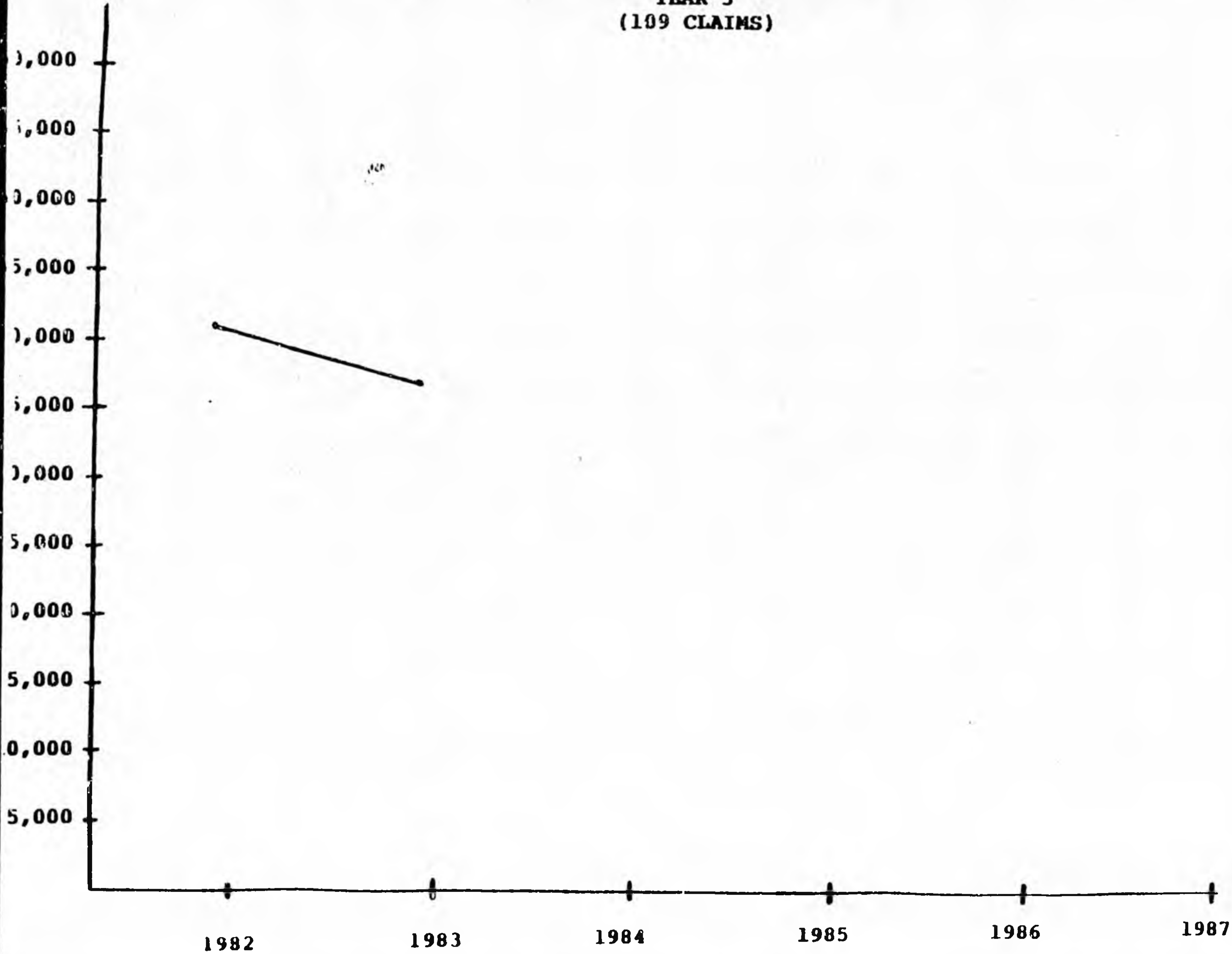
ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5901 HOUSE LABOR & COMMERCE

385

CLAIM SEVERITY AT
EQUAL LOSS DEVELOPMENT YEARS
YEAR 5
(109 CLAIMS)



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SECTIONAL ANALYSIS OF HB 166
March 21, 1989

The following is an overview of House Bill 166, which seeks to remedy the high cost of insurance through gutting the civil justice system. For the most part, it is an attempt to modify the comprehensive changes made in 1986 to tort law. Where appropriate, examples have been given to clarify what rights are being taken away from victims.

S E C T I O N 1

This section attempts to justify these deprivations of victims rights. The stated purpose is to more equitably distribute the cost and risk of injury, but the actual effect would be to distribute the costs and risks only to the injured victims. A second stated purpose is to make insurance more available, but nothing in this bill will reduce insurance rates. When changes were made to the tort system in 1986, it was because proponents claimed that insurance rates would go down. Rates have not substantially decreased since that time. More changes should not even be considered unless the legislature gets a written guarantee from the insurance industry that rates will decrease as a result of this proposed legislation. The stated intent of the legislature, as written in this bill, is to reduce the costs associated with the tort system without affecting the rights of injured persons to seek redress through the courts. The true effect of this bill, however, is only to take away the rights of injured persons, without any benefit to them. Section 21 seeks to gather the facts that Section 1 claims the legislature already knows.

S E C T I O N 2

This imposes a six year statute of repose. This means that no claims may be brought six years after an injury-causing product was purchased or a building completed or an action took place.

Examples: A wing falls off of a Boeing 737 six years and one day after the airline bought it. Neither the passengers nor the airline could sue Boeing for their losses. The roof on the gymnasium in Aleknagak collapses shortly after the building is six years old. The school district and the injured children cannot recover their losses against the construction contractors or building designers.

You have surgery and the doctor leaves a sponge inside of you. It does not begin to cause you problems until more than six years later, when you discover this foreign object in your body. You will not be able to sue the doctor for this negligent act. Similarly, you hire a lawyer to draw up a document for you. Ultimately, because of errors on the lawyer's part, you end up losing a great deal of money, but not until more than six years later. You would not be able to recover your losses from the attorney.

This six year limit applies even to minors or incompetents who were previously protected under AS 09.10.140. The statute of limitations remains two years. For lawsuits not eliminated by this section, see Section 4.

S E C T I O N S 3 & 4

Section 3 eliminates most torts from the current two year statute of limitations. Section 4 reenacts a similar two year statute of limitations for claims for personal injury, death or property damage. The new provision eliminates AS 09.10.140, which currently protects minors and incompetents.

Examples: A person is injured, resulting in a coma that lasts for 18 months. If AS 09.10.140 is eliminated, the person would then have only six months in which to file a lawsuit concerning the injury. Similarly, if a two-year old child were injured, the child would lose its right to sue this wrongdoer when the child was four years old even though a four-year old cannot understand claims for injury.

S E C T I O N 5

Makes it more difficult to obtain punitive damages award. Punitive damages represent the civil justice system's way of punishing defendants for gross, wanton, or willful misconduct. Punitive damages are infrequently awarded and when they are, it is because a jury felt very strongly about the misconduct and wanted to make an example of the defendant. Punitive damages serve as a deterrent so that businesses think twice before safety is sacrificed for profit. The 1986 statute restricted punitive damages to cases where there is clear and convincing evidence to support punitive damages. Under this section the standard would be even more restrictive. Not only would the plaintiff have to show malice, bad motive, or reckless indifference on the part of the defendant, but also would have to show conscious acts showing deliberate disregard. This is similar to a specific intent in criminal law. Wrongdoers would be insulated from punitive damages in spite of their conscious decision to ignore safety.

S E C T I O N   6

In the tort bill passed by the legislature in 1986, a victim who was injured while committing a felony lost the right to seek damages. This section now proposes to take this right from someone who is injured while engaged in any misdemeanor. A misdemeanor is defined as a crime punishable by a year or less in prison.

Examples: A person is hiking in Kachemak Bay State Park and wanders upon a private cabin that is an inholding within the park. The person decides to check out the cabin, opens the door, and a spring-loaded gun goes off, killing or injuring the person. Because the person was trespassing, they have no right to seek damages because they were engaged in a crime at the time that substantially contributed to the injury. Similarly, a citizen fearful of being robbed carries a concealed handgun. Because the gun has a manufacturing defect, it discharges. The injured person could not sue the manufacturer, despite the defect.

S E C T I O N   7

This section allows that if the person responsible for causing injury was also committing a crime, then Section 6 does not apply. In other words, if you were committing a crime and were injured, and the person who injured you was also committing a crime, then you still have recourse for damages through the courts. Two wrongs do appear to make a right in this case.

S E C T I O N   8

After a trial, a judgment is entered by the court. This provision would allow a defendant who lost a trial to prevent the plaintiff from obtaining his or her judgment. Instead, there would be a second mini-trial to set up a payment schedule over time. There are many problems with this.

Such periodic payments are called structured settlements. Structured settlements are very complicated. There is a vast difference between someone paying you $100,000 cash today, or paying you $10,000 per year over the next 10 years. In addition to the difference in value, there is a great difference in security. If payment is made today, you know the debt is satisfied; if all you have is someone's promise to pay, there is no guarantee you will ever receive the money. This problem does not disappear if the defendant buys an annuity from an insurance company that promises to make the payments. Undercapitalized or poorly managed insurance companies regularly fail. They also sell annuities cheaper than strong companies. To buy a fair structure from a strong company will cost defendants the same amount as if the plaintiff were paid cash today. Why then do defendants and liability insurers want mandatory periodic payments? To cheat injured victims of the compensation the jury found due. Future payments are worth less than cash in hand. A law that said all jury awards will be reduced by 50 percent would clearly be unfair and unconstitutional. This proposal tries to do that in a backhanded manner.

The periodic payment statute sought to be changed by this section was enacted in 1986. Some of the primary proponents were brokers who make their money by selling annuity contracts. Their main pitch was that periodic payments were good for plaintiffs. The law they proposed then, however, allowed defendants to require plaintiffs to take periodic payments. When the bill was on the Senate floor, an amendment was passed that said if it was such a good idea for the injured party, then structured settlements should only be done at the request of the injured party. This legislation again proposes allowing either party to request a structured settlement. An injured party, who is no longer going to be able to continue in the line of work performed before the injury, may want a lump-sum payment to invest in a new business that is compatible with his or her capabilities. This section would allow the wrongdoer, rather than the injured person, to make the decision. The parties would then have a mini-trial about periodic payments. This would be a huge burden on the court system.

The impact of the second sentence of this section is unclear, since attorney fees are already a present value amount and contain no provision to adjust them for future value. Thus there is nothing to reduce to present value.

S E C T I O N 9

Adds a reference to existing law about increases in future payments for anticipated inflation. It does not require that such adjustments be made. What has been created here is a system in which a plaintiff can successfully try a claim, have a structured payout foisted upon him, and not even be compensated for inflation. Additionally, appropriate rates for inflation and discounting are not exact sciences. Mini-trials would be required on these issues with both sides bringing in economists to argue the case. Judges would be required to make decisions without the economic expertise to know what will be best for the claimant in the future. The court system will be controlling the entire future of injured people. By being injured, they will have sacrificed control of their destiny to the court system and insurance industry.

SECTION 10

Creates immunity from liability for board members and officers of public corporations, electric cooperatives and telephone cooperatives, as long as they were acting within the scope of their official duties. Reviewing this amendment discloses a glaring error in the 1986 statute. The intent of the statute is to protect board members and officers for managerial decisions. As passed in 1986, it is much broader. It covers all acts within the scope of official duties. Thus, if driving an insured vehicle while dropping off a report to another board member, one of them runs a red light and kills or maims another person, there could be no recovery from the auto insurer for the injuries or death.

SECTION 11

Opponents of victims' rights claim the collateral source rule is unfair because it gives a windfall to the victims. This is not true. The most common collateral source is health insurance bought by the victim or his employer. But health insurance policies almost always have subrogation clauses. This means that the health insurer gets paid back when damages are recovered from the wrongdoer. Thus there is no double recovery by the victim. It would be very unfair to have the victim's recovery reduced for such collateral payments because the victim would still be obligated by contract to pay back the health insurer. The collateral source rule ensures that the wrongdoer will properly bear the financial burden of his wrongdoing. It is not fair for a wrongdoer to profit because a plaintiff happens to be protected by insurance.

Example: A wrongdoer injures a person who spent his own money for a disability policy. The wrongdoer would thus receive a windfall. The same is true if the victim received gratuitous wage payments from an employer or help from family and friends.

This section replaces the collateral benefits statute enacted in 1986. Instead of being considered at a post-trial hearing, collateral benefits would now be considered by the jury and reduce the recovery. The 1986 statute served to reduce compensation to victims, but at least allowed the judge to consider countervailing costs to the claimant such as actual costs and fees incurred in the litigation.

This section also requires the jury to be instructed about any tax implications of damage awards. The IRS does not tax injury damages because they are compensation that simply replaces what the victim lost. If your house burns down, the insurance money you collect is not taxable. Damages are replacement of capital, not new income. The judge or jury decides the amount of the loss. Taxability or non-taxability has nothing to do with that loss. This provision seeks to confuse juries with irrelevant information so they will impose their own "tax" on that which is not legally taxable, by reducing the damages they award.

SECTION 12

Reduces the interest rate on judgments from 10.5 to 8 percent. The prime rate is now 11.5 percent. This 8% rate is well below the market rate and will encourage insurers not to settle. Insurers will be able to make money by setting it aside and collecting higher interest on it than they have to pay out, thus they lose any incentive to settle a case.

SECTION 13

Under the 1986 statute, interest runs from the date of written notice of a claim. This section eliminates prejudgment interest on future damages, thus again providing a disincentive for insurers to settle cases.

SECTION 14

Implements section 15.

SECTION 15

Caps non-economic damages in a wrongful death case at $50,000. This is particularly discriminatory to those who operate in a non-cash based society, such as rural people and homemakers. The survivors of a successful orthoscopic surgeon in Anchorage who is killed by a wrongful act stand to receive a great deal of money for the future earning potential of the victim. The survivors of a native person living in the Bush and existing in a subsistence economy with very little actual cash value, will only receive $50,000 as the value of that life. Similarly, homemakers who do not have a W-2 to show for wages earned are only worth $50,000 under this bill. This limit applies regardless of the number of survivors, thus reducing the recovery of each one. If a housewife had a husband and four children, each would get only $10,000 in spite of their huge loss.

S E C T I O N 1 6

Alaska Civil Rule 82 awards partial attorneys' fees to the party who wins a lawsuit. This section would eliminate that partial reimbursement only in claims for injury or death. This is very unfair to injured people. Insurance companies use litigation to wear people down so they will settle for less money than is due them. But injured people typically have to pay their attorneys out of the damages recovered. So an injured person never pockets all her damages. Rule 82 helps ease the burden of using an attorney to protect your rights. This proposed legislation would allow big businesses and insurance companies to get partial fees from each other, but take that right away from an injured person suing an insurance company or an oil company. It is extremely unfair.

S E C T I O N 1 7

This overrules Jackson v. Power, which was a case in which a hospital was found liable for damages caused by a doctor working in its emergency room. The hospital was liable because of duties owed to emergency room patients under state regulations, national hospital accreditation standards, and its own bylaws. This section would give the hospitals immunity, even when the health care provider is the actual agent of the hospital, not just a contract physician. Enactment of this legislation would allow hospitals to avoid liability by merely posting a notice. This does not take into consideration severely injured persons who may be unconscious on the way into the emergency room and not able to read the notice. There is no requirement that the notice be seen or understood by the patient.

S E C T I O N 1 8

Requires that medical malpractice rate information be included in the annual report to the legislature presented by the director of the Division of Insurance under AS 21.06.110.

S E C T I O N 1 9

Current law gives immunity to peace officers or emergency service patrollers who handle intoxicated persons. The purpose of this amendment is unclear. It appears to be an attempt to preclude any legal action, such as an action against the governmental body employing the individual.

SECTION 20

This section repeals three statutes. When the $500,000 cap was instituted in 1986, an exception was made for those victims who suffer disfigurement or severe physical impairment. Repeal of AS 09.17.101(c) removes that exception.

Example: A quadriplegic or triple amputee could receive no more than $500,000 general damages.

The second statute repealed here, AS 09.17.040(c), currently makes it possible for parties to stipulate to use the rules of Beaulieau v. Elliott to compute damages. This amendment would require the parties to use an inflation/discounting procedure that is more costly, more time consuming, and ultimately reaches the same result. It will impose an unnecessary burden on the limited resources of the court system. If the parties to litigation agree to follow the simpler procedure, the state has no legitimate reason to prevent them from doing so.

The final repealer in this section eliminates AS 09.55.548, the statute that specifically controls collateral source payments in medical malpractice cases.

SECTION 21

Requires reports to the legislature of the effects of all these changes. To a large extent, this seeks the facts that are stated in the purpose section of the bill.

SECTIONS 22 & 23

Clarifies that certain sections of this bill amend the Alaska Rules of Civil Procedure.

SECTION 24

Clarifies applicability of this act.

SECTION 25

Provides an immediate effective date.

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Balanced Proposals for Product Liability Reform*

JEFFREY O'CONNELL**

I. INTRODUCTION

Injuries resulting from faulty products or conduct not only lead to much personal trauma, but also occasion wild fluctuations in insurance premiums, huge legal costs, and long delays before settlements or verdicts are reached. These costs and the uncertainties of the legal system are in turn blamed for skyrocketing tort liability insurance rates. The result is widespread alarm and cries for tort reform throughout the United States.

Perception of the legal system as a game of chance rather than a sound mechanism for catching unreasonable behavior undercuts the system's ability to raise standards of products and conduct and to deter injuries. Providers of goods and services believe that, in seeking to establish reasonable standards of care, the legal system itself lacks the capacity to be reasonable and, instead, often penalizes only the spurious appearance of fault.

Even more importantly, the system's haphazardness also diminishes its value as a protection for the injured. One seriously injured victim may recover nothing at all or far less than fair compensation, while another, similarly injured, receives far more than actual losses. The inconsistency is exaggerated by allowing juries to award damages for such noneconomic losses as pain and suffering or grief. Because placing a monetary value on such nonmonetary losses is inherently irrational, plaintiffs are encouraged to play upon the jury's sympathy, further distorting the issue of who or what was really at fault.

Although only a small fraction of claims go to trial, the prospect of litigation is still weighed by both defendants and plaintiffs in assessing their settlement prospects. As a result, high costs and long delays are incurred in evaluating claims, whether or not they reach court. Ideally, a system of insurance should call for settlement of typical claims by prompt, periodic payment of the injured party's actual economic loss, but the unpredictable and intensely adversarial nature of liability insurance claims makes such settlements rare indeed.[1]

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* This Article is based on the author's Arent Lecture at The Ohio State University College of Law, April 6, 1987. Portions of the lecture were, in turn, adapted from previous writings of the author, including J. O'CONNELL & C.B. KELLY, THE BLAME GAME: INJURIES, INSURANCE, & INJUSTICE (1987); Moore & O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267 (1984). I am grateful to Jam[illegible] uinivan, University of Virginia Law School Class of 1988, for his (as usual) expert research assistance.

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1. For criticisms of the uncertainties and vicissitudes of personal injury law from varying points of view, see, *e.g.*, TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES EXTENT AND POLICY IMPLICATIONS OF THE

II. INADEQUATE REFORMS

What is the solution to this mess? The insurance industry and its institutional insureds urge *tort reform*, which, for them, means new laws that curtail what they perceive as the excesses of the tort system. Specifically, they propose "reforms" that either (1) pay injured parties less, or (2) make it harder for them to be paid, if at all.[2]

In the first category are laws that:

- Limit pain and suffering awards to, say, $100,000 or $250,000 or $500,000.
- Eliminate or severely curb the amount of or the occasions for punitive damages.
- Deduct from the plaintiff's tort award the other insurance monies already payable to the plaintiff from collateral sources, such as from health or disability insurance.

In the second category are laws that:

- Raise the standard of liability—for example, requiring plaintiffs to prove defendant's fault by a more demanding level of proof.
- Limit plaintiffs' lawyers' contingency fees—for example, by setting a ceiling of forty percent of the first $50,000 awarded to the plaintiff, with the share dwindling gradually to only ten percent of recoveries over $200,000.
- Abolish or alter the doctrine of "joint and several liability," under which if two or more defendants are both found to be liable to the plaintiff for an injury, a defendant only marginally responsible can be held liable for all the plaintiff's damages (especially likely if the primarily responsible party is either insolvent or grossly underinsured). Under this reform, a defendant's share of any liability would be limited to its share of responsibility. Thus, a defendant found twenty-five percent responsible would be liable, at most, for twenty-five percent of any damage award.
- Reduce the time allowed for suit under the statute of limitations.
- Penalize those bringing marginal claims.

One or more of these reforms have been or are under consideration in all states, including Ohio, and many have been enacted.[3] But a "solution" that merely further

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CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) (Federal Inter-Agency Study sponsored by the Attorney General); U. S. ATTY'S GEN. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987); Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985); Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. (forthcoming 1987).

