piece to use for lobbying the-
practice reforms
Regards,
Brad

cma **LEGISLATIVE ALERT**

KEY CONTACT

CALIFORNIA MEDICAL ASSOCIATION • 925 L Street • Suite 1150 • Sacramento, CA 95814-3756 • (916) 444-5532

November 15, 1985

Brad Cohn, M.D.
450 Stanyan Street
San Francisco, CA 94117

Re: Defense of MICRA

Dear Dr. Cohn:

Ten years ago, in response to a malpractice insurance crisis, the California Legislature enacted sweeping reforms in statutes governing professional liability (AB 1xx - The Medical Injury Compensation Reform Act, MICRA).

On May 8, 1985 the California Supreme Court handed down a decision which favorably settled the legal challenges to MICRA, including the $250,000 cap on non-economic damages in medical malpractice cases.

Since the day the Governor signed the act in 1975, skeptics (including many physicians) predicted that the reforms would be ineffective. The only real test of such a measure is hard data. The statistics are as follows:

	Nationwide	California
Average size of malpractice awards	$974,000	$396,000
Premium increase in average policy since 1975	300%	150%
Premium increase in average policy in 1985	33%	15%

The above statistics eloquently explain why physicians must protect MICRA from alteration or repeal. Gutting MICRA is the number one priority of the California Trial Lawyers Association.

Please write to, call or meet with your State Senator before January and ask for a "NO" vote on any bill which would increase the cap, increase the threshold for periodic payments or otherwise weaken any provision of MICRA. A roster of members of the Senate is enclosed for your use.

After reading the attached analysis, if you have any questions please call me or Judge Gordon Cologne at (916) 444-5532. Thank you.

Sincerely,

Jay Dee Michael

Jay Dee Michael, Vice President
Government Relations

J&S:5a

cc: Component Society Medical Executives

CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

Hon. Pat Rodey
Chairman
Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Dear Mr. Chairman:

This documentation relating to the testimony of J. Robert Hunter before your Committee on February 26 has just come to our attention. Presumably this information has been turned up by your researchers, but in case it has not, we are offering it to you now.

Briefly, here is a summary of the contents:

A paper refuting the Nader-Hunter challenge on the 1985 profit/loss in the property casualty industry.

An article on the property casualty industry's pre-tax operating loss for 1984 from the March 20, 1985 "Wall Street Journal."

An Insurance Information Institute news release reporting year-end 1984 property/casualty industry operating results.

Sources of data on financial results for property/casualty insurance.

Concepts of profit/loss in the property/casualty insurance industry.

A refutation of the assertion by Mr. Hunter before your Committee that the Canadian Providence of Ontario has had and unsuccessful experience with "tort reform."

The Coalition does not represent the insurance industry nor is it a spokesman for the industry. However, we feel that a sound appreciation of how the industry operates is vital to an understanding of why substantial tort reform is in the public interest. This information from the Insurance Information Institute is presented in that spirit.

Thank you again for your efforts to make sense of this difficult issue.

Sincerely,

David A. McGuire

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

CITIZENS COALITION FOR TORT REFORM, inc.

"voices raised in unison..."

DOCUMENTATION ON TESTIMONY OF
J. Robert Hunter
Before the House Labor and Commerce Committee, Judiciary Committee, Senate Labor and Commerce Committee and Senate Judiciary Commitee
February 24, 24 and 26, 1986

** A paper refuting the Nader-Hunter challenge on the 1985 profit/loss in the property casualty industry.

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** Sources of data on financial results for property/casualty insurance.

** Concepts of profit/loss in the property/casualty insurance industry.

** A refutation of the assertion by Mr. Hunter before your Committee that the Canadian Providence of Ontario has had and unsuccessful experience with "tort reform."

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Nader-Hunter Challenge on 1985 Profit/Loss in P/C Industry

At a press conference in Washington, D.C. on January 6, 1986, Ralph Nader and Robert Hunter, president of the National Insurance Consumer Organization (NICO), asserted that the property/casualty industry had a profit of $6.6 billion in 1985 rather than an operating loss of $5.5 billion, as reported by the Insurance Information Institute.

In interviews with the media on January 6, Dr. Sean Mooney, senior vice president and economist of the I.I.I., and other I.I.I. staff members refuted the Nader-Hunter assertions. By the end of the day, Hunter had lowered his $6.6 billion profit figure to $5.0 billion, as reported by The Wall Street Journal, Jan. 7, 1986, page 12.