2. An Ohio tort reform bill passed by the Ohio General Assembly was vetoed by Governor Richard Celeste after protests by consumer advocates, such as Ralph Nader, claimed that it unfairly discriminated against consumers in favor of industry. S.B. 330 (1986). For a report on the bill, the veto, and the failure of an attempt to override the veto, see NATIONAL UNDERWRITER (Prop. & Cas. ed.) Jan. 12, 1987, at 28, cols. 1–5. Further reform bills have been reintroduced in the current session of the Ohio General Assembly. *E.g.*, H.B. 1 (1987).

3. More than a third of the states enacted statutes limiting liability in all, or in a wide range of, cases. Often enacted were these kinds of reforms:

(1) *Limits on joint and several liability*. ALASKA STAT. § 09.17.080 (Supp. 1986); COLO. REV. STAT. § 13-21-111.5 (Supp. 1986); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1987); FLA. STAT. ANN. § 768.81 (West Supp. 1987); ILL. ANN. STAT. ch. 110, para. 2-1117 (Smith-Hurd 1987); MICH. COMP. LAW ANN. § 27A.6304 (West 1987); N.Y. CIV. PRAC. L. & R. 1601 (McKinney 1987); WASH. REV. CODE ANN. § 4.22.070 (Supp. 1987); WYO. STAT. § 1-1-109(d) (Supp. 1986). These statutes are not all alike, however. Some apply only in particular circumstances, as where the plaintiff himself is negligent.

(2) *Caps on damages*. Some states enacted flat caps, others include escape clauses; one provides for variations in the

limits the amount or availability of compensation to injured persons is a questionable solution indeed. The *least* appealing way to reform the tort system is to make it even harder for injured parties to be paid.

That is not to deny the evils of the present system. Even if liability insurance cases were not rising, and even if sellers of products or services were finding it easy to buy liability insuance, the tort system would still need fundamental change—especially from the point of view of those who are injured. But change is needed not only from the victims' perspective, it is also urgently needed to correct the profligate diversion into litigation of dollars that *all* consumers of products and services are paying, even if the price of insurance made such coverage readily affordable.

That is why it is so sad to see so many consumer groups allying themselves with the trial bar in defense of the present tort liability system.[4] Consumer advocates are right in opposing changes that simply make it more difficult for the injured to get compensation, but they are wrong in wanting to maintain a system that already makes it *much too* difficult to be paid insurance dollars. Trial lawyers, of course, have to concede how difficult it is to get payment from the tort-liability system: else how could they justify charging a third or more to help get it?

Trial lawyers argue that the tort system makes sense in requiring a provider of defective products or services to pay the injured buyer or other victim. But the problem is that product injuries, for example, often happen under very complex circumstances.[5] As a result, unraveling the cause-and-effect relationship between a malfunctioning product and the individual hurt by it usually is difficult, calling for expensive expert engineering testimony and exhaustive discovery techniques. Even in much simpler cases such as those involving automobile accidents, it is often too difficult for the law to determine who is "at fault." Finding fault then is often an extremely expensive business in both simple and complex product liablity cases.

To compound the problem, the second variable mentioned above makes it even more of a nightmare of complexity in product liability suits: injured parties can recover not only their medical expenses and wage loss but also the monetary value of their nonmonetary loss, especially pain and suffering. But what is the monetary value of physical pain? What is an aching back worth? There is no rational answer to that—no market value to consult for the selling price of aching backs.

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cap depending on the age of the claimant and the state's current average wage. *See* Alaska Stat. § 09.17.010 (Supp. 1986) ($500,000 cap except when involving serious disfigurement); Fla. Stat. Ann. § 768.80 (West Supp. 1987) ($450,000); Md. Cts. & Jud. Proc. Code Ann. § 11-108(b) (Supp. 1986) ($350,000); N.H. Rev. Stat. Ann. § 508:4-d (Supp. 1986) ($875,000); Wash. Rev. Code Ann. § 4.56.250 (Supp. 1987) (cap varies with age of plaintiff and state's economy). Md. Cts. & Jud. Proc. Code Ann. § 11-108(b) (Supp. 1986) ($350,000); N.H. Rev. Stat. Ann. § 508:4-d (Supp. 1986) ($875,000); Wash. Rev. Code Ann. § 4.56.250 (Supp. 1987) (cap varies with age of plaintiff and state's economy).

(3) *Limits on punitive damages recoveries.* Some statutes put limits on punitive damages—imposing a higher standard of proof to recover such damages; putting a cap on such damages; or allocating part of the recovery to a state fund. *E.g.*, N.H. Rev. Stat. Ann. § 507:16 (Supp. 1986); Fla. Stat. Ann. § 768.73(2) (West Supp. 1987) (only 40% of punitive damages payable to claimant); Iowa Code § 668A.1 (only part of punitive damages payable to plaintiff unless tort aimed specifically at plaintiff); Okla. Stat. Ann. tit. 23, § 9 (West 1987) (clear and convincing evidence required to overcome limit equal to actual damages).

4. *E.g.*, *supra* note 2.

5. The discussion in this Article will focus on product injuries but can be applied equally to all personal injury actions, including those from services such as medical treatment.

Seeing how wildly complex the tort-liability insurance system is in being required to determine not only who or what was at fault, but also the monetary value of nonmonetary losses, we can more appreciate why that system is so unmanageable and why compared with life, health, or fire insurance, it is so uniquely plagued by delay, uncertainty, and costly lawsuits. Although high costs and unavailability of insurance currently highlight the need for change, the system's demand for fundamental change exists quite apart from whether, say, product liability insurance happens to be readily available at a reasonable price at any given time.

III. No-Fault Reforms

Two generations ago the answer to this mess, at least for workplace accidents, was workers' compensation. This was a form of no-fault insurance enacted in Germany in the 1880s, in Great Britain in the 1890s and in the United States roughly between 1910 and 1920. Workers' compensation decrees that workers injured on the job need not go to court to assert their employers' fault and their own freedom from fault, with all the entailing litigation. Rather, injured workers are automatically paid for all their medical costs and for a substantial part of their wage loss with nothing paid for pain and suffering. Thus, the two litigious issues that dominate tort liability—fault and the value of pain and suffering—are eliminated.[6] The result, in turn, is a viable insurance system.

Of course there are problems with our workers' compensation system. It does not always work as well as the reformers said it would—hardly any reform ever does—but it has worked magnificently compared to the tort system. No one (except maybe some trial lawyers) suggests that we go back to litigating over fault and the value of pain and suffering after every workplace mishap.

The next great wave of accidents to engulf modern society came from traffic collisions. And no-fault again has presented itself as the answer to the shortcomings of tort law.[7] One can best illustrate the stunning contrast between the relatively low cost of high payments under no-fault auto insurance and the relatively high cost of low payments under traditional liability coverage by looking at the cost of auto insurance in New York State. There, no-fault benefits pay for medical expenses and wage loss up to a combined total of $50,000—at an average annual premium of $46 in 1983. Lawsuits based on fault, meanwhile, are allowed when the victim is disabled for at least ninety days or when the victim dies or suffers other serious injury. To cover their liability losses in such lawsuits, New York motorists are also required to buy tort-liability insurance providing coverage of at least $10,000 per person and $20,000 per accident. In 1983, the average premium for liability coverage was $118.[8] In other words, no-fault insurance with high limits and automatic payment costs about

6. For a summary of workers' compensation statutes, see O'Connell & Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 Ohio St. L.J. 931–33 (1987).

7. *See id.* at 930; U.S. Dep't of Transp., Compensation Auto Accident Victims: A Follow-Up Report on No-Fault Auto Insurances Experiences (1983); for a summary of the Department of Transportation Report, see O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 Va. L. Rev. 61–72 (1986).

8. U.S. Dept. of Transp. Report, *supra* note 7, at 37.

half what tort-liability insurance, often with low limits and disputed payment, costs. Similar scenarios exist in other no-fault states.[9]

Can we construct a no-fault insurance plan for accidents caused by manufactured products? In a limited sense, we already have. Product sellers are now held to "strict products liability," which means that anyone injured by a defective product is entitled to be reimbursed for his loss by the product seller, whether or not the seller was in any way negligent in letting the product on the market.

But even strict products liability does not really begin to eliminate the basic problems connected with the tort liability system. It may not be necessary to litigate over whether the manufacturer was negligent, but deciding whether a product was "defective" is still necessary—and about as difficult. And once it has been determined that a product was defective, there is the same opportunity for costly wrangling over the monetary value of nonmonetary loss—pain and suffering, loss of consortium, and so forth—that must be reimbursed.

There is a real problem, though, in extending no-fault principles to provide reimbursement of all medical expenses and wage loss (but not noneconomic loss) caused by injury from a product, whether or not the product is "defective." In the field of products liability, the question of who or what should be viewed as "causing" an injury can be just as complicated as the question of "negligence" or "due care" in other settings. If one is in reasonably good physical condition before an auto accident and comes out of the collision with a gash on the cheek or even a severed arm, it is not hard to determine that it was the automobile accident that caused the gash or the amputation. But what if one slips on a throw rug at a neighbor's house and smashes one's head on the marble table top? On a no-fault basis, who should pay for the medical expenses and wage loss? Should the neighbor pay as a homeowner? The marble quarry? The manufacturer of the table? Or the manufacturer of the throw rug (remembering that, under no-fault, it doesn't matter whether or not the manufacturer put a rubber backing on the rug to prevent slips)? Thus, determining liability could often be just as vexing on a no-fault as on a negligence basis.

IV. The Fair-Trade Answer

On the other hand, this does not mean that society has to make do with product liability insurance, either as it exists or as insurance companies and those they insure would like to reform it. The key to both workers' compensation and auto no-fault reforms, unlike those being proposed by insurers and product sellers, is balance: it is easier for the injured party to be paid but he or she is paid less. That is a fair exchange on both sides. If a complete no-fault system for non-workplace and non-auto accidents is not feasible, at least some of the same trade-offs can be obtained.

We should start with the following two benchmarks for reform:

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9. *Id.* at 25–40.

- *Make it easier for injured parties to be paid promptly for economic losses without litigating the fault of either products or persons (including the injured themselves) and without significantly increasing current liability costs.*
- *To hold the line—and perhaps even reduce—the costs for any increase in new claims by lowering the costs of litigation and lowering payments for noneconomic loss.*

Proposals being made by the insurance industry and by product sellers do not meet these criteria. By limiting pain and suffering awards, contingent fees, joint and several liability, and other remedies, they would make it no easier—and often indeed harder—for injured parties to be paid promptly for their economic loss. Similarly, proposals that obligate payment of any and all injury claims—or at least an indeterminate number of new ones—offer no guarantee that insurance costs will not rise exponentially.[10]

V. Neo-No-Fault

With these benchmarks in mind, I have proposed a law under which any product seller[11] facing a products liability claim would have the option of offering a claimant within, say, a maximum of 180 days, periodic payment of the claimant's net economic loss. That would be prompt payment compared to what the tort system offers. Such payment would cover any further medical expenses, including rehabilitation, and wage loss, not already covered by any other health or disability insurance payable to the claimant. It would also call for a reasonable hourly fee for the claimant's lawyer.

These benefits are lavish compared to those under most health insurance policies in this country; few such policies, for example, cover costs of rehabilitiation. Under the proposed law, if a product seller promptly offers to pay these benefits to the injured customer, further pursuit of a product liability claim in tort would be foreclosed. The claimant, in other words, would be forced to accept such an offer. Indeed, I have elsewhere termed the proposal "Offers That Can't Be Refused."[12] (I would allow the claimant to refuse the offer, under certain restricted circumstances: if the defendant had caused the injury intentionally—a rare occurrence, surely—or if the victim's economic losses were minimal, as with the death of a nonearner. More on this last point later.[13]) Under this proposal, no defendant would be forced to offer such a settlement. Thus, potential defendants would not be saddled with unmanageable new burdens.

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10 *E.g.*, *Product Liability Amendments: Hearings Before the Subcommittee on the Consumer of the Senate Comm. on Commerce, Science and Transporation*, 99th Cong., 1st Sess. (1985); J. O'Connell & C.B. Kelly, The Blame Game: Injuries, Insurance, & Injustice 128–29 (1987), *see* text following *supra* note 9.

11. Which term includes anyone in the chain of transmission—manufacturer, wholesaler, or retailer. *See* notes 16–17 *infra* and accompanying text.

12. O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 Nw. U.L. Rev. 589 (1982).

13. *See infra* note 24 and accompanying text.

But wouldn't such a law give defendants an unfair advantage by allowing them to settle for less than they would be forced to pay in a tort suit but never forcing them to settle for *more* than they would pay in such a suit? I foresee little risk of such one-sided advantage. Rather, the huge costs of defending tort cases and the massive exposure to payment for noneconomic losses in such cases would encourage defendants to save themselves such costs and avoid such exposure by offering to pay claimant's noneconomic losses, not only in cases they are sure to lose, but even in many—perhaps most—cases in which their liability is in doubt. One leading malpractice lawyer has said that if a similar neo-no-fault plan were in effect in the realm of medical malpractice, he would advise making an offer to pay claimants' net economic losses in 200 of the 250 cases his office was then defending.[14]

What about injured products users? Would they be unhappy with this new law? The answer is that most claimants are not happy with the slugfest tort lawyers have created. Few who have been seriously injured have any taste for (1) a lottery to determine whether they will be paid for their medical expenses and wage loss, and (2) a bitter fight that constantly reminds them of the accident, even to the point of being challenged by the other side's lawyer, often snidely, that a jury might consider them liars or cheats. Such battles may be acceptable to lawyers, who do it for a living, but their injured clients hate the process. Indeed, they emerge twice injured: by the accident itself and then by the bruising legal battle that follows. Given a choice between prompt payment of real losses on the one hand, and a warring gamble for long-delayed possible payment of more on the other, the certainty of prompt payment usually will seem more attractive. Most seriously injured buyers will prefer a legal system that encourages prompt payment rather than one that encourages product providers to dig in their heels and incur potentially huge litigation expenses, either out of fear that an award of intangible damages will be yet more costly or out of hope that delay and expense will force the claimant to reduce or drop his demands. The premise of the proposal is that it is foolish and wasteful to spend vast sums on guesswork over whether a product was faulty, then paying some victims much more than their loss and others much less, instead of simply encouraging injured victims to be compensated promptly for their out-of-pocket losses.

Trial lawyers and others claiming to speak in consumers' interests may criticize the proposal on the ground that findings that a product is defective and damage awards for pain and suffering, which the proposal would remove, work to deter businesses from selling unsafe products. But, we have already noted how arbitrary and capricious the tort system often is in imposing damage payments; such caprice tends to undermine whatever deterrent effects the present system may otherwise have. As criminologists have long preached, if sanctions are to be effective as a deterrent they must be both *swift* and *certain*. But swift and certain are two things that tort law surely is not. In addition, whatever deterrence is imposed by tort law is heavily diluted by product liability insurance, which shifts the cost of injury not to the maker

14. Personal communication to author.

or other seller of the supposedly defective product, but to all who are paying (directly or indirectly) for similar insurance coverage.

Also, under this neo-no-fault proposal, a defendant could only foreclose a tort claim by offering to pay the victim's economic losses in perpetuity—a not insufficient commitment in itself. By no means would defendants escape scot-free under this plan. We would not be abandoning the tort liability system. Rather, in a sort of jujitsu maneuver, we would use tort law's bulk and weight as leverage to spin it around and thereby protect ourselves from losses while avoiding the system's own crushing effects.

VI. Some Further Detail

Once a product seller has made a commitment to pay the victim's economic loss, it is required within thirty days to make payments for any losses already incurred and to continue to make them as further losses are incurred. The plan thus contemplates that payments be made as loss accrues. It provides, however, that, if the parties agree, a court-approved lump sum payment may be made to the victim. (The proposed legislation also authorizes the court to make provisions to prevent dissipation of the fund in appropriate circumstances.)

The bill also permits the seller and accident victim to agree that the seller may discharge its liability by a tender of less than full economic loss. It is unwise, and probably impossible, to prevent people from making their own arrangements. However, to avoid the risk that an unscrupulous seller or its insurance company might take undue advantage of an injured victim, any settlement for payment of less than full economic loss (if the economic loss exceeds $5000) would have to be approved by the court to be effective. If such a lesser settlement were required to be submitted to a court, but was not submitted, the settlement would not be effective, and the victim would have the same rights as any victim of a product defect to whom a tender is not made.

The injured victim is assured by the seller's offer that he will be made financially whole for the injury without having to bring suit and suffer the uncertainty and delay of litigation. In exchange for this certainty, and the inducements to the seller to make the offer, the victim gives up an opportunity to participate in the litigation lottery, which admittedly for some victims results in recovery for noneconomic damages.

Under the present tort system, attorneys' fees owed by a successful plaintiff are often paid out of the noneconomic damages; such extra payment thus funds the payment of contingent fees.[15] Because these elements of damages would be eliminated, the bill provides that in addition to paying the victim's net economic loss, the tendering seller would pay reasonable expenses, including attorneys' fees, incurred by the victim in obtaining legal advice about the offer and collecting benefits.

The bill also provides that any product seller—a manufacturer, wholesaler, or retailer—which believes it is at risk of liability for an injury (or illness) may make

15. O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. Ill. L. Rev. 333, 351.

the offer to the victim. The provider of goods making such an offer may also designate any third person who may be liable as a participant in the offer. The issue of whether or in what amount a third person must contribute to the amount to be tendered would be determined in a separate arbitration.[16] A third party so designated would receive the same protection against personal injury suits as a tendering provider. Although a third party thus can be forced to participate in the tendering process against its will, it will not, as a practical matter, be disadvantaged by being a participant in an offer. It thereby avoids exposure to liability for noneconomic tort damages (including pain and suffering), and can still deny and dispute any liability on its part under the offer. Thus, if a retailer makes an offer, it may designate a manufacturer as a contender. A manufacturer may similarly designate the retailer. Either offeror may also designate a wholesaler or component parts manufacturer or other person who may be liable.

When an offer is made and more than one person is designated as a participant, the participants may agree upon their relative contribution to the compensation to be paid to the victim. It can be expected that this agreement will be made informally and expeditiously among sellers in the chain of distribution and their insurers who know they will be dealing commercially with each other on an ongoing basis, and, consequently, that they will make common-sense settlements. If they fail to do so, however, this question will be submitted to arbitration to be decided on the basis of relative fault among the participants in the offer.[17]

The plan would not permit a product seller to preclude a tort action where a seller's wrongful conduct was intentional.[18] If the victim elected to rely on the exception for intentional conduct, he would notify the party making an offer that he was rejecting that offer. Thus, the victim could not receive payment for economic loss and then sue the tendering party alleging that the exception applied.

Under the above version of the early offers approach, the product seller *may* make an offer. The claimant has no choice; if an offer is made to a claimant, the claimant cannot sue for any pain and suffering. The two greatest problem areas under the proposal are the fact that the claimant has no choice, and further that since pain and suffering damages are totally abolished, a claimant with small economic, but large noneconomic, loss would recover little.

I have in the past said that a first fallback would be a cap: the claimant could be given a choice of whether or not to accept an offer of net economic loss; if she

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16. *See infra* note 18 and accompanying text.

17. At common law, a defendant can implead a third person in a tort action: as a result, involving such third persons in the offer can be viewed as just another form of impleading.

18. The definition of *intentional* should read in the following terms or their equivalent:

> A person intentionally causes or attempts to cause a personal injury when acting or failing to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow; but a person does not intentionally cause or attempt to cause injury merely because the act or failure to act is intentional or is done with the realization only that it creates a grave risk of causing injury without the purpose of causing injury or if the act or omission is for averting bodily harm to oneself or another person.

For the rationalization for rigidly defining intentional conduct in this way, as opposed to including, say, gross negligence, see J. O'Connell, Ending Insult to Injury: No-Fault Insurance for Products and Services 154–55 (1975); P. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts § 34 (5th ed. 1984).

rejected the offer, she could sue—but a cap would be placed on the amount of pain and suffering she could recover in any such suit.[19] This would be better than the traditional cap discussed above[20] because it would give the claimant something in exchange: the claimant would be subject to the cap only if she had been offered payment of her economic loss without having to go to court. (The usual proposals for a cap, as discussed earlier,[21] would require the plaintiff to go to court and then impose a cap on her when she was successful.)

However, even though the fallback is fairer to the plaintiff than the traditional cap, it will be tarred with the same brush. It is clear that even such a cap may be the lightning rod for opposition to the proposal.

And yet the focus of the early offers approach on reducing litigation is entirely valid. Avoiding litigation is obviously the area where the largest savings can be obtained and where the treatment of victims of malfunctioning products can be most easily improved.

Accordingly, we should consider ways of maintaining the basic structure of the early offers approach but avoiding a unilaterally imposed cap. The bill could provide that the claimant has a choice of whether or not to accept an offer, but that if the claimant rejects an offer, he may go to court subject to certain restrictions, such as:

1. The standard of proof is more stringent than the usual civil standard of preponderance of the evidence. (It is questionable whether a verbal standard makes much difference to a jury,[22] but it does give the trial court and the appellate court a better handle to control a result if they so desire.)