At his press conference, Hunter claimed property/casualty insurers would earn $6.6 billion in this way:

	$ BILLIONS
Operating Loss	-$5.5
Capital Gains	+ 6.5
Federal Tax Credits	+ 3.5
Dividends to Policy-holders	+ 2.1
PROFIT	$6.6

In refuting the Nader-Hunter claims, Dr. Mooney noted:

1) Hunter accepts I.I.I's report of an operating loss of $5.5 billion based on underwriting and investment performance;

2) Nader's Capital Gains figure includes unrealized gains. This is unacceptable because it violates Generally Accepted Accounting Principles as required by auditors and the Securities and Exchange Commission as well as statutory insurance accounting principles. Unrealized capital gains represent increases in the market value of securities which have not been sold. Therefore, the companies have received no money from them. Hence, they are not included in profit and loss data.

3) Nader's Federal Tax Credits figure is one developed by NICO and grossly excessive. I.I.I. figures on page 3 are based on nine months of actual data reported by insurers.

4) Nader's Dividends to Policyholders entry is wrong. Under general accounting principles, a return to consumers is a price rebate and must be deducted from sales revenues.

The media asked why the industry reported operating figures and not after-tax income at the end of 1985. The I.I.I. year-end press release is based exclusively on data from A.M. Best Company, an independent analytical, rating

and information service organization. These data do not include after-tax income.

When the fourth-quarter data are in, the I.I.I. releases the figures, including after-tax income. (See March 20, 1985, Wall Street Journal story, based on March 19, 1985, I.I.I. release. Copies are attached.)

The I.I.I. reports on after-tax profit or loss on a quarterly basis.

The I.I.I.'s estimates for Profit & Loss in 1985 are as follows:

Profit (Loss) in P/C Industry

($ Billions)

	1985	
Underwriting Loss	$(25.2)	Underwriting loss here was supplemented by income from investments (interest and dividends) to produce an operating loss.
Investment Income	19.7	
Net Operating Loss	(5.5)	
Realized Capital Gains*	5.3	However, capital gains primarily from the sale of stocks offset this loss, plus
Tax Credits and Other* Income	1.9	tax credits and other minor income items so that
Net After-Tax Income*	1.7	net after-tax income was positive.

*Estimates by Insurance Information Institute.

Why are the I.I.I. figures right and the Nader-Hunter figures wrong? Because with nine months of data available, the net after-tax income was $1.49 billion. It is totally unrealistic to expect a gain in the last quarter more than three times the size of the gain in the prior nine months.

The Institute is hesitant to estimate the after-tax industry result, but based on nine-month data, the figure should be close to $1.7 billion -- far below the Nader-Hunter estimate.

Nader and Hunter question whether there has been a litigation "explosion" in the U.S.

There are many facts to demonstrate the increase in litigation in the U.S. over the last few years as well as the increase in the cost of the tort liability system.

-- Million-dollar verdicts awarded in the United States skyrocketed to 251 in 1982 from one in 1962 and to 360 in 1983, the latest year for which figures are available. The lure of jumbo awards in civil suits often contributes to increased litigation.

-- Civil suits filed in state courts rose 22 percent from 1977 to 1981 and appeals climbed 32 percent. Civil case filings in federal district courts soared to 206,000 in 1982 from a mere 35,000 in 1940. Last year there was one private civil lawsuit filed for every 15 Americans.

-- In the 15 years Chief Justice Burger has been heading the Supreme Court, federal court case filings have risen nearly two and a half times as fast as the population.

-- A 1984 Rand study of thousands of asbestos-related lawsuits showed: Cases closed took an average of two years and eight months, with 11 percent taking six years. How much did victims get? Only 37 cents of each dollar paid. The other 63 cents went for legal fees.

THE WALL STREET JOURNAL
March 20, 1985

Pre-Tax Operating Loss for '84 Is Posted By Property Insurers

By a Wall Street Journal Staff Reporter

NEW YORK – The nation's property-casualty insurance industry posted a pre-tax operating loss of $2.9 billion last year, the largest in its history. In 1983, the industry had pre-tax operating profit of $3.04 billion.

After tax credits and capital gains, however, the industry last year posted net income of $1.94 billion, down 68% from $6 billion in 1983.

Such results were expected. Last December, the Insurance Information Institute, a trade group, predicted that the property-casualty industry would post a net loss for 1984. But insurers' tax credits and capital gains both proved to be larger than anticipated, producing net income for the industry rather than a loss, Sean Mooney, the institute's economist, said.

The results released by the institute are based on data from companies representing 97% of the nation's property-casualty premium volume. They were compiled by two other trade groups, the Insurance Services Office and the National Association of Independent Insurers.

Based on the size of the 1984 operating loss, Mr. Mooney said, last year was the property-casualty industry's worst ever. He said the losses surpassed those sustained in 1906, the year of the San Francisco earthquake and fire, which resulted in $375 million damages.