2. The defendant is specifically authorized to offer to finance a second opinion from another lawyer (who cannot be the plaintiff's trial counsel and who cannot have any financial interest in the plaintiff's case) as to whether it is in the plaintiff's interest to reject the defendant's early offer.[23]

3. The plaintiff can recover noneconomic losses, only if he establishes a "substantial" amount of such damages. This would limit rejections of the tender to those cases which underlay the justification for giving the plaintiff a choice—those in which noneconomic loss (including any punitive damages awarded) is much greater than the plaintiff's economic loss. A formula would be used to define "substantial." For instance, a plaintiff could collect nonecomonic damages only if they were at least four times greater than his economic loss.[24] (The risk of this approach, of course, is

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19. J. O'Connell & C.B. Kelly, *supra* note 10, at 135.

20. *Supra* note 3.

21. *Id.*

22. O'Connell, *Jury Trials in Civil Cases?*, 58 Ill. B.J. 796, 807–08 (1970).

23. In a more stringent provision, the bill might provide that an action could not be brought unless the plaintiff had obtained a second opinion from another lawyer (who, as in the above provision, could not be the plaintiff's trial counsel nor have any financial interest in the plaintiff's case) as to whether it is in the plaintiff's interest to reject the defendant's early offer. *See* O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 Calif. L. Rev. 898, 909–10 (1985).

24. For the genesis of this provision, see O'Connell, *supra* note 12, at 601–02. Note that under such a provision the plaintiff would be constrained from exaggerating how small his economic losses were in order to prove them less than 20% of his total damages in that he would be limited in what he would be paid for his economic losses, which would be all he would be entitled to if he could not get over the threshold for recovery of noneconomic damages. As a corollary, defendants would be constrained from exaggerating how large the economic losses were in order to prove them more than

that it might be an incentive for juries to increase the standard of proof of the amount of noneconomic loss in order to have their award be effective.)

4. If the plaintiff does not prevail in the subsequent litigation, the plaintiff must pay the defendant's costs, including legal fees, incurred after rejection of the tender. The plaintiff's counsel who brought the action would be jointly and severally liable for this obligation.

The main criticism of the early offers approach is arguably still applicable, namely that it is one-sided, in that the putative tortfeasor may initiate, with sanctions for rejecting, settlement of the case for periodic payment of net economic loss, but the claimant may not. To deflect this, a present version of the bill gives the claimant the opportunity to request speedy arbitration on the issue of fault.[25] If she is successful in same, she can collect net economic loss, plus attorney's fees.

There will be pressure to further revise the early offers approaches to provide that the claimant can offer to settle for net economic loss. If the provider rejects the offer, it becomes subject to sanctions such as those discussed above (particularly payment of attorneys' fees if it loses). This should be resisted. It would give the claimant further leverage to extract settlements and encourage strike suits. The positions of the claimant and defendant in making a settlement offer to cover economic loss are arguably asymmetrical. The bill imposes limitations on the claimant's suit only after he has been offered and rejected prompt payment for his net economic loss. But if the claimant offers to settle for net economic loss, society's interests are arguably not served by tilting the scales against a product seller in subsequent litigation if it rejects the offer. The risk of encouraging too many new claims (some of them of the nuisance variety)—and therefore of rising costs—argue against this approach.[26]

Unlike most proposals for tort reform, these versions of the early offers plan would *not* impose the restrictions across the board. They would demand that a defendant give something in return for its stronger shield against liability. Thus, the proposal would leave intact the tort rights of those victims to whom an offer of settlement had not been made and who therefore had to resort to a lawsuit.[27] Restrictions would only apply when victims reject an opportunity to avoid litigation by accepting what society and insurance theory[28] deem a fair settlement in the typical case.

20% of total damages. Such mutually reinforcing (and therefore healthy) incentives would seem to lead to more settlements in those (relatively few) cases where tort actions seem feasible. *Cf.* Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982).

25. Moore & O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267, 1284 n.51 (1984).

26. O'Connell, *supra* note 12, at 605–06. As a further incentive, however, for defendants in product liability cases to proffer claimants' net economic loss, the bill could provide that failure to do so eliminates any defense of claimant fault in a subsequent civil claim, short of intentional self-infliction of injury. *Id.* at 606; O'Connell, *A Proposal to Abolish Contributory and Comparative Fault with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L. REV. 591–600; for the restricted definition of "intentional" conduct (applicable to either the defendant or plaintiff), see *supra* note 18.

27. Moreover, the proposal may offer the additional advantage of barring the defendant from any potential defense based upon claimant's fault. *See supra* note 26.

28. As to the flagrant violations of insurance theory involved in tort liability for personal injury, see O'Connell, *supra* note 15, at 344–48.

VII. Conclusion

In sum, society ought to avoid, whenever possible, "shin-kicking litigation"[29] as a means of deciding whether injured people receive insurance benefits. After all, it was shortly after 1900 that our grandparents—with comparatively little information, actuarial or otherwise, to go on—abandoned tort liability as a means of paying for workplace injuries. As to other types of injuries—including those from manufactured products—as we approach the next turn of the century, surely we can follow their example and avoid tne costs, delays, and uncertainties of lawsuits. Indeed, such a neo-no-fault approach need not be limited to product liability. It could and should apply just as successfully to any or all personal injury claims.[30]

29. As one plaintiff's lawyer put it, after six years of legal battle before settlement of a complex products liability case, "this type of litigation is war—shin-kicking litigation. It often lasts for a long time." N.Y. Times, Aug. 31, 1982, at 10, cols. 1–6.

30. *See, e.g.*, Moore & O'Connell, *supra* note 25 Note that conflicts of laws problems loom especially large in products cases with their manifestly more likely interstate elements. *See* Professor Kozyris' contribution to t symposium.

Proposition 103
CALIFORNIA

103 Insurance Rates, Regulation, Commissioner. Initiative Statute

Official Title and Summary Prepared by the Attorney General

INSURANCE RATES, REGULATION, COMMISSIONER. INITIATIVE STATUTE. Requires minimum 20-percent rate reduction from November 8, 1987, levels, for automobile and other property/casualty insurance. Freezes rates until November 8, 1989, unless insurance company is substantially threatened with insolvency. Thereafter requires every insurer offer any eligible person a good-driver policy with 20-percent differential. Requires public hearing and approval by elected Insurance Commissioner for automobile, other property/casualty insurance rate changes. Requires automobile premiums be determined primarily by driving record. Prohibits discrimination, price-fixing, unfair practices by insurance companies. Requires commissioner provide comparative pricing information. Authorizes insurance activities by banks. Summary of Legislative Analyst's estimate of net state and local government impact: Would increase Department of Insurance administrative costs by $10 to $15 million in first year, varying thereafter with workload, to be paid by additional fees on the insurance industry. State and some local governments would have unknown savings from lower insurance rates. Gross premium tax reduction of approximately $125 million for first three years offset by required premium tax rate adjustment. Thereafter, possible state revenue loss if rate reductions and discounts continue but gross premium tax is not adjusted.

Analysis by the Legislative Analyst

Background

Various types of insurance are sold in California, including automobile, liability, fire, health and life. In 1987, companies collected about $50 billion in premiums from the sale of insurance. In turn, the state received about $1 billion from a tax on these premiums.

Motor vehicle insurance is one of the major types of insurance purchased in the state. It accounted for about $12 billion (24 percent) of all premiums collected during 1987. Additionally, fire and liability insurance premiums totaled about $10 billion, or 21 percent, of all premiums.

Rate Setting by Insurance Companies. Currently, insurance companies set rates for various types of insurance, using a number of factors. For motor vehicle insurance, these factors generally include the age, sex, marital status, driving record, type of vehicle and home address of the insured. The insurance companies also take into consideration other factors such as their claims experience, income and expenses. Insurance companies are not required to tell the public what relative weight they give to these factors when setting rates. In addition, insurance companies are not subject to the state's anti-trust laws.

Role of the Department of Insurance in Reviewing Rates. Currently, the Department of Insurance does not review and approve insurance rate changes before they take effect. Instead, the Department of Insurance can request insurance companies to justify such rates *after* they take effect, as part of the rate examination process or in response to complaints from consumers. Historically, the scope and frequency of rate examinations has been limited.

Proposal

In summary, this measure:

- Requires insurance companies to reduce rates for various types of insurance, including motor vehicle, fire and liability.
- Requires insurance companies to offer a "Good Driver Discount Plan" and makes other changes regarding automobile insurance.
- Requires the Insurance Commissioner to review and approve rate increases—for various types of insurance—before they can take effect.
- Requires that the Insurance Commissioner be elected.

This measure changes the laws that regulate insurance rates for certain types of insurance. It applies to motor vehicle, fire and liability insurance, but not to life, mortgage and disability insurance.

Rate Reductions

1. **Rate Reduction.** This measure requires that rates for motor vehicle, fire and liability insurance issued or renewed on or after November 8, 1988, be reduced by 20 percent from their levels on November 8, 1987.

2. **Rate Freeze.** The measure requires that the rates be kept at the reduced levels until November 8, 1989. During this period, the rates can be increased only if the Insurance Commissioner determines that the affected insurance company is threatened with insolvency.

Review and Approval of Insurance Rate Filings

Beginning November 8, 1989, the measure requires the Insurance Commissioner to review and approve rate changes before they go into effect. Insurance companies are required to file information with the commissioner to justify the new rates. In general, the commissioner is required to hold a public hearing on the proposed rate change whenever it exceeds certain percentages. Additionally, the commissioner is authorized to hold a hearing when requested by a consumer.

Good Driver Discount Plan and Other Automobile Provisions

1. **"Good Driver" Discount.** This measure requires insurance companies to offer motor vehicle insurance to good drivers at reduced rates. These rates would take effect November 8, 1989, (one year after the general rate reduction) and would be 20 percent below the rate which would otherwise have been paid for the same coverage.

Continued on page 140

Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds and repeals sections of the Insurance Code, and adds a section to the Revenue and Taxation Code; therefore, existing sections proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declaration.

The People of California find and declare as follows:

Enormous increases in the cost of insurance have made it both unaffordable and unavailable to millions of Californians.

The existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates.

Therefore, the People of California declare that insurance reform is necessary. First, property-casualty insurance rates shall be immediately rolled back to what they were on November 8, 1987, and reduced no less than an additional 20%. Second, automobile insurance rates shall be determined primarily by a driver's safety record and mileage driven. Third, insurance rates shall be maintained at fair levels by requiring insurers to justify all future increases. Finally, the state Insurance Commissioner shall be elected. Insurance companies shall pay a fee to cover the costs of administering these new laws so that this reform will cost taxpayers nothing.

SECTION 2: Purpose.

The purpose of this chapter is to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.

SECTION 3: Reduction and Control of Insurance Rates.

Article 10, commencing with Section 1861.01 is added to Chapter 9 of Part 2 of Division 1 of the Insurance Code to read:

Insurance Rate Rollback

1861.01. (a) For any coverage for a policy for automobile and any other form of insurance subject to this chapter issued or renewed on or after November 8, 1988, every insurer shall reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987.

(b) Between November 8, 1988, and November 8, 1989, rates and premiums reduced pursuant to subdivision (a) may be only increased if the commissioner finds, after a hearing, that an insurer is substantially threatened with insolvency.

(c) Commencing November 8, 1989, insurance rates subject to this chapter must be approved by the commissioner prior to their use.

(d) For those who apply for an automobile insurance policy for the first time on or after November 8, 1988, the rate shall be 20% less than the rate which was in effect on November 8, 1987, for similarly situated risks.

(e) Any separate affiliate of an insurer, established on or after November 8, 1987, shall be subject to the provisions of this section and shall reduce its charges to levels which are at least 20% less than the insurer's charges in effect on that date.

Automobile Rates & Good Driver Discount Plan

1861.02. (a) Rates and premiums for an automobile insurance policy, as described in subdivision (a) of Section 660, shall be determined by application of the following factors in decreasing order of importance:

(1) The insured's driving safety record.

(2) The number of miles he or she drives annually.

(3) The number of years of driving experience the insured has had.

(4) Such other factors as the commissioner may adopt by regulation that have a substantial relationship to the risk of loss. The regulations shall set forth the respective weight to be given each factor in determining automobile rates and premiums. Notwithstanding any other provision of law, the use of any criterion without such approval shall constitute unfair discrimination.

(b) (1) Every person who (A) has been licensed to drive a motor vehicle for the previous three years and (B) has had, during that period, not more than one conviction for a moving violation which has not eventually been dismissed shall be qualified to purchase a Good Driver Discount policy from the insurer of his or her choice. An insurer shall not refuse to offer and sell a Good Driver Discount policy to any person who meets the standards of this subdivision. (2) The rate charged for a Good Driver Discount policy shall comply with subdivision (a) and shall be at least 20% below the rate the insured would otherwise have been charged for the same coverage. Rates for Good Driver Discount policies shall be approved pursuant to this article.

(c) The absence of prior automobile insurance coverage, in and of itself, shall not be a criterion for determining eligibility for a Good Driver Discount policy, or generally for automobile rates, premiums, or insurability.

(d) This section shall become operative on November 8, 1989. The commissioner shall adopt regulations implementing this section and insurers may submit applications pursuant to this article which comply with such regulations prior to that date, provided that no such application shall be approved prior to that date.

Prohibition on Unfair Insurance Practices

1861.03. (a) The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section 16600 of Division 7, of the Business and Professions Code).

(b) Nothing in this section shall be construed to prohibit (1) any agreement to collect, compile and disseminate historical data on paid claims or reserves for reported claims, provided such data is contemporaneously transmitted to the commissioner, or (2) participation in any joint arrangement established by statute or the commissioner to assure availability of insurance.

(c) Notwithstanding any other provision of law, a notice of cancellation or non-renewal of a policy for automobile insurance shall be effective only if it is based on one or more of the following reasons: (1) non-payment of premium; (2) fraud or material misrepresentation affecting the policy or insured; (3) a substantial increase in the hazard insured against.

Full Disclosure of Insurance Information

1861.04. (a) Upon request, and for a reasonable fee to cover costs, the commissioner shall provide consumers with a comparison of the rate in effect for each personal line of insurance for every insurer.

Approval of Insurance Rates

1861.05. (a) No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter. In considering whether a rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income.

(b) Every insurer which desires to change any rate shall file a complete rate application with the commissioner. A complete rate application shall include all data referred to in Sections 1857.7, 1857.9, 1857.15, and 1864 and such other information as the commissioner may require. The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article.

(c) The commissioner shall notify the public of any application by an insurer for a rate change. The application shall be deemed approved sixty days after public notice unless (1) a consumer or his or her representative requests a hearing within forty-five days of public notice and the commissioner grants the hearing, or determines not to grant the hearing and issues written findings in support of that decision, or (2) the commissioner on his or her own motion determines to hold a hearing, or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the commissioner must hold a hearing upon a timely request.

1861.06. Public notice required by this article shall be made through distribution to the news media and to any member of the public who requests placement on a mailing list for that purpose.

1861.07. All information provided to the commissioner pursuant to this article shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply thereto.

1861.08. Hearings shall be conducted pursuant to Sections 11500 through 11528 of the Government Code, except that: (a) hearings shall be conducted by administrative law judges for purposes of Sections 11512 and 11517, chosen under Section 11502 or appointed by the commissioner; (b) hearings are commenced by a filing of a Notice in lieu of Sections 11503 and 11504; (c) the commissioner shall adopt,

Continued on page 140

103 Insurance Rates, Regulation, Commissioner. Initiative Statute

Argument in Favor of Proposition 103

There are important differences between the five insurance initiatives on the November ballot which you should be aware of before voting.

Proposition 103—Voter Revolt to Cut Insurance Rates—is the only insurance initiative written and paid for exclusively by consumers. It alone reduces all of your automobile, home and business insurance premiums to November 1987 prices. Then, it alone cuts them another 20%.

Proposition 103 will also end the insurers' exemption from the antimonopoly laws, allow people to elect the Insurance Commissioner, require a special 20% discount for good drivers, and stop unfair price increases in the future. It specifies that a permanent, independent consumer watchdog system will champion the interests of insurance consumers.

Proposition 103 is written in plain language. There are no loopholes or fine print. Unlike the other propositions, nonlawyers can read it.

Because the polls showed that the insurance industry could not defeat Voter Revolt's 103 directly, the insurance companies came up with a plan to defeat it indirectly. They are pushing Proposition 104—the so-called "no-fault" proposition—and are spending tens of millions of dollars to advertise that it is better for consumers than Proposition 103.

Privately, insurance executives have admitted that their Proposition 104 would actually raise auto insurance premiums for many drivers. Worse, Proposition 104 rewrites the entire California Insurance Code to benefit insurance companies. The 24,000 words of obscure legalese in Proposition 104 turn the law into a "your fault" system. Their fine print cancels out every consumer reform in Voter Revolt's Proposition 103.

Some insurance companies disagree with "no fault," so they're financing Proposition 101, which claims to make the biggest cut in auto insurance. But the big cut they boast about affects only one portion of your auto insurance—they could raise premiums for the rest of your coverage as much as they want. In return, Proposition 101 allows insurance companies to avoid full payment for accidents. It, too, cancels many of the auto insurance reforms in Proposition 103.

Insurance companies are also financing Proposition 106, which restricts your right to quality legal counsel. The insurance companies claim Proposition 106 will cut their costs. In fact, it will limit your ability to make the insurance companies pay up.

Proposition 100, which is paid for by trial lawyers and bankers, simply does not go far enough to protect consumers' interests. Unlike Proposition 103, it does not automatically and immediately cut insurance rates. Nor does it enable consumers to permanently unite to fight against insurance abuse, as Voter Revolt's Proposition 103 does.

Proposition 103 is the only initiative written and paid for exclusively by consumers. It will save you the most money.

To guarantee that every reform in Voter Revolt's Proposition 103 becomes law, it must get more "Yes" votes than any other proposition. Every vote in favor of another insurance proposition cancels your vote for Proposition 103. That's why we advise you to vote "Yes" *only* on Proposition 103.

RALPH NADER
Consumer Advocate

HARVEY ROSENFIELD
Chair, Voter Revolt to Cut Insurance Rates/ Proposition 103

Rebuttal to Argument in Favor of Proposition 103

Proponents of PROP 103 claim that their initiative includes no "fine print," but IT'S FULL OF UNINTENDED CONSEQUENCES THAT WILL WIPE OUT ANY BENEFITS IT PROMISES YOU. VOTE NO ON PROP 103.

The most glaring example of this "fine print" allows for massive government intervention into the insurance industry. A GOVERNMENT-RUN INSURANCE SYSTEM IS NOT THE ANSWER.

In New Jersey, where the government intervened in the insurance business under circumstances similar to those mandated in PROP 103, every driver is paying a surcharge to help foot a $2.5-billion deficit racked up by the state-run insurance system.

PROP 103 advocates also tell you their initiative contains no loopholes. Look again. It's loaded with them.

- RATES WILL INCREASE by an average 22% for two-thirds of the state's drivers, according to the State Department of Insurance, because PROP 103 eliminates rating based on the driving safety record of your neighborhood and forces suburban and rural drivers to subsidize motorists in high-risk areas.
- DRUNK DRIVERS who haven't lost their licenses can qualify for "good driver" discounts.

A MASSIVE BUREAUCRACY IS NOT THE SOLUTION. Only fundamental reform of our auto insurance system will hold down insurance premiums. We need to reduce the cost of litigation, fraud and subsidizing uninsured motorists.

PROP 103 DOES NOT REFORM OUR SYSTEM. IT DOES NOT GUARANTEE YOU LONG-TERM RATE REDUCTIONS.

Vote NO on PROP 103.

ALISTER McALISTER
Former Chair, Assembly Finance and Insurance Committee

ED DAVIS
State Senator, 19th District

KIRK WEST
President, California Chamber of Commerce

Insurance Rates, Regulation, Commissioner. Initiative Statute

103

Argument Against Proposition 103

KEEP BIG GOVERNMENT OUT OF THE AUTO INSURANCE BUSINESS.

You might think PROP 103's auto insurance rate reductions seem too good to be true. You're right.

Vote NO on PROP 103; it does not enact any cost-cutting reforms. Instead, it attacks the symptoms of our failing auto insurance system. It does not address, let alone begin to grapple with, the real problem—the cost of uninsured motorists, fraud and, most importantly, *runaway auto accident litigation.*

PROP 103 might seem well-intentioned but, unfortunately, it inevitably would lead to a huge, state-run insurance system costing millions of dollars.

Hidden provisions of this measure give the state unprecedented authority to enter the insurance business. If you think lines are long and the bureaucracy impenetrable at government offices today, just wait until you have to deal with the state to purchase insurance.

This sloppily drafted measure will:

- *Raise insurance premiums, in the long term, for the majority of California drivers.* PROP 103 forces insurers to ignore the driving safety record of where you live and, instead, forces you to subsidize drivers in areas that have the highest insurance losses. For example, a 55-year-old suburban driver will end up paying more for insurance so that a young urban driver can pay less. A State Department of Insurance study recently predicted that this aspect of PROP 103 will raise rates for two-thirds of the state's drivers —by an average 22%!
- *Allow convicted drunk drivers who have not lost their licenses to win an additional rate discount for "good driving."*
- *Make the Insurance Commissioner an elected official with* enormous new powers. This "insurance czar" would be a politician first, and a regulator second. As a politician, this official would be preoccupied with raising campaign money from special interests all too willing to "buy" influence.
- *Create a huge government bureaucracy that does nothing to make auto insurance more affordable.* Instead, PROP 103 would add time, expense and lots of lawyers to enact a price-control policy that has failed miserably in New Jersey and other states. To carry out this price-control policy, the measure increases the Department of Insurance's budget by 33% and its staff by at least 100 new bureaucrats.

VOTE NO on PROP 103. Lowering auto premiums for California drivers is a laudable goal, but this measure's flawed methods are not the answer. Please VOTE NO on PROP 103.

KIRK WEST
President, California Chamber of Commerce
WILLIAM CAMPBELL
State Senator, 31st District
Chairman, Joint Legislative Budget Committee
DAVID DAVREUX
Author, Consumers' Guide to Auto Insurance

Rebuttal to Argument Against Proposition 103

The insurance companies want to divert your attention away from the fact that Prop 103 will save *everyone* 20% on their auto insurance as well as their home and business insurance. That's why the statement above employs confusing and often ridiculous arguments against it.

Here are the facts:

- 103 is the *only* initiative that will immediately cut *everyone's* premiums by 20%.
- 103 forces insurance companies to base your rates on your driving record first, rather than on where you live. That means good drivers throughout the state will pay less than they do now, while bad drivers will pay more.
- 103 eliminates the insurance industry's unfair exemption from the antitrust laws. This will reduce rates permanently.
- 103 involves no new government bureaucracy—just a new set of rules to create a competitive marketplace and prohibit excessive rates.
- 103 will actually save money for taxpayers, according to the official California State Legislative Analyst.
- And no wonder the insurance companies don't want an elected Insurance Commissioner—in the states where people elect insurance commissioners, rates average 30% lower than in California.

Voter Revolt's Proposition 103 is the *only* insurance reform initiative written and paid for exclusively by consumers. That's why it is the *only* initiative endorsed by Ralph Nader.

103 will lower insurance rates for everyone. That's why the insurance industry is against it. Don't buy their misleading advertising. Vote YES on Proposition 103.

HARVEY ROSENFIELD
Chair, Voter Revolt to Cut Insurance Rates/ Proposition 103

Proposition 103: Analysis

Continued from page 98

In general, this measure defines a good driver as a person who, during the last three years, has (a) held a driver's license and (b) had no more than one conviction for a moving violation.

2. **Determining Factors for Rates.** In general, the measure requires that rates and premiums for automobile insurance be determined on the basis of the insured person's driving record, miles driven and number of years of driving experience.

Other Insurance-Related Provisions

1. **Antitrust Laws.** The measure makes insurance companies subject to the state's antitrust laws.

2. **Election of Insurance Commissioner.** The measure requires that the Insurance Commissioner be elected, the first election taking place in 1990.

3. **Consumer Assistance.** The measure requires the establishment of a nonprofit corporation to represent the interests of insurance consumers. Additionally, the measure requires the Insurance Commissioner to provide consumers—upon request and for a reasonable fee—with a comparison of the rates for *each* personal (that is, noncommercial) type of insurance offered in California. In general, this would include rates for private automobile, homeowner's and renter's insurance.

4. **Discounts or Rebates.** The measure permits insurance agents and brokers to give certain discounts or rebates to those who buy insurance from them. It does so, by eliminating the prohibition in current law against such discounts or rebates.

Fiscal Effect

Costs

Department of Insurance. This measure would increase the Department of Insurance's administrative costs by between $10 million to $15 million during 1988–89. These costs would be financed out of the Insurance Fund which is supported by fees and assessments on the insurance industry. Given the current balance in this fund, fees and assessments would have to be increased to cover these costs.

In years following, these costs could be somewhat lower or higher, depending on workload.

State and Local Governments. While some local governments purchase insurance, most "self-insure" by relying upon their own resources to pay losses and claims. The state is generally self-insured, but does purchase some liability and fire insurance. Because this measure reduces the rates for certain types of insurance, including motor vehicle, fire and liability, it would result in unknown savings to the state and those local governments that purchase such insurance.

Revenues

Insurance companies pay a tax based on the amount of gross premiums they receive each year from insurance sold in California. These tax revenues are deposited in the State General Fund.

Starting in November 1988, this measure requires that rates for motor vehicle, fire and liability insurance be reduced. These lines of insurance account for about 45 percent of all California insurance premiums. A good driver discount takes effect a year later. The Department of Insurance's new role in reviewing and approving proposed rate changes also takes effect in November 1989. The rate reductions and the good driver discounts combined normally would reduce state insurance tax revenues by about $125 million a year. This estimate assumes that about 50 percent of the drivers would qualify for the discount. It also assumes that no offsetting adjustments would be made in other insurance rates. The resulting state revenue loss, however, will not occur because this measure provides that for the period November 1988 to January 1991 the State Board of Equalization shall adjust the state tax rate on gross premiums to offset these premium reductions.

Thereafter, there would be an unknown General Fund revenue loss to the extent these rate reductions and discounts continue.

Proposition 103: Text of Proposed Law

Continued from page 99

amend or reject a decision only under Sectio '1517 (c) and (e) and solely on the basis of the record; (d) Section 11513.5 shall apply to the commissioner; (e) discovery shall be liberally construed and disputes determined by the administrative law judge.

1861.09. Judicial review shall be in accordance with Section 1858.6. For purposes of judicial review, a decision to hold a hearing is not a final order or decision; however, a decision not to hold a hearing is final.

Consumer Participation

1861.10. (a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

(b) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant.

(c) (1) The commissioner shall require every insurer to enclose notices in every policy or renewal premium bill informing policyholders of the opportunity to join an independant, non-profit corporation which shall advocate the interests of insurance consumers in any forum. This organization shall be established by an interim board of public members designated by the commissioner and operated by individuals who are democratically elected from its membership. The corporation shall proportionately reimburse insurers for any additional costs incurred by insertion of the enclosure, except no postage shall be charged for any enclosure weighing less than ⅓ of an ounce. (2) The commissioner shall by regulation determine the content of the enclosures and other procedures necessary for implementation of this provision. The legislature shall make no appropriation for this subdivision.

Emergency Authority

1861.11. In the event that the commissioner finds that (a) insurers have substantially withdrawn from any insurance market covered by this article, including insurance described by Section 660, and (b) a market assistance plan would not be sufficient to make insurance available, the commissioner shall establish a joint underwriting authority in the manner set forth by Section 11691, without the prior creation of a market assistance plan.

Group Insurance Plans

1861.12. Any insurer may issue any insurance coverage on a group plan, without restriction as to the purpose of the group, occupation or type of group. Group insurance rates shall not be considered to be unfairly discriminatory, if they are averaged broadly among persons insured under the group plan.

Application

1861.13. This article shall apply to all insurance on risks or on operations in this state, except those listed in Section 1851.

Enforcement & Penalties

1861.14. Violations of this article shall be subject to the penalties set forth in Section 1859.1. In addition to the other penalties provided in this chapter, the commissioner may suspend or revoke, in whole or in part, the certificate of authority of any insurer which fails to comply with the provisions of this article.

SECTION 4. Elected Commissioner

Section 12900 is added to the Insurance Code to read:

12900. (a) The commissioner shall be elected by the People in the same time, place and manner and for the same term as the Governor.

SECTION 5. Insurance Company Filing Fees

Section 12979 is added to the Insurance Code to read:

12979. Notwithstanding the provisions of Section 12978, the commissioner shall establish a schedule of filing fees to be paid by insurers to cover any *administrative or operational costs arising from the provisions of Article 10 (commencing with Section 1861.01) of Chapter 9 of Part 2 of Division 1.*

SECTION 6. Transitional Adjustment of Gross Premiums Tax

Section 12202.1 is added to the Revenue & Taxation Code to read:

12202.1. Notwithstanding the rate specified by Section 12202, the gross premiums tax rate paid by insurers for any premiums collected between November 8, 1988 and January 1, 1991 shall be adjusted by the Board of Equalization in January of each year so that the gross premium tax revenues collected for each prior calendar year shall be sufficient to compensate for changes in such revenues, if any, including changes in anticipated revenues, arising from this act. In calculating the necessary adjustment, the Board of Equalization shall consider the growth in premiums in the most recent three year period, and the impact of general economic factors including, but not limited to, the inflation and interest rates.

SECTION 7. Repeal of Existing Law

Sections 1643, 1850, 1850.1, 1850.2, 1850.3, 1852, 1853, 1853.6, 1853.7, 1857.5, 12900, Article 3 (commencing with Section 1854) of Chapter 9 of Part 2 of Division 1, and Article 5 (commencing with Section 750) of Chapter 1 of Part 2 of Division 1, of the Insurance Code are repealed.

~~1643. No bank, or bank holding company, subsidiary, or affiliate thereof, or any officer or employee of a bank, bank holding company, subsidiary, or affiliate, may be licensed as an insurance agent or broker or act as an agent or broker for insurance, in this state, or control a licensed insurance agent or broker, except that a bank or a bank holding company subsidiary, or affiliate of a bank, may be issued a license to act as a life and disability agent limited to the transaction of credit life and disability insurance, or an agent limited to the transaction of insurance which is limited solely to assuring repayment of the outstanding balance due on a specific extension of credit by a bank or bank holding company or its subsidiary in the event of the involuntary unemployment of the debtor, or both. A commercial bank may be licensed to sell insurance or act as an insurance broker as provided in Section 1203 of the Financial Code. This section shall not apply to any bank or bank holding company which, under the authorization of the Federal Reserve Board, had prior to January 1, 1976, a subsidiary or affiliate licensed to sell insurance (except that subsequent authorization to expand such activities shall be subject to this section), or to any bank holding company owning a state-chartered bank which had, prior to January 1, 1976, a subsidiary or affiliate licensed to sell insurance. This section shall not apply to any person authorized or licensed to make loans pursuant to Division 7 (commencing with Section 18000), Division 9 (commencing with Section 22000), Division 10 (commencing with Section 24000), or Division 11 (commencing with Section 26000) of the Financial Code.~~

~~For the purposes of this section, the following definitions shall apply:~~

~~(a) "Bank" means any institution in this state defined in Section 109 of the Financial Code except that such term does not include a title insurance company authorized to transact a trust business under the provisions of Article 4 (commencing with Section 12390) of Chapter 1 of Part 6 of Division 2 or a trust company controlled by or under common control with a title insurance company.~~

~~(b) "Bank holding company" means the same as the definition of that term set forth in Section 2 of the federal Bank Holding Company Act of 1956, as amended, but limited to holding companies which control a bank authorized to accept deposits in this state.~~

~~(c) "Subsidiary" means any corporation, association, or partnership, owned in whole or part by a bank or bank holding company.~~

~~(d) "Affiliate" means any corporation, association, or partnership connected through the ownership of a 10-percent or greater interest by a common parent.~~

~~(e) "Credit life, health, and accident insurance" means insurance on the life and health of a borrower from a bank issued to secure the repayment of the amount borrowed.~~

~~(f) "Control" means the possession, by any means, of the power to direct or cause the direction of the management or activities of a licensed insurance agent or broker.~~

~~1850. The purpose of this chapter is to promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory, to authorize the existence and operation of qualified rating organizations and advisory organizations and require that specified rating services of such rating organizations be generally available to all admitted insurers, and to authorize cooperation between insurers in rate making and other related matters.~~

~~It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis and nothing in this chapter is intended to give the Commissioner power to fix and determine a rate level by classification or otherwise.~~

~~1850.1. In this chapter "rating organization" means every person, other than an admitted insurer, whether located within or outside this State, who has as his object or purpose the making of rates, rating plans or rating systems. Two or more admitted insurers which act in concert for the purpose of making rates, rating plans or rating systems, and which do not operate within the specific authorizations contained in Sections 1853.5, 1853.7, 1853.8, and Article 5 shall be deemed to be a rating organization. No single insurer shall be deemed to be a rating organization.~~

~~1850.2. In this chapter "advisory organization" means every person, other than an admitted insurer, whether located within or outside this State, who prepares policy forms or makes underwriting rules incident to but not including the making of rates, rating plans or rating systems, or which collects and furnishes to admitted insurers or rating organizations loss or expense statistics or other statistical information and data and acts in an advisory, as distinguished from a rate making, capacity. No duly authorized attorney at law acting in the usual course of his profession shall be deemed to be an advisory organization.~~

~~1850.3. Unless otherwise apparent from the context, in this chapter:~~

~~(a) "Member" means an insurer who participates in or is entitled to participate in the management of a rating, advisory or other organization.~~

~~(b) "Subscriber" means an insurer which is furnished at its request (1) with rates and rating manuals by a rating organization of which it is not a member, or (2) with advisory services by an advisory organization of which it is not a member.~~

~~1852. The following standards shall apply to the making and use of rates pertaining to all classes of insurance to which the provisions of this chapter are applicable:~~

~~(a) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.~~

~~No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable.~~

~~No rate shall be held to be inadequate unless (1) such rate is unreasonably low for the insurance provided and (2) the continued use of such rate endangers the solvency of the insurer using the same, or unless (3) such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly.~~

~~(b) Consideration shall be given, to the extent applicable, to past and prospective loss experience within and outside this State, to conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to past and prospective expenses both countrywide and those specially applicable to this State, and to all other factors, including judgment factors, deemed relevant within and outside this State; and in the case of fire insurance rates, consideration may be given to the experience of the fire insurance business during the most recent five-year period for which such experience is available.~~

~~Consideration may also be given in the making and use of rates to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers.~~

~~(c) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof.~~

~~(d) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any difference among risks that have a probable effect upon losses or expenses. Classifications or modifications of classifications of risks may be established based upon size, expense, management, individual experience, location or dispersion of hazard, or any other reasonable considerations. Such classifications and modifications shall apply to all risks under the same or substantially the same circumstances or conditions.~~

~~1853. Subject to and in compliance with the provisions of this chapter authorizing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems; the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, or carrying on of research.~~

~~1853.6. Members and subscribers of rating or advisory organizations may use the rates, rating systems, underwriting rules or policy or bond forms of such organizations, either consistently or intermittently, but, except as provided in Sections 1853.8, 1853.9, and Article 5, shall not agree with each other or rating organizations or others to adhere thereto. The fact that two or more admitted insurers, whether or not members or subscribers of a rating or advisory organization, use, either consistently or intermittently, the rates or rating systems made or adopted by a rating organization, or the underwriting rules or policy or bond forms prepared by a rating or advisory organization, shall not be sufficient in itself to support a finding that an agreement to so adhere exists, and may be used only for the purpose of supplementing or explaining direct evidence of the existence of any such agreement.~~

~~1853.7. Licensed rating organizations and admitted insurers are authorized to exchange information and experience data with rating organizations and insurers in this and other states and may consult with them with respect to rate making and the application of rating systems.~~

~~1857.5. (a) The commissioner may promulgate reasonable rules and statistical plans, reasonably adapted to each of the rating systems in use within the state, which may be modified from time to time and which shall be used thereafter by each insurer in the recording and reporting of its loss and countrywide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid him in determining whether rating systems comply with the standards set forth in this chapter. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and are not susceptible of determination by a prorating of countrywide expense experience. In promulgating such rules and plans, the commissioner may give due consideration to the rating systems in use and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans used for such rating systems in other states. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system in use by it. The commissioner may designate one or more rating organizations or advisory organizations to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the commissioner, to insurers and rating organizations.~~

(b) Reasonable rules and plans may be promulgated by the commissioner for the interchange of data necessary for the application of rating plans.

(c) In order to further uniform administration or rate regulatory laws, the commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult with them with respect to ratemaking and the application of rating systems.

12000. The commissioner shall be appointed by the Governor, with the consent of the Senate and shall hold office for a term of four years, coextensive with the term of office of the Governor.

Article 3. Rating Organizations

1851. No rating organization shall conduct its operations in this state without first filing with the commissioner a written application for and securing a license to act as a rating organization. Any rating organization may make application for and obtain a license as a rating organization if it shall meet the requirements for license set forth in this chapter. Every such rating organization shall file with its application (a) a copy of its constitution, its articles of incorporation, agreement or association, and of its bylaws, rules and regulations governing the conduct of its business, all duly certified by the custodian of the originals thereof, (b) a list of its members and subscribers, (c) the name and address of a resident of this state upon whom notices or orders of the commissioner or process affecting such rating organization may be served, and (d) a statement of its qualifications as a rating organization.

The fee for filing an application for license as a rating organization is one hundred seventy-seven dollars ($177) lawful money of the United States, payable in advance to the commissioner.

1851.1. To obtain and retain a license, a rating organization shall provide satisfactory evidence to the commissioner that it will:

(a) Permit any admitted insurer to become a member of or a subscriber to such rating organization at a reasonable cost and without discrimination, or withdraw therefrom.

(b) Neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member or subscriber as a condition to membership or subscribership, to adhere to its rates, rating plans, rating systems, underwriting rules, or policy or bond forms.

(c) Neither adopt any rule nor exact any agreement the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policy holders, members or subscribers.

(d) Neither practice nor sanction any plan or act of boycott, coercion or intimidation.

(e) Neither enter into nor sanction any contract or act by which any person is restrained from lawfully engaging in the insurance business.

(f) Notify the commissioner promptly of every change in its constitution, its articles of incorporation, agreement or association, and of its bylaws, rules and regulations governing the conduct of its business; its list of members and subscribers; and the name and address of the resident of this State designated by it upon whom notices or orders of the commissioner or process affecting such organization may be served.

(g) Comply with the provisions of Section 1857.

1851.2. The commissioner shall examine each application for license to act as a rating organization and the documents filed therewith and may make such further investigation of the applicant, its affairs and its proposed plan of business, as he deems desirable.

The commissioner shall issue the license applied for within 60 days of its filing with him if from such examination and investigation he is satisfied that:

(a) The business reputation of the applicant and its officers is good.

(b) The facilities of the applicant are adequate to enable it to furnish the services it proposes to furnish.

(c) The applicant and its proposed plan of operation conform to the requirements of this chapter.

Otherwise, but only after hearing upon notice, the commissioner shall in writing deny the application and notify the applicant of his decision and his reasons therefor.

The commissioner may grant an application in part only and issue a license to act as a rating organization for one or more of the classes of insurance or subdivisions thereof or class of risk or a part or combination thereof as are specified in the application if the applicant qualifies for only a portion of the classes applied for.

Licenses issued pursuant to this section shall remain in effect until revoked as provided in this chapter.

1851.25. Notwithstanding the provision of Section 1851.2, each rating organization possessing a license of indefinite term pursuant to such section shall owe and pay to the commissioner an annual fee of one hundred seventy-seven dollars ($177) in lawful money of the United States in advance on account of such license until its final termination. Such fee shall be for periods commencing on July 1, 1964, and on each July 1st thereafter and ending on June 30, 1965, and each June 30th thereafter, and shall be due and payable on March 1, 1964, and on each March 1st thereafter and shall be delinquent on April 1, 1964, and each April 1st thereafter.

1851.3. Subject to the approval of the commissioner licensed rating organizations may make reasonable rules governing eligibility for membership.

1851.4. If two or more insurers having a common ownership or operating in this State under common management are admitted for the classes or types of insurance for which a rating organization is licensed to make rates, the rating organization may require as a condition to membership or subscribership of one or more that all such insurers shall become members or subscribers.

1851.5. A workers' compensation insurance rating organization licensed pursuant to the provisions of Article 3 (commencing with Section 11750) of Chapter 3 of Part 3 of Division 2 which does not make rates, rating plans or rating systems for insurance covering the liability of employers for compensation or damages under the United States Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, et seq.), shall not be required to be licensed as a rating organization or registered as an advisory organization pursuant to the provisions of this chapter and shall have authority under its license as a workers' compensation insurance rating organization to:

(a) Collect and tabulate loss and expense experience statistics and other information and data relating to insurance covering employers against their liability for compensation under the United States Longshoremen's and Harbor Workers' Compensation Act.

(b) Furnish or exchange such information and experience data to or with rating organizations, advisory organizations and insurers in this and other states.

(c) Adopt and enforce compliance by its insurer members with reasonable rules and statistical plans to be used in the recording and reporting by insurer members of their California longshoremen's and harbor workers' insurance loss and expense experience in order that such experience of all of its insurer members shall be available in such form and detail as will be of aid to the commissioner in the enforcement of, and to its insurer members in complying with, the provisions of this chapter.

(d) Engage in the same activities and carry out the same functions with respect to insurance covering the liability of employers for compensation or damages under the United States Longshoremen's and Harbor Workers' Compensation Act that it is authorized to engage in or carry out with respect to California workers' compensation insurance generally under the provisions of Article 3 (commencing with Section 11750) of Chapter 3 of Part 3 of Division 2 other than the making of rates, rating plans and rating systems.