In the fourth quarter, the industry had a pre-tax operating loss of $760 million, compared with pre-tax operating profit of $590 million a year earlier.

After tax credits and capital gains, fourth quarter net income was $846 million, down 40% from $1.4 billion in 1983.

For the full year, insurers had pre-tax losses from insurance underwriting of $20.52 billion, compared with $12.93 billion in 1983. Investment income, primarily interest on bonds and dividends on stocks, was $17.62 billion, up 10% from 1983. Capital gains were $3.17 billion, up 56%.

The industry's poor 1984 performance has been blamed on heavy weather-related claims and lingering effects of a six-year price war in commercial insurance that apparently ended last summer. Still, analysts don't expect earnings to improve until late this year or early 1986.

Insurance Information Institute

The Insurance Information Institute is a nonprofit educational, fact-finding and communications organization for the property and casualty insurance business. The Institute is supported by some 300 insurance companies and provides public relations and communications services to other insurance organizations in the fields of property, casualty, fidelity, surety and marine insurance. Headquartered in New York City, the Institute has offices in other major U.S. cities.

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for INSURANCE SERVICES OFFICE, INC.
and the NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

ISO, NAII REPORT YEAR-END 1984
PROPERTY/CASUALTY INDUSTRY OPERATING RESULTS

NEW YORK, March 19 -- The nation's property and casualty insurance industry reported net after-tax income of $1.94 billion in 1984, down 68 percent from the 1983 net income of $6.0 billion.

The industry recorded a pretax operating loss of $2.9 billion in 1984, compared with pretax operating income in 1983 of $3.04 billion. The 1984 operating loss consists of a pretax underwriting loss of $20.52 billion and pretax net investment income of $17.62 billion.

The industry's pretax underwriting loss of $20.52 billion for 1984 was $7.59 billion greater than the loss of $12.93 billion in 1983. The underwriting loss includes $2.10 billion of premiums returned to policyholders as dividends in 1984, compared with $2.16 billion a year ago.

(more)

The $17.62 billion of net investment income for 1984 (primarily dividends earned from stocks and interest earned on bonds), was up 10.3 percent from a year ago. Net investment income, combined with realized capital gains, which rose 56.1 percent to $3.17 billion, brings the industry's total pretax net investment gain for 1984 to $20.79 billion, up 15.4 percent from $18.01 billion a year ago.

The figures were released by Insurance Services Office, Inc. (ISO) and the National Association of Independent Insurers (NAII), reporting for insurers that account for 97 percent of the country's property/casualty insurance business.

The 1984 underwriting loss of $20.52 billion was 18.2 percent of the earned premiums of $112.49 billion. This compares with the 12.4 percent underwriting loss on earned premiums of $103.89 billion for the year 1983.

Written premiums for 1984 totaled $115.87 billion, up 9.4 percent from $105.87 billion in 1983. That growth compares with the 4.6 percent growth of 1983 over 1982 written premiums.

For the fourth quarter of 1984, the industry's net after-tax income was $848 million, compared with $1.40 billion for the fourth quarter of 1983, a decrease of 39 percent.

(more)

The industry recorded a fourth-quarter 1984 pretax underwriting loss of $5.85 billion, compared with the $4.03 billion loss a year ago. The fourth-quarter 1984 underwriting loss included $582 million of premiums returned to policyholders as dividends, compared with $793 million in the fourth quarter of 1983.

The industry's pretax net investment gain in the fourth quarter of 1984 was $6.20 billion, up 24.5 percent from $4.98 billion in the fourth quarter of 1983.

The fourth-quarter 1984 loss of $5.85 billion was 19.6 percent of the period's earned premiums of $29.91 billion. This compares with the 14.9 percent underwriting loss on earned premiums of $27.11 billion recorded for the fourth quarter of 1983.

Written premiums in the fourth quarter of 1984 totaled $29.45 billion, up 14.1 percent from $25.80 billion in the fourth quarter of 1983. That growth compares with the 6.7 percent growth of 1983 over fourth-quarter 1982 written premiums.

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3/19/5: 53TN
March 19, 1985

SOURCES OF DATA ON FINANCIAL RESULTS (Property/Casualty Insurance)

1. Most data published by the Insurance Information Institute are from A.M. Best Company, an independent analytical, rating and information service organization.

2. The A.M. Best Company data are collected from individual insurance companies throughout the United States. Each insurance company is required to report to each state in which it is licensed what is known as the convention statement. A.M. Best Company receives copies of these reports and adds the data up line by line, company by company, to produce a total. This total is then increased by a small factor (less than 3 percent) to produce an overall industry aggregate figure. The incremental factor is used mainly to reflect estimates for companies not required to report to the state insurance departments. In many states, small farm mutual companies are not required to report.