Article 5. Unlawful Rebates, Profits, and Commissions

750. An insurer, insurance agent, broker, or solicitor, personally or by any other party, shall not offer or pay, directly or indirectly, as an inducement to insurance on any subject/matter in this State, any rebate of the whole or part of the premium payable on an insurance contract, or of the agent's or broker's commission thereon, and such rebate is an unlawful rebate.

750.1. The Legislature hereby finds and declares that the continued regulation of the business practices of insurers and their producers is in the interest of the citizens of the state and that the control and limitations of unlawful rebates, profits, and commissions is an essential component of that regulation which is necessary to effectuate an adequate and complete system and regulation of insurer and producer business practices.

The Legislature finds that the statutes controlling unlawful rebates, profits, and commissions continue to provide critical protection to insureds in this state from the numerous consequences that would occur in the absence of such regulation, including company insolvencies, unfair discrimination between insureds with identical risks creating subsidies from small purchasers of insurance in favor of large purchasers of insurance, decreased quality of services to insurance consumers, increased concentration of insurance distribution and sales mechanisms, and misrepresentation and unethical sales practices such as improper replacement or twisting to the detriment of the public.

It is the intent of the Legislature in enacting this section to clearly set forth the legislative intent supporting the enactment, continuing vitality, and importance of the unlawful rebates, profits, and commissions sections of this code.

751. An insurer, or an insurance agent, broker, or solicitor, personally or otherwise, shall not offer or pay, directly or indirectly, as an inducement to enter into an insurance contract, any valuable consideration which is not clearly specified, promised or provided for in the policy, or application for the insurance, and any such consideration not appearing in the policy is an unlawful rebate.

752. Any person named as the insured in any policy or named as the principal, or obligee, in any surety policy or the agent or representative of any such person who, directly or indirectly, knowingly accepts or receives any unlawful rebate is guilty of a misdemeanor.

753. (a) It is unlawful for any insurance agent or broker, or any insurance solicitor employed thereby, to receive any financial benefit from an automobile repair facility or any other form of direct or indirect consideration from any person for referring insureds to that person or that person's designee for vehicle repairs covered under automobile comprehensive coverage, property damage coverage, or automobile collision coverage of an insurance policy issued through the insurance agent or broker or by an insurer represented by the insurance agent.

(b) Subdivision (a) applies with respect to commercial and noncommercial policies of automobile insurance.

(c) For purposes of this section, "financial benefit" means the receiving of any commission or gratuity, discount on repair costs, free repairs, or employment by a repair facility.

754. Payments of commissions or fees by insurers or their agents to insurance brokers, when otherwise lawful under this code, are expressly authorized.

755. The paying or allowing of any commission or other valuable consideration on insurance business in this State to other than an admitted insurer or a licensed insurance agent, broker or solicitor is an unlawful rebate.

755.2. If at the time of the solicitation and issuance of a policy of life or disability insurance, or of a surety bond which by its terms continues until canceled, a person may lawfully receive commissions thereon, such person, or in the event of his death, his estate or heirs may continue to receive commissions thereon during the continuance in force or renewal of such policy or bond without being licensed under the provisions of Chapter 5, Part 2, Division 1 of this code, provided:

(a) Such recipient does not transact insurance in connection with such policy or bond while not so licensed; and

(b) The payment is made pursuant to a contract entered into, before such solicitation and issuance, between the insurer paying or allowing the commission and such person.

755.5. It is unlawful for an insurance agent who is not also licensed as an insurance broker to receive commissions derived from insurance placed with an insurer which has not appointed him to act as its agent in the transaction of such insurance.

It is unlawful for an insurance solicitor to receive commissions on insurance from any source other than the employer for whom he is licensed excepting on life or disability insurance transacted by him under individual licenses as life or disability agent issued to him pursuant to this code.

It is unlawful for any person to pay to an insurance agent or solicitor any commissions which he can not lawfully receive.

Except as provided in Section 763 it is unlawful for an insurer to receive for its own use commissions on insurance placed with another insurer.

755.6. Notwithstanding the provisions of Section 755.5, an insurer participating in any Assigned Risk Plan, as provided for in Article 4 (commencing with Section 11620), Chapter 1, Part 3, Division 2 of the Insurance Code, may pay to a licensed insurance agent, and such agent may receive, a commission or consideration on any automobile or liability coverages written in addition to any commission or consideration required under such plan if such agent has been designated by the applicant for insurance as producer of record for the coverages required under such plan.

755.7. Any person, including but not limited to any person licensed, certificated under this code or exempted under this code from regulation, who for consideration advises, or agrees to advise, any person concerning insurance, insurance policies, insurance needs or insurance programs of any sort and who agrees to, or does, allow credit against such consideration for such services for any portion of any insurance commission which may accrue, directly or indirectly, to such person who so advises or agrees to advise, is guilty of making an unlawful rebate and guilty of a misdemeanor.

756. When the premium on a policy insuring an employer is based upon the amount or segregation of the employer's pay roll, and the employer, personally or knowingly through his employee, procures a lower premium by wilfully misrepresenting the amount or segregation, such misrepresentation is an unlawful rebate as to the employer.

In addition to any penalty provided by law for unlawful rebates, the employer in such case is liable to the State in an amount ten times the difference between the lower premium paid and the premium properly payable. The commissioner shall collect the amount so payable and may bring a civil action in his name as commissioner to enforce collection unless the misrepresentation is made to and lower premium procured from the State Compensation Insurance Fund. In the latter case the liability to the State under this section shall be enforced in a civil action in the name of the State Compensation Insurance Fund and any amount so collected shall become a part of that fund.

757. When a statement of the amount or segregation of a pay roll is materially false, and an insurer, through a person employed by it in a managerial capacity, accepts the statement as the basis for the premium on a policy, the acceptance is an unlawful rebate if the accepting employee knows of the falsity.

758. Every insurer shall exercise reasonable diligence in securing the observance of this article by its agents.

759. It is unlawful for any insurer to appoint an agent for the purpose of enabling such agent, or the employer or person requesting the appointment of the agent, to obtain insurance at a cost less than that specified in the policy, or at a cost less than that specified in the application therefor.

760. As used in this section "personal or controlled insurance" means insurance covering an insurance agent, broker, or solicitor, or

(a) His spouse, his employer or his employer's spouse.

(b) Any person related to him or the persons mentioned in subdivision (a) within the second degree by blood or marriage.

(c) If his employer is a corporation, any person directly or indirectly owning or controlling a majority of the voting stock or controlling interest in such corporation.

(d) If his employer is a partnership or association, any person owning any interest in such partnership or association.

(e) If the agent or broker is a corporation, any person directly or indirectly owning or controlling a majority of the voting stock or controlling interest in the agent or broker and any corporation which is also similarly directly or indirectly controlled by the person who directly or indirectly controls the agent or broker.

(f) If the agent or broker is a corporation, any corporation making consolidated returns for United States income tax purposes with any corporation described in subdivision (e).

If premiums on personal or controlled insurance transacted by an insurance agent, broker, or solicitor payable in one year exceed the premiums on other insurance transacted by such licensee payable in the same year, the receipt of commissions upon the excess is an unlawful rebate.

Provided that during and after the sixth calendar year following the initial licensing of such agent, broker, or solicitor, in any manner as an agent, broker or solicitor, whether continuously licensed or not, if premiums on personal or controlled insurance transacted by him payable in any one such calendar year exceed 33⅓ percent of the other premiums transacted by him payable in the same calendar year, the receipt of commissions upon the excess over such 33⅓ percent is an unlawful rebate. For the purposes of this paragraph, if the agent or broker be an organization the sixth calendar year shall be the first calendar year beginning five years or more after the initial licensing of the organization, or any predecessor thereof, as an agent or broker.

Provided further, that this section does not apply to an individual licensee who: (1) is licensed during all of such calendar year as a solicitor, or individually as an agent or broker; (2) during such calendar year conducts an individual business, not being named to transact on any organization license nor owning any interest in any corporation or partnership transacting an insurance agency or brokerage business; (3) has been continuously licensed in some manner as an active agent, broker or solicitor for at least 25 years; and (4) is at least 65 years of age at the beginning of the calendar year.

Whenever an officer or director of a corporation acts as agent, broker, or solicitor in the transaction of insurance covering the corporation, he shall be conclusively presumed to have received the full commission on such contract while an employee of the corporation. Whenever the remuneration for services of an employee is decreased by the employer or is made unreasonably small in amount but the employee is permitted, as an insurance agent, broker, or solicitor, to transact personal or controlled insurance, it shall be conclusively presumed that such employee receives the full amount of commission on such personal or controlled insurance.

"Year" as used in this section means the calendar year. Suspension, revocation or denial of license for violation of this section may be ordered at any time within five years after the close of the year in which the violation occurred.

760.5. As used in this section "personal or controlled insurance" means insurance covering a life agent, or

(a) His spouse, his employer, his employer's spouse, or any group of employees under a group policy issued to his employer.

(b) Any person related to him, his spouse, his employer or his employer's spouse within the second degree by blood or marriage.

(c) If his employer is a corporation, any person directly or indirectly owning or controlling a majority of the voting stock or controlling interest in such corporation.

(d) If his employer is a partnership or association, any person owning any interest in such partnership or association.

(e) If the agent is a corporation, any person directly or indirectly owning or controlling a majority of the voting stock or controlling interest in the agent.

If commissions on personal or controlled insurance transacted by a life agent under his license as a life agent received in one year exceed the commissions received in that year on other insurance transacted by such licensee under his license as life agent, the receipt of commissions upon personal or controlled insurance in excess of those on such other insurance is an unlawful rebate.

Provided that during and after the sixth calendar year following the initial licensing of such life agent in any manner as a life agent, disability agent or life and disability agent, whether continuously licensed or not, if commissions on personal or controlled insurance transacted by him under any or all such licenses received in any such calendar year exceed 33⅓ percent of the commissions received in the same calendar year on other insurance transacted by him under any or all such licenses, the receipt of commissions upon personal or controlled insurance in excess of 33⅓ percent of those on such other insurance is an unlawful rebate. For the purposes of this paragraph, if the license be a joint firm license: The sixth calendar year as respects the firm shall be the first calendar year beginning five years or more after the initial licensing of the firm or any predecessor thereof as a joint firm licensee with any individual; the firm may be charged with a violation of this section separately based upon all joint firm licenses it may have held during the calendar year; and an individual named on one or more joint firm licenses may be charged with a violation of this section separately based upon all life licenses, individual and joint firm, he may have held during the calendar year.

Provided, further, that this section does not apply to an individual licensee who: (1) is licensed during all of such calendar year under one or more kinds of individual life licenses; (2) during all of such calendar year conducts an individual business, not being named in any joint firm license nor owning any interest in a corporation or partnership transacting business under any kind of life license; (3) has been continuously licensed in some manner as an active agent under some kind of life license for at least 25 years; and (4) is at least 65 years of age at the beginning of the calendar year.

"Year" as used in this section means the calendar year. Suspension, revocation or denial of license for violation of this section may be ordered at any time within five years after the close of the year in which the violation occurred.

761. Any insurer, insurance agent, broker, solicitor, or life agent and any officer or employee of an insurer, insurance agent, broker, or life agent that makes or receives an unlawful rebate is guilty of a misdemeanor.

763. The following acts are not unlawful rebates:

(a) The return by an insurer issuing policies on a participating plan, or any portion of the premium as a dividend after the expiration of the term covered by such policy.

(b) The payment of commission by any insurer, or insurance agent, broker or solicitor, to another insurer, or insurance agent, broker or solicitor, upon insurance lawfully transacted in that capacity.

(c) The allowance by any marine insurer, or marine insurance agent, broker, or solicitor to any insured, of such usual discount as is sanctioned by custom among marine insurers as being additional to the agent's or broker's commission.

(d) The paying by an insurer to another insurer, or to an insurance agent, broker, or solicitor, of a commission in respect to a policy under which the payee is insured, or the receiving by such payee of such commission.

(e) The paying by an insurer of bonuses to policyholders on nonparticipating life insurance or otherwise abating their premiums, in whole or in part, out of surplus accumulated from nonparticipating insurance.

(f) The return as a dividend by a life insurer of any portion of the premium on policies issued on a participating plan at any time.

(g) The return, by an insurer transacting industrial insurance on a weekly payment plan, to policyholders who have made premium payments for a period of at least one year directly to the insurer at its home or district office, of a percentage of the premium which the insurer would have paid for the weekly collection of such premiums.

~~(h) The paying by any life insurer, or the receiving by life insurance policyholders of special compensations, or the allowing and receiving of credits already agreed upon in life insurance contracts now in force.~~

~~(i) The payment by an insurer of any portion of life insurance premiums payable by its employees pursuant to a life insurance program under which 75 per cent or more of its employees are required to carry life insurance on their lives so long as they remain in the employment of insurer.~~

~~(j) The payment or allowance of a fee or commission by one surety insurer to another surety insurer in respect to a risk on which both are cosureties.~~

~~763.5. The sale of the good will, business, list of policyholders or similar assets of an agent or broker in consideration of commissions or portions thereof to be thereafter earned by the use of such assets and payments of such consideration are not unlawful rebates if the purchaser is duly licensed to transact insurance and the receipt of the commissions would not constitute a violation of Section 760 if the person receiving them were licensed as an insurance agent.~~

~~764. Any person may be compelled to testify or produce evidence at the trial or hearing on a charge of violating a provision of this article, even though such testimony or evidence may incriminate him. A prosecution shall not be brought or maintained against such person for any act concerning which he thus testifies or produces evidence, except for perjury committed in so testifying.~~

~~765. If an insurer knowingly violates any provisions of this article, or knowingly permits any officer, agent, or employee so to do, the commissioner, after a hearing in accordance with the procedure provided in Section 704, may suspend the insurer's certificate of authority to do the class of insurance in which the violation of this article occurred.~~

~~766. If an insurance agent, broker, or solicitor knowingly and wilfully violates any of the provisions of this article, the commissioner, after a hearing in accordance with the procedure provided in Article 13 of Chapter 5 of this part may suspend or revoke the violator's license.~~

~~767. Notwithstanding any provision in this article to the contrary, it shall not be unlawful for any licensed insurance broker to pay a commission to an agent or broker licensed under the laws of Mexico when such agent or broker in Mexico refers to the insurance broker licensed in this state a resident of Mexico who wishes to obtain a policy of automobile liability insurance to be effective in this state from an insurer licensed in this state, and such broker negotiates and effects such a policy of insurance for such resident of Mexico.~~

SECTION 8. Technical Matters

(a) This act shall be liberally construed and applied in order to fully promote its underlying purposes.

(b) The provisions of this act shall not be amended by the Legislature except to further its purposes by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electorate.

(c) If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Proposition 104: Analysis

Continued from page 102

- Permits, but does not require, insurance companies to offer an unspecified "good driver" discount.
- Enacts other insurance-related provisions, and reenacts many provisions related to various lines of insurance which are currently in law.
- Provides that if this measure receives a higher number of votes than other measures on this ballot, then those provisions in other measures that relate to the business of insurance shall have no effect.

No-Fault System

Starting July 1, 1989, this measure establishes a no-fault motor vehicle insurance system that (1) applies only to bodily injury and (2) permits individuals to sue for losses which exceed specified limits.

This measure applies to private and commercial motor vehicles including automobiles, trucks, buses and trailers. It does not apply to motorcycles and "off-road-type" vehicles which are not registered with the Department of Motor Vehicles.

This measure contains the following features.

1. **"Basic" Benefits.** Requires the following minimum basic benefits to be paid by insurance companies to injured persons regardless of who is at fault:
   - Up to $10,000 for medical expenses;
   - Up to $15,000 for lost wages; and
   - $5,000 for funeral benefits, in case the injuries result in death.

In general, the basic benefits would not be provided to an uninsured motorist, a person driving a stolen car, or a person engaged in the commission of a felony.

This measure provides that the basic benefits shall be available only to pay medical expenses and lost wages to the extent that these expenses are not covered by workers' compensation and disability benefits.

Any dispute concerning payment of basic benefits would be decided by arbitration, and not by court trial. The arbitration would be conducted in accordance with procedures established by the Insurance Commissioner.

2. **Recovery of Workers' Compensation Costs.** Restricts the ability of employers to be reimbursed for medical expenses and wage losses paid under workers' compensation and other similar programs when employees are injured in motor vehicle accidents. Currently, an employer may recover the cost of benefits—such as workers' compensation—it provides to an employee who was injured in an accident by another person who was at fault.

3. **Additional Recovery.** Permits an injured person to recover costs in excess of the no-fault basic benefits by suing the party at fault for the accident.

4. **Noneconomic Losses.** Prohibits recovery for noneconomic losses (such as pain and suffering), except in cases involving (a) death or (b) serious and permanent disfigurement or injury. It would not limit the right to sue for damages in cases involving (a) the operation of an uninsured vehicle, (b) harm caused intentionally, or (c) specified crimes

5. **Attorney Fees.** Limits plaintiffs' attorney contingency fees in motor vehicle accident cases involving bodily injury to the following: (a) 15 percent of the basic no-fault benefits recovered; (b) 33.3 percent of the first $50,000 recovered over the basic benefits; (c) 25 percent of the second $50,000 recovered over the basic benefits, and (d) 15 percent of the recovery over $100,000.

6. **Premium Reduction.** Requires insurance companies to reduce—by 20 percent for a two-year period (July 1989 through June 1991)—th[illegible] average statewide premium rates for spec[illegible] motor vehicle insurance. This would includ[illegible] sic bodily injury liability, uninsured motorist a[illegible] basic no-fault benefits provided under this measure. This reduction does not apply to the personal property liability damage, collision and comprehensive portions of a motor vehicle insurance policy.

Other Insurance-Related Provisions

The measure enacts other motor vehicle insurance-related provisions including the following.

1. **Claims Settlement Practices.** Requires that disputes between an insurance company and persons other than policyholders be settled by arbitration rather than by court action.

2. **Penalty.** Increases the penalty from an "infraction" to a "misdemeanor" fo[illegible] second and subsequent convictions for violation of the current financial responsibility laws.

3. **Insurance Fraud.** Increases the authority of the Insurance Commissioner to investigate and prosecute insurance fraud.

4. **Premium Discounts.** Permits, but does not require,

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ALASKA

Claims Made Professional Liability Premium Schedule

Effective June 1, 1988

First Year New Doctor Rule Rates*

Retroactive Date 1/1/88 or Later

DOCTORS COVERAGE CLASSIFICATIONS	LIMITS 1 500,000/1,500,000		LIMITS 2 1,000,000/3,000,000		LIMITS 3 2,000,000/4,000,000		LIMITS 4 5,000,000/5,000,000	
	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY
1. COVERAGE CLASS 1	475	118.75	558	139.50	742	185.50	928	232.00
2. COVERAGE CLASS 2	604	151.00	710	177.50	852	213.00	1,065	266.25
3. COVERAGE CLASS 3	862	215.50	1,015	253.75	1,217	304.25	1,521	380.25
4. COVERAGE CLASS 4	992	248.00	1,167	291.75	1,400	350.00	1,750	437.50
5. COVERAGE CLASS 5	1,509	377.25	1,775	443.75	2,130	532.50	2,662	665.50
6. COVERAGE CLASS 6	1,681	420.25	1,978	494.50	2,373	593.25	2,966	741.50
7. COVERAGE CLASS 7	2,155	538.75	2,536	634.00	3,169	792.25	3,961	990.25
8. COVERAGE CLASS 8	3,103	775.75	3,651	912.75	4,563	1,140.75	5,704	1,426.00
9. COVERAGE CLASS 9	4,310	1,077.50	5,071	1,267.75	6,591	1,647.75	8,239	2,059.75
10. COVERAGE CLASS 10	5,861	1,465.25	6,896	1,724.00	9,240	2,310.00	11,550	2,887.50

ALASKA
DATE PREPARED: MARCH 17, 1988
PROCEDURE: NDPREM
USERID: MIECUWK

*These rates apply only to physicians entering the practice of medicine for the first time after completion of a residency, fellowship training or military service.

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MIEC Medical Insurance Exchange of California

ALASKA

Claims Made Professional Liability Premium Schedule

Effective June 1, 1988

Limits of Liability: 5,000,000 Each Claim / 5,000,000 Annual Aggregate

DOCTORS COVERAGE CLASSIFICATIONS	FIRST YEAR RATES RETROACTIVE DATES: 01/01/88 OR LATER		SECOND YEAR RATES RETROACTIVE DATES: 01/01/87 - 12/31/87		THIRD YEAR RATES RETROACTIVE DATES: 01/01/86 - 12/31/86		FOURTH YEAR RATES RETROACTIVE DATES: 01/01/85 - 12/31/85		FIFTH YEAR RATES RETROACTIVE DATES: 08/01/75 - 12/31/84	
	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY
1. COVERAGE CLASS 1	3,712	928	7,296	1,824	9,272	2,318	10,016	2,504	10,880	2,720
2. COVERAGE CLASS 2	4,260	1,065	8,376	2,094	10,648	2,662	11,500	2,875	12,496	3,124
3. COVERAGE CLASS 3	6,084	1,521	11,968	2,992	15,212	3,803	16,428	4,107	17,848	4,462
4. COVERAGE CLASS 4	7,000	1,750	13,760	3,440	17,492	4,373	18,892	4,723	20,524	5,131
5. COVERAGE CLASS 5	10,648	2,662	20,940	5,235	26,620	6,655	28,748	7,187	31,232	7,808
6. COVERAGE CLASS 6	11,864	2,966	23,336	5,834	29,660	7,415	32,036	8,009	34,804	8,701
7. COVERAGE CLASS 7	15,844	3,961	31,160	7,790	39,612	9,903	42,780	10,695	46,476	11,619
8. COVERAGE CLASS 8	22,816	5,704	44,872	11,218	57,040	14,260	61,604	15,401	66,924	16,731
9. COVERAGE CLASS 9	32,956	8,239	64,812	16,203	82,388	20,597	88,980	22,245	96,668	24,167
10. COVERAGE CLASS 10	46,200	11,550	90,856	22,714	115,496	28,874	124,736	31,184	135,516	33,879
11. NURSE/TECHNICIAN	256	64	504	126	640	160	692	173	752	188
12. PHYSIOTHERAPIST	512	128	1,008	252	1,280	320	1,384	346	1,500	375
13. PHYS ASST/NURSE PRAC	612	153	1,200	300	1,524	381	1,644	411	1,788	447

The Retroactive Date is the original date of your first MIEC policy.

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ALASKA

Claims Made Professional Liability Premium Schedule

Effective June 1, 1988

Limits of Liability: 2,000,000 Each Claim / 4,000,000 Annual Aggregate

DOCTORS COVERAGE CLASSIFICATIONS	FIRST YEAR RATES RETROACTIVE DATES: 01/01/88 OR LATER		SECOND YEAR RATES RETROACTIVE DATES: 01/01/87 - 12/31/87		THIRD YEAR RATES RETROACTIVE DATES: 01/01/86 - 12/31/86		FOURTH YEAR RATES RETROACTIVE DATES: 01/01/85 - 12/31/85		FIFTH YEAR RATES RETROACTIVE DATES: 08/01/75 - 12/31/84	
	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY
1. COVERAGE CLASS 1	2,968	742	5,836	1,459	7,420	1,855	8,012	2,003	8,704	2,176
2. COVERAGE CLASS 2	3,408	852	6,704	1,676	8,520	2,130	9,200	2,300	9,996	2,499
3. COVERAGE CLASS 3	4,868	1,217	9,576	2,394	12,168	3,042	13,144	1,286	14,280	3,570
4. COVERAGE CLASS 4	5,600	1,400	11,008	2,752	13,996	3,499	15,116	3,779	16,420	4,105
5. COVERAGE CLASS 5	8,520	2,130	16,752	4,188	21,296	5,324	23,000	5,750	24,988	6,247
6. COVERAGE CLASS 6	9,492	2,373	18,668	4,667	23,728	5,932	25,628	6,407	27,844	6,961
7. COVERAGE CLASS 7	12,676	3,169	24,928	6,232	31,688	7,922	34,224	8,556	37,184	9,296
8. COVERAGE CLASS 8	18,252	4,563	35,896	8,974	45,632	11,408	49,284	12,321	53,540	13,385
9. COVERAGE CLASS 9	26,364	6,591	51,852	12,963	65,912	16,478	71,184	17,796	77,336	19,334
10. COVERAGE CLASS 10	36,960	9,240	72,688	18,172	92,396	23,099	99,788	24,947	108,412	27,103
11. NURSE/TECHNICIAN	208	52	404	101	512	128	556	139	600	150
12. PHYSIOTHERAPIST	412	103	808	202	1,024	256	1,108	277	1,200	300
13. PHYS ASST/NURSE PRAC	488	122	960	240	1,220	305	1,316	329	1,428	357

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MIEC **Medical Insurance Exchange of California**

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Claims Made Professional Liability Premium Schedule

Effective June 1, 1988

Limits of Liability: 1,000,000 Each Claim / 3,000,000 Annual Aggregate

DOCTORS COVERAGE CLASSIFICATIONS	FIRST YEAR RATES RETROACTIVE DATES: 01/01/88 OR LATER		SECOND YEAR RATES RETROACTIVE DATES: 01/01/87 - 12/31/87		THIRD YEAR RATES RETROACTIVE DATES: 01/01/86 - 12/31/86		FOURTH YEAR RATES RETROACTIVE DATES: 01/01/85 - 12/31/85		FIFTH YEAR RATES RETROACTIVE DATES: 08/01/75 - 12/31/84	
	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY
1. COVERAGE CLASS 1	2,232	558	4,388	1,097	5,580	1,395	6,024	1,506	6,544	1,636
2. COVERAGE CLASS 2	2,840	710	5,584	1,396	7,100	1,775	7,668	1,917	8,332	2,083
3. COVERAGE CLASS 3	4,060	1,015	7,980	1,995	10,144	2,536	10,952	2,738	11,900	2,975
4. COVERAGE CLASS 4	4,668	1,167	9,176	2,294	11,664	2,916	12,596	3,149	13,684	3,421
5. COVERAGE CLASS 5	7,100	1,775	13,960	3,490	17,748	4,437	19,168	4,792	20,824	5,206
6. COVERAGE CLASS 6	7,912	1,978	15,556	3,889	19,776	4,944	21,356	5,339	23,204	5,801
7. COVERAGE CLASS 7	10,144	2,536	19,944	4,986	25,352	6,338	27,380	6,845	29,748	7,437
8. COVERAGE CLASS 8	14,604	3,651	28,720	7,180	36,508	9,127	39,428	9,857	42,832	10,708
9. COVERAGE CLASS 9	20,284	5,071	39,888	9,972	50,704	12,676	54,760	13,690	59,492	14,873
10. COVERAGE CLASS 10	27,584	6,896	54,244	13,561	68,956	17,239	74,472	18,618	80,904	20,226
11. NURSE/TECHNICIAN	172	43	336	84	428	107	464	116	500	125
12. PHYSIOTHERAPIST	344	86	672	168	856	214	924	231	1,000	250
13. PHYS ASST/NURSE PRAC	408	102	800	200	1,016	254	1,096	274	1,192	298

The Retroactive Date is the original date of your first MIEC policy.

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MIEC Medical Insurance Exchange of California

ALASKA

Claims Made Professional Liability Premium Schedule

Effective June 1, 1988

Limits of Liability: 500,000 Each Claim / 1,500,000 Annual Aggregate

DOCTORS COVERAGE CLASSIFICATIONS	FIRST YEAR RATES RETROACTIVE DATES: 01/01/88 OR LATER		SECOND YEAR RATES RETROACTIVE DATES: 01/01/87 - 12/31/87		THIRD YEAR RATES RETROACTIVE DATES: 01/01/86 - 12/31/86		FOURTH YEAR RATES RETROACTIVE DATES: 01/01/85 - 12/31/85		FIFTH YEAR RATES RETROACTIVE DATES: 08/01/75 - 12/31/84	
	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY	ANNUAL	QUARTERLY
1. COVERAGE CLASS 1	1,900	475	3,732	933	4,744	1,186	5,120	1,280	5,564	1,391
2. COVERAGE CLASS 2	2,416	604	4,748	1,187	6,036	1,509	6,516	1,629	7,080	1,770
3. COVERAGE CLASS 3	3,448	862	6,784	1,696	8,620	2,155	9,312	2,328	10,116	2,529
4. COVERAGE CLASS 4	3,968	992	7,800	1,950	9,912	2,478	10,708	2,677	11,632	2,908
5. COVERAGE CLASS 5	6,036	1,509	11,868	2,967	15,084	3,771	16,292	4,073	17,700	4,425
6. COVERAGE CLASS 6	6,724	1,681	13,224	3,306	16,808	4,202	18,152	4,538	19,724	4,931
7. COVERAGE CLASS 7	8,620	2,155	16,952	4,238	21,548	5,387	23,272	5,818	25,284	6,321
8. COVERAGE CLASS 8	12,412	3,103	24,412	6,103	31,032	7,758	33,512	8,378	36,408	9,102
9. COVERAGE CLASS 9	17,240	4,310	33,904	8,476	43,096	10,774	46,544	11,636	50,568	12,642
10. COVERAGE CLASS 10	23,444	5,861	46,108	11,527	58,612	14,653	63,300	15,825	68,772	17,193
11. NURSE/TECHNICIAN	148	37	288	72	364	91	392	98	428	10[illegible]
12. PHYSIOTHERAPIST	292	73	572	143	728	182	784	196	852	213
13. PHYS ASST/NURSE PRAC	348	87	680	170	864	216	932	233	1,012	253

The Retroactive Date is the original date of your first MIEC policy.

6250 Claremont Avenue, Oakland, California 94618-1324
Telephone (415) 428-9411 / From outside California (800) 227-4527

MIEC Medical Insurance Exchange of California

ALASKA

1988 Coverage Classification and Premium Schedule

If you practice in more than one specialty, use the highest rated specialty.

Class	Specialty
2	Administrative Medicine
2	Allergy
8	Anesthesiology
5	Assisting at Surgery
4	Cardiology*
9	Cardiovascular Surgery
8	Colon & Rectal Surgery
3	Dermatology, Excluding Hair Transplants
5	Dermatology, Including Hair Transplants
7	Dermatology – liposuction
8	Emergency Medicine
3	Endocrinology*
	Family Practice General Practice
3	– No Surgery
5	– Less than 5% of income from performance of Surgery
8	– 5% or more of income from performance of Surgery
10	– Including Obstetrics
9	– Including 5% or more income from any combination of Orthopedics, Gynecology, ENT Surgery
3	Gastroenterology*
3	General Preventive Medicine
8	General Surgery
8	Gynecology (Only)
8	Hand Surgery
8	Head & Neck Surgery
3	Hematology*
6	Industrial Medicine
3	Infectious Diseases*
3	Internal Medicine*
4	Neonatology*
3	Neoplastic Diseases*
3	Nephrology*

Class	Specialty
4	Neurology, Excluding Invasive Procedures
5	Neurology, Including Invasive Procedures
10	Neurological Surgery
3	Nuclear Medicine*
10	OB-GYN
3	Occupational Medicine (Not Industrial)
4	Ophthalmology, Excluding Radial Keratotomy
7	Ophthalmology, Including Radial Keratotomy or 5% or more from cosmetic surgery
9	Orthopedics, Excluding Spinal Surgery and use of Chymopapain
10	Orthopedics, Including Spinal Surgery and use of Chymopapain
8	Otolaryngology
9	Otolaryngology – 5% or more from Cosmetic Surgery
2	Pathology
3	Pediatrics
4	Pediatric Cardiology
8	Pediatric Surgery
3	Physical Medicine and Rehabilitation
8	Plastic Surgery
1	Psychiatry**
1	Psychiatry, Child**
2	Public Health
3	Pulmonary Diseases*
7	Radiology, Diagnostic and Therapeutic
4	Radiology, Diagnostic Only*
7	Radiology, Therapeutic Only*
3	Rheumatology*
8	Thoracic Surgery, Excluding Cardiovascular
4	Urgent Care Medicine
7	Urology

*Includes all procedures, including Invasive Diagnostic Procedures, considered usual and customary to and within the training and purview of the specialty.

**Without ECT or drug shock therapy. With ECT or drug shock therapy, use Class 3.

Partnership/Corporation Liability and Full Time Employed Physicians — 7% if all partners/shareholders and employed doctors have $500,000/1,500,000 limits; 2.5% if all partners/shareholders and employed doctors have $1,000,000/3,000,000 limits or higher. Full Time Employed Physicians must carry limits at least equal to employer. Employer will be charged a percentage of the premium charged for the employed physician's classification at employer's limits.

Secretaries, Receptionists and Bookkeepers — No charge.

Optional Coverages:

Professional premises/limited non-owned automobile liability

Covers certain liabilities for injuries sustained by the public or for damage to property of third persons at your offices. It also covers certain liabilities to injured parties arising from an employee's use of an automobile (not owned, rented or leased to you) in the course of your professional practice, up to $100,000 for bodily injury and $25,000 for property damage. Refer to the policy for coverage specifics.

LIMITS OF LIABILITY: Bodily injury, $500,000 each claim/aggregate, or $1,000,000 each claim/aggregate (to coincide with professional liability limits, but not higher than $1,000,000); Property damage, $100,000.

PREMIUM: No additional premium for premises occupied as physicians' professional offices. Clinics and other premises: refer to MIEC.

Defense coverage for miscellaneous liability

Provides up to $100,000 legal defense coverage only for alleged acts or omissions involving:

- Certain civil actions or proceedings, including a physician's acts or omissions as an officer of a national, state or local medical or specialty society;
- Alleged wrongful termination or discrimination against an employee;
- Breach of contract or other alleged misconduct in the nature of a commercial or fee dispute arising from professional practice.
- Assault, battery, false arrest or personal restraint, malicious prosecution or conspiracy arising from professional practice.

This optional coverage is fully described in Part IV of the MIEC policy and is subject to the terms and conditions of the policy and endorsements actually issued. MIEC pays 90% of legal expenses to a maximum amount of $100,000.

PREMIUM: Individuals and solo professional corporation, $1,800 per year. Individuals with more than 10 employees, medical corporations with more than one physician shareholder, partnerships, laboratories and all other non-individual policyholders should contact MIEC for a special application and premium quotation.

M E M O R A N D U M February 17, 1989

SUBJECT: Civil Actions - HB 166

TO: Representative Sam Cotten

FROM: Michael F. Ford
Legislative Counsel

The following is a sectional analysis of HB 166:

Section 1 - Findings and purpose.

Section 2 - Requires that an action for personal injury, death, or property damage be brought within six years of the date of injury, if caused by a product or by construction, or within six years of the last act alleged to be the cause of the injury. Periods of disability, such as minority, incompetency, or imprisonment do not extend the six year period. This section does not apply if the personal injury, death, or property damage was caused intentionally, or if another shorter period of limitation applies.

Section 3 - Removes actions for personal injury, death, or property damage, from the existing two year statute of limitations.

Section 4 - Requires that an action for personal injury, death, or property damage be brought within two years of the time the person had the right to bring the action. The two year period is not extended for any period of disability, such as minority, incompetency, or imprisonment. The section does not apply if a shorter period of limitation is imposed.

Section 5 - Requires that clear and convincing evidence of malice, bad motive, or reckless indifference to the interests of another exist before punitive damages may be awarded.

Section 6 - Prohibits a person from recovering damages for personal injury or death if the injury or death occurred while the person was committing a crime and the person has been convicted of the crime. Crime includes a felony or a misdemeanor.

Section 7 - Provides that a person who commits a crime that results in personal injuries to that person is not prevented from recovering damages for personal injury or death, if the person liable was also engaged in the commission of a crime and has been convicted of the crime. Also defines the term "crime", to include a felony or a misdemeanor.

Section 8 - Requires that if a portion of a judgment is owed to an attorney under a contingent fee agreement, that portion must be reduced to a present value and paid in a lump sum, rather than as a part of periodic payments ordered by the court.

Section 9 - Requires that the court include an amount for inflation, when ordering that future damages be paid by periodic payments.

Section 10 - Prohibits recovery of damages for personal injury, death, or property damage caused by an act or omission within the official duties of a member of the board of directors or an officer of a public corporation, or electric or telephone cooperative, unless the act or omission constituted gross negligence.

Section 11 - Allows a person to only recover damages that are in excess of compensation received from other sources, such as private or government insurance. Also requires the court or jury to be informed of the tax implications of an award of damages.

Section 12 - Lowers the legal rate of interest that may be awarded on judgments from 10.5% to eight percent, unless otherwise agreed by contract.

Section 13 - Prohibits the award of prejudgment interest for future economic or noneconomic damages.

Section 14 - Technical amendment.

Section 15 - Prohibits an award of nonmonetary damages in excess of $50,000, in a wrongful death action.

<u>Section 16</u> - Prohibits the court from awarding attorney fees in a civil action for personal injury, death, or property damage, unless specifically authorized by statute or by agreement of the parties.

<u>Section 17</u> - Limits the liability of a hospital for civil damages caused by a person who is not an employee. Requires the hospital to post notice that certain individuals are not employees. Provides that the limitation does not apply to liability based on the hospital's own negligence or intentional misconduct. Adds certain definitions.

<u>Section 18</u> - Requires the director of the division of insurance to annually report to the legislature regarding medical malpractice insurance rate changes occurring as a result of certain court decisions.

<u>Section 19</u> - Limits the right of a person to bring an action against a peace officer or member of the emergency service patrol when taking an intoxicated person into custody, unless the act or commission was grossly negligent, reckless or intentional.

<u>Section 20</u> - Repeals (1) a limit on recovery of noneconomic damages contained in AS 09.17.010(c),(2) an exception to the award of future damages contained in AS 09.17.040(c), and (3) a section regarding consideration of collateral benefits in a medical malpractice action contained in AS 09.55.548.

<u>Section 21</u> - Requires the Department of Commerce and Economic Development to report to the legislature regarding the effect of certain insurance claims on the civil justice system.

<u>Section 22</u> - Notice of amendment to the civil rules of court.

<u>Section 23</u> - Notice of amendment to the civil rules of court.

<u>Section 24</u> - Applicability.

<u>Section 25</u> - Effective date.

MFF:kb
wkk2/022

Alaska State Legislature

C-17

Please enter into the record my testimony to the (H) ~~Labor & Commerce~~ Interior Delegation
committee name

committee on HB 166, dated ~~4~~ 4/1/89.
bill/subject

1) Please clarify what the exemptions are under Sec. 09.17.030, and what other matters besides felonies this will include.

2) Please explain Sec 15 (g) what is this $50,000 nonpecuniary damages mean to victims?

3) I do not feel tort reform is going to be the solution to this problem. I haven't seen any insurance premiums come down whether it's the Doctors or whoever.

4) Who is going to be able to afford insurance in another five yrs. No insurance company has said, if you give us tort reform we'll give you 1-2-3 they haven't given us anything! Now they want to limit the victims right to recover more. (over)

Signed: Barbara Gaston
Testifier

(self)
Representing (Optional)

1825 Sheldon Ave
Address

Fbks, Ak 99701

Phone No. 451-8872

(2)

I didn't catch the fellow's name who testified from Matsu but he has said everything I wanted to say. Please send me a copy of his testimony.

Why don't insurance companies make victims a decent offer to begin with? Why have they forced victims to get lawyers just to talk to them?

This bill is an April Fool's joke and no solution. We need insurance reform!

Citizens' Coalition For Tort Reform

March 15, 1989

Rep. Sam Cotten
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker,

Recently we have received a wide variety of documents in support of our continued quest for comprehensive tort reform. We would like to share some of those letters and resolutions with you.

Submitted, for the record, are communications from:

Alaska Chapter, The American Institute of Architects

Alaska Dental Society

Alaska Society of Professional Engineers

Anchorage Branch, American Society of Civil Engineers

Anchorage Chamber of Commerce

CH2M Hill, Inc. (Including Rationale for Statutes of Repose, American Consulting Engineers Council)

Consulting Engineers Council of Alaska

Cordova Medical Clinic

Greater Ketchikan Chamber of Commerce Resolution

Institute of Electrical & Electronics Engineers, Inc., Alaska Section

Maniilaq Association on behalf of its Member Villages; Ambler, Buckland, Deering, Kiana, Kivalina, Kobuk, Kotzebue, Noatak, Noorvik, Selawik, Shungnak

Ouzinkie, City of - Resolution 89-4

P.O. Box 2[illegible]668
Anchorage, Alaska 99520
Phone: 561-6250

Petersburg, City of - Resolution No. 1170-R

PEPP (Professional Engineers in Private Practice), Alaska Chapter

Providence Hospital, Sister Dona Taylor, Administrator

Providence Hospital, Kaaren R. Johnson, Associate Administrator, Program & Service Development

Soldotna, City of - Resolution 89-3

Structural Engineers Association of Alaska

Valdez, City of - Resolution No. 8905

Yukon Equipment, Inc.

We sincerely hope these messages, along with the many others you have received, or will receive, will encourage the House to (1) report HB166 out of committees with "Do Pass" recommendations and then (2) promptly adopt the bill.

The mandate of Alaskan voters will then be fulfilled.

Very truly yours,

David A. McGuire, M.D.
Chairman

ALASKA CHAPTER
THE AMERICAN INSTITUTE OF ARCHITECTS
P.O. BOX 10-3563 • ANCHORAGE, ALASKA 99510

Citizens Coalition For Tort Reform
P.O.Box 201668
Anchorage, Alaska 99520
(907) 561-6250

The Members of the 16th Alaska State Legislature,

We are writing to you to express the Alaska Chapter, American Institute of Architects support for the immediate enactment of Alaska's tort reform agenda.
We cannot emphasize enough the importance of tort reform to Alaska's Architectural and Engineering professions. Our professions liability insurance has become prohibitively expensive and it is tenative on continued availability in Alaska at any price.
It is essential that Tort Reform legislation be passed this year. The practices and future of many A/E firms hang in the balance.
Because insurance underwriters will not positively respond to a vauge or impotent bill, it is imperative that the Legislature develope effective Tort Reform legislation.
Tort Reform (in general) and reinstating the Statute of Limitation and repose is the Alaska Chapter American Institute of Architectures number one legislative priorty. Our goal is to rest only when such significant legislation is enacted.
The Alaska Chapter American Institute of Architecture desires that the 16th Legislature enact Alask's Tort Reform Agenda.