3. The Institute publishes data from a quarterly report issued jointly by Insurance Services Office, Inc. (ISO) and the National Association of Independent Insurers (NAII). These data are collected each quarter from

companies representing about 97 percent of premium volume in the U.S. The data are received by ISO and NAII in the form of answers to questions, e.g., what were your written premiums in the past quarter?

CONCEPTS OF PROFIT/LOSS IN THE PROPERTY/CASUALTY INSURANCE INDUSTRY

There are several ways of measuring profit and loss in the property/casualty insurance industry, as there are in any other industry. The different concepts used depend on the question being asked and the perspective of the inquirer. For example, a regulator frequently will have a different perspective on data than a shareholder of an insurance company. Some of the common measures of profitability are:

1. Net profit/loss after taxes.

This is the basic concept of bottom-line earnings. This number is the bottom line on the income statement of most U.S. companies. The figure includes losses or gains from underwriting, investment income (interest income and dividends), realized capital gains and federal income taxes. Shareholders are interested in this figure because it provides some indication of whether dividends will be paid and at what rate. However, this figure does include extraordinary items and other factors, which may be of a transitory nature. Of key importance for property/casualty insurance in recent years has been the impact on this figure of federal taxes and realized capital gains.

In the case of federal taxes, what was normally a subtraction from before-tax income has turned into an addition. This is because companies were losing money before taxes and received a credit for taxes paid in the prior three years -- a form of income-averaging for companies. Realized capital gains also increased in importance in the past few years, partly because of the strong stock market, but also because of the need by insurance companies to raise cash to pay losses. In calculating bottom-line profit or loss, the profit or loss from the sale of stock is included regardless of the purpose of the sale.

2. Operating profit/loss.

Because this figure includes the key operating concepts -- underwriting profit or loss and investment income, it is the most reliable indicator of how the property/casualty industry is doing. It excludes realized capital gains or losses and federal taxes.

3. Underwriting profit/loss.

The underwriting profit or loss is calculated by subtracting incurred losses (funds assigned to pay claims) and expenses (e.g., commission to insurance agents) from earned premiums. It does not include income from

investments. This figure tells a regulator how a company is doing in the basic functions of the business -- selling insurance and paying claims.

4. The combined ratio.

The combined ratio is similar to the underwriting profit or loss. The combined ratio is the sum of the ratio of incurred losses to premiums earned and the ratio of commissions and expenses to premiums written. A combined ratio above 100 means that the industry is incurring more in claims and expenses than it is taking in in premiums.

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February 13, 1986

Nader's Charge on Ontario, Canada Termed Misleading

The Charge: Insurance Woes Unrelated To Tort Law. Leah R. Young. The Journal of Commerce. 86/02/11. Page 14A. Ralph Nader told Washington reporters that the experience in Ontario, Canada, which has many of the tort reform measures being proposed in the United States, "shows that the insurance emperor has no clothes," since, even with tort reform, Ontario is also experiencing high premiums and a shortage of insurance coverage. Jay Angoff, counsel to the Nader-supported National Insurance Consumer Organization, said Ontario already has a cap on compensation for pain and suffering, restrictions on punitive damages, prohibitions on injured parties specifying the amount they are seeking, restrictions on attorneys' contingency fees, few jury trials, and penalties for frivolous suits.

The charge is grossly inaccurate and misleading.

* 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 impact of recent statutes, which increase the incentives to litigate;

    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 attorney's contingency fees.

In Ontario, attorneys fees are set by the Law Society. Contingency fees are prohibited.

5) Few jury trials.

Traditionally, Canada has used 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.

Insurance
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February 11, 1986

Nader/Hunter Challenge

The Property/Casualty insurance industry shares the concern of state and federal public officials, business and the general public about developments leading to restricted insurance coverages and the rising cost of commercial insurance protection. The insurance industry is deeply disturbed about the actions it has felt compelled to take in certain lines of insurance and for selected types of coverage. The industry welcomes the commitment of the affected policyholders and public policymakers in restoring the legal and regulatory stability needed to provide a responsive insurance market. The industry already has responded with a number of programs in various states aimed at alleviating the distress in various industries.

The industry recognizes that competitive price cutting by the industry in the first half of the 1980's has been a major factor behind the current large increases in rates for commercial liability insurance. The industry beginning about 1979 entered a period of fierce price competition with two major results:

- commercial businesses throughout the U.S. got bargains in the purchase of liability insurance,

- the insurance industry ended up posting record operating losses in 1984 and 1985.