Sincerely,
Joel G. Chamberlain 1/16/89
Joel G. Chamberlain
President,
AIA, Alaska Chapter
American Institute of Architects

Alaska Dental Society
3400 Spenard Road, Suite 10
Anchorage, Alaska 99503
(907) 277-4675

January 20, 1989

David A. McGuire, M.D., Chairman
Citizens' Coalition for Tort Reform
P.O. Box 201668
Anchorage, Alaska 99520

Dear Dr. McGuire:

The Alaska Dental Society has heartily endorsed the newest agenda for tort reform legislation and would like to communicate our support to Coalition members and to the members of the 16th Alaska State Legislature.

Certainly, our most immediate appeal is to emphasize the importance of passing this particular agenda during this legislative session. The mandate for constructive tort reform was overwhelmingly stated by the Alaska electorate last November, and it appears the once heard opposition that the matter is too complicated has been defeated at the polls. This proposed agenda, issue by issue, presents effective, comprehensive tort reform legislation....badly needed in Alaska. We vote YES!

Sincerely,

Kerry D. Kennedy

Kerry D. Kennedy, D.D.S.
President
Alaska Dental Society

cc: Sam Kito

Alaska Society of Professional Engineers

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS FOUNDED 1934

Anchorage Chapter
P.O. Box 10-0833 Anchorage, Alaska 99510-0833

January 19, 1989

Members of the 16th Alaska State Legislature
c/o Citizen's Coalition for Tort Reform
P.O.Box 201668
Anchorage, AK 99520

Re: Tort Reform Legislation

Senators and Representatives of the 16th Legislature:

The Anchorage Chapter of the Alaska Society of Professional Engineers (ASPE) is a strong supporter of the Coalition's efforts to secure passage of **comprehensive and efficient tort reform legislation.** In fact, many of our members helped obtain signatures for the initiative petition process which resulted in Ballot Measure #2.

Our chapter membership of approximately 110 professional engineers supports the eleven reforms the Coalition is asking the legislature to pass this session. Some of these reforms, such as the statutes of limitations and repose, and the cap on non-economic damage awards, are of more importance to the design profession that others, however, I believe all are important to us as citizens. It is evident that the present tort laws are costing us all money, not just the plaintiffs and defendants. This is apparent through the ever-increasing cost of insurance - business insurance, automobile insurance, homeowner's insurance, etc.

The tort reform legislation is not intended to deprive injured parties of fair and just compensation. Rather it is intended to introduce fairness and predictability to the process.

Our society supports these reforms. I believe the people of Alaska support these reforms as evidenced by the recent overwhelming passage of Ballot Initiative #2. ASPE urges each and everyone of you to seriously consider and support meaningful tort reform legislation this session. We ask that you not allow the proposed legislation be butchered, so that what is passed in the name of tort reform has little practical meaning, as was done in 1986.

Many of us will be monitoring the progress of this important legislation. Please don't allow it to become stuck in one committee or another.

We look forward to a successful and productive legislative session. Good luck!

Very truly yours,

Anchorage Chapter,
Alaska Society of Professional Engineers

Stephen D. Shrader

Stephen D. Shrader, P.E.
Chapter President

ANCHORAGE BRANCH
AMERICAN SOCIETY OF CIVIL ENGINEERS

January 16, 1989

Dear Members of the 16th Alaska State Legislature:

RE: TORT REFORM LEGISLATION

As President of the Anchorage Branch of the American Society of Civil Engineers, I represent nearly 600 civil engineers in the Anchorage area. These civil engineers come from the private sector, the public sector and academia. One issue that continues to be of interest to this diverse group of professionals is the enactment of effective, comprehensive tort reform legislation.

Members of the Anchorage Branch were encouraged by the passage of Ballot Measure #2 which takes joint liability off the books in Alaska. The Alaska voters passed Ballot Measure #2 by an overwhelming majority - 72% voted "yes". It is now incumbent on the 16th Alaska State Legislature to take this mandate and enact effective, comprehensive tort reform legislation.

The Anchorage Branch fully supports the continuing efforts of the Citizen's Coalition for Tort Reform to seek the reforms necessary to enable Alaska to have a justice system that serves everyone's interests. In particular, the Anchorage Branch expects the Legislature to address the following reforms this year:

- clarify the conditions under which punitive damages can be awarded;

- preclude a person from recovering damages when his/her injuries or death occurred while committing a crime (felony or misdemeanor), unless the person liable for the damages was committing a crime when the death of injury occurred;

- at the request of any party in the suit, allow the court to order that a judgement award for <u>future damages</u> (economic and non-economic) be paid <u>to the maximum</u> extent feasible in periodic payments rather than lump sum and, in such cases, require the attorney's contingent fee to be reduced to present value and paid in a lump-sum;

- add electrical and telephone cooperative board members and officials to the list of persons with limited liability when carrying out their official duties;

- exempt personal injury, death and property damage suits from the application of Alaska Civil Rule 82, so that the court cannot award payment of the prevailing party's attorneys fees unless authorized to do so by statute or by an agreement between the parties to the suit;

- limit the liability of hospitals for the negligence of non-employees;

- prevent a person from taking civil action against a peace officer or an emergency service patrol member for a non-malicious decision to take or not to take an intoxicated or incapacitated person into protective custody or to release such a person from custody;

- cap the amount of non-economic damage awards for all personal injuries at $500,000;

- reduce the amount the injured party may recover by the amount he or she is compensated for those injuries from collateral sources, e.g. another successful lawsuit;

- repeal the existing provision that allows parties to agree not to reduce the award of future damages, such as lost income, to present day value and;

- provide for equal and uniform application of Alaska's statutes of repose and limitation.

Tort reform is of utmost importance to the nearly 600 members of the Anchorage Branch of the American Society of Civil Engineers. We will be closely following the 16th Alaska Legislature. Our members expect the Legislators we sent to Juneau to pass nothing short of effective, comprehensive tort reform legislation this year.

Sincerely,

Thomas S. Wolf

THOMAS S. WOLF, P.E.
President, Anchorage Branch
American Society of Civil Engineers

Anchorage · *Star of the North*
Chamber of Commerce

1989 LEGISLATIVE PRIORITIES

February 1, 1989

Executive Summary

I. The State needs to develop a strategic financial plan to reduce spending to a sustainable level.

Two constitutional amendments are needed:

(1) A 40/30/30 allocation of Permanent Fund earnings
(2) Limitations on State spending.

II. Provide economic development incentives to foster development:

(1) Stable taxes
(2) Anchorage Economic Development Corporation's seven incentives
(3) Establish an independent Anchorage Airport Authority
(4) Increased tourism funding will yield rapid returns to Alaska
(5) Revise Alaska Industrial Development and Export Authority statutes
(6) Develop the mariculture industry

III. Regulatory and statutory reform to include:

(1) Tort reform
(2) Revise the "Right to Return Transportation"
(3) Allow alternative methods of compensation for overtime
(4) Emphasize "one stop shopping"
(5) Reform procurement policies

IV. Capital projects:

(1) Maintain the Railbelt Fund for railbelt energy projects
(2) Support area-wide cooperative capital projects
(3) Study a deep water Fire Island port
(4) Fund a scaled down Anchorage courthouse

V. Land and natural resource issues:

(1) Adequately fund ANWR promotion
(2) Oppose further wilderness designation in Alaska
(3) Allow reasonable military training on State lands

VI. Support quality of life issues:

(1) Keep Alaska Psychiatric Institute in Anchorage
(2) Maintain social service block grant funding
(3) Provide for needed "base level" arts funding
(4) Support adequate highway maintenance
(5) Adopt Crime Commission proposals

Representing: *1,200 Member businesses*
38,000 Employees
18 Committees
over 400 Volunteers

CH2M HILL Engineers Planners Economists Scientists

February 21, 1989

Representative Dave Donley
Chairman, House Labor & Commerce Committee
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Donley:

Subject: House Bill No. 166, Tort Reform

I am writing to urge your favorable consideration of HB 166, the omnibus tort reform bill.

This bill will bring essential judicial reform to many public and private business sectors. In the case of my own business, reestablishing Statutes of Repose and Limitation, as provided in Sections 09.10.052 and 09.10.070 of the bill, is especially vital.

A copy of a "rationale" paper put out by the American Consulting Engineers Council is attached. This paper lists five important reasons for a strong statute of repose. These are all patently fair reasons which we believe should transcend any argument that a statute of repose is a special interest issue.

The stated purpose of HB 166 is, ". . . to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." For companies such as CH2M HILL, which has been established in Alaska for over 20 years, the fulfillment of that purpose by passing statutes of repose and limitation is essential to the future stability of our business.

Thank you in advance for your positive support of HB 166.

Sincerely,

Dan M. Rowley

Dan M. Rowley, P.E.
Alaska Regional Manager

bja:079:34

CH2M HILL

Engineers
Planners
Economists
Scientists

February 21, 1989

Representative Max F. Gruenberg, Jr.
Co-Chairman, House Judiciary Committee
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Gruenberg:

Subject: House Bill No. 166, Tort Reform

I am writing to urge your favorable consideration of HB 166, the omnibus tort reform bill.

This bill will bring essential judicial reform to many public and private business sectors. In the case of my own business, reestablishing Statutes of Repose and Limitation, as provided in Sections 09.10.052 and 09.10.070 of the bill, is especially vital.

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Thank you in advance for your positive support of HB 166.

Sincerely,

Dan M. Rowley

Dan M. Rowley, P.E.
Alaska Regional Manager

bja:079:34

Engineers
Planners
CH2M HILL Economists
Scientists

February 21, 1989

Representative Peter Goll
Co-Chairman, House Judiciary Committee
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Goll:

Subject: House Bill No. 166, Tort Reform

I am writing to urge your favorable consideration of HB 166, the omnibus tort reform bill.

This bill will bring essential judicial reform to many public and private business sectors. In the case of my own business, reestablishing Statutes of Repose and Limitation, as provided in Sections 09.10.052 and 09.10.070 of the bill, is especially vital.

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Sincerely,

Dan M. Rowley

Dan M. Rowley, P.E.
Alaska Regional Manager

bja:079:34

CH2M HILL INC. Anchorage Office Denali Towers North, 2550 Denali Street, 8th Floor, Anchorage, Alaska 99503 907.278.2551

American Consulting Engineers Council

1015 Fifteenth Street N.W., Washington, D.C. 20005 202-347-7474

December, 1987

Rationale for

STATUTES OF REPOSE

For actions arising out of "improvements to real property" a special statute exists in many states to limit the time a claim can be brought for design deficiencies. These special statutes are commonly called "statutes of repose." They differ from statutes of limitations in that the time period in which to bring an action usually begins to run from the date of substantial completion of the project. Under a statute of limitations, the time period begins on the date of injury or discovery thereof.

There are several important reasons to support a strong statute of repose:

1. Unlike most products, the useful life of an improvement to real property can last for decades and even centuries. Evidence relative to any claim brought years after completion might be lost or destroyed, and witnesses may no longer be available. In addition, it is terribly expensive and virtually impossible to maintain records involving all past projects.

2. Data on claims filed for design deficiencies demonstrate conclusively that the vast majority of design cases arise within the first five years after completion of a project.

3. Once the owner accepts the project, all maintenance and subsequent improvements are beyond the control of other parties, including the designers of the project. Improper maintenance and repairs (or inattention to necessary maintenance and upgrading) can lead to numerous claims, and it is not fair to bring the design professional into the suit.

4. Without a statute of repose, design professionals may be unfairly exposed to evolving standards and technology being applied to a dated project. Often, it is very difficult for a defendant to prove what the "state-of-the-art" standards were at the time the project was designed. As a result, a defendant's design might be judged against current standards.

5. The expense of living with liability exposure for an infinite period of time is an unfair burden both for design professionals and their clients. The cost of insurance to cover all past work, no matter how long ago it was designed, against the threat of litigation is an expense carried by design professional and client alike.

It should be understood that even if the time period to make a claim against a design professional has expired under a statute of repose, an injured plaintiff still has recourse to seek and obtain compensation. A statute of repose for design deficiencies merely helps the plaintiff to focus the action on the party or parties who may be truly at fault.

CONSULTING ENGINEERS
COUNCIL OF ALASKA

P. O. BOX 200345
ANCHORAGE, AK 99520-0345

Members of the 16th Alaska
State Legislature
Pouch V
Juneau, Alaska 99811

Honorable Representatives and Senators
of the 16th Legislature:

The Consulting Engineers Council of Alaska (CECA) fully supports tort reform and, in turn, urges your support of the reforms the Citizens Coalition for Tort Reform intends to ask the Alaska State Legislature to address this year.

In 1988, consulting engineers nationwide spent over $250 million on professional liability insurance. Overall, firms paid 4.5 percent of their annual gross billings for professional liability insurance. On an individual basis, insurance premium costs were highest (over 7 percent) for small (1- to 5-person) firms.

We estimate that the average cost for a firm to defend itself against a lawsuit is over $20,000 per claim. In 1988, one-third of the claims brought against consulting engineering firms were settled without payment to the claimant. We are living in an environment that fosters frivolous claims and, unfortunately, Alaska has more than its fair share of litigious opportunists.

Until a legal climate is created in this state that presents reasonable insurance risks, we are going to be faced with exorbitant premium and defense costs that force many firms to operate without professional liability insurance. Operating without PL insurance is not in anyone's best interest, least of all the public's. Tort reform is absolutely essential to restore the level of professional service and insurance protection that our public and private Alaskan clients need and deserve.

Sincerely,

Dan M. Rowley

Dan M. Rowley, P.E.
President

bja:076:70

CORDOVA MEDICAL CLINIC

Arthur D. Tilgner, M.D. Larry A. Ermold, M.D. Oliver S. Osborn, M.D.

P.O. Box 310
Cordova, Alaska 99574
(907) 424-8200

March 3, 1989

Representative Dave Donley
P.O. Box V
Juneau, AK 99811

Dear Representative Donley:

I'm a physician in Cordova. I've been in practice here for 18 years. I and my two partners are the only available medical care in the area. We have been unable to afford medical malpractice insurance for over two years. Our situation is desperate. I've never been sued but, as you know, you can do something right thousands of times but, one mistake will cost you dearly. I and my family stand to lose everything that we've worked for should something like that occur. We need your help.

Would you please make every effort to get House Bill 166 through your committee and on its way to the floor.

Thank you so much for your consideration.

Sincerelv yours,

AD Tilgner

A.D. Tilgner, M.D.

ADT:tw

cc: Citizens's Coalition for Tort Reform

Greater Ketchikan Chamber of Commerce
P.O. Box 5957, Ketchikan, Alaska 99901
(907) 225-3184

February 22, 1989

David McGuire, M.D.
CITIZENS' COALITION FOR TORT REFORM
P.O. Box 201668
Anchorage, AK 99520

Dear Dr. ~~McGuire~~ David:

With regard to your letter of January 12, 1989, please find enclosed a copy of the Greater Ketchikan Chamber of Commerce Resolution on Tort Reform.

Copies of the Resolution have been sent to Senator Jones, Representative Taylor and Representative Davis.

Sincerely,

Leslie

Ms. L. J. Bartholomew
President
Greater Ketchikan Chamber of Commerce

Enc.

Let me know if we can do anything!
LJB

Greater Ketchikan Chamber of Commerce
P.O. Box 5957, Ketchikan, Alaska 99901
(907) 225-3184

COMPREHENSIVE TORT REFORM LEGISLATION
RESOLUTION

WHEREAS: The voters of Alaska demonstrated their strong support for tort reform by passing Ballot Measure #2, enacting pure several liability, in the 1988 General Election by an overwhelming majority of 71.8%; and

WHEREAS: It is clear that the citizens of the State of Alaska want a fair, efficient and consistent civil justice system; and

WHEREAS: Enacting pure several liability is only the beginning of the reforms needed if Alaska is to have a civil justice system that will 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; and

WHEREAS: The chaotic state of the civil justice system in Alaska adding to the high cost of obtaining adequate insurance coverage is jeopardizing the ability of local governments to provide the facilities and services that communities in Alaska desire and need; and

WHEREAS: The 16th Alaska State Legislature has the opportunity to enact comprehensive legislation that will result in a justice system that will best serve the interests of all Alaskans;

NOW, THEREFORE, BE IT RESOLVED: That the Greater Ketchikan Chamber of Commerce urges the 16th Alaska State Legislature to enact comprehensive tort reform legislation in 1989.

DATED AT KETCHIKAN, ALASKA this 22nd day of February, 1989.

L.J. Bartholomew

Ms. L. J. Bartholomew
President
Greater Ketchikan Chamber of Commerce

THE INSTITUTE OF
ELECTRICAL AND
ELECTRONICS
ENGINEERS, INC.
Alaska Section

PLEASE REPLY TO:
P.O. Box 111193
Anchorage, AK 99511-1193

January 11, 1989

Members of the 16th Alaska State Legislature
Juneau, AK

Reference: TORT REFORM LEGISLATION

Dear Legislator:

The Alaska Section of the Institute of Electrical and Electronics Engineers is very concerned about the lack of fairness in the current civil justice system in Alaska. As technical and design professionals, we have joined with other interested organizations including health care professionals, businesses, and local government agencies in calling for effective, comprehensive tort reform legislation. Compromises, such as occurred in the 1986 legislation, will only erode and confuse the justice system further.

The results of Ballot Measure #2 should give all legislators a clear mandate on this issue. On behalf of the IEEE Alaska Section Executive Committee and over 300 electrical, electronics, and computer professionals throughout our great State, we urge your support for passage of equitable tort reform legislation this year.

Sincerely,

IEEE ALASKA SECTION

Calvin L. Hoggard
Calvin L. Hoggard, Chairman

90111.1/L1/rme

Maniilaq Association

P.O. Box 256
Kotzebue, Alaska 99752
(907) 442-3311

February 16, 1989

David A. McGuire, M.D.
Citizens Coalition for Tort Reform.
P.O. Box 201668
Anchorage, Alaska 99520

Dear Dr. McGuire:

I would like to add my support to your efforts to reform the Civil Justice Tort System in Alaska.

The spiraling cost of liability insurance to local government and non-profit agencies is becoming a burden impossible to bear. Services to our constituents have been and will be further limited unless we can feel a lesser degree of fear of lawsuits and excessive awards.

You are right! It's time for the Legislature to act for a fair and consistent Civil Justice System.

Sincerely,

Berend Roeters, Administrator
Maniilaq Medical Center
P.O. Box 43
Kotzebue, Alaska 99752

A RESOLUTION

89-4

REQUESTING THE 16TH ALASKA STATE LEGISLATURE TO ENACT COMPREHENSIVE TORT REFORM LEGISLATION

WHEREAS, Alaska's voters demonstrated their strong support for tort reform by passing Ballot Measure #2, enacting pure several liability, in the 1988 General Election by an overwhelming majority of 71.8%; and

WHEREAS, it is clear Alaskan's want a fair, efficient and consistent civil justice system; and

WHEREAS, enacting pure several liability is only the beginning of the reforms needed if Alaska is to have a civil justice system that will 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; and

WHEREAS, the chaotic state of Alaska's civil justice system adding to the high cost of obtaining adequate insurance coverage is jeopardizing the ability of local governments to provide the facilities and services Alaska's communities desire and need; and

WHEREAS, the 16th Alaska State Legislature has the opportunity to enact comprehensive legislation that will result in a justice system that will best serve the interest of all Alaskans.

NOW THEREFORE BE IT RESOLVED BY THE Ouzinkie City Council

THAT:

The 16th Alaska State Legislature is urged to enact comprehensive tort reform legislation in 1989.

Zack Chichenoff

Dated: February 9, 1989

Debra Garner, Clerk

City of Ouzinkie
P.O. Box 109
Ouzinkie, Alaska 99644

CITY OF PETERSBURG IN THE STATE OF ALASKA CORPORATE SEAL APRIL 20, 1910

City of Petersburg
P. O. Box 329
Petersburg, Alaska 99833

February 10, 1989

David A. McGuire, M.D., Chair
Citizens' Coalition For Tort Reform
PO Box 201668
Anchorage, Alaska 99520

Dear Dr. McGuire:

Enclosed please find a copy of City of Petersburg Resolution No. 1170-R, requesting the 16th Alaska State Legislature to enact comprehensive tort reform legislation.

The City Council of the City of Petersburg supports the Citizens' Coalition For Tort Reform in its efforts to make our civil justice system fair and consistent and making Alaska's local governments' exposure to law suits more reasonable so they can provide the services our communities need and deserve.

Sincerely,

Arlene Pence

Arlene Pence, Mayor
City of Petersburg

Resolution No. 1170-R

REQUESTING THE 16TH ALASKA STATE LEGISLATURE TO ENACT COMPREHENSIVE TORT REFORM LEGISLATION

WHEREAS, Alaska's voters demonstrated their strong support for tort reform by passing Ballot Measure #2, enacting pure several liability, in the 1988 General Election by an overwhelming majority of 71.8%; and

WHEREAS, it is clear Alaskan's want a fair, efficient and consistent civil justice system; and

WHEREAS, enacting pure several liability is only the beginning of the reforms needed if Alaska is to have a civil justice system that will 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; and

WHEREAS, the chaotic state of Alaska's civil justice system adding to the high cost of obtaining adequate insurance coverage is jeopardizing the ability of local governments to provide the facilities and services Alaska's communities desire and need; and

WHEREAS, the 16th Alaska State Legislature has the opportunity to enact comprehensive legislation that will result in a justice system that will best serve the interest of all Alaskans.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PETERSBURG, ALASKA

THAT:

The 16th Alaska State Legislature is urged to enact comprehensive tort legislation in 1989.

PASSED and APPROVED this 10 date of February 1989.

Mayor

ATTEST:

City Clerk

PEPP PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE

- Alaska Chapter -

January 18, 1989

The 16th Legislature
State of Alaska
Juneau, AK 99801

Re: Tort Reform

Dear Members of the 16th Alaska Legislature:

Meaningful tort reform is of vital interest to the nearly 70 owners and senior principals represented by our State Chapter of Professional Engineer's in Private Practice (PEPP). We strongly support the eleven reforms The Coalition is presenting for enactment this session.

While we believe tort reform legislation passed in 1986 was a positive beginning, it is essential that effective legislation be passed this year to address the outstanding issues identified by The Coalition. The public is not ultimately well served when victim status is merely transferred from one party or group to another, as is now frequently the case in civil actions. The cost of not enacting legislation to address the existing philosophy operative in the court system is not merely passed off to out-of-state insurance underwriters, it is transferred to the public as a cost of doing business. We all pay for it.

We support comprehensive tort reform legislation as proposed by the Citizen's Coalition. We will be monitoring the progress of legislation dealing with this issue through the session, and hope that you will work to make our civil justice system predictable and equitable for all.

Respectfully,

Mark D. Anderson

Mark D. Anderson, P.E.
State Chairman, PEPP

A Practice Section of the Alaska Society of Professional Engineers
Box 833 • Anchorage, Alaska • 99501

COPY

PROVIDENCE HOSPITAL
3200 PROVIDENCE DRIVE
P.O. BOX 196604
ANCHORAGE, ALASKA 99519-6604
PHONE: (907) 562-2211

SISTERS OF PROVIDENCE
SERVING IN THE WEST SINCE 1856

February 22, 1989

Honorable Dave Donley, Chairman
House Labor and Commerce Committee
P.O. Box V
Juneau, AK 99811

Dear Chairman Donley:

As the new Administrator at Providence Hospital, I am writing to urge you to hold hearings on House Bill 166 in the Labor and Commerce Committee and to pass it out of committee, as soon as possible.

The recent 72% approval by the voters of the State for Ballot Measure #2 is a clear expression that it is time for comprehensive tort reform in Alaska. House Bill 166 is an excellent vehicle to enact such reform. This overwhelming support for tort reform will most certainly make your job of hearing and passing HB 166 an easy one.

Thank you in advance, Representative Donley, for your attention to this request, and for expediting hearings on House Bill 166.

On another note, I will be in Juneau in mid-March for the meetings of the Healthcare Association of Alaska. I look forward to meeting you and other members of the Legislature when I am there. Thank you again for your attention to this issue.

Sincerely,

Sister Dona Taylor

Sister Dona Taylor
Administrator

cc H.B. 166 Sponsors:
Labor and Commerce Committee Members

COPY

PROVIDENCE HOSPITAL
3200 PROVIDENCE DRIVE
P.O. BOX 196604
ANCHORAGE, ALASKA 99519-6604
PHONE (907) 562-2211

SISTERS OF PROVIDENCE
SERVING IN THE WEST SINCE 1856

February 22, 1989

Honorable Sam Cotten, Speaker
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Cotten:

This letter is to thank you so very much for your sponsorship of House Bill 166, to bring about comprehensive tort reform for the State of Alaska.

As the newly appointed Administrator of Providence Hospital, and a returned resident to Alaska, I am very impressed with the overwhelming support for tort reform expressed by the voters in November with 72% voting for Ballot Initiative #2. That is a clear mandate. Your leadership in this movement is greatly appreciated.

In mid-March, I will be in Juneau for the Health Association of Alaska meetings. I would like to take that opportunity to meet you and discuss tort reform and other issues which may be of interest. We will be contacting your office for an appointment.

Again, thank you for your sponsorship. I look forward to meeting with you soon.

Sincerely,

Sister Dona Taylor

Sister Dona Taylor
Administrator

PROVIDENCE HOSPITAL
3200 PROVIDENCE DRIVE
P.O. BOX 196604
ANCHORAGE, ALASKA 99519-6604
PHONE: (907) 562-2211

SISTERS OF PROVIDENCE
SERVING IN THE WEST SINCE 1856

January 20, 1989

Senator Tim Kelly, President of the Senate,
Representative Sam Cotten, Speaker of the House and
Members of the 16th Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Members of the 16th Alaska State Legislature:

As you know, Providence Hospital is very interested in comprehensive tort reform legislation. We are very pleased with the enormous success that Ballot Measure #2 had in the recent elections; that vote clearly expressed the interest of the citizens of Alaska in having effective, comprehensive tort reform for the State.

The 15th Legislature did enact Conference Committee Substitute for Senate Bill 377, effecting a new Chapter 17 to Title 9. This was a good beginning towards tort reform.

Now we urge you to take the necessary steps, this year, to complete those efforts. We urge you to enact a comprehensive, effective tort reform bill, which will make Alaska's civil justice system fair and predictable. In this comprehensive bill, we urge you to:

- o clarify that punitive damages can be awarded in the case of fraud, malice, gross negligence or reckless disregard by the defendant;
- o preclude a person from recovering damages when his/her injuries or death occurred while committing a crime, unless the person liable was committing a crime when the injury occurred;
- o allow the court to order that a judgement award for future damages be paid in periodic payments rather than lump sum, and require the attorney's contingent fee to be reduced to present value and paid in a lump-sum;
- o exempt personal injury, death and property damage suits from the application of Alaska Civil Rule 82;
- o limit the liability of hospitals for the negligence of non-employees, known as the "Jackson v Powers" section;

- o repeal AS 47.37.170(g), and reenact it to protect civil servants from being held liable for non-malicious actions while carrying out their duties with regard to intoxicated and incapacitated persons;

- o cap the amount of non-economic damage awards for all personal injuries at $500,000;

- o reduce the amount the injured party may recover by the amount he or she is compensated for those injuries from collateral sources (eg. another successful lawsuit);

- o repeal the provision that allows parties to agree not to reduce the award of future damages to present day value (eg. repeal Beaulieu v Elliott);

- o provide for equal and uniform application of Alaska's statutes of limitation and repose.

The mandate from the citizens of the state is clear because of the overwhelming support for Ballot Initiative #2. We urge you to complete the task of enacting comprehensive tort reform during this year.

Thank you for your attention and prompt action. Providence Hospital stands ready to support those efforts, and to answer any questions you may have.

Sincerely,

Kaaren R. Johnson,
Associate Administrator,
Program and Service Development

cc: Citizens' Coalition For Tort Reform
Sisters of Providence Public Policy Task Force

City of Soldotna

P.O. Box 409 • 177 North Birch • Soldotna, Alaska 99669 • Phone: 262-9107

February 21, 1989

David A. McGuire, M.D.
Chair
Citizens' Coalition For Tort Reform
P.O. Box 201668
Anchorage, Alaska 99520

Dear Dr. McGuire:

Enclosed is Resolution 89-3 of the City of Soldotna requesting the 16th Alaska State Legislature to enact comprehensive tort reform legislation per your request.

Sincerely,

Patricia C. Burdick

Patricia C. Burdick, CMC
City Clerk

Encl.

CITY OF SOLDOTNA

RESOLUTION 89-3
(Proposed by the Citizens' Coalition for Tort Reform)

REQUESTING THE 16TH ALASKA STATE LEGISLATURE TO ENACT COMPREHENSIVE TORT REFORM LEGISLATION

WHEREAS, Alaska's voters demonstrated their strong support for tort reform by passing Ballot Measure #2, enacting pure several liability, in the 1988 General Election by an overwhelming majority of 71.8%; and

WHEREAS, it is clear Alaskans want a fair, efficient and consistent civil justice system; and

WHEREAS, enacting pure several liability is only the beginning of the reforms needed if Alaska is to have a civil justice system that will 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; and

WHEREAS, the chaotic state of Alaska's civil justice system adding to the high cost of obtaining adequate insurance coverage is jeopardizing the ability of local governments to provide the facilities and services Alaska's communities desire and need; and

WHEREAS, the 16th Alaska State Legislature has the opportunity to enact comprehensive legislation that will result in a justice system that will best serve the interest of all Alaskans;

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

The 16th Alaska State Legislature is urged to enact comprehensive tort reform legislation in 1989.

ADOPTED this 21st day of February, 1989.

Dolly M. Farnsworth

Dolly M. Farnsworth, Mayor

ATTEST:

Patricia C. Burdick

Patricia C. Burdick, CMC
City Clerk

STRUCTURAL ENGINEERS ASSOCIATION OF ALASKA

January 20, 1989

The 16th Legislature
State of Alaska
Juneau, AK 99801

Re: Tort Reform

Honorable Senators and Representatives
of The 16th Legislature:

The Structural Engineer's Association of Alaska is vitally interested in the passage of effective tort reform legislation this year. The design profession represented by our association is among those most dramatically impacted by the issues addressed in the reforms presented by the Citizen's Coalition.

In 1985, five carriers offered Alaskan architects and engineers professional liability insurance on an admitted basis, and three on a surplus basis. Only one carrier refused to insure Alaskan design professionals. Now, four years later, when the insurance market is "soft", only one program is available to A/Es on an admitted basis. Three carriers supply coverage on a surplus basis and five refuse to insure Alaskan A/Es. The picture is even more grim for structural engineers.

We strongly support the eleven reforms presented by The Coalition for enactment this year, and will be looking for your effective effort is this regard.

Respectfully,

STRUCTURAL ENGINEER'S ASSN. OF ALASKA

Mark D. Anderson

Mark D. Anderson, P.E.
President, SEAA

c/o KCM, Inc.
3701 E. Tudor Rd., Ste. 205
Anchorage, AK 99507

February 13, 1989

David A. McGuire, M.D.
Citizens' Coalition for Tort Reform
P.O. Box 201668
Anchorage, AK 99520

Dear Dr. McGuire:

The City Council of the City of Valdez passed Resolution No. 8905 supporting comprehensive tort reform at its last regular meeting on February 6. A copy of the resolution is enclosed.

We are especially concerned about the issues of limiting the liability of hospitals for the negligence of non-employees and preventing a person from taking civil action against a peace officer for a non-malicious decision to take or not to take an intoxicated or incapacitated person into protective custody.

Tort reform is critical for the survival of hospitals. Quality of care is jeopardized to the extent any health care decision is influenced by liability more than appropriateness. The Alaska Supreme Court ruled in Jackson v. Powers that a general acute care hospital has a nondelegable duty to provide emergency room services and, therefore, the hospital is vicariously liable for the negligence of an emergency room physician. Because of this decision, no new hospital malpractice insurance carriers have been willing to come to Alaska. Rates have escalated to the point that hospitals do not know how they can afford the rates, surcharges, and excess liability exposure.

It has been alleged by certain groups that tort reform will result in police officers neglecting their duty to provide protection to incapacitated persons. Because of the "grey area" that exists between the terms "intoxicated" and "incapacitated", police officers have the burden of balancing the impaired individual's personal freedom and their physical safety. False arrest and false imprisonment suits can be very costly. The myriad of factors involved in taking someone into custody make each case different.

P.O. BOX 307 • VALDEZ, ALASKA 99686
TELEPHONE (907) 835-4313 • TELEX 25-381 • TELECOPIER (907) 835-2992

Tort reform will ease this burden somewhat and officers will be more willing to take action to protect the impaired person.

We appreciate your consideration of this legislation.

Sincerely,

John Devens

John Devens, Ph.D.
Mayor

JD:tc

Enc.

CITY OF VALDEZ, ALASKA

RESOLUTION NO. 8905

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, REQUESTING THE 16TH ALASKA STATE LEGISLATURE TO ENACT COMPREHENSIVE TORT REFORM LEGISLATION.

WHEREAS, Alaska's voters demonstrated their strong support for tort reform by passing Ballot Measure #2, enacting pure several liability, in the 1988 General Election by an overwhelming majority of 71.8%; and

WHEREAS, it is clear Alaskan's want a fair, efficient and consistent civil justice system; and

WHEREAS, enacting pure several liability is only the beginning of the reforms needed if Alaska is to have a civil justice system that will 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; and

WHEREAS, the chaotic state of Alaska's civil justice system adding to the high cost of obtaining adequate insurance coverage is jeopardizing the ability of local governments to provide the facilities and services Alaska's communities desire and need; and

WHEREAS, the 16th Alaska State Legislature has the opportunity to enact comprehensive legislation that will result in a justice system that will best serve the interest of all Alaskans.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that

The 16th Alaska State Legislature is urged to enact comprehensive tort reform legislation in 1989.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, this 6th day of February, 1989.

CITY OF VALDEZ, ALASKA

John Devens

John Devens, Mayor

ATTEST:

Jeanne Donald

Jeanne Donald, City Clerk

January 23, 1989

Citizens' Coalition for Tort Reform
David A. McGuire, M.D.
Chairman
P.O. Box 201668
Anchorage, Alaska 99520

Dear David:

Our state and our nation desperately need effective and comprehensive Tort Reform. As long as our legislature keeps passing meaningless and impotent bills under the guise of "Tort Reform", no true changes in insurance premiums and fairness will take place.

Premiums can be lowered and fairness can be put back into the system with complete tort reform legislation. Most insurance people we have talked to tell us this will never happen without complete and comprehensive changes in our tort system.

I was recently back at an Association of Equipment Distributors Meeting in Anehiem, California. They had a guest speaker, Mr. James Watt, former U.S. Secretary of the Interior. He spoke to us about the lack of courage in today's politicians. The statement was made about how the typical legislator is constantly being pulled between special interest groups, his constituants, the press, and the strong need to get re-elected. What he felt was missing was the ability of the typical legislator to do what was right for America instead of what was needed to get re-elected.

How do we get our legislators to do what is right for Alaska? How do we make them understand that nothing will change until sweeping tort reform legislation is passed into law? How can they keep overlooking Alaska's problems simply to keep attracting compaign contributions from special interest groups (trial lawyers)?

We have got to get a complete tort reform bill passed into law this session. Doing what is right for Alaska is essential. Count on our continued support to do whatever is possible to bring about these much needed changes for Alaska and our nation.

Sincerely,

YUKON EQUIPMENT, INC.

Morry Hollowell

Morry Hollowell
President

MH/dc

BRISTOL BAY AREA HEALTH CORPORATION

P.O. BOX 130 • DILLINGHAM, ALASKA 99576

(907) 842-5201 or (907) 842-5202

April 21, 1989

Representative David Donley and
Representative Max F. Gruenberg Jr.
Chairman and Vice Chairman
Labor and Commence Committee
Room 17, Capitol
P.O. Box V
Juneau, AK 99811

Dear Representative's Donley and Gruenberg:

My organization on behalf of 32 villages in the Bristol Bay Area was very involved and together with 72% of the voters of your State overwhelmingly approved Ballot Measure #2 as a message to you folks in Juneau to pass legislation about Tort Reform.

We want you to get HB166 to the full floor to become law.

In looking up your committee, and I see from the biographical information in the "Alaska State Legislature" Directory that you both are attorneys. I assume that you are trial attorneys. I hope that as public servants on behalf of all Alaskans, and in particular 72% of all voters, that what might be viewed as a "conflict of interest" is not clouding your passing HB166 out of your committee so that it can be passed by the full legislature. Please put your personal occupation aside and pass HB166 out of your committee so that it shows clearly you are willing to fulfill the wishes of the people.

Thank you for your help.

Sincerely,

Robert J. Clark
Executive Director

cc: Rep. George Jacko
Senator Fred Zharoff
BBAHC Board of Dirs.
BBNA
BBNC
AFN
ANHB
Citizen's Coalition for Tort Reform

Citizens' Coalition For Tort Reform

April 13,1989

Dear Friend:

Its hard to believe, but some legislators haven't got the message about tort reform. **And we need your help to set them straight.**

Alaskans overwhelmingly approved Ballot Measure #2, our tort reform initiative. In fact, 72% of all voters approved its passage. With that kind of demonstrated support you would think legislators would sit up, take notice, and amend their ways. But some still haven't.

Right now, Representatives Donley and Gruenberg are sitting on the bill that would complete the much needed reforms to our civil justice system. HB166 is simply stuck in their House Labor and Commerce Committee. And while they say they are holding hearings, they are **in truth merely stalling its passage.**

You can help. **Call or write to both Donley and Gruenberg today.** Let them know that you support HB166, and want to see it pass the legislature. You can reach them at:

Rep. David Donley	Rep. Max Gruenberg
P. O. Box V	P. O. Box V
Juneau, AK 99811	Juneau, AK 99811
465-3892/3893	465-4968/4986

Your contacting them will help us convince Donley and Gruenberg to move the bill from their Committee. **We also need your help in another way.**

In order to bring more attention to this issue, and the treatment that 72% of the voting public are receiving at the hands of Donley and Gruenberg **we need to publicize their actions.** Unfortunately, **that takes money.** A contribution from you at this critical point can mean the difference in gaining meaningful reform now, or letting the trial lawyers get their way for another year. **Please help by sending in a contribution today.**

Your early and constant support was vital to passage of Ballot Measure #2. With your help now, I know we can be successful again.

Sincerely,

David A. McGuire, M.D.
Chairman

P.O. Box 201668
Anchorage, Alaska 99520
Phone: 561-6250

HB166 - INSURANCE INDUSTRY PROFITS

United States General Accounting Office

GAO

Testimony

For Release
On Delivery
Expected at

Tuesday
April 21, 1987

Profitability of the Medical Malpractice and General Liability Lines of Insurance

Statement of
William J. Anderson, Assistant Comptroller
General, General Government Programs

Before the Subcommittee on Commerce,
Consumer Protection, and Competitiveness
Committee on Energy and Commerce
House of Representatives

GAO/T-GGD-87-13

Mr. Chairman and Members of the Subcommittee:

We are pleased to appear before the Subcommittee today to present the results of our work on the profitability of the property/casualty insurance industry, particularly the profitability of the medical malpractice and general liability insurance lines. Our testimony today is in response to your request for information on insurance industry profitability.

In our testimony, we make the following points on the basis of our estimates:

-- Despite substantial underwriting losses, the property/casualty industry, as a whole, has been profitable over the 10-year period from 1976 through 1985. Its profitability was made possible by the industry's investment gains.

-- Profitability in the property/casualty industry has been cyclical. In recent years, returns on net worth have been lower than many industries. However, over the past 10 years the average return has been comparable to other industries.

-- The medical malpractice line of insurance suffered a cumulative after-tax loss for the 11-year period 1975 through 1985 if reserves for future payments are booked at their full payout value. If, however, these reserves are discounted to their present value, a procedure we recommended and is now required for tax purposes, the medical malpractice line showed an after-tax profit for this period.

-- The general liability line showed an after-tax profit from 1975 through 1985 even when its reserves are booked at their full payout value. If its reserves are discounted to present value, the line's profitability increases significantly.

-- If the established reserves proved inadequate by 10 or 20 percent, the medical malpractice and general liability lines would be profitable, provided that the reserves are discounted to present value.

I would first like to briefly discuss the profitability of the property/casualty insurance industry as a whole, and then I will discuss in more detail the medical malpractice and general liability lines. I would also like to note that our analysis pertains to industry aggregates; therefore, the experience of individual companies may differ.

PROFITABILITY OF THE PROPERTY/CASUALTY INDUSTRY

In July 1986, we testified that over the 10-year period 1976 through 1985, the property/casualty industry was profitable. As shown in the table below we estimated that the industry had about $81 billion in after-tax income despite almost $65 billion in underwriting losses. This income resulted primarily from the investments the industry made with funds collected from premiums. Over this 10-year period, the industry had investment income and capital gains of approximately $144 billion. Thus, profitability in the insurance industry is determined by combining both underwriting results and investment results.

All Companies--Consolidated Basis
1976 through 1985
($ in billions)

Underwriting gain/loss[a]	Investment gain	Net gain	Federal income tax	Total gain after-tax
($64.8)	$144.3	$79.5	($1.6)	$81.1

undiscounted
"Barnyard estimate is $10 Billion MORE"

[a]Reserves used in this calculation were not discounted.

These figures are derived from our computations, and the industry disagrees with our assumptions about including unrealized capital gains and excluding policyholder dividends. If we eliminate those assumptions from our computations, the after-tax net gain was about $54 billion. Furthermore, we testified that the industry's profitability in terms of its rate of return on net worth over this period was comparable to that